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IN MEMORIAM: PROFESSOR DAVID L. SHAPIRO

The editors of the *Harvard Law Review* respectfully offer this collection of tributes to Professor David L. Shapiro.

*Justice Ruth Bader Ginsburg**

Among members of the legal academy, David L. Shapiro impressed me as the very best, the most devoted to his teaching and writing, the least self-regarding. Attesting to the intellectual rigor, yet suppleness of his mind: the Fay Diploma and *summa* degree he received from Harvard Law School; his talent as a teacher; his hand, 1973–2019, at the helm of the second through seventh editions of *Hart & Wechsler's The Federal Courts and the Federal System*, with supplements in between;¹ other books he wrote with characteristic elegance and accessibility; and reams of articles. He resisted typecasting as a formalist or a consequentialist.² He was ever mindful of the importance of facts and of the law's impact on the people law exists (or should exist) to serve.

My personal experience with David's wit and wisdom began when he and my revered Civil Procedure teacher, Benjamin Kaplan, launched, early in the 1970s, the American Law Institute's Restatement (Second) of Judgments. As a member of the Advisory Council to that Restatement, I attended periodic meetings to review drafts. It was a treat to observe the Reporters' presentations, their good humor, patience, and readiness to listen carefully to views that did not coincide

* Associate Justice, Supreme Court of the United States.

¹ Harvard Law School Dean John F. Manning, a coauthor of the sixth and seventh editions, called Professor Shapiro "the heart and soul of 'The Federal Courts & the Federal System.'" Christine Perkins, *David L. Shapiro 1932–2019: The "Heart and Soul" of Federal Courts and the Federal System*, HARVARD LAW TODAY (Nov. 26, 2019), <https://today.law.harvard.edu/david-l-shapiro-1932-2019-the-heart-and-soul-of-federal-courts-and-the-federal-system> [https://perma.cc/QRU5-FCNP].

² See Letter from David L. Shapiro, Professor of Law, Harvard Law Sch., to author (Mar. 20, 2007) (on file with the Harvard Law School Library).

with their own. I was hugely appreciative when Professor Kaplan and David asked me to join them as Reporter for the Restatement's Fifth Chapter on Relief from a Judgment. Hard as it was to miss the opportunity, my days and nights in the 1970s were occupied heading the American Civil Liberties Union's Women's Rights Project, advancing its mission to rid state and federal statutes of explicit gender-based differentials.³

David took a three-year leave of absence from his law school post, 1988–1991, to serve as Deputy Solicitor General, principal aide to his Harvard teaching colleague, then–Solicitor General Charles Fried. Fried's choice caused an uproar among some in the administration,⁴ for in 1976, David had written an article published in the *Harvard Law Review* titled: *Mr. Justice Rehnquist: A Preliminary View*.⁵ In it, David recognized the Justice's "considerable intellectual power and independence of mind," but said his performance was marred by "the unyielding character of his ideology."⁶ Would Shapiro fare well before the Court having so criticized the Chief Justice, was the question opponents of Fried's choice raised.⁷ Yes was the answer, David's time in office made plain. He participated in composing more than forty briefs and delivered ten oral arguments.⁸ David's briefs were always lucid and trustworthy; his oral arguments, engaging and nimble.

The article, after all, was only a first view and uncharacteristically, it contained a mistake, which I called to David's attention. David wrote that in Justice Rehnquist's first four and a half years, "he has never voted to strike down government action subject to scrutiny under the rational basis test."⁹ I asked David if he had missed *Weinberger v. Wiesenfeld*,¹⁰ a case decided in 1975. At issue in that case: Was a widower denied equal protection when he was turned down for Social Security benefits upon his wage-earning wife's death in childbirth, leaving him the infant's sole parent?¹¹ Had a wage-earning male parent

³ As it turned out, Professor Kaplan had to resign in 1973 after he was appointed to the Supreme Judicial Court of Massachusetts. David withdrew the next year when he suffered a rare and debilitating illness that left him able to speak only in a raspy whisper. He coped bravely with the ailment, ever after using a microphone to speak in class and elsewhere.

⁴ See Ruth Marcus & Al Kamen, *Solicitor General Rocks the Conservative Boat*, WASH. POST, June 10, 1988, at A21.

⁵ 90 HARV. L. REV. 293 (1976).

⁶ *Id.* at 293.

⁷ See Bryan Marquard, *David L. Shapiro, Harvard Law Professor and Former Deputy Solicitor General, Dies at 87*, BOS. GLOBE (Dec. 1, 2019, 6:06 PM), <https://www.bostonglobe.com/metro/obituaries/2019/12/01/david-shapiro-harvard-law-professor-and-former-deputy-solicitor-general-dies/RfHXQqY2hfelarjWJFthmJ/story.html> [https://perma.cc/76JM-S4GG].

⁸ See Perkins, *supra* note 1.

⁹ Shapiro, *supra* note 5, at 308.

¹⁰ 420 U.S. 636 (1975).

¹¹ *Id.* at 639–42.

died, there would have been benefits for the widow.¹² The Court's majority viewed the classification as discriminating impermissibly against women as wage earners, because the law provided their families less protection than it provided the families of male wage earners.¹³ As counsel for the widower, I also argued that the law discriminated against men as parents, because it did not afford them the same opportunity as women to care personally for their children.¹⁴ Justice Rehnquist resisted both arguments, but was satisfied that the baby had been treated arbitrarily. He wrote: "[I]t is irrational to distinguish between mothers and fathers when the sole question is whether a child of a deceased [Social Security] contributing worker should have the opportunity to receive the full-time attention of the only parent remaining to it."¹⁵

David was aware of the *Wiesenfeld* case. He told me he had an index card on Justice Rehnquist's atypical opinion. But those were pre-personal computer days. When it came time to report the results of his research, he simply skipped over the card. David's preliminary view was just that. I think he would have revised his first look after the Chief Justice wrote the opinion saving *Miranda*¹⁶ and the equally remarkable opinion upholding the authority of Congress to enact the Family and Medical Leave Act.¹⁷

David took emeritus status in 2006 and wrote that he relished the "luxury" of "not having to adhere to a schedule."¹⁸ His days remained full. He stepped up his activity as a consultant in complex appellate cases, worked out regularly, kept up with *Hart & Wechsler*, and "read[] everything from Dostoevsky to Scott Turow."¹⁹

For sixty-five years David was married to Jane Bennett, an art dealer, whose "energy and zest for life. . . [kept him] going," in his later years in particular, through a hip replacement in 2012, a new heart valve the next year,²⁰ and no doubt, the death of their only child from cancer in 2011.²¹

I will think of him when a sticky question of statutory construction arises and recall his sound advice: "[C]lose questions of [statutory] construction should be resolved in favor of continuity and against

¹² *Id.* at 640-41.

¹³ *Id.* at 645.

¹⁴ Brief for Appellee at 11-12, *Wiesenfeld*, 420 U.S. 636 (No. 73-1892).

¹⁵ *Wiesenfeld*, 420 U.S. at 655 (Rehnquist, J., concurring in the result).

¹⁶ See *Dickerson v. United States*, 530 U.S. 428 (2000).

¹⁷ See *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

¹⁸ Letter from David L. Shapiro, Professor of Law, Harvard Law Sch., to author (Aug. 14, 2006) (on file with the Harvard Law School Library).

¹⁹ Letter from David L. Shapiro, Professor of Law, Harvard Law Sch., to author (Sept. 16, 2014) (on file with the Harvard Law School Library).

²⁰ *Id.*

²¹ See Marquard, *supra* note 7. An adored granddaughter continued to brighten his life.

change.”²² And I will miss our correspondence about the Court’s jurisprudence, his applause for some of our decisions,²³ his worries about others.²⁴ But I count it my good fortune to have known David L. Shapiro, a man as kind and caring as he was brilliant.

*John F. Manning**

The William Nelson Cromwell Professor Emeritus, David L. Shapiro, taught at Harvard Law School for forty-three years, with only a brief hiatus to serve his country as Deputy Solicitor General. David loomed large here — and throughout the entire legal community. He was a great and innovative teacher, not to mention an engaged and generous institution builder. David was also a wise and important scholar, who did more than perhaps any other person in the past half century to cultivate and keep alive the central premise of Harvard’s Legal Process tradition: the idea that law is — and, if it is to be legitimate, must be — the product of reason, not will.²⁵ David, whom I knew well as a colleague, coauthor, and friend, was also a wonderful person — kind, generous, humble, and full of mischief, always ready to tell a joke or laugh at one. And he was brave in the face of adversity that he never let define him.

David Shapiro taught generations of our students. Though he covered a number of subjects, his staples were civil procedure and federal courts. As his former student Michael Dorf (who now teaches the same subjects) wrote, these are subjects that “students find challenging,” but David found ways to draw the relationship between technical rules and more fundamental questions concerning justice and the role of law in

²² David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 925 (1992).

²³ Among them, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), and *Boumediene v. Bush*, 553 U.S. 723 (2008). See Letter from David L. Shapiro, Professor of Law, Harvard Law Sch., to author (June 20, 2008) (on file with the Harvard Law School Library); Letter from David L. Shapiro, *supra* note 18.

²⁴ Among them, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). See Letter from David L. Shapiro, Professor of Law, Harvard Law Sch., to author (May 19, 2009) (on file with the Harvard Law School Library).

* Morgan and Helen Chu Dean and Professor of Law, Harvard Law School. I thank Catherine Claypoole, Richard Fallon, John Goldberg, Jack Goldsmith, and Amanda Tyler for thoughtful comments on this essay.

²⁵ See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

ordering society.²⁶ Though I was never a student of David's, I suspect there is a second explanation for his classroom success. David loved the law. He had faith in its integrity, its essential role in fairly structuring solutions to the reasonable disagreements that any complex society experiences, its capacity to promote and manage both continuity and change, and the central role of process and procedure in accomplishing all of this. I think this faith, this commitment to law, was part of what made David such a superb teacher. If he conveyed to his students the enthusiasm for law that he conveyed to us, his colleagues, every time we spoke, his students surely found it compelling to hear him explain notice pleading,²⁷ the *Erie* doctrine,²⁸ issue preclusion,²⁹ or the Madisonian Compromise.³⁰ Whatever the source of his classroom magic, David stands among the greats in a distinguished history of Harvard Law School teachers.

David Shapiro was also a great scholar. The *Hart & Wechsler* casebook was in some ways his greatest achievement. Although the first edition of the book³¹ was a classic, it was woefully out of date and hanging on by a thread by the time he, Paul Bator, and Paul Mishkin joined Herbert Wechsler in producing the second edition, published in 1973.³² For six editions across more than four decades,³³ David was the heart and soul of the book. He knew every inch of it — every chapter, every edition, every year, right through last year's supplement. David was the perfect editor of *Hart & Wechsler*. He was a lawyer's lawyer, committed to the craft. He was also, as I mentioned, the personification of the Legal Process tradition, committed to the idea that our society has

²⁶ Michael C. Dorf, *In Memory of David Shapiro*, DORF ON LAW (Nov. 25, 2019), <http://www.dorfonlaw.org/2019/11/in-memory-of-david-shapiro.html> [<https://perma.cc/996E-C4U7>].

²⁷ See, e.g., FED. R. CIV. P. 8.

²⁸ See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

²⁹ See DAVID L. SHAPIRO, *CIVIL PROCEDURE: PRECLUSION IN CIVIL ACTIONS* (Turning Point Series 2001).

³⁰ See RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 307–08 (7th ed. 2015).

³¹ HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1st ed. 1953).

³² PAUL M. BATOR, PAUL J. MISHKIN, DAVID L. SHAPIRO & HERBERT WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (2d ed. 1973).

³³ See FALLON, MANNING, MELTZER & SHAPIRO, *supra* note 30; RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (6th ed. 2009); RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (5th ed. 2003); RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (4th ed. 1996); PAUL M. BATOR, DANIEL J. MELTZER, PAUL J. MISHKIN & DAVID L. SHAPIRO, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (3d ed. 1988); BATOR, MISHKIN, SHAPIRO & WECHSLER, *supra* note 32.

agreed to a kind of “institutional settlement” — a process, decided in advance, for resolving disputes and accepting the outcomes, even if they do not align with one’s preferences in a particular case.³⁴ The Legal Process tradition also includes the idea that we should assume law is reasonable unless we are left with no choice.³⁵ You can see this impulse in all of David’s work — the impulse to make law, the law of federal courts, a product of reason, precedent, consistency, not mere power. No one since Professors Hart and Wechsler themselves has played a larger role in shaping the field of federal courts.

David’s other scholarship, significant in its own right, reflected the same Legal Process ethos. To this day, he lays claim to the single most important article explaining how agencies choose between adjudication and rulemaking in making policy, the consequences of their having broad discretion to choose between the two, and the role Congress might appropriately play in shifting agencies more toward rulemaking.³⁶ Likewise, I have yet to see a more thoughtful account than the one he produced of why courts sometimes (but not always) have legitimate discretion to forbear from deciding cases, even when statutes confer unqualified jurisdiction over those cases.³⁷ And then there is my personal favorite, a spirited but temperate defense of the once-dreaded canons of statutory construction — a defense that found in those much maligned rules a shared function; that of requiring legislatures to be more transparent when they seek to change the law from its pre-statutory baseline.³⁸ Each of these pieces displayed David’s abiding commitment to the rule of law, the importance of institutional legitimacy, and the power of reason.

Finally, no tribute would be complete without mention of what an extraordinary colleague and friend David was. David was a quick, thorough, and highly astute reader of others’ work. He took pains not only to offer his own views of a subject but also to provide authors constructive criticism from within their own frames of reference. If you were struggling with how to teach a class or solve a problem in a piece of scholarship, David was always there, ready to entertain and exchange ideas. And he eagerly shared stories, really interesting stories, of the history of Harvard Law School during the more than six decades he knew it. He was also an intellectual leader, a pedagogical innovator who made the heavy lift of integrating our 1L writing program into the civil procedure course, and a generous administrative contributor to a vast institution that requires plenty of administration. The stories he

³⁴ HART & SACKS, *supra* note 25, at 4; *see id.* at 4–5.

³⁵ *Cf. id.* at 1378 (instructing interpreters to “assume, unless the contrary unmistakably appears, that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably”).

³⁶ *See* David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965).

³⁷ *See* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985).

³⁸ *See* Shapiro, *supra* note 22.

told me when we met each semester to have lunch and catch up consisted partly of historical gossip, recounted with relish and filled with the vivid personalities involved in this or that piece of HLS history. But in each of these stories was a lesson, a good lesson, about how institutions move forward, how they get into trouble, and how they move past it. Most of all, his stories reflected that David Shapiro loved Harvard Law School, loved his students, and loved his colleagues, even when they did not see eye to eye.

I would be remiss not to mention a salient fact about David, the friend. He was funny. Genuinely funny. Sometimes his sense of humor would take the form of a witty line launched, in the moment, when the opportunity presented itself. Other times, he would do a chunk, sometimes a surprisingly big chunk, of some comedian's routine, quoting the likes of Mel Brooks, Carl Reiner, or Groucho Marx. You get the picture. He was full of mischief, like a favorite uncle whom you always look forward to seeing at family gatherings. And like that uncle, he was often endearingly corny: when faced with the *Bluebook* rule that only the first author in a multi-author book like *Hart & Wechsler* should be cited by name, he told his coauthors he was changing his name either to David Aardvark-Shapiro or to Et Al. Even when he was corny, David always made you laugh because he so enjoyed laughing himself, and you could not help but join in.

David also had extraordinary character. As was apparent to all, he spoke with difficulty and had a raspy voice that sounded as if he were whispering. Mid-career, David developed a neurological and muscular condition that presented him with serious physical challenges at the time and left some lasting effects, including the ones just mentioned. It might have stopped him in his tracks. It didn't. David went on to write many important articles, teach many students, mentor many colleagues (including me), and argue ten cases in the Supreme Court as Deputy Solicitor General. He was also open with students and colleagues about his illness and the challenges he faced; his courage and determination were a model for all who knew him.

It is hard to capture the life of a great man in a brief tribute. So I will just say this, in closing: David Shapiro was my friend, and I loved him. We will miss him terribly at Harvard Law School and beyond.

*Richard H. Fallon, Jr.**

* Story Professor of Law, Harvard Law School.

In 2003, Dan Meltzer and I dedicated the fifth edition of *Hart & Wechsler's The Federal Courts and the Federal System*³⁹ to David Shapiro. It was an unusual gesture. David was very much alive and the third coauthor of the book. But he was an extraordinary man, and Dan and I wanted to pay our tribute while David could savor it. Our dedication read: "The editors of the fifth edition, by a 2-1 vote, add a dedication [to those of prior editions] to David L. Shapiro, lawyer's lawyer, exemplary teacher and scholar, who continues to show us the way."⁴⁰ Those words echo in my mind in this time for mourning David's death and for celebrating his life.

David may have been the best lawyer I have ever known. He had encyclopedic legal knowledge, surpassing analytical intelligence, and superb judgment. He wrote with extraordinary clarity and precision. He had an unparalleled gift for concise but accurate summary.

David's characteristic genius as a lawyer was to work from the ground up, from cases to theories, and to keep his theories tethered tightly to the cases on which he relied to support them. David was a brilliant theorist, as the best lawyers necessarily are. To argue successfully, lawyers must craft theories explaining why their side deserves to prevail. But David was a stickler for not letting his theories outrun the foundations on which they were built. His legal theories were sturdy ones — often sturdier than any I could have imagined being constructed out of the materials with which he had to work.

I never had the privilege of hearing David argue a case. But mutual friends who worked with him in the Solicitor General's office have told me that they never saw the Justices listen to a lawyer more closely than they did to David when he was the Deputy Solicitor General. The best lawyers' reputations for insight and reliability are among their most valuable assets. For good reason, David's reputation as a lawyer was unsurpassed.

David had a similarly exalted and deserved reputation as a teacher. Dan Meltzer had been his student and spoke from personal experience in describing David as an "exemplary teacher." Beyond taking Dan's word on the subject,⁴¹ I had sat in on one of David's classes early in my tenure at Harvard Law School, when faculty colleagues suggested that if I wanted to see a master teacher in action, I ought to observe David. I still recall the class that I attended. David was in utter command. He questioned students in classic Socratic style and, in doing so, modeled

³⁹ FALLON, MELTZER & SHAPIRO, *supra* note 33.

⁴⁰ *Id.* at iii. The first edition of *Hart & Wechsler* was dedicated to Felix Frankfurter, "who first opened our minds to these problems"; the second to the memory of Henry M. Hart, Jr., "profound and passionate student and teacher"; the third to the memory of Henry J. Friendly, "man for all seasons in the law; master of this subject"; and the fourth to Herbert Wechsler, "source of inspiration and wisdom, epitome of a grand tradition." *Id.*

⁴¹ As anyone who knew Dan would attest, there could be no better evidence.

analytic insight and lucidity. But there was no haughtiness about David. He exuded excitement, concern, and good humor. Some of his jokes were corny, even goofy, but the goofiness accentuated the warm humanity of the formidable analyst in the three-piece suit. I could see immediately why David's students loved as well as admired him.

Among the most enduring testaments to David's success as a teacher comes from the extraordinary roster of his former students who followed him into law teaching in his fields of Civil Procedure and Federal Courts. Notable among them are a number of women whom David not only inspired but also mentored personally. I seldom if ever saw David happier than when he, John Manning, and I agreed to ask his former student Amanda Tyler to join us as a coeditor for the forthcoming eighth edition of the *Hart & Wechsler* casebook.

As a scholar, David's hallmarks were engagement, imagination, and integrity. Throughout his long career, David not only kept up with, but also remained excited by, debates within his fields. He read widely. In doing so, he recurrently identified mistakes and omissions in both judicial decisions and scholarly commentary. And he then undertook to correct some of those mistakes and rectify some of those omissions in imaginative work of his own.

Once David had chosen a topic, he worked with a singular combination of imagination and integrity. Even when exercised by others' mistakes, David never sought to score cheap points, never distorted arguments or cases, and never claimed to have established more than his precise arguments and characterizations supported. In this sense among others, he was truly a scholar's scholar.

In concluding our dedication of *Hart & Wechsler's* fifth edition to David, Dan Meltzer and I wrote that he "continues to show us the way." Those were heartfelt words. For me, working with David and with Dan on the fourth through the seventh editions of *Hart & Wechsler* was a distinctive career highlight. When they asked me to join them on what David always called "our book," I felt as if I had been given a for-this-project-only admissions pass onto Olympus and been asked to work with and among the gods. Partnering with David and Dan was a privilege that I wish could have lasted forever and an enduring education in scholarly devotion.

As an editor of *Hart & Wechsler*, David scrutinized every line in every draft of additions and revisions to "our book." His own work always met the highest standards of excellence. He saved me from innumerable errors. He was a brilliant editor who blue-penciled infelicity after infelicity — characteristically with a joke in the margin to explain his suggestions. David's attention to detail extended to footnotes and commas and proper and improper italicization. Through his commitment to excellence, he imbued and sustained an ethos: we were custodians of a grand tradition, launched by Henry Hart and Herbert Wechsler, that David felt a solemn duty to maintain.

David's influence on me and on others who were privileged to work closely with him was profound. The depth of that influence arose in considerable part from the relationship between David's professional life and his personal life and from the example that he set for others. Besides being a consummate lawyer, teacher, and scholar, David was a marvelous human being — warm, generous, quick with a joke, occasionally acerbically insightful. He and his wife Jane were life partners who lighted each other's lives.

As work commences on a new eighth edition of *Hart & Wechsler* in which David had hoped to participate, I feel his loss deeply and recall how much it always meant to me to have him there on previous editions to "show us the way." I take heart that those who carry the book forward will at least have his luminous example,⁴² for which I shall always be grateful.

*Charles Fried**

David Shapiro was one of the most distinctive and dazzling stars in the Harvard Law School firmament. It was my privilege to have known him throughout his Harvard Law School career. David came to the law school two years after me, but he was my senior in every way. By a similar anomaly he followed me by two years as a clerk to Justice John Marshall Harlan, who was a distinctive voice of both bold and traditional jurisprudence — one might say that he was following in the New York tradition of Justice Robert Jackson and Judge Henry Friendly, both of whom he much admired.

Despite our warm friendship, we never had the opportunity to collaborate. From David's years as a student through 1985, David and I had rather different interests. I was more concerned with legal philosophy, moral philosophy, and how those topics played out in private law. Then, by a weird turn of events, I found myself first a Deputy Solicitor General and then the Solicitor General. The Solicitor General's office was most definitely the playground of David's concerns, expertise, and accomplishments: federal procedure and jurisdiction.

⁴² I borrow the word "luminous," which seems to me to be precisely apt, from the sad but perfect dedication that David wrote for the seventh edition of *Hart & Wechsler*: "[T]o the memory of Daniel J. Meltzer, whose luminous scholarship so enriched our field, and whose contributions and wise counsel so enriched this book." FALLON, MANNING, MELTZER & SHAPIRO, *supra* note 30, at iii.

* Beneficial Professor of Law, Harvard Law School.

I remember vividly how I became David's colleague in that playground. At the start of my tenure I had succeeded in luring to the office as one of five deputies Louis Cohen, another former Harlan clerk and a distinguished senior partner at a Washington law firm. In 1988, Louis announced that he was returning to private practice, and he and I put our heads together to find an appropriate successor. As we pondered, my eye lit on the latest *Harvard Law School Bulletin* lying on Lou's desk.⁴³ The cover showed David teaching a law school class in a most animated mode. At that moment it became blindingly obvious that David would make a marvelous addition to the office, both in its work and in the warm fellowship of the deputies and assistants. I did not imagine that David could be persuaded to give up both his beloved teaching and editing of *Hart & Wechsler's The Federal Courts and the Federal System* casebook. To my great delight, I was wrong.

The only real obstacle was the possible objection of the Attorney General. After all, in 1976 David had written a short article reflecting on then-Justice William Rehnquist's first five years on the Supreme Court.⁴⁴ His research was, as always, meticulous, and his conclusions were devastating: while Justice Rehnquist was brilliant, stylish, and acute, he also had a remarkably consistent pattern in his judgments.⁴⁵ As David put it in a nutshell: if the dispute was between the citizen and the government, the government won; if the dispute was between the federal government and the state government, the state government won; and if the dispute was centered on the exercise of federal jurisdiction, state jurisdiction prevailed.⁴⁶ Although I have no doubt that an analogous analysis of the work of Justice William Brennan would have yielded a similarly consistent pattern, David's article nonetheless left the impression that political and ideological matters — rather than the merits of each individual case — determined the future Chief Justice's decisions.

As the administration had just elevated Rehnquist to the Chief Justiceship, and because Chief Justice Rehnquist was a darling of the right wing of the party in power, the designation of such a trenchant critic of the man before whom it was the Solicitor General's office's principal occupation to litigate did more than raise eyebrows. Objections were raised to the Attorney General, who had to approve the appointment. It was typical of Edwin Meese that when I assured him that David was a highly competent man, a lawyer above all, a man of principle, and one who would bring honor to the office, that was all that was needed. David joined us shortly thereafter.

⁴³ HARV. L. BULL., Spring 1988.

⁴⁴ Shapiro, *supra* note 5.

⁴⁵ *See id.* at 298–99.

⁴⁶ *See id.* at 294.

Others questioned whether David was really suited to a job with oral advocacy as a culminating moment. David had undergone a long course of medical interventions, including surgery leaving him with a hoarse, whisper-like voice. Was he really suited to be an oral advocate? All who knew David knew that he was a superb teacher, handling classes of 150 and 200 students, which was more physically taxing than addressing nine Supreme Court justices for half an hour. In this as in every other respect, David proved my predictions correct.

Because of David's legendary expertise in matters at the very core of the Solicitor General's work, the other members of the office regularly consulted him and tested their work against his intuitions. After I left the office, the new Solicitor General, Kenneth Starr, urged David to continue as his deputy. To the delight of his colleagues, David stayed on for two years. During his time in the office David argued ten cases before the Court and prevailed in nine. Of course, like other members of the office he contributed to innumerable briefs, the arguments of which fell to other members of the office, because we very much tried to even out that privilege among all the members of the staff.

It was a delight to me that when David finally returned to Harvard, he also had an occasional consulting practice focused on his areas of expertise. So did I, and sometimes we found ourselves on opposite sides, no more dramatically than in the signal case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*⁴⁷

I cannot leave this brief account without inviting the reader to revisit two of the elegant short essays of which David was a master: *A Cave Drawing for the Ages*⁴⁸ and *The Death of the Up-Down Distinction*.⁴⁹ What stands out about these is that he makes definitive points with humor, absolute accuracy, and a wonderful absence of unnecessary adjectives and adverbs. David, your voice will continue to resonate in the heavenly chorus of reason, wit and wisdom. *Ave atque vale!*

Amanda L. Tyler*

As I look back twenty-five years later, I cannot recall for certain whether it was the first or the second day of sitting in David Shapiro's

⁴⁷ 509 U.S. 579 (1993).

⁴⁸ David L. Shapiro, *The Case of the Speluncean Explorers: A Fiftieth Anniversary Symposium — Foreword: A Cave Drawing for the Ages*, 112 HARV. L. REV. 1834 (1999) (foreword to a symposium on the fiftieth anniversary of Professor Lon L. Fuller's article, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949)).

⁴⁹ David L. Shapiro, *The Death of the Up-Down Distinction*, 36 STAN. L. REV. 465 (1984).

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civil procedure class, but I do know that by the end of my first week of law school, I had decided that I wanted to be a law professor. Each and every single day, David turned in a masterclass performance at the front of the room. He was absolutely brilliant and yet never intimidating. Navigating this balancing act was easy for David. This is because he drew his students in with his legendary good humor and passion for the subject and for the study of law more generally. Through it all, one thing above all else struck me: *David was having fun up there*. I thought to myself: *I want to do that too*.

To my great fortune, David took me under his wing and helped me eventually to achieve that ambition. I took David's statutory interpretation seminar and he supervised my third-year paper. He also invited my classmate Kannon Shanmugam and me to serve as teaching assistants for his Civil Procedure class during our 3L year while he was also briefing a procedure case before the Supreme Court.⁵⁰ We watched David model how to be a great lawyer while also bringing an entire class of students along to master a subject and come to love it as he did. There is not a day that goes by that I do not draw on things that David taught me that fall.

All this being said, the real joy of knowing David came after I graduated, when he remained an enormously impactful mentor and became a cherished friend and, in time, coauthor. David supported my career at every turn, starting with helping me secure a clerkship with Justice Ginsburg and continuing with helping me land my first academic job. Along the way, he could not have been more generous. David read every line of everything I ever wrote as a scholar, including my lengthy book on the history of habeas corpus in wartime. His feedback spanned from exceptionally insightful big-picture comments to the smallest of details — always peppered with encouragement. He also interspersed hilarious notes throughout. For example, when I once used the word “impacted” in a draft, David returned to me both his comments and an article entitled “*Impact as a Verb and the Decline of Western Civilization*.” (Per his suggestion, I substituted the word “influenced.”)

David loved the craft of writing almost as much as he loved the law, and he taught me a great deal about both. In going over one of my projects, David wrote me:

⁵⁰ David taught the case to his students that semester and invited Kannon and me to argue it before the class to a panel comprised of himself and his colleagues Dan Meltzer and Larry Tribe. I will never forget the thrill of the experience — or the nerves I had that morning. (I would be remiss if I did not also note that this is where Kannon got his start as the great Supreme Court advocate he is today, a fact that made David very proud.)

Strunk & White's Rule No. 1 is "Avoid unnecessary words".⁵¹ The rule is a superb illustration of itself. They might have said: "Notably, we would like to begin by pointing out that by far the most important rule, and one that is therefore given precedence here, is the mandate, however, tempting it may be to do otherwise, to avoid the use of words that one may regard, or that others may perceive, as unnecessary or superfluous."

As though there was any debate over how spectacular a writer David was, one need only read his essay *The Death of the Up-Down Distinction*⁵² to appreciate his mastery of the craft.

Behind all of this stood one of the most accomplished legal scholars of a generation. After graduating first in his class from Harvard Law School, clerking at the Supreme Court for Justice Harlan, and practicing at Covington & Burling in Washington, D.C., David joined the Harvard Law School faculty in 1963. Having studied under the great Henry Hart, David played an important role in reviving the casebook that his professor had cowritten to establish the field of Federal Courts, *Hart & Wechsler's The Federal Courts and the Federal System*.⁵³ David went on to work actively on five more editions of the book — six in total — through its current seventh edition.⁵⁴ But David was not done. He remained an active consultant on the book and its supplements right up until he died, counseling those of us privileged enough to carry on its legacy as we began preparations for an eighth edition.

David's influence in the field of Federal Courts,⁵⁵ as with the fields of Civil Procedure⁵⁶ and Statutory Interpretation,⁵⁷ was nothing short of massive. His scholarship was of course well-written, yet what I love about it is the fact that he steadfastly focused on important and consequential real-world issues, offering exemplary analysis and brilliant insights while at times taking creative approaches.⁵⁸ Rereading his articles now in celebration of his life is a true joy.

David's influence swept even more broadly. In addition to teaching and inspiring generations of law students and being a scholar of enor-

⁵¹ The period goes outside the quotation marks, per *Hart & Wechsler* tradition. David once counseled those of us on the *Hart & Wechsler* team that here, too, any other rule would result in the decline of Western civilization.

⁵² See Shapiro, *supra* note 49.

⁵³ Here, David worked alongside the other original author, Herbert Wechsler, as well as Paul Bator and Paul Mishkin. See BATOR, MISHKIN, SHAPIRO & WECHSLER, *supra* note 32.

⁵⁴ See FALLON, MANNING, MELTZER & SHAPIRO, *supra* note 30.

⁵⁵ In addition to countless important articles, this work included David's extraordinary book on federalism, DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* (1995).

⁵⁶ There are too many outstanding articles to pick a favorite here.

⁵⁷ Here, I must cite a favorite article, David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921 (1992).

⁵⁸ See, e.g., David L. Shapiro, *The Role of Precedent in Constitutional Adjudication: An Introspection*, 86 TEX. L. REV. 929 (2008).

mous impact, David was also a reformer, a successful advocate (including during a stint in the Solicitor General's office and work on amicus briefs that continued right up to his death), and a public servant. In this respect, David was, as I once wrote, "the true Renaissance man of legal academia."⁵⁹

David was also an intellectual's intellectual. He loved ideas, and when it came to his scholarship, he never had an ax to grind except when it came to possessing limited patience for those who did not share his devotion to civility and respectful discourse. When I was offered the incredible honor of working alongside David, my former professor Dick Fallon, John Manning, and Jack Goldsmith as part of the *Hart & Wechsler* team, I felt like I had won the lottery.⁶⁰ Even though my time overlapping on the book with David spanned only five years, I will treasure it always as one of the most special and rewarding periods of my intellectual life.

As I look back and take stock of David's extraordinary life, what I appreciate most about David beyond his legendary humor and brilliance was his humility, integrity, resilience, and kindness, which defined the man he was. David carried his many successes lightly while holding himself to the highest standards. David was also resilient in the face of many extraordinary health challenges, never permitting them to define him or slow him down. As to his kindness, David had a particular talent for reaching out during difficult times at just the right moment to offer encouragement when it was most needed. David was also a devoted spouse to his life partner of more than sixty-five years, Jane. I treasure the memories of experiencing their hospitality first as a student, when they welcomed his classes into their home (which also doubled as a spectacular art gallery), and over the many years that followed.

As I write these words, I find it incomprehensible that David is gone. His influence on my life — and that of so many other students — was nothing short of profound. As I wrote when David retired from the classroom:

When I decided to become an academic myself (with David's gracious encouragement and generous mentoring), I was asked during interviews if there was a model on which I would draw in my own teaching and scholarship. The answer was obvious. I could only hope to be half as good as David.⁶¹

That is still so true.

⁵⁹ Amanda L. Tyler, *David L. Shapiro '57: A Judgment, Stated*, HARV. L. BULL., Summer 2006, at 11.

⁶⁰ This being said, I deeply regret that I never had the chance to work on the book with the great Dan Meltzer, my Federal Courts professor. Looking back, I consider myself especially blessed to have studied under David, Dan, and Dick.

⁶¹ Tyler, *supra* note 59, at 11.

I Still Remember
*Brian T. Fitzpatrick**

The first day of Civil Procedure 3b, fall 1997
The raspy voice, the microphone held close
The jokes about Frasier

The only question I was asked all semester
“Do you think it is a good idea to have a safe harbor somewhere,
where you know you can sue someone for anything?”
Yes I do
So did he

Lunches at the Sheraton Commander
The faux fancy decor
Caesar salads with grilled chicken
Trying — unsuccessfully — not to embarrass myself too much

The time he hired me
A lecture in England
“When asked to give a talk on something I know nothing about I do
what anyone else would do: hire a research assistant!”

A case at the Supreme Court
A Justice overheard
“If Shapiro is on the brief, I don’t need a bench memo”

My job talk paper
“The section on federal common law is so overdone, it sounds almost
biblical”
When Settlements Are Law (unpublished)

Civil Procedures A and B and C, 2007-present
Shapiro, Civil Procedure: Preclusion in Civil Actions⁶²

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⁶² SHAPIRO, *supra* note 29.

Shapiro, *Class Actions: The Class as Party and Client*⁶³
Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*⁶⁴

The last day of Civil Procedure 5, fall 2018
Sheraton Commander again (but updated decor)
A brief to the Fifth Circuit
“Have you looked into the *Erie* issue?”
What *Erie* issue?
Weatherly v. Pershing, LLC, No. 19-1157 (S. Ct.)⁶⁵

I will always remember.

⁶³ David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913 (1998).

⁶⁴ David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317 (1977).

⁶⁵ *Weatherly v. Pershing, LLC*, 945 F.3d 915 (5th Cir. 2019), *petition for cert. filed*, No. 19-1157 (U.S. Mar. 18, 2020).