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Diligent Dave—A Remembrance

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Professor Kenneth W. Graham, Jr.²²*Diligent Dave—A Remembrance*

I would rather feel compassion than know the meaning of
it. —Thomas Aquinas

Anyone who heard the laudatory adjectives pouring from the lips of speakers at funeral services for Professor David Leonard might not think of adding “under-appreciated” to the list. And yet—despite his devotion to it, no one mentioned Dave’s prodigious scholarship. Oversight? Perhaps. But maybe speakers felt no need to speak of his writing because it simply reflected the virtues of the man.

A glance at Professor Leonard’s latest writing should suffice to show the virtues that suffuse it. If one word could capture most of the qualities mentioned by Dave’s eulogists, *diligence* might do. One respected dictionary defines *diligent* this way: “1. of persons—consistent in application, persevering in endeavor . . . industrious”²³ Let us take a peek at Dave’s work to see these qualities at play.

In 1986, the publishers of Wigmore’s massive treatise on the law of evidence agreed with Professor Richard Friedman’s proposal to produce a completely new work rather than a revision of the treatise. Professor Friedman spent some time assembling a cadre of evidence scholars for the task. Dave agreed to do the volume on the “quasi-privileges”—or as he called them, “Selected Rules of Limited Admissibility.”²⁴ Diligent Dave completed his assigned volume well before any of the others.²⁵

22. Professor of Law Emeritus, University of California, Los Angeles School of Law.

23. THE COMPACT OXFORD ENGLISH DICTIONARY 666 (2d ed. 1987). The entry also includes *attentive*, *assiduous*, and *careful*, adding that it comes from the Latin *diligere*, which adds “esteem highly” and “take delight in doing.”

24. *Quasi-privileges* resemble true privileges in excluding otherwise relevant evidence for policy reasons, but differ in giving the holder only a right to bar use at trial, not to refuse to disclose in discovery; for example, the rule codified in FEDERAL RULE OF EVIDENCE 407 covering evidence of subsequent repairs.

25. General Editor’s *Introduction* to DAVID P. LEONARD, THE NEW WIGMORE: A TREATISE ON EVIDENCE: SELECTED RULES OF LIMITED ADMISSIBILITY xxxv (1996) (Leonard “has also—putting others of us to shame—completed this volume, covering a widely disparate subject matter, with remarkable speed, making it the first volume of *The New Wigmore* to be published.”).

Professor Friedman praised Dave for more than his diligence—for example, he added his “clarity of expression” to the list of virtues.²⁶ We can see his way with words in his law review articles. Consider, for example, the practice of some appellate courts when affirming a decision admitting evidence of other crimes to simply list all the exceptions in the applicable statute or rule in hopes that the reader will think one of them might apply. Some writers called this the “smorgasbord approach,”²⁷ but Dave’s label—“the kitchen sink”—seems much more apropos.²⁸

Professor Friedman also lauded Dave for his “sound judgment”²⁹ and “scrupulous fairness.”³⁰ We can find a good example of this in Dave’s introduction to a symposium published in this law review.³¹ He gives generous descriptions of ideas that he probably found questionable. And when one of the authors claimed novelty for an idea that Dave undoubtedly knew goes back at least as far as Wigmore, Dave passed over this gaffe in silence.³²

Finally, Professor Friedman thought the treatise exemplified Dave’s “thoroughness and insight.”³³ We can also see this in his effort to explain the verdicts in the Rodney King and O.J. Simpson cases; he takes an unusual step for an academic by looking at evidence from the perspective of the jury.³⁴ Similarly, in his analysis of the use of other crimes evidence to prove knowledge, Dave

26. DAVID P. LEONARD, *SELECTED RULES OF LIMITED ADMISSIBILITY: THE NEW WIGMORE* xxxv (1996). For an example, see the description of policy at *id.* at lv.

27. 22 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE: EVIDENCE* § 5240, at 479 (1978).

28. David P. Leonard, *The Use of Uncharged Misconduct Evidence To Prove Knowledge*, 81 NEB. L. REV. 115, 148 (2002).

29. For an example of this, see DAVID P. LEONARD, *SELECTED RULES OF LIMITED ADMISSIBILITY: THE NEW WIGMORE* 1.2 (1996) (analysis must always begin with relevance).

30. *Id.* at xxxv.

31. David P. Leonard, *Federal Privileges in the 21st Century: Introduction*, 38 LOY. L.A. L. REV. 515 (2004).

32. In keeping with the spirit of Dave’s generosity, I forbear from any identifying details.

33. DAVID P. LEONARD, *SELECTED RULES OF LIMITED ADMISSIBILITY: THE NEW WIGMORE* xxxv (1996).

34. David P. Leonard, *Different Worlds, Different Realities*, 34 LOY. L.A. L. REV. 863 (2001).

displays a broad vision, including a historical perspective, and makes a number of careful and crucial distinctions.³⁵

Unhappily, the treatise did not allow Professor Friedman to see another side of Dave's diligence—what the dictionary calls “delight in doing” and his eulogists called “his sense of humor.” But if we return to the symposium introduction and glance at the footnotes, Dave modestly reveals that he was not the first person to imagine Wigmore turning over in his grave and after citing several other writers who beat him to it, including one who applied the metaphor to Greenleaf, Dave concludes that “[i]n a sense . . . Wigmore is rolling over right alongside Greenleaf.”³⁶ This brings to mind the four Marx brothers rolling off the boat in barrels during the opening sequence of their movie “Monkey Business.”

Dave's modesty, noted by several of his eulogists, coexisted with an unusual kind of courage. In his article about the Simpson trial, he admitted that he erred in predicting the outcome of the case and, though he would have been justified in using the third person plural inasmuch as most pundits made the same error, Dave wrote “I”—a rare use of the first person singular in his work.³⁷ He then proceeded, hiding his erudition in the footnotes, to challenge the conventional explanations for the verdict and to use the King and the Simpson trials in an imaginative way to illuminate and vindicate jury verdicts with which he disagreed.

Unlike many of us, Dave had no difficulty in admitting his mistakes. In an article about the effect of the Supreme Court's *Old Chief* decision on the admissibility of other crimes evidence, he started off with “I began working on this article with a grand idea.”³⁸ But he said a bit later “my thesis began to break down as I dug into the cases and considered more carefully the relevance and probative value of uncharged misconduct evidence.”³⁹ If there were a legal

35. David P. Leonard, *The Use of Uncharged Misconduct Evidence to Prove Knowledge*, 81 NEB. L. REV. 115 (2002).

36. David P. Leonard, *Federal Privileges in the 21st Century: Introduction*, 38 LOY. L.A. L. REV. 515, 521 n.19 (2004).

37. David P. Leonard, *Different Worlds, Different Realities*, 34 LOY. L.A. L. REV. 863 (2001) (“I was, of course, utterly wrong.”).

38. David P. Leonard, *The Legacy of Old Chief and the Definition of Relevant Evidence: Implications for Uncharged Misconduct Evidence*, 36 SW. U. L. REV. 819 (2008).

39. *Id.* at 820.

version of the scientists' long imagined "Journal of Failed Research,"⁴⁰ Dave would have had no reluctance in publishing there.

The eulogists mentioned another one of Dave's virtues not usually associated with legal scholarship—strong moral values. But while Dave did not wear them on his sleeve, his writing bears clear marks of a deep moral conviction. For example, in his introduction to the privileges symposium, Dave noted the impact of socioeconomic inequality on the distribution of privileges.⁴¹ And in his article on the King and the Simpson verdicts, Dave compared the demographics of the neighborhoods surrounding the UCLA School of Law and Loyola Law School on his way to a sobering conclusion: without greater socioeconomic equality, courts cannot do justice.⁴²

Dave's eulogists traced his moral values to his religion, raising the question: "what is a nice Jewish boy like you doing in a Jesuit law school?" "Thriving," apparently. Dave seemed in tune with the Catholic bishops who wrote of "the responsibility of individuals and governments to assist the most vulnerable among us."⁴³ Indeed, the somber conclusion of his King and Simpson article echoes the Catholic social teaching that law alone does not suffice to end social conflict.⁴⁴

We may doubt that Dave ever read Ignatius's *Spiritual Exercises* or the pastoral letter of the Catholic bishops on economic inequality. But apparently he found in his own religious tradition an older version of that duty spelled out in *Gaudium et Spes* "to work with all men in constructing a more humane world."⁴⁵ Perhaps in these times of divisive ecclesiastical fanaticism, the ability to work across religious differences to find common ground is David Leonard's

40. The source of this does not readily come to hand, but the idea was that a lot of wasted effort might be avoided if scientists had some journal where they could discover that someone else had already found that their "brilliant idea" did not work.

41. David P. Leonard, *Federal Privileges in the 21st Century: Introduction*, 38 LOY. L.A. L. REV. 515, 517 n.6 (2004).

42. David P. Leonard, *Different Worlds, Different Realities*, 34 LOY. L.A. L. REV. 863, 873–74 (2001).

43. Lucia Ann Silecchia, *Catholic Social Teaching and Its Impact on American Law: Some Observations on the Past and Reflections on the Future*, 1 J. CATH. SOC. THOUGHT 277, 278 (2004).

44. *Id.* at 285.

45. *Id.* at 280.

most significant legacy to the rest of us—and one that he characteristically refused to preach except by example.

*Professor Edward J. Imwinkelried*⁴⁶

My (Initial) Impressions of David Leonard

I can still remember the very first time I met David several decades ago. We both had attended an evidence conference in Iowa. We had not had an opportunity to speak during the conference, but we had seen each other there. Consequently, when we ended up at the airport at the same time, we immediately recognized each other and began to chat.

Since we both had long delays before our flights, we had a good, long talk. It turned out that we had numerous common interests. We both were intrigued by many of the provisions in Article IV of the Federal Rules, and in particular we shared an interest in the validity of the psychological assumptions underlying those provisions. During that conversation, I formed two strong impressions of David. One was that David was a very thoughtful student of evidence law. It was obvious that he read widely and had thought about many of the issues far more deeply than I had. Although at that time David was just beginning his academic career, David had already carefully dissected many of the provisions in Article IV and had identified the issues that warranted additional scholarly critique.

My second impression was that, simply stated, David was a wonderful, friendly, decent human being. We were virtual strangers to each other, but within a few minutes I felt as if we had known each other for years. One of the things that struck me was the way in which David stated his criticisms. If he thought that a doctrine was unsound or that a specific case was wrongly decided, he couched his criticism in a temperate, modulated way. David was not inclined

46. Edward L. Barrett, Jr. Professor of Law, University of California, Davis School of Law.