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Essay

Rick Kay: And Now for the Rest of the Story

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Rick Kay: And Now for the Rest of the Story¹

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More than forty years ago, a rather dapper and bow-tied gentleman barged into my office in Cambridge on a Friday afternoon. He skipped any small talk and earnestly announced that he was Phillip Blumberg, the new Dean of the UConn Law School, and he would like me to come down to West Hartford and interview for a faculty position. The rub was that I had never heard of him or UConn Law School, and having just entered the job market, I had offers from schools of which I had heard.

But anyone who knows Phillip realizes that he treated such niceties as mere trifles. I told him I would think about it, assuming that would be the end of the matter, the way one might deal with a telephone solicitor or pesky insurance salesperson.

What I did not know was that Phillip was commuting from West Hartford (the then-home of the Law School) to a suburb of Boston and would return to my office every Friday thereafter. He did not make millions on Wall Street by taking “No” for an answer.

He planted the hook when he challenged me on whether I wanted to help build a law school rather than be a disposable cog in a big established one. He had plans for taking UConn from a sound, regional school and thrusting it into national prominence. And his reputation as I came to learn, meant the odds of that happening were great.

I struck a deal with Phillip—I would come down and spend the day at UConn if he promised to take “No” for an answer. With that deal struck, I reluctantly came to 1800 Asylum Avenue, which I thought was an appropriate address for a law school. In typical Blumberg fashion, he orchestrated every step of my visit, although none of this was obvious or transparent. My visit was built around Rick Kay, who shepherded me for the day, and who Phillip described as the cornerstone for the ascendancy of the law school and its emergence on the national scene. And that one day spent with Rick shaped the rest of my career as I accepted Phillip’s challenge.

¹ I suspect only a small number of readers will associate the heading with the legendary radio personality Paul Harvey. Putting aside his politics, he was a superb story teller and would build up to an unexpected ending by taking a commercial break around the halfway mark. After the break, he would finish the story by starting off with his iconic lead-in and inimitable voice “and now for the rest of the story.” See generally Carlos Watson, *The Rest of the Story: Paul Harvey, Conservative Talk Radio Pioneer*, NPR (Oct. 9, 2014, 7:50 AM), <https://www.npr.org/2014/10/09/354718833/the-rest-of-the-story-paul-harvey-conservative-talk-radio-pioneer>.

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Rick was a wunderkind. Fresh from a clerkship on the prestigious Massachusetts Supreme Judicial Court, a master's in economics from Yale, a magna cum laude graduate of Harvard Law School, and an Editor of the Harvard Law Review, whose student note was published in a prestigious journal.

Rick served as the nucleus of the young group who catapulted the school into national prominence, and Blumberg's vision became a reality as UConn was on the map and has never looked back.

As the articles in this Festschrift demonstrate, Rick was the intellectual father of a major school of constitutional interpretation known as "originalism," starting with his legendary article, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*.² To paraphrase Barbara Mandrell,³ he was an originalist when originalism wasn't cool.

To be an originalist in those early days did not put one on a fast track to stardom. But Rick has always been true to his principles, unlike Groucho Marx who once said, "[t]hose are my principles, and if you don't like them . . . well, I have others."⁴ He was not going to soft-pedal his views on originalism even if that were what some other ambitious junior faculty member would have done. Rick's writings reflected the way he led his life, with complete integrity, honesty, and trustworthiness. His views on originalism were vindicated more than two decades after his path breaking article when then-Solicitor General Kagan announced at her Supreme Court confirmation hearings that "we are all originalists."⁵ That may have been a sop to Justice Scalia, who was probably influenced in his thinking more by Rick rather than vice versa.

Rick's writings are unusually broad, extending well beyond what is reflected in this Festschrift.⁶ They have been translated into Russian, Ukrainian, and Macedonian—a trifecta few American academics have achieved (perhaps not to their disappointment). He has lectured widely including England, the Netherlands, Puerto Rico, Florence, Vienna, Portugal, and Hong Kong.

² Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988).

³ Jeremy Burchard, *Rare Video: Barbara Mandrell and George Jones Sing 'When Country Wasn't Cool'*, WIDE OPEN COUNTRY (July 1, 2016), <https://www.wideopencountry.com/barbara-mandrell-and-george-jones-sing-i-was-country-when-country-wasnt-cool/>.

⁴ *Groucho Marx Quotes*, BRAINYQUOTE, https://www.brainyquote.com/quotes/groucho_marx_122547 (last visited Feb. 20, 2020).

⁵ *Kagan: 'We Are All Originalists'*, BLOG LEGAL TIMES (June 29, 2010, 9:22 AM), <https://legaltimes.typepad.com/blt/2010/06/kagan-we-are-all-originalists.html>.

⁶ My personal favorite because it captures his Catholic tastes is RICHARD S. KAY, *THE GLORIOUS REVOLUTION AND THE CONTINUITY OF LAW* (2014). It is a real page turner, especially if you do not know how the Revolution turns out. For a complete list of Rick's writings, see *Scholarship: Richard S. Kay*, UCONN SCH. L., <https://www.law.uconn.edu/faculty/scholarship-richard-s-kay> (last visited Feb. 20, 2020).

His writings share certain characteristics. They are straight-forwardly elegant. No references to Derrida or Foucault or other passing fashions, just beautiful and accessible prose, unvarnished and unencumbered by pretension or academic twaddle. He does not take a paragraph to make a point when one well-formed sentence would suffice. Those who know him would see this as a reflection of who he is and how he leads his life.

His teaching has matched his writings. In preparation for this paean, I went back and read his teaching evaluations. A representative sample. “Funniest professor at UConn.” “Best teacher ever.” “Uncanny ability to make complex material accessible.” “Awesome.” “A rock star.” “Easy on the eyes.”

Lest readers unfamiliar with UConn think that all our students are this gushy, let me offer the following contrast. “If I had just one day to live, I would like to spend it with Professor Pomp because it would seem like an eternity.”

Rick was the School’s finest teacher of constitutional law. But being Rick, he gave it up out of frustration with the Supreme Court’s contentless balancing tests. Rick felt he had nothing of value to say about these vacuous cases and hence there was no reason for him to be teaching them. He remained true to his core values.

I tried for years to turn Rick into a tax professor. He would have been a natural. While never quite succeeding, I managed to entice him to collaborate with me on various projects, which display the breadth of his intellect.

When I was directing the New York Tax Study Commission, I proposed the creation of an independent state tax court, the first one of its kind in the country. I had a very formidable opponent from Columbia Law School, a person of gravitas and great standing in the academy, (and more than twice Rick’s age and experience). At a major conference on the work of the Commission, I arranged for a special debate between Rick and my nemesis before a large audience of academics, legislators, lobbyists, and journalists. I will spare the reader the details of the debate, (his adversary has long passed on) and note only that the court was subsequently created and became a model for the rest of the country.⁷

We also worked together on the nagging problem of Hartford’s tax base being emasculated by a disproportionate amount of tax-exempt property. We formulated a series of proposals that led to landmark and unprecedented

⁷ It is common to question the role of law reviews in effecting change, but the *Albany Law Review* fast-tracked the article that laid out the arguments for the court and that responded to critics, which helped move the proposal forward. See Richard D. Pomp, Robert D. Plattner & Richard S. Kay, *Fairness and Function in the New York Tax Appeals System: Proposals for Reform*, 49 ALB. L. REV. 352 (1985). A favorable *New York Times* editorial helped as well. Opinion, *Wise and Witty Tax Reform*, N.Y. TIMES, Feb. 22, 1983, § A, at 18. But clearly Rick turned the momentum in our favor.

legislation, which was subsequently copied around the country, calling for payments by the State to a municipality for the taxes lost due to exempt colleges and hospitals.⁸

Rick and I take especial pride in the reason gift cards do not expire in Connecticut. The Treasurer of Connecticut receives the funds from escheated property, which includes expired gift cards, with little constraint on how to spend the money. The quicker gift cards escheat, the more money the Treasurer has. The retailers favored no expiration on gift cards. The Treasurer hired a well-known, out-of-state heavyweight to support its case, and I brought Rick in to join me on the side of the retailers.

Because the opposing expert was so well respected and had appeared at hearings so often on behalf of the states, we were able to obtain a tape of his anticipated testimony. Like a coach breaking down tape of next week's opponent, stopping it at key points, rewinding it, analyzing, and vetting it, we had prepared a rebuttal, which relied on Rick's newly acquired understanding of the Supreme Court's murky jurisprudence governing escheat.

By the time the Legislature scheduled a hearing on whether gift cards should escheat or never expire, Rick and I had prepared what was essentially a trial lawyer's opening and closing. With a little help from our former UConn students in the Legislature, we arranged it so that Rick spoke before the witness, throwing him entirely off balance. I testified after the State's witness. Thanks to Rick, these two bookends had the desired double whammy.

I have seen Rick drop the ball only once. Years ago, when he and Claire were coming over to dinner, I told our daughter, who was probably nine or ten, that Professor Kay would be here, and he is the smartest person I know, so ask him a tough question. She was a bit shy then so I did not know whether she would take the bait. The second after Rick and Claire arrived, our daughter rushed up to Rick, skipping any pretense at small talk, and asked, "Who made God?"

In fairness to Rick, he gave a superb answer, just more fitting for a theology graduate student than a ten-year-old, who promptly concluded that like her father, Rick tried to confuse her with big words that he hid behind because he had no answer. She sauntered off triumphantly. Now whenever Rick's name comes up, her quick response—with a twinkle—is that "he is not that smart."

* * * * *

Forty years ago, when I arrived at the Law School my office was next to Rick's. I will never forget his first comment to me. "You can ask me the questions you were too afraid to ask anyone else."

⁸ See generally GREATER HARTFORD CHAMBER OF COMMERCE, PROPERTY TAX EXEMPTIONS FOR NON-PROFIT INSTITUTIONS: PROBLEMS AND PROPOSALS (Richard D. Pomp ed., 1978) (discussing state tax exemptions for nonprofit institutions).

By chance or manipulation, our offices have been next door or within spitting distance for the next four decades. Until his recent retirement, I started most mornings dropping by his office, with conversations ranging from the intimate to the pedestrian. We have gone off on tangents that have become our standing jokes. We have been mildly obsessed with—up to recently—a fairly obscure state tax case involving a Hawaii tax exemption for pineapple wine.⁹ We have used that case to develop the basic principles of the Commerce Clause and of remedies for discrimination.¹⁰ Our passion for this obscure case was an inside joke until last year when the Supreme Court “rediscovered the case.”¹¹ Once again, Rick felt vindicated.

Time with Rick is always marked by humor and laughter and the release of endorphins. His irreverent humor always puts me in a good mood. As the students indicated, he was the funniest person on the faculty. The days when he is not at the School are dull, empty days for me.

He has been more than just a colleague. He has been my confidant, a co-conspirator when necessary, an intellectual provocateur, an editor, and a font of wisdom and solace during challenging times.

As a legal matter, Rick has retired from the Law School. He and Claire have moved to Boston to be closer to their daughter and grandson. But I am not sure what retirement means in the case of Rick. His scholarship continues unabated. He just published his latest post-retirement article, *Updating the Constitution: Amending, Tinkering, Interpreting*.¹² He continues as the President of the American Society of Comparative Law. The real difference is that he will deprive scores of students of his teaching and insights.

Rick is the consummate intellectual, with a long queue of work in progress. Do not look for him on the golf course or tootling around the country in retirement. Justice Thomas and his wife should not expect to find Rick and Claire in an RV next to them in a Walmart parking lot one day.¹³

⁹ See *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263 (1984) (discussing a Hawaii state tax exemption for pineapple wine). One of the defects in the case is that the Court does not acknowledge that no one really drinks pineapple wine, which is god awful, so how can it actually compete with imported wines and liquors that were taxable? Instead, it is bought as a souvenir and gifted and regifted by those who know it is unpalatable, just the way fruit cakes, which are inedible, constitute an endless loop of regifting.

¹⁰ Property law teachers do something comparable, using *Pierson v. Post*, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805), to develop basic principles of ownership. *Pierson v. Post* is known to nearly every law student; *Bacchus* is virtually unknown.

¹¹ *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2470 (2019) (quoting *Bacchus Imps., Ltd.*, 468 U.S. at 274).

¹² Richard S. Kay, *Updating the Constitution: Amending, Tinkering, Interpreting*, 67 *DRAKE L. REV.* 887 (2019).

¹³ Debra Cassens Weiss, *Why Justice Thomas Loves Wal-Mart*, A.B.A. J. (Aug. 6, 2009, 12:00 PM), http://www.abajournal.com/news/article/why_justice_thomas_loves_wal-mart.

It is simply not part of Rick's DNA, even though Thomas, as the Court's oldest originalist, would find much to talk to him about.¹⁴

¹⁴ Rob Natelson, *Justice Thomas Again Shows He's the Supreme Court's Only Consistent Originalist*, INDEPENDENCE INST. (Feb. 25, 2019), <https://i2i.org/justice-thomas-again-shows-hes-the-supreme-courts-only-consistent-originalist/>.