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IN APPRECIATION: PAUL G. HASKELL

JUDITH WELCH WEGNER*

Academics are known for their respect for tradition. Universities endeavor to preserve and transmit the knowledge of past generations. Commencement ceremonies feature ceremonial garb dating from centuries past. Journals, like this one, remember and commemorate the life and work of faculty members who have touched the lives of their students and their colleagues. All of us at UNC are grateful that Paul Haskell has allowed us to honor his tenure in this fashion.

Other colleagues share memories of their friendship with Paul in the essays that follow. My comments can accordingly be brief. Paul has provided much spice to our life here at Carolina. When he joined the UNC faculty in 1977, he provided fresh insights based on his experience at Georgetown and at Case Western Reserve. While at UNC, Paul was named as Graham Kenan Professor and later as William Rand Kenan, Jr. Professor, in recognition of his scholarly accomplishments in the field of property law and trusts and estates. As others have attested, he has given unstintingly of his opinions, his time, and his dry wit in a continuing quest to keep his colleagues and students honest, to open their minds, and to spur them to be the best they can be. At the same time he has kept us focused on those intangible, finer things of life: Boston, Harvard College, and baseball.

I will remember Paul for the example he set in shaping and reshaping his life as a teacher and thinker. When he found that students in his trust and estates class lacked engagement, he reinvented the course to incorporate more use of problems. When he concluded that there was need for more active discussion of lawyers' roles and values, he gathered an active and talented group to engage in extracurricular discussion. When he determined that a new approach to teaching and writing about legal ethics was warranted, he designed new courses and used the power of the pen to espouse his views to the profession and the populace.

I am sure that Paul's many students join me and his colleagues in wishing him and his wife Sally the very best on the occasion of his

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retirement.

THOMAS F. BERGIN**

Some Thoughts From a Co-Author

I welcome this opportunity to write some words about Paul G. Haskell on the occasion of his retirement from the University of North Carolina School of Law. I start by recounting a lie that I told two years ago while flying to Indiana to teach law and economics to trial judges. During the flight, the young woman sitting next to me reached into her travel bag, took out a copy of Paul's and my *Preface to Estates in Land and Future Interests*,¹ and turned to a page near the end of the book. "You must be a law student," I said to her. "How did you know?" she asked. "That book," I replied; "how do you like it?" "The first half was absolutely grim;" she said, "nothing but feudal law." "That was Haskell's half," I lied; "I wrote the half you're reading now." "Oh, wow!" she said, "you're the Bergin of Bergin and Haskell?" "None other," I replied, giving her that bashful smile that I had perfected at the age of eight. I felt like a movie star. Was the lie justified? Of course. She would have been horrified to be told that I had written the half that she had described as grim. But on the rather good chance that God disagrees with my assessment, I will, one day, as an act of contrition, read Paul's half. Maybe as early as next year. Fair enough?

This year, Paul and I are sharing a fiftieth anniversary that I'll bet has not crossed his mind. In the fall of 1948, Paul entered Harvard Law School and I entered Yale Law School. Since no one who *could* have gone to Yale Law School at that time *would* have gone to Harvard, I infer that Paul didn't have quite enough of the right stuff. But what the heck, you don't blame a guy for something that's not his fault. Right?

Oh nuts! Am I going to have to get soggy about Haskell here? I come from the wrong generation to do that. Paul knows already that there is no one whom I admire and respect more than him. We have been close friends since we first met as entering associates at the Wall Street firm of Kelley, Drye, Newhall and Maginnes in 1951. That's

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1. THOMAS F. BERGIN & PAUL G. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS (2d ed. 1984).

forty-seven years. We practiced law together for five years. He was as able a lawyer as I have ever known. We were both New Deal Democrats and I can remember the beach where, with a gang of other Democrats, we listened on a portable radio to Adlai Stevenson's acceptance speech at the Democratic nominating convention. I rapped out grounders to his sons when they were Little Leaguers. And he and his wife, Sally, were as uncle and aunt to my daughter. We wrote a book together, and we took counsel with one another countless times on articles we were working on. Six years ago, he got me the chance to earn some dollars (far too few) by delivering an address at the University of North Carolina Law School on lawyers' advancing the immoral (but legal) goals of their clients.

There are, I must say, weirdnesses in the way our lives and careers have paralleled one another's. I am going to try to account for one of those parallels here. But let me first just point to a few: Haskell started teaching law at Georgetown in 1962. Bergin at Virginia in 1963. Haskell's major first-year course: property. Bergin's? Property. Haskell's favorite course (after property): law and morality. (If it wasn't, it ought to have been.) Bergin's? Law and morality. Haskell's strongest current academic interest: lawyer ethics. Bergin's? The same.

The parallel that I attempt to explain here is our common interest in lawyer ethics. I have not written on the subject; but I have delivered at least three addresses to bar groups on it and I have made it a central focus of two of my graduation speeches at Virginia. Paul published this year a book on the subject entitled *Why Lawyers Behave As They Do*.² I do the readers of this essay a true favor by recommending the book to them. If proof were needed that Paul's mind is as fiercely sharp today as it was back in the early 1950s, this book would supply it in abundance. But no one who knows Paul needs the proof.

The scary proposition that Paul advances in the book is that a good number of the ethical rules that govern the conduct of lawyers, far from requiring lawyers to conform in their professional labors to accepted moral principles, invite them or even compel them to ignore those principles. He not only advances the proposition, but also proves its correctness with over twenty hypothetical cases that he presents in the beginning of his book and analyzes in detail later. A good number of the hypothetical cases were based on actual cases.

I present just one example from his book. An accused, charged

2. PAUL G. HASKELL, *WHY LAWYERS BEHAVE AS THEY DO* (1998).

with having robbed a pedestrian, has admitted his guilt to his lawyer. The lawyer knows that a woman who witnessed the crime will testify truthfully that the accused did it. May the lawyer, on cross-examining the witness, attempt to discredit her truthful testimony by bringing out the facts that she had several convictions for shoplifting, that she had been drinking that night, and that she had had a violent argument with the accused earlier in the evening?³ The Model Rules bar a lawyer from knowingly using false testimony for his client, but they do not bar his attempting to discredit testimony against his client that he knows is true. Yet, the successful discrediting of testimony that one knows is true is, arguably at least, morally indistinguishable from knowingly using false testimony. In one respect, it is plainly worse; for the discrediting process, in addition to misleading the jury as much as false evidence would, commonly unjustly harms the truth teller. One simply throws one's hands in the air when one attempts to find moral worth in the process. But the dismaying point, of course, is that the Model Rules, by not barring the process, make discrediting the only course open to the lawyer for the accused; for what defense lawyer, knowing that the Model Rules do not bar him from discrediting the truth teller, will dare *not* to do it?

The idea that rules of ethics might be guiding lawyers to unethical conduct is, to me, a deeply troubling one. Long before reading Paul's book, I had thought that we American lawyers had gone overboard, at least in some respects, on the requirement that we be zealous advocates of our clients' interests. But Paul demonstrates that the effect of the rules may be more baleful than I had ever imagined. Although the book is aimed at a general audience, I judge it must reading for every lawyer who is concerned about the role of the lawyer in contemporary American society.

But if Paul convinces us that the rules do, in fact, authorize or even compel unethical conduct by lawyers, we shall surely be left wondering how it came about that the rules got to be the way they are. Were they purposely designed to enable unethical conduct? If they were, then it was not the rules that brought about unethicalness; it was unethicalness that brought about the rules. My fear is that it was the latter.

Here is Cornell Law School's Roger C. Cramton speaking in a 1984 address about the lawyer who is negotiating or litigating with an unrepresented party:

The older ethic of the profession counseled fairness to the

3. See *id.* at 2.

adversary. The modern ideology is that unrepresented or inexperienced parties are entitled to no favors—running over a patsy is accepted behavior. The early versions of the new model rules attempted to resuscitate the public-responsibility ethic by enjoining lawyers from “unfairly exploiting ignorance of the law . . .” and “procur[ing] an unconscionable result.” In response to vehement bar opposition, these provisions were deleted. The patsy is a target of opportunity, not the source of ethical concern.⁴

Here, by way of contrast, is a snapshot of life in the Kelley, Drye firm in the early 1950s. I was in a senior partner’s office when a call came to him from the president of a corporate client. Here, absolutely faithfully rendered, is the senior partner’s half of the dialogue:

Partner: I never said that what you’re going to do is illegal. I said I thought it was morally wrong.

Client . . .

Partner: You’re absolutely free to go ahead, and I don’t think it will cost you anything—not unless you count it a cost that I won’t be your lawyer.

The senior partner was ready to give up a client for moral principle. That was the world in which Paul and I grew up as lawyers. We were told explicitly that Wall Street lawyers were the conscience of the marketplace. Is it surprising we found awakening in us at the same time deep disquiet about the world of lawyering we see about us today? What has turned that world around? The love of money?

Paul may go through the formal motions of retiring from the academic life; but he will never really retire, for he gets too much fun out of it. That, I think, is very good news for American legal education.

4. Roger C. Cramton, *Ethical Dilemmas Facing Today’s Lawyer*, BAR LEADER, Jan.-Feb. 1985, at 14, 16 (adapting remarks from address to the American Bar Association Section of Tort and Insurance Practice).

DANIEL H. POLLITT***

From The Left

I thought little of it more than twenty years ago when Paul Haskell was invited to visit and teach the courses in Trusts and Future Interests. He was recommended by John Scott, and that was good enough for me. But then came antagonism, followed first by admiration, and then by affection.

Paul and I are political junkies. We are of the World War II generation and share memories of war time service (he in the Navy, I in the Marines); the cold war days of Joe McCarthy; the Vietnam War and Eugene McCarthy; and the long forgotten Korean conflict.

We can reminisce about Hubert Humphrey and the Civil Rights efforts at the 1948 Democratic Convention; the 1964 Convention and the fight over admission of the delegates from the Mississippi Freedom Party. We talk about Ike, Adlai Stevenson, Estes Kefauver, Sarge Shriver, J.F.K., L.B.J., and feel deeply about the issues these memories evoke.

But we occupy opposite ends of the political spectrum. Paul advises the conservative Federalist Society, I the ACLU. Paul heads the North Carolina branch of the National Association of Scholars (opposed to affirmative action in faculty hiring). I have a long affiliation with Civil Rights groups, and as chair of the faculty strongly supported the initiation of affirmative action.

Poles apart on issues we hold dear, rational discussion between us was difficult when he first joined the faculty. After several strident lunches, we tacitly agreed that he would go his way, I would go mine.

So it was for several years. But gradually came a grudging admiration for his work as a scholar. Whenever I sought information in his area of trusts (is it O.K. for a state to fund a scholarship limited to African Americans?), Paul gave a quick answer, replete with more than ample annotation.

His mind and energy are expansive. Basically a teacher of property, wills and trusts, he extended his responsibilities into teaching Professional Responsibility and a special course on Law and Morality. He agreed to oversee the popular annual Dan K. Moore Program on Ethics.

Most recently, rather than gently ease into retirement, Paul

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chose to write a book (his fourth) in his new field of legal ethics. *Why Lawyers Behave As They Do* is a highly readable account of how the professional rules of conduct permit lawyers (if they so mind) to wear moral blinders: to discredit adverse witnesses whom the lawyers know are telling the truth; to exploit an adversary's mistake (as to the time of a crime for example) and thereby obfuscate the truth; to utilize dilatory tactics to wear down a weaker adversary; to advise a client as to the de minimis consequence of a penalty and thereby encourage unlawful conduct.

Paul's book, rightly, is highly acclaimed.

With time, Paul and I became acquainted on a personal level and began to disagree on controversial matters without controversy; to disagree without being disagreeable. We both had taught at Georgetown Law School, and even lived in the same house in suburban D.C. (I in the fifties, he in the sixties). It turned out that as a law student I had a shipboard romance with his cousin Mimi on my way to study at the Academy of International Law at the Hague.

I learned of his exploits on the basketball court while playing for Lowell House in the Harvard inter-house league (Robinson Everett led the arch-rival Adams House). He told of his sons' progress in the academic world (one is now a Congressional Scholar) and I in turn boasted of my children's work in public health and legal services.

Our bonds of friendship strengthened a few years back around issues growing out of a student body election. Aaron Nelson was a candidate for student body president (he won hands down). On election eve the right wing *Carolina Review* blanketed the campus with a publication featuring a cover picture of Aaron Nelson with anti-Semitic overtones. Two of Nelson's fraternity brothers gathered them up, and turned them over the next day to the student attorney general.

There was an immediate campus uproar. A number of prominent faculty wrote an open letter to Chancellor Hooker protesting the anti-Semitism. After affirming the " 'primacy' " and " 'value' " of campus free speech, Hooker added that he wished " 'to add his voice to those who . . . find the article . . . deeply offensive and altogether inappropriate.' " ⁵

The faculty advisor resigned. There was no replacement. The *Carolina Review* was doomed to die. Without a faculty advisor, it could not function as a campus organization. Its voice was muzzled.

5. John Sweeney, *Hooker Slams Review Article*, THE DAILY TAR HEEL (Chapel Hill, N.C.), Feb. 26, 1996, at 1 (quoting statement of Chancellor Hooker).

Paul Haskell and I stepped into the breach. We agreed to serve, and wrote the *Daily Tar Heel* that it would be a “shocking limitation upon the freedom of expression” if a controversial periodical were denied the right to publish because of the inability “to satisfy the technical requirement of a faculty advisor.”⁶

That was the first round. The second came when the student Honor Court concluded that the two friends of Nelson were justified in seizing the magazine because of its anti-Semitic tone and character.

Haskell and I again entered the fray. We referred to the *Tinker* arm-band case (students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate”)⁷; the *Terminiello* breach of the peace case (free speech “may indeed best serve its high purpose when it . . . stirs people to anger”)⁸; the *Cohen* “fuck the draft” case (“words are often chosen as much for their emotive as their cognitive force”)⁹; and the *Johnson* flag burning case (“Government may not prohibit the expression of an idea simply because society finds the idea itself offensive”)¹⁰. Our conclusion: no matter how offensive, “[t]here is simply no justification for the midnight seizure of an opponent’s campaign literature.”¹¹

Paul Haskell is a straight shooter with a sensitivity to what is right and what is wrong. He speaks his mind, no matter how formidable the opposition, how damning the torpedoes. On retirement he loses his view of the football practice field and moves to an interior office, the one next to mine. I welcome him as a neighbor.

6. Paul G. Haskell & Daniel H. Pollitt, Letter to the Editor, *THE DAILY TAR HEEL* (Chapel Hill, N.C.), Apr. 1, 1996, at 10.

7. *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969).

8. *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949).

9. *Cohen v. California*, 403 U.S. 15, 26 (1971).

10. *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

11. Daniel H. Pollitt & Paul G. Haskell, *Freedom of the Press: An Addendum to the Statement of Professors Haskell and Pollitt* (1996) (on file with the *North Carolina Law Review*).

WILLIAM J. TURNER****

Musings from a Friend and Neighbor

When I joined the law faculty twenty five years ago it seemed that fully half of the faculty consisted of former trusts and estates teachers. Anxious for a job I replied in the affirmative when asked if I would replace a junior faculty member who, after one year in the profession, looked forward to joining this elite group. Needless to say, I was thrilled when four years later I learned that Paul G. Haskell, a distinguished scholar in decedents' estates, would be visiting at the school and I would be given a reprieve from teaching trusts and estates for the upcoming academic year and, if he decided to join the faculty, I might find myself permanently exempted from such duties. This, however, was not my first contact with Paul Haskell. Nearly a decade earlier, at the University of Virginia School of Law, I had been a student in Tom Bergin's first year property course, where, despite Tom's excellent teaching, I would have found the whole field of future interest law to be unintelligible had it not been for that splendid book, *Preface to Estates in Land and Future Interests*, which Paul and Tom had put together to take students and teachers alike through one of the law's most thorny thickets.

I was therefore delighted when I learned that Paul, after a visit of two years, had decided to join the law faculty at the University of North Carolina. I would be free to teach corporate tax indefinitely and our students would benefit from the presence of a recognized national authority in decedents' estates. I was also pleased to learn that shortly after Paul decided to join the faculty on a permanent basis, he and Sally decided to purchase a home down the street from ours. Over the years my wife, Marifé, and our children have come to appreciate Sally and Paul as good neighbors, amateur ornithologists, and good friends. Our daughter Christine had her first automobile accident in the Haskells' front yard and later remarked, based on Paul and Sally's calmness, kindness and concern, that she could not have picked a better place to put a car off the road.

My discussion thus far has primarily concentrated on Paul's value to me. However important that might be to me as an individual, it is transcended by his value to the legal academic community. Since joining the faculty Paul has proved to be an excellent colleague with deep institutional concerns as well as a

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dedicated scholar. Over the course of his academic career he has authored eighteen law review articles and has authored or co-authored four books, several of which have been issued in second editions.

An examination of Paul's corpus of scholarly production reveals two rather remarkable features which are a tribute to him.

Paul has never lost his enthusiasm for engagement in serious scholarship. Between his first article in 1964 in *Georgetown Law Journal*¹² and his most recent offering, a well regarded monograph *Why Lawyers Behave As They Do*, published earlier this year, one finds regular mileposts of articles and books which mark his course through a life's work of scholarship. Such lifelong dedication to scholarship is rare in legal education even among prominent scholars at our most elite schools. Unfortunately, a flurry of scholarship at the start of a teaching career with several well placed pieces in major reviews followed by decades of silence punctuated by the occasional article, book review, or casebook seems to be the pattern which marks many successful academic careers even among the profession's best and brightest. That Paul would have none of this is hardly surprising. It simply does not fit with either his sense of professionalism or his no nonsense New England sense of personal responsibility.

The second distinguishing feature of Paul's scholarly production is its broad range, which is the product of a mind which is always restless and in search of new ideas and horizons. Although he established his academic reputation in the field of decedent's estates, this did not prevent him from exploring other legal issues. With decedents' estates as his North Star, he roamed the seas of legal scholarship, with ports of call in education law, constitutional law, legal education, moral analysis, and professional responsibility. Were it not for this institution's omnipresent need for teachers of decedents' estates, there is a good chance that the subjects which he taught would be as varied as his scholarly offerings. Nonetheless, since joining the faculty he found it possible to provide, in addition to his normal offerings, courses in real estate finance, professional responsibility, and law and morality. It therefore came as no surprise when several years ago he announced that he and Professor Conley were to teach a new course on the legal profession, a course for which there were no prepared materials and, as far as I know, for which

12. Paul G. Haskell, *The Power of Disinheritance: Proposal for Reform*, 52 GEO. L.J. 499 (1964).

there was no precedent at any other law school.

In closing there is another aspect of Paul's persona which deserves mention, his high sense of moral virtue. All too often we hear criticism that the legal profession has lost its moral compass as its members struggle to attain maximum legal advantage for their clients within, and perhaps a bit beyond, the outer limits of what the profession will tolerate. This does not characterize Paul's sense of what is asked of the lawyer by society because it does not characterize his sense of what is asked of an individual as a member of society. Discussion of the moral element is rarely absent from his normal discourse even on matters such as economics or sports. In a conversation in the faculty lounge about college baseball with Paul present one could count on his making a comment about something such as the institutional immorality subjecting student athletes to a long season and far away road trips. Fortunately for our friendship, Paul is almost as tolerant of different points of view as he is certain of the correctness of his own.

Although Paul has retired from the classroom, we his colleagues are fortunate that he will be retaining an office in the law school and we all know with certainty that he will retain his keen interest in a wide range of legal topics. I am certain that sometime this fall or next spring, while I am out walking my dog or he is out walking his, we will meet down at the bottom of the hill, and full of enthusiasm, Paul will tell me about an area of the law which he feels calls out for scholarly attention, attention which he will provide with dedication and moral bearing.

