

Michigan Law Review

This Issue is Dedicated to
PROFESSOR YALE KAMISAR

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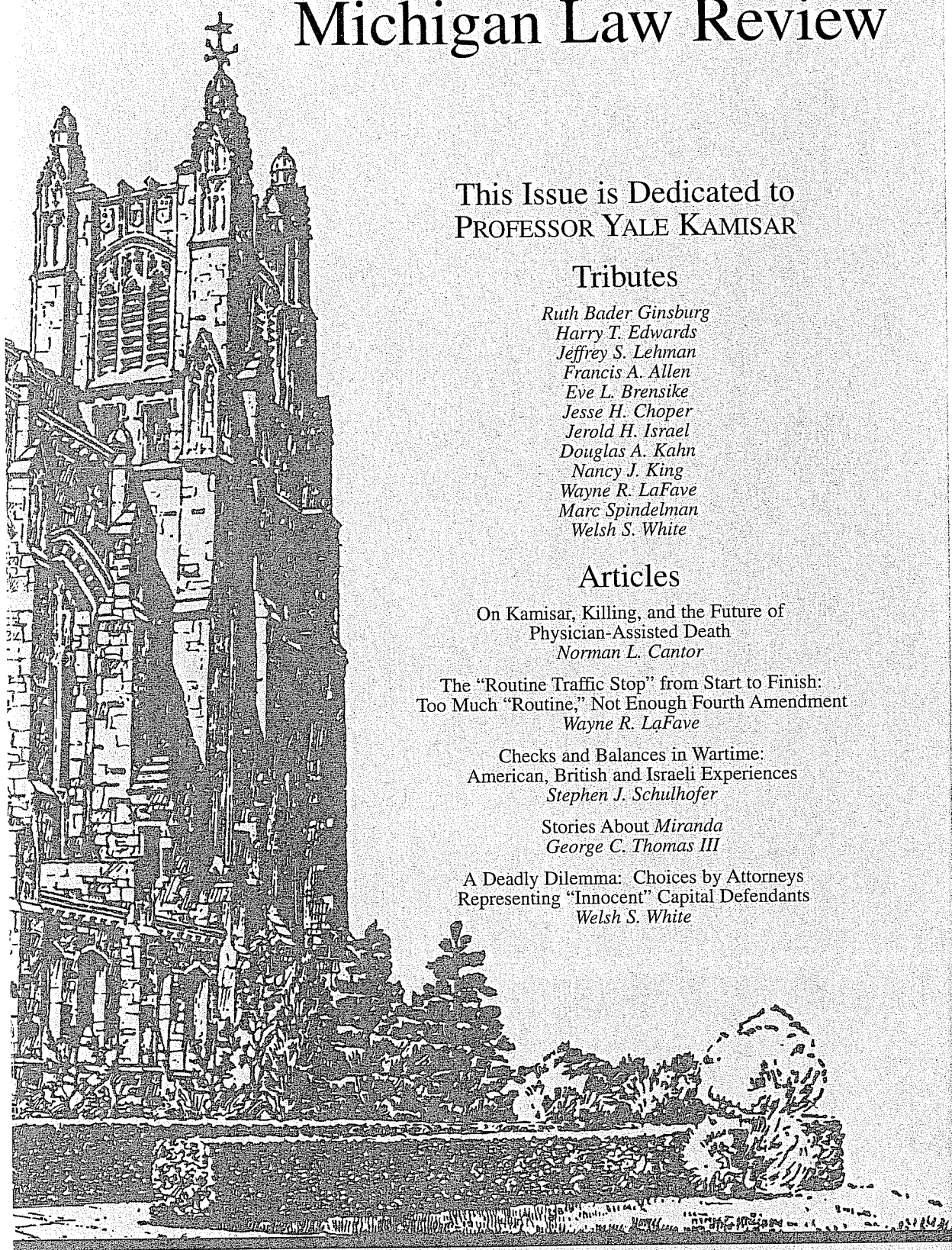
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YALE

Marc Spindelman*

Yale does have, as Nancy King has said, a story for every occasion.¹ Many of my favorites — and I definitely have my share — reflect Yale's *gaudium certaminis*: his “joy of battle” in Gerald Gunther's helpful translation.² Some of Yale's battles I have only heard or read about. A few of the more memorable ones from over the years include Yale's confrontations with Glanville Williams,³ Fred Inbau,⁴ Joe Grano,⁵ John Kaplan,⁶ James Vorenberg,⁷ Robert Bork,⁸ Malcolm Wilkey,⁹ Edward Barrett,¹⁰ and Yale's

* © 2004 by Marc Spindelman. All rights reserved. Assistant Professor of Law, The Ohio State University Moritz College of Law. — Ed. Many thanks to Sarah Cole, Sharon Davies Joshua Dressler, Alan Michaels, and Bill Miller for comments on earlier drafts, to Jerry Israel for a few key leads, to Bruce Frier for a quick Latin lesson, and to Peter Debelak for research assistance.

1. Nancy J. King, *Inspiring Generations*, 102 MICH. L. REV. 1728, 1729 (2004).

2. GERALD GUNTHER, LEARNED HAND 391 n. (1994) (translating expression used by Felix Frankfurter about his own).

3. See Yale Kamisar, *Some Non-Religious Views Against Proposed “Mercy-Killing” Legislation*, 42 MINN. L. REV. 969 (1958) (reviewing GLANVILLE WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* (1957)). For Williams' reply, see Glanville Williams, “*Mercy-Killing” Legislation — A Rejoinder*, 43 MINN. L. REV. 1 (1958).

4. See, e.g., Yale Kamisar, *Public Safety v. Individual Liberties: Some “Facts” and “Theories,”* 53 J. CRIM. L. C. & P.S. 171 (1962) (responding to Fred E. Inbau, *Public Safety v. Individual Civil Liberties: The Prosecutor's Stand*, 53 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 85 (1962)); Yale Kamisar, *Some Reflections on Criticizing the Courts and “Policing the Police,”* 53 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 453 (1962) (discussing Fred E. Inbau, *More About Public Safety v. Individual Civil Liberties*, 53 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 329 (1962)); Yale Kamisar, *What is an “Involuntary” Confession?: Some Comments on Inbau and Reid's Criminal Interrogation and Confessions*, 17 RUTGERS L. REV. 728 (1963) (offering, shall we say, some critical thoughts on Fred E. Inbau's work).

5. See, e.g., Yale Kamisar, *Remembering the “Old World” of Criminal Procedure: A Reply to Professor Grano*, 23 U. MICH. J.L. REFORM 537 (1990).

6. See, e.g., Yale Kamisar, “*Comparative Reprehensibility” and the Fourth Amendment Exclusionary Rule*, 86 Mich. L. Rev. 1, 3 n.4, 12, 15-16 (1987) [hereinafter, Kamisar, *Comparative Reprehensibility*] (engaging Kaplan's work).

7. Yale disagreed with Vorenberg on constitutional criminal procedure matters, as well as the “right to die.” In the constitutional criminal procedure arena, some disagreements with Vorenberg surfaced during deliberations on the ALI Model Pre-Arrest Code, for which Vorenberg was the Chief Reporter. Cf. *infra* note 11. On the “right to die,” Yale and Vorenberg once duked it out on the op-ed page of the *New York Times*. See James Vorenberg, *Going Gently, with Dignity*, N.Y. TIMES, Nov. 5, 1991, at A25; Yale Kamisar, *An Unraveling of Morality*, N.Y. TIMES, Nov. 5, 1991, at A25.

8. See, e.g., Kamisar, *Comparative Reprehensibility*, *supra* note 6, at 1-5, 43.

9. See, e.g., Yale Kamisar, *Is the Exclusionary Rule an ‘Illogical’ or ‘Unnatural’ Interpretation of the Fourth Amendment?*, 62 JUDICATURE: J. AM. JUDICATURE SOC'Y 66

former teacher Herbert Wechsler.¹¹ And let's not forget the numerous law-enforcement officials Yale caught in his sights at one moment or the other, among them Ronald Reagan's Attorney General Edwin Meese,¹² and one-time New York City Police Commissioner Michael Murphy.¹³ As for Yale's more recent skirmishes (those from the last decade or so), I've had the privilege of witnessing

(1978); Malcolm Richard Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE: J. AM. JUDICATURE SOC'Y 214 (1978); Yale Kamisar, *The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More Than 'An Empty Blessing,'* 62 JUDICATURE: J. AM. JUDICATURE SOC'Y 337 (1979); Malcolm Richard Wilkey, *A Call for Alternatives to the Exclusionary Rule: Let Congress and the Trial Courts Speak*, 62 JUDICATURE: J. AM. JUDICATURE SOC'Y 351 (1979). Part of what launched this exchange was Malcolm Richard Wilkey, *Why Suppress Valid Evidence?*, WALL ST. J., Oct. 7, 1977, at 12.

10. See Kamisar, *Comparative Reprehensibility*, *supra* note 6, at 4-5, 11, 32-33, 38-39, 43.

11. Ever the well-known student of substantive criminal law (not only did he write a classic casebook on substantive criminal law, JEROME MICHAEL & HERBERT WECHSLER, *CRIMINAL LAW AND ITS ADMINISTRATION* (1940) (1410 pages), also the Chief Reporter for the American Law Institute's (ALI's) Model Penal Code), Wechsler had become "conservative" on constitutional criminal procedure by the time he served as the Director of the ALI, perhaps because of civil disorders and student demonstrations.

Over the years, particularly when Yale was an Advisor to the ALI's Model Code of Pre-Arraignment Procedure Project, he and Wechsler had some small tussles. One story Yale tells goes something like this: While sitting in the first meeting of the Advisory Committee, for which James Vorenberg was nominally the Chief Reporter, Judge Walter Schaefer, directing his comments to Wechsler, said, "Herb, unless you delete this third provision, I'm going to have to vote against you on this issue." Wechsler replied, "OK, we'll take care of that, we'll delete the third provision." Judge Roger Traynor spoke up next to similar effect: "Herb, if you don't add this modifying clause, I'm going to have to vote against you." Wechsler replied, "Alright, we will add the modifying clause you want." When Yale, following the judges' pattern, chimed in, "Professor Wechsler, if you don't delete subpart (a) of the second provision, I'll have to vote against you." Wechsler quipped: "So, vote against me."

Another story takes place several years later. Toward the end of the sixties, the Advisory Committee was considering the implications of the *Line-up Cases*. See *United States v. Wade*, 388 U.S. 218 (1967), *Gilbert v. California*, 388 U.S. 263 (1967), and *Stovall v. Denno*, 388 U.S. 293 (1967). Yale was, not surprisingly, reading the cases broadly. Wechsler was trying to read them narrowly, placing some considerable weight on the fact that, in them, the men in the line-ups already had lawyers. Yale insisted that the cases could not be read that way in light of existing Supreme Court precedent, chiefly *Gideon v. Wainwright*, 372 U.S. 365 (1963). A conservative judge who was attending this particular meeting insisted that he didn't believe that the cases had to be read with Yale's kind of "fanatical devotion to equality." Wechsler agreed. After the lunch break, Judge Henry Friendly announced to the group, "Herb, over lunch I went back to my chambers and re-read the *Line-up Cases*. There's no way you can limit them to the defendant who already has a lawyer." Wechsler relented: "OK, I guess we can't."

12. Yale Kamisar, *Meese Fails to Honor His Obligation to Be Accurate*, L.A. TIMES, Sept. 3, 1985, pt. II, at 5.

13. Yale tells the story in Yale Kamisar, *A Look Back on a Half-Century of Teaching, Writing, and Speaking About Criminal Law and Criminal Procedure*, 2 OHIO ST. J. CRIM. L. 73, 77-79 (2004) [hereinafter Kamisar, *A Look Back*]. There were, of course, others. In Yale Kamisar, *On the Tactics of Police-Prosecution Oriented Critics of the Courts*, 49 CORNELL L.Q. 436 (1964), Yale took on a number of them in one fell swoop. Jerry Israel has suggested that Duane R. Nedrud should be included in this category.

them in real time: with Akhil Amar,¹⁴ for instance, and of course Paul Cassell,¹⁵ as well as Robert Sedler,¹⁶ Sylvia Law,¹⁷ John Robertson,¹⁸ Laurence Tribe,¹⁹ and Guido Calabresi.²⁰

14. See Yale Kamisar, *On the "Fruits" of Miranda Violations, Coerced Confessions, and Compelled Testimony*, 93 MICH. L. REV. 929 (1995) [hereinafter Kamisar, *The "Fruits" of Miranda Violations*] (challenging the reconstruction of the "first principles" of the Fifth Amendment provided in Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857 (1995)); Yale Kamisar, *The Writings of John Barker Waite and Thomas Davies on the Search and Seizure Exclusionary Rule*, 100 MICH. L. REV. 1821, 1846-48 (2002) [hereinafter Kamisar, *Writings of Waite and Davies*] (engaging Amar on the exclusionary rule).

15. See, e.g., Paul Cassell & Yale Kamisar, *The Reaffirmation of Miranda: What's Next?*, Debate at the Association of American Law Schools 2001 Annual Meeting, Section on Criminal Justice (Jan. 6, 2001); Yale Kamisar, *Miranda Thirty-Five Years Later: A Close Look at the Majority and Dissenting Opinions in Dickerson*, 33 ARIZ. ST. L.J. 387, 388 n.6 (2001) (mixing it up again with Cassell); *id.* at 404 (same). See also Yale Kamisar, *Forward: From Miranda to § 3501 to Dickerson to . . .*, 99 MICH. L. REV. 879, 882 n.13 (2001) (taking exception to some of the observations in Paul G. Cassell, *The Path Not Taken: The Supreme Court's Failures in Dickerson*, 99 MICH. L. REV. 898, 926-27 (2001)). Yale also took exception to the Fourth Circuit's decision in *United States v. Dickerson*, 166 F.3d 667 (4th Cir. 1999), see Yale Kamisar, *Can (Did) Congress "Overrule" Miranda?*, 85 CORNELL L. R. 883 (2000) [hereinafter Kamisar, *Can (Did) Congress Overrule Miranda?*], a decision that Cassell was in no small part behind. See Alan Cooper, *4th Circuit Narrows Role of 'Miranda' Warnings*, NAT'L L. J., Feb. 22, 1999, at A9 (noting that the Fourth Circuit's *Dickerson* decision relied on 18 U.S.C. § 3501, a statute that Paul Cassell's brief on behalf of the Washington Legal Foundation and Safe Streets Coalition, Brief of the Washington Legal Foundation and Safe Streets Coalition as Amici Curiae in Support of Appellant United States, *United States v. Dickerson*, 166 F.3d 667 (4th Cir. 1999) (No. 97-4750), highlighted for the court).

16. See Yale Kamisar, *The "Right to Die": On Drawing (and Erasing) Lines*, 35 DUQ. L. REV. 481, 508-13 (1996) [hereinafter Kamisar, *Drawing Lines*] (challenging Sedler's views on physician-assisted suicide); Yale Kamisar, *Against Assisted Suicide — Even A Very Limited Form*, 72 U. DET. MERCY L. REV. 735 (1995) [hereinafter Kamisar, *Against Assisted Suicide*] (arguing against Sedler's proposals for a constitutionally-based "circumscribed right" to assisted suicide on the ground that any such right cannot, as a matter of principle, remain "circumscribed" for long).

17. See Yale Kamisar, *Physician Assisted Suicide: The Problems Presented by the Compelling, Heartwrenching Case*, 88 J. CRIM. L. & CRIMINOLOGY 1121, 1129-1133 (1998) [hereinafter, Kamisar, *The Compelling, Heartwrenching Case*] (responding to Law's insistence that a rule of law permitting physician-assisted suicide treats all people alike by arguing that such a rule will have class-based effects).

18. See Yale Kamisar, *When Is There a Constitutional "Right to Die"? When Is There No Constitutional "Right to Live"?*, 25 GA. L. REV. 1203, 1230-42 (1991) (analyzing the shortcomings of Robertson's "best interests of the patient" test).

19. For several years, Yale and Tribe, along with Jesse Choper, presented an annual Supreme Court Term "wrap-up." See 1-5 JESSE J. CHOPER, YALE KAMISAR & LAURENCE H. TRIBE, *THE SUPREME COURT: TRENDS AND DEVELOPMENTS* (Dorothy Opperman, ed., 1979-1984). While Yale and Tribe agreed on many things, their positions on physician-assisted suicide differ quite dramatically. They were on opposite sides in the assisted suicide cases decided by the Supreme Court in 1997. See *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Vacco v. Quill*, 521 U.S. 793 (1997); Brief for Respondents, *Vacco*, 521 U.S. 793 (1997) (No. 95-1858) (signed by Tribe as counsel for the respondent); see also Yale Kamisar, *On the Meaning and Impact of the Physician-Assisted Suicide Cases*, 82 MINN. L. REV. 895 (1998).

Aside from their sheer number,²¹ perhaps the most remarkable feature of Yale's battle-tales, and also one of the easiest to overlook, is that even in their most dramatic moments, they feature no enduring enemies, only adversaries, sometimes friends.²² Yale has — or has come to have — something kind to say about practically everyone with whom he has crossed swords during his fifty-odd year career. But there are a few characters in the stories that Yale tells (and if you noodge him enough, retells) who never emerge entirely unscathed. On this roster, interestingly, are a few who have served as Justices of the Supreme Court, including someone who once described himself in the third person as “a fellow named Felix Frankfurter.”²³

In his published work, Yale has painted a complex, ambivalent portrait of Frankfurter. Its proportions can be gleaned from a careful study of decades of Yale's writings. But helpfully — almost as if someone had asked him to — Yale has sketched his thoughts on Frankfurter in miniature in an article that takes a full-length look back at his career.²⁴

20. Yale Kamisar, *In Defense of the Search and Seizure Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 119 (2003) [hereinafter, Kamisar, *In Defense of the Search and Seizure Exclusionary Rule*] (responding to Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 111 (2003)); Yale Kamisar, *The Reasons So Many People Support Physician-Assisted Suicide — And Why These Reasons Are Not Convincing*, 12 ISSUES L. & MED. 113, 126 n.63 (1996) (engaging Judge Calabresi's concurrence in *Quill v. Vacco*, 80 F.3d 716, 731-43 (2d Cir. 1996) (Calabresi, J., concurring)).

21. The list I have given is only partial. Excluded from it is John Barker Waite. Even his death did not keep Yale from quarreling with him, see generally Kamisar, *Writings of Waite and Davies*, *supra* note 14, though it did, unremarkably, if sadly, keep Waite from offering a reply. At one point when I ran the list past Yale to see if there was anyone I should have included but inadvertently left out, Yale said, “Well, there's [Joseph] Cardinal Bernadin.” “Oh?,” I asked, “What was that one all about?” “Well,” Yale replied with a laugh, “I was once on a panel with him after the *Quinlan* case was decided and told him that I thought he was ‘soft on euthanasia.’ I think I'm probably the only guy who ever told a Cardinal that.”

22. Jerold H. Israel, *Seven Habits of a Highly Effective Scholar*, 102 MICH. L. REV. 1701, 1717-18 (2004) (describing the ways that Yale “respect[s] the other side”); accord Francis A. Allen, *Yale Kamisar: Warrior Scholar*, 102 MICH. L. REV. 1689, 1692 (2004) (“Despite the thunder of battle, Yale is able to admire the strong points made by his opponents and to respect able adversaries. He has himself gained the admiration of many of those who most strongly oppose his views.”); Albert W. Alschuler, *Hail Yale*, 2 OHIO ST. J. CRIM. L. 31, 33 (2004); cf. Eve Silberman, *Yale Kamisar on Guard*, ANN ARBOR OBSERVER, Nov. 3, 1992, at 31, 39.

23. LAURA KALMAN, *LEGAL REALISM AT YALE 1927-1960*, at 281 n.57 (1986) (quoting Letter from Felix Frankfurter to E.M. Morgan (Nov. 10, 1947) (on file with Harvard Law School archives)).

24. Kamisar, *A Look Back*, *supra* note 13, at 95-98 & n.96. Yale's sketch of Frankfurter comes in a larger discussion of legal academic norms that regard “advocacy scholarship” as an oxymoron. Frankfurter is Yale's prime counter-example, a once-living illustration of the proposition “that one *could* lead the life of the advocate as well as that of the scholar, and do both very well, indeed.” *Id.* at 95. In saying so, Yale comes perilously close to suggesting his own career has been forged in Frankfurter's image. No sooner does that idea take shape than it is qualified: Frankfurter, Yale adds, “was not one of my favorite Justices[.]” *Id.* A long footnote — discussed in the text, see notes 25-50 *infra* — explaining why, “[f]rom [his]

Yale opens with praise, casting Frankfurter as the “valiant” hero of *McNabb v. United States*,²⁵ the author of the opinion for the Court that established a federal exclusionary rule, as well as of *Mallory v. United States*,²⁶ where Frankfurter, again writing for the Court, reaffirmed *McNabb* “over strong criticism from law enforcement officials and politicians.”²⁷ Yale also features Frankfurter as the “champion” of “what has been called the ‘police methods’ approach to coerced confessions — the view . . . that the use of coerced confessions is constitutionally obnoxious not only because of their unreliability[,]” but also because of how they “offend the community’s sense of fair play and decency.”²⁸ Frankfurter, Yale reminds us, gave this test its first powerful articulation in *Rochin v. California*,²⁹ the famous “stomach pumping” case.

No less significantly, turning from doctrine to aesthetics, Frankfurter is, in Yale’s estimation, the “author of some of the most memorable lines ever uttered by a Supreme Court Justice.”³⁰ By way of illustration, Yale serves up a small fistful of the Justice’s “beautifully rounded phrases of almost Victorian elegance,”³¹

vantage point, Felix Frankfurter has a mixed record as a Supreme Court justice[.]” follows. *Id.* at 95 n.96.

25. 318 U.S. 332 (1943).

26. 354 U.S. 449 (1957).

27. The published version is: “The *McNabb-Mallory* rule was a valiant effort to bypass conflicts over the nature of the secret interrogation and to minimize both the ‘temptation’ and the ‘opportunity’ to obtain confessions by impermissible means.” Kamisar, *A Look Back*, *supra* note 13, at 96 n.96.

28. *Id.* (internal quotation marks omitted); see also Kamisar, *The “Fruits” of Miranda Violations*, *supra* note 14, at 942 (calling Frankfurter “the leading proponent of the police methods test for admitting confessions”) (footnote omitted).

29. 342 U.S. 165 (1952).

30. Kamisar, *A Look Back*, *supra* note 13, at 96 n.96.

31. Fred Rodell, *Felix Frankfurter, Conservative*, HARPERS MAGAZINE, Oct. 1941, at 449, 457 [hereinafter, Rodell, *Frankfurter, Conservative*]. Rodell consistently described Frankfurter from the perspective of what he himself called “the Axis” of William O. Douglas and Hugo Black. See, e.g., MELVIN I. UROFSKY, FELIX FRANKFURTER: JUDICIAL RESTRAINT AND INDIVIDUAL LIBERTIES 56 (John Milton Cooper, Jr. ed., 1991). Laura Kalman traces Rodell’s ill feeling toward Frankfurter in KALMAN, *supra* note 23, at 158-59 (2001).

Frankfurter pulled no punches when describing Douglas and Black. Douglas, according to Frankfurter, was “‘malignant,’ ‘narrow minded,’ ‘the most cynical, shamelessly amoral character I’ve ever known,’ and a ‘mommser’ [bastard].” Melvin Urofsky, *Conflict Among the Brethren: Felix Frankfurter, William O. Douglas, and the Clash of Personalities and Philosophies on the United States Supreme Court*, 1988 DUKE L.J. 71, 106 (1988) (footnotes omitted). Likewise, Frankfurter once wrote of Douglas that:

Except in cases where he knows it is useless or in cases where he knows or suspects that people are on to him, he is the most systematic exploiter of flattery I have ever encountered in my life. He tried it on me when he first came on the Court — every opinion of mine that he returned, he returned with the most extravagant praise, all of which ceased after I left him no doubt that I did not come on to the Court to play politics on the Court but to vote in each case as my poor lights guided me.

including this from *McNabb*: “The history of liberty has largely been the history of the observance of procedural safeguards. And the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law.”³² And this from *Fisher v. United States*: “A shocking crime puts law to its severest test. Law triumphs over natural impulses aroused by such crime only if guilt be ascertained by due regard for those indispensable safeguards which our civilization has evolved for the ascertainment of guilt.”³³ And this from *United States v. Rabinowitz*: “It is a fair summary of history to say that the safeguards of liberty have frequently been forged in

JOSEPH P. LASH, FROM THE DIARIES OF FELIX FRANKFURTER 175 (1975) (entry for Jan. 30, 1943). For an engaging account of some of the intemperate remarks by Frankfurter about Black, as well as some deeply human and mutually-understanding ones, see generally JAMES F. SIMON, THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA (1989).

Frankfurter's feelings were, not surprisingly, returned in various ways. Douglas, for instance, seemed to take some pleasure in taunting — or should I say, tormenting — Frankfurter. See, e.g., ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 327-328 (1994) (telling the story of Douglas giving Frankfurter a Nazi salute, and exclaiming “Heil, Fuhrer!” when Frankfurter entered the Conference room); BRUCE ALLEN MURPHY, WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS 301 (2003) (cataloging Douglas's nicknames for Frankfurter, including “the Little Giant,” the “little bastard” or “Der Fuhrer”); *id.* at 354 (Douglas offering that he had become “more and more suspicious of the good faith of [Frankfurter], his intellectual honesty.”). One of the more amusing stories is found in Fred Rodell, *As Justice Bill Douglas Completes His First Thirty Years on the Court: Herewith A Random Anniversary Sample, Complete with Casual Commentary, of Divers Scraps, Shreds, and Shards Gleaned from a Forty-Year Friendship*, 16 UCLA L. REV. 704, 705-06 (1969) (recounting the story of the lip-readers who supposedly told the lawyers for whom they worked, “Sorry, . . . but all we got was when Justice Frankfurter kept asking that lawyer all those questions and Justice Douglas turned to Justice Reed and what he said was, ‘Why can't the little bastard keep his big mouth shut and let us get on with it?’”). Douglas later described the story as “apocryphal.” Urofsky, *supra*, at 106. Black's feelings toward Frankfurter do not seem to have been as hard as Douglas's. *Id.* at 90 n.121. See generally SIMON, *supra*. Without a doubt, Frankfurter could — and did — get under Black's skin. See NEWMAN, *supra*, at 485 (commenting to his wife privately after Frankfurter had been particularly hostile in conference, Black said “‘Why, I could beat that little thing up with one arm tied behind my back.’”); *id.* at 520 (quoting Black as saying, after finishing a draft of his tribute to Frankfurter for the *Harvard Law Review*, “‘Well, now that I have written about my deep and sincere friendship for Felix, I feel free to write my views on how mistaken his views were.’”). And not only Black's, but Earl Warren's, as well. See, e.g., G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE 184 (1982) (“Warren . . . ‘turn[ing] crimson, then purple,’ [in reaction to an oral dissent Frankfurter delivered] . . . snapp[ed] ‘That was not an opinion. That was a lecture.’”) (footnote omitted); WILLIAM O. DOUGLAS, THE COURT YEARS 1939-1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS 228 (1980) (recalling that “[o]nly one other time did Warren lose his composure at Conference”: when, after hearing of Frankfurter's attempt to interfere with his selection of the Clerk of the Court, “Warren . . . in a loud voice denounced him at the next Conference and threatened to take reprisals if Frankfurter ever repeated such a mission.”).

32. Kamisar, *A Look Back*, *supra* note 13, at 96 n.96 (quoting *McNabb v. United States*, 318 U.S. 332, 347 (1943)).

33. *Id.* (quoting *Fisher v. United States*, 328 U.S. 463, 477 (1946) (Frankfurter, J., dissenting)).

controversies involving not very nice people.”³⁴ I myself would only add that the lines Yale quotes — like some others he does not — seem to be far more memorable than actually remembered.

Having paid his respects, Yale finally starts “mixing it up”³⁵ a little. Hence we have Frankfurter “the seducer,” giving us the Court’s opinion in *Wolf v. Colorado*,³⁶ formally declaring our federalism to mean “that state courts are free, if they wish, to admit evidence seized in violation of the prohibition against unreasonable search and seizure.”³⁷ Bringing to mind what this seduction actually did — all of the unconstitutionally seized evidence it allowed state courts to admit, and the unconstitutional police practices it did not lift a finger to stop³⁸

34. *Id.* (quoting *United States v. Rabinowitz*, 339 U.S. 56, 69 (1949) (Frankfurter, J., dissenting)). Yale quoted Frankfurter favorably on a number of occasions over the years. Without pretending exhaustiveness, see, for example, Kamisar, *In Defense of the Search and Seizure Exclusionary Rule*, *supra* note 20, at 122 (quoting Frankfurter’s opinion in *Wolf v. Colorado*, 338 U.S. 25 (1949)); Kamisar, *Writings of Waite and Davies*, *supra* note 14, at 1827 (quoting Frankfurter in *Rogers v. Richmond*, 365 U.S. 534, 541 (1961), on the “totality of circumstances” and “voluntariness” tests for admitting confessions); Kamisar, *Can (Did) Congress Overrule Miranda?*, *supra* note 15, at 911, 915 (quoting Frankfurter’s opinion for the Court in *Columbe v. Connecticut*, 367 U.S. 568, 571 n.2 (1961), and *Watts v. Indiana*, 338 U.S. 49, 51 (1949)); Kamisar, *Drawing Lines*, *supra* note 16, at 506 (quoting from Frankfurter’s dissent in *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 660-61 (1943)); Kamisar, *Against Assisted Suicide*, *supra* note 16, at 735-36, 750 (quoting Frankfurter to set up a response to Sedler); Kamisar, *The “Fruits” of Miranda Violations*, *supra* note 14, at 940-42 (quoting from Frankfurter’s opinions); Kamisar, *Comparative Reprehensibility*, *supra* note 6, at 20 (quoting Frankfurter’s dissent in *Fisher v. United States*, 328 U.S. 463, 477 (1946)); and Yale Kamisar, *Miranda: The Case, the Man, and the Players*, 82 MICH. L. REV. 1074, 1091 n.65 (1984) (reviewing LIVA BAKER, *MIRANDA: CRIME, LAW AND POLITICS* (1983) (“I can think of no person, on or off the Court, who has underscored the importance of the [F]ourth [A]mendment more forcefully and more eloquently than did Frankfurter . . .”).

35. The expression is one that Yale likes to use. See, e.g., Andy Daly & John Fedynsky, *Caught on Tape: Yale Kamisar Talks About End of Teaching Career*, RES GESTAE, Oct. 28, 2003, at 1, 10 (“I don’t know, it may be the students are prepared, but they don’t want to mix it up, so they say they’re unprepared.”). The interview is reprinted as *You Have the Right to Remain Silent: An Interview With Yale Kamisar*, LAW QUADRANGLE NOTES, Spring 2004, at 22.

36. 338 U.S. 25 (1949).

37. Kamisar, *A Look Back*, *supra* note 13, at 96 n.96.

38. Yale made a not entirely dissimilar point a number of years ago in a review of Anthony Lewis’s *Gideon’s Trumpet*, one of only two articles (both book reviews) he published in the *Harvard Law Review*. (The other was a review of *The Horsky Report* on police arrests for investigation, Yale Kamisar, Book Review, 76 HARV. L. REV. 1502 (1963).) In *Gideon’s Trumpet*, Lewis noted that, from his deathbed, Frankfurter agreed that *Betts v. Brady* should have been overturned when it was, in *Gideon*. ANTHONY LEWIS, *GIDEON’S TRUMPET* 221-22 (1964). As Yale wrote in his review:

Lewis informs us Mr. Justice Black believed that if Mr. Justice Frankfurter, the preacher of judicial caution and self-restraint, had still been on the Court in 1963, by then he, too, would have found this [right to assigned counsel] “absolute.” And Mr. Justice Frankfurter, we are also told, was quick to agree: “Of course I would.” For all the talk, suggests Lewis, the difference between Justices Frankfurter and Black may “have come down to a question of timing.” In 1942, continues Lewis, “Justice Frankfurter might have said, the country was not ready for a universal requirement of counsel in serious criminal cases; the bar was not prepared for such a burden; the states would have resisted and the decision would have been

— would have been reason enough for Yale (or anyone else) to believe that “Justice Frankfurter’s opinion for the Court in *Wolf* . . . deserves all the criticism it has received — and it has received quite a lot.”³⁹ But *Wolf*’s death (it has long since been formally overruled⁴⁰) did not save us from its effects, nor it from Yale’s criticism. *Wolf*, after all, stalks us from the grave. It was *Wolf*, as Yale notes, that “inject[ed] the instrumental rationale of deterrence of police misconduct into [the Court’s] discussions of the exclusionary rule,” using it as “support for [the Court’s] refusal to apply the exclusionary rule to the states,” thus “plant[ing] the seeds of [the exclusionary rule’s] destruction . . . in federal as well as state cases.”⁴¹ Substantively, from Yale’s perspective, that’s a devilishly bad thing for a judicial opinion — or an act of authorship — to do.

Frankfurter’s opinion for the Court in *Minersville School District v. Gobitis*,⁴² the famous “flag salute” case, later reversed over his very, very bitter (some might say, intemperate) dissent,⁴³ provides further evidence of his judicial manipulations. *Gobitis*, according to Yale, “is a good illustration of how Frankfurter often asked ‘loaded questions,’ [meaning:] framed the questions presented in such a way that they impelled the reader to want to answer them the way he did.”⁴⁴ What’s more, “[i]n ruling that children of Jehovah’s Witnesses could be expelled from public schools for refusing to salute the flag, Justice Frankfurter inflated the governmental interests at stake [not just a bit, but] enormously.”⁴⁵ Needless to say, this was neither the first nor the

widely ignored.” Twenty-one years (*and hundreds of thousands of convictions of unrepresented defendants*) later, suggests Lewis, Mr. Justice Frankfurter probably would have recognized that society had advanced in its standards of “what is deemed reasonable and right” to the point where it was now ready for the *Gideon* principle.

Yale Kamisar, Book Review, 78 HARV. L. REV. 478, 479 (1964) [hereinafter Kamisar, *On Gideon’s Trumpet*] (reviewing LEWIS, *supra*) (citations omitted) (emphasis added). That may be so, Yale allowed, but that the Court and the country were ready by 1963 — if not before — for the *Gideon* principle was no thanks to Frankfurter, with his “warnings about the dire consequences of overruling *Betts*.” *Id.* at 479-80 (citing “especially” *Foster v. Illinois*, 332 U.S. 134, 139 (1947)). For a little history on what followed Yale’s publication of this review, see Bruce Jacob, *Memories of and Reflections About Gideon v. Wainwright*, 33 STETSON L. REV. 181, 244 n.261 (2003).

39. Kamisar, *A Look Back*, *supra* note 13, at 96 n.96.

40. See *Mapp v. Ohio*, 367 U.S. 643 (1961) (overruling *Wolf*).

41. Kamisar, *A Look Back*, *supra* note 13, at 97 n. 96 (internal quotations omitted).

42. 310 U.S. 586 (1940).

43. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 646 (1943) (Frankfurter, J., dissenting).

44. Kamisar, *A Look Back*, *supra* note 13, 97 n.96.

45. *Id.*

last time that one of Frankfurter's opinions reflected the patriotism born of a convert's zeal.⁴⁶

Yale saves his strongest note of disapproval for his discussion of *Dennis v. United States*,⁴⁷ a case in which the Court ultimately rejected the free expression challenges that various communists had raised against their convictions for violating the Smith Act. Remarks Yale: "What [Frankfurter] would [have] call[ed] judicial humility, and what others (including me) would call an inclination to abdicate the Court's responsibility to interpret the Constitution, pervades Frankfurter's concurring opinion in [the] case."⁴⁸ To be sure, Yale's comments, like his description of "Mr. Justice Frankfurter" years earlier, as "the preacher of judicial caution and self-restraint,"⁴⁹ sting, and are meant to. But they hardly scratch the surface when compared to the biting, even savage, attack Fred Rodell once launched against Frankfurter in the pages of *Scanlan's* magazine:

Frankfurter's philosophy of constitutional law always favored judicial inertia, a deliberate ducking of the big issues on whatever excuse he could fish up, from the picking of some procedural nit to an arbitrary fiat (as in the reapportionment cases) that an issue was too "political," meaning too hot for the Court to handle. This pusillanimous policy of "judicial restraint," of deference to the legislature even if the Constitution thus be damned, was in direct conflict with the . . . drive for the righting by the Court of Constitutional wrongs.⁵⁰

Just so, it is tempting to think that, but for the seething and seemingly personal animosity towards Frankfurter that breaks through the surface of Rodell's text in a veritable rolling boil, Yale, who does not do *ad hominem*, might not have completely disagreed.

What has long struck me about Yale's views on Frankfurter is that they are and, for years, have been, so, well, "mixed."⁵¹ At times,

46. See, e.g., ROBERT A. BURT, TWO JEWISH JUSTICES: OUTCASTS IN THE PROMISED LAND 40 (1988) ("It is well known that a convert is more zealous than one born to the faith." (quoting Frankfurter)).

47. 341 U.S. 494, 517 (1951) (Frankfurter, J., concurring).

48. Kamisar, *A Look Back*, *supra* note 13, at 97 n.96.

49. Kamisar, *On Gideon's Trumpet*, *supra* note 38, at 479 (referring to "Mr. Justice Frankfurter, the preacher of judicial caution and self-restraint," and criticizing him for just that in the context of the right to counsel). On judicial restraint as humility, generally, see WALLACE MENDELSON, JUSTICES BLACK AND FRANKFURTER: CONFLICT IN THE COURT 124 (1961) ("Mr. Justice Frankfurter is deeply humilitarian. Plainly this is an acquired characteristic, a judicial mold superimposed upon a powerfully active and thoroughly libertarian personality. If to some his modesty seems exaggerated — breast-beating it has been called — that may be the measure of the struggle within him or within the Court.").

50. Fred Rodell, *Alexander Bickel and the Harvard-Frankfurter School of Judicial Inertia*, SCANLAN'S, May 1970, at 76 (book review of ALEXANDER BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970)) [hereinafter Rodell, *Alexander Bickel and the Harvard-Frankfurter School*].

51. Kamisar, *A Look Back*, *supra* note 13, at 95 n.96.

especially when Yale holds forth on them in person, the precise balance between cheer and faultfinding can seem a little uneven. Whatever their measure, and it varies from article to article as well as over time, my experience has been that Yale prefers not to pour Frankfurter's glories straight.

I do realize, of course, that Yale has probably never had a single feeling in his life that was not both intense — and, on close examination, complex.⁵² But I have often wondered: Why does Yale have such persistently mixed feelings about this man? It may well be true that Yale has “mellowed” in certain respects, as Jesse Choper reports Yale says.⁵³ But not (or at least not a great deal) when it comes to Felix Frankfurter.

In an effort to figure out why, I decided to do some digging. I read some of what Frankfurter wrote — his opinions, his scholarship, his “reminiscences,” his letters — and some of the volumes that have been written about him, by friend and foe alike. As I did, I discovered something both strange and strangely revealing. Although Yale will not be overjoyed to hear me say so, it turns out that, in a number of respects, he and Felix Frankfurter really are very much alike.

To take the obvious, biographically-speaking: Both Yale and Frankfurter spent a number of their formative years in the Jewish communities of New York City — Yale in the Bronx and Frankfurter on the East Side.⁵⁴ Both grew up in families of modest means.⁵⁵ As schoolboys, both excelled through hard work and native intelligence, rising from public educational institutions to be schooled in the Ivy League;⁵⁶ at one time or another, both even attended New York University.⁵⁷ After law school, both practiced anti-trust law for a while before moving,⁵⁸ if Yale somewhat more quickly than Frankfurter, into the legal academy.⁵⁹ As academics, both Yale and Frankfurter quickly

52. Cf. Kamisar, *The Compelling, Heartwrenching Case*, *supra* note 17, at 1146 (“But I never promised, or at least I never meant to promise, that I could always show how simple seemingly subtle and complex problems really are. Sometimes, I am afraid, what appear to be agonizingly subtle and complex problems turn out to be just that.”).

53. Jesse H. Choper, *Yale Kamisar: Collaborator, Colleague, and Friend*, 102 MICH. L. REV. 1698, 1700 (2004). I have heard Yale say the same thing. He has, apparently, been saying it for years. See, e.g., Silberman, *supra* note 22, at 38.

54. UROFSKY, *supra* note 31, at 1.

55. H.N. HIRSH, THE ENIGMA OF FELIX FRANKFURTER 13 (1981).

56. UROFSKY, *supra* note 31, at 1-2.

57. HARLAN B. PHILLIPS, FELIX FRANKFURTER REMINISCES RECORDED IN TALKS WITH DR. HARLAN B. PHILLIPS 15 (1960) [hereinafter PHILLIPS, FRANKFURTER REMINISCES].

58. Compare Kamisar, *A Look Back*, *supra* note 13, at 73, with Rodell, *Frankfurter, Conservative*, *supra* note 31, at 451.

59. UROFSKY, *supra* note 31, at 8.

distinguished themselves as thoughtful students of the Supreme Court.⁶⁰ Both became famous in no small part for defense-oriented positions they took in high-profile criminal cases — cases that involved what may fairly be described as police-prosecution practices that “outraged [their] sensibilities, [and] outraged [their] whole conviction of what the administration of justice call[ed] for.”⁶¹ Through their involvement in these cases, which caused many to dismiss them as radicals,⁶² they effectively thumbed their noses at the kind of thinking contained in Judge Learned Hand’s admonition “not [to] carry a sword beneath a scholar’s gown.”⁶³

60. Alexander M. Bickel, *Applied Politics and the Science of Law: Writings of the Harvard Period*, in FELIX FRANKFURTER: A TRIBUTE 164, 197 (Wallace Mendelson ed., 1964) (“There were great scholars of the Constitution before Mr. Frankfurter, but he was the first scholar of the Supreme Court.”); see also UROFSKY, *supra* note 31, at x (noting the reputation of Frankfurter’s book on the Supreme Court as “the definitive study” of “how the modern Court operated”).

61. PHILLIPS, FRANKFURTER REMINISCES, *supra* note 57, at 213 (commenting on the Sacco-Vanzetti affair).

62. Yale’s article in *The Nation*, Yale Kamisar, *Criminals, Cops, and the Constitution*, NATION, Nov. 9, 1964, at 322, seems to have put some absolutely over the edge. Some Boston “conservatives” branded Frankfurter a radical for his stance in defense of workers’ rights and against American military intervention in Russia during the “Red Scare” of 1919-20. UROFSKY, *supra* note 31, at 20-21. And, of course, Frankfurter’s attempted defense of Sacco and Vanzetti left not a few convinced that Frankfurter had radical-left sympathies. For additional evidence of thinking along these lines, and how it affected Frankfurter’s confirmation hearing in the U.S. Senate, see, for example, SIMON, *supra* note 31, at 13-16 (recreating the drama surrounding Frankfurter’s confirmation hearings, including the need for Frankfurter to defend himself against charges he was a Communist or a Communist-sympathizer). Some of Frankfurter’s other activities, which, for some, pointed in the same sinister political directions, are described in *id.*, at 46-47 (discussing the Mooney and Bisbee reports and how they “inspired American conservatives to label Frankfurter a dangerous radical, a reputation that would stalk him for the next two decades”), and *id.* at 52-53 (detailing other engagements that led people to slather him with the same reputation). *But see* Rodell, *Frankfurter, Conservative*, *supra* note 31, at 449, 451-53 (describing how those “in the know” knew Frankfurter was no radical lefty, and proposing that even his defense of Sacco and Vanzetti was procedural, hence system-oriented, not substantive); SIMON, *supra* note 31, at 17-18 (noting conservative support for Frankfurter’s nomination, at least in part because of his philosophy of “judicial restraint”).

63. LEARNED HAND, THE SPIRIT OF LIBERTY 138 (Irving Dilliard ed., 3d ed. 1960). There’s some evidence suggesting that Hand may have had Frankfurter in mind when making the point. Consider the message of the complete passage:

You may take Martin Luther or Erasmus for your model, but you cannot play both roles at once; you may not carry a sword beneath a scholar’s gown, or lead flaming causes from a cloister. Luther cannot be domesticated in a university. You cannot raise the standard against oppression, or leap into the breach to relieve injustice, and still keep an open mind to every disconcerting fact, or an open ear to the cold voice of doubt. I am satisfied that a scholar who tries to combine these parts sells his birthright for a mess of pottage; that, when the final count is made, it will be found that the impairment of his powers far outweighs any possible contribution to the causes he has espoused. If he is fit to serve in his calling at all, it is only because he has learned not to serve in any other, for his singleness of mind quickly evaporates in the fires of passions, however holy.

Id. Compare the language and tone with the correspondence between Hand and others, including Frankfurter, reported in Gunther’s Hand biography: When the Harvard Corporation was attacking Frankfurter for being a radical “left-winger,” Frankfurter fought

The similarities do not stop there. Consider, for instance: “He talked copiously, with an overflowing gaiety and spontaneity which conveyed the impression of a great natural sweetness[.]”⁶⁴ This of Frankfurter by Isaiah Berlin. Compare it to Wayne LaFave’s extended description of Yale as “The Talker.”⁶⁵ According to Wayne, Yale’s “acute logorrhea, which is apparently not susceptible to any effective treatment, is well known to all.”⁶⁶ (It is.) As for Yale’s “natural sweetness,” what needs to be mentioned beyond that beautiful smile his beloved wife Joan flashes so naturally when Yale talks (and talks and talks and talks⁶⁷)? Or the way Benjamin Kamisar, Yale’s grandson, sprinkles kisses all over his face with a single, starry-eyed look?⁶⁸ Yale is, in fact, so sweet that even Bill Miller, hardly known for

back with “extensive, agitated correspondence.” GUNTHER, *supra* note 2, at 358-59. Hand did not approve. *Id.* at 359. On another occasion, Hand “told [Walter] Lippmann, ‘I wish to God [Frankfurter] wouldn’t feel that every case was a signal for a moral crusade[.]’” *Id.* After Frankfurter sent Hand a copy of his *The Business of the Supreme Court: A Study in the Federal System* (1928), Hand responded with a letter full of praise, but not without “a remark that reopened old wounds”: “Your temper in this book was so severely detached,” Hand wrote, “so ‘scientific,’ that there is little to carry away for propaganda. I wish those who complain of Sacco & Vanzetti would be forced to see how dispassionate you can be, when you are engaged in real research, and are not trying to accomplish a specific purpose.” *Id.* at 395. After a delay, according to Gunther, Frankfurter “erupted”:

I know the criticisms that have been widely made. But, personally, I think that exactly the same spirit of scholarship which produced the *Business* was behind the S.V. [the Sacco-Vanzetti book]. I aimed at accuracy & thus far no one . . . has pointed out any omissions or commissions. If ever you know of anyone who is prepared to be specific in his criticisms I should be genuinely obliged to you to let me have such criticisms.

Id. at 396 (alternation in original). *But cf.* KALMAN, *supra* note 23, at 158-59 (discussing the 1947 letter — or “manifesto” — circulated by Fred Rodell and Fowler Harper, and signed by twenty-two Yale Law School faculty members, “urging the abolition of the House Committee on Un-American Activities”; the “manifesto” was, according to Kalman, mentioned in “[n]ewspapers throughout the country” and debated “on the floors of the House and Senate”); *id.* (quoting Wesley Sturges’ defense of the manifesto: “As citizens and lawyers, we are generally of one mind, that regardless of traditions, we should not be doomed to the monastic life and that we should positively contribute our thoughts and judgments to the end that our democratic scheme of government may be perpetuated and enabled adequately to function within its constitutional objectives[.]”). Tellingly, in a letter to Oliver Wendell Holmes, Jr., Frankfurter wrote in September of 1913: “I have decided to go to Cambridge if they want me. I would not go up there for a conventional professorship. Academics are neither my aptitude nor the line of my choice — so far as one chooses. The thing is rather different and what challenges me is to bring public life, the elements of reality, in touch with the university, and, conversely, to help harness the law school to the needs of the fight outside.” SIMON, *supra* note 31, at 41.

64. Isaiah Berlin, *Felix Frankfurter at Oxford*, in *FELIX FRANKFURTER: A TRIBUTE*, *supra* note 60, at 22, 24.

65. Wayne LaFave, “*What Is A Kamisar?*”, 102 MICH. L. REV. 1732, 1737 (2004).

66. *Id.*

67. *Cf.* John Mansfield, *Professor Mansfield*, in *FELIX FRANKFURTER: TALKS IN TRIBUTE* 14, 16 (Austin W. Scott et al. eds., 1965) (“Shall I tell you of talk, and talk and more talk on a thousand subjects?”).

his sentimentality, cannot keep himself from wanting a piece of the action. After publicly avowing his *love* for Yale at Yale's retirement dinner — and I quote, “I simply do not know what to say except *I just love the man*”⁶⁹ — Miller got right in Yale's face, zig-zagged around his nose, and copped a thoroughly unexpected kiss. If that were not enough, he held Yale for a few uncomfortable seconds in a noticeable embrace.⁷⁰

And the parallels go on. Listen to the description Alexander Bickel offered of Frankfurter *in memoriam*:

There is a bird, it is said, that flies at a normal body temperature of upwards of 200 degrees Fahrenheit. Something of the intensity that this temperature suggests there was about the way Felix Frankfurter lived and functioned. At any given moment, he thought more thoughts, loved more loves, felt more outrages than anyone else. There was never a man so quick to understand, so ready to contradict, so warm in sympathy, and so warm in anger, so indulgent of the frailties of others and so intolerant of them, so patient and so restless, so gentle and so brusque. There never was such a listener and such a talker, such a verbal fencer. . . . There never was such laughter and such intellectual rigor, such involvement in politics and such moral rectitude. And above all there never was such a friend.⁷¹

Never such a man? Perhaps not — until Yale.

Even Yale's famous close-talking, which Miller and LaFave have each theorized to perfectly comic effect,⁷² including Yale's habit, which Doug Kahn generously describes as “touch[ing a] person's arm [during conversation] as an aid to communication,”⁷³ is not entirely original to Yale. “Who of us will not continue to feel that iron grip upon the arm?,”⁷⁴ asked Paul Freund after Frankfurter retired from the Court. Dean Acheson, Frankfurter's constitutional companion for many years, spoke of his “vise-like grip just above one's elbow” which, he

68. Starry-eyed, but not star-struck. Benjamin, having learned of Yale's great fame in certain prominent circles, asked Yale: “If you're so famous, how come your house isn't bigger?”

69. William Ian Miller, *Yale Kamisar: Up Close and Personal*, 2 OHIO ST. J. CRIM. L. 69, 71 (2004) [hereinafter, Miller, *Kamisar: Up Close and Personal*] (emphasis added).

70. For the record, Miller's performance gave entirely new meaning to WILLIAM IAN MILLER, *THE ANATOMY OF DISGUST* (1997). No one who witnessed it could reasonably have supposed he was faking it, though he did write the book on that, too. Literally. See WILLIAM IAN MILLER, *FAKING IT* (2003).

71. Alexander M. Bickel, *Felix Frankfurter*, 78 HARV. L. REV. 1527, 1527-28 (1965).

72. See Miller, *Kamisar: Up Close and Personal*, *supra* note 69, at 69 (discussing Yale's close-talking and speculating about its relationship to Yale's work on police practices — “it's [Yale's] space”); LaFave, *supra* note 65, at 1739 (recounting one of many experiences in which Yale was “bearing down on [him] as he spoke”).

73. Douglas A. Kahn, *Yale Kamisar: A Principled Man For All Seasons*, 102 MICH. L. REV. 1722, 1726 (2004).

74. LASH, *supra* note 31, at 89 (quoting Paul Freund).

said, “numbed” one’s arm.⁷⁵ It was, as John Mansfield explained, “the mark of [Frankfurter’s] complete attention to the particular human being who was before him.”⁷⁶ With Yale, to be sure, the grip was hardly ever so vise-like — certainly not after he hit his mid-sixties. And it was often replaced with a gentle, if insistent, backhand right where your arm meets your shoulder, typically in quick succession as if spelling out in Morse code the message the gesture itself urgently sent: “Get that!” According to reports, in all the years of submitting his briefs this way, Yale knocked only one person down.⁷⁷

There are other similarities between Yale and Frankfurter that should not go unmentioned: a constant yearning for self-improvement (just think of the time only a few years back when Yale received a “worst-dressed professor” award and bought Van Boven’s⁷⁸ out — “I don’t want to be [one of] the . . . worst . . . *anything*,”⁷⁹ he told a reporter not too long afterward, and compare it to the story about Frankfurter’s terror that he might be improperly dressed at a formal Oxford dinner, because he did not know the local protocol⁸⁰); a love of words (both Yale and Frankfurter used to keep track of words they did not know⁸¹); a dedication to writing and, to use Yale’s own term, the “art of wordmanship”⁸² (years later, I can remember the hours

75. Dean Acheson, *Felix Frankfurter*, 76 HARV. L. REV. 14, 14 (1962).

76. Mansfield, *supra* note 67, at 14.

77. Miller, *Kamisar: Up Close and Personal*, *supra* note 69, at 70 (mentioning the incident).

78. A tony men’s clothing store in Ann Arbor.

79. Silberman, *supra* note 22, at 38.

80. PHILLIPS, FRANKFURTER REMINISCES, *supra* note 57, at 253.

81. See, e.g., Dean Acheson, Address During Proceedings in the Supreme Court of the United States in Memory of Mr. Justice Frankfurter (Oct. 25, 1965), in PROCEEDINGS OF THE BAR AND OFFICERS OF THE SUPREME COURT OF THE UNITED STATES, 1965, at 42 (“His vocabulary, over the years, became immense and exotic. Many of us have often turned from one of his pages to the dictionary to look up gallimaufry, for example, or hagiolater or palimpsest. He delighted in English words; but was not so happy with English style.”). According to Paul Freund:

He was very sensitive about language. Words are our business, he used to say, and one of the common sights in Langdell Hall was to see his poor, overburdened secretary, then full-time, carrying weighty volumes of the unabridged Oxford English Dictionary between the library and his office. On one occasion he wrote something for the *Harvard Law Review* which contained a very odd, conspicuous word. The Law Review editor, knowing what had to be done before he questioned this, consulted the O.E.D. and then confidently went to Mr. Frankfurter and said, We wonder about this word; we don’t find it in the Oxford Dictionary. And F. F. said No, of course you don’t. But you will if you look at the second supplement to the Dictionary!

Paul A. Freund, *Professor Freund*, in FELIX FRANKFURTER: TALKS IN TRIBUTE, *supra* note 67, at 9, 10.

82. See Israel, *supra* note 22, at 1719 (quoting Yale Kamisar, *Fred E. Inbau: “The Importance of Being Guilty,”* 68 J. CRIM. L. & CRIMINOLOGY 182, 186 n.24 (1977) [hereinafter Kamisar, *Inbau: “The Importance of Being Guilty”*]). As for Yale’s wordmanship

Yale and I spent one afternoon in his office working to get the imagery of a single sentence just right;⁸³ fortunately, moments like these kept Yale from having to engage in Frankfurter's notorious practice of breaking page proofs — for articles, as well as Supreme Court opinions — in order to give them a deep edit⁸⁴; an inspiring sense of mission (bring to mind the countless Law Review editors who were on the receiving end of Yale's and Frankfurter's unsolicited advice⁸⁵); and an unheralded munificence toward those in their circle (the time, for example, that both men spent over the years advancing other peoples' careers⁸⁶).

and craft, *see id.* at 1718-19; *see also, e.g.*, Miller, *Kamisar: Up Close and Personal*, *supra* note 69, at 70 (describing Yale as a "Homer" (in the grand, traditional sense) and a "bard"); Allen, *supra* note 22, at 1690 (recounting the story of Yale's reaction to Dostoyevsky's *Crime and Punishment* and quoting Yale: "I didn't find one good quotation in it for my case-book."); Welsh S. White, *Yale Kamisar: The Enemy of Injustice*, 102 MICH. L. REV. 1772, 1773 ("Why has Kamisar been so influential? His meticulous scholarship, his precise analysis, and his passionate advocacy are all significant. But most important, perhaps, is simply the power of his writing."). If the citability — or quotability — of Yale's writing were ever in doubt, one would need to look no farther than Justice Ginsburg's descriptions of Yale as "one of the most-cited scholars of his time." Ruth Bader Ginsburg, *Tribute to Yale Kamisar*, 102 MICH. L. REV. 1673, 1674 (2004); *accord* Israel, *supra* note 22, at 1705-10 & nn.14-16, 27 (noting the influence of Yale's scholarly work and publications for the general public on the courts, including citations in 27 Supreme Court opinions).

83. The sentence was finally published as "*Schmerber* does not tell us, and it cannot be plausibly read as telling us, that the nontestimonial nature of derivative evidence, like some sorcerer's amulet, creates a bubble that envelops the evidence and shields it from the contamination of unconstitutional police action." Kamisar, *The "Fruits" of Miranda Violations*, *supra* note 14, at 1007.

84. Erwin N. Griswold, *Dean Griswold*, in FELIX FRANKFURTER: TALKS IN TRIBUTE *supra* note 67, at 13.

85. Compare Harry T. Edwards, *Professor Yale Kamisar: "Awesome,"* 102 MICH. L. REV. 1677, 1680-84 (2004) (providing some first-hand evidence that Yale was hardly ever shy about offering his opinions or suggestions to *Michigan Law Review* editors), with Erwin Griswold, *Felix Frankfurter — Teacher of the Law*, 76 HARV. L. REV. 7, 9, 10 (1962) (noting Frankfurter's influence on him, including his own selection of research topics, both when a student and a junior faculty colleague of Frankfurter's), and Mark Tushnet & Timothy Lynch, *The Project of the Harvard Forewords: A Social and Intellectual Inquiry*, 11 CONST. COMMENT. 463, 493 (1994) (noting Frankfurter's persistence in recommending authors (and articles) to be published in the *Harvard Law Review*, which was in his view, a "significant part of our legal system").

86. Compare Ronald J. Allen, *In Praise of Yale Kamisar*, 2 OHIO ST. J. CRIM. L. 9, 12-13 (2004) (discussing his own professional debt to Yale), and King, *supra* note 1, at 1729 ("[Yale] has taken many under his wing, calling around on their behalf, writing letters, counseling them on the phone, commenting deftly on drafts, opining on recent decisions."), and Eve L. Brensike, *Saying Goodbye to a Legend: A Tribute to Yale Kamisar — My Mentor, Teacher, and Friend*, 102 MICH. L. REV. 1693, 1695-96 (2004) (describing Yale's professional generosity), with ARTHUR M. SCHLESINGER, JR., *THE COMING OF THE NEW DEAL*, 16 (1958) (quoting some administration officials saying "[a] plague of young lawyers settled in Washington . . . claim[ing] to be friends of somebody or other and mostly of Felix Frankfurter"), and UROFSKY, *supra* note 31, at 36-37 (noting that "Frankfurter helped place an enormous number of Harvard Law students in key government positions" and giving an abbreviated version of the "staggering" list of the beneficiaries).

Truth is, I could go on and on. But I won't. However uncanny the similarities between Yale and Frankfurter may at first glance seem, they ultimately run only so deep,⁸⁷ as the story Yale tells of his one and only face-to-face meeting with Felix Frankfurter, long after Frankfurter had ascended to the Court, begins to suggest.

One day, the story goes, Herbert Wechsler announced to the staff of the *Columbia Law Review* — of which Yale was then a part — that Justice Frankfurter would be coming along to meet them. Everyone, Wechsler instructed, was to stand in a receiving line against the wall. They did. Yale was the last in line. Bob Pitofsky, years before he became Dean of Georgetown's law school, stood next to him.

Frankfurter slowly walked the line as Wechsler introduced him to the Law Review staff. Occasionally, on being introduced to someone with a certain family name, Frankfurter would stop and ask with evident interest over a handshake, "Are you related to Judge So-and-So?" Or: "Is that Such-and-Such of the law firm of Big Name & Such-and-Such?" Or: "Are you related to the well-known violinist?" Frankfurter, on hearing Pitofsky's surname, asked him if he was related to Jake Potofsky, a famous union official whose name resembled his.⁸⁸ Pitofsky respectfully answered, "No." That was that. And then Wechsler introduced Yale. "And this is Yale Kamisar." To which Frankfurter responded, without so much as looking Yale square in the eye, by walking on.

Years later, Alexander Bickel would capture the insight Yale instantly understood. Frankfurter, Bickel wrote, "was a hero worshipper."⁸⁹ A hero worshipper, Bickel continued, "who transformed all those he worshipped into real heroes."⁹⁰ But a hero worshipper just the same.⁹¹ And there were — back then at least — no heroes by the name of Kamisar. As Yale has explained it to me, "nobody named Kamisar had achieved any prominence in law or anything else."

This experience, which as best I can determine is an important part of the backdrop of Yale's thoughts and feelings about Frankfurter, had a lasting impression, to put it mildly. How much is attributable to the slight, which undoubtedly meant nothing to Frankfurter, hence

87. Jerry Israel has noted that one major difference between Yale and Frankfurter is that Frankfurter left an unbelievably massive epistolary legacy. Then again, as Jerry noted, Yale's telephonic legacy is in its way no less impressive. Wayne LaFave comments on it delightfully in LaFave, *supra* note 65, at 1737-38 (describing a telephone call from Yale).

88. See, e.g., WALTER GALENSON, *THE CIO CHALLENGE TO THE AFL: A HISTORY OF THE AMERICAN LABOR MOVEMENT, 1935-1941*, at 35, 59-61, 294, 296, 298, 563, 607, 608 (1960).

89. Bickel, *supra* note 71, at 1528.

90. *Id.*

91. In his own words, quoted by Paul Freund, Felix Frankfurter explained: "Let us now praise famous men." Freund, *supra* note 81, at 9.

added to its bite, is difficult to say. It is one of a number of experiences during law school that Yale has credited at one time or another with his decision to make a name out of his name. Citing others, Yale told a reporter more than a decade ago: "I . . . vowed that one day they wouldn't ask my son what his father did — they'd ask if he was related to Yale Kamisar."⁹² The very question Frankfurter did not ask Yale about *his* father.

* * *

An approach to constitutional adjudication — a method of judging constitutional questions — is not the same thing as a philosophy of law. In our constitutional culture, the two are often confused. But the difference helps to explain how Felix Frankfurter could have had, in Dean Hardy Dillard's words, "an aversion to large abstractions and solemn incantations in favor of the concrete problem and the immediate occasion,"⁹³ while being so well known as — and hailed by his colleague Justice Tom Clark (among others) for being — "an apostle of judicial self-restraint, [who] practice[ed] with a passion the belief that it is 'of the essence in the observance of the judicial oath, for the Constitution has not authorized the judges to sit in judgment on the wisdom of what Congress and the executive branch do.'"⁹⁴

There are numerous accounts that seek to explain what has come to be thought of as Frankfurter's "judicial philosophy." But for me, the most interesting speculation about its origins is Mark DeWitt Howe's. To quote it at some length:

The hypothesis is very simple. It suggests that the Justice's awareness of the importance of judicial restraint was accentuated by his consciousness of his own fervor and zest. Did he not, perhaps, innocently misjudge the character of his fellowmen and assume that his intensities were matched in most other human beings? Had his assumption been justified, there would have been good reason to fear that judges, invigorated by such an exuberance as his, would allow passionate, personal commitment to govern public business from the bench. A restraining mood, a cautionary hesitance in exercising judicial power, quite naturally seemed more important to a judge whose spirit glowed with fierce intensity than it does to the general run of flaccid beings who make up the bulk of mankind. If you take a restraining hand from the impulses of most of us we will not set many fires or agitate many rebellions. Our doubts and our skepticism will take command of conduct and prevent us from doing appreciable damage or distributing measurable benefits. The mind and spirit of Felix

92. Silberman, *supra* note 22, at 34-35.

93. Hardy C. Dillard, *In Memoriam: Felix Frankfurter Preliminary Remarks*, 51 VA. L. REV. 547, 548 (1965).

94. Tom C. Clark, *My Brother Frankfurter*, 51 VA. L. REV. 549, 549 (1965).

Frankfurter, however, were charged with such an effervescent ardor that had he not contained the zeal within confines fixed by scrupulous tradition the dominion of his vivacity would have been almost imperial. It would have been a livelier and a brighter world if it had been governed by his spirited intelligence. When he accepted judicial office, however, he determined that he would not be the governor of our society — that its liveliness and its brightness, its inventiveness and its decency, must be born of other powers than those which our judges have in charge.⁹⁵

Perhaps it is because Yale knew, as Frankfurter did not, that his own sense of injustice is tuned to a frequency that few others can detect.⁹⁶ Perhaps it is because Yale saw how others — including Frankfurter — hoarded the judicial authority they had at hand aplenty, and that the affirmative exercise of “judicial restraint” was often a luxury that only those who did not need it could afford: “judicial inertia, a deliberate ducking of the big issues,”⁹⁷ indicative, as Walton Hamilton saw it, of “a state of mind so esoterically judicial that a slight deviation from correct procedure — often existing only in the mind of the justice — is a moral sin, while a serious miscarriage of justice is only a venal one.”⁹⁸ Perhaps it is because Yale did not take his own seat on the Court.⁹⁹ But whatever the reason, Yale never

95. Mark DeW. Howe, *Felix Frankfurter*, 78 HARV. L. REV. 1526, 1526 (1965).

96. One of Yale’s former research assistants, Eve Brensike, suggests that it can be learned. See Brensike, *supra* note 86, at 1696. Jeff Lehman seems to agree. See *infra* note 105.

97. Rodell, *Alexander Bickel and the Harvard-Frankfurter School*, *supra* note 50, at 76; see also KALMAN, *supra* note 23, at 223-24 (quoting Charles Clark: “How much harm has been done by the felt need at Harvard to protect Felix in his negative approach which he tries to pin on Holmes, but which obviously satisfies his conservative and withdrawing judicial view!”).

98. Walton Hamilton, Book Review, 56 YALE L. J. 1458, 1459 (1947). Hamilton went on in withering language to comment that:

Frankfurter affects a lack of concern for the “end product”; yet his votes are to be predicted in terms of the end product. You can almost always tell where he is coming out; yet not even the faithful can tell in advance how his stand is to be legalized. Frankfurter spurns “policy” and professes to lay the law down on the line. Yet he usually gets to the same place as Jackson whose law is not unspotted by the world.

A host of truths, quite ugly truths, need to be spoken. It does no good to impute personal blame. Mr. Justice Frankfurter has no feel for the dominant issues; he operates best when weaving crochet patches of legalism on the fingers of the case. He does the best he can, often very well indeed, with the techniques in which he is proficient; it is a calamity that his skills happen to be petty skills. He is the victim of a bad legal education; but the Court has no business allowing him to select, from all the issues the case holds, the question upon which it must turn.

Id. at 1460. Hamilton’s review, along with another by Fred Rodell in the same volume, Rodell, *supra* note 23, “made me puke,” wrote Erwin Griswold to Frankfurter. KALMAN, *supra* note 23, at 157.

99. The rumor that floated around the law school at the time I was there was that if Walter Mondale had become President, Yale would have been nominated to the Supreme Court. I do recall having heard a similar rumor that Jerry Israel was on a short-list of potential Supreme Court nominees prepared for George H. W. Bush. I have not been able

became a devotee or defender of Frankfurter's judicial philosophy. Far from it. Considering the positions Yale took over the years in the constitutional criminal procedure arena, and what he defended, how could he? It was judicial self-restraint when interpreting the Constitution, or, more precisely, the stance that a narrow reading of it generally implies on the legitimacy of existing distributions of social power, that Yale, through his work, was struggling against.¹⁰⁰

Part of what makes this struggle so noteworthy is that, as Frankfurter's example demonstrates, it was hardly inevitable. Yale recognized that the path Frankfurter had finally chosen after ascending to the Supreme Court was open to him if he wanted to pursue it.¹⁰¹ He, like Frankfurter, could become "an overeager

independently to verify either story (sometimes a rumor is just a rumor). I can say with considerably more confidence that Yale's association with Mondale goes a long way back — at least as far back as urging him to write an amicus brief in favor of *Gideon*, which he did. Brief for Amici Curiae, *Gideon v. Cochran*, 372 U.S. 335 (1963) (No. 155); see also Walter Mondale, *The Problem of Search and Seizure*, 18 BENCH & B. MINN., Feb. 1962, at 15; Yale Kamisar, *Mondale on Mapp*, 3 C.L. REV., February/March 1977, at 62. Abe Fortas praised the brief in *Gideon*. Oral Argument by Abe Fortas on Behalf of Petitioner, *Gideon v. Cochran*, 370 U.S. 932 (1963), in 57 LANDMARK BRIEFS AND ORAL ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 612, 620-21, 623-24 (Philip B. Kurland & Gerhard Casper eds., 1975). Fortas also mentioned Yale's work a few times. *Id.* at 627, 630.

100. Some of Yale's work on *Miranda* — in which Yale reads the Court's decision more narrowly than some of his liberal confreres did or do — might seem not to fit this schema. But I myself think that it is a mistake to treat this work as if it were not written in a context of significant hostility to *Miranda* and its associated rules. Had *Miranda* been greeted with only as much warmth as the opposition it has faced, I suspect that Yale would have read it as broadly as anyone else does — or has. A not unrelated point must be made about Yale's position on the constitutionality of physician-assisted suicide, which may seem to some to retrace Frankfurter's on judicial review. To see matters this way is to ignore — or to flatten out — the reasons behind Yale's views on the proper outcome of the assisted suicide cases. See *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Vacco v. Quill*, 521 U.S. 793 (1997). In particular, it would be to misapprehend how aggressive the Supreme Court and the lower courts, not to mention the other branches of government, would have to be to address and redress the social inequalities, including in the health care arena, that have long loomed large among the reasons Yale opposes legalized assisted suicide and active voluntary euthanasia. See, e.g., Kamisar, *Against Assisted Suicide*, *supra* note 16, at 737-38 (citing THE NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, WHEN DEATH IS SOUGHT: ASSISTED SUICIDE AND EUTHANASIA IN THE MEDICAL CONTEXT 102 (1994)). In any event, Yale's position on "the right to die" can ultimately be squared, quite neatly I should add, with what I later describe as his "philosophy of law." See *infra* notes 110-122 and accompanying text.

101. Cf. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). For a much-overlooked, contemporaneous reply to Wechsler, see Charles E. Clark, *A Plea for the Unprincipled Decision*, 49 VA. L. REV. 660, 665 (1963) (venturing that *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), and *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), were, by Wechsler's criteria, "unprincipled decisions," but urging that "the history of the country would have been changed, the Supreme Court lessened in authority, and our government hampered and restricted, without them"); *id.* ("I do fear to be left to the tender mercies of judges who shiver to take the responsibility of forthright decision along lines never before attempted.").

apologist for the existing order.”¹⁰² He, like Frankfurter, could “embrace[] an attitude to America that provided no critical distance for him in reaching judgment on his contemporary society.”¹⁰³ Yale heard the message that everyone in the legal academy hears in some way or another: the safest and surest way to achieve power and rank within academic circles — certainly, the most well traveled path — is to deploy the talents and devices at one’s disposal to preserve the *status quo* — or if one absolutely *must* challenge it, to do so in only the smallest, most incremental of ways, affirming that the law moves best when it moves, in Justice Holmes’ famous phrase, “from molar to molecular motions.”¹⁰⁴

In a tribute to Fred Inbau, Yale exposed exactly how well he had heard — and understood — this message:

Professors, it seems, are supposed to tiptoe, not crash. They are supposed to be troubled and tentative, not take very strong and very clear positions on anything (except, perhaps, right down the middle). Their stock in trade is not supplying answers but asking questions (and criticizing *others* who have the audacity to propose solutions). They earn points, it seems, by showing how *agonizingly subtle and complex* an issue or a problem actually is, not by suggesting how *simple* it might really be.

The safe course for a law professor, it seems, is to set forth all imaginable arguments (or, better yet, some unimaginable ones, too) on both sides (or better yet, on four or five sides), lament the lack of sufficient data, deplore the “single-minded thinking” which has characterized the field (and probably add that it has generated “much heat but little light”), recognize that valid principles are “in collision,” stress that there are no “absolutes,” and wind up troubled (or, better yet, tortured and paralyzed) by doubts and uncertainties.¹⁰⁵

102. BURT, *supra* note 46, at 60.

103. *Id.*

104. S. Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting). Frankfurter discussed Holmes’ “highbrow way” of putting the point, which in his own became his famous aphorism that “legislatures make law wholesale, judges retail,” by which meant, as he himself explained, that judges “cannot decide things by invoking a new major premise out of whole cloth; they must make the law that they do make out of the existing materials and with due reference to the presuppositions of the legal system of which they have been made a part,” in ALPHEUS T. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 469-70 (1956) (quoting Frankfurter), *quoted in* MENDELSON, *supra* note 49, at 116.

105. Kamisar, *Inbau: “The Importance of Being Guilty,” supra* note 82, at 189. In an important emendation, Jeff Lehman translates this perspective into how many law professors *teach*:

Most of us implicitly suggest that effective, ethical legal argument involves a certain “pose.” The pose is that of the thoughtful, reflective scholar. One who sees the difficulty of a problem, its complexity, the nuances, the play of competition among worthy social values; one who then struggles to make the close judgment that one position is better than its opposite.

....

Just in case we happened to miss exactly where Yale positioned himself in relation to this mark — or could not figure it out — Yale told us that he, like Inbau, had “declin[ed] to take the conventional route.”¹⁰⁶ I am not, to be sure, someone who believes in the idea of a person’s “nature.” But if I were, I would confidently say it was not and is not in Yale’s nature to have done otherwise. Yale, it seems, is incapable of walking tippie-toe. I strongly suspect that if one took the time to poll the truly dedicated and talented, and yes, let it be said with great affection, incredibly patient people who have spent time (often years) working with Yale in that small office directly adjacent to his, they would confirm that anyone within earshot, not only Yale’s research assistants, always knew when he was about to burst onto the scene — even on those rare occasions when his voice, booming in the corridor on the Ninth Floor of Legal Research, did not give his arrival away. The sound of Yale’s squeaky shoes gripping the floor in his signature rapid, determined gait is unmistakable. Literally and figuratively, Yale has defied the Academy’s corked floors.

As much as anything else, Yale accomplished this feat by being — and staying — true to himself. Unlike many other Jewish kids who grew up in New York at the same time as Yale did, and who for various reasons were so busy trying to become someone that they lost themselves, leaving their backgrounds behind,¹⁰⁷ Yale never did. In a 1992 article for the *Ann Arbor Observer*, Eve Silberman captured this dimension of Yale’s personality with a delightful sense of drama. Yale’s “office in the elegantly Gothic law quad,” she wrote, “is large and gracious,” and “boasts pink walls, old-fashioned radiators, and

Indeed, until I took a class from Yale, I had come to believe that hot-tempered passionate argument was at best counterproductive and at worst a kind of unprincipled bullying.

Yet Yale’s example showed us otherwise. In that class, he combined passion with nuance. It was effective. He won a lot of converts to his perspective on criminal procedure, and even those who remained unpersuaded were not unmoved. More importantly, he showed us that lawyers could exercise their craft in the fully engaged service of profound personal commitments.

Jeffrey S. Lehman, *Yale Kamisar The Teacher*, 102 MICH. L. REV. 1686, 1687 (2004).

106. Kamisar, *Inbau: “The Importance of Being Guilty,” supra note 82*, at 189.

107. Some, for instance, changed their names, while others smoothed out their accents — a few buffed them out so thoroughly they became foreign-sounding. Cf. Garson Kanin, *FF Toward the End*, 51 VA. L. REV. 557 (1965) (“In the last of his days, FF’s spoken English often took on a trace of the soft, stubborn accent of his native Vienna. Was it fatigue, a result of the stroke, or simply a sign of the beginning of the final relaxation?”). Despite being urged to change his name, see SIMON, *supra note 31*, at 34 (“He was the first Jew the firm [Hornblower, Byrne, Miller and Potter] had hired and even after he had begun working there, Frankfurter was quietly advised by one partner to change his name.”), Frankfurter never did. In this respect at least, he followed his mother’s advice to “[h]old yourself dear.” *Id.* It is for other reasons that Bo Burt treats Frankfurter as the quintessence of the *parvenu*. BURT, *supra note 46*, at 62 (borrowing the concept of the *parvenu* from HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 56-68 (1951)).

carved wood bookcases . . . dense with volumes, including some [Yale had] written.” But, she immediately added:

The office’s air of privileged academic security could not be more misleading. Kamisar got here the hard way, and he remembers exactly where he came from. As an intense, stuttering kid from the Bronx whose parents hadn’t graduated from high school, he spent his childhood frustrated by . . . [the] small indignities [of not having money to spare, of always having to worry about it] and determined to get something better for himself.¹⁰⁸

Truly, “[w]as ever a man so clearly himself, always himself, and no other person than Yale?”¹⁰⁹ If so, it’s not easy to think of who it is. After decades in the Midwest, Yale still talks like he just stepped off an express train from the Bronx.

This authenticity, this remembering, courses throughout Yale’s work. And it informs what may be thought of as his philosophy of law. For Yale, the law is not (as it is for some) about abstract institutional arrangements.¹¹⁰ It is not designed, as some seem to think it should be, to protect the privileged who sit atop existing social hierarchies.¹¹¹ Nor, for that matter, is it about, say, deterring or punishing private violence.¹¹² In an interview given last year, Yale offered us a glimpse of

108. Silberman, *supra* note 22, at 34.

109. Miller, *Kamisar: Up Close and Personal*, *supra* note 69, at 71.

110. See generally, e.g., Henry M. HART & ALBERT M. SACKS, JR., *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

111. See, e.g., Orrin Hatch, *Like It or Not . . .*, NATIONAL REVIEW ONLINE, July 8, 2004, at <http://www.nationalreview.com/comment/hatch200407080829.asp>. Hatch writes:

While the American people should be able to protect marriage through ordinary legislation, the multi-front legal assault is poised to strip away this right to self-government. The only solution left is to amend the United States Constitution.

. . . .

To permit a handful of liberal judges to force this radical change on the entire nation is wholly inconsistent with the right of people to govern themselves. This debate over same-sex marriage is fundamentally a question of who decides important matters of public policy in a constitutional democracy. Judges who usurp the role of legislatures by imposing their preferred policies on the people dramatically undermine democracy’s vitality and legitimacy. . . .

. . . .

The Constitution’s amendments have generally served to extend the right of citizens to govern themselves, and to be able to make final decisions on issues such as marriage. The people in the states have already spoken on this issue, and the [Federal Marriage Amendment] will protect their fundamental right to democratic self-government — a right being eroded by an unaccountable judiciary.

Id.

112. See, e.g., JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (John Bowring ed., 1843); Michael S. Moore, *The Moral Worth of Retribution*, in *RESPONSIBILITY, CHARACTER, AND THE EMOTIONS* 179 (Ferdinand Schoeman ed., 1987). Thanks to my colleague Joshua Dressler for the leg-up here.

how he himself sees his own philosophy of law.¹¹³ “I’m against authority,”¹¹⁴ he is quoted as having said. (Odd coming from a law professor.) In the same interview, Yale went on to provide some additional insight into what it was that he meant by this when he attributed his anti-authoritarian disposition to his reactions to his mother. As a child, he explained, he debated her and appealed to her sense of injustice when she was unfair, which (apparently) was not uncommon.

Far be it from me to question Yale’s own understanding of his work. But I think that seeing it in these liberal terms — terms that seem to frame his scholarship as being, in some basic way, about the limits of, or checks on, State power¹¹⁵ — is only to see half of the picture. Obscured beneath it is the purpose of Yale’s resistance, hence the law: to protect the ordinary man, the average Joe, the guy who is down and out, who needs, but never gets, a break. In a word: The “underdog.”¹¹⁶ Law should be written for the man who, in the course of his life is subject to being cast about, battered, and discarded. The man who, as he lives from day to day, and season to season, sees himself as small, singular, and solitary in the face of institutionalized power. If anything, he is likely to be dominated by others — typically men, I would add — who are more socially muscular than he. If Yale’s philosophy of law is about the “extraordinary man,” it is only because Karl Jaspers had it right when he wrote that “[a]n extraordinary person is an ordinary person.”¹¹⁷

The unanswered question is, Who is this man? Interestingly, there is a telling passage in Eve Silberman’s *Ann Arbor Observer* story

113. Anyone who knows Yale knows he is not one to talk this way — except, perhaps, in just the way that Lon Fuller once did. See Lon L. Fuller, *My Philosophy of Law*, in *MY PHILOSOPHY OF LAW: CREDOS OF SIXTEEN AMERICAN SCHOLARS* 111, 113 (Julius Rosenthal Foundation Nw. U. ed., 1941) (“In a very real sense no one can know what his own philosophy is. . . . Necessarily, then, a man’s attempt to describe his own shifting point of orientation must be fragmentary and incomplete.”); *id.* (suggesting, rather than a whole philosophy of law, some of the ways in which his views clashed with “certain accepted conceptions of law and legal study”). Yale put me on to this essay of Fuller’s, citing it as an illustration of how he thinks about a “philosophy of law.” Dean Francis Allen captures my point here perfectly where he observes that Yale’s “reader should not expect to find in his writings the formulation or manipulation of jurisprudential abstractions. He has found it unnecessary to articulate in a systematic way the values that underlie his work.” Allen, *supra* note 22, at 1691. Compare *id.* with *supra* text accompanying note 93 (describing Frankfurter in not dissimilar terms).

114. Daly & Fedynsky, *supra* note 35, at 13.

115. See also Allen, *supra* note 22, at 1691 (providing a similar accounting of Yale’s work).

116. Silberman, *supra* note 22, at 33; Choper, *supra* note 53, at 1700.

117. Letter from Hannah Arendt to Gertrud and Karl Jaspers (March 21, 1967) in *HANNAH ARENDT/KARL JASPERS CORRESPONDENCE 1926-1969*, at 668, 669 (Lotte Kohler & Hans Saner eds., Robert & Rita Kimber trans., 1992) (quoting Jaspers).

about Yale that, I think, has gone largely unnoticed. It speaks about Yale's father:

Kamisar's father was born in Minsk and came to the U.S. as a boy. A bakery supply salesman, he worried constantly about being fired. He eventually did lose his job when the company he worked for went bankrupt. More than fifty years later, Kamisar recalls feelingly the time that his bike was stolen and his parents told him that they couldn't afford a new one. Or the time his father stopped the Sunday newspaper when the price rose by a nickel. "I couldn't read my favorite comics!" he exclaims.¹¹⁸

How, I wonder, would Silberman's observation — or Yale's own — have added to the conversation LaFave and Andy Watson used to have,¹¹⁹ speculating about the determinants of what Yale's former Dean, Francis Allen, has described as his "burning ambition to gain recognition as a great legal authority"?¹²⁰ Whatever the answer, it seems to me, borrowing from Howe, that it would "leave something suggestive unsaid" were I not to offer a "tentative hypothesis for understanding"¹²¹: The law, for Yale, as it was in the Beginning, is the law of — or should I say, *for* — the Father.¹²²

If I am right, it is no surprise that Yale had the feelings he did — and does — about Felix Frankfurter. Nor, for that matter, that Yale felt the way he did — and does — about Frankfurter's version of judicial restraint.¹²³ It is easy to forget, but an approach to law can be (or become) a way of life, a form of *ascesis*. For Frankfurter on that day with those young men and women of the *Columbia Law Review* — and undoubtedly on others, as well — judicial restraint took form to operate as insensitivity. What it said was: The ordinary man does not matter, is unacknowledgeable, invisible, undeserving of time, attention, interest, or respect.¹²⁴ And that is enough of a reason to take a side — or a stand.

118. Silberman, *supra* note 22, at 34.

119. See LaFave, *supra* note 65, at 1734-35.

120. Allen, *supra* note 22, at 1690.

121. Howe, *supra* note 95, at 1526.

122. See, e.g., JEROME FRANK, *Getting Rid of the Need for Father-Authority*, in LAW AND THE MODERN MIND 243-52 (1930); Austin Sarat, *Imagining the Law of the Father: Loss, Dread, and Mourning in The Sweet Hereafter*, 34 L. & SOC'Y REV. 3 (2000) ("Until we become thoroughly cognizant of, and cease to be controlled by, the image of the father hidden away in the authority of the law, we shall not reach that first step in the civilized administration of justice, the recognition that man is not made for the law, but that the law is made by and for men" (quoting FRANK, *supra*, at 252)).

123. Yale takes issue with the distinction between the "scholar" and the "advocate"; indeed, he contends that if a scholar has done his research thoroughly enough, he *will* reach "firm conclusions" — conclusions that may obligate him "to enter the fray." Kamisar, *A Look Back*, *supra* note 13, at 95.

124. James Simon tells the story of a young Felix Frankfurter making his way to Hoboken in 1896 to hear the then-Democratic presidential candidate William Jennings

If I may quote from Alexander Bickel one last time: “Young or old, whoever was touched by the friendship of Felix Frankfurter was affected forever.”¹²⁵ In Yale’s case, without too much exaggeration, it might be said: Those who were not touched by Frankfurter’s friendship, including those touched instead by offense, could also be affected forever.

It is, of course, easy to regard Frankfurter’s disrespect as yet another blemish on his already much-besmirched memory, as yet another reason to retell the stories that heap scorn on his personality and his life.¹²⁶

I myself, though, am inclined to want to think of it as something more like a reason for gratitude. If nothing else, it seared into Yale’s memory a lesson that he never forgot — a lesson that, to our benefit, he has taught us again and again. It is the choices we make in the causes we keep, in the battles we choose and the adversaries we confront — and not with what success we bow and praise the high and the mighty, whose ranks we may or may not join — that define a career in the law, and even a life.

Bryan speak. “Lecturing the crowd on the virtues of the common man, particularly the Midwest farmer, Bryan pointed an accusing finger at the evil bankers and Eastern big-city politicians who stood in the path of populist progress.” SIMON, *supra* note 31, at 26. Simon continues:

Frankfurter returned to the family apartment, excited and prepared to carry Bryan’s fight to his own father, who supported William McKinley and the Republican party. Frankfurter never accepted his father’s political views but later did admit that he had been carried away by Bryan’s rhetoric. “Bryan was for me with reference to public affairs,” he recalled, “what some actor or actress is to an adolescent girl.” In other words, Bryan was a matinee idol to his infatuated supporter, the young Felix Frankfurter. Bryan was plagued, Frankfurter later concluded, by a rigid, doctrinaire view of the world that simply could not be squared with realistic human expectations. In years to come Frankfurter would condemn the philosophy and performance of other public men on similar grounds — among them . . . Hugo LaFayette Black.

Id. at 26-27.

125. Bickel, *supra* note 71, at 1528.

126. See, e.g., BURT, *supra* note 46 *passim*; Thomas L. Shaffer, *Judges as Prophets*, 67 TEX. L. REV. 1327, 1330 (1989) (book review) (reviewing BURT, *supra*, and describing it as “harder on the memory of Justice Frankfurter than any respectable commentator I know about”). See also, e.g., KALMAN, *supra* note 23, at 156-157 (detailing criticisms of Frankfurter by Fred Rodell and Walton Hamilton). *But see id.* at 281 n.57 (“Fred Rodell seems to be pathological on the subject of a fellow named Frankfurter.” (quoting Letter from Felix Frankfurter to E.M. Morgan (Nov. 10, 1947) (on file with Harvard Law School archives))).