

HOUSTON LAW REVIEW

IN MEMORIAM

YALE ROSENBERG

*Nancy B. Rapoport**

Many of you reading this issue knew Yale Rosenberg far better than I did. I met him briefly in 1991, when I was interviewing for an entry-level teaching position at the University of Houston Law Center, and I got to know him better when I returned here as Dean in 2000. Getting to know him as a colleague and as a friend was an honor and a delight, made all the more poignant by the great loss that we have felt with his passing.

Yale was the embodiment of a “gentle man,” in the truest meaning of the phrase. I’ve only known two completely gentle men in my life: one is my father, and one was Yale. Yale set a benchmark for collegiality and affectionate humor that will be as much a part of his legacy as are his writings.

He set the standard for a happy marriage as well. He and his wife, Irene Merker Rosenberg, were the perfect partners—their life together and their work together were completely intertwined. Simply put, they were basherter (Yiddish for the perfect match).¹

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1. TALMUD BAVLI, SANHEDRIN 22A.

There are no words to express the depths of our sadness, but our memories of Yale are of all good things. His memory will always be as a blessing.

Like a dancer who offers years of bloodied feet and tender injury toward a gift, a moment of perfect, elusive grace, we proceed through our buffeted lives, trying to make of ill fortune and random blows one small and beautiful thing, which all of us deserve not because of talent or means but simply because we live.

It is the hardest of all learning that the opposite of depression is not happiness—a radiant, receding goal—but vitality, to feel alive each moment you are given. Then when sweetness comes it is most sweet, and when sorrow comes you know its name. In the aftermath of suffering, you chart each day as an explorer preceding map or compass, and what you find is shockingly alloyed. All happiness is dappled, and even bleakest tragedy has moments of strange praise.²

In this issue, you will hear from former students, colleagues, and friends who knew him well, and some of the flavor of Yale's scholarship will reveal itself in their comments. I hope that, between the lines, and in the text, you'll also get a feel, not just for the elegance of his prose, but for the generosity of his spirit.

*Rabbi Judith Z. Abrams**

*A Tribute to Yale Rosenberg: A Wise,
Strong, Wealthy, Honored Man*

When Irene Rosenberg asked me to write a tribute to her husband Yale, I was grateful to be able to draw yet another lesson from Yale's life. Yale allowed me to teach with him at the University of Houston Law Center in his course on Jewish law. It was a wonderful opportunity for me and he made the entire experience a delight. He shared his classroom, his students, and his wisdom with me. I learned as much as I taught. He was never anything but unfailingly kind.

2. NESSA RAPOPORT, *A WOMAN'S BOOK OF GRIEVING* 50–51 (1994).

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A text that describes Yale immediately springs to mind. It begins: "Who is wise? The one who learns from others. Who is strong? The one who controls his own will. Who is wealthy? The one who is happy with what he has. Who is honored? The one who honors others."¹ Yale was so knowledgeable about Judaism and Jewish law. I have no way of knowing about his expertise in other areas but I feel sure it was considerable. Yet, he was never overbearing. He was always genuinely interested in what someone else had to say. He really *listened*; ready to learn from every person. To be able to see every other person as a possible teacher indicates an incredibly high spiritual level. It means that you see each person as designed in the image of God. And to see people in this way imbues them with dignity. Yale made every person feel elevated in this way. It is a rare gift to achieve this state of perception every once in a while. But to operate from this level of insight is the sign of a true *tsaddik*, a righteous person.

Yale was strong. He controlled his own will in many ways. He lived a pious and observant Jewish lifestyle, which entails the following of many rules, even when one might naturally want to do otherwise. And he was strong as he faced his illness. As much as possible, really until just days before the end, Yale was Yale. He was actually still *there*, inside the body that betrayed him. But out of his eyes radiated his kindness and from his lips came sweet words. He was faithful through one of the most harrowing tests a person could endure. This was true strength and Yale possessed it.

Yale was wealthy not only because there wasn't a greedy bone in his body or a covetous thought in his mind. Yale's wealth went beyond that. Wealth for him was what he could do for others. I should know. Even through his illness, he helped me in the process of applying to law school, writing me a letter of recommendation and giving me guidance. He could be content and peaceful to the point of generosity, even as his body weakened and made that more difficult to do.

Finally, Yale is honored because he did honor others, as I've described above. And so now, at last, we can honor Yale by publicly saying these things (which I'm sure he would have claimed were far too extravagant compliments). The opposite, of course, is the truth: no matter how much we say about Yale and how great he was and how much we will miss him, we will never be able to capture all of his wonderful essence in words. It is only when we remember him in our deeds and our prayers and try to emulate him as we live our lives that we will be able to invoke his kind, strong, rich, and honor-filled presence and bring it to life once more.

1. Pirkei Avot 4:1.

*Sherman L. Cohn**

Yale Rosenberg: The Scholar and the Teacher of Jewish Law

In the early 1980s, when he was a young professor at the University of Houston Law Center, I had the occasion to meet Yale Rosenberg. It was clear from our discussion that Professor Rosenberg had a strong interest in Jewish law as well as a strong knowledge base. We discussed teaching such a course at the University of Houston Law Center. Professor Rosenberg was doubtful about teaching a course in Jewish law at a secular law school, particularly one in Texas. But that conversation began a series of conversations where Yale explored in some depth the course that we were offering at Georgetown. It took several years of discussion, but in 1989, Professor Rosenberg took the plunge and began offering a Jewish law course to the students at the University of Houston Law Center. The rest is a highly successful history.

By 1989, Professor Rosenberg also began to publish in the field, co-authoring with his wife, Professor Irene Marker Rosenberg. Together, there are ten major articles with a focus on Jewish law. But when one examines Professor Yale Rosenberg's other writings, it is clear that the influence of his study and interest in Jewish law permeated all of his thinking and scholarship.

It would take a full volume of this Journal to review all of Professor Rosenberg's writings on Jewish law. But I would like to examine, though cursorily, one that illustrates the contribution that has been made by Yale and Irene Rosenberg. This one article was also written with a third author, Bentzion S. Turin, then a student at the University of Houston Law Center, and with a significant background in Jewish law. This is the 1999 article on *Return of the Stubborn and Rebellious Son: An Independent Sequel on the Prediction of Future Criminality*.¹

This article takes one of the more difficult biblical commandments,² that appears to require parents to bring forward for condemnation to death a son who is rebellious against his parents. The article, after setting forth the biblical commandment and its context, traces the thinking that went into this commandment, as well as its application, through the two

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1. 37 BRANDEIS L.J. 511 (1999).

2. *Deuteronomy* 21:17-21.

significant segments of the Talmud, the Mishnah (redacted at the end of the second century) and the Gemara (redacted during the sixth century), and from there to the significant writings of various commentators through the ages. It is a real tour de force.

The article is a first-rate exposition of the sources of Jewish law and how they interrelate. Taking a set of biblical verses, exploring both their literal and their contextual meanings, and then moving on, through history, with the exposition of how these verses were treated in the Talmud and in the writings and responsa since, the article moves the reader through a full development of how Jewish law works. The biblical word is put forth. But it is not just the literal word that is of concern. The context is also important and set forth. And from there to the historical development. The sages of the Talmudic era worried about the intent as well as the meaning of the language. They sought the purpose behind a commandment which, read literally, would have parents bring forth their own child, charge him with the crime of rebellion, and lead him to his death for that crime. As they parsed for intent, the sages of the Talmudic era began to focus upon prevention of greater crimes after the child became an adult. Thus, there is a concept of predicting the future criminal. And, once that intent is arrived at, the sages of old begin to place boundaries upon biblical command so that it would not be utilized except where the intent would be furthered. This journey is then continued with the views of writings of Maimonides and Rashi in the Middle Ages through responsa authors of the past few centuries.

From the set of biblical verses, the article develops the jurisprudence of Jewish law. A jurisprudence that begins with the word of the supreme lawgiver, one that says this is the entire law to which one may not add and from which one may not subtract,³ but then, building on intent, and utilizing the exegesis of and hermeneutics of Jewish law, cabins the commandment so that it is to be used in only the most essential situations—if ever. The article thus provides an abject lesson of the entire jurisprudence that is Jewish law, building logically block upon block toward a conclusion that does not negate the biblical command, but utilizes it for the positive hortatory that it can serve to help persuade the child who is able to discern toward responsibility. In a sense, this jurisprudential journey shows how to turn a commandment almost on its head: but to accomplish the purpose without the negative violence of which it speaks. And in process, the reader learns how Jewish law works.

3. *Deuteronomy* 4:2.

But the article goes further. Drawing on the jurisprudence of Jewish law, the article teaches a lesson concerning prediction of criminality. Thus, the lesson of the article is broader than the teaching of Jewish law and its system in the context of one commandment. It presents an abject lesson about the ability of man to predict who in the future will commit a crime. That is the issue that the sages of old, and the writers through the ages, have wrestled with. And as the article makes clear, it is an issue that is still being wrestled in our time. Preventive detention is an attempt to lock up those who, from past profile, are likely to commit crimes. Our "three strikes and you are out" penology is really based on an attempt to predict that here is a person who will continue to commit crimes if permitted to do so. And, our society is wrestling with the issue of predictability again in terms of trying to identify those who, though not yet having committed a wrongful act, are lying in wait to commit some terrible terrorist act. What this article does is to teach us that the issue is not new, it goes back to biblical times and has been wrestled with ever since. And from the jurisprudence of the rebellious son, we too have much to learn.

This raises the broader issue of the teaching of Jewish law. In 1999, after ten years of offering the course at the University of Houston Law Center, Professor Yale Rosenberg offered his reflections at the Jewish Law Section of the Association of American Law Schools (AALS) Annual Meeting. Professor Rosenberg's experience mirrored that which I have found at Georgetown. A significant number of students who take the course are not Jewish, and are exploring the subject from their own perspectives. Some are fundamental Christians who are already well versed in the Bible. Others are Mormons, exploring their own heritage. (The longest continuous running course on Jewish law has been offered at the law school at Brigham Young University.) Others are children of, or participants in, an intermarriage and are exploring the subject of Judaism from this perspective. And still others have a significant background in theology or (and they are different) moral theology and wish to build upon their already strong bases. Among the Jewish students there are generally one or two with significant backgrounds in the field, but sometimes rigidly so. However, most are exploring a heritage to which they have been barely exposed.

The number of law schools offering Jewish law courses has grown, from just a handful in 1980, to somewhere between thirty and forty today, and that number is held in check partially by the inability to find qualified teachers. An interesting question arises as to why this evolution. Until the 1970s, the emphasis in law school was almost exclusively upon those practical courses that

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were needed for the successful practice of law, including the passing of the bar exam. Courses such as ethics, jurisprudence, history of law, and the like were considered oddities if offered at all.

But the academic legal community has undergone change. In the first half of the twentieth century, law schools were almost completely under the influence of the Realist and Positivist schools of jurisprudence: the law is what has been duly enacted, and in a common-law system, what the judge says it is. Leading law schools taught solely positive law. Indeed, there was no need to teach jurisprudence as there was no issue to be discussed. The same was true of ethics. Ethics explores values, and the Realist was not interested in a value discussion within the law. But with the study of what happened in Europe in the 1940s, there was a realization that Germans accomplished the Holocaust—and not just of Jews—within duly enacted German law. It is said that the Realist school floundered upon the shoals of Auschwitz. And the Nuremberg trials helped foster a concept that there is a law of general principles that trumps positive law when they are in conflict.

Thus, in the law schools of the 1960s and 1970s, there was a re-discovery of values in the law. Law school faculties began to ask “Why?” Watergate furthered this process, for many of those involved were graduates of first-rank law schools. For the first time, the self-appointed leading law schools began to explore values and offer courses in which values were explored. And the students of the 1970s and beyond were open to such courses, for they too were questioning and exploring.

Thus, attitudes changed. Today, ethics of law practice is a must in the studies of the student. But, more, today most law schools offer perspective courses that look at the history of the law as well as the legal profession, the sociology of the law, and subjects as diverse as Law and Literature, Law in Literature, and Law in Film. As a part of this broadening, there was an opening for other courses that gave breadth and depth, though of no practical importance.

Jewish law fits into this picture. But more was happening. For one thing, legal education, which had been quite isolated, began to find significance in other disciplines. The interplay of law and economics, psychiatry, psychology, philosophy, and even physical science began to appear in curricula. Joint teaching with members of other disciplines became a sign of maturity. And many of the newer recruits to law faculties had PhDs in other disciplines along with law degrees. Joint degree programs proliferated, bringing both law students and law faculties into contact with other disciplines in a meaningful way.

Still another influence affects this evolution. Before the 1970s, the focus was upon assimilation. Historically, legal studies were pursued by the establishment (generally, White, Anglo-Saxon, Protestant and male). Then, between the First and Second World Wars, came the Roman Catholics from southern and eastern Europe as well as Jews, largely from eastern European backgrounds. The emphasis, however, was upon assimilation. There was no recognition in American university education as a whole, and certainly not in legal education, of any value to ethnic studies. This began to change, with the push coming largely from the Afro-American Black Pride movement. It also came from the Women's movement. We began to have, at the undergraduate, college level, Black studies and Women's studies programs. This made it possible for the Jews, too, to speak of wanting to study their own heritage, and Jewish studies programs began.

Thus, we found in the past three decades that it was possible to be openly ethnic and still be American. And we found it acceptable to study each other's heritage, which permits non-Jews to take Jewish law courses.

Finally, there is another movement, small but important: what Professor Russell Pearce has termed the "religious lawyering movement."⁴ In the 1970s, Professor Thomas Schaffer of Notre Dame first looked at being a lawyer from the Roman Catholic perspective.⁵ Others joined in from various Christian perspectives. This led Jewish academics and lawyers to begin exploring what it means to be a Jewish lawyer. Professors Russell Pearce,⁶ Howard Lesnick,⁷ Monroe Freedman,⁸ Michael Broyde,⁹ Steven Resnicoff,¹⁰ and Samuel Levine¹¹ began to think and write on the subject. This paper is not the place to explore

4. See Russell G. Pearce, *The Religious Lawyering Movement: An Emerging Force in Legal Ethics and Professionalism*, 66 FORDHAM L. REV. 1075 (1998).

5. See Thomas L. Schaffer, *The Practice of Law as Moral Discourse*, 55 NOTRE DAME L. REV. 231 (1979). See generally THOMAS L. SCHAFFER, ON BEING A CHRISTIAN AND A LAWYER: LAW FOR THE INNOCENT (1981).

6. See Russell G. Pearce, *Reflections on the American Jewish Lawyer*, 17 J.L. & RELIGION 179 (2002) (book and essay review).

7. See, e.g., Howard Lesnick, *The Religious Lawyer in a Pluralist Society*, 66 FORDHAM L. REV. 1469 (1998).

8. See Monroe H. Freedman, *Legal Ethics from a Jewish Perspective*, 27 TEX. TECH L. REV. 1131 (1996).

9. See, e.g., Michael J. Broyde, *Genetically Engineering People: A Jewish Law Analysis of Personhood*, 13 ST. THOMAS L. REV. 877 (2001).

10. See Steven H. Resnicoff, *The Attorney-Client Relationship: A Jewish Law Perspective*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 349 (2000).

11. See, e.g., Samuel J. Levine, *The Broad Life of the Jewish Lawyer: Integrating Spirituality, Scholarship and Profession*, 27 TEX. TECH. L. REV. 1199 (1996).

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this fascinating subject in depth.¹² I use it solely to show that it became respectable in academic legal circles to be a Jew or a Catholic or a Mormon or a fundamental Christian openly and to explore the law from that perspective as a legitimate academic and scholarship subject.

It is in this era that Yale Rosenberg, with a strong interest in Jewish law, began teaching at the University of Houston Law Center. It took several years, but in 1989, he finally took the plunge and began offering courses in Jewish law. And he found among the students a fertile ground. Perhaps, in conclusion, it would be best to quote Professor Rosenberg's own words:

Finally, a confession and a bit of advice: I was initially very reluctant to teach Jewish law. For five years, Sherman Cohn, a past chair of this section, urged me to teach the course—and I told him I wasn't a rabbi, I had never studied Jewish law other than on a very informal basis at my shul, and, in short, I didn't know enough—and he said, 'At the rate you're going, you'll never know enough.' And so when I finally took the plunge, I stepped into the water very gingerly. The Talmud is, after all, a sea and a very deep one at that, and many have drowned in it. Nonetheless, a decade later, I can tell you that even for a water treader like me, teaching Jewish law is a remarkable experience and a very gratifying one. So my one piece of advice to you, if you are thinking about teaching Jewish law, is not to make the same mistake that I did. Don't dawdle. Jump right into the sea or the bramble bush of Jewish law as soon as possible. You'll be glad you did—and so will your students.¹³

Yes, Yale Rosenberg took the plunge. He proved to be an important scholar as well as a first-rate teacher of the subject. He will be missed by his fellow teachers but most of all, by his students and those who will have no opportunity of joining with him in exploring this fascinating subject.

12. See Symposium, *The Relevance of Religion to a Lawyer's Work: An Interfaith Conference*, 66 *FORDHAM L. REV.* 1075 (1998), and Symposium, *Faith and the Law*, 27 *TEX. TECH L. REV.* 911 (1996), for a collections of views from the perspectives of a large variety of faiths.

13. Yale Rosenberg, Remarks at the Ass'n of American Law Schools, Annual Meeting, Section of Jewish Law (January 1999) (copy of the text of the speech is in the possession of the author).

*David R. Dow**

Our Prophet

In Jewish law, which Yale taught, one is obligated to say a prayer when one encounters a learned person. It is a good thing for me that I am a heretic, because my office was adjacent to Yale's, and I would have had to spend all my time praying.¹

Law school corridors teem with extremely bright people. Some of them, like Yale Rosenberg, stand out even among such a group. If you read only a single sentence of virtually anything he wrote during his twenty-nine years on the University of Houston Law Center faculty, you will see that intelligence for yourself. His work is erudite without arrogance; his writing is beautiful without ornament.

But I do not want to talk simply about Yale's sheer brainpower or only about his published theses, partly because you can see it for yourself in his written words, but more importantly because I believe that if I were to talk principally about his intelligence, I would not be talking about the essence of Yale.

Law schools are full of impressive brains, but, as any law student will tell you, they often suffer a shortage of impressive souls. Yale's brain was substantial, but his soul was bigger. He was admired for his ideas, but he was loved for his personality.

Yale Rosenberg entered academia because he was smart, but he became a remarkable academician because he was good. The institution where he walked has never known a better person. It is as simple as that. Intelligence in these halls is cheap. Soulful intelligence, compassionate wisdom—these virtues are far rarer than simple genius, and far more valuable. These are the virtues that defined Yale Rosenberg, and the virtues that he exuded at literally every moment.

Yale's scholarship was breathtaking in its breadth. He wrote about habeas corpus law, among the most arcane areas of federal law, and with equal facility—and beauty—about Jewish law. To be accomplished in either of these areas would have represented a successful career; to be accomplished in both, as Yale was, is a

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1. In fact, this would have been a more serious time commitment than the text implies, because Jewish law commands one to utter a certain prayer when one encounters a scholar of Jewish law, and a different prayer when one encounters a scholar of something other than Jewish law. In Yale's presence, the observant Jew would have had to articulate both.

staggering achievement. Yet technical accomplishment was not even the half of it. In every area in which he ventured, he brought the strength of his essential goodness to bear.

In the habeas area, for example, Yale was—and there is no other word—America’s prophet. He wrote his first article in this area in 1978. The article—at more than 100 pages, it was really a book—addressed the problem of procedural default.² Under the doctrine of procedural default, if a defendant’s lawyer makes certain mistakes and neglects to raise certain issues in state court, the defendant will not be permitted to raise those issues subsequently in federal court. What Yale realized in the late 1970s was something that did not become apparent to most others writing in the area until years later: namely, that the role that habeas corpus has historically played in enforcing federal constitutional guarantees in the United States was being inexorably eroded by a Supreme Court more interested in being deferential to the states than in safeguarding the Bill of Rights.³

His last published article in the area was titled *Kaddish for Federal Habeas Corpus*.⁴ I want to spend a brief moment discussing the thesis of this brilliant piece because, despite its brevity (a mere sixteen pages), it said everything that there was to say about the law, and it tells us everything we need to know about Yale.

In a series of cases decided in the late 1970s and early 1980s, the Supreme Court constricted the availability of habeas review by carving out certain subject-matter areas from habeas jurisdiction, and by holding that if a litigant was barred from raising certain issues under state law, as a consequence of regularly enforced procedural rules, then the litigant also could not obtain relief in federal court.⁵ There was, therefore, by the mid-1980s, an exceedingly narrow universe of claims that could support relief in federal court. It was narrow, but it existed.

Then, in the late 1980s and early 1990s, the Court constricted the universe still further—pinching it to the point of oblivion—by holding that, with narrow exceptions, so-called new rules would not be retroactive to cases that were already final at

2. Yale L. Rosenberg, *Jettisoning Fay v. Noia: Procedural Defaults by Reasonably Incompetent Counsel*, 62 MINN. L. REV. 341 (1978).

3. Yale was perhaps not the only student of habeas corpus to see what was happening, but it did not take long to call the roll. For others who saw it, see for example, Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Courts*, 86 YALE L.J. 1035 (1977); Larry W. Yackle, *The Exhaustion Doctrine in Federal Habeas Corpus: An Argument for a Return to First Principles*, 44 OHIO ST. L.J. 393 (1983).

4. 59 GEO. WASH. L. REV. 362 (1991) [hereinafter Rosenberg, *Kaddish*].

5. See, e.g., *Engle v. Isaac*, 456 U.S. 107 (1982); *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Stone v. Powell*, 428 U.S. 465 (1976).

the time the rule was decided.⁶ Simply stated, a litigant whose case was in federal habeas review could not obtain relief from a federal court, even if his rights were violated, if the Supreme Court had not identified the precise constitutional claim he was invoking in a previous case. The dramatic significance of these cases is breathtaking once the holding is translated from legalese into simple English: Even if your rights were violated by the police, prosecutors, or during state-court proceedings, you still cannot get relief in federal court if the precise violation had not already been declared unconstitutional by the Supreme Court at the time the violation occurred; if it is declared unconstitutional for the first time in your case, you are out of luck.⁷ Yale Rosenberg saw the *Teague* line of cases for what it was: a coup de grace. The Supreme Court had made habeas relief not literally impossible, but nearly so.

Yale announced in 1991 that habeas corpus was dead.⁸ He was correct, of course, but he was also prescient, because it took the rest of the legal world another half decade to realize what had happened. Eventually it dawned on Congress that habeas review had died, and Congress acted to preclude a renaissance by codifying the Supreme Court's decisions that had been responsible for habeas' demise. With the passage of the ominously titled Anti-Terrorism and Effective Death Penalty Act of 1995 (AEDPA), Congress, by translating the Court's decisions into statutory law, ensured that the revolution of the Burger and Rehnquist Courts would not be undone easily by future jurists.

And yet, Yale was not merely prescient, he was also prophetic, for the role of the prophet is not simply to describe how we have erred, but, as importantly, to exhort us to walk rightly. Most people who knew him would characterize Yale as a liberal, but Yale blamed liberals and conservatives alike for our repudiation of our constitutional heritage. He saw, of course, that the Burger and Rehnquist Courts had effected the death of habeas review, but he also saw that the fault lay equally with the liberals who had never adequately or vociferously explained the value of the constitutional protections that a vigorous habeas

6. The line is referred to eponymously as the *Teague* line after *Teague v. Lane*, 489 U.S. 288 (1989). The remaining cases comprising the *Teague* line include *Saffle v. Parks*, 494 U.S. 484 (1990) and *Butler v. McKellar*, 494 U.S. 407 (1990).

7. Actually, for reasons that would take us astray, if yours was the first case after it would be declared unconstitutional, then the Court will not issue the declaration, because you would not be able to take advantage of it. See, e.g., *Penry v. Lynaugh*, 492 U.S. 302 (1989).

8. Rosenberg, *Kaddish*, *supra* note 4.

review is needed to protect.⁹ Yale had political beliefs, but his critique of doctrine was not enslaved to them. Like a prophet, he rose out of and became bigger than himself when rebuking us; at those moments, he embodied not only his own personal values, but those of our culture.

As I mentioned, Yale also taught and wrote in the area of Jewish law. In this respect, Yale was not the lonely prophet, for he worked with his wife Irene as collaborator and co-author. The Rosenbergs were at the very forefront of legal scholars who use Jewish texts to gain insight into American constitutional values. Jewish law is often regarded as rather recondite, and that is not an inapt characterization, but that characterization can tend to obscure the preeminent value that Jewish law places on accompanying study and scholarship with action. As the mishnah puts it in Pirke Avot: “He whose good deeds exceed his wisdom, his wisdom will endure; but he whose wisdom exceeds his good deeds, his wisdom will not endure.”¹⁰ Yale was a writer and a scholar, but he was also, and primarily, a doer. He did not live in an ivory tower. He lived in the world, and by living there, he made it better. As vast as Yale’s wisdom was, his goodness was greater—which is why we miss him so terribly, and why his memory will endure.

*Arye Edrei**

Tribute

One morning, about fifteen years ago, as a young student, I arrived as usual to the small and intimate library of the Institute of Jewish Law of the Hebrew University on Mt. Scopus. On that day I saw two people, strangers to me, working hard on deciphering a page of the Talmud. One could see that the task was unfamiliar, and I daresay most difficult to them, but they were by no means discouraged. They were completely absorbed in their work, only leaving their desk to peruse the stacks for dictionaries and reference books. That day marked the beginnings of a wonderful friendship, deepened and matured by time, between me and that wonderful couple Irene and Yoel Rosenberg.

9. *Id.* at 376.

10. Chapter 3, Mishnah 12.

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The Talmud tells us about Hillel, a penniless and uneducated immigrant from Bavel, who wanted to gain admission to the Hall of Studies of Shemayah and Abtalion: "It was reported about Hillel the Elder that every day he used to work and earn half a dinar, half of which he would give to usher at the Hall of Study, the other half being spent for his food and family. One day he found nothing to earn and the usher would not permit him to enter. He climbed up and sat upon the window, to hear the words of the living God from the mouth of Shemayah and Abtalion—They say that day was the eve of Sabbath in the winter solstice and snow fell down upon him from heaven. When the dawn rose, Shemayah said to Abtalion: Brother Abtalion, on every day this house is light and to-day it is dark, is it perhaps a cloudy day. They looked up and saw the figure of a man in the window. They went up and found him covered by three cubits of snow. They removed him, bathed and anointed him and placed him opposite the fire and they said: This man deserves that the Sabbath be profaned on his behalf." We all know what became of Hillel. He was appointed to be the Patriarch of Israel, and became one of the most prominent and important figures of the spiritual heritage of the Jewish people.

About half a mile and two thousand years from the wonderful story of Hillel, was the beginning of the wonderful story of Yoel Rosenberg. Their stories are similar. At that first meeting with Yoel on Mt. Scopus, it was clear that the man I met was firmly committed to learn, that he had a great longing for the knowledge of the Torah, and a deep faith in his own ability. Indeed, not many years had passed before Yoel Rosenberg, together with his wife Irene, had become prolific and important contributors to the research of Jewish law. Beside profundity and incisiveness, every page of their work is marked by sensitivity, their love of the Torah and their joy of being able to study it.

Over the years I became familiar with one of the wonderful traits of this man who was much more interested in others than in himself. Each time we met, he wanted to know about me and what I was doing, generously offering assistance and advice. But he did not like to speak about himself. Once again, he could be described by the words of the Sages whom he so much liked. "Hillel used to say: if I am not for myself, who is for me, but if I am for my own self only, what am I, and if not now, when? Shammai used to say: make thy study of the Torah a matter of regularity; speak little, but do much; and receive all men with a pleasant countenance."

This was Yoel, quiet and unassuming, meeting all men with a pleasant countenance, one who speaks little but does much, using every minute for study; "for if not now, when?"

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I cannot neglect to mention the very special and perhaps enviable relationship of Yoel and Irene. “Appoint for yourself a teacher and acquire for yourself a companion” says the Mishnah. Maimonides explains that there are friends of different kinds and levels. In the highest category of friendship “the desires and intentions of both should be aimed toward what is good, and each one wishes the help of his friend to achieve this good for the benefit of both.” It would be difficult to find a more apt description of the wonderful companionship of Yoel and Irene. They did everything together, worked, wrote and studied, and persisted in rising together spiritually and intellectually. They wanted the assistance of each other to achieve the good and the perfect; a love of knowledge, the Torah, and the fear of G-d.

May his memory be blessed.

May he rest in peace.

*Anthony P. Griffin**

My Atticus Finch With His Yarmulke In Tow

Honestly, my memories of Yale Rosenberg are not based on his role as a professor—even though he served that role with respect to myself at least once. Our relationship however was forged at the law school. Although, my memories of law school are somewhat hazed at this point, something tells me that the class was Federal Jurisdiction or Conflicts of Law. I am not willing to commit to either under oath, but take my word for this last point.

I must make an admission and provide you with some history in order that you understand why Yale Rosenberg is/was/remains my Atticus Finch with his yarmulke in tow. First, I was an activist law student. I was President of the Black American Law Students Association (BALSA) during my tenure at the law school. My activism meant stressing and encouraging the institution to diversify its curriculum, faculty, and student body. At the time I wore the hat as President of BALSA, I was also asked to represent the interest of the Women’s Law Student Association (WLSA) and the Chicano Law Students Association (CLSA). No, I am neither female nor Hispanic. No, I was not the president of these other organizations, but I was their mouthpiece, their visual representative with regards to the presentation of interests and

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issues to the administration. In reality, the multiple hats I wore were based upon the hostility we all felt. Somehow we knew we were different from the traditional law student. The school was not necessarily a pleasant environment.

Of course, our existence in the school was framed by the larger debates that took place in the society. Affirmative action and its meaning was part of the discussion.¹ The admission of a greater percentage of women in the law school was debated openly by both faculty and students. And finally, the irreducible and seemingly insoluble issue of race never left the lips of those involved.

Oh, I wish I had taken notes with respect to some of the statements made as the supposed position of women (should not be in the law school), of Black and Hispanics (the beneficiary of reverse discrimination), and of courses or schools not worthy of consideration. I do remember, however, the anonymous letters placed throughout the school with the purported author(s) being members of an organization possessing the dubious name of the White Law Student Association. Sure, I would not argue with you that the First Amendment protects the rights of citizens to meet, assemble and organize with folks of like mind, no matter how repugnant. But the name in context of the debate just didn't seem like a compliment. It's sort of like trying to convince African Americans that the Confederate Flag is simply a celebration of history and has nothing to do with the celebration of slavery and the "old" South. But I am digressing—the letter railed against affirmative action (which was supposed to mean "us"), preferences (which we knew meant "us"), and organizations such as BLSA, CLSA and WLSA. In this context, I was forced to have interaction with the faculty and administration, and it was in this context that I remember Yale Rosenberg.

Yale Rosenberg was a tall, thin man; he possessed a disarming smile, a slight stutter and a distinctive chuckle. I remember my first impression: he reminded me of the type of person whose mind was constantly moving, thinking, and challenging. Although soft spoken, he was one who was blessed with the ability to communicate through his eyes. I also saw trust in those eyes that I didn't see in others; time's slow dance ultimately confirmed my initial impressions.

In the 1977–1978 school-term, I had the pleasure of serving on the Admissions Committee with Yale Rosenberg. The Admissions Committee, at the time, was a process that possessed inherent contradictions. If you attended the University of Texas or Rice

1. See generally *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

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University as an undergraduate, you were awarded bonus points; no likewise bonus points were awarded to University of Houston graduates—talk about self-hatred. If you were an alumnus (read this as wealthy, influential), you were given extra consideration. If you took “certain” history courses, the Committee spoke negatively of those courses (Women’s Studies, African American History). The Committee members spoke with hostility of affirmative action, spoke of qualifications, sought to admit those who looked like them even if they possessed the same grade point average and LSAT score of those who didn’t so carry the same hue, hair, lips, sex. Now I told you I was an activist law student, so please bear with me. My failing memory and graying hair notwithstanding has not changed my view of the world.

The admissions process was framed in the context of the external affirmative action debate. My and other students’ participation in the process was part of the debate in context of making the selection process fairer and more inclusive.² The students, because of their numbers, could neither grant admission to nor deny admission to any given applicant, even if the students voted in bloc. The only way the student would have any influence was for at least one professor to vote consistently with them. I will admit to you that the students felt that the incoming class in the fall of 1978 should be more representative. A stated goal of the students was to increase the women enrollment to at least fifty percent of the incoming class. Yale Rosenberg made it clear to us that he had a similar goal. With his smile, eyes constantly searching and with his yarmulke and history in tow, we struggled together from October 1977 to October 1978. The lateness of our work was in part due to the contentiousness of debate itself and by what Yale’s group sought to accomplish and did accomplish in that one admission cycle. Our work on the Committee continued after the incoming class was to have been in place and after I had in fact graduated from the law school.³ Yale Rosenberg framed the debate, lessened the tension with his smile and laugh, and when necessary, cajoled his fellow professors. No matter how much disdain was demonstrated by the other professors on the Committee, Yale Rosenberg demonstrated the type of legal strength that was oft-times spoken of in the classrooms but not demonstrated very

2. There were two other students on the Committee, Beatrice Gonzalez and Elaine Carpenter, both of whom were representatives of the Student Bar Association.

3. Our coalition of like-minded conspirators was able to maintain the African American admissions number, increase the Hispanic numbers, and for the first time admit an incoming class that was over fifty percent female.

often. Over the years, I have taken his model and attempted to apply it to my everyday practice.

My second admission—I have always wondered why he elected to do what he did. Over the years, I questioned why he didn't take the easy path. Why didn't he just talk one way in private but say and do differently in public—others did.

As the years passed, we had intermittent contact. We have spoken to each other about societal issues, politics, legal ethics, and our enthusiasm and appreciation for the proper application of the rule of law. When others have railed about positions I have taken, Professor Atticus Finch has always provided me a steady understanding of the equal application of the law. When I didn't understand the full debate on an issue, Professor Finch would always return my calls, walked me patiently through the legal hurdles, with smile, with chuckle, with stutter.

My initial impression was right. Yale Rosenberg was someone whom I trusted from the first day we met and who repeatedly provided a real world basis for my trust. This doesn't mean that we agreed on every subject—that is not what friendships are about. What I am saying is rather simple—Yale Rosenberg honestly dealt with all that he touched.

Thank you, Irene for sharing him with us. Yale, thank you my friend—may you rest in peace.

*Katie Isaac**

In Tribute

Professor Rosenberg was a remarkable man. He also happened to be a terrific teacher. I had the good fortune to be one of over 5000 students he taught during his 23-year career at the Law Center.

The last time I saw Professor Rosenberg was a couple of years ago when he received the Enron Teaching Excellence Award. I was asked to introduce him by way of explaining what made him an excellent teacher. Before I could do that, I had to figure it out for myself. I think that a big part of what made him excellent was the way he treated us from the very beginning.

I first met Professor Rosenberg in a room full of 100 very edgy people. It was our first day of law school. We were expecting Kingsfield from *The Paper Chase*, barking questions and hurling insults. Instead, what we got was a really tall, thin, well-dressed

* J.D. University of Houston Law Center, 1999; B.B.A. University of Texas, 1991.

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man (his yarmulke always matched his tie). He began speaking to us in a friendly singsong voice, and he treated us with respect and kindness; we found ourselves at ease in the middle of this very stressful time. We were so grateful for this, and came to admire him and to seek his respect; so we listened a little closer and tried a little harder. We would quickly learn what many who had come before us already knew—that Professor Rosenberg was a true friend to all students lucky enough to land in his first-year section.

Professor Rosenberg was a gifted teacher; he loved teaching and he happened to excel at it. He had this magical way of making the light bulb go off in your head. He would give the class the material from all possible perspectives so that everyone could get it—giving just enough information so that we could make the leaps and we could draw the conclusions. He allowed us to have that wonderful feeling when you finally put something tough together. It is the best part of learning, and he had it mastered.

Of course, Professor Rosenberg was a very popular teacher. It seemed that everyone who had him for one class wanted him for another. His classes were always overflowing, and it wasn't the material—he taught a lot of “rules” classes like Civil Procedure and Professional Responsibility. And it wasn't because he was easy—he was very stingy with good grades. He was popular because students really admired him and enjoyed learning from him. He went out of his way to teach each and every student. Students found him to be very approachable—his door was always open. And many understood that he cared more about us as people than as law students.

Professor Rosenberg led an enviable life. He answered his calling to teach and used his gift to enrich 5000 lives by enriching 5000 minds. His life was enriched because he spent most of it with the other Professor Rosenberg, Irene; his colleague, his collaborator, his wife, his Bashert. It is nearly impossible to have a conversation about him without at least mentioning her. Once, when I was walking through the Law Center, I found him waiting outside of her classroom. He explained to me that he was “waiting for my girl, so I can carry her books.” They had such diverse styles and personalities, but they were perfect companions, a match made in heaven.

Above all, Professor Rosenberg was a really good man who easily won the affection and admiration of the people surrounding him. He was a gentle man and, of course, a scholar. He was devoted to his faith, he openly admired his wife, and he showed great respect for his students and their ideas. These things, coupled with a well-honed gift for teaching, are what made Professor Rosenberg an excellent teacher—of much more

than just the law—anyone who was really observant got a great lesson on how to live a full, enriching, and laudable life.

Yes, Professor Rosenberg was an excellent teacher, but he was an even better person. He was kindhearted and completely unpretentious. When I read his obituary in the paper, I wasn't surprised by his numerous academic accolades and devotion to the Jewish community. It did, however, surprise and tickle me to hear he was quite the handball champ. That is quite a picture.

He was the rarest of birds and he is deeply missed by so many. Shalom Professor Rosenberg—it was an honor to know you.

*Samuel J. Levine**

Remembering Yale Rosenberg

In remembering Yale Rosenberg, it seems appropriate to adopt Jewish tradition's emphasis on trying to recall the essence of an individual, captured in that person's teachings and character.¹ Like so many others, I have been and will continue to be deeply influenced and inspired by both of these aspects of Yale's life.

I first encountered Yale Rosenberg when, as a law student considering a career in legal academia, I had a particular interest in comparing and contrasting Jewish legal theory and American law. As I quickly learned, Yale's pioneering work in this field has set a high standard for those who have followed. Yale possessed a unique ability to combine accurate study of Jewish law on its own terms² with innovative applications to important issues in American legal thought.³ Be it a copy of an actual page of the Talmud printed in its original form⁴ or a hypothetical "meeting" between Judge Henry Friendly and the MaHaRal of Prague,⁵

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1. See, e.g., HERHEL SCHACHTER, NEFESH HARAV 1–3 (1994); SICHOTH MUSSAR 98–102 (1980).

2. See Irene Merker Rosenberg & Yale L. Rosenberg, *Lone Star Musings on "Eye for an Eye" and the Death Penalty*, 1998 UTAH L. REV. 505.

3. See, e.g., Irene Merker Rosenberg & Yale L. Rosenberg, *Advice From Hillel and Shamai on How to Read Cases: Of Specificity, Retroactivity and New Rules*, 31 HOUS. L. REV. 1371 (1995).

4. See Irene Merker Rosenberg & Yale L. Rosenberg, *In the Beginning: The Talmudic Rule Against Self Incrimination*, 63 N.Y.U. L. REV. 955, 1050 (1998) [hereinafter Rosenberg & Rosenberg, *In the Beginning*].

5. See Irene Merker Rosenberg & Yale L. Rosenberg, *Guilt: Henry Friendly Meets*

Yale's articles fill the pages of American law reviews with words and thoughts from the Jewish legal tradition. Not satisfied with merely uncovering similarities, Yale consistently demonstrated that a careful analysis of Jewish law can help us better understand and perhaps rethink some of the basic assumptions and practices prevalent in the American legal system.⁶

The influence of Yale's scholarship is manifest, in court opinions and law review articles referencing and relying on his work.⁷ In addition, his approach has had an even more pervasive—if less explicit—influence on those in the legal academy engaged in scholarship relating to Jewish law. From my own experience, I gratefully acknowledge that whenever I write in this field, even if my project does not involve substantive areas of law that Yale has discussed, I continue to owe him an intellectual debt for establishing a methodology to be admired and emulated.

In some ways, though, Yale's character was even more unique than his scholarship. My first impression of Yale was based solely on knowing that he was a former federal prosecutor in New York, a law professor, and author and co-author of intellectually rigorous law review articles. As I later observed through interacting with Yale in both personal and professional settings, far from the stereotypes sometimes associated with such accomplishments, Yale possessed a self-effacing humility, coupled with a generous concern for the well-being of others.

In particular, I treasure the shabbos I spent with Yale and Irene Rosenberg in Houston, and the kindness they extended to me. Having learned that I was scheduled to speak at a conference at St. Mary's Law School on a Friday morning, they called me in New York and insisted that I be their guest, so that I would not have to find a place to stay in San Antonio. Over the course of shabbos, whether in the synagogue, at the shabbos table (where I first ate "tofu chulent"), or in personal conversation, I was consistently struck by Yale's deep caring for others, his willingness to listen patiently to their thoughts, and his ability always to offer an appropriate and insightful response. Over the years I continued to appreciate and benefit from Yale's friendship and guidance, his words of encouragement, and his careful advice.

Perhaps more notably, Yale's character was as evident in the professional setting as in the personal setting. As I discovered a few

the MaHaRal of Prague, 90 MICH. L. REV. 604 (1991).

6. See, e.g., Rosenberg & Rosenberg, *In the Beginning*, *supra* note 4.

7. See, e.g., *Gomez v. Acevedo*, 106 F.3d 192, 197 n.5 (7th Cir. 1997) (citing Irene Merker Rosenberg & Yale L. Rosenberg, *Perhaps What Ye Say is Based Only on Conjecture*—*Circumstantial Evidence, Then and Now*, 31 Hous. L. Rev. 1371, 1417–19 (1995)).

years ago when I had the opportunity to appear on an AALS panel with Yale, he was clearly the same person at the podium as he was at his shabbos table. I felt that Yale stood out on the panel, not merely through his ideas, but more significantly through the humble and gentle way in which he delivered his remarks. After the program concluded, I was not surprised to learn that my wife, who had been in the audience, found Yale's the most interesting of all the presentations. We both remember Yale's sincere and engaging manner, which naturally and warmly invited the listeners to join him in thought and discussion.

It is perhaps fitting to conclude that, knowing Yale's character and his priorities, of all his accomplishments, I sense that most valuable to him was the merit he achieved teaching Torah to others through his work and his scholarship. Having incorporated Yale's work in my Jewish law courses and articles, I have witnessed his success in bringing these teachings to law students and legal scholars who have an interest in Jewish law but depend on works like Yale's to help make it accessible. Like much of his legacy, Yale has thus left me with yet one more facet of both his teachings and his character to be remembered, admired, inspired by, and emulated.

*Ellen Marrus**

A Tribute to Yale Rosenberg

During one's lifetime it is rare to have the opportunity to make the acquaintance of many truly good people. Having Yale Rosenberg as a colleague and a friend provided me with that privilege. Yale was unique. Not just because he was good, extremely intelligent, witty, gentle, compassionate, loyal, and strong, but his distinction was that he displayed these characteristics with remarkable consistency.

My first encounter with Yale was when I was interviewing for my current position at the University of Houston Law Center. The interview day at law schools is typically long and conversations tend to blur together. My interaction with Yale remained in my memory because as everyone else was trying to hurry me through the day, Yale slowed the pace. I was introduced to him as I was being rushed from one place to the next. His greeting was sincere, he wished me well through the

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day, and encouraged me to ask him any questions that I might have about the law school or the Houston community. His gentleness, concern for others, and loyalty to the school were immediately apparent. He was a bright spot in the day and continued to be after I came to the law center to teach.

Without Yale's presence at the law school, there will be a void which will be difficult to fill. Yale was our voice of reason. He understood the importance of giving others an opportunity to voice their opinions and had the patience to listen. Yale was able to balance all factors and develop a position that could bring warring factions together. He would encourage us all to work together for the good of the school and the legal community. This did not mean that Yale was not strong in his convictions. He was. This did not mean that Yale believed it was proper to bend on your principles. He never did. Yale did, however, know how to bring people together to accomplish the greater good. I may not have always agreed with him, but I did always know that what he had to say would be well thought out, intelligent, and with the best interests of the law school in mind.

I enjoyed discussing scholarship ideas with Yale because whether it was a small germ of a concept or something more developed, he always had something noteworthy to add. Even when Yale was ill and you thought he was dozing off, he heard the conversations around him. While I might be struggling to find a word to complete a thought, Yale would open his eyes and give the perfect word to complete the concept.

Yale lived a good, full life, full of learning, joy, and giving to the many people whose lives he touched. His colleagues at the Law Center and in the legal academic community will remember his work and his legacy to the legal community through his scholarship and teachings. His students will be better lawyers, not just for the legal concepts that he taught, but for the ethics and the ability to think like a lawyer that he bestowed upon them. But Yale's reach goes beyond the legal community. He will be remembered and missed by many in the Jewish community and by his many friends and family. Most of all he is missed by his soul mate, his wife, Irene Rosenberg. Although those of us who knew Yale will miss him, there is also sorrow for those who never got to know him. My six-year-old granddaughter, Rifqa, put it well when she said, "It is too bad that everyone does not know Mr. Yale. We need to do something to make sure that everyone knows how good, and kind, and smart he is."

*Laura Oren**

Professor Yale L. Rosenberg, ha Moreh shel li

Before he was a good friend, before he was a colleague at the University of Houston Law Center, Yale Rosenberg was my teacher. I entered law school in 1977, first encountering Yale as my professor of Federal Civil Procedure. So, he was my teacher, or, in Hebrew, *ha Moreh shel li*. Now, twenty-five years later, after watching Yale end his days with the same integrity that he lived them, Yale still is my teacher.

I have personal memories to relate from my very first year of law school. In Civil Procedure, a class that combines some very sophisticated constitutional law with some very boring rules, Professor Rosenberg offered a kindness to first-year students: he gave us a “practice midterm.” Law school is graded on a curve and can be very competitive. Professor Rosenberg, however, set a different tone. He was so eminently fair and his explanations so gracefully clear that if you listened you could still the rising sense of panic. Without reducing complexities to oversimplification, he had a way of gently setting you on the right track. I myself still teach jurisdictional issues in reliance on the foundations he laid, even though there has been considerable change in the law in the intervening years.

Apparently, I am not alone in my respect and admiration for Yale Rosenberg, the teacher. Just recently, his teaching garnered recognition both at the Law Center level and University wide. In 1998, the Student Bar Association named him Professor of the Year. In 2000, he received the University of Houston Teaching Excellence Award. At the ceremony for that award, Yale’s impish sense of humor shone through the serious talk about teaching and learning. When he stood up to accept his award with his usual eloquence, he could not resist teasing the distinguished assembly that, although he appreciated the honor, he also surely enjoyed the nice check that came with it!

The comments of the latest group of students to benefit from Professor Rosenberg’s Civil Procedure course reveal the secrets of his “effective” and “engaging” style. You could call Yale’s teaching method “modified Socratic.” “Socratic,” in that he did call on people and, as one student said, “helped [them] to think about the material rather than just giving out answers.” Modified, oh modified by so many wonderful qualities, by his “humor,” his “patience,” his

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“approachability,” “the smile on [his] face.” One student ended his statement by saying “you are a good decent man.” Another called him a “Great Professor in a tough class,” while still another summarized as follows: “put it simply, Professor Yale L. Rosenberg is an outstanding teacher whose love for the material and concern for his students are second-to-none.” Perhaps my favorite comment, however, reminds me of something my son would say about someone he admired: “Yale is the man.”

The second way that Yale Rosenberg was a *Moreh*, a teacher of distinction, was in the scholarly career that he pursued, which led to his appointment as A. A. White Professor of Law at the University of Houston Law Center in 1996. In all of his various areas of scholarship, Yale Rosenberg was a teacher in the truest sense of the word. He was one of the nation’s leading experts in the law of federal habeas corpus. Habeas review is the legal device that permits federal courts to free prisoners who have been incarcerated in violation of the Constitution. Over the last fifteen years, Professor Rosenberg has been one of the most vocal and persistent critics of the trend of curtailing the availability of habeas relief. And following the Supreme Court’s recent decisions in the area, Yale pronounced the writ of habeas corpus dead, in an article entitled *Kaddish for Habeas Corpus*. He was a legal scholar of uncommon breadth, writing with equal facility on juvenile law and criminal law. His preeminence also has been recognized in the field of Jewish law, to which he brought an innovative comparative point of view.

Yale Rosenberg not only wrote well, but he wrote for justice. He stood up for the wrongfully incarcerated denied their federal habeas relief; he stood up for the accused subjected to coercive interrogation; he stood up for the convicted facing the threat of a death penalty rationalized by the cry of “an eye for an eye” and a faulty understanding of biblical law.

The third way that I learned from Yale Rosenberg was from the model that he provided for what a good colleague should be. Always rational, always civil, but not afraid to disagree, Yale was often called upon to head difficult committees where his diplomatic skills and patience made a huge difference. Even if I can never live up to the model Yale provided, I will always bear it in mind as an aspiration.

The last way in which Yale was my teacher is the hardest to express. As I watched Yale go through the crazy ups and downs of his disease, I learned something about how a real *mensch*, a true gentleman, lives, and dies, in this world. Even close to the end, when he appeared to be dozing, he roused himself to add the perfect word to an article under discussion by his bedside. He

took pains to reassure his six-year-old friend Rifqa that she could come in the room because there was nothing to fear from the machines that surrounded him, and he answered her curious questions about the apparatus. The love and loyalty he showed Irene was not surprising to those who knew them. His gentleness, however, was a little misleading, as he was a true fighter to the end. Yale's decency and morality were the real thing. On a deeply personal level he cared about the families he knew in his community but also about the outcasts of society. I cherish the lessons taught by *ha Moreh shel li*.

*Abraham D. Sofaer**

Yale Rosenberg

I met Yale Rosenberg when I visited NYU Law School in 1961. He was a freshman, and a Root-Tilden Scholar from Texas. I asked him if he liked it there. He said he did, and that professors like Edmund Cahn, Dan Collins, Norman Dorsen, and Norman Redlich made NYU an exciting place. When I joined him at NYU the next year, we quickly got to know each other, in part because of special Root-Tilden seminars, and in part through the law review.

My law review experience was amazing. Douglas Liebhafsky was editor-in-chief, and he assigned a brilliant and eccentric lady named Irene Merker to edit my student note. The Supreme Court had issued two important opinions that radically expanded access to habeas corpus review for state prisoners. In the process of trying to understand the opinions it became clear that I could perform a service by explaining them. Irene liked the idea, so I got started. Soon, I realized that Irene was not just brilliant; she was generous and passionate as well. She helped me fashion a complex set of ideas into a single theme that explained what the Court seemed to be attempting to do. The note got longer as it got better; the law review got impatient. Irene insisted on getting as close to perfection as we were able. Doug needed copy.

* Senior Fellow and George P. Shultz Distinguished Scholar, The Hoover Institute, Stanford University; Professor of Law. The Honorable Abraham D. Sofaer has had a distinguished career as prosecutor, legal educator, federal judge, government official, and attorney in private practice. From 1985 to 1990, Mr. Sofaer served as Legal Adviser to the United States Department of State. In 1990, he was named the George P. Shultz Distinguished Scholar and Senior Fellow at the Hoover Institute. He is considered a leading scholar in the area of the war powers. Mr. Sofaer graduated from Yeshiva College and the NYU School of Law. He served as Law Clerk for Judge J. Skelly Wright, United States Court of Appeals for the District of Columbia Circuit, and Justice William J. Brennan, Jr., United States Supreme Court.

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Into this rather tense situation came the Note Editor, Yale Rosenberg. He was charming, clever, helpful, but very quickly aware that the note would be finished when Irene said it was, and no sooner. We worked night and day. Yale insisted we finish. Irene firmly told him we were doing our best. It was the only time I ever saw Yale get flustered. At one point he vented his frustration, shouting "Irene!" and walking out of the room. This worried Irene, but only because she did not want my chances for promotion to be hurt. My immediate reaction was that Yale must have fallen in love. His gentle manner had, for the first time in my experience, been disrupted. And he so clearly had come to admire and respect the lovely and passionate woman that was soon to become his wife. I told Irene then and there that Yale was in love with her. She burst out laughing. But it was a nervous laugh, and I sensed something big was in the making: as it turned out, a glorious partnership in life, love, and scholarship.

Yale and I were good friends, and we often talked about law, justice, religion, and what to make of our lives. It was a time of ferment in legal education and ethics. As Root-Tilden Scholars, we were committed to engage in public service. Lawyers had always worked in the public sector, but the idea of encouraging such work was taking hold at NYU and elsewhere. The Civil Rights Movement was in full swing, with marches, demonstrations, and desegregation. President John Kennedy was killed, and the law review did a special issue on the Warren Commission's Report. The Vietnam War became increasingly unpopular. Bob Dylan was singing his songs of protest in Greenwich Village cafes.

Yale had strong views on all these issues. But he never expressed them with bitterness, anger, or frustration. He knew what was right, not just intellectually, but instinctively. We were impressed with Edmund Cahn's search for evidence that could prove the validity of basic human values. The World War and the Holocaust, racism and Vietnam, were our moral inheritance. They triggered a search for meaning that continues. Both Yale and I were convinced that Cahn was right: something inside us, something beyond what we are taught, pushes us toward certain outcomes or preferences in particular situations. It had become impossible to speak of "justice" as a concept that can be comprehensively defined. But Cahn's "Sense of Injustice," though limited, seemed incontrovertible, and gave us comfort. It still does.

Over the years, I had the privilege of being with Yale and Irene at various important points in our lives. Throughout the forty years since we met, I have felt a close bond to them and followed their work and their writings with great admiration.

Their work, based on religious insights and rules, is a deliberate search for universal values and understandings.

This understates, though, what Yale has meant to me. The same Sense of Injustice that gives me confidence in the existence of natural law has a human counterpart. Some people I have known seem aware in the most natural way of what is unjust. They glow with a goodness that isn't the slightest bit arrogant or self-satisfied. If God is present in the world, it is in the faith, joy, and love these individuals generate by their very existence.

Yale was such a person. The very thought of him smiling, his integrity, his gentle and formidable intelligence, conveyed the same sense of meaning that we both found in the fact that people are instinctively offended by injustice. His very existence gave me faith in a world with little evidence of inherent goodness. What a privilege and comfort to have known him.

*Bentzion S. Turin**

Professor Yale Rosenberg: A Student Remembers

In traditional Jewish thought, the study of *Torah*, Jewish law, is viewed as the primary purpose of creation.¹ And the study of *Torah* for its own sake, that is *Lishma*, is considered the most worthy endeavor of all.² Yale Rosenberg studied *Torah Lishma* and shared his knowledge with thousands of students and colleagues throughout his illustrious career.

Consummate Scholar and Accomplished Author

The Talmud teaches that one who studies *Torah Lishma* will reap great rewards.³ He will be clothed with humility, will gain the wisdom to give sage counsel and will be crowned with kingship.⁴ The Talmud further promises that such an individual will uncover the "secrets" of *Torah* and be transformed into an

* J.D. University of Houston Law Center, 2000; Beth Medrash Govoha, MRTS, Ordination, 1992; Ner Israel Rabbinical College, BTL, 1990.

1. See GENESIS RABBAH, § 1, ch. 4, at 8a (Vilna Edition). "Rabbi Banai taught 'the world and its inhabitants were only created in the merit of Torah.'" ADIN STEINSALTZ, THE THIRTEEN PETALLED ROSE 89 (1980) ("The relation between Torah and the world is thus the relation between idea and actualization, between vision and fulfillment. So that the intellectual study of Torah . . . [is] a form of identification with . . . what may be called God's dream of the existence of the world.")

2. See MISHNA, PEAH, ch. 1 (1988).

3. *Id.* at Avot, Chapter 6.

4. *Id.*

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effusive spring of intellectual innovation and a river that does not stop flowing with wisdom.⁵

Yale Rosenberg embodied this vision. His teachings, actions, and manners served as a living example to countless students. Although he has passed on, the beauty and majesty of his life lives on in our hearts and memories. Beyond his classroom pedagogy, he taught through his exemplary personal character and humility. His acts of generosity, friendship, and kindness continue to inspire his students, colleagues, and friends. We were all warmed by his love. He loved each and every one of us and we all felt that love. He loved scholarship and that love was contagious.

Yale was a consummate scholar and an accomplished author. He was an effusive spring, and a river that did not stop. Like a spring, his mind was constantly bubbling with ideas, insights, and questions; and like a river, he never seemed to tire. My fondest memories of Yale go back to the time when we first began to study Jewish law together. We used to meet on Friday mornings. When I arrived at his home, Yale would be sitting at the kitchen table already at work organizing the materials that we were scheduled to study that morning. Studying with Yale was intense and delightful. Yale was sharp, incisive, and funny. He would quickly slice to the core of the densest of topics. He was tireless. Even after we had finished our scheduled session, he would continue working, reviewing the material and planning the next avenue of inquiry.

Yale published numerous articles during his career. In addition to his articles on Jewish law, he also wrote about criminal procedure, federal jurisdiction, and other topics. His writing is bright, succinct, and approachable. Yale was a meticulous and organized author. He left no stone unturned in his analyses. He would slog through long textual footnotes again and again until they were perfect. This devotion to perfection was also a reflection of his great humility. Many accomplished authors leave clean-up work for law review editors. Not Yale; when an article left his hand it was a finished product. And even after publication, Yale would continue to enjoy discussing the substantive issues and exploring new avenues of inquiry. As a result of his ongoing involvement in his scholarship, he retained a sharp clarity in all of his areas of study.

5. *Id.*

Yale's Learning Was Organized in His Hand

The Talmud records that Rabbi Joseph became deathly ill and miraculously recovered.⁶ Upon his recovery, he recounted his experiences. He told that he had overheard the heavenly hosts saying, "Praised is the one who comes here, [that is to the world to come] with his learning [organized] in his hand."⁷

Yale has moved on to the heavenly academy,⁸ and he has not gone empty-handed. He went with his scholarship organized in his hand, with a portfolio distinguished by its remarkable comprehensiveness, clarity, and depth.

Yale's Contributions to Jewish Law Scholarship

Yale's Jewish law scholarship has been most influential on two fronts. His articles open up in-depth Jewish law scholarship to those who are not fluent in Hebrew. Additionally, through his comparative studies, he unveils new understandings of American and Jewish legal philosophy.

There is an age-old debate in the Talmud regarding the relative merits of two distinct styles of scholarship. The rabbis ask, "Who is better, *Sinai*, the repository of all information; or *Oker Harim*, the scholar who uproots mountains with his piercing analyses."⁹

During the past two decades there has been an explosion in English language Jewish law scholarship.¹⁰ Much of that scholarship has been in the realm of *Sinai*, that is, scholarship focused on providing basic explanation and interpretation of large volumes of Jewish law materials. Many authors have focused on translating and annotating existing works, such as Rabbi Adin Steinsaltz's monumental translation of the Talmud,¹¹ but fewer have written new, in-depth works.

6. See TALMUD BAVLI, TRACTATE PESACHIM 50a (2000).

7. *Id.* Rabbi Joseph also reported that he "saw an upside down world—those that are not respected in this world are afforded great respect in the next." Although not the focus of my comments here, Yale's concern for the downtrodden demonstrated that he saw the "upside down" world mentioned in the Talmud.

8. The phrase the "heavenly academy" is often used in rabbinic literature. See, e.g., Kol Nidrei prayer recited on Yom Kippur. See MACHZOR ZICHRON YOSEF, THE COMPLETE ARTSCROLL MACHZOR (1986).

9. TALMUD BAVLI, TRACTATE BERACHOT 64a (2000).

10. See American Academy for Jewish Research, at http://www.library.upenn.edu/cjs_AAJR/mission.html (last visited Nov. 16, 2002); see also Book News from ArtScroll.com (providing those without a complete understanding of Hebrew or Aramaic with the ability to read authentic Torah literature), at [Artwww.artscroll.com/Spec_FEB01.htm](http://www.artscroll.com/Spec_FEB01.htm) (last visited Nov. 16, 2002).

11. ADIN STEINSALTZ, THE TALMUD: THE STEINSALTZ EDITION (Israel B. Berman ed.

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Yale Rosenberg's scholarship was of the *Oker Harim* sort. Yale had the ability to focus on discrete areas of the law and to penetrate to their essential cores. Yale had the patience, determination, grit, and perseverance to plumb the depths of the most difficult problems, and to clearly convey his understandings through beautiful poetic prose.

Yale blazed new paths in the philosophical realm as well. Many who study traditional Jewish law sources believe that traditional Judaism advocates and supports a socially conservative political philosophy.¹² Yale, however, demonstrated that Jewish legal philosophy contains many elements that more closely align with a more liberal political perspective.¹³

Yale – we miss you terribly. We thank you for opening up the depths of the Talmud and the breadth of Jewish philosophy to so many people. We love you and cherish our memories of you. As we wait for the time the prophet spoke of—when g-d will wipe away all tears and bring about the final redemption—we will study your works and hold your memory dear in our hearts.

*Larry Yackle**

A Note for Yale Rosenberg

I am privileged to add a few lines to this celebration of Yale Rosenberg's life and work. The occasion is bittersweet. All of us feel an appalling personal loss. Loss of the man and loss of the help and guidance he would have given us in the troubling days ahead. Things are going to be harder without him. Then again, we have Yale's career as a model for the future. We can make something of that.

I want to say something about Yale's wonderful contributions to the body of legal scholarship on a topic dear to him, to Irene, and to me: the authority of Article III courts to entertain petitions for the writ of habeas corpus from convicts challenging criminal convictions.

Some years ago, I picked up a collection of articles offering advice to beginning law teachers. I must have had a lot of time on my hands that morning, because I glanced through the lead article

& trans., 1989).

12. See Irene Merker Rosenberg & Yale L. Rosenberg, *Lone Star Liberal Musings on "Eye for Eye" and the Death Penalty*, 1998 UTAH L. REV. 505, 508 n.11, 540–41.

13. See *id.*

* Professor of Law, Boston University. LL.M. Harvard Law School, 1974; J.D. University of Kansas School of Law, 1973; A.B. University of Kansas, 1968.

purporting to tell young law teachers how to choose topics for their first articles. I found the advice perfectly sound. In a nutshell, the idea was that a topic should be conceptual enough to be intellectually challenging, but still practical enough to justify a large measure of case analysis and doctrine-crunching—the stuff of a long, dry, heavily-footnoted, traditional “tenure piece.” I recall thinking that if young teachers took that advice, they would be well served. Then, as I was about to put the book aside, I noticed that the symposium also included a short piece by a good friend, Avi Soifer. I flipped back to that article and found an entirely different take on the topic. Avi didn’t give a damn about traditional tenure pieces. He told young teachers to write about something that mattered to them, something they cared about. Why the hell else were they in the business of writing at all?

Yale Rosenberg wrote about habeas corpus. He didn’t pick that topic because it provided an opportunity, as good as any other, for demonstrating his considerable analytical skills.¹ He picked habeas corpus because it *mattered* to him that human beings deprived of their liberties should have access to independent federal courts in order to press claims that their convictions were obtained in violation of the Bill of Rights. The writ of habeas corpus sits astride the rough boundary between rights and procedural vehicles for enforcing rights. Zechariah Chafee put it bluntly: Habeas is the most important *human* right in the Constitution.² But for this remedial idea, we might never have developed the constitutional guarantees we have come to recognize and value.

Yale wrote about habeas with great sophistication, prodigious intellectual firepower, penetrating insight, and, above all, inspiring personal passion. His articles were closely argued, richly detailed, and fiercely honest. Anyone who wanted to know something about habeas corpus (not just to get the flavor of the thing but actually to *know* something) could read Yale’s work with profit and pleasure. I studied those articles as perfect illustrations of the way to do academic work of genuine worth in the world.

I recall in particular the wonderful piece that Yale wrote with Irene on the dangers of limiting habeas corpus to prisoners whose factual guilt is in question.³ In that piece, Yale and Irene

1. This said, it must also be noted that one of Yale’s early pieces on habeas counts in anybody’s book as a thoroughgoing tenure piece in the traditional form. See Yale L. Rosenberg, *Jettisoning Fay v. Noia: Procedural Defaults by Reasonably Incompetent Counsel*, 62 MINN. L. REV. 341 (1978).

2. Zecharia Chafee, Jr., *The Most Important Human Right in the Constitution*, 32 B.U. L. REV. 143 (1952).

3. Irene Merker Rosenberg & Yale L. Rosenberg, *Guilt: Henry Friendly Meets the*

took issue with Judge Friendly, who had suggested that factual guilt should be the primary focus.⁴ They insisted, by contrast, that the point of courts is to ensure that defendants retain the presumption of innocence unless they are found *legally* guilty—unless, this is to say, they are proved to be guilty according to prescribed procedures, scrupulously enforced. Their point was not unconventional (thank goodness), but the way they made it surely was. I have never forgotten the lesson.

Yale and Irene brought Jewish law to bear. They introduced me to the MaHaRaL, the sixteenth century rabbi who offered two explanations for the ancient rule that a court could not find a defendant guilty without retiring for the night. The first explanation was straightforward: frail human minds needed a night's sleep to digest the evidence and arrive at a reliable result. The second was non-utilitarian: human judges were duty-bound to consider the justice of a case apart from the evidence and to determine whether the prisoner should be set free despite factual guilt. Yale and Irene drew an analogy to the values associated with *Miranda* warnings and the Fourth Amendment exclusionary rule—values that they would have federal courts vindicate in habeas corpus cases.

My favorite article is Yale's moving lament of the Court's intellectually dishonest *Teague* doctrine.⁵ Some readers will be aware that in *Teague*, the Court announced that federal habeas courts would in the future entertain claims based on "new rules" of law only in extremely narrow circumstances. When the *Teague* decision was initially handed down, it seemed unremarkable. The Court had always hesitated to enforce breaks from precedent retroactively. Yet as Yale pointed out, *Teague* and its progeny treated virtually every claim as "new," and thus foreclosed in federal habeas proceedings. In effect, the general ban on "new rules" was a general ban on federal court enforcement of federal rights. The demise of federal enforcement, in turn, threatened rights themselves. Yale saw what was afoot and nailed it:

The *Teague* rule effectively capsulizes the popular sentiment that the accused in a criminal case is entitled to freedom only if he is innocent and has had the hell beaten out of him. What really may be at the heart of this revolution in habeas corpus jurisprudence is an abiding

MaHaRal of Prague, 90 MICH. L. REV. 604 (1991).

4. Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970).

5. Yale L. Rosenberg, *Kaddish for Federal Habeas Corpus*, 59 GEO. WASH. L. REV. 362 (1991).

dissatisfaction with substantive constitutional safeguards as well as remedies for their vindication.⁶

That kind of candor is rare in legal scholarship generally. It was common in what Yale put on paper. The reason was that he cared and cared so very much. He wouldn't concede that habeas was dead in *Teague's* wake, and I dare say he wouldn't concede it today. Nor should anyone else. Another old friend, Milner Ball, once explained to me the difference between two quite different concepts: optimism and hope. Optimism, he said, is only a way of looking at the facts. But hope? Ah, hope we have in spite of the facts. Yale Rosenberg understood that.

*Irene Merker Rosenberg**

Co-authoring Rosenberg Style

In other disciplines, particularly the sciences and social sciences, co-authorship is the norm. Indeed, there are often five or six authors listed, some of whom I am told, have little to do with the project. There are also conventions as to who really did the work. In some disciplines it is the first named author, whereas in others the last named person is the workhorse of the team effort. In law, however, collaboration for law review articles (as opposed to casebooks) is often full of pitfalls, and therefore not very common. Non-hierarchical co-authorship is even rarer. The problem, they say, is one of attribution.

When Yale and I started teaching almost thirty years ago, we decided to try co-authorship. We had each written separately in our other legal jobs, but law review articles were something different. So, naively oblivious to the attribution question, we co-authored two articles that placed very well. We were delighted. Some colleagues, however, were less than enthusiastic. They were pleased with the placements, but the attribution bugaboo won. They could not tell who had written the article. We told them, we did. How, they asked? Did one of you write one part and the other a different section. No. We did it together. As a result, it was difficult for either of us to get credit for the pieces. Presumably, they thought either that one of us was writing the whole article and letting the other freeloader, ("they're married you know"), or that Mickey Mouse was the author. Not too subtly, we

6. *Id.* at 376.

* Royce R. Till Professor of Law, University of Houston; LL.B. New York University School of Law, 1964; B.A. College of the City of New York, 1961.

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were advised to write separately if we wanted to get tenure. By this time, we were a little more savvy. Each of us wrote solo articles which were well received, including Yale's important pieces on habeas corpus. Eventually we received tenure. The problem was, we missed writing together. Tenure, the great liberator, allowed us to go back to collaboration.

Over the years we had become more observant Jews and spent time learning Talmud. We went to Israel and studied Jewish law at (separate) yeshivas. During the course of our studies, we realized the way Jewish criminal law and its American counterpart differed. Out of that realization came a string of co-authored comparative law articles, which, we thought, represented our best work.

This collaboration was much richer than our earlier efforts. We were more experienced writers, and we had learned how to work together more intensely and productively. Initially we had tried a system whereby we each wrote separate sections and then cross-edited. It did not work for us. Our styles were very different and no amount of editing could produce a unified piece. Not only were our writing styles different (Yale was by far the better writer), so were we. I was a fast talking hyper New Yorker who would go off on tangents, and who thought acerbic flagellation of the courts was the way to make a point. Yale was a subtle, gentle, highly organized, slow talking, slow moving, Southern gent. My idea of writing was to get something down on paper, even if it was gibberish, and go from there. A blank page was an enemy to be conquered as quickly as possible. Yale wanted to cogitate and write perfect sentences, which he did, even if it was only one a day. We talked (actually argued) about the problem, and then because we loved each other, and because Yale was the essence of goodness, we compromised. In the end, however, I think he sped up more than I slowed down, and he came to enjoy our new pace, slower than mine and faster than his. If one day I speeded up, Yale would get up early the next morning and in solitude go over what we had written the day before to make sure it was good, and to prepare himself for the day's collaborative efforts, with a view towards slowing me down.

In addition to our different personalities and writing styles, we each taught in different areas of the law. Yale taught Civil Procedure, Administrative Law, Federal Jurisdiction, Jewish Law, and Professional Responsibility. I taught the sexy subjects—Criminal Law, Criminal Procedure, Constitutional Law, Juvenile Justice, and writing seminars. These appeared to be widely disparate fields but, as the cliché says, they were really part of the seamless web of law. Our varied expertises

contributed to a more complex understanding of the issues with which we were grappling. Yale, for example, saw criminal law and procedure issues mainly through the more abstract prism of federal habeas corpus, whereas I, who had practical experience in these areas, wrestled with the diminution of constitutional protections and the effects on our freedoms.

All our differences became our strengths, and allowed us to explore issues that probably neither would have done alone. We complemented each other in a unique way that made it appear as if the writing was done by a third party—not Mickey Mouse, but IreneYale or YaleIrene.

It is hard to describe the actual process. Some days Yale would have the pencil and I spoke, and some days I kept the pencil and he spoke. Some days we each had a pencil and we both spoke and wrote. One would start a sentence and the other would finish it. We would talk and write, and write and talk, back and forth, and then edit together. It was impossible to say who wrote what, or whose idea prevailed. It was a complete fusion; our collaborative articles are unlike our separately written pieces.

Our writing allowed us to share another kind of intimacy—unfettered exploration of our intellectual selves, which generated incomparable excitement and unbridled joy. I can recapture some essence of our intellectual intimacy when I revisit our articles. But, of course, it cannot be replicated. For this gift of intellectual union, I thank you, my irreplaceable Yale. *Ani dodi v'dodi li*. I am my beloved's and my beloved is mine. Shalom, Yoel.