
TRIBUTE

OPTIMISM V. HOPE: LARRY YACKLE, IN FAIRNESS

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Hope is definitely not the same thing as optimism. It is not the conviction that something will turn out well, but the certainty that something makes sense, regardless of how it turns out.¹

In his 1993 Commencement Speech at Wesleyan University, Cornel West further emphasized the difference between hope and optimism. West described how—having at that point been black in America for thirty-nine years—he could not be an optimist because to be that required “sufficient evidence that would allow us to infer that if we keep doing what we’re doing, things will get better.”² By contrast, West called for “audacious hope.”³

I also recently heard Bryan Stevenson—remarkable lawyer, law professor, and author of the brilliant book, *Just Mercy*—make much the same point about the need for hopefulness even as he dug deeply into last summer’s troubling events in Charlottesville. And I remember that the late Milner Ball—who was a longtime friend to Larry and me, as well as to many others present for this talk, and who was an eccentric and wise law professor as well as a practicing

* Dean and Professor, William S. Richardson School of Law, University of Hawai‘i. This is a lightly edited, lightly footnoted version of my talk at the Symposium in Honor of Larry Yackle held at the Boston University School of Law on September 15, 2017. I am grateful to the colleagues, students, and staff members who made my thirteen years teaching at the Boston University School of Law so enjoyable and rewarding. Additionally I want to specifically thank two friends over many years: Pnina Lahav, who organized the memorable event in honor of Larry Yackle, and Fran Miller, who hosted me. Also, the current students who worked on this Essay for the Law Review, who were unusually gracious and helpful, as was their faculty advisor Jim Fleming.

¹ VÁCLAV HAVEL, *DISTURBING THE PEACE: A CONVERSATION WITH KAREL HVÍŽDĀLA* 181 (Paul Wilson trans., 1990).

² Cornel West, Keynote Speaker, Commencement Address at Wesleyan University (May 30, 1993), <http://www.humanity.org/voices/commencements/cornel-west-wesleyan-speech-1993> [<https://perma.cc/LEW2-LQQA>].

³ *Id.* West added, “William James said it so well in that grand and masterful essay of his of 1879 called ‘The Sentiment of Rationality,’ where he talked about faith being the courage to act when doubt is warranted. And that’s what I’m talking about.” *Id.*; see generally also WILLIAM JAMES, *The Sentiment of Rationality*, in *COLLECTED ESSAYS AND REVIEWS* 83 (1920); BARACK OBAMA, *THE AUDACITY OF HOPE* (2006).

Presbyterian minister—liked to point out that optimism tends to be overtaken by facts, while hopefulness is what can keep one going anyway.⁴

Decades ago, at the beginning of *Reclaiming the Federal Courts*, Professor Larry W. Yackle proclaimed that: “We know, as the world is beginning to understand, how fragile is our way of life and what dreadful chances we take with it when we trifle with its basic institutions.”⁵

Nonetheless, Larry went on to declare:

The time is coming when the reins of power will come again to progressive leaders. On that day, with the guidance of a willing chief executive and on the strength of the legislative power of Congress, we will have reform legislation to set right what has recently gone so terribly wrong.⁶

This is a shining example of hope if ever there were one. Sadly, the hopeful goal Larry articulated in 1994 seems even further away today. In other middle-range prognostication, however, Larry has proved impressively prescient.⁷

Nonetheless, Larry continues to push the habeas corpus rock uphill. He does so quietly, despite the fact that throughout the decades in which he has been writing and advocating on behalf of prisoners, federal judges and Congress have been creating more and more intricate barriers against issuing the Great Writ.⁸ When our son Raphi was around two years old, Marlene and I delighted in seeing

⁴ Milner also pointed out that no practicing Presbyterian could be an optimist in any event.

⁵ LARRY W. YACKLE, *RECLAIMING THE FEDERAL COURTS* 3 (1994). He also noted “[t]he time is coming when we Americans will have done with the ideological conservatism that slipped into power when the mainstream liberal consensus collapsed in the mid-1970s.” *Id.* We wait.

⁶ *Id.*

⁷ In one of his early articles, Larry forecast:

It now seems clear that broadcasting will in time displace newspapers entirely and, in turn, that broadcasting will be displaced by still more dramatic technological achievements. Already cable systems pose a serious threat to broadcast interests. Before very long, broadband programming, satellite communications unrestricted by the horizon, and fiber optics will eclipse over-the-air broadcasting by local stations. Two-way communications systems are already in use, promising to transform the making of public policy as we know it.

Larry W. Yackle, *Confessions of a Horizontalist: A Dialogue on the First Amendment*, 27 U. KAN. L. REV. 541, 542 (1979).

Characteristically, Larry then sounded a theme that constitutes a significant thread throughout his work: “Plainly, if these developments are left to be dealt with by Congress, the enormously significant free speech consequences will be swallowed up by the political and economic concerns of conglomerates that wish to fend off any technology they cannot dominate.” *Id.*

⁸ Larry’s remarkable outpouring of brief writing as well as massive scholarship about habeas corpus amounts to a kind of practical reverence. His article, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331 (1993), subtly illustrates this point. A hagioscope is the narrow opening that affords those in the transcript a view of the altar.

Larry and Jeanette often, and Raphi began to call Larry “Habeas Corpus.”⁹ Raphi had it right then, more than thirty years ago, and it is still accurate today: Larry really is Mr. Habeas Corpus.

So what keeps Larry going? His prolific scholarship—eight books, not counting supplements or teachers’ manuals, and fifty articles—attest to his tenacious focus. Yet how does Larry keep doing what many would call the Lord’s work on behalf of some of the most downtrodden among us? How can he, paradoxically, remain preternaturally calm and keep fighting the good fight exceptionally well, knowing all the while that he will keep losing time after time—even though he is the genuine master at the federal courts chessboard? Out of the myriad of possibilities, I will suggest three plausible factors.

First, I think we may find part of the answer within Larry’s brief eulogy for Allan Macurdy, our student, and later Larry’s colleague, at Boston University. Here is some of what Larry said: “I deeply respected Allan for thinking, and writing, and caring about things that genuinely *matter*. He was an intellectual. But he was not a bystander to the world at large. He wouldn’t be, he couldn’t be, a bystander.”¹⁰

Larry and I have talked of many things stretching even beyond the Red Sox, but I doubt that we ever discussed Rabbi Abraham Joshua Heschel’s work. Nonetheless, Larry does not need any guidance, religious or otherwise, to act steadily in pursuit of justice, perceiving that indifference to evil may be worse than evil itself.¹¹ Larry is constitutionally incapable, as it were, of being a bystander—though in a moment I will begin quibbling with Larry about constitutional capability in a different sense. Rather he is an outstanding example of a lawyer who is consistently something rare: an upstander.¹²

⁹ Appropriately, on the very day that we gathered to celebrate the somewhat shy but definitely not retiring Professor Yackle, Raphi successfully defended his Ph.D. thesis at the Federal University of Rio de Janeiro. Raphi’s work focuses on the displacement of lower class people and their memories by gentrification and government policy. He did all this in Portuguese, and so we can further credit Jeanette’s Peace Corps experience in Brazil and her exemplary linguistic skills for helping to shape this young lad. Over many decades, Larry and Jeanette also have run a warmly welcoming Home for Wayward Soifers and Booths—as international as Jeanette’s incomparable cherry pie.

¹⁰ Larry Yackle, *Reflections on Allan Macurdy*, 27 B.U. INT’L L.J. vii, at viii (2009).

¹¹ Heschel proclaimed, for example, “morally speaking there is no limit to the concern one must feel for the suffering of human beings.” ABRAHAM JOSHUA HESCHEL, *The Reasons for My Involvement in the Peace Movement*, in MORAL GRANDEUR AND SPIRITUAL AUDACITY 224, 225 (Susannah Heschel ed., 1996). He also wrote “that indifference to evil is worse than evil itself” and “that in regard to cruelties committed in the name of a free society, some are guilty, while all are responsible.” *Id.* at 224-25.

¹² Martha Minow points out that “upstander” is increasingly accepted in the human rights context, apparently coined in its modern usage by Samantha Power. See Lincoln Caplan, *The “Upstander,”* HARV. MAG. (Feb. 27, 2017), <https://harvardmagazine.com/2017/02/harvard-law-dean-martha-minow-assessed> [<https://perma.cc/K7CE-RDUS>]

Larry is close to the vest generally, but another element of Larry's unflagging commitment may be discoverable in Larry's brief but uncharacteristically autobiographic description of how he began to represent federal prisoners at Leavenworth while he was still a law student. He described his initial trepidation and added: "Yet after frequent visits I became as hardened to the doors, the bars, and the rest of the prison environment as the others who came that way—the inmates, the families, the guards."¹³

Larry further acknowledged that few of the prisoners had any chance of winning and he suggested that they knew that as well as he did.

I was frankly confounded, then, by [the prisoners'] incorruptible conviction that if nobody else was still prepared to listen to their claims, the courts remained open. And not just any courts, but the federal courts—the courts ordained and established by Congress to exercise the federal judicial power. Those federal convicts at Leavenworth, and equally the inmates at the state penitentiary a few miles away, believed as they believed nothing else that the federal courts *were* still listening.¹⁴

Larry remains an astute critic of the work of the federal courts, pointing out that "we should not confuse the familiar with the necessary."¹⁵ Yet the story of *Fay v. Noia*,¹⁶ for instance, "is also about even-handed treatment as a moral imperative."¹⁷

Finally, Larry is a seeker after truth. His quest is a marathon event, fueled by dry wit, clarity, and the willingness to concede opposing points. In matters large and small, this is his steady approach. He writes with striking confidence, for example, using his first-person narrative voice—and his dry sense of humor—to great effect as he directly addresses readers.¹⁸ And one of his unusual writing

¹³ YACKLE, *supra* note 5, at 212.

¹⁴ *Id.* at 212-13.

¹⁵ Larry Yackle, *The Story of Fay v. Noia: Another Case About Another Federalism*, in *FEDERAL COURTS STORIES* 191, 192 (Vicki C. Jackson & Judith Resnik eds., 2010).

¹⁶ 372 U.S. 391 (1963).

¹⁷ Yackle, *supra* note 15, at 193. Sadly, *Coleman v. Thompson*, 501 U.S. 722 (1991), overruled *Fay v. Noia*, 372 U.S. 391 (1963). *Noia* was handed down the same day as *Gideon v. Wainwright*, 372 U.S. 335 (1963), and Larry links the two decisions as important elements of the Warren Court legacy. See Yackle, *supra* note 15, at 211.

¹⁸ There were early indicators of Larry's self-confidence, as well as his analytic skill. His burst of scholarship within the first few years of his 1972 graduation from the University of Kansas School of Law was remarkable. In Larry W. Yackle, *Private Use of Public Facilities: A Comment on Gilmore v. City of Montgomery*, 10 WAKE FOREST L. REV. 659 (1974), for example, Larry took apart and then suggested how to improve and put back together the tangled issue of state action doctrine in the context of private racial discrimination. He concluded by informing the Supreme Court about its proper role:

Constitutional principles have ragged edges, and adjustments will always be necessary in borderline cases. On the other hand, the Court cannot fail to decide issues that fairly

quirks is to grant—and often thereby to defang—that there may be weighty counterarguments. Thus many Yackle sentences are sprinkled through with “to be sure” or “to be fair” or “in fairness” qualifiers. This is not only an effective way to write; it also reflects the subtle strength of being an absolutely first-rate lawyer.

And Attorney Yackle somehow, paradoxically, retains his deep faith in our federal courts. In this Larry is anything but understated. Here, for example, are his stirring words near the end of *Reclaiming the Federal Courts*:

The lesson I learned at Leavenworth is that federal courts are special. They are the most splendid institutions for the maintenance of governmental order and individual liberty that humankind has ever conceived. They work, you see. And they ensure that the rest of the framework we call constitutional democracy also works.¹⁹

This passionate belief helps to explain why Professor Yackle is so keyed up when federal courts law makes no sense at all. In *The Figure in the Carpet*, for example, Larry contrasted the many possible meanings of the carpet in the famous Henry James short story with how extensively the Supreme Court—and even more so Congress—have ripped up the Warren Court legacy, to the point of creating “a bewildering morass that defies explanation at any deep conceptual level. We can find no figure in this carpet.”²⁰ Indeed, Larry’s writing stands out for communicating complex ideas effectively, and for doing so in a down-to-earth manner that manages to bring readers along clearly and, almost always, convincingly as well.

Despite all the extreme examples of Byzantine twists and turns, Larry’s federal habeas corpus goal remains remarkably consistent, pithy, and direct: “Federal habeas corpus law should be traceable to the baseline idea that prisoners are generally entitled to litigate federal claims in federal court.”²¹ I fully agree with Mr. Habeas Corpus on this essential point, and much more. But long-lasting great friendship is also built on differences, including quibbles and even disagreements. I have at least one of each to suggest.

My main quibble involves wondering how far Professor Yackle will go in advancing his belief in the important work of judges. In *Regulatory Rights*, Larry offers a severe critique of rights discourse generally and he swears off arguments

are presented by docketed cases. Legitimate disputes must be resolved for the sake of litigants, present and future. The system depends for guidance upon principled decisions that are both certain and flexible enough to stand the test of time. This is the essential function of the Supreme Court.

Id. at 690.

¹⁹ YACKLE, *supra* note 5, at 213.

²⁰ 78 TEX. L. REV. 1731, 1731 (2000). Indeed, “[t]his is an intellectual disaster area. . . . But state judgments are worth protecting only if they meet a sufficient standard of acceptability—not, I should think, if they are close enough for government work.” *Id.* at 1756.

²¹ *Id.* at 1769.

grounded in constitutional text or original intent.²² I was honored to provide a blurb on the back cover of *Regulatory Rights*—a lot of good that did for sales—and I continue to think that Larry produced “the kind of book that comes along once or twice in a generation, as in the works of Alexander Bickel, Charles Black, and John Hart Ely.”²³ But, in the memorable words of Alan Feld during our long-running, low-stakes Boston poker game—generously hosted by Larry and Jeanette more often than their fair share—I now want to add: “Not so fast.”

I look forward to many more years to badger Larry about how much, within constitutional law, one ought to embrace somewhat more than his clean sweep of text and history. He summarizes his argument as follows: “I mean to argue that substantive federal constitutional rights draw their meaning exclusively from the great body of relevant Supreme Court decisions.”²⁴ The central theme of *Regulating Rights* is the essential, exclusive role of what Larry terms the “rational instrumentalism” of judges; indeed, he asserts that, in giving content to substantive individuals rights, “[n]othing else matters.”²⁵ I counter, however, that the text of the Constitution indeed has been very much abused,²⁶ yet that text still matters. In fact, its very abuse over the centuries underscores the text’s unfulfilled promise.

This is not an argument, to be sure, that we are bound by the text. Indeed, my claim about both text and its historical context is that while “the past has a vote . . . , it does not have a veto.”²⁷ This should be particularly important if one were actually to attend to the unfulfilled hope within the text of the Reconstruction Amendments, and the statutes based upon them. And I believe

²² See generally LARRY YACKLE, *REGULATORY RIGHTS: SUPREME COURT ACTIVISM, THE PUBLIC INTEREST, AND THE MAKING OF CONSTITUTIONAL LAW* (2007).

²³ *Id.* (dust jacket).

²⁴ *Id.* at 1-2.

²⁵ *Id.* at 2.

²⁶ There is no credible way, for example, to find that Justice Scalia’s beloved Takings Clause of the Fifth Amendment was incorporated and applied to the states through the Due Process Clause of the Fourteenth Amendment. The Fourteenth Amendment quoted other parts of the Fifth Amendment *haec verba*, and the omission of the Takings Clause language was hardly a slip of the pen. See generally Aviam Soifer, *Text-Mess: There is No Textual Basis for Application of the Takings Clause to the States*, 28 U. HAW. L. REV. 373 (2006).

Nor is the Second Amendment “naturally divided into two parts,” *Heller v. United States*, 554 U.S. 570, 577 (2008), no matter how much Justice Scalia’s majority opinion manipulates both its language and its history.

²⁷ This well-known paraphrase is often invoked to summarize the thinking of Rabbi Mordechai Kaplan, the founder of the Reconstructionism movement in Judaism, briefly discussed in Aviam Soifer, *The Spokesman Conundrum: “Is it Good for the Jews?”* 40 LAW & SOC. INQUIRY 1039, 1044 (2015).

there are additional intimations from the constitutional text, as well as some important insights to be drawn from history, underscoring this claim.²⁸

I do embrace Larry's point that the "equal" part of equal protection does not mean that everyone ought to be treated equally.²⁹ But I want to bring him along (slowly) to worrying with me about the hopeful aspects, as well as the knotty problems, if we were seriously to resuscitate the unrealized commitment to "protection" in the text of the Fourteenth Amendment. My ongoing argument is that the texts, historical context, and aspirations of the Reconstruction Amendments and civil rights statutes indicate—and even emphasize—affirmative guarantees of federal rights extending beyond formal equality.³⁰ After all, as Larry summarized, "[t]he Constitution is not an exclusively conservative constraining force, but primarily a positive empowering idea."³¹

To be fair—as Larry is wont to say—the "rational instrumentalism" proposed in *Regulatory Rights* is a helpful concept in itself, as is the book's learned and critical discussion of other leading constitutional law scholars' work and judicial decisions. The four overlapping background assumptions around which Larry organized *Regulatory Rights*, and which he claims are generally accepted, merit

²⁸ *Rosenberg v. United States*, 346 U.S. 273, 310 (1953) (Frankfurter, J., dissenting) (explaining, even after the Rosenbergs had been executed: "To be writing an opinion in a case affecting two lives after the curtain has been rung down upon them has the appearance of pathetic futility. But history also has its claims").

Frankfurter concluded—notwithstanding his own generally crabbed view of federal jurisdiction—with words that might appeal to a champion of broad federal habeas corpus review:

Only by sturdy self-examination and self-criticism can the necessary habits for detached and wise judgment be established and fortified so as to become effective when the judicial process is again subjected to stress and strain. . . . Perfection may not be demanded of law, but the capacity to counteract inevitable, though rare, frailties is the mark of a civilized legal mechanism.

Id.

²⁹ Larry sounded the theme that equal treatment does not mean identical treatment as early as his student piece for the University of Kansas Law Review. See generally Larry Yackle, Comment, *The Indigent's Right to a Transcript of Record*, 20 U. KAN. L. REV. 745 (1972). Within a year, Larry joined his professor, Keith Meyer, in publishing a massive article and handbook. See generally Keith G. Meyer & Larry W. Yackle, *Collateral Challenges to Criminal Convictions*, 21 U. KAN. L. REV. 259 (1973).

³⁰ My argument focuses on the Thirteenth Amendment, and on the statutes based upon it, as well as on the Fourteenth Amendment. See generally, e.g., Aviam Soifer, *Protecting Full and Equal Rights: The Floor and More*, in THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT 196 (Alexander Tsesis ed., 2010); Aviam Soifer, *Federal Protection, Paternalism, and the Virtually Forgotten Prohibition of Voluntary Peonage*, 112 COLUM. L. REV. 1607 (2012); Aviam Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. REV. 651 (1979).

³¹ YACKLE, *supra* note 22, at 5.

close attention.³² And though I go most of the way with Larry, I am afraid that we two are still in quite a small minority in rejecting the tight hold of textualism and originalism within constitutional law. We may have even less company in emphasizing what should be an inescapable origin story: the crucial role of government in establishing rights and the importance of government's vast regulatory authority. And we share the isolated view that the constitutional search for state action "is at best misleading and at worst naive."³³

Though I am with Larry again, I think few others would embrace his succinct, substantial point that: "For one thing, federalism (of any stripe) was never inevitable in this country. The early states were only the product of the way this part of the world was invaded."³⁴

And Larry surely was overly optimistic when he expressed doubt that there were still "fish left in those barrels [textualism and originalism] worth the shooting."³⁵ Those big fish seem to be flopping around still, and making a big splash at that.

Indeed, Larry's own meticulous digging into the context and lawyerly strategies behind old chestnuts such as *Ex parte Young*³⁶—who knew that *Young*'s famous "Noble Lie" had a start as a habeas corpus case?—and *Smith v. K.C. Title & Trust Co.*,³⁷ as well as the more recent yet now old chestnut, *Fay v. Noia*,³⁸ suggests that he may agree at least somewhat that contextual history and lawyerly strategy do matter in influencing, as well as in understanding, judicial decisions.

And a related cautionary note: as judges explore the connection of means and ends in the course of Yackleian rational instrumentalism, there is probably

³² *Id.* at 8 ("I organize the materials around four overlapping themes: the rejection of natural-rights theory, the concomitant recognition that government is largely responsible for the measure of freedom that individuals enjoy, the acceptance of governmental power to regulate private activities for the larger social good, and the abiding effort to distribute authority between the Supreme Court and more politically accountable institutions."). See also *id.* at 57, 125.

³³ Yackle, *supra* note 7, at 575. This article's dialogue format, as well as its innovative argument about First Amendment content regulation, is an early indicator of Larry's quiet yet consistent boldness.

³⁴ Larry Yackle, *A Friendly Amendment*, 95 B.U. L. REV. 641, 644 (2015).

³⁵ YACKLE, *supra* note 22, at 7.

³⁶ Larry Yackle, *Young Again*, 35 U. HAW. L. REV. 51 (2013) (describing, in what seems to have been lawsuit created by the parties, that remedy sought technically was to forestall criminal prosecution).

³⁷ Larry Yackle, *Federal Banks and Federal Jurisdiction in the Progressive Era: A Case Study of Smith v. K.C. Title & Trust Co.*, 62 U. KAN. L. REV. 255, 301-10 (2013) (explaining significance of federal right of action/cause of action in realm of federal common law development prior to *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938)).

³⁸ Yackle, *supra* note 15, at 191-93 (decrying Supreme Court's willingness to embrace procedural default rules in name of federalism at expense of federal rights).

something to be feared that is captured somewhat within an old cynical line, “if the ends don’t justify the means, what good are they?” Furthermore, as the character played by Jean Renoir stated in *The Rules of the Game*—Renoir’s great film on the cusp of World War II—“[t]he tragedy in life is that everyone has his reasons.”³⁹

As a final point, I feel obliged to mention one instance in which Larry is definitely, blatantly, and entirely wrong. Recall what he said about his early days at Leavenworth: “I became as hardened to the doors, the bars, and the rest of the prison environment as the others who came that way—the inmates, the families, the guards.”⁴⁰

Not so!

And we are much the better for it.

Would that we had even a few more people like Larry Yackle, willing and very able to make “good trouble, necessary trouble”⁴¹ on behalf of those who are among the most troubled in our midst. Long may Larry go on—giving us hope as he challenges startling inequality, allegedly free markets and federalism, purported efficiency, and additional false faiths. Larry Yackle tenaciously keeps on pushing against basic unfairness in the law.

³⁹ THE RULES OF THE GAME (John McGrath & Maureen Teitelbaum trans., 1970) (containing script of 1939 film of same name).

For an earlier variation regarding this sobering psychological theme, see JAMES, *supra* note 3, at 86 (“There is no more common sight than that of men’s mental worry about things incongruous with personal desire, and their thoughtless incurious acceptance of whatever happens to harmonise with their subjection ends.”).

⁴⁰ YACKLE, *supra* note 5, at 212.

⁴¹ Madina Toure, *In New York, Civil Rights Icon John Lewis Urges People to Get into ‘Necessary Trouble,’* OBSERVER (June 13, 2017, 6:00 AM), <http://observer.com/2017/06/john-lewis-civil-rights-georgia-racism-trump-anne-frank/> [<https://perma.cc/H6H8-3BYS>] (reporting Congressman John Lewis’s message to audience upon his receipt of award from Anne Frank Center for Mutual Respect).