



Stephen Kanter '71, his wife, Dory,
and the 1961 Chevy Bel Air

When a Car Was Not a “Car”

A Quintessentially Yale Theory of Legal Interpretation

BY STEPHEN KANTER '71

Photographs courtesy of the author

**Cars and America went together
like love and marriage in the twentieth century.
Lots of chrome and passion, but occasionally
the transmissions were not as smooth as advertised.**

By the 1960s, the bloom was already partly off the rose at General Motors, Ford, Chrysler, and with Ozzie and Harriet, too. These shifting sands surrounding cars and American culture played a prominent role in my time at Yale Law School (1968–1971), and car stories from that era shed light on the powerful role Yale played in advancing a theory of legal interpretation that empowers humans to use the force of law to ennoble rather than enslave.

But I am getting ahead of myself. Without a much more personal car story, I never would have attended Yale Law School in the first place. I was a math major in my senior year in 1967–1968 at MIT when it suddenly dawned on me that after college one had to make a choice about what to do. I metaphorically hit the wall. I loved most everything about college and life in Cambridge and Boston, and the relative paucity of math-major required courses—though those few that were required presented more than sufficient challenge—allowed a full social, cultural and athletic life. Yes, I definitely loved pure math, and was accepted at several math PhD programs, but intuitively I knew that I wanted to

do something more directly involving people and positive social change. For a time it seemed our government wanted to make the choice for me by trying to train me up and send me to Vietnam, but luckily that didn't happen.

In desperation and a bit of a panic, I went next door in Cambridge to Harvard and picked up a graduate bulletin. I knew surprisingly little about Harvard, but suspected if there was a graduate or professional field in existence they probably had a program. I went through the list of programs one by one, which served only to raise my panic level when I discovered that I had methodically crossed all listed graduate programs off as “not for me.” My analytical screen was obviously too fine-grained. I took a head-clearing walk before again reviewing Harvard's lengthy catalog. This time law survived among a still very small tentative list of possibilities. With no more than that, I took the LSAT and did fine, and applied to and visited two law schools: Harvard just up the street, and Yale 150 miles down the road in New Haven. I was admitted to both, and my visits persuaded me that if it was to be Yale, then law might well be for me. Relieved and increasingly excited, I received word from Yale of a much needed scholarship offer. My personal crisis was over, and if I could avoid Uncle Sam I would be happily enrolled in Yale Law School for fall semester 1968.

I then proceeded to read the dreaded small print, an occupational hazard and requirement for a lawyer that I must intuitively have known should begin a lifelong discipline. Horrors. It said that if you accepted a scholarship, you could not have a car. My poor beloved (and essential, I felt) 1961 Chevy Bel Air.



Stephen Kanter '71 is currently a professor at Lewis & Clark Law School, where he also served as dean from 1986 to 1994. The recipient of multiple Fulbright awards, he served on a three-member international panel that assisted Kazakhstan in writing a new constitution, and he is also the author of the children's book *The Bear and the Blackberry*.

I was crestfallen. I needed the scholarship to go to Yale. I had lots of friends, including a girlfriend, and a rich life in Boston. I was convinced I could not live in New Haven for three years without a car, or psychiatric help. I made one last mournful visit to New Haven to decline admissions and the scholarship. I went to the office of Associate Dean Jack Tate, known affectionately by many of us applying supplicants as the one-armed dean.

I am not really sure why I went to see Jack. The offer was clear; if you want a scholarship, no car. The law, I thought, is truly an ass. I explained to Jack who I was and why I was there. He welcomed me and situated me in a comfortable chair across from him, perhaps to slow down my leaving or escape once he had confirmed the bad news that it would have to be my scholarship or my Chevy. I told Jack how much I wanted to come to Yale, how honored I was to be accepted, and how grateful I was for the absolutely necessary scholarship support. He was modestly beaming but knew I was buttering him up though telling the absolute truth while doing so. Then I told him how regretful I was that I nonetheless would be turning down the offer, as I could not accept the terms. Jack did not cajole or even try to persuade; he simply asked, "Why?" I told him I had a car, explained that I did not think I could live in New Haven for three years of law school without car access to Boston or for the drive home to Cincinnati at winter break to see my mother who had passed the Bel Air on to me.

He paused for what seemed a long time as I finished. Perhaps his pause was a military interrogation technique to see if I would change my mind or spill more beans. I assumed erroneously that Jack had lost his arm in service to our country, and that my decision would have seemed youthfully soft and unreasonable to him. After leaving me in silence to stew in my own imaginative juices and contemplate for a minute, he leaned in and asked me to stay and answer one final question: "What kind of car do you have?"

What kind of car did I have? It was the hand-me-down 1961 plain-Jane white Chevrolet Bel Air with blue interior and its one luxury, power windows, that of course broke down quickly. My mom had bought it new in late 1960, the year after my Dad died. It had always, in today's vernacular, been a lemon, but we milked it along to more than 100,000 miles, a considerable feat. Still, it worked for me and I knew how to keep it alive: carry lots of motor oil and coolant and

water for regular pit stops to keep from further frying the engine, and use copious quantities of Alumaseal to shore up the breached radiator and head gasket, slowing if not stopping their innumerable leaks. I made an offer of proof of these automotive particulars. Jack took all of this in, gathered himself solemnly, leaned back in his chair, looking contemplative, then grinned broadly and broke into unrestrained laughter. Only then did he pronounce his judgment that altered my path and sent me on my way to Yale Law School after all: "That is not what we mean by a 'car'!"

With that single pithy sentence Dean Tate made it psychologically possible for me to attend Yale Law School, persuaded me that my intuition had indeed helped me select the right school, and taught me a most important lesson about the highest form of legal interpretation and reasoning.

Much proverbial ink has been spilled over the centuries debating the legitimacy and merits of various methods of legal interpretation and reasoning. The legal literature on this essential, foundational topic is highly complex and sophisticated, or sometimes sophistic, but the core of the debate can be reduced to its elemental simplicity without much if any loss.

One view is that the law must be firm, rigidly predictable, and unmalleably rule-bound. Adherents of this view are often described as originalists, strict constructionists, or

textualists, and they currently are surprisingly well represented on the Supreme Court and in the academy. There is little room for discretion, individualized justice, legal mercy, or creative judgment. Said adherents claim to be possessed of a uniquely coherent theory, applicable without insertion of personal or subjective values. They promise to serve as the essential guardians of order against the perceived clear and present dangers of chaos and arbitrariness. The cost is that such strict adherence to text or rules leads to manifest large and small injustices in the name of upholding the majesty and fixed permanence of the law. Herman Melville explores this cost well in his notable novella wherein Billy Budd must be hanged in order to uphold the abstraction of the law, though almost all aboard ship including the hanging captain recognize the pity and injustice of the sentence. I am

Only then did he pronounce his judgment that altered my path and sent me on my way to Yale Law School after all:

"That is not what we mean by a 'car'!"



The author and friends. (back, from left) Martin Frederic Evans '72, Frederick Middleton '71, Daniel Guttman '71, Ronna Beck '72, and Art Kaminsky '71. (front) David Hodgman '74, Daniel Cohen '71, Stephen Kanter '71, and unidentified person.

sure I am not alone in perceiving an inherent and depressing pessimism, and insecurity, from the proponents of this method of legal interpretation.

The competing view is that the law must be reasonably adaptable and should be seen as a tool to serve humanity and moral justice rather than as an abstract end in and of itself. Adherents of this second view refuse to measure the correctness of a legal proceeding by whether the procedures and substantive rules have been followed to the letter in their most narrow and strict sense. Instead, the measure is how well the underlying purposes of the law have been served and advanced, and whether justice has been achieved from both a procedural and substantive point of view. Adherents of this view are often referred to in the contrapositive as non-originalists, non-textualists, or open-textured interpretivists, or those who believe in an evolving or organic living Constitution. They believe in a purpose-driven method of legal interpretation, and that the law (to avoid being an ass too often) is informed by what Chief Justice Earl Warren

called "the evolving standards of decency that mark the progress of a maturing society." Dean Tate's exercise of judgment in my case, luminary Supreme Court Justice Benjamin Cardozo, and the deep humanist traditions of the Yale Law School are firmly in this camp.

The benefit of this second approach is individualized justice, appropriate tempering and mercy of the law's harsh extremities, adaptability, and the exercise of true judgment (in the Solomonic sense) by the law's practitioners and judges. Of course there are indeed risks of arbitrary individual value preferences, masked prejudice, unpredictability, and incoherence if discretion is exercised in an unprincipled or unduly undisciplined manner. But these risks are really no more absent in the so-called originalist or textualist camps—they are just less nakedly observable and paradoxically perhaps more dangerous there. Count me among the adherents of a purpose-based legal method of interpretation, that which I am calling the Yale model.

continued on page 93

When a Car was not a “Car”
Stephen Kanter ’71

continued from page 57

Of course any real system worth its salt has important strands of each of the methods of interpretation. Good lawyering, judging, and their sensible methods of law interpreting are neither purely mechanical nor purely free-floating in untethered discretion. To pretend that necessarily nuanced judgments are purely mechanical or easy, or that a particular call or interpretation is either definitely “correct” or “fallacious,” is a huge category mistake made by many adherents of the strict construction persuasion. The Yale method of legal interpretation is the antidote to this cribbed and dangerously narrow strand in our legal tradition. There are many judgment calls, and many others that go strictly by the book, but in our heavily legalistic culture the greater danger by far is in shortchanging the humanistic, purpose driven side of the law, or failing to take proper account of law’s artistic face as well as its scientific one.

In our one meeting in 1968, Dean Tate taught me this important lesson that I have never forgotten and have used with effect throughout my career and life. This fundamental lesson together with its many valuable cousins were reinforced, amplified and subjected to the crucible of rigorous intellectual testing during my three succeeding years at the law school.

During first year at Yale Law School in 1968–1969, many of my classmates and I were fortunate to taste Torts from the incomparable Guido Calabresi, one of Yale’s all-time treasures. A subset of us received the double treat of also consuming small section Civil Procedure and Writing with Gordon Spivack, antitrust lawyer extraordinaire with the Justice Department who loved teaching enough to postpone his highly successful New York private practice to return to New Haven as a faculty member to spend a few hours each week with our group of neophytes. Who knew that the distinction between process and substance could be so richly nuanced, complex, and, lo and behold, downright interesting, and that the two concepts—process and substance—are inextricably intertwined and synergistically interdependent like DNA’s double helix.

I knew good things when I saw them, and I signed up for upper-class offerings from Professors Calabresi (Tragic Choices) and Spivack (Antitrust Law). Both esteemed men used automobiles as significant teaching exemplars. Guido had just published his paradigm shifting *The Cost of Accidents*, soon enough followed by *Tragic Choices*.

He applied his clear-eyed analytical horsepower to problems that naively were assumed

by some to have been answered correctly already, or conversely pessimistically written off by others as entirely intractable. In the bargain Guido turned our system of auto insurance and the allocation of the costs of accidents on its head for the benefit of all. His work also heavily influenced emerging fields including organ transplants, and other scarce resource allocation choices for society. For example, his mode of analysis is at the heart of any sensible regime of environmental legal and policy choices. In my view his work was the grandfatherly precursor to today’s entertaining, yet insightful, *Freakonomics* and of course much more. It is also the mirror in which lesser lights should see their embarrassing shame in claiming law and economics expertise, when it is more often used (in hands less adept or conscientious than Guido’s) as a dodge for poor economic analysis and worse law and policy.

If potentially dull Civil Procedure became interesting under the tutelage of Gordon Spivack, Antitrust Law was his true passion and belief. He had been one of the leading antitrust lawyers at the Justice Department when antitrust enforcement was taken seriously in this country. Both major political parties professed genuine belief in competition and market efficiency rather than merely paying lip service to free market rhetoric as a cover for corrupt, lazy, protected business leaders whose crony capitalism drove our banking system into the ditch in 2008. Gordon let his students know that there had been a vigorous debate at Justice as to whether to apply the anti-monopoly provisions of the Sherman Act to General Motors. Ultimately, the decision was made not to proceed, against Gordon’s sage advice. As an aside, I suspect that we were not his only Antitrust class to be tested at the end of semester with an essay exam containing a detailed hypothetical on the legal and policy analysis of a putative breakup of GM.

The last half-century of experience surely has proved Gordon correct. The Justice Department and the courts restrained IBM through vigorous litigation and, arguably as a result, lowered barriers to innovation that allowed Intel, Microsoft, Apple, Google, among others, to emerge and keep the United States at the forefront of the computer revolution. We also broke up Ma Bell (ATT), and again our country has been blessed with continued leadership in much of the vital networking and telecommunications fields. With autos, by contrast, the stodgy and effectively protected big three dithered away much of our nation’s comparative advantage, choked off innovation from homegrown companies, and allowed/forced the inevitable competition/innovation to come from outside our borders. Japan and Germany—and perhaps even Korea, France, and Italy—flanked us (with China poised to

follow) and drove our automobile industry to near extinction. With the American economy collapsing around them, the Obama administration was compelled to step in and finally forcibly restructure these shrunken behemoths in a final hope to give them new vitality and life.

Even I finally had to admit that the Chevy had served its purpose and had to go. I managed to sell her for \$50, transferred the title and the car and said my fond farewells. It was a weekend. Of course once the banks opened on Monday, the check bounced. Still, in the end I decided that overall I had clearly gotten the best of the bargain and that my putative contract claim, worthy in the abstract, best lay in forbearance/abeyance.*

If I had not had the intuitive good fortune to set up a meeting with Dean Jack Tate in the spring of 1968, I never would have ended up getting to know my extraordinary classmates or studying with Professors Calabresi and Spivack, or the many other inspirational teachers at the law school. Cars (including their safety, efficiency, insurability, environmental acceptability, and their useful lessons as exemplars for jurisprudential rumination) and social and legal justice all go together. To the extent that each is better today than it was yesterday, and holds the promise to be still better tomorrow, more credit deserves to be given to Yale’s teachers, the Law School’s core values and methods, its practice of bringing together extraordinary people in a uniquely supportive and challenging environment, and especially the quintessentially Yale development of an enlightened humanistic theory and method of legal interpretation.

Nearly a full half-century on, and most of us have managed to contribute substantial positive social good to our communities and the institutions we have been involved with and often led, produced excellent children, made a little money along the way, and had some real fun. It has been a heck of a ride thus far. Y

*Justice Hugo Black is reputed to have often told one of his favorite apocryphal stories: A poor southern sharecropper is prosecuted for stealing the cow of his overbearing landlord. Despite overwhelming evidence and clear instructions, the jury deliberated for a time and came back with a verdict of not guilty but with a demand that the sharecropper return the cow. The judge was furious and told the jury that their verdict was impermissibly inconsistent and that they should go back and deliberate further and return a proper verdict consistent with the law and facts. After a short re-deliberation the jury returned to the courtroom and the foreman reported: “Well, in that case your honor, we have decided the defendant can keep the cow.”