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John K. McNulty

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# A Student's Tribute to Fritz Kessler

John K. McNulty<sup>†</sup>

Fritz Kessler beamed as he sat down for a lunch to celebrate his ninety-third birthday last August at the home of Joan and Egon von Kaschnitz (the daughter and son-in-law of the late Professor Albert Ehrenzweig) with just a couple of other friends and his indispensable caretaker Hilde Lorentz. Fritz looked as happy as those in his company themselves felt to be with him. Egon, and Fritz's accountant, Gretchen Smith, had remembered to find some of his favorite Boodles gin for a little martini, the sun was streaming in through the windows in Orinda, near Berkeley, and all was well with the world. Now, after the spring California rains have subsided, Fritz sits in his Berkeley living room<sup>1</sup> overlooking San Francisco Bay and speaks of his late wife, Eva, and their daughters, Maria and Inge, all of whom he lost within a short span of time more than a dozen years ago. Figuring too in the conversation are the grandchildren, Anne, Jack, Paul, and Gregory, their spouses, and the great-grandchildren.

It seems a long way from the Yale Law School dining hall in the Fall of 1956 when he spoke to my incoming class of 1959, in his precise and formal English, with a flavor of the Continent, of the history and majesty of the law, of Arthur Corbin's great contributions to it,<sup>2</sup> and of the wonderful Yale Law School we could all look forward to. Fritz taught Contracts I so wonderfully that many of us went on to take everything he offered, Contracts II and even Negotiable Instruments. (He still remembers where some of us sat in that room.) Contracts of adhesion,<sup>3</sup> section 90 of the Restatement of Contracts, the roots of *culpa in contrahendo*,<sup>4</sup> detrimental reliance and the hypothetical fellow climbing the flagpole to touch the golden eagle at the top, in return for a promise of \$10 (to be revoked just as he neared the eagle), entranced, challenged, and shaped us.<sup>5</sup> Yet in the halls one day he stunned me by stating

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<sup>†</sup> Roger J. Traynor Professor of Law, University of California (Berkeley) School of Law (Boalt Hall); LL.B. Yale Law School, 1959.

1. 459 Michigan Ave., Berkeley, CA 94707.

2. See Friedrich Kessler, *Arthur Linton Corbin 1874-1967*, YALE L. REP., July 1967, at 30-31 (memorial to Professor Corbin, approved by the Yale Law School faculty on June 6, 1967)

3. See Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

4. See Friedrich Kessler & Edith Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401 (1964).

5. See John K. McNulty, *Dedicated to Friedrich Kessler upon His Eightieth Birthday, August 25, 1981*, 69 CALIF. L. REV. frontispiece, reprinted in YALE L. REP., Winter 1981-82, at 13.

that he thought he “might have been happier if he had been a farmer”! He always seemed larger and more resounding on the podium than in the halls, even when he wasn’t talking about farming. Later in class, in 1957, wearing a black armband of mourning, he movingly eulogized Judge Jerome Frank. He didn’t give his jurisprudential Freud Lectures during the years of my class, and whenever I ask about his notes or manuscript he tells me that evidently they were lost in the move from New Haven to Berkeley in 1970.<sup>6</sup> The move was made a few months after the surprise (Eva knew but kept the secret), black-tie dinner that his students and former students gave him (over four hundred people in the Freshman Commons),<sup>7</sup> and after the Yale Law School Association of New York City made him its guest of honor on January 30, 1970.<sup>8</sup>

He was here, as a Visiting Professor at Berkeley in the Summer of 1964, when on my first day of teaching we (Sandy Kadish at the wheel) picked him up at his rented home on Southampton Road for the ride to Boalt Hall. He tolerated my “Mr. Kessler” form of address that once, in public, but in our next private conversation insisted I call him “Fritz,” which we all at Boalt Hall so gratefully and happily have done for these more than thirty years. Nearly all, I should say, because when he comes into the faculty club lunchroom or the Registrar’s office to pick up his mail and speaks his formal “Good afternoon, ladies,” they cheerily reply in the same respectful “Professor Kessler” terms.

Fritz first saw the Yale Law School on October 12, 1934, which seems like a long time ago—because it was the day before I was born. He tells of his early days and years there, of then going to Chicago (where he and Eva and their daughters knew Albert and Erika Ehrenzweig, having met the first day, and Ed Levi, Malcolm Sharp, and the others, and where he became a member of the Illinois Bar), of becoming a U.S. citizen in 1942, and then returning to Yale in 1947, after a late night of persuasion with Dean Wesley Sturges and a bottle of Jack Daniels. He recounts happy lunches, some decorated by a martini, with Ward Bowman and Alex Bickel in New Haven. (And if I’ve seen *La Traviata* in San Francisco the week before, he will often, at lunch, show he better remembers a performance he saw in Berlin in 1933!) And when I told him that his coauthor and friend Tony Kronman had become the new Dean of Yale Law School he declared that he was very pleased, and almost surprised—because he hadn’t “been sure the Yale Law Faculty had such good sense”!

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6. If any reader has or knows of a recording or good notes, probably Fritz and surely I and other former students would be grateful for a chance to review them.

7. For an account of the occasion, see J. William Heckman Jr., *A Surprise Dinner*, YALE L. REP., Spring 1970, at 2, 3.

8. See Remarks of Eugene V. Rostow (Jan. 30, 1970), in YALE L. REP., Spring 1970, at 3; Friedrich Kessler, *The Future of the Law School* (Jan. 30, 1970), in YALE L. REP., Spring 1970, at 4.

Fritz was born in Hechingen, Germany, August 25, 1901, the son of Wilhelm and Helene (Krueger) Kessler. His father was a judge, army officer, and “a stern taskmaster”; his mother a loving but sometimes unhappy woman. He had a sister, Anneliese, and a brother, Karl Ludwig. Fritz was educated in Tübingen, Munich (a student—in Rechtssoziologie—of Max Weber) and Marburg (a family tradition), before his years in Berlin (1926–34), where he was a research member of the Kaiser Wilhelm Institute for Foreign and International Law, and a Privatdozent at the Handelshochschule from 1931–34. He and Eva Jonas married in 1930, each having been married before, and in 1934 they and her/their two daughters, Inge and Maria, came to the United States with the aid of a Rockefeller Foundation Fellowship to make their new home.

Then it was Yale Law School as an Instructor and Assistant Professor, 1934–38, University of Chicago Law School (Associate Professor and then Professor) 1938–47, and back to Yale as Justus Hotchkiss and then Sterling Professor of Law,<sup>9</sup> until retirement in 1970. (He tells wonderful stories of Addison Mueller, Harry Shulman, Grant Gilmore, Wesley Sturges, Arthur Corbin, Underhill Moore, Edwin Borchard, and the others. He tells me today that he considers himself a student of Arthur Corbin, and a great admirer of his character.) From 1970–78 he taught actively on a postretirement or “visiting” appointment basis at Boalt Hall, earlier having visited at Harvard Law School in 1960–61 and Boalt Hall in 1964–65.

With the credentials to do so, others have described, analyzed, and applauded his scholarship.<sup>10</sup> It was his teaching that so stimulated and stirred and attracted his students, my classmates and me. His casebook *Contracts: Cases and Materials*, first with Professor Malcolm Sharp of Chicago (1953), later with Professor Grant Gilmore of Yale (1970) and still later with Gilmore and Anthony Kronman of Yale (1986), intrigued and led and inveigled us. I remember how, lost in the analysis for an unmarked time in class, I would sometimes have a sense of the purely Socratic dialogue coming back around to the point at which the class had begun, and then look at my watch—invariably to see that it was two or three minutes before the end of the

9. See *Friedrich Kessler Named Sterling Professor*, YALE L. REP., Fall 1964, at 5.

10. See Grant Gilmore, *Friedrich Kessler*, 84 YALE L.J. 672 (1975); Christian Joerges, *Demos vs. Ethnos in Private Law: Friedrich Kessler and His German Heritage*, 104 YALE L.J. 2137 (1995); Christian Joerges, *History as Non-History: Points of Divergence and Time Lags Between Friedrich Kessler and German Jurisprudence*, 42 AM. J. COMP. L. 163 (1994), first published in German as *Geschichte als Nicht-Geschichte: Unterschiede und Ungleichzeitigkeiten zwischen Friedrich Kessler und der deutschen Rechtswissenschaft*, in DER EINFLUSS DEUTSCHER EMIGRANTEN AUF DIE RECHTSENTWICKLUNG IN DEN USA UND IN DEUTSCHLAND 221 (Marcus Lutter et al. eds, 1993); George L. Priest, *Contracts Then and Now: An Appreciation of Fritz Kessler*, 104 YALE L.J. 2145 (1995); George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 484–96 (1985); Andreas Wacke, *Address (Laudatio) on the Bestowal of the Degree of Doctor Juris Honoris Causa of Cologne University (Law Faculty) on Friedrich Kessler*, 37 AM. J. COMP. L. 662–64 (1989) (in Berkeley). He was awarded the Knight Commander's Cross of the German Order of Merit, in 1969. See *Awarded Knight Commander's Cross*, YALE L. REP., Spring 1970, at 2.

hour. We had traveled far in the branches with “offer and acceptance” and “consideration” and “detrimental reliance” and even dealer franchises or unendorsed checks, but—without resorting to notes and by rearranging our unpredictable contributions—the great teacher was leading us back, in a large circle, to the trunk and the day’s fundamental question or topic. We celebrated his artistry then, as students. I think he and Boris Bittker and the other wonderful teachers of the Yale Law School in the late 1950’s were important reasons some of us wanted to become professors of law.

What more impressed us so much? His respectful, earnest exploration of the doctrine was part of it. His great historical and comparative legal knowledge entered in. His courtly and courteous treatment of us meant a lot, even when he said (benignly) “That’s beautiful, beautiful, Mr. Smith; fancy footwork—but you couldn’t be wronger.” The skill of his Socratic teaching, the way his invitation led us to follow in our own minds as he or he and another student went deeply into things, gave us intellectual exercise and struggle that tested and satisfied us. Simply put, he taught us “how to think like lawyers.”

He set freedom of contract in an economic and social context, and he conveyed the evolving nature of American contract law (sometimes using his civil law training and knowledge as a counterpoint). He believed in doctrine and in theory, but was neither doctrinaire nor ideological. He valued capitalism, freedom of the will, and human autonomy; he believed in human responsibility. His was a serious and high regard for the law and for the uses of rational efforts to find it out, to see it, to improve it, and to make it coherent. He evidently loved the law, as we wanted to do—and came to do, with his example to show us how, and his implication that our affection for it would reward us. Fritz’s own humanity, rationality, and respect drew us to him and to the law.

He sought out our parents at graduation to tell them what fine students we had been. We admired and loved him then. How lucky for us that we have been able to love him so long. And that this *Yale Law Journal* has been moved to mark this twenty-fifth anniversary of Fritz’s retirement from Yale and his coming ninety-fourth birthday with a bow to the great teacher, scholar, and friend.