Elements of the Law

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low of a study not only of cases but of the institution which is
controlled by the cases, both will be augmented and enriched. 22

Edward Levi had tried to set himself off from the more extreme
Realists in an essay published in 1938 entitled The Natural Law,
Precedent, and Thurman Arnold. 23 Arnold was, like Jerome Frank, one
of the more rhetorically bellicose Realists, and his books, The Sym-
bols of Government 24 and The Folklore of Capitalism, 25 were central
tracts in the later days of the Realist episode. In patient and self-
conscious steps, Levi accused Arnold of being a closet natural lawyer
whose descriptions of legal reasoning tended to the mystical and
whose prescriptions were circular. 26 Although Levi claimed to be rec-
onciling three “approaches to law”—natural law, precedent, and the
“Thurman Arnold way”—the essay in fact anticipates in argument
and presentation his famous monograph, published a decade later, as
An Introduction to Legal Reasoning. 27

In Levi’s hands, then, the Levi-Steffen materials used for the first
time in 1937 for Elements were a sustained dose of anti-Realism, at
least in its most flamboyant forms. The materials introduced students
to basic principles and concepts of the Anglo-American customary le-
gal system, emphasizing two overriding themes: the influence of social
and political theory outside the legal system on the system’s behavior,
and the incremental, sometimes un-self-conscious, development of
new legal principles. 28 If the traditional emphasis in first-year law
school courses was on the science of making deductions from legal
rules, the Levi-Steffen approach taught that the important problems
in law involved making a “choice between rules,” 29 and doing so in a

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22 Id at 408.
587-88 (1938).
27 Id at 587.
We may say that there is a fairly certain structure of the law because judges will not fre-
quently mean to invent concepts or change old ones. If anything, they mean not to do so. It
is for this reason that the law can change while the judges and lawyers insist that it does
not. The concepts change with the social order without our knowing it; new concepts come
in without our realizing it. In the main this is as it should be. It gives the law its ability to
change and yet remain consistent. It is also the reason why judges should not be particu-
larly bright, or they would change the law consciously too frequently.
30 Letter from Levi to Hutchins (Sept 7, 1938), Presidential Papers, Box 113, JRL (discuss-
ing Steffen’s call for “[a]n awareness that the important problems in the law do not involve de-
ductions from the legal rules but a choice between rules—a choice which Steffen sometimes
speaks of as being ‘philosophical’”).
deliberate, disciplined fashion that avoided the artificial mysteries or conclusory certitude of the "Thurman Arnold way."

The affinity between Steffen and Levi suggests that Chicago would have been a natural place for Steffen and Elements a natural course for him to teach, and, indeed, Levi tried to recruit Steffen. Or rather Robert Maynard Hutchins added Steffen to the growing list of Yale faculty members he tried to recruit during the 1930s in order to enhance the stature of the Law School. He offered Charles Clark, his successor as Dean, $25,000 ($255,455 in 2001 dollars) to leave New Haven, but Clark turned him down.\(^3\) William O. Douglas technically joined the Chicago faculty for the academic year 1931–32 at a salary of $20,000 ($204,364 in 2001 dollars), although he was on leave in Washington, D.C., and Clark managed to secure a Sterling Professorship and substantial salary increase in order to lure him back.\(^3\) Douglas and Hutchins plotted together to lure other Yale faculty members to Chicago (principally Wesley Sturges, Walton Hamilton, and Underhill Moore), but the planning apparently never proceeded past the brainstorming stage. Levi wrote Hutchins a thirteen-page, single-spaced memorandum in the fall of 1938 that evaluated Steffen’s professional writings since 1930 with an obvious eye toward a lateral appointment.\(^3\) Steffen remained at Yale until 1949 when he was appointed to the John P. Wilson Professorship at Chicago, much to the (publicly reported) dismay of the Dean of Yale Law School.\(^3\) Hutchins’s only successful attempt to raid Yale before World War II was Friedrich Kessler, whom Levi had recommended to him when he returned from his post-graduate year at Yale. Kessler joined the faculty in 1939, became a full professor in 1943, but returned to Yale in 1947, largely for financial reasons.

World War II dramatically affected the Law School and the University as a whole. Enrollment in all units fell, university facilities were utilized for military and related training, and the future of the

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\(^{32}\) Id at 345, 347. Part of the reason Douglas left was that Hutchins could not deliver the promised salary and could offer only $15,000. Id at 347. Compare William O. Douglas, Go East, Young Man: The Early Years 163–64 (Random House 1974) (Douglas said the figure was $25,000, but there is no evidence that Hutchins promised more than $20,000).

\(^{33}\) See Letter from Levi to Hutchins (Sept 7, 1938) (cited in note 30).

\(^{34}\) Dean Sturges’s annual report said:

The attractiveness of that chair—and especially the generous stipend which it provides for the incumbent—left Yale no practical basis upon which to exercise the amenities of competition which usually attend similar situations. Professor Steffen was the seventh among our faculty who were approached during the year with offers by other law schools. Only by his resignation have our ranks been broken. We regret his leaving.

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institution became clouded. Generous salaries and raids on other faculties became distant memories almost overnight. Teaching loads increased markedly, and the University struggled to keep afloat financially. In the fall of 1940, Edward Levi relinquished Elements to Kessler, who taught the course until 1944. Levi explained the change to Hutchins a few months earlier in a confidential memorandum in which he reported that his Spring Quarter course load included “Elements of the Law, Risk (which you knew as Agency); Philosophy of Law; Bankruptcy and Reorganization, and Moot Court” — a total of 22 class hours per week, not counting tutorial responsibilities for first-year students. “This situation is not good for me nor for anyone else.” Hutchins responded with characteristic dash and buoyancy: “I have learned with regret that you are not working hard enough. Mr. Adler and I will be glad to turn over to you the class which we are scheduled to teach in [the] Law School next year in order to round out your program.”

Enrollment trends in the Law School became grave as the war progressed, and Hutchins could not disguise the fact with either eloquence or flippancy. In the academic year in which he taunted Levi, the Law School conferred 53 degrees; three years later, at the conclusion of the 1942–43 school year, the number had plummeted to nine. There was a serious question whether the University could afford to continue to operate the Law School in that posture. Hutchins mulled closing the School; he also considered papering over the maneuver by announcing a “merger” with the Social Sciences Division, to be explained, no doubt, by a forest of rhetoric about intellectual synergies, cooperative research, and interdivisional activity. The law faculty took a more practical, and personal, perspective on the question. Led by Sheldon Tefft and William Winslow Crosskey, they sought clarification from Hutchins of whether the University would honor their contracts “if the Law School is closed.” Hutchins temporized, but after two months of worrying, he gambled and sent a memo to Tefft assuring the faculty that “the Law School will be kept open and the salaries of the staff paid” during the following academic year. Enrollments continued to lag and did not return to pre-war levels until the 1946–47

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35 Letter from Levi to Hutchins (undated), Box 113, Presidential Papers, JRL.
36 Id.
37 Text of telephone message from Hutchins to Levi (Mar 6, 1940), Box 113, Presidential Papers, JRL.
38 I am grateful to Eric Pittenger, Registrar of the Law School, for verifying these figures and confirming them with the Registrar of the University.
39 Letter from Wilber G. Katz to Hutchins (Jan 8, 1943), Box 113, Presidential Papers, JRL.
40 Letter from Hutchins to Sheldon Tefft (Mar 12, 1943), Box 113, Presidential Papers, JRL.
academic year. In 1945, Levi reclaimed his franchise on the Elements course, even though Kessler continued on the faculty for two more years.

After what can fairly be called a near-death experience during the war, the Law School was reinvigorated by the post-war boom. Enrollments surged, spurred by the G.I. Bill. The entering class for 1946–47 was allowed to reach 125, and that meant new faculty had to be hired as the returning veterans began to spread out over the entire curriculum. The losses of three senior professors—Kessler (to Yale), George Bogert (emeritus), and Charles O. Gregory (to Virginia)—meant that several courses were understaffed or not covered: torts, labor law, trusts, commercial law, legal history, and international law. Hutchins was willing to add one, and possibly two, senior faculty members to meet the shortfall, so the Committee on Additions to the Faculty recommended to Hutchins the appointment of “two of the following persons: Professor David Cavers of Harvard, Professor Roscoe Steffen of Yale, Professor Friedrich Kessler of Yale.” Only Steffen came, but the appointment made a splash in the profession because it was said that no chaired member of the Yale law faculty had ever left to accept appointment at another law school.

More significant changes in staffing and teaching were on the way. Over the private but fierce objections of some anti-Semitic trustees, Hutchins appointed Edward Levi Dean of the Law School in 1950. Levi, hoping to capitalize on the momentum that began to build with Steffen’s appointment, immediately took two steps that promised to enlarge the School’s national profile. He engineered the appointment of Karl Llewellyn and Soia Mentschikoff to the faculty, and he convinced Hutchins to authorize twenty one-year, full-tuition scholarships to students entering the Law School in 1951 in order to improve the quality and geographic diversity of the application pool.

41 See Letter from Wilber G. Katz to Ernest C. Colwell (June 5, 1946), Box 24, Presidential Papers, JRL (discussing the need for an additional faculty member as a result of the increased enrollment).
42 The four-year curriculum was voted out of existence by the faculty in January of 1949, and all entering students from the autumn of 1949 were subject to a unitary three-year program of 48 required quarter hours (only six of which were elective) to attain an L.L.B. degree. An optional “fourth year of advanced and specialized work” was offered to attain a J.D. degree. University of Chicago Law School, Announcement of Revised Program, 1949–50.
43 Report of the Committee on Additions to the Faculty, 10 March 1949, Presidential Papers, Ser 1945–50, Box 42, JRL (unanimously adopted by the faculty).
44 See Shils, Portraits at 143–44 (cited in note 2).
45 See Robert Whitman, Soia Mentschikoff and Karl Llewellyn: Moving Together to the University of Chicago Law School, 24 Conn L Rev 1119 (1992). Levi conditioned his acceptance of the deanship on receiving authority to appoint three senior members to the faculty. Shortly after Llewellyn and Mentschikoff were appointed, Allison Dunham—like Llewellyn, also on the Columbia law faculty—was named professor of law effective July 1, 1951.
46 See Letter from Levi to Central Administration (Nov 1, 1950), Presidential Papers, Ser
Llewellyn was 57 years old and had taught at Columbia Law School since 1925 after six years at Yale, his alma mater. He was now best-known not as the author of *The Bramble Bush*, but as the chief reporter for the Uniform Commercial Code. Mentschikoff, 45, was the assistant chief reporter for the Code and his third wife. Both had held visiting positions at Harvard Law School in 1948–49, but antinepotism rules precluded their joint appointment there; Columbia had a similar policy. Levi finessed Chicago’s comparable policy by appointing Mentschikoff as “Professorial Lecturer,” a position under the Statutes of the University that did not implicate antinepotism policies.

The appointments of Llewellyn and Mentschikoff, combined with the earlier appointment of Steffen, were designed to identify the Law School as a center for the study of commercial law on an international basis. But Llewellyn was also nationally prominent in legal theory (his chair at Columbia was the Betts Professorship of Jurisprudence), and he had one of the most sustained records in the profession of writing on legal education. With Levi now occupied by the deanship, Llewellyn was the natural choice to teach Elements. Indeed, perhaps he should be described as the “irresistible” choice, notwithstanding the facts that Levi had just published his classic monograph, *An Introduction to Legal Reasoning*, and that the Levi-Steffen materials had now reached a fourth edition and had been published by the University of Chicago Press. As anyone knows who has ploughed through *The Bramble Bush*, let alone heard or seen him in action, Llewellyn was a self-styled force of nature—exuberant, rambunctious, taunting, inspirational, and sometimes exasperatingly obscure. By the time he arrived in Chicago, the Realist moment had passed, and the firebrands of the 1930s had become domesticated, as Deans (Wesley Sturges), wealthy lawyers (Thurman Arnold), and even judges

1945–50, Box 42, JRL. Levi pointed out that applications were beginning to decline after the post-war rise, that some admitted students were withdrawing due to “insufficient funds,” and that the “geographical distribution of the students [was] extremely poor.”

47 See Whitman, 24 Conn L. Rev at 1127–28 (cited in note 45).

48 See Letter from Edward H. Levi to Lawrence A. Kimpton (Apr 4, 1957), Dean’s Office Files (Karl N. Llewellyn), University of Chicago Law School.


(Jerome Frank). Llewellyn, by contrast, was unreconstructed: He no longer preached Realism—at least in print—but he continued to practice it, and Elements of the Law was the perfect podium for him.

The materials Llewellyn used for his brand of Elements could not have been more different from the Levi-Steffen materials. None of the classic philosophers appeared in the mimeographed materials; they comprised only cases, and principally cases from one jurisdiction—New York State. The cases covered different topics, such as "indefiniteness" in contracts, warranties, or the law of foreign remittances, but the subject matter was incidental. For Llewellyn, the purpose of the course was to teach the craft of lawyering. To do that, he tried to create an almost clinical atmosphere in the classroom. Students would treat cases as problems, often taking the side of plaintiff or defendant, and then try to provide advice or to develop arguments to present to courts should the problem become a case or the case become a decision to be appealed. Thus, the single jurisdiction was essential to the teaching strategy: Students needed to "learn the law"—or appreciate its ambiguities and gaps—in order to work out their "advice." As Llewellyn inimitably explained on the second day of class in 1955:

I call your attention to one thing, however, that distinguishes this assignment of cases from any other that you have had—you will have noticed that all of this set of cases come from a single court in a single state. And with this change in order, you will note that they occur in time sequence. The effect of this is that you are, as you work into the series of cases, coming to see them with pretty much the same eyes with which the lawyers and the respective courts saw the cases. The bulk of what has gone before is in your hands as you approach the case. And we can start to work over what it is the court was doing and the lawyers were doing case by case, and see what the process was that was going on. We are studying primarily in these cases the process. What was the lawyers' job and how did they perform it? What was the court's job and how did it perform it? And we see a new job coming up—the eternal problem of the court is with us; no matter how much you

51 See, for example, Robert Jerome Glennon, The Iconoclast as Reformer: Jerome Frank's Impact on the Law chs 4–6 (Cornell 1985).
have got done a new one is coming up tomorrow. And we see the new ones come up and see the court use their old machinery for the purpose of dealing with it.\textsuperscript{53}

Although law schools were beginning to emphasize theory over rules in the classroom, Llewellyn remained as fixed in the 1950s as he had been thirty years before on the imperative of teaching “skills,” even in large first-year classes. In his view, first-year courses were often confused by the combination of substance and what he called “craft-skills” being taught from the same casebooks.\textsuperscript{54} His solution was not without its own problems, however. As two experienced second-generation teachers of the materials explain:

The presentation of the material in this form, in a course whose name revealed neither its content nor purpose, to students hungry for knowledge and direction, raised difficult questions of pedagogy for the instructor and created a tendency on the part of students to treat Elements as an afterthought to their apparently more relevant substantive courses.\textsuperscript{55}

Worse, Llewellyn tended to overload his intellectual agenda for the course without clear indication to his students of when he was changing focus. At one minute, he was emphasizing “craft-technical” skills, at another “area-policy” questions (“Is-It-Wise? Is-It-Right? (not ‘right’ contrasted with ‘legally incorrect’, [sic] but ‘right’ contrasted with ‘evil’”), and at another, questions of “general jurisprudence.”\textsuperscript{56} Compounding the problem was Llewellyn’s tendency to proclaim, without much elaboration, that the “arts of the legal crafts” were imbued with “deep truths about man’s nature and man’s life with his fellowman.”\textsuperscript{57} To top it off, the materials and class presenta-


\textsuperscript{54} Shortly before joining the faculty, he wrote, somewhat wishfully:

There is an increasing body of opinion in the law schools to the effect that if the various legal craft-skills now inculcated by indirectness in the first-year case-classes were made the explicit focus of the first year, we should be able to bring every student who remains in the school into the opening of the second year already trained to read judicial decisions and to use them with some professional competence.

Llewellyn, 1 J Legal Educ at 216 (cited in note 49).

\textsuperscript{55} Gerwin and Shupack, 33 J Legal Educ at 83 (cited in note 52).


\textsuperscript{57} Defending the “craft-skills” emphasis against the developing theoretical trend in American law schools, he wrote in 1958:

With the waning of apprenticeship the arts of the legal crafts slipped into the forgotten or into disrepute; either they were wholly neglected or they were seen in terms not of deep truths about man’s nature and man’s life with his fellowman, but as matters of shallow and

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tions were supplemented by required readings—plural—of *The Bramble Bush*, and, depending on the year, at least one reading of Levi’s *Introduction to Legal Reasoning*. From time to time, guest lecturers addressed the class, but Llewellyn’s efforts to enlist fellow first-year teachers in coordinating their presentations with his were routinely if politely declined.\(^5\)

Karl Llewellyn taught Elements from 1951 until 1961, a few months before his death. Harry Kalven, who tended to take a more historically-oriented approach to the course, and Edward Levi split the teaching duties in 1962, and Harry W. Jones, visiting from Columbia, taught the course in 1963.\(^6\) Then Mentschikoff took over her late husband’s materials and the course from 1964 to 1973,\(^7\) after which she left the Law School to become Dean of the University of Miami Law School. The franchise was intact, at least symbolically, but much of the energy had gone out of the enterprise. Mentschikoff dutifully worked through the materials, but her passion seemed uneven and her final examinations often included an hour of true/false questions, which struck many students as undermining the emphasis on craft and nuance developed by the materials and the class. Nonetheless, both she and Llewellyn “inspired countless students,”\(^8\) either by their enthusiasm and warmth, or by quiet acts of kindness in an often forbidding world. Nor was their long-term influence negligible. Geof Stone attributes Mentschikoff’s Elements, which he took in 1968, as the inspiration for his seminar, Constitutional Decision Making, which year in and out has won praise from students for its challenging structure—writing judicial opinions *tabula rasa*, based only on the text, followed by application of the precedents developed from scratch to new situations.

Mentschikoff’s departure posed somewhat of a quandary for the curriculum. In an academic ethos growingly committed to theory and in a profession struggling to develop sensible critiques to the explo-

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58 For example, at the beginning of the 1952–1953 academic year, Llewellyn circulated his reading assignments for the first months of Elements to the other first-year faculty inviting “[a]ny coordination you can suggest with your own course.” None responded. Llewellyn’s description of the course’s objective was classic: “The classwork will concentrate on the lawyer’s job of patient accuracy in being effective for his cause, and on drill in technical analysis directed to a sharp purpose.” Letter from Llewellyn to First Year Faculty (Oct 2, 1952), KLP at Q, V, 1 (JRL) (cited in note 53).


60 With two qualifications: Kalven taught the course in 1966, and he taught a small section of the course in 1969 using Spencer Kimball’s *Historical Introduction to the Legal System* (West 1966).

61 Whitman, 24 Conn L Rev at 1125 n 24 (cited in note 45).
sion of public law two decades after Brown v Board of Education\textsuperscript{62} revolutionized aspirations for the Constitution, “craft-skills” sounded dated or pedestrian. Dean Phil Neal taught Elements in 1975, and future Dean Gerhard Casper filled in the following year, but the course fell out of the curriculum in 1976. Then Edward Levi returned from his service as Attorney General and took up the course again from 1977 to 1983. During that period, and following his formal retirement in 1984, he worked steadily to revise the Levi-Steffen materials, which had last been modified in 1950, but he never settled on a final version before his death.

Cass Sunstein taught the course for the first time in 1985, and David Strauss did so the following year. Since 1993, they have both taught the course, each to half of the entering class, on an annual basis. Their courses still treat the problem of reasoning by analogy in the case law system, but also touch on larger themes that students will encounter throughout the curriculum such as the tension between rules and discretion, the conflict between coercion and autonomy, and the recurrent mysteries of “interpretation.” Sunstein emphasizes questions about the meanings of liberty and equality, the proper role of judicial review (he tends to focus on Lochner v New York\textsuperscript{63} and the problems of constitutional “baselines”), and, recently, rationality and behavioral economics. Strauss begins his course with a line of common law cases that Levi employed in his Introduction and then compares the developments in those cases with the argument in Benjamin N. Cardozo’s The Nature of the Judicial Process.\textsuperscript{64} The underlying theme in both sections of the course during the past decade is nicely captured in the title of Sunstein’s 1996 monograph, Legal Reasoning and Political Conflict.\textsuperscript{65}

Assessing the effect of American Legal Realism on the Yale Law School between the World Wars, John Henry Schlegel quipped in 1979, “[C]urriculum reform at Yale proceeded in the time-honored way with the acquisition of new faculty members who brought new courses with them and the departure of old faculty members who took their old courses away.”\textsuperscript{66} The experience at Chicago with respect to Elements is more a twice-told tale, with Edward Levi trying to provide a philosophical and pedagogical antidote to Realism before the war, with Llewellyn and Mentschikoff trying to plant Realist peda-

\textsuperscript{62} 347 US 483 (1954).
\textsuperscript{65} Cass R. Sunstein, Legal Reasoning and Political Conflict (Oxford 1996).
\textsuperscript{66} John Henry Schlegel, American Legal Realism and Empirical Social Science: From the Yale Experience, 28 Buff L Rev 459, 480 (1979).
gogy in the theory-thickening air of Hyde Park, and finally Levi re-
storing the introductory course to true north. To some extent, the syl-
labi support that interpretation, notwithstanding that Levi’s *Introduction to Legal Reasoning* was routinely a common text, regardless of
the instructor, from 1949, when it was published, until Levi’s retire-
ment thirty-five years later. The disparity between the two approaches
could not be greater. Levi’s materials included numerous excerpts
from classical philosophy, including, for example, Plato, Hobbes,
Locke, Engels, Hans Kelsen, Savigny, Aristotle (Nicomachean Ethics,
Politics, Rhetoric), St. Thomas Aquinas, and H.L.A. Hart (and that’s
just in the first 200 pages of almost 1200 pages of photocopied mate-
rials which also included case law). Llewellyn included no philosophy,
only cases. Even the edition of the materials that were eventually pub-
lished posthumously under Mentschikoff’s direction adds only notes
or the occasional essay by a lawyer (often Llewellyn) or a judge; for-
mal philosophy is entirely absent. Levi had broad and deep ambitions
for his course; Llewellyn, aiming to produce “lawyers’ lawyers,” was
extremely narrow, notwithstanding frequent grand asides and ringing
maxims.

I think there are deeper commonalities between the courses, de-
spite their sharp differences in focus, scope, and tone. The congruence
lies in their mutual hostility to the extreme, almost nihilistic strain of
Legal Realism, and in the corresponding optimism about the capac-
ity of a customary legal system to develop workable rules for concrete
problems. To some extent, Arthur Linton Corbin, who spent half a
century preaching that message, was the Godfather of Elements of
the Law. Since his days as a student at Yale Law School, Karl Lle-
wellyn viewed Corbin as his “father in the law”; for decades, letters
from Llewellyn to Corbin began, “Dear Dad.” In a letter to Lle-
wellyn late in both their lives, Corbin recounted his “fight for life as a
law teacher” during the dizzy height of Realism:

> Probably 1928, when I had to drive a good beginning class to
> study the Law of Contracts, against the competition in their
> other courses of Bob Hutchins, Lee Tulin, and Leon Green, all
> three telling these beginners that there is no “law,” only separate
cases—that each decision is a “chigger” decision or a stomach
> burp—that there are no organized molecules, only individual at-

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67 See note 52.
68 Gilmore, *The Ages of American Law* at 80–81 (cited in note 64), citing the example of
Wesley Sturges (see note 10). David Strauss’s course also pursues this theme after building on
the foundation described in the text accompanying note 64.
69 Grant Gilmore, *The Death of Contract* 60 (Ohio State 1974).
70 See Letters to Arthur L. Corbin (various dates), KLP at R, III, 15 (JRL) (cited in note
53).
oms—and all three (however green behind the ears) telling it with explosive, atomic power. Did Bob Hutchins ever read an opinion?"

In another letter two months later, Corbin recalled another incident from 1928 which restates his conviction from a positive standpoint:

Hamilton, Green, Sturges, and Hicks were there [at lunch]. After eating, Fred Hicks turned to me and asked an obviously "loaded" question: "Do you believe there is such a thing as a legal principle?" My reply: "Certainly I do. By this I don't mean something handed down from the sky. Instead, I mean this: It is possible to group together a number of similar cases (decisions) on which to base a generalization that is usable, subject to change as new cases appear with varying facts. That is the only kind of principle that I know." Leon Green, quickly, in a surprised manner: "Why, what you mean is a working rule." "Exactly that," I replied, "a working rule." That ended the discussion. Hamilton and Sturges said nothing. Hicks looked confused. The meeting broke up."

For Corbin, the process of meticulously analyzing the facts and results of cases, then trying to generate a workable rule, was the essence of legal scholarship; showing students how to discern the patterns of behavior beneath the surface rhetoric of opinions was at the heart of law teaching. Llewellyn used vastly different rhetoric, calling the process "the Grand Style" throughout his career, but essentially marched in Corbin's footsteps. And, in many respects, so did Fritz Kessler, whom Corbin said was "like a brother," although his civil law background brought different insights and concerns to the debate.

Edward Levi had little trouble aligning himself with the Corbin-Llewellyn view of legal reasoning. Levi emphasized in his monograph that the kind of reasoning involved in the legal process is one in which the classification changes as the classification is made. The rules change as the rules are applied. More important, the rules arise out of a process which, while comparing fact situations, creates the rules and then applies them . . . . A controversy as to whether the law is certain, unchanging, and expressed in rules, or uncertain, changing, and only a technique for deciding specific cases

73 Id. But see Gilmore, 84 Yale L J at 674 (cited in note 8) (stating that despite Kessler's "veneration" for Corbin, Kessler "ultimately parted company with, or went beyond, Corbin").

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misses the point. It is both. 74

It is a testament to Levi's tact and ingenuity that he could work closely and effectively from the very outset with Robert Maynard Hutchins, whose views of the legal process, at least when he was most deeply involved in it, were light-years from his own. It is true that Hutchins changed over time 75—many thought opportunistically—but in 1937 at the installation here of the new curriculum Hutchins declared, "No law professor can claim to be one if he separates himself altogether from the 'realistic' movement."76 Like so many of his pronouncements at the time, his views are presented at such a general level that it is difficult to pin down exactly what he thinks. That, in part, is the value of Corbin's eyewitness testimony, at least for the period in which Hutchins was fully engaged in legal teaching and research.

However elusive Hutchins was, and is, the message of the Corbin-Llewellyn-Levi(-Kessler) lesson was clear, whether conveyed adequately by the syllabus or not, and is captured by almost every lawyer's favorite poet, Wallace Stevens:

A. A violent order is disorder; and
B. A great disorder is an order. These
Two things are one. 77

Corbin communicated the point by enormous industry and lucidity for almost a half-century; Llewellyn by bombast, cajolery, and passionate insistence; Levi (and Kessler) by cold patience and incessant questioning of the conventional wisdom. In the end, we all became Realists to some degree, whether we appreciated it or not, and the challenge of their successors in the classroom was to figure out what to do with the realization. Llewellyn stated the challenge, almost as a mantra, in his teaching materials and from the podium for generations: "Ideals without technique are a mess. But technique without ideals is a menace."78 As long as Elements of the Law remains in the first-year curriculum, this I know: Whatever the course description, the urgent issues Llewellyn reduced to an aphorism will remain at the heart of the course.

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76 Hutchins, 4 U Chi L Rev at 362 (cited in note 4).
Activists Vote Twice

Joseph Isenberght†

Judicial activism has a bipolar press. It is widely extolled, and widely decried, often by the same people. Academic commentators see it as pervasive, the de facto norm in judicial determinations. Rarely, however, do they accept judicial activism with detached equanimity. More often, when a high-profile decision cuts against their preferential grain, they denounce it; and when it promises to advance their favored vision of the future, they wax rhapsodic.

Critics of judicial activism assail it as a corruption of the judicial function, a substitution of judicial will for the outcome of political consensus, hence antimajoritarian and undemocratic. A refrain during the Warren era was that the courts had usurped other functions of government: they were running school systems, apportioning political districts, fine-tuning law enforcement down to the very words read to suspects, abetting the murder of innocent babies, and more. With shifting electoral tides and the alea of judicial mortality, the tune changed, and was sung by a new chorus. In recent years, the courts have been charged with “conservative activism.” This charge impounds the additional vice of hypocrisy, because among the judges viewed as perpetrators of conservative activism are once and present proponents of judicial restraint.

What follow are some thoughts on judicial activism. To give them focus, I will consider two recent Supreme Court decisions. One of them, *Bush v Gore*, 531 US 98 (2000), was immediately identified as an imperious stroke and demonized as judicial power run riot. The case attracted the full battery of epithets often directed at judicial activism. A “judicial coup,” “corrupt decision,” are two that come to mind. A dissenting Justice wrote that the decision would imperil the “Nation’s confidence in the judge as an impartial guardian of the rule of law” (p 129).

The other decision, *Clinton v Jones*, 520 US 681 (1997), raised few hackles on this score. It was noticed, to be sure, because the appellant had a high public profile, but not especially as an instance of judicial overreaching.

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In my view, these responses are no more than half right. *Bush v Gore* does have hallmarks of an exercise in judicial activism. Quite possibly, five Justices wanted to nail down their preferred candidate's win in Florida. The legal theory propounded to this end is somewhat tortured (although it would have delighted the decision's most ardent critics had it favored someone they consider worthy). But *Bush v Gore* pales next to *Clinton v Jones* as an extension of judicial power beyond the legitimate bounds of law. The forensic manipulation in the latter case, to boot, is more egregious.

In addition to disapproving observations about these recent cases, I have a broader point. The process of adjudication itself creates pressure toward judicial activism. The reason, as expounded more fully below, is that when activists and adherents of judicial restraint sit on the same court, there is effectively a shift of power from the latter to the former.

First, though, I should define the terrain. By judicial activism I mean the decision of cases according to the judges' preferences. Its opposite, for present purposes, is adjudication according to neutral principles without regard for preference. An activist judge, in other words, gives effect to preference over the objective meaning of the law when they conflict. A neutralist follows the law without regard to personal preference. Other terms describing these approaches, although with considerably different resonances, are "result orientation" and "tendentiousness" for judicial activism, and "judicial restraint," "strict constructionism," and "adjudication on the merits" for its opposite. Here I will call the former "activism" or "preference," and the latter "neutralism" or "adjudication on the merits." These terms surface periodically in judicial determinations and ubiquitously in academic commentary.

An idea that flared briefly among legal academics in the 1970s and 80s (and still flickers ever so faintly today) was that all judicial actions necessarily reflect ideology, temporal contingency, and confluences of class, race, sex, and childhood trauma. If this or something similar is your world view—that is, you believe neutral adjudication on the merits to be inherently impossible—you can stop reading now. What follows will mean nothing to you. My postulate here is that in a considerable number of cases there is an objectively neutral ground of decision other than the judge's pure preference or ideological atavism. Another way of putting this is that the proverbial intelligent Martian who brought no preferences to bear (because the sort of thing that shivers its timbers is out of this world) would conclude that some outcomes were more strongly supported by a discernible ground in law than others.
At the opposite pole from the academic postmodernists, judicial activism itself does not wear its heart on its robe. The official, or at least self-asserted, standard of judicial action acknowledges only objectively grounded determinations. Judges habitually profess to be neutralists, and almost all would disavow naked preference as a fulcrum of decision. You will find in published opinions many more disclaimers like “I might prefer another outcome but the law compels this one,” than outbursts like “The law may compel another outcome but, heck, I prefer this one.” Academic folk, for their part, bring a jaded wariness to proclamations of judicial neutrality, regarding them (and there is ever-renewed grist for this view) as conventional pieties of the sort that all express and none believes, akin to the main goal of literary edification sometimes asserted by readers of men’s magazines.

The question remains: why? Or more discursively, why is activism—preference, essentially—so common a basis of adjudication? Some reasons come immediately to mind. People naturally accord transcendent value to their own preferences and wouldn’t want to withhold their benefit from humanity. Perhaps too, as in the song, judges just want to have fun. On an absolute scale, to be sure, judicial activism may not be as much fun as, say, skydiving. But I have little doubt that compared to the alternative of self-effacing pursuit of neutral grounds of adjudication, issuing judicial thunderbolts is more fun.

To observe human propensities, however, falls short of a systematic account of judicial activism. An additional and decisive element in the story is the process of adjudication itself. A single judge who decided all cases might, unsurprisingly, allow personal preference to shape their outcomes. But that would not be foreordained. This single judge might have a strong conviction about judicial detachment, or might derive satisfaction from hewing closely to neutral grounds of decision. One could, to be sure, impute to such a judge a preference of a sort—for judicial restraint—but the resulting body of decisions would not have the look and feel of judicial activism.

In the actual process of adjudication, where appellate cases are decided by several judges, a judge who subordinates preference to neutral principles loses power to judges who are less restrained. This, I believe, draws out judicial activism, which in any event is rarely far below the surface. To illustrate this point, consider the following schema.

Imagine a court with two judges, H. Dumpty and D. Quixote. Judge Dumpty decides all cases according to his preferences (i.e., is an unalloyed activist); Judge Quixote decides all cases on the merits (i.e., is a pure neutralist). Cases are decided by majority vote, which here means unanimity. Cases where the two judges vote differently are resolved by coin toss.
This array may strike you as so contrived as to be thoroughly unilluminating. With some added texture, however, it is not unlike a real tribunal. Imagine a nine-member court, on which four judges are hardcore activists and four other judges strive toward neutral decisions. Further, the four activists have similar preferences across a broad range of cases. The ninth judge is a wild card. This judge is somewhat muddle-headed and finds it difficult to follow an analysis to its conclusion, being easily diverted from a course of reasoning by some extraneous and unpredictable element. There have been arrays comparable to this on the United States Supreme Court within living memory.

Returning to our imaginary two-judge court, suppose that of 100 cases, 50 have outcomes on the merits that match Judge Dumpty's preferences while the other 50 have outcomes on the merits matching Judge Quixote's. Judge Dumpty in all 100 cases votes his preferences. Judge Quixote votes the same way in the 50 cases where the merits and Judge Dumpty's preferences coincide. These 50 cases are therefore decided in accordance with Judge Dumpty's preferences. In the other 50 cases (where Judge Dumpty's preferences and the merits diverge) Judge Quixote votes the other way, and the cases are decided randomly, 25 for each side. Thus, of 100 cases, 75 are decided according to the activist judge's preferences and only 25 according to the neutralist's. Judge Dumpty's preferences have determined the outcome of many more cases than Judge Quixote's (who by hypothesis has subordinated his preferences to a neutral standard of decision).

As this simple matrix suggests, activists have more votes in effect (or perhaps I should say more effective votes) when there are also neutralists on the bench. This is what I mean by activists vote twice. It is also why there are so few neutralists. Sooner or later Judge Quixote will tire of tilting at Judge Dumpty's preferences, and start voting his own. If we assume a more fully modulated environment, the pressures remain the same. A pure rigorist cannot bargain or logroll. A judge who unwaveringly pursues a neutral ground has nothing to trade. In order to be a player, Judge Quixote must barter away some neutrality for outcomes. It comes down to a matter of turf. If a judge who subordinates preference to neutral principles sits on the same bench with a judge who always follows preference, the former loses ground to the latter.

Adjudication by neutral principles, furthermore, gets little if any reinforcement from academic quarters. Being inclined no less than others to identify eternal verity with their own preferences, legal scholars are quick to dispense adulation or contumely to judicial actions that advance or thwart their vision of the future. This kind of attention, even when adverse, is likely to reinforce judges' activist pro-
pensities. Since most people like attention, it functions as a reward of sorts for judicial activism. I don’t want to make too much of this admittedly minor element, but at a minimum it seems likely that any influence from the academic world would sooner encourage than inhibit a willful judge. Which is more plausible: that the majority Justices in *Bush v Gore*, chastened by the outpouring of ink decrying their action as lawless, become paragons of judicial restraint? or that in some future iteration of the same case, with the political colors of the parties reversed, both the Justices’ votes and the thrust of sidebar commentary are symmetrically reoriented?

*Bush v Gore*, in any event, was immediately and widely scourged as the marquee instance of judges muscling their way to a favored outcome. As I mentioned earlier, however, I think *Clinton v Jones* has claim to higher billing in this regard.

Since *Clinton v Jones* has been largely eclipsed by later events, let me remind readers that in that case the Supreme Court held unanimously that a sitting President is subject to a civil action brought by a private person and accordingly to the associated arsenal of compulsory process. I have written on the merits of this question elsewhere and will try to contain myself here. That said, I find both broadly structural and narrowly technical reasons for doubt on *Clinton v Jones*, which seems to me weakly grounded both in law and common sense. What is more, the decision is as good an illustration of judicial overreaching as I know.

First, the entire executive power of the United States resides in the President. To expose the President personally to judicial compulsion (particularly at the instance of a private person) might prove a serious impairment of that power. Unlike any other executive officer, or a minister (even a premier) in a parliamentary system, the President cannot be replaced if subject to constraint by a court.

A narrower focus on the question adds force to this broad point. It is hard to see how a civil action can proceed against the President, ultimately, without the possibility of arrest and detention in the event the President refuses to submit. If we assume to the contrary that a sitting President cannot be arrested or indicted—and that is the common view of the matter—then a civil judgment and possible contempt citation are essentially hortatory. Or at least they are unless Congress impeaches. In one branch of corollaries, therefore, impeachment is the backstop of private lawsuits against the President. If, on the other hand, we accept the possibility implicit in *Clinton v Jones* that the President is subject to arrest, indictment, and imprisonment, the consequences are more unnerving. Even if indicted or imprisoned, the President is still the President, holding the full battery of powers including the pardon power. On this branch as well, therefore, lest the
President spring himself from jail, Congress must impeach. All this to make sure that some civil plaintiff—who in *Clinton v Jones* turned out to be dangling on strings pulled by a cadre of ideologues—doesn’t have to wait until the end of the President’s term to obtain satisfaction.

For reasons of this order, and others, it was obvious from the start that a sitting President ought not routinely to be subject as an individual to judicial power. In the Constitutional Convention of 1787 the debate on presidential impeachment is unfathomable without the essential predicate that the President personally is not subject to the power of the courts. A generation later this was still common ground, as revealed by an observation of Joseph Story in his *Commentaries on the Constitution*. In order to give the Supreme Court its due, let me present Story’s comment exactly as the Court does in *Clinton v Jones*:

Story wrote that because the President’s “incidental powers” must include “the power to perform [his duties], without any obstruction,” he “cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability” (pp 695–96 n 23).

It would be hard to make the point more straightforwardly, or more strongly. Story accords to the President’s person an official inviolability in civil cases. That means no civil actions, doesn’t it? Apparently not, after the Court works its way. The Court slaps Story right into line:

Story said only that “an official inviolability,” . . . was necessary to preserve the President’s ability to perform the functions of the office; he did not specify the dimensions of the necessary immunity. While we have held that an immunity from suits grounded on official acts is necessary to serve this purpose . . . it does not follow that the broad immunity from all civil damages suits that petitioner seeks is also necessary (Id).

Thus we are to understand Story’s reference to the “official inviolability” of the President’s person “in civil cases” as leaving the President subject to private lawsuits because “official inviolability” does “not specify the dimensions of the necessary immunity.” You could have fooled me. Without the Court’s explanation I would have understood Story’s terms as specifying exactly the dimensions of the necessary immunity. It is absolute, because inviolability is an absolute. And I am not the only one who understands inviolability in this manner. Hamilton, in Federalist 69 describes the King of England as “inviolable,”