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Postwar Legal Scholarship on Judicial Decision Making

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It is not at all clear how to deal with postwar legal scholarship in thirty minutes. It is possible to say definitively that there is too much of it. Once that point has been made, generalizations grow less confident. What I have chosen to attempt is to exhibit a series of snapshots of people who have performed since World War II in that long-running production of American legal scholarship/comment on judicial decision making. I will have to omit some important figures, and I cannot hope to do justice to any of the people I will mention. But the theme of judicial decision making has been an obsession of legal scholarship. A glance at this facet of scholarship may show more than a glimpse of any other part of it could.

By way of introduction, I will say that the work I will mention has been concerned, as I see it, with first one and then the other of two problems. I think that for perhaps fifteen years after World War II there was an effort to present an image of adjudication that could withstand the iconoclasm of the legal realists. This was done, it seems to me, not so much by attacking the realists as by building up a new conception of adjudication that would be proof against the realist criticisms. Beginning in the late 1950s, attention shifted to judicial activism as represented by the Warren Court, attention that was at first highly critical but more recently has been quite sympathetic. Let me begin with legal realism from the perspective of the late 1940s.

Realism had called in question the view that authoritative statements of law—precedents, statutes, constitutional provisions—can produce reliable outcomes in litigated cases, reliable in the sense that different people would reach the same results in the same cases by applying legal rules. The proposition that legal rules fail to control decisions suggests that decisions depend on who decides, or to put the matter another way, that the rule of law does not exist. In the Supreme Court, Justice Roberts had seemed to encapsulate the position the realists attacked. I refer of course to his remark in *United States v. Butler:* "When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former."[1] Justice Stone,

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1. 297 U.S. 1, 62 (1936).

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dissenting in the same case, could have been read as embracing a corollary of the realist position. "The only check upon our own exercise of power," he said, "is our own sense of self-restraint."[2]

This was in 1936. In 1948 George Braden, then of the Yale Law School, took up the question of reliability in the exercise of the power of judicial review.[3] First characterizing the judicial process in constitutional cases as "primarily political, not judicial," he supposed a justice saying to himself the following: "I admit that Justice Robert's [*sic*] mechanical method of squaring the statute and the Constitution was nonsense. Of course, we wield power. But this is potentially dangerous. Therefore, we must create a rule which is sufficiently objective to circumscribe us and our successors in our exercise of political power."[4] Braden examined the positions of three justices—that of Stone in footnote 4 of his *Carolene Products* opinion and of Justices Black and Frankfurter. He argued that none of them formulated such a rule. The most he would allow is that Stone ". . . did evolve a well-considered personal philosophy of self-limitation and present it for public criticism as such."[5] Braden remained within the tradition of realist criticism. He was at the least deeply skeptical of the possibility of reliability in exercising judicial review. In default of reliability, he endorsed as the best attainable alternative "an open declaration of personal belief."[6]

Also in 1948, Edward Levi published his short study *An Introduction to Legal Reasoning*.[7] His project was to separate "the mechanism of legal reasoning" from its "pretense," which, he said, "is that the law is a system of known rules applied by a judge."[8] Levi thus adopted at the outset an important part of the realist case. But while this claim had been seen as subversive of law in the hands of the realists, Levi made it into a defense of the law. He did so by trying to show that there is a mechanism of legal reasoning and that its working brings about democratic control of the law. "The basic pattern of legal reasoning," he said, "is reasoning by example."[9] In deciding cases, judges look for points of similarity and difference between the case before them and earlier cases. When an earlier case is seen as similar, ". . . the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case."[10] A rule of law develops as new cases are declared similar to old ones, and the rule changes depending on what it is in new cases that is identified as similar to their predecessors. The doctrine of *stare decisis* does not require that the same point of similarity

2. 297 U.S. 78, 79 (1936).

3. George Braden, The Search for Objectivity in Constitutional Law, 57 Yale L. J. 571 (1948).

4. *Id.* at 571.

5. *Id.* at 582.

6. *Id.*

7. Edward H. Levi, An Introduction to Legal Reasoning, 15 U. Chi. L. Rev. 501 (1948). This article was published as a book by the University of Chicago Press in 1949, and citations below are to the book.

8. *Id.* at 1.

9. *Id.*

10. *Id.* at 2.

have provided each link in the series of all the cases included in one classification at any given time. Instead, the cases can been seen in retrospect as connected within a system of family resemblance, with the courts shifting from one common trait to another as doctrine develops. This means the judges are making choices—first identifying as decisive a receding chin, next a Roman nose, then a tendency to obesity and baldness. As Levi puts it, "the rules change as the rules are applied."[11] But on his account this is a necessary feature of the law. It allows the law to change. New situations arise, to which the law must adapt, and social desires shift, which the law must come to express. This happens, according to Levi, because in litigation the parties bring to court the common ideas of society in the form of competing analogies. The parties participate in making the law and the lawyers represent more than the litigants, affording vicarious participation to all citizens. Just because it is indeterminate, the law comes to reflect social ideals, and it changes as they change.

In Levi's picture of adjudication the interaction of society and the courts continuously reshapes the law to express the community's changing values. It was not clear, perhaps it was implicitly denied, that there could be a critical perspective from which to judge the values urged in litigation or adopted in decision. Such a perspective appeared over the 1950s and early '60s in the work of Lon Fuller and in the legal process materials of Henry Hart and Albert Sacks.

Fuller was an early critic of realism, and after the war he conducted a long-running campaign against legal positivism, within which he located the American realists. His chief objection to positivism centered on its strategy of separating law from morality; in Fuller's view moral standards are so embedded in law that law is unintelligible without reference to them. Notwithstanding this position, he said very little by way of moral judgment on the substantive outcomes legal institutions produced. It seems a fair inference that he found a standard of moral judgment in the contribution of institutional outcomes to the satisfaction of human wants, but what he mainly discussed was a morality of process.

Fuller had a very general view of legal systems as sets of institutions for ordering social interaction to accomplish a group's purposes. In his account these institutions more or less closely approach certain models of forms of social ordering. A list of those he gave most attention would include adjudication, legislation, contract, mediation, and managerial discretion. According to Fuller, these possess a definite structure; as he presents them, they resemble natural kinds. Their defining features function as both conditions of efficacy and criteria of moral evaluation. For example, legislation, or law making, is effective and also legitimate to the extent that it satisfies such standards as intelligibility and noncontradiction.[12]

What is of most interest here is Fuller's conception of adjudication. He saw this process as "a device which gives formal and institutional expression

11. *Id.* at 3-4.

12. See Lon L. Fuller, The Morality of Law 33-41 (New Haven, Conn.: Yale Univ. Press, 1964).

to the influence of rationality in human affairs."[13] It was not that rationality was unique to adjudication—quite the contrary. Rather, reason was constitutive of adjudication, unlike other forms of social ordering. Thus for Fuller the distinctive feature of adjudication lies in its guarantee to affected parties of an opportunity to seek a favorable decision by proofs and reasoned arguments, which he took to mean arguments in terms of moral principles. To Fuller, this implied additional features of the process that, taken together, furnish a description of the structure of adjudication. These were: participation by proofs and reasoned argument, an impartial judge, decisions rationally derived from principles, the shaping of issues as claims of right and accusations of guilt or fault. Fuller saw adjudication's commitment to reason as limiting in two ways its domain, or scope of application. First, adjudication is impossible without moral principles to guide argument and decision. He thought that the source of these standards lies in what he regarded as the two fundamental principles of social order—organization by common aims and reciprocity. Disputes between persons united by shared purposes could be resolved by rational derivation of standards traced to the imperatives of accomplishing common ends. Similarly, he believed that the rules needed to maintain a regime of reciprocity—such as the market—could be built up by rational means. But if the parties lacked any relation by common aims or reciprocity, adjudication would fail for lack of the necessary source of principles for decision.

Second, Fuller thought that adjudication could not deal with polycentric disputes, as he called them. These are, roughly, disputes with mutually interacting elements so intricately entangled and widely ramified that it becomes impossible in dealing with them to preserve participation by proofs and argument. Questions of allocation of economic resources, in Fuller's view, commonly answer to this description. Dispute of this sort could be solved, according to him, only by contract or managerial discretion. In general he evidently believed that each form has a distinctive structure that fits it to certain social tasks but prevents its use on others. Thus he considered it a grave mistake to mix different forms—as mediation and adjudication—or to fail to observe their limits by resorting to a form of ordering in contexts to which it is ill suited.

Fuller never achieved a comprehensive statement of his overall view, and the fragmentary exposition of his position that he left behind is far more suggestive than it is clear. Nevertheless, several themes emerge from his work that became important to the resolution of the realist crisis achieved in the late fifties. These were: the conception of law in terms of processes in which legal processes have characteristic strengths and limits—the idea, that is, of institutional competence; the view of adjudication as reasoned development of the implications of principle; the belief that principles are rooted in the common purposes of a community.

At the same time that Fuller was developing these ideas, another version of them appeared in a form that reached a wide audience in American law

13. The Principles of Social Order: Selected Essays of Lon L. Fuller, ed. Kenneth I. Winston, 94 (Durham, N.C.: Duke Univ. Press, 1981).

schools. This was *The Legal Process,* the collection of teaching materials constructed by Fuller's Harvard colleagues Henry Hart and Albert Sacks.[14] The book remains unfinished and unpublished, but a duplicated typescript dated 1958 and labeled "Tentative Edition" was used in classroom instruction at Harvard and elsewhere and became well known. Hart and Sacks set a long series of exercises designed to guide critical inquiry into characteristic operations of the American legal system. The range of topics considered was wide—from negotiating a commercial lease to preparing an opinion for the Federal Trade Commission to drafting a statute protecting the interest in privacy. Some great issues were examined—such as malapportioned legislatures and the emergency powers of the President—along with humbler, everyday problems like the responsibility of airlines for lost baggage. Through the presentation of small case studies the editors raised such questions as, What should be the role of custom in resolving questions of tort liability? How should prosecutors exercise their discretion to charge criminal offenses? Is there a sound theory of statutory interpretation?

The Legal Process invited its readers to assume a perspective that largely duplicates Fuller's. There was the same emphasis on law as a set of institutional processes designed to advance social purposes. Like Fuller, Hart and Sacks insisted on the convergence of law and morals, although they stressed more clearly the maximization of human satisfactions as the basic test of institutional outcomes. They developed a very similar conception of institutional competence, assigning different tasks to different institutions and distinguishing reasoned decisions from decisions reached by exercise of discretion or summing of preferences. Thus they presented adjudication in Fuller's terms as a process of reasoned elaboration of the implication of shared purposes, including the purpose of maintaining a regime of reciprocity. They adopted Fuller's view that adjudication is unsuitable and negotiation the preferred means for fixing the terms of reciprocal exchange, and they followed him in rejecting adjudication as a means of dealing with polycentric disputes. In at least one major respect Hart and Sacks went well beyond Fuller. His description of adjudication seems to have been modeled on the common law. Consequently, it left statutory interpretation out of account.[15] This omission is remedied in *The Legal Process,* in which the final chapter undertakes to show that problems of interpreting statutes yield to the overall approach recommended throughout the book.

One way to describe the considerable achievement of *The Legal Process* is to see it as repairing the damage inflicted by legal realism. The realists' demonstration of the range of choice left open by characteristic forms of legal reasoning implied that judicial decisions are either arbitrary or partisan. Hart and Sacks were fully as critical of conventional legal argument as any realist. But they redeemed the ideal of the rule of law by

14. The following account in some respects tracks and in some other respects departs from G. Edward White, The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change, 59 Va. L. Rev. 279 (1973).

15. But cf. Lon L. Fuller, Positivism and Fidelity to Law—A Reply to Professor Hart, 71 Harvard L. Rev. 630, 661-69 (1958).

sponsoring an explicitly policy-guided style of argument capable of preserving reliability and neutrality because confined to the rational explication of generally shared or, in the case of statutes, authoritative premises. It would be a considerable exaggeration to say that their views were universally shared, but it does seem fair to say the *The Legal Process* expressed an approach to law that became deeply entrenched among legal scholars.

The Hart and Sacks conception of legal process succeeded brilliantly against legal realism, but no sooner had it done so than it met a formidable opponent in the Warren Court. During the period Warren was Chief Justice, the Supreme Court held unconstitutional official discrimination against racial minorities, greatly expanded the rights of criminal defendants, required legislative apportionment on the principle of one man—one vote, gave increased protection to speech, and barred prayer in public schools. The Court became the center of intense political controversy that reopened fundamental questions about the judicial role in American government.

Many law professors agreed with the Court's program. At the same time they had come to believe that the test of a judicial decision lies not so much in the result it reaches as in the quality of the argument advocated to justify it. By that standard much of the Court's work failed. It was undeniably vulnerable to criticism of the kind massed in one sentence by Alexander Bickel and Harry Wellington in their attack on the *Lincoln Mills* decision:[16]

> The Court's product has shown an increasing evidence of the sweeping dogmatic statement, of the formulations of results accomplished by little or no effort to support them in reason, in sum, of opinions that do not opine and of per curiam orders that quite frankly fail to build the bridge between the authorities they cite and the results they decree.[17]

The law professor's dilemma was fully revealed in Herbert Wechsler's 1959 Holmes Lecture, "Toward Neutral Principles of Constitutional Law."[18] Wechsler aimed in part to defend the power of judicial review. He also undertook to state the conditions that made exercise of the power legitimate and to appraise three important Supreme Court decisions according to the criteria he supplied. The cases were *United States v. Classic*,[19] *Shelley v. Kraemer*,[20] and *Brown v. Board of Education*.[21] These decisions, he said, had "the best chance of making a lasting contribution to the quality of our society of any that I know in recent years."[22] The question he then put was whether they were "entitled to approval in the only terms that I acknowledge

16. Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957).

17. Alexander M. Bickel & Harry Wellington, Legislative Purpose and the Judicial Process, The *Lincoln Mills* Case, 71 Harv. L. Rev. 1, 3 (1957).

18. Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1 (1959), *reprinted in* Herbert Wechsler, Principles, Politics, and Fundamental Law 3 (Cambridge, Mass.: Harvard Univ. Press, 1961). Citations below are to the book.

19. 313 U.S. 299 (1941).

20. 334 U.S. 1 (1948).

21. 347 U.S. 483 (1954).

22. Wechsler, *supra* note 18, at 37.

to be relevant to a decision of the courts."[23] Those terms he stated in the following way:

> The courts have both the title and the duty when a case is properly before them to review the actions of the other branches in the light of constitutional provisions, even though the action involves value choices, as invariably action does. In doing so, however, they are bound to function otherwise than as a naked power organ; they participate as courts of law. This calls for facing how determinations of this kind can be asserted to have any legal quality. The answer, I suggest, inheres primarily in that they are—or are obliged to be—entirely principled. A principled decision, in the sense I have in mind, is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved. When no sufficient reasons of this kind can be assigned for overturning value choices of the other branches of the Government, or of a state, those choices must, of course, survive. Otherwise, as Holmes said in his first opinion for the Court, "[the] constitution, instead of embodying only relative fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions. . . ."[24]

Wechsler could not find that the opinions in any of the three cases rested on adequately neutral and general principles. It seemed to follow on Wechsler's terms that the white primary, racially restrictive covenants, and school segregation should have survived constitutional challenge. Combined with the view that these cases had the best chance of improving American society of any decided over roughly a twenty-year period, this, at the least, was a sobering conclusion.

Most law teachers supported the Court's decisions in the cases Wechsler criticized, notwithstanding the difficulties some of them perceived in the opinions. *Brown v. Board of Education* was, however, only the beginning of the Warren Court's long march, in the course of which it recruited a significant number of lower court judges. It became increasingly clear that the activist course sponsored by the Supreme Court would not conform to the prescriptions of the legal process position. Many legal scholars felt themselves forced toward a painful choice either to enlist in the campaign of reform conducted by activist judges or to criticize them for violating the legal process standards the scholars had internalized.

This tension appears clearly in the work of Alexander Bickel, probably the leading constitutional law scholar of the 1960s. In 1962, when he published his most substantial book, *The Least Dangerous Branch,* he remained at least on speaking terms with the Warren Court. While he criticized the Court's performance in much the same terms as Wechsler, Bickel strongly supported the *Brown* decision; and he was anxious to justify a large role in American government for the power of judicial review. He argued that "the constitutional function of the Court is to define values and proclaim principles."[25] In comparison to the Court, legislatures were, he thought, "ill equipped" to achieve "the creative establishment and renewal of a coherent body of principled rules."[26] This distinctive capacity also served, in Bickel's

23. *Id.*

24. *Id.* at 27.

25. Alexander M. Bickel, The Least Dangerous Branch 68 (Indianapolis: Bobbs-Merrill, 1962).

26. *Id.* at 25.

view, as a limit. He maintained that the Court should "decide a constitutional issue only on the basis of a general principle,"[27] that it "should declare as law only such principles as will—in time, but in a rather immediate foreseeable future—gain general assent."[28]

Bickel's most distinctive, if problematic, contribution lay in his resolution of what he called "the Lincolnian tension," the need to accommodate principle and expedience. As he put it, "No good society can be unprincipled, and no viable society can be principle-ridden."[29] It followed that if the Court were to take a large part in government it could not decide on principle whenever an issue of principle could be framed in litigation; either the Court would yield to expedience by declaring constitutionally valid politically necessary compromises with principle, or it would provoke unmanageable conflict by doctrinaire insistence on principle. Instead, the Court should ration the occasions for deciding on principle by cultivating devices such as standing and ripeness that enabled it to avoid facing constitutional issues at inopportune moments. The heart of the book was devoted to the description of these devices for avoiding decision—"passive virtues" Bickel called them—and to showing how they could be used to preserve and enlarge the Court's capacity to serve as "a voice of reason, charged with the creative function of discerning afresh and of articulating and developing impersonal and durable principles."[30]

By 1969, when Bickel gave the lectures published as *The Supreme Court and the Idea of Progress,* he had grown thoroughly out of sympathy with the Warren Court. The justices, he said, had "relied on events for vindication more than on the method of reason for contemporary validation."[31] He pointed out that "the Warren Court has come under professional criticism for erratic subjectivity of judgment, for analytical laxness, for what amounts to intellectual incoherence in many opinions, and for imagining too much history."[32] He went on to say that "the charges against the Warren Court can be made out, irrefutably and amply."[33] This amounted to a verdict of guilty because, for Bickel, judicial review was justifiable only it if were conducted as reasoned application of "impersonal and durable principles."[34] His unfavorable judgment stood, even though he conceded that the Court "may for a time have been an institution seized of a great vision, that it may have glimpsed the future, and gained it."[35]

Bickel did not believe the Court would gain the future. On the contrary, he thought its school-desegregation and reapportionment doctrines would be

27. *Id.* at 247.

28. *Id.* at 239.

29. *Id.* at 64.

30. *Id.* at 27. Bickel was here quoting Henry Hart.

31. Alexander M. Bickel, The Supreme Court and the Idea of Progress 12 (New York: Harper & Row, 1970).

32. *Id.* at 45.

33. *Id.* at 47.

34. *Id.* at 98.

35. *Id.* at 100.

largely abandoned. As he said, "I have come to doubt in many instances the Court's capacity to develop 'durable principles' and to doubt, therefore, that judicial supremacy can work and is tolerable in broad areas of social policy."[36] The lesson he drew from the Warren Court's failure, as he predicted it, was that the Court could not manage "problems of great magnitude and pervasive ramifications, problems with complex roots and unpredictably multiplying offshoots."[37] To put the matter another way, the courts could not deal successfully with polycentric problems. Rather, adjudication met its proper limits in the rational derivation of outcomes from principles implicit in shared aims, as Fuller had it, or in Bickel's terms, in a "single, well-recognized ethical precept."[38] By 1969 the domain of shared aims or well-recognized ethical precepts seemed to have shrunk considerably, while the territory given over to polycentric disputes appeared to have grown very large.

Bickel's disenchantment had deeper roots than just the Warren Court's failure to produce reasoned justification in important cases. He had come to disbelieve in the possibility of resolving current constitutional controversies by rational argument. The legal process view in which he shared required widely held premises to serve as starting points from which outcomes in litigation could be deduced. Fuller and Hart and Sacks had seen American institutions as fundamentally benign and had been optimistic about the prospects for reform within a context of general agreement on social goals. Between 1962 and 1970—the publication dates, respectively, of *The Least Dangerous Branch* and *The Supreme Court and the Idea of Progress*—many people came to hold quite a different view. They were persuaded by the experience of conflict during the 1960s over issues of racial discrimination, the distribution of wealth and opportunity, and war in Southeast Asia that the country was deeply divided and most of its institutions unresponsive or oppressive. From this perspective the Supreme Court was the least damaged of the institutions of the American government. This was due to just those decisions that were faulted as inadequately justified; the decisions more or less matched the moral judgments of those who advocated large-scale change. What was needed was a new conception of adjudication that would justify the performance of the Warren Court.

This is what John Ely's book *Democracy and Distrust* tries to do. Ely offers a view of the Constitution as very largely unconcerned with substantive values. Questions about values, he argues, the Constitution commits to the political process. The role of the courts within the constitutional scheme is not to enforce the judges' conceptions of fundamental values but to guarantee the integrity of the political process. According to Ely, this is the true meaning of the Warren Court's reapportionment and voter-qualifications decisions, and of cases dealing with political expression and association as well. The Court acted "to ensure that the political process . . . was open to

36. *Id.* at 99.
37. *Id.* at 175.
38. *Id.* at 84.

those of all viewpoints on something approaching an equal basis."[39] Ely thinks that the same concern with the political process in a representative democracy explains the Warren Court's decisions upsetting legislative classifications that disadvantage certain groups, most notably racial minorities. The Court intervened in these cases, on his account, to correct malfunctions of the political system where "representatives beholden to an effective majority [were] disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest and thereby denying the minority the protection afforded other groups by a representative system."[40] The overall effect of Ely's theory of judicial review is to preserve the leading decisions of the Warren Court without at the same time providing a basis for substantive due-process cases like *Lochner v. New York*.[41]

Ely's thesis is unsatisfactory to people who believe that the Constitution guarantees rights beyond those of participation in the political process and fair representation. It seems impossible to show that their position is mistaken. Thus Ely defends his view partly on the ground that it is consistent with the premises of the American system of representative democracy. But once the institution of judicial review is conceded, the premises of the American system become debatable, and it cannot be maintained that the principle of majority rule controls. American government combines majority rule with the countermajoritarian institution of judicial review, and many of the Constitution's important provisions are so indefinite that the division of authority between majority rule and minority rights is open to perpetual contest.

Perhaps the leading proponent of the view that individuals have constitutional rights more extensive than Ely would allow is Ronald Dworkin.[42] He believes people have moral rights at least some of which have been incorporated in the Constitution and elsewhere in the law and have thus become legal rights as well. Given the ambiguity and vagueness of legal materials, it is often unclear what the legal rights of the parties are. However, Dworkin gives moral rights an important role to play in so-called hard cases—that is, "cases that cannot be brought under a clear rule of law, laid down by some institution in advance."[43] He maintains that in such cases a judge should decide on the basis of principles derived from an interpretation of the legal system as a whole, or the relevant part of it, that brings it "as close to the correct ideals of a just legal system as possible."[44]

Dworkin concedes that judges will differ in their moral views and so may come to different decisions. On the other hand he insists that a judge cannot properly just implement his own opinions. He is obliged to decide cases

39. John H. Ely, Democracy and Distrust 74 (Cambridge, Mass.: Harvard Univ. Press, 1980).

40. *Id.* at 103.

41. 198 U.S. 45 (1905).

42. See Ronald M. Dworkin, Taking Rights Seriously (Cambridge, Mass.: Harvard Univ. Press, 1977).

43. *Id.* at 81.

44. Ronald M. Dworkin, "Natural" Law Revisited, 34 U. Fla. L. Rev. 165, 168 (1982).

consistently with the existing body of law, albeit clarified in its application to hard cases by interpretation according to the judge's political morality.[45] There might be x number of systems of political morality, but only x minus y could be implemented consistently with the existing body of law. This constraint is less stringent than those Ely advocates.[46] For example, a judge who agreed with Ely would simply see no footing in the Constitution for a claim of constitutional right to an abortion. A judge who acted on Dworkin's prescriptions could decide in favor of the claim.[47] The authority Dworkin gives to judges, not just in constitutional cases but in statutory and common-law cases also, reaches very far. Thus he has restated and extended a critique of the notion of legislative intent that undermines commonly used techniques of statutory and constitutional interpretation. It is quite possible to subvert the force precedent is sometimes supposed to have in parallel ways. Consequently, the class of cases governed by clear rules might turn out to be quite small. It may even be open to doubt that there are enough easy cases to make up a body of law comprehensive enough to control judges in any meaningful way.

It would be eminently worthwhile to focus on the validity of the work of each of the people I have mentioned as an account of adjudication. In the main I have not tried to do that. Rather, I have intended to suggest the question how each person's work fit the time at which it appeared.

Braden's article, as I have said, represents the persistence into the postwar period of the legal realist outlook. Concerned as it is with constitutional law, the article brings close to the surface the conflict between liberal reform and judicial conservatism that was implicit in the realist critique of the 1930s. I think the same conflict can be detected behind Levi's book. Writing as he did after the Supreme Court revolution of 1937, Levi could argue that judges are ultimately subject to democratic control. When he turned to constitutional litigation, his example was the Commerce Clause, and he ended his story with *NLRB v. Jones & Laughlin Steel Corp.*[48] and *United States v. Darby,*[49] cases in which durable legislative majorities at last won out over the old Court. At least some contemporary readers looking at the book after the upheavals of the 1960s would be likely to ask questions that evidently were not salient when the book was written. They might question, if they did not deny, that there are common social ideas, or at least doubt that they extend as widely as Levi implied. They might ask whether unequal litigating resources do not handicap the presentation of some of the social ideas that compete in litigation. And they might think that judges do not finally acknowledge an emerging consensus when they make the law but rather choose between incompatible ideas. A person in contact with law schools

45. See Ronald M. Dworkin, How to Read the Civil Rights Act, N.Y. Rev. Bks. Dec. 20, 1979, p.37; Ronald M. Dworkin, The Forum of Principle, 56 N.Y.U. L. Rev. 469, 476-500 (1981).

46. See Dworkin, The Forum of Principle, *supra* note 45, at 500-16.

47. Compare John H. Ely, The Wages of Crying Wolf: A Comment on *Roe v. Wade*, 82 Yale L. J. 920 (1973), with Dworkin, The Forum of Principle, *supra* note 45, at 515-16.

48. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

49. United States v. Darby, 312 U.S. 100 (1941).

over the past twenty or twenty-five years would have seen the work of Fuller and Hart and Sacks wax and then wane. He might think that this had less to do with the quality of their work than with a change in the social context within which they were read. In crudely conventional terms a consensus view of society was replaced by one of conflict, so that many of the same questions that could be asked of *An Introduction to Legal Reasoning* were directed at *The Legal Process*. However, a student exposed to *The Legal Process* today might respond to it a good deal more sympathetically than some of his predecessors did ten or fifteen years ago. The same student might find *The Least Dangerous Branch* unproblematic even though its author moved away from it in the late 1960s.

Ely's *Democracy and Distrust* and Dworkin's *Taking Rights Seriously* are of course contemporary books. They may very well turn out to have lasting value, but at least some of their current appeal, I think, is owing to the answers they furnish to questions made urgent by the inspiring or troubling example set by the Warren Court.