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# President's Letter

We here reproduce a chapter on Edward H. Levi from a book I published twenty years ago *The Common Law Tradition: A Collective Portrait of Five Legal Scholars* (Transaction Books, now Routledge). The chapter discloses what a real university president, and real Attorney General, should look like.

One of my classmates at the University of Chicago Law School was the late Judge David Rothman of Los Angeles. He was a gifted caricaturist and gave me permission to include his drawings in the book referred to above; because of my publisher's frugality this did not happen. His drawings of Levi and a photograph appear below at the head of the article

George W. Liebmann

# Time For A Road Trip – To The Bar Library

This past weekend my wife and I did something we had never done before: we travelled to another city to see the Orioles. We had been to parks in other cities, from Boston to Seattle, but never to see the Orioles. I would say that we were inspired by new Orioles majority owner David Rubenstein who spoke at the Library several weeks ago, but we in fact purchased the tickets several months ago. Oh well!

The trip got off to somewhat of an adventurous start while we were cutting through the mountains and it began to snow. The temperature dropped from thirty-five to twenty-eight, and what I would call heavy snow, lasted for about forty-five minutes. About half way through it all I engaged in conversation with my old friend St. Christopher, who once again, came through in a pinch.

We are quite fond of Pittsburgh and in addition to going to P.N.C. Park we visited the Phipps Conservatory and Botanical Gardens as well as the National Aviary. Both are divided into themed rooms, each are fascinating, and if you are even remotely interested in flowers or birds, I highly recommend them. I believe my wife set some sort of record for most pictures taken over a two day period.

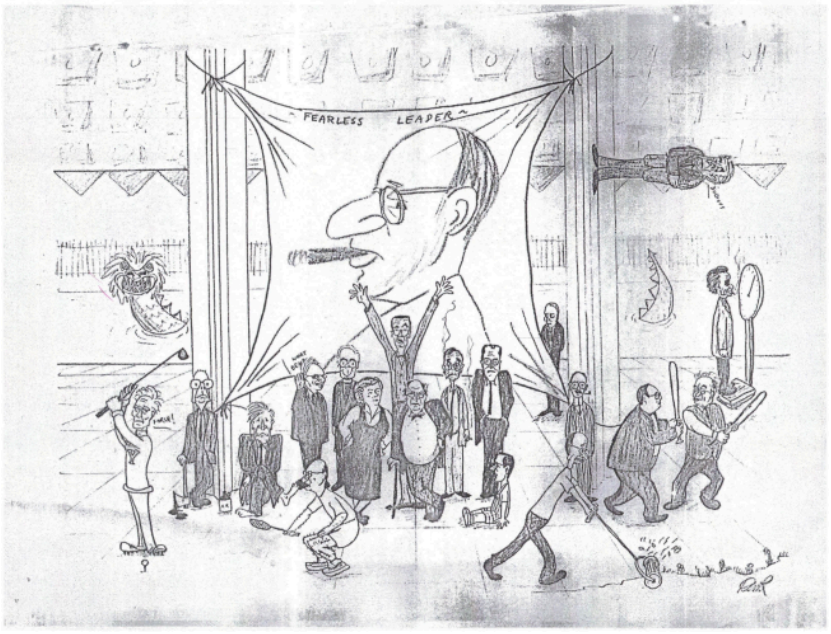
Now, as for the baseball, P.N.C. Park is fabulous, worth making the trip to see whether the Orioles are in town or not. The fairly evenly divided crowd (Orioles fans do indeed travel quite well) was a great deal of fun. Unlike several other American League East fanbases that inundate Camden Yards in

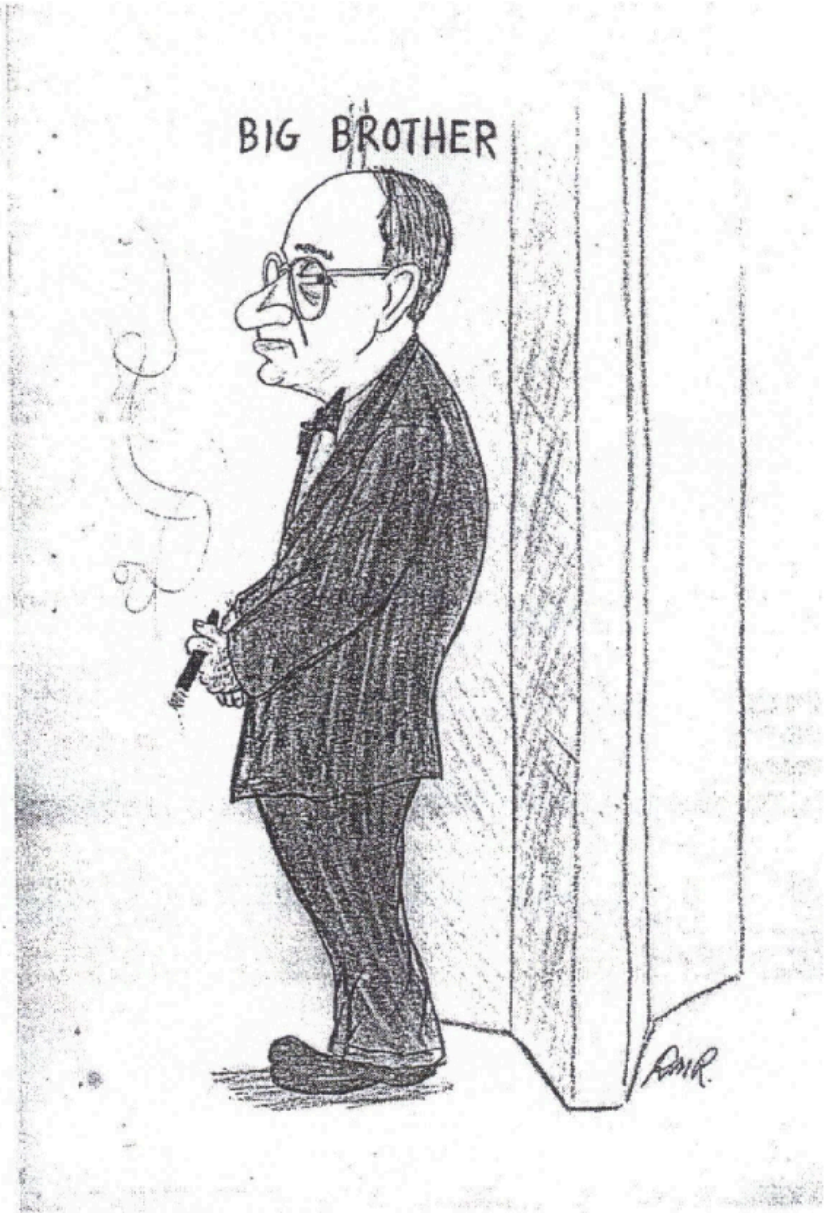
the Summer, Orioles road fans, at least the ones we encountered this past weekend, are a-okay.

Now road trips are fun, but there is no place like home and when you are home once in awhile you must put leisure aside and get down to work. While P.N.C. Park, like Camden Yards, might be a monument to baseball, the Baltimore Bar Library has been referred to by many as a monument to the legal profession. Like the two ballparks there is not a bad seat in the house providing you wonderful sightlines to treatises, old and new, some you are unlikely to find anywhere else. Some of those seats can be used to access an expansive collection of Westlaw databases, including not just cases, statutes and regulations, but law reviews, treatises, briefs and forms. You can utilize one of the Libraries computers or even your own laptop. If you want to bring home the pennant, or success in whatever it is you might be working on, I suggest you come to the Bar Library. You will not be sorry, and for at least the next six months or so, you will not have to travel through the snow to get here.

I look forward to seeing you soon.

Joe Bennett




BIG BROTHER

EDWARD H. LEVI

1911 - 2000

# 1

# Edward H. Levi

Edward Levi was a child of the University of Chicago. Born in 1911, he was a graduate of its Laboratory Schools, its College (at the time he attended the university it was in the throes of transition to the famous Hutchins college),[1] with its emphasis on a core curriculum in which the classics of Western political thought and literature were studied in chronological sequence, and its Law School. Along with Whitney Griswold of Yale, he was probably the greatest of postwar American university presidents, preserving, at least for a time, the distinctive ideals of independence, free inquiry, and curricular focus associated with his great predecessors, William Rainey Harper and Robert Maynard Hutchins. As attorney general of the United States for two years during the Ford administration, he labored to restore an appreciation of the separate domains of law and politics.[2] He also sought to reinforce the institutional safeguards of American liberty: federalism and the separation of powers; his successors have eroded but not completely destroyed his legacy.[3] His concerns centered less on individual rights than on the structure of divided and separated government that protected them, and that distinguishes the United States from a myriad of dictatorships with "parchment barriers" supposedly guaranteeing individual rights. His third great role, here considered, is that of the impresario, but not the founder, of a remarkable law faculty, whose influence on modern American government is the subject of this book.

Levi's central concerns were with the legal process, not with political outcomes. His *Introduction to Legal Reasoning* still remains the best short description of the common law method. While he regarded case law, statutory interpretation, and constitutional adju-

dication as separate domains, his description of the common law technique has great contemporary relevance. As applied to constitutional adjudication, it provides a way out of today's sterile and ever more fanatical controversies between "originalists" and exponents of a so-called "living Constitution." Levi presupposed a system that proceeded by gentle stages, not by violent leaps; that was a "moving classification system" deriving its legitimacy from its assimilation of precedent and its progressivism from the direction of movement, objectively derivable from actions of the political branches of government.

While his concerns were similar to those of the "legal process" school at Harvard, his vision was broader. In legal education, he was a pioneer in the assimilation of law and the social sciences. While similar attempts were made at Yale, there law was swamped by social science and its bastard cousin, politics. At Chicago the visions of the economists and others were kept more earthbound, accounting for the fertility of the "law and economics" program, the relative success of the Chicago jury project, and Chicago's role as nursery for a number of prominent comparativists and legal historians. His approach to public office likewise showed broad vision; he was concerned with institutions, not partisan advantage.His father and grandfather were both rabbis; his mother was described by one of his contemporaries as "a dignified woman of friendly but firm views."[4] Although he was not particularly observant in matters of religion, the influence of this heritage was reflected in one of the most notable of his speeches, that to the Jewish Theological Seminary of America in 1968.[5] Emil Hirsch, his grandfather, was appointed to the original Chicago faculty in 1892 and was a close friend of Harper.[6]

Following graduation from law school where he was editor-in-chief of its law review (the traditional law school of Mechem, Hall, Freund,[7] Bigelow, and Bogert), Levi became a Sterling Fellow at the Yale Law School. There he became associated with a group of younger faculty, including Friedrich Kessler, Charles Gregory, and William O. Douglas. Levi was thus socially as well as intellectually a part of the "realist" movement centered at Yale, which sought to adapt the law to changed conditions through empirical study of them. Hutchins planned to have Wilber Katz of the Chicago Law Faculty, together with Levi, Gregory, and Douglas, teach a four-

part corporation law sequence at Chicago entitled, in reflection of Depression-era concerns, "Losses, Management, Finance, and Reorganization," with parallel courses on Allocation of Risk and Labor Law. When Douglas went to Washington instead of Chicago this design fell through, but Levi in 1936 joined the faculty—which then included Katz, Kessler, Gregory (a labor law specialist), the contracts scholar Malcolm Sharp, the comparativist Max Rheinstein, the economist Henry Simons,[8] and the constitutional iconoclast William Winslow Crosskey—as assistant professor. The school sought to introduce a four-year curriculum, with an intensive writing program in the first year and an industry study in the fourth. The New Plan was introduced in 1937; although the fourth-year program was soon eliminated, the faculty group according to Levi was "able, diverse and in retrospect more appreciative and tolerant of each other than might have been expected;" Chicago remains one of the more collegial law faculties to this day. According to Levi, "some of us enlisted for study of economics under the gentle tutelage of Henry Simons, and also for reading of Aristotle and Plato and St. Thomas under a less gentle tutor, Mortimer Adler."[9] In a tribute to Katz, who served as dean from 1939 to 1950, Levi extolled qualities that were his own touchstones: "he sought the long-run implications and the knowledge that other disciplines might usefully bring to law...he shared his enthusiasm and to a large extent he shared his doubts." Most of all, he had "appreciation for the work of others [and] would never make a decision for a meretricious reason."[10]

While at Yale, Levi had collaborated with the federal procedure scholar James William Moore on two major projects. The first of these gave rise to two lengthy articles in the *Yale Law Journal* on intervention in federal litigation;[11] the second was a revision of Gilbert's *Collier on Bankruptcy*,[12] which gave rise to a three-part comparative survey of recent developments in English, Canadian, and American bankruptcy legislation that appeared in the *University of Chicago Law Review*.[13] The writers stressed that when the legal structure has been well designed, an economic crisis is not apt to result in appreciable change. This was borne out by the English and Canadian experience. American legislation, by contrast, was

> [t]emporary in character, hastily conceived, and none too successful...the problem of reorganization is basically a problem of protection of credit. In the corporate field this

> can only be done by control over the original corporate structure. The new legislation already shows the desire of the framers to control the corporate structure after reorganization. This logically leads to control before reorganization.... The reorganization sections may become simply federal debtor laws and federal incorporation acts.

This drastic suggestion has not been realized and fits badly with Levi's later dislike of needless federal regulation. The articles on intervention concluded with another suggestion relating to large bankruptcy cases that retains continuing pertinence: "It should be possible for a court to anticipate the amount of fees to be allowed in a particular reorganization; the fact that intervention is often sought solely to gain the allowance of fees by the court could be taken care of by such a procedure."[14] Both of these major studies, though based largely on "law in the books," had an empirical cast.

## Thurman Arnold and Antitrust

In 1940 Levi joined the Antitrust Division of the Department of Justice, then led by Thurman Arnold, who in the late 1930s produced a level of antitrust enforcement not seen since the Progressive era, with major actions against the motion picture, tobacco, and aluminum industries, among others. Previously, Robert Hutchins had promised Levi to take him to Washington if Hutchins succumbed to FDR's repeated urging that he go on the Securities Exchange Commission.[15] Earlier, Levi had published a law review article on Arnold's writings, with the title "The Natural Law, Precedent, and Thurman Arnold."[16] Natural law, a concept generally associated with Roman Catholic writers, as seen by Levi was a modest doctrine: "An idea of natural law which assumes that somehow or other men may see clearly natural rights which apply in specific cases is not the idea of natural law which we wish to espouse."[17] The doctrine had three essential precepts: Aquinas' admonition that "[t]he good for men is to seek to know the truth, to live in society, and to harm no one,"[18] and those of Aristotle: "Justice is equality, or the giving to every man his due" and its corollary:

> Justice is the distribution of earthly goods in the state according to some standard set by the state. Corrective justice restores the balance upset by one man's misdeed. Apparently the distribution of earthly goods is a function of the basic constitution of the state and of the legislature. Corrective justice is more properly the function of the court or the impartial wise man...there must be equity applied to the particular case which does not fit into the general rule. Once equity has been administered, a new rule has been created, and a new distribution of goods is effected. The judiciary in administering equity has administered distributive justice.[19]

Levi's reconciliation of the three subjects of his title was as follows:

> Mr. Arnold in his *Symbols of Government* is happy with the end of the doctor which is to cure people, and he laments the fact that lawyers have allowed themselves to become enslaved to concepts forgetting their practical purpose. The end of the lawyer is to do justice.... If we would be slave to that concept and no other, we would have a guarantee of freedom which we do not now have. We would not be deceived into believing that the natural law can be stated in more specific terms, nor that we can dispense with the natural law and rely on precedent. We would be willing to use the slogans of a coming era but always for the purpose of doing justice as we see it.[20]

It would be accurate to say that Levi never departed from this description of the legal system; for him, the distinction between corrective and distributive justice was a critically important distinction. As for realism, "I didn't think it was a wonderful thing just to gather a lot of facts and not know why you were doing it... On the other hand, I was very much interested in what Thurman Arnold was doing...his approach to law was that of an anthropologist."[21]

Book Five of Aristotle's *Nichomachean Ethics* defines the distinction important to Levi, a distinction also discussed in Aquinas' *Summa Theologica*.[22] Corrective or commutative justice is about restoring the status quo: the punishment of crime, the provision of restitution to civil tort and contract litigants to restore them to the position that they reasonably expected to occupy. Distributive justice, by contrast, sought to alter the positions of persons or classes in conformity with moral ideals drawn from outside the judicial system. Aristotle's scheme, and that of Aquinas, is carried forward in the separation of powers: corrective justice is properly for courts, distributive justice for legislatures. This at least was the view of the judges in the tradition of Holmes, Brandeis, Frankfurter, and Hand, and indeed of Justice Black. It also was, as we shall see, explicitly the view of Levi's colleagues Llewellyn, Kurland, and Davis. Even Harry Kalven, though instinctively more egalitarian than the others, was convinced that insistence on political and procedural values, particularly free expression, would cause the substantive law to "work itself pure."

There can be no doubt that Arnold's *Symbols of Government* and *Folklore of Capitalism* exerted a powerful effect on Levi's thinking. In years aptly described by Dean Acheson as "the desert years of the human spirit,"[23] in which, as Learned Hand said, "the power of

reiterated suggestion and consecrated platitude has brought our entire civilization to imminent peril of destruction."[24] Arnold and others gave thought to the use of emotive symbols for defensive purposes against fascism and communism, leading to the charge that "in what were widely regarded as anti-democratic passages, Arnold had spoken of how beautifully the social scientists could govern if only they would learn to manipulate the symbols."[25]

His colleague Max Rheinstein was troubled by Arnold's writings in a way that Levi was not. In a review in 1939 of Arnold's *Symbols of Government*, he noted:

> Here we are probably at the gist of Mr. Arnold's book: the social scientist should govern the world... Mr. Arnold wants the new governing class to manipulate the symbols successfully. Perhaps he could simply refer them to Hitler's *My Battle*. But Mr. Arnold asks for a new science of social psychology. [While] doctrinarism has characterized the oratory of political and forensic speakers in the United States, [there are dangers in] see[ing] man no longer as a rational animal but as an animal pure and simple.[26]

Levi's writing was always elliptical, and potentially controversial and unpopular passages were heavily masked and aimed at specialized and discerning audiences. In this way, Levi avoided compromising his intellectual honesty; he also avoided any resemblance to a tribune of the people. Gerhard Casper, one of his successors as dean, relates that "Maurine Campbell, who at the Law School was secretary to Edward...tells the story of how she had typed a speech for him and afterwards commented: 'Mr. Levi, I did not understand one word.' To which Edward responded: 'I am much relieved, because if you had, I would have had to rewrite the speech.'"[27] His colleague Philip Kurland once observed: "You may hear that Edward is cold and calculating. This is not the case. Edward is warm and calculating."[28]

Levi rose to become first assistant under Arnold. The new staff members were subjected to intensive instruction in psychological devices, business structures, grand jury investigations, and the proper methods of building a case and became part of an agency of legendary competence in which morale was high and there was a sense of purpose and mission.[29]

Levi never lost his regard for Arnold. "He was and is the great person in my life."[30] "He was skeptical of most categories though he used many of them. He believed in civility, in reasoning, in kind-

ness, in fair treatment, in the perfectible goodness and capacity (and weakness) of all people." His works were "generative works...projecting an understanding of the purposes, functions, and flexibility of the legal system. He had the capacity and the necessity to free himself and in that way to be himself. In the joining of skill, purpose and responsiveness, he became one of the great lawyers and human beings of his time."[31]

Arnold was the key to the extraordinary self-confidence and drive of a seemingly diffident man. When Arnold left the Antitrust Division in 1943 when Levi was thirty-two, he wrote Levi a three-page handwritten letter. In it, he acclaimed the Socony-Vacuum (Madison Oil) brief as "the best job of style and arrangement I have ever seen." He went on:

> It is my conviction that you are laying a foundation during the war years which is going to put you at the very front of leaders of thought or action in this country...work such as you are able to do can't keep buried. And the reason why each year is going to add to your stature is that you have always been more interested in the job you are doing than in yourself. The boys who move around fast in politics and intrigue can grab the petty honors. But you are going to have in the future a reputation that has been built on a series of jobs well done. You have only started. Your broad strokes are yet to come. And when they do come, you are going to be able to rise above most of the men in your generation.... I have the temerity to believe that I can pick a long-run winner...hoping you keep this letter to read when you are fifty years old and all my predictions for you have come true.[32]

Although Levi is popularly thought of as a founder of the Law and Economics movement, it is a mistake to think of him as an undeviating member of the Chicago School in economics, with its belief in minimizing government regulation and its skepticism about economic redistribution. His tutelage in economics came initially from Henry Simons,[33] who along with Wilhelm Röpke and Friedrich Hayek represented a distinctly minority tendency in that collectivist era, and who in consequence displayed a more decent regard for the opinions of mankind than his more orthodox and doctrinaire successors. Levi's postwar antitrust course, which provided an intellectual epiphany for some, most famously Judge Robert Bork, a highly influential antitrust writer,[34] owed its revolutionary impact not to Levi but to Levi's collaborator, Aaron Director,[35] Simons' successor as the economist at the Law School, whose self-effacement concealed his influence as the initiator of numerous articles and doctoral theses,[36] who influenced the University of Chicago

Press to publish Hayek's *Road to Serfdom* after English publishers had refused it,[37] and whose economics washed all preexisting doctrine in cynical acid.[38] Bork declared that Levi "thought my arguments and conclusions too certain...[was] uneasy with all attempts to construct a complete system...ambivalent about the enterprise" but acclaimed him as "the greatest classroom teacher I have ever seen"; Thurman Arnold was the "tutelary divinity of this great theological seminary."[39]

For the present writer, Levi's approach was the most convincing. He began his course by requiring his students to read the full texts of virtually every district court decision rendered in the first ten years of the Sherman Act; the remainder of the course illustrated the disappearance and reappearance of the doctrines suggested in these cases. Antitrust, and all law, was for him at root an empirical exercise.

Levi's contribution was not economic orthodoxy but emphasis on the mutability and cyclicity of antitrust doctrines. It was alleged that "Levi would spend the first four classes of each week attempting to demonstrate how seemingly inconsistent antitrust decisions were in fact rationally interconnected. In the last class, Director would use economic analysis to show that everything Levi had said was wrong."[40]

After service in the Antitrust Division, and briefly as acting head of the War Division in 1943,[41] Levi served as counsel for the Federation of Atomic Scientists in support of the principle of civilian control of atomic energy, testifying at the hearings on what became the Atomic Energy Act of 1946.[42] "We knew how to relate to the people making decisions with respect to the domestic framework, but we didn't really get through to them on the international level."[43] He was enticed back to Chicago by Wilber Katz after having lost out to Herbert Wechsler for an appointment as assistant attorney general.[44]

When Levi emerged from the Antitrust Division, his views on many issues verged on the populist. In 1947, he published an article on "The Antitrust Laws and Monopoly" cautioning against an unchecked postwar merger movement. This emphasized that the percentage of nonfinancial assets controlled by the 200 largest nonfinancial corporations increased from 33 percent in 1909 to 48-50 percent in 1929 and 57 percent in 1939, and had further increased

in the war. "The Sherman Act can at least claim the credit for setting up the domination of the few as a substitute for the domination of the one in a number of industries." He shared the concern of Arnold's fellow Wyomingite and political ally, Senator Joseph C. O'Mahoney, that "collectivism in business leads directly to collectivism in government"[45] and even quoted Brandeis' famous dissenting opinion in the Florida chain store tax case on the social costs of large enterprise.[46]

"We now have with us the third great merger movement," he declared. "The first great merger movement occurred largely between 1898 and 1903.... The stock market crash of 1903 and the depression of 1907 brought this first movement to an end. The second great merger movement occurred from 1925 to 1929. When the depression came, it was recognized that artificial price rigidity, the mark of monopoly or effective trade restrictions, had played its part.... It is doubtful if a free and competitive society can be maintained if the direction of concentration is to continue." Levi read the *Alcoa* case as meaning that, "size and power are themselves the abuse,"[47] Judge Learned Hand having declared that Congress "did not condone 'good trusts' and condemn 'bad' ones; it forbad all."[48] "[H]ope lies in the new interpretation of the Sherman Act and an increased awareness of the responsibility of the courts to give adequate relief."[49] He celebrated the per se rule against horizontal price fixing of the *Madison Oil (Socony-Vacuum)* case: "If the trend [of the *Appalachian Coals* case] had continued it seems probable that we would have had a cartel commission in this country."[50]

This was close to the decentralist Brandeisian vision as described by Ellis Hawley:

> The huge corporation, with its myriad of employees, its stuffed shirts and high-priced conferences, its absentee ownership and financier control, was a menace to a democratic society. It sapped away the vitality of local communities, corrupted the political process, denied to the great mass of citizens the satisfactions that came from owning and operating their own businesses.... Big business, moreover, was not only a curse in itself, but also the primary cause of big government, big labor, and big agriculture. Because of it, society became organized into collective fighting units, each bent on sabotaging the others.... Government officials, taxed with problems that were beyond their capacity to solve, would grow fearful, suppress freedom of speech and press, and take refuge in an impersonal bureaucratic ineptitude, oblivious to the needs and problems of the individual or local community.[51]

In the following year, Levi had cautioned, in a review of an antitrust casebook, that "Students ought not to be permitted to forget that the power and structure of labor organizations have their impact on the problem of competition."[52] This was not fashionable doctrine at the time. He was influenced in this view by his colleague and brother-in-law Bernard Meltzer, for whom the relation of labor law and antitrust was a consuming interest.[53] Meltzer was a writer of articles, not of books or treatises, and a writer who wrote for specialists, as well as the author of the leading labor law casebook.[54] He was sufficiently acceptable to both management and unions to serve as a labor arbitrator in major industrial cases as well as for baseball, basketball, and hockey leagues. His premises derived from an earlier, more tolerant, era of "law and economics," which conceded more to the claims of the political order. As he retrospectively put it, "Simons raised the question of the costs imposed on the consumer, other workers and society by powerful labor unions. At the same time, Simons recognized the positive contribution unions could make."[55]

All this still has some appeal. The leading historian of the New Deal anti-monopolists has noted that they were fully successful only in their "banking, securities, power and holding company reforms,"[56] notably the Glass-Steagall Act separating commercial and investment banking and limiting branch banking and permitted investments by banks, the Securities Act and Securities Exchange Act, with their attempted regulation of corporate accounting practices, and the Public Utility Holding Company Act, with its dissolution of complex holding companies into single-level entities that could be effectively regulated by the states. The erosion of these regulatory schemes has thus far given us the savings and loan disaster and the Enron affair.

Already in the 1930s theories of monopolistic competition that used the marginal revenue curve as a key analytical tool had begun to undermine a belief in atomization and pure competition resting on economic grounds, by purporting to demonstrate that increased size and the spreading of fixed costs produced increased efficiency. However, Levi's later antitrust writings suggest that he never abandoned the political insights at the root of the antitrust movement. In 1959, reviewing a book on market power under the Sherman Act, he referred to the antitrust laws in more skeptical terms as "saving

us from our ignorance through the negative value of filling up a void otherwise too inviting for more harmful regulatory schemes, such as, I fear, the limitation on [corporate] wealth which [the authors] suggest."[57] He found the book "an amusing collection of rationalizations for different positions" that "enlarged the stream of economic literature which may now be referred to in legal circles, and, with due regard to the quality of the stream, this may not be an unmitigated service." His doubts about doctrinaire economics were shown when he sardonically introduced Aaron Director to his classes with the admonition: "Listen to this man very carefully. He will make you very rich." In the early eighties, in a conversation with the present writer at an American Law Institute luncheon, he indicated unhappiness at the extent to which the law and economics movement had assumed a life of its own:[58] "The Constitution does not provide for a dictatorship of economists." The economist Donald Dewey in 1990 echoed his concerns:

> Antitrust is good or bad in relation to the alternatives. Bork seems to think that the elimination of the many bad antitrust rules would be followed by a void that would enlarge contractual freedom. I cannot share his confidence.... A more decentralized, less bureaucratized economy is not an ignoble ideal. If the country is prepared to sacrifice some amount of GNP to realize it, so be it.... Justice Douglas believed that the country's only choice was between his version of antitrust and some detestable kind of state socialism. I am never entirely free of the fear that he could be right. De Tocqueville chided the middle classes of nineteenth-century France for their contemptuous anticlericalism, observing that the excesses of the Great Revolution should have taught them the utility, if not the truth, of religion."[59]

Levi would also have joined in Donald Dewey's caution: "The judicial economics that Robert Bork treats with such scorn is, after all, the blue-ribbon opinion in economics of a generation back.[60]

In a similar vein the lawyer Frederick Rowe, best known as a critic of the Robinson-Patman Act limiting price discrimination by manufacturers, criticized Bork's Efficiency Model of antitrust: "Inevitably, in view of the model's origins in a vision of the Victorian era, its inbuilt ideology of abstention yields legal norms compelling headlong antitrust default...the...inbuilt ideology of a self-correcting market, a noble vision of a bygone era, is spoiled by the pervasive reality of governmental interventions—notably antitrust itself." After quoting the great nineteenth-century economist Alfred Marshall for the proposition that every change in social conditions is likely to require a new development of economic doctrines, Rowe goes

on to observe: "A dying antitrust 'religion' is the loss of a precious cultural resource. In times of turmoil, crisis tempts revision of the enterprise system toward regimens of centralization which, as twice before, a strong antitrust idea can serve to deflect."[61]

The claims of intellectual orderliness have led to the ascendancy of the view, espoused by Judges Bork[62] and Posner,[63] among others, that makes economic efficiency the sole touchstone of antitrust doctrine, just as a similar quest in constitutional law on the part of Justice Ruth Ginsburg and her acolytes has led to the near demise of what was once called "difference feminism" in favor of simple rules condemning all gender-based distinctions including those designed to permit women with small children to accommodate work and family life.

How tidy this really is may be open to doubt. As Levi noted, much of the "economics" used in antitrust cases is meretricious, and as the public choice economist Dennis Mueller has observed, "there is ever-more-refined model-building on a narrow behavioral foundation rather than [a] shift out to the extensive margin where economics, rational politics, sociology, and psychology come together."[64]

Levi was too broad-minded to be an enthusiastic member of any school of legal thought, even one of which he is popularly deemed the co-founder. "This conforming society sees individuals as types and clusters ideas in the same way...lesser concepts which men create as pale images of what they ought to mean, and which then are used to forestall inquiry and block insight."[65] Early in his career, in reviewing a book on legal theory by Wolfgang Friedmann, he observed, with some asperity:

> [a] statement of philosophic principles...can operate to insulate a lawyer from an awareness of what is going on, and certainly can make it psychologically easier for him, if it has any effect, to mold the law in accordance with beliefs and prejudices. One cannot help thinking that in view of what people sometimes say when they speak out loud, that it is sometimes better, all things considered, if they remain silent. Professor Friedmann's book raises very sharply the question whether philosophy of law has anything to contribute to the good of the legal profession, the law, or the world. It remains to be shown that prejudices cease to exist or are more easily controlled because they are stated; much of recent history seems to show the reverse. A book on legal theory which begins by summarizing Aristotle and ends by attacking Prof. Hayek may be intended to delimit the field of legal theory from the area of political theory but there remains some doubt that perhaps the articulation of legal theory has served rather to give support to particular political ideas. The discipline of orderly discussion is necessary to prevent the theory of law from degenerating into a statement

> of power words which appeal to the community, and which are set forth as values and goals, and are then used to justify action without discussion.[66]

Twenty years later, he again expressed his dislike of superficial survey courses: "As Prof. Knight has written, 'the visible effect of general education is to enable people to rationalize more ingeniously and literately their snap judgments based on prejudice.'"[67] His dislike of the sort of jurisprudential theorizing today so in vogue[68] was expressed in an early book review that noted that an author "bows rather deeply to the Hohfeldian concepts. A middle-size bow would be much better and then not because the concepts are useful but because some people think they are."[69] Of Ronald Dworkin he observed, "I have thought that Dworkin ought to be read as writing on 'Taking rights seriously which the legislature and the constitution didn't take seriously enough... I have to admit I am put off by the pretentiousness of the Dworkin approach. But of course that's wrong. I think there is something to learn here."[70]

There can be no doubt, however, that Levi's views on antitrust issues moderated over time. Shortly before leaving the Antitrust Division he had successfully argued *United States v. Frankfort Distilleries*,[71] a cartel case, in the Supreme Court; it was one of three Supreme Court cases he argued in his career, the others being Illinois post-conviction cases.[72] In 1950, he briefly served as counsel to the House Monopoly Committee.[73] In 1952, he condemned theories resting monopoly on findings of abusive behavior as "a vague system of law restricting the activities of large enterprises.... The trend...to curb the dangers of monopoly power...carries with it its own dangers. The antitrust laws have been a symbol of both competition and nonregulation."[74]

In a critical review of two books denouncing antitrust policy by J. Kenneth Galbraith and David Lilienthal published in 1954, Levi candidly observed:

> Despite what many have written on the subject, including myself, I do not know whether it should be said that there is a great deal of economic concentration in this country, and recent studies cast great doubt on the once prevalent notion that concentration has been increasing.

In refuting Galbraith, he observed

> [t]he contention that countervailing power acts as a substitute for competition in reducing the effects of monopoly power seems to clash with the contention that it is the

> actual exercise of monopoly power (presumably not checked by countervailing power) which has made for technological change...the threat of a buyer to go into production for itself is, after all, the threat of a potential competitor...it is not clear why, under the theory, the defensive possessors of monopoly power, that is those having countervailing power, should pass on to consumers the fruits of their victories.

As for use of the antitrust laws to punish companies deemed bad corporate citizens, Levi reiterated his view that this would weaken the role of the antitrust laws as a symbol of government action that permits competition to regulate and denies a more active role to government.[75] The less strict antitrust doctrine that he espoused in his later years was thus consistent with his earlier concern for control over concentrations of power, though his focus had shifted, with the war, from the power of corporations to the power of government.

Two years later, in an article written jointly with Aaron Director,[76] Levi stated his more mature views. He continued to support the view of monopoly expounded by Judge Learned Hand in the *Alcoa* case, which allowed monopoly to be found even in the absence of bad acts, but vigorously rejected efforts to rest monopoly findings on perceived abusive behavior: "The economic teaching gives little support to the idea that the abuses create or extend monopoly." To require abuse as a condition of liability would mean that "the law would be seen as having less to do with competition and monopoly and more to do with merely a set of rules for fair conduct, perhaps emphasizing the protection of smaller firms." Nonetheless, in assessing monopoly, "the method of growth through mergers or combination could be used as some evidence of intention to monopolize and as an answer to the efficiency argument." The writers agreed with Judge Wyzanski[77] that a firm with high market share could escape liability if it owed its monopoly "solely to superior skill, superior products, natural advantages (including access to raw materials or markets), economic or technological efficiency (including scientific research, low margins of profit maintained permanently and without discrimination or licenses conferred by and used within the limits of law)." In language that was almost certainly Levi's and not Director's, the article concluded "nor do we mean to suggest that the law must of necessity conform to the prescriptions of economic theory, let alone move within the confines of changing fashions in such theory.... We do suggest that in the future there may well be a recognition of the instability of the

assumed foundation for some major antitrust doctrines."[78] The influence of the article was such that the *Mississippi College Law Review* published a symposium discussing it on its fortieth anniversary.[79]

One of the articles in the Symposium noted the accuracy of Levi's prophecy:

> The main lines of the law, then, may remain the same, but the statement of reasons for the law may change, and this in itself should have an interstitial effect in the cases. This sentence describes, in capsule form, what has indeed happened in antitrust. The Supreme Court has not overruled any antitrust precedents since...*GTE Sylvania* twenty years ago. Instead it has reconceptualized long-standing antitrust doctrine in terms of economic efficiency, and this process has markedly affected the application of these rules.[80]

Another commentator noted "we cannot trace Bork's single goal thesis directly to Levi, who in *Law and the Future* seems open to non-economic goals in conjunction with economic ones...Bork went well beyond the ideas sketched in *Law and the Future*...I would suggest that Bork was correct in arguing that his and Levi's legal process goals militate against an open-ended, standardless multi-goal approach in which courts take upon themselves the essentially legislative task of balancing economic and socio-political goals, such as the protection of small business."[81] But Levi's respect for legislation makes it seem unlikely that he would go as far as Bork in his commentator role in disparaging the policy of the anti-merger statutes.[82]

In 1957, Levi published an article on Section 7 of the Clayton Act, the anti-merger statute newly stiffened by the Celler-Kefauver Act in the early 1950s.[83] With respect to vertical acquisitions, he urged that "stock or asset acquisitions necessarily raise more market consideration problems than do exclusive arrangements; it is at least difficult to think of as rigorous a ban on acquisitions.... An analysis of market factors, therefore, should be of greater importance under Section Seven than under Section Three.... But at bottom there will have to be the acceptance under Section Seven of what appears to be the legislative determination; namely that at some point the coverage of commerce achieved through acquisitions results in an almost automatic ban...greater emphasis must be given to the proportion of coverage when acquisition is involved. This greater emphasis must be given because legislation has determined

that there is something likely to be particularly wrong with growth by acquisition, even though the growth achieved would not be illegal otherwise and even though the wrong cannot be seen by straightforward economic tests." This "double standard of market control...fails to reveal the distortion of the competitive symbols as used in the Clayton Act...one may hope, though there is no reason for any optimism, that a reevaluation of the double standard may come about." This discussion strikingly reveals the tension between Levi's jurisprudence and his newly acquired economic views.

A second article, written on resale price maintenance and published in 1960 reveals the same tension. The Levi of *U.S. v. Frankfort Distilleries*, which ended a resale price maintenance cartel, is not in evidence. His view of the economics is that "[a]s far as social policy is concerned, it would not be earthshaking whichever direction that the common law of antitrust took with regard to resale price fixing. But it is a matter of concern that the law should have failed to provide itself with a meaningful structure of theory...so as to put a premium on the avoidance of words which describe what the parties clearly intend. This must seem strange and degrading to men who take pride in their given word, and it fosters a caricatured view of the law."[84]

Writing in 1962,[85] before the erosion of antitrust doctrines under the influence of the Chicago School, Thurman Arnold regarded with satisfaction the fact that "in few areas of the law is a mature jurisprudence reinforced by so powerful an arsenal of investigative powers and procedures" and with even greater satisfaction the spread of antitrust conceptions to Western Europe. He, like Levi, remained fearful of bureaucratic regulation: "Our courts, which before the great depression were accustomed to review decisions of administrative tribunals with meticulous care, now affirm them if there is the slightest supporting evidence; there is no effective protest made today against bureaucratic aggression." He decried postwar economic stagnation, which he attributed to a fetish for budget balancing. Ironically, his last two concerns were addressed by the deregulation and deficit spending of the Reagan years, though traditional antitrust now appears shrunken and not "mature."

The changes in antitrust doctrine of the 1980s had their seeds in the writings of economists in the 1930s who wrote with alarm of imperfect competition between members of oligopolies and of "ad-

ministered prices." When they turned to description, they increasingly came to stress that "workable competition" in the form of product substitutes, product improvements, and imports continued to limit the behavior of oligopolists.[86] Reduced transportation costs and the progressive elimination of international trade barriers gave rise to larger geographic markets less susceptible to monopoly. All this, as well as price theory, had an impact on Levi's economic thinking.[87]

The historian Richard Hofstadter, writing in 1964, was likewise impressed by the bureaucratic survival of antitrust: "one of our small industries, which gives employment to many gifted professional men."[88] He saw the driving force behind the laws as noneconomic: the sponsors wanted to keep concentrated private power from destroying democratic government. Political support for the movement in his view had shriveled with postwar prosperity: "Individual entrepreneurship is a much less sure and satisfactory path as compared with bureaucratic careers.... This was the response of a generation raised in an economy of giant corporations, educated very often in universities with thousands of students, disciplined by army life, and accustomed to the imperatives of organization, mass, and efficiency.... What is questioned, when anything is questioned, are matters of personal style.... It is this concern that marks the transition from an age in which *The Curse of Bigness* and *Other People's Money* set the tone of the prevailing anxieties to one in which everyone reads *The Lonely Crowd* and *The Organization Man*.... The beats opt out of corporate uniformity in uniforms and erect themselves into a stereotype. The right-wingers sing their praises of individualism in dreary, regimented choruses and applaud vigilantes who would kill every vestige of genuine dissent."

But his explanation of the bureaucratic survival of antitrust, at least as of 1964, corresponded to Levi's view of its virtues: "It is one of the strengths of antitrust that neither its effectiveness nor its ineffectiveness can be precisely documented; its consequences rest on events of unknown number and significance that have not happened—on proposed mergers that may have died in the offices of corporation counsel, on collusive agreements that have never been consummated, on unfair practices contemplated but never carried out." Levi perceived that the desuetude of antitrust would leave a dangerous vacuum in difficult times; his successors at Chicago have

not shared that insight. "The balance between individualism and collectivism reflecting various stages of development is to be found in the history of the Sherman Act itself."[89]

## Defining Legal Reasoning

Levi's published writing was not focused on antitrust issues, but turned at an early stage to more general concern about the legal process. His *Introduction to Legal Reasoning*, published in 1948, three years after he left the Justice Department, stands as his major work and is still in use as an introductory primer in many law schools; it dovetailed with an introductory course he gave entitled "Elements of the Law" that he later passed on to Karl Llewellyn, for which he prepared a casebook in collaboration with Roscoe Steffen.[90]

While Levi and Llewellyn used vastly different written materials, Dennis Hutchinson correctly notes that they shared "mutual hostility to the extreme, almost nihilistic strain of Legal Realism and...corresponding optimism about the capacity of a customary legal system to develop workable rules for concrete problems."[91]

The book begins by distinguishing between the role of courts in developing case law, in applying statutes, and in enforcing constitutional guarantees. The common law gives judges significant leeway: "If a rule had to be clear before it could be imposed, society would be impossible. [Case law provides] a forum for the discussion of policy in the gap of ambiguity. On serious controversial questions, it makes it possible to take the first step in the direction of what would otherwise be forbidden ends. The mechanism is indispensable to peace in a community." Case law provides "a moving classification system" in which "the classification changes as the classification is made." "Where case law is considered, and there is no statute, the doctrine of dictum forces [the judge] to make his own decision." The law in this system is not viewed as static: "Not only do new situations arise, but people's wants change." "If different things are to be treated as similar, at least the differences have been urged...the adoption of an idea by a court reflects the power structure of the community. But reasoning by example will operate to change the idea after it has been adopted." Against the charge that such an approach knows no higher law than positive law, a defender of the "historical school" in jurisprudence observed that it found "in the finite a revelation of the infinite and in the earthly a

gradual development toward perfection";[92] compare the epigraph by Holmes.

In Levi's view, "courts are less free in applying a statute than in dealing with case law...the words used by the legislature are treated as words of classification which are to be applied...thus in the application of a statute the intent of the legislature seems important." Levi quoted with approval the language of Justice Reed in *United States v. American Trucking Association*[93] rejecting "a literal interpretation dogma which withholds from the court available information for reaching a correct conclusion." He thus rejected the approach of the English courts, urged in a later time by Justice Scalia, of looking to the language of the statute alone, without reference to committee reports and legislative debates.

He was emphatic, however, in declaring "if the court is to have freedom to reinterpret legislation, the result will be to relieve the legislature from pressure.... The democratic process seems to require that controversial changes should be made by the legislative body." The same applied, in Levi's view, even to noncontroversial changes affecting the prior construction of a statute. The writer recalls a conversation with him in the early 1980s, shortly after the rejection of the Bork nomination, in which we discussed the maiden flight of Mr. Justice Kennedy, an opinion that overruled the case of *Wilko v. Swan* that had construed a provision of the securities laws as having a short statute of limitation. The rationale of the overruling decision was that a longer limitations period applied to Rule 10b5 actions was available in many of the cases invoking the more specific provision. Levi was outraged by this repudiation of a prior construction of an unamended statute, and declared that it reinforced his view that Judge Bork's confirmation would have been better for the law.[94]

The rules relating to statutory construction in his view "more than any other doctrine in the field of precedent...has served to limit the freedom of the court...the area where private parties can determine their rules between them or rely on what courts have said in the past seems to me to be one where intrusion by the court to change the rules is judicial activism."[95] "The matter must be one that involves the Constitution before the court may revise the interpretation of legislation."

He asserted that in constitutional cases, the courts had the most latitude of all, a controversial proposition today. "The constitution

sets up the conflicting ideals of the community in certain ambiguous categories."[96] For this proposition he significantly cited the first chapter of Myrdal's *An American Dilemma*, obviously thinking forward to the time bomb of racial segregation that was about to explode. In 1950 Levi, together with several other law teachers including Erwin Griswold of Harvard, had filed a brief amicus curiae in the case of *Sweatt v. Painter* involving law school segregation in Missouri urging more stringent application of the separate but equal principle.[97]

In common law cases, unlike those involving the constitution, "the judge does not feel free to ignore the results of a great number of cases that he cannot explain under a remade rule." In constitutional cases "the freedom is conceded either as a search for the intention of the framers or as a proper understanding of a living instrument." In his view "the framers may have intended a growing instrument...what is desired is a different emphasis not different language. This is tantamount to saying that what is required is a different interpretation rather than an amendment." Writing of the expanded interpretation of the Commerce Clause adopted by the Supreme Court in 1937, he declared:

> In the long run, it seems now that a shift was inevitable. A written constitution could justify delay; its ambiguous terms could hardly prevent change as people saw problems in a new light. Causal connections which justified the change might not actually exist. The economic theories expounded by the Government in the Carter Coal case might be low grade, but they were believed.

The propositions he put forth were illustrated by series of cases involving dangerous instrumentalities, the Mann Act, and the Commerce Clause. He concluded: "Legal reasoning has a logic of its own. Its structure fits it to give meaning to ambiguity and to test constantly whether the society has come to see new differences or similarities.... The probable area of expansion or contraction is foreshadowed as the system works. This is the only kind of system which will work when people do not agree completely. The loyalty of the community is directed toward the institution in which it participates." Levi's vision in the constitutional area envisioned gradualism, however, not sudden *coups de main* imposing rigid new rules. The difficulty with new decisions imposed in that fashion is simply that the community will not be a participant in the court process, and will not extend loyalty to the court as an institution; the effect

of judicial intervention is to destroy the other forum available for people who do not agree completely: the political process and the legislature.

A properly functioning court, however, has the virtue that "The words change to receive the content which the community gives to them. The effort to find complete agreement before the institution goes to work is meaningless. It is to forget the very purpose for which the institution of legal reasoning has been fashioned. This should be remembered as a world community suffers in the absence of law." At the induction of Judge Robert Bork, Levi referred to "the progress of law as the collaborative articulation of shared purposes...among judges, distanced in time for many years, indeed not alive at the same time, and writing their opinions with respect to different factual situations and with the conditions of life considerably changed...it is the strength of our legal process that this is true."[98]

Levi's optimistic propositions compelled more general assent in 1948 than they do today. A harsher discourse informs discussions of the role of courts particularly in constitutional cases. Levi's statements were almost the apotheosis of the "legal process" school of jurisprudence: "Different organs have different tasks to perform within the legal process; and it is for students and scholars not only to identify those tasks but also to ascertain whether or not they are being performed properly. Jurisprudence, in other words, conceived as quality control."[99]

The reviews of *Introduction to Legal Reasoning* were generally enthusiastic. Although a number of reviewers took umbrage at Thurman Arnold's jacket blurb "the greatest piece of jurisprudential writing that has ever come to my attention," Roscoe Pound lauded the book as "exceptionally well written in a clear style with no attempt at brilliant paradox or challenging overstatement...a promising beginning of what I predict will be a notable career. The concluding paragraph is well put and calls for thoughtful consideration.... He approaches the judicial process...in a much better way than most of those whose reference of everything to economics and abnormal psychology has held the ground so fully in the present generation. Along with Llewellyn's work upon the task of the legal order and the relation of sociology to jurisprudence, Dr. Levi's book promises a more real realism and augurs well for the science of law."[100]

The philosopher Charles Perry declared that Levi's reasoning described "a moving equilibrium between justice and convention, maintained by argument and discussion and reflecting shifts in interests in purposes and in the circumstances of society."[101] Murray Gartner of the New York bar noted that Chief Justice Stone had only recently provided a splendid example of adherence to Levi's restrictive view of the discretion of courts in construing statutes, having "dissented in the *Girouard*[102] case although the majority reached exactly the decision he had urged almost two decades earlier [dissenting in the famous *Rosika Schwimmer* case]. One would be tempted to say that the Chief Justice died in the cause of judicial self-restraint...he was mortally stricken as he read his *Girouard* dissent in open court."[103]

Joseph Morse of the New York bar provided a more critical review, whose essential points Levi would probably have conceded. After praising Levi's recognition that "Both certainty and ambiguity have roles to play, but that of the latter has been largely overlooked," Morse trained his fire on the limited scope of the book as a theory of legal reasoning: it "neither probes the mind of the men of law nor numbers among them any but the appellate judge [manifesting] the upper court myth [it] fails to discuss the jury at all...eschews the administrative process...not even the shadow of a police officer falls upon his pages. The author's jurisprudence is one of doctrine, not of technique...the prior words of earlier courts are only a partial key."[104]

An English reviewer, B. E. King, saw benefits in Levi's latitudinarian approach to constitutional doctrine, while perceiving its potential for what was later called "judicial imperialism":

> When rules of law are fixed and certain, it is clear, as Aristotle realized, that there is "a whole class of matters which cannot be decided...properly by rules of law"..... The type of decision envisaged here is political and is a necessary supplement to judicial decision in any community. But if rules of law are framed in vague and general terms and the judges are well versed in "legal reasoning" the class of matters suitable for "decision by rules of law" is vastly extended—.[105]

Gilbert Schmitt of the University of Saskatchewan, writing in the *Canadian Bar Review*, lamented that Levi "fails to take the final step of analyzing the factors which control legal reasoning and make the law predictable [and] fails to consider the restricting elements which reduce the number of possible solutions."[106] It is worth not-

ing that this defect was attempted to be remedied by Levi's colleague, Karl Llewellyn, in his final work, *The Common Law Tradition: Deciding Appeals.*[107] Two other Chicago law professors sought to fill the remaining lacunae in Levi's study identified by Morse: Harry Kalven, in his study of the behavior of *The American Jury*[108] and Kenneth Culp Davis, in his studies of administrators, *Administrative Law Treatise*[109] and *Discretionary Justice: A Preliminary Inquiry*,[110] and of policemen, in *Police Discretion.*[111]

Felix Frankfurter, though recognizing the book's place in the realist tradition, disparaged it as "Bramble Bush Minor" and maintained that Levi and Llewellyn merely "said what John Chipman Gray told my class in 1905 and Holmes wrote in the 70s."[112]

It is clear from his later writings that Levi found the *Brown* decision problematic, not because of its result but because of the sudden leap it involved. He said as much, in a highly elliptical fashion, in 1970 in a talk to the Association of the Bar of the City of New York.[113] In 1958, obviously referring to *Brown*, he bemusedly observed: "Even a sociological footnote can turn out to be unhelpful, and particularly if it need not be related to the law and might be bad sociology.[114] There is a certain protection in taking a legal position, if one must do so, in a noncontroversial area, that is the best place to be, and if it turns out to be controversial at least to take a position based on the law pure and simple."[115]

He opposed the use by legal activists of partisan sociology; he would have been equally opposed to the suggestions of self-styled "civic republicans" that the answer to the claims of conservative originalists is the use by "liberals" of partisan history: "The historic turn represents a sensitive strategy for legal liberals...originalism may prove a useful fiction."[116] In the wake of *Brown*, he became a participant in the debate instigated by Learned Hand's *The Bill of Rights* and Herbert Wechsler's *Toward Neutral Principles of Constitutional Law*, publishing an article in 1965 on "The Nature of Judicial Reasoning."[117] In it he referred to the unusual interest in the form of judges' opinions: "For the judge or lawyer the relevant effects are upon the web of the law, the administration of the law, and respect for it. These are large items, and the priest who only keeps his temple in good repair is not to be condemned on that account." Levi was explicit in declaring, "It is possible that the *Brown* case should have been decided with the same result but with less of

an immediate jump and on the partial basis of an old and accepted theory."[118]

In this respect, he took issue with Professor Wechsler's demand for neutral principles forecasting future cases:

> [t]he function of articulated judicial reasoning is to help protect the court's moral power by giving some assurance that private views are not masquerading behind public views. This might lead to the conclusion that the more controversial the issues the more the court should endeavor to spell out the future rules of the road. But I doubt if this conclusion follows. I do not ignore the obligation of higher courts to give direction to trial and intermediate courts, the need greater in some areas than others to guide private transactions, the special duty to enforce rules of fairness where court procedures are involved, and the requirement that law not be segmented but be a pattern. But the existence of controversy on public issues may speak for a less decisive and far reaching determination by a court which can have the advantage of taking the law a step at a time.

In the same article he suggested, without further explanation of his reasoning, that in determining the need for adherence to precedent "the Sherman Act is so vague it may be regarded less as legislation and more as common law" for purposes of his three-pronged analysis in *An Introduction to Legal Reasoning*. But given the fact that Congress has quite frequently shown itself capable of amending the Sherman Act, the basis of this suggestion, other than his view that some older decisions were economically unjustified, is not apparent.

## Dean of the Law School

As dean, Levi proved to be an energetic and successful recruiter. To a faculty that already included Walter Blum, Harry Kalven, Wilber Katz, and Bernard Meltzer, among others (both Meltzer and Kalven were Levi recruits, the former before there was a family relationship), he shortly added Karl Llewellyn (from Columbia) as well as Llewellyn's wife, Soia Mentschikoff, who became the first permanently appointed woman law professor in a major law school,[119] Philip Kurland (from Northwestern), Kenneth Culp Davis (from Minnesota), Francis Allen (from Harvard via Northwestern), Nicholas Katzenbach (from Yale), Brainerd Currie (from Pittsburgh), and Allison Dunham. His capture of Currie was celebrated in verse by the Llewellyns:

They may blow cold, they may blow hot
The answer's still the same

No matter who does which or what
It's Edward gets the blame

Llewellyn thinks he ought to come
To join Chicago's team
Does Smith yell that Llewellyn's dumb
O no, you hear him scream

It's Edward who has done this thing
This thing of sin and shame
He adds folk to Chicago's string
It's Edward is to blame

Young Currie's eye lights up in glee
Says he: Chicago's keen
Says Nutting: Who's done this to me
It is Chicago's dean

Chicago gallops to the post
They do not play the game
Just give a year, more time than most
It's Edward is to blame![120]

He was closely associated for fifty years with Blum, Kalven, and Meltzer (he and Meltzer had married sisters). Meltzer was indeed a soul mate. Like Levi, and unlike so many of today's law professors, he had spent substantial time in the outside world, as special assistant to Jerome Frank at the SEC and then special assistant to Dean Acheson at the State Department from 1941-43;[121] in the Navy; and later as the prosecutor of Reichsbank President Funk at Nuremburg.[122] Levi later unsuccessfully endeavored to secure his appointment to the Seventh Circuit.[123] The new recruits were all, in varying degrees, "realists"; Llewellyn was the high priest of realism; Kurland viewed constitutional law as a process, not as divine writ; Allen was centrally concerned with the practical effects of such innovations as the juvenile court, parole, and indeterminate sentences; Blum introduced finance professors and accountants as participants in his corporate tax classes; Dunham pioneered in presenting real estate law in forms meaningful to future land developers, not historians and antiquarians. Kenneth Davis, known for his fact-intensive investigations of administrative agencies, was one of the last of Levi's recruits. Under his regime, two successful and influential new periodicals were added, the annual hardbound *Supreme Court Review*, initially edited by Philip Kurland, and the quarterly *Journal of Law and Economics*, edited by Director. In the early

part of this period, Robert Hutchins "was like a second father to me, or else I thought so."[124]

In 1952, shortly before the end of the Truman administration, Levi was one of a half-dozen Chicago lawyers recommended to President Truman for a federal district judgeship by Senator Paul Douglas of Illinois. Former Attorney General Francis Biddle commended Levi to Truman on the basis that "Levi is a liberal Democrat and has the endorsement of the Americans for Democratic Action." Although Truman had settled on Judge Abraham Marovitz for the vacancy, the nomination was delayed by a feud between Truman and Douglas and fell victim to the change of administration.[125] During the Johnson administration, Levi was recommended to Senator Percy for appointment to the Seventh Circuit.[126]

Shortly after becoming dean, Levi was confronted, or deemed himself confronted, with the problem presented by an unusually stubborn and principled law student, George Anastaplo of the Class of 1951. As described by a classmate, later Congressman and Presidential Counsel Abner Mikva at his fiftieth class reunion in 2001, Anastaplo "graduated first in my class of 1951, he was the iconoclast of our class, from not showing up for graduation to dressing super casual when that was not the style."[127] Anastaplo declared his intention to refuse on principle to respond to the questions on affiliation or sympathy with the Communist Party traditionally posed by the Character Committee of the Illinois State Bar as a condition of bar admission. At the time, McCarthyism was in full swing and the University of Chicago had become embroiled in several instances with the McCarthy Committee's state level equivalent, the Broyles Committee of the Illinois State legislature. Against this background Anastaplo took his course, as explained by Mikva, "against the advice of teachers, his dean, his classmates and he paid a high price for it." (It did not help that Anastaplo's answers to one of the questions about American government referred to a "right of revolution.")

At least according to Anastaplo, Dean Levi's efforts at dissuasion were unusually strenuous: "attempting to intimidate a vulnerable young law student into becoming as submissive to the anti-subversive campaign of that day as most of the law school faculty evidently wanted him to be. His efforts included a remarkable attempt to intimidate that student's wife as well, an attempt

which she never forgot." "My wife has always thought that Mr. Levi should have had more sense than to threaten as he did a Texas oilman's daughter with something so routine from her childhood as the loss of a regular income."[128] Anastaplo's case divided the faculty, several members including Katz, Kalven, Kaplan, Steffen, and Malcolm Sharp supporting him in contesting *In re Anastaplo*, in which he suffered an adverse 4-3 judgment from the Illinois Supreme Court and a similar 5-4 judgment from the United States Supreme Court, the last accompanied by an eloquent tribute to Anastaplo, who was the antithesis of a communist, in the dissenting opinion of Justice Black. Ramsey Clark, later attorney general, and Mikva were among his supporters in the student body.

While Anastaplo's appeal was pending, a divided law faculty adopted a resolution sponsored by Professor Walter Blum, a friend of Levi from his Washington days frequently regarded by other faculty as the dean's instrument[129] and supported by the dean and Professors Mentshikoff, Tefft, and Dunham declaring that

> The faculty is of the opinion that a character and fitness committee having the powers of the Illinois committee would be acting within its legal power in requesting an applicant to state his views on Communism and to reveal any affiliations with the Communist Party. The chances of successfully contesting the legal power of such a committee in this respect are so slight as to not be worth considering. If an applicant refuses to answer such inquiries either because he questions the powers of the committee or for any other reason, the committee would then be justified as a matter of law in refusing to certify his character and fitness. This suggests that a student who feels that he would not be willing to answer such inquiries would be well advised to consider now rather than later whether he can best serve his ideals by continuing his education in law.[130]

Although Anastaplo had reason to consider this resolution and its timing as less than kind and helpful, it can be defended on several levels. In the climate of the period, many regarded the outcome as certain and wanted to discourage Anastaplo from sacrificing a promising career. Presumably it deflected from the Law School and University as an institution whatever wrath the Illinois authorities might feel at Anastaplo, and did so without imposing any sanctions on him or other students. The faculty might also have had genuine reason to fear that Anastaplo would serve as a pied piper inducing numerous other students to needlessly vitiate their careers. Finally, most of the members of the faculty were from a generation different from Anastaplo's, one that had lived through the thirties, that

had endured a world shaped by the acts of small and secretive party cadres, and that was at least on occasion moved by Sidney Hook's slogan "Heresy, yes; conspiracy, no." Later on, defending his course, Levi explained, "I thought Anastaplo's position was ill-timed. I thought the big problem was the teacher-oath cases. I thought to raise the non-Communist oath issue with the Character and Fitness Committee was the wrong way to do it and because of the timing of the thing, he would lose and hurt himself, and he did. We were all trying to help him, whether he knows it or not."[131] In 1975, in a letter to Anastaplo, he observed, apropos of what was said in the Navasky article, "If I had been writing about you myself... I would have said that I knew your actions sprang from deeply felt convictions, and that present Supreme Court decisions would support the position you took."[132]

On Levi's death Anastaplo published a curious eulogy indicating that the passage of fifty years had only partially healed the wounds left by this episode. It began, both unfairly and unkindly, with a quotation from Leo Strauss comparing an assimilated grand rabbi of Paris to "the poorest Polish Jew [who] was externally a man without rights and in this sense a slave, but he was not a slave in his heart. And that is of crucial importance in this matter." It compounded this ethnic slur with the stereotyped declaration that "Mr. Levi's shortcomings were intimately connected to the temperamental timidity from which he suffered, a timidity not unrelated (one suspects) to his inability to be completely comfortable with numerous of the ways of his fathers, ways from which he evidently considered himself liberated." It then sanctimoniously observed that "He had sense enough not to rely [at his confirmation hearings as attorney general] upon the doctrines which he as an academic had brilliantly championed for years, doctrines about law and economics, about the nature of legal reasoning, and about the limitations of highmindedness. Perhaps he had learned that...[these] were in need of substantial correction...he might have had the unsound theoretical underpinnings and some of the dubious practical consequences of his opinions about law and the common good, as well as about religion and philosophy, usefully called into question by learned colleagues."

Yet, after this, Anastaplo paid a tribute that goes to the heart of the matter: "the more eminent and seasoned Levi became, the more sensible and humane he was in the exercise of power...it was his

congenital apprehensiveness, informed by his considerable intelligence, which contributed to making Mr. Levi as respectful as he obviously was of the law, including of the 'technicalities' of a legal system. This informed respectfulness served him and his country well."[133]

Much of Anastaplo's bitterness arose from the University's ungenerous treatment of him in later years. His career was spent teaching at a series of Catholic colleges in the Chicago area, where he published widely in both philosophy and law, supplemented by teaching for forty years in the University of Chicago Evening Basic Program of Liberal Education for Adults. His most notable work, *The Constitutionalist*, published by the Southern Methodist University Press in 1994, deserves more attention than it has received; although it is formless and includes a certain amount of "natural law" rhetoric, its emphasis on the polis and political speech as central to constitutionalism is not that far removed from the view of the "legal process" school and is to this reader highly convincing in its central thesis.

When after twenty-five years, burdened by a twenty-hour a week teaching load, he sought more remunerative University employment, he did not receive it, partly, one suspects, as a result of an instinct for self-dramatization that led him on this occasion to send the equivalent of "a large shopping cart" of his publications to more than two dozen addressees, and to publish the results of this effort.[134] An avuncular and charming lecturer when not involved in his personal controversy, he was right in his feeling that in the postwar university "someone like me is needed. It remains unfortunate that 'the best and the brightest' among our law students can be consistently misled (if not even corrupted) by careerists." The failure to find a place for him, in the College if not the Law School, is a blot on the record of Levi and his successors. His fate, as he would be the first to proclaim, was that of a modern Socrates.[135] He found partial refuge in association with Hutchins' Center for the Study of Democratic Institutions; in an earlier time he would have been the prototypical teacher in the Hutchins College.[136]

After this controversy, Levi faced a second embarrassment when it was discovered that some overenthusiastic investigators for the University of Chicago Jury Project had placed recording devices in some federal jury rooms in Kansas City with the assent of a trial

judge and court officers. At the ensuing congressional investigation, Levi took personal responsibility for what had happened. The recordings had been carried out with court approval at the suggestion of Paul Kitch of the Wichita bar. At the ensuing Senate hearing presided over by the notably unsympathetic William Jenner (R-Ind.) and James Eastland (D-Miss.) and by committee counsel J. G. Sourwine, Levi was asked about his youthful membership in the National Lawyers' Guild and about a letter critical of the House Committee on Un-American Activities he had sent to the *Chicago Daily News* in 1948.[137]

So vehement was the outcry that according to Hans Zeisel "when the newspapers came out against the jury bugging, they 'hadn't a friend in the world.' Dean Levi feared for the continued existence of the Law School."[138] The investigation had the possibly salutary result that Congress enacted a statute (18 U.S.C. § 1508) forbidding the recording of federal jury proceedings and was followed in this respect by more than thirty states.

The jury project was supported by two grants from the Ford Foundation, one for $400,000 in 1952 and one for $1 million in 1955, to foster behavioral science at the Law School. These grants were used also for a commercial arbitration study that proved to be largely historical in nature and a largely abortive study of public opinion and the tax laws. After Levi had made an abortive application in 1952 for funds for a graduate legal clinic and law revision group, he recast the application to seek funds for behavioral science research with the assistance of Meltzer, the first director of the jury project, who recalls the hours devoted to writing the grant application as the most well-compensated time he ever spent. Meltzer's interest in juries had been stimulated by a reading of Jerome Frank's *Courts on Trial*. In 1955 Levi had ambitiously sought $3,775,000, including $1.5 million as a contribution to the cost of the new law school building and $1 million for fellowships and international studies, resulting in the $1 million grant, $200,000 of which was for foreign law. The jury study ultimately produced three books of nine projected. A historian has observed: "The program had almost no long-term impact on the Law School, the only surviving bit of law and social science at the school, the Center for Studies in Criminal Justice was created by Norval Morris after the Law and Behavioral Science Program was largely over and works in an area where the program hardly ventured."[139]

At the Law School Levi supervised construction of its new building on the south side of the Midway. His active collaboration with architect Eero Saarinen produced a modern glass-lined building that was not only beautiful but highly functional, particularly in its arrangement of faculty offices around the perimeter of library stacks, in close proximity to the books in which the faculty member was most interested. Robert Bork later commented on Levi's "manag[ing] to wring four separate dedication ceremonies out of a single building."[140]

He also undertook to broaden the school's national reputation by offering a national scholarship program to students at leading colleges, of which the present writer was a beneficiary. This sometimes produced unexpected results. At the convocation of the first-year class in the fall of 1963, the speaker was the then president of the American Bar Association, Whitney North Seymour. The four Dartmouth graduates in the audience gazed at each other with horror as the speaker arose, extracted from his pocket a well-worn manuscript, and proceeded to re-deliver the speech he had given at the Dartmouth commencement three months earlier. It was inconceivable to a Wall Street lawyer of that period that any graduate of a respectable New England college would cross the Alleghenies to gain a legal education.

In 1952, the Law School published a series of four talks given by its dean in the preceding two years. The first of these extolled the school's first-year legal writing program, which had been in existence since 1937, and spoke of the addition of training in accounting to the corporations class and of economics to that in trade regulation. It concluded by noting that "The legal philosophy of instrumentalism has dominated the law schools for a considerable period of time. Law is viewed as an instrument to achieve ends which are given. The underlying theories of our own institutions [must be] re-examined and restated." To this end, Levi proposed a Chicago equivalent of the Sterling Fellowship at Yale, of which he had been a beneficiary "to bring back to the Law School each year a number of lawyers...to undertake for a year or two special studies in various fields of the law." In the second lecture, Levi addressed himself to the movement for law school legal clinics. "A clinic as part of a research center is most appropriately, I believe, a graduate clinic." Its justification is that it can serve a valuable use in research.

This appeal was renewed in the third speech, expressing the hope that such empirical graduate work would help the bar protect the law from unreasoned assumptions. In the last speech Levi noted that

> Respect for that wisdom which comes from countless cases, the need for stability and the doctrine of equality have been powerful factors in contributing to the discipline of the law.... But it has never been thought that training in the common law was sufficient to make a lawyer. Justice Story would have sent the student to the classics of the humanities and the social sciences.

Levi again appealed for institutes for legal research to insure that "remedies proposed have meaning other than the mere transference of power to some particular class of experts to decide as they please."[141] It cannot be said that the law school realized this design either during his tenure or afterwards. Its cooperative ventures with the nearby American Bar Foundation withered when that organization moved away from the Midway in the late sixties. Levi's frequently reiterated support of a graduate legal clinic successfully kept at bay advocates of expanded clinical education in the ordinary law curriculum, in keeping with his view that "the law schools ought to concentrate on the preliminary theoretical training."[142] "The first demand of legal education must still be for excellence in the core curriculum.... The lawyer's approach: the ability to weigh the effect of a word properly, to marshal arguments for a cause, to be objective and sceptical."[143]

Levi unsuccessfully urged Sargent Shriver as director of the "War on Poverty" to associate legal clinics with law schools and established social service organizations, correctly predicting that "A corps of young lawyers on a full-time basis in a subsidized practice might really run into very great opposition."[144]

Levi's departure as dean set off a controversy over the succession worth of C. P. Snow's *The Masters*. Meltzer disqualified himself; Kurland, successful in assisting Levi's recruiting efforts, had some support but appears not to have been seriously interested. Initially, "Beadle, Levi and Glen Lloyd want[ed] Dunham—Tefft against. Soia and Wally want Dunham because they think they will be in a position to control him," Kurland reported to Currie. "The only possible alternative is Harry Kalven. However great my disagreements with Harry, I have some respect for his administrative capabilities."[145] Currie, who had just departed for Duke, seems to have been the first to suggest the ultimate victor, the newly arrived

Phil Neal, expressing concern for the effect of a Kalven appointment on the jury project.[146] Currie also suggested an attempt to secure the return of Francis Allen.[147] Kurland had seen a conflict as "to whether we are looking for a 'white shoe' character to improve our image or a person of capacity to improve the reality." By October, Neal seemed to Kurland to be the frontrunner although "Soia's still fighting for Dunham."[148]

## Provost of the University

Both as Law School dean and as University provost and president, Levi's recruiting methods included the judicious use of cash;[149] under his regimes, university and law school faculties were second or third in the country in their pay levels. As a university president, Levi put first things first: his emphasis was always on faculty salaries and recruitment, though under his regime the university's Regenstein Library was begun.

On becoming provost of the University in 1962, Levi expressed his view on the College, which since Hutchins had inspired the greatest passion and loyalty on the part of its faculty. The Hutchins College, he declared in 1963, "collected its thoughts on what education was about when it was popular to leave that to the students.... I would not say that all this was done with the greatest modesty in the world, nor was the Message to the Gentiles always as pleasing or as persuasive as it might have been."[150] Although he applauded the College's famous interdisciplinary courses, he urged, as to the last two college years, that a better organization of undergraduate study would break down the barriers between undergraduate and graduate work because participation in research illuminates the field of study. He served for several years as acting dean of the College and reorganized it into five divisions, including a New Collegiate Division, with a common core program for the first two years and heavy involvement in research afterwards.[151] This change was only imperfectly implemented at Chicago; it was later a major theme of the too-neglected 1998 Report of the Boyer Commission on Educating Undergraduates in the Research University,[152] which included Wayne Booth, dean of the College of the University of Chicago from 1964 to 1969, lauded by Levi thirty years earlier as "the best college dean in the country."[153]

In 1967, Levi declared

> Our priorities are clear. We have given most emphasis to faculty salaries, scholarships, and the needs of the library. Our faculty salaries on the average are second highest in the country. I wish they could be higher. Over the last eleven years the greatest increases in the regular budget have gone, with the exception of one professional school, to the College, and then to the Humanities Division. This reflects the determination of the university at a time when greatly needed scientific support has been coming in part from governmental sources, but which in turn has been matched in considerable amounts by university funds, not to permit a distortion of university life and goals.[154]

As provost, Levi had been instrumental in the creation of ten university professorships, supported by a special Trustee's Fund. In 1964, President Beadle told a faculty dinner that

> [l]ast week a news story in the New York Herald Tribune began somewhat as follows: "Everyone talks about doing something for the Humanities, but the University of Chicago has done it." This referred to the establishment now of fifteen additional graduate fellowships for study in the Humanities, these to be augmented by thirty more within two years, each providing a stipend equal to the most attractive graduate fellowships offered in the sciences. This program, suggested by Provost Levi and supported by special Trustee funds, I predict will initiate a whole series of competitive programs in other top institutions and thus stimulate scholarship in the Humanities way out of proportion to the funds initially invested by this University.[155]

Levi reaffirmed Harper's statement of 1902: "In the University of Chicago neither the trustees, nor the president, nor anyone in official position has at any time called an instructor to account for any public utterances which he may have made.... Neither an individual, nor the state, nor the church has the right to interfere with the search for truth, or with its promulgation when found."[156] Levi was a more than usually influential provost in his six years of service while George Wells Beadle, a geneticist, was president; the more worldly Levi was the dominant force in faculty recruitment and organization.[157]

## University President

In December 1968, after becoming president, Levi delivered a notable address on "Unrest and the Universities." He had been urged by the irrepressible Thurman Arnold, quoting Tennyson's *Ulysses*, to "by patience make mild a savage people and by soft degrees subdue them to the useful and good."[158] He criticized the civil rights movement's increasingly inflammatory rhetoric, noting that it built upon the force of law and depended on the morality of acquiescence and now was the vehicle for destruction of this acquiescence. He catalogued some defects in the legal system

> [w]hich compels the violation of law…as the only road for testing the constitutionality of many statutes. Or a legal system which operates with a schedule of fines imposed without regard to the ability of the defendant to pay. Or a system which perpetually proclaims that justice delayed is justice denied, but accepts unconscionable delays.... Or a system which only in the last few years has moved to correct the vice of using poverty as a screen against the effective raising of defenses in criminal cases.... Part of our difficulty perhaps arises as a concomitant of excessive reliance on judicial interpretation of the constitution. This may have weakened, as some have said it would, the thrust for legislative improvement of the system as a whole. Excessive reliance on changing constitutional doctrine creates other difficulties, increasing the sense of injustice by expectations that are then unfulfilled.[159]

He decried a view that sees coercion in all relationships, including the coercion of benefits, as well as much of the rhetoric used by groups such as the Kerner Commission, urging federal appropriations to avoid civil disturbances:

> We have relied on forms of speech and perhaps of thought which are essentially degrading. Thus, one does not ask those who riot to cease doing so because they are chiefly hurting themselves and not others, or ask the community to do what it ought to do because if it does not there will be more riots and more destruction....[160]

In May 1969, he explained to the American Law Institute his response to the disruptions at Chicago—a response that relied on university discipline rather than police power:

> Particularly because these festivals are built upon a conception of the world ruled by coercion and corruption, the university's response must exemplify the principles which are important to it. The university must stand for reason and for persuasion by reasoning.... It is most unfortunate and in the long run disastrous for a university to exemplify expediency which avoids or solves conflicts by the acceptance of ideas imposed by force.... This approach requires candor, consistency and openness, but also effective discipline. The discipline will be difficult. But the university owes this much to itself, and it also owes this much to the larger society.[161]

This notable speech also addressed itself to wider causes of student unrest, latent in our time:

> [i]n a protective society where they see only errors and not the reality of choice, their experience in doing has been long delayed.... In another day religious orders might have provided an avenue for service. Despite the Peace Corps, Vista, and the interest of the churches, insufficient avenues of this kind have been created.... We should reduce the number of years made standard for higher education—years which are stultifying and delaying for so many—and we should do this in recognition that education is a continuing process which should be renewed in various ways throughout the adult years.... There is no reason why entrance to law school, for example, should be postponed until after graduation from college. The three years required for law school, as an optional matter, could be reduced to two.... A great deal of graduate work should be curtailed by making a doctor's degree less necessary for teaching."[162]

He concluded this finest of his speeches with the epigraph to this book and with an exhortation to the lawyers before him:

> [l]aw is the greatest educational force. It teaches through its administration of justice. It teaches—for better or worse—through the police, through the condition of the cities, of the public schools, and of the courts themselves. It teaches through its sometime neglect of civility and its occasional endorsement of apparent cruelty. It teaches through example, compulsion, and the effective concern to create institutions, to perfect measures, to get jobs done—which is the organized special noble responsibility of the bar.[163]

The anguish of 1968 called forth two other notable speeches. In May, Levi spoke at the Jewish Theological Seminary of America. In speaking of calls to political and religious commitment, Levi observed:

> How does one condition the call upon the mighty and often destructive forces of mankind, those mysterious and awesome movements in which hatred sometimes appears as love, coercion as a higher justice, individual guilt as lost in collective virtue or vice so characteristic of revolution? And then how does one break the rhythm through which violence or evil find imitation or justifying reaction?... Even in history the prophetic tradition was in some sense saved by and made possible through the opposing or complementary tradition of rabbinical scholarship and institution building.... The house of learning is indeed a place for confrontation, but it is the confrontation of minds that is called for—a confrontation in which none is vanquished, for the victory will belong to all.[164]

Thus, while he recognized the rhetorical force of the prophetic "rights talk" of the civil rights movement, with its roots in churches, he believed that it had to be cabined by respect for existing social institutions designed to curb passions and provide room for reflection and for competing values. At the beginning of 1968, before its assassinations, its black and student riots, and the turmoil of the presidential election, Levi had given the dedication speech for the Earl Warren Legal Center at Berkeley. After describing the accomplishment of the Warren Court as "awesome" and alluding to its criminal procedure, reapportionment, free speech, and reapportionment decisions, he declared "I do not join some of the critics of the courts who review cases and opinions as though they were plays, in deprecating the growth of constitutional doctrine."[165] But he defined the function of the bar not in the manner of the rights-centered legal activist generation that followed but more modestly, as "a coordinating influence, a strategic intermediary between people, between the government and the individual, between ideas and their application."[166]

In November 1969, he addressed himself to wider social issues. His muffled prose cannot obscure the unfashionable views he expressed about some of the most controversial of political questions. He deplored the fact that there was "a turning away from political theory, and not many voices in jurisprudence." He warned against the political consequences of romanticism: "The *Gemeindschaft* of the Nazi movement. The daemonic appears in the response of a collectivity." He quoted Hannah Arendt: "The practice of violence, like all action, changes the world, but the most probable change is a more violent world. A further likely outcome is the imposition of new controls. This likelihood is not dissipated by warnings against it. These warnings contribute to the unsureness of society's reactions at early but not at later stages. Society is not that patient." Warnings against the counterproductive nature of repression do not prevent severe and uncontrollable repression from taking place.

He warned against erosion of separation of powers:

> Legislators...punish citizens. Much legislation is hortatory, leaving it to courts.... The President...controls steel prices, or issues guidelines, without benefit of a price control law.... This is not a case by case approach in which the law grows but a contest of pressures...half-law, fitting no model of authorized command which can be authenticated.

He also warned against further expansion of the "state action" concept, which required private property owners to behave with the same impartiality as public institutions:

> [i]t has become extremely difficult to know what constitutes state action.... But at least when it comes to basic jurisprudential matters, the malleability of concepts, making them responsive to social needs in litigation, is no assurance their original meaning is not important.... The question concerns how much we value the rights of privacy and diversity, how much we want to avoid what Judge Friendly has described as the "uniform and dull structure of governmentally run institutions characteristic of continental Europe," how much we wish to encourage individuals on their own to create structures which reflect the values they hold.[167]

His concern in this regard echoed that of Jacob Burckhardt a century earlier: "Traditional politics will seem like a game played by amateurs as the militarized state adopts the rational organization of the modern factory, with schools and cultural institutions completely subordinate to the state... The men and women of the generation to come will be a different breed."[168] Levi understood, however, that "The new problem [in education] is the felt need to train the multitude. That is really the great change."[169]

Later, he was to speak even more sharply:

> Once you try to say that the faculty or administration of a university or college will be chosen in the way the Democratic Convention chooses delegates, the result will be mediocrity because people will give in to it and make appointments that should not be made. Once you determine quality by race or creed, there will be a levelling in this country. Then only universities outside this country will have intellectual excellence.[170]

He condemned the indefiniteness of the new equal employment and War on Poverty legislation, which "could create a constitutional crisis": "law against discrimination turns toward a law in favor of quotas and affirmative action, and sometimes toward a policy which encourages a new kind of segregation." "The attempt of the national government...to create in an offhand way competing political assemblies within local communities...further weakens responsible action...the willingness to isolate areas of life, as in the ghettos, where a different standard is used—all these are enemies of law's legitimacy." This hostility toward racial classification was shared by Meltzer, who took the view that "need or disadvantage [is] a criterion that is a better measure of inequality of condition and less troublesome—morally and politically—than race."[171]

Addressing himself to the Supreme Court's criminal procedure decisions, he observed:

> The quandary and explanations of the courts as to which of the constitutionally based new rules are retroactive, and how far retroactive, are harrowing commentaries on the limits of decisional legislation.

Condemning both capital punishment and the Chicago conspiracy trial, he declared:

> The more dramatic the criminal trial, probably the less it fulfills its proper purpose. The function of the death penalty at the present time is largely to increase the dramatic element.... We have to accept the fact that in a modern criminal trial the defendant is entitled to be the central figure.... The conspiracy charge carries the disability of obscuring individual action. It invites the kind of confrontation which in sensitive areas in the past has turned a trial into a political event.[172]

In a speech on "The State of the University" at the end of 1969, Levi outlined an approach to problems little resembling that of many of today's empire-building university presidents:

> Distinguished departments frequently point out that they have achieved great distinction with a faculty too small in numbers, if comparisons are made to departments

> elsewhere. The complaint is made so often one wonders whether it does not describe a cause for excellence.... We are a combination of college, graduate divisions and professional schools which, unlike a frequent model, does not rest upon a mass of undergraduates to pay the bill.... This year, upon the recommendation of the Dean of the College and of the College Council, the size of the College's entering class was reduced from 730 to 500. The action was primarily taken because of shortages of space in the University residence halls, the desire to undouble 133 rooms to single occupancy, the felt necessity to create better quarters for head residents in six of the undergraduate residence halls as part of a long-term program to induce faculty to take part in the cultural life of these houses.[173]

## "The Chicago Plan"

Almost immediately after becoming president, Levi was confronted with the demands of black radicals, demands that overwhelmed the Cornell University administration and were of special concern in a university situated on a small island in the midst of one of the largest black ghettos in the country in what was then a highly segregated city. In the wake of the riots following the assassination of Martin Luther King, Levi received a visit from LeRoi Jones, one of the most colorful black agitators of the period, who demanded that one-fifth of the curriculum be converted into an autonomous black studies program: "We consider this our turf; we'll tolerate you but we have to be reckoned with."[174] In May 1968 students demanding special admissions and a separate dormitory for blacks seized the administration building; the university threatened to expel them from its programs and the demonstration and a subsequent attempted boycott of classes quickly collapsed.[175]

On January 30, 1969, a more serious demonstration began arising from the University's refusal to renew the three-year contract of Marlene Dixon, a sociology instructor. Another sit-in at the Administration building began, led by Staughton Lynd. Levi set up his offices at his home, where windows were broken by demonstrators, made it clear that he would resign rather than evict the demonstrators by force and that there would be no negotiations with them, and abstained from direct public statements of any kind. On February 7 the law faculty met and adjourned without making a statement, a default Kurland never forgave, declaring "I think that a law faculty that cannot take a public position against the use of coercive force as a substitute for reason...is not one for which I can maintain any respect."[176] On February 8 the graduate student association voted against support of the demonstration; on February 12, after the University suspended sixty students and had a committee

headed by Hannah Gray investigate Dixon's allegations of discrimination and unfair treatment, the instructor was unilaterally offered a final one-year extension of her contract, which she refused, and twenty-two additional students were suspended. On the following day the sit-in ended, Levi, in his first public statement, expressing the hope that "tactics which should be recognized as having no place on this campus would cease." One of the leaders of the demonstrators declared "we lost because there just wasn't enough faculty or student support of us"; Dixon declared that the University's "reputation as a liberal school is destroyed forever." On February 19 Levi was supported by a vote of the faculty senate. There were new demonstrations, including demonstrations of parents of expelled students, on February 26 and 27, March 29, and April 9, when 100 faculty members asked for a student voice in discipline[177] and Levi was forced to relinquish speaking time to a student at the University's commencement on April 27.[178] When parents of the disciplined students placed an advertisement in the *New York Times* on March 30 complaining that the University had suspended more students than Berkeley, Columbia, and San Francisco State combined, a University spokesman tartly replied: "This isn't Berkeley, or Columbia, or San Francisco State." Levi remained entirely unyielding on the subject of discipline, which he left entirely to a large faculty committee, a spongy target; the faculty committee, presided over by Dallin Oaks, a former law clerk to Chief Justice Warren and later president of Brigham Young University, concluded its work with forty-one expulsions and eighty-two suspensions. One faculty member observed: "He let them overextend themselves and unite the faculty.... Pusey [of Harvard, who had called the police] suspended nobody and had a [faculty] rebellion on his hands."[179] Levi declared, "It's not true that we waited until summer and then kicked them out. That suggests a kind of adroitness that I didn't have and wouldn't want."[180] Levi was widely applauded for having avoided "calling in the cops, which is disastrous, and amnesty, which only brings more and more sit-ins." In oral history recollections, he observed: "I was really much more sympathetic to the students after I had seen some of their parents," recommending to them that they acquire airplane tickets and "take your daughter or son by the hand and say 'I am asking you to come home.' That will mean more to this kid than any lecture."[181]

## Attorney General of the United States

In late 1974, Levi was asked by President Ford to become attorney general, at the suggestion of Donald Rumsfeld. When it was suggested to him that he endeavor to neutralize opposition by calling on the ranking members of the Senate Judiciary Committee, Senators Eastland and Hruska, he agreed to do so "if it was made clear that it was at the direction of the President. I didn't really think that the President of the University of Chicago should go around looking for a job."[182] He was appointed after the Nixon pardon, which he thought "a proper decision."[183] "The reaction to Nixon was as much a commentary on the state of our society as it was on him. The presidency does not sit well with one who is uncomfortable with himself, but we have not been, I think, fair to Nixon. He was not fair to himself. There were curious signs of a feeling of inferiority."[184]

Ford commended him to the two senators by relating "when we asked 'what's wrong with Levi,' we were told 'He's too tough. He's too hard headed.'"[185]

At his confirmation hearings, he was asked about his youthful membership in the National Lawyers' Guild and about the jury-eavesdropping episode. He disclaimed any party affiliation, but noted that "there was no doubt that in the 1940s...I would have been regarded, partly because I was in the Department of Justice...as a Democrat."[186] The only significant opposition at the hearings came from the Chicago Property Owners Association,[187] aggrieved at the urban renewal efforts carried out by the University in which Levi's brother, Julian Levi, played a prominent role. These were spoofed by the comedians Mike Nichols and Elaine May: "Well, here we are in Hyde Park, black and white together, working shoulder to shoulder against the poor."[188] Responding to this sort of gibe, President Beadle had declared at the 1968 convocation: "The fact is, that between 1956, when the total population [of Hyde Park] was 76,000 and the present, when it is 55,000, less than a third of the reduction of population was the result of negroes being displaced or voluntarily moving from the community. The percentage of non-white is now almost the same as it was 12 years ago, namely thirty-eight percent."[189]

After his confirmation, Levi rejected full-time FBI protection and designated Judge Harold Tyler as his deputy, Rex Lee, dean of the

Brigham Young Law School and a former U of C graduate as assistant attorney general for the Civil Division,[190] and Richard Thornburgh, then a prosecutor in Pennsylvania, as head of the criminal division. He retained Robert Bork as solicitor general, leading Bork to later write: "When you became Attorney General, it would have been easy to ask for the resignation of the man who fired Cox, but you didn't."[191]

Tyler was given almost complete control over appointments to the lower courts, which were made on a much less partisan basis than has prevailed before or since. Roughly 10 percent of Ford's Court of Appeals appointments and 25 percent of his District Court appointments were Democrats.[192] Policy was made through "a process of discussion and the demonstration that he was alert to real problems."[193]

In April 1975, he addressed himself to the vexing subject of handgun control, stating that a pistol "makes an individual in a city too powerful for his environment [and involves a] mechanism that translates passion or passing evil intent into destruction." His proposal was to tax so-called Saturday night specials, defined on the basis of size, barrel length, and metal quality, and to prohibit possession of handguns outside a home or place of business in Standard Metropolitan Statistical Areas with violent crime rates 20 percent greater than the national average. This was designed to benefit "cities whose neighboring suburbs do not control handguns strictly" while "leav[ing] unaffected rural areas where handgun use is less threatening and more legitimate."[194] Rumsfeld praised Levi's skill in presenting the president's crime proposals, though a press secretary noted that the diffident Levi "was frightened as hell before facing the TV cameras."[195] In July 1975, this proposal was modified by the administration to provide for a ban on "Saturday night specials," a reduction in the number of licensed dealers, police checks on gun purchasers, and intensified federal enforcement efforts in the ten metropolitan areas with the highest violent crime rates, the object again being to reach "the commerce which has stymied local and state efforts to regulate."[196] This nuanced and politically sophisticated proposal later largely became law; it led a critic to observe, "If he were Moses, the Ten Commandments would have three exceptions and a saving clause."[197] In the following year, these proposals became caught up in the presidential primary and

general election campaigns. "We avoided such concepts as registration. There was to be no 'central registry.' We did provide for checking and a waiting period."[198] Later, he noted his doubt that the Second Amendment limited state, as opposed to federal, gun control legislation."[199]

In two speeches in August, Levi upheld the "realist" approach he and his Chicago colleagues shared and denounced shrill advocacy groups with their claims to absolute constitutional rights and their reasoning from fixed premises: "A society which cannot discuss gun control without having the National Rifle Association go crazy and that cannot discuss procedures for wiretapping without the counterpart of the NRA, namely the ACLU, going crazy is a society that is having difficulty looking at issues in a candid way."[200]

He did not share Harry Kalven's enthusiasm for the *New York Times v. Sullivan* case: "I have always regarded the *Sullivan* case as another example of the distortion of the law caused by the flaw in our society caused by chattel slavery... One influence is I think the view that the courts have about participatory democracy and their own protected view of the glories of free, open, and in fact libelous non-debate. I have always thought it somewhat strange that the authorities on this area should be the judges who are most shielded from it, although I realize that they don't think that they are most shielded from it. The newspapers tend to read the first amendment as it applies to themselves much the same way the gun lobby reads the second amendment."[201]

With respect to the emerging issue of illegal immigration, Levi is quoted by Doris Meissner, then a young Justice Department aide, and later commissioner of immigration in the Clinton administration, as having told her "it has to do with our identity and our traditions as a nation. It may not be possible to get the same levels of compliance as in the other areas of law enforcement or to use the same tactics."[202]

In February 1976, Levi gave strikingly candid testimony before congressional committees investigating abuses of law enforcement powers, testifying among other things about the FBI surveillance of Martin Luther King, the Cointelpro program, Operation Chaos, mail opening by the FBI, the abortive Huston Plan, surveillance abuses by the National Security Agency, and apparent perjury by some CIA officials.[203]

Throughout his tenure, the Justice Department under Levi issued guidelines regulating activities of law enforcement agencies, including FBI use of informers,[204] DEA use of informers,[205] foreign intelligence surveillance, plea bargains,[206] journalist's privilege,[207] and successive state and federal prosecutions. In general, the guidelines fixed responsibility, required periodic reviews, and limited the use that could be made of information. The FBI Guidelines required the attorney general's personal approval for national security wiretaps; this power later being transferred by Congress in the Foreign Intelligence Surveillance Act of 1978 to a special court, a secretive, handpicked and politically irresponsible body that later was found to have approved substantially all applications. Wiretap and related authority was later greatly expanded in 2001 by the so-called USA Patriot Act," which allowed nationwide warrants, emergency disclosures, and delay in reporting execution of wiretaps.[208] In 1983, the Levi Guidelines, which required "specific and articulable facts" to open investigations, and which forbade reporting on unpopular views not constituting advocacy of violence were somewhat diluted by new guidelines adopted by Attorney General William French Smith, allowing investigations to be opened upon a "reasonable indication" of forbidden acts.[209] In 2002, Attorney General Ashcroft issued new guidelines, which allowed use of private sector data bases, attendance at public events, and scanning of the Internet without requiring any indication of specific behavior, and which largely vitiated Levi's scheme for fixing responsibility by delegating authority to the FBI district office level.[210]

The process of adoption of the guidelines was an open one; proposals to authorize the FBI to disrupt violent groups were deleted and even liberal commentators like Anthony Lewis praised the process and result.[211] The policy of openness also led to the release of FBI and Justice Department records on the Hiss and Rosenberg cases.[212] Tighter control was imposed over organized crime prosecutions.[213]

Levi set in motion a process of criminal sentencing reform ultimately leading to the controversial establishment of a United States Sentencing Commission. His support of sentencing reform was a cause shared with his colleague Francis Allen; neither of them appears to have anticipated the much higher imprisonment rate that was to result.

Allen's discussion of the abuses of rehabilitation[214] was a stone that unleashed an avalanche. Like the reaction to George Kennan's "Mr. X" article of 1946 on Soviet behavior, it produced repercussions going well beyond the author's intentions. The objections to rehabilitation as a mode of social control were first taken up by the revolutionaries and parlor revolutionaries of the 1960s.[215] As disorder grew, stimulated by a demographic bulge, the Vietnam War, and the civil rights movement, a Thermidor ensued. Conservative criminologists like James Q. Wilson and Ernest van den Haag[216] urged determinate sentencing with a deterrent purpose, embodied in some state codes and in federal bills sponsored by the Johnson administration's Brown Commission and by the Nixon administration. The federal proposals were undone by their own excesses,[217] but were later enacted piecemeal in federal crime bills fostered by "'big government'" liberals like Senator Edward Kennedy and "law and order" conservatives like Senator Strom Thurmond.[218] The high minimum penalties of the Rockefeller drug laws in New York and elsewhere were followed by creation of the Federal Sentencing Commission, which leveled existing sanctions upward. The drug problem, fostered by "'personal liberation'" movements of educated whites but primarily affecting vulnerable blacks, changed the racial composition of the prison population, fostering reduced public concern for the welfare of offenders. By 1996,[219] Allen saw a developing collapse of legality. Heavier sentences invited plea-bargaining and nullification; the drug laws fostered police corruption, abusive searches, and misuse of informers; both helped elevate the police to a potential "'third force' in American society, with interests and power significantly distinct from other political groups."

A major controversy over school busing arose after Levi announced an intention to intervene in litigation involving busing in Boston, a decision vigorously opposed by civil rights groups and Secretary of Transportation William Coleman, Levi's cabinet colleague. Levi and his solicitor general, Robert Bork, proposed to adopt a position limiting busing to areas directly affected by prior official acts fostering segregation. After considerable public controversy, Levi issued a statement saying that he would not file a brief asking the Supreme Court to grant certiorari in the Boston busing case: "The desire and intention of the department to seek clarification of the rulings of the Supreme Court is well known as is

the strong and continuing commitment of the department not to tolerate acts of lawlessness in violation of the orders of the district court."[220] Levi also resisted pressure from Coleman and others for federal law enforcement or military intervention in Boston; "Boston was on its own."[221]

One result of the controversy was that sweeping busing orders like that of Judge Garrity in Boston fell into general disfavor; even Anthony Lewis, a Bostonian, criticized the District Court judgment.[222] In 1985, former President Ford could accurately say that Levi's view of the appropriate scope of desegregation orders had prevailed.[223]

He expressed serious concern about abusively wide consent decrees by which federal agencies sought to regulate private and official behavior.[224]

Levi's Justice Department was likewise responsible for recommending a Supreme Court nominee to the president. After considering some twenty possible choices including at least four of his former colleagues, Philip Kurland, Dallin Oaks, Phil Neal, and Gerhard Casper, a short list consisting entirely of judges and practitioners was prepared, including Judges Arlin Adams of the 3d Circuit, John Paul Stevens of the 7th Circuit, Charles Clark and Paul Roney of the 5th Circuit, William Webster of the 8th Circuit, and Vincent McKusick of Portland, Maine. The president ultimately made his choice between Adams and Stevens, the latter being unanimously confirmed.[225] The records do not disclose why Kurland was eliminated, noting however that he "has often urged Congress to reassert its primacy against the executive."

Levi in his comments on the list subtly steered the choice toward Stevens, also a favorite of Senator Percy. Stevens had once helped him teach the antitrust course at Chicago, but this association was not mentioned. He credited Adams with "verve" that sometimes "bypasses careful analysis," while noting the conservatism of Bork and crediting Stevens with "discipline and self-restraint."[226] Twenty years earlier, when asked to recommend an antitrust lawyer for a motion picture industry plaintiff, Levi came up with two names: Stevens and Bork.[227]

Levi himself had been recommended to Ford for the vacancy by Judge Henry Friendly, Senator Charles Percy, and Mayor Richard Daley of Chicago, who conveyed his recommendation to Dick

Cheney, then Ford's Chief of Staff. "Before the vacancy occurred, Levi and the President agreed that it would appear improper for Ford to name his Attorney General to the Court in light of the circumstances of their holding office. When Douglas resigned, Levi also told Ford that it would be unwise to nominate anyone from within his administration."[228]

Levi had been briefly considered for the Supreme Court during the Nixon administration for the vacancies to which Justices Powell and Rehnquist were appointed. He was recommended by Leonard Garment, a Nixon aide, and was supported by, among others, Milton Friedman, Daniel Patrick Moynihan, Henry Friendly, Peter Peterson, William F. Buckley, Jr. and Irving Kristol.[229] He had also been considered during the Kennedy administration[230] and, though only nominally, in the Johnson administration.[231]

In the wake of the Watergate scandal, Levi put forward proposals for an independent special prosecutor, but opposed the system of ad hoc special prosecutors that was authorized by Congress and ultimately repealed.[232] "This procedure enables any individual to convert a private allegation against a high government official into a highly publicized investigation."[233] After leaving the attorney general's office, one of his last professional activities was the filing in 1988 of an amicus curiae brief, prepared on his behalf by David Strauss of the Chicago Law Faculty, assailing the constitutionality of the special prosecutor law in *Morrison v. Olson*.[234] His was the lone disinterested amicus brief attacking the law, which fell into discredit and was repealed; the validity of the law was supported as amici by all the usual *bien pensants*, including the American Bar Association, Common Cause, the Center for Constitutional Rights, Public Citizen, and that most egregious of special prosecutors, Lawrence Walsh. Earlier, Levi had insisted on filing an amicus curiae brief expressing doubt about some provisions of the campaign finance law even though the solicitor general was representing the Federal Election Commission at its insistence.[235]

Levi was responsible for reappointment of a Democrat as U.S. attorney in West Virginia notwithstanding the abortive indictment there of a Republican governor. Ford declined to intervene, declaring to the governor, Arch Moore: "When Attorney General Levi accepted the job, he got an assurance from me that I would not get involved in criminal matters."[236] Levi also felt compelled to refer to

the Watergate special prosecutor, Charles Ruff, allegations that Ford had improperly accepted campaign contributions from a maritime union in one of his congressional campaigns.[237]

In addition,

> [t]here is now in the department, as a result of Edward H. Levi's incumbency, an Office of Professional Responsibility which is concerned with misbehavior of departmental personnel and the Public Integrity Section in the Criminal Division, with responsibility for the prosecution of cases of public corruption. The latter office is not responsible to the Attorney General, so there is a buffer between its operations and the cabinet officer on whom White House staff might be inclined to put pressure.[238]

In 1975, Levi surveyed the legal scene in an address to the Nebraska Bar Association, noting that the "resources for which men compete cannot satisfy them all...factionalism is probably the inevitable price of diversity." He noted the "increasing resort to the law to settle differences among individuals and organizations once resolved by informal relations of trust and comity...law as the custodian of the historic rights mankind has developed for itself, must never be regarded as the tool of the moment."[239]

While he applauded the ongoing effort to revise the federal criminal code, he later expressed concern about some of its provisions, notably "civil rights" provisions that would overrule the decision of the Supreme Court in *Screws v. United States* and allow prosecution of state law enforcement personnel under a vague statute.[240] He elsewhere expressed the view that "we must find ways to strengthen state's rights in this country. If we don't, we'll no longer have the states."[241] He opposed legislation allowing the federal government to impose law enforcement duties on state officers, which he viewed as a sort of *gleitenschaung*: "It is an insidious point to say that there is more federalism by compelling a state instrumentality to work for the federal government...[this is] loving the states to their demise."[242] This declaration was quoted by Justice O'Connor, dissenting along with Chief Justice Burger and Justice Rehnquist in *FERC v. Mississippi*;[243] their view was ultimately adopted by a court majority. His department's brief on the validity of the post-Watergate campaign finance litigation was criticized for its presentation of both sides of the issue. He emphatically opposed proposals for a federal no-fault statute for auto insurance: "We are in a sense eliminating freedom of choice. It is another case of living in a society when costs occur and no one is responsible."

Before leaving office, Levi defended FBI director Kelley against charges that the investigation of previous FBI wrongdoing had been inadequate, stating that an FBI investigation was not designed to write "history...you either indict or you don't and if the decision is not to indict the investigator should not make public accusations."

When leaving the department upon President Carter's inauguration in January 1977, Levi summed up his experience in an article on the separation of powers published in the *Columbia Law Review*. He warned against Congressional excesses in the wake of Watergate, describing "the movement for congressional review of administrative action, the product of expansive grants of authority by Congress to the executive at a time when judicially-defined limits on delegation have fallen...a new and ironic reversal of roles—the executive making laws and the legislature wielding in effect the veto and often a one-house veto at that...the disease of bureaucracy is as catching for the legislature as for any other branch." It was Levi's Justice Department that set in motion the litigation campaign ending ten years later in the *Chadha* case argued by Rex Lee as Reagan's solicitor general that invalidated the legislative veto. He explained, "I think we are not organized for a parliamentary government."[244]

Levi went on to emphasize the importance of structural restraints on concentrated power. The framers were afraid of legislative abuses in the form of confiscations and moratoria, and Madison in Federalist No. 48 had cautioned that, "An elective despotism was not the government we fought for." "The doctrine of federalism was based on a similar conception. The national government was made supreme, but only in a limited compass defined by limited powers." "It would not be good for judges to act executively; it is better to expect executives to act judicially." (Quoting Lord Devlin) "Power and strict accountability of its use are the essential constituents of good government." (Quoting Woodrow Wilson)

In passages revealing of his central outlook, Levi compared the "Romantic idealism" of the nineteenth century, in which "men and nature stand in the abundant energy and grace of life," and the twentieth-century "metaphors of entropy and humbling intellectual paradoxes [in which the] self shares the potential cruelty of nature, its ineluctable process of running down, and its fundamental impenetrability to observation." He shared his colleague Max

Rheinstein's view of the conditions of social peace: "Dissatisfied people are the most dangerous to peace, political and domestic... The hard ways of discipline, self-restraint, acceptance of fate immutable by man, these solely effective ways to find satisfaction here on earth, are disdained."[245]

In discussing instances of infringements of the separation of powers, Levi listed first, and unconventionally, the opinion of the Supreme Court in *Debs v. United States*, in which "the court and the executive usurped the legislative power of Congress" by seeking and granting injunctive relief unauthorized by statute.[246] Harry Kalven was also a critic of *Debs*.[247] The Steel Seizure case and *Ex Parte Milligan* were invoked as other examples of executive abuse, and it was noted that "the Supreme Court too has not been entirely immune to the temptation to stray into the province of the other branches," citing an article in which he had criticized the capital punishment and abortion cases. "The responsibility of the Court not to destroy the legislative process, or the citizen's feeling of participation in the determination of public issues, particularly when the law is to be changed, is very great. The law was changed in the capital punishment and abortion cases...judicial care is necessary. Otherwise we do not make use of the process which not only reflects but helps create a collective morality, and we are on our way to an impairment of that morality and a widening gap between the people and the law."[248] In another context, he observed, "one cannot just institute law—that is in some sense the law has to arise out of and have an interchange with an environment in which there are many social forces."[249]

He warned against allowing members of Congress standing to contest executive action: the "very nature of this kind of determination may then require continuing judicial supervision [resulting in] remand to the courts of judgments of responsibility and discretion...a rule of law was not intended to create a government by litigation." He also defended what remained of the unpopular doctrine of executive privilege after *United States v. Nixon*, a theme also of one of his Bar Association speeches[250]: "too limited a right of executive privilege can drive deliberations into a more centralized and dependent focus," private discussions with personal staff rather than permanent or responsible officials. "The process necessary for observation can change what is observed."[251] He upheld an appropri-

ately circumscribed executive privilege in one of his formal opinions as attorney general.[252]

In 1977, he reflected on the *Bakke* case in terms that still resonate:

> We have mixed up the question of what a state educational institution can do as to its own admissions with what a non-state institution can do—and both or either with what the government can require them to do. Part of the difficulty of course arises from the desire to have concealed government programs—to make institutions do what the government itself will not overtly do; to have executive orders which are contrary or not mandated by statute...to use the constitution as legislation.[253]

Laws would not be enacted that allocate proportions of college admissions or jobs to racial groups; it was wrong for the courts to do the same thing.

## Later Years

After his service as attorney general, Levi returned to teach at the Law School and College, retiring in 1985 at the age of seventy-four, and served as trustee of a large number of academic organizations. During the Carter presidency, he cautioned that "Inflation destroys a university's capital and diverts its diminished income from academic to nonacademic expenditures. And, it is said, beggars cannot be choosers."[254] He supported an effort to nominate Gerald Ford in 1980[255] and in 1987 supported a short-lived similar effort on behalf of his former colleague Donald Rumsfeld.[256] He was a visiting professor at Stanford Law School in 1977-78 and was president of the American Academy of Arts and Sciences from 1986 to 1989. In that capacity, he was instrumental in having the Academy sponsor a series of publications on evangelism in the Christian and Moslem faiths known as "The Fundamentalisms Project," declaring that "The profession of ministry is too important in our culture and society for it to go unmonitored by and uncontributed to by universities."[257] The aftermath of September 11, 2001 has given rise to renewed interest in this series of books. In his later years, he was an active member of the Council of the American Law Institute and from 1979 to 1984 a founding director of the MacArthur Foundation; in that capacity, he deplored "the drift toward advocacy rather than objectivity in policy studies."[258] He opposed proposals to televise Supreme Court proceedings.[259]

His last published writing appears to have been a eulogy of Judge Charles Wyzanski in the *Harvard Law Review* in 1987 in which, in paying tribute, he appears to have voiced his own concerns. He attributed to Wyzanski the view that "the history of ideas, in short, the history of man's progress, is largely the history of group action.... He thought specialization had diminished the responsibility and independence of the bar. He feared that what was taking place was the overall conversion of law from a profession into a business."[260] Early in his career, Levi had written, "The end of the lawyer is to do justice. If we would be slave to that concept and no other, we would have a guarantee of freedom which we do not have."[261]

He strongly supported the nomination of Robert Bork at the hearings on his nomination in 1987, declaring of the invocation of "privacy" in the *Roe v. Wade* decision:

> It is a part of the fabric of our law, to some extent, but there is something wrong with it. It is misshapen. It doesn't fit...privacy is a construct that hasn't been worked out. No one knows its limitations, and the language itself is not helpful. And since...there isn't agreement as to what part of the Constitution to point to in terms of helping to define it—it needs more work. It needs lawyer's work.[262]

In 1986, he declined to join in the attacks on the nomination of Daniel Manion for the 7th Circuit Court of Appeals, declaring that Manion's reputation in his own community should be decisive.[263] He viewed appellate courts as places where "saying is doing, at least partly so."[264] In his later years, he shared an office suite in Harper Hall with Kurland, a long-time friendly critic.[265]

He suffered a long, mentally debilitating final illness for six years until his death in 2000.[266] His marriage to Kate Sulzberger Hecht whom he married in 1946 was a long and devoted one, and he was survived by his widow and three sons: John, a partner in the Chicago law firm of Sidley and Austin, David, a federal district judge in Sacramento, who later gave one of the eulogies at the memorial service for Philip Kurland, a close family friend, and Michael, a high-energy physicist at the Lawrence Berkeley National Laboratory. At his memorial service, the eulogy of President Gerhard Casper of Stanford University came closest to capturing the significance of his career: "Against those who seek to use universities for political and social purposes, he dared to say that 'the object of the University is intellectual, not moral.'[267] Of course, for Edward, adherence to reason partook of the highest morality."

## EPILOGUE

It is plain that Levi's preferred approach to *Brown* favored case-by-case development, applying the "accepted theory" of separate but equal to ultimately force dismantling of formal racial barriers. The Supreme Court had already traveled a long way down this road in the 1950 case of *Sweatt v. Painter*,[268] where it was held that the creation of a separate black law school failed to comply with the standard, since the resulting law school lacked many of the intangible advantages of its competitor that go to make up "a great law school." The prototypical illustration of Levi's approach was that taken by a particularly distinguished judge, Collins Seitz, who eventually became Chief Judge of the Third Federal Circuit (Pennsylvania, New Jersey, and Delaware). One of the four cases argued together with *Brown* was Delaware's appeal from a decision of Judge Seitz, then chancellor of Delaware, in which Seitz had held the black and white schools in Delaware to be unequal by reason of somewhat less spending on the former, and had awarded as a remedy the right of the complaining students to attend the "white" schools until such time as equality between the two systems had been brought about.[269] Had the Supreme Court followed this course, the result, at least for an interim period, would have been the equivalent of the "freedom of choice'" plans validated by the Fourth Circuit for a time after *Brown*, using the mantra that the Fourteenth Amendment neither permitted segregation nor compelled integration.[270] There would also have been heavy pressure on the southern states to enhance spending on their black schools, a process that was under way in Virginia and South Carolina under progressive governors but was brought to a halt for at least ten years by the *Brown* decision and the "massive resistance" that followed until the Civil Rights Act of 1964.

*Brown* set off a noisy period of squabbling among law professors. In the most famous and perhaps least well judged of their contributions, Herbert Wechsler sought "neutral principles" to validate the *Brown* decision; the only one he could find was the notion that segregation impaired freedom of association, an approach that would have validated the result in *Brown* but also would have legitimized opposition to the public accommodations laws, including the public accommodations provisions of the 1964 Civil Rights Act.[271] Some other law professors denied the relevance or need of

any sort of legal doctrine; the contributions of Arthur Miller,[272] Eugene Rostow,[273] and Charles Black[274] came close to this position. In 1958, Judge Learned Hand created consternation with his Holmes lectures,[275] asserting that the only plausible neutral principle was one condemning all racial distinctions; this scandalized the faint of heart at that time, since it would have required invalidating the anti-miscegenation laws, which Justice Frankfurter and others thought would inflame the South.[276]

When the miscegenation laws were finally invalidated fifteen years later, arousing scarcely a murmur, it appeared for a time that the court would embrace Judge Hand's suggestion, and that of the first Justice Harlan before him. The Supreme Court's two most "advanced" thinkers, Justices Douglas and Goldberg in *Wright v. Rockefeller*,[277] a reapportionment case, would have denied the validity of any consideration of race, even for benevolent purposes (except where necessary as an immediate remedy for discrimination), pointing in this regard to the dismaying histories of Cyprus and Lebanon; later events in both places confirmed their judgment. Mr. Justice Stevens, who is currently regarded as the most "liberal" member of the court, took a similar position in dissenting in the *Fullilove*[278] and *Bakke*[279] cases. Few would then have predicted the result of the recent *Grutter*[280] case on university "affirmative action" programs, in which assertedly benign racial discriminations were not only validated, but assessed by a test scarcely more rigorous than the traditional "rational basis" test applied to economic legislation. Even greater confusion reigned in reapportionment decisions, the "swing" judge, Justice O'Connor, first banning consideration of race,[281] then allowing it in order to ensure the election of blacks from overwhelmingly black districts into which black voters were "packed," and then imposing limits on "packing" while still allowing consideration of race to promote party balance.[282] The last two results alternately brought joy to Republican and Democratic partisans.

Levi would have been horrified by these ukases from on high, not only because of their inconstancy, their authoritarianism, and their indifference to social reality and predictable effects, but because of the distraction they produced from measures addressing the underlying social problems. He favored greater spending on inner-city schools, but neither as university president nor as attor-

ney general did he indulge the illusion that differences in commitment to education and preparation for it could be wished away.

As attorney general, Levi held to the view that abolishing de jure segregation was all the law could do. The judicial heroics that culminated in the *Swann*[283] decision in 1971 were short-lived; following President Nixon's landslide victory in the 1972 election, "forced busing" was swiftly cabined by the *Milliken*[284] and *Pasadena v. Spangler*[285] cases. He similarly renounced absolutism in his approach to gun control, achieving more than his successors from both right and left.

## Notes

1. See *The Idea and Practice of General Education: An Account of the College of the University of Chicago by Present and Former Members of the Faculty* (Chicago: University of Chicago Press, 1950).
2. See M. Loughlin, *Sword and Scales: The Relation of Law and Politics* (Oxford: Hart, 2000); M. Loughlin, *The Idea of Public Law* (Oxford: Oxford University Press, 2004). See also T. Campbell, K. Ewing, and A. Tomkins, Sceptical Essays on Human Rights (Oxford: Oxford University Press, 2004).
3. Levi declined to criticize the dilution of some of the guidelines carried out by the Reagan administration: "I simply do not know what the experience under the old guidelines has been since Jan.20, 1977." Levi to Don Edwards, March 31, 1983; Levi Papers, Box 19, Folder 2.
4. B. Boskey, in "Special Session of the Council in Honor of Edward H. Levi, Herbert Wechsler, and Charles Alan Wright," 2000 Proceedings of the American Law Institute 423, 427.
5. E. Levi, *Point of View: Talks on Education* (Chicago: University of Chicago Press, 1969), 105.
6. "The Life of Edward H. Levi," in *Tributes Given at the Memorial Service of Edward H. Levi,* April 6, 2000 (Chicago: University of Chicago Press, 2000), 3.
7. Comment, "Ernst Freund: Pioneer of Administrative Law," 29 *U. Chi. L. Rev.* 755 (1962).
8. See H. Simons, Economic Policy for a Free Society (Chicago: University of Chicago Press, 1948), which contains an essay, "A Positive Program for Laissez Faire," which has not completely lost its timeliness.
9. E. Levi, "Wilber G. Katz," *46 U. Chi. L. Rev.* 767 (1979). On the pre-World War II law school, see also H. Kalven, "Wilber G. Katz: The Gentle Exemplar," 1972 *Wisc. L. J.* 954 (1972). In nominating Adler for the Medal of Freedom, Levi declared that Adler "has courageously stood against a popular tide which has accepted as inevitable lower standards of performance, the continued lengthening of the period of formal schooling (thus further isolating young people from the working world) and which has sought improvements...solely in specialized training for particular tasks." Levi Papers, Box 11, Folder 5.
10. E. Levi, "Wilber G.Katz," 46 *U. Chi. L. Rev.* 767 (1979). Katz, a prominent Episcopal layman and later dean at Wisconsin, is best remembered for W. Katz, *Religion and American Constitutions* (Evanston: Northwestern University Press, 1962). David Rothman's caricature, drawn in the early'60s, depicts him with a benign expression and a clerical collar.

11. J. Moore and E. Levi, "The Right to Intervene and Reorganization," 45 *Yale L. J.* 565 (1936); J. Moore and E. Levi, "Federal Intervention: Procedure, Status, and Federal Jurisdiction," 47 Yale L. J. 898 (1938).
12. J. Moore and E. Levi (eds.), Gilbert's Collier on Bankruptcy (4th ed. 1937).
13. J. Moore and E. Levi, "Bankruptcy and Reorganization: A Survey of Changes," 5 *U. Chi. L. Rev.* 1, 219, 398 (1938). See also E. Levi, "Corporate Reorganization and a Ministry of Justice," 22 *Minn. L. Rev.* 3 (1938).
14. 47 Yale L. J. 898, 943 (1938).
15. Hutchins to Levi, March 31,1959; Levi Papers, Box 23, Folder 8.
16. E. Levi, "Natural Law, Precedent and Thurman Arnold," 24 *Va. L. Rev.* 587 (1938).
17. Ibid., 589.
18. Ibid., 589.
19. Ibid., 592.
20. Ibid., 611-12.
21. Griswold-Brewster Oral History Interview, p. 3; Levi Papers, Box 24, Folder 6. See also Levi to John Henry Schlegel, March 3, 1977; Levi Papers, Box 35, Folder 3.
22. *Summa Theologica* 1a,xxi, I. See T. Gilby, *St. Thomas Aquinas: Philosophic Texts* (New York: Oxford, 1960), 116.
23. D. Acheson, in I. Dilliard (ed.), *Mr. Justice Brandeis: Great American—Press Opinion and Public Appraisal* (St. Louis: Modern View Press, 1941), 125.
24. L. Hand, *The Spirit of Liberty* (New York: Knopf, 1953), 170-73.
25. E. Hawley, *The New Deal and the Problem of Monopoly: A Study in Economic Ambivalence* (Princeton: Princeton University Press, 1966), 423-24, citing, inter alia, Arnold to Edward Levi, Dec. 11, 1937 (Arnold Papers, University of Wyoming, Box 47).
26. M. Rheinstein, Book Review, 49 *Ethics* 212 (1939), reprinted in M. Rheinstein, *Gesammte Schriften: Collected Works* (Tubingen: J.C.B. Mohr, 1979), 211.
27. *Tributes Given at the Memorial Service of Edward H. Levi, April 6, 2000* (Chicago: University of Chicago, 2000), 41, 42.
28. Jack W. Fuller, in Ibid., 29.
29. E. Hawley, Ibid., 432.
30. Levi to Mrs. Thurman Arnold, November 19, 1969; Levi Papers, Box 12, Folder 2.
31. E. Levi, "Thurman Arnold," 79 *Yale L. J.* 983 (1970).
32. Arnold to Levi, March 3, 1943; Levi Papers, Box 12, Folder 1.
33. On Simons, see N. Duxbury, *Patterns of American Jurisprudence* (Oxford: Clarendon, 1995), 331-39.
34. R. Bork, *The Antitrust Paradox* (New York: Basic Books, 1978).
35. See E. Levi, "Aaron Director and the Study of Law and Economics," 9 *J. Law and Econ.* 3 (1966); E. Kitch (ed.), "The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932-1970," 26 *J. Law and Econ.* 163 (1983).
36. On Director's influence, see N. Duxbury, supra, 341-49.
37. R. Coase, "Law and Economics at Chicago," 36 *J. Law and Econ.* 239 (1993).
38. For a sardonic critique of "Director's Law," see A. Hirschman, *The Rhetoric of Reaction* (Cambridge, Mass.: Belknap, 1991), 63-67.
39. R. Bork, "Edward H. Levi," in E. Shils, *Remembering the University of Chicago: Teachers, Scientists, and Scholars* (Chicago: University of Chicago Press, 1991), 292-94.
40. N. Duxbury, supra, 344. The divergence in their views was persistent, Levi referring in 1986 to "my views on precedent and legal rules and the power of the courts, my appreciation or understanding of law and economics, and even the Mac Arthur Foundation." Levi to Director, April 14, 1986; Levi Papers, Box 18, Folder 4.
41. Francis Biddle to Levi, July 27, 1943; Levi Papers, Box 106, Folder 7.

42. *Tributes Given at the Memorial Service of Edward H. Levi*, April 6, 2000 (Chicago: University of Chicago Press, 2000), 4, reprinted at 67 *U. Chi. L. Rev.* 967 (2000).
43. Levi to Edward Shils, December 6, 1982; Levi Papers, Box 36, Folder 1.
44. Katz to Levi, February 16, 1944, Levi Papers, Box 25, Folder 2.
45. A masterful sketch of the intellectual background of this article appears as E. Hawley, *The New Deal and the Problem of Monopoly*, supra, ch. 15.
46. *Liggett Co. v. Lee*, 288 U.S. 517 (1933).
47. Id., 175. "I think point worth making in connection with price leadership that where the units are of particular size, price leadership is really inevitable. It is really price setting and it need not involve any collusion at all." Levi to William Kirsch, November 9, 1948, Levi Papers, Box 25, Folder 5.
48. *U.S. v. Alcoa*, 148 F.2d 416, 425-26 (2nd Cir. 1945).
49. Id., 183.
50. Id., 173.
51. E. Hawley, supra, 287-88.
52. E. Levi, Book Review of S. Oppenheim, *Cases on Federal Antitrust Law*, 1 *J. Legal Ed.* 139 (1948).
53. B. Meltzer, "*Labor Unions, Collective Bargaining, and the Antitrust Laws*", 32 *U. Chi. L. Rev.* 659 (1965).
54. B. Meltzer, *Labor Law: Cases, Materials, and Problems* (Boston: Little, Brown, 1970, supplemented and updated to 1990).
55. B. Meltzer, "Ruminations and Reminiscences", 70 *U. Chi. L. Rev.* 233, 248 (2003).
56. E. Hawley, supra, 303.
57. E. Levi, Book Review of G. and R. Hale, *Market Power: Size and Shape Under the Sherman Act*, 26 *U. Chi. L. Rev.* 672 (1959).
58. Its early history is ably discussed in E. Kitch, " 'The Fire of Truth': A Remembrance of Law and Economics at Chicago, 1932-1970," 26 *J. Law and Econ.* 163 (1983). See also R. Posner, "The Chicago School of Antitrust Analysis," 127 *U. Pa. L. Rev.* 925 (1979); G. Stigler, *Memoirs of an Unregulated Economist* (New York: Basic Books, 1988), 148-69.
59. D. Dewey, *The Antitrust Experiment in America* (New York: Columbia University Press, 1990), 127, 130.
60. Ibid., 51.
61. F. Rowe, "The Decline of Antitrust and the Delusion of Models: The Faustian Pact of Law and Economics," 72 *Geo. L. Rev.* 1511, 1558, 1570 (1989).
62. R. Bork, *The Antitrust Paradox* (New York: Basic Books, 1978). There is indeed tension between "the ostentatiously theoretical methods of *Paradox* and the putatively historical concerns of [Bork's] *Tempting [of America]*." B. Ackerman, "Robert Bork's Grand Inquisition", 99 *Yale L. J.* 1419, 1423-24 (1990). On the legislative history of the Sherman Act, see D. Ernst, "The New Antitrust History," 35 *N.Y. Law School Review* 879, 882 (1990).
63. R. Posner, *Antitrust Law: An Economic Perspective* (Chicago: University of Chicago Press, 1976).
64. D. Mueller, *The Public Choice Approach to Politics* (Aldershot: Elgar, 1993), 513-14. For similar observations about economics in the law schools, see W. Landes, "The Empirical Side of Law and Economics," 70 *U. Chi. L. Rev.*167, 180 (2003); G. Hazard to American Law Institute Council, May 11, 1987, Levi Papers, Box 32, Folder 6.
65. E. Levi, "Thurman Arnold," 79 *Yale L. J.* 983 (1970).
66. E. Levi, Book Review of W. Friedmann, *Legal Theory*, 25 *N.Y.U. L. Rev.* 426 (1950).
67. E. Levi, "The Political, the Professional and the Prudent in Legal Education," 11 *J. Legal Educ.* 457 (1958).

68. See G. Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (New York: N.Y.U., 1995).
69. E. Levi, Book Review of Gavit, *Cases and Materials on Introduction to Law and Judicial Reasoning*, 4 *U. Chi. L. Rev.* 692 (1937). The reference was to the elaborate classification of legal interests attempted by Wesley Hohfeld of Yale.
70. Levi to Anthony Kronman, January 17, 1978; Levi Papers, Box 26, Folio 2.
71. 324 U.S. 293 (1945).
72. *Woods v. Nierstheimer*, 328 U.S. 211 (1946); *Young v. Ragen*, 337 U.S. 235 (1949). Reform of Illinois criminal post-conviction remedies was a Law School cause at the time. See W. Katz, "An Open Letter to the Attorney General of Illinois," 15 *U. Chi. L. Rev.* 251 (1948).
73. Navasky, supra.
74. E. Levi, "A Two Level Anti-Monopoly Law," 47 *Nw. U. L. Rev.* 567 (1952).
75. E. Levi, in Symposium Review of Galbraith, *American Capitalism: The Concept of Countervailing Power* and Lilienthal: *Big Business: A New Era*, 49 *Nw. U. L. Rev.* 150 (1954).
76. E. Levi and A. Director, *Law and the Future: Trade Regulation*, 51 *Nw. U. L. Rev.* 281 (1956).
77. *U.S. v. United Shoe Machinery Co.*, 110 F. Supp. 295, 342 (D. Mass. 1953).
78. "You think economics is good economics, and bad economics is not economics. You now have a high regard for monopolistic competition, the economists or many of them at the University of Chicago do not have a high regard for it. But history can be read or forgotten in many ways. I think one attribute of law is to comfort us that values remain, even though experts change their minds." Levi to Posner, September 17, 1986; Levi Papers, Box 32, Folder 6. See also Levi to Phil Neal, February 17, 1976; Levi Papers, Box 116, Folder 2.
79. "The Past and Future of Antitrust: Reconsideration of Director and Levi's Law and the Future After Forty Years," 17 *Miss. College L. Rev.* 1-129 (2001).
80. H. Page, "Forward," 17 *Miss. Coll. L. Rev.* 1, 2 (2001).
81. H. Page, "Discussion," 17 *Miss. Coll. L. Rev.* 1, 126 (2001).
82. Bork as judge was more restrained, see. e.g. *F.T.C. v. PPG Industries*, 798 F.2d 1900 (D.C.Cir.1985).
83. E. Levi, "The du Pont Case and Section 7 of the Clayton Act," *3 Antitrust Bulletin* 3 (1957).
84. E. Levi, "The Parke, Davis-Colgate Doctrine: The Ban on Resale Price Maintenance," 1960 *Sup. Ct. Rev.* 258, 325-26 (1960).
85. T. Arnold, "The Emperor's Old Clothes: III. The Folklore of Capitalism Revisited," 52 *Yale Review* 188 (1962), reprinted in R. Himmelberg (ed.), *Antitrust and Business Regulation in the Postwar Era 1946-1964* (New York: Garland, 1994).
86. See J. Clark, "Toward a Concept of Workable Competition," 30 *Am. Econ. Rev.* 241 (1940).
87. See G. Stocking, "Economic Change and the Sherman Act: Some Reflections on 'Workable Competition,'" 44 *Va. L. Rev.* 537 (1958), reprinted in Himmelberg, supra, 341-86.
88. R. Hofstadter, "What Happened to the Antitrust Movement?" in E. Cheit (ed.), *The Business Establishment* (New York: Wiley, 1964), 113-51, reprinted in Himmelberg, supra, 71-110. David Riesman for his part referred to antitrust as "a great provider of legal business for graduates of those law schools which have been most committed to the radical economic teachings of free enterprise." D. Riesman, *Some Observations on Graduate Training in Law and Social Science* (typescript), p. 12, in Llewellyn Papers, Box 6, Item A.IV.101.

89. Levi to Leonard Krieger, October 6, 1964; Levi Papers, Box 26, Folder 2.
90. R. Steffen and E. Levi, *Cases and Materials on the Elements of the Law* (4th ed., Chicago: University of Chicago Press, 1950). On the history of the "elements" course at Chicago, see D. Hutchinson, "Elements of the Law," 70 *U. Chi. L. Rev.* 141 (2003).
91. Hutchinson, supra, 156. For Llewellyn's tribute to Levi, see Levi Papers, Box 27, Folder 5.
92. L. Gossman, *Basel in the Age of Burckhardt: A Study of Unseasonable Ideas* (Chicago: University of Chicago Press, 2000), 127.
93. 344 U.S. 298 (1953).
94. He took issue with the young Judge Richard Posner on this point: "You appear to be downgrading the difference between construing a statute and applying case precedent...it is a little shocking to think a statute is simply a reference of a matter to a court to do what it pleases." Levi to Posner, January 24, 1983, Levi Papers, Box 32, Folder 4.
95. Levi to Posner, April 19, 1983; Levi Papers, Box 32, Folder 4.
96. Llewellyn appropriately annotated this passage in his copy of the book: "Maybe. Why concede it entire?" Llewellyn Papers, Box 6, Item A.4.52, p. 23.
97. "Segregation and Equal Protection: Brief for Committee of Law Teachers in Opposition to Segregation in Legal Education," 34 *Minn. L. Rev.* 289 (1950). Although the brief contended for a *Brown*-like result, two sections of it tendered separate-but-equal theories in support of the result sought by the plaintiff. These have been credited to Levi, and were embraced by the Court. M. Gruenberg, "Edward Levi, Legal Philosopher: A Very Private Man," *National Jewish Monthly*, April 1975, 22, in Levi Papers, Box 25, Folder 6.
98. Kurland Papers, Box 6.
99. N. Duxbury, supra, 236.
100. R. Pound, Book Review, 60 *Yale L. J.* 193 (1951). The avuncular Pound did note "Sir Frederick Pollock used to say that a man who would publish a book without an index ought to be banished ten miles beyond hell where the devil himself could not go because of the stinging nettles."
101. C. Perry, Book Review, 18 *U. Chi. L. Rev.* 394 (1951).
102. 328 U.S. 61(1946).
103. M. Gartner, Book Review, 2 *Stan. L. Rev.* 436 (1950).
104. J. Morse, Book Review, 35 *Cornell L. Q.* 705 (1950).
105. B. King, Book Review, 11 *Camb. L. J.* 126 (1951).
106. G. Schmitt, Book Review, 28 *Can. Bar Rev.* 717 (1950).
107. K. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Boston: Little Brown, 1960).
108. H. Kalven, *The American Jury* (Chicago: University of Chicago Press, 1966).
109. K. Davis, *Administrative Law Treatise* (St. Paul, Minn.: West Publishing, 1958).
110. K. Davis, *Discretionary Justice: A Preliminary Inquiry* (St. Paul, Minn.: West Publishing, 1975).
111. K. Davis, *Police Discretion* (St. Paul, Minn.: West Publishing, 1975).
112. Frankfurter to Kurland, July 6, 1961; Kurland Papers, Box 31.
113. E. Levi, "The Crisis in the Nature of Law," 25 *Record of the Association of the Bar of the City of New York* 121 (1970).
114. On footnote 11 in Brown, see S. Mody, "Brown's Footnote 11 in Historical Context: Social Science and the Supreme Court's Quest for Legitimacy," 54 *Stanford L. Rev.* 793 (2002); M. Klarman, "Brown v. Board of Education: Facts and Political Correctness", 80 *Va. L. Rev.*185 (1994). On the effort by southern racists to exploit the Court's receptivity to "social science," see I. Newby, *Challenge to the Court: Social*

*Scientists and the Defense of Segregation 1954-1966* (2d ed. Baton Rouge: Louisiana State University Press, 1969).

115. E. Levi, "The Political, the Professional and the Prudent in Legal Education," 11 *J. Legal Educ.* 457 (1958).
116. See L. Kalman, *The Strange Career of Legal Liberalism* (New Haven: Yale U., 1996), 9, see generally chs. 6 and 7.
117. E. Levi, "The Nature of Judicial Reasoning," 32 *U. Chi. L. Rev.* 395 (1963).
118. A prescient comment on the brief he had signed in *Sweatt v. Painter* in 1950, see note 86 supra, had made the same point: "As you predict, I do not like all of the brief...a one-man law school is not the equivalent of the real thing. On the other hand, I have too little confidence in the exact nature of the social sciences to feel that the court will be justified in ramming down the throats of southern communities, as newly mined constitutional ore, the *obiter dicta* of Gunnar Myrdal. Step by step is still the right way in constitutional adjudication." William L. Marbury to Erwin N. Griswold, May 25, 1950, quoted in W. Marbury, *The Catbird Seat* (Baltimore: Maryland Historical Society, 1988), 323.
119. See J. Stevens (Mr. Justice Stevens), "Edward H. Levi," 52 *U. Chi. L. Rev.* 290 (1985). Soia Mentschikoff is included as a visiting professor, however, in a photograph of the Harvard Law Faculty taken in 1949. See the illustrations in N. Hull, *Roscoe Pound and Karl Llewellyn* (Chicago: University of Chicago Press, 1997). On Levi's recruitment of the Llewellyns, see R. Whitman, "Soia Mentschikoff and Karl Llewellyn: Moving Together to the University of Chicago," 24 *Conn. L. Rev.* 1119 (1992).
120. The heading was "For Our Kitten" (undated). Levi Papers, Box 5, Folder Llewellyn.
121. As acting chief of the Foreign Funds Control Division, he sought to facilitate an effort to transmit funds to ransom Rumanian and French Jews. Notwithstanding that under his proposal the funds would remain in blocked accounts until the end of the war, obstruction at the State Department caused him to appeal to the Treasury Department, where his effort ultimately resulted, after much delay, in creation of the War Refugee Administration. See the accounts in 6 D. Wyman, *America and the Holocaust: Showdown in Washington: State, Treasury and Congress* (New York: Garland Publishing Company, 1990, 42-61, 156-60, 166-67, 172-73; O. Schachter, "In Defense of International Rules on the Use of Force," 53 *U. Chi. L. Rev.* 113 (1986).
122. B. Meltzer, *Remembering Nuremberg* (Occasional Paper 24, Chicago: University of Chicago Law School, 1995), concludes that retroactivity "left a shadow on the trial"; that acquittals showed it to be better than summary execution; that it was "an important part of the closure of World War II"; and that application of its principles in Yugoslavia "ask[ed] those who have already suffered so much to risk more war so that the prosecution may use the peace process in order to get custody of the major indictees." See B. Meltzer, "The Nuremberg Trial: A Prosecutor's Perspective," 4 *Journal of Genocide Research* (2002); B. Meltzer and J. Goldsmith, "Swift Justice for Bin Laden," *Financial Times*, November 6, 2001.
123. Levi to Charles Percy, January 14, 1970, Levi Papers, Box 29, Folder 1.
124. Levi to Edward Shils, December 28,1989, Levi Papers, Box 36, Folder 2.
125. Biddle to Truman, January 23, 1952, quoted and discussed in S. Goldman, *Picking Federal Judges: Lower Court Selection from Roosevelt to Reagan* (New Haven: Yale University Press, 1997), 75-76, 204.
126. Henry Manne to Jean Sulzberger Meltzer, January 14, 1970, Levi Papers, Box 29, Folder 2. After serving as attorney general, he disclaimed any interest in appointment to the D.C. Circuit during the Carter administration. Levi to Joseph Tydings, January 10, 1978,Box 38, Folder 5.

127. A. Mikva, Commencement Speech, University of Chicago Law School, June 8, 2001, quoted in part in G. Anastaplo, "Legal Education, Economics and Law School Governance," 46 *S.D.L.R.* 102 (2001).
128. G. Anastaplo, "What is Still Wrong with George Anastaplo?" 35 *De Paul L. Rev.* 551, 552 n.4.
129. "In the inimitable fashion of Walter Blum passing on any of Edward's suggestions, it will be approved." Kurland to Neal, January 4, 1967, Kurland Papers, Box 8. "You might get hit by a falling Sputnik and Wally Blum might take over, and then where would I be?" Currie to Levi, June 2, 1958, Levi Papers, Box 2.
130. Anastaplo, supra.
131. V. Navasky, "The Attorney General as Scholar, not Enforcer," *New York Times Magazine*, September 7, 1975, 13.
132. Quoted in Anastaplo, supra, 45 *De Paul L. Rev.*551, 601 (1986). Earlier, Levi annoyed Anastaplo by discouraging but not prohibiting the law review from publishing his article about the case. Levi to Alex Polikoff, May 12, 1952, Levi Papers, Box 6.
133. Ibid.
134. G. Anastaplo, supra, 35 *De Paul L. Rev.* 551, 565-609.
135. Cf. Kurland to Alfred Avins, October 26, 1965: "You ought to remove the personal element. Otherwise you sound like a right-wing George Anastaplo, more interested in getting the chip knocked off your shoulder than in getting the piece published." Kurland Papers, Box 1.
136. See the festschrift and bibliography, J. Murley et al. (eds.), *Law and Philosophy: The Practice of Theory: Essays in Honor of George Anastaplo* (Athens, Ohio: Ohio University Press, 1997), 2 vols.
137. *New York Times*, October 13, 1955, 1:1.
138. V. Hans and N. Vidmar, "*The American Jury* at Twenty-Five Years," 16 *Law and Social Inquiry* 323, 326 n.15 (1991). See the account in J. Katz, *Experimentation with Human Beings* (New York: Russell Sage Foundation, 1972), 67-109; Levi to Edward de Grazia, February 22, 1985, Levi Papers, Box 18, Folder 1.
139. J. Schlegel, *American Legal Realism and Empirical Social Science* (Chapel Hill: University of North Carolina Press, 1995), 238-44. Morris was a relentless empiricist in his investigations of prison conditions and sentencing practices, and was an important advocate of intermediate sanctions, "between prison and probation."
140. R. Bork, "Edward H. Levi," in E. Shils (ed.), *Remembering the University of Chicago* (Chicago: University of Chicago Press, 1991), 294.
141. E. Levi, *Four Talks on Legal Education* (Chicago: University of Chicago Press, 1952).
142. E. Griswold, "Edward H. Levi," 52 *U. Chi. L. Rev.* 291 (1985).
143. E. Levi, "The Political, the Professional, and the Prudent in Legal Education," 11 *J. Legal Educ.* 457 (1958).
144. Levi to Sargent Shriver, October 22, 1964, Levi Papers, Box 36, folder 4.
145. Kurland to Currie, May 1,1962, Kurland Papers, Box 2.
146. Currie to Kurland, May 7, 1962, Ibid.
147. Currie to Kurland, August 22,1962, Ibid.
148. Kurland to Currie, October 19, 1962, Ibid.
149. See Currie to Levi, May 22,1960, Levi Papers, Box 17, Folder 3, thanking him for an unsolicited pay increase. When Currie nonetheless left for family reasons, Levi made strenuous efforts to secure his return. "I am not going to touch the cigars until you leave. Next year I will blow smoke rings with them and utter an incantation which will bring you back." Levi to Currie, June 29, 1961, Levi Papers, Box 17, Folder 3.

150. Elsewhere, he observed of Hutchins: "He helped give the place a mystique...is that a bad thing? Part of the mystique was that of a discussing, learning society...much of what was done was adolescent. How can you have a discussing, learning society which includes adolescent[s] without being somewhat adolescent?" Levi to Edward Shils, January 1978; Levi Papers, Box 36, Folder 1.
151. "I will do my best for this institution which I love," *U. of Chicago Magazine* (April, 2000), 10.
152. Carnegie Foundation for the Advancement of Teaching, *Reinventing Undergraduate Education: A Blueprint for America's Research Universities* (1998).
153. E. Levi, *Point of View: Talks on Education* (Chicago: University of Chicago Press, 1969), 131.
154. *Point of View*, supra, 130.
155. Quoted in W. Murphy and D. Bruckner (eds.), *The Idea of the University of Chicago: Selections from the Papers of the First Eight Chief Executives of the University of Chicago from 1891 to 1975* (Chicago: University of Chicago Press, 1976), 173.
156. *Point of View*, supra, 130.
157. "The trustees have pressured Edward to bail Beadle out and he is going to try to do so." Kurland to Brainerd Currie, May 16, 1962; Kurland Papers, Box 2.
158. Arnold to Levi, December 11, 1968; Levi Papers, Box 12, Folder 1.
159. Ibid., 141-42.
160. Ibid., 145. He had been a critic of the Vietnam War. In October 1969 he was one of five private university presidents to circulate a petition gathering seventy signatures of their colleagues urging "a stepped-up timetable for withdrawal from Vietnam." Levi Papers, October 12, 1969, Box 78, Folder 11.
161. Ibid., 157.
162. Ibid., 160-61. More radically, Levi suggested that if high schools were upgraded, "the norm for most students should be two years of college, not four." Telegram [reporting speech], June 27, 1972 Kurland Papers, Box 7.
163. Ibid., 162.
164. Ibid., 106-07.
165. Kurland took sharp issue with "your slurs on the literary criticism of the Court and your praise of Warren's efforts;" Levi responded "I was not in fact advocating the Supreme Court decision as the way out." Kurland to Levi, January 26, 1968, with Levi postscript, Kurland Papers, Box 6.
166. Ibid., 68-69.
167. His colleague Meltzer had stressed similar values in defending labor arbitration whose popularity is fuelled by "the fear of mediocre and partisan official tribunals." B. Meltzer, "Reflections on Ideology, Law and Labor Arbitration," 34 *U. Chi. L. Rev.* 545 (1967). Soia Mentschikoff's interest in commercial arbitration was driven by similar concerns.
168. Quoted in L. Gossman, *Basel in the Age of Burckhardt* (Chicago: University of Chicago Press, 2000), 241.
169. Levi to Glenn Lloyd, January 29, 1964; Levi Papers, Box 27, Folder 5.
170. *San Francisco Chronicle*, June 27, 1972, quoted in Gruenberg, supra, note 93.
171. B. Meltzer, "The *Weber* Case: Double Talk and Double Standards," 3 *Regulation* No. 5, 34 (September/October 1979).
172. E. Levi, "The Crisis in the Nature of the Law," 25 *Record of the Association of the Bar of the City of New York* 121 (1970).
173. E. Levi, *The State of the University: The University of Chicago* (Chicago: University of Chicago Press, 1969), 10-12.
174. Navasky, supra.

175. *New York Times*, May 16, 1968, 43:3; May 19, 1968, 84:5.
176. Kurland to Neal, February 8, 1969, Kurland Papers, Box 8; "I admired your restraint in not pushing the faculty to a public statement. It was clear that they were not prepared to make one." See also Kurland to Allen, February 10, 1969, Kurland Papers, Box 11.
177. See Levi to Clark Kerr, November 27, 1967, Levi Papers, Box 25, Folder 4: "It would be helpful if there were a good publishable study made on the Latin American universities and the effects of student participation; there are some European examples also."
178. *New York Times*, January 1, 1969, 18:1; February 1, 32:4; February 2, 61:2; February 3, 22:3; February 4, 28:5; February 5, 26:2; February 8, 18:6; February 9, 58:3; February 13, 34:4; February 14, 22:8; February 15, 16:7; February 20, 35:6; February 27, 26:1; February 28, 19:1; March 30, IV, 8:1; April 10, 32:5; April 13, 60:4; April 27, 65:1. See generally Levi Papers, Box 78, Folder 12.
179. Navasky, supra.
180. Ibid.
181. Griswold-Brewster Oral History, 20, 22; Levi Paper, Box 24, Folder 5.
182. G. Ford, "Edward H. Levi," 52 *U. Chi. L. Rev.* 284 (1985).
183. Levi to Mike Minor, May 9, 1978; Levi Papers, Box 30, Folder 1.
184. Levi to David Riesman, April 14, 1986; Levi Papers, Box 34, Folder 2.
185. G. Ford, *A Time to Heal* (London: W. H. Allen, 1979), 236-37.
186. A. Scalia, in *Tributes Given at the Memorial Service of Edward H. Levi, April 6, 2000* (Chicago: University of Chicago Press, 2000), 33, 38. Levi had actively supported the Johnson-Humphrey ticket in 1964. Hubert Humphrey to Levi, December 10, 1964; Levi Papers, Box 23, Folder 7. Levi did not enjoy these hearings. "I think it unfortunate that decent men must be subjected to the scrutiny of Senate approval because indecent men are so often nominated for high government posts. But the fact remains that the price of privacy made in exchange for the acquisition of governmental power is voluntarily paid and not coerced. In light of your experience and John's I have come to think the price too high. I don't even want to be Solicitor General anymore." Kurland to Levi, December 14, 1975; Kurland Papers, Box 7.
187. *New York Times*, January 30, 1975, 14:5.
188. Navasky, supra.
189. Quoted in Murphy and Bruckner, supra, 504.
190. At the inception of the Reagan administration, Levi urged the appointment of Lee not as solicitor general but as attorney general. Levi to Penn James, November 11, 1980, Levi Papers, Box 26, Folio 6.
191. Bork to Levi, November 12,1991, Levi Papers, Box 13, File 5. Levi had declared, "I was very fortunate...that you were Solicitor General." Levi to Bork, November 3,1977, Ibid.
192. S. Goldman, *Picking Federal Judges: Lower Court Selection from Roosevelt to Reagan* (New Haven: Yale University Press, 1997), 204-05, see also D. O'Brien, "The Politics of Professionalism: President Gerald R. Ford's Appointment of Justice John Paul Stevens," in B. Firestone and A. Ugrinsky, *Gerald R. Ford and the Politics of Post-Watergate America* (Westport, Conn.: Greenwood, 1993), 2 vols., 111, 116.
193. R. Bork, "Edward H. Levi," in E. Shils, *Remembering the University of Chicago* (Chicago: University of Chicago Press, 1991), 295.
194. *New York Times*, April 7, 1975, 18:1.
195. J. Casserly, *The Ford White House: Diary of a Press Secretary* (Boulder: Colorado Associated University Press, 1977), 100.

196. *New York Times*, July 23, 1975, 31:1.
197. Navasky, supra.
198. Levi to Gerald Ford, April 6,1981; Levi Papers, Box 20, Folder 6.
199. Levi to John P. Frank, December 16, 1983; Levi Papers, Box 20, Folder 8.
200. *New York Times*, August 10, 1976, 18:5, August 11, 1976, 46:1.
201. Levi to Walter Schaefer, April 13, 1981, Levi Papers, Box 35, Folder 3.
202. Quoted in R. Soto, *Watching America's Door: The Immigration Backlash and the New Policy Debate* (Washington: Century Foundation, 2001).
203. *New York Times*, February 7, 1976, 48:4; Hearings before the Senate Select Committee on Intelligence Activities [Church Committee], 94th Congress, 1st Session, vol. 5, 90-91; vol. 6, 471-82; Hearings before the Subcommittee on Civil and Constitutional Rights, 94th Congress, 1st Session, Series 2, Part 1, 10.
204. *New York Times*, January 6, 1977.
205. *New York Times*, January 16, 1977, 22:6.
206. G. Ford, "Edward H. Levi," 52 *U. Chi. L. Rev.* 284 (1985).
207. *New York Times*, July 22, 1975, 37:6. Unlike the other guidelines, these have been codified in the Federal Register and survive in substantially their original form. 28 C.F.R.sec.50.10 (2003).
208. Pub. L. 107-56, secs. 201-225; 115 Stat. 272 ff.
209. The Smith Guidelines appear at 32 *BNA Criminal Law Rep.* 3087 (1983).
210. The successive iterations of guidelines may be found at www.usdoj.gov/ag/readingroom/generalcrimea.
211. *New York Times*, March 9, 1976, 1:8; March 18,1976, 41:1.
212. R. Carr, "Mr. Levi at Justice," 52 *U. Chi. L. Rev.* 300 (1985). See also two rather thin studies, N. Baker, "Rebuilding Confidence: Ford's Choice of Attorney General," and H. Ball, "Confronting Institutional Schizophrenia: The Effort to Depoliticize the U.S. Department of Justice," in B. Firestone, et al., supra, 79, 97.
213. *New York Times*, August 13,1976, 18:1; August 14, 1976, 28:2; November 24, 1976, 32:1, 37:1.
214. F. Allen, "Legal Values and the Rehabilitative Ideal," 50 *J. Crim. L. C. & P.S.* 226 (1959), reprinted in F. Allen, *The Borderland of Criminal Justice* (Chicago: University of Chicago Press, 1964), see also F. Allen, *The Decline of the Rehabilitative Ideal* (New Haven: Yale University Press, 1981).
215. American Friends Service Committee, *Struggle for Justice* (New York: AFSC, 1971) reflects and refers to some more extreme studies.
216. J. Wilson, *Thinking About Crime* (New York: Vintage, 1977); E. Van den Haag, *Punishing Criminals* (New York: Basic Books, 1975).
217. See G. Liebmann, "Chartering a National Police Force", 56 *A.B.A.J.* 1070, 1176 (1970).
218. Notably the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, 108 Stat. 1796 and the Terrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1246, both signed by President Clinton.
219. F. Allen, *The Habits of Legality* (New York: Oxford University Press, 1996), vii, 7, 54, 79.
220. *New York Times*, May 30, 1976, 1:8, 19:1.
221. J. Greene, *The Presidency of Gerald Ford* (Topeka: University Press of Kansas, 1995), 89.
222. *New York Times*, May 24, 1976, 29:5. See A. Lukas, *Common Ground: A Turbulent Decade in the Lives of Three American Families* (New York: Knopf, 1983).
223. Ford, supra.

224. Levi to Gaylord Freeman, April 21, 1986, commenting on J. Rabkin and N. Devins, "A Welcome Retreat from Government by Consent Decree," *Wall Street Journal*, April 10, 1986. For a discussion of later abuses of "consent decrees" in "institutional reform" litigation, see R. Sandler and D. Schoenbrod, *Democracy by Decree* (New Haven: Yale University Press, 2002).
225. *New York Times*, November 27, 1975, 42:5.
226. D. O'Brien, supra. See generally Levi Papers, Box 122, Folders 13 and 14.
227. Levi to James Willard Hurst, November 22, 1958; Levi Papers, Box 23, Folder 7.
228. Ibid.
229. A cryptic notation in a summary of Nixon Tapes for October 18, 1971 reads "Supreme Court Appts. Leonard Garment's recc—Edw. H. Levi. Jewish question—Pol consid—Israel." Nixon Presidential Materials Staff, Tape Subject Log (rev. 6/02), Nos. 594-10/595-1. See also Ibid., Oct. 12, 1971, No. 589-1. Available at www.ssa.gov/history/Nixon/-OVAL. See Kristol to Levi, October 26, 1971; Levi Papers, Box 26, Folder 2.
230. In an oral history record, Nicholas Katzenbach recalled mentioning Levi to Kennedy for the vacancy that went to Byron White. Noting that Frankfurter was still on the Court, he observed, "You wouldn't want to appoint two Jews to the Court." The president replied, "Why the hell shouldn't I?" "And that was no argument against Ed Levi. But Ed Levi kind of got left at that." See the enclosure to Charles Daly to Levi, April 20, 1989, at 67; Levi Papers, Box 17, Folder 5.
231. When Johnson induced Arthur Goldberg to resign from the Court, it was accepted that his successor would also be Jewish. Attorney General Katzenbach, who knew Johnson's intention with regard to Fortas, presented Johnson with a list also including Henry Friendly, Levi, and Paul Freund, though indicating that Fortas would be his choice. B. Murphy, *Fortas: The Rise and Ruin of a Supreme Court Justice* (New York: Morrow, 1988) 175, 624 n.47, citing a memorandum from Katzenbach dated July 21, 1969.
232. *New York Times*, February 7, 1976, 48:4. "Where there is this outside mechanism, the opportunity to threaten to use it in itself becomes a political fact—a political weapon." Levi to Charles Percy, April 2, 1976; Levi Papers, Box 116, Folder 2.
233. Quoted by Justice Antonin Scalia in *Tributes Given at the Memorial Service of Edward H. Levi, April 6, 2000* (Chicago, University of Chicago Press, 2000), 33, 34.
234. 487 U.S. 654 (1988). Kurland had likewise opposed its enactment. Kurland to Swietuka, May 18, 1977, Kurland Papers, Box 10.
235. Levi to Vincent Mc Kusick, November 16, 1992, Box 28, Folio 7.
236. G. Ford, *A Time to Heal*, supra, 383.
237. Ibid., 417-418; see also J. Greene, supra:, 180-181.
238. P. Kurland, *Watergate and the Constitution* (Chicago: University of Chicago Press, 1978), 197.
239. E. Levi, Law Day Address, 55 *Neb. L. Rev.* 35 (1975).
240. *New York Times*, November 12, 1977, 10:1.
241. Navasky, supra.
242. Hearings on S.354 before the Senate Committee on Commerce, 94th Congress, 1st Session, 503, 507.
243. 456 U.S. 742 (1982).
244. Levi to Paul Bator, March 6, 1986; Levi Papers, Box 12, Folder 6.
245. M. Rheinstein, *Marriage Stability, Divorce, and the Law* (Chicago: University of Chicago Press, 1972), 428.

246. See C. Warne (ed.), *The Pullman Boycott of 1894: The Problem of Federal Intervention* (Boston: D.C. Heath, 1955).
247. H. Kalven, "Professor Ernst Freund and *Debs v. United States*," 40 *U. Chi. L. Rev.* 235 (1973).
248. E. Levi, "The Collective Morality of a Maturing Society," 30 *Wash. and L. L. Rev.* 399 (1973).
249. Levi to Arnold P. Grunwald, December 20, 1983; Levi Papers, Box 22, Folder 3.
250. E. Levi, "Confidentiality and Democratic Government," 30 *Record of the Association of the Bar of the City of New York* 323 (1975).
251. E. Levi, "Some Aspects of Separation of Powers," 76 *Colum. L. Rev.* 371 (1976).
252. A. Scalia, in *Tributes*, supra, 33, 35-36; 43 *O.A.G.* 29 (September 4, 1975). His position was caustically assailed by Philip Kurland and Raoul Berger at the hearings, and in C. Mollenhoff, *The Man Who Pardoned Nixon* (New York: St. Martin's, 1976), 206-10.
253. Levi to Lloyd Cutler, December 13, 1977; Levi Papers, Box 17, Folio 5. "I think the main point (or one main point) is the latitude of freedom which should be allowed a university." Levi to Cutler, November 18, 1977, Ibid.
254. E. Levi, *Convocation Speech*, June 9, 1978, Levi Papers, Box 26, Folder 3.
255. Levi to John O. Marsh, Jr., April 4,19809; Levi Papers, Box 20, Folder 6.
256. Levi to Edward Brennan, February 20, 1987, March 24, 1987; Levi Papers, Box 34, Folder 7.
257. M. Marty, "The Minister as Professional," in *Sightings* (University of Chicago Divinity School), January 7, 2002.
258. Levi to James Furman, Jr., June 9, 1981; Levi Papers, Box 21, Folio 4.
259. Levi to Geoffrey Hazard, Jr., September 15, 1989; Levi Papers, Box 23. Folio 2.
260. E. Levi, "Charles E. Wyzanski," 100 *Harv. L. Rev.* 716 (1987).
261. E. Levi, "Natural Law, Precedent, and Thurman Arnold," 24 *Va. L. Rev.* 587 (1938).
262. *Hearings on the Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States* before the Committee on the Judiciary, United States Senate, 100th Congress, First Session (1987).
263. Levi to Thomas Eagleton, June 23, 1986; Levi Papers. Box 18, Folder 9. Kurland was more severe: "If we are to have reactionaries on the federal bench, they ought at least to be intelligent ones." Kurland to James Mercurio, July 1, 1986, Kurland Papers, Box 7.
264. Levi to Frank Easterbrook; Levi Papers, Box 19, Folder 1.
265. Kurland to Student Housing, January 16, 1993, Kurland Box 1.
266. See A. Lewis, "A Man for All Seasons," *New York Times*, March 11, 2000.
267. Early in his tenure as university president, a former student wrote: "I was not an educated man when I went to the U of C nor was I educated when I left it. It did only one thing for me: It taught me the priceless lesson of how to learn, how to seek truth without prejudice or fear." Dwight Ragle to Levi, January 3, 1968, Levi Papers, Box 33, Folder 3. Levi responded: "I greatly appreciate your letter. Indeed, it makes me proud of the University to have it." Levi to Ragle, January 10, 1968, ibid.
268. 339 U.S. 629 (1950).
269. *Gebhart v. Belton*, 32 Del. Ch. 343, 87 A.2d 862 (1952).
270. *Briggs v. Elliott*, 132 F.Supp. 776 D.S.C.1955 (Parker, J.), see *School Board of Charlottesville v. Allen*, 240 F.2d 59 (4th Cir. 1956); *Covington v. Edwards*, 264 F.2d 780 (4th Cir. 1959).
271. H. Wechsler, "Toward Neutral Principles of Constitutional Law, 73 *Harv. L. Rev.* 1 (1959).

272. A. Miller and R. Howell, "The Myth of Neutrality in Constitutional Litigation," 27 *U. Chi. L. Rev*. 661 (1960).
273. E. Rostow, *The Sovereign Prerogative* (New Haven: Yale University Press, 1963).
274. C. Black, "The Lawfulness of the Segregation Decisions," 69 *Yale L. J*. 421 (1960).
275. L. Hand, *The Bill of Rights* (Cambridge, Mass.: Harvard University Press, 1958).
276. See G. Gunther, *Learned Hand: The Man and the Judge* (New York: Knopf, 1994), 666-69. See also L. Kalman, *The Strange Career of Legal Liberalism* (New Haven: Yale University Press, 1996), 33-35.
277. 376 U.S. 52 (1964).
278. *Fullilove v. Klutznick*, 448 U.S. 448 (1980).
279. *Regents v. Bakke*, 438 U.S. 265 (1978).
280. *Grutter v. Bollinger*, 539 U.S. 306 (2003).
281. *Shaw v. Reno*, 509 U.S. 630 (1993).
282. *Georgia v. Ashcroft*, 539 U.S. 461 (2003).
283. *Swann v. Charlotte-Mecklenburg School District*, 402 U.S. 1 (1971).
284. *Milliken v. Bradley*, 418 U.S. 717 (1974).
285. 427 U.S. 424 (1976).