

Whizzer White at Yale

Dennis J. Hutchinson

BYRON WHITE CAME to Yale Law School more or less at gunpoint. When World War II broke out in Europe on September 3, 1939, he was living in Munich during the summer vacation from Oxford University, where he had finished two terms of a Rhodes Scholarship “reading” for a law degree. He delayed his matriculation at Oxford by one term to play professional football for Pittsburgh (at the highest salary in National Football League history at the time – \$15,800) and had led the league in rushing on the way to being selected on the all-league team. That athletic success came on the heels of his senior year at the University of Colorado, in which he had been the most publicized amateur athlete in the country, first as captain of the Cotton Bowl football team, then as leader of the basketball team which played in the first National Invitational

Tournament in New York. The publicity pressure cooker of his senior year, followed by the expectations intensified by his unprecedented pro salary (two or three times that of established stars), made Oxford a respite for White. As a professional, he could not play varsity sports, which he was quietly but firmly told as soon as he arrived. For the first time in years, he said at the time, he could be a student first and foremost.

White went to Oxford seeking intellectual challenge and hoping to have his mind stretched – a man in quest of a map of his own mental topography. Instead, he found a curriculum front-loaded with Roman Law and an academic pressure both unanticipated and aggravated by his deferred matriculation. Some contemporaries thought unkindly that White survived Oxford without a scratch, untouched

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by either the larger world of ideas or the rich culture of England and the Continent in the twilight of a golden age. Yet Oxford provided White with the glimpse of a world view that he had lacked, and, more importantly, and more permanently, Oxford supplied White with an endowment of human capital that he drew on throughout his life.

Yale Law School alumni at Oxford had urged White to attend Yale by emphasizing the student-faculty ratio and the physical facilities of the institution and White apparently was persuaded by their sales pitch. The outbreak of war in Europe sent White and most other American Rhodes Scholars home, and Yale Law School became a primary beneficiary of lacerated study plans. As the Dean's Report later noted, "the war situation made it impossible for college graduates who had been awarded Rhodes Scholarships, or had otherwise planned to study abroad, to take advantage of that opportunity, and a number of these men were admitted late in the summer, in addition to the regular quota."¹ There were seven Rhodes Scholars enrolled in 1939-40.

The School was in transition on multiple fronts. For two decades, Yale had played a leadership role in the post-World War I professionalization of American legal education. Successive deans, including Robert Maynard Hutchins and Charles Clark, had hired young scholars who were eager to change the theory of both legal scholarship and legal education. By 1930, many would be identified as "American legal realists," but the label suggests more unity of method and conviction than ever existed among those swept into the category. At most, the "realists" shared premises that they deployed in different directions with different intensity. Any summary is risky, but most would subscribe to three interrelated tenets: 1. law is not like geometry, with agreed premises and protocols for verification, but is a

type of rhetoric; 2. that rhetoric adopts a logical format but decisions are driven more by social input than by reason; and 3. the test of law's utility is not its intellectual cogency or logical clarity, but whether it produces desirable social effects when measured by precise empirical tools. Debates over "realism" filled scholarly journals for more than a decade but had largely run out of steam a few years before White entered Yale Law School, largely because many so-called "realists" went off to work in the New Deal and because much of the energy was expended in the classroom – where it began – and thus became invisible to the outside world. By the fall of 1939, Yale had lost four of the most prominent practitioners of the new orthodoxy to various forms of public service. In 1936, Thurman Arnold became Assistant Attorney General for Antitrust and William O. Douglas joined the Securities and Exchange Commission; Abe Fortas joined Douglas – his mentor – at the SEC in 1938 and went to the Interior Department in 1939; and Wesley Sturges, after a brief stint with the Agricultural Adjustment Administration in 1935, took leave to run the Distilled Spirits Institute for a two-year period beginning in 1940.

President Roosevelt inadvertently shook up the faculty dramatically in the spring of 1939 when he appointed Douglas to the Supreme Court and Charles Clark, who had spearheaded procedural reform, to the United States Court of Appeals for the Second Circuit. Clark's replacement, Ashbel Gulliver, was a genial placeholder who became Acting Dean when internal divisions within the faculty precluded consensus on a permanent replacement. Although the School sustained its generous student-faculty ratio, the intellectual leadership of the institution was up for grabs with Douglas and Clark gone permanently and Arnold not likely to return; as so often

1 Dean's Report, Yale Law School, 1939-40, p. 3.

happens on divided law school faculties, the fight was between the young Turks and the old Turks.

White was not immediately conscious of the intellectual turf wars that were developing, and in fact by outward appearances Yale University must have seemed eerily like Oxford – a well-furnished bastion for the elite, who expected first-class amenities and were not disappointed. One of Yale's attractions to White was its athletic complex. In fact, the Payne-Whitney Gymnasium was prominently featured in the Yale Law School catalog:

Equipment for competitive sports is an outstanding feature of the gymnasium. For practice and recreation there are badminton, tennis, basketball, squash, and handball courts, golf galleries, polo cages, rooms for wrestling, fencing and boxing, swimming pools, rowing tanks, a sundeck, and an outdoor running track. Lockers, showers, drying rooms, and dressing rooms are conveniently located.²

Yale resembled Oxford in another, but unwelcome, way: White's classmates, like many at Oxford, thought he had a lot to prove. *This isn't Wellington or Colorado*, muttered more than one student under his breath. *Byron White finally is going to learn about the big time*. More than half of the student body was from the Ivy League, including one-third of the student body from Yale itself. Half of the students were from the tri-state area of New York, New Jersey and Connecticut. The decor had changed from Oxford, but the academic pressure had – if anything – actually increased. White's response was familiar: he studied fourteen hours a day and found release in the gymnasium, usually on one of Payne-Whitney's basketball courts. The pick-up games soon took on a competitive edge that closely matched the classroom. One of the graduate students who frequented the courts was Clint Frank, the

winner of the 1937 Heisman Trophy and a first-class basketball player who had been forbidden by Yale's football coach, Raymond "Ducky" Pond, to play basketball during the football off-season for fear of injury. White had finished a distant second to Frank in balloting for the Heisman Trophy. Witnesses of the frequent pick-up games which featured White and Frank on opposite teams retain vivid memories to this day. "I can still hear them," Robert Harry, a classmate of White, recalled recently. "Blocking each other's shots, they crashed into each other with incredible brutality." "They took physical competition to a higher, and somewhat frightening level," remembered another. "I never wanted to play when they were on opposite teams: it would be like getting between Paul Bunyan and Babe the Blue Ox." Gerry Brown tried once, and "felt like I'd been crushed between two steel walls." Frank was smaller and more compact than White, but at least as quick and an equally fierce competitor. His performance in the 1937 Harvard-Yale football game sent usually jaded sportswriters into swoons of admiration, as he played both ways in intense pain and managed several stirring plays – including tackling a breakaway runner from behind to save a touchdown – in a losing cause. Frank later became an advertising executive in his native Chicago.

Byron White missed the first week of classes and arrived mid-day Monday of the second week. He quickly issued public denials that he was interested in resuming his professional football career. He told the New Haven Journal-Courier:

My football playing days are over. I'm started on a law career. Don't get me wrong, though. I would like to play football again. [A]nybody who has ever played the game and loves it the way I do wouldn't feel any different, but I am in law school now, and my classes wouldn't permit it. It's just impossible. Yes sir, you can

2 Yale Law School Catalog, 1939-40, p. 39.

quote me as saying my football playing days are over. I've unpacked my clothes and books and if there is anything I dislike, it's packing and unpacking.³

Tim Mara, the owner of the New York Giants, made more than one trip to New Haven trying to change White's mind, as did representatives from other NFL teams. White remained adamant, however; his only concession to his celebrity status in the athletic world was his attendance in late October at the annual fall lunch of the Connecticut Sportswriters' Alliance, at which he consented to a brief interview and "made a very favorable impression."⁴

With the football issue behind him, White turned himself, again, to catching up with his course work. His class schedule consisted of four basic courses, plus two minor courses – a research seminar and an introductory course, emphasizing legal ethics. The basic courses were Commercial Bank Credit with Underhill Moore, Civil Procedure with James William Moore, Torts with Harry Shulman and Contracts with the grand old man of the faculty, Arthur Linton Corbin. The schedule illustrates why it is a mistake to assume that academic institutions have an intellectually homogenous character and how the philosophical division over law and its pedagogy manifested itself to the student. J.W. Moore and Shulman were both in their mid-30s and had taught at Yale for one and eight years, respectively. Moore was a Montanan who had graduated from the University of Chicago, where he taught for two years before coming to Yale. Shulman was a Harvard graduate and protégé of Felix Frankfurter, a conventional, and very liberal, scholar who pooh-poohed the realists as peripheral or frivolous. Underhill

Moore was a Columbia graduate who was 60 and had taught at Yale for ten years. He was one of the leading realist scholars and a pioneer in developing the social science or empirical strand of realism which tried to analyze the practical effect of legal rules and processes.⁵ Corbin, 65, was the senior member of the faculty and combined an original mind with impatience for passing enthusiasms. He was often identified as a realist but did not court the designation, disliked the agenda of many of those who did, and remained a stoutly independent, even stubborn figure. His writings reshaped the law of contracts and pushed the field away from highly abstract theories to market-oriented, pragmatic rules and doctrines. Corbin appealed to White on multiple grounds – he was a westerner whose only private practice was in Colorado (Cripple Creek, 1899-1903), he was an athlete of sorts (first base – still – on the faculty softball team), and he was insistently practical.

Only Corbin taught from a standard casebook, the two-year old second edition of his own work; the others used mimeographed materials almost exclusively, evidence of the intellectual ferment, even turmoil, in which American law churned on the eve of World War II. Within less than three years prior to White's arrival at Yale, three events of monumental significance had occurred. Any one would have constituted an intellectual earthquake on its own, but together they re-cast the map of American law no less than the revolution of 1848 wholly re-drew the face of Europe. The first event was a pair of decisions decided by the Supreme Court of the United States during October Term 1936. In late March of 1937, the Court decided in *West Coast Hotel Co. v. Parrish*⁶ that a state law regulating wages and

3 Oct. 4, 1939.

4 NEW HAVEN JOURNAL-COURIER, Oct. 24, 1939.

5 Laura Kalman, *LEGAL REALISM AT YALE, 1927-1960* (UNC, 1986); John Henry Schlegel, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (UNC, 1995).

6 300 U.S. 379 (1937).

hours did not violate an employer's property rights under the Due Process Clause of the Fourteenth Amendment. The decision reversed more than three decades of judicial allegiance to *laissez-faire* which had invalidated state legislation controlling various aspects of employment including child labor as well as wages, hours and working conditions. Two weeks later, by another 5-4 vote and in another opinion by Chief Justice Charles Evans Hughes, the Court in *NLRB v. Jones & Laughlin Steel Corp.*⁷ upheld Congress's power under the Commerce Clause to regulate labor pursuant to a national statutory regime. The decision swept away generations of close analysis of the precise relationship between the regulated activity and interstate commerce and asserted simply that the court took "judicial notice" that labor was an interstate market.

The two decisions constituted a "switch in time that saved nine,"⁸ Professor Edward S. Corwin's famous quip that ascribed – somewhat unfairly – the Court's change of direction to fear of President Roosevelt's Court-packing Plan. Between Roosevelt's landslide re-election in November of 1936 and the new Congressional session in early March of 1937, Roosevelt had suggested legislation to increase the size of the court by one justice for every justice age 70 then sitting. He claimed the purpose of the plan was to help an elderly court – with a median age of more than 70 – to keep pace with its caseload, but no one was fooled: operation of the law would have increased the Court's size to 15, and the six new appointments could be counted on to provide the President with a comfortable 10-5 or 9-6 majority for the constitutionality of the New Deal, which had suffered a string of invalida-

tions on constitutional grounds by the Court during the previous three years – including the Agricultural Adjustment Act, the National Industrial Recovery Act, the Guffey Coal Act and so on. In every case, the Court – often by a bare majority – had construed the Due Process Clause to prohibit the mechanism chosen by Congress to implement the legislation or had concluded that the Commerce Clause did not reach the activity in question.

The Court-packing Plan divided the country politically, split progressives who could ordinarily be relied upon by the President, and politicized the academy as no other single issue had in the New Deal. The presidents of Harvard, Yale and Princeton publicly opposed the proposal, but Charles Clark testified before the Senate Judiciary Committee in support of the plan. No other dean appeared on Roosevelt's side, although Wiley Rutledge, the Dean of Iowa, energetically supported the plan. The Yale Law School faculty favored the President's plan by an 11 to 8 margin, according to the Yale Daily News, a position which caused sharp criticism of the School by many alumni, including members of the Yale Corporation, the governing body of the University. When the Court capitulated, a majority of the faculty naturally felt vindicated, both on the merits and against the forces of reaction in the alumni body.

The second major event of the period was also a decision by the Supreme Court. In April of 1938, *Erie Railroad Co. v. Tompkins*⁹ held that the Court lacked the constitutional power – and always had lacked the power – to declare general common law in suits brought in federal courts by citizens of different states. The decision was a blockbuster both as to pro-

7 301 U.S. 1 (1937).

8 Corwin to Homer S. Cummings, May 19, 1937, Corwin Papers (Princeton), quoted in William E. Leuchtenburg, Comment: *FDR's Court-Packing Plan: A Second Life, A Second Death*, 1985 DUKE L.J. 673, 673 n. 2. Cf. Michael Arians, *A Thrice-Told Tale: Or Felix the Cat*, 107 HARV. L. REV. 620, 623 n. 11 (1994) (examining other claims to authorship of the phrase).

9 304 U.S. 64 (1938).

cess and as to result. The question had not been briefed or argued; the Court raised the issue *sua sponte* and overruled a precedent, *Swift v. Tyson*,¹⁰ that was a century old. *Swift*, written by Justice Joseph Story, one of the leading nationalists of the early nineteenth-century court, had established the Court's power to create ("identify") controlling common law in "diversity" suits (between citizens of different states), and thus to help shape a uniform national commercial law at a time when it was most needed. Justice Louis Brandeis's opinion for the *Erie* court reasoned, in effect, that the Supreme Court had behaved unconstitutionally since 1842, because neither the Constitution nor the controlling legislation authorized such creativity; the most that federal courts could now do was to apply the law of the appropriate state. *Erie* thus provided a second symbolic stake in the heart of loosely reined judicial creativity, along with the timely switches from a year before. Brandeis, who had also dissented in most of the old court's nullification of the New Deal, had worked hard since his controversial appointment in 1916 to both model and explicate a modest role for the federal judiciary. The Court's landmark decisions during the last two terms marked a dramatic institutional change of course, although there were hints that the retreat from aggressive constitutional adjudication was not wholesale: a footnote in an otherwise obscure case, *United States v. Carolene Products Co.*,¹¹ contained a germ of a new theoretical posture for the Court – passivity toward economic regulation, energetic scrutiny of cases involving freedom of speech, religion and discrimination.

The third major event raised the prospect that federal judges needed to restructure their entire approach to litigation as well as to learn to follow the Supreme Court's new, def-

erential approach to the constitutional powers of coordinate branches of the government. The Federal Rules of Civil Procedure, which became effective in 1938, dramatically changed the process of litigation in federal courts, from the content of the complaint to the creation and management of pre-trial discovery and from the nature of relief available to the treatment of the fact-finding function after trial. Getting into court was now simpler, losing on technicalities was less likely, fact-finding could be compelled by court order, relief could combine damages and equitable remedies, and fact-finding was formally entitled to respect after judgment. To judges schooled, or at least trained, before the turn of the century in the categories of the common law and in the technicalities of code pleading, the new Federal Rules were more revolutionary than any of the Supreme Court's decisions. For many reasons, the Rules did not fully take hold for nearly a decade; because most litigation still took place in state courts under local versions of the old regime, all law schools, including Yale, continued to teach the pleading regime that preceded the Rules. The new learning had arrived, however, and two of its principal architects were associated with the Yale Law faculty, former Dean Clark and J.W. Moore.

Taken together, the three events constituted both a restructuring of many of the basic premises of American public law and an epochal break with the constitutional tradition that had been dominant since the turn of the century. With *West Coast* and *Jones & Laughlin*, the era of *Lochner v. New York*¹² was over. *Lochner* was a minor case in a string of regulatory due process cases spanning the turn of the century, but it became a symbol of the wicked political instincts of a majority of the

¹⁰ 16 Pet. 1 (1842).

¹¹ 304 U.S. 144, 152-53 n. 4 (1938).

¹² 198 U.S. 45 (1905).

Court. *Lochner* held that the Due Process Clause of the Fourteenth Amendment prevented the State of New York from limiting the number of hours that a baker could work in one day. The “liberty” at stake was that of the employer and the baker to fix the terms of their mutual engagement. The case had comic overtones –the plaintiff’s case was argued by a former baker who had gone to law school and suggested at oral argument that bakeries were not terribly unsafe, even at long hours. Academic critics, unamused by the result, seized upon Justice Rufus Peckham’s majority opinion as proof of the Court’s subjectivity and of the incapacity of formal analysis to comprehend political reality. Legal scholars from Walter Wheeler Cook, one of the earliest realists, to Roscoe Pound, Dean of the Harvard Law School and a progressive who later came to deride the “realists,” both condemned *Lochner*. They took their tack, if not their text, from Justice Oliver Wendell Holmes, Jr., whose dissent in *Lochner* attacked both the majority’s economic theory and its political authority (compared to Justice Harlan’s long and pedestrian dissent, which argued the merits of bakeries). *Lochner* ignited the realist “movement” and lasted more than thirty years, outlasting the movement itself.

Ironically, realist scholarship, in all its many forms, did not confront constitutional questions head on but instead examined the elements of the common law system from the ground up. This was due less to strategic design than to the training and expertise of those who identified themselves with realism – men who were recognized, and middle-aged, authorities in a variety of non-constitutional law fields such as jurisprudence (Joseph W. Bingham), conflict of laws (Cook), sales (Karl N. Llewellyn), commercial law (Herman Oliphant), insurance (Edwin W. Patterson), and so

on. The Yale realists followed the same pattern. Underhill Moore was a banking expert and Wesley Sturges was a specialist in credit and in arbitration. Even the younger realists were not constitutional lawyers. William O. Douglas was an expert in corporate law, including reorganization, and Myres McDougal focused on property before he turned to international law.

As a result of the disjunction between animating passions and expertise, “realism” – in all its shapes, weights and focal points – permeated the Yale Law School curriculum, however diffusely, in 1939. In its crudest form, the realist message could be reduced to a student mantra recalled by one of White’s classmates, Louis Oberdorfer:

- 1 Substantive due process is original sin.
- 2 The authors of the *Lochner* case were evil incarnate.
- 3 All judges are biased in favor of property or some other anti-social interest.
- 4 Congressmen and legislators are crooks, fools or both.
- 5 The only proper way to allocate resources is to create an administrative agency – staffed by experts – such as former Professor Douglas or former Professor Fortas.¹³

Sometimes the more sophisticated version of the message did not get through clearly. By constantly shifting from the general to the particular and back, and by frequently changing focus from method to substance and back, a particular instructor’s “realist insight” could be garbled in the transmission. Gerry Brown

13 Remarks at the 25th Anniversary of Byron White’s Appointment to the Supreme Court, April 25, 1987, courtesy of Judge Louis F. Oberdorfer (cited below as “Oberdorfer Remarks”).

found Underhill Moore “brilliant,” with “breathtaking synthetic powers”;¹⁴ to Frank Taplin, who had read law for two years at Oxford, Moore’s presentations frequently were “gobbledegook.”¹⁵

Despite the critical mass of realists of various stripes, not every faculty member located himself in the realist camp, and some, such as Edwin Borchard, who actually taught constitutional law, seemed to ignore their younger and trendier colleagues. (In a speech to the American Political Science Association several months after the 1937 decisions, Borchard celebrated “the deflation of the due process clause to normal proportions” and approved Justice Cardozo’s recent decision in *Palko v. Connecticut*: “Not all the first eight amendments need be regarded as sacred against state limitation.”¹⁶) Others were “old beyond their years,” such as Shulman, who acquired Frankfurter’s patronage as well as his distaste for realist hyperbole. Where realism was most clearly manifest was in the structure of the curriculum. Unlike other leading law schools, which confined the first-year curriculum to civil procedure and the standard common law subjects (contracts, torts, and property), Yale intermixed both business law and public law topics in the first year. Byron White and his classmates took commercial bank credit from Underhill Moore in the first semester alongside Contracts, Torts and Procedure; in the second semester, the curriculum was Agency (Business Units I), Constitutional Law I with Borchard (taught from the 1937 second edition of Walter Dodd’s very conventional casebook), Property with McDougal, and Public Control of Business I, a course on antitrust

policy if not antitrust law, taught primarily by Walton Hale Hamilton, an economist.

Many have assumed or even argued that Byron White’s view of law was determined by his exposure to the Yale realists. The claim ignores the diversity of the realists and the influence of the non-believers. One journalist even identified Myres McDougal as the infectious agent who turned White into a realist. It is true that White and McDougal enjoyed a warm relationship for many years, beginning with second-semester Property, continuing through McDougal’s famous seminar, “Law, Science and Policy” in the Spring of 1946 when White returned to Yale after the war, and rekindled informally over time. Their exchanges in both courses are still vividly remembered by many fellow students, if only for the intensity of the debates and not for their substance.¹⁷ McDougal was a stimulating sparring partner, but not necessarily a dominant influence. Nicholas Katzenbach, who also attended McDougal’s seminar in 1946, later recalled White’s contribution: “a healthy skepticism – a probing questioning of premises and an insistence on conclusions reached by small and visible steps in a rational process as opposed to giant leaps of faith.”¹⁸

Other evidence suggests that more practical, subtle, and less dogmatic instructors than Myres McDougal made a greater impact on White’s thinking. White supplied his own testimony years after the fact when he provided an encomium for Wesley Sturges on the occasion of his retirement from the Deanship of the University of Miami Law School. White wrote:

His classes were intense and consuming expe-

14 Interview with Gerald Brown, June 14, 1993 (Chevy Chase, MD).

15 Interview with Frank Taplin, May 27, 1993 (Princeton, NJ).

16 Edwin Borchard, *The Supreme Court and Private Rights*, 47 *YALE L.J.* 1051, 1077 (1938); *Palko*, 302 U.S. 319 (1937).

17 Oberdorfer Remarks, note 13 above.

18 Nicholas deB. Katzenbach, *Byron White’s Appointment to the Supreme Court*, 58 *U. COLO. L. REV.* 429 (1987).

riences, which seemed to be over before they began, stimulating, fast-moving, exhausting and mortifying. His insistent, driving analysis was a kind of classroom surgery which produced exceedingly thin slices of case, principle, and judge, so thin they were transparent to even the dimmest eye.

Learn “the law” we did, or what the cases said it was. But this was a by-product, a rather minimum goal which would never get you a passing grade. Lawyers are hired for many things, but the essence of their engagement, he thought, is to think and understand. And to this end he never for a moment took the pressure off a single student. He did not so much want the student to marvel at the teacher’s mind and wisdom – which we did – but to get the student to use his own and to develop his own sense of things. ... He inoculated with a hardy skepticism and this he hoped would be lasting protection against a flabby mind operating on flabby principle.¹⁹

Grant Gilmore, a contemporary of White at Yale, echoed the point:

What did Wesley teach us? He taught us, in a way that none of us will ever forget, something – indeed a great deal – about the use and the uses of words. ... He taught us to be forever on our guard against the slippery generality, the received principle, the authoritative proposition. He taught us to trust no one’s judgment except our own – and not to be too sure about that. He taught us to live by our wits. He taught us, in a word, how to be lawyers.²⁰

Yet White did not encounter Sturges until after his first year. The most formative influence on his thinking, according to several fellow students, was Arthur Corbin, the senior member of the faculty and White’s Contracts teacher first semester. “We both loved Corbin, because he put

complex theoretical issues in very practical terms and showed you how to think like a lawyer,” according to Robert Harry, who sat near White in the front row of Corbin’s Contracts classroom.²¹ Corbin, like Sturges, had no dogmatic program to inculcate nor did he allow himself to dazzle his class with feats of theoretical dexterity. What he did, in the words of Louis Oberdorfer, was to teach the law of contracts, “case by case, fact by fact,”²² with emphasis on the precise factual context of each dispute. Corbin emphasized that the lawyer’s task was first to predict how courts would respond to facts, and then to craft arguments whose factual characterizations and use of precedent would appeal to the relevant tribunal. To predict judicial behavior accurately, Corbin taught his students to see patterns of results regardless of how the outcomes were explained by the courts; “think things, not words,”²³ Corbin would quote Holmes while simultaneously ridiculing Holmes’s penchant for arid theory and pretty phrases. “Corbin never let you lose sight of the practical stakes involved in theoretical debates,” Harry added.²⁴ Nor did Corbin argue that rules were meaningless or that law was, or should be, purely subjective: his great strength was in demonstrating how formal analysis could be used and abused, and how doctrines develop and die. His normative message was two-fold – doctrine should address practical reality, not theoretical nicety, and no authority should be taken to be final given the potential permutations of human behavior:

[T]he “rules” and doctrines and generalizations of men are often (if not always) based on quite insufficient life experience and inaccurate observation, but solemnly repeated down the corridors of time. ... It was only after begin-

19 Byron R. White, *Mr. Justice White Recalls: To Students, The Deftness of a Master Surgeon*, 18 MIAMI L. REV. 1, 2 (1963).

20 Grant Gilmore, *For Wesley Sturges: On the Teaching and Study of Law*, 72 YALE L.J. 646, 654 (1963).

21 Interview with Robert Harry, April 19, 1996 (Denver, CO).

22 Interview with Louis F. Oberdorfer, June 23, 1993 (Washington, D.C.).

23 Oliver Wendell Holmes, Jr., *Law in Science and Science in Law*, COLLECTED LEGAL PAPERS, p. 238.

24 Harry interview, see note 21 above.

ning the teaching of “law” that I fully realized that the meaning and value of any “rule” or generalization are wholly dependent on the specific items of life experience and observation on which they are based.²⁵

The passage was published in 1965, but the theme was first aired by Corbin in 1913, recurs, in a somewhat milder form, in the preface to the first edition of his casebook in 1921, and appears again in essence in the prefaces to the second edition in 1937 and the third ten years later.

Corbin spanned both stages of the “legal realist” period, chronologically and intellectually. His work in the 1920s and early 1930s coincided with the corrosive realist phase, which belabored the subjectivity and logical fallacies of traditional legal analysis (which was sometimes pejoratively labeled formalism). During this period, the realists split into two camps, those who continued as textual critics of law, and those – like Underhill Moore and William O. Douglas – who shifted their focus to empirical studies of the impact of legal rules on society. The second period was forced to some extent by the New Deal, which borrowed many law teachers for the alphabet agencies (including ten Yale University faculty members during the first Roosevelt administration) and prompted many to think that much of the battle they had been fighting in the scholarly journals had been won. The triple-witching events of 1937–1938 (the 1937 decisions, *Erie*, and the new Civil Rules) took realism to the next period, which required development of posi-

tive doctrines and theories on top of the harshly negative work that had been the staple and the fuel for the movement at its outset. The agenda of second generation realists, such as Myres McDougal, was to develop mechanisms for “securing certain generally accepted social ends,”²⁶ but the goal was never consummated, in part because of World War II and in part because the quest assumed a greater capacity for consensus than an increasingly pluralistic society could forge. Writing in the 50th anniversary issue of the *Yale Law Journal* in 1941, McDougal also cautioned, in the wake of the 1937 *volte face* by the Supreme Court, that “the judicial institution, indispensable though it may be for the preservation of many of our old and continuing values,” may be “utterly helpless” to address “many of our modern, complex problems, requiring as they do for their solution a continuous and informed exercise of highly specialized skills.”²⁷

Looking back many years later, White declared: “Yale Law School was the most stimulating intellectual experience I had had up to that time.” The faculty “had a very exciting approach to the law and its relationship to the world around you. The law was interpreted in relation to the social and economic aspects of our society.”²⁸ He had told Gerry Brown in Oxford that his ambition upon returning to the states was to live the law,²⁹ and he did. Brown’s diary is dotted with the occasional concert that they attended together in New York or New Haven, but those occasions were rare. Classmates even today recall vividly a

25 Arthur L. Corbin, *Sixty-Eight Years at Law*, 11 *YALE LAW REPORT* 20 (1965), quoted in William L. Twining, *KARL LLEWELLYN AND THE REALIST MOVEMENT*, pp. 31–32. See especially Corbin, *CASES ON THE LAW OF CONTRACTS*, Preface, p. VII (3rd ed., 1947); Corbin, *The Law and the Judges*, 111 *YALE REVIEW* (Jan. 1914), pp. 234–50.

26 Myres S. McDougal, *Fuller v. The American Legal Realists: An Intervention*, 50 *YALE L.J.* 827, 836 (1941).
27 *Id.* at 837.

28 Alfred Wright, *A Modest All-American Who Sits on the Highest Bench*, *SPORTS ILLUSTRATED*, Dec. 10, 1962, p. 92.

29 Brown interview, see note 14.

rather still figure with abruptly sloping shoulders, sitting erect in the library, frequently with green eye-shade, reading for hour after hour seemingly without a break. "The combination of intensity and concentration was eerie," in Frank Taplin's view.³⁰ Potter Stewart, a year ahead of White, later remembered him "as a serious-minded, scholarly, and rather taciturn (except when he found himself engaged in lively colloquy with J.W. Moore in his class on Procedure), and extremely likable young man with steel-rimmed eyeglasses."³¹ When the University of Colorado basketball team was invited to play in the third National Invitational Tournament during White's second semester at Yale, he went to New York City to see his old team, which included several members of the 1938 team who had been sophomores then and were now seniors. He was asked about the academic competition, and he said, *I've never had it so tough. I just hope I make it.* "It wasn't exactly false modesty," recalled Don Thurman, one of the seniors. "Byron just hated ever to seem big-headed. We weren't surprised when we heard later that he was top of his class. He was just constitutionally incapable of tooting his own horn."³² White had been number two in his class academically at the end of the first semester, and at the end of the year he was awarded the Edgar M. Cullen Prize, "established in 1923 by gift from William B. Davenport, B.A. 1867, in memory of Edgar M. Cullen, formerly Chief Judge of the Court of Appeals of New York" and "awarded to that member of the first-year class who receives the highest grades in his annual examination."³³ (The corresponding

prize for second-year students was won by Potter Stewart, B.A. 1937.)

As soon as term ended in mid-June, Byron White went to New York City to spend a few days as a guest of Tim Mara, the owner of the New York Giants. Mara had stayed in touch with White throughout the year, and the visit reinforced speculation that a deal was in the offing for White's services. Nonetheless, White left New York for Colorado, where he planned to attend both sessions of the summer school at the University of Colorado School of Law. Recurrent abdominal pains forced him to modify the plan: he had an appendectomy on June 20. As he entered the hospital for surgery, reporters asked about the rumors linking him with the New York Giants, and his response was tersely familiar: "I haven't heard a thing about it."³⁴ He was confined for ten days, then returned to Boulder where he made national news by becoming a waiter again at his old fraternity house. He told the Associated Press, which was incredulous that someone who made more than \$15,000 a year before could be a waiter again, that "I waited table for my board when I was in school here. ... It's a good way to earn your food and you don't make money to go to school."³⁵

Within two months, White's money worries took another turn. The new owner of the Detroit Lions purchased White's dormant contract from Pittsburgh and offered him \$7500 a year for two seasons. He was torn between his desire to finish law school as the war in Europe expanded and his passion for athletic competition – and its not inconsider-

30 Taplin interview, see note 15.

31 Potter Stewart to John Marshall Harlan, April 14, 1970, Box 609, JMHP (background memoir for 1970 Yale Law School Association Citation of Merit, presented by Justice Harlan).

32 Interview with Don Thurman, July 14, 1993 (Denver, CO).

33 1940-41 YALE LAW SCHOOL BULLETIN, pp. 31, 52 (now awarded to the best paper written by a first-year student).

34 Associated Press, June 20, 1940.

35 FORT COLLINS COLORADOAN, July 24, 1940.

able financial benefits, especially with a brother in medical school and parents dependent on a struggling farm economy in northern Colorado. White decided to play for the Lions, and as a result, the remainder of his legal education became a patchwork of a semester off, a semester back at Yale, summer courses at the University of Colorado School of Law, and so on almost in a repeat cycle.

Because he was on leave from Yale for the fall of 1940 and 1941, he forfeited experience on the *Yale Law Journal*, and his opportunities for sustained research and writing were bluntly truncated. Many law students would later claim that the bulk of what they learned in law school occurred in the first year; in Byron White's case, the claim turned out to be a statement of fact. 