Elements

at 75

Dennis J. Hutchinson
Elements of the Law has been a fixture of the first-year curriculum since 1937 and has been taught by more than a dozen faculty members since its inception. The description of the course in the Law School catalog has changed very little, but the content and nominal objective have changed, sometimes radically, with each new instructor. The changes have been the product not only of professorial idiosyncrasy but also of continuously shifting focus in theories both of teaching and of precedent in American law.

As with so many dramatic changes at the University of Chicago in the 1930s, Elements of the Law began with a conversation prompted by Robert Maynard Hutchins, who left the deanship of Yale Law School to become President of the University in 1929 at the age of 30. Hutchins inherited a distinguished research university whose initial momentum from its founding at the turn of the century was beginning to flag. Nonetheless, many members of the faculty were strong, and the undergraduate curriculum was in the process of being revitalized. Hutchins was eager to impose his own stamp on higher education, both in Chicago and nationally. He embraced the classics, especially as presented by his intellectual aide-de-camp, Mortimer Adler, and correspondingly distrusted the empirical social sciences; the ultimate enemy was narrow professionalism, either of the curriculum or of the faculty. So it was natural that Hutchins, rebuffed by the divisional faculty on some early initiatives, would turn to the Law School to apply his hand.

Edward Levi, who had graduated from the Law School in 1935 and had spent the following academic year as a Sterling Fellow at Yale Law School, discussed the issue of an introductory course with Hutchins during mid-September of 1936. The next day, Levi sent Hutchins a copy of the introduction he and Roscoe T. Steffen of the Yale faculty had prepared for a set of materials entitled “The Elements of the Law.” The presentation undoubtedly appealed to Hutchins. The materials were dotted with snippets from the classics (Aristotle, St. Thomas Aquinas, Sir Henry Maine) as well as from famous cases at common law, and the introduction was frankly contrarian:

To put the matter bluntly the present course is a response to the growing demand for an intellectual attitude in law. Many of us have been too content to accept unquestioningly the aphorism that the common law is the perfection of all reason. Some lawyers have gone through life thinking that results they see about them are the outcome of natural law and inevitable. The present materials will justify themselves if they do no more than acquaint the student with some of the vital ideas in legal scholarship.

A year later, Levi taught Elements of the Law for the first time as a required course for entering students and used the Levi-Steffen materials.

The letter to Hutchins was a calculated risk on multiple levels. Levi acknowledged in the final paragraph that he was leapfrogging the academic chain of command in taking a curriculum proposal to the President of the University: “I feel that the form of this communication may be a breach of etiquette, but this is a pretty important matter and I am willing to risk it.” The “this” was twofold: both the proposal for the course and an addendum implicitly recommending Friedrich Kessler for an appointment to the law faculty to teach comparative law. Elements was the more pressing issue, however, because the intellectual emphasis of the new curriculum would be framed by the introductory course. Levi was eager for something besides the traditional litany of received wisdom about courts, precedent, and reasoning by analogy adding up to the “perfection of reason.” At the same time, but not even bubbling beneath the surface of his correspondence with Hutchins, the Levi-Steffen materials were an indirect repudiation of the most extreme tenets of the American “Legal Realist” movement that had developed before World War I, crested around 1930–31, and was, at this point, on the downward arc of its influence in the legal academy.

In its simplest and most extreme forms, Legal Realism rejected the idea of law as a system of rules logically developed and rigorously applied. Rather, legal decisions were seen as the products of personal and political bias, presented in a syllogistic form. The formal opinions were said to be really no more than post hoc rhetorical exercises. As Karl Llewellyn, the most voluble and colorful of the Realists, put it in his introductory lectures to first-year law students at Columbia University (first published in 1930 as The Bramble Bush):

Edward Levi
This doing of something about disputes, this doing of it reasonably, is the business of law. And the people who have the doing in charge, whether they be judges or sheriffs or clerks or jailers or lawyers, are the officials of the law. What these officials do about disputes is, to my mind, the law itself.1

Another passage echoed Oliver Wendell Holmes in his famous speech, “The Path of the Law”:

And rules, through all of this, are important so far as they help you see or predict what judges will do or so far as they help you get judges to do something. That is their importance. That is all their importance, except as pretty playthings. But you will discover that you can no more afford to overlook them than you can afford to stop with having learned their words.2

The year in which these passages were published, 1930, and the following year signaled the high-water mark of Legal Realism. Llewellyn and Roscoe Pound squared off in a famous exchange in the Harvard Law Review, and reviews of Jerome Frank’s psychologically oriented critique of the legal system, Law and the Modern Mind, simultaneously stoked the theoretical fires. With the arrival of the New Deal in 1933, the energy of the Realist critique began to dissipate. Many self-styled Realists took leaves to work in Washington for Franklin D. Roosevelt, and the Supreme Court’s “horse and buggy” reading of the Constitution created practical and political problems more urgent than a debate in professional journals.

Although Legal Realism was on the wane, the issues that provoked the controversy were far from dead. At stake was no less than the question of whether law was an autonomous discipline or simply a specialized subfield of political rhetoric. The Levi-Steffen materials had something to say about the debate, but it was subtle and indirect. They had collaborated in one of the intellectual hothouses of the Realist movement, Yale Law School, and Llewellyn viewed Steffen as an intellectual fellow traveler if not a card-carrying Realist, but Elements of the Law as edited by Levi and Steffen was hardly a doctrinaire Realist casebook. The selections attempted to demonstrate the influence and development of philosophical strains in Anglo-American law, and the case law examples illustrated a practical logic if not a tidy geometric system. None of the Realist tracts from Frank and Llewellyn or others was excerpted. The furious debate in the law reviews and evangelical prescriptions of The Bramble Bush were invisible.

The focus and tone of the Elements materials should have surprised no one. In writings at the time, both Steffen and Levi had gone out of their way to disavow many of the Realists’ more extreme enthusiasms. Steffen was a commercial lawyer who had taught at Yale since 1925, five years after taking his LLB there. He taught at the University of Chicago Law School in the summer of 1934, where he met Levi, who was a year away from taking his law degree. Steffen ridiculed the “evangelical realist” who claimed “that rules and principles are wholly illusory; they are all subject to change without notice—and apparently for no discernible reason. I do not think I need to argue with this body that that is gross overstatement of the situation.”

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

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

The affinity between Steffen and Levi suggests that Chicago would have been a natural place for Steffen and *Elements* a natural course for him to teach, and, indeed, Levi tried to recruit Steffen. Or rather Robert Maynard Hutchins added Steffen to the growing list of Yale faculty members he tried to recruit during the 1930s in order to enhance the stature of the Law School. However,

At stake was no less than the question of whether law was an autonomous discipline or simply a specialized subfield of political rhetoric.

Hutchins’s only successful attempt to raid Yale before World War II was Friedrich Kessler, whom Levi had recommended to him when he returned from his postgraduate year at Yale. Kessler joined the faculty in 1939, became a full professor in 1943, but returned to Yale in 1947, largely for financial reasons.

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

Enrollment trends in the Law School became grave as the war progressed, and Hutchins could not disguise the fact with either eloquence or flippancy. In the academic year in which he taunted Levi, the Law School conferred 53 degrees; three years later, at the conclusion of the 1942–43 school year, the number had plummeted to nine. Enrollments did not return to prewar levels until the 1946–47 academic year.

In 1945, Levi reclaimed his franchise on the Elements course, even though Kessler continued on the faculty for two more years.

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

More significant changes in staffing and teaching were on the way. Over the private but fierce objections of some anti-Semitic trustees, Hutchins appointed Edward Levi Dean of the Law School in 1950. Levi, hoping to capitalize on the momentum that began to build with Steffen’s appointment, immediately took two steps that promised to enlarge the School’s national profile. He engineered the appointment of Karl Llewellyn and Soia Mentschikoff to the faculty, and he convinced Hutchins to authorize 20 one-year, full-tuition scholarships to students entering the Law School in 1951 in order to improve the quality and geographic diversity of the application pool. Llewellyn was 57 years old and had taught at Columbia Law School since 1925 after six years at Yale, his alma mater. He was now best known not as the author of *The Bramble Bush*, but as the chief reporter for the Uniform Commercial Code. Mentschikoff, 45, was the assistant chief reporter for the Code and his third wife. Both had held visiting positions at Harvard Law School in 1948–49, but antinepotism rules precluded their joint appointment there; Columbia had a similar policy. Levi finessed Chicago’s comparable policy by appointing Mentschikoff as “Professorial Lecturer,” a position under the Statutes of the University that did not implicate antinepotism policies.
The appointments of Llewellyn and Mentschikoff, combined with the earlier appointment of Steffen, were designed to identify the Law School as a center for the study of commercial law on an international basis. But Llewellyn was also nationally prominent in legal theory (his chair at Columbia was the Betts Professorship of Jurisprudence), and he had one of the most sustained records in the profession of writing on legal education. With Levi now occupied by the deanship, Llewellyn was the natural choice to teach Elements. Indeed, perhaps he should be described as the “irresistible” choice, notwithstanding the facts that Levi had just published his classic monograph, *An Introduction to Legal Reasoning*, and that the Levi-Steffen materials had now reached a fourth edition and had been published by the University of Chicago Press. As anyone knows who has ploughed through *The Bramble Bush*, let alone heard or seen him in action, Llewellyn was a self-styled force of nature—exuberant, rambunctious, taunting, inspirational, and sometimes exasperatingly obscure. By the time he arrived in Chicago, the Realist moment had passed, and the firebrands of the 1930s had become domesticated, as deans (Wesley Sturges), wealthy lawyers (Thurman Arnold), and even judges (Jerome Frank). Llewellyn, by contrast, was unreconstructed: he no longer preached Realism—at least in print—but he continued to practice it, and Elements of the Law was the perfect podium for him.

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

> I call your attention to one thing, however, that distinguishes this assignment of cases from any other that you have had—you will have noticed that all of this set of cases come from a single court in a single state. And with this change in order, you will note that they occur in time sequence. The effect of this is that you are, as you work into the series of cases, coming to see them with pretty much the same eyes with which the lawyers and the respective courts saw the cases. The bulk of what has gone before is in your hands as you approach the case, and we can start to work over what it is the court was doing and the lawyers were doing—case by case, and see what the process was that was going on. We are studying primarily in these cases the process. What was the lawyers’ job and how did they perform it? What was the court’s job and how did it perform it? And we see a new job coming up—the eternal problem of the court is with us; no matter how much you have got done a new one is coming up tomorrow. And we see the new ones come up and see the court use their old machinery for the purpose of dealing with it.
Although law schools were beginning to emphasize theory over rules in the classroom, Llewellyn remained as fixed in the 1950s as he had been 30 years before on the imperative of teaching “skills,” even in large first-year classes. In his view, first-year courses were often confused by the combination of substance and what he called “craft-skills” being taught from the same casebooks. His solution was not without its own problems, however. As two experienced second-generation teachers of the materials explain:

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

Worse, Llewellyn tended to overload his intellectual agenda for the course without clear indication to his students of when he was changing focus. At one minute, he was emphasizing “craft-technical” skills, at another “area-policy” questions, and at another questions of “general jurisprudence.”

Mentschikoff and Llewellyn inspired countless students, either by their enthusiasm and warmth or by quiet acts of kindness in an often forbidding world.

Compounding the problem was Llewellyn’s tendency to proclaim, without much elaboration, that the “arts of the legal crafts” were imbued with “deep truths about man’s nature and man’s life with his fellowman.” To top it off, the materials and class presentations were supplemented by required readings—plural—of The Bramble Bush, and, depending on the year, at least one reading of Levi’s Introduction to Legal Reasoning. From time to time, guest lecturers addressed the class, but Llewellyn’s efforts to enlist fellow first-year teachers in coordinating their presentations with his were routinely if politely declined.

Karl Llewellyn taught Elements from 1951 until 1961, a few months before his death. Harry Kalven, who tended to take a more historically oriented approach to the course, and Edward Levi split the teaching duties in 1962, and Harry W. Jones, visiting from Columbia, taught the course in 1963. Then Mentschikoff took over her late husband’s materials and the course from 1964 to 1973, after which she left the Law School to become Dean of the University of Miami Law School. The franchise was intact, at least symbolically, but much of the energy had gone out of the enterprise.

Mentschikoff dutifully worked through the materials, but her passion seemed uneven and her final examinations often included an hour of true/false questions, which struck many students as undermining the emphasis on craft and nuance developed by the materials and the class. Nonetheless, both she and Llewellyn inspired countless students, either by their enthusiasm and warmth or by quiet acts of kindness in an often forbidding world. Nor was their long-term influence negligible. Geoffrey Stone attributes Mentschikoff’s Elements class, which he took in 1968, as the inspiration for his seminar Constitutional Decisionmaking (see page 18), which year in and out has won praise from students for its challenging structure—writing judicial opinions tabula rasa, based only on the text, followed by application of the precedents developed from scratch to new situations.

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

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develop sensible critiques to the explosion of public law
two decades after Brown v Board of Education revolutionized
aspirations for the Constitution, “craft-skills” sounded dated
or pedestrian. Dean Phil Neal taught Elements in 1975,
and future Dean Gerhard Casper filled in the following
year, but the course fell out of the curriculum in 1976.
Then Edward Levi returned from his service as Attorney
General and took up the course again from 1977 to 1983.
During that period, and following his formal retirement in
1984, he worked steadily to revise
the Levi-Steffen materials, which
had last been modified in 1950,
but he never settled on a final
version before his death.

Cass Sunstein taught the course
for the first time in 1985, and
David Strauss did so the following
year. Their versions of the Elements
course cover the problem of
reasoning by analogy in the case
law system but also touch on larger themes that students
encounter throughout the curriculum such as the tension
between rules and discretion, the conflict between coercion
and autonomy, and the recurrent mysteries of “interpretation.”
Sunstein emphasized questions about the meanings of
liberty and equality, the proper role of judicial review
(tending to focus on Lochner v New York and the problems
of constitutional “baselines”), and, later, rationality and
behavioral economics. Strauss begins his course with a line
of common-law cases that Levi employed in his Introduction
and then compares the developments in those cases with
the argument in Benjamin N. Cardozo’s The Nature of the
Judicial Process. Aristotle makes an appearance, as do
John Stuart Mill and Shakespeare; Edmund Burke plays a
leading role along with Cardozo. But there is also behavioral
economics, feminism, Friedrich Hayek, Holmes (of course),
and John Rawls. Recent enlistees to the Elements faculty
have included Richard McAdams and Geoffrey Stone.

BY THE NUMBERS

16 – Number of professors who have taught Elements
2 – Number of visitors who have taught Elements
4 – Number of faculty members who have taught
Elements only once (excluding visitors)
23 – Number of times David Strauss has taught
Elements (most of anyone)
12 – Longest consecutive stretch of years with the
same faculty member(s) teaching Elements
(Strauss and Sunstein, 1996-2007)
2 – Number of years the course was not taught
(1976 and 1984)
46 – Longest number of years between a faculty
member’s first and last teaching of Elements
(1937-1983, Levi)
Assessing the effect of American Legal Realism on the Yale Law School between the World Wars, John Henry Schlegel quipped in 1979, “Curriculum reform at Yale proceeded in the time-honored way with the acquisition of new faculty members who brought new courses with them and the departure of old faculty members who took their old courses away.” The experience at Chicago with respect to Elements is more a twice-told tale, with Edward Levi trying to provide a philosophical and pedagogical antidote to Realism before the war, with Llewellyn and Mentschikoff trying to plant Realist pedagogy in the theory-thickening air of Hyde Park, and finally Levi restoring the introductory course to true north. To some extent, the syllabi support that interpretation, notwithstanding that Levi’s Introduction to Legal Reasoning was routinely a common text, regardless of the instructor, from 1949, when it was published, until Levi’s retirement 35 years later. The disparity between the two approaches could not be greater. Levi’s materials included numerous excerpts from classical philosophy, including, for example, Plato, Hobbes, Locke, Engels, Hans Kelsen, Savigny, Aristotle (Nicomachean Ethics, Politics, Rhetoric), St. Thomas Aquinas, and H. L. A. Hart (and that’s just in the first 200 pages of almost 1,200 pages of photocopied materials that also included case law). Llewellyn included no philosophy, only cases. Even the edition of the materials that were eventually published posthumously under Mentschikoff’s direction adds only notes or the occasional essay by a lawyer (often Llewellyn) or a judge; formal philosophy is entirely absent. Levi had broad and deep ambitions for his course; Llewellyn, aiming to produce “lawyers’ lawyers,” was extremely narrow, notwithstanding frequent grand asides and ringing maxims.

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

Probably 1928, when I had to drive a good beginning class to study the Law of Contracts, against the competition in their other courses of Bob Hutchins, Lee Tulin, and Leon Green, all three telling these beginners that there is no “law,” only separate cases—that each decision is a “chigger” decision or a stomach burp—that there are no organized molecules, only individual atoms—and all three (however green behind the ears) telling it with explosive atomic power. Did Bob Hutchins ever read an opinion?

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

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

It is a testament to Levi’s tact and ingenuity that he could work closely and effectively from the very outset with Robert Maynard Hutchins, whose views of the legal process, at least when he was most deeply involved in it, were light-years from his own. It is true that Hutchins changed over time—many thought opportunistically—but in 1937 Hutchins declared, “No law professor can claim to be one if he separates himself altogether from the ‘realistic’ movement.” Like so many of his pronouncements at the time, his views are presented at such a general level that it is difficult to pin down exactly what he thinks.

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

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

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

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2. Llewellyn, at 7.