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# Christopher St. German and the Law of Custom

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based on custom.<sup>25</sup> He drew the same distinction between local customs and general customs that appeared in the *ius commune*.<sup>26</sup> In sum, custom was a consistent theme.

### III. COMMON LAW RULES UNDER SCRUTINY

His invocation of custom had a purpose beyond simple description. St. German turned to the law of custom as it had been developed in the *ius commune* in order to explain and to justify the English common law.<sup>27</sup> After the general introduction, *Doctor and Student* took up individual rules of the common law and submitted them to analysis. He largely used the same test as the *ius commune*. As the Doctor said, a law based on custom was the surest kind of law, but only if the custom in question did not contradict “the law of God” or “the law of reason.”<sup>28</sup> It was St. German’s design to examine English rules of law and then to demonstrate that, once their purposes were fully understood, they passed that test. It was this method that allowed him to make a “critical” examination of its tenets. It enabled him to examine the justification for some rules that then looked (and some still look) suspect at the outset. Here are three examples.

#### A. The Law of Tithes

St. German examined some of the disputed issues of his own day. Among them, the law of tithes, and the place of custom within it, occupied a particularly contentious place. It was agreed by all that “the tenth part of the increase, yearly arising and renewing from the profits of lands, the stock upon lands, and the personal industry of the inhabitants” was owed to the church.<sup>29</sup> It was also agreed that customary methods of paying tithes were perfectly lawful; for example, tithes of grain or animals might lawfully be commuted to money payments. Parsons preferred to have an equivalent sum of money in place of a pig or a sheaf of wheat. The contention between clergy and laity (and between canon law and common law) came in deciding what scope to

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<sup>25</sup> See, for example, Statute of Marlborough, 52 Hen III (1267), in 1 *Statutes of the Realm* (William S. Hein 1993) (providing that individuals shall receive justice in the King’s Courts, and thus prohibiting individuals from seeking unlawful revenge or distress), mentioned in Plucknett and Barton, eds, *Doctor and Student* at 48–49 (cited in note 4) (stating that “this custom is confirmed by the statute of Marlborough”) (spelling modernized).

<sup>26</sup> See Plucknett and Barton, eds, *Doctor and Student* at 46–47 (cited in note 4) (stating that the general customs of the realm are the ground of different courts in the realm); id at 70–71 (noting that there are different customs in different areas). This had the consequence that the judges determined general customs, whereas local customs had to be found by verdict of a jury.

<sup>27</sup> See id at 74–75 (“quod lex illa nichil vult contra rationem nec contra legem dei”).

<sup>28</sup> Id at 56–57 (spelling modernized).

<sup>29</sup> William Blackstone, 2 *Commentaries on the Laws of England* 24 (Chicago 1979). For the canon law, compare Hostiensis, *Summa aurea*, Bk IV, tit *De decimis*, no 1.

give these customs. A custom to pay no tithes whatsoever was invalid, but what about a custom not to pay full tithes on particular items?

St. German discussed this question in the context of tithes on so-called “great wood,” that is trees of over twenty-years growth. When one of them was cut down, did the person whose wood it was owe a tenth of its value? English custom, backed in this case by a statute enacted in the fourteenth century, said no.<sup>30</sup> The canon law said yes.<sup>31</sup> At no point in his discussion did St. German address the question simply by pitting the relative powers of church and state against each other.<sup>32</sup> There was no test of brute strength. Instead he asked whether the custom was valid under the *ius commune* itself. He did not slavishly follow the canonists, most of whom would have held the custom invalid, but he made use of their methods.

First, he looked at biblical texts, which showed the diversity of ways in which tithes had been paid in past ages. Thus, the law could not require an automatic answer. Second, he noted that the purpose of the tithe—to provide a sufficient maintenance to the clergy—could be met perfectly well without this particular form. Tithing should be considered in light of its purpose. Third, he attempted to show the absurdity to which the canonists’ position might lead. They claimed a tenth of the yearly increase was owed under the canon law. But if one took that argument seriously, every tree would have to be cut down every year. The law should not reach such results. His conclusion was that this English custom must be valid. No tithe was owed on “great wood.”

## B. The Right to Notice of Process

St. German did not shrink from taking on hard cases. The Doctor asked whether it was true that the King took the goods of men who had been outlawed after failing to appear in a lawsuit, even though they had been unaware of the process against them.<sup>33</sup> The Student answered that it was. It was “an old custom” in the law. But was it a valid custom? The defendant’s right to a legitimate citation was an important right under the *ius commune*.<sup>34</sup> Even Adam had been given that right after having eaten the forbidden fruit in the Garden of Eden (Genesis 3:9). The right to be summoned before being judged was re-

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<sup>30</sup> See 45 Edw III, ch 3 (1370–71), in 1 *Statutes of the Realm* (cited in note 25).

<sup>31</sup> See William Lyndwood, *Provinciale (seu Constitutiones Angliae)* 190–91 (1679), for the contemporary understanding from the canonical point of view.

<sup>32</sup> See Plucknett and Barton, eds, *Doctor and Student* at 300–14 (cited in note 4).

<sup>33</sup> *Id.* at 181–84.

<sup>34</sup> See, for example, Charles J. Reid, Jr., *The Canonistic Contribution to the Western Rights Tradition: An Historical Inquiry*, 33 *BC L Rev* 37, 64–65 (1991) (arguing that thirteenth-century canon law contained the concept of a right, liberty, or privilege).

garded as a part of natural justice, and it seemed, therefore, that this English custom would not pass muster.<sup>35</sup>

St. German nevertheless found the custom valid. It has been used “time out of mind,” and the King, as the font of justice, was obliged to make writs available to his subjects whether their complaints were true or false. The purpose of this custom was to guarantee that there would be due administration of justice according to that oath, for if the King could not offer strong sanctions, he would not be true to his oath and his responsibility to do justice. Moreover, St. German added, all property had been granted to men by positive law, not by natural law. By the natural law all property was held in common. Hence, positive law could set reasonable conditions on the grant of property. Indeed there are many such limitations—for example, laws barring claims to property after the passage of a certain period of time. This was a perfectly permissible encroachment on property rights, one recognized by all the jurists. In addition, the English law sets up numerous stages in any lawsuit before property could be forfeit to the Crown for a defendant’s non-appearance; there must first be attachment, *capias*, *alias*, *pluries*, and a summons *in exigent*. Fully considered, the Student concluded, the custom could not be said to be contrary to either reason or the law of God. Everything the “policy of man could reasonably devise to make the party have knowledge of the suit” was done in the English law.<sup>36</sup> Indeed, if the worst happened, the person whose property was taken might have a remedy against the person who caused him to be summoned without good cause into the royal courts.

### C. The Practice of “Giving Color” to a Claim

Some of the customs St. German examined and discussed were quite technical. For instance, in assizes of novel disseisin—actions brought to recover possession of land—it became customary during the fourteenth century for defendants to “give color” to the plaintiff’s claim.<sup>37</sup> It was a way of keeping a legal issue out of the hands of a jury and submitting it to the judges instead. But it required making use of a fiction. When a tenant (defendant) was sued by a stranger to recover land that was in his possession, instead of pleading what amounted to

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<sup>35</sup> See Kenneth Pennington, *The Prince and the Law, 1200–1600: Sovereignty and Rights in the Western Legal Tradition* 142–43, 161–64 (California 1993).

<sup>36</sup> Plucknett and Barton, eds, *Doctor and Student* at 183 (cited in note 4) (spelling modernized).

<sup>37</sup> See generally Donald W. Sutherland, *Legal Reasoning in the Fourteenth Century: The Invention of “Color” in Pleading*, in Morris S. Arnold, et al, eds, *On the Laws and Customs of England: Essays in Honor of Samuel E. Thorne* 182–94 (North Carolina 1981) (describing the requirement of color in pleading).

the general issue (“no wrong and no disseisin”), he would plead that the plaintiff had himself received a deed of the same land from the tenant’s grantor prior to the time the defendant entered by deed and livery of seisin. In other words, the plea raised a legal issue: whether an earlier deed *without* livery prevailed over a later deed *with* livery. For that reason, the judges would be competent to determine the outcome.<sup>38</sup> However, the prior deed was pure invention. It only gave “color” to the plaintiff’s title. As St. German himself noted, “[T]he truth be that there were no such deed of feoffment made to the plaintiff as the tenant pleadeth.”<sup>39</sup>

The question was whether this form of pleading, treated as a custom of English law by St. German, was a legitimate one. It was a lie. On hearing it so described, the Doctor distinguished between *mendacium perniciosum* and *mendacium officiosum*, but his initial view was that whichever of the two it was, the custom was a sin and to be avoided.<sup>40</sup> However, the student answered, taking a page from the Doctor’s own book, by recalling the lie told by the Hebrew midwives to Pharaoh in order to save the male children of the Israelites (Exodus 1:18–20). God had approved that lie. Its purpose was meritorious and its outcome was a praiseworthy increase of the nation of Israel. Moreover, this custom avoided the possibility of a greater peril, that of perjury among the jurors. It was common ground that jurors were not experts in the law. If forced to give a general verdict, they might decide wrongly. If they did, they might be erring out of ignorance, but this would not altogether excuse them. They would have been false to the oath they had taken nonetheless. Thus the legal fiction by which decision was given to the judges, although false, was consistent with both divine law and reason. And that was the real test.

#### IV. LIMITATIONS OF THE METHOD

These three examples show how St. German approached the common law. It was very like the method developed in the *ius commune*. However, the parallel could not have been exact—and it was not. This is true because within the continental traditions, particular customs were tested against the laws found in the *Corpus iuris civilis* and the *Corpus iuris canonici*, the basic sources of the *ius commune*. The question would be whether custom could lawfully prevail against the texts and what was stated in them. In England, by contrast, there was no *Corpus* of the law to be contrasted with custom. The common

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<sup>38</sup> See F.W. Maitland, *The Beatitude of Seisin II*, 4 L Q Rev 286, 295 (1888) (noting that courts limited juries to matters of “only the purest fact”).

<sup>39</sup> Plucknett and Barton, eds, *Doctor and Student* at 294–95 (cited in note 4).

<sup>40</sup> *Id.* at 295.

law was custom. It was all that existed. Only when particular customs could be set against national custom could the method used by the civilian commentators be adopted with more exact fidelity. Of course, this happened. Borough customs, the customs of merchants, and ecclesiastical customs would be “tested” against the rules of the common law.<sup>41</sup> The tests turned out to be the same as those used by St. German.

In one sense, then, what St. German did was only half of what the continental jurists did; he used the concepts of rationality, natural law, and divine law to test the validity of English customary law, but he did not have the alternative—the texts of the Roman and canon laws—to fall back on if the English custom proved to be illegitimate. Luckily (it seems) St. German found few flaws in the English rules he examined under the lens of the academic law of custom. This was in fact a quite common situation wherever English common lawyers sought to make use of the resources of the *ius commune*. The fit was not perfect. There would have to be some pushing and pulling—some serious efforts at adjustment—if intelligent use were to be made of what one learned from the Continental sources. From *Bracton* to *Coggs v Bernard*,<sup>42</sup> loose ends would always appear.

However, those loose ends should not cause historians to close their eyes to the attempts of lawyers like St. German to make productive use of “alien” legal habits. A modern observer once suggested that in *Doctor and Student*, “legal rules are put in the witness-box and cross-examined to credit.”<sup>43</sup> True enough in a sense. What this observer said vindicates the view of St. German’s preeminence as an early critic of the common law. At the same time, the modern observer’s statement misses the vantage point from which St. German “cross-examined” the legal rules. That was a vantage point adapted from the law of custom derived ultimately from the *ius commune*.

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<sup>41</sup> See, for example, Carleton K. Allen, *Law in the Making* 123–44 (Oxford 5th ed 1951) (discussing the application of custom).

<sup>42</sup> 2 Ld Raym 909, 914–15, 92 Eng Rep 107, 110–11 (KB 1703).

<sup>43</sup> Percy H. Winfield, *The Chief Sources of English Legal History* 322 (Harvard 1925) (describing St. German’s work).



## Elements of the Law

Dennis J. Hutchinson†

When Geof Stone, then Dean of the Law School, asked me ten years ago to teach a section of Elements of the Law, I was flattered and delighted—at least until a few days later when he asked me what I would try to do with the course. When I told him, his face seemed to fall slightly but he recovered quickly and said, “That’s not what Cass does.” It testifies to Geof’s polished charm that I wasn’t sure whether I was being gently rebuked for insubordination or lightly complimented for ingenuity.

In any event, I was stimulated to investigate what might be called the original intent of the course, which has been a fixture of the first-year curriculum since 1937 and has been taught by a (baker’s) dozen faculty members since its inception.<sup>1</sup> I discovered that the description of the course in the Law School catalog has changed very little but that the content and nominal objective have changed, sometimes radically, with each new instructor. The changes were 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.<sup>2</sup> Nonetheless, many members of the faculty were

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<sup>1</sup> Edward Levi taught the course from 1937 to 1940, in 1942, from 1945 to 1950, in 1962, and from 1977 to 1983; Friedrich Kessler from 1941 to 1944; Karl N. Llewellyn from 1951 to 1961; Harry Kalven in 1962, 1965, and 1969; Harry N. Jones in 1963; Soia Mentschikoff in 1964 and 1965, and from 1967 to 1973; Phil C. Neal in 1974; Gerhard Casper in 1975; Cass Sunstein in 1985, from 1988 to 1990, and since 1993; David Strauss from 1986 to 1988, from 1991 to 1994, and since 1996; Scott Brewer (visiting professor from Harvard) in 1995; Joseph Isenbergh in 1989; Dennis Hutchinson from 1989 to 1990. The course has been sectioned since 1988, and was also taught in sections in 1942, 1962, and 1969.

<sup>2</sup> See Edward Shils, *Portraits: A Gallery of Intellectuals* 125–44 (Chicago 1997) (Joseph



strong, and the undergraduate curriculum was in the process of being revitalized.<sup>3</sup> 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. The Law School “dealt with the one field of academic life with which he had substantial experience and where his intellectual discrimination did not encounter any resistance from his espousal of ‘principles.’”<sup>4</sup> The new four-year program, which Bernie Meltzer explains elsewhere in this issue, was certainly one outgrowth of the ferment Hutchins brewed at this time.<sup>5</sup>

Another, at least indirectly, was Elements. 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 law-

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Epstein, ed); William H. McNeill, *Hutchins' University: A Memoir of the University of Chicago, 1929–1950* 41–47 (Chicago 1991); Harry S. Ashmore, *Unseasonable Truths: The Life of Robert Maynard Hutchins* 57–78 (Little, Brown 1989).

<sup>3</sup> See John W. Boyer, *The Organization of the College and the Divisions in the 1920s and 1930s* (Chicago 2001); John W. Boyer, *Three Views of Continuity & Change at the University of Chicago* 40–58 (Chicago 1999).

<sup>4</sup> Shils, *Portraits* at 143 (cited in note 2). For one such espousal, connected directly to legal education at the time the new Law School curriculum was developing, see Robert Maynard Hutchins, *Legal Education*, 4 U Chi L Rev 357, 359 (1937) (“There is no reason why the case system should necessarily have forced the consideration of principles out of the course of study.”). For a lucid discussion of Hutchins’s sometimes opaque call for “principles,” see Edward A. Purcell, Jr., *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value* 139–58 (Kentucky 1973).

<sup>5</sup> See Bernard D. Meltzer, *The University of Chicago Law School: Ruminations and Reminiscences*, 70 U Chi L Rev 233, 247 (2003). See also Wilber G. Katz, *A Four-Year Program for Legal Education*, 4 U Chi L Rev 527 (1937) (explaining some objectives of the four-year academic program).

yers 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.<sup>6</sup>

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."<sup>7</sup> 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.<sup>8</sup> *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 now on the downward arc of its influence in the legal academy.<sup>9</sup>

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<sup>6</sup> Letter from Edward H. Levi to Robert Maynard Hutchins (Sept 19, 1936), Box 113, Presidential Papers, Joseph R. Regenstein Library (cited below as JRL).

<sup>7</sup> *Id.*

<sup>8</sup> After reporting that he and Kessler were working on several articles together, Levi added: "I mention this merely to say that I think Dr. Kessler is a good man for comparative law work of this type and he ought to be kept in mind." *Id.* On Kessler, see Grant Gilmore's thoughtful tribute, *Friedrich Kessler*, 84 *Yale L J* 672 (1975), which traces Kessler's adaptation of civilian insights to the common law, especially in the law of contract.

<sup>9</sup> Wilfrid E. Rumble, Jr., *American Legal Realism* (Cornell 1968) is the standard treatment. Later work includes William Twining, *Karl Llewellyn and the Realist Movement* chs 13–14 (Weidenfeld & Nicolson 1973; rev ed 1985); Laura Kalman, *Legal Realism at Yale, 1927–1960* (North Carolina 1986); William Twining, *Centennial Tribute: The Idea of Juristic Method: A Tribute to Karl Llewellyn*, 48 *U Miami L Rev* 119 (1993); John Henry Schlegel, *American Legal Realism and Empirical Social Science* 211–57 (North Carolina 1995); N.E.H. Hull, *Roscoe Pound and Karl Llewellyn: Searching for an American Jurisprudence* 223–77 (Chicago 1997); Neil Duxbury, *Patterns of American Jurisprudence* ch 5 (Clarendon 1995). See also Grant Gilmore, *Legal Realism: Its Cause and Cure*, 70 *Yale L J* 1037, 1047 (1961) ("Legal realism was essentially a demonstration that the system of law which had evolved in this country had become intolerably overburdened and unworkably complex."), and, more recently, Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 *Nw U L Rev*

In its simplest and most extreme forms, Legal Realism rejected the idea of law as a system of rules logically developed and 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.<sup>10</sup> 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*):

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.*<sup>11</sup>

Another passage echoed Oliver Wendell Holmes in his famous speech, “The Path of the Law”:<sup>12</sup>

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 dis-

251, 265 (1997); Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 *Tex L Rev* 267, 315 (1997); Brian Leiter, *Legal Realism and Legal Positivism Reconsidered*, 111 *Ethics* 278, 301 (2001). William W. Fisher III, Morton J. Horwitz, and Thomas A. Reed, eds, *American Legal Realism* (Oxford 1993) is a handy collection of Realist writings.

<sup>10</sup> See, for example, Wesley A. Sturges and Samuel O. Clark, *Legal Theory and Real Property Mortgages*, 37 *Yale L J* 691, 714 (1928):

Without presuming to declare why judges behave like judges, we do submit that the writing of opinions couched in one or more terms which are more, rather than less, abstractions, in terms of generalizations, general legal principles, legal doctrine or legal theory, is a problem involving the functions of language. Without insisting that there is an exact delineation in the two concepts, we believe, however, that the words reporting the theories, doctrines and generalizations which are under consideration are not used as symbols designed to be *descriptive*, but rather to be *emotive*. They are ‘one word more’ in soliciting approval, in urging plausibility, for a particular judgment.

<sup>11</sup> K.N. Llewellyn, *The Bramble Bush: On Our Law and Its Study* 12 (student ed Little, Brown 1930; trade ed Oceana 1951). For a knowing review of the trade edition, see Grant Gilmore, *Reviews: The Bramble Bush*, 60 *Yale L J* 1251 (1951). Many of Llewellyn’s occasional papers, including nine he collected under the heading of “Realism,” are republished in Karl N. Llewellyn, *Jurisprudence: Realism in Theory and Practice* (Chicago 1962). What he viewed to be his ultimate statement on the legal process was completed shortly before his death. Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little, Brown 1960). See also Karl Llewellyn, *The Case Law System in America* (Chicago 1989) (Paul Gewirtz, ed) (Michael Ansaldi, trans).

<sup>12</sup> Oliver Wendell Holmes, *Collected Legal Papers* 167 (Harcourt, Brace 1920) (“The object of our study [as lawyers], then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.”). Bernie Meltzer is certainly correct that the remarks became the “most quoted legal address in our history.” Meltzer, 70 *U Chi L Rev* at 235 (cited in note 5).

cover that you can no more afford to overlook them than you can afford to stop with having learned their words.<sup>13</sup>

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*,<sup>14</sup> and reviews of Jerome Frank's psychologically-oriented critique of the legal system, *Law and the Modern Mind*,<sup>15</sup> simultaneously stoked the theoretical fires.<sup>16</sup> 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 when the new curriculum was installed at the Law School, 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 sub-field 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,<sup>17</sup> 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 en-

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<sup>13</sup> Llewellyn, *Bramble Bush* at 14–15 (cited in note 11).

<sup>14</sup> Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 *Harv L Rev* 697 (1931); Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 *Harv L Rev* 1222 (1931).

<sup>15</sup> Jerome Frank, *Law and the Modern Mind* (Brentano's 1930).

<sup>16</sup> See, for example, Felix S. Cohen, *Current Legal Literature: Law and the Modern Mind*, 17 *ABA J* 111, 111 (1930) (calling *Law and the Modern Mind* a "provocative stimulus to thinking on fundamental legal problems," but ultimately challenging its arguments); K.N. Llewellyn, Mortimer J. Adler, and Walter Wheeler Cook, *Law and the Modern Mind: A Symposium*, 31 *Colum L Rev* 82 (1931) (discussing the strengths and weaknesses of *Law and the Modern Mind* from each author's point of view).

<sup>17</sup> See Hull, *Roscoe Pound and Karl Llewellyn* at 346 (cited in note 9) (including Steffen on a list entitled "Llewellyn's Additional Realists").

thusiasms. Steffen was a commercial lawyer who had taught at Yale since 1925, five years after taking his LL.B. 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 wrote extensively, particularly in the areas of negotiable instruments and banking, but also in agency and labor law. He also advocated changes in legal curricula and teaching materials.<sup>18</sup> Speaking to the annual meeting of the Association of American Law Schools in 1932, Steffen ridiculed the “evangelical realist” who, he said, had

but one point, that law changes. Jerome Frank states in his “Law and the Modern Mind” 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; for surely, if a man signs an ordinary note and mortgage, notwithstanding the new realists, the probability is, if he fails to pay at maturity, that his land can be sold under foreclosure. That seems to be pretty well settled. There are many other matters fortunately not subject to momentary change.<sup>19</sup>

Steffen was not entirely hostile to what he preferred to call the “functional approach”<sup>20</sup> to legal scholarship and legal education, an approach that viewed “law as a dynamic changing growth, not a static set of general principles. This has meant that law must be studied in connection with the social institutions which it serves in order to be understood.”<sup>21</sup> He thought that the case method was useful only for a year and that subsequent years should focus on particular fields and the institutions that shape them: “Our present organization of the law school curriculum, for the most part, ignores the development of particular institutions.” He went on:

If the argument of the new realist has any validity, it seems to me that much of the argument which is going to shape the new case, comes out of knowledge and careful study of the larger social institution which is involved. If we ignore that in designing our courses we are in danger of holding fast to the husks, the words in which our rules and principles are written, and letting go of the substance. If we can get another classification which will al-

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<sup>18</sup> See Roscoe T. Steffen, *The Law School and the Student: The Content of the Curriculum*, 7 *Am L Sch Rev* 403, 406–07 (1932).

<sup>19</sup> *Id.* at 405.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*