



THE SPEECHES OF
Attorney General Edward H. Levi

EDITED BY JACK FULLER

With a Foreword by Larry D. Kramer

RESTORING JUSTICE

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EDWARD H. LEVI (1911–2000) was Attorney General of the United States from 1975 to 1977, president of the University of Chicago, and dean of the University of Chicago Law School. JACK FULLER served as editor and publisher of the *Chicago Tribune* and was awarded the Pulitzer Prize for his journalism. He was special assistant to Edward H. Levi in the Department of Justice and is the author of *What Is Happening to News*.

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We have lived in a time of change and corrosive skepticism and cynicism concerning the administration of justice. Nothing can more weaken the quality of life or more imperil the realization of those goals we all hold dear than our failures to make clear by word and deed that our law is not an instrument of partisan purpose, and it is not an instrument to be used in ways which are careless of the higher values which are within us all.

Mr. President, when you spoke to me two months ago you were eloquent and persuasive as to your high aspiration for this Department. And, speaking literally, you moved me.

I am sure that the able men and women of this Department will join with me in responding to your aspirations.

From Edward Levi's remarks at his swearing-in ceremony as Attorney General, February 7, 1975

Foreword

Larry D. Kramer

Reading the speeches in this volume really made me miss Edward Levi. I don't mean miss him personally, though I did know him. Actually, I owe my career to Levi. You see, I went to law school grudgingly, mainly to allay my parents' anxiety about my career plans, or lack thereof. Secretly, I planned to stay for a short time only, maybe five or six weeks, after which I could tell them I had tried law and hated it and was dropping out to return to New York City, where I fantasized I would become a writer. (Looking back, I'm not sure what I was thinking, as I had no experience, nor any actual talent.) It was 1981, and Levi was still teaching *Elements of the Law*, a required first-year course he had created with Karl Llewellyn and had worked on steadily—for a time with Llewellyn, for a time with Soia Mentschikoff, but mostly on his own—for more than three decades.

A version of *Elements* is still part of the first-year curriculum at the University of Chicago. But with due respect to some very fine teachers, what's taught there today is a mere shadow of Levi's class—a ten-week forced march that began with the debate between Socrates and Thrasymachus about whether might makes right and ended 1,800 pages later with *Roe v. Wade*, while seeming to cover just about everything in between. It was brutal, but also surprising, exhilarating, and wildly challenging: a smorgasbord of materials from law, history, philosophy, classics, political science, and more. We read Augustine and Aquinas and Coke and Holt

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and Blackstone and Austin and Rousseau and Hobbes and Hohfeld and Holmes and a boatload of judicial opinions; we studied Nuremberg and Rhodesia, the emergence of the jury, the relationship of law to morality, and the nature of the common law compared to civil law and to statutory and constitutional law. It was an eye-opening lesson in the unbounded richness of legal studies—a demonstration of the way in which, as Levi explained to the entering class of 1976, “law is pervasive throughout most of human life” and “part of both the humanities and the social sciences.”¹ I was hooked. My skepticism about a career in law melted away, and I decided not only to remain at Chicago but to become Levi’s research assistant, so I could work with him on the Elements materials. And everything in my professional life has followed from there.

I never became close to Levi, though I worked for him all three years I was a student at Chicago and think he even liked my work. I was still too intimidated to ask for a letter of recommendation when I applied for clerkships in my third year. And while Levi was genuinely witty and could be immensely charming—qualities evident in the speeches that follow—he was somewhat gruff, perhaps drily disdainful is more accurate, toward his students (and research assistants). My classmates and I were absolutely convinced that it must have been Levi who supplied the real inspiration behind *The Paper Chase*’s Professor Kingsfield, its Harvard setting notwithstanding. Even after I returned to Chicago to join the faculty in 1986, I could never bring myself to call him “Edward.”

So when I say that the contents of this book made me realize how much I miss Edward Levi, I mean as an educator and public intellectual, as someone whose words and ideas could enlighten and inspire. I miss him for what these speeches reveal about how people in positions of authority used to talk to us. The records of Levi’s tenure as Attorney General remind us that we have had leaders who spoke to us like adults and treated us as capable of grasping complex ideas. Obviously, Levi was more erudite than most government officials, even in his time. But to read his speeches is to be reminded that the level of political discourse in this country was still quite high as recently as a generation ago. It is to feel acutely how far we have lowered our expectations by embracing men and women who compete for high office while wearing their ignorance on their sleeves—indeed, while seeming almost proud of it—and by constraining even intelligent and educated leaders to reduce what they say to kindergarten-level sound bites.

What makes these speeches so marvelous, so unlike political speeches

today, is the extent to which they are filled with serious ideas presented in a serious manner. The utter absence of ideology, of simpleminded dogma and cant and false piety, is totally refreshing. Levi stakes out positions that frankly acknowledge the complexity of a problem, and he defends his positions with arguments that ask us to grapple with nuance and that assume we can do so. He does so, moreover, while effortlessly and unself-consciously drawing on history and literature and law and culture. As Attorney General, Levi was a political figure. Yet these do not feel like political speeches. They feel, rather, like the product of hard thinking by a responsible public official who, when faced with difficult choices, takes it upon himself to explain his decisions to a public he assumes is intelligent enough to understand and thoughtful enough to deserve nothing less. That's why I miss Edward Levi.

Levi's candor is particularly notable given the state of public affairs when he took office. After reaching a high point of prosperity and power in the mid-1960s, the country had endured one calamity after another: the souring of the civil rights movement and the devastating riots that followed, the catastrophically failed war in Vietnam, recession and inflation and our first energy crisis, rapid urban decay combined with steeply rising crime rates, and the abrupt rotting of a counterculture movement that changed seemingly overnight from the "Summer of Love" and Woodstock into the Manson family and Altamont.

But above all, there was Watergate. The passage of years may have softened the edges of the Watergate scandal, causing us to forget how truly demoralizing it was when it happened. In part, that's because we've seen even worse government misconduct since Nixon resigned, while his strengths have come to look better in retrospect. But at the time, Watergate was a shattering experience. It wasn't just the breadth and depth of Nixon's wrongdoing, though it did sometimes seem as if criminal misbehavior pervaded every part of his administration. It was also the petty and pedestrian nature of it all: the sordid, sleazy quality of White House "plumbers" and CREEP and all those "expletive deleted."

These controversies were continually in the background—and sometimes the foreground—of Levi's public comments, and he did not hesitate to draw on them for lessons. A few examples should suffice to convey the flavor. We may have been mistaken to let "our ideals of justice in the world [overcome] our humility" in Vietnam, Levi cautioned, but we must take care lest "skepticism and doubt" lead us to "reject those ideals with

a fervor equal to that with which we held them before,” or to lose “awareness of history and the understanding of current problems . . . in the energetic process of getting even.”² And if Watergate taught us anything, it is that we must not “assume that everything the government does is equivalent to law or the legal system.”³

Concern for restoring public confidence in the Department of Justice and the FBI is a common theme—both agencies having lost credibility from involvement in assorted Watergate-related cover-ups and illegal investigations. “The institutions of law and the profession still have the legacy of a skepticism which has grown over many years,” Levi acknowledged at a meeting of the American Bar Association. But while skepticism can be useful, “[m]istrust can be corrosive,” and “[j]ustified mistrust places the heaviest burden upon us.”⁴ Things needed to change: “The Department has to be a special advocate, not only in defending governmental decisions at law, but in the attempt to infuse into them the qualities and values which are of the utmost importance to our constitutional system. There must be a special concern for fair, orderly, efficient procedures, for the balance of constitutional rights and for questions of federalism and the proper regard for the separation of powers. It is sometimes said that, so far as the Department is concerned, courts alone have this duty. I do not agree.”⁵

Many of Levi’s best-known acts as Attorney General—the guidelines for electronic surveillance and for domestic security investigations being only the most obvious examples—were motivated as much by the desire to do something visible to restore the DOJ’s reputation as they were by the need to fix very real problems with the department’s procedures and controls.

Levi also tackled the related task of restoring departmental morale, which likewise had been devastated by the scandals. “I know we all realize that in the past there have been grave abuses,” Levi told the Senate Select Committee on Intelligence. “I am uncomfortable with a kind of writing of history, however, which sees it only in terms of the abuses and not in terms of past and present strength. . . . In spite of the abuses, there is a proper place for pride. I take it our mutual work should be to nurture that pride and the conditions which justify it.”⁶ In the final analysis, after all, “[n]o procedures are fail-safe against abuse. The best protection remains the quality and professionalism of the members of the Bureau and of the Department”—something Levi took pains to recognize and praise on every possible occasion.⁷

Nor did Levi view the task of rebuilding morale as limited to the government's lawyers alone. He sought to do what he could to restore the faith of the American people as well and to do so in a comprehensive sense: to rebuild confidence not just in the particular agencies of government that had failed so badly but in our constitutional system generally. As he explained to the one hundredth graduating class of the FBI Academy, "We must never forget one essential truth": "Ultimately, enforcement must spring from the faith of citizens. In a free society there are essential values which would be destroyed were law enforcement to depend entirely on force of arms. Another kind of force must operate. That force is the willing acceptance by an overwhelming proportion of our people of the law's demands. People must believe, if not in the wisdom of a particular law, at least in the fairness and honesty of the enforcement process."⁸

The mere fact that Levi himself was the nation's top law enforcement officer probably went some distance toward restoring this belief, and for that reason among many, Levi was a brilliant choice to be the first post-Watergate Attorney General: a genuine intellectual, a gifted scholar and teacher, a former law school dean and university president, and an accomplished administrator of unimpeachable integrity who had experience in the Department of Justice but who had never been involved in politics. Few could match Levi's authority when it came to encouraging the American people to trust their system of government.

And encourage he did. "We have come through a crisis of legitimacy," he offered reassuringly:

It is no doubt difficult for us to characterize objectively the nation's response to these events. We are left with uneven and see-sawing relations among the branches of government, with basic questions concerning parliamentary forms, the role of the executive and the courts, the nature of federalism. Of course we have much to think about. My guess is that history will not see our difficulties as great as we imagine them to be, that it will look with special favor, if not upon us, then upon the Founders who created a hope for mankind, and that indeed it will probably add a word of approval as that hope is renewed in our day.⁹

One could end here, having invited readers to enjoy these speeches for their historical value. But that would be to overlook other, equally significant aspects of Levi's writings. Levi was and always remained an academic at heart, after all, and while Attorney General he continued to fol-

low—and comment upon—the legal intellectual movements of his day, including some that are still important but that were then just beginning to develop. Levi had absolutely no use for originalism, for example, seeing in the provisions of the Constitution “the expression of compromises that mirror the sort of adaptation and accommodation envisioned by the process the Constitution set into motion”—a process “intended as a confrontation with problems to be solved, and in its new form an invention for the future.”¹⁰ It was, in fact, “the special duty of the legal profession, and surely that of jurisprudence, to attempt to emphasize and explain the basic values of our legal order in the light of the problems of our time.”¹¹

Such sentiments are consistent with Levi’s general pragmatism, a cast of mind very much at odds with the ideological reductionism embraced by originalists. This same intellectual disposition led Levi eventually to disparage both law and economics, of which he was a founder, and critical legal studies—two newly emerging schools of thought that presented themselves as polar opposites but that shared what Levi saw as a crude and simpleminded picture of law as nothing more than a tool of power used to manipulate or coerce. “While it is certainly possible to view all activities this way,” he reflected, “it is only a partial truth. It elides important distinctions. It puts a gloss of politicization on all events, when in fact it is a question of more or less, and the designation sometimes hardly fits at all.”¹² The incompleteness of a view that “describe[s] everything that goes on . . . in terms of power relationships or automatic reactions” was, in Levi’s mind, not just misguided, but dangerous as well: “The position diminishes reason, disparages the ideal of the common or public good, adds legitimacy to the notion that law is only one more instrument among many to be manipulated. . . . I suppose it is not strange that our view of the struggle of self-interests, real or induced, is somewhat self-fulfilling. It builds easily upon the pragmatic strain among us with its inherent cynicism, even though events of the last thirty-five years indicate that one should not count on cynicism to combat passion.”¹³

Levi’s own intellectual proclivities ran rather strongly toward the movement that has come to be known as “law and society.” The formal legal system of courts and lawyers is, in this view, only one institution among many that shape legal norms, and not necessarily the most important one. (“If we are to woo all the Muses and Graces,” he teased, “let Humility be among them.”¹⁴) Levi’s description of how law functions reflects textbook law and society thinking:

Law is not only the product of lawyers. The whole society uses and interprets the law. And because of that, the law expresses something deep and important about the values we hold as a people. It expresses our strongest commitments and the highest aspirations. Law is not everything in society. The law is only one of a number of institutions through which we express ourselves and which in turn influence us, maintain our customs and change our habits. Thus law takes a place along with family structures, religious beliefs, the expressions of art and the explanations of science. Law embodies the values common to many of those institutions. Law, as the custodian of the historic rights mankind has developed for itself, must never be regarded as the tool of the power of the moment.

The public, the press, the academic community, the artists, all by their assertions and conduct inform and develop the law. As new human values and ideas make their way into common acceptance, they also make their way into the law which translates them into words by which common conduct may be governed. By guiding common conduct, by speaking in words, the law has its own power to educate, to alter commonly held views, to shape the thinking of the public whose thinking in turn shapes the law.¹⁵

While all this is genuinely interesting and important, ultimately, the real reward in reading these speeches is not what they show us about history, nor what they have to say about jurisprudence or legal theory. It is the opportunity to be exposed to the mind of Edward Levi: to hear his voice and experience his way of thinking. Levi was enormously learned, of course, and he had a genuinely penetrating intellect. But he combined these cerebral qualities with an uncommonly sensitive eye when it came to people and institutions and what made them tick, and it was the rare bringing together of these attributes that makes him stand out. Levi was, in a word, *wise*—and that wisdom is reflected on every page of this book. He is thought provoking and shrewd, occasionally eloquent, and always balanced and measured: a subtle critic who becomes all the more persuasive, because while he cares about his subjects and respects his audiences, he never takes himself too seriously.

It is, moreover, amazing to see how much of what Levi had to say remains directly relevant to our current situation. I will illustrate this with a single example, but the continuing pertinence of Levi's words will strike any reader pervasively in reading through the speeches. My example concerns the nature and quality of political discourse and public deliberation.

As diagnosed by Levi, post-Watergate America turns out to have had many of the same difficulties with this as America today—and for many of the same reasons. Speaking personally, I'm not sure whether I find this a relief ("things always seem this bad") or massively depressing ("they have just kept getting worse"), but the parallels are uncanny.

Political debate in the mid-1970s, like today, was acrimonious, tiresome, and utterly unproductive. Recalling George Washington's famous remark about the tendency of Americans to swing between extremes, Levi observed that "[w]e are in such a period of cyclical reaction today, justifying what we do now as a kind of getting even with the events of prior years."¹⁶ This "energetic process of getting even" distressed Levi, who condemned the angry game of tit for tat for making politics simultaneously heated and empty—a destructive tendency that was being exacerbated by two new developments.¹⁷ First, "the breakdown of so many supportive institutions"¹⁸: "I do not know whether the family, the church, volunteer religious orders, community organizations, the school, the university are less important than they once were. I suppose it could be argued that in some ways, contrary to popular belief, some of them have been strengthened. But in many ways they have removed themselves from a leadership of civility."¹⁹

The effect on public deliberation from the deterioration of these traditional institutions was worsened by a second change, the development of "new forms of communication," which produced "a veritable bombardment of capsulizing concepts and conclusions in a powerful and dramatic way."²⁰ It's hard to believe that Levi did not already have our twenty-four-hour news cycle and internet-based culture in mind:

Modern communication emphasizes the immediate event which can be seen; it tends to make of discussion the declaration of opinions in a form to be quickly understood, suggesting that the complexity of a problem is always the result of inefficiency or bad motives. One can join to this the influence of widespread dissemination of the professional sampling of how people say they feel. At any time the ideal of reasoned discussion is hard to approximate. It seems harder now, even though there should be greater chance for it in spite of the obvious barriers which perhaps will turn out to be supportive in the long run. Voltaire once observed that the real scourge of mankind has not been ignorance but the pretense of knowledge. Today there may be more pretense of knowledge, a vice which most of us share, because there are more bits of knowledge widely distributed.²¹

The cumulative effect of such developments was ravaging American democracy by undermining the fundamental preconditions for its success: a reasonably informed citizenry made up of individuals willing to reconsider their positions or to compromise based on respectful discussion with people who believe differently. Each of these conditions seemed critical to Levi, as they should be to us today. Each also seemed to be failing, as they look to be doing today.

So, Levi noted, “[O]ver time a working society, with a broadened electorate and a representative government, cannot help but be elevated or depressed by the general level of knowledge and spirit of candor to inquire and to learn and to think and rethink possessed by the many.”²² Or, again, “Free inquiry means that we should put ourselves to the test of finding out what is wrong with what we think—an unsettling, a disconcerting, at times a most unwelcome pursuit of knowledge.”²³ Or yet again, “A free society, a government by discussion, requires mutual respect. It requires mutual understanding. It requires a culture held in common—a culture not unitary but composed of many differences. The base for understanding must be built and rebuilt over time.”²⁴ It is when our differences are greatest that “accommodation and compromise reflecting the exigencies of the matter at hand have been not only possible but a felt necessity. The essence of compromise is that there is no surrender of principle or power on either side, but there is respect for the responsibility of others and recognition of the need for flexibility and reconciliation of competing interests.”²⁵ Nor, Levi notes in a particularly apt passage, are these concerns applicable to substance alone: “Andre Malraux has written, ‘A civilization can be defined at once by the basic questions it asks and by those it does not ask.’ I would add one more item to Malraux’s comment: namely, the tone in which a society asks its questions. The tone itself may be even more important than the question or the answer.”²⁶

I said above that Levi was “occasionally eloquent.” And it is true that the power of his writing usually comes less from rhetorical elegance than from intelligence and sense. But when considering problems like this—problems that cut to the heart of the democratic experiment, an experiment that looked in Levi’s day, as it does in ours, to be seriously at risk—Levi’s voice and pen could become exceedingly powerful. In a speech to the Fellows of the American Bar Foundation entitled “In the Service of the Republic,” Levi offered his most heartfelt message to and for the American people, a lesson as necessary in 2013 as it was in 1976, and one no one today articulates as well:

The point which must be made, I think, is that behind the courts and behind the legislatures are the influential mechanisms of society which set or distort the debate, which enlighten, or by a delight in induced or assumed antagonism, cheapen every discussion so that the immediate reaction is never troubled by a later thought. These are harsh words, too harsh perhaps, but the freedom our society has given does place a responsibility upon the press and upon the professions, particularly our profession, to clarify the issues, not in a spirit of antagonists or adversaries—there are forums for that—but so an enlightened public will understand not the catch words, not the chosen disagreements, but the basic issues which are involved. If one believes in a government by reason or discussion, the victory comes when there is understanding. The problems we have are not easily solved, but the beginning is made when they are understood. This is of course much to ask. But it has a great deal to do with the role of our country if it is to continue to be the best hope in government for mankind.

I miss Edward Levi. The whole nation does.

Editor's Introduction

Two months before Attorney General Edward Levi turned over the position to his successor, Griffin Bell, he gave a speech to the Los Angeles County Bar Association. "In my view," he said, "one paramount concern must always guide our way. This is the keeping of the faith in the essential decency and evenhandedness in the law, a faith which is the strength of the law and which must be continually renewed or else it is lost. This has been a central principle which my colleagues and I have kept as our first concern."¹

Levi touched on themes he had spoken about many times before in speeches included in this volume—particularly privacy, confidentiality, national security, and the need for serious thinking and rethinking in light of our values, all of which the Watergate scandal had brought to the fore. He told of an experience he had at the very beginning of his term:

One area in which the process of rethinking began very early concerns the standards and procedures by which intelligence agencies should operate. I vividly recall that quite late in the afternoon on my first day as Attorney General this issue arose immediately. Just as I was settling into my chair and observing the handsome wood paneling of the office, an FBI agent appeared at my door without announcement. He put before me a piece of paper asking my authorization for the installation of a wiretap without court order and he waited for my approval. For close to 40 years the Department of Justice had been called upon to undertake electronic surveillance in certain cases without prior judicial approval. But I thought it was a bit unusual that I was expected to sign so automatically, if that really was the expectation. I asked the agent to leave the request with me—I think, perhaps, to his surprise—so that I could consult other officials in the Department.

This experience was one of many that led us to explore the question of how procedures could be perfected in this world of inevitable secrecy.²

I knew this anecdote well. Levi had told me a version of it the day that he asked me to join him as one of his special assistants. He was trying to explain the work he wanted me to help him with, but because it was all so highly classified he had to be vague. I barely understood what he was talking about. This problem of how to begin the discussion of matters that had been undiscussable was one of the great challenges of his Attorney Generalship.

Speaking in public became a vital instrument. Levi used his speeches to reassure people inside government and out that the Department of Justice was operating by the rule of law, that it was not partisan, and that it aspired to be wise. As is generally the case at this level of government, he often asked others to write early drafts of talks. When the subject concerned one particular part of the Justice Department, he would give that unit a chance to offer its ideas. At other times he would ask the public information office to try a draft. Or he would ask one of us on his personal staff. Usually the drafts did not even come close to what he had in his mind. In the end, he always thoroughly rewrote (or simply started over), which is why these talks are so distinctive both in content and in voice. He worked hard on his speeches, often for hours on end, sometimes at night or very early in the morning at his home, sometimes in a small, quiet study above his main office at the Justice Department where he worked curved over a typewriter like a parenthesis, testing every generalization and qualifying those that seemed to him overstated or reductive. This extraordinary care and commitment of time reflects the importance he gave his public addresses in accomplishing his goals for the department and the restoration of public faith in federal justice.

At times he spoke in public settings as a way of cutting through a cumbersome system and establishing a new direction, but most often he used his speeches to demonstrate the possibility of genuine conversation about the important and conflicting values in play and the choices to be made. He spoke often of his ideal of a "government by discussion," and he practiced it within the Department of Justice. It was a process that former Solicitor General Robert Bork, once Levi's student, described as being like a good seminar.³

At times Levi went beyond the leaders of the department and brought strong, sage voices from outside government into the discussion. At one

point he gathered a group of eminent constitutional scholars, including Herbert Wechsler, director of the American Law Institute; Paul Freund, Harvard constitutional law scholar and editor-in-chief of a multivolume history of the Supreme Court;⁴ Yale Kamisar, an important criminal law and procedure scholar; and Gerald Gunther, a Stanford law professor and author of his generation's standard textbook on constitutional law. They met with Levi in his office to talk through the problem of electronic surveillance in national security cases: Should it continue to be used without judicial warrants? Would a new kind of warrant give federal judges a role beyond what the Constitution envisioned? To keep the conversation from being abstract, Levi obtained security clearances for the law professors, so that they would know what was at stake. Later, he retained as special counsel Wechsler and Philip Kurland, University of Chicago law professor and editor of the *Supreme Court Review*, as he was deciding whether to prosecute a number of Central Intelligence Agency employees who had secretly opened mail addressed to or sent from the United States.⁵

Unlike a seminar, discourse was not an end in itself. It led to decision and then to candid public disclosure. As Levi's former special assistant, Ron Carr, wrote, "Perhaps the most remarkable quality about the process was the perfect congruence between the process itself and the way in which Mr. Levi publicly described the consequences."⁶

Levi gave his talks before police officers graduating from the FBI Academy, before people being sworn in as new United States citizens. He often gave speeches to groups of leaders of the bar, because if they did not believe federal justice was on the square, nobody else would either. And he talked with academic groups, partly because they so often asked him to, but also because they led opinion. And, of course, he testified before committees of Congress.

I have chosen for this volume talks that speak to what Levi called in his Los Angeles County Bar Association speech his "central concern": demonstrating his and the Department of Justice's commitment to the essential decency and evenhandedness of the law.⁷ The first chapter includes talks setting out Levi's view of the fundamental challenges he faced: the corrosive skepticism of the times, the need to restore confidence by discussion and by demonstration, and the ideal of the executive branch "acting judicially." I also include a few brief anecdotes Levi told about life in the Attorney General's office in this period. The second chapter includes talks in which Levi located contemporary legal issues in a larger context. He drew on classical and American political and intellectual history and