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COMPARATIVE LEGAL RESEARCH*

SOME REMARKS ON

"LOOKING OUT OF THE CAVE"

Hessel E. Yntema†

THE most famous of Plato's similes commences the Seventh Book of *The Republic*, in which the fundamental distinction between shadow and reality is presented. Imagine a cave in which men are chained so that they are unable to look behind them to the entrance but can see only a wall in the rear, on which appear the shadows of performers engaged in all sorts of activities, who pass between them and the light. The inhabitants of this cave-world, Plato observes, regard the shadows as real; one who chanced to escape into the light of the sun, if he were to return with strange new notions of truth and justice and therefore proceed to question the shadows as a source of knowledge, the cave dwellers would undoubtedly punish with severity, even perhaps with death.

This allegory in which Plato contrasts the shadow world of appearances with the realities of reason is an appropriate text to invite consideration of the relations between "comparative law," as it is ineptly termed in English, and legal research. Even at first blush, the text is forward-looking; it suggests that we should look out of the cave and give realistic consideration to the problems of legal research, and not merely indulge in polite exchange of mutual satisfaction with things as they are. But at the same time, while the text suggests the possibility that enlightenment in legal research may come from comparison, it also carries a premonition of the dire fate of those who would import alien ideas into the shadow land of positive law. In the Platonic conception, the

* This article in substance reproduces an address given at the Conference on Aims and Methods of Legal Research, held at the University of Michigan Law Quadrangle, Ann Arbor, November 4, 1955. It is to be reprinted with comment in the proceedings of the Conference.

It should be observed that, in view of the topic assigned, no effort is made herein to consider the problems of factual, as distinguished from comparative, legal research.

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images, or the shadows of the images of justice, appearing in the decision of particular cases, each in the particular setting of some local system of courts and legislative regulation, can be but pale reflections of the eternal light of justice. And the cave men shun the light.

Despite this risk and without limiting discussion of comparative legal research to a Platonic theory of knowledge—to which I for one would not accede—the text prompts first the inquiry, unavoidable in a constructive discussion of the matter, whether contemporary legal study in the United States is concerned with shadows in an intellectual cave—or in other words, whether it is true, as I was told years ago, partly perhaps in jest, by a late distinguished member of the Supreme Court, then Attorney General, when, encountering me on a visit to the Department of Justice, he kindly asked what I was looking for, and I said, "Justice," that it was the last place to look.

I

An inquiry into the adequacy of legal education in the United States at the present time from the viewpoint of comparative legal research is as difficult and delicate as it is essential. It is difficult, since it requires laying aside traditional and deep-rooted preconceptions concerning the function and scope of legal science, derived from prepossessions of positive municipal law. It is delicate, since these preconceptions are supported by a powerful complex of vested professional interests, which those beneficially concerned find it difficult to discuss without prejudice. In all countries, the legal profession jealously guards its local privileges, while it is common knowledge that no passion exceeds that of a law professor for his favorite course. But the inquiry is nevertheless essential to evaluate the present prospects and needs of comparative legal research, since without some conception of the place of legal research in the cosmos of human endeavor and some inspection of the conditions under which it presently has to be conducted, intelligent consideration of the premises would not be feasible. Consequently, after stating the place of legal research in legal education, a preliminary answer to the inquiry may be essayed by drawing attention to certain crucial features of existing American legal culture, which may serve to outline certain imperative needs for the development of comparative legal research at the present time.

It will be obvious, in the first place, that the placement of legal research in legal education is dependent upon the conceived nature and scope of legal science. It may be assumed that, in the performance of a complex social function such as the administration of a modern system of justice, there is need for systematic legal education in order to prepare those who are called to the bar for the various services rendered by members of the profession. The most obvious function of this branch of the law, broadly conceived, thus is the instruction of those who seek to enter the profession, in the necessary qualifications for their prospective offices. It does not need to be emphasized that this function of legal education—namely, the transmission of existing legal knowledge and development of the abilities needed by those who aspire to practice law—has become highly specialized, due to the great number of those required to provide professional services in our progressively regimented civilization and the increasing mass and complexity of the materials to be mastered. These aspects of legal education do not concern the present inquiry as such, but only as they condition comparative legal research or indeed it should appear that adequate professional preparation includes such research. This will be touched upon later.

But legal education is something more than indoctrination in what has been or acquirement of technical expertise. It also contemplates that at least the principal centers of legal education have in effect a scientific mission, a responsibility for the constant refinement and extension of our knowledge of law, regarded as the practical realization of justice. This idea may be illustrated by a passing analogy to another branch of education, in which theory is also closely allied with practice, namely medicine. It needs no argument today—though it did in Molière's time—that in the field of medicine, devoted to the cure of disease and public health, the great medical centers are expected to do more than to imbue the acolytes of Hippocrates with the accepted materia and methods of medicine; their intensive training is integrated with extensive hospital services, and in particular, with persistent, elaborate research to improve medical practice. The field of engineering offers a significant, if later, parallel. The conception that research is an essential responsibility of education is not peculiar to medicine; it pervades the physical and social sciences generally, and its value has been demonstrated beyond question. The lesson for legal education is obvious.

This example at once gives a touchstone to distinguish certain useful but inferior or spurious types of legal research. We would not regard as research such activities as the dissection of a cadaver by a student in anatomy, nor the production of a treatise on that topic, summarizing the current knowledge of bodily structure, nor mere practice in laboratory analysis, nor the collection of a number of case histories for instruction in medical practice, and it would be advantageous to be equally scrupulous in designating analogous activities in connection with legal education. This would of course exclude from consideration as legal research much contemporary legal production, the purpose of which is not to extend, but to brief our knowledge of law, whether to support a client's claim, to facilitate legal instruction, or to transmit information for students or practitioners. Here are to be included the prolific casebooks, conventional textbooks, analogous law review contributions, and even such epitomes of current doctrine as *Corpus Juris Secundum* and the *Restatement of the Law*. While any of these may embody the results of true research, this, if not accidental, is incidental to the object in view and the subject matter, all contrived to tell what has been and not specifically to extend legal science. The great preponderance of this type of legal literature is doubtless an unfortunate necessity, owing to the voluminous complexity of the legal materials, and it is indispensable for legal practice. But the activities of which these are the end products can be termed legal research only by courtesy.

If now it be asked, what then, if not these common types of legal study, is legal research, the answer implied in the foregoing is simply the scientific study of law. In sum, this conception, so successfully employed in other branches of knowledge, involves two things: the formulation of more or less general propositions about the subject matter under scrutiny and their verification by observation, the ultimate ends being increased accuracy and economy in the representation of experience. The principal techniques employed in this process of the formulation and verification of hypotheses to ascertain whether they are true, are: controlled experimentation, in which the possible variables are previously fixed, or comparison of relevant historical events, whether in time or in place or more typically both, serving to cancel out the variables.¹ While it should not be presumed that the technique of controlled

¹ For elaboration, see the writer's article, "The Implications of Legal Science," 10 N.Y. UNIV. L. Q. REV. 279 (1933).

experimentation with respect to regulation of human conduct by law necessarily requires a dictatorial regime with human guinea pigs at its disposal—Underhill Moore's well-known study of automobile traffic in New Haven² demonstrated that such investigations are feasible under democratic conditions—this type of research has practical limitations. Not only are such inquiries difficult and expensive, but there are ideological impediments; the formulation of law engrosses attention, rather than its effects. Characteristically, centers of legislative research are designed to aid in drafting new laws, not to test them; in prevalent legal theory, the judicial decision, not what it accomplishes in a human situation, is the criterion of justice. Under these conditions, it is obvious that scientific study of law must primarily consist of comparative observation and analysis; indeed, even if the existing experimental knowledge of how law operates were far less fragmentary than it is—and I for one do not see how the need and significance of such knowledge could be overstated—it would still have to be comparative, if only to make sure that what happens in Ann Arbor is duplicated in Ruritania.

In this sense, comparative law is another name for legal science, an integral part of the more comprehensive universe of social or human science. More specifically, the term comparative law commonly denotes reference in legal study to the laws of more than one jurisdiction, or to foreign law. In the former sense, the influential conception of a common law, Anglo-American or Romanic, forming a body of general doctrine, subsidiary to the local laws in a federation or other suprapstate community, is obviously comparative within its orbit—an incomplete comparative law. The latter, and today more usual meaning of comparative law, embracing also foreign legal systems, has a universal humanistic outlook, not delimited by political frontiers; like other branches of science, it contemplates that, while techniques may vary, the problems of justice are basically the same in time and space throughout the world. As Pascal long ago observed, it were a singular justice that a river bounded.

II

We need not linger to elaborate the theoretical objections that the idea of legal science has encountered; these are the progeny of the positivistic territorial conception of law that Pascal ridiculed.

² Moore and Callahan, "Law and Learning Theory: A Study in Legal Control," 53 *YALE L.J.* 1 (1943).

One, fully argued by Kirchmann over a century ago,³ is that law consists of legislation, which can at any time be wiped out by a stroke of a pen—a contingency that areas dominated by legislative law not infrequently suffer. Another, to paraphrase a famous remark of Chief Justice Hughes apropos of the Constitution, is that law is what the courts say it is, a flexible body of precedents not susceptible of scientific analysis.

This latter assumption, today too prevalent, deserves a parenthetical comment. While the uncertainty of jurisprudential law—"the imaginary law extracted by each man for himself out of a mass of jurisprudence"⁴—was castigated by Bentham many years ago, as serving the partnership interest of bench and bar in three distinguishable ways: by increasing the number of lawsuits, by increasing the quantity of legal advice that must be purchased by litigants, present, past, and prospective, and by increasing the arbitrary power of the judiciary proportionably to the degree of uncertainty, the judicentric conception of law has not merely survived, but has become a dominant legal philosophy. The relativistic hypothesis that application of legal norms by the courts in individual cases is the ultimate criterion of law and justice, is embodied in the doctrine of the leading contemporary legal theoretician, Hans Kelsen, and in the United States has been most bravely and persistently advanced by the distinguished author of *Law and the Modern Mind*,⁵ for whom the only certainty about law is that it is uncertain. It is a patent fallacy to say that, because law is not always certain, it must be always uncertain; if this were so, there would be no warrant for lawyers' fees. This supposes that, law being essentially decisional, uncertainties in the minority of disputed cases reviewed are fairly representative of the vast majority of litigious situations in which the rule and its application are not in dispute, not to speak of all the customary activities of the community that transpire without benefit of counsel. This theory, carrying an unreal notion of science as absolutely exact, and hence as excluding statement in terms of contingency or probability, apparently precludes a priori the existence of sequences in legal events that can be compared and doubtless would accordingly deny the possibility of comparative legal research.

³ KIRCHMANN, *DIE WERTLOSIGKEIT DER JURISPRUDENZ ALS WISSENSCHAFT* (1848).

⁴ "Rationale of Judicial Evidence," Bk. viii, c. xxiv, 7 *WORKS OF JEREMY BENTHAM* 310 (Bowring, 1843).

⁵ FRANK, *LAW AND THE MODERN MIND* (1930).

A third objection, opposed specifically to comparative legal study, merits even less consideration, namely, the notion that a native of a common-law country such as the United States cannot possibly comprehend the basic ideas of the civil law, and vice versa. It would be strange indeed if the descendants of Scotch, French, Spanish, German, Italian, Belgian, Swiss, Dutch, or other civil-law progenitors, were unable to understand the laws of the respective countries of their ancestors, simply because they happened to be born and educated in the United States. This of course is not true; if it were, it would be the worst possible indictment of the system of law or legal instruction supposed to be generally unintelligible. The idea that legal concepts are strictly national and cannot be assimilated by foreigners is cherished, not by those who have studied law comparatively, but only by those who know not whereof they speak.

These arguments that legislation is ephemeral, that case law is incalculable, or that legal ideas are not internationally communicable, are obviously frivolous objections to legal science. Inspired by the absolutist dogma of territorial sovereignty as the source of law, they presuppose that law is authoritative directive, geographically localized, and not justice. In consequence, they reflect inadequate theories of the place of law in society and foster inflated estimates of official discretionary power. We therefore pass them by, to consider the far more serious difficulty with the scientific conception of legal research, presented by the enormous mass of technical legal materials and the consequent professional and practical introversion of legal education. The difficulty is not that scientific legal study is inherently incompatible with professional training, but that these two functions of legal education have not been successfully integrated in the United States, with the result that legal research has in a degree been starved to meet the pressing demands of practical instruction.

III

This brings in view the central problem in this discussion: the conditions confronting comparative legal research in modern America. The first impression of this scene, regarded as a stage for the serious development of comparative legal research, is that there is some evidence of a more or less general watering down of intellectual standards, both in general culture and, more particu-

larly, in legal education—if not in all phases of knowledge, at least in certain branches of vital importance for such research.⁶

Take for example the matter of linguistic preparation. In charity, we may leave aside the average degree of proficiency among high school and college graduates, in reading, writing, and speaking proper English, the first technical skill requisite for the practitioner, not to speak of those employed in legal education. This is naturally of concern also in legal research; in addition, to the extent that legal materials in a foreign language are to be consulted, corresponding linguistic preparation is necessary. No one, for instance, can undertake a serious study of the civil law, or of any branch of ancient, medieval, or early modern law without at least some understanding of Latin. The more recent national laws must be read for the most part in their native tongues; only to a limited extent are English translations of such materials available, and these are not reliable—as all well know, translation is a treacherous vehicle of communication. For these reasons, as well as for its special value as linguistic training and as a key to a number of modern languages, including English, it is peculiarly unfortunate that, for so many of those who seek higher education, the teaching of Latin has been relegated to the limbo of obsolete electives. Even the Rhodes Scholarship appointments, shortly after my time, had to dispense with the original requirements of Latin and Greek; these had become a superfluity in the intellectual careers of many American students, who were thus denied a glimpse in the vernacular at the glory that was Greece and the grandeur that was Rome.

The situation with respect to modern languages is only less dismal; undoubtedly, it has been improved by the voluntary or compulsory visits of many young Americans to foreign countries in recent years. At the higher level of studies in natural science, these deficiencies are partly counteracted by the requirement, satisfied often too little and too late in life, of a reading knowledge of perhaps two foreign languages. But for the study of law, a cen-

⁶ Mr. John R. Starrs of the Detroit bar has kindly drawn my attention to Roscoe Pound's article on "A Generation of Law Teaching," 38 MICH. L. REV. 16 at 24-25 (1939):

"Yet looking back over forty years of teaching (for I began law teaching in 1899), I seem to see certain effects of college teaching of the social sciences to students with no training in logic or in languages requiring accurate attention to accident, grammar and context. I seem to feel an increasing difficulty in teaching the technique of legal reasoning to students with a predominantly literary training, satisfied with plausible speculation and clever writing, with no sound basis in exact information, no clear philosophical background and no habits of consecutive thought. Certainly the contrast between the feeling of students today and those of yesterday about a course in the law of real property

tral part of human culture, no such modicum of linguistic preparation is expected—not even for appointment to a law faculty. This is a relatively recent condition; in the golden age of Kent and Story and even to the turn of the century, the luminaries of the profession had not lost the keys to comparative law and could cite the *Digest* or *Pothier* to their purpose as readily as their successors today quote the *Restatement of the Law*. But since then, the percentage of those who in this essential respect are qualified for comparative legal research has become exiguous indeed in the United States; many of these had the good fortune to have been trained abroad in their early years. In the result, if the legal profession in the United States is not completely monolingual, this is no fault of our law schools, which should have taken measures to forestall this trend in preliminary education years ago.

In the second place, knowledge of history, philosophy, including scientific method, and social science, and inculcation of extensive as well as intensive reading habits in these and related aspects of general culture among the population of the colleges, the law schools, and their graduates, is assuredly of no less importance than linguistic proficiency alone as a base for the humanistic study of law. From this viewpoint, not merely the necessarily limited training received in school is significant, but even more so the extent to which active interest in the progress of these branches of knowledge and, in particular, the advances made in legal science, as well as in the technical aspects of immediate practice, develops in later years. Without such interest, inevitably the intellectual horizons of the profession will be limited by a gradually fading, contracting, and ossifying memory of what little was learned years ago in student days, now doubtless more or less obsolete. For this reason, it is of extreme importance that in college and professional school the student should be inspired with habits of self-education that will persist after graduation. This for our purpose is highly important; obviously, it would be difficult to propagate a flourishing development of comparative legal science among an association of, let us say, carpenters or even civil engineers, or to find qualified

is significant. It did not seem hard to the student of my generation, although it took up more of the curriculum than it does now. The first year course in property in 1889-90 covered more ground than has generally been attempted in recent years, and covered it thoroughly. Today, the subject seems to bewilder students. The things which are simply so and must be learned as such, and the exact logical development of propositions to reach assuredly predictable results are not congenial to the habits of thinking and study of a generation not raised on the Latin grammar, the Greek verb, and compulsory mathematics."

researchers among them, unless a sufficient proportion of the members acquired the necessary background and generated a genuine interest in such matters. This does not exclude the possibility of individual contributions which may be of the greatest significance—of a Montesquieu, a Marshall, or a Maitland, for example. But their success will depend upon an audience of qualified and intelligent readers. In short, the effective development of comparative legal research, as of any other needed intellectual activity, is conditioned by (a) the availability of an adequately qualified body of recruits and (b) the presence of sufficient interest among those for whom such research is to be undertaken, an interest which in the nature of things can be evoked only by general understanding of the character and significance of what is contemplated.

How far the contemporary scene can be measured in these terms, it would be difficult to demonstrate. However, a few illustrative items may be adduced. One item is the avidity with which law students accept an invitation to read books on legal and political philosophy; one tells me, for instance, that he had never before opened John Austin's *Lectures on Jurisprudence*; another, a specialist in political theory, that his previous acquaintance with the outstanding contributions in this field had been secondhand. Or, to speak of experiences nearer home, in the comparative law field, the difficulties in starting and prosecuting such ventures as the late Ernst Rabel's comparative survey of conflicts law, and Vladimir Gsovski's two volumes on Soviet Civil Law, would be an illuminating tale, unfortunately too long and even too parlous to unfold on this occasion. Yet even now the value of these monumental contributions is not widely recognized in professional circles. A partner in one of the first New York law firms, for example, wrote some time since that their library would not purchase Rabel's work, as it was not a law book.

The problems encountered in developing the subscription list of the *American Journal of Comparative Law* are perhaps more symptomatic. This enterprise, sponsored by sixteen leading law schools and the American Foreign Law Association, during the past four years has built up a list of over 1000 subscribers to the *Journal*, with remarkably few cancellations, and we are told that this is most satisfactory. As a matter of fact, this compares favorably with the support given to the chief reviews in the field in France and England, which have been established for fifty years or more. And it should be added that the list includes the principal law libraries

throughout the world. But it is disconcerting to reflect that of the 1000 or so subscribers, about 600 are in the United States, a large proportion of these being libraries, leaving some 300 most appreciated individual subscriptions from a population of perhaps a quarter million. (How many of these are law professors is classified information.) Perhaps an explanation of the foregoing experience may be suggested by a response recently received from the librarian of a federal circuit court, located in a great seaboard center of commerce and culture, to whom a complimentary set of the first volume of the *Journal* had been sent, accompanied by a special subscription offer, to the effect that the library would not subscribe since the judges were interested only in the federal laws and cases.

The hypothesis that examples such as these suggest is that law is scarcely a learned profession in the United States and, for most lawyers, is regarded as an honorable trade. Indeed, it is commonly observed that the more successful a lawyer is, the less law he has to read—this is for the bright young apprentices from the law reviews. Doubtless, there are notable exceptions, whose brilliance is enhanced by the shade in which they shine, but to the degree that the hypothesis is true, it should provoke, not recrimination, but inquiry respecting the causes of a condition that is of fundamental importance to the development of legal science, historical, comparative, or functional. The thesis that suggests itself in response to this hypothesis is—Look to the law schools, or more specifically, to the law that is taught. This is the most responsible element in fixing the intellectual pattern of the profession.

IV

In Western Europe, the tradition of legal education goes back to the early Renaissance.⁷ Indeed, the phenomenal development of civil-law studies, starting at Bologna in the twelfth century, was one of the chief influences in the growth of the continental universities, in which law formed one of the four traditional faculties. In consequence, law was integrated with other branches of education, and the universities were in position to control legal instruction. This instruction for centuries was of a universal character,

⁷ This development is reviewed by the writer in the "Introduction" to ANDRES BELLO, *DERECHO ROMANO*, which is to appear in the new official edition of BELLO, *OBRAS COMPLETAS*, which is being published by the Venezuelan Government under the editorial direction of Professor Rafael Caldera.

based upon the premise that the Roman law as codified in the *Corpus Iuris Civilis* was the common law of Western Europe—the general law of the Holy Roman Empire or at least universally applicable by virtue of its authority as reason. For a brief period, the period of the Glossators, therefore, legal study was concentrated on establishment of the texts, but it soon was devoted to the *usus modernus*, the common doctrine evolved by the Commentators and their successors through construction of the texts in the light of current needs, which was regarded as the fundamental subsidiary law in countries where the civil law was received. This conception of a currently accepted body of doctrine as the basic law, quite analogous to the notion of the Anglo-American common law, although challenged by the humanistic effort of Cujas and his successors to restore the texts by scientific historical study of Roman antiquities, prevailed in legal study until the eighteenth century, when in the Age of Enlightenment the new courses in the law of nature and of nations for a time eclipsed instruction in civil law and presaged the adoption of national codes in Prussia (1794), France (1804), Austria (1811), and other countries. In theory, the enactment of these codes and the dissolution of the Empire in 1806, destroyed the unity of the civil law; in actuality, however, the codes were in effect a restatement of the current civil-law doctrine, and, as a result notably of the influence of the historical school of Savigny, the scientific study of law was revived and intensified, so that, alongside of the codes, it has formed, together with related courses in jurisprudence and legal history, the essential basis of legal education in civil-law countries. Evolved within the universities, law is a humanistic as well as a practical science.

In England, the successful resistance on nationalistic grounds to formal (though not to substantive) reception of the civil law and the early organization of the legal profession in the inns of court enabled the bar to monopolize legal training and admission to practice. In consequence, the establishment of civil law in the universities and the introduction by Blackstone in the middle of the eighteenth century of lectures on the common law for gentlemen as well as lawyers, enabled the universities to concentrate on the theoretical and historical branches of law, including the Roman law, which is a basic comparative element in the academic scheme of legal education. Thus in England as on the Continent of Europe, theoretical training in law precedes apprenticeship in practice. The scientific and technical phases of legal education are effectively differentiated, the first recognized as the responsibility

of the universities, the second inculcated in principle in the place where practice can be most efficiently learned, in the chambers of a practitioner.

In the United States, legal education is dominated by a new institutional type, the professional law school.⁸ Originating in the initial era as a proprietary substitute for apprentice preparation for legal practice, it is of interest to observe how these institutions have acquired a recognized place in the universities so as to give academic prestige to what is basically training in the trade. After colonial times, in which it was customary after college for prospective lawyers to read law under the guidance of a member of the bar, there was a brief period of experimentation during which various efforts were made to implant in the colleges courses in law and government, more or less fashioned after the Blackstonian or Continental models. This might have been a golden moment to advance legal education, for at the same time the democratic, or more accurately the republican, trend of the times was about to liquidate the requirements for admission to the bar, along with property qualifications for election and other class or professional privileges; as it became no longer necessary for the law student to read law in an attorney's office for a prescribed number of years, the door was opened for formal legal training. But the colleges were not prepared to exploit the opportunity; the various efforts to introduce nonvocational courses in law and related subjects at William and Mary, Virginia, Columbia, Maryland, Pennsylvania, and Harvard, either withered on the vine or evolved into professional schools. The only really successful law school of the time was that at Litchfield, where from about 1782 to 1833 a narrow course of instruction in private law, or in other words, a superior curriculum of apprentice training, was offered. This model, a more or less autonomous, proprietary school, with a strictly professional curriculum, was the type around which "the mantle of Yale was wrapped" in 1824 and, more important in its eventual influence, after the abandonment of Chief Justice Parker's program in 1829, was accepted as the basis of the new look given to legal education at Harvard by one of the greatest jurists of his time, Joseph Story. In view of his appreciation of the humanities and his unique attainments in comparative law, it is ironical that Story excluded all such topics, in this respect following the Litchfield

⁸ See especially REED, *TRAINING FOR THE PUBLIC PROFESSION OF THE LAW* (1921), and *PRESENT-DAY LAW SCHOOLS IN THE UNITED STATES AND CANADA* (1928).

curriculum, in the program then effectively instituted at Harvard.⁹ The explanation was obvious—Chief Justice Parker's program had not attracted students, and it was a question of ensuring returns from the box office.

Thus the die was cast. For educational purposes, government was divided into two separate spheres: professional legal training vs. whatever else pertains to human affairs. On the one hand, the law schools, following the eminently successful plan of Nathan Dane to establish a national common law in the United States through the teaching and writings of Justice Story and his successors at Harvard, concentrated on the common law decisions relating to private law, in principle excluding local state legislation, criminal law, and public law (excepting the constitutional jurisprudence), as well as the civil law. Reinforced by the concrete method of case study later introduced by Langdell, this vocational conception *a fortiori* disclaimed responsibility either to instruct the layman in what he should know about government by law in a democracy or to consider law in the light of reason, justice, or science. Such matters were left to the colleges and universities, upon which also devolved the development of the social sciences generally. It is small wonder that since Story's time, comparative law in the United States has been a poor Cinderella, who missed her date at midnight, lost between more engrossing professional and academic preoccupations of law school and university.

It has also resulted that there has been no effective control over nonvocational prerequisites of admission to legal study. For a

⁹ Regarding the curriculum of the Harvard Law School in Story's time, Reed states:

"In the second place, in its curriculum the school projected more than it actually carried out. Generalities in Story's inaugural address as to Philosophy, Rhetoric, History and Oratory may be ignored. His failure, while professing to believe in the value of such studies for lawyers, to find any place for them in the curriculum of his school is of interest chiefly as destroying a possible defense for his failure to insist upon college study. What he did do in his first curriculum, published in 1830, was to supplement the common-law and equity subjects, already taught by Stearns, by textbooks in Civil Law, International Law, Criminal Law, and Constitutional Law, including in the latter American state constitutions as well as the law of the federal constitution. In 1832, however, all these topics except the last (federal constitutional law) were dropped from the regular two-year course, now outlined as an alternative to the three-year course originally contemplated. Although until 1850 the additional subjects continued to be more or less vaguely offered as extra studies, for students who would consent to stay an additional year, ('For gentlemen who remain in the Institution three years, other studies are prescribed.' Catalogue, 1835.) the intensive work of the school was henceforth confined to its original narrow field, supplemented only by study of the federal constitution. Not merely state government but also statutory law was eliminated. (Hence, doubtless, the omission of Criminal Law, which in many states was early placed upon a statutory basis. This topic was not restored to the curriculum until 1848, after Story's death. See further as to the curriculum, Chapter XXIX, and Appendix, pages 453-456, 458.)" TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 146-147 (1921).

time, in fact, these were negligible, and the law schools actually competed with the colleges for students. Today, this has been partly remedied, and a modicum of cultural preparation is needed to enter law school or to qualify for the bar. But there is no agreement on what such preparation should be and no real disposition to look behind the high school or college diplomas to make sure that applicants are in fact qualified. The law schools automatically accept the more or less standardized products of the system of public or private instruction.

The effect upon the legal curriculum itself is patent. The box office makes it necessary to limit the law course to three years, regardless of the adequacy of the term or its repercussions upon the nature and content of instruction. These are aggravated by a cumulation of factors. In the first place, the progressive industrialization and consequent regimentation of human activities in modern life have vastly increased the quantity and complexity of legal materials. In the second place, a growing population with an expanding volume of laws and orders needs more and more legal services, for which a constantly enlarged number of students must be trained. In the third place, such mass production of lawyers inevitably tends to lower the average level both of the student body and also of the greater number of instructors required. In the fourth place, as a result of the extended interests of the United States in world affairs and in international trade, a pressing need to provide training for international as well as national leadership, not only for domestic students but also for those from abroad who in increasing numbers seek instruction in our law schools, adds new problems in a curriculum already surcharged with the conventional topics of domestic law. Finally, in the fifth place, the typical casuistical mode of instruction—the case method—is ill-adapted for standardized mass education: it is expensive in time to cover a topic by real Socratic discussion of anecdotal detail; such treatment characteristically emphasizes *ad hoc* judicial utterances and almost inevitably sacrifices basic theory to the details of judicial legislation; and as regulation is extended to new fields—railroads, motor vehicles, aircraft, taxes, trade practices, nuclear power, or whatnot—new courses press for attention, so that less and less complete or more and more superficial must the curriculum be.

In this dilemma, in a philistine environment, courses that, however mistakenly, are regarded as nonvocational, inevitably are sacrificed to the box office. Since Story's time, the study of civil law, except where it is of immediate professional interest, as in

Louisiana, has been restricted; few indeed are the graduates of our law schools who have even been invited to examine, however superficially, the main stream of legal culture in the Western world from ancient Rome to contemporary civil-law developments and fewer still those who have studied it sufficiently to undertake significant research in legal history or comparative law.¹⁰ The same fate attends related topics; the history of the common law itself, for example, which in the days of Langdell and Holmes was intensively traced, also has become *terra incognita* for the great majority of law students; jurisprudence maintains a sort of marginal existence, partly fed by the perennial interest in philosophy in a troubled world, partly by adulteration into formalistic case analysis or a speedy view of a particular system of justice, and partly indeed by the inextinguishable interest of intelligent members of the bar in those general aspects of legal thought that seem to lend dignity and meaning to their mundane occupations. This condition naturally is reflected in the paucity of scholarly legal publications in the United States as compared with the variety of texts and monographs appearing in other leading jurisdictions.

Thus the law school curriculum tends to resemble the academy of astronomy in Aristophanes' play, whose pupils, bottoms up, diligently grubbed in the ground to learn the movements of the stars. Undoubtedly, even from the most practical viewpoint, it is a mistake to sacrifice the general aspects of law to provide a little more bread and butter detail. Laws, regulations, and cases pass in kaleidoscopic array; the lawyer's concern is to fit them into significant patterns to meet new problems. For this purpose, comparative presentation of the historic phenomena of law, expressed in logical theory, provides a more effective training for legal practice, than a superficial casuistry of ephemeral statutory provisions or decisions embalmed in the fading cells of memory. At the same time, such a comparative synthesis of contemporary legal culture will materially facilitate the necessary reorientation of legal education in the United States to serve international as well as domestic needs.

V

The scene that thus confronts us in the field of legal education

¹⁰ For recent discussion of comparative legal instruction in the United States, see Stevenson, "Comparative and Foreign Law in American Law Schools," 50 COL. L. REV. 613 (1950); Re, "Comparative Law Courses in the Law School Curriculum," 1 AM. J. COMP.

is of course not entirely unrelieved. In the first place, after the early abortive attempts to institute lectures on law in the colleges, account must be taken of the extensive instruction later provided outside of the law schools in political and other branches of social science, including legal history, political and legal theory, public law, and even Roman law, supplementing and indirectly influencing the formal professional training. In the second place, within the law schools themselves, efforts, recently reviewed in the *Journal of Legal Education* by Professor Currie,¹¹ have been made, with varying success, to liberalize the professional curriculum. Among these should be mentioned:

First, the program of what President Woolsey of Yale University in 1874 termed "the ideal Law School—where might be acquired a knowledge of the history of law, the doctrines of finance and taxation, comparative legislation and other liberal branches,"¹² as introduced at the Yale Law School in 1876 during the administration of Dean Wayland, comprised a two-year undergraduate course, including, in addition to the usual technical branches, lectures on various nonvocational topics, and a further two-year graduate program.

Second, contemporaneously at Columbia University, the appointment of John W. Burgess in 1876 to fill the vacancy left by Francis Lieber's death in 1872, led to the establishment of the Graduate School of Political Science in 1880. By this "master stroke of diplomacy," occasioned by the opposition to including public law subjects in the basic private law course of instruction,¹³ which its then famous dean, Theodore Dwight, said would be like planting a upas tree in the garden of paradise, a unique and effective means was provided, by the system of joint appointment to the

L. 233 (1952); Schlesinger, "Teaching Comparative Law," 3 AM. J. COMP. L. 492 (1954); Bolgár, "Comparative Law in Legal Education," 1 N.Y. LAW FORUM 389 (1955), and references cited.

¹¹ "The Materials of Legal Study," 3 J. LEGAL ED. 331 (1951) and 8 id. 1 (1955).

¹² Dagget, "The Yale Law School," 1 GREEN BAG 239 at 253 (1889).

¹³ This is not to intimate that Dwight opposed public law instruction except as it would interfere with the two-year regular course in private law topics. To the contrary, as appears from his article on "Columbia College Law School," 1 GREEN BAG 141 at 158 (1889), as well as from the HISTORY OF THE SCHOOL OF LAW, COLUMBIA UNIVERSITY, prepared under the direction of Julius Goebel, Jr., chapters iii and iv, 44 ff. (1955), Dwight had truly liberal views of university education, was primarily instrumental in bringing Burgess to Columbia, and indeed regarded the establishment of the School of Political Science with favor. Nevertheless, Dwight opposed the integration of public law in the ordinary course of legal instruction, and with a certain justice, since in 1858 when the Columbia School of Law was established, as he stated, "the City of New York was, so far

graduate and law faculties, to integrate the courses in constitutional law, comparative jurisprudence, international law, and other supposedly nonvocational branches of legal or social science, offered by the graduate school, with the professional legal instruction.

Third, later came the development of graduate programs in law, of which that instituted at Harvard in 1909 and notably promoted by Roscoe Pound sparked analogous programs in other institutions. This was in substance a fourth year of study in course, chiefly in nonvocational subjects, Roman and modern civil law originally being required. The underlying theory, continuing the policy of Langdell and Ames and at the same time recognizing the need for broader legal training, was that graduate instruction of law teachers and their individual research in the cultural aspects of law would effectively diffuse the necessary enlightenment among their pupils. This plan avoided admixture of abstract cultural subjects with the concrete practical detail of the professional courses, on the assumption that culture need not be taught in course—a curious argument, as the graduate program was organized strictly on a course basis and it was never supposed that technical courses for undergraduates should be expendable.¹⁴

Fourth, in 1926-28, the Columbia Law School undertook, under the driving leadership of Herman Oliphant and Underhill Moore, the most extensive survey of the professional law curriculum ever made in the United States.¹⁵ While the organization of the Graduate School of Political Science at Columbia in 1880 alongside of the Law School, and the introduction of graduate legal studies at Harvard and elsewhere after 1909 had left the technical curriculum relatively inviolate, the purpose of the Columbia survey was to introduce a more realistic content and approach in the professional instruction itself. Among its results was to make clear that a substantial development of legal education along functional lines could be accomplished only on the basis of

as legal instruction is concerned, unbroken and virgin ground." It was chiefly due to his efforts that legal instruction became recognized as superior to apprentice training alone. If this be true, Dwight like Story is a further example of the pervasive influence of the box office in American legal education.

¹⁴ See *THE CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL, 1817-1917*, chapter vii, 162, especially at 167 ff. (1918).

¹⁵ See especially *SUMMARY OF STUDIES IN LEGAL EDUCATION BY THE FACULTY OF LAW OF COLUMBIA UNIVERSITY* (1928) prepared by Herman Oliphant.

extensive research, involving not only law as such but also social and economic phenomena. In the division that developed in the faculty respecting this program, the conviction, fortified by the success of the opposition, that its realization would be unduly impeded in a too professional environment, led to the establishment of the Institute for the Study of Law at The Johns Hopkins University in 1928. Although this venture, inadequately financed and doomed by the date of its foundation, had to be suspended for want of funds at the end of five years just when the fruit was beginning to appear, it had the important secondary effects of causing those who remained at Columbia to execute with some success the program which many of them had more or less systematically opposed, as well as of stimulating analogous activities at Yale, Chicago, and elsewhere. It was a time of great interest in the improvement of the legal system generally as well as of legal education—of the establishment of the American Law Institute, the Wickersham and other crime commissions, the creation of judicial councils in a number of states, the unique benefaction by W. W. Cook for legal research to the University of Michigan, Colonel Parker's notable donation to found the School of Foreign and Comparative Law at Columbia, and other more or less important developments, none of which, however, immediately touched the professional curriculum as such. These efforts unfortunately were soon paralyzed by the absorption of energies in the more imperious demands of the New Deal and the World War that followed the depression. In consequence, the latent possibilities of the Columbia survey, originating in the area of business law, had no opportunity for the time being to develop significantly in fields such as of international and comparative law.

More recently, in the third place, in addition to the study of law as a social science in the universities and the various efforts to enlarge the program of instruction in the law schools, the trend of current events has accentuated the need of comparative legal research. Widely extended contacts with foreign countries, resulting from the war and the resumption thereafter of international commerce with all quarters of the globe, have brought home to many of our citizens the value of acquaintance with foreign cultures, and specifically foreign laws. The cultural relations program of the Department of State and a great variety of related arrangements have facilitated exchange of students and instructors between the United States and other countries. It is not feasible

nor desirable for the law schools to remain aloof from a movement of such potential significance, which must inevitably present the question whether the system of legal education in the United States should be reoriented to meet the needs both of American law students, as prospective members of the profession from whom those who provide counsel in foreign, as well as in domestic affairs, are chiefly drawn, and also of the foreign students who attend our law schools. This presents a real opportunity to reconsider the system of legal education. The fact that funds have been made available to assist certain law schools in effecting much needed adjustments to meet these needs, notably by the Ford Foundation, is a source of real encouragement. While in the first instance such benefactions have stimulated the improvisation of special programs for foreign students, without essentially disturbing the professional curriculum, the fact that these involve some expensive duplication of effort and inferentially advertise the inadequacy of the regular program, invites consideration of the source of these maladjustments, namely, the curricular scheme itself. All this inspires hope that even more effective provision may be made to the end that the law taught in the law schools of the United States may become not merely a national common law of the United States but a system of justice such as, by its intrinsic comparative merits, may serve as a world law.

These things, the development of social science in the universities, the ferment of educational experimentation in the law schools, and the recent intensification of interest in international relations, relieve somewhat the stark scene of legal education in the United States. But these elements should not blind our eyes to the fact that the major problem remains—the problem presented by the admission to the bar each year of thousands of graduates of our law schools, the great majority of whom, judged by the standards here proposed, seem deficiently equipped in language, in their appreciation of the basic historic elements of our political and social culture, and even in the general principles that provide light in the wilderness of concrete legal phenomena. In other words, the institutional type of professional law school evolved in the United States, in which it is sought to combine technical preparation with academic pretensions, has measurably failed itself to provide the essential theoretical foundation for professional practice, or to ensure instead that this is secured elsewhere; indeed, as a result of the limitations of the method of instruction, even the

coverage of the technical subjects has become inadequate. It is to be inferred that the theory of the prevailing law school curriculum, namely to combine practical training with a dash of culture in a three-year program, has proved inadequate for the needs of the legal profession today.

VI

As an epilogue to this cursory review of legal education in the United States in relation to comparative legal research, the question naturally arises, what is to be done?

In response, it may be assumed that to any intrinsic reform of the professional curriculum as such, the typical reaction will be the same as of Joseph Story in 1829, of Theodore Dwight in 1876, of Roscoe Pound in 1917, and doubtless also of those promoting foreign student programs today, to proposals that subjects of general humanistic interest should be introduced in appreciable quantity into undergraduate legal study: These would be excellent in some other course, but in the regular curriculum—Never. In the present case, the argument of the box office is well-nigh impregnable—that is, on its level. This is simply that there is now a steady, increasing demand for the product; therefore, why change? Doubtless, the argument would be even stronger, if the market weakened; why take an unknown risk? This is of course specious; there have been two conspicuously successful models in the field of American legal education, both labelled Cambridge, Massachusetts, but both are now of venerable vintage. The first is the prebuggy model of Justice Story, and the second, equally narrow, but equipped with a more powerful technique of analysis, is the Langdell model of horse-and-buggy times. Even with the refinements that have been added since, the basic design has become inadequate for modern needs, and a new model is indicated.

Instead of evading the issue, therefore, the following theses, implied in the foregoing remarks, are proposed, two relating to prelegal education, two to the legal curriculum as such, and two to extracurricular possibilities:

I. Enough Latin to parse a passage from the *Digest* and a working knowledge of two foreign languages, e.g., sufficient to read Planiol or Enneccerus without discomfort, should be required for admission to law school and to practice.

Such preparation is a matter of course across the Atlantic, and corresponds to the typical prerequisites in this country for ad-

vanced work in various other sciences. Needless to say, such a requirement would involve analogous readjustment in prelegal education.

II. General knowledge of the humanities, especially history, philosophy, including logic and scientific method, economics, political and other relevant branches of social science, should also be required for admission to law school and to practice.

The extent of the preceding requirements should be carefully defined, and it is desirable that, instead of relying on college certificates alone, the law schools should give appropriate examinations to test the qualifications of candidates for admission in these respects.

III. Law school instruction should be predicated upon comparative orientation in the nature and evolution of legal institutions and ideas.

The function of a law school, as a department of a university, is to provide the requisite scientific and humanistic preparation, based upon on-going research, for public service in the legal profession. Emphasis upon such preparation is the only apparent solution for the critical dilemma of the American law school curriculum, the dilemma of superficiality or inadequacy. In law school, building upon the prelegal background outlined above, the foundation for subsequent specialization should be laid through an adequate synthesis of the more significant legal doctrines, policies, and trends, inculcating in the student the most valuable product of legal education—the ability to think like a lawyer. For this purpose, historical and theoretical instruction should be provided in at least the following subject matters:

1. The basic conceptions and policies of law, as exemplified by comparison of the common-law and civil-law systems.
2. Roman law, and the history of the common law and the civil law.
3. The principal legal and political theories.

Incidentally, this basic instruction need not require more than a semester's time.

IV. As a rule, the principal courses in particular branches of law should be presented on a comparative basis.

At present, the major professional courses are necessarily and typically treated on a demi-comparative basis, since they are de-

signed to present the national law of the United States. Their scope could be advantageously broadened without undue strain. Professor Gorla's recent study of contracts law,¹⁶ for example, indicates that the course in contracts would benefit by comparative treatment including civil-law as well as common-law matter, and the same is true of other subjects, among which conflict of laws and negotiable instruments may be instanced. The systematic inclusion of materials in such courses from the principal civil-law countries as well as from those in the British Commonwealth, would have two salutary effects: it would require more incisive analysis of legal problems, since their solution would be less dependent upon the accidents of legislation in a particular country, and it would thus promote instruction of more universal, and not merely local, value.

Moreover, it should be apparent that such treatment will provide a far more satisfactory basis for significant comparative research than the endeavor in a short course or two of so-called comparative law to sweep together curious fragments from the universe of legal history, in a vaudeville, ranging perhaps from Hammurabi to Nuremberg. In fact, efforts to teach comparative law as such, instead of utilizing comparison as a basic technique for dealing with legal problems, while doubtless better than nothing, are something of a menace to the development of serious comparative studies. Too frequently, the treatment must be superficial; it duplicates the subject matter of other courses; and it labels comparative law as extraneous to the central subjects of legal education. It is not to be expected that isolated courses of this nature, ostensibly devoted to a law that never was on land or sea, will significantly influence the legal scene. To do this, it needs more than another excrescent patch on the old curricular buggy.

V. Special efforts should be made to enlist the interest of members of the legal profession generally in comparative legal studies and to provide the necessary materials.

The most dismaying aspect of the scene as here envisaged, is a consequence of the fact that American legal education has been comparatively defective now for well over a century. While the experience in medicine suggests that extensive postgraduate education should be possible in other professions, if one may say so

¹⁶ *IL CONTRATTO. PROBLEMI FONDAMENTALI TRATTATI CON IL METODO COMPARATIVO E CASISTICO* (1955).

with all respect, it would not do to be too sanguine in the case of the bench and bar. For one thing, the value of science is less easily demonstrated in law than in medicine; in the medical case, improper treatment may well result in the patient's death or at least his continued disability, whereas in case of an unjust judgment or unenlightened conduct of litigation, the client pays, and pays without being able to prove that he has been bilked. Hence too, the very human tendency in proportion to one's success in later years to envelope the good old student days in a roseate halo of perfection, to assume that what one studied then was just right, forms a real psychological barrier to spending busy hours in learning what is new. Some such complacent assumption, it is understood, was the reason why even nominal instruction in comparative law was discontinued not so long since in an important law school by a most eminent, successful, and internationally-minded leader of the profession. The argument of professional success is peculiarly inaccessible; how prove, for example, that Lincoln would have been a better lawyer, if he had attended law school.

Hence, it is the more imperative to do whatever possible to enlist the interest of members of the profession and to enable them to keep abreast of the developments in law and legal science here and abroad, as their interest may develop. At least, without referring to other means, the necessary materials should be made available in English for those who are not in position themselves to specialize in the subject matter. Reference has above been made to the disparity in publications providing comparative legal information—treatises, monographs, translations, and the like—appearing in the United States, relative to its population, resources, and international interests. Here is a real challenge to American legal science. To meet a limited aspect of this obvious need, the *American Journal of Comparative Law* has made a propitious start, while the Association through which the leading American law schools and the American Foreign Law Association support the *Journal* offers a potential co-operative basis for additional undertakings that cannot be effectively assumed by individual scholars or institutions and for which the necessary funds may be made available. Yet this is but a beginning, and without discounting other worthy efforts, it is clear that far more in the preparation

and publication of relevant materials remains to be done to vitalize comparative legal research in the United States.

VI. Systematic attention should be given to the development of a corps of specialists in comparative legal research to staff the law schools.

For the program outlined, it is vital that there should be a sufficient continuing supply of qualified individuals from whom the law schools can be staffed. Indeed, such a corps of specialists is no less needed to provide expert counsel in government and business. To meet this need, in the first place, it would be immediately expedient to organize, perhaps in a co-operative institute of advanced legal studies, drawing upon the present limited pool of available talent, a program of specialized comparative training, for those who are now, or will soon be, available for appointment. At the same time, in the second place—and this in the long run will be indispensable—the recruitment practices of the law schools should be standardized, so as to ensure that their staffs have the requisite qualifications. In other words, there is a specific need to develop individuals who have special aptitude for advanced legal studies and to devise means, on the basis of demonstrated competence, for the appointment of the best of these to the law faculties.

This, it need scarcely be pointed out, is merely recognized practice in other branches of university education. At present, however, in the field of legal instruction, the problems of personnel are left in a degree to ad hoc executive decision, with the result that at times important posts go to alumni who have still to win their spurs in the world of legal scholarship. Such practices can scarcely be excused on the ground of emergency due to inadequate planning. It is all too obvious that, unless provision is made to have properly qualified candidates available and there is reasonable assurance that priority in appointment and promotion will be given to such as have demonstrated real intellectual and scientific attainments in advanced legal research, the existing situation, such as it is, will inevitably tend to perpetuate itself in both legal education and consequently in the profession at large. This delicate and crucial matter merits systematic consideration—there should be recognized and severe standards for appointment and promo-

tion; corresponding advanced training should be provided; and those who have shown the best qualifications, on an open competitive basis so far as possible, should be preferred.

VII

Whatever enthusiasm may be evoked by the foregoing program, outlining certain essential requirements for the study of law *sub specie universitatis*, or in other words as a comparative science, will doubtless be assailed by various questions and doubts, not to say quibbles. Just what is involved? the blueprint-minded will inquire. Who is to do all this research? Or even give such courses? It is not feasible here to elaborate all such detail, but a few general observations on ways and means may be made to anticipate some of the inevitable tergiversations.

First, no blueprint has been offered for a variety of reasons: such has been sufficiently sketched elsewhere;¹⁷ it is inexpedient for the present purpose to confuse the basic problem of American legal education with subordinate matters; and in the view here taken, the question of comparative legal research is as wide and deep as the whole universe of legal phenomena, a house of many mansions, as Pound once said of jurisprudence. Hence, application of the recommendations here outlined may appropriately vary according to local conditions.

Second, on the question of personnel, if the program is needed and requires qualifications not yet sufficiently satisfied by the present law school products, suitable steps should at once be taken to remedy the situation. For this purpose, apart from the possibility of enlisting the temporary assistance of visiting jurists, which has been too little explored, attention is drawn to the fact that the upheavals in various countries in recent years have brought to the United States a number of individuals trained in various branches of the civil law who are highly qualified to assist in the formation of such a specialized corps of future instructors and researchers as well as in the general courses proposed. It is one of the tragedies of our time that, while their colleagues in other sciences are readily transplanted, so many of these displaced and gifted jurists have not been effectively integrated into our system of legal education. One would not like to imagine that this

¹⁷ E.g., the writer's "Roman Law as the Basis of Comparative Law," in 2 LAW: A CENTURY OF PROGRESS, 1835-1935, 346 ff. (1937).

may be due in the slightest degree to latent xenophobia excused by the supposed particularity of American law. In any event, it does not make sense to refuse their services and at the same time to contend that the program outlined cannot be realized on the ground that there are too few qualified persons among the graduates of our own law schools.

Third, it is apparent that much can be done along the lines proposed without serious dislocation of the scheme of things as they are. For example, it is not suggested that the three-year term of law school study, which is apparently fixed in this scheme and becomes each year more obviously inadequate under present conditions, should be changed. Instead of making futile efforts to remedy this situation by robbing the colleges of a year or two of prelegal training or to add a year of graduate study for a minor fraction of the bar, if a leaf were taken out of the European experience or that of other sciences, so as to differentiate between the basic scientific instruction to be provided by the university and the practical training to be provided largely on an "in service" basis, the problem would be susceptible of solution. Law school instruction could be concentrated on the humanistic and theoretical aspects of law, suitable for university study; the period of practical training, which would be efficiently related to active practice, could be extended as needed without affecting the three-year term in the law school itself. This would of course reverse the present trend; instead of discarding or squeezing essential topics to make room for more and more technical detail in law school, attention to specialized matters of practice would be reduced or left to the postgraduate apprentice period, in order to ensure proper education in the fundamentals.

Fourth, to implement a program such as this, it would be helpful if means could be found to reduce somewhat the existing anarchy in legal education. At present, requirements of admission to law school and the arrangement and contents of the curriculum are more or less independently decided by each school typically *in camera*, subject of course to the general factors fixed by the colleges and the bar examiners. This is true even of a matter so vital as the prerequisites of faculty appointment, which in Europe are guaranteed by public competition or by rigorous preparation for the *agrégation* or its equivalent. A central authority to regulate such matters would doubtless infringe the radiation of the Tenth Amendment, but there is no inherent reason why common prob-

lems of this character should not be commonly considered and certain standards established, if not by the appropriate associations of the profession, at least by joint action of the leading institutions. If this were done, it would alleviate somewhat the confusion and delays that in the present situation automatically clog reform.

Fifth, whether or not it may be possible to introduce an adequate program of comparative legal research in the professional law schools in our time—and the chances are always that arguments for existing interests will prevail until some crisis supervenes—it would be highly expedient, in this rich and phenomenally prosperous country, with its far-flung international interests, that there should be at least one single center adequately equipped and devoted to the scientific study of law, including comparative legal research, as here envisaged. From this point of view, the suspension of the Institute at Baltimore was a real misfortune. It is not to be expected that successful going institutions will be easily reformed or that schools of and for practitioners readily be transmuted into centers of advanced legal study. If an allusion may be made again to the experience in medical education, it will be recalled that the most important step in the medical history of the United States was the decision of the Rockefeller group to establish the Rockefeller Institute for Medical Research and at the same time to develop the medical school at The Johns Hopkins University as a pilot institution. An analogous institutionalization of humanistic legal studies, with relative freedom from inherited professional prepossessions, would inevitably accelerate the needed reform of our scheme of legal education.

VIII

In sum, the call that comes from the scene of American legal education is clear. The time is overdue to justify the pretensions of law as a university discipline. This means quite simply that the study of law should be conducted on the objective level of rational scientific inquiry, including notably comparative legal research. It has been shown that such a reform, focussing instruction and research in the law schools upon the basic criteria of justice, rather than upon casuistic derivation and technical application of positive law in particular cases, will serve to resolve the existing dilemma of the law schools, enabling them to give more adequate preparation in the fundamentals and at the same time providing more scope for specialized training in practice thereafter; that this will

foster comparative and other types of legal research, much needed to improve the knowledge of law; and that in fine it will contribute to ensure that the profession which above all others is responsible for the guidance of international, political, economic, and social affairs, should be truly learned.

It is also clear that such advancement of legal study as a university discipline concerns not merely the law schools but also the public at large, and specifically the universities which have endowed them with the mantle of scientific prestige. It behooves the universities to require that what is taught in law school is worthy of their name. It was stultifying, as Holmes once observed, to teach law as a blind tradition; but it is no less reprehensible to treat law as a relative concatenation of imperatives imposed by official authority, or as merely a technique, a craft of clever tricks of the trade, without consideration of the human effects and without objective research to determine the justice of what is imposed. For law by its very nature involves interference with human liberty, and this can be justified only by demonstrated need. What, for example, would be said of a surgeon who was accustomed to operate on a hunch, without careful diagnosis based upon the results of the best available research? And yet one of the most brilliant figures on the bench today once described the judicial process in such terms.¹⁸ As this will suggest, the question of American legal education is of more than professional concern—it involves issues of deep public and moral interest.

In this context, the contemporary trend of legal speculation in a number of countries is significant. It evidences the profound need of modern times for a rational or scientific basis to evaluate the plethora of laws and orders that carry the cachet of authority. As Chief Justice Warren has currently observed, what all legal systems most need today is "a vital concern for the ideal of justice."¹⁹ Even in Germany, the Mecca of legal relativism, it has finally been observed by recent thinkers such as Radbruch and Coing, after the final *Goetterdaemmerung* of National Socialism at Berlin, that there are limits, social and moral, to the efficacy of law, conceived as the mandate of organized power. This retreat from formal jurisprudence and renewed interest in the natural and rational condi-

¹⁸ Hutcheson, "The Judgment Intuitive: The Function of the 'Hunch' in Judicial Decision," 14 CORN. L.Q. 274 (1929).

¹⁹ "The Law and the Future," 52 FORTUNE 106 at 229 (Nov. 1955).

tions of the legal order undoubtedly reflects a deep discontent with what government has done or failed to do in recent years. At the same time, it points to what Raymond Fosdick and others have remarked a generation since: the relative backwardness of the humanistic sciences as compared with natural science and technology. This is a condition for which the university law schools cannot disclaim responsibility. For, so long as there is crime, poverty, or injustice, or the scourge of war hangs like the sword of Damocles over mankind, it cannot be assumed that technical proficiency and material progress alone will resolve human needs. In this situation, law occupies a strategic place, as the chief instrument by which the peace and welfare of mankind is systematically secured. This was understood by the great Roman jurists, who in Savigny's judgment most perfectly joined theory and practice; law, as elegantly defined by Celsus, is the *ars boni et aequi*, the realization of justice in human affairs. Here, in the last analysis, is the reason why the study of law in a university must be more than indoctrination in technique; its distinctive object is legal science and research as the rational means to maintain and improve the legal order which is the primary condition of modern civilization and of all that we hold most dear.