Redlich, Josef

The common law and the case method in American university law schools

a report to the Carnegie Foundation for the Advancement of Teaching

New York
1914

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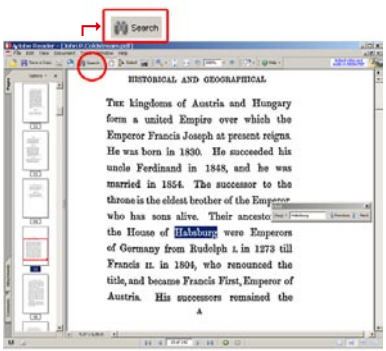

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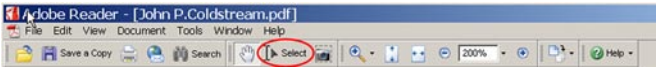

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THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING

THE CASE METHOD IN AMERICAN LAW SCHOOLS

BULLETIN NUMBER EIGHT

1914

Herrn Hofr. Dr. Josef Hirsch
in alter kollegialer Freundschaft
mit herzlichen Grüßen!

Wien 21. 4. 915

Josef Redlich

THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS

A REPORT TO THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING

BY

PROFESSOR DR. JOSEF REDLICH

OF THE FACULTY OF LAW AND POLITICAL SCIENCE IN THE UNIVERSITY OF VIENNA

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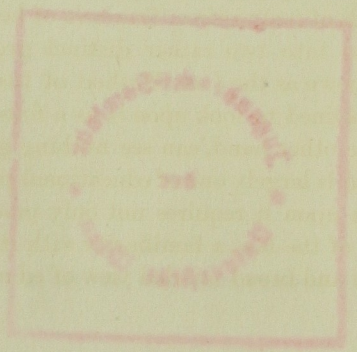
CONTENTS



PREFACE

THE Carnegie Foundation for the Advancement of Teaching administers two endowments. The larger of these is devoted to the payment of pensions to teachers in colleges and universities. The income from the second endowment is expended, under the terms of the gift, in the study of educational questions. This department of the Foundation's work is known as the Division of Educational Enquiry. It has been the effort of the trustees and of the officers of the Foundation to take up through this division, and by means of this endowment, the study of those larger educational questions which can be best approached from a point of view free from institutional and local interests.

Amongst the enquiries which have been prosecuted is a Study of Medical Education. Two bulletins have been issued, one dealing with medical education in the United States and Canada, the other with medical education in Europe. The second of these bulletins was issued in 1912. A report on Education in Vermont was published in 1914. Studies on the Engineering Curriculum and on the Training of Teachers are in progress.

In 1913 the trustees approved a plan for the Study of Legal Education in the United States, involving not only an examination of existing law schools, but also of methods of instruction, of bar examinations, and of the relation of these matters to the quality of legal practice. The general conduct of this enquiry was entrusted to Mr. Alfred Z. Reed, who began his work in the spring of 1913. The task has proved a difficult and arduous one, involving as it does not only a study of the law schools of the whole country, but also of the methods of bar examinations in forty-nine jurisdictions and of the relations of the various methods of legal training to the larger problems involved in the practice of the law. Excellent progress has been made in this work. It has been carried on with the coöperation of many able teachers of law in America and with the advice of leading practitioners of law; but the amount of material to be dealt with is so enormous and so complex that a year and a half will probably elapse before a final report can be presented.

At the outset of this study, one question quickly presented itself which involved fundamental ideas as to methods of instruction. Teachers of law in the United States were, broadly speaking, divided into two rather distinct groups in their attitude toward what has come to be known as the Case Method of Instruction. The extreme advocates of this system are inclined to look upon it as a finished and perfect thing. The extreme opponents, on the other hand, can see nothing good in this method of teaching. The question involved is largely one of educational philosophy and method. To give an intelligent opinion upon it requires not only practical teaching experience, but also wide knowledge of the law, a familiarity with its practical administration, and, above all, a scholarly and broad-minded view of education and its function in civilization.

It seemed clear to the officers of the Carnegie Foundation that it would be difficult to obtain from any teacher of law or any practitioner of law in America a thoroughly sound, fair-minded, and scholarly report upon this question. We therefore turned to England and the Continent to see if some one could be found who would take up this enquiry in a sympathetic spirit, and who could bring to it the requisite educational and legal discrimination.

After very careful consideration Dr. Josef Redlich, Professor of Law in the University of Vienna, and member for some years of the Austrian Parliament, was invited by the trustees to make this study.

Dr. Redlich is well known to English readers as the author of two books — *Local Government in England*, published in 1904; and *The Procedure of the House of Commons*, published in 1907. By his training as a scholar, as a teacher of law, as a practical legislator, no less than by his knowledge of the English common law and of the English language, Professor Redlich was admirably prepared to undertake this study. He had made already a somewhat extended visit to America, in which he had visited some of the law schools. The trustees of the Foundation felt themselves fortunate that a man of these qualities was willing to take up the study of this question in so devoted and open-minded a spirit.

Professor Redlich came to America in October, 1913, and spent some two months in the country, in the course of which he attended class exercises in ten law schools. This group included six of the eight largest law schools in the country, schools which in respect to numbers, at least, stand in a class by themselves. Of the other schools visited, three were of approximately half this size, and one was a much smaller institution. A majority of these institutions, large and small, employed the case system, at least to a great extent. Four, however, did not employ the case system at all; and in these four the methods of instruction varied widely and were representative of those commonly in use. Finally, evening schools as well as day-time classes were visited by him, schools which were in some instances departments of universities, sometimes only loosely connected with a university, and, in other instances, schools entirely independent of any college or university connection. Every effort was made, in other words, to enable him to visit a thoroughly representative list of law schools, the grounds of selection being completely objective, qualified only by the exigencies of time and of geographical distribution.

In the course of these visits in different parts of the country, Professor Redlich, as he explains in his paper, was brought into contact not only with students and teachers of law, but also with many men of eminence in the legal profession. He took counsel with a large number of leading judges and lawyers with regard to the varied problems of American legal education. Perhaps more than any other foreign visitor who has come to our institutions, he was by this process enabled to apprehend the different points of view of American teachers of the law and was put in a position to survey our situation sympathetically and yet from an impartial standpoint.

The outcome of this study is the report which is here presented. It is not too much to say that this paper is worthy of the scholarship and high legal position of its author. His impartial attitude appears throughout the report. The discriminating analysis which he there gives, both from the standpoint of the teacher and of the lawyer, cannot fail to be of the highest value to serious students of American legal education. It is presented by the Carnegie Foundation as a paper preliminary to the general report on legal education now being prepared, in the hope that it will receive a careful and impartial study.

The report cannot be judged from any abstract. It must be read in its entirety to appreciate both the philosophical reach of its treatment and the attention to legal technique and to the practical administration of the law which are always included in its point of view.

Professor Redlich makes clear that the case method cannot be properly appraised by itself, but must be considered in connection with the entire system of legal education in America, and, indeed, with an understanding of American politics and social ideals. Within this broad field he reaches conclusions which are almost startling in their freshness and originality. Thus it will doubtless be something of a surprise to some American lawyers to read that the case method schools are not, in the opinion of the author, too academic, too "transcendental," as they are often charged with being, but that on the contrary the success of the case method in training practitioners is really its most vigorous quality. Moreover, Professor Redlich finds that the Langdell method is not merely a very practical one in its results, but that it is essentially empirical, "casuistic,"—to employ an old word in a somewhat unfamiliar sense; but there is no reproach in Professor Redlich's use of these terms, since he considers the case method none the less strictly scientific. The grounds upon which he considers it scientific are not, however, those usually adduced; and his high commendation of the method does not prevent him from indicating measures which, in his judgment, are essential in order to make it fully effective.

Finally, there is food for thought to all interested in this subject in the fact that a man who makes so much of science as Professor Redlich does, and who finds so little of science outside of the case method school, can at the same time find other schools successfully pursuing a quite different aim, and can feel that this aim also is not without warrant. An attitude like this helps to take us out of our ordinary formulas and out of the contentious tendency to argue that because such and such things are true, such and such other things cannot possibly be true. In the law no less than in other fields of education there are few specifics. To have our institutions pictured in this bold and vigorous perspective cannot fail to be of the highest value.

The following extracts indicate in a general way Professor Redlich's conclusions as to the strength and the weakness of the case method of instruction:[1]

[1] Pages 39, 41, 45.

"As the method was developed, it laid the main emphasis upon precisely that aspect of the training which the older text-book school entirely neglected: the training of the student in intellectual independence, in individual thinking, in digging out the principles through penetrating analysis of the material found within separate cases: material which contains, all mixed in with one another, both the facts, as life creates them, which generate the law, and at the same time rules of the law itself, component parts of the general system. In the fact that, as has been said before, it has actually accomplished this purpose, lies the great success of the case method. For it really teaches the pupil to think in the way that any practical lawyer — whether dealing with written or with unwritten law — ought to and has to think. It prepares the student in precisely the way which, in a country of case law, leads to full powers of legal understanding and legal acumen; that is to say, by making the law pupil familiar with the law through incessant practice in the analysis of law cases, where the concepts, principles, and rules of Anglo-American law are recorded not as dry abstractions but as cardinal realities in the inexhaustibly rich, ceaselessly fluctuating social and economic life of man.

"Thus in the modern American law school professional practice is preceded by a genuine course of study, the methods of which are perfectly adapted to the nature of the common law. The average student at Harvard or Columbia who starts with the requisite general education and capacity, who takes full advantage of his three years' course, and who proves this by his success in the yearly written examinations, enters finally the practice of the law office — and a law office that is busy, too, with difficult legal questions — better prepared than a graduate of any other school in America, England, or on the European continent. In his practice he has only to continue to exercise and to develop the manner of thinking that he has already brought to a very high degree of perfection in the school. By the side of this, what he has still to learn in his law office (especially in the fields of procedure and of written forms in general) is of very subordinate importance; although in this connection it must of course again be emphasized that this knowledge can never be gained in any school, anywhere, any more than any law school of Europe or America can teach the future lawyer the ethics of the legal profession or the peculiar instinct (*Takt*) of the successful lawyer or judge. In this calling, as in every other, only the direct atmosphere of daily professional life can furnish to the beginner certain experiences and qualities which are of great practical importance. But apart from this the American student gains in the modern law school of his country all the practical knowledge of the law that any school can give to a future attorney or judge, in unparalleled manner."

"Herein we find the strength, but herein also the weaknesses, of the case method. These weaknesses, to sum up the writer's opinion in a word, lie on the scientific side of American legal instruction in its present form. In this connection we may distinguish between, first, the influence exerted by the case method upon the scientific comprehension of law by the students, that is to say, upon legal instruction proper; and secondly, its reaction upon the scientific elaboration of law in general, that important function of law faculties which we must consider apart from their purely pedagogic aims. . . . It is characteristic of the case method that where it has thoroughly established itself, legal education has assumed the form of instruction almost exclusively through analysis of separate cases. The result

of this is that the students never obtain a general picture of the law as a whole, not even a picture which includes only its main features. This is, in my opinion, however, just as important for the study of Anglo-American law as for the codified continental systems, and is a task which should also be accomplished by the law courses in the universities. To this end, the following seems to me above all things requisite:

"First, as an introduction to the entire curriculum, care should be taken to introduce to the students, in elementary fashion, the fundamental concepts and legal ideas that are common to all divisions of the common law. Or, to express it in a word current in European pedagogy, the beginners in American law schools should be given a legal *Propädeutik*, or preparatory course, which in a simple yet scientific manner shall set forth the elements of the common law; shall furnish, that is to say, a comprehensive view of the permanent underlying concepts, forms, and principles, not forgetting the elementary postulates of law and legal relationships in general. The more rigorously *casuistic* the case method of instruction which then follows necessarily has to be, the more important it seems to me it is to make clear to the students at the very beginning certain fundamental facts and guideposts of the law which are removed from all casuistry and theoretical controversy. Only in this way will their future studies rest upon a solid and scientifically grounded foundation.

"Classical Roman law at its height developed, as is well known, a special literary type, the *Institutes*. This was a comprehensive presentation of the elements of law, intended to introduce and facilitate the regular course of study, and the fact that Justinian retained it as an introduction to his code shows what importance was attached to it. . . .

"Similarly, in my opinion, in American university law schools the students ought to be given an introductory lecture course, which should present, so to speak, 'Institutes' of the common law. Every department into which the American law is divided, whether as common law or equity, employs certain common elementary ideas and fundamental legal concepts which the student ought to be made to understand before he is introduced into the difficult analysis of cases. Concepts such as choses in action, person and property within the meaning of the law, complaint and plea, title and stipulation, liability and surety, good faith and fraud, should, in these introductory lectures, be given to American students in connection with a system of the law, even although this should include only the general fundamental features. They should not, as usually occurs to-day, come to the students unsystematically and unscientifically, as scraps of knowledge more or less assimilated out of law dictionaries and indiscriminate reading of textbooks."

"It seems to me very advisable to add also at the end of the course lectures which shall furnish the American law student once more, before he steps out directly into practical legal life, a certain general summing up and survey of the law. If the student has mastered all essential institutions and doctrines of the common law during his three years' course, through the analysis of countless cases, he will certainly now be sufficiently matured to undertake, with full understanding, two important tasks. First, he should be able to grasp the general scientific theory of the law as one of the great dominating phenomena of human civilization and human thought. Secondly, he should now be fully prepared to cast to great

advantage a comparative glance at that second mighty system of law which has shaped the history of humanity, namely the Roman law.

"The first mentioned task corresponds pretty closely to what has for a long time been designated by English and American teachers of law by the term 'Jurisprudence,' and is taught as such in several universities. By this is understood, broadly speaking, a presentation of the leading fundamental principles that are more or less common to the modern law of every civilized people, considered both as products of a developing positive law and as influenced and perfected by the theories and ideas of legal philosophy. Historical, philosophical, and sociological aspects of the law have here to be bound together in harmony with one another, in order to help erect a theory of the fundamental principles of law which shall rest upon the surest possible foundations. The concept of law in general, the concept of sovereignty, of law as an objective norm on the one side, as subjective authority on the other; the various classifications and divisions of the law — public, private, and international; the various manifestations of the law — customary, written, and judge-made; in connection with this, moreover, a general theory of the sources of law; further, the philosophic basis of the great legal institutions of possession, of property, of inheritance, of contract, and of damages; in connection with this the theory of the will in law; and finally the great basic forms and fundamental principles of the safeguard of law, of procedure; these, and many other fundamental theoretical problems besides, could be presented to the mature students in such a course of lectures, under the head of Jurisprudence, to their great advantage.

"The second course of lectures, on the other hand, those dealing with Roman law, would also, of course, be primarily so planned as to bring the outlines of this system of law into comparison with the common law, already familiar to American students at this stage. The analogies and the differences which are brought out sharply by the comparative method would go far to make the features and characteristics of the native law still clearer to the students, and to deepen their understanding of their own law through their insight into that of other peoples."

Briefly stated, Professor Redlich estimates the case method of teaching law to be the practical and efficient method by which the student learns to do independent thinking, by which he is brought into actual touch with the living questions of the law. On the other hand, he argues that before he enters upon this method of study, he ought to have a certain foundation upon which to build, which should give him a perspective and should acquaint him with the elementary ideas and fundamental concepts common to all branches of the law — in some such way as the student of engineering first studies mathematics and physics in order to be familiar with those physical concepts which underlie the practice of engineering, or the student of medicine takes a pre-medical course in chemistry and biology in order that he may have in his grasp the fundamental chemical and biological concepts which underlie medical thinking. Similarly, Professor Redlich advocates at the end of the term of study an effort to give to the student, whose powers of thinking have been sharpened by the case method of instruction, a comprehensive view of the law as a whole and of its relation to the

administration of justice. In order to secure time for both these additions to the curriculum, he advocates a lengthening of the course to four years.

Those interested in this bulletin may obtain it by application to the Carnegie Foundation.

Following this introductory bulletin there will be published later a description of the systems of admission to the bar in force in the several states, and a comprehensive study of existing law schools.

HENRY S. PRITCHETT,
President of the Carnegie Foundation.

December, 1914.

THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS

INTRODUCTORY

THE following report upon the use of officially reported law cases as the basis of legal instruction has been prepared at the request of the Carnegie Foundation for the Advancement of Teaching. In accepting this honor, and in venturing to set forth my views in regard to this contemporary method, now almost exclusively employed in the leading law schools of the United States, I am well aware that the task presents extraordinary difficulties to a foreign lawyer.

These difficulties originate, of course, in the complete dissimilarity between the law of England and America and that of continental Europe. An additional obstacle is to be found in the fact that the general traditions and the organization of legal education in the United States are quite peculiar to this country and differ not only from the corresponding institutions of France, Germany, and Austria, but from those of England as well. It is a further and a very appreciable handicap to a citizen of continental Europe who attempts to appraise the American system of legal education, that he approaches the problem more or less unfamiliar with American legal life as a whole as well as with its separate organs.

Any one who is asked to pass judgment upon the value of a method of legal instruction will of course feel the need at the very outset of gaining a working insight into the living forces which underlie the actual legal practice and legal terminology of the country concerned. He must form an idea of the part played in legal life by the judge and by the attorney, by the individual parties who are seeking justice and by the state, if he is to render even a provisional judgment as to the extent to which the prevailing methods of legal education fulfil their purpose. Moreover, in the narrower field of legal education proper the foreign critic has the not inconsiderable task of appraising to some extent the character of the law students themselves, the general and special preparation they have had before entering the law school, and in addition to all this the ideas current among students and in the community at large as to the nature and purpose of legal education. In this connection, too, he must become familiar with the actual conditions under which the teachers in the law schools approach their work, and with the point of view held more or less generally by the professorial body toward the problem of legal education in America.

All of these difficulties were clear to me at the outset. What persuaded me more than anything else, however, that I might conscientiously accept the honor of undertaking the task was the conviction that, in spite of dissimilarity in the law itself and the peculiarities of the American system of education, nevertheless there exists between Europe and the United States, in their legal thought and in their efforts toward educational improvement, a very close and even intimate relationship; a relationship which makes it possible for the continental jurist to form a judgment as to the inherent efficiency of the American system of legal education and also, if he disregards certain purely technical features, as to the extent to which that system fosters legal science.

I may also point out another circumstance which influenced my decision, namely, the fact that my scientific study of English law and institutions, extending over a period of many years, rendered me not an entire stranger in this field, at least with respect to the main features of the common law, and thus facilitated my approach to the principles of American law. I may say, too, that during my extended visit to the United States in 1910 I came somewhat closely into contact with American institutions in general, and particularly with those pertaining to the legal profession, and that in the meantime I have kept in close touch with the leading tendencies of American universities and law schools. Nevertheless, in spite of the fact that these circumstances have been of material assistance to me in the specific study and criticism of the methods of American legal education, I wish this to be clearly understood, that I am entirely conscious to how great an extent the value of my studies and observations must be limited by the difficulties indicated above. With this in mind, then, I shall have to ask forbearance and considerate judgment in those cases where the American critic may discover gaps in my observations or error in my conclusions traceable to these difficulties.

My task as I conceived it was to endeavor, in the comparatively short time at my disposal, to gain at first hand as varied and vivid impressions of American legal education as possible. For this purpose I visited ten law schools, among these a majority of those generally ranked as the best in the country, and in each of these institutions I attended several lectures or practical exercises. I was enabled to enter into intimate relations with the law schools and, thanks to the exceedingly hospitable reception tendered me everywhere, was able to get into direct touch with the professors and instructors and to profit by a lively and extremely suggestive exchange of views in all these schools, and often to enjoy exhaustive discussions. Further, by talking to the students I endeavored to gain an insight into their work and methods of study; I was allowed to examine their note-books; and of course I familiarized myself so far as possible with the printed means of instruction. Collections of examination papers and announcements of courses of many different schools were also placed at my disposal.

It was also of the utmost value to me that, by the good offices of my American friends, I was enabled to meet many men of prominence in the legal profession of America, and to converse with leading judges and lawyers in regard to the varied problems of American legal education. The number of different personalities with whom I thus came into contact was sufficient to insure the discussion of the problem under consideration from the most diverse political and professional points of view. For this reason the impression made upon me was all the stronger when, upon certain points, I found complete or almost complete unanimity.

Finally, in addition to the material gained by first-hand observation and experience, there should be mentioned the assistance offered me by the vigorous and quite recent development of a very notable literature dealing with the condition of American legal life and with the reciprocal relations of courts, lawyers, and law schools.

The criticisms and views of theorists and practitioners, especially as they find expression in the proceedings of the American Bar Association and the Association of American Law Schools, are of the greatest interest and importance for an understanding of the problems of American legal education. These volumes show an increasing appreciation on the part of American judges and lawyers, and a more extensive and deeper comprehension on the part of practitioners, of the questions and principles of legal education and legal training in general. The papers and treatises also of leading professors in the law schools of the country have been of particular value to me. The undoubtedly increasing influence that American university professors of law exert upon the appreciation and treatment of the fundamental problems of the legal profession in America, and the recognized importance of these professors in the development of the entire legal system, should be noted as constituting one of the most encouraging features of American public life.[1]

Before presenting the conclusions which I have drawn from the experience and the data outlined above, let me note that the essential problem before me has been to pass judgment upon the nature and success of the so-called case method. It will of course be understood that in rendering such a judgment other methods of legal education cannot be completely disregarded. Indeed, a German lawyer, whose own training was received chiefly through lectures and text-books, could hardly avoid drawing certain comparisons. It seemed to me, however, that the first task to be accomplished was to obtain the most exact conception possible of the nature of the case method and to make an objective examination of its effect. Accordingly I endeavored at the outset to inform myself as completely as possible as to the historical circumstances under which the case method originated and developed, and also as to those facts which are important for the understanding of American legal education as a whole. In this connection the most important point to bear in mind is that although, from the point of view of European educational history, special law schools, as independent institutions of learning, came into existence in the United States comparatively late, nevertheless, during the last third of the nineteenth century they developed to an extraordinary degree. Indeed, the existing American system of legal education has hardly a rival worth mentioning in the entire great jurisdiction of the English

[1] In addition to the works cited below (page 9) relating more particularly to the life and work of Langdell, see also the following treatises:

H. Waentig: "Die amerikanischen Law Schools und die Reform des Rechtsunterrichtes in Preussen," in Schmoller's *Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft*, 1902, pages 1439 *et seq.* (This very valuable essay is the only description and criticism of the American universities known to me which discusses in detail law schools and their methods of instruction. It is to be noted that Professor Waentig not only commends most emphatically the excellence of Langdell's system of legal education, but also sets up Harvard and Columbia as models for the legal faculties of Germany.)

Roscoe Pound: *The Evolution of Legal Education, an Inaugural Lecture*, Lincoln (Neb.), 1903.

A. V. Dicey: "The Teaching of English Law at Harvard," 13 *Harvard Law Review* (1900) 422-440.

Harlan F. Stone: "The Function of the American University Law School," paper read before the Association of American Law Schools, 36 *Rep. Am. Bar Ass.* (1911) 768.

Henry M. Bates: "Some Problems in Legal Education in a Period of Transition in Law," paper read before the Association of American Law Schools, 38 *Rep. Am. Bar Ass.* (1913) 890.

W. Harrison Moore: "Legal Education in the United States," 13 n.s. *Journal of the Society of Comparative Legislation*, 207 *et seq.*

common law. Neither in England itself, nor in the great English colonies, has systematic instruction in law achieved a development so intensive and at the same time so comprehensive as in the United States.

EARLY METHODS OF LEGAL INSTRUCTION

THE LAW OFFICE; LECTURE AND TEXT-BOOK SCHOOLS

The prevailing method of legal instruction in America, up to the middle of the last century, was the purely practical training of young law students in the office of a judge or practising attorney; and even at the present time, in spite of the development of so many law schools, a great number of lawyers in the United States still receive their training entirely or almost entirely in the same manner. Admission to the bar still continues—in sharp distinction from German and Austrian requirements—to have no necessary connection with university work. If any general education is required, it is never more than graduation from a high school. In order to prove that one possesses sufficient technical knowledge of the law to entitle one to be admitted into practice, it is sufficient to pass a bar examination conducted by a court or by a board acting under judicial direction. The knowledge necessary to pass this examination may be picked up wherever the candidate thinks he can find it.

Theoretical legal education in America clearly had its origin in these purely practical needs and considerations. The oldest American law school, that of Judge Reeve in Litchfield, Connecticut, was originally established towards the end of the eighteenth century on a very small scale, and was exclusively a creation of practitioners. For several decades young candidates for the legal calling received their training here through lectures and instruction by Reeve and his assistants, always practising lawyers and judges. This oldest American law school was, of course, a purely private undertaking. In time, however, there arose a number of competitors, and law courses had also been introduced here and there in conjunction with existing colleges. Among these was Harvard College, whose first professorship of law dates from 1816, but it was only after the appointment of Story in 1830 that this school attained its position of great and rapidly increasing significance for the development of legal instruction in the United States.[1]

All the older American law schools started by being so-called lecture schools. *Blackstone's Commentaries*, which, as we know, were used for purposes of instruction earlier and with far more lasting effect in America than in England,[2] formed the almost exclusive basis of the work. Within a generation there developed very naturally out of these same lectures a literature of text-books; and straightway the second method of American legal education in order of time—the text-book method—came into being. The essential feature of this was, and still is, that, from recitation period

[1] Cf. J. B. Ames: "The Vocation of a Law Professor," in his *Lectures on Legal History*, Cambridge, 1913, pages 354 *et seq.* Ames points out here that the first chair of jurisprudence was established under the influence of Thomas Jefferson at the famous old College of William and Mary, in Virginia, 1779, and that John Marshall heard the lectures of Chancellor Wythe, the first professor, there. How little these early law professorships or schools amounted to, however, is shown by the fact that in the year 1833, when the school at Litchfield was closed, there were scarcely 150 students in the 7 university schools then existing. In 1850 there were 14 schools; in 1860, 23, with 1000 students altogether; these schools, with a single exception, all forming a department of a university. In the year 1901 Ames counted 105 law schools, with 13,000 students, and at present there are more than 150 schools, with over 20,000 students.

[2] *Vide infra*, page 62, note.

to recitation period, the students are assigned a specified portion of a regulation text-book to study, and for the most part to memorize; this is then explained by the teacher and recited on at the next period. In this method of instruction one part of the hour is occupied with the more or less purely mechanical testing of the knowledge learned by the students, the so-called "quizzing." Frequently also, in such schools, particularly where the number of students is large, the instruction was, and still is, supplemented by the appointment of special assistants — quiz masters — who conduct this part of the instruction in special hours.

The two methods which I have thus briefly described — the method of instruction by lectures as it originated in the old lecture school and the text-book method — were in the newer schools, and are at present almost always, combined, and are often handled very effectively. Even to-day legal education in the United States is very commonly imparted by these methods, sometimes without change from the old ways, sometimes again with all sorts of improvements in detail. I will return later to the character of instruction in these text-book schools. Suffice it to note here in passing that both in the old lecture law school, now considered almost extinct, and in the later text-book method especially associated with the activity of Dwight in New York, the teaching of law possesses throughout a dogmatic character. The law is organized in definite courses corresponding to its separate main heads, and is presented in such a way that the students are introduced more or less systematically to the separate great legal institutions and are given a methodical and comprehensive survey of the most essential subjects and principles of common law and equity. In the exposition the good representatives of this method include old and new statutory rules and refer to those judicial decisions which are of especial importance from the point of view of the principle contained. Sometimes a large number of cases are thus cited, but always in a purely illustrative way, for the purpose of elucidating and furnishing a better understanding of the dogmas and principles of the law.

THESE two older forms of the American law school show, it may be here remarked, the closest relationship with the methods of legal education that had long been in use on the European continent. Following these appeared that mode of instruction which, historically considered, is the third and most recent in American law, the so-called case method. Whatever judgment may be passed upon the significance and value of this method, one thing is clear at the outset even to the continental observer: it is an entirely original creation of the American mind in the realm of law, and must be comprehended and appraised as such. It is indeed particularly noteworthy that this new creation of instruction in the common law sprang from the thought and individual characteristics of a single man, Christopher C. Langdell, who, as the originator of this method, became the reformer of the Harvard Law School, and in this way of American university law schools in general.[1]

In trying to explain the essence of Langdell's method, one is involuntarily reminded of the proposition that all great discoveries are, at bottom, extremely simple; that once these innovations have been pushed through, they are regarded as almost self-evident. Great as was the opposition and antagonism which Langdell's method of legal instruction encountered at the outset, it has now for some time been just as warmly defended by many American lawyers, as the only conceivable and successful method of teaching English law. Before I come to pass judgment upon this view, which prominent American lawyers have often expressed to me, I must necessarily first present with the requisite thoroughness the essential features of the method.

No better account of what Langdell sought and to a great extent himself accomplished, when he created his method of instruction, can be given than in the works of Langdell himself. In the preface to the first edition of the first book planned by him as an aid to the new method, namely in *A Selection of Cases on the Law of Contracts* (1871), he has analyzed in words, simple but weighty, his view of how the English common law must be taught. Since, curiously enough, Langdell seems never after-

[1] For Langdell's career and significance cf. Ames's essay, "Christopher Columbus Langdell," in *Lectures on Legal History*, pages 467 *et seq.* (reprinted from Lewis, *Great American Lawyers*, Philadelphia, 1909, vol. viii, pp. 463 *et seq.*); also Charles Warren, *History of the Harvard Law School and of Early Legal Conditions in America*, New York, 1908, vol. ii. Warren in a series of chapters gives an account of the method of teaching developed by Langdell and his pupils at Harvard, and adds a great number of utterances of American law professors concerning this innovation.

Valuable material bearing upon this problem, and a good review of the varying views held by practising lawyers and law teachers, is found in the *Reports of the American Bar Association* for the last two decades. These volumes include the reports of the Committee on Legal Education and Admission to the Bar, the papers and proceedings of the Association's Section of Legal Education, and the papers and proceedings of the independent Association of American Law Schools. See especially the papers read before the Section in 1894 by Woodrow Wilson, Edmund Wetmore, and William A. Keener, with the resulting debate, 17 *Rep. Am. Bar Ass.* (1894) 373-387, 439-490. Also in 1903 an exhaustive discussion took place in the Association of American Law Schools following a paper by Simeon E. Baldwin, 26 *Rep. Am. Bar Ass.* (1903) 659-670, 673-690; and compare also the *Reports* for 1906, vol. ii.

See also obituary and appreciations of Langdell in 20 *Harv. Law Rev.* (1906) 1-13, 56, and an article by William Schofield in 16 n. s. *American Law Register* (1906), quoted by Warren. The *Harvard Law Review* contains numerous articles dealing with the problem of methods of instruction in law; note, in addition to Dicey's article, already cited (page 5), Baldwin's "Teaching Law by Cases," in volume xiv (1900), pp. 258-261. See also contributions by Keener, Edward J. Phelps, and John C. Gray to the first volume of the *Yale Law Journal* (1892), pages 139-161, comparing as to this last 22 *Am. Law Rev.* (1888) 756-764; and a final article by Judge Baldwin, "The Study of Elementary Law, the Proper Beginning of a Legal Education," in 13 *Yale Law Journal* (1903) 1-15.

wards to have expressed himself concerning the entire question of method, and never himself entered into the lively battle of words that for two decades waged round his innovation, it appears to me particularly important to set down here in its entirety Langdell's analysis of his method as he expounded it in 1871 in the introduction in question. He says:

"I cannot better explain the design of this volume than by stating the circumstances which led me to undertake its preparation.

"I entered upon the duties of my present position, a year and a half ago, with a settled conviction that law could only be taught or learned effectively by means of cases in some form. I had entertained such an opinion ever since I knew anything of the nature of law or of legal study; but it was chiefly through my experience as a learner that it was first formed, as well as subsequently strengthened and confirmed. Of teaching indeed, as a business, I was entirely without experience; nor had I given much consideration to that subject, except so far as proper methods of teaching are involved in proper methods of study.

"Now, however, I was called upon to consider directly the subject of teaching, not theoretically but practically, in connection with a large school, with its more or less complicated organization, its daily routine, and daily duties. I was expected to take a large class of pupils, meet them regularly from day to day, and give them systematic instruction in such branches of law as had been assigned to me. To accomplish this successfully, it was necessary, first, that the efforts of the pupils should go hand in hand with mine, that is, that they should study with direct reference to my instruction; secondly, that the study thus required of them should be of the kind from which they might reap the greatest and most lasting benefit; thirdly, that the instruction should be of such a character that the pupils might at least derive a greater advantage from attending it than from devoting the same time to private study. How could this threefold object be accomplished? Only one mode occurred to me which seemed to hold out any reasonable prospect of success; and that was, to make a series of cases, carefully selected from the books of reports, the subject alike of study and instruction. But here I was met by what seemed at first to be an insuperable practical difficulty, namely, the want of books; for though it might be practicable, in case of private pupils having free access to a complete library, to refer them directly to the books of reports, such a course was quite out of the question with a large class, all of whom would want the same books at the same time. Nor would such a course be without great drawbacks and inconveniences, even in the case of a single pupil. As he would always have to go where the books were, and could only have access to them there during certain prescribed hours, it would be impossible for him to economize his time or work to the best advantage; and he would be liable to be constantly haunted by the apprehension that he was spending time, labor and money in studying cases which would be inaccessible to him in after life.

"It was with a view to removing these obstacles that I was first led to inquire into the feasibility of preparing and publishing such a selection of cases as would be adapted to my purpose as a teacher. The most important element in that inquiry was the great and rapidly growing number of cases in every department of law. In view of this fact, was there any satisfactory principle upon which such

a selection could be made? It seemed to me that there was. *Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law.* Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries. This growth is to be traced in the main through a series of cases; and much the shortest and best, if not the only way of mastering the doctrine effectually is by studying the cases in which it is embodied. But the cases which are useful and necessary for this purpose at the present day bear an exceedingly small proportion to all that have been reported. The vast majority are useless and worse than useless for any purpose of systematic study. *Moreover, the number of fundamental legal doctrines is much less than is commonly supposed; the many different guises in which the same doctrine is constantly making its appearance, and the great extent to which legal treatises are a repetition of each other, being the cause of much misapprehension.* If these doctrines could be so classified and arranged that each should be found in its proper place, and nowhere else, they would cease to be formidable from their number. It seemed to me, therefore, to be possible to take such a branch of the law as Contracts, for example, and, without exceeding comparatively moderate limits, to select, classify, and arrange all the cases which had contributed in any important degree to the growth, development, or establishment of any of its essential doctrines; and that such a work could not fail to be of material service to all who desire to study that branch of law systematically and in its original sources.

"It is upon this principle that the present volume has been prepared. It begins the subject of Contracts, and embraces the important topics of Mutual Consent, Consideration, and Conditional Contracts. Though complete in itself, it is my expectation that it will be followed by other volumes upon the same plan; but I have as yet formed no definite opinion as to how far the design will be carried. A volume upon Sales of Personal Property is more than half completed, and will be published within a few months."[1]

Seemingly, then, Langdell's great innovation consisted in his desire to see the whole study of law built exclusively and directly upon the study of the separate cases. His purpose was that the doctrines and principles—relatively few in his opinion—which make up the whole body of law should be derived and grasped, both in their historical development and in their systematic classification, from the direct study of cases, —the real and only sources of the common law. The number of cases which need to be drawn upon for this purpose is, he held, very small in relation to the prodigious mass of the Law Reports. Hence it is the more important to make a suitable selection of cases and to arrange them in such an order that their study shall on the one hand yield a clear and complete systematic view of that entire branch of the law, as for instance the law of contracts, and at the same time shall make as clear as possible, within

[1] C. C. Langdell: *A Selection of Cases on the Law of Contracts: With References and Citations, prepared for Use as a Text-Book in Harvard Law School*, Boston, 1871.

the separate parts of this subject, the manner in which, through judicial decision, the separate principles and doctrines have historically developed.

These fundamental ideas were realized by Langdell in the creation of his first text-book, *Cases on the Law of Contracts*. This pioneer work was soon revised and followed by many such case-books, until, ultimately, there arose in America a whole great literature of this sort, at present including pretty nearly the whole domain of private, criminal, and constitutional law and the law of procedure, with the various institutions and natural divisions of the law more and more specialized and differentiated. In the compilation of these case-books, from the beginning, the text has regularly contained no table of contents of the separate cases, such as is contained in the Law Reports, nor any brief statement of the rules of law involved, such as is regularly inserted by the official reporter. In this Langdell has recognized an extremely important pedagogical principle; a principle peculiar to the case method, and one to which all later pupils and followers of Langdell have adhered. The intellectual labor, namely, of disentangling the facts and the leading train of thought from the report of each decided case is to be performed by the students, quite independently, even although carried on to a certain extent under the guidance of the teacher. The central idea of the new method was thus indicated from the start. According to Langdell and his pupils, the law — meaning of course the English common law as it has been developed in America — should be acquired methodically from the original material of all principles and doctrines of the common law, — that is to say, from the decided cases, — by individual, purely personal, intellectual labor on the part of the student. To this end a further device was employed. Langdell began his actual teaching by having each of the cases, which the students had to study carefully in preparation for the class, briefly analyzed by one of them with respect to the facts and the law contained in it. He then added a series of questions, which were so arranged as gradually to lay bare the entire law contained in that particular case. This stimulated questions, doubts, and objections on the part of individual students, against whom the teacher had to hold his ground in reply. Teacher and pupils then, according to Langdell's design, work together unremittingly to extract from the single cases and from the combination or contrasting of cases their entire legal content, so that in the end those principles of that particular branch of the law which control the entire mass of related cases are made clear. The two ideas taken together suggest and are sufficiently well described by the term "Socratic method," — an expression which was indeed early employed by Langdell and his pupils.

It is only necessary to picture to one's self the practical working of this Socratic method in order at once to recognize how completely opposed it is to the method of instruction by means of text-books and lectures, the method which up to this time had been the one exclusively employed in American law schools. Without a doubt Langdell's method created an extraordinarily radical change, as it were at a single stroke. Up to that time the main feature in American law schools had been the memorizing

of more or less stereotyped subject-matter, systematically presented in the text-book. It is true that it was then the teacher's task to encourage, by lecture and explanation, independent thought on the part of the students, and to make clear the connection between the separate rules of law; and there is also no reason to doubt that this task was actually accomplished by many teachers according to their powers, and that it is so even to-day in these text-book schools, in a very satisfactory manner. In this connection it should be borne in mind that this older method of teaching has always been combined with the regular questioning of a number of students, a part of each period or special periods being reserved for the so-called recitations and quizzing of the students. The new method, on the other hand, proceeds from a fundamentally different conception of the task both of the teacher and of the student in legal instruction, and attempts, without any compromise and in the shortest way, to realize this new conception. To Langdell and his followers the most important means of instruction is the analysis of the separate cases by the student. The analytical decomposition of the separate cases, and the distillation of the legal principles contained in each such case; the construction, on the basis of the analysis of the alytical decomposition the case-book, of a system, historically and logically accurate, of the entire legal institution or field of law, — all these are in the first instance tasks for the students, who must perform them, even though under the guidance and direction of the teacher, as independently as possible. It is easy to recognize wherein then the fundamental difference lies. Under the old method law is taught to the hearer dogmatically as a compendium of logically connected principles and norms, imparted ready made as a unified body of established rules. Under Langdell's method these rules are derived, step by step, by the students themselves by a purely analytical process out of the original material of the common law, out of the cases; a process which forbids the *a priori* acceptance of any doctrine or system either by the teacher or by the hearer. In the former method all law seems firmly established and is only to be grasped, understood, and memorized by the pupils as it is systematically laid before them. In the latter, on the other hand, everything is regarded as in a state of flux; on principle, so to speak, everything is again to be brought into question. Or, in other words, in the method of legal instruction developed by Langdell law is conceived as the expression of social order in judicial form, which begins its separate existence all over again in every single case. Teacher and pupil approach it in the same way, the learner discovering it, under the guidance of the teacher, as a new and original joint creation.

Opposition to innovation is deeply rooted in human nature. It is not astonishing, then, that when, as in the present instance, the new method was obviously also the more exacting, it should have had to make war with the old, and have established itself only with difficulty.[1] It is more surprising that the war should have come to an end relatively soon. In one decade Langdell had already converted the whole Harvard Law

[1] At the first class held by Langdell in Contracts, the students all gradually dropped out, with the exception of seven, who were called Langdell's freshmen.

School to this method, notably his contemporary Thayer, who through his own powers ripened into a legal historian of the first rank. At this time Langdell had among his pupils Ames, the man who was to be the most prominent exponent of his method, and whose work for its propagation was so significant that he may well be called its most successful apostle.

After another decade Langdell's method was in a fair way to triumph. A great number of pupils, whom he and his successor Ames had trained, were spreading the new method, particularly in the academic law schools of the country, in the universities that had long been accustomed to compete with Harvard in the most diverse fields of knowledge. At the same time an extensive literature of text-books constructed according to the new method — of "Case-Books," in other words — began to develop. In the year 1909 Professor Ames felt justified in stating that, "To-day the Langdell method is adopted in whole or in part in a majority of the schools of the country, and in nearly all the best schools."[1] The outward success of the Langdell method of teaching showed itself above all, however, in the transformation of the Harvard Law School itself. In the year 1871, when Langdell became professor there, he, with three other professors, constituted the faculty, which at that time had to instruct 165 students. In 1895, when Langdell resigned his office as Dean, the school consisted of ten professors and over 400 students. Ten years later the number of students had risen to more than 760,[2] and has since then exceeded even this figure. In this connection it is especially noteworthy that this increase in attendance took place in spite of the fact that during the same period, and owing indeed to the influence of Langdell and Ames, not only were the entrance requirements made more strict, but the examinations became much more difficult in character. In the year 1871 students of the Harvard Law School were entitled to receive their degree after a course of study extending over a year and a half; since then the required period of residence has been increased to three years, conditions for admission, based upon evidence of previous education, have been made extraordinarily difficult, and in addition, strict annual examinations for each of the three years have been introduced.[3] These reforms, also, have served as models for the law faculties of the great universities throughout the country, and have been adopted by them. The study of law in American universities has, accordingly, through Langdell's method, and in consequence of its development, been advanced to an extraordinary degree, and has been placed on the same level as that which was attained, at almost the same time, by the other great branches of scientific study and instruction.[4]

[1] "Christopher Columbus Langdell." (Lewis, *Great American Lawyers*, Philadelphia, 1909, vol. viii, p. 484; Ames, *Lectures on Legal History*, Cambridge, 1913, p. 479.)

[2] Warren, *History of the Harvard Law School*, vol. ii, p. 520.

[3] *Lectures on Legal History*, p. 477.

[4] Warren shows also that the first period of American law school development was strongly and decisively influenced by Harvard, especially after Story's remarkable work. Under the influence of the earlier success of the old Harvard Law School, most of the law schools existing in connection with colleges were established: Cincinnati, 1833; Dickinson, 1836; Louisville, 1846; University of Pennsylvania, 1850; Albany, 1851; Columbia Law School, reëstablished, 1858; Northwestern (Chicago) and University of Michigan, 1859. Again, more recently, since the success of Langdell's reform, the Harvard method of instruction has become the general mode of teaching law in the prominent universities; thus in the Columbia Law School by the appointment of Keener in 1890; in Northwestern through Wigmore and Nathan Abbott, 1893; in the new University of Chicago through Beale, 1902, etc.

THE LAW CONCEIVED OF AS AN INDUCTIVE SCIENCE

In order properly to appraise the case method, one must, I think, consider critically its origin, its results, and its present relation to the general development of American higher education and institutions of higher learning. Langdell expressly designated his method as a "scientific method," and in its adoption he saw the only possible way of cultivating and continuing legal education as a fully recognized and respected branch of university teaching. He expressed himself clearly on this point in a speech delivered November 5, 1886, in which he enunciated the following propositions:

> "First, that the law is a science; secondly, that all the available materials of that science are contained in printed books. If law be not a science, a university will best consult its own dignity in declining to teach it. If it be not a science, it is a species of handicraft, and may best be learned by serving an apprenticeship to one who practises it. If it be a science, it will scarcely be disputed that it is one of the greatest and most difficult of sciences, and that it needs all the light that the most enlightened seat of learning can throw upon it."[1]

If these ideas of Langdell's are kept in mind, and if at the same time it is remembered under what circumstances the originator of this case method was called directly from practice to become a teacher in the Harvard Law School, it will be possible, in my opinion, to explain the advent of the case method into American legal education,—an advent apparently sudden, almost inexplicable, and triumphant only because of Langdell's personality. It is well known that it was President Eliot, the great second founder of Harvard, who, on his own initiative and through his own insight, singled out Langdell, a hitherto obscure New York lawyer, to be the reformer of the Harvard Law School, and at the very beginning of his presidency put through the appointment in the face of very real obstacles. Langdell's striking personality had impressed itself upon Eliot many years before, when he himself, as a young student of the physical sciences at Harvard, had made the acquaintance of this more mature student in the law school and tireless worker in the law library. Even then Langdell's views concerning the nature and purpose of legal education, which he occasionally expounded to Eliot, made a great impression on the latter,—an impression by no means effaced by the long interval that intervened before Langdell's appointment. To an enthusiastic scientist like Eliot it was an illuminating and attractive idea, this favorite one of Langdell's, that the law ought to be studied from its own concrete phenomena, from law cases, in the same way that the laws of the physical sciences are derived from physical phenomena and experiments. He was ready to subscribe to the theory that just as the laws of physical science, so here the principle, the rule, should be derived and taught in a purely inductive manner.

Concerning the limited and merely relative accuracy of these views, more will be said as we proceed. The point which is here made is that they must necessarily have

[1] Charles Warren, *History of the Harvard Law School*, vol. ii, p. 374; 3 *Law Quarterly Review* 124.

been exceedingly effective at a time when the old, strictly classical ideal of college instruction in America, as it had existed unchanged even in Harvard up to the days of Eliot, was yielding in favor of a new theory of education; that theory according to which the more practical branches of knowledge, or as they are termed in Europe, "realistic" subjects, are to be especially recognized and encouraged. This reform was carried through at Harvard in the first place under the dominant influence of Eliot, but it at once appealed to a great number of American colleges as the correct expression of contemporary educational ideals, and has long since been almost completely realized. There would seem to be a very real connection between this prevailing vogue of the physical and applied sciences and the fact that Langdell's innovation in legal education was also introduced comparatively quickly, and into almost all of the law schools that are connected with colleges. If one was disposed to identify science with the employment of the inductive method, as used in the investigation and teaching of the physical sciences, then it was quite obvious that a remodeling of the method of legal instruction to correspond to this view was needed in order to preserve—or, as many believed, even to establish for the first time—its scientific character.

Whether one accepts or rejects this assertion that the origin and development of the Langdell method was influenced by the modern study of science, so much is certain: For some time the opinion has been held almost universally in the law schools of American universities that American law has been scientifically treated, and its study has become a coördinate branch of university work, only since instruction in it has been based on a study of practical cases, that is, only since the time of Langdell. Again and again, in conversation with professors of the leading American law schools, have I been given to understand that the "Case method" is nothing but the application of the universal scientific method of induction to law in particular; and in the literature concerning the problem of legal education this thought has also found repeated expression. Thus Professor Keener, who is justly regarded as one of the most zealous and successful of reformers, in Langdell's sense of the word, says in the preface to his book, *A Selection of Cases on the Law of Quasi-Contracts* (1888):

> "Under this system [of the case method] the student must look upon law as a science consisting of a body of principles to be found in the adjudged cases, the cases being to him what the specimen is to the geologist."

Professor Roscoe Pound, in his inaugural lecture of the year 1903, expresses himself in a similar way, when he endeavors to explain as follows the original opposition of the American teacher of law to Langdell's method:

> "As teachers of science were slow to put the microscope and the scalpel into the hands of students and permit them to study nature, not books, so we have been fearful of putting reports into their hands, and permitting them to study the living law."[1]

[1] Roscoe Pound, *The Evolution of Legal Education, an Inaugural Lecture*, Lincoln (Neb.), 1903, p. 14.

If one adopts this point of view assumed by the leading American teachers of law, according to which Langdell's mode of instruction is nothing more than the application of the inductive method to the study of law, then, certainly, his reform appears no longer as an organically disconnected intrusion into the historically developed system of American legal education, but rather as a natural link in the chain of universal reform which affected all American higher education, and especially the American college, during the last half-century, and most strongly after 1870. As Flexner has shown in his spirited book on the American college, the critical hour for this had then come.[1] Under the pressure of public opinion the old course of study, dominated, and from this point of view deadened, by classical instruction, could no longer remain. It must, rather, adapt itself to the pressure of the modern tendency originating, in all American education, in the unbounded progress of the technical and natural sciences. The whole traditional system of education in America had to try to measure up to the needs of the new social development, the ideas and demands of society in an industrial age. Thus the college has been transformed from its old, simple organization of instruction into its present system of many different curricula from which the individual students may choose more or less freely. Thus again, out of the college has developed the university in the American sense, the university, that is to say, of the most diverse educational means and aims; the outward and administrative union of an ever-increasing number of inherently independent schools, each specializing in a separate branch of theoretical or applied science. Herewith, however, a strong incentive was given to each one of these different professional schools to develop itself along special lines, as regards curriculum and method, corresponding to the single profession for which it was preparing. The traditional law schools, with their recitations and their quizzes, naturally seemed old-fashioned and unscientific beside the schools for natural science, medicine, and the technical professions, which were of recent origin, and aimed to show their strictly scientific character by utilizing modern, experimental, and inductive methods. The method of Langdell and his pupils, taken in connection with the simultaneous appearance of important investigators in legal history, such as Thayer, Bigelow, and others, lifted law schools at one stroke, as it were, to this same level of genuine "science." From now on, for lawyers also, study was to be based directly upon the original material of the matter studied, upon the cases. From now on, the critical analysis of the law case was established as that application of inductive methods which alone was thoroughly suited to the nature of Anglo-American law.

[1] Abraham Flexner, *The American College*, New York, 1908, pages 27 *et seq.*

In dealing with the law schools, moreover, as with all the departments of the modern American university, a second tendency must be taken into consideration, whose influence especially upon law schools has been open and avowed. I refer to the practical, utilitarian tendency of modern systems of education. American law schools have always had to pursue, and always actually have pursued, the aim of preparing their pupils directly for the practical calling of an attorney. From the beginning they have therefore entered into competition with all other institutions and undertakings intended to serve the same purpose. In this connection the first kind of legal instruction to be considered is that which consists exclusively in learning the law through an apprenticeship in an attorney's office. As has already been stated, in every state of the Union even to-day the law office trains directly a large number of future lawyers and judges. A great many young men gain admission to the bar, and are thus put in the path of preferment to the bench, on the basis of legal knowledge picked up during a clerkship in a law office, rarely extending over a period of more than two or three years. If any general knowledge is required in addition, it is never more than that given by a high school. Obviously these law students, acting merely as apprentices in the legal business, require, in addition to this purely practical training, a certain amount of theoretical instruction. Law schools, since their establishment in the beginning of the nineteenth century, have tried to respond to the need of these candidates for the legal profession in various ways, but mostly through the organization of evening schools with abbreviated courses. This state of affairs has in the main, in spite of the great and significant development of law schools, continued unchanged until the present. It may confidently be asserted that a very large percentage of existing American attorneys and judges received their theoretical instruction at the same time that they were serving as lawyers' clerks and assistants. To this circumstance also one part of American legal literature owes its origin and character; it has led to the preparation of the most varied legal compilations of a text-book nature, and of aids to study of all kinds, often arranged in the form of questions and answers and catechisms.

Added to this there is the second and no less significant fact already mentioned, that even to-day, in all the states of the Union, definitive admission to the bar has no necessary connection with the manner in which the candidates acquired their theoretical and practical knowledge of the law. Admission to the bar may always be secured by passing a specific bar examination, conducted by a court or by a committee or board of examiners acting usually under judicial direction. In connection with this examination evidence of preliminary general education is sometimes demanded; sometimes, also, evidence must be presented that a certain period of time has been devoted to legal study; and sometimes, if an applicant has been graduated from certain law schools situated within the state, he does not need to take the examination;

but never is it positively required that his studies shall have been pursued in a particular school or type of school, or in any school at all. "In an attorney's office or a law school, or partly in one, partly in the other," is the usual formula. All the law schools of America, the best as well as the worst, have to reckon with this fundamental fact, and the result is that all the law schools of America are exposed, though in very different ways, to absolutely unrestricted competition with every undertaking, every institution, that attempts to perform a like service for legal education. On the other hand, however, it is of some advantage to the law schools, and especially to the university law schools of America, that they are not legally compelled, as in Austria and Germany, to pay any attention to the bar examinations, as such. They establish, therefore, the general educational requirements for entrance to the school solely from the point of view of their own ideals; and also with respect to the manner in which they test the accomplishments of their students through their own annual examinations, they are completely independent.

It has been of the greatest significance for the development of the American bar, and through it for the whole history and structure of American legal education and university law schools, that there exists in the United States of America a tradition (peculiar to this country) concerning the constitutional freedom of the legal profession,—a tradition which even to-day is expressly affirmed in the constitution of one state. This tradition is to the effect that it is the inherent right of every free American citizen to engage as an attorney in the practice of law just as freely as in any other business or calling. Professor Pound expresses himself in regard to this phenomenon and its results, in a noteworthy manner:

> "First among the obstacles which have retarded the development of our law schools, we must put the strange notion of an inherent natural right of the citizen to practice law, long dominant in the public mind and widespread in the profession. Until very recently there were no serious requirements for admission to the bar outside of a few of the older states. Many states to-day, some of them old and intelligent, are substantially without such requirements. In Indiana, by express constitutional provision, good moral character is the sole requisite to admission. Any legal voter of good moral character may practice. In Wisconsin, in 1849 the legislature enacted a statute to the same effect. So completely has this natural right to practice been deemed inherent in men as men, that one court has been required to discuss gravely the admission of a Chinaman. Within the last few years, the supreme court of Illinois has been compelled to deny the power of the legislature to prevent the court from imposing necessary qualifications for admission to practice and to insist that the judiciary could not be obliged to put up with ignorance and incompetence at the bar merely because the legislature so desired it. In Kentucky, as late as 1902, a member of the State Bar Association, in addressing his fellows, felt it necessary to argue that 'it is no more an abridgement of the rights of the citizen to prescribe the legal eligibility of those who propose to practice law than it is to prescribe the legal eligibility of those who are to interpret and apply the law.'" [1]

[1] Roscoe Pound, *The Evolution of Legal Education*, 1903, pages 8, 9.

Ex-President William H. Taft, too, recently wrote as follows in his article, "The Social Importance of Proper Standards for Admission to the Bar:" [1]

> "There is a spirit of hostility manifested by some courts and lawyers, and some who are not lawyers, to the suggestion that a fundamental general education is necessary to the making of a qualified member of the legal profession. In Indiana the constitution impliedly forbids the imposition of examination for admission to the Bar. The argument is: 'Look at Abraham Lincoln. He never had any education of any sort. He educated himself, and note his greatness both as a lawyer, a statesman and a man.' Such an argument would do away not only with the necessity for education at the Bar, but the necessity for schools or colleges of any kind." [2]

Constitutional and statutory provisions of this same general character were once far more common than they are to-day. As a result of the practical demands of the legal profession, the extreme democratic conception of the law as an open profession has been pretty generally abandoned, and almost every state now demands of the attorney a certain amount of professional knowledge. Nevertheless, the inevitable consequence of the phenomenon cited above, and especially of the example of Lincoln, has been that the American people continues to impose upon law schools the traditional standard of practical utility; to justify them, if at all, on the ground that they provide the speediest and most successful preparation for the practice of the law. Even if, as has been said, recognition of the actual qualifications demanded of a successful lawyer and the realization of the growing public need of a sound legal profession have made it customary, at least in the eastern states, for graduates of law schools before starting independent practice to spend an additional one or two years as apprentices in a lawyer's office, the fundamental conception of the legal profession remains unchanged; the popular idea is deeply rooted that the law school at bottom is, and must be, merely an institution for the training of young lawyers and judges. Not even the law schools themselves, not even those connected with the most prominent universities, have ever attacked this conception on its own merits; they have, rather, accepted it as a most essential point of departure for the elaboration of their own curricula, and as the legitimate standard wherewith to test their own success in teaching. In consequence of this even Langdell's new method, specifically termed, as we know, the "scientific" method, started out from the beginning with the claim that it was the best and most effective method for training practical American lawyers. So famous a representative of the case method as Professor Keener expressed himself on this point quite clearly when he said: [3]

[1] Paper read in joint session of the Association of American Law Schools and Section of Legal Education. 38 *Rep. Am. Bar Ass.* (1913) 924-925.

[2] Edmund Wetmore in this connection, in a paper read before the Section of Legal Education of the American Bar Association, 1894, on the raising of standards for admission to the bar, says: "It would not be difficult to find those, in some parts of our country, who insist that it is an impairment of natural right to impose any requirement in the way of previous education upon any one who desires to practise law, and the logical outcome of this belief was illustrated in a Western state a few years since by the election to the bench of a candidate who had never either studied or practised law at all." 17 *Rep. Am. Bar Ass.* (1894) 463.

[3] "The Inductive Method in Legal Education." 17 *Rep. Am. Bar Ass.* (1894) 489.

"That it is by the study of cases, that one is to acquire the power of legal reasoning, discrimination and judgment, qualities indispensable to the practicing lawyer; that the study of cases best develops the power to analyze and to state clearly and concisely a complicated state of facts, a power which, in no small degree, distinguishes the good from the poor or indifferent lawyer."

And Professor Keener made this explicit assertion:

"That the student, by the study of cases, not only follows the law in its growth and development, but also acquires the habit of legal thought which can be acquired only by the study of cases, and which must be acquired by him either as a student or after he has become a practitioner if he is to attain any success as a lawyer."

It was upon just this point, moreover, that grave doubts were expressed from the first as to the case system. Thus Judge Baldwin, in an article published in the *Harvard Law Review*, 1900, in which he criticized the case method very sharply, denied that the Langdell method was especially successful from the point of view of the training of practical lawyers. The ordinary American law student, it seems, aims at nothing more than to become sufficiently equipped for the practice of law; he has not the slightest desire, at the age of twenty-five years, to "shine as a jurist," but merely wishes to know the current law and to be prepared to apply it practically in proper fashion. The correct way to achieve this end, according to Baldwin, is by no means to employ Langdell's method, but rather the method whereby the instructor systematically teaches the principles of the law by means of good text-books and oral explanation of the more difficult problems.[1] Baldwin's criticisms stand, however, somewhat alone. In opposition to them, at the time of the literary controversy as well as at present, the case method has been described by members of the most prominent law faculties of American universities as precisely that kind of instruction in Anglo-American law which alone has been found fitted to assure to the student clear comprehension and full mastery of objective law. Of course we must not overlook the fact that there are well-defined limits to the success of any merely theoretical system of instruction in law. Dean Stone shows very pertinently[2] that no theoretical mode of teaching can furnish the student with practical routine and experience, such as are gained only by immediate participation in legal activity in the law office. Yet in this respect, too, the modern case method, compared with the other traditional methods of American legal instruction, is held to have proved itself without doubt the most efficient. The danger which must still be avoided is that legal education may become too "academic." To obviate this danger, Dean Stone recommends that as a rule there should be appointed as professors in law faculties only men who have already had adequate experience as practitioners. As a matter of fact this requirement, so far as

[1] 14 *Harv. Law Rev.* 259.

[2] "The Function of the American University Law School," paper read before the Association of American Law Schools. 36 *Rep. Am. Bar Ass.* (1911) 768.

I could see, has been actually met in the overwhelming majority of cases. I believe that the mere theorists, who have never practised for any length of time as attorney or judge, constitute at present a small minority of the teachers of law in American universities.

SHIFT OF EMPHASIS UNDER LANGDELL'S SUCCESSORS

TRAINING THE LEGAL MIND

For the further progress of this discussion it is necessary to keep in mind these two directions in which the new Langdell method has exerted its influence for reform. On the one hand it professes to be the first really scientific method of treating the common law; indeed, the general opinion seems to go so far as to hold that the application of the principle of induction to separate law cases is the correct method of studying any sort of law, and that the innovation introduced by Langdell and his pupils must be recognized as a genuine discovery in the realm of teaching.[1] Secondly, there is claimed for this new method, at the same time, an increased efficiency in the purely pedagogic aspect. As the common source of this far-reaching scientific significance and practical efficiency, inherent in the method, the circumstance is noted that essentially the case system consists of nothing more than the careful analysis of the law and the facts of each separate case, for the purpose of establishing the general principles and doctrines of law that determined that particular decision. Professor Keener says very clearly in regard to this:

> "While this method of teaching does not at all proceed on the idea that the common law is wanting in jurists, its advocates regard the adjudged cases as the original sources of our law, and think that it is better for the student, under proper advice and guidance, to extract from the cases a principle, than to accept the statement of any jurist, however eminent he may be, that a certain principle is established by certain cases. When the student has by the study of cases grasped a principle, it has assumed to him a concrete form, and he can apply it because it was by studying it in its application that he has acquired his knowledge. Under this system the student must look upon law as a science consisting of a body of principles to be found in the adjudged cases."[2]

In another place this same distinguished law teacher defines the belief of the representatives of the case method thus:

> "That the system produces a lawyer more quickly than the text-book system, for the reason that, in their opinion, the powers of analysis, discrimination and judgment which have been acquired by the study of cases by the student before graduation must be acquired by the student of the text-book system after he has ceased to be a student and has become a practicing lawyer."[3]

In conclusion Professor Keener sums up his views as follows:

> "That it [the case system of instruction] is best adapted to exciting and holding the interest of the student, and is, therefore, best adapted to making a

[1] Keener, in the passage cited above, advanced the theory "that law, like other applied sciences, should be studied in its application if one is to acquire a working knowledge thereof; that this is entirely feasible for the reason that while the adjudged cases are numerous the principles controlling them are comparatively few."

[2] William A. Keener, Preface to *A Selection of Cases on the Law of Quasi-Contracts*, Cambridge, 1888.

[3] 17 *Rep. Am. Bar Ass.* (1894) 487.

lasting impression upon his mind; . . . that it is a method distinctly productive of individuality in teaching and of a scientific spirit of investigation, independence and self-reliance on the part of the student."[1] . . . "This method of teaching does not consist in lectures by the instructor, with reference to the cases in support of the propositions stated by him. The exercises in the lecture room consist in a statement and discussion by the students of the cases studied by them in advance. This discussion is under the direction of the instructor, who makes such suggestions and expresses such opinions as seem necessary.

"The student is required to analyze each case, discriminating between the relevant and the irrelevant, between the actual and possible ground of decision. And having thus discussed a case, he is prepared and required to deal with it in its relation to other cases. *In other words, the student is practically doing as a student what he will be doing as a lawyer. By this method the student's reasoning powers are constantly developed,* and while he is gaining the power of legal analysis and synthesis, he is also gaining the other object of legal education, namely, knowledge of what the law actually is."[2]

These last quotations, however, clearly reveal the development which the case method has already received in the hands of Langdell's eager disciples. We recall the ideas, incomparable in their simple clearness, with which Langdell introduced his reform. He was concerned simply with the establishment of the principles in separate law cases, and with nothing else. The law consists, he believes, only in these principles. Through the analytic treatment of the cases under the direction of the teacher, the student gains knowledge of the law. Langdell's pupil, however, Professor Keener, goes much farther; he attributed to the Langdell method the peculiarity that through it the law student, above all, "learns to think legally," and by this means obtains the intellectual training necessary for practical legal activity. Herein Keener, and with him most of the eminent law teachers of America, sees the peculiarly "scientific" character of this method.

Brief reflection shows plainly that it is only a step from this to a completely changed conception of the purpose of legal education as a whole; to the conception, namely, that the real purpose of scientific instruction in law is not to impart the content of the law, not to teach the law, but rather to arouse, to strengthen, to carry to the highest possible pitch of perfection a specifically legal manner of thinking. This step, after the new method had reached its full development, was unhesitatingly taken by the foremost American teachers of law. In discussing this matter I have again and again encountered the very emphatic opinion that the really great accomplishment of the case system consists in the "training in characteristically legal thinking," and that therein also is to be seen the great *practical* significance of this new method.

For example, Professor James Brown Scott, in an address delivered in 1906,[3] expressly says:

[1] 17 *Rep. Am. Bar Ass.* (1894) 489. [2] Preface to *Cases on the Law of Quasi-Contracts.*
[3] At George Washington University. 2 *Am. Law School Review* 4.

"That method which *best trains the student in legal thinking and in legal reasoning is necessarily the best method for the student of law;*"

and Professor Ames, too, in the last year of his activity, added the weight of his great authority to this view, when, in a debate of the "Association of American Law Schools" in 1907, turning to the representatives of the older methods of legal education, he expressed himself as follows:

"The writer of the paper and I seem to differ radically in regard to the object of the three years of law school. I should infer from the paper that to the author the main object is knowledge. The object arrived at by us at Cambridge is the power of legal reasoning, and we think we can best get that by putting before the students the best models to be found in the history of English and American law, because we believe that men who are trained, by examining the opinions of the greatest judges the English Common Law System has produced, are in a better position to know what legal reasoning is and are more likely to possess the power of solving legal problems than they would be by taking up the study of the law of any particular state."[1]

We see, then, that Langdell's principle of instruction, in the period of four decades during which it has spread, experienced also a significant inner development. Originally thought of, in essence, as a mere aid in teaching, the case method for its most enthusiastic adherents has become to a certain extent an end in itself. In the place of the old ideal of instruction, the ideal of imparting the greatest possible amount of knowledge, there has arisen a new ideal: the specific training in that manner of legal thinking which is peculiar to and necessary for the practising lawyer. It is true that the aim of imparting legal knowledge is not completely put aside. That would be absurd. Indeed, attention is called to the fact that, as experience shows, the old method of instruction by text-books imparts no lasting knowledge, that knowledge which is thus imparted does not "stick;" while on the contrary, the positive knowledge and the grasp of legal principles which are imparted by the case method are permanently assured to the student, simply because of this method of self-teaching. But there can be no doubt that with many American law teachers to-day the tendency is to regard the transmission of positive legal material to the student as a secondary consideration, compared to the special intellectual training provided by the Socratic method.

The observations that I have made have left no doubt in my mind that the development of the case method in American law schools has produced a far-reaching change in the general conception of the nature and purpose of legal education; a phenomenon which transcends the boundaries of Anglo-American legal life, and demands the attention of all modern lawyers.

[1] 31 *Rep. Am. Bar Ass.* (1907) 1025.

PERSONAL OBSERVATIONS OF THE CASE METHOD

I TURN now from the abundant literature dealing with the case method to the personal impression produced upon me by visits to a number of law schools. I have been able to observe the application of the case method in its home in Harvard, in Columbia University in New York, in the University of Michigan Law School at Ann Arbor, in the University of Chicago, in Northwestern University, situated in the same city, and in the Law School of the New York University; and I have observed its application in different fields of law. How this method is actually handled has been often described, and can accordingly be told here in a few words. The case-books, of course, form the foundation of the study. These are generally very carefully arranged in such manner that the material of the whole field of law appears systematically organized in the choice and order of the cases, this organization being also clearly indicated by the titles of the separate parts of the book and the headings of subordinate sections. In each section or subdivision the cases themselves are again so chosen as to form a well-conceived pedagogic whole, since regularly the case which illustrates the main principle — the so-called "leading case" — comes first, and the immediately following cases are intended to show individual extensions or limitations of the principle. Occasionally there are found, as, for instance, in Gray's famous case-book on Real Property,[1] excerpts from old English statutes which are virtually part of the common law, and brief notes, generally of an historical nature; these, however, are isolated exceptions. As a rule the book contains only reports of actual law cases, in which first a brief statement of facts appears, then the arguments of the two contending parties, and finally, in full, the decision of the court and the grounds upon which it was rendered. Every lawyer, even the European colleague, who examines the many prominent case-books will readily recognize the enormous intellectual labor which has been expended upon these aids to modern American legal education. The task which has confronted the law teacher here is to make the proper choice from among the thousands, even tens of thousands, of decisions contained in the Law Reports, so that as far as possible all relevant rules and principles of that particular branch of the law may be made perfectly clear in all their various practical applications; so that, furthermore, as much light as possible may at the same time be thrown upon the historical development of these legal principles; and so that, finally, the whole may constitute a systematic structure. This very difficult task has been accomplished in a great number of case-books with really remarkable success. The objection frequently made by the critics of this method, that case-books soon become obsolete because new cases are continually creating new law, seems to me to offer no argument against the case-book that could not be advanced against text-books in general, whether it be here or in Europe. Dogmatic text-books also have to be con-

[1] John C. Gray, *Select Cases, and other Authorities on the Law of Property*, Cambridge, 1888–92.

tinually supplemented at frequent intervals, and brought up to the latest stage of the literature and of the decisions of the highest court.

The case-books are now everywhere used in the following manner: The students study thoroughly a number of cases at home and strive to master the actual facts involved as well as the rule of law; usually they prepare a very brief abstract of each separate case, which they bring with them to class. In the actual class exercise the professor calls on one of the students, and has him state briefly the content of the case. Then follows the interchange of question and answer between teacher and students; in the course of the discussion other students are brought in by the teacher, and still others interject themselves in order to offer objections or doubts or to give a different answer to the original question. The whole exercise generally moves quickly and yet with absolute quiet and with undivided attention on the part of the class. It must indeed make a strong impression upon every visitor to observe, as, for instance, in the Harvard or Columbia Law School, classes of 100 to 150 students engaged in this intensive intellectual work; all the students intent upon the subject, and the whole class continually, but to a certain extent imperceptibly, guided by the teacher and held to a common train of thought. The thing that specially impressed me was the general intense interest displayed by the whole class in the discussion, even by those who did not take part in it themselves; I do not remember that a student, when called upon, was confused or unable to reply, although of course not all gave an adequate answer. The transition from one case to another followed quickly, and indeed in general the tempo is a rapid one, and always only the matter in hand is discussed and superfluous generalities are avoided. Digressions from the theme are as a rule dismissed by the lecturer with a short remark; pauses seldom occur, for if the professor notices a general lack of understanding of the case, he then interposes with a lengthy explanation. The great majority of the students make notes during the course of the discussion. I looked at many of these note-books and found in them the principles of the case jotted down, almost always briefly but intelligibly, and for the most part in ordinary long-hand writing.

Up to this point case method instruction goes on everywhere in about the same way, naturally more or less modified at times by the individuality of the professor. When, however, the case or the several cases have been exhausted, when the analysis has been carried sufficiently far, then we reach that stage of instruction in which a different application of the method by different teachers of law may undoubtedly be observed. Some find it then necessary to sum up the whole discussion to some extent; to establish explicitly the theoretical result, the abstract proposition that was reached; and to give a very brief lecture of some minutes' duration which brings the rule or principle into relation with other propositions of the law. Also many professors at this point cite other cases from the Reports and occasionally even give references to single prominent legal works; in short, several further "aids to study" are made known to the students and eagerly noted down by them. Other professors, among whom are many

of the strongest representatives of the case method, abstain from any summary résumé of the discussion, and even scrupulously avoid in any way formulating the result for the hearers, or presenting to the students their own view of the legal principles of the case. And this occurs, as I have learned from many conversations with law teachers, as the result of definite convictions in regard to method.[1] They feel that the case method, correctly understood, ought to avoid any dogmatic instruction of the pupils by the teacher. The students, through their own study and through the analysis which goes on in the class exercises, must themselves find the law contained in the cases. Nay, more, they must themselves systematically put together the knowledge gained from hour to hour; or, as it has been repeatedly expressed to me by distinguished law teachers, instruction by the case method should make the students competent to compose their own text-books.[2]

[1] It is characteristic that Langdell added to his *Cases on the Law of Contracts* — the first case-book ever published — a special part called "Summary," which is nothing more than a dogmatic presentation of the common law of contracts, strictly limited, of course, to the preceding cases and therefore not exhaustive. Later, in 1880, this summary was published as a separate volume.

[2] Thus I was told in Chicago that the students have coined a particular expression for the synopsis of legal rules which they prepare at the conclusion of each case-book section. They call this the "dope sheet," and the better students take a great deal of trouble to make it as complete as possible.

PRACTICAL SUCCESS OF THE CASE METHOD

CONTRIBUTORY REASONS FOR THIS SUCCESS: INCIDENTAL INSTRUCTION; MOOT COURTS; STUDENT SPIRIT; CLUBS AND PERIODICALS

As Keener says in the repeatedly quoted article upon the inductive method in legal education, the case method has two aims: the development of the logical, legal power of thinking, as well as the acquisition of positive knowledge. A student who learns from a text-book only appropriates the intellectual work of another instead of himself working out the principles and legal rules from the material of the cases. The memory of a student taught by text-books is like a sieve that lets most of what was poured into it run out again; he, however, who works out the abstract thoughts for himself also keeps a firm hold upon them, and thus the case system is precisely the method which really does impart legal knowledge.[1]

Most of the leading law professors of America, after an experience with the method for twenty years or more, agree with these views. One who intends to pass judgment upon the case method certainly cannot ignore this fact. Nor can any one deny that as a general principle in all realms of human knowledge, and so in legal education, too, the independent acquisition of knowledge is the highest form of teaching psychologically, and ethically is the most fruitful. Apart from certain limitations which must here be made, and to which I shall shortly recur, I must not neglect, on the basis of the impressions that I received, to recognize again explicitly the great value of this Socratic method of instruction, and to testify to my conviction of its great success. I visited particularly classes of the third year, in which difficult cases, as for example cases involving a "conflict of laws," were analyzed by the students with great readiness and grasp of the subject-matter; classes in which there stood out strongly not only excellent logical training, capacity for independent study, and especially for quick comprehension of the actual point of law involved, but also indisputable knowledge of positive law. I gained the impression that law students of the third year in our European law schools would hardly ever be found competent for such work. On the other side, however, I am just as positive that, if all first attempts are difficult, this is especially true of legal education according to the case method. Eminent professors of law have repeatedly explained to me that it takes a long time before the excellent effects of instruction by law cases are evident. The beginners are, as a rule, rather confused by what is demanded of them in class, and usually for a considerable period only the particularly quick or talented students take part in the debate; but after some weeks or months, things become clearer to the others also; the students begin to grasp what it is all about, and there soon follows the hearty coöperation of the majority. Mr. Justice Holmes tells in characteristic fashion of his own experiences when, not without some misgivings, he first began to use this method:

[1] 17 *Rep. Am. Bar Ass.* (1894) 482 *et seq.*

"The result was better than I even hoped it would be. After a week or two, when the first confusing novelty was over, I found that my class examined the questions proposed with an accuracy of view which they never could have learned from text-books, and which often exceeded that to be found in the text-books. . . . My experience as a judge has confirmed the belief I formed as a professor."[1]

In order to account completely for this success of the case method we must, however, make clear the peculiar conditions under which this mode of instruction is carried on,—conditions upon which that success is in large measure dependent. Above all we must not overlook the fact that the case-books and accompanying discussions are not by any means claimed by the representatives of the case method in Harvard, Columbia, Chicago, and other institutions, as the solitary and exclusive means of instruction. "The distinctive feature of the case method is not the *exclusive* use of cases," says Professor Keener, "but that the reported cases are made the *basis* of instruction, not used merely as illustrations."[2] The object of the case system is not to have students memorize cases but to analyze them. Text-books are not in any way barred, but are used and recommended by the professors both to explain individual cases and more broadly to assist the students in finding their bearings. It is characteristic of the Harvard Law School, and also of most of the academic law schools, that regularly, usually in the afternoons, the professor receives those pupils who wish to secure advice. As a matter of fact, most of the professors at Harvard, for example, place a very considerable portion of their free time at the disposal of students, in their offices at Langdell Hall, and it is at these interviews that the students are often referred to further means of assistance. In response to my repeated question as to how the beginners secured that elementary knowledge of law without which even the simplest case cannot be understood, I was always informed that this need was met partly by the broad introductory lectures, partly through references dictated by the professors. It is expected also that the students will get for themselves this elementary knowledge of the law, as for example the meaning of the current legal concepts and technical terms, out of law dictionaries and encyclopedias. Indeed, I may forestall my subsequent suggestions in regard to this matter of independent work, by saying that in my opinion a great deal—I fear too much—is demanded and expected of a novice in the law school. Of course it is also assumed that the students, especially those of the second and third years, study for themselves the standard works of English and American law, such as Blackstone, Story, Anson, Pollock, Thayer, and Wigmore, in connection with the corresponding parts of their law course.

But even the hours devoted to purely oral instruction are not exclusively taken up by the Socratic method. In most of these law schools there appears in addition, as a second very important means of instruction, the practice courts, or moot courts, held

[1] Speech delivered at the quarter-millennium celebration of Harvard University, November 5, 1886. 3 *Law Quarterly Review* 122.

[2] 17 *Rep. Am. Bar Ass.* (1894) 487. The italics are Keener's.

every week or every fortnight. These are practical exercises in the shape of judicial trials or cases which the professor prepares, and in which the whole class takes active part. I visited, for example, a trial of this sort in the Law School of the University of Chicago, and found this method of teaching excellently developed there. In a civil suit two students represented the plaintiff's attorneys, two others those of the defendant; the professor presided as judge. The complaint, pleas, and other trial papers had been worked out on the basis of a statement of facts given beforehand to the students. The pleadings then took place before the whole class, and at the end the professor rendered the decision and the "opinion." In another action to recover damages, since a question of fact was involved, after the pleadings a jury of the students was formed, both attorneys addressed the jury, and one of the students sitting as judge also charged the jury. The whole affair proceeded very smoothly and showed especially great fluency in speaking on the part of the student-attorneys and the student-judges. But also the purely legal arguments, conducted with abundant citations of precedent, gave the impression of adequate familiarity with the objective law. I had the feeling about this whole exercise that it assuredly did not fall below the level of an average court of the first instance in this country or in any other country. This custom of forming such practice courts for the purpose of legal instruction is, it should be noted, traditional in America. Under the name of moot courts they were used for decades in Harvard, for instance, as well as in other schools, although at Harvard itself they have for some time been replaced by another institution. I found the custom of holding such moot courts almost universal, even in schools which are dominated entirely or predominantly by the text-book method.[1]

The incidental devices just spoken of, as in use in law schools in order to supplement instruction by cases, constitute, however, only one of the conditions which are responsible for the great success of the method. Of still greater significance, and in my opinion of really decisive consequence in this connection, is a general factor that I might briefly term the general "atmosphere" of the American university law schools; a phenomenon which has not its like in the most remote degree anywhere else in the world to-day, and which can hardly be too much applauded. This specific "atmosphere," without which so successful an application of the case method would be difficult or even impossible, consists above all in the extraordinary strong spirit of fellowship, in the spirit of professional comradeship, that pervades the young people in all these important law schools in varying degree, but nowhere in so peculiarly powerful a way as in Harvard. From the first day each new class forms a unified whole from which only a very few hold themselves aloof, usually those very ones who later drop out of the course altogether. The whole class feels itself as a sort of free association of students who spend almost the entire day in close contact: mornings in the class-rooms; during the intervals between classes and during recreation peri-

[1] Cf. William G. Hastings, "Practice Courts," paper read before the Association of American Law Schools, 37 *Rep. Am. Bar Ass.* (1912) 1010; Edson R. Sunderland, "Teaching Practice," *ibid.* (1913) 908.

ods in the Common Rooms of Austin Hall and Langdell Hall; afternoons and evenings, when no classes are held, in the library of the school, where the cases that happen to be up for discussion at that moment form the main topic of conversation. With great eagerness, so I was assured on all sides by former students and by the professors, and so I could myself observe, actual legal problems, incorporated in living cases, are here continually being argued. In this way mutual emulation and a continuous mutual instruction and teaching are brought about, as could never be done either through lectures or through individual study of text-books. It is significant, too, that this part of the student body takes little or no part in the athletics which bulk so large in the life of other American students.

This spirit, at once professional and coöperative, which dominates the student body, finds especially strong expression at Harvard, for instance, in the formation of the so-called law clubs, which have here come completely to take the place formerly filled by the moot courts. These law clubs exist at Harvard in great numbers, and have above all the function of conducting, usually once a week, the already described moot courts. They constitute accordingly a voluntary organization of students for supplementing the teaching activities of the school. The best known of these clubs, the Pow Wow Club, founded in 1870, is so constituted that there is an approximately equal number of members for each one of the three years. These form three courts for each year, each of which consists of eight members, the Superior Court, the Supreme Court, and the Court of Appeals.[1]

In the free organization of these clubs, which always enjoy the thorough coöperation of the professors, there is clearly displayed the intellectual independence and initiative of the American university student,—qualities which the case method claims as most important pedagogical forces and to which it appeals most emphatically. These qualities find, however, an even wider and more distinguished field of operation. This is provided in the really astonishingly comprehensive and highly fruitful activity of the students in the technical periodicals connected with the separate law schools — the *Law Reviews*. Here, too, Harvard has led the way, and almost all the more prominent academic law schools have followed; thus there are to-day, besides the famous old *Harvard Law Review* (founded in 1887), a Columbia, Michigan, Illinois, University of Pennsylvania *Law Review*, and so forth. Following the Harvard example, these periodicals are generally arranged in two main parts. The first consists of scientific legal discussions which are written by members of the faculty or other legal scholars. The second part, on the other hand, is composed and edited entirely by students and consists of three sections: first, of the so-called Notes, which give short essays upon separate legal problems, based upon one or more recent decisions; second, of the Recent Decisions, a section under which a large number of important recent

[1] Cf. Warren, *History of the Harvard Law School*, vol. ii, pp. 319 *et seq.* Law clubs have existed in Harvard since 1825, the oldest called the Marshall Club after the famous Chief Justice of the United States. At present there are a large number of these law clubs, for the most part called after famous teachers, *e.g.*, Ames Club, Thayer Club, and every student belongs to at least one such club.

decisions of the courts are analyzed and criticized; and finally there follows a series of critical reviews of the most recent publications in legal literature. The whole periodical is published by a committee formed from the student body, — the Editorial Board, — the members of which share the entire editorial work of the second part, under the direction of an elected editor-in-chief. In Harvard, for example, the Editorial Board consists of twenty-four members who belong to the second and third years of the Law School; at the end of a year the twelve members of the third year withdraw, and their places are taken by twelve from the new second year, the seven who stood highest in the last annual examination being taken on at once and these during the course of the year choosing five additional members. The professors may, of course, give advice in regard to the choice of these persons and the appointment of the editor-in-chief, but the actual determination of all these questions is made by the students themselves. The principal labor of the Editorial Board, and the one which has the greatest importance from the point of view of instruction, consists in reading all the Law Reports which are issued during the year, the most important being discussed in the *Review*. From time to time a so-called "case-meeting," *i.e.*, a general meeting of the Board, is held, at which individual members report upon the cases assigned to them, and the whole body decides upon the selection of the most important.

It does not require extended discussion to show what great importance this activity, always limited, to be sure, only to a picked few in each class, has for the general training of the young law students. In this way there is formed for the school a kind of legal general staff: that is to say, a number of young men who have all the advantages and accomplishments, which the case training particularly develops, in the highest degree. Naturally, too, membership on the Editorial Board of the *Law Review* is the highest distinction which a law student in Harvard or Columbia can attain, and the distinction is the greater because every one knows that this place of honor can be gained only through one's own exertions and ability. What an impulse this gives to the whole of legal education in American universities may easily be estimated. We have here, indeed, a stimulus of the highest ethical force, which is made especially strong by the complete publicity with which everything takes place, as well as by the inviolable democracy of the "Class," and of the system of instruction, in general. These special institutions undoubtedly count for a great deal in the practical success of the case method of teaching, a practical success no longer seriously disputed by any one in the United States.

We have, however, reached certain questions which present themselves in this enquiry, and must now be faced.

First: What are the essential causes of this success?

Second: In how far is this method really a scientific method of legal education, and in how far do the representatives of this method make good their claim to have revolutionized thereby legal education in general?

And the further question must be put: Are the best American law schools justified in suppressing, to the extent that they do to-day, text-books and instruction based upon text-books and lectures?

All these questions are intimately connected with one another, and in this connection they must be answered.

ESSENTIAL REASON FOR THE SUCCESS OF THE CASE METHOD

NATURE OF ANGLO-AMERICAN LAW

In answering the first question I will lay down first, for the sake of clearness, the following propositions:

In so far as the aim of legal education is practical activity in the law — the development and training, that is to say, of young attorneys — the case method is undoubtedly successful. The most essential reason for this success is the peculiar condition in which Anglo-American law finds itself, as unwritten law, in the present stage of its development.

Secondly: this success is, further, in large part due to the conditions, peculiarly favorable for it, which existed, or which could be developed, first at Harvard and then in more or less equal degree in the law schools of other American universities. These conditions indicate also from the outset limits to the peculiarly successful operation of this method.

I will now explain these two propositions. It has been said, the success of the case method is an educational success achieved by the American university law school from the point of view of methodical preparation for the practical calling of the law. This success is attested by many well-known phenomena in the legal life of America, and especially by the fact that the best law offices give to the product of Harvard, Columbia, Chicago, the preference over other applicants. Indeed, the continually increasing influx of students into these schools constitutes the best proof of its practical success, especially in a country like America where there are no legal regulations requiring law school attendance as part of the preparation of lawyers. It may be said, I think, that the fight for and against the case method has been just as much settled in favor of the method among practitioners as it was long ago among university law teachers.

I said, further, that the fundamental reason for this success is to be found in the present condition of American law, and within this especially in the unshaken authority of the common law. Unchecked by the voluminous output of statutory law, in all conceivable fields of law and in all the states of the Union, the law of America has still remained, above all things, common law. It may even be maintained that the numerous legislative performances that prove the incapacity of democratic bodies to give anything like correct legal expression to their projects of law, and the great number of such statutes, which usually amount to nothing more than clumsy bills of particulars, with no attempt to develop legal concepts, — that all this has actually helped to preserve the ascendancy of the common law in spite of its often fossilized or insufficiently developed principles. And this is so, even where, as in the field of Civil Procedure, an attempt has been made to "codify," or to formulate anew, separate branches of the law. *But common law is case law and nothing else than case law.*

This indicates, however, to borrow an illustration from physical science, a very

peculiar molecular structure of the law, and at the same time a definite stage in the process of development of law in general. In this stage law appears, not as a system of norms and general principles, of abstract commands and prohibitions, which the state as the highest power sets up by direct ordinance as the general rule of life, and which is laid upon the people, as it were, from the outside; on the contrary, the law appears here in its original form as the rules of law found by the judges in every single case that has come up for decision. Considered from the point of view of the people, law always appears an all-embracing network of legal relationships which exist between one individual and another, and between individuals and the state; as universal order indispensable to life, and growing out of life as it were spontaneously. Wherever this order is violated or contested, however, in any point, it is the sovereign judge who by his decision creates the law, and thus continually reëstablishes the old order. Grand as has been the development of the English law in the eight centuries of its history, and greatly as it has been deepened and refined in many of its component parts, both through natural growth and through the influence of foreign law, nevertheless, up to the present it has never passed beyond this original, relatively fluid condition of "judge-made law." Those Germanic peoples, on the other hand, who at a definite stage in the development of their national law submitted to the so-called "reception" of the Roman Law, gained thereby a system of abstract legal institutions which in the refinement and finish of its concepts had already been brought to the highest perfection. It is true that this system of abstract laws or rules remained for a long time foreign to the habits of life of those peoples, so that a development of centuries was required in order to complete the necessary adjustment between the inherited legal ideals of the people and the foreign system of law that had been "received" or taken over. In this way, on the European continent very often the original law, and above all in Germany the German legal thought, has remained the core even though overlaid with the perfected, definite concepts of technical Roman Law. The development of the law of the English people was quite different, for their law, the common law, in spite of occasional strong influences of Roman and canon law, remained really inviolate in form and content.

That is to say, even at the present time the common law, in its general aspect and in the nature of its concepts, has remained stationary in that phase of development of all national laws which precedes the formation of a strictly abstract codified system of law: that phase in which objective law appears in principle as a complex of legal relationships, from a practical forensic standpoint as a catalogue of writs and legal remedies. To the German and Frenchman of our time, therefore, the law appears always in popular thought as the abstract rule, as the general principle, to which all individual relationships of the citizens are *a priori* and for its own sake subordinated. To the Englishman and the American, on the other hand, the law appears rather as the single case of law, as the single subjective suit, conducted by the regular judge, and depending only upon his "finding of the law." The task of the European judge is to find

which of the rules and principles of law that are contained in the system of law governs the state of facts in question. Here, however, in the common law country, the law appears in the national thought as a quality which to a certain extent comes of itself to men and to the relations which bind men together; as something that is always there and for that reason is known and understood by every one of the people themselves. When, accordingly, in the single case, the rights of a fellow countryman come into question, it is the judge's duty to extract from the existing state of facts the law which is already contained in it, and to declare in his decision how, from the point of view of the law, the human relationships involved ought to have been, or ought now to be, ordered; in which task the only guide he can use is not an abstract norm or principle, but only the decisions of other judges in similar cases. It is true that the decision gives for the single case a rule which rests upon a legal principle. This rule, this principle, however, does not exist as a general and abstract norm, but appears only in the single case, and to a certain extent exists only for the need of the parties involved in this particular decision, even though as a precedent it possesses a certain directive force for future cases of the same or similar nature. The whole law lies in the reports of single cases which have been accumulating for centuries. Common law is case law, and the handling of such law is the practical calling for which the American student demands preparation.

Clearly this characteristic feature of the common law must have decisive and practical significance for legal education also. A law like the Anglo-American common law, for which the maxim still holds that it lives in the breast of the judge, and the rules and principles of which are made known not through statutes as abstract norms but only in the application to the separate case and through the voice of the judge, —a law so formed must be studied in its native environment, in the court of justice, and must be obtained from the decisions of the judge. Legal education in England has been governed by this point of view from the beginning, from the time when the Inns of Court arose, and with them the first law schools of a practical kind in which the young students of law, in daily intercourse with judges and lawyers, learned the law as novices and apprentices learn a craft or trade. Thus it was in England for centuries, and thus it is at present, for even to-day, whether or not they have formerly busied themselves with jurisprudence at Oxford or Cambridge, and whether or not they later attend the lectures on common law and equity, on criminal law and procedure, given under the direction of the legal guild, "reading in chambers," study of cases, direct participation in the practice of the law office and in the court, is the method by which young English lawyers acquire the requisite knowledge of the existing law.

Considered from this point of view, the case method is, then, in a certain sense, nothing but the return to the principles of legal education demanded by the very nature of the common law. The manner in which this occurs, however, shows a great advance in the first place over the pure apprenticeship in the law office as tradition-

ally practised in England and America; and also in the second place over the method of school instruction by text-books and lectures, as it was created in the nineteenth century. The purely empirical "'prentice-like" preparation for the law naturally takes away from legal education at the outset every characteristic of scientific teaching, since from the outset it leaves to chance the amount of legal knowledge which the student can actually acquire. Every possibility of methodically covering the entire field of the law as a great whole, logically and historically coördinated in all its parts, is lacking here. From the outset everything is based upon the intellectual power and the independent character of the individual student; upon that depends the extent to which through study of the law cases he can master common law and equity. In this method of preparation every young lawyer must conquer the legal world and the legal way of thinking, each time newly for himself; must create for himself, empirically, so far as he can, principles and system. His personal talent for legal thought and the measure of his forensic success are here the decisive actual factors.

Now, the older type of law school, with its text-book method, can in no way replace those particular qualities which practice alone can give; let this be expressly emphasized. No theoretical instruction in the law, whether in a country of codified law or in a country of common law, can do this. But this school and method proceeds from the correct point of view that, on the other hand, practice, the routine of the law office, whether in England or in America, is not real instruction. Important though it is, it can, even under the most favorable circumstances, supply only empiricism — that is to say, habitual use and practical familiarity joined to irregular acquisition of knowledge. No matter how indispensable is this stage in the training of the legal practitioner, it presupposes the existence of, and is made vastly more effective by, a preliminary course of systematic and theoretical instruction in the principles of law in its entire compass. On the basis of this belief there grew up first systematic lectures, then text-books, as the literary precipitate, so to speak, of the preceding. Both proceed from the conviction that even in English and American law a system of legal principles exists, and they obtain this system from the real source of the common law, from the decisions of the judges, gladly availing themselves, at the same time, of the classical work on the common law, *Blackstone's Commentaries*, as the most important means of instruction. But instruction based upon such lectures and upon various topical text-books which have grown out of them is to be carried on in a purely "academic" manner, that is to say, as dogmatic teaching, which rests upon the authority of the book and of the teacher who explains it. Judge Baldwin, one of the most zealous representatives of this older method of teaching law, says:[1]

> "No general method of studying law is likely ever to be discovered which is better than that of requiring the scholar to read daily and read with care a chapter or two from such a book, and then to be ready to explain the principles of decision

[1] 14 *Harv. Law Rev.* (1900) 260.

applicable to states of fact slightly variant from those given in the example put by the author."

The main defect in this mode of teaching is clear from these very words: it lies in the fact that law is taught here as a kind of elementary instruction of immature pupils, like any branch of knowledge in the high school. The principles are laid down in the text-book and in the professor's lectures, ready made and neatly rounded, the predigested essence of many judicial decisions. The pupil has simply to accept them and to inscribe them so far as possible in his memory. In this way the scientific element of instruction is apparently excluded from the very first. Even though the representatives of this instruction certainly do regard law as a science, that is to say, as a system of thought, a grouping of concepts to be satisfactorily explained by historical research and logical deduction, they are not willing to teach this science, but only its results. The inevitable danger which appears to accompany this method of teaching is that of developing a mechanical, superficial instruction in abstract maxims, instead of a genuine intellectual probing of the subject-matter of the law, fulfilling the requirements of a science. For as things now are, the empirical routine of the law office is preceded by a schoolmaster's routine of a sort of legal dogmatism, by which scarcely anything is gained for the development of the future lawyer, and certainly time is lost.

This is where the Langdell case method steps in. It proceeds upon the assumption that these threatened disadvantages of text-book instruction have generally been realized. It emphasizes the scientific character of legal thought; it goes now a step further, however, and demands that law, just because it is a science, must also be taught scientifically. From this point of view it very properly rejects the elementary school type of existing legal education as inadequate to develop the specific legal mode of thinking, as inadequate to make the basis, the logical foundation, of the separate legal principles really intelligible to the students. Consequently as the method was developed, it laid the main emphasis upon precisely that aspect of the training which the older text-book school entirely neglected: the training of the student in intellectual independence, in individual thinking, in digging out the principles through penetrating analysis of the material found within separate cases: material which contains, all mixed in with one another, both the facts, as life creates them, which generate the law, and at the same time rules of the law itself, component parts of the general system. In the fact that, as has been said before, it has actually accomplished this purpose, lies the great success of the case method. For it really teaches the pupil to think in the way that any practical lawyer—whether dealing with written or with unwritten law—ought to and has to think. It prepares the student in precisely the way which, in a country of case law, leads to full powers of legal understanding and legal acumen; that is to say, by making the law pupil familiar with the law through incessant practice in the analysis of law cases, where the concepts, principles, and

rules of Anglo-American law are recorded not as dry abstractions but as cardinal realities in the inexhaustibly rich, ceaselessly fluctuating social and economic life of man.

Thus in the modern American law school professional practice is preceded by a genuine course of study, the methods of which are perfectly adapted to the nature of the common law. The average student at Harvard or Columbia who starts with the requisite general education and capacity, who takes full advantage of his three years' course, and who proves this by his success in the yearly written examinations, enters finally the practice of the law office—and a law office that is busy, too, with difficult legal questions—better prepared than a graduate of any other school in America, England, or on the European continent. In his practice he has only to continue to exercise and to develop the manner of thinking that he has already brought to a very high degree of perfection in the school. By the side of this, what he has still to learn in his law office (especially in the fields of procedure and of written forms in general) is of very subordinate importance; although in this connection it must of course again be emphasized that this knowledge can never be gained in any school, anywhere, any more than any law school of Europe or America can teach the future lawyer the ethics of the legal profession or the peculiar instinct (*Takt*) of the successful lawyer or judge. In this calling, as in every other, only the direct atmosphere of daily professional life can furnish to the beginner certain experiences and qualities which are of great practical importance. But apart from this the American student gains in the modern law school of his country all the practical knowledge of the law that any school can give to a future attorney or judge, in unparalleled manner.

ACCOMPANYING WEAKNESSES OF THE METHOD ON THE SCIENTIFIC SIDE; SUGGESTIONS LOOKING TOWARD IMPROVED INSTRUCTION

HEREIN we find the strength, but herein also the weaknesses, of the case method. These weaknesses, to sum up the writer's opinion in a word, lie on the scientific side of American legal instruction in its present form. In this connection we may distinguish between, first, the influence exerted by the case method upon the scientific comprehension of law by the students, that is to say, upon legal instruction proper; and secondly, its reaction upon the scientific elaboration of law in general, that important function of law faculties which we must consider apart from their purely pedagogic aims.

With respect to the first point, it seems to me that the following consideration is of some importance. It is characteristic of the case method that where it has thoroughly established itself, legal education has assumed the form of instruction almost exclusively through analysis of separate cases.[1] The result of this is that the students never obtain a general picture of the law as a whole, not even a picture which includes only its main features. This is, in my opinion, however, just as important for the study of Anglo-American law as for the codified continental systems, and is a task which should also be accomplished by the law courses in the universities. To this end, the following seems to me above all things requisite:

First, as an introduction to the entire curriculum, care should be taken to introduce to the students, in elementary fashion, the fundamental concepts and legal ideas that are common to all divisions of the common law. Or, to express it in a word current in European pedagogy, the beginners in American law schools should be given a legal *Propädeutik*, or preparatory course, which in a simple yet scientific manner shall set forth the elements of the common law; shall furnish, that is to say, a comprehensive view of the permanent underlying concepts, forms, and principles, not forgetting the elementary postulates of law and legal relationships in general. The more rigorously *casuistic* the case method of instruction which then follows necessarily has to be, the more important it seems to me it is to make clear to the students at the very beginning certain fundamental facts and guideposts of the law which are removed from all casuistry and theoretical controversy. Only in this way will their future studies rest upon a solid and scientifically grounded foundation.

Classical Roman law at its height developed, as is well known, a special literary type, the *Institutes*. This was a comprehensive presentation of the elements of law, intended to introduce and facilitate the regular course of study, and the fact that Justinian retained it as an introduction to his code shows what importance was attached

[1] Judge Baldwin (14 *Harv. Law Rev.* 258) replies to the question: What is a case-book? in the following words: "It is in substance a series of fragmentary discussions of particular topics, interspersed with fragmentary portions of opinions from reported cases. . . . No science can be learned purely from particulars. The universals must be studied to discover what the particulars mean and whence they sprang."

to it. Now when at the beginning of the nineteenth century in Germany, thanks to the work of Savigny, modern teaching of the so-called German common law came to be developed, the real foundation for this new teaching was the reception of the Roman law; and so, naturally enough, the name and form of the *Institutes* were taken over for the introductory legal instruction. In all the German law faculties it became the invariable practice to begin legal instruction with a so-called "Institutes-course" (*Institutionenvorlesung*), which usually comprised, first, a general elementary discussion of the relation between law and the state; next, some account of the external history of the Roman law; and finally, a description of the fundamental institutions and main principles of the Roman private law in its important divisions, such as the law of persons, of property, of liens, of inheritance, of obligations, etc.; in connection with which the main events of the inner legal history, that is to say the development of the most important concepts and doctrines, were also presented. When, later, codification began in the great German provinces, scientific instruction in the law (the Codes again being in large part founded upon Roman legal thought) very soon recovered from the error, which it originally committed, of immediately beginning to teach these new law codes dogmatically. The faculties returned rather to the practice of introducing scientific instruction in law by thoroughly inculcating the fundamentals of the historic Roman law, and so again, at the very forefront of this instruction, stood an *Institutionenvorlesung*. This can be traced with especial clearness in the history of legal education in the Austrian universities, where, about the middle of the nineteenth century, the reforms connected with the name of Josef Unger occurred in the manner described. In the German Empire, too, although the Civil Code, since its introduction, as a matter of course constitutes the core and the main substance of legal instruction, the custom of prefacing an "Institutes-course" has continued.

Similarly, in my opinion, in American university law schools the students ought to be given an introductory lecture course, which should present, so to speak, "Institutes" of the common law. Every department into which the American law is divided, whether as common law or equity, employs certain common elementary ideas and fundamental legal concepts which the student ought to be made to understand before he is introduced into the difficult analysis of cases. Concepts such as choses in action, person and property within the meaning of the law, complaint and plea, title and stipulation, liability and surety, good faith and fraud, should, in these introductory lectures, be given to American students in connection with a system of the law, even although this should include only the general fundamental features. They should not, as usually occurs to-day, come to the students unsystematically and unscientifically, as scraps of knowledge more or less assimilated out of law dictionaries and indiscriminate reading of text-books.

And there is a second consideration which must be taken into account as bearing upon this question of the comprehension of law as a whole. The current common law of England and America is an essentially historical law. Many of its current concepts

and doctrines go back through a development of centuries, and can be comprehended only on the basis of a fundamental historical explanation. For Anglo-American law just as much as for the common German law of the nineteenth century, the birth and powerful influence of the new historical method marks the turning-point at which the inheritance of the Middle Ages—legal craftsmanship and practical expertness in law—becomes converted into legal science. What Savigny and his pupils and the entire legal-historical school of Germany accomplished for the common law of Germany has been performed in no less admirable fashion in the last half-century for the English common law by such men as Thayer, Langdell, Ames, and Bigelow in America, and in England by that incomparable genius, F. W. Maitland. The task which now in our time confronts scientific legal instruction in America, the task of teaching the historical development of the separate doctrines and principles of the common law, is already in part being most excellently performed in those schools where the necessary case-books have been provided, and where the case method is so handled as to lay proper emphasis, in the analysis of the separate cases, upon the historical point of view. But here, also, it seems to me that the historical scaffolding of the English common law, as a general introduction to the analytical study of Anglo-American law, is extremely desirable and of the greatest importance. A scientifically constructed survey of the main sources of the common law and of their relation to one another; of the concepts of customary and positive law; a short external history of the law, which should include the origin and development of the English courts of justice; a brief exposition and development of the nature and extent of the concept of equity; a description of that institution so important for Anglo-American law, the Reports, and of the concept of precedent; finally also a glance at the phenomenon of statutory law (legislation) and its nature and forms; all these things and much else connected with them ought to be furnished the students at the beginning of their studies, before their introduction to the analytical study of the cases. The fact that this ground can be covered only in elementary and summary fashion need not prevent the presentation from being thorough and scientific.

This, then, would be another task to be accomplished by an "Institutes-course" in the English common law. A further service would be the introduction of the students from the beginning into the atmosphere peculiar to legal science, through direct lecturing on the part of a living teacher. I attach very great importance to the direct lectures of a legal scholar who has been trained in a thoroughly scientific manner. It is simply doctrinaire exaggeration on the part of many contemporary law teachers in American universities, when, in order to preserve the exclusiveness of the case method as a unique, hermetically sealed system of teaching, they reject every lecture *a limine* as a means of instruction; when they describe such lectures as mediaeval and therefore obsolete; when they declare that lectures to-day do not easily arouse, and still less easily hold, the interest and attention of the students. In the same way that the students put down in their note-books the main points which are brought out by dis-

cussion in the pure case method exercises, so they can just as well jot down the train of thought of a series of such lectures, in which the elementary concepts of the law and the most important details of legal terminology are explained to them. Such a course of preliminary lectures, whose nature throughout should be that of talks to beginners, would, in my opinion, with great profit, take the place of the now customary, unscientific introduction to the law, through law dictionaries and discursive reading.

The course of lectures on Institutes, which I here recommend to serve as authoritative introduction to the study of law, would naturally divide itself along the two lines of approach already indicated. First would come a sort of "general part," an exposition of an essentially dogmatic kind, in which the main legal concepts, forms, and fundamental institutions, corresponding to the examples I have already cited, should be systematically set forth, while the second part should give a beginners' course in the sources of the law, and a historical survey of the main events in its development. Such a course of lectures, which should be given for about three or four hours a week, would doubtless extend over a part of the first year of study, at least the first third or the first half. On the other hand, there is no reason why a part of the case method exercises which are now conducted during the first year in separate fields of the common law should not also go on simultaneously. If, however, during the first few weeks of study, the main task of the pupils consisted in a course of "Institutional Lectures," then, in my opinion, we should essentially shorten and diminish that confusion and obscurity which—as is admitted by even the most zealous advocates of the exclusive case method—troubles most of the young men at present during a large part of their first year in their attempts to analyze the cases. They would enter upon the analysis with a certain amount of definite knowledge, and certainly with a better understanding of the sense of the entire machinery of the law. They would learn more quickly to group under several general heads the particulars with which the study of the cases supplies them, and thus from the beginning would introduce a certain orderly arrangement into their growing knowledge of the law. In other words, the accumulation of the material of legal thought, taking place daily through the analytical exercises, would from the beginning take place systematically and with a certain consciousness of purpose.

Such an introduction to the law, effected by means of a scientifically systematized course of lectures, would in my opinion enhance those great advantages which subsequent instruction under the case method undoubtedly possesses for the students. Particularly would this be true for those who by mental aptitude incline more to the dogmatic or synthetic method of thought than to the analytic, a distinction which is given by nature, and to which far too little importance is attached by the advocates of an exclusively analytic method.

An introductory course of lectures, then, upon the Institutes of the common law seems to me extremely desirable, in order that before the student enters upon the

casuistic study of law—lasting several years and of necessity splitting the topic up into fragments—he may be given a general survey of legal organization, and may thus be made to see the system of law as a living whole, the product of centuries of development. I go farther than this, however. It seems to me very advisable to add also at the end of the course lectures which shall furnish the American law student once more, before he steps out directly into practical legal life, a certain general summing up and survey of the law. If the student has mastered all essential institutions and doctrines of the common law during his three years' course, through the analysis of countless cases, he will certainly now be sufficiently matured to undertake, with full understanding, two important tasks. First, he should be able to grasp the general scientific theory of the law as one of the great dominating phenomena of human civilization and human thought. Secondly, he should now be fully prepared to cast to great advantage a comparative glance at that second mighty system of law which has shaped the history of humanity, namely the Roman law.

The first mentioned task corresponds pretty closely to what has for a long time been designated by English and American teachers of law by the term "Jurisprudence," and is taught as such in several universities. By this is understood, broadly speaking, a presentation of the leading fundamental principles that are more or less common to the modern law of every civilized people, considered both as products of a developing positive law and as influenced and perfected by the theories and ideas of legal philosophy. Historical, philosophical, and sociological aspects of the law have here to be bound together in harmony with one another, in order to help erect a theory of the fundamental principles of law which shall rest upon the surest possible foundations. The concept of law in general, the concept of sovereignty, of law as an objective norm on the one side, as subjective authority on the other; the various classifications and divisions of the law—public, private, and international; the various manifestations of the law—customary, written, and judge-made; in connection with this, moreover, a general theory of the sources of law; further, the philosophic basis of the great legal institutions of possession, of property, of inheritance, of contract, and of damages; in connection with this the theory of the will in law; and finally the great basic forms and fundamental principles of the safeguard of law, of procedure; these, and many other fundamental theoretical problems besides, could be presented to the mature students in such a course of lectures, under the head of Jurisprudence, to their great advantage.

The second course of lectures, on the other hand, those dealing with Roman law, would also, of course, be primarily so planned as to bring the outlines of this system of law into comparison with the common law, already familiar to American students at this stage. The analogies and the differences which are brought out sharply by the comparative method would go far to make the features and characteristics of the native law still clearer to the students, and to deepen their understanding of their own law through their insight into that of other peoples.

Now, it is perfectly true that through both of these additions — the institutional lectures at the beginning and the two encyclopedic courses at the close of the course of study — the curriculum, already very comprehensive and with difficulty to be covered in a three years' course, would be very appreciably enlarged. Indeed, the subdivision of the three original departments of the law — common law, equity, and procedure — has now been pushed so far and the number of specialized courses has thereby become so great, that three years appears entirely too short for a legal education, pursued with the earnestness and thoroughness which characterize the leading university law schools of America at present. A glance at the annexed curriculum offered at Harvard brings this fact out unmistakably.

First Year: Agency; Civil Procedure at Common Law; Contracts; Criminal Law and Procedure; Property; Torts.

Second Year: Bills of Exchange and Promissory Notes; Equity; Evidence; Insurance; Property; Public Service Companies; Sales of Personal Property; Trusts; Damages; Law of Persons.

Third Year: Conflict of Laws; Constitutional Law; Corporations; Partnership; Property; Suretyship and Mortgage; Bankruptcy; Equity; Municipal Corporations; Quasi-Contracts; Admiralty.

Harvard, realizing this fact, and at the same time desirous to take a step forward in the development of legal scientific studies, introduced several years ago an optional fourth year, open, of course, only to graduates. As appears from the list given below,[1] there are offered in this fourth year, besides legal philosophy, general jurisprudence, and Roman law, a number of special courses which from their very nature can avail themselves of the analytical case method only in part. Assuredly, then, if an obligatory fourth year should be added to the American university law curriculum, enough time would be gained to find place not only for the courses here suggested, but also for special lectures, and for special practical analytic exercises conducted by the case method; so, in particular, in international law and American administrative law. There would also be time for lectures upon legal reform, designed to give the students, even before they go out into practice, some critical guidance in the problems of the *lex ferenda.* In general this lengthening of the period of law study would undoubtedly permit a deepening in various directions of the students' theoretical knowledge of the law, and this, again, would act as a powerful stimulus to many, after they have left the school, to continue their scientific studies.

If we glance now at the Harvard curriculum, we must recognize that here already the right path has been entered upon, and entered upon very well — the path which leads, if I may so express myself, to a classical perfection of modern legal education in America. May we not hope that Harvard, again assuming the lead, will pursue this

[1] *Graduate Courses:* Roman Law and the Principles of the Civil Law and Modern Codes as developments thereof; Criminal Procedure and Procedural Reform; Administrative Law; History of the Common Law; International Law as administered by the Courts; Introduction to the Year Books; Jurisprudence.

path to the end, and make the fourth year obligatory? And may we not expect that in this instance again Harvard's example will be followed by its traditional rivals among American university law schools? It is not as though this lengthening of the legal curriculum necessarily meant any loss of time; this need not be the case if the year be taken away from the place where, at present, it is spent to the least advantage, namely from the college. It would lead me too far, and I ought not to venture on the basis of my own very insufficient personal experiences, to say here anything definite in regard to the efficiency of the present-day American college. The question is too difficult, and involves too many important considerations. But much that I have heard and read of the college and of its success in its present form, much that I could observe for myself, leads me with all caution to the conclusion that in those very institutions in which college work is taken as a preliminary to law, the benefits of the college training could easily be secured to future law school students by setting a more rigorous pace in a period of time shortened by a year. The gain of this full year would undoubtedly, however, be a good thing for the law school and hence for legal education. Harvard would not have to alter much in its present graduate courses to reach for all its students the goal which it already almost touches,—a goal which can be defined in a single word: to be, in our day, absolutely the best school for lawyers. There is no doubt that Columbia University, that the excellent Chicago faculties, led by Hall and Wigmore, and with them, or soon after them, still others of the more progressive university law schools, would attain the same high goal.

THE IMPROVEMENT OF LEGAL SCHOLARSHIP AND THE PROMOTION OF LEGAL RESEARCH

It has already been remarked that the modifications here suggested are of a sort to exert a beneficial influence not only upon legal education but also upon American legal science in general. This point will now be very briefly developed.

A glance over the history of American legal education reveals clearly how the rise of numerous law schools resulted immediately in intensive literary activity on the part of lawyers. On the basis of the lectures given at the schools there appeared numerous treatises and text-books covering separate fields of the law. The scientific value of this literature, the type of which continued unchanged until far into the second half of the nineteenth century, is not, it must be confessed, very great. Like the English legal literature of the century following Blackstone's work, it is really confined to commentaries, or to compilations and fragmentary discussions of the most important decisions in the separate fields of law. Almost uniformly, both in England and America, this literature is intended either for young candidates for admission to the bar, or for the use of practising attorneys, and has accordingly no higher aim than to make it easier for judges and lawyers to master the ever-increasing flood of judicial decisions. Still, even in this period, some notable literary production was achieved by American lawyers; above all, Chancellor Kent's famous commentaries supplementing Blackstone, and the writings of Story, are not only among the best literary efforts in the field of the common law, but are among those which are most used by the profession in actual practice. The activity of both these men, however, was completed not long after 1840. From that time on, for a generation, American legal literature, while continuing to broaden its field to an extraordinary extent, remained consistently upon the level of manuals of instruction (and instruction, note, of high school grade), or of aids to practice.

So much the more remarkable, then, is the significant change which occurred after the year 1870. Doubtless influenced to a considerable extent by the new spirit evoked by Langdell's reform, there began, first in Harvard and soon in university law schools generally, a new epoch for American literature. A series of works was produced which rose to the level of European legal science, and need not fear comparison with the new English legal literature which at about this same time also came into being. Through the writings of Maine, Bryce, A. V. Dicey, Anson, Sir Frederick Pollock, and F. W. Maitland, Oxford and Cambridge became small but influential and efficient centres for a scientific treatment of the common law — scientific in that high sense which the term has possessed in Germany since Savigny and Jhering. It is significant that it was again the historical method, the creation of a new history of law, using in its investigations all modern scientific methods, which also in England changed the legal scholar from an industrious compiler of decisions and statutes into a scientific investigator in the full meaning of this word. Similarly in America, it was Langdell and Thayer, Bige-

low and Ames, who as keen historians of the common law laid the foundations for a new, truly scientific, activity in American law. At the same time, in the really classical work of Oliver Wendell Holmes upon the common law, there appeared the first philosophical theory of Anglo-American law to be produced in this country; a most admirable performance from a literary and from a scientific point of view, being based upon a masterly command of the legal literature of Germany and France, and possessing a value for the whole science of law which, in my opinion, is only beginning to be recognized.[1] This newly founded American science was shortly reinforced by the younger generation of scholars, trained first in the Harvard Law School, and later also in the other university law schools, who created, first of all in the *Harvard Law Review*, their literary meeting ground and powerful organ, but have also, for something like a decade, found expression in the more recent publications mentioned above, of the other university law schools.[2] The amount of scientific legal labor which has gone into the making of the twenty-six volumes or years of the *Harvard Law Review* is a wonderful accomplishment on the part of teachers and pupils of modern American law faculties employing the analytic method. In men like Roscoe Pound and John Wigmore the younger generation possess two eminent masters of legal research and of comparative legal theory; and it is one of the most encouraging features of present day legal life in America that such men are in a position to influence the tide now plainly setting in towards a systematic, scientifically grounded reform of great parts of current American law — notably its thoroughly antiquated rules of civil and criminal procedure.

Now, although, as has been said, the Langdell reforms were really responsible for the first scientific treatment of the law, and consequently for a scientific legal literature in the sense in which European jurisprudence employs this term, nevertheless it cannot be denied that the literary powers of the new generation of American teachers were for many years very largely expended upon supplying the new aids to law school work and instruction — the case-books, that is to say — which the new method demanded. This task has been accomplished in the last generation in an eminently comprehensive and satisfactory manner.[3] Undoubtedly this work of making from out of the almost incalculable mass of published cases, contained in thousands of volumes of English and American reports, a continually better selection of those which are to be used in teaching, and of arranging these again systematically in the case-books, has been performed admirably. But on the other hand, it is equally certain that this

[1] The appearance of Leonhard's translation at Breslau, in 1913, gives German legal science the greatly desired opportunity of now spreading Holmes's work widely over the legal world.

[2] In England, for almost a generation, the celebrated *Law Quarterly Review*, now edited by Sir Frederick Pollock, has been the literary stronghold of the modern, strictly scientific legal research of England.

[3] In the year 1908 there were at least eighty-six different case-books; since then the number has considerably increased. At that time there was announced for publication, under the editorship of Professor James Brown Scott of Washington, a special series, which was designed to embrace, within the compass of about twenty-five volumes, the entire private and public law, and thus to place at the disposal of American law schools a standard type of case-book, constructed with the greatest possible uniformity and care.

kind of literary activity has prevented many forceful writers among modern American law teachers from cultivating the fields of legal history and dogmatic literature as fruitfully as they might otherwise have done. The already suggested obligatory lengthening of the law course to four years would undoubtedly greatly stimulate the production of strictly scientific literature in American law. For this would render possible a larger number not only of analytic exercises, but also of lecture courses; lectures upon separate legal institutions resting in large part upon statutory law, as well as courses upon problems of legal history and of comparative legal science, such as Harvard already offers to its voluntary fourth year students.

Perhaps the thought may be here expressed that, in connection with this, a certain disadvantage which the case system possesses for the scientific activity of law teachers would be diminished. The case method claims, as has been remarked above, an uncommon amount of time and devotion on the part of the teacher in connection with the oral instruction, and so already reduces very seriously his opportunities of composing extended works in legal science. Furthermore, in the prosecution of legal instruction by means of analytical exercises, a great part of the teacher's important intellectual work (which consists in preparation for the exercises, as well as in conducting them) survives only in the tradition of the pupils and finds as a rule no literary expression. From this point of view also a certain amount of lecture work, such as is here suggested, would give the law teachers of American university schools somewhat more leisure for literary activity. In general I cannot forbear to remark that the burden of purely pedagogical labor which rests upon American law teachers is extraordinarily great, and that, furthermore, there is not as much division of labor, in this direction, as I should consider necessary. If I am not mistaken, the view still very commonly prevails in American universities that in reality every law teacher ought to be competent to conduct case method exercises in every part of the common law, and as a matter of fact we find professors who (to cite an example) offer, concurrently or successively, criminal law, contracts, and then again equity pleading and admiralty law. Now, it seems to have been well established from the development of European science that, in the realm of legal science as in other sciences, truly intensive scientific work can as a rule be accomplished only by restricting one's self to definite, more or less connected parts of the entire content of the law. Thus, for example, in the German, Austrian, and Swiss universities, it would be absolutely out of the question for civil and criminal law, both, to form the field of work of a legal scholar. Civil law and criminal law on the Continent are sometimes connected with civil procedure and criminal procedure, but further than this the field of a single legal scholar is not extended. Public, commercial, and criminal law form completely independent subjects, each sufficient to occupy the entire working life of a single legal scholar, and recently the tendency toward specialization has proceeded much further still, both in Germany and in Austria. A similar development will have to take place in the American university law schools, and then the strength of the individual teacher of law, already so strongly

taxed by the analytic method, may be devoted somewhat more freely to his own literary activity.

In connection with the number of the professors and the distribution of work among them, I might perhaps mention here a second fact which is not, as would seem at first sight, of merely superficial importance for the university law schools, and which seems to me, moreover, to react upon instruction. I refer to the relatively small number of the professors working in the institutions, on the one side, and the great number of students in the separate classes and exercises, on the other. In the Harvard Law School in particular this circumstance struck me most forcibly. It results, first of all, in the general overburdening of the professors which has been already criticized; then, in the necessity for one and the same teacher to teach at the same time relatively distinct portions of the law, as, for example, private law and criminal law. A further serious consequence, however, is the overcrowding of the classes, which has a natural connection with the limited numbers of professors. I have seen classes in Harvard and Columbia which were regularly attended by 100, 120, 150, and perhaps even more students. Under these conditions inevitably only a very small fragment of the students present can actively participate in the exceedingly fruitful and instructive analysis of cases according to the Socratic method. It is obvious that inside of this small fragment, again, there will always be a tendency—simply for the sake of the more rapid progress of the analysis—for certain of the more talented students to be generally called upon and drawn into coöperation by the professor. Now, although it is true that those other students—the great majority—who listen silently and make notes, also learn much, nevertheless, a very valuable element of this whole method has undoubtedly been destroyed for them. In fact, the complete effectiveness of the Langdell method, and for that matter of any instruction which involves an exchange of questions between teacher and student, is always conditioned by the requirement that only a limited number shall take part in the exercises. In the *Praktika* which are customary in the legal seminars of our German and Austrian universities, the small number of the participants is taken for granted as a part of the system. It seems to me, therefore, important and urgently desirable that, particularly in the leading schools of Harvard and Columbia, the classes should be further subdivided and the teaching force increased, to the end that the number of direct participants in the analytic instruction may reproduce the originally very favorable conditions which surrounded Langdell and his pupils. For one should never overlook this fact: the living influence of the teacher upon the individual hearer who has been questioned or who has entered into the discussion is an irreplaceable element of the entire method. If this is weakened, or if in any way the direct personal contact between teacher and pupils fails, it will be only a matter of time before the success of the whole method of teaching, and of the law schools dominated by it, will be open to discussion.

Summarizing the preceding remarks, I may say that the proposition with which I started as to the value of the case method, and the conditions as well as the reasons for its success, has now been fully discussed. The mode of instruction created by Langdell has proved itself to be an unrivaled method for training the American law student to independent thought and to the keenest powers of legal reasoning, and for leading him at the same time to the knowledge of what the law really is. It should be strongly emphasized here, however, that it can concern itself only with the knowledge of that law which may be designated as the general common law of America. That is to say, at the university law schools the student becomes acquainted with those principles of the whole common law which are more or less current in all the separate states of the Union. It cannot, of course, be denied that in this process no account can be taken of those not inconsiderable local variations in the law which are due in part to the legislation of individual states, in part to deviations made by the courts in certain fields from the general norm or standard of the common law. Assuredly in this fact, as Professor Albert M. Kales of Chicago has recently pointed out in a keenly reasoned and very forcibly written article,[1] there lies a certain disadvantage, which has also been emphasized differently from another side—by New York practitioners, for instance, who criticize the prominence of Massachusetts law in the case-books used in Harvard and Columbia.

We may concede that these imputed disadvantages of the case method exist in some degree, but should be careful not to attach too much importance to them. In a field of law as enormous as that of the Union, with its forty-nine separate jurisdictions and its equal number of highest courts, a certain local or—if one may so express one's self without wounding the state pride of the members of the Union—a provincial variation in the separate fields of the common law is unavoidable. No law school, and no method of legal instruction ever devised, could accomplish this: on the one hand, to fulfil unexceptionably its great task of teaching, in a period of three years, the principles of the common law, which have been developing for eight hundred years, and since the Declaration of Independence have been continued independently in each separate state; and on the other hand, to take especial care that every new student, whether he comes from California to Harvard, or from New York to Chicago, shall find the peculiarities of his home state fully treated. To ask this is to ask the impossible. The demand for stronger emphasis of the local law of that state or group of states, in which the individual law school is situated, may doubtless be met to a certain extent by special lectures, exercises, and case-books, through which students who have finished the regular course may pick up the variations in question. It must always be borne in mind, however, that a scientific education in American law can only be an education in the general common law, and it must be said that no science—and the aim since Langdell's time has been to teach the law as a science—can have any other

[1] "The Next Step in the Evolution of the Case Book," paper read before the Association of American Law Schools. 31 *Rep. Am. Bar Ass.* (1907) 1091-1119; 21 *Harv. Law Rev.* 92-119.

aim than the establishment of general principles, ruling the mass of single facts. Certain it is, that local divergences or deviations of special judge-made or of special statutory law do not lend themselves to scientific instruction, and the eloquent pleaders for the consideration of this "exceptional law" (*Sonderrecht*) in theoretical legal instruction may be consoled by the fact that such law will sooner or later tend to disappear, because of the well-known strong tendency of the American judiciary to maintain in all important points the legal unity of the common law.

TRUE SIGNIFICANCE OF LANGDELL'S INVENTION IN THE DEVELOPMENT OF LEGAL SCIENCE

I PASS now to the question of whether we are justified in considering the case method, irrespective of the manner in which, in points of detail, it may be modified or supplemented, as essentially a scientific method at all, and if so, on what grounds we may so consider it. I have already designated as the most noteworthy attribute of the American university law school the fact that it is an educational institution which leads directly into practice, and is thought of as existing only for this end—that it is a "professional school," in other words, in the full sense of this expression. This very quality has, as was remarked above, without doubt been responsible for its great success. Langdell's intention, however, went much farther than this. He expressly postulated the existence of a science of the common law, and, arguing from this premise, in the first place claimed legal education as a branch of university work, and in the next place ascribed to the analytic method the special characteristic of a thoroughly scientific manner of instruction. When we recall his words, we must perforce recur to this point of view, and appraise finally the case method in its present relation to legal science.

The questions involved were phrased above in the following order. We enquired, first, in how far a scientific method of legal instruction really exists here; further, in how far legal education in general has been thereby revolutionized; and finally, whether the university law schools of America are justified in suppressing to the extent that they do to-day, text-books and lectures. I think that I have already answered the last question. I have shown that the vigor of American legal science is the result of the deepening which all legal education has received through the analytic method. I have, however, in my positive suggestions also pointed to the necessity of supplementing these analytic exercises, both at the beginning and at the conclusion of the course, by scientific, systematic lectures, and finally I have also referred to the fact that a more extensive growth of scientific legal literature in the United States may be expected with full certainty from the forces now at work, and fortunately so, for the reason that it seems essential to further progress. Therefore I do not hesitate to say again expressly that the unqualified rejection of the lecture from the curriculum of the university law schools, and the extraordinary slighting of literary aids to the study of law, seems an error and a prejudice which has its origin in an undoubted exaggeration of the value of the analytic method in and for itself; and possibly also in an exaggeration of the value in scientific instruction of "method" in general.

This exaggeration comes out also in that assertion of American law teachers, so often heard, that the case method, first and alone, made possible the scientific study of the common law; that only through it can the study of law gain the character of science, because in the case method we find the application of the "inductive method" to the study of law, and science can be built up only by induction. This ever-recurring proposition of the identity of the inductive method and the case method

betrays clearly the misunderstanding which here exists. In the first place it is not correct to say that science, or even physical science alone, avails itself only of the inductive method, that is to say, of inference from the particular to the general. In the construction of every science, and especially of the exact sciences, deduction plays as large a part as induction; no one has expounded this more clearly than John Stuart Mill in the second volume of his *Logic*. Prominent though experimental and inductive methods are in the sciences which serve physical research, we press a generalization much too far when we make of the inductive method the sole criterion of scientific intellectual activity. But even apart from all this, the analogy between legal science and physical science so frequently drawn by modern American lawyers in their discussions of method is, in everything that concerns nature and method, itself inaccurate.[1] In so far as modern "comparative" legal science investigates the law as an historical manifestation of social life, and therefore as a natural, because a social, phenomenon, it may indeed be permissible to speak of "induction," for in the method of thought that is here applied to the law we strive, after observation of separate historical and statistical facts, to pass beyond the concrete manifestations and operations of legal institutions to a study of the sequence, and of the simultaneous appearance among different peoples, of these manifestations of popular life, and so, finally, establish certain "laws" (*Gesetze*) which govern the development of "Law" (*Recht*). If this were what is meant by legal science, then legal science might by all means claim to be proceeding by the inductive method, and therefore following in its methods the same path as physical science. The end aimed at, however, in these modern sociological, legal-historical, and cultural investigations—useful and important as these certainly are—is not at all legal science in the sense in which this expression has been used for centuries,—in the only sense in which legal science or legal education is understood, when Langdell and his followers indicate the case method as its most important instrument.

Rather, legal science, according to the traditional and established view, shared also by Langdell and his followers, is to be understood as the science of positive law, which is always to be cultivated through the study of the sources of law; in the case

[1] The same may be said of the comparison, so frequently made, between the law library with its thousands of volumes of reports and the laboratory of the chemist or the research institute of the physiologist; as also of the proposition advanced by Keener, "that law, like other applied sciences, should be studied in its application." Such comparisons can signify at bottom nothing more than that the exact knowledge of the original material with which they work is common to all sciences; but the knowledge to which this study tries to attain is quite different in physical sciences, on the one side, and in the science of positive law, on the other. The latter is not an applied science in the sense that chemistry, for instance, is; for the rule of law, the norm, whether the law is codified or not, is not found first through the "application," that is, through the individual law case of the court,—in the way in which a physical law is found through an experiment,—but it is present from the very first as an abstract norm—in the common law mostly in the precedents; its application in the individual case serves only to analyze its content of thought. This content of every legal norm is, however, inexhaustible and must be analyzed again and again, for the reason that every norm comes into contact with a continually changing state of facts whose potentialities no law can express, no judicial decision can provide for once for all, nor anticipate by a general legal rule. The "finding" of the law by the judge is, therefore, confined, from the very first, within the narrow circle of the single or of the several legal principles which alone can be involved in the particular case. The student who then studies the "application" of the law in the particular cases does not stand in the same relation to these as does the physical scientist in relation to natural phenomena. These latter are the result of forces of nature that are to be investigated. Judicial decisions, on the other hand, are special acts of the will, which have been reached by a process of logical interpretation from a more general declaration of the will, contained in each positive legal principle.

of the common law, therefore, through the study of the decisions of English and American courts of law. Legal science, in the traditional sense of the word, is scientific knowledge of the positive law, and as such is one of the so-called intellectual sciences (*Geisteswissenschaften*); or, to use another expression current in German, it is conceived of as a normative science (*Normwissenschaft*) in contrast to all sciences which rest upon observation, experience, and investigation of natural phenomena, and have to make clear and to explain the general laws governing life and matter. For the positive law rests entirely upon "norms," that is to say, upon commands or prohibitions, denoting something which "ought to be" rather than something that "is." Every single decision of a court of law contains nothing else than the regulation of a legal relationship, a regulation which, for the single case, gives actual expression to this something which ought to be. In essence, legal science can, therefore, only consist in comprehending all these commands and prohibitions, these norms, in the inner historical and logical relation which they bear to one another. In the immense confusion of individual legal relationships it can have no other purpose than to create order; first by distinguishing the great branches of the law as a whole; then, within these branches, by bringing into clear relief the leading institutions, forms, and doctrines of the law, as they have been developing for centuries; and finally by arranging again the general concepts thus obtained into a system, as logically coherent as possible, that shall express the fundamental ideas of the national law. The science of law does not work, then, with physical facts, but with the products of the human will, which has been directed to the ordering and guidance of the individual and social life of humanity.

This holds good for a science of the English common law just as much as for that of the Roman law or of the law of a modern, code-ruled nation. The notion that the separate cases, in which the common law always expresses itself, are somewhat like the separate observations or experiments of the physical investigator, and that just as the physical investigator by means of the inductive method derives the generally valid law of nature out of the separate phenomena of life, so also the lawyer, on his side, out of the separate law cases extracts the general rule, the law,—this view I consider an erroneous and merely superficial analogy. For legal science cannot deal with law in the sense of the physical investigator, but only with law in the sense of definite norms, willed by men, and intended to guide and limit the business of men. Even in the unwritten customary or judge-made law of England and America, these general norms have long existed, developing richly and in manifold ways out of primitive germs and rudiments, and bound together into a whole which, even if still incompletely developed itself, tends none the less to be logical and systematic. The judge who, in the individual case, decides according to the common law, applies, consciously or unconsciously, to the state of facts then before him, one of these already existing norms, or several of these norms in logical connection, and pronounces, as the result of his intellectual process of thought embodied in the judgment, only the

rule or norm applicable to the specific case. His intellectual activity in this is, therefore, essentially deductive; for by deduction we mean the application of an already existing general rule to the particular case. The fact that these norms of the common law are not codified, that they have not been set up in their entirety as fixed law, that is to say, by a single act of the lawgiver, does not alter the fact that they exist, and that from the very beginning they dominate all legal life, both the parties who seek the law and the judge who declares it. The illusion that all existing legal decisions should be regarded in the same light as physical facts, as a sum total of separate phenomena, from which the judge and the legal scholar, in the same way as the physical investigator, have to extract by induction the principle, the "law,"—this illusion is produced by the fact that the common law judge in framing his decisions enjoys the freedom (in practice greatly limited by the principle of *stare decisis*) of formulating to some extent anew in each case the norm which is to be applied to it. Out of the entire body of law, published in the form of an enormous mass of prior decisions, he finds the norm, as it were. The principle, however, that resides in the norm, and that finds expression also in the particular decision, has always existed *a priori*, and its application in the particular case is an instance of logical deduction from that principle. Even when the common law judge in a particular case enunciates, because of the nature of this case, an apparently entirely new principle,—wipes out existing norms, that is to say, and puts in their place a new rule,—even in this case, more careful enquiry will show that this decision, which apparently states new law, is really logically connected at the core with some other fixed point of the legal system, with some already existing legal principle. It not only is thus connected. It must be thus connected. It could not otherwise exist. So that even in this case knowledge of the law follows in the end a deductive, not an inductive, path.

Not in induction, then, as Langdell and his successors would have us believe, is the scientific character of the case method to be found. It lies rather in the logical and systematic development of all fundamental norms of the common law out of the original sources of this law, namely, out of the decisions of the courts. The innovation of Langdell and his followers, so fruitful and so important for legal education, consists herein: that they do not present these norms and doctrines in the manner of the older method of teaching, as completed abstractions having behind them, in the absence of a codification of Anglo-American law, only the authority of the text-book or the lecturer; but that the modern American law teachers teach these norms and doctrines of the common law in their practical form, as it daily arises in the courts of justice, and thus oblige the students to obtain a first-hand knowledge of positive law out of its actual application. Not induction but empiricism is in my opinion the characteristic feature of this method of instruction.

This notion of teaching law empirically, however, is of course no discovery of Langdell's. With due recognition of the great service performed by Langdell and his fellow workers in the revival of American legal education, it must be maintained that

the so-called case method is really nothing more than a form of the long existing empirical method of studying and teaching positive law; a form better adapted to modern resources for the study of the common law. From time immemorial the common law has been taught empirically in England, and will be so taught so long as there is a tradition of ordered legal life. For it was empirical instruction and nothing else that the young law apprentices since the thirteenth century sought and received in the Inns of Court, in the hostels or assembly places of the lawyers' guilds; and even to-day, as the institution of "reading in chambers" indicates, instruction in the common law of England may be termed almost exclusively empirical.[1] This kind of purely practical instruction in the positive law of England is very closely related to, is indeed almost identical with, that kind of practical lawyers' training which even to-day constitutes the entire preparation of a very large number of American attorneys and future judges. I mean all those who, after passing through the public elementary or high school, enter as clerks into an attorney's office, and are engaged for the requisite number of years in the practical business of law. In this connection it matters little whether these candidates for the bar, who are thus trained directly by the lawyers' office, acquire in addition a certain amount of knowledge in one of many night law schools, or whether they interrupt their office activity for a year and attend a day law school, for in any case the purely practical technical information and training gained in the law office is the real foundation for the later examination and so for admission to the bar.

Now, the great and inestimable advance which Langdell and his pupils have brought about consists, in the first place, in the fact that they substituted for this more or less unorganized and crude empirical training a genuine theoretical instruction in the common law covering three full years (a period quite suitable for the purpose in view). In the second place, understanding the true nature of the common law, they have based this instruction not, like the text-book schools, upon the memorizing of text-books or lectures and of the abstract propositions contained therein, but upon the study of the true sources of the common law itself, upon the decisions of the law courts. We may regard the epoch of the absolute supremacy of the text-book school merely as a digression from the ancient Anglo-Saxon tradition of purely practical training in the attorney's calling and say that, in this respect, the advocates of the new system returned to the traditional method of instruction in the common law, namely to its empirical study. But, of course, in so doing they introduced in place of more or less unorganized and unsystematic "reading in chambers" or in the office, the success of which was often determined by accident, a well-planned, exhaustive course of instruction by specialists, by professors of the law, who out of the law cases taught both the historical development of common law doctrines and their logical expansion. Thus

[1] The efforts of the Inns of Court to impart to the candidates for the bar, enrolled as students of law, a regular theoretical education by the establishment of courses of study and lectures, have changed the centuries old, purely practical education of lawyers in England just as little as has the organization of a course of study leading to a doctor's degree in law at the Universities of Cambridge and Oxford. This latter has virtually nothing to do with the common law and preparation for the bar. It concerns itself, rather, with the study of general legal science, of general jurisprudence, not with a methodical study of the common law.

they were able to inculcate, at one and the same time, both knowledge of the positive law and also that peculiar mode of thought by means of which a lawyer, when given the state of facts existing in a particular case, is able, alone and unaided, to find the rule of law applicable to that case; out of the principles and norms, which in their entirety go to make up the common law, to pick out those which regulate that particular human relationship. The really new thing, therefore, in Langdell's contribution is the transformation of the old empirical method of teaching into a new empirical method; and the actual ingenious "discovery" that he made in this connection, and which his pupils later perfected, is at bottom only the modern case-book, through which it has become possible to put directly into the hand of the student those cases from out of the sources of the common law which are most important for the knowledge of its doctrines and for the study of law in general. While still in school the student is thus trained to use intelligently the whole mass of existing Reports, and becomes able immediately, or after a short initiation into office routine, to undertake successfully the work of a practising attorney.

In spite, therefore, of the fact that this purely practical aim has been the ruling purpose in the development of all American law schools,—of schools connected with the university equally with those not so connected,—Langdell and his followers are none the less entirely justified in describing their method of legal instruction as truly scientific. The case method schools are thus distinguished from almost all other American law schools, for while these latter dole out a certain amount of legal information on the plane of secondary instruction, Harvard and Columbia, and the more or less comparable sister institutions in the fully developed American universities, strive zealously for an intellectual mastery of the entire content of the law, through independent effort of the students; make their students seize the law itself, in its logical and historical setting, directly out of the sources. Not on the ground that it is an inductive method, but on the ground that it is that method of instruction which is entirely suited to the established character of the common law, to independent intellectual assimilation of positive law from its sources, and to the highest development of the ability to think logically and systematically—on these grounds the case method must indeed be recognized as the scientific method of investigation and instruction in the common law.[1]

[1] I must not neglect to note here the excellent and clear distinctions established by James Bradley Thayer, the great American legal scholar, in his discussion of the case method and legal instruction in general. In the preface to his case-book on Constitutional Law, he says: "Of teaching there has never been at this school any prescribed method. There never can be, in any place where the best work is sought for. Every teacher, as I have said elsewhere, 'in law, as in other things, has his own methods, determined by his own gifts or lack of gifts,—methods as incommunicable as his temperament, his looks, or his manners.' But as to modes of study, a very different matter, Dean Langdell's associates have all come to agree with him, where they have ever differed, in thinking, so far at least as our system of law is concerned, that there is no method of preparatory study so good as the one with which his name is so honorably connected,—that of studying cases, carefully chosen and arranged so as to present the development of principles. Doubtless, the mode of study must greatly affect the mode of teaching; if students are to prepare themselves by studying cases, their teachers also must study them. And, moreover, while good teaching will differ widely in its methods, there is at least one thing in which all good teaching will be alike: no teaching is good which does not rouse and 'dephlegmatize' the students,—to borrow an expression attributed to Novalis,—which does not engage as its allies their awakened, sympathetic, and coöperating faculties. As helping to that, as tending to secure for an instructor this chief element of success, I do not think that there is, or can be, any method of study which is comparable with the one in question." *Cases on Constitutional Law*," Cambridge, 1895, p. vi.

IMPORTANCE OF THE AMERICAN UNIVERSITY LAW SCHOOL FOR THE FUTURE SCIENTIFIC DEVELOPMENT OF THE COMMON LAW

The present condition of the English common law may be well illustrated by that of the Roman law during its first formative period, when, although already influenced (as we now know) in many parts of its development by foreign elements, it was still the thoroughly national law of Rome, for both the people and the lawyers. This classical Roman law was thorough case law; always connected, that is to say, with law practice, with particular cases, or with the clauses of the praetorian edict. "If we compare," says one of the most learned and keenest of German experts in Roman law, Professor Lenel, "the remains of Roman legal writings with modern legal literature, we notice first of all that the ancients do not by a long way carry abstraction, the reduction of particular phenomena to general concepts and of legal propositions to general principles, so far as we do. In a hundred places they discuss separate questions which have to do with the invalidity of legal action; but they have no general concept and no general theory either of the void or of the voidable. They give us a detailed account of the conclusion of *certain* obligatory contracts—but the concept of contract, and still more, of course, the concept of legal transaction (*Rechtsgeschäft*), remained unknown to them. They speak of error on the most varied occasions—of error in general we find only a couple of arid commonplaces." The undying service of the Romans lies, as Lenel says, not in what they accomplished for the knowledge of Roman law, but in the fact that they created Roman law, or at least that part of it that has lasting value. The great men among them were not theorists but ingenious practitioners, and to them we owe the art of legal technique: the art of utilizing the legal mechanism already at hand to satisfy the newly arising need; the art of building upward and outward from the firm foundation of the law; the art of discerning, in every relationship of life, those sides which the law must regard, if it is not to crystallize into unreasonable rigidity. The science of the Romans remains, therefore, essentially casuistic; even their commentaries and systems are casuistic. But it is not that hair-splitting, scholastic casuistry that takes pleasure in solving the most strange and paradoxical combinations, but a living, practical casuistry which strives only to embrace and to rule the wealth and the variety of actual life.[1]

And corresponding to this fluid condition of classical Roman law, we find also casuistic characteristics in its methods of instruction. Legal education, at the time of the great jurists, was based not only upon lectures, but often also upon oral debates and disputations between teachers and pupils upon particular law cases and legal opinions. Up to a certain point, in short, the well-defined parallel which can be traced in many respects between the two world systems of law—the Roman law and the

[1] Cf. Lenel in Holtzendorff's *Encyklopädie der Rechtswissenschaft*, ed. 1904, vol. i, pp. 128-131.

English common law—obtains also for the methods of legal science and legal instruction.

At this point, however, the parallel—since it covers only the stage already reached in the development of the common law—ceases. For while the Roman law has been extremely fruitful, and during a period of almost a thousand years has been reconstructed into a mighty scientific and comprehensive system, and into a unity of living law; on the other hand the common law of England and America until the present moment has not passed out of its historically developed casuistical condition. Not merely were the creators of the common law, like those of the Roman law, above all things practitioners, and as such expert in legal technique, but even to-day the substance of the sources of the common law is what the great judges of England in the eighteenth and nineteenth centuries, and those of America since the formation of the Union, have contributed in legal sagacity and legal productiveness. In the opinions delivered by these men we hear solemnly pronounced the fundamental thoughts and principles of the common law developed by the Anglo-Saxon race—those thoughts and principles which are continually at work as creative forces of practical legal life. This powerful intellectual contribution of the practitioners, however, recorded in a literally overwhelming mass of English and American reports, has not been accompanied by a corresponding development of legal science. When Professor Roscoe Pound lamented recently, as one of the great defects of the common law, the lack of a genuine legal system,[1] it must be said that this phenomenon is primarily due to the fact that, up to the present, legal science has not kept pace with the remarkable wealth of the common law in legal substance, in legal forms and fictions, in almost inexhaustible legal ideas and legal remedies.

Now it is a fact that the Roman law, too, so long as it was the law of the Roman people, that is to say, in its unparalleled abundance and intellectual vigor, of which the *Corpus Juris* has by lucky chance kept so much for us, did not produce any legal science in the sense of a systematic reduction of the entire content of the law. After the settlement of the law by Justinian, the formation of a complete legal science out of the Roman legal material was brought about, not by the Romans themselves, but by other peoples, and of course under quite different conditions of life and civilization from those of imperial Rome. It was through the enormous intellectual labor of Italian, French, and German scholars, and under the constant influence of the practical needs of those countries in which it was received, that the Roman law first became moulded into the incomparable system upon which the whole modern jurisprudence of the European continent now rests.[2]

[1] Roscoe Pound, "Taught Law," paper read before the Association of American Law Schools. 37 *Rep. Am. Bar Ass.* (1912) 975 *et seq.*

[2] It is interesting to trace the varying methods of instruction employed during this long period of development. After the time of the great jurists, the decline in the productive legal power of the Romans was accompanied by a more formal instruction, a process which finally reached its almost absurd expression in the "citation laws" of the fifth century emperors. When, then, Justinian, out of the great abundance of the law of the Roman people, had the *Corpus Juris* composed and published as statute, legal instruction also came under the control of the state, and at once (as has almost always been the fate of the generation of law teachers immediately following a modern codification)

To set down the reasons why England did not develop such a science would lead much farther than is permissible here. Assuredly, however, one of the principal causes is the unassailable position maintained by the ancient legal guilds of London at the centre of legal life, and their exclusive control of the training of future lawyers. Legal education thus became permanently and completely isolated inside of purely practical legal life; the universities of England—and thus the great currents of scientific development of the modern intellect—remained cut off from any direct or powerful influence upon the common law and the traditional English legal instruction. In the nineteenth century, to be sure, a free, unacademic thinker, whose fame is now a century old, Jeremy Bentham, had, as a theorist, an extraordinarily strong influence upon the development of English law. But the building up of a system out of the historical legal material of the common law could not and never can be the work of a single man. Such a building up can be accomplished only by a generation—say rather by several generations—of legal scholars, as occurred in the case of the Roman law in Italy, France, and finally in Germany. And although the English universities, thanks to the life work of several creative legal scholars, have accomplished during the last decades—above all in the domain of legal history—a great deal, still the unchanged ascendancy of England's purely practical, so to speak, "craft guild" system of legal instruction hinders, now as always, any movement to arrange the common law, in gross and in detail, into a system; into something which might serve both as basis of a legal science of the common law and also as foundation for a systematic reform of the current law.

Here, then, is the point which I am really trying to make. In sharp distinction from England there has been developed in America during the nineteenth century a genuine legal education, which, unlike the condition in the English mother country, has from the beginning cultivated the common law as a coherent whole, as a branch of the great tree of all the intellectual sciences, in special educational institutions.[1] These institutions, in spite of their eminently practical aim of training di-

became bound to the letter of the written law and thus deprived of its creative power. If we follow now the later history of the Roman law and of instruction in it, we find that in the great epochs into which its history falls,—the epochs of the Glossarists, of the Italian, French, and German law scholars in the period of humanism and the renascence of classical studies, and finally the epoch of the great scientific renascence of the Roman law through the German legal science of the nineteenth century,—that in all these epochs scientific advance in the law, as well as its practical development in the courts, goes hand in hand with a return in investigation and instruction to the original legal sources; coincides with a more intensive and deeper research into the original material of the Roman law contained in the *Corpus Juris*, and above all into the opinions and decisions of the great jurists of classical Rome contained in the *Digests*. And in the same way we see how, in all these epochs of advancing legal science, legal instruction in Roman law is transformed from the method of mere memorizing of the content of the law and of schematic assimilation of the doctrines, definitions, and norms, into a method of living grasp of the law as it appears in its practical casuistic application, under active coöperation of teacher and pupils.

[1] Thayer, in his paper read before the Bar Association's Section of Legal Education, "The Teaching of English Law at the Universities," 18 *Rep. Am. Bar Ass.* (1895) 409; 9 *Harv. Law Rev.* 169; *Legal Essays*, Boston, 1908, p. 367, has very well shown that the idea of organizing special law faculties as constituent parts of the universities has been carried out only in America, up to the present time, but that the first impulse toward it came from England and that from no less significant a person than Blackstone. This great master of English legal literature began his lectures in 1753 in Oxford, and after Viner's death became the first professor of the common law at an English university; in 1765 he published the first volume of his famous *Commentaries* and hoped to put into effect his plan of the establishment of a College of Law in Oxford; however, in 1766 he gave up this plan and abandoned his professorship. The impression of his work on the lawyers in the colonies was originally deeper even than in the mother

rectly for the attorney's calling, have had, nevertheless, from the beginning the avowed characteristic of institutions for theoretical teaching. The reform of Langdell—as simple as it is far reaching—now places the best of these institutions upon a truly scientific foundation; and this reform creates at the same time a second: it develops a new theoretical calling, that of the non-practising law teachers of America. By this means, for the first time in a common law jurisdiction, the study of this law has become a career, an independent profession.[1] In this way, through the law schools of the American universities, there has been brought about that condition which I indicated above as indispensable to the construction of a system of the common law: the existence of genuine schools of law, in the institutional as well as in the purely intellectual sense of this word. In the United States the second generation of lawyers is already at work. Many of the best intellectual powers of the country are engaged in the historic and dogmatic working over of the common law; teachers and learners cover all branches of the law in its daily manifestations in the courts, and a literature highly noteworthy in quantity and quality has come into being. The merely industrious commentator, the compiler of useful works of reference for busy lawyers and judges, in short, the technical day laborer of various kinds, no longer monopolizes the field of common law literature. What is more, he is gradually disappearing. With the passing of old forms and methods of legal instruction in those institutions to which the best prepared young men resort, the old manner of teaching, which tried through cheap generalizations and shallow schematization to furnish the students with legal equipment for the most immediate practical use, is on the decline; its place is being taken by a laborious linking and logical dogmatic probing of the substance of the law. With this there has been awakened in the law schools of the American universities a really scientific spirit,—a spirit which not only supplies to pupils aiming solely at practical legal life a real knowledge of the law, but out of these very pupils produces ever new forces eager and qualified to continue this scientific treatment of the law.

Herewith, I believe, however, that the two great problems are revealed whose solution devolves upon American jurisprudence: the creation of a scientific system of the common law, and a reform of the current law in the direction of that movement which is becoming more and more pronounced among the people of the United States in favor of a simplification, a greater efficiency and improvement, of substantive law as well as of civil and criminal procedure. Such a reform will, of course, not be produced by statutory decree alone. In my opinion this goal can be reached only through long and fruitful labor on the part of all elements of American legal life, the judges, the attorneys, the university law schools, and the legal scholars of the country. A broad-

country; twenty-five hundred copies of his work were sold in America by 1776. To this influence was due the founding of chairs of common law in America for the first time at William and Mary College (Virginia) and (abortively) at Harvard in 1779. However great Blackstone's literary influence in England was, chairs of common law in Oxford and Cambridge were established only in the second half of the nineteenth century.

[1] Cf. Ames, "The Vocation of the Law Professor," in *Lectures on Legal History*, Cambridge, 1913, pages 354 *et seq.*

ening, a deepening, and a developing of modern legal instruction upon the magnificent foundations created by Langdell; the thereby increased intellectual powers of the practical legal profession; the unmistakably successful efforts that are also proceeding from the bar in the direction of higher ethical standards; the creation of a literature that is scientific while yet resting throughout upon the living judge-made law;—all these factors, already firmly rooted in American soil, will produce a scientific system of the common law and ultimately, as the slowly ripening fruit of this last, a reform in the law also. Scientific instruction in the universities; development of a scientific literature of high rank; intellectual and ethical advancement among lawyers and judges, who, under these influences, will be better qualified than before to reform the common law "from the inside," in the traditional manner of a law that has been made by lawyers; this appears to me the goal of American legal life to-day,—a goal that is placed very high, and that can therefore only with difficulty be attained, but that is none the less completely attainable.

I know very well the objections that are often advanced against such a task and such a future for American legal science, by many of its best supporters. The grounds for this scepticism must certainly be very seriously examined, especially when set forth by a man like Professor Roscoe Pound, whose legal talents and erudition assure to him, not only in America, but in Europe also, a place among the first scholars of our time. With masterly brevity Pound paints the present condition of American law in the following words:

> "Long and thoroughly as we have studied the common law, we have no system of the common law as a whole at a time when a system of law as a whole, including both the imperative and the traditional elements, is coming to be much needed. Our law is cut and cross cut in three directions by three great lines of cleavage—common law and legislation, law and equity, real property and personal property. In consequence nearly every question involves two and often three modes of approach. Nearly every rule has to be learned over again in two other ways, or is subject to the qualification that it is thus if one sort of relief is sought and otherwise if another procedure is open, or thus if one sort of property is involved and otherwise if another. All kinds of combinations of these three are possible, and singly or in combinations they give rise to a great variety of arbitrary rules and distinctions. Thus, in contracts (regarded as a matter for proceeding at law) we have rules as to conditions based on fundamental ideas of justice, which, when one proceeds in equity and so has to do with essentially the same questions from a historically wholly different standpoint, are replaced by rules as to risk of loss, proceeding upon theories of equitable ownership, or of mutuality based upon notions of fairness in awarding extraordinary relief. In sales of personalty, we have doctrines now become legal which give results that in case of sales of land do not apply at law and may be reached only circuitously in equity. And yet the line here is by no means clear and plain. Judicial absorptions of equity into law and piecemeal statutory changes have made the line exceedingly irregular and at places difficult to draw with precision. . . . These lines of cleavage are purely historical in origin and subserve no useful purpose. On the other hand, they lead to diffi-

culties of procedure and to technicalities of substantive law which impede the administration of justice by causing uncertainty, injure respect for law by making it appear arbitrary and irrational, and hinder the progress of the law by compelling teacher and student to busy themselves in learning the details of logically arbitrary rules."[1]

No clearer exposition can be imagined than this of Professor Pound as to the difficulties which, because of the historically determined conditions of the common law, to-day confront legal instruction, legal science, and legal reform in America. Where the evil is so clearly recognized, however, the way to reform seems to have been opened up; how great is the advance which this recognition alone signifies, every one acquainted with the customary attitude in England and America toward the common law and its scientific treatment will realize. If men like Roscoe Pound and John Wigmore are the very ones upon whom we pin our faith that modern American jurisprudence will be able to solve step by step the mighty problems confronting American legal life, then I may recall here the suggestions which I made above. These had as a cardinal feature the addition of an obligatory fourth year of law study at the universities and, in intimate connection with this, the organization of lecture courses and exercises of a strictly theoretical and comparative nature, serving as conclusion to the case method study of American law. What has qualified Pound and Wigmore for their deservedly valued and admirable achievements as legal writers and teachers is—apart, of course, from the personal talent of each—precisely that comprehensive outlook with which the deep understanding of the Roman law and of the modern codes of continental Europe, as well as their broad command of legal philosophy, has endowed them. The deep understanding of the modern social function of law, moreover, which shows plainly in the writings of both these leading representatives of American jurisprudence, frees them from the easily satisfied traditionalism of the English or American common law lawyers; qualifies them to do creative work as law teachers in the true sense of the word, and to gain an influence over the practical reform of the law.

It seems to me, accordingly, that if the American university law schools should adopt the policy of extending the course, and above all of deepening it on the side of strictly theoretical legal science and comparative law, so as to try to reveal to the younger generation in the law schools the true problems of the common law and of modern legal development in general, this policy would be in line with that of these typical men, and may be expected, despite all scepticism, to inaugurate a new era in the development of Anglo-American law and of its science. Then also, as Professor Pound so thoughtfully explains in the treatise already referred to,[2] the "socialization of legal training" for which he hopes will be made possible; then one may feel confident that the capacity which the common law has exhibited through so many centuries, of flexibly adapting itself to the needs and the economic life of the people, will again be dis-

[1] "Taught Law," paper read before the Association of American Law Schools. 37 *Rep. Am. Bar Ass.* (1912) 983, 984.
[2] 37 *Rep. Am. Bar Ass.* (1912) 989 *et seq.*

played, and that the law will prove equal to its next great task, inexorably imposed upon it by the modern organization of a completely industrialized democracy; and then the new legal science will be the fructifying source from which the common law will draw this very power for regeneration and renewal.

LEGAL INSTRUCTION OUTSIDE OF UNIVERSITIES IN THE UNITED STATES AND GERMANY

This brings to a close what I have to say concerning the case-teaching system. A few remarks, however, seem to me still necessary in order to prevent a very possible misunderstanding. The conclusions I have drawn concerning legal education in America, and what I have said about the outlook which, in my opinion, is indicated as the result of the method and form of legal education developed in the last generation, applies entirely to those law schools with which I have been principally concerned; namely, to the law faculties of the fully developed universities of America. It would be an error to assume that I intended by this to say that in the future only these law schools will be called into service in the United States. So far as I myself can judge, there is not going to be any important break within any period of time that we can now foresee in the American tradition that, independent of systematized legal instruction, the legal profession is open to any citizen exclusively on the basis of a bar examination, for which he may procure the necessary knowledge in his own way. This view is too deeply entwined with the roots of American democracy and of the entire organization of American legal and business life, and too deeply involved with the traditional status of the lawyer in the economic life of the Union, to be sacrificed by the people to any more or less theoretical, even if obvious, considerations of educational policy. This is equivalent to saying that the many still existing day and night law schools which offer various abbreviated law courses in preparation for the bar examination will continue to exist for a long time, if not indefinitely. In my opinion, however, the condition that is thereby created is not in the least an obstacle to the further invigoration and expansion that I have pictured in scientific legal instruction at the universities. Nor do I think that this condition is a specifically American evil, nor, when considered from the point of view of the interests of the whole American people, an evil at all.

This differentiation of legal instruction in America, which has long existed, and which in consequence of the stronger development of the scientifically conducted university schools will undoubtedly become even more marked, does not by any means stand alone among contemporary systems of legal education. A comparison with the present condition of the law faculties and of their teaching activity in the great states of Europe shows this at once. It is of course impossible for me to go into this matter further than to touch upon the present condition of law study in the German Empire or Austria. But some few observations upon this point seem to me necessary for the purpose of a correct judgment as to American conditions.

Legal education in the German and Austrian law faculties is distinguished from that in American university law schools primarily by a fundamental dissimilarity in the entire conception of the nature of a university. There is no "instruction," such as is practised in American law schools, in a single one of our legal faculties. Ger-

man and Austrian professors in the law faculties do not instruct at all, in the American sense of this word. They deliver lectures, in general and special lecture courses, but the students are theoretically free as to the choice of the courses which they wish to attend, and also completely free as to whether and how often they wish to appear in the lecture halls.[1] Here there is no catalogue of students as in the American law schools; the professor knows but a few, perhaps none, of his students personally; only in the seminars and practical exercises held by certain professors does a personal contact exist between professors and students. In these seminars and exercises those students who regularly attend are assigned certain tasks, consisting for the most part merely in the preparation and delivery of single lectures upon some problem or other of legal science. But only a very slight percentage of the entire number of law students—those students who are particularly industrious or who are particularly interested and enthusiastic in regard to legal science—attend these seminars. For the law student body in general we still have the old principle which, though it has undergone extensive changes in the study of philology and history, and especially in the practical sciences such as physics and medicine, still dominates the character of the entire German university—the principle of complete freedom in choosing and attending lectures.[2] Freedom for the student to do and to leave undone what he pleases, to study or not to study, and in studying to find so far as possible his own way. Freedom for the professor: the German university professor of legal science delivers his lectures, conducts his exercises, will gladly accord advice and assistance to any student who asks for it, but as for methodical instruction, in the manner of American law schools, he simply does not give it, nor is such a thing ever expected. This would contradict the entire traditional nature of the German universities. Just as, until graduation from the *Gymnasium*, not the slightest academic freedom exists for the pupil and hardly any even for the teacher (everything here being established and regulated by official ordinance), so, on the other hand, the most complete freedom for both sides is the inviolable principle of university life. Our law faculties exist above all things for the cultivation of legal science. The results and existing state of this science, in all divisions of the law, are placed at the students' disposal in the shape of carefully worked out lectures, but how much profit the individual student can and will get out of this is his affair. Instruction arranged according to classes, and continuous questioning on what has been learned, exist no more than do annual examinations. The lecture courses endeavor to present exhaustively the content of their particular fields of law, and rest everywhere, in the first instance, upon the statute-books, the codes, illustrated here and there, to some slight extent, by the decisions of the highest courts. After completing the curriculum prescribed by the state in Prussia or Saxony or Bavaria, for exam-

[1] In Austria, however, the curriculum is closely prescribed, and the first state examination, to be passed after the third or fourth semester, is upon legal history, which is thus separated from the later work in current law and political science.

[2] Concerning the university instruction and especially the value of the lecture course as the prevailing means of instruction, cf. F. Paulsen, *Die deutschen Universitäten und das Universitätsstudium*, Berlin, 1902, pp. 236-335, 363-379, 392 *et seq.*

ple, every law student takes his Referendar examination, held by the state with the coöperation of the faculty, on the basis of which he is admitted to practical work in the court and later to a law office or to an administrative position. The university offers him the opportunity, also, to prove his scientific knowledge by passing the doctor's examination—in connection with which a dissertation must usually be written as well—and in this way to attain a doctor's degree. This, however, has nothing to do with legal practice. Always the German lawyer has to spend several years in unpaid work in a court or in an administrative position, and, on the basis of this three or four years' practice, he has then to pass a second examination conducted by the state and called in Prussia the *Assessor* examination. Only on the strength of this can he practise as an attorney, or receive a permanent appointment to an administrative or judicial office.

The striking difference between this system of legal study, which offers no instruction, and the modern American law school method of training in the common law, is very clear. On the one side, complete independence on the part of the students and complete indifference on the part of the professors in respect to the question of whether the students actually study law or not. On the other side, the obligation of studying law directly from the cases for three years, under the strict supervision of the professors, who even keep track of class attendance personally; a method which makes the greatest demands both upon the independent thought and industry of the students and upon the resources of their teachers, who must be constantly prepared, in the lecture hours and out of them, by guiding, by asking questions, and by answering questions according to the Socratic method, to train the students into lawyers. But furthermore, in order to draw the picture accurately on each side, on the German and on the American, a pendant must be added. In Germany and Austria we have our seminars in which professors of law, many of whom enjoy a European reputation, cultivate real legal science with a small group usually of the older or graduate students; out of this aristocracy of talent, very small in relation to the entire number of law students, is recruited the magnificent rising generation of German legal scholars, and also the best, the really scientifically trained, governmental employees and judges. On the American side, on the contrary, there stands beside the dazzling picture of the modern university law school with its characteristic devotion and tireless activity on the part both of teachers and students, the picture of the many law schools and law courses in which "legal knowledge" is inculcated like stenography, or bookkeeping, or any other useful art; in which pupils with little previous education are taught by methods that rarely rise above the level of secondary instruction, by recitations from a memorized text-book, assisted by cheap quiz-books or other superficial aids and more or less illuminating lectures.

The pupils of these institutions represent often, although not invariably, a definite social interest in legal education, for those who attend these schools are, for the most part, young people who are earning their living as clerks in law offices, and are try-

ing to gain the qualifications for passing the bar examination, in order either to become lawyers themselves, or, as is often the case in Washington, for example, to make themselves eligible for higher clerkships in the governmental service. For the most part these young people are not willing or able to bear the higher cost of attending university law schools like Harvard or Columbia. It is true that even in these latter schools there are not a few students who have great trouble in paying their tuition fees, or who earn their own living during their studies. The Harvard Law School should by no means be considered an aristocratic institution or an institution of the higher classes, like most of the English colleges of Oxford and Cambridge. The fundamentally democratic idea which pervades everything in America, including its educational life, is much too strong for that. Even in the Harvard Law School, and to a large extent in the excellent law schools of the state universities of Michigan and Wisconsin, or in the two Chicago universities, students of all classes of the population are to be found, the sons of farmers as well as of those belonging to the urban middle classes. Nevertheless, this much may be said, that many of the law schools that are not connected with universities, — the "proprietary law schools," — aiming as they do to combine the quickest, the most practical, and the cheapest possible training for the bar examination with the greatest possible return upon the capital invested in the school, supply the needs primarily of those social strata whose sons are not thinking of university education in either the American or the continental sense. They consider the legal profession as a trade, like any other, and regard legal education in the same light as commercial education in a commercial school. It must be remembered that many American attorneys, among whom, of course, the distinction between barrister and solicitor does not prevail, are during their whole life nothing more than pure business men, and that their entire activity is taken up with looking after commercial interests. Such men act as real estate agents or brokers, have general charge of their clients' property, or are occupied with formal legal papers, the drafting of deeds, or other similar functions. This being so, it will readily be seen that for this type of legal activity the instruction which is obtained in one of these proprietary law schools is on the whole adequate. And this is true not only for the country lawyer, but also in the large cities, where a certain differentiation has begun to develop in the profession, prominent lawyers and their staff being engaged by those attorneys who do principally a solicitors' business, as counselors or experts on difficult points of the law, or again to do trial work for them.

It must accordingly be said that these more or less commercial law schools, in which the old manner of teaching American law has been retained, correspond to real requirements of the American people. Although they have not the slightest significance from the point of view of scientific legal instruction, with which they do not concern themselves at all, nevertheless they have their warrant in the economic life of the nation, and are firmly rooted in the old democratic view of the legal profession as a practical trade. In so far, then, this kind of legal education, which, as I have repeatedly

explained, is connected with the scientifically undeveloped condition of the common law as carried over from England to America, may be described as an organically related phenomenon, grounded in the historical development of America, and fully warranted even to-day, within the specified limits.

A very different judgment must be passed, however, upon the corresponding development of a very singular "dualism" in German legal education in the universities of both the German Empire and Austria. Only by a very brief description of this phenomenon will the parallel drawn here between the teaching systems of the two great nations become absolutely clear.

The American school of law, like all other higher educational institutions of the American people, has, as we know, originated and developed quite freely without co-operation or legislation by the state; so that out of this absolutely free growth there have resulted, under the influence of different social forces and educational ideas, great differences within the separate types of schools in general and of law schools in particular. Legal education in the German states, on the other hand, has at all times been practised and developed only in the universities, and has therefore remained uniform in all fundamental features. Since the end of the eighteenth and the beginning of the nineteenth centuries the governments have regulated by statute the legal training of administrative employees, and of judges and attorneys, without thereby impairing, however, in any way the monopoly enjoyed by the university law faculties in the entire field of legal education. This state of affairs has continued unchanged up to the present. Just as legal science in Germany has always possessed complete freedom as against the state, so, on the other hand, in everything that has to do with legal education a definite order has been imposed by the establishment of a state curriculum for candidates preparing themselves for the bar, the bench, and the administration; though of course the manner of instruction, the method, and the whole conduct of the teaching by the law faculty are, as in all other branches of university work, entrusted entirely to the professors.[1] So much the more remarkable is it, then, that in spite of the statutory monopoly enjoyed by the law faculties as law schools, nevertheless in Germany and Austria a kind of private instruction has started up in connection with the state examinations which, as was remarked before, every student must undergo before he can begin his apprenticeship year in a court, or in an administrative position, or in a law office. The occasion for this peculiar phenomenon is the well-known fact that the law lectures at German universities are regularly attended by only a part of the matriculated students. After the German student has passed from the discipline of the *Gymnasium* into the freedom of the *alma mater studiorum*, public opinion universally accords him full liberty to give himself up more or less completely, for several months, to the enjoyment of student life; and in no faculty to so

[1] Only in so far as the state—but always with the agreement and at the instigation of the professors—allows special appropriations for seminars or special practice courses, and for the libraries connected with them, has it made its influence felt here also.

great an extent as in the law, is use made of this tradition. Hence in many universities the lecture courses of the law teachers are very often only sparsely attended. Then, when the end of the course and the examinations draw near, there arises for a number of young jurists the absolute necessity of procuring the knowledge necessary for the state examination in the greatest haste. This pressing, practical need is willingly met by private law courses conducted by practitioners, former judges for the most part, or even active officials versed in the law, who find herein an extra source of income, and often their real vocation. Every one who is acquainted with the study of law in Germany and Austria is familiar with this characteristic figure of the crammer (*Einpauker*), and it is also worth noting that out of the original simple "repeater" (*Repetitor*) there have developed whole permanent courses, often called by this name (*Repetitorien*), which, year in, year out, prepare a great number of students for the state examination. Indeed, in the last decade this phenomenon has often taken on a formal institutional character, especially in Vienna, at whose university more than twenty-five hundred law students are matriculated. Here the movement has progressed so far as to produce genuine private law schools in which an entire staff of teachers cover for the students the whole four years' course, squeezed into a much shorter period, and charged for at very substantial rates. The study of law in these law courses and law schools, corresponding to its purely practical aim, is conducted, of course, not at all in the same way as in the university; not scientifically, but chiefly through appeal to the memory. From hour to hour a certain quantity of material is recited on from special text-books, skilfully compiled for this purpose. As helps in teaching, various kinds of catechisms, collections of examination questions, and other memory aids are used, in which, characteristically, attention is often paid to the lectures and text-books of the examining university professors. Often devices known to the American proprietary schools are found here—quiz-books and similar practical aids.

Now, if this kind of legal education—mere preparation for an examination and memory work—is comprehensible in America, where it is organically connected with the development of the law, with the general nature of education, and with the prevailing attitude toward the legal profession, in Germany and Austria, on the other hand, the corresponding phenomenon in private law schools attached to the universities can be regarded only as a sign of degeneracy in our traditional German study of law. Without a doubt we have here a very serious situation. It is well known that the last two decades have produced an extraordinarily rich and in many ways extremely valuable literature concerning the needed reform of legal education in Germany and Austria.[1] It is an expression of the extensive and profound dissatisfaction with the

[1] To cite only one of many excellent utterances concerning the reform of legal study in Germany,—the author in this case being one of our greatest living legal scholars,—let me reproduce here some remarks from the work of Professor Ernst Zitelmann, *Die Vorbildung der Juristen* (*The Training of Lawyers*), Leipzig, 1909, pp. 4-5, 11: "Above all the legal faculties fail to-day in their essential purpose as teaching institutions in that a great number, indeed I fear I must say the majority, of the students make little or no use of the instruction or means of teaching in the university. It is an open secret that the lectures and exercises, especially the first, are in point of fact—as measured by the ratio between those who register and those who actually come—very poorly attended. This may differ from university to university, and within one university from teacher to teacher, but it is more or less the case every-

current form of our law studies, the present situation of which is characterized by most law teachers in the universities, and also by prominent judges and attorneys, as really critical. And in the first rank of the numerous and varied aspects that are touched upon by this criticism belongs this recently developed "dualism," as I have called it, in legal education, which places side by side with the century-old faculties and their law studies a complete, rankly growing organization of private legal instruction.[1] Zitelmann puts it neatly:

> "This is a strange picture, though: on the one side, kept up with great expense and enjoying a teaching monopoly, public institutions of learning which are not used; on the other side, not recognized by the state, and standing outside the universities, preparatory courses, in which the young lawyers seek their training. If we look these facts resolutely in the face, we are brought to this alternative: either this state of affairs works—in which case the legal faculties are superfluous as teaching institutions, the expense for them can be saved, and they should be done away with as teaching institutions as soon as possible; or the theoretical preparation of our lawyers is defective—in which case ways and means must be found to improve it."

Utterances like this of Professor Zitelmann's might be reinforced by many of similar import from no less considerable authorities, all tending to show that the long renowned study of law in the German law faculties has undeniably failed at a vital point, namely, in respect to the method of study.

It would certainly be very useful and interesting to enquire whether, even in Germany, there is not a connection between changes in the social function of the professions that are related to the study of law and the rise of these private law courses or cryptogamic schools; whether the employment of large numbers of legally trained officials in the state administration of the German Empire and of Austria does not necessarily bring with it an element of shallowness into the study of law; whether also, to a certain extent, the enormous capitalistic growth of Germany does not bring about a commercialization of the German bar, more and more engaged with the defence of property and business interests. All this, of course, cannot be discussed in this connection. My purpose in drawing attention to these phenomena is simply to show my friends and colleagues in American universities that the continuance of numerous inferior law courses, of which they often complain, will certainly not hinder the further strengthening and progress of American legal science and of the scientific study of law. The German faculties, in spite of the partial failing of their powers as insti-

where. . . . Even to-day numerous students start in to do serious work in legal science only after one and a half or even two years; and then they do not try to make up the lectures they have missed, but attend only—in case they make use of university instruction at all—those lectures which they would have had to attend in regular order if they had already studied during the preceding semesters. Of course attendance of this kind is as good as useless—they are building upon sand! Most of them continue their policy of non-attendance, and take part, instead, in the much discussed preparatory courses, given by persons not connected with the university—courses which are euphemistically termed 'repetitions,' although there is nothing there to repeat."

[1] In Austria it seems impossible to suppress these private law schools in any way for the reason that the fundamental law of the state allows every one to teach privately.

tutions for teaching the law, have not only maintained in our time their old scientific and literary fame, but have undoubtedly enhanced it. Moreover, in the instruction afforded by the seminars and practical exercises they can point to a highly respectable success, even if only with a small number of students. If, in spite of this, the leading spirits of German law faculties demand a transformation of the general study of law, which shall insure to the great mass of the students a truly fruitful education, they represent in this demand, above all, the great interests of state and nation, which everywhere are intimately bound up with successful and effective legal education.

In these efforts of the German legal world toward reform, more account, in my opinion, will have to be taken than heretofore of the products and achievements of the leading law schools of American universities. And with this I have now returned absolutely to my starting-point; it forms, in truth, also the conclusion of my entire train of thought. The case-teaching system, as created at Harvard and now practised and applied with excellent effect in numerous other law schools of American universities, must serve very largely as a model in the coming reform of our German law study. Even though by reason of fundamental differences in the structure of the common law on the one side and of the German or Austrian civil law on the other, an exact replica is impossible, still the fundamental thought which this method of teaching embodies will have to be made more familiar to our faculties than it is at present. They will have to realize that, in the study of law, independent intellectual labor on the part of the students must form the real vital force of legal education, and that, on a larger or smaller scale, the accompanying teaching must be joined to the practical application of the law, as it presents itself in the decisions of the courts or in hypothetically constructed law cases. But again the American law teachers of our time, in their turn, should not doubt that the great reform in teaching which Langdell introduced is the very thing which qualifies them, and earnestly summons them, to do the great work that lies before them now: namely, to apply the resources of European legal science, with its development of nearly two thousand years, to the establishment at last of a scientific system for the common law, thereby opening the way for a most fruitful development of national law and procedure and raising and invigorating the principle of social and economic justice in the life of the American people.

INDEX

INDEX


Jugendrecht-Seminar
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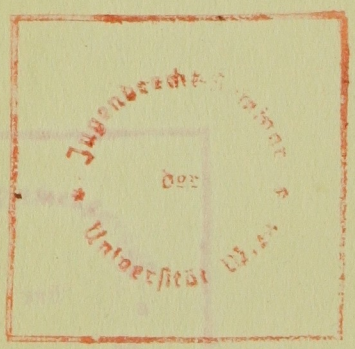


Strafrecht-Seminar
der
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