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THE HUMANE STUDY OF LAW*

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I

You have asked for some observations on the place of legal history in the curriculum of the law school. The more I have reflected on the subject, the more convinced I have become that the fundamental question is rather the place of the law school in the study of legal history. I propose, therefore, that for a few moments at least we cease seeking a niche for historical studies in the structure of the present law school, and instead ask what is the spirit in which valuable historical studies are to be pursued and what relation there is between this spirit and the spirit of the American law school.

The present state of American studies in legal history is anything but flourishing. In perhaps less than a dozen law schools is a course in legal history being offered. In the whole United States, there are at the most three or four men giving their full time, and maybe six or eight more who give any substantial part of their time, to the history of our legal institutions. The legal historian, as historian, is thought to be an ornament rather than a prop of the law school. Usually he must earn his right to give a small part of his time to his *métier* by giving the major part of his time to the non-janitorial chores around the law building. If he can make himself useful enough in other ways he may be allowed also to teach legal history. The faculty consider themselves engaged with the real world while the historian idles in the amusing but unsubstantial past. If this picture is not altogether caricature, one can hardly say that a place has been found for the historian in the scheme of the American law school. This is not the fault either of the historian or of the other members of the law faculty; rather it is a symptom of the spirit of the American law school.

Within the last seventy-five years that spirit has been predominantly pragmatic. It has sometimes been obscured by sectarian controversies within law schools; but, as often is the case, the odium of controversy has been bitterest between those whose disagreement has been least fundamental. The so-called revolutions in law curricula have revealed a continuous preoccupation with "curriculum"—a preoccupation which itself expresses the pragmatic temper. The curriculum has been dealt with like the heating system of the law building—a contraption to be tinkered with, modernized and improved. Law school revolutions, like

* The substance of this article was delivered as a speech by Professor Boorstin to the Legal History and Jurisprudence Section of the Association of American Law Schools' Meeting in December 1947.

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some other "revolutions" in history, have thus for the most part concealed the fact that no essential change has been made.

The expression of the pragmatic spirit has had two phases. The first phase was the origin, development and diffusion of the "case-method" and of the prediction concept of law in its simplest form. "Law, considered as a science," Langdell explained in the preface to his influential case-book on contracts in 1871, "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. . . ." It has often been noted that the elaboration of the case-method of legal instruction occurred simultaneously with the development of pragmatism as an explicit philosophy. Despite the fact that Langdell himself was not a pragmatist, the appeal of the case-method in the United States in the late 19th and early 20th century was due in large measure to its compatibility with the prediction concept of law. "The object of our study," Justice Holmes wrote in a familiar passage, ". . . is prediction, the prediction of the incidence of the public force through the instrumentality of the courts. . . . Far the most important and pretty nearly the whole meaning of every new effort of legal thought is to make these prophecies more precise, and to generalize them into a thoroughly connected system." "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." From the point of view of such a concept of law, the case-method had obvious advantages.

But even if—perhaps, especially if—one shared this emphasis on prediction, the case-method of instruction would show itself to have limitations. For example, the case-method over-emphasized the utility of law reports as the raw material of prediction. Langdell himself declared in 1886 in a passage now often quoted by his critics: "First, that law is a science; second, that all the available materials of that science are contained in printed books." Moreover, the case-method tended to approach law almost exclusively from the point of view of the practising lawyer. It was preoccupied with predicting the particular decision, with describing how the application of the public force was apt to affect the individual client. At the same time it was never made clear just how the student was to get from prediction in general to prediction in particular: or from "the law" to the client. This was like claiming for astronomy the uses of astrology without explaining precisely how the power to predict the general movements of heavenly bodies would improve one's power to predict the actual behavior of earthly creatures.

In these and other ways the case-method was inadequate to its pragmatic aspirations. And the second phase in the expression of the pragmatic spirit developed out of the attempt to remedy such inadequacies. To predict what the courts would do, you needed more than reports of

past cases—which Justice Holmes had called “the oracles of the law.” It was the growing awareness of the importance of extra-legal materials for the attainment of pragmatic ends that led to the so-called “integration of law with the social sciences,” by which the University of Chicago Law School, for example, has characterized the curriculum which it introduced about nine years ago. This second phase has expressed the belief that a lawyer needs to know not merely the reasons which judges give for their decisions, but the reasons which they do not give: their education, their social and economic background, their peculiarities of character and personality, and even something of their instincts and of the indirect effects of their sexual drives. The lawyer, it is argued, has to be a social scientist, simply because otherwise he will be a bad lawyer. His predictions will be faulty unless he can calculate the probable effect both of large social forces and of intimate non-rational influences on the decision of any particular case. At this stage, law teachers still lack clarity on how to get from astronomy to astrology, from the general to the particular prediction, but they have at least enlarged the material which the lawyer is trained to take into account in prophesying the fortune of his client. The newer approach has represented a greater concern with groups and an increasing interest in “long run” effects. If I am not mistaken, the conception of a “policy science” now being developed by the Yale Law School (while lacking the naiveté of the earlier pragmatists, and in fact expressly rejecting prediction as the object of the curriculum) itself expresses a pragmatic emphasis. It, too, is largely concerned with labor and management, with landlords and tenants, with consumers, with the underprivileged and the overprivileged, with prediction and control of the size, form and distribution of the national income and the national expenditure.

These are the two phases of the pragmatic spirit which we have already witnessed. What is likely to be the next phase of its expression in legal education is brilliantly forecast by Judge Jerome Frank in his recent “Plea for Lawyer-Schools.”¹ His argument seems to me virtually unanswerable. And if, as is likely, his view gains in popularity, we will be brought full circle in American legal education—with the law office and the law school once again closely associated. The “advanced” law schools of our generation are thus likely to combine training in the skills of prediction and management for the individual client (which will be accomplished by law office apprenticeship in addition to the present reading of “cases and materials”) with training in the skills of prediction, management and control for interest-groups.

1. 56 YALE L. J. 1 (1947).

II

What are likely to be the consequences of these developments for the study of law in that broad humanistic spirit which has characterized the writing of legal history at its best? It is a notable fact, often forgotten, that nearly every American contribution to legal history which ought to be considered a classic was made *before* the movement toward the so-called "integration of law with the social sciences." Holmes' *Common Law* was published in 1881; Ames' *Lectures on Legal History* were first delivered in 1886-7; and Thayer's *Preliminary Treatise on Evidence at the Common Law* was published in 1898. While each of these has been to some extent corrected by more recent scholarship, and while they all left something to be desired in breadth of view or elegance of form, nevertheless they were all works of large conception and of scholarly integrity, in the best tradition of history as a humanistic study. It is true that these classics were produced simultaneously with the development of the case method. But while the case method was a characteristically American development, such works on legal history were not so at all, but were squarely in the German and English tradition. They were to a considerable extent stimulated by if not actually based on the work of European historians of the 19th century. Numerous factors help explain why this period saw the efflorescence of American legal history. Among these might be the growth of the idea of Anglo-Saxon supremacy; and the fact that the first great development of American legal education was in New England where there was a strong local tradition of historical scholarship reaching back to Bancroft, Parkman and Prescott, and where the genteel tradition required even lawyers to cultivate the past. The only later work which impresses me as belonging in this class is Professor McIlwain's *High Court of Parliament and Its Supremacy*, which dates from 1910 and thus still belongs to the early period.

Whatever the explanations may be, after the movement toward the "integration of law with the social sciences" gained momentum, there appeared hardly another work in legal history of the stature of those mentioned. From this movement we have reaped a harvest of monographs which to be sure are useful, but which somehow lack the scope and grandeur of conception of the greatest works of the earlier period. This phenomenon is not entirely accidental, but can be related to the larger historical development which I have tried to trace. In the age of the unadulterated case-method, law professors were preoccupied with turning the bare materials of the law reports to the purposes of a "legal science" or a prediction of the behavior of the courts; they had little energy or imagination left for incorporating the materials of the legal past or the non-legal materials of the present into their pragmatic scheme. But, as we have already observed, the second phase in the

recent history of the American law school (that of integration with the social sciences) was actually aimed at remedying this "defect"; at enlisting the history of legal institutions, along with anthropology, psychology, economics and even philosophy, in the service of its pragmatic ends. This enlargement might in one sense have extended the vision of legal historians—and may in the long run still somehow produce this effect. Yet its more immediate effect has been to nourish a spirit which is at odds with the spirit of the most important historical scholarship.

The pragmatic atmosphere has thus killed American legal history almost before its birth. For the law school has required that the historian who would survive in its midst should justify his inquiry according to criteria which have nothing to do with history; and in the United States the law schools have a virtual monopoly of the teaching and study of law. How can he contribute, the historian is asked, to explaining the procedure which the practising lawyer must employ? What "lessons" can history teach? But as Professor McIlwain has wisely remarked, to try to teach the lessons of history without teaching history itself is like trying to plant cut flowers.

The so-called integration of the social sciences with the study of law has, moreover, witnessed the decline (in so far as this has been possible) of legal history as a recognized subject in law schools. The number of economists, psychologists, and political scientists has grown while the number of historians on law faculties has hardly increased at all. In fact the University of Chicago Law School, which pioneered in the second pragmatic phase, has recently dropped English legal history from the list of required subjects in its four-year program. From law deans who are dominated either by the pragmatic spirit of contemporary law schools, or by the more pragmatically minded of their colleagues, we hear the familiar argument that legal history is better taught not as a separate subject, but as a part of the categories of contemporary law. They allege that, far from having ceased to teach legal history they actually have infused it into all courses: the history of contracts being "integrated" with the law of contracts, etc. This method is said to have the pedagogical advantage of making history more "interesting" by relating it to the practical concerns of the student; but no account is taken of the fact that most law professors have neither the knowledge nor the vocation for historical studies. The important effect in the long run is the swallowing up of history in the pragmatic concerns of the rest of the law school.

So far I have used the pragmatic spirit as a way of defining how studies in legal history should *not* be guided. Is there an alternative, and if so what is it? The alternative which I propose might for convenience be called the humane study of law, to distinguish it both from the pragmatic and from the "social science" approach. In any such discussion as the present, of course, pragmatism has a rhetorical advantage. For

it purports to provide concrete, definite, and above all limited objectives for intellectual activities which otherwise sometimes seem discouragingly vague and undirected. But this rhetorical advantage is itself a clue to the danger of allowing the pragmatic spirit to dominate legal research: its tendency to narrow human reflection to practical and contemporary interests, to inhibit the exploration of the range of human thought and experience. As Veblen remarked in his *Place of Science In Modern Civilization*, the pragmatic spirit, the spirit of worldly wisdom, of willing subservience to predominant contemporary interests, is the great enemy of the free exercise of man's idle curiosity:

"Wisdom and proficiency of the pragmatic sort does not contribute to the advance of a knowledge of fact. It has only an incidental bearing on scientific research, and its bearing is chiefly that of inhibition and misdirection. . . .

". . . [The pragmatists] feel the inherent antagonism between them and the scientists, and look with some doubt on the latter as being merely decorative triflers, although they sometimes borrow the prestige of the name of science—as is only good and well, since it is of the essence of worldly wisdom to borrow anything that can be turned to account."

This spirit, Veblen observed, tends to pervert scholarship from disinterested inquiry into "a taxonomy of credenda." To plead against the pragmatic spirit in legal studies is, then, less to plead *for* any particular type of studies, than to seek an atmosphere which allows men freely to pursue all the types of studies which their intellectual curiosity, imagination, and interests may lead them to. It is to plead that the nature and development of legal institutions be examined in many different ways, with the fullest regard for the complex totality of man's past and present, material and spiritual concerns; and not with an eye solely for the utility of such investigations for improving the skills of the practising lawyer, or for guarding the interests of particular clients (whether individuals or groups), or for maximizing immediate social goods.

Such a plea, while its general validity may seem almost too obvious to require support, is especially called for in this country. For other deep-rooted factors have conspired with the pragmatic spirit to make our legal studies less free, humane and cosmopolitan than they might otherwise have been. The most obvious and most potent of these has been that our common law is predominantly a system of case law based on the principle of *stare decisis*. Since the law reports of the past have been the main raw material from which the lawyer has hoped to discover the legal rules of the present, this use of the documents of legal history has overshadowed all others. The utility of the data of history for the practising lawyer, rather than stimulating an

interest in the significance of institutions in past ages, has tended to assimilate historical studies to the pragmatic purposes and categories of contemporary legal practice. As I have tried to show elsewhere,² even the best English legal historians have been influenced in this direction.

Had our legal institutions been of more thoroughly native growth, our interest in law might conceivably have led us indiscriminately into the legal institutions of many other ages and nations. But our institutional, traditional and linguistic ties with the English common law have given us some of the satisfactions and indeed some of the values of studies in comparative law (which inevitably must be studies in comparative legal history) while at the same time narrowly confining our comparisons. What I mean may be made clearer by comparing our situation with that of those European countries, like Germany or France, which have built their legal institutions on the Roman law. The English tradition of the common law on which we have based our legal institutions takes us back not much more than eight or nine hundred years, all of course within the Christian era, and in the European civilization closest to our own. But a serious study of the development of contemporary French or German law inevitably has carried French and German scholars back over two thousand years, at least to 500 B. C., through a foreign language into an alien, largely pre-Christian civilization which was itself in close touch with still more alien Near Eastern cultures. European students of law have profited from these larger scholarly and imaginative demands made of them. Either the pragmatic spirit or an overweening national or racial arrogance (or both) has allowed us, despite the vast sums spent in this country on the social sciences, complacently to ignore the other great secular legal system of modern Western civilization. In this country the Roman law has not been treated, either by legal scholars or historians, with the respect due to so impressive a monument of Western man's attempts to order his society; the subject has been stubbornly ignored, and Roman law is now studied here in few places outside of Louisiana or of sectarian institutions. If primitive law and ancient law have elicited more scholarly interest in the United States, this may be explained largely by the fact that they have fallen within the province of anthropologists, sociologists and students of antiquity, rather than of legal scholars.

III

Before proposing specific institutional ways in which studies of the broader type might be encouraged, I would like to suggest some kinds of inquiry related to the law which a free atmosphere might stimulate. Of course, one of the virtues of this freer spirit is that it will take men

2. Boorstin, *Tradition and Method in Legal History*, 54 HARV. L. REV. 424 (1941).

where it may; for in every individual case such scholarship would have an inward logic of its own. The examples I give must therefore not be considered an agenda for scholars, but rather hints at types of inquiry that heretofore have lacked the encouragement they deserve. Because my own interest is mainly in history, my examples will inevitably have an historical emphasis.

It is a commonplace that the sort of order which men have wished to embody in their society has been related to the sort of order which they have seen in the universe at large. This order has been expressed in their ideas of religion, science and metaphysics; at the same time the order which they have seen in the universe has been affected by the actual conditions of climate, geography, natural resources and social institutions in which they have lived. Therefore we can hardly pretend to have studied law in the context of human life until we have done our best to relate legal institutions to man's spiritual aspirations as well as to his material environment. Studies of law in this proper context have been by no means unknown among scholars of ancient history. Students of Egyptian institutions tell us that the concept of *maat* ("justice"; "order"; "regularity") which lay at the center of the Egyptian conception of political order cannot be understood except in the context of religion and science. Similarly, we are told that the Mesopotamian idea of law cannot be comprehended without some understanding of the Mesopotamian notion of the cosmos as a state and of the gods as legislators. Again, it is obvious that the Hebrew legal institutions and concept of law are unintelligible without reference to religion. Attempts to understand law among these peoples have led scholars not only into theology, metaphysics and science, but also to the actual influences of geography and climate; all these taken together and in relation to each other say a great deal more than does each aspect seen separately. In relation to Roman law such enquiry is brilliantly illustrated in the works of von Jhering—especially his *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*. But there has been shamefully little exploration of the intellectual foundations and environment of the common law, English or American. Of course, the most influential works of legal theory like those of Hobbes and Bentham have been attempts at such exploration. Yet historians, excepting a few like Elie Halévy—in his *Growth of Philosophic Radicalism*—have not shared this catholicity. At the present time, however, with the scholarship of Stubbs, Maitland, Vinogradoff, Holdsworth, Holmes, Ames, Thayer and McIlwain behind us, we are admirably equipped to connect the history of the internal development of our institutions with the whole of man's thought and experience.

The study and writing of American legal history have, in my opinion, been retarded more by the failure to approach them in the humane spirit than by the scarcity or inaccessibility of documents for the earlier

period or by the excess of more recent material. To advance our understanding of American legal history we should, perhaps, become philosophically more ambitious and chronologically or geographically more modest; we should focus on broader problems, though always, of course, illustrated in the limited data of some particular time and place. The preconception that our task is to trace the linear development of all the topics handled by the contemporary lawyer makes our work seem hopeless or futile. The Digest System with its 400-odd alphabetical topics from "Abandonment" to "Workman's Compensation" may lead us into the cases but it will never provide a framework for legal history; and it is likely to discourage us from serious effort. Yet such an approach is the product of allowing historical studies to be dominated by pragmatic interests. If on the contrary, we take our stand at almost any point in our past, and inquire into the relation between a few of the major legal institutions of that day and the whole context of man's life, we will have set ourselves a work at once more feasible and more significant.

Let me illustrate. Anyone who should set himself the task of writing the history only of the law of marriage in the United States from the beginning and in all the jurisdictions, would doubtless be unable within a single lifetime to encompass the relevant materials. Even should he succeed, his product would interest few save practising lawyers; if he were a man of great talent and industry he might produce another *Williston on Contracts*. On the other hand, a careful study of even a few legal institutions (such as marriage, contract, or the law of master and servant) in Puritan New England (to take only one of many possibilities), in the full light of the theological and scientific ideas of that age would have a great deal to say about the relation between thought and institutions, and might even help recast and define the problem of the reception of the common law in America. Or, to see the legal theories and institutions of the Jeffersonian age (for example, their attitude toward legislation) in relation to the consuming quest for a natural order, the omnivorous interest in natural history, and the energetic effort to conquer a continent might tell us something new and vital, not only about the Jeffersonian tradition but about the general implications of materialism and a naturalistic theology for legal institutions. What preconceptions about the nature of man, of thought, of justice, and of society have supported American movements toward codification, as illustrated, say, in the work of Edward Livingston or of David Dudley Field? What is the place of these movements in man's quest for certainty? We have already hinted at a study of the relation between, on the one hand, the growth of the case-method of legal instruction and the prediction-concept of law and on the other hand the growth of the explicit philosophy of pragmatism and the new biology, physics and psychology with their attendant concepts of scientific method.

If one sets out from the material side of man's existence—that is, less from intellectual than from social and economic history—a host of other possibilities offer themselves. For example, what has been the influence of the frontier, of the juxtaposition of civilization and barbarism, on the concepts and institutions of law at different times and places on this continent? In what ways does the fact that men live in an agricultural, a ranching, or a mining community affect their concepts of the natural order, and their attempts to embody such order in their social arrangements? Even such an obvious subject as the influence of the American revolution on our legal institutions has hardly been touched.

The history of technology opens up many broad questions which involve the copious use of legal materials. The problem may be posed in one form as that of the connection between man's control (or his sense of control) over his environment, and his conception of the basis of the institutions which are to control his society. Consider the view expressed by the author of the Book of Job, in the words addressed to man by God out of the whirlwind:

“Where is the way to the dwelling of light?
And as for darkness, where is the place thereof . . .
Hast thou entered the treasuries of the snow,
Or hast thou seen the treasuries of the hail,
Which I have reserved against the time of trouble,
Against the day of battle and war?”

In contrast, what does it imply for legal institutions when men can say, as did George Mead early in this century, “The human being as a social form has actually got relatively complete control over his environment.” Or, again, what has been the relation between the introduction of steam power and the internal combustion engine, and man's conception of the ordering force in the Universe, and what is the relation, in turn, between this new concept of natural order and man's ideal of a legal order?

A single example may illustrate the relation of the history of technology to the humane study of law. There remains to be written a work of great significance on American civilization, taking as its point of departure the history of the rise of the automobile. To such a study, legal history would be an important if not the major contributor. Professor Jerome Hall has already suggested one of the possibilities in relation to the law of larceny. But many other facets of American life, thought and morals would be illuminated by readily available sources on relevant aspects of the law of larceny, insurance, sales, suretyship, and negligence—to mention only a few. Conceived in the proper spirit, and written with a feeling for the broad problems, such a work could tell us a great deal about the relation of technology to man; and specifically about the interrelations of technology and law with conceptions of

standard of living and status, and moral, civil, and criminal responsibility—in the largest sense about man's relation to a moral and legal order as these develop in an industrial society.

Technology and ideas meet still more obviously in a question like that of the connections between a society's means of communication and its concept of law. Here are vast unexplored possibilities. How do the ways in which the decisions of courts and the discussions of lawyers are communicated to the general public express or influence the views which lawyers and laymen hold about the nature of law? Specifically, compare the role of newspaper law-reporting in England with that of the forum in classical Roman law. In the United States we see the growth of law-reporting as a large-scale commercial enterprise (made possible by the improvement of power-printing techniques and stimulated by the invention of the key-number system of indexing) and the wide dissemination of criminal trial-reports in the daily press. How do these facts affect the concept of law held by both lawyers and laymen? While lawyers find their way handily into the law by alphabetical indices referring to such items as "fences," and "fish," many laymen think of law mainly in relation to the courtroom drama of criminal trials; legal principles and reasons become increasing inaccessible to both lawyer and layman. What is the significance of such an emphasis on the superficialities of the law?

Even the so-called internal or conceptual development of legal institutions might be better understood if studied without preoccupation with current legal practice or pressing social needs. Our understanding of the roles in man's quest for law, of custom, statutes, case-law, and of spiritual or moral sanctions is greatly deepened by such works as McIlwain's *High Court of Parliament*; and the roles of bar, bench and business community by such works as those of Morris, Dubois, Goebel, and Livermore. Or, to take a more neglected question, what connection is there between aesthetics, the desire for symmetry, neatness, or beauty, and the actual development of legal ideas and institutions?

At first sight, the items in this miscellany may seem to have very little in common. I think, however, that they do have something in common which is of the greatest importance. They are not in the pragmatic mood: they cannot be justified as contributing to immediate solutions of problems of individual clients or of interest groups. Moreover, they are all relevant to the study of man, to his quest for a moral, intellectual and social order. They would all be likely to spring from a disinterested curiosity about man and his efforts to perfect his institutions.

Works of this type are not coming from our law schools or universities in any significant number. From our law schools there issues a swelling flood of case-books and so-called "collections of cases and materials," which add little of permanent significance and which usually do not outlive the generation of law students for which they are

written. Occasionally, it is true, we do find a practising lawyer like Albert Beveridge or Charles Warren, or a judge like Jerome Frank or (still less frequently) a law professor like Karl Llewellyn, who allows his mind to range freely and humanely over institutions, without crabbed preoccupation with the uses of his writing. But, generally speaking, the humanistic writings of such men are classified as the curiosae of their careers, out of the main current of their thought. Meanwhile many technically trained persons who are capable of humanistic studies become popularizers rather than humanizers. Instead of contributing to the permanent literature, they write vulgar narratives of the careers of lawyers or of judges (so-called Lives of Great Lawyers), debunking pamphlets on the legal profession or the idea of law, or handbooks which oversimplify without explaining (*Your Own Lawyer in 15 Minutes a Day*, etc.).

IV

At present few students are aware even of the possibility of humanistic studies in the law. They are plunged from college, where legal institutions are virtually ignored, into law school where these institutions are studied only from the pragmatic point of view. The disagreement among their law professors mainly concerns the proper means of attaining the pragmatic end. The alternatives presented to the brighter students (assuming they are not interested in government service or in business) are to practise law, or to teach in law schools; and even for the latter the best preparation is practice. What is to happen to men who become interested in the humane study of law?

In proportion as a literature of the subject actually develops in this country, and as there appear more and more well-trained scholars competent to excite the interests of others—as the paths are laid freely open from law to philosophy, theology, anthropology, and history—finding a career for such men will become less difficult. It is necessary now to take practical steps in two directions: (a) to provide as many centers as possible where mature scholars will be encouraged and given the freedom to pursue the humane study of law; and (b) to provide many other ways for stimulating the younger student's awareness of other than pragmatic approaches to legal studies. In this connection it is urgent to find a place in universities where competent and industrious students who wish to pursue programs of this kind may do so without the rigidity of the law school curriculum, and yet actually receive degrees.

In the first place, there are even now a few scholars in law schools in this country whose main interests are in the humane study of law. Needless to say, their task is not to try to "reform" the curriculum of the law school. Rather, they should seek in their writing and teaching to become exemplars of the humane spirit in the study of the law. Such

law professors are in a position to take the lead in setting up broad and flexible programs of graduate study (in cooperation with faculty members outside the law school) which might provide a place of intellectual refuge for students qualified for the type of study I have mentioned.

That such programs are practicable is demonstrated, for example, by the Committee on Social Thought at the University of Chicago. This Committee offers an interdepartmental graduate program which seeks among other objectives to encourage the study of all institutions in the broadest context with no confining pragmatic emphasis. Similar units elsewhere, bringing together historians, philosophers and social scientists might help draw legal institutions into the main current of our reflection. Such programs should, at least at the outset, be confined to the ablest and most mature students. There should be a minimum of prescription and of curricular apparatus, a maximum of personal consultation of teacher and student. Because of the greater maturity and competence demanded of these students, such programs have both a special need and a special claim for fellowship funds.

Institutes and foundations of several types might serve the ends I have described. The Foundation for Research in Legal History at Columbia University, under the direction of Professor Julius Goebel, Jr., during its brief life has done valuable work. The Littleton-Griswold Fund might look toward encouraging work of a broader nature. Still other institutes or foundations might be helpful.

The great law libraries throughout the country should become centers for such studies. Even a few sizeable fellowships for example, at Harvard, Yale, or at the University of Michigan, could do much in this way. An important work remains to be done by the law department of the Library of Congress. In the first place, of course, this department should become one of the most active agencies in encouraging directly and indirectly the publication of now unpublished legal records throughout the country. But more than that, it is the natural crossroads for legal scholarship of the most varied types. Substantial fellowships there, either under Federal auspices or under a private foundation, could do a great deal to advance studies in comparative law, jurisprudence, and legal history.

A Journal of the Humane Study of Law, or a Journal of Legal History, though appearing only semi-annually, might be of great value. There are, it is true, already too many law journals in this country. But they are nearly all of a type: professionally centered, dominated by the practical concerns of the law schools or the bar associations which publish them. Such journals do, occasionally, publish articles of an historical or general nature, but these are the garnish on the solid professional dish; a spray of parsley and nothing more. Such a journal as that proposed would seek to draw together important articles showing

the wider significance of legal institutions and of concepts of law, and to provide a focus and a forum for such studies.

We are often told that the disorganized condition of the documents for the earliest period makes premature the writing of American legal history on a large scale. While I cannot acquiesce in this view, I believe that even those who hold it may see something in the final project which I should like to propose. Obviously, the greatest stimulus to the type of study I have been talking about would be the production of an American counterpart to the work of Maitland. But meanwhile we already have the scholarly resources for a collaborative work which might at once exemplify the broadest legal scholarship and encourage others to significant writing. What I propose is a two or three volume collection to be conceived unpretentiously as *Essays in American Legal History* or, better, *Legal Essays on American Civilization*. The essays might be grouped into three or four chronological sections. Each essay would be contributed by a different person and related to his field of special competence. Each author would in his own way seek to point outward in many directions from the development of legal institutions to intellectual, political, economic, and social history. Any such work, of course, would have the virtues and vices of that variety of points of view which characterizes all collections of this kind. The work as a whole would not in any sense attempt to be complete, definitive, or exhaustive, but rather would endeavor to explore, stimulate, and suggest—to provide a rough preliminary map of some areas to be explored and some ways of exploring. It would have the merit of drawing together as collaborators, lawyers, judges, legal historians, intellectual historians, philosophers, economic historians, anthropologists, and scholars in many other fields. I think the value and the feasibility of such a work will appear if we simply consider some possible contributions to the earliest section, presumably on the colonial period. At the present time in this country there are scholars of competence and imagination who might contribute essays on such topics as land tenure in early New England and its significance for political and economic life; the relation of theology in Puritan New England to the theory of legislation and the theory of society; Colonial criminal law and the problem of the reception of the common law; colonial education and the law; law and the colonial village; the regulation of labor in the colonial economy; the American Revolution and the law. There are analogous possibilities for each of the later periods. Such a work could hardly help developing among both its authors and its readers an interest of a wider sort in American legal history; by bringing together illustrations of the work already being done along these lines, it would offer an impressive example of the manifold humanistic possibilities of legal scholarship. Here might be a source for the infusion of a fresh spirit into contemporary legal thinking.

As a beginning, I propose that a group of us interested in encouraging the kind of study I have proposed, constitute ourselves a small informal committee to explore the above and any other ways of encouraging the study of law in the humane spirit.

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The significance of the growth of such a spirit is in my opinion much larger than its effect on legal scholarship. The future of our own society and of the international community as well may depend on our success in making real to literate classes everywhere, and not least in the United States, the idea of law. This sense of the reality and significance of the idea of law cannot stem from the notion that laws are nothing but temporary expedients to serve the dominant interests of the strongest in the domestic or the international community. It must come from a deepening sense that the search for law is one of man's characteristically human needs; that it is intimately related to his whole thought, experience, and nature; that legal systems and institutions are somehow symptoms of man's attempt to embody in his social life a fragment of a larger moral order, dimly seen, but transcending the interests of any man or group of men.

Maine pointed out in his neglected work on International Law, that the most potent force for the adoption of Roman law in medieval Europe was the opinion of the literate population, and that it was this self-propagating power of an idea that disseminated international law in its earliest stages. Our national history is full of paradoxes in this regard: probably in the history of no other modern nation has a more central place been given to the concept of natural law; yet no other nation has been more easily seduced by legislative panaceas, or been more positivistic or pragmatic in its temper. We have used the doctrine of natural law throughout our history to help found and change our institutions; at the same time, the spirit of our studies of institutions has been essentially positivistic—closer that is to the spirit of Hobbes and Bentham than to that of Locke and Blackstone. Bentham, as you know, called the idea of natural law "nonsense on stilts;" Holmes, with his customarily majestic condescension, likened it to the insistence of the romantic knight that his lady-love be flattered with superlatives. In the course of our history, we have appealed to the law of nature to support our Declaration of Independence, to found our Constitution, to preserve our union, to abolish slavery, and to support the Atlantic Charter and the Four Freedoms, but our recent legal scholarship has shown precious little concern or even respect for the natural law tradition. And especially within the last seventy-five years, during which positivistic approaches have been impressively elaborated. This has been in many ways unfortunate. For the concept of natural law did

open and can still open the way from legal doctrine to the world of philosophy, anthropology, history and everything else which may illuminate man and his institutions.

Our recent preoccupation with the relation of law to the interests (primarily the material interests) of individuals and groups has led us to overlook the significance of legal institutions for the nature of man and his quest for a moral order. Holmes' continuous concern with the significance of institutions for "our friend the bad man" suggests the narrowness of the pragmatic emphasis. "But what does it mean to a bad man?" was Holmes' persistent question. However useful or necessary such an approach may be in professional schools, it is only a partial approach to legal institutions; nor need one be a devotee of natural law philosophy to see its partiality. There is also the question "What does it mean to a good man?"—if any such there be. And even more important, "What does it mean to a man?" The humane study of law would at least try to bring the study of the legal past and present into relation with the whole human being, with his striving for a moral order as well as his scramble to satisfy his material interests. In this way such an approach (compared with the pragmatic view) would be at once more objective (that is, more attentive to the whole man as he actually is), and more normative, since it makes the study of law more effectively a part of our quest for what is essentially human. It would at the same time relax and enrich the intellectual atmosphere in which legal institutions are to be studied—or even perhaps practised—and it would lead us freely into the neglected fields of comparative law, into the past of many nations, and into the whole context, physical, social and spiritual, of human life.