The University and the Legal Profession*

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Chief Justice Weygandt, introducing Dean Pound:

Since tradition demands that everything uttered on an occasion such as this be reduced to permanent form for preservation in what I once heard a Washington taxicab driver designate as the "arshives," I read.

As Chief Justice of my state's court of dernier resort, I accept as an honor the invitation to participate in the program incident to the inauguration of a former member of that high tribunal as the seventh president of one of those mighty institutions now carrying the burden of our great experiment known as universal education.

In discharging my pleasant duty of presenting the first speaker, it may not be inconsistent with the proprieties for me to observe that in the colonies during the mid-eighteenth century lawyers apparently were of little importance. To be a lawyer was to incur social ostracism. In Connecticut they were included in the discriminatory legislation of that day, and were classed with keepers of brothels. Rhode Island excluded them from membership in the legislature. In 1730 the number allowed to practice in the courts of New York was limited to eight, although there were thirty practicing in that city—many of extremely bad reputation. However, during the latter part of that century their rise was rapid and was due probably to the development of business on a larger, intercolonial scale, and to the increased number of legal problems incident to the approach of the Revolutionary War. By the time the early years of the nineteenth century were reached the law opened

*Address given in the University Chapel, October 24, 1940, during the ceremonies of inauguration of President Bevis. The introductory remarks are by Chief Justice Carl V. Weygandt of the Supreme Court of Ohio.

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the surest way to reputation, influence and power, and it was during this period in 1817 that Harvard Law School was founded. Immediately thereafter the pulpit began to give way to the bar, and the teaching of brimstone was partially superseded by the teaching of Blackstone. Thus was developed the art of saying the ungracious thing in a gracious manner.

I am told that the early graduates of Harvard Law School were responsible for the then ultra-modern negative pregnant known as the itemization of services rendered by the lawyer to his client. One of those early graduates, I am told, billed his client in the following manner: "At home with my family thinking, studying and scheming as to the manner and method of avoiding your tax assessment, $5.00."

But generation after generation of Harvard Law School graduates have made contributions of the highest order to our national progress, and the school itself has been ever vigilant and zealous in elevating the practice of the great profession of the law.

It is sufficient to say that the distinguished gentleman to address us at this time was for many years the dean of the Harvard Law School and still is an active member of its faculty. We welcome to Ohio this lawyer, scholar, educator and author, Dean Roscoe Pound, whose subject is "The University and the Legal Profession."

THE UNIVERSITY AND THE LEGAL PROFESSION

The relation of the University to the legal profession must be approached by way of the relation of the University to the law as well as by way of its relation to law teaching. Law, law teaching, and the legal profession are three things which have grown up together. The University can do more for the law than merely teach it in the grand style. The law school of a state university can do much of the work of a ministry of justice for the state by the study of the problems of administering

justice in the jurisdiction and its ability to bring to bear upon them its resources in the learning and research of its teachers in the social sciences in addition to the learning and experience and training in research of its faculty of law. It can do more for law teaching than merely impart a sound professional training. It can train lawyers who will not only be competent advisers useful to their clients and helpful to the courts, it can train lawyers who as legislators, as critics of public affairs, and as intelligent guides to public opinion in a polity like ours, in which political questions are so often legal and so many legal questions are political, will be public spirited and useful citizens. It can do more for the profession than what I have pointed out as its task for the law and for law teaching. It can develop the professional spirit in those who go to the practice of law from its teaching and thus foster what is not the least feature of an effective administration of justice according to law.

Plato tells us that, of all kinds of knowledge, the knowledge of good laws may do most for the learner. A deep study of the science of law, he adds, may do more than all other writing to give soundness to our judgment and stability to the state. Indeed, he goes so far as to claim for it that it will confirm and advance the good in their goodness and reclaim the bad, except that incorrigible remnant for whom he conceives there is no help short of the gallows. It is true that this high estimate of the study of law has two presuppositions that must give us pause. For one thing, the philosopher was thinking and writing of study of an ideal body of laws devised for an ideal social and political order, not of study of the code of legal precepts that happens to obtain at a given time in a given state. For another thing, he writes under the influence of the Socratic identification of wickedness with ignorance and the belief that when men are well informed as to the right they will not go wrong. Thus it might be questioned whether the study of law in a professional school is the same thing as that study of laws which Plato commends so highly. Also it is not so clear to us today that we may

combat evil with mere learning. With full allowance for this last consideration, however, we still have warrant for high claims for study of the science of law.

But, some one will say, is it a science of law that you study in the professional school of today? You study the Anglo-American common law. You study that common law in its practical application as set forth in the reported decisions of the courts. You investigate, not the principles of justice nor the ideal of the social and legal order, but the recorded experiences of the administration of justice among English-speaking peoples. You study these materials in order to train lawyers for the practice of their profession. How are these things to achieve even a large measure of what Plato expected from the science of law?

Plato called for knowledge of good laws and for deep study of the science of law. We set up law schools to teach "law." But are these the same? Does "law" include "good laws"? Does the teaching of "law" involve deep study of the science of law? What is "law"?

To the lay mind the answer is simple: Law is an aggregate of laws, and laws are rules. Law is the whole body of legal precepts that obtain in the time and place. Indeed, some jurists have acceded to this lay view of the matter, and the analytical school, which was conspicuous in England and America in the last century, took this for its fundamental position. It held that lawyers were concerned only with the precepts which the state established, or which the state recognized and enforced through its tribunals. With the goodness or badness of these precepts lawyers had nothing to do. Nor was the science of law to go beyond an ordering and systematizing of these precepts. If this is the sound theory of law, and the true conception of the science of law, certainly it is not the good law and the science of law of which Plato wrote. Moreover, if such is to be our conception, we may well inquire whether there is much warrant for an academic school of law. We may well ask whether the aggregate

of legal precepts applied for the time being in the particular place needs to be taught academically—whether it is not the best and the simplest course to learn them in the office of the practitioner, as was formerly the custom. We may well ask, even if it be thought that these precepts may be taught best in a school, whether it is worth while to devote large endowments and set up expensive university schools to teach a set of precents that may be repealed by the next legislature.

In truth, the matter is by no means as simple as the common sense of the layman or the dogmatism of the analytical jurist make it appear. There is much more in law than a mere aggregate of legal precepts. Legal precepts are something much more complicated than the baseball rules or the football rules, or the constitutions and by-laws of clubs and fraternal orders, or the army regulations, or even than the municipal penal ordinances. Good laws in the sense of ideals are a large element in the apparatus by which causes are decided every day in the tribunals, and the science of law must take account of this element if it is to give us a true picture of the legal precepts that obtain for the moment. Likewise the science of law must do more than arrange and systematize those precepts. It must investigate the way they are given shape and are eked out and are developed with reference to ideals and by means of a juristic and judicial technique. It must investigate the means by which abstract formulas are made into living instruments of justice in their interpretation and application. Such a science of law may indeed give soundness to our judgment and stability to the state. It is no less a science that is taught in the American law school.

Three elements go to make up the law. The first element is legal precepts, the element to which Bentham referred when he said that law was an aggregate of laws. The second element is a traditional technique of deciding cases; a technique of finding the grounds of decision in legislation supplemented by traditional legal materials, or, in the absence of legislation, on

the basis of traditional materials alone; a technique of developing and applying legal precepts whereby those precepts are supplemented, extended, restricted, and thus adapted to the administration of justice. The third element is a body of ideas as to the end or purpose of law and as to what legal precepts ought to be in view thereof, an ideal picture of the social order with consequent pictures of the details of the legal ordering of society, with reference to which legal precepts and the traditional technique of decision are developed and applied and are continually given new shape or new content or new application in the changing circumstances of life.

No one questions that legal precepts are law. But if we mean by law that body of materials by means of which the courts decide the controversies that come before them, legal precepts are not all of the law. Indeed, it is impossible for them to be all of the law. Human wisdom does not suffice to provide a complete and perfect body of precepts for which no supplement and no gloss will be needed, and in which every human controversy can find its exact preappointed solution. No matter what the legal precepts may be for the time being, no matter what the last legislature may have prescribed or the justices of the highest appellate tribunal may have announced in the last lot of opinions handed down, interpretations and distinctions and analogical extensions and logical inferences and equitable applications will be called for by the infinite variety of human life to which the precepts must be applied. The precepts, the statutes, the judicial opinions will prove to be but materials from which tribunals must construct grounds of decision for states of fact which those who formulated the precepts, those who drew the statutes, those who wrote the opinions had never been called upon to consider. They are able to do this because of a certain judicial and juristic craftsmanship, because of a traditional technique, because of habits of mind which are the most enduring features of a legal system.

By way of example, consider four settled habits of mind of

the common-law lawyer—his attitude as to the force to be given to judicial decisions, his attitude toward specific redress and substituted redress, his attitude toward legislation, and his tendency to think in terms of relations. As a matter of course he attributes to judicial decision a controlling force in the decision of subsequent cases. As a matter of course he regards substituted redress as the normal type and specific redress as something exceptional, reserved for cases for which substituted redress is not adequate. As a matter of course he regards a statutory rule as something introduced specially into the general body of the common law, without any necessary or systematic relation thereto, in order to govern same special situation, and hence governing that situation only. As a matter of course he thinks in terms of relation—of husband and wife, landlord and tenant, master and servant, principal and agent, principal and surety, vendor and purchaser. So completely do these mental habits shape his legal thinking that he is at a loss to understand how the lawyers of half the world can think in radically different fashion upon each point. The civil-law lawyer finds his common law in texts and conceives of a judicial decision as determining nothing beyond the case in which it was rendered. He thinks of specific redress as normal and substituted redress as exceptional. He reasons by analogy from legislative texts and confines the force of a settled line of adjudication to the exact proposition it establishes. He thinks of will, where we think of relation, and speaks of the law of persons or family law, of usufruct, of the contract of letting services, of the contract of mandate, of the contract of suretyship, and of the contract of sale. We have a traditional technique of deciding with reference to the judicial decisions of the past, a traditional technique of developing the grounds of decision of particular cases on the basis of reported judicial experience. The civilian has a traditional technique of construing legal texts, and a traditional technique of developing the grounds of decision therefrom. In each case the art of

working with legal precepts is more significant than the details of the legal precepts themselves.

But the administration of justice involves more than the interpreting and applying of given precepts by means of a traditional technique. It happens continually that courts must choose between competing principles, developing the one and distinguishing the other. They must choose to apply this precept by analogy and thus to extend its scope, and to restrict that precept that might well cover the case. They must choose to go in one path of legal analogy and not in another, where both lie open before them. The choice is not one of inexorable logic. Nor is it a matter of mere personal inclination or personal caprice. It is governed by settled ideals of the end of law and of what the legal order, and hence what legal precepts, should be in view thereof. These ideals give the background upon which judicial decision and juristic writing are projected. They determine the choice of starting points for judicial and juristic reasoning, the choice of analogies, and the selection of the concrete materials with which to fill out abstract formulas. Consider the test of applicability to American conditions that played a determining part in the formative period of American common law. How did courts ascertain what was applicable and what was not? There were no precepts defining applicability. The phrase had no historical content. They could only refer to an idealized picture of pioneer, rural, agricultural America of the fore part of the nineteenth century. That picture became part of the law. Other such pictures may be seen in connection with the criteria of conformity to "the nature of free government" or conformity to the "nature of American government" or to the "nature of American institutions," which have served as the basis of so many decisions on constitutional law; in connection with the hypothetical "old law of England," that idealization of parts of the medieval law to which so many things were referred a generation ago; and in connection with "the common law as it was at the time of colonization," an idealization of seventeenth-

century law in terms and for purposes of the present, which still serves as the basis of decision in more than one of our commonwealths.

Nor are the legal precepts that make up the first and most obvious element of the law merely a body of simple commands and prohibitions. There are, indeed, many rules—many precepts in which a definite detailed legal consequence is attached to a definite detailed state of facts. But the lawyer knows well that he may seldom expect to find such a rule precisely applicable to his problem. Often he can hope only to find a principle —a generalization giving an authoritative premise for judicial and juristic reasoning. Often he must turn to some legal conception—to some critically defined type of situation to which he may refer or by which he may measure the facts of the case before him and thus find a basis for legal reasoning. Often there is no more than a standard—a general measure of conduct to be applied with reference to the circumstances of each case with wide margins of application and an ultimate reference to what is fair and reasonable on the particular facts.

Thus rules are no more than a small fraction of the whole that we call law. Often they are the least stable part of the law. In a large view they are the least significant part. If one doubt this, let him compare the rules of 1800 with those of 1830, of 1860, of 1890, and of today. Where is the learning of real actions of 1800? Where are the nice rules of common-law pleading of 1830? Where are the pedantic distinctions of bailments that obtained in 1860, or the minute precepts as to appellate procedure and error in trials at law that were at the height of their vogue in 1890? Yet how stable have principles and conceptions proved in comparison. If our law schools taught rules only, their teaching would be built upon the sand. It is because they must teach and do teach principles and conceptions and how to use them, standards and how to apply them, the traditional technique of the lawyers' and judges' craft, and the traditional ideals of what law is and what it is for—it is for these reasons

that we may assert for the law school what Plato claimed for the study of law. When we train common-law lawyers, *i.e.*, lawyers bred in the traditional art of decision that has grown up among English-speaking peoples, we give soundness to judgment and stability to the state. For our Anglo-American polity is a legal polity and our political institutions are legal institutions. But we seek to make common-law lawyers in whose hands the tradition shall further the progress of civilization. We seek to train common-law lawyers in whose hands the traditional Anglo-American technique of working out the grounds of decision from the judicial experience of the past shall continue to be an instrument of justice. In Plato's phrase, we seek to transmit a knowledge of good laws.

Although legal precepts in the narrowest sense, *i.e.*, rules attaching a definite detailed legal consequence to a definite detailed state of facts, are the staple of ancient codes, it is not true, even in the beginnings of law, that the law is a mere body of legal precepts. In the beginning law is scarcely set off from other forms of social control. There is an undifferentiated social control by religion, ethical custom, and enacted rules. Hence knowledge of the traditional religious precepts and of the traditionally established ethical custom, as well as knowledge of the traditional interpretation of the written law, is even more important for the administration of justice than knowledge of the precepts promulgated in the code. Thus legal education is as old as law. For although the promulgated precepts are written out for all to read, the tradition must be transmitted through some sort of instruction. With the evolution of the legal order and development of the elaborate systems of the maturity of law, the relative significance of authoritatively established rules becomes even less and the demand for legal education continually increases.

In the modern world, legal education takes three forms: The Continental academic type, running back to legal education in ancient Rome; the English apprentice type, going back to the

medieval conception of the profession as analogous to a craft, with its own government, it own traditional art or mystery, and its own instruction by the neophyte's serving as apprentice to a master; and the American academic professional type, growing out of the inapplicability of the English type to the conditions of the formative period of American law and the need of a rapid working over and adaptation of seventeenth-century English law in order to make of it a common law for America.

In the beginning of Roman law, the little differentiated or undifferentiated body of religious precepts, ethical custom, and legal rules, by which the social order was maintained, was a tradition of the pontifices. Except as codified by the Twelve Tables, down to the fourth century B.C. this tradition was possessed exclusively by the patricians, who alone were eligible to the priesthood. The great man who knew the tradition sat in the court of his house and advised his dependents, drew legal documents for them, and, if need was, conducted causes for them. A turning point in legal history is the secularization of the law, which took place at Rome at the opening of the fourth century B.C. As a part of this process of secularization, the first plebeian *pontifex maximus* began to give consultations in public, so that students could listen and take notes. Also those who knew the law began to give advice to all comers, and had hearers, as they were called, who attended the consultations, learned the tradition and the traditional art, and in time, when they had become learned in the law, might themselves sit and give counsel. Thus in place of the priestly caste who have a class monopoly of the tradition, we get a profession with a sort of professional monopoly. When, in the reign of Augustus, the jurisconsults come to be licensed by the emperor, the transition is complete. At least as far back as the reign of Augustus we find that the jurisconsult is both counsellor and teacher, and this double function continues through the classical period. Not only do students attend consultations and take notes, but the juris-

consult lectures to them and even writes institutional treatises for them. Moreover, there is evidence that there were teachers of law in the classical period who were not practitioners.

Law schools as such developed in the period of maturity of law. The school of most importance was at Berytus, which in the fifth century was the chief seat of legal learning. The teachers of law in this school were men of culture, learned in the classical law, and possessed of an academic legal science only just short of the practical legal science of the classical jurists. From their time to the present, the academic law school has been the chiefest factor in the development of Roman law. Their notes upon the classical texts, editing them and bringing them down to date as statements of the actual law, as well as interpreting them and putting their details into a harmonious, logically constructed system, prepared the way for Justinian's Digest, which is the common law of at least half of the world today.

There is evidence of a continuity of law teaching in Italy from the law schools of Justinian's time to the rise of the great medieval teachers of law at Bologna in the twelfth century. Thus in a sense the methods of the school at Berytus set the standard for teaching of Roman law for the modern world. But beyond this, the conditions of teaching at fifth century Berytus and in twelfth century Italy were the same. In the maturity of law in the ancient world, the writing of the chief jurisconsults of the classical era had been given statutory authority. Hence the task of the teacher was to interpret and expound these texts of the second and third centuries as a living body of law for the fifth and sixth centuries. In the same way in twelfth-century Italy the task was to interpret and expound the codification of Roman law by Justinian in the sixth century as a universal law of Christendom six centuries later. Thus from the beginning legal education in the modern Roman law was a training in the interpretation and application of written texts.

To understand the academic juristic method of the medieval

Roman law, we must remember that medieval thought assumed the existence of a universal Christian society, which on its temporal side was a continuation of the ancient Roman empire. Postulating the continuity of the empire, the Corpus Juris was authoritative legislation binding upon the empire over which Justinian had ruled. It was an age of authority. Hence all that seemed permissible was analysis of the text and interpretation. Thinking of the Digest of Justinian as a statute and so of every text as written at one time, the academic teachers sought by means of analysis and formal logic to reconcile conflicting texts, to develop the implied content of each text, and to carry out the content to all its logical conclusions. As academic teaching of Roman law became the practical teaching of law for western Europe, a great part of the work of the teachers was application of the texts to hypothetical cases, leading to distinctions, analogical extensions, and generalizations in the form of maxims. Thus we get two characteristics of Roman-law teaching that persist to this day. First, it is primarily a teaching of the art of using authoritative texts as the basis for administering justice. Second, it is an academic teaching upon the basis of purely hypothetical cases and the opinions of the doctors as to the proper application of the texts to these cases. In consequence, it has no immediate relation to actual cases. It ignores judicial experience. It discusses opinions on the texts and academic solutions of hypothetical cases, conceiving of the texts as laying down universal propositions, raising universal questions, and to be interpreted for all times, all places, and all men.

In the sixteenth century, the Humanists gave another direction to academic teaching of Roman law. The scholastic dialectical apparatus of the commentators, well adapted to organize any particular topic of the law, involved so diffuse and elaborate an exposition that only a small portion of the law could be treated in the reasonable limits of academic lectures. At most the professor could expound a few texts during a term, and for the rest the student must read by himself. The Humanists

began to work out a system of Roman law as a whole. They engaged in a systematic exposition of the law derived from the texts instead of an exposition of the texts in their own order. Thus begins that search for a universal systematic arrangement, that quest for an analytical scheme whereby the whole law may be exhibited as a complete body of harmonious, logically interdependent precepts, flowing logically from a small number of established fundamental propositions, which has been characteristic of civilian exposition of law ever since and has exercised a profound influence upon systematic ideas in our own law.

After the Reformation and the consequent downfall of the canon law as an everyday agency of social control, Roman law was left in possession of the field as the one system of law with claims to universality. But by this time the idea of the continuity of the empire, and of the binding force of the Corpus Juris as authoritative legislation for all Christendom had broken down. It was apparent to jurists that they must find some test of the authority of a legal precept, or of a juristic principle, other than the text of the Corpus Juris. Accordingly lawyers began to study the actual course of decision in the courts in order to ascertain what parts of the Corpus Juris had been received as customary law and what had not. Thus they worked out the *usus modernus pandectarum* as a recognized system. Meanwhile the academic jurists sought to find a philosophical basis for the reception of Roman law upon which to rest the authority of its rules. This quest led them to adopt reason as the ultimate test of the validity of a legal precept. The result was a liberal, creative period, strikingly analogous to the classical period of Roman law in the ancient world. But in large part they assumed that the Roman law was embodied reason and reconciled authority with their rationalist philosophy in this way.

At the end of the eighteenth century and in the nineteenth century the law was codified in substantially the whole of the Roman-law world. But the modern codes assume a background of the modern Roman law, which is the common law in all the

jurisdictions in which these codes obtain. Also the technique of development of code precepts, the technique of application of the codes, and the technique of judicial decision on the basis thereof, are the technique of the modern Roman law, derived from the classical Roman law and developed academically in the modern world. Hence in the Roman-law world legal education is and must be a Roman-law education for the same reason that with us legal education is and must be a common-law education. Also it must be an academic education because the modern Roman law is a university-made law. Its spirit is the spirit of the university. Its organs are academic treatises. Its oracles are academic teachers. The great names in the civil law are not the names of great judges, or of great advocates. They are the names of great teachers.

If, then, the method of teaching law in the world of the modern Roman law is an academic method, by lectures and study of academic commentaries on authoritative texts, and of academic doctrinal treatises, it is because the modern Roman law demands such instruction. It is a university-made law. From its beginnings in ancient Rome, its technique has been a technique of developing and applying written texts, and its oracles have been teachers and academic commentators, not judges. Those who still in some quarters advocate this method as a method of legal teaching of our law should reflect upon the intimate connection between the academic teaching of Roman law and the traditional technique which is taught thereby. They should consider how far such a method consists with the genius of our technique which has a wholly different history and has been developed by wholly different agencies.

For the common law, our story begins in the thirteenth century. In that century our law passes definitely into a stage of strict law, and it reaches its classical era in the seventeenth century. In the form which it took in the latter century it was received as the common law of America. Two points of contrast with the Roman law are decisive. In the first place, it had few

or no authoritative texts. There are, it is true, Magna Charta, and the legislation of Edward I. But there is no complete authoritative statement. Bracton's treatise, "the crown and flower of English medieval jurisprudence," was not official and did not receive legislative sanction, as did the classical Roman treatises, nor become the subject of commentary. The common law was the work of the King's justices, sitting in the King's courts and applying reason to judicial experience, rather than to juristic or legislative texts. For, in the next place, we must note that whereas in the classical Roman practice the judge was appointed for each case *pro hac vice*, and was not a learned lawyer, from the thirteenth century at least, the judges of the King's court are permanent magistrates learned in the law. A Roman *iudex* could not follow his own decisions because he was not a permanent judge. He would not follow another *iudex* because the latter was not a learned lawyer and his opinion carried no weight. What counted was the opinion of the learned jurisconsult on which the *iudex* acted. The common-law judge, on the other hand, tended to follow his own decisions because he held a permanent office, and he tended to follow the decisions of other judges because they were learned lawyers and it was natural to respect their conclusions. Thus from the outset the common-law technique becomes one of applying judicial experience—one of developing the grounds of decision out of the reported decisions of the past. What may fairly be called reports of decisions begin in the thirteenth century, and the doctrine of precedents may be found in the Year Books as early as the beginning of the fourteenth century.

Meanwhile, agencies of law teaching had been growing up with the law. In another respect the common law as a system of law begins with the thirteenth century. For in that century there was in some sort a secularization of law. The non-clerical element came to predominate upon the bench, and a profession of non-clerical lawyers grew up to practice before the non-clerical judges. Apprentices of law were known already in the

time of Edward I. How the societies of apprentices grew up we do not know precisely. Apparently certain masters of law took pupils, and the groups gradually expanded and became societies. After the manner of the Middle Ages, they came to be organized in colleges or corporations, self-perpetuating and self-governing. The path to the bar and to the bench was through these societies, not, as on the Continent, through the Universities. Since they were societies of professional lawyers, and practice before the courts of the common law was exclusively in their hands and in the hands of the sergeants, a guild or order selected from among them by the King, they controlled legal education by their control of admission to the profession. They were made up of benchers, the governing body, barristers and students. And the latter, after a probationary studentship, were called to the bar by their Inn.

A member of the bar, a "reader" or lecturer, was responsible during his term for teaching the students. The instruction was partly in the form of "readings" or lectures, taking the form of analysis and exposition of a statute or of some section of a statute. Here we may see Roman influence, through imitation of the method of the Universities. But statutes were too small a part of the law for these readings to suffice. And the bulk of the law, not formulated in written texts, but contained in the reported decisions, or in the tradition of what had been decided, did not lend itself to analytical and expository lectures in the scholastic manner. Hence the other form of instruction was by moots, in which students argued before a bencher and two barristers in the hall of the Inn. These moots were of such importance that the opinions of learned lawyers sitting in them as judges are sometimes reported, and some of them are cited as authority today. The students learned by observing the lawyer in action in the courts, and by trying their hands in the moots. It was essentially an apprentice training.

We must remember that the common law was not taught in the Universities. They taught the Roman law and the canon

law, but had no professorships of English law until the eighteenth century. They had the training of advocates in the ecclesiastical courts and in admiralty, but after the sixteenth century, when for a time it seemed that there might be a reception of Roman law in England, the training of civilians became of relatively slight importance. Even today, when the English Universities are coming to take a much larger part in the professional training of common-law lawyers, the basis of the instruction is Roman law, jurisprudence, and a historical and political introduction to law, followed by a survey of what might be called the institutes of English law. There is still a gulf between professional instruction and academic instruction. Nor is this gulf to be wondered at. For the common law is not an academic system. From the beginning it has been a law of the courts as definitely as the modern Roman law, and indeed the Roman law since the fifth century has been a law of the Universities. The great names of English law are the names of judges, not of teachers. Indeed, it used to be that a text book of the common law was of no persuasive authority and might not be cited unless written by a judge. Naturally legal education in England is as characteristically professional as legal education on the Continent is characteristically academic. In each case there is a decisive practical reason. For teaching of law is primarily a teaching of the traditional technique of developing the legal materials, and of developing grounds of decision of particular cases therefrom. In England the technique to be taught is a lawyer's technique of developing and applying the materials to be found in the law reports, not a teacher's technique of developing and applying written texts.

Although we received the political institutions of seventeenth century England, and in the latter part of the eighteenth and fore part of the nineteenth century received the English common law, and although we set up our system of courts on an English model, there were compelling reasons why the English method of legal education could not be taken over for America.

The systematic study which had been maintained in the Inns of Court almost to the eighteenth century had degenerated in that century to a few empty forms; and until the middle of the nineteenth century the real training was by study in the office of a practitioner, reading, observing, copying precedents and opinions, and drawing papers. In America we did not preserve the division of the profession into counsellors and attorneys. When we received English institutions and English law, the last remnants of the relationally organized society of the Middle Ages were thrown over. Craft organization had become obsolete, and only a few great companies preserved its memory. A purely individualist organization of society appealed both to Puritan and to pioneer. Moreover, the conditions of rural, agricultural, pioneer society demanded and produced a versatility, a distrust of specialization, and a proneness to allow every one to demonstrate freely what he could do, that made organization of the profession in self-governing societies after the English model impossible. Immediately after the Revolution, law and lawyers were in much disfavor; the law because it could not escape the odium of its English origin in the period of bitter feelings after the war, lawyers because they alone seemed to thrive in the economic disorganization and disturbed conditions that followed peace. These circumstances and the radical democratic notions of the Jeffersonian era determined our professional organization.

Another reason operated also to shape our organization of the bar, and to give character to our legal education. In England the courts were centralized at Westminster. Hence, the bar was centralized at the Inns of Court. But with us, in a country of long distances and expensive travel, central courts entailed an intolerable expense upon litigants. We decentralized the courts of general jurisdiction at law and in equity, almost from the start, and sought to set up a judicial organization that should bring justice to every man's back door. This decentralizing of the judicial system involved a decentralizing of the bar. As

each of the old common-law courts had its roll of attorneys, so each local court of general jurisdiction had its own bar. There could be no such centralized system of admission to practice, and consequent centralized control of legal education, as the control of admission by the Inns of Court made possible in England.

While all these things were making for the system of reading in the office of a local practitioner, which obtained in this country until within a generation, another force was acting to promote the academic professional training which is now characteristically American.

We received English law at the end of the eighteenth and in the fore part of the nineteenth century. But we could not receive it exactly as it stood in the English books. We had many things to be provided for which English legislation and English judges had never been called upon to consider. Much in English law was devised for social and political and economic conditions quite different from ours. Our courts were constrained to work out somewhat rapidly a system of legal precepts adapted to a new and growing country upon the basis of the somewhat stagnant English legal tradition at the end of the eighteenth century. For half a century at least our chief concern was to work out an American common law—to develop a system of certain and detailed legal precepts which should meet the requirements of American life. Apprentice trained lawyers, knowing only the traditional technique as the practitioners had learned it in the courts, could not rise to the exigencies of this demand. Indeed, two things quite un-English, natural law and comparative law, played leading roles in the evolution of an American law, and for these, so far as they were made effective agencies of shaping our legal development and directing the growth of our law, we had to look to teachers.

Our first law schools, indeed, were but practitioners' offices. Certainly in the case of the first school of the common law in America, the one conducted at Litchfield, Connecticut, by Judge

Reeve, there was a transition from law office to law school with no definite dividing line. As there were more students than in an office, the talks of the preceptor with the student turned into dictated lectures, but the spirit and method were those of an office apprenticeship.

On the other hand, the example of the Vinerian Professorship at Oxford and of Blackstone's lectures suggested a different method. That example was followed eagerly in the years when American law was formative. Wythe was professor at William and Mary in 1779-1780. James Wilson was professor at the College of Philadelphia in 1790-1791. Kent was professor at Columbia from 1793 to 1798. Isaac Parker became Royall professor at Harvard in 1815. But the general lectures which they delivered to academic audiences did no more than prepare the way. When the Harvard Law School was established in 1817 it was essentially a school of the Litchfield type; it afforded an improved method of study under a preceptor in a law office. It was not until the appointment of Joseph Story as Dane professor at Harvard that academic lectures and professional training under the direction of a common-law lawyer were brought into one system. Story was a common-law lawyer, and the traditions of English legal teaching insured that an Anglo-American academic law school under his guidance would be a professional school. But the philosophical ideas of the time in which Story had been trained insured that a school over which he presided would be a school of law, not a lawyer's office teaching rules of thumb. Also Story's zealous exposition of the doctrines of English law in the light of a natural-law philosophy and of comparative law, enabled the school in which he taught to remain a school devoted to the common law. From Story and Greenleaf to Parker and Parsons and Washburn, thence to Langdell and Ames, and thence to the American law schools of today, is a continuous evolution. It has given us a system of academic professional instruction that is as characteristically American as our American common law itself. It has given us

a system of legal education that grows out of and expresses the spirit of our law as completely as the Continental system expresses the spirit of the modern Roman law, and as the English system expresses the spirit of the medieval common law. For if the modern Roman law is jurist-made, and English law is court-made, American law has been made by courts guided and inspired by jurists who worked scientifically upon a proved body of judicial experience in the administration of justice. Thus there are two elements in our technique as distinctly as there is but one element in the technique of the civilian and but one in the technique of the classical common law. Moreover, in the interpretation and application of constitutions we have had the same problem of developing a body of law from enduring texts, to which the academic legal science of the civilians has been addressed for centuries. Here also judges and teachers have each had a part. Along with the decisions of Marshall, the teaching of Story and of Cooley has given content to abstract formulas and determined the technique of constitutional interpretation which has become a distinctive feature of our law.

In the law school of a state university the American system of academic professional legal education cannot but be especially fruitful. A study of the local legal institutions and of the local law from a universal standpoint is made more effective through a close relation between the law school of the state and the organized bar of the state. There is no gulf between academic teaching of law and the law of the tribunals. Each reacts upon and corrects the other. Likewise, where bench and bar are trained for the most part in the law school of the state university, the loyalty of the almuni which is the mainstay of American institutions of learning, must make of the law school a center of professional life such as we have never had in our decentralized judicial and professional organizations. Thus the sane measuring of what is by what ought to be, the intelligent testing of theories by the exigencies of concrete controversies, and the critique of judicial pronouncements with reference to rational

principles, which have become the mark of our academic law schools, may come to be a part of the intellectual life of the whole profession.

But the University has not done all that needs to be done for American law when it has provided the best training in the law for well-trained students and has stimulated research to make the legal system of the time and place respond to the needs of the social order in which it is to govern. More than lawyers well trained in the law is needed, if the judicial process is to be at its best. The work of the courts calls for judges aided by lawyers, and that means lawyers imbued with the spirit and raised in the traditions of a profession. Unhappily, in our formative era we went far to deprofessionalize the lawyer and to this we owe most of the abuses which too often disfigure the proceedings in our courts. The process of rebuilding has been going on for two generations. But it has been a painful one and has had to contend with conditions in metropolitan cities which make for an atmosphere of business competition rather than for one of professional emulation. In its time the apprentice training kept alive the professional ideal in spite of deprofessionalizing forces. Law students were brought up to feel themselves part of a body of men pursuing a common calling as a learned art and in the spirit of a public service—no less a public service because it was incidentally a means of livelihood. They were brought up to be thoroughly aware of obligations to clients, to courts, to the public and to the profession, neglect of any of which simply was unthinkable. With the decadence of the apprentice training, inevitable under the conditions of practice in the present century, this, which was its best feature, has been lost sight of or has been but feebly provided for. If the University is to do the whole of the task which has devolved upon it because of its replacing the law office in legal education, it must learn how to replace the apprentice training on the side of training in the profession as well as training in the law.

This task is not to be achieved by formal courses in legal ethics or in the history of the profession, much less by lectures on the moral obligations of the lawyer. Such things are likely to do no more than give opportunities to crammers for bar examinations, or fill student note books. They are not matters for courses nor for mere reading. They require contact with the leaders of the profession or with teachers conscious of what the profession is and what its professional traditions mean for the law and for administration of justice according to law. They are matters of the atmosphere of teaching and study. It is a gain that the American university law school has put legal education in an atmosphere of culture and scholarship. It is a loss that it has broken the continuity of the professional tradition, the tradition of what is done and what is not done by the good lawyer, a tradition handed down from lawyer to apprentice almost from the beginnings of our law.

I am not here with a paper program for meeting this demand which we must make upon our University law schools. The first step is to bring it home to our law schools that they have such a task. Very likely there will prove to be more than one way of performing it. Very likely a certain amount of trial and error will be necessary before our schools learn what they can do most effectively toward maintaining, furthering and transmitting a true professional tradition, felt as such, not merely learned for the purposes of an examination and then forgotten.

In a complete program of making American administration of justice what it should be in the twentieth century, a full reprofessionalizing of the lawyers is not the least item, nor is it the least item in what the Universities have undertaken now that they have definitely and fully taken over the training of the American lawyer.