BYU Law Review

Volume 1987 | Issue 2 Article 10

5-1-1987

Medieval Universities, Germany and the United States: On Comparative Legal Education

Walter Otto Weyrauch

Medieval Universities, Germany and the United States: On Comparative Legal Education*

*Walter Otto Weyrauch***

I. INTRODUCTION

This article is a reflection on the articles by Professors David S. Clark and Richard L. Abel. I offer no conclusive theories of my own, nor a critique, but merely thoughts that are loosely connected and stimulated by the scholarly efforts of my colleagues. Part II relates to Mr. Clark's discussion of the medieval university, supplemented by some thought on freedom of teaching and learning at nineteenth-century German universities and its impact on American education, including legal education.

Part III focuses on an aspect of great importance, touched upon by Mr. Abel: the comparative study of legal education. Some of the difficulties in collecting factual information about legal education are described, especially if the collection and analysis is carried out in several countries by persons of different cultural and professional backgrounds. For illustrative purposes, Part III emphasizes problems of perception both in Germany and in the United States which may cloud the collector's vision. Similar distortions are likely to occur anywhere. My injection of German problems has two bases. Because of personal background and experience, I am intimately familiar with Germany and its relation to the United States, especially in regard to law and academic life. Furthermore, the historical impact of German universities on American educational patterns, including legal education, has been substantial.

---

* This article is based on a speech by Professor Weyrauch at the Brigham Young University Law School International and Comparative Law Symposium on October 19, 1986.

** Professor of Law, University of Florida, Gainesville, Florida; Honorarprofessor Johann Wolfgang Goethe Universität, Fachbereich Rechtswissenschaft, Frankfurt, West Germany. Dr. iur. 1951, University of Frankfurt, West Germany; LL.B. 1955, Georgetown University; LL.M. 1956, Harvard University; J.S.D. 1962, Yale University.

II. The Medieval University: Freedom of Teaching and Learning and its Impact on American Education

The great and continued importance of the historical origins of the medieval university on contemporary American life should be stressed at the outset. Americans are inclined to downplay the ancient historical connections of their country, almost as if the founding of the United States had been a radical departure from pre-existing patterns, especially if they were of non-English derivation. Yet links to the remote past are ever present. For example, all my American university diplomas are written in Latin. Even my first names are Latinized to Gualterum and Othonem. By contrast, my German university diplomas are written in contemporary German. Some of my German documents are merely typed on ordinary stationery, while my American equivalents make an effort to recreate a medieval spirit by the use of formal seals and rolled up parchment. One may consider these matters purely related to form, but form often mirrors substance.

The American university campus creates a monastic appearance. The academic gowns worn during graduation invoke the medieval robes of monks. The academic hood resembles a monk's hood. In fact, medieval professors were clerics and they, as well as their students, wore their academic costumes to class.[1] The hood occasionally had a special significance as the ancient professors strode up and down the aisles, coming invitingly close to their students, perhaps with a slight swagger or sway, with the students responding by dropping the honorarium for the lecture or, if they were from affluent families as was often the case, an additional gratuity into the hood. Compensation was initially a matter between the students and professors who occasionally engaged in some undignified haggling.[2] There existed, however, substantial variations between universities in regard to academic costumes and compensation.

By referring to professors and students as clerics, I do not mean that term in the contemporary sense as being ordained as priests or initiated in a monastic order. I merely indicate that

---

1. *See* 3 H. Rashdall, The Universities of Europe in the Middle Ages 385-97 (F. Powicke & A. Emden new ed. 1936); *see also* L. Daly, The Medieval University: 1200-1400 5-8 (1961).

2. See 1 H. Rashdall, *supra* note 1, at 208-09; L. Thorndike, University Records and Life in the Middle Ages 273-78 (1944).

the privileges and immunities of clergy were bestowed upon them.[3] They were freed from claims of jurisdiction by temporal authority, although their academic status did not necessarily protect them from the jurisdiction of the Church. The academic garment and clerical status were closely related to each other and set academics visibly apart from the townspeople, as reflected in the phrase: "town and gown."[4]

We must also understand that we deal with the origins of contemporary intellectualism. By intellectualism I mean a style of living in which the world of thought (a critical and contemplative concern) is given priority over any practical consideration.[5] Intellectualism is an urgent and demanding concern for spirit over matter. In a medieval context, as today in the United States,[6] this meant inevitable clashes with established authority, perhaps even with the population at large. These clashes were aggravated in the Middle Ages by religious considerations and the fact that the professors, as clerics, were subject to Church discipline.[7] The Church did not always like what the professors said in class. Since academic freedom in the modern sense was

---

3. The clerical privileges and immunities were granted first by Emperor Frederick Barbarossa in 1158. See the so-called *Authentica Habita* of Emperor Frederick I. The students and the faculty were given privileges and immunities as if they were clergy, perhaps an early illustration of legal fiction, provided they conformed to external characteristics, such as receiving a tonsure and wearing clerical dress. The action of the Emperor was confirmed by Pope Alexander III. L. DALY, *supra* note 1, at 163. *See generally* 1 H. RASHDALL, *supra* note 1, at 20-24 (F. Powicke & A. Emden, *Additional Note to Chapter I*). Concerning the collaboration between the Church and secular authority in university matters, see H. DENIFLE, DIE ENTSTEHUNG DER UNIVERSITÄTEN DES MITTELALTERS BIS 1400 795-96 (1885 & reprint 1956).

Interestingly, many prominent authors concerned with studies of the medieval universities were and are in fact clerics. For example, P. Heinrich Denifle (1844-1905) was a monk and archivist at the Vatican; Hastings Rashdall (1858-1924) was Dean of Carlisle; and Lowrie John Daly (1914-) is a member of the Society of Jesus.

4. The whole topic is, however, of great obscurity, marred by the difficulty of recreating the spirit of times past and the relation between the medieval university and the Church by the use of contemporary rationality.

5. For a discussion on the difference between intelligence and intellect, two concepts that may be antithetical, see R. HOFSTADTER, ANTI-INTELLECTUALISM IN AMERICAN LIFE 24-29 (1963).

6. For a manifestation of contemporary anti-intellectualism, see Johnson, *The Heartless Lovers of Humankind*, Wall St. J., Jan. 5, 1987, at 18, col. 3 (Eastern ed.) ("Insensitivity to the needs and views of other people is, indeed, a characteristic of those passionately concerned with ideas.").

7. *See, e.g.*, 1 H. RASHDALL, *supra* note 1, at 231-32 (F. Powicke & A. Emden, *Additional Note to Chapter IV*). Martin Luther was a professor at the University of Wittenberg and John Huss a professor and rector of the University of Prague. Luther survived his clash with the Church, but Huss was burned at the stake in 1415.

not available, it was inevitable that the professors developed devices that could protect them from the Church if necessary. One such device was to teach by way of hypotheticals, especially if the subject matter was problematical.

Hypothetical reasoning was practiced in Bologna by professors of law[8] as well as other disciplines. Nicolaus Copernicus, who had been a student of canon law in Bologna, after long hesitation to publish his revolutionary views on astronomy, had them introduced as a mere hypothesis for scientific convenience and not as a representation of reality.[9] Outwardly the device was meant, as today, to develop the minds of students. Perhaps medieval professors were also attempting to clarify matters of great spiritual concern by examining them from various intellectual angles. In fact, hypotheticals could be used to claim that what seemed to have been said had not actually been maintained.

Assume, for example, that a medieval professor had raised the question of Immaculate Conception which, at a time, was indeed a matter of heated academic controversy.[10] He could raise the taboo issue by way of hypothetical. "Suppose," he could say, "that Mary was not really a virgin." To a possible enraged response, "How can you say such a horrible thing," he could counter, "I did not say it, I only said *suppose*." Of course a defense that a point was only made for purposes of argument and would be retracted upon demand did not always work, and in one instance was dismissed by the ecclesiastical court as a "foxy excuse."[11] But in less aggravating circumstances, the hypothetical may have effectively conveyed a novel or controversial idea.

Another device used to assure personal immunity in teaching, especially available to medieval law professors, was to elevate teaching to the highest level of abstraction. In such instances neither the audience nor Church or state authorities were likely to understand what had actually been said. Insight

---

8. *See* J. NOONAN, PERSONS AND MASKS OF THE LAW at ix (1976).

9. *See* R. HOFSTADTER & W. METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES 40 (1955).

10. *See, e.g.*, 1 H. RASHDALL, *supra* note 1, at 550-51.

11. *See* R. HOFSTADTER & W. METZGER, *supra* note 9, at 37 n.84 (trial of Nicholas of Autrecourt at Avignon, 1346). However, the strategy seems not to have been entirely ineffectual. In spite of his severe censure, Nicholas retained his clerical office as dean of the cathedral at Metz. *See id.* at 27. A strategy similar to the medieval, "retracted, if heretical," is employed in some contemporary advertisements: "void, where prohibited by law."

was then confined to a small circle of academicians of similar frame of mind. The strategy could even be refined by presenting the abstractions in a detached and neutral way, as if the underlying thought was not truly revolutionary but well under control.[12] Clearly, this ruse is also available to contemporary law professors and more or less instinctively practiced by them, especially if the matter discussed is emotionally unsettling.

All teaching took place in Latin which probably protected the professors less from the Church than from secular authority (the sovereign and the local police). Of course these powers were not likely to listen to intellectual argumentation but in case of controversy they were prone to incarcerate, perhaps even kill, members of the faculty and students, as happened in Paris and Oxford. Often the cause of trouble was the incompatibility of the townspeople with the faculty and students.[13] The latter appeared to the townsfolk as strange birds, conversing in a foreign tongue. The faculty and students were also perceived as irresponsible, privileged not to pay taxes and free to abstain from ordinary civil duties. The students were often rambunctious and irreverent and were not subject to financial exploitation, because the rent and prices that they could be charged were regulated and fixed in minute detail.[14]

If a situation became intolerable, faculty and students could remove themselves from this inhospitable location and move elsewhere, or perhaps even close the university altogether. In general, scholars enjoyed greater mobility in the Middle Ages than today. Since the teaching continued to be in Latin, there were no language barriers between universities. Thus, in 1229, professors and students moved without handicap from Paris to Oxford and Cambridge, following the invitation of Henry III of England.[15] However, the scholarly migrations did not necessarily

---

12. *See, e.g.*, Falk & Shuman, *The Bellagio Conference on Legal Positivism*, 14 J. LEGAL EDUC. 213, 217-18 (1961).

13. *See, e.g.*, L. DALY, *supra* note 1, at 190-98.

14. Concerning student privileges, see L. DALY, *supra* note 1, at 163-69. For a discussion on student misconduct, see e.g., L. THORNDIKE, *supra* note 2, at 343-46.

15. The exodus received its impetus from a tavern brawl between students and an innkeeper, resulting in the killing of several students. Thereafter, lectures were suspended and the university dissolved in retaliation against the town authorities. *See* 1 H. RASHDALL, *supra* note 1, at 334-39. Pope Gregory IX, in an effort to restore peace, vindicated students and faculty and recognized by special charter their privilege of cessation, somewhat similar to contemporary rights to strike. The document is translated from Latin in L. THORNDIKE, *supra* note 2, at 35-39. On the complex language situation in England at that time, see G. TREVELYAN, ENGLISH SOCIAL HISTORY 1 (1st ed. 1942).

mean a move to a foreign country, and the grounds for the change varied. A local dispute in Oxford over the accidental death of a townswoman resulted in a retaliatory killing of several students. Thereupon all lectures were suspended in 1209, leading to a mass exodus of professors and students from Oxford to Cambridge.[16] Protracted friction between the city government of Bologna and the University of Bologna led to a large-scale departure of faculty and students to Padua in 1222.[17]

In these various power struggles an important element that could oppress professors and students was relatively absent—the medieval equivalent of a modern university administration which may act as a watchdog over the potentially subversive seems to have originated in the United States and came about in an almost accidental fashion. In the early days of Harvard no cohesive faculty existed. The teachers were young clerics who were subject to reassignment. In view of their rapid turnover, power accrued by default to administrators whose positions were of greater permanence.[18] Whatever the merits of this innovation, it was bound to be imitated, first elsewhere in the United States, then increasingly in contemporary European universities.

The question of whether the United States influenced Europe or vice versa is difficult to determine in modern times. Not only has the United States exported university bureaucracy to Europe, but also some of the less libertarian European states, such as Prussia, have exported academic freedom to the United States.[19] In 1809 and 1810 Wilhelm Freiherr von Humboldt, acting as Secretary for Education and Religion in the Prussian Ministry of Education, decreed that universities should be free from all forms of censorship. A large measure of autonomy was given to the universities. The freedoms were meant to apply to both faculty and students. The motives for these extraordinary steps appeared to be highly idealistic, fostering the pursuit of

---

16. Reportedly about 3,000 students left Oxford. After restoration of peace through papal intervention in 1214, faculty and students were invited to return, substantial privileges were granted to them, and the town of Oxford was ordered to pay reparations. *See, e.g.*, 3 H. RASHDALL, *supra* note 1, at 33-35.

17. *See, e.g.*, H. DENIFLE, *supra* note 3, at 277-89; 1 H. RASHDALL, *supra* note 1, at 168-71.

18. *See* R. HOFSTADTER & W. METZGER, *supra* note 9, at 85-86. The same factors account for the evolution of lay boards of control in American universities and colleges. *See id.* at 134-35.

19. *Id.* at 367-412.

truth for its own sake regardless of the consequences.[20] In fact, some surreptitious thoughts may have been at work to turn the patriotic universities loose against a hated invader and occupying force, Napoleon. Yet idealism and nationalism were not necessarily perceived to be incompatible, certainly not considering the ways the university population in Prussia felt at the time.[21]

The concept of academic freedom was received with so much enthusiasm that all efforts by reactionary forces to abolish it after Napoleon's defeat were unsuccessful. Thousands of American students, including law students, many of whom had come from a puritanical environment such as New England, discovered to their delight that they could freely imbibe and carouse, perhaps even have multiple affairs, relying on their new found status as members of an intellectual elite.[22] Thus, they found themselves liberated in such unlikely places as Berlin. After having earned their doctorates and upon return to the United States, they brought with them the conception of academic freedom, subject to some changes and omissions.[23]

Yet, what the American students had experienced in Germany was arguably less related to actual freedom than to the intellectual and other privileges enjoyed by an essentially aristocratic caste which they had temporarily shared as visitors. Their privileged status was not dissimilar to that of medieval students, who were also perceived to be members of an elite group regardless of whether they were local or foreign. Perhaps expectations were at work, both in the Middle Ages and in nineteenth-cen-

---

20. *See* W. VON HUMBOLDT, *Über die innere und äussere Organisation der höheren wissenschaftlichen Anstalten in Berlin*, 10 WILHELM VON HUMBOLDTS GESAMMELTE SCHRIFTEN 250-60 (1903), published in English translation under the title, *On the Relative Merits of Higher Institutions of Learning*, in AN ANTHOLOGY OF THE WRITINGS OF WILHELM VON HUMBOLDT: HUMANIST WITHOUT PORTFOLIO 132-40 (M. Cowan trans. & ed. 1963).

21. Walter P. Metzger implies a connection between the military and political situation in defeated Prussia and the rise of academic freedom. *See* R. HOFSTADTER & W. METZGER, *supra* note 9, at 385 n.60.

22. *Id.* at 392-93. More than 9,000 Americans studied during the nineteenth century in Germany, *id.* at 367, and the second largest contingent was in law. *See* D. CLARK, Tracing the Roots of American Legal Education: A Nineteenth-Century German Connection, (lecture at the Annual Meeting of the Association of American Law Schools in Los Angeles, California, Jan. 6, 1987), *reprinted in* 51 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 313 (1987); *see also* J. HERBST, THE GERMAN HISTORICAL SCHOOL IN AMERICAN SCHOLARSHIP: A STUDY IN THE TRANSFER OF CULTURE 6-7 (1965).

23. For example, student freedoms were curtailed. *See* R. HOFSTADTER & W. METZGER, *supra* note 9, at 397-98; *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1049 (1968).

tury Germany, that were drastically different from what is expected of universities and their populations today. In earlier times universities were given free reign, to the point of accommodating their wishes whenever possible, because they were understood to be of tantamount importance to the rulers. This sentiment has been replaced in modern times by reservations and a greater desire for control. I turn now to contemporary issues.

III. A Comparative Study of Legal Education

A comparative study of the legal profession and of legal education, as undertaken by Mr. Abel, is highly laudable for a variety of reasons. Studying the methods of teaching law in different countries and times is crucial to an understanding of basic variations in legal systems. Beyond that, one may learn something about the comparative history of intellectualism. If lawyers are engaged in a pursuit of truth and justice, as well as power, by the exacting use of words and concepts, an examination of how they become this way may bring us closer to understanding different cultures. We deal with cultural aspirations that are reflected imperceptibly in the curricula of law study. The procedures of law study may lead us to an appreciation of legal procedures. Lastly, the substance of law is woven into procedures. The more one understands the forms of differing rituals, the more one may gain insight of a general nature.[24]

From that perspective a close examination and understanding of Islamic law, not covered by the Abel study, is particularly helpful. Because of the apparent rigidity of the religious sources, Islamic lawyers have found numerous and ingenious ways to adapt a supposedly unalterable ancient law to the needs of modern society.[25] Thus, Islamic law is a lawyers' law in pure form. If we comprehend Islamic law and the methods by which it is taught and practiced, we may understand a good deal about ourselves as lawyers.

Student interest in matters of comparative legal education is a sure gauge for the vitality and potential accuracy of information. Thus, student interest in how lawyers are educated else-

---

24. *See* W. Weyrauch, *Hierarchie der Ausbildungsstätten, Rechtsstudium und Recht in den Vereinigten Staaten* 7-9 (Juristische Studiengesellschaft Karlsruhe, Schriftenreihe No. 129, 1976); *see also* Klausa, Book Review, 25 Am. J. Comp. L. 164 (1977).

25. *See* R. David & J. Brierley, Major Legal Systems in the World Today 466-72 (3d ed. 1985).

where, even if Islamic legal education is covered, is always immediate and high. Students, themselves, are subject to numerous pressures in the process of education, many not openly acknowledged. The discussion of foreign legal education, leading to the structure and functions of the legal profession abroad, gives a welcome release from local and immediate anxieties. On the other hand, an abstract comparison of legal concepts, taking place in a cultural void, is often experienced by the students as deadening and boring. However, it is not only ineffective but in all probability also intellectually worthless, because we cannot abstractly know what the concepts mean in different cultural settings.

There is a caveat both for the American teaching of comparative legal education and the corresponding studies abroad that are concerned with educational and professional phenomena in the United States. We can hardly examine any foreign matter without being immediately confronted with assumptions about what takes place in our own front yard and perhaps even within ourselves. If the assumptions are on a relatively high plane of consciousness, not much damage is done. They can be controlled and revised. Mostly, however, they are not, and the unconscious visions of ourselves inevitably distort what we see elsewhere. The comparative literature in the United States and Europe abounds with unsettling evidence that the authors of great learning, while seemingly describing foreign legal education, have to a large extent depicted hidden and unconscious assumptions about their legal education at home. By doing so, they have involuntarily described peculiarities of their own legal systems, while believing to describe what they thought transpired elsewhere. In a warped and backhanded fashion their efforts still have scientific value because they show us covert characteristics of their home cultures that they normally would be disinclined to describe or even acknowledge.

Inevitably we deal here with taboo matters, and their articulation is painful indeed and likely to be disputed. Nevertheless I will try, dangerous as this may be, to enunciate some of the hidden assumptions of legal education in the United States and elsewhere that tend to interfere with an understanding of foreign legal cultures. I shall proceed by presenting common reactions of German law students when some details of American legal education are described to them. Their perceptions are at the same time accurate and distorted, depending on the point of

observation chosen. In any event, they are influenced by inarticulate assumptions of self. On the other hand, the American reaction to what German students feel about American legal education is equally accurate and distorted. It is influenced by idealized conceptions Americans have about themselves as living in a country where freedom reigns, especially when they are confronted with foreign criticism.

Contemporary German law students, when given details about American legal education, are fascinated with the concept of the "assignment." They perceive it, perhaps correctly, as an order that is given by the American law professor to read certain materials. The order, in this view, is combined with veiled threats that sanctions will be applied if it is not complied with. The reaction is aggravated if the students are told that assignments permeate American law studies from the first day to the end, to the point that neither faculties nor students view them as being problematical or significant. American legal education acquires, in the minds of the German students, characteristics of a drill field, where conceptions of academic freedom are absent,[26] and where constant fear of sanctions keeps the future American lawyer going until he or she has been beaten through a legal education of barely three years. Germans talk in this context sometimes of *Verschulung* of the American university, an untranslatable term indicating a trend toward assimilation of university and high school.[27] The American distinction between so-called professional schools and academically oriented education in the liberal arts, at least theoretically unknown in Europe, adds to the discomfort.

The pressures of the first year of law study in the United States becomes, in this view, a merciless hazing to which prospective lawyers are subjected, much as senseless hazing takes place upon entrance into a fraternity. This hazing is then repeated in aggravated form when the bar examination is taken. The main justification for these exercises, from this perspective, is not enlightenment or training for practice, although this

---

26. *See supra* note 23 and accompanying text. These student responses occurred in a university of a large metropolitan center. There are regional differences, and law students in some other areas of Germany may not necessarily react in the same fashion.

27. For American views propagating such assimilation, *see* R. HOFSTADTER, *supra* note 5, at 332-37. The problem arises in part from the difficulty of transfering German university education to the American undergraduate college level. *See* J. HERBST, *supra* note 22, at 23-51.

seems to remain the idealized purpose, but instead to test whether the neophyte has sufficient burning desire to become a lawyer and to suffer cruel indignities and seemingly senseless tasks. Of course, if some German law students express these reactions to American legal education, they also express hidden assumptions about their own education and legal culture, which they perceive as being "free," as contrasted with their notion of the American legal culture as being supposedly authoritarian and compulsory.

A likely result of a comparison that remains on this preliminary emotional level is that it prevents scrutiny of the pressures on German law students, for example, by being initially left to their own devices to test their commitment, and at a later time subjected to rigorous comprehensive examinations of several months' duration. Ultimately, a conclusion could be reached, difficult to accept for Germans and Americans as well, that the conception of freedom has no universal quality but, similar to other widely shared concepts, has different meaning depending on the unconscious cultural preferences of different people. In a similar fashion, the assumed aspects of American legal education, although complained about also by American law students, have not really reached the level of full consciousness of American scholarship, especially not when making comparisons with foreign legal systems. Essentially, an ideal of American legal education, or perhaps it should be called a myth,[28] is compared with foreign reality. If we compare at all, we should compare realities with realities. Or perhaps we should compare myths with myths; that too would be a valid, although an exceedingly difficult undertaking. To compare, as usually done, an American myth with foreign reality is absurd.

A problem could arise because the boundaries between myths and reality are not clear. Commonly held myths are perceived to be reality or, as the following illustration shows, a partial reality may become a myth. Any such occurrence may pose obstacles to the validity of educational and professional comparisons. American legal scholars are, for example, more or less aware of the hierarchy in legal education, from Harvard to some proprietary night schools that are accredited only within an in-

28. Ideal and myth, as used here, have in common that they do not correspond to reality. However, they differ in the level of consciousness. The discrepancy between ideal and reality is known, while a myth is largely thought to correspond to reality.

dividual state for purposes of admission to that particular bar. All of these schools are engaged in legal education, and all of them train future lawyers. What do we mean then, if we talk about "legal education" here as compared to legal education elsewhere? Most likely we have legal education at the elite schools in mind, although they educate only a small minority of American lawyers. A partial reality becomes a myth about the nature of American legal education. There is distortion of vision at the onset.

The method of teaching law in the elite American universities is different from that in state universities and law schools of lesser status where the main educational aspiration is passing the bar examination. On any of these levels the cultural assumptions and underlying philosophies of law are not the same. Although law as taught at the elite schools has many variations, it seems to have elements of a speculative intellectual discipline that is willing to question any proclaimed truth, if only for the purported sake of advocacy, no matter how well established.[29] In this quest they may go beyond anything experienced, or even possible, in foreign countries. Thus, we have here the sources of an American intellectualism that seems to be equal, if it does not surpass, the best elsewhere—a contemporary equivalent to the enthusiasm for inquiry, based on hypotheses, in the early medieval universities.

American legal education as offered in the middle levels of the hierarchy and below seems to be governed by Vaihinger's philosophy of the "as if."[30] Legal theory is presented as if it were real. A common law is taught that does not exist in any given state; a state law is developed that is largely imaginary.[31] The lower we get, the more mechanical and unreal the presentation may become. That the professors are unaware of the philosophical underpinnings of their theories, perhaps even scornful if they are told, does not really matter. Nor can we assume that this

---

29. *See* W. WEYRAUCH, *supra* note 24, at 28-30; Gilmore, *The Truth About Harvard and Yale*, 10 YALE L. REP., Winter 1963, at 8.

30. *See* H. VAIHINGER, THE PHILOSOPHY OF "AS IF" (C. Ogden, trans. 2d ed. 1935).

31. State law has often insufficient and incomplete legal authority on given issues. The professor in the university of lower rank may supplement it with what he perceives to be common law or the majority view as developed in decisions from other states. Most of this is presented with a flair of certainty, but is in fact based on speculation. *See* W. WEYRAUCH, *supra* note 24, at 30-32. As elite educated professors are increasingly appointed in less prestigious schools, severe ideological faculty splits may result. *See* KLAUSA, *supra* note 24, at 168.

kind of legal education is necessarily bad. While the elite schools may offer scholarly depth and skepticism, the less prestigious schools may offer certainty, no matter how unreal, and a magical consistency in a belief system that corresponds exactly to what the American population as a whole is looking for. This law as taught in the vast majority of American law schools acquires elements of a secular religion that promises firm answers for any conceivable problem. Law, accordingly, has an evangelical and expansive quality and, even though as unreal as any other belief system, is taught with missionary zeal and considerable enthusiasm that equals anything that takes place in the realm of fundamentalist creeds.[32]

IV. CONCLUSION

The elite law schools, following medieval antecedents, may offer speculative intellectualism and scholarly direction while the less prestigious schools offer the single-minded vitality that is perhaps the source of the progressive juridification[33] of American law. But what should be compared? If, for example, an American legal scholar gives his critique that Israeli law schools essentially teach black-letter law,[34] what does he mean? What are his hidden assumptions about American legal education? Are they correct? What other forms of education would he propose as suitable for an extremely complex and diversified legal culture as that of Israel? How much time does the Israeli law student have to pursue, without interruption, an in depth study of the multiple sources of Israeli law? What functions could black-letter law, at this point unreal, serve in a slow unification of a

---

32. *See* W. WEYRAUCH, *supra* note 24, at 58-60.

33. The term *juridification*, although not uniformly used, implies a cultural preference for an expanding scope of law and legal processes. *See, e.g.*, Simitis, *The Juridification of Labor Relations*, 7 COMP. LAB. L. 93 (1986). For the origin of the concept, see Clark, *The Juridification of Industrial Relations: A Review Article*, 14 INDUS. L.J. 69 n.2 (1985). General aspects of the trend are discussed in Trubek, *Turning Away From Law?*, 82 MICH. L. REV. 824 (1984).

34. An informative article by Joseph Laufer criticizes the lecture and examination methods in Israeli law schools which are designed for "systematic coverage" and objects to the learning by rote through canned outlines by the students who are frequently absent in class. *See* Laufer, *Legal Education in Israel: A Visitor's View*, 14 BUFFALO L. REV. 232, 245, 252-53 (1964). More recent articles describe an ideological split among and within Israeli law schools and propagate reforms corresponding to American ideals. *See* Grunis, *Law School Developments—Legal Education in Israel: The Experience of Tel-Aviv Law School*, 27 J. LEGAL EDUC. 203 (1975); Shapira, *Changing Patterns in Legal Education in Israel*, 24 ADMIN. L. REV. 233 (1972).

legal system that could not be achieved through ordinary political channels? Are there perhaps even arguable reasons for so much black-letter law dominating American legal education and the admission to the bar?[35] These are questions that comparative law should explore.

35. *See* Weyrauch, Book Review, *Taboo and Magic in Law*, 25 STAN. L. REV. 782, 798-99 (1973). The negative characterization of black-letter law originates probably with Oliver Wendell Holmes. *See* Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).