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The Institute of Jurisprudence

[A paper presented at the Fortieth Annual Meeting (January, 1917) of the New York State Bar Association, by GEORGE H. BOKE, Professor of Law in the University of California.]

THIS is a day when all departments of life are being subjected to close scrutiny and severe testing for fitness to survive. The European war has compelled the greater part of the civilized human race to submit to a discipline so drastic and far-reaching as to have been inconceivable to the normal mind three years ago. The outer waves of this influence reach America, and we read of the mobilization of industrial and business interests for defense, and the passing of many laws to meet newly arising war and after the war conditions; we have a sense of an impending future that may not be safely presaged from the past, nor one in which there is a too securely assured immunity, unless we rise to the full measure of our strength and intelligence to shape a new policy great enough to equal the large demands that are now foreshadowed.

Everywhere we see the order of the day is for the elimination of the non-essential and the useless, the utilization of waste, the dynamification of unused and sleeping energies, the assembling of our resources of every sort, and their coördination made into a unified coherent plan for practical operation.

To what extent is the American legal world exempt from these new searching processes—to what degree where, similar answer must be made by the world of law, is there being prefaced an intelligent plan for meeting it? Senator Root, in addressing the American Bar Association at its session of 1914, said:

“We are in a period of universal development. All business, all science, all thought are casting off old shackles and impediments and improving their methods, increasing their efficiency, lifting up their standards. It should not be that our noble profession is alone to remain stationary and without growth along the lines of better service and greater usefulness.”

It perhaps may even be said without fear of contradiction, that we are now reaching a point where the American legal system cannot remain stationary, and we shall be compelled to acknowledge an imperative pressure that may not be denied. What are the reasons, however, for urging any change of position by the regular forces of legal authority?

For conveniences of analysis we may say there are two groups of deficiencies, or alleged deficiencies, in our legal system; first, there are the weaknesses that the lawyer himself sees and deplures; for instance,

the chaos of forty-eight jurisdictions giving forty-eight systems of laws for one people who have come to have in a large degree a unity of commercial and individual interest, and yet find no unity in the legal care for those interests.

Then there is the second group of alleged deficiencies relating to the various demands of private interests and public reformers. The lawyer views these demands with great caution and doubt, but, notwithstanding his attitude, there has come a great flood of new legislation and its judicial determination on the fast increasing problems of business, labor and modern society at large. Here actual or imagined needs force the issues from social theory to legal fact, and the new law is made *en masse*. Because of this irresistible fact, there remains the question, not of an alternative of changing on the one hand, or on the other of remaining stationary, but a single issue—who shall guide and determine the nature of the new legal order with this dual demand of lawyer and layman appearing on the horizon? Shall the guidance be by the lawyer who may by summoning his best intelligence provide proper means for conserving the field of law as his own? Or shall it be the popular pressure of discontent and unrest which, with blind force sweeps things aside that should be kept, and puts into effect ill considered reforms and legislation in the effort to do what the proper authority, the lawyer, has failed to do?

The direct and real work to be done is summed up by Dr. Josef Redlich in his recent epoch-making report on legal education for the Carnegie Foundation. He gives as his conclusion that his investigation revealed two great problems:

“Whose solution devolves upon American jurisprudence: (1) the creation of a scientific system of American law, (2) a reform of the current law, . . . in favor of a simplification, a greater efficiency and improvement, of substantive law, as well as of civil and criminal procedure.”

It is not that many earnest lawyers are not working seriously in this direction both in private effort and in the Bar Associations through their committees on special problems. The Committee on Uniform Laws, for instance, is an evidence, not only of this desire and devotion, but an augury of what can be done by a continuous effort for improvement of the law. But compared with the enormous amount of work to be done, the present means are entirely inadequate, and accumulating against the day of definite attack have, in fact, made no attempt to surround the problem with a general policy for its solution.

Likewise the law schools are doing splendid work in their defined field of preparing men for practice at the bar, and to some extent they are pressing on in advanced lines of instruction and plans for research—

while a few individuals among the professors are making highly valuable and notable contributions to legal literature. But even here there is no unity of plan, no single continuous instrument or means for dealing with the whole problem before us. And in the nature of things there can be by the law schools no general united mode of operation in this matter — no one law school can draw others of rival interests into a support of any national plan which it might put forth.

Dr. Redlich, having given high praise to our legal education, reports as his opinion that the weaknesses of our law schools lie on the scientific side — we are not building any needed jurists for the future. The deficiency along the scientific side in our present legal instruction, and legal thinking, and the difficulties in the way of the removal of this deficiency may be ascribed to two principal factors: First, fundamentally the whole purpose of each law school is to train students for practice at the bar. This is its very proper function. But for the very reason that its vitality is absorbed in serving this function of training for practice, there is not left a sufficient driving energy of scientific purpose to create opportunity for the juristic mind to develop itself. Secondly, the heavy pedagogical burden of the professional case teacher, with its exhaustion of nervous energy through many hours of dialectic teaching and long preparation of various courses, is preventive of that highly specialized scholarship, with its creative productivity, which is required of the continental jurist.

If it is true that we have reached a stage in our legal history, jurisprudence, and scientific investigation generally in legal fields — and there seems to be a consensus of professional opinion that we have reached this stage — it is clear that there stands a definite problem before us, and we should set about the solution of such problem without further delay. We can no longer be content to talk in generalities of the requirements for greater scientific activities in law, nor is it rational to leave this field to whatever haphazard development may occur. The solution itself should be scientific.

This question opens up the whole field of our subject. What is the nature of a scientific solution, and what are its practical recommendations? First, there is now an urgent need for a central or national legal clinic or laboratory with local centers for research, which shall be a continuous body of practical expert investigators. This group should cover the entire field of law and its problems in a systematic plan that can look forward to a permanent undertaking and coöperate with the present efforts of the Bar Associations and the Law Schools.

The legal world can well tear out a leaf from its business brothers' book of "get there" action, in this respect as well as others. President

James A. Farrell, of the National Foreign Trade Council, has just called the foreign trade convention to meet in January to consider the results of the research of the Council, since the last convention, into problems of foreign trade; he invites the participation of all American business in a "practical and constructive discussion of problems and practices necessary to meet keener competitions which the United States may encounter in the world markets after the war."

Thus we see a special group of business men preparing a year ago to solve these new war problems of industry by a general plan covering the entire field of their operations. Look again at the Mellon Institute of Industrial Research at Pittsburgh as even a closer analogy to what business is doing along the line of scientific work as a solution of its difficulties. Here we have a group of manufacturers who consider it a wise private investment to pay annual sums to maintain chemists at the Mellon Institute where special attention is given to the definite proposition of the solution of industrial problems—and this notwithstanding the multitude of college and university laboratories for research in chemistry.

As to the need of a place for legal research, I quote Prof. Charles Thaddeus Terry in his President's address at the conference of commissioners on Uniform State Laws held at the 1914 meeting of the American Bar Association. He said:

"There are legal diseases and maladies which afflict men and women in their domestic, industrial and social relations just as certainly and just as vitally as there are medical diseases and maladies which afflict their minds and bodies. The applause which marked the Institution of the Medical Research Bureau has been justified in the success of its work. Similar applause and similar success would attend the establishment and work of a corresponding Legal Research Bureau."

Now, Professor Terry had in mind the highly valuable work of his Committee on Uniform Laws as such a legal laboratory, but it seems a sound inference that so true a statement applies yet more strongly as the grounds for a complete and permanent legal laboratory or laboratories in continuous operation that should undertake to grapple with the entire problem of the legal field.

To do this work of scientific investigation of legal problems we should need to train new men specially, giving them a larger and broader viewpoint than does the usual law training, and giving them a power to wield the tools of practical research in something more than a mediocre or academic manner. In other words, what is required of the law school graduates is a juristic or scientific training, with practical reference to actual needs and conditions as well as the wide scholarship

in jurisprudence and acquaintance with what has been actually done in foreign countries to meet similar problems and difficulties.

In the past the law schools have made no provision, other than the chance work of busy individual teachers, for research work in what may be termed the practical demands of legal problems. President Frank Goodnow, of Johns Hopkins, recently stated that "the system of legal education at the present time has no place for the serious study of legal problems." It is clear this should be otherwise. No matter what central national plan for united work in legal research may be adopted, there is a part which each law school as a local "plant" can play.

Under the adoption of some central plan in which the work should be apportioned, and a general executive direction and contact maintained, each law school could constitute itself a local research center, covering the part of the general scheme of work agreed upon, and building up its own center to the fullest extent it could command of resources.

Fortunately there are even now signs of awakening to this possibility, as the very recent announcement of a recommendation for plans of research by one of our leading law schools indicates.

It is true the average law teacher prefers to work in his own individual way, and that initiative should not be taken from him. But much could be done by the law school in employing investigators to work in conjunction with the instructors, or on separate problems.

It is to be again said, however, that after the law school has done all that it can to promote legal research there yet remains the main proposition before us untouched — and that proposition is the establishment of a single national central instrumentality through which all law schools, and their graduates, all Bar Associations and their affiliations, all legal societies and their organizations, may work together, free from local or rival interests or sectional divisions.

If we are to rise to the spirit this heroic day of war is bringing forth, even though it takes a plain form like the Trade Convention above noted, we must sink the particular interest that would stand in the way of a total plan equal to the new order of things. We must make our legal "war council" that shall take command of the field, and unite all forces in a splendid single array for a permanent, constant, scientific campaign of effectiveness in law.

Have we any legal analogy to put beside that of the commercial world in connection with this proposed central instrument which shall undertake the total problem of the law as one of its functions? Here it is interesting to observe the work of the French jurists in their "Society for Legislative Studies." Here a group of legal scholars met and mapped

out a definite plan, apportioning the work among them, and each working out his allotted part. Much of their work later took the form of legislation in amendment to the French Code, and it all is available in the several volumes of the publication of the Society.

Dr. Redlich has stated the work before us to be (1) the creation of a scientific system out of our wealth of substance in the common law and its present modifications; (2) the reconstruction and improvement of our system of law.

As to who shall do this, he says:

"In my opinion this goal can be reached only by the long and fruitful labor on the part of all elements of American legal life, the judges, the attorneys, the university law schools, and the legal scholars of the country. . . . Such a building up (of a system out of the historical legal material of the common law) can be accomplished only by a generation—say rather by several generations—of legal scholars, as occurred in Italy, France, and finally in Germany."

But how create a scientific system of law! How bring about such a reconstruction and improvement that shall be a worthy contribution to the jurisprudence of the future, as well as ranking it with high peaks of juristic attainment of the past! How deal with the mass of new legislation now upon us! Must we await the coming of a genius? When we refer to the great work of Justinian or the history making creation of the Napoleonic Code or the massive thoroughness, with its twenty-odd years of preparation, of the German Civil Code—we know we are speaking not of a single legal genius of those periods who shone like some flaming Sirius or new solar light in the heavens of jurisprudence—but on the contrary we are but acknowledging what can be accomplished through a group of legal scholars by a conscious and distinct effort on a thorough-going, decisive undertaking.

Can we approach our own task with a less noble apprehension and large conception? May we not shatter the fetters of our daily particularism and build boldly with new mind and amplitude of plan so comprehensive and yet practical that it shall set in motion, in however small a way, the beginning of a complete and capable total legal scheme?

With the grave timidity that one steps out into the unknown we offer the suggestion of the Institute of Jurisprudence as a form for such a total scheme. We ask your indulgence as to detail, while we counsel together why a new instrument should be created in a field already fitted with many agencies of constructive legal purpose. The requirements to be met in the large are: (1) a total and not partial plan—this means one in which there can be a general coöperation of all

agencies — all law schools, all Bar Associations, legal societies, and correlated bodies in the commercial and general field of activity — in a word, we need one great central national instrumentality through which all can coöperate and be united in common effort. (2) A continuous body of activity — not a group of men meeting once a year and reading papers, nor even committees giving of their incidental best efforts, but a group of men set apart for the business of permanent accomplishment. (3) An advanced scholarship beyond that of the present law school training in its usual form — a scholarship that has the balance of knowledge of other systems and other legal horizons. (4) A practical understanding of the actual needs of the world — the operative effect of law as well as the litigious view. Not only the scholar's knowledge, and the lawyer's knowledge, but the keen grasp of the man of affairs, who must make good with his day's work. (5) Specially trained practical experts who may develop the best methods of investigation, and be to the legal world what the chemist is to the industrial world, or a Flexner or Carrel is to the medical field. (6) Legal laboratories under a comprehensive permanent plan of operation. (7) An executive board of experts for survey, supervision and coöperation with other agencies.

It is earnestly urged upon you that in no other way than the creation of a new instrumentality can all these requirements be met. For lack of a better name it is suggested that this new legal organism be called the Institute of Legal Science or, in short, the Institute of Jurisprudence.

Let us look at the form and functions of such an Institute. It is to do the four-fold work of: (1) Ascertaining and developing a scientific system for American law. (2) Making investigation and solution of legal problems to meet the demands of the legal world and the needs of actual affairs. (3) Developing men in advanced or juristic work for an enlarged legal scholarship and training them for the severer test of practical legal research. (4) As a working executive center coöperating with the work of schools, bench, bar, and legal associations and governmental and commercial requirements.

The means by which this would be accomplished would be: (1) Establishment of a main center and other local centers of legal research. (2) Foundation of a national juristic school for advanced instruction in comparative law, jurisprudence, legal history, scientific legislation, methods of research, legal education, etc., and the relation of law to industry, and in the practical field of the world of affairs generally. (3) Creation of an executive board of experts for direction and coördination.

The main center of research would be located at the Juristic School, the site of the Institute. Here would be made the legal surveys, and

from this point could be mapped out the general plan of attack and apportionment of parts of the plan to local centers at the law schools, at the federal seat of government, and elsewhere when thought desirable. Here could be devised some way of reducing the present chaos of many jurisdictions and unnecessarily varied interpretations of laws for one people, or some plan created to reduce the accumulating mass of judicial decision threatening to reach in a few years beyond human knowable power. Here could be devised some *modus operandi* for bringing about a more scientific system of legislation, and securing a popular confidence in authoritative direction of legislative proposals or rejections. Here the man of affairs could bring his problems for legal solution as he now takes his industrial difficulty to the chemist. Here could be united the effectiveness of the practical mind joined with scholarly training and scientific methods.

Let us now consider the juristic school which would be the head-center of the other activities of the Institute, although their range would be nation-wide. The juristic school would be primarily a graduate school of advanced legal studies (in the broadest sense of Jurisprudence) unattached to any university, but it would be something more and something different from any post-graduate studies under the very best development of any law school primarily devoted to training men for practice, and restricted by the local affiliations of this university and no one law school can be a general center of the legal scholars drawn from other law schools.

Practically what can be done? First the Juristic School should be restricted in numbers of students so that personal contact and instruction will be always available to every student. It must be an "intimate" school. The students should be graduates of the standard law schools, and the best of these graduates only should be admitted—a superior group of young men previously trained in the regular way of the law. By establishing liberal fellowships of \$1250 a year, there would be obtained as students young men of ability who otherwise would feel that they could not afford the time for advanced work. As the value of the work appeared others would come to see they could not afford to miss this juristic training, and the standard of entrance ability would eventually need to be kept high to restrict the numbers of the juristic school within its proper function.

Second, the legal scholars called to the juristic school would give their time to development of their own special fields—they would give a small portion of their time to instruction—and this not routine instruction.

The students would receive the active thinking values of these men

as they went along, and a guidance into the legal literature and legal methods of advanced work. Much of the instruction would be informal — the plan would include an arrangement whereby students and instructors would meet informally as part of the day's work.

The staff of legal scholars would be composed in part of permanent members, and in part by men of distinction detached from the law schools for limited periods. Men of the highest standing in our law schools would find it an advantage to join the juristic group, where the leisure and freedom from school demands would enable them to carry forward and complete studies on their own field. They could give a small amount of advanced instruction or not, and they could give direction to students in research. The students and regular members of the staff would have the stimulating influence of the presence and judgment and informal contact of these men, in addition to whatever direct instruction and direction they gave. Arrangement would be made with the law schools of satisfactory financial nature to care for the detachment, and it would give a definite plan of work for the sabbatical year or part year of the law school professor.

Since the juristic school would then become a single center for able men from all law schools — students would find a greater opportunity for advanced juristic instruction at this center than would be possible in any one law school where there is usually but one or two men who stand out in the light of distinguished legal scholarship.

Eventually there would be developed from the young men matured in this atmosphere a new group of advanced scholars from whom would be built the permanent fixed staff of the juristic school. The juristic school would constitute a new scholastic goal for the younger teachers of the present law schools — as their ability showed itself they would be tried out on short term periods of detachment, and the right men discovered.

There would be developed such relations with other countries through drawing foreign scholars to the juristic school and sending our younger men as fellows abroad for observation and study.

Imagine then that we have gathered able legal scholars of this country and from abroad into a single group. Invited one from one point, and another a thousand miles away, and we have the best brought together at one place. Bring to them, as students, the able graduates of the best law schools. Now look upon these scholars and students together with the practical administrators gathered about the working center of the law library, with the direct purpose of scientific development of the law and scientific training of young men for future work. No strain of elementary legal instruction or the sapping of nerve energy

by huge classes of students. No pressure of a legal productivity when their freshness and vigor of mind have been taken up by the processes of didactic teaching. On the student's part no huge body of men proposing to practice, to distract from that calm, quiet absorption necessary to long-range thinking and scientific preparation.

Here in the juristic school is a place for leisurely and ripened scholarship to go hand in hand with the practical work of the investigator and observer of actual conditions related to legal needs. Here is a place where a legal plan or book or investigation can be laid out without reference to haste or financial need. Here is a constantly sitting board of legal experts and practical investigators that approach the whole problem of American law with the power and deliberation in which Justinian called upon his juris-consults to lay the foundation of Roman jurisprudence.

Here there will live and work, year in and year out, in continuous intellectual exchange and informal contact and companionship, a group of older and younger students, infused with a single purpose and breathing an atmosphere where the new spirit of American jurisprudence can vitalize the law of the whole people.