America's Cultural Contributions to Europe in the Realm of Law

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IN his "intellectual history"—as Crane Brinton himself characterizes his book *Ideas and Men*—he says that we know little about the process of successful innovation, from the idea in the mind of genius to its widespread working out among human beings. And yet we do know something of what happens with a legal idea after it has been reduced to a form discernible in the outside world. In a great many cases it has been adopted only within the legal system of the country where it originated and obtained binding effect through the judicial, legislative or administrative process. However, there are great numbers of legal ideas which have been taken over by other countries.

Most of the Continental countries adopted Roman law in a wholesale fashion. Even in our law, particularly in international law, the Roman-law theories of acquisition and of succession have been adopted as the principles controlling the acquisition of territory and the succession to an extinct state, for example. This evening's discussion deals with the same problem, with a difference, however. We shall be concerned not with the role of Roman-law ideas in the new world, but with the role of America's legal innovations in the old world.

To mention the words written constitution is to point, with two words, to one of the greatest legal feats ever recorded as an object of universal adoption. Surely we meet with great charters in European medieval history. But they, such as the Magna Carta of 1215 and the Golden Bull of 1356, were not "constitutions." The word constitution means "constituere rem publicam." Those medieval documents did not "found" a "civil body politic" as the Pilgrims on the Mayflower said in their Compact. They placed limitations on the power of the personal sovereign.

One may add that the Magna Carta, the Bill of Rights, and the Act of Settlement are, as James Bryce so aptly stated, "merely ordinary laws which could be repealed by Parliament at any moment in exactly the same way as it can repeal a highway act or lower a duty on tobacco."

This second new idea of a "fundamental law," "a superior paramount law unchangeable by ordinary means ... not on a level with ordinary legislative acts," by which all legislation is limited, was likewise first expressed on American soil—by those Puritans who emigrated from Massachusetts and established three

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2. For details, including the historical insignificance for English constitutional law of the Agreement of the People of 1649 and the Instrument of Government of 1653, see the author's *American Legal Inventions Adopted in Other Countries*, 1 Buffalo L. Rev. 118-37 (1951).
towns in the valley of the Connecticut River. This was in 1638 when these founders of Connecticut drew up the Fundamental Orders of Connecticut, a document which—in contrast to the English acts—was intended to be the foundation of government by laying down the principles for its formation and organization, for the exercise of its powers through different branches, and for the limits placed upon them. Not without good reason was it therefore said that the Fundamental Orders of Connecticut present "the first written Constitution known to History."4

After the secession of the thirteen colonies, the permanent federation of the new states with one another into a new nation was brought about by our federal constitution of 1787.

The idea of a written constitution, setting down the principles of government and its organization, regulating the jurisdictions of its organs and determining the relation of the individual to the government, originated, as we saw, in America. The Compact and the Fundamental Orders had, if ever so imperfectly, heralded those ideas.

Now, the new federal constitution fulfilled and shaped these ideas into a comprehensive form. The Constitution, in creating a central power but paying due regard to sectionalism or state particularism, had no precedent in history. However, it became the model for the whole world, wherever modern federative constitutions were enacted. It is worth noting that when about a century ago the Spanish colonies in Latin America broke away from the motherland, they took inspiration for their constitutions from our Constitution,5 and not from Bentham's model constitution which he—in 1830—hoped would be adopted by them.6

No one denies, not even the English writers, that our Constitution became the model for the constitutions in the old world. First in France, Belgium and the Netherlands, then in 1848 in Switzerland, and in 1871 for the newly founded German Reich, the American Constitution greatly influenced the draftsmen in Europe. Who can deny that even the draftsmen of the British North America Act for Canada—1867—and of the Commonwealth of Australia Act—1900—heavily drew upon our great charter? Arnold Toynbee admits all this but he dares to say that our Constitution is itself a copy of the British model.7 His statement is unattended by any evidentiary facts. It does not stand proof. The American idea of a written constitution was alien to English thinking.

The idea of 1787 of integrating in one single written instrument the process

4. See, e.g., Beard and Beard, A Basic History of the United States 72 (1944).
5. Owing to this fact, a distinctive difference in legal theory has arisen between the law of those countries and the French law, which is otherwise so basic to their law: While in France constitutional law has not permeated all legal thinking, it has done so in the former countries which, in this regard, follow the American experience. See René David, Traité élémentaire du droit civil comparé 240 (1950).
and the principles of interaction between national and state powers—by a fair
distribution of jurisdiction, i.e., legislative, judicial and administrative jurisdic-
tion—between federal and state branches of government and with direct author-
ity given also the national government over individuals, was a concept of
wonderful originality and immense magnitude. In addition, it was a document
admirable in “the simplicity, brevity, and precision of its language, its judicious
mixture of definiteness in principle with elasticity in details,” to quote Toynbee’s
countryman, James Bryce.8

Not only because our Constitution was written—this is Toynbee’s explana-
tion—but because it offered by the organization of its contents and the lucidity
of its language the legal guidance which the few English laws standing alone
without inner coherence could not offer, the American Constitution became the
model for the whole world. The late Chief Justice Stone said that the draftsmen
“set up in the Constitution an enduring framework of government” enabling men
“in all the vicissitudes of the changing affairs to carry out those fundamental
purposes which the Constitution itself discloses.”9 A masterwork does not lose
its vitality. The provisions of our Constitution are very much alive. A court
recently, in a case involving radio communications forced upon commuters in
buses—a “captive audience”—remarked: “The issues of the case were not
implied in the means of communication known or contemplated by Franklin and
Jefferson and Madison, but the Constitution can keep up with anything an
advertising man or an electronics engineer can think of.”10

Nor can that great guaranty of freedom of individuals and their protection
against tyranny—I speak, of course, of the theory of the separation of powers—
be found in English constitutional law. On the contrary, Bagehot regards it a
great merit that a singular approximation exists between the legislative and the
executive in his country.11 Whether the English system is preferable is a ques-
tion of opinion; but it is not a question of opinion, it is a fact, that the theory
of separation of powers—first put into action by our constitutions, starting with
that of Massachusetts of 1780—has become, as Adolf Arndt, a German legal
scholar, half a century ago said, “the backbone of modern constitutional law in
all countries.”12 For the Frenchman Montesquieu it was a mere idea; our
founders made it work—but the English claim credit!

Speaking of vital American innovations one hardly needs to be reminded
of the judicial control over the constitutionality of legislation. The sovereignty
of the British Parliament, its omnipotence and boundless power, make the rise
of such a control impossible in Great Britain. American constitutional theory has

8. 1 Bryce, op. cit. supra note 3, at 28.
11. Bagehot, The English Constitution 781 (1908). See also Chalmers & Asquith,
subordinated even the legislative power to the fundamental law expressed in the 
constitutions.

Alexis de Tocqueville called this control over legislation “one of the most powerful barriers” ever devised against the “tyranny of political assemblies.” 13 James Bryce, the noted English jurist, writing half a century later, was so impressed by this American-created idea that he said: “The importance of re-
viewing functions”—the court’s control over the constitutionality of legislation—“can hardly be exaggerated; . . . there is no part of the American system which reflects more credit on its authors or has worked better in practice.” 14

This constitutional control supplies the greatest protection for minorities. No wonder that after the destruction of the old Austrian Empire the new suc-
cession states, such as the Republic of Austria and the then democratic Czecho-
slovakia, incorporated this American feature into their constitutions. And after the collapse of the Nazi and Fascist regimes, Italy in 1947 and Western Germany in 1949, adopted the American concept of control over the constitutionality of legislation.

Under English law an alteration of a constitutional provision can be voted as any other bill might be. The American Constitution has, however, separated the ordinary legislative powers from the powers of amending the constitution—an idea as original as the others mentioned previously. Abbé Siéyès, who was to become the great specialist of the French Revolution in constitutional matters, particularly in drafting constitutions, was impressed by this separation. It was upon his suggestion that the Third Estate on June 17th, 1789, set itself up as a national assembly “to make a constitution.” 15 The famous European theory of a “power constituent”—“pouvoir constituant”—to be distinguished from the “power constituted”—“pouvoir constitué”—is therefore likewise of American origin, as one glance at article V of our Constitution shows. Incidentally, the Convention Nationale of French Revolution fame took idea and name from our conventions.

The noted German legal scholar Georg Jellinek has shown—by a textual comparison—that the provisions of the Declaration of the Rights of Man and of the Citizen drafted and accepted in that famous night of August 27th, 1789, by the French Constituent Assembly, to a very great part were translations from the American bills of rights, particularly from the Declaration of Right in Virginia of 1776. 16

Certainly the ideas associated with the Enlightenment, such as the doctrine of the inalienable natural rights of man, had exercised their strong influence upon American thinkers. In Blackstone, who heavily drew on Grotius, Pufendorf, and Bynkershoek, those natural rights are the common law rights of Englishmen.

13. 1 De Tocqueville, Democracy in America 103 (Reeves transl. 1943).
14. 1 Bryce, op. cit. supra note 3, at 254, 256.
15. 1 Michelet, Histoire de la revolution fran aise 166-78 (1868).
G. de Ruggiero, The History of European Liberalism 68 (Collingwood transl. 1927).
However, the German legal historian Planitz, now a professor at the law school of Vienna, made the observation that the American draftsmen's original feat lies—exactly as was the case with the separation of powers—in the creation of legal institutions embodying what had been merely pale abstractions before. In the American formulation natural law concepts became fundamental rights, attack-proof barriers against the aspirations of unscrupulous majorities. Since the American declaration of fundamental rights and liberties in constitutional form preceded the French constitutions and the latter were copied by the Belgian Charter of 1831, which in turn became the paragon for the charters of the German countries in 1848, and ever since (with the exception, of course, of the Hitler era)—the honor due to the originator of a great creative idea is owed to our country.

Among so many individual traits discernible in the period of the Enlightenment, one, originally American in both idea and achievement, stands out in modern history, and that is the separation of church and state. There was never in this country a national established church, and the first amendment said that there should not be any. This amendment expressed as well the equivalidity of all positive religions—an ideal cherished by the Enlightenment—and it initiated, if we follow the Supreme Court, the complex of principles relating to the separation of religious and secular authority.

He who has ever lived in Europe knows how much that American legal principle inspired great political debates. Certainly historical and social conditions in Europe must account for the fact that not even a country as liberal as Protestant England has adopted the principle. When Pope Pius IX in his famous Syllabus Errorum of 1864 rejected the separation idea he probably expressed dominant opinion, particularly in the Catholic part of Europe. Even James Bryce, writing two decades later, thought that of all the differences between Europe and America, the American idea of separation was perhaps the most salient one. Nevertheless, the separation idea struck deep roots in Europe. European liberalism split on the question. Socialist parties in Germany and Austria included the separation principle within their programs. Radicals pronounced the subordination of the churches to the State. In contrast to them the moderates such as Count Cavour, the unifier of Italy, asserted the liberty of the church from the state and found the solution in the American principle. Cavour's formula, "A free Church in a free State," expressed the separation principle for Italy, since practically speaking there was only one church in Italy. As early as 1830, Belgium had incorporated the separation idea in her constitution, even though qualified by the state's obligation to pay salaries and pensions to the ministers of the churches and by the municipalities' obligation to

17. See 3 Grundrechte und Grundpflichten der Reichsverfassung 606 (Nipperdey ed. 1930).
20. Id. at 335.
share in the costs of the upkeep of the places of worship and the residences of the ministers.21 France by the Law of Separation of December 9, 1905 had adopted the whole idea of separation,22 while even Italy changed its law in 1929 to some extent.

The first amendment of the American Constitution—"noble and magnanimous when duly understood" as Chancellor Kent said—was far from withdrawing religion in general. On the contrary, the founders considered religion as the best sanction of moral and social obligations. It was the spirit of a free and universal toleration which was at the root of the amendment.23 This spirit, together with that of liberalism and humanitarianism showed itself also in other reform ideas and was the incentive for innovations embodied now in European legal theories and legislation. I speak here mainly of criminal law and international law.

Let's turn first to the protection of society against crime. We may note that America had enacted the first legislation which was based upon the idea that punishment should not be inflicted as an act of retributive justice only, but also as an act of reformation of the wrongdoer. Here in America, a vigorous movement arose to avoid cruel punishment. The pillory was not abolished in England until 1837. Capital punishment abounded all over Europe in the eighteenth century. So did corporal punishment. The fact that imprisonment replaced these cruel forms of punishment, is to the credit of the American Quakers. Under the influence of the Quakers, Pennsylvania reduced the application of capital punishment to murder and treason. England and the Continent followed—much later—that lead. Equally, the first vigorous movement to put an end to corporal punishment for crime was launched by the Quakers towards the close of the seventeenth century. In 1681 in West Jersey, in 1682 in Pennsylvania, corporal punishment was abolished and replaced by imprisonment and fines.24 It took more than a century and the French Revolution to have these innovations copied in Europe.25

It was the humanitarian philosophy upon which Edward Livingston in 1820 founded the draft of the penal law at Louisiana.26 The probation system, in turn, originated in Boston, Massachusetts, in 1869.27 If we follow Las 21. See M. Vauthier in 1 Belgique—La Vie Juridique des Peuples 20 (1931).
25. See Professor Moritz Lipman's praise of the originality and importance of the Quaker's deeds and ideas in 5 Handwörterbuch der Rechtswissenschaft 788 (ed. by Stier-Somlo & Elster 1928). See also the preamble to the Pennsylvania criminal statute of 1794 (Laws 1794, ch. 257): "It is the duty of every government to endeavor to reform, rather than exterminate offenders."
26. For Livingstone's work, see Franklin, Concerning the Historical Importance of Edward Livingston, 11 Tul. L. Rev. 163 (1937).
27. For a foreign appreciation of the American innovation, see Allfeld, Der Bedingte Strafferlass 1 (1901). See also L. Ebermayer in 1 Handwörterbuch der Rechtswissenschaft 544 (1926): "The idea of giving a person convicted for a crime a chance to obtain freedom from punishment by his good conduct, was first accomplished in America."
Nuevas Teorias de la Criminalidad of the noted Spanish criminalist Bernaldo de Quiroés, the probation idea spread from Boston to the entire state, from there to all states of the Union, thence to Australia and New Zealand, and finally it reached Europe with the English Probation of Offenders' Act in 1907.\textsuperscript{28} German writers acknowledge that America must be given full credit for these innovations.\textsuperscript{29} The word and idea of "probation" are American. It amounts to a \textit{freedom from punishment} under supervision upon the condition of good conduct. By contrast, the principal means by which release from imprisonment is granted, upon a similar condition, is parole. As it was properly stated, parole "avoids the peril which inheres in the abrupt transition from the prison to the outer world."\textsuperscript{30} It was in Philadelphia in the memorable year 1776 when, for the first time in the world, a Society for Assisting Distressed Prisoners was founded. One of the founders was Benjamin Franklin. Now, there is no country in Europe which has not adopted the idea. Nor could Europe dispute the leadership of America in prison reform.\textsuperscript{31} As a matter of fact, America took the leadership from the very beginning. Europe was very much impressed. And, interestingly enough, that classic on democratic government—Alexis de Tocqueville's \textit{Democracy in America}—would never have been written without the interest incited in Europe in American criminological inventions. The French Minister of Justice granted the young judge Tocqueville a leave of absence in 1830 for the study of the prison system in America.\textsuperscript{32}

To appreciate fully the role of America as pioneer in the progress of criminal law, we have to remember that this country first conceived the idea of differentiating between the adult and the juvenile delinquent. Here, for the first time in legal history, the thought materialized that the state has to take the child in hand who has begun to go wrong, the state, not as the dark angel of vengeance, but as the leader and guardian through new juvenile courts, guided by principles entirely different from those applicable to criminal proceedings.\textsuperscript{33} Great Britain, Ireland, Canada, the Continental countries, and Australia studied and adopted the American institutions.\textsuperscript{34}

\begin{thebibliography}{9}
\bibitem{28} Bernaldo Quiró, \textit{Las Nuevas Teorias de la Criminalidad} 155 (2d ed. 1908; Eng. ed. by A. de Saldo 1912).
\bibitem{29} See note 27, \textit{supra}.
\bibitem{32} See Ph. Bardley, \textit{Introduction to De Tocqueville}, \textit{op. cit. supra} note 13, at 77. The immense influence Tocqueville's study of American democracy had on the rise of European democratic liberalism in the years prior to, and the decades following, the fateful year 1848 is apparent from Ruggiero; he says: "The most important writer of this period, perhaps the greatest French writer of the nineteenth century is Alexis de Tocqueville. His work on Democracy in America, published in 1835 and reprinted twelve times before the Revolution of 1848, marks a turning point—in the attitude of Liberalism toward the changed historical environment which has seen the revival of democracy and the rise of Socialism." Ruggerio, \textit{op. cit. supra} note 16, at 187.
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Humanitarianism was the characteristic feature in America's contributions to criminal law; it operated also as the driving force in new and spectacular achievements in international law, the basis for which was laid in America. America’s pioneering genius has conceived four new great principles in this area. Time does not allow more than a few glances at those principles. The new Republic which in 1783 joined the international community of nations proved to be, from the very beginning, a champion for the rights inherent in neutrality. Not the nationality of the goods, but the nationality of the flag, should determine the liability of a ship to capture. England, controlling the seas, practiced the opposite rule, "intent to starve out the enemy by capturing goods destined to it." The War of Independence gave rise to the first "Armed Neutrality" against England. Twenty years later, America insisted when England announced a blockade against Napoleonic France that the blockade was unlawful because it was merely a "paper blockade." 35

From the time this nation came into existence, it has challenged so-called "privateering." This was a method by which a belligerent might accept the voluntary service of privately-owned and privately-manned ships by issuing to the masters letters of marque. Not only had America never used this abominable device, but Benjamin Franklin wrote in a letter written in March 1785 these words: "It is high time for the sake of humanity that a stop were put to this enormity." 36

The ends for which America fought finally became recognized rules of international law in 1856, in the Declaration of Paris: the "free ships-free goods" rule, the requisite of effectiveness for a blockade, and the abolition of privateering. Even more important than the role of America in the build-up of the rights of neutrality was America's role in the other part of the law of neutrality which deals with the duties imposed upon neutrals. It was no less an American than George Washington whose proclamation of neutrality of April 22, 1793, upon the outbreak of the war between France and England, ushered in a new epoch of international law. When the French Minister, citizen Genêt, attempted to use American ports as bases of operation for French privateers and issued letters of marque to them, granted commissions to American citizens to serve in the French Army, and used the French Consulates here as places for prize courts, Secretary of State Jefferson wrote, on June 5th, 1793, his famous letter, protesting vigorously as well as presenting the newly formulated principles of neutrality. 37 One year later to the day, on June 5th, 1794, the first Neutrality Act was passed by Congress. It was the first of its kind in any country in the world. 38 It declared, among other things, as crimes punishable by federal courts the following: the fitting out, the arming, or

35. See, e.g., Fenwick, International Law 634 (3d ed. 1948).
36. 9 Writings of Benjamin Franklin 291 (Smyth ed. 1906)
37. 7 Moore, Digest of International Law 1010 (1906).
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equipping of any ship, if one knows that the ship will be employed in the service of a belligerent; the accepting by an American citizen within our territory of a commission from a belligerent; and the acts of hiring or retaining persons in the service of a belligerent.

By this token, an item illustrative of the promotion of international law in this country must not be overlooked. After the First World War, the German and the Austrian constitutions incorporated the tenet that international law shall be regarded as a part of the law of the country. Analogous provisions were embodied after the Second World War, in the Italian and French constitutions. Such reference was new to them but was by no means a novelty to us. Since 1787 our Constitution has authorized Congress "to define and to punish offenses against international law."\(^{39}\) The Neutrality Act of 1794 set a landmark in this respect also, that international law came to be defined not only through treaties, but through statutes as well.

It was not until 1819 that England in her Foreign-Enlistment Act accepted—after a quarter of a century, replete with her violations of neutrality, and the War of 1812 caused by those violations—the principles enunciated in the American Neutrality Act.\(^{40}\) And in 1871, in the Treaty of Washington concerning Great Britain's liability for the Alabama claims, three rules were laid down which even more closely defined the duties of neutrals than had the former acts. American neutrality legislation and these three rules became the basis for both the Fifth and the Thirteenth Convention of the Hague of 1907 concerning the rights and duties of neutral powers in land and in naval war.\(^{41}\) Twenty-five countries, including the United States, have joined these conventions.

One of the subject matters regulated at the Hague in 1907—by the Fourth Convention—dealt with the laws and customs of war on land. To mention that Convention is to point to another instance of America's original contributions to international law. No foreign work on international law fails to point out that the "Instruction for the Government of Armies of the United States in the Field"—the famous General Order 100—drafted upon President Lincoln's direction by Dr. Francis Lieber in 1863, constituted the first codification of this subject and exercised a great influence upon the Conference at Brussels in 1874 and upon the work at the Hague in 1907.\(^{42}\) These instructions were notable for the spirit of humanitarianism, a spirit which had inspired the rules of neutrality. Johann Kaspar Bluntschli, the great European internationalist of the nineteenth century, stated in his book, The Modern Law of Nations, that those American instructions were more detailed and more civilized than the "rules of war" which were in use among European powers.\(^{43}\)

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40. See Niemeyer in 2 Strupp, Wörterbuch des Völkerrechts 133 (1925).
41. Id. at 134.
43. J. K. Bluntschli, Das Moderne Völkerrecht als Rechtsbuch dargestellt 6 (Ger. 1868).
Two more features creditable to America stand out in the progress of international law in admirable greatness. These are, in chronological order, the general use of arbitration in lieu of war for the determination of international disputes, and the new concept of a World Society. America's leading role as promoter of arbitration started with the Jay Treaty of 1794. The above mentioned Washington Treaty of 1871 concerning arbitration of the Alabama claims brought arbitration into the foreground of international relations, culminating in the adoption of an arbitral system by the First Hague Conference and the creation of a Permanent Court of Arbitration.

As for proposals on the formation of a federation of nations, they go far back into the centuries. However, those were more or less speculations made by philosophers, theologians, and lawyers. Immanuel Kant wrote, in the middle of the War of the First Coalition against France, his immortal essay, Toward Perpetual Peace, clearly showing that the conception of perpetual peace is not utopian, and that a confederation of the nations is the presupposition for a binding law of nations. However, the statesman who first translated the idea of a federation of nations from the merely idealistic form into reality, advocating it with official authority, was an American President. Although it was disappointing that President Wilson's idea of a general association of nations was diluted into a mere league in the peace treaties of 1919, the League of Nations was a fascinating innovation in international law. We can agree with the noted contemporary American writer and teacher of international law, Professor Hyde, that permanent peace can not be obtained until all nations realize that they have to divest themselves of their instruments of war, a state of things which would require full control and inspection. The League failed in getting even a mere restriction of armaments, a failure which Adolf Hitler used as a pretext for Germany's withdrawal from the League.

The alternative to universal disarmament or, at least its essential restriction, is universalism and interdependence of nations replacing national sovereignty and self-determination. The United Nations, an organization first conceived on January 1, 1942, among twenty-six governments, some in exile, and sponsored again by an American President, has now sixty members, but presents still, to use Jessup's words, a "relatively primitive form" of international organization, and is a long way from the "more perfect union" espoused in the preamble of our Constitution.

However, our American federation, the more perfect union, has become since the end of the last war the real model for the achievements of a European federation. The Council of Europe created in 1948 in Strasbourg suffers from having no other authority than to talk. It is still in a stage comparable to that of the inter-colonial conference at Albany in 1754; but twenty years later the
First Continental Congress met at Philadelphia. Only four years have passed since 1948, so hopes for more perfect confederation in Europe may still be realized in the future.

This is only a little picture of great things. America also pioneered in many fields of private law. I included them in a more comprehensive study on *American Legal Inventions Adopted in other Countries*, published in the Buffalo Law Review.\(^4\) You were more than patient in following me through this outline of a few of the finest contributions made by my adoptive country to the world.

\(^4\) See note 2, *supra*. 