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America's Legal Inventions Adopted in Other Countries

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THE following discussion uses the legal-historical method for purposes of comparative law. It does not deal with all of the great legal ideas which the Anglo-American system of law—briefly but inaccurately called common law—has created. The cross-examination in the Anglo-American law of evidence is one of the most significant examples of the great and original ideas which will not be discussed here, because Continental law, also briefly called Civil law, has not used it. For the same reason, the fundamental reform of civil procedure based on the merging of common law procedure and equity procedure in a unified system of procedure will not be included. But, although our reforms in civil procedure were not given further attention on the Continent, it should be mentioned that they inspired Franz Klein, the great creator of modern European civil procedure, to introduce in his draft of an Austrian Code of Civil Procedure of 1895 the testimony of the parties, (although not qua witnesses, but qua parties). This was a novelty on the Continent, while the Anglo-American law had already at the middle of the nineteenth century incorporated in its law the testimony of parties as witnesses, by decisional law as well as by statute.

Finally, one more qualification: The settlers who in the seventeenth century created the thirteen colonies out of which later the United States emerged, brought with them from the beginning the English common law; New York was temporarily an exception, having followed Netherland's law until New York aligned itself with the other colonies under the sovereignty of Great Britain. Naturally, this legal system was subject to changes similar to the ones which the Roman law suffered on the Continent, after it had been adopted as the law of Continental Europe towards the end of the Middle Ages. Such permutations occurred because of changes in the economic and social conditions, but they took place in one and the same legal system, and this usus modernus Americanus—the counterpart of the

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†The great number of foreign references in the footnotes finds its explanation in the fact that foreign sources rather than American sources prove the adoption of American ideas in the respective foreign countries.

The purpose of the following lecture is to point out only those legal creations which had their origin in the United States and were subsequently adopted by all or by some of the civil law countries.

The Declaration of Independence and later the founding of the new Republic under the name of United States of America were accompanied by a completely novel legal achievement. It consisted in the creation of a written constitution, setting down the legal organization of a whole nation, and regulating the jurisdictions of all its organs—federative and state organs alike—as well as the relation of the individual to the Government. We meet with great charters in the English and German medieval history, such as the Magna Charta of 1215 and the Golden Bull of 1356. They restrained the powers of the feudal overlord—king or emperor, respectively—who in order to allay the spirit of resistance among the bishops and barons in England, and the Electors in the Holy Roman Empire, had to make great concessions by accepting limitations upon their sovereign powers. Thus, the safeguards in the Magna Charta must be regarded as obligations, binding upon the king as a party to the feudal contract, rather than as an expression of eternal rights of man. Also, the rights laid down in the great legal instruments which reflect the spirit of the stormy era of the two last Stuart kings and the end of the Second Revolution, such as the Petition of Right in 1620 and the Bill of Rights (1689), seem to be founded upon "laws, customs, and statutes" rather than upon inalienable freedoms. All these laws, much as they might be treasured, are subject to alteration or even to repeal by Parliament, like any other statute. Furthermore, they do not even pretend to define the form of government, or to organize the latter, or to delimit its powers in particular.

The last remark may not apply to The Agreement of the People of 1649, and The Instrument of Government of 1653, made by a Council of—Cromwellian—military officers. However, the world-historical chapter devoted to written Constitutions does not open with these last two instruments. They lost their shadowy existence almost immediately, without leaving the slightest mark even in their own country.

Eleven years before those English documents were drafted, the Puritans, who had emigrated from Massachusetts and established three towns in the valley of the

2. This was the term under which German legal scholars of the 17th and 18th century presented the transformations of Roman law in the countries north of the Alps, transformations which took place in the form of customary law rather than of statutory law. See Heinrich Brunner, Fundamentals of German Legal History (2d. ed., in German, 1903) p. 248.
Connecticut River, had drawn up the "Fundamental Orders of Connecticut." It is a fact that these Orders were really intended to do what their name implied—to "found" a new settlement, to organize it under a specific form of representative government, and to distribute governmental powers among settlers, General Assembly, Courts, and Executive. One has to bear in mind that the term "fundamental" points to the act of "founding" a "civil body politic," as the Pilgrims on the Mayflower, before they set to work at Plymouth, called it in the Compact. And the word "Constitution" means constituere rem publicam. The Connecticut "Fundamental Orders" have therefore properly been named "the first written Constitution known to History."3 In those Orders, and in the Charters and Constitutions which followed them, the idea was realized that the fundamental law is above any legislative power and therefore immutable from the standpoint of legislation.

There cannot be any doubt that the great modern Charter signed in Independence Hall at Philadelphia in September 17, 1787, by the Delegates of the thirteen independent states, which became the American Constitution of 1789, had been admirably prepared on American soil—the word soil to be understood—in the literal and in the spiritual sense. The Constitution "founded" a nation, and "founded" a government, all-inclusive and complete, for the nation to be organized as a federation, and to be controlled by a unitary and fundamental law.

For the first time in the history of mankind we see the idea of a composite unit legally established as a nation transcend the limits set to the federal government as well as to the member states. This is exemplified by the exercise of control by a national authority over both Congress and state legislatures. Thus, the powers of a supreme authority inherent in the legal concept of a nation are conspicuously set off from the mere federative powers and the mere state powers. The Constitution secured for the individual, by almost unprecedented guaranties, the fundamental human freedoms in all aspects, from freedom of religion and conscience to the right to own property and to due process of law. Just an example: Whatever one's opinion may be of the idea of "Separation of State and Church," it was—if we follow the interpretation of the Supreme Court—for the first time laid down as a legal principle in the First Amendment. Such a pronouncement was unprecedented. The French Catholic Alexis de Tocqueville was greatly impressed by this new approach to the Church-State problem. He noted that in France he "had always seen the spirit of freedom and the spirit of religion marching in opposite directions," while in America he found them "intimately united and reigning in common over the same country." He remarks that everyone he spoke to attributed "the peaceful dominion of religion in this country mainly to the separation of

3. For the American origin of the idea of a "Constitution" see Hermann Rehm, Allgemeine Staatslehre 1907 pp. 98-100.
AMERICA'S LEGAL INVENTIONS ADOPTED IN OTHER COUNTRIES

State and Church." It was the first time that the status of Churches became that of a corporation of private law, while their status in Europe was that of a corporation of public law. France followed the American legal idea in 1905.

The American Constitution guaranteed personal freedom in documentary form and by threefold safeguards. They present a system of limitations upon governmental powers—the famous "checks and balances"—establish the principle of separation of powers, and, finally, supply the protection of the individual from high-handed and arbitrary actions of a majority or, to use the language of the Constitution, from a violation of due process.

It is of course true that not all of the great principles of the American Constitution and of the First Ten Amendments which followed almost immediately have been adopted by all other countries. But a fact which cannot be denied is the almost universal spreading of the idea of a written Constitution. This idea ushered in a new historical era and presents an important chapter in universal legal history, beginning with the French Revolution in 1789, the constitutional experiments of which were based on the American model, up to the recent post-war times, characterized by the awakening of the Asiatic and Indonesian peoples to national aspirations. The American pattern is clearly discernible in every single foreign constitution.

Not only the legal historians and comparatists but also the student of the history of civilization must be fascinated by the grandiosity and originality of the idea of an organization of government, integrated in a written charter systematizing the powers of a nation, regulating its government, and defining the status of the member states. Can it be an accident, they may ask themselves, that the same second half of the eighteenth century, with its unprecedented achievements in human civilization, marked by the emergence of the creative genius of Kant and Voltaire, Rousseau and Montesquieu, Benjamin Franklin and Thomas Jefferson, Mozart and Beethoven, Goethe and Schiller, saw also the peak in the field of law? Bentham and Beccaria, Portalis and Martini were contemporaries of Alexander Hamilton and James Madison.

The triumphant march of the American Constitution began with its influence on France and upon the newly created States of Belgium and The Netherlands, and is especially remarkable in the Swiss Federal Constitution of 1848. The federative

4. 1 Alexis de Tocqueville, Democracy in America 308 (translated by Henry Reeve) (new ed. by Ph. Bradley, 1945).

5. Jean Etienne Portalis (who died in 1807) was the great French jurist who in 1801, together with Tronchet, prepared the draft which came into effect as Code Civil (Napoleon) in 1804. The Austrian Civil Code of 1811 is mainly based on the draft of the eminent legal scholar and professor of natural law Karl Anton von Martini (who died in 1800); his draft of 1798 was finally revised by a commission headed by his disciple, Professor Franz von Zeiller (who died in 1828).
structure of Switzerland follows closely that of America; the organization of the House of Representatives ("Nationalrat") and of the Senate ("Staenderat") in Switzerland is identical with the American prototype. The Swiss Constitution follows the latter also in having government officials elected for a specified term; an Administration cannot—as in other European countries—be compelled to resign when it has lost the confidence of the representatives of the nation.

Switzerland has also taken over another characteristic feature of the American Constitution, not followed, unfortunately, by France, Austria, Germany, and Italy. The historian may ponder the question whether its adoption would have prevented open or disguised coups d'état in those countries. I am speaking of the idea of a form of government founded on the principle that there exists a constituent power set off entirely from a constituted power such as the legislative power. In the former countries, the procedure for amendments to the constitution is not essentially different from the ordinary legislative procedure; the only difference lies in the requisites of a qualified quorum and of an affirmative vote of more than the usual majority, for instance, of a vote of two-thirds of the members. Obviously, a change of a constitutional provision is therefore the easiest thing in the world in such countries; it is often being done in session after session, and sometimes changing not only one but several provisions in one single session, the amendatory process being nothing else than the ordinary legislative process, slightly qualified in the fashion indicated before. Switzerland was well advised not to do that, but to emulate the American model in the question of constitutional amendments, too. The American Constitution contains three provisions for the amendatory process.

First: A proposal for an Amendment must originate in Congress, or in a National Convention convoked by Congress upon the initiative of at least two-thirds of all the Member State legislatures.

Two: The adoption of the proposal, if the proposal originated in Congress, by two-thirds of both Houses.

Three: The ratification of the proposal by at least three-fourths of the Member State legislatures, which means at present ratification by 36 States, or at least as many Member State Conventions.

6. Since 1874, when a total revision of the "Fundamental Law" of the Swiss Federation of 1848 was adopted by a plebiscite and by the Cantons, the contrast between the amendatory process regarding the Constitution and the ordinary legislative process is focussed in the case of a "total revision" of the Constitution rather than in that of a "partial revision" i.e. an amendment concerning one provision of the Constitution. For details see F. Fleiner, Schweizerisches Bundesstaatsrecht (1923) p. 396 ff.
In view of the foregoing, it is easy to understand why in this country and in Switzerland the introduction of a bill delegating to the Government powers which include authorization to change the Constitution, would give rise to the examination of the sponsor’s mind, rather than to a legislative procedure in the bill.

However, another American doctrine which was derived from rather than written in the Constitution was adopted relatively early also in Austria, and has in very recent years been included in the Bonner Charter (the fundamental law for the German Republic) and in the Italian Constitution. It is the doctrine that it is the function of the courts to decide on the constitutionality of legislative acts, with the Federal Supreme Court in Washington, speaking for the nation as such, as the ultimate Custodian of the Constitution, controlling the constitutionality of every kind of legislation, whether federal or state legislation. From the day, approximately one-and-a half centuries ago, when the great Chief Justice of that Court, John Marshall, laid down this principle in *Marbury v. Madison*, up to today, also this “Marshall-Plan” has been a bulwark against legislative, i.e., political autocracy. A law-maker who knows that his legislative powers are not limitless will tread more softly. A government whose power must always be subordinate to the acts of the Legislature—and the Act itself in turn must be unobjectionable from the constitutional point of view—is by virtue of these limitations warned against any excess in governing by executive orders. In evaluating the theory of judicial control one must bear in mind that it is the foremost function of the Supreme Court to assert with authoritative finality the powers of the integral whole—of the nation as such—over its federal as well as state legislative and administrative organs. The control of the nation thus exercised extends therefore to all legislative and administrative acts of the Federation and of the Member States. These acts are tested, with respect to their accordance with the principles, guaranties, and concepts expressed in the Constitution. President and Congress, federal, state, and local authorities or, to put it more simply, the Federal Government as well as the State Governments in all their subdivisions, are bound by the views of the Supreme Court as to their powers. The fact that the Supreme Court of the United States wields a two-fold authority—one as the highest appellate instance in the federal judicial system, and the other as the national arbiter in all constitutional questions—may disconcert the champion of a pure separation of powers. He may applaud the establishment of courts for constitutional matters in the Austrian, Italian, and (West) German Charters, because these courts are in no way connected with the judicial branch of the government. But in reality the concept of courts built up outside of the Judiciary for the purpose of constitutional review of legislative acts, can be regarded as an addition to the original American invention rather than as an independent concept.

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From Alex de Tocqueville’s account one can see how deeply the French jurist was affected by the reviewing functions which American courts exercise over legislation. He calls the reviewing functions “one of the most powerful barriers which have ever been devised against the tyranny of political assemblies.” More than fifty years later James Bryce, the noted English jurist, pointing to the fact that “the importance of those functions can hardly be exaggerated,” remarked that “there is no part of the American system which reflects more credit on its authors or has worked better in practice.”

To secure to authors and inventors (for limited times) the exclusive right to their respective writings and discoveries was one of the many new ideas originating in the American Constitution. It is true that the history of patent rights started with the English Statute on Monopolies of 1623, which prohibited the granting of monopolies by royal prerogative, making an exception for the monopoly granted to the actual inventor. But the institution of an official preliminary examination by a special patent-office was given to the legal field by the American Patent Laws of 1790 and 1793, and especially by the law of 1836. Surely the American-born method of investigation of “interferences” was the model for the European preliminary proceeding, which is called proceeding on objections against the grant of an application of a patent. The patent-office has therefore the authority to decide upon the priority of an invention, and, hence, whether an application interferes with an unexpired patent. Thus, the office has to determine whether the application should be granted or refused. Europe followed the United States also in this respect.

Speaking of a control exercised by the patent-office, it may also be mentioned that the idea of a control over insurance companies running to the substance—in contrast to the form only—and to the manner in which the various branches of insurance should be conducted, originated in America. It was in the United States that Insurance Commissioners were first appointed and the principles by which insurance enterprises should conduct their business were first regulated. All these creative ideas in the field of insurance spread then all over the world. Austria

8. 1 Alexis de Tocqueville, op. cit. 103.
10. First patent statute was that of April 10, 1790, 1 stat. 109 followed by that of 1793, 1 stat. c. 11. The Act of July 4, 1836, 5 stat. c. 357 is that referred to in the text.
adopted them in 1880, followed in 1885 by Switzerland, where excellent laws concerning insurance and insurance control were enacted. The remark may be added that many other innovations in the field of insurance law, particularly life insurance, were first conceived in the United States. The same is true of new branches of property insurance. All these new features were later adopted by almost all other countries.

The American innovations in the field of stock corporation law—such as the share without par value and the convertible bond—must at least be mentioned in passing because these, too, were emulated abroad.13

Of great importance are the daring ideas to be found in the recent American laws concerning business and labor. American labor law has many features which differ from Continental labor law. In the latter, governmental regulations cover every detail; except in matters relating to salaries and wages, the parties to labor contracts have little influence upon the regulation of labor relations. The Hegelian concept of the State has its root in the Continental ideology; on the Continent, governmental intervention—even in private law transactions—has since times immemorial been regarded as an apriorism, and was therefore never questioned.

The American pioneers, who had from the beginning to rely solely on their own strength and not on any help from the government in colonizing and preparing for cultivation a new continent, entertained of necessity a completely different view of life and law. It is not surprising for anyone who has lived for some time in the United States to realize that not only the managerial class but also the trade unions are definitely opposed to any measures interfering with free enterprise. Aside from a few exceptions, also the public utilities, as railways, telegraph, telephone, electrical and gas corporations, warehouses and transportation enterprises are not under governmental control in the United States, as they are in Europe. They render first-class service, and are not only cheaper in terms of prices, but also qualitatively better than in Europe.

In a competitive price economy, every agreement or regulation excluding or even only restricting free competition is treated with greatest hostility, because such an agreement or regulation conflicts with the very nature of a free market system. This may, on the one hand, supply the reason why in a country adhering to a free competition and therefore free enterprise system, anti-trust laws have been enacted and vigorously administered as far as the province of business extends and explain, on the other hand, why in the United States a large segment of public

13. Belgium has adopted the concept of a share without par value by the law of May 25, 1913 and Liechtenstein did the same by the law of January 20, 1926. The German Act on stock corporations of 1937 adopted the American idea of convertible bonds, after it had been introduced in 1926 in the law of Liechtenstein. Cf. W. Hallstein, die Aktienrechts der Gegenwart 88, 114 (1931).
opinion and, following it, national and state legislations have rejected the notion of a closed shop; for closed shops are after all the counterpart of trusts and cartels.\textsuperscript{14}

True to the tenets of a free competitive market system, the American Government has interfered with the conduct of business and with the labor-management relations proscribingly rather than prescribingly, with the objective always in mind of protecting a free and open market as well as free bargaining between management and unions for the size of their share in the economic results of the productive process. The so-called New-Deal legislation, enacted during the "depression" from 1933 to 1935, served intrinsically the same purpose, because the two particular benefits obtained by the unions were:

First: The legal guaranty that the management must recognize a majority union as the workers' representative and bargain with it in good faith with the view of coming to terms. The idea of the majority principle was there extended from the political to the socio-economic scene.

Two: Legal protection from any discriminatory treatment of an employee who exercises his right to associate in permanent or temporary labor organizations or engages in concerted actions. What does this mean? In the absence of any contractual obligation, it is in the free discretion of a company to demote or discharge a person, and to refuse to employ or promote him; but it would be a misuse of this discretion, and therefore unlawful, if the reasons for those acts were of a discriminatory nature. Although it is an historical fact that the American worker had obtained the right to form combinations for the promotion or defense of his economic interests more than a hundred years ago, it was under the circumstances still a case of freedom for the employer to discriminate at his pleasure rather than of freedom for the employee, as long as the worker was faced with the danger of a discriminatory discharge as a result of his trying to reinforce his bargaining power by means of organizing. The new laws, granting full freedom to combine, have strengthened the economic position of the working class and have thus helped the unions to become a powerful match for the management in negotiations for collective contracts or their renewal.

The law imposes upon the employer the duty to recognize the trade union as representative, and imposes upon him and upon the union (chosen by the majority of the employees) the duty of collective bargaining. However, one must not confuse compulsory bargaining with compulsory arbitration. In other words, you find in the United States a system of industrial self-government. The collective contract is the Charter and at the same time the Code on which labor relations are

\textsuperscript{14} Cf. Arthur Lenhoff, American Labor Law, a report to the \textit{Primo Congresso Internazionale di Diritto del Lavoro}, held in Trieste, May 1951; the report was also translated into Italian, published in \textquotedblleft \textit{Il Diritto del Lavoro},\textquotedblright no 7-8 (1951).
AMERICA'S LEGAL INVENTIONS ADOPTED IN OTHER COUNTRIES

based; this is self-government at its best, in contrast to a regime in which wages, hours, and all other working conditions are forced upon the parties by administrative regulations, as they are in countries under an authoritarian government. The Swedish Statute of 1936 on The Right to Associate embodied the duty to bargain, and the Canadian Industrial Relations and Disputes Investigation Act of 1948 contains not only this feature but followed the American model also in its characteristic new concept of unfair labor practices. Whether this system will expand beyond Canada and Sweden remains to be seen. Undoubtedly the American worker has achieved many rights not granted to most of his colleagues. For instance: Every collective contract protects an employee from discharge "without cause"; every collective contract, in addition, protects his job by a seniority system. In the last few years, collective contracts in all basic industries have included a pension and retirement system. Consequently, employees need no longer dread that their old age be penurious, for the retirement and pension systems assure them a substantial addition to the federal annuity, based on the Social Insurance system. Furthermore, a great many collective contracts contain welfare features and time-off provisions, side by side with profit-sharing plans, group life-insurance and group accident-insurance arrangements, and provisions for medical care and hospitalization. There is no collective contract without provisions for grievance procedure; owing to the grievance machinery, controversies arising out of the individual employment relationship and turning mostly upon the interpretation and application of a provision in the collective contract are thus handled in a rather informal way within "the plant community." The grievance procedure, as long practice has developed it, provides for the handling of the grievance in four steps, running from the shop steward and foreman to intermediate instances and finally to the union committee and management. It is a bipartite simple proceeding, as one sees, without any expenditures and costs. The immense number of collective bargaining agreements currently in operation explains, therefore, why the United States can get along without the labor courts, which constitute an outstanding feature in the labor law systems on the Continent. The European Labor Courts fulfill substantially the same function as the contractual grievance procedure in America. However, simplified as the procedure before the labor courts is, it consumes incomparably more time than the grievance machinery, and is certainly costlier.

The aspect of these legal fields confirms once more the well-founded impression that in the polyphonic composition presented in the entire system of American law, the freedom of the individual remains the key note; the accompaniment by the Government is soft and gentle, while private initiative and self-confidence are still the dominant.

This is not to say that protective legislation has been neglected. Legislative innovations were made where neither the English common law nor Chancery made an appropriate approach to meet the great needs with which a new society turning
to industrialism was faced. The necessity for protection of mechanics and material men arose when more and more urban areas developed, and building work in the expanding cities grew to considerable proportions. The stage for unscrupulous manipulations by building speculators was set. The problem was to secure the payment of claims for the performance of labor and the supply of materials for the improvement of real property. The need for legislation resulted from the fact that the laborers and material men by necessity had to become the losers, because their debtor lacked the funds to pay from, and when finally they obtained a judgment against the defaulter, he no longer had the property, or if he was still the owner in name, others of his creditors, particularly the money lenders, had acquired legal and equitable security on the property, incumbrances which had the priority over the debts owed to the laborers and material men. It was, therefore, a legal innovation indeed, to create for the claims of the latter a statutory lien upon the improvement, endowed with the priority which relates back to the time when the laborers and material men filed a notice, which they could do upon the commencement of their work. As early as in 1791, the legislature in Maryland conceived and enacted a statute providing for mechanics' liens. Sooner or later all other State legislatures followed Maryland's lead.

The idea of this statutory lien offers once more an impressive illustration for the world-wide influence of legal innovations. This is what two German legal scholars have to say:

"When one in 1897 had made up his mind [in Germany] to approach the problem of protection [for mechanics and materialmen], the United States could look back on more than one hundred years of history of mechanics' liens ... The American law became the model for the German legislature on this subject. Thus, the law of mechanics' liens supplied striking evidence of the value of comparative law." ¹⁵

It was not until 1907 that Switzerland and not until 1909 that Germany enacted legislation of this kind.

If we turn from the protection of creditors to the exemption granted for a man's landed property and dwelling house—modern homestead legislation—on a comparative view we notice again the wide expansion of an original American innovation. The first Homestead Act, that of Texas, goes back to January 26, 1839. In the first decade of this century, the idea, adopted during the nineteenth century in all other American States, spread to Europe. It was brought to Germany by Rudolf Meyer, and to France by Abbe Lemire. As the German law in turn influenced the Swedish and Hungarian legislature, so French law became the model for

¹⁵. Emphasis is that of the quoted authors, Dr. Georg Solmssen and Wilhelm Haudek, article "Bauhandwerkerschutz" in 2 Rechtsvergleichendes Handwoerterbuch 367, 369 (1929).
The homestead idea was adopted in Canada and Australia, in Mexico and in the South American countries.

Lawyers, at least, should be aware of the fact that also new great ideas in criminal law and new criminological practices originated in the United States. It was there that the then universally accepted theory on the function of punishment, first met with sharp legislative criticism. This theory had defined the paramount ends of juridical punishment in terms of retribution and deterrence. The State was regarded as a god of vengeance, intent on inflicting humiliation and castigation on a criminal. The American reformers denied the justness as well as the reasonableness of the theory; for them, the ultimate aim of criminal sanction was to be found in the reform and re-education of the individual delinquent, whose conduct might thereupon change into a socially desirable one. This new and keen theory led its advocates to the idea that delinquents should be classified according to age groups, sex, and corrigibility. The first provisions based upon classification of delinquents were enacted in the United States. At present, the differentiation between habitual and occasional offenders and their classification seems self-evident.

When Edward Livingstone in 1820 drafted a new penal law for Louisiana, a landmark was set in the history of theories of criminal law. A great step had been taken to break down the hoary theory of vengeance and retribution, exemplified in the extremely heavy punishment in the then criminal law of England, and culminating in a dangerous mechanization of treatment. Livingstone replaced it with methods which sought the justification for punishment not only in deterrence but also in reformation of the individual and therefore—ultimately—in the promotion of social welfare.

One cannot find a more convincing evidence for the originality of the American thoughts and practices than the following two pieces of affirmation. On the one hand, German scholars have pointed to the advance made in the theory of criminal law for which the world is indebted to America. This acknowledgement is all the more remarkable as the noted German criminalist and founder of the new sociological school in criminal law, Franz von Liszt, more than half a century after Livingstone came to preach—with great success—the gospel of classification and individualization, of correction of the occasional offender and of education, not punishment, of the juvenile lawbreaker. As his famous formula holds, “we have to punish the individual offender, not his deed.” One does not detract from the


significance of his great works if one, together with the German writings, recalls that the modern sociological approach owes something, as one can see, to the American originators.

On the other hand, Alex de Tocqueville would never have been able to write the—not a—classic on democratic government, if the French Minister of Justice had not granted him in 1830 a leave of absence to study the prison system in America where, as one had heard in Europe, “for the first time the idea of reforming as well as punishing the delinquent formed a part of prison discipline.”

Four important American ideas in the province of criminal law and criminology stand out among the many which have later been adopted in part or in their entirety in other civilized countries.

In the first place, it is the idea of probation in connection with the suspension of sentence. This method, allowing an individual to escape the disgrace involved in a prison sentence and to go at large on condition of good conduct, is a social achievement of great importance, which has by now been accepted all over the world. It made its appearance first in 1869 in the State of Massachusetts. England followed in 1887, and many Civil law countries have copied or imitated it. I may mention that many States, as for instance New York, provide for two types of probation, the one with suspended sentence, as described before, the other with suspended execution of judgment.

In the second place, the indeterminate sentence must be mentioned as an original American contribution to modern criminal law. It was the logical extension of the individualized treatment of offenders; it has been fittingly pointed out that the American idea of an indeterminate sentence constitutes the strongest incentive for a prisoner to live up to proper standards, and that it shows the effect of the idea of “special prevention” at its best. The Continental writers use the term special prevention when referring to one of the aspects of the individualized treatment of delinquents, a practice under which the attempt is made to restrain the offender from committing further crimes. To say that deterrence of the people

18. A. de Tocqueville, op. cit. 258. See also Ph. Bradley's Introduction to this work (in his edition of it, cited note 4 supra) p. 11.


20. Professor Sheldon Glueck offered good evidence for the fact that the idea of a suspension of sentence can be traced back to the Pilgrim Fathers in the Bay (Massachusetts) Colony. See the reference to Glueck's research in Handbook of Probation, cited note 19 supra, p. 20.


at large (which expresses the idea of general prevention) has been a failure, is today a common-place statement. We don't know, of course, how many persons may have been “deterred”, but we do know from the number of first offenders who appear before the courts (and there are quite many first offenders) that for them, at least, general prevention has not worked.

From the Middle Ages down to the eighteenth century, European penal codes, such as the Carolina and the Prussian Landrecht, had provisions for keeping felons in prison for an indefinite period of time. However, to call the indefinite confinement of a felon after he has served his term an "indefinite sentence" is a question of semantics. When Z. R. Brockway in the Michigan Penal Law of 1869 first advocated the indeterminate sentence, it was a humanistic experiment with the objective of rehabilitating an offender by utilization of his good qualities, i.e., by his reformation. This concept is as different from the life-time confinement of a dangerous felon, such as provided for in the old criminal codes, as our democracy is from the police-state type. The indeterminate sentence was adopted in Norway in 1902, in New South Wales in 1904, in New Zealand in 1905.

A third great feature of criminal law, first introduced in the United States, can be defined as "special treatment of juvenile offenders." Here, too, the individualized socio-psychological approach characteristic of the philosophy underlying American criminal law is evident. America extended the Equity concept of the State as parens patriae, protecting the economic-pecuniary interests of its citizens, to the field of protection of and custody over delinquent children. One found that the success of the new idea depended upon the establishment of a special Court, the introduction of a proceeding suited to the treatment of juvenile delinquents, and upon the performance of a particular kind of judicial function by specially trained and understanding judges, who would handle young offenders with insight, and devise wholesome incentives to which a youthful individual can respond. In other words, the great problem was to replace punishment for juvenile delinquents by protection and guardianship. All this required for each and every case individually differing standards, depending on the case history, the environmental background, and the character and intelligence of the juvenile offender. The new idea was first recognized in Illinois, when before the turn of this century the Illinois legislature enacted a Juvenile Courts Act.

23. For Brockway see F. H. Wines, Punishment and Reformation (rev. ed. by W. D. Lane, 1919) ch. X; it should be noted that also Brockway's draft on the treatment of first offenders in the Reformatory of Elmira, New York, was an original idea centering around the indeterminate-sentence concept.

24. The Committee of the Chicago Bar Association together with the Society for the Protection of Children in Chicago prepared the first draft of a juvenile court law, in 1899.
Foreign countries have copied the American model, Germany since 1908,25 France, Great Britain, Belgium, and The Netherlands in 1912. All of Europe, including Turkey, furthermore Japan, Australia, and New Zealand followed the American pattern. Austria (in 1928) and Denmark (in 1930) have also adopted the idea of the indeterminate sentence for Juvenile Courts.

A fourth novelty must be credited to America. It lay in the field of criminology, and concerned the method of imprisonment, and the rehabilitation of discharged prisoners. In the light of history it was quite natural that the great interest in these problems arose first in the United States. At the time when capital punishment and corporeal punishment were still the main sanctions in Europe, American states, particularly under the influence of Pennsylvania Quakers, had humanized the methods of punishment; and imprisonment had supplanted capital punishment and corporeal punishment, so that the latter was abolished, and the former was resorted to only in cases of murder of the first degree. At the beginning of the Revolutionary War, in 1776, Richard Whister founded the Society for Assisting Distressed Prisoners. He was supported by his fellow-Philadelphian Benjamin Franklin. It bespeaks the historical significance of this great achievement that the leading German text on penology says that "this event marks the beginning of rehabilitation for discharged convicts in the whole world." 26

Turning to the problem of imprisonment, we find that America was the first country to set aside the idea of retaliation, and to try to develop appreciation for social values in the prisoner. Here, again, it was the application of considerations of "special prevention" to methods of imprisonment which were bound to bring about changes in accord with the new sociological views. In its day, the creation of reformatories in America in the 1860's was a great step.27 Likewise, viewed in the historical light, the introduction of solitary confinement—as early as in 1790—was a great improvement if one compares it with the unspeakable conditions prevalent in the dungeons of those days.28 As early as in 1825, a penitentiary was constructed in Philadelphia—the first of its kind in the world—with a series of cell houses extending from a center like the spokes of a wheel, and affording each prisoner light and air.29 All these prison reforms made a great impression in Europe, as one can see from previous remarks in this paper.

27. Herr, op. cit. (note 17 supra) 562.
28. Certainly, the Philadelphia Society for Alleviating the Miseries in Public Prisons, the efforts of which led to this innovation, was inspired by John Howard's suggestions. Cf. H. E. Barnes, the Evolution of Penology in Penna. (1927).
29. 1 R. von Hippel, Deutsches Strafrecht (1925) 337. The Philadelphia prison was the model for the well known Pentonville Prison near London, England.
If we turn from the criminal sanctions for violation of municipal law to those for crimes against *international law*, it is well to remember that it was in the American Constitution in which for the first time written law approached the subject of "international crimes" by declaring it to be a matter for Congress to "define and punish Piracies and Felonies committed in the high Seas, and Offences against the Law of Nations." In framing the provision, the Founding Fathers regarded the prosecution not only of piracy—the criminality of which was recognized from times immemorial—but also of all other violations of international law as a governmental problem. It is interesting to note that the moral indignation over atrocities against prisoners of war and other violations of the rules of war during the American Civil War led to prosecutions for war crimes; but it took 130 years after the signing of the Constitution before international law advanced to a formulation of what constitutes a "supreme offense against international morality and the sanctity of treaties." Such a provision was inserted in the Peace Treaty of Versailles in 1919. More than a quarter of a century later, the London Charter of August 8, 1945, listed as international crimes not only war crimes, but also crimes against peace and crimes against humanity. This was agreed upon by the United States, Great Britain, France, and the Soviet Union.

In no country has the interest in the development of international law been greater than in America. The humane sentiments so abundantly demonstrated in the criminological field in America are reflected to no lesser degree in America's role in the development of international law. Who planned and championed the creation of an international world organization subject to an international law, binding upon all civilized countries, an organization intended to be the legal machinery of the Community of Nations, and the instrument to secure peace? How the Wilsonian idea of a real League of Nations, as announced by him on January 8, 1918, was wrecked, is a matter of general knowledge. The Covenant of the League of Nations, incorporated in the structure of the Versailles Peace Treaty, was far from the original conception of its author. The statesmen representing so many countries had not yet learned to replace nationalistic thinking by such a national policy as is based upon the sense of a community of nations and the collective responsibility of the nations for permanent peace. The ineffectual practices of the League of Nations whenever faced with important decisions is a very sad chapter in the history of the 20th century. Can we hope that future historians will come to a better judgment on the United Nations, the ideological basis of which was likewise inspired by an American President in the Declaration of January 1, 1942. Strongly ideologically suggestive, as has been repeatedly pointed out in the last few years, for the realization of a real and not only verbal and ceremonial organization of the world are the words of the preamble of the American Constitution, "to form a more perfect Union."

Nevertheless, it would be wrong to deny the significance of various efforts to bring about a pacific settlement of international disputes. The first Hague Peace Conference of 1899 led to the establishment of the Permanent Court of Arbitration. In 1907, the idea of a judicial settlement of international disputes through that Court was implemented in the Hague Convention of that year, but still, despite its name, the Court was not a permanent tribunal. The project of such a really permanent Court materialized when in compliance with a directive given to its Executive Council by the League of Nations, the Permanent Court of International Law was created in 1920.

In pointing to the establishment of these International Tribunals, it is only fitting to remember that it was America which had a leading part in suggesting arbitral procedure for an adjustment of international disputes. It was in line with humanitarian ideas to conceive judicial procedure as a more just and equitable reaction against international wrongs than reprisal and warfare.

The Jay Treaty of 1794 between the United States and Great Britain signifies the turning point.31 It evidenced that statesmen had come to consider arbitration as a practical means for effecting peaceful solutions. The arbitration idea was a genuine American idea, which then by the famous submission of the Alabama claims to the Arbitration Tribunal in Geneva in 1872 molded arbitral disposition of disputes into a typical method for the settlement of international conflicts.32 Thus, a new rich source for international law was opened.33

Two more American contributions to international law must be mentioned. One deals with the law of neutrality, and the other with the law of treaties. A noted Austrian writer on international law describes the contribution of the United States to the law of neutrality as follows:

"The practice of the United States has become of greatest significance for the law of neutrality. The practice has been inaugurated by the foreign policy of George Washington. George Washington's Neutrality Proclamations of April 22, 1793, and of March 24, 1794, constitute together with the first American Neutrality Act of May 5, 1794—amended in 1818—the foundation of the modern practice of all countries in this field of international law." 34

The first American Neutrality Act of 1794, for example, imposed a penalty upon the citizen who within American territory should accept and exercise a commission to serve a foreign prince or state in war by land or sea, and laid a penal

32. 2 P. Guggenheim, Lehrbuch des Völkerrechts (1951) 600.
34. Alfred von Verdross, Völkerrecht (1937) 312.
sanction upon enlisting within the United States American citizens or residents in foreign military or naval service, and upon outfitting or arming of vessels for foreign belligerent powers. Thus, America became the originator and protagonist of ideas which in partly enlarged and in partly diluted form were adopted more than a century later—in 1907—in The Hague.

Concerning the law of treaties, it had been a traditional opinion that war *ipso facto* annuls treaties of every kind between the warring nations. It is therefore remarkable that more than one-and-a-half centuries ago in the Treaty between the United States and Prussia, an express stipulation was inserted concerning the attitude of the contracting Powers if a state of war between them should arise. The principle was announced that the citizens of one country shall be allowed to continue their living in the other country and “shall not be molested in their persons.” “And the merchants shall be allowed to remain nine months to collect their debts and settle their affairs, and may depart freely, carrying off all their effects, without molestation or hindrance.” It was also in this Treaty, more than one hundred years ahead of the Hague Conferences of 1899 and 1907, that the humane treatment of prisoners of war was stipulated.35

However, America took from the very beginning of its national existence the position that, in general, treaties—if silent on the question of the effect of war upon them—should survive the outbreak of hostilities. Justice Bushrod Washington, speaking for the Supreme Court in *Society for the Propagation of the Gospel in Foreign Parts v. New Haven*, laid down its position in 1823. This is what he said: “...whatever may be the latitude of doctrine laid down by elementary writers on the law of nations, the doctrine contended for [—that war extinguishes treaties—] is not universally true.”36 Seven years later, Great Britain’s Court of Chancery followed Washington’s view in *Sutton v. Sutton*.37 It is remarkable that Judge Washington at that early day referred also to the qualifications of the principle pronounced by him. One century later the Court of Appeals in New York in *Techt v. Hughes*, speaking through Judge Cardozo, referred to the opinion of 1823. Looking back, Cardozo said that “the older writers sometimes said that treaties ended *ipso facto* when war came,” but that “the writers of our own time reject these sweeping statements.”38 Quoting from a Swiss work

35. For the treaty of July 11, 1799, see 2 H. Miller, Treaties and Other International Acts of the U. S. A. (1931) 433.


published almost half a century after the Gospel case Cardozo remarked: "Treaties lose their efficacy in war only if their execution is incompatible with war." Justice Washington had expressed the same idea by saying that "there may be treaties of such a nature as to their object and import, as that war will put an end to them."

We may not leave the subject of treaties without pointing to two other ideas which originated in American law. Our Constitution established the supremacy of treaty law—pari passu with federal law—over state law (not over federal law). Thus, in the view of the Constitution, a treaty is "the law of the land." To appreciate the magnitude of this principle one must bear in mind that, in the main, American law in the daily practice of life is state law. More than 150 years after the pronouncement of this principle in the American Constitution, the new French Constitution adopted it in 1946. New was also the principle of self-execution of treaties, because the English and Continental international law followed the transformation doctrine. The former is explained by Chief Justice Marshall in Foster v. Neilsen. He said that by our Constitution a treaty "operates of itself, without the aid of any legislative provision," while by the transformation doctrine treaty provisions, in order to become enforceable as municipal law, must be transformed into a municipal statute. Naturally, the principle of self-execution contains the qualification that legislative action is required when the treaty provision, as is often the case, must be construed as calling for supplementary action by the legislature.

It was the great Prussian legal scholar Karl Friedrich von Savigny who paid tribute to the leading part another great legal scholar, Joseph Story, had in the creation of modern private international law. The first edition of Joseph Story's commentaries on Conflict of Laws had been published fourteen years earlier than Savigny's noted work on the same subject. The eighth volume of the latter's system of Modern Roman Law, dealing with private international law, contained in its introduction an acknowledgment of the influence which Story's work had

40. Techt v. Hughes (note 37, supra).
42. U. S. A. Constitution (1789) Art. VI, cl. 2.
44. e.g., Ellerman Lines v. Murray (1931) A. C. 126.
45. P. Schoen in 2 Strupp, Woerterbuch des Voelkerrechts (1925) 661.
had on the author's treatment of the subject. Speaking—in 1849—of the formative stage of the theories on Conflict of Laws he remarks: "This incomplete but promising stage is impressively pictured to us in the very excellent work of Story, a work which, at the same time offering a wealth of material, is extremely helpful to every scholar." 48

No-one casting his eyes over the panorama of American legal inventions can fail to consider the change of scene caused in the field of legal education by the case method. The authorship of the American, Christopher Columbus Langdell, is a matter of world-wide recognition wherever the elements of legal thinking are being taught to a more or less cupida legum iuventus.49 A present-day visitor of law schools in Western and Central Europe notices a more than merely platonic interest in the case method, and it will not come as a surprise if we hear more of its—limited—adoption there in the near future.

This discussion is only a survey without any claim of completeness. It invites further research, and as one throws a glance around the legal systems of the world, he feels the urge to look into the origin of many of their salient features. But comparative studies must be international in every real sense of the word. We should be aware of a vice-versa. The attempt of an American writer to survey the influence of American innovations upon other parts of our present legal civilization should be reciprocated by an analogous attempt to discover the effect of foreign legal ideas upon many American principles and rules of law. The greatest contribution the scientific branch of the legal profession can make towards an international approach to the great problems lies in leaving behind legal parochialism.

Judicial notice is everywhere taken of the fact that America's great technological inventions have been generally adopted. This study attempts to show that the assertion that also many American legal inventions have been incorporated in many foreign laws is not entirely without the support of good evidence.

48. 8 Friedrich Carl von Savigny, System des heutigen Roemischen Rechts (1849) p. IV.

49. These are the words used by the author of the Introductory Imperial "Constitution" to "The Institutes" i.e. that part of the great work of the codification inaugurated by the Emperor Justinian, which was destined as a new introductory text book for his law schools. "The Institutes" were published A.D. 533. Cf. H. F. Jolowicz, Historical Introduction to the Study of Roman Law (Cambridge, England, 1932) 499.