

APPENDIX II

Memorandum to Dean Miller from David F. Cavers:

SUGGESTIONS WITH REFERENCE
TO THE PROPOSED DUKE LAW REVIEW [1932]
[Proposal leading to the creation of *Law and Contemporary Problems*]

This memorandum has its *raison d'être* in the fact that there is under consideration the establishment of a Law Review at this school of law next year. So far as I am aware, no definite plans have been formulated as to the character which this publication will assume. It seems to me, therefore, opportune to proffer suggestions which may at least stimulate discussion as to the best form which may be adopted.

Ever since 1887 when the fertile brains of Messrs. Beale and Wigmore conceived the Harvard Law Review, university legal periodicals have with a surprising degree of uniformity followed the lines laid down at that time. Occasionally new departments have been added or old ones have been enlarged, but the changes have been neither radical nor numerous. In considerable measure this uniformity reflects the soundness of the original plan, but it does not follow that because one formula has operated with a reasonable degree of success it is the best which can be devised for all times and in all places. Here at Duke we are unencumbered by any traditions in this field. It seems appropriate therefore to examine the entire matter afresh and to do so first in the light of the purposes which the university legal periodical is designed to fulfill.

In my opinion, these purposes are threefold. First, the Law Review seeks to provide a method for keeping all branches of the profession abreast of the developments in current legal thinking and to afford a medium of publication of the products of scholarly research in the law. Second, the departments for student work are a valuable pedagogical device for stimulating independent student work. Third, a good legal periodical helps to put the law school publishing it "on the map" in the legal educational world.

It so happens that this third end can be achieved only by a successful fulfillment of the first. The ensuing discussion shall be directed therefore to the problems which are encountered in achieving the latter purpose in the light of present conditions and to the consideration of a suggested solution. The problem of student work will be considered in Part II of this memorandum and a solution suggested for this problem in Part III.

I

A. *Limitations of the Typical Law Review Form.*

Any Law Review is embarrassed in seeking to keep abreast of the progress of the law by difficulties inherent in the nature, breadth, and diversity of the

subject matter. A still more embarrassing difficulty is, however, created by the rapid multiplication of periodicals of this nature. The consequence of this development is that even the oldest and most widely circulated Law Reviews find difficulty in securing contributions of high standard and the newer periodicals are, of course, still more pressed. The desperate editor is frequently obliged to print speeches by Ornaments of the Bar of no permanent value and portions of treatises which will soon be published elsewhere. Again he is forced to make incessant demands upon the faculty of his school for contributions which result, if they are acceded to, in circumscribing the public which the writers may wish to reach, and frequently in depriving them of the time necessary for maturing a thoroughly scholarly production.

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B. *Proposal for a New Type of Legal Periodical.*

The essential step in departing from the traditional Law Review form seems to me to be the abandonment of the practice of accepting all suitable contributions on all varieties of legal topics and the substitution therefor of the practice of selecting for discussion, well in advance of publication, definite legal problems and soliciting contributions relating thereto. I advocate the abandonment, as not feasible, of the effort to keep abreast of the progress in all fields of law. In its place I suggest that each issue of the periodical be devoted to an intensive and, if possible, exhaustive treatment of a single legal problem.

There are a large number of topics in the law which are susceptible of approach from several legal angles. Thus, for instance, the relatively new device of the insurance trust has ramifications cutting into the law relating to trusts, to insurance, to perpetuities, and to taxation. It also raises interesting questions, not strictly legal in nature, of concern to the banker, the insurance company, and to the private individual of means. If, for example, a number of the proposed periodical were to concern itself with insurance trusts, this topic might profitably be treated in two or more monographs dealing with the legal problems and one or more with the economic.

So many topics of this nature suggest themselves, particularly in the fields of public law, criminal law, commercial law, and corporation law, that it is unnecessary to indicate other examples. Treatment of legal problems along these lines will enable the periodical to become a medium for that correlation of the law with other social sciences concerning which so much is being said everywhere and so little is being done anywhere. It might also be feasible to tie in an undertaking of this sort with some of the work to be done by the Department of Legislative Research and Drafting.

Assuming the successful effectuation of this scheme for such a periodical, the Duke University School of Law would stand as sponsor for an entirely distinctive contribution to legal literature. Each study published by it would be equally as intensive as that contained in the average Law Review article, but far more comprehensive in scope than most. The intensive character of the

treatment would distinguish it from all but the very finest treatises, and the inclusion of non-legal material would be virtually without precedent. I do not see how any branch of the legal profession could fail to profit from having access to such studies and the credit for undertaking them would redound to the Duke University School of Law even though most of the contributors were associated elsewhere.

This alternative to the publication of just another Law Review cannot be achieved with ease, but in the following subdivision of this memorandum I have outlined some suggestions with reference to a means for obtaining the necessary contributions.

C. Suggested Sources of Contributions to the Proposed Periodical.

Since it will be necessary almost without exception to obtain articles written with a definite view to publication in a specific number of this periodical, it is obvious that plans for each number must be laid well in advance of the contemplated date of publication. In the light of the discussion following it will be apparent that a year would not be too long a period for preparation. However, this should not derogate from the value of the study when it appears. Although the topics for consideration would usually be of contemporary importance, they should not be so ephemeral in character that the lapse of a year would detract substantially from their significance. Indeed the value of such a series of legal studies would lie chiefly in their importance as works of reference until superseded by similar studies in the same field or rendered obsolete by radical changes in the law or in their social and economic background.

It is patent that the supervision of work of this sort would require the attention of a man with special training in the field. Therefore, it would seem necessary that a special editor be appointed to work in collaboration with whatever permanent editorial staff the periodical might have, for each number published. He should, of course, be chosen from the ranks of the faculty as the one best equipped to conduct a study in the selected field. This, of course, would require a rotation of topics, but such a program would enhance the interest in the publication.

When the special editor (or editorial committee) undertook the preparation of his number, he would, of course, first analyze the subject into such topics as might profitably be dealt with in separate articles. Probably he or some colleague would undertake the preparation of an article on one of these. (At the least an introductory article by the special editor, serving to orient the reader, would be necessary). He would also solicit articles on such topics from those members of the profession who, he believed, might be induced to write. Here, of course, he would encounter difficulties similar to, although I believe not as great as, those encountered in the solicitation of contributions to the common or garden variety Law Review. There is, however, another source of legal writing which lends itself exceptionally to exploitation by a periodical of the type projected, viz. the graduate schools of the larger law schools.

The graduate departments of the Harvard, Yale, and Columbia Law Schools have been expanding steadily. They are attracting some of the best men in each graduating class for one or two years additional work. They are also attracting men of experience in teaching and practice. Virtually all of these men undertake some form of creative writing. Most of them—and this is especially true of those in the first category—begin their year's work with no specific project in mind. It seems all but certain that, with the cooperation of their faculty advisers, two, three, or even four of the best of these men in each school could be induced to undertake studies with a view to publication in the proposed periodical. The probability of publication would increase their sense of responsibility and enhance thereby the quality of their work. Furthermore, they could be, and would be, subjected to a greater degree of control than can be exercised over the usual contributor to Law Reviews (which incidentally publish every year a number of articles having their inception in just such work).

A similar source of contributions might be exploited in the case of the non-legal material published by the periodical. Every year the second-year students in the Harvard School of Business Administration undertake intensive studies of commercial problems. These same men could contribute much of value to studies of problems in commercial and corporation law. One need but mention the vast amount of work done in graduate departments of economics, political science, sociology, and psychology, much of which is thereafter interred in library stacks, to realize the possibilities open for supplementing the material of a strictly legal character.

The success of any such periodical would stimulate the enlistment as contributors of men outside academic circles whose work would fall into the fields discussed in its pages. Again in the larger law offices there are files of valuable memoranda, which could be tapped by persons having connections with their members, which might readily be whipped into shape suitable for publication once it were known that a study on a definite topic was desired.

It must once more be conceded that this work would demand the expenditure of considerable time and effort on the part of the editors involved. One device calculated to lessen this load and incidentally to promote the success of the scheme would be to have an editor visit the leading eastern graduate schools at the commencement of each school year for the purpose of lining up graduate students to undertake studies. Schools in the Chicago area might be reached at Christmas time. Duke is fortunate in having a faculty already possessed of a variety of valuable contacts at such schools, but the very nature of the work itself would seem sufficient to insure the hearty cooperation of those faculty members who are in a position to direct the work of graduate students.

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[In a paragraph at this point, problems of costs and revenues are considered.]

D. *The Problem of Student Editorial Work In Relation to the Proposed Periodical.*

The cost of any publication is in large measure proportionate to its size. The treatment of legal topics in the manner outlined above would, of course, call for a liberal allotment of space—certainly no less than one hundred pages, probably more. If student work is to be added to this material, size and cost might reach alarming proportions. The solution I suggest is the drastic one of eliminating all student work. The importance of student work as a pedagogical device is such that I have relegated the defense of the above suggestion on this score to the second part of this memorandum. Considering the question apart from this aspect, I feel that the balance of policy lies definitely in favor of the step I have proposed.

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Against [the abandonment of student work] must be set the advantage of sponsoring a distinctive type of periodical which strives to make a contribution different in kind from that of the ordinary Law Review. From the standpoint of the reception which would be accorded such a periodical, I think that the break with the past can not be made too clear. I should suggest, for example, that the title of the publication escape from the usual formula of "Duke Law Review" or "Duke Law Quarterly." In its place, I hazard something in the nature of "Contemporary Legal Problems."* Attention could then be focused on the one problem discussed in the issue. The coupling of student work, cutting across all fields of law, with the treatment in the leading articles of the various facets of a single problem would not only blur the departure from previous practice, but would lead to a diffusion of effort and a confusion as to the goal aimed at.

With these advantages to be gained from the elimination of student work, there remains to be considered whether its importance, from the standpoint of pedagogy, demands its retention.

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[Parts II and III of the Memorandum deal with student law review work and a plan for separate publication of student work. The author reports that this plan was adopted. Moreover, a student was invited to contribute a note or article to each symposium in "Law and Contemporary Problems."]

DAVID F. CAVERS

* Professor Cavers reports that "Law and Contemporary Problems" was proposed as title for the quarterly by his colleague, the late Douglas B. Maggs.

