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NEW FIELDS FOR THE LEGAL PERIODICAL*

I

LAW reviews are not, of course, identical; neither are peas in a pod. But, like the peas, the resemblances of one law review to another are far more fundamental than are the differences. And if one compares the reviews of 1900 to those of the present day, this statement still holds true.

The uncritical reaction to this phenomenon of persistent adherence to a form in a time of changing forms will, if hostile, brand it as a manifestation of the lawyer's bondage to precedent, his professional resistance to the unfamiliar. To the admirer of the law review, on the other hand, this steadfastness in conformity will represent nothing more than a recognition of the perfection of the form.

For one whose purpose is to explore new areas for exploitation by the legal periodical, it is obvious that an explanation of the basic similarities among law reviews is prerequisite to his task, and it is equally apparent that he must press behind the conflicting answers suggested above. But his search need not carry him far. The answer, I submit, lies in the fact that the law review is an integral part of the American system of legal education. Certainly the standardization of the law reviews is no more striking than the standardization of the schools which have fathered them. More peas in a bigger pod, or, to use a metaphor better adapted to the times and to the objects under comparison, a series of models of the same machine, equipped with interchangeable parts. Give a Harvard law professor a Columbia casebook and set him to teaching in any summer school in the land, and, with perhaps a perceptible grinding of gears, the wheels turn and another groove is cut in those "legal minds" which our machines are designed to produce. And the variations in the product are

*This group of articles is printed in the belief that a frank discussion of the merits and the failings of law reviews is timely. It goes without saying that the opinions of the authors are not necessarily those of this Review.

due principally, I believe, to the differences in what is fed into the hopper.

This is not the place to lament a lack of diversity in legal pedagogy;[1] indeed from the standpoint of this article it is distinctly a convenience for it permits generic reference to "the law school" as well as to "the law review" in the necessary inquiry into their relationship. My premise—that the law review is an integral part of the American system of legal education—is in a sense a commonplace: the preparation of notes and comments on current decisions of interest is a part of the curriculum of the law schools publishing reviews, regardless of whether scholastic credit may be granted therefor. But I believe the existence of the law review has had consequences which invest with greater significance its relationship to legal education and which must be reckoned with in calculating the possibilities for profitably expanding the scope of the legal periodical.

Before the coming of the law review, legal periodicals were few in number and, with some honorable exceptions, made little pretence at scholarly investigation of the law. Had the law review not come into existence, commercial journals would have increased in number, but I question whether the objectives of many would have differed greatly from those of the periodicals which the law review stifled. Bar association publications would doubtless have attained a more vigorous growth but certainly would never have achieved the vitality of the medical journals published, not by state or regional medical societies, but by associations of specialists in the various branches of the science, journals which derive their strength from the fact that a common interest and a shared store of special knowledge on the part of their readers enable their editors to exact high standards of contributors.

Accordingly, without the law review, the law teacher who was imbued with an urge for expression unsated by the confection of classroom notes would have found little other outlet than that afforded by the treatise.[2] But the treatise is a medium not open to

[1] Nor does a contention that some diversification is desirable imply that the standard methods are unsatisfactory for the ends which they are designed to attain.

[2] Very possibly university presses would have sponsored the publication

everyone. It demands a substantial investment which the commercial publisher is willing to make only if the assured position of its author (or, occasionally, the timeliness of its subject) affords some guaranty of an adequate market. The young law teachers, the law teachers in the smaller schools, would for the most part have been obliged to remain treatise readers, not writers. Moreover, the legal treatise is a work with well-defined limitations. It is designed primarily for use by "the average practising attorney"; that gentleman has little taste, and believes himself to have little time, for extended jurisprudential inquiries in the treatises he acquires. He will brook a paragraph of commentary accompanying three paragraphs of "law" but he will look askance upon more. Moreover, tradition, reinforced by economic sanction, requires the subject of the treatise to be broad, and breadth of subject in a nation cherishing fifty-nine courts of last resort imposes a burden of sheer compilation on the treatise writer which straitly limits his opportunities for analysis. He faces a dilemma, one horn of which is uncritical inclusion of the grist of the courts, the other horn, the construction of a system utilizing selected materials only. Only a few masters have effected an acceptable compromise.

Doubtless, in this land wherein the periodical proliferates so luxuriantly, there would in the course of time have emerged legal journals sponsored by law schools. But, ruling out, *ex hypothesi*, that happy historical accident, the law review, it is unlikely that they would have approximated its form. Instead, I suspect that these periodicals would have been built about cores of special interest, shared by law teachers situated in various schools, and that they would have developed on the periphery of the lawyer's law, in territory not dominated by the treatises. Thus, I think one can safely assume the establishment of quarterlies devoted to legal history, to jurisprudence (with a schism *circa* 1915 between the analytical and the sociological schools), to comparative law, and, as time advanced, to certain fields of public law.

Perhaps the implications of such a development can better be appraised by departing from the speculative and turning to an

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of more books of a legal character not falling within the "treatise" category than they actually have.

examination of what we have—the law review. Three points must be noted. First, the law review has enjoyed institutional sponsorship. It has thereby been emancipated from at least the crasser considerations likely to prove influential in a venture which must show a profit. Second, it has nonetheless been directed primarily to the needs and interests of the practising attorney, perhaps not the "average" practising attorney, but the man with the intellectual bent, the lawyer who likes to "keep up". In the development of this field, however, the review has escaped the restrictions imposed on treatises by reason of their form. Third, and here, of course, is its significantly distinguishing characteristic, it has included from the beginning one or more departments of student work. This characteristic merits special examination.

Student law review writing is a natural outgrowth of classroom work. Inevitably, the student approaches the case or group of cases which constitute the occasion for his comment in the same fashion and with the same objectives that obtain in his study of case law. It is true that his materials are not selected for him in advance, that he must press beyond analysis to synthesis. But the end product of his efforts resembles not inconsiderably the work which he would do—or, more accurately, would like to do—in developing a segment of his notes in preparation for a final examination.

Student law review editors ultimately become bachelors of law, and it is then that the nature of their student editorial work becomes relevant to our problem, for it is from this group that the law teachers of today and those other members of the profession given to law review writing are recruited. They who have served their apprenticeship as student editors continue to write notes and comments. These are now expanded to more formidable dimensions; they appear as leading articles, but their spirit and content remain essentially the same. This is true in the selection of subjects for consideration; that which has aroused debate in the classroom continues to challenge the interest of the law review writer—and editor. That plane of approach, peculiar to the classroom, which partakes of the judge's and the lawyer's but which is not quite that of either, persists in the law review

article. Moreover, what appears in the law reviews is influential in the classroom. The groove wears deeper.

It is true that the law review has always been hospitable to the article which departs from the formula I have indicated. There is no line of legal scholarship which is not represented by at least a few notable essays in the law reviews and, from time to time, one encounters an article which would be equally at home in a periodical devoted to one—or should I say, another?—of the social sciences. But the discipline of the student editorial board not merely fails to develop such tangential tendencies among law review writers; it develops a very positive bent for the familiar task.

One cannot be oblivious of the very real contributions to knowledge of law, and the processes that create it, which the law reviews through their emphasis upon a single type of legal writing have been able to make. Light has been shed in dark places in the history of legal doctrine. The crudities of treatise system-building have been refined. The very number of contributors has made dogmatic statement hazardous. As time has narrowed the new fields for exploitation in the law review manner, intensive cultivation of ground already broken has set in, a tendency which I believe must be regarded as a causative factor of very real importance in the development of the realist movement in contemporary legal thought in this country. The finely woven web becomes a loosely strung net when subjected to microscopic examination.

II

There is no need here to enumerate all the entries on the profit side of the law review ledger. It is more pertinent to inquire at what cost they have been obtained. Briefly, the price exacted is a restriction of the range of inquiry to the exclusion of other important objectives of study. This manifests itself in two forms. In the first place, the intimate relationship of law review writing to the content of the law school curriculum results in a redundancy of articles in some fields of the law with a corresponding paucity in others which, however important in the actual practice of law, fall without the compass of the curriculum. But this may not be serious. Judge and counsel, familiar with the law review

approach, may find occasion to utilize it in their own explorations in the areas the law review ignores.

Secondly, and far more consequential, is the fact that the plane of discussion is restricted. The law review looks upon law as the concern of courts and lawyers; it keeps within the framework of the body of legal rules and techniques which happen now to prevail within some or all of the forty-eight United States. It accepts the restrictions upon inquiry which trammel the lawyer and the judge and, less obviously perhaps, the legislator. But so significant a social force as organized official behavior calls for constant scrutiny by those free from such inhibitions. A legal rule represents an attempted solution to a problem in human conduct. Approached after an examination of that problem, the tentative character of the legal solution becomes apparent. Other possible solutions may suggest themselves: a modification of the rule itself, its radical change, the substitution of a rule controlling conduct in place of a rule for resolving the controversies that uncontrolled conduct engenders, or, perhaps, the complete withdrawal of the problem from the area of legal control. Usually it will also become evident in such an inquiry that the existing legal rule is but one of many forces operative in the field. It is only by reference to these alternative legal solutions and to the non-legal controls that a true appraisal of the existing rules can be made and, where these fail to achieve the not impossible "ought", that better solutions can be devised.[8]

So dominated by professional interests has been the study of the Anglo-American system of law that it is rarely in its literature that one encounters a critique which does not derive from

[8] The study of Comparative Law, which operates "to counteract the tendency of law students toward a smug provincialism, toward the acceptance of the accidents and perversities of a single imperfect system as a universal norm" (to quote from the 1935 Report of the Dean of the Columbia University School of Law), is perhaps the closest analogy to this approach to be found in the American legal curriculum. And Comparative Law is notoriously a step-child in most of the few schools where it is offered. Moreover, while the problems set for study in Comparative Law are based on a social or economic problem common to many nations rather than on a given rule of law, there will be, of course, a tendency to focus inquiry upon existing legal solutions to that problem to the exclusion of the non-legal and the hypothetical.

the system criticized. Bentham stands alone among the major figures, but the naivete of his psychology and the idiosyncracies of the man and his style have operated to overshadow his major contribution: the willingness to cut beneath existing law in order "to investigate the desires, fears, passions and opinions of the human being and to discover from thence what means an able legislator can employ to connect the private happiness of each individual with the observance of those laws which secure the well being of the whole." [4]

For a time sociological jurisprudence promised to free legal scholarship from its too intimate relation to the work of judge and advocate. But the sociological jurists, having once assumed the role of social engineers, thereafter contented themselves with the study of judicial brick-laying in this age of structural steel. More recently we have had the "functionalists" from whom one might have anticipated a bolder course, but a shift in emphasis led to a change in their direction. They emerged as "realists", and many have become bemused in the contemplation of the bricklayer's technique and his accompanying psychological processes, without a comparable concern for the structure.

This absorption in the work of the appellate courts [5] has not been dictated by the philosophical assumptions of these groups; quite the contrary is true.[6] But I do not think that bondage to

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[4] The quotation is not, as might readily be supposed, from Bentham's own writings, but instead is from a comment by Gibbon to the introductory chapter in Blackstone's Commentaries, "Of the Nature of Laws in General," quoted in Holdsworth, *Gibbon, Blackstone, and Bentham* (1936) 52 L. Q. Rev. 46, 50. (Gibbon's comment formed part of a criticism of Blackstone for following a "high *a priori* road" in that chapter.)

[5] Llewellyn in his survey of the characteristics of the "new fermenters" has conceded that "these innovating realists brought their batteries to bear in the first instance on the work of the appellate courts" and that "that study still remains their potent stimulus." Llewellyn, *Some Realism About Realism* (1931) 44 Harv. L. Rev. 1222, 1236, 1250. I have not marked much evidence that a longer range is now being sought by many of the artillerists. Rather my impression is to the contrary, that some of those who scored hits at the longer distances, having displayed the effectiveness of their gunnery, are now content to await reinforcements which seem to be distressingly slow in making an appearance. Perhaps the distractions of Washington are responsible.

[6] Indeed it is in their writings that the need for a broadening of the hori-

"prior thinking" suffices to explain the phenomenon.[7] The law review's virtual monopoly of the field of scholarly legal writing must bear a fair share of the responsibility. There has been neither an apt and adequate medium for the publication of studies departing from the law review pattern nor the incentive for the undertaking of these studies which such a medium would afford. Courts are articulate; the lawyer and the legal commentator, still more so. The "client", unfortunately, is not. The stuff out of which law review writing is made is at hand in the law libraries, but material for the approach to law which would not be so circumscribed is sadly lacking. Nor can it often be found by stepping across the campus to the general library's collection of works on economics, sociology, and political science, for investigation will soon reveal that their writers have tended to set for themselves problems of such breadth that in their discussion the very concrete, the very specific considerations which are of vital concern to the student of law are dismissed in a sentence or paragraph. Coupled with this tendency is the very understandable practice of the social scientists to veer away from matters with substantial legal content. They render unto the lawyer, what is the law's, and that usually in too abundant measure.[8]

Occasionally, with the high purpose of interrelating law and the social sciences, the resources of a foundation are tapped and facts are found. These are assembled with scrupulous care, correlated, charted, and all too frequently forgotten. Somehow the asepsis practiced by the fact-finder, in the name of science, often sterilizes also the yeast of imagination whose fermentation might lead to something more significant than another entry in a library catalog. Moreover, foundations are not overly numerous; fact-

zons of the legal scholar has been most forcefully and cogently presented. Certainly this paper derives from them.

[7] Llewellyn suggests this explanation in the passage from which the first of the two quotations in note 5, *supra,* was taken, but it would not be fair to assume that he would insist upon this as the only operative factor.

[8] Seligman's elaborate, two-volume study, Economics of Instalment Selling (1927) exemplifies the inadequacy, from the legal scholar's standpoint, of most works relating to business practices which are not prepared with a view primarily to the actual (and possible) legal implications of the practices considered. In most instances, he carries the legal inquirer to the threshold of his problem.

finding is long and funds are fleeting. Salvation does not lie this way. And, after all, why must the legal scholar demand that exactitude of knowledge which neither the law-maker nor those for whom the law is made enjoy in the conduct of their affairs? Is it not enough that the legal scholar know what the manufacturer knows, what the salesman, the insurance agent, the trust officer, the realtor, the mortician, the social worker—indeed, "the average practicing lawyer"—knows about the affairs in which daily he must participate and upon which the law impinges?

That significant contributions could be made by those who did not await a research grant to liberate them from the confines traditional to legal scholarship may be made more evident by reference to a specific field. Consider that intricate combination of legal devices known as the installment sale. One may analyze the Uniform Conditional Sales Act and the decisions antedating and interpreting it with barely a glimmer of the reasons which led the not-conspicuously daring Indiana legislature to enact last year the sweeping Retail Installment Sales Act.[9] But talk to sales finance company officials, to automobile dealers, to the proprietors of furniture stores, to Better Business Bureau executives, to social workers, to the officials of small claim courts, and a congeries of complex and interrelated problems is revealed. The simple prescriptions of the Uniform Act will then seem as efficacious to resolve these conflicts as is sulphur and molasses to correct some obscure glandular imbalance. The Indiana Act, on the other hand, will seem a hasty improvisation. This is not a field for buckshot reform. Industries of the billion-dollar magnitude are affected, as are millions of consumers with purses of slender dimensions. Nor can the problem be left to the economist alone for solution; the lawmaker is the surgeon, and it is one trained in the law who can best determine whether a legal operation is indicated and how it is to proceed. Moreover, he can-

[9] Ind. Acts 1935, c. 231. Last fall this act was held unconstitutional (without opinion) by a three-judge federal court. On appeal to the United States Supreme Court, plaintiff's suit for an injunction restraining the enforcement of the act was dismissed on the ground that plaintiff (which had done an aggregate business of $7,000,000 in Indiana in 1934) had failed to show that the matter in controversy exceeded $3,000. McNutt v. General Motors Acceptance Corp., 56 Sup. Ct. 780 (1936).

not await the elaborate diagnostics of the social statistician. What he might, and should, have is the opinion evidence, the common-sense judgments, of those informed by experience, and such aid in analysis and appraisal as the economist and the sociologist can afford. And it is only by excursions into the legal hinterland that these can be procured.

The law today teems with problems of this sort. They cry for the disinterested consideration of the legal scholar who is inventive and who is unimpeded by too nice a regard for the jurisdictional lines of his calling or for those which, on paper, divide "is" from "ought". Yet he must first surmount the obstacle of his own ignorance. Fortunately much of the information which he lacks he can bring together himself; that inarticulate "client" may often welcome a ghost writer. But his efforts could be far more effective if they were seconded by those of editors who can search out those laymen willing to speak for themselves and who can direct the latter to the topics on which information is needed. Such lay testimony may be partisan, distorted, opinionated. So much the better. Problems arise because people are partisan, inaccurate, and opinionated; to ignore that fact is to oversimplify. To press passionately-held beliefs through the filter of objectivity may result in understatement. What is needed is a forum for their presentation and a stimulus to secure it. Corrective criticism will follow.

This is all the more important because of the fact that today so many of these problems lie in the domain of action. Now, as never before, accumulated stresses must be relieved. But where action takes legal form, it is the product of many wills, and for that action to be based on informed opinion it must have been preceded by a period of discussion in which proposals have been exposed for appraisal, amplification, and amendment. The medium through which this can be best effected, at least in the initial stages, is the printed word; more specifically, the periodical.

Given periodicals which are deliberately directed to the consideration of legal problems in the broader sense which has been suggested, periodicals which are sponsored and directed by disinterested institutions, and to which not only the trained legal scholar but also the informed layman and the student of the re-

lated social sciences contribute, and in time there would be effected, I am confident, a very real and a needed extension in the range of legal scholarship. And in the fruits of this development the legal profession would obtain a direct and considerable share.

This is neither a call to new crusades or to a newer jurisprudence. That the development in legal scholarship which an extension of the field of legal periodicals would at once stimulate and implement, would contribute to legal "reform" is, of course, apparent. But the word "reform" connotes narrowly the extirpation of existing abuses, whereas I should anticipate, as the principal contribution of the new periodicals, the fostering of a more genuine understanding of what law is—and is not—doing; what it can—and cannot—do; what it should—and should not—do. Such understanding is prerequisite to the intelligent administration of the existing law and, perhaps more importantly, to the intelligent direction of legal growth, not in the interstices between hardened lines of judicial decision, but from the bed soil of human conduct.

III

Those readers who have borne with this prolonged and abstract exordium are entitled to demand some specification of ways and means. And if they happen to be acquainted with the periodical, *Law and Contemporary Problems,* and with my editorship of it, they may now be waiting, with varying degrees of resignation, for me to prescribe the form it takes as the device whereby the ends which I have depicted are to be achieved. It is true that *Law and Contemporary Problems* was established and has been conducted with those ends in view,[10] and my personal experience as editor has reinforced my conviction of their significance. But that experience has also confirmed what was evident enough from the beginning: that the symposium form which it employs is not well-suited for general use. It compels a shifting of the field of inquiry with each issue; that renders it necessary for each issue to be more or less self-contained; and this in turn narrows

[10] And with an acute consciousness of the disparity between objective and achievement.

the number of subjects which can be treated. Moreover, the editor is limited in the enlistment of contributors to those persons who happen at a particular time to be at liberty to write. Many who might have something of importance to contribute are found enmeshed in prior commitments. Finally, nearly all the articles must be written "to order". Such a periodical cannot provide an always-available outlet for the writer who is working on a topic which, however admirably adapted to treatment therein, does not happen to coincide with the current editorial program.

There are, I believe, considerations which justify the existence of *Law and Contemporary Problems,* which might justify the establishment of one or perhaps two more journals organized on similar lines, and which amply repay the occasional resort to the symposium form by the law reviews. But since my concern is with a broader program, in which the symposium form can play only a minor rôle, little would be gained by a recital of these considerations by a biased judge.

The type of periodical which would best subserve the ends which I believe the law review has neglected is one which would be limited to a specific field of human activity but which would develop all its aspects which are properly of concern to the lawyer, the "client", the judge, the legislator, and the legal scholar (embracing in the last term, the student of law as a social force as well as of law as a professional discipline). Certainly such a periodical would not exclude the typical law review article. Nor, on the other hand, need it publish the "non-legal" indiscriminately. But no canon of selection, general in application, can be formulated. How far behind decisions and statutes such a periodical could go and still rightfully remain a *legal* periodical is a matter which can be determined only in experience. It is enough for present purposes to recognize the wide extent of the undeniably significant which the law review does not reach.

Some examples are called for. To suggest one, I believe there is a very considerable need for a legal periodical of this sort devoted to banking. There is a steady, if not very large, stream of articles in the law reviews relating to banking problems, a stream which, however, tends to flow in a few well-defined channels, leaving bare wide areas of untouched problems. Obviously

the relation between legal rule and business practice in the field of banking is an intimate one, a fact which points not only the necessity for their concurrent consideration but also the inevitability of interactions which are productive of continuous growth. It is a field wherein the respective jurisdictions of public law and private law are no longer easy to demarcate and wherein the progressive enlargement of the former is certain. In the legal problems of banking, moreover, the "client's" point of view is more readily obtainable than in most fields because of the fact that the banker and his customer cannot escape an awareness of the incidence of law upon their transactions.

A journal devoted to real estate transactions would have an equally rich field to exploit, a field which could easily support two or three publications. Certainly the scope of such a journal would range well beyond the confines of "Property I" and "Property II" in the typical law school curriculum. Mortgage problems, tax collection problems, building and zoning ordinances, subdivision development, city planning and low-cost housing schemes, all might fall within the territory to be covered.[11]

Another opportunity for specialized periodicals lies in the field of corporate practice and, particularly in these days, of corporate reorganization practice. Here there is no dearth of law review writing, but there is a pressing need for a treatment of aspects of the subject which, however pertinent to the lawyer, the law review approach tends to rule out; that of accounting, to mention but one. Consider, too, the wealth of material which would be amassed in a few years by a department in such a journal, devoted to the analysis of corporate reorganization plans, accompanied by so much of the history of each reorganization as is discoverable without benefit of subpoena. In happier days, merger and consolidation plans could be substituted for reorganizations. Such a journal, moreover, would constitute a standing invitation to the student in this field to utilize the stores of sig-

[11] A periodical devoted to this field (and also to that next considered) would afford a medium for the treatment of problems in drafting legal instruments. Much useful knowledge relating to drafting technique, always a factor of significance in the development of law, is locked in the files of the larger law offices. The resourceful editor could, I believe, succeed in inducing some of the legal architects to discuss their work and its problems.

nificant facts which are being accumulated as a consequence of governmental investigations and the routine activities of the S. E. C.

To continue an enumeration of the many and varied fields which could be exploited in this fashion would not be complimentary to the reader's imagination. Without recourse to those more obvious fields for the specialized periodical, such as legal philosophy, legal history, and comparative law, I am sure that he as well as I could add a score and more of subjects to the three I have sketched above, even though he were to apply the exacting criterion that the subjects indicated be such as to attract enough readers to carry a substantial portion of the publication costs.

IV

In suggesting somewhat more specifically the possible content of such periodicals, I have not as yet discharged my obligation to specify ways and means. But before proceeding to the severely practical problems of organization, let me first survey briefly some of the specialized periodicals which now exist.

From the standpoint of sponsorship, these seem to me to fall roughly into three categories, those published by law schools, by associations, and by commercial houses. Of specialized periodicals which are sponsored solely by law schools there is but one, *The George Washington Law Review*, and its field, federal public law, is too broad and varied to make possible any marked deviation from the conventional in its development. Two periodicals, *The Air Law Review* and *The Journal of Air Law*, although the organs of associations, are sponsored by law schools.[12] The former of these periodicals holds staunchly to the law review form, the latter—and, I think, to its advantage—is less faithful. That neither furnishes a very satisfying example of the type

[12] *The Air Law Review* is the "Official Journal of The American Academy of Air Law and The American Section of the International Committee on Radio." It is "issued" by the New York University School of Law and "edited" by that institution and by the Catholic University and the University of Washington Schools of Law. *The Journal of Air Law* is "edited" by the Northwestern University and the University of Southern California Schools of Law "in conjunction with" its publisher, the Air Law Institute which the former law school "fosters."

of periodical I have in mind may in part be due to the rarefied substance they exploit. The good earth would prove more fertile. The excellent *Journal of Criminal Law and Criminology* is the organ of the American Institute of Criminal Law and Criminology, but the Institute's intimate relation to the Northwestern University School of Law virtually brings it into the same category.[13] It is in this periodical that the union of diverse disciplines seems to me to have been more fruitfully achieved than in any other legal periodical.

Of periodicals with association sponsorship, *The Journal of the American Judicature Society* and *The American Labor Legislation Review* deserve mention.[14] Slender as their dimensions are, the reader will find in them more of value in their respective —and important—fields than he is likely to discover after tedious researches in the law reviews. When one considers how much greater their contribution would have been had they been developed on the law review scale, one grudges the reviews their more generous patronage.

Among the commercial periodicals, there are few that are noteworthy; several are merely compilations of recent cases, digested and undigested. Outstanding among them is *The Tax Magazine,* wherein one finds the policy of drawing on the knowledge of the economist, the accountant, and the administrator as well as the lawyer. An interesting variant is *Trust Companies* which combines material which is of very real value to the trust lawyer—and should be to the legal scholar—with much that is essentially trade association stuff.[15] *Corporate Reorganizations,* on the other hand, is narrowly legalistic.

Association sponsorship provides a backlog of subscribers and thereby insures a certain financial stability to the enterprise. But

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[13] The Northwestern University School of Law "fosters" the Institute. The editor of the *Journal* is a professor of psychology and the managing director, a professor of law, in Northwestern University.

[14] Mention should also be made of the quarterly *Journal of the National Association of Referees in Bankruptcy* which, however, devotes much of its space to papers presented at the meetings of the Association and to reprinted articles.

[15] Yet valuable material may be found in the publications of trade associations.

the existence of commercial journals suggests the existence of a potential demand which the specialized periodical could awaken;[16] a demand which, incidentally, would not be greatly affected by law review competition. The law school which launched a new periodical treating of a subject matter which affected directly (and, better still, pecuniarily) the interests of a substantial group of lawyers and business houses could count with reasonable certainty on operating it at a relatively small expense if, at least, the school could absorb the cost of the editor's services by reducing his teaching load. In many instances, a profit, after a few years, could be fairly predicted.[17] Financial considerations should not, therefore, be a deterrent to those schools not forced by the depression to operate on a bare subsistence basis.

The organization of the editorial work presents more of a problem. Obviously the editor's task would call for specialized knowledge, continuity in office, and the active direction of the periodical. His knowledge—and, above all, his interests—could not be compartmented by the scope of his teaching assignment. He would have to know the men in the legal profession and outside it who were the leaders of thought and action in the periodical's field. To discharge his duty most effectively, he would be obliged to ferret out and then persuade, inveigle, and cajole people into contributing who had never before written for publication. In so doing, he would have to be prepared on occasion to rewrite articles from stem to stern and leave their authors happy in the illusion that only minor modifications had been undertaken or that they themselves had effected them.

This is not work for a student editor, however brilliant. Indeed, on the score of knowledge, it is doubtful that many law professors would fill these specifications today. They would

[16] The ten-dollar subscription price of *Corporate Reorganizations,* a not overly-large publication, is suggestive.

[17] The circulation manager's problem in the case of the specialized periodical is quite different from that presented by the law review. Competition would, at first at least, be insignificant; a defined group could be approached, and with respect to many subjects, this group would not be restricted to the legal profession and its libraries. In the case of periodicals devoted to such subjects as legal philosophy or history, a considerable subsidy would be essential. The Association of American Law Schools seems an appropriate body to provide this support.

soon learn, however, for, educational as such a periodical would be to its readers, it would be far more so to its editor. He would soon find himself an Authority, a Person of Importance, in his field. He would be subject to the occupational hazard of after-dinner speeches and the presentation of papers at the Annual Meetings of Associations of This and That, experience which, however painful, would contribute materially to the performance of his job.

To vest in a single man (possibly with student editorial assistants) sole responsibility for the conduct of such a journal might be of doubtful wisdom. The cooperation of others expert in the field should, if possible, be enlisted. This has been done in the case of *The Air Law Review, The Journal of Air Law,* and *The Journal of Criminal Law and Criminology.*[18] Precisely how these editorial set-ups operate, I do not know. Certain it is that arrangements of this character breed problems which are foreign to that house organ, the law review; but that they are susceptible of solution is evidenced not only by the publications named above but by the numerous learned periodicals in other fields which operate on a similar basis.

In the large universities a special opportunity would be afforded for the cooperation of the law school with those other departments of the university interested in the subject matter of the periodical.[19] Such collaboration would be peculiarly advantageous in breaking down that isolation which characterizes the law school's position on almost every campus. That stresses and strains would be encountered in the process no one at all familiar with *homo academicus* could deny, but that to experience them would be unwholesome to the participants is less certain. May it not be that that delicate sensitivity to the infringement of prerogatives which is characteristic of the professor (and, incidentally, of the bureaucrat) is due in considerable degree to the fact that his sphere of activity is defined for him in advance and from above and is not worked out by the pragmatic process of give-and-take normal to competitive existence?

[18] See notes 12 and 13, *supra.*

[19] I have resisted with difficulty the temptation to make this suggestion concrete by "naming names," but this may, I think, be safely left with the knowledgeable reader.

The "Board of Advisers" which adorns the mast-heads of so many learned periodicals is often no more than harmless window-dressing, but in periodicals of the sort envisaged it is quite probable that such boards would prove of genuine utility to editors, at least in the developmental years when the making of wide contacts would be essential.

The rôle of the law student in a faculty-edited periodical of this sort presents an interesting question to which the answer would depend not a little on the form found most desirable for the periodical. It is possible that some periodicals would include departments of notes and comments similar to those in law reviews, a practice attended by the danger that this would fortify the tendency—always to be consciously resisted — for the periodical to slip back into the conventional law review pattern. In those schools which already maintain law reviews a better practice would be to encourage the contribution of leading articles by student editors of the law review. There is no need to apologize for student work by relegating it always to a smaller type. Student work in the better reviews will certainly stand comparison with the average leading article; indeed the principal defect of the best of it is attributable to the convention of distributing the discussion between text and annotation with the result that the former is often skeletal and the latter necessarily discontinuous. The leeway afforded by a leading article would discourage this blighting artificiality.

The faculty editor could undoubtedly profit from the assistance of one or more student editors in the routine—but not for that reason mechanical—work of his office. And even where student comments on recent decisions were eschewed, a department of current decision digests, conducted by students, would often be well worth-while. From a pedagogical point of view the necessary scrutinizing of the advance sheets would have the special virtue of compelling the employment of criteria for the selection of the decisions to be reported which would be distinct from the definitely scholastic standards now predominant. The "nice" case for law review comment is not always the significant case from the standpoint of the operation of law in a given field.

It should be emphasized that the establishment of a specialized

periodical is not inconsistent with the maintenance of a law review. Indeed, since so many law schools now publish reviews and since there is little likelihood that these reviews will presently be abandoned or reorganized, the principal opportunity for the specialized periodical must lie among law schools which will continue the publication of law reviews. Consequently, those legal educators who prize the law review primarily as a pedagogical device (i. e. as a means of according special training to that portion of each class which needs it least[20]) will not have to disband their student law review editorial boards. From these boards can be recruited such editorial assistance as the specialized periodical may require.

Some law schools which now publish a law review may lack the faculty personnel to publish a second periodical or the funds to finance its publication during the developmental years. But certainly this is not true of at least a score of law schools. The innovators would, in all probability, have to come from this group. With the success of a few specialized periodicals, smaller schools might be emboldened to enter the field, perhaps some might even liquidate starveling reviews and start afresh. However, there is no reason to suppose that the specialized periodical would ever proliferate as has the law review nor take the place which the latter rightfully holds.

V

There would be little likelihood that the new periodicals would fall into a single pattern. There would be experimentation, mistakes, and occasional failures. There would be an unremitting challenge to the resourcefulness and the ingenuity of the editors

[20] Limitations of space and subject (and the hope that elsewhere in this symposium the problem will be discussed) lead me to abstain from more than noting the inconsistency in the position of those who are most prone to place an extremely high value on law review writing as a form of student training. Granting that the special form taken by such writing places a premium on certain capacities which are not widely distributed, nevertheless some comparable substitute for law review work should be found for the B, C, and D men in each class. They present the more formidable pedagogical problem, but this problem most law schools, complacent in the successes of their law review men, have chosen either to ignore or to deal with in makeshift fashion.

(harried souls but not drudges). And there would be successes far more exciting than perpetuating great traditions or supplying the acquiescent members of a state bar association their quarterly ration of legal thought.

Consider the successes. A periodical which met specifications such as I have sketched with respect to objectives, content, and organization, would, if wisely conducted, gain in influence and vitality with every year of its existence. The impact of the ideas and proposals presented in its pages would be far more direct than that of those now appearing in the law reviews since their incidence would be upon a group of subscribers who had subscribed because they were interested in these ideas and proposals and were most likely to be affected by them. Each issue of, say, a hypothetical *Life Insurance Law Quarterly,* would be awaited with interest—and occasionally, perhaps, with anxiety—by the legal counselors of the insurance companies, by attorneys with large insurance practices, and by forty-eight insurance commissioners. They could not afford to ignore it. They could not fail to profit from it.

To be sure, such readers would not look upon the specialized periodical as an instrument for the reorientation of legal study or even as an agency for law reform. To them, such a periodical would appeal because it would come closer to their daily concerns than the law review, because it would deal with aspects of their problems which the law review writer has ignored, because, in short, it would be more "practical." Unfortunately, what this appraisal gained for a periodical in subscriptions, it would, for a time at least, cost in prestige-value. For that which the man of affairs esteems as "practical," the schoolman tends to reject as not appropriate for the concern of scholars. However, the destruction of this false antithesis would be one of the goals of the specialized periodical, and the editor who persisted in his endeavor to secure articles diverging from the law review stereotype would find his task steadily growing easier. Each successful exploration of the *terra deserta* between the well-tilled fields of the legal commentator and the broader ranges of the social scientist and the "business" writer, would afford a guide to the next adventurer. As these accumulated, the gravitational pull

of the customary would be lessened. Students (in the schools and out) would begin, without editorial urging, to set their own observations down on paper. A demand will always tend to generate its own supply, and, as supply increases, standards of quality can be raised.

The cumulative effect of a number of such periodicals upon legal education in America would be great. The sociological jurists, the functionalists, and the realists (when not preoccupied by excursions into the judicial psyche) have aroused aspirations for a revitalized legal order, but their plans are ill-defined and they have neglected the essential business of supplying the raw materials of knowledge out of which it is to be fashioned; indeed they have tended to look askance on all such materials which have not first been scientifically refined. It is not surprising then that most of the students whom they instruct and on whom they must rely for the realization of their visions, remain preoccupied by essentially the same concerns that absorbed their student fathers and grandfathers, having acquired little that is fresh save a certain verbal jauntiness in the presence of old gods. Nor is it surprising that some of the aspirants themselves become weary of well-wishing and turn, in a new manner, to the old, familiar tasks with which Ames, Minor, Langdell, Greenleaf, Story, and Kent busied themselves at a time when those tasks far more imperatively needed doing.

The business of assembling those materials which are essential to the realization of law's rôle in the modern world should be the responsibility of the law schools. This work transcends the initiative and energies of isolated scholars. It calls for systematic and persistent and imaginative effort and a means whereby its fruits may be made available in the present and be stored for the future. For its special objectives, the law review has demonstrated the importance of the periodical as such a means. Its success should, in coming years, be a stimulus to creation rather than to further imitation.

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