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The West Virginia Law Review: Law Reviews and the Courts

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EDITORIAL NOTE

THE WEST VIRGINIA LAW REVIEW LAW REVIEWS AND THE COURTS

It is with hesitancy that your editor-in-charge claims the prerogative of utilizing these pages for an editorial communication with the reader. Rarely is there a need to do so. Most good things are self-explanatory—if obvious enough—and only default needs apology. But that is my principal justification. During the past publication year our issues appeared late and irregularly. Our excuse is that we changed horses mid-stream.¹ In our effort to terminate the customary delay, we had to risk the additional delay due to a change in printing arrangements. Our gratitude goes to the University Administration, the State Director of Purchases and the Executive Committee of the West Virginia Bar Association and its chairman, Walter F. Ball, Esq., for making possible the switch to the Rose City Press of Charleston, W. Va., which it is our hope will permit us to render prompt service to the members of the West

¹ This apology is to be sung to the tune: "The ol' grey mare, she ain't what she used to be."

Virginia Bar and our other subscribers.² The difficulties of the past years had been aggravated by the fact that we—gladly—returned to a quarterly publication. Without lowering our traditionally high standards,³ our productivity had to be increased 100%. That this has been accomplished is due to the efforts of our out-going student editorial board, Messrs. James K. Brown, Billy E. Burkett and John L. McClaugherty. I wish to note their endeavors with deep gratitude. But particular appreciation should be expressed to Professor Marlyn E. Lugar, my predecessor in office, to whose stride we owe it that we could return to a quarterly publication.⁴ It was with pleasure that the editors assumed the increased obligations, and with equal pleasure did the newly elected editorial board, Messrs. Charles M. Cunningham, Robert W. Friend and Herbert G. Underwood, pledge all their efforts for the coming fifty-ninth publication year. Indeed, as long as we are fortunate enough to have the continued services of our irreplaceable business manager, Mrs. Louise F. Winterbottom, no hurdle in the way of progress will be insurmountable.

The reader's attention is called to three new, or revived, departments of the *Law Review*:

(1) The President's Page: The President of your West Virginia Bar Association will discuss administrative and policy matters of interest to all practicing attorneys in West Virginia in every issue of the *Law Review*. The first President's Page appeared in the last issue.

(2) Abstracts of Recent Cases: Due to the increased litigiousness of Americans, West Virginians included, it is impossible to discuss all important new cases of interest in our Case Comment department. Many cases demanding thorough and detailed discussion had to be omitted in the Case Comment department. Henceforth, rather than to omit these cases entirely, we shall publish brief abstracts with crossreference to past decisions or text material in point, as an additional service to the practicing attorney.

² The *West Virginia Law Review* is being sent to countries on all five continents.

³ One recent example: a student note on *The Law of Safety Deposit Boxes*, 57 W. VA. L. REV. 74 (1955), by Messrs. Clark B. Frame and Winfield T. Shaffer, was reprinted, with our permission, as a leading article at 72 BANKING L.J. 694 (1955).

⁴ See 71 ANN. REP. W. VA. BAR ASS'N 50 (1955). Gratitude to the West Virginia Bar Association for the financial assistance which made the resumption of full publication activity possible, has been expressed at 58 W. VA. L. REV. 75 (1955).

(3) The Book Review department: At the risk of incurring the wrath of publishing houses, I should like to say that in publishing book reviews it is not our intention to sell books. Whatever the benefit to the publisher might be, it is the purpose of our book reviews to give brief descriptions and criticism of recent works which concern the practitioner, to point to new and interesting legal and related developments, to whet the literary appetite and to suggest new research tools and sources. Some endeavor will be made to obtain reviews of suitable law books by non-legal experts, physicians, economists or sociologists, whose ideas may throw new light on our legal problems.

None of these innovations are startling. But we are willing to listen to our readers' suggestions, and we do appreciate any letter to the editors with suggestion or criticism, however little constructive, or however much destructive.

Turning from the provincial to the universal, I find it my duty to call attention to a matter of the utmost importance to the practicing attorney, a development which has long been felt, and which should now be explained: It is the vastly increased influence of law review writing on the development of law.

Not so long ago the observation was made that "[a] search of the Index to Legal Periodicals will reveal no more than a handful of articles *about* law reviews published in a law review (certainly an appropriate place for such speculation)."⁵ Nine years later this still holds true, and the inference lies close that law reviews seem to have a greater concern for the law which they review than for themselves. That should be commendable rather than condemnable. But according to an even more recent law review reviewer the opposite is supposed to be true.⁶ Indeed, if what this critic tells us is correct, then the law reviews are being published for the sake of publishing law reviews, and nothing could be more self-centered.⁷ It is gratifying to note that despite such criticism, which is both old and new, the law reviews have continued publishing much in the way they did one, two or three generations ago,

⁵ Marsh, *The Law Review and The Law School: Some Reflections About Legal Education*, 42 VA. L. REV. 424 (1947).

⁶ Mewett, *Reviewing the Law Reviews*, 8 J. LEGAL ED. 188 (1955).

⁷ Mr. Mewett, *supra* note 6, is entitled to credit for some worthy suggestions. Thus, we are agreed that the trend toward publication of specialized law reviews in various fields of law is sound, if kept within limits, both as to compartmentalization and number of special law reviews for any particular field. For instance, in the field of Criminal Law, with its appendices (Procedure,

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with little fundamental change.⁸ But, in so doing, have they done anything for the development of law and legal education?

To start with the latter, there is virtually unanimous agreement that supervised law review work, analysis, research and exposition, is, and always has been, an educational device of incomparable effectiveness. Were this not so, law firms would long have ceased giving employment preference to former law review editors. Due to such universal recognition, I can pass to the next point. How did law review writing aid legal development, if at all?

Teachers and law review editors were not surprised when in 1938 *Swift v. Tyson* was overruled on account of the "recent research of a competent scholar" published in a leading law review.¹⁰ Even before *Erie R. Co. v. Tompkins* references to law review articles had not been infrequent in the opinions of the federal and state supreme courts. But since then such references have increased manifold. Thus, in the current (76) volume of the *Supreme Court Reporter*, with eleven advance sheets and 558 pages published at the time of writing, the United States Supreme Court had cited twenty-two law review articles and comments, *i.e.*, both signed and unsigned (student) work, and many of these citations are not even to material in the so-called "leading" law reviews.¹¹ On the state level the frequency of reference to law review material is not quite as pronounced. But I have been advised that in many states the influence is larger than appears from the reported opinions. On the whole, citation of law review material in state supreme court

Criminology, Police Science and Administration, Forensic Science), there are currently over a dozen legal-scientific journals in the English language, not counting mere trade journals. Somewhere there is a limit, or ought to be. Apart from educational aspects for the benefit of student editors, such specialized journals are no substitute for university law reviews of general (even though partially locally restricted) coverage. Nor should the university law review adjust its contents to please specialized journals. The place of publication does not determine the quality of an article, and the accessibility is equal in both types of periodicals. See note 21, *infra*.

⁸ The specialized law reviews and the symposium issue of the general law review are probably the only major new development.

⁹ Again, a few have taken opposite stands, occasionally with astounding courage and frankness, but with little effect. See Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38 (1936).

¹⁰ *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), overruling *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), citing Warren, *New Light on the History of the Federal Judiciary Act*, 37 HARV. L. REV. 49 (1923).

¹¹ These eleven advance sheets include fifty-eight opinions, many of which are per curiam, many are brief tax cases in which of necessity law review influence has been slight. In 50% of the remaining opinions law review material was cited.

opinions shows a marked increase too, and this holds true for West Virginia. This trend has become so pronounced that many law firms who previously had nonchalantly discarded old law review issues now begin to worry—and with good cause. The stock of back issues of many law reviews, e.g., the *West Virginia Law Review*, has been depleted, and a number of law reviews have reprinted complete sets for the benefit of public and private law libraries.¹²

How should we regard the increasing importance of legal periodical materials with respect to legal development? Those concerned with the progress of law hail the development without reservation. The courts, we must remember, are restricted in their decisions to the questions and issues at hand. Rarely do they have occasion to render a complete review and preview of the entire body of law of which the instant issue forms a part. But if nobody would perform this task of review and preview, our law would turn to chaos. Not only does the time allocable to any one decision by a supreme bench become less and less due to the increasing number of cases, but the task of rendering a decision itself becomes more and more difficult due to the enormous number of precedents which has to be considered, reconciled or distinguished. At Coke's time when the entire *corpus juris* consisted of 5,000 precedents, there was no need for systematizing. The stones in the mosaic of law were apparent enough to form a picture which every lawyer could perceive. But with two million or more precedents, as today, and with an enormous number of statutes, lack of systematic inquiry and guiding surveillance would mean the end of progress. Can we rely on practitioners' handbooks or digests to perform this function? Most certainly not. Only the analyst with a scholarly mind, be he judge, practitioner or teacher, who can take the additional time which it takes to turn an obvious principle into an enlightened rationale, is in a position to render that guidance service which is necessary for a system of law as complicated as ours. It is only with such guidance that the attorney is in a position to rationally predict what the courts will do in fact.¹³ But more important than

¹² To keep up with legal development as discussed in the law reviews, many law firms, unable to subscribe to all but a few law reviews, are subscribing to law review digest services. The Commerce Clearing House loose leaf *Legal Periodical Digest* (since 1928) digests all major law review contributions. *Current Legal Thought* performed a similar function from 1935 to 1948—though on a much more restricted level—, as does the *Law Review Digest*, published since 1950. In the field of taxation the *Monthly Digest of Tax Articles* serves the same purpose.

¹³ See Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

that, only the independent analyst can be critical enough to tell the courts what it would be just, wise and utilitarian to do in the future. Forensic battles can be won by tactics, but for a growing body to retain system, it takes strategy.

Professor Max Rheinstein, one of the few of scholars who has acquired the reputation of greatest scholarship during the midyears of his life—upon most scholars such honor is bestowed only post-humously—has aptly stated the importance of our law reviews today:

“In the development of American law the role of learned writing has been constantly increasing. Such writing has become so significant that American law has reached a stage at which it no longer exhibits exclusively those traits which are characteristic of a purely judge-made law. It has assumed new aspects which reflect the systematic thought of the law teacher or the deeply cutting analysis of the scholar.¹⁴ There is yet missing, however, a kind of writing which has for generations constituted an essential, if not perhaps the principal, part of the legal literature of the continental countries—the legal monograph. The cause is entirely external. The high cost of printing has limited the production of law books to those types for which a wide market can be expected—the text and case book for law students, and the reference book for the practitioners. In rare cases the author of a learned inquiry into a topic of limited scope has been fortunate enough to obtain the subsidy necessary to pay for the cost of publication. As a rule, however, authorship must be adjusted to the facilities of the law reviews.”¹⁵

Since law reviews, thus, are the virtually exclusive storehouse of scholarly legal writing, law reviews are the only means for exerting this wholesome influence upon the courts of which Professor Rheinstein speaks. This vests law reviews with an obligation which, once undertaken, they can not shirk, and it is their duty to perform this obligation well.

Scholarliness has long been regarded with suspicion, has been connected with ivy, dust, straight back chairs and heavy glasses which penetrate all but the realities of life, particularly life as satyriized in the courtroom. If there is such kind of scholarship, then it is *not* the kind of scholarship which helped decide *Erie R. Co. v. Thompson*, and *not* the kind which is exemplified twenty-

¹⁴“Cf. Rheinstein, Max Weber on Law in Economy and Society lix (1954).” Footnote renumbered.

¹⁵Rheinstein, *Critique: Contracts to Make a Will*, 30 N.Y.U.L. REV. 1224 (1955), quoted with permission of the *New York University Law Review* and the author.

two times in the United States Supreme Court opinions of the current term, and it is *not* the type which can be found on past and future pages of the *West Virginia Law Review*. (Indeed, so far nobody has been able to point out to me any specific instance in any law review of that type of uninspired, unrealistic scholarship which constitutes the stock-in-trade of the comedian.) In fact, there is no reason why the terms legal scholar and lawyer should not be synonyms. But two facts prevent many lawyers from establishing reputations as scholars: crowded calendars and fear of estoppel, *i.e.*, the assumed undesirability of taking a stand in view of dozens of axes which must be ground in the courtroom. The former exists by necessity, the latter can be overcome. It is to the busy practitioner whom nothing but the pressure of practice prevents from writing, that I wish to direct an appeal. Let all of us share your problems. Find the good will and the spare time to write about your thoughts on the problems of law. (Having found his good will, even the busy practitioner usually finds some spare time.) Law is a practical matter, and it is for the benefit of practice that law reviews are being published. The *West Virginia Law Review* always has been practical.¹⁶ We want it to be most practical, and the attorney crowded with practical matter certainly is in an excellent position to form and publicize an opinion about the merit of these problems for the benefit of every colleague. Fifty-eight volumes of the *West Virginia Law Review* attest to the fact that West Virginia always had a "literate Bar". Indeed, the age and pioneer character of the *Law Review* probably are the best testimonial.¹⁷ Not only should

¹⁶ It started as a journal written almost exclusively by practitioners, and solely for the practice of the profession, and as a means of communication between all members of the West Virginia Bar.

¹⁷ The *Law Review* was founded in February 1894 by Professor William P. Willey, of the College of Law of West Virginia University, under the name *The West Virginia Bar*. Of the nearly one hundred law school periodicals in the common law world today, only the law reviews of the University of Pennsylvania, Harvard Law School, the University of Iowa and Yale University have an older lineage. Professor Willey remained editor-in-charge until his retirement in 1917. He always worked closely with the editorial board of the West Virginia Bar Association. See 25 W. VA. L.Q. 1 (1917). It was during Professor Willey's editorship that student participation was introduced in volume 22, with Professor David C. Howard as note editor-in-charge. See 22 BAR 10 (1915). Professor Willey was succeeded by an editorial board consisting of the entire faculty of law *ex officio*, with associate Bar Association editors, followed in turn by individual editors-in-charge of the highest professional reputation: Professor George F. Osborne (1919-1921), Professor Clifford R. Snider (1921-1927),—from 1927 to 1930 the *Law Review*, or *Law Quarterly*, as it was then called, was edited by the faculty with the assistance of Louise Farrell Hartley, now Mrs. Louise Winterbottom, whom we are fortunate to have as our business

we keep it that way, but it is hoped that the literary (productive) interest of members of the Bar will be increased, not for the benefit of literacy, but for the benefit of the continued development and utility of that which concerns all of us most: the Law.

Not all literary contributions which the *Law Review* receives are publishable. Many fall short of our requirements and must be turned down. That has been the practice in the past and will continue to be the practice in the future. But every contribution receives careful consideration. It will be published if it continues the tradition and exemplifies the high reputation for which the *West Virginia Law Review* has always been noted.¹⁸ By the same token the editors are obliged to properly balance the contributions in every issue. Our primary responsibility exists toward the Bar of this state. Therefore, the practice will be continued to devote approximately sixty percent of our article coverage to matter of concern for the practicing attorney, with emphasis on West Virginia law.¹⁹ But, by long tradition, we have assumed an obligation toward law and legal education regardless of jurisdictional lines. In the past many eminent authors have spoken on legal education and jurisprudence from the pages of our *Law Review*,²⁰ and it is far from our intention to terminate the reputation which we have gained in this respect. Law without legal education has as much chance to perpetuate itself as an eunuch, and law without jurisprudence as well is an eunuch without a brain.

A further balancing of contributions is that between articles by experts, practitioners and teachers on the one hand, and student material on the other. As between the two, there is little difference in accuracy. There is, of course, a difference of approach, scope

manager ever—Professor Jefferson B. Fordham (1930-1935), Professor C. C. Williams, Jr. (1935-1936), Professor Clyde L. Colson (1936-1940, 1942-1943), Professor Albert S. Abel (1940-1942, 1947-1949), Professor R. A. MacFarlane, Jr. (1949-1950), Professor Marlyn E. Lugar (1940-1942, 1950-1955).

¹⁸ In an address delivered at the College of Law of West Virginia University, on the occasion of the formal inauguration of Dr. John Roscoe Turner as President of West Virginia University, on November 28, 1928, the great American educator and jurist Robert Maynard Hutchins assured the faculty and students of this Law School: "There is no better state law school and no better state law journal than those which you possess." Reprinted, 35 W. VA. L.Q. 103, 112 (1929).

¹⁹ Of course, not every issue can be arranged by arbitrarily assigning a set page number to each department. The balancing of which I speak is an average and approximation, volume by volume.

²⁰ The indexes to the *West Virginia Law Review* might be mistaken for excerpts from a lawyers' Who's Who.

and insight. But both types of contributions are meant to serve, and they do serve. However, the student contribution is a self-education device as well. For that reason, we shall continue giving preference to our student contributions. The number and size of leading articles will depend on the availability of space after consideration of all publishable student material. In the typical 100 page issue the relation is likely to be sixty-five pages of articles (inclusive of other nonstudent material) as against thirty-five pages of student notes and comments.

The increased reliance on law review material by the courts makes it necessary for the practitioner to pay more careful attention to the periodicals. Indeed, on many topics of West Virginia law critical discussions in the *Law Review* are the only safe and reliable guide for the practitioner, and oftentimes no analytical discussion at all can be found elsewhere. Thus, the time-conscious attorney turns from the statute or leading case immediately to the *Law Review* where he is likely to find a helpful discussion and collection of authorities in point. To be such a useful tool, the *Law Review* needed an up-to-date index. Our new cumulative index has been completed and is now being distributed. This index covers volumes forty-one to fifty-seven, inclusive, and connects with the first cumulative index (1934, ending with volume forty). Our gratitude is due to our librarian and business manager, Mrs. Louise F. Winterbottom, for her tireless efforts in compiling this index. We are sure that it will make work with the *Law Review* easy. For volume fifty-eight and subsequent volumes the researcher must be referred to the annual indexes, published in the last issue of each publication year, until we are in a position to publish our first master index and cumulative supplements thereto.²¹

²¹ Many practicing attorneys are not sufficiently familiar with law review research devices. For their benefit I would like to mention briefly the existence of the *Index to Legal Periodicals*, available in any major law library. This index, published by the Association of American Law Libraries, is arranged along the 421 digest topics of the West system. In addition, it contains a case name index for all cases commented upon in law reviews, as well as an author index and a book review index. To date the *Index* covers ten volumes, and supplementing pamphlets (monthly) until volume eleven will appear. The index lists all contributions to (currently) 233 legal periodicals in English, constituting the entire list with a few unimportant exceptions. For the period prior to 1926 an earlier series of the A.A.L.L. index (17 vols.) exists, but is cumbersome for use. Instead, for the earlier period the researcher is well advised to use the Jones-Chipman index which, in similar arrangement as the A.A.L.L. index, covers the period up to 1937 in six volumes.

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Nothing remains to be said except that Faculty Editorial Board, Faculty Editor-in-Charge, Student Board of Editors and staff pledge their continued efforts to maintain the high standard which always has been the *West Virginia Law Review's* very own.

Gerhard O. W. Mueller
Faculty Editor-in-Charge