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Why Law School Reviews? A Symposium: Law School Reviews and the Courts

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Why Law School Reviews? A Symposium: Law School Reviews and the Courts

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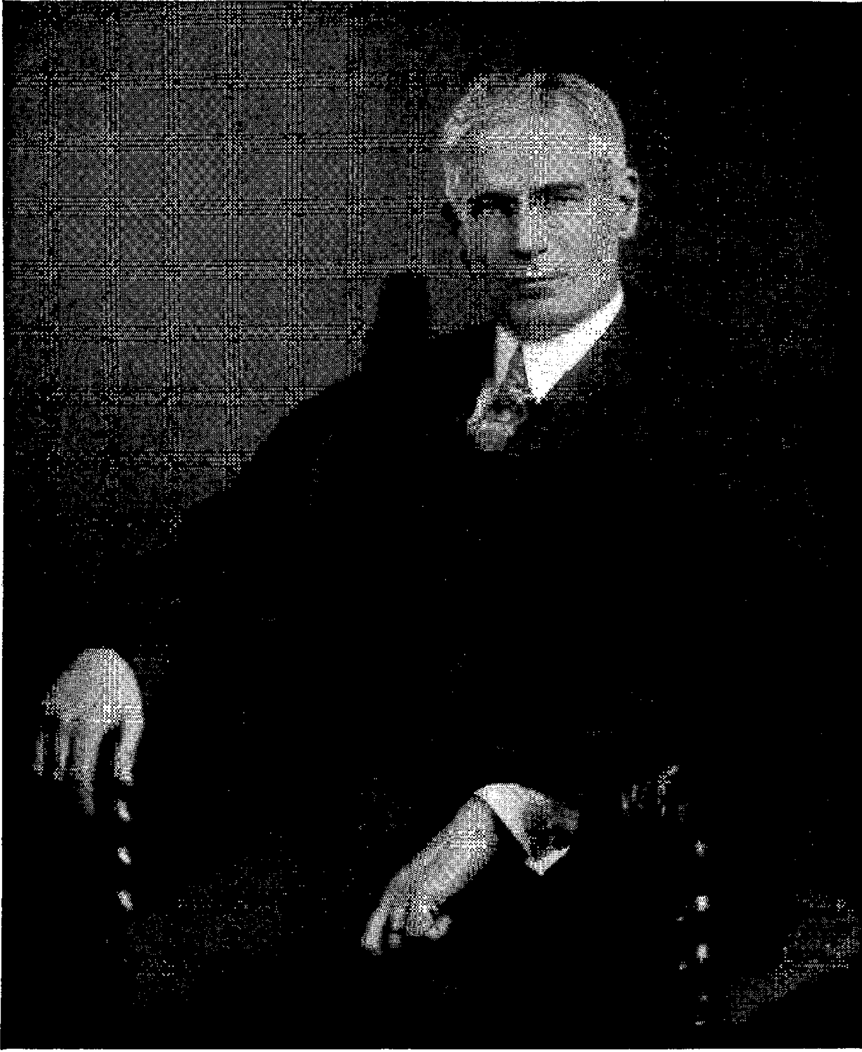

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WHY LAW SCHOOL REVIEWS? A SYMPOSIUM

Law School Reviews and the Courts

FREDERICK EVAN CRANE†

IT IS timely to say a word in behalf of our law school periodicals and to notice the place which they have made for themselves in legal education. Many of our important institutions and methods have been a gradual growth out of habit and custom without specific planning and forethought or corporate enactment or governmental legislation. Anyone reading the Constitution of the United States to find out how we elected our presidents would hardly believe that we had so far departed from the original scheme of our fundamental government as to make the electoral college a mere formality. He would find nothing in the written Constitution recognizing a national party convention. Unthinkable would it be that the electoral college would vote contrary to the choices of these conventions.

If I mistake not, the English Cabinet has no recognition under their constitutionally developed form of government. It exists as the outgrowth of custom and practice and now functions as the chief source of power. Tradition and custom may be slow in forming, but when once established are more effectual than much written law.

In some such way the law school journal or review or quarterly, call it what you will, has slowly and gradually developed into one of the chief functions of our law schools and has become so important and useful that its weight and authority find influence outside the scholastic atmosphere with the practicing lawyer as well as the judges in our courts.

No doubt the emphasis in the law school curriculum is placed upon the study of law and the teaching of it by the professorial staff. However, both the teaching and the professor himself have developed to cover a much wider field.

In these college papers, law students, or some of them, have found

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the means of expressing their own ideas about decided cases, generally recent ones, and many of their criticisms have been exceedingly good. Independence of thought is a valuable asset to our profession. The main purpose, of course, in the law school, is to teach the law as it is, but this is by no means an easy task. The law does not stay put; it changes with the years; new ideas have to be met and dealt with. Life itself changes; the law must expand to meet the change. The time has long since passed when the certainty of the law is its chief qualification. In the main this is true, but a cursory glance over the procedure or substantive law of the past indicates how rapidly rules are modified either by legislation or decision. Therefore, any means which develops these young college students to think for themselves and apply the tests of their own independent judgment is a very valuable training. Probably the best work which is done by any law school professor is not confined to the mere teaching of the law as it is, but in creating an enthusiasm for justice and for the improvement of the law.

As an aside I may make a confession, which is, that we judges—perhaps I had better speak for myself—look at these reviews of cases with considerable interest and when I find that any opinion of mine has been approved by these young critics I have a feeling of satisfaction which I am sure is justified when we remember that these students come to the law with fresh impressionable minds, sensitive to right and wrong and to any act of injustice. Too frequently the opinion of the older man represents the trend of a time which has passed, whereas youth ever is at the threshold of the future.

Then too, as I have said, the college professor has entered upon a wider field of activity through his teaching in the narrower one. Many of these men no longer are merely professors; they are jurists, like Professor A. V. Dicey of England, whose books and writings are followed by the bench of England. These professors have become specialists at a time when the law is so complicated that specialists are necessary. They give us their views frequently in important articles printed in these law school journals, with the result that the bound volumes of the issues are to be found in the libraries of the appellate courts and in the offices of the leading practitioners.

I may say—again speaking for myself, although I know of others who follow similar practice—that in difficult cases dealing with intricate subjects of law, about which there is much dispute and many conflicting decisions, I eagerly turn to these college reviews, scan the index to see if any of these college professors or teachers have written a paper upon the subject. The responsibility for a negligent statement resulting in damage was involved in *Nichols v. Clark, MacMullen & Riley, Inc.*,[1]

1. 261 N. Y. 118, 184 N. E. 729 (1933).

and from the opinion you will see the help derived from the law school reviews. As I am not speaking officially, but merely as an individual, I may be permitted to suggest that this help and the advantage afforded the courts by the research of professors and law students are not always acknowledged in the opinions by citations of the reviews, but these writers suffer no further in this respect than many of our leading lawyers who present very able briefs from which the courts may copy copiously without even a suggestion that the lawyer has furnished the idea or possibly even the language.

Courts are busy places. Decisions must be made with expedition. Serious and important questions of law must be disposed of one way or the other by men who have little time for study or for research. Any court which hears seven to eight cases a day involving disputed questions of law and seeks to decide them within the month has very little time for deep and thorough study. We must all more or less depend upon the research of others, whether it be in textbook, previous decisions or in papers printed in our law reviews. The latter has supplemented the textbook and the decision because we have found from experience that the modern law professor or teacher—perhaps jurist would be a better name for some of them—has had time as well as desire to enter thoroughly into the study of a particular subject and has given the result of his efforts for the benefit of the profession. Much of this work is done gladly, without compensation, from a mere desire to be helpful.

Without saying more I shall merely add that we of the bench, as well as the lawyer at the bar, should make this acknowledgment, though somewhat belated, of the help which we get from the younger men and from the college professor in the disposition of the every-day work of the courts.

Law School Reviews and Lawyers

WILLIAM D. GUTHRIE

As I have for nearly twenty years been an honorary alumnus of Fordham University, and have been following with interest the growth and improvement of its Law School, I am much interested in the proposed revival of the FORDHAM LAW REVIEW. I believe that the law school reviews have for many years been rendering a service of great and enduring value to jurisprudence, the administration of justice, and the governance of the State. They have been doing for the literature and the scientific progress of the law to a very great extent what Blackstone and Kent and Story did in their day. They are making the law

more and more a liberal science and an inspiring, ennobling and uplifting calling; and they are helping to supply the Bar, the Bench and our federal and state governments, respectively, scholarly lawyers, able legislators, trained statesmen, and law teachers, as well as competent and trustworthy public executives and administrators.

A broad field will lie before the editors of the FORDHAM LAW REVIEW for exploration and service, and to my mind just as important a field as Marshall, Story and Kent faced at the beginning of the nineteenth century. The legal and constitutional foundations that these great American judges and authors helped to lay are being attacked and undermined. We are in a period of experimentation and, to some extent at least, of precipitate, haphazard and ill-considered "trial and error." Subversive doctrines are being taught and advocated which in Marshall's day, to quote his own words, "no political dreamer was wild enough to think of."[1] Ancient principles are at stake. We have among us "false prophets," against whom humanity has been divinely warned from time immemorial. Many are apprehensive that we are heedlessly drifting from the long tried old order and its constitutional morality and political justice into what is leading us to national socialism, the repudiation of standards and obligations heretofore upheld, the leveling of classes, the destruction of property, and the overthrow of our federal system designed to be composed of sovereign and indestructible States. Novel and innumerable are the problems urgently pressing for study and solution, many of which embody incalculable menace and immeasurable danger to our future. If these problems are to be wisely, justly, and providently solved, it will be predominantly under the guidance of the legal profession and in accord with long tried and honest standards, heretofore observed, and constitutional principles, heretofore revered, and with just and equal laws in accord with these true standards and principles.

A retrospect of half a century at the American Bar vividly recalls to my mind the remarkable and encouraging improvements during that period in the field of legal philosophy, science and literature, and in the administration of justice throughout the United States. These improvements have undoubtedly been due in greatest measure to the influence of the leading and better class of law schools and their law reviews. The term "better class of law schools" should be emphasized, for their standards and requirements of scholarship and character have greatly influenced, if not largely fixed, the intellectual qualifications, the morale, and the professional standards of those who truly represent and lead the American Bar of to-day. Unfortunately, in point of number, the graduates of these law schools have long been outnumbered by graduates

1. McCulloch v. Maryland, 17 U. S. 316, 403 (1819).

from "the schools which have allowed their standards to be set by the requirements for admission to the Bar and which devote themselves merely to guiding their students by the easiest route to the Bar," as Dean Harlan F. Stone, of the Columbia Law School, pointed out in his University Lectures published twenty years ago,[2] and he then added that "the lamentable result is that thousands of young men in the United States annually find their way to the Bar, who are poorly qualified for its duties and responsibilities, and who, without the aid of the 'cramming' law school, would have possessed neither the patience nor the force of character to have prepared themselves for their bar examinations." But Dean Stone, at the same time, very fittingly and properly tempered his criticism by stating[3] that "examples are not wanting of lawyers conspicuously fitted, by character and attainments, for the practice of their profession, and there is now at the Bar, as there always has been and always will be, a considerable body of men who individually and collectively exhibit qualifications of character, learning, and skill worthy of the best traditions of the American Bar." In my judgment, there continues to be such a considerable body, and they still constitute the true representatives and leaders of the profession in the United States.

Notwithstanding the laxity of the authorities regulating admission to the Bar and of certain law schools, and the consequent flood into the profession of undesirables, innumerable are the representatives of the profession throughout the United States who are governed by the best and highest traditions and ethics of the past. They faithfully "observe the fiduciary principle, the precept as old as holy writ, that a 'man cannot serve two masters,'" which Mr. Justice Stone cited in his address last June at the University of Michigan, published in the Harvard Law Review for November, 1934, in which he rather severely criticizes the profession. There are still many, and I believe a large majority, in the profession who have not become and never have been, as he suggests "obsequious servants of business," and who are not "tainted," as he likewise suggests, "with the morals and manners of the market place in its most anti-social manifestations," or otherwise. Nor have these representatives of the profession been "complaisant to departures from the fiduciary principle," to quote again the characterization of the learned justice. In fact, it may still be confidently affirmed, as Sir Frederick Pollock affirmed many years ago, that "with few exceptions, the law has, in such matters, been constantly ahead not only of the practice but of the ordinary professions of business men."[4]

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2. Stone, Law and Its Administration (1915) 174.
3. *Id.* at 178.
4. Pollock, First Book of Jurisprudence (1904) 49.

The American Bar as a class are not justly to be held responsible for the dishonest corporate methods and breaches of trust which have been recently exposed and exploited, and which Mr. Justice Stone can deplore no more strongly than the profession generally does. Surely, there are lawyers and lawyers. There are undoubtedly many who are not worthy of their profession and its best traditions, and perhaps too many of them, but these are not truly representative, nor are they leaders, and by no means are they examples by which the profession ought in fairness to be judged. An impartial and thorough investigation of the recent reprehensible and deplorable corporate scandals growing out of an era of the wildest speculation in history, and the emergence and domination therein of a class of unscrupulous, untrustworthy, and irresponsible promoters and speculators, would, I venture to assert, indicate very few, if any, really representative or leading members of the Bar as having advised or aided or abetted dishonest or illegal or so-called anti-social schemes, and none so advising who fairly or properly should be classed as representative or typical of the legal profession as a whole throughout the United States. Mr. Justice Stone undoubtedly recalls that the test of leadership and prestige in our profession is not success in mere money-making, or in being, as he sees fit to phrase his criticism, "more often than not the proprietor or general manager of a new type of factory, whose legal product is increasingly the result of mass production methods."

Generalizations on the profession ought not to be indiscriminate and should be based on facts reliably ascertained, for without the facts generalizations are likely to be worthless. As Lord Bryce, when Ambassador here, admonished us in one of his cogent addresses, "To counsel you to stick to facts is not to dissuade you from philosophical generalizations, but only to remind you . . . that the generalizations must spring out of the facts, and without the facts are worthless."

I do not hesitate to affirm that the facts would not warrant the indictment, disparagement, and condemnation of the American Bar as a whole which the address of the learned Justice seems to imply, even if unintended by him.

No one, unfortunately, can read Mr. Justice Stone's address without the impression that he has come to believe that the profession in the United States has of recent years greatly deteriorated, and fallen morally and intellectually to a low and deplorable state. He repeatedly speaks of lawyers as doing "so little" in public service, when the fact, everywhere evident, ought in fairness and justice to have been recognized that they have been doing and are now doing as much as, if not more

than, any other class or group in the country, as shown by their activities, services, and prominence in every branch of public or charitable and welfare service, national or state, whether in the present period of emergency, the New Deal, or otherwise, and frequently, too, at the sacrifice of that kind of professional success that is measured only by dollar incomes. As matter of fact, the large law offices, which he compares to factories, are comparatively few, and they include a small fraction of the profession; they are to be found only in the larger cities; most of them practise according to the best and highest standards of professional ethics and "scrupulous fidelity," and very few of these offices can fairly or properly be stigmatized as a "new type of factory," and their members ought not to be disparaged as proprietors or general managers of factories, or as mass producers.

Mr. Justice Stone mentions "petty misconduct in the disreputable outer fringes" of the profession; but he shows that he appreciates that in judging the profession attention should be focused upon the facts and "not [be] in the form of assumptions or generalizations." He apparently recognizes that it is hardly a reliable or safe method to judge the quality of a fabric by its ragged "outer fringes," any more than it would be rational to judge the ocean in even limited measure by the objectionable rubbish or driftwood thrown upon the beach by a storm. The danger flowing so frequently from the spawn of unwarranted assumptions or generalizations should ever be borne in mind.

The Harvard Law Review is generally regarded as the premier American law review; its prestige and influence are deservedly very high; and its circulation is world-wide. Hence, the harm done to the good name of the profession by the above-mentioned criticism on the part of a Justice of the Supreme Court of the United States may be quite immeasurable. Such criticism might well tend to bring the American Bar as a body unjustly into disrepute both at home and abroad, and the wrong thus done might well be irreparable.

The faculty of the Fordham Law School should, in my judgment, actively participate in and supervise the direction of the review, the selection of its leading articles, the notes on recent decisions, the reviews of new works dealing with law, government and history, *etc.;* in a word, should hold themselves in great measure responsible for its direction and contents. Their knowledge, experience, and maturity of judgment must tend to give additional accuracy, weight, and value to the review. Of course, primarily, the interest and cooperation of the students must be considered, stimulated, and cultivated, for in their ranks are the lawyers, judges, legislators and law teachers of the future, and without their constant interest and participation the review would fail of much of its purpose and usefulness. Nothing could be more stimulating or

more beneficial to the students of a law school than the study of current decisions and early practice in legal composition and in the analysis of recent opinions of the courts, under competent guidance. There, in its pages, law students should always find that very real spur, tonic, and encouragement that will spring from reading in print what they have written.

Chief Judge Crane's generous recognition of the service being rendered to the Court of Appeals by the law reviews ought to be an inspiration and justification for the revival of the FORDHAM LAW REVIEW, and the striking tabulation by Dean Wilkinson of the average of three citations of law reviews in each of four recent volumes of reports of that high court persuasively shows the importance and value of the service that these publications are now rendering.

It may be amusing, and not entirely irrelevant, if I recall a skit or satire interpolated by the late lamented Circuit Judge Hough in a really eloquent tribute which he paid to the law school reviews at the dinner in the City of New York in April, 1926, commemorating the twenty-fifth anniversary of the founding of the Columbia Law Review. After highly praising the services rendered by the law reviews, he pictured, in most playful banter, the "youngsters" who are presumably allowed therein to set themselves up as critics or reviewers of current decisions and who, he suggested, are at times "self-satisfied and cock-sure on everything." After citing one delightful, even if imaginary and far-fetched, example of such an instance, he gave what he called a typical and patent inside model for student comment on decisions which he imagined might be available in reviewing a recent decision involving questions of monopoly and tender. His amusing "patent inside model" for a law review criticism on such a current case was as follows:

"This well-written decision re-examines in a modern way a difficult subject. It frankly overrules several earlier decisions of the same court (an excellent procedure), and while flatly opposed to the Supreme Court of the United States in *Doe v. Roe,* 360 U. S. 1001, is in accord with the more recent decision of the same court in *Roe v. Doe,* 361 U. S. 1002. There are a few States which still refuse to apply the doctrine, but this decision falls squarely in line with the majority view, which is best expressed in *Dives v. Lazarus,* 5 New Zealand 25, and more recently set forth in *Pharaoh v. Moses,* 2 Palestine 1. The English rule is somewhat stricter, drawing unwarranted distinctions between Stellar and Lunar; but the general tendency in this country is toward liberality in all tender matters. There can be no monopoly in tenderness. Doubt should always be resolved in favor of freedom in exchange (citations from Arizona, Alaska and Hawaii reports). The principal case is well reasoned and seems to be correctly decided."

In conclusion, I want to express confidence that the faculty of the Fordham Law School will ever bear in mind the lofty and inspiring

conceptions of Mr. Justice Holmes, *venerabile nomen!*, who nearly forty years ago eloquently declared that the true function of a law school is "to teach law in the grand manner, and to make great lawyers . . . to do more than simply to teach law," and ever to uphold "the dignity of moral feeling and profundity of knowledge,"[5] whose fruits are Justice in its highest and noblest sense. The faculty, I likewise confidently hope, will continue to dedicate their joint efforts to inculcating, so far as practicable, the traditions and maxims of our ancient and honorable profession, which have been its glory in the past, and which are by no means now submerged, and the constant duty of its members, at any personal sacrifice, to devote themselves unselfishly and patriotically to the public service.

Our inspiring motto, coming down to us from the great days of Rome, must ever continue to be *Pro clientibus saepe, pro lege, pro republica, semper.*

Finally, the FORDHAM LAW REVIEW cannot too often recall and impress upon law students, in one form or another, the lofty admonition of Justice Story in his great work on the Constitution of the United States:[6]

"Let the American youth never forget that they possess a noble inheritance, bought by the toils and sufferings and blood of their ancestors, and capable, if wisely improved and faithfully guarded, of transmitting to their latest posterity all the substantial blessings of life, the peaceful enjoyment of liberty, property, religion, and independence. The structure has been erected by architects of consummate skill and fidelity; its foundations are solid; its compartments are beautiful as well as useful; its arrangements are full of wisdom and order; and its defences are impregnable from without. It has been reared for immortality, if the work of man may justly aspire to such a title. It may, nevertheless, perish in an hour by the folly or corruption or negligence of its only keepers,—THE PEOPLE. Republics are created by the virtue, public spirit, and intelligence of the citizens. They fall when the wise are banished from the public councils, because they dare to be honest; and the profligate are rewarded, because they flatter the people in order to betray them."

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5. HOLMES, COLLECTED LEGAL PAPERS (1921) 37.
6. Section 1914.

Law School Reviews and Law Schools

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THE happy event of the revival of the FORDHAM LAW REVIEW after the lapse of a number of years makes a discussion of the policies, advantages and utility of such a publication to the law student and the law school, as well as to the legal profession, appropriate.

The benefits flowing from publication of a law review, both to the school itself and its students, are obvious on slight reflection. Appointment to membership on the editorial board of the review and continuance thereon, are based to a large degree on the ability of the student as disclosed by the grades obtained by him in his law school tests and examinations. The existence of a law review in a school, therefore, necessarily acts as a continued stimulus to a very large part of the student body to display that high degree of scholarship which will result in selection to membership on its editorial board. This means that a powerful motive is furnished to the students for better preparation of material assigned for classroom discussion throughout the year, and more thorough and comprehensive review of the student's work in preparation for the various tests and final examinations. The tonic effect of this is good not only for the student individually, but likewise for the school, because almost inevitably the level of scholastic effort and attainment of the entire group will be raised.

Appointment to the editorial board, moreover, means that the students in helping select recent cases for discussion in the review, as well as in preparing case notes thereon, will receive invaluable training in the very kind of work which they will be required to do and which will make for their success as future members of the bar. A developed ability to conduct research work in law as well as to handle legal materials and reduce one's conclusions to clear, concise and readable form is of the essence of the practicing lawyer's work, both in the preparation of briefs as trial and appellate counsel, and in the formulation of opinions on the legal problems of clients. In addition, the student editor's work will serve to make him "advance sheet-minded" and develop in him the habit of keeping up with the current decisions of the courts. This habit is of great value to the practicing lawyer and yet is one which all too many practitioners either never have developed at all or have developed so insufficiently as to lose it very soon amid the demands of a busy practice.

The circulation of a good law review among the student body with good leading articles and its exhaustive coverage of leading cases with

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comments thereon, cannot fail to bring to the students generally a knowledge of the progress, change, and perhaps reform occurring daily both in the courts of the domestic forum and elsewhere. At the same time stimulated to read the product of their fellow-students serving as editors, the review will develop in them also the salutary habit of keeping abreast of the trend of recent judicial decisions and of developments in the statutory field effecting modifications in the rules of common law. Moreover, while it may be inevitable that the major part of student activities in preparing material for the pages of a law review must emanate from a permanent board of editors regularly reviewing advance sheets, selecting current cases, and preparing them for the columns of the review, it is possible and I believe it should become the policy of the FORDHAM LAW REVIEW to permit any student in the school to submit worthwhile material for publication. If the student's work warrants it, there is no good reason why such material should not be accepted. Nor is the suggestion a novel one.[1] The objective of a good law review may well be to make it the publication of most of the students in the law school, and the success of intramural activities in college athletics promises similar success in the law review field if this expansion of activity be not accompanied by a lowering of standards.

Furnishing also a forum in which the alumni of the Law School, as well as others, can publish articles which are the result of their experience and specialization in the field of practice, a law review necessarily tends to develop a proper pride in one's legal alma mater, an *esprit de corps* among the graduates of the school and a bond of union between student, alumnus and school of great value to all.

Apart from the immediate benefits to the school, its students and alumni, a well conducted law review is of value to the public, the courts, and the legal profession generally. More and more courts are referring to leading articles in law reviews to give them the history of a doctrine, a review of its rationale and soundness, which busy judges frequently have not the time to develop independently for themselves. An examination of the last four permanent volumes of the Court of Appeals Reports in New York discloses at least a dozen opinions in which reference is made to articles or notes in various law reviews.[2]

1. (1934) 47 HARV. L. REV. 1009; Green, *Integrating Law School and Community* (1933) AM. L. SCHOOL REV. 821, 826.

2. State Bank of Commerce v. Stone, 261 N. Y. 175, 185, 184 N. E. 750, 754 (1933); Matter of Evans v. Berry, 262 N. Y. 61, 71, 186 N. E. 203, 206 (1933); Fay v. Witte, 262 N. Y. 215, 219, 186 N. E. 678, 679 (1933); Salimoff & Co. v. Standard Oil Co., 262 N. Y. 220, 225, 186 N. E. 679, 681 (1933); People v. Nebbia, 262 N. Y. 259, 266, 273, 186 N. E. 685, 697, 699 (1933); Matter of Satterwhite, 262 N. Y. 339, 343, 186 N. E. 857, 858 (1933); Hutchison v. Ross, 262 N. Y. 381, 389, 392, 187 N. E. 65, 68, 70 (1933);

What is true of the courts is equally true of the busy practitioner who finds he can turn to the law reviews with the certainty of discovering valuable briefs and case notes on the questions occurring in his practice. The time when a law review was considered as merely a cultural product of the legal profession or of such of its members as had become pedantic professors, long since has passed. Today practicing lawyers have come to regard it as a valuable working tool and an aid to them in their various fields of legal activity.

Because of all of the foregoing it follows that the student appointed to membership on the editorial board of a law review should approach his work not merely with the thought in mind that his designation constitutes a badge of honor for him but also with the consciousness of the high responsibilities of his position. His editorial activities furnish a great opportunity for him to serve his school, his fellow students, the courts, and the great profession in which he aspires to membership. While he may feel a proper pride in his position, his pride should be chastened by the humility which even great scholars feel, because of the consciousness of their own limitations. It has been said, and not without truth, that as the diameter of one's knowledge increases, so in direct proportion does the circumference of one's ignorance. Therefore he must remember always that at best he is a humble co-laborer with students in his own and other law schools, as well as with great teachers and jurists whose painstaking work is making for improvement in our great heritage of the common law.

It is a deep gratification to the Faculty of the school that the FORDHAM LAW REVIEW once more is to take its place among the journals which have been edited and published for years by the students of great law schools in this and other states. May it prove a worthy associate of its distinguished and useful contemporaries.

Brown v. Bedell, 263 N. Y. 177, 186, 188 N. E. 641, 643 (1934); Matter of McCulloch, 263 N. Y. 408, 414, 189 N. E. 473, 474 (1934); Bergman v. Scottish Union & National Inv. Co., 264 N. Y. 205, 215, 190 N. E. 409, 412 (1934); Herzog v. Stern, 264 N. Y. 379, 388, 191 N. E. 23, 26 (1934); Gimenez v. Great Atlantic & Pacific Tea Co., 264 N. Y. 389, 394, 191 N. E. 27, 28 (1934).