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THE TWENTY-FIFTH ANNIVERSARY OF THE VIRGINIA LAW REVIEW.

A TWENTY-FIFTH birthday is a conventionally appropriate time for appraisal, condemnation and criticism, whether the anniversary is celebrated by an individual or an institution. Those law reviews which are autonomous, whose fate is in the hands of the student boards, are truly institutions in their own right, though living within the larger body of their respective law schools. They are not mere adjuncts of faculty policy and dependent upon a faculty manager. The Virginia Law School may well congratulate itself without reserve that the succession of students which have carried on the Review have never surrendered the basic responsibility which they assumed twenty-five years ago. Likewise, a faculty member may also congratulate his associates and his predecessors that they have never been tempted to replace, or overawe, that student control which is so largely the source of the benefits which only an independent law review confers on its school.

If we go back several generations it may fairly be said that a law review of that character would not have fitted into the pattern of law schools as they were then conceived. Lectures supported by texts produced a system of instruction which was essentially authoritative—it was most blessed for the student to receive, even though favored with the exposition of alternative views and doctrines. This was not an inferior method of instruction, when we consider that it lent itself to the expression of the great abilities possessed by many of the teachers of the time, and that it was also the method inevitable in a generation whose conventional intellectual processes in all fields of learning were similarly conceived.

With the decadence of the lecture system of instruction, and the introduction of a fresh mode of approach in the case system, the student was called upon to share the initiative with the instructor. If the introduction of the case method in law schools be regarded as a reform, as its originators and first adherents naturally esteemed it, it was a reform justified not by its inherent superiority as a method of instruction, but rather as an expedient change because, according to the rule which seems to govern the succession of generations in any humanly controlled organization, the great lecturers had tended to be succeeded by men who instinctively sought to reproduce from observation a teaching technique which in their predecessors had been merely the method natural and convenient to their particular time and individuality. Such efforts at reproduction inevitably tend to approach the dull and lifeless, we see it in the arts and all other modes of expressing human personality, and there must come a time when the old method is repudiated, and a new method is extolled. In so far as this revolution impugns the masters of the old technique it is most unjust, for the need for the creation of a new and spontaneous mode of self-expression, avoiding the stultification inherent in a method which has become a convention, is the true and adequate ground for justifying the adoption of the new approach. It is to be noted in passing that it was during the incumbency of the third generation of law teachers under the regime of the case method that we could observe the certain signs of a revolt against that method of instruction. For that system is, in its turn, becoming regarded as a convention imposing itself, as it were, on the latest generation of teachers who feel impelled to free themselves by the adoption of a new technique, a newly conceived objective and approach.

Hence it may be said that the first twenty-five years of the Virginia Law Review was comprised in the period when the case method of instruction was generally accepted as the sound method of education in law,—at least that is true of those schools which developed law reviews of the student controlled type. Any estimate of the role and past accomplishments attributable to such law reviews is properly to be made in terms of the case method of instruction.

Possibly the most obvious accomplishment of these law reviews, certainly one most frequently acknowledged, is that they have provided the student with a laboratory for independent case analysis and reporting which was completely in accord with the accepted methods pursued in the class room. The quality of the notes and decisions has come to be a criterion of the quality of the class instruction in the opinion of the general membership of the bar. It would seem a just basis for judgment of the quality of the school, generally, for the cream of the student body which rises through the selective processes of law review competition may be taken as a fair gauge of the general quality of the milk which first went into the pail. Here, then, the Faculty, as a co-ordinate body in the Law School must acknowledge that an important contribution to the reputation it enjoys for sound educational accomplishment has been made by the standards maintained in the Review, and that any decline of quality in that succession of student contributions would very quickly reflect upon the reputation of the School. And justly so.

Less generally recognized, there is a second respect in which a student controlled review has come to sustain a heavy responsibility to its school. It sets a standard of scholarship and industry, of intellectual initiative, which has a direct and most important effect on the entire body of students. For the faculty, there is probably no object more constantly and anxiously pursued than that of arousing individual initiative. That such efforts and example from the professor's side of the platform are subject to some discount, even under the most inspiring of teachers, is unavoidable, and, however favorable the circumstances are, there must always be an appreciable lag in student response to professorial leadership. Rightly so, if the student is to temper his receptivity with a wholesome degree of critical reserve. From his fellow students, on the other hand, there is no fear of precept, and example is entirely free from suspicion of ulterior motive. The Law Review is staffed by men picked by their fellows, men who have worked and earned their election and thereafter carry on the tradition of conscientious labor at a task set and directed by themselves. The membership of the Review at any time is the self-perpetuating élite of the student body, and in discharging their

responsibility to the Review they also provide the School with a standard of scholarship and industry.

It goes without saying that law review work is personally advantageous to the members of the staff, and that in the long run it makes some contribution to a better understanding and clarification of legal principles, but the two contributions which The Virginia Law Review makes to its Law School, the perpetuation of which, once secured, becomes indispensable, are those by which it provides a standard of the School's educational attainments and at the same time is itself a cardinal factor in advancing and maintaining that standard through the general body of students.

But birthday appreciations may also properly include suggestions for the future. There is one which may be worthy of the consideration of the present managers. The editorial content of the Review, the notes and decisions, is presented in accordance with a convention which has developed naturally in the atmosphere of the established case method of instruction. Both forms of discussion, whether in class or editorial, assume that the body of legal principles has a doctrinal integrity against which cases may be analysed and classified to the conclusion that the contribution of the particular decision is sound or unsound. That is merely the traditional conception of the growth of the common law. But in a time like the present, characterized by a pronounced political preoccupation with social questions of far reaching implications, we need not be surprised that an adherence to established legal doctrines for the decision of marginal or novel cases should embue the leaders of reform with an impatience with the operation of the courts and the legal profession in general which they are eager to regard as a challenge and to brand as reactionary. There is plenty of evidence that many law teachers are releasing themselves from what is conceived as a restrictive tradition and are experimenting with the substitution of a functional or sociological approach for pure case analysis. This is, from one point of view, attributable to the natural and over due desire to escape from the sense of restriction resulting from the case method having become classical, but it is also manifest that the fluidity of contemporary social values underlying at least several branches of the law invites opening a purely legal discussion to

the consideration of matters which are political or economic, and in any case highly controversial and unsettled. Politically our social order is engaged in one of its historical periods of ferment from which it seems safe to predict that there will result some important alterations in the heretofore accepted balancing of conflicting interests. As our system of law presupposes that the relative value of rights and interests is fixed and reasonably ascertainable, and conceives its function merely to be the application, or at most the very gradual adjustment, of such recognized principles to varied circumstances, it is not surprising that the legal profession should find it difficult to accommodate itself to challenges presaging change in social values. We might as well expect a tap-dancer not to be disconcerted if he suddenly perceived that the dance floor was being jogged by a series of earth tremors.

Now those aspects of the law whose social premises are being reconsidered are very extensive. If we name the examples that immediately suggest themselves, there are the fundamental bases of taxation; the fiduciary obligations of corporate managers and financial leaders; the relative rights and duties of shareholders, wage-earners and consumers; the observance by common law judges of their traditional obligations to precedent and constitutional precept, with the corollary though inchoate doctrines which have attempted to harmonize the quick-step characteristic of much legislation with the more deliberate tempo of habitual judicial march time. We are accustomed to think in terms of conflicts of interest under the law. The orderly settlement of these is the social contribution of the bench and bar. But that presupposes that the applicable principles of law are reasonably ascertainable, subject only to the principles of growth consistent with the doctrine of *stare decisis* and the directional control of constitutional limitations addressed to executive and legislature. There are substantial periods of time during which this process is adequate. We can, it is true, always discern the demand for change, but in such times the growth of the law can be met by the judicial process, and the moderate innovations of legislation do not challenge the major premises of social policy nor exceed the assimilative capacities of the courts. There is no need to stress today that there are other periods when, in some quarters at least, the de-

mand for new law becomes accelerated and insistent, finding expression through social and political processes in the form of legislation which cannot readily be accommodated into the continuum of orderly legal growth. That raises nice questions for the legal professions of bench, bar and school; in fact the protagonists of such quick-tempo legislative changes regard them as burning questions—sometimes, it might appear, in the transitive sense of that verb.

Our place in the social order is to be specialists, students of the law, and we are accorded privileges and support because it is conceived to be important that our special function be discharged. Like the observers trained to fly over a battery and report the effects of fire, we have a detached position from which to take a broad view. It would be humanly understandable if the fire control expert abandoned his position and left his role unfulfilled, to join the hand-to-hand conflict, but it would be a grave breach of his true duty, not even to be excused on the score of bravery, for it is a much greater test of courage to stay aloft and exposed to the fire of both sides. When long range dispassionate observation is vitally important and of the highest social value it is equally shortsighted for the students and scholars of the law to desert the detached position essential to the proper discharge of their true role for the more obvious self-satisfaction of political controversy. To clarify our own positions, at least, our duty is to preserve our disinterestedness, seeking to understand and perform our special role in the service of the law and society. It must be observed that no law school and no law review which has a proper understanding of the long range realities of a period of social change like the present, may ignore the challenge of the problem of accelerated legislative alterations of the social basis of the law, and continue to discuss, in the editorial department, the purely doctrinal and evolutionary significance of judicial decisions turning upon that sort of legislation, any more than the bench and bar may properly do so in their sphere. Like it or not, faculty and editorial board must attempt to deal with the problem whenever it arises as the central incident of statutes expressive of a degree of social innovation.

That does not mean that the Review any more than the Faculty

should enter the arena of political controversy and conflicting social opinion in the discharge of their respective functions. Their roles are much more important than that. For those of us who have assumed the social responsibilities of legal scholarship to descend to the arena of controversy is to abandon our proper function at a time when its performance may be invaluable, if dispassionately pursued. Neither the possession of transcendent gifts of satire or dialectic, nor the overwhelming compulsion of partisan sympathies or convictions should be allowed to obscure the fact that to follow their lead is to desert the position essential to gaining the attention and confidence of both sets of partisans. Manifestly, there is need today for scholarly unbiased study of each of those occasions of legislative change which involve alterations of the assumptions upon which principles of law have been established. That means, in any particular instance, a consideration of the legal purport of the statute and its effect upon, or contrast with the state of the law at the time of its enactment. Previous doctrines and principles must be reexamined; the existing rules for the judicial interpretation and reception of legislation must be subjected to new analysis and criticism; while case precedent bows to subsequent legislation, the impress of constitutional limitations and affirmative grants of power require constant reappraisal. For a passing example, take the powers of Congress to legislate under the commerce clause.

During nearly 150 years of national growth we can pick out at least three crucial occasions when this source of legislative power was resorted to. In the first place, it was written into the Constitution largely to prevent the continuation among the States of the petty policies of trade rivalry, protectionism and taxation which several of them had been pursuing. *Gibbons* v. *Ogden* is the landmark of this conception of the commerce power as extending to the maintenance of free communication and intercourse, subject only to regulation in the national interest. In 1890 ten years of public preoccupation with the preservation of an open competitive market for goods and services resulted in the Sherman Anti-Trust Act. This represents the first great branch stemming out from the main trunk of the commerce clause, and for more than forty years the courts were so busy with the elab-

oration of the Sherman Act and its extensions that the branch took on the appearance of being the whole tree. That is why, when we come to such recent social legislation as the National Labor Relations Act, and the decisions of the Supreme Court passing upon its constitutionality under the commerce clause, we find, say in the opinions in the *Jones & Laughlin Steel* case, that the major portion of the decision is devoted to a consideration of the judgments under the anti-trust acts, and the dissent rests on the same decisions as constituting a definition of the commerce clause, rather than a body of interpretation of the legislative intent expressed in the anti-trust laws. The truth of the matter is that our traditional approach to a new problem by marshalling precedent, gives the impression that the courts can only get back to the tree trunk of the commerce clause by climbing laboriously along the luxuriant limb of the anti-trust decisions. Yet anyone will admit that a constitutional grant of power does not become limited because Congress at first chooses to invoke it to a limited extent. Acting first to secure free intercourse under the exclusive control of the national government, and thereafter to promote the operation of competitive forces free from monopolistic interference by business men, Congress, at a still later date, in the various minimum wage acts, and in other contemporary "social" legislation, turned once more to the commerce clause. Just as the *Knight* case imposed on the Sherman Act the narrow conception of commerce appropriate to the situation presented in *Gibbons* v. *Ogden,* when the turn of the minimum wage cases came to submit their claims to constitutionality to the highest court they too were met, in the *Adkins* case for example, by tests developed in the course of the precedent anti-trust decisions. Now, it is easy to show that from the beginning of the present century a new set of factors influencing the course of business was manifesting itself. These were the questions of cost differentials among goods competing in the inter-state market. Lower freight costs on a short haul, lower wages where female or child labor was permitted by local law, non-union wage scales,—all such elements of cost are just as determinative of the terms on which competition may be maintained in a common market as are restrictions selfishly imposed by States, or the monopolistic devices of business men to

control supply or prices. The organized miners of Ohio and Pennsylvania did not seek to unionize the Hitchman and other open-shop mines in West Virginia until the coal from the former States could not meet the competition of the coal produced by the latter at a materially lower wage. But this point is nowhere relied upon in the *Hitchman* case.

It has not been the widely proclaimed humanitarian impulse which has led to the passage of child labor acts, or minimum wage-hour laws for women, but the compelling desire to protect higher wage scales from disastrous competition. Not until the recently enacted Federal Wage-Hours Law has this purely economic incentive to self-protection been included in the declared purposes of such measures. Whether it is morally, socially or economically desirable to legislate to equalize social differentials in the costs of competing goods, or whether, for that matter, geographical and other natural factors leading to lower costs should be regulated or equalized by legislation, is, in the first instance, the exclusive business of the law-making branches of government. Then, when in the inevitable course of events the constitutional competence of Congress is called in question in the courts, we have a clean cut question. Is the act a regulation of interstate commerce?

There is a disingenuousness discernible in this long range view of such legislation. The legislators seem to anticipate that, when having a fresh recourse to a source of power, the statute will have easier going in the courts if it is given the color of decisions interpretative of earlier instances of the exercise of that particular power. Counsel likewise establish their argument on the precedents arising from the earlier enactments. By the time appeal points are evolved for the higher courts they are irrevocably stamped with the likeness of a line of decisions to which they are not lineally but only collaterally related. That seems to be our established method of subjecting new statutes to the test of constitutionality. It is not easy to see why that should be, because there is another method of approach equally well established and generally recognized—the accepted rules for statutory construction. The first inquiry is what does the act mean, what is its intendement and scope. Once the legal meaning of the particular statute is established,

then comes the ordinary question of considering its application to the situation of fact presented on the record. Then, and only then, does the issue arise to determine whether Congress had the power to enact a law of that import.

What is intended as a brief suggestion for steering an editorial policy between the extremes of political controversy and the unrealism of purely legal analysis has, by an attempt at illustration, outrun itself. It is submitted that there is today an important function for you as Editors of the Virginia Law Review, in common with all other students of the law, which no one else is in a position to perform. In the fields of new legislation bring to bear all the originality of thought and analysis which a scholarly devotion to our system of law and a faith in its inestimable value for the future can inspire. Lawyers and judges must discharge their daily tasks and responsibilities, compelled by the duties of advocacy, or the necessities of the immediate decision. Of all those trained in the law, the faculties and scholarly students of the law schools are free from these practical duties of court room and counsel's office; have disinterestedness, and opportunity to view and appraise and analyse the doctrinal structure, the historicity, certainty, integrity and social responsiveness of the legal system under which we live, upon which the security and order as well as the progress and increasing happiness of all must depend.

That, then, brings us to the birthday of the Review, and you who are to guide it through its twenty-fifth year. May you maintain and advance the high standards of student responsibility which your predecessors set for you. Be conscious that the reputation of the Law School is a charge upon you as well as upon us of the Faculty. Carry on the tradition of devotion and industry in the interest of the Review, and remember that you are also maintaining a standard of disinterested effort and scholarship for the entire personnel of the Law School. And, when you come to the daily grind of turning out each number of Volume XXV, may you bring to it, as legitimate occasion offers, a more extensive, critical and constructive consideration of the frontier problems of legal change than was necessary or appropriate in the earlier days. In full confidence that you can solve the working problem of

weighing and valuing, of testing and appraising, without surrendering the detachment and disinterested viewpoint of scholarship, may you have every success in the discharge of this year's offices and trusts, and may the twenty-fifth volume of the Virginia Law Review be better, but no bigger, than ever before.

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