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A Foreword

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TEXAS LAW *and* LEGISLATION

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A FOREWORD

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THE students of the School of Law of Southern Methodist University are to be congratulated on their new publication. Legal periodicals edited by law students are no novelty; the HARVARD LAW REVIEW is the prototype of scores of similar publications. Periodicals written as well as edited by students are relatively new arrivals in the law school world. The INTRAMURAL LAW REVIEW OF NEW YORK UNIVERSITY, founded in 1944, publishes some of the best of the law notes that the school requires of all its students. Much to the surprise of its contributors the magazine, commented upon in the Dean's report, has been in demand far beyond the walls of their law school; a set of it is to be found, among other important places, in the Library of the Supreme Court of the United States. Last year the Publications Society made up of law students of the University of Virginia initiated a Reading Guide of which nine numbers appeared in the first year. Its reviews of new books, of leading articles from periodicals, and of older books "from the stacks" have a brevity and a pith and a breadth of selection that quite regularly causes me to break my rule against opening the pages of any periodical during office hours. I judge from an editorial in its latest number, "looking forward to greater possibilities for future reporting," that it has already attracted others as it has me. There doubtless are or have been other student publications beyond the traditional yearbooks and newspapers, but I do not happen to know of them. I am fairly certain that nowhere else have

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law students endeavored to edit and publish a law journal each number of which will be devoted to a single general topic.

Law students cannot begin to think and write too soon—and such writing should induce critical thinking—*provided* that the editor does not fancy himself ‘Sir Oracle.’ He will do well to keep in mind the vast difference between law in books and law in action. More and more law books, especially those dealing with procedure, are coming to be written in the field as much as in the library; RAGLAND ON DISCOVERY and WARREN ON TRAFFIC COURTS are outstanding examples. The Survey of Judicial Administration in the United States which will be published within the year by the National Conference of Judicial Councils embodies field work in every state of the Union. Your editors, I am sure, will constantly keep in mind the difference in the connotation of seemingly unambiguous legal terms. Trial by jury, for example, may mean a trial in which the judge may, if the dictates of justice require it, question a witness, comment on the evidence and charge the jury as to the law in language of his own choosing after counsel has addressed the jury—or trial by jury may mean a proceeding, as in twenty odd states, in which the trial judge is precluded from questioning a witness, or from commenting on the evidence and whose charge precedes rather than follows the argument of counsel and whose charge, moreover, is not of his own composition but consists of repeating to the jury assignments or requests submitted to him by one or another of the trial counsel. In each instance there is a judge and a jury of twelve, but that is about all the two proceedings have in common. It is well always to remember, too, but a slight change in the application of a rule may mean all the difference between justice and injustice. In the federal courts a party in a civil case is allowed three peremptory challenges. Where the trial judge questions all the jurors as to their qualifications, their relation to the parties, the witnesses and the subject matter, and allows counsel to

suggest possible questions to him to put to the jury panel, three challenges are generally ample. But where the judge takes no part in the preliminary interrogation of the panel of jurors and lets or insists on counsel asking all the questions, and where counsel must use up his three precious challenges on jurors who are obviously undesirable even though not challengable for cause, the allowance of three peremptory challenges may be so greatly inadequate as to amount to a miscarriage of justice.

I am delighted that the experiment of this particular type of legal periodical is to be made in Texas, the vast stretches of which are sufficient to furnish wide variety in the application of a rule of law combined with that degree of unity in action which is essential to the operation of a mature system of jurisprudence. I am glad that the journal has been instituted in a state which is known in other jurisdictions for its willingness to consider and weigh rational suggestions for improving the law, while still insisting that the existing rule be given an opportunity to defend itself. I am particularly pleased that TEXAS LAW AND LEGISLATION has been started in a state that is so vast that it is in less danger of being provincial than some other jurisdictions. Followers of the common law seem to have an innate tendency to be parochial in their outlook, especially where procedure is concerned. In the field of substantive law each court does not hesitate to borrow freely ideas from the decisions of courts in other states, but in the realm of procedure that is done more rarely. There is more likelihood of the comparative method being employed in larger states than in small ones. Larger areas make for greater possibility of "free trade" in ideas, a doctrine that whatever its political implications may be, is essential to sound growth in the law.

It is significant that the word "Legislation" forms part of the title of the new publication. Lawyers have too long neglected legislation for court decisions. Our facility in the use of statutes is

far less than our capacity for handling decisions. This is unfortunate in an age in which the written law is assuming greater and greater importance, in constitutions, in codes, in statutes and in administrative rules and regulations. We need constant training in the use of statutes as well as in legislative methods. Even more do we need familiarity with the written law of the administrative agencies. First of all we want to know where to find it, for in relatively few states is it promptly published, in many states it is not published at all, and in few states does it appear in a single publication corresponding to the Federal Register. First, administrative regulations must be made readily and speedily available (the same observation applies in many states to statutory law) and then we sorely need, in most jurisdictions, comprehensive indices and digests. Is it not a reflection on our civilization that our written law should be so inaccessible that a lawyer cannot safely advise a client on the statutory law or administrative regulations of another state, although he would have less hesitation in doing so with regard to the judicial decisions of another jurisdiction? TEXAS LAW AND LEGISLATION has a peculiar opportunity to pioneer in the work of uncovering statutory law and the legislation originating in the administrative agencies. It would be interesting to compare the volume of the output year by year of the courts, the legislature and the administrative agencies of every state with the amount of time given to each in the law schools. Our law schools, by this test, might be convicted of nonfeasance at least.

It is a significant omen that the first number of TEXAS LAW AND LEGISLATION is devoted to the need for a revision of criminal procedure in Texas. Law students have generally had a tendency to ignore criminal law, and particularly criminal procedure, in favor of the great topics of private substantive law. This, of course, is a great mistake, for many of our most cherished civil liberties depend for their ultimate vindication on the work of the criminal courts and the procedure followed therein. There is a wide variety

of types of criminal procedure, ranging from technical common-law practice to tangled statutory compilations, from simple practice acts to complicated codes, from sixty brief rules of court as in the federal system to the more formal code of criminal procedure of the American Law Institute. For some years the tendency has been in the direction of simplification and flexibility in criminal procedure through the exercise of the rule-making power by the courts, either through their innate power or by legislative direction. The reasoned views of the oncoming generation of lawyers in this important field of the law will be awaited with much interest.