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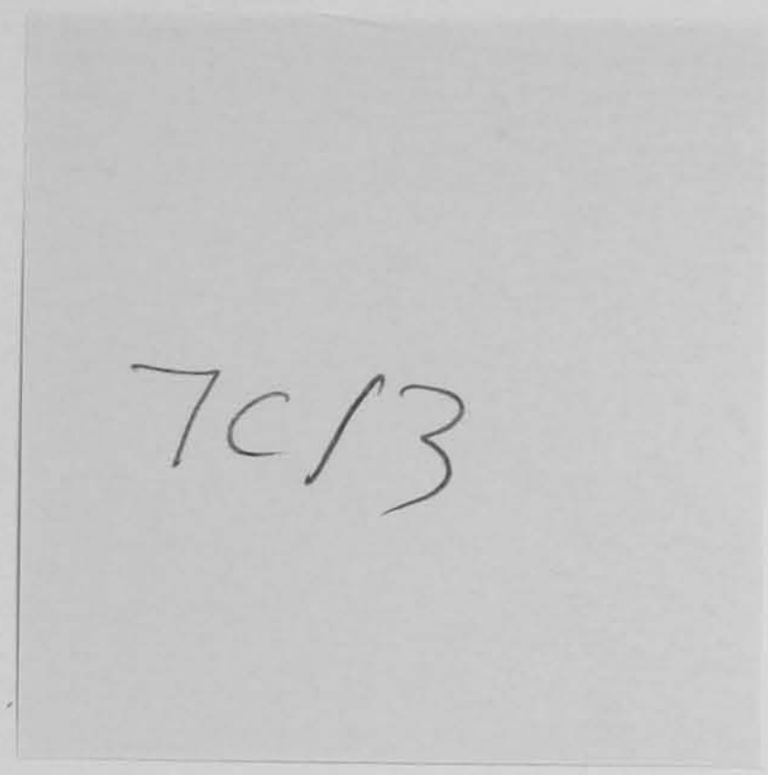
A Forward to the Vanderbilt Law Review's New Section on Legislation

Roger J. Traynor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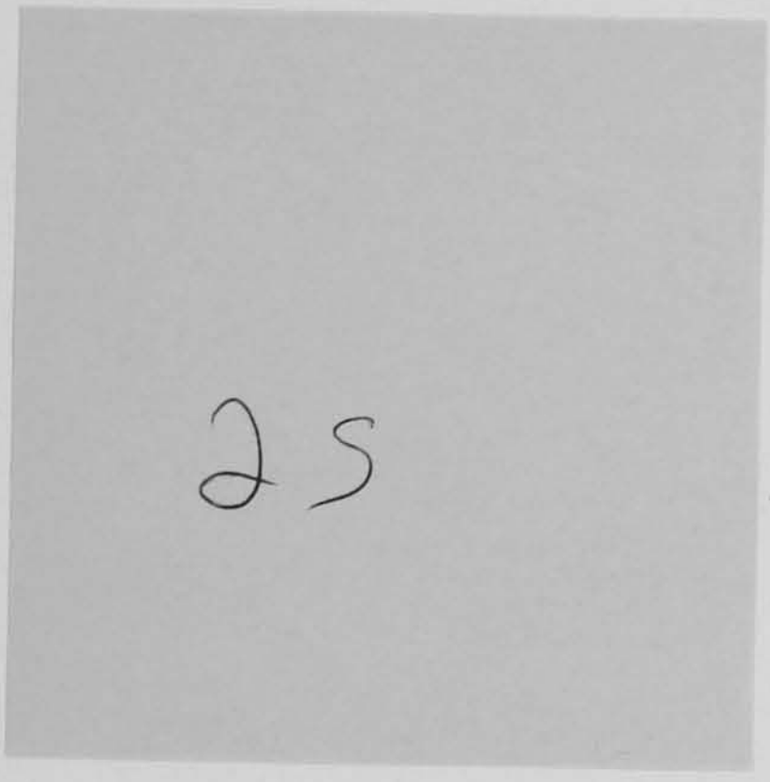
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LEGISLATION

The Vanderbilt Law Review takes pleasure in presenting to its readers its new Legislation Section. This section will carry student comments dealing with problem areas of the law that call for statutory solution, and with recent statutes of importance; the principal emphasis will be on the first of these—the area of law reform. The Legislation Section was conceived in response to a challenge issued by Judge Roger J. Traynor of the California Supreme Court in an article entitled "To the Right Honorable Law Reviews." Judge Traynor has graciously consented to write a foreword to this new enterprise; we only hope that we can live up to his expectations.

A Foreword to the Vanderbilt Law Review's New Section on Legislation

Hon. Roger J. Traynor°

For all of this century, and some years before it, law reviewers have trained their one-two-three-year learning primarily on appellate decisions. They have brought youth and zest and some impressive scholarship to the task. More than once they have brightly demonstrated that their elders whose word is law are not very good at words or, worse, are very good at words but not so very good at the law or, worse still, are bumbling on both counts or—aha, no praise be, and close in for the kill—are men dedicated to *idées fixes* that have no place in modern cosmologies.

The reviews have found a ready audience among students and scholars, wherever they may be. They early appeared on the open shelves of many courthouse libraries; but there they at first remained all too quietly at rest among the circulating reports. Only in recent years have they gained the status of widespread citation in decisions. What dislodged the academic-bound commentaries from their dusty niches was a dual phenomenon. Legal problems were growing novel horns at an unprecedented rate; fortuitously the new men coming to the workbenches of the law were prompted by their contemporary education and experience to reach for all the scholarly aids to continuing education within their grasp. The concept of the judicial temperament grew to include an aptitude for learning even from the young, and a corresponding perspective on emerging as well as on historical problems. It could no longer be meanly defined as no more

° Associate Justice, Supreme Court of California.

than a capacity for appraisal of adversary briefs not always sufficient unto the morrow or even unto the day.

In restrospect it could not have been otherwise. In a world that barely survived the devastation of global depressions and wars to move into a swiftly expanding economy and an age of exploration, in a country that is everywhere shifting from primarily rural to primarily urban living, the law reviews have become an indispensable signal corps in the legal process of giving social order to social change. To courts daily overwhelmed by every conceivable controversy, and not a few inconceivable ones, they have brought the unhurried reflections that sometimes yield fresh insight into the familiar and now and again anticipate the surprise twist. A responsible judge, arriving at his decisions as independently as ever, cannot now afford to ignore the reflections of independent specialists. Rare now is the judge so narrowly committed to formula or so torpid with revery of simpler days as to deplore or ignore what a job the law reviews are doing on appellate decisions, including his own. The reviews have established lines of education, if not of open communication, between those who must constantly have a decision ready at least in the nick of time on a barking controversy and those who have all the time in the world to reflect on what the bark portends in the way of bite.

So we come to the happy ending of this important first chapter on law reviews and the law. Is that all there is to the story?

One might think so from a cursory glance at many law reviews, heavily freighted with critiques of appellate decisions. Yet clearly more chapters are under way in the story of law reviews and the law, and for good reason. There is much more to law than appellate decisions. To recognize the obvious, there is massive statutory law, controlling with finality the lives of most of us who have no occasion to litigate its meaning or application all the way to the authority of an appellate decision. There is administrative law, running the gamut from rulings not far removed from judicial decision to regulations far removed from the formality and finality of decisional law. Private organizations such as corporations and unions, private associations related to their members by noneconomic ties, impose regulations on their constituents not unlike those of a state. Inevitably, in an expansive age, law has expanded in all directions and in new forms. Indeed, a few law schools are already encouraging polymerization of legal education with related disciplines; it is no longer heresy to suggest that the analysis of a legal problem may involve some awareness of its economic or medical or anthropological aspects. There is a breakdown of provincialism in space as well as in subject: mobile domestic relations and corporations fly straight into conflicts; on a long flight,

they risk public encounter with *le droit international privé.*

What all this portends for the law reviews, as the signal corps of the law, is a responsibility greater than any they have yet undertaken. Already some of them, though not nearly enough, are beginning to acquaint themselves and their readers with the legal problems emerging beyond the narrow range of appellate decisions. Already some of them have taken substantial first steps toward their new responsibility, proceeding from comments on statutory interpretation in appellate decisions to explications of significant new statutes to analysis of one so-called Model Code or another or even of those bills that by any other name would smell as model.

For all the sporadic heartening signs, however, they do not add up to a collective continuing responsibility of the law reviews for the orderly growth of statutory law comparable to the one they have long assumed for the orderly growth of decisional law. As bills swarm like minnows in the aquariums of legislative committees, some quickly, sometimes all too quickly, liquidated in committee hoppers, and some tenderly nourished for showcase presentation under the most favorable circumstances, the need grows for a steady vigil by law reviews in every state on the legislative process, as alert as the one they now keep on the judicial process. For lack of such a vigil, many a minnow of inconsequential appearance in the bill stage has achieved immortality of sorts as a whale of an act, a frozen monster of language, each inept or poisonous word of which is Law. For lack of such a vigil, the legislative process itself suffers. By nature a disorderly process, because of what is sometimes euphemistically called its responsiveness to the public, it can also become an irresponsible one in the absence of informed and forthright criticism.

Last year, in another law review, I stated the problem with some urgency:

> If ever we needed the law reviews, it is in this area. It is an area that most of them have sadly neglected. They could if they would take the lead on many timely problems with well-drafted proposals for legislative consideration. They could do a job, and what a job it would be, of analyzing statutes and administrative rulings as painstakingly as they now analyze opinions. It would be a job such as could absorb the talents of every student in every law school.[1]

I did not quite despair that the challenge would strike a response here or there, but it went beyond my expectations to receive a letter from Managing Editor Charles E. McCallum of the *Vanderbilt Law Review* setting forth the plans of the *Review* for a Legislation section.

1. Traynor, *To the Right Honorable Law Reviews,* 10 U.C.L.A.L. Rev. 3, 9-10 (1962).

In this foreword that he requested, I could do justice to the relevant paragraph in his letter only by quoting it in full:

> Our aim is somewhat different from that of other law reviews with similar departments. While we do not preclude the possibility of studying in detail recent statutory enactments, we plan to concern ourselves primarily with the field of law reform. That is, we will locate and discuss areas of the law that call for statutory reform and will make proposals. Our format for short student material in this department is: statement and analysis of the problem; summary and critique of proposed solutions (model acts, uniform laws, meritorious state acts, laws of other countries); recommendations. We plan to include, where suitable, well-drafted statutory proposals.

Bravo, editors of the *Vanderbilt Law Review*, and Godspeed on a venture that will be always challenging even if at times discouraging. That paragraph—perhaps some day you will reread it and find its clarity of purpose as heartening as I do now.

Administrative Procedure—Supervision of Administrative Rule-Making

The burden of testing the validity of a rule[1] promulgated by a governmental agency is often borne in litigation by those whose conduct the rule was designed to regulate. Scrutiny of the rule prior to its becoming effective by an element of the government independent of the rule-making agency[2] may be the most effective means of shifting to the government some of that burden.[3] Concomitant with this gov-

1. "'[R]ule' means each agency statement of general applicability that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. The term includes the amendment or repeal of a prior rule, but does not include (A) statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public, or (B) declaratory rulings, . . . or (C) intra-agency memoranda." REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 1(7).

2. The scope of this article does not include advisory opinions by state supreme courts. In eleven states such opinions may be requested by the executive or the legislature. See, *e.g.*, DEL. CODE ANN. tit. 29, § 2102 (1953): "The Governor may, whenever he requires it for public information, or to enable him to discharge the duties of his office with fidelity, request the members of the Supreme Court to give him their opinions in writing touching the proper construction of any provision in the Constitution of this State . . . or the constitutionality of any law enacted by the Legislature of this State." For a concise discussion, see Stevens, *Advisory Opinions—Present Status and an Evaluation*, 34 WASH. L. REV. 1, 3 (1959).

3. "This form of review places the burden of proof on the state rather than on the individual, and it tends to lessen the possibility of conflict after the rule has been in effect." THE COUNCIL OF STATE GOVERNMENTS, ADMINISTRATIVE RULE-MAKING PRO-