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Palmer D. Edmunds

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## HAIL TO LAW REVIEWS

By PALMER D. EDMUNDS\*

In 1937 Professor Fred Rodell, of the Yale Law School, authored an article entitled "Goodbye to Law Reviews."<sup>1</sup> Professor Rodell introduced it by saying:

"It is doubtless of no concern to anyone that this is probably my last law review article. As a matter of fact, this makes one more article than I had originally planned to write. It was something in the nature of a New Year's resolution. Yet the request to do a piece about law reviews seemed a golden opportunity to make my future absence from the 'Leading Articles, Authors' lists a bit more pointed than would the business of merely sitting in a corner, sucking my thumb, and muttering Boo."<sup>2</sup>

Having thus sounded the key-note, Professor Rodell launched into his dissertation by saying:

"There are two things wrong with almost all legal writing. One is its style. The other is its content. That, I think, about covers the ground. And though it is in the law reviews that the most highly regarded legal literature — and I by no means except those fancy rationalizations of legal action called judicial opinions — is regularly embalmed, it is in the law reviews that a pennyworth of content is most frequently concealed beneath a pound of so-called style. The average law review writer is peculiarly able to say nothing with an air of great importance."<sup>3</sup>

It is not of record that a Lochinvar arose in behalf of the law reviews to formally accept in kind the challenge thus posed to their legal erudition and manner of expression. Without a powerful champion, the proverbial reasonable man might well have concluded that under such a body blow they were doomed to succumb. Writers might well have declined to write for their columns, fearing to identify themselves with those "able to say nothing with an air of great importance." Nevertheless, writers continued to take the calculated risk, and wrote. Manuscripts were transformed into galley proofs; presses rolled out the pages, and with accelerating tempo the reviews of the nation's law schools circulated merrily on their way.

In retrospect, it is a fair conclusion that Professor Rodell's

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\* Faculty, The John Marshall Law School.

<sup>1</sup> 23 VA. L. REV. 38 (1936).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

words of criticism were not without some foundation. At the time he wrote, law reviews had hardly emerged from the adolescent stage at which advice, to be heeded, had to be promulgated with an acrid pen. Professor Rodell returned to the law review fold twenty-five years later with another article, "Law Reviews Revisited."<sup>4</sup> In the latter he confined himself to a more temperate critique reflecting his relative satisfaction with law reviews as they are today.

Today's law reviews need no formal defenders. They stand on their own feet and speak for themselves. But if there ever was occasion for the "Goodbye" to them which has long stood of record, there is the more occasion today to balance the record with a "Hail."

#### WARREN AND BRANDEIS: "THE RIGHT TO PRIVACY"

In December, 1890, there appeared in the *Harvard Law Review* an article entitled "The Right to Privacy."<sup>5</sup> It was written by two Boston lawyers, Samuel D. Warren and Louis D. Brandeis.

The article was introduced by a quotation from an opinion of Justice Willes, an English jurist, epitomizing the common law:

"It could be done only on principles of private justice, moral fitness, and public convenience, which, when applied to a new subject, make common law without a precedent; much more so when received and approved by usage."<sup>6</sup>

Then followed the first paragraph of the article:

"That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been necessary from time to time to define anew the exact nature and extent of such protection. Political, social and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society. Thus, in very early times, the law gave a remedy only for physical interference with life and property, for trespasses *vi et armis*. Then the 'right to life' served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle. Later, there came a recognition of his spiritual nature, of his feelings and intellect. Gradually the scope of these legal rights broadened, and now the right to life has come to mean the right to enjoy life — the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term 'property' has grown to comprise every form of possession — intangible, as well as tangible."<sup>7</sup>

We recognize this at once as a forcefully written introduction to a dissertation urging that the time had come for the common

<sup>4</sup> 48 VA. L. REV. 286 (1962).

<sup>5</sup> 4 HARV. L. REV. 193 (1890).

<sup>6</sup> *Miller v. Taylor*, 4 Burr. 2303, 2312 (1769).

<sup>7</sup> See Note 5, *supra*.

law to recognize and implement the right to full protection for man's spiritual nature, in the last analysis the most precious of all human rights. Up to the year 1890, no such right had been recognized by common law courts. Doubtless the article was written with a background of representing the interests of clients who had suffered indignities of a sort for which no relief at law or in equity had been found available. In its purpose to bring about a recognition of the right which, in consequence, Warren and Brandeis keenly sensed, their article exemplified the contribution which every lawyer owes by way of doing his part to make the law a better instrument of justice.

In the sense of stimulating legal thinking the article had a growing impact. But definite results were slow in coming. Writing nearly fifty years later, Professor Francis N. Bohlen said:

"Fifty years ago the right which every normal and decent person feels in living his life to himself appeared likely to be protected by a legal recognition of a right to privacy. Unfortunately the campaign for its recognition brilliantly begun by the article written by Justice Brandeis and published in the *Harvard Law Review* has almost completely failed."<sup>8</sup>

But it was not long after Professor Bohlen penned these lines that the breakthrough came. Court after court recognized the right to privacy and opened the judicial process to its vindication. The recapitulation was aptly made by an alumnus of the John Marshall Law School, Justice Ulysses S. Schwartz, speaking for the Appellate Court of Illinois:

"Following the lead of Samuel Warren and Louis D. Brandeis, whose famous article, *The Right to Privacy*, 4 Harv. L.R. 193 (1890), first used the phrase 'right of privacy,' distinguished writers have supported the recognition of the right. Larremore, *The Law of Privacy*, 12 Col.L.R. 693 (1912); Pound, *Interests in Personality*, 28 Harv.L.R. 343, 362-4 (1915); Winfield, *Privacy*, 47 Law Q.R. 23 (1931); Green, *Right of Privacy*, 27 Ill.L.R. 237 (1932); Nizer, *Right of Privacy*, 39 Mich. L.R. 526 (1941); Thayer, *Legal Control of the Press*, ch. 12 (1944); Feinberg, *Recent developments in the Law of Privacy*, 48 Col.L.R. 713 (1948). . . .<sup>9</sup>

"The right is now recognized by the great preponderance of authority throughout the country. Courts of at least twenty American jurisdictions have explicitly recognized the right either in direct holdings or well considered dicta. . . . Three other states have statutes recognizing the right."<sup>10</sup>

We have here, obviously, an example of how the attention of the world of common law jurisprudence was brought to focus on an area of human life which the common law up to that time had left unprotected. Originating in the minds of lawyers who

<sup>8</sup> Bohlen, *Fifty Years of Torts*, 50 HARV. L. REV. 725, 731 (1937).

<sup>9</sup> *Eick v. Perk Dog Food Co.*, 347 Ill. App. 293, 295, 296, 106 N.E. 2d 742, 743 (1952).

<sup>10</sup> *Id.* at 295, 106 N.E. 2d 742 at 743.

through experience had come to realize the need, the columns of a law review afforded a forum for its dissemination and suggestions as to its recognition and amelioration by the common law. "Christened in the columns of the Harvard Law Review," as Professor Sidney P. Simpson put it,<sup>11</sup> other legal scholars took it up in other reviews until the courts recognized its rightful place in our common law.

CARDOZO: "THIS NEW ORGAN OF EXPRESSION —  
THE UNIVERSITY LAW REVIEW"

In the course of his lectures at the Yale Law School in 1923, Judge Benjamin N. Cardozo paid emphatic tribute to the part that law reviews had come to play in the sound development of the law:

"More and more we are looking to the scholar in his study, to the jurist rather than to the judge or lawyer, for inspiration and for guidance. Extra-judicial agencies are assuming an importance that increases year by year. Chief of these agencies is the criticism and the suggestion of scholars in the universities and in other institutes of learning. Until the rise of the modern law school with its critical method, there was no organ through which professional opinion could disclose itself effectively and promptly. The universities have given us for the first time a body of critics ever on the watch. This new organ of expression is the university law review."<sup>12</sup>

Judge Cardozo then went on to particularize:

"I have spoken of the words of Williston and Wigmore which took the rank of classics almost overnight. Hardly less notable are the studies in smaller fields which are made month by month in the columns of the reviews."<sup>13</sup>

"A recent case in New York will illustrate my meaning and show the power of the universities to guide the course of judgment," Judge Cardozo said, continuing:

"We had a series of decisions dealing with a supposed rule that in actions for specific performance there must be mutuality of remedy, and mutuality, not merely at the time of the decree, but at the making of the contract. Some cases, repeating the words of Fry and Pomeroy, went pretty far in exalting the supposed rule into one of general application. I have little doubt that if the university professors had not intervened, the rule would have been extended by a process of purely logical deduction, and things would have gone from bad to worse. In the meantime the professors in the universities became busy, and pointed out where we were tending. Ames started the crusade in an early number of the *Columbia Law Review*. Lewis of Pennsylvania strengthened the attack, advancing from a somewhat different angle, in a series of papers in the *American Law Register*. More recently Dean Stone of Columbia, writing in the *Columbia Law Review*, exposed the dangers of the course that many of the courts were following. Finally, Pro-

<sup>11</sup> Simpson, *Fifty Years of American Equity*, 50 HARV. L. REV. 171 (1937).

<sup>12</sup> M. Hall, *Selected Writings of Benjamin Nathan Cardozo*, 190 (1947).

<sup>13</sup> *Id.* at 191.

fessor Williston summarized the arguments and the precedents in his treasury of learning (3 Williston Contracts, secs. 1433, 1436, 1440). Only the other day, the Court of Appeals reconsidered the whole subject and put it on a basis which will be found consistent, so, at least, I hope, with equity and justice. (Epstein v. Gluckin, 233 N.Y. 490.) But the interesting thing about the episode is the part that was played by extrajudicial agencies. Without the critical labors of Ames and Lewis and Stone and Williston, the heresy, instead of dying out, would probably have persisted, and even spread. It would have gained new vitality with every judgment that confirmed it. Inevitably, too, the process of logic or of development by analogy would have pushed it forward into new fields. What saved the day was criticism from without."<sup>14</sup>

#### THE BEGINNINGS OF THE HARVARD LAW REVIEW

Let us glance at the history of the Harvard Law Review which, early in its career, so effectively initiated the trend of juristic thought that culminated in judicial recognition of the right to privacy. Its first number was published in 1887. Among those shown at the masthead as student editors were Joseph H. Beale, Jr., George R. Nutter and John H. Wigmore. An editorial note following the masthead stated:

"In publishing the first number of the *Harvard Law Review* the editors feel it necessary to offer a few words of explanation. The *Review* is not intended to enter into competition with established law journals, which are managed by lawyers of experience, and have already a firm footing with the profession. Our object, primarily, is to set forth the work done in the school with which we are connected, to furnish news of interest to those who have studied law in Cambridge, and to give, if possible, to all who are interested in the subject of legal education, some idea of what is done under the Harvard system of instruction. Yet we are not without hopes that the *Review* may be serviceable to the profession at large."<sup>15</sup>

The first number contained two leading articles — one by Professor James Barr Ames on "Purchase for Value without Notice," and the other by Joseph H. Beale, Jr., on "Tickets." Professor Ames, one of the profession's greatest scholars in all fields of the law, was later to become Dean of the School. It would seem that Beale was "jumping the gun" in authoring a leading article, for 1887 was the year of his graduation from the School. But the generations of students who thereafter sat in his classroom in Conflict of Laws and other subjects can understand that even as a neophyte he could have held his own in fast company. Of the others mentioned above, it would be a work of supererogation to discourse about John H. Wigmore, another scholar in all fields of law, whose broad erudition is manifested in his "Panorama of the World's Legal Systems." Later Dean of the Northwestern University School of Law, he

<sup>14</sup> *Id.*

<sup>15</sup> 1 HARV. L. REV. 35 (1887).

is probably best known today for his monumental treatise on evidence. George R. Nutter entered the firm of Warren and Brandeis as an associate, later became a partner, and the firm became an outstanding one of the Boston Bar.

Also in the first number of the *Harvard Law Review* were "Notes on the School" and extracts from a lecture by Professor Ames on "Choses in Action." A letter at some length from Washington, D.C., commented on decisions of the United States Supreme Court at its October Term, 1886. There were comments on a number of recent cases, and several book reviews.

As we have outlined the content of the first number of the *Harvard Law Review*, it would seem to have established a pattern which it has rather consistently maintained through the years, and which has been followed by the many law reviews which were later established throughout the country. The pattern includes (1) leading articles on subjects of current importance and interest, grounded on scholarship and knowledge in the field under consideration; (2) commentaries on current important judicial decisions and developments in the law; and (3) review of current books on legal subjects. And it established, of course, the pattern of student participation. Warren and Brandeis attained professional eminence without having had opportunity for law review experience, because the *Harvard Law Review* was not established until after their graduation. But it is reasonable to say that Beale, Wigmore and Nutter, and other student editors who might have been named, gained much from their Law Review experience. In passing, mention might be made of the names of other student editors, taken at random from later volumes of the *Harvard Law Review*. Among them are Norman Hapgood, who transferred his legal talents to the world of literature; Henry Upson Sims, legal author and past president of the American Bar Association; Thomas W. Swan, former Dean of the Yale Law School and Judge of the United States Court of Appeals; Charles E. Hughes, Jr., son of the Chief Justice of the United States and an eminent member of the New York Bar in his own right; Robert A. Taft, likewise a son of a Chief Justice who left a successful legal career to become a leader in American politics; Clarence B. Randall, who turned industrialist and became president of the Inland Steel Company; Robert P. Patterson, Judge of the United States Court of Appeals and Secretary of War; Raymond S. Wilkins, Chief Justice of the Supreme Judicial Court of Massachusetts; Dean Acheson, Secretary of State of the United States; Archibald MacLeish, who like Norman Hapgood, transferred his talents to literature; Louis L. Jaffe, scholar in the field of administrative

law and a professor at Harvard Law School, and Edwin N. Griswold, presently Dean of the Harvard Law School. A glance through the masthead entries of the law reviews of other institutions would, without question, likewise reveal a rich treasury of names of lawyers who have distinguished themselves in the legal profession, and, in the process, have uplifted the profession and the law.

The benefit of student training through law review participation is not, however, restricted to those who have subsequently achieved pre-eminent public and academic fame or recognition. From student experience on a law review staff, all profit including the vast majority who accomplish their everyday service to the bar and the public quietly and without fanfare.

#### EARLY PROFESSIONAL LAW JOURNALS

With the advent of the *Harvard Law Review*, followed from time to time by the entry into the area of reviews from other law schools, the ultimate demise of the "established law journals managed by lawyers of experience," referred to above<sup>16</sup> in the first number of the *Harvard Law Review*, was inevitably foreshadowed. Today's lawyers do not know such publications, save, perhaps, as the *American Bar Association Journal* has some measure of their qualities. One of the oldest of the "established law journals" began publication, in 1866, as the *American Law Review*.<sup>17</sup> It ceased publication in 1940. Others of the old private law reviews had succumbed before then. The law school reviews had come to cover the field so thoroughly that there was no longer a place for the privately edited journals, however high their standards might be.

One finds a fascination in turning the pages of the old law journals and noting their content. Much of the material is unsigned. On the first page of Volume 5 of the *American Law Review*, dated Boston, October 1870, begins an article, "Codes, and the Arrangement of the Law." There is no name attached. But at the top of the page, above the printing, appears the following, written in red ink: "Note: This Article is undoubtedly written by O. W. Holmes, Jr." One reading the first few sentences can hardly avoid sensing the Holmes "touch":

"It is the merit of the common law that it decides the case first and determines the principle afterwards. Looking at the forms of logic it might be inferred that when you have a minor premise and a conclusion, there must be a major, which you are also prepared then and there to assert. But in fact lawyers, like other men, fre-

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<sup>16</sup> See text at note 14, *supra*.

<sup>17</sup> In 1929 this journal was reorganized and continued publication as the UNITED STATES LAW REVIEW. Under a subsequent reorganization it became the NEW YORK LAW REVIEW.



quently see well enough how they ought to decide on a given state of facts without being very clear as to the *ratio decedendi*. Lord Mansfield's often-quoted advice to the business man who was suddenly appointed judge, that he should state his conclusions and not give his reasons, as his judgment would probably be right and the reasons certainly wrong, is not without application to more educated courts."<sup>18</sup>

#### "BRIBERY AND CORRUPTION" IN ILLINOIS

In the Book Review section of this same Volume 5 of the *American Law Review* there appears a review of a brochure containing the Constitution of the State of Illinois "as adopted in Convention, May 13, 1870, and submitted to the people for adoption or rejection at an election to be held July 2, A.D. 1870, and the Address of the Convention accompanying the same." The unsigned comment, dealing specifically with a number of its provisions, manifests a spicy quality which is not beyond the appreciation of those who read it nearly a century later:

"Under the head of the Legislative department, we find that a very stringent oath is required of members of the General Assembly against bribery and corruption, which we have no hesitation in saying will be a complete failure. When legislators reach that pitch of depravity at which they become accustomed to bribery and corruption as part of the ordinary course of legislation (and this point we understand the legislature of Illinois to have reached) their consciences do not any longer stop at such trifling stumbling blocks as oaths. One would think on reading the oath prescribed that the Convention supposed the corrupt law-giver would, on the presentation of it, succumb at once to the voice of conscience, turn pale as ashes, and, grovelling in the dust, sue for mercy. For our own part, we incline to think that he will do something very different — he will in all cases take the oath."

The reviewer then brought to bear the judgment of the "statesmen" who framed the Constitution of the United States. Continuing, he said:

"But this is a matter of minor importance. In its haste to remedy some of the more crying evils of the present, the Convention seems to us to have forgotten a primary maxim of constitution making, that constitutions must consist of general principles and not of special laws. What would the statesmen of 1787 say to such constitutional provisions as these: '25. The General Assembly shall provide by law that the fuel, stationery, and printing paper furnished for the use of the state; the copying, printing, binding and distributing the laws and journals, and all other printing ordered by the General Assembly, shall be let by contract to the lowest responsible bidder, but the General Assembly shall fix a maximum price.' The people of the United States would have been rather astonished, we fancy, if the instrument submitted in 1787 had contained a provision as to statutory contracts, or the expenses of furnishing the capitol."

The reviewer looked with a critical eye upon the provisions for the elective process:

"We are somewhat surprised to see that the 'elective principle'

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<sup>18</sup> 5 AM. L. REV. 1 (1870).

is retained by the new constitution in full force. All the judges of the supreme, circuit, county and probate courts are to be chosen by the people. Even in Chicago this is to continue, although that city is probably quite as unfitted for the practice by the nature of its population as is New York, where its failure is confessed. Perhaps Vanderbilt and Fisk may yet teach Illinois the lesson which New York seems to have learned too late. The profession will be glad to know that the Supreme Court reporter, at any rate, is selected by the court, and not at the polls."

Finally, the reviewer expressed concern as to the number of "accomplished statesmen" in Illinois:

"On the whole, it may be said of the new Constitution of Illinois, that it abounds in negative rather than positive provisions, provisions rather calculated to hedge the powers that have been abused than to establish new ones. This, from one point of view, is an advantage. It is unlikely that a new state, like Illinois, contains a large number of accomplished statesman, and she is much safer in the hands of law-givers who are willing to stand *supra antiquas vias* than she would be if her government were to be used as the *corpus vile*, for the experiments of empirics and dreamers. 'Thou shalt not' has often been found in politics as in religion a safer ordinance than 'thou shalt.'"<sup>19</sup>

A look at the subscription rolls of the *American Law Review* in 1870, when these comments were written, would probably have disclosed but few Illinois names. A state short of its quota of "accomplished statesmen" could hardly have been over-served by lawyers who looked for enlightenment to the columns of a law journal published in the East. That it was at pains to publish a careful appraisal of a document lacking in direct interest to most of its constituency is indicative of the comprehensive coverage attempted by the professional journals of the time. Certainly the editors of the *American Law Review* could not have anticipated that what was said would increase the popularity of the journal in Illinois.

#### THE ALBANY LAW JOURNAL — FORENSIC ELOQUENCE

Another highly regarded professional law publication was the *Albany Law Journal*. In its introductory number, January 8, 1870, appeared the following notice:

"The undersigned will commence, on the 8th day of January, 1870, the publication of a law journal, to be issued weekly under the above title. It is not the intention to make the Journal a "Law Report" merely, but a medium of conveying to the profession of the country the latest intelligence of interest on all subjects pertaining to the law. Each number will contain valuable and original articles on subjects of general legal interest; discussions of Law Reform; reviews of important decisions; a digest of the latest decisions of the courts of this and other states and of the United States courts; also of the English decisions of interest in this country; a collection of the general legal news of the week, and carefully prepared reviews of new works on legal subjects."<sup>20</sup>

<sup>19</sup> *Id.* at 110.

<sup>20</sup> 1 ALBANY L. J. 2 (1870).

It is apparent that a general pattern was established here which was followed by the *Harvard Law Review*. The pattern was a natural one: "Original articles on subjects of general legal interest," "discussions of Law Reform," "reviews of important decisions," "carefully prepared reviews of new works on legal subjects" — all stood to be of interest and benefit to the profession.

In the *Albany Law Journal*, as in other old law publications, the browser is rewarded by considerable content, obviously held in high esteem a century ago but which is not found elsewhere in print at a juncture when the conquest of outer space appears to inspire more interest than the solution of many mundane problems, and mechanical computers are being groomed to supersede the workings of the human senses. For example, the editorial in the first issue of the *Albany Law Journal* is entitled "On the Study of Forensic Eloquence," and at some length comments on the need for better presentation of cases to court and jury.<sup>21</sup>

The editorial follows with some sound advice as to how to cultivate the art. The writer was setting down his thoughts at a time when forensic eloquence truly related only to courts and juries. Practice before administrative tribunals, even in small degree, could not have been within his conception. Courts and juries remain today; persuasion of administrators calls for appropriate forensic eloquence in the use of the written as well as the spoken word. Forensic eloquence has played a major role in the drama of the law since the days of Demosthenes, trials before the Greek dicastery, and Aristotle's *Treatise on Rhetoric*. Few of today's lawyers would not be more effective if they were capable of evidencing a more persuasive degree of forensic eloquence, oral and written, than they are equipped to demonstrate. But it would be far from the thought of the editors of modern law reviews to give space to commentaries on the subject. It is a tribute to the thoroughness of treatment which our legal literature has given to all aspects of our law and procedure that he who is interested can find helpfully suggestive material in the matter, albeit in pages yellowing with age.

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<sup>21</sup> *Id.* at 3. "There is another essential, aside from a knowledge of the law, for the successful court lawyer — that is eloquence; that sort of eloquence which Blair defines to be 'the art of speaking in such a manner as to attain the end for which we speak.' Many young men, who study with a view of coming to the Bar, have an ambition, more or less strong, to become advocates — to be able to convince judges and persuade juries by the power of their logic and the graces of their style and utterance; but a visit to our courts is but too likely to show how lamentable the great majority of them fail of achieving their desire. Lack of perseverance in performing the labor necessary to the student of elocution, or ignorance of the method to be pursued, or, in many cases, a notion that orators, like poets, 'are born, not made,' has served to make the number of eloquent advocates very small indeed."

## THE JURIDICAL REVIEW

We would expect to find in Great Britain, also, professional legal publications of the kind referred to in the first number of the *Harvard Law Review* as "established law journals." There were, indeed, such. An example is the *Juridical Review*, published in Edinburgh, Scotland. In the Prefatory Note of its first issue, in 1889, the editors stated:

"The object of this Review will be to record accurately and discuss impartially subjects relating to the science and practice of law and politics. . . . A critical record of the leading decisions of the Supreme Courts in Scotland and England is intended to be one of its prominent features, and will be intrusted to gentlemen who have made a special study of the branches of law to which such decisions relate. . . . Its columns will be open to the jurists and publicists of all parts of the United Kingdom, India and the Colonies, and also to those of the Continent and of America. . . . The editors will endeavor to make the Review a chronicle and guide for current legal and political literature. . . ." <sup>22</sup>

The leading article of the first number of the *Juridical Review* was by David Dudley Field, author of the Field Code which instituted code pleading in New York in 1848, and was entitled "Codification in the United States." In its leading article make-up, its "Critical Record of the Leading Decisions," and its endeavor "to make the Review a chronicle and guide for current legal and political literature," the editors announced a policy in broad conformity with that of its American counterparts, although going beyond them in introducing the element of politics. In this latter regard, however, perhaps they were only somewhat in advance of the times. Today's student of Administrative Law finds law and politics inextricably intertwined. Did not Chief Justice Hughes say: "Legislative agencies . . . work in a field peculiarly exposed to political demands."<sup>23</sup> In the Soviet conception, law *is* politics.

## IN LIGHTER VEIN

Not all of the old professional magazines for the legal profession were completely serious in their content. Among those which were not was the *Green Bag*, established in 1889. On its masthead appeared the rather frank announcement, "A Useless But Entertaining Magazine for Lawyers." A sample of its humor:

"The late Judge Keogh was 'a fellow of infinite jest.' When he first went on the circuit as Judge of Assizes he was entertained in state by his bar, and the evening was passed in dignified decorum, as grave compliments were exchanged on both sides. The 'counselors' present were made to feel that their old comrade had become a judge. At ten o'clock, to their amazement, he rose, thanked

<sup>22</sup> 1 JURIDICAL REV. 1 (1889).

<sup>23</sup> St. Joseph Stockyards v. United States, 298 U.S. 38, 52 (1936).

them for their hospitality, made a solemn bow, and retired, leaving them in blank consternation at the complete change. In five minutes a face beaming with fun appeared at the door. 'Boys, the Judge has retired for the night, but Billy Keogh won't go home till morning.' A roar of laughter and applause greeted the return, and the mirth was fast and furious."<sup>24</sup>

Again:

"At a legal investigation of a liquor seizure, the judge asked on unwilling witness: 'What was in the barrel that you had?' The reply was, 'Well, Your Honor, it was marked 'whiskey' on one end of the barrel and 'Pat Duffy' on the other; so I can't say whether it was whiskey or Pat Duffy was in the barrel, being as I am on my oath.'"<sup>25</sup>

But the *Green Bag* had its serious side, as evidenced by the following, deserving of being taken to heart by legal writers in general:

"The Chicago Legal News, in reviewing Beach on Wills, puts forth the following curious idea: 'The usefulness of many law works is injured by an indiscriminating over-citation of authorities.' The reviewer probably meant that the usefulness of many law works is injured by an indiscriminate citation of authorities. There can be no such thing as an over-citation of authorities in a legal treatise, provided the authorities are in point. The citation of an additional case in support of a proposition from the court of last resort of the smallest jurisdiction, like Delaware or Rhode Island, will afford assistance to lawyers in that jurisdiction. The time has gone by when lawyers will accept as law, except on the most obvious proposition, the statements of authors not well fortified by the citations of authorities."<sup>26</sup>

### THE ILLINOIS LAW REVIEW

Let us look at the beginning of law reviews nearer in point of time and geographical proximity. The *Illinois Law Review* commenced publication in 1906. John H. Wigmore was named as faculty editor. The first issue contained the following introductory note:

"Undoubtedly the field for law reviews of a general character is already overcrowded. Moreover, it must be conceded that such reviews, however excellent, enlist the interest of but a small minority of the practicing lawyers of Illinois. It is believed, however, that there is genuine and widespread need for a live periodical primarily devoted to the discussion and exposition of Illinois law, and of matters of special practical value to the Illinois Bar. In that belief, and with the purpose of supplying that need this *Review* is launched.

"The salient features of the *Review*, as contemplated by the Editors, may be enunciated as follows:

1. Articles on legal subjects of live interest to the bar and people of the state.
2. Articles on the history and status of important problems and doctrines in the courts of this state.
3. Monthly Digest of the current decisions of Illinois Appellate Courts.
4. Articles and symposiums on proposed constitutional amendments and law reform.
5. Reviews of the work of the state legislature at

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<sup>24</sup> 1 GREEN BAG 84 (1889).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 86.

the close of each session. 6. Reports of committees of state and city bar associations and selected addresses delivered before said associations. 7. Addresses delivered in the course on Legal Tactics in the Northwestern University Law School. 8. Critical comment on important decisions of Federal and Illinois courts, and in some instances of the courts of other states. 9. Review of law books of interest to the Illinois Bar. 10. Announcements of the Northwestern University Law School and notes of matters of interest to its alumni."<sup>27</sup>

In its inception, as its name almost necessarily implied, the *Illinois Law Review* was designed to be primarily a local publication, serving Illinois lawyers. Its general program followed the same pattern of content that we have seen established by the *Harvard Law Review* and the professional journals before it — articles on subjects of current interest, comments on cases, and book reviews.

Although it was not directly emphasized, the leading articles published in the first three numbers dealt, for the most part, with matters of procedure, indicating that in 1906, over half a century ago, enlightenment was strongly needed in that area of the law. Since that time Illinois has come from common law and chancery pleading to the Civil Practice Act, but there is little doubt that even under such a "simplified" system of procedure, today's Illinois lawyer finds procedural problems exacting and frustrating in a degree fairly comparable to those troubling his professional brother at the turn of the century.

There is now no "*Illinois*" *Law Review* to assist him. Years ago, it departed from its provincial perch, and under the name of "*Northwestern*" *University Law Review* took its place with the reviews of other University law schools pointed to serving the profession generally.

#### THE UNIVERSITY OF CHICAGO LAW REVIEW

Coming closer in point of time, the *University of Chicago Law Review* was established in 1933, and its first number appeared in May of that year. Dean Harry A. Bigelow wrote an Introductory Note:

"The issue of this, the first number of the *University of Chicago Law Review*, marks another step in the growth of the school. The *Review* will have a double purpose harmonious with the character and aims of the school itself. The Law School has, in general, two points of view: that of a school of national scope with interests as broad as the whole field of the law, and that of a school situated in the city of Chicago and consequently having a very direct and vital interest in the legal problems of the city and state in which it is. Both these points of view and these interests will be manifest in the various departments of the *Review*."<sup>28</sup>

<sup>27</sup> 1 ILL. L. REV. 39 (1906).

<sup>28</sup> 1 U. CH. L. REV. 110 (1933).

In the course of the Introductory Note, Dean Bigelow emphasized the part to be played by the students:

"The *Review* is primarily and essentially a product of the student body. It, of course, has and will continue to have the whole-hearted endorsement and assistance of the Faculty, but the responsibility of the *Review* and the credit for it will belong to the students of the Law School."<sup>29</sup>

Also, he said that "the main divisions of the magazine will constitute a carefully considered adaptation of the arrangements generally prevailing in law reviews."<sup>30</sup>

#### THE JOHN MARSHALL LAW QUARTERLY

We come now to the John Marshall Law School itself, and the *John Marshall Law Quarterly*, the first number of which appeared in December, 1935. The late Dean Edward T. Lee provided a Foreword:

"*The John Marshall Law Quarterly* makes its first appearance with this number, and a word of explanation may be in order to justify the advent of another legal publication, which may hope to add to the learning and excellence of other law school journals and magazines. Law students and lawyers are peculiarly persons of impression and expression. During the law course and during practice lawyers are engaged chiefly in receiving impressions from teachers, from their reading, and from their active practice. Expression in student years is very limited and this may be so during many years of practice and yet the power of expression, orally or in writing, is the most valuable possession of a lawyer. His chief function is to impart to his client, and to the court, and to the jury his understanding of the law. And however much legal knowledge he may have imbibed as a student or in his later years at the Bar, unless he can express his learning clearly, precisely, and convincingly, his store of knowledge may be unproductive."<sup>31</sup>

Dean Edward T. Lee projected for *The John Marshall Law Quarterly* a scope and content in general conformity with that established by the professional law journals of the century past, and adopted by the law reviews of the law schools as they later appeared. We have noted his reference to "legal reform." We have noted a like reference in the introductory number of the *Albany Law Journal*.<sup>32</sup> The same key-note was struck in the introductory numbers of the *Illinois* and *University of Chicago Law Reviews*, and was implicit in the initial number of the *Harvard Law Review*. Reform of the law has been a consistently expressed objective of the law journals and reviews from the beginning. Those who were privileged to know and work closely with Dean Edward T. Lee know how close to his heart was the matter of true legal reform. The columns of *The John*

<sup>29</sup> *Id.* at 111.

<sup>30</sup> *Id.*

<sup>31</sup> 1 JOHN MARSHALL L. Q. (1935), Foreword.

<sup>32</sup> See text at note 20, *supra*.

*Marshall Law Quarterly*, during the years that it was published, bear ample testimony to his concern and action.

In carrying out a program which in general followed that employed by other law reviews, although placing considerable emphasis on the law of Illinois, *The John Marshall Law Quarterly* gained a position of high esteem in the legal profession. It came to be regarded as an excellent working tool for the practicing lawyer.

#### THE ILLINOIS LAW FORUM

In 1949, the *University of Illinois Law Forum* made its debut. In the Foreword of its first issue, the late Dean Albert J. Harno stated the aim of the *Forum* to be:

"To keep the discussions close to the urgent problems of the profession, and to shape the materials of the periodical so that they will offer the highest attainable measure of help for the members of the bar in the solution of their problems and in the advancement of law improvement."<sup>33</sup>

He also spoke of the plan ". . . that each issue of the publication will be devoted to a single topic with various phases of it presented in a symposium."<sup>34</sup>

Like *The John Marshall Law Quarterly*, the content of the *University of Illinois Law Forum* was slanted strongly towards the Illinois lawyer, and has so continued. This is well exemplified by the 1966 Summer and Fall Issues. The Summer, 1966, issue is given over (apart from student notes, comments and recent decisions) to Part I of a Symposium on Illinois Criminal Procedure, in memory of Dean Albert J. Harno. The Fall, 1966, issue is given over to Part II of the Symposium. Through the years its volumes have evidenced a consistent adherence to the originally stated policy of devoting each issue to a single topic. In their symposium parts these volumes constitute a repository of legal information of great value to Illinois lawyers. The student notes and comments add the elements which are common to all law reviews.

#### A LATE ARRIVAL: THE U.C.L.A. LAW REVIEW: PROSSER

In the year 1953 a law review was established at the Law School of the University of California at Los Angeles. A number of jurists were invited to make introductory comments for publication. William E. Prosser, Dean of the Law School at the University of California wrote:

"No major law school is now without its law review. There are a great many; but so dispersed and disparate is the vast field of American law, and so various are the law schools, that no two of

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<sup>33</sup> 1949 U. ILL. L. FORUM, Foreward.

<sup>34</sup> *Id.*



them serve exactly the same function. . . . Essentially a law review is the expression of what a law school itself has to say to the world. It is one of the means by which the school makes its influence felt by those who make the practice and administer the law.

"A law review is the only place where the decisions of the courts can receive calm, enlightened and friendly comment and criticism. Here the binding force of precedent is less oppressive; any fear of popular opinion is removed; the urgency of time is not so acute; and aspects of the question which may have been overlooked or minimized under the pressure of a busy court may be examined at length in something approaching leisure, and called to the attention even of the courts themselves."<sup>35</sup>

CHIEF JUSTICE WARREN: "WITHOUT LAW  
REVIEWS, A GREAT VOID IN THE LEGAL WORLD"

Ten years later, in 1963, the editors of the *U.C.L.A. Law Review* again invited comment. Chief Justice Warren, of the Supreme Court of the United States, whose affirmation appeared in the first number, was again invited. He replied:

"As you enter your tenth year of publication and increase the annual number of issues, you invite me to dedicate the November issue of Volume 10. You call attention to my statement in Volume I: 'The American Law Review properly has been called the most remarkable institution of the law school world,' and you ask 'have your views modified during your years as Chief Justice?'"

"It is normal and almost inevitable for the views of individuals to be modified as they view life and legal problems from a different vantage point. Sometimes they change their views. At other times their earlier views are strengthened, and so it is with me. So far as law reviews are concerned, my views are strengthened. If it were not for their critical examination, we would have a great void in the legal world. Courts would have few guidelines for appraising the thinking of scholars and students or of the bar itself. It is largely through them that we are able to see ourselves as others see us.

"In these days of emotion-packed issues which reach our courts, it is highly important that we have the discussion and enlightened criticism of their decisions and opinions. The courts are not plagued by lack of criticism, but they do suffer from an abundance of criticism based on animosity to the result without objective scrutiny of the facts, legal principles and precedents involved. The latter kind of criticism cannot be attributed to the law reviews. While they are our greatest critics, and properly so, they match precedent with precedent, principle with principle, and reason with reason. So conducted, criticism becomes of inestimable assistance to the courts and cannot do other than raise the standards of justice throughout the land. Very often a law review article concerning a current court decision will start a chain reaction in our law schools, which, in the aggregate, will explore the facets and implications in that decision far beyond what can properly be discussed by a court under any given state of facts. Such reactions are truly informative to bench, bar and the public, as well as to the students for and by whom law reviews are published. For the latter, they constitute a foundation for that self-imposed discipline which is essential to a sound legal career."<sup>36</sup>

<sup>35</sup> 1 U.C.L.A. L. REV. 2 (1953).

<sup>36</sup> 10 U.C.L.A. L. REV. 1 (1962).

In the literature of free men there may be found many ringing and inspiring statements. Many of these relate particularly to the procedural side of our legal system. Referring to the attitude of our constitutional framers, Justice Brandeis said that ". . . protection of the individual, even if he be an official, from the arbitrary or capricious exercise of power was then believed to be an essential of free government."<sup>37</sup> That the achievement of this desideratum was to him dependent in large measure upon proper procedures was made clear by his pronouncements in many cases, and by his succinct conclusion that ". . . in the development of our liberty insistence upon procedural regularity has been a large factor."<sup>38</sup> Justice Douglas said:

"It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law."<sup>39</sup>

Procedural principles essential to the freedom of men thus embodied in the Bill of Rights, were implicit in Magna Carta. A substantial portion of the Massachusetts Body of Liberties of the year 1641 was given over to "Rites, Rules and Liberties concerning Judicial proceedings," containing forty sections.<sup>40</sup> The basic importance of legal procedure in maintaining human freedom has been emphasized throughout the whole course of our common law jurisprudence.

It is entirely fitting that a law review should make this area of our law its primary concern. As *The John Marshall Journal of Practice and Procedure* picks up the thread that ties it to *The John Marshall Law Quarterly* of former years, its aim is to do just that.

Hail to law reviews!

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<sup>37</sup> *Myers v. United States*, 272 U.S. 52, 295 (1926) (dissenting opinion).

<sup>38</sup> *Burdeau v. McDowell*, 256 U.S. 465, 477 (1921) (dissenting opinion).

<sup>39</sup> *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 179 (1951) (concurring opinion).

<sup>40</sup> PERRY-COOPER, *SOURCES OF OUR LIBERTIES* 150 (Am. Bar Foundation, 1959).