

1-1985

The Historical Origins, Founding, and Early Development of Student-Edited Law Reviews

Michael L. Swygert

Jon W. Bruce

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal



Part of the [Law Commons](#)

Recommended Citation

Michael L. Swygert and Jon W. Bruce, *The Historical Origins, Founding, and Early Development of Student-Edited Law Reviews*, 36 HASTINGS L.J. 739 (1985).

Available at: https://repository.uchastings.edu/hastings_law_journal/vol36/iss5/2

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.

The Historical Origins, Founding, and Early Development of Student-Edited Law Reviews†

By MICHAEL I. SWYGERT*
AND JON W. BRUCE**

If we fail, we shall at least have the satisfaction of believing that our work has been honestly done in the interest of the law school and of its alumni.¹

The American law review properly has been called the most remarkable institution of the law school world. To a lawyer, its articles and comments may be indispensable professional tools. To a judge, . . . the review may be both a severe critic and a helpful guide. But perhaps most important, the review affords invaluable training to the students²

Most accredited law schools in the United States publish a student-edited law review containing scholarly writing about recent court decisions, unresolved issues of law, and other topics of interest to the legal community.³ Begun a century ago by law students as an academic experiment,⁴ law reviews have achieved a prominent and influential position in the legal profession.⁵ Much has been written both praising⁶ and criticiz-

† © Copyright 1985 by Michael I. Swygert and Jon W. Bruce. All rights reserved.

* Professor of Law, Stetson University; B.A., 1965, J.D., 1967, Valparaiso University; LL.M., 1968, Yale University.

** Professor of Law, Vanderbilt University; B.A., 1966, Hanover College; J.D., 1969, College of William and Mary.

1. 1 HARV. L. REV. 35 (1887).

2. *Messages of Greeting To The U.C.L.A. Law Review*, 1 U.C.L.A. L. REV. 1 (1953) (offered by Earl Warren, Chief Justice of the United States).

3. The term "law review" is used in this article to refer to student-edited scholarly reviews, journals, quarterlies, or similar periodicals published by law schools. The typical law review is divided into two major sections. The first section contains articles composed by experienced professionals and edited by law students. The second is comprised of works written and edited by law students. See generally Fidler, *Law Review Operations and Management*, 33 J. LEGAL EDUC. 48 (1983); Lee, *Administration of the Law Review*, 9 J. LEGAL EDUC. 223 (1956).

4. See *infra* notes 208-328 & accompanying text.

5. See E. GRISWOLD, *LAW AND LAWYERS IN THE UNITED STATES* 53-55 (1965); M. MAYER, *THE LAWYERS* 110-13 (1966). See generally Bard, *Legal Scholarship and the Professional Responsibility of Law Professors*, 16 CONN. L. REV. 731, 739-41 (1984); Bernstein, *The*

ing⁷ these periodicals, particularly with respect to the unique phenomenon of law students managing and editing journals to which academic and practicing professionals submit articles for evaluation, revision, and publication.⁸ This process stands in stark contrast to that employed in most other disciplines, in which scholarly journals are edited by recognized authorities in the field and works are selected for publication by a panel of expert referees.

The authors of this Article, however, do not wish to enter the debate

Supreme Court and Secondary Source Material: 1965 Term, 57 GEO. L.J. 55 (1968); Burgess, *Law Reviews and the Practicing Lawyer*, 51 NW. U.L. REV. 10 (1956); Cane, *The Role of Law Review in Legal Education*, 31 J. LEGAL EDUC. 215 (1981); Douglas, *Law Reviews and Full Disclosure*, 40 WASH. L. REV. 227 (1965); Fuld, *A Judge Looks at the Law Review*, 28 N.Y.U. L. REV. 915 (1953); Havighurst, *Law Reviews and Legal Education*, 51 NW. U.L. REV. 22 (1956); Hoffman, *Law Reviews and the Bench*, 51 NW. U.L. REV. 17 (1956); Maggs, *Concerning the Extent to Which the Law Review Contributes to the Development of the Law*, 3 S. CAL. L. REV. 181 (1930); Marke, *Legal Research: Growth, Value of Law Reviews*, N.Y.L.J., Nov. 18, 1980, at 4; Marsh, *The Law Review and the Law School: Some Reflections About Legal Education*, 42 ILL. L. REV. 424 (1947); Newland, *Legal Periodicals and the United States Supreme Court*, 7 U. KAN. L. REV. 477 (1959) [hereinafter cited as Newland, *Legal Periodicals*]; Newland, *The Supreme Court and Legal Writing: Learned Journals as Vehicles of an Anti-Antitrust Lobby*, 48 GEO. L.J. 105 (1959); Thompson, *The Law Review Meets the Marketplace*, STUD. LAW., Dec. 1984, at 14; Wilson, *The Law Schools, The Law Reviews and the Courts*, 30 CORNELL L. Q. 488 (1945); Comment, *Legal Periodicals: Their Use in Kansas*, 7 KAN. L. REV. 490 (1959); Preface, *The Northwestern University Law Review, 1906-1956*, 51 NW. U.L. REV. 2 (1956); Survey, *The Law Review—Is It Meeting the Needs of the Legal Community?*, 44 DEN. L.J. 426 (1967); *Why Law School Reviews?*, 4 FORDHAM L. REV. 1 (1935).

6. See, e.g., Cribbet, *Experimentation in the Law Reviews*, 5 J. LEGAL EDUC. 72 (1952); Edmunds, *Hail to Law Reviews*, 1 J. MARSHALL J. PRAC. & PROC. 1 (1967); McKelvey, *The Law School Review 1887-1937*, 50 HARV. L. REV. 868 (1937); Richardson, *Law Reviews and the Courts*, 5 WHITTIER L. REV. 385 (1983); Traynor, *To the Right Honorable Law Reviews*, 10 U.C.L.A. L. REV. 3 (1962); Westwood, *The Law Review Should Become the Law School*, 31 VA. L. REV. 913 (1945); *The University of Detroit Law Journal's 40th Anniversary*, 34 U. DET. L.J. 247 (1957).

7. See, e.g., Cane, *supra* note 5; Kelly, *Faculty Ponders Alternative Journal*, HARV. L. REC., Feb. 10, 1984, at 6; Mewett, *Reviewing the Law Reviews*, 8 J. LEGAL EDUC. 188 (1955); Murray, *Publish and Perish—By Suffocation*, 27 J. LEGAL EDUC. 566 (1975); Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38 (1936); Rodell, *Goodbye to Law Reviews—Revisited*, 48 VA. L. REV. 279 (1962).

8. Compare K. LLEWELLYN, *THE BRAMBLE BUSH* 107 (1930):

[The] law review is a scientific publication on which in good part the reputation of the school depends Here is a thing Americans may well be proud of. There is not, as far as I know, in the world an academic faculty which pins its reputation before the public upon the work of undergraduate students—there is none, that is, except in the American law reviews Such an institution it is an honor to belong to.

with Mewett, *supra* note 7, at 190: "The student, as such, has no place on a law review at all I am unable to understand this insistence upon publishing the attempts of students at all. I am not convinced that they write any better merely because their names may appear in print"

regarding the value or appropriateness of law reviews as they presently exist. Nor do we quibble with the frequent assertion that these periodicals have an enormous impact on our courts and law schools, and thus on the legal profession in general.⁹ Rather, it is our purpose to explore a long neglected subject—the historical origins, founding, and early development of student-edited law reviews—and by so doing, to shed light on the reasons for the existence of this significant legal institution.

This Article begins with an analysis of the evolution of early forms of legal writing, a process that led to the founding of the first law reviews in the late nineteenth century. Next, the Article focuses on the initial attempts to establish student-edited law reviews, with particular attention to the birth of the *Harvard Law Review* in 1887. Although by all accounts the *Harvard Law Review* is this country's most prestigious and imitated legal periodical,¹⁰ it was not, contrary to popular belief, the first student-edited law journal.¹¹ Finally, the Article traces the early development of student-edited law reviews into the beginning of the twentieth century, by which time the foundation for their present stature had been laid, and examines the expanding role of law reviews in legal education and their subsequent influence on the legal profession.

Historical Origins

All the earlier forms of legal writing—treatises, law reports, and periodicals—influenced the founders of law reviews, but the growth of legal journalism in America during the nineteenth century provided the groundwork upon which law reviews were built.¹² The “concise and casual” legal writing found in legal periodicals introduced during this period contrasted sharply with the tedious and encyclopedic treatises of Blackstone, Kent, and Story.¹³ The newer research and writing, which was somewhat less historic and academic in its orientation, was aimed at the

9. See *supra* notes 5-6.

10. See Bernstein, *supra* note 5, at 67; Maru, *Measuring the Impact of Legal Periodicals*, 1 AM. B. FOUND. RESEARCH J. 227 (1976); Newland, *Legal Periodicals*, *supra* note 5, at 478.

11. See *infra* text accompanying notes 206-41. The misconception that the *Harvard Law Review* was the first student-edited law school periodical apparently stems from the assertion in an early history of the Harvard Law School that “the *Harvard Law Review* [was] the first legal journal issued in a Law School.” 2 C. WARREN, HISTORY OF THE HARVARD LAW SCHOOL 440 (1908). But see F. HICKS, MATERIALS AND METHODS OF LEGAL RESEARCH 207 (3d ed. 1942).

12. See *infra* text accompanying notes 117-204.

13. See *infra* text accompanying notes 17-92. In the early nineteenth century, Professor David Hoffman used the phrase, “concise and casual essays,” to refer to writing in legal periodicals. D. HOFFMAN, A COURSE OF LEGAL STUDY 666 (2d ed. 1836).

practitioner.¹⁴ These early journals typically highlighted recent court decisions, local news, and editorial comments. During the middle to late 1800's, new legal periodicals appeared with great frequency.¹⁵ Thus, by the time the *Harvard Law Review* commenced publication in 1887, a total of 158 different legal periodicals had been published in the United States.¹⁶

The reasons why these professional and academic periodicals came into existence are complex and properly addressed only by examining earlier forms of legal writing. This section first examines the early treatises and law reports, and then analyzes the commercial law journals that served as models for the initial student-edited law reviews.

Early Legal Writing: Treatises and Law Reports

Before the advent of legal periodicals, two principal forms of legal writing existed: doctrinal writing in the form of treatises, and case reporting in the form of law reports. The treatise was a lengthy academic exposition of a body of legal doctrine.¹⁷ The law report, on the other hand, contained court decisions, summaries of court opinions, and reporter's comments about the opinions.

Treatises

The only major law-related work produced in England during medieval times¹⁸ was Littleton's *Tenures*.¹⁹ The *Tenures*, written in law French,²⁰ had enormous significance because Littleton, rather than merely summarizing or abridging court decisions, construed and expli-

14. See *infra* text accompanying notes 117-70.

15. See *infra* text accompanying notes 142-200.

16. E. WOODRUFF, INTRODUCTION TO THE STUDY OF LAW 25 (1898) (citing L. JONES, INDEX TO LEGAL PERIODICAL LITERATURE (1888)).

17. See Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632, 633-34 (1981).

18. *Id.* at 634.

19. T. LITTLETON, *TENURES NOVELLI* (London ca. 1481). Harvard law professor Eugene Wambaugh described the *Tenures* as one of the "most famous books ever written," adding that it was the "first important law book that is thoroughly English." LITTLETON'S *TENURES* at xi-xii (E. Wambaugh ed. 1903). Historian W. S. Holdsworth declared the *Tenures* to be "the first great book upon English law not written in Latin and wholly uninfluenced by Roman Law." W. HOLDSWORTH, *SOURCES AND LITERATURE OF ENGLISH LAW* 137 (1925).

20. Law French, a Norman-French language which was substituted for the ancient Saxon language after the Norman Conquest, was used in all law proceedings and was the language of writs, records, and pleadings until the time of Edward III. Writers continued to use law French in books about the law even after English became the official language of the courts. 2 BOUVIER'S LAW DICTIONARY 1859 (1914).

cated a "coherent body of legal doctrine" in an expository style.²¹ His work demonstrated that court pronouncements were not necessarily a hodgepodge of ad hoc resolutions unrelated to human experience.²² The *Tenures* showed that the common law "possessed principles and doctrines . . . founded upon the actual problems of daily life."²³ Littleton took one important subject—land law—and treated it extensively and comprehensively in a distinctive literary form.²⁴ Thus, the *Tenures* came to serve as an important model for monographic writing centuries later.²⁵

The next significant English legal work was Coke's *First Institute*, published in 1628.²⁶ Coke, after serving as chief justice of the King's Bench,²⁷ authored various law reports²⁸ and a series of doctrinal expositions called *Institutes*.²⁹ His *First Institute*—also referred to as *Coke upon Littleton*—was intended to modernize the *Tenures*.³⁰ The result was a legal encyclopedia of various branches of the law.³¹ Eventually, the text of Coke's *Institute* "came to be treated as though it were itself the law; it was regarded with a reverence approaching that accorded an actual statute."³² Consequently, Coke exerted enormous personal influence in shaping the common law.

Coke's various *Institutes*³³ were followed by the publication of Hale's *Analysis of the Law of England* in 1713, reportedly the first effort to systematize the law by a rational scheme other than that of alphabetical abridgment.³⁴ Hale's *Analysis* in turn served as the organizational

21. W. HOLDSWORTH, *supra* note 19, at 138.

22. *Id.*

23. *Id.*

24. The *Tenures* was "the first exposition of English land law as a system based on principles instead of as a number of disconnected formulae concerning the procedure of real actions." P. STEIN, *REGULAE IURIS* 159 (1966); *see also* W. HOLDSWORTH, *supra* note 19, at 139-40.

25. Before the next great English law book, Coke's *FIRST INSTITUTE*, was produced in 1628, over 70 editions of the *Tenures* had been published. W. HOLDSWORTH, *supra* note 19, at 139.

26. *See* Simpson, *supra* note 17, at 635-41.

27. W. HOLDSWORTH, *supra* note 19, at 140.

28. *Id.* at 141.

29. *Id.* at 141-43.

30. *Id.* at 141.

31. *Id.*

32. Simpson, *supra* note 17, at 635.

33. Coke wrote four *Institutes* in all: the *SECOND INSTITUTE* (1642) commented on English statutes; the *THIRD INSTITUTE* (1644) concerned criminal law; and the *FOURTH INSTITUTE* (1644) discussed the history and jurisdiction of the courts. W. HOLDSWORTH, *supra* note 19, at 142. *See generally* T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 281-84 (5th ed. 1956).

34. Simpson, *supra* note 17, at 640. Abridgments were condensations of case reports. They appeared only in the 13th and 14th centuries. *See generally* J. COWLEY, *A BIBLIOGRAPHY*

model for the immeasurably influential Blackstone's *Commentaries*,³⁵ which appeared from 1765-1769.³⁶

The *Commentaries*, which have been aptly described as the "great legal publishing event" of the eighteenth century,³⁷ constituted the most complete and the most literary book of English law that had yet appeared.³⁸ Blackstone combined a lucid style with superb literary judgment and a faithful accuracy in recounting the legal principles of the case authorities upon which the *Commentaries* relied.³⁹

The *Commentaries* were based on a series of lectures Blackstone delivered at Oxford University beginning in 1753.⁴⁰ The academic roots of the *Commentaries* foreshadowed a revived emphasis on the teaching of law, first in England and later in America.⁴¹ To teach law, one must make legal doctrine understandable, and to Blackstone's credit his *Commentaries* combined "the language of the scholar and the gentleman"⁴² into one "great readable, reasonable book about English law."⁴³

In addition to the institutional books of Coke, Hale, and Blackstone, various monographic works appeared in England in the eighteenth century.⁴⁴ The most prolific monograph writer of the century was Sir Geoffrey Gilbert, who authored fifteen treatises in a span of thirty-three years.⁴⁵

Few important legal works were produced in the United States during the 1700's,⁴⁶ but certain English treatises were republished,⁴⁷ espe-

PHY OF ABRIDGMENTS ETC. (1932). These condensations at times were prepared and used by law students in much the way "briefing" of cases occurs today. See T. PLUCKNETT, *supra* note 33, at 273-76.

35. Simpson, *supra* note 17, at 640.

36. *Id.* at 652.

37. *Id.*

38. W. HOLDSWORTH, *supra* note 19, at 155-56.

39. *Id.*

40. Simpson, *supra* note 17, at 652. A few years after commencing these lectures, Blackstone was appointed Vinerian Professor of English Law at Oxford in 1758. The endowment of this chair "had derived in part from the other major legal publication of the century, Charles Viner's twenty-three volume abridgement (1741-57)." *Id.* (citing C. VINER, A GENERAL ABRIDGEMENT OF LAW AND EQUITY (Aldershot 1742-1753)).

41. W. HOLDSWORTH, *supra* note 19, at 155, 160-61.

42. *Id.* at 156.

43. *Id.* (quotation ascribed to Maitland).

44. See Simpson, *supra* note 17, at 652-62.

45. *Id.* at 654. Gilbert's works included: TREATISES OF TENURES (1730), LAW OF EVIDENCE (1734), and TREATISE ON RENTS (1758). See Simpson, *supra* note 17, at 654 nn.138, 142 & 147.

46. See Simpson, *supra* note 17, at 668.

47. *Id.*

cially the editions of Blackstone's *Commentaries*.⁴⁸ The first "significant expository work" by an American author was Zephaniah Swift's *System of the Law of Connecticut*, published in 1795-1796.⁴⁹

In the early 1800's, the pace of publication of treatises quickened in England and the United States.⁵⁰ The popularity of such works thrived, and the treatise became the predominant form of legal writing in the nineteenth century.⁵¹ A significant feature of this period was the extent to which law students studied these doctrinal writings.⁵² Roscoe Pound, legal historian and educator, has written that the legal monographs, commentaries, and treatises "became and remained the basis of law teaching down to the present century."⁵³ It is unsurprising that foremost among the nineteenth-century American treatise writers were two university law professors—James Kent of Columbia and Joseph Story of Harvard.

Chancellor James Kent was appointed the first professor of law at Columbia in 1793. Although Kent left academia to serve in various judicial capacities, he was re-appointed professor of law at Columbia in 1823.⁵⁴ Shortly after his second appointment, he meticulously drafted an extensive set of lectures.⁵⁵ The result was Kent's four-volume, "hugely successful" *Commentaries*, published between 1826 and 1830.⁵⁶ In the preface, Kent wrote that he produced those volumes "for the benefit of American students,"⁵⁷ and benefit they did. Early editions were in great demand. Upon arriving at Harvard in 1829, one new professor noted that at least a half-dozen copies of Kent's *Commentaries* were needed for student use.⁵⁸ Edition after edition appeared. The twelfth, published in 1873, was edited by Oliver Wendell Holmes, Jr.⁵⁹ Holmes added extensively to an earlier version, including over twenty-five years of English and American case authority that had been decided since the eleventh edition.⁶⁰ This laborious task took three years,⁶¹ but the Holmes edition

48. *Id.*

49. *Id.* at 669.

50. *Id.* at 669-74.

51. *See id.*; *see also* R. POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 138-67 (1938).

52. *See* R. POUND, *supra* note 51, at 144, 163-64.

53. *Id.* at 144.

54. 1 J. KENT, *COMMENTARIES ON AMERICAN LAW* at ix (14th ed. 1896).

55. *Id.*

56. Simpson, *supra* note 17, at 670.

57. J. KENT, *supra* note 54, at iii.

58. A. SUTHERLAND, *THE LAW AT HARVARD: A HISTORY OF IDEAS AND MEN, 1817-1967*, at 100 (1967).

59. S. BENT, *JUSTICE OLIVER WENDELL HOLMES* 13 (1932).

60. *Id.*

61. *See* C. BOWEN, *YANKEE FROM OLYMPUS* 251-53 (1944).

of Kent's *Commentaries* quickly became a "classic."⁶²

The other American giant among nineteenth-century treatise writers was Joseph Story, first holder of the Dane chair at Harvard Law School where he served from 1829 until his death in 1845.⁶³ Story was prolific even though his career as a treatise writer did not commence until 1832, when he was fifty-two years of age.⁶⁴ Over the next thirteen years, he authored nine *Commentaries*, various monographic volumes on the topics of bailments,⁶⁵ constitutional law,⁶⁶ conflict of laws,⁶⁷ equity,⁶⁸ pleadings,⁶⁹ agency,⁷⁰ partnership,⁷¹ bills of exchange,⁷² and promissory notes.⁷³ Unlike Blackstone's and Kent's books, Story's treatises were not prepared from lecture notes.⁷⁴ Story's *Commentaries on the Conflict of Laws*, published in 1834, is generally considered his best work. It was "for its time, so far ahead that it was a new creation rather than a development of the existing state of literature."⁷⁵ Story was, in short, a prototype of the academic scholar of the late nineteenth century.

Although Kent and Story were the most significant American treatise writers during the mid-1800's, several others became known by the topic of their labors.⁷⁶ For example, even today scholars refer to these nineteenth-century authors and their respective treatises as: "Greenleaf on Evidence,"⁷⁷ "Wharton on Criminal Law,"⁷⁸ "Sedgwick on Damages,"⁷⁹ "Parsons on Contracts,"⁸⁰ and "Washburn on Real Property."⁸¹

62. S. BENT, *supra* note 59, at 139. "For America, it [the Kent-Holmes edition] was a pioneer work. Nothing so searching and critical had been done before." C. BOWEN, *supra* note 61, at 252.

63. Simpson, *supra* note 17, at 670.

64. *Id.*

65. J. STORY, COMMENTARIES ON THE LAW OF BAILMENTS (Cambridge 1832).

66. J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (Boston 1833).

67. J. STORY, COMMENTARIES ON CONFLICT OF LAWS (Boston 1834).

68. J. STORY, COMMENTARIES ON EQUITY JURISDICTION (Boston 1836).

69. J. STORY, COMMENTARIES ON EQUITY PLEADINGS (Boston 1838).

70. J. STORY, COMMENTARIES ON THE LAW OF AGENCY (Boston 1839).

71. J. STORY, COMMENTARIES ON THE LAW OF PARTNERSHIP (Boston 1841).

72. J. STORY, COMMENTARIES ON THE LAW OF BILLS OF EXCHANGE (Boston 1843).

73. J. STORY, COMMENTARIES ON THE LAW OF PROMISSORY NOTES (Boston 1845).

74. A. SUTHERLAND, *supra* note 58, at 107. Story's treatises, however, were intended as "suitable texts for students." *Id.*

75. *Id.* at 115.

76. For a list, see R. POUND, *supra* note 51, at 140-41.

77. *Id.* at 141.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

These texts were largely the product of legal education.⁸² They served as the basis of most classroom legal instruction until Langdell's revolutionary case method of teaching diminished, but did not eliminate, their influence.⁸³

More significant than their pedagogic value for legal education was the extent to which practitioners and courts turned to these treatises as "authoritative statements" of the "received common law during the formative era" of American jurisprudence.⁸⁴ Doctrinal writing played a "much greater part in the growth of the common law . . . than our juristic theory admits."⁸⁵ The treatises often influenced judges as to what the law was or ought to be, so in time a particular author's view might actually become the law.⁸⁶ Without these treatises, American law would not have developed the consistency, uniformity, and sophistication that it has.⁸⁷

Some commentators have suggested that the quality of the American law treatises declined following the Civil War,⁸⁸ in part because the widespread publication of reported American cases provided newer sources of authoritative statements of the law.⁸⁹ Nevertheless, the authorship of great treatises rebounded in the twentieth century. "Ultimate

82. *Id.* at 144.

83. *See infra* text accompanying notes 297-300.

84. R. POUND, *supra* note 51, at 151.

85. *Id.* at 138.

86. *Id.* at 138-39, 151-53. Most early treatise writers subscribed to the "natural law" theory of jurisprudence. *See* Simpson, *supra* note 17, at 665-67. This view, having roots in Greek philosophy, holds that law embodies and should reflect universal principles—principles of right reason—which courts and other entities have the duty to discern and reveal. *See* R. POUND, *supra* note 51, at 13-16, 144-45, 147-48.

Natural law theory in part explains why various legal writers chose to write treatises, especially from 1750 onward. They felt obliged to unravel the confusion of countless court decisions and to explain how and where these courts had on occasion gone astray from universal principles. Thus, with the belief that decided cases are only of transitory interest vis-a-vis their underlying principles, many legal authors in the 18th and 19th centuries approached their writing with missionary zeal. For example, the American treatise writer Joel Bishop declared that his task was "to unfold the rules, the principles, the reasons, . . . which not only governed former decisions, but are to govern subsequent ones." J. BISHOP, *THE FIRST BOOK OF THE LAW* 126 (1868). The obligation of the legal writer, in short, was "to discover the true rule" and to reveal it in his writings for the enlightenment of all. Simpson, *supra* note 17, at 674.

The prevalence of natural law thinking, especially in America, was not limited to legal writers. Many judges believed that their juristic role was to discover and unfold the "true rule" and, if no voice came to their aid in the middle of the night, then readable books by the likes of Blackstone, Kent, and Story would have to do. *See generally* R. POUND, *supra* note 51, at 3-30.

87. R. POUND, *supra* note 51, at 145-52.

88. *Id.* at 157.

89. *See infra* text accompanying notes 107-16.

treatises”⁹⁰ were written between 1904 and 1951 by John Wigmore, Samuel Williston, Joseph Beale, Jr., Austin Wakeman Scott, William Prosser, and Arthur Corbin.⁹¹ Three of these scholars, Wigmore, Beale, and Williston, had been students at Harvard Law School during 1887 and members of the first editorial board of the *Harvard Law Review*. They studied the nineteenth-century treatises; then they authored the twentieth-century treatises. In between, near the turn of the century, they helped to produce a new form of legal writing—the student-edited law review.

Law Reports

Although nineteenth-century treatise writers typically cited and commented on numerous cases, they often wrote in a discursive style, expounding their own theories as well as rules developed by the courts. Moreover, the treatise writers frequently analyzed older cases, often focusing on English cases in which the factual situations did not parallel those arising in a younger nation at a later time.⁹²

American courts meanwhile were rendering numerous decisions, and lawyers needed to know their latest pronouncements. Thus, it was inevitable that this need would be filled by publishing American court decisions or “reports.” This happened first at Litchfield, Connecticut, in 1789⁹³ in a publication called *Kirby’s Report*, which contained decisions of the Connecticut Superior Court from 1785-1788.⁹⁴

Law reports were not new; they had been printed in England for centuries. These case summaries were essential to the development of the common law because they were considered to contain “the highest and most authentic evidence of the principles and rules of the common

90. Simpson, *supra* note 17, at 674.

91. *Id.* The full titles of these treatises are: J. BEALE, TREATISE ON THE CONFLICT OF LAWS (1935); A. CORBIN, CORBIN ON CONTRACTS (1950); W. PROSSER, HANDBOOK OF THE LAW OF TORTS (1941); A. SCOTT, THE LAW OF TRUSTS (1939); J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE (1904-1905); S. WILLISTON, THE LAW OF CONTRACTS (1920-1922).

92. See generally D. HOFFMAN, A COURSE OF LEGAL STUDY 656-57 (2d ed. 1836).

93. *American Legal Periodicals*, 2 ALB. L.J. 445, 445 (1870).

94. D. HOFFMAN, *supra* note 92, at 659. One authority contends that Francis Hopkinson’s work, *Judgments in Admiralty in Pennsylvania* (1789), was the first volume of law reports published in this country. J. WALLACE, THE REPORTERS ARRANGED AND CHARACTERIZED WITH INCIDENTAL REMARKS 571 n.2 (4th ed. 1882). But see Briceland, *Ephraim Kirby: Pioneer of American Law Reporting*, 16 AM. J. LEGAL HIST. 297, 315 n.68 (1972) (discussing why Kirby should be listed first). Kirby’s work was a general, “fully developed” reporter not, like Hopkinson’s, limited to a specialty area. *Id.* at 315. Kirby’s volume, therefore, is the more significant one for the purpose of this Article.

law.”⁹⁵ As W. S. Holdsworth, the highly respected legal historian, noted, “[S]ince the principles and rules of the common law could only be learned by attending to the decisions of the courts, reports of cases made by lawyers for lawyers became absolutely essential.”⁹⁶ The oldest of these reports was the *Year Books* written in law French from the reign of Edward I through the reign of Henry VIII, a period of nearly 200 years.⁹⁷ Originally, reports in the *Year Books* were written by lawyers in longhand from notes taken in court⁹⁸ primarily to instruct pleaders.⁹⁹ The *Year Books*, therefore, were essentially summaries of “arguments used by the bar and the bench,”¹⁰⁰ rather than reports of case resolutions. The last of the *Year Books* was published in 1537.¹⁰¹

Thereafter, various members of the bar, including Coke, privately published the first English collections of cases.¹⁰² These early English reports usually contained “histories of the several cases, with a short summary of the proceedings, . . . the arguments on both sides and the reasons the court gave for its judgment,”¹⁰³ rather than the written decisions of the judges.

Case reports were a natural by-product of the English judicial system.¹⁰⁴ A common-law judge occupied a permanent position and “so tended to follow his decisions.”¹⁰⁵ If the judge was considered a learned jurist, his decisions were important to other jurists and lawyers as well.¹⁰⁶ The importance of stare decisis had its roots in such notions.

The publication of case reports in this country apparently was delayed by the American Revolution, which among other things produced a “strong dislike for everything English, including the English common law.”¹⁰⁷ As noted above, the *Kirby Reports* of 1789 were the first general American law reports. Next came the *Dallas Reports* in

95. READINGS ON THE HISTORY AND SYSTEM OF THE COMMON LAW 295 (R. Pound & T. Plucknett 3d ed. 1927).

96. W. HOLDSWORTH, *supra* note 19, at 75.

97. *Id.* at 78.

98. *Id.* at 80-81.

99. *Id.* at 82-83.

100. *Id.* at 87.

101. Note, *Abridgements of the Year Books*, 37 HARV. L. REV. 214, 214 (1923).

102. W. HOLDSWORTH, *supra* note 19, at 89-91.

103. 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *71.

104. Pound, *Types of Legal Periodical*, 14 IOWA L. REV. 257, 259 (1929).

105. *Id.*

106. *Id.*

107. Chroust, *The Dilemma of the American Lawyer in the Post-Revolutionary Era*, 35 NOTRE DAME LAW. 48, 48 (1959); see also Surrency, *Law Reports in the United States*, 25 AM. J. LEGAL HIST. 48, 54-55 (1981).

1790, containing Pennsylvania and United States cases.¹⁰⁸ After the turn of the century, an explosion of published American case reports occurred. By 1836, 473 volumes of reports had been published,¹⁰⁹ plus a dozen or more works on specific cases such as *Trial of Selfridge for Killing Austin*¹¹⁰ and *Robertson's Report of Burr's Trial*.¹¹¹

The late scholar Anton-Hermann Chroust wrote that one of the most remarkable phenomena of the post-Revolutionary period in American law "was the publication of American law reports."¹¹² Chroust pointed out that the appearance of the first printed reports had "lasting effects" upon later generations of lawyers.¹¹³ Two factors contributed to the significant impact of the American law report. First, the legal treatise was becoming less important to the practitioner. Natural law thinking, incorporated into many legal treatises, was beginning to give way to a more positivist attitude about the nature of law.¹¹⁴ Second, "fresh intelligence of court proceedings became almost as much of a necessity as that of the general current news of the day."¹¹⁵ This need continued, and case reporters gained popularity throughout the nineteenth century. In the 1870's and 1880's, West Publishing Company established the national reporter system that is used extensively today.¹¹⁶

Early American Legal Periodicals

In the early 1800's, the current news of the day in America was provided mainly by general circulation newspapers, which frequently reported recent court decisions. These journalistic accounts, however, often contained inaccuracies and inevitably were incomplete.¹¹⁷ Hence, members of the legal profession "demanded a medium of their own."¹¹⁸ The publication and growth of case reports was one response to this de-

108. D. HOFFMAN, *supra* note 92, at 285, 659. Dallas became the first reporter for the Supreme Court of the United States. See Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 MICH. L. REV. 401 (1985).

109. D. HOFFMAN, *supra* note 92, at 657.

110. *Id.* at 660.

111. *Id.* at 664.

112. Chroust, *supra* note 107, at 75. See generally Joyce, *supra* note 108.

113. Chroust, *supra* note 107, at 75.

114. This jurisprudential shift was gradual. For a discussion of the influence of natural law theories on treatise writers, see *supra* note 86.

115. *American Legal Periodicals*, *supra* note 93, at 445.

116. Surrency, *supra* note 107, at 62.

117. *American Legal Periodicals*, *supra* note 93, at 445.

118. *Id.* "After 1800, . . . [l]awyers looked to legal magazines as well as to other activities to maintain professional cohesion and power." R. STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850'S TO THE 1980'S*, at 8 (1983).

mand. Yet the case reports failed to meet all the needs of the bar. Practitioners desired a publication devoted specifically to bar-related matters.

By the early 1800's, American lawyers had settled throughout the nation. Unlike England, in America the practice of law was largely decentralized. The decentralization resulted in a disjointed body of common law. The development of the American common law along different paths was due not only to the vast geographic distances involved, but also to differences among the court systems in each state. Consequently, the treatises, which tended to be national or universal in scope, did not fully meet the needs of practitioners,¹¹⁹ whose law practice was primarily local or state oriented.

Furthermore, the treatises and commentaries discussed law developed decades in the past, but the states were rendering new decisions daily. Although the newly published case reports contained accounts of recent decisions, there were so many cases being decided in so many jurisdictions that one could hardly keep up. Moreover, the reporters rarely analyzed or commented upon these cases.

Finally, although the competent practice of law required knowledge of numerous and specific legal principles, rules, and procedures, it also involved dealing with judges, lawyers, and clients—people about whom it was expedient to be informed. Lawyers needed publications that would set out “the literature of the bar, especially its biographical and statistical material, questions of legal reform, chit-chat, and gossip, and [even] an enlivening anecdote.”¹²⁰ Thus, “concise and casual” legal publications devoted to the American practitioner became inevitable.

First American Legal Periodicals

The first legal periodical in America was the *American Law Journal and Miscellaneous Repertory*, published in 1808 at Philadelphia.¹²¹ In the preface to the first issue, editor John E. Hall declared: “The feeble exertions of a youthful individual, unaided by the impressive sanction of experience, can effect but little without the cordial cooperation of those

119. “The idea that periodicals were especially needed in the United States because of the diversity of law between [sic] the states was emphasized in the forewards to many of our early journalistic attempts.” F. Hicks, *supra* note 11, at 215.

120. *American Legal Periodicals*, *supra* note 93, at 445.

121. F. Hicks, *supra* note 11, at 202-04; Glasier, *Early American Periodicals*, 28 A.B.A. J. 615 (1942); *American Legal Periodicals*, *supra* note 93, at 445. Sometimes the last word in this periodical's title is incorrectly listed as “Repository.” See Pound, *supra* note 104, at 262 n.4.; *American Legal Periodicals*, *supra* note 93, at 445-46. In any case, beginning with the fourth volume published in 1813, the last part of the correct title—“and Miscellaneous Repertory”—was dropped, leaving the journal with *American Law Journal* as its official name.

from whom he has some right to claim assistance."¹²² Not only was Hall unaided by the sanction of experience, he was unguided by the example of an American precedent.

The *American Law Journal and Miscellaneous Repertory*, like many journals to follow, was in essence a transitional publication between the earlier case reporters and the later legal magazines that developed in the mid-nineteenth century. As the first of these transition periodicals, the *American Law Journal and Miscellaneous Repertory* deserves special study. It primarily contained long excerpts of judicial opinions. Hence, to a degree it was another "reporter." But unlike the reporters, it also contained a short biography, some notices and brief descriptions of recent law books, and a commentary or editorial section titled "The Adversaria." It was issued irregularly in six volumes through 1817.

The *American Law Journal and Miscellaneous Repertory* had no lasting reference value, but as the original American antecedent of today's legal periodicals, the work is historically significant.¹²³ It is not known why it was not published after 1817. Whatever the reason for the demise of the *Repertory*, after a four-year publishing hiatus Hall tried again in 1821 to found an American legal periodical. The *Journal of Jurisprudence* was described as a "New Series" of the *American Law Journal and Miscellaneous Repertory*.¹²⁴ This venture died after only one volume was issued.¹²⁵

Hall was not the only American attempting to edit and produce a legal periodical during the period of 1800-1825. Three other short-lived journals were published during these years. First, Joseph Gales of North Carolina founded *The Carolina Law Repository* at Raleigh in 1813.¹²⁶ It survived until 1816; the entire series consisted of only two volumes.¹²⁷ The issues are said to have contained reports of North Carolina decisions, digests of other American and English cases, biographical sketches, and various comments and addresses.¹²⁸ The inclusion of speeches and commentary by nonlawyers led one reviewer to conclude that *The Carolina Law Repository* was "only partially a law magazine."¹²⁹

In 1818 another legal periodical appeared: *The New York Judicial*

122. 1 AM. L. J. at v, vii (1808).

123. See Glasier, *supra* note 121, at 615; *American Legal Periodicals*, *supra* note 93, at 446.

124. D. HOFFMAN, *supra* note 92, at 670.

125. *Id.*

126. *American Legal Periodicals*, *supra* note 93, at 446.

127. D. HOFFMAN, *supra* note 92, at 670.

128. *American Legal Periodicals*, *supra* note 93, at 446.

129. *Id.*

Repository, published in New York City.¹³⁰ This monthly magazine consisted almost exclusively of reports of trials, especially criminal trials and those thought to have a mass appeal. The published reports included cases dealing with assault and battery on a wife, assassination, conspiracy, a duel challenge, grand larceny, libel of a son-in-law, swindling, and rape. This journalistic venture into legal sensationalism lasted only six months; the last issue of the *New York Judicial Repository* appeared in February 1819.¹³¹

The final effort at publishing a legal periodical during this period was also short-lived. The *United States Law Journal and Civilian's Magazine* was produced by members of the Connecticut and New York bars from 1822-1826, during which time only two volumes were published.¹³² Like the earlier *New York Judicial Repository*, the *United States Law Journal* apparently tried to be a magazine for the general populace.¹³³ And like the *Repository*, it failed.¹³⁴

Each of these early legal periodicals was unable either to define or to carry out its mission. By featuring case reports, these publications were similar to the numerous established reporters. And, by attempting to attract a wide audience, at least two of these periodicals were too general for practicing attorneys yet overly technical for the general readership.

Although none of the legal periodicals published in the first quarter of the nineteenth century attained a position of literary distinction or lasting influence, they represent the first step toward a new form of legal publication. The next move in that direction was taken in 1829 when Joseph Angell, an official reporter for the courts of Rhode Island,¹³⁵ began editing *The United States Law Intelligencer and Review*, a legal journal that has been properly described as the "first publication displaying the distinctive features of the law magazine" as it exists today.¹³⁶ The *Law Intelligencer and Review* was distinctive because it included what came to be called "lead articles," a writing format which eventually produced some of the most significant legal scholarship of the times and foreshadowed the mainstay of modern law reviews.¹³⁷ In particular in-

130. See 1 N.Y. JUD. REPOSITORY (1818).

131. Letter from Marlene D. McGuirl, Chief, Law Library, American-British Law Division, Library of Congress, to Craig Laporte, research assistant (July 1982) (copy on file with *The Hastings Law Journal*).

132. D. HOFFMAN, *supra* note 92, at 670.

133. See *American Legal Periodicals*, *supra* note 93, at 446.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* The lead article concept was described by the editor of the *Albany Law Journal* in 1874 as follows:

stances, these articles approached the treatise in stature, respect, and influence.

The *United States Law Intelligencer and Review* also contained case reports and general news, but the lead article, "well considered, upon live subjects,"¹³⁸ was its hallmark. Unfortunately, this periodical ceased publication in 1831 after only three volumes.¹³⁹ Its demise may have been due to financial difficulties rather than deficiencies in its content.¹⁴⁰

Many early journals failed because publishers were either unable or unwilling to extend the necessary financial support.¹⁴¹ Of course, as discussed above, several journals could not carve out a niche in the marketplace because they were too similar to law reports, too local in flavor, too broadly focused, or too technical. Thus, the failure rate of legal periodicals during this period was very high. By 1850, approximately thirty law journals had been attempted in America, but only about ten survived.¹⁴²

A newspaper or journal that only contained news that was a mere record of passing events, would be a short-lived anomaly. The reader requires something more than news. When he has read the telegrams and summary, he turns with unabated interest, and generally with increased interest, to the other parts of the newspaper or journal. He sees in the summary that a new play was brought out last night, and he wants to know whether it was good, bad or indifferent. A telegram tells him that there has been another revolution at Madrid; he wants to know what the newspaper thinks about the affair, and turns to the leader. There has been a ministerial defeat, and the first thing he reads is the leader on the political crisis The criticisms and the articles are not merely expressions of opinion, but are chiefly instructive essays. The writer of the leading article gives life and interest to the curt telegram.

Editorial, *Legal Journalism*, 9 ALB. L. J. 106 (1874).

The editor pointed out that life and interest can also be put into legal matters by the use of lead articles in law periodicals. *Id.* at 107. Indeed, in 1888 the editors of the *American Law Review*, quoting from an earlier source, opined that "a greater benefit from the study of lead articles may be derived than can usually be gained from the study of the textbooks" because the authors in the law periodicals are "specialists discussing subjects with a well defined object in view." Note, *Leading Articles in Law Periodicals*, 22 AM. L. REV. 786, 786 (1888).

138. *American Legal Periodicals*, *supra* note 93, at 445.

139. F. HICKS, *supra* note 11, at 204.

140. See 11 ALB. L. J. 1 (1875).

141. *Id.*

142. *Id.* But see Glasier, *supra* note 121, at 615 ("Approximately fifty publications with some claim to be classed as legal periodicals were started between 1808 and 1850.").

The most important periodicals that had ceased publication during the mid-1800's were the *American Jurist and Law Magazine* (1829-1842), the *Pennsylvania Law Journal* (1842-1848), and the *Law Reporter* (1838-1866). The quarterly *American Jurist and Law Magazine* has been described as the "first compact, methodical and comprehensive law periodical" published in America. *American Legal Periodicals*, *supra* note 93, at 447. David Hoffman, while Professor of Law at the University of Maryland in 1836, advised his students to improve their leisure hours by the perusal of the legal periodicals, especially the "admirable works" in the *American Jurist*. D. HOFFMAN, *supra* note 92, at 669. Commenting on the *Jurist* and the earlier *American Law Journal*, Hoffman noted that America had taken a decided lead over England in the area of "repositories of legal essays." *Id.* at 83. The *American Jurist* survived

Nonetheless, the phenomenon of legal journalism was spreading across the United States,¹⁴³ and a more sophisticated, nationally oriented law journal evolved. Two journals founded during the mid-1800's—the *American Law Register* in 1852¹⁴⁴ and the *American Law Review* in 1866¹⁴⁵—qualitatively advanced legal journalism in this country.

American Law Register and American Law Review

In 1852, two members of the Philadelphia bar, Asa Fish and Henry Wharton, compiled and edited the first issue of the *American Law Register*.¹⁴⁶ The monthly issues of the *Register* were distinctive because they contained more scholarly articles than the other journals. Roscoe Pound described the *Register* as the prototype of the “academic-professional type of periodical” which became the “characteristic American type.”¹⁴⁷ In the *Register*, “along with popular articles and addresses there were more scientific articles from a general, even . . . a comparative law

until 1842. A reviewer later described the *Jurist*'s volumes as characterized by “good taste and scholarship.” *American Legal Periodicals*, *supra* note 93, at 447.

The *Pennsylvania Law Journal* was started in 1842 at Philadelphia. *Id.* Later to become the *American Law Journal*, the publication stressed Pennsylvania court decisions, but included articles and legal news items. *Id.* This journal is important because it partly served as a model for another Philadelphia based legal periodical, the *American Law Register*, which in turn was one of the most important legal reviews extant in 1886 when students at Harvard Law School sought examples to emulate.

The third significant but ill-fated publication of this era was the *Law Reporter*, a monthly published at Boston under the editorship of Peleg W. Chandler. *Id.* at 448. Twenty-seven volumes were issued before it too was discontinued in 1866. *Id.* Although the *Law Reporter* contained lead articles, news, and comments in addition to reports of cases, its demise was in part due to keen competition. *Id.*

143. The *Western Law Journal*, published in Cincinnati, was the first legal periodical in the United States published outside of the east or southeast. *American Legal Periodicals*, *supra* note 93, at 447. According to one listing of twenty-one periodicals commenced from 1808 through 1850, six were based in Philadelphia, six in New York City, three in Boston, and one in each of the following cities: Providence, Rhode Island; Burlington, New Jersey; Charleston, South Carolina; Raleigh, North Carolina; Nashville, Tennessee; and Cincinnati, Ohio. *Id.* at 445-48. Within the next 25 years, by 1875, at least one legal periodical was published in each of the following locales: Minneapolis; Chicago; St. Louis; Cleveland; Albany, New York; Bloomington, Illinois; Rochester, New York; Austin, Texas; Topeka, Kansas; Louisville, Kentucky; Baltimore, Maryland; St. Paul, Minnesota; Newark, New Jersey; Pittsburgh, Pennsylvania; Richmond, Virginia; Columbus, Ohio; Scranton, Pennsylvania; and Washington, D.C. See *Digest of Cases in the Law Periodicals*, 21 AM. L. REV. 329 (1887).

144. 1 AM. L. REG. 55 (1852).

145. 1 AM. L. REV. 1 (1866).

146. 100 U. PA. L. REV. 69 (1951). The *American Law Register* was an outgrowth of a local periodical, the *Pennsylvania Law Journal* (1842-1848) and its successor, the *American Law Journal* (1849-1852). Pound, *supra* note 104, at 264.

147. Pound, *supra* note 104, at 264; see also *infra* note 172 (further discussion of the Pound article).

standpoint."¹⁴⁸ This scholarly emphasis no doubt contributed to the *Register's* most significant achievement—its survival. Indeed, it exists today under the title of the *University of Pennsylvania Law Review*.¹⁴⁹

Although it was more scholarly than the other journals, the contents of the *Register's* early issues were not unique. Lead articles were followed by a section entitled "Legal Miscellany," which included digests of and notes about recent decisions, as well as professional news items. Each issue concluded with "Notices of New Books," a section that included reviews of recently published volumes of case reports.¹⁵⁰

The *Register's* original editors, Fish and Wharton, compiled and edited the first nine volumes for the Philadelphia publishing house of D.B. Canfield & Co. The *Register*, like all previous American law journals, began as a commercial venture not associated with a university. Beginning with Volume Ten, however, various boards of editors consisting of practicing attorneys, jurists, and law professors operated the *Register*.¹⁵¹ The first noteworthy legal academic to serve on the *Register's* editorial board was Thomas Cooley of the University of Michigan.¹⁵² The addition of Cooley, a former Chief Justice of the Michigan Supreme Court and one of the leading American treatise writers of the mid-1800's,¹⁵³ enhanced the *Register's* professional and academic credibility.

Another editorial board member, William Draper Lewis of Philadelphia, had an even greater impact on the *Register*. Following his appointment as dean of the University of Pennsylvania Law School in 1895, Lewis arranged for the *American Law Register* to be published by the law school he headed,¹⁵⁴ apparently because he believed "that an important attribute of a good law school was a law journal."¹⁵⁵ This conclusion reflected developments in legal education at the time; by 1895 Harvard and Yale already had established successful law school periodicals.

In 1896, law students at Pennsylvania began to edit the *Register*.¹⁵⁶ The name of the publication was changed in 1908 to the *University of Pennsylvania Law Review and American Law Register* and modified in

148. Pound, *supra* note 104, at 264.

149. See 100 U. PA. L. REV. 69 (1951).

150. See, e.g., *Review of Swan's Tennessee Reports*, 1 AM. L. REG. 382 (1853).

151. 100 U. PA. L. REV. 69 (1951).

152. *Id.*

153. *Id.*

154. *Id.*; see *infra* notes 344-48 & accompanying text.

155. 100 U. PA. L. REV. 69 (1951).

156. *Id.*

1945 by deleting the "American Law Register" portion.¹⁵⁷ The *University of Pennsylvania Law Review* goes on, now into its 132nd year, making it the oldest continuously published legal periodical in America.¹⁵⁸

Another prominent legal periodical that emerged during the mid-1800's was the *American Law Review*, which was first published in Boston in 1866 by Little, Brown & Co. Unlike the monthly schedule of the *Register*, the *Review* was issued quarterly. This schedule may have allowed for more careful writing, selection, and editing of its contents. Certainly, that was the result; the first issue of the *American Law Review* was a breed apart. There were five substantial lead articles dealing with conceptual and institutional issues of national interest.¹⁵⁹ The editors, John Chipman Gray and John Codman Ropes,¹⁶⁰ successfully appealed to the intelligentsia of the nation's legal profession. In Volume One, under the heading "Summary of Events," they declared that it was not their "desire or intention to give the *American Law Review* a local tone or circulation" and added that they would "spare no pains in the future to bring together matters of general interest from all quarters."¹⁶¹ They called on their "professional brethren throughout the Union" to provide the editors with any information as to "judicial appointments, deaths of leading lawyers, important decisions, legislative changes, interesting trials, or other legal news."¹⁶²

The *American Law Review's* aims "were evidently higher than those of most of its competitors, in that it was hospitable to theoretical essays and was as much concerned about the developments in the law of England as with the current American scene."¹⁶³ The editors' efforts produced an immediate success. Even the *Review's* competitors wrote of it in glowing terms, one declaring that it was a publication of which the "profession may well feel proud."¹⁶⁴ The *Review*, containing "dignified

157. *Id.* From 1892 through 1897, the periodical's full title was *American Law Register and Review*. In 1898, it again was called *American Law Register*.

158. Douglas, *supra* note 5, at 228.

159. See 1 AM. L. REV. 1-83 (1866).

160. Both Gray and Ropes received law degrees from Harvard Law School in 1861. A. SUTHERLAND, *supra* note 58, at 140. These same men founded the Boston law firm bearing their names shortly after their graduation from Harvard. *Id.* at 185. Gray later was appointed to fill the first Story Professorship at Harvard Law School in 1875. *Id.* Roscoe Pound, in discussing his days as a student at Harvard Law School, commented that Gray was a "master," a "great scholar," and "an outstanding influence with me." Sutherland, *One Man in His Time*, 78 HARV. L. REV. 7, 11-12 (1964).

161. Comment, *Summary of Events*, 1 AM. L. REV. 206, 206 (1866).

162. *Id.*

163. M. HOWE, JUSTICE OLIVER WENDELL HOLMES: THE SHAPING YEARS: 1841-1870, at 264 (1957).

164. *American Legal Periodicals*, *supra* note 93, at 449.

and elaborately prepared articles upon legal topics," possessed a "vigorous tone" which "earned for it a large measure of influence."¹⁶⁵ Its value to lawyers, the editorialist continued, "can hardly be overestimated," adding that Gray and Ropes established for themselves "an enviable reputation for their ability and discriminating taste."¹⁶⁶

By including scholarly lead articles, honestly critical book reviews,¹⁶⁷ news of legal events having regional and national interest, and contributions from the best available legal minds, the *American Law Review* quickly became and arguably remained the most important American legal periodical of the nineteenth century. Its role as a model for the later student-edited law reviews¹⁶⁸ made the *American Law Review* an important link in the evolutionary chain of American legal periodicals, which began in 1808 with publication of Hall's *American Law Journal and Miscellaneous Repertory*.¹⁶⁹

At this stage, however, in the latter half of the nineteenth century, many developmental paths were still open in the field of legal journalism.¹⁷⁰ If the *American Law Review*'s birth in 1866 heralded a more "academic" future for the American legal periodical,¹⁷¹ the emergence of other law journals suggested the continuation of a more "professional" orientation.¹⁷²

Professional Journals

Lead articles in the *American Law Review* usually had an academic orientation. They were written primarily to educate—to enhance the reader's knowledge and awareness of legal principles. Most legal periodi-

165. *Id.*

166. *Id.*

167. The *American Law Review* became well known for its candid and often critical book reviews. Although the *Albany Law Review* described the *American Law Review*'s book notices as "fearless and impartial," *id.*, the *Central Law Journal* contended that they sometimes were "conceived . . . in a spirit of faultfinding." 1 CENT. L.J. 24 (1874). The *Central Law Journal* also commented that a recent issue of the *American Law Review* contained "the usual amount of 'heavy' editorial matter, 'grated down and filed away with thought,'" adding that the first article of that particular issue "is a fifty-page discussion." *Id.*

168. See *infra* notes 205, 304 & accompanying text.

169. See *supra* notes 121-25 & accompanying text.

170. See Pound, *supra* note 104, at 265.

171. *Id.* at 259.

172. *Id.* By the early twentieth century, a mixed academic-professional journal emerged as the predominant form of American legal periodical. In a 1928 paper read at the annual meeting of the Association of American Law Schools, Roscoe Pound placed legal periodicals into three categories: academic, professional, and mixed. He generalized that the purely academic journal primarily had been published in Continental Europe, while the purely professional was produced in England. This paper was subsequently published in the *Iowa Law Review*. *Id.* at 260-65.

cals published in the 1870's, however, were designed primarily to inform—to discuss recent decisions, developments in the law and in legal education, efforts at codification, and news in a journalistic rather than in a scholarly style. These practitioner-oriented journals typically began with comments or editorials, followed by brief articles, case reports, digests, and concluded with book notices. The few “articles” typically did not “lead” the issue, but were buried in the middle. Yet, as mediums of information about legal matters of interest to lawyers and judges, a few of these publications performed superbly.¹⁷³

One journal in particular understood its informational function and successfully performed it for nearly forty years. This publication, *The Albany Law Journal*, commenced on January 8, 1870, in Albany, New York.¹⁷⁴ Although an academic review might publish only quarterly, an informational magazine must appear more frequently to be of value. The *Albany Law Journal* commenced as a weekly, a schedule that placed a burden on its editor, Isaac Grant Thompson.¹⁷⁵ Its publisher hailed the *Journal* as a “medium of conveying to the profession of the country the latest intelligence of interest on all subjects pertaining to the law” and solicited “[b]rief contributions on legal topics, notes of decisions, and items of general legal news.”¹⁷⁶

The first issue of the *Albany Law Journal* began with two pages of advertisements, including those of practicing lawyers,¹⁷⁷ followed by a lengthy editorial comment, “On the Study of Forensic Eloquence.”¹⁷⁸ This unsigned exhortation, which probably was written by Editor Thompson, was directed primarily at students. It concluded:

These examples [of Cicero, Lord Chatham, Pitt, Erskine, and Daniel Webster] will teach [the student] that God has set a price on every real and noble achievement; that success in oratory, as in everything else worth succeeding in, can be purchased only by pain and labor; . . . that those who would follow in their steps must give their days and nights to study¹⁷⁹

These lines reveal two characteristic thrusts of the *Albany Law Journal*: the topic of legal education and the espousal of the work ethic. These

173. See, e.g., *infra* notes 174-90 & accompanying text.

174. This publication should not be confused with the later *Albany Law Review* or the shortlived *Albany Law School Journal*. See *infra* notes 208-26 & accompanying text.

175. The *Albany Law Journal* published two volumes each year.

176. 1 ALB. L. J. 2 (1870) (advertisement).

177. The advertisements for lawyers merely stated the firm name and location, such as “Hilton & Whitney, Counsellors at Law, St. Louis, Mo.” Other advertisers were publishers, stenographers, and court reporters. *Id.* at 1-2.

178. 1 ALB. L. J. 3 (1870).

179. *Id.* at 5-6.

themes recurred in the ensuing issues.¹⁸⁰

The *Albany Law Journal* often raised its voice in behalf of better education of lawyers and for higher standards for entry into the profession.¹⁸¹ The *Journal*'s continuing concern for improving the public image of lawyers was typified by its reaction in its initial issue to a letter in the New York *Independent* newspaper that criticized the legal profession for producing "so few saints, so few martyrs, so few moral heroes."¹⁸² The *Journal* responded that "[nearly] every trace of social and religious liberty on earth is due to lawyers," adding that it was "high time that the vulgar notions about lawyers were done away with."¹⁸³

In certain ways, the *Albany Law Journal* of the late nineteenth century resembles the *American Bar Association Journal* of the mid-twentieth century. For example, each reportedly had the largest circulation of any legal periodical of its time.¹⁸⁴ In addition, both journals sought the support of the entire legal profession. One important distinction is that the American Bar Association, a professional organization, publishes the *American Bar Association Journal*, but the *Albany Law Journal* was not affiliated with any bar organization.¹⁸⁵ As might be expected, these publications did not coexist; the American Bar Association began publishing its *Journal* in 1915,¹⁸⁶ seven years after the demise of the *Albany Law Journal*.¹⁸⁷

The significance of the *Albany Law Journal* has been misconstrued. Although one writer has asserted that the *Albany Law Journal* established a general pattern of articles which was followed by student-edited law reviews,¹⁸⁸ this view is incorrect. The general pattern of scholarly lead articles was established principally by the *American Law Review* and, to a lesser extent, by the *American Law Register*.¹⁸⁹ The most significant aspect of the *Albany Law Journal* was its spectacular success.

180. See, e.g., *Method and Objections of Law Reading, with Reference to Apprehension-Memory-Judgment*, 1 ALB. L. J. 226 (1870).

181. Such efforts certainly helped unify the national movement in American law which began in the 1850's and gathered momentum after the Civil War. See Pound, *supra* note 104, at 263. "By 1870, professional journals were vying with one another in appeals for improving the legal profession." R. STEVENS, *supra* note 118, at 24.

182. Comment, *The Moral Standing of the Legal Profession*, 1 ALB. L.J. 10, 10-11 (1870).

183. *Id.*

184. *Our Second Volume*, 2 ALB. L.J. 1 (1870).

185. No national bar organization existed in 1870. The American Bar Association was not formed until 1878. R. POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 270 (1953).

186. See 1 A.B.A. J. 1 (1915).

187. The last issue of the *Albany Law Journal* apparently was published in 1908.

188. Edmunds, *supra* note 6, at 9-10.

189. See *supra* notes 144-62 & accompanying text.

The great majority of nineteenth-century legal periodicals failed within a few years for a lack of readers.¹⁹⁰ The *Albany Law Journal*, however, had broad appeal due to the wide variety of topics covered, the general quality of its writing, and its willingness—even eagerness—to take a public stand on controversial legal topics of the day.

The success of the *Albany Law Journal* spawned a score of other professional journals during the early 1870's. One of its better "imitators" was the *Central Law Journal*, located in St. Louis, Missouri, and published weekly to achieve "the highest degree of usefulness."¹⁹¹ The format of the *Central Law Journal* was substantially the same as that of the *Albany Law Journal*. Like the *Albany Law Journal*, the *Central Law Journal* desired submissions to be brief, stating that "few persons can afford the time or find the patience to peruse long articles; nor can a weekly journal, dealing with a great variety of topics, afford space to print them."¹⁹² The *Albany Law Journal*, however, published a great variety of topics of general and national appeal, while the *Central Law Journal* focused on court decisions and items of interest to the Mississippi Valley region of the United States.¹⁹³

Other similar regional periodicals soon sprang up throughout the country; no longer was the publication of legal periodicals centered in the northeast. By 1875, law magazines such as the *Western Jurist* (Des Moines), the *Chicago Legal News*, the *Louisiana Law Journal* (New Orleans), the *Pittsburgh Legal Journal*, the *American Law Record* (Cincinnati), the *Forum* (Baltimore), the *Southern Law Review* (St. Louis), the *Washington Law Reporter* (District of Columbia), and the *Monthly West-*

190. Why had the majority failed? One answer is suggested in an 1875 issue of the *Albany Law Journal*, which states that the majority of American legal journals have "mistaken the true province of legal journalism." 11 ALB. L.J. 261, 262 (1875). The editorial continues:

A journal which is simply a series of reports, or a compilation of reported cases, can hardly claim the name of "legal journal." . . . The true function of legal journalism is principally to present the various phases of the legal profession, disquisitions on legal topics, a condensed record of legal events, and a summary of the most recent legal decisions. A journal which does this will not fail . . .

Id.

Attempts to "out report" the reporters and not provide "disquisitions" or lead articles on law-related topics typically resulted in a periodical that failed to win sufficient support to survive. Thus, it was reported in 1887 that the *Texas Law Review*, "lately of Austin, Texas, has already succumbed to the rivalry of two sets of 'Reporters' which are taking the whole land for their province, and making hopeless the future of those local journals which find a pretext for existence in case reporting." *Changes in Legal Journalism*, 21 AM. L. REV. 140 (1887).

191. 1 CENT. L.J. 1 (1874).

192. *Id.*

193. *Id.* The provincial nature of the *Central Law Journal* is also revealed by its repeated inclusions of excerpts from other midwest area law periodicals such as the *Chicago Legal News*. See, e.g., Comment, *The Purpose of a Law Review*, 1 CENT. L.J. 463 (1874).

ern Jurist (Bloomington, Illinois) were being published.¹⁹⁴ Several specialized periodicals also appeared by 1875. They included the *Insurance Law Journal*,¹⁹⁵ the *Medico-Legal Journal*,¹⁹⁶ *The Bankrupt Register*,¹⁹⁷ the *Internal Revenue Record and Custom Journal*,¹⁹⁸ and the *American Civil Law Journal*.¹⁹⁹ More would soon follow. The number of legal periodicals published in this country leaped from seventeen in 1870 to forty-two in 1886.²⁰⁰

Several factors contributed to this explosion of commercial ventures in legal periodical publishing. The success of the *Albany Law Journal* was one. Another was the deprofessionalization of the bar. As notions of Jacksonian egalitarianism spread throughout the country²⁰¹ and barriers to entry into the profession were lowered, more persons began to practice law.²⁰² Many of these new, often unschooled lawyers probably were concerned less with the universal principles of law found in the treatises than with cases and news of their particular region or state.²⁰³ The new legal periodicals fulfilled their need.

In summary, the "concise and casual" style, which combined scholarly insight and historical perception with a professional and practical focus, was the creation of nineteenth-century American legal journalism. In time, the treatises lost some of their appeal, not only to practitioners, but also to many authors. The more modern style of legal writing and the medium in which it was published, the legal periodical, eventually

194. See *supra* text accompanying notes 174-93. The *Chicago Legal News* was edited by Mrs. Myra Bradwell, who may have been the first woman editor of an American law periodical. Comment, *Female Lawyers*, 1 CENT. L.J. 487 (1874). Another woman, Mrs. Catherine Waite, was the editor of the later *Chicago Law Times* which began publication in 1887. 35 ALB. L. J. 21, 22 (1887).

195. The *Insurance Law Journal* was first published in September 1871. Book Notices, 4 ALB. L.J. 195 (1871).

196. 27 ALB. L.J. 481, 483 (1883).

197. *American Law Periodicals*, *supra* note 93, at 449.

198. See *id.*

199. This periodical first appeared in 1873. Book Notices, 7 ALB. L.J. 94 (1873).

200. See Bloomfield, *Law v. Politics: The Self-Image of the American Bar (1830-1860)*, 12 AM. J. LEGAL HIST. 306, 309 (1968) (listing the number of legal periodicals in existence in 1870); *Digest of Cases in the Law Periodicals*, 20 AM. L. REV. 281 (1886) (listing legal periodicals being published in 1886).

201. Kommers, *Reflections on Professor Chroust's The Rise of the Legal Profession in America*, 10 AM. J. LEGAL HIST. 201, 209 (1966); see also Bloomfield, *supra* note 200, at 306-08; Pound, *supra* note 104, at 262.

202. See Bloomfield, *supra* note 200, at 306-08; Pound, *supra* note 104, at 262.

203. See Pound, *supra* note 104, at 262. "[In] the late nineteenth century . . . American law became associated with precedents rather than principles and with ad hoc rationalizations, as the judges moved from case to case. Instead of attempting to discover 'the underlying theory of law' the American lawyer looked 'for cases "on all fours"'. . . ." R. STEVENS, *supra* note 118, at 132-33. See generally Bloomfield, *supra* note 200.

became the predominant mode of written discussion about the law. In an 1872 editorial comment on "legal journalism," the editors of the *Albany Law Journal* wrote:

[T]he province of legal journalism is enlarged and made to be an almost indispensable auxiliary to the profession by . . . well-written, able and elaborate articles on new or doubtful legal subjects. Law journals are also the means of the dissemination of the views of distinguished men upon topics of vital interest . . . [T]here is abundant reason to believe and to hope that we are in the beginning of an era of legal journalism which shall be brilliant in success, powerful in the accomplishment of law reform, indispensable in the . . . improvement . . . of the profession, and distinguished for the literary . . . lustre which it shall reveal in the law²⁰⁴

Thus, American legal periodicals paved the way for the student-edited law reviews by developing formats for legal writing, by demonstrating that legal periodicals could be useful to the profession, and by creating a widespread audience for articles combining scholarly insights with a professional focus. Although English authors originally dominated doctrinal writing (treatises and institutional works), the Americans blazed the new path of legal journalism that eventually led to student-edited law reviews.²⁰⁵

The Founding of Student-Edited Law Reviews

Student-edited law reviews emerged in the late nineteenth century. Contrary to popular belief, the *Harvard Law Review* was not the first student-edited law review.²⁰⁶ Law students at two other institutions, Albany and Columbia, produced short-lived law journals prior to the publication of the first volume of the *Harvard Law Review* in 1887. Before discussing the founding of the *Harvard Law Review*, we must first examine these earlier efforts.

204. Editorial, *Legal Journalism*, 6 ALB. L.J. 201 (1872).

205. There were few outstanding English legal periodicals prior to the 1885 publication of the *Law Quarterly Review* in London. See 50 HARV. L. REV. 862 (1937). Yet by that year, America could boast of scores of legal journals, several of which were being edited with a high degree of professionalism. The *Law Quarterly Review*, moreover, imitated the approach of the earlier *American Law Register* and *American Law Review*. The *Quarterly Review* was distinguished by the intellectual superiority of many of its lead articles and the leadership of its esteemed editor, Sir Frederick Pollock. Even the *Albany Law Journal* commented that the articles in *Quarterly Review's* initial issue were "excellent," adding that its contents were "much less soporific" than that of other English law periodicals. 31 ALB. L.J. 81 (1885). See Goodhart, *The Jubilee of the Iowa Law Review*, 50 IOWA L. REV. 1 (1964) (discussing the impact of the *Law Quarterly Review* on American student-edited law reviews).

206. See *supra* note 11 & accompanying text; *infra* notes 207-47 & accompanying text.

Initial Ventures at Albany and Columbia

With publication of the *Albany Law School Journal* in 1875, the American law periodical was no longer exclusively in the hands of "professionals." This journal, whose name bore a close resemblance to that of the successful *Albany Law Journal*,²⁰⁷ did not last long. Apparently, it survived only one academic year.²⁰⁸ Yet this publication is significant because it was started and edited by students of Albany Law School. Thus, that institution was the first to produce a student-edited legal periodical.²⁰⁹

The efforts of the Albany law students did not go unnoticed by the commercial legal periodicals of the day. "The boys at the Albany Law School have had the enterprise to start a law journal," wrote the *Central Law Journal* on February 25, 1876, adding, "Altogether it is quite creditable. Of course it is not a man's law journal."²¹⁰ The *Central Law Journal* review of this new student enterprise continued:

The editorial contributions are evidently for the most part in the storm-and-stress period. Each one of these boys is an immense aggregation of force which must needs [sic] work itself off in some direction; and it is much better that such electric batteries should be turned upon a novel experiment like this, than that they should expend their energies in stopping chimneys and robbing suburban hen-roosts.²¹¹

This "novel experiment" consisted of a few short articles, reports of moot court dispositions, news items, and information about the law school's clubs.²¹² The *Albany Law School Journal* attempted to be a

207. See *supra* note 174.

208. See F. HICKS, *supra* note 11, at 207.

209. *Id.*

The old University of Albany had joined Union College, located in Schenectady, New York, in 1873 to form Union University. Browne, *The Albany Law School*, 2 THE GREEN BAG 153 (1890). The Albany Law School remained in Albany, but became a department of the new University. *Id.* The oldest law school in the state, it occupied only one room in the south wing of the Medical Building in 1875. *Id.* at 155. The school required that students complete at least one academic year of study even before such a requirement was prescribed by the New York bar authorities. *Id.* Isaac Edwards headed the Albany Law School in 1875, and he reportedly "endeared himself to the students by his gentle and winning manners and his kind and sincere nature." *Id.* at 159. Given such a description, it is easy to imagine that Edwards was receptive to the revolutionary idea that students compile and publish a law periodical.

The first law school publication of any kind was the 1822 journal ("minutes of proceedings") of the law school at Needham, Virginia. F. HICKS, *supra* note 11, at 206-07. See generally W. BRYSON, LEGAL EDUCATION IN VIRGINIA 1779-1979, at 592-93 (1982) (discussing the Needham Law School). Only one volume was produced. F. HICKS, *supra* note 11, at 206-07. For a chronological listing of all law school periodicals appearing from 1822-1941, see *id.* at 207-09.

210. *The Albany Law School Journal*, 3 CENT. L.J. 136 (1876).

211. *Id.*

212. *Id.*

chronicle of law school events and a magazine of general interest to graduates and members of the profession. This concept was unique in the history of English and American legal periodicals.

The *Central Law Journal* tempered its relatively cool reception of this new student-edited venture by noting that the initial issue of the *Albany Law School Journal* did contain some "good contributions," "interesting items of news," and even "one question of practical interest."²¹³ This practical question concerned whether, at the conclusion of a lecture, it was better for a law student to go to the library and read the authorities cited or to go to the textbooks and read about the subject discussed.²¹⁴ The student editors answered their own question by arguing for the textbook option.²¹⁵ The *Central Law Journal* editors felt otherwise:

It seems to us that reading from a text book would simply be reading another lecture on the subject. We believe that nothing can take the place of an exploration of the original sources from which text writers and lecturers generalize the knowledge which they present. The law is an applied science; and nothing short of a wide and attentive examination of adjudged cases will give the student a practical idea of how the various questions arose²¹⁶

It is noteworthy that the *Albany Law School Journal* produced a mini-debate on the pedagogy of legal education.²¹⁷ By 1875, the methodology of legal education had undergone dramatic transformation at one law school,²¹⁸ and the debate over whether casebooks or textbooks constituted better educational study material was about to begin in earnest.²¹⁹ The "boys" of the *Albany Law School Journal* and the "men" at the *Central Law Journal* fought an early skirmish.

The editors of the commercially published *Albany Law Journal* also noticed the student experiment in legal journalism taking place in their city.²²⁰ An editorial in that periodical stated that the new student venture was "the outgrowth of a very commendable spirit—that of furnishing a medium of expression for the legal mind of the school and a chronicle of the events of the school year."²²¹ The editorialist also opined that even though the student editors "cannot hope to rival in use-

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. The earlier *Albany Law Journal*, *supra* note 174, had addressed itself to professional standards rather than to classroom methods.

218. See *infra* notes 297-99 & accompanying text.

219. See McKelvey, *supra* note 6, at 878 (discussion of the quality of legal education and its effect on "the welfare of the human race").

220. Notes, 13 ALB. L.J. 31, 31 (1876); see *supra* notes 174-90 & accompanying text.

221. Notes, *supra* note 220, at 31.

fulness to the profession their legal contemporaries of a more sober and practical character, they can at least be the instruments of encouraging an endeavor among law students toward a higher legal education.”²²²

As mentioned above, the *Albany Law School Journal* ceased publication after one year.²²³ It is unlikely that the journal had much of an impact even at Albany Law School. In a lengthy address to the graduating class of the school delivered on May 17, 1876, Judge Lyman Tremain made no mention of the new venture although the students who had produced the volume were surely present.²²⁴ Moreover, a detailed description of the Albany Law School in an 1877 issue of the *Albany Law Journal* does not mention the student journal,²²⁵ nor does a history of the school written by Irving Browne and printed in an 1890 issue of *The Green Bag*.²²⁶

Despite the failure of the first student-edited legal periodical, other efforts were made. In February 1885, almost ten years after the demise of the *Albany Law School Journal*, six young men at Columbia Law School started the second student-edited legal periodical—the *Columbia Jurist*. They apparently did so without knowledge of the earlier student effort at Albany.²²⁷ The Columbia law students modeled their effort after other periodicals being published by some academic departments in Columbia College.²²⁸ The editors of the *Jurist* explained their intentions in the initial issue: “We think that the *Columbia Jurist* will supply a want long felt. The other departments of this College are each supplied with a paper or publication. Why are not we? Let each member of the Law School contribute heartily with pen and purse.”²²⁹

The editors declared that the weekly *Jurist*’s greatest value would be as a reference work for students and that it would include notes from

222. *Id.*

223. Unfortunately, the authors have been unable to locate the volume produced in 1875.

That the *Albany Law School Journal* failed after only one volume is not surprising, particularly in view of its several attempts at humor. Consider this sample: “A man rushed excitedly into a lawyer’s office last week and said: ‘A man has tied a loop in my horse’s tail; can I do anything about it?’ ‘Yes; go and untie it—fee \$5.’” *Id.*

224. Tremain, *Address to Law Students*, 13 ALB. L.J. 376 supp. 1 (1876).

225. *The Albany Law School*, 16 ALB. L.J. 115 (1877).

226. Browne, *supra* note 208. *The Green Bag* was an excellent monthly periodical which was first published in 1899. Its title refers to the practice of mid-nineteenth century lawyers of carrying a “green bag of common professional shape and using the same in his practice in a professional manner.” R. POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 217-18 (1953) (quoting from the bylaws of the Wilkes-Barre Law Association).

227. A HISTORY OF THE SCHOOL OF LAW, COLUMBIA UNIVERSITY 103 (J. Goebel, Jr. ed. 1955) [hereinafter cited as A HISTORY OF COLUMBIA LAW SCHOOL].

228. *Id.*

229. 1 COLUM. JURIST 2 (1885).

class lectures, moot court decisions, plus "all news that can interest Law Men."²³⁰ Upholding at least half of its motto "Quality before Quantity," the first issue consisted of four pages.²³¹ In that issue the editors noted that the faculty at Columbia Law School had given them encouragement to proceed, several even promising to contribute articles.²³²

Like the editors of the earlier *Albany Law School Journal*, the student editors of the *Jurist* did not focus solely on internal matters of the law school. They also took note of developments in the law and, in imitation of the successful commercial law journals, published casenotes of recent decisions and lead articles by "persons of acknowledged merit."²³³ By calling on contributors from both inside and outside the college, the student editors of the *Columbia Jurist* "made their magazine the forerunner of the modern university law review."²³⁴

The second volume of the *Jurist* was of a higher quality than the first and, in some respects, more controversial. It contained numerous signed and unsigned articles and several reprints of works from commercial law journals.²³⁵ Interspersed among these diverse and useful writings were editorials, news items, and notes of class lectures.

The *Columbia Jurist* was not received with open arms by its commercial brethren. The second volume of the *Jurist* contained five separate articles concerning "Mr. Dudley Field's Civil Code,"²³⁶ and the student editors became embroiled in a journalistic controversy with the *Albany Law Journal* and the *American Law Review* over the proposed Field Code. The commercial publications had endorsed the codification effort and asserted that the *Columbia Jurist* editors, who espoused the opposing view, had "indulged themselves largely in an intemperate" reaction.²³⁷ In 1886, the *American Law Review* editors decried the "amateur legal journalism" of the *Jurist's* editorials.²³⁸ Conceding that the *Jurist's* content had "been enriched by several essays of [Columbia law

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. A HISTORY OF COLUMBIA LAW SCHOOL, *supra* note 227, at 102.

235. At this time it was commonplace for periodicals to borrow liberally from each other and then to cite back to the source. See Note, *Stolen From Thieves*, 20 AM. L. REV. 573 (1886).

236. See 2 COLUM. JURIST 325, 327, 337, 340, 373 (1886).

237. Note, *Amateur Legal Journalism*, 20 AM. L. REV. 421, 422 (1886). The *Jurist* editors were also critical of the New York bar examination, claiming that the questions were often irrelevant. See *The Learned Fifth*, 1 COLUM. JURIST 89 (1885) (noted in R. STEVENS, *supra* note 118, at 32 n.39).

238. Note, *supra* note 237, at 422.

professor] Theodore Dwight and other eminent men," the *American Law Review* nonetheless claimed to examine each table of contents "to prepare ourselves for whatever assault or criticism the learned and exacting editor of the *Columbia Jurist* may have launched at us."²³⁹

Weekly issues of the *Jurist* continued to appear for only another year. After Volume Three, Number Eighteen had been published in 1887, the *Jurist* died. The *Albany Law Journal* commented that the *Jurist*:

ha[d] succumbed after a long disorder, manifested by an inveterate hatred to codification. The disease lately took a bad form, and with a gasp the *Jurist* expired on January 29th last The *Jurist* died penitent, and by a singular fact made a public confession of its wicked life and its unholy antipathy to codification. With its last breath it feebly murmured, the need of codification is confessed on all sides, and then it died. May so die all enemies to codification! We don't want them to die, but when they die, we want them to die penitent.²⁴⁰

The real reason for the demise of the *Columbia Jurist*, notwithstanding the *Albany Law Journal's* romantic belief to the contrary, was the inability of the new student editors to meet the grinding task of putting out a weekly publication.²⁴¹

Despite its short duration the *Columbia Jurist*, unlike the earlier *Albany Law School Journal*, had a significant impact on the development of student-edited law reviews in this country. A copy of the *Jurist* attracted the attention of Harvard law student John Jay McKelvey in the fall of 1886.²⁴² The Columbia venture motivated McKelvey and other Harvard students to start a student-edited law review of their own.²⁴³ Indeed, the initial issue of the *Harvard Law Review* appeared in the spring of 1887²⁴⁴ with McKelvey as editor-in-chief.²⁴⁵ Although there is no evidence that McKelvey or his fellow Harvard editors were aware of the earliest student-edited periodical, the *Albany Law School Journal*, they certainly

239. *Id.*

240. *The Columbia Jurist*, 35 ALB. L.J. 242 (1887).

241. A HISTORY OF COLUMBIA LAW SCHOOL, *supra* note 227, at 103. The new editors were selected from the student body on the basis of "competitive essays" submitted to a committee. *Id.* at 103. Grades were of no use for selection purposes because they were only given when a student took examinations at the conclusion of his course of studies. *Id.* at 430 n.100.

242. CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL 1817-1917, at 139 (1918) [hereinafter cited as CENTENNIAL HISTORY].

243. *Id.* at 140.

244. The initial issue was dated April 15, 1887, and numbered 54 pages. 1 HARV. L. REV. 1 (1887).

245. *Id.* at 35. Other members of the editorial board listed on the initial masthead were Joseph H. Beale, Jr.; Bertrum Ellis, treasurer; Wm. A. Hayes, Jr.; Julian W. Mack; John Wells Morss; John H. Wigmore; Alexander Winkler; Bancroft G. Davis; Marland C. Hobbs; Blewett H. Lee; Henry M. Williams; John M. Merriam; Geo. R. Nutter; and Paul C. Ransom. *Id.*

were familiar with the *Columbia Jurist*. For example, the *Jurist's* publication of lecture notes is mirrored by the publication of summaries of class lectures in early issues of the *Harvard Law Review*. Moreover, knowledge of the Columbia students' venture in legal journalism surely contributed to the overall concept of the Harvard publication.²⁴⁶ Thus, the *Jurist* influenced the founding and early content of the *Harvard Law Review*.²⁴⁷ The origin of the *Harvard Law Review*, however, cannot be attributed solely to the influence of the *Jurist*. The development of a student-edited legal periodical at Harvard resulted from the interaction of numerous influences, persons, and events, a complex topic which the next section explores.

Harvard Law Review

To do something daring and to do it well requires talent and inspiration.²⁴⁸ Support from others is also helpful. In the matter of the birth of the *Harvard Law Review*, talent, inspiration, and support combined to produce a legal publication that has had an enormous impact on the legal profession.

The talent emanated from a small group of Harvard students who formed a club for the writing of legal essays;²⁴⁹ a group Samuel Williston²⁵⁰ later described as including "several brilliant men who afterwards attained distinction."²⁵¹ The inspiration came from speeches delivered at the 250th celebration of the founding of Harvard University²⁵² and from the tone and content of certain earlier legal journals.²⁵³ The support consisted of encouragement offered by faculty members²⁵⁴ and financial contributions made by alumni.²⁵⁵

246. See *infra* text accompanying notes 306-08.

247. Other journals arguably had a greater influence on the format and content. See *infra* notes 304, 313 & accompanying text.

248. "It was rather daring, even rash, was it not, for students still in law school to believe that they could start and edit a worthwhile law review?" wrote John Wigmore, one of the student founders of the *Harvard Law Review*, fifty years later. He went on: "Why should we suppose that we should and could do this novel thing?" Wigmore, *The Recent Cases Department*, 50 HARV. L. REV. 862 (1937).

249. See *infra* text accompanying notes 256-60.

250. Williston, later a distinguished member of the Harvard Law School faculty and treatise author, was not one of the original *Harvard Law Review* editors, but joined the editorial board in the fall of 1887. His name first appeared on the masthead of the issue dated October 15 of that year. See 1 HARV. L. REV. 144 (1887).

251. S. WILLISTON, *LIFE AND LAW, AN AUTOBIOGRAPHY* 82 (1940).

252. See *infra* text accompanying notes 274-82.

253. See *infra* notes 304, 313 & accompanying text.

254. See *infra* text accompanying notes 261-73.

255. See *infra* text accompanying notes 290-93.

During the 1880's, student clubs were common at Harvard Law School.²⁵⁶ Their principal function was to organize "Moot Courts," which were an important part of the curriculum.²⁵⁷ In the fall of 1886, eight third-year students formed a new club, the Langdell Society, "for the serious discussion of legal topics and for other serious work on law."²⁵⁸ In addition to conducting mock trials, the members planned to write legal essays to be read at meetings.²⁵⁹ The intention of writing essays only for their own use soon gave way, however, because "it was felt that the . . . writers deserved a wider circulation than was originally proposed and the founding of the *Harvard Law Review* was the result."²⁶⁰

Of course, it was not quite that simple. The prospective editors presented the plan to the faculty, who displayed "differing degrees of warmth in support offered."²⁶¹ In particular, the students consulted Professor James Barr Ames.²⁶² As one student founder, Julian Mack,²⁶³ explained: "The suggestion that the *Harvard Law Review* be established met at once with the response: 'Let's consult Mr. Ames. If he approves, we'll do it.' The project received his cordial support; the editors his encouragement and advice."²⁶⁴ Ames was a likely consultant because his general availability for counseling made him the students' "best friend" during this period.²⁶⁵ As Joseph Beale,²⁶⁶ a student founder and later a

256. M. HOWE, *supra* note 163, at 189. The more famous of these clubs included the Pow-Wow Club and the Thayer Club. See W. ROALFE, JOHN HENRY WIGMORE, SCHOLAR AND REFORMER 11 (1977); Williston, *Joseph Henry Beale, A Biographical Sketch*, 56 HARV. L. REV. 685, 686 (1943).

257. M. HOWE, *supra* note 163, at 189.

258. CENTENNIAL HISTORY, *supra* note 242, at 139.

259. *Id.*

260. Williston, *supra* note 256, at 686.

261. Beale, *James Barr Ames His Life and Character*, 23 HARV. L. REV. 325, 328 (1910); see also W. ROALFE, *supra* note 256, at 11.

262. Having graduated first in his class from Harvard Law School in 1868, Ames was Langdell's first appointment to the law faculty after Langdell became Dean in 1870. Beale, *supra* note 260, at 328. Roscoe Pound, among many others, described Ames as a "great teacher." Sutherland, *One Man in His Time*, 78 HARV. L. REV. 7, 11 (1964).

263. The first Harvard Law School graduate to be awarded the Parker Fellowship, Mack subsequently taught at Northwestern University Law School, then became a state judge in Illinois. He was appointed a United States Circuit judge at large in 1913, a post from which he retired in 1941. Hand, *Julian W. Mack*, 57 HARV. L. REV. 96-97 (1943).

264. J. Ames, *Memoir of James Barr Ames*, in LECTURES ON LEGAL HISTORY AND MISCELLANEOUS LEGAL ESSAYS 21 (1913) [hereinafter cited as *Memoir*].

265. Beale, *supra* note 261, at 328.

266. After graduating from Harvard Law School in 1887, Beale was appointed to its faculty in 1891. He was a prodigious author of books, treatises, and law review articles throughout his career. See Williston, *supra* note 256, at 685-89. Harvard Law School Dean Ervin Griswold later said about Beale that: "It is one of the finest experiences of life that

Harvard law professor, recounted: "Ames approved [the idea for the review] without reserve, wrote the first leading article, and became the chief advisor and helper of the editors throughout his life."²⁶⁷ Clearly, Professor Ames, more than any other person, influenced the talented group of law students that comprised the original editorial board of the *Harvard Law Review*.²⁶⁸

The faculty played no role in managing the review, although apparently the students had invited them to do so.²⁶⁹ With the exception of Ames, they may not have had high hopes for the new venture because faculty minutes initially referred to the periodical as a "paper" rather than as a "journal" or "review."²⁷⁰

John Chipman Gray, who had been co-editor of the prestigious *American Law Review* when it commenced publication in 1866, was a prominent member of the Harvard Law School faculty at this time.²⁷¹ Although Gray could have provided the students with a wealth of practical advice,²⁷² there is no indication that he, or Dean Langdell, for that matter, supported the establishment of the *Harvard Law Review*. Despite the apparent lack of involvement of an experienced editor like Gray, the enthusiastic assistance and encouragement of Ames must have helped to keep the embryonic project alive. Moreover, the entire faculty encouraged the student editors, if not directly by their assistance, then indirectly by their enthusiasm for scholarly activities.²⁷³

young men can feel the influence of older men upon them. It was Beale's privilege to influence greatly the lives of many men." Griswold, *Mr. Beale and the Conflicts of Law*, 56 HARV. L. REV. 690, 694 (1943).

267. Beale, *supra* note 261, at 328.

268. *Id.* This group also included John Wigmore, who later became a distinguished treatise writer and law school dean at Northwestern Law School. See *infra* text accompanying notes 383-84. He wrote several works on evidence and other topics. See generally W. ROALFE, *supra* note 256.

269. CENTENNIAL HISTORY, *supra* note 242, at 140. "The Faculty were invited to take an active part in the management, but thought 'that the interests of the paper would be more advanced by their remaining in the background.'" *Id.*

270. *Id.*

271. See *supra* text accompanying notes 159-67.

272. See R. GRAY, JOHN CHIPMAN GRAY 21 (1917); Thayer, *John Chipman Gray*, 28 HARV. L. REV. 539 (1915).

273. One of the student founders, Judge Julian Mack, would later write:

Trained as I was in the school of Langdell, Ames, and Thayer, I came to attach great value to their penetrating historical researches . . . I find myself today pleading in defense of my teachers, the legal giants of their day, that they were truly progressive and not wholly unaware of the relation between the law and the other sciences, in an age when sociology was virtually unknown and economics was far remote from the actual working world . . ."

Mack, *Introduction* to J. FRANK, *LAW AND THE MODERN MIND* at x (1930).

The students were also inspired by the heady times at Harvard in November 1886. The occasion was the 250th anniversary celebration of the founding of the university.²⁷⁴ Lasting three days,²⁷⁵ the celebration included speakers James Russell Lowell and Oliver Wendell Holmes, Jr.²⁷⁶ Even President Grover Cleveland attended.²⁷⁷

During this event, the Harvard Law School Association,²⁷⁸ a recently-formed group of alumni, held a general meeting in the law building.²⁷⁹ Holmes delivered an inspirational address to the gathering.²⁸⁰ He recounted the influential history of the Harvard Law School and ended with an exhortation for the school and its future graduates:

[T]he business of a law school is not sufficiently described when you merely say that it is to teach law, or to make lawyers. It is to teach law in the grand manner, and to make great lawyers

. . . .
Yes, this School has been, is, and I hope will be, a centre where great lawyers perfect their achievements, and from which young men, ever more inspired by their example than instructed by their teaching, go forth in their turn²⁸¹

The students who founded the *Harvard Law Review* were certainly impressed by Holmes and the other speakers. Wigmore, later discussing the birth of the journal, bluntly stated that the celebration of the 250th anniversary "put pride into our hearts, and the conviction that the Harvard Law School had a message for the professional world."²⁸²

This conviction became the key to the eventual success of the daring, perhaps even rash, student experiment in legal journalism.²⁸³ The mission of the publication was to be a vehicle for the "faculty's scholar-

274. 2 C. WARREN, *supra* note 11, at 439-40.

275. A. PIER, *THE STORY OF HARVARD* 204-07 (1913).

276. *Id.* Williston would later recall "the thrill that ran through the audience in Sanders Theatre" at Lowell's oration. S. WILLISTON, *supra* note 251, at 82. Lowell was renowned in both the realms of literature and the law. He held the Longfellow's Smith Professorship at Harvard and later was the United States Ambassador to the Court of St. James. A. SUTHERLAND, *supra* note 58, at 118-19. Holmes, of course, later became one of the most prominent jurists to serve on the Supreme Court of the United States. See generally M. HOWE, *JUSTICE OLIVER WENDELL HOLMES* (1957).

277. S. WILLISTON, *supra* note 251, at 82.

278. The Harvard Law Association was organized on September 23, 1886, and then solicited former students and alumni to meet at Harvard during the 250th celebration in November 1886. 2 C. WARREN, *supra* note 11, at 439.

279. *Id.*

280. Wigmore, *supra* note 248, at 862.

281. O. HOLMES, *The Use of Law Schools*, in *COLLECTED LEGAL PAPERS* 37, 46-47 (1920).

282. Wigmore, *supra* note 248, at 862.

283. *Id.*

ship, . . . not so much as an organ for ourselves.”²⁸⁴

Indeed, the founding of the *Harvard Law Review* gave the faculty, and Ames in particular, a new outlet for their scholarship.²⁸⁵ Prior to the *Review*'s birth, Ames and Professor James Bradley Thayer²⁸⁶ had begun research on legal history topics, but did not publish the results until the *Review* was in existence.²⁸⁷ The *Review*'s editors unabashedly relied on such faculty articles to justify the new venture in legal publishing.²⁸⁸ “We *knew* that our faculty comprised scholars of the highest standards and accomplishments in their fields We *knew* that their pioneer work in legal education was not yet but ought to be appreciated by the profession. We yearned to see the fruits of their scholarship in print.”²⁸⁹

A problem of funding remained. The project was not an official part of the law school program, and it needed outside support. At the suggestion of Ames, the student editors sought assistance from alumnus Louis Brandeis,²⁹⁰ secretary of the newly created Harvard Law School Association.²⁹¹ Brandeis gave the editors money and placed them in touch with other members of the Boston bar who were likely to support the project.²⁹² Student editor McKelvey also solicited alumni in the New York City area for subscriptions, which reportedly numbered around 300 by the first issue.²⁹³

The stage was set. It was time for the student editors to produce an enduring, first-rate academic journal. Although the result was not radically different from leading legal periodicals of the time, the review clearly reflected a law school orientation.

The initial issue of the *Harvard Law Review*, published in the spring of 1887, consisted of two lead articles, notes about happenings at the school, reports of moot court arguments, summaries of class lectures, case digests and comments, book reviews, and a list of books received.

284. *Id*; see also W. ROALFE, *supra* note 256, at 16.

285. Beale, *supra* note 261, at 328.

286. Thayer was Weld Professor of Law at Harvard at the time of his death in 1902. During his 27 years on the faculty he often gave advice and assistance to editors of the *Review*. 15 HARV. L. REV. 568 (1902).

287. M. HOWE, *supra* note 163, at 140.

288. Wigmore, *supra* note 248, at 862.

289. *Id*.

290. Landis, *Mr. Justice Brandeis and the Harvard Law School*, 55 HARV. L. REV. 184, 188 (1941).

291. Wigmore, *supra* note 248, at 862-63.

292. Landis, *supra* note 290, at 188.

293. Wigmore, *supra* note 248, at 863. In 1890, Brandeis persuaded the Harvard Law Association to purchase sufficient copies of the *Review* to distribute to all Association members. Landis, *supra* note 290, at 188.

The editors declared that their goal was to be a vehicle for the publication of research centered at Harvard Law School, to furnish news about the school to alumni, and to spread the word of the new method of instruction introduced at Harvard.²⁹⁴

The reference to the "Harvard system of instruction,"²⁹⁵ of course, concerned the "case method:" the use of casebooks, rather than textbooks, and Socratic, rather than lecture, pedagogy. The person most responsible for instituting this system at Harvard was Christopher Columbus Langdell, who became dean of Harvard Law School in 1870²⁹⁶ and transformed the institution into a model of the modern law school.²⁹⁷

The case method of instruction sought, through the use of casebooks

294. 1 HARV. L. REV. 35 (1887).

295. *Id.*

296. CENTENNIAL HISTORY, *supra* note 242, at 27. Langdell succeeded Professor Theophilus Parsons as Dane Professor of Law in December, 1869. He was selected Dean the following year. J. GARDINER, HARVARD 75 (1914).

297. A. SUTHERLAND, *supra* note 58, at 162.

When Langdell arrived at Harvard as a faculty member in late 1869, he encountered a law school patterned after a poorly run lawyer's office. J. GARDINER, *supra* note 296, at 75. The students read from textbooks and listened to lectures from a faculty consisting of three instructors. No examinations were required either at the end of a course or for a degree. *Id.* The library was in a shambles, *id.*, and the school did not have a dean. A. SUTHERLAND, *supra* note 58, at 162. The conditions prompted two recent graduates, Oliver Wendell Holmes, Jr. and Arthur Sedgwick, to publish a comment in the *American Law Review* decrying the Harvard Law School as "a disgrace to the commonwealth of Massachusetts" which injured the profession and discouraged "real students." Summary of Events, *Harvard Law School*, 5 AM. L. REV. 177 (1870) (discussed in A. SUTHERLAND, *supra* note 58, at 164). Holmes and Sedgwick contended that a degree from Harvard Law School during this period was nearly valueless. But their comment ended on an upbeat note, pointing to one recent change for the good—the adoption of a requirement that examinations be passed for the LL.B. degree. *Id.* As a consequence of the adverse publicity, pressure was put on Harvard President Charles Eliot to create a committee to review the condition and prospects of the law school. J. SELIGMAN, THE HIGH CITADEL, THE INFLUENCE OF HARVARD LAW SCHOOL 29 (1978).

Amidst these generally gloomy conditions, the Langdell era at Harvard Law School began. Almost immediately the fortunes of the institution took a dramatic upturn. Not only were the examination requirements continued, A. SUTHERLAND, *supra* note 58, at 171-74, but admission standards were raised significantly. *Id.* at 167-68; *see also* J. GARDINER, *supra* note 296, at 78. The library became a top priority, J. GARDINER, *supra* note 296, at 76; the course of study was extended from eighteen months to three years, S. WILLISTON, *supra* note 251, at 83; a new building for the school was constructed, S. MORISON, THREE CENTURIES OF HARVARD 338 (1965); *see also* 2 C. WARREN, *supra* note 11, at 434-37, and the faculty was increased by the addition of such first-rate scholars as Ames, Gray, and Thayer. S. MORISON, *supra*, at 337; *see also* J. GARDINER, *supra* note 296, at 76-77. The Ames appointment in 1873 was especially noteworthy. "[Ames] was a new sort of law teacher, a man comparatively young, whose professional accomplishments all were to be in writing, teaching, and in educational administration, with no preliminary experience in practice or on the bench." A. SUTHERLAND, *supra* note 58, at 164; *see also* S. WILLISTON, *supra* note 251, at 73. In short, Ames was the prototype for law teachers of the future. The most dramatic change, however, was the

and Socratic questioning, to engage students in classroom discussion.²⁹⁸ This method stood in stark contrast to the prevailing method of law teaching, which employed textbooks and classroom lectures.²⁹⁹ The

introduction of a new method of instruction. L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 531 (1973).

298. Much has been written about the Langdell case method. For a generally favorable description, see A. SUTHERLAND, *supra* note 58, at 174-80. For a less charitable view, see J. SELIGMAN, *supra* note 297, at 33-38; see also A. REED, *TRAINING FOR THE PUBLIC PROFESSION OF THE LAW* 369-88 (1921); R. STEVENS, *supra* note 118, at 117-23; J. Frank, *Both Ends Against the Middle*, 100 U. PA. L. REV. 20, 21-22 (1951).

299. L. FRIEDMAN, *supra* note 297, at 531.

The textbook-lecture mode of instruction had been used almost exclusively in American law schools from the time Litchfield Law School, the nation's first law school, opened its doors in 1784. A. SUTHERLAND, *supra* note 58, at 27-28. The College of William and Mary established the first professorship of law in this country in 1779. George Wythe, teacher of John Marshall, was its initial occupant. *Id.* at 26-27. See generally A. DILL, *GEORGE WYTHE: TEACHER OF LIBERTY* (1979).

Early law teachers utilized treatises as the basic instructional tool. See R. POUND, *supra* note 51, at 161. Later they wrote their own texts which, like the traditional treatises, covered only one subject. *Id.* In the classroom, law teachers lectured and law students took copious notes. L. FRIEDMAN, *supra* note 297, at 529-30. There was little, if any, dialogue, but some law teachers quizzed students about their rote memory of the assignment. *Id.* at 529; Ames, *The Vocation of the Law Professor*, 48 AM. L. REGIS. 129, 138-39 (1900). "In every law school, the method used to teach law was dogmatic, and uncritical . . ." L. FRIEDMAN, *supra* note 297, at 529.

At this low point in the history of legal education, Langdell introduced his innovative system of casebook instruction. *Id.* at 530. Langdell explained:

Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law [T]he shortest and best, if not the only way of mastering the doctrine effectually is by studying the cases in which it is embodied It . . . [is] possible to take . . . a branch of the law [such] as Contracts, for example, and . . . to select, classify, and arrange all the cases which had contributed in any important degree to the growth, development, or establishment of . . . its essential doctrines

C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* at v-vii (1871), *quoted in* S. KIMBALL, *HISTORICAL INTRODUCTION TO THE LEGAL SYSTEM* 575 (1966).

Much was left to the student to discover because casebooks usually contained only cases and no commentary. L. FRIEDMAN, *supra* note 297, at 548. These volumes of raw material thereby accentuated the "most striking characteristic of the teaching style they reflected . . . the Socratic masquerade: the act of saying everything while appearing to say nothing at all." *Id.*

By the time the editor-to-be of Volume One of the *Harvard Law Review* matriculated at Harvard Law School in 1884, not only had Langdell authored a casebook, so had Ames. *Id.* Moreover, the controversy between proponents of casebooks and advocates of textbooks was in full bloom. McKelvey, *supra*, note 6, at 878; see also Note, *The Columbia and New York Law Schools*, 5 HARV. L. REV. 146-47 (1891).

The new casebooks were used by several Harvard law professors. Ames was considered the master, clearly better than Langdell, at employing the casebook method of instruction. Beale, *supra* note 261, at 328; see also S. WILLISTON, *supra* note 251, at 73-74. Ames used the assigned case or cases as a basis for Socratic discussion during which he drew out the key legal

Harvard Law Review editors were apparently won over to this new teaching method used not only by Langdell and Ames, but also by an able young professor, William Keener, who later became Dean at Columbia Law School.³⁰⁰ These innovative teachers were role models for the new editors who were about to embark on a bold venture of their own. Certainly the intellectual excitement produced by the effective use of casebooks and Socratic dialogue played a critical role in the founding of the *Harvard Law Review*.³⁰¹ The student editors thus were not mere purveyors of Harvard's "message for the professional world,"³⁰² they were a part of it because they were the products of the new casebook method. They had been taught to analyze, not merely to recite from rote memory like schoolboys.³⁰³ And they wanted the legal profession to take notice.

Although the student editors of Volume One of the *Harvard Law Review* were imbued with great enthusiasm for disseminating the Harvard message, they did not lose sight of the competition: the numerous commercial law journals of the day.³⁰⁴ These periodicals, together with the defunct *Columbia Jurist*, served as organizational models for the Harvard publication.³⁰⁵ Early issues of the *Harvard Law Review* included two features which were imitations of the *Columbia Jurist*:³⁰⁶ one section entitled "In the Moot Court," which described cases in the moot court clubs,³⁰⁷ and another feature, "From the Lecture Room," which

principle from the students. *Memoir*, *supra* note 264, at 8. By virtue of his adeptness with the Socratic method, Ames has been credited with making the casebook teaching system successful. *Id.* It was said that he "baptized men in brain fire" and that his students were "interested, stimulated, tantalized." *Id.* at 9.

300. S. WILLISTON, *supra* note 251, at 74. "William A. Keener [was] a man of acute mind and an excellent teacher." *Id.*; see also *infra* text accompanying notes 360-63.

Langdell, Ames, and Keener apparently were not the first to break away from the lecture method at Harvard Law School. Joseph Story, the great treatise writer, served on the Harvard Law faculty from 1829 until his death in 1845. He used in the classroom "the dialectic which we have come to ascribe to [these later teachers]." A. SUTHERLAND, *supra* note 58, at 105.

301. Brandeis, *The Harvard Law School*, 1 THE GREEN BAG 10 (1889). "The intellectual self-reliance and the spirit of investigation which this new method of instruction engenders, have produced the 'Harvard Law Review' . . ." *Id.* at 23.

302. Wigmore, *supra* note 248, at 862. See generally R. STEVENS, *supra* note 118, at 35-72 (discussing the impact the early Harvard Law School had on legal education).

303. Ames, *supra* note 299, at 139.

304. Wigmore, *supra* note 248, at 862. Wigmore considered the *American Law Review* the best of the lot. He also thought that good articles appeared from time to time in the *Central Law Journal*, the *Albany Law Journal*, the *American Law Register*, and Frederick Pollock's *Law Quarterly Review*. *Id.* "Probably the *Harvard Law Review* could and would have been born without our example, but it is a reasonable supposition that we did something to prepare the way for it." Pollock, *Editor's Note*, 51 L.Q. REV. 10 (1935).

305. Wigmore, *supra* note 248, at 862.

306. CENTENNIAL HISTORY, *supra* note 242, at 140.

307. See, e.g., *In the Moot Court*, 1 HARV. L. REV. 38, 38-41 (1887).

contained summaries of class lectures.³⁰⁸

Joseph Beale was the student editor responsible for lecture notes in Volume One. At one point, he went to Dean Langdell seeking permission for the *Review* to print notes from one of Langdell's lectures.³⁰⁹ Langdell instead decided to write an article on the topic covered in the lecture.³¹⁰ The result was a seventeen-year project in numerous installments—"A Brief Survey of Equity Jurisdiction"—the original segment of which was the lead article in the second issue of Volume One.³¹¹

Student editor Wigmore was in charge of the recent cases department.³¹² Although established commercial journals all had similar departments run by well-respected editors,³¹³ Wigmore and his fellow students did not hesitate to become "criticasters of judicial decisions."³¹⁴ The primary object was to select cases "which bore directly upon topics discussed" in the classroom.³¹⁵ Wigmore also was involved in writing notes about law school news.³¹⁶ On occasion these notes were "calculated to induce in . . . [the students] a complacent feeling that . . . Harvard Law School . . . was achieving things."³¹⁷

In sum, the new editors included critical comments on recent cases while promoting good feelings about their school. They also were willing to take chances. For example, student editor Beale wrote a lead article for the initial issue.³¹⁸ Publishing a student work as a lead article was adventurous; also out of the ordinary was the chosen topic—"Tickets"—a subject not covered in any law school course.³¹⁹

Another provocative characteristic of the early *Harvard Law Review* is typified by an experience Williston related in his autobiography:³²⁰

I had ventured to disagree with . . . Professor Ames . . . and I now

308. See, e.g., *From the Lecture Room*, 1 HARV. L. REV. 41, 41-42 (1887).

309. Beale, *Professor Langdell—His Later Teaching Days*, 20 HARV. L. REV. 9, 11 (1906).

310. *Id.*

311. 1 HARV. L. REV. 55 (1887).

312. CENTENNIAL HISTORY, *supra* note 242, at 140.

313. Wigmore, *supra* note 248, at 863.

314. *Id.* at 864. "[M]ost of the cases were merely abstracted without any critical or expanded comment." *Id.* at 865.

315. *Id.* at 865.

316. *Id.* at 866-67.

317. *Id.* at 866.

318. 1 HARV. L. REV. 17 (1887). The practice of publishing lead articles by students was in time discontinued. A separate section for student works was developed.

319. Williston, *Joseph Henry Beale, A Biographical Sketch*, 56 HARV. L. REV. 685, 686 (1943). "The choice of an unusual topic, wholly outside the somewhat restricted curriculum of the School at the time, and the keen and thorough treatment of the subject were characteristic of [Beale]." *Id.*

320. See S. WILLISTON, *supra* note 251.

undertook to argue the question in print. It illustrates the spirit that has made the Harvard Law School what it is . . . that Professor Ames encouraged me in my plan and discussed in an unbiased way . . . the reason for deciding the problem in one way or another. My essay was published in the second volume of the *Review*.³²¹

A final feature of the publication deserves mention. United States Supreme Court Justice Felix Frankfurter wrote that the *Harvard Law Review* was a democratic institution "permeated by ethical presuppositions and assumptions and standards."³²² Students became members of the *Review* if they excelled academically; there were no other considerations.³²³

One of the principal purposes for establishing the *Harvard Law Review* was to convey to the professional world the message and the scholarship of the Law School's faculty.³²⁴ To this end it performed ably. A review of the index to the *Harvard Law Review* discloses that Professor Ames contributed twenty-eight signed articles, Dean Langdell authored twenty-seven, Professor Thayer produced nineteen, and Professor Gray wrote twelve.³²⁵ Student editor, and later Harvard Professor, Joseph Beale, Jr., contributed an astonishing fifty-one articles.³²⁶ Another early student editor who became a Harvard law faculty member, Samuel Williston, was almost as productive; he contributed thirty-four articles.³²⁷ Law professors who arrived at Harvard shortly after the publication's founding also contributed numerous works to the *Review*.³²⁸ Thus, the growth in the prestige of the Harvard Law School may have resulted in part from the dissemination of the scholarship of its faculty through the pages of the early volumes of the student-edited *Harvard Law Review*.

Early Development of Student-Edited Law Reviews

The Harvard Law Review rapidly developed influence in academic

321. *Id.* at 255.

322. FELIX FRANKFURTER REMINISCES 19 (H. Phillips ed. 1960).

323. *Id.* at 27. The meritocracy, however, operated only with respect to individuals who were already Harvard law students. There were no female *Review* members in the first years of the publication because Harvard, as well as Columbia and Yale, did not admit women students during this period. Robinson, *Women Lawyers in the United States*, 2 THE GREEN BAG 10, 12 (1890).

324. HARVARD LAW REVIEW, CUMULATIVE INDEX AND TABLE OF CASES, VOLUMES ONE TO FIFTY 1887-1937 (1938) [hereinafter cited as INDEX].

325. *Id.*

326. *Id.*

327. *Id.*

328. For example, Jeremiah Smith was appointed to a professorship at Harvard in 1890. 2 C. WARREN, *supra* note 11, at 444. He contributed twenty articles to the *Review*. See INDEX, *supra* note 324.

and professional circles.³²⁹ The impact on the academic world of the first successful student-edited law review is reflected in the creation of similar periodicals at other institutions. In the legal world at large, its articles soon began to affect judicial decisions and legislative deliberations.

Expanding Role in Legal Education

In a twenty year period following the founding of the *Harvard Law Review*, five of the nation's then most prestigious law schools—Yale (1891), Pennsylvania (1896), Columbia (1901), Michigan (1902), and Northwestern (1906)—modeled legal periodicals after the Harvard prototype.³³⁰ During the next two decades, the law review tide swept the country as many other law schools started and nurtured student-edited periodicals.³³¹

The phenomenon of the early growth of law reviews did not occur solely because other institutions modeled one aspect of their programs after the country's leading law school. To be sure, an element of "keeping up with Harvard" motivated the establishment of law reviews at other law schools. Other factors, however, contributed significantly to the increase in the number of law reviews. Most important, the law schools recognized the educational benefits of such student-run operations.³³² In addition, the existence of a law review was, and still is, considered to be the mark of a mature educational institution, one whose reputation is partially based upon the students' academic product.³³³ Moreover, law schools made a positive statement about their commitment to legal scholarship by including a law review in their curricula.³³⁴

The validity of these assertions about the early development of law reviews is best tested by examining the creation of the five reviews noted above. The first wave of *Harvard Law Review* imitators were located at excellent law schools. Thus, once these institutions adopted the Harvard model, the die was cast for legal education. Thereafter, a law school without a law review was considered a lesser institution.

Yale was the first law school to successfully emulate Harvard in this

329. One of first tangible signs of success of the *Harvard Law Review* was the heavy demand for early volumes of the *Review* that developed around the turn of the century. 15 HARV. L. REV. 219 (1901).

330. Maggs, *supra* note 5, at 181-83.

331. *Id.*; see F. HICKS, *supra* note 11, at 207-08.

332. See generally Maggs, *supra* note 5, at 184-86 (discussing the positive impact of law reviews on law teachers, law students, and law schools).

333. *Id.*

334. *Id.*

area.³³⁵ Yet the student editors of Volume One of the *Yale Law Journal*, published in 1891, failed to mention their well-established counterpart at Harvard. Unlike the lofty mission of the *Harvard Law Review*, the initial goals of the *Yale Law Journal* were to unite those connected with the institution and to serve as "a mark of the vitality of the school."³³⁶

As stated in its first volume, the purpose of the *Journal* was conceived to be threefold: to provide a means of communication between graduates and students, to serve them both as a common arena for discussion of legal matters, and to aid in the education of student editors and contributors.³³⁷

The *Yale Law Journal*, unlike many of its commercial brethren, had little or no financial trouble in its infancy.³³⁸ Only much later did the *Journal* require outside financial support, and in 1920, after several years of operating in the red, the *Journal* was assured of continued funding from the Yale Law Alumni Association.³³⁹

Frederick C. Hicks, writing the history of Yale Law School, asserted that one aspect of the *Yale Law Journal* set it apart from law reviews at other institutions: "For many years, the *Journal* was somewhat more receptive than its rivals in other law schools to articles not intended for practitioners."³⁴⁰ Although early issues of the *Yale Law Journal* did contain articles on legal education and legal history,³⁴¹ it is not clear that these volumes were broader-gauged than the efforts of other early reviews.

During the 1890's, several more law schools began publishing legal periodicals.³⁴² Except for the journals begun at the University of Pennsylvania Law School in 1896 and the Dickinson School of Law in 1897, however, all these publications died around the turn of the century.³⁴³

335. Three other law school periodicals—the *Counsellor* (New York Law School), the *Intercollegiate Journal*, and *The Law Bulletin of the State University of Iowa*—also first appeared in 1891, but none survived for long. F. HICKS, *supra* note 11, at 207; *see also infra* notes 342-43 & accompanying text.

336. 1 YALE L.J. 30 (1891); *see also The First Half-Century*, 50 YALE L.J. 740 (1941).

337. F. HICKS, YALE LAW SCHOOL: 1869-1894 INCLUDING THE COURT HOUSE PERIOD 68 (1937).

338. *Id.* at 66-68.

339. *Id.* at 68.

340. *Id.* at 69.

341. *Id.*

342. *See* F. HICKS, *supra* note 11, at 207 (listing law school periodicals published during this period). These publications took various forms, but most can be characterized as law reviews. *See supra* note 3.

343. F. HICKS, *supra* note 11, at 207. Two of these journals survived for at least a decade. One was *The Law Bulletin of the State University of Iowa*, which first appeared in 1891. *The Bulletin*, published by the Iowa law faculty, ceased publication in 1901. It was revived in 1915 as the *Iowa Law Bulletin* and became the *Iowa Law Review* in 1925. *See* 1 IOWA L. BULL. 29

Each of the surviving periodicals followed an unusual pattern of development. As discussed previously, the Pennsylvania effort did not originate at the school. Instead, University of Pennsylvania law students assumed the editorial chores for the already thriving *American Law Register* in 1896.³⁴⁴ The publication was brought into the law school by Dean William Draper Lewis, former *Register* co-editor,³⁴⁵ who sought to enhance the prestige of the institution by becoming associated with "a legal publication of established reputation and national interest and circulation."³⁴⁶ Renamed the *University of Pennsylvania Law Review*,³⁴⁷ the publication is the oldest continuously published legal periodical in America.³⁴⁸

The Dickinson periodical also underwent a name change during its early development. Christened *The Forum* at its birth in 1897,³⁴⁹ it was renamed the *Dickinson Law Review* in 1908.³⁵⁰ The new title reflected modifications in the nature of the publication. Initially, "it was published monthly and its content was principally social; the pages . . . were devoted to comments concerning . . . students and . . . alumni, reports of

(1915); Notes, *The Iowa Law Review*, 11 IOWA L. REV. 66 (1925). The other journal was the *Kansas University Lawyer* (1895-1911). F. HICKS, *supra* note 11, at 207.

Most of the other law school publications begun in the 1890's survived for only a short time. For example, an attempt to create a monthly *Cornell Law Journal* ended after the publication of one issue in 1894. The law students at Cornell tried again in 1895. This time six monthly installments of a periodical entitled the *New York Law Review* were produced before publication ended. Forrester, *Introduction to Volume 50, Cornell Law Quarterly*, 50 CORNELL L.Q. 1 (1964); *see also infra* text accompanying notes 369-70.

One other entry on Professor Hick's list requires explanation. The *West Virginia Law Quarterly* is listed as a law school periodical first published in 1894. F. HICKS, *supra*, note 11, at 207. This is not entirely accurate. A periodical entitled the *West Virginia Law Quarterly and the Bar* was published by the West Virginia University law faculty beginning in 1917 as the successor to a monthly publication of the West Virginia Bar called *The Bar* that originated in 1894. Foreward, 25 W. VA. L.Q. at i, 56 (1917); *see* 1 THE WEST VIRGINIA BAR 1 (1894). The *West Virginia Law Quarterly* remained the "official publication of the West Virginia Bar Association." In 1949, its name was changed to the *West Virginia Law Review*. 52 W. VA. L. REV. 56 (1949).

According to Professor Hicks, the other law school periodicals which were commenced during the 1890's were the *University Law Review* (University of City of New York) (1893-1897), *Western Reserve Law Journal* (1895-1901), and *Boston Law School Magazine* (1896-1897). F. HICKS, *supra* note 11, at 207.

344. *See supra* text accompanying notes 146-58.

345. 44 AM. L. REG. 63 (1896); 100 U. PA. L. REV. 69 (1961).

346. 44 AM. L. REG. 63 (1896).

347. The publication was renamed the *University of Pennsylvania Law Review and American Law Register* in 1908 and in 1945 the title was shortened to its current form—*University of Pennsylvania Law Review*. 100 U. PA. L. REV. 69 (1951); *see supra* notes 149, 154-58 & accompanying text.

348. *See* Douglas, *supra* note 5, at 228.

349. 1 THE FORUM 1 (1897).

350. Editor's Note, 13 DICK. L. REV. 32 (1908).

. . . moot court cases, . . . and the like.”³⁵¹ Such a publication cannot properly be considered a law review as that concept is generally understood.³⁵² Much later, the Dickinson publication began to include the “discussion of legal questions and contributions by well-known writers” promised by the student editors of its first issue.³⁵³ Thus, before 1900 only three institutions—Harvard, Yale, and Pennsylvania—produced law reviews that would endure to the present.

During the first decade of the twentieth century, three other prominent law schools—Columbia, Michigan, and Northwestern—established law reviews,³⁵⁴ thereby virtually assuring a permanent position in legal education for such publications. The establishment of an enduring law review at Columbia University was accomplished only after a series of fitful starts. As noted above, the earliest effort, the *Columbia Jurist*, lasted only three years, from 1885 through 1887.³⁵⁵ The second attempt to establish a law review at Columbia took the form of a monthly periodical known as the *Columbia Law Times*.³⁵⁶ This student publication was born in the fall of 1887 and died in 1893, reportedly from lack of revenue.³⁵⁷

In 1901, Columbia law students made their third attempt to publish a law review, this time with happier results. In the late 1890’s, the law school at Columbia moved to more spacious quarters and acquired the services of a professional law librarian.³⁵⁸ “As a result, no doubt, of the improved library facilities after the removal, there was a revival of interest in legal scholarship among the students, and a new student publica-

351. 50 DICK. L. REV. 195 (1946).

352. See *supra* note 3.

353. 1 THE FORUM 1 (1897). It was not until 1904 that *The Forum* published its first article, Trickett, *Character-Evidence in Criminal Cases*, 8 THE FORUM 121 (1904), a work written by the Dean of Dickinson Law School. 50 DICK. L. REV. 195 (1946). Gradually, the Dickinson publication developed into the law review that it officially became in name in 1908. See Editor’s Note, 13 DICK. L. REV. 32 (1908). Even after the name change, twenty years passed before the *Dickinson Law Review* switched from a monthly to a quarterly production schedule and discontinued its heavy emphasis on moot court reports. 50 DICK. L. REV. 195 (1946).

354. A few other law schools established law reviews during this period, but none of these journals endured. See F. HICKS, *supra* note 11, at 207; see also *infra* note 393.

355. See *supra* text accompanying notes 227-41.

356. A HISTORY OF THE COLUMBIA LAW SCHOOL, *supra* note 227, at 103, 182; see also Book Review, 1 HARV. L. REV. 209 (1887) (noting that the *Law Times* “is evidently modeled on our *Review*”).

357. A HISTORY OF THE COLUMBIA LAW SCHOOL, *supra* note 227, at 182. A financial crisis resulted when the *Law Times* discontinued its practice of publishing class notes and thus became less attractive to student purchasers. *Id.*

358. *Id.* at 181-82.

tion [the *Columbia Law Review*] was founded to publish its results.”³⁵⁹ Dean William Keener, however, was concerned that the publication have a longer life than its predecessors at Columbia.³⁶⁰ He therefore required that the student editors solicit professionals to write the lead articles and book reviews and that commitments be obtained from authors for the entire year before publication of the first issue.³⁶¹ Dean Keener also demanded that “the new periodical follow closely the pattern of the *Harvard Law Review*.”³⁶²

The student editors of the *Columbia Law Review* adhered to Dean Keener’s wishes and sought advice from their counterparts at Harvard.³⁶³ The first issue of the *Columbia Law Review*, published in 1901, carried an editorial that contained the following statement: “In particular, we wish to thank the editors, past and present, of the *Harvard Law Review*, not only for setting before us a standard to which we some day hope to attain, but also for their kindly suggestions.”³⁶⁴ This third attempt to establish a permanent student-edited law review at Columbia obviously succeeded. Today the *Columbia Law Review* is one of the most frequently cited law periodicals in the country.³⁶⁵

The efforts of the next two universities to publish enduring law reviews, Michigan and Northwestern, are noteworthy for reasons other than their early entry into the field of law school publication. First, the creation of law reviews at these institutions marked an emergence in the midwest of what previously had been largely a northeastern phenomenon.³⁶⁶ Second, and more important, the journals at Michigan and Northwestern were initially operated by the faculty.

In 1902, the editors of the first issue of Volume One of the *Michigan Law Review* proclaimed that their purpose was “to give expression to the legal scholarship of the University” and to meet the needs of the legal profession, particularly in the northwest.³⁶⁷ The publication took substantially the same form as its predecessors at Harvard, Yale, and Co-

359. *Id.* at 182.

360. *Id.* at 183.

361. *Id.*

362. *Id.*

363. *See id.* at 184.

364. 1 COLUM. L. REV. 50 (1891).

365. *See generally* Maru, *supra* note 10, at 227.

366. By 1902 a few short-lived law reviews had been attempted at schools outside the northeast. *See* F. HICKS, *supra* note 11, at 207; *see also supra* note 343; *infra* note 376. In addition to those law reviews previously mentioned, Professor Hicks lists the *Maryland Law Review* (Baltimore Law School) (1901-1903) and the *Oregon Law School Journal* (1902-1917). F. HICKS, *supra* note 11, at 207.

367. 1 MICH. L. REV. 58 (1902).

lumbia, but the makeup of its editorial board was distinctly different. While the three earlier reviews relied on student editors, the *Michigan Law Review* was edited and managed by the faculty.³⁶⁸

It is unclear why the Michigan law faculty chose to operate the publication themselves. Possibly they believed that such control was necessary for the success of the venture in view of their experience with an earlier legal publication at the school. In the 1890's, a pamphlet entitled the *Michigan Law Journal* was published for a short time at the law school and then elsewhere.³⁶⁹ The *Journal*, which displayed a curious mixture of law school, bar, and commercial interests, lasted only seven years.³⁷⁰ The Michigan law faculty certainly desired a better fate for the new *Michigan Law Review*. Thus, their experience with the *Journal* may have been the determining factor in the decision to place the *Michigan Law Review* "under the editorial management of a member of the faculty, assisted by [a Faculty] Advisory Board."³⁷¹ The students, of course, were involved, but only as "editorial assistants." As the *Michigan Law Review* became firmly entrenched in the school's program of legal education, however, the situation changed. "Over the years, the Law Faculty tended to turn over more and more of the editorial work of the *Review* to the student editors"³⁷² By the late 1930's, the students had "taken over a much larger share of the total responsibility, with the faculty serving primarily in an advisory capacity."³⁷³

Northwestern was the next law school to produce an enduring law review. The publication at Northwestern, founded in 1906, followed the format of the *Harvard Law Review*,³⁷⁴ but was more closely aligned to the *Michigan Law Review* in two respects. First, it was designed to fill a need of the legal community in a particular area of the country—Illinois.³⁷⁵ Second, it was initially edited by the faculty with some student assistance.³⁷⁶

368. *Id.* at 59.

369. E. BROWN, LEGAL EDUCATION AT MICHIGAN 1859-1959, at 328-29 (1959).

370. *See id.* The last issue of the *Michigan Law Journal* appeared in June, 1898. *See* 7 MICH. L.J. 157 (1898). In September 1898, "ex-editor" R. T. Speed wrote a faithful subscriber that: "The Michigan Law Journal would be alive today if all our patrons had acted as fairly as yourself: our inability to collect subscriptions has left us several hundred dollars in debt." Letter from R. T. Speed to A.H.R. Fraser (Sept. 23, 1898), reprinted in 7 MICH. L.J. (1898).

371. 1 MICH. L. REV. 58, 59 (1902).

372. E. BROWN, *supra* note 369, at 331.

373. *Id.* at 332 (quoting Dean Stason's 1951-1952 report to the President of the University of Michigan).

374. Edmunds, *supra* note 6, at 13.

375. MacChesney, *An Old Tradition—The Same Review But a New Name*, 47 NW. U.L. REV. at iii, vi (1952); 1 ILL. L. REV. 39 (1906).

376. *See Law Reviews and Legal Progress: Herein of Past Services and Future Responsibility*

The relatively narrow focus of the Northwestern publication is explained in its first issue. There the editors commented:

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 of 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.³⁷⁷

Given this perspective, it is easy to understand why the Northwestern faculty chose to call its journal the *Illinois Law Review*.³⁷⁸ The local orientation of the review also was the reason³⁷⁹ that the University of Chicago and the University of Illinois law schools united with Northwestern for several years in the late 1920's and early 1930's to produce this publication.³⁸⁰ Although the cooperative editorship apparently was successful, Northwestern resumed sole control of the *Illinois Law Review* in 1932.³⁸¹ Two decades later the review's name was changed to the *Northwestern University Law Review* to reflect the identity of its publisher and the expanded scope of its content.³⁸²

As in the case of Michigan, it is difficult to determine why the Northwestern law faculty assumed control of the review and initially permitted only limited student involvement. The dean of the school at the time was John Wigmore, who had been one of the student founders of the *Harvard Law Review*.³⁸³ Nevertheless, Wigmore apparently did not advocate an entirely student-edited journal, but supported the concept of a faculty managed publication involving only a few student associate editors.³⁸⁴

Perhaps the limited use of student talent in the early days of the

ties, 51 NW. U.L. REV. 2, 7 (1956) [hereinafter cited as *Law Reviews and Legal Progress*.] An earlier student-edited law review at Northwestern had failed. For four years (1893-1896), *The Northwestern Law Review* was "published monthly during the school year by students of the Northwestern University Law School." 1 NW. L. REV. 17 (1893); see F. HICKS, *supra* note 11, at 207.

377. 1 ILL. L. REV. 39 (1906).

378. See *Law Reviews and Legal Progress*, *supra* note 376, at 13.

379. See *The New Management of the Review*, 19 ILL. L. REV. 161 (1924).

380. MacChesney, *supra* note 375, at iv; *Law Reviews and Legal Progress*, *supra* note 376, at 3.

381. MacChesney, *supra* note 375, at iv; *Law Reviews and Legal Progress*, *supra* note 376, at 3.

382. MacChesney, *supra* note 375, at vii-viii.

383. See *supra* text accompanying notes 312-17.

384. Dean Wigmore served as one of the associate editors from the Northwestern faculty. 1 ILL. L. REV. 39 (1906).

review was due in part to the involvement of a Chicago attorney in the establishment of the *Illinois Law Review*.³⁸⁵ The attorney, Nathan MacChesney, had attended the University of Michigan and was aware of the *Michigan Law Review*.³⁸⁶ He proposed to Dean Wigmore that Northwestern start a similar journal, and he made a financial contribution toward that end.³⁸⁷ MacChesney's admiration of the *Michigan Law Review* may have influenced Northwestern's decision to follow the Michigan model of faculty editors, rather than the Harvard model of student editors.³⁸⁸ His involvement may also explain the inclusion of alumni on the review as associate editors.³⁸⁹

Restricted student participation in the early issues of the *Illinois Law Review* also has been attributed to the Northwestern faculty's commitment to scholarship, rather than to doubts about the adequacy of student talent at Northwestern.³⁹⁰ Indeed, over time the law students at Northwestern played an expanding role in the publication of the *Illinois Law Review*.³⁹¹ Following a quarter of a century of faculty control, "complete responsibility for the *Review* was turned over to the students of the law school and in 1932 the first student editor-in-chief was chosen."³⁹²

Although six years intervened between events at Northwestern and the development of the next enduring law review,³⁹³ the trend was established. Once law reviews emerged at the leading law schools described

385. MacChesney, *supra* note 375, at iii.

386. *Id.*

387. *Id.*

388. For a discussion of the wisdom of the decision, see Maggs, *supra* note 5, at 189-90. The failure of an earlier student-edited law review at Northwestern may also have contributed to the decision to utilize faculty editors. See *supra* note 376.

389. MacChesney naturally was one of those chosen to fill a slot as an "Associate Editor of the Alumni." 1 ILL. L. REV. 39 (1906).

390. *Law Reviews and Legal Progress*, *supra* note 376, at 7. Dean Wigmore also used the *Illinois Law Review* to editorialize on a wide range of newsworthy legal issues. *Id.* at 5-7.

391. See *id.* at 7-9.

392. *Id.* at 3.

393. See F. HICKS, *supra* note 11, at 207. In 1912, Georgetown University and the University of California each began publishing a student-edited law review. There was, however, some new activity on the law review front during the 1906-1912 gap between the founding of the journal at Northwestern and the birth of similar periodicals at Georgetown and California. First, *The Forum* took steps toward law review status by regularly publishing short articles and assuming the name *Dickinson Law Review*. See *supra* notes 349-54 & accompanying text. Second, the University of Maine School of Law established the *Maine Law Review* in 1908. See 1 ME. L. REV. 30 (1908). The review at Maine lasted as long as the school—until 1920. 14 ME. L. REV. at vii (1962). See generally *The Law Review*, 12 ME. L. REV. 32 (1918). The law review was resurrected in 1962, shortly after the University of Maine School of Law reopened. 14 ME. L. REV. at vii (1962).

above, it was a foregone conclusion that the remaining institutions would join the movement. This proved to be the case.³⁹⁴ By 1930, forty-three law schools featured law reviews,³⁹⁵ although "the division of work and responsibility between the faculty and the students of the law-review-publishing schools varie[d] considerably."³⁹⁶ Whatever their editorial makeup, law reviews already had assumed significance in addition to their educational value to the students. Almost from the beginning, election to an editorial position proved to be a ticket to attractive placement opportunities.³⁹⁷ For example, "[b]y 1914, at least, the value of [*Columbia*] *Law Review* training was so generally recognized . . . that the School was unable to supply the demand for graduates who had been editors."³⁹⁸ In the broader perspective, Justice Cardozo noted: "More and more, the law reviews are becoming the organs of university life in the field of law and jurisprudence. The advance in the prestige of the universities has been accompanied, as might be expected, with a corresponding advance in the prestige of their organs."³⁹⁹

Influence on the Legal Profession

It is difficult to assess precisely how the early reviews influenced the legal profession.⁴⁰⁰ Certainly some commercial law journals did not think very highly of these competitive journalistic efforts by law students.⁴⁰¹ Nonetheless, there is substantial evidence that law reviews had an almost immediate impact on the development of the law in the courts and the legislatures.⁴⁰²

The best-known example of an influential early law review article is *The Right to Privacy*, written by Samuel Warren and Louis Brandeis, which appeared in the *Harvard Law Review* in 1890.⁴⁰³ Shortly after its

394. Nearly all law reviews followed the Harvard, Yale, Columbia, Michigan, and Northwestern format. See, e.g., *Beginning the Second Fifty Years: A Glance at the First Fifty*, 51 U. COLO. L. REV. 5 (1979). The author comments: "The Review's format was patterned after the established formats of the *Harvard Law Review*, *Michigan Law Review*, and *Yale Law [Journal]*." *Id.* at 7.

395. Maggs, *supra* note 5, at 181-82.

396. *Id.* at 183.

397. HISTORY OF COLUMBIA LAW SCHOOL, *supra* note 227, at 185.

398. *Id.*

399. B. CARDOZO, SELECTED READINGS ON THE LAW OF CONTRACTS at vii, ix (1931).

400. See generally Maggs, *supra* note 5, at 186-89 (discussing the positive impact of early law reviews on various facets of the legal profession).

401. See *supra* text accompanying notes 210-22; see also McKelvey, *supra* note 6, at 880.

402. See L. FRIEDMAN, *supra* note 297, at 547-48; McKelvey, *supra* note 6, at 880.

403. 4 HARV. L. REV. 193 (1890). See generally A. MASON, BRANDEIS 70-71 (1946) (discussing reasons why Brandeis and Warren wrote *The Right to Privacy*); C. PEARE, THE LOUIS D. BRANDEIS STORY 99-100 (1970) (same). Other significant works appeared in early law

publication, the article was cited by a judge, who apparently based his opinion on its contents.⁴⁰⁴ Eventually the article produced a broadbased change in the law.⁴⁰⁵

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 . . . the columns of a law review afforded a forum for its dissemination and suggestion as to its recognition . . . [O]ther legal scholars took it up in other reviews until the courts recognized its rightful place in our common law.⁴⁰⁶

The impact of *The Right to Privacy* on the development of the law was not a singular occurrence. Other works published in early law reviews were cited in the briefs of counsel and in court decisions.⁴⁰⁷ The stature of student-edited law reviews was particularly enhanced when the Supreme Court of the United States began to cite their articles.⁴⁰⁸ This first happened in 1897 when Justice Edward White referred in his dissenting opinion in *United States v. Trans-Missouri Freight Administration*⁴⁰⁹ to an article entitled *On Contracts in Restraint of Trade*, written by Amasa Eaton for the *Harvard Law Review*.⁴¹⁰ Three years later, a Supreme Court majority opinion for the first time cited a law review article. In *Chicago, Milwaukee and St. Paul Railway Co. v. Clark*,⁴¹¹ Chief Justice Fuller cited an article by Harvard Professor James Ames on contract consideration.⁴¹²

Although neither of these articles played a pivotal role in the Court's deliberations, their mere mention gave law reviews additional credibility. The members of the Supreme Court, as well as other judges, gradually increased their reliance on law review articles over the years until by the mid-1920's the impact of law reviews on judicial decision-making was well recognized.⁴¹³ In this regard, one commentator noted:

reviews. For example, Harvard's Dean Landell wrote a series of influential articles under the umbrella title, *A Brief Survey of Equity Jurisdiction*. See *supra* notes 309-11 & accompanying text.

404. Note, *The Right to Privacy*, 5 HARV. L. REV. 148 (1891).

405. Edmunds, *supra* note 6, at 3-4.

406. *Id.* at 3.

407. See Maggs, *supra* note 5, at 186-88.

408. The authors wish to express their gratitude to research assistants Craig A. Laporte of Stetson University College of Law and Stephen L. Anderson of Vanderbilt University School of Law for their work in locating citations to law review articles in early Supreme Court cases.

409. 166 U.S. 290, 350 n.1 (1896).

410. 4 HARV. L. REV. 128 (1890).

411. 178 U.S. 353, 365 (1899).

412. Ames, *Two Theories of Consideration*, 12 HARV. L. REV. 515 (1899).

413. See generally Maggs, *supra* note 5, for an excellent empirical study and analysis of this subject.

"When a Supreme Court Justice was first told by some friend that the *Harvard Law Review* declared his latest decision *wrong*, he may have pretended to scorn the disapproval as the theoretical conclusion of an immature student, but it hurt just the same."⁴¹⁴

Justice Benjamin Cardozo was particularly complimentary of law reviews. He "found law review articles of conspicuous utility in the performance of [his] judicial duties"⁴¹⁵ and concluded that "[i]n the engulfing flood of precedents the courts are turning more and more to the great scholars of the law schools to canalize the stream and redeem the inundated field."⁴¹⁶ "Judges have at last awakened . . . to the treasures buried in law reviews."⁴¹⁷

Early law review articles also influenced the thinking of legislators. Many articles contained the recommendation that a certain legal problem could best be solved legislatively.⁴¹⁸ Consequently, the law reviews served "as a mine for legislative drafting bureaus;"⁴¹⁹ numerous statutes resulted from the suggestions of authors of law review articles.⁴²⁰ One authority has even suggested that the National Conference of Commissioners on Uniform State Laws was created in response to law review criticism of existing law.⁴²¹ The Commissioners, of course, have prepared numerous uniform statutes over the years for the consideration and enactment by state legislatures.⁴²²

Attorneys practicing in the late 1800's and early 1900's felt the impact of law reviews in still other, more subtle ways. Practitioners who subscribed to these periodicals became more aware of current legal thinking and recent developments in other jurisdictions than those who did not.⁴²³ Lawyers of the era also soon discovered that law reviews often were "a more reliable source of information . . . than the ideas and con-

414. McKelvey, *supra* note 6, at 880 (emphasis in original).

415. Maggs, *supra* note 5, at 186 n.11a.

416. B. CARDOZO, *supra* note 399, at vii, ix.

417. B. CARDOZO, *THE GROWTH OF THE LAW* 14 (1927). Recent studies indicate that today judges rely heavily on law review articles for insights into various legal issues. See *supra* note 5.

418. Maggs, *supra* note 5, at 188.

419. *Id.*

420. *Id.* For example, the Warren and Brandeis work, *The Right to Privacy*, *supra* note 404, precipitated New York legislation on the subject. Jones, *The Problem of the Law School*, 1 CAL. L. REV. 1, 6-7 (1912).

421. Maggs, *supra* note 5, at 188-89. "[T]he creation of the Commissions on Uniform State Laws and the numerous statutes prepared by them . . . are probably due to the criticisms of the Negotiable Instruments Law made by Dean Ames in his articles in the *Harvard Law Review*." *Id.* at 188.

422. *Id.*

423. *Id.* at 186.

clusions of . . . law clerks.”⁴²⁴ The usefulness of the publications led many firms to look favorably on job applicants with law review experience.⁴²⁵

Over the years, student-edited law reviews became more influential in each of the various spheres of the legal profession discussed above.⁴²⁶ Although the powerful status of law reviews today is subject to criticism on several counts,⁴²⁷ it is unlikely that the pervasive influence of this institution will wane appreciably in the foreseeable future.

Conclusion

Student-edited law reviews were founded for a variety of reasons. Many failed, while others exceeded their founders' expectations. Yet all were representative of the nineteenth-century development of a more casual, informative, and topical approach to writing about law. This “legal journalism” in part reflected changing jurisprudential notions taking place in America away from natural law and toward a positivist attitude.

Practitioners found the formal doctrinal works less useful because authors usually adhered to natural law theories. Instead, attorneys wanted information about the latest decisions of America's geographically diverse and politically sensitive courts. They desired news of the profession. New periodicals, calling themselves repositories, journals, registers, and reviews, responded to these needs. They offered case digests, then case comments, and in time, lead articles.

These publications were intended not only to serve the legal profession, but also to turn a profit. As commercial ventures, many succeeded, at least for a time. Certain periodicals even achieved a position of prestige in the legal community.

The early law school reviews imitated the format, style, and content of the more influential commercial publications. Even so, the student-edited law periodicals that appeared near the end of the nineteenth century and in the early years of the twentieth century were unique in three respects. First, “not one iota of commercialism” inspired the commencement of any of the student-edited law reviews.⁴²⁸ They were designed instead to facilitate academic scholarship. Second, the student-edited re-

424. McKelvey, *supra* note 6, at 880.

425. A HISTORY OF COLUMBIA LAW SCHOOL, *supra* note 227, at 185; Maggs, *supra* note 5, at 186.

426. See *supra* note 36.

427. See *supra* note 7.

428. See McKelvey, *supra* note 6, at 871.

views began as a "medium of extracurricular training."⁴²⁹ The editors were not paid,⁴³⁰ nor did they receive academic credit for their law review work.⁴³¹ And third, the student-edited reviews were managed, edited, and at least partially written by nonprofessionals.⁴³²

The idea that individuals who have not yet graduated from law school select, edit, and publish critical writings for the legal profession still causes concern among critics.⁴³³ Yet few voices are raised scorning the efforts of students who edit law school reviews today. This situation stands in sharp contrast to the published outcry of a century ago deriding the attempts of law students at Albany and Columbia to establish unprecedented law school-related legal periodicals.⁴³⁴ For the most part, the derision and skepticism of the early years soon subsided as America's law school reviews came of age.

429. *Id.*

430. CENTENNIAL HISTORY, *supra* note 242, at 143.

431. *Id.*

432. K. LLEWELLYN, *supra* note 8, at 107.

433. *See supra* note 7.

434. *See supra* text accompanying notes 210-41.

