

Review

Twenty Years With the Editors

With the Editors, by the editors of the *Harvard Law Review*. Cambridge: Gannett House, 1949 *et seq.*

November 1969 marked a significant milestone in legal scholarship. "With the Editors,"¹ the lead column of the prestigious *Harvard Law Review*, celebrated its twentieth birthday. The event went unheralded at the time;² surprisingly so, since "With the Editors" had previously marked its own first³ and tenth⁴ anniversaries, not to mention the 66 2/3 anniversary of the *Review*⁵ and the fifth anniversary of the "comment" as a new form of legal art.⁶ During its twenty years, the column's value has been questioned;⁷ and scholarly reaction has ranged from tepid praise⁸ to vituperative denunciation.⁹ But until now, there has never been a comprehensive functional analysis of this unique institution.¹⁰

After thanking its sisters in scholarship the *Harvard Business Review* and the *Stanford Law Review* for pioneering talk of the town features,¹¹ the initial column outlined its dual function.¹² First, "With the Editors" would provide additional information about authors and their subjects. Second, interesting correspondence from readers would be published. No one could object to such laudable aims, but twenty-two issues later came the announcement: "[I]t has been suggested that part of the *With the Editors* column be devoted to describing

1. Hereinafter referred to as *Editors*.

2. Four months later the Editors awoke. See *Editors*, Vol. 83, No. 5 (1970), at vii.

3. *Editors*, Vol. 64, No. 1 (1950), at x.

4. *Editors*, Vol. 72, No. 8 (1959), at viii.

5. *Editors*, Vol. 67, No. 1 (1953), at vii.

6. *Editors*, Vol. 67, No. 6 (1954), at x.

7. "Does this column serve any useful purpose?" *Editors*, Vol. 82, No. 6 (1969), at vii.

8. "Does this column serve any useful purpose? There is some evidence that it does." *Id.*

9. Unpublished, undated, anonymous letter on file at the Yale Law Journal.

10. The exact authorship of the column is a closely guarded secret, just as is the authorship of the *Review's* student work. However, security leaks and occasional unguarded praise for the *Review's* President suggest that he is the author.

11. Most reputable legal journals have now discontinued, or have never utilized, such columns. See, e.g., YALE L.J. But see CALIF. L. REV.; STAN. L. REV.; U.C.L.A. L. REV.; U. PA. L. REV.; VA. L. REV.

12. *Editors*, Vol. 63, No. 1 (1949), at vii.

Review practices.”¹³ That devious passive. Who suggested? One can only surmise. The column went on to argue that it was indeed possible to spend more than fifteen minutes writing a case note.

As of 1952, therefore, the Editors used their column for three purposes: to talk about the content of the magazine, its readers, and themselves. It was not long, however, before these three acknowledged functions were reduced to one.

The administration of Richard N. Goodwin during Volume 71 was the turning point of the column, earning Mr. Goodwin the sobriquet “Father of the Modern With the Editors Column.” The first issue of Volume 71 introduced short italic paragraphs preceding each article, which eliminated one half of the column’s original purpose. The future of the column was anticipated by Mr. Goodwin: “The change also frees the *With the Editors* column for the more informal material that it was originally [sic] designed to handle.”¹⁴ Among such informal material was some information on a topic of almost universal interest—the Editors’ career plans. There was a brief regression during Volume 72, caused by several thoughtful readers who objected to the “informal style” of the column;¹⁵ but Volume 73 counterattacked with another career roundup and a wealth of other interesting statistics about the Editors.¹⁶ The new “With the Editors” was here to stay.

With the function of giving information about authors and their subjects out of the way, only the commitment to publish interesting correspondence from readers blocked full dedication of the column to the Editors themselves. In 1964, however, the column acknowledged what had long since become fact: “We no longer print correspondence”¹⁷

The content of “With the Editors” in recent years may be divided into three rough categories. First, the column has served as a forum for the introduction and advocacy of radically innovative techniques of legal scholarship.¹⁸ Of course, “With the Editors” itself qualifies as just such an innovation, but it is not alone. For example, in January

13. *Editors*, Vol. 65, No. 7 (1952), at x.

14. *Editors*, Vol. 71, No. 1 (1957), at vii.

15. *Editors*, Vol. 72, No. 8 (1959), at viii.

16. *Editors*, Vol. 73, No. 3 (1960), at vii.

17. *Editors*, Vol. 77, No. 6 (1964), at vii.

18. Readers who object to “radically innovative” on grounds of overkill are referred to “With the Editors,” Vol. 71, No. 1 (1957), at vii, where the Editors themselves characterized the “abandonment of the traditional system of interlinear citations in Recent Cases” as “revolutionary.”

1952, the *Review* initiated the two-typeface footnote system.¹⁹ "Textual" footnotes—those containing substantive comments which the author thought important but an editor thought unworthy of the actual text—were identified with an italicized footnote number.²⁰ The Editors asked for reaction from the readership; we have been deprived, however, of the insights of that correspondence, for the innovation was never mentioned again.²¹

Of a similar Edselian ilk was Richard Goodwin's proposal that there be a second index to legal periodicals covering only those 15 to 25 law reviews with the widest circulation.²² One objection to this proposal—its implied suggestion that most reviews print little of value—was anticipated and neatly answered by the assertion that the problem with the current index was that it was too complete. Despite its obvious appeal, the proposal suffered the same fate as the italicized footnote number. Other ideas significant enough to merit mention in the column proved more lasting; the gummed and perforated errata device,²³ for example, filled an obvious need, and the decision to move the Book Review Editor's name to the center of the masthead²⁴ has endured the judgment of succeeding editorial boards.

But "With the Editors" is not just a harbinger of scholarly innovation. Its second type of commentary consists of unique insights into the Harvard legal fraternity. Like many fraternities there is an initiation—in this case *Review* participation. Dean Griswold and Professors Freund and H. M. Hart, Jr., were Presidents of the *Review*. Professor Braucher was a Note Editor, although the record is unclear whether he was a Senior Note Editor. Professor Sutherland was a mere Case Editor and Professor Alexander Bickel was only Treasurer. Professor Bickel worked to overcome the handicap by becoming a leading constitutional scholar. Recognizing his distinguished work at Yale, "With the Editors" generously included him as a member of the Harvard School of Principled Adjudication,²⁵ along with Mr. Justice Harlan, another Harvard product.²⁶

19. *Editors*, Vol. 65, No. 3 (1952), at x.

20. At this time the *Review* apparently used the unsophisticated two-tier editorial process. Lesser luminaries in the galaxy of legal periodicals had already developed the three-tier system. Under the latter system there is no need to identify textual footnotes, because the Note and Comment Editor first drops material to the footnotes, and the Editor-in-Chief then deletes the material altogether.

21. It is possible that a small technical problem, rather than any lack of intrinsic merit, caused the demise of the system. The technical problem was that the eye of the unpracticed reader could not distinguish the two footnote typefaces.

22. *Editors*, Vol. 71, No. 3 (1958), at vii-viii.

23. *Editors*, Vol. 71, No. 6 (1958), at ix.

24. *Editors*, Vol. 75, No. 2 (1961), at vii.

25. Identifying leading scholars with the institution which initially trained them, rather

Officership on the *Review* is apparently not a prerequisite to notice by the Editors; Professor Jaffe and Justice Frankfurter were mere members. Justice Frankfurter overcame this shortcoming and earned his place at the head table by steadfastly championing *Review* independence. Once, as "With the Editors" informs us, an angry "Columbia" professor tried to pressure the Editors through the Justice by wiring: "What will become of sociological jurisprudence?"²⁷ Justice Frankfurter wired back: "To hell with sociological jurisprudence. The independence of the Harvard Law Review is paramount."²⁸ But even Frankfurterian principles must occasionally bend. On the crucial issue of whether old Supreme Court cases should be cited to renumbered volumes of the United States Reports,²⁹ Justice Frankfurter refused to yield to a change which the Blue Book prescribed.³⁰ The Editors quickly capitulated; their only regret was that the Blue Book had gone to press, and the rule couldn't be changed.

Dean Griswold was another defender of the faith. As part of his program for preserving *Review* independence, the Dean established an already legendary tradition. On the tenth of each month, the Dean sat drumming his fingers on his desk waiting for a copy of the latest issue to be delivered. When the President staggered in, he would be greeted with a cheery—"I was wondering if you'd make it this month."³¹ Dean Griswold's monthly ritual is no doubt followed by thousands of eager *Review* subscribers around the country.

The clubby relationship between *Review* editors and Harvard faculty has generated recurrent fears that non-members might be discouraged from submitting articles. On one occasion, the Editors cried not so, and observed that in 1961 only one-third of the articles published were written by Harvard professors.³² A quick check confirms the truth of this statement, and also reveals that 17 of 22 articles (a modest 76 per cent), and all the lead articles, were written by either Harvard professors or Harvard law graduates. Six years

than with the institution at which they developed their philosophies, is a long-standing American tradition. Economist Milton Friedman, for example, is generally considered a member of either the Rutgers School (where he did his undergraduate work) or the Columbia School (where he received his Ph.D.).

26. A.B. Princeton, LL.B. New York School of Law.

27. *Editors*, Vol. 81, No. 2 (1967), at vii.

28. *Id.*

29. This issue has been a source of great controversy among Blue Book buffs. The current system is an uneasy compromise.

30. *Editors*, Vol. 69, No. 2 (1955), at vii.

31. One editor with a flair for the metaphorical put it: "The train was always on time even if there was nothing in the box cars."

32. *Editors*, Vol. 75, No. 8 (1962), at vii.

later, the column reassured us that only half of the articles were written by Harvard professors;³³ a similar adjustment estimates the proportion of articles written by both professors and graduates to be 115 per cent.

While announcements of editorial policy and anecdotes about members of the Harvard legal fraternity provide occasional relief, most of the column's columns are devoted to discussing the life and work of the Editors. Careful study of "With the Editors" through the years yields a remarkable portrait of *Harvard Law Review* editors.

The first notable characteristic of the Editors is their uniform brilliance. Readers hardly need be informed that the Editors are selected for their smashing grades, but "With the Editors" reminds us just how significant these grades are: "[W]e are selected by the wholly objective criterion of examination performance"³⁴ Or, "[P]erformance on an examination is the best, if not the only, method of testing legal ability."³⁵ The Editors apparently do not hold a monopoly on legal ability, but we are informed that the ability characteristic of the Editors is not universally shared: "A great many Harvard law students are capable of doing the work that the *Review* requires of its editors."³⁶

The Editors combine talent with a remarkable dedication to their work. We are informed that "the *Review's* work week equals—if it does not surpass—that of the traditionally hard-working big city law office"³⁷ This dedication is also illustrated by the Editors' leisure reading habits; one column described a particular *Review* article as "especially appropriate for a long winter's night and a wood fire."³⁸ There are indications, however, that *Review* work may have become less strenuous. A recent column noted that one half of the married second-year editors were, or were about to become, fathers.³⁹

Another manifestation of the Editors' dedication to their work is the thoroughness with which they collect and analyze highly significant data. For instance, the November 1954 column treated readers to a tabulation of who had written the most articles for the *Review*.⁴⁰

33. *Editors*, Vol. 80, No. 4 (1967), at vii.

34. *Editors*, Vol. 74, No. 3 (1961), at vii.

35. *Editors*, Vol. 81, No. 5 (1968), at vii.

36. *Editors*, Vol. 80, No. 3 (1967), at vii.

37. *Editors*, Vol. 74, No. 2 (1960), at vii.

38. As opposed to an electric fire. *Editors*, Vol. 80, No. 2 (1966), at vii.

39. *Editors*, Vol. 80, No. 7 (1967), at vii.

40. *Editors*, Vol. 68, No. 1 (1954), at v. Failing to publish in the *Review* is regarded as unusual even among non-Harvard scholars; e.g., "Although Professor Fleming James, Jr., . . . has been a member of the Yale Law School faculty for almost twenty-five years,

Professor Beale led the field with Professor Williston a distant second. In the "most volumes contributed to" category, Beale still led but Dean Pound eclipsed Williston for the second slot. Another example of faultless collection and analysis of empirical data is a 1949 "With the Editors" report on readership reaction to various sections of the *Review*.⁴¹ Regarding student notes, 29 per cent favored devoting more space; 3 per cent favored less space; 54 per cent wanted no change; and 14 per cent had no opinion. However, only 7 per cent favored expanding faculty articles; the Editors concluded, therefore, that readers favored expanding student notes.

Though total devotion to their work is the price paid by the Editors for *Review* membership, that price is not offered without consideration. Richard Goodwin set the general tone when he epitomized the aspirations of generations of graduating Editors: "Finally, the opportunities offered by the large law firms seem more attractive than ever [A]lways there is the faint glimmer of those enormous earnings which top the pyramid of legal remuneration in the world of the 'corporation' lawyer."⁴² To make sure that one could actually drown his discontent in a sea of dollars, the Editors ran a tasteful survey of the average income of former *Review* members between the ages of fifty-one and sixty-five.⁴³ The results shockingly revealed that big city law practice "does not offer financial rewards as great as does equivalent success in business."⁴⁴ Only one in six survey subjects made over \$100,000 per year, and the median salary was a paltry \$50,000. Even more disturbing, perhaps, were later studies which showed that the average income of men in the middle of the class was higher than the income of the students who had "demonstrated their capacity for excellent *Review* work on their year-end examinations." One could go on and on describing the Editors. They are noted for their sophisticated yet tasteful humor—for example, naming their intramural basketball team the Hemophiliacs.⁴⁵ They earned their place in the vanguard of social and political activism by electing their first female officer in 1966,⁴⁶ and finding fault with the Vietnam War in

his comment in this issue is his third contribution to the *Review*." *Editors*, Vol. 71, No. 8 (1958), at vii. Professor James has occasionally been granted other forums.

41. *Editors*, Vol. 63, No. 2 (1949), at ix.

42. *Editors*, Vol. 71, No. 5 (1958), at viii.

43. *Editors*, Vol. 74, No. 2 (1960), at vii.

44. *Id.* at viii.

45. *Editors*, Vol. 81, No. 7 (1968), at viii.

46. There were at least eight other women who apparently failed to meet the *Review's* "totally objective" standards during the past twenty years. (Names on the masthead like Meredith and Leslie somewhat foiled our investigation.)

1969.⁴⁷ But most important, they are academic revolutionaries directing the “winds of change” that are sweeping the Law School.⁴⁸ They are not upset about grading reform; speaking of the annual *Review*-faculty softball game, the Editors joked: “In keeping with the spirit of the age . . . , both teams were graded pass and the transcript of the game is confidential.”⁴⁹

Only a few months ago, the Editors of the *Harvard Law Review* announced a radical departure in the content of “With the Editors”: “[W]e have sensed that if ‘With the Editors’ is truly to mirror life around Gannett House, it cannot be confined to pleasantries and puffing.”⁵⁰ If this announcement signals the end of a tradition, we hope that the Editors will collect, bind, and make available to nostalgic readers all the columns from the old days. But a wake for the old-style “With the Editors” may be premature. A few paragraphs after the announcement quoted above, the Editors offered words of reassurance:

Perhaps accounts of the scholarly emphasis in the “good old days” are unduly romantic. Many of us feel, however, that even so romantic an account of the past might serve well as a model for the future and a measure of success in the present.⁵¹

Ah, for the good old days when men were men and grades were zero to one hundred.

YLJ

47. *Editors*, Vol. 82, No. 3 (1969), at vii.

48. *Editors*, Vol. 83, No. 1 (1970), at viii.

49. *Editors*, Vol. 82, No. 8 (1969), at viii.

50. *Editors*, Vol. 83, No. 5 (1970), at vii.

51. *Id.* at viii.