A Brief History of the *Harvard Civil Rights-Civil Liberties Law Review*

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Maintaining an institutional memory is a formidable project when an organization's generational cycle is a mere two years. However, allowing a history as rich and as salient as ours to go unremembered would be to forfeit a cherished possession. Thus, it is with the aspiration of keeping our membership in touch with its proud roots that the Volume 37 Board of Editors created the Historian position. The following history, originally presented as a speech by Professor Horwitz in celebration of our thirty-fifth anniversary, is one of the links to our past uncovered by Claire Prestel, our first Historian. It is our hope that this speech will both serve as a powerful reminder that civil rights and civil liberties must not be taken for granted and motivate former journal members to contact us with their own stories of CR-CL*'s history.*

—Ajay Krishnan & Heather Butterfield,
Editors-in-Chief, Volume 37

The first volume of the *Harvard Civil Rights-Civil Liberties Law Review* [*CR-CL*] appeared in the spring of 1966 just as the tidal wave of constitutional reform produced by the Warren Court was reaching its peak. Moreover, the passage of the Civil Rights Act of 1964[1] and the Voting Rights Act of 1965[2] represented legislative triumphs that had seemed impossible even to imagine when *Brown v. Board of Education*[3] was decided. The moral energy generated by the Civil Rights Movement is written all over the early volumes of *CR-CL*.

The lead article, divided for publication in the first two volumes, reprinted the third-year paper of Paul Brest, soon to become a famous constitutional law scholar and Dean at Stanford Law School. Entitled *The Federal Government's Power to Protect Negroes and Civil Rights Workers Against Privately Inflicted Harm*,[4] it was a direct outgrowth of the effort to protect civil rights workers from the supposedly private activity of southern white racists. Brest offered a number of theories that could reverse the significant constitutional barriers put in place by the post-Reconstruction Supreme Court that had substantially weakened the reach of the Fourteenth Amendment and had prevented federal intervention against Klan-like violence. Among Brest's most impressive efforts were

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[1] 42 U.S.C. §§ 2000a–2000h (1994).
[2] 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1994).
[3] 349 U.S. 294 (1955).
[4] Paul Brest, *The Federal Government's Power to Protect Negroes and Civil Rights Workers Against Privately Inflicted Harm*, 1 HARV. C.R.-C.L. L. REV. 2 (1966).

his arguments for expanding the "state action" doctrine, which since *Brown* had been deployed to shelter supposedly "private" entities from the reach of the Equal Protection Clause.[5] A student case note in the first volume on *Evans v. Newton*[6] illustrates the doctrinal trend that Brest had identified.[7] *Evans* held that a racially segregated public swimming pool could not be privatized by creating a charitable trust.[8]

Student idealism forged by the Civil Rights Movement found its faculty mentor in Harvard Law Professor Mark de Wolfe Howe, the advisor to the founding group. After the murderous summer of 1964, Howe joined 125 lawyers who had organized The Lawyers Constitutional Defense Committee ("LCDC") as volunteer civil rights attorneys in the Deep South. Until he died prematurely in 1967, Howe devoted himself to the civil rights struggle at the expense of other personal and professional commitments.

In his foreword to the first issue, Howe declared his philosophy:

> Recent times have reminded us . . . that aspiration, like history, is a seamless web—that when we talk of civil liberties we are discussing civil rights, that when we deal effectively with civil rights we must deal courageously with human misery, that when we take military action with respect to the world around us the achievements that we have sought at home are likely to be postponed.[9]

The allusion to the Vietnam War echoes of Martin Luther King's recent denunciation of American intervention. King's insistence that one's position on the war was relevant to achieving civil rights at home was a very controversial position at the time.

Howe also sought to justify treating civil rights and civil liberties together in one organization. In the student preface, the previous separation between the two fields is accounted for primarily as an accident of the way in which two different student organizations had developed. Yet the students also ultimately justified the merged enterprise as expressing their "most important . . . aim": "to be a review of revolutionary law. Such an ideal is as new as United Nations Declarations on Human Rights and as old as the 'Grand Tradition' of Common Law fashioning causes of action to right wrongs."[10]

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[5] Brest, *supra* note 4, at 8.

[6] 382 U.S. 296 (1966).

[7] Note, *Equal Protection—Recreational Facilities—City Park Established as a Racially Restricted Charitable Trust Must Desegregate Because Transfer from Municipal to Private Trustee Does Not Divest It of "Public Character."* Evans v. Newton (U.S. 1966), 1 HARV. C.R.-C.L. L. REV. 184 (1966).

[8] *Evans*, 382 U.S. at 296.

[9] Mark de Wolfe Howe, *Foreword* to 1 HARV. C.R.-C.L. L. REV. 1 (1966).

[10] *Preface* to 1 HARV. C.R.-C.L. L. REV. iii (1966).

I dwell on the founding of *CR-CL* because I believe that it explains a lot about the later character of the journal. Little did the founders realize that the heady days of the Warren Court were soon to come to a close and that, during most of the journal's thirty-five-year history, the U.S. Supreme Court would be cutting back on many of the gains achieved during the Warren Era. Many civil rights and civil liberties organizations lost self-confidence in the face of a less friendly Court. Even worse, many worked themselves into a siege mentality in which the Golden Age of the Warren Court seemed ever further removed from existing possibilities.

What is most striking in reading through the journal from the beginning to the present is how *CR-CL* has managed to stay relevant while giving up none of its early idealism. The reason why this has happened, I suspect, is that the original vision was wisely rooted in a substantive commitment to a conception of social justice that permitted the editors of *CR-CL* to explore the variety of different paths to human liberation that the Warren Court had only begun to suggest. Unlike many civil libertarians, whose pursuit of neutral principles led them to conceive of liberty and equality as opposed concepts, the founders of *CR-CL* understood civil rights and civil liberties as reinforcing categories.

The variety of new subjects tackled by the early editors of *CR-CL* is staggering. In Volume 5, published one year after Richard Nixon became president and the Warren Era ended, the lead article is by Ralph Nader on the Freedom of Information Act.[11] Others deal with air and water pollution[12] and the emerging "cruel and unusual punishment" attack on capital punishment.[13] Articles in Volumes 7 and 9 deal with the newly developing area of employment discrimination.[14] The problem of "hate crimes" and the First Amendment first appears in 1974.[15] Catharine MacKinnon discusses her theories about pornography and the First Amendment in 1985.[16]

The Symposiums held over the years by the journal are a good reflection of the dominant interests of the editors. The first, in 1971, dealt

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[11] Ralph Nader, *Freedom from Information: The Act and the Agencies*, 5 HARV. C.R.-C.L. L. REV. 1 (1970).

[12] John C. Esposito, *Air and Water Pollution: What to Do While Waiting for Washington,* 5 HARV. C.R.-C.L. L. REV. 32 (1970).

[13] Faye Goldberg, *Toward Expansion of* Witherspoon*: Capital Scruples, Jury Bias, and Use of Psychological Data to Raise Presumptions in the Law* 5 HARV. C.R.-C.L. L. REV. 53 (1970).

[14] E. Richard Larson, *The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment,* 7 HARV. C.R.-C.L. L. REV. 56 (1972); Comment, *Implying Punitive Damages in Employment Discrimination Cases*, 9 HARV. C.R.-C.L. L. REV. 325 (1974).

[15] Mark C. Rutzick, *Offensive Language and the Evolution of First Amendment Protection*, 9 HARV. C.R.-C.L. L. REV. 1 (1974).

[16] Catharine MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985).

with the ultimately unsuccessful Equal Rights Amendment.[17] In 1979, the entire issue was devoted to the *Bakke* case.[18] There was a First Amendment Symposium in 1981;[19] one on poverty and the law in 1987;[20] civil rights and civil liberties in the workplace was the symposium topic in 1988.[21] In 1992, the symposium focused on the general state of civil liberties,[22] with the lead article by Justice Brennan, who, along with Justice Marshall, was the model *CR-CL* Justice. In 1993, the subject was the contributions of women of color in the law.[23] Celebrating the 25th Anniversary of Stonewall, Volume 29 in 1994 focused on the subject of gay rights.[24] In 1995, the symposium subject was economic justice in America's cities.[25] In 1996 the subject was using political lawyering as a means towards social change.[26]

The Warren Court introduced two innovations to American liberalism. The first was to see liberty and equality not as mutually exclusive categories but as negotiable and potentially self-reinforcing ideals. Second, the Court shifted American liberalism away from the ideal of melting pot homogeneity derived from the Jeffersonian ideal of the yeoman farmer to our emerging ideal of cultural pluralism. In reaction to the horrors of totalitarianism, the Supreme Court began to elaborate a vision of a pluralistic society profoundly different from the conception of patriotism that underlay the original 8-1 decision to uphold the expulsion of the Jehovah Witness children from school for refusing to salute the flag.[27] But it was the civil rights struggle that, for the Warren Court, reignited pluralism as a cultural ideal.

The Warren Court's refusal to see liberty and equality as opposed categories and the Court's vision of cultural pluralism were barely worked out when the Court came to an abrupt end in 1969. Questions involving gender discrimination, a woman's right to an abortion, sexual orientation, or affirmative action had not yet come before the Court. The work of *CR-*

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[17] Symposium, *Equal Rights for Women: A Symposium on the Proposed Constitutional Amendment*, 6 HARV. C.R.-C.L. L. REV. 215 (1971).

[18] Symposium, Bakke *Symposium: Civil Rights Perspectives*, 14 HARV. C.R.-C.L. L. REV. 1 (1979). *See also* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (ruling that affirmative action in higher education is not unconstitutional).

[19] Symposium, *First Amendment Symposium*, 16 HARV. C.R.-C.L. L. REV. 311 (1981).

[20] Symposium, *Poverty and the Law*, 22 HARV. C.R.-C.L. L. REV. 1 (1987).

[21] Symposium, *Civil Rights and Civil Liberties in the Workplace*, 23 HARV. C.R.-C.L. L. REV. 1 (1988).

[22] Symposium, *The State of Civil Liberties: Where Do We Go from Here?*, 27 HARV. C.R.-C.L. L. REV. 309 (1992).

[23] Symposium, *In Your Midst: Contributions of Women of Color in the Law*, 28 HARV. C.R.-C.L. L. REV. 259 (1993).

[24] Symposium, *Stonewall at 25*, 29 HARV. C.R.-C.L. L. REV. 277 (1994).

[25] Symposium, *Economic Justice in America's Cities: Visions and Revisions of a Movement*, 30 HARV. C.R.-C.L. L. REV. 293 (1995).

[26] Symposium, *Political Lawyering Conversations on Progressive Social Change*, 31 Harv. C.R.-C.L. L. Rev. 285 (1996).

[27] Minersville School District v. Gobitis, 310 U.S. 586 (1940).

CL has involved articulating this complex, dynamically unfolding vision of a free and just society.

In one way, the editors of *CR-CL* were lucky to have had the Burger and Rehnquist Courts to react to. It has saved *CR-CL* from the self-satisfied view that history is on our side. A universal, unhistorical conception of rights, as true as the law of gravity, had begun to afflict the Civil Rights Movement in its last giddy days. One often believed then that history would assure the triumph of the Good and the True, which was good and true because it could be deduced from natural law or history. All of this ended with the Rehnquist Court's demonstration that rights were, indeed, a "two-edged sword." There could be corporate free speech rights in *First National Bank of Boston v. Bellotti*,[28] "Money is Speech" rights in *Buckley v. Valeo*,[29] and the free speech rights of racists to trespass onto a black family's lawn in order to burn a cross in *RAV v. City of St. Paul*.[30] After this, one would have a hard time continuing to believe that "rights" are discovered and not socially created.

The editors of *CR-CL* were spared late–Warren Court Era rhetoric that simplistically assumed that the determination of rights in a just society was a relatively self-determining act. Too many believed, in Dworkin's words, that there was but "one right answer" if only one took rights seriously.[31] The editors of *CR-CL* never labored under the burden of believing that history was moving in their direction; they always understood that it would be a continuing but dynamically unfolding struggle between victims and victimizers.

The founders of *CR-CL* had the vision that one could not speak of civil rights or liberties without grounding them in a conception of social justice. That spirit has been consistently present in the journal over thirty-five years. And since utopia is not at hand, let us continue the struggle to end social injustice, which goes hand in hand with infringements of civil rights and civil liberties.

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[28] 435 U.S. 765 (1978).
[29] 424 U.S. 1 (1976).
[30] 505 U.S. 377 (1992).
[31] *See generally,* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978); RONALD DWORKIN, LAW'S EMPIRE (1986).