ESSAYS

A BRIEF HISTORY OF *RUTGERS LAW REVIEW*

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I. THE PREDECESSORS TO *RUTGERS LAW REVIEW*

The history of *Rutgers Law Review* closely mirrors that of Rutgers Law School itself. Its earliest predecessor, the *New Jersey Law Review*, was first published in 1915,[1] seven years after the New Jersey Law School, the earliest predecessor to the modern Rutgers School of Law, was founded as New Jersey's first law school in 1908. As the "clerkship" method of training to become a lawyer through apprenticeship was beginning to fade,[2] the law school was attempting to establish its legitimacy as the only source of formal legal education in New Jersey.[3] Moreover, the law school had just extended its

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1. *See* W.M. H. Taft, *The Lawyer of Ideals*, 1 N.J. L. REV. 1 (1915) (the first article in the first edition of the *New Jersey Law Review*).

2. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 464 (3d ed. 2005).

3. In 1908, when New Jersey Law School was founded, the New Jersey Board of Bar Examiners required an applicant for admission to the Bar to have completed a thirty-six month clerkship in the office of a senior lawyer. *See* PAUL TRACTENBERG, A CENTENNIAL HISTORY OF RUTGERS LAW SCHOOL IN NEWARK 21-23 (2010). However, eighteen months of study in a law school of "established reputation" could satisfy one-half of the clerkship requirement. *Id.* Remarkably, in May of 1909, the "established reputation" of New Jersey Law School was recognized by the Bar Examiners and, thus, completion of its then two-year course of study counted toward the thirty-six month clerkship requirement. *Id.*

curriculum to a three-year program,[4] and a successful legal periodical edited by students would likely have been seen as another indication of that legitimacy.

In the forward to the first issue, the law school's co-founder and president, Richard Currier, issued a modest apologetic begging for the understanding of its readers:

> The opportunity for benefit to be derived by students in connection with work on a law magazine is untold. It is to give such opportunity that our faculty and students have combined for the purpose of publishing the NEW JERSEY LAW REVIEW. This, our first issue, we feel is crude; our editorial board has had no previous experience. We must ask the indulgence of our readers. With encouragement, we trust succeeding issues will improve, until we shall occupy a worthy place with similar legal publications.[5]

The inaugural issue opened by reprinting a rousing address on legal professionalism and ethics given on January 6, 1915, by William Howard Taft, two years after he had left office as the twenty-seventh President of the United States, and six years before he would become the tenth Chief Justice of the United States Supreme Court.[6] In his remarks to the men (and even at that time the occasional woman) of New Jersey Law School, President Taft, while acknowledging the "popular feeling at various times against the profession," exhorted his audience to live up to the model of a "lawyer of ideals" who "answers every call that comes for public service, who sacrifices the prospect of a good and lucrative practice, to the call of his country or his state for service in the common weal."[7] Other articles in that volume commented favorably on the protection of individual rights in the early constitutions of New Jersey,[8] excoriated lawyers representing large businesses for opposing revisions to the workers' compensation laws,[9] and noted the pending legal challenge to the legitimacy of the newly constituted Board of Public Utility Commissioners created by Governor (later President) Woodrow Wilson to mitigate the effects of monopoly enterprises.[10] As a self-proclaimed modest beginning, the first volume appeared to confront

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4. In September 1913, the New Jersey Board of Bar Examiners changed the Bar Admission requirements to permit twenty-seven months of study in a law school to be counted towards the clerkship requirement. *Id.* In response, New Jersey Law School extended its course of study to three years. *Id.*

5. Richard D. Currier, *Foreword*, 1 N.J. L. REV. 86, 86-87 (1915).

6. Taft, *supra* note 1.

7. *Id.* at 3, 16.

8. Edward Q. Keasbey, Note, *The Early Constitutions of New Jersey*, 1 N.J. L. REV. 20 (1915).

9. John B. Andrews, *The New Jersey Compensation Law*, 1 N.J. L. REV. 44 (1915).

10. Frank H. Sommer, Note, *The New Jersey Public Utilities Act: Some Questions Involved in the Passaic Gas Rate Case*, 1 N.J. L. REV. 128 (1916).

the pressing legal issues of the day admirably.

Despite this auspicious beginning, however, the initial attempt at publishing critical legal scholarship at a New Jersey law school did not flourish. Publication was suspended in 1916, and did not resume until a renumbered Volume I appeared almost twenty years later in 1935.[11] After almost a century we can only speculate as to the reasons, but it must be acknowledged that at the time New Jersey Law School was among the many for-profit proprietary entities that were not affiliated with any university, whose pedagogical technique was grounded more in practical skills training than in treating law as an academic or scientific discipline.[12] The pedagogical theories of Dean Christopher Columbus Langdell, which were initially controversial enough at Harvard,[13] would probably not have fared well in pre-World War I Newark, where the New Jersey Law School served those who desired an efficient and expeditious path to becoming competent practitioners. The only requirement for admission was that the applicant be eighteen years of age and of good moral character.[14] The concept of a student-edited legal periodical that engaged in speculative writing about the law, an idea that had only recently been introduced at university-affiliated law schools,[15] was thus perhaps beyond the scope of the still fledgling institution. Although, after World War I, New Jersey Law School flourished, becoming for a time the second largest law school in the nation with more than 2300 students,[16] it focused on a utilitarian rather than theoretical approach to legal education.

The reappearance of a student law journal at New Jersey Law School in 1935 may have been triggered, in part, by the launching of a new publication in 1932 by the then cross-town rival of New Jersey

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11. *See* 1 N.J. L. REV. (1916); 1 N.J. L. REV. (1935).

12. *See* John Sonsteng, *A Legal Education Renaissance: A Practical Approach for the Twenty-First Century,* 34 WM. MITCHELL L. REV. 303, 321-30 (2007) (detailing the development of the modern legal education system); *see generally* FRIEDMAN, *supra* note 2, at 463-74 (same).

13. *See* FRIEDMAN, *supra* note 2, at 470-71 (noting that the then dean of Harvard College complained to university president Charles Eliot that Langdell's idea seemed to "breed professors of Law not practitioners," and the new law school would "sever[] itself from the great current of legal life which flows through the courts and the bar").

14. No college education was required to enroll, although a high school graduation requirement was added in 1914. TRACTENBERG, *supra* note 3, at 24. A two-year college education requirement was introduced in 1928, but until the 1950s, it was still a common occurrence to enroll in Rutgers Law School and sit for the New Jersey bar exam without a baccalaureate degree. *See id.* at 28-29.

15. *Harvard Law Review* was first published in 1887; *Yale Law Journal* in 1891, and *Columbia Law Review* in 1900. *See* FRIEDMAN, *supra* note 2, at 481-82.

16. *History of Rutgers School of Law – Newark*, RUTGERS SCHOOL OF LAW – NEWARK, http://law.newark.rutgers.edu/about-school/history-rutgers-school-law-newark (last visited Apr. 15, 2012).

Law School, the Mercer Beasley Law School, which was founded in 1926 by several prominent Newark attorneys, including future New Jersey Chief Justice Arthur T. Vanderbilt.[17] In the forward to the first issue of the *Mercer Beasley Law Review*, Arthur F. Egner, the president of the board of trustees, like Mr. Currier a generation earlier, initially proclaimed modest ambitions. "[I]t is not intended to make the review one of national scope,"[18] he stated. Indeed, Mr. Egner noted wryly that having too many law reviews laying claim to such pretensions was not necessarily a positive development.

> To the busy practitioner, it is already becoming well-nigh impossible to cope with the discussions, many of them ably handled, of the numerous legal problems, so assiduously studied and so painstakingly documented, appearing in the long established reviews. Indeed such a feat is daily becoming more difficult for men who have primarily devoted themselves to the domain of legal instruction, except by a rather drastic limitation of such study to their respective specialties. In fact, the attempt to accomplish so herculean a task is more apt to lead to confusion of thought, from principles partially assimilated and distinctions vaguely apprehended, than to a substantial increase in our fundamental legal knowledge.[19]

Apart from providing the practicing bar with useful research tools through the "reasoned marshalling of authorities and their critical analysis,"[20] the primary goal of *Mercer Beasley Law Review* was cheerfully and unapologetically announced as pedagogical. "To students of law—in the narrower sense—nothing is more stimulating than serious critical effort,"[21] and "[t]he actual preparation of such notes cannot fail to develop a power of distinguishing, and an ability tersely to express such distinctions, which must prove invaluable to the growth of legal reasoning."[22]

By the 1900s the paradigm of the independent proprietary law school had clearly been overtaken by the model of the university-affiliated law school.[23] Any rivalry between the *Mercer Beasley Law Review* and the *New Jersey Law Review* was thus short lived. During the period from 1934 to 1935, an alliance of local educational institutions combined to form the University of Newark,[24] and the

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17. TRACTENBERG, *supra* note 3, at 31-32.

18. Arthur F. Egner, *Foreword*, 1 MERCER BEASLEY L. REV. 1, 1 (1932).

19. *Id.*

20. *Id.*

21. *Id.* at 2.

22. *Id.*

23. *See* FRIEDMAN, *supra* note 2, at 463.

24. TRACTENBERG, *supra* note 3, at 33. In addition to the two law schools, these institutions included Dana College, a four-year undergraduate college originally formed in 1930 from the pre-legal department of New Jersey Law School, the Newark

two law schools merged and became the University of Newark School of Law, which received accreditation from the American Bar Association in 1941.[25] The two journals in turn joined to become the *University of Newark Law Review*, which published seven volumes from 1936 until 1942, when drastically declining law school enrollments caused by World War II brought the Newark law school itself to the brink of closure.[26] Nevertheless, even in wartime, the *University of Newark Law Review* published some significant articles calling for reform of the New Jersey State Constitution,[27] particularly seeking restructure of the labyrinthine New Jersey court system (which was described as a "cumbersome, ancient and patched up machinery"),[28] thus presaging the constitutional convention that led to the 1947 New Jersey Constitution and the modern New Jersey judiciary.

II. THE EARLY AGE OF *RUTGERS LAW REVIEW*

The modern history of *Rutgers Law Review* dates from the absorption in 1946 of the University of Newark by Rutgers University, which had just been designated by the New Jersey Legislature as the State University of New Jersey.[29] Volume 1, No. 1 of *Rutgers Law Review* was published in the spring of 1947 as the self-proclaimed successor to all three previous journals (whose total contents were laboriously indexed for posterity in the first issue), and the journal has published continuously for the sixty-four succeeding years.[30] Now it could truly be said that the law school was firmly established in an academic setting, and the student editors of the law review were not only professional students but graduate students as well.

Just as Rutgers, The State University of New Jersey, grew from

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Institute of Arts & Sciences, and the Seth Boyden School of Business, which was also originally a subsidiary of New Jersey Law School. *Id.* at 29.

25. *Id*. at 35.

26. *Id*. at 34.

27. John Beboult & Julius Kass, *How Can New Jersey Get a New Constitution?*, 6 UNIV. NEWARK L. REV. 1 (1941).

28. William W. Evans, *Constitutional Court Reform in New Jersey*, 7 UNIV. NEWARK L. REV. 1, 1 (1941).

29. *See* 1945 N.J. Laws c.49 (repealed and succeeded by 1956 N.J. Laws c.61, now codified at N.J. STAT. ANN. § 18A:65-1 et seq.).

30. The honor of publishing the first article in the modern *Rutgers Law Review* went to Alan V. Lowenstein, who became one of the most esteemed members of the corporate bar, and who later founded of one of New Jersey's preeminent law firms, served as principal draftsman of the Banking Act of 1948, as Chair of the New Jersey Corporation Law Revision Commission, and who was a generous benefactor to institutions that promoted the law as an instrument of positive social change, including Rutgers School of Law—Newark. Alan V. Lowenstein, *Assignments of Accounts Receivable and the Bankruptcy Act*, 1 RUTGERS L. REV. 1 (1947).

a small colonial land grant college to a major public research university, so too the law school and its law review expanded their scope and aspirations to a national level. Any attempt to canvass or inventory in a comprehensive way all the articles of significance that have since appeared in the *Rutgers Law Review* in its modern iteration would be a perilous and probably unsuccessful endeavor. However, a few examples, each drawn from a particular historical context, are illustrative, albeit not definitive.

One early 1956 article, written by former Rutgers Dean and then New Jersey Appellate Division Judge Alfred C. Clapp, probably required not only intellectual fortitude but also some measure of personal daring to write and publish. In an article written for a symposium on the Uniform Rules of Evidence, Judge Clapp argued for the inclusion of the privilege against self-incrimination in New Jersey's state rules of evidence.[31] At the time, the Fifth Amendment privilege was not binding *ex proprio vigore* on the states,[32] and New Jersey was the only American jurisdiction whose state constitution had not been construed to establish it independently,[33] so the debate was one of immediate and topical interest. Judge Clapp countered the criticisms of some formidable contemporary scholars in the field of evidence, such as Dean Roscoe Pound, Dean Charles McCormick, and Professor Edmund Morgan,[34] who deprecated the value of the privilege, and who believed that, as one of them argued, "the *raison d'etre* of this immunity ceased . . . in the seventeenth century."[35] Clapp stated, however, that "[t]hese views cannot be accepted."[36] He continued: "On the contrary it is submitted that the privilege is in some situations vital, and in others, strong and compelling, never more so than today."[37]

Clapp then turned to the particular situation of the self-incrimination privilege in the context of the legislative investigating committee:

> When such a body, pursuing rumors, proposes to compel a man to

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31. Alfred C. Clapp, *Privilege Against Self-Incrimination*, 10 RUTGERS L. REV. 541, 541-42 (1956).

32. *See* Twining v. New Jersey, 211 U.S. 78, 114 (1908) ("[T]he exemption from compulsory self-incrimination in the courts of the states is not secured by any part of the Federal Constitution."). *Twining* was eventually overruled by *Malloy v. Hogan*, 378 U.S. 1 (1964) (Fifth Amendment right against self-incrimination made applicable to the states through incorporation by the Fourteenth Amendment).

33. Clapp, *supra* note 31, at 570 & n.116.

34. *Id.* at 541-42 & nn. 3-4, 6 (citing articles by Deans Pound and McCormick and Professor Morgan criticizing the self-incrimination privilege).

35. Roscoe Pound, *Legal Interrogation of Persons Accused or Suspected of Crime*, 24 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 1014, 1015 (1934).

36. Clapp, *supra* note 31, at 542.

37. *Id.*

> submit to interrogation about a crime without prior indictment or specific accusation, it tends to assume the characters of both prosecutor and judge and to anoint itself with the oil of its own prepossessions. To withstand dangers such as these was the originating purpose of the privilege: that is, to shield the innocent from browbeating officials, who have been invested with authority, but without a sense of their responsibilities, who, proceeding sometimes upon the most insufficient of suspicions, make use of the power in their hands to destroy a man and his family, his position in life, and at times his livelihood.[38]

In the context of the McCarthy era, to publish these remarks in the spring of 1956 was no small act of political courage both by Judge Clapp[39] and by the student editors of the Law Review. While, by this time, Senator Joseph McCarthy had himself been removed as an individual political force, the House Un-American Activities Committee was still very much in operation, and the curtailment of civil liberties prompted by the "Red Scare" and the condemnation of "Fifth Amendment Communists" was still very much a part of the political mainstream. Indeed, three years earlier, when Judge Clapp was still Dean of the Law School, Rutgers law professor Abraham Glasser had been suspended by the president of the University and eventually forced to resign because he had invoked the Fifth Amendment when called to testify before the House Un-American Activities Committee.[40] Although the United States Supreme Court ruled, at almost the same time that Judge Clapp's article was published, that terminating a public college teacher for invoking the self-incrimination privilege before a legislative committee violated due process,[41] it was not until the early 1960s that the constitutional

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38. *Id.* at 543 (citation omitted).

39. Having been appointed to the state bench for only three years, Judge Clapp was still in his seven-year probationary period, after which, under the 1947 New Jersey Constitution, he would require reappointment by the governor and reconfirmation by the state senate in order to enjoy tenure until retirement, and thus was still vulnerable to political attack. N.J. CONST. art. VI. § VI, para. 3. Happily, he was reappointed and had a distinguished career in public service in New Jersey, having also served as a state senator from 1947 to 1953, as a delegate to the 1947 New Jersey Constitutional Convention, and as legal counsel and campaign manager to a number of Republican candidates for office, including Governor Thomas Kean in his first successful campaign for governor. *See* Joan Cook, *Alfred C. Clapp, 84; Former Jersey Judge Led Kean Campaign*, N.Y. TIMES (May 25, 1988), http://www.nytimes.com/1988/05/25/obituaries/alfred-c-clapp-84-former-jersey-judge-led-kean-campaign.html.

40. *See* Arda Arguilan, Special Collections and University Archives, Rutgers University Libraries, *Inventory to Rutgers University School of Law, Committee of Review, Transcripts of the Hearings Regarding The Suspension of Abraham Glasser, May - June 1953*, *available at* http://www2.scc.rutgers.edu/ead/uarchives/glasserf.html.

41. Slochower v. Bd. of Higher Ed. of N.Y., 350 U.S. 551, 557-59 (1956). *Slochower* was announced on April 9, 1956, and existing law review records do not indicate the

legitimacy of the privilege was clearly established[42] and became relatively safe territory for public dialogue. Judge Clapp's article thus stands as an early example of the role of scholarly discourse in applying neutral principles of law to temper the results-oriented politics of the moment.

III. *RUTGERS LAW REVIEW* IN THE TIME OF THE "PEOPLE'S ELECTRIC LAW SCHOOL"

The late 1960s and 1970s were a time of foment for the nation, and so too for Rutgers Law School. In 1967, the law school's south Jersey campus in Camden, which had been administered by the Dean of the law school in Newark but with its own faculty, was created as a separate and equal unit of the University,[43] and eventually the students there founded a new law journal, the *Rutgers-Camden Law Journal* (now known as the *Rutgers Law Journal*).[44] Meanwhile, the original school, known thereafter as Rutgers School of Law—Newark, was affected by the social unrest of its environs, exemplified by the Newark riots of 1967 and the takeover of Conklin Hall in 1969.[45] Rather than seeking to shield itself from these realities, the Law School sought both to reform itself to embrace the urban community that surrounded it and broaden its mission to champion the use of the law as an instrument for positive social change. Internally, the Law School created the Minority Student Program in 1968 in order to diversify a student body that had been overwhelmingly white and male.[46] It was the age of the "People's Electric Law School."[47]

The institutional commitment to diversity that was born in the 1960s eventually, if somewhat belatedly, was applied to the internal governance of the Law Review. Since the mid-1970s, the selection criterion for law review membership has been predominantly, and at times exclusively, based on the annual writing competition, with

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exact date when the Spring 1956 issue of the *Rutgers Law Review* was disseminated. Since Judge Clapp's article does not cite *Slochower*, it can be presumed that the article was sent to print before the decision was announced.

42. Malloy v. Hogan, 378 U.S. 1, 6 (1964).

43. TRACTENBERG, *supra* note 3, at 39.

44. *Id.*; *see Rutgers-Camden Law Journal*, 1 RUTGERS CAMDEN L.J. (1969); *Rutgers Law Journal*, 12 RUTGERS L.J. (1980).

45. For a digital archive of documents related to the February 24, 1969, takeover of Conklin Hall by students, with support from faculty and administrators, and the subsequent effect on the history and development of the Newark campus and its commitment to diversity, see *The 40th Anniversary of the 1969 Conklin Hall Takeover,* JOHN COTTON DANA LIBRARY, http://www.newark.rutgers.edu/~danadml/conklin/index.html (last visited Apr. 1, 2012).

46. TRACTENBERG, *supra* note 3, at 51-54.

47. *Id.* at 59-60.

first-year grades playing a secondary role. Then in 1982, the Editorial Board, without any prompting by the law school administration, concluded that historically the membership of the Law Review was taken from too narrow a segment of life experiences to be able to engage successfully in critical analysis of contemporary legal issues. The Editorial Board therefore voted to institute a diversity program that permitted the addition of qualified candidates from the law school's Minority Student Program to law review membership, without excluding other qualified candidates.[48] In 1983, the first member of a racial minority was elected Editor-in-Chief, who although personally unworthy of this honor,[49] paved the way for subsequent law review leadership coming from increasingly diverse backgrounds.

Perhaps no article published by the *Rutgers Law Review* during this time is a better paradigm of the law school's newly invigorated dedication to public interest and the promotion of social justice than *The Constitutional Right of Negro Freedom*, published in 1967 by then recently appointed Professor of Law Arthur Kinoy.[50] Professor Kinoy's legacy to Rutgers Law School and his scholarly contributions to the *Rutgers Law Review* are too extensive to catalog in this brief history,[51] but this seminal article merits special attention. Professor Kinoy presented a withering criticism of the majority opinion in the *Civil Rights Cases*,[52] written in 1883 by Justice Bradley, which had drastically circumscribed Congress's enforcement power under the Fourteenth Amendment, limiting it to correcting affirmative state malfeasance that interfered with the exercise of civil rights, but denying Congress the power to enact direct national legislation mandating rights of equality and regulating the primary conduct of private actors.[53] The Supreme Court thus provided a legal theory to justify the political decision reached in the Hayes-Tilden Compromise of 1877, which ironically left it to the states—including those recently defeated southern states whose enthusiasm for the task might reasonably be questioned—to provide legal protections to the emancipated race. Kinoy wrote:

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48. *Staff Selection*, RUTGERS LAW REVIEW, http://www.rutgerslawreview.com/about/staff-selection/ (last visited Mar. 29, 2012).

49. *See supra* note 30.

50. Arthur Kinoy, *The Constitutional Right of Negro Freedom*, 21 RUTGERS L. REV. 387 (1967).

51. *See, e.g.*, Arthur Kinoy, *The Rutgers MSP: Commitment, Experience, and the Constitution*, 31 RUTGERS L. REV. 860 (1979); Arthur Kinoy, *The Present Crisis in American Legal Education*, 24 RUTGERS L. REV. 1 (1970); Arthur Kinoy, *The Constitutional Right of Negro Freedom Revisited: Some First Thoughts on* Jones v. Alfred H. Mayer Company, 22 RUTGERS L. REV. 537 (1968).

52. 109 U.S. 3 (1883).

53. *See* Kinoy, *supra* note 50, at 398.

> The constitutional theory of the Bradley Court, structured to provide a juridical explanation for the political decision of 1877 to withdraw from primary national responsibility the rights of the newly emancipated race, was predicated, as we have seen, upon a factual assumption, unsupported by reality, that the black man had already been elevated from his status of slavery-engendered inferiority in the hitherto white political community. The extraordinary fact of the matter is that the constitutional theory itself, resting upon an assumption wholly unjustified in life, became a primary causal instrumentality in guaranteeing that the change in status which it assumed had already occurred would not in fact occur for almost a century to follow.[54]

While strongly adhering to the view of the first Justice Harlan, writing in dissent, that the Wartime Amendments themselves imposed upon the national government the primary power and obligation to enforce the newly created civil rights,[55] Professor Kinoy was not content simply to condemn (with ample justification) the Bradley Court's holding as inconsistent with the obvious historical understanding of the Fourteenth Amendment, but he went further to lay out an elegant theory by which to bypass its negative effects without directly calling for it to be overruled. Noting that even the majority in *The Civil Rights Cases* acknowledged that the Thirteenth Amendment was not restricted to the narrow abolition of the institution of human slavery, but affirmatively enacted a broad "charter of liberty" that by its own force eliminated all "badges and incidents of slavery,"[56] including those committed by private actors without a showing of "state action," Kinoy argued convincingly that all acts of racial discrimination amounted to such badges and indicia of slavery. Ironically, he relied on as support for this proposition the expansive description of, and justification for, the institution of slavery provided by Chief Justice Taney a generation earlier in the infamous *Dred Scott* case.[57] By expanding the definition of "badge and indicium of slavery," Kinoy concluded that the Thirteenth Amendment empowered Congress to enact primary legislation eliminating not only the narrow institution of slavery but also its "badges and indicia," including racial discrimination in places of public accommodation.[58]

While one can only speculate if Professor Kinoy's reasoning, as expressed in the *Rutgers Law Review*, had any direct influence on subsequent Court decisions, it is worth noting that very soon

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54. *Id.* at 413.

55. *Id.* at 398.

56. *Id.* at 407 (citing *Civil Rights Cases*, 109 U.S. at 20-25).

57. *Id.* at 409 (citing Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 413-16 (1856)).

58. *See* Kinoy, *supra* note 50, at 407, 439-40.

thereafter, in *Jones v. Alfred H. Mayer Co.*,[59] the Supreme Court redefined and expanded the scope of congressional power under the Thirteenth Amendment. The Court found that "Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation."[60] Read literally, Congress thereby possesses the potential power under the Thirteenth Amendment to protect individual civil rights against private encroachment that is as open-ended as the interstate commerce power which has, in contemporary times and in light of the *Civil Rights Cases*, been called into service to justify federal legislation prohibiting discrimination by private actors.[61] As Professor Kinoy himself aptly observed in a subsequent article in *Rutgers Law Review*:

> Accepting the challenge, the Court reached out and, for the first time since Reconstruction, found constitutional authority for congressional legislation in the area of Negro rights in the power created by the Thirteenth Amendment "to pass *all laws necessary and proper for abolishing all badges and incidents of slavery in the United States*."[62]

While Congress has not recently based much civil rights legislation upon its Thirteenth Amendment enforcement power, when and if it should choose to do so, it need only refer to *The Constitutional Right to Negro Freedom* in the *Rutgers Law Review* for a thoroughly researched legal justification.

Another example of the lasting impact of an individual author published in *Rutgers Law Review* stands out. In 1956, the Law Review published an article entitled simply *Labor Law: 1954-1956*, written by then Assistant Professor of Law Alfred W. Blumrosen as part of an annual survey of New Jersey law.[63] Fifty-five years later in 2011, in what is surely an individual record for the longest span of time between the earliest and most recent publication in the Law Review by the same author, *Rutgers Law Review* published an article

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59. 392 U.S. 409 (1968). *Jones* overruled *Hodges v. United States*, 203 U.S. 1 (1906), which limited Congress' power under the Thirteenth Amendment to proscribing only those private acts that met a judicially, not legislatively, created definition of the incidents of slavery, which the Court found was limited to acts that created a "state of entire subjection of one person to the will of another." 203 U.S. at 17.

60. *Jones*, 392 U.S. at 440.

61. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (Congress had rational basis to determine in Civil Rights Act of 1964 that racial discrimination in places of public accommodation affected interstate commerce).

62. Kinoy, *The Constitutional Right to Negro Freedom Revisited, supra* note 51, at 539 (emphasis in original) (quoting *Jones*, 392 U.S. at 409).

63. Alfred W. Blumrosen, *Labor Law: 1954-1956*, 11 RUTGERS L. REV. 171 (1956).

by Blumrosen, now the Thomas A. Cowan Professor of Law Emeritus, co-authored with his son Steven, entitled *Restoring the Congressional Duty to Declare War*.[64] In the intervening half-century, Blumrosen has published numerous influential articles, principally in the area of labor law and employment discrimination,[65] including at least twenty-one published in *Rutgers Law Review* alone, that themselves provide a historical record of the development and growing sophistication of an entire area of law.[66] In a 1958 article,[67] Professor Blumrosen noted that "[l]abor law is primitive law" that had only recently developed as a cognizable category.[68] A year later, newly promoted Associate Professor of Law Blumrosen published a much cited article that began to construct the jurisprudential explanation for the role of unions in collective bargaining,[69] as well as another article providing doctrinal support for the allocation of roles among union, management, and employee.[70] The next ten years saw seven articles by Professor Blumrosen in the *Rutgers Law Review*,[71]

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64. Alfred W. Blumrosen & Steven M. Blumrosen, *Restoring the Congressional Duty to Declare War*, 63 RUTGERS L. REV. 407 (2011). This article stemmed from the advice given by the authors to the Rutgers Constitutional Litigation Clinic in connection with the litigation brought by the Clinic in *New Jersey Peace Action v. Obama*, 379 F. App'x 217 (3d Cir. 2010), *cert. denied*, 132 S. Ct. 937 (2011), which challenged the constitutionality of the military incursion into Iraq without a Congressional declaration of war.

65. A few articles were on topics unrelated to labor or employment law. *See* Blumrosen & Blumrosen, *supra* note 64 (constitutionality of military action without Congressional declaration of war); Alfred W. Blumrosen, *Willard Heckel and the Spirit of Rutgers Law School*, 41 RUTGERS L. REV. 481 (1989) (tribute to the late Dean Heckel). One early article was in the area of criminal procedure. Alfred W. Blumrosen, *Contempt of Court and Unlawful Police Action*, 11 RUTGERS L. REV. 526 (1957) (suggesting use of the contempt power to sanction police officers who violated Fourth Amendment proscriptions). This article was written at a time when full-time faculty at Rutgers were expected to have a much broader subject matter repertoire than today.

66. Blumrosen's institutional role at the Law School has been described in detail in a recent article printed in the *Rutgers Law Review*. Gary L. Francione & George C. Thomas III, *Centennial Essay: The Wind Was at Our Backs: The Third Golden Period of Rutgers Law School*, 61 RUTGERS L. REV. 471, 479-80 (2009).

67. Alfred W. Blumrosen, *Labor Law*, 12 RUTGERS L. REV. 98 (1958).

68. *Id*. at 98 & n.1.

69. Alfred W. Blumrosen, *Group Interests in Labor Law*, 13 RUTGERS L. REV. 432 (1959).

70. Alfred W. Blumrosen, *Legal Protection for Critical Job Interests: Union-Management Authority Versus Employee Autonomy*, 13 RUTGERS L. REV. 631 (1959).

71. *See* Alfred W. Blumrosen, *Public Policy Considerations in Labor Arbitration Cases*, 14 RUTGERS L. REV. 217 (1960); Alfred W. Blumrosen, *The Right to Seek Workmen's Compensation*, 15 RUTGERS L. REV. 491 (1961); Alfred W. Blumrosen, *United States Report*, 18 RUTGERS L. REV. 428 (1964); Alfred W. Blumrosen, *Anti-Discrimination Laws in Action in New Jersey: A Law-Sociology Study*, 19 RUTGERS L. REV. 187 (1965); Alfred W. Blumrosen, *The Duty of Fair Recruitment Under the Civil Rights Act of 1964*, 22 RUTGERS L. REV. 465 (1968); Alfred W. Blumrosen, *Seniority*

and as antidiscrimination statutes enacted in the 1960s began to develop an interpretive history, they began to focus on equal employment law. Then, as the adverse reaction to affirmative action in employment reached the courts in the 1970s and 1980s, the pages of the Law Review reflected the positions taken by Blumrosen that were dedicated to the so-called "reverse discrimination" phenomenon.[72] Blumrosen's scholarship in fact influenced the United States Supreme Court to permit racial preferences as a carefully tailored judicial remedy for past employment discrimination,[73] and to reject the notion that the Civil Rights Act of 1964 "qualifies or proscribes a court's authority to order relief otherwise appropriate . . . in circumstances where an illegal discriminatory act or practice is established."[74] The evolution of scholarship evidenced by Professor Blumrosen's prodigious output of publications in *Rutgers Law Review*, and by the work of many generations of Law Review editors who decided to publish and then edit those articles, is a testament to the value of institutional continuity that is achieved by delegating the task of maintaining the learned journals of the legal discipline to students at our nation's law schools.

IV. THE CURRENT CHALLENGES FOR A STUDENT EDITED LAW REVIEW

As an academic discipline, law is unique because it has traditionally bestowed the primary responsibility of publishing and editing its scholarship on student-run law reviews rather than peer-

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and Equal Employment Opportunity: A Glimmer of Hope, 23 RUTGERS L. REV. 268 (1969); Alfred W. Blumrosen, *Workers' Rights Against Employers and Unions: Justice Francis—A Judge for Our Season*, 24 RUTGERS L. REV. 480 (1970).

72. *See* Alfred W. Blumrosen, *Quotas, Common Sense, and Law in Labor Relations: Three Dimensions of Equal Opportunity*, 27 RUTGERS L. REV. 675 (1974); Alfred W. Blumrosen & Ruth G. Blumrosen, *The Duty to Plan for Fair Employment Revisited: Work Sharing in Hard Time*s, 28 RUTGERS L. REV. 1082 (1975); Alfred W. Blumrosen, *Affirmative Action in Employment After* Weber, 34 RUTGERS L. REV. 1 (1981); Alfred W. Blumrosen, *Rethinking the Civil Rights Agenda: Impressions of the Rutgers Law School Conference*, 37 RUTGERS L. REV. 1117 (1985); Alfred W. Blumrosen, *Society in Transition II:* Price Waterhouse *and the Individual Employment Discrimination Case*, 42 RUTGERS L. REV. 1023 (1990); Alfred W. Blumrosen, *Society in Transition IV: Affirmation of Affirmative Action Under the Civil Rights Act of 1991*, 45 RUTGERS L. REV. 903 (1993); Alfred W. Blumrosen, Ruth G. Blumrosen, Marco Carmignani & Thomas Daly, *Downsizing and Employee Rights*, 50 RUTGERS L. REV. 943 (1998); Alfred W. Blumrosen, *Forty-Five Years Near Broad Street: A Memoir of Rutgers Law School*, 45 RUTGERS L. REV. 777 (1999).

73. Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 476 n.48 (1986) (citing Blumrosen, *Affirmative Action in Employment After* Weber, *supra* note 72, at 41).

74. *Id*. at 464 n.37 (citing Blumrosen, *Affirmative Action in Employment After* Weber, *supra* note 72, at 39).

reviewed journals.[75] It does not require excessive cynicism to note the convergence of interests amongst the various stakeholders in legal education that explains this phenomenon. "Law schools depend upon law reviews for publicity and prestige. Law professors depend upon law reviews for publication and promotion. Law students depend upon law reviews for education and eventual employment."[76] A plethora of student law journals[77] seemingly satisfies the needs of multiple constituencies, and the necessity of having at least one student journal, therefore, has become an unquestioned assumption for any American law school. As Judge John T. Noonan put it, "As cathedrals to every good-sized medieval French town, and as universities to every twentieth century state of the United States, so law reviews are a necessary element of every respectable law school."[78]

The relevance of student law reviews, however, has frequently been questioned. Skeptics note, not without some justification, that "law reviews were made to be written and not read,"[79] and that much

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75. Dean Toni Massaro has provided an energetic defense of this practice in her essay commemorating the anniversary of the law review at her own school:

> This student-centered approach to our profession's academic voice has many virtues. Law students exist in between two worlds; they are both pre-professional laypeople and individuals with professional identities and vocabularies and habits already taking shape. In this transitional space, ideas that are fresh, organic, or counter to customary ways of thinking stand a greater chance of expression than in venues umpired solely by professionals with solidified intellectual habits. Our profession's distinctive tradition of allowing these pre-professional student editors to umpire so much of the universe of legal scholarship teaches the students much about contemporary legal writing and thought, allows for interaction between student editors and leaders in the profession, broadens students' exposure to a variety of legal issues, and compels legal scholars and other contributors to write lucidly, transparently, and in a voice that students can understand-not just intellectual insiders. The educational arrow points in two directions in another respect: many law students possess technological savvy that some of their professors lack. The pace of the IT revolution is exceedingly brisk, and teachers can and do learn much from their students about emerging technologies.

Toni M. Massaro, *Dean's Welcome*, 50 ARIZ. L. REV. 1, 6 (2008).

76. Bernard J. Hibbitts, *Last Writes? Reassessing the Law Review in the Age of Cyberspace*, 71 N.Y.U. L. REV. 615, 616 (1996).

77. Rutgers—Newark is certainly no exception and has no less than five recognized student journals. In addition to the *Rutgers Law Review*, the School of Law—Newark currently recognizes the *Rutgers Computer & Technology Law Journal*, the *Women's Rights Law Reporter*, the *Rutgers Race & Law Review*, and the *Rutgers Law Record*. There are also other publications, currently recognized as student organizations but not as academic journals, that are seeking faculty recognition.

78. John T. Noonan, Jr., Keynote Address of the Law Review Conference at Stanford Law School: Law Reviews (Feb. 25, 1995), *in* 47 STAN. L. REV. 1117, 1117 (1995).

79. Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and*

of what is contained in modern law reviews is driven "much less to find answers than to avoid perishing in pursuit of promotion and tenure."[80] As Professor Bernard Hibbitts warns:

> The law review, however, is hardly an inevitable institution. It emerged in the late nineteenth and early twentieth centuries as the product of a fortuitous interaction of academic circumstances and improvements in publishing technology. Today, new academic circumstances (not least among which is an increased professorial dissatisfaction with law reviews themselves) and new computer-mediated communications technologies (e.g., on-line services and the Internet) are coming together in a way that may soon lead to the demise of the familiar law review in favor of a more promising system of scholarly communication.[81]

Even in a somewhat celebratory and ceremonial essay such as this, therefore, it is fair to ask the question of how *Rutgers Law Review* has fared in the last twenty to thirty years in finding a meaningful role for itself as one of over 1,000 English language conduits of legal scholarship.[82] The risk of a student-edited law review being defined solely by its niche in the arcane process of enhancing the credentials of legal academics seeking professional advancement is a real and disturbing one. As one who was its student editor-in-chief and later its faculty advisor for much of that time, the best and honest answer that I can give is that it has had its fair measure of accomplishments and also some disappointments, but that like most flagship law reviews, it is attempting to adapt, and I believe successfully, to changing circumstances in the legal academy, and also especially to the advance of technology.

An example of one those disappointments, which may have had its roots in the at times unrealistic role that student editors are now expected to play in deciding the professional fate of legal academics, was the *Law Review*'s most acutely embarrassing moment in recent history,[83] when in 1994 it was required to acknowledge publicly that it had published a lengthy lead article fairly characterized as more jurisprudential than doctrinal, authored by a well-respected senior law professor, that contained a significant amount of plagiarized

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Tenure, 103 Harv. L. Rev. 926, 931 (1990); *see also* Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38, 38 (1936) (famously identifying the two problems he perceived with legal writing, and law review writing in particular: "One is its style. The other is its content."); Fred Rodell, *Goodbye to Law Reviews -- Revisited*, 48 VA. L. REV. 279, 286 (1962).

80. Lasson, *supra* note 79, at 927.

81. Hibbitts, *supra* note 76, at 616.

82. The *Index of Legal Periodicals* currently lists 1136 legal periodicals as of March 2012.

83. *See* Editorial Board, *Notice to Readers*, 47 RUTGERS L. REV. 241 (1994) (referring to Stanley Ingber, *Judging Without Judgment: Constitutional Irrelevancies and the Demise of Dialogue*, 46 RUTGERS L. REV. 1473 (1994)).

material from another law professor. Although all parties acknowledged that the student editors of *Rutgers Law Review* could not have been faulted for neither finding nor preventing this lack of attribution,[84] this acknowledgement forces us to ask whether law students are equipped to make judgments or perform traditional auditing functions for some of the highly stylized and abstract papers that are now routinely submitted for publication—especially when much of the underlying discourse from which articles on jurisprudence or legal philosophy are derived now takes place in closed or relatively inaccessible settings,[85] at which legal academics write more for each other as the intended audience rather than the legal profession in general.

As for its accomplishments, the *Rutgers Law Review*, and indeed Rutgers Law School generally, has been at its best when it has heeded the advice given by Professor Kinoy when for almost forty years he exhorted each entering Rutgers class, quoting Oliver Wendell Holmes, that "[t]hose of you who aspire to greatness in the profession must immerse yourselves in the agonies of the times."[86] For the past eleven years, many in the Rutgers Law School community, and in the legal community generally, have believed that the greatest test of our fidelity to the rule of law has been the response to the greatest agony of our recent times: the terrorist attacks of September 11, 2001, and their aftermath. While it may be presumptuous to draw conclusions so soon after its publication, the symposium issue, *Unsettled Foundations, Uncertain Results: 9/11 and the Law Ten Years After*,[87] published a few months ago, may be a

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84. *Id.* at 244-45. Since the original work had not been published at the time the student editors would have performed the cite-checking process, there was no practical way they could have discovered the plagiarism. *Id.*

85. The author of the article admitted that he had been given a typescript of the unpublished work in anticipation of a symposium at which both authors participated a few years before publication in *Rutgers Law Review*. *Id.*

86. *See* Arthur Kinoy, *The Role of the People's Lawyer in the 1990s*, 2 TEMP. POL. & CIV. RTS. L. REV. 209, 226 (1993) (synthesis of a speech delivered by Professor Kinoy at Temple University on October 28, 1992); s*ee also* Charles Jones, *Why Not Freedom?*, 51 RUTGERS L. REV. 1063, 1063 (1999) (noting that Professor Kinoy gave the same exhortation to students at Harvard Law School). Professor Jones (now Professor Emeritus) continued:

> Professor Kinoy's commitment to the role of peoples' lawyer is evidenced from his life as a lawyer and teacher and is expressed in his writing. It was this sort of commitment that drew me and countless others concerned about social justice, to Rutgers Law School. In addition to Kinoy, in the late 1960s, Rutgers Law School defined itself as a school devoted to social justice through the development of a path-breaking clinical program, a nationally distinguished Minority Student Program, and a diverse faculty and student body.

Id.

87. *Symposium 2011: Unsettled Foundations, Uncertain Results: 9/11 and the*

defining moment for *Rutgers Law Review*. The Symposium was probably a somewhat lucky product both of timing and opportunity. Any earlier attempt to engage in a rational narrative of how traditional legal principles were altered to fit the metaphor of the "war on terrorism" would likely have been impossible; the legal landscape was changing too quickly, and the collective raw emotions of the moment needed a full decade to subside and thus permit reasoned discourse. And John Farmer's appointment as Dean of the Law School in 2009 enabled the Law Review to have unique access to primary participants and policy makers, due to his prior roles as New Jersey Attorney General on September 11, 2011, and as Senior Counsel to the National Commission on Terrorist Attacks Upon the United States (the "9/11 Commission").[88]

One article in the Symposium issue exemplifies the best traditions of Rutgers Law School and the *Rutgers Law Review* for the particular reason that it was written by a Law Review alumnus. Gary Thompson '90,[89] author of *Guantánamo and the Struggle for*

Law, Ten Years After, 63 RUTGERS L. REV. 1085 (2011). The symposium print issue included: John J. Farmer, Jr., *Introduction: Awaiting "The Authorities": 9/11 and National Security Doctrine After Ten Years*, 63 RUTGERS L. REV. 1085 (2011); Thomas H. Kean, *Unsettled Foundations: Ten Years After 9/11, Legal Questions and Practical Challenges of How to Battle Terrorism Remain*, 63 RUTGERS L. REV. 1095 (2011); John J. Gibbons, *Does 9/11 Justify a War on the Judicial Branch?*, 63 RUTGERS L. REV. 1101 (2011); Michael Chertoff, *The Decline of Judicial Deference on National Security*, 63 RUTGERS L. REV. 1117 (2011); Ivan K. Fong, *The Current State of Homeland Security*, 63 RUTGERS L. REV. 1135 (2011); Alec Walen, *Transcending, but Not Abandoning, the Combatant-Civilian Distinction: A Case Study*, 63 RUTGERS L. REV. 1149 (2011); Laurie R. Blank, *A Square Peg in a Round Hole: Stretching Law of War Detention Too Far*, 63 RUTGERS L. REV. 1169 (2011); Gary Thompson, *Guantánamo and the Struggle for Due Process of Law*, 63 RUTGERS L. REV. 1195 (2011); Nicholas Rostow, *The Laws of War and the Killing of Suspected Terrorists: False Starts, Rabbit Holes, and Dead Ends*, 63 RUTGERS L. REV. 1215 (2011); Jeff Mustin & Harvey Rishikof, *Projecting Force in the 21st Century - Legitimacy and the Rule of Law: Title 50, Title 10, Title 18, and Art. 75*, 63 RUTGERS L. REV. 1235 (2011).

88. *Faculty Profile: John J. Farmer, Jr.*, RUTGERS SCHOOL OF LAW—NEWARK, http://law.newark.rutgers.edu/faculty/faculty-profiles/john-j-farmer-jr (last visited Apr. 1, 2012).

89. Mr. Thompson was Senior Articles Editor for Volume 42 of *Rutgers Law Review*. His previous publication in *Rutgers Law Review* was on a less emotionally provocative subject, perhaps due to the wayward influence of his Federal Courts professor. *See* Gary Thompson, Note, *The* Rooker-Feldman *Doctrine and the Subject Matter Jurisdiction of Federal District Courts*, 42 RUTGERS L. REV. 859 (1990) (arguing that the *Rooker-Feldman* doctrine is unnecessary because its rationale is adequately served by principles of res judicata and abstention). Mr. Thompson's student note, however, has been frequently cited and indeed quoted by federal courts and other law review articles and is a good example of the value of traditional student written commentary, which are thoroughly researched, carefully written, and skillfully edited. *See, e.g.*, Riter v. Ross, 992 F.2d 750, 754 (7th Cir. 1993); Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148, 1193 n.217 (1998).

Due Process of Law,[90] is now a commercial litigation partner at a Washington D.C. law firm and was among those stalwart practitioners who dedicated hundreds of hours of pro bono service representing Guantánamo detainees.[91] He explicitly raised the question that most politicians who enthusiastically supported the Authorization for Use of Military Force ("AUMF")[92] nevertheless found inconvenient to answer explicitly: had the AUMF effectively suspended the writ of habeas corpus? An affirmative answer to that question would lead to the logical inference, under Article I, Section 9 of the Constitution, that Congress had determined the nation was in a state of "Rebellion or Invasion," the political consequences of which were probably unpalatable even to those who favored denial of basic procedural rights to Guantánamo detainees. Welcome, if not intentional, obfuscation of the legal status of military detainees, both by lawmakers and some courts,[93] has left them in legal limbo for over a decade without requiring an explicit admission that Congress believes the situation to be so grave as to warrant invocation of the Suspension Clause. Mr. Thompson attempts to call out those who seek to avoid accurate description of the doctrinal state of affairs and would compel them at least to acknowledge the current reality.

> At its core, the "Great Writ" of habeas corpus is the simple rule that an independent judge has the power to decide whether the government can detain an individual. In 1215, the ancient concept was given greater vitality on the field at Runnymede in England, when King John signed the Magna Carta and begrudgingly accepted that a king's decision to detain an individual would be subject to "lawful judgment of his peers [and] the law of the land." This was the very birth of the "separation of powers" that almost

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90. Gary Thompson, *Guantánamo and the Struggle for Due Process of Law*, 63 RUTGERS L. REV. 1195 (2011).

91. *Id.* at 1195 n.1 & 1196.

92. Pub. L. No. 107-40, 115 Stat. 224 (2001).

93. Justice Antonin Scalia, in his dissent in *Hamdi v. Rumsfeld*, roundly criticized the plurality opinion for "distort[ing] the Suspension Clause" and "transmogrifying the Great Writ" by interpreting the AUMF as authorizing indefinite detention by the Executive (albeit under minimal judicial supervision) even though concededly not an invocation of the Suspension Clause. Hamdi v. Rumsfeld, 542 U.S. 507, 576 (2004) (Scalia, J., dissenting). Justice Scalia vigorously expounded the view that unless Congress expressly invokes its power under the Suspension Clause, the writ of habeas corpus cannot be denied even under the justification of national defense.

> Many think it not only inevitable but entirely proper that liberty give way to security in times of national crisis—that, at the extremes of military exigency, *inter arma silent leges*. Whatever the general merits of the view that war silences law or modulates its voice, that view has no place in the interpretation and application of a Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it.

Id. at 579.

> six centuries later would become fundamental to the U.S. Constitution, with all of its checks and balances between three co-equal branches. The writ of habeas corpus itself was enshrined into the Constitution and subject to suspension only in times of war, rebellion, or insurrection. President Abraham Lincoln briefly suspended the writ during a time of obvious rebellion, the American Civil War. More than 140 years later, President George W. Bush effectively suspended the writ indefinitely for the hundreds of men who had been shipped to GTMO, purporting to take back what King John gave up at Runnymede—the total, unquestionable power to detain a human being without oversight or evaluation by anyone.[94]

Mr. Thompson opined that "[t]en years later, nearly everything about GTMO habeas litigation remains unsettled."[95] While taking some comfort from the Supreme Court's decision in *Boumediene v. Bush*,[96] which firmly established the right of Guantánamo detainees to seek habeas corpus relief,[97] he nevertheless concludes bluntly that "we have made a bungle of due process of law."[98]

Notably, another distinguished participant in the Symposium, former Secretary of Homeland Security Michael Chertoff, while predictably advocating for greater executive authority and less judicial intervention in national security,[99] found common ground with civil liberties advocates at least to this extent: the doctrinal confusion that still permeates the scope of judicial review of the status of Guantanamo detainees is just as much the fault of the Executive Branch in which he served, as it was the Judicial Branch whose intervention in *Boumediene* (as modest as it might have been) he criticizes. "[E]verybody was complicit in putting us in this situation—all three branches of government."[100] In Chertoff's view, the failure of the Executive Branch to negotiate with Congress to develop a "sustainable legal architecture" that would promote

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94. Thompson, *supra* note 90, at 1197 (footnotes omitted).

95. *Id.* at 1213.

96. 553 U.S. 723 (2008).

97. *Id.* at 771.

98. Thompson, *supra* note 90, at 1213. On this issue at least, Mr. Thompson is in good company. His views accurately reflect those of Justice Antonin Scalia in his dissent in *Hamdi*:

> If the Suspension Clause does not guarantee the citizen that he will either be tried or released, unless the conditions for suspending the writ exist and the grave action of suspending the writ has been taken; if it merely guarantees the citizen that he will not be detained unless Congress by ordinary legislation says he can be detained; it guarantees him very little indeed.

Hamdi, 542 U.S. at 575 (Scalia, J., dissenting).

99. Michael Chertoff, *The Decline of Judicial Deference on National Security*, 63 RUTGERS L. REV. 1117 (2011).

100. *Id.* at 1127.

confidence in a long term solution to handling of detainees was "a strategic error that more or less baited the Court into doing what the Court did."[101] Similarly, Chertoff chided that "Congress has never stepped up to the plate on this[,]"[102] and predicted that expenditure of some modicum of legislative effort at crafting comprehensive procedures designed to stabilize and routinize the process of detention may have forestalled the *Boumediene* Court's ultimate decision to intervene.[103] Thus, while some law review symposia may at times appear to be excessively choreographed recitations at which participants perform more than interact, the 9/11 Symposium was an example of the beneficial results of relatively unrehearsed colloquy, and disagreement followed by discovery of areas of consensus.

The 9/11 Symposium not only provided a unique platform for traditional legal scholarship, it also provided the opportunity for the Law Review to be a leader in the use of the Internet as a complementary method of disseminating legal scholarship and the raw data that informs that scholarship. Professor Hibbitts predicted in 1996 that the World Wide Web and related advanced information technologies could doom the traditional printed law review.[104] Among the benefits he gave for welcoming this predicted obsolescence was the limitation of the printed medium:

> On the Web, we no longer have to defer to the sensory limitations of the print medium; we can communicate our ideas and information with media and combinations of media that printed law reviews either cannot deal with or can deal with only with difficulty. For instance, an article on the Magna Carta might provide readers not only with the text of the famous thirteenth-century English charter, but also with a full color image of the manuscript in the British Library. Analogously, an article on the O.J. Simpson trial might include not only excerpts from the trial transcripts, but also pictures from the trial, audio clips of the legal arguments, and even video from the court proceedings.[105]

In a special section of the revamped Law Review website entitled "A New Type of War: The Story of the FAA and NORAD Response to the September 11, 2001 Attacks,"[106] however, the Law Review

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101. *Id.*

102. *Id.* at 1128.

103. *Id.*

104. *See* Hibbitts, *supra* note 76, at 687-88. Professor Hibbitts argued that the ability of authors to self-publish articles independently on the Web without abiding by the onerous procedures and limitations of submitting to a traditional law review "will almost certainly bring about the end of the law review as we know it, in both its print and electronic forms." *Id.*

105. *Id.* at 670.

106. RUTGERS LAW REVIEW, http://www.rutgerslawreview.com/2011/a-new-type-of-war/ (last visited Apr. 1, 2012).

provided a powerful response to this criticism when it posted a previously unpublished "audio monograph" by the 9/11 Commission staff that reconstructs the events of the day itself through audio clips of critical communications from the morning of 9/11, including radio communications with American 11, United 175, American 77, and United 93, linked by narrative and graphics that place each audio clip in context.[107] Such an interactive and multimedia presentation would have been impossible in the traditional printed format and is strong evidence that advanced information technology can enhance rather than supersede traditional formats for legal scholarship.[108]

V. CONCLUSION

Rutgers Law Review is nearing its second century when measured from the first printing of its earliest predecessor, and is in its sixty-fourth year of continuous publication. Concerning the future, like all human institutions, it is a fitting time for it to reexamine the traditional model of publishing legal scholarship and adjust accordingly to avoid obsolescence. Concerning the past, however, mindful of the words Arthur Egner wrote almost eighty years ago, the history of the *Rutgers Law Review* to date rebuts his contention that an abundance of legal scholarship "is more apt to lead to confusion of thought, from principles partially assimilated and distinctions vaguely apprehended, than to a substantial increase in our fundamental legal knowledge."[109] We hope that in hindsight, he would agree.

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107. Access to those audio clips was not easily obtained. John Farmer, Jr., *Preface*, RUTGERS LAW REVIEW, http://www.rutgerslawreview.com/2011/preface/ (last visited Apr. 1, 2012). As Dean Farmer wrote:

> The Commission had heard testimony early on that no tapes were made, and we were told at one point that a technical malfunction would prevent us from hearing them. If we had not pushed as hard as we did – ultimately persuading the Commission to use its subpoena power to obtain the records – many of the critical conversations from that morning may have been lost to history.

Id.

108. Released in conjunction with the tenth anniversary of the September 11 attacks, the audio tapes attracted nationwide attention in the general news media, receiving over 4 million hits from over 100 countries in the first thirty-six hours. *See, e.g.*, Jim Dwyer, *The Whole Building Just Came Apart*, N.Y. TIMES, Sept. 8, 2011, at A1, *available at* http://www.nytimes.com/2011/09/08/nyregion/newly-published-audio-provides-real-time-view-of-911-attacks.html.

109. *See* Egner, *supra* notes 18-20 and accompanying text.