A MISSED OPPORTUNITY

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An appellate judge recently chided me—law review articles are not worth reading, the judge told me. The criticism was hardly novel, and echoed comments from a litany of luminaries, including the Chief Justice of the United States John Roberts.[1] I had no rebuttal. The comment stung not only because I had just recently published a law review article (in *Temple Law Review*, no less[2]), but also because I was the editor-in-chief of *Temple Law Review* thirty-two years ago, and the judge's comment suggested that in that role I had squandered an opportunity to help improve the quality of legal scholarship.

Indeed I did.

Law review scholarship is simply too heavy. Its pages are packed with historical background, and its topics rarely help practitioners or jurists. Missing is the crisp, punchy style that makes readers thirst for more. Some density is inevitable given the nature and complexity of the subject matter—and I am not advocating that we dumb it down. But too often law reviews emphasize thoroughness and citation formatting at the expense of persuasiveness and clarity.[3]

Everyone agrees reform is needed.[4] Yet, nothing changes. Typical of law reviews, the debate over their usefulness generates even more law review articles.[5] Most exhaustively recount the history of the law review reform

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1. *See, e.g.*, Richard A. Wise et al., *Do Law Reviews Need Reform? A Survey of Law Professors, Student Editors, Attorneys, and Judges*, 59 LOY. L. REV. 1, 6 (2013) (summarizing public criticism of law review scholarship).

2. Timothy R. Rice, *Restoring Justice: Purging Evil from Federal Rule of Evidence 609*, 89 TEMP. L. REV. 683 (2017).

3. *See* Joseph Kimble, *How to Dominate Your Reader—and Make Stewie Griffin Proud*, MICH. B.J., May 2013, at 50, 50–52 (highlighting twelve writing flaws common to law review scholarship).

4. *See* Wise et al., *supra* note 1, at 71 (concluding in its study that "the vast majority of legal professionals and student editors believe that law reviews need reform and usually agreed on what reforms should be implemented"). In a 2004 survey of 780 faculty members by the *Harvard Law Review*, 85% believed law review articles were too long. *Id.* at 6 (citing Letter from law reviews at Columbia, Cornell, Duke, Georgetown, Harvard, Michigan, Texas, University of Pennsylvania, Virginia, and Yale (2006), http://harvardlawreview.org/wp-content/uploads/2014/03/articles_length_policy.pdf [perma: http://perma.cc/4C2G-3VXT] (expressing the preference for shorter articles)).

5. *See id.* at 75 (noting "the intense debates about law reviews and the hundreds of articles that

movement, beginning with what has been labeled the "polemic" of 1936.[6] Still, so many decades and articles later, nothing changes.

Ironically, given my judicial colleague's critical position, appellate opinions are not far behind.[7] Perhaps it is because they are often drafted by judicial clerks who formerly served as law review editors. Deciding the case is often secondary to an exhaustive survey and an unnecessary history that buries the holding, whatever it may be.

Contrast today's appellate opinions with those written by judges like James Hunter[8] and Albert Maris,[9] who served on the U.S. Court of Appeals for the Third Circuit only a generation ago. They got to the point. They identified the claim, cited only the relevant facts and controlling law, and rebutted the opposing argument. Their writing grabbed you. Case closed.[10]

I wish I did more in 1986 to get legal scholarship back to basics. I should have done my part to make it more useful, more readable, and more timely.

Time is the mortal enemy of law reviews. Student editors have only a year to complete their work. They must balance editing with their personal lives, class work, and job hunting. And they must do it while learning how to manage people and their own time. There is no human resources department, no overtime pay, a modest budget, no support staff, and minimal guidance from above. The publishing cycle demands that topics be submitted far in advance of the publication date, a tricky business when the law is subject to change at any time.

I wish I had invested the time, and had the vision, to consult alumni and judges to discuss legal trends, circuit splits, and issues impacting the profession. We could have identified and solicited potential authors to address those topics, instead of waiting for submissions from tenure-seeking faculty desperate to publish or perish. It would have required additional work, a lot of networking, and significant guidance from the faculty and alumni. But it would have paid dividends. Future editors should seek at least some content through atypical channels—it would only improve and diversify content.

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have been written about them").

6. *See*, *e.g.*, Harry T. Edwards, *Another Look at Professor Rodell's* Goodbye to Law Reviews, 100 VA. L. REV. 1483, 1484 (2014) (discussing Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38 (1936), which critiqued law reviews and noted: "In other words, law schools, law reviews, and legal scholars should do a better job in producing scholarship that is of interest and use to wider audiences in society"); Leo P. Martinez, *Babies, Bathwater, and Law Reviews*, 47 STAN. L. REV. 1139, 1139 (1995) ("From Fred Rodell's polemic to the present, there has been a consistent clamor for the abolition of the hated law reviews and their imperious stewards, the despised law review editors.").

7. *See* Bruce M. Selya, *In Search of Less*, 74 TEX. L. REV. 1277, 1278–79 (1996) (noting that appellate judges have "created a universe in which [their] opinions are longer but not better, more laden with citations but not weightier," and "combin[ing] 'more matter with less art'" (quoting WILLIAM SHAKESPEARE, THE TRAGEDY OF HAMLET, PRINCE OF DENMARK act 2, sc.2)).

8. *See* John F. Gerry, *James Hunter III: The Private Man*, 62 TEMP. L. REV. 805 (1989).

9. *See* Dolores K. Sloviter, *Albert Branson Maris*, 62 TEMP. L. REV. 471 (1989).

10. *See, e.g.*, Virgin Islands v. Leonard, 548 F.2d 478 (3d Cir. 1977) (example of four-page opinion by Judge Hunter); United States v. Lipsky, 309 F.2d 521 (3d Cir. 1962) (example of two-page opinion by Judge Maris).

Today, that process happens on a smaller scale with symposium issues dedicated to a specific subject and featuring scholarship from targeted experts in their field. Even symposium issues, however, are published nearly a year after the symposium.

The increasing trend toward publishing electronic issues gives editors more flexibility. Law reviews should simply scrap hard copy issues and move to digital publications that deliver innovative ideas to the bench and bar with ease and speed. Online legal research is so prevalent that even venerable institutions such as the Third Circuit library are relocating to smaller spaces. Thousands of volumes of case reporters and law reviews will vanish into digital databases.

Looking back on Volume 59 of *Temple Law Review*, which I edited, we did manage to publish some outside articles that benefited the bar and fostered developments in the law. Two examples come to mind. The first article advocated for federal legislation prohibiting employment discrimination against cancer victims.[11] It was provocative and timely. And it foreshadowed passage of the broader Americans with Disabilities Act a few years later in 1990.

The second article was dedicated to the findings of the commission examining the 1985 MOVE tragedy that left five children dead after Philadelphia police bombed a building and turned a neighborhood into an inferno.[12] Our faculty advisors said we were wasting an issue and straying too far from pure legal scholarship, but we persisted. The MOVE investigation not only gripped our community but implicated the rule of law and how it was administered.

As attorney Charles Bowser, a commission member, wrote in our pages: "The [MOVE] tragedy was more than an accident, it was a revelation of what we can become if the trappings and procedures of our lives overpower the purposes and potential of our humanity."[13] Powerful stuff. And not the usual law review fare.

The *Temple Law Review* boasts a history of fostering public discourse on legal issues of general interest and historical importance. In 1946, we published the proceedings of the Nuremberg trials for the Nazis' war crimes,[14] and in 1971 we published the investigation of racial discrimination in the Pennsylvania bar.[15] We need more of this.

On student scholarship, I also fell short. Although our pieces were consistently well written and thoroughly researched, I suspect that they had little impact. I should have scrapped the clumsy "case note" or "comment" format

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11. Barbara Hoffman, *Employment Discrimination Based on Cancer History: The Need for Federal Legislation*, 59 TEMP. L.Q. 1 (1986).

12. *See* Phila. Special Investigation Comm'n, *The Findings, Conclusions and Recommendations of the Philadelphia Special Investigation Commission*, 59 TEMP. L.Q. 339 (1986).

13. *Id.* at 379 (opinion of Charles W. Bowser, Commissioner of Philadelphia Special Investigation Commission).

14. Robert H. Jackson, *Closing Arguments for Conviction of Nazi War Criminals*, 20 TEMP. L.Q. 85 (1946).

15. Phila. Bar Ass'n Special Comm. on Pa. Bar Admission Procedures, *The Report of the Philadelphia Bar Association Special Committee on Pennsylvania Bar Admission Procedures—Racial Discrimination in Administration of the Pennsylvania Bar Examination*, 44 TEMP. L.Q. 141 (1971).

altogether.

Those antiquated vehicles offer students little room for original thought and persuasive legal analysis. Instead, their rigid structure and repetitive style drag readers on an endless slog through historical background, facts, procedure, and summaries of undisputed law. Any valuable legal insight is buried beneath the hallowed vault of footnotes. Moreover, interesting cases reviewed by students are often appealed and resolved by higher courts before the student work is published. And the less interesting cases become (you guessed it) even less interesting with time.

I should have unleashed our student authors to challenge the status quo, to propose better laws, to fix broken legal models, and to defend the good laws against unjustified attack and erosion. That would have been a call to arms, rather than an imposition of duty. Future editors must redefine the essence of student scholarship.

When I began teaching Evidence in 2005, I read a 1988 *Harvard Law Review* student article advocating judicial inquiry into jury verdicts tainted by racially biased deliberations.[16] Probing the sanctity of jury deliberations had been taboo for centuries,[17] but I watched as the First Circuit in 2009,[18] and then the Supreme Court in 2017,[19] adopted the student's vision as the law of the land. This was unjaded, forward-thinking, worthwhile student scholarship. We need more of it.

That is the model I should have promoted. The material was there. The brainpower of talented staff was there. I just missed the opportunity. And so have many of those who have edited law reviews around the country.

Although time is the enemy, law reviews can still reinvent themselves. As a former newspaper reporter, I have mourned the slow death of the printed news media. We are losing a great public institution because the newspaper industry ignored its critics for too long. It refused to adapt and change. And now it is almost too late.

Law reviews should learn from the demise of newspapers. If not, they risk drifting into irrelevance. But change will take much more than publishing long articles pondering the journals' delicate existence. And it will take much more from both students and legal academics.

16. Developments in the Law, *Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1595 (1988).

17. *See* FED. R. EVID. 606(b)(1) ("During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment."); Tanner v. United States, 483 U.S. 107, 117 (1987) (referencing the "near-universal and firmly established common-law rule in the United States flatly prohibited the admission of juror testimony to impeach a jury verdict").

18. United States v. Villar, 586 F.3d 76, 86–88 (1st Cir. 2009).

19. Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 869 (2017).