

FOREWORD: REFLECTIONS ON OUR FOUNDING

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Law Journals have been under heavy criticism for as long as we can remember. The criticisms come from all quarters, including judges, law professors, and even commentators at large. In an address at the Fourth Circuit Judicial Conference almost a decade ago, for example, Chief Justice Roberts complained about the “disconnect between the academy and the profession.”¹ More pointedly, he continued, “[p]ick up a copy of any law review that you see, and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th Century Bulgaria, or something, which I’m sure was of great interest to the academic that wrote it, but isn’t of much help to the bar.”² Similarly, law professors have developed what Lawrence Friedman calls “a literature of invective” against law reviews.³ Adam Liptak summarized one line of criticism with a question: “[W]hy are law reviews, the primary repositories of legal scholarship, edited by law students?”⁴

As far back as 1936, Fred Rodell famously complained that “the law reviews will keep right on turning out stuff that is not fit to read, on subjects that are not worth the bother of writing about them.”⁵ The criticisms have not abated.⁶ More recently, Jim Lindgren wrote that “[o]ur scholarly journals are in the hands of incompetents.”⁷ Judge Posner has similarly argued that “[g]iven the handicaps of ignorance, immaturity, inexperience, and inadequate incentives, the wonder is not that law reviews leave much to be desired as scholarly journals, but that they aren’t much worse

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1. SCOTUS Chief Justice Roberts criticizes legal scholarship for being out of touch with practicing bar, LEGAL SKILLS PROF BLOG (July 7, 2011), http://lawprofessors.typepad.com/legal_skills/2011/07/scotus-chief-justice-roberts-criticizes-legal-scholarship-for-being-out-of-touch-with-practicing-bar.html.

2. *Id.*

3. Lawrence M. Friedman, *Law Reviews and Legal Scholarship: Some Comments*, 75 DENV. U. L. REV. 661, 661 (1998).

4. Adam Liptak, *The Lackluster Reviews That Lawyers Love to Hate*, N.Y. TIMES (Oct. 21, 2013), http://www.nytimes.com/2013/10/22/us/law-scholarships-lackluster-reviews.html?smid=tw-share&_r=1&.

5. Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38, 45 (1936).

6. For a history, see Richard Brust, *The High Bench vs. the Ivory Tower: More Law Reviews Give Professors Places to Publish, but Judges Stick Up Their Noses at Elite and Useless Articles*, A.B.A. J., Feb. 2012, at 50.

7. James Lindgren, *An Author’s Manifesto*, 61 U. CHI. L. REV. 527, 527 (1994).

than they are.”⁸ Leo Martinez encapsulates this critical history as follows: “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.”⁹

We were vaguely aware of some of these criticisms in the Summer of 1994 when a group of us decided to create a new journal at Michigan Law School. We still remember the day early in the semester when we approached then-Dean Jeffrey Lehman with our vision for a new law journal that would focus exclusively on race issues. He did not immediately shoot us down, which we took as a good sign. Instead, he directed us towards Professor Deborah Malamud, who agreed to meet with us and provide whatever guidance she could. She was a great friend to us. Her guidance was invaluable and always sobering.

She was not the only friend we discovered. Along the way, we made a great friend of Mrs. Maureen Bishop, who was the Publications Manager for all of the journals with the exception of the Law Review. She believed in our enterprise, fought for us, and guided our steps. Of course, we would be remiss not to note the encouragement that we received from Mrs. Dores McCree. She was our angel. With her blessing and the support of Mrs. Bishop and Professor Malamud we forged ahead.

Our reasons for starting a race journal at the law school were diffuse though strongly held. We still remember the day when the editors-in-chief came to our torts class in the spring of our first year. Some of us had no clear idea of what a law review was or what exactly it did. At this point in our lives, we had no time to think about things like that. But we knew enough to know that these were prestigious, “exclusive clubs,”¹⁰ open only to a select few. We also knew that they mattered. Law reviews, and

8. Richard A. Posner, *The Future of the Student-Edited Law Review*, 47 STAN. L. REV. 1131, 1132 (1995).

9. Leo P. Martinez, *Babies, Bathwater, and Law Reviews*, 47 STAN. L. REV. 1139, 1139 (1995).

10. Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926, 932 (1990); see also Roger C. Cramton, “The Most Remarkable Institution”: *The American Law Review*, 36 J. LEGAL EDUC. 1, 5-7 (1986); Harold C. Havighurst, *Legal Reviews and Legal Education*, 51 NW. U. L. REV. 22, 23 (1956) (“Indeed, the term ‘law review student,’ in that it has come to designate one who is superior, has achieved a general honorific significance.”); Frank Kubler, *What’s Wrong with Law School: Even Socrates Didn’t Use the Socratic*, 14 STUDENT LAWYER, Nov. 1985, at 10, 11 (“Although law review is, in truth, little more than a freshman honor society providing experience staffing a periodical, it has achieved a status unequalled by any other honors recognition and unparalleled in any other educational program.”); James Lindgren, *Return to Sender*, 78 CAL. L. REV. 1719, 1722 (1990) (quoting a professor who, while speaking with the editors of the Texas Law Review, remarked: “You’re supposed to be the cream of the Texas Law School.”). For critiques of this practice, see Kubler, *supra* note 10, at 10; Phil Nichols, Note, *A Student Defense of Student Edited Journals: In Response to Professor Roger Crampton*, 1987 DUKE L.J. 1122 (1987).

particularly the flagship law review,¹¹ conferred prestige and a “mark of merit”¹² upon their members. What we could only intuit at the time, but came to know better in due time, was the important role that law reviews play as part of the educational mission of law schools.¹³

Law reviews dispense with such valuable honor badges and pedagogical opportunities under criteria that made no sense to us at the time. We implicitly understood that we, law schools and the legal academy, ask law review boards – that is, third-year law students – to act as gatekeepers of a very valuable commodity. This is no small thing. We found this especially troubling because law reviews at public law schools are public institutions subsidized by the schools, which means that “law schools support a pedagogical strategy whereby a minority of their students are given an intensive training in some practical skills where the vast majority are inadequately trained.”¹⁴ We knew enough to understand that law reviews were part of a law school’s educational mission. We also knew that, by and large, most students of color did not have ready access to that part of our Law School’s educational institution.

The law review process made sense only as long as we could accept the idea that merit drove the process. At the very least our intuition and what we observed around us told us to be very suspicious of claims of merit. The admissions process for most law reviews is driven by grades and a writing competition. It is not clear how these two metrics correlate with the actual responsibilities of law review editors.¹⁵ Law review editors are

11. Not to put too fine a point on it, age makes all the difference in the world. See Jordan H. Leibman & James P. White, *How the Student-Edited Law Journals Make Their Publication Decisions*, 39 J. LEGAL EDUC. 387, 387 (1989) (“Because they are generally older than the school’s specialty reviews, they have had more time to accumulate the patina of prestige.”).

12. KARL N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 134 (Oceana Publications, special ed. 1951).

13. See, e.g., Gerhard Casper, *Foreword*, 50 U. CHI. L. REV. 405, 405 (1983) (“[T]he participation of students in the critical assessment of law and legal literature, which law reviews provide, is one of the distinctly American means for achieving the depth of understanding and fidelity to one’s materials that make up some of the essence of a learned profession.”). This is a widely held view. See John Jay McKelvey, *The Law School Review: 1887-1937*, 50 HARV. L. REV. 868, 883 (1937) (“[I]t is clear that the review is looked upon as a part of the machinery of the school for educating the students, as is the lecture room or the roundtable conference.”); David F. Cavers, *In Advocacy of the Problem Method*, 43 COLUM. L. REV. 449, 450 (1943) (asserting that “most law schools have been running two educational systems concurrently”—“the familiar casebook system” and the law review process); James Lindgren, *Student Editing: Using Education to Move Beyond Struggle*, 70 CHI.-KENT L. REV. 95, 97 (1994) (“Students, on balance, do learn something. It’s an intense experience; they learn because they have to.”); Scott M. Martin, *The Law Review Citadel: Rodell Revisited*, 71 IOWA L. REV. 1093, 1099-1101 (1986) (“The entire process of writing for, researching for, editing, and operating a law review is of extraordinary educational benefit to those students allowed to participate.”) (footnote omitted).

14. JOEL SELIGMAN, *THE HIGH CITADEL* 185 (1978).

15. See, e.g., Kubler, *supra* note 10, at 12 (“[I]f the law review admissions process does what it purports to do [with its writing competition], it separates students who already write well and don’t need the experience, while excluding absolutely those who do.”).

asked to cite-check articles during the first year, after which a select few will move on to editorial boards and give shape to the new volume of the law review. It is debatable whether most law students, whether in the top, middle, or bottom of their class hierarchy could do this well. Grades and the writing competition, that is, are less than imperfect proxies for law review membership. More importantly, this means that the process serves as an echo chamber, reproducing the hierarchies that form after the first year. The process of selecting the staff of a law review, in short, is not easy to defend.¹⁶ We were particularly troubled by what we perceived as the reproduction of inequality.

In our most idealistic days, we wished to take on the law review culture. We wanted to force students to make a choice between the flagship law review and our nascent race journal. But we knew that the law review had a few built-in advantages, including a head start dating back to 1902.¹⁷ Instead, we thought of the Journal as a reaction to the dearth of a space within the Law School community for students of color to build intellectual community as well as social community by talking about their experiences. Many, though not all of us, experienced Michigan Law School—and, by extension, its flagship journal, the Michigan Law Review—as less hospitable to students of color than White students. While we felt privileged to be at the Law School, we were at the same time battling periods, sometimes prolonged periods, of marginalization. It was hard to make a general assessment of the Law School. Some faculty supported students of color profoundly and others were profoundly hostile. Though the Law School did not take hiring faculty of color seriously, the Michigan Journal of Race and Law would not have existed without the support of the Law School Administration and various faculty members. Moreover, the Michigan Journal of Race and Law would not have existed if the Law School had not admitted and matriculated the large number of students of color and allies that formed the core of Journal members for the first few years of the Journal's existence. The Journal was necessary because of the deficiencies we experienced at the Law School, but the Journal was possible because the Law School admitted a “critical mass”¹⁸ of students of color such that our collective action could have an impact on the institution. The Journal was borne out of a lack of institutional responsiveness, but it was possible because of the Law School's responsiveness—albeit sometimes grudgingly but responsive nonetheless—to our concerns. We were both at home and estranged in what was ostensibly our institution. Our task was to continually reconcile ourselves to being at a place

16. See E. Joshua Rosenkranz, *Law Review's Empire*, 39 HASTINGS L.J. 859, 892-94 (1988).

17. See Jeffrey S. Lehman, *Foreword*, 100 MICH. L. REV. 1791, 1792 (2002).

18. *Grutter v. Bollinger*, 539 U.S. 306, 318 (2003).

that presented for many of us a realistic promise of a better future yet sometimes called our very presence into question.

A report commissioned by the student intervenors in the Grutter litigation confirms our experience.¹⁹ The report, based on interviews and focus groups with undergraduate students at four schools considered to be “feeder schools” for Michigan Law School,²⁰ concludes that “students of color experience these campuses as hostile environments, places where they are either not welcome or are welcome only in clearly delimited, subordinate status.”²¹ For some of us, this conclusion summarizes our experience at the Law School. The report further argues that students of color at Michigan “have become very adept at navigating their way through the law school by ‘picking and choosing their battles’ wisely.”²² For many of us, this was the Michigan Journal of Race and Law.

We knew what journal membership meant and the many benefits it bestowed upon its members. We also knew what it meant for employers, clerkships, and alumni networks. But we also knew that far too few students of color at Michigan Law School took part in this process.²³ To be sure, we were not naïve in thinking that a new race journal would soon give us all the benefits that flagship journals gave their members. But at the very least, we wanted to create a separate space that would allow students of color to take part in the law review experience and gain some of the benefits that this experience had to offer.²⁴

Some of us had even bigger ideas. We were outsiders within an institutional culture that never tired to remind us of that fact. The law review process simply replicated this culture. Every year a few students of color would join the ranks of the law review and the existing structural inequalities would continue. In responding to these inequalities as we did, we were fully aware about the implicit dangers of advocating integrationist strategies at the expense of criticisms of the status quo.²⁵ Rather than take part in a process that would lead to further subordination, we wanted to use our subordinate status to our advantage.

19. See generally Walter R. Allen & Daniel Solórzano, *Affirmative Action, Educational Equity and Campus Racial Climate: A Case Study of the University of Michigan Law School*, 12 BERKELEY LA RAZA L.J. 237 (2001).

20. U.C. Berkeley, Harvard, Michigan, and Michigan State. See *id.* at 242.

21. *Id.* at 301.

22. *Id.* at 288.

23. Martin argues that the limited availability of membership on journals is “[t]he greatest failing of the law review system.” Martin, *supra* note 13, at 1102.

24. See Meera E. Deo, *Two Sides of a Coin: Safe Space & Segregation in Race/Ethnic-Specific Law Student Organizations*, 42 WASH. U. J.L. & POL’Y 83, 83 (2013) (explaining that “[m]any law students of color create and join race/ethnic-specific organizations in order to receive support on otherwise unwelcoming campuses”).

25. See generally Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758 (1990).

Finally and importantly, many of us harbored academic aspirations. We were after all attending an academic institution with a very theoretical approach to legal education. Intellectualism was the coin of our realm and the lingua franca. It should not have been surprising that many of us wanted to be law professors, and we implicitly understood working on a journal as an important step toward achieving those aspirations. Ironically, for many of us, our intellectual yearnings were developed at the Law School as a by-product of our very theoretical education. But the place that created those intellectual desires seemed unwilling to nurture those desires when the desires manifested themselves in colored bodies. There were then few academics of color at the Law School. Sallyanne Payton and Jose Alvarez were on the faculty then, and Sherman Clark joined before many of us graduated. Many of our academic heroes were the authors of the articles that shaped the Critical Race Theory movement.

To us, the Journal would be a type of Habermasian counter-public, a space where students of color could explore their intellectual curiosities, build community, and come together to fight the battles within the law school that needed to be fought. We were not the only group within the law school pushing back on the injustices and inequalities among us. With the journal, however, we hoped to institutionalize our counter-publicness. We also wanted, as Rosa Ehrenreich writes, to “provide a supportive intellectual forum for students.”²⁶ As we come together for the twentieth anniversary of the Journal, we look back fondly and proudly on these early years.

It was not easy. To be sure, there were many journals at the time, perhaps too many journals, at the Law School and across law schools in general.²⁷ Also, recruitment proved to be difficult. The challenge was to motivate and recruit students to join a fledgling institution that promised great things but could not be sure to deliver on anything. We were mostly second-year students who had not undergone the training that the traditional law review process accords new members. This was a criticism we heard often: we were the blind leading the blind. Of course they had a point; we were the blind leading the blind.²⁸ But we still could not under-

26. Rosa Ehrenreich, *Look Who's Editing*, LINGUA FRANCA, Jan.-Feb. 1996, at 56, 62; cf. Editorial Page, 1 BERKELEY WOMEN'S L.J. iii, iii (1985) (establishing as their editorial priority “to give voice to the complex and varying perspectives reflecting the legal concerns of all women, especially the women of color, lesbians, disabled women and poor women whose voices have been severely underrepresented in existing literature”).

27. This was an early criticism of law reviews. Alan W. Mewett, *Reviewing the Law Reviews*, 8 J. LEGAL EDUC. 188, 188 (1955).

28. What we did not know was that they were pretty blind themselves. This is a leading criticism of law reviews, the shortcomings of student editors. This criticism unfolds into three further claims. One, that students are not familiar with topic at hand, “particularly when the author is changing or developing a field by making new points.” Carol Sanger, *Editing*, 82 GEO. L.J. 513, 517 (1993). Two, that the students are simply not good at editing. See Lindgren, *supra* note 13, at 95 (“Student editors are grossly unsuited for the jobs they are faced with.”); Fred

stand the reaction; it was not clear to us why they would focus on what was clearly going to be yet another marginal journal at the Law School. Moreover, it was not as if we were taking students from their journal. So we pressed ahead.

We also did not have any illusions that leading academic stars would send their articles to us. That was a big issue for us. How would we get submissions? This is where we got the idea for a symposium, *Toward a New Civil Rights Vision*. The law school administration proved incredibly supportive of this project. And the number of scholars willing to come to Ann Arbor for our conference was far better than we had a right to imagine. We just called them, and they supported us. We are forever grateful.

Once we had a solid group of students willing to meet and discuss what it would take to get the Journal off the ground, we began to hold regular meetings. We met at a nearby café, Espresso Royale, on State

Rodell, *Goodbye to Law Reviews—Revisited*, 48 VA. L. REV. 279, 289 (1962) (“[T]hree-fourths or more of the bright boys who beat their way into law school, cannot, even after four years of college, construct a decent English sentence, much less an entire paragraph that holds together.”); Sanger, *supra* note 28, at 518. The first and second criticism blend into a third, that the students lack the scholarly expertise to edit capably. See Arthur Austin, *The Reliability of Citation Counts in Judgments on Promotion, Tenure, and Status*, 35 ARIZ. L. REV. 829, 832 (1993) (“Student editors are more interested in playing mind games with the latest edition of the Bluebook than looking at the relevance and content of cites. Even if they wanted to evaluate, they lack the expertise.”). Horror stories abound. See, e.g., Patricia J. Williams, *The Death of the Profane*, in *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* 44, 45, 48-49 (1991):

Two days after the piece was sent to press, I received copies of the final page proofs. All reference to my race had been eliminated because it was against “editorial policy” to permit descriptions of physiognomy. “I realize,” wrote one editor, “that this was a very personal experience, but any reader will know that you must have looked like when standing at that window.” In a telephone conversation to them, I ranted wildly about the significance of such an omission. “It’s irrelevant,” another editor explained in a voice gummy with soothing and patience; “It’s nice and poetic,” but it doesn’t “advance the discussion of any principle . . . This is a law review, after all.” Frustrated, I accused him of censorship; calmly, he assured me it was not. “This is just a matter of style,” he said with firmness and finality.

Ultimately, I did convince the editors that mention of my race was central to the whole sense of the subsequent text; that my story became one of extreme paranoia without the information that I am black; or that it became one in which the reader had to fill in the gap by assumption, presumption, prejudice, or prejudice.

See also Sanger, *supra* note 28, at 520-21 (“One friend was required to write out what L.A. stood for (not in Los Angeles, but in H.L.A. Hart) and to fix his citations accordingly. Another was forbidden to use the word ‘gendered’ as an adjective in a piece on women and culture; another had all her ‘whiches’ changed to ‘thats.’ I have experienced editors who did not believe in commas and others who insisted that all plural nouns take singular objects (for example, ‘women [plural] may decide to continue their pregnancy [singular]’).”); Lindgren, *supra* note 13, at 96-97 (documenting a number of examples where student editors of “top law reviews” either abused their position as editors or asked for ridiculous changes to the original text).

Street. We had discussions and disagreements about everything. One particular discussion that still resonates after so many years was about choosing a name for the Journal. An early candidate was “Journal of Critical Race Theory.” We ran the idea by Professor Alex Aleinikoff, who at the time was communing between D.C. and Ann Arbor, and he warned us to be careful not to identify the journal with any particular movement. He was right, of course, but the point was not evident to all of us. We also toyed with “Re-Visioning Justice: The Michigan Journal of Race and the Law.” In the end, almost by default, we settled on “Michigan Journal of Race and Law.”

We intensely debated the Journal’s leadership structure: whether it should be hierarchical, like the traditional journals, or horizontal like some newer journals, and particularly the Michigan Journal of Gender and Law. Though the decision was far from unanimous, we ultimately settled on a vertical, hierarchical framework. Most of us were persuaded that students of color needed to be Editors-in-Chief, Managing Editors, Articles Editors and the like. Some of us felt very strongly that there needed to be a space within the Law School for students of color to exercise leadership skills and to be recognized for doing so. Others felt equally strong that this fledgling institution was already compromising the very principles of critical and radical racial equality upon which it was founded. This was not the last time we debated the extent to which the Journal ought to create a more racially equitable version of the dominant paradigm so long as it opened up the paradigm to students and academics of color or whether the Journal ought to create a different paradigm that would serve as a model of equality for the Law School, the University, and society at large.

We often confronted that question in the selection of articles. How should we define merit? Should it differ from the dominant definition and construction of merit? Was our purpose to reconceive the academy’s conception of good scholarship or to provide an outlet for good work being done by great scholars? The Journal presented many opportunities for us to wrestle with underlying critical commitments and principles that many of us shared with practical considerations of putting together a legal magazine.

We had many funny hiccups. We had much to learn, and we learned a lot. We had to learn to do our own typesetting and to get the articles “camera-ready.” We chased our tails often and struggled with the demands of Journal work and our own academic expectations. We also learned that students of color were not the only ones who felt alienated by the institution. Many White students, particularly conservative White students, also felt that this was not their institution and that their intellectual promise was not valued. Alienation is complicated, and allies may be found in unexpected quarters.

So this is our story. A little bit over twenty years ago, a group of students of just about every race—White, Asian, Latino, Native, Black—

and some of mixed-race, came together to leave the University of Michigan Law School a better place than they found it. They came together because they felt excluded and marginalized by important parts of the institution. Many were students of critical race theory, some were political theorists, some were activists, some just wanted to do something positive. For almost two years, they worked together, they fought together, they just about lived at the Law School together, and they created something together. They created the Journal because they refused to be complicit in their own marginalization. They created the Journal to bear witness to their academic capabilities and their academic aspirations. By this endeavor they meant to say to a skeptical institution: “We too are smart, capable, ambitious, flawed, petty, funny, vulnerable, strong, human. This institution is also ours.”

Many of us are now legal academics. From the founding era of the Journal – that is, the first three years of its existence – at least seven members are currently legal academics. One of our enduring hopes for the Journal is that it will remain a stepping-stone for students at the University of Michigan Law School who harbor academic aspirations. We hope that it is a place where many will find their academic voice and the fulfillment of their intellectual promise.

To be honest, when we were working on the Journal, few of us gave little thought to whether our footsteps would remain in the sand. Our hope was that we would look back in ten years and see an institution still standing. If we could speak for those who founded the Journal, our guess is that they would say, as we do, that they wanted to leave the institution a better place than they found it. It is now twenty years into the future. We could not be prouder. It is now up to future generations to make their mark.

