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In its first seventy-three years of existence, the Virginia Law Review never had a black member. In an effort to eradicate this perceived injustice, the Review adopted in 1987 an affirmative action plan designed to increase minority membership.\(^1\) It invited third-year student Dayna Bowen Matthew, a black, to be a member. Matthew’s admittance onto the Virginia Law Review was not a result of the affirmative action plan.\(^2\) Two other black classmates, however, were invited to become members as a result of the affirmative action plan.\(^3\) In this respect, the plan was successful; blacks had finally broken the barrier of what has been described as a white institution—the law review.\(^4\)

Matthew’s response to her and her black classmates’ admittance and the implementation of the affirmative action plan shed doubt on the plan’s purported success. She explained: “Affirmative action was a way to dilute our personal victory. It took the victory out of our hands. I see this well-intentioned, liberal-white-student affirmative-action plan as an intrusion.”\(^5\)

The controversy that arose in response to the affirmative action scheme at the Virginia Law Review was not new. When the
Harvard Law Review implemented an affirmative action plan in 1982, that plan was also disputed. This Note discusses the issues involved in affirmative action on law reviews. Part I examines law review affirmative action admissions schemes and alternative types of affirmative action programs. Part II considers the arguments supporting and opposing the implementation of affirmative action programs by law reviews. Part III presents the results of a survey of law reviews concerning affirmative action. This Note concludes that affirmative action programs are the most effective means of increasing minority membership on law reviews, but that law reviews may increase minority membership through other methods.

I. CURRENT MODELS AND ALTERNATIVE MODELS

To implement their affirmative action goals, law reviews have pursued different means. Law reviews have utilized a strict quota plan and a "goals" plan. Although no law review permits affirmative action candidates to apply after their second year of law school, this method would also make a viable affirmative action program. Law reviews have also varied in their determination of who constitutes an affirmative action candidate.


7. As used here, "law review" means a student-run organization that publishes scholarly work on various aspects or one aspect of the law. At a law school with more than one student-run publication, "law review" usually refers to the preeminent publication of the school—the one that selects its members through a process that includes the use of grades and whose writing competition is considered more rigorous. See Fidler, Law Review Operations and Management, 33 J. LEGAL EDUC. 48 (1983). For criticism of law review management, see Cane, The Role of Law Review in Legal Education, 31 J. LEGAL EDUC. 215 (1981). For a history of law reviews, see Swygert & Bruce, The Historical Origins, Founding, and Early Development of Student-Edited Law Reviews, 36 HASTINGS L.J. 739 (1985).

Law reviews are important because of the legal community's dependence on them for "the highest quality and most important legal writing possible." Kornstein, Race, Sex and The Law Review, N.Y.L.J., July 22, 1981, at 2, col. 3. They are unique because they are managed and operated by law students. See generally Fidler, supra. No other academic or professional field has its most prestigious journals published by the students in that graduate department or professional school. Kornstein, supra.
A. The Strict Quota Model

The strict quota plan allots a set number of invitations to affirmative action candidates. Non-affirmative action applicants are ineligible for that specific number of places. The specified number of affirmative action invitations are extended regardless of the number of minority students who gain admission to the review without the assistance of the affirmative action plan. No ceiling exists, only a floor designating the minimum number of invitations that must be made to minorities. The size of the minority group admitted may vary from year to year, depending on the number of minority students who gain admission through the regular admissions process, while the size of the staff will remain the same.

A typical plan works as follows: The law review accepts the two affirmative action candidates with the highest grades in the affirmative action pool. The review also accepts the two affirmative action candidates with the highest writing competition score.8 Students chosen in either the grades or writing category must be in the top fifty percent of the law review applicant pool. If there are not two candidates in one of the categories who are in the top fifty percent of the applicant pool, the candidate with the next highest score in the other category is chosen. If neither the students with the highest writing scores nor the students with the highest grades among the affirmative action candidates are in the top fifty percent of the entire applicant pool, then no minority applicants will be invited to join the publication through the affirmative action process.

Another strict quota plan has no minimum criterion. The two affirmative action candidates with the highest scores based on grades or the writing competition or both combined would receive invitations to join the review regardless of their rank in the applicant pool. This method guarantees minority representation unless no minority students apply for membership.9

B. The Second-Year Model

The second-year plan allows affirmative action candidates to apply for admission onto law review after the completion of

8. Writing competitions are explained infra note 41.
9. This statement assumes that students must apply for membership before the law review looks at their grades.
their second year of law school. Under this plan, the student has two opportunities to make law review—once after the first year and again after the second year. Theoretically, this plan compensates minority students who got off to a “slow start” during their first year because of the difficulties involved in adjusting culturally to law school.

The second-year plan allows minorities to enter the law review admissions competition in order to demonstrate either improved writing and research skills or better grades. Implementation of this mechanism allows not only a comparison between the law student and the rest of her second-year class, but also a comparison between the law student’s first and second year of law school. A large improvement could indicate both a potential to succeed on law review and that any lack of success in the first year was an aberration due to cultural disadvantages.

One drawback of this model is that the third-year invitee would not be able to assume a position of leadership on the publication because of her junior status. One response to this observation is that a minority who is a junior member on a publication benefits from the experience—that it is better to have some minority participation than none at all.  

Another unresolved question is whether nonminorities would be able to apply after their second year as well. Nonminorities should not be allowed to apply after the second year. Although it is likely that some of these students improved greatly in the second year of law school, they did not undergo the same cultural adjustment to law school as minorities. They do not deserve the benefits of the second-year plan.

A separate question concerns class grading averages. If a law school encourages its instructors to grade their first-year classes more favorably than their upper-class students, a student may improve relative to his class but not relative to his first-year performance. In this instance, the law review may want to recognize that receiving a B in a class taken during the second year is more difficult than receiving a B in a first-year class. The law review may want to adjust grade point averages according to a lodestar method that considers what year the class was taken.

Finally, allowing the addition of more staff members after the second year may enlarge the publication unmanageably. If a publication invites more people than it needs, it may become inefficient or unwieldy. If, on the other hand, a publication suf-

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10. For a discussion of the importance of minority participation on law reviews, see *infra* Part II, section G.
fers from a high attrition rate, another group of junior members may be just what it needs.

C. The "Goals" Model

Under the "goals" plan, the publication determines the number of minorities to invite. That numerical goal is tied to the percentage of minorities in the law school. If that number is not reached through the regular review selection process, then the law review considers an applicant's race or ethnic origin.

The object is not to limit the number of minority members on the law review, but to ensure that a minimum number of affirmative action candidates become members. A result of this procedure may be that the number of minorities remains constant from year to year, unlike the strict quota plan. If a sufficient number of minority students makes law review without affirmative action, then the publication does not select any applicant through the affirmative action process.

D. Who's Who?

In the implementation of any affirmative action plan, a law journal must determine which minorities will be eligible for affirmative action consideration. How will a law review know whether a minority applicant comes from an economically and educationally advantaged background?

One law review attempted to solve this problem by requiring those who wanted to be considered affirmative action candidates to write an essay. The minority candidate would explain why

11. This goal may also be tied to the percentage of minorities in the community in which the law school is located or in American society.

This goal may also consider the composition of the entire law review and not simply the composition of the incoming members. For example, a law review with fifty members, none of whom are minorities, may want to meet the percentage of minority law students on the law review all at once. If the number of minorities at the law school is ten percent, then it selects as a goal five minorities for the junior members, not two to three minorities (which would be ten percent of twenty-five new members).

12. See supra Part I, section A. Minority students also may exceed the target goal without the help of an affirmative action plan.

13. Although differences exist among minority applicants, institutional racism cuts across socioeconomic class lines and does not significantly decrease for minorities who have had the economic and educational benefits that most minorities do not have.

14. The identity of this law review will be kept anonymous. See infra Part III for information regarding survey results of law review affirmative action programs.
she should be considered differently from the nonminority students in her class. This law review dropped the essay portion of the law school application because it failed to attract minority applicants. Why it failed to attract minorities is not certain. Common sense, however, leads to the following conclusions: First, minorities find it offensive to prove they deserve affirmative action status. They loathe the idea of writing about themselves in a way that portrays themselves as culturally and economically disadvantaged. Second, minorities believe that all minorities face significant, pervasive racism and that requesting an essay implies that some minorities do not.

The law review that used an essay portion adopted a simpler alternative. It required only that anyone who requested consideration as an affirmative action candidate check off a box on the law review application. By checking off this box, the individual consented to the law review's perusal of admissions records to determine if the law school itself considered her eligible under its own affirmative plan.

This solution resolves the problem of what criteria the law review should use to determine affirmative action status. If someone were one-sixteenth Native American, but had past experience demonstrating that she was dedicated to the Native American cause, should the review consider her eligible for affirmative action? Here, two important considerations exist: an individual's ability to surmount past obstacles and a person's commitment to minority advancement. By not requiring an essay and by allowing the admissions office to make this decision, the law review avoids the issue.

Although it is easier to let the admissions office wrestle with these decisions, a law review may have different objectives from the law school in general. Law reviews presumably are interested in publishing diverse ideas. Nonminority students committed to the advancement of minorities may add more diversity to the publication than some minority students. These majority students may urge the acceptance of articles regarding minority concerns and the publication of journal symposia regarding minority issues; and they may encourage junior members to select note topics dealing with minority issues, in addition to writing notes about minority concerns themselves. Although majority students can also contribute to the diversity of a publication, diversity is only part of the reason for affirmative action. Affirma-

15. See supra note 13.
tive action is also meant to compensate for past discrimination, something only minorities experience.  

II. THE ARGUMENTS FOR AND AGAINST AFFIRMATIVE ACTION ON LAW REVIEWS

Opponents of affirmative action make six major arguments: (1) affirmative action destroys meritocracy;  
(2) it stigmatizes minorities;  
(3) the writing competitions law reviews use are already affirmative action plans; (4) affirmative action diminishes the prestige of the review; (5) the quality of the work published will be inferior;  
and (6) affirmative action is not necessary because nonmembers may submit notes to the law review for publication. Proponents of affirmative action plans attempt to rebut these arguments and offer four major reasons why affirmative action plans are necessary.

A. Meritocracy

Advocates of the meritocracy argument assert that law review is supposed to be for the top students of the law school, “with its automatic passage to Supreme Court clerkships and major law firms.” The top students can be identified largely by their high grades. Grades are significant, the argument goes, because

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16. See supra note 13; see infra Part II section G.
18. See Drawing Distinctions at Harvard Law, supra note 17; Raspberry, supra note 3.
20. See Graves, supra note 2.

Judicial clerkships are important in part because they “buy privilege and prestige” and they “hasten advancement at a firm or at a university throughout the lawyer's professional life.” Chambers, supra, at 14, col. 1.
they indicate objectively a student’s ability to excel (A’s are rarely a fluke). In addition, they show which students possess sufficient academic strength to fulfill the obligations of law review without jeopardizing their legal educations. A law review does not want to burden students so much that they neglect class work and perform poorly. Students who achieve the highest grades not only deserve to be on law review, but they can usually budget the time obligations imposed by the review.

Proponents of the meritocracy argument assert that grades are also important because they indicate a willingness to work hard, and hard work is an essential aspect of law review. Review members work “aplenty.” An editor can spend seventy hours a week reading, writing, and editing legal articles. This time comes in addition to the researching and writing she does on her own note. Those who receive the highest grades are considered to be the most committed to working hard in the law school. Similarly, those who succeed in writing onto law review demonstrate a strong desire to work on the publication.

Advocates of the meritocracy approach conclude that admitting applicants because of their race or ethnic origin defeats one of the law review's chief criteria: selecting students who have shown they are hard workers by obtaining high grades or writing onto the publication. Minority students admitted through affirmative action are neither at the top of their classes nor among the best writers in their classes, yet they have made law review based on a factor unrelated to merit. An opponent of affirmative action on law reviews complained: “[A] fixed standard of merit is being abandoned for only the vaguest reasons of social good. The editors [of the Harvard Law Review] have yet to explain how the merit system damaged or handicapped the magazine.”

24. Kornstein, supra note 7.
25. Id. at 2.
27. Kornstein, supra note 7.
The flaw of the merit argument in the law review context is the same flaw of the argument in affirmative action generally. The deficiency in the merit argument is not that merit is unimportant, but that, at the present time, the criteria used in law schools to measure merit are inaccurate. Written tests, whether designed to measure aptitude or achievement, do not reflect accurately a student’s potential. The Law School Admissions Test (LSAT), for instance, is accurate less than half of the time as a predictor of future performance.\(^{29}\) Law school examinations, like the LSAT, cannot measure qualities that are important for law students and attorneys, such as “maturity, motivation, self-reliance and discipline, dependability and determination.”\(^{30}\)

Besides being inaccurate as a measure of potential, law school examinations are biased against minorities. A strictly merit-based system in higher education has resulted in blacks comprising only two percent of medical doctors and less than two percent of lawyers in the United States.\(^{31}\) Similarly, a merit-based system resulted in the incredible fact that until 1987 no black had ever been a member of the Virginia Law Review.\(^{32}\)

The cultural bias against minorities runs deep. The writing styles that professors analyze on tests and editorial boards scrutinize on law review applications are “infrequently found in persons whose school, home and community background is not upper middle class. Few minority students are the products of such backgrounds . . . .”\(^{33}\) In that same vein, one law professor observed, “Law is the study of the culture of the white ruling class. If the students didn’t grow up with them then without that level of exposure it is hard to understand the thinking patterns of judges and faculty members.”\(^{34}\) Law review affirmative action does not result in the selection of students who are not the law school’s top students; it results in the selection of students who

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30. Id. Discussing education generally, one commentator noted that “standardized tests [do not] confer a moral entitlement to admission, since such tests are only modestly correlated with subsequent academic success and give no reliable indication of achievement later in life.” Bok, *The Case for Racial Preferences: Admitting Success*, NEW REPUBLIC, Feb. 4, 1985, at 15; see also R. Klitgaard, *Choosing Elites* (1985).
31. Bok, supra note 30, at 15.
do not meet the conventional criteria that define the top students.

B. The Stigma

Affirmative action opponents assert that the program brands law review affirmative action invitees as unqualified in the eyes of many classmates and employers. These classmates and employers also perceive minorities invited to join law review without the benefit of affirmative action as unqualified for membership. It follows from this argument, then, that all minorities who make law review after the implementation of an affirmative action plan win a hollow victory because of stigmatization.\(^6\) Worse still, affirmative action plans may perpetuate the belief that minorities are intellectually inferior and need affirmative action to obtain law review membership.

Stigmatization may affect minority members' employment opportunities as well as their psyches. Realizing that minorities may be affirmative action candidates, legal employers may scrutinize their credentials more carefully.\(^6\) Minorities "may be forced to go out of their way to explain their achievement,"\(^6\) This stigmatizing effect neutralizes an argument that proponents of law review affirmative action make—that such programs serve as indirect affirmative action for judicial clerkships, associate and subsequent partner positions in major law firms, and positions as professors and judges. If judges and hiring attorneys at top-tier firms doubt minority members' achievements and decline to employ them because they think minorities cannot handle the work requirements, the stigma frustrates an attempt to end the cycle of underrepresentation. Law review membership does little, if anything, to benefit minority students by helping them obtain positions from which they traditionally have been excluded.

The stigma argument suffers two deficiencies. First, it fails to recognize that abandoning affirmative action may not enable minority students to "avoid the less-than-qualified stigma."\(^8\) Opponents argue that affirmative action programs unfairly stigmatize minorities. Affirmative action, however, does not generate

35. See Raspberry, supra note 3.
the stigma. Rather, the stigma "is manufactured in the hearts and minds of individuals and is within the American tradition of seeing persons of color as 'inferior beings.'"\textsuperscript{39} Stigma will exist with or without affirmative action plans. Second, the beneficial experience of law review membership should not be thwarted by the misperceptions of others. The skills that minorities learn compensate for any stigmatizing effects.\textsuperscript{40}

Additionally, the stigma argument erroneously implies that being invited to join law review is the most important part of law review membership. What defines a student as an achiever is the work he actually does for law review, including writing and publishing a note. A student who is invited onto law review and then is asked to resign because he is not progressing on his note adequately is not seen in the same light as one who makes law review and remains with the publication. Any stigma attached to the minority law review member may disappear if that minority student demonstrates his academic strength and commitment by writing and publishing a note and taking on a senior editorial position.

\textbf{C. The Writing Competition}

Many law reviews accept some applicants based solely on the results of a writing competition.\textsuperscript{41} Many also use the writing competition in conjunction with the grades of the applicant when making membership decisions. Some reviews will not admit students unless they have completed a writing submission.\textsuperscript{42}

Opponents of affirmative action plans contend that a writing competition constitutes an affirmative action plan and that law reviews do not need another method.\textsuperscript{43} This argument recognizes that grades may be culturally biased. Although the writing com-

\textsuperscript{39} Id.; cf. Herrera, Affirmative Action Creates a Stigma All its Own for Minorities, L.A. Daily J., June 19, 1985, at 4, col. 3.


\textsuperscript{41} See infra Part II, section D.

The writing competition usually requires applicants to write a note on a designated topic. All the research materials the applicant needs are enclosed in the application packet so that the applicant will concentrate on legal reasoning and effective writing, rather than on researching. Some publications, on the other hand, assign topics and require the applicants to research as well as write.

\textsuperscript{42} See infra Part III, section D.

\textsuperscript{43} One law review editor, for example, said that the writing competition was implemented with affirmative action in mind. See infra Part III, Section B.
petitions may be culturally biased as well, some minorities favor a writing competition over a selection process that uses grades.44

The problem with calling a writing competition an affirmative action plan is that when a journal combines writing with grades in the selection process, the affirmative action program tends to be unsuccessful in increasing minority membership.45 Poor structure is one reason some writing competitions have failed to increase minority membership. Some reviews select first those students with the best writing submissions, then those with the highest grades, and finally those with the next highest grades whose writing submissions sufficiently boost their grades. In addition to the overarching effect of diluting the value of the writing competition, this process ends up with the review counting the students with both the highest grades and the best submissions as write-ons. At a minimum, the review should reverse the order of selection and count those students against the grade-on quota.

D. The Prestige

The “prestige argument” against affirmative action claims that affirmative action programs diminish the prestige of law reviews as institutions. Its proponents assert that law reviews traditionally are known and well-respected because their members are the brightest students in the law school. In addition to their role in enhancing the legal skills of their members and publishing the most important scholarly work, the law reviews exist to reward the law school’s top students.

The prestige argument assumes that attaining law review membership is an accomplishment in itself. Affirmative action destroys this achievement. With an affirmative action plan, a law review ceases to be a place only for those students with the highest grades and the best writing competition submissions. Law reviews may become less prestigious than strictly write-on journals

44. See, e.g., Gonzalez, supra note 21 (presenting the author’s view, as chairperson of the Hispanic Law Students Association at Michigan Law School, that the Michigan Law Review should place more emphasis on writing submissions and less on grades).

45. Law reviews that only use writing competitions tend to attract more minority members than law reviews that use a writing competition in conjunction with grades. See infra Part III, section D.
that do not consider an applicant’s race and only more prestigious than “walk-on” journals.46

This argument is the most flawed of the anti-affirmative action positions. Even some opponents of law review affirmative action on law reviews do not view the law review as an “honor society.” Perceiving law review as an “honor society” leads to “double-counting” because the highest grades pave the way to “another achievement, law review membership.”47 Those with the highest grades already enjoy considerable prestige; they do not need another “gold star on their resume.”48

E. The Quality

Another argument commonly advanced against affirmative action is the assertion that the quality of scholarly work on law reviews diminishes as a result of the inclusion of affirmative action candidates. If reviews have one overarching purpose, it is to publish the “highest quality and most important legal writing possible.”49 This goal cannot be met, some argue, by law reviews with affirmative action plans because professors will hesitate to submit their articles to these law reviews, fearing an improper edit.50 The law review will not attract high-quality articles and will have to publish lesser articles. Advocates of this view often acknowledge that affirmative action has its merits, but contend that the quality of work published cannot be sacrificed to achieve those benefits.51

Assertions of decline in quality can be countered with two responses. First, the presumption that reviews will publish inferior work stems from the belief that the traditional “objective” crite-

46. Drawing Distinctions at Harvard Law, supra note 17. A “walk-on” journal is a publication in which all students are invited to become members. Usually, the students who wish to join the publication perform the tasks that law reviews assign junior members, such as verifying citations in articles, but are not considered members of the journal until they write a publishable note.
47. Kornstein, supra note 7.
48. Lack, supra note 4, at A22, col. 4.
49. Kornstein, supra note 7.
50. Many professors submit their articles as drafts and eagerly wait for the comments of law review article editors. If article editors edit the work poorly, the professors would most likely be disappointed and hesitate to send other manuscripts to the publication. Even professors who expect law review members to make small changes only in their manuscripts would be frustrated to find that the editors made mistakes on these minor changes.
51. See Harvard Law Review’s Ethnic Screening Criticized, supra note 6, at A22, col. 3; Drawing Distinctions at Harvard, supra note 17.
ria measure merit accurately. As mentioned above, grades and writing samples cannot determine the most qualified law review applicants. These traditional criteria are biased against people from educationally and economically disadvantaged backgrounds and do not measure their academic strength and potential. Minorities selected through the affirmative action program will be unusually bright students who have shown the capacity and the commitment to be on law review. Second, minorities have been excluded consistently from law reviews for too long. Whether the grades-plus-writing admissions scheme results from purposeful discrimination to keep minority students from law review membership or simply has had a disproportionate impact on minority students, reliance on this scheme has not proved an adequate measure of minority students’ potential. Law reviews desperately need to develop another admissions standard. The law review tutorial experience and the need to cultivate minority professors, lawyers, and judges is great. The cost of diminution of quality—if any occurs—is therefore worth the benefits achieved by affirmative action.

F. Self-Motivation

The final argument against affirmative action asserts that affirmative action is not necessary. Law reviews permit students who are not members of the publication to submit notes. A self-motivated student can obtain the experience of writing and researching a note. The problem with this argument is that law review members perform tasks other than note writing. They gain valuable skills by cite checking and editing the notes and articles of other authors.

Law review members also receive close supervision by their note editors, unlike individuals working on their notes independently. This supervision informs the law review member of her progress. Continual guidance allows the law review member to learn from other members. The student writing the note on her own, however, does not benefit from this learning experience.

52. Bell, Bakke, Minority Admissions, and the Usual Price of Racial Remedies, 67 CALIF. L. REV. 3, 17 (1979) (stating that minorities admitted under affirmative action do not expect a “free lunch”).
53. Finell, supra note 40.
54. See infra Part III, section A.
Proponents of affirmative action on law reviews have four central arguments: (1) minorities have much to gain from law review participation; (2) grades and writing samples do not measure achievement adequately; (3) law reviews need a diverse membership; and (4) law review affirmative action programs serve as an indirect form of affirmative action with respect to influential positions in society. As discussed above, minorities can enhance their legal skills through law review. The law review experience is separate and distinct from law school generally. By reading and editing the works of others and by researching and writing a note, they improve their editorial and research skills. The sense of commitment and values stressed in law review work will likely produce attorneys committed to hard work and excellence.

Second, grades and writing samples are inadequate measures of knowledge and potential. An affirmative action admissions scheme must consider an applicant's race and ethnic origin to judge her abilities and achievements.

Third, diversity on law reviews is a compelling interest. As a primarily white, male establishment, law reviews have suffered from a lack of diverse ideas. Minorities would provide this diversity by exposing the law review members to different ideas, and, subsequently, minority presence would affect the work the review publishes. This presence in turn would expose readers of legal publications to diverse subjects, including subjects discussed in the writings of minority members and members influenced by minority members.

Fourth, affirmative action on law reviews also works as an indirect form of affirmative action in other areas of the law. Law reviews are microcosms of the legal world. Law reviews are not the only areas where minorities are underrepresented. The percentage of minority attorneys and minority law students does not reflect the percentage of minorities in the United States.

55. Kornstein, supra note 7.
56. See Bell, Black Students in White Law Schools, supra note 23; Bell, Law School Exams, supra note 23; Comment, supra note 33.
57. Lack, supra note 4, at A22, col. 4.
58. Ranii, supra note 36.
Overcoming the barrier of making law review is a step in the direction of increasing minority enrollment in law school and admission to the bar.

Greater diversity will, in turn, create more role models. Minorities need to see not only that law review membership is an admirable achievement but that this achievement is within their reach and in the reach of other minorities. Through minority law review role models, they can see a future for themselves as members of law reviews and in positions, such as judicial clerk and associates in prestigious law firms, that are more accessible to law review members.60 Currently, "because law review membership is often the chief criterion for an opportunity at the most influential positions, the [non-affirmative action] Review selection process operates to exclude minorities from these positions."61

III. THE SURVEY

The survey, reproduced in Appendix 2, produced information regarding the characteristics of law reviews, the reasons for not implementing affirmative action, the effect of affirmative action, the effect of different non-affirmative action selection procedures on minority participation, and the operation of affirmative action programs on law reviews.

A. Characteristics of Law Reviews with Affirmative Action and Without Affirmative Action

Six law reviews had affirmative action programs, constituting a little more than seven percent of all the reviews that responded to the survey. Fourteen elite schools responded to the survey, comprising about seventeen percent of the eighty-four responses.62 This rate is a little lower than the percentage of

60. Drawing Distinctions at Harvard Law, supra note 17; Kornstein, supra note 7.
61. Silas, untitled, at 2 (Jan. 24, 1983) (unpublished manuscript on file with U. Mich. J.L. Rev.); see Culp, Blacks in Prestigious Law Firms, 7 Black L.J. 159, 160 ("If blacks are to have a substantial influence on shaping legal strategies and policies in the future, they have to have access to the resources and authority of these [top-tier] firms."); Silas, Business Reasons To Hire Minority Lawyers, A.B.A. J., Apr. 1984, at 52; Silas, supra note 21, at 5, col. 2.
62. See Appendix 1 for a discussion on how the survey was conducted and which schools comprise elite schools.
elite schools nationally, forty-one out of 175, or about twenty-three percent. Among the law reviews at elite schools, six (or forty-three percent) had affirmative action programs. No law reviews at nonelite schools had an affirmative action program.

No specific geographical area contained the majority of law schools with law reviews that had affirmative action programs. Law reviews with affirmative action programs were located in the South (one), Midwest (three), and West (two). Generally, the law reviews that responded to the survey are based at schools located throughout the country—twenty-three law reviews or approximately twenty-seven percent are located in the Midwest, twenty-two publications or about twenty-six percent are in the South, twenty-one journals or twenty-five percent are from the West, and eighteen law reviews or roughly twenty-one percent are in the East.63

Proportionately, approximately thirteen percent of the law reviews surveyed in the Midwest had affirmative action programs; about five percent of the law reviews surveyed in the South had affirmative action programs; approximately ten percent of the law reviews surveyed in the West had affirmative action programs; and none of the law reviews surveyed in the East had affirmative action programs.

The size of the law review was related to whether it had an affirmative action program. Law reviews with affirmative action programs averaged seventy-six members. Law reviews without affirmative action programs averaged forty-five members. Several law reviews with a small number of members brought down this average. The median number of members on law reviews without affirmative action programs was fifty. It is more likely that law schools with large student populations—whose law reviews tend to have more members than law reviews at smaller

63. The total percentages are less than 100% because of rounding off. See infra note 78 for discussion on how schools were divided geographically. These numbers are roughly consistent with the numbers of law reviews in these four regions. Using the list of schools supplied by the Gourman Report (excluding the two in Puerto Rico), 49 law schools or 28% are located in the East. The South has 44 law schools or 25%; the West has 37 law schools or 21%; and the Midwest has 43 or 25% of the total number of law schools. See J. GOURMAN, THE GOURMAN REPORT: A RATING OF GRADUATE AND PROFESSIONAL PROGRAMS IN AMERICAN AND INTERNATIONAL UNIVERSITIES 75-80 (3d ed. 1985).

For a list of law schools that are members of the Association of American Law Schools; law schools that are on the approved list of the American Bar Association, but are not members of the Association of American Law Schools; and law schools that are not on the approved list of the American Bar Association and not members of the Association of American Law Schools, see ASSOCIATION OF AMERICAN LAWS, DIRECTORY OF LAW TEACHERS 1987-88, at 1075-86, 1089-91 (1987).
law schools—will have law reviews that implement affirmative action selection schemes.

All but one of the law reviews with affirmative action programs accepted notes written by nonmember law students. Out of the seventy-eight law reviews without affirmative action programs, thirty-nine, or fifty percent, did not accept notes from nonmembers and an equal number did accept such writing submissions. This result means that at half of the schools whose law reviews do not use an affirmative action selection procedure, students cannot become members by independently writing a note. This fact cuts against the self-motivation argument against affirmative action. Even if a student has the self-motivation to write a note, half of the law reviews surveyed would not admit her.

Regarding career opportunities, however, only thirty-one editors or about forty percent of the law reviews without affirmative action programs indicated that to interview with some firms the student had to be a member of law review. This fact cuts against the notion that law review is necessary to obtain positions in top-tier law firms and as judicial clerks. It still means, though, that at nearly forty percent of the law schools that responded, minorities who do not meet the traditional criteria of law review are excluded from these positions of influence. Additionally, even at those law schools where minorities can obtain interviews, some employers will look upon minorities unfavorably when compared to law review members.

Only one law review with an affirmative action program or about seventeen percent of the law reviews with affirmative action indicated that to interview with some firms at the law school placement office, the applicant had to be a member of the law review. But concern for career opportunities cannot be the sole reason for not implementing affirmative action. If it were, then twelve of fourteen law reviews (roughly eighty-three percent) would have affirmative action rather than the current number of six. Therefore, the law reviews at elite and non-elite schools had other reasons for not implementing affirmative action programs.

64. See supra Part II, section F, for a discussion of the “self-motivation” argument.
B. The Reasons for Not Having Affirmative Action

Thirty-one editors responded that the reason their law review did not have an affirmative action program was because the idea had never been considered.26 Twenty-four indicated that the minority population in the law school was too small for an affirmative action program to have a meaningful impact. Twelve responded that minorities had been fairly represented on the publication without the need for affirmative action. Ten editors felt that an affirmative action program would stigmatize minority students offered membership by the publication. Six responded that they selected members based on merit.26

Some minorities on law reviews opposed affirmative action.27 One editor mentioned that two blacks on the staff opposed adding a writing competition in addition to a grade-based selection system. Another editor commented that minority students in the law school were opposed to an affirmative action plan because of the possible stigmatizing effect.

Four editors noted that they were interested in starting an affirmative action program and that their editorial boards were currently considering the idea. Two editors explained that their publications encouraged minorities to apply to increase minority participation. One law review implemented a writing competition to increase minority participation on the publication. Another two editors noted that the law school had at least one other journal that especially attracted minority students because of its focus. One editor responded that he was “confident” that the current system would eventually result in more minority members. Another editor stated that some minorities at the law school received additional assistance through a writing improvement program, implying that this program was a sufficient affirmative action plan.28

26. One editor commented that, although the idea had never been considered, he thought that “the usual litany of objections to affirmative action programs would greet such a proposal.”

27. More than 78 answers were given because the questionnaire allowed the editor to select more than one response for this question. See infra Appendix 2, question 8.

28. “Merit system” was not a category in this section. One editor commented that the law review was “a scholarly publication” and that candidates were rated anonymously.

29. This position echoes Ms. Matthew’s comments. See supra text accompanying note 5.

30. See generally Minority Affairs Committee of the Law School Admission Council, Summary Report on the LSAC Questionnaire on Special Law School Programs for Minority Students (1988) (discussing affirmative action plans designed to assist minority law students).
Of the eleven editors who said minorities had been fairly represented on their publication, one belonged to a law review at a predominately black law school, another worked for a journal that focused on the legal issues concerning one minority group, and the rest, except for one, attended schools located in cities or towns with large black, Hispanic, or Asian-American populations. One review had no minority members, although the editor added that there were too few minorities at the law school for an affirmative action program to have a meaningful impact.

C. The Effect of Affirmative Action

Absence of an affirmative action program effectively excludes minorities from membership on a large number of law reviews. Thirty law reviews or about thirty-eight percent of the seventy-eight law reviews without affirmative action programs had no minority members. Nineteen, or approximately twenty-four percent, had at least one black, with one having as many as eight blacks; twenty-four, or about thirty-one percent, had at least one Hispanic, with one having as many as six; two, or about three percent, had at least one Native American, with one having as many as eight; and twelve, or about fifteen percent, had at least one Asian American, with as many as five on one publication.

In comparison, all of the six law reviews with affirmative action programs had minority members. One review had not selected its new members at the time that it completed the survey and could not give information regarding its current makeup, although it had at least two third-year minority members. Three of the five who could answer this question had at least one black, and one review had as many as seven. Four of the five had at least one Hispanic, and one had as many as two. None had a Native American, and two had at least one Asian-American, with one having as many as four.

Of the law reviews without affirmative action but with minorities, seven had at least one black on the senior editorial board, including two editors-in-chief; ten had at least one Hispanic on the editorial board; one had at least one Native American on the editorial board; and three had at least one Asian-American on the editorial board, including one editor-in-chief. Comparatively, three of the six law reviews with an affirmative action program

69. See infra Appendix 1 for a discussion concerning which minorities were considered affirmative action candidates.
had at least one minority on their senior editorial boards. One had two blacks on the editorial board; two had one Hispanic on the editorial board; and one had two Asian-Americans on the editorial board.

Two of the six law reviews with affirmative action said that applications from minority members did not increase as a result of the adoption of an affirmative action program. Two said that applications had increased, although one was not certain. Two said they did not know.

Implementation of affirmative action programs, however, generally effected an increase in minority participation. Four of the six law reviews said that minority membership had increased on their publication as a result of the affirmative action program. Two did not know. None could say how many minority applicants had been accepted by the publication without the use of an affirmative action program.

D. The Effect of Different Non-Affirmative Action Law Review Selection Procedures

Nine, or about eleven percent, of the eighty-four law reviews surveyed used a write-on competition solely, and only two, or about two percent, used grades as the sole factor for law review admission. The rest used grades in conjunction with a writing competition. Some used the writing submission as a grade boost. Others invited those students with grades within a certain percentage (ranging from the top ten to fifty percent) to participate in the writing competition. Others selected a certain number of members through grades and selected the rest through a writing competition in which the entire first-year class was permitted to participate. Some permitted second-year law students to become members upon the review's acceptance of a publishable note.70

Although one of the publications that relied exclusively on grades had minority members, it was a fairly small review consisting of eleven members. The other review that used only grades was more than twice this size. It had no minority members. Of the nine law reviews that selected their members through a writing competition, eight had at least one minority. This eighty-nine percent figure exceeds the fifty percent figure for the reviews that use a strictly grade-based system (which is

70. See supra Part III, section A, for a discussion of publications that accept notes from nonmembers.
actually zero percent not including one small law review), and the fifty-eight percent figure for the law reviews that use a mixed process (thirty-nine out of sixty-seven).

E. The Operation of Affirmative Action on Law Reviews

Among the six law reviews with affirmative action, two use nearly identical programs. These two do not limit affirmative action consideration to blacks, Hispanics, or Native Americans, but rather allow anyone who is disadvantaged or would add diversity to the publication to apply as an affirmative action candidate. Both require the applicants to write a brief statement explaining why they should be considered for affirmative action. The publications then open an additional slot or slots for these affirmative action candidates.

One review expressly included Eskimos, in addition to blacks, Hispanics, and Native Americans, as affirmative action candidates. This review uses the minority status as a boost to the writing competition entry score, so long as the minority applicant scored in the top fifty percent of the entry pool.

Another publication considers blacks, Hispanics, Native Americans, and those similarly situated to persons in these groups to be affirmative action candidates. This review requires a brief statement from the applicant as well. It makes membership decisions based on a combination of grades and writing competition performance. The top minority candidates receive affirmative action spots unless a specified number of minority students are invited to join the publication through the regular process.

One review considers Asian-Americans, in addition to the three groups listed above, to be affirmative action candidates. It uses the minority status to boost grades, and then combines the grade score with the writing competition score. Top minority candidates receive affirmative action spots.

The final law review considers only blacks, Hispanics, and Native Americans to be affirmative action candidates. It requires applicants who wish to be considered for affirmative action to check off a box if they want the editors of the publication to look into their admissions files to determine whether the admissions office considers them to be eligible for affirmative action. It

71. See Appendix 1 for a discussion regarding groups the survey specifically classified as minorities.
opens additional slots for the affirmative action candidates, combines the applicant’s grades and writing competition score, and invites the top minority candidates to be on law review.

Generally, law reviews appear to be satisfied with the decision to begin an affirmative action program. Only one review updated an old affirmative action program. It explained the reason for the change as “a desire to expand the program.” None of the publications that did not have an affirmative action program, to the best of the editors’ knowledge, had ever had an affirmative action program.

IV. Conclusion

For a law review concerned about increasing minority participation, four recommendations can be made based on these survey results. First, encourage the law school administration to have an aggressive affirmative action stance. Nearly thirty percent of the law reviews without affirmative action programs said that the law school had too few minority students for an affirmative action program to have a meaningful impact. A law review cannot admit minorities when no minorities attend the school.

Second, consider an affirmative action program. Sixty-seven percent of the law reviews with affirmative action programs increased minority membership as a result of the affirmative action plan. Among the various types of programs, no one particular program appears to be more effective than any other. Obviously, a system that requires a minimum number of minorities without a ceiling would increase the number of minority members the most. But the bottom line is that all law reviews with affirmative action programs had at least one minority and about forty percent of the law reviews without affirmative action programs had no minorities.

If the editorial board does not approve such a plan, then consider adopting a selection scheme that emphasizes a writing competition. Such a scheme remains consistent with the notions that first-year grades do not accurately indicate a minority student’s potential and that the writing competition is a better indicator of that potential.

72. See supra Part III, section B.
73. See supra Part III, section C.
74. See supra Part III, section D.
Third, consider establishing a publication that only addresses minority concerns. These publications attract more minorities than general-topic law reviews. A new publication provides more minorities at the law school with an opportunity to work on a journal.\textsuperscript{75}

Finally, law review members must continually encourage minority students to apply for membership. This process includes opening the selection process to students who independently write notes.\textsuperscript{76} Additionally, law review editors who are aware of minority nonmembers writing notes should provide guidance in their note-writing endeavors.

\textbf{APPENDIX 1}

The questionnaire, reproduced in Appendix 2, is seven pages long and consists of sixteen questions. It was enclosed in the registration packets of the editors of those law reviews that attended the 1988 National Law Review Conference in Richmond, Virginia. Out of approximately seventy-five law review editors who received the questionnaire, forty-two responded to the survey, a fifty-six percent response rate. The questionnaire was then sent to the editor-in-chief of the leading publication at each law school whose journal was not represented at the Conference. About 105 were actually sent, although two were returned without having reached the law review editors. Of these editors, forty-two responded, a response rate of forty percent. About 178 law review editors received the questionnaire in all, and eighty-four responded, for an overall response rate of approximately forty-seven percent.

The questionnaire had several trouble spots. Few editors could answer question ten, which attempted to discover the history of minority representation on the publication. Most responded that they kept no records on such information. One commented that he thought it was an "elitist" question. Question thirteen, which suffered from the same problem, asked whether minority underrepresentation on law reviews was due to minority students declining invitations to be on law reviews. Few law reviews kept records of who had turned them down.

\textsuperscript{75} This suggestion is based on two responses. One publication that focused on a minority group's concern had a large number of minorities on its staff. Another law review pointed out that the publication at the law school that focused on minority issues appeared to attract the minority law students. \textit{See supra} Part III, section B.

\textsuperscript{76} \textit{See supra} Part III, section A.
Question four dealt with the issue of which groups would be classified as minorities and drew responses from several editors. One pointed out that Asian-Americans should not be relegated to an "Other" status. At the University of Michigan Law School, only blacks, certain Hispanics, and Native Americans receive affirmative action consideration in admissions. The survey used the criteria of the University of Michigan Law School admissions office in classifying minority groups on the questionnaire.

The law reviews were divided by their law school's rank, geographical location, and size of the law review. Law schools were placed into two groups: elite and non-elite. For purposes of this survey, forty-one law schools were considered elite, and the rest were considered non-elite schools.

77. See The University of Michigan Bulletin, Law School Announcement 1989-90, at 86 (1987) ("Black, Chicano, Native American, and many Puerto Rican applicants are automatically considered for a special admissions program designed to encourage and increase the enrollment of minorities.").

78. Geographical location was divided into four central regions. The East consisted of law schools in the District of Columbia and in the following 11 states: Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont. The Midwest consisted of those law schools located in the following 12 states: Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, and Wisconsin. The South consisted of those law schools located in the following 13 states: Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, Virginia, and West Virginia. The West consisted of those law schools located in the following 14 states: Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oklahoma, Oregon, Utah, Washington, and Wyoming.

79. Elite law schools for the purpose of this survey were comprised of law schools Dr. Jack Gourman listed as "distinguished" and "strong." J. Gourman, supra note 63, at 75-80. Dr. Gourman listed the following law schools as "distinguished": Harvard University; the University of Michigan (Ann Arbor); Yale University; the University of Chicago; University of California, Berkeley (Boalt Hall); Stanford University; Columbia University; University of Pennsylvania; Duke University; Cornell University; New York University; University of Texas (Austin); University of California, Los Angeles; Northwestern (Chicago); University of Virginia; and Vanderbilt. Id. at 75.

Under the list of "strong" schools, he included: Iowa (Iowa City); Georgetown (D.C.); University of California, San Francisco (Hastings); University of Minnesota (Minneapolis); University of Wisconsin (Madison); Fordham; Boston University; University of North Carolina (Chapel Hill); University of Washington (Seattle); University of Southern California; University of California, Davis; Hofstra (N.Y.); Utah; Indiana University (Bloomington); the George Washington University; Tulane; the Ohio State University (Columbus); Albany Law School (Union University); University of Notre Dame; Loyola University (Los Angeles); McGeorge School of Law; University of Illinois, Urbana; SUNY (Buffalo); Marquette University; Washington (St. Louis). Id. at 76. See also Brains for the Bar, U.S. News & World Rep., Nov. 2, 1987, at 72-73 (rating the top 20 law schools according to a survey of law school deans).
APPENDIX 2

Affirmative Action Questionnaire

Note: These answers will be used for statistical purposes only. No school-specific information will be released without your express consent.

1. Name of publication:

2. Contact person and phone number for follow-up questions:

3. How many members are on your publication?

4. Of them, how many belong to the following minority groups:
   a. Black
   b. Hispanic
   c. American Indian
   d. Other (please specify)

5. Are there any basic or minimum requirements to be accepted onto your publication? (for example, minimum GPA of 3.0) yes no [Circle one] If yes, please list them:

6. How does your publication select its members? [Circle those that apply and please include any materials regarding admission onto your publication]
   a. based solely on grades
   b. based solely on a writing submission
   c. some members selected solely on grades, others selected solely on a writing submission, others selected by using the writing submission as grade boost
   d. if those who have the top writing submissions also have the highest grades, your publication selects those with the next best writing submissions
   e. walk-on
   f. affirmative action
   g. Other. Please explain

7. If you circled 6(f), answer questions (a) through (g). If not, go to question 8.
a. Who constitutes a member of a minority group eligible for this affirmative action program?

Black
Hispanic
American Indian
Other (please specify)

b. How does this affirmative action program work? (please check those that are applicable)

(1) applicants write a brief statement explaining why they should be considered for affirmative action

(2) applicants check off a box if they want the publication to look into their admissions files to determine whether the admissions office considers them eligible for affirmative action

(3) minority status is used to boost grades

(4) additional slots are opened for affirmative action candidates

(5) grades and writing competition are combined; top minority candidates receive affirmative action spots unless specified number of minority students already on publication through regular process

(6) minority status is used to boost writing competition entry score, applicant must be in the top __% of the entry pool to qualify.

(7) grades and writing competition are combined; top minority candidates receive affirmative action spots

(8) other (please explain):

c. How long has the affirmative action program been in effect? (If you are not certain, write the approximate date or number of years you know the program has been in effect)

d. Did your publication have an affirmative action program prior to the one you currently use? yes no [Circle one]
i. If yes, how did it work? (please refer to 7(b) (1-8) and check those that are applicable)

(1)  (5)  
(2)  (6)  
(3)  (7)  
(4)  (8) (please explain):

ii. If yes, why was the prior plan terminated?

___ Poor response from affirmative action candidates

___ Those affirmative action candidates that applied did not meet the minimum or basic criteria of the Review

___ Minorities became fairly represented on the publication

___ Other (please include any materials that may be helpful)

e. Has the affirmative action program resulted in increased applications for membership by minorities on your publication? yes no [Circle one] Please list, if possible, the increase in numbers for each minority group for the following years after the program’s implementation:

<table>
<thead>
<tr>
<th>Year</th>
<th>Black</th>
<th>Hispanic</th>
<th>Amer. Indian</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>1st yr</td>
<td>#</td>
<td>#</td>
<td>#</td>
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<td>2nd yr</td>
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<td>3rd yr</td>
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<td>4th yr</td>
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<td>5th yr</td>
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<tr>
<td>6th yr</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

f. Since the implementation of this affirmative action program has there been an increase in minority membership on your publication? yes no [Circle one] Please list, if possible, the increase in numbers for each minority group for the following years after the program’s implementation:
1st yr 2nd yr 3rd yr 4th yr 5th yr 6th yr
Black: #
Hispanic: #
Amer. Indian: #
Other (please specify):

g. Of that increase (if there was an increase), how many minorities have been accepted onto your publication without your publication using its affirmative action program? Please list, if possible, the increase in numbers for each minority group for the following years after the program’s implementation:

1st yr 2nd yr 3rd yr 4th yr 5th yr 6th yr
Black: #
Hispanic: #
Amer. Indian: #
Other (please specify):

8. If your publication does not have an affirmative action program, please explain your reasons for this policy:

___ Idea has never been considered
___ Do not want to stigmatize those minorities who are accepted onto the publication
___ Minority applications have been fairly represented on the publication without the need for affirmative action
___ Too few minorities at the law school to have a meaningful impact
___ Other (Please explain)

9. If your publication does not have an affirmative action policy, did it ever have one?  yes  no [Circle one] If yes,
a. Please state the dates it was in existence:

b. Please describe how the affirmative action program worked (please refer to question 7(b)(1-8))

(1) (5)
(2) (6)
(3) (7)
(4) (8) (please explain):

c. Please state why the program was terminated:
   ___ Poor response from affirmative action candidates
   ___ Those affirmative action candidates that applied
did not meet the minimum or basic criteria of the
   Review
   ___ Minorities became fairly represented on the
   publication
   ___ Other (please include any materials that may be
   helpful)

10. In the last (20) (15) (10) (5) years, how many minorities
   have been on Law Review?

   (years)  20  15  10  5

   Blacks
   Hispanics
   American Indian
   Other (please specify)

11. Are there any minorities currently serving as third year
    editors?  yes  no  [Circle one] If yes,
    a. How many minorities are third year editors?
    b. Which minority groups do they belong to and what are
       their positions?
       Black
       Hispanic
       American Indian
       Other (please specify)

12. To interview with some firms at your placement office, do
    you have to be a member of law review?  yes  no  [Circle one]

13. Have minorities declined invitations to be members of law
    review?  yes  no  [Circle one] If yes, please state
    1) about how many invitations to minority students are
       made a year and about how many are declined: ___made
       ___declined
2) about how many invitations to majority students are made a year and about how many are declined: ___made ___declined

14. Does your publication accept notes written by non-review students? yes no [Circle one] If yes, about how many notes a year are submitted by non-review members and about how many of these are published? notes submitted: __; notes published __.

15. Please add any comments or include any materials about your publication you feel are relevant.

16. This survey is being sent out to every law review at every ABA accredited law school. Would you be interested in seeing the results of this survey? yes no [Circle one] If yes, please state the address where you would like the note to be sent.