1-1-1995

The Myth of Meritocracy, and the Silencing of Minority Voices: The Need for Diversity on America's Law Reviews

Mark A. Godsey
University of Cincinnati College of Law, markgodsey@gmail.com

EDUCATIONAL INEQUALITIES, THE MYTH OF MERITOCRACY, AND THE SILENCING OF MINORITY VOICES: THE NEED FOR DIVERSITY ON AMERICA'S LAW REVIEWS

*Mark A. Godsey**

I. INTRODUCTION

American law reviews[1] play an unparalleled role in nurturing jurisprudential thought and sculpting America's ever-changing legal climate. Their value to the legal system over the past century has been thoroughly documented,[2] and well-reasoned articles have frequently affected dramatic changes in the law.[3] Former Chief Justice Charles E. Hughes once noted:

---

* Associate, Jones, Day, Reavis & Pogue, Chicago. B.S., Northwestern University, 1990; J.D., The Ohio State University College of Law, 1993. Judicial Law Clerk, The Honorable Monroe G. McKay, Chief Judge, United States Court of Appeals for the Tenth Circuit (1993 Term). This Article was originally written for a class entitled "Racism and the Law" at The Ohio State University, taught by Professor Leroy Pernell. In law school the author was articles editor for the *Ohio State Law Review*. He would like to thank Professor Pernell, Kristin D. Godsey, Jim Maxson, Lisa Hammond, and Amy Davis for sharing their insights and editing skills.

1. The term "law review" is used interchangeably with "law journal" throughout this Article to refer to student-edited periodicals containing the scholarly writings of professors and students discussing unresolved issues of law and other topics of general interest to the legal community. *See generally* Josh E. Fidler, *Law Review Operations and Management*, 33 J. LEGAL EDUC. 48 (1983). Approximately 174 accredited law schools produce more than 250 separately titled law reviews, each publishing two to eight issues per year. Roger C. Cramton, *"The Most Remarkable Institution": The American Law Review*, 36 J. LEGAL EDUC. 1, 1–2 (1986). At an average of 228 pages per issue, approximately 160,000 pages of law review material are produced each year. Fidler, *supra*, at 48.
2. Michael L. Closen, *A Proposed Code of Professional Responsibility for Law Reviews*, 63 NOTRE DAME L. REV. 55 (1988) (citing Louis H. Burke, *Introduction*, 1 LOY. L. A. L. REV. 1 (1968)); Palmer D. Edmunds, *Hail to Law Reviews*, 1 J. MARSHALL J. PRAC. & PROC. 1 (1967); *Messages of Greeting to the UCLA Law Review*, 1 UCLA L. REV. 1 (1953); C. William O'Neil, *Dedication*, 1 CAP. U. L. REV. (1972); Roger J. Traynor, *To the Right Honorable Law Reviews*, 10 UCLA L. REV. 3 (1962); Earl Warren, *Upon the Tenth Anniversary of the UCLA Law Review*, 10 UCLA L. REV. 1 (1962); Comment, *The Law Review—Is It Meeting the Needs of the Legal Community?*, 44 DEN. L.J. 426 (1967).
3. Indicative of the influence that law journals have over the law is the fact that between 1924 and 1956, the United States Supreme Court cited a law journal article for a particular proposition 626 times. Chester A. Newland, *Legal Periodicals and the United States Supreme Court*, 7 U. KAN. L. REV. 477, 479 (1959). The frequency increased to

> [T]he quality of the leading reviews . . . has won them wide influence in giving direction to professional thought and thus in shaping the law itself as announced by the courts . . . . [I]n confronting any serious problem, a wide awake and careful judge will at once look to see if the subject has been discussed, or the authorities collated and analyzed in a good law [review article].[4]

Not only are judges influenced by the arguments appearing in law review articles, but practicing attorneys, law professors, and legislators rely heavily on the creative suggestions found in them as well.[5]

Most importantly, law reviews offer an outlet for fresh and innovative ideas and provide a venue for students, professors, politicians and practitioners to discuss and debate issues of interest to legal-minded individuals.[6] These publications unquestionably serve as the legal community's primary "marketplace of ideas."

---

963 law review citations during the 1971–1973 terms alone. Louis J. Sirico, Jr. & Jeffrey B. Margulies, *The Citing of Law Reviews by the Supreme Court: An Empirical Study*, 34 UCLA L. REV. 131, 134 (1986). From 1981 to 1983, the Supreme Court used law review articles as a source 767 times. *Id. See also* Ronald D. Rotunda, *Law Reviews—The Extreme Centrist Position*, 62 IND. L.J. 1, 1–5 n.8 (1986) (discussing major cases that were based on law review articles and citing McCray v. Abrams, 750 F.2d 1113, 1120–21 (2d. Cir. 1984); Cousins v. Wigoda, 419 U.S. 477, 483 n.4 (1975); and Erie R.R. v. Tompkins, 304 U.S. 64, 72–73 (1938)). *The Right to Privacy*, 5 HARV. L. REV. 148 (1891), written by Samuel Warren and Louis Brandeis, is the most famous law review article to produce a broad-based change in the law.

4. Charles E. Hughes, *Foreword*, 50 YALE L.J. 1 (1941). *See* Stanley H. Fuld, *A Judge Looks at the Law Review*, 28 N.Y.U. L. REV. 915 (1953) ("Any morning's mail may bring a law review from Harvard or Yale or Columbia or Pennsylvania or Michigan or a score of other places to disturb our self-conceit and show with pitiless and relentless certainty how we have wandered from the path." (quoting Justice Cardozo)). Judge Fuld, in his address to the Second National Conference of Law Reviews, commented:

> We [the bench] admire the law review for its scholarship, its accuracy, and, above all, for its excruciating fairness. We are well aware that the review takes very seriously its role as judge of judges—and to that, we say, more power to you. By your criticisms, your views, your appraising cases, your tracing the trends, you render the making of "new" law a little easier. In a real sense, you thus help to keep our system of law an "open" one, ever ready to keep pace with changing social patterns.

Id. at 918.

5. *See generally* Douglas B. Maggs, *Concerning the Extent to Which the Law Review Contributes to the Development of the Law*, 3 S. CAL. L. REV. 181 (1930) (discussing the value of law reviews to attorneys, judges, and professors among others); Closen, *supra* note 2, at 55; Scott M. Martin, *The Law Review Citadel: Rodell Revisited*, 71 IOWA L. REV. 1093, 1096 (1986) (discussing the value of law reviews to practicing attorneys, and arguing that "[t]he very fact that those services [Lexis and Westlaw] are adding law reviews to their computer databases is evidence of the continuing demand for the reviews.").

6. *See* Martin, *supra* note 5, at 1093–97; Max Stier et al., *Law Review Usage and Suggestions for Improvement: A Survey of Attorneys, Professors, and Judges*, 44 STAN. L. REV. 1467 (1992). These authors surveyed attorneys, professors and judges in regard to how often and for what purposes they consulted law review articles. Sixty-six percent of the attorneys responded that they had read at least one law review article in the past six months primarily to gain a general overview of a particular area of law, to track current developments in the law, or to find a citation to support a specific position in a brief or memorandum. All of the law professors had read at least one law review article in the previous six months, most of them having done so for academic purposes. Finally, 81% of the judges had consulted a law journal piece within this

Law reviews also have come to serve another recognized function—as a resume builder that places its members on a fast track to the most lucrative and powerful careers. The author of a popular pre-law school guide describes this phenomenon to incoming first-year students:

> [D]oors are opened by law review. That's just a fact of life. And if it is through one of those doors you wish to seek entrance to the profession, whether it's a Wall Street firm, a choice public-service spot, or a prestigious clerkship, you will have to do your damnedest to make the law review . . . .[7]

Considering that the mastheads of most American law reviews display only the names of the white members of their respective law schools, however, it appears that only certain people benefit from all that law reviews have to offer.[8] As the following chart indicates, minority students[9] are substantially underrepresented on law reviews across the country:

Minority Group	*Law Journals with No Minority Members*
African American	76%
Hispanic	69%
Native American	97%
Asian	85%[10]

When asked whether affirmative action[11] should be invoked to resolve such disparities, most student editors, even those who support affirmative

---

time period primarily to track current developments in the law, evaluate the effectiveness of existing law, and identify new approaches to specific problems in the law.

7. JEFF DEAVER, THE COMPLETE LAW SCHOOL COMPANION 170 (1984). *See* Stier, *supra* note 6, at 1487–88, 1492 (reporting that all three groups surveyed—law professors, practicing attorneys, and federal judges—considered law review membership a very important factor in making their hiring decisions, and that those surveyed who had served on a law review during law school considered law review membership very helpful in "broadening their employment opportunities"); *see also* John G. Ives, *Questionable Role of Law Reviews in Evaluating Young Lawyers*, N.Y. TIMES, Mar. 22, 1981, § 4, at 18. ("Law firms and corporate law departments in every major city screen job applicants on the basis of first-year law school grades and membership in law reviews . . . ."); *Harvard Law Review Selects Minority Editors*, N.Y. TIMES, Oct. 10, 1982, § 1, at 30 ("It still stands that the Harvard Law School gives out two degrees. . . . In effect, there's a J.D. and a 'J.D. with Law Review.'"(quoting Muhammad Kenyatta, president of Harvard Black Law Students Association)).
8. *See infra* note 10 and accompanying text.
9. Reference to African Americans or Native Americans is only to provide specific examples, but the overall principle applies to all educationally marginalized groups.
10. *See* Frederick Ramos, Note, *Affirmative Action on Law Reviews: An Empirical Study of its Status and Effect*, 22 U. MICH. J.L. REF. 179, 198 (1988) ("Absence of an affirmative action program effectively excludes minorities from membership on a large number of law reviews.").
11. Affirmative action has been defined as "a term of general application referring to . . . policies that directly or indirectly award jobs, admission to universities and professional schools, and other social goods and resources to individuals on the basis of membership in designated protected groups, in order to compensate those groups for past discrimination caused by society as a whole." THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 18 (Kermit L. Hall ed., 1992). Affirmative action in the law review context, however, includes more than the traditional notions

action in other contexts, typically respond: "Law reviews are meritocracies. Exams and competition papers are blindly graded and those that do the best on them make Review regardless of race."[12] From this they conclude that the system is fair and that it responsibly serves its purposes.

Such conclusions give rise to five major arguments against affirmative action in the law review context: (1) law reviews are meritocracies and affirmative action would destroy the sanctity of this system; (2) present selection methods are fair and impartial because they are anonymous; (3) presently used selection methods ensure that the most qualified students make law review, therefore, affirmative action would diminish the quality and prestige of the work published; (4) affirmative action is unfair to the deserving students who are "displaced" by its implementation; and (5) affirmative action stigmatizes minorities.[13]

The first flaw in these arguments is that they inaccurately characterize law reviews as "honor societies." In doing so, they ignore the intended functions and purposes of law reviews: (1) to act as an intense research and writing course for students, and (2) to provide the legal community with a vehicle for scholarly and political expression that is capable of transmitting many different views and perspectives.

Furthermore, the "honor society" mentality makes two erroneous assumptions: (1) that "grade-on" and "write-on" selection methods identify the students who are able to do the best job as law review members, and (2) that anonymous "merit"-based selection policies are inherently fair and impartial simply because they are blindly graded.

Recognizing that change ultimately lies in the hands of students,[14] this Article is aimed primarily at guiding current law review members through a process that explores the real purposes of law reviews. Part II discusses the two primary responsibilities of law reviews and the effect that a lack

---

of reparations and restitution as described in the foregoing definition. As I will discuss in this Article, law reviews have a pressing need for diversity as a matter of self interest beyond the moral responsibility to compensate minorities for past wrongs. This idea was captured in a *New York Times* editorial explaining the implementation of affirmative action on Columbia's law review:

> Although some supporters may view the new [law review] policy as traditional affirmative action designed to remedy disadvantage, it is not simply a charity program. It is an effort to improve the journal by opening it to students whose experience, outlook and assumptions about society may differ from those who have preceded them and who will improve the journal and the legal community in years to come.

Townsend Davis, *Columbia Law Review Broadens Its Outlook*, N.Y. TIMES, May 19, 1989, at A34.

12. Ramos, *supra* note 10, at 197 (noting that when asked why they did not have affirmative action programs on their law reviews, several editors responded that their selection procedures were anonymous and based solely on merit).
13. *Id.* at 185, 196.
14. Universities and law school faculties, through their control of funding and awards of class credit, have influence over some of the decisions that law journals make. Nevertheless, policy and procedural decisions, such as the methods employed to select members, are usually left to the discretion of the editorial board. *See* Fidler, *supra* note 1, at 57. Therefore, it is the responsibility of current law review members to explore the benefits of implementing measures to ensure diversity on their respective staffs.

of minority participation has on a review's ability to meet these responsibilities. Specifically, section IIA explores a law review's responsibility to serve as an advanced legal writing course for students. This section questions whether it is legitimate for law reviews to use selection procedures that consistently exclude certain races from this part of the curriculum. Section IIB discusses a law journal's responsibility to serve as a forum of debate open equally to all segments of the legal community. This section also addresses "minority voices"—whether they exist and whether majority-culture students can adequately speak for these voices in the marketplace of ideas.

Having addressed the problems with the status quo in Part II, Part III then questions the validity of grade-on and write-on selection methods and argues that the advantages obtained from using these methods, if any, do not justify the problems that have resulted from their exclusive use. Section IIIA explores the arbitrariness of these selection methods and the lack of correlation between law school grades, write-on competitions, and a student's ability to excel as a member of a law review. Section IIIB discusses the cultural and racial biases inherent in traditional "meritocratic" selection procedures that negatively affect minorities. Finally, Part IV summarily addresses each of the five major arguments against affirmative action in light of the previous sections.

II. THE PROBLEM WITH ALL-WHITE LAW REVIEW STAFFS: THE FRUSTRATION OF BASIC RESPONSIBILITIES

A. The Primary Responsibility of a Law Review to Educate Students

Since the inception of student-run law reviews, their primary purpose has been to train students of law.[15] The easily recognizable educational benefit that one attained from the law review experience was the most important factor contributing to the proliferation of student-edited legal periodicals across the United States. Professors Michael Swygert and Jon Bruce, authors of the most comprehensive article on the history of law journals, report:

> The phenomena of the early growth of law reviews did not occur solely because other institutions modeled one aspect of their programs after the country's leading law school. To be sure, an element of "keeping up with Harvard" motivated the establishment of law reviews at other law schools. Other factors, however, contributed significantly to the increase in the number of law reviews. Most important, the law schools recognized the educational benefits of such student-run operations.[16]

Today, skills training is widely recognized as the most important purpose of law journals.[17] In a speech to the UCLA Law Review, former Chief

---

15. Rotunda, *supra* note 3, at 4.
16. Michael I. Swygert & Jon W. Bruce, *The Historical Origins, Founding, and Early Development of Student-Edited Law Reviews*, 36 HASTINGS L.J. 739, 779 (1985).
17. *See infra* notes 18–32 and accompanying text.

Justice Earl Warren paid tribute to the teaching ability of these publications:

> The American law review properly has been called the most remarkable institution of the law school world. To a lawyer, its articles and comments may be indispensable professional tools. To a judge, . . . the review may be both a severe critic and a helpful guide. But perhaps most important, the review affords invaluable training to the students . . . .[18]

Similarly, in discussing a law review's duty to serve as an extension of the classroom, Ronald Rotunda, a leading constitutional law scholar at the University of Illinois, argues that "influence is merely subsidiary to the law reviews' main goal: training future lawyers, judges, and academics. Law review editing and writing provide valuable experience for the law students. This training alone justifies the reviews' existence."[19]

On this point, Karl Llewellyn has aptly explained:

> In its essence law review editorship has value not for what it took to get on, but for what the editor learns because he has got on . . . . [T]he advantage of law review [members] in getting jobs comes not because they come certified as having made the grade initially, but because they come certified as having had, and been capable of using, the best education that the school has thus far offered.[20]

Perhaps most eloquently, Harold C. Havighurst, the former Dean of Northwestern University Law School, once remarked:

> Law reviews are unique among publications in that they do not exist because of any large demand on the part of the reading public. Whereas most periodicals are published primarily in order that they may be read, the law reviews are published primarily in order that they may be written.[21]

Many legal scholars believe that law schools provide insufficient training in legal research and writing beyond the required first-year course.[22] Law reviews, however, do an excellent job of ensuring a strong and well-rounded curriculum beyond the first year to those students who are fortunate enough to receive an invitation:

> 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 . . . . Law review work supplements the curriculum by giving valuable training in writing, in

---

18. Swygert & Bruce, *supra* note 16, at 739.
19. *See* Rotunda, *supra* note 3, at 4.
20. KARL N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 134–35 (rev. ed. 1951).
21. Martin, *supra* note 5, at 1099 n.26 (citing Harold C. Havighurst, *Law Reviews and Legal Education*, 51 NW. U. L. REV. 22, 24 (1956)).
22. Martin, *supra* note 5, at 1099. *See also* Gary S. Laser, *Educating for Professional Competence in the Twenty-First Century: Educational Reform at Chicago-Kent College of Law*, 68 CHI.-KENT L. REV. 243, 277 (1992). *See infra* note 26 and accompanying text.

> research technique, in policy considerations, and in a strong understanding of how the American legal system operates. . . .[23]

Current law review members are often unaware of the extent to which their research and writing skills are being enhanced while they are participating on one of these publications. As a recent survey indicates, however, upon entering practice they come to greatly appreciate the educational value of their law journal experience regardless of the area of law in which they concentrate.[24] Indeed, in writing the Note or Comment required of each law journal member, the student undertakes a research and writing responsibility unparalleled in the law school curriculum and rarely matched in the careers of most lawyers. The average student spends much of an entire year researching and writing her paper, usually with several upper-class journal members providing close supervision. As a matter of necessity, the student must master every avenue of legal research, both printed and computerized, and must quickly become proficient with the acceptable formats and citation methods found in the "Bluebook." The student must also become intimately familiar with the way lawyers structure legal arguments, in both a logical and persuasive sense. Finally, the student must condense her research into the clearest, most well-written piece she has ever produced, as this will most likely be the first time her work will be considered for publication in such a prominent forum.

Not only do the law review members gain from writing their Note or Comment, but all of the other tasks that they must perform significantly sharpen their practical skills and enhance their ability to communicate at a scholarly and professional level. The process of editing works written by, and interacting with, the nation's leading legal scholars not only provides an educational benefit but instills one with a sense of confidence and legitimacy. Additionally, while cite-checking and editing these articles, students are often forced to track down obscure and ancient sources, a hassle to students, but a task that deeply indoctrinates them in advanced methods of legal research.

Compare this research to the curriculum-based research and writing program in the average American law school. In many writing programs around the country, students receive very little individual attention and, by the end of the course, produce only a few short and hurried papers.[25] With a host of bar courses that must be taught in a three-year period, many law schools seem to believe that the skill of legal writing is a luxury that students should develop and hone after graduation.[26]

---

23. Martin, *supra* note 5, at 1100 (citations omitted).
24. *See infra* text accompanying notes 28–30.
25. This problem is aggravated because many schools offer their legal writing course solely on a pass/fail basis. *See* Robert P. Charrow, Book Note, 30 UCLA L. REV. 1094, 1096 (1983) (reviewing DAVID MELINKOFF, LEGAL WRITING: SENSE AND NONSENSE, 1982)). Law students attending these schools, therefore, have little incentive to devote energy to legal writing and research when they are being graded in their other courses. *See also infra* note 26.
26. Judith T. Younger, *Legal Education: An Illusion*, 75 MINN. L. REV. 1037, 1040 (1991) ("The prevailing faculty attitude is laissez faire: A student either knows how to write when he arrives, learns that he doesn't thereafter and remedies it himself on his own, or he continues illiterate into the profession."). *See also* George D. Gopen, *The State*

Besides greatly enhancing students' practical skills, law journals offer an outlet for creativity and expression that relieves students of the monotony of their core classes.[27] During the second and third years, even the most motivated students often have trouble focusing on the routine of their law school studies. Law review members, however, have a mentally stimulating, socially interesting, and sometimes even morally gratifying extra-curricular activity to help maintain their interest in law school. With law review, students can see their efforts materialize in the concrete form of a published manuscript to be read by future students, lawyers, judges, legislators, and academics. This is in sharp contrast to the final product of classroom effort, an often less-than-pleasing numerical grade unceremoniously typed on a white sheet of paper. The rejuvenating effect of law journal participation allows many members to get more out of their studies and ultimately leave law school better prepared and feeling more enriched from the experience.

The wide range of educational benefits perceived to flow from law journal participation has been empirically confirmed by a study performed by several students at Stanford Law School.[28] The results of their research were published in an article entitled "Law Review Usage and Suggestions for Improvement: A Survey of Attorneys, Professors, and Judges" appearing in a recent issue of the *Stanford Law Review*.[29] The researchers polled attorneys, law professors, and judges across the country on a variety of issues relating to law reviews. Those who had participated on a journal during law school were asked to evaluate (on a scale of 0 to 5) how helpful their journal experience was in three categories: enhancing the precision of their writing and editing; improving their ability to work with others; and teaching substantive law. The former journal members "enthusiastically endorsed" the educational value of their law review experience. The following table indicates this outcome: (the average score is listed where 0=no help and 5=very helpful)

	Attorneys	*Professors*	*Judges*
Enhancing Precision of Writing and Editing	3.66	3.73	4.02
Improving Ability to Work with Others	2.23	3.58	2.25
Teaching Substantive Law	1.93	2.29	2.25[30]

---

of Legal Writing: Res Ipsa Loquitur, 86 MICH. L. REV. 333 (1987) (arguing that writing programs in law schools are inadequate); Allen Boyer, *Legal Writing Programs Reviewed: Merits, Flaws, Costs, and Essentials*, 62 CHI.-KENT. L. REV. 23 (1985); Martin, *supra* note 5, at 1099–1100.

27. Martin, *supra* note 5, at 1101.
28. Stier, *supra* note 6.
29. *Id.*
30. *Id.* at 1491–92 ("In sum, law reviews have done a good job of improving their members' research, writing, and editing skills . . . .").

It seems patently unfair that law reviews use selection strategies that provide all of these benefits to white students only. As one author notes:

> The question then is whether it is proper for a law school to be supporting an artificially elitist law review with admission criteria that may have little to do with the ability to do the work of the review. The role of the law school should be to provide the best legal education possible to all of its students, not to invest tuition money in easing the hiring process for law firms, perpetuating hierarchies of the past, or supporting false elitism among students based on review membership.[31]

Similarly, Professor Joel Seligman of the University of Michigan argues:

> The fact remains that the intensive two-year training of law review members in research and writing may be the most effective training presently offered in American law schools. All students deserve a comparable education. For law schools to accord frequent faculty contact and intensive research and training only to a chosen few is a fundamental failing of American legal education. Law schools provide the most attention to students who presumably need the least extra help.[32]

This type of educational policy is even more unpalatable and indefensible when it cuts along racial lines.

When law journals are viewed through the lens of their primary function—teaching—the employment of selection methods that result in the exclusion of minorities is comparable to offering certain advanced courses in the curriculum to white students only.

B. The Responsibility of Law Reviews to Provide a Forum of Debate Equally Accessible to All Voices

Law reviews carry the heavy burden of serving as the legal community's vehicle for expression and intellectual exchange. A central tenet of any society or profession that considers itself democratic is the preservation of a venue for speech equally accessible to all. As one scholar notes, "the availability of a forum open to all works ensures the uniquely democratic and diverse nature of the American system of legal education."[33] Indeed, law reviews were founded with this goal in mind.[34]

Current law review editors must remember that when their predecessors chose methods for selecting new members, they did so among a homogeneous student body. In the nineteenth century, almost every attorney and law student in the country was white and male.[35] Therefore, any

---

31. Martin, *supra* note 5, at 1106.
32. JOEL SELIGMAN, THE HIGH CITADEL: THE INFLUENCE OF HARVARD LAW SCHOOL 185 (1978). At most law schools, 2.5% to 17% of the students receive an invitation to join a law review. The average number is roughly 9%, with the larger schools having a smaller percentage of the student body represented on the law review. Martin, *supra* note 5, at 1102 n.35.
33. Martin, *supra* note 5, at 1097.
34. *See* Swygert & Bruce, *supra* note 16.
35. TASK FORCE ON MINORITIES IN THE LEGAL PROFESSION, ABA REPORT WITH RECOM-

method of selecting members would have resulted in a staff that perfectly matched the legal community. The white men of Harvard and Columbia did not need to worry about adequately representing different perspectives and backgrounds among the community affected by their publication.

Today, the racial composition of the legal profession has changed dramatically. Most minority groups have achieved significant representation in the field.[36] In contrast, the composition of most law review staffs has not evolved; they remain primarily white institutions. As will be discussed in the following sections, such homogeneity renders law review staffs unable to adequately represent the opinions and attitudes of the minority members of our profession. In other words, because law journals consist almost exclusively of white students, non-whites are denied an equal voice in the legal community's marketplace of ideas.

1. The Distinct Minority Voice

In discussing the existence of separate minority perspectives or "voices," Harvard Law Professor Duncan Kennedy describes the effects of background and community on one's outlook:

> Communities have cultures. This means individuals have traits that are neither genetically determined nor voluntarily chosen, but rather consciously and unconsciously taught through community life. . . . The distinctiveness [of communities] comes in part from the origins in Africa, Asia, Europe, and Latin America . . . . Each group has put its culture of origin together with its peculiar circumstances in the United States to produce a distinct set of behaviors, attitudes, beliefs, and values.[37]

MENDATIONS 6 (1986) ("Until about a century ago, the legal profession was the exclusive domain of white males. The few intrepid minorities who were permitted entry into the profession were usually treated as unwanted intruders and exiled to the outskirts of professional activity."). *See also* Derrick A. Bell, Jr. *Black Students in White Law Schools: The Ordeal and the Opportunity*, 1970 U. TOL. L. REV. 539, 540 (1970) ("Until almost the middle of the nineteenth century there were no black lawyers at all . . . ."). Macon B. Allen, who had practiced two years in Maine before being admitted to practice in Massachusetts on May 3, 1845, was probably the first African American lawyer in this country. *Id.* at n.5; *see also* IAN VAN TUYL, THE PRINCETON REVIEW STUDENT ACCESS GUIDE TO THE BEST LAW SCHOOLS 23 (1994 ed.) ("[F]or most of its history, the American legal profession has been the exclusive domain of white men."); *see also* Kim Lane Scheppele, Foreword, *Legal Storytelling: Telling Stories*, 87 MICH. L. REV. 2073, 2074 (1989).

36. Scheppele, *supra* note 35, at 2074 ("The legal community, once comprised almost entirely of white men, has, however, partially, hesitantly and reluctantly, begun to admit women, people of color, and those with life experiences far different than those of the lawyers whose ranks they now join."); Van Tuyl, *supra* note 35, at 23 (noting that, since 1972, "the representation of historically excluded minority groups [in law schools] has more than doubled, from 5.9 percent to 14.4 percent"). Despite percentage increases, minorities still face racial barriers when attempting to enter the legal profession. For example, African Americans make up 13% of the American population, yet only 3.5% of all lawyers are African American. *See* Alex M. Johnson, Jr., *Symposium on Race Consciousness and Legal Scholarship: Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties*, 1992 U. ILL. L. REV. 1043, 1054 (1992).

37. Duncan Kennedy, *Frontiers of Legal Thought III: A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705, 723 (1990).

Legal scholar Mari Matsuda reports that differences in background lead to diverse voices:

> Those outside the traditional center of academia intuit that their personal knowledge—what they hold true and dear, what is real to them—often comes from their life experience as outsiders. Women report the experience of a different reality, a different morality. People of color find an affinity of knowledge in their separate caucuses that they do not find in predominantly white settings.[38]

Similarly, University of Colorado professor Richard Delgado, when speaking in terms of the African American voice, argues that

> [It] is not that there is a single, monolithic nonwhite voice; there are indeed many of them. It is, rather, that all people of color speak from a base of experience that in our society is deeply structured by racism. That structure gives their stories a commonality warranting the term "voice."[39]

An expression of the African American voice appears in the purpose statement of *The Black Letter Law*, the newspaper of the Black Law Students Association at The Ohio State University College of Law:

> The Black Law Students Association (BLSA) is an organization that uses its unique composition to achieve its goals and addresses the daily challenges that confront all African-American law students. Bearing the burden of recognizing, accepting, and overcoming daily challenges, in addition to the rigors of legal study, often means that we see the world in a different light than those who are comfortable with the status quo. BLSA, therefore, on many issues maintains a profoundly different perspective than some other organizations and individuals in the law school. The Black Letter Law is one vehicle by which we can articulate and expose this perspective.[40]

An example in the context of traditional Native American values and contemporary American property law will perhaps best illustrate the ability of minority groups to speak from unique perspectives. Most of our country's property law concepts, such as "first in time—first in right," true ownership, inheritance, adverse possession, and future interests, are uniquely European in origin.[41] Most Native American tribes, however, believe that land is something to be shared and worshipped instead of owned.[42] Thus,

---

38. Mari Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground*, 11 HARV. WOMEN'S L.J. 1, 1–2 (1988).
39. Richard Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95, 98 (1990).
40. *See* The Blackletter Law (on file at The Ohio State University Law School library).
41. *See* JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY (1988).
42. *See* Eric T. Freyfogle, Note, *Land Use and the Study of Early American History*, 94 YALE L.J. 717, 723 (1985) ("In essence, the Indians did not believe that they, or anyone else, 'owned' the land. Like other hunter-gatherer and horticultural groups, they believed that land was no more subject to ownership than was air, water, sky, or the numerous spirits that inhabited the world."). This idea is reflected in a letter from an Indian Chief to President Pierce in 1855. After explaining how the Indians did not see the

to Native Americans, concepts relating to land ownership are of a relatively new and strange import. Common sense dictates that students predominantly reared and socialized in a Native American culture are likely to hold opinions and attitudes about property law that radically differ from those of their classmates of European ancestry. These unique beliefs and attitudes about property law, compose and amplify a distinct voice that cannot easily be duplicated by students from dissimilar backgrounds.[43]

2. How Selection Methods Silence Minority Voices

Minority voices are denied equal volume in the marketplace of ideas both directly and indirectly by all-white law review staffs. Silencing occurs directly when all of the student articles, accounting for approximately fifty percent of the published material, are written entirely by white students. Indirect silencing occurs when the articles are reviewed and selected for publication. A large percentage of articles received by journals each year are written by law professors under great pressure to "publish often or perish."[44] Attempting to satisfy tenure requirements, many pro-

---

land as something that could be owned, the Chief wrote: "[w]e know that white man does not understand our ways . . . for he is a stranger who comes in the night and takes from the land whatever he needs. The earth is not his brother but his enemy, and when he has conquered it he moves on." CHARLES M. HAAR & L. LANCE LIEBMAN, PROPERTY AND LAW 15 (1977). *See also* Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 87 (1985) (noting how European property law did not account for the nomadic existence of most Indian tribes and arguing that "the audience presupposed by [common law property concepts] is an agrarian or a commercial people"); Leslie M. Silko, *They Were the Lands*, N.Y. TIMES, May 25, 1980, § 7, at 10 (describing the sense of kinship Indian tribes felt toward the land); Gerald Torres & Katherine Milun, *Frontier of Legal Thought III: Translating Yonnondio by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625, 637–38 (1990) (describing the negative impact of "European notions of private ownership" on Mashpee society); Jill De La Hunt, Note, *The Canons of Indian Treaty and Statutory Construction: A Proposal for Codification*, 17 U. MICH. J. L. REF. 681, 682–83 n.10 (1984) ("Cultural differences regarding the concept of land 'ownership' complicated Indian and non-Indian relations . . . . Differences regarding the concept and value of land remain a problem today.").

43. In recent years, a spirited exchange has occurred on the pages of law reviews over the validity of "minority voices." *See generally* John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2168–78 (1992). On one side, the unique realities and perspectives of "outsiders" have been explored in a host of articles. *See* Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984); Richard Delgado, *Brewer's Plea: Critical Thoughts on Common Cause*, 44 VAND. L. REV. 1 (1991); Carrie Menkel-Meadow, *Excluded Voices: Realities in Law and Law Reform: Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIAMI L. REV. 29 (1987); Robin D. Barnes, *Race Consciousness: Thematic Content of Racial Distinctiveness in Critical Race Scholarship*, 103 HARV. L. REV. 1864 (1990); Milner S. Ball, *The Legal Academy and Minority Scholars*, 103 HARV. L. REV. 1855 (1990); Delgado, *supra* note 39; Matsuda, *supra* note 38; Kennedy, *supra* note 37. This list is non-exhaustive. Opposition to the idea of "minority voices" has come primarily from Randall Kennedy, law professor at Harvard Law School. *See* Randall Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989) (arguing that the so-called uniqueness of minority perspectives does not reflect reality and that the views of "outsiders" are not inherently different from those of white male scholars).

44. John F.T. Murray, *Publish and Perish—By Suffocation*, 27 J. LEGAL. EDUC. 566, 567 (1975)

fessors are forced to send out hurried and superficial articles between their more deliberate and well-thought-out pieces.[45] An important duty of students on law review is to scrutinize incoming articles to screen out those of less-than-publishable quality. Minority voices are indirectly muted when all of the incoming articles are screened by all-white committees and then edited in six or seven stages by the same homogeneous group of people.

It is natural for white students to choose articles to which they can relate and to write on topics that, because of cultural and personal backgrounds, pique their interest and stimulate their creativity. I do not suggest that law review members intentionally stifle minority voices as they select and edit articles, that minority students all think alike, or that white students write only about topics of interest to white lawyers. My point is that white students are incapable, because of their lack of personal and cultural experiences, of adequately speaking for the unrepresented voices.

Even when consciously attempting to choose an article from a pool of Black professors, a white student is less able to differentiate between an article written primarily for tenure purposes and an article motivated by uniquely Black experiences and concerns. An African American student-editor may have a greater chance of recognizing an article that truly reflects the African American experience in America. Similarly, a Hispanic student-author can bring more creativity, originality, and personal insight into a Note or Comment when critiquing areas of the law that deal with the unique problems of Hispanics in this country. While white students are certainly capable of writing a thoughtful critique of a racially discriminatory practice, they may be less able to produce a heartfelt exposition that captures the true impact of the problem on the particular group affected.[46]

Additionally, students from marginalized cultural groups can sometimes offer creative perspectives on seemingly "culturally neutral" areas of the law such as property or tax, via their position as an "outsider." The contrast provided earlier between the Native American students and their classmates concerning views on property and land ownership is a good example of possible "outside" perspectives in a so-called "neutral" areas of the law.

All-white law journals inevitably lead to a stagnant marketplace of ideas that repetitively exchanges the views of the dominant culture. The unique voices of African Americans, Native Americans, Hispanics, and all other educationally marginalized groups are either completely unrepresented, mimicked ineffectually and inaccurately by white students, or unconsciously filtered out of the arena through the processes of article selection and editing.

(arguing that tenure pressures force professors to write "not necessarily from inspiration, but because they are required to develop or maintain a scholarly reputation"). *See also* David L. Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 EMORY L.J. 1005, 1082 (1989).

45. Murray, *supra* note 44, at 568.
46. The idea expressed in this paragraph is a natural outgrowth of the distinct "minority voice" discussed in *supra* part II.A and developed in detail by the authors cited in *supra* note 43.

3. *The Political and Cultural Cases*

Duncan Kennedy explores the cultural and political consequences of excluding minority voices from forums of intellectual debate in his article "Frontiers of Legal Thought III: A Cultural Pluralist Case for Affirmative Action in Legal Academia."[47] His article exposes the need for diversity in the hiring of law school faculty and academia generally, but his arguments are equally, if not even slightly more, applicable to the law review context.[48] Kennedy presents two cases: the political case and the cultural case. The political case argues that, in a society that purports to follow the ideals of democracy, the intelligentsia of subordinated cultural communities should have access to and representation within institutions that politically affect their lives. The cultural case stresses that increasing the volume of minorities' voices would improve the quality and social value of legal scholarship by adding unique and fresh perspectives into academia.

a. The Political Case

The political case is compelling when applied to law journals. Considering the importance of law journals in defining individual rights and shaping our nation's ideological landscape,[49] these periodicals truly play a significant role in our "democratic apparatus." As Kennedy argues, "the knowledge law teachers produce [in law reviews] is intrinsically political and actually effective in our political system."[50] This idea was captured in a speech by Geoffrey Stone, the Dean of the University of Chicago Law School:

> In its purest form, legal scholarship, like other forms of scholarly research, enables us to understand who we are, how we got here and where we're headed. It illuminates and defines our legal, political, intellectual and social cultures.
> . . . Legal scholarship plays an essential role in the evolution of law. Lawyers, judges and government officials rarely have the time systematically to re-think complex legal issues. Professors, on the

---

47. Kennedy, *supra* note 37, at 705.
48. Law review is an important credential for someone trying to become a law professor. Affirmative action measures on law reviews would provide more minority professorial candidates with that credential. Therefore, the first step toward increasing diversity among faculties may be to achieve diversity on law reviews. *See generally* Robert. J. Lack, *Challenge to the White Male Legal Establishment*, N.Y. TIMES, Mar. 9, 1981, at A22:

> Harvard Law School's student body is 28 percent female and 14 percent minority, yet the Law Review numbers among its 89 editors only 11 women and only one member of a minority group (before affirmative action on Harvard's law review). Is it any surprise, then, that of the 32 present law clerks to the Justices of the U.S. Supreme Court only three are women and two are black, or that there are few women or minority members among the partners of the nation's largest law firms or on the faculties of the nation's law schools?

49. *See supra* text accompanying notes 2–6.
50. Kennedy, *supra* note 37, at 712.

> other hand, have the luxury—perhaps more accurately the responsibility—to devote months and even years to the often daunting task of intensive research, analysis, discussion, and re-evaluation of our legal concepts and institutions. This effort can, and does have an important and salutary impact on the course of the law.[51]

The crux of the political case, in the law review scenario, "includes the idea that minority communities can't compete effectively for wealth and power without intelligentsias that produce the kinds of knowledge, especially political or ideological knowledge, that will help them get what they want."[52] In other words, the exclusion of minorities from law journals, like the exclusion of minorities from law faculties, prevents the intelligentsia of minority groups from raising their voices and participating in political debate, thus frustrating their attempts to gain intellectual recognition, political standing, and influence over the evolution of the law.

b. The Cultural Case

Kennedy's cultural case envisions an improved marketplace of ideas stimulated by the influx of "new blood" that affirmative action would bring to academia.[53] The inclusion of minority voices in academia would invigorate our cultural and educational exchanges by challenging and stimulating current modes of thought with the fresh perspectives of others. Professor Matsuda explains:

> [H]uman beings learn and grow through interaction with difference, not by reproducing what they already know. A system of legal education that ignores outsiders' perspectives artificially restricts and stultifies the scholarly imagination.[54]

The reasoning behind the cultural case influenced the *Rutgers Law Review* in its decision to implement diversity-ensuring procedures on its editorial staff:

> . . . [The editors concluded] that the work product of the Law Review was adversely affected by the absence of any meaningful diversity within its membership. A group of predominantly white middle class students had in fact concluded that, as a group, they were somewhat boring, and that the intellectual dust and cobwebs that pervaded the institution were finding their way onto the printed page . . . . [T]he decision [to implement an affirmative action program] was reached . . . only after a protracted debate in which the only issue that was germane was the editorial quality of the Law Review.[55]

---

51. Dean Geoffrey Stone, Remarks at the Annual Dinner of the University of Chicago Law School Alumni Association (May 10, 1989) (transcript on file with the *Chicago-Kent Law Review*).
52. Kennedy, *supra* note 37, at 713.
53. *Id.* at 716.
54. Matsuda, *supra* note 38, at 3–4 (1988).
55. Ronald K. Chen, *Rutgers MSP*, NEW JERSEY L.J., Dec. 6, 1990, at 30.

The philosophies underlying the political and cultural cases appear to have influenced the United States Supreme Court in its decision upholding the constitutionality of an F.C.C. affirmative action program designed to promote diversity in media broadcast ownership.[56] Writing for the Court, Justice Brennan stated:

> We are compelled to observe that the views of racial minorities continue to be inadequately represented in the broadcast media. This situation is detrimental not only to the minority audience but to all of the viewing and listening public. Adequate representation of minority viewpoints serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience. . . .[57]
>
> . . . The predictive judgment about the overall result of minority entry into broadcasting is not a rigid assumption about how minority owners will behave in every case but rather is akin to Justice Powell's conclusion in Bakke that greater admission of minorities would contribute, on average, "to the 'robust exchange of ideas.'"[58]

III. THE FLAWS IN TRADITIONAL SELECTION METHODS

The originators of the student-edited law review at Harvard and Columbia, the first schools to establish law reviews, chose their members through merit-oriented competitions. In February 1885, six young male students started the *Columbia Jurist*, the forerunner to Columbia's modern law review,[59] promising to publish "all news that can interest Law Men."[60] The editors of the *Columbia Jurist* were selected on the basis of "competitive essays."[61] Grades were not used for selection purposes at Columbia because they were only recorded once, just prior to graduation.[62] Likewise, the founding students of Harvard's law review helped to establish the tradition of "meritocratic" selection. First published in 1886 "for the serious discussion of legal topics and for other serious work on law,"[63] students became members if they achieved academic excellence; there were no other considerations.[64]

As the idea of student-edited legal periodicals swept across the country, the practice of selecting members through writing competitions or grades, or a combination of the two, became the standard.[65] Except for increases in membership and circulation, the basic law review model developed by Columbia and Harvard has remained "intact and unchanged

---

56. Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547 (1990).
57. *Id.* at 556 (quoting Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979, 980–81).
58. *Id.* at 579 (quoting Bakke, 438 U.S. at 313).
59. FOUNDATION FOR RESEARCH IN LEGAL HISTORY, A HISTORY OF THE SCHOOL OF LAW, COLUMBIA UNIVERSITY 102 (J. Goebel, Jr. ed. 1955).
60. *Id.*
61. *Id.* at 103.
62. *Id.* at 430 n.100.
63. Centennial History of the Harvard Law School 1817–1917 139 (1918).
64. *See* FELIX FRANKFURTER REMINISCES 27 (H. Phillips ed. 1960).
65. *See generally* Swygert & Bruce, *supra* note 16, at 778–87.

for a century . . . and remarkably similar from one law school to the next."[66]

Although the specifics concerning selection methods vary slightly from school to school, four basic models of selection have prevailed today: (1) membership based solely on first-year grades, (2) membership based on a writing competition open only to students with grades higher than a minimum grade point average, (3) membership based on an unrestricted writing competition, and (4) membership based on a combination of grades and a writing competition.[67]

As discussed earlier, minorities have not fared well under these systems. This phenomenon has several elements. First, many minority students do not attempt to join law reviews through writing competitions because of their belief that these periodicals are elitist, all-white institutions. An African American student at George Washington Law School referred to this problem when discussing the lack of minority membership on the law journal at his school: "Many Blacks and other minorities have not applied to these publications. . . . [T]here's a feeling [that we] wouldn't be warmly greeted."[68] Such widespread perceptions cause many minority students to feel unwanted and unwelcome, and ultimately, to become discouraged from "trying out" for law review.[69]

By far the most important reason minorities have not fared well in attaining membership on law reviews, however, is the selection methods employed by the reviews. As I will discuss in the next two sections, law school grades and writing competitions are largely ineffective at selecting the best potential law review members. When slight cultural biases and inequalities are added to the equation, the result is competitions that systematically exclude minorities.

A. The Inefficacy of Grades and Writing Contests in Predicting Aptitude for Law Review

Many law review editors base their support for traditional selection methods on the purported need to maintain current levels of quality.[70]

---

66. E. Joshua Rosenkranz, *Law Review's Empire*, 39 HASTINGS L.J. 859, 860–61 (1988).
67. Martin, *supra* note 5, at 1102. *See also* Fidler, *supra* note 1, at 53, reporting:

> Fifty-four percent of the reviews do not use grades in the selection process; only 2 percent use grades exclusively. Twenty-three percent use some test of writing skills as the only measure of admission. Another 2.9 percent use a combined index of grades and writing skills exclusively. Of those publications that consider writing skills in the selection process, only 23 percent use publishable notes as the sole criterion, whereas 58.2 percent use solely a "writing competition."

68. Anne Kornhauser, *Quotas or Outreach? GW Law Review Implements 'Diversity Criteria,'* LEGAL TIMES, May 15, 1989, at 6. *See* Bell, *supra* note 35.
69. Minority culture students may be less likely than their majority culture counterparts to be informed of the advantages of law review membership. One former law professor reports that most of the minority students enrolled in her classes, presumably because of a lack of contact with the second and third year law review students of the majority culture, were not aware of the benefits and prestige of law review until it was too late to qualify for membership. Portia Y.T. Hamlar, *Minority Tokenism in American Law Schools*, 26 How. L.J. 443, 553 (1983).
70. *See* Ramos, *supra* note 10, at 185.

Proponents of this argument believe that grade-on and write-on selection methods sift through the student body and uncover the best and the brightest, thus ensuring that law reviews will continue to produce top-notch publications and maintain their influential position in the legal profession.[71] As I will discuss in the following section, however, law school exams and condensed writing competitions do not effectively measure the qualities needed for successful law review membership. As a result, many of the students with the greatest potential to produce an influential, top-notch Note, or who would be best able to excel as a law review editor, are denied an invitation.

1. *The Law Journal Experience*

Law review membership is usually a two-year commitment, beginning after first-year grades are released and the writing competition has ended. Each student on law review is required to research and write a scholarly Note or Comment over the course of the first year of participation, the best of which are published in later issues.[72] Members must also read and choose among all of the articles submitted by professors and other legal scholars, edit each article to be published, and perform the various leadership and administrative functions typical of a small publishing company.[73] The primary characteristics include the ability to perform technical edits, to work and communicate effectively with others, to conduct thorough research, and to revise articles until they are clear and well reasoned. In addition, law review members must demonstrate intelligence, leadership, initiative and most importantly, dedication.[74]

2. *Examinations*

The typical law school exam is a three-to-five hour affair, consisting primarily of essay questions. Students are required to apply everything they have learned in the course of a semester to a series of hypothetical scenarios invented by their professor.[75] Key attributes for success on law school exams include the ability to memorize enormous quantities of

---

71. For example, in lamenting over the implementation of an affirmative action program on Columbia's law review, one commentator stated, "[T]he aggregate quality . . . of the *Review* will decline because some of the members necessarily will lack the requisite academic credentials." Jay P. Lefkowitz, *Law Review Errs with Affirmative Action Plan*, MANHATTAN LAW., May 23, 1989, at 11.
72. Fidler, *supra* note 1, at 55.
73. *Id.* at 48, 57–60.
74. *See generally* Rosenkranz, *supra* note 66.
75. The American Bar Association accreditation standards for law schools establish the universal method for evaluating student performances:

> As part of the testing of scholastic achievement, a written examination of suitable length and complexity shall be required in every course for which credit is given, except clinical work, courses involving extensive written work such as moot court, practice court, legal writing and drafting seminars and individual research projects.

David M. White, *An Investigation into the Validity and Cultural Bias of the Law School Admission Test*, *in* TOWARDS A DIVERSIFIED LEGAL PROFESSION 214 (1980) (quoting Note, *ABA Law Schools: Standards, Procedures, and the Future of Legal Education*, 72 MICH L. REV. 1134, 1145 n.63 (1974)).

material, to write quickly, to organize exam sources in a manner conducive to finding answers quickly (i.e., "tabbing" notes and outlines), to spot issues in a time-pressured situation, to argue both sides of legal issues, to psychoanalyze professors, and to perform under intense pressure.[76]

A recent study found that the discussion of both sides of legal issues on an exam (i.e., arguments from both the plaintiff's and defendant's perspectives) and the length, in terms of the number of bluebook pages written, were the factors with the strongest statistical correlation to high exam grades.[77] While the ability to argue from different points of view may be a talent worthy of evaluation, a lengthy exam answer could be the result of either: (1) exceptional knowledge, or (2) the ability to write quickly and thus get more information on paper before time runs out. Because most exams are time-pressured and require the students to spend most of the allotted time writing,[78] those who can put their ideas on paper in the least amount of time have a clear advantage, regardless of the amount of knowledge that they possess. Researchers also discovered that neat handwriting is another dubious talent with a "statistically significant" relation to high exam grades.[79]

Regardless of whether law school exams accurately measure general legal aptitude,[80] it is clear that they do not measure the essential attributes needed for successful law review participation, including research skills, technical editing abilities, leadership traits, maturity, dependability, communication skills, interest in scholarly publishing, originality of perspectives stemming from background, ability to work with others, and writing and analytical abilities when not under intense time pressures.[81]

---

76. *See generally* Rosenkranz, *supra* note 66, at 893; White, *supra* note 75, at 214–18.
77. White, *supra* note 75, at 215–16.
78. *See* Philip C. Kissam, *Law School Examinations*, 42 VAND. L. REV. 433, 437–53 (1989).
79. White, *supra* note 75, at 215.
80. For arguments that law school exams do not accurately measure aptitude, see Derrick Bell, *Law School Exams and Minority-Group Students*, 7 BLACK L.J. 304, 307 n.5 (1981):

> The flaw of the merit argument in the law review context is the same flaw of the argument [against] 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 aptitude are inaccurate. Written tests, whether designed to measure aptitude or achievement, do not reflect accurately a student's potential. The LSAT, for instance, is accurate less than half of the time as a predictor of future performance. 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. . . ."

See also Kissam, *supra* note 78 at 457–61. Kissam argues that while law school exams effectively measure a student's legal "imagination," capacity for self-learning, and legal productivity, they do so in a superficial manner. Kissam points out that the traditional format of law school exams brings many irrelevant factors into the evaluation process and fails to measure several aptitudes that are very important in the legal profession. For empirical research on the efficacy of law school exams, see generally Jay Feinman & Mark Feldman, *Pedagogy and Politics*, 73 GEO. L.J. 875, 918–25 (1985) (discussing why law school grades are poor measuring sticks of a student's aptitude for the legal field).
81. *See* Rosenkranz, *supra* note 66, at 893.

Arguably, law school exams effectively measure hard work, perseverance, and dedication to academics.[82] Indeed, good grades are often the direct result of intense and effective study habits.[83] A significant difference exists, however, between the willingness to motivate oneself for a graded exercise, like law school exams, and the willingness to dedicate oneself to a non-graded, voluntary pursuit, like law review. Students who devote their time in law school to getting top grades may be motivated primarily by desires for numerous firm interviews, the ability to quickly pay off education loans, a prestigious judicial clerkship, or a lucrative career. After making the law review, the "carrots" that compelled them to hit the books during the semester are no longer dangling in front of them. Thus, they need only to perform their law journal tasks at the minimal level necessary to avoid having their membership terminated.

To remain dedicated to excellence on a law review after initially being accepted onto the journal, one must be motivated by forces such as a genuine interest in scholarly publishing, a desire to create a helpful and insightful periodical for the benefit of the legal community, or a desire to influence the law through a creative Note or Comment. Students who are obsessed with receiving and maintaining top grades may be poor candidates for law review because they will be unwilling to fully commit to any outside activity that could cut into their study time. In short, the kind of dedication and hard work reflected in the achievement of top law school grades may not be relevant to predicting one's willingness to dedicate oneself to excellence as a member of a law journal.

The problem with using exam grades as the measuring device for law review potential has been accentuated in recent years by the growing homogeneity in raw academic ability among students in each law school class. Prior to World War II, admission at most law schools was "open."[84] Marked differences in the analytical and cognitive abilities of the enrolled students was readily apparent to law professors in that era.[85] With the enormous increase in the number of law school applicants, beginning in the 1960s and continuing today, the gap between the top and bottom of the class at every law school seems to have virtually disappeared.[86] The majority of students at each law school fall within a narrow band of admission criteria unique to the school they attend. This pattern has made the grade differentials on the bell curve increasingly superficial as a method of distinguishing the "A" students from the "C" students.[87] This fact, along with the flurry of recent studies and articles revealing the problems in the traditional law school examination process, has solidified the per-

82. *See* Ramos, *supra* note 10, at 186.
83. *Id.*
84. *See* Cramton, *supra* note 1, at 5; *see also* Van Tuyl, *supra* note 35, at 47 ("For most of the years prior to about 1965, relatively few people who applied to law school were turned away.").
85. Cramton, *supra* note 1, at 5–6.
86. *Id.*; *see also* Van Tuyl, *supra* note 35, at 47–49 (noting that, in 1965, 27,000 people applied to law schools; in 1968, 45,000 people applied; in 1972, 75,000 people applied; in 1975, 100,000 people applied; and in 1991, 99,327 people applied.).
87. Cramton, *supra* note 1, at 6.

ception that "[f]irst year grades are a notoriously arbitrary way of selecting review members."[88]

3. Condensed Writing Competitions

Writing competitions are only slightly better than law school grades at identifying the best journal members. Taking place against the backdrop of early summer, the most important factor in successfully completing a competition paper is the lack of a summer job to compete with precious time. Most law review writing competitions are "canned." That is, all reference material is pre-researched. They also have a limit of ten pages for text and endnotes combined, and provide students with one to six weeks to write the paper.[89] Most reviews, therefore, do not even attempt to measure research skills. Furthermore, such minimal space in which to discuss a heady topic does not allow a student an opportunity to develop her creativity, originality, or personal perspectives on the topic. Indeed, with seven or eight pages necessary to cover all the expected formalities of a case review (facts, history, arguments by parties, etc.), students have only one or two pages to differentiate themselves from other students.[90]

This restrictive format coupled with the fact that the judges are only one year more experienced than the competitors—the primary difference being that the judges have already learned and expect the detailed formalities of legal scholarship (i.e., Bluebook, format, etc.)—results in a competition that values form over substance. Moreover, like law school exams, writing competitions fail to consider leadership traits, maturity, dependability, perseverance, communication skills, interest in scholarly publications, writing abilities when not under time pressures, differences in background leading to unique perspectives, ability to work with others, intelligence, meticulousness, and dedication.

4. Summary

Choosing law review members on the basis of first-year grades and/or a condensed writing competition is like selecting members for a basketball team by pitting the contestants against each other in the sports of swimming and wrestling. While success in these three sports may indicate one common characteristic—athletic ability—the rules of the games and the dynamics of the playing fields vary such that completely different talents and skills are needed for success in each of them. Basketball requires speed, jumping ability, and good hand-eye coordination. Swimming requires a strong respiratory system and endurance. Wrestlers must possess upper-body strength and a natural sense of balance. The mastery of wrestling or swimming in no way indicates a natural aptitude for basketball. Common sense leads one to the conclusion that wrestling and swimming try-outs are particularly arbitrary and irrational ways to identify the best players for a basketball team.

88. Martin, *supra* note 5, at 1103.
89. Rosenkranz, *supra* note 66, at 894.
90. *Id.*

Likewise, having the ability to take exams or to achieve a high score on a writing competition does not necessarily correlate with one's potential for excellence on a law review. Law school exams and writing competitions do not even attempt to measure the talents, aptitudes, and convictions most needed for successful participation on a law journal. Many of the best writers and potentially best law review members, from both minority groups and the dominant-culture group, fall through the cracks because the methods utilized are not designed to detect the necessary attributes. Inevitably, a large percentage of the students selected, particularly those who did not apply through voluntary procedures but "graded on," lack the interest in or aptitude for scholarly publishing. Nevertheless, these students do not hesitate to accept their invitations simply because of the fringe benefits associated with law journal membership.

B. Cultural Biases and Educational Obstacles

Another argument of students who resist the need for affirmative action on law reviews is the supposed integrity and impartiality of selection procedures stemming from the fact that most law school exams and writing competitions are blindly graded.[91] For any competition to be fair and impartial, however, the contestants must start the race from the same gate and must compete on equally challenging playing fields. The "fairness" view that pervades law reviews assumes that all students start law school at the same level and face identical obstacles along the way. Students who argue the "impartiality" point fail to recognize that minority students face discrimination in the subjectivity of the selection processes, and that many have faced educational barriers, stemming from past discrimination against their minority group, which impede their ability to perform at a competitive level.

Minority students are the objects of both overt and unintentional discrimination in the highly subjective law review selection processes. Overt racial discrimination can occur on any law review that has not yet adopted anonymous selection procedures.[92] More subtle forms of discrimination occur on every law review. Law review members who judge writing competitions, like the law professors who assign grades, are naturally more inclined to define "quality" writing in terms of the standards and styles to which they are accustomed. As one author notes:

> [L]aw professors, who grade the examination papers submitted by all students, are overwhelmingly white, and incorporate cultural traits, including preferred writing styles, of the white race. This does not accuse the law professors of intentional discrimination; it simply notices that law professors will carry their culture biases

91. *See supra* note 13 and accompanying text.

92. Overt discrimination can occur in a number of scenarios, from intentional to subconscious, when a subjective competition is not judged anonymously. For example, racial discrimination occurs when a white journal member chooses a white classmate over a minority classmate, not because of the selected student's race, but because the journal member would rather work with a student with whom she feels she has more cultural similarity. For a discussion of the subconscious racism that is prevalent, yet invisible, in our society, see Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

along with their other traits when they compose and grade student examinations.[93]

Likewise, the students composing the staffs of most law reviews are incapable of selecting competition papers without imposing their own cultural standards of quality. In a letter to the editor of the *New Jersey Law Journal*, the former editor-in-chief of the Rutger's law review, Ronald Chen, explains the reasoning his editing board used when adopting affirmative action measures:

> Even though one hardly has to subscribe to leftist principles in order to conclude that there is such as thing as cultural bias . . . much deliberation occurred before the board accepted as proven fact that such a thing existed, at least in the abstract. There was much disagreement, however, on whether cultural bias could be said to be actually at work in any particular case.[94]

The Rutgers editing board concluded that some papers are so outstanding that it was safe to assume that bias could not significantly affect the result of their high scores. Similarly, many papers are so inferior that rejection is inevitable because of the reality of their poor quality, not because a cultural bias made them inferior.[95] Chen continues:

> Where a paper falls into the great morass known as the "middle group," however, more subtle factors, including cultural bias, can come into play. . . .
>
> The editorial board therefore concluded that its competence to judge these papers was limited, in part because of its own inbred cultural or ethnic inclinations. It was decided to accept additional [minority] papers out of this group, therefore, because the Law Review concluded that any disproportionately low [minority] representation within this group was not the result of inferior work by those being judged, but rather was the result of limited competence by those doing the judging.[96]

As former Harvard law professor Derrick Bell has recognized, many minority students do not exhibit the thinking patterns and writing styles associated with the white, upper-middle class background from which law professors and law review members usually come.

> Many instructors provide what they consider the basic instructions required to succeed on their exams. This advice is seldom provided in sufficient detail, and assumes a writing style only infrequently found in persons whose school, home and community background is not upper-middle class. Few minority students are products of such backgrounds and, not surprisingly, few utilize, in

---

93. Thomas J. Ginger, *Affirmative Action: Answer for Law Schools*, 28 How. L.J. 701, 707 (1985). *See also* White, *supra* note 75, at 225–26 (discussing racially biased questions on recent law school exams and the negative effects such questions had on the concentration of the students from that racial group).
94. Chen, *supra* note 55, at 30.
95. *Id.*
96. *Id.*

> their writing, the organization, word usage, and structural characteristics of those who regularly read *The New York Review of Books*.
>
> The shortcoming is attributable neither to an innate lack of intelligence nor an absence of potential legal ability. It concerns rather the processes of communication and the habits of thinking—particularly analysis of problems—that are more likely to be found among those in the upper echelons of our "classless" society.[97]

This phenomenon results in the exclusion of many minority candidates with equal or superior abilities merely because their thoughts and methods of self-expression are not "mainstream."[98]

In reflecting on the educational challenges unique to minority law students, Sallyanne Payton of the University of Michigan has observed that "law is the study of the culture of the white ruling class. If the students didn't grow up with . . . that [kind of] exposure it is hard [for them] to understand the thinking patterns of judges and faculty members."[99] Similarly, Derrick Bell describes the experience of Black students in white law schools:

> [A] majority of Black law students are repelled early in their law school careers by the degree to which the views expressed by their teachers reflect a far from analytical allegiance to a legal system that since its inception has systematically suppressed Black people. Blacks do not expect the law schools to advocate revolution. They do, however, expect a view of the world, law, and society more encompassing than that held by Louis XIV. And in this expectation, they are often disappointed.[100]

---

97. Bell, *supra* note 80, at 306–07. *See also* Donald K. Hill, *Myth, Law, and Linguistic Thought*, 1991 WIS. MULTI-CULTURAL L.J. 9 (1991) ("The difficulty Black students have with the study of law and the taking of bar examinations may have more to do with their culturally dictated linguistic responses to the discipline of law than to either their intellectual or skills capabilities."); Donald K. Hill, *Law School, Legal Education, and the Black Law Student*, 12 T. MARSHALL L. REV. 457, 458, 488 (1987) (discussing the fact that the problems minority students have competing in law schools is "more psychological than intellectual in nature," and is "related to the [lack of] acquisition and development of skills and not a lack of substantive knowledge," and stems partially from the fact that African American culture is still imbedded in an oral tradition, rather than a written tradition).
98. In his article "Law School Examinations," University of Kansas law professor Philip Kissam discusses how professors and students can reach different understandings of the same class material because of differences in background:

    > Another complicating factor in the reading of complex texts is that each reader will bring her specific perspectives, frameworks, and information to bear in understanding the text. These perspectives, frameworks, and information are based on diverse factors such as the individual's cultural background, previous education, and gender. Comparably diverse readings of law school texts might be expected as a natural result. In sum, different ways of reading and understanding texts and the many fragmented and discontinuous texts in law school work create the danger of a radical or incoherent pluralism in law school communication and knowledge.

    Kissam, *supra* note 78, at 469.
99. Rudolfsky, *Review Nixes Affirmative Action*, RES GESTAE U. MICH L. SCH., Mar. 17, 1982, at 1 (quoting Professor Payton).
100. Bell, *supra* note 35, at 546–48.

In addition, many minority students have not benefitted from the same quality of pre-law school education or the same type of confidence-nurturing environment as their white counterparts. These students begin law school and the race to law review at a distinct disadvantage. The magnitude of this problem is beyond the scope of this Article. Indeed, it would take several volumes of law review articles to adequately describe the failure of the American educational system in regards to cultural and racial minorities. In short, the much-celebrated decision of *Brown v. Board of Education*, while effectively abolishing institutionalized segregation, has failed to significantly improve educational opportunities for many minorities.[101] In America's desegregated schools, minority students are routinely placed in classes below their abilities,[102] subtly treated as inferiors by many of their peers and teachers,[103] taught by teachers who are unlikely to understand or be sympathetic to their unique situation,[104] pushed more toward athletics than academics, suffer from a lack of role models, and taught from textbooks written from an Anglocentric perspective. This fact, though empowering to white students, often leaves minority students feeling unconnected and lacking confidence.[105] Studies show that the experience of being a "token" minority in a post-*Brown* school often has more of a negative impact on the self-esteem of school children than did segregation as it existed before *Brown*.[106]

Minority students living in the inner-city or ethnic neighborhoods whose schools have not fallen under the judicial implementing orders following the *Brown* decision, roughly two-thirds of all minority students in the United States, attend the poorest, most physically decrepit, and overall worst public schools in the country.[107] With the benefit of hindsight,

---

101. *See generally* Kevin Brown, *Do African-Americans Need Immersion Schools?: The Paradoxes Created by Legal Conceptualization of Race and Public Education*, 78 IOWA L. REV. 813, 814–16 (1993) (describing the disparaging experience of being educated as an African American in a primarily white post-*Brown* public school); Pamela J. Smith, *All-Male Black Schools and the Equal Protection Clause: A Step Forward Toward Education*, 66 TUL. L. REV. 2003 (1992); Ginger, *supra* note 93, at 712 (1985) (discussing the inadequacies of pre-law school education for many minorities); Leslie G. Espinoza, *Empowerment and Achievement in Minority Law Student Support Programs: Constructing Affirmative Action*, 22 U. MICH. J. L. REF. 281 (1989); Roberta L. Steele, *All Things Not Being Equal: The Case for Race Separate Schools*, 43 CASE W. RES. L. REV. 591, 591–92 (1993) ("The benefits of school desegregation are illusory to many African-American children in the United States."); Bell, *supra* note 35. *But see* Drew S. Days III, *The Other Desegregation Story: Eradicating the Dual School System in Hillsborough County, Florida* 61 FORDHAM L. REV. 33 (1992).
102. Jeannie Oakes, *Limited Opportunity: Student Race and Curricular Differences in Secondary Vocational Education*, 91 AM. J. EDUC. 328, 348 (1983).
103. *See generally* Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?*, 78 CORNELL L. REV. 1, 80 (1992).
104. *See* Brown, *supra* note 101, at 814–16.
105. *Id.* at 853–54, 856.
106. Walter G. Stephan, *School Desegregation: An Evaluation of Predictions Made in* Brown v. Board of Education, 85 PSYCHOL. BULL. 217, 227–28 (1978) ("None of the desegregation studies found that desegregation had positive effects on black self-esteem, but 25% found that desegregation had negative effects."); Hill, *supra* note 9, at 458–59 (arguing that the problems that minorities have in competing in law school stem from the psychological effects of racism, and that "[t]herefore it is crucial that Black law schools focus their efforts on building students' self-confidence and self-worth.").
107. *See* Smith, *supra* note 101, at 2014. In 1980, two-thirds of African American children

many scholars now believe that the Court could have achieved greater educational equality in the long run had it focused as much on the word "equal" as it did "separate" when overturning *Plessy v. Ferguson*.[108] The problems in our educational system, along with the cultural biases inherent in law schools exams and writing competitions, place minority students at a distinct disadvantage in the race to law review. Contrary to the belief of many editors, traditional selection methods are far from fair and impartial measures of law review potential because the contestants begin from different starting lines and face obstacles of varying difficulty along the way.

In sum, the ineffectiveness of grade-on and write-on methods of selecting the best law review members from a group of students who are essentially homogeneous in raw intellectual ability (although not always in quality of educational background) leads to results that are largely arbitrary. These competitions resemble contests where the winners are chosen at random from tickets in a hat. The subtle discrimination inherent in the competitions and in our educational system makes the tickets belonging to minority students slightly smaller and heavier, and thus overall, less likely to be drawn for membership.

IV. RE-EXAMINING THE MAJOR ARGUMENTS AGAINST AFFIRMATIVE ACTION ON LAW REVIEWS

This section addresses the five major objections to affirmative action on law reviews in light of the analysis contained in Parts II and III. Some repetition is necessary to highlight the problems underlying the "honor society" mentality and its objections to affirmative action on law reviews.

A. "Affirmative Action Destroys a Law Review's Basic Meritocratic Nature."

Justifying a system that is purportedly meritocratic by asserting that it is meritocratic in nature is circular. It begs the questions "Do present criterion truly measure merit and one's aptitude for law review?" and "Are the so-called 'meritocratic' methods and procedures best suited to help law journals fulfill their responsibilities at the present time?"

As I have discussed in previous sections, current selection practices frustrate a law journal's ability to meet its responsibilities in a democratic and equitable manner. They produce a great inequality in the distribution of legal education, closing the most advanced part of the writing program to non-white students. As a result, minority students are placed on the

---

in America were attending racially isolated schools, untouched by *Brown*. These students' school districts were, and remain today, the oldest, largest, and most financially strapped public schools in the country. *See also* William L. Taylor, *The Continuing Struggle for Equal Educational Opportunity*, 71 N.C. L. REV. 1693, 1074–76 (1993) (discussing the fact that many school districts serving primarily minority populations "simply cannot afford to furnish the services that educators consider vital [to quality education]").

108. 163 U.S. 537, 41 L.Ed 256, 16 S.Ct. 1138 (1896). *See generally supra* note 101. *See also* W.E. du Bois, *Does the Negro Need Separate Schools?*, 4 J. NEGRO EDUC. 328, 335 (1935) ("[T]he Negro neither needs segregated schools nor mixed schools. What he needs is Education.").

slower career track and suffer from a deficiency in the advanced skills of their legal intelligentsia.

Additionally, grade-on and write-on methods, as currently implemented, defeat the ability of journals to provide the legal profession with a marketplace of ideas equally accessible to different perspectives. The homogeneous white staffs are culturally unable to represent the views and voices of the closed-out minority groups, and the result is a stale and stagnant medium that repetitively exchanges the ideas of the majority culture. With only a minute and stifled voice in the forum of debate, minority groups are unable to influence the evolution of the law with their unique perspectives and are denied representation on the legal community's most important political apparatus, both of which result in an inability to achieve power, equality, and favorable change.

More importantly, implementation of affirmative action cannot damage law reviews' "meritocratic" nature because these institutions are far from being meritocracies. The members of a truly meritocratic organization are selected by procedures that *actually* measure the talents and abilities that are needed for outstanding performance in that particular institution. Meritocracies must ensure that their selection procedures do not discriminate against certain contestants ensuring that the winners are actually the most qualified individuals, not just the beneficiaries of preferential biases. In contrast, grade-on and write-on procedures do not measure aptitude for law review. Whatever characteristics these methods do measure, they do so in a way that is subtly biased against non-white modes of thought and expression. Although law reviews cannot be blamed for wanting to claim the lofty title of "meritocracy," their current status as meritocracies, however, is nothing more than a myth.

B. "Quality Will be Diminished if Law Reviews Abandon the Methods that Hand-Pick the Students 'Best Able' to Perform on a Law Review."

The ability of present selection methods to choose the best law review members is arbitrary at best. A large number of students with equal or superior analytical, writing, editing, and leadership skills are not invited because traditional selection methods are not designed to detect these talents. Simply put, the "quality" interest asserted by those favoring the status quo is untenable. Until selection methods are discovered that accurately and fairly measure merit and aptitude, the use of selection processes alone cannot justify their ends. In fact, as many of the top law journals in the country have realized, the quality of a law review is dramatically improved through the deliberate infusion of minority perspectives.

C. "Traditional Merit-Based Methods of Selection Are Fair and Impartial Because They Are Anonymous."

The fallacies of this view were pointed out in Part III. Grade-on and write-on competitions are not fair and impartial because the contestants often start the race from different gates and run on tracks that vary in degree of difficulty. This view also fails to account for the cultural and racial prejudices inherent in the subjective nature of current selection

practices. While the criterion of grades and condensed writing competitions make law review selection an arbitrary activity, the biases inherent in these subjective procedures make the arbitrariness cut primarily against racial and cultural minorities.

D. "Affirmative Action Measures Will Cause Tension and Animosity Because they Are Unfair to the Students Who Would Have Made Law Review had the Affirmative Action Candidates Not Taken Their Spots."

The most obvious flaw in this fourth argument is its assumption that the number of students who can be invited to join a law review is inflexible. An easy way in which a law review could negate this argument is to simply add a suitable number of additional places when affirmative action measures are implemented.[109]

Furthermore, the complaining students are only truly "injured" by affirmative action if they are more deserving of a position than the new members. Given the arbitrary nature of "meritocratic" selection procedures, the displaced students have no basis for claiming that they are more qualified simply because they have better law school grades or higher scores on a condensed writing competition. Additionally, the displaced students are more deserving of a position only if they defeated the affirmative action candidates in a fair and impartial contest. Not only does the fourth argument fail to recognize the biases inherent in the write-on and grade-on systems, but it ignores the fact that the displaced students were only in a position to make law review because of past and current discrimination against minorities. Basic rules of percentages dictate that if all students were competing on an even playing field (i.e., without the additional discrimination and other barriers that minorities face), then many minority students who would normally get rejected under traditional systems would be accepted, and those from the dominant-culture group who were only narrowly able to make it under preferential systems would be pushed out.

Most importantly, the added benefit to a law review of adding minority-group students, in terms of fulfilling its previously discussed goals, greatly outweighs the benefit of adding students who cannot contribute any culturally unique perspectives to the marketplace of ideas. The students added by affirmative action, therefore, have better "credentials" than the displaced students, when credentials are accurately defined as those things that benefit an institution and help it fulfill its goals.

---

109. For example, both Columbia and Rutgers added a set number of additional spots corresponding to the number of students invited under affirmative action measures. *See* Jeffrey Kanige, *Affirmative Action Row Flares at Rutgers: Law Review Editors Clash Over Minority Ration Rule*, NEW JERSEY L.J., Nov. 1, 1990, at 1 (discussing Rutgers' affirmative action policy); *see also* Stephen Labaton, *Law Review at Columbia In a Dispute on Bias Plan*, N.Y. TIMES, May 3, 1989, at B1 ("[T]he review [at Columbia] will set aside up to five extra places on its enlarged staff of 40.").

E. "Affirmative Action Stigmatizes Minorities."

This is the only point made by affirmative action opponents that is not refutable. Nevertheless, it is an illegitimate reason to oppose measures for diversity. This argument ignores the fact that minority groups, in the eyes of some students, are already stigmatized by their perceived inability to compete for positions on law reviews. Affirmative action would not add any new stigma. It would merely alter the nature of that already present.[110]

More importantly, stigma is not generated by affirmative action. Stigma is manufactured "in the hearts and minds of individuals and is within the American tradition of seeing [minorities] as inferior beings."[111] A law review member sees an affirmative action recipient as undeserving only if she rejects the existence of the institutional biases, past discrimination, the effect of underfunding on ethnic and inner-city public schools, and the other steep hurdles that minorities face in American education. After rejecting these barriers, the only justification this person can assert for the stigma she places on her colleague is her belief that the individual is inherently inferior because of his minority status. This type of racism is not a legitimate justification for the continuation of present practices, especially in light of the positive effect affirmative action would have on the quality of law journals and their ability to carry out their intended functions.[112]

V. CONCLUSION

Law review editors who oppose affirmative action in all contexts or who are hostile to the Critical Race Studies movement will probably never support the implementation of affirmative action on law reviews. However, a significant number of editors generally understand and support the policies behind affirmative action, but in a knee-jerk manner, reject such measures in the context of their own law review. Several factors contribute to the inability of these students to come to terms with the broader implications of their responsibilities.

The first factor is the transient nature of law journal membership. Editing boards turn over each year and the entire staff is replaced every other year.[113] The members and editors are so busy trying to meet deadlines and handle day-to-day operations that they never get the chance to examine their roles in a philosophical sense. If a student does take the time to contemplate such issues, he or she will usually graduate before any ideas for change can turn into concrete action. This short-term membership prevents the law review, as an institution, from being introspective and hampers its ability to gain perspective on the long-term trends,

---

110. A student is free to decline her invitation to join a law review if she feels that the attachment of negative stigmas would outweigh the benefits of law review participation.
111. Roy L. Brooks, *Affirmative Action in Law Teaching*, 14 COLUM. HUM. RTS. L. REV. 15, 47 (1982).
112. *See supra* part II.
113. Phil Nichols, Note, *A Student Defense to Student Edited Journals: In Response to Professor Roger Cramton*, 1987 DUKE L.J. 1122, 1127 (1987).

problems, and needs of both law school and the broader legal communities.

The second factor inhibiting change is inertia. Law review editors take the "It's always been done this way" attitude and conclude that one hundred years' worth of journal staffs could not have all been wrong. What they fail to realize is that the composition of the legal community has changed dramatically in recent years. When their predecessors chose to use grades and condensed writing competitions as the sole criterion for selection, the profession was exclusively white-male. Today, however, law journal members have a responsibility to serve a much more diverse audience. The status quo in regards to selection methods is maintained more through blind adherence to anachronistic practices than through conscious management decisions designed to keep pace with our ever-changing, pluralistic society.

Finally, and most importantly, methods presently used to distinguish among students provide members with a selfish incentive to resist affirmative action. The only function that traditional "merit"-based selection procedures serve well is to honor those students with the highest first-year grades and those with the best scores in the writing competition. This "honorary function" provides members with a personal incentive to preserve anachronistic selection methods and clouds their ability to understand the real purposes behind a law review. While balancing school work, journal work, and a host of interviews with law firms, it is easy and natural to pat one's self on the back and say, "I deserve this" or "I earned it." It is difficult for these members to accept that many other students equally deserve the chance and are probably able to perform law review functions at a comparable or higher level of excellence. Because their attention becomes too focused on the prestige element of their achievement, law journal members often begin to think of their institution in terms of an "honor society" and forget about their broader responsibilities to a reading public and the community at large.[114]

The ability of present selection methods to bestow honor, however, is not a legitimate justification for the continued existence of such practices. This "honor society" by-product was not a motivation behind the creation of law reviews[115] and is counterproductive to their goals. If law reviews were truly just honor societies, then it would make much more sense to quit performing all of the work that flows from publishing articles and simply hold an awards ceremony for those students with the best grades in the classroom and highest scores in the writing competition. By continuing present practices to the exclusion of diversity, law review mem-

---

114. *See, e.g.*, Ramos, *supra* note 10, at 190–91. This "honor society" mentality was reflected in an editorial appearing in the *New York Times* that protested the implementation of a law review affirmative action plan at Harvard Law School. The editorial claimed that affirmative action was inappropriate on a law review because membership resembles an "Olympic medal of excellence." *Drawing Distinctions at Harvard*, N.Y. TIMES, Mar. 3, 1981, at A18. *See also* Stier, *supra* note 6, at 1473 (discussing how law review membership is often viewed as a "certification stamp" or an "exclusive honor society").

115. *See generally* Swygert & Bruce, *supra* note 16 (noting that law reviews were created by students desiring to practice their writing skills and to provide a news and intellectual media to faculty, alumni, and the legal community).

bers are placing their own self-interests above the important responsibilities and purposes of law reviews: to provide nondiscriminatory education and a democratic marketplace of ideas. This idea was expressed perfectly in a *New York Times* editorial addressed to the many critics of affirmative action on law reviews:

> Unfortunately, many of the critics of the Law Review's plan—including *The Times* in its editorial of March 3—have judged it more in terms of what it will do to the editor's prestige than on what effect it may ultimately have on the legal system. To *The Times*, for example, the affirmative action plan spelled the end of selection on the basis of "absolute merit" and would result in the devaluation of "Law Review status."
>
> But a law review does not exist to honor its members' prior academic achievements, or to serve as a gold star on a student's resume. It has a role to play in sparking scholarly debate in the law and in training future lawyers, professors, and judges. A law review whose membership persistently excludes large segments of society cannot hope to provide the diversity of perspective necessary to ensure the law's continuing vitality and responsiveness to social concerns.[116]

I do not suggest that we must totally eliminate grades and writing competitions from the selection format, as the perfect method to select law review members has yet to be discovered.[117] Even with their inability to predict aptitude, grades and condensed writing competitions can be options if the biases and deficiencies in these methods are recognized and the competitions are utilized in a non-destructive manner. What I am suggesting is that present law review members must examine the broader purposes and responsibilities of their periodicals and implement selection methods that serve those goals first and foremost.

To do so, law journals must change their definitions of "merit" and "credential" in selection procedures in a way that accounts for: (1) the

---

116. Lack, *supra* note 48, at 22.

117. In my utopian vision of law review selection, law school grades would not be considered. Contestants would be required to attend a personal interview and submit two papers and an essay. The essay would be a statement of purpose and interest, similar to those required on admission applications to colleges and law schools. The first paper would be limited to approximately twenty pages, focused on one topic shared by all competitors, and written in the traditional law review style (i.e., Note or Comment, footnotes, etc.). The second paper would be on a law related topic of the student's choice, would not be regulated in regards to page minimums or maximums, and could take any form—from the traditional law review style with footnotes to a story or narrative. The judges, a culturally and racially diverse committee of law professors, judges, and practicing attorneys, would evaluate each candidate's ability based on the two papers submitted. The interview and statement of purpose would be used to measure the student's dedication to the law review and her interest in scholarly publishing.

    Of course, this description is both logistically and economically unfeasible for most schools. The practical reality is that grades and student-graded condensed writing competitions will persist despite their inadequacies. One author has suggested, however, that the law review experience be converted into a class, like moot court, in which any student can enroll for credit. *See generally* Martin, *supra* note 5, at 1104.

partiality and discrimination inherent in traditional selection methods, (2) the additional barriers that minorities face in American education, and (3) a law review's need for diversity. Reports indicate that as many as eleven law journals have experimented with some form of affirmative action in recent years, including Columbia, Rutgers, George Washington, Harvard, Virginia, Cornell, Michigan, Wisconsin, the University of Pennsylvania, and New York University.[118]

The various forms of affirmative action plans recently implemented can be categorized into three different models. First, the "quota" model allots a set number of invitations to students who qualify for affirmative action.[119] The second model offers affirmative action candidates another chance to write-on to journal after the second year of law school.[120] A third strategy, the "goals" model, operates similar to the quota model, except the number of minority students invited is proportionate to a numerical goal representing the percentage of minorities who "tried out" for law review.[121]

The addition of these programs has generally achieved the intended goal of diversity.[122] Implementation of affirmative action on a law review

---

118. *See* Davis, *supra* note 11 (discussing the implementation of affirmative action on Columbia's law review and citing similar programs at Harvard, Virginia, Cornell, Michigan, Wisconsin, University of Pennsylvania, and NYU); Kanige, *supra* note 109, at 1 (discussing the affirmative action program on Rutger's law review); Kornhauser, *supra* note 68, at 6 (discussing the law review's affirmative action program at George Washington); Fidler, *supra* note 1, at 53 (noting a survey indicating that eight publications reported having affirmative action programs); Ramos, *supra* note 10, at 198 (noting a survey indicating that six law reviews reported having affirmative action programs).

119. For example, the invitations are given to the two students in the affirmative action pool with the highest grade-point-average and the remaining invitations to those with the highest scores from the writing competition. Minority students are still allowed to attain membership through regular selection procedures. This affirmative action method simply ensures a minimal amount of diversity on an annual basis. For a more thorough discussion, see Ramos, *supra* note 10, at 181.

120. This method is intended to compensate those students who took longer to acclimate to the law school environment because of cultural adjustments and past educational deficiencies. It is an affirmative action option, however, only if minority students are the only students offered a second opportunity to write-on after the second year. An obvious drawback with this method is that newly invited third-year minority members are not able to hold senior editorial positions due to their third-year status. For a more thorough discussion, see Ramos, *supra* note 10, at 181.

121. First, the review determines how many minority students gained admission through traditional processes. If the goal has been reached or surpassed without affirmative action measures, then no additional students are invited. If the "meritocratic" methods fail to provide the requisite percentage of diversity, however, then the highest scoring minority students are invited until the numerical goal of minority students is reached. The numerical goal is determined by the ratio of minority to non-minority students applying to law review. For example, if one hundred students apply and twenty of those students qualify for minority status, then 20% of the students invited must be minority students. If the law review decides it wants fifty new members, then the ten highest scoring minority students (i.e., 20% of 50) are given invitations. *See also* Kanige, *supra* note 109, at 1.

122. Ramos, *supra* note 10, at 199 ("Implementation, of affirmative action programs . . . generally affected an increase in minority participation."); Fidler, *supra* note 1, at 53 ("Thus, it appears that affirmative action can promote diversity of [law review] membership".).

rejects ridiculous and reprehensible notions that minority students are incapable of performing at a level of excellence equal to white students. It acknowledges the unique talents and perspectives that minorities bring with them that add to the value of the review. Under this perspective, "credential" takes on a more realistic definition, standing for any quality, like strong research skills, dedication, writing ability, or a minority perspective, which directly lends to an organization's ability to achieve its goals. The new definition of "merit" refers to the possession of enough of these credentials to warrant an invitation to be a member of the law journal.

Affirmative action is not the ultimate answer, however. If the deficiencies in the American educational system in regard to minorities were improved and methods were developed that minimized the prejudices in subjective selection, then meritocratic systems would naturally achieve culturally and racially diverse law review staffs. Until these pursuits are realized, affirmative action should be utilized to neutralize deficiencies in present methods.

Law reviews were intended to be, and must strive to be, classrooms for students and vehicles for scholarly and political expression, not honor societies. After rejecting the "honor society" mentality with its flawed assumptions, law journals must realize their responsibilities to distribute education in a nondiscriminatory manner and to provide the legal community with a medium for exchange of ideas and expression equally accessible to all. They must also come to terms with the fact that the methods of selection presently used are not bastions of efficiency and impartiality. Adaptations of these methods can be implemented, for the sake of fairness and the aforementioned responsibilities, without sacrificing quality in any respect. With these understandings, law journals must work to achieve realistic definitions of "credential" and "merit" in their selection procedures so that they may finally fill the void in our legal education and the silence in our forum for academic and political exchange.