The Law Review and the affirmative action issue

Imani Ellis & Lisa Wilson

Matthew's achievement doesn't solve everything

In its 73-year history, the Virginia Law Review has never had a black member on its staff. This year, a number of concerned students with the Black Law Students Association and students with the current staff of the Law Review decided to take steps to break through the Review's historical color barrier by mandating the implementation of an affirmative action program.

Affirmative action, in and of itself, has spawned heated debate, and the Law School is no exception. Those members of the Review who vehemently opposed instituting affirmative action criteria put forth the following arguments:

1) The Review's try-out process is color-blind. If black students have not been selected, it is not because there is a flaw in the system, rather it is because there has not been a black student that has achieved the requirements imperative to Review membership.

2) The caliber of black students in general at the Law School is below that of other top-ten law schools. Many of the high caliber black law students go to Harvard, Yale and Stanford. Consequently, Virginia is forced to accept low caliber black students.

3) Membership on the Review is merit based. Race or ethnicity should not be a issue in the try-out process.

4) An affirmative action policy is likely to lower the standards of Review membership, and consequently lower the quality of the publication.

5) Affirmative action is nothing more than reverse discrimination.

Proponents of an affirmative action policy found these arguments to be fallacious, disturbing and insulting. In our attempts to implement a plan, we addressed the issues in two phases. First, we attempted to reveal the inherent contradictions in the above arguments. Secondly, we offered arguments that revealed the benefits of an affirmative action policy.

We countered their arguments in the following manner. First, we rejected the notion that the Review process is completely color-blind. The try-out process encompasses two phases. There is the "objective" grade-on process, where students in the top seven percent of each class are invited onto the Review, and the write-on process where students compete for the coveted prize of Review membership. We contend that the grade-on and the write-on processes are not immune to personal prejudice of subjectivity. In light of the fact that many black students here have similar academic backgrounds and qualifications as their white counterparts, we were forced to reach the conclusion that such prejudicial factors must come into play. Furthermore, when one reviews the individual profiles on black students that have attended the Law School -- the educational institutions that they have attended, their academic accomplishments, their work experience and personal achievements -- it is evident that black students here are of the highest caliber. Opponents of the plan fail to admit that other high caliber students choose not to attend the University because of its perceived racial hostility and alienation towards black students.

The argument that Review membership is merit based is undermined by the proponents contentions that the process is not completely color-blind, therefore the process as implemented does not allow for true "merit" based achievement.

The argument that the quality of the Review will diminish with the adoption of an affirmative action policy is nothing more than a new twist to the ancient argument that black people are intellectually inferior to whites. We unequivocally reject this notion.

Historically, black people have been subject to domination and persecution by whites. Blacks have been denied equal access to public facilities (e.g. restaurants, restrooms, movie theaters, business establishments), equal educational opportunities and other basic human rights. The legislature and the judiciary have taken affirmative steps to rectify these injustices through various pieces of legislative enactments and court orders. Now we look to the Review to eradicate the apparent inequities that its system imposes on black students at the Law School.

We propose that affirmative action will not hurt the Review, but rather it will help to eliminate the inherent injustice imposed by the current system. More importantly, the plan will expand the range of ideas articulated in the Review and expose its members and its readership to more diverse perspectives and cultural experiences. We think that this plan will inevitably enhance the Review and will further enhance the educational experience at the Law School.

As you may well know, an affirmative action plan was finally adopted by the Virginia Law Review on Jan. 26 and is scheduled for implementation this spring. Since the adoption of the plan, the Review has accepted for publication a note by Dayna Matthew, a black third-year Law student. Matthew's success is a victory that all black students should be proud of. She is the first black member in the history of the Virginia Law Review. The fact that Matthew was extended an invitation without any affirmative action considerations will hopefully have the effect of eradicating the myth of the unqualified black student, while the adoption of an affirmative action plan will simultaneously address the protracted discriminatory impact of the Review's "old policy" on black students.

Imani Ellis is BLSA President and Lisa Wilson is BLSA Vice President.

Michael Fay

The tryouts were not biased

In the Feb. 11 Metro Section of the Washington Post, an article entitled "Law Review About Face: U-Va. Journal Tries to Attract First Black," described the recent affirmative action plan adopted by the Virginia Law Review. The article cited comments by black students who suggested that the most recent Review tryout may have purposely involved a topic which operated as a "thinly veiled attempt to identify black entries and weed them out." Black Law Students Association President Imani Ellis was then quoted as saying, "I got the sense that, no, they didn't want us on."

I have no idea whether these comments were actually made or whether they were the product of journalistic license. Regardless, I think they need to be addressed. As someone who read 110 of the approximately 180 tryouts submitted during the Spring 1986 tryout, I find these comments almost laughable in their off-handed character, and most importantly, in their insensitivity to the simple hard work, concern and time that goes into the tryout process.

Last year, the Law Review and the Journal of Law & Politics held their first joint writing tryout for Law students. Each student was invited to complete the tryout and submit copies to both the Journal and the Review. Students who chose to submit their work to both publications had their tryouts reviewed by an independent review board on each journal. The joint tryout had one very simple rationale: to allow first-year Law students a chance to save some time in light of the frantic pace that the first year of law school often entails. Of the some 180 tryouts submitted, 165 were submitted to both publications.

The topic of the tryout was the constitutionality of divestment policies adopted by public universities with respect to investments held by these universities in corporations doing business in South Africa. The topic was chosen for a number of reasons: it was interesting, it was controversial, it was contemporary, and most significantly, it required some challenging constitutional analysis. Materials highlighting the challenging legal issues raised by such divestment policies were included in the tryout "packet." Students were directed to consider the materials, develop a legal rule they thought appropriate in this context and apply it to a hypothetical factual situation of a recently adopted University divestment policy.

The consideration of the tryouts was one of the most grueling tasks that I and the other members of the Journal have ever taken on. The papers were remarkably uniform in approach: each began with an introductory condemnation of apartheid, proceeded to an analysis of the constitutional doctrines involved and ended with a conclusion based on the analysis. The vast majority of the papers reasoned that a divestment policy, such as the one given in the tryout question, would be constitutional.

All of the papers were valiant efforts to deal with an abhorrent problem through legal analysis. Consequently, it took a mighty long time to pick the 33 top papers to be offered positions on the Journal. Our criteria were creativity in legal analysis, persuasiveness and clarity. To suggest that anyone could have distinguished between those papers written by blacks as against whites, or even males as against females, it to suggest the impossible. Law students are bright, and they know legal analysis. It took many hours to accomplish the simple task of reading the tryouts carefully. The Journal's review board agonized over the selection process, and on one nightmarish morning at 3:30 a.m., we rejoiced over our final choices. The time given and sacrifices made by the review board members demonstrated both the difficulty of the process and the importance they had placed on doing the job correctly.

During the tryout, I had frequent discussions with the Law Review members who were reading the tryout papers. They too commented on the difficulty of making final choices, the sheer volume of work the tryout entailed and their concerns that the best possible selections be made. They concentrated on the very same criteria we were using: creativity in legal analysis, persuasiveness, clarity. The race, sex, and most importantly, name, of the students trying out were never discussed, never known and never taken into consideration by any of the tryout readers.

The comments cited in the Post's article are the product of ignorance operating within the comfortable buffers of racist accusations -- words slanderous and demeaning, and yet of such a sensitivity that most who bear the brunt of these accusations usually fail to speak up. These flippant condemnations of hard-working students are inexcusable and represent a haphazard approach to rectifying racial tensions.

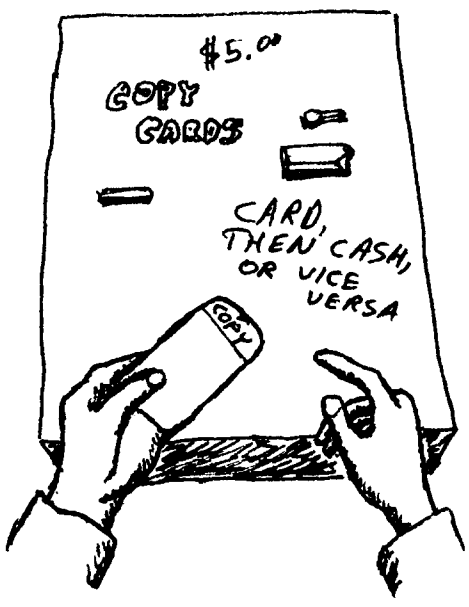
If racial tensions are ever to be effectively eradicated, it will not be through irresponsible accusations. Such tactics only serve to incense those who have worked hard to eliminate prejudice based on racial distinctions. No one devotes the hours we spent laboring over the Spring tryouts who does not have a deep-set loyalty to merit, and to the recognition of merit regardless of race, or sex, or any of a number of completely ridiculous ways of distinguishing the mind of a student.

Michael Fay is Editor-in-Chief of the Journal of Law & Politics.

Letters Policy

Please submit all letters and columns to Room 391 no later than the Tuesday prior to publication. Letters must be typed double-spaced and have the author's signature and telephone number. We reserve the right to edit all letters for grammar, style, brevity and punctuation. Due to space limitations, not all submissions can be published.

Siena



It was a special moment for the first-year. One to be savored slowly. He would never forget fondling the smooth surface of his first copy card.