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FOREWORD

A New Journal of Color in a "Colorblind" World: Race and Community

By Jerome McCristal Culp, Jr.*
Frank Cooper**
Lovita Tandy***

We are extremely honored to be able to write the foreword for the inaugural issue of the *African-American Law & Policy Report (ALPR)*. The question this issue and future issues of the ALPR raise, particularly in the midst of renewed debate about the meaning of racial equality and justice, is why? Why a journal of color in this "colorblind" world? Why not a journal about urban problems like some journals that have been created at other institutions?[1] Why not a journal about all racial minorities, all societal disabilities, or all oppressions, as have been created by other law schools and other students?[2] Why create a forum for issues affecting only the African-American community or, as we will indicate, African-American communities? After all, in

* Professor of Law, Duke University School of Law and Visiting Professor of Law, University of California, Berkeley, Boalt Hall School of Law, Spring 1995. I consider this foreword to be one of the most important tasks and one of the greatest honors of my academic career.

** J.D. Candidate, Duke University School of Law, May 1995.

*** J.D. Candidate, Duke University School of Law, May 1996.

1. For an example of such a journal, see the *Fordham Urban Law Journal*.

2. For example, see the *Harvard Civil Rights-Civil Liberties Law Review*, the *Columbia Human Rights Law Review*, and the *Temple Political and Civil Rights Law Review*.

1996 Californians may well enact a form of "colorblindness" that would affect all public institutions including the University of California at Berkeley and Boalt Hall.[3] At a minimum, the spirit of this so-called Civil Rights Initiative would preclude an *African-American Law and Policy Report* as well as an *Asian Law Journal* (*ALJ*), a *La Raza Law Journal* and a *Berkeley Women's Law Journal* (*BWLJ*).[4]

The continuing need for such journals is amply demonstrated by the excellent array of articles included here. The articles show that being African American is both different and the same. We are the same as other groups in that those of us who grew up in this country have been steeped in its culture. We share the beliefs and aspirations of Americans of varied backgrounds. The specificity of the African-American tradition has been demonstrated by cultural critics such as Henry Louis Gates, Jr.[5] and bell hooks.[6] Their writings, as well as those of others emphasize that we are different in our history, and the manners in which we are perceived and treated in this country. One example of this difference can be seen in the disparate treatment of blacks who commit crimes.[7] It is important to understand both the similarities and the differences and how they interact. The articles, speech, and book reviews included here make the case for that discussion.

We also need journals of color because "colorblindness" is currently being defined in a way that reinforces the social stratification of society. The prime example of this is California's proposed Civil Rights Initiative.[8] This Initiative purports to create a level playing field by barring "preferences" for minorities and women. This objective assumes, however, that a level playing field exists somewhere beneath the current affirmative action policies of employers and schools. In reality, this Initiative would withhold an effective tool for fighting the effects of past and ongoing racial and gender discrimination and replace that tool with only the existing "merit" system.

The Los Angeles Fire Department provides a recent example of explicit discrimination. Female fire fighters have only recently been ad-

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3. The proposed California Civil Rights Amendment, which is an attempt to amend California's Constitution to prohibit the state from granting "preferential treatment to any individual or group in the operation of the state's system of public employment, public education or public contracting". *Text of Proposed Amendment*, SACRAMENTO BEE, Jan. 22, 1995, at A17.

4. These are other journals at Boalt that deal with issues of communities of color.

5. *See* HENRY LOUIS GATES, JR., THE SIGNIFYING MONKEY: A THEORY OF AFRICAN-AMERICAN LITERARY CRITICISM (1988); HENRY LOUIS GATES, JR., LOOSE CANNONS: NOTES ON THE CULTURAL WARS (1992); HENRY LOUIS GATES, JR., COLORED PEOPLE: A MEMOIR (1994).

6. *See* bell hooks, OUTLAW CULTURE: RESISTING REPRESENTATIONS (1994).

7. *See, e.g.*, Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White Fears — On the Social Construction of Threat*, 80 VA. L. REV. 503 (1994).

8. *See supra* note 3.

mitted to fire training classes. Once admitted, the trainees were subjected to constant abuse by their male peers and supervisors. A video tape showing women mishandling training exercises was subsequently distributed to fire houses.[9] The emotional duress these women faced is only remediable through an affirmative action program. Insults to women are less likely to go unchallenged if women constitute a noticeable portion of fire fighters. The proposed Civil Rights Initiative, therefore, creates a Catch-22 situation — women may not be given preference in hiring — hence, there will not be a large number of women present to help prevent men from harassing women on the job.

In addition, more subtle forms of bias continue to perpetuate economic stratification by race. The U.S. Department of Labor has recently documented the "glass ceiling" phenomenon — a phenomenon in which minorities and women tend to bump their heads against a barrier as they reach a certain level in corporations.[10] As one climbs the corporate ladder, job criteria become less objective and hiring tends to be based on how comfortable executives are with the candidate. The mostly white, mostly male, upper-echelons of corporations thus hire people like themselves and replicate social stratification.

The law's current model of "colorblindness" is unable to address these problems. "Colorblindness" is perceived as the mere removal of the capacity to see racial differences. This view is consistent with the traditional scientific understanding of colorblindness. Scientists believed that colorblindness was the result of the lack of the gene for perceiving a particular color or all colors. "Colorblindness" under law holds that we may not utilize our knowledge of how color matters in society. The proposed Civil Rights Initiative is thought to embody this principle by removing race, as well as gender, from the realm of subjects that may be considered in making public policy.

As Professor Culp has noted earlier, "colorblindness" is not a moral principle.[11] "Colorblindness" is a policy choice, the value of which depends upon the setting in which it is used. "Colorblindness" and "gender-blindness" are not legitimate policy choices if they excuse the imposition of a glass ceiling upon qualified minorities and prevent methods of dissipating the misogyny of all male fire houses.

The updated scientific explanation of colorblindness adds subtlety to the consideration of what it means not to see color. In fact, color-

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9. Robert J. Lopez, *Fire Chief Says Video of Women is Harmless*, L.A. TIMES, Dec. 7, 1994, at B1.

10. *See Glass Ceiling: Women, Minorities Shut Out of Top Spots of Corporate America, Commission Reports*, Daily Lab. Rep. (BNA) No. 51., at D-5 (March 16, 1995).

11. *See* Jerome McCristal Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 68 N.Y.U. L. REV. 162 (1994).

blindness is the result of a combination of genes, not the lack of a certain gene.[12] "Colorblindness", in the sense of preventing socio-economic stratification based on race, can be analogized to this process. As with the scientific definition of colorblindness, a combination of factors contribute to the ways individuals perceive the world. Blacks and whites, as well as African Americans of different sexual orientations, genders, classes, etc., often see the world differently.

Just and equitable "colorblindness" under law requires consideration of the various aspects of racial identity. The law cannot be blind to the effects of racism if it is to prevent racially disparate results. In order for the results of policies to be blind to the identities of their subjects, the law must consider the significance of racial and cultural differences. Journals such as the *ALPR* can assist in that process.

One response to the concern for disparate racial impacts is to admit their existence but to claim that they should be discussed within the pages of existing publications. If race is important, then the *California Law Review* should publish timely articles about how law and race interact.[13] The problem with this view is that traditional law journals have neither the capacity nor the impetus to gather all aspects of the race question.[14] Journals centered on race, gender, and sexual orientation are necessary to assist the development of communities of resistance to existing legal and social oppression.

The *ALPR* is an effort to create a community sensitive to the ways in which race intersects with the law — an essential task if the current racial status quo is to be changed. African-American communities must continue to explore the tapestry of history, culture, and race that has created and still influences our unique experience in this country. Likewise, we have only recently begun to investigate avenues for shared advocacy with other oppressed groups. The articles in this inaugural issue are welcomed additions to that continuing dialogue.

A journal of color, or any journal for that matter, is not created overnight. In addition to the painstaking efforts of the students here at Boalt, the *Report* is an extension of the passionate work of numerous African-American scholars who have devoted their careers to exploring

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12. *See* Maureen Neitz & Jay Neitz, *Numbers and Ratios of Visual Pigment Genes for Normal Red-Green Color Vision*, SCIENCE, Feb. 17, 1995 at 1013-16.

13. This comment is not meant as an attack on the *California Law Review* (*CLR*). This reference is used simply because *CLR* is the majority law journal at Boalt Hall. Any majority law review not addressing issues of significance to communities of color on a frequent basis, could be substituted here. To its credit, *CLR* has recently published an excellent issue on Critical Race Theory. *See* Symposium, *Critical Race Theory*, 82 CAL. L. REV. 741 (1994).

14. For a description of the race question: "How we should alter the legal and social world because of race" see Jerome M. Culp, Jr., *Notes from California: Rodney King and the Race Question*, 70 DENV. U. L. REV. 199 (1993).

the interaction between race and law. This issue includes a glimpse into the life of one such scholar. Mario Barnes, co-editor of the *ALPR*, presents a review of Derrick Bell's new book, *Confronting Authority: Reflections of an Ardent Protestor*. The book itself discusses Bell's decision to leave Harvard Law School after several failed efforts to persuade the faculty to offer a tenure track position to a woman of color. It also offers a fable in Bell's now famous narrative style. This time Bell leads us through the Citadel — the stronghold of an intellectual elite who, based on their presumed intellectual superiority, try to wield authority over the nearby lowlanders. We will not tip Bell's hand, but as usual, readers will be pleasantly engaged by Bell's thought-provoking narrative.

In *"Each One, Pull One": The Inspirational Methodology Behind an Impassioned Though Somewhat Flawed Protest*,[15] Barnes offers an analysis of Bell's book and a critique of his strategies for activism. Like many of the authors in this issue, Barnes emphasizes the relationship between the individual and the community. In addition to drawing his title from one of Alice Walker's poems, Barnes utilizes the poem and the experiences of other African-American leaders and scholars to create a richly contextualized essay. This approach allows him to engage in a more attentive exploration of the dilemmas inherent in Professor Bell's, or any individual's, efforts to direct the advancement of our diverse community. As both Bell and Barnes acknowledge, every strategy we develop requires a delicate balancing of the concerns of discrete groups within the whole, long-term and short-term goals, personal concerns, and public realities.

Three strategies for empowerment are discussed by D. Malcolm Carson in his review of Professor Harold McDougall's book *Black Baltimore: A New Theory of Community*. In *A Message From the Grassroots: Participatory Democracy, Community Empowerment, and the Reconstruction of Urban America*,[16] Carson traces the history of the two major strategies of black empowerment: W.E.B. DuBois's drive for full social inclusion and Booker T. Washington's strategy of economic advancement within our separate spheres. McDougall's book argues for the resolution of these opposing strategies through grassroots activism. McDougall shows that "base communities" — small groups establishing dialogue about particular topics of local concern — have been an effective means of empowering African-American communities in Baltimore. Carson welcomes the addition of participatory strategies to the panoply of choices for African-American empowerment but warns that

15. 1 AFR.-AM. L. & POL'Y REP. 89 (1994).

16. 1 AFR.-AM. L. & POL'Y REP. 119 (1994).

overemphasis on self-help could obscure the structural character of the problems we must address.

Professor Margalynne Armstrong's piece, *African-Americans and Property Ownership: Creating Our Own Meanings, Redefining Our Relationships*,[17] also calls for a broad dialogue between African Americans about the meaning of property. Armstrong emphasizes the shared history of racial oppression that has shaped African-American conceptions of property and property law. She notes that historically, African Americans have moved from a native culture devoid of concepts of object dominance through a painful and still remembered era as object. Today, as individuals, we are increasingly the owners and holders of property. Armstrong argues that this new status requires that we engage in a dialogue to reconceptualize and harmonize property and property theories. Rather than accepting the popular American notion of property as the individual's haven and insulation from the collective, African-American communities must explore the potential for property as an avenue for group advancement and goal definition. African Americans must use law, politics and all other available forums to deconstruct remaining societal barriers that devalue property when it is in the hands of African Americans.

In his article, *Race as an Under-Inclusive and Over-Inclusive Concept*,[18] Professor Roy Brooks asks us to recognize the differences between the histories of discrimination against African Americans and discrimination against other groups. Brooks argues that the legacy of slavery and systemic discrimination against African Americans is so fundamentally divergent from other experiences of oppression that it forecloses any unifying theory of subordination. Any such attempt would merely oversimplify the African-American experience and place unnecessary demands on our country's finite political and judicial resources. At the same time, Brooks notes that race itself is often an over-inclusive category. Relying on socio-economic differences to illustrate this point, he examines the ways in which several civil rights polices are only of practical use to certain socio-economic groups.

In contrast to Brooks's piece, Professor Margaret Russell's article *Lesbian, Gay and Bisexual Rights and the "Civil Rights Agenda"*,[19] criticizes conservative efforts to divide the interests of African Americans and gay, lesbian and bisexual individuals. In 1992 Colorado passed an amendment to its state constitution that eliminated current civil rights protections for gays, lesbians and bisexuals and prohibited

17. 1 AFR.-AM. L. & POL'Y REP. 79 (1994).
18. 1 AFR.-AM. L. & POL'Y REP. 9 (1994).
19. 1 AFR.-AM. L. & POL'Y REP. 33 (1994).

any future attempts at protective legislation. The article analyzes the resulting litigation and the Colorado Supreme Court decision invalidating Amendment 2 under the Fourteenth Amendment's Equal Protection Clause. Russell notes that a more detailed discussion of the plaintiffs' claim that gays, lesbians and bisexuals constitute a suspect or quasi-suspect class under the Fourteenth Amendment would have been helpful in analyzing the similarities and differences between discrimination based on race and sexual orientation.

This current wave of anti-gay legislation exposes our society's continuing penchant for unfounded and illogical prejudices. Such proposals directly threaten African-American communities on several levels. In the most basic sense, the proposals threaten to subject gay, lesbian or bisexual African Americans to renewed and redoubled oppression. In addition, once again, opponents of civil rights have attempted to breed hostility among oppressed groups with the disingenuous plea that there is not enough equality for everyone. The most troubling prospect, however, is the attempt to redefine our struggle as a struggle for special treatment based on previous mistreatment rather than acknowledging that our struggle is simply a call for fairness, justice and equal treatment for every member of society. At its core and through the similar struggles it has inspired, the civil rights struggle is the struggle for group and individual dignity.

Professor Russell's article shows the possibilities for a coalition of oppressed groups. Opponents of civil rights must not be allowed to turn the debate over anti-discrimination policies into a debate about "special rights." Nor should they be allowed to drive a wedge between gay and other minority communities by redefining gay identity as merely a choice of lifestyle. What cannot be forgotten is that oppression is directed at both African Americans and gays and that some African Americans have intersecting identities as gay and lesbian blacks. In addressing the commonalities between the African-American communities and other oppressed communities, the *Report* is preparing the way for broad based anti-discrimination strategies.

As this issue of the *ALPR* demonstrates, not everyone will agree on the proper analysis of the relationship between race and the law. This journal will provide a forum for exhausting the possibilities of an African-American centered critique of the law. Only dialogue about the differences among African Americans and between African Americans and other communities can trace these possibilities.

All of the contributions to the debate that this premier issue presents allow an important discussion about race that majoritarian concerns impede. The majoritarian story basically states that race is not important or race can only be examined in a "colorblind" way or that race can only be considered if we do not upset the existing power

arrangements that keep African Americans and other racial groups in their place. This journal is important to ventilate those concerns because the voices of the majority often cannot hear the cries of the less powerful. They drown them out while claiming to include. One way to turn this lack of power into voice and justice is to speak. To the authors, students, and faculty who will participate in this process in the future we say: "Speak out and describe the colors that you see." Such descriptions will empower those who come later to map the differences that still oppress many individuals simply because they are African American. Is there a danger that African-American people will see only their own colors and that they will speak only to each other? African Americans in that corner, Asian Americans in that corner, gays and Latinos in other places around the room. Yes, that is a real danger. However, it is a danger for the *California Law Review* and for our faculty meetings and for our classrooms. This inaugural issue of the *ALPR* certainly does not fall prey to that possibility. Race matters in how we see the consequences of various forms of "colorblindness". This journal allows important views about these issues to prod and pull and infuriate and inspire those who want to alter the racial status quo.