EDITOR’S NOTE

Participation. Perseverance. Prominence. Although it is impossible to completely describe the Berkeley Journal of African-American Law & Policy [BJALP] (formerly the African-American Law & Policy Report) in three words, I believe that the aforementioned words represent the past, present, and future of this publication.

Participation: “the state of being related to a larger whole.”¹ In 1992, BJALP was founded by a group of determined Boalt Hall law students as a forum for scholars, practitioners, and students to address law and policy issues relating specifically to the African-American community. The Founders believed that mainstream law reviews were not effectively addressing the concerns of African-American communities, leaving the majority of Boalt Hall students of African descent without opportunities to participate on legal journals that mattered to them, where they could cultivate the editing and writing skills needed in order to become effective lawyers, advocates, and leaders. Hence, BJALP served as a resource for any Boalt Hall student interested engaging in the legal and policy discourse centering on African-American issues. From 1992 to 1996, BJALP began building a reputation as exemplar in the relatively small field of journals devoted to African-American scholarship and strove to fortify the nexus between African-American communities and academic research. However, in the fall of 1996 California Proposition 209 was enacted, and its ban on affirmative action in all public programs nearly destroyed BJALP’s ability to carry out the Founders’ mission of using its position to improve the conditions of African Americans.

Perseverance: “to persist in an undertaking in spite of counterinfluences, opposition, or discouragement.”² Proposition 209 and SP1, a similar restrictive measure enacted by the University of California Regents, decimated the number of African-American students attending Boalt Hall, significantly reducing the traditional membership source for BJALP. In the 1996-1997 academic year, prior to the enactment of these policies, the Journal had ten editorial board members and seventeen general members. Within two years, we experienced a forty percent reduction in staff, with editorial and general membership totaling only sixteen people.

This conspicuous absence of African Americans at Boalt had a

1. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, 10th ed., s.v. “participation.”
2. Id. at s.v. “persevere.”
debilitating effect on BJALP, making consistent publication difficult. For the next several years, the Journal departed from its normal annual publication schedule and published only two volumes, both of which were in collaboration with other law journals on campus. Yet in spite of these counterinfluences and challenges, BJALP echoed the tradition of the communities that it sought to serve by becoming stronger in the face of adversity. Through perseverance and determination, the members of the Journal were able to publish the first independent volume since the passage of Proposition 209 in Fall 2002. Additional independent volumes followed in Spring 2004 and Spring 2005. Moreover, this year marked a resurgence in Journal membership – BJALP had fifteen editorial board members and fourteen general members – the largest number of members to date. Thus, BJALP stands at a juncture – remaining cognizant of its past, while striving optimistically towards the future – and sits poised to take the Journal to a level unthinkable just three years ago.

Prominence: “the quality, state, or fact of being widely and popularly known.”3 We are excited to build on the foundation laid by the Journal’s alumni as we forge into a new era. This volume represents our fourth independent publication since the enactments of Proposition 209 and SPI and we expect to continue our annual publication in the years to come. However, we are not satisfied with merely participating in legal and policy discourse or persevering in the face of difficulty. Instead, we hope to reinvigorate our reputation as an exemplary Journal so as to influence the debate over which policy and legal measures are best for our communities. With this ambition in mind, we made a decision to change our name to the Berkeley Journal of African-American Law & Policy. We believe that our new name pays homage to those who came before us, yet also recognizes that the Journal is a part of the University of California at Berkeley (“UCB”) community. As a world-renowned university, UCB has and continues to have an influential voice in academic discourse as well as impact the nation’s political and scientific trajectory through its social and technological contributions. In this storied UCB tradition, we aim to make the contributions of the Berkeley Journal of African-American Law & Policy similarly influential on the world stage.

Obviously, a name change alone will not help us achieve this goal. We must ultimately publish scholarship that significantly contributes to both legal discourse and public policy, and the pieces in this volume are indicative of BJALP’s ability to make such contributions. Volume VIII begins with the examination of whether the Court in Brown v. Board of Education decided the case in an unprincipled manner, by failing to couch the decision in any accepted legal standard beyond the individual Justices’ preferences for an integrated society. Co-authors Dr. Hans J. Hacker and William D. Blake argue that the Court was moved by an old and evolving principle in American

3. Id. at s.v. “prominence.”
jurisprudence, one that had survived court eras and changes in court personnel, as well as economic and social upheavals since the founding. The principle of government neutrality, although historically tied to economic rights, provided the jurisprudential grounding for early civil rights decisions and for developments in common understandings of due process and equal protection throughout the twentieth century. The authors conclude that evolving and organic definitions of due process and equal protection can provide a rubric under which to organize developments in associative rights doctrine in American jurisprudence.

Volume VIII then presents two essays originating from BJALP’s March 2004 symposium entitled The Role of Law & Policy: Africa, the Caribbean, and the United States. In his essay, Professor Jeffery Brown posits that the Pan-African movement must recognize a shared interest in promoting economic justice for the entire African Diaspora. He suggests that while Pan-Africanism remains a viable ideology, its adherents must create a more relevant multilateral dialogue and form new alliances to mitigate the potentially harmful effects of trade multilateralism. In keeping with this international focus, Professor Ruth Gordon examines the relationship between Third World countries and the international trade regime. Professor Gordon primarily focuses on how the World Trade Organization has affected Sub-Saharan African nations. She concludes that although globalization discourse holds to the contrary, the only solution for these nations may be to disengage from the international trade regime and explore regional solutions.

Adding to the broad scope of this volume is a comment by Lydia Edwards discussing Native American tribal sovereignty and the disenfranchisement and disenrollment of black tribal members from the Cherokee Nation of Oklahoma and the Seminole Nation of Oklahoma. The black members are descendents of the original “Freedmen” who were part of the tribes before the Civil War and gained their freedom after the end of the Civil War. Edwards argues that federal courts should allow a narrow exception to tribal sovereign immunity to allow the Freedmen to enforce their constitutional rights against the tribes under a novel Thirteenth Amendment claim. For instance, she posits that disenfranchisement and disenrollment on the basis of race is a “badge and incident” of slavery, therefore qualifying as a Thirteenth Amendment violation.

Finally, author Sara Love reviews Richard Ford’s Racial Culture: A Critique, which argues against the claim that anti-discrimination law should protect racialized cultural traits. She finds that the book brings fresh clarity to this ongoing social conversation about race. Yet she is also concerned that Racial Culture is narrowly focused on only one federal district court case, while at the same time she observes that Ford’s arguments merit broader discussion as they are cultural as much as they address the law.

In addition to the pieces contained in this Volume, we feel it is important to note our efforts not contained within the four corners of this publication.
During the 2005-2006 academic year the Journal co-sponsored two major symposiums on the Boalt Hall campus. In March, As the Flood Waters Recede: the Injustice Exposed by Hurricane Katrina examined the causes and effects of Hurricane Katrina on the environment and communities of color along the southern coast of the United States. The second symposium, Overturning 209—A Joint Symposium & Movement, brought together students, attorneys, scholars, activists, and policymakers from across California and beyond to discuss the impact of Proposition 209 on communities of color and to debate effective responses to assaults on communities of color. Both symposia were presented due to the joint efforts of various Boalt Hall student groups and with substantial support from the Boalt Hall and UCB administration, faculty, staff, and the Bay Area community, and as such illustrate the great successes that can be achieved through collaborative effort. Likewise, both symposia allowed the Journal to engage in real-time policy discussions about issues that presently affect our communities.

In the end, we realize that the scholarship presented in this volume and addressed at our symposiums merely touch the surface of myriad topics that should be explored within our community. We further realize that in order to bring these issues to light we must continue to expand our participation in legal and policy discourse, while persevering in the face of tenacious opposition. We are confident this Journal will continue to examine and present solutions to some of the toughest challenges affecting the African-American community. Because of its role in shaping the discourse of policy decisions for communities within the African Diaspora, the Berkeley Journal of African-American Law & Policy is poised to become one of the most prominent publications in this country.

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