

# COLUMBIA JOURNAL OF RACE AND LAW

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## EDITOR'S NOTE

### GROWTH IN UNPRECEDENTED TIMES

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Our *Journal* has published in unprecedented times. This year, we have gone to the streets to declare what should be a universal truth: Black Lives Matter. We have chanted the names of unarmed Black persons who have been killed by the state. This time, our demands for justice were not lost. In fact, a form of justice was delivered by a jury in Minnesota. This jury found Derek Chauvin guilty for the murder of George Floyd.

This year, we've seen the United States Capitol sacked. We've seen the impact of propaganda, created and spread by those nefariously continuing to believe that the presidential election has been stolen. We have seen public officials—those sworn to protect the Constitution against both foreign and *domestic* threats—flirt with, fail to condemn, and endorse white supremacy, authoritarianism, xenophobia, and hate. All of this hidden under the guise of “states’ rights,” “liberty,” “small government,” and “freedom.”

We've also experienced the new reality of living in a global pandemic. It completely changed how we interacted with each other. For example, while chanting in the streets, we wore something novel to many: a face mask. Some of us became caretakers during the pandemic. And over 650,000 American

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\* Editor-in-Chief, *Columbia Journal of Race and Law*, Volume 11. J.D. Columbia Law School, 2021. B.F.A. and B.A., The New School, 2016. I wholeheartedly thank the entire Board and Staff of our *Journal*. Your drive and commitment to our *Journal* gives me strength. You are essential. I am also thankful for our Symposium Co-Chairs, Professor Jane M. Spinak and Professor Nancy Polikoff. Your vision, support, and work has resulted in a successful three-day symposium, and this fifteen-piece Issue you have in your hands—the largest Issue in the *Journal's* history. You have been integral to our *Journal's* success. I am especially grateful for the Managing Editors, Vinay Patel, Jennifer Romero, and Jacob Bryce Elkin. Thank you for accompanying me on this journey. Leading the *Journal* with you has been the honor of my time at Columbia Law School. Finally, I am grateful for my partner, Serengeti. I could not have made it through this year, and law school, without your unyielding support and love.

families lost a loved one. I lost my *Tío* George Antonio Silva,<sup>1</sup> a pillar of our family. Two Managing Editors and several other members of our Board also lost a family member this year. As vaccination rates rise, many sense a return to normalcy. Yet, for others, going back to “normal” can never truly mean a return to our pre-pandemic lives.

The pandemic also placed a microscope on existing inequalities. In line with less access to health care and lower quality of care, Black and Latinx people have died at disproportionate rates from Covid-19 compared to any other group.<sup>2</sup> In our own New York City, Black and Latinx folks experienced death rates twice as high as white communities.<sup>3</sup> We’ve also seen a resurgence of hate crimes, particularly against the Asian and Pacific Islander community.

Inequalities exposed by the pandemic are also intersectional. At the peak of the pandemic, we’ve seen how the majority of “essential,” front-line workers were persons of color.<sup>4</sup> Our society and institutions depend on the labor of the essential: our health care workers; our grocery, convenience, and drug store workers; our crop-pickers, agricultural, trucking, and logistical workers; our postal and delivery workers; our public transit workers; our janitors and building staff; our child and social services workers; and many of those in the “gig” economy. We depend on these workers. And when lawmakers delineated different types of workers, they designated their work as “essential.” Despite this classification, many of these workers were paid less than a living-wage. Even now, after not receiving a fair base compensation to begin with, many have not received

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<sup>1</sup> May his soul rest in peace. Thank you for all you’ve taught me, and so many others.

<sup>2</sup> Carla K. Johnson et al., *As US COVID-19 Death Toll Nears 600,000, Racial Gaps Persist*, AP NEWS, <https://apnews.com/article/baltimore-california-coronavirus-pandemic-race-and-ethnicity-health-341950a902affc651dc268dba6d83264> [https://perma.cc/Q54T-WR6S] (June 14, 2021).

<sup>3</sup> Jeffery C. Mays & Andy Newman, *Virus is Twice as Deadly for Black and Latino People than Whites in N.Y.C.*, N.Y. TIMES (June 26, 2020), <https://www.nytimes.com/2020/04/08/nyregion/coronavirus-race-deaths.html> [https://perma.cc/3Q2M-JR JW].

<sup>4</sup> Catherine Powell, *Color of Covid and Gender of Covid: Essential Workers, Not Disposable People*, 33 YALE J.L. & FEMINISM 1, 10–19 (2021).

hazard pay for their increased, and necessary, exposure to the deadly virus.<sup>5</sup>

The *Columbia Journal of Race and Law* experienced this precarious reality in the context of a virtual reality. We could not ignore the world around us. Columbia Law School became a matrix of Zoom calls instead of our New York City campus; a grid of faces and superimposed backgrounds instead of the favorite chair in our professor's office; an empty room in a different city instead of a lecture hall. Studying, networking, outlining, internships, teaching assistantships, and sustaining our *Journal* all became an isolated series of events. Working from home blurred the distinction between relaxation and productivity. For many of us, the dining room replaced the law school library. And for some of us, we could not find silence while at home.

Our relationship with Columbia Law School and our *Journal* changed. Reading cases seemed irrelevant as we saw the death toll rise at home and abroad. Month after month in front of our screens and TVs, being separated by much more than six-feet became demoralizing, even paralyzing. For some of us, caretaker responsibilities took precedence over our coursework, and even our *Journal* responsibilities. All I wanted to do was to spend time with my family as we wrestled with the sudden loss of *Tío* George.

The demands of the legal profession did not change in these unprecedented times. Our law school exams were not postponed. Our legal externships and employers expected a work product. Even our *Journal* was complicit in these continued demands as we continued to publish. These demands tested our abilities. It tested our capacities. At one point, I even feared our ability to publish. I feared for the future of our *Journal*.

Yet, against these odds, we persisted. Like those who came before us—our parents and grandparents who have worked their entire lives so we could attend an Ivy-League legal institution—we persisted. And we succeeded.

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<sup>5</sup> Molly Kinder et al., *The COVID-19 Hazard Continues, but the Hazard Pay Does Not: Why America's Essential Workers Need a Raise*, BROOKINGS INST. (Oct. 29, 2020), <https://www.brookings.edu/research/the-covid-19-hazard-continues-but-the-hazard-pay-does-not-why-americas-frontline-workers-need-a-raise> [https://perma.cc/RZ88-W882].

This year, we have published more than any other volume of the *Columbia Journal of Race and Law*. This year, we published twenty-six pieces, resulting in over 1,000 pages of original scholarship. This was only possible due to the commitment of our Editorial Board and Staff. Our Masthead was also the largest in the *Journal's* history, comprising over fifty students, and spanning over three graduating classes of students. Among our achievements this year is a mention in *TIME Magazine*.<sup>6</sup>

We have also created an entirely new publication: The *Columbia Journal of Race and Law Forum*—our exclusively online companion to our traditional, printed pieces. The *Forum*, unlike our traditional print Issues, is dedicated to shorter, more timely pieces, and isn't constrained by the same financial and logistical demands of print scholarship.

Our first Issue proceeded with four pieces. First, Professor John A. Powell and Eloy Toppin Jr., examines the “othering” that fuels the global rise of authoritarianism and proposes a “society of belonging” to combat racism.<sup>7</sup> Second, Professor Michelle Foster and Timnah Rachel Baker provide the first analysis of Article 1(3) of the International Convention on the Elimination of All Forms of Racial Discrimination and its consistency with the *jus cogens* prohibition on racial discrimination.<sup>8</sup> Then, in my Note, I analyze the Supreme Court's doctrinal methodologies of evaluating constitutional harm, and argue that what I call the “cumulative harm framework” is necessary to combat second-generation discrimination.<sup>9</sup> And, Jacob Elkin, our Managing Online and Symposium Editor, argues that a public trust duty imposed by the Pennsylvania Supreme Court should prohibit state actors from continuing to

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<sup>6</sup> Chris Gottlieb, *Black Families Are Outraged About Family Separation Within the U.S. It's Time to Listen to Them*, TIME (Mar. 17, 2021), <https://time.com/5946929/child-welfare-black-families> [https://perma.cc/DFD5-66ST].

<sup>7</sup> John A. Powell & Eloy Toppin, Jr., *Uprooting Authoritarianism: Deconstructing the Stories Behind Narrow Identities and Building a Society of Belonging*, 11 COLUM. J. RACE & L. 1 (2021).

<sup>8</sup> Michelle Foster & Timnah Rachel Baker, *Racial Discrimination in Nationality Laws: A Doctrinal Blind Spot of International Law?*, 11 COLUM. J. RACE & L. 83 (2021).

<sup>9</sup> Nicolás Quaid Galván, Note, *Adopting the Cumulative Harm Framework to Address Second-Generation Discrimination*, 11 COLUM. J. RACE & L. 147 (2021).

place environmental hazards in communities that already bear disproportionate environmental burdens.<sup>10</sup>

Our second Issue contained three pieces. It included the longest individual piece in our *Journal's* history. In 103 pages, David H. Gans provides an in-depth historical and legislative account of the formation of the 14th Amendment, arguing that current Supreme Court doctrine falls egregiously short of the original intent of the Amendment.<sup>11</sup> Next, Avanthi Cole, in her Note, demonstrates how the Uniform Partition of Heirs Property Act, was designed to assist the “wealthy and legally savvy” in resolving issues with “heirs property,” but does not provide the tools to help Black and low-income communities.<sup>12</sup> Finally, Alyson Merlin, our Symposium Editor, argues that unenforced but unabrogated treaty rights between Native Americans and the federal government may serve as a mechanism for Native nations to assert a greater role in the decision-making process regarding massive energy projects, such as oil pipelines.<sup>13</sup>

Our newly created *Forum* was also home to multiple pieces. There, Vinay Patel, our Managing Articles Editor, demonstrates that the FBI's new, facially neutral classification of “Racially Motivated Violent Extremism” is a façade to surveille Black Lives Matter protestors, and should not survive a challenge under the Fourteen Amendment.<sup>14</sup> We also used the *Forum* to memorialize our Keynote and Closing Remarks of Volume 10's Symposium, entitled *How the Law Underdeveloped Racial Minorities in the United States*, which was postponed due to the pandemic and hosted by Volume 11.

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<sup>10</sup> Jacob Elkin, Note, *Environmental Justice and Pennsylvania's Environmental Rights Amendment: Applying the Duty of Impartiality to Discriminatory Siting*, 11 COLUM. J. RACE & L. 195 (2021).

<sup>11</sup> David H. Gans, “*We Do Not Want to Be Hunted*”: *The Right to Be Secure and Our Constitutional Story of Race and Policing*, 11 COLUM. J. RACE & L. 239 (2021).

<sup>12</sup> Avanthi Cole, Note, *For the “Wealthy and Legally Savvy”: The Weaknesses of the Uniform Partition of Heirs Property Act as Applied to Low-Income Black Heirs Property Owners*, 11 COLUM. J. RACE & L. 342 (2021).

<sup>13</sup> Alyson Merlin, Note, *Unenforced Promises: Treaty Rights as a Mechanism to Address the Impact of Energy Projects Near Tribal Lands*, 11 COLUM. J. RACE & L. 373 (2021).

<sup>14</sup> Vinay Patel, Comment, *Racially Motivated Spying Pretext: Challenging the FBI's New Regime of Racialized Surveillance*, 11 COLUM. J. RACE & L.F. 1 (2021).

This Issue is unique. In this first of two Symposium Issues, we celebrate the 20th anniversary of Professor Dorothy Roberts' *Shattered Bonds: The Color of Child Welfare*.<sup>15</sup> Professor Roberts gave our Keynote, which is also memorialized here.<sup>16</sup> In this Issue and at our actual Symposium,<sup>17</sup> we call for the abolition of the child welfare system, more appropriately called the family regulation system,<sup>18</sup> and asked our participants and authors to reimagine child wellbeing. The Issue's *Foreword* provides a thorough summary of the thirteen subsequent pieces within this Issue and two pieces published online in the *Forum*.<sup>19</sup> This Issue and our Symposium was only possible through the devotion of Professors Jane M. Spinak and Nancy Polikoff, our Symposium Co-Chairs. Our *Journal* is grateful for your commitment, time, and energy. We cannot thank you enough.

Our *Journal* inhabits a unique space at Columbia Law School. We are exclusively devoted to combating racial inequalities, the only legal journal to do so at Columbia. Because of purpose, we cannot, and will not, be oblivious to the world outside Morningside Heights. We will continue to ask the difficult questions, and advance our cause. I, and the Editorial Board and Staff of the *Columbia Journal of Race and Law*, thank you for joining us. We thank you for engaging with the ideas of our authors. We hope this discourse helps, and that soon enough, these words ring true: "Equal Justice Under Law."

With gratitude, *y en solidaridad*,

Nicolás Quaid Galván  
Editor-in-Chief  
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<sup>15</sup> DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2001).

<sup>16</sup> Dorothy Roberts, Keynote, *How I Became a Family-Policing Abolitionist*, 11 COLUM. J. RACE & L. 455 (2021).

<sup>17</sup> Columbia Journal of Race and Law, *Strengthened Bonds Symposium Introductions, Keynote, and Responses*, YOUTUBE, (July 13, 2021), <https://www.youtube.com/watch?v=NMZffrsE-b8> [<https://perma.cc/C6XW-LG84>].

<sup>18</sup> Nancy D. Polikoff & Jane M. Spinak, *Foreword: Strengthened Bonds: Abolishing the Child Welfare System and Re-Envisioning Child Well-Being*, 11 COLUM. J. RACE & L. 427 (2021).

<sup>19</sup> *Id.*