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## CLOSING REMARKS

### 10TH ANNUAL SYMPOSIUM: HOW THE LAW UNDERDEVELOPED RACIAL MINORITIES IN THE UNITED STATES

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*On November 20–21, 2020, the Columbia Journal of Race and Law hosted a virtual two-day symposium entitled How the Law Underdeveloped Racial Minorities in the United States. Broadly, the theory of underdevelopment looks at the standard of life in a nation as a measure of that country's economic conditions. The application of this theory in the context of the law and as a measure of the quality of life of racial minorities stems from Professor Manning Marable's work on capitalism and the economic and social conditions of Black Americans.*

*In her Closing Remarks, Professor Alexis Hoag provided context for the contemporary application of Professor Marable's theory in light of current events, exploring the Coronavirus pandemic, the Black Lives Matter Movement, and the 2020 Presidential Election. She then introduced carceral abolition as a theoretical and practical framework to understand the law's underdevelopment of Black people and to help address the criminal legal system's disparate impact on racial minorities.*

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I wanted to start by thanking the *Columbia Journal for Race and Law* for inviting me to deliver closing remarks at what is now the 10th annual symposium. I'm honored and humbled, particularly relative to the fantastic scholars and thinkers who participated last night and today. I especially want to recognize this year's symposium organizers, Jacob Elkin, Nicolas Galvan, and last year's, Ibrahim Diallo and Amanda McNally. Ibrahim and Amanda first approached me with their thoughts on Manning Marable's powerful body of work<sup>1</sup> in January 2020. They initially planned for a convening in early April of this year. However, it's fitting that the symposium is occurring now, as the nation braces for the second wave of the Coronavirus pandemic and in the wake of the presidential election. Georgia, recently reconfirmed that yes, indeed, Biden and Harris won the electoral votes in that state.<sup>2</sup> Both events exposed longstanding structural damage to the nation's foundation. Damage that the law's underdevelopment of segments of the population cemented.

We continue to witness the lethal impact that COVID-19 has had on under-resourced communities of color. Due to generations of unequal access to health care, Black people experience higher rates of the very illnesses that make them most susceptible to the Coronavirus—diabetes, hypertension, and sickle cell disease. After the U.S. Supreme Court gutted the Voting Rights Act of 2013, we continue to witness states like Arizona, Georgia, and Texas close early polling locations most utilized by Black and Brown people. By almost every measure—health outcomes, education, access to wealth, and contact with the criminal legal system—the condition of racial minorities in the U.S., and Black people in particular, is in a state of underdevelopment relative to white people. Each of the speakers at this symposium has explored and interrogated the intertwined

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<sup>1</sup> Dr. Manning Marable was a prominent political activist and scholar at Columbia University, where he served as a Professor of Public Affairs, Political Science, History and African-American Studies. Dr. Marable was the founding director of the Institute for Research in African-American Studies at Columbia University. Under Dr. Marable's leadership, the Institute became one of the nation's most prestigious centers of scholarship on the Black American experience. His posthumously published biography, *MALCOLM X: A LIFE OF REINVENTION* (2011), was awarded the 2012 Pulitzer Prize for History.

<sup>2</sup> Richard Fausset, *Hand Tally of Georgia Ballots Reaffirms Biden's Win*, N.Y. TIMES, Nov. 19, 2020, A16 (reporting on Georgia's statewide hand recount after President Donald Trump's campaign challenged the initial results showing President-elect Joseph Biden won the election).

relationship between the law and the underdevelopment of racial minorities. This is a powerful framework from which to hold these discussions. It both acknowledges the law's central role in maintaining white supremacy and urges us to question the legal standards and norms that the law presents to us as neutral.

Over the next 15 or so minutes, I'd like to discuss three areas. First, I want to tie together some of the concepts raised throughout this symposium. Secondly, I want to examine the law's unfulfilled promise to deliver redress to Black victims of state violence. And lastly, I'd like to end with an exploration of abolition as a theoretical framework to dismantle the law's chokehold on Black people and other racial minorities.

I'd like to begin by picking up where this last panel ended. So, first, yesterday: Professor Kendall Thomas<sup>3</sup> in conversation with Katharina Pistor,<sup>4</sup> recognized the role of the law in designing and maintaining an architecture of underdevelopment with respect to capital. We were introduced to Professor Pistor's book, *The Code of Capital*,<sup>5</sup> where she refers to the law as the cloth from which capital is cut. And if I may extend that metaphor, despite the labor of enslaved people to turn the cloth into goods, the law denied Black people from reaping the benefit of those goods. Professor Thomas then explained that the law prevented people of color from availing themselves of the power and protections that the state offered.

Next, we heard from Professor Maeve Glass,<sup>6</sup> who examined underdevelopment in the context of property and contract law. Professor Conrad Johnson<sup>7</sup> and Bruce Ornstein<sup>8</sup> shared personal accounts of how underdevelopment impacted

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<sup>3</sup> Nash Professor of Law at Columbia Law School, focused on comparative constitutional law and human rights whose teaching and research focus on critical race theory, legal philosophy, feminist legal theory, and law and sexuality.

<sup>4</sup> Edwin B. Parker Professor of Comparative Law at Columbia Law School, focusing on corporate governance, money and finance, property rights, and comparative law and legal institutions.

<sup>5</sup> KATHARINA PISTOR, *THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY* (2019).

<sup>6</sup> Associate Professor of Law at Columbia Law School, teaching and writing on the history of slavery in America, property, and constitutional law.

<sup>7</sup> Clinical Professor at Columbia Law School, founder and director of the Lawyering in the Digital Age Clinic.

<sup>8</sup> *Artist in Residence at the Samuel DuBois Cook Center on Social Equity at Duke University.*

their families—one Black, one White—access to educational opportunity, capital, and the accumulation of generational wealth. Professor Etienne Toussaint<sup>9</sup> explained that contract law served as a tool to legitimate the underdevelopment of Black people. Following Emancipation, the government extended the “freedom” to contract to Black people, many of whom—with no other options—bonded themselves into sharecropping contracts.<sup>10</sup>

Today, we heard from Sean Ossei-Owusu,<sup>11</sup> who led a conversation on the criminal legal system’s underdevelopment of Black people with Professor Bennett Capers,<sup>12</sup> Rukia Lumumba,<sup>13</sup> and Naima Gregory.<sup>14</sup> They reminded us that we cannot discuss inequality within the criminal legal system today, without first acknowledging the history of slavery, Black Codes, and Jim Crow. Professor Capers encouraged us to denaturalize the conduct that we consider criminal. Rukia Naima called upon us to reimagine public safety without propping up and legitimizing existing criminal law.

Next, I’d like to discuss the laws unfulfilled promise to Black people as it relates to state violence. Before Emancipation the law generally did not recognize harmful acts committed against enslaved Black people as crimes.<sup>15</sup> Property law provided one of the only available means of redress, enabling an enslaved person’s owner to collect compensation for damaged or lost

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<sup>9</sup> Associate Professor of Law at the University of the District of Columbia David A. Clarke School of Law, teaching and writing about community economic development, environmental justice, business law, legal ethics, and professional responsibility.

<sup>10</sup> DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* 48-52 (6th ed. 2008).

<sup>11</sup> Presidential Assistant Professor of Law at the University of Pennsylvania Carey Law School, focusing on legal history, criminal law and procedure, civil rights, and the legal profession.

<sup>12</sup> *Professor of Law and Director of Center on Race, Law & Justice, at Fordham Law School*, with a focus on race, gender, technology, and criminal justice.

<sup>13</sup> Transformative justice strategist, human rights activist, and the Founder of the People’s Advocacy Institute in Jackson, Mississippi.

<sup>14</sup> Supervising attorney at the Neighborhood Defender Service of Harlem in New York, New York.

<sup>15</sup> Alexis Hoag, *Valuing Black Lives: A Case for Ending the Death Penalty*, 51 COLUM. HUM. RTS. L. REV. 983, 996-99 (2020)

property (in the event of an enslaved person's death).<sup>16</sup> The law treated Black victims as a legal invisibility.<sup>17</sup> The same is not true for Black perpetrators of violence. For even relatively minor infractions, and where the victim was white, the law punished Black people with death.<sup>18</sup> In this way, Black lives did not matter in the eyes of the law. Reconstruction, what Columbia historian Eric Foner refers to as the nation's "Second Founding,"<sup>19</sup> had the power to change this. It recognized Black people as citizens, and codified laws to prohibit the denial of their rights.<sup>20</sup>

Yet, anti-Black racism, derived from slavery, runs in the very DNA of this country.<sup>21</sup> The underdevelopment of racial minorities and white supremacy are what this nation was founded and expanded upon.<sup>22</sup> Notably, our constitution frames civil rights in the negative, rather than as a positive.<sup>23</sup> The Reconstruction Amendments did not bestow new rights upon Black people, rather they removed race—and the status as a formerly enslaved person—as a barrier to citizenship.<sup>24</sup> And then prohibited others from preventing citizens from exercising their civil rights.<sup>25</sup>

But once citizenship included Black people, the law permitted discretion and the development of jurisprudence to exclude Black people from protection. Reflecting on Reconstruction, Frederick Douglass observed: "The arm of the federal government is long, but it is far too short to protect the

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<sup>16</sup> KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* 96 (Vintage Books 1989) (1956).

<sup>17</sup> See Stephen Carter, *When Victims Happen to Be Black*, 97 *YALE L.J.* 420 (1988).

<sup>18</sup> Dorothy Roberts, *Abolition Constitutionalism*, 133 *HARV. L. REV.* 1, 38-40 (2019).

<sup>19</sup> ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* (2019).

<sup>20</sup> *Id.* at 1-20.

<sup>21</sup> Nikole Hannah-Jones, *Our Democracy's Founding Ideals Were False When They Were Written. Black Americans Have Fought to Make Them True.*, *N.Y. TIMES MAG.* (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/black-history-american-democracy.html> [<https://perma.cc/4GRF-LVAY>].

<sup>22</sup> Alexis Hoag, *Abolition as the Solution: Redress for Victims of Excessive Police Force*, 48 *FORDHAM URB. L. J.* 721, 728 (2021).

<sup>23</sup> Erwin Chemerinsky, *Lessons from Gideon*, 122 *YALE L.J.* 2676, 2678 (2013).

<sup>24</sup> Hoag, *supra* note 23, at 729.

<sup>25</sup> *Id.*

rights of individuals in the interior of distant states.”<sup>26</sup> The first Supreme Court case to test the reach of the Civil Rights Act of 1866 and its federal authority was *Blyew v. United States*.<sup>27</sup>

In 1866, two white men approached a cabin in Kentucky. Three generations of a Black family lived there, including a 97-year-old grandmother who was blind.<sup>28</sup> When the family refused the men, they came back and slaughtered the family with an axe. The only witnesses to the crime were the survivors, all Black.<sup>29</sup> Because Kentucky law prohibited Black people from testifying in court, the local US Attorney—armed with the new federal Civil Rights Act—removed the case from state court and tried it in federal court, securing convictions, and death sentences against those two white men.<sup>30</sup>

On appeal, the U.S. Supreme Court reversed, holding that the surviving witnesses were “not persons affected” under the law, and therefore, the lower court lacked jurisdiction to indict the defendants.<sup>31</sup> Since the “affected persons” were no longer alive, the federal court could not uphold their rights. The Court’s early evisceration of the Civil Rights Act of 1866 prevented it from being a viable tool to provide redress to Black victims of state violence.<sup>32</sup> Notably, parts of the act today serve as the foundation for 18 U.S.C § 242, which is the criminal equivalent to Section 1983. These two contemporary federal statutes are intended to provide redress when state actors violate the rights of Black people. Beginning with the Court’s 1871 holding in *Blyew*, and continuing today, the law has failed to fulfill this promise to Black people.

Lastly, I teach a class on Abolition,<sup>33</sup> and I want to suggest carceral abolition as a tool to dismantle the law’s chokehold on Black people. My comments on abolition are in

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<sup>26</sup> Frederick Douglass, *Reconstruction*, ATL. MONTHLY, Dec. 1866, at 50.

<sup>27</sup> *Blyew v. United States*, 80 U.S. 581 (1871).

<sup>28</sup> *Id.* at 589.

<sup>29</sup> *Id.* at 583.

<sup>30</sup> Robert D. Goldstein, *Blyew: Variations on a Jurisdictional Theme*, 41 STAN. L. REV. 469, 483-89 (1989).

<sup>31</sup> *Blyew*, 80 U.S. at 593.

<sup>32</sup> Hoag, *supra* note 23, at 730.

<sup>33</sup> Abolition: A Social Justice Practicum, Columbia Law School, Fall 2020, available at <https://www.law.columbia.edu/academics/courses/26989> [<https://perma.cc/9KDY-3E5J>].

direct response to Rukia and Naima's call to reimagine public safety. Abolition is a theoretical framework that invites us to examine how this nation's history of slavery, and the racial hierarchy that followed, helped shape today's racialized carceral state.<sup>34</sup> And it invites us to look to the future to imagine a society without a carceral focus on punishment. In a criminal law course, we would learn about abolition, right alongside other theories of punishment—retribution, rehabilitation, and incapacitation.<sup>35</sup>

Abolition moves us away from prisons policing and prosecution, and invites us to think critically and dynamically, about the conditions that cause crime and inequality. Abolition focuses on finding new restorative ways of addressing wrongdoing and insuring safety. This is not a new concept. The modern prison abolition movement coalesced 20 years ago with the formation of Critical Resistance<sup>36</sup> and Angela Davis's 2003 publication, *Are Prisons Obsolete?*<sup>37</sup> However these ideas have spread as lawmakers, scholars, organizers, and even lawyers, begin to question mass incarceration. And these ideas have spread to other disciplines outside of criminal law. As Ruth Wilson Gilmore<sup>38</sup> explains: "Abolition is deliberately everything-ist. It's about the entirety of human environmental relations."<sup>39</sup> Gilmore, a geographer by training, recognizes that prison abolition would force this country to address environmental toxins, employment and educational opportunities, childhood trauma, housing, and mental health resources.<sup>40</sup> Our reliance on prisons, jails, and detention centers is not a sustainable form of social organization.

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<sup>34</sup> Hoag, *supra* note 23, at 735-38.

<sup>35</sup> Amna Akbar & Jocelyn Simonson, *Rethinking Criminal Law*, LAW & POL. ECON. PROJECT, Oct. 24, 2018, <https://lpeproject.org/blog/rethinking-criminal-law/> [<https://perma.cc/LK7W-UR24>] (last visited Apr. 9, 2021).

<sup>36</sup> See *History*, Critical Resistance, <http://criticalresistance.org/about/history> [<https://perma.cc/5Q5M-BRPG>] (last visited Apr. 9, 2021).

<sup>37</sup> ANGELA DAVIS, *ARE PRISONS OBSOLETE?* (2003).

<sup>38</sup> Dr. Ruth Wilson Gilmore is a Professor of Earth & Environmental Sciences, and American Studies, and the director of the Center for Place, Culture, and Politics at the City University of New York (CUNY).

<sup>39</sup> Rachel Kushner, *Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind*, N.Y. TIMES (Apr. 17, 2019), <https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html> [<https://perma.cc/Z88S-XT62>].

<sup>40</sup> *Id.*

These concepts gained greater urgency this year—and in this school—in the wake of George Floyd and Breonna Taylor’s murders, and from the murders of countless other Black people at the hands of law enforcement.<sup>41</sup> This country’s mass demonstrations for Black Lives Matter encouraged all of us to think critically about combating structural racism in all sectors of society.

I’d like us to now consider abolition as a remedy to harm. An abolitionist framework allows us to look beyond existing law toward models that enable repair and prevention of future harm.<sup>42</sup> Abolition enables us to craft tailored remedies that fit the harm experienced. The remedy sought may differ depending on the nature and extent of the harm, and the desires of the persons or the communities who experienced the harm. Examples of these models already exists in communities that have experienced state violence and I’ll highlight two briefly.

In response to decades of police torturing Black people in Chicago, activists and lawyers demanded and then received reparations from the city.<sup>43</sup> They used the term reparations to harken back to this history of enslavement and racial hierarchy. In addition to monetary compensation, they secured psychological counseling for the torture survivors, an official apology, tuition-free education at a local college for torture survivors and their families, a requirement that Chicago public schools teach students about the torture cases, and the construction of a public monument recognizing the torture victims.<sup>44</sup> Chicago’s Reparations Resolution can serve as a model for other communities.

In Los Angeles, L.A for Youth activists are engaged in a campaign to redirect monetary resources away from policing and into prevention and intervention strategies, including employment opportunities for young people to provide them skills to enter the workforce. This is an example of “justice reinvestment,” a term that Allegra McLeod uses.<sup>45</sup> This is what

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<sup>41</sup> Larry Buchanan, Quoc Trung Bui, & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES, July 3, 2020.

<sup>42</sup> Hoag, *supra* note 23, at 738-39.

<sup>43</sup> *Id.* at 739-41.

<sup>44</sup> *Id.* at 741-42.

<sup>45</sup> Allegra McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1225-26 (2015).



we mean when we say “defund the police.” It is disinvestment, followed by thoughtful reinvestment with an eye toward preventing and mitigating future harm. Beyond reparations and divest/invest, abolition allows for reckoning and reconciliation as remedies for past harm, and to prevent the cyclical reoccurrence of future harm.

Police violence against Black people is a symptom of a larger illness. And that illness is the presumption of criminality and dangerousness that society assigns to Black people. This presumption emerged from slavery and the racial hierarchy that followed; it’s what Isabel Wilkerson explains in her recent book *Caste*.<sup>46</sup> Bryan Stevenson, the founder and director of Equal Justice Initiative, is deeply engaged in a campaign to acknowledge racial terrorism, and to provide pathways toward reconciliation.<sup>47</sup> My former boss Sherrilyn Iffil, President and Director Counsel of the NAACP Legal Defense and Educational Fund, has called for racial reckoning to enable reconciliation of longstanding harms that whole communities of Black people experienced as a result of state sanctioned violence in the name of white supremacy.<sup>48</sup>

The adversarial criminal legal system—where assuming responsibility for harm is disfavored—is ill-equipped to enable reckoning and reconciliation. As Rukia Lumumba explained, we must look to alternative models that focus on accountability rather than punishment. To meaningfully address harm, to protect and advance the rights of racial minorities, and to prevent harm from reoccurring, we must look outside of existing laws. I offer abolition as a pathway toward justice. Thank you. And I’m happy to take questions if we have any time.

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<sup>46</sup> ISABEL WILKERSON, *CASTE: THE ORIGINS OF OUR DISCONTENTS* (2020).

<sup>47</sup> See *National Memorial for Peace and Justice*, EQUAL JUSTICE INITIATIVE, <https://museumandmemorial.eji.org/memorial> [<https://perma.cc/W3DM-H5XR>] (last visited Apr. 9, 2021).

<sup>48</sup> SHERRILYN A. IFILL, *ON THE COURTHOUSE LAWN: CONFRONTING THE LEGACY OF LYNCHING IN THE TWENTY-FIRST CENTER* (2018).

