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Introduction to the Special Issue: A Retrospective on Race in America

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INTRODUCTION TO THE SPECIAL ISSUE: A RETROSPECTIVE ON RACE IN AMERICA

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On May 25th, 2020, George Floyd was arrested by four Minneapolis Police Officers for attempting to pass a counterfeit twenty-dollar bill. To subdue a nonviolent Mr. Floyd, Officer Derek Chauvin knelt on Mr. Floyd's neck. Despite Mr. Floyd repeatedly gasping "I can't breathe" and eventually losing consciousness, Officer Chauvin held him pinned for roughly nine minutes.¹ Ultimately, Mr. Floyd died at the hands of Officer Chauvin.² The entire encounter was caught on camera.

The heart-wrenching video ignited the nation. Citizens took to the streets across the country, once again demanding an end to the senseless killing of Black people at the hands of law enforcement.³ The ensuing protests became the largest civil rights movement in American history.⁴

As a result of these protests, many institutions across the United States are reckoning with how to confront pasts and

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1. Amy Forliti, *Prosecutors: Officer was on Floyd's Neck for About 9 Minutes*, ASSOCIATED PRESS, (Mar. 4, 2021) <https://apnews.com/article/trials-derek-chauvin-minneapolis-racial-injustice-060f6e9e8b7079505a1b096a68311c2b> [<https://perma.cc/UA3H-ZQHN>].

2. Chauvin was ultimately convicted by a jury of his peers of second-degree murder, third-degree murder, and second-degree manslaughter in a Minnesota State Court. *See, e.g.*, Tim Arango et. al., *Derek Chauvin Is Found Guilty of Murdering George Floyd*, N.Y. TIMES (Apr. 20, 2021) <https://www.nytimes.com/2021/04/20/us/chauvin-guilty-murder-george-floyd.html> [<https://perma.cc/Z9NF-7S3R>].

3. *See, e.g.*, Jelani Cobb, *The Matter of Black Lives*, NEW YORKER (Mar. 6, 2016) <https://www.newyorker.com/magazine/2016/03/14/where-is-black-lives-matter-headed> [<https://perma.cc/3LV3-6ZYR>] (describing the formation of the Black Lives Matter movement and discussing factors that could impact its longevity as a social movement).

4. Larry Buchanan et. al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES, (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> [<https://perma.cc/Y8NY-MAZY>].

presents rife with racial inequity and to take concrete steps to move forward to an anti-racist future. This reckoning cannot come too soon. Indeed, across the United States, racial disparities have been further showcased. For instance, former President Trump's continual reference to COVID-19 as the "Chinese virus" has been connected to the rise in Asian-American hate crimes in 2020.⁵ The organization, Stop AAPI Hate has received 6,603 anti-Asian "hate incidents" from across the United States between March 2020 and March 2021.⁶ Similar racial inequities are present here in Colorado, where the Latinx population has borne a disproportionate rate of COVID-19 infection: nearly 27 percent of cases, despite comprising just 21 percent of the population.⁷

The *University of Colorado Law Review* is one such institution grappling with these questions. As it approaches its one hundredth anniversary, one thing is clear: this Law Review is a predominantly white institution that has largely failed to represent the diversity of the University of Colorado Law School more broadly. In doing so, it has reinforced the broader racial inequities in the legal profession.⁸ These inequities exist and, in persisting, undermine the quality of our scholarship, the strength of our social collective, and the positive impact that we have on the legal profession.

Given these larger racial inequities and our contribution to those inequities, the *University of Colorado Law Review* partnered with the Black Law Students Association, the Latinx Law Students Association, the Native American Law Students Association, and the Womxn of Color Collective to publish this

5. See, e.g., Sabrina Tavernise & Richard A. Oppel Jr., *Spit On, Yelled At, Attacked: Chinese-Americans Fear for Their Safety*, N.Y. TIMES (Mar. 18, 2021) <https://www.nytimes.com/2020/03/23/us/chinese-coronavirus-racist-attacks.html> [<https://perma.cc/B9VV-ZJLR>]; Richard Fausset et. al., *Suspect in Atlanta Spa Attacks is Charged with 8 Counts of Murder*, NY TIMES, (Mar. 17, 2021) <https://www.nytimes.com/2021/03/17/us/atlanta-shooting-spa.html> [<https://perma.cc/EV4N-LUJF>]

6. RUSSEL JEUNG ET. AL., STOP AAPI HATE, STOP AAPI HATE NATIONAL REPORT, (May 6, 2021) <https://stopaapihate.org/national-report-through-march-2021/> [<https://perma.cc/Z6YT-PQSH>].

7. *Colorado COVID-19 Data*, COLORADO DEP. OF PUBLIC HEALTH & ENVIRONMENT, <https://covid19.colorado.gov/data> (last visited June 10, 2021) [<https://perma.cc/6DFR-MX45>].

8. See, e.g., Dorene Roberts Sarnoski, *The Law Review Selection Process: An Analysis of the Disparate Treatment on Minority Students*, 7 MINN.J. OF L. AND EQUALITY 459, 460 (1989).

Special Issue. In this collaborative environment, we read hundreds of Articles previously published in this Law Review and selected four to republish in this Special Issue that we feel spoke to the current moment in important ways. What's more, our select Authors graciously wrote Forewords to recontextualize their original work and reflect on the viability of their original claims with the benefit of hindsight. At its core, this Special Issue contributes to the equitable development of the Law through scholarship, and thus embodies our collective institutional values and mission.

The Special Issue opens with Professor Wendy Greene's groundbreaking Article, "Title VII: What's Hair (And Other Race-Based Characteristics) Got to Do with It?" Originally published in 2008, her Article advanced the novel argument that the federal judiciary's treatment of employer grooming practices allowed employers to discriminate against their Black employees in contravention of Title VII.⁹ Reflecting on this argument today, Professor Greene's Foreword skillfully demonstrates the continued relevance of her original claim, while also highlighting the efforts made by local, state, and national legislatures to address this problem.

Our next Article is Professor T. Alexander Aleinikoff's "The Constitution in Context: The Continuing Significance of Racism." Professor Aleinikoff argued—in 1992—that racism was very much alive and well in the United States, and that our legal system's apparent refusal to acknowledge this reality did so "at the peril of its victims and society as a whole."¹⁰ Now, nearly thirty years later, Professor Aleinikoff uses his Foreword to explore the viability of the claims he advanced in his original Article. Ultimately, Professor Aleinikoff concludes that racism must be confronted through concerted political action, since the courts—most notably, the US Supreme Court—have wholeheartedly disavowed the consideration of race to resolve racial inequities perpetuated by prevailing legal doctrines.

Following this Article is Professor Eric K. Yamamoto and Jen-L W. Lyman's piece "Racializing Environmental Justice." This Article, originally published in 2001, problematizes the

9. D. Wendy Greene, *What's Hair (and Other Race-based Characteristics) Got to Do with It?*, 79 U. COLO. L. REV. 1355 (2008).

10. T. Alexander Aleinikoff, *The Constitution in Context: The Continuing Significance of Racism*, 63 U. COLO. L. REV. 325, 325 (1992).

apparent one-size-fits-all ideology commonly wielded by environmental activists and instead urges the adoption of highly context approach that explicitly incorporates the unique racial community impacted by such activism.¹¹ Twenty years later, Professor Yamamoto and Professor Susan K. Serrano utilize their Foreword both to acknowledge the advances made possible by the recognition of “systemic racism” in the context of environmental justice and to highlight the continued importance of the highly contextual approach to ensure that genuine environmental justice is achieved for indigenous communities.

The Special Issue closes with Professor Paul Butler’s Article “Affirmative Action and the Criminal Law.” In his Article, Professor Butler advanced the somewhat controversial claim that affirmative action should be utilized in the criminal justice system to ameliorate the disproportionate representation of African Americans in the criminal justice system.¹² He offers a series of proposals modeled after affirmative action to address this flagrantly unjust reality. Reflecting on the arguments he made in 1997, Professor Butler concedes in his Foreword that he has lost faith that the court’s will implement changes that promote substantive racial equity, especially in light of affirmative action’s larger deterioration as a legal doctrine. What’s more, in his estimate, contemporary abolitionist efforts—efforts that seek to solve such racial inequities—actually risk perpetuating different forms of the problems they seek to address.

Collectively, these Articles speak to the foundational, complex, and thoroughly entrenched problems that we face as a society. As an institution that has contributed in its own ways to these inequities, the *University of Colorado Law Review* hopes this Special Issue can inspire this Law Review and others to continue working towards a more just, equitable future. With this in mind, the rest of this Introduction is authored by our colleagues with whom we have collaborated to create this Special Issue.

Foremost, as members of the Colorado Law community, we would like to acknowledge that the University of Colorado Law School sits on the traditional lands of the Cheyenne, Arapahoe,

11. Eric K. Yamamoto & Jen-L W. Lyman, *Racializing Environmental Justice*, 72 U. Colo. L. Rev. 311 (2001).

12. Paul Butler, *Affirmative Action and the Criminal Law*, 68 U. COLO. L. REV. 841 (1997).

and Ute peoples. We further acknowledge the forty-eight contemporary tribal nations that have historical ties to the land that makes up the state of Colorado. We acknowledge the land upon which we stand because these lands have been the foundation of the historical trajectory of the United States and the social and racial direction it has taken. The impact of stolen lands and slave labor by Black and brown Americans has allowed white Americans to benefit from the fruits of such labor.

As members of these affinity groups at the University of Colorado Law School, we are hyper-aware of the direct impact that the law has and how it has continually oppressed our communities. For example, the continued failure of the United States government to honor Native American Treaties has resulted in untold injustices.¹³ Additionally, Republican lawmakers continue with efforts to pass legislation that would disenfranchise BIPOC voters.¹⁴ For many of us, the ability to be a part of the legal profession presents us with the opportunity to provide direct legal services and a platform to advocate for our communities.

Yet there is still so much more work to be done. As affinity groups, we continue to urge the University of Colorado Law School to create a safe and open place for BIPOC law students. Beyond the need for a physical space in which BIPOC students can safely engage on campus, a physical space allows BIPOC students to see themselves reflected in the past, present, and future of the legal profession. Our engagement with the *University of Colorado Law Review* is an example of our continued desire to urge the Journals to enter into dialogue and reflect upon what they can do to ensure there is space for BIPOC law students and voices in the legal community.

As readers, we encourage you to analyze these articles and digest the message. Yet, beyond the thesis of each Article, we implore each reader to reflect on how their own lives are impacting the narratives and struggles that our communities face. For it is not words, but actions that will spark legal change.

13. See, e.g., *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).

14. *State Voting Bills Tracker 2021: State Lawmakers Continue to Introduce Voting and Elections Bills at a Furious Pace*, BRENNAN CENTER FOR JUSTICE <https://www.brennancenter.org/our-work/research-reports/state-voting-bills-tracker-2021> (last visited June 10, 2021) [<https://perma.cc/RG8K-GBBJ>].

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