

Foreword: Racial Capitalism as Legal Analysis

Jay Hedges

Follow this and additional works at: <https://scholarship.law.stjohns.edu/jcred>

This Foreword is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in Journal of Civil Rights and Economic Development by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

FOREWORD: RACIAL CAPITALISM AS LEGAL ANALYSIS

JAY HEDGES*

In 2010, the *Journal of Legal Commentary* was renamed the *Journal of Civil Rights & Economic Development* (JCRED) to reflect its status as the official journal of the Ron Brown Center for Civil Rights here at St. John's University School of Law.¹ From then on, the *Journal* has been dedicated to exploring issues of social, racial, and economic justice in the law. Thus, JCRED is situated to be a publication that breaches the divide that has held so much power over legal scholarship through the years.² That divide is the segregation of issues of Public Law and Private Law, the realm of Public Law being considered the only appropriate space to discuss issues of identity-based oppression covered in the civil rights cases and anti-discrimination litigation of Constitutional Law. The realm of Private Law, on the other hand, has been considered the “neutral” economic space devoid of any considerations of identity or historical context, where the law of Contracts, Business Organizations, and Property exists. There is no doubt that this arbitrary division has been a major disservice to legal scholarship.³

* Research & Symposium Director 2020–2021, *Journal of Civil Rights & Economic Development*.

¹ See Leonard M. Baynes, *Introduction: The Celebration of the 40th Anniversary of Ronald H. Brown's Graduation from St. John's School of Law*, 25 J. C.R. & ECON. DEV. 1, 8 (2010).

² See Angela P. Harris, *Foreword: Racial Capitalism and Law*, in HISTORIES OF RACIAL CAPITALISM at x (Destin Jenkins & Justin Leroy, eds., 2021).

³ *Id.*

Thankfully, JCRED, by its very name, covers both Civil Rights and Economic Development. This makes our journal uniquely positioned to disrespect the divide, promoting scholarship which recognizes that racial justice and economic justice go hand in hand. And thus, one cannot grasp the full picture of the legal dynamics of a given social problem unless both considerations are brought to bear.

This symposium issue, *Racial Capitalism as Legal Analysis*, adds exemplary scholarship which bridges the public-private law division. To set the stage, it seems appropriate here to draw out relevant aspects of the racial capitalism concept. This is where the work of Athena Mutua and Carmen Gonzalez has been vital in mapping racial capitalism.⁴ They point out that racial capitalism is a global system characterized by Exploitation (of both waged labor and the often unpaid or underpaid labor performed primarily by women), Expropriation (the confiscation of human, nonhuman, or natural resources without a fair exchange of value), and Race-Making (the creation of social hierarchies among humans and the assignment of superior and inferior status based on specific characteristics).⁵ Key to Racial Capitalism is that these processes are carried out in the service of wealth accumulation and white supremacy. Moreover, these processes are rooted in legal systems, and enforced, at times brutally, through legal mechanisms. The topics which our symposium articles touch on illustrate this dynamic: foreclosure, eviction, gentrification, water shut-offs, police brutality—these are forms of racialized violence carried out or legitimized by legal mechanisms.

Racial Capitalism, explored in more length in other disciplines such as history and sociology, has only recently been explored in legal scholarship. We are fortunately among a group of journals that are now publishing on this previously under-explored concept. And our journal's entry into the conversation came about in an attempt to reflect on our present historical moment.

⁴ Athena Mutua & Carmen Gonzalez, *Mapping Racial Capitalism: Implications for Law, J. L. & POL. ECON.* (forthcoming 2022); Athena Mutua, *ClassCrits Time? Building Institutions, Building Frameworks*, 1 J. L. & POL. ECON. 333, 356–59, figs. 6–8 (2021).

⁵ *Id.*

The social circumstances in which we found ourselves in the summer of 2020 were the direct inspiration for this symposium issue. Our editorial board came into our positions right as COVID-19 accelerated from epidemic to pandemic. Then, over the summer of 2020, the past and present application of racialized violence confronted the nation, exemplified horrifically in the police killings of Breonna Taylor and George Floyd and the vigilante murder of Ahmad Aubrey. Righteous rage from these injustices sparked historic mass protests in the streets, making the realities of racial injustice impossible to ignore.⁶ Simultaneously, the pandemic revealed the bedrock of our capitalist economy to be labor exploitation as essential workers were praised in rhetoric and yet left unprotected and endangered due to the demands of capital and its apologists. These essential workers represented a racialized population whose health, safety, and wellbeing were disregarded along with that of their loved ones.⁷

Amid these present crises, JCRED sought to craft a call for papers that would wrap its arms around the interlocking origins and foundations of these issues. We, along with many others in academia and movement politics,⁸ saw the concept of *racial capitalism* as a means of articulating the heavy air we breathed—rendering the unseen seen. While the realities of racial capitalism as a system tend to be uncritically accepted and perpetuated through mainstream legal analyses,⁹ JCRED believed that this system needed to be named and appropriately challenged in the legal scholarship we produced.

The response has been heartening. The articles which we are publishing in the present symposium issue add pieces to the puzzle of understanding the law's relation to a racist and capitalist political economy, while simultaneously understanding this political

⁶ See Robin D.G. Kelley, *Foreword: Why Black Marxism? Why Now?*, CEDRIC J. ROBINSON, *BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION* xi, xi (2020) (1983).

⁷ See Zophia Edwards, *Racial Capitalism and COVID-19*, 72 *MONTHLY REVIEW* 21, 21 (Mar. 1, 2021).

⁸ See, e.g., Charisse Burden-Stelly, *Modern U.S. Racial Capitalism: Some Theoretical Insights*, 72:2 *MONTHLY REVIEW* 8, (July-August 2020); *HISTORIES OF RACIAL CAPITALISM* (Destin Jenkins & Justin Leroy, eds., 2021); Kelley, *supra* n. 6.

⁹ See Harris, *supra* n. 2, at viii.

economy through its legal constructs. We believe that the articles respectively give a Pedagogical, Ideological, Socio-Historical, and Reconceptualized basis for using *Racial Capitalism as Legal Analysis*.

In the first article, Prof. Chaumtoli Huq describes her applied critical pedagogy.¹⁰ She uses the concept of racial capitalism to teach her first-year contracts course, aptly titled Law and Market Economy, at CUNY School of Law. In her article, Prof. Huq shows how *theory* and *praxis* must be interrelated in what she calls “anti-capitalist” lawyering. Her approach essentially decolonizes contract theory and business law education by rejecting the commonplace and expected catering to the sensibilities of whiteness (and thus white students). Through exploring the racially exploitative social and historical contexts of the cannon contracts cases, and by exposing the empty promises of contract law’s equitable remedies when applied to the question of reparations for Black Americans, Prof. Huq accomplishes two vital objectives for legal pedagogy. First, since the context provided by a racial capitalism lens connects these cases to present-day social circumstances, she provides her students with a firm foundation of the legal doctrine and its intended application. But also, crucially, by refusing to ignore the obvious limitations of contract theory within our racial capitalist system, she opens the door for her students to actually challenge and reshape the doctrine as future practitioners and movement lawyers. We can only hope that Prof. Huq’s article inspires more legal educators to fearlessly adopt this critical approach to teaching.

Next, Prof. cummings provides a refreshing Ideological application of racial capitalism.¹¹ Prof. cummings observes that the entrenchment of a racialized elitist political economy was the main inspiration and motivation for the architects of the highly influential Law & Economics movement in legal academia and the judiciary. Prof. cummings exposes not only the moral bankruptcy of this movement of legal thought, but also its intellectual vacuity.

¹⁰ Chaumtoli Huq, *Integrating a Racial Capitalism Framework into First-Year Contracts: A Pathway to Anti-Capitalist Lawyering*, 35 J. C.R. & ECON. DEV. 181 (2022).

¹¹ andré douglas pond cummings, *The Farcical Samaritan’s Dilemma*, 35 J. C.R. & ECON. DEV. 219 (2022).

As Prof. cummings explains, the architects of Law & Economics, rather disturbingly in the service of the economic and political elite, co-opted both biblical narratives like the Good Samaritan and anti-capitalist rhetoric such as exploitation. In so doing, they obscured the meanings of both beyond recognition. Prof. cummings' analysis calls to mind the surreal and allegorical depiction of capitalist exploitation in Bong Joon-ho's *Parasite*.¹² Law & Economics evangelists have tricked a critical mass of those with their hands on the lever of our legal framework into believing those at the bottom are society's leeches to be scapegoated. But Prof. cummings' article shows the reality, which the majority of the body politic intuitively understands, that elites—those in the house above the flood plains, not the basement—are the exploiters, guilty of leeching off of the value produced by the racialized oppressed. While the continued outsized power and influence of political and business elites can be attributed in no small part to the architects and purveyors of the Law & Economics movement, Prof. cummings shows that their house is built on moral and intellectual sand. With delegitimization of their position comes room for a truer analysis that can offer liberatory solutions to our racially exploitative system.

Prof. Whitlow's article takes a vivid snapshot of the moment in which he drafted his article, the same moment which inspired the topic for this symposium issue.¹³ Yet he weaves this snapshot into its historical context of exploitation. Prof. Whitlow does not sugarcoat the horrible condition of the country, demonstrating the reality and absurdity that one's premature exposure to death is correlated with his or her race. As an affront to liberal notions of meritocracy, with the occasional admissions of the need to tweak the rules of the game to be fairer for "minorities," Prof. Whitlow reveals a long, intentional subjugation of Black and brown populations to the violent dictates of real estate capital, of which COVID-19's racially disparate deadliness is but one of the symptoms.

¹² Bong Joon-ho, *Parasite* (Barunson A&E 2019).

¹³ John Whitlow, *The Real Estate State and Group-Differentiated Vulnerability to Premature Death: Race, Class, Geography, Pandemic*, 35 J. C.R. & ECON. DEV. 247 (2022).

The fourth article in this issue is actually an edited transcript of Prof. Marissa Jackson Sow's remarks during this issue's corresponding symposium event.¹⁴ Prof. Jackson Sow has graciously allowed our journal to republish her remarks here. Whereas the previous three authors use the concept of racial capitalism to illuminate areas of the law, Prof. Jackson Sow's body of work reverses the application. Her theory of whiteness as contract sharpens our understanding of racial capitalism through a reconceptualized legal doctrine.¹⁵ We find her scholarship is as revolutionary as it is revelatory.

In building on Charles W. Mills' *The Racial Contract*¹⁶ and Cheryl Harris's *Whiteness as Property*,¹⁷ Prof. Jackson Sow has established a theory of whiteness as contract, using the legal doctrine of contract law to expose the social realities of white supremacy and settler colonialism in the United States. In this way, Prof. Jackson Sow moves the conversation about racism in the United States from a matter of personal morality to its recognition as the bedrock reality around which our so-called liberal democracy is organized. Thus, scholars of racial capitalism would do well to employ Prof. Jackson Sow's reconceptualization of contract language to articulate the economic domination and psychological benefits white citizens reap as intended beneficiaries in this white supremacist nation.

We hope readers of this issue not only glean the value of these articles as individual contributions to an emerging field but also recognize the common threads and points of departure of these articles in relation to each other. Though we recognize that reading the articles of legal journal issues as a group is a practice nearly lost in the digitized landscape of legal scholarship today, care and consideration was taken to publish a diverse yet cohesive set of articles in this issue. Each of these articles uniquely contributes to *Racial Capitalism as Legal Analysis*, while also conversing with each other in surprising ways which reinforces the value of exploring the topic. As such, this symposium issue speaks to the use of critical theory to illuminate the often-invisible effects of our legal

¹⁴ Marissa Jackson Sow, *Comments on 'Whiteness as Contract'*, 35 J. C.R. & ECON. DEV. 303 (2022).

¹⁵ Marissa Jackson Sow, *Whiteness as Contract*, 78 Wash. & Lee L. Rev. 1803 (2022).

¹⁶ CHARLES W. MILLS, *THE RACIAL CONTRACT* (1999).

¹⁷ Cheryl L. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1710 (1993).

2022]

FOREWORD

179

system as well as the inadequacy of present legal frameworks to challenge social harms. In doing this, we hope the reader may begin to imagine and embody a form of anti-racist and anti-capitalist lawyering long needed but seldom seen emerging from legal academia. The Editors want to extend our deepest appreciation to the present authors and their intellectual ancestors for making this hope possible.