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## INTRODUCTION

Many agree that American carceral punishment is unjust; from the *New York Times*<sup>1</sup> to the Movement for Black Lives,<sup>2</sup> calls for urgent and drastic change have become increasingly common.<sup>3</sup> But where the *New York Times* editorial is headlined “End Mass Incarceration Now” and laments that “the United States ‘has gone past the point where the numbers of people in prison can be justified by social benefits,’”<sup>4</sup> the Movement for Black Lives demands that the United States “End the War on Black People” by bringing “an end to all jails, detention centers, youth facilities and prisons as we know them.”<sup>5</sup> The difference between these two calls to action speaks to a broader divide in diagnoses of the depth and character of the injustice of American carceral control.<sup>6</sup> Commenting on a similar division between organizers and lawyers, Derecka Purnell recently noted: “People on the streets, people who are organizing, are gonna put certain things on the table that will rarely leave a lawyer’s mouth. Like police abolition. Abolishing the carceral state. Ending prisons.”<sup>7</sup>

This edition of *Developments in the Law* seeks to bring to the lawyers’ table what Purnell points out is so often missing from legal journals

<sup>1</sup> Editorial, *End Mass Incarceration Now*, N.Y. TIMES (May 24, 2014), <https://nyti.ms/1jNhRq2> [<https://perma.cc/XAH9-CQN5>].

<sup>2</sup> *End the War on Black People*, MOVEMENT FOR BLACK LIVES, <https://policy.m4bl.org/end-war-on-black-people/> [<https://perma.cc/R3JL-5WJY>].

<sup>3</sup> E.g., Barack Obama, Commentary, *The President’s Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 816 (2017) (“It’s hard to deny the urgent need for reform.”).

<sup>4</sup> Editorial, *End Mass Incarceration Now*, *supra* note 1 (quoting NAT’L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 9 (2014)).

<sup>5</sup> *End the War on Black People*, *supra* note 2.

<sup>6</sup> Professor Benjamin Levin recently described a similar phenomenon in legal scholarship, arguing that there are two main critiques of criminal processes: “The *over* frame . . . is rooted in a belief that the criminal law has an important and legitimate function, but that it has exceeded that function. . . . [I]t has criminalized too much and incarcerated too many. The *mass* frame, on the other hand, focuses on the criminal system as a sociocultural phenomenon. . . . [C]riminal law is doing ill by marginalizing populations and exacerbating troubling power dynamics and distributional inequities.” Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 262–63 (2018).

<sup>7</sup> Harvard Law School, *HLS in the World | The Changing Political and Intellectual Landscape of Criminal Justice Reform* at 33:01, YOUTUBE (Nov. 17, 2017), <https://www.youtube.com/watch?v=cWjLl9-bVqo> [<http://perma.cc/P7S3-4G3J>].

and education: a sustained discussion of what it means, in the words of Professor Angela Davis, to “explor[e] new terrains of justice, where the prison no longer serves as our major anchor.”<sup>8</sup> Scholars and activists — mostly outside of the legal academy<sup>9</sup> — have long taken up this task, and the goal of building a society without prisons has yielded a wide array of ways to describe abolition. Professor Allegra McLeod, collecting understandings from influential abolitionist thinkers and organizers, cites several. Abolition is “the complete and utter dismantling of prisons, policing, and surveillance as they currently exist within our culture. And it’s also the building up of new ways of . . . relating with each other.”<sup>10</sup> Abolition is a “set of political responsibilities.”<sup>11</sup> It’s “a long-term political vision.”<sup>12</sup> To Angel Sanchez, abolition requires treating the prison system like a “social cancer: we should fight to eradicate it but never stop treating those affected by it.”<sup>13</sup> For Patrisse Cullors, “[a]bolition must be a cultural intervention. It must produce a new way of being even in the most challenging and difficult moments.”<sup>14</sup> These understandings and visions of abolition, distinct and overlapping at once, underscore the fact that abolition must be broadly understood; as Professor Dylan Rodríguez writes, “abolition is . . . a practice, an analytical method, a present-tense visioning, an infrastructure in the making, a creative project, a performance, a counterwar, an ideological struggle, a pedagogy and curriculum, an alleged impossibility that is furtively present.”<sup>15</sup>

And yet, though bold and sweeping in their ambition, “[p]rison abolitionists aren’t naïve dreamers. They’re organizing for concrete reforms, animated by a radical critique of state violence.”<sup>16</sup> The Vision for Black Lives, which was produced collaboratively by a group of organizations called the Movement for Black Lives after identifying “a set

<sup>8</sup> ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 21 (2003).

<sup>9</sup> *But see infra* pp. 1571–72.

<sup>10</sup> Allegra M. McLeod, *Envisioning Abolition Democracy, in Developments in the Law — Prison Abolition*, 132 HARV. L. REV. 1613, 1617 (2019) (quoting *Episode 29 — Mariame Kaba*, AIRGO (Feb. 2, 2016), <https://airgoradio.com/airgo/2016/2/2/episode-29-mariame-kaba> [<https://perma.cc/ETG2-M43L>]).

<sup>11</sup> *Id.* at 1618 (quoting *Vision 4 Black Lives Webinar Series: Invest/Divest*, FERGUSON NAT’L RESPONSE NETWORK (Apr. 12, 2017), <http://fergusonresponse.tumblr.com/post/156584034738/vision-for-black-lives-webinar-series-political> [<https://perma.cc/V7VM-82UX>]).

<sup>12</sup> *Id.* (quoting CHARLENE A. CARRUTHERS, UNAPOLOGETIC: A BLACK, QUEER, AND FEMINIST MANDATE FOR RADICAL MOVEMENTS, at x (2018)).

<sup>13</sup> Angel E. Sanchez, *In Spite of Prison, in Developments in the Law — Prison Abolition*, 132 HARV. L. REV. 1650, 1652 (2019).

<sup>14</sup> Patrisse Cullors, *Abolition and Reparations: Histories of Resistance, Transformative Justice, and Accountability, in Developments in the Law — Prison Abolition*, 132 HARV. L. REV. 1684, 1694 (2019).

<sup>15</sup> Dylan Rodríguez, *Abolition as Praxis of Human Being: A Foreword, in Developments in the Law — Prison Abolition*, 132 HARV. L. REV. 1575, 1578 (2019).

<sup>16</sup> Dan Berger et al., *What Abolitionists Do*, JACOBIN (Aug. 24, 2017), <https://www.jacobinmag.com/2017/08/prison-abolition-reform-mass-incarceration> [<https://perma.cc/MM3H-Z633>].

of principles grounded in the idea of transformation,<sup>17</sup> advocates for an end to capital punishment; money bail and other court fines and fees; and the use of criminal records in determining access to “housing, education, licenses, voting, loans, employment, and other services and needs.”<sup>18</sup> Activists in Chicago, responding to decades of police violence terrorizing Black and Latinx youth, formed a group, We Charge Genocide (WCG), to document that violence in a 2014 report to the United Nations.<sup>19</sup> Members of the same movement also “developed proposed legislation, . . . the Illinois Reparations for Police Torture Victims Act,” which among other things provided for “‘a center for torture victims and families’ to offer rehabilitative support and treatment, community education, and vocational assistance.”<sup>20</sup> In New York, abolitionists began calls for the city to shut down the notorious Rikers Island jail, “divest entirely from police and prisons,” and redirect those funds to “education, healthcare, housing, and other basic needs.”<sup>21</sup> One of the groups involved in the campaign to shut down Rikers, Critical Resistance, has long been at the forefront of abolitionist organizing.<sup>22</sup> Last year, Critical Resistance chapters opposed the construction of new jails in Los Angeles,<sup>23</sup> helped secure a vote by the Board of Supervisors in Oakland to end United Shield (an annual event criticized for militarizing the police and promoting racist stereotypes),<sup>24</sup> and fought to reduce proposed increases in the policing budget in Portland.<sup>25</sup>

<sup>17</sup> See Marbre Stahly Butts & Amna A. Akbar, *Transformative Reforms of the Movement for Black Lives 9* (2017) (unpublished manuscript), <https://law.rutgers.edu/sites/law/files/attachments/Stahly%20Butts-Akbar%20-%20Transformative%20Reforms%20of%20the%20Movement%20for%20Black%20Lives.pdf> [<https://perma.cc/6A24-H87Y>].

<sup>18</sup> *End the War on Black People*, *supra* note 2.

<sup>19</sup> See WE CHARGE GENOCIDE, POLICE VIOLENCE AGAINST CHICAGO’S YOUTH OF COLOR (2014), [https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/USA/INT\\_CAT\\_CSS\\_USA\\_18557\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/USA/INT_CAT_CSS_USA_18557_E.pdf) [<https://perma.cc/JT3D-NVUA>]; McLeod, *supra* note 10, at 1624–25; Rodríguez, *supra* note 15, at 1602–05.

<sup>20</sup> McLeod, *supra* note 10, at 1627 (quoting G. Flint Taylor, *The Long Path to Reparations for the Survivors of Chicago Police Torture*, 11 NW. J.L. & SOC. POL’Y 330, 339 (2016)).

<sup>21</sup> Raven Rakia & Ashoka Jegroo, *How the Push to Close Rikers Went from No Jails to New Jails*, THE APPEAL (May 29, 2018), <https://theappeal.org/how-the-push-to-close-rikers-went-from-no-jails-to-new-jails/> [<https://perma.cc/6F86-TZN9>].

<sup>22</sup> See *History*, CRITICAL RESISTANCE, <http://criticalresistance.org/about/history/> [<https://perma.cc/8FLC-DDSP>].

<sup>23</sup> See *Fighting a \$3.5 Billion Jail Proposal in Los Angeles*, CRITICAL RESISTANCE, <http://criticalresistance.org/no-jails-crla/> [<https://perma.cc/5L6E-M8X5>].

<sup>24</sup> Darwin BondGraham, *Alameda County Supervisors Vote to End Urban Shield as “Currently Constituted,”* E. BAY EXPRESS (Mar. 27, 2018), <https://www.eastbayexpress.com/SevenDays/archives/2018/03/27/alameda-county-supervisors-vote-to-end-urban-shield-as-currently-constituted> [<http://perma.cc/YBX7-E8SE>]; *March 27, 2018: People’s Victory Against Urban Shield!*, CRITICAL RESISTANCE (Mar. 28, 2018), <http://criticalresistance.org/march-27-2018-peoples-victory-against-urban-shield/> [<https://perma.cc/57QY-UMLW>].

<sup>25</sup> *Critical Resistance Campaigns: Going Strong Into 2019!*, CRITICAL RESISTANCE, <http://criticalresistance.org/2018-campaigns/> [<https://perma.cc/8HY8-GB7W>].

Abolitionist efforts can also be found at universities across the country, where students are demanding that their institutions divest from the prison industrial complex.<sup>26</sup> At Harvard, student organizers urge divestment in order to “construct an endowment — and hopefully a society — without reliance on prisons and police.”<sup>27</sup> As Purnell notes, though, lawyers have, for the most part, yet to contemplate prison abolition in any serious way.<sup>28</sup> But as people like Professors Amna Akbar,<sup>29</sup> Dean Spade,<sup>30</sup> and Allegra McLeod<sup>31</sup> have begun to urge the need for abolitionist teachings in law school pedagogy and legal scholarship, abolition has experienced an unmistakable surge in influence. In his 2010 book *Let’s Get Free: A Hip-Hop Theory of Justice*, Professor Paul Butler explicitly distanced himself from the idea of abolishing prisons.<sup>32</sup> Less than a decade later, Butler’s new book devotes an entire chapter to prison abolition, endorsing it “as the third gift people who fight for African American freedom will have provided to the country, after they defeated slavery and the old Jim Crow.”<sup>33</sup> Professor Tracey Meares, a member of President Obama’s Task Force on 21st Century Policing, recently penned an essay concluding that “policing as we know it must be

<sup>26</sup> See, e.g., Wilfred Chan, *Columbia Becomes First U.S. University to Divest from Prisons*, CNN (June 24, 2015, 9:26 AM), <https://www.cnn.com/2015/06/23/us/columbia-university-prison-divest/index.html> [<http://perma.cc/ZVE4-85TA>]; Rachel Leber, *Yale University Students Urge Divestment from Private Prison Corporations*, CORRECTIONAL NEWS (Dec. 6, 2017), <http://correctionalnews.com/2017/12/06/yale-university-students-urge-divestment-private-prison-corporations/> [<http://perma.cc/DCC2-9MR2>]; *Update from the Board of Trustees on Investment Responsibility Issues*, STAN. NEWS (Oct. 11, 2017), <https://news.stanford.edu/2017/10/11/update-board-trustees-investment-responsibility-issues/> [<https://perma.cc/5R66-4E5Z>].

<sup>27</sup> Paul T. Clarke et al., Opinion, *Unsettling Truths About Harvard’s Investments in Prisons*, HARV. CRIMSON (Oct. 15, 2018, 1:39 PM), <https://www.thecrimson.com/article/2018/10/12/clarke-drake-dunbar-gronke-harvard-prison-investments/> [<https://perma.cc/HT9S-MJBR>].

<sup>28</sup> See Harvard Law School, *supra* note 7, at 37:18.

<sup>29</sup> See Amna A. Akbar, *Law’s Exposure: The Movement and the Legal Academy*, 65 J. LEGAL EDUC. 352, 354, 359 (2015) (offering “pedagogical techniques to integrate the [Movement for Black Lives’] teachings into our classrooms,” *id.* at 354, and noting the movement’s call for abolition of police and prisons); Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 410 (2018) (highlighting “how radical social movements reimagine the very same social problems with which significant bodies of legal scholarship engage”).

<sup>30</sup> See Dean Spade, *The Only Way to End Racialized Gender Violence in Prisons Is to End Prisons: A Response to Russell Robinson’s “Masculinity as Prison,”* 3 CALIF. L. REV. CIR. 184, 186 (2012) (“We need the politics and analysis developed by prison abolition scholarship and activism in order to even begin to imagine any solutions that would reduce or eliminate the horrifying conditions facing trans, gender non-conforming, and queer prisoners.”).

<sup>31</sup> See Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1161 (2015) (“When abolition is conceptualized in these terms — as a transformative goal of gradual decarceration and positive regulatory substitution wherein penal regulation is recognized as morally unsustainable — then inattention to abolition in criminal law scholarship and reformist discourses comes into focus as a more troubling absence.”).

<sup>32</sup> PAUL BUTLER, *LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE* 4 (2009) (“What I am not saying: prison should be abolished . . .”).

<sup>33</sup> PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* 230 (2017).

abolished before it can be transformed” and noting support for the related project of prison abolition.<sup>34</sup> In this issue of the *Harvard Law Review*, Professor Dorothy Roberts argues for “an abolitionist approach to contesting the digitized carceral state.”<sup>35</sup> Elsewhere, Professors Benjamin Levin,<sup>36</sup> Jocelyn Simonson,<sup>37</sup> and César Cuauhtémoc García Hernández,<sup>38</sup> to name a few, have written positively about abolitionist movements. As Dan Berger, Mariame Kaba, and David Stein recently summarized about the trending support for abolitionism: “This would have seemed difficult to fathom even just five years ago.”<sup>39</sup>

The abolitionist contributions in this edition of *Developments in the Law* thus stem from both a long historical tradition of radical critiques of state violence<sup>40</sup> and the more recent embrace of abolitionism within certain corners of the legal academy. In “Abolition as Praxis of Human Being: A Foreword,” Rodríguez begins by contextualizing current abolitionist efforts within a “(feminist, queer) Black liberation and (feminist, queer) Indigenous anticolonialism/decolonization” tradition.<sup>41</sup> Part II then poses several questions that expose the connections between chattel slavery and the modern American carceral state.<sup>42</sup> In mapping out the answers, Rodríguez develops a “working abolitionist definition of incarceration,”<sup>43</sup> one more comprehensive than conventional understandings

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<sup>34</sup> Tracey L. Meares, *Policing: A Public Good Gone Bad*, BOS. REV. (Aug. 1, 2017), <https://bostonreview.net/law-justice/tracey-l-meares-policing-public-good-gone-bad> [<https://perma.cc/FX7H-JGKK>].

<sup>35</sup> Dorothy E. Roberts, *Digitizing the Carceral State*, 132 HARV. L. REV. 1695, 1699 (2019) (book review).

<sup>36</sup> Benjamin Levin, *Rethinking the Boundaries of “Criminal Justice,”* 15 OHIO ST. J. CRIM. L. 619, 636 (2018) (book review) (“Appreciating the kinds of radical critiques that have driven the Movement for Black Lives and other activists means not treating current modes of policing, punishment, or criminal adjudication as fixed points.”).

<sup>37</sup> See Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609, 1612 (2017) (describing her past work as “emphasiz[ing] the importance of studying and respecting grassroots forms of participation in and disruption of everyday criminal justice”).

<sup>38</sup> See César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245, 250 (2017) (describing the article as “[b]uilding on the pioneering criminal law scholarship of Allegra McLeod”).

<sup>39</sup> Berger et al., *supra* note 16.

<sup>40</sup> See McLeod, *supra* note 10, at 1617 (“Abolitionist organizers understand their work to be related to the historical struggles against slavery and its afterlives, against imperialism and its legacies in more recent practices of racial capitalism, and against immigration enforcement and border fortification.”); see also DAVIS, *supra* note 8, at 22–39 (“In the nineteenth century, antislavery activists insisted that as long as slavery continued, the future of democracy was bleak indeed. In the twenty-first century, antiprison activists insist that a fundamental requirement for the revitalization of democracy is the long-overdue abolition of the prison system.” *Id.* at 39.).

<sup>41</sup> Rodríguez, *supra* note 15, at 1578.

<sup>42</sup> *Id.* at 1580.

<sup>43</sup> *Id.* at 1583–84.

of the term.<sup>44</sup> Part III turns to the phrase “mass incarceration” and the popular reformist narratives that accompany it, critiquing this type of discourse for “obscur[ing] rather than clarif[ying] the origins, casualties, and structuring logics of carceral power.”<sup>45</sup> Part IV examines the work of the Chicago grassroots group WCG, contrasting its abolitionist logic with the reformist narratives cataloged in Part III and positing that “if we are to take the implications of the WCG renarrative seriously,” then “perhaps the regime of gendered racist police violence ought not to be incessantly reformed, but rather extinguished.”<sup>46</sup> Finally, in Part V, Rodríguez emphasizes the fundamentally creative nature of abolition, noting that this is so “precisely because [abolition] entails a radical re-configuration of relations of power, community, collective identity, and sociality that does not rely on . . . oppressive forms of state and cultural violence.”<sup>47</sup>

In “Envisioning Abolition Democracy,” McLeod describes abolitionist efforts to realize justice without reliance on prisons and police and argues that these efforts “present[] a formidable challenge to existing ideas of legal justice.”<sup>48</sup> Part I explains “abolition democracy,” a concept from Angela Davis’s book of the same name, as “call[ing] for a constellation of democratic institutions and practices to displace policing and imprisonment while working to realize more equitable and fair conditions of collective life.”<sup>49</sup> This conceptual backdrop informs Part II, which describes how “abolitionists have sought justice . . . outside of traditional legal contexts”<sup>50</sup> in the aftermath of state-perpetrated violence and interpersonal harm, as well as in the pursuit of economic justice. Part III contrasts abolitionist justice with conventional legal theories of justice, arguing that the former’s commitment to “incrementally changing the means of prevention and redress of harm” is superior to “highly idealized theories of criminal accountability or civil justice.”<sup>51</sup>

In “In Spite of Prison,” Sanchez, now a second-year student at the University of Miami Law School, shares the story of his journey from elementary school to prison and the challenges he faced in the “so-called reentry process.”<sup>52</sup> In Part I, Sanchez invokes the critical race theory tradition of storytelling, explaining why he “thought it important . . . to

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<sup>44</sup> See *id.* at 1587 (“[I]ncarceration as a logic and method of dominance is not reducible to the particular institutional form of jails, prisons, detention centers, and other such brick-and-mortar incarcerating facilities . . .”).

<sup>45</sup> *Id.* at 1590.

<sup>46</sup> *Id.* at 1604.

<sup>47</sup> *Id.* at 1612 (emphasis omitted).

<sup>48</sup> McLeod, *supra* note 10, at 1616.

<sup>49</sup> *Id.* at 1618.

<sup>50</sup> *Id.* at 1623.

<sup>51</sup> *Id.* at 1647.

<sup>52</sup> Sanchez, *supra* note 13, at 1652.

share uncomfortable firsthand experiences.”<sup>53</sup> Part II paints a personal picture of the school-to-prison pipeline, as Sanchez describes being labeled a “troublemaker[.]” in elementary school and then a “superpredator” not long after that.<sup>54</sup> In Part III, Sanchez explains the emotional and physical violence of prison, and the self-education — through revolutionary literature as well as the law library — that led him to pursue a college education.<sup>55</sup> Part IV describes a reentry process devoid of support or resources and the emotional journey that Sanchez faced to find his own “prison-to-school pipeline — not because of prison . . . , but in spite of it.”<sup>56</sup> Finally, the Essay concludes with Sanchez’s reflections on the contradiction between his recent success as a law student and the uncertainty of his future given the stigma of his past — as he concludes, “the debt is never satisfied.”<sup>57</sup>

This edition concludes with “Abolition and Reparations: Histories of Resistance, Transformative Justice, and Accountability,” a collection of reflections from Cullors, a cofounder of Black Lives Matter.<sup>58</sup> The reflections begin by demonstrating the inadequacy of legal punishment for responding to sexual abuse, mental health crises, and drug use.<sup>59</sup> In doing so, Cullors describes what abolition means in the context of how we engage in personal relationships, noting: “Abolition does not isolate individuals. Abolition invites people in.”<sup>60</sup> Finally, Cullors includes examples of successful transformative practices.<sup>61</sup> She concludes by urging: “We need to be committed to building a culture that is rooted in care, dignity, and accountability.”<sup>62</sup>

Across this series of essays, abolition takes several forms: a continuing tradition of radical, creative praxis; a challenge to existing ideas of legal justice; a celebration of personal stories; a demand for empowering those directly impacted; and a call for critical reflection at both the individual and movement level. By highlighting the breadth and power of abolitionist insight, this edition of *Developments in the Law* hopes both to contribute to the robust abolitionist dialogues already taking place around the country and world and to further demonstrate the need for continued engagement with abolitionism within the legal academy.

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<sup>53</sup> *Id.* at 1654.

<sup>54</sup> *Id.* at 1656, 1660.

<sup>55</sup> *Id.* at 1669–70.

<sup>56</sup> *Id.* at 1680.

<sup>57</sup> *Id.* at 1683.

<sup>58</sup> Cullors, *supra* note 14, at 1684.

<sup>59</sup> *Id.* at 1687–92.

<sup>60</sup> *Id.* at 1692.

<sup>61</sup> *Id.* at 1692–94.

<sup>62</sup> *Id.* at 1694.