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FOREWORD

*Risa Goluboff**

On August 11 and 12, 2017, Charlottesville, Virginia—the home of the University of Virginia and this journal—played unwitting host to two days of white nationalist and neo-Nazi rallies and violence. For those of us in Charlottesville, those events were intensely personal and local. The white nationalists and neo-Nazis violated our physical space. They maimed and killed members of our community. They threatened the security and sense of belonging of our neighbors, colleagues, students, and friends. And they challenged the values of equality and tolerance we hold dear.

From the moment the events unfolded, it was clear that they resonated beyond Charlottesville itself. Such blatant forms of white supremacy came as a surprise to many. They preoccupied observers far flung from Charlottesville both for the violence and loss of life on display and for the stark evidence they provided of deep and enduring fault lines within our nation and our society. The intolerance and hate the white nationalists and neo-Nazis exhibited most directly and explicitly targeted Jews and African Americans, but their reach was far broader. Their intent to make vulnerable all those who do not conform to their image was potent and palpable. Moreover, the incident implicated numerous questions for the law, for politics, and for society itself. The discussions that followed engaged questions not only of race, religion, ethnicity, and nationality, but also of gender and sexuality, pluralism and tolerance, politics and civic engagement, social justice and economic opportunity, speech and violence, civility and protest and counter-protest, and more.[1]

* Dean, University of Virginia School of Law. With thanks to Amanda Swanson for research assistance.

[1] See generally Charlottesville 2017: The Legacy of Race and Inequity (Louis P. Nelson & Claudrena N. Harold eds., 2018) (collecting responses from the University of Virginia faculty

This symposium focuses on the racial implications and reverberations of August 11-12. The conference that produced these articles brought an annual national meeting of empirical critical race theorists to Charlottesville to train their considerable intellectual talents on the first anniversary of August 11-12. The resulting scholarship asks what we can learn from August 11-12 about the legal underpinnings of white supremacy in the United States, from the beginning of its history to the violence in 2017 and beyond. It investigates the surprise with which so many responded to August 11-12 and shows us why we should not be surprised.

Historical events rarely occur without precedent, without antecedents and available frameworks. Where racial inequality and white supremacy are concerned, those antecedents and frameworks run deep. But they have been repeatedly and systematically submerged over time. Those in power declare victory where it can be found or constructed and obscure and forget the places where inequality persists. Our own lack of memory contributes to the fact that inequality remains and structures what comes next.

We like to tell ourselves that we have triumphed over Jim Crow and the oppression for which it once stood. We vanquished slavery with the Civil War and Jim Crow with *Brown v. Board of Education*[2] and the civil rights movement. In this story, the civil rights movement ended overt white supremacy. All Americans are now on an equal playing field, with President Barack Obama often serving as Exhibit A for this "postracial" world.[3]

What the white supremacist actions of August 11-12 make far clearer today, and to many more people, is that the era of overt racism is not past. It is apparent that the legal and social changes we have seen over the last seventy-five years—which have been transformative in many ways—

to the events of August 11 and 12); Risa Goluboff, Where Do We Go From Here?, *in* Charlottesville 2017, supra, at 82; Leslie Kendrick, The Answers and the Questions in First Amendment Law, *in* Charlottesville 2017, supra, at 70; Frederick Schauer, In the Shadow of the First Amendment, *in* Charlottesville 2017, supra, at 63.

[2] 347 U.S. 483 (1954).

[3] See, e.g., Matt Bai, Is Obama the End of Black Politics?, N.Y. Times Magazine (Aug. 6, 2008), https://www.nytimes.com/2008/08/10/magazine/10politics-t.html [https://perma.cc/-G27Q-YJA6]; Daniel Schorr, A New, 'Post-Racial' Political Era in America, NPR: All Things Considered (Jan. 28, 2008, 4:00 PM), https://www.npr.org/templates/story/story.php?storyId=18489466 [https://perma.cc/29B7-N4VL]; see also Ian F. Haney López, Is the "Post" in Post-Racial the "Blind" in Colorblind?, 32 Cardozo L. Rev. 807, 807–808 (2011).

have not been as thoroughgoing as many surmised. Perhaps we should not be surprised. The United States has always been in a hurry to grow up, move on, declare the past dead and the present and future bright with possibility. But it was naïve to think that a system of racial subordination and white supremacy ingrained for three centuries could be undone in a generation or two.[4]

So the surprise the world felt at Charlottesville, the surprise that made it national and international news, is in part a product of forgetting and disappearances. This symposium shows us what those disappearances are and how they have come about. The scholars in this symposium show how, even as some forms of racial inequality have abated, the approaches frequently taken in our constitutional and legal framework—and the attendant triumphalist historical narrative—have limited the nature and scope of that change. In the words of the conference organizers, they examine the "structural forms of white supremacy that have produced racial disparities that remain embedded within the nation's justice, education, voting and economic systems—institutionalized systems of oppression that are part of not only our history but also our contemporary law and society."[5]

This symposium counters the resurgence of overt racism and the persistent effects of covert racism by resurfacing the histories and legal doctrines that we have buried under false narratives of triumph. One way in which the authors published here begin that project is by excavating the foundations—theoretical and at times literal—of racial inequality in our legal system. Professor Dayna Bowen Matthew shines a light on Charlottesville's own history of housing segregation, linking residential separation to unequal distribution of rights and resources. Professor Matthew concludes that such inequality is just as dehumanizing in its implicit as in its explicit form.[6] Dean Angela Onwuachi-Willig takes up that thread of dehumanization at the Supreme Court. She focuses on *Brown v. Board of Education*, identifying the landmark decision as a missed opportunity for the Court to articulate the full dehumanizing power of discrimination, for white citizens as well as for black citizens.

[4] The preceding two paragraphs originally appeared in similar form in Risa Goluboff, Where Do We Go from Here?, supra note 1, at 91–92.

[5] Event Program, Virginia Law Review Symposium, One Year After Charlottesville: Replacing the Resurgence of Racism with Reconciliation (Sept. 27–28, 2018) (on file with Virginia Law Review).

[6] Dayna Bowen Matthew, On Charlottesville, 105 Va. L. Rev. 269, 278–79 (2019).

As a result, *Brown* has propagated a false narrative of racial equality as a zero-sum game.[7] Similarly, Professor Khiara Bridges asks how racial identities went overlooked in watershed Supreme Court precedent, focusing on the role of white privilege as both a benefit and detriment in *Buck v. Bell*.[8]

In addition to exposing the historical bedrock of inequality, the articles in this symposium seek to uncover the many ways in which courts—and the legal doctrines they generate and enforce—act to perpetuate and exacerbate that inequality today. Professor LaToya Baldwin Clark picks up where Onwuachi-Willig and Bridges leave off, examining how the Court's education decisions in the wake of *Brown* propped up racial stratification. She shows how modern courts continue that trend by treating education as property that can be both bought and stolen.[9] Likewise, Brie McLemore,[10] Professor Osagie Obasogie, and Zachary Newman[11] shine light on the ways in which modern courts preserve historical wrongs, concentrating on policing as a major site of racial violence. McLemore analyzes how courts legitimize police misconduct and contribute to alienation between marginalized communities and the state. Professor Obasogie and Newman find that courts often simply ratify existing department policies, rather than fulfilling their obligations to check police abuses. Both pieces then consider how the particular role of courts in creating the problem of police violence might ultimately suggest community-driven solutions.

These are sober and sobering articles. They reveal that much of what we thought we did right in overcoming slavery and Jim Crow might have exacerbated and re-entrenched inequality and racism. In both intended and unintended ways, the law continues to entrench racial inequality and make possible racism both overt and covert.[12]

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[7] Angela Onwuachi-Willig, Reconceptualizing the Harms of Discrimination: How *Brown v. Board of Education* Helped to Further White Supremacy, 105 Va. L. Rev. 343, 348 (2019).

[8] Khiara M. Bridges, White Privilege and White Disadvantage, 105 Va. L. Rev. 449, 451–52 (2019) (discussing *Buck v. Bell*, 274 U.S. 200 (1927)).

[9] LaToya Baldwin Clark, Education as Property, 105 Va. L. Rev. 397, 398–99 (2019).

[10] Brie McLemore, Procedural Justice, Legal Estrangement, and the Black People's Grand Jury, 105 Va. L. Rev. 371, 374 (2019).

[11] Osagie K. Obasogie & Zachary Newman, Constitutional Interpretation Without Judges: Police Violence, Excessive Force, and Remaking the Fourth Amendment, 105 Va. L. Rev. 425, 427 (2019).

[12] In my own work, I have taken part in this endeavor as well. See Risa Goluboff, The Lost Promise of Civil Rights (2007); Risa Goluboff, The Thirteenth Amendment and the Lost

But there is optimism here too. These articles identify the play in the joints, the places in legal doctrine and institutions where change is possible and how that change can be affected. Professors Obasogie and Newman, for example, do not stop at the insight that the police have played a major role in the development of Fourth Amendment doctrine. They continue on to suggest that the role of police subjects them to grassroots advocacy and thereby makes change possible.[13] And Dean Onwuachi-Willig does not only identify a problem in how the law conceives of the harms of discrimination; she imagines how reframing that conception could alleviate many of its systemic effects.[14] More generally, by excavating these disappearances, the authors are participants in creating legal and social change.

Events like August 11-12 require reexamination, response, and ultimately change. Those events have in fact engendered such a response. At the University and in the City of Charlottesville, in the allocation of resources and the articulation of our values, in law and in politics, August 11-12 has provoked and motivated us. By excavating how we got here, scholars like those in this symposium help us understand not just what happened those two days in August but where those events came from, what they meant, and how we can do better. The scholars here have taken up that call with careful research, profound insight, and an essential humanity. They have put their intellectual resources to work for us all. In so doing they have made meaning from violence and optimism from despair.

These articles bring us closer to real and enduring change. The work of legal scholars is always, whether directly or indirectly, engaged with questions and problems in the law, its operation, and its relationship to society. These articles most certainly are. They serve as a bridge across the great divides some observers see between the "ivory tower" and the "real world," between activism and scholarship, social movements and lawyers. They create intellectual resources for the other actors who are also part of the dynamic and relational process of legal change: judges,

Origins of Civil Rights, 50 Duke L.J. 1609 (2001); Risa Goluboff, "We Live's in a Free House Such as It Is": Class and the Creation of Modern Civil Rights, 151 U. Pa. L. Rev. 1977 (2003).

[13] Obasogie & Newman, supra note 11, at 427–28.

[14] Onwuachi-Willig, supra note 7, at 369.

lawyers, activists, journalists, police officers, and other government officials.[15]

This moment, when the racism that has been harder for some to see has gained new visibility, both requires and invites us to remember what has disappeared, to recast the historical narrative, and to ask anew what role the law has played in bringing us to this moment, and what role it can and must play in moving us forward once again. That might sound like a feeble call or a dry one. To me, it is neither. It is profoundly important to interrogate the stories we tell, and to identify the harms our laws can see, acknowledge, and redress.

[15] On the process of legal change, see, e.g., Risa Goluboff, Vagrant Nation: Police Power, Constitutional Change, and the Making of the 1960s (2016); Risa Goluboff, Lawyers, Law, and the New Civil Rights History, 126 Harv. L. Rev. 2312 (2013) (reviewing Kenneth W. Mack, Representing the Race: The Creation of the Civil Rights Lawyer (2012)).