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FOREWORD

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On August 11 and 12, 2017, neo-Nazis and Klansmen came to Charlottesville to hold a rally meant to assert themselves as a force in American society. That event, and the President's reaction to it, raised the disturbing possibility that for the first time in more than fifty years, white supremacy could be a matter of debate at the highest levels of American politics. This Foreword asks what legal scholarship has to contribute in times like these. It also introduces a partial answer: a group of student and faculty pieces analyzing some of the many difficult legal questions the rally raised.

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IT'S hard to know where to begin the story that culminated in the murder of Heather Heyer and the injury to our body politic.

It could start in the early twentieth century, when black service in WWI and the rhetoric of that war gave black Americans new hope and inspired them to new militancy in demanding equal citizenship.¹ These hopes, short-lived, were “smashed” by a “reaction of violence that was probably unprecedented.”² The last six months of 1919 saw twenty-five race riots in American cities, north and south, in which “mobs took over cities for days at a time, flogging, burning, shooting, and torturing at will.”³ It was also in 1919, that Paul Goodloe McIntire, a one-time UVA attendee and a great university benefactor, dedicated the first of the four bronze statues he had

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¹ C. Vann Woodward, *The Strange Career of Jim Crow* 114 (1974).

² *Id.*

³ *Id.*

commissioned to beautify his home town. In 1924, he formally presented the last to the city of Charlottesville: a statue of Robert E. Lee, along with the land it stood on, a landscaped parcel he had named Lee Park. There is no coincidence here. The statue was a symbolic affirmation of the same principles expressed by the violence that destroyed black communities from Chicago to Tulsa: that is, white supremacy and the rejection of blacks as social equals and as claimants to the economic and political rewards of American democracy.

It could instead be told as a twenty-first century story, beginning with the election of the first black president and the furious, sustained, racist counter-reaction among some stunned Americans awakened to new political consciousness. The emergence of a radical racist fringe, condemned by right-thinking people everywhere as unrepresentative of the American way, was nevertheless tolerated by some as a harmless evil. And in districts gerrymandered such that the only threat came from primary challengers, many conservatives decided they could not afford to alienate birther conspiracists and other radicals.

Or it could start more recently, in 2014, with the killing of the black teenager, Trayvon Martin, and the acquittal of his killer, George Zimmerman, who was later able to sell the weapon at auction for more than \$130,000. Or it could start with the death of Michael Brown, whose body was left to fester where it fell for four hours after the fatal encounter. It would discuss how Brown's death and the subsequent acquittal of Brown's killer sparked a movement. And it would cover how that loosely organized effort, named for a mild observation, Black Lives Matter, became the subject of a wildly popular petition to Obama's White House demanding that it be labeled a terrorist organization.

Perhaps the murders closest to the events in Charlottesville this August were those committed in 2015 by the childish and "troubled" Dylann Roof, who joined black parishioners for their Bible reading class before opening fire, killing nine. He reportedly felt, watching the rioting and protests that followed the killing of Trayvon Martin and of Freddie Gray, that "blacks were taking over the world," and that he needed to act to save "the white race." During his confession, he explained that he had wanted to start a "race war." But the search for his motive didn't have to go further than his website, where Roof

posed with guns and a Confederate battle flag. Dylann Roof saw himself as the inheritor of the tradition represented by that flag. And it was in recognition that Roof had it right about what the flag represented that statehouses across the south began to discuss taking that symbol down. It came down in South Carolina. It came down in Alabama. And in Charlottesville, citizens began a serious conversation about removing Robert E. Lee from his place of honor in town.

These are some of the relevant actions, reactions, and counter-reactions, the concentric parabolas that will one day resolve into a coherent narrative arc that tells us who we were as a people and what we became. We are still too close to see the shape of the entire wave or mark whether the tide is coming in or going out. What we do know is what happened in Charlottesville in August 2017 fit into a pattern: progress toward racial equality perceived as a threat and violently opposed. And it occurred as the nation endured what might be remembered as that same dynamic playing out in the presidential election, in an atmosphere of great fear, mistrust, and national division.

The Charlottesville saga began in February of 2017 with a city council vote, 3-2, to remove the statues of Robert E. Lee and “Stonewall” Jackson. This prompted a lawsuit by plaintiffs including the Virginia division of the Sons of Confederate Veterans and others to prevent the statues’ removal.⁴ They invoked a Virginia statute protecting war memorials, and argued that removing the statue would violate the terms of McIntire’s gift of Lee Park. Over the life of this case, while the judge has considered the briefing, letters, emails, and calls from Americans both supporting the statue and condemning it have inundated the clerk’s office. Whatever meaning these calls have for the people making them, the judge has called them a “counterproductive . . . distraction;” “worse than a waste of time;” and grumbled “[t]hat’s not how our system works, nor should it work.”⁵ In May, the judge granted the plaintiffs a six-month temporary injunction barring the city from removing the statues and directed the parties to prepare further briefing. The judge’s

⁴ Paul Duggan, *Battle Over Robert E. Lee Statue in Hands of Charlottesville Judge*, Wash. Post (Sept. 1, 2017), <https://perma.cc/HGZ2-EDCT>.

⁵ *Id.*

temporary injunction did not prevent the city from renaming the park where the statue stood, and so in June 2017 Lee Park became Emancipation Park.

It is during this period, while the fate of the statues remains uncertain, that self-described White Nationalists have come to Charlottesville to defend the threatened statue and to protest all that its removal represents. They rallied in the light of Tiki torches with Richard Spencer in May, 2017. The Ku Klux Klan came to Emancipation park in July, 2017. And they held a “Unite the Right” rally on August 11-12, 2017 that drew participants and counter-protesters to Charlottesville from around the country. This August rally was about more than the statue to the organizers—it was meant to unite and publicize American white supremacy and included a plan to hear speakers drawn from the leadership of far-flung but ideologically aligned white supremacist groups. Out of a concern for public safety, the city tried to move the rally’s permit to McIntire Park, on Charlottesville’s outskirts. But the rally’s organizer sued in federal court under the First Amendment and won the right to hold the rally downtown.

The event began on the evening of August 11, with a well-organized, two-by-two, firelight march by participants uniformed in khakis and collared shirts, chanting “White lives matter,” “You will not replace us,” “Jews will not replace us,” “Hail Trump,” and the Nazi slogan “blood and soil.” They processed down the Lawn and to UVA’s rotunda and then gathered around the statue of Jefferson, overwhelming a small band of students standing there with linked hands and a hand-made banner rejecting white supremacy. The violence that ensued, and the initial absence of police aside from a single officer, was a foreshadowing of the chaos of the following day.

Over the course of the next morning, gun-toting and uniformed white supremacists, bearing Nazi insignia, confederate flags, riot shields, and the occasional “Make America Great Again” hat confronted clergy, UVA students, anti-fascist groups, Black Lives Matter protesters, and others. An armed, home-grown “militia” also arrived to “keep the peace.” The Charlottesville police came to the rally less prepared for violence than the participants. Outgunned, they mostly stayed back as mobs clashed on Market Street, rally-goers and counter-protesters wielding sticks and clubs, fists, and sprayed chemicals. At around 11:20, the police declared the rally an

unlawful assembly. Small skirmishes and violence continued as the crowd dispersed, including a vicious beating caught on video, in which six white men kicked and clubbed black teenager DeAndre Harris as he lay on the ground. But the major body of rally-goers had begun to dissipate when the murder occurred. White supremacist James Alex Fields, Jr. sped his car down Fourth Street, ramming into a group of counter-protesters and then reversed his car into another group. Nineteen people were injured. Heather Heyer, a 32-year-old Charlottesville resident who had shown up to protest intolerance, was killed. And there were two other deaths that day: state troopers Lieutenant H. Jay Cullen and Trooper-Pilot Berke M.M. Bates, who had monitored the rally by helicopter, suffered a crash a few miles from the downtown.

But the story cannot end there. To many Charlottesville residents, the events seemed straightforward: evil had come to Charlottesville wearing hoods and bearing swastikas and had left its mark in blood. But when the President came to the podium later that day to address the events, he said only that “We condemn in the strongest possible terms this egregious display of hatred, bigotry and violence on many sides— on many sides.”⁶ The response was swift. Congressmen of both political parties denounced Nazism and racism on their Twitter feeds and condemned the idea that two culpable “sides” were to blame for the violence in Charlottesville. The President reemerged two days later with a prepared statement in which he asserted that “racism is evil.”⁷ But the following day he doubled down on his earlier words. Insisting that there were “fine people on both sides” of the event, he called for an acknowledgement of the equal guilt of the anti-Nazi protesters.⁸

Congress’ reaction was unprecedented: it sent a veto-proof bill to the President’s desk condemning white supremacy, in effect requiring him to sign a statement stronger than the message he had

⁶ Carly Sitrin, Read: President Trump’s Remarks Condemning Violence “on many sides” in Charlottesville, *Vox* (Aug. 12, 2017, 4:09 PM), <https://perma.cc/JS4K-WMS3>.

⁷ Glenn Thrush, New Outcry as Trump Rebukes Charlottesville Racists 2 Days Later, *N.Y. Times* (Aug. 14, 2017), <https://www.nytimes.com/2017/08/14/us/politics/trump-charlottesville-protest.html>.

⁸ Meghan Keneally, Trump Lashes Out at “alt-left” in Charlottesville, Says “fine people on both sides”, *ABC News* (Aug. 15, 2017, 4:58 PM), <https://perma.cc/QB6V-JKY7>.

issued of his own accord.⁹ The President also shed supporters in the days following his remarks. Those who stood by him were forced to either voice their agreement, mischaracterize his remarks, speak to his “heart,” which they “knew” to be non-racist or not anti-Semitic, or accuse liberals of hysteria. Some also hewed to the theme of the statue, echoing the President in asking whether slave-owners Jefferson and Washington would be the next torn down from their pedestals. In doing so, they explicitly equated Lee, a historical figure known for his traitorous and costly rebellion in defense of slavery, with American presidents whose legacies are complex but overwhelmingly positive, and who are popularly known for their state-building efforts including winning the Revolutionary War and penning the Declaration of Independence.

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This is where we find ourselves. The events in Charlottesville are one window onto a remarkable moment in American history and in American politics. And they reveal that we are in a dangerous place. The many risks we face include the possibility that the ideas voiced by the rally-goers and countenanced by the President will make their way back into the mainstream as a generation of newly politically-aware citizens is nurtured in the impression that those ideas form part of the normal back and forth between America’s two great political parties.

So what do we legal scholars do when hate marches in the streets and takes comfort from official silence or equivocation?

We can get angry. In fact, there is a moral obligation to be angry when so much is at stake and has been put at stake through carelessness. There are times when we must go into the streets as some UVA students did, and as Heather Heyer did, to use our bodies to impede the progress of extremism and to counter its narrative of dominance. We go to law school, however, because our main strength is not in the fiery emotional appeal or in the mode of the chanted call and response, but in logic. And in the usual course, attendance at law school cements this preference for the syllogism until it is almost an involuntary impulse.

⁹ Danielle Diaz et al., WH: Trump “looks forward” to Signing Resolution Condemning White Supremacists, CNN (Sept. 13, 2017, 3:00 PM), <https://perma.cc/9CMA-TGVZ>.

And the socialization into the practice of law that happens in law school is about more than logic. It also has a component of faith. A few years ago, I went to a one-man show on Broadway about Thurgood Marshall's life that dwelled on his work as an activist lawyer in the South and the dangers and threats he faced during that time. When I learned that Owen Fiss, the great civil procedure professor and former Marshall law clerk, had also seen it, I asked him what he had thought of the play. He said he thought it was brilliant, but that it had a flaw. In his view, in portraying Marshall primarily as a civil rights activist, the play had failed to capture his essential love for the law and his enduring belief in law's capacity.

It isn't surprising that the layman author of *Thurgood* could more easily convey the fire of Marshall the warrior than the optimism of Marshall the lawyer and jurist. That optimism, a belief in the ability to find the change we need through the rule of law and the elaboration of legal principles, is something learned in law school. While not as obvious or immediate in emotional impact, it is nevertheless the constructive corollary to the anger and frustration of street protest. And it is the mutually reinforcing efforts of law and protest, of anger and optimism, that have dragged this country out of the darkness of the early twentieth century, and that are responsible for all of the civil rights gains we have made.

Part of what we do as legal scholars, and what the best American jurists have done, is to trust that the great values of American liberalism are there in the precedents. During times that fail to live up to the tolerance and equal treatment and procedural fairness that we know are at the heart of American democracy, we need only look to those precedents to produce those values and then amplify them. Scholarship can play the role of the judicial dissent. Through it, we produce and preserve a vision for what the law can be or should be—and, with our help, what it will be.

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To the poverty of political discourse we hold out, as always, the treasure house of the American legal tradition. That is our contribution.