

# DISSENT IN A CROWDED THEATER

*Mari Matsuda\**

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### I. INTRODUCTION: DEFINING IMMINENT THREAT

REVOLUTION was in the air, and anti-war merged with anti-capitalism to create what the state believed was an imminent threat to its efforts in the First World War. In this context, refrains of which are coming soon to a metaphorical theater near you, Oliver Wendell Holmes came up with his famous analogy allowing limits on free speech when dissent is akin to yelling fire in that crowded theater.<sup>1</sup>

What constitutes clear and present danger justifying incursions on the right to dissent? For Holmes, the distinction was imminence. Unlike most judges, he was a combat survivor. He bore witness to the imminent threat of cannon fire and fallen comrades. I read his particular concern for the effective prosecution of a declared war as tied to his biography. His imminence test does not solve my problem: what if war itself is the imminent threat? For contemporary jurists, the legacy of unjust, misbegotten, and endless wars looms large. Bodies are falling, indeed, and good citizens must ask “to what end?” My practice of democratic citizenship began when I marched in the moratorium to end the war in Vietnam.

Critical race theorists argue for a distinction between dissent and hate speech.<sup>2</sup> This approach sees two imperatives:

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\* Mari Matsuda is a critical race theorist and intersectional feminist who teaches at the William S. Richardson School of Law. She is also a visual artist ([marimatsudapeaceorchestra.com](http://marimatsudapeaceorchestra.com)). Thanks to Ellen Ashford, Ciara Kahahane, and Ahmad Nasser.

1. See *Schenck v. United States*, 39 S. Ct. 247, 249 (1919) (“The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force.”).

2. See, e.g., MARI J. MATSUDA, CHARLES R. LAWRENCE III, RICHARD DELGADO & KIMBERLÉ WILLIAMS CRENSHAW, *WORDS THAT WOUND* (1993) (arguing for legal restriction of assaultive, racist speech); see also MARI J. MATSUDA, *WHERE IS YOUR BODY?* 117 (1996) (distinguishing academic freedom from “freedom to hurt and degrade the powerless”).

- (1) criticism of the government is required in a democracy, and
- (2) subordinated citizens whose participation in democracy does not carry presumptions of entitlement require protection from assaultive speech.

If both imperatives apply, then a criticism of the state's acts of war is presumptively protected, whereas speech designed to silence victims of racism is not. This distinction requires inquiry into history, social relations, and power distributions. It is functional, in the spirit of Alexander Meiklejohn:<sup>3</sup> What speech do we need to pursue the ends of democracy? How do we get more of that speech? What are impediments to that speech?

No simple formula will tell us how to thread the needle between *Schenck* and *Abrams*, the two cases in which Holmes attempted to maximize dissent while protecting the government's interest in filling troop ships as bombs fell. Pacifists then, and now, will argue that the idea of war as a solution to political conflict is itself the clear and present danger. Dissent is the only thing that will stop the bombs. The First World War presented an imminent threat in the minds of great leaders in the time of the *Schenck* and *Abrams* cases, but the entry into that war, and the ambiguous peace that followed, set us up spectacularly for more war, fascism, and genocide.

We live now in the most dangerous of times. If one studies the coming climate disruption, clear and present danger does not come close to capturing where we are going, with loss of human life, upheaval, and forced migration on a scale unprecedented in recorded history. That is my emergency; what is yours? Inevitably, the neutral criteria of danger and imminence require resort to questions of value and politics. Inevitably, we land back where we started, with the First Amendment declaring speech protected, while jurists search for the distinction that will make our commitment to free speech something other than a suicide pact.

This essay uses the example of cross burning to show that deep historical tracing of violence on the road to securing full citizen participation is the only way to effectuate the First Amendment. We cannot achieve the goal of free speech by resort to formulas. Rather we have to understand our national character at its best and its worst, with its history of violence and exclusion standing alongside resistance to subordination. This is a history of taking sides: white supremacy versus equality, the lynching tree versus the welcome table. Democracy cannot stand neutral on this, since full inclusion and participation are prerequisites of democracy.

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3. See generally ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948) (Meiklejohn believed that the main purpose of the First Amendment is to allow citizens to participate in the democratic system of self-governance).

## II. THE KKK AND THE BURNING CROSS: HATE SPEECH IN CONTEXT

A cross is burning in the middle of the night on the lawn of a Black family in St. Paul.<sup>4</sup> What would it feel like to wake up to that sight?

Given the history of the Ku Klux Klan in the United States, the burning cross is a clear statement of white supremacy.<sup>5</sup> This history includes thousands of lynchings within the lifetime of citizens still living,<sup>6</sup> an unending catalog of violence against Black people on this continent for over 200 years under slavery, and over 100 years since, there is no argument that the burning cross stands for anything other than white supremacy and threat.

Despite this social reality, the U.S. Supreme Court found that St. Paul's effort to criminalize this cross burning was unconstitutional.<sup>7</sup> What method, what analysis, what worldview might lead to a different legal knowledge and to the conclusion that a burning cross is not free speech, that it is, instead, the same thing as a loaded gun in your face?

In critical race theory, we start from history and lived experience under structures of subordination.<sup>8</sup> In feminist theory, we start from conscious-

4. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 379 (1992) (“In the predawn hours of June 21, 1990, petitioner and several other teenagers allegedly assembled a crudely made cross by taping together broken chair legs. They then allegedly burned the cross inside the fenced yard of a Black family that lived across the street from the house where petitioner was staying.”).

5. See *Virginia v. Black*, 538 U.S. 343, 383 (2003) (Virginia statute banning cross burning held constitutional: “The cross may have been selected because of its special power to threaten, but it may also have been singled out because of disapproval of its message of white supremacy . . . .”); WYN CRAIG WADE, *THE FIERY CROSS* 147–48 (1987) (the Ku Klux Klan professed, “We avow the distinction between races of mankind as same has been decreed by the Creator, and we shall ever be true to the faithful maintenance of White Supremacy and will strenuously oppose any compromise thereof in any and all things.”); WADE, *supra*, at 185 (describing the cross burning ceremony).

6. See EQUAL JUSTICE INITIATIVE, *LYNCING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR* (3d ed. 2018), <https://lynchinginamerica.eji.org/report> [<https://perma.cc/W9EX-97Y6>] (“[The Equal Justice Initiative] has documented 4084 racial terror lynchings in twelve Southern states between the end of Reconstruction in 1877 and 1950, which is at least 800 more lynchings in these states than previously reported. [The Equal Justice Initiative] has also documented more than 300 racial terror lynchings in other states during this time period.”); Campbell Robertson, *A Lynching Memorial is Opening. The Country has Never Seen Anything Like It*, N.Y. TIMES (Apr. 25, 2018), <https://www.nytimes.com/2018/04/25/us/lynching-memorial-alabama.html> [<https://perma.cc/G3EL-EGMX>] (reporting the opening of the National Memorial for Peace and Justice in Montgomery, Alabama. “[I]t demands a reckoning with one of the nation’s least recognized atrocities: the lynching of thousands of Black people in a decades-long campaign of racist terror.”).

7. See *R.A.V.*, 505 U.S. at 391 (“Applying these principles to the St. Paul ordinance, we conclude that, even as narrowly construed by the Minnesota Supreme Court, the ordinance is facially unconstitutional.”); see also ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990) (“Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.”).

8. See MATSUDA ET AL., *supra* note 2, at 3 (“Critical race theory is grounded in the particulars of a social reality that is defined by our experiences and the collective historical experience of our communities of origin.”). See generally Mari J. Matsuda, *This is (Not)*

ness raising.<sup>9</sup> Both methods ask us to remember what we know in our bones, reminding us that we know things we are taught to keep silent about, things we leave at the door when we do the work of logical analysis. Our charge as anti-subordination jurists is to bring bone-deep knowledge through the door with us.

What does danger feel like? Women tell of feeling afraid: of sitting at a bus-stop at night, approached by a stranger, rebuffing unwanted advances; of a demeaning word screamed out of a passing car; of a stranger's footsteps heard from behind in a deserted parking garage; of a fist to the face, when a man who is supposed to love her, lashes out in rage. When women, through the method of consciousness raising, share these stories in specific detail—where she was and what was said—the particularized fear is linked to a shared experience and a larger structure appears: Woman, objectified, with a target on her back.

This embodied fear is further linked to a globalized fear rising up from climate change,<sup>10</sup> coming scarcity,<sup>11</sup> wealth inequality,<sup>12</sup> and displacement.<sup>13</sup> Right-wing, authoritarian, neo-Nazi hate groups are growing in many quarters, most significantly, our own.<sup>14</sup> Burning crosses, torches,

*Who We Are*, 128 YALE L.J.F. 657 (2019) (discussing racialized violence, national identity, and constitutional interpretation).

9. See CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 84 (1989) (“Consciousness raising is the process through which the contemporary radical feminist analysis of the situation of women has been shaped and shared.”).

10. See generally NAOMI KLEIN, *THIS CHANGES EVERYTHING: CAPITALISM VS. THE CLIMATE* (2014) (arguing that the United States has not done enough to combat climate change).

11. See generally Jacob Schewe et al., *Multimodel Assessment of Water Scarcity Under Climate Change*, 111 PROC. NAT’L ACAD. SCI. 3245 (2014) (studying the effects of global water scarcity and the ramifications on food supply, world population, and economic prosperity).

12. See JOSEPH E. STIGLITZ, *THE PRICE OF INEQUALITY: HOW TODAY’S DIVIDED ECONOMY ENDANGERS OUR FUTURE* 2–4, 7 (2012) (“By 2007 . . . the top 0.1 percent of America’s households had an income that was 220 times larger than the *average* of the bottom 90 percent . . . with the wealthiest 1 percent owning more than a third of the nation’s wealth.” From 1982–2012, wealth continued to increase in the top percentiles of earners while declining in the bottom leading to less income mobility than Canada, Australia, and almost all of Europe. “[T]he rich are getting richer[,] . . . the poor are becoming poorer and more numerous, and the middle class is being hollowed out.”).

13. See generally Maxine Burkett, *A Justice Paradox: On Climate Change, Small Island Developing States, and the Quest for Effective Legal Remedy*, 35 U. HAW. L. REV. 633 (2013) (analyzing the vulnerability of small island developing states to climate change, including the loss of habitability of their territory).

14. According to the Anti-Defamation League, white supremacist murders more than doubled in 2017. See *White Supremacist Murders More Than Double in 2017*, ANTI-DEFA-MATION LEAGUE (Jan. 17, 2018), <https://www.adl.org/news/press-releases/adl-report-white-supremacist-murders-more-than-doubled-in-2017> [<https://perma.cc/X5AU-7KCZ>] (“[W]hite supremacists and other far-right extremists were responsible for 59 percent of all extremist-related fatalities in the U.S. in 2017, up dramatically from 20 percent in 2016.”); see also CAL. STATE UNIV., SAN BERNARDINO, CTR. FOR THE STUDY OF HATE & EXTREMISM, FINAL U.S. STATUS REPORT: HATE CRIME ANALYSIS & FORECAST FOR 2016/2017 (2017), [https://csbs.csusb.edu/sites/csusb\\_csbs/files/Final%20Hate%20Crime%2017%20Status%20Report%20pdf.pdf](https://csbs.csusb.edu/sites/csusb_csbs/files/Final%20Hate%20Crime%2017%20Status%20Report%20pdf.pdf) [<https://perma.cc/6D5X-7J86>] (providing statistics of hate crimes in major U.S. cities). See generally DAVID NEIWERT, *ALT-AMERICA: THE RISE OF THE RADICAL RIGHT IN THE AGE OF TRUMP* (2017) (describing the increase in nationalist

swastikas, and Seig Heil saluting—it would seem like parody, but for the numbers. Hundreds of organized groups with thousands of active participants and millions of so-called lone wolf participants joining along on the internet, all imbibing a daily cocktail of hate linked to calls for violence.<sup>15</sup> It is more vile than most citizens imagine, with actual images of Hitler’s genocide celebrated and the torture, rape, and murder of actual people, past and present, fantasized over in loving terms. If the target is an actual living person, a typical meme may include their face positioned over that of someone facing a death camp oven, with a celebratory caption.<sup>16</sup> The name, home address, and social media contacts of targets are sent to thousands, even millions of viewers, and targeted harassment ensues.<sup>17</sup> People—including university professors and academic writers—have had to move, cancel book tours, and hire security guards.<sup>18</sup>

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ideology and actions in the United States following the announcement of the presidential campaign of Donald Trump).

15. *Hate Map*, S. POVERTY LAW CTR., <https://www.splcenter.org/hate-map> [<https://perma.cc/JX24-J5TE>] (last visited June 2, 2019) (tracking the number of hate groups in the U.S., presently displaying data on 954 hate groups nationwide); see Thomas J. Main, *What’s the Alt-Right, and How Large Is Its Audience?*, L.A. TIMES (Aug. 22, 2017), <https://www.latimes.com/opinion/op-ed/la-oe-main-alt-right-audience-20170822-story.html> [<https://perma.cc/7YMA-SJAX>] (estimating the monthly average of web traffic to nine alt-right sites in 2017 at “264 million visits and 111 million unique visitors”). The white supremacist who killed nine African American worshippers and wounded another at a church in Charleston, South Carolina, is an example of a “lone wolf” participant. His personal manifesto posted to his website expressed frustration that, “We have no skinheads, no real KKK, no one doing anything but talking on the internet. Well someone has to have the bravery to take it to the real world, and I guess that has to be me.” Keegan Hankes & Alex Amend, *The Alt-Right is Killing People*, S. POVERTY L. CTR. (Feb. 5, 2018), <https://www.splcenter.org/20180205/alt-right-killing-people> [<https://perma.cc/9J6U-D8VX>].

16. These vile memes are commonly found on the Internet today. The author did not include a citation to avoid spreading assaultive imagery. For examples of harassment on the internet, see *infra* note 18.

17. See *infra* note 18.

18. See Emma Marshak, *Online Harassment: A Legislative Solution*, 54 HARV. J. LEGIS. 503, 504, 513 (2013) (providing examples of online harassment and “doxxing” as well as the perpetrators and unique challenges associated with enforcement); Petula Dvorak, *It’s Scary: Why We Flinch When White Nationalists Stage a Protest at a Bookstore*, WASH. POST (Apr. 30, 2019), [https://www.washingtonpost.com/local/its-scary-why-we-flinch-when-white-nationalists-stage-a-protest-at-a-bookstore/2019/04/29/ac2c70a4-6a80-11e9-a66d-a82d3f3d96d5\\_story.html?utm\\_term=.a9e479618c0e](https://www.washingtonpost.com/local/its-scary-why-we-flinch-when-white-nationalists-stage-a-protest-at-a-bookstore/2019/04/29/ac2c70a4-6a80-11e9-a66d-a82d3f3d96d5_story.html?utm_term=.a9e479618c0e) [<https://perma.cc/6DVB-AH5X>] (covering a white supremacist protest at Jonathan Metz’s talk at Politics and Prose bookstore in Washington, D.C. Metz, director of the Center for Medicine, Health and Society at Vanderbilt University, noted in his book, *Dying of Whiteness*, that illness, addiction, and gun violence are among white America’s top killers); Rose Eveleth, *How to Deter Doxxing: Newsroom Strategies to Prevent the Harassment That Follows the Public Posting of Home Addresses, Phone Numbers and Journalists’ Other Personal Information*, NIEMANN REPORTS (July 17, 2015), <https://niemanreports.org/articles/how-to-deter-doxxing> [<https://perma.cc/VW7N-3HF2>] (defining doxxing as “the practice of publicly posting private information . . . which can be used to threaten or otherwise harass an individual” and reporting different harassment tactics engaged in against victims); Colleen Flaherty, *Old Criticisms, New Threats*, INSIDE HIGHER ED (June 26, 2017), <https://www.insidehighered.com/news/2017/06/26/professors-are-often-political-lightning-rods-now-are-facing-new-threats-over-their> [<https://perma.cc/TQ44-BZZJ>] (describing a collection of recent threats against scholars following their expressions of opinion, including Keeanga-Yamahtta Taylor, an assistant professor at Princeton University who had to cancel planned public talks after receiving death threats for criticizing Donald Trump in a commencement speech, and

Hate-motivated murders are a serious form of domestic terrorism—over 500 in the past decade with an uptick in the past year.<sup>19</sup> Nine people were murdered in their church by a white supremacist in South Carolina<sup>20</sup> and eleven in a synagogue in Pittsburgh.<sup>21</sup> A consumer of anti-Muslim propaganda killed two in Oregon.<sup>22</sup> An immigrant-hater shot two engineers in Kansas, killing Srinivas Kuchibhotla, after hurling anti-immigrant slurs.<sup>23</sup> Heather Heyer was killed by a neo-Nazi who used his car as a weapon in Charlottesville.<sup>24</sup> Every time white supremacist murder happens—and it is happening more often<sup>25</sup>—we react with shock, as though hate-motivated execution is not an expected occurrence.

A different view sees the whirlwind we reap from the violence we sow. To really understand why crosses still burn and lynchings still happen, we have to ask where the habit of violence comes from in U.S. empire. We know the numbers of native people exterminated,<sup>26</sup> but do we stop to absorb the details: babies bayoneted,<sup>27</sup> families burned alive in their

Johnny Eric Williams, an associate professor at Trinity College who had to flee town due to threats following a race-focused post online).

19. See *White Supremacist Murders More Than Double in 2017*, *supra* note 14.

20. See Alan Blinder & Kevin Sack, *Dylann Roof Found Guilty in Charleston Church Massacre*, N.Y. TIMES (Dec. 15, 2016), <https://www.nytimes.com/2016/12/15/us/dylann-roof-trial.html> [<https://perma.cc/NNX5-TURX>].

21. See Campbell Robertson, Sabrina Tavernise & Sandra E. Garcia, *Quiet Day at a Pittsburgh Synagogue Became a Battle to Survive*, N.Y. TIMES (Oct. 28, 2018), <https://www.nytimes.com/2018/10/28/us/pittsburgh-synagogue-shooting.html> [<https://perma.cc/3937-63H5>] (reporting the mass shooting of a synagogue in Pittsburgh where eleven were killed and six were injured. Upon surrender, the gunman told police, “All these Jews need to die.”).

22. See Nicholas Kristof, *On a Portland Train, the Battlefield of American Values*, N.Y. TIMES (May 30, 2017), <https://www.nytimes.com/2017/05/30/opinion/portland-train-attack-muslim.html> [<https://perma.cc/J8F8-88SJ>].

23. See Matt Stevens, *Kansas Man Who Fatally Shot Indian Immigrant Gets Life in Prison*, N.Y. TIMES (May 5, 2018), <https://www.nytimes.com/2018/05/05/us/adam-purinton-sentenced-kansas-shooting.html> [<https://perma.cc/DG2J-YEGY>].

24. See Melissa Gomez, *Charlottesville Car Attack Suspect Pleads Not Guilty to Federal Hate Crimes*, N.Y. TIMES (July 5, 2018), <https://www.nytimes.com/2018/07/05/us/charlottesville-plea-hate-crimes.html> [<https://perma.cc/ULT8-UBDA>] (reporting the murder of Heather Heyer, after a white supremacist drove his car into a crowd of nonviolent anti-Nazi demonstrators. The driver “had engaged in chants promoting or expressing white supremacist, racist and anti-Semitic views”); see also Katie Benner & Hawes Spencer, *Charlottesville Car Attack Suspect Indicted on Federal Hate Crime Charges*, N.Y. TIMES (June 27, 2018), <https://www.nytimes.com/2018/06/27/us/politics/charlottesville-death-hate-crime-charges.html> [<https://perma.cc/J39J-T2FH>].

25. See *supra* note 14; see also Jennifer Medina et al., *One Dead in Synagogue Shooting Near San Diego; Officials Call It Hate Crime*, N.Y. TIMES (Apr. 27, 2019), <https://www.nytimes.com/2019/04/27/us/poway-synagogue-shooting.html> [<https://perma.cc/M2AS-W6ZJ>] (reporting a gunman entered a synagogue yelling anti-Semitic slurs and opened fire, killing a 60-year-old woman and leaving the rabbi and two others seriously wounded).

26. See DAVID E. STANNARD, *AMERICAN HOLOCAUST: COLUMBUS AND THE CONQUEST OF THE NEW WORLD* 151 (1992) (accounting for the killing of American Indian peoples “in numbers that eventually totaled close to 100,000,000”).

27. See, e.g., *id.* at 71 (describing “Spanish reports of their own murderous sadism” shortly after Columbus’s arrival in the New World, which described the bodies of infants being “spitted . . . together with their mothers and all who were before them, on [the Spanish’s] swords”); see also, e.g., David W. Grua, *Liabilities of Conquest: Wounded Knee and the Politics of Memory* 209 (Dec. 2013) (unpublished Ph.D. dissertation, Texas Christian University) (recording experiences of Wounded Knee Massacre survivors. “James Pipe

homes,<sup>28</sup> bodies, some still alive, piled in a pit made slippery with blood?<sup>29</sup> Do you know that men laughed while perpetrating this and carried off body parts as souvenirs?<sup>30</sup>

We may know the story of the middle passage, but do we imagine what it would feel like to be the human in the hold of a slave ship, kidnapped from family, chained and packed in tight with hundreds of bodies, the dark, the sickening smell, the screams, and the moans?<sup>31</sup> Do we consider the embodied reality of the hundreds of years—both before and after the founding of the nation—when rape, torture, forced labor, the taking of children from parents, and the sale of human beings was foundational to American law and American wealth?<sup>32</sup> Consider just one image from

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on Head, who was about ten in 1890, recalled seeing his baby sister shot, while she was strapped in a papoose on her mother's back. Henry Jackson, who was perhaps six years old at the time of Wounded Knee, carried traumatic memories of his mother being shot in the head.”).

28. See, e.g., *id.* at 113–14 (excerpting records of a British attack on a sleeping “Indian encampment[,]” during which they set fire to the largely unprotected village. “[M]ost of those who were dying in the fires, and who were ‘crawling under beds and fleeing from Mason’s dripping sword were women, children, and feeble old men.’” (quoting FRANCIS JENNINGS, *THE INVASION OF AMERICA: INDIANS, COLONIALISM, AND THE CANT OF CONQUEST* 222 (1975))).

29. See also, e.g., MICHAL R. BELKNAP, *THE VIETNAM WAR ON TRIAL: THE MY LAI MASSACRE AND THE COURT-MARTIAL OF LIEUTENANT CALLEY* 72 (2002) (relating a scene from the infamous My Lai Massacre during the Vietnam War, where American soldiers brutally murdered Vietnamese civilians, including women, children, and the elderly. At one point, the soldiers forced living Vietnamese people into an irrigation ditch and opened fire, claiming the lives of ninety to one hundred human beings. “Several GIs told Hersh they saw Calley run after a bloody but unhurt two-year-old boy who had managed to crawl out of the ditch, throw him back in, and shoot him. . . . The killing at the ditch continued for about an hour.”); see also STANNARD, *supra* note 26, at 147–49 (recounting some of the horrific genocides of the past. One example describes, “Mass burials followed the carnage. One hundred forty-six bodies were thrown into this pit . . .”).

30. See, e.g., STANNARD, *supra* note 26, at 147–49 (images depicting the gruesome carnage carried out by the Spaniards upon the Native Americans, including their practice of collecting souvenirs).

31. See, e.g., SOWANDE’ M. MUSTAKEEM, *SLAVERY AT SEA: TERROR, SEX, AND SICKNESS IN THE MIDDLE PASSAGE* 58–64 (2016) (illustrating the cramped conditions in which slave ship captives were held, including the dangers of interiors where each captive “had not so much room as a man in his coffin,” unventilated cargo holds which sometimes sent them “fly[ing] to the hatchway with all the signs of terror and dread of suffocation[,]” and the unmistakable stench of slave ships, which one trader described as “intolerably offensive”); MARCUS REDIKER, *THE SLAVE SHIP* 108–09, 113–21 (2007) (describing the experience of Olaudah Equiano, the first person to write extensively about the slave trade from the perspective of the enslaved, who recorded how the chains rubbed their skin raw, the terror of the enslaved people aboard, and the filthy conditions aboard the ship, which caused many passengers to die of dysentery). For an indelible fictionalized account based on historical research, see generally BARRY UNSWORTH, *SACRED HUNGER* (1992).

32. See EDWARD E. BAPTIST, *THE HALF HAS NEVER BEEN TOLD: SLAVERY AND THE MAKING OF AMERICAN CAPITALISM* xxi (2014) (“From 1783 at the end of the American Revolution to 1861, the number of slaves in the United States increased five times over, and all this expansion produced a powerful nation. For white enslavers were able to force enslaved African-American migrants to pick cotton faster and more efficiently than free people. Their practices rapidly transformed the southern states into the dominant force in the global cotton market, and cotton was the world’s most widely traded commodity at the time, as it was the key raw material during the first century of the industrial revolution. The returns from cotton monopoly powered the modernization of the rest of the American economy, and by the time of the Civil War, the United States had become the second

Dorothy Roberts's book: the flogging of a pregnant woman, placed face down with her belly in a pre-dug hole, so that the fetus, the master's property, would not be harmed while the woman's back was beaten bloody.<sup>33</sup> It is hard to think about slavery in concrete terms, but given the scope of slavery, it was impossible *not* to think about it for anyone who lived in that time.<sup>34</sup> The huge silence was work. What did it take, Toni Morrison asks, for most of American literature to proceed as though torture and rape were not happening, literally, in the backyard? The silence, she suggests, speaks.<sup>35</sup>

Out of that dark past, we did what Eric Foner calls unprecedented and transcendent: we abolished slavery.<sup>36</sup> The contradiction that had weighed down the land of liberty was finally confronted, and miraculously, the process of undoing began. We passed the Thirteenth, Fourteenth, and Fifteenth Amendments, creating a legal structure from which there is no going back. For over 100 years, right up to the present, the Ku Klux Klan was there trying to reverse emancipation.<sup>37</sup>

The history of the Klan is tied to the history of progress on race. The effort to emancipate the enslaved and establish democracy in the former Confederacy led to the first rise of the Klan and the bloody end of Reconstruction.<sup>38</sup> Hundreds of freed men and women were murdered in this

nation to undergo large-scale industrialization. In fact, slavery's expansion shaped every crucial aspect of the economy and politics of the new nation—not only increasing its power and size, but also, eventually, dividing U.S. politics, differentiating regional identities and interests, and helping to make civil war possible.”).

33. DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 39–40 (1997) (citing Michael P. Johnson, *Smothered Slave Infants: Were Slave Mothers at Fault?*, 47 J.S. HIST. 493, 513 (1990)).

34. See generally DAINA RAMEY BERRY, *THE PRICE FOR THEIR POUND OF FLESH: THE VALUE OF THE ENSLAVED, FROM WOMB TO GRAVE, IN THE BUILDING OF A NATION* (2017) (describing the realities of slavery for both enslavers and the enslaved and tracing the internal and external valuation of the enslaved from before birth to after death).

35. Toni Morrison, *Unspeakable Things Unspoken: The Afro-American Presence in American Literature*, in *THE BLACK FEMINIST READER* 37 (James & Sharpley-Whiting eds., 2000) (“It only seems that the canon of American literature is ‘naturally’ or ‘inevitably’ ‘white.’ In fact it is studiously so. In fact these absences of vital presences in Young American literature may be the insistent fruit of the scholarship rather than the text.”).

36. See ERIC FONER, *FOREVER FREE* xi, xx, xxvi (2005) (“The story of four million slaves and their transformation from bondage to citizenship is one of the great and inspiring events in world history. . . . Here was a critical and revolutionary moment of change that was essentially unknown to most Americans . . . .”); ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION* xi (1988) (“[M]y book sees the destruction of slavery as a transcendent accomplishment.”).

37. JOHN DAVID SMITH, *RECONSTRUCTION* 14 (2016) (describing the actions of former rebels in organizing the Ku Klux Klan, supporting efforts to deprive African Americans of their rights. “Former Rebels . . . worked to concentrate power in their hands and to prevent Blacks from voting. They allowed such ‘vicious organizations’ as the Ku Klux Klan to form ‘for the express purpose of depriving the negro of the political rights conferred upon him by law.’” (quoting 2 JAMES G. BLANE, *TWENTY YEARS OF CONGRESS: LINCOLN TO GARFIELD* 469 (1886))).

38. See Wade, *supra* note 5, at 105 (“[T]he Klan had been caused by a continuation of Southern Civil War passions, carried on by the most violent diehards of the former Confederacy who denied that Blacks were entitled to anything more than a servile role in society.”).



period and many more forced to leave their homes.<sup>39</sup> Rape and mutilation were favored tools, along with lynching.<sup>40</sup> The linkage of the violent, sexualized objectification of women to racial violence continued from slavery to Reconstruction: so-called “ruined” white women displayed as props at lynchings.<sup>41</sup> Jacquelyn Dowd Hall, a pioneering historian of women in the South, was one of the first to ask how the violence of the lynch mob was tied to the subordination of women.<sup>42</sup> Black women were raped and tortured as a warning to their families to accept peonage,<sup>43</sup> and Reconstruction-era teachers of both races were punished for teaching Black children to read.<sup>44</sup> Just one example: a white woman guilty of sympathy for Black citizens was tortured by having hot tar poured into her vagina.<sup>45</sup>

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39. HERBERT SHAPIRO, *WHITE VIOLENCE AND BLACK RESPONSE: FROM RECONSTRUCTION TO MONTGOMERY* 31–32, 34 (1988) (estimating the total number of Blacks lynched between 1882 and 1901 at 1,914 and quoting Frederick Douglass, who argued against Black exodus from the South while acknowledging the practical reasons that they had for emigrating. Douglass noted that Blacks were “not only the victims of fraud and cunning, but of violence and intimidation . . . the murder of a Black man by a white man is followed by no conviction or punishment”).

40. See IDA B. WELLS, *SOUTHERN HORRORS* 9 (Jacqueline Jones Royster ed., 1997) (describing that, during the post-Civil War era, “lynching and other acts of mob violence against African Americans . . . steadily increased”); *id.* at 31 (“[Ida B. Wells] brought to light the reality that violations of African American womanhood by white men . . . went unacknowledged and unavenged.”).

41. See FONER, *FOREVER FREE*, *supra* note 36, at xxii (describing how the Ku Klux Klan used the “despoiling” of white women as a reasoning behind the torture and murder of Black men for their “lustful assaults”); WELLS, *supra* note 40, at 9 (“They believed that virtuous white women should see their evil attackers punished quickly and with finality.”).

42. Jacquelyn Dowd Hall, *The Mind That Burns in Each Body*, in *POWERS OF DESIRE: THE POLITICS OF SEXUALITY* 328 (Snitow, Stansell & Thompson eds., 1983).

43. See BLACK WOMEN IN WHITE AMERICA: A DOCUMENTARY HISTORY 172–73 (Gerda Lerner ed., 1972) (“The sexual oppression of black women is not only an end in itself; it is also an instrument in the oppression of the entire race. . . . In this sense, sexual assaults on black women are part of the reinforcing structure upholding a system of racial and economic exploitation.”); *id.* at 173–93 (detailing instances of sexual violence being employed to terrify and oppress Black women and their families taken from excerpts and legal proceedings); DANIELLE L. MCGUIRE, *AT THE END OF THE STREET: BLACK WOMEN, RAPE, AND RESISTANCE—A NEW HISTORY OF THE CIVIL RIGHTS MOVEMENT FROM ROSA PARKS TO THE RISE OF BLACK POWER* xvii–xviii (2010) (“When African Americans tested their freedom during Reconstruction, former slaveholders and their sympathizers used rape as a ‘weapon of terror’ to dominate the bodies and minds of African-American men and women. . . . [S]exual and racial violence functioned as a tool of coercion, control, and harassment.”); MCGUIRE, *supra*, at 29 (“The sexual violence enacted and enforced rules of racial and economic hierarchy.”); see also Aviam Soifer, *Federal Protection, Paternalism, and the Virtually Forgotten Prohibition of Voluntary Peonage*, 112 COLUM. L. REV. 1607, 1617–18 (2012) (discussing the legislative intent behind the Peonage Abolition Act of 1867. “[T]he Thirty-Ninth Congress understood all too well that autonomous nightriders, for example, were often entirely successful in depriving former slaves and their allies of basic rights—and many times of their lives . . .”).

44. WADE, *supra* note 5, at 63–64 (explaining that by 1868, teachers who were teaching African American children “were being threatened, flogged, run out of town, or murdered, and their schoolhouses burned to the ground by the Klan”).

45. *Id.* at 69 (describing the horrific consequence of a woman, Mrs. Skates, after being found hiding three Black men running from the Klan. “After finding these men and beating them, Klansmen took Mrs. Skates outdoors, tore her clothing off, and poured tar into her vagina.”).

The Klan won in its first round, serving as the stormtroopers for the post-Civil War planter class that enacted the Black Codes, instituting conditions that mimicked slavery.<sup>46</sup> The federal government retreated from the goal of emancipation. Lawlessness against Black Southerners became the law.<sup>47</sup>

The Klan rose again, some fifty years after winning round one, with a new project: saving a white Protestant nation from immigrants and punishing Blacks who had the audacity to escape peonage.<sup>48</sup> Entire Black communities suffered pogroms, with homes and businesses burned, many murdered, and families run out of town.<sup>49</sup> There were twenty-six of these so-called “race riots” in 1919 at the height of the second Klan.<sup>50</sup> At least 25 were murdered in one day in Atlanta in 1906,<sup>51</sup> 100 in the East Saint

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46. See FONER, *FOREVER FREE*, *supra* note 36, at 95–96 (including the observations of journalist Sidney Andrews: “[T]he whites seem wholly unable to comprehend that freedom for the negro means the same thing as freedom for them. They readily enough admit that the Government has made him free, but appear to believe that they have the right to exercise the old control.”); JACOBUS TENBROEK, *EQUAL UNDER LAW* 180 (2d ed. 1969) (“Under [the Black Codes] the freedman was socially an outcast, industrially a serf, legally a separate and oppressed class. Slavery, abolished by the organic law of the nation, was in fact revived by these statutes of the states.”).

47. See DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* 461 (4th ed. 2000) (describing that during the post-Reconstruction years, the law failed Black people: “[I]t was the absolute refusal of the law to protect them from random and organized violence that enabled the virtual re-enslavement of a race so recently freed.”); WELLS, *supra* note 40, at 6 (describing how old Confederates were pardoned and could participate in political decision-making processes, “enacting legislation that placed the freed men and women in a state of virtual bondage.” These laws were “developed from a general philosophy that the enslaved Africans were property and not human beings”).

48. See WADE, *supra* note 5, at 77 (recounting that freed men and women were often assaulted and driven from their homes for a multitude of reasons including, “simply . . . being prosperous”).

49. See, e.g., ALFRED L. BROPHY, *RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921* (2002) (documenting the Tulsa Race Riot of 1921, an attack by the citizens and law enforcement officers of Tulsa, Oklahoma, on its sizable Black community, which left between seventy-five and one hundred fifty people dead, thirty-five city blocks demolished, and over a thousand families homeless); FONER, *FOREVER FREE*, *supra* note 36, at 152 (describing the July 1876 massacre and destruction of the Black town of Hamburg, South Carolina); LORENZO J. GREENE ET. AL., *MISSOURI’S BLACK HERITAGE* 149 (rev. ed. 1993) (describing, alongside numerous other instances of racial violence in Missouri, the lynching of prisoner Raymond Gunn, which was attended by three thousand people. Gunn was chained to the roof of a schoolhouse where he had murdered a white schoolteacher, then doused with gasoline and burned alive); MALCOLM McLAUGHLIN, *POWER, COMMUNITY, AND RACIAL KILLING IN EAST ST. LOUIS* 87, 125–44 (2005) (recounting the events preceding and encompassing the race riot in East St. Louis on July 2, 1917, where white mobs “mercilessly beat and shot black men, women, and children in the streets, and set black businesses and homes ablaze[.]” claiming the lives of at least forty Black people and leaving many more injured or maimed. Entire Black neighborhoods were razed to the ground, and thousands of Black families were forced to flee the city).

50. WADE, *supra* note 5, at 151 (“From June to December 1919, twenty-six race riots erupted in American cities . . .”).

51. See REBECCA BURNS, *RAGE IN THE GATE CITY: THE STORY OF THE 1906 ATLANTA RACE RIOT* 18 (2006) (“The Atlanta Race Riot left at least twenty-five African Americans dead and dozens injured . . .”).

Louis riot in 1917,<sup>52</sup> 38 in the Chicago riot in 1919,<sup>53</sup> and up to 250 in the Tulsa riot in 1921.<sup>54</sup> In the same period, pogroms targeted Greek and Italian enclaves, echoing earlier anti-Chinese massacres, leaving no quadrant of the U.S. untouched by the practice of killing those who are different.<sup>55</sup> The baiting of Catholics and Jews was used to drum up Klan membership where there were few Blacks to target, and the northern Klan, in places like Indiana, grew so large that virtually every prominent citizen—including judges and Congressmen—signed up.<sup>56</sup> Their message is regrettably familiar: make America white and Protestant, all others are a threat.

The third rise of the Klan came in response to the civil rights movement.<sup>57</sup> Once again, Black efforts to claim equality were met with violence. Many lost their lives to lynching and summary execution in this period. James Chaney, Michael Schwerner, and Andrew Goodman are among the many examples of how the Klan worked with law enforcement to murder brave young people who were leading voter registration drives.<sup>58</sup>

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52. See ELLIOT M. RUDWICK, *RACE RIOT AT EAST ST. LOUIS: JULY 2, 1917*, at 50 (1964) (explaining that the death toll was difficult to ascertain as many corpses “were just thrown in like you would gather up so many dead hogs in the yard” to save county funds. However, “[t]he East St. Louis Police Department indicated that about one hundred persons died, and this number was accepted by the St. Clair County Grand Jury.”); see also BELL, *supra* note 47, at 209 (estimating forty to two hundred Blacks were killed in the East St. Louis Race Riot).

53. See WILLIAM M. TUTTLE, JR., *RACE RIOT: CHICAGO IN THE RED SUMMER OF 1919*, at 64 (1970) (“Dead were thirty-eight, including twenty-three Black men and boys.”).

54. See SCOTT ELLSWORTH, *DEATH IN A PROMISED LAND: THE TULSA RACE RIOT OF 1921*, at 66, 69 (1982) (“The total number of people who died . . . is very much in question; estimates range from 27 to over 250.”).

55. See RICHARD D. ALBA, *ITALIAN AMERICANS* 64–65 (1985) (recounting the lynching of Italian Americans in New Orleans in 1890. Following the trial and acquittal of nine Italian Americans after the death of a policeman, a mob stormed the jail and lynched eleven Italian Americans); THOMAS BURGESS, *GREEKS IN AMERICA* 162–64 (1913) (describing the riot race of 1909 in South Omaha, Nebraska. Following the death of a policeman, the Greeks were driven from their homes and their shops destroyed); HIM M. LAI, JOE HUANG & DON WONG, *THE CHINESE OF AMERICA 1785–1980*, at 47 (1980) (following the passage of the 1882 Exclusion Act, “Chinese were the targets of riots throughout the West during the 1880’s and 1890’s.” This included the twenty-eight Chinese Americans killed in Rocksprings, Wyoming, in 1885); see also WILLIAM R. LOCKLEAR, *The Celestials and the Angels*, in *ANTI-CHINESE VIOLENCE IN NORTH AMERICA* 239, 244 (Roger Daniels ed., 1978) (fifteen Chinese were lynched and four others were killed by a mob of whites during a massacre in Los Angeles in 1871. The mob of 500 whites stormed Negro Alley, where many Chinese lived, and hung their victims from makeshift gallows).

56. See WADE, *supra* note 5, at 114 (“The [1894] movement boasted 500,000 members and elected twenty of its sympathizers to Congress.”)

57. SHAPIRO, *supra* note 39, at 409–10 (1988) (describing the violent response of the Ku Klux Klan and newly organized White Citizens Council to the Supreme Court decision in *Brown v. Board of Education* in the mid-1950s and the numerous racially-motivated attacks that followed).

58. See generally SETH CAGIN & PHILIP DRAY, *WE ARE NOT AFRAID: THE STORY OF GOODMAN, SCHWERNER, AND CHANEY AND THE CIVIL RIGHTS CAMPAIGN FOR MISSISSIPPI* (1988) (Goodman and Schwerner, who were white, and Chaney, who was Black, were civil rights workers investigating Klan violence in the state of Mississippi. The three men were apprehended by Klansmen with the assistance of a county deputy, taken to a remote

We are in a new period of backlash that started in the late 1980s and culminates with open white supremacist support for a sitting president. The civil rights movement's success in enacting Title VII and Title IX are part of the slow, unfinished business of Reconstruction. The civil rights movement eliminated racist immigration laws and ended quotas favoring white immigrants.<sup>59</sup> The look and feel of America has changed, and the resentment is palpable.

Without racist immigration quotas—and the Oriental exclusion acts that denied my grandparents citizenship—ours would have been a majority non-white nation well before today.<sup>60</sup> The inevitability of demographic change is a real threat to the “make America white again” crowd, right at a time when the globalization of greed and coming scarcity makes all our lives a survival calculus.

What will happen when the big climate disaster hits and we are without food, water, electricity, and cash for weeks stretching into months? What bonds, what norms will keep us helping one another instead of killing one another? Those marchers in Charlottesville,<sup>61</sup> the wink of support from a sitting President,<sup>62</sup> the legal back-up from an attorney general implementing whites-only through the full force of law,<sup>63</sup> all of this is threaten-

location, and then shot dead. Their bodies were discovered forty-four days later, buried at the future site of a dam).

59. See Cristina M. Rodríguez, *Immigration and the Civil Rights Agenda*, 6 STAN. J. C.R. & C.L. 125, 127 (2010) (describing how “[i]mmigration law and policy evolved over the course of the twentieth century in deep relation to the civil rights movement” and how “[t]he 1965 reforms of the INA” abolished the racist quotas).

60. See BILL ONG HING, MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY: 1850–1990, at 1–4 (1993) (describing the anti-Asian immigration policies and laws restricting the entry of Asians into the United States and showing the marked population increase of Asian Americans after 1965 following changes in immigration policy); see also, Bill Ong Hing, *Vigilante Racism: The De-Americanization of Immigrant America*, 7 MICH. J. RACE & L. 441, 450 (2002) (highlighting some of the ethnic groups and geographical areas where immigrants were essentially barred from entering the United States).

61. Maggie Astor, Christina Caron & Daniel Victor, *A Guide to the Charlottesville Aftermath*, N.Y. TIMES (Aug. 13, 2017), <https://www.nytimes.com/2017/08/13/us/charlottesville-virginia-overview.html> [<https://perma.cc/CYN6-DA6V>] (reporting on the events that took place following the “Unite the Right” rally in Charlottesville, Virginia, on August 12, 2017).

62. Michael D. Shear & Maggie Haberman, *Trump Defends Initial Remarks on Charlottesville; Again Blames ‘Both Sides,’* N.Y. TIMES (Aug. 15, 2017), <https://www.nytimes.com/2017/08/15/us/politics/trump-press-conference-charlottesville.html> [<https://perma.cc/6XL7-FLQS>] (reporting President Trump’s remarks following the Charlottesville protests: “I think there is blame on both sides.”); Felicia Sonmez & Ashley Parker, *As Trump Stands by Charlottesville Remarks, Rise of White-Nationalist Violence Becomes an Issue in 2020 Presidential Race*, WASH. POST (Apr. 28, 2019), [https://www.washingtonpost.com/politics/as-trump-stands-by-charlottesville-remarks-rise-of-white-nationalist-violence-becomes-an-issue-in-2020-presidential-race/2019/04/28/83aaf1ca-69c0-11e9-a66d-a82d3f3d96d5\\_story.html?utm\\_term=.f03d7acce77b](https://www.washingtonpost.com/politics/as-trump-stands-by-charlottesville-remarks-rise-of-white-nationalist-violence-becomes-an-issue-in-2020-presidential-race/2019/04/28/83aaf1ca-69c0-11e9-a66d-a82d3f3d96d5_story.html?utm_term=.f03d7acce77b) [<https://perma.cc/D62U-G3KP>] (covering the President’s continued defense of his comment that there were “very fine people on both sides” at the neo-Nazi rally three years ago).

63. In a speech on June 18, 2018, former Attorney General Jeff Sessions stated: “We cannot and will not encourage people to bring children by giving them blanket immunity from our laws.” Att’y Gen. Jeff Sessions, Address at the National Sheriffs’ Association Annual Conference (June 18, 2018), <https://www.justice.gov/opa/speech/attorney-general->

ing to the bone. This is not a few misfits exercising free speech rights. Today's white supremacists include fourth generation Klan-descendants, with killing hands in their genealogy. The crowds who gawked at lynchings, bringing along their children and their picnic dinners, throughout the twentieth century, did not go away without leaving a legacy. In Maryville, Missouri, thousands showed up to witness one lynching.<sup>64</sup> The lynch mob crowds carried home souvenirs—a piece of noose or burnt human bone—and kept them in closets to show their grandchildren.<sup>65</sup> They taught a language of hate, dehumanization, entitlement, and fear that is now exploding on the World Wide Web.<sup>66</sup>

It is a myth of U.S. optimism that we don't have many neighbors with ugly things in their closets. Our Constitution engrained violence through the institution of slavery. The unsafety of a woman living under the domestic terrorism of rape culture is linked to the terror felt by the mother of a Black son. The formation of masculine identity in the time of slave patrols, the status of women as objects for rape and breeding, and the unlearning of the inhibition against killing through the unlearning of the human impulse of affinity grievously wound the American character. We are armed with assault weapons, adrift in a sea of hate, the Klan rising every single time a step is taken toward the realization of the Fourteenth Amendment, and rape—like spousal murder in domestic settings—is so

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sessions-delivers-remarks-national-sheriffs-association-annual [https://perma.cc/XW53-5RYF]; see also Att'y Gen. Jeff Sessions, Address at the Annual Joint Conference of the Montana Association of Chiefs of Police and Montana Police Protective Association (June 7, 2018), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-24th-annual-joint-conference-montana> [https://perma.cc/BG39-EZG4] (“I hope that we don't have to separate any more children from any more adults. But there's only one way to ensure that is the case: it's for people to stop smuggling children illegally. Stop crossing the border illegally with your children. Apply to enter lawfully. Wait your turn.”).

64. See GREENE ET. AL., *supra* note 49, at 149 (“Three miles south of Maryville, the mob chained the prisoner to the roof of the schoolhouse . . . doused the structure with gasoline, and set it on fire. A crowd of three thousand watched [him] burn alive.”); see also ORLANDO PATTERSON, *RITUALS OF BLOOD* 193 (1998) (describing the events leading to the lynching of Henry Smith who was arrested in Arkansas and brought back to Paris, Texas, by train. One eyewitness recounts, “Arriving here (Paris, Texas) at 12 o'clock the train was met by a surging mass of humanity 10,000 strong.”).

65. See ELLSWORTH, *supra* note 54, at 43 (describing the scenes following a lynching of Roy Belton reported in the *World* newspaper: “Hundreds rushed over the prostrate form to get bits of the clothing. The rope was cut into bits for souvenirs. . . . [T]he mob fairly fought over gruesome souvenirs.”); Harvey Young, *The Black Body as Souvenir in American Lynching*, 57 *THEATRE J.* 639, 639 (2005) (describing a horrific scene in which a man's ears, fingers, and genitals were amputated before he was burned alive: “Before the body was cool, it was cut to pieces, the bones were crushed into small bits, and even the tree upon which the wretch met his fate was torn up and disposed of as ‘souvenirs.’”).

66. A notable white supremacist hate site in today's America is the Daily Stormer. See, e.g., Keegan Hanks, *Intelligence Report: Eye of the Stormer*, S. POVERTY L. CTR. (Feb. 9, 2017), <https://www.splcenter.org/fighting-hate/intelligence-report/2017/eye-stormer> [https://perma.cc/ZDA3-XRW6]. For discussion of how right-wing activists recruit and disseminate misinformation on widely read websites, see Justin Ward, *Day of the Trope: White Nationalist Memes Thrive on Reddit's r/The\_Donald*, S. POVERTY L. CTR. (Apr. 19, 2018), <https://www.splcenter.org/hatewatch/2018/04/19/day-trope-white-nationalist-memes-thrive-reddits-rthedonald> [https://perma.cc/BR82-R2JX].

common a crime it barely makes the news.<sup>67</sup>

All of this is what we see when a cross burns on a suburban lawn. The cross is chosen because it carries with it in an instant 400 years' worth of terror. However we analyze the speech of cross burning, the embodied experience of life under a reign of terror must inform the conversation.

Let us close, however, with an entirely different idea. While we re-read the story of our failed Reconstruction, we might imagine the next, and final, one.

### III. CONCLUSION: EQUALITY CONSTRUCTS LIBERTY

We are at a large and looming crossroads, a period of great turmoil and amazing possibility. Racist hatemongers choose the road backwards to dystopian apocalypse, hoping that the annihilation of the rest of us will allow them to rise from the ashes without us. We may instead choose the road forward to a utopian vision, in which a woman of color is not their other, their object, their race war, but a sister to whom they can reach out a hand of mutual care. Most humans, given the chance, would prefer to live in the world some of us are trying to make, in which we move humbly on this earth, taking less and respecting all creatures, honoring the creative joy within all of us, released from fear because we know there is always a community that will lift us up from whatever hardship comes.

The current, fourth rise of the Klan, is its last. As constitutionalists, we come back to the Thirteenth, Fourteenth, and Fifteenth Amendments, the parts of the Constitution requiring that the state act to end oppression. Intersectional feminism teaches that no oppression ends until all oppression ends, and thus, the correct interpretation of the Reconstruction Amendments is the one that includes all of us, giving us true, substantive equality: fully human, recognized, protected, cared for, and supported. Nazis too, as soon as they put away their violence and hate and decide to join the community that we will either become or die.

Barbara Jordan said, "My faith in the Constitution is . . . complete."<sup>68</sup> No stranger to the failure of the Constitution to protect the basic human rights of Black Americans for centuries, she must have meant that her faith in the aspiration of the Constitution is complete. I share this faith. Securing the blessings of liberty through the Constitution is an aspiration I am sworn, as a lawyer, to uphold.

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67. See VIOLENCE POLICY CTR., *THE MILITARIZATION OF THE U.S. CIVILIAN FIREARMS MARKET* 1 (2011), <http://www.vpc.org/studies/militarization.pdf> [<https://perma.cc/D35K-MNRJ>] ("Selling militarized firearms to civilians . . . has been at the point of the [gun] industry's civilian design and marketing strategy since the 1980s. Today, militarized weapons—semiautomatic assault rifles, 50 caliber anti-armor sniper rifles, and armor-piercing handguns—define the U.S. civilian gun market . . .").

68. *Debate on Articles of Impeachment: Hearing on H.R. 803 Before the H. Comm. on the Judiciary*, 93rd Cong. (1974) (statement of Barbara Jordan, Representative from the 18th Congressional District of the State of Texas), reprinted in BARBARA C. JORDAN: SELECTED SPEECHES 105 (Sandra Parham ed., 1999) ("My faith in the Constitution is whole; it is complete; it is total.").

Holmes spent little time defending his starting premise in *Schenck* that a nation at war has interests that transcend the speech rights of “ordinary times.”<sup>69</sup> The man, who understood legal reasoning so well he believed he could explain all of it,<sup>70</sup> resorted to the unsatisfying logic of “of course.” It was self-evident to him that when words interfere with the war effort, they are the equivalent of shouting fire in a crowded theater. Having seen millions die in foolish wars that did not make us safer, my generation has no easy “of course” when it comes to government exercise of war powers. Certainly not since Hiroshima. If citizens care enough to stop a war with inciteful speech, that is exactly what the Constitution envisions. If the government cannot make its case for war effectively enough to overcome the shouting in the crowded theater, then perhaps the war should not proceed.

This is not an easy conclusion. I would have supported Holmes’s side in the Civil War. There were violent dissenters then, desperately seeking to undermine Abraham Lincoln’s war effort. “Draft riots”—more accurately anti-government racist pogroms—plagued Northern cities.<sup>71</sup> I understand Holmes’s concern. The only way out is to take sides and, since the Thirteenth and Fourteenth Amendments, we have taken sides, constitutionalizing the commitment to end white supremacy. The “draft riots,” and more controversially, the incitement to them, were crying fire in a crowded theater with specific targets: Black Americans. Lynching, cross burning, and propaganda for genocide are all a package. Dehumanization comes first. That is how lynching happens. This social reality is speech driven. We don’t stop lynching without addressing its psychological and social creation: the idea, the speech, at its core. Catharine MacKinnon would argue the same for rape.<sup>72</sup>

This is content analysis, the thing we are never supposed to do in content-neutral First Amendment jurisprudence. Increasingly we aren’t supposed to do this in equal protection analysis either.<sup>73</sup> If we are going to achieve equality, there is no other way than with eyes wide open to the context of content. We have to know and understand harm creation, who does what to whom, with what cultural imprimatur, with what history of

69. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

70. See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (1881).

71. See ADRIAN COOK, *THE ARMIES OF THE STREETS: THE NEW YORK CITY DRAFT RIOTS OF 1863*, at 49–74 (1974) (recounting the events leading up to the brutal racist attacks from July 13–16, 1863 where 105 people lost their lives); *id.* at 214–32 (listing the confirmed deaths and injuries of individuals resulting from the riots); see also DAVID M. BARNES, *THE DRAFT RIOTS IN NEW YORK* 8–20 (1863) (detailing first-hand accounts from police officers in the lower Manhattan precincts following the 1863 draft riots).

72. See, e.g., MACKINNON, *supra* note 9, at 212 (1989) (“Deeper than the personhood question or the violence question is the question of the mechanism of social causation by which pornography constructs women and sex, defining what ‘woman’ means and what sexuality is in terms of each other, hence excluding women’s social reality from the substantive definition of personhood.”).

73. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 339–43 (1987) (holding that the court will not presume racist reasons for racist outcomes even when no other reason makes sense); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 749 (2007) (refusing to distinguish between invidious discrimination and racial remediation).

violence, and with what body count, in order to discern the difference between assaultive speech and dissent.

The clear and present danger of climate chaos will require all hands on deck—all citizens standing free, equal, and mutual—if we are to respond in a way that does not end democracy itself. Fear and scarcity are twin democracy killers. These killers are coming for us, and if social practices of dehumanization prevail, we will fall. This is why I am a constitutionalist who believes we should restrict hate speech and a pacifist committed to dissent in a crowded theater.