

VIOLENCE IN THE NAME OF THE CONFEDERACY: AMERICA'S FAILURE TO DEFEAT THE LOST CAUSE

*Emily R. Larrabee**

ABSTRACT

Since the immediate aftermath of the American Civil War, the United States has been plagued with its violent consequences. Following the Civil War, there was a rise of neo-Confederate hate groups who preached the "Lost Cause" ideology. To this day, these groups continue to plague the United States. The failure to invalidate the Lost Cause ideology, which drained the American Civil War of all historical context, has led to increased racial violence and a general inability to control the neo-Confederate hate groups that have gained traction and gall in recent years. Without swift action to counteract the violence perpetrated in the name of the Confederacy, the next storming of the Capitol could turn into the next civil war. Congress should enact legislation as Germany did in response to Nazi violence after World War II to curb the perpetuation of neo-Confederate and other hate-group-related violence in the United States.

*This Note utilizes a novel approach to the unique issue that Confederate imagery poses to the American public. It adds to the current literature a roadmap to aid in dismantling white supremacy in the United States. This Note also builds on the work of philosopher Susan Neiman and her book, *Learning from the Germans*, by calling on Congress to take action, switching the perspective to view the issue through a legal lens, and mimicking the structure of laws passed in post-War Germany.*

* Emily Larrabee is from Charlottesville, Virginia. She is a 2022 J.D. candidate at Drexel University's Thomas R. Kline School of Law. She received a B.A. in international studies, with a concentration in world politics and diplomacy, and minors in Chinese studies and Latin American and Iberian studies from the University of Richmond.

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INTRODUCTION

Violence perpetrated in the name of the Confederacy is so commonplace in American society¹ that evidence of a defendant’s allegiance to racist neo-Confederate hate groups can be excluded from his murder trial in which he is accused of fatally shooting a Black man while serving as a police officer.² Police officers with ties to neo-Confederate hate groups are not

1. See generally *Hate by the Numbers*, JIGSAW, <https://jigsaw.google.com/the-current/white-supremacy/data-visualization/> (last visited Oct. 30, 2021) (discussing data relating to violent white supremacist extremist attacks in the United States).

2. Dan Sewell, *Judge: No Confederate Flag T-Shirt in Officer’s Retrial*, AP NEWS (May 26, 2017), <https://apnews.com/article/71fa13ca7ecd4e53a20ce327e4707329>.

an anomaly.³ One disturbing account details a Chicago police officer with ties to the KKK who tortured at least 100 Black men whom he allegedly suspected to have committed crimes.⁴ The officer, Jon Burge, was convicted of multiple offenses for his use of torture methods, including pressing electric cattle prods to the men's testicles.⁵ If the United States had a methodology for weeding out members of neo-Confederate hate groups, such as the KKK, from pools of applicants for positions of power within the sphere of public service, such as police officers, countless lives may be spared.

This Note addresses violence perpetrated by neo-Confederate hate groups as such violence becomes more prevalent in the United States. "Neo-Confederate" is a term used to describe the belief that the Confederacy was heroic in its fight for states' rights in the Civil War, and it is typically used to describe a specific branch of white nationalism with a predilection for Confederate symbols.⁶ Neo-Confederate groups disseminate a version of the Civil War typically referred to as the "Lost Cause."⁷ The Lost Cause reflects an ideology that began in the Reconstruction era to rehabilitate the reputation of the South by twisting the cause of the Civil War into a battle for states' rights.⁸

To finally eradicate neo-Confederate and other hate-group-related violence, the United States should look to Germany for guidance, create an appropriate crime for domestic terrorism,

3. See Samuel Vincent Jones, *Law Enforcement and White Power: An F.B.I. Report Unraveled*, 41 T. MARSHALL L. REV. 103, 104 (2015).

4. Marwa Eltagouri, *Chicago's New Center for Police-Torture Victims Is First of Its Kind in U.S.*, CHI. TRIB. (May 27, 2017, 6:05 PM), <https://www.chicagotribune.com/news/breaking/ct-burge-torture-justice-center-met-20170526-story.html>.

5. *Id.*

6. *Neo-Confederate*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/ideology/neo-confederate> (last visited Oct. 20, 2021).

7. *The Lost Cause: Definition and Origins*, AM. BATTLEFIELD TR., <https://www.battlefields.org/learn/articles/lost-cause-definition-and-origins> (July 14, 2021).

8. See *id.* ("There are six main parts of the Lost Cause myth, the first and most important of which is that secession had little or nothing to do with the institution of slavery. Southern states seceded to protect their rights, their homes, and to throw off the shackles of a tyrannical government.").

remove Confederate pilgrimage sites, and ban public displays of Confederate symbolism. Ultimately, Congress should enact legislation, just as Germany did in response to Nazi violence, to curb the perpetuation of neo-Confederate and other hate-group-related violence in the United States.

Part I of this Note addresses the history of white supremacy in America, which has set the stage for the violence to which American society has become desensitized. Part II juxtaposes the American history of white supremacy to Germany's history of Nazism and the rise of neo-Nazi ideology in the wake of World War II. Finally, Part III offers solutions directed toward the removal of Confederate imagery and namesakes from American society.

I. THE AMERICAN HISTORICAL BACKGROUND

A. *A Legacy of Violence*

Racial violence has taken many distinct but similar forms in American history. After slavery was abolished in the wake of the Civil War, lynchings, vicious attacks, and political and social oppression became commonplace tools of enforcing a racial hierarchy in American society.⁹ The government's longstanding lackluster response to that violence has allowed neo-Confederate violence to persist throughout American history. From the lengths to which the Confederacy went to maintain the institution of slavery, to the hate groups that sprung up in the Confederacy's place, slavery's effects are entrenched throughout American history.

1. *A brief history of the Confederacy*

Legislation from Northern states strained the already fraught relationship between the Union and the Confederacy.

9. See EQUAL JUST. INITIATIVE, RECONSTRUCTION IN AMERICA: RACIAL VIOLENCE AFTER THE CIVIL WAR, 1865-1876, at 6-7 (2020), <https://eji.org/wp-content/uploads/2020/07/reconstruction-in-america-report.pdf>.

Pennsylvania, for instance, enacted a law aimed at preventing fugitive slaves from being recaptured.¹⁰ In response to that law, the Supreme Court decided *Prigg v. Pennsylvania* in 1842, which lit a match that would eventually erupt into the Civil War.¹¹ *Prigg* offended both abolitionists and slaveholders.¹² In *Prigg*, the Supreme Court upheld the Fugitive Slave Act of 1793,¹³ a law abolitionists challenged for want of procedural protections that would prevent free Black people from being wrongly captured.¹⁴ In doing so, the Court struck down Pennsylvania's law to prevent recapture, signaling that other states' similar "personal liberty laws . . . that aimed to provide such procedural protections" were likewise unconstitutional, garnering backlash from abolitionists.¹⁵

The *Prigg* Court also declared unconstitutional Southern state laws designed to permit the capture and imprisonment of Black people suspected of being runaway slaves, while upholding Northern states' practice of forbidding state employees from enforcing the Fugitive Slave Act.¹⁶ The Court's decision effectively made the Fugitive Slave Act of 1793 unenforceable, leaving slaveholders outraged.¹⁷ That outrage translated into calls for secession, and the divide between the Union and Confederacy widened.¹⁸

On December 24, 1860, South Carolina was the first state to secede from the Union with the issuance of its "Declaration of the Immediate Causes Which Induce and Justify the Secession

10. See *Prigg v. Pennsylvania*, 41 U.S. 539, 608 (1842).

11. *Id.*; see also Nicholas Mosvick, *On This Day, The Supreme Court Decides Prigg v. Pennsylvania*, NAT'L CONST. CTR. (Mar. 1, 2020), <https://constitutioncenter.org/interactive-constitution/blog/on-this-day-the-supreme-court-decides-prigg-v-pennsylvania> (noting that *Prigg* had "far-reaching consequences" leading to the passage of new "personal liberty" laws and the new Fugitive Slave Act of 1850—which would later spark the Civil War).

12. Leslie Friedman Goldstein, *A "Triumph of Freedom" After All? Prigg v. Pennsylvania Re-Examined*, 29 L. & HIST. REV. 763, 763 (2011).

13. *Prigg*, 41 U.S. at 622.

14. Goldstein, *supra* note 12, at 763.

15. *Id.*

16. *Id.* at 764.

17. *Id.*

18. See Mosvick, *supra* note 11.

of South Carolina from the Federal Union.”¹⁹ The Declaration aired grievances with Northern state laws that came in the aftermath of the *Prigg* decision and were designed to prevent the return of fugitive slaves to the South.²⁰ South Carolina’s secession was thus directly aligned with its position regarding the validity of slavery.²¹

Despite the clear connection between secession and slavery, ashamed Confederate sympathizers have spun a false narrative of the Civil War to reflect the idea that the war was the product of a battle over states’ rights.²² But Alexander Stephens, vice president of the Confederacy, made the true intentions of the South clear in his Cornerstone Address, given mere weeks before the start of the War:

[T]he new Constitution has put at rest *forever* all the agitating questions relating to our peculiar institutions—African slavery as it exists amongst us—the proper *status* of the negro in our form of civilization. *This was the immediate cause of the late rupture and present revolution. . . . The prevailing ideas entertained by [Jefferson] and most of the leading statesmen at the time of the formation of the old Constitution were, that the enslavement of the African*

19. SOUTH CAROLINA CONVENTION, THE DECLARATION OF THE IMMEDIATE CAUSES WHICH INDUCE AND JUSTIFY THE SECESSION OF SOUTH CAROLINA FROM THE FEDERAL UNION (Charleston, South Carolina, Evans & Cogswell 1860).

20. *See id.*; *see generally* *Prigg v. Pennsylvania*, 41 U.S. 539 (1842) (upholding the Fugitive Slave Act of 1793).

21. *See South Carolina Secession*, NAT’L PARK SERV., <https://www.nps.gov/articles/000/south-carolina-secession.htm> (Mar. 30, 2021) (“According to South Carolina’s declaration, secession occurred because of threats, both real and perceived, to the institution of slavery.”).

22. *See, e.g.*, William Black, *Confessions of a Former Neo-Confederate*, VOX, <https://www.vox.com/first-person/2016/9/30/13090100/confederacy-myths-lost-cause> (Dec. 16, 2016, 9:10 AM) (recounting how the author previously believed that: “slavery in the antebellum South wasn’t as awful as some people made it out to be,” that “the Confederacy seceded to preserve states’ rights, not slavery,” that “Reconstruction was . . . a prime example of federal overreach,” and that “the Confederate flag was a symbol of Southern pride, not racism”). The states’ rights narrative finds no basis in history; while “Confederate states did claim the right to secede,” not one “claimed to be seceding for that right.” James W. Loewen, Opinion, *Five Myths About Why the South Seceded*, WASH. POST (Feb. 26, 2011), https://www.washingtonpost.com/outlook/five-myths-about-why-the-south-seceded/2011/01/03/ABHr6jD_story.html.

*was in violation of the laws of nature; that it was wrong in principle, socially, morally, and politically. . . . Those ideas, however, were fundamentally wrong. They rested upon the assumption of the equality of races. This was an error. . . . [The Confederacy] is founded upon exactly the opposite ideas; its foundations are laid, its cornerstone rests, upon the great truth that the negro is not equal to the white man; that slavery, subordination to the superior race, is his natural and moral condition.*²³

Stephens' address clearly articulated that the Confederacy's motivation to secede was to uphold slavery as an institution.

The United States Supreme Court has long recognized the connection between slavery and the Civil War.²⁴ In the *Slaughter-House Cases*, the Court explained that slavery was the most overt cause of the Civil War and that Congress drafted the Thirteenth and Fourteenth Amendments in the aftermath of the Civil War to eradicate slavery.²⁵ The Thirteenth, Fourteenth, and Fifteenth Amendments were adopted during the Reconstruction period to ensure that newly freed, formerly enslaved people would enjoy the protections of the Constitution.²⁶ Congress conditioned former Confederate

23. Paul Halsall, *Modern History Sourcebook: Alexander H. Stephens (1812-1883): Cornerstone Address, March 21, 1861*, FORDHAM UNIV. (July 1998), <https://sourcebooks.fordham.edu/mod/1861stephens.asp>.

24. *See, e.g.*, *Slaughter-House Cases*, 83 U.S. 36, 68 (1872).

25. *Id.* at 68–70. The Court explained that

[t]he institution of African slavery, as it existed in about half the States of the Union, and the contests pervading the public mind for many years, between those who desired its curtailment and ultimate extinction and those who desired additional safeguards for its security and perpetuation, culminated in the effort, on the part of most of the States in which slavery existed, to separate from the Federal government, and to resist its authority. This constituted the war of the rebellion, and whatever auxiliary causes may have contributed to bring about this war, undoubtedly the overshadowing and efficient cause [of the Civil War] was African slavery.

Id. at 68.

26. *Landmark Legislation: Thirteenth, Fourteenth, & Fifteenth Amendments*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/generic/CivilWarAmendments.htm> (last visited Oct. 24, 2021).

states' eligibility to rejoin the federation on the adoption of the Fourteenth Amendment.²⁷

Congress, however, failed to balance the interests of angry former slaveholders and the safety of formerly enslaved people, making its efforts futile in the face of Southerners determined to maintain white supremacy.²⁸ In 1862, President Abraham Lincoln signed a bill that emancipated the enslaved people of the District of Columbia and compensated former slaveholders up to three hundred dollars for each freed slave.²⁹ Lincoln found justification for reparations to slaveholders in the Fifth Amendment's Takings Clause, which requires "just compensation" when the government seizes private property.³⁰ In other words, by rewarding Southerners when they freed their slaves, the government legitimized both the acquisition of slaves and the notion that former slaves were still property in the eyes of the law. Had the government intended to condemn the practice of slavery, it would have adopted one of the various proposals to provide freed slaves with some form of reparations.³¹ Reparations for former slaves would have been warranted because slaves were stolen from their homes, separated from their children, bought and sold as property, and exploited for labor.³² But financial injustice was only the beginning.

27. *Id.*

28. See generally Tera W. Hunter, *When Slaveowners Got Reparations*, N.Y. TIMES (Apr. 16, 2019), <https://www.nytimes.com/2019/04/16/opinion/when-slaveowners-got-reparations.html> (discussing how "the District of Columbia Emancipation Act paid those loyal to the Union up to \$300 for every enslaved person freed," but failed to compensate those who had been enslaved).

29. *Id.*

30. *Id.*

31. See e.g., Henry Louis Gates, Jr., *The Truth Behind '40 Acres and a Mule'*, PBS, <https://www.pbs.org/wnet/african-americans-many-rivers-to-cross/history/the-truth-behind-40-acres-and-a-mule/> (last visited Oct. 24, 2021) (describing some of the proffered reparations to freed slaves that never came to pass).

32. See SAMUEL WOOD, *INJURED HUMANITY; BEING A REPRESENTATION OF WHAT THE UNHAPPY CHILDREN OF AFRICA ENDURE FROM THOSE WHO CALL THEMSELVES CHRISTIANS* (New York, Samuel Wood 1805); Anne C. Bailey & Dannielle Bowman, *For Hundreds of Years, Enslaved People Were Bought and Sold in America. Today Most of the Sites of this Trade are Forgotten.*, N.Y.

On Christmas Day of 1868, President Andrew Johnson gifted Confederate soldiers pardons “for the offence of treason against the United States, or of adhering to their enemies during the late Civil War, with restoration of all rights, privileges, and immunities under the Constitution and the laws.”³³ Lincoln had previously contemplated such pardons in his Southern Reconstruction plans.³⁴ Governmental condonation of Confederate ideals allowed racial violence to flourish, and the righteous narrative of the South emerged.³⁵ Predictably, therefore, Confederate sympathizers began to skew the Civil War narrative to reflect favorably on Confederate states.

2. *The Lost Cause*

The Lost Cause is the byproduct of a collective romanticization of the antebellum South by neo-Confederates attempting to defend the cause of the Confederacy and the Civil War.³⁶ Their defense of the Confederacy and the Civil War has created a “pseudo-history.”³⁷ Specifically, neo-Confederates mutilate history by “soft-pedal[ing] the atrocities of slavery and accentuat[ing] Confederate grievance and gallantry.”³⁸ The Lost Cause has come to stand for something noble and virtuous.³⁹ One theologian, Charles Reagan Wilson, describes the Lost Cause as the South’s answer to the death of their nation and the creation of a cultural identity rooted in religion that portrays

TIMES MAG., <https://www.nytimes.com/interactive/2020/02/12/magazine/1619-project-slave-auction-sites.html> (last visited Oct. 24, 2021).

33. Andrew Glass, *All Confederate Soldiers Gain Presidential Pardons, Dec. 25, 1868*, POLITICO (Dec. 25, 2018, 8:19 AM), <https://www.politico.com/story/2018/12/25/this-day-in-politics-dec-25-1868-1074077>.

34. *Id.*

35. See, e.g., *id.*; Paul Duggan, *Sins of the Fathers*, WASH. POST (Nov. 28, 2018), <https://www.washingtonpost.com/news/magazine/wp/2018/11/28/feature/the-confederacy-was-built-on-slavery-how-can-so-many-southern-whites-still-believe-otherwise/>.

36. Duggan, *supra* note 35 (“[T]he Confederacy’s grown children set about trying to rewrite their fathers’ legacy . . . Around dinner tables and campfires, and in white classrooms, a stirring tale was told of chivalry and fortitude—the enduring creed of the Lost Cause.”).

37. *Id.*

38. *Id.*

39. *Id.*

the South as “an innocent victim crucified by superior political and economic forces.”⁴⁰

The Lost Cause has six main tenets: (1) secession was motivated by the protection of the Confederate states’ rights and had “little or nothing to do with the institution of slavery;” (2) slavery was favored by enslaved people, who were “better off” under the care of their enslavers; (3) the Confederacy lost the Civil War only because they were outnumbered by Union troops; (4) Confederate soldiers were honorable, virtuous men; (5) Robert E. Lee is a sanctimonious figure worthy of reverence; and (6) the idealistic white Southern woman supported the Confederate cause.⁴¹ The Lost Cause, however, is an inappropriate contextualization of the Civil War because it ignores the brutality and torture that Black people endured, and replaces those unpleasanties with white-washed stories of valor and bravery.⁴²

Popular culture’s glamorization of the Civil War, coupled with its misrepresentation in the American education system, perpetuates the harms caused by the Lost Cause.⁴³ The Lost

40. SUSAN NEIMAN, *LEARNING FROM THE GERMANS: RACE AND THE MEMORY OF EVIL* 203 (2019).

41. *The Lost Cause: Definition and Origins*, *supra* note 7.

42. See Khalil Gibran Muhammad, *The Sugar That Saturates the American Diet Has a Barbaric History as the ‘White Gold’ That Fueled Slavery*, N.Y. TIMES MAG., Aug. 18, 2019, at 73 (describing the brutality and torture that former slaves endured and how this truth is often not told in the classroom, due in part to the white-washing of American history).

43. The Lost Cause ideology is not just something hate groups subscribe to; it is deeply engrained in mainstream American culture through other mechanisms, including entertainment and educational textbooks, among other outlets. See Greg Huffman, *Twisted Sources: How Confederate Propaganda Ended Up in the South’s Schoolbooks*, FACING SOUTH (Apr. 10, 2019), <https://www.facingsouth.org/2019/04/twisted-sources-how-confederate-propaganda-ended-souths-schoolbooks> (explaining how Confederate heritage groups ensured that the Lost Cause ideology was present in school textbooks in the South for decades following the Civil War and continuing through the 1960s); Sidney Blumenthal, *Romanticizing the Villains of the Civil War*, THE ATLANTIC (July 22, 2013), <https://www.theatlantic.com/national/archive/2013/07/romanticizing-the-villains-of-the-civil-war/277969/> (criticizing movies such as *Copperhead*, *Gone with the Wind*, and *Gods and Generals* for their revisionist history depictions of the Civil War); see also NEIMAN, *supra* note 40, at 187 (“Hollywood turned out hundreds of films suggesting that the war was a tragic misunderstanding, including two starring Shirley Temple, who made the Lost Cause look not only noble and valiant but incontestably cute.”); Jason Nuckolls, *McGraw-Hill to Rewrite Textbook After Online Outrage Over Whitewashed History*, METRO (Oct. 5, 2015),

Cause myth has had detrimental effects on the ability of United States citizens to conceptualize the motives behind the Civil War.⁴⁴ This gap in understanding has resulted in continued racial violence.⁴⁵

The Lost Cause is rooted in white supremacy because it attempts to rewrite history by painting Southern states with honor and dignity, instead of confronting the truth behind the racism-fueled war that culminated in the deaths of an estimated 750,000 people.⁴⁶ The Anti-Defamation League defines White supremacy as:

[A] term used to characterize various belief systems central to which are one or more of the following key tenets: 1) whites should have dominance over people of other backgrounds, especially where they may co-exist; 2) whites should live by themselves in a whites-only society; 3) white people have their own 'culture' that is superior to other cultures; 4) white people are genetically superior to other people.⁴⁷

<https://www.metro.us/mcgraw-hill-to-rewrite-textbook-after-online-outrage-over-whitewashed-history/> (describing backlash faced by textbook publisher McGraw-Hill in response to a section in a history textbook that "described the African slave trade as bringing millions of 'workers' to America").

44. A Pew Research Center poll showed that when asked about the primary cause of the Civil War, a plurality of Americans (48%) identified states' rights as that cause, whereas only 38% identified slavery as its primary cause. Russell Heimlich, *What Caused the Civil War?*, PEW RSCH. CTR. (May 18, 2011), <https://www.pewresearch.org/fact-tank/2011/05/18/what-caused-the-civil-war/>.

45. See Blumenthal, *supra* note 43 ("The Lost Cause myth was at its heart not a matter of a differing interpretation, but of the falsification and suppression of history in order to vindicate the Confederacy and later to justify Jim Crow.").

46. Guy Gugliotta, *New Estimate Raises Civil War Death Toll*, N.Y. TIMES (Apr. 2, 2012), <https://www.nytimes.com/2012/04/03/science/civil-war-toll-up-by-20-percent-in-new-estimate.html>. For over a hundred years, the accepted number of Civil War deaths was 620,000. See Jennie Cohen, *Civil War Deadlier Than Previously Thought?*, HIST. <https://www.history.com/news/civil-war-deadlier-than-previously-thought> (Aug. 31, 2018). However, a more recent estimate puts the number of deaths between 650,000 and 850,000, with 750,000 as the official estimate. Gugliotta, *supra*; Cohen, *supra*.

47. *White Supremacy*, ADL, <https://www.adl.org/resources/glossary-terms/white-supremacy> (last visited Jan. 4, 2021).

White supremacy is more than just a mindset exclusive to hate groups like the Ku Klux Klan (KKK).⁴⁸ Rather, it is a broad outlook or belief that spreads far beyond the explicit racism embodied by hate groups, with the potential to occupy the mind of anyone actively or passively contemplating race relations.⁴⁹ It is a mentality openly embraced by several hate groups that rose from the ashes of the Civil War.⁵⁰

3. *Hate groups that idealize the Lost Cause or evolved from its legacy*

After the Civil War, the United States failed to disincentivize and control neo-Confederate groups. Today, there are multiple sects of neo-Confederacy that have minute differences.⁵¹ The differences range from Lost Cause sympathizers who believe the debunked assertion that the fight for states' rights led to the Civil War, to those who use their belief in the Lost Cause as a mechanism to promote a racist dogma that was prominent in the Confederate South.⁵² Ultimately, all Neo-Confederate organizations seek to redefine American history and relive the atrocities of the antebellum South.⁵³ As part of their hate campaigns, neo-Confederate organizations like the KKK have denied Black Americans their right to vote through violence and intimidation,⁵⁴ and perpetuate false romanticism of history.⁵⁵

48. See Janice Gassam Asare, *4 Myths About White Supremacy That Allow It to Continue*, FORBES (Jan. 14, 2021, 10:23 PM), <https://www.forbes.com/sites/janicegassam/2021/01/14/4-myths-about-white-supremacy-that-allow-it-to-continue> ("In the workplace, for example, company policies and practices may perpetuate white supremacy.").

49. See *id.* ("There is this false narrative that white supremacists are these outspoken extremists . . . [yet] we overlook the white supremacists lurking in our workplaces, our schools, and within our communities.").

50. See *infra* Section I.A.3 (describing white supremacist organizations whose roots trace back to the Civil War).

51. See *Neo-Confederate*, *supra* note 6.

52. See *infra* Section I.A.3; *Neo-Confederate*, *supra* note 6.

53. *Id.*

54. LISA KLOBUCHAR, 1963 BIRMINGHAM CHURCH BOMBING: THE KU KLUX KLAN'S HISTORY OF TERROR 24–25 (2009).

55. See *infra* Section I.A.3 (discussing various neo-Confederate organizations and the ways in which they have perpetuated false historical narratives, thereby re-writing history).

The United Daughters of the Confederacy (“the Daughters”), a conglomerate of women that united during the Civil War to support Confederate soldiers, still exists today, and historians blame the group for disseminating false information relating to the Civil War that promotes white supremacy.⁵⁶ The Southern Poverty Law Center has criticized the Daughters as one of the most prominent proponents of the Lost Cause fallacy.⁵⁷ In 2017, the Daughters responded to the widely publicized (and criticized) white supremacist rally in Charlottesville, Virginia, with a statement denouncing white supremacist ideals and eschewing various Confederate symbols that hate groups had adopted.⁵⁸ However, its response to the violence in Charlottesville was hollow because the Daughters nonetheless affirmed their support of Confederate monuments. This support most likely stems from the group’s creation of at least 450 Confederate monuments.⁵⁹ The group’s attempt to distinguish between violent and non-violent neo-Confederate groups ignores the overlap between the two kinds of groups and the identical motivations behind all neo-Confederate groups—to advocate for the validity of antebellum South traditions, including slavery.⁶⁰

The Sons of Confederate Veterans group also supports the Lost Cause fallacy.⁶¹ The remnants of the United Confederate Veterans formed the Sons of Confederate Veterans, which is still active today.⁶² The group promises to “preserv[e] the history and legacy of [Confederate] heroes so that future generations can understand their motives[,] emulate [the

56. *Whose Heritage? Public Symbols of the Confederacy*, S. POVERTY L. CTR. (Feb. 1, 2019), <https://www.splcenter.org/20190201/whose-heritage-public-symbols-confederacy> [hereinafter *Whose Heritage?*]; Huffman, *supra* note 43.

57. Allen G. Breed, *‘The Lost Cause’: The Women’s Group Fighting for Confederate Monuments*, GUARDIAN (Aug. 10, 2018, 12:17 PM), <https://www.theguardian.com/us-news/2018/aug/10/united-daughters-of-the-confederacy-statues-lawsuit>.

58. *Whose Heritage?*, *supra* note 56.

59. Breed, *supra* note 57.

60. See *Neo-Confederate*, *supra* note 6.

61. See Duggan, *supra* note 35.

62. See SONS OF CONFEDERATE VETERANS, <https://scv.org/> (last visited Oct. 20, 2021).

Confederate soldiers’] virtues,” and effectuate those principles.⁶³ Sons of Confederate Veterans endorses the idea that Southerners took in slaves because Black people were “barbarian and cannibal, [and that Southerners then] civilized [the Black man], supported [the Black man], clothed [the Black man], and turned [the Black man into] a devout Christian.”⁶⁴ Through this message, the Sons of Confederate Veterans has drained the Confederacy of its historical context and promoted the idea that the Civil War was a righteous fight exclusively based on “states’ rights.”⁶⁵

Probably the most popular white supremacist organization that sprung from the aftermath of the Civil War was the KKK.⁶⁶ Confederate veterans formed the group in direct response to the Union’s victory and the changes that ensued, as well as out of fear that the Union would upend the power balance between former slaves and slaveholders.⁶⁷ Adorned in white hoods and robes, they set out to ensure that formerly enslaved people would live in perpetual fear for their lives.⁶⁸ The KKK committed lynchings, shootings, and arsons of schools and homes to preserve its reign of terror.⁶⁹ Members committed these crimes because they were frustrated that they could no longer legally terrorize African Americans as they did as slaveholders.⁷⁰ While their violence was illegal and thus not officially condoned, states often did not punish perpetrators.⁷¹

63. *Id.*

64. LYON GARDINER TYLER, *A CONFEDERATE CATECHISM: THE WAR OF 1861-1865*, at 11 (3d ed. 1929).

65. See *SONS OF CONFEDERATE VETERANS*, *supra* note 62 (citing “[t]he preservation of liberty and freedom” as the South’s “motivating factor” for fighting in the Civil War); John Semley, *What If We Treated Confederate Symbols the Way We Treated the Defeated Nazis?*, *GUARDIAN* (July 2, 2020, 8:55 AM), <https://www.theguardian.com/commentisfree/2020/jul/02/what-if-we-treated-confederate-symbols-the-way-we-treated-the-defeated-nazis> (describing how, post-Civil War, white southerners “recast[] chattel slavery not as an abject moral horror, but a matter of states’ rights”).

66. See *KLOBUCHAR*, *supra* note 54, at 16.

67. *Id.* at 16–18.

68. *Id.* at 19–20.

69. *Id.* at 21.

70. See *id.* at 22.

71. *Id.*

Some law enforcement officials shared a general sense of fear that prohibited them from coming down on the KKK, while others were members of the vicious group themselves.⁷²

White supremacy exists within all levels of law enforcement throughout the country.⁷³ Indeed, there is significant evidence of racism towards African Americans by the police dating back to the Civil Rights Era.⁷⁴ But even before the Civil Rights Era, the origins of police departments date back to bands of white citizens gathering in pursuit of runaway slaves.⁷⁵ In the wake of the Civil Rights Era, however, American society has whitewashed the history of racism in policing.⁷⁶ Notably, the whitewashing has not stopped law enforcement officials from being outed as members of neo-Confederate hate groups. For instance, in 1991, a federal judge found that members of the Los Angeles sheriff's department were involved in a "neo-Nazi, white supremacist gang" that targeted Black and Latino community members.⁷⁷ Then, in Cleveland, Ohio, in 1999, Nazi

72. *Id.*; see also *id.* at 26 ("In May 1871, Congress began another investigation of the KKK. Hundreds of witnesses testified over many months The panel submitted its 632-page report in February 1872. The investigation found that the KKK had carried out terrorist activities in the South. The report said local governments had done nothing to stop them and in some cases had supported them.").

73. See, e.g., Lynne Peeples, *Brutality and Racial Bias: What the Data Say*, 583 NATURE 22 (July 2, 2020), <https://media.nature.com/original/magazine-assets/d41586-020-01846-z/d41586-020-01846-z.pdf>.

74. Michael German, *Hidden in Plain Sight: Racism, White Supremacy, and Far-Right Militancy in Law Enforcement*, BRENNAN CTR. FOR JUST. (Aug. 27, 2020), <https://www.brennancenter.org/our-work/research-reports/hidden-plain-sight-racism-white-supremacy-and-far-right-militancy-law>.

75. See Stephen L. Carter, *Policing and Oppression Have a Long History*, BLOOMBERG (Oct. 29, 2015, 6:19 PM), <https://www.bloomberg.com/opinion/articles/2015-10-29/policing-and-oppression-have-a-long-history>; see also Victor E. Kappeler, *A Brief History of Slavery and the Origins of American Policing*, EKU ONLINE (Jan. 7, 2014), <https://ekuonline.eku.edu/blog/police-studies/brief-history-slavery-and-origins-american-policing/>.

76. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 43–47 (rev. ed. 2012) (describing how the U.S. Government's "law and order" catchphrase validated and improved the public perception of Civil Rights Era policing so much that it even brought opposing political parties together).

77. Hector Tobar, *Deputies in 'Neo-Nazi' Gang, Judge Found: Sheriff's Department: Many at Lynwood Office Have Engaged in Racially Motivated Violence Against Blacks and Latinos, Jurist Wrote.*, L.A. TIMES (Oct. 12, 1991, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1991-10-12-me-107-story.html>.

symbols were found in police precincts.⁷⁸ The symbols were believed to have been placed there by certain officers within the precinct, who were also accused of wearing pins symbolizing white power.⁷⁹ In another instance, two Texas police officers were fired in 2001 after they tried to recruit another officer into their KKK chapter.⁸⁰ In 2013, a police lieutenant in Alabama was publicly outed for being a member of the League of the South, a neo-Confederate hate group.⁸¹

Neo-Confederate white nationalist organizations use claims of heritage to rationalize their beliefs.⁸² To signal their beliefs, many groups use variations of the Confederate flag on their group-specific flags.⁸³ One such group is the League of the South.⁸⁴ The League of the South is a hate group to its core.⁸⁵ It is described by one academic as “a burgeoning organization of mostly middle-class, often academic, certainly angry, white men . . . [whose] mission is to alert like-minded ‘neo-Confederates’ to ‘heritage violations,’” and “to return [the South] to the ‘order’ it once had before . . . the Civil Rights Movement.”⁸⁶ The League of the South continues its dreams of

78. Karin Scholz & Ted Wendling, *Racist Graffiti in the Cleveland PD*, PLAIN DEALER (July 22, 1999), http://www.mdcbowen.org/p2/bh/racist_graffitti_in_the_cleveland.htm

79. *Id.*

80. *Texas Officers Fired for Membership in KKK*, ABC NEWS (Jan. 7, 2006, 10:18 AM), <https://abcnews.go.com/US/story?id=93046>.

81. Keegan Hankes, *Anniston Police Department Has Two Hate Group Members on the Force*, S. POVERTY L. CTR. (June 17, 2015), <https://www.splcenter.org/hatewatch/2015/06/16/anniston-police-department-has-two-hate-group-members-force>. The lieutenant’s membership ultimately led to his firing two years later. See William Thorton, *Lawsuit of Anniston Police Officer Fired Over Hate Group Dismissed*, AL.COM, https://www.al.com/news/anniston-gadsden/2017/10/lawsuit_of_anniston_police_off.html (Mar. 06, 2019, 9:22 PM).

82. See, e.g., Christopher M. Centner, *Neo-Confederates at the Gate: The Rehabilitation of the Confederate Cause and the Distortion of History*, 9 SKEPTIC 60 (Fall 2002).

83. See, e.g., *The Past as Prelude: The League of the South and the Origins of the Neo-Confederate “Cushman” Flag*, S. POVERTY L. CTR. (Aug. 10, 2016), <https://www.splcenter.org/hatewatch/2016/08/10/past-prelude-league-south-and-origins-neo-confederate-“cushman”-flag> [hereinafter *The Past as Prelude*]; *Neo-Confederate*, *supra* note 6.

84. *The Past as Prelude*, *supra* note 83.

85. See *League of the South*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/league-south> (last visited Oct. 20, 2021).

86. EUAN HAGUE, HEIDI BEIRICH & EDWARD H. SEBESTA, *NEO-CONFEDERACY: A CRITICAL INTRODUCTION* 3 (2008) (quoting Diane Roberts, *Real Lives: Ghosts of the Gallant South*, GUARDIAN, July 22, 1996, at 14).

secession—the group is known for its roadside “SECEDE” billboards throughout the South.⁸⁷

Neo-Confederate ideas thrive in the Southern political sphere.⁸⁸ Congressional members have public affiliations with neo-Confederate groups.⁸⁹ Former Senate Majority Leader Trent Lott (R-Miss.) was often photographed with the Council of Conservative Citizens, a white supremacist organization.⁹⁰ Representative Robert L. Barr (R-Ga.) appeared as a speaker before the same organization.⁹¹ Both members of Congress faced backlash and criticism for aligning themselves with the Council, and they later attempted to distance themselves from the organization.⁹² The Council of Conservative Citizens unapologetically confirmed its relationships with both Congressmen, affirming “their opposition to immigration, racially integrated schools, affirmative action, and their fight to protect ‘such symbols of southern heritage as Confederate monuments and public displays of the Confederate flag.’”⁹³

Groups like the Sons of Confederate Veterans and Daughters of the Confederacy continue to threaten Black Americans.⁹⁴

87. See Associated Press, *Alabama-Based Southern Nationalists Again Calling for South to Secede*, AL.COM, https://www.al.com/news/2017/08/alabama-based_southern_nationa.html (Jan. 13, 2019, 11:47 AM); Don Terry, *LOS Comes to Harrison with Another ‘Secede’ Billboard*, S. Poverty L. Ctr. (Jan. 29, 2015), <https://www.splcenter.org/hatewatch/2015/01/29/los-comes-harrison-another-secede-billboard> (noting that the League of the South has unveiled billboards in Arkansas, Florida, Tennessee, Georgia, and Alabama).

88. See Thomas B. Edsall, *Controversial Group Has Ties to Both Parties in South*, WASH. POST, at A2 (Jan. 13, 1999), <https://www.washingtonpost.com/wp-srv/politics/daily/jan99/south13.htm>; Max Boot, *Opinion: The GOP is Now the Party of Neo-Confederates*, WASH. POST. (Nov. 25, 2018), <https://www.washingtonpost.com/opinions/>.

89. See Boot, *supra* note 88 (“[Senator Cindy Hyde-Smith] has strong ideas about the War Between the States—the name preferred by neo-Confederates to describe what the rest of us call the Civil War. Hyde-Smith used that very term in a 2007 state Senate resolution that she introduced to commemorate a 92-year-old daughter of a Confederate soldier who ‘fought to defend his homeland.’”).

90. See Edsall, *supra* note 88.

91. *Id.*

92. *Id.*

93. HAGUE ET AL., *supra* note 86, at 4.

94. See e.g., Mark Potok, *Once Again, Racism Rears Up in the Sons of Confederate Veterans*, S. POVERTY L. CTR. (Feb. 11, 2011), <https://www.splcenter.org/hatewatch/2011/02/11/once-again-racism-rears-sons-confederate-veterans> (detailing how the Sons of Confederate Veterans

Institutional tolerance towards those groups has led to an inability to control their behavior, especially when it turns violent. Further, institutional tolerance towards neo-Confederate hate groups is an implicit endorsement of the violence they commit because it permits the groups to continue to act on their racist goals.⁹⁵ And when institutions regulate neo-Confederate actions after previously employing a laissez-faire approach, they are likely still ineffective because the groups are already deeply ingrained in society. All these factors further perpetuate the general threat to Black Americans.

4. *Confederate symbolism today*

Erecting Confederate monuments and naming schools, military bases, and other public landmarks after Confederate figures are explicitly racist because they promote the imagery of white supremacy.⁹⁶ Confederate supporters intend these homages to remind Black Americans of their forced subordination during the antebellum South.⁹⁷ For instance, numerous schools were named after Confederate figures in the 1950s and 1960s, during the Civil Rights Movement.⁹⁸ The coordinated effort to implant Confederate symbolism in modern society was known as the “Massive Resistance,”

continue to pay homage to the Confederacy); Joseph Guzman, *United Daughters of the Confederacy Sues to Stop Removal of Monument*, HILL (Apr. 22, 2021), <https://thehill.com/changing-america/respect/549698-united-daughters-of-the-confederacy-sues-to-stop-removal-of-monument> (discussing how the Daughters of the Confederacy have filed a lawsuit in Kentucky in an attempt to stop the relocation of a Confederate statute).

95. See generally Jennifer Rae Taylor, *A History of Tolerance for Violence Has Laid the Groundwork for Injustice Today*, AM. BAR ASS'N (May 16, 2019), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/black-to-the-future/tolerance-for-violence/ (providing historical context for how institutionalized tolerance of racial violence furthers racial inequality today, specifically that “[s]tate officials’ tolerance of lynching created enduring national and institutional wounds that survived to oppose the goals of the civil rights movement and modern calls for equality”).

96. Miles Parks, *Confederate Statues Were Built to Further a ‘White Supremacist Future,’* NPR (Aug. 20, 2017, 8:31 AM), <https://www.npr.org/2017/08/20/544266880/>.

97. See *The Truth About Confederate-Named Schools*, EQUAL JUST. INITIATIVE (Sept. 16, 2020), <https://eji.org/news/the-truth-about-confederate-named-schools/>.

98. *Id.*

designed to challenge the desegregation of public schools in the wake of *Brown v. Board of Education*.⁹⁹

As of 2019, 103 public schools across the United States have Confederate figures as their namesakes.¹⁰⁰ The Southern Poverty Law Center reports that approximately 25% of these schools have a majority-Black student body, and nearly 10% have student bodies that are over 90% black.¹⁰¹ Confederate symbols are detrimental to the development of our nation's youth because they psychologically impact Black students at these schools.¹⁰² So long as Confederate symbols still have a place in American society, there is no chance of achieving racial equity.

In addition to schools, there are public parks, lakes, roads, bridges, and even military bases across the United States that bear the names of Confederate soldiers, all of which undermine the Union's victory in the Civil War and the subsequent abolition of slavery.¹⁰³ Although Confederate soldiers' names

99. *Id.* ("Historically, the practice of naming schools to honor the architects and defenders of slavery has been part of a broader effort to maintain racial hierarchy in the U.S. . . . [The] 'Massive Resistance,' [was] a coordinated effort by governors, legislators, and other white leaders to resist the racial integration of public schools."); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

100. *Whose Heritage?*, *supra* note 56. Some of these figures include Jefferson Davis, Robert E. Lee, and Stonewall Jackson. *Id.* When looking more broadly, the numbers are even higher; according to research from Education Week, as of 2020, "[a]pproximately 290 schools in 20 states [bore] the names of men with ties to the Confederacy." Corey Mitchell, *Data: The Schools Named After Confederate Figures*, EDUC. WEEK, <https://www.edweek.org/leadership/data-the-schools-named-after-confederate-figures/2020/06> (Nov. 23, 2021). This figure includes all schools "named after an entity/person that had Confederate ties," including schools named after a city or county that itself was named after a Confederate figure. *Id.*

101. Kelcie Willis, *At Least 109 Schools Named After Confederate Figures, Study Says*, ATL. J.-CONST. (Aug. 16, 2017), <https://www.ajc.com/news/national/least-109-schools-named-after-confederate-figures-study-says/U5FSI1QjlydgZVNwhN2XKP/>.

102. *The Truth About Confederate-Named Schools*, *supra* note 97 ("Simply by going to school, young people are taught to embrace the names, likenesses, and symbols of men who fought a brutal war against the U.S. in order to preserve white supremacy."); Melinda D. Anderson, *Attending a School Named After a Confederate General*, THE ATLANTIC (Nov. 7, 2017), <https://www.theatlantic.com/education/archive/2017/11/attending-a-school-named-after-a-confederate-general/545186/>.

103. See Patricia Sullivan, *Across Virginia, Local Officials Weigh Taking Down Reminders of Confederate Legacy*, WASH. POST (July 25, 2020, 3:51 PM), <https://www.washingtonpost.com/>

may be displayed prominently in public spaces, the soldiers themselves are not classified as American veterans.¹⁰⁴ Despite the decision not to recognize Confederate soldiers representing one step forward in delegitimizing the white supremacist-motivated secession efforts of the South, it falls short of condemning the behavior of treasonous individuals.¹⁰⁵ Instead, it sets a precedent that the United States will tolerate future acts of race-based violence.

Perhaps the most prominent and controversial remaining Confederate symbols are the monuments of Confederate soldiers that stand tall in town squares. Richmond, Virginia, the former capital of the Confederacy, previously erected nearly a dozen enormous monuments dedicated to Confederate soldiers.¹⁰⁶ In the aftermath of the Black Lives Matter protests during the summer of 2020, the city removed the statues.¹⁰⁷ In fact, in 2020, ninety-four Confederate monuments were

local/virginia-politics/. The naming of military bases after Confederate officers has sparked outrage from prominent military leaders. Helene Cooper, *Milley Calls for 'Hard Look' at Renaming Bases Honoring Confederates*, N.Y. TIMES (July 9, 2020), <https://www.nytimes.com/2020/07/09/us/politics/milley-trump-confederate-base-names.html>. General Mark A. Milley, the chairman of the Joint Chiefs of Staff, recently argued before the House of Representatives that those bases should be renamed to signify that “[t]here is no place in our armed forces for manifestations or symbols of racism, bias or discrimination.” *Id.*

104. *Fact Check: 1958 Law Not Related to Confederate Graves or Monuments but Veteran Pensions*, REUTERS (June 26, 2020, 11:33 AM), <https://www.reuters.com/article/uk-factcheck-1958-confederate-pensions/fact-check-1958-law-not-related-to-confederate-graves-or-monuments-but-veteran-pensions-idUSKBN23X28B>.

105. *See supra* notes 28–34 and accompanying text (discussing pardons and reparations given to former slave owners under presidents Lincoln and Jackson, thus legitimizing the Confederate view of slaves as property).

106. Andrew Lawler, *The Origin Story of Monument Avenue, America's Most Controversial Street*, NAT'L GEO. (July 27, 2020), <https://www.nationalgeographic.com/history/2020/07/origin-story-monument-avenue-america-most-controversial-street/>.

107. *Id.* As of 2021, Virginia is in the process of replacing its statue of Robert E. Lee that has been on display in the United States Capitol building with one of Barbara Rose Johns, a civil rights activist and Drexel University alumna. *Statue of Civil Rights Icon and Drexel Alumna Barbara Rose Johns to Replace Robert E. Lee in U.S. Capitol*, DREXEL UNIV. COLL. COMPUTING & INFORMATICS (Mar. 8, 2021), <https://drexel.edu/ci/stories/barbara-rose-johns-to-replace-robert-e-lee-in-us-capitol/>.

removed nationwide, leaving more than 700 still standing across the country.¹⁰⁸

According to the Southern Poverty Law Center and the United States Congressional Research Service, “most Confederate monuments were erected decades after the . . . Civil War in three waves.”¹⁰⁹ Southern society after the Civil War did not romanticize Confederate war veterans like it does today, but there were several monuments dedicated to Confederate soldiers in the immediate aftermath of the War.¹¹⁰ Until the Supreme Court’s decision in *Plessy v. Ferguson* in 1896, there were 101 Confederate monuments in the United States.¹¹¹ *Plessy* infamously upheld the separate but equal doctrine.¹¹² The decision prompted the beginning of the Jim Crow era, considered the second wave, which saw the erection of hundreds of Confederate monuments meant to intimidate African Americans.¹¹³ The eruption of new monuments lasted through the beginning of the 1920s and picked up again during the third wave in the 1950s and 1960s.¹¹⁴ Some speculate that a

108. Rachel Treisman, *Nearly 100 Confederate Monuments Removed in 2020, Report Says; More Than 700 Remain*, NPR (Feb. 23, 2021, 5:48 PM), <https://www.npr.org/2021/02/23/970610428/nearly-100-confederate-monuments-removed-in-2020-report-says-more-than-700-remai>.

109. Ellen Hunt, Note, *What Is a Confederate Monument?: An Examination of Confederate Monuments in the Context of the Compelled Speech and Government Speech Doctrines*, 37 LAW. & INEQ. 423, 426 (2019).

110. *Id.*

111. *Id.*

112. *Plessy v. Ferguson*, 163 U.S. 537, 550–51 (1896).

113. See Hunt, *supra* note 109, at 426; Miles Parks, *Confederate Statues Were Built to Further a ‘White Supremacist Future,’* NPR (Aug. 20, 2017, 8:31 AM), <https://www.npr.org/2017/08/20/544266880/confederate-statues-were-built-to-further-a-white-supremacist-future>.

114. Hunt, *supra* note 109, at 426 (noting that the uptick in the erection of Confederate monuments took place “between the Supreme Court’s decision in *Brown v. Board of Education* and Dr. Martin Luther King, Jr.’s assassination”). Ironically, Confederate General Robert E. Lee—of whom many statues have been erected, and whose name public schools and roadways bear across the South—advocated against the memorialization of the Confederacy and urged his Southern supporters to accept the results of the war. See Mitchell, *supra* note 100. Robert E. Lee once stated, “I think it wiser, moreover, not to keep open the sores of war but to follow the examples of those nations who endeavored to obliterate the marks of civil strife, to commit to oblivion the feelings engendered.” Robert E. Lee, *Letter of Reply*, REPUBLICAN VINDICATOR (Virginia), Sept. 3, 1869. And yet, it was Lee’s nephew, Fitzhugh Lee, who served as Virginia’s governor in the aftermath of the Civil War, who erected the large statue commemorating General Lee. See Lawler, *supra* note 106.

fourth wave has come in more recent years, with dozens of Confederate monuments constructed since 2005.¹¹⁵

Monuments draw the attention of Confederate sympathizers who support the Lost Cause mentality because they portray Confederate generals as heroic rather than traitorous. The grandiose nature of these monuments echoes the Lost Cause, which is harmful to an American society that must reconcile its role in creating a system premised on white supremacy.

B. *Violent Crimes Connected to Confederate Symbolism*

Since the end of the Civil War, neo-Confederate and race-based violence have replaced legal slavery.¹¹⁶ The romanticization of the Civil War and related violence preserve white supremacist values.

Neo-Confederate ideals have thrived in American culture, which has led to a rise in white supremacy-fueled hate crimes.¹¹⁷ “In 2017, the FBI reported that white supremacists posed a ‘persistent threat of lethal violence’ that has produced more fatalities than any other category of domestic terrorists since 2000.”¹¹⁸ The Southern Poverty Law Center reported a noticeable spike in hate crimes just days after the election of former President Trump, which scholars attribute to it “[s]uddenly [having been] acceptable to express the fury that had been rising since a black family moved into the White House.”¹¹⁹

Examples of white supremacists committing heinous acts in furtherance of the Lost Cause ideology are abundant

115. See Hunt, *supra* note 109, at 426.

116. See EQUAL JUST. INITIATIVE, *supra* note 9, at 6, 63.

117. See Michael Miller, *The Times That Try Our Souls . . . And Define Us for History*, 91 N.Y. STATE BAR ASS'N 5, 5 (2019).

118. Michael German, *Hidden in Plain Sight: Racism, White Supremacy, and Far-Right Militancy in Law Enforcement*, BRENNAN CTR. FOR JUST. (Aug. 27, 2020), <https://www.brennancenter.org/our-work/research-reports/hidden-plain-sight-racism-white-supremacy-and-far-right-militancy-law>.

119. NEIMAN, *supra* note 40, at 180.

throughout American history.¹²⁰ Examples include the 16th Street Baptist Church Bombing,¹²¹ the Charleston Church Massacre,¹²² the Unite the Right Rally,¹²³ and, most recently, the Storming of the Capitol,¹²⁴ all of which have resulted in American casualties and have left the country grieving.

The 16th Street Baptist Church Bombing occurred in Birmingham, Alabama, where bombings had become something of a commonplace occurrence in the African American community that earned the city the nickname “Bombingham.”¹²⁵ White segregationists used bombings to express their outrage over African Americans moving to their neighborhoods.¹²⁶ On the morning of Sunday, September 15, 1963, at the 16th Street Baptist Church in Birmingham, Alabama, members of a local KKK chapter set off a bomb that killed four African Americans and injured at least twenty others.¹²⁷ The bomb caused widespread damage, including destroying the building and overturning and crushing cars parked nearby.¹²⁸ Years later, three of the four perpetrators were finally tried and convicted of their crimes, but the fourth died before the trial concluded.¹²⁹

120. See DANIEL L. BYMAN & MARK PITCAVAGE, BROOKINGS INST., IDENTIFYING AND EXPLOITING THE WEAKNESSES OF THE WHITE SUPREMACIST MOVEMENT 2 (2021), <https://www.brookings.edu/wp-content/uploads/2021/04/Identifying-and-exploiting-the-weaknesses-of-the-white-supremacist-movement.pdf>.

121. KLOBUCHAR, *supra* note 54, at 9–12.

122. Robert Costa, Lindsey Bever, J. Freedom du Lac & Sari Horwitz, *Church Shooting Suspect Dylann Roof Captured Amid Hate Crime Investigation*, WASH. POST (June 18, 2015, 9:17 PM), <https://www.washingtonpost.com/news/morning-mix/wp/2015/06/17/white-gunman-sought-in-shooting-at-historic-charleston-african-ame-church/>.

123. Sam Reisman, *Paralegal Killed in Charlottesville ‘Enjoyed the Law’*, LAW360 (Aug. 15, 2017, 11:31 AM), <https://www.law360.com/articles/954307/paralegal-killed-in-charlottesville-enjoyed-the-law->.

124. Maria Cramer, *Confederate Flag an Unnerving Sight in Capitol*, N.Y. TIMES (Jan. 9, 2021) <https://www.nytimes.com/2021/01/09/us/politics/confederate-flag-capitol.html>.

125. KLOBUCHAR, *supra* note 54, at 12.

126. *Id.*

127. *Id.* at 8, 12–15.

128. *Id.* at 12–13.

129. Matthew Desmond, *In Order to Understand the Brutality of American Capitalism, You Have to Start on the Plantation*, N.Y. TIMES MAG., Aug. 18, 2019, at 78.

On June 17, 2015, in Charleston, South Carolina, twenty-one-year-old Dylann Roof marched into the Emanuel African Methodist Episcopal Church, one of the oldest African American churches in the United States, and opened fire on a bible study group, killing nine of the twelve worshipers.¹³⁰ Before his rampage, Roof shouted racist slurs at the churchgoers and his social media activity echoed those sentiments and celebrated Confederate imagery proudly.¹³¹ At his trial, the prosecution entered into evidence a jailhouse journal written by Roof, where he explained that the massacre was “worth it,” and made clear that he was not apologetic for his actions.¹³² Dylann Roof is hardly an anomaly; one former Confederate sympathizer acknowledged that “[i]f Dylann Roof had gone to my high school and we had talked about American history, we would have agreed on a lot.”¹³³

In February 2017, after years of deliberation and petitions, Charlottesville planned to remove a statue that memorialized Confederate General Robert E. Lee.¹³⁴ In response, opposers launched a lawsuit challenging the removal.¹³⁵ While the case was pending, Jason Kessler, a Charlottesville native, organized the “Unite the Right” rally in historic downtown Charlottesville.¹³⁶ White nationalists traveled from across the country to attend the rally and the “white genocide” conspiracy theory took center stage.¹³⁷ That conspiracy theory holds that national governments pose a worldwide threat to the white race

130. Costa et al., *supra* note 122.

131. See *id.*; Frances Robles, *Dylann Roof Photos and a Manifesto are Posted on Website*, N.Y. TIMES (June 21, 2015), <https://www.nytimes.com/2015/06/21/us/dylann-storm-roof-photos-website-charleston-church-shooting.html>.

132. Matt Zapposky, *Charleston Church Shooter: ‘I Would Like to Make It Crystal Clear, I Do Not Regret What I Did,’* WASH. POST (Jan. 4, 2017), <https://www.washingtonpost.com/world/national-security/charleston-church-shooter-i-would-like-to-make-it-crystal-clear-i-do-not-regret-what-i-did/2017/01/04/05b0061e-d1da-11e6-a783-cd3fa950f2fd>.

133. Black, *supra* note 22.

134. Jacey Fortin, *The Statue at the Center of Charlottesville’s Storm*, N.Y. TIMES (Aug. 13, 2017), <https://www.nytimes.com/2017/08/13/us/charlottesville-rally-protest-statue.html>.

135. *Id.*

136. *Id.*

137. See RODNEY A. SMOLLA, CONFESSIONS OF A FREE SPEECH LAWYER 292 (2020).

and white culture.¹³⁸ At the rally, chants of “You will not replace us!” and “Blood and soil!” shouted by the alt-right supremacists in Charlottesville were indicative of this theory.¹³⁹ White supremacist groups that attended the rally asked participants to arrive ready to “crack skulls” and be armed with guns, pepper spray, fascist flags, and shields.¹⁴⁰

Heather Heyer attended the Unite the Right rally as a counterprotester to oppose the white supremacist activity.¹⁴¹ Heyer was with a large group of fellow counterprotesters walking near the protest.¹⁴² James Fields was a participant in the rally, marching alongside Vanguard America.¹⁴³ The Anti-Defamation League describes Vanguard America as “a white supremacist group that opposes multiculturalism and believes that America should be an exclusively white nation,” because “people with ‘white blood’ have a special bond with ‘American soil.’”¹⁴⁴ Just outside the rally, Fields accelerated his car into Heyer’s group, injuring nineteen people and killing one: Heyer.¹⁴⁵ Fields was found guilty of first degree murder and sentenced to life in prison.¹⁴⁶ His actions were regarded by many, including Attorney General William P. Barr and U.S. Attorney Thomas T. Cullen, as “acts of domestic terrorism,”

138. *Id.*

139. *Id.* at 253.

140. Kat Greene, *Charlottesville Victims Hit Protesters with \$3M Terrorism Suit*, LAW360 (Aug. 15, 2017, 9:23 PM), <https://www.law360.com/articles/954641/charlottesville-victims-hit-protesters-with-3m-terrorism-suit>.

141. Reisman, *supra* note 123.

142. Christina Caron, *Heather Heyer, Charlottesville Victim, Is Recalled as ‘a Strong Woman,’* N.Y. TIMES (Aug. 13, 2017), <https://www.nytimes.com/2017/08/13/us/heather-heyer-charlottesville-victim.html>.

143. See *Vanguard America*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/resources/backgrounders/vanguard-america> (last visited Jan. 1, 2022).

144. *Id.*

145. Reisman, *supra* note 123.

146. Mitch Smith, *James Fields Sentenced to Life in Prison for Death of Heather Heyer in Charlottesville*, N.Y. TIMES (June 28, 2019), <https://www.nytimes.com/2019/06/28/us/james-fields-sentencing.html>.

and accordingly, he was also charged with twenty-nine federal hate crimes.¹⁴⁷

White supremacist rhetoric is not exclusive to any single class of Americans. Throughout history, prominent American figures have been members of hate groups.¹⁴⁸ Hate groups, like the KKK, continue to have a stranglehold on American politics, as reflected in the speech of political leaders.¹⁴⁹ Without decisive action, the United States will continue to be plagued by neo-Confederate violence because it did not quell violent sentiments among Confederate sympathizers in the wake of the Civil War.¹⁵⁰ The United States should look to other countries that have committed human rights atrocities for guidance to avoid future offenses and right the wrongs of the past.¹⁵¹

II. THE GERMAN HISTORICAL BACKGROUND

World War II brought about a worldwide reckoning as well as a significant human rights atrocity: The Holocaust.¹⁵² While the evils of the Holocaust and the Civil War are not analogous, nor can they be ranked, the aftermaths of the two historical periods can be compared.¹⁵³ While German culture has acknowledged the crimes perpetrated by its citizens, American culture emanates amnesia—“textbooks and laws [are] scrubbed

147. Press Release, Dep’t of Just., Ohio Man Pleads Guilty to 29 Federal Hate Crimes for August 2017 Car Attack at Rally in Charlottesville (Mar. 27, 2019), <https://www.justice.gov/opa/pr/ohio-man-pleads-guilty-29-federal-hate-crimes-august-2017-car-attack-rally-charlottesville>.

148. See, e.g., Edsall, *supra* note 88; Leslie Proll, *White Supremacy Has No Place on the Federal Bench*, NAACP LEGAL DEF. & EDUC. FUND, <https://www.naacpldf.org/naacp-publications/ldf-blog/white-supremacy-has-no-place-on-the-federal-bench/> (last visited Jan. 1, 2022).

149. See, e.g., Sheera Frenkel & Annie Karni, *Proud Boys Celebrate Trump’s ‘Stand By’ Remark About Them at the Debate*, N.Y. TIMES, <https://www.nytimes.com/2020/09/29/us/trump-proud-boys-biden.html> (Jan. 20, 2021).

150. See NEIMAN, *supra* note 40, at 37–38.

151. See, e.g., *id.* at 25.

152. See Mattie Kahn, *The German Model for America*, VOX, <https://www.vox.com/the-highlight/21405900/germany-holocaust-atonement-america-slavery-reparations> (Oct. 5, 2020, 8:05 AM).

153. *Id.*

of so much of what happened here.”¹⁵⁴ In Germany, Nazism rose and fell within a span of twenty-five years, from the Nazi Party’s founding in 1920 to the fall of Nazi Germany in 1945.¹⁵⁵

A. *The Rise of the Nazi Regime*

Fascism is not a new idea, yet it has survived centuries of shape-shifting. This pervasive, ultra-nationalist ideology is especially prevalent during times of socio-political unrest, during which marginalized groups are often the targets of hate.¹⁵⁶ The original fascist ideology was the philosophical offspring of Benito Mussolini and Giovanni Gentile during the early twentieth century.¹⁵⁷ Indeed, “[t]he word *fascism* has its root in the Italian *fascio*, literally [meaning] a bundle.”¹⁵⁸ Fascism is an ideology converged on hyper-nationalism, militarism, glorification of and eagerness to use violence, hyper-masculinity, and imperialism, and targets youth.¹⁵⁹

Fascism rose to prominence in Germany under Adolf Hitler, who established himself as the leader of the Nazi Party after World War I.¹⁶⁰ Hitler gave the infamous regime its name and created a “program of twenty-five points mixing nationalism, anti-Semitism, and attacks on department stores and international capital.”¹⁶¹ The aftermath of World War I created the perfect storm for the rise of such an extreme ideology.

154. *Id.*

155. *The Nazi Party*, U.S. HOLOCAUST MEM’L MUSEUM: HOLOCAUST ENCYC., <https://encyclopedia.ushmm.org/content/en/article/the-nazi-party-1> (June 25, 2020).

156. *See, e.g.*, Niki Kitsantonis & Iliana Magra, *Golden Dawn Found Guilty of Running Criminal Organization in Greece*, N.Y. TIMES, <https://www.nytimes.com/2020/10/07/world/europe/golden-dawn-guilty-verdict-greece.html> (Apr. 27, 2021) (describing the prosecution and conviction of members of Greece’s Golden Dawn political party, a neo-fascist criminal organization, that “rose to prominence during the country’s financial crisis, systematically targeting migrants and left-wing critics”); *see also Intellectual Origins*, BRITANNICA, <https://www.britannica.com/topic/fascism/Intellectual-origins> (last visited Jan. 1, 2022) (discussing the development of fascist ideology).

157. ROBERT O. PAXTON, *THE ANATOMY OF FASCISM* 4, 17 (1st ed. 2004).

158. *Id.* at 4; *see* JOHN MARTIN, *DICTATORS AND DEMOCRACIES TODAY* 111, 116 (1935).

159. *See* PAXTON, *supra* note 157, at 3–23.

160. *Id.* at 27–28.

161. *Id.* at 28.

Culturally, [World War I] discredited optimistic and progressive views of the future, and cast doubt upon liberal assumptions about natural human harmony. Socially, it spawned armies of restless veterans . . . looking for ways to express their anger and disillusion without heed for old-fashioned law or morality. Politically, it generated economic and social strains that exceeded the capacity of existing institutions . . . to resolve.¹⁶²

The extreme nationalist viewpoint that fascists took quickly led to the rise of the Nazi Party and its white nationalist beliefs.¹⁶³ The Nazi party rose to prominence by pedaling the racist ideology that Germans were a biologically “superior” race, and people of “inferior” races—especially Jewish people—threatened their existence.¹⁶⁴ When Hitler took power in 1933, he shattered Germany’s democratic institutions and forced Germany into war.¹⁶⁵ He did so “for the benefit of the so-called Aryan race,” which he placed at top national priority.¹⁶⁶ World War II ensued.¹⁶⁷

B. “Denazification” and its Challenges

After World War II, the denazification process began in Germany almost immediately.¹⁶⁸ “Denazification” referred to the process of removing all traces of “Nazis and Nazism from public life in Germany and across occupied Europe following

162. *Id.*

163. *See id.* at 150–51.

164. *World War II and the Holocaust*, U.S. HOLOCAUST MEM’L MUSEUM: HOLOCAUST ENCYC., <https://encyclopedia.ushmm.org/content/en/animated-map/world-war-ii-and-the-holocaust> (last visited Oct. 18, 2021).

165. *How Did Hitler Happen?*, NAT’L WWII MUSEUM, <https://www.nationalww2museum.org/war/articles/how-did-hitler-happen> (last visited Oct. 18, 2021).

166. *Id.*

167. *Id.*

168. *See Postwar Trials and Denazification*, WIENER HOLOCAUST LIBR.: HOLOCAUST EXPLAINED, <https://www.theholocaustexplained.org/survival-and-legacy/postwar-trials-and-denazification/> (last visited Jan. 1, 2022).

the fall of the Third Reich.”¹⁶⁹ The Allied Forces initiated denazification to target the intellectual, cultural, and educational systems the Nazi Party built in its decades in power.¹⁷⁰ Additionally, four armies occupied post-war Germany for forty-five years until a 1990 peace treaty declared the war over.¹⁷¹

The Allied Powers created a scale that classified members of the Nazi Party into five tiers of severity and provided the courts with corresponding sentencing guidelines.¹⁷² Major offenders faced life in prison or death; activists, militarists, and war profiteers were sentenced to up to ten years in prison; lesser offenders were sentenced to up to three years’ probation; Nazi supporters were surveilled and fined or charged with any later offenses.¹⁷³

Denazification occurred throughout the German government, economics, and culture.¹⁷⁴ It included purging libraries of all Nazi publications and removing public office holders who were Nazis or Nazi sympathizers.¹⁷⁵ The Allied Powers sought to wipe Germany’s slate clean, but their mission was never fully accomplished, due in part to technological hindrances that failed to accommodate their data collection goals.¹⁷⁶ Denazification was not without opposition and resistance. The first German chancellor after the fall of the Third Reich, Konrad Adenauer, opposed denazification because he desired a strategy that would integrate Nazis into the new Germany as a way to move forward.¹⁷⁷ Denazification faced yet another challenge from Germans who objected to foreign

169. *Id.*

170. Udi E. Greenberg, *Germany’s Postwar Re-education and Its Weimar Intellectual Roots* 46 J. CONTEMP. HIST. 10, 11 (2011).

171. NEIMAN, *supra* note 40, at 32–33.

172. *Postwar Trials and Denazification*, *supra* note 168.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

governments controlling German reconstruction.¹⁷⁸ The Allied Forces' denazification policy in Germany reached a stalemate as the Cold War commenced.¹⁷⁹ The Cold War shifted American attention and left German rebuilding in a state of disarray.¹⁸⁰ Americans left the goal of eliminating Nazi prominence in the hands of a newly formed German government.¹⁸¹ The failures of the Allied Powers' denazification process were rectified when children of denazification opposers spearheaded a confrontation of those failures in the 1960s.¹⁸²

The German Constitution was reformed and codified into law as Section 86a of the Criminal Code of Germany, prohibiting the use of symbols of unconstitutional organizations and symbols that could be mistaken for those of unconstitutional organizations, with hand gestures and symbols of the Nazi party foremost among them.¹⁸³ There are no memorials that celebrate Nazis in Germany because "[b]y choosing to remember what its soldiers once did, [Germany] has made a choice about the values it wants to reject."¹⁸⁴ As part of denazification, any such monuments were declared illegal because they romanticized the harm caused by the Nazi party to the German Jewish population.¹⁸⁵

In Germany, police officers are required to visit Nazi death camps to learn firsthand how Nazi policing caused immense and long-lasting harm.¹⁸⁶ In addition, police cadets receive in-

178. See NEIMAN, *supra* note 40, at 33.

179. See FREDERICK TAYLOR, *EXORCISING HITLER: THE OCCUPATION AND DENAZIFICATION OF GERMANY 98–99* (2011).

180. See *id.*

181. See *Postwar Trials and Denazification*, *supra* note 168.

182. NEIMAN, *supra* note 40, at 33.

183. BUNDESAMT FÜR VERFASSUNGSSCHUTZ, *RIGHT-WING EXTREMISM: SIGNS, SYMBOLS AND BANNED ORGANIZATIONS 17–18* (Oct. 2018) [hereinafter *SIGNS, SYMBOLS AND BANNED ORGANIZATIONS*].

184. Susan Neiman, *There Are No Nostalgic Nazi Memorials*, *THE ATLANTIC* (Sept. 14, 2019), <https://www.theatlantic.com/ideas/archive/2019/09/germany-has-no-nazi-memorials/597937/>.

185. See *id.*

186. Katrin Bennhold & Melissa Eddy, *In Germany, Confronting Shameful Legacy Is Essential Part of Police Training*, *N.Y. TIMES* (June 23, 2020), <https://www.nytimes.com/2020/06/23/world/europe/germany-police.html>.

depth, years-long training about “the shameful legacy of policing under the Nazis.”¹⁸⁷ A central goal of German policing has been to avoid allowing the institution to become too powerful, but it took decades after World War II for law enforcement in Germany to acknowledge its past.¹⁸⁸ Moreover, the many qualifications to be a police officer in Germany make clear that the United States employs novices to do the jobs of professionals.¹⁸⁹ German police applicants must pass personality and intelligence tests before they can complete the required two-and-a-half-year training course.¹⁹⁰ German re-education focused on democratization, “equality of educational opportunity, free school attendance, extension of compulsory schooling until [fifteen], the transformation of the separate primary, middle and secondary tracks into a comprehensive two step system and the inclusion of teacher training in the university.”¹⁹¹

These steps were all part of a reconciliation process that stretched across decades.¹⁹² Germany’s image did not change overnight, and it remains a work in progress. But, by attacking harmful social values and re-educating its citizens about the country’s atrocities, Germany exemplifies a valiant effort toward reconciliation.¹⁹³

III. THE ROAD TO A NEW AMERICAN PATRIOTISM

Germany’s efforts to subvert white supremacy in the wake of World War II should serve as a model for America as it reconciles its shameful history with its uncertain future. While Germany did not experience an immediate resolution to its

187. *Id.*

188. *Id.*

189. *See id.*

190. *Id.*

191. Konrad Jaraush, *Re-Education in Post-War Germany*, 22 HIST. EDUC. Q. 387–88 (1982) (book review).

192. NEIMAN, *supra* note 40, at 226.

193. *See id.* at 25–26.

troubled past, its rebuilding efforts were sweeping and occurred at both a grassroots and institutional level.¹⁹⁴

A. Why We Should Learn from Post-WWII Germany

Leading philosophical scholar Susan Neiman praises the “slow[] and fitful[]” work of the German people to acknowledge the evils of Nazi Germany, and she identifies lessons that Germany can offer Americans who struggle to reconcile the impact of American history on current racism.¹⁹⁵ Although slavery and the Holocaust—two of the worst atrocities in human history—are incomparable, the United States and Germany’s respective responses offer important lessons to be learned.¹⁹⁶ Germany’s ability to create a culture of understanding and shame surrounding its responsibility for the murder of millions begs the question: why is American slavery romanticized as a states’ rights issue and defended to this day by *nearly half*¹⁹⁷ the population? Neiman argues that it is impossible to compare evils, but it is possible to compare redemptions, which is how America can learn from Germany.¹⁹⁸

The opportunity for the rise of extremism in post-World War I Germany is markedly similar to the circumstances in the post-Civil War South. The conflict in the aftermath of World War I allowed fascism and Nazi thought to rise exponentially.¹⁹⁹ In the United States, the KKK emerged out of the Civil War as

194. *See id.* at 30, 33.

195. *See id.* at 25–26.

196. *See id.*

197. *See* Russell Heimlich, *What Caused the Civil War?*, PEW RSCH. CTR. (May 18, 2011), <https://www.pewresearch.org/fact-tank/2011/05/18/what-caused-the-civil-war/> (“Asked their impression of the main cause of the Civil War, a 48%-plurality of Americans say it was mainly about state rights. Just 38% say the Civil War was mainly caused by slavery. Another 9% volunteer that it was about both equally. Young people are more likely than older Americans to say that the war’s main cause was states’ rights—60% of those younger than age 30 express this view, the highest percentage of any age group. Those ages 65 and older, by a 50%-to-34% margin, are the most likely to say that slavery rather than states [sic] rights was the main cause of the Civil War. Nearly half of whites (48%) say states’ rights was the war’s main cause, but so do 39% of blacks.”).

198. NEIMAN, *supra* note 40 at 32.

199. *See* Paxton, *supra* note 157, at 28.

a way for disgruntled former slave owners with common and dangerous ideals to unite.²⁰⁰ In both cases, hate groups flourished. On a global scale, however, the subsequent state reactions to each event were significantly different from one another. In post-War Germany, four nations aimed to restructure Germany's democracy and called for Germany to acknowledge its crimes after the fall of Nazi Germany.²⁰¹ America, by contrast, was praised as a global leader in the aftermath of the Civil War.²⁰² Neiman argues that America's reaction suppressed any chance of other countries urging the United States to confront the sins of its past, a concept that has bled into the present.²⁰³

Modern hate group actions in America and Germany are not identical, but they share similarities in agendas. Reports show that without a targeted approach toward national atrocities, historical accounts are destined to be diluted by new generations.²⁰⁴ Thus, to prevent slavery from being further skewed in the future, the record must be set straight now, before the problem worsens. Germany was unable to confront its past immediately; rather, it took decades.²⁰⁵ The process that was eventually initiated by the next generation was coined "Vergangenheitsaufarbeitung," meaning "working off the past."²⁰⁶

200. KLOBUCHAR, *supra* note 54, at 16.

201. *See* NEIMAN, *supra* note 40, at 33.

202. *Id.*

203. *Id.*; *see also* Kahn, *supra* note 152 (arguing that American refusal to take an introspective look at the country's complicated history with slavery, the Confederacy, and racial violence is "not unique" and is similar to Britain's reverence for its empire and Poland's refusal to inculcate itself in the Holocaust). Kahn also argues that the United States should use an approach similar to that of Germany in order to dismantle white supremacy and neo-Confederate violence, but stops short of outlining the steps that could be taken to do so. *See id.*

204. *See* Kahn, *supra* note 152 ("[I]n 2017 . . . four out of [ten] German students [did not] know that Auschwitz-Birkenau was a concentration camp . . . and . . . fewer than 10 percent of high school seniors in the United States [could] identify slavery as the central cause of the Civil War.").

205. *Id.*

206. *Id.*

While it is not decades, but over a century and a half, that separates contemporary America from the era of American slavery, perhaps the passage of time allows for a more complete and honest attempt at reconciliation. Nevertheless, an internal confrontation with America's past is far overdue.

B. *How to Learn from Post-WWII Germany*

The purpose of denazification was to immediately and aggressively confront Germany's past.²⁰⁷ The United States government, on the other hand, failed to act decisively to suppress violent white supremacist ideology after the Civil War.²⁰⁸ On the contrary, Congress pardoned Confederate soldiers for their treasonous behavior and issued reparations to slaveholders.²⁰⁹ Such acts subliminally condoned the South's role in the Civil War and the institution of slavery, representing an official failure to disincentivize racial violence.²¹⁰ Now, with racial equality at the forefront of the American conversation,²¹¹ Congress should enact legislation that mirrors the Allied Powers' legislative response to Nazi violence in Germany to curb the perpetuation of neo-Confederate violence in the United States.

The legislation aimed at neo-Confederate violence should be structured to: (1) direct the Department of Homeland Security to take deterrence and enforcement action against neo-Confederate hate groups; (2) reform police screening and training procedures; (3) address a streamlined process for removing Confederate monuments and renaming Confederate-named schools, military bases, roads, bridges, libraries, parks,

207. See *Postwar Trials and Denazification*, *supra* note 168.

208. See KLOBUCHAR, *supra* note 54, at 26.

209. Andrew Glass, *All Confederate Soldiers Gain Presidential Pardons, Dec. 25, 1868*, POLITICO (Dec. 25, 2018, 8:19 AM), <https://www.politico.com/story/2018/12/25/this-day-in-politics-dec-25-1868-1074077>; Kahn, *supra* note 152.

210. See Hunter, *supra* note 28.

211. See, e.g., Michael Chui, Sara Prince & Shelley Stewart III, *America 2021: The Opportunity to Advance Racial Equity*, MCKINSEY & CO. (Feb. 17, 2021), <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/america-2021-the-opportunity-to-advance-racial-equity>.

lakes, and municipalities; and (4) ban public displays of Confederate imagery.

These targeted strategies represent a modern take on German denazification, which accounts for the challenges post-War Germany faced in its struggle to rebuild and remove Nazi influence.

1. *Increase enforcement action*

Congress should enact legislation to address neo-Confederate violence. The legislation must address enforcement and deterrent action to prevent future acts of violence. The Department of Homeland Security already tracks far-right hate groups,²¹² but as evidenced by the aftermath of the riots at the United States Capitol on January 6, 2021,²¹³ there is no adequate law on the books in the United States to address domestic terrorism.²¹⁴

The Patriot Act, passed in the aftermath of September 11th, did create a definition of domestic terrorism that encompassed “criminal acts in the United States that are ‘dangerous to human life’ and appear ‘intended to intimidate or coerce a civilian population or to influence the policy of a government by intimidation or coercion’ or ‘to affect the conduct of a government by mass destruction, assassination or kidnapping.’”²¹⁵ The Patriot Act, however, stopped short of creating an accompanying criminal offense, rendering it useless as a criminal cause of action.²¹⁶ That is where this proposed

212. *E.g.*, STEVEN M. CHERMAK, JOSHUA D. FREILICH & MICHAEL SUTTMOELLER, THE ORGANIZATIONAL DYNAMICS OF FAR-RIGHT HATE GROUPS IN THE UNITED STATES: COMPARING VIOLENT TO NON-VIOLENT ORGANIZATIONS 10 (2011), https://www.dhs.gov/sites/default/files/publications/944_OPSR_TEVUS_Comparing-Violent-Nonviolent-Far-Right-Hate-Groups_Dec2011-508.pdf.

213. *See The Capitol Attack Aftermath*, N.Y. TIMES (Apr. 29, 2021), <https://www.nytimes.com/live/2021/01/07/us/capitol-building-trump>.

214. Richard B. Zabel, *Opinion: Domestic Terrorism Is a National Problem. It Should Also Be a Federal Crime.*, WASH. POST (Feb. 2, 2021, 9:16 AM), <https://www.washingtonpost.com/opinions/2021/02/02/domestic-terrorism-federal-crime/>.

215. *Id.*

216. *Id.*

legislation should pick up: denouncing domestic terrorism and codifying a crime that aligns with the definition of domestic terrorism found in the Patriot Act. Without a domestic terrorism law in the United States, the government's ability to appropriately condemn bad actors with dangerous ideologies is limited.

2. *Reform police screening and training procedures*

America has long been aware of issues surrounding racism and policing. Specifically, in a 2006 report, the FBI detailed the immense threat of neo-Confederate groups infiltrating law enforcement ranks in the United States.²¹⁷ Despite this and numerous other high-profile warnings, police departments still do not have procedures in place to expose and remove officers with affiliations to neo-Confederate groups.²¹⁸ This must change.

Structural change to police recruiting and training programs should mimic the changes implemented by post-World War II Germany. Like how officers in Germany are required to visit concentration camps,²¹⁹ American police officers should, at minimum, be required to study the implications of American policing's reprehensible past of racism. Moreover, similarly to Germany's focus on preventing the centralization of power within law enforcement,²²⁰ American police should also implement measures to ensure that officers cannot exploit the power imbalances that have historically plagued American policing. As a part of a reformed qualification process, law enforcement applicants should undergo extensive testing to ensure that their motivations are pure. Finally, in the inevitable case that racist police officers slip through the cracks of this new

217. See Kenya Downs, *FBI Warned of White Supremacists in Law Enforcement 10 Years Ago. Has Anything Changed?*, PBS (Oct. 21, 2016, 4:10 PM), <http://www.pbs.org/newshour/rundown/fbi-white-supremacists-in-law-enforcement/>.

218. See *id.*

219. Bennhold & Eddy, *supra* note 186.

220. See *id.*

system, policies and procedures must be put in place to periodically check the social media and sentiments of officers.²²¹

3. *Create a streamlined process for dismantling Confederate namesakes and monuments*

Confederate monuments should be removed and placed in the care of the American Civil War Museum, or similar groups that seek to educate the nation on the cause of the Civil War, its major players, and especially on its aftermath that led to the rising prominence of the Lost Cause ideology.²²²

The legislation that tackles reconciliation with America's past must also outline a Confederate monument removal process and Confederate namesake renaming process. It would likely involve: (1) the allocation of costs associated with monument removal, which the legislation should specifically allot; (2) a decision about where the monuments should be stored in the interim before they are displayed in the American Civil War Museum *in context with their symbolism*; (3) what the monuments should be replaced with, with potential possibilities including renaming parks for victims of the atrocities of slavery; and (4) a mandatory timeframe for total removal that involves a condition on federal funding to incentivize states to remove Confederate monuments.²²³

Similarly, public schools and military bases named after Confederate soldiers should be renamed because—to maintain

221. See generally Elona Neal, *A History of Police Violence in America*, STACKER (Apr. 20, 2021), <https://stacker.com/stories/4365/history-police-violence-america> (providing a list of fifty “events showing the history of police violence in the United States”).

222. See, e.g., Robert Draper, *Toppling Statues Is a First Step Toward Ending Confederate Myths*, NAT'L GEOGRAPHIC (July 2, 2020), <https://www.nationalgeographic.com/history/2020/07/toppling-statues-is-first-step-toward-ending-confederate-myths/#close> (advocating for the removal of Confederate monuments).

223. See *Confederate-Monument Removals Slowed by Knot of Legal Issues*, AM. BAR ASS'N (Dec. 2019), <https://www.americanbar.org/news/abanews/publications/youraba/2019/december-2019/efforts-to-remove-confederate-monuments-slowed-by-knot-of-legal-/>. This incentive is aimed at ensuring compliance. Any conditioning done to incentivize compliance from states ought to comply with *National Federation of Independent Business v. Sebelius*. Nat'l Fed'n of Indep. Bus. v. Sebelius, Sec'y of Health and Hum. Servs., 567 U.S. 519 (2012).

integrity—public institutions should not honor soldiers who were traitors to the United States and fought to uphold slavery and white supremacy, values that are unacceptable in contemporary American society. Targeted renaming will prevent children and military officers who attend those locations from being misinformed about the importance of their building's namesake's legacy. Further, if attendees of those institutions are racial minorities, renaming would prevent continued reminders of the racial hierarchy that reigned supreme in the antebellum South.²²⁴ Those who argue that the removal and replacement of Confederate monuments is an overcompensation²²⁵ ignore the monuments' histories. They were erected as fear tactics, they stand for white supremacy, and they depict traitors as honorable and worthy of public prominence.²²⁶

The removal and renaming of Confederate symbols will symbolize to Black Americans that society disfavors the legally sanctioned ownership of another human being, repudiates a racial hierarchy, and is ready to evolve past those dark days of history.²²⁷ Scholars further recognize that "monuments are not about history; they are values made visible."²²⁸ Even if renaming public spaces and removing public monuments appear only facially symbolic, the psychological effects that the

224. Lindsay Huth, Taylor Umlauf & Valerie Bauerlein, *Confederate Names Are Common in the U.S.—and Not Just on Statues*, WALL ST. J. (June 26, 2020, 9:00 AM), <https://www.wsj.com/articles/confederate-names-are-common-in-the-u-s-and-not-just-on-statues-11593176400>.

225. See, e.g., Yuliya Komska, *From 2017: How Germany Handles Monuments from Nazi and Communist Eras*, PHILA. INQUIRER (June 17, 2020), <https://www.inquirer.com/philly/opinion/commentary/charlottesville-nazis-germany-communists-monuments-trump-20170817.html>; Allison M. Mosig, *Hate or Civic Pride? The Speech of Symbols in the United States, Germany and Japan*, 40 SUFFOLK TRANSNAT'L L. REV. 73, 77 (2017).

226. Karen L. Cox, *The Whole Point of Confederate Monuments Is to Celebrate White Supremacy*, WASH. POST (Aug. 16, 2017), <https://www.washingtonpost.com/news/posteverything/wp/2017/08/16/the-whole-point-of-confederate-monuments-is-to-celebrate-white-supremacy/>.

227. See Melinda D. Anderson, *Attending a School Named After a Confederate General*, THE ATLANTIC (Nov. 7, 2017), <https://www.theatlantic.com/education/archive/2017/11/attending-a-school-named-after-a-confederate-general/545186/>.

228. NEIMAN, *supra* note 40, at 32.

symbolic move would outweigh any interest in preserving Confederate symbolism.

4. *Ban public displays of Confederate imagery*

Confederate imagery has the same effect as Confederate monuments and namesakes.²²⁹ Thus, the Confederate flag—and other displays of Confederate symbolism—should be banned from public display in the United States, much like how Germany banned Nazi symbolism in the wake of World War II.

The Confederate flag is a dog whistle for hate groups disguised as a symbol of heritage and pride.²³⁰ Flying a Confederate flag serves as a notice to the observer that the flier sympathizes with the causes of the Civil War and attempted succession by the South.²³¹ It also demonstrates that the flier holds near and dear the ideals of white supremacy and slavery. In that sense, the public has the choice to either accept that a Confederate-flag-flying friend, family member, or stranger promotes white supremacist ideals, or to rationalize the behavior as pride in the flier's "heritage." When confronted with this choice, most Americans prefer the latter,²³² potentially because it is the path of least resistance. But when Confederate flags are flown above the Mason Dixon line by Americans with no Southern "heritage," only one inference can be drawn. The Lost Cause rationale, however, is equally unsound because it is nothing more than a cloak for white supremacy intended to

229. See Brentin Mock, *The Confederate Flag's Message Is Clear for African-Americans*, N.Y. TIMES (Dec. 22, 2015, 12:19 PM), <https://www.nytimes.com/roomfordebate/2015/06/19/does-the-confederate-flag-breed-racism/the-confederate-flags-message-is-clear-for-african-americans>.

230. See generally Erin Blakemore, *How the Confederate Battle Flag Became an Enduring Symbol of Racism*, NAT'L GEOGRAPHIC (Jan. 12, 2021), <https://www.nationalgeographic.com/history/article/how-confederate-battle-flag-became-symbol-racism>.

231. *Id.*

232. See Jennifer Agiesta, *Poll: Majority Sees Confederate Flag as Southern Pride Symbol, Not Racist*, CNN (July 2, 2015, 10:43 AM), <https://www.cnn.com/2015/07/02/politics/confederate-flag-poll-racism-southern-pride/index.html>. A 2015 CNN poll "show[ed] that 57% of Americans [saw] the [Confederate battle] flag more as a symbol of Southern pride than as a symbol of racism, about the same as in 2000 when 59% said they viewed it as a symbol of pride." *Id.*

hide behind the veil of a romanticized version of events that paints a person's grandfather as a war hero rather than a traitor. Tearing down that cloak requires deep introspection.

Just as Germany faced a period of self-reckoning in the wake of World War II, the United States must now face its own systemic inequities in the wake of increased racial violence across the nation, partly because the United States failed to acknowledge widespread racism in the wake of the Civil War.²³³

Confederate imagery, like the battle flag, raises First Amendment free speech issues as the Confederate flag undoubtedly symbolizes *something*, whether it be the heritage of the South or the slavery for which the South fought. The inevitable challenge by opposers of a ban on Confederate imagery is that, because the flag conveys a message, it qualifies as protected speech under the First Amendment.²³⁴

As for other Confederate imagery and symbolism, the First Amendment persists as central to arguments against a process similar to that of denazification in the United States. Although the First Amendment does not provide blanket protection on all speech, it poses a significant obstacle for government officials who attempt to restrict it, and rightfully so, given the purpose of the Amendment as a measure to limit the vast powers of the Federal government.²³⁵

There are three ways the government could defend banning the flag against a First Amendment challenge. First, the government could claim that Confederate flags constitute racist hate speech that falls outside the First Amendment's protections.²³⁶ The success of such claims would be uncertain,

233. Arguably, the United States was not in a position to accept the realities of slavery and racism immediately following the Civil War because those in power still harbored sympathy for the Southern states that still believed in a racial hierarchy, even after defeat. *See* Blakemore, *supra* note 230. At that point, their sentiments were likely even more emphasized given their anger and distrust of the federal government after losing the war, similar to post-World War II Germany. *See id.*

234. Alberto R. Gonzales, *The Confederate Flag and Free Speech*, THE HILL (June 30, 2015, 5:52 PM), <https://thehill.com/opinion/op-ed/246590-the-confederate-flag-and-free-speech>.

235. *Id.*

236. *Id.*

however, because racist hate speech must have a narrow enough definition to be applied moving forward.²³⁷ Second, if the government claims the Confederate flag's messaging raises passion and inspires others to breach the peace, the government would face the Supreme Court's decision on the fighting words doctrine, which found it vague and overbroad.²³⁸ Finally, the government could argue that displaying Confederate imagery is intended to intimidate, so it should be prohibited.²³⁹ But the Supreme Court may equate this action to cross burnings, which the Court has held cannot be outlawed.²⁴⁰ Unless a court finds that a Confederate flag is displayed in a manner that constitutes a threat, eradicating Confederate imagery will prove a complex task.²⁴¹

Courts, however, have upheld prohibitions of the Confederate flag in schools where there was a previous history of racial tension or conflict.²⁴² The same argument could apply

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Defoe ex rel. Defoe v. Spiva*, 625 F.3d 324, 327–37 (6th Cir. 2010) (holding that a school could ban clothing displaying the Confederate flag because there was evidence of racial violence, threats and tension, including use of racial slurs, racial graffiti on school property, the throwing of Oreo cookies at a biracial athlete, and unspecified race-related physical altercations, that made it reasonably foreseeable that displaying the Confederate flag would cause a substantial disruption); *B.W.A. v. Farmington R-7 Sch. Dist.*, 554 F.3d 734, 741–42 (8th Cir. 2009) (upholding a school ban on dress that displayed the Confederate flag where the record contained “evidence of likely racially-motivated violence, racial tension, and other altercations directly related to adverse race relations in the community and the school”); *Barr ex rel. White v. Lafon*, 538 F.3d 554, 568–73 (6th Cir. 2008) (holding that a school’s dress code that banned “the Confederate flag is constitutional because of the disruptive potential of the flag in a school where racial tension is high and serious racially motivated incidents, such as physical altercations or threats of violence, have occurred” and that the school’s “exclusion of racially divisive symbols in a school that has experienced intense racial tensions is a permissible content-based [as opposed to viewpoint-based] restriction” because of the “unique mission of public education” and the Supreme Court’s “holding that the free-speech rights of public-school students are not coextensive with those of adults”); *TW ex rel. West v. Derby Unified Sch. Dist.* No. 260, 206 F.3d 1358, 1365–68 (10th Cir. 2000) (upholding the suspension of a student for drawing a picture of a Confederate flag during math class in violation of the school’s “Racial Harassment and Intimidation” policy and noting that the school could bar students from drawing the Confederate flag while also “permitting other students to possess the flag in history

to areas of public accommodations—specifically in states that were members of the Confederacy—to attempt to ban the Confederate flag at least partially. Moreover, private-sector employers have control over their workplaces and can restrict the display of offensive imagery, including the Confederate flag.²⁴³ But even if the final prong of this Note’s proposed legislation banning Confederate imagery proves ineffective, the other initiatives discussed in this Note, coupled with increased education, would nonetheless position the United States in a better place than where it is today.

CONCLUSION

The pseudo-historical narrative of the Lost Cause is nothing more than a dog whistle for neo-Confederate white nationalist organizations. Rally calls of the Lost Cause embolden members of neo-Confederate white nationalist organizations, which results in race-based violence that the United States government has thus far been unable or unwilling to control. Congress must enact legislation that acknowledges the sins of America’s past. Learning from how Germany confronted its racist past can be instructive toward this end. The goal of the

books and other approved materials”); Melton *ex rel.* Melton v. Young, 465 F.2d 1332, 1333–35 (6th Cir. 1972) (holding that the suspension of a high school student for refusing to stop wearing a Confederate flag patch in violation of a school board ban did not violate the First Amendment as, in previous years, the school had stopped using the Confederate flag as the school’s symbol in response to serious racial tensions and emphasizing that school officials “had every right to anticipate that tense racial situation continued to exist”); D.B. *ex rel.* Brogdon v. Lafon, 452 F. Supp. 2d 813, 819, (E.D. Tenn. 2006), *aff’d*, 217 F. App’x 518 (6th Cir. 2007) (upholding the school’s ban on clothing depicting the Confederate flag because of a substantial history of racial tensions in the school, including fights and lockdowns as a result of threats made against African American students); Hardwick *ex rel.* Hardwick v. Heyward, 711 F.3d 426, 430–31 (4th Cir. 2013) (upholding a school district’s ban on clothing displaying the Confederate flag as well as a shirt displaying an image of the United States flag with the statement that “Old Glory Flew over legalized slavery for 90 years” where there was a history of racial tension in the school district); Phillips v. Anderson Cnty. Sch. Dist. Five, 987 F. Supp. 488, 490–91 (D.S.C. 1997) (holding that a student’s First Amendment rights were not violated when he was suspended for refusing to remove a jacket that looked like the Confederate flag and where school policy required that school “attire should not interfere with classroom instruction” and the student had previously been involved in racially-motivated fights at school involving such clothing).

243. See, e.g., Dixon v. Coburg Dairy, Inc., 330 F.3d 250, 262–63 (4th Cir. 2003).

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legislation that this Note proposes is to delegitimize the platform of neo-Confederate white nationalist organizations and educate American youth on the atrocities of the South pre- and post-Civil War.

America must reconcile why it authorized and participated in denazification in Germany, but it refuses to do the same with respect to slavery on its own soil. With blood on its hands, the United States government must act to correct the wrongs of the past.