TRESPASSING ON WHITE SUPREMACY: THE LEGACY OF ESTABLISHMENT WHITE SUPREMACY IN NORTH CAROLINA*

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White supremacy offers a unifying framework for understanding the legal history of North Carolina, the current legal regime of the state, and the actions of the state in responding to protests demanding redress from that insidious history. We provide a history of the First Reconstruction in the state, the leading role of white lawyers in the subsequent reaction resulting in the codification laws advantaging white citizens over nonwhite citizens, and the continuities between the early Jim Crow legal regime and the legal reactions to current protests in the state. We explore three waves of recent protests in North Carolina in the context of this legal history: Moral Monday, Confederate monument removal, and Black Lives Matter. We argue these protests point to the reforms necessary to root out persisting institutionalized white supremacy in North Carolina. We describe the legal theories we used in defending protestors and our attempts to reconcile the promise of equal protection under the law with racially disparate treatment in the state's institutions. In doing so, we add a universal constitutional lens to the criminal charges brought against protesters and attempt to name what has become an invisible force in interpretation of North Carolina's history.

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INTRODUCTION

The history of white supremacy has, in principle and practice, poisoned the American legal system and undermined the rule of law in the United States. Civil disobedience and protest for racial equity expose the evil of white supremacy while at the same time offering a path to reform. By demanding a correction of institutionalized and systemic white supremacy, protest is necessary to achieve a more legitimate rule of law. Racially disparate treatment in the legal system is an area crying out for healing, repair, and reconciliation as a result of continued systemic racial inequality.

Racial inequality is a festering historic and generational wound because of a contradiction between the promise of equal protection of law and the history of actual racial oppression and exploitation—a contradiction planted at the root of our constitutional democracy, which continually undermines the principle of

equal protection of the law. North Carolina's legal history shows how the seeds of white supremacy planted deep roots that grew into laws, policies, and systems that still influence how our present legal system operates. Protest has been an important tool in uprooting the insidious legacy of racism in our institutions and legal system.

This Article will first explore the history of how influential white lawyers in North Carolina organized a campaign to preserve white rule, fanned the flames of white supremacist violence, and became the architects of the codification of white supremacy in Jim Crow laws of the early twentieth century. We will provide historical context on the Reconstruction era and the subsequent white supremacist reaction at the turn of the nineteenth century. We will then turn to the resulting codification of white supremacy and illustrate how North Carolina's laws have yet to reconcile this problematic history.

This historical framework provides a necessary context for recent protests in North Carolina and frames our experience defending the arrest of racial justice protesters in three different protest movements: Moral Monday, Confederate monument removal, and Black Lives Matter.

I. THE PROMISE OF RECONSTRUCTION

In the aftermath of the Civil War,[1] congressional reconstruction in the South promised a legal framework for racial equality, including the right to vote, opportunities for education, land ownership, and entrepreneurship for recently freed slaves.[2] Economic depression of the 1880s radicalized white agrarians who founded the "People's Party" and became known as "Populists."[3] They allied with newly freed slaves loyal to the Republican Party of Lincoln to form an interracial "Fusion" coalition.[4]

1. *See* Alan T. Nolan, *The Anatomy of the Myth*, *in* THE MYTH OF THE LOST CAUSE AND CIVIL WAR HISTORY 11, 11–12 (Gary W. Gallagher & Alan T. Nolan eds., 2010).

2. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, at xvii (2014). *See generally* DAVID W. BLIGHT, RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY (2001) (exploring the shortcomings of Reconstruction and the consequences of failure to fulfill the promise of racial equality); W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA 1860–1880 (1963) (same).

3. *See* Timothy B. Tyson, *The Ghosts of 1898: Wilmington's Race Riot and the Rise of White Supremacy*, NEWS & OBSERVER, Nov. 17, 2006, at 5 [hereinafter Tyson, *The Ghosts of 1898*].

4. *See, e.g.*, *id.*; Timothy B. Tyson & David S. Cecelski, *Introduction* to DEMOCRACY BETRAYED: THE WILMINGTON RACE RIOT OF 1898 AND ITS LEGACY 3, 4 (David S. Cecelski & Timothy B. Tyson eds., 1998) [hereinafter DEMOCRACY BETRAYED]; Stephen Kantrowitz, *The Two Faces of Domination in North Carolina, 1800-1898*, *in* DEMOCRACY BETRAYED, *supra*, at 95, 105–06; Laura F. Edwards, *Captives of Wilmington: The Riot and Historical Memories of Political Conflict, 1865–1898*, *in* DEMOCRACY BETRAYED, *supra*, at 113, 131–32; Michael Honey, *Class, Race, and Power in the New South: Racial Violence and the Delusions of White Supremacy*, *in* DEMOCRACY BETRAYED, *supra*, at 163, 171.

This Fusion coalition took control of the North Carolina General Assembly, the governorship, and "countless local offices, threatening the power of both the remnants of the old planter class and the emerging industrial leaders of the New South."[5] Additionally, the passage of the Reconstruction Acts, the Thirteenth, Fourteenth, and Fifteenth Amendments, and the North Carolina Constitution, opened the doors of political power for Black people and recently freed slaves.[6] The North Carolina elections of 1894 and 1896 saw the widespread success of the Fusion coalition; their platform focused on an equal right to vote for white and Black residents, free public education, and a check on monopoly capitalism.[7]

Charles Chesnutt,[8] a writer, activist, and lawyer from Fayetteville, North Carolina, described this First Reconstruction for Black residents of North Carolina:

> For thirty-five years this has been the law. As long as it was measurably respected, the colored people made rapid strides in education, wealth, character and self-respect. This the census proves, all statements to the contrary notwithstanding. A generation has grown to manhood and womanhood under the great, inspiring freedom conferred by the Constitution and protected by the right of suffrage—protected in large degree by the mere naked right, even when its exercise was hindered or denied by unlawful means. . . . They have reduced their illiteracy 50 per cent. Excluded from the institutions of higher learning in their own States, their young men hold their own, and occasionally carry away honors, in the universities of the North. They have accumulated three hundred million dollars worth of real and personal property.[9]

As a result of expanded rights for Black North Carolinians and an interracial politics focused on enhancing public education and shared economic

5. Tyson & Cecelski, *supra* note 4, at 4.

6. Edwards, *supra* note 4, at 117.

7. Tyson, *The Ghosts of 1898*, *supra* note 3, at 5H; *see* Tyson & Cecelski, *supra* note 4, at 4.

8. Charles Chesnutt was born in 1858 and died in 1932. William L. Andrews, *Chesnutt, Charles W.*, *in* ENCYCLOPEDIA OF SOUTHERN CULTURE 202, 202–03 (Charles Reagan Wilson & William Ferris eds., 1989). He was the son of freed Black people who left Fayetteville when Chesnutt was eight years old and returned later when he attended a school founded by the Freedman's Bureau. *Id.* He became a teacher and studied the classics, languages, music, and stenography. *Id.* He moved to Cleveland, Ohio, in 1883, where he passed the state bar and started a court reporting firm. *Id.* He served on the General Committee of the NAACP when it was formed, working with W.E.B Du Bois and Booker T. Washington. *Id.* Writing for the NAACP's magazine, *The Crisis*, he wrote essays on disenfranchisement and segregation. *See* Eleanor Lee Yates, *Charles Chesnutt Leaves an Indelible Legacy in Hometown and the Nation*, DIVERSE (Nov. 26, 2012), https://diverseeducation.com/article/49736/ [https://perma.cc/K64F-3R7X]; Michael Flusche, *On the Color Line: Charles Waddell Chesnutt*, 53 N.C. HIST. REV. 1, 22–24 (1976).

9. Charles W. Chesnutt, *The Disfranchisement of the Negro*, *in* CHARLES W. CHESNUTT: STORIES, NOVELS & ESSAYS 874, 874 (2002) [hereinafter Chesnutt, *The Disfranchisement of the Negro*].

opportunity, the Fusion coalition won every statewide office, the legislature, and governorship in the elections of 1894 and 1896.[10]

II. LEGAL HISTORY OF NORTH CAROLINA'S WHITE SUPREMACY: LAWYERS AS THE ARCHITECTS OF CODIFIED RACISM

A. *Reactionary White Supremacy*

Threatened by the political gains of the Fusion coalition, a collection of "white Democrats vowed to regain control of the government."[11] Affluent white southerners met advances for Black equality with brutal violent reactions[12] due to their perception of waning power[13] and the "rapid progress"[14] made by Black Americans.

This violence was in large part a result of, and fueled by, a propaganda campaign of prominent white Democrats throughout the state. For instance, Furnifold Simmons, chairman of the Democratic Party in North Carolina, 1892–1894 and 1896–1907,[15] carefully organized a bureau of white supremacist speakers which included attorneys Charles Aycock, Locke Craig, Alfred Waddell,[16] Robert B. Glenn, Thomas J. Jarvis, and Cameron Morrison.[17] The propaganda wing of the white supremacist Democratic Party, which included all the aforementioned lawyers, focused its message on sexualized and criminalized images of Black men as "black beasts" who "threatened the flower

10. Tyson, *The Ghosts of 1898*, *supra* note 3, at 5H.

11. *Id.*

12. *See* THE MYTH OF THE LOST CAUSE AND CIVIL WAR HISTORY, *supra* note 1, at 32.

13. Tyson, *The Ghosts of 1898*, *supra* note 3, at 5H.

14. Chesnutt, *The Disfranchisement of the Negro*, *supra* note 9, at 875 ("Heavily handicapped, they have made such rapid progress that the suspicion is justified that their advancement, rather than any stagnation or retrogression, is the true secret of the virulent Southern hostility to their rights, which has so influenced Northern opinion that it stands mute, and leaves the colored people, upon whom the North conferred liberty, to the tender mercies of those who have always denied their fitness for it.").

15. Richard L. Watson, Jr., *Simmons, Furnifold McLendel*, *in* 5 DICTIONARY OF NORTH CAROLINA BIOGRAPHY 346, 346–47 (1994). Simmons became a U.S. Senator in 1900 and served until 1930. *Id.* During that period he continued to exert strong influence over North Carolina politics, selecting governors and other officials in what came to be known as the "Simmons Machine." *Id.*

16. In addition to being an attorney, Waddell was a lieutenant colonel in the Confederate army. Kent McCoury, *Alfred Moore Waddel (1834-1912)*, N.C. HIST. PROJECT, https://northcarolinahistory.org/encyclopedia/alfred-moore-waddell-1834-1912/ [https://perma.cc/9K9F-TMFA].

17. *See* VANN R. NEWKIRK, LYNCHING IN NORTH CAROLINA: A HISTORY, 1865-1941, at 12–13 (2009); Tyson, *The Ghosts of 1898*, *supra* note 3, at 1A; H. Leon Prather, Sr., *The Red Shirt Movement in North Carolina 1898-1900*, 62 J. NEGRO HIST. 174, 178 (1977) [hereinafter Prather, *The Red Shirt Movement*] ("It is important to mention that public persuasion (political oratory) from rostrums and stomps was the major attraction at the rallies. Indeed, the Democrats had the most effective speakers who could excite their hearers. They included the veteran ex-Governor Jarvis, Simmons, Cameron Morrison, the fiery and rabid Alfred M. Waddell of Wilmington, sometimes dubbed the 'American Robespierre,' and the heavy-set and vigorous Robert B. Glenn, a perfect rough-and-tumble, 'give-them-hell' type speaker. The star, to be sure, was Charles B. Aycock, the next governor.").

of Southern Womanhood."[18] Making the "safety of the home" a campaign slogan, white men were urged, often by Simmons's stable of speakers, to "restore to the white women of the state the security they felt under the [previous] twenty years of democracy."[19] Although local statistics showed no actual increase in rapes, the myth of a racialized rape scare was used to "pull white apostates back into the Democratic Party."[20]

Extrajudicial white supremacist violence against Black North Carolinians was an effective form of racial control, and lynchings were not an isolated event, as there were approximately 165 lynchings in North Carolina between 1865 and 1941.[21] One emblematic moment of this movement came in Laurinburg in May 1898, when Charles Aycock, on a white supremacist speaking tour, inflamed the emotion of the crowd by emphasizing the threat posed by "Negro supremacy" to sexual purity and the virtue of white womanhood, saying, "I appeal to you in the name of white womanhood and motherhood of North Carolina to come to the rescue of your state now seriously threatened."[22] To the cheers and delight of the audience, Aycock made a favorable reference to two Black men lynched in Cabarrus County: "Why, you white men of Cabarrus don't even wait for the law when negroes have dishonored your helpless white women."[23]

Adding to this culture of racial violence, the "Red Shirts" were the paramilitary wing of this white supremacy movement and were openly endorsed by white Democratic candidates.[24] Although they did not murder people the way the Ku Klux Klan did, the Red Shirts did seek to put the state "under a kind of martial law."[25] The Red Shirts, which included men from all walks of life,[26] often appeared at political parades and rallies, stoking fear and violent intimidation by firing "cannons in the vicinity of Republican rallies" and "stag[ing] torchlight processions, [making] nocturnal raids against . . . carpetbaggers and whipp[ing] blacks who were politically active."[27] They even threatened Fusionist leaders with assassination.[28]

In a white supremacist election speech in Goldsboro, Alfred Waddell proclaimed,

18. Tyson, *The Ghosts of 1898*, *supra* note 3, at 1A.

19. Glenda E. Gilmore, *The Flight of the Incubus*, *in* DEMOCRACY BETRAYED, *supra* note 4, at 75.

20. *Id.* at 74.

21. NEWKIRK, *supra* note 17, at 167–70.

22. RICHARD A. PASCHAL, JIM CROW IN NORTH CAROLINA: THE LEGISLATIVE PROGRAM FROM 1865 TO 1920, at 85 (2021).

23. *Id.*

24. *Id.* at 87–88.

25. Prather, *The Red Shirt Movement*, *supra* note 17, at 175.

26. *See id.* ("While the organization was tinctured with hoodlums, it included wealthy farmers, schoolteachers, and bankers—both young and old men.").

27. *Id.*

28. *See* PASCHAL, *supra* note 22, at 87–88.

> You are Anglo-Saxons. You are armed and prepared and you will do your duty . . . . Go to the polls tomorrow, and if you find the negro out voting, tell him to leave the polls and if he refuses, kill him, shoot him down in his tracks. We shall win tomorrow if we have to do it with guns.[29]

Leading up to the election of 1898, the Red Shirts made good on Waddell's threats, disrupting Black church services and Republican and Populist meetings around the state as well as patrolling the streets of Wilmington, intimidating and attacking Black citizens.[30]

As a result of the white supremacist campaign of violent voter intimidation, the Democrats won a statewide victory in November of 1898.[31] Yet in Wilmington, things remained—for a while—relatively undisturbed: the mayor and the board of aldermen were not up for reelection and remained in office,[32] and the city remained a center of African American economic and political power. The campaign of white supremacy, however, had, as it were, stacked the logs and prepared the kindling for a fire that would ignite the city in 1898.

The day after the election, an angry white mob gathered outside the Wilmington courthouse, with Waddell announcing a "White Declaration of Independence," which called for Black disenfranchisement, while also delivering his famous (and no doubt ignominious): "We will never surrender to a ragged raffle of Negroes, even if we have to choke the Cape Fear River with carcasses."[33] The precipitating event involved an editorial written by Alexander Manly, the Black owner of the *Wilmington Daily Record*.[34] Manly asserted that not all sex is rape and that white women willingly have sex with Black men: "White women are not any more particular in the matter of clandestine meetings with colored men than are white men with colored women."[35] The mob demanded that white employers fire Black employees, Alex Manly leave the city, and the Fusionist chief of police and mayor resign (despite the fact the mayor had a year left to serve).[36]

When their ultimatums were not met, Waddell and his mob gathered together the next day and burned down the *Daily Record* building.[37] White racial violence spread throughout the city, and by the end of the day many Black

29. Catherine W. Bishir, *Landmarks of Power: Building a Southern Past, 1885-1915*, 1993 S. CULTURES 5, 17 (alteration in original).

30. Tyson, *The Ghosts of 1898*, *supra* note 3, at 9H.

31. *Id.* at 1A.

32. Gilmore, *supra* note 19, at 85.

33. *Id.*; Tyson, *The Ghosts of 1898*, *supra* note 3, at 1A.

34. Tyson, *The Ghosts of 1898*, *supra* note 3, at 1A.

35. HENRY LOUIS GATES, JR., STONY ROAD: RECONSTRUCTION, WHITE SUPREMACY, AND THE RISE OF JIM CROW 143–44 (2019).

36. *See id.*

37. *See id.*

residents were killed.[38] The mayor, the board of alderman, and the police chief were forced to resign at gunpoint, and Waddell was installed as Wilmington's mayor.[39] At least twenty-one Fusionist leaders were marched to the train station and banished.[40] All said, these events, which together make the Wilmington Insurrection,[41] resulted in the only successful coup d'état in United States history.[42]

This violence and overthrow of a duly elected government was the direct result of the white supremacy campaign launched by white Democrats and organized by white lawyers to return power to the white elite, seizing it from a coalition of Black people and poor white farmers.

B. *Disenfranchisement*

After taking power at the turn of the century, the white supremacist Democratic legislature acted immediately to consolidate their illegitimate gains.[43] Their first legislative priority was to disenfranchise Black voters.[44] Disenfranchisement was, in a real sense, the legislative goal of racial violence. Riding the wave of white terror they fomented,[45] Southern Democrats were able to successfully disenfranchise Black North Carolinians, and in so doing sought to "knock the race down and rob it of its rights once and for all," as opposed to having to "repeat the process day to day and with each individual."[46]

Charles Aycock, who was the leading speaker for the white supremacy campaign movement, campaigned heavily in support of the 1900 North Carolina constitutional amendment disenfranchising Black voters.[47] His campaign succeeded by launching Aycock into the governor's seat in 1900.[48]

38. *See* Tyson, *The Ghosts of 1898*, *supra* note 3, at 10.

39. *Id.*

40. *Id.* at 1A.

41. Historically given the misnomer "Wilmington Race Riot." *See id.* at 3H.

42. Aaron Randle, *America's Only Successful Coup d'État Overthrew a Biracial Government in 1898*, HISTORY (Oct. 7, 2020), https://www.history.com/news/wilmington-massacre-1898-coup [https://perma.cc/99F3-A2L5].

43. PASCHAL, *supra* note 22, at 152.

44. *See* Tyson, *The Ghosts of 1898*, *supra* note 3, at 12.

45. *See* Prather, *We Have Taken a City*, *in* DEMOCRACY BETRAYED, *supra* note 4, at 15, 20–21; *see also* Moore v. Bryant, 205 F. Supp. 3d 834, 840 (2016) ("Upon the readmission of the Confederate states to the Union, the South committed itself to two 'new' causes—the continuation of a racial caste system and the endurance of Antebellum culture. During Reconstruction, organizations like the Ku Klux Klan, Knights of the White Camellias, and the White League sought to preserve white supremacy by using intimidation and violence to terrorize African-Americans."); NEWKIRK, *supra* note 17, at 12 (describing a white supremacy campaign "which relied on speeches, editorials, and threats of violence to shape public opinion and remove blacks from the political process").

46. Charles W. Chesnutt, *The Future American*, *reprinted in* CHARLES W. CHESNUTT: STORIES, NOVELS & ESSAYS 845, 861 (2002) [hereinafter Chesnutt, *The Future American*].

47. Tyson, *The Ghosts of 1898*, *supra* note 3, at 6H–7H.

48. *Id.* at 1A.

Aycock used the violence perpetrated by white supremacists in Wilmington as justification for Black disenfranchisement, reframing the incident under the misnomer "race riot."[49] Under his reframing, white domination was purportedly necessary to prevent future bloodshed.[50]

Further, an analysis of the 1900 vote for the disenfranchisement constitutional amendment reflects substantial voter fraud: According to the data, Black people, apparently, overwhelmingly voted to disenfranchise themselves—an obvious absurdity.[51] An analysis of voting during that period showed that between 1880 and 1896, the Democratic Party never received more than fifty-four percent of the vote in races for governor.[52] A county-by-county analysis of the North Carolina election of 1900 showed that the estimated percentage of the Black vote for the Populist-Republican gubernatorial candidate and opposition to disenfranchisement was zero, and the estimated Black vote for the Democrats and the constitutional amendment for disenfranchisement was seventy-three percent.[53] This means that "[u]sing the estimates for adult black males, the county-by-county vote totals suggest that blacks voted overwhelmingly to disenfranchise themselves."[54] Historian Helen Edmonds, in her book on Fusion politics of the period, reached the same conclusion in her analysis of county vote totals.[55] The idea that Black people supported their own disenfranchisement, and virtually none opposed it, is "simple fraud."[56]

The Democratic voting reforms then included provisions: (1) appointing Democratic white supremacists as local election officials;[57] (2) purging Black people from voter rolls and requiring reregistration;[58] and (3) requiring proof of identity and date of birth and other questions deemed material for registration, which was nearly impossible for former slaves.[59] A literacy test was

49. *Id.* at 3H.

50. Prather, *We Have Taken a City*, *in* DEMOCRACY BETRAYED, *supra* note 4, at 15, 39; *see also* H. LEON PRATHER, SR., WE HAVE TAKEN A CITY: THE WILMINGTON RACIAL MASSACRE AND COUP OF 1898, at 179–81 (1984) (explaining that Charles Aycock used the violence that Democrats had orchestrated in Wilmington as an argument for giving the Democratic Party full sway over state politics; disenfranchisement, he argued, would prevent future bloodshed).

51. PASCHAL, *supra* note 22, at 153.

52. *See* J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910, at 183 (1974); PASCHAL, *supra* note 22, at 71.

53. KOUSSER, *supra* note 52, at 194; PASCHAL, *supra* note 22, at 153.

54. *Id.*

55. HELEN G. EDMONDS, THE NEGRO AND FUSION POLITICS IN NORTH CAROLINA: 1894–1901, at 233 (1951); *see also* PASCHAL, *supra* note 22, at 153–54.

56. PASCHAL, *supra* note 22, at 154.

57. An Act To Regulate Elections, ch. 507, §§ 4–5, 1899 N.C. Sess. Laws 658, 659.

58. *Id.* § 11.

59. *Id.*; *see also* PASCHAL, *supra* note 22, at 152.

also imposed, except for those whose grandfathers could vote,[60] and a literacy test remains part of the North Carolina Constitution to this day.[61]

Once elected governor, Aycock furthered white supremacist political objectives by ensuring that no Black North Carolinian would have any political power in government and ensuring that the schools were radically segregated.[62] In a speech as governor in 1903, Aycock boasted:

> [W]e have solved the negro problem . . . .We have taken him out of politics and have thereby secured good government under any party . . . . I am inclined to give to you our solution of this problem. It is, first, as far as possible under the Fifteenth Amendment to disfranchise him. . . . Let the negro learn once for all that there is unending separation of the races, that the two peoples may develop side by side to the fullest but that they cannot intermingle; let the white man determine that no man shall by act or thought or speech cross this line, and the race problem will be at an end.[63]

Any lip service to Black North Carolinians developing "to the fullest" neither softened the government's restrictions on Black North Carolinians nor reversed the harm to those murdered or exiled in Wilmington. Specifically, the segregation laws passed during the Aycock administration include the following Acts: giving Greenville Board of Trustees discretion to racially segregate funding for schools;[64] mandating the state librarian create a separate place for colored patrons;[65] authorizing the Charlotte librarian to segregate the library;[66] and defining "negro child" for the purposes of segregated education.[67] Additionally, Aycock oversaw legislation that segregated all public schools:

> All white children shall be taught in the public schools provided for the white race, and all colored shall be taught in the public schools provided

60. PASCHAL, *supra* note 22, at 156.

61. N.C. CONST. art. VI, § 4; *see also* N.C. CONST of 1868, art. VI, § 4 (amended 1900).

62. The segregation laws passed during the Aycock administration include the following: Act of Jan. 9, 1901, ch. 497, § 8, 1901 N.C. Sess. Laws 690, 693–94 (giving the Greenville Board of Trustees discretion to racially segregate funding for schools); *id.* § 2 (requiring the state librarian to create separate place for colored patrons); *id.* § 4 (authorizing the Charlotte librarian to segregate the library); Act of Jan. 6, 1903, ch. 435, § 22, 1903 N.C. Sess. Laws 751, 756 ("All white children shall be taught in the public schools provided for the white race, and all colored shall be taught in the public schools provided for the colored race; but no child with negro blood in his veins, however remote the strain, shall attend a school for the white race."). *See also* NEWKIRK, *supra* note 17, at 13 ("During Aycock's first three months in office, lynch mobs claimed the lives of three African Americans.").

63. R.D.W. CONNOR & CLARENCE HAMILTON POE, THE LIFE AND SPEECHES OF CHARLES BRANTLEY AYCOCK 162 (1912).

64. § 8, 1901 N.C. Sess. Laws at 693–94.

65. *Id.* § 2.

66. Act of Jan. 9, 1901, ch. 176, § 4, 1901 N.C. Sess. Laws 476, 476.

67. Act of Jan. 6, 1903, ch. 435, § 22, 1903 N.C. Sess. Laws 751, 756.

> for the colored race; but no child with negro blood in his veins, however remote the strain, shall attend a school for the white race.[68]

Finally, Aycock told his supporters toward the end of his life in 1912, that "everywhere and all the time we have fought for white supremacy."[69]

What is more, when Black people sought to challenge these legislative schemes in court, the complete institutionalization of white supremacy made it nearly impossible for these legal challenges to succeed. For example, in *Giles v. Harris*,[70] plaintiffs challenged the State of Alabama's constitutional requirements for voter registration and qualifications, arguing that, in practice, they discriminated against Black citizens. In one of the clearest examples of the self-sustaining cycle of institutionalized white supremacy, the U.S. Supreme Court did not consider the clear intent or broader context of the passage of the laws and thus upheld the requirements.[71] The Court explained that if the law was not discriminatory on its face, the Court would not look at its racially disparate impact to protect Black people from discrimination.[72]

Highlighting the insidious effects of these legislative efforts so as to close the courts to hearing the claim of racial discrimination, Chesnutt critiqued the Court's holding, stating "it took the narrow view, and held that so long as the State did not discriminate in terms against the Negroes as such, there was no violation of the constitutional provision, though *in effect* it might disfranchise the race."[73] Chesnutt argued that the Court might have held, as it did in cases involving the right to sit on juries, that the action of state officers charged with the execution of the law was as much a violation of the Constitution as an act of the legislature.[74] Instead, the Court suggested that this was a political issue for the Black community to take up with the legislature, and not a justiciable issue in Courts.[75] Quoting an editor in Richmond, Chesnutt exposed the circular "pass the buck" attitude of the branches of government toward race discrimination:

68. *Id.*

69. N.C. BAR ASS'N, REPORT FROM THE EXECUTIVE DIRECTOR TO THE NORTH CAROLINA BAR ASSOCIATION (NCBA) BOARD OF GOVERNORS AND THE NORTH CAROLINA BAR FOUNDATION (NCBF) BOARD OF DIRECTORS REGARDING RELATIONSHIPS BETWEEN THE NCBA AND SYSTEMIC RACISM IN NORTH CAROLINA 14 (2020) [hereinafter N.C. BAR ASS'N REPORT], https://www.ncbar.org/wp-content/uploads/2020/12/Report-Regarding-Relationships-Between-the-NCBA-and-Systemic-Racism-11-30-2020.pdf [https://perma.cc/F4UD-WPDZ].

70. 189 U.S. 475 (1903).

71. *Id.* at 486.

72. *Id.*

73. Charles W. Chesnutt, *The Courts and the Negro*, *reprinted in* CHARLES W. CHESNUTT: STORIES, NOVELS & ESSAYS 895, 905 (2002) (emphasis added).

74. *Id.*

75. *Id.* at 487.

> When we seek relief at the hands of Congress we are informed that our plea involves a legal question, and we are referred to the Courts. When we appeal to the Courts we are gravely told that the question is a political one, and that we must go to Congress. When Congress enacts remedial legislation our enemies take it to the Supreme Court which promptly declares it unconstitutional.[76]

All said, this perpetuated the cycle of entrenched white supremacy in North Carolina: white supremacist lawyers organized a political campaign and seized power in North Carolina by illegitimate acts of violence and fraud. Then white supremacist lawyers amended the North Carolina Constitution to obliterate Black political power. Constitutional amendments and Jim Crow laws were written to be racially neutral on their face but racially disparate in application. When those racist constitutional amendments came before the all-white judiciary, the courts upheld the racist outcome of racially neutral disenfranchisement provisions by narrowly reading the constitution. As a consequence, North Carolina as a state became an apparatus for white supremacy instead of an arm of justice.

This disenfranchisement had further self-reinforcing results: Chesnutt's analysis of Supreme Court decisions that upheld the disenfranchisement of Black people in the South[77] found no protection for Black North Carolinians in the courts and no representation in state legislatures. Chesnutt showed that the Black community could expect no help from Congress because the white South sends a "delegation nearly twice as large as it is justly entitled to."[78] With respect to the right to vote, Chesnutt wrote, "Armed with the Negro's sole weapon of defense, the white South stands ready to smite down his rights. The ballot was first given to the Negro to defend him against this very thing."[79]

C. *Segregation Laws*

At the same time that white supremacists disenfranchised the Black community, they passed other laws to reinforce cultural norms that separated and segregated the races in public, enforced other racially neutral laws in a racially discriminatory manner, and allowed racial cultural separation by private

76. Chesnutt, *The Disfranchisement of the Negro*, *supra* note 9, at 889. "There are three tribunals to which the colored people may justly appeal for the protection of their rights: The United States Courts, Congress, and public opinion. At present all three seem mainly indifferent to any question of human rights under the Constitution." *Id.*

77. *Id.* at 879–80 ("For the decision of the Supreme Court in the Giles case, if it foreshadows the attitude which the Court will take upon other cases to the same general end which will soon come before it, is scarcely less than a reaffirmation of the Dred Scott decision; it certainly amounts to this—that in spite of the Fifteenth Amendment, colored men in the United States have no political rights which the States are bound to respect.").

78. *Id.* at 880.

79. *Id.*

acts of violence and intimidation.[80] The primary rationale for the legalized separation of the races was the racial mythology that Black men had a natural propensity to rape white women, and therefore race mixing in public transportation, accommodations, and schools increased the opportunity for Black men to rape white women.[81] Again as a result of the success of the white supremacy campaign, the new Democratic legislature passed laws racially segregating railroads and steamboats.[82]

The effective tactic of disenfranchisement allowed for increasing segregation in all things. These forms of segregation were, as Chesnutt explains, "attempts to keep the white and colored races apart in every place where their joint presence might be taken to imply equality[,] effort[s] to degrade the Negro to a distinctly and permanently inferior caste."[83] The "drastic and increasing legislation" included segregated schools, separate public transportation, voter restrictions, and a violent carceral state.[84] In addition to segregating institutions, Black people were systemically excluded from occupying certain positions, such as law enforcement.[85] Moreover, Chesnutt observed these laws and abuses were tolerated or made more palatable by "an unflagging campaign of calumny, by which the vices and shortcomings of the Negroes are grossly magnified and their virtues practically lost sight of."[86] In short, Charles Chesnutt witnessed and documented the imposition of a new system of racial American Apartheid.

This era—which serves as the root of our modern-day racist legal framework—saw the cultural and legal separation of the races in politics, housing, employment, education, marriage, and society, enforced by law and by lawless white terrorism, racial intimidation, and lynching.[87] The enforcement of the law was used as a tool to oppress Black North Carolinians, and the lack of enforcement of the law was used to protect white perpetrators of racial violence against Black residents. Racism made the rule of law impossible.

80. *See* PASCHAL, *supra* note 22, at 41.

81. *See* GATES, *supra* note 35, at 141.

82. PASCHAL, *supra* note 22, at 118; Act of Jan. 4, 1899, ch. 384, § 1, 1899 N.C. Sess. Law. 539, 539–40 (requiring segregation of railroads and steamboats); Act of Jan. 9, 1907, ch. 850, § 2, 1907 N.C. Sess. Laws 1238, 1238 (requiring segregation on street cars).

83. Chesnutt, *The Future American*, *supra* note 46, at 859.

84. *Id.* ("His equal right to a free public education is constantly threatened and is nowhere equitably realized.").

85. Chesnutt, *The Disfranchisement of the Negro*, *supra* note 9, at 878.

86. Chesnutt, *The Future American*, *supra* note 46, at 859.

87. *See* Raymond Gavins, *Fear, Hope, and Struggle: Recasting Black North Carolina in the Age of Jim Crow*, *in* DEMOCRACY BETRAYED, *supra* note 4, at 185, 188–89; Moore v. Bryant, 205 F. Supp. 3d 834, 840–41 (S.D. Miss. 2016) ("Racial violence continued through the 1870s as local Klan groups lynched, beat, burned, and raped African-Americans. Despite the Klan's record of violence, 'Southerners romanticized it as a chivalrous extension of the Confederacy.'").

D. *Vagrancy Laws and Convict Leasing*

Continuing the trend of self-reinforcing institutionalized racism, legislators passed vagrancy laws in order to control the presence of Black people in public by criminalizing their presence. Again using racialized, sexualized violence, the rationale behind the laws was to protect white women from being raped by Black men. For example, a 1909 editorial in the *Charlotte News* called "White Women in Danger" advocated for the strict enforcement of the "rigid law against vagrancy" to protect white homes from "shiftless negroes."[88]

Vagrancy laws, which criminalized "sauntering about without employment," were passed after the Civil War and left those incarcerated for vagrancy susceptible to being leased by the state for work.[89] Increased discriminatory enforcement of criminal laws and court-mandated fines also reinforced the laws targeting Black North Carolinians, which offered further methods to exploit Black labor. Even for misdemeanors, or for failure to pay fines, Black people were incarcerated.[90] The convict leasing system led to mass arrests of Black people for minor offenses like vagrancy, drunkenness, or gambling.[91] Once convicted, they would be put to work on a chain gang for public works or leased to private companies. Sometimes Black people were held on bond pending trial and forced to work until they could pay the amount of the bond, then sentenced to hard labor.[92] Convicts were held beyond their term of imprisonment in involuntary servitude, or peonage.[93]

Largely as a result of discriminatory enforcement, a majority of North Carolina's prisoners were Black and were leased to local governments for public works projects or private companies to build railroads and canals.[94] With workers being leased to the highest bidder, convict leasing was a form of forced labor—and one that subjected Black people to substantial cruelty and harsh conditions.[95] For if a Black person died in these conditions, the lessor could just

88. GATES, *supra* note 35, at 142–43.

89. PASCHAL, *supra* note 22, at 61.

90. *See id. See generally* Elizabeth Hinton & DeAnza Cook, *The Mass Criminalization of Black Americans: A Historical Overview*, 4 ANN. REV. CRIMINOLOGY 2.1, 2.8 (2021).

91. PASCHAL, *supra* note 22, at 61.

92. Henry Calvin Mohler, *Convict Labor Policies*, 15 J. AM. INST. CRIM. L. & CRIMINOLOGY 530, 567 (1925).

93. N. Gordon Carper, *Slavery Revisited: Peonage in the South*, 37 PHYLON 85, 85–86 (1976).

94. David Cecelski, *The Convict Labor Camp*, DAVID CECELSKI (Feb. 16, 2020), https://david cecelski.com/2020/02/16/the-convict-labor-camp/ [https://perma.cc/S5JH-6B77] ("After the Civil War, a large majority of the state's prisoners were African American. That was not an accident and it had little to do with criminality: state political leaders openly justified prison construction and convict labor by referring to the end of slavery and calling for new ways to maintain control over a Black labor force. African Americans often ended up on the chain gang for a decade or more for crimes as minor as vagrancy, loitering and petty theft. In the last decades of the 19th century, prison officials 'leased' most of those African American convict laborers to private companies to build railroads and canals. Many also built government buildings.").

95. *See* Carper, *supra* note 93, at 85–86.

lease another convict without absorbing an economic loss arising from the loss of life.[96]

The work was also very dangerous. For example, in just over three years at one railroad company, at least ten leased convicts died in accidents, another twenty-two died of pneumonia, and seventeen more died of tuberculosis.[97] What is more, quite a bit of public resources were dedicated to convict leasing: in 1915, "a state official estimated that one-third of the state's budget for road building crews went to chain gangs."[98] By that time, many convict laborers also worked on state farms.[99]

Convict leasing caused resentment from organized labor because it seriously depressed wages.[100] While white legislators and prosecutors failed to protect Black people from racially motivated crimes committed by white people against them, these same white legislators and prosecutors criminalized poverty and prosecuted Black people in order to exploit and subjugate them. As N. Gordon Carper explains:

> Both the Black Codes and the contract labor laws supported the tendency in the South to weave around ignorant black laborers a legal system which would guarantee not only second-class citizenship for blacks but which would force them into complete economic dependence upon the will of the white landowners and employers.[101]

For many Black North Carolinians, slavery was replaced by another brutal form of economic exploitation which relied on white lawyers' racist administration of the criminal justice system.

III. BUILDING A CULTURAL FRAMEWORK TO REINFORCE CODIFIED WHITE SUPREMACY: CONSTRUCTION OF CONFEDERATE MONUMENTS

After 1900, all of the branches of North Carolina's government were run by white men who expressly advocated for white supremacy, even when it involved intimidation, fraud, or violence. Under this government's tenure, white supremacists erected Confederate monuments in front of courthouses around North Carolina to celebrate their victory which ended the brief era of

96. Cecelski, *supra* note 94.

97. *Id.*; *see also* U.S. INDUS. COMM'N, 3 REPORT OF THE INDUSTRIAL COMMISSION ON PRISON LABOR 96 (Comm. Print 1900); MATHEW J. MANCINI, ONE DIES, GET ANOTHER: CONVICT LEASING IN THE AMERICAN SOUTH, 1866–1928, at 206–07 (1996); Bryan Stevenson, *A Presumption of Guilt: The Legacy of America's History of Racial Injustice*, *in* POLICING THE BLACK MAN 11–13 (Angela J. Davis ed., 2017) (describing the unsafe working conditions and violence faced by Black leased convicts).

98. Cecelski, *supra* note 94.

99. *Id.*

100. Mohler, *supra* note 92, at 567.

101. Carper, *supra* note 93, at 86.

legal, political, and economic gains Black North Carolinians achieved during Reconstruction.[102] As a result, North Carolina is now home to some of the highest numbers of Confederate monuments in the South.[103]

The predominant designer and promoter of Confederate monuments across the South was the United Daughters of the Confederacy ("UDC").[104] The UDC's main objective was to vindicate and glorify the Confederate generation.[105] The UDC also advanced and supported the political white supremacy campaign which disenfranchised and terrorized African Americans.[106] UDC members placed the Confederate flag and portraits of Confederate heroes in southern classrooms and helped teachers plan history lessons.[107] The UDC glorified "Redeemers" who fought against threats to white supremacy and hailed them for "placing white supremacy on an enduring and

102. Brian K. Fennessy, *Silent Sam and Other Civil War Monuments Rose on Race*, NEWS & OBSERVER (Nov. 27, 2017, 9:12 AM), https://www.newsobserver.com/opinion/op-ed/article186178233.html [https://perma.cc/Z99Q-44VC (staff-uploaded, dark archive)] ("To answer this question, I searched for dedication speeches that were given at Confederate soldier monuments across North Carolina. Most orations were given by veterans and state officials. I successfully tracked down 30, and they support two conclusions: 1) white nationalism was a fixture of Confederate monumentation, and 2) Confederate soldier monuments honored veterans for their postwar success in eroding black equality as much as for their failed wartime sacrifices. Racist language pervades the dedication speeches. If one assumes that the speaker is excluding blacks from the term 'southerners,' when its use clearly meant only *white* southerners, then white identity politics are present in every speech. But speakers were often more explicit. 14 speeches explicitly invoked 'our Anglo-Saxon ancestors,' 'love of race,' or 'your own race and blood.'").

103. Erika Williams, *Confederate Statue Removed from NC Courthouse Grounds*, COURTHOUSE NEWS SERV. (Mar. 12, 2019), https://www.courthousenews.com/confederate-statue-removed-from-nc-courthouse-grounds/ [https://perma.cc/YTR9-2CQH]. For context, Confederate monuments sit outside court houses in: Albemarle (1925), Asheville (1898), Bakersville (2011), Burgaw (1914), Burnsville (2009), Clinton (1916), Columbia (1902), Concord (1892), Currituck (1918), Dallas (2003), Danbury (1990), Dobson (2000), Durham (1924), Elizabeth City (1911), Gastonia (1912), Graham (1914), Greenville (1914), Hendersonville (1903), Hertford (1912), Laurinburg (1912), Lincolnton (1911), Louisburg (1923), Lumberton (1907), Marion (unknown dedication), Morganton (1918), Newton (1907), Oxford (1909), Pittsboro (1907), Plymouth (1928), Roxboro (1931), Person County (1922), Rutherfordton (1910), Shelby (1907), Snow Hill (1929), Statesville (1906), Taylorsville (1959), Trenton (1960), Wadesboro (1906), Warrenton (1913), Waynesville (1940), Wilkesboro (1998), Wilson (1926), and Winton (1913). Commemorative Landscapes of N.C., *Mapping Historical Memory*, DOCSOUTH, https://ncmonuments.ncdcr.gov/ [https://perma.cc/DJ2Y-SNZL]. Confederate monuments sit outside schools in: Asheville (Vance Elementary School); Charlotte (Zebulon B. Vance High School); and Henderson (Kerr-Vance Academy, Northern Vance High School, Vance Charter School, Vance County Early College High School, Vance County Middle School, Vance County High School, and Zeb Vance Elementary School). *Id.*

104. KRISTEN L. COX, DIXIE'S DAUGHTERS: NEW PERSPECTIVES ON THE HISTORY OF THE SOUTH 49–52 (2003).

105. *Id.* at 3; Moore v. Bryant, 205 F. Supp. 3d 834, 841–42 (S.D. Miss. 2016) ("What the South lost on the battlefield, it sought to recover in the collective memory of the next generation. 'We have pledged ourselves to see that the truth in history shall be taught,' proclaimed UDC officer Kate Noland Garnett, and there 'shall be no doubt in the minds of future generations as to the causes of the war, and why Southern men were forced to take up arms to defend their homes from the invading North.'").

106. COX, *supra* note 104, at 14.

107. *Id.* at 121.

constitutional basis."[108] The UDC included the KKK among the Redeemers and officially commended the Klan for helping to restore southern home rule and white supremacy.[109]

The same speakers who advanced the successful white supremacy political campaign of 1898, and the disenfranchisement campaign of 1900, made the circuit again to celebrate the erection of Confederate monuments in public spaces around North Carolina. The leader of the white supremacist coup in Wilmington, Alfred Waddell, spoke at several dedication and unveiling ceremonies of Confederate monuments, including monuments erected in Forsyth, Johnston, and Wake Counties,[110] and the town common Confederate monument in Edgecombe County in 1904.[111] Robert B. Glenn spoke at the unveiling and dedication of the Confederate monuments across the state. This included an appearance as governor on Confederate Memorial Day, May 10, 1906, at the Iredell County Courthouse, which was erected and sponsored by the Statesville chapter of the UDC.[112] Glenn also spoke at the dedications in

108. *Id.*

109. *Id.*; *see also Moore*, 205 F. Supp. 3d at 842 ("The UDC also defended the KKK. One set of catechisms ended with a lesson teaching children that the Klan 'protected whites from negro rule.'").

110. Waddell gave the dedication speech at the unveiling of a number of Confederate monuments, including: the monument at the courthouse in Forsyth County, North Carolina, on October 3, 1905, Commemorative Landscapes of N.C., *Confederate Dead Monument, Winston-Salem*, DOCSOUTH, http://docsouth.unc.edu/commland/monument/15 [https://perma.cc/N8UG-CMUN]; the monument in Smithfield, North Carolina, on May 10, 1887, Commemorative Landscapes of N.C., *Confederate Soldiers Monument, Smithfield*, DOCSOUTH, https://docsouth.unc.edu/commland/monument/507/ [https://perma.cc/6NWS-6UY2]; the monument at the Guilford County Courthouse on July 4, 1906, Commemorative Landscapes of N.C., *William Lee Davison Arch, Guilford*, DOCSOUTH, https://docsouth.unc.edu/commland/monument/133/ [https://perma.cc/XQ9S-RKKJ]; and the monument on the capitol grounds in Raleigh on May 20, 1895, Commemorative Landscapes of N.C., *Confederate Monument, State Capitol, Raleigh*, DOCSOUTH, https://docsouth.unc.edu/commland/monument/106/ [https://perma.cc/Z3P6-7763]. At the dedication for the Confederate monument on the capitol grounds in Raleigh, Waddell said, "[Slavery] was an institution, guaranteed and protected by the Constitution, as exclusively within the control of the State, and when the equality and reserved rights of the States were attacked by interference with it, there was just ground to believe that other preserved and guaranteed rights would be assailed, and the equality of the States destroyed." ALFRED MOORE WADDELL, ADDRESS AT THE UNVEILING OF THE CONFEDERATE MONUMENT AT RALEIGH, N.C. 16–17 (1895). Alfred Waddell was a statewide speaker advancing white supremacy, there was a chapter of the United Daughters of the Confederacy named in his honor, and he was a charter member of the North Carolina Bar Association and its first vice president. *See* N.C. BAR ASS'N REPORT, *supra* note 69, at 12.

111. Commemorative Landscapes of N.C., *Edgecombe County Confederate Monument*, *Tarboro*, DOCSOUTH, https://docsouth.unc.edu/commland/monument/14/ [https://perma.cc/P4NQ-7UTT].

112. Commemorative Landscapes of N.C., *Iredell County Confederate Memorial, Statesville*, DOCSOUTH, http://docsouth.unc.edu/commland/monument/232/ [http://perma.cc/7Q3W-WAQN].

> In North Carolina the removal became unlawful after the legislature passed a law in 2015 protecting "objects of remembrance." Despite Governor Roy Cooper's calling for a repeal of this law and the removal of all such memorials on public property, Iredell County officials seemed to oppose removal of their memorial. In the summer 2020, protests intensified, as opposing groups have been protesting and counter-protesting over a Confederate statute in

Warren County on October 27, 1913,[113] and in Buncombe County, Asheville, on November 8, 1905.[114]

North Carolina governors appearing at confederate unveilings in their official capacity was a common thread in the early twentieth century and further underscores the deep roots of institutionalized racism in North Carolina. Governor Locke Craig gave a speech at the dedication of the monument to Confederate women in the capitol complex in Raleigh on June 10, 1914,[115] and before the Pitt County Courthouse on November 13, 1914.[116] Craig gave speeches dedicating the Confederate monuments at the Catawba County Courthouse on August 15, 1907,[117] in Louisburg, Franklin County, on May 13, 1914,[118] and at the Rutherford County Courthouse on November 12, 1910.[119] At the latter event, another speaker was future North Carolina Governor Clyde R.

> Statesville, which has stood since 1905. News reports in March 2021 caused confusion about the possibility of this monument being removed. The reports states that the Iredell County Board of Commissioners passed a resolution supporting removal of the statute with the resolution calling for three steps as officials planned the removal. The first was a request to the city of Statesville to assist in the removal to one of two city owned cemeteries, Fourth Creek Cemetery or Oakwood Cemetery. Second was to consult with The Sons of Confederate Veterans Camp 387 and local Daughters of the Confederacy on the site selection and relocation. Third was for the cost of the relocation to be determined with the move taking places as the funds became available. These reports missed the key point of the resolution. What the commissioners actually voted to do was to pay for the relocation if the statue's owners wanted it to be moved. The owners, United Daughters of the Confederacy and Sons of Confederate Veterans, did not want it to be moved.

Id.

113. Commemorative Landscapes of N.C., *Warren County Confederate Monument, Warrenton*, DOCSOUTH, https://docsouth.unc.edu/commland/monument/98/ [https://perma.cc/V9WC-NQRL]. That monument was sponsored and built by the Warren Chapter of the United Daughters of the Confederacy. *Id.*

114. Commemorative Landscapes of N.C., *Confederate Soldiers Memorial, Rockingham*, DOCSOUTH, https://docsouth.unc.edu/commland/monument/499/ [https://perma.cc/49U7-FDST]. At this unveiling, Governor Glenn appeared with future Governor Lock Craig, another familiar name from the white supremacist speakers' bureau. *Id.*

115. Commemorative Landscapes of N.C., *Monument to N.C. Women of the Confederacy, Raleigh*, DOCSOUTH, https://docsouth.unc.edu/commland/monument/99/ [https://perma.cc/U47L-TW7U].

116. Commemorative Landscapes of N.C., *Pitt County Confederate Soldiers Monument, Greenville*, DOCSOUTH, http://docsouth.unc.edu/commland/monument/382/ [https://perma.cc/H4ML-JHGL].

117. Commemorative Landscapes of N.C., *Catawba County Confederate Soldiers Monument, Newton*, DOCSOUTH, https://docsouth.unc.edu/commland/monument/261/ [https://perma.cc/VSR3-B2G8].

118. Commemorative Landscapes of N.C., *Monument to Our Confederate Soldiers, Louisburg, N.C.*, DOCSOUTH, https://docsouth.unc.edu/commland/monument/16/ [https://perma.cc/9QMT-W6X2]. There were approximately 5,000 North Carolinians in attendance at this event. *Id.*

119. Commemorative Landscapes of N.C., *Rutherford County Confederate Soldiers Monument, Rutherfordton*, DOCSOUTH, https://docsouth.unc.edu/commland/monument/262/ [https://perma.cc/B3EA-EPMG]. This monument was sponsored by the Davis-Dickerson-Mills Chapter of the United Daughters of the Confederacy. *Id.* Also speaking at this event was future Governor Clyde R. Hoey. *Id.*

Hoey.[120] Craig gave a speech in honor of the Joseph Morehead Monument in Greensboro on July 4, 1913, in which he commended the return to "local self-government," saying that after the Civil War the state had "been forced to abandon [that] principle . . . for the reason that a mass of ignorant voters was injected into the body politic."[121] This ability to again self-govern was apparently a reference to the 1900 constitutional amendment that disenfranchised African-American voters.[122]

The direct link between white supremacist speakers and the erection of Confederate monuments is explicit: Walter Clark, at one time a North Carolina Supreme Court Justice, gave speeches at the dedications for the Confederate monuments at the Chatham County Courthouse in Pittsboro on August 23, 1907;[123] at the Caldwell County Courthouse on June 3, 1910;[124] at Hertford in Perquimans County on June 12, 1912;[125] at the Pender County Courthouse on May 27, 1914;[126] and at the Burke County Courthouse in Morganton on June 22, 1918.[127] On February 1, 1915, Chief Justice Clark also gave the dedication speech for the monument of North Carolina Supreme Court Justice Thomas Ruffin, a slaveholder from Orange County who wrote opinions upholding the lawfulness of slavery.[128]

Chief Justice Clark was the keynote speaker at the Confederate monument dedication ceremony in Asheboro, on September 7, 1911, in front of the courthouse.[129] He said,

120. Commemorative Landscapes of N.C., *Rutherford County Confederate Soldiers Monument, Rutherfordton*, DOCSOUTH, https://docsouth.unc.edu/commland/monument/262/ [https://perma.cc/B3EA-EPMG].

121. Commemorative Landscapes of N.C., *Joseph Morehead Monument, Guilford Courthouse*, DOCSOUTH, https://docsouth.unc.edu/commland/monument/135/ [https://perma.cc/8PLB-6KFC].

122. *Id.*

123. *See* Commemorative Landscapes of N.C., *Confederate Monument, Pittsboro*, DOCSOUTH, https://docsouth.unc.edu/commland/monument/11/ [https://perma.cc/QFT2-UTZP].

124. Commemorative Landscapes of N.C., *Caldwell County Confederate Monument, Lenoir*, DOCSOUTH, https://docsouth.unc.edu/commland/monument/220/ [https://perma.cc/6XT6-FX3R]. This monument was sponsored by the Zebulon Baird Vance Chapter of the United Daughters of the Confederacy. *Id.*

125. *See* Commemorative Landscapes of N.C., *Confederate Monument, Hertford*, DOCSOUTH, https://docsouth.unc.edu/commland/monument/606/ [https://perma.cc/3D4A-4C7V]. The Hertford monument, dedicated on June 12, 1912, was sponsored by the Perquimans Chapter of the United Daughters of the Confederacy—a common character throughout North Carolina's history of confederate monuments. *See id.*

126. Commemorative Landscapes of N.C., *Pender County Confederate Monument, Burgaw*, DOCSOUTH, https://docsouth.unc.edu/commland/monument/514/ [https://perma.cc/B6AF-BZG6].

127. Commemorative Landscapes of N.C., *Burke County Confederate Monument, Morganton*, DOCSOUTH, https://docsouth.unc.edu/commland/monument/259/ [https://perma.cc/XJ94-TQRR].

128. *See* Commemorative Landscapes of N.C., *Thomas Ruffin Monument, Raleigh*, DOCSOUTH, https://docsouth.unc.edu/commland/monument/152/ [https://perma.cc/T22Y-J92P].

129. *See* Commemorative Landscapes of N.C., *Confederate Monument, Asheboro*, DOCSOUTH, https://docsouth.unc.edu/commland/monument/1045/ [https://perma.cc/G874-TEY8]; Walter Clark, Asheboro Dedication Speech (Sept. 2, 1911), *in* COURIER ASHEBORO, Sept. 7, 1911, at 1, 4.

> In the long centuries that are to come, legend and song in this fair Southland will keep bright the story of the Confederate soldier. . . . You raised up the broken and discarded statues of Law and Order and replaced them with Honor upon their pedestals. You cleared your fields of the brambles that had grown up and your government of the bad men who had climbed to power.[130]

After a long tale of heroic deeds by Confederate soldiers against great odds, Chief Justice Clark complained that "the monuments which the fair hands of our women have caused to be raised to the memory of the Confederate soldiers are not the only ones. The enemy, in sad sincerity, have erected far more costly ones."[131] By "enemy," he meant the rights bestowed to Black North Carolinians and the Constitution he swore to protect when he became Chief Justice of the Supreme Court of North Carolina.

Confederate monuments may be whitewashed as complicated pieces that celebrate "heritage, not hate,"[132] but their inception betrays an intentional campaign, as evidenced by the timeline and proponents of their creation. Every piece of North Carolina's enduring white supremacist legal history is intentional, connected, and—most harmfully—enduring to this day.

IV. ENTRENCHING WHITE SUPREMACY: LEGAL APOLOGISTS

This era also produced early legal apologists: those who ignored the surrounding white supremacist legal system designed to subjugate Black North Carolinians and instead suggested the law is fair and people must simply use the proper channels to rectify any harm or inequalities.

For example, Walter Clark was the Chief Justice of the Supreme Court of North Carolina from 1903 to 1924.[133] He grew up on a wealthy plantation of several thousand acres in Halifax County along the Roanoke River, and his father owned over a hundred slaves on one of the most wealthy plantations in North Carolina.[134] He fought as an officer for the Confederacy in the Civil War.[135] Clark held paternalistic views toward Black residents and advanced white supremacy. He wrote during his 1902 campaign for chief justice that "the proper order of things . . . demands Anglo-Saxon supremacy."[136] He supported

130. Clark, *supra* note 129, at 4.

131. *Id.*

132. Rick Neale, *Sons of Confederate Veterans Insist It's Heritage, Not Hat*e, FLA. TODAY (Aug. 25, 2017), https://www.floridatoday.com/story/news/2017/08/25/sons-confederate-veterans-insist-its-heritage-not-hate/546009001/ [https://perma.cc/779T-F5VB].

133. Willis P. Whichard, *A Place for Walter Clark in the American Judicial Tradition*, 63 N.C. L. REV. 287, 295 (1985).

134. *See id.* at 289.

135. James A. Lockhart, Presentation of the Portrait of the Late Chief Justice of the Supreme Court Walter Clark (Oct. 28, 1924), *in* 188 N.C. 839–40 (1924).

136. Whichard, *supra* note 133, at 303.

giving the right to vote to white women, in part, because it would negate the vote of Black residents, saying in a speech that "the admission of the women to the ballot box will be the only certain guarantee of white supremacy."[137]

At a commencement speech to Black graduates at St. Augustine's College in Raleigh, Chief Justice Clark made it clear that he supported racially segregated schools, public accommodations, transportation, racial disenfranchisement, and white-only juries in the courts.[138] Chief Justice Clark defended segregated train cars, claiming both a practical explanation and legitimate legal channels for redress:

> There has been sometimes complaint as to what is known as the "Jim Crow cars," which are established by law. At the North, where there are few colored people in proportion to the population, the railroads cannot afford to furnish separate cars for them. With us, where nearly one-third of the people are colored, and probably one-fourth of the travelers by rail, it is better for them and the whites that separate cars should be furnished for them. The real objection is that sometimes these cars are inferior to those furnished the whites. This is contrary to the law, which requires the same rate to be charged for fare and the same and equally good accommodations furnished for both races. When this is not done it is not because of the law, but in violation of it, and the remedy is by application to the Corporation Commission to require better accommodations.[139]

Chief Justice Clark's argument that separate cars are necessary given the population breakdowns ignores the underpinning white supremacist belief that Black people and white people should be separated to begin with. Further, arguing that what is at issue is simply inequalities between the two types of cars redirects the argument to a question of condition and not the system that created those conditions. Finally, Chief Justice Clark's argument that application to the Corporate Commission will rectify any ills echoes of counterprotest arguments today: "I don't have a problem with the message, my problem is how they're doing it."

Chief Justice Clark also saw no problem with racial inequality of the law or its application in court. Writing during the same period as Chesnutt, Chief Justice Clark said, "There has been no complaint by the colored people as to partiality in the courts, and I think there has been none as to any inequality in

137. *Id.*

138. *See generally* Walter McKenzie Clark, Chief Just. N.C. Sup. Ct., Commencement Address at St. Augustine's School: The Negro in North Carolina and the South. His Fifty-Five Years of Freedom and What He Has Done (May 26, 1920), https://docsouth.unc.edu/nc/staugust/clark.html [https://perma.cc/76B9-7BFJ].

139. *Id.* at 7.

the laws."[140] He explained that Black people do not need to serve on juries, because

> a colored man may have differences with a white man, as will happen between any two men, but when they go into the courthouse to have it settled every man knows that colored men are at no disadvantage. The white men on the jury, with the pride of the Anglo-Saxon race, will see that equal and exact justice is done, and if ever I have seen any partiality shown it is that if the juries and the judges have tipped the scales at all, it has been in favor of the colored men upon the innate belief that if any advantage has been taken it has been by the white man by reason of his advantages.[141]

As to lynchings, Chief Justice Clark explained that

> [t]here has been complaint as to lynchings, but that is not a matter of law, but lawlessness, which officials have endeavored to prevent and have done so whenever they could. There have been lynchings of white people as well as of colored. This is not a matter of race but of the lawless passions of men who believe that prompt action is necessary because the processes of the courts, often uncertain, are often too long delayed. Personally I believe that the true cure for lynching is in the promptest and most efficient execution of the laws.[142]

Black people, who supposedly enjoyed equal protection under the law and allegedly were under the protection of law enforcement, were killed without judicial process and thus with the implicit consent of the judicial system.

In his legal opinions, as in his public speeches, Chief Justice Clark was a vector for the institutionalization of white supremacy in the courts and the law. In *State v. Wolf*,[143] Chief Justice Clark upheld the conviction of a Native American man who refused to send his child to school under a law compelling Native American children to attend school.[144] Chief Justice Clark held that the discriminatory nature of the law did not violate the North Carolina Constitution because "[t]he Constitution does provide (article 9, § 2): 'The children of the white race and the children of the colored race shall be taught in separate public schools, but there shall be no discrimination in favor of, or to the prejudice of either.'"[145]

In *State v. Darnell*,[146] Chief Justice Clark reversed the criminal conviction of a Black resident of Winston, North Carolina, for violating the city ordinance

140. *Id.*
141. *Id.*
142. *Id.*
143. 145 N.C. 440, 59 S.E. 40 (1907).
144. *Id.* at 440, 59 S.E. at 42.
145. *Id.*
146. 166 N.C. 300, 81 S.E. 338 (1914).

prohibiting a Black person from occupying a residence on streets where more white people live.[147] Chief Justice Clark overturned the conviction on the grounds that the city did not have authority to pass such a law of general welfare, and only the General Assembly could pass such a law.[148] This was no victory for desegregation, as Chief Justice Clark noted that "[t]here is no question that legislation can control social rights by forbidding intermarriage of the races, and in requiring Jim Crow cars and in similar matters."[149]

In *Johnson v. Board of Education*,[150] the Supreme Court of North Carolina interpreted three provisions of the North Carolina Constitution: Article 9, Section 2, which provided for separate schools for white and Black children; Article 14, Section 8, which prohibited interracial marriage; and Article 14, Section 8, which defined whiteness as a person with no "negro blood in his veins, however remote the strain."[151] The question before the court was whether a child born of a lawful marriage (more than third generation African American heritage), but who had some "negro blood in his veins," could still be barred from public schools. In other words, could a child be prohibited from attending the white school because their mother "has less than one-eighth admixture of negro blood"?[152] The constitutional provision on marriage meant the marriage was lawful under the constitution, but the provision on schools barred from schools children who had any African American ancestry whatsoever.[153] The court held that it was lawful to bar from school the child with any African American ancestry whatsoever, and Chief Justice Clark concurred in that result.[154] Chillingly, the opinion ends with this explanation:

> Even considering alone the welfare of the two races, and following the maxim, "The greatest good to the greatest number," as said by the court in Plessy's Case, it would seem to be far better that the children of the two races should each be segregated than that a large majority of those attending the public schools should be denied educational advantages. It avoids the disastrous results of racial antagonisms, which cannot be removed by legislation, and does not withdraw from either race any of the equal benefits of education conferred by the Constitution and guaranteed by the laws of the land. This policy of racial separation in the schools is not only fixed by law in plain terms, but is commended by

147. *Id.* ("In 1913 the defendant, William Darnell, a colored man, moved his family into a house on Highland Avenue, to occupy it as a residence. At that time in the other houses on that street and block there were more white families than colored.").

148. *Id.* at 305–06, 81 S.E. at 340.

149. *Id.* at 304, 81 S.E. at 340.

150. 166 N.C. 468, 82 S.E. 832 (1914).

151. *Id.* at 468, 82 S.E. at 833.

152. *Id.*

153. *See id.*

154. *Id.*, 82 S.E. at 835.

> every consideration upon which the prosperity and happiness of the two races are founded. Living side by side in a free country, with equal rights before the law, it is a just and wise policy that provides for the maintenance of that harmony between the two races which is so essential to their friendly relations and to the peace and welfare of both.[155]

To summarize this brief legal history of white supremacy, the Reconstruction era promoting racial equity allowed for a fusion of white Populist and Black Republican politics that outnumbered and defeated the white ruling elite. To regain power, the white ruling elite propagated myths of Black violence while enacting intimidation and violence on entire Black communities. They wrote laws to consolidate their ill-gotten power and criminalize Blackness, an essential element to the white supremacists' gambit. White supremacists enacted and enforced certain laws while misapplying and refusing to enforce the law against those who terrorized Black communities. White supremacists used fraud and violence to win politically. Legislators disenfranchised and criminalized Black North Carolinians to put them back in chains and lease them for labor, directly replacing the system of slave ownership with convict leasing. Prosecutors and sheriffs refused to prosecute members of mobs who engaged in extrajudicial lynching. Members of the judicial branch upheld racially discriminatory laws. The law was used to institutionalize white dominance and harm Black people and was not available to protect Black North Carolinians from white crime.

V. THE STRUCTURE OF WHITE SUPREMACY STILL OPERATES IN OUR LEGAL SYSTEMS AND INSTITUTIONS

This codified and institutionalized white supremacy prevented society from undoing the harmful legacy of slavery. It also prevented Black people from accumulating generational wealth and engaging in the political process to bring education, housing, and equal employment opportunity to the Black community. Today, despite the removal of facially discriminatory laws, substantial racial disparities still exist in every major institution, including

155. *Id.*

voting,[156] education,[157] housing,[158] the criminal justice system,[159] health care,[160] employment,[161] and environmental land use.[162] Within each of these systems we

156. When Republicans took control of the North Carolina General Assembly in 2013 they began passing voting law amendments which required state-issued photo identification, cut early voting, eliminated same-day registration, and took away automatic voting restoration rights for ex-felons. WILLIAM J. BARBER II WITH JONATHAN WILSON-HARTGROVE, THE THIRD RECONSTRUCTION: MORAL MONDAYS, FUSION POLITICS AND THE RISE OF A NEW JUSTICE MOVEMENT 98 (2016). A three-judge state court panel recently struck down the voter identification provision as unconstitutional because it was racially discriminatory. Will Doran, *Why a State Court Ruled NC's Voter ID Law Is Racially Discriminatory and Unconstitutional*, NEWS & OBSERVER (Sept. 20, 2021, 12:23 AM), https://www.newsobserver.com/news/politics-government/article254318478.html [https://perma.cc/7RV6-XEMG (staff-uploaded, dark archive)].

157. *See* NICHOLAS P. TRIPLETT & JAMES E. FORD, E(RACE)ING INEQUITIES: THE STATE OF RACIAL EQUITY IN NORTH CAROLINA PUBLIC SCHOOLS 4–6 (2019); GENE R. NICHOL, THE FACES OF POVERTY IN NORTH CAROLINA: STORIES FROM OUR INVISIBLE CITIZENS 144 (2018) ("Black children attend, very disproportionately, North Carolina's highest poverty public schools."); ETHAN ROY & JAMES E. FORD, DEEP ROOTED: A BRIEF HISTORY OF RACE AND EDUCATION IN NORTH CAROLINA (2019), https://www.ednc.org/deep-rooted-a-brief-history-of-race-and-education-in-north-carolina/ [https://perma.cc/WG7F-5CSF]. Black students also account for a disproportionately higher number of suspensions. NICHOL, *supra*, at 144.

158. *See* NICHOL, *supra* note 157, at 43 ("Almost three times as many African Americans' home mortgages are underwater in the state."). *See generally* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017) (detailing how federal housing policies created segregation and undermined the ability of Black families to own homes).

159. *See* NICHOL, *supra* note 157, at 144 ("The North Carolina Department of Correction reports a prison population of about 38,000. A startling 57 percent of the inmates are African American, though 23 percent of the state's population is black . . . . A heavily racialized mass incarceration markedly affects the economic prospects of virtually every community in North Carolina.") *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (10th anniversary ed. 2020) (describing how mass incarceration today serves the same purpose that slavery and Jim Crow did: maintaining a racial caste system).

160. *See* NICHOL, *supra* note 157, at 145. ("Unsurprisingly, perhaps, other large empirical studies reveal dramatically disparate results for North Carolina whites and blacks in employment, contracting, housing, health care, education, and access to credit.").

161. *Id.* at 143 ("More than twice as many African American Tar Heels live in poverty as whites. The differential is even starker for children. Almost three times as many black kids as white ones in live in poverty. . . . Two and a half times as many blacks are unemployed as whites.").

162. *See* Darryl Fears & Brady Dennis, *How a Protest in a Black N.C. Farming Town Nearly 40 Years Ago Sparked a National Movement*, WASH. POST (Apr. 6, 2021), https://www.washingtonpost.com/climate-environment/interactive/2021/environmental-justice-race/ [https://perma.cc/9ZRG-SWX9 (dark archive)] ("Today, Black people are nearly four times as likely to die from exposure to pollution than White people."); ROBERT D. BULLARD, DUMPING IN DIXIE: RACE, CLASS AND ENVIRONMENTAL QUALITY 1 (3d ed. 2000) ("An abundance of documentation shows blacks, lower-income groups, and working-class persons are subject to disproportionately large amount of pollution and other environmental stressors in their neighborhoods as well as in their workplaces."); NICHOL, *supra* note 157, at 155–56 ("Dramatic differences in rates of poverty, child poverty, unemployment, median income, wealth, hunger, home foreclosure, health insurance coverage and outcomes, education, arrests, convictions, imprisonment, and the collateral consequences attendant to interaction with the criminal justice system reflect a social, legal, and economic structure that results, on average, in hugely disparate opportunities, expectations, and outcomes for black and white North Carolinians.").

can see how the seeds of white supremacy grew into permanent and persistent racial inequality.

In efforts to disenfranchise the electorate, many conservatives of today use the same playbook as the white supremacists of the past when it comes to making it harder for Black people to vote. When Republicans took control of the North Carolina General Assembly in 2013, they began passing voting law amendments which required state-issued photo ID, cut early voting, eliminated same-day registration, and took away automatic voting restoration rights for ex-felons.[163] These changes to the voting laws echo the same kind of "race-neutral" provisions the white supremacists employed to disenfranchise Black voters in the early twentieth century. The racial motivation of these reforms has been exposed in a variety of contexts, and recently a three-judge North Carolina state court panel struck down the voter ID provision as unconstitutional because it was racially discriminatory.[164]

The criminal justice system is an institution still deeply entrenched in its white supremacist history. Racial disparities, racial profiling, use of force, and incarceration echo the racialized criminal stereotypes that justified white supremacy in the first place and supported the system of convict leasing and criminal debtors' prisons at the turn of the nineteenth century. While operating under a different name, the convict leasing system persists via the U.S. Constitution.[165] Those disparities are still with us in the form of racial disparities in the use of force and incarceration[166] and accepted practices of extracting free labor from Black North Carolinians. The structures of Jim Crow still cast the outline of broad shadows upon our present institutions and systems that still persist in generating gross racial disparities.

The three North Carolina protest movements that we will describe in Part VI of this Article—the Moral Monday Movement, Black Lives Matter, and the

163. BARBER WITH WILSON-HARTGROVE, *supra* note 156, at 97–98.

164. Will Doran, *Panel of Judges Strikes Down North Carolina's Voter ID Laws*, NEWS & OBSERVER (Sept. 18, 2021), https://infoweb.newsbank.com/apps/news/document-view?p=AMNEWS&t=pubname%3ARLOB%21News%2B%2526%2BObserver%252C%2BThe%2B%2528Raleigh%252C%2BNC%2529&sort=YMD_date%3AD&maxresults=20&f=advanced&val-base-0=Will%20Doran&fld-base-0=Author&docref=news/1851A4C6C24A5978 [https://perma.cc/W6K6-328B (staff-uploaded, dark archive)]; *see also* Final Order and Judgment, Holmes v. Moore, No. 18 CVS 15292 (N.C. Super. Ct. Sept. 17, 2021).

165. U.S. CONST. amend. XIII, § 2.

166. *See generally* ALEXANDER, *supra* note 159 (describing how mass incarceration today serves the same purpose that slavery and Jim Crow did: to maintain a racial caste system); JAMES FORMAN JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA (2017) (grappling with why Black officials supported the punitive war on drugs and tough-on-crime initiatives given the disproportionate impact mass incarceration has on Black Americans); DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION AND A ROAD TO REPAIR (2019) (connecting the rise in mass incarceration with the United States' history of racial inequity that includes Jim Crow, convict leasing, and slavery); ANGELA DAVIS, *Introduction* to POLICING THE BLACK MAN, *supra* note 97 (exploring and explaining the policing of Black men through the criminal system).

Confederate monument removal protests—highlight and make visible the historic scars of white supremacy and suggest the kind of reforms necessary to clear the invasive weeds of white supremacy from our current legal system.

Moral Monday protesters, Black Lives Matter protesters, and Confederate monument protesters understand the insidiousness of white supremacy and the ways which it makes their protests necessary.

Leaders of Moral Monday articulate their movement in terms of launching a "Third Reconstruction" for America on the issue of racial equality.[167] According to Dr. Reverend William J. Barber, II, "we are participating in the embryonic stages of a Third Reconstruction."[168] The Moral Monday protests were aimed at bringing Fusion politics into the General Assembly in order to address voting rights, public education, and criminal justice reform. In our current time there are, as Reverend Barber explains,

> many tributaries that run toward the great stream of justice throughout America—whether in the Hands Up, Don't Shoot, I Can't Breathe, and Black Lives Matter movements; the fast-food workers' Raise Up and minimum wage movements; the voting rights and People Over Money movements; the women's rights and End Rape Culture movements; the LGBTQ equality movements; the global movement to address climate change; or the immigrant rights, Not One More movements. Within the framework of a Third Reconstruction, we see how all of our movements

167. BARBER WITH WILSON-HARTGROVE, *supra* note 156, at 121. The Second Reconstruction marked the next historic attempt to advance the rights and welfare of African Americans during the civil rights movement of the 1960s. *See* MANNING MARABLE, RACE, REFORM, AND REBELLION: THE SECOND RECONSTRUCTION IN BLACK AMERICA, 1945–1982, at 1 (1984), https://www.nypl.org/sites/default/files/marable_-_prologue.pdf [https://perma.cc/V97N-27K7] ("[T]he Second Reconstruction was a series of massive confrontations concerning the status of the Afro-American and other national minorities (e.g. Indians, Chicanos, Puerto Ricans, Asians) in the nation's economic, social and political institutions."). Another reactionary white supremacy effort arose in response to advances of the civil rights era in the form of the assassination of Black leaders, *see Civil Rights Martyrs*, S. POVERTY L. CTR., http://www.splcenter.org/what-we-do/civil-rights-memorial/civil-rights-martyrs [https://perma.cc/E9PQ-ALSJ] (detailing the lives of individuals who lost their lives during the civil rights movement, from 1954 to 1968); prolonged and sustained resistance to school desegregation, *see* generally *Brown v. Board: Timeline of School Integration in the U.S.*, LEARNING FOR JUST. (2004), https://www.learningforjustice.org/print/11368 [https://perma.cc/S675-PVS9] (providing a timeline of school desegregation from 1849 to 2007); regressive tax policies, *see* Stanley S. Surrey, *Federal Tax Policy in the 1960's*, 15 BUFF. L. REV. 477, 477 (1966) (describing the shift in tax policy in the 1960s); increased privatization, *see* Jeffrey R. Henig, *Privatization in the United States: Theory and Practice*, 104 POL. SCI. Q. 649, 668 (1989–1990) (describing how privatization provided a unifying force in the late 1960's); racial housing discrimination, *see generally* ROTHSTEIN, *supra* note 158 (describing federal housing discrimination in the United States); the war on drugs and mass incarceration, *see generally* ALEXANDER, *supra* note 159 (characterizing mass incarceration as racialized social control); and continued racial economic inequality.

168. BARBER WITH WILSON-HARTGROVE, *supra* note 156, at 121.

> are flowing together, recognizing our intersectionality creates the opportunity to fundamentally redirect America.[169]

The same issues which were the focus of the white supremacy reaction to the First Reconstruction persist today in voting rights, education, law enforcement, racialized mass incarceration, and living wage employment.[170] The Moral Monday protestors' goal is to pull North Carolina out of the wreckage of its legacy of white supremacy and continue the historic work of rebuilding North Carolina into a beloved community.

Similarly, Black Lives Matter protesters exercise First Amendment speech in the street as a result of police violence towards Black and Brown communities, understanding how the history of race impacts policing and the criminal justice system. As discussed above, racial stereotypes of dangerous Black men as rapists or vagrants were used to justify police and prosecution policies that reenslaved Black North Carolinians. Conversely, Black communities enjoyed no protection under the law historically, as lynching was tolerated by the law and white prosecutors.

Many Black Lives Matter protesters argue this echoes true today in the failure to prosecute police officers who murder or harm Black men. That is why Reverend Drumwright, an organizer of a protest in Graham, North Carolina, evoked the memory of Wyatt Outlaw, the Black town commissioner and constable who was lynched by the Ku Klux Klan in 1870 for standing up to white supremacist intimidation.[171] "We are going to march to this courthouse," Drumwright said,

> We're going to take the same route that Wyatt Outlaw took when he traveled down North Main Street to be hung in this same space where this Confederate statute stands right now. We are going to dignify his body being on the line for our bodies out here and demand justice for Alamance County, for justice around this monument.[172]

As with the other two movements, and almost by definition, the protesters against Confederate monuments also understand the connection between the

169. *Id.* at 121–22.

170. *Id.* at 97–99, 117.

171. Jordan Green, *Federal Judge Orders Graham To Suspend Enforcement of Its Restrictive Protest Ordinance*, TRIAD CITY BEAT (July 6, 2020), https://triad-city-beat.com/federal-judge-orders-graham-restrictive-protest-ordinance/ [https://perma.cc/BMU4-ALQT] [hereinafter Green, *Graham Ordinance*]; Jordan Green & Brian Clarey, *Graham Redux: 650 March for Voting Rights and Police Reform*, TRIAD CITY BEAT (Nov. 3, 2020), https://triad-city-beat.com/graham-redux/ [https://perma.cc/4BYW-FBNK] ("'People in Alamance County don't feel safe,' [Drumwright] said. 'If you're Black in Alamance County, if you're Hispanic, you don't feel safe calling the police. Every demonstration we've done throughout this entire summer I've been told by people I look up to not to do it,' he said. 'We need the organizers of yesterday to know the organizers of today are not going to stop until we see justice for the next generation.'").

172. Green, *Graham Ordinance*, *supra* note 171.

history of white supremacy and the Confederate monuments.[173] In our defense of these protesters, our legal arguments echo the historical continuity of white supremacy and the need to reconcile contemporary injustice to improve the rule of law.

In Part VI, we argue that due to the insidious nature of institutionalized white supremacy, protest is, in fact, necessary to reconcile current injustices. One case study in our defense of protesters highlights that without intention or bad intent, white supremacy will continue unless it is intentionally acknowledged, called out, and rectified. We argue that protests are met with violence and hostility because they are, literally and metaphorically, trespassing against white supremacy itself, white supremacy being a powerful and persistent force in North Carolina politics that will both continue to reinforce and propagate itself unless rooted out.

VI. PROTEST IS A TRESPASS ON WHITE SUPREMACY

A. *The Theory Behind Protest: How "Breaking" the Law Can Improve the Rule of Law*

Protests reveal the contradiction between the Constitution that promises equal protection of the law and the enduring success of white supremacy in government institutions. Anti-racism protesters who are resisting the legacy of white supremacy are pointing out the contradiction between the promise of equal treatment and prevailing racial disparities. Removing overt facial racism from our law today has taken a bloody civil war, civil disobedience, and the assassination of civil rights leaders. Protests against white supremacy are necessary because racial inequality is inconsistent with the promise of equal protection of the law under our Constitution and with human rights and justice. Reforms forced by protests ultimately improve the rule of law by reducing the contradiction between equal protection and racial inequality.

Civil disobedience forces the reconciliation of legalized inequality. Philosopher John Rawls defined civil disobedience "as a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government."[174] He argued that civil disobedience is justified when there is "a clear violation of the liberties

173. *See* Virginia Bridges, *Student Who Poured Blood and Ink on Silent Sam Found Guilty*, NEWS & OBSERVER (Oct. 16, 2018), https://infoweb.newsbank.com/apps/news/document-view?p=AMNEWS&t=pubname%3ARLOB%21News%2B%2526%2BObserver%252C%2BThe%2B%2528Raleigh%252C%2BNC%2529&sort=YMD_date%3AD&maxresults=20&f=advanced&val-base-0=UNC%20Student%20who%20poured%20blood&fld-base-0=alltext&docref=news/16F1A75A5685E650 [https://perma.cc/67D5-CG98 (staff-uploaded, dark archive)] ("In their testimonies Monday, UNC students and current and former professors who study African-American history said Silent Sam was built on violence against black people and to perpetuate the ideals of the Confederacy.").

174. JOHN RAWLS, A THEORY OF JUSTICE 364 (original ed. 1971).

of equal citizenship, or of equality of opportunity, this violation having been more or less deliberate over an extended period of time in the face of normal political opposition."[175] Furthermore, philosopher Ronald Dworkin has suggested that prosecuting protesters is a poor use of resources when the protesters are challenging the laws in ways that help clarify the law.[176]

When the Constitution promises racial equality yet government entities continue to engage in racial discrimination, protests make visible the contradiction, raise consciousness, and demand the rule of law operate on a stronger and more equitable foundation. In his speech titled "Love, Law and Civil Disobedience," Dr. Martin Luther King, Jr., highlighted the history of civil disobedience, noting the civil disobedience of Socrates facing persecution for teaching unpopular ideas, early Christians facing Roman persecution, abolitionists prosecuted for assisting slaves seeking their freedom, Germans resisting the persecution of Hitler, and the Montgomery Bus Boycott.[177] With respect to the civil rights protests, King noted the crisis in race relations became visible when the 1954 Supreme Court ruling outlawing segregation was met with opposition from the white community that called for nullification of the law.[178] Here, protest was necessary to reconcile the contradiction between the promise of racial integration and the reality of southern white supremacy via segregation.

Unjust laws result when the powerful party inflicts a code on a population not imposed on those in power and when the minority has no part in enacting or creating the law.[179] The goal then becomes to "defeat the unjust system."[180] Thus,

> the individuals who stand up on the basis of civil disobedience realize that they are following something that says that *there are just laws and there are unjust laws*. Now, they are not anarchists. They believe that there are laws which must be followed; they do not seek to defy the law, they do not seek to evade the law. For many individuals who would call themselves segregationists and who would hold on to segregation at any cost seek to defy the law, they seek to evade the law, and their process can lead on into anarchy. They seek in the final analysis to follow a way of uncivil disobedience, not civil disobedience. And I submit that the

175. *Id.* at 375.

176. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 214–16 (1977); *see also* Alan Carter, *In Defense of Radical Disobedience*, 15 J. APPLIED PHIL. 29, 30 (1998) ("Hence, those who conscientiously engage in such challenging behavior regarding doubtful laws serve a very useful purpose in having a particular law clarified and in forcing a decision on its constitutionality.").

177. Martin Luther King, Jr., *Love, Law and Civil Disobedience*, *in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 43, 50 (James Melvin Washington ed., 1986).

178. *Id.* at 44 (referencing Brown v. Bd. of Educ., 347 U.S. 483).

179. *Id.* at 49.

180. *Id.* at 47.

> individual who disobeys the law, whose conscience tells him it is unjust and who is willing to accept the penalty by staying in jail until that law is altered, is expressing at the moment the very highest respect for law.[181]

The U.S. Supreme Court ultimately adopted as true this idea that violating the state laws of trespass were justified in the campaign for equal protection of the law. In *Lombard v. Louisiana*,[182] the Court considered the case of Rudolph Lombard, who sat down at a lunch counter at the McCrory Five and Ten Cent Store in New Orleans, Louisiana, on September 17, 1960, with a group of college students. They were ordered to leave because of their race and were arrested and convicted for trespass when they refused.[183] The convictions were reversed because "a conviction under the State's criminal processes employed in a way which enforces the discrimination mandated by that ordinance cannot stand."[184]

In *Peterson v. City of Greenville*,[185] the court again interpreted a law as unjustly applied when considered in a broader social context and as-applied effect.[186] James Richard Peterson was among a group of ten people who were arrested on August 9, 1960, when they refused to leave the lunch counter at the S. H. Kress store in Greenville, South Carolina, after they were ordered to leave because of their race.[187] His conviction was reversed under the Fourteenth Amendment as violating the Equal Protection Clause, as the Court held that

> [w]hen a state agency passes a law compelling persons to discriminate against other persons because of race, and the State's criminal processes are employed in a way which enforces the discrimination mandated by that law, such a palpable violation of the Fourteenth Amendment cannot be saved by attempting to separate the mental urges of the discriminators.[188]

In so doing, the Court acknowledged the broader context of the laws being applied in order to reinforce racism, and acts of protests forced that revelation.

Arthur Hamm was convicted of trespassing at the McCrory's variety store in Rock Hill, South Carolina, and Frank Lupper was convicted of trespassing at the Gus Blass Company department store in Little Rock, Arkansas, for refusing to comply with an order to leave because of their race.[189] The Civil Rights Act of 1964, which protected them from racial discrimination in public

181. *Id.* at 49 (emphasis added).
182. 373 U.S. 267 (1963).
183. *Id.* at 269.
184. *Id.* at 273–74.
185. 373 U.S. 244 (1963).
186. *Id.* at 245.
187. *Id.*
188. *Id.* at 248.
189. Hamm v. City of Rock Hill, 379 U.S. 306, 307 (1964).

accommodation, passed after they were convicted.[190] The Court held that "now that Congress has exercised its constitutional power in enacting the Civil Rights Act of 1964 and declared that the public policy of our country is to prohibit discrimination in public accommodations as therein defined, there is no public interest to be served in the further prosecution of the petitioners."[191] This ruling stands in contrast to the contextless and "pass the buck" rulings we examined in Part IV.

Trespassing on white supremacy forces a legal reconciliation and, we argue, is necessary for the rule of law. Protests demand an unjust system to deliver on the promises of the Constitution in the context of racial discrimination and advance the rule of law. Protesters, in essence, are demanding the law catch up to their behavior by rooting out pervasive inequalities that necessitate their protest.

What do the protests of our time tell us about the issues before us and the best strategies for dismantling institutionalized white supremacy? We must see protest itself as speech and as a necessary tool for both revealing and dismantling white supremacy. In the last decade, we have defended many protesters and learned from them about the intersection of current inequality and a legal system that refuses to reconcile its white supremacist past—and present.[192] We focus in this part of the Article on our work defending protesters

190. *Id.*

191. *Id.* at 317.

192. For a discussion of our work and a sampling of the cases we have defended, see Heath Hamacher, *Attorneys Speaking Up for Those Who Speak Out*, N.C. LAWS. WKLY. (Apr. 8, 2021), http://nclawyersweekly.com/2021/04/08/attorneys-speaking-up-for-those-who-speak-out/ [http://perma.cc/K48A-CXX6 (dark archive)]; Staff, *Prosecution 0-2 This Week as Two More Racial Justice Protest Defendants Found Not Guilty*, ALAMANCE NEWS (July 22, 2021), https://alamancenews.com/prosecution-0-2-this-week-as-two-more-racial-justice-protest-defendants-are-found-not-guilty/ [https://perma.cc/67FZ-FHVE (dark archive)] [hereinafter *Prosecution 0-2 This Week*] (defending protester arrested on October 31, 2020, at a Black Lives Matter, Souls to the Polls Voting Protest in Graham, North Carolina, at the Confederate monument where Wyatt Outlaw was lynched); Barry Yeoman, *Is Any Protest a Threat to Public Safety? Yes, Said This Small North Carolina City*, WASH. POST (July 29, 2020), https://www.washingtonpost.com/national/is-any-protest-a-threat-to-public-safety-this-small-north-carolina-town-said-yes/2020/07/28/33511ca8-d0f9-11ea-8d32-1ebf4e9d8e0d_story.html [https://perma.cc/72EX-TE9S (dark archive)]; *Charges Dismissed Against NC State Students Who Put Klan Hoods on Civil War Monument*, NEWS & OBSERVER (Aug. 2, 2019), https://www.newsobserver.com/news/local/crime/article233458212.html [https://perma.cc/ACG7-FZBB (staff-uploaded, dark archive)] (defending protesters who were arrested in April 2019 for allegedly defacing monuments by putting Klan hoods on Confederate monuments); Virginia Bridges, *Two Women Chain Themselves to the Durham Jail Gate To Protest Cash Bail Policy*, NEWS & OBSERVER (May 9, 2019), https://www.newsobserver.com/news/local/article230222994.html [https://perma.cc/LTV7-39RS (staff-uploaded, dark archive)] (defending women arrested in May 2019 for protesting bail policies at the Durham County Jail); Virginia Bridges, *Durham Man Arrested at Jail Protest Fought the Law, and Won*, HERALD SUN, http://www.heraldsun.com/news/local/counties/durham-county/article166435842.html [https://perma.cc/5UF9-TZZX (staff-uploaded, dark archive)] (Aug. 10, 2017) (defending protesters arrested at a Durham County Commissioner meeting on March 13, 2017, while protesting jail conditions); David Zucchino, *Immigrants' Minor Offenses Can Ruin Hope for Deportation Waiver*, L.A. TIMES (Aug.

from the Moral Monday, Black Lives Matter, and Confederate monument removal movements.[193]

In these cases we presented technical legal arguments as well as constitutional arguments, which we outline. These arguments are all rooted in the theory that entrenched white supremacy led to the need for protest and are aimed at working toward a more just and stable rule of law while highlighting the injustice of white supremacy. The statements and goals of the protesters, and the legal arguments we made on their behalf, are a response to the evil of white supremacy that caused the need for protest. Because of the deeply institutionalized racism of the state, its entities reflexively perceive protest as a trespass on their domain; protester arrests thus reveal the defensive, rather than reconciliatory, perception of protesters by government actors.

1. Moral Monday

Reacting to a series of laws that hurt poor people in North Carolina, including a law blocking the expansion of Medicaid, a bill overturning the Racial Justice Act, bills cutting spending for education and legal aid, and a voter suppression bill,[194] Dr. Reverend William J. Barber, II, as president of the North Carolina NAACP, helped lead and organize a racially integrated Fusion political movement in North Carolina that became known as the Forward Together Moral Monday Movement.[195] On April 29, 2013, Reverend Barber led a small group of ministers and activists to petition the General Assembly to change.[196] He and seventeen leaders were arrested in the General Assembly on that Monday, sparking an outpouring of support.[197] The group decided to return the next Monday, when the General Assembly Police arrested twice the number

19, 2012), https://www.latimes.com/archives/la-xpm-2012-aug-19-la-na-immigrant-20120819-story.html [https://perma.cc/86HC-LWTQ (dark archive)] (defending a group of Dream Team activists who were charged with disrupting a committee meeting of the North Carolina General Assembly in February 2012 while protesting harsh immigration policies).

193. "[H]e works on first degree murder cases, charges against Moral Monday protesters and incidents of racial profiling . . . . 'I am trying to experiment with a kind of community lawyering that empowers people and movements to help voices that are often hidden or suppressed.'" Elizabeth Van Brocklin, *Hugh Hollowell, Carolyn Schuldt and Scott Holmes Destigmatize Homelessness*, INDY WK. (Jan. 29, 2014), https://indyweek.com/guides/archives/hugh-hollowell-carolyn-schuldt-scott-holmes-destigmatize-homelessness/ [https://perma.cc/NPS2-RR7W].

194. BARBER WITH WILSON-HARTGROVE, *supra* note 156, at 97. Reverend Barber grew up in eastern North Carolina where his parents were activists for racial equality. *Rev. Dr. William J. Barber, II*, NAACP, https://naacpnc.org/rev-sr-william-j-barber-ii/ [https://perma.cc/AKB2-BXT7]. He attended North Carolina Central University as an undergraduate and then Duke University for divinity school. *Id.* He has been the pastor of the Greenleaf Christian Church in Goldsboro for more than twenty years. *Id.*

195. *See* Ari Berman, *North Carolina's Moral Mondays*, NATION (July 17, 2013), http://www.thenation.com/article/175328/north-carolinas-moral-mondays# [https://perma.cc/C2TU-XVRP].

196. *Id.*

197. BARBER WITH WILSON-HARTGROVE, *supra* note 156, at 101.

from the previous week.[198] The number of arrests grew each Monday after that, resulting in a movement that brought more than 35,000 protesters to the General Assembly and resulted in nearly 950 arrests.[199]

The Moral Monday Movement explicitly demanded that North Carolina reckon with its history of white supremacy in the areas of voting rights, education, criminal justice, and poverty.[200] The Moral Monday protesters gathered each week to amplify the voices of people directly impacted by inequality of work opportunities, education, and health care, as "moral witnesses" who "came forward to speak for themselves about how legislators' extremism was hurting North Carolina."[201] Inspired to challenge restrictions of voting that disproportionately harm Black voters, the repeal of the Racial Justice Act protecting Black defendants from unequal application of the death penalty, cuts to public education and private vouchers that encourage racial resegregation of schools, and the failure to expand Medicaid for poor North Carolinians desperate for health care, Moral Monday protesters descended upon the General Assembly, or the People's House, to bring a new generation of Fusion politics to North Carolina.[202] Moral Monday protesters understood the need to keep advancing toward equality in each of these areas because of the history of racial inequality.[203]

A group of more than 100 attorneys coordinated by the North Carolina NAACP and North Carolina Central University Professor Irving Joyner defended the more than 900 people arrested in these Moral Monday protests.[204] We tried these cases over the course of several months before a specially appointed judge presiding over sessions dedicated to hearing specifically these cases.[205] We saw the courts invest tremendous resources into prosecuting protesters while ignoring the broader context that informs the scenario before

198. *Id.* at 102.

199. *See id.* at 102–04; Kia H. Vernon, *A Cautionary Tale About Policing Peaceful Protests: First Amendment Rights Still Reign Supreme*, 37 N.C. CENT. L. REV. 105, 107 (2015).

200. Vann R. Newkirk II, *North Carolina Reckons with Its Jim Crow Past*, ATLANTIC (Oct. 27, 2016), https://www.theatlantic.com/politics/archive/2016/10/the-battle-for-north-carolina/501257/ [https://perma.cc/W8ED-2FNP (dark archive)]

201. BARBER WITH WILSON-HARTGROVE, *supra* note 156, at 104.

202. *See id.* at 97–99.

203. *Id.* at 117 ("When we pay attention to this history, a pattern emerges: first, the Redeemers attacked voting rights. Then they attacked public education, labor, fair tax policies, and progressive leaders. Then they took over the state and federal courts, so they could be used to render rulings that would undermine the hope of a new America . . . . Past is prologue: This history lays out how efforts to stop fusion movements have always consisted of direct acts of deconstruction on these fronts.").

204. Vernon, *supra* note 199, at 106 n.4.

205. *Id.* at 107 ("Although some protestors accepted the deferral agreement, the majority of those arrested decided to challenge the constitutionality of the charges, asserting that they 'were engaging in 'peaceful political speech' protected under the U.S. Constitution.' To accommodate the over 900 cases, the North Carolina Administrative Office of the Courts appointed a special judge who was scheduled to oversee all of the Moral Monday Cases during the two monthly court dates allocated for the trials.").

them and refusing to use the state system of justice to undo the codified forms of white supremacy. The District Attorney's office could have dismissed these charges or the courts could have refused to schedule a special session to allocate state resources to trying them all.[206]

We framed a legal defense around the idea that the General Assembly is the People's House and that the people of North Carolina have the constitutional right to go directly to their representatives to "instruct them."[207] Even though the party in power closed its doors and refused to meet with the Fusion political protesters, they could not constitutionally be excluded from the building, and they had to be heard. We tailored the legal argument to convey the historic importance of a coalition of Black, Brown, and white North Carolinians joining hands to resist the efforts that echoed past policies of white supremacy.

a. *Legal Argument: The General Assembly Is the People's House*

We argued that the General Assembly Police allowed protesters to enter the second-floor rotunda of the General Assembly knowing they were going to engage in political speech. Legislative rules prohibited gatherings of people on the second floor and specifically prohibited signs communicating messages on political issues.[208] In order to protect individuals' right to speech, a regulation cannot give government officials unfettered discretion to determine what is and is not lawful activity.[209] Thus, a law's standards must be "narrowly drawn, reasonable, and definite" in order to create defined standards for applying the law.[210] North Carolina General Assembly Police Chief Weaver ordered the crowd to leave the premises when he determined the group became "disruptive" in violation of the legislative rules.[211] The rules under which these protesters were arrested and charged did not establish a regulation with clearly established objective standards for regulating speech.[212]

The order to leave the premises was unconstitutional because protesters were engaging in protected political speech in a designated public forum[213] in a

206. This experience supported Ronald Dworkin's assessment that prosecuting protesters for conscientiously exposing injustice is a poor use of the criminal justice resources. *See* DWORKIN, *supra* note 176, at 214–16.

207. N.C. CONST. art. I, § 12.

208. N.C. GEN. STAT. § 120-32.1 (LEXIS through Sess. Laws 2021-162 of the 2021 Reg. Sess. of the Gen. Assemb.).

209. Forsyth County v. Nationalist Movement, 505 U.S. 123, 123–24 (1992).

210. *Id.* at 123 (quoting Niemotko v. Maryland, 340 U.S. 268, 271 (1951)).

211. Vernon, *supra* note 199, at 119; *see also* Win Bassett & Nick Pironio, *How To Get Arrested on Moral Monday: A North Carolina Minister's Protest*, ATLANTIC (June 24, 2013), https://www.theatlantic.com/politics/archive/2013/06/how-to-get-arrested-on-moral-monday-a-north-carolina-ministers-protest/277070/ [https://perma.cc/MW8A-VUXM (dark archive)].

212. Vernon, *supra* note 199, at 199 n.122.

213. Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 673 (1992).

public area where protest was allowed to occur per the Legislative Building Rules.[214] Finally, Police Chief Weaver's order was also unconstitutional because he exercised unfettered discretion in the enforcement of vague and overbroad legislative rules which were not content neutral. "First Amendment protections are subject to heightened scrutiny: 'the State . . . must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'"[215] Because the State could not show the order to leave for "disruptive" behavior was necessary to serve a compelling state interest, the order to leave was unconstitutional.

We also argued there were no reasonable time, manner, and place regulations enacted by a governmental agency that guided Police Chief Weaver to restrict protesters' speech. Laws regulating speech in designated public fora must have constitutionally sufficient time, place, and manner restrictions.[216] *McCullen v. Coakely*[217] held that time, place, and manner restrictions must be narrowly tailored and not substantially burden other protected First Amendment speech.[218] Rather than prohibiting all persons from a "buffer zone," the Supreme Court required the state to take measures to protect persons who were engaged in constitutionally protected free speech and restrict only persons who were actually disrupting or obstructing legitimate governmental interests.[219] The Supreme Court gave an example:

> To determine whether a protestor intends to block access to a clinic, a police officer need only order him to move. If he refuses, then there is no question that his continued conduct is knowing or intentional. To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier.[220]

To constitutionally order a protester to leave, the State is required to tailor their order to that person and their illegal activity. We argued, and the court ultimately agreed, that when protesters were asked to move they did so without

214. LEGIS. SERVS. COMM'N, RULES OF STATE LEGISLATIVE BUILDING AND LEGISLATIVE OFFICE BUILDING (2014), https://ncleg.gov/Files/About/BuildingRules.pdf [https://perma.cc/9LHY-TF64].

215. Bd. of Airport Comm'r of L.A. v. Jews for Jesus, 482 U.S. 569, 573 (1987).

216. *See* Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640, 647–48 (1981).

217. 573 U.S. 464 (2014).

218. *Id.* at 486 ("Even though the Act is content neutral, it still must be 'narrowly tailored to serve a significant governmental interest.'").

219. *Id.* at 497 ("But here the Commonwealth has pursued those interests by the extreme step of closing a substantial portion of a traditional public forum to all speakers. It has done so without seriously addressing the problem through alternatives that leave the forum open for its time-honored purposes.").

220. *Id.* at 495.

incident.[221] Furthermore, the group showed it was capable of being quiet when requested to do so.[222] The order to leave was not narrowly tailored to people who may actually be causing some disruption and restricted the free speech of innocent behavior protected by the First Amendment.[223] Police Chief Weaver's order to leave was an unconstitutional use of executive police power, not a governmental enactment of reasonable time, place, manner restrictions.

In response to the protests, the General Assembly Police issued a memorandum on May 13, 2013, stating they intended to warn individuals causing a disturbance to cease the disturbance before ordering people to leave; however, the police did not follow this procedure on June 17, 2013.[224] Additionally, all persons in the second-floor rotunda area were ordered to leave without first warning them to move or be quiet.[225] This order also applied to persons who were merely present in the second floor rotunda area and were merely standing and silently listening to the speeches.[226] There was never a warning or request to be quiet prior to the order to leave.[227]

The state has an interest in providing an open, secure environment for conducting the business of the General Assembly. The state's interest in providing a safe space extends as well to those visiting the Legislative Complex to exercise their constitutionally protected rights of assembly and speech.[228] However, the court concluded that capitol police failed to explore less restrictive means to accomplish the government interest in providing an open and secure environment.[229] The state failed to narrowly tailor the Legislative Building Rules to avoid overly burdening constitutionally protected conduct as required by *McCullen*. As a result, the protesters were subject to an unconstitutional order to disperse.[230]

The State also failed to show that alternative measures would have failed to achieve the government's interests. The State's evidence suggested that alternative measures could have accomplished the governmental interest in limiting disruptions. Therefore, the order to disperse was unconstitutionally overbroad.[231] The protesters were not engaging in disruptive behavior, but

221. Order at 10, North Carolina v. Beeghley, 13-CRS-214602 (N.C. Super. Ct. Sept. 12, 2014).

222. *Id.*

223. "As attorney Scott Holmes argued while defending Moral Monday protestors, 'you can't use a bulldozer and clear everybody out of a public forum when only a few people are causing a disturbance.'" Vernon, *supra* note 199, at 121.

224. Order, *supra* note 221, at 8.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.* at 10.

230. *Id.*

231. *Id.*

instead were assembling peacefully, merely listening to the speeches of others.[232]

North Carolina defines second-degree trespass as "without authorization, [a person] enters or remains on premises of another: (1) After he has been notified not to enter or remain there by the owner, by a person in charge of the premises, by a lawful occupant, or by another authorized person."[233] The charge of trespass, as applied to the protesters, therefore constituted an unconstitutional burden upon their right to free speech and peaceful assembly.[234] A superior court dismissed our test case, and because the rest of the cases were almost factually identical, the District Attorney elected to take a dismissal of all the cases that involved protests in the public forum but reserved the right to prosecute people who occupied legislative offices.[235]

b. *Legal Argument: The Intersection of Failure To Disperse and First Amendment Rights*

Failure to disperse is a common charge against protesters, either as an explicit charge or as the basis to constitute a trespass charge for "unlawful assembly."[236] Further, failure to disperse is a law with clearly defined thresholds for enforcement, the elements of which are rarely present in protest-related charges.[237] According to the General Statutes of North Carolina, failure to comply with any law enforcement officer's command to disperse is an arrestable offense.[238] However, the command is only lawful when many necessary elements are met. The officer must reasonably believe that "a riot, or disorderly conduct by an assemblage of three or more persons is occurring."[239] A riot requires "disorderly and violent conduct, or the imminent threat of disorderly and violent conduct," resulting in or creating a "clear and present danger of injury or damage to persons or property."[240] Additionally, disorderly conduct is defined as "a public disturbance intentionally caused by any person who . . . [e]ngages in fighting or other violent conduct, or conduct creating the threat of

232. *Id.*

233. N.C. GEN. STAT. § 14-159.13 (LEXIS through Sess. Laws 2021-162 of the 2021 Reg. Sess. of the Gen. Assemb.).

234. Order, *supra* note 221, at 11.

235. *See* Anne Blythe, *Wake DA Agrees To Dismiss All but About 50 "Moral Monday" Cases from 2013*, NEWS & OBSERVER (Sept. 19, 2014), https://www.newsobserver.com/news/politics-government/state-politics/article10065071.html [https://perma.cc/SQQ5-32CY (staff-uploaded, dark archive)].

236. Dick J. Reavis, *For Some Moral Monday Protestors, the Law Won*, INDY WK. (Jan. 22, 2014), https://indyweek.com/news/moral-monday-protesters-law-won/ [https://perma.cc/BPT3-THVJ].

237. N.C. GEN. STAT. § 14-288.5 (LEXIS through Sess. Laws 2021-162 of the 2021 Reg. Sess. of the Gen. Assemb.).

238. *Id.*

239. *Id.*

240. *Id.* § 14-288.4(a).

imminent fighting or other violence."[241] This includes "any utterance, gesture, display or abusive language which is intended and plainly likely to provoke violent retaliation and thereby cause a breach of the peace."[242]

Thus, in order to issue a lawful command to disperse, Section 14-288.5 of the General Statutes of North Carolina requires a law enforcement officer to reasonably believe that a riot or disorderly conduct is occurring. In North Carolina, both "riot" and "disorderly conduct" require either actual violence or imminent lawless action (damage to persons or property), as discussed below. In addition, "[i]n order to ascertain what actions are violative of the statute as constituting 'disorderly conduct,' one must look, not to the general definition of 'public disturbance,' but to the specific examples of prohibited conduct as set forth in the subsections of the statute itself."[243]

These North Carolina statutes are narrowly drawn in recognition of the First Amendment guarantee of free expression. A law enforcement officer does not have unfettered discretion to limit lawful dissent, political speech, or speech in public forums.[244] Thus, the only time a lawful command to disperse may be issued against an assemblage of three or more people involved in public advocacy is when they are engaged in violent conduct or destruction of property or present the immediate threat of violent conduct or property damage.[245] Protesters may not be ordered to leave simply because law enforcement has commanded it; instead, protesters' behavior must rise to the level of a "clear and present danger."[246]

241. *Id.*

242. *Id.* § 14-288.4(a)(2).

243. State v. Strickland, 27 N.C. App. 40, 43, 217 S.E.2d 758, 760 (1975).

244. Cox v. Louisiana, 379 U.S. 536, 557–58 (1965) ("It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups either by use of a statute providing a system of broad discretionary licensing power or, as in this case, the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute."); Forsyth County v. Nationalist Movement, 505 U.S. 123, 131 (1992) ("The reasoning is simple: If the permit scheme 'involves appraisal of facts, the exercise of judgment, and the formation of an opinion,' . . . by the licensing authority, 'the danger of censorship and of abridgment of our precious First Amendment freedoms is too great' to be permitted . . . ." (citations omitted) (first quoting Cantwell v. Connecticut, 310 U.S. 296, 305 (1940); then quoting Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975))); Shuttlesworth v. City of Birmingham, 394 U.S. 147, 153 (1969) ("Even when the use of its public streets and sidewalks is involved, therefore, a municipality may not empower its licensing officials to roam essentially at will, dispensing or withholding permission to speak, assemble, picket, or parade according to their own opinions regarding the potential effect of the activity in question on the 'welfare,' 'decency,' or 'morals' of the community.").

245. *See* § 14-288.5 (LEXIS through Sess. Laws 2021-162 of the 2021 Reg. Sess. of the Gen. Assemb.).

246. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) ("These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

The standard as a basis for an arrest or enforcing a command to disperse was clarified in *Brandenburg v. Ohio*,[247] requiring the perception of "imminent lawless action."[248] In *Brandenburg*, the defendant was charged with advocating "criminal syndicalism," in violation of Ohio's criminal code.[249] Brandenburg, at a KKK meeting of members brandishing firearms, in KKK regalia, on film, was alleged to have threatened "revengeance [sic]" against the President, the Congress, and the Supreme Court.[250] According to the *Brandenburg* Court, "constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[251]

Further bolstering the threshold to which demonstrations must arise before lawfully being ordered to disperse, *Hess v. Indiana*[252] refined the definition of "imminent lawless action."[253] Gregory Hess was a student arrested under Indiana's disorderly conduct statute.[254] At the time of his arrest, Hess was a participant in an anti-war demonstration on a public street.[255] The group was alleged to be interfering with traffic and blocking vehicles.[256] At some point, he and fellow demonstrators were forced by law enforcement to step out of the street and onto the curb.[257] A sheriff's officer testified that Hess, speaking to the crowd, said in a loud voice, "We'll take the fucking street later" (or "again").[258] Hess was promptly arrested; witnesses denied that Hess was exhorting others to any immediate action.[259] The court noted of Hess's statement that "at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time. This is not sufficient to permit the State to punish Hess' speech."[260] In sum, a lawful order to disperse can only issue in the presence of actual violence or where lawless action is imminent.

Finally, an officer's perception of violence or its imminence must be reasonable. In *State v. Clark*,[261] the North Carolina Court of Appeals noted that the critical element of the failure-to-disperse statute is the whether the officer's

247. 395 U.S. 444 (1969).
248. *Id.* at 447.
249. *Id.* at 445.
250. *Id.* at 445–46.
251. *Id.* at 447–48.
252. 414 U.S. 105 (1973) (per curiam).
253. *Id.* at 108–09 (quoting *Brandenburg*, 395 U.S. at 447).
254. *Id.* at 105.
255. *Id.* at 106–07.
256. *Id.* at 106.
257. *See id.*
258. *Id.* at 107.
259. *Id.*
260. *Id.* at 108.
261. 22 N.C. App. 81, 206 S.E.2d 252 (1974).

determination that a riot or disorderly conduct is occurring is reasonable.[262] The court specified that under Section 14-288.5, "the failure to disperse when commanded by an officer would be an offense where no disorderly conduct was occurring so long as it is shown on trial that the officer had reasonable grounds to believe that disorderly conduct was occurring by an assemblage of three or more persons."[263]

Because officers often issue orders to disperse when there is no threat of violence, those orders are unconstitutional and the conduct is protected by the First Amendment.[264] When people reasonably struggle or argue with officers about their arrest, they are lawfully resisting an unlawful arrest.[265]

c. *Moral Monday 2.0: Protestors' Right to Assembly Versus Trespass Charges*

Reverend Barber was again arrested May 30, 2017, in the General Assembly while protesting their refusal to expand Medicaid.[266] The police ordered the group he was with to leave for causing a "disturbance" when they were chanting, singing, and praying in the halls of the General Assembly.[267] Reverend Barber was charged with the crime of second degree trespass, which requires proof that a person (1) remain on the premises of another, (2) after being notified not to remain there by (3) a person in charge,[268] a frequent charge against protesters.

We have argued that the law of trespass is subject to the First Amendment so that when the trespass occurs in a public forum the State must prove more than just an order to leave in order to criminalize the behavior.[269] In a public

262. *Id.* at 87–88, 206 S.E.2d at 257.

263. *Id.*

264. *See, e.g.*, Cox v. Louisiana, 379 U.S. 536, 544–52 (1965).

265. *See generally* State v. Mobley, 240 N.C. 476, 83 S.E.2d 100 (1954) (explaining that a person may use reasonable force to prevent an unlawful arrest and circumstances in which officers may arrest without a warrant).

266. Josh Shaffer, *Reverend Barber Convicted of Trespassing at General Assembly During 2017 Protest*, NEWS & OBSERVER (June 6, 2019), https://www.newsobserver.com/news/politics-government/article231254283.html [https://perma.cc/LCJ2-9NLD (staff-uploaded, dark archive)].

267. *Id.*

268. N.C. GEN. STAT. § 14-159.13(a) (LEXIS through Sess. Laws 2021-162 of the 2021 Reg. Sess. of the Gen. Assemb.).

269. Brief of Defendant-Appellant at 10–11, State v. Barber, No. COA 20-268 (N.C. Ct. App. July 24, 2020); *see, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 268 (1964) ("But the Court was careful to note that it 'retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel'; for 'public men, are, as it were, public property,' and 'discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled.'" (quoting Beauharnais v. Illinois, 343 U.S. 250, 263–64, 263 n.18 (1952))). "In deciding the question now, [the Court was] compelled by neither precedent nor policy to give any more weight to the epithet 'libel' than [it has] to other 'mere labels' of state law." *Id.* at 269 (quoting NAACP v. Button, 371 U.S. 415, 429 (1963)). "Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression

forum, the demonstrator has a right to remain subject to following reasonable time, manner, and place restrictions.[270] If the person in charge orders a protester to leave who is otherwise following the rules governing the protest, the order violates the First Amendment and the protester is not guilty of a crime.[271] In short, defending a protester's trespass charge in a public forum has other constitutional elements beyond the law of private trespass. In this case, the court erred in refusing to consider the political nature of Reverend Barber's speech and the public forum where he stood in the North Carolina General Assembly.[272]

As a result of these cases, we have developed an argument, which was recently rejected by the North Carolina Court of Appeals,[273] that the state law of trespass is necessarily supplemented by the First Amendment, which requires additional elements when the trespass charge involves protesting in a public forum subject to time, manner, and place restrictions.[274] We contend on appeal that when a criminal statute is written without expressly including, as elements, the requirements of the First Amendment, the statute must be construed and applied at trial with the First Amendment requirements included as essential elements of the statutory crime.[275] "The trial court may often construe a statute otherwise unconstitutional on its face by instructing the jury on the complete definition of the crime, that is, a definition that includes the statutory elements as well as constitutionally required elements."[276] In the present case, the law of private criminal trespass does not incorporate the constitutionally required elements of the offense.

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that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." *Id.*

270. Forsyth County v. Nationalist Movement, 505 U.S. 123, 130 (1992) ("Although there is a 'heavy presumption' against the validity of a prior restraint, the Court has recognized that government, in order to regulate competing uses of public forums, may impose a permit requirement on those wishing to hold a march, parade, or rally. Such a scheme, however, must meet certain constitutional requirements. It may not delegate overly broad licensing discretion to a government official. Further, any permit scheme controlling the time, place, and manner of speech must not be based on the content of the message, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication." (citations omitted)).

271. *See* Edwards v. South Carolina, 372 U.S. 229, 237–38 (1963) (overturning criminal convictions for protesters who were engaged in protected First Amendment speech in a public forum and refused an order to leave by police).

272. *See* Shaffer, *supra* note 266. Arguing to the jury that the protest had nothing to do with the law of trespass, Assistant District Attorney Nishma Patel argued, "This entire trial has been about enforcing the law as it's written and should have nothing to do with the defendant's beliefs." *Id.*

273. *See* State v. Barber, 868 S.E.2d 601, 2021-NCCOA-695, ¶ 33.

274. *See* Brief of Defendant-Appellant, *supra* note 269, at 10–29; Reply Brief of Defendant-Appellant at 3–9, *Barber*, No. COA 20-268 (N.C. Ct. App. Feb. 11, 2021).

275. Brief of Defendant-Appellant, *supra* note 269, at 25 (citing State v. Taylor, 270 N.C. App. 514, 544–45, 841 S.E.2d 776, 806 (2020), *discretionary review granted*, 847 S.E.2d 412 (2020) (mem.)).

276. *Taylor*, 270 N.C. at 545, 841 S.E.2d at 806; *see also* State v. Leigh, 278 N.C. 243, 251–52, 179 S.E.2d 708, 713 (1971).

We argued in Reverend Barber's case that when the alleged trespass occurs in a public forum where the suspect is engaging in political speech, the Constitution prevents the state from removing, or trespassing, the person from the public forum.[277] This is subject to two exceptions: (1) the person has violated some reasonable time, manner, and place restriction; or (2) they are engaging in violent behavior. We argued it was a matter of law for the court to determine whether the facts support a conclusion that the area is a public forum and whether the time, manner, and place restrictions are reasonable.[278] And though the court rejected our argument, we believe it should have concluded that the defendant was in a public forum, and thus held that the Constitution implies additional elements of proof before the defendant could be convicted. The court should have required that the jury determine whether the defendant violated a time, manner, and place restriction such that ordering them to leave was justified under the First Amendment. In Reverend Barber's case, we unsuccessfully argued that the jury should have considered the additional factual issue of whether he was sufficiently disruptive under the building rules to justify the General Assembly Police order for him to leave the area or be arrested for trespass.[279]

This extensive litigation and examination of trespass as a common charge against protesters has also contextualized the *act* of protest as one that is protected as political speech. This informs our current analysis that protest must be considered in the *broader context* of the power dynamics at play, particularly when perpetuated by ill-gotten gains or with harmful intent.

2. Confederate Monument Removal

While the Moral Monday Movement represents a historic effort to thwart the current iteration of legislative policies, such as voting, education, housing, health care, and wages, that are the descendants of white supremacy, the demonstrations to remove symbols of the Confederacy seek to rid our courthouse steps of the actual monuments erected to celebrate white supremacist terror, the success of the codification of white supremacy, and the enactment of Jim Crow.

The debate about removing Confederate monuments from public spaces bears out a false historical choice: a concern for preserving "history" ignores that history's context in the rise of white supremacist power in the North Carolina legislature, via violence, that laid the groundwork for false Confederate history

277. Brief of Defendant-Appellant, *supra* note 269, at 10–11; *see also Barber*, 868 S.E.2d 601, 2021-NCCOA-695, ¶¶ 30–33 (holding that the First Amendment was not implicated since Barber was removed for the volume of his words, not their content).

278. *See* Brief of Defendant-Appellant, *supra* note 269, at 10–29.

279. *Id.* at 18–19.

propagation and for improper homages to white supremacy to be erected on public grounds around the state in the first place.

Confederate monuments have become a flashpoint where communities are wrestling with racial identity amidst the resurgence and growth of white supremacist groups.[280] The effort to remove public symbols of the Confederacy reignited when white supremacist Dylann Roof, under the banner of the Confederate flag, murdered nine Black people worshipping at the Mother Emanuel AME Church in downtown Charleston, South Carolina, on June 17, 2015.[281] Since then, local governments have been tediously reevaluating the placement of Confederate symbols in public places.[282] Supporters of removal point to a legacy of racism and systemic oppression, and detractors incorrectly claim the monuments to be important artifacts of the cultural heritage of the United States.[283]

Only days after protests and the murder that occurred in Charlottesville, Virginia, on August 14, 2017, over 100 protesters advocating for the removal of a Confederate monument in front of a county building gathered in Durham, North Carolina. There, some individuals toppled a statue of a Confederate soldier in front of the historic Durham County Courthouse.[284] These were North Carolinians disturbed by the Confederate monument outside the courthouse and concerned with the refusal of the government to remove the monument and reconcile its complicit history in harm.[285] The Durham County Sheriff's office issued warrants against eight people, charging them with: (1)

280. Chris Woodyard, *Hate Group Count Hits 20-Year High amid Rise in White Supremacy, Report Says*, USA TODAY (Feb. 20, 2019), https://www.usatoday.com/story/news/nation/2019/02/20/hate-groups-white-power-supremacists-southern-poverty-law-center/2918416002/ [https://perma.cc/6K5Q-6XJF (dark archive)].

281. Adam K. Raymond, *A Running List of Confederate Monuments Removed Across the Country*, INTELLIGENCER, http://nymag.com/intelligencer/2017/08/running-list-of-confederate-monuments-that-have-been-removed.html [https://perma.cc/D2LW-D8RY (dark archive)] (Aug. 25, 2017) ("Before June 17, 2015, most Americans didn't think much about the more than 700 Confederate monuments around the nation. And then Dylann Roof, a 21-year-old white supremacist, massacred nine black churchgoers in Charleston, South Carolina.").

282. Gabriella Borter, *Museum or Dumpster? U.S. Cities Wrestle with Confederate Statues' Fate*, REUTERS (Aug. 17, 2017), https://www.reuters.com/article/us-usa-protests-statues/museum-or-dumpster-u-s-cities-wrestle-with-confederate-statues-fate-idUSKCN1AX2ED [https://perma.cc/7W9N-4WZX].

283. Miles Parks, *Confederate Statues Were Built To Further a "White Supremacist Future*," NPR (Aug. 20, 2017), https://www.npr.org/2017/08/20/544266880/confederate-statues-were-built-to-further-a-white-supremacist-future [https://perma.cc/LEB8-4UVY].

284. Maggie Astor, *Protestors in Durham Topple a Confederate Monument*, N.Y. TIMES (Aug. 14, 2017), http://www.nytimes.com/2017/08/14/us/protesters-in-durham-topple-a-confederate-monument.html [https://perma.cc/65LS-ZSDU (dark archive)].

285. *See Protestors Tear Down Confederate Statue in Durham, North Carolina*, CBS NEWS, https://www.cbsnews.com/news/durham-north-carolina-protesters-tear-down-confederate-monument/ [https://perma.cc/Y5BQ-BPK9] (Aug. 15, 2017).

felony rioting; (2) misdemeanor injury to personal property; (3) misdemeanor injury to real property; and (4) misdemeanor defacing a public statue.[286]

The Durham District Attorney's office dropped the felony charges against the defendants before trial. On February 19, 2018, after three bench trials, a judge dismissed the remaining charges against two of the protestors and acquitted a third.[287] The following day, the District Attorney's office announced that, due to a lack of any additional evidence, it would not pursue charges against the remaining five defendants.[288]

After the removal of the Durham Confederate monument, North Carolina Governor Roy Cooper said that he understood the frustration of the protestors who toppled the statue and agreed that Confederate monuments should be removed, but that there was a better way to remove the monuments.[289] He went on to say that "history is not on [the] side" of those who "cling to the belief that the Civil War was fought over states' rights"; that we "cannot continue to glorify a war against the United States of America fought in the defense of slavery," and thus "[t]hese monuments should come down."[290]

A few days after the toppling of the Confederate monument in downtown Durham, a monument of Confederate General Robert E. Lee at Duke University's chapel was vandalized.[291] The statue was removed three days

286. Janell Ross, *Eight People Charged for Toppling Confederate Statue in Durham as Scores Line Up To Confess*, WASH. POST (Aug. 17, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/08/15/durham-county-sheriff-investigators-working-to-identify-those-responsible-for-statue-removal-and-vandalism/ [https://perma.cc/43A3-UTBU (dark archive)]; Amanda Jackson & Ralph Ellis, *Seven Arrested in Toppling of Confederate Statue in North Carolina*, CNN (Aug. 16, 2017), https://www.cnn.com/2017/08/14/us/confederate-statue-pulled-down-north-carolina-trnd/index.html [https://perma.cc/927Y-QBQJ]. As we defended these protesters, we began to learn about the history of these monuments as celebrations of the 1898 white supremacy campaign and the 1900 campaign for Black disfranchisement—rather than innocent homages to local war heroes—erected concurrently or close in time to the loss of those lives. *See* W. Fitzhugh Brundage, *I've Studied the History of Confederate Memorials. Here's What To Do About Them.*, VOX (Aug. 18, 2017), https://www.vox.com/the-big-idea/2017/8/18/16165160/confederate-monuments-history-charlottesville-white-supremacy [https://perma.cc/2MVZ-F5KL]. Their placement outside courthouses around the state were symbols of white supremacy and subtle reminders that there would be no equal protection of the law within the courthouse. *See* Caileigh Peterson, *Efforts Underway To Remove Confederate Monuments from N.C. Courthouses*, SPECTRUM NEWS (Mar. 25, 2021), https://spectrumlocalnews.com/nc/triad/news/2021/03/25/efforts-underway-to-remove-confederate-monuments-from-courthouses [https://perma.cc/KMD6-4D2S].

287. David A. Graham, *How the Activists Who Tore Down Durham's Confederate Statue Got Away with It*, ATLANTIC (Feb. 21, 2018), https://www.theatlantic.com/politics/archive/2018/02/durham-confederate-monument-charges-dismissed/553808/ [https://perma.cc/ZX8F-K9RB (dark archive)].

288. *See id.*

289. Roy Cooper, *North Carolina Monuments*, MEDIUM (Aug. 15, 2017), https://medium.com/@NC_Governor/north-carolina-monuments-b7ead3c471ee [https://perma.cc/ZD5V-55SW].

290. *Id.*

291. Ray Gronberg, *Vandals Strike Statue of Confederate General Robert E. Lee at Duke University*, HERALD-SUN, http://www.heraldsun.com/news/local/counties/durham-county/article16770240.html [https://perma.cc/JV4X-R8XN (staff-uploaded, dark archive)] (Sept. 18, 2017, 6:29 PM).

later.[292] In a press release, Duke President Vincent Price stated the statue was removed over concerns of student safety and that the removal presented an opportunity for the Duke community to learn and heal.[293]

As evidence that protest points the way to reform, leaders around the country began considering the removal of Confederate symbols in response to these protests. In New York, religious leaders removed two plaques commemorating General Lee outside an Episcopal church in Brooklyn.[294] In Boston, the only Confederate monument in the State of Massachusetts was covered after Charlottesville and later removed by the state's Department of Conservation and Recreation.[295] Massachusetts Governor Charlie Baker had called for the removal, noting that the memorial and others like it represented "symbols . . . that do not support liberty and equality for the people of Massachusetts and the nation."[296] In Maryland, a statue of former Supreme Court Chief Justice Roger B. Taney, the author of the *Dred Scott* decision, was taken down.[297] Governor Larry Hogan endorsed the removal in a statement: "While we cannot hide from our history—nor should we—the time has come to make clear the difference between properly acknowledging our past and glorifying the darkest chapters of our history."[298] Here, we see these protests in a nationwide context, revealing these shrines to white supremacy and what the appropriate treatment of these homages are.[299]

In North Carolina, however, the General Assembly sustained its reinforcing approach to the codification of white supremacy and passed a law in 2015 preventing local governments from moving any "object of remembrance" sitting on public property.[300] The law prohibits the removal of monuments by

292. Vincent Price, *Duke Removes Robert E. Lee Statue from Chapel Entrance*, DUKE TODAY (Aug. 19, 2017), https://today.duke.edu/2017/08/duke-removes-robert-e-lee-statue-chapel-entrance [https://perma.cc/ZP8Y-KPSB].

293. *Id.*

294. Molly Crane-Newman, Thomas Tracy & Larry McShane, *Religious Leaders Remove Brooklyn Plaques Honoring Robert E. Lee, Prompting Threats from Alt-Right Protesters*, N.Y. DAILY NEWS (Aug. 17, 2017), http://www.nydailynews.com/new-york/brooklyn/robert-e-lee-plaques-removed-brooklyn-article-1.3416400 [https://perma.cc/K6K3-3JUE].

295. Cristela Guerra, *State's Only Confederate Memorial Will Be Removed*, BOS. GLOBE (Oct. 2, 2017), http://www.bostonglobe.com/metro/2017/10/02/state-only-confederate-memorial-will-move-state-archive/fiFFyZcJxK7A529ugIzjFN/story.html [https://perma.cc/D3HW-QFNT (dark archive)].

296. *Id.*

297. Pamela Wood & Erin Cox, *Roger Taney Statue Removed from Maryland State House Grounds Overnight*, BALT. SUN (Aug. 18, 2017), http://www.baltimoresun.com/news/maryland/politics/bs-md-taney-statue-removed-20170818-story.html [https://perma.cc/9HMV-KUJS (dark archive)].

298. *Id.*

299. To be clear, removal is the appropriate remedy. Commemorative and celebratory statues to white violence have no place in the public sphere.

300. Cultural History Artifact Management and Patriotism Act of 2015, ch. 170, § 3(c), 2015 Sess. Laws 435, 437 (codified at N.C. GEN. STAT. § 100-2.1(b) (2015)); *see also* Jaweed Kaleem, *In Some States, It's Illegal To Take Down Monuments or Change Street Names Honoring the Confederacy*, L.A. TIMES

requiring approval of the North Carolina Historical Commission.[301] The North Carolina Historical Commission is also, at present, appointed and controlled by a Republican majority committed to maintaining Confederate monuments.[302]

In Orange County courts, we successfully defended the people protesting the erection and continued presence of Silent Sam on the University of North Carolina at Chapel Hill ("UNC") campus.[303] Police arrested these protesters and charged them with property damage as a result of removing Silent Sam in August 2018.[304]

In the weeks that followed, several people, including UNC students, were arrested at clashes between police and people both defending and decrying the Confederate monument on UNC's campus.[305] After UNC announced a proposal to build a new building for the monument, more protests erupted, more people were arrested, and teaching assistants even threatened to withhold grades.[306]

(Aug. 16, 2017), http://www.latimes.com/nation/la-na-confederate-monument-laws-20170815-html story.html [https://perma.cc/S8V7-AK3L (dark archive)].

301. N.C. GEN. STAT. § 100-2.1(a) (LEXIS through Sess. Laws 2021-162 of the 2021 Reg. Sess. of the Gen. Assemb.).

302. Erica Hellerstein, *N.C. Historical Commission Votes To Punt on Removing Confederate Monuments from Capitol*, INDY WK. (Sept. 22, 2017), https://indyweek.com/news/archives/n.c.-historical-com mission-votes-punt-removing-confederate-monuments-capitol/ [https://perma.cc/J97P-9NT9]; Gary Robertson, *N.C. GOP Leaders Don't Want Confederate Statues Moved*, CITIZEN TIMES (Sept. 21, 2017), https://www.citizen-times.com/story/news/local/2017/09/21/nc-gop-leaders-dont-want-confede rate-statues-moved/691454001/ [https://perma.cc/7W4D-34ZY (dark archive)] ("North Carolina Republican lawmakers . . . pressed a state panel not to grant Democratic Gov. Roy Cooper's request to relocate Confederate monuments from the old Capitol grounds, with one leader predicting that any such approval would be overturned in court.").

303. *Judge Declines To Punish UNC Student Who Poured Ink on Silent Sam Statute*, N.C. PUB. RADIO (Oct. 15, 2018), https://www.wunc.org/news/2018-10-15/judge-declines-to-punish-unc-student-who-poured-ink-on-silent-sam-statue [https://perma.cc/K2CG-8MX8]. Silent Sam is the same statue that was unveiled to "Dixie," and Julian Carr extolled "what the Confederate soldier meant to the welfare of the Anglo Saxon race." Julian Carr, Address at the Unveiling of Confederate Monument at University of North Carolina (June 2, 1913), https://hgreen.people.ua.edu/transcription-carr-speech. html [https://perma.cc/8Z9N-DYM2].

304. Tammy Grubb, *Cases Dismissed Against Men Charged with Helping Take Down UNC's Silent Sam Statue*, NEWS & OBSERVER (Jan. 27, 2021, 2:12 PM), https://www.newsobserver.com/news/local/counties/orange-county/article248799850.html [https://perma.cc/MH6X-KAU4 (staff-uploaded, dark archive)]. Here, again, we gained insight to the priorities of prosecutors using court time and resources to prosecute protests.

305. Carli Brosseau & Tammy Grubb, *Silent Sam Opponents and Supporters Square Off Again at Statue's Former Site*, NEWS & OBSERVER (Sept. 9, 2018), https://www.newsobserver.com/news/local/article218067295.html [https://perma.cc/K8SU-NF9Y (staff-uploaded, dark archive)] (Sept. 9, 2018, 10:20 AM); *8 Arrested at Confederate Statue Protest Blame Officers*, ASSOCIATED PRESS (Sept. 10, 2018), https://www.apnews.com/21026ee6babd45e1acf08f8a2bf64b8c [https://perma.cc/EJY8-29LK].

306. Steven Johnson, *Silent Sam Protesters at Chapel Hill Embrace a New Tactic: A 'Grade Strike*,' CHRON. HIGHER EDUC. (Dec. 7, 2018), https://www.chronicle.com/article/Silent-Sam-Protesters-at/245288 [https://perma.cc/77UK-5M58] ("Just as the fall semester is set to close, activists say, at least 79 teaching assistants and instructors have joined a rare 'grade strike,' pledging to withhold more than 2,000 final grades unless the university meets their conditions."); Susan Svrluga, *UNC in Turmoil over Silent Sam, the Confederate Monument Toppled by Protesters*, WASH. POST (Dec. 13, 2018), https://www.

This proposal was rejected by the Board of Governors.[307] Like the North Carolina Historical Commission, the UNC Board of Governors is appointed by the Republican majority of the North Carolina General Assembly, who favor keeping Confederate monuments in public spaces.[308] Their support for Confederate monuments brought them into conflict with the UNC administration, faculty, and student body who oppose the Confederate monument on campus.[309] Members of the Board of Governors had expressed their wish for Silent Sam to be returned to the campus.[310] Nevertheless, Chancellor Carol Folt announced her decision to have the remaining base of the Confederate monument removed as she also announced her resignation.[311]

In a bizarre turn in the saga of the Confederate monument on UNC's campus, and an unfortunate example of how self-reinforcing institutionalized white supremacy can be, white lawyers for UNC met privately with white lawyers from the Sons of Confederate Veterans ("SCV") on November 21, 2019, and agreed for UNC to pay the SCV $74,999 in order for the SCV to purchase an interest in the Confederate monument from the United Daughters

washingtonpost.com/education/2018/12/13/unc-turmoil-over-silent-sam-confederate-monument-topp led-by-protesters/?utm_term=.ac7fdd5803c6 [https://perma.cc/47CE-99QV (dark archive)].

307. Sarah Willets, *UNC Board of Governors Rejects Proposal for a New On-Campus Facility To House Silent Sam*, INDY WK. (Dec. 14, 2018), https://indyweek.com/news/northcarolina/unc-board-of-governors-rejects-silent-sam/ [https://perma.cc/XYJ4-GK3R].

308. *See* Joe Killian, *Trove of Emails Provides a Window into Conflicts at UNC*, NC POL'Y WATCH (Jan. 10, 2018), https://ncpolicywatch.com/2018/01/10/trove-emails-provides-window-conflicts-unc/ [https://perma.cc/Q44W-HLLP]; Paige Masten, Opinion, *UNC Has Management Problems, but Republicans Are To Blame*, CHARLOTTE OBSERVER (June 30, 2021, 12:00 AM), https://www.charlotteobserver.com/opinion/article252423668.html [https://perma.cc/PSB2-6G9Y (staff-uploaded archive)] (Oct. 12, 2021, 12:53 PM).

309. Julia Jacobs, *U.N.C. Chancellor To Leave Early After Ordering Removal of 'Silent Sam' Statue's Base*, N.Y. TIMES (Jan. 15, 2019), https://www.nytimes.com/2019/01/15/us/silent-sam-statue-removal-unc.html [https://perma.cc/7TJJ-J8YG (dark archive)] ("The statue's toppling touched off political tensions between North Carolina's Republican-dominated legislature, which elects the board of governors, and the university community, a liberal enclave in a red state. Mr. Smith, the chairman of the board of governors, which is elected by the state legislature, reacted angrily to the initial toppling of the statue, calling it vandalism.").

310. Jeffrey C. Billman, *UNC Board of Governors Member Thom Goolsby's Got a Plan To Re-Erect Silent Sam*, INDY WK. (Jan. 17, 2019), https://indyweek.com/news/northcarolina/unc-board-of-governors-thom-goolsby-silent-sam/ [https://perma.cc/EW9D-PRNK] ("That decision, then, will ultimately fall to the Board of Governors, a mostly conservative bunch appointed by the Republican-controlled General Assembly. And one of its most conservative members—and probably its biggest Silent Sam apologist—former state senator Thom Goolsby of Wilmington, has a "great suggestion": Take the $5 million Folt wanted to use to build a history center to house Silent Sam and instead put the Confederate statue back where it once stood, in McCorkle Place, then build some sort of structure to protect it from the rabble and 'allow people to present their views, and actually allow different points of view, and perhaps even encourage other statues to be put up.'").

311. *Chancellor Folt Announces Resignation, Orders Confederate Monument Pedestal To Be Removed Intact*, UNC CHAPEL HILL U. NEWS (Jan. 14, 2019), https://www.unc.edu/posts/2019/01/14/folt-resignation-orders-confederate-monument-pedestal-removed/ [https://perma.cc/Q7HH-TVL6].

of the Confederacy ("UDC").[312] The $74,999 amount was one dollar short of the amount that would have require approval of the North Carolina Attorney General.[313]

Although no lawsuit was actually filed against the University, UNC's lawyers then presented a "settlement agreement" to the UNC Board of Governors Committee on University Governance to give the Confederate monument to the SCV and pay them $2.5 million.[314] After the committee approved the settlement, the lawyers for UNC and SCV filed the complaint and the answer, and then had a superior court judge sign the consent judgment—all within ten minutes on the Friday after Thanksgiving.[315]

After the consent order was entered, a group of UNC students and faculty members moved to intervene and set aside the agreement.[316] Their motion to set aside the consent agreement showed how UNC lawyers allowed the lawyers for the SCV to falsify the historical record, and, among other distortions, to concoct a false claim of ownership of the monument for the SCV.[317]

The complaint and consent order were predicated upon a factual and legal theory that the UDC paid for the Confederate monument at UNC and provided it as a gift to the University.[318] The complaint and consent order asserted that the UDC reserved an interest in the gift, a "condition subsequent," that the monument would remain permanently on campus.[319] The complaint and consent orders concluded that the ownership in the monument reverted back to the UDC when the monument was removed from campus.[320] Then, the UDC assigned their interest in the monument to the SCV.[321]

312. Kate Murphy, *Secrecy and Misleading Communications Marred UNC's Silent Sam Deals, Settlement Shows*, NEWS & OBSERVER, https://www.newsobserver.com/news/local/education/article248974550.html [https://perma.cc/QW54-KKB9 (staff-uploaded, dark archive)] (Feb. 4, 2021, 1:15 PM) [hereinafter Murphy, *Secrecy and Misleading Communications*].

313. *See* N.C. GEN. STAT. § 114-2.4(a) (LEXIS through Sess. Laws 2021-162 of the 2021 Reg. Sess. of the Gen. Assemb.) ("The Attorney General shall review the terms of all proposed agreements entered into by the State or a State department, agency, institution, or officer to settle or resolve litigation or potential litigation, that involves the payment of public monies in the sum of seventy-five thousand dollars ($75,000) or more.").

314. Murphy, *Secrecy and Misleading Communications*, *supra* note 312.

315. *Id.*

316. Kate Murphy, *Judge Overturns Silent Sam Settlement Between UNC and Confederate Group*, NEWS & OBSERVER, https://www.newsobserver.com/news/local/education/article240198087.html [https://perma.cc/4ZV7-663B (staff-uploaded, dark archive)] (Feb. 12, 2020, 5:31 PM).

317. *See id.*

318. *See* Defendant-Intervenors' Motion for Relief from Consent Judgment and Motion for Stay of Execution of Judgment ¶¶ 9–14, N.C. Div. Sons of Confederate Veterans, Inc. v. Univ. of N.C., 19-CVS-1579 (N.C. Super. Ct. Dec. 13, 2019).

319. Verified Complaint ¶ 111, *N.C. Div. Sons of Confederate Veterans, Inc.*, 19-CVS-1579; *see also* Consent Judgment, Declaratory Judgment, and Order at 13–14, *N.C. Div. Sons of Confederate Veterans, Inc.*, 19-CVS-1579.

320. *See* Consent Judgment, Declaratory Judgment, and Order, *supra* note 319, at 13–14.

321. *See id.* at 15.

However, one historical problem that the architects of this deal faced was the law of coverture which prevented women from having the capacity to enter into contracts. The attorneys sidestepped this problem by interpreting correspondence between the UDC and the UNC President to mean that he was acting as their agent;[322] however, the historic letters do not show an agency relationship, and the law of coverture at the time would have prevented such a legal relationship because only husbands could contract on behalf of their wives.[323] Upon closer look, the historical record showed that the UDC was an association incapable of owning property anyway.[324] And even if they were able to give the monument to UNC, there was no legal language creating a reversionary interest by way of a condition subsequent.[325] Furthermore, the letters showed that the UDC helped with some but not all of the fundraising, with many funds having been donated directly by alumni to UNC.[326] Once it was made aware of the false history and law, the court set aside the judgment sua sponte and ordered the return of the monument and settlement money.[327] In sum, the complaint and consent order included a false history of the effort to erect the Confederate monument and then distorted the law in order to justify giving the monument and $2.5 million to the SCV. This false history and violation of the rule of law echoed the same mythological history of the Civil War and misconfiguration of the law to erect Jim Crow—a parallel that was not lost on historians.[328]

Also, we highlight this example to exemplify how deeply entrenched white supremacy is in our history that it becomes invisible in our current, daily lives. We assume no negative intent on the part of the judge or UNC's lawyers here; rather, we assume only positive intent. However, intentionality and analysis are essential to root out white supremacy: good intent in trying to get a problematic statue removed, in fact, only rewarded the same parties that allowed for the codification of prejudicial views. Problematic systems of power put the statue at UNC in the first place and allowed it to remain until 2019; and under the

322. *See id.* at 6–7, 15.

323. Verified Complaint, *supra* note 319, ¶ 37.

324. *See* Defendant-Intervenors' Motion for Relief from Consent Judgment and Motion for Stay of Execution of Judgment, *supra* note 318, ¶ 13.

325. *See id.* ¶¶ 21–22.

326. *Id.* ¶¶ 16–17.

327. *See* Consent Judgment, Declaratory Judgment, and Order, *supra* note 319, at 16–17.

328. David W. Blight, W. Fitzhugh Brundage & Kevin M. Levin, *A University's Betrayal of Historical Truth*, ATLANTIC (Dec. 9, 2019), https://www.theatlantic.com/ideas/archive/2019/12/the-university-of-north-carolinas-payout-to-the-confederate-lost-cause/603253/ [https://perma.cc/D77Y-UD32] ("This is the sort of flawed history that Silent Sam was erected to enshrine. But instead of directing its largesse to the descendants of those who were enslaved, the university chose to give its millions to apologists for their enslavers. 'What we have accomplished is something that I never dreamed we could accomplish in a thousand years,' the SCV's North Carolina leader emailed to members, 'and all at the expense of the University itself.'").

original "settlement," this power dynamic would have been upheld and perpetuated.

These protests against the continued existence of Confederate statues that celebrate white terror and white supremacy made visible the state-sanctioned racism that persists from the post-Reconstruction white terror. The protesters made visible these threads that are traced directly back to white violence and pointed a clear arrow towards the appropriate reforms: removal of the statues. These protests trespassed on the entrenched white supremacy of the state and interrupted further perpetuation of these lasting legacies.

3. Black Lives Matter Makes Visible the Police as a Tool for White Supremacy and Cities' Ab Initio View of Protest as Trespassing

In 2014, protesters around the country gathered to protest police violence against Black people. The protests were prompted by the decision of the New York grand jury not to indict the officer who killed Eric Garner with a fatal chokehold concurrent with the police murder of Tamir Rice after police mistook a toy gun in his possession for a real gun.[329] The responses to Black Lives Matter protests are one of the most overt examples of using laws as a tool for violence when protest trespasses on white supremacy.

In December 2014, we defended over forty people arrested at Black Lives Matter protests in Durham. Hundreds of people took to the streets after the announcement of no criminal charges for police killing Black men in Ferguson, Missouri, and in New York.[330] Protesters converged near the Durham Performing Arts Center as a show was letting out to protest police killing Black men. The charges against our clients revealed the perhaps unconscious motivation to protect entrenched white supremacy rather than reconcile a racist history. Police arrested our clients and charged them with some combination of four charges: (1) failure to disperse,[331] (2) impeding traffic,[332] (3) resisting a public officer,[333] and/or (4) misdemeanor carrying a concealed weapon.[334]

In examining protester charges in their broader contexts, impeding traffic is a useful examination in that on its face it seems a neutral law. In the case of our 2014 Black Lives Matter protesters, however, we pointed out that the police

329. Jennifer Steinhauer & Elena Schneider, *Thousands March in Washington To Protest Police Violence*, N.Y. TIMES (Dec. 13, 2013), https://www.nytimes.com/2014/12/14/us/thousands-march-in-washington-to-protest-deaths-by-police.html [https://perma.cc/9P5Y-TN7V (dark archive)].

330. *Police, Protestors, Patrons Converge at DPAC; 31 Arrested*, WRAL (Dec. 6, 2014, 11:31 AM), https://www.wral.com/police-protesters-patrons-converge-at-dpac/14250068/ [https://perma.cc/5DJ6-TNWQ].

331. N.C. GEN. STAT. § 14-288.5 (LEXIS through Sess. Laws 2021-162 of the 2021 Reg. Sess. of the Gen. Assemb.).

332. *Id.* § 20-174.1.

333. *Id.* § 14-223.

334. *Id.* § 14-269.

showed up in riot gear *before* our clients arrived and blocked the street first; thus, there was no traffic to impede.[335] The audacity of protesters to trespass on institutionalized white supremacy resulted in arrests, despite the impossibility of having broken these laws.

We also built on our arguments from Moral Monday with regards to the failure-to-disperse charges. As we had with disorderly conduct, we reminded the court of language from *Terminiello v. Chicago*[336]: "A function of free speech under our system of government is to invite dispute. It may indeed serve its high purpose when it induces a condition of unrest."[337] We relied on this language from *Terminiello* to, again, add constitutional analysis to the charges against our protest clients. In this case, while the arresting officers may not have *liked* the content of the speech of the protesters, it was constitutionally protected speech—which is "often provocative and challenging."[338] Though officers may have ordered the protesters to disperse in Durham, that order was required to have a legally sufficient basis to disrupt their First Amendment practice.

Unconstitutionally ordering a protest to disperse, as was the case with these Black Lives Matter protesters, is a common protest fact pattern. Specifically, it is common for police to order the crowd to disperse even though there is no threat of violence, which is the constitutional threshold necessary to chill political speech. This may be a result of discomfort with the tone or issue with the message of the protest. When protesters refuse to comply with these unlawful orders—even if their reason for noncompliance is due to a physical disability[339]—they are arrested for "failure to disperse."

On May 25, 2020, Derek Chauvin, a Minneapolis Police Department officer, knelt on the neck of George Floyd, a forty-six-year-old Black man, for over nine minutes, killing him.[340] Mr. Floyd died as three other officers looked on.[341] The police killing of Mr. Floyd sparked protests in more than 2,000 cities and towns and over sixty countries in a shared vision for necessary reforms and support of the Black Lives Matter movement.[342]

335. *See* Keith Upchurch, *Charges Against Black Lives Matter Protesters Dismissed*, HERALD SUN (June 4, 2015, 6:42 PM).

336. 337 U.S. 1 (1949).

337. *Id.* at 4.

338. *Id.*

339. *See* Bob Geary, *State v. Occupy Raleigh's Margaret Schucker: Dismissed*, INDY WK. (Feb. 14, 2012), https://indyweek.com/news/archives/state-v.-occupy-raleigh-s-margaret-schucker-dismissed/ [https://perma.cc/74DL-J267].

340. Evan Hill, Ainara Tiefenthäler, Christaan Triebert, Drew Jordan, Haley Willis & Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. TIMES, https://www.nytimes.com /2020/05/31/us/george-floyd-investigation.html [https://perma.cc/TT4N-7Q5S (dark archive)] (Jan. 24, 2022)

341. *Id.*

342. Audra D.S. Burch, Weiyi Cai, Gabriel Gianordoli, Morrigan McCarthy & Jugal K. Patel, *How Black Lives Matter Reached Every Corner of America*, N.Y. TIMES (June 13, 2020), https://www.

Once more, these protests bore out the intersection of institutionalized white supremacy and the reforms necessary to root out this enduring legacy; once more, many governments used racially "neutral" legal frameworks such as city-issued emergency declarations and restrictive permitting of protests to curb local protests and attempt to preempt any trespasses against their institutionalized white supremacy. Under the auspices of fearing unrest and violent protest, many cities around North Carolina issued emergency orders over the weekends following the death of George Floyd, imposing curfews and other restrictions to limit or restrict protests.[343]

In anticipation of these protests, not riots, government officials used these emergency orders to prevent exercises to make visible the entrenched white supremacy, and paradoxically, reinforced its view that protest is trespassing on its power. States of emergency may be declared "by the governing body of a municipality or county, if either of these finds that an emergency exists."[344] On its face, the law requires a certain threshold of death or destruction to warrant an emergency, defining emergency as: "An occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any . . . cause."[345] Additionally, there is a natural reasonable place restriction insofar as declarations of emergency only affect specific geographical areas or

nytimes.com/interactive/2020/06/13/us/george-floyd-protests-cities-photos.html [http://perma.cc/3V6R-QNZ6 (dark archive)]; Joanna Walters, *George Floyd Protests: The US Cities That Became Hotspots of Unrest*, GUARDIAN (May 31, 2020), https://www.theguardian.com/us-news/2020/may/31/george-floyd-protests-us-cities-hotspots-unrest [https://perma.cc/U4CZ-LJ7T]; Daniel Odin Shaw & Saman Ayesha Kidwai, *The Global Impact of the Black Lives Matter (BLM) Movement*, GEOPOLITICS (Aug. 21, 2020), https://thegeopolitics.com/the-global-impact-of-the-black-lives-matter-movement/ [https://perma.cc/24EM-Z93M].

343. Order and Declaration of the Mayor of the City of Greensboro Declaring a Curfew in the City of Greensboro, NC (June 1, 2020), https://www.greensboro-nc.gov/home/showpublisheddocument/45883/637268682776500000 [https://perma.cc/LTF4-XNLE] (declaring a curfew as a result of protests connected to the killing of George Floyd); Alison Kunzitz & Fred Clasen-Kelly, *Charlotte Leaders Declare State of Emergency After Protests over George Floyd Death*, CHARLOTTE OBSERVER (May 30, 2020), https://www.charlotteobserver.com/news/local/article243117346.html [https://perma.cc/BK9X-3VL9 (staff-uploaded, dark archive)]; City of Raleigh Second Amended Emergency Proclamation (June 3, 2020), https://cityofraleigh0drupal.blob.core.usgovcloudapi.net/drupal-prod/COR14/emergency-proclamation.pdf [https://perma.cc/4KEX-BB8D] (renewing emergency declarations that were declared May 31 and June 1); Proclamation Declaring a State of Emergency in the City of Wilmington (June 20, 2020), https://www.wilmingtonnc.gov/home/showpublisheddocument/11994/637282857468670000 [https://perma.cc/5W3Z-VWZD]; Staff, *Wilmington Issues Curfew, 'State of Emergency' After Authorities Fire Tear Gas on Protesters*, PORT CITY DAILY (May 31, 2020), https://portcitydaily.com/local-news/2020/05/31/wilmington-declares-state-of-emergency-after-authorities-fire-tear-gas-on-protestors-free/ [https://perma.cc/697T-N4Z7].

344. N.C. GEN. STAT. § 166A-19.22(a) (LEXIS through Sess. Laws 2021-162 of the 2021 Reg. Sess. of the Gen. Assemb.).

345. *Id.* § 166A-19.3(6).

jurisdictions.[346] In cities where there was actual violence and property damage, an emergency order imposing a curfew was a reasonable response for limited periods of time in certain areas to protect the public. However, in cities where there was no violence and protests were peaceful and nonviolent, such emergency orders constituted a prior restraint of free speech.

We turn our attention to Graham, North Carolina,[347] which has long been a bastion of support for the Confederacy.[348] In 2020, the Graham mayor preemptively issued emergency orders so as to prevent protest, and the Alamance County Sheriff's Office prohibited all protests around the courthouse near the Confederate monument outside the Historic Alamance Courthouse in the center of Graham.[349] After the killing of George Floyd, the Graham mayor began issuing emergency orders on the weekends to limit or restrict demonstrations. The Graham city ordinance ("Ordinance") also required permits for demonstrators who wanted to use the sidewalk and had no exception for small groups, requiring a permit whenever two or more people gathered. The Sheriff's office also closed down access to the sidewalks and steps of the Historic Alamance Courthouse in the center of Graham to prevent protests.[350]

We filed suit against the City of Graham and Alamance County and secured a preliminary injunction that reopened the courthouse, caused the repeal of the Ordinance, and made clear to the city and county that a protest is not an emergency. We successfully argued that the use of emergency orders issued as a result of fear of protests getting violent is unconstitutional because

346. *See id.* § 166A-19.22(b) (stipulating the principles by which the emergency shall be determined); *see also id.* § 166A-19.3(7) (defining "emergency area" as the "geographical area covered by a state of emergency").

347. Our first case defending a protester in Graham involved charges against two people who were protesting a Confederate Memorial Day rally in downtown Graham at the foot of the courthouse's Confederate monument. *See* Abbie Bennet, *Duke Lecturer Charged with Assaulting Officer at 'Confederate Memorial Day' Event*, NEWS & OBSERVER (May 23, 2017), https://www.newsobserver.com/news/local/counties/durham-county/article152193787.html [http://perma.cc/FF3G-MVRU (staff-uploaded, dark archive)]. When the anti-racism protester grabbed a Confederate flag, the elected Sheriff Terry Johnson intervened and bruised his knee during the scuffle. *Id.* Felony assault charges were brought against the protesters, and we defended the pair of protesters in Alamance County courts. *See id.*

348. *See* Jordan Green, *Quiet Protest Met with Threats in Graham, a Bastion of Confederate Sympathy*, N.C. TRIAD CITY BEAT (June 26, 2020), https://triad-city-beat.com/quiet-protest-threats-graham-bastion-confederate-sympathy/ [https://perma.cc/684S-3K3F] [hereinafter Green, *Quiet Protests Met with Threats*] (describing the tragic story of Wyatt Outlaw, a Black town commissioner and constable in Graham, who, in February of 1870, after shooting at but not injuring Ku Klux Klan members, was kidnapped and hanged by Klan members); *see also* Jim D. Brisson, *"Civil Government Was Crumbling Around Me": The Kirk-Holden War of 1870*, 88 N.C. HIST. REV. 123, 134–36 (2011) (describing the Kirk-Holden War, which resulted from the kidnapping and hanging of Wyatt Outlaw).

349. *See* Green, *Quiet Protests Met with Threats*, *supra* note 348.

350. *Id.*

a protest is not an emergency, unless one perceives an expression of dissent or criticism as an emergency.[351]

In addition to the use of emergency orders, we challenged the Ordinance. The Ordinance provided: "No parade, picket line or group demonstration is permitted on the sidewalks or streets of the city unless a permit therefor has been issued by the city."[352] A group demonstration was defined as "assembly together or concert of action between two or more persons for the purpose of protesting any matter or making known any position or thought of the group or of attracting attention thereto."[353]

The Fourth Circuit has made clear that an ordinance with a permitting scheme must contain a small-gathering exception to be considered narrowly tailored, presuming the permitting scheme is content neutral and leaves open ample alternatives for communication.[354] Thus, because the Ordinance failed to provide a small-group exception, while also requiring permits for sidewalk protestors, the Ordinance was, as we convincingly argued, unconstitutional.[355] As a result, the Graham City Council repealed the Ordinance,[356] and the county revised its facility use policy for the courthouse.

In addition to successfully attacking the Ordinance as unconstitutional and securing a ruling that protests are not emergencies, we also successfully argued that restrictions on protests at the courthouse and the surrounding sidewalks are unconstitutional. The court ruled as follows in an order reopening the courthouse sidewalks and steps to our clients:

> The plaintiffs here have already been denied their First Amendment free speech rights for some weeks by the total prohibition of protests on the courthouse grounds. The issues are matters of intense public interest and discussion in the here and now. The plaintiffs are thus likely to suffer irreparable injury. This injury is imminent and immediate as the plaintiffs have ongoing plans for protests about and near the monument, they have been blocked from accessing the courthouse grounds, and they have been threatened with arrest if they attempt to pass through the Sheriff's barricades. There have been shifting enforcement practices

351. *See* NAACP Alamance Cnty. Branch v. Peterman, 479 F. Supp. 3d 231, 241 (M.D.N.C. 2020) ("For clarity, even though it seems obvious, a protest, even a large protest, does not constitute a short-term emergency situation; if it did, the injunction would be meaningless in the context of this case.").

352. GRAHAM, N.C., CODE OF ORDINANCES § 18-175 (2019).

353. *Id.* § 18-172.

354. *See* Cox v. City of Charleston, 416 F.3d 281, 284–85 (4th Cir. 2005); *see also* Green v. City of Raleigh, 523 F.3d 293, 303–05 (4th Cir. 2008).

355. Complaint for Injunctive & Declaratory Relief at 2, *Peterman*, 479 F. Supp. 3d at 240 (No. 20CV00613).

356. Yeoman, *supra* note 192.

recently as to the prohibition, but the total prohibition was in place for weeks and there is no evidence it will not be resumed.[357]

B. *The Government Frequently Attempts To Use a Heckler's Veto To Prevent Protest*

North Carolina cities that have issued emergency orders out of fear of violent reaction based upon provocative speech need to be concerned with the First Amendment consequences of this prior restraint on speech. When there is actual violence or the clear and present danger of violence or property damage, there is reasonable justification to limit association and speech. But when there is a generalized fear, based upon the content of the speech, there is inadequate justification to restrict the speech. One First Amendment doctrine relevant to this discussion is called the heckler's veto.

In *Edwards v. South Carolina*,[358] the U.S. Supreme Court overturned convictions for breach of the peace when civil rights activists protested on the South Carolina State House grounds.[359] There was no evidence that the onlookers were threatening, hostile, or dramatically impeding the flow of traffic, but the police issued a dispersal order and required the petitioners to disperse within fifteen minutes.[360] The petitioners failed to leave and were arrested and convicted of breach of the peace.[361] The Court found that there was no violence or threat of violence to justify the order to disperse, that fear of violent reaction from onlookers should not govern the rights of the protesters, and that the Fourteenth Amendment does not permit a state to criminalize peaceful expression of unpopular views.[362] Furthermore, the Court noted that "freedom of speech is protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."[363]

The Fourth Circuit dealt with the doctrine of the heckler's veto in *Berger v. Battaglia*,[364] where an off-duty Baltimore police officer, Office Berger, regularly performed in blackface, offending many Black citizens of Baltimore.[365] In response to ongoing protests and complaints, Officer Berger was ordered to cease appearing in public wearing blackface.[366] In its analysis, the court determined that the threatened disruption by others reacting to Officer Berger's

357. *Peterman*, 479 F. Supp. 3d at 240.
358. 372 U.S. 229 (1963).
359. *Id.* at 230.
360. *See id.* at 231–33.
361. *Id.* at 233.
362. *Id.* at 236–37.
363. *Id.* at 237; *see also* Terminiello v. Chicago, 337 U.S. 1, 4 (1949).
364. 779 F.2d 992 (4th Cir. 1985).
365. *See id.* at 993–94.
366. *Id.* at 996.

use of blackface could not serve as a justification for preventing Officer Berger from exercising his free speech.[367] Specifically, it characterized the heckler's veto as a government curtailing of "offensive" speech ultimately chilling free speech and acting as a persistent and insidious threat to First Amendment rights.[368] Because protests are not an emergency, local governments should only use their emergency powers when there is actual violence or the clear and present danger of actual violence.

However, as white supremacy is deeply entrenched in our system of laws and protesting that system betrays the very need for reform, arguing against unconstitutional orders and practices does not prevent those from happening again in the future. Here, even after sheriff's deputies were forced to allow protesters to return to the courthouse to demonstrate, they attacked peaceful protesters with pepper spray at a rally intended to get out the vote.[369] We successfully defended a young woman who was pepper sprayed and then arrested during that protest for obstructing a law enforcement officer by interfering with an arrest of a person refusing to disperse to a designated protest area.[370] Along with other protesters who were unlawfully sprayed and arrested that day, she brought suit against the Alamance County deputies and Graham officers who unlawfully arrested her in violation of the First Amendment rights, and she was able to settle that suit in her favor.[371]

C. *While Making Visible Institutionalized Racism, Protests Point the Way Toward Reconciliation and Reform*

We have learned a lot defending these protest cases. The Moral Monday protests showed us the power of Fusion politics and the way current legislation around voting rights, education, and criminal justice echo with the legacy of white supremacy. We learned from the Black Lives Matter protests how the criminal justice system still overpolices Black communities, acting on racial stereotypes of Black criminality to kill and harm people without justification, a direct import from the rise of Jim Crow. We learned from the Confederate monument protests how the state is still complicit with the white supremacy campaigns of the early twentieth century by maintaining the Confederate

367. *Id.* at 1001.

368. *Id.*

369. Zachery Eanes & Carli Brosseau, *March to Alamance Polls Ends with Police Using Pepper-Spray on Protesters, Children*, NEWS & OBSERVER (Oct. 31, 2020), https://www.newsobserver.com/news/local/article246861942.html [https://perma.cc/7S3X-SVHB (staff-uploaded, dark archive)].

370. *Prosecution 0-2 This Week*, *supra* note 192.

371. *See* Isaac Groves, *Alamance County, Graham To Pay $120,000 To Settle Protest Lawsuit*, TIMES NEWS (June 11, 2021, 4:32 PM), https://www.thetimesnews.com/story/news/2021/06/11/graham-alamance-county-pay-120-k-settle-one-protest-lawsuit-oct-31-voting-rights-first-amendment/7622753002/ [https://perma.cc/47ZW-WTSH].

symbols at the steps of our courthouses. We also learned how to be better community lawyers and successfully defend protesters.

We have learned in our defense of protesters that police are both an arm of racist terror and an enforcer of institutionalized white supremacy. The system that overpoliced and underprotected Black communities during the terrorism of Jim Crow has never been reconciled, and that pernicious perception of the potential violence of Black and anti-racism protesters translates directly to infringement of First Amendment rights.

Because the institution of policing is firmly rooted in the history of suppressing racial equality, we learned that police continually curtail the First Amendment rights of protesters. Unchecked power continues to poison its treatment of those who criticize it, as many protesters do. We have observed that police will sometimes charge people with resisting arrest or assaulting a government official when the person was compliant and, in fact, it was the officer who used excessive force.[372]

We have used history as our guide to tailor legal defenses that convey and amplify the messages of protesters that anti-racist voices have a right to voice objection to the historic trauma and legacy of racism in the form of voter suppression, racial resegregation of public schools, racial profiling and excessive force against Black and Brown residents of North Carolina, and symbols of white supremacy at courthouses and schools. Each of these movements have called for a recognition of the history of white supremacy and demanded reforms that would remedy the enduring harm of white supremacy. These reforms would aim North Carolina toward a more egalitarian society.

D. *Moving Forward in Defending Protest*

Defending groups of protesters, we learned important strategies for mass criminal defense and have begun institutionalizing these efforts with a nonprofit, Emancipate NC, to train lawyers on how to defend protesters and protester groups.

To aid in the defense of protesters, we begin our journey by contextualizing protest and support the defense process all the way through

372. Tammy Grubb, *Orange County Judge Reopens Courtroom to Public for Silent Sam Protest Cases*, NEWS & OBSERVER (Jan. 18, 2019, 5:03 PM), https://www.newsobserver.com/news/local/article224719395.html [https://perma.cc/F6ZT-UX3V (staff-uploaded, dark archive)]; *see* Brian Keyes, *Two Silent Sam Demonstrators Appealed Charges Brought Against Them in September*, DAILY TAR HEEL (May 13, 2019, 1:23 PM), https://www.dailytarheel.com/article/2019/05/anti-confederate-protest-appeal [https://perma.cc/2WWT-T6JQ]; Camila Molina, Carli Brosseau & Tammy Grubb, *Police 'Broke the Peace' at UNC's Silent Sam Protest, Say 8 Who Were Arrested*, NEWS & OBSERVER (Sept. 9, 2018, 8:00 PM), http://www.newsobserver.com/news/local/article218089130.html [http://perma.cc/VVZ7-C4FS (staff-uploaded, dark archive)]; *see also* Charlie McGee, *A UNC Police Officer Has Been Accused of Lying Under Oath in a Silent Sam Arrest Case*, DAILY TAR HEEL (Mar. 27, 2019, 11:35 PM), https://www.dailytarheel.com/article/2019/03/unc-police-false-testimony-0327 [http://perma.cc/MWQ2-MV2W].

trial. First, we make clear that protest is a form of political speech that deserves the strictest degree of scrutiny. Further, we call out the codified and institutionalized racism as they exist on the books today to add context to the larger dynamics surrounding protest and white supremacy. We provide intake documents, joint defense agreements, waiver of conflict-of-interest forms, waiver of first appearance forms, and other documents helpful to defending protesters. We also consult individually with volunteer lawyers as they prepare for trial, offering template motions, briefs, and example exhibits.

This work is informed by our extensive experience working with protesters and what we have learned from the "movement lawyers" who came before us. Law for Black Lives defines movement lawyering as

> taking direction from directly impacted communities and from organizers, as opposed to imposing our leadership or expertise as legal advocates. It means building the power of the people, not the power of the law. . . . [W]ork over the long haul to dismantle systems of oppression including white supremacy, cis-heteropatriarchy, and capitalism in our country.[373]

Movement lawyering, it could be said, is about "bolstering the genius of ordinary people to disrupt systemic inequity and wrest power from those who wield it in service to some, returning it to the community to make better decisions for the whole."[374]

In our protester defense practice, our role as movement lawyers is both individual and systemic: while we never assume to represent the entire movement at the core of the protest, we must also center for our clients every opportunity to divest power from the systems they fight against and to disrupt those systems. One must unlearn years of legal training and practice and also ensure the attorney meets her ethical duties to fully inform her client of his options and potential consequences.

Here, the role of the movement lawyer is to empower and amplify the voices of the people who are directly impacted by injustice. We therefore listen deeply to our clients and brainstorm with them, as equals, about ways to use and navigate the court system that achieve their goals. Protest defense includes a careful review of the charging documents for fatal defects in the pleadings because they are very often legally insufficient. We also seek to help the court understand our clients' conduct within the protection of the First Amendment and hold police accountable to their duties under the Fourth Amendment. On

373. *What We Can Do: Movement Lawyering in Moments of Crisis*, LAW FOR BLACK LIVES, http://www.law4blacklives.org/respond [https://perma.cc/W2QQ-GCG9].

374. Judith Browne Dianis, *The Role of Movement Lawyering in Empowering Communities*, ADVANCEMENT PROJECT (Oct. 8, 2019), https://advancementproject.org/the-role-of-movement-lawyering-in-empowering-communities/ [https://perma.cc/6XF8-U67P].

the whole, defending protesters has been a rewarding way to learn about the needs of our community and respond with the tools of the trial lawyer.

In addition to learning how to defend groups of protesters and the different areas of work that must be done to dismantle white supremacy, we learned how important it is to be in our communities and listen to people directly impacted by injustice. Our goal is not to specialize in any particular area of the law but become experts in what our community says it needs and find ways to use the courts and community organizing to address those issues. Sometimes that involves trying to make injustice more visible by framing problems with legal theories and litigating them. Litigation is one component of a multilevel community strategy that ultimately centers on protest. Protester defense alone does not offer reconciliation of the white supremacist history of the laws and enforcement of our state, North Carolina. But it is one important step to protecting those who put their bodies, and lives, on the line to make white supremacy visible and point our government towards necessary reforms.