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"Charlottesville" as Legal History

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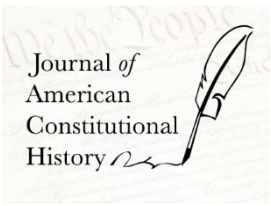

"Charlottesville" as Legal History

Risa Goluboff[*]

INTRODUCTION

I am delighted and honored to have been asked to give this plenary address to the American Society for Legal History and to spend some time with all of you. You are my teachers, my peers, my colleagues, my students. You are literally the legal historians in my head.

When you invite a sitting dean to offer a plenary address, you're likely to hear about either a very old project or a very new one. In my case, I have decided to share with you a very new project—about the white supremacist and anti-Semitic violence that took place in my hometown of Charlottesville, Virginia on August 11 and 12, 2017. Those events have come to be called "Charlottesville." Because "Charlottesville "means so much more to us locals, we tend to call them "August 11 and 12" or "8/11-12." Hence the scare quotes in my title.

When I first imagined speaking about this project, I worried that it was too early in my conceptualization to share productively. I then recalled what Dirk Hartog, one of the voices in my head, has always said: "What you think is the problem is actually the thing that is interesting."

We do not talk often about how scholarly projects begin. When we do, we describe retrospectively what it was like to construct them. In this talk, I will instead share prospectively how I begin a project—what it looks like when the aperture opens, when it focuses and refocuses, before closing again.

I will tell you from the start: The aperture has not yet closed. There will be little resolution at the end of this lecture. I am very much still in the open aperture moment, and I'm going to take you on a journey.

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[*] Dean and Arnold H. Leon Professor of Law, and Professor of History, University of Virginia School of Law. This essay was originally presented as the Plenary Lecture at the American Society for Legal History Annual Meeting, on November 11, 2022. With thanks to Dirk Hartog, readers Leslie Kendrick and Rich Schragger, research assistant Haley Gorman, JACH editor David Schwartz, and the wonderfully engaged attendees of the ASLH plenary.

That journey is a very personal one. The first part of this lecture is organized explicitly around three points of autobiographical inflection, with the remainder organized more analytically. I've structured it this way in part because I just don't how else to do it. Why and how I am thinking about this project is deeply personal, requiring me to come to terms with what writing about 8/11-12 might actually mean, and whether I am someone who can do that writing.

In part, organizing this lecture autobiographically is neither unique nor surprising. As historians, we always bring ourselves to our history in some way, whether through explicit autobiography or through more or less submerged personal perspectives or normative commitments. Though that claim engages recent (and longstanding) debates about presentism, a full discussion of presentism will have to await another day.[1] Suffice it to say for now that it is my view that the present, however we define it, is always present in our past and infuses the work of all historians.

MOMENT OF AUTOBIOGRAPHICAL INFLECTION I: SO MANY CASES

At a holiday party in December 2018, I struck up a conversation with a local judge who was also a UVA Law alum. He told me that he had thirteen distinct cases of different types on his docket related to the events of August 11 and 12, 2017. It made me start to wonder how many other cases were ongoing in other courts and what kinds they were—federal, state, civil, criminal.

It wasn't that I wasn't familiar with what had happened on 8/11-12 or the legal issues surrounding those events. I was more familiar than I wanted to be with the white supremacists who marched with burning tiki torches across UVA's campus, surrounding and trapping counter-protesters around a statue of Thomas Jefferson. I knew all about the white supremacists and neo-Nazis who swarmed downtown Charlottesville the following day to protest the planned removal of two Confederate statues, leading to pervasive violence and injuries, the murder of a counter-protestor and the deaths of two law enforcement officers in a helicopter accident.

At that time, I had been living in Charlottesville with my family for around 15 years. I was an active member of the local synagogue and a faculty member at UVA. I had been dean of the law school for a year. I led my law school community through those days and their aftermath, and I chaired the committee that the university created to coordinate its response over the 2017-2018 academic year.

Given my involvement in the university's response and my background as a civil rights historian and constitutional law scholar, friends and colleagues had encouraged me to write a book about these events. Prior to that conversation with the judge in December 2018, I had been resistant. I had written a few shorter pieces and given talks, but I really could not imagine a book. Even a year and a half later, the events were too raw. My own involvement and feelings about it were too

[1] See Emma Green, *The Right Side of History,* The New Yorker (Mar. 7, 2023), https://www.newyorker.com/news/annals-of-education/the-right-side-of-history; David Armitage, *In Defense of Presentism, in* History and Human Flourishing 59 (Darrin M. McMahon ed., 2023).

complicated. But as I listened to the judge's description of his docket, I saw the scope of the cases in a new light. I saw the beginnings of a historical archive.

Prior to that moment, I had assumed that any sustained writing I did about 8/11-12 would be part memoir and part institutional accounting. After that conversation, I could see questions I wanted to answer about the role of law as a legal scholar, and not only as a participant.

The aperture had opened.

I began to identify and amass records for all the cases I could find. I found 109, and there are likely more to come. Of these 109 cases, you have perhaps heard of three. Two are prosecutions of James Alex Fields, the person who drove his car into the crowd of counter-protesters, killing Heather Heyer, and injuring several others. He faced a state murder charge and a federal civil rights prosecution. The third case is *Sines v. Kessler*, a multimillion-dollar private federal civil rights suit against the white supremacists that went to trial in October 2021. These three cases—one state criminal, one federal criminal, one federal civil—accurately reflect that not all of the cases related to 8/11-12 are the kind of state criminal prosecutions one might expect to see, given the violence that occurred on those days.

To be clear, there were charges for assault, failing to disperse from a riot, and the many other kinds of criminal charges you might imagine. But given the hundreds of participants in this violence, 109 total cases seemed remarkably few. One might have expected to see more than the 78 state criminal cases that I have found, and more with white supremacist defendants, who only made up a third of the state criminal defendants.

Instead, one finds among the cases wrongful death suits, defamation suits, First Amendment claims, 1983 claims against the police by both protesters and counter-protesters, and, of course, the various cases concerning the Confederate monuments and their removal that precipitated the protests in the first place.

As I amassed these records after my conversation with the judge, the questions I was asking were basic. In Bob Gordon's framework, they centered on the narrow and conventional definition of law as "output."[2] I sought information on how these cases came about. I wanted to know how different individuals, organizations, social movement actors, and government entities mobilized legal actions and claims in reaction to these events.

At bottom, my questions revolved around identifying the legal response to two days of violence and lawlessness that has taken shape over the past five years. In particular, I have tried to understand how the law has redressed that violence—whether it has repaired the breach in the rule of law, and if so, through what mechanisms.

[2] Robert W. Gordon, *J. Willard Hurst and the Common Law Tradition in American Legal Historiography* (1975).

MOMENT OF AUTOBIOGRAPHICAL INFLECTION II: THE ONE PARTICULAR CASE

Two months after that conversation with the judge—on Valentine's Day 2019—I was called for jury duty. I went to the local Charlottesville courthouse. There was a lot of energy there and clearly far more potential jurors than usual. Something was up.

As I walked into the courtroom, I realized that I knew the defendant, a high school teacher who had been my children's summer camp counselor for many years. During a press conference that Jason Kessler—a Charlottesville local, an undergraduate alumnus of the University of Virginia, and one of the key organizers of the white supremacist rally—had held in downtown Charlottesville on August 13, 2017, the defendant had bear-hugged Jason Kessler while yelling, "We love you, Jason," and pushing him to the ground. She was arrested and charged with assault and battery. She had claimed that she was trying to protect Kessler from aggressive counter-protesters. In Kessler's view, she had assaulted him.

The judge gave us few facts about the case, but he did tell us that Kessler was the complaining witness. Kessler was not present in the courtroom that day, though I later learned that had been elsewhere in the courthouse.

During *voir dire*, I shared how I knew the defendant. Later in the process, I shared my knowledge of Kessler and his role as a primary organizer of 8/11-12 through my roles as dean and chair of the university's response.

Likewise, many of the other potential jurors shared what they knew of Kessler. One after another, they stood and told their stories. Where they were on 8/11-12. The harms they suffered. Their views of and feelings about the white supremacists. The prosecutor twice unsuccessfully asked the judge to stop the open-court *voir dire* process for fear of contaminating jurors who might yet be unbiased. As *voir dire* continued, it seemed increasingly unlikely that an unbiased jury could be seated. The judge and the lawyers eventually conferred in chambers, and we were removed from and then returned to the courtroom. The judge told us that an agreement had been reached in the case and thanked us for our service.

The defendant's attorney thanked us as well, stating that our presence had resulted in the case being resolved. I later learned that the defendant had to apologize to Kessler in open court, perform community service, and maintain good behavior for six months, after which the case would be dismissed.

The experience of sitting in that room and hearing those testimonials seemed to galvanize the jury pool collectively and perhaps, by extension, our community generally. Even as the lawyer in me knows that the law cannot tolerate vigilante justice, the case's outcome—and even more, the way *voir dire* functioned as a cathartic testimonial by the potential jurors—seemed in some ways to reimpose community norms, to allow for community healing, and to effect a kind of rough justice in the face of what seemed to many in the room an unjust charge on behalf of an undeserving complainant.

This experience refocused the aperture of my developing project, and it raised a whole new set of questions for me. Although to some extent those questions sounded in a scholarly register—concerning the role of the jury and especially how

juries, and trials more generally, operate in a small town like Charlottesville—they were fundamentally of a different sort. They were the questions of a Charlottesville local, a community member and parent, a juror and a citizen, a participant and an interested party, a university leader and a dean. On that day, it seemed to me that the jury process had "worked" in some crude and Whiggish way.

I wanted to know, in that same crude and Whiggish way, whether the law had "worked" in the other 108 cases I was amassing as well. Who won those cases? On whose behalf was the justice system effectively mobilized? On whose behalf was it not effective? Where did the power of the law come down? I wanted to know, at the end of the day, if the law was providing redress. Did it, and would it, protect us? In this question, the "us" referred to those I wanted to protect and defend, and for whom I felt responsible: my children, my students, my university, my various Charlottesville communities. I felt responsible for defending "us" against "them"—the white supremacists who came to our town and caused violence. Although I recognized the naïveté and thoroughgoing normativity of these questions—law as not only output but thoroughly normative output—I found them exceedingly difficult to escape.

I began to see my archive through this new lens. The results were equivocal. There were some instances where the law seemed to "work" in just this way. For example, a state civil suit against the white supremacists argued that under the Virginia Constitution and statutes, any militia had to be under the authority of the state. The case led to consent decrees that made it impossible for armed white supremacists to return to Charlottesville in groups of more than two.[3] This limitation meant that the white supremacists did not—as many of us in Charlottesville had feared—return in large groups on the first anniversary of 8/11-12 or at any time since. There are other reasons that the anniversaries have been largely peaceful, but it seemed to me that the law—and that case in particular—played a significant role.

The three high profile cases mentioned above also showed law "working" to rectify harms and prevent further violence. A state jury found James Alex Fields guilty of first-degree murder. In the federal civil rights case, he pled guilty to 29 of 30 counts. In both cases, he received life terms in prison.[4] In *Sines v. Kessler*, the private federal civil rights case, a jury found 24 defendants liable and awarded an unprecedented $26 million in damages.[5]

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[3] City of Charlottesville v. Pa. Light Foot Militia, No. CL17000560-00 (Va. Cir. Ct. Jul. 12, 2018). *See also* Melissa Gomez, C*harlottesville Rally Organizer Agrees to Discourage Violence in Future Demonstrations*, N.Y. Times (Jul. 12, 2018), https://www.nytimes.com/2018/07/12/us/jason-kessler-charlottesville-violence-discourage.html.

[4] Tyler Hammel, *Fields Sentenced to Life in Prison on State Charges,* The Daily Progress (Jul. 15, 2019), https://dailyprogress.com/news/fieldstrial/fields-sentenced-to-life-in-prison-on-state-charges/article_0a153b97-a656-5e68-8d58-21cf7d0d0f76.html. Tyler Hammel, *Fields Sentenced to 29 Life Sentences, Speaks at Hearing,* The Daily Progress (Jun. 28, 2019), https://dailyprogress.com/news/local/courts/fields-sentenced-to-29-life-sentences-speaks-at-hearing/article_8b4ec0c8-afc9-5055-a102-d99f1474b2f7.html.

[5] Tyler Hammel, *Jury Hits Rally Organizers With Millions of Dollars in Damages,* The Daily Progress (Nov. 23, 2021), https://dailyprogress.com/news/august12/jury-hits-rally-organizers-with-millions-of-dollars-in-damages/article_81ffded6-4cb1-11ec-ae69-8f1e78cb683b.html.

But that is an incomplete accounting. The urgency with which I hoped the law would "work" resulted in no small part from watching the law emphatically not "work" in this same sense on 8/11-12. What we had all witnessed, and what I spent so much time responding to in my administrative roles, was the failure of the law—both around the statue at the university on the 11th and all day downtown on the 12th. The law was meant to insert itself into the interactions between protestors and counter-protestors to prevent violence, but it repeatedly failed to do so. The notoriety of Charlottesville nationally and internationally seemed to derive as much from the failure of law to prevent violence as from the white supremacists' demonstration of hate itself.

The cases that followed from those violent days hardly seemed poised to rectify the harms. Despite the hundreds of people who had been involved, there have been only four completed prosecutions stemming from the violence on August 11th, and only 21 from the rally itself in downtown Charlottesville on August 12th.[6] The main Justice Department took no action. Five years later, it is not clear that much monetary redress has been accomplished. The *Sines v. Kessler* damages award was later reduced in accordance with state statutes, and an appeal is pending.[7]

It was thus not clear whether the law had "worked" in the normative sense. This ambiguity highlighted the flaw in the questions I had been asking. Even accepting the law as normative output, the answers to these questions depended on a number of variables. For example, even the question of what it meant to "win" or "lose" was oversimplified. Did the defendant in my jury pool case lose because she had to apologize, perform community service, and maintain good behavior, or did she win because, once she fulfilled those conditions, her case would be dismissed? In many other cases as well, it was hard to tell. Cases were continued, some defendants received only nominal sentences, and others pled *nolo contendere*. It was not clear whether formal or material outcomes should determine the answer of who ultimately prevailed, especially where the victory of a conviction was juxtaposed against the weakness of the prescribed punishments.

The answers to these questions also depended on the time frame one had in mind and the notion of causation. It is possible that the law "worked" because litigation served to bankrupt several white supremacist organizations, leading to their return to the internet from the streets. But it is also possible that the law failed,

[6] New cases continue to be brought. A grand jury in Albemarle County recently indicted three men for allegedly burning an object at UVA on August 11 with the "intent to intimidate," and more indictments may follow. Hawes Spencer, *Grand Jury Indicts Torch-Wielding Marchers from 2017,* The Daily Progress (Apr. 17, 2023),

[7] Hawes Spencer, *Judge Trims* Sines v. Kessler *Punitive Award from $24 Million to $350K,* The Daily Progress (Jan. 2, 2023), https://dailyprogress.com/news/judge-trims-sines-v-kessler-punitive-award-from-24-million-to-350k/article_d842bd64-8af8-11ed-b0f6-6747dd92d022.html. An appeal of the judgment is pending at the Fourth Circuit. Elizabeth Sines v. Jason Kessler, No. 23-01154 (4th Cir. filed Feb. 10, 2023).

because some experts now think that shift may have contributed to the increase in lone-wolf white supremacist mass shootings nationwide.[8]

The answers depend as well on how broadly we think about the law itself. In order to understand if and how the law worked, I began to expand my archive to include the cases that were not brought but could have been, the administrative responses by UVA and other institutions, developments in the Charlottesville City Council and in Charlottesville politics more broadly, state legislative and federal agency responses, and social movement activism on all sides.

This expansion of the archive better reflected the more capacious vision of the law I tend to embrace. In this vision, law operates within and on, and is operated in and on, the rest of the world. It neither begins nor ends in the formal legal processes that comprised the initial archive. Even as my sources began to reflect my scholarly methodological commitments, I still found it difficult to escape my own relationships to these events and their legal ramifications. I still found it difficult to escape my crude, normative questions.

I knew that my focus on such questions, even with a broader definition of law, would not have produced a book that I would have wanted to write. The project might have ended there had I not encountered the third moment of personal inflection.

MOMENT OF AUTOBIOGRAPHICAL INFLECTION III: THE INVITATION

In the summer of 2019, Laurie Benton, then the president of the American Society for Legal History, invited me to give this plenary lecture. That invitation reminded me that I was not only dean, and university committee chair, and juror, and community member. I was also—and chronologically first—a legal historian.

That epiphany prompted a host of new questions about this project, a legal historian's questions about how to tell the story of "Charlottesville" as legal history. These were questions about sources, people, lawyers, institutions, processes, narratives, potential presentisms, arguments, perspectives, normative challenges, and the relationship always between law and not law and history and legal history.

The legal historian's aperture had now opened. I began to see the analytical alongside the personal, institutional, and normative.

As soon as I started thinking like a legal historian, I could see more clearly that my frustration with the questions I had been asking stemmed, in large part, from the crude way that they treated law as "output." Because of course, law is not only output. It is also input, as well as its own "put"—its own arena of struggle for which I have not yet settled on the perfect vocabulary.

The balance of this lecture describes how one might adjust—and how I have thought about adjusting—the methodological and narrative lenses of telling the

[8] Cassie Miller & Howard Graves, *When the 'Alt-Right' Hit the Streets: Far-Right Political Rallies in the Trump Era,* Southern Poverty Law Center (Aug. 10, 2020), https://www.splcenter.org/20200810/when-alt-right-hit-streets-far-right-political-rallies-trump-era.

story of "Charlottesville" as legal history. I will return at the end to the problem of autobiography that this legal historian's lens does not, and probably cannot, solve.

METHODOLOGICAL ADJUSTMENT I: THE CONSTITUTIVE POWER OF THE LAW

My first methodological adjustment was to think about the constitutive power of the law, or in fashionable history terms, the history of Charlottesville's present, circa 2017. The constitutive nature of the law—the idea that we can only see the world through legal categories—has sometimes been too abstract for me. But I see it clearly here in two respects, with regard to race and free speech.[9]

The Constitutive Power of Equal Protection

The headline about race and 8/11-12 was the surprise that many whites, though fewer people of color, expressed that such blatant forms of white supremacy persisted in 2017. Some attributed this muscular, misogynistic racism, anti-Semitism, and xenophobia in part to Donald Trump's election to the presidency and his apparent approval of such sentiments. Whatever role that played, 8/11-12 seemed either to reveal or confirm, depending on one's perspective, that prevailing stories about the end of overt racism were not quite right.

Another aspect of the relationship between the past and present of racial equality, and especially the legal past, has been largely overlooked. It is not just that civil rights law has not succeeded as thoroughly as one might have thought or hoped. It is also that the form that law has taken over the past 50 years structures how and through what categories we think about race in our society. One can see this in some of the rhetoric and framing of the white supremacists and their self-presentation. Whereas many identified as white supremacists, others intentionally called themselves advocates for "white civil rights."[10]

That term was made possible in part by the dominance of the anti-discrimination approach to equal protection over the past 70 years. To some extent, this was facilitated by *Brown v. Board of Education* itself and its capture of our dominant equal protection imagination, a story I tell in *The Lost Promise of Civil Rights*.[11] It was also facilitated by related and unrelated developments in the decades since that led the anti-discrimination approach largely to prevail over an anti-subordination one. The dominant approach has treated most race-based governmental action as constitutionally equivalent, not differentiating between Jim Crow segregation and, say, modern affirmative action, or as Justice Stevens once put it, between "a 'No Trespassing' sign and a welcome mat."[12] This post-*Brown* civil rights backdrop

[9] I am sure that scholars with other types of expertise, in anti-Semitism or gender, for example, would see the constitutive force of the law in other ways as well.

[10] See *infra* n. 18 and accompanying text.

[11] Brown v. Board of Education, 347 U.S. 483 (1954); Risa L. Goluboff, The Lost Promise of Civil Rights (2007).

[12] Adarand Constructors v. Pena, 515 U.S. 200, 245 (1995) (Stevens, J., dissenting).

framed 8/11-12 by deeming all racial categories equally suspect. The dominant anti-discrimination norm, wittingly or not, lent rhetorical, intellectual, and constitutional heft to the position of the "white advocate." It facilitated white victimhood and white racial grievance.

The Constitutive Power of the First Amendment

The background conditions of free speech doctrine and its penumbra even more fundamentally shaped every aspect of the events of 8/11-12. The background conditions I have in mind are the constitutional and cultural norms that peaceful expression is protected and categorically distinct from action, and in particular, from violence, something I discuss in my book *Vagrant Nation*.[13]

However messy free speech doctrines might be in many respects, the law in 2017 (and today) clearly required that in public forums, speech must be allowed within certain content-neutral constraints, that speakers engaged in peaceful protest are deserving of First Amendment protection and receive the imprimatur of the law. In the context of 8/11-12, the dominant image for this legal framing was an event that never actually took place: Nazis marching peacefully in Skokie, Illinois in 1977.[14] Though the Nazis never did march in Skokie, that image did enormous work—sometimes visible and sometimes invisible—in shaping what the university, the city, the courts, the lawyers, and the various police forces saw in the events surrounding 8/11-12, how they prepared and responded, what they understood their options and degrees of freedom to be, and the arguments they made and accepted. It also shaped how the counter-protesters responded, and why and how unmediated interactions occurred between white supremacists and counter-protesters.

Given that backdrop, the police saw their role initially during the spring and summer of 2017 as ensuring that the white supremacists would be able to speak. The central problem, as they understood it, was a structural worry that counter-protesters taking issue with the content of the white supremacists' speech would confront them and either stifle their speech or precipitate violence. The Charlottesville Police Department included a First Amendment refresher in its advance planning for a Ku Klux Klan event on May 13, and its operating plan focused on providing "the Klan with safe passage to their designated area while maintaining separation from counter-protesters at all times."[15]

Later that summer, the UVA police chief at the time reflected this same First Amendment framework, stating that he "considered Jason Kessler's March [on August 11] like any other political event on grounds." In his view, "the university's

[13] Risa L. Goluboff, Vagrant Nation: Police Power, Constitutional Change, and the Making of the 1960s (2016).

[14] Irving Louis Horowitz and Victoria Curtis Bramson, Skokie, The ACLU and the Endurance of Democratic Theory, 143 Law and Contemp. Probs. 328, 330 (1979).

[15] Timothy J. Heaphy, Independent Review of the 2017 Protest Events in Charlottesville, Va. 35, 38, 45-49 (2017).

public areas were fair game for any ideology, and … the University Police Department would only intervene if laws were broken."[16]

The constitutive force of the First Amendment is perhaps most visible in the lawsuit the city of Charlottesville brought to revoke the white supremacists' permit for 8/12 and move the event out of downtown. The white supremacists retained the ACLU of Virginia to defend them. Few things reveal or reify the free speech backdrop of any event more than the involvement of the ACLU. That is especially the case when the court agrees, as it did here, that there was in fact a First Amendment violation. This is not to say that the judge got this wrong, though some might have found the public safety issues ripe for the seeing.

The point here is not that the white supremacists were not engaging in expression—they were—but that the constitutive role of the law made it difficult to see that they could also engage in violence. Indeed, the overhang of the First Amendment continued to shape perceptions of August 12 even when the white supremacists arrived militarized and armed. Though their weapons could have been seen—and were also seen—as an augur of the violence to come, they were given a wide berth in part because of their potential relationship to free expression. The white supremacists were exercising both First and Second Amendment rights, a convergence that raises new and important constitutional questions beyond the scope of this lecture.[17]

Adjusting the lens to see the law as input thus makes visible often invisible or submerged legal categories—the legal ocean in which we swim. Though making this ocean visible is enormously fruitful, I still struggle against it. I resist the tendency of the constitutive approach toward abstraction and inevitability, which reveals itself in phrases like "the law does," "the law constitutes," and "the law structures." I miss the human agency, and I still feel the pull of my own normativity.

METHODOLOGICAL ADJUSTMENT II: LAW AS "PUT"

Indeed, right after registering the constitutive force of law in my archive, I was struck by the visibility of human agency, by the ways people were strategically deploying background legal conditions to their advantage. New questions arose: How did the white supremacists get constituted as free speakers? Were they passive beneficiaries of this abstraction of the law or did they actively don the free speech mantle? Who else deployed or tried to deploy the law, and in what ways?

If my first reflexive methodological approach was to think about the law as output, and a second was to explore it as input, a third is to think about it as neither input nor output, but as "put." Law is a medium, with actors on every side seeing the promise of deploying the legal process as one among many arenas of struggle—formal politics, social movement jockeying, social media and regular media, and,

[16] Id. at 113. *See also* Deans Working Group, The University's Response to August 11, 2017: Observations and Improvements (2017), https://response.virginia.edu/system/files/public/observations-improvements-uva-response.pdf.

[17] Risa Goluboff, *Where Do We Go From Here?, in* Charlottesville 2017: The Legacy of Race and Inequity (Claudrena N. Harold & Louis P. Nelson, ed., 2018).

of course, the physical, violent arena of struggle that occurred on the streets of Charlottesville.

The participants in these events mobilized the law on their respective behalfs pervasively in a variety of directions and to a variety of ends. Who won in individual cases was only sometimes the point. The goal was often harassment, coercion, incapacitation. In other cases, the goal was to bankrupt and scatter an organization, or use law as political theater and a platform for one's views or as proof of government complicity in the dominance of someone else's views.

I have thought about this at various points as going to law, weaponizing law, legal pluralism, the instrumental or strategic deployment of the legal process, the law as an arena of struggle, legal politics, or simply as "put". These terms all have different historical origins, normative valences, and methodological pedigrees. In this open aperture moment, I am not yet ready to choose between them. They all get at the way we are awash in law, not only in the constitutive sense that substantive legal rules and norms structure our understanding of the world, but also in a very mechanical one. The availability of legal processes, the opportunity to deploy the power of the law on one's behalf, pervades our interactions with one another.

Constitutive and instrumental approaches are often described as in tension. What I see instead are legal structures ripe for opportunistic use by various groups and people who self-consciously deploy them, trading on as well as resisting these background legal rules. I have no doubt that long-standing legal doctrines shaped both the events of 8/11-12 and discourse about them. I am equally confident that various actors purposefully deployed those background legal rules. Indeed, the availability of these legal mechanisms may itself be constitutive. While the constitutive approach tries to make visible law's otherwise invisible presence, the instrumental attempts to make sense of the highly visible uses of law everywhere. This refocusing of the lens moves law from background condition to foregrounded weapon.

Take one precursor event in May of 2017. Several protestors asserted that they were not white supremacists.[18] They announced that they were engaged in peaceful demonstration and that they eschewed violence, implicitly invoking the image of Skokie.[19] Indeed, they called their planned August "rally" in Charlottesville "Unite the Right," which served to place their speech within the tradition of political speech.[20] They positioned themselves as a conservative political coalition to peacefully protest the Charlottesville City Council decision to remove Confederate statues.[21] According to a legal expert who testified at the *Sines v. Kessler* trial, the white supremacists strategically created distance between their public face of peaceful protest and their private plans to incite and engage in violence, attempting to maintain plausible deniability that would "shield them[] from being blamed for

[18] Heaphy, *supra* note 15, at 23, 26.

[19] Id.

[20] Id. at 69.

[21] Id.

wrongdoing, including criminal conduct."[22] This legal expert cited *The Daily Stormer* Style Guide, which said, "It's illegal to promote violence on the internet. At the same time, it's totally important to normalize the acceptance of violence as an eventuality or an inevitability."[23]

In several ways, counter-protesters fought the free speech framing that seemed to be doing so much work for the white supremacists. Sometimes they rejected the speech/violence distinction, contesting the legal protection of hate speech. At other times, they accepted that distinction, but tried to shift the white supremacists from the category of free speakers into the category of committers, or at least intentional provokers, of violence. If the white supremacists' goal was to keep law enforcement out of interactions between protestors and counter-protestors—inviting violence in—the counter-protesters instead begged law enforcement to get involved. Finally, the counter-protestors tried to shift to themselves, or at least to share, the free speech mantle by highlighting the peaceful nature of their protests—for example, by centering the clergy in those protests.

None of these efforts saw much success. In a free speech narrative with only two clear roles—protected free speaker and heckler—the white supremacists had claimed the speaker role, and the counter-protestors found it exceedingly difficult to escape the heckler role and to position themselves as equally protected and protectable free speakers. This narrative stickiness represents the confluence of the constitutive and the instrumental. The Skokie image was available as a reference point, and white supremacists intent on violence successfully invoked it. The entrenchment of that image made it difficult for the counter-protestors to undermine the white supremacists' free speech mantle and claim police protection for themselves. On August 12 itself, the police anticipated that its arrests would be focused on counter-protestors, who were in fact the first to be arrested.[24] Moreover, even after seeing the weaponry and military bearing of the white supremacists, the Charlottesville police maintained its plan for officers to wear "soft" uniforms—usually intended to express "both a commitment to support free expression and a recognition that most participants are peaceful"—and store their riot gear offsite, for use if necessary at a later point.[25]

The counter-protesters' frustration at not being able to convince the police to take the likelihood of violence seriously enough—to see past the white supremacists' self-constitution as peaceful protestors—is palpable in the sources in my archive. It is as palpable as the sense of vindication the white supremacists projected about the violence that ensued.

These struggles over deploying legally available categories were at their most acute in the relationship between speech and violence on 8/11-12. But the use of law as an arena of struggle functioned across the interactions between these various

[22] Transcript of Peter Simi Direct Testimony at 47, Sines v. Kessler, Docket No. 3:17-cv-00072 (W.D. Va. Oct 11, 2017).

[23] Id. at 90.

[24] Timothy J. Heaphy, Independent Review of the 2017 Protest Events in Charlottesville, Va. 48-49 (2017).

[25] Id. at 99, 160.

groups before, during, and after the violence that occurred on those two days. It was pervasive in the legal jockeying around the Confederate statues. It was pervasive in interactions, harassment, and scuffles between the two sides in Charlottesville throughout that summer and afterwards.

Activists on all sides deployed the law regularly and strategically. A political rally Jason Kessler was trying to livestream offers a mundane but telling example: A woman took Kessler's phone out of his hands. Another man took it from her and gave it back to Kessler. What might in other contexts have been fairly insignificant interactions led to separate prosecutions of both the woman and the man. In other instances, the use and misuse of a Virginia magistrate's warrant law, which allows for arrests in certain circumstances on the basis of only a private party's complaint, facilitated legal harassment and unwarranted arrests, frequently unmediated by lawyers.[26]

This is not to say that lawyers were not key players. Just as lawyers were important to my prior work,[27] they are important here as well. Lawyers and law students from Charlottesville were part of the local counter-protestor movement; lawyers from elsewhere brought the militia case and the federal civil rights case; lawyers for the white supremacists understood themselves as part of the cause; and Virginia ACLU lawyers and numerous federal prosecutors and public defenders participated in various cases. Many of the players could not afford lawyers or preferred the theater of their own representation, however. Reading through this archive underscores both the critical role lawyers played and the absence of lawyers as mediators in many of these cases, highlighting the sense of law as a field of battle.

"Law" in this methodological lens is not about high-minded ideals, or the rule of law, or even sedate legal doctrine. It is often ugly and crude. It is present in the attempts to impose state power into conflicts, relationships, and ideological disagreements, as well as to keep state power strategically out of such conflicts. Law becomes a facilitator of, rather than obstacle to, violence. Law is, of course, all those different things. Just as it is input and output and just plain put. It is thus unsurprising that we see these different faces of law in the story of "Charlottesville."

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Alongside the multiple methodological approaches emerging at this stage in the project, I also began to imagine multiple narrative throughlines. Choosing among these narratives requires answering various questions of scope that are essential historian's questions: about breadth and narrowness, scale and argumentation, background and foreground, where and when to start and end the timeline, and what contours and boundaries to impose on this story.

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[26] See, e.g., Virginia vs. Harris, Deandre, Docket No. GC17007891-00 (Va. Gen. Dist. Ct. Oct. 12, 2017).

[27] See Risa L. Goluboff, The Lost Promise of Civil Rights (2007); Risa L. Goluboff, Vagrant Nation: Police Power, Constitutional Change, and the Making of the 1960s (2016); Risa Goluboff, *Lawyers, Law and the New Civil Rights History*, 126 Harv. L. Rev. 2312 (2013) (book review).

NARRATIVE FRAMING I: THE GRAND NARRATIVE

I generally prefer to begin at the margins—with peons or vagrants, say—and eventually find my way to a center—*Brown v. Board* or the 1960s writ large. By contrast, I did initially think of Charlottesville as the center of this project. In fact, I thought of Charlottesville as the center and the margins, as the whole story. But I have since realized that there are so many other centers for which "Charlottesville" might be the margin. Zooming out in spatial and temporal terms, "Charlottesville" might be the margins for a national and global story of the 20th and 21st centuries. One can zoom out in disciplinary terms as well. Legal history is often, maybe always in its modern instantiation, combined with other subdisciplines of history—political, social, cultural, economic, intellectual.

Zooming out from "Charlottesville" in all these ways simultaneously leads me to a grand narrative. Part of what made Charlottesville "Charlottesville" was its resonance with so many related developments of the late 20th and early 21st centuries and especially its resonance with a grand narrative about the relationship between race and democracy. Charlottesville was, after all, the home of Thomas Jefferson, and UVA was his brainchild. Arguably, this story goes all the way back to the origins of our nation, in which white supremacy was deeply bound up with our aspirations for democracy.

More directly, this story begins in the Jim Crow era with the white supremacist violence perpetrated in places like Tulsa and Wilmington that Charlottesville echoes. That era spawned Confederate statues as part of the terror and violence of Jim Crow, and the continued presence of these statues raises conflicts about American heritage and its relationship to race as well as the relationship between local, state, and national entities over politics, race, region, and inequality. The narrative continues with the Civil Rights Movement in all of its forms and the dynamic of civil rights progress and civil rights backlash over the past eighty years. That includes the newly resurgent or newly visible forms of white supremacy, anti-Semitism, and Christian nationalism on display on 8/11-12. Most recently, it includes the national prominence of new movements for Black equality like Black Lives Matter, and the massive protests after the killing of George Floyd and others, with their focus on police and criminal justice reform. Arguably, those spring 2020 protests were the moment when the racial equality activists finally—if fleetingly—reclaimed the mantle of free speakers, and white supremacists once again became the counter-protesters.

These dynamics are on display in politics as well as social movements. We see them in the election of first Barack Obama and then Donald Trump—and the race and class politics those elections reflected—and in the January 6, 2021 attack on the Capitol that both grew out of 8/11-12 in very concrete ways and resembled it in more general ones. Donald Trump declared that there were "very fine people, on both sides" in Charlottesville. Joe Biden announced his presidential campaign from Charlottesville. And the Biden Administration announced a new plan for domestic terrorism from Charlottesville. Charlottesville is thus connected to the rise of global fascism, anti-Semitism, and political violence, and to the challenges to United

States democracy that have recently dominated the political and legal landscape. These trends have culminated in questions about the relationship between democracy and pluralism, and whether democracy can survive the new pluralism that this nation is moving toward in the coming decades, as it transitions to a majority-minority state.

It remains to be seen whether "Charlottesville" is part of a last gasp of white supremacist reaction to eighty years of civil rights activism, the continuity of an enduring internal racial tension within our democracy, or a major inflection point in the breakdown of that democracy. I do not yet know if this will be a story of continuity or change, of declension or triumph, of irony or tragedy. This history is so recent, it seems to both curtail possible endings—because we are obviously still in its middle—and yet also to proliferate them—because we cannot know now which aspects will look significant to historians and readers of the future.

What is clear is that this grand historical arc that has not yet ended requires moving from the particular to the general. It decenters both Charlottesville and 8/11-12. The Charlottesville statues become interesting because they are related to all the Confederate statues in dispute across the country. White supremacy in Charlottesville is tied to white supremacy everywhere. Charlottesville might become a case study or a lens through which to understand all of this or perhaps just a footnote to this larger story. My fear is ultimately that this project will not end up about Charlottesville at all.

NARRATIVE FRAMING II: LAW, PLACE, AND POWER

That fear makes me want to zoom in rather than out. I resist the "Charlottesville" moniker because this is not the story of a place that stands for an event, but the story of an actual place, actual people, and an actual community, or rather, a set of overlapping and connected communities. We lose something critical if we lose sight of that. We/I must tell the personal stories and narratives, how a community experiences trauma and can itself be a protagonist and responsible party.

This, then, is the story of a small city's reckoning with its own, our own, past, present, and aspirations for the future. Of course, all of this occurs in the context of that grand 20th- and 21st-century narrative, which helps to frame this project and make sense of Charlottesville and its place in the larger world. But that grand narrative can too easily overshadow the specific and the grounded. I would not want to tell that story at the expense of the archive I have been creating and the rich and textured sources that I have found there. I would not want to lose sight of the legal historical questions my own jury participation has generated.

In this iteration, I would start by zooming all the way into the courtroom where I was a potential juror, or rather, the many courtrooms in which jurors and potential jurors encountered 8/11-12. In case after case, hundreds of potential jurors were called to seat a panel of just 21 or 12. In the Fields case, the *voir dire* process took 27 hours, and its transcript spans more than 1,000 pages.[28] The transcript reads as

[28] *Fields v. Commonwealth*, 865 S.E.2d. 400, 405, 408 (Va. Ct. App. 2021).

a testimony of trauma, catharsis, defiance, and healing. There are so many snippets of life and law and loss to be seen here. It includes many people who referred to Heather Heyer as "Heather" and who when pressed, said that though they had never met her, that was how they thought of her. In my own jury pool experience, when the case ended earlier than expected, perfect strangers offered to drive each other home. Other courtroom transcripts reveal less about the interpersonal and more about the law and reactions to it. In a case against another counter-protestor for assaulting Jason Kessler during his August 13th press conference, the jury passed a note to the judge that said, "If we infer that Jason Kessler should have expected to be assaulted given the tenor of the crowd, would that have bearing on this case?"[29]

Zooming in like this raises important questions about juries and jurors. The common story legal historians tell is that once upon a time juries were self-informing. Jurors were local, selected for their knowledge of events and parties. Though there are debates about when the jury transitioned away from this self-informing nature—sometime between the 14th and 16th centuries—historians generally agree that over time the valence of such particularized knowledge changed. Today, we not only do not expect our jurors to know anything about a particular case, but we consider such knowledge bias and deem it disqualifying.

Against that backdrop, what do we make of a *voir dire* in a small town that reads as a ritual of personal and communal testimony? Does it undermine the idea that we have indeed moved to a non-self-informing jury? Does it make a mockery of the values of neutrality to which we aspire? Or does it, like jury nullification and community standards, confirm what we already know about the contemporary jury: that whatever we might say we want a jury to do, we will end up along some spectrum of lamenting or acknowledging or expecting or condoning or desiring it to act otherwise?

Whatever this story tells us about juries, it most definitely has something to tell us about Charlottesville—the place, not the symbol. I hesitate to romanticize the jury or overstate the sense of unity I saw in the *voir dire* transcripts. But the reason I was so struck by that unity is because it revealed something very different from much of what I have seen in this small, southern, diverse, stratified university city in the aftermath of 8/11-12. Those two days were a major inflection point for us here in Charlottesville. They highlighted—and released anger about—inequalities that had been too long submerged and that we have been discussing and reckoning with ever since. They have shaped and reshaped our local politics and our governance. This story is most emphatically that story too, a story not only about coming together but also about coming apart.

AUTOBIOGRAPHICAL INFLECTION REDUX: THE PROBLEM OF AUTOBIOGRAPHY THROUGH ANY LENS

Sometimes I think I have to tell this story. Not that I am the only one who can—I most certainly am not. But I am among those who can. I know things that cannot be found in the written sources, like the story of my jury pool experience. Historians

[29] Virginia vs. Winder, Jeffrey, Docket No. CR18000035-01 (Va. Cir. Ct. Feb. 14, 2018).

often think of sources as becoming less available over time. We lose them, they deteriorate, first-hand participants are no longer available. I have been surprised in 2022 how much is already lost to the proverbial record. We have a transcript, we have voluminous transcripts, we have the overabundance of sources that are part of the 20th- and 21st-century historian's problems.

But the record is still so partial, and partial in ways that are to me vitally important. The only inkling of the role the jury pool played in the case in which I participated, for example, is the defense lawyer's thanks.

In that sense, I am a primary source, and perhaps that bears on my responsibility to tell this story. It also raises the question of whether I can tell it, precisely because of my personal involvement. For one thing, my participation creates not only access but difficulty. I am a potentially unreliable narrator, with many roles to navigate. I worry that it is wrong to place myself in this story at all.

For another thing, I remain unable or unwilling—I don't know which—to let go of my moral framing of these events. You may have noticed, for example, that throughout this lecture I have referred to those who incited violence on 8/11-12 as "white supremacists" rather than "white advocates" or "Unite the Right." I do not doubt that the white supremacists were and are entitled to First Amendment protection as long as they engaged in peaceful protest within the terms of time, place, and manner regulations. But I am not interested in seeing them as they saw themselves or as they tried to convince others to see them. Even as I acknowledge that some counter-protesters also engaged in violence and illegal acts, the moral asymmetry in the causes of the two groups pervades my sense of everything that occurred.

I am not sure that it makes sense to write a legal history in which one does not even try to understand the motivation of all the actors, and especially of those who play significant roles. My research assistant found a recording of one 8/11-12 organizer explaining how he thinks about the weaponization of the law. I have not clicked that link yet. I don't want to click it. I am dogged by the question: Does that reluctance mean I cannot tell this story?

Finally, and perhaps most fundamentally, telling this story may simply be too difficult. I had not wanted to write about the violence of 8/11-12 when I imagined writing about it directly from my own personal or institutional position. My conversation with the local judge, my jury pool experience, and my thinking about this lecture encouraged me to think of "Charlottesville" as a legal scholar and historian. Turning to the law can provide distance from the humanity and inhumanity of the story. Thinking of this project in terms of formal law—whether triumphant or failing or ironic, whether constitutive or pluralist, whether part of a larger narrative or a close reading of sources—would create a buffer from the horror, would abstract away from the humanity.

As I have worked through what it would really mean to treat "Charlottesville" as legal history in any of the ways I would want to given my methodological commitments, I realize that all of these distancing moves necessarily fail. I cannot hide behind the law, and I cannot limit myself to a formal and sterile understanding of law. That is not how I do legal history. I do not want to push the people or the violence from the center to the margins and place some abstract notion of the law

at the center. The lived experience of the law and the formal legal process cannot be separated. A legal history devoid of all of those ostensibly "non-law" aspects would probably be one that I do not want to write and one few would find compelling to read.

As I have amassed my archive and written this essay, the "non-law" has kept hitting me in the face. I use that violent analogy intentionally, because there is so much violence here. Violence is unavoidable if I am going to do this story justice as legal history or in any other way.

As I sat writing the first draft of what became this lecture, UVA commemorated the fifth anniversary of 8/11-12. Bells were literally tolling for the dead and injured as I wrote. The media renewed its interest. The student newspaper reprinted articles from the days and weeks afterward, including an interview with me in my capacity as chair of the university's response.

"How can I write this story," I wondered, "even if I call it legal history?"

I do not know where I will end up or if I will write this book. But I know this: If I do write it, it will involve law as output, input, and just plain put. It will involve humanity and inhumanity. It will be messy and normative and grand and specific and personal and deeply flawed. I hope that I will be able to write this story, and I hope that you, the audience always in my head, will want to read it.