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## Truth and Reconciliation: The Ku Klux Klan Hearings of 1871 and the Genesis of Section 1983

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## Truth and Reconciliation: The Ku Klux Klan Hearings of 1871 and the Genesis of Section 1983

Tiffany R. Wright, Ciarra N. Carr, and  
Jade W.P. Gasek\*

### ABSTRACT

Over the course of seven months in 1871, Congress did something extraordinary for the time: It listened to Black people. At hearings in Washington, D.C. and throughout the former Confederate states, Black women and men—who just six years earlier were enslaved and barred from testifying in Southern courts—appeared before Congress to tell their stories. The stories were heartbreaking. After experiencing the joy of Emancipation and the initial hope of Reconstruction, they had been subjected to unspeakable horror at the hands of white terrorists. They had been raped and sexually humiliated. Their children and spouses murdered. They had been savagely beaten and forced to seek refuge in swamps. The terrorists were often state actors or respected members of society who claimed to engage in savagery

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for self-defense and community protection. And state courts were unable or unwilling to prosecute the crimes.

Congress listened and did something else extraordinary. For the first time in American history, Congress interposed federal courts between the states and their citizens as guardians of federal constitutional rights. Through the Ku Klux Klan Act of 1871, which includes what is now codified as 42 U.S.C. § 1983, Congress rejected the proposition that the federal government had no power to intercede when state officials violated the federal constitution. Section 1983 provides a federal remedy for constitutional violations committed by state actors. The text is plain: Any state actor who violates the federal constitutional or statutory rights of any U.S. citizen “shall be liable to the party injured in an action at law.” But the Supreme Court of the United States has refused to enforce the statute as written. The Court instead invented the doctrine of qualified immunity that shields state actors from liability under Section 1983 unless victims can identify prior precedent where a state actor violated federal rights in a nearly identical manner.

With the U.S. Supreme Court’s blessing, federal courts have granted qualified immunity to state officials who violate federal rights in increasingly depraved and unreasonable ways. This Article demonstrates that the Supreme Court is permitting the very evil that Section 1983 was designed to end. This Article does so by reviewing the painful narratives of the courageous Black people who testified before Congress in 1871. The Ku Klux Klan Hearings were the United States’ closest attempt at truth and reconciliation in the aftermath of slavery and the terror that followed. The testimony is replete with examples of a particular form of violence—assaults committed by state actors that local governments were unable or unwilling to remedy—which Congress specifically sought to rectify through Section 1983. And it is this precise form of violence that the Supreme Court of the United States permits through its expansive application of qualified immunity.

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## INTRODUCTION

Donald Williams II began his day on May 25, 2020, with a father-son fishing trip.<sup>1</sup> Before the day ended, he would witness an execution. As Williams approached the Cup Foods Store in his Minneapolis, Minnesota neighborhood on that spring afternoon, he came upon a horrifying scene.<sup>2</sup> White police officer Derek Chauvin had his knee pressed on the neck of a Black man, George Floyd, following an accusation that Floyd had used a counterfeit \$20 bill.<sup>3</sup> Williams and other bystanders—some recording the incident with their cellphones—pleaded with Chauvin to get off Floyd’s neck.<sup>4</sup> Floyd screamed that he could not breathe 20 times.<sup>5</sup> He begged for his life.<sup>6</sup> He cried out for his deceased mother.<sup>7</sup> He wanted his children to know he loved them.<sup>8</sup> Williams recognized that Floyd was in tremendous pain: his eyes rolled back in his head; his mouth

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1. Loretta Hunt, *How MMA Fighter Donald Williams Helped Achieve Justice for George Floyd*, GUARDIAN (Apr. 26, 2021, 10:35 AM), <https://bit.ly/3si6ldf> [<https://perma.cc/YX5Q-L4JV>]; see also Jon Wertheim, *Police Killed George Floyd. An MMA Fighter Punched Back.*, SPORTS ILLUSTRATED (May 25, 2021), <https://bit.ly/36EIPQE> [<https://perma.cc/7PQU-JDXE>].

2. Hunt, *supra* note 1.

3. Nicholas Bogel-Burroughs & Will Wright, *Little Has Been Said About the \$20 Bill that Brought Officers to the Scene*, N.Y. TIMES (Apr. 19, 2021), <https://nyti.ms/3skUcUZ> [<https://perma.cc/E8BH-GQZN>].

4. NewsNation, *Donald Williams Testifies on the Second Day of the Derek Chauvin Trial*, YOUTUBE (Mar. 30, 2021).

5. Richard A. Opiel, Jr. & Kim Barker, *New Transcripts Detail Last Moments for George Floyd*, N.Y. TIMES, <https://nyti.ms/3GwcnvV> [<https://perma.cc/5BA6-VNMF>] (Apr. 1, 2021).

6. *Id.*

7. *Id.*

8. *Id.*

hung open as he gasped for air.<sup>9</sup> People in the crowd cried and screamed.<sup>10</sup> Williams called 9-1-1.<sup>11</sup> But none of this moved Chauvin; he compressed Floyd's neck for 9 minutes and 29 seconds, killing him.<sup>12</sup> Knowing that witnesses had their phones trained on him, Chauvin made no move to change his behavior.<sup>13</sup> He instead continued to apply half of his body weight (nearly 92 pounds) to Floyd's neck,<sup>14</sup> looked directly into the cameras, and smirked.<sup>15</sup>

Ninety years earlier, a similar scene of brazen brutality took place in Marion, Indiana. Police arrested and charged Thomas Shipp, Abe Smith, and James Cameron—three young Black men—for allegedly murdering a white man, Claude Deeter, and raping his “sweetheart”<sup>16</sup> Mary Ball, a white woman.<sup>17</sup> The police chief displayed Deeter's bloody shirt from one of the Department's windows, calling on residents to take extrajudicial action.<sup>18</sup> As the news spread, a white mob, including women and children, broke into the jail at nightfall.<sup>19</sup> Cameron—who would escape the ordeal with rope burns around his neck and a lifetime of psychological trauma—later recounted that the “bloodthirsty crowd c[a]me to life the moment” vigilantes “dragged [Shipp's body] into view.”<sup>20</sup> The mob killed the two young men “many times over, their bodies reduced to pulp or cut up for souvenirs.”<sup>21</sup> Some participants clubbed

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9. NewsNation, *supra* note 4.

10. *Id.*

11. Wertheim, *supra* note 1 (“I called the cops on the cops.”).

12. Nicholas Bogel-Burroughs, *Prosecutors Say Derek Chauvin Knelt on George Floyd for 9 Minutes 29 Seconds, Longer than Initially Reported*, N.Y. TIMES (Mar. 30, 2021), <https://nyti.ms/3rv1ciP> [<https://perma.cc/23GE-PYTN>].

13. Associated Press, *Expert: Chauvin Never Took Knee Off Floyd's Neck*, YOUTUBE (Apr. 7, 2021), <https://bit.ly/3rtEUhl> (showing prosecution witness, Los Angeles Police Department Sergeant, Jody Stiger, testifying that Chauvin's use of force against Floyd remained consistent throughout the restraint period).

14. *See* Star Tribune, *Chauvin Trial: Witness Describes “Shimmy” Move that He Says Chauvin Used on George Floyd*, YOUTUBE (Mar. 30, 2021), <https://bit.ly/3smZM9f>; *see also* Aris Folley, *Breathing Expert Estimates Half of Chauvin's Weight Was on Floyd's Neck*, HILL (Apr. 8, 2021, 1:12 PM), <https://bit.ly/3gu7mcF> [<https://perma.cc/4T6X-QCY4>].

15. *See* Tony Norman, *Derek Chauvin's Smirk—For the Prosecution*, PITTSBURGH POST-GAZETTE (Apr. 2, 2021, 12:00 AM), <https://bit.ly/3JaBoPg> [<https://perma.cc/77YK-V4E9>].

16. CYNTHIA CARR, *OUR TOWN: A HEARTLAND LYNCHING, A HAUNTED TOWN, AND THE HIDDEN HISTORY OF WHITE AMERICA* 136 (2006).

17. *See id.* at 148 (discussing how Ball fabricated the sexual assault allegations against Shipp, Smith, and Cameron).

18. *See id.* at 38.

19. *See id.* at 18, 25.

20. *Id.* at 18.

21. *Id.* at 51.

and stoned Shipp before throwing him from a jailhouse window.<sup>22</sup> Another forced a crowbar through Smith's chest.<sup>23</sup>

The crowd hung both bodies from trees near the courthouse.<sup>24</sup> A local photographer captured the "bulging eyes and the twisted mouth[s]" of the victims in an infamous photograph that would inspire Abel Meeropol to pen "Strange Fruit."<sup>25</sup> Perhaps most disturbing was the "weird ecstasy" apparent in the white crowd.<sup>26</sup> As Shipp's and Smith's mutilated bodies swayed at the end of ropes, the white killers and spectators excitedly "howled and milled around [them], their voices a mumbo jumbo of insane screams and giggles."<sup>27</sup> Having taken part in a vicious execution, the killers made no effort to conceal their identities: they smiled and posed for the camera with pride.<sup>28</sup>

Over 220 years before the Marion lynch mob wreaked havoc, white slave patrols, hunters, and their "negro dogs"<sup>29</sup> fulfilled the role of law enforcement with broad powers to "exert control over the slave community using fear and discretionary violence."<sup>30</sup> The use of canines as a slave-catching strategy was an indispensable piece of the slave enforcement system,<sup>31</sup> but the depravity did not stop here. Nefarious patrollers derived immense pleasure<sup>32</sup> from stalking Black people like "wild beast[s]"<sup>33</sup> and using vicious and menacing<sup>34</sup> state-sanctioned canine torture.<sup>35</sup> They patrolled their

22. *Id.* at 18.

23. *Id.*

24. *Thousands Lynch Two Black Men in Marion, Indiana*, EQUAL JUST. INITIATIVE, <https://bit.ly/3rv8rHC> [<https://perma.cc/5GUZ-T3KA>] (last visited Mar. 17, 2022).

25. *Id.*; see also Elizabeth Blair, *The Strange Story of the Man Behind 'Strange Fruit'*, NPR (Sept. 5, 2012, 3:24 AM), <https://n.pr/3Li3kTc> [<https://perma.cc/AB47-LV6F>].

26. CARR, *supra* note 16, at 18.

27. *Id.*

28. *Id.* at 51.

29. Larry H. Spruill, *Slave Patrols, "Packs of Negro Dogs" and Policing Black Communities*, 53 *PHYLON* 42, 51 (2016).

30. *Id.* at 49.

31. *Id.* at 51.

32. DEVON W. CARBADO & DONALD WEISE, *THE LONG WALK TO FREEDOM: RUNAWAY SLAVE NARRATIVES* 207 (2012) ("The slave holders and their hired ruffians appear[ed] to take more pleasure in [the] inhumane pursuit [of hunting fugitive slaves] than English sportsmen [did] in chasing a fox or a stag.").

33. HARRIET A. JACOBS, *INCIDENTS IN THE LIFE OF A SLAVE GIRL* 22 (Jean Fagan Yellin ed., 1987).

34. See, e.g., SOLOMON NORTHUP, *TWELVE YEARS A SLAVE* 137 (Applewood Books ed. 2008) (1853) ("I knew they would tear me to pieces, that they would worry me, at once, to death.").

35. Shontel Stewart, *Man's Best Friend? How Dogs Have Been Used to Oppress African Americans*, 25 *MICH. J. RACE & L.* 183, 186 (2020); see also Spruill,

“beats”<sup>36</sup> and tracked fugitives with a “zest of sport,”<sup>37</sup> “celebrat[ing] chases as adventurous escapades.”<sup>38</sup> Testimonials from slave hunters evidence their sadistic pride in using inhumane recapturing methods:

If I can catch a cuss'd runaway [slave] without killing him, very good; *though I generally let the hounds punish him a little, and sometimes give him a load of squirrelshot.* If mild measures, like these, do not suffice, I use harsher punishment . . . . The moment the hounds come close . . . they utter a hideous and mournful howl . . . . [H]eaven pity the poor [slave].<sup>39</sup>

What manner of evil gave these killers—with their macabre smiles and sadistic behavior separated by hundreds of years—the courage to torture and kill without fear of consequences? *The answer is white supremacy.* This evil has come in many forms throughout the centuries, but it has been an ever-present apparition. It distorted the hearts and minds of white men and women in the Founding era, who fought a war to attain freedom while embracing a brutal system of enslavement that denied any freedom to Black people.<sup>40</sup> It nearly ended the Union a century later when hundreds of thousands of white men sacrificed their lives to uphold their perceived superiority to Black people.<sup>41</sup> It tore the country apart a century after that when white men brutalized, lynched, and murdered Black people—including Black women and children—rather than embrace them as equals. This evil is what leaps out of the smiles of sadistic killers like Derek Chauvin, the Marion lynch mob, and slave patrollers. Those smiles, actions, and words reflect the killers' certainty that they would escape accountability and the misguided moral conviction that their actions were justified.

This certainty results from a centuries-old system of injustice that has rarely punished state assault on Black bodies. Key to this system has been the U.S. Supreme Court's insistence on shielding state actors who harm Black people—such as slave patrolmen, Ku

*supra* note 29, at 48; JOHN H. FRANKLIN & LOREN SCHWENINGER, *RUNAWAY SLAVES: REBELS ON THE PLANTATION* 160 (2020).

36. Spruill, *supra* note 29, at 51.

37. FRANKLIN & SCHWENINGER, *supra* note 35, at 161.

38. Tyler D. Parry & Charlton W. Yingling, *Slave Hounds and Abolition in the Americas*, 246 *PAST & PRESENT* 69, 93 (2020).

39. Spruill, *supra* note 29 at 54 (emphasis added) (citation omitted).

40. See, e.g., Michael E. Miller, *The War of Races: How a Hateful Ideology Echoes Through American History*, *WASH. POST* (Dec. 27, 2019), <https://wapo.st/3rtP9iN> [<https://perma.cc/PV6P-8MUJ>].

41. See, e.g., *Civil War Facts: 1861-1865*, *NAT'L PARK SERV.*, <https://bit.ly/34eXkKg> [<https://perma.cc/GN6E-R5H6>] (last visited Mar. 17, 2022).

Klux Klan members, and police officers—from liability. The doctrine of qualified immunity has emerged as the ultimate shield. Qualified immunity shields law enforcement from civil liability unless plaintiffs can show that a “reasonable officer”<sup>42</sup> knowingly violated “clearly established statutory or constitutional rights.”<sup>43</sup> In practice, it serves as near absolute immunity for police officers<sup>44</sup> in excessive force cases brought under 42 U.S.C. § 1983 or “Section 1983.”<sup>45</sup>

The perniciousness of qualified immunity is best understood when armed with a fulsome understanding of the genesis of Section 1983. Congress enacted Section 1983 as part of the Ku Klux Klan Act of 1871<sup>46</sup> at the height of violent white resistance to Reconstruction reforms.<sup>47</sup> Within a month of the Act taking effect, Congress commissioned an investigation into the racial and political violence pervading the Southern United States. Black victims of white supremacist terrorism risked their lives and livelihood to publicly testify about the horrors they had endured. Led by the Joint Committee to Inquire into the Condition of Affairs in the Late Insurrectionary States, the Ku Klux Klan Hearings<sup>48</sup> represent one of the most extensive congressional investigations in American history

42. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

43. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (citation omitted).

44. According to the American Bar Association, “most members of law enforcement operate today in a culture of near-zero accountability. . . . [T]his culture of near-zero accountability has many causes, [but] by far the most significant is qualified immunity.” See Jay Schweikert, *Qualified Immunity*, A.B.A. (Dec. 17, 2020), <https://bit.ly/3HyWOoP> [<https://perma.cc/4WVW-HZDJ>].

45. 42 U.S.C. § 1983 states in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983.

46. Ku Klux Klan Act, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. §§ 1983, 1985, 1986).

47. For example, the Equal Justice Initiative has documented more than 2,000 Black lynching victims killed during the Reconstruction era from 1865 to 1876 (a 12-year period). This figure is particularly staggering considering the 4,400 victims documented from 1877 to 1950 (a 74-year period). See EQUAL JUST. INITIATIVE, *RECONSTRUCTION IN AMERICA: RACIAL VIOLENCE AFTER THE CIVIL WAR, 1865-1876*, at 44 (2020), <https://bit.ly/3gQaP5O> [<https://perma.cc/DK4C-BQUN>].

48. This Article uses “the Ku Klux Klan Hearings” and “the Hearings” interchangeably.



and remain the federal government's closest attempt to impanel a post-slavery truth and reconciliation commission.<sup>49</sup>

The Hearings provide contemporaneous accounts by Black victims—in their own words—of the rampant state violence when Congress enacted Section 1983. This Article is the result of an exhaustive review of these accounts, the testimony of which spans more than 7,300 pages of the congressional record. The specific details of the testimony may differ, but the general stories are consistent: white terrorists, who were often affiliated with state governments, violently assaulted Black people, and states looked the other way. This precise form of violence—assaults committed by state actors that local governments were unable or unwilling to remedy—is the harm that Congress sought to rectify through Section 1983. And it is this precise form of violence that the Supreme Court of the United States permits through its expansive application of qualified immunity.

Part I of this Article traces the road to the Ku Klux Klan Act of 1871, including the violence incentivized and perpetuated by the American system of chattel slavery and the Civil War that ended it. Part II catalogs the terrorism that followed the Civil War as told by the brave men and women who risked their lives to testify during the Ku Klux Klan Hearings. Part III analyzes the Court's repeated unwillingness to hold white perpetrators of racially motivated violence accountable. Finally, Part IV discusses the U.S. Supreme Court's role in creating the judicial defense of qualified immunity against the backdrop of widespread violence committed by members of law enforcement and the continued failure of state courts to hold individual actors accountable.

## I. A “COVENANT WITH DEATH”: AMERICAN CHATTEL SLAVERY, THE CIVIL WAR, AND THE ERA OF RECONSTRUCTION

The road to Section 1983 began with chattel slavery, an institution that incentivized and tolerated unspeakable violence against Black people. The institution represented a profound psychological distortion among many white individuals in the founding generation. They proclaimed sincere belief in freedom—and fought a war against the English Crown's oppression—but embraced a founding document that tolerated ownership of human beings.<sup>50</sup> Slavery and

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49. RECONSTRUCTION: AMERICA AFTER THE CIVIL WAR, PART 1, HOUR 1, at 20:35–21:15 (Inkwell Films and McGee Media 2019).

50. All 13 colonies permitted slavery at the onset of the American Revolution. See PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN

freedom stood fundamentally at odds; slavery corrupted the enslaver as much as it hurt the enslaved. The lie of white supremacy was, at least in part, an effort to resolve this contradiction. Founding Father and President Thomas Jefferson, for example, reconciled his declaration that “all men are created equal” with his ownership of hundreds of human beings by claiming that Black people “lacked intellectual abilities” and “were not equipped to participate in a free republican society.”<sup>51</sup> An “engrained sense of racial superiority” and “negrophobia” pervaded early white American thought.<sup>52</sup> As with all big lies, white supremacy required belief in a host of other lies, all of which were at odds with objective reality. Examples abound.

White enslavers who required assistance from Black people to bathe, dress, clean, cook, and even breastfeed their children falsely characterized enslaved persons as “lazy” and “possessed with the greatest aversion to every species of labo[ ]r.”<sup>53</sup> In truth, countless enslaved persons were “literally . . . worked to death.”<sup>54</sup> The accidental discovery of New York City’s “Negro Burial Ground” in 1991 revealed this horrifying reality.<sup>55</sup> Anthropologists examined the 200-year-old bones of 419 enslaved persons, finding evidence of severe “trauma or injury to the bone” and “broken neck bones because [enslaved persons] were forced to do [harsh] labor.”<sup>56</sup> The exacting conditions of chattel slavery killed half of the total exhumed population before they became teenagers.<sup>57</sup> Enslaved persons—men, women, and children alike—began work before dawn

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THE AGE OF JEFFERSON ix (M.E Sharpe, 3d ed. 2014). Only two states—Massachusetts and New Hampshire—had abolished slavery when the Framers wrote the Constitution. *Id.* Abolitionist William Lloyd Garrison argued that the Constitution’s embrace of slavery represented “a covenant with death” and “an agreement with Hell.” *Id.* at 3. Another abolitionist, Wendell Phillips, asserted that “it [was] impossible for free and slave States to unite on any terms, without all becoming partners in the guilt and responsible for the sin of slavery.” *Id.*

51. President Jefferson believed Black people were “inferior to the whites in the endowments of body and mind.” *Id.* at 265.

52. Kenneth Morgan, *George Washington and the Problem of Slavery*, 34 J. AM. STUD. 279, 285 (2000).

53. William Baker, *William Wilberforce on the Idea of Negro Inferiority*, 31 J. HIST. IDEAS 433, 434 (1970) (citing THOMAS COOPER, FACTS ILLUSTRATIVE OF THE CONDITION OF THE NEGRO SLAVES IN JAMAICA 12–15 (1824)).

54. Ann Kellan, *Bones Reveal Little-Known Tale of New York Slaves*, CNN (Feb. 12, 1998, 2:30 PM), <https://cnn.it/3BnfiGB> [<https://perma.cc/247V-8QX5>].

55. Edward Rothstein, *A Burial Ground and Its Dead Are Given Life*, N.Y. TIMES (Feb. 25, 2010), <https://nyti.ms/3uz66gD> [<https://perma.cc/K27L-BAHG>].

56. Kellan, *supra* note 54 (describing remains that showed evidence of muscular lesions and tears).

57. *Id.*

and toiled in stifling hot cotton, tobacco, corn, and sugar-cane fields until dusk.<sup>58</sup>

White men raped enslaved Black women with impunity yet falsely characterized Black men as “black beast rapists” and “the mythological incubus, a beast that attack[ed] women while they sle[pt].”<sup>59</sup> Black women were demonized as hypersexual beings “governed almost entirely by [their] libido[s].”<sup>60</sup> In truth, white masters made Black women “victim[s] of the grossest passions.”<sup>61</sup> White slave owners employed “routine sexual abuse” as much as “the whip and the lash.”<sup>62</sup> It is impossible to precisely know the frequency with which white men raped Black enslaved women; however, modern DNA analysis evidences a significant practice of sexual assault.<sup>63</sup> Because “Southern laws did not recognize the rape of a [B]lack woman as a crime, often the only recourse slave women had was to fight off their assailants.”<sup>64</sup> But fighting brought deadly retribution: “Enslaved women who successfully fought off enslavers who tried to assault them were sold away from their families, gruesomely maimed, or executed.”<sup>65</sup>

White enslavers who claimed to deeply believe in the nation’s foundational tenets of liberty and freedom<sup>66</sup> falsely claimed that enslaved persons who courageously fled slavery suffered from a “disease of the mind causing [them] to abscond.”<sup>67</sup> The prescribed treatment for this illness, known as “drapetomania,” was to keep enslaved persons “[in] the position of submission” as mandated by the Scriptures.<sup>68</sup> Returned enslaved people faced brutal punishment for defying their oppressors.<sup>69</sup> They were flogged, branded,

58. See ANGELA Y. DAVIS, *WOMEN, RACE, AND CLASS* 5–6 (1981).

59. DANIELLE L. MCGUIRE, *AT THE DARK END OF THE STREET: BLACK WOMEN, RAPE, AND RESISTANCE* 21 (2011).

60. DEBORAH GRAY WHITE, *AR’N’T I A WOMAN? FEMALE SLAVES IN THE PLANTATION SOUTH* 29 (rev. ed. 1999) (1985).

61. BEVERLY GUY-SHEFTALL, *BLACK WOMAN IN UNITED STATES HISTORY* 60 (Darlene Clark Hine et al. eds., 1990).

62. DAVIS, *supra* note 58.

63. Dorothy E. Roberts, *Race, in THE 1619 PROJECT: A NEW ORIGIN STORY* 45, 52–53 (Nikole Hannah-Jones et al. eds., 2021).

64. WHITE, *supra* note 60, at 78.

65. Roberts, *supra* note 63, at 53.

66. See Seth Rockman, *Liberty Is Land and Slaves: The Great Contradiction*, 19 *OAH MAG. HIST.* 8 (2005).

67. Samuel A. Cartwright, *Report on the Diseases and Physical Peculiarities of the Negro Race*, 1851 *NEW ORLEANS MED. & SURGICAL J.* 691, 707, <https://bit.ly/34xFpyf>.

68. *Id.* at 708.

69. See FRANKLIN & SCHWENINGER, *supra* note 35, at 244. In one instance, a young Black enslaved woman identified only as Hannah absconded from her owner in Southampton County, Virginia. *Id.* After pursuing and recapturing her,

mutilated, incarcerated, sexually assaulted, forcibly separated from spouses and children, attacked by dogs, and murdered.<sup>70</sup>

The dissemination of lies to justify such conduct was not just the errant practice of a few evil men and women; it became pervasive and reinforced by law. As early as 1669, “the Carolina colony granted every free white man ‘absolute Power and Authority over his Negro Slaves.’”<sup>71</sup> Later slave codes permitted “brutal punishment” against Black people who dared to “move freely, to ‘resist’ any white person, and to carry weapons of any kind.”<sup>72</sup> The codes “legally empowered enslavers to beat, maim, assault, or even kill an enslaved person without penalty.”<sup>73</sup>

Courts enforced these laws, most of which denied enslaved people any legal standing.<sup>74</sup> These courts included the U.S. Supreme Court, which endorsed white supremacy in *Dred Scott v. Sandford*.<sup>75</sup> The Court concluded that Black people had “been regarded as beings of an inferior order” for over a century, “altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect.”<sup>76</sup>

Beyond court decisions, the “United States government provided th[e] force”<sup>77</sup> necessary to maintain the “inherently unstable” institution of slavery.<sup>78</sup> The federal government expended “its resources to hunt fugitive slaves and, when necessary, suppress rebellions.”<sup>79</sup> Even the local militias that violently shut down rebellions “were armed by the national government.”<sup>80</sup>

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the owner subjected her to “great torture.” *Id.* He stripped and tied her, and then he continuously flogged her until he had “wore out one whip.” *Id.* Hannah made “dreadful” cries; her back was “very much lacerated”; her tongue “dry [and] white”; one of her eyes was nearly swollen shut. *Id.* The owner’s family pleaded for him to stop; bystanders asked if they could give her water. *Id.* But he remained unmoved; he killed Hannah and asked witnesses to help move her body. *Id.*

70. *See id.*; *see also* JACOBS, *supra* note 33, at 21–23.

71. Leslie Alexander & Michelle Alexander, *Fear*, in *THE 1619 PROJECT: A NEW ORIGIN STORY* 97, 103 (Nikole Hannah-Jones et al. eds., 2021).

72. *Id.*

73. *Id.*

74. *See* Nikole Hannah-Jones, *Democracy*, in *THE 1619 PROJECT: A NEW ORIGIN STORY* 7, 12 (Nikole Hannah-Jones et al. eds., 2021).

75. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

76. *Id.* at 407.

77. FINKELMAN, *supra* note 50, at 4.

78. *Id.*

79. *Id.*

80. *Id.*

White supremacy was thus a lie that the legal, political, and social apparatus of this country supported. Even white people who did not engage in slavery had “a considerable psychological as well as economic investment in the doctrine of Black inferiority.”<sup>81</sup> The result was generations of white people who not only supported or tolerated the inhumanity of slavery but also believed that it was justified. It is thus unsurprising that an estimated 1,000,000 men of the Confederacy risked their lives during the Civil War in the name of white supremacy and in defense of the right to own human beings; nearly 500,000 of them died fighting the deadliest war in American history.<sup>82</sup> The Union’s triumph in the Civil War effectively ended plantation slavery, but many Americans’ commitment to white supremacy would live on for centuries (and remains today). Indeed, even in his farewell address, General Robert E. Lee never admitted that the cause for which he fought was unjust; he acknowledged only that the Union had outmanned his army.<sup>83</sup> The South would come to lament its effort as “The Lost Cause” rather than a morally bereft one.<sup>84</sup>

## II. “A BRIEF MOMENT IN THE SUN”: THE PROMISE OF RECONSTRUCTION AND THE TERRORISTS WHO DESTROYED IT

From the ruins of the Civil War, Congress sought to reconstruct the nation in the Constitution’s image—a country where all were truly equal. The era of Reconstruction promised “a new birth of freedom.”<sup>85</sup> From 1863 to 1877, Congress “wrought great changes in the constitutional framework of civil rights.”<sup>86</sup> Congress enacted the Reconstruction Amendments, solidifying the promise of equality.<sup>87</sup> The Thirteenth Amendment formally abolished slav-

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81. Hannah-Jones, *supra* note 74, at 21.

82. *Civil War Facts: 1861-1865*, NAT’L PARK SERV., <https://bit.ly/3rCB1a3> [<https://perma.cc/9CHT-A9JC>] (Oct. 27, 2021).

83. Robert E. Lee, General, General Order No. 9, Address Before the Confederate States Army of Northern Virginia (Apr. 10, 1865) (on file with the Indiana University Library) (“After four years of arduous service marked by unsurpassed courage and fortitude, the Army of Northern Virginia has been compelled to yield to overwhelming numbers and resources.”).

84. The term “Lost Cause” attempts to rebrand the Confederacy as a just and heroic war “fought by honorable men protecting their communities, and not about slavery at all.” Clint Smith, *Why Confederate Lies Live On*, ATL. (May 10, 2021), <https://bit.ly/3sxWQHg> [<https://perma.cc/NK4Z-WLHA>].

85. Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863).

86. Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1323 (1952).

87. Importantly,

ery except as a punishment for a crime.<sup>88</sup> The Fourteenth Amendment guaranteed due process and equal protection under the law.<sup>89</sup> The Fifteenth Amendment prohibited voting discrimination on the basis of race or former slave status.<sup>90</sup>

Congress also enacted several statutes affirming Black people's humanity. The Civil Rights Act of 1866<sup>91</sup> ensured birthright citizenship<sup>92</sup>—a protection the U.S. Supreme Court had previously denied—over President Andrew Johnson's veto.<sup>93</sup> Finally, the Civil

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[t]he constitutional revolution . . . found the rights of the individual at the mercy of the states . . . and placed them under the shield of national protection. It made the liberty and rights of every citizen in every state a matter of national concern. Out of a republic of arbitrary local organizations it made a republic of equal citizens.

ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* xxviii (2020).

88. U.S. CONST. amend. XIII, § 1. The “crime exception” to the Thirteenth Amendment’s prohibition on slavery resulted in Southern states passing restrictive laws criminalizing activities that would make it easy to imprison newly freed Black people. See Nadra Kareem Nittle, *How the Black Codes Limited African American Progress After the Civil War*, HIST., <https://bit.ly/3uBrXEu> [<https://perma.cc/93YD-QYSU>] (Jan. 28, 2021). The “Black Codes” promulgated throughout the South in the aftermath of the Civil War served as a means of “getting things back as near to slavery as possible.” ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863-1877*, at 199 (2014). Black people who violated these “sweeping vagrancy and labor contract laws” could “be whipped, placed in the pillory, and sold for up to one year’s labor [contract],” among other punishments. *Id.* at 200. These laws, in effect, rendered the promises of the Thirteenth Amendment illusory for Black people in the South.

89. U.S. CONST. amend. XIV, § 1. Despite the guarantees included in the Fourteenth Amendment, “the exclusion of felons from the vote [also allowed] an affirmative sanction in § 2 of the Fourteenth Amendment.” *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974). This feature, which became part of the Constitution “largely through . . . political exigency” and the South’s hesitancy to permit the full franchise of the Black population, *id.* at 73–74 (Marshall, J., dissenting), allowed Southern states during and after Reconstruction to tailor their laws to target conduct believed to be engaged in by the Black population in order to rob them of their right to vote, see JEAN CHUNG, SENT’G PROJECT, *VOTING RIGHTS IN THE ERA OF MASS INCARCERATION: A PRIMER* 3 (2021), <https://bit.ly/3GBmsYK> [<https://perma.cc/55LP-6E66>].

90. U.S. CONST. amend. XV, § 1. The Fifteenth Amendment, like those preceding it, fell victim to Southern redeemers intending to “make [the Amendments] dead letters on the statute-book.” FONER, *supra* note 88, at 590. Throughout the South, Democratic lawmakers gerrymandered districts to dilute the Black vote, instituted poll tax requirements to restrict the Black vote, and ballot fraud “became the order of the day in counties with [B]lack majorities.” *Id.*

91. Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981, 1982).

92. *Id.* § 1.

93. CONG. GLOBE, 39th Cong., 1st Sess. 1801–02 (1866) (debating whether the Senate should pass the Civil Rights Act of 1866 notwithstanding President Johnson’s veto).

Rights Act of 1875<sup>94</sup> forbade racial discrimination in hotels, trains, and other public accommodations.

Freed Black people, determined to shed the vestiges of slavery, embraced the freedoms afforded by Congress's actions and quickly amassed unprecedented political, economic, and social power. More than 1,500 Black officials moved into positions of public leadership,<sup>95</sup> with Black people leading the charge to elect the first Black members of Congress in 1870: U.S. Senator Hiram R. Revels of Mississippi<sup>96</sup> and U.S. House Representative Joseph H. Rainey of South Carolina.<sup>97</sup> Fourteen formerly enslaved Black men were also elected to Congress, more than 600 were elected to state legislatures, and hundreds of others held local offices throughout the South.<sup>98</sup>

Black legislators, in turn, built, funded, and staffed schools, establishing the first public education system serving Black students in the South.<sup>99</sup> South Carolina, for instance, became a seat of Black power with its majority Black state legislature and service by Black people in all other federal, state, and local level positions.<sup>100</sup> Some newly freed Black people significantly improved their economic positions in many places due to the accumulation of businesses and real estate.<sup>101</sup> And the presence and membership of the Black church thrived, driving social cohesion and development of Black communities.<sup>102</sup> Formerly enslaved people, W.E.B. Du Bois wrote, “stood for a brief moment in the sun; then moved back again toward slavery.”<sup>103</sup> But white Southerners—who had for generations

94. Act of Mar. 1, 1875, ch. 114, 18 Stat. 335.

95. Eric Foner, *South Carolina's Forgotten Black Political Revolution*, SLATE (Jan. 31, 2018, 11:08 AM), <https://bit.ly/3LjwFwr> [<https://perma.cc/YC92-5FZZ>] (adding “there were undoubtedly a few hundred others whom historians have not yet identified”).

96. REVELS, *Hiram Rhodes*, U.S. HOUSE OF REPRESENTATIVES: HIST., ART & ARCHIVES, <https://bit.ly/3stvQZh> [<https://perma.cc/2NDL-DUF7>] (last visited Mar. 8, 2022).

97. RAINEY, *Joseph Haynes*, U.S. HOUSE OF REPRESENTATIVES: HIST., ART & ARCHIVES, <https://bit.ly/3srRBbN> [<https://perma.cc/E5MW-U3MV>] (last visited Mar. 8, 2022).

98. History.com Editors, *Black Leaders During Reconstruction*, HIST., <https://bit.ly/3HGMMlk> [<https://perma.cc/L5TT-EYCS>] (Jan. 26, 2021).

99. David Tyack & Robert Lowe, *The Constitutional Moment: Reconstruction and Black Education in the South*, 94 AM. J. EDUC. 236, 236 (1986).

100. Foner, *supra* note 95.

101. See Loren Schwening, *Black-Owned Businesses in the South, 1790-1880*, 63 BUS. HIST. REV. 22, 49–50 (1989).

102. Richard I. McKinney, *The Black Church: Its Development and Present Impact*, 64 HARV. THEOL. REV. 452, 452–53 (1971).

103. W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA* 66 (Henry Louis Gates, Jr., ed., 2014) (1935).

believed themselves superior to the humans they had owned—set out to bring a bloody eclipse.

A. *White Southern “Redeemers” Terrorized the South, Disenfranchising, Raping, Lynching, and Massacring Newly Freed Black People*

The possibility of Black equality triggered a violent terror campaign aimed at thwarting Reconstruction efforts in the Southern United States. White Democrats set out to “redeem” the Confederacy by washing the land in blood. White terrorists burned Black schools and churches “with impunity.”<sup>104</sup> The vigilantes defiled, mutilated, and murdered Black bodies. Nearly 2,000 Black people were lynched in the decade following the Civil War.<sup>105</sup> Lynchings and individual incidents of violence escalated into large-scale attacks and community-wide massacres. Between 1872 and 1875, white Southerners committed at least 34 documented mass murders, destroying Black-owned property, killing hundreds of Black people, depriving Black men of due process,<sup>106</sup> and raping an untold number of Black women solely for being Black and within reach.<sup>107</sup> Two themes are clear: First, the violence was often perpetrated by state actors—police officers, teachers, state militia members, and politicians. Second, state courts were unable—or unwilling—to address the rampant and gruesome racial terrorism.

State law enforcement played an active role in Reconstruction violence from the very beginning: “Police brutality and murder flared up in the spring and summer of 1866 as Congress completed

104. RON CHERNOW, *GRANT* 571 (2017).

105. The horrifying gravity of this figure is compounded by the unknown number of additional victims of racial violence whose deaths remain undocumented. See EQUAL JUST. INITIATIVE, *supra* note 47, at 44.

106. For example, in August 1874, hundreds of armed white men abducted 16 Black men from a jail in Trenton, Tennessee after authorities accused them of shooting at 2 white men. *Id.* at 76. The violent lynch mob filled their bodies with bullets and drowned them, eventually killing each one. *Id.* Despite this depravity, a local newspaper published a letter from a white resident that justified the mob’s murderous actions as “self-defense,” insisting that the Black men were “incarnate devils” and had received the punishment they “richly deserve[d]” because, if allowed to live, the Black men “might [have] violate[d] the persons of a dozen ladies, burn[ed] a hundred houses and kill[ed] as many men.” *Id.*

107. Sexual violence perpetrated against Black people—in particular, Black women—served as a “critical element of the terrorization that took place across the South” in the backlash to Reconstruction, SHAWN LEIGH ALEXANDER, *RECONSTRUCTION VIOLENCE AND THE KU KLUX KLAN HEARINGS* 1, 11 (Shawn Leigh Alexander ed., 2015), and as “act[s] of physical violence designed to stifle Black women’s will to resist and to remind them of their servile status,” DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 30 (1997).



its work on the Fourteenth Amendment and the American people considered whether to ratify [it].”<sup>108</sup> Just one month after Congress passed the Civil Rights Act of 1866, white police officers and a vigilante mob violently “breath[ed] vengeance” against Black men, women, and children in Memphis, Tennessee for three days.<sup>109</sup> “The result was a killing spree led by the Memphis police force to exterminate Black people and destroy the community they had built.”<sup>110</sup> The concerted effort of state officials—specifically, the city’s infamously brutal and all-white police force as well as white firemen and white civilian sympathizers—gave the Memphis Massacre “the sanction of official authority.”<sup>111</sup> As a direct result, “it is no wonder that the mob, finding itself led by officers of the law, butchered miserably and without resistance every negro it could find.”<sup>112</sup>

A subsequent congressional investigation revealed the horrors of the Memphis Massacre: Forty six Black people were slaughtered and several Black women reported instances of rape<sup>113</sup> (perpetrators sexually assaulted some of these women in front of their children).<sup>114</sup> Over 100 structures—90 of which were the homes of Black people—were robbed or burned, including 4 churches and 12 schoolhouses.<sup>115</sup> Police lulled Black women and their children into a false sense of security, promising them that they would not be harmed if they stayed inside, only to set their home on fire and shoot at them as they attempted to flee.<sup>116</sup> Firefighters “made no effort whatever to extinguish the fires” except to prevent adjoining buildings from catching fire.<sup>117</sup> Authorities did not make a single arrest.<sup>118</sup>

A mere 12 weeks later, “a white mob, backed by police, many of them Confederate veterans,” committed the New Orleans Massacre after a group of Black men staged a demonstration in support

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108. David H. Gans, “*We Do Not Want to Be Hunted*”: *The Right to Be Secure and Our Constitutional Story of Race and Policing*, 11 COLUM. J. RACE & L. 239, 281 (2021).

109. MEMPHIS RIOTS AND MASSACRES, H.R. REP. NO. 39-101, at 13 (1866) [hereinafter MEMPHIS MASSACRE REPORT].

110. Gans, *supra* note 108, at 281.

111. *Id.* at 283.

112. *Id.*

113. MEMPHIS MASSACRE REPORT, *supra* note 109, at 36.

114. *Id.* at 14.

115. *Id.* at 36; *see also* Hon. Bernice Bouie Donald, *When the Rule of Law Breaks Down: Implications of the 1866 Memphis Massacre for the Passage of the Fourteenth Amendment*, 98 B.U. L. REV. 1607, 1638 (2018).

116. MEMPHIS MASSACRE REPORT, *supra* note 109, at 20.

117. *Id.* at 21, 25.

118. Altina L. Waller, *Community, Class and Race in the Memphis Riot of 1866*, 18 J. SOC. HIST. 233, 234 (1984).

of Black suffrage and repeal of discriminatory Black Codes.<sup>119</sup> White people responded with unhinged violence:

[They] stomped, kicked, and clubbed the black marchers mercilessly. Policemen smashed . . . windows and fired . . . indiscriminately until the floor grew slick with blood. When [B]lack[ ] [people] inside shook a white flag from a window, the white policemen ignored it and invaded the building. They emptied their revolvers on the convention delegates, who desperately sought to escape. Some leapt from windows and were shot dead when they landed. Those lying wounded on the ground were stabbed repeatedly, their skulls bashed in with brickbats. The sadism was so wanton that men who kneeled and prayed for mercy were killed instantly, while dead bodies were stabbed and mutilated.<sup>120</sup>

The police and mob, “in mutual and bloody emulation, continued the butchery in the hall and on the street, until nearly two hundred people were killed.”<sup>121</sup> A congressional report concluded that police and firemen acted in concert with citizens, many policemen taking measures to hide their identities.<sup>122</sup> Neither the mayor nor the chief of police attempted to control or check these public servants; “the slaughter was permitted until the end was gained.”<sup>123</sup> Aptly, a newspaper reported, “if anything could reveal, in light as clear as day, the demoniac spirit of the southern whites toward freedmen, . . . it is such [events] as this.”<sup>124</sup>

While local law enforcement often promoted such savage violence, state courts left the terrorism committed by various white militant groups seeking control in the South unchecked. Most notably, the Ku Klux Klan emerged, and the “lawlessness which, in 1865–1868, was still spasmodic and episodic, now became organized. . . . Using a technique of mass and midnight murder, the South began widely organized aggression upon the Negroes.”<sup>125</sup> Institutions such as churches and schools—“embodiments of [B]lack autonomy”—were frequently targeted by the groups, and Black educators were often attacked and victimized.<sup>126</sup> “In effect, the

119. CHERNOW, *supra* note 104, at 574.

120. *Id.* at 574–75.

121. 2 H.R. SELECT COMM. ON THE NEW ORLEANS RIOTS, 39TH CONG., REPORT OF THE SELECT COMMITTEE ON THE NEW ORLEANS RIOTS 11 (1867). *But see id.* at 12 (noting that NEW ORLEANS RIOTS, H.R. REP. NO. 39-16 (1867) also concludes that 34 Black people died during the New Orleans Riots).

122. *Id.* at 17.

123. *Id.*

124. *See* FONER, *supra* note 88, at 262.

125. DU BOIS, *supra* note 103, at 582.

126. *See* FONER, *supra* note 88, at 428.

Klan was a military force serving the interests of . . . all those who desired the restoration of white supremacy.”<sup>127</sup> Shrouded in secrecy and disguise, however, the Klan and other white supremacist factions operated with impunity; some members even maintained official state positions by day, cloaking themselves as members of these organizations at night.<sup>128</sup>

Local magistrates, judges, and grand juries refused or failed to act: “No southern sheriff would arrest the hooded night riders who terrorized [B]lack citizens[,] and no southern jury would convict them.”<sup>129</sup> In one instance in Democrat-controlled Alabama, a Black woman sought legal redress against a group of white people that had brutally beaten her; the court required her to raise \$16.45 to cover the cost of litigation before it would hear her complaint.<sup>130</sup> After she managed to pay the fees, however, the court released the perpetrators and ordered the woman to either drop the complaint or face time in jail.<sup>131</sup> Stories like these—in addition to the reality in which Black people experienced, including “exclusion from juries, severe punishment for trifling crimes, the continued apprenticeship of their children against parental wishes, and a general inability to obtain justice”<sup>132</sup>—inspired little confidence in the ability or willingness of the states to protect their rights.

The federal government had an obligation to respond to the increasingly violent anti-Black racial terror that continued to plague the former Confederacy. Southern lawlessness convinced President Ulysses S. Grant, the former Commanding General of the U.S. Army who had defeated the Confederacy in the Civil War, that only federal intervention could “protect the rights of the freedmen, who are looked upon with deep hatred by a large proportion of the people.”<sup>133</sup>

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127. *Id.* at 425.

128. 1 JOINT SELECT COMM. ON THE CONDITION OF AFFAIRS IN THE LATE INSURRECTIONARY STATES, 42D CONG., REPORT OF THE JOINT SELECT COMMITTEE TO INQUIRE INTO THE CONDITION OF THE LATE INSURRECTIONARY STATES 14–15 (1872) [hereinafter KU KLUX KLAN REPORT] (noting, as an example, that Benjamin F. Biggs, the chief officer (internally referred to as the “Grand Cyclops”) of a local Ku Klux Klan chapter, became a member of the South Carolina House of Representatives).

129. See CHERNOW, *supra* note 104, at xxi.

130. FONER, *supra* note 88, at 421.

131. *Id.*

132. *Id.*

133. CHERNOW, *supra* note 104, at 572.

### III. BLACK VOICES MATTER: THE KU KLUX KLAN HEARINGS AND THE KU KLUX KLAN ACT

Repudiating “rule by ‘the terrorism of the mob’” and “the policeman’s club,” “[t]he American people ratified the Fourteenth Amendment against the backdrop of horrific instances of police beatings and murder.”<sup>134</sup> The brutality of Southern law enforcement, coupled with Southern states’ refusal to prevent and rectify that violence, revealed a critical need for a federal avenue through which individuals and the government alike could enforce the guarantees of the Fourteenth Amendment.<sup>135</sup> For this purpose, Congress promulgated three Enforcement Acts between 1870 and 1871.

Congress promulgated the final Enforcement Act, known as the Ku Klux Klan Act of 1871, on April 20, 1871.<sup>136</sup> The congressional record regarding the law is “replete with references to the lawless conditions existing in the South” at the time.<sup>137</sup> Congressman John Beatty of Ohio, for instance, argued:

[C]ertain States have denied to persons within their jurisdiction the equal protection of the laws. The proof on this point is voluminous and unquestionable . . . [M]en were murdered, houses were burned, women were outraged, men were scourged, and officers of the law shot down; and the State made no successful effort to bring the guilty to punishment or afford protection or redress to the outraged and innocent. The State, from lack of power or inclination, practically denied the equal protection of the law to these persons.<sup>138</sup>

The Act’s necessity arose from the “lack of enforcement” of state law rather than any “quarrel with the state laws on the books.”<sup>139</sup> As a result, the “breadth of the remedy” set forth by Congress stood as a testament to the seriousness of the problem and the urgent need for reprieve.<sup>140</sup> Section 1 of the Act, which is now codified at 42 U.S.C. § 1983, “authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action against the wrongdoer in the Federal courts.”<sup>141</sup>

134. Gans, *supra* note 108, at 290–91.

135. See FONER, *supra* note 88, at 454–55.

136. Ku Klux Klan Act, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. §§ 1983, 1985, 1986).

137. *Monroe v. Pape*, 365 U.S. 167, 174 (1961).

138. *Id.* at 175.

139. *Id.* at 176.

140. *Id.* at 178.

141. *Id.* at 179–80.

Within days of prescribing the “strong medicine” of the Ku Klux Klan Act,<sup>142</sup> Congress initiated an investigation into the racial and political terrorism that plagued the South. Known as the Ku Klux Klan Hearings of 1871, the Joint Select Committee led the investigation to Inquire into the Conditions of Affairs in the Late Insurrectionary States.<sup>143</sup> Congress organized subcommittees to travel throughout the South—to South Carolina, Alabama, Florida, Georgia, Mississippi, North Carolina, and Tennessee—to obtain firsthand testimony about the rampant violence from victims, public officials, army officers, and even Klansmen.<sup>144</sup> The focal point of the testimony were Black women and men, who, having been subjected to unspeakable violence, reclaimed their power by telling stories of the terror they had witnessed and endured. The Hearings were a “national phenomenon,” open to the public and intensely followed by the press.<sup>145</sup> As one of the most extensive investigations in American history, the testimony gathered and subsequent congressional report span 13 volumes, exceeding 8,000 pages of the congressional record.<sup>146</sup> The Ku Klux Klan Hearings remain the U.S. government’s closest attempt to achieve a truth and reconciliation commission following the end of chattel slavery.<sup>147</sup>

Previous writings have chronicled the horrific reality that led to the enactment of Section 1983 as part of the Ku Klux Klan Act.<sup>148</sup> But the story is rarely told from the perspective of the Black people who lived through those events. To truly comprehend the horror that made Section 1983 necessary—and to understand why the statute remains critical today—it is vital to listen to these voices from the past.

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142. Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 485 (1982).

143. See generally 1 KU KLUX KLAN REPORT, *supra* note 129.

144. ALEXANDER, *supra* note 107, at 9–10. Notably, although white women were not officially permitted membership in the Ku Klux Klan, they indeed participated in Klan activities and “were as active in the shaping of racial violence as men, whether they acted as victims, accomplices, or perpetrators.” KATE CÔTÉ GILLIN, *SHRILL HURRAHS: WOMEN, GENDER, AND RACIAL VIOLENCE IN SOUTH CAROLINA, 1865-1900*, at 9 (2013).

145. ALEXANDER, *supra* note 107, at 10.

146. See generally 1 KU KLUX KLAN REPORT, *supra* note 128.

147. RECONSTRUCTION: AMERICA AFTER THE CIVIL WAR, PART 1, HOUR 2, *supra* note 49, at 20:43–21:15.

148. See, e.g., *Monroe v. Pape*, 365 U.S. 167, 174–80 (1961); *Jamison v. McClendon*, 476 F. Supp. 3d 386, 397–401 (S.D. Miss. 2020).

A. *The Ku Klux Klan Hearings Displayed the Depraved Violence Against Black People and Southern States' Failure to Intervene*

The Hearings began in May 1871 and concluded in December 1871 following in-person testimony in Washington, D.C. and throughout the former insurrectionist states.<sup>149</sup> The details differed, but the general stories were sickeningly similar: White terrorists—sometimes high-placed members of Southern society—violently raped, murdered, and assaulted Black people without reproach from state governments.<sup>150</sup> Stripped of their fundamental rights under state and federal law and often forced to flee their homes or seek refuge in swamps and marshes to avoid the lawlessness, Black people used the one power they still had—their voices.<sup>151</sup>

The stakes could not have been higher for those who testified. For instance, after Daniel Blue gave his testimony accusing Klan members in North Carolina of burning the home of another Black person, a mob of Klansmen retaliated by breaking into his home, murdering his pregnant wife, and killing all five of his children. One Klansman reported murdering the last child by “kicking its brains out with the heel of his boot.”<sup>152</sup>

Hundreds of Black women—“at great risk of reprisal”<sup>153</sup>—testified under oath about the violence, sexual assault, and humiliation<sup>154</sup> “designed to reinforce the idea that white men controlled the sexual dynamics of the South.”<sup>155</sup> Ellen Parton of Meridian, Mississippi testified that white men, all of whom tried to obscure their faces from her but only some of which used face coverings, broke into her residence; a Klansman referred to “Capt. Jinks” raped her at gunpoint.<sup>156</sup>

Hannah Tutson of Clay County, Florida testified that several Klan members broke into her home, ripping her baby from her arms and throwing him.<sup>157</sup> After dragging her outside, Klansmen

149. ALEXANDER, *supra* note 107, at 10.

150. *See generally* 1 KU KLUX KLAN REPORT, *supra* note 128.

151. *See id.*

152. EQUAL JUST. INITIATIVE, *supra* note 47, at 73.

153. ALEXANDER, *supra* note 107, at 11.

154. Allyson Hobbs, *Pay Tribute to the Black Women Who Spoke Out About the Sexual Violence*, N.Y. TIMES: ROOM FOR DEBATE, <https://nyti.ms/3LAF83k> [<https://perma.cc/3PQ9-4RGS>] (May 26, 2015, 6:47 AM).

155. ALEXANDER, *supra* note 107, at 12.

156. 11 KU KLUX KLAN REPORT, *supra* note 128, at 38–39.

157. 13 KU KLUX KLAN REPORT, *supra* note 128, at 59. This act of depraved Klan violence severely injured the child’s hip, temporarily limiting his ability to walk. *Id.* at 61.

forced Hannah to undress, tied her arms around a pine tree, and poured alcohol over her head and body: “I smelled it for three weeks . . . . [I]t made me sick.”<sup>158</sup> The terrorists took turns whipping her “from the crown of [her] head to the soles of [her] feet” until “blood oozed out through [her] frock all around [her] waist.”<sup>159</sup> One Klansman raped Hannah repeatedly, causing her significant injury: “[H]e pulled my womb down so that sometimes now I can hardly walk.”<sup>160</sup> The Klansmen also tore down Hannah’s home and beat her husband, Samuel, mercilessly.<sup>161</sup> Hannah stated that the Klan inflicted this torture on her and her family because they refused to relinquish their land.<sup>162</sup> Hannah and Samuel petitioned a court in Jacksonville to hold the violators accountable, even providing their violent attackers’ identities. While the Klansmen went unpunished,<sup>163</sup> the court jailed the Tutsons overnight for making a false statement solely because they sought judicial intervention twice because their first attempt proved unsuccessful.<sup>164</sup>

The Klan also targeted Black men in positions of political and social power. Richard Pousser of Jackson County, Florida testified that Klan members made “it their business to kill and murder,” stating he still had a bullet in his shoulder from when Klansmen shot him in front of his home while serving as County Constable.<sup>165</sup> Richard reported other abuses while in office, including incidents where Klansmen forced him to strip naked, threatened him with pistols, and struck him in the mouth for carrying a pistol as required by his job—“an officer cannot carry out his duty in Jackson.”<sup>166</sup> When asked why he had not sought prosecution against his known assailants, Richard replied: “There is no use in it; you cannot get justice there. . . . There is no use to try it[ ] because they will make it appear that a [Black] man is a liar, and he cannot get justice; in fact[,] a [Black] man is afraid to try for it.”<sup>167</sup> Speaking to the general sentiment among Black Republicans, he expected the federal government to protect the enjoyment of his rights, including pursuing prosecution against Klansmen and voting Democratically: “We cannot get protection unless we have assistance from the . . . United

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158. *Id.* at 59–60.

159. *Id.* at 60.

160. *Id.* at 60, 62.

161. *Id.* at 61.

162. *Id.* at 62.

163. *Id.* at 57.

164. *Id.* at 62–64.

165. *Id.* at 272–73.

166. 13 KU KLUX KLAN REPORT, *supra* note 128, at 273.

167. *Id.* at 273.

States Government” because white Republicans, while sympathetic to the plights of Black people, were unwilling to involve themselves, and white Democrats refused “to be controlled by the law.”<sup>168</sup>

Betsey Westbrook testified that six armed and disguised white men attacked and killed her husband, Robin, in front of her and their young child inside their Jefferson, Alabama home on July 18, 1871.<sup>169</sup> According to Betsey, the Klan had targeted her family because her husband “was a strong radical” and because she refused to break her labor contract to work for one of the Klansmen.<sup>170</sup> She recognized the voices of two of the Klansmen—one of which was a former justice of the peace in Jefferson.<sup>171</sup>

An estimated 65 disguised Klansmen removed Abram Colby, a formerly enslaved Black man, and Republican House Representative, from his home in Greene County, Georgia at gunpoint.<sup>172</sup> Abram testified that roughly 25 of the terrorists “took [him] to the woods and whipped [him for] three hours or more and left [him] . . . for dead.”<sup>173</sup> He knew 10 to 15 of the men who had nearly beat him to death (he estimated that they delivered over 5,000 punches and kicks). In detailing the character of his assailants, Abram stated: “Some of them are the first-class men in our town. One is a lawyer, one a doctor, and some are farmers; but among them[,] some are not worth the bread they eat.”<sup>174</sup> He explained that the Klan violently assaulted him because he had refused their \$5,000 bribe to give his legislative seat to a white Democrat.<sup>175</sup> Abram reasoned he “would have come before the court . . . last week, but [he] knew it was no use for [him] to try to get Ku-Klux condemned by Ku-Klux” and that one of the grand jury members appearing the preceding week was the father of one of the responsible Klansmen.<sup>176</sup> Finally, Abram discussed the persistent psychological trauma he experienced:

I have never got over it yet. They broke something inside of me, and the doctor has been attending to me for more than a year. Sometimes I cannot get up and down off my bed, and my left hand is not of much use to me . . . . I cannot do any work now,

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168. *Id.* at 273–75.

169. 9 KU KLUX KLAN REPORT, *supra* note 128, at 1242–43.

170. *Id.* at 1244–45.

171. *Id.* at 1244.

172. 7 KU KLUX KLAN REPORT, *supra* note 128, at 696.

173. *Id.* at 696.

174. *Id.* at 696–97.

175. *Id.* at 697.

176. *Id.*



though I always made my living before in the barber-shop, hauling wood . . . .<sup>177</sup>

Reverend Elias Hill of York County, South Carolina, a physically disabled Baptist minister, testified that six disguised Klansmen savagely beat him with a horsewhip, threatening to kill him unless he stopped preaching, publicly renounced Republicanism through the newspaper, and abstained from voting.<sup>178</sup> Reverend Hill stated he had heard the Klansmen may have also whipped one woman, raped another woman, and burned down a man's house the same night of his attack.<sup>179</sup> He also disclosed that his "breast is now sore from their blows, and there is one place on [his] head where [he can] feel the effect of it still."<sup>180</sup>

Klansmen harassed and threatened Black people incessantly, ultimately forcing many of their victims to flee their homes to seek refuge elsewhere.<sup>181</sup> Henry Reed of Marianna, Florida testified that he saw a Klansman sitting in the back of his church, disguised in "old black gowns . . . with old sunbonnets like women."<sup>182</sup> The Klan would target churchgoers by standing outside behind a tree at night "and shoot [their] brains out."<sup>183</sup> He also divulged that the Klan used the woods near his home to meet and kill people, including a family with a young child, roughly three weeks before Henry fled his home to seek refuge in Jacksonville after Klansmen violently harassed and intimidated his family—his son narrowly escaped their bullets.<sup>184</sup> "It was as terrible a place at that time as ever there was in the world," Henry stated, going on to reiterate law enforcement's feigned interest in arresting those responsible.<sup>185</sup> Finally, Henry acknowledged the political danger both Black and white Republicans faced, stating white people "were almost afraid to own it, for fear they could not stay there."<sup>186</sup>

### B. Congressional Conclusions

Armed with the testimony of victims and witnesses of racially and politically motivated terrorism, Congress concluded:

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177. *Id.*

178. 5 KU KLUX KLAN REPORT, *supra* note 128, at 1406–08.

179. *Id.* at 1409.

180. *Id.*

181. 13 KU KLUX KLAN REPORT, *supra* note 128, at 95.

182. *Id.* at 110.

183. *Id.*

184. *Id.*

185. *Id.* at 110–11.

186. *Id.* at 111.

The proceedings and debates in Congress show[ed] that, whatever other causes were assigned for disorders in the late insurrectionary States, the execution of the laws and the security of life and property were alleged to be most seriously threatened by the existence and acts of organized bands of armed and disguised men, known as [the] Ku-Klux [Klan].<sup>187</sup>

White supremacists organized secret orders under various names, including the White Caps,<sup>188</sup> White League, Pale Faces, and Knights of White Camelia.<sup>189</sup> These armed vigilante factions operated essentially identical to the Ku Klux Klan in that each sought to preserve white supremacy under the guise of “self-protection”<sup>190</sup> and “defend[ing] their communities”<sup>191</sup> in a time of overwhelming social progress and lawlessness.<sup>192</sup>

By September 1867, approximately 550,000 Ku Klux Klan members policed the Southern United States.<sup>193</sup> Tennessee was home to 40,000 of these Klansmen.<sup>194</sup> The congressional report stated: “A number of the counties in [Tennessee were] entirely at the mercy of [the Klan], and roving bands of nightly marauders bid defiance to the civil authorities, and threaten[ed] to drive out every man, white or black, who [did] not submit to their arbitrary dictation.”<sup>195</sup> By 1868, the organization maintained a presence in all of the former states of the Confederacy and Kentucky.<sup>196</sup>

187. 1 KU KLUX KLAN REPORT, *supra* note 128, at 2.

188. Mobs of poor, white farmers who called themselves “whitecaps” formed similar terrorist campaigns across the United States. These criminals targeted Black people because they viewed them as economic competition, threatening murder if met with resistance to leave their land or employment. *See* EQUAL JUST. INITIATIVE, *supra* note 47, at 26. Albeit less organized and notorious, one newspaper in Missouri reported that the whitecaps had “become almost as formidable and mysterious as the famous Ku-Klux [Klan].” *Id.* (citation omitted).

189. *See id.* at 25–29.

190. Nathan Bedford Forrest made this statement. 1 KU KLUX KLAN REPORT, *supra* note 128, at 7. Forrest, who served as a general for the Confederacy during the Civil War, later became the Klan’s first leader or “Grand Wizard.” History.com Editors, *Nathan Bedford Forrest*, HIST., <https://bit.ly/3HhKOHl> [<https://perma.cc/7KLZ-Y5HZ>] (July 15, 2019).

191. LINDA GORDON, *THE SECOND COMING OF THE KKK: THE KU KLUX KLAN OF THE 1920S AND THE AMERICAN POLITICAL TRADITION* 103 (2017) (citation omitted).

192. 1 KU KLUX KLAN REPORT, *supra* note 128, at 7 (statement of General N.B. Forrest).

193. *Id.* at 8. Horrifyingly, nearly all the white men in York County, South Carolina had joined the Ku Klux Klan by 1871. *See* FONER, *supra* note 88, at 431.

194. 1 KU KLUX KLAN REPORT, *supra* note 128, at 8.

195. *Id.* at 18.

196. *Id.* at 21.

In North and South Carolina, the Ku Klux Klan committed 197 murders and 548 aggravated assaults between 1866 and mid-1867 alone.<sup>197</sup> One report attributed most of the daily murders that occurred over six consecutive months to Klan violence; very few faced punishment for their crimes.<sup>198</sup> In many instances, however, “redress [could not] be obtained against those who commit[ted] crimes in disguise and at night” because identification was “difficult, almost impossible.”<sup>199</sup> “[T]he terror inspired by their acts, as well as the public sentiment in their favor in many localities, paralyze[d] the arm of civil power,” making victims and witnesses afraid of disclosing the identities of perpetrators even when known.<sup>200</sup> Ultimately, in counties with large Black populations, “there [was] a state of public opinion [that] completely over[rode] the law, which refuse[d] to enforce it with respect to a certain class of offenders and a certain description of offenses.”<sup>201</sup> This lapse in protection left Black people—particularly those who voted Republican—overwhelmingly unprotected and vulnerable to violence in all aspects of their lives.

Instances of palliating and justifying the Ku Klux Klan’s actions pervaded every level of state governance and communities’ willingness to punish the organization’s members; public servants in the South were careless in carrying out the duties owed to all Americans equally. Additionally, even when local courts were unsympathetic to the Redemption cause, Klan members paralyzed the legal system by instilling the fear of retribution at each level of participation; police officers would not arrest them, victims and witnesses refused to cooperate or testify, juries refused to convict, and judges would not hold fair trials out of fear of retaliation.<sup>202</sup> And when

197. See DU BOIS, *supra* note 103, at 604.

198. 1 KU KLUX KLAN REPORT, *supra* note 128, at 18. Lewis E. Parsons, the former governor of Alabama, testified that, of the “numerous” murders perpetrated during this era of racial terrorism, he had “never known an instance in which a man ha[d] been convicted of killing a [Black person].” *Id.* at 4.

199. *Id.* at 2.

200. *Id.* at 3.

201. *Id.* at 3–4.

202. According to Major Merrill, for example:

[T]he reason why [the Klan] persisted in such acts [of violence and terror], was the certainty they felt that no person would dare to testify against them; and, in this connection, he exonerated the civil officers of what would appear to be dereliction in the discharge of their duties, by not arresting and bringing to trial the guilty persons. For the reason that victims [were] afraid to make complaints, no warrants [were] issued, and consequently, the sheriff or other proper officer [wa]s powerless to make arrests.

1 KU KLUX KLAN REPORT, *supra* note 128, at 42–43.

such figures “had [ ] the courage to do their duty,” their efforts were often thwarted by citizens—serving as juries and witnesses—who were equally subject to the influences of membership, sympathy, and fear.<sup>203</sup> Ultimately, the Klan and its network of sympathizers were simply too powerful for the states to govern and temper effectively.

#### IV. BLACK LIVES MATTER: MODERN DAY IMPLICATIONS OF SECTION 1983 AND THE CONTINUATION OF WHITE SUPREMACY

The Hearings and congressional conclusions provide robust evidence of the events leading up to the enactment of the Enforcement Acts. The extraordinary instances of extremist violence—as detailed by the firsthand accounts of the witnesses who testified during the Ku Klux Klan Hearings—preceded Congress’s decision to take extraordinary action, including the enactment of Section 1983. For the first time in American history, Congress sought to “interpose the federal courts between the States and the people, as the guardians of the people’s federal rights . . . .”<sup>204</sup> The Acts “established a new legal order that contemplated direct federal intervention in what had been considered to be state affairs, a system in which federal courts were to enforce newly created federal constitutional rights against state officials through civil remedies and criminal sanctions.”<sup>205</sup> “Protection to the individual, the rights of man,” Congressman John Packard lamented, “is the central sun of our system . . . . It is a monstrous assumption that this Government has not ample constitutional power to protect its own citizens because they happen to dwell inside the lines of a State that cannot or will not protect them . . . .”<sup>206</sup>

Tellingly, while the Klan was “one main scourge of the evil” spreading throughout the South, Congress, through Section 1983, did not *only* create a “remedy against it or its members but [also] against those who representing a State in some capacity were unable or unwilling to enforce a state law.”<sup>207</sup> This legislative decision was undoubtedly informed by evidence linking members of the Klan to state law enforcement or when Klansmen acted without

203. *Id.* at 20.

204. *Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

205. Katherine A. Macfarlane, *Accelerated Civil Rights Settlements in the Shadow of Section 1983*, 2018 UTAH L. REV. 639, 660.

206. CONG. GLOBE, 42d Cong., 1st Sess. 281 (1871) (statement of Hon. J. Packard of Indiana).

207. *Monroe v. Pape*, 365 U.S. 167, 175–76 (1961).

fear of state prosecution. It also proved remarkably prescient. The federal government's aggressive intervention during Reconstruction forced the first iteration of the Ku Klux Klan to mostly disband.<sup>208</sup> But by the early 20th century, the ever-lurking evil of white supremacy would spur a "second coming" of the Klan.<sup>209</sup>

This "second Klan," constrained by the need to "maintain[ ] a law-abiding legitimacy," would "employ nonlethal and occasionally lethal terrorism, in which [state] police forces were active participants."<sup>210</sup> The second Klan continued acts of violent vigilantism but "legaliz[ed] it through official cooperation with lawmen,"<sup>211</sup> and spread far beyond the South. In Portland, Oregon, for instance, the "Klan announced that 150 members of the police department had become 'citizens' of the KKK."<sup>212</sup> The city's mayor even formed a 100-man vigilante force to support police efforts, its members selected in coordination with the Klan.<sup>213</sup> In Anaheim, California—with "a city government controlled by the Klan"—police officers were permitted to "patrol in Klan robes and symbols."<sup>214</sup> In Dayton, Ohio, "the Catholic university president did not bother to call the police because he knew they would not act against the Klan."<sup>215</sup> And finally, in Madison, Wisconsin, "a former police chief recalled that pretty near all of his men were [Klan] members."<sup>216</sup>

By 2006, the Federal Bureau of Investigation, noting the history of white supremacist groups' "strategic efforts to infiltrate and recruit from law enforcement communities," emphasized the threat of white supremacist cells permeating current law enforcement agencies.<sup>217</sup> Congress, while addressing the crude form of white supremacist violence typified by the first Klan, understood the "remarkable variety and persistence" of the "vile infection" of white supremacy.<sup>218</sup> It intended Section 1983 "to provide a federal remedy where the state remedy, though adequate in theory, was not

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208. Jonathan M. Bryant, *Ku Klux Klan in the Reconstruction Era*, NEW GA. ENCYC., <https://bit.ly/3vgy7Kv> [<https://perma.cc/2ZCY-6CL3>] (Aug. 12, 2020).

209. See generally, GORDON, *supra* note 191.

210. *Id.* at 26.

211. *Id.* at 102 (citation omitted).

212. *Id.* at 103 (2017).

213. *Id.* ("[T]hey [had] guns, badges, and the power to make arrests, but their names would remain secret . . .") (citation omitted).

214. *Id.*

215. *Id.*

216. *Id.*

217. FBI COUNTERTERRORISM DIV., WHITE SUPREMACIST INFILTRATION OF LAW ENFORCEMENT 3 (2006), <https://bit.ly/3oCKLze> [<https://perma.cc/98UR-RNYT>].

218. *Shelby Cnty. v. Holder*, 570 U.S. 529, 560 (2013) (Ginsburg, J., dissenting).

available in practice.”<sup>219</sup> Moreover, Congress created no exceptions to the use of this remedy in federal court: Section 1983 makes no mention of immunity, which is unsurprising considering the then-controlling common law did not recognize qualified immunity.<sup>220</sup>

#### A. *Limitations on Black Invocation of Section 1983*

It would take Black people nearly a century to invoke Section 1983 with any regularity. As Redemption spread after the collapse of Reconstruction, testifying against white people in court—much less filing suit—was tantamount to suicide for Black people. The Carrollton Courthouse Massacre provides a harrowing illustration.<sup>221</sup>

In early 1886, brothers Ed and Charley Brown, both of whom were Black and Native American, filed a lawsuit against seven white men for attempted murder.<sup>222</sup> White Mississippians became incensed by the brothers’ audacity to wield the law in their favor against white people.<sup>223</sup> So when the local Black community turned out in droves to support the brothers, between 50 and 100 armed white men fired indiscriminately into the courtroom gallery.<sup>224</sup> Some Black people tried to seek safety by crawling through windows; the terrorists shot them to death.<sup>225</sup> Twenty three Black people died as a result of the massacre, either during the gunfire or on account of their significant injuries, including both of the Brown brothers.<sup>226</sup> Despite national news coverage, the government never prosecuted *any* of those responsible for the heinous anti-Black violence.<sup>227</sup>

In 1961, Section 1983—which had laid virtually untouched since its enactment in 1871—resurfaced when the Supreme Court decided *Monroe v. Pape*.<sup>228</sup> In *Monroe*, a Black family sued under Section 1983, alleging that Chicago police officers violated the family’s constitutional rights by breaking into their home, making them

219. *Monroe v. Pape*, 365 U.S. 167, 174 (1961).

220. See William Baude, *Is Quasi-Judicial Immunity Qualified Immunity?*, 73 STAN. L. REV. (forthcoming 2021).

221. See, e.g., *Carrollton Courthouse Massacre*, MISS. CIV. RTS. PROJECT, <https://bit.ly/3HPc1lx> [<https://perma.cc/T4M7-WBSZ>] (last visited Mar. 17, 2022).

222. *Id.*

223. LaKeadra Coffey, *Citizen Asks for Confederate Flag to be Removed*, WINONA TIMES (Apr. 29, 2021, 11:43 AM), <https://bit.ly/34xMjUu> [<https://perma.cc/38EK-Z5EW>].

224. *Id.*

225. *Id.*

226. *Id.*; see also *Carrollton Courthouse Massacre*, *supra* note 221.

227. Coffey, *supra* note 223.

228. *Monroe v. Pape*, 365 U.S. 167 (1961).

stand naked in the living room while they ransacked the apartment, and interrogating the father without access to a lawyer about a recent murder in which he played no part.<sup>229</sup> Recognizing the circumstances of this case as reminiscent of the conduct Congress sought to curb in enacting Section 1983, the Court explained that the very purpose of the statute was “to give a remedy to parties deprived of constitutional rights, privileges, and immunities by an official’s abuse of his position.”<sup>230</sup>

Since *Monroe*, however, “the Court has been hostile to [Section 1983], continuously narrowing it and imposing restrictions on civil rights plaintiffs” such as qualified immunity.<sup>231</sup> In *Pierson v. Ray*<sup>232</sup>—6 years after *Monroe*—police officers arrested a group of 15 Black and white clergymen who attempted to use a segregated interstate bus terminal in Jackson, Mississippi.<sup>233</sup> The clergymen were on a “prayer pilgrimage,” the purpose of which was to “promote racial equality and integration.”<sup>234</sup> Although the group “entered the waiting room peacefully and engaged in no boisterous or objectionable conduct,” police officers arrested them for breach of peace under a Mississippi statute later found to be unconstitutional.<sup>235</sup> The men sued the arresting officers under Section 1983 for deprivations of their constitutional rights.<sup>236</sup>

Writing for the Court, Chief Justice Earl Warren held that the officers were entitled to qualified immunity from liability, reasoning that “[a] policeman’s lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does.”<sup>237</sup> Instead of focusing its analysis on the officers’ violation of the rights of the individuals involved in this case as directed by the statute, the Court narrowed in on the potential effect the law would have on police officers.<sup>238</sup> And in doing so, the Warren Court

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229. *See id.*

230. *Id.* at 172.

231. Lynn Adelman, *The Erosion of Civil Rights and What To Do About It*, 2018 WIS. L. REV. 1, 4.

232. *Pierson v. Ray*, 386 U.S. 547 (1967).

233. *Id.* at 549.

234. *Id.* at 552.

235. *Id.* at 553.

236. *Id.* at 548.

237. *Id.* at 555.

238. Whatever effect about which the Court may have been worried was certainly not the misconduct of the police department. A month after the Court’s decision in *Pierson*, police officers in Mississippi killed a Black man named Benjamin Brown when they fired into a group of protestors. *See* Radley Balko, *The Ugly Origins of Qualified Immunity*, WASH. POST (Oct. 26, 2021, 8:00 AM), <https://wapo.st/3LqZ6IZ> [<https://perma.cc/4XAM-P2JK>].

planted the seeds for a broad form of immunity that strictly limits individuals' ability to seek redress for law enforcement's violation of their constitutional rights.

Fifteen years after *Pierson*, the Court solidified the foundations of present-day qualified immunity doctrine and expanded it to include policy interests notably absent from the statute's text. In *Harlow v. Fitzgerald*,<sup>239</sup> the Court held that qualified immunity shields government officials from liability so long as their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."<sup>240</sup> As in *Pierson*, the Court once again highlighted the need to protect government officials from financial liability as a justification for the doctrine. It added, however, that qualified immunity was necessary to protect against such "social costs" as the "diversion of official energy from pressing public issues[,] the deterrence of able citizens from acceptance of public office [and,] the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'"<sup>241</sup> And, like the Court's evisceration of other protections of the Reconstruction Amendments and enforcing legislation,<sup>242</sup> the limitations on Section 1983 were "the product of a conscious choice to exempt constitutional violations from civil liability because of a concern over other lesser values."<sup>243</sup>

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239. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

240. *Id.* at 818.

241. *Id.* at 814 (citation omitted).

242. The Court began the assault on Reconstruction protections by significantly narrowing the reach of the privileges and immunities clause of the Fourteenth Amendment. *See Slaughter-House Cases*, 83 U.S. 36, 37–38 (1872). This decision rendered "the broad application of that amendment that was necessary to sustain the civil rights program of Congress . . . impossible." Gressman, *supra* note 86, at 1337. The Court subsequently neutered the federal government's ability to prosecute racial crimes against Black Americans, *see United States v. Cruikshank*, 92 U.S. 542, 542–44 (1875), and narrowly construed the Fifteenth Amendment as prohibiting only explicit deprivations of the right to vote because of race but not conferring the right of suffrage, *United States v. Reese*, 92 U.S. 214, 217–18 (1875). The Court continued to facilitate Redemption by declaring unconstitutional the criminal conspiracy section of the Ku Klux Klan Act of 1871, *United States v. Harris*, 106 U.S. 629, 640–41 (1883), as well as the Civil Rights Act of 1875, which sought to eliminate racial discrimination in public accommodations, *Civil Rights Cases*, 109 U.S. 3, 25–26 (1883). The Court's denouement in its role of assisting the dismantling of Reconstruction efforts came in *Plessy v. Ferguson*, where it affirmed the constitutionality of the "separate but equal" doctrine that would reign supreme for the next 60 years. *Plessy v. Ferguson*, 163 U.S. 537, 550–52 (1896).

243. Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1246 (2015).



The Court has expanded qualified immunity by “engag[ing] in a pattern of covertly broadening the defense, describing it in increasingly generous terms and inexplicably adding qualifiers to precedent that then take on a life of their own.”<sup>244</sup> Just a year after *Harlow*, the Court further broadened the doctrine in *Malley v. Briggs*<sup>245</sup> to include “all but the plainly incompetent or those who knowingly violate the law.”<sup>246</sup> And later, the Court would clarify that, to be clearly established, “the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right”<sup>247</sup> and that “existing precedent must have placed the statutory or constitutional question beyond debate.”<sup>248</sup>

Through the doctrine of qualified immunity, the Court has essentially “close[d] the courthouse doors to individuals seeking damages to redress constitutional violations by the police, making the Framers’ preferred remedy presumptively unavailable.”<sup>249</sup> In so doing, “the Court [has] simply turned a blind eye to Congress’s decision to create a federal cause of action to enable individuals victimized by state officers to obtain redress in the federal courts.”<sup>250</sup>

In the last 10 years alone, the U.S. Supreme Court’s expansive use of qualified immunity has permitted lower courts to deny liability for egregious acts of police misconduct and sheer depravity, including officers who: set a suicidal man on fire after shooting him with a taser while he was doused in gasoline,<sup>251</sup> shot a child while firing his gun at a family pet in the child’s vicinity,<sup>252</sup> shot an unarmed man in the back, paralyzing him.<sup>253</sup> In yet another disturbing example, qualified immunity shielded from liability a jail guard who *watched* a suicidal inmate strangle himself to death with a telephone cord—the jail officials had placed the man in the cell with the cord knowing he was mentally unstable and expressing self-harm ideations.<sup>254</sup> The guard did not render aid, and he did not summon

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244. Kit Kinports, *The Supreme Court’s Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. 62, 64 (2016).

245. *Malley v. Briggs*, 475 U.S. 335 (1986).

246. *Id.* at 337.

247. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

248. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).

249. Gans, *supra* note 108, at 326.

250. *Id.* at 329.

251. *Ramirez v. Guadarrama*, 844 F. App’x 710, 711–12 (5th Cir. 2021).

252. *Corbitt v. Vickers*, 929 F.3d 1304, 1307–08 (11th Cir. 2019).

253. *Salazar-Limon v. City of Houston*, 826 F.3d 272, 274 (5th Cir. 2016), *as revised* (June 16, 2016).

254. *Cope v. Cogdill*, 3 F.4th 198, 202–03 (5th Cir. 2021).

emergency assistance.<sup>255</sup> Still, neither he nor any jail official faced any consequence for the man's death.<sup>256</sup> This inconceivable and otherwise criminal conduct is the depravity that the Supreme Court has chosen to protect—the very sort of depravity by state actors that Congress sought to guard against through Section 1983.

The Court's disfiguration of Section 1983 has transformed qualified immunity into absolute immunity, and "it also sends an alarming signal to law enforcement officers and the public. It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished."<sup>257</sup>

## CONCLUSION

The voices of the brave Black women and men who risked everything to place their stories before Congress in 1871 make the evil of qualified immunity clear. Through its constant stream of qualified immunity decisions, the Court tells state actors—who, as in 1871, are almost certain to avoid criminal prosecution and are highly unlikely to face civil liability in state courts—that they are free to violate federal rights with impunity so long as they find novel ways to do so. And the Court tells citizens who suffer these violations that they have no recourse in federal court. Congress rejected that conclusion 150 years ago; it is shameful that the Supreme Court has erased Congress's judgment with increasingly deadly consequences.

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255. *Id.*

256. *Id.* at 212.

257. *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (SOTOMAYOR, J., dissenting).

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