

WHITE PRIVILEGE: WHAT IT IS, WHAT IT IS NOT, AND HOW  
IT SHAPES AMERICAN DISCUSSIONS OF POLICING AND  
HISTORICAL ICONOGRAPHY

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Abstract

What is White privilege? In this Essay, I explore the privileges that White men take for granted in dealing with the police, even as I acknowledge that the most privileged Americans are still potentially subject to arbitrary and unaccountable police abuses. I also examine the debate over changing the names of places in the United States, as well as taking down the statues of the people who have long been treated as heroes, including the founding generation. The common thread between these two topics is that privilege allows White people not even to notice when they receive favorable treatment. They do not feel privileged when dealing with the police, because their baseline assumption is that they will not be targeted because of their race. They do not feel privileged when thinking about the heroes of American history, because history has always been written largely as the story of White men; so if anyone else tries to think about history in a different way, the proposed changes challenge White people's long-held presumptions. It is those very presumptions that are the evidence of privilege.

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## INTRODUCTION

Early in his career, the comedian Eddie Murphy was a cast member on “Saturday Night Live.” In one classic and hilarious 1984 sketch, “White Like Me,”<sup>1</sup> filmed in the form of a documentary, Murphy showed himself “going undercover” as a White person.<sup>2</sup> After working with a hair and make-up artist, changing the way he walked and talked, and studying stereotypically White “culture” (such as Hallmark cards), Murphy went out to experience being White in America.<sup>3</sup> At one point, for example, he applied for a loan at a bank, and he was amazed when the loan officer said that none of the purported rules for issuing loans apply to White people.<sup>4</sup> The officer then happily pulled out stacks of cash and gave them to Murphy, saying, “Just take what you want, Mr. White. Pay us back any time—or don’t, we don’t care!”<sup>5</sup>

The power of Murphy’s brilliant mock documentary derived from its subversive humor in suggesting not only that White people treat each other much differently than they treat Black people—which is clearly true—but that the privileges of being white are so extensive that White people give each other things without a second thought—which is not true. The absurdity of the privileges that Murphy imagined added to the impact of his keen observation that even seemingly non-racial social and commercial interactions are infected by racial bias.

It was only years later that the term “White privilege” began to be used widely, communicating the idea that White people are afforded advantages that people of color, and particularly Black people, are routinely denied.<sup>6</sup> The backlash from some White Americans has been revealing, however, because a common retort has been, in essence, “I don’t notice any privileges being given to *me*.”<sup>7</sup> Especially for those who are economically struggling and of relatively low social status, the idea that they are “privileged” apparently sounds like a cruel joke.<sup>8</sup>

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1. Saturday Night Live, *White Like Me – SNL*, YOUTUBE (Aug. 29, 2013), [https://www.youtube.com/watch?v=l\\_LeJfn\\_qW0](https://www.youtube.com/watch?v=l_LeJfn_qW0) [https://perma.cc/FN56-U26Y].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. Joshua Rothman, *The Origins of “Privilege,”* NEW YORKER (May 12, 2014), <https://www.newyorker.com/books/page-turner/the-origins-of-privilege> [https://perma.cc/W7RH-8EAM].

7. Cory Collins, *What Is White Privilege, Really?*, TEACHING TOLERANCE (2018), <https://www.tolerance.org/magazine/fall-2018/what-is-white-privilege-really> [https://perma.cc/2JY6-C7PG] (“The word *white* creates discomfort among those who are not used to being defined or described by their race. . . . [T]he word *privilege*, especially for poor and rural white people, sounds like a word that doesn’t belong to them—like a word that suggests they have never struggled.”).

8. *Id.*

The reason for this misunderstanding, I suggest, is that a large aspect of White privilege is passive rather than active. Unlike Murphy's fictional Mr. White, most White people do not live in a world where advantages are literally handed to them with a smile. It is still possible to be miserable as a White person, as suicide rates dramatically attest.<sup>9</sup> If "privilege" is understood as being given things that other people do not receive,<sup>10</sup> then it is perhaps understandable that most White people do not think that they are being handed the good life on a silver platter.

What that interpretation misses, of course, is that White people's privileges consist in large part in *not* experiencing negative things—negative things that non-White people endure regularly but that are invisible to those who are not targeted for abuse.<sup>11</sup> For example, White parents do not have to have "the talk" with their sons to tell them how to avoid antagonizing police, nor do White people need to think about where they can travel in the country in a way that avoids bigoted confrontations.<sup>12</sup> The absence of bad experiences is easy not to notice, especially for those who have never talked about these issues with someone who is not White.

In this Essay, I discuss two distinct ways in which White privilege operates. In Part I, I discuss how very fortunate White Americans are to be able to expect that the police are not likely to harm them.<sup>13</sup> (I set aside the separate issue of gender-based mistreatment by police that too often affects all women, not because it is less important but because that issue deserves its own deep and lengthy discussion.) The reality is that White people are privileged by living without fear of racially motivated police misconduct.<sup>14</sup>

In Part II, I move to the question of whether statues of historical figures should be removed from public areas, and I extend the inquiry into the question of changing the names of places (cities, streets, and so on) because of the misdeeds of the people who are thus honored.<sup>15</sup> This is a form of White privilege in the sense that far too many historical figures—including but certainly going beyond the key figures of the

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9. *Suicide Statistics*, AM. FOUND. FOR SUICIDE PREVENTION (Mar. 1, 2020), <https://afsp.org/suicide-statistics/> [<https://perma.cc/2LDB-UUDK>].

10. See Collins, *supra* note 7.

11. *Id.*

12. John Blake, *George Floyd. Ahmaud Arbery. Breonna Taylor. What can black parents possibly tell their kids now about staying safe?*, CNN (May 20, 2020, 12:39 PM), <https://www.cnn.com/2020/05/29/us/black-parents-children-safety-talk-blake/index.html> [<https://perma.cc/FCS2-QCEV>].

13. See *infra* Part I (discussion on police interactions).

14. *Police shootings database 2015-2020*, WASH. POST (Sept. 23, 2020), [https://www.washingtonpost.com/graphics/investigations/police-shootings-database/?itid=lk\\_in\\_line\\_manual\\_10](https://www.washingtonpost.com/graphics/investigations/police-shootings-database/?itid=lk_in_line_manual_10) [<https://perma.cc/6MR9-RKTF>].

15. See *infra* Part II (discussion on the removal of statues and changing place names).

Confederacy—are treated as heroes in spite of their having owned slaves and defended slavery, engaged in White supremacist oppression against racial minorities, and other shameful actions.<sup>16</sup> To defend those people by saying, “Well, they did good things, too,” is to privilege White historical figures by deliberately ignoring their often-horrific acts, treating them as “complicated” people who should not be judged by current moral standards.

Those excuses are based on a sense that White Americans can simply decide what is important to them, and if “other people” are offended by statues or city names that glorify White violence and domination, then those other people need to simply get over it. Never being confronted with public displays honoring those who have targeted White people with violence and subjugation, the privileged never stop to think that they are benefiting from entering a public square that—without anyone ever needing to say it out loud—is carefully curated not to offend White people.

Together, these two categories of privilege offer a window into why many White people seem so resistant to reconsidering their assumptions about the world. The thinking seems to be that, if White people do not feel targeted by police and feel no pain from existing statues and place names, why should other people be so sensitive? Surely, those other people must be imagining things.

But of course, that is not true. My aim in this Essay is to offer some insights into how White privilege operates, offering my own experiences and understandings as I have become more aware of the passive privileges that I have long taken for granted.

I hasten to add that maybe, as the actor Kevin Bacon recently put it, “it’s a good time for old white guys like me to just shut up and listen. Speechless is probably a good choice.”<sup>17</sup> Given that I have been offered the honor and privilege of publishing these thoughts in the *Journal of Law & Public Policy*’s issue focusing on Black Lives Matter, however, I feel that I can at least try to use this opportunity to say something that might be helpful in untangling what White privilege is, what it is not, and how it operates at the pre-conscious level.

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16. Elliot C. McLaughlin, *Racist statues in America: The horrific acts behind the names*, CNN (June 17, 2020, 10:42 AM), <https://www.cnn.com/2020/06/16/us/racist-statues-controversial-monuments-in-america-robert-lee-columbus/index.html> [https://perma.cc/QX5J-UGN2].

17. Isobel Lewis, ‘Old white guys like me need to shut up and listen’: Kevin Bacon shows support for Black Lives Matter movement, INDEPENDENT (June 15, 2020, 9:59 AM), <https://www.independent.co.uk/arts-entertainment/films/news/kevin-bacon-tonight-show-jimmy-fallon-black-lives-matter-a9566046.html> [https://perma.cc/7L4N-DGLG].

## I. WHITE PRIVILEGE

### A. *Everyone Should Have My Privilege (at Least)*<sup>18</sup>

It has become difficult even to begin writing about newsworthy issues, because there is so much going wrong in the world. When the issue of systemic racism came to dominate our lives in the Summer of 2020, however, it became even more of a challenge to try to engage in a positive way. As a white Anglo-Saxon Protestant man with a titled academic position, I have to ask myself what this aging liberal can say that does not run the danger of being presumptuous or possibly tone-deaf.

It then occurred to me that I can come at this by acknowledging my privilege. I am committed to engaging with others and to trying to understand and help (if I can) those who have reason to fear the police, but maybe it is also useful at least to try to describe what it is like *not* to fear the police.

That is, I can attempt to explain how the privileges of race, class, and gender play out in ways that are often all too easy to take for granted. Stopping to think about what I have almost never had to think about is enlightening, not only in terms of my own self-awareness but as a means of asking what a much better world would look like.

The short version is simple: The privileges that I enjoy are great. I am fortunate. Everyone should also be able to enjoy the same privileges and take them for granted. Is that possible?

In 1971, the Supreme Court handed down *Palmer v. Thompson*,<sup>19</sup> the primary holding of which is that a city may choose not to operate desegregated facilities if its decision appears neutral on its face.<sup>20</sup> The Jackson, Mississippi city council had decided to close public swimming pools rather than integrate them,<sup>21</sup> which the Court by a 5-4 vote held did not violate equal protection.<sup>22</sup>

The *Palmer* case has come to embody the concept of “leveling down or leveling up.”<sup>23</sup> That is, in order to make two unequal things equal, we can move the higher one down to the level of the lower one, or we can move the lower one up to the level of the higher one.<sup>24</sup> “No one gets to swim in city pools” is equality, and so is “Everyone gets to swim in city

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18. This sub-Part is an edited and updated version of Neil H. Buchanan, *Everyone Should Have My Privileges*, DORF ON LAW (June 9, 2020), <http://www.dorfonlaw.org/2020/06/everyone-should-have-my-privileges.html> [<https://perma.cc/MN2Y-5RGY>].

19. 403 U.S. 217 (1971).

20. *Id.* at 225–26.

21. *Id.* at 219.

22. *Id.*

23. Michael C. Dorf, *Discrimination and the “Leveling Down” Puzzle*, JUSTIA: VERDICT (Feb. 3, 2020), <https://verdict.justia.com/2020/02/03/discrimination-and-the-leveling-down-puzzle> [<https://perma.cc/SPE8-F5K2>].

24. *Id.*

pools.” Level down or level up, either way you end up equal. But that hardly means that both approaches are right.

As I noted above, people in my position in society are on the higher level when it comes to our interactions with the police. It makes no sense to level down, making us as afraid of the police as everyone else is. This is a situation where expanding the group of people who have the privilege of not being afraid of the police is in principle quite straightforward, even though it has never been done in this country—and even though there are powerful actors, including the now-former occupant of the White House and his lawless Attorneys General,<sup>25</sup> who want to keep things as they are.

Contrast this leveling up or down question with the issue of economic inequality. When Senator Bernie Sanders says that billionaires should not exist,<sup>26</sup> he is of course not saying that physical harm should come to billionaires but simply that there is something deeply unjust about a system that creates billionaires while children go hungry and people die because health care is not recognized as a human right. A just society would not create billionaires in this first place, much less tolerate their effects on our society and political system.

Although there are right-wing propagandists who would like us to say that we should all aspire to be billionaires rather than disparaging them,<sup>27</sup> the fact is that there is a limit to how much leveling up we can do when it comes to income and wealth inequality. Billionaires, or people who think that they have a reasonable shot at becoming extremely wealthy, definitely have something to lose from progressive policies that would level things out a bit. To be clear, there is no defensible argument against Sanders’s—or Elizabeth Warren’s—anti-inequality policies (which are quite mild), but saying that it is *worth it* to reduce the privileges of those at the top does not deny that we would be doing so.

When it comes to dealing with the police, however, there is simply no reason why the privileges that the lucky minority to which I belong takes for granted could not become the norm for everyone.<sup>28</sup> Fair treatment by

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25. See Greg Sargent, Opinion, *The real lawless extremist in the race is Trump. And he has William Barr’s help*, WASH. POST (Sept. 3, 2020), <https://www.washingtonpost.com/opinions/2020/09/03/only-one-candidate-is-lawless-extremist-he-has-william-barrs-help/> [https://perma.cc/V37V-S964] (describing the President and Attorney General as lawless).

26. See Thomas Kaplan, *Bernie Sanders Proposes a Wealth Tax: ‘I Don’t Think That Billionaires Should Exist,’* N.Y. TIMES (July 16, 2020), <https://www.nytimes.com/2019/09/24/us/politics/bernie-sanders-wealth-tax.html> [https://perma.cc/9UUJ-Y8G6] (quoting Bernie Sanders).

27. See Rush Limbaugh, *Wealth and American Exceptionalism*, THE RUSH LIMBAUGH SHOW (Dec. 9, 2013), [https://www.rushlimbaugh.com/daily/2013/12/09/wealth\\_and\\_american\\_exceptionalism/](https://www.rushlimbaugh.com/daily/2013/12/09/wealth_and_american_exceptionalism/) [https://perma.cc/SP3V-Z2B7] (criticizing the disparagement of wealthy persons).

28. I say “minority” here because, as I noted in the Introduction, women—including White women—reasonably fear interactions with the police in ways that I do not.

law enforcers is not—or at least need not and should not be—a limited resource that only a few can enjoy.

What does this privilege look like? To be clear, I do worry when I have interactions with law enforcement officers, because I am aware that a motivated bad officer could do something to me and get away with it. Immunity is immunity, and my privilege is not absolute. (Absolute immunity is what Donald Trump thinks he had and deserved.<sup>29</sup>) But this underlying fear is eased for people like me by two factors. First, if something bad happens, I have resources on which to draw (not just money but friends and acquaintances, including lawyers and judges) that would give me a decent chance of redress.

More importantly, second, I go about my daily life able to presume that nothing bad is likely to happen when it comes to the police and me. I will not be profiled and thus pulled over pretextually, and it is quite unlikely that I will be treated harshly in any interaction with law enforcement. This is in part because the police are also aware that people like me are better able to challenge and resist mistreatment, reinforcing the loop of privilege.

But what does that look like in real life? Consider a remarkable example from several years ago, when I was living in Washington, D.C.—remarkable mostly because of what did *not* happen to me in what could have become a very fraught situation.

On a beautiful Saturday afternoon in May 2008, I decided to walk from my office several blocks west of the White House to a movie theater several blocks east. As I approached the front of the White House, the Secret Service suddenly came out and closed the sidewalk without explanation. I was told to take a different route, and (because I was unfamiliar with the area) I ended up walking all the way around to the South Lawn.

Because of some poorly placed metal barriers, I ended up walking on a driveway that was actually supposed to be closed to the public. I was not particularly close to the White House itself, but as I emerged from a grove of trees, I was surprised to see tourists gathered ahead and to my right, behind two knee-high fences. About one hundred yards ahead of me was a Secret Service squad car and some officers on bicycles leaning against the car and chatting.

I decided not to turn and walk away, because I worried that it would look like I was fleeing. I thought, “Well, they’ll notice me at some point and tell me that I’m in the wrong place, and I’ll follow their instructions.” When they finally did see me, one officer yelled over his car’s speaker, “Step over the fence.” I thought, “OK, there are two fences here, but he

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29. *See* *Trump v. Vance*, 140 S. Ct. 2412, 2429 (2020) (rejecting the President’s argument that he holds absolute immunity from the issuance of a state criminal subpoena).

said ‘fence,’ singular. I guess he wants me to step over the first fence and wait.” Again, I did not want to appear to be fleeing, and it seemed important to obey orders precisely.

The officers had gone back to their conversation, and several minutes passed before they even noticed me again, but I waited patiently. When they did finally realize that I was still there, the officer shouted sarcastically: “Get over the fence. It’s *not that difficult!*” I saw red, because I did not like being publicly mocked, especially because I had been careful to follow orders. Angered and annoyed, I then scowled at the officers as I walked on, not looking away for several minutes until I was too far away to see them. They watched me the entire time, and we were essentially engaged in a stare-down as I walked by.

It was only later that I realized just how insane it had been for me to be so brazen in my defiance. If I were not living in my privileged world, I would not have been able to assume that I could get away with such an attitude, and I suspect that a non-privileged person would never even consider doing what I did—at least not without knowing that they risked much worse than a mere staring contest with a few Secret Service agents.

The most fascinating aspect of this, I think, is that everything I did was based on my unexamined presumption that I was quite safe in doing so. My father had never sat me down for a talk and said, “Neil, because you’re privileged, you can be confrontational with police officers.” Living when and where I lived and knowing how that world treated me, no one had to tell me that I could get away with things that others would never even consider doing. I have, in my life, rolled my eyes at police officers and argued with them, all the while considering it perfectly normal not to fear violent consequences.

Contrast my attitude with how Eric Garner<sup>30</sup> or George Floyd<sup>31</sup> conducted themselves before their murders. Consider that, if somehow an officer did appear to be killing someone like me with a choke hold or other excessive force, not only bystanders but other officers would be much more likely to intervene.

And it is not just in those extreme situations that privilege arises. I recall when I was in my twenties, hearing a friend tell a story from his student days at Hampshire College in Massachusetts. It was actually a rather delightful tale that involved my friend and his drunk/high buddies trying to steal a Big Boy statue from the front of a restaurant. The full-

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30. See Al Baker, J. Davis Goodman & Benjamin Mueller, *Beyond the Chokehold: The Path to Eric Garner’s Death*, N.Y. TIMES (June 13, 2015), <https://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html> [<https://perma.cc/LUN5-LLFQ>] (describing the events leading up to Eric Garner’s death).

31. See *What We Know About the Death of George Floyd in Minneapolis*, N.Y. TIMES (Sept. 12, 2020), <https://www.nytimes.com/article/george-floyd.html> [<https://perma.cc/W7GB-A37P>] (describing the events leading up to George Floyd’s death).

sized Big Boy statue! The story included their dealing with the police officers who arrived on the scene, with the perpetrators knowing that they would get away with merely a warning and advice to go home and sleep it off. Would a non-privileged kid have even considered doing something like that? Would the police have treated him so indulgently? The questions answer themselves.

The nature of this kind of privilege is that it need never be seriously doubted. Yes, as I explain in Part I.B. below, there are limits to what people like me can expect to get away with, but that is not always a bad thing. What I want, more than anything, is for the world at least to level up when it comes to police interactions with the public. Everyone should be able to assume that the police will not use excessive force, will not escalate, and will not treat any of their fellow citizens as the enemy.

What I have is precious, but it only becomes obvious how precious it is when one looks at the alternative. This is an area in which the new normal is not some hard-to-imagine world of sweetness and light. All it requires is that the people to whom public safety is entrusted treat all citizens in the same way that they currently treat our most privileged citizens. No one loses, and plenty of people win.

### B. *Understanding Privilege, or At Least Trying To*<sup>32</sup>

It is a testament to the depth of the wounds of systemic racism in America that the protests<sup>33</sup> sparked by the police murder of George Floyd continued with such intensity for so long. Especially during a public health disaster,<sup>34</sup> it takes a lot to get people to sustain this kind of action and passion. But with literally centuries of injustice unaddressed, it apparently took that final spark to start a conflagration.

That is both sad and hopeful. The centuries of tragedy, of murder upon murder and oppression upon oppression, are shameful to contemplate, especially because so many people knew about it but could not get everyone else to focus on such chronic injustice. The hope is that this is, at long last, when things will change in fundamental ways.

In Part I.A above, I argue that this change should involve “leveling up,” meaning that giving people equal protection requires that we move

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32. This sub-Part is an edited and updated version of Neil H. Buchanan, *Understanding Privilege, Or At Least Trying To*, DORF ON LAW (June 18, 2020), <http://www.dorfonlaw.org/2020/06/understanding-privilege-or-at-least.html> [<https://perma.cc/NT7P-5RAB>].

33. See Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (July 10, 2020), <https://www.nytimes.com/article/george-floyd-protests-timeline.html> [<https://perma.cc/V7UF-Q47Z>] (describing the series of protests that have followed the death of George Floyd).

34. See NPR, *Protesting Racism Versus Risking COVID-19: 'I Wouldn't Weigh These Crises Separately'* (June 1, 2020, 4:46 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/06/01/867200259/protests-over-racism-versus-risk-of-covid-i-wouldn-t-weigh-these-crises-separate> [<https://perma.cc/4FYZ-4NPT>] (explaining that racism poses a dire health threat, and protests are therefore justified even during the COVID-19 pandemic).

currently disadvantaged people up to the best levels of treatment that society already affords its privileged citizens.<sup>35</sup> It would be possible to level down by creating a terroristic police state that trains its guns and violence against everyone regardless of race or class, but although that would be equal treatment, it would not be justice.

Here, I want to continue my discussion of what it means already to be at the top level of social status in the sense of how the justice system treats people. That is, even if we succeed in leveling up, will we still need to do more for everyone, the privileged and the currently unprivileged alike?

As it turns out, leveling up would unfortunately not be enough—as important and essential as it is. Even the people like me at the top level know that random police violence could possibly be visited upon us under certain circumstances. After, or while, we level up, we need to raise the bar and change the way the law enforcement system treats everyone. What would that look like?

The big message in Part I.A was that people like me currently have every reason to expect—and everyone else should also be able to expect—that the police will not overreact to what we do. I shared a somewhat unusual story about a time when I accidentally found myself on the wrong side of fences separating the South Lawn of the White House from a gaggle of tourists. Had I not been a middle-aged white guy wearing L.L.Bean summer casual clothes, we have every reason to believe that the situation would not have gone well.

Moreover, I pointed out that the police (in this case, the Secret Service) were not even provoked when I “gave them attitude,” which I later realized was the true measure of what White privilege looks like. No one had ever said to me, “Do not look an officer in the eye, and for God’s sake do NOT in any way show disrespect.” It is not that somehow my parents had failed me, because this is simply not advice that people like me need to have hammered into them at a young age.

The murder in Atlanta of Rayshard Brooks<sup>36</sup> last June captured such expectations perfectly. Had I ever fallen asleep at a drive-thru, or frankly anywhere else in public, I would have expected to be respectfully (or at least nonviolently) woken up by a passerby or a police officer. If I were intoxicated in such a situation, the worst I might expect is a DUI charge, although even that would possibly not happen if I (like Brooks) said that I could simply leave the car in a parking lot and walk home.

Again, my message here is that the world should change so that my presumptions become everyone’s presumptions. Everyone should be treated decently, without fear of being beaten or killed by police who

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35. See discussion *infra* Part II.A.

36. Aimee Ortiz, *What We Know About the Death of Rayshard Brooks*, N.Y. TIMES (Sept. 10, 2020), <https://www.nytimes.com/article/rayshard-brooks-what-we-know.html> [<https://perma.cc/S27U-HSJF>] (describing the events leading up to the death of Rayshard Brooks).

escalate the situation. There is no trade-off here, because the sum is not zero. I do not have to give up any of my current privilege to allow others to enjoy the same. At that point, it would no longer meaningfully be called “privilege,” of course, but that is precisely the point.

One of the ways that I have noticed my privilege over the years is in my easy presumption that I can travel essentially anywhere that I want to travel. It is true that, even within the U.S., there are places where I might feel endangered, but never would I feel that the police were my enemy. And with rare exceptions, the locals treat me as if I am welcome, or at least tolerated.

When I was in my late twenties, I took three driving trips across the country, two on my own and one with a White male friend. This necessarily involved making stops for gas and food in remote places, staying overnight in cheap hotels next to the highway, and so on. The worst feeling that I ever experienced was merely that some people at roadside stops in Wyoming and Nebraska were looking at my preppy clothes and sneering at me. Never once did I feel in danger.

I thought to myself back then, “What would this be like if I were black, Latino, Middle Eastern, or anyone who doesn’t ‘look White’?” (I will set aside here the overlapping but distinct issues that I would have confronted as a woman—especially traveling alone—but a reckoning on those issues is also long overdue.) Not just the local police, but everyone I came in contact with, would have presented at least the possibility of a dangerous interaction.

At that time, I had not yet heard about the Green Book (formally titled *The Negro Motorist Green Book*), which was published and regularly updated from the mid-1930’s through the mid-60’s, which was quite literally a survival guide for blacks who traveled around the country.<sup>37</sup> Even so, and even though my travels were in the late 1980’s, it was obvious that part of my privilege was simply that I had the freedom to travel without much concern about being targeted by local cops or citizens.

As I noted above, however, it is not true that even someone with my privileges has nothing at all to worry about. A recent article, “Confessions of a Former Bastard Cop,”<sup>38</sup> ought to be required reading for everyone who wishes to weigh in on the policing issues facing this country. Even for someone like me who thinks of himself as quite aware of the systemic part of systemic racism in policing, it is an eye-opening piece.

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37. VICTOR H. GREEN, *THE NEGRO MOTORIST GREEN BOOK* (1940), <https://digitalcollections.nysl.org/items/dc858e50-83d3-0132-2266-58d385a7b928> [<https://perma.cc/FA63-FH9Q>].

38. Officer A. Cab, *Confessions of a Former Bastard Cop*, MEDIUM (June 6, 2020), <https://medium.com/@OfcrACab/confessions-of-a-former-bastard-cop-bb14d17bc759> [<https://perma.cc/Y4Y9-NAP2>].

Here is (by the author's own description) the most important part of the article, for people of all races and backgrounds:

If you take nothing else away from this essay, I want you to tattoo this onto your brain forever: if a police officer is telling you something, it is probably a lie designed to gain your compliance.

Do not talk to cops and never, ever believe them. Do not "try to be helpful" with cops. Do not assume they are trying to catch someone else instead of you. Do not assume what they are doing is "important" or even legal. Under no circumstances assume any police officer is acting in good faith.

Also, and this is important, do not talk to cops.

I just remembered something, do not talk to cops.

Checking my notes real quick, something jumped out at me:

Do  
not  
fucking  
talk  
to  
cops.  
Ever.<sup>39</sup>

Coming from a former police officer, those words (and his supporting evidence and arguments) are simply stunning. To emphasize his point, he adds this comment later in the piece:

If you take only one thing away from this essay, I hope it's this: do not talk to cops. But if you only take two things away, I hope the second one is that it's possible to imagine a different world where unarmed black people, indigenous people, poor people, disabled people, and people of color are not routinely gunned down by unaccountable police officers.<sup>40</sup>

But is he only aiming his comment at non-privileged people? Is it okay for guys (and I do mean guys) like me to assume that the cops are on our

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39. *Id.* (formatting in original)

40. *Id.*

side? The author certainly does not say so, and nothing in his argument suggests that police officers will not lie to people like me whenever they want to, and for whatever reasons.

Notwithstanding my privilege, I do worry about interacting with the police. Years ago, I moved into a house in a Milwaukee suburb, and I found that a previous owner had left a box of bullets in a basement closet. Having no desire to keep them and realizing that it would be a terrible idea simply to throw them out with the garbage, I took them to the local police station. I explained the situation, and I was surprised when the officer demanded that I provide my name and address. I was so stunned that I complied, but I was quickly troubled by the idea that there was a police report with my name on it that connected me to a box of bullets. Why should my being a responsible citizen result in my name being put on a police report? In a similar situation (not with bullets this time, thankfully) more recently, I said to the officer, “I decline to provide my name,” and he angrily said, “Then I’m not going to help,” even though I was reporting something that had nothing to do with me and was in fact a Good Samaritan situation.

More worrisome was a moment during my clerkship in Oklahoma City, when I went to the local convenience store one evening and stood hoping to buy a candy bar while waiting for the clerk to appear (presumably after taking a break in the back of the store). Suddenly, a young White police officer rushed in and told me that I had to get into the back of his squad car. As he was forcing me out of the store, another (White male) customer arrived, and he was also grabbed and pushed into the car beside me. As we were being shoved inside, the officer slammed the door on my co-detainee’s legs and started kicking the door to close it.

It turned out that the convenience store had been robbed, but that does not explain why I would be a suspect, given that I stood idly waiting to pay for a Hershey bar—or why the officer roughed up both of his detainees. Because I was clerking for a federal judge, I asked him the next day if there was anything I could do. The (White male) judge, who had previously been the state’s attorney general, smiled knowingly and said: “No, you should just drop this. You do not want to cross the police. They can make your life miserable—and mine, too, frankly.” I am not at all equating what happened to me with what happens to far too many people in this country, but what I discovered was that there is effectively no way to address even relatively harmless abuses.

And that is the other big lesson about systemic abuse of power. The system encourages the police to show venom toward non-privileged people, but what seems to especially motivate bad police behavior is being told that they have misbehaved.

There has been a longstanding effort to make the police untouchable, an effort that is very much reinforced by movies and TV shows that

glorify police violence<sup>41</sup> and make heroes of cops who “play by their own rules.”<sup>42</sup>

For example, last year I came across an Amazon Prime series called *Bosch*,<sup>43</sup> which is based on a series of crime novels. Getting even a few minutes into the first episode, which aired in 2014, I noticed two things.<sup>44</sup> First, this was like every other cop show in depicting the police’s aggrieved resistance to supervision and discipline. And second, watching that show in the summer of 2020 was an especially fraught experience.

Like other police procedurals (especially the long-running *CSI*), the show is an homage to the police, even when the stories depict the unpleasant side of policing. In the first season, the main character (an LAPD detective) was being sued by the widow of a suspect whom he had shot in an alley when the suspect pulled what looked like a gun out of his pocket.<sup>45</sup> There was no video of the interaction, and the only claim by the plaintiff (based on no evidence) was that Bosch had planted a gun at the scene after the fact.<sup>46</sup>

All of the familiar grievances and tropes are there: a sneering attorney who is willing to twist everything to make the cop look bad, the sense that “you have to do what you have to do,” and on and on. The cops hate everyone: the courts, the lawyers (including the prosecutors), internal affairs detectives, the politicians, and certainly any attempt at citizens’ oversight of police use of deadly force. In *Bosch*, the police captain who is most opposed to reining in LAPD abuse – fighting against a weaselly politician, of course – is played by Lance Reddick (a Black actor who played Baltimore Police Lt. Daniels in “The Wire”), and his entire agenda is to “protect our house.”<sup>47</sup> “Our house” is most assuredly not “our city,” but rather the insular metaphorical house within which the police attempt to evade accountability.

These shows are almost always written by former police officers, or they have “consultants” who are retired officers.<sup>48</sup> The idea that any case like the one in “Bosch” would have been brought at all is farfetched in

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41. See Mary Beth Oliver, *Portrayals of Crime, Race, and Aggression in “Reality-Based” Police Shows: A content analysis*, 38 J. BROAD. & ELEC. MEDIA 179, 189 (1994).

42. Nick Pinto, *Investigating the harsh realities of ‘Cops,’* COLUM. JOURNALISM REV. (July 16, 2019), [https://www.cjr.org/united\\_states\\_project/running-from-cops-taberski-headlong.php](https://www.cjr.org/united_states_project/running-from-cops-taberski-headlong.php) [<https://perma.cc/7526-55DF>].

43. *Bosch* (Amazon Prime broadcast Jan. 14, 2015).

44. *Bosch: Chapter One: ‘Tis the Season* (Amazon Prime broadcast Jan. 14, 2015).

45. *Id.*

46. *Id.*

47. Lance Reddick, IMDB, <https://www.imdb.com/name/nm0714698/> [<https://perma.cc/PDZ8-NG7U>] (last visited Sept. 10, 2020).

48. Diane Haithman, *When Hollywood Calls the Cops*, L.A. BUS. J. (Sept. 15, 2017), <https://labusinessjournal.com/news/2017/sep/15/when-hollywood-calls-cops-lapd/> [<https://perma.cc/NJX4-R37H>].

the extreme, much less that he would actually lose. (In a later episode, the jury found for the plaintiff but awarded \$1 in damages.)<sup>49</sup> What causes real-world officers like those in Buffalo to shove a White male BLM protester and then leave him bleeding on the sidewalk<sup>50</sup>—with one officer yanking the other away to prevent him from helping<sup>51</sup>—must surely be this overwhelming sense of grievance. That is certainly what we are seeing from local police union representatives who rant in front of cameras about the injustice of the very idea that police officers could be disciplined or held criminally liable.<sup>52</sup>

In the end, then, the privilege that people like me enjoy in our dealings with the police (as well as in every other aspect of life) is important but still limited—limited by the extent to which we know that the police are shielded from consequences, even when they abuse their power. If I tried to intervene to stop an act of police brutality, I too would risk being brutalized myself, even with all of my privilege.

We desperately need to level up, allowing everyone to enjoy what privileged members of society take for granted. That is a lot to try to accomplish, but it is a bare minimum. Once we have done that, we must go further and prevent everyone from being victimized by abusive officers acting with impunity. Unaccountable power, especially backed up by the gun, is a disease that has been killing people. The current moment is an attempt to find the cures to that disease. Accountability is essential.

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49. *Bosch: Chapter Four: Fugazi* (Amazon Prime broadcast Feb. 13, 2015).

50. Neil Vigdor et al., *Buffalo Police Officers Suspended After Shoving 75-Year-Old Protester*, N.Y. TIMES (June 9, 2020), <https://www.nytimes.com/2020/06/05/us/buffalo-police-shove-protester-unrest.html> [<https://perma.cc/G47U-XMR5>].

51. *Id.*

52. See Noam Scheiber et al., *How Police Unions Became Such Powerful Opponents to Reform Efforts*, N.Y. TIMES (June 20, 2020), <https://www.nytimes.com/2020/06/06/us/police-unions-minneapolis-kroll.html> [<https://perma.cc/6CUU-NJDQ>].

## II. STATUES AND PLACE NAMES: WHO IS HONORED, AND WHY?

### A. *The Statues and Place Names Compromise Is This Decade's Version of Civil Unions*<sup>53</sup>

I never thought that I would see NASCAR ban the Confederate flag from its events.<sup>54</sup> Ever. I could not imagine Mississippi getting rid of that flag's inclusion in its state flag.<sup>55</sup> Ever. I never thought that entire high school sports teams would take a knee during the national anthem,<sup>56</sup> or that Mitt Romney would join a civil rights march against systemic racism,<sup>57</sup> or that any number of other politicians would embrace the phrase “Black Lives Matter.”<sup>58</sup> Ever. Ever. Ever.

Even so, we often see things happen suddenly that had once seemed unthinkable. I have noted at various times, for example, that the public's attitude about cigarette smoking once seemed implacable: Smoking was viewed as an individual's right, dammit!<sup>59</sup> But in very short order, not only did smoking become “uncool” but New York City's smoking ban<sup>60</sup>—even in bars and restaurants—was adopted in cities across the

53. This sub-Part is an edited and updated version of Neil H. Buchanan, *Biden's Statues and Names Compromise is 2020's Version of Civil Unions*, DORF ON LAW (July 2, 2020), <http://www.dorfonlaw.org/2020/07/bidens-statues-and-names-compromise-is.html> [https://perma.cc/T4C6-JD2G].

54. Steve Almasy, *NASCAR Bans Confederate Flags at All Races, Events*, CNN (June 10, 2020, 11:29 PM), <https://www.cnn.com/2020/06/10/us/nascar-bans-confederate-flag-spt-trnd/index.html> [https://perma.cc/WBV6-FUYP].

55. Rick Rojas, *Mississippi Governor Signs Law to Remove Flag with Confederate Emblem*, N.Y. TIMES (July 2, 2020), <https://www.nytimes.com/2020/06/30/us/mississippi-flag.html> [https://perma.cc/FQ2M-RCSS].

56. Christina Zdanowicz, *An Entire High School Baseball Team Kneled During the National Anthem to Protest Police Brutality*, CNN (June 16, 2020, 3:26 PM), <https://www.cnn.com/2020/06/16/us/iowa-baseball-team-kneels-trnd/index.html> [https://perma.cc/4484-YCFS].

57. Michael S. Rosenwald, *Republicans Like George Romney Who Supported Civil Rights Wouldn't Recognize Trump's GOP*, WASH. POST: RETROPOLIS (June 8, 2020, 2:20 PM), <https://www.washingtonpost.com/history/2020/06/08/george-romney-mitt-trump-protests-civil-rights/> [https://perma.cc/QEX9-5TXK].

58. Annie Linskey, *Democratic Convention Embraces Black Lives Matter*, WASH. POST: POLITICS (Aug. 18, 2020, 12:16 AM), [https://www.washingtonpost.com/politics/democratic-convention-embraces-black-lives-matter/2020/08/18/f1de2ce8-e0f7-11ea-b69b-64f7b0477ed4\\_story.html](https://www.washingtonpost.com/politics/democratic-convention-embraces-black-lives-matter/2020/08/18/f1de2ce8-e0f7-11ea-b69b-64f7b0477ed4_story.html) [https://perma.cc/A2Z6-D8BG].

59. Yvette van der Ejik & Gerard Porter, *Human Rights and Ethical Considerations for a Tobacco-Free Generation*, 24(3) NAT'L CTR. FOR BIOTECHNOLOGY INFO. (TOBACCO CONTROL) 238 (2015).

60. Georgia Dull, *And as the Gaspers of the World Unite, Nonsmokers Become Fashionably Cool*, N.Y. TIMES (Nov. 5, 1975), <https://www.nytimes.com/1975/11/05/archives/and-as-the-gaspers-of-the-world-unite-nonsmokers-become-fashionably.html> [https://perma.cc/RU7V-5M3N]; Michael Cooper, *Mayor Signs Law to Ban Smoking Soon At Most Bars*, N.Y. TIMES (Dec. 31, 2002), <https://www.nytimes.com/2002/12/31/nyregion/mayor-signs-law-to-ban-smoking-soon-at-most-bars.html> [https://perma.cc/SVH6-7RMS].

country and the world.<sup>61</sup> Paris without people smoking arrogantly (and now merely being arrogant)? *Quelle horreur!*

Drunk driving went from cool to unacceptable in a few short years in the mid-1980's.<sup>62</sup> Marijuana is now legal and widely accepted in many states, with nary a Jeff Sessions to turn it into a culture war battle.<sup>63</sup> Bill Cosby is a pariah.<sup>64</sup> Harvey Weinstein is serving a 23-year prison sentence.<sup>65</sup> There are, of course, different reasons for each of these changes, but they all once seemed unthinkable.

In addition to the current debate about statues, flags, and place names, same-sex marriage is the other huge issue about which, when public attitudes suddenly and radically changed for the better, advocates happily said things like: "I thought that, if this ever happened, it certainly would not be in my lifetime."

Here, I first want to discuss the current reconsideration of Confederate and other racist iconography, offering some examples that I think are especially telling. But my larger point, telegraphed in the title of this sub-Part, is that I think the position that President Joe Biden and others have taken<sup>66</sup>—yes to ending idolatry of traitors, no to similarly condemning Founding-era slave-owners and others—is the equivalent of the creation of so-called civil unions during the years prior to the acceptance of same-sex marriage.

As it happens, I drove through Richmond, Virginia in July of 2020. I did not stop for a variety of reasons, but it did offer an opportunity to

61. See Cooper, *supra* note 60; *U.S. State and Local Issues: Smoke-Free Laws*, CAMPAIGN FOR TOBACCO-FREE KIDS (Aug. 31, 2020), <https://www.tobaccofreekids.org/what-we-do/us/smoke-free-laws> [https://perma.cc/4Q9V-LNT7].

62. David J. Hanson, *Drunk Driving is Unacceptable Socially and Legally Today as Never Before*, ALCOHOL PROBS. & SOLS. (1997), <https://www.alcoholproblemsandsolutions.org/drunk-driving-is-unacceptable/> [https://perma.cc/N7LY-7GTD].

63. Maria McFarland Sanchez-Moreno, Opinion, *How anti-marijuana Jeff Sessions became the best thing to happen to pot legalization*, USA TODAY (May 6, 2018, 4:39 PM), <https://www.usatoday.com/story/opinion/2018/05/06/marijuana-legalization-jeff-sessions-colorado-washington-controlled-substance-enforcement-column/573156002/> [https://perma.cc/HNA9-QGUD].

64. Daniel Arkin, *Bill Cosby was once 'America's Dad.' Now he's a convicted pariah*, NBC NEWS (Apr. 26, 2018, 6:54 PM), <https://www.nbcnews.com/storyline/bill-cosby-scandal/bill-cosby-was-once-america-s-dad-now-he-s-n869396> [https://perma.cc/KQA9-K22W].

65. Eric Levenson, Lauren del Valle & Sonia Moghe, *Harvey Weinstein sentenced to 23 years in prison after addressing his accusers in court*, CNN (Mar. 11, 2020, 4:26 PM), <https://www.cnn.com/2020/03/11/us/harvey-weinstein-sentence/index.html> [https://perma.cc/EE2Z-MH5E].

66. Annie Linskey, *On monuments, Biden draws distinction between those of slave owners and those who fought to preserve slavery*, WASH. POST (June 30, 2020, 4:39 PM), [https://www.washingtonpost.com/politics/on-monuments-biden-draws-distinction-between-those-of-slave-owners-and-those-who-fought-to-preserve-slavery/2020/06/30/a98273d8-bafe-11ea-8cf5-9c1b8d7f84c6\\_story.html](https://www.washingtonpost.com/politics/on-monuments-biden-draws-distinction-between-those-of-slave-owners-and-those-who-fought-to-preserve-slavery/2020/06/30/a98273d8-bafe-11ea-8cf5-9c1b8d7f84c6_story.html) [https://perma.cc/ST3W-B6LR].

reflect on that fascinating city. I had never visited until about three years earlier, but when I finally spent time there, I immediately fell in love.

Well, sort of. Every time that I try to describe Richmond to people who have never been there, I say something like this: “If you can completely compartmentalize the ubiquity of Confederate iconography, then you’ll love that city. *But* there is quite a bit to compartmentalize.” I have returned two or three more times for weekend visits, and I honestly have never truly felt comfortable with those mental gymnastics.

Still, nearly everything else about Richmond appealed to me. It is a medium-sized city, a state capital, and a university town.<sup>67</sup> (I was surprised to learn that Virginia Commonwealth University is an urban campus and enrolls over 30,000 students;<sup>68</sup> the much smaller University of Richmond is out in a rich suburban area.<sup>69</sup>) There is an arts district near downtown, next to which hipsters and artists are reclaiming an abandoned neighborhood of row houses. The Carytown neighborhood is (pre-COVID, anyway) a thriving LGBTQ+ area and is not far from the Virginia Museum of Fine Arts, which has among other things a beautiful sculpture garden. Vegan-friendly restaurants are easy to find.

Or, to put it more simply, Richmond is an American city in the 21st century—youth-centered, economically reviving,<sup>70</sup> progressive, blue.<sup>71</sup> Well, except for all of that Confederate stuff.<sup>72</sup> My take on the situation is that Richmonders have long been embarrassed by all of it, but the state legislature (often dominated until recently by the Republican Party)<sup>73</sup> has

67. NATIONS ONLINE PROJECT, *Satellite View and Map of the City of Richmond, Virginia*, [https://www.nationsonline.org/oneworld/map/google\\_map\\_Richmond.htm](https://www.nationsonline.org/oneworld/map/google_map_Richmond.htm) [<https://perma.cc/ACJ9-BBE9>] (last visited Oct. 13, 2020).

68. Mike Porter, *VCU joins national student success initiative*, VCU NEWS (Dec. 7, 2018), [https://www.news.vcu.edu/article/VCU\\_joins\\_national\\_student\\_success\\_initiative](https://www.news.vcu.edu/article/VCU_joins_national_student_success_initiative) [<https://perma.cc/9REQ-NC9Y>].

69. Genevieve Siegel-Hawley et al., *Confronting School and Housing Segregation in the Richmond Region: Can We Learn and Live Together?*, RICHMOND SCH. OF PROF. & CONTINUING STUD. 8 (Sept. 2017), <https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1074&context=spsc-faculty-publications> [<https://perma.cc/6NHM-FSMK>]; N.Y. TIMES, *Economic Diversity and student outcomes of the University of Richmond*, <https://www.nytimes.com/interactive/projects/college-mobility/university-of-richmond> [<https://perma.cc/5SSH-JL5Z>].

70. *Richmond, VA Demographics*, AREA VIBES, <https://www.areavibes.com/richmond-va/demographics/> [<https://perma.cc/MU8X-DKDE>] (last visited Oct. 12, 2020).

71. Sabrina Tavernise & Robert Gebeloff, *How Voters Turned Virginia From Deep Red to Solid Blue*, N.Y. TIMES (Nov. 9, 2019), <https://www.nytimes.com/2019/11/09/us/virginia-elections-democrats-republicans.html> [<https://perma.cc/9XY8-7S3W>].

72. Deepa Shivaram & Kyle Stewart, *Virginia has the most Confederate memorials in the country, but that might change*, NBC NEWS (June 9, 2020, 6:44 AM), <https://www.nbcnews.com/news/us-news/virginia-has-most-confederate-memorials-country-might-change-n1227756> [<https://perma.cc/GZ4D-PVKL>].

73. Reid Wilson, *Democrats win control of Virginia Legislature*, THE HILL (Nov. 5, 2019), <https://thehill.com/homenews/campaign/469164-democrats-flip-virginia-state-senate> [<https://perma.cc/EE6X-4S99>].

forced the city to continue to display and apparently celebrate its role as the capital of a treasonous rebellion against the United States.<sup>74</sup>

The most well-known controversies have swirled around Monument Avenue.<sup>75</sup> I honestly did not know anything about that street (or much else about Richmond, to be honest), so when I drove down a beautiful avenue lined by stately homes, I was shocked to see not just statues but full installations honoring Jefferson Davis,<sup>76</sup> Stonewall Jackson,<sup>77</sup> J.E.B. Stuart,<sup>78</sup> Robert E. Lee,<sup>79</sup> and someone named Matthew Fontaine Maury.<sup>80</sup> Slack-jawed, I then came upon the much newer statue of civil rights icon (and Richmond native) Arthur Ashe,<sup>81</sup> and I had to laugh and applaud the locals' ingenuity.

The point is that this was the kind of situation in which, even when I returned in 2018 and 2019 (that is, even *after* Charlottesville<sup>82</sup>), my reaction was glum resignation. "This is *never* going to change," I said.

74. See, e.g., Andrew Lawler, *The origin story of Monument Avenue, America's most controversial street*, NAT'L GEOGRAPHIC (July 27, 2020), <https://www.nationalgeographic.com/history/2020/07/origin-story-monument-avenue-america-most-controversial-street/#close> [https://perma.cc/D9UD-T2WF].

75. *On Monument Avenue: Controversial From the Start*, AM. CIV. WAR MUSEUM: BLOG (Aug. 17, 2017), <https://acwm.org/blog/monument-avenue-controversial-start/> [https://perma.cc/6KRZ-BEPM].

76. Charlie Grymes, *Jefferson Davis on Monument Avenue in Richmond*, VA. PLACES, <http://www.virginiaplaces.org/vacities/monavedavis.html> [https://perma.cc/A777-SZEY] (last visited Sept. 21, 2020).

77. Charlie Grymes, *Stonewall Jackson on Monument Avenue in Richmond*, VIRGINIA PLACES (last visited Sept. 21, 2020), <http://www.virginiaplaces.org/vacities/monavejackson.html> [https://perma.cc/6T8U-9SZV]. *Id.*

78. Charlie Grymes, *J.E.B. Stuart on Monument Avenue in Richmond*, VIRGINIA PLACES (last visited Sept. 21, 2020), <http://www.virginiaplaces.org/vacities/monavestuart.html> [https://perma.cc/JWX8-TEEL].

79. Charlie Grymes, *Robert E. Lee on Monument Avenue in Richmond*, VIRGINIA PLACES (last visited Sept. 21, 2020), <http://www.virginiaplaces.org/vacities/monavelee.html> [https://perma.cc/RT3J-WSFY].

80. Charlie Grymes, *Matthew Fontaine Maury on Monument Avenue in Richmond*, VIRGINIA PLACES (last visited Sept. 21, 2020), <http://www.virginiaplaces.org/vacities/monavemaury.html> [https://perma.cc/YCB2-NCMJ].

81. Charlie Grymes, *Arthur Ashe on Monument Avenue in Richmond*, VIRGINIA PLACES (last visited Sept. 21, 2020), <http://www.virginiaplaces.org/vacities/monaveashe.html> [https://perma.cc/WT8T-BDF5].

82. See generally Debbie Lord, *What happened at Charlottesville: Looking back on the rally that ended in death*, THE ATLANTA J.-CONST. (Aug. 13, 2019), <https://www.ajc.com/news/national/what-happened-charlottesville-looking-back-the-anniversary-the-deadly-rally/fPpnLrbAtbxSwNI9BEy93K/> [https://perma.cc/U4EF-DLPW] (describing the white supremacist terrorist attack that occurred at Charlottesville, Virginia during the 2017 Unite the Right rally).

On my first drive from Washington, D.C. to Richmond, I had noticed an official road sign guiding people to the Stonewall Jackson Shrine.<sup>83</sup> *Shrine*?! Here are Merriam-Webster’s definitions for that word:

- 1 a : a case, box, or receptacle especially: one in which sacred relics (such as the bones of a saint) are deposited
  - b : a place in which devotion is paid to a saint or deity  
:SANCTUARY
  - c : a niche containing a religious image
- 2 : a receptacle (such as a tomb) for the dead
- 3 : a place or object hallowed by its associations<sup>84</sup>

This is not about “understanding our history,” or some such dodge. Finally, the National Park Service announced in 2019 that they would change the name to the “Stonewall Jackson Death Site”<sup>85</sup> (rather than, say, pretending that Definition #2 above is what they intended all along). So, even before 2020’s upheaval, there had been some small progress in how we handle these issues. But again, even the most optimistic among us never thought that Richmond would quickly, and at long last, update its most publicly embarrassing ties to a pro-slavery rebellion.

One of the attack lines that people like Donald Trump have used—beyond the usual nonsense about heritage and “erasing history”—was that this is a slippery slope.<sup>86</sup> If you do not like Confederate statues and places names, he and others say, what about slave-owning people like George Washington and Thomas Jefferson?<sup>87</sup> Do you want to stop honoring them? Do you? Well, *do you*?

Trump has been pushing this bogus line for several years,<sup>88</sup> and I recall having a dinner with some other law professors in 2018 where this question came up. One respected senior scholar offered this: “I have no problem differentiating between those who founded the nation and those

83. Chris Mackowski, *Site of Stonewall Jackson’s Death Gets New Name*, EMERGING CIV. WAR (Sept. 18, 2019), <https://emergingcivilwar.com/2019/09/18/site-of-stonewall-jacksons-death-gets-new-name/> [<https://perma.cc/NW9T-KX8J>].

84. *Shrine*, <https://www.merriam-webster.com/dictionary/shrine> [<https://perma.cc/3LPC-2URY>] (last visited Sept. 22, 2020).

85. Mackowski, *supra* note 83.

86. Darlene Superville, *Trump Says ‘Learn from History’ Instead of Removing Statues*, ASSOCIATED PRESS (June 23, 2020), <https://apnews.com/article/fa842fd5bcf509bdc6d199c31e134f53>.

87. *Id.*

88. Eugene Scott, *Trump’s Ardent Defense of Confederate Monuments Continues as Americans Swing the Opposite Direction*, WASH. POST (July 1, 2020, 2:11 PM), <https://www.washingtonpost.com/politics/2020/07/01/trumps-ardent-defense-confederate-monuments-continues-americans-swing-opposite-direction/> [<https://perma.cc/TS6D-H654>].

who tried to destroy it.” This felt right at the time, and variations on that comment are now widely circulating.<sup>89</sup> The problem is that this is all a bit too clever.

Even more surprising than the speed with which Confederate statues and names are being removed and changed is that serious people are now talking openly about reconsidering Washington, Jefferson, and others.<sup>90</sup> If some people in Columbus, Ohio, have a problem—a very understandable one—with their city’s association with a genocidal slaver,<sup>91</sup> what about Washington, D.C., which is a district named not only after Columbus but also for a man who owned over 300 slaves?<sup>92</sup>

Along with *New York Times* columnist Charles Blow, I have no problem reconsidering whether Washington deserves to be spared. In Blow’s words: “Some people who are opposed to taking down monuments ask, ‘If we start, where will we stop?’ It might begin with Confederate generals, but all slave owners could easily become targets. Even George Washington himself. To that I say, ‘abso-fricking-lutely!’”<sup>93</sup> Yes, even “the good ones” should be reconsidered.

For one thing, they were not, *ahem*, good. They owned slaves, and they did so even while the Enlightenment thinkers from whom they claimed inspiration openly condemned it. George and Martha Washington did not merely bide their time, passively owning people—as if that should be dismissed with the word “merely”—but actively tracked

89. *Should Statues Of Historic Figures With Complicated Pasts Be Taken Down?*, NPR MORNING Edition (June 23, 2020, 5:04 AM), <https://www.npr.org/2020/06/23/881992636/should-statues-of-historic-figures-with-complicated-pasts-be-taken-down> [https://perma.cc/8CLA-CRPW].

90. Camille Caldera, *Fact Check: Washington Monument, Lincoln Memorial, Aren’t at Risk of Removal*, USA TODAY (Sept. 5, 2020, 1:17 PM), <https://www.usatoday.com/story/news/factcheck/2020/09/04/fact-check-washington-monument-lincoln-memorial-werent-risk-removal/5692073002/> [https://perma.cc/ZGA3-GKG2]; *Mayor Bowser Releases DCFACES Working Group Report*, DC (Sept. 1, 2020), <https://dc.gov/release/mayor-bowser-releases-dcfaces-working-group-report> [https://perma.cc/68BG-SNEV].

91. History.com Editors, *Why Columbus Day Courts Controversy*, HISTORY (Sept. 17, 2020), <https://www.history.com/news/columbus-day-controversy> [https://perma.cc/G8K2-SBQP]; Alicia Lee, *Why Christopher Columbus Wasn’t the Hero we Learned About in School*, CNN (June 12, 2020, 7:04 AM), <https://www.cnn.com/2020/06/12/us/christopher-columbus-slavery-disease-trnd/index.html> [https://perma.cc/D5BZ-JR28]; Alicia Lee, *Thousands Sign Petition to Rename Columbus, Ohio to ‘Flavortown’ After Native Son Guy Fieri*, CNN (June 22, 2020, 12:22 PM), <https://www.cnn.com/2020/06/21/us/guy-fieri-flavortown-columbus-ohio-petition-trnd/index.html> [https://perma.cc/HJ4P-DYQ8].

92. *A Decision to Free His Slaves*, GEORGE WASHINGTON’S MOUNT VERNON, <https://www.mountvernon.org/george-washington/slavery/washingtons-1799-will/#:~:text=Of%20the%20317%20slaves%20at,freed%20upon%20his%20wife’s%20death> [https://perma.cc/FN7V-E2T5] (last visited Oct. 13, 2020).

93. Charles M. Blow, *Opinion, Yes, Even George Washington*, N.Y. TIMES (June 28, 2020), <https://www.nytimes.com/2020/06/28/opinion/george-washington-confederate-statues.html> [https://perma.cc/FN7V-E2T5].

down an escaped slave (at least one) and used them as “dower slaves.”<sup>94</sup> Jefferson’s transgressions are even more widely known.<sup>95</sup>

The point is that one can appreciate the good that these men did without building shrines to them or continuing to ignore their shameful and monstrous realities. If society reaches a point where we say, “You know, those guys are historically important but did horrible things, so maybe we should stop treating them as deities,” I would be fine with that.

Biden, however, has taken the now-centrist position that Washington and Jefferson are out of bounds, because they were not traitors to the United States.<sup>96</sup> Why am I not surprised? Even a politician with a record of taking bold positions (very much unlike Biden, in other words) would almost certainly be eager to claim this easy middle ground in our current difficult moment.

The similarities to the same-sex marriage debate are palpable, once one thinks about it. I, and nearly everyone I knew with similar political views, originally reacted with great discomfort to the very idea of same-sex marriage. It just seemed *so extreme*, we thought, and it would be political suicide. We came up with diversionary arguments (“Well, marriage is a dying and corrupt institution, so why should we bother fighting to extend it to more people?”), and then we quite suddenly allowed ourselves to admit that it was an essential civil rights issue. In the end, people’s views “evolved.”<sup>97</sup>

And now, the cautious strategy regarding statues and place names is to occupy space that is politically safe only because of the bravery of people who rejected the previous status quo. This is the same position as those who, during the middle years of the country’s same-sex marriage

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94. Sarah Pruitt, *When One of George Washington’s Enslaved Workers Escaped to Freedom*, HISTORY (Feb 18, 2020), <https://www.history.com/news/george-washington-and-the-slave-who-got-away> [<https://perma.cc/64FN-PLBV>]; Michele L. Norris, *George and Martha Washington Enslaved 300 People. Let’s Start With Their Names*, WASH. POST (June 26, 2020), [https://www.washingtonpost.com/opinions/george-and-martha-washington-enslaved-300-people-lets-start-with-their-names/2020/06/26/d3f7c362-b7e7-11ea-a510-55bf26485c93\\_story.html](https://www.washingtonpost.com/opinions/george-and-martha-washington-enslaved-300-people-lets-start-with-their-names/2020/06/26/d3f7c362-b7e7-11ea-a510-55bf26485c93_story.html) [<https://perma.cc/PU4S-CBJQ>].

95. Henry Wiencek, *The Dark Side of Thomas Jefferson*, SMITHSONIAN MAG. (Oct. 2012), <https://www.smithsonianmag.com/history/the-dark-side-of-thomas-jefferson-35976004/> [<https://perma.cc/WTV8-EU9C>].

96. Johnathan Easley, *Biden: Government Must Protect Monuments to Washington, Jefferson*, HILL (June 20, 2020, 2:47 PM), <https://thehill.com/homenews/campaign/505271-biden-government-must-protect-monuments-to-washington-jefferson> [<https://perma.cc/9PP7-K8VF>].

97. See, e.g., Zeke J Miller, *Obama Says He Didn’t Miscalculate on Gay Marriage*, TIME (Feb. 11, 2015, 8:50 AM), <https://time.com/3704760/barack-obama-gay-marriage-david-axelrod/> [<https://perma.cc/H5NY-Z9DS>].

debate, found themselves embracing what we now see as an untenable and dishonest middle ground known as civil unions.<sup>98</sup>

That is not to say that civil unions were unimportant at the time. They were a huge step forward, just as getting rid of Confederate statues, flags, and place names represents real progress now.<sup>99</sup> And for a variety of reasons, the current debate might not reach the same clear conclusion that the country reached on same-sex marriage.<sup>100</sup> For example, I sincerely doubt that Washington, D.C., will be renamed, or even that the Jefferson Hotel in Richmond (where I have stayed) will abandon the name of its native-son slaveholder.

But maybe some or all of those things actually will change. Stalingrad and Leningrad are now historical names and nothing more.<sup>101</sup> Istanbul was Constantinople, and it is not our business to say why “Constantinople got the works.”<sup>102</sup>

Even though we currently appear to have ended up—due to a political standoff—stopping well short of a full reckoning on Jefferson and the rest, that does not mean that half-measures are actually defensible (or sensible). Civil unions, for all the progress that they represented, should not have been the point at which political stasis set in. Yet it could have ended there.

Those who want to make the case that the slaveholding founders should continue to receive a pass on the iconography front need to come up with something better than, “Well, they did important things, and they did fewer bad things than Stonewall Jackson did.” We can recognize important accomplishments without engaging in idolatry or the willful erasing of ugly reality.

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98. Neil H. Buchanan, *Biden’s Statues and Names Compromise is 2020’s Version of Civil Unions*, DORF ON LAW (July 2, 2020, 12:54 PM), <http://www.dorfonlaw.org/2020/07/bidens-statues-and-names-compromise-is.html> [<https://perma.cc/9SYU-59AR>].

99. Alisha Ebrahimji et al., *Confederate Statues are Coming Down Following George Floyd’s Death*, CNN (July 1, 2020), <https://www.cnn.com/2020/06/09/us/confederate-statues-removed-george-floyd-trnd/index.html> [<https://perma.cc/ZW45-L58X>].

100. See *Obergefell v. Hodges*, 576 U.S. 644, 670–71 (holding that the right to marry was a fundamental right which extended to same-sex couples).

101. Buchanan, *supra* note 98.

102. THE FOUR LADS, *Istanbul (Not Constantinople)* (Columbia Records 1953).

## B. *Writing and Rewriting History, from Columbus to Jefferson and Beyond*<sup>103</sup>

Donald Trump decided to stand up for Confederate generals and symbols, accusing everyone else of being eager to erase history.<sup>104</sup> He has, of course, decided that any attempt to change the way history is presented—actually, that any progressive change at all—is a horrific act of leftist fascism.<sup>105</sup> This is all deranged, and it should continue to be treated with derision.

For the sane world, however, there are still a lot of interesting questions to confront, and we must at least try to begin to think through possible answers. In Part II.A above,<sup>106</sup> I joined the side of those who argue that nothing should be off the table, which means that the answer to Trump’s slippery slope-style question—If Robert E. Lee goes, will Washington and Jefferson be next?—might be yes. *Might* be, although the arguments can be complicated and nuanced.

Here, I want to ask what it means to “erase history” and then to suggest that the cases in favor of continuing to honor some of the historical figures now under reconsideration are actually not all that strong. In Part II.A, I analogized Joe Biden’s position—essentially that Confederate generals are categorically different from the founders, because the former tried to destroy the nation that the latter built—to the middle-ground solution in the same-sex marriage debate, that is, creating civil unions.<sup>107</sup> Neither of these centrist compromises is exactly satisfying, but it is still a sign of progress when a hyper-cautious centrist like Biden no longer feels it politically necessary to dance around the question of Confederate iconography.

The fundamental difference between the same-sex marriage debate and the current debate about the nation’s founders is that there is no direct analogy to marriage equality when it comes to honoring historical figures.

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103. This sub-Part is an edited and updated version of Neil H. Buchanan, *Writing and Rewriting History, from Columbus to Jefferson and Beyond*, DORF ON LAW (July 7, 2020), <http://www.dorfonlaw.org/2020/07/writing-and-rewriting-history-from.html> [https://perma.cc/YLZ2-Z7P5].

104. Max Greenwood, *Trump on removing Confederate statues: ‘They’re trying to take away our culture’*, THE HILL (Aug. 22, 2017), <https://thehill.com/homenews/administration/347589-trump-on-removing-confederate-statues-theyre-trying-to-take-away-our> [https://perma.cc/LM3F-R3JU]; Neil H. Buchanan, *Writing and Rewriting History, from Columbus to Jefferson and Beyond*, DORF ON LAW (July 7, 2020, 12:26 PM), <http://www.dorfonlaw.org/2020/07/writing-and-rewriting-history-from.html> [https://perma.cc/5SGH-B6AG].

105. See Suzanne Nuyen, *Trump Flouts Virus Rules, Warns Of ‘New Far-Left Fascism’ At Mount Rushmore Event*, NPR (July 4, 2020, 3:25 AM), <https://www.npr.org/2020/07/04/887222928/trump-flouts-virus-rules-warns-of-new-far-left-fascism-in-speech-ahead-of-july-4> [https://perma.cc/XH65-QF7F].

106. See discussion *supra* Part II.A.

107. *Id.*

That is, even if one views Biden's approach as a halfway measure, the full measure is not to automatically drop the names of every historical figure and remove every statue. Instead, this debate ends up being a classic facts-and-circumstances inquiry, the type of analysis that people with legal training both love and hate.

Law is all about finding baseline principles. What do we do when there is no consensus baseline? We argue, reconsider, and reach uneasy compromises. Welcome to real life.

To be sure, many people are extremely uncomfortable with all of this, not merely Trump and his supporters. For example, former *New York Times* columnist Roger Cohen, whose work was often excellent, apparently could not wrap his head around the idea that it is important to debate the not-easy cases:

Some of the founders are now under attack for owning slaves. When George Washington and Thomas Jefferson fall from grace, you have to wonder. Union generals, including Ulysses Grant, who fought to defeat the Confederacy and slavery, were not good enough. They were imperfect, the human condition.

Moral absolutism has its giddy day. The guillotine falls. This is madness. Be careful what you say. It is the hour of the new judges; the judged are scared; and judgment of the judges may be decades or even centuries off.

. . . .

We can celebrate our history without hiding from its stains.<sup>108</sup>

How exactly are those founders "under attack"?<sup>109</sup> We are simply asking whether they deserve to be held up as heroes. That is not an attack but an unavoidable question, a question that only seems avoidable to those who approve of the current answer.

To listen to Cohen, however, people like me are simply being nitpicky, because they/we refuse to admit that the human condition is imperfect. But this is not moral absolutism. It is a question about whether the way that we have been honoring these particular imperfect humans should continue. We remember certain imperfect humans in one way, and we remember others in other ways (or not at all). And that can change.

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108. Roger Cohen, *A Difficult Independence Day*, N.Y. TIMES (July 2, 2020), <https://www.nytimes.com/2020/07/02/opinion/july-4th-coronavirus.html> [https://perma.cc/224E-D29L].

109. *See id.*

So no, this is not madness, because we are all now asking how best to “celebrate our history without hiding from its stains.”<sup>110</sup> It is the reflexive defenses of Washington and Jefferson that are stain-free. History will be reconsidered in the future, no matter what. If the current judges are judged differently, then so be it. That is how the public performance of shared history works.

Indeed, shared history must necessarily be selective, and there is no reason that the selections of heroes made during previous eras deserve to be maintained in perpetuity—to be etched in stone, sometimes literally. If we are supposedly erasing history, we have to ask how the history that we are erasing was written in the first place.

Yet even that gives too much ground to those who are now shouting about other people stealing and rewriting history. After all, if anyone can be accused of erasing and rewriting history, it is Confederate sympathizers—who have done so for more than a century after their side lost the war.<sup>111</sup> The South explicitly fought the war to prevent the abolition of slavery, a fact that screams out from all of the historical evidence.<sup>112</sup> But over time, we were told (by groups such as the United Daughters of the Confederacy<sup>113</sup>) to believe that it was a War of Northern Aggression,<sup>114</sup> that the states that insisted on enforcing a national Fugitive Slave Act were fierce defenders of states’ rights,<sup>115</sup> and that the current celebrations of the traitors are merely about families’ heritage.<sup>116</sup> If that is not erasing history, it is difficult to know what would be.

Back in the 1970’s, a U.S. Senator joked about the Panama Canal: “We should hang on to it. We stole it fair and square.”<sup>117</sup> Confederate sympathizers such as Trump look at the neo-Confederate whitewashing of history and the “Lost Cause” myth and say the same: *We stole the history of the Confederacy, and we’ll fight like hell to keep what we stole.*

Taking down statues or changing the names of places does not erase history. There is a clear difference between the historical record and the celebration of parts of it. People who objected when Pete Rose was

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110. *Id.*

111. Buchanan, *supra* note 98.

112. Frank James, *Slavery, Not States’ Rights, Caused Civil War Whose Political Effects Linger*, NPR (Apr. 11, 2011, 4:42 PM), <https://www.npr.org/sections/itsallpolitics/2011/04/12/135353655/slavery-not-states-rights-was-civil-wars-cause> [<https://perma.cc/6H8Q-GMVW>].

113. Allen G. Breed, *‘The lost cause’: the women’s group fighting for Confederate monuments*, THE GUARDIAN (Aug. 10, 2018), <https://www.theguardian.com/us-news/2018/aug/10/united-daughters-of-the-confederacy-statues-lawsuit> [<https://perma.cc/UV69-5FHH>].

114. Buchanan, *supra* note 98.

115. *Id.*

116. *Id.*

117. *To Unsteal the Panama Canal*, N.Y. TIMES (Feb. 14, 1977), <https://www.nytimes.com/1977/02/14/archives/to-unsteal-the-panama-canal.html> [<https://perma.cc/XX9M-VQCZ>].

banned from the Baseball Hall of Fame<sup>118</sup> were apoplectic because, they pointed out, he had the most hits in major league history (a history that included more than a half-century in which only White men could play,<sup>119</sup> but never mind).

But keeping someone out of the Hall of Fame does not say that he did not get those hits. The record book still says that Rose had more hits than any other player.<sup>120</sup> If all we cared about were keeping accurate records, we would not even have halls of fame, because we already have compendia of statistics. A hall of fame exists explicitly for the purpose of bestowing special honors, and it is entirely appropriate for people to say that such honors should not merely replicate one part of the historical record.

Indeed, even when an organization decides to change the record book—for example, adding asterisks or simply saying that some achievements do not count (due to steroid use, among other things)—that still does not change history. Anyone who cares to do so could still consult the historical record and know that seventy-three home runs were hit by one player in a single season and were counted at the time,<sup>121</sup> even if the record book later were to be changed to say that those home runs will no longer be counted.<sup>122</sup> The facts of history do not change in these cases, but the ways we think about them do.

Similarly, we need not deny that, say, Kevin Spacey did some remarkable things as an actor,<sup>123</sup> but that does not require us to honor him.<sup>124</sup> His movies exist, so we are not “wiping away history.” If people no longer want to see him act, his movies (like so many others) will no longer be made or shown. That is not a rewrite of the past. That is supply and demand. Personally, I can still enjoy, say, *BABY DRIVER* with

118. Murray Chass, *Rose, in Deal, Is Said to Accept Lifetime Ban for Betting on Reds*, N.Y. TIMES (Aug. 24, 1989), <https://nyti.ms/29yuQho> [<https://perma.cc/4JCT-5N3P>].

119. *The History of Baseball and Civil Rights in America*, SPORTS ILLUSTRATED (June 11, 2020), <https://www.si.com/mlb/rockies/hof-chatter/the-history-of-baseball-and-civil-rights-in-america> [<https://perma.cc/BNW7-XAJE>].

120. Evan Caminker & Erwin Chemerinsky, *Pete Rose Has Done His Time*, N.Y. TIMES (Feb. 11, 2020), <https://www.nytimes.com/2020/02/11/opinion/pete-rose-baseball.html> [<https://perma.cc/94RS-NQYY>].

121. Selena Roberts, *BASEBALL; Bonds Hits 73rd Home Run, Then Ponders Free Agency*, N.Y. TIMES (Oct. 8, 2001), <https://www.nytimes.com/2001/10/08/sports/baseball-bonds-hits-73rd-home-run-then-ponders-free-agency.html> [<https://perma.cc/J9LV-YTF5>].

122. Harold Friend, *Barry Bonds: MLB Must Delete His Records or Move on from Him*, BLEACHER REPORT (May 13, 2012), <https://bleacherreport.com/articles/1181749-mlb-must-delete-barry-bonds-records-or-leave-him-alone> [<https://perma.cc/LMT9-7QMV>].

123. KEVIN SPACEY, IMDB, <https://www.imdb.com/name/nm0000228/> [<https://perma.cc/6VXG-JCAU>] (last visited Sept. 22, 2020).

124. *Kevin Spacey: Special Emmy award withdrawn after assault allegations*, BBC (Oct. 31, 2017), <https://www.bbc.com/news/entertainment-arts-41816238> [<https://perma.cc/AHX7-NDPS>].

Spacey<sup>125</sup> but can no longer stomach Woody Allen's films; but everyone will draw lines in different places. Some cases are more extreme than others, but that is not a reason to ignore the less-extreme ones.

Similarly, in politics, there is no reason that our reconsideration of when to engage in public celebration should, per Biden<sup>126</sup> (and Cohen<sup>127</sup>), be limited to the most extreme cases. As I argued in Part II.A, we can look anew at Washington and Jefferson and conclude that we have ignored the bad too long and overvalued the good.<sup>128</sup> Again, that does not deny their accomplishments. It says that their stories are more complicated, that the facts and circumstances deserve to be reconsidered, and possibly concluding that people who have been unthinkingly revered are no longer deserving of our worship.

Again, the facts will be different for different historical figures. In Part II.A, I noted that Christopher Columbus enslaved people upon his arrival in the Caribbean, and he became a slave trader.<sup>129</sup> What is especially interesting about Columbus, however, is just how weak the other side of his balance sheet is.

To be blunt, what the hell did Christopher Columbus do that makes him a hero? Washington and Jefferson did things that deserve to be celebrated (more on that in a moment), but what did Columbus do that was admirable? He was looking for a trade route and instead found an island with an exploitable population of indigenous peoples.<sup>130</sup>

I remember in a public grade school (many years ago) being taught that Columbus did not discover America. Eric the Red supposedly did, centuries earlier.<sup>131</sup> Even in the usual U.S. mythology, then, Columbus's big achievement should be a "meh." He captained ships and found things that other Europeans exploited.<sup>132</sup> What did he *do* for what became the United States?

If we are in the business of balancing credits and debits, then, Columbus is a particularly easy case. For no particular reason, his achievements have been overstated and his atrocities ignored. Other than the cost of putting up new street signs, why exactly should we continue to treat him as we have for far too long?

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125. SPACEY, *supra* note 123.

126. *See* Easley, *supra* note 96.

127. *See* Cohen, *supra* note 108.

128. *See* discussion, *supra* Part II.A.

129. *See* discussion, *supra* Part II.A.

130. Delno West, *Christopher Columbus and His Enterprise to the Indies: Scholarship of the Last Quarter Century*, 49 WM. & MARY Q. 254, 260 (1992).

131. Eric Weiner, *Coming to America: Who Was First?*, NPR (Oct. 8, 2007, 2:22 PM), <https://www.npr.org/templates/story/story.php?storyId=15040888> [<https://perma.cc/3E5D-HN5W>].

132. Dave Roos, *The Ships of Christopher Columbus Were Sleek, Fast—and Cramped*, HISTORY (Oct. 10, 2019), <https://www.history.com/news/christopher-columbus-ships-caravels> [<https://perma.cc/W85E-KGAF>].

Other cases raise their own balancing tests, some much easier than others. Andrew Jackson certainly is also an easy case. Even setting aside his fake populism and corruption (including imprisoning judges<sup>133</sup>), Jackson was a genocidal maniac who authored the “Trail of Tears” that killed thousands upon thousands of Native Americans.<sup>134</sup> Are there positive things that he did as president? Sure, but that cannot possibly make this a difficult case.

What about George Washington? Here, we have a much more obvious case on the positive side, what with his decision to serve only two terms,<sup>135</sup> to inveigh against political factionalism,<sup>136</sup> and so on. But as one of *Dorf on Law*'s readers pointed out in a comment on my short post commemorating Independence Day last year: “The Brits lost the First War of American Secession, c. 1774-1783, through logistical ineptitude and their own domestic corruption as much as anything else; the Colonies didn't ‘win.’”<sup>137</sup> Which means that Washington's supposed military prowess in “winning our independence” is itself a contestable and selective reading of history.

That is not to say that everyone would view even a man who owned 300 slaves and used the government's powers to recapture his escaped slaves as unworthy of public honor,<sup>138</sup> given his positives. I personally think that it is shocking that people are not willing to confront Washington's ugly side, but that is what public discussions are about.

And what of Thomas Jefferson? His soaring rhetoric has inspired many people, including me. It is worth remembering, however, that even his moving Declaration of Independence includes this complaint about King George III: “He has excited domestic insurrections amongst us, and has endeavoured to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions.”<sup>139</sup>

133. History.com Editors, *Andrew Jackson shuts down Second Bank of the U.S.*, HISTORY (Sept. 6, 2019), <https://www.history.com/this-day-in-history/andrew-jackson-shuts-down-second-bank-of-the-u-s#:~:text=President%20Andrew%20Jackson%20announces%20that,as%20the%20E2%80%9CBank%20War.%22> [https://perma.cc/RJK5-JY6F].

134. History.com Editors, *Trail of Tears*, HISTORY (July 7, 2020), <https://www.history.com/topics/native-american-history/trail-of-tears> [https://perma.cc/FKV6-4964].

135. Elaine Zelby, *Which US Presidents chose not to run for a second term?*, MEDIUM (Feb. 2, 2019), <https://medium.com/useless-knowledge-daily/which-us-presidents-chose-not-to-run-for-a-second-term-eba9cb2660cb> [https://perma.cc/XXK7-FW2N].

136. John Avlon, *George Washington's Farewell Warning*, POLITICO (Jan. 10, 2017), <https://www.politico.com/magazine/story/2017/01/washingtons-farewell-address-warned-us-about-hyper-partisanship-214616> [https://perma.cc/7J29-PNCL].

137. CEP, Comment to Neil H. Buchanan, *Happy (?) Independence Day*, DORF ON LAW (July 3, 2020), <http://www.dorfonlaw.org/2020/07/happy-independence-day.html#comments> [https://perma.cc/EH8X-4VWZ].

138. GEORGE WASHINGTON'S MOUNT VERNON, *supra* note 89.

139. The Declaration of Independence (U.S. 1776).

Even Exhibit A in the pro-Jefferson canon, then, is hardly an unsullied celebration of high ideals. More to the point, however, the negative side of Jefferson's story is especially awful. He owned hundreds of slaves,<sup>140</sup> and he was a serial rapist.<sup>141</sup> He did not free his slaves upon his death<sup>142</sup> (which would not have erased the stain, but it would have been better than what he did). And even on the more mundane side, Jefferson's role in the acts that led to the landmark *Marbury v. Madison*<sup>143</sup> case are not what one would call "good facts" in his case for iconic status.<sup>144</sup> One of Jefferson's direct descendants wrote an op-ed in *The New York Times* in which he called for the Jefferson Memorial in Washington(!), D.C.(!), to be transformed into a memorial to Harriet Tubman.<sup>145</sup> He argued that Jefferson's slave plantation is memorial enough, because:

[A]t Monticello, you will learn the history of Jefferson, the man who was president and wrote the Declaration of Independence, and you will learn the history of Jefferson, the slave owner. Monticello is an almost perfect memorial, because it reveals him with his moral failings in full, an imperfect man, a flawed founder. That's why we don't need the Jefferson Memorial to celebrate him.<sup>146</sup>

In other words, one need not choose to stop paying attention to Jefferson but instead to pay attention to him in a more complete way. That is not erasing history but adding to it.

As I wrote in Part II.A, I do not expect my point of view to prevail (at least for now), especially given the Biden/Cohen unwillingness to recognize anything other than a bright-line rule.<sup>147</sup> That does not mean, however, that they are right. History will continue to be understood in

140. *Slavery FAQs - Property*, THOMAS JEFFERSON'S MONTICELLO, <https://www.monticello.org/slavery/slavery-faqs/property/> [<https://perma.cc/T2ZG-XUMV>] (last visited Oct. 12, 2020).

141. See Farah Stockman, *Monticello Is Done Avoiding Jefferson's Relationship With Sally Hemings*, N.Y. TIMES (June 16, 2018), <https://www.nytimes.com/2018/06/16/us/sally-hemings-exhibit-monticello.html> [<https://perma.cc/6EXQ-J3XA>].

142. THOMAS JEFFERSON'S MONTICELLO, *supra* note 140 (Throughout his life and in his will, Jefferson freed a total of (at the most) nine or ten of the human beings whom he had owned as slaves—a far cry from what one might have expected of the individual who penned the words "all men are created equal.").

143. 5 U.S. 137 (1803).

144. See History.com Editors, *Marbury v. Madison Establishes Judicial Review*, HISTORY (Feb. 20, 2020), <https://www.history.com/this-day-in-history/marbury-v-madison-establishes-judicial-review> [<https://perma.cc/7PMK-6VTP>].

145. Lucian K. Truscott, Opinion, *I'm a Direct Descendant of Thomas Jefferson. Take Down His Memorial*, N.Y. TIMES (July 6, 2020), <https://www.nytimes.com/2020/07/06/opinion/thomas-jefferson-memorial-truscott.html> [<https://perma.cc/6P2K-GAZT>].

146. *Id.*

147. See discussion *supra* Part III.A.

different ways. We need not pretend that our habitual honoring of people from Columbus on down was well thought out in the first place.

We are not changing the past. We are deciding how we, today, will celebrate or condemn the past. That is not only our right: it is inevitable.

C. *Reassessing America's Founders is Deeply Patriotic*<sup>148</sup>

U.S. Senator Tammy Duckworth, an Illinois Democrat, upset some people in the summer of 2020.<sup>149</sup> She was asked whether statues of George Washington, Thomas Jefferson, and so on should be brought down, and she replied that it was legitimate to have a “national dialogue” about that question.<sup>150</sup> She did not say that she agreed with those who would change the national deification of those (slave-owning) men, only that discussing it is legitimate.<sup>151</sup>

Naturally, she was quickly excoriated by those on the right who are constantly looking for wedge issues, including (of course) Donald Trump.<sup>152</sup> Duckworth responded with a pointed and moving op-ed in *The New York Times*, in which she stated emphatically:

I don't want George Washington's statue to be pulled down any more than I want the Purple Heart that he established to be ripped off my chest. I never said that I did.

But while I would risk my own safety to protect a statue of his from harm, I'll fight to my last breath to defend every American's freedom to have his or her own opinion about Washington's flawed history. What some on the other side don't seem to understand is that we can honor our founders while acknowledging their serious faults, including the

148. This sub-Part is an edited and updated version of Neil H. Buchanan, *Reassessing America's Founders is Completely Patriotic*, DORF ON LAW (July 10, 2020), <http://www.dorfonlaw.org/2020/07/reassessing-americas-founders-is.html> [<https://perma.cc/Q9X5-ZBVF>].

149. See *Interview With Food and Drug Administration Commissioner Stephen Hahn; Interview With Sen. Joni Ernst (R-IA); Interview With Sen. Tammy Duckworth (D-IL); Interview With Austin, Texas, Mayor Steve Adler. Aired 9-10a ET*, CNN: TRANSCRIPTS, <https://www.cnn.com/videos/politics/2020/07/05/sotu-duckworth-statue.cnn> [<https://perma.cc/P9KK-Z4MX>] (last visited Oct. 13, 2020) [hereinafter *Duckworth Interview*].

150. *Id.*

151. *Id.*

152. Donald J. Trump for President, <https://www.donaldjtrump.com/media/trump-campaign-statement-on-sen.-tammy-duckworths-openness-to-tearing-down-george-washington-statues/> [<https://perma.cc/SM37-2GW9>] (last visited Apr. 1, 2021); see also Lauren Lantry, *Sen. Duckworth Defends her patriotism, Tucker Carlson's right to free speech*, ABC NEWS (July 10, 2020, 5:23 PM), <https://abcnews.go.com/Politics/sen-tammy-duckworth-defends-patriotism-tucker-carlsons-free/story?id=71715148> [<https://perma.cc/DJH9-TJEQ>].

undeniable fact that many of them enslaved Black Americans.<sup>153</sup>

Duckworth's military service resulted in her losing both legs on a battlefield in Iraq (hence the Purple Heart),<sup>154</sup> and she acidly added this about Trump and his culture warriors: "They should know, though, that attacks from self-serving, insecure men who can't tell the difference between true patriotism and hateful nationalism will never diminish my love for this country—or my willingness to sacrifice for it so they don't have to. These titanium legs don't buckle."<sup>155</sup>

Well played. I happen to disagree with Duckworth on the merits of Washington and Jefferson, but as she points out, that is not the larger issue here. She knows that such discussions are not only appropriate and natural but that they are nothing to fear. They are certainly patriotic.

The problem is that Republicans are not the only ones who get it wrong about this issue. Some who claim to be centrists smugly assert that Duckworth is wrong both politically and morally.<sup>156</sup> What the heck are they talking about?

In Parts II.A and II.B, I explained why I find the reassessment of Washington, Jefferson, and others to be long overdue.<sup>157</sup> Path dependence and transition costs are formidable obstacles to change, of course, but on the merits, it is hardly a stretch to say that we might not want to honor those men who wrote and did important things but who also engaged in the systematic enslavement and serial rape of other human beings. Even in the 1700's, enlightened people—and we certainly have always liked to think of Washington, Jefferson, and the others as enlightened—understood that this abomination must not stand.<sup>158</sup>

As I wrote, however, each person can and should do their own balancing test to determine whether these and other historical figures should continue to be honored. I was thus pleased to see Senator

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153. Tammy Duckworth, Opinion, *Tammy Duckworth: Tucker Carlson Doesn't Know What Patriotism Is*, N.Y. TIMES (July 9, 2020), <https://www.nytimes.com/2020/07/09/opinion/tammy-duckworth-tucker-carlson.html?auth=login-facebook&searchResultPosition=1> [<https://perma.cc/LGK8-9VXL>].

154. *See id.*

155. *Id.*

156. Matt Bai, Opinion, *Why is the party with a strong chance of winning playing a reckless game with U.S. history?*, WASH. POST (July 8, 2020, 6:29 PM), <https://www.washingtonpost.com/opinions/2020/07/08/going-after-washington-jefferson-isnt-just-wrong-its-politically-negligent/> [<https://perma.cc/D8YQ-5CGE>].

157. *See discussion supra* Parts II.A, II.B.

158. John R. Howe, Jr., *John Adam's Views of Slavery*, 49 J. NEGRO HIST. 201, 201 (1964); Richard J. Werther, *Roger Sherman: The Only Man Who Signed All Four Founding Documents*, J. AM. REVOLUTION (Sept. 28, 2017), <https://allthingsliberty.com/2017/09/roger-sherman-man-signed-four-founding-documents/> [<https://perma.cc/77R8-G4ZE>].

Duckworth make precisely the same point.<sup>159</sup> Leaving aside the founding generation, I continue to think of Christopher Columbus and Andrew Jackson as easy calls against public honor, but I concede that Washington and Jefferson have much more on the plus side of their balance sheets. That is why we should have a dialogue.

So far, so good. Is this good politics, though? Again, I have been clear all along that I understand why this is dangerous ground for Joe Biden and the Democrats, so the deliberate mangling of Duckworth's words by the Trumpists was completely predictable.<sup>160</sup> I have likened Biden's stated approach—the founders are off limits, but of course Confederate iconography must go—to the creation of civil unions as a compromise in the same-sex marriage debate,<sup>161</sup> but that does not mean that it is not smart politics. In fact, for a few years, the civil unions dodge was the best that we could hope for, given the (rapidly evolving) politics of that moment.

As it happens, the usual defenses of the regrettable choices of the founding generation regarding slavery—explicitly protecting slavery in the new nation,<sup>162</sup> agreeing to the three-fifths compromise,<sup>163</sup> and so on—take as a given that the more progressive founders had no choice but to give in to the pro-slave colonies, where the presumption is that *if they had had their druthers*, the better men among the founders would have ended slavery entirely. That idea has even made it into popular culture, with the Broadway play and film *1776* depicting the history in exactly that way.<sup>164</sup>

That does not absolve the slaveholding founders themselves, of course, because no one was forcing them to enslave or brutalize other human beings. Washington, Jefferson, and the others could and should have said, “Well, we lost that political battle, but we as individuals can still do what's right,” but they instead chose to continue to own humans as property.

In any event, if I were advising Democrats—a prospect that both they and I would find equally unpleasant, I suspect—I would have been fully on board in telling Biden and others to try not to engage with a debate

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159. Duckworth, *supra* note 153.

160. *See id.*

161. Annie Linksey, *On monuments, Biden draws distinction between those of slave owners and those who fought to preserve slavery*, WASH. POST (June 30, 2020, 4:39 PM), [https://www.washingtonpost.com/politics/on-monuments-biden-draws-distinction-between-those-of-slave-owners-and-those-who-fought-to-preserve-slavery/2020/06/30/a98273d8-bafe-11ea-8cf5-9c1b8d7f84c6\\_story.html](https://www.washingtonpost.com/politics/on-monuments-biden-draws-distinction-between-those-of-slave-owners-and-those-who-fought-to-preserve-slavery/2020/06/30/a98273d8-bafe-11ea-8cf5-9c1b8d7f84c6_story.html) [<https://perma.cc/TFG7-55M2>].

162. Matthew Spalding, *How to Understand Slavery and the American Founding*, HERITAGE FOUND. (Aug. 26, 2002), <https://www.heritage.org/american-founders/report/how-understand-slavery-and-the-american-founding> [<https://perma.cc/DZ67-D9P6>].

163. *Three-Fifths Compromise*, ENCYCLOPEDIA BRITANNICA (June 26, 2020), <https://www.britannica.com/topic/three-fifths-compromise> [<https://perma.cc/C5H4-LTMJ>].

164. *1776* (Columbia Pictures 1972).

about the founders' place in the American political firmament. Better to steer clear, even now, given the fundamental threat to American constitutional democracy that Trump still poses.

As I noted above, however, there is a slice of the centrist punditocracy that cannot simply leave it at that simple statement: "This is politically explosive, so leave it alone."<sup>165</sup> Instead, the guardians of the conventional wisdom are using this as an opportunity once again to bash progressives for daring to be progressive.<sup>166</sup> And there is not a more self-satisfied centrist than Matt Bai, formerly of *The Times* and now with *The Washington Post*.<sup>167</sup> Because he is an anti-conservative, I have frequently agreed with Bai's writings over the years. Even so, he is most in his element when he can go after people to his left, especially by engaging in false equivalence.<sup>168</sup>

In July 2020, Bai penned an op-ed in which he could have made the simple case that Democrats would be wise to tamp down the debate over the founding generation.<sup>169</sup> And he sort of wrote that column, saying that Duckworth's position left him "wondering why a party with a strong chance of winning back the White House in November would want to play such a reckless game when it comes to the nation's history."<sup>170</sup>

Okay, fine, but this is Matt Bai, so he could not leave it at that. His opening paragraph is absurdly (but all too typically) overwrought: "I watched with a kind of horrified fascination last weekend as Sen. Tammy Duckworth (D-Ill.) pointedly refused—twice—to answer a direct question from CNN's Dana Bash about whether statues of George Washington around the country should be torn down and replaced."<sup>171</sup>

Duckworth's op-ed had not yet been published when Bai attacked her, but he did link (via the word "refused" in the quote above) to the CNN transcript of the interview<sup>172</sup> that incensed him so much. Here are those two supposedly pointed "refusals":

BASH: "Senator, I know that you support change in the name of military bases named after Confederate leaders. But there are leaders like George Washington and Thomas

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165. Buchanan, *supra* note 95.

166. *Id.*

167. *Matt Bai*, WASH. POST, <https://www.washingtonpost.com/people/matt-bai/> (last visited Sept. 26, 2020); *Matt Bai*, N.Y. TIMES, <https://www.nytimes.com/by/matt-bai> [<https://perma.cc/7LAG-6K9B>] (last visited Sept. 26, 2020); Duckworth, *supra* note 153.

168. Neil H. Buchanan, *False Equivalence from Down Under*, DORF ON LAW (Jan. 21, 2011), <http://www.dorfonlaw.org/2011/01/false-equivalence-from-down-under.html> [<https://perma.cc/L8ZU-K7EX>].

169. Bai, *supra* note 167.

170. *Id.*

171. *Id.*

172. *Duckworth Interview*, *supra* note 143.

Jefferson who were slave owners, and some people are demanding that their monuments come down, too. So, in your view, where does it end? Should statues, for example, of George Washington come down?”

DUCKWORTH: “Well, let me just say that we should start off by having a national dialogue on it at some point.”<sup>173</sup>

Duckworth, obviously aware that it would be a bad idea for the interview to become sidetracked on that issue, then tried to pivot the conversation back to Trump’s criminal mishandling of the pandemic, the Russian bounties on American soldiers, and so on.<sup>174</sup> Bash responded:

BASH: “So, that might be -- be true, but George Washington, I don’t think anybody would call him a traitor. And there are ...”

DUCKWORTH: “No.”

BASH: “... moves by some to remove statues of him. Is that a good idea?”

DUCKWORTH: “I think we should listen to everybody. I think we should listen to the argument there. But remember that the president at Mount Rushmore was standing on ground that was stolen from Native Americans who had actually been given that land during a treaty.”<sup>175</sup>

Duckworth then returned to coronavirus and the other issues.<sup>176</sup>

For Bai, this was a cause of “horrified fascination.”<sup>177</sup> Rather than trying to focus on Trump’s failures, Duckworth “pointedly refused—twice—to answer a direct question.”<sup>178</sup> She answered not by offering her own opinion but by saying that she respects other people’s right to have opinions.<sup>179</sup> Bai did not like that answer, obviously, apparently because she did not say, “No, Washington and Jefferson were gods among men and should never be reconsidered.”

Indeed, the telling aspect of Bai’s attack on Duckworth was that he did not leave it at saying that she left herself open politically.<sup>180</sup> He

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *See* Bai, *supra* note 167.

178. *Id.*

179. Jack Turman, *Tammy Duckworth fires back at Tucker Carlson and Trump campaign over statute removal criticism*, CBS NEWS (July 10, 2020, 8:37 PM), <https://www.cbsnews.com/news/tammy-duckworth-tucker-carlson-trump-campaign-statue-removal-criticism/> [https://perm a.cc/9PLN-Z5MV].

180. Bai, *supra* note 167.

twisted his response into an attack on the left, saying that political calculations are “not something my progressive friends want to hear right now. (I hesitate to use that word—‘progressive’—since the father of progressivism, Theodore Roosevelt, is among those whose statues are under assault.)”<sup>181</sup>

If that was not snarky and disingenuous enough, Bai then let this fly: “I’ve been thinking lately about the Taliban. (No, I’m not comparing liberals to Afghanistan’s radical mullahs. Stay with me here.)”<sup>182</sup> Unsurprisingly, he does in fact compare liberals to the Taliban.<sup>183</sup> He begins by saying that the world ignored the Taliban until they started destroying cultural artifacts, at which point “[t]he world responded with revulsion and outrage, a kind of global gag reflex.”<sup>184</sup>

If we are not comparing liberals to the Taliban, what is his point? “[T]he destruction of cultural artifacts often has a resonance that human tragedy, with its faceless statistics, does not. These historical symbols connect us to the flow of human history; erasing that history leaves us diminished and unmoored from any larger purpose.”<sup>185</sup>

And there we have it. Bai engages in exactly the diversion that Trump and other Confederate sympathizers love so much, saying that taking down statues means “erasing history.”<sup>186</sup> Worse, we will supposedly lose any connection to a larger purpose. Any change in statues or names is not a *different* way to understand and depict history in the public square. It is complete *erasure*.

Let me repeat that Bai is not merely saying that Democrats would be politically wise not to seem open to a discussion about whether the founders’ public recognition should be changed. He is saying that it is affirmatively a horrible thing to remove statues or update place names. Once something is there, it must stay there, or we do violence to history, just as the Taliban did by blowing up the two Buddhas of Bamiyan.

Why? Well:

In the United States, we don’t raise up statues as shrines to be worshiped, or as instruments of oppression. We tend to erect them as markers of our progress, reminders that even flawed men and women can leave the nation less flawed than they found it. Memorials are sedimentary layers of the American bedrock, there to be excavated and reexamined by every succeeding generation.<sup>187</sup>

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181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. Bai, *supra* note 161.

186. *Id.*

187. *Id.*

This is classic pundit-speak, mixing utter falsehoods (“we don’t raise up statues as shrines to be worshiped”) with pseudo-intellectual pronouncements that inadvertently concede the writer’s own lack of conviction. After all, what are we doing now if not “excavat[ing] and reexamin[ing]” the “layers of the American bedrock”? We are asking how and where we will remind ourselves of our flawed former leaders. Bai cannot get himself to say that such reexamining is a bad idea, so he concedes that it is a good thing even as he condemns those who have the temerity to do so.<sup>188</sup>

Bai concludes: “Indiscriminately attacking the nation’s memorials is chilling. Letting Trump have a debate about it is just plain dumb.”<sup>189</sup> The latter point is arguably accurate, but even that is not obviously so. But even if it is, the former claim is frankly idiotic.

Neither Duckworth nor anyone with my views would indiscriminately attack the nation’s memorials. Are there some people who would? Maybe, but even the people who would take down the largest number of statues and change the largest number of names are not being indiscriminate. Saying that “indiscriminate attacks” are “chilling” is merely a tautology, and a pompous one at that. I can say of Bai that “baselessly criticizing one’s opponents is closed-minded,” and if Bai objects that his criticisms are not baseless, I can then say, “Oh, I was only criticizing people who have no basis for their claims.” That is a waste of everyone’s time.

This is, then, yet another example of the “hippie-punching” default among those who view themselves as defining the sensible center. Do we have the freedom to debate important questions? *Yes, of course*, people like Bai say, *but if you should ever be tempted to do so, I’ll attack you for being politically stupid and for attacking our “markers of progress.” How dare you!*

Senator Duckworth, interestingly, quoted George Washington himself, noting that he urged Americans to “guard against the impostures of pretended patriotism.”<sup>190</sup> Who was Washington warning us to worry about? The pseudo-centrists like Bai no less than the buffoons of the Trump cult, all of whom feel no remorse in attacking the patriotism of those with whom they disagree.

## CONCLUSION

White privilege takes many forms, but the most important thing to know about it is that it is mostly a matter of what White people can

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188. *Id.*

189. *Id.*

190. Richard Lim, *George Washington’s Warning on Disunity*, FOUND. FOR ECON. EDUC. (Sept. 20, 2018), <https://fee.org/articles/george-washingtons-warning-on-disunity/> [<https://perma.cc/6T9R-UT7Y>].

passively take for granted. Police violence can be visited upon anyone, but White people—and especially White men—have the privilege of not having to actively worry about being targeted by officers of the law because of their race. Similarly, White people who are worried about “erasing history” by removing statues and changing place names have the privilege of thinking that White history is merely “history,” such that any changes to the way we currently represent and understand history are inherently suspect.

If we are going to make further progress, White people need to understand our privilege and see that we are benefiting even when we are not aware that it is happening.