

**THE GHOSTS OF WHITE SUPREMACY:  
TRAYVON MARTIN, MICHAEL BROWN, AND THE SPECTERS OF  
BLACK CRIMINALITY**

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I. INTRODUCTION

We are haunted by the specters of white supremacy conveniently masked in the avatar of black criminality.<sup>1</sup> Racism is real and structural.<sup>2</sup> Criminal law has a disparate effect on people of color.<sup>3</sup> Workplace discrimination is real.<sup>4</sup> White society’s dominant strategy for addressing

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<sup>1</sup> See KILLING TRAYVONS: AN ANTHOLOGY OF AMERICAN VIOLENCE (Kevin Alexander Gray et al. eds., 2014).

<sup>2</sup> See generally Eduardo Bonilla-Silva, *Rethinking Racism: Toward a Structural Interpretation*, 62 AM. SOC. REV. 465 (1997); William M. Wiecek, *Structural Racism and the Law in America Today: An Introduction*, 100 KY. L.J. 1 (2012); Donna Barry & Heidi Williamson, *In Ferguson and the Entire Nation, Institutional Racism Extends Far Beyond Law Enforcement*, THE ROOT.COM (Aug. 28, 2014), [http://www.theroot.com/articles/culture/2014/08/in\\_ferguson\\_and\\_the\\_entire\\_nation\\_institutional\\_racism\\_extends\\_far\\_beyond.html](http://www.theroot.com/articles/culture/2014/08/in_ferguson_and_the_entire_nation_institutional_racism_extends_far_beyond.html).

<sup>3</sup> See generally Kathleen Daly, *Symposium: Race and Criminal Justice: Criminal Law and Justice System Practices as Racist, White, and Racialized*, 51 WASH & LEE L. REV. 431 (1994).

<sup>4</sup> See generally Paul Butler, *Affirmative Action: Diversity of Opinions: Affirmative Action and the Criminal Law*, 68 U. COLO. L. REV. 841 (1997); David Cole, *No Equal Justice: How the Criminal Justice System Uses Inequality*, CHAMPION, Sept.–Oct. 1999, at 20; Diana R. Gordon, *Drug Policy and the Dangerous Classes: A Historical Overview*, 10 TEMP. POL. & CIV. RTS. L. REV. 315 (2001); William M. Wiecek & Judy L. Hamilton, *Beyond the Civil Rights Act of 1964: Confronting Structural Racism in the Workplace*, 74 LA. L. REV. 1095 (1994).

blackness is violence.<sup>5</sup> Or, as Joseph Pugliese has written, “White supremacy is a priori the exercise of violence through the diffuse iteration of everyday practices that, precisely because of their quotidian status, render the violence unrepresentable to everyone but its targets.”<sup>6</sup> We cannot expect whiteness<sup>7</sup> to self-correct; it never has. We as scholars, lawyers, and activists must challenge dominant discourses that displace, obscure, and obfuscate the centrality of whiteness in our everyday lives. Whiteness is strategic, used at will to denigrate, debase, and other blackness.<sup>8</sup> Ghosts are at war. The ghosts of white supremacy walk the realm of the living masked in the trappings of post-racialism.<sup>9</sup> We heed the drum beat of spectral violence every time we remain silent. Silence is whiteness’s strategy.

In this short essay, I am interested in unpacking the ways in which black criminality haunts United States law as white supremacy’s avatar. For some time, I have been interested in hauntings<sup>10</sup> both for the vivid imagery they encourage, and of course the interest such imagery generates, as well as the way such a description gets at the presence/absence conundrum of a post-everything world.<sup>11</sup> That is to say, although post-racialism has roundly been critiqued in the legal academy, it is a salient feature of everyday discourse. So, in light of this, legal scholars and other interested parties must consider the ways in which the ghosts of white supremacy structure modern concepts of black criminality. And, also, the ways our responses to anti-blackness must be structured in order to address white supremacy’s spectral existence. These ghosts flutter about in the recesses, corners, and alleyways of public memory and discourse. But we often forget the important ways the past is made present,

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<sup>5</sup> See Steve Martinot & Jarod Sexton, *The Avante-Garde of White Supremacy*, 9 SOC. IDENTITIES 169 (2003).

<sup>6</sup> JOSEPH PUGLIESE, *STATE VIOLENCE AND THE EXECUTION OF LAW: BIOPOLITICAL CAESURAE OF TORTURE, BLACK SITES, DRONES* 79 (2013).

<sup>7</sup> Teresa J. Guess, *The Social Construction of Whiteness: Racism by Intent, Racism by Consequence*, 32 CRITICAL SOC. 649, 650–52 (2006).

<sup>8</sup> Cf. Thomas K. Nakayama & Robert L. Krizek, *Whiteness: A Strategic Rhetoric*, 81 Q.J. SPEECH 291 (1995).

<sup>9</sup> David D. Troutt, *Barack Obama, “Post-Raciality” and Mythic-Rhetorical Regime Change*, 22 NAT’L BLACK L.J. 1, 11 (2009) (“Having argued that post-raciality neither exists in fact nor even constitutes some kind of static ideal, I will conclude by saying that it is, in even the best hands, a mythic-rhetorical gamble that is rooted in our terrible history of race relations. The gamble is that what works to save a presidency may further marginalize the people who need its success the most.”).

<sup>10</sup> See Nick J. Sciuillo, *The Ghost in the Global War on Terror: Critical Perspectives and Dangerous Implications for National Security and the Law*, 3 DREXEL L. REV. 561 (2011).

<sup>11</sup> See generally Peter Benson, *Derrida on Language*, PHILOSOPHY NOW, Jan./Feb. 2014, at 13, available at [https://philosophynow.org/issues/100/Derrida\\_On\\_Language](https://philosophynow.org/issues/100/Derrida_On_Language).

particularly in terms of race relations. What we need do is look<sup>12</sup> awry<sup>13</sup> in order to see the ghosts not in front of us. Looking awry is, of course, the way Slavoj Žižek suggests we might be able to confront from the side, askew, our objects of study to better apprehend them in light of their refractal possibilities.

To wit, I contend white supremacy is a ghostly regime of intolerance that serves as the justification for police violence and enables structural inequality. I also contend that the ghosts of white supremacy must be addressed, must be confronted, no matter how fleeting and ineffectual such psychic engagement may be. Such engagements are fraught with difficulty and disappointment, but unless we explore the deep recesses of our minds with unflagging critical attention, we are destined to let white supremacy haunt our attempts at racial understanding, our desire to better understand difference, and our interest in equality.

Law is ineffective in dealing with racial injustice. Recent discussions about the ineffectual nature of *Brown v. Board of Education* bear this out.<sup>14</sup> Racism remains central to sports, media, law, and civil society.<sup>15</sup> Law cannot be our answer, not because law, judges, and lawyers do bad things, but because law asks that we displace hope into someone else's hands. Only through hope can we attempt to challenge white supremacy, but that hope only matters in a world where we appreciate the hauntings that guide our everyday actions.

In this Article, I begin with an explanation of haunting's role in law, followed by a discussion of blackness's visibility. To this, I add a discussion of negative dialectics as a more helpful way to engage the dialectical nature of race and a discussion of the possibilities of hope as an answer to law's anti-blackness. Each section is intended to be an avenue from which to critique anti-blackness in law, and to then take the next step of challenging white supremacy and anti-blackness.

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<sup>12</sup> I do not mean "look" or "see" in the ablest sense, but instead in the critically engaging sense. Looking and seeing need not occur with eyes. If eyes are all we use to look and see, we are missing quite a lot.

<sup>13</sup> See SLAVOJ ŽIŽEK, *LOOKING AWRY: AN INTRODUCTION TO JACQUES LACAN THROUGH POPULAR CULTURE* vii (1992).

<sup>14</sup> See CHARLES J. OGLETREE, JR., *ALL DELIBERATE SPEED: REFLECTIONS OF THE FIRST HALF-CENTURY OF BROWN V. BOARD OF EDUCATION* (2005); Joe R. Feagin & Bernice McNair Barnett, *Success and Failure: How Systemic Racism Trumped the Brown v. Board of Education Decision*, 2004 U. ILL. L. REV. 1099, 1107–10, 1114–30; Ronald Brownstein, *How We're Still Failing, 60 Years After Brown v. Board of Education*, NAT'L J., Apr. 24, 2014, <http://www.nationaljournal.com/political-connections/how-we-re-still-failing-60-years-after-brown-v-board-of-education-20140424>; Sarah Garland, *Was 'Brown v. Board' a Failure?*, THE ATLANTIC, Dec. 5, 2012, <http://www.theatlantic.com/national/archive/2012/12/was-brown-v-board-a-failure/265939/>.

<sup>15</sup> Nick J. Sciullo, *Richard Sherman, Rhetoric, and Racial Animus in the Rebirth of the Bogeyman*, 37 HASTINGS COMM. & ENT. L.J. (forthcoming 2015).

## II. A HAUNTOLOGY OF THE CRIMINAL

For some time, we have feared criminals, fearing what they do and fearing the fear they inspire. Television, motion pictures, and newspapers trade in crime stories,<sup>16</sup> fictionalized and more factual, all to capture our attention in the economy of spectral images. We desire to see the ghost, to be able to prove it is out there. But, it is precisely the unreachable ghost that motivates us, that beckons us toward the unknowable. In some ways then, white supremacy's spectral nature is the precondition for its investigation and challenging. White supremacy can be challenged particularly because it cannot be. This is to make complex a relatively simple idea: unknowns can invigorate resistance.

We watch ghost hunting shows on television, impressed and raptured by the sudden changes in readings on EMF (electromagnetic field) readers.<sup>17</sup> We love the known unknowns of Halloween, an unlit house, and the plot twist not yet read. We hope to be able to guess the killer or find the killer's hideout. Surprise! The killer is already inside the house. The same is true of our legal system; it is not that outside actors have constructed something that bears little resemblance to the idyllic democratic experiment of the Founding Era. No. Instead, we should direct our attention at judges, lawyers, prosecutors, and police officers. A police officer killed Eric Garner.<sup>18</sup> A police officer killed

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<sup>16</sup> See Kornil Swaroop Kumar, *Crime and the News Media*, 1 TURKISH J. POL. SCI. 17 (1999); Jessica M. Pollak & Charis E. Kubrin, *Crime in the News: How Crimes, Offenders and Victims Are Portrayed in the Media*, 14 J. CRIM. JUST. & POPULAR CULTURE 59 (2007); Dana Mastro et al., *The Influence of Exposure to Depictions of Race and Crime in TV News on Viewer's Social Judgments*, 53 J. BROADCASTING & ELECTRONIC MEDIA 615 (2009); Daniel Romer et al., *Television News and the Cultivation of Fear of Crime*, 53 J. COMM. 88 (2003).

<sup>17</sup> See Brenda S. Gardenour Walter, *Listening to Ghosts: Haunted Hospitals, Spectral Patients, and the Monstrous in Modern Medicine*, 4 TRESPASSING J. 51, 51 (2014) ("The popularity of 'reality-based' television programs such as Paranormal State (2007-2011) and Ghost Adventures (2008-present), supernatural horror films such as the Paranormal Activity franchise (2009-2014), as well as countless websites dedicated to legend tripping and urban exploration, attest to our cultural fears of a horrifying past that hovers just out of sight yet demands to be heard."); Sharon A. Hill, *Being Scientific: Popularity, Purpose and Promotion of Amateur Research and Investigation Groups in the U.S.* (2010) (unpublished Ed.M. thesis, University of Buffalo, State University of New York), available at [https://idoubtit.files.wordpress.com/2012/07/hill\\_arigs\\_being\\_scientifical\\_thesis.pdf](https://idoubtit.files.wordpress.com/2012/07/hill_arigs_being_scientifical_thesis.pdf). Research has suggested that exposure to paranormal media correlates to belief in paranormal activity, helping to explain the haunting economy of ghostly images. Glenn G. Sparks & Will Miller, *Investigating the Relationship Between Exposure to Television Programs that Depict Paranormal Phenomena and Beliefs in the Paranormal*, 68 COMM. MONOGRAPHS 98 (2001).

<sup>18</sup> Jake Pearson, *Eric Garner's Death by Police Chokehold Ruled a Homicide*, HUFFINGTON POST, Aug. 1, 2014, [http://www.huffingtonpost.com/2014/08/01/eric-garner-homicide\\_n\\_5642481.html](http://www.huffingtonpost.com/2014/08/01/eric-garner-homicide_n_5642481.html).

Michael Brown.<sup>19</sup> A wannabe police officer who was unable to get hired by a police force killed Trayvon Martin.<sup>20</sup> This is evil within the system. This is living, breathing anti-blackness. We risk pushing anti-blackness outside the systems in structures at our own peril. The ghosts of white supremacy are powerful.

It makes sense, then, that we ought to be intrigued by black criminality because it is precisely this sort of logic that drives so many to consider such a misleading spectral image. We do not fear specific criminals or specific black persons. That would put (un)rationality above reason, and in today's political climate, the last thing we want to consider is reason. What we fear is our love of the known unknowns. Think for a minute of Halloween and the fear the grotesque masks inspire. We fear these masks, the avatars affixed by rubber band to the fearfulness of the unseen origin. It is not that the masks are truly our fear, but what they expose about the madness of those who wear masks. So then, it is my contention that we fear black criminality precisely because it casts a sideways glance at the fear we have of white supremacy. In the fear of black criminality we are confronted with the unspoken fear of white supremacy. Because this unspoken energy exists, I draw hope in a world structured by anti-blackness. It is as if the psychoanalyst has said to the analysand,<sup>21</sup> "You only need fear the way you mask over those feelings you have and not the feelings you have masked." Sure enough, but what lays under the mask is far more frightening. When seen sideways, the problem may be better realized.

Of course, I am not naïve enough to think that reason, in its Enlightenment velour sweatsuit of privilege, will save the day. Quite the opposite. Nor do I think a few crafty psychoanalytic explorations will unveil anti-blackness to whites. But I do harbor a belief that with a little more thinking, a little more critical reflection, and a little more reflexivity, we might be better able to address the issue of black criminality's Other<sup>22</sup> because a call

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<sup>19</sup> Frances Robles & Julie Bosman, *Autopsy Shows Michael Brown Was Struck at Least 6 Times*, N.Y. TIMES, Aug. 17, 2014, <http://www.nytimes.com/2014/08/18/us/michael-brown-autopsy-shows-he-was-shot-at-least-6-times.html>.

<sup>20</sup> Yaminche Alcindor, *Zimmerman's Interest in Police Work Fair Game at Trial*, USA TODAY, July 3, 2013, <http://www.usatoday.com/story/news/nation/2013/07/03/george-zimmerman-trayvon-martin-trial/2485825/>; Natasha Barrett, *George Zimmerman Trial: Zimmerman Was Rejected by Prince William County Police*, WJLA.COM, July 3, 2013, <http://www.wjla.com/articles/2013/07/george-zimmerman-trial-zimmerman-was-rejected-by-prince-william-county-police--90939.html>; Bianca Prieto, *Trayvon Martin: 'We Are Gathered Here Today To Demand Justice' in Teen's Fatal Shooting*, ORLANDO SENTINEL, Mar. 14, 2012, [http://articles.orlandosentinel.com/2012-03-14/news/os-trayvon-martin-shooting-death-rally-20120314\\_1\\_shooting-death-bryant-chief-bill-lee](http://articles.orlandosentinel.com/2012-03-14/news/os-trayvon-martin-shooting-death-rally-20120314_1_shooting-death-bryant-chief-bill-lee).

<sup>21</sup> An analysand is a person undergoing psychoanalysis.

<sup>22</sup> DYLAN EVANS, AN INTRODUCTORY DICTIONARY OF LACANIAN PSYCHOANALYSIS 133 (1996) ("Lacan equates this radical alterity with language and the law, and hence the big Other is inscribed in the order of the symbolic. Indeed, the big Other *is* the symbolic insofar as it is

to challenge anti-blackness is not enough. A call to reject whiteness is not enough. What is needed far more, what can save lives, is a complex engagement with these ideas in total. What we need to think about most is the ways in which law presents superficial problems to mask deeper structural inequalities.

My argument is not that crime is good, or the reductive argument that no black person can commit a crime. Nonetheless, I become increasingly weary of criminality regimes that seem to stack the deck against identity categories because it is precisely that rigidity and recourse to otherization that justifies the genocidal consensus of despots and generals. I do not contend that crime, whatever that means, is something to not be feared. Nor do I contend that whiteness looks the same in every instance or that all white people are to blame. Broad strokes may make articles shorter, but they do not solve life and death problems like police violence, employment discrimination, and counterterrorism.

I do contend black criminality is a ghostly regime of intolerance and the justification for police violence and an enabler of structural inequality. What we are dealing with is the unseen and unrealized. Put more concretely, policy makers, lawyers, and legal scholars must think about the ways the past remains chained to the present in order to best appreciate the reasons for criminality and the construction of law. We can continue to displace blame, push it away from legal structures and actors if we wish to never solve or even adequately address anti-blackness. We should want more; we should want to do better.

Ian Baucom's masterful work draws precisely on these connections to explain the ways in which slavery haunts race relations presently.<sup>23</sup> It is not that the chains of slavery have been broken, but that they have merely become spectral, ever-present but never fully seen.<sup>24</sup> It is not that slavery presents itself at every turn, but that it lurks insidiously in a world shackled by anti-blackness.

In this way, history becomes important because it informs the present, shapes policy decisions, and reifies ideology. Students of law should be

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particularized for each subject. The Other is thus both another subject, in his radical alterity and unassimilable uniqueness, and also the symbolic order which mediates the relationship with that other subject.”); Slavoj Žižek, *The Big Other Doesn't Exist*, J. EUROPEAN PSYCHOANALYSIS, Spring–Fall 1997, at 1, 3, available at <http://www.psychomedia.it/jep/number5/zizek.htm> (“Thus, the fact that ‘the big Other doesn't exist’ (as the efficient symbolic fiction) has two interconnected, although opposed, consequences: on the one hand, the failure of symbolic fiction induces the subject to cling more and more to imaginary simulacra, to sensual spectacles which bombard us today from all sides; while on the other, it triggers the need for violence in the Real of the body itself (cutting and piercing the flesh, or inserting prosthetic objects into the body).”).

<sup>23</sup> See generally IAN BAUCOM, *SPECTERS OF THE ATLANTIC: FINANCE CAPITAL, SLAVERY, AND THE PHILOSOPHY OF HISTORY* (2005).

<sup>24</sup> See Ian Baucom, *Specters of the Atlantic*, 100 SO. ATLANTIC Q. 61, 79–80 (2001), available at [http://muse.jhu.edu/journals/south\\_atlantic\\_quarterly/v100/100.1baucom02.pdf](http://muse.jhu.edu/journals/south_atlantic_quarterly/v100/100.1baucom02.pdf).

students of history.<sup>25</sup> Why is it so uncommon to hear about the Zong Massacre,<sup>26</sup> Stono Rebellion,<sup>27</sup> or George Jackson<sup>28</sup> in law school? History should inform the way we organize ourselves. We've lost our connection to struggles of yesteryear. We're allowing the ghosts of white supremacy to take the upper hand.

We might draw on this hauntology to suggest a spectral basis for Frank Wilderson's argument that civil society is structured as anti-black, governed by the politics of anti-blackness.<sup>29</sup> When Wilderson writes of blacks being barred from civil society, his arguments rest upon a spectral economy run by a history of anti-blackness ever present in lived reality.<sup>30</sup> It is not that civil society is constructed by overt anti-blackness, although this is surely a key feature in civil society, but that the structure of civil society rests upon specters of fear and otherization that are so firmly believed, so ephemeral as to not be seen, that they structure the phenomenological psychology of everyday life.

Following in this vein, Charles W. Mills suggests, "White supremacy is the unnamed political system that has made the modern world what it is today."<sup>31</sup> But, Mills and Wilderson differ, seemingly, about the nature of white supremacy; Mills understands it as epistemological whereas Wilderson understands it as ontological. That distinction is problematic, but a discussion

<sup>25</sup> Jim Phillips, *Why Legal History Matters*, 41 VICTORIA U. WELLINGTON L. REV. 293, 294–95 (2010); Randall T. Shepard, *The Importance of Legal History for Modern Lawyering*, 30 IND. L. REV. 1, 1–2 (1997).

<sup>26</sup> See generally JAMES WALVIN, *THE ZONG: A MASSACRE, THE LAW AND THE END OF SLAVERY* (2011); Paula Morgan, *Re-membering Our Scattered Skeletons: Inscripting the Zong Massacre in Caribbean Literature*, 1 LUCAYOS 60 (2008), available at <http://www.cobses.info/ojs/index.php?journal=lucayos&page=article&op=viewFile&path%5B%5D=6&path%5B%5D=6>.

<sup>27</sup> See generally PETER CHARLES HOFFER, *CRY LIBERTY: THE GREAT STONO RIVER SLAVE REBELLION OF 1739* (2010); JACK SHULER, *CALLING OUT LIBERTY: THE STONO SLAVE REBELLION AND THE UNIVERSAL STRUGGLE FOR HUMAN RIGHTS* (2009); MARK M. SMITH, *STONO: DOCUMENTING AND INTERPRETING A SOUTHERN SLAVE REVOLT* (2005).

<sup>28</sup> George Jackson was the founder of the Black Guerilla Family and a major force in black radicalism. See generally GEORGE JACKSON, *SOLEDAD BROTHER* (1970); GEORGE JACKSON, *BLOOD IN MY EYE* (1971); Heather Gray, *The Legacy of the Stono Rebellion*, COUNTERPUNCH.ORG, (Sept. 9, 2014), <http://www.counterpunch.org/2014/09/09/the-legacy-of-the-stono-rebellion/>.

<sup>29</sup> Frank Wilderson, III, *Gramsci's Black Marx: Whither the Slave in Civil Society?*, 9 SOC. IDENTITIES 225, 231–33 (2003) ("I submit that death of the black body is (a) foundational to the life of American civil society (just as foundational as it is to the drama of value—wage slavery), and (b) foundational to the fantasy space of desires which underwrite the industrialist's hegemony and which underwrite the worker's potential for, and realisation of, what Gramsci calls 'good sense'." *Id.* at 233. (emphasis in original)).

<sup>30</sup> *Id.* at 233.

<sup>31</sup> CHARLES W. MILLS, *THE RACIAL CONTRACT* 1 (1997).

of that distinction would distract us from the importance of white supremacy's hauntings now.

Indeed it is our failure to recognize the ways in which ghosts are at work in our policy decisions and civic engagements that structures the failures of the legal system. We fail to look awry. We should be afraid, to paraphrase Immortal Technique, of the racists we don't see, not the racists we see.<sup>32</sup> It is easy to spot a Klansman or a neo-Nazi,<sup>33</sup> it is easy to spot racially coded rhetoric in tough-on-crime legislation,<sup>34</sup> but it is not easy to spot ghosts we fail to acknowledge. There is a disjuncture here because we strive steadfastly for change to fight the racism we see in institutions, but what we ought to be doing is working better to challenge the unspoken, unseen, unacknowledged racism that permeates U.S. law.

If we take *Plessy v. Ferguson*<sup>35</sup> as the starting point for modern discussions about race and law, as some sort of fracture with racism that not simply enshrined anti-blackness, but more clearly enshrined white supremacy, then we should agree with Derrick Bell who has noted, "*Plessy*'s simplistic 'separate but equal' form served as a legal adhesive in the consolidation of white supremacy in America."<sup>36</sup> *Plessy* certainly did mark an important concretization of white supremacy in law, which would shape law well through *Brown v. Board of Education*.<sup>37</sup> If we are to do right by Trayvon, Michael, Eric, and countless others who were not mentioned by the media, we must acknowledge the influence of white supremacy on our everyday lives.<sup>38</sup> It is not enough to confront the racists we know.

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<sup>32</sup> IMMORTAL TECHNIQUE, *The Poverty of Philosophy, on REVOLUTIONARY*, VOLUME 1 (Viper Records 2001) ("My enemy is not the average white man. It's not the kid down the block or the kids I see on the street. My enemy is the white man I don't see: the people in the White House, the corporate monopoly owners, fake liberal politicians; those are my enemies.").

<sup>33</sup> The legal academy has conducted significant work on these groups. See, e.g., Justin Driver, *Supremacies and the Southern Manifesto*, 92 TEX. L. REV. 1053 (2014); Claudia E. Haupt, *The Scope of Democratic Public Discourse: Defending Democracy, Tolerating Intolerance, and the Problem of Neo-Nazi Demonstrations in Germany*, 20 FLA. J. INT'L L. 169 (2008); Edward L. Rubin, *Nazis, Skokie, and the First Amendment as Virtue*, 74 CALIF. L. REV. 233 (1986); Rebecca Blackmon Joyner, Note, *An Old Law for a New World? Third-Party Liability for Terrorist Acts—From the Klan to Al Qaeda*, 72 FORDHAM L. REV. 427 (2003).

<sup>34</sup> Walker Newell, *The Legacy of Nixon, Reagan, and Horton: How the Tough on Crime Movement Enabled a New Regime of Race-Influenced Employment Discrimination*, 15 BERKLEY J. AFR.-AM. L. & POL'Y 3, 5 (2004); Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the "War on Drugs" Was a 'War on Blacks*," 6 J. GENDER RACE & JUST. 381, 390-91 (2002).

<sup>35</sup> 163 U.S. 537 (1896).

<sup>36</sup> Derrick Bell, *How Would Justice Hugo Black Have Written Brown v. Board?*, 56 ALA. L. REV. 851, 861 (2005).

<sup>37</sup> 347 U.S. 483 (1954).

<sup>38</sup> See Zeus Leonardo, *The Color of Supremacy: Beyond the Discourse of 'White Privilege'*, 36 EDUC. PHIL. & THEORY 137, 137 (2004).



## III. BLACK LETTER LAW'S PHOTOGRAPHIC NEGATIVE

Black letter law should be read as the photographic negative, for it is black letter law that imposes white supremacy in black script. It is this oppressive rescripting of white supremacy as neutral that allows white supremacy to flourish in the neutral arena of black letter law. Careful students of the law should read the photographic negative though, instead of assuming the neutrality of law's scripting. What I mean here is that there is a tendency to read law as it is, under the pressure of bar passage, job prospects, project deadlines, and efficiency—all the logics of late-stage capitalism. As opposed to this, in opposition to the liberal reading of law as it is with perhaps a modest critique here and there, students of the law should radically critique law through the oppositional strategy of reading the photographic negative.

This play with vision harkens back to the centrality of the photographic image in the Civil Rights Movement. The negative dialectic<sup>39</sup> of reading the law in reverse demands a realization that law is constructed by its absolute non-neutrality. Calling on Theodor Adorno,<sup>40</sup> I see the negative dialectic of producing not some affirming synthesis, but some deformed crisis, a necessary step in grasping law's structural racism.<sup>41</sup> It is, in essence, law's lack of objectivity that makes law's supposed objectivity the profession's closest-held and best-protected secret. By opening up the field of play through negative dialectics, legal scholars may better understand racism as contingent, ephemeral, spectral, free-forming, and open to re-writing both by the agents of white supremacy, and those subject to its spectral influence.

One of the dangers of doing race work, thinking about race, engaging race in one's social justice activism is the tendency to think about race in relatively rigid ways. This becomes a traditional dialectical move that assumes a battling of static forces to produce a static synthesis. Opposed to that, I see a world of negative dialectics as offering a more nuanced view of race and justice, one that neither rests on outdated notions of blackness and whiteness nor totally obscures itself with relativism. The photographic negative metaphor is another way to think about acknowledging white supremacy through looking awry.

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<sup>39</sup> Negative does not mean the opposite of positive. Instead it means the rejection of the determinism inherent in Hegel's dialectic, and Marx's study of Hegel. Negative dialectics open up the field of play to indeterminacy and contingency, producing a dialectic that does not drive toward an almost pre-configured synthesis, but instead opens up to a plethora of possibilities.

<sup>40</sup> Theodor Adorno (1903-1969) was a German philosopher and sociologist best known as a key member of the Frankfurt School. *Theodore W. Adorno*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Theodor\\_W.\\_Adorno](http://en.wikipedia.org/wiki/Theodor_W._Adorno) (last visited Mar. 12, 2015).

<sup>41</sup> See Peter Thompson, *The Frankfurt School, Part 2: Negative Dialectics*, THE GUARDIAN, Apr. 1, 2013, <http://www.theguardian.com/commentisfree/2013/apr/01/negative-dialectics-frankfurt-school-adorno>.

## IV. HOPE, NOT PESSIMISM, AND SURELY NOT OPTIMISM

In order to better understand the ramifications of this spectral account of law, one must understand that my political project is hope. Attempting to see the unseeable, speak the unspeakable, and think the unthinkable is a logic designed to confront. In desperate times, where white supremacy slips through our fingers save for a few tugs at the ghost's tattered rags, what legal scholars must do is engage in politics of hope, because hope sustains a critical orientation to the world. Even if civil society is anti-black, and anti-blackness would seem to prevent black political engagement, the answer is hope and not radical negativity, which can only reproduce the character of negativity attributed to blacks by whites. This is to say, the more radical disjuncture is to confront white negativity with black hope. Keep in mind Ernst Bloch's famous statement, "We must believe in the Principle of Hope. A Marxist does not have the right to be a pessimist."<sup>42</sup> But, it is not just a Marxist that cannot be a pessimist, it is also a critical race theorist, a black radical, a labor organizer, a student protestor. Bloch wrote at a time when hope might seem preposterous, when hope was in short supply, yet his vision for hope motivated the Frankfurt School to care deeply about ethics and well-being throughout the World Wars and later.<sup>43</sup>

While our hauntings may be cause for concern, while they may inspire in us anything but hope, a consistent critical stance against white supremacy requires just the hope Bloch described. In order to do that, we must do more lawyering, more speaking, more writing, more marching, and more learning. White supremacy's proponents are busy at this work. Challenging anti-blackness requires the same. Negativity or disengagement cannot sustain struggle. Far from Nietzsche's positive politics of negation, which have their place, what we need now is an orientation toward hope. Let that be the strategy, even if we may quibble about tactics.

## V. CONCLUSION

Nat Turner haunts us.<sup>44</sup> Gabriel Prosser haunts us.<sup>45</sup> Medgar Evers<sup>46</sup> and Emmett Till<sup>47</sup> haunt us. Trayvon Martin haunts us.<sup>48</sup> Michael Brown haunts

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<sup>42</sup> Peter Thompson, *The Frankfurt School, Part 6: Ernst Bloch and the Principle of Hope*, THE GUARDIAN, Apr. 29, 2013, <http://www.theguardian.com/commentisfree/belief/2013/apr/29/frankfurt-school-ernst-bloch-principle-of-hope> (quoting Ernst Bloch).

<sup>43</sup> Paul R. Mendes-Flohr, "To Brush History Against the Grain": *The Eschatology of the Frankfurt School and Ernst Bloch*, 51 J. AM. ACAD. RELIGION 631, 636-37 (1983); Peter Thompson, *Bloch, Badiou, Saint Paul, and the Ontology of Not Yet*, 40 NEW GERMAN CRITIQUE 31, 45, 49 (2013).

<sup>44</sup> See generally KENNETH S. GREENBERG, NAT TURNER: A SLAVE REBELLION IN HISTORY AND MEMORY (2004); STEPHEN B. OATES: THE FIRES OF JUBILEE: NAT TURNER'S FIERCE REBELLION (2009).

us.<sup>49</sup> Eric Garner haunts us.<sup>50</sup> What haunts us more is the specter of white supremacy that enabled these tragic events. In order to engage a world structured by anti-blackness, to engage a legal system that seems determined through many of its most important actors to attack, disempower, and disenfranchise people of color, to engage a political system built on a foundation of dead black bodies, we must, with nary a bat of the eye, ask what are we to do with the ghosts of white supremacy?<sup>51</sup> We must ask this question not because there is one answer, not because the solution is easy, not because the end is near, but instead precisely because the end is far. We are a long way from justice. We are a long way from peace. We are a long way from recognizing our connections to each other, to our role in the struggle for equality and the ways in which we hinder that struggle's success.<sup>52</sup> The ghosts

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<sup>45</sup> See generally ARNA BONTEMPTS, *BLACK THUNDER: GABRIEL'S REVOLT: VIRGINIA, 1800* (1992); DOUGLAS R. EGERTON, *GABRIEL'S REBELLION: THE VIRGINIA SLAVE CONSPIRACIES OF 1800 AND 1802* (1993); JAMES SIDBURY, *PLOUGHSHARES INTO SWORDS: RACE, REBELLION, AND IDENTITY IN GABRIEL'S VIRGINIA, 1730-1810* (1997).

<sup>46</sup> See generally *THE AUTOBIOGRAPHY OF MEDGAR EVERS: A HERO'S LIFE AND LEGACY REVEALED THROUGH HIS WRITINGS, LETTERS, AND SPEECHES* (Myrlie Evers-Williams & Manning Marable eds., 2006); MARYANNE VOLLERS, *GHOSTS OF MISSISSIPPI: THE MURDER OF MEDGAR EVERS, THE TRIALS OF BYRON DE LA BECKWITH, AND THE HAUNTING OF THE NEW SOUTH* (1995).

<sup>47</sup> See generally *THE LYNCHING OF EMMETT TILL: A DOCUMENTARY NARRATIVE* (Christopher Metress ed., 2002); STEPHEN J. WHITFIELD, *A DEATH IN THE DELTA: THE STORY OF EMMETT TILL* (1991).

<sup>48</sup> See Serge F. Kovalski, *Trayvon Martin Case Shadowed by Series of Police Missteps*, N.Y. TIMES, May 16, 2012, <http://www.nytimes.com/2012/05/17/us/trayvon-martin-case-shadowed-by-police-missteps.html?pagewanted=all&r=0>; John H. Richardson, *Trayvon*, ESQUIRE, Nov. 12, 2012, <http://www.esquire.com/features/americans-2012/trayvon-martin-1212>.

<sup>49</sup> See Jamelle Bouie, *Why the Fires in Ferguson Won't End Soon*, SLATE.COM, (Aug. 19, 2014), [http://www.slate.com/articles/news\\_and\\_politics/politics/2014/08/ferguson\\_protests\\_over\\_michael\\_brown\\_won\\_t\\_end\\_soon\\_the\\_black\\_community.html](http://www.slate.com/articles/news_and_politics/politics/2014/08/ferguson_protests_over_michael_brown_won_t_end_soon_the_black_community.html); Rachel Clarke & Christopher Lett, *What Happened when Michael Brown Met Officer Darren Wilson*, CNN (Nov. 11, 2014), <http://www.cnn.com/interactive/2014/08/us/ferguson-brown-timeline/>; *Unarmed Teen Michael Brown Killed by Ferguson Police*, ST. LOUIS AMERICAN, Jan. 5, 2015, [http://www.stlamerican.com/news/local\\_news/article\\_1160a5ba-2050-11e4-aa5c-001a4bcf887a.html](http://www.stlamerican.com/news/local_news/article_1160a5ba-2050-11e4-aa5c-001a4bcf887a.html).

<sup>50</sup> See Radley Balko, *Some Thoughts on Eric Garner*, WASHINGTON POST, Dec. 4, 2014, <http://www.washingtonpost.com/news/the-watch/wp/2014/12/04/some-thoughts-on-eric-garner/>; Deborah E. Bloom & Jareen Imam, *New York Man Dies After Chokehold by Police*, CNN (July 20, 2014), <http://www.cnn.com/2014/07/20/justice/ny-chokehold-death/>; J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES, Dec. 3, 2014, <http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html>.

<sup>51</sup> See Jared Sexton, *The Social Life of Social Death: On Afro-Pessimism and Black Optimism*, INTENSIONS J., Fall/Winter 2011, at 1, 34.

<sup>52</sup> Here I am reminded of Martin Luther King, Jr.'s Nobel Peace Prize Speech where he said, The problem is far from solved. We still have a long, long way to go before the dream of freedom is a reality for the Negro in the United States. To put it

of white supremacy must be addressed, must be confronted, no matter how fleeting and ineffectual such psychic engagement may be.<sup>53</sup> Trying is the redress to pessimism's affront to an ethic of hope.

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figuratively in biblical language, we have left the dusty soils of Egypt and crossed a Red Sea whose waters had for years been hardened by a long and piercing winter of massive resistance. But before we reach the majestic shores of the Promised Land, there is a frustrating and bewildering wilderness ahead.

Martin Luther King, Jr., Nobel Lecture: The Quest for Peace and Justice (Dec. 11, 1964), available at [http://www.nobelprize.org/nobel\\_prizes/peace/laureates/1964/king-lecture.html#footnote](http://www.nobelprize.org/nobel_prizes/peace/laureates/1964/king-lecture.html#footnote).

<sup>53</sup> See generally Sexton, *supra* note 51.