AN INQUIRY INTO WHITE SUPREMACY, SOVEREIGNTY, AND THE LAW

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"When liberal whites fail to understand how they can and/or do embody white-supremacist values and beliefs even though they may not embrace racism as prejudice or domination (especially domination that involved coercive control), they cannot recognize the ways their actions support and affirm the very structure of racist domination and oppression that they profess to wish to see eradicated."[1]

Critical race theory has produced entire fields of knowledge to analyze, critique and understand racism. Inspired by that discipline, this paper theorizes the current state(s) of affairs and the extant relationship of people

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1. bell hooks, *Overcoming White Supremacy: A Comment*, *in* OPPRESSION, PRIVILEGE AND RESISTANCE: THEORETICAL PERSPECTIVES ON RACISM SEXISM AND HETEROSEXISM 112, 113 (Lisa Heldke, et al. eds., 2004).

of color and white people to the State. A theory of white supremacy is advanced where metaphysical whiteness is always already the a priori *condition of state sovereignty and non-whiteness as a political force must be continuously appropriated and obliterated under color of law as the core project of state security.*

"Although we know so much about the sociohistorical determinants of racial subjection, we are at pains to describe how precisely the racial institutes the others of Europe as subaltern subjects."[2]

"Subordination occurs in the very act of a white person recognizing a Black person's race."[3]

"Recognizing or identifying oneself as white is thus a claim of racial purity, an assertion that one is free of any taint of Black blood."[4]

"I conclude that Whiteness exists at the vortex of race in U.S. law and society, and that Whites should renounce their racial identity as it is currently constituted in the interests of social justice."[5]

I. INTRODUCTION

Outside of activist circles, the dominant view, which is to say the orthodoxy required to be taken seriously in U.S. civic life, insists that the American project remains the best hope for global peace and stability. U.S. politicians never fail to remind us that the U.S. is the greatest country on Earth. American exceptionalism is taken as a given. By virtue of Manifest Destiny, the U.S. is the proverbial City on a Hill; a model of civil liberties, human rights and the entrepreneurial spirit all over the world. The engine of American democracy is sound, and while we may need to change the oil occasionally, it is humming along just fine.

Those individuals who hint that something is rotten in the state of Denmark, who suggest there may be a fundamental problem, those who experience the American Dream as an American Nightmare—such people are generally shunned as unhinged radicals, subversives or enemies of the

2. DENISE FERREIRA DA SILVA, TOWARD A GLOBAL IDEA OF RACE 3 (2007).

3. Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 Stan. L. Rev. 1, 26 (1991).

4. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1737 (1993).

5. IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 2 (2nd ed. 2006).

state. They are fired, blacklisted, or their contracts aren't renewed. They get crossed off the Christmas card list. They may be lucky to board a commercial airliner. They might get a warning or two, but if they persist, Uncle Sam takes notice. Questioning the sovereignty of the state might not lead to Guantanamo, but you won't be invited to the party. And if you are a person of color, you may very well meet an untimely demise, executed simply for your existence.

Against this background, the production of knowledge that fundamentally threatens white supremacy occurs sporadically, against tremendous pressure, in fits and starts. It occurs late in the night at generic hotel bars in the "heartland," in books that appear once a decade, in law review articles that inspire generations of new minds unwilling to accept the party line. This knowledge has carved out a space for new challenges to racism and I hope this paper will contribute to the production of knowledge that destabilizes and destroys the metaphysics of white supremacy.[6]

At the outset, I describe how people of color remain forever symbolically locked outside of the body politic in a state of nature by virtue of their non-whiteness, while whites are the only people who have total access to the institutions of society. I then discuss how and why people of color have been literally and figuratively banned from the polity. Next, I offer an analysis of the relationship between the Law, whiteness and sovereignty. Ultimately, I discuss how the Law operates as a form of sovereign violence against non-white bodies. I conclude by renewing the call for people who identify as white to stop doing so and to renounce white supremacy and the metaphysical basis of said supremacy.

II. THE STATE OF NATURE

The recurring "state of nature" in Western (read: white) philosophy, made famous by Hobbes,[7] Locke,[8] and Rousseau,[9] et al., imagines human beings absent the wonders of civilization: it is a conceptual question that asks what would humanity look like absent law and the state police power that

6. I wavered on whether to capitalize "white supremacy." On the one hand, it very much has the weight and historicity of a proper noun. On the other hand, it as ubiquitous as "natural law," if not in name than in operation. The broader question is to what extent do ideologies/theologies like white supremacy and natural law go uninterrogated by virtue of their commonality? Additionally, conjoining the two words, "white," and "supremacy," seems redundant in the context of race. Whiteness, by definition, is a claim about purity, both biological and moral.

7. *See* THOMAS HOBBES, LEVIATHAN 189 (Penguin Group 1982) (1651).

8. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 194 (Cambridge Univ. Press 1988) (1690).

9. *See* JEAN-JACQUES ROUSSEAU, A DISCOURSE ON INEQUALITY 60 (Penguin 1985) (1755).

enforces law. For Western philosophers, the indigenous peoples of the Americas emerged as the perfect representation of humanity *sans* civilization.[10] Such people were conceived by European thinkers to be not so much human subjects in the context of the natural world, but savages in a state of nature, *a priori* incapable of reason and subjectivity. Indians were understood not in relation to nature but part and parcel of nature. Famously, Hobbes understood life in the state of nature "as solitary, poor, nasty, brutish, and short."[11]

Such individuals in the Americas occupied an otherwise empty continent and, in Lockean terms, were content to let the land lay fallow (they left it alone).[12] As Denise Ferreira da Silva has noted in *Toward a Global Idea of Race*:

> When indicating how labor constitutes the basis for claims for private property, for instance, Locke constructs "America" as a land that remains in the "state of nature"—"the wild woods and uncultivated waster. . ., left to nature, without any improvement, tillage or husbandry"—as if its inhabitants had failed to exceed the command of the law of nature (the law of reason) and act upon nature to produce more than that which is necessary for the preservation of human life.[13]

Thus, a defining aspect of the state of nature is the absence of private property obtained via labor; cultivation of the *terra firma* in furtherance of extending dominion. However, all is not lost in the state of nature because reason[14] will lead some fortunate souls out of the state of nature[15] into civilization. Reasonable people emerge from the state of nature by making a social contract[16] to surrender freedom in exchange for the security provided by the

10. *See* DONALD A. GRINDE & BRUCE ELLIOT JOHANSEN, EXEMPLAR OF LIBERTY: NATIVE AMERICAN AND THE EVOLUTION OF DEMOCRACY 64 (1991).

11. THOMAS HOBBES, LEVIATHAN, CHAPTER XIII (Penguin 1982) (1651).

12. *See* JANEL M. CURRY & STEVEN MCGUIRE COMMUNITY ON LAND: COMMUNITY, ECOLOGY, AND THE PUBLIC INTEREST 31 (2002).

13. FERREIRA DA SILVA, *supra* note 2, at 204 (quoting LOCKE 139 ([1690] 1947).

14. It should be noted that both Hobbes and Locke maintained that reason, as such, was possible in a state of nature, the former to ascertain certain natural laws, while for the latter reason itself is law in a state of nature. Hobbes, Leviathan, pt. 1, ch. 14 (p. 64). Locke § 6 ("The state of nature has a law of nature to govern it, which obliges every one: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions").

15. Charles W. Mills contrasts the European state of nature as merely hypothetical with the non-European state of nature as actual. *See* CHARLES W. MILLS, THE RACIAL CONTRACT 46-47, 64-67 (1997).

16. *See generally* THE SOCIAL CONTRACT THEORISTS: CRITICAL ESSAYS ON HOBBES, LOCKE AND ROUSSEAU (Christopher W. Morris, ed., 1998).

state. But who is a reasonable person[17] for purposes of entering into the hallowed social contract? How does one acquire reason? Indeed, who is capable of knowledge? And what is the relationship of property to knowledge?

In the groundbreaking work *The Racial Contract*, Charles W. Mills answers these questions by reviewing the history of Western philosophy in so far as that philosophical history has determined who is capable of knowledge (and in turn reason) and who is not.[18] The crux of the matter is that the people of Europe elected to colonize as much of the Earth as they could.[19] In order to legitimize their appropriation and engulfment of land and people, the people of Europe needed a theory of justice that would simultaneously declare their actions morally righteous while also prohibiting their victims from asserting any cognizable grievance. The solution lay in their theology, which legitimized European law.[20] To be sure, European engulfment of the world was nothing if not legal.[21]

A full human being, one who may depart the state of nature into society, from the point of view of the European conquistador, is one who has submitted to the Word of God as communicated by the Pope.[22] The European legal theory of conquest was rooted squarely in medieval theology.[23] Europeans claimed authority to kill non-Christians and seize their lands by divine right:

> When the potentates of Christendom (whether popes or monarchs) granted others "the right" to discover, acquire, conquer, subdue, and possess "heathen" lands, they thereby assumed the role that the Lord played in the Old Testament story of the Hebrews and the promised land. In a sense, the Christian grantees who received the authorization to discover and possess

17. For a history of the reasonable person standard, see Simon Stern, *R. v. Jones (1703): The Origins of the "Reasonable" Person*, in LANDMARK CASES IN CRIMINAL LAW (Ian Williams, et al. eds., 2016).

18. *See* CHARLES W. MILLS, THE RACIAL CONTRACT 59-60 (1997).

19. ANTHONY PAGDEN, LORDS OF ALL THE WORLD: IDEOLOGIES OF EMPIRE IN SPAIN, BRITAIN AND FRANCE C.1500-C.1800 (1998).

20. *See* ST. THOMAS AQUINAS, TREATISE ON LAW (Richard J. Regan, trans., 2000, Hackett Classics) (1485).

21. Harris, *supra* note 4, at 1723 ("The conquest and occupation of Indian land was wrapped in the rule of law. The law provided not only a defense of conquest and colonization, but also a naturalized regime of rights and disabilities, power and disadvantage that flowed from it, so that no further justifications or rationalizations were required").

22. SAMUEL FREIHERR VON PUFENDORF, THE WHOLE DUTY OF MAN: ACCORDING TO THE LAW OF NATURE, at preface (London, Benj. Motte 1698).

23. "As Robert A. Williams has shown in his book *The American Indian in Western Legal* Thought, federal Indian law and policy are, to a great extent, an outgrowth of the imperial mentality of Christendom, extending back to medieval Europe." STEVEN T. NEWCOMB, PAGANS IN THE PROMISED LAND 59 (2008).

> non-Christian lands assumed the role of Abraham. Behind such grants was the belief that the pope or the king truly represented God and that God, through the divine agency of the potentate, had granted Christians the right to fulfill Genesis 1:28 to *subdue* and exercise *dominion* over the heathen lands of the earth.[24]

American law further gave meaning and legitimacy to European conquest in fomenting the logic of discovery, whereby European discovery, and European discovery alone, gave rise to a claim of title.[25] "The assumption of American law as it related to Native Americans was that conquest [gave] rise to sovereignty."[26] Thus, discovery gave rise to title while conquest gave rise to sovereignty. What is abundantly clear is that there was absolutely nothing in European law or morality that precluded the "discovery" and conquest of non-Christians; Christianity did nothing to prevent the greatest genocide in the history of the world and in fact was its cause. Rather, every indication is that European law and morality—which is to say White law and morality—is rooted in killing the heathen: "And when the Lord thy God shall deliver them before thee; thou shalt smite them, and utterly destroy them; thou shalt make no covenant with them, nor show mercy unto them."[27]

"This people with no Faith, no Law, and no King did not seem to offer a psychological and institutional ground in which the Gospel might take root."[28] It seems wherever the European explorer ventured off to, the peoples he encountered in a state of nature were not particularly interested in immediate obedience to the Pope. Their intransigence of course could only mean one thing: such people were heathens and/or savages, incapable of reason or logic.

Indigenous people were not interested in the Gospel any more than they were interested in a system of title to the land they had occupied for millennia.

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24. *Id.* at 46.

25. Johnson v. M'Intosh, 21 U.S. 543, 587 (1823) ("The United States, then, has unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold and assert in themselves the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy either by purchase or by conquest, and gave also a right to such a degree of sovereignty as the circumstances of the people would allow them to exercise."). For an analysis of the legacy of *Johnson*, see David P. Waggoner, *The Jurisprudence of White Supremacy: Inter Caetara, Johnson v. M'Intosh and San Antonio Independent School District v. Rodriguez*, 44 SW. L. REV. 749, 749-65 (2015).

26. HARRIS, *supra* note 4, at 1727.

27. *Deuteronomy* 7:1-3.

28. EDUARDO VIVEIROS DE CASTRO, THE INCONSTANCY OF THE INDIAN SOUL: THE ENCOUNTER OF CATHOLICS AND CANNIBALS IN 16TH CENTURY BRAZIL 3 (trans. Gregory Duff Morton, 2011).

The gifts of the Enlightenment—freedom, equality, agency—meant little when heretofore no one had insisted they were not free, equal or autonomous. In any event, "By virtue of their complete nonrecognition, or at best inadequate, myopic recognition, of the duties of natural law, nonwhites are appropriately relegated to a lower rung on the moral ladder (the Great Chain of Being). They are designated as born *un*free and *un*equal."[29]

According to the Church, because the heathens were not baptized they were literally no one (*nullus*[30]); heathens were not persons[31] subject to the protections of God's law. Unable to grasp God's infinite mercy, they could never avail themselves of knowledge itself. Accordingly: "Knowledge, science, and the ability to apprehend the world intellectually are thus restricted to Europe, which emerges as *the global locus of rationality*, at least for the European cognitive agent . . . ."[32] Lacking reason and awareness, they could never be said to truly "discover" anything. Thus, global exploration was strictly in the purview of the White man. "[T]he Racial Contract is *global*, involving a tectonic shift of the ethicojuridical basis of the planet as a whole, the division of the world, as Jean-Paul Sartre put it long ago, between 'men' and 'natives.'"[33]

However, for some thinkers, discovery and conquest were not so much a function of theology as geography. Foreshadowing Jared Diamond's *Guns, Germs and Steel*,[34] both Kant[35] and Hegel[36] believed that climate and environment were the keys to whether a people exist in a state of nature or a state of society (civilization). The linkage of whiteness to reason and

29. MILLS, *supra* note 15, at 16.

30. *See* STEVEN T. NEWCOMB, PAGANS IN THE PROMISED LAND 107 (2008).

31. It is interesting to consider that the key figure of modern philosophy, Kant, held essentially the same view of personhood as did the medieval church. "The famous theorist of personhood is also the theorist of subpersonhood, though this distinction is, in what the suspicious might think a conspiracy to conceal embarrassing truths, far less well known. . . [I]n complete opposition to the image of his work that has come down to us and is standardly taught in introductory ethics courses, full personhood for Kant is actually dependent upon race." MILLS, *supra* note 15, at 70-71.

32. *Id.* at 45.

33. *Id.* at 20.

34. "In short, Europe's colonization of Africa had nothing to do with differences between European and African peoples themselves, as white racists assume. Rather, it was due to accidents of geography and biogeography—in particular, to the continents' different areas, axes, and suites of wild plant and animal species. That is, the different historical trajectories of Africa and Europe stem ultimately from differences in real estate." JARED DIAMOND, GUNS, GERMS AND STEEL: THE FATES OF HUMAN SOCIETIES 400-401(1997).

35. Immanuel Kant, *Of the Different Human Races*, *in* THE IDEA OF RACE 3, 19 (Robert Bernasconi, et al. eds., 2000).

36. Georg Wilhelm Friedrich Hegel, *Race, History and Imperialism*, *in* RACE AND THE ENLIGHTENMENT: A READER 110, 112 (Emmanuel Chukwudi Eze, ed., 1997).

knowledge appears over and over again in the writings of the paragons of Western morality and thought:

> In philosophy one could trace [a raced capacity for rationality, abstract thought, cultural development, civilization in general] through Locke's speculations on the incapacities of primitive minds, David Hume's denial that any other race but whites had created worthwhile civilizations, Kant's thoughts on the rationality differentials between blacks and whites, Voltaire's polygenetic conclusion that blacks were a distinct and less able species, John Stuart Mill's judgment that those races "in their nonage" were fit only for "despotism."[37]

The progenitors of White legal and moral philosophy, without exception, created and maintained the logic of White Supremacy. Yet somehow, millions of students learn about Locke, Hume, Kant, et al., and the phrase "White Supremacy" is never mentioned. Concerning Kant, Charles Mills remarked:

> But the embarrassing fact for the white West (which doubtless explains its concealment) is that their most important moral theorist of the past three hundred years is also the foundational theorist in the modern period of the division between Herrenvolk and Untermenschen, persons and subpersons, upon which Nazi theory would later draw. Modern moral theory and modern racial theory have the same father.[38]

Not unlike the indigenous peoples of the Americas, people from the African continent have also been left to fend for themselves beyond the reaches of the European "Enlightenment." According to Hegel:

> [I]n Africa, as a whole, we encounter what has been called the *state of innocence*, in which man supposedly lives in unity with God and nature. For in this state, man is as yet unconscious of himself . . . . This primitive state of nature is in fact a state of animality . . . .[39]

Lacking awareness, the Black and the Indian are little more than innocent animals in a state of nature. Unable to comprehend right from wrong, how could they possibly avail themselves of the rights and benefits of civil society? As da Silva writes,

> In the postslavery United States, blacks have been forced into a juridical position that resembles Locke's "state of nature." Not, as the foundational statement has it, because "race prejudice" is a "natural reaction" to substantive difference, but because writings of the U.S. subject place them outside the body politic founded by the Anglo-Saxon.[40]

37. MILLS, *supra* note 15, at 59-60.

38. *Id.* at 72.

39. Hegel, supra note 36, at 178.

40. FERREIRA DA SILVA, *supra* note 2, at 213.

Thus, European philosophy and theology have delineated an *ontological*[41] taxonomy of the human consisting of the White person, who alone has access to the wonders of civilization, and everyone else, who are consigned to the state of nature. The symbolic power of this figuring cannot be overstated. Succinctly put: where knowledge, culture, history and subjectivity attach to Whiteness, ignorance, nature, innocence and objectivity attach to everyone else.

III. THE STATE OF SOCIETY

Where people of color inhabit a state of nature, ignorant of law and morality, White people exist in society—in civilization—which in turn is defined by the presence of law and morality. But of course we know that people of color also exist in society. What explains this paradox? Was it the Emancipation Proclamation? *Brown v. Board of Education*? The Civil Rights Act of 1964? I think not. Instead, just as Whites can exist in nature, people of color can exist in society, but each bring some baggage.

Participation in civil society is the default activity of Whites. For people of color, such participation is fraught with danger. Yet society demands that people of color play their role. In the most basic sense, "Whiteness determined whether one could vote, travel freely, attend schools, obtain work, and indeed, defined the structure of social relations along the entire spectrum of interactions between the individual and society. Whiteness then became status, a form of racialized privilege ratified by law."[42] Race, then, is instantiated by law; Law constructs race.[43]

How can people of color, heretofore lacking awareness, become capable of participating in society? If history is any indication, the primary way that people of color participate in White society is by being killed by White people. In the European framework of raciality, where Whites bring the law to nature, non-whites bring the nature to the law, where law is death and nature is life. This is because the meaning of law is in the prerogative of the state to kill where the meaning of nature is innocence. White society exists in relation to non-whites vis-à-vis the death of non-whites. In other words, Whiteness is dependent on the death of people of color. As Foucault remarked, "[Racism] is primarily a way of introducing a break into the

41. For a discussion of the ontology of race, see generally Michael Rabinder James, *The Political Ontology of Race* 44 POLITY 106-34 (2012).

42. Harris, *supra* note 4, at 1745.

43. *Id.* at 1718.

domain of life that is under power's control: the break between what must live and what must die."[44]

In theorizing this contradiction between the law (interiority; inside) and nature (exteriority; outside), Giorgio Agamben writes:

> It has often been observed that the juridico-political order has the structure of an inclusion of what is simultaneously pushed outside. Gilles Deleuze and Felix Guattari were thus able to write, "Sovereignty only rules over what it is capable of interiorizing;" and, concerning the "great confinement" described by Foucault in his *Madness and Civilization*, Maurice Blanchot spoke of society's attempt to "confine the outside" (*enfermer le dehors*), that is, to constitute it in an "interiority of expectation or of exception . . . The particular "force" of law consists in this capacity of law to maintain itself in relation to an exteriority. We shall give the name *relation of exception* to the extreme form of relation by which something is included solely through its exclusion.[45]

Thus, White society is dependent on people of color because without people of color to compare themselves to, Whiteness would be nothing. Similarly, if everyone were innocent, the law would be meaningless.

The origin of both Whiteness and the law is God.[46] This brings us to the point that the main difference between the law and nature is God; Whites have God on their side and non-whites do not. God, the authority for manifest destiny, is also the source of the law. Might also God be the source of White Supremacy? What does God really want, anyway? The history of colonization would indicate God is primarily interested in gold, land, natural resources and slave labor. "Colonizers and missionaries are ultimately governed by the same motivation."[47] The most expedient way to obtain the material wealth of another is to kill him. This then is the function of law and

44. MICHEL FOUCAULT, *Society Must Be Defended*, *in* LECTURES AT THE COLLEGE DE FRANCE 254 (1997).

45. GIORGIO AGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE 18 (1998).

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> The Law is coeternal with the Divine, a metaphysical reality that does not just provide mortal beings with a code of conduct for suitable behavior on this terrestrial ball. It is the precondition for the very existence of individual laws and being itself, the necessary condition under which being could come to be. That we should think of our earthly being in relation to laws in a legal sense and laws in the sense of a condition of being (for instance, the laws of our nature) is the logical product of a primordial Law, the first Law, the uncreated Law that is inseparable from Divine Being and the Being of the Divine. From Sophocles' *Antigone* and Plato's dialogues, through Augustine's *City of God* and Dante's *Divine Comedy*, to the United States' Declaration of Independence, the secular laws have been determined in western culture by the Divine Law, so if we, as a culture, would wish to know the inalienable rights of humans and the inviolable laws of the universe, we must first acknowledge the existence of the primordial Law, the Law that is coeternal with the Divine.

MICHAEL LACKEY, AFRICAN AMERICAN ATHEISTS AND POLITICAL LIBERATION: A STUDY OF THE SOCIOCULTURAL DYNAMICS OF FAITH 103 (2007).

47. *Id.* at 111.

society: to grant the White man the most expedient means of amassing wealth while destroying nature. That the White man is killing himself in the process seems not to matter; in fact, it may be the ultimate goal.[48]

Consumption of the self may be the defining hallmark of the state of society. As Joseph Conrad told us in *Heart of Darkness*,[49] nature is frightening. The people who live in a state of nature, lacking any sense of morality, are capable of anything. Nothing can strike fear into the heart of a little white boy like being told of ravenous cannibals. Cannibalism is a favorite trope to portray people of color as lacking any sense of decency or dignity.[50] According to Hegel, "[T]o the sensuous negro, human flesh is purely an object of the senses."[51] However, there is a deep irony to Whites' fascination with cannibalism among people in a state of nature: the core dogma of the conquistadors was a theology of cannibalism.[52] The doctrine of transubstantiation meant that White people were literally eating Christ every time they took communion.[53] Thus, at the heart of society, at the heart of Whiteness, we find an ontology of cannibalism, which is in turn used to deny the humanity of people of color.

It is constitutive of White identity that the White person can see the race of non-Whites, but not their own color. "Within the logic of transparency, the race of non-Whites is readily apparent and regularly noted, while the race of Whites is consistently overlooked and scarcely ever mentioned."[54] Similarly, Whites are adept at perceiving what they find disturbing about non-Whites while masking the rot in their own hearts. Front and center in the conscious of the White mind is the lurking Black man waiting to rob him and rape his wife and children.

> What in reality has become a phantasmatically constructed African body, a fantasized object, whites "see" instead as *given*, and thus not the result of

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> In essence, God is not a neutral, objective, and just Being who neutrally, objectively, and justly discloses Himself and His laws to neutral, objective, and just believers. To the contrary, God is a concept that becomes through psychic violence, a violence that brings desiring subjects into being such that they willingly accept and desire the rule of Law, even when specific laws sanction their own dehumanization and degradation.

Id. at 108.

49. *See generally* Carola M. Kaplan, *Colonizers, Cannibals, and the Horror of Good Intentions in Joseph Conrad's* Heart of Darkness, *in* 34 Studies in Short Fiction 323, 323-33 (Summer 1997).

50. *See* PATRICK BRANTLINGER, TAMING CANNIBALS: RACE AND THE VICTORIANS (2011).

51. *See* Hegel, *supra* note 36, at 134.

52. AMANDA RUSSELL BEATTIE, JUSTICE AND MORALITY: HUMAN SUFFERING, NATURAL LAW AND INTERNATIONAL POLITICS 104 (2010).

53. Jessie Hill, *Ties That Bind? The Questionable Consent Justification for Hosanna-Tabor*, 109 NW. U. L. REV. 563, 568 (2015).

54. *See* HANEY LÓPEZ, *supra* note 5, at 17.

> any processes of rationalization, projection, ejection, or denial on the part of themselves. Hence whites are able to mask or deny their dependency upon the fabrication of the phantasmatic object.[55]

IV. THEORY: THE SACRED AND THE SOVEREIGN

The state itself arises when the guilty, self-aware, White soldiers of Christ kill and conquer the innocent, ignorant, non-White infidels, not unlike the central teaching of Christian theology where the innocent must be killed to expiate the sins of the guilty, thus giving birth to a redemptive sovereignty. In this way, White Supremacy functions as a symbolic logic whereby the non-White body is a phantasm that must be obliterated. This logic continues to operate unabated both at home and abroad, as the U.S. incarcerates, shoots, tortures and obliterates black and brown bodies wherever it can, whenever it can. The sovereign state will shoot down a black teenager on the streets of the Heartland just as soon as it will drop a bomb on a wedding party in Afghanistan. Contrast the state's "shoot-first-and-ask-questions-later" stratagem[56] with regard to non-White bodies with the state's recent kid-glove handling of White ranchers who seized federal property with automatic weapons.[57]

Paradoxically, the non-White phantasm is at once both the symbolic criminal, forever outside the law, and sacred, as it can have no awareness of guilt. Agamben's conception of the werewolf is useful here:

> The life of the bandit, like that of the sacred man, is not a piece of animal nature without any relation to law and the city. It is, rather, a threshold of indistinction and of passage between animal and man, *physis* and *nomos*, exclusion and inclusion: the life of the bandit is the life of the *loup garou*, the werewolf, who is precisely *neither man nor beast*, and who dwells paradoxically within both while belonging to neither.[58]

People of color are thus neither human nor animal, but exist outside the regular scientific taxonomy. For sovereignty to hold, instantiated by divine violence, "The banishment of sacred life is the sovereign *nomos* that conditions every rule, the originary spatialization that governs and makes

55. GEORGE YANCY, BLACK BODIES, WHITE GAZES: THE CONTINUING SIGNIFICANCE OF RACE 145 (2008).

56. Matt Apuzzo, *Training Officers to Shoot First, and He Will Answer Questions Later*, N.Y. TIMES (Aug. 1, 2015), http://www.nytimes.com/2015/08/02/us/training-officers-to-shoot-first-and-he-will-answer-questions-later.html.

57. Alexander Smith & Joe Fryer, *FBI Seeks "Peaceful" End to Armed Standoff at Oregon Federal Building*, MSNBC (Jan. 4, 2016, 5:22 PM), http://www.msnbc.com/msnbc/fbi-seeks-peaceful-end-armed-standoff-oregon-federal-building.

58. *See* AGAMBEN, *supra* note 44, at 105.

possible every localization and every territorialization."[59] The non-White subject, then, is the innocent criminal[60] who must remain sacred to preserve the sovereignty of the State.

V. PRAXIS: LAW ENFORCEMENT

"Race and racism are centrally about seeking, or contesting, power."[61] Accordingly, all power flows naturally to those who are white, including and most importantly, the power to kill. The police are an occupying army, frequently looking every bit the part. Rarely a week goes by when the death of another non-White person at the hands of law enforcement is not in the news. So many more never make the news. Additionally, every White person is automatically deputized to take the life of a person of color under color of law, as the case of Trayvon Martin demonstrated.

While it may at times seem that some non-White people have power, this temporary access to power is read as an affectability whereby the State must devise new methods to achieve its ends, commonly referred to as civil rights law. The murder of people of color in such a state is normalized to the point of being a banal, quotidian footnote, if it is ever even a footnote. When the law is not merely concerned with the killing of people of color, it is also concerned with their reproduction. "What does this new technology of power, this biopolitics, this biopower that is beginning to establish itself, involve? . . . [A] set of processes such as the ration of births to deaths, the rate of reproduction, the fertility of a population, and so on."[62] Meanwhile, apologists for normalization make reference to the Constitution and human rights. Could it be that the only promise the State ever made to people of color was to enslave them, kill them, and abscond with their property?

Foucault conceived of the power of the State over life and death as biopower:

> In a normalizing society, race or racism is the precondition that makes killing acceptable. When you have a normalizing society, you have a power which is, at least superficially, in the first instance, or in the first line a biopower, and racism is the indispensable precondition that allows someone to be killed, that allows others to be killed. Once the State functions in the

59. *Id.* at 111.

60. "What the prevailing strategy of racial subjection in the United States indicates is not that the racial explains class subjection but that the association of criminality and material (economic) dispossession has become the new signifier of the affectability of the racial subaltern." FERREIRA DA SILVA, *supra* note 2, at 265.

61. HANEY LÓPEZ, *supra* note 5, at xvi.

62. FOUCAULT, *supra* note 44, at 243.

> biopower mode, racism alone can justify the murderous function of the State.[63]

In a White Supremacist state, the function of the law is first and foremost to kill non-White people.[64] "To understand the long, bloody history of police brutality against blacks in the United States . . . one has to recognize it not as excesses by individual racists but as an organic part of this political enterprise."[65]

Every mechanism of the law, from the criminal industrial complex to the civil courts, exists to deprive people of color of their lives and property. Understood in this way, the law is violence.[66] That the law operates through violence is likely a given for many people of color, though comes as a shock to White people. As Ian Haney López put it:

> It is crucial to note that, in constructing race, legal rules operate through violence . . . . In the law of race more generally, violence is manifest in slavery, in Jim Crow segregation, in police brutality, in the discriminatory enforcement of criminal laws, in the dispossession of Native American land rights, in the internment of people of Japanese descent, in the failures of the law to provide equal justice or to protect against discrimination. In all of this violence, the law not only relied on but also constructed racial distinctions.[67]

Thus, history is replete with examples of the White Supremacist state denying the full humanity of people of color, people who remain in a state of nature. But the very term "White Supremacy" is scarcely heard in a law school classroom. Every time a young black man is gunned down in the street by police, the sympathy of most White people is with the cops who did the killing. White people seem to have an innate deference and respect for police. Time and again, the officer must have feared for his life. Everyone knows the police exist to "protect and serve."

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63. *Id.* at 256.

64. "Once the mechanism of biopower was called upon to make it possible to execute or isolate criminals, criminality was conceptualized in racist terms." *Id.* at 256.

65. MILLS, *supra* note 15, at 85.

66.

> Legal interpretation takes place in a field of pain and death. This is true in several senses. Legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life. Interpretations in law also constitute justifications for violence which has already occurred or which is about to occur. When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence. Neither legal interpretation nor the violence it occasions may be properly understood apart from one another.

Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1985-1986).

67. HANEY LÓPEZ, *supra* note 5, at 85.

Perhaps police are the new priests, carrying out the rite of transubstantiation, offering up the innocent black body on the altar of fear to expiate White guilt.[68] According to Derrida, "the police are the state":

> Prior to being ignoble in its procedures, in the unnameable inquisitions that police violence allows itself without respect for anything, the modern police force is structurally repugnant, filthy [*immonde*] in essence because of its constitutive hypocrisy. Its lack of limit does not only come from surveillance and repression technology—such as was already being developed in 1921, in a troubling manner, to the point of doubling and haunting all public and private life (what we could say today about the development of this technology!). It come from the fact that the police are the state, that they are the specter of the state and that, in all rigor, once cannot take issue with the police without taking issue with the order of the *res publica*. For today the police are no longer content to enforce the law and thus to preserve it: the police invent the law, publish ordinances, and intervene whenever the legal situation is unclear to guarantee security—which is to say, these days, nearly all the time. The police are the force of law [*loi*], they have the force of law, the power of the law.[69]

VI. TOWARDS A COUNTER ONTOLOGY

As noted in the quotes at the beginning of this paper, the solution in so far as White people like myself are concerned is first and foremost to renounce Whiteness. At this point in history, renouncing Whiteness remains a highly controversial proposition. Yet people who have White privilege must attack Whiteness on its own terms, in every way possible, in every

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68.

> [K]illing the Black body is an act that functions to provide the white body with an "omnipotent" consciousness, giving whites the illusion of absolute power to take a Black life, which, according to racist ideology, is no more problematic than taking the life of a subhuman animal. In this way, although the Black body is negated qua killed, the dead Black body, the burned, castrated, and lynched Black body, is still needed in order to magnify white existence.

YANCY, *supra* note 55, at 116.

69. JACQUES DERRIDA, ACTS OF RELIGION 276-77 (2001). This passage appears in Derrida's noted essay, "Force of Law: The 'Mystical Foundations of Authority'"; an earlier version of the essay may be found in DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE 42-43 (Drucilla Cornell et al. eds., 1992) (quoting Walter Benjamin's *Critique of Violence* (1921)):

> This absence of a frontier between the two types of violence, this contamination between foundation and conservation is ignoble, it is, he says, the ignominy (*das Schmachvolle*) of the police. For today the police are no longer content to enforce the law, and thus to conserve it; they invent it, they publish ordinances, they intervene whenever the legal situation isn't clear to guarantee security. Which these days is to say nearly all the time. The police are ignoble because in their authority "the separation of the violence that founds and the violence that conserves is suspended (*in ihr die Trennung von rechtsetzender und rechtserhaltender Gewalt aufgehoben ist*, "in this authority the separation of lawmaking and lawpreserving is suspended," p.286) . . . Where there are police, which is to say everywhere and even here, we can no longer discern between two types of violence, conserving and founding, and that is the ignoble, ignominious, disgusting ambiguity.

context. Doing so necessarily means taking significant risks. But Whiteness operates vis-à-vis the perceived safety of White people. It is that sense of safety that must be destroyed. While it may not be popular, White people need to give up the need to constantly feel safe. Acting in solidarity with people of color means nothing if I can do so only from my position of privilege.

We must also begin to create and instantiate counter-narratives of our lives in relation to people of color and our own ethnicities absent the specter of Whiteness. We need to stop pretending Whiteness is anything other than a fiction manufactured to murder non-White people. We must call the paragons of Western philosophy—Locke, Kant, Hegel, etc.—what they are: White Supremacists. Every word they put on paper should be interpreted in light of their legacy of horrors.

Ultimately, we must create a counter ontology of liberation that categorically rejects redemption through violence. We must decouple cultivation of the self from consumption of the self. The logic of White Supremacy is rooted in a theology of cannibalism. If and until this ontology is recognized, named, called out, identified and dismantled for what it is, we will remain either in the state of nature or its inverse, the state of society, for both the state of nature and the state of society are merely the logic of Whiteness.

VII. CONCLUSION

"Racial subjection does not result from excessive strategies of power, but is an effect of the analytics of raciality, the political-symbolic apparatus that has produced in the United States global/historical subjects, the white transparent (National I) and his affectable 'others.'"[70]

What is race? Michael Omi and Howard Winant have posited that "race is a concept which signifies and symbolizes social conflicts and interests by referring to different types of human bodies."[71] Racism, then, is not merely some accident of history that can be corrected by an act of Congress or a Supreme Court opinion. It is not a function of civics or political inequality. It is not a social ill like crime or poverty. It is not a result of geography or an abundance of iron or dearth of rice. Racism is not bad manners or ignorance

70. FERREIRA DA SILVA, *supra* note 2, at 219.

71. MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S 55 (2d ed. 1994)

or stupidity. Nor is racism a function of class war[72] or gender oppression,[73] though of course race, class and gender interpolate one another. No—racism is not any of these things or the result of any of these things.

Racism is much deeper than an economic, geographic, or sociological phenomenon. It is more powerful than an act of state. Ultimately, racism is a set of metaphysical claims about being itself. "[W]hat needs to be recognized is that side by side with the existing political structures familiar to all of us, the standard subject matter of political theory—absolutism and constitutionalism, dictatorship and democracy, capitalism and socialism—*global white supremacy*—and these struggles are in part struggles against this system."[74]

Undoubtedly, the reader may ask: but what about all of the advances in civil rights? People of color can vote, buy and own property, run a business, go to college. And of course many do, though people of color remain far behind their white counterparts in nearly every indicia of well-being.[75] However, the fact that the courts have afforded people of color a measure of dignity here and there does little or nothing to change the fact that, at its core, the linchpin of the organization of society remains White Supremacy. People of color continue to be banned to the state of nature to fend for themselves.

72. "Marxism's embracing of historicity limits its deployment as a basis for the projects of racial emancipation . . . . Precisely because of its desire for transparency, historical materialism has been a rather limiting strategy for the writing of the racial subaltern as a subject." FERREIRA DA SILVA, *supra* note 2, at 262.

73.

> Similarly, to comprehend how the racial and patriarchy operate as strategies of subjection requires an account of how racial difference and gender difference signify affectability, that is, outer determination. No other figure indicates their combined effect better than the welfare queen, the single female who engages in unprotected sex and uses her children to remain out of work. Beyond supporting the dismantling of the U.S. welfare state, this construct has produced economically dispossessed black mothers as social subjects entitled to neither the legal protections nor the remedies ensured in civil rights legislation. The attack on these women's reproductive freedom—a right women of color elsewhere have never had, as witnessed by the global population control projects along with the criminalization of black female drug users, enabled by their construction as "social problem"—indicates a juridical position that escapes the protection, now under attack, ensured by the *Roe* decision. What is stripped away here is precisely consent, that is, what Locke's account of the *scene of regulation* ensures that self-determination remains a distinguishing attribute of the modern political subject. The criminalization of reproduction operates before consent because the cultural and economic conditions of these black women become the sole determinant of the way the laws are applied to them. The concept guiding gender studies, patriarchy, does not capture this political position because it assumes a woman who can decide, act, and perform out of her own desire, that is, a transparent female subject who will emerge once the veil of patriarchy is lifted.

FERREIRA DA SILVA, *supra* note 2, at 265-66.

74. MILLS, *supra* note 15, at 125.

75. Tim Wise, *Whine Merchants: Privilege, Inequality, and the Persistent Myth of White Victimhood* (May 13, 2013), http://www.timwise.org/2013/05/whine-merchants-privilege-inequality-and-the-persistent-myth-of-white-victimhood.

The recent water crisis in Flint, Michigan,[76] is only the most recent example of the sovereign state affirmatively obliterating people of color.

> Frightening as it seems, the sociology of race relations may provide such a useful toolbox for comprehending a kind of racial subjection in which racial difference operates as a strategy of exclusion because of its own participation in the writing of blackness as the signifier of an affectable consciousness, one that radically departed from the one the U.S. legislative and executive power were instituted to protect.[77]

The U.S. was never meant for people of color. We need to stop pretending like it was. The founding documents of the State and their subsequent interpretations were written by and for White people at the expense of people of color. The entire system of law exists to manifest White Supremacy. Until that essential truth is acknowledged, we will continue to put a band aid on the hemorrhaging of the blood of people of color.

76. Yanan Wang, *In Flint, Mich., There's So Much Lead in Children's Blood That a State of Emergency is Declared*, WASHINGTON POST (Dec. 15, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/12/15/toxic-water-soaring-lead-levels-in-childrens-blood-create-state-of-emergency-in-flint-mich.

77. FERREIRA DA SILVA, *supra* note 2, at 213.