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[RE]INTEGRATING PSYCHIC SPACE: LAW, ONTOLOGY, AND THE *GHOSTS* OF OLD SAVANNAH

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*The dead do not die. They haunt the living.*¹

One day some years ago, while I attended an academic conference at Hilton Head Island, South Carolina, my day was happily interrupted by a call from the third of my then late-teenaged children, looking for a break from our rural North Carolina home to the north, and the short road trip it promised. In quickly

* Professor of Law, Atlanta's John Marshall Law School. Many thanks to Professor Liza Karsai for turning me on to the usefulness and importance of Professor Dayan's *The Law is a White Dog*, to my own developing agenda, and, of course, thanks to Professor Dayan for her remarkable project. Thanks as well to Jessica Kee for useful ongoing conversations around hauntology, and ghosts, important in her graduate work, and useful in mine. Proud of you!

¹ COLIN DAYAN, *THE LAW IS A WHITE DOG: HOW LEGAL RITUALS MAKE AND UNMAKE PERSONS* 33 (2011). The full power of Professor Dayan's observation is augmented in context:

The dead do not die. They haunt the living. Both free and unfree, the undead still speak in the present landscape of terror and ruin. The dogs of hurricane Katrina, citizens turned refugees in the United States; prisoners warehoused indefinitely; disappeared ghost-detainees tortured and held incommunicado in prolonged detention; sick cows kicked and prodded into slaughter—the rationales and rituals of terror proliferate. But perhaps we need to think more deeply about the dying and the dead.

Id. at 33-34. In fact, the goal of this work is to do just as Professor Dayan suggests, from a particular perspective: to think more deeply about *the place of law* particularly in the business of the dying and the dead, in Old Savannah, and beyond. *See id.* at 70 (“In the fiction of civil death . . . the state reinvents what happens after literal death The soul is killed before the body dies.”).

searching for things to do in consequence, I settled on something of which I had negative interest personally, but which then struck me as a potentially valuable experience for father and son together: a tour of nearby Charleston Bay. As I viscerally anticipated, the tour proved a daunting, enlightening, and memorable experience for us both, making its way into the complex tapestry of our *family life* in consequence. While there, we both made sobering eye contact at the bright-faced, happy voiced, college-aged tour guide's chipper, ironic observation that "Charleston built its financial infrastructure throughout the early nineteenth century on the industry of shipping!"² Though I can provide no irrefutable proof in support, as I gazed out at the same sight reaching the no-doubt wide eyes of so many like me so many years before—their very first look at their desperate, violent new home of America—I felt certain I could hear the frightening, urgent cries of their many remaining ghosts.

In September 2014, *Savannah Law Review* organized a colloquium, *[Re]Integrating Spaces*. I was sincerely grateful for the invitation from *Savannah Law Review* to join with and learn from a weighty group of interested, interesting scholars, and to engage more directly a topic occupying my peripheral attention for some time past: *law* and *ghosts*. Philosophically, the formal place of my inquiry in this area is *ontology* generally, and, more particularly, prescient French philosopher Jacques Derrida's brilliant play on the word and medium: *hauntology*.³ While I suppose it was inevitable that my earlier broad fascination with law as a catalyzing agent in American antebellum culture would atomize to concern with the individual person, I do have this Colloquium's thoughtful theme to thank for its timing. For if ontology concerns itself with metaphysical matters of *human existence* and *being*,⁴ and if its Derridan derivative points at the

² Shipping what? Every fiber in my being wanted to desperately challenge the bright-voiced observation. However, in consequence of his open-faced youth and the generally congenial mood of the all-white accompanying tourist group with me—and my vague sense of the rudeness of such a confrontation in that setting—I held my tongue. Looking back at the moment from the present vantage point, I am glad I did.

³ JACQUES DERRIDA, *SPECTERS OF MARX: THE STATE OF THE DEBT, THE WORK OF MOURNING & THE NEW INTERNATIONAL* (Peggy Kamuf trans., Routledge 1994) (1993), available at <http://m.friendfeedmedia.com/411d68a9b887290f0f6a1621dad4ad2249ea7421>.

⁴ Comparatively, two sources—one older and one newer—capture the essence of the word used here and its preference for this work. In WEBSTER'S NEW INTERNATIONAL DICTIONARY 1704 (2d ed., unabridged 1954), the word is recovered as following: "on·tol'·o·gy . . . *n.* [NL. *Ontologia*, fr. Gr. *Onta* the things which exist . . . + *-logy*.] The science of being or reality; the branch of knowledge that investigates the nature, essential properties, and relations of being, as such." *Id.* Two generations hence, in the NEW ILLUSTRATED WEBSTER'S DICTIONARY 679 (1994), the word is assigned the following meaning: "on·tol·o·gy . . . *n.* The science of real being; the philosophical theory of reality; the doctrine of the universal and necessary characteristics of all existence." *Id.* Of course, both treatments focus on the realities of human existence, the essences of human being. The effect of human law on that reality is the place where my continued musing has, quite naturally, led.

interface of being and nonbeing—*present* and *past*—in the human,⁵ this is an apt time and an ideal venue for such consideration. And if there can be no better lens through which to examine the violent intersections of law and the human body and spirit than the venue of American slavery, there is no better place to complete that work than right here—Savannah, Georgia—and right now, through the Colloquium’s theme of reintegration.

In considering law in relation to ghosts here, I do not mean with the latter reference to reach for some scholar-hip, new-age reference to spooks or hobgoblins,⁶ but rather to highlight and ponder presentist moments that inevitably beg a people’s troubling past. For scholar Claudia Ruitenberg, these spectres are “parts of our histories that we—or some of us—would rather not acknowledge and that, when we do, threaten to disrupt the comfort of our everyday assumptions and make our moral hair stand on end.”⁷ Jessica Baker Kee dramatically describes my intended subject as “[t]hese traumatic ruptures, here symbolized as spectral hauntings, emerg[ing] in moments when the past, present, and future collide uncomfortably to disrupt the linear experience of the embodied present.”⁸ For Jacques Derrida himself, these ghosts were cornerstones of the “spectral moment, a moment that no longer belongs to time Furtive and untimely, the apparition of the specter does not belong to that time.”⁹ My ghosts, then, are not white-sheeted spooks: they are temporal ripples, present moments demanding immediate, visceral attention by the rattling chains of our past, and my focus is the interplay of law in these moments with these ghosts.

To elucidate my point here, I had intended to make reference to the tortured recent events in Ferguson, Missouri, but in a macabre twist on the *southern hospitality* trope, Savannah has just recently afforded me an example at once both clearer and closer to home. Between the time I awoke on a bright Thursday morning—September 18, 2014, to be precise—and the time of my arrival in Savannah that same evening, Savannah was practically short one formerly beating heart—a young black father of two, dead by at least one police bullet. The Chatham County Emergency Management Agency issued in consequence a “robo-call to 286 people” regarding a “potential civil unrest

⁵ I am especially indebted to the recently published work of Jessica Baker Kee, which allowed this subtle concept to become accessible to the *lay* traveler, particularly as it pertains to the human spirit and ghosts. Jessica Baker Kee, *The Haunted Curriculum: Memory, Pedagogy, Trauma*, in COLLECTIVE UNRAVELINGS OF THE HEGEMONIC WEB 83, 83-97 (Becky L. Noel Smith, Katherine Becker, & Libbi R. Miller eds., 2014).

⁶ Though to be sure, I mean in no way by this to denigrate the importance of such images, in historical study or popular culture, nor to reflect any skeptical doubt on the possibility of their actual existence.

⁷ Claudia Ruitenberg, *Education as Séance: Specters, Spirits and the Expansion of Memory*, 40(3) INTERCHANGE 295, 297 (2009).

⁸ Baker Kee, *supra* note 5, at 86.

⁹ See DERRIDA, *supra* note 3, at xix.

situation,”¹⁰ and though the spokesperson downplayed the urgency behind it,¹¹ no one is unmindful of the hyper-particular concerns driving the request. Local voice Reverend Leonard Small announced for the death-site crowd of that tragic day that the *real* cause of death of the victim, Mr. Charles Smith, was “being black in America.”¹² While many might have challenged this observation, no single one receiving his passionate words would be ignorant of their deeper meaning. Ghosts of the very kind I am referencing for you now, loosed in Savannah by a plaintive, recent gun report, remain in its streets this moment, and, if they have their own preternatural way, will be with Savannah for some time to come.

Of course, given the related historical pristinity of this particular place—Savannah, Georgia—the cries of the dying man of that day, if there were any, were by no means strange, new, or unheard before in this place—especially this place. Similar cries going before—many thousands before—have thundered through the surrounding moss-covered branches right before us today. One well-noted event in this very area over a century-and-a-half ago—in fact, but a short walk and a few minutes from Savannah Law School—saw the equivalent of nearly seven million dollars trade hands while hundreds of men, women, children, and infants “stepped on the block” to be passed as legalized chattel—*human beings* reduced by law into *things*—from hand to hand.¹³ To one observer, “faces . . . [were] always the same, . . . [telling] of more anguish than it is in the power of words to express.”¹⁴ Ontologically, the echoing cries of those ghosts are everywhere to the ear inclined to listen—to the present-day inquirer caring to hear. In the words of one local historian and author, Barry Sheehy, “[Savannah]

¹⁰ Dash Coleman, *Suspect Killed by Police; GBI Leads Investigation*, SAVANNAH MORNING NEWS, Sept. 19, 2014, at 3A. Interestingly, to me, the subtitle of the reporting press organ is “Light of the Coastal Empire.” *Id.* at 1A.

¹¹ “Spokeswoman Meredith Ley said the call was standard protocol . . . [s]imilar calls . . . made for St. Patrick’s Day and the Rock ‘n’ Roll Marathon . . .” *Id.* at 3A. Her added comments, augmenting the thinking behind the decision, echoed the faint, other-worldly cries of *ghosts* clearly in the air:

The decision to place the call Thursday was made internally at CEMA, “based on us working with the police and listening to what’s going on,” Ley said. It wasn’t based on the report of a shooting by a police officer per se but on “the civil unrest and how things could possibly escalate quickly,” she said.

Id. at 3A.

¹² *Id.*

¹³ *A Slave Auction*, N.Y. TRIB., Mar. 9, 1859, reprinted in IV AMERICAN HISTORY TOLD BY CONTEMPORARIES: WELDING OF THE NATION, 1845-1900, 75, 78 (Albert Bushnell Hart ed., 1909) (1859), available at <https://archive.org/details/americanhistory01curtgoog>.

¹⁴ *Id.* Staged in the Savannah late winter “for two long days, during which time there were sold 429 men, women and children. There were 436 announced to be sold, but a few were detained on the plantations by sickness The total amount of the sale foot[ing] up \$303,850” in 1860 dollars. *Id.* at 79.

was one-stop shopping,” and the inhuman exchange continued “until you could hear the guns” of the Civil War.¹⁵

As a legal historian moved by the Hurstian quest of *law in society* and mesmerized by the odd, counterintuitive role of law in the evisceration of the human form and spirit in antebellum America, I cannot turn my gaze from these stories, these intersections, these hauntologies, these ghosts. And I believe the issue is especially critical to this endeavor and this *situs*, as *Savannah Law Review* rightly and responsibly considers the question of the best place for Savannah Law School in this unique community. In seeking to understand what these spectres might teach about law in the context of American slavery, and surviving lessons for today, this Essay will first employ the jurisprudence of the founders to find the legitimate place (if any) of human peonage and slavery within the spiritual and intellectual safe haven of *republican democracy*—the grand American experiment. Once answering the question in the *ideal*, this Essay will then consider the question in the *real*, looking briefly at a construction in several states of a practical jurisprudence of slavery against this ideal, necessarily paying close attention to the preferred legal rhetoric of each—a *rhetoric of incoherence*, as this Essay will suggest. Once the real is within the umbra of the ideal, we can then trust our ghosts with the critical task of leading us through the intellectual wreckage of legal slavery in this nation’s past to a place of hope and peace, with appropriate challenges following.

In a famous letter dated January 18, 1773, patriot *nonpareil* Patrick Henry penned a thank-you letter to Robert Pleasants on his gift to Henry of “Anthony Benezets’s book against the slave trade.”¹⁶ In acknowledging with gratitude the receipt of the gift, Henry felt moved to reflect both the fact of its having been read by him and the effect of that reading on Henry’s own thinking regarding the intractable problem writ large before the colonies.¹⁷ Henry candidly noted, “[w]ould any one believe that I am master of slaves of my own purchase!,” adding with apparent embarrassment, “I am drawn along by the general inconvenience of living here without them. I will not, I cannot justify it.”¹⁸ Candidly owning a belief that “a time will come when an opportunity will be offered to abolish this lamentable evil,” if Henry did not then have the courage of his own famously announced *Liberty or Death!* convictions, the responsibility followed at least to “transmit to our descendants, together with our slaves, a pity for their unhappy lot, and an abhorrence for slavery.”¹⁹ As between moral and legal right, for Henry the matter was not a difficult one: “It is a debt we owe to

¹⁵ Chuck Mobley, *Slavery Was Their Business, and Business Was Good*, SAVANNAHNOW.COM (Feb. 18, 2011), <http://savannahnow.com/accent/2011-02-18/slavery-was-their-business-and-business-was-good>.

¹⁶ Letter from Patrick Henry to Robert Pleasants (Jan. 18, 1773), *reprinted in* 1 PATRICK HENRY: LIFE, CORRESPONDENCE AND SPEECHES 152, 151-52 (William Wirt Henry ed., 1891), *available at* <https://ia600303.us.archive.org/17/items/pathenrylife01henrrich/pathenrylife01henrrich.pdf>.

¹⁷ *Id.* at 152-53.

¹⁸ *Id.* at 152.

¹⁹ *See id.* at 152-53.

the purity of our religion, to show that it is at variance with that law which warrants slavery.”²⁰

Of course, if somewhat surprising in the candor of his politically sensitive admissions, Founder Patrick Henry was in no way unique in them. As early as 1688, Pennsylvania Quakers felt compelled to challenge this practice among themselves, memorialize those thoughts on paper, and share them with others:

Is there any that would be done or handled in this manner? viz., to be sold or made a slave for all the time of his life? . . . Here is liberty of Conscience, w^{ch} is right & reasonable; here ought to be likewise liberty of y^e body But to bring men hither, or to robb and sell them against their will, we stand against Ah! doe consider well this things, you who doe it, if you would be done at this manner? And if it is done according Christianity? . . . This mackes an ill report in all those Countries of Europe, where they hear off, that y^e Quackers doe here handel men, Licke they handel there ye cattel.²¹

Furthermore, Revolutionary War hero Benjamin Rush used an agricultural analogy to make what he believed to then be an irrefutable point about the institution of slavery in the fledgling American public: “The plant of liberty is of so tender a nature, that it cannot thrive long in the neighbourhood of slavery.”²² Even if he was torn in his own private life, the public patriot Thomas Jefferson had no qualms whatsoever railing in writing against “this execrable commerce” of the buying and selling of human beings.²³ Jefferson notes, candidly and publically, that since “nothing is more certainly written in the book of fate, than that these people are to be free”²⁴ Jefferson continues, “the way I hope [is] preparing, under the auspices of heaven, for a total emancipation”²⁵ For

²⁰ See *id.* at 153.

²¹ Brycchan Carey, *Inventing a Culture of Anti-Slavery: Pennsylvanian Quakers and the Germantown Protest of 1688*, in *IMAGINING TRANSATLANTIC SLAVERY* 17, 20-21 (Cora Kaplan and John Oldfield eds., 2010). The original of this important document is reported to be on file with the *Haverford College Quaker and Special Collections*, Haverford, PA. A scanned copy of the original is available at <http://trilogy.brynmawr.edu/speccoll/quakersandslavery/commentary/themes/earlyprotests.php>.

²² BENJAMIN RUSH, *On Slave-Keeping* (1773), reprinted in *THE SELECTED WRITINGS OF BENJAMIN RUSH* 3, 17 (Dagobert D. Runes ed., Philosophical Library 1947), available at <https://ia700306.us.archive.org/0/items/selectedwritings030242mbp/selectedwritings030242mbp.pdf>.

²³ Thomas Jefferson, *Original Rough Draught of the Declaration of Independence*, in *A CASEBOOK ON THE DECLARATION OF INDEPENDENCE* 260, 263 (Robert Ginsberg ed., Thomas Y. Crowell Co. 1967).

²⁴ THOMAS JEFFERSON, *Autobiography* (1821), reprinted in 1 *THE WRITINGS OF THOMAS JEFFERSON* (Monticello ed.) 1, 72 (Andrew A. Lipscomb & Albert Ellery Bergh eds., Thomas Jefferson Mem. Assoc. 1904).

²⁵ THOMAS JEFFERSON, *Notes on Virginia* (1785), reprinted in 2 *THE WRITINGS OF THOMAS JEFFERSON* (Monticello ed.) 1, 227-28 (Andrew A. Lipscomb & Albert Ellery Bergh eds., Thomas Jefferson Mem. Ass’n 1904). Even more arresting than the uncompromising nature of his stated hope was the apocalyptic convictions giving rise to the hope:

Englishman turned American Revolutionary Thomas Paine, it was a simple and straightforward human calculus: “Our traders in MEN (*an unnatural commodity!*) must know the wickedness of that SLAVE-TRADE, if they attend to reasoning, or the dictates of their own hearts.”²⁶

We must not make the present-day mistake of imagining these reporters and many others like them to have been particularly courageous in their direct treatments of this important national question.²⁷ In fact, putting political considerations and matters of practicality to the side, the question before the nation at the time of its founding was not intellectually difficult at all. With regard to the ideal jurisprudence of *democratic republicanism* upon which the founding generations hoped to build their anticipated republic, there was simply no room whatever for human slavery, African-origin or otherwise. Jurisprudentially, for Saint Augustine of Hippo the matter was elegantly simple: *lex iniusta non est lex*.²⁸ This assertion was fully defended by Saint Augustine’s

For if a slave can have a country in this world, it must be any other in preference to that in which he is born to live and labor for another; in which he must lock up the faculties of his nature, contribute as far as depends on his individual endeavors to the evanishment of the human race, or entail his own miserable condition on the endless generations proceeding from him And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God? That they are not to be violated but with His wrath? Indeed I tremble for my country when I reflect that God is just; that his justice cannot sleep forever; that considering numbers, nature and natural means only, a revolution of the wheel of fortune, an exchange of situation is among possible events; that it may become probable by supernatural interference! The Almighty has no attribute which can take side with us in such a contest.

Id. at 226-27. Thus, for the great Jefferson, as ‘God’ was attentively watching—and waiting—and as the ‘law of nature’ was without equivocation in the matter, for his country, much indeed depended on his hoped for ameliorating outcome.

²⁶ THOMAS PAINE, *African Slavery in America* (1775), reprinted in 2 THE COMPLETE WRITINGS OF THOMAS PAINE 15, 16 (Philip S. Foner ed., The Citadel Press 1945) (emphasis in original), available at <http://library.mises.org/books/Thomas%20Paine/The%20Complete%20Writings%20of%20Thomas%20Paine,%20Volume%201.pdf>.

²⁷ See *supra* notes 15-25 and accompanying text.

²⁸ “A law that is not just is not a law.” S. AURELIUS AUGUSTINE, DE LIBERO ARBITRIO VOLUNTATIS [ST. AUGUSTINE ON FREE WILL] 9 (Carroll Mason Sparrow trans., Univ. Va. Press 1947) (387-89 A.D.). The attribution of this iconic phrase to Saint Augustine derives from a famous recordation of his platonic dialogue with *Evodius*, where he raises the issue rhetorically, answering his own question in consequence:

A. Then the law is not just that gives the wayfarer the right to kill a robber to save his own life, or that permits anyone, man or woman, to kill an attacking ravisher before he can accomplish his purpose? The law moreover commands the soldier to kill the enemy; if he stays his hand he is punished by the emperor. Shall we venture to say that such laws are

intellectual heir eight centuries later, Saint Thomas Aquinas, in his own complex iteration of the pristine interface of natural law and human freedom.²⁹ Moving

unjust, or that they are indeed not laws at all? For I think that a law that is not just is no law.

Id. Augustine elaborated on his point thereafter in a way anticipating St. Thomas Aquinas, eight centuries in the future:

- E.* I see that law is eternal and immutable.
A. I judge that you see also that in that temporal law there is nothing just or legitimate but what men have derived from the eternal law.

Id. at 13. Norman Kretzmann quite rightly references the *Augustine/Aquinas* interplay around this famous quote, even in terms of its popular surviving form, noting: “Aquinas, who did at least as much as anyone else to make this Augustinian passage famous, quotes only the last sentence of it and omits the words ‘to me.’” (In the quotation above these words correspond to “I think.”). Norman Kretzmann, *Lex Iniusta Non est Lex: Laws on Trial in Aquinas’ Court of Conscience*, 33 AM. J. JURIS. 99, 101 (1988).

²⁹ After years of consideration of his thick theo-legal ponderings in his *magnum opus*—SUMMA THEOLOGICA—I remain capable of reiterating only cartoon Aquinas, at best. In that regard, the great ponderer imagines law in four major iterations, nested in one another: (1) *eternal law* (over all; the law under which the Godhead itself exists and by which it particularly and uniquely is governed); (2) *divine law* (the law by which the Godhead governs the *incorporeal universe* (e.g., heaven, hell, the angels)); (3) *natural law* (the law by which the Godhead governs the corporeal universe, presented to the human experience in two forms: (a) the *physical law* of nature (e.g., gravity; doppler effect; Krebs cycle), and (b) the *moral law* of nature (e.g., kindness, faith, altruism)); and, lastly, (4) *human law*.

Each of these forms has unique qualities in relation to one another, of significance to the human experience. Eternal law is *immutable* (unchangeable by (wo)man) and *utterly unknowable* (beyond the merest knowledge that it *is*). Comparatively, divine law is also immutable, though it is (wo)man *sensible*, in that the human spirit can imagine its character, more closely than eternal law. Natural law (in both forms) shares immutability with its larger iterations, though, as it is situated closer to the human experience than the others, it is *knowable*; indeed, given natural law’s echoing of both the *divine* and the *eternal*, and its vital relationship with the last form of law—the *human*—close knowledge of natural law by the human is critical to maximization of the human experience. That last form of law—*human law*—is *utterly knowable* and *mutable*; indeed, it is our own creation. For Aquinas, as the goal of human law must be to echo the divine, it is necessary that we pay closest attention to that part of God’s system to which we have comparatively ready access—the *natural law*—in our fashioning of the human. In this way, at best, in our human law-making we are like sculptors, paying the closest attention to the real (e.g., the *natural*) in fashioning from stone its best replica among us. And, for Aquinas, the exercise is not without significance: the closer our *human* replication mimics the *natural*, the more beautiful is our sculpted product—the *easier is our way*, both on earth and in the life beyond. In this light then, where our human law deviates significantly from the only part of that scheme to which we have ready access—the *natural*—it is essentially *no law at all*; no echoing of the divine with whatever consequences naturally following. For ecclesiastics like Augustine and Aquinas, and for their western intellectual heirs—including the founding fathers—this synergy was (is) by no means inconsequential, for *people* or for *nations*. See, with regard to the above broadly, ST. THOMAS AQUINAS, II SUMMA THEOLOGICA, Ia IIae Questions 91-95, 996-1025 (Fathers of the English Dominican Province trans., 1981) (1948), available at http://www.documentacatholicaomnia.eu/03d/12251274,_Thomas_Aquinas,_Summa_Theologiae_%5B1%5D,_EN.pdf.

forward in western intellectual tradition, for Baron de Montesquieu the matter was plain and unalloyed: “The state of slavery is in its own nature bad.”³⁰ The matter was no less clear for Jean-Jacques Rousseau following: “From whatever angle the question is considered, then, the right of slavery is void, not only because it is illegitimate, but because of its absurdity and meaninglessness.”³¹

For the great and important John Locke,³² in theory, at least, and where we presently are:³³

³⁰ CHARLES LOUIS DE SECONDAT BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* 261 (Thomas Nugent trans., Batoche Books 2001) (1748), *available at* <http://socserv2.socsci.mcmaster.ca/econ/ugcm/3ll3/montesquieu/spiritoflaws.pdf>. Baron de Montesquieu elaborated on his bald pronouncement immediately thereafter:

It is neither useful to the master nor to the slave; not to the slave, because he can do nothing through a motive of virtue; nor to the master, because by having an unlimited authority over his slaves he insensibly accustoms himself to the want of all moral virtues, and thence becomes fierce, hasty, severe, choleric, voluptuous and cruel.

Id.

³¹ JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT OR PRINCIPLES OF POLITICAL RIGHT* 53 (Christopher Betts trans., Oxford Univ. Press 1994) (1762). Rousseau was unequivocal in these sentiments:

The words slavery and right contradict each other; they are mutually exclusive. Whether made by one man addressing another, or by a man addressing a nation, this statement will always be equally senseless: ‘I make a covenant between us which is entirely at your expense and entirely for my good, which I will observe as long as I please, and which you will observe as long as I please.’

Id. For Rousseau, the matter was not difficult “since no man has a natural authority over his fellow.” *Id.* at 49.

³² Writing effectively as an intellectual contemporary of the American founders, and championing as he did the cause of the people through English Parliament against the divine right of Kings, Locke’s place in the American ethos is unchallenged. For our own Thomas Jefferson, Locke was included among “the three greatest men that have ever lived.” Letter from Thomas Jefferson to John Trumbull (Feb. 15, 1789), *in* 14 *THE PAPERS OF THOMAS JEFFERSON* 561, 561 (Julian P. Boyd ed., 1958). In Jefferson’s mind, having previously noted that “Montesquieu’s spirit of laws is generally recommended,” containing as it did, in his view “a great number of political truths; but almost an equal number of political heresies,” Locke’s *Two Treatises of Government* presented no such qualms. See Letter from Thomas Jefferson to Thomas Mann Randolph, Jr. (May 30, 1790), *in* 16 *THE PAPERS OF THOMAS JEFFERSON* 448, 449 (Julian P. Boyd ed., 1961) (“Locke’s little book on government is perfect as far as it goes.”). Indeed, in the twilight of his years and long after the fact, Jefferson himself would report with some chagrin to his friend James Madison that “Richard Henry Lee charged [the Declaration of Independence] as copied from Locke’s treatise on government.” Letter from Thomas Jefferson to James Madison (August 30, 1823), *in* 15 *THE WRITINGS OF THOMAS JEFFERSON* 460, 462 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1904) (1823) (“[W]hether I had gathered my ideas from reading or reflection I do not know. I know only that I turned to neither book nor pamphlet while writing it.”). If nothing else, these observations clearly illustrate the importance of the great philosopher John Locke to at least one of the critical minds and voices in the founding of the nation, and to many others, of course.

The *natural liberty* of man is to be free from any superior power on earth, and not to be under the will or legislative authority of man, but only to have the law of nature for his rule.

....
 This is the perfect condition of *slavery*, which is nothing else, but *the state of war continued between a . . . conqueror and a captive*.³⁴

In fact—and in the world of jurisprudence this is by no means slight or insignificant—to find any foundational support for human slavery in a western intellectual tradition, it is necessary to leave the relatively safe harbors of Rousseau, Montesquieu, Locke, and the other naturalists and head straight into a roiling sea with Thomas Hobbes as Captain. For Hobbes—our “nasty, brutish and short” fellow,³⁵ law’s reach was truncated only by the scope of the Sovereign’s imagination and the strength of his grip.³⁶ In Hobbes’s world, the *rule of the Sovereign* and the *rule of law* were one—not *in lex* but *in terrorem*³⁷—the

³³ I do not mean by any of the immediately previous or following to suggest there is innate truth of the above or related natural law debates carried forward to modern times by such deep thinkers as H.L.A. Hart, John Finnis, Lon Fuller, Ronald Dworkin, and the like. Neither do I mean to suggest that there is no debate within the defining walls of natural law jurisprudence about the Augustinian-Thomist conclusion presented here. I mean only this: in endeavoring heroically to construct the democratic republic of their greatest imaginings, the so called founding fathers deliberately chose a natural law foundation, as articulated by the very jurisprudes cited here. And, for these jurisprudes, the question of human slavery within the confines of natural law was, or is, as straight forward and clear, as these same founders knew and understood. Thus, they were not unaware of this sticky truth when, in consequence of the positive outcome of the Revolutionary War, they were tasked with imagining a place for human slavery in a democratic republic.

³⁴ JOHN LOCKE, TWO TREATISES OF GOVERNMENT 205-07 (A New Edition Corrected, London 1823) (1689), *available at* <https://ia600400.us.archive.org/21/items/twotreatisesofg00lockuoft/twotreatisesofg00lockuoft.pdf>.

³⁵ The full quote from Hobbes’s famous *Leviathan* is even more colorful and daunting than its popular tweet:

In such condition, there is no place for Industry; because the fruit thereof is uncertain: and consequently no Culture of the Earth; no Navigation, nor use of the commodities that may be imported by Sea; no commodious Building; no Instruments of moving, and removing such things as require much force; no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society; and which is worst of all, continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short.

THOMAS HOBBS, LEVIATHAN 96-97 (Oxford Univ. Press 1965) (1651), *available at* http://lf-oll.s3.amazonaws.com/titles/869/0161_Bk.pdf. It is from this grim platform that the philosopher spins his own more grim view of the necessities of governments in consequence.

³⁶ Given the energy and direction of the philosopher’s presentation, the use of the gender-specific descriptor here does not seem inappropriate.

³⁷ For Hobbes, the calculus was elegant and chilling:

For by this Authoritie, given him by every particular man in the Common-Wealth, he hath the use of so much Power and Strength

legitimacy of any individual edict being measured not by its Thomistical echoing of natural law above,³⁸ but only by its fidelity with the vision of the Sovereign here below.³⁹ The difference is striking, and chilling. If law in the best imaginings of those early erstwhile Americans is a discovered and inherited thing, depending for its virility and creative capacity on its conformity with the *original mind of its Creator*,⁴⁰ our ghosts are presently on hand to testify that law is a very different thing in Hobbes's dark universe, depending for its animus on the scope of the Sovereign's mind and, of course, the strength of his bare right arm.

To the question of which of these available templates—Locke or Hobbes—our founders would choose as a model in constructing the world of their pronouncements⁴¹ and their imaginings,⁴² our ghosts echo the ready and sad reply, even to this day. In fashioning Hobbesian positive law to do what natural law could never do, or even imagine, the historical shards and surviving relics of the law in consequence are inevitably profane and shocking, garish and ghostly. For Professor Colin Dayan, the founders having made their choice-of-law, the matter of results following was frighteningly geometric: “Slave law relied on fictions of invisible taint and property rights in human beings, criminal law on civil death and a host of other apparitional constructs, and property, once judged to be infested with ghosts, was legally stigmatized.”⁴³ Dayan expands on this observation thereafter in stark fashion:

conferred on him, that by terror thereof, he is inabled to [con]forme the wills of them all, to Peace at home, and mutuall ayd against their enemies abroad.

HOBBS, *supra* note 35, at 132.

³⁸ *Supra* note 29 and accompanying text.

³⁹ *See id.*

⁴⁰ In prophetic and apocalyptic utterance, for the ‘New Jerusalem’ of America in its earliest stages, fleeing as they were from the searing ‘Egypt’ of George III and his oppressive band of English governors and lords, the ancient prophet Jeremiah may have been seen to have put this matter best:

Behold, the days come, saith the LORD, that I will make a new covenant with the house of Israel and with the house of Judah: Not according to the covenant that I made with their fathers in the day that I took them by the hand to bring them out of the land of Egypt; which my covenant they brake But this shall be the covenant that I will make with the house of Israel; After those days, saith the LORD, I will put my law in their inward parts, and write it in their hearts; and will be their God, and they shall be my people.

Jeremiah 31:31-33 (King James). In this way, then, for the American founders as Thomistic natural lawyers: “The law of the LORD is perfect, reviving the soul,” *Psalms* 19:7 (RSV), and, therefore, wisely, “his delight is in the law of the LORD; and in his law doth he meditate day and night.” *Psalms* 1:2 (King James).

⁴¹ “We hold these truths to be self-evident” THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

⁴² “Give me your tired, your poor, your huddled masses yearning to breath free.” EMMA LAZARUS, *The New Colossus*, in *SELECTED POEMS AND OTHER WRITINGS* 233, 233 (Gregory Eiselstein ed., 2002) (1883).

⁴³ DAYAN, *supra* note 1, at 12.

Specters are very much part of the legal domain. Human materials are remade and persons are undone in the sanctity of the courtroom. Whether slaves, dead bodies, criminals, ghost detainees, or any one of the many spectral entities held in limbo in the no-man's-lands sustained by state power, they all remain subject to undue influences and occult revelations of law's rituals.⁴⁴

From those early and garish beginnings, the macabre die was cast for the new nation, yet to be.

Regarding Slavery, the sad evidence of this austere truth is found strewn all through our own carefully published and preserved written legal record—our ghosts remind us. In Virginia:

[W]e assent to the general proposition . . . that our slaves have no civil or social rights; that they have no legal capacity to make, discharge or assent to contracts

. . . .

The agency of the slave, in truth, instead of affording any argument in behalf of the existence of *his social or civil rights*, is but an instance or illustration of the complete *dominion of the master*; of his entire control over all the powers and faculties of his slave; and of his right, consequently, to use him as an instrument or medium through which to make or execute contracts with third persons.⁴⁵

For her neighbor in North Carolina just below:

The [legally constructed] end is the profit of the master, his security and the public safety; the subject, one doomed in his own person, and his posterity, to live without knowledge and without the capacity to make any thing his own, and to toil that another may reap the fruits. What moral considerations shall be addressed to such a being, to convince him what, it is impossible but that the most stupid must feel and know can never be true—that he is thus to labour upon a principle of natural duty . . . [S]uch services can only be expected from one who has no will of his own; who surrenders his will in implicit obedience to that of another. Such obedience is the consequence only of uncontrolled authority over the body. There is nothing else which can operate to produce the effect. The power of the master must be absolute, to render the submission of the slave perfect.⁴⁶

⁴⁴ *Id.*

⁴⁵ *Bailey v. Poindexter's Executor*, 55 Va. (14 Gratt.) 132, 197-98 (1858).

⁴⁶ *State v. Mann*, 13 N.C. (II Dev.) 263, 266 (1830). In service of the themes at the center of this Essay, and in deference to the particular ghosts in question, it is important here to reference the deep feelings of Judge Ruffin, presented immediately following these stark words in consequence of their harshness, and the inevitable place of *law* in all of this unnatural, Hobbesian positivist mischief:

I most freely confess my sense of the harshness of this proposition, I feel it as deeply as any man can. And as a principle of moral right, every

And, of course, famously:

[T]he *status* of the African in Georgia, whether bond or free, is such that he has no civil, social or political rights or capacity, whatever, except such as are bestowed on him by Statute; that he can neither contract, nor be contracted with; that the free negro can act only by and through his guardian; that he is in a state of perpetual pupillage or wardship; and that this condition he can never change by his own volition. It can only be done by Legislation.

. . . [T]he social and civil degradation [of the African], resulting from the taint of blood, adheres to the descendants of Ham in this country, like the poisoned tunic of Nessus . . . [N]othing but an Act of the Assembly can purify, by the salt of its grace, the bitter fountain—the “*darkling sea*.”⁴⁷

Human beings remade—unmade—by human law, living persons conceptually transformed into spectral entities with each unnatural word of the governing law, ghosts remaining with us in some form to this day.

In closing, let me reference a story well known in our religious circles but perhaps underappreciated in its context, to make two points about law, ghosts, and Savannah Law School. In this story, we learn of a man named Lazarus who lived a life of leisure underscored by the comparatively bleak existence of a “poor man . . . full of sores”⁴⁸ managing his own sustenance by taking a physical position of abjection, and waiting patiently “to satisfy his hunger with what fell from the rich man’s table.”⁴⁹ In the inevitable rhythms of life, of course, both

person in his retirement must repudiate it. But in the actual condition of things, it must be so. There is no remedy. This discipline belongs to the state of slavery. They cannot be reunited, without abrogating at once the rights of the master, and absolving the slave from his subjection. It constitutes the curse of slavery to both the bond and free portions of our population. But it is inherent in the relation of master and slave . . .

. . . The truth is, that we are forbidden to enter upon a train of general reasoning on the subject. We cannot allow the right of the master to be brought into discussion in the Courts of Justice. The slave, to remain a slave, must be made sensible, that there is no appeal from his master; that his power is in no instance, usurped; but is conferred by the laws of man at least, if not by the law of God. The danger would be great indeed, if the tribunals of justice should be called on to graduate the punishment appropriate to every temper, and every dereliction of menial duty . . . The Court therefore disclaims the power of changing the relation in which these parts of our people stand to each other.

Id. at 266-67 (emphasis added). Again, within context of the theme of this Essay, I cannot leave this without acknowledging directly what the ghosts already know and have lived: coming from that State’s highest halls of justice, these are remarkable words indeed.

⁴⁷ *Bryan v. Walton*, 14 Ga. 185, 198 (1853).

⁴⁸ *Luke* 16:20 (RSV). To further illustrate the gulf of existence between the two, our storyteller compares our rich man—“dressed in purple and fine linen and who feasted sumptuously every day,”—with our poor man, who had the poor comfort of “the dogs [that came] and licked his sores.” *Id.* at 16:19, 16:21.

⁴⁹ *Id.* at 16:21.

men died, though going off to very different existences as a result: the poor man was carried straightaway “by the angels to be with Abraham”⁵⁰ in Heaven, our rich Lazarus waking to an afterlife of torment and anguish in the Hades of his eternity.⁵¹ On catching Abraham’s eye above from his place of torment below, and learning that the gulf between the two places was so great that even a thimbleful of the plenteous quenching waters of Heaven could not survive the impossible distance to his aching tongue where he then was, his mind naturally turned—as ghosts do—to the living; his plea was spare, and sincere: “Then, father, I beg you to send [me] to my father’s house—for I have five brothers—that [I] may warn them, so that they may not also come into this place of torment.”⁵² Abraham’s answer was spare, and, I believe, instructive: “If they do not listen to Moses and the prophets, neither will they be convinced even if someone rises from the dead.”⁵³

In laying that story alongside our present one, I am drawn more to what did not happen than what did. Suppose Lazarus’s tortured efforts to return from his place among the dead to those of the living had been graciously granted: How do we imagine that would have turned out? Of course, given the vagaries of life and the opacity of the veil between it and the world beyond—if even, indeed, there is one at all⁵⁴—given the preternatural gulf between there and here, the living would have received his deeply sincere and well intended warnings as ghostly eminences alone, frightening moans and spectral groans and the like, things for us on this side to fear and shun and silence. How sad and unnerving for Lazarus and his fellow dead, given the urgency of their call, the utter sincerity and vitality of their intended message. And in consequence, of course, how very tragic for the continuing living, whose ultimate end remains presently in the balance.

My first point is simple, of course: perhaps our ghosts remain with us to instruct us, not to haunt us. In the case of the ghosts carefully constructed by our laws into the violent, spectral, nether-worldly existence, which our preserved records continue eloquently—and perhaps graciously—to reflect, what if the ghosts remain here among us in the end for our benefit, not our fear, our instruction and admonition, and not our terrified denial and silencing? As these ghosts are of a particular nature, and as events of the kind in Ferguson, Missouri—and in Savannah, Georgia—clearly reflect their cause of earthly torment to be somehow, some way, still with us, what is our responsibility as lawyers to the communities while we remain alive to serve, and what can we learn from these ghosts? For being professionally trained today in the same way as our confreres were then, what might be our responsibilities—and our opportunities—from their past mistakes? Might we be privileged to serve as

⁵⁰ *Id.* at 16:22.

⁵¹ *Id.* at 16:22-23.

⁵² *Id.* at 16:27-28. Here, I have amended the personal pronouns in the text to better support the point intended, though this in no way does violence to the essential purpose of the original text.

⁵³ *Id.* at 16:31.

⁵⁴ For the record, and in service of transparency, I believe there is, though my beliefs in this regard are by no means straightforward.

mediums of a special sort, channeling the experiences of the dead still among us, including Savannah's own Charles Smith, recently enrolled, and the lessons they would have us learn therefrom, to the living, including the Charles Smiths remaining still in the crosshairs of withering fates?

And, of course, my second point personalizes the first: what is the best calling of Savannah Law School in this place, with these many-thousand ghosts all around? How ought we to challenge these heirs of the law among us to look at this tool of law, to appreciate at a visceral level its frightening power, power for evil, as our history baldly reflects, and power imagined for good? In the reintegrating of this particular space at this particular time, what are the challenges, and what are the opportunities? What do the ghosts have to say to you, from their yesterday to your today and, here in your place of reintegration, through your important acts of ownership,⁵⁵ contrition,⁵⁶ and instruction,⁵⁷ to Savannah's *tomorrow*? And, of course, as with all of us faced with great challenge and opportunity, do you have the courage to listen, and to act?

⁵⁵ As our profession's historical records are meticulously kept, it does us no good as inheritors of the story of law in this country to deny these 'truths,' to ignore them, or to pretend they do not exist; if we are lawyers, they are ours. Indeed, as with the few relics of American legal history in context of American slavery presented here—and the many others extant—and with other legal treatments of other distinctly American stories, for Native Americans (*e.g.*, *Cherokee Nation v. Georgia*, 30 U.S. (5 Peters) 1 (1831); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823)), women (*e.g.*, *Bradwell v. Illinois*, 83 U.S. 130 (1873); *U.S. v. Susan B. Anthony*, 24 Fed. Cas. 829 (1873)), and the like, the 'bodies' are everywhere. More critically, their like in kind are with us this very day, our own versions of the difficult challenges of our professional forbears. Then as now, the competing factors are looking to law, to *bind* or to *free*, to *debilitate* or to *heal*. If honestly owning our profession's unique place in that torrid past will aid us in even the smallest way in the difficult, courageous work of addressing our present challenges, this business of 'ownership' becomes very critical indeed.

⁵⁶ This particular call invites creativity. Using the old Catholic trope from my own childhood, *words* of contrition for past wrongs are nowhere near as cathartic and effective as *acts* of contrition. Savannah Law School cannot atone for the 'sins of the world' with regard to the matters this Essay has raised for consideration. But what about the sins of Savannah? To the extent this law school is prepared to take the novel call of reintegration not as a conference theme alone, but as an institutional mission statement, the possibilities with regard to active, valuable contrition in this community are as rich and hopeful as the searing inhumanity of its legally garrisoned past.

⁵⁷ This is *inward* and *outward*, of course, calling thoughtful attention to the important work of instructing present crops of the future lawyers among you as students, in the *power of law* in the life of our communities, and through them, to the world beyond. This responsibility and opportunity falls especially on the most delicate, vital and powerful resource of all the many necessary to the creation of something as ambitious as a professional school: its faculty.

