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Legal Slaves and Civil Bodies

Joan Dayan

During my last visit to Haiti, I heard a story about a white dog. Starving, its eyes gone wild, it appears late at night with its tongue hanging out. Reclaimed by an oungan or priest who “deals with both hands,” practicing “bad” magic, the dog comes back to life in skin bloated with spirit. A friend called it “the dog without skin,” but this creature was not a dog. Instead, when a person died, the spirit, once stolen by the oungan, awakened from what had seemed sure death into this new existence in canine guise. We all agreed that no manhandled spirit would want to end up reborn in the skin of the dog. Being turned into a dog was bad enough, but to end up losing color, to turn white, seemed worse. In this metamorphosis, the skin of the dead person is left behind, like the skin discarded by a snake. But the person’s spirit remains immured in the coarse envelope, locked in another form, trapped in something not his or her own.

I begin with this story, evidence of what some call the “supernatural,” as entry into my discussion of the sorcery of law: most instrumental when most fantastic and most violent when most spectral. In analyzing how the rhetoric of law both disables civil persons and invents legal slaves, I argue that the creation of an artificial person in law, whether the civil body, the legal slave, or the felon rendered dead in law, takes place in a world where the supernatural serves as the infallible mechanism of justice.

From its beginnings, law traded on the lure of the spirit, banking on religion and the debate on matter and spirit, corporal and incorporal,
in order to transfer the power of the deity to the corrective of the state. The rituals of law I examine not only became critical to the ideology of democracy and liberty, but also shaped a genealogy of property and possession essential to America’s social memory. Legal structures give flesh to past narratives and life to the residue of old codes and penal sanctions. The law materializes dispossession, and in far more corporal ways than the abstract precepts of law might first suggest. What, then, is law’s history? What are the conditions under which categories of identity are legally reconstructed? Which words act as revenants, haunting the precincts of law?

**Sacrifice**

In his *Commentaries on the Laws of England*, William Blackstone (1979, 1: 121), explaining how civil liberty arises on the ruins of the natural, set the ground for the creation of an artificial person in law: “But every man, when he enters society, gives up a part of his natural liberty, as the price of so valuable a purchase; and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish. And this species of legal obedience and conformity is infinitely more desirable than that wild and savage liberty which is sacrificed to obtain it.” In this duality of civil and natural, the natural person who existed before the social contract haunts the margins of the formal community. The resurrection of the individual as civil person depends on sacrifice: the old nature takes on the skin of the civil. In herding this renunciation, Blackstone reminded his reader that he means more than an exchange for the greater good. This trade-off is a quasi-religious process, a ritual staged again and again in order to reaffirm the stability of civilization. Turned into law’s scapegoat, nature, and the vestiges of barbarism it summons, must be killed off, disguised, and ultimately reproduced in the sacraments of law.

The dog skin that encases the spirit of the dead person applies both to the civil body—the artificial person who possesses self and property—and to the legal slave—the artificial person who exists as both person and property. In this ritual, both legal slave and civil body are sacrificed to the civil order. Though both entities are legally distinguished from natural persons, civil bodies are governed by one set of laws, and legal slaves by another. Different as they are in position, in rights and duties, they cannot be the subjects of a common system of laws. The duality, however, remains shaky, and the arguments interrelate in crucial ways. I will suggest that certain images recur, and words like blood, infection, corruption, and death
Dayan · Legal Slaves and Civil Bodies

have a remarkable staying power. Once the juggernaut of deprivation is under way, the language of blood and death becomes the key to what is being relinquished.

I begin with the equivalence of free person and slave, since I want to analyze what happens to persons and progeny in two cases: the free person of property who commits a felony and undergoes civil death, and the enslaved person—who, I suggest, is the carrier of “negative personhood”—who has undergone social death. Rather than focusing on social attitudes and relationships, this essay instead traces a developing logic in modern law. It explores how, by the eighteenth century, the appeal to Judeo-Christian antecedents and inchoate traditions of punishment would be redescribed and fully articulated as a rationale appropriate to the needs of emerging modernity. In this logic, the law covers you with white skin and the law encases you in black, whether or not the colors can be seen. The law giveth and the law taketh away. The law kills and the law resurrects. Legal practice thus conflates symbolic control and the inscription of that control on real bodies. If the natural dies to be reborn not in the spirit but in the body of civil society, what kind of body is this? What does it mean to be a creature of law?

In Slavery and Social Death, Orlando Patterson (1982) makes two crucial points that suggest the troubling power of legal authority. In his section “Property and Slavery,” he first draws our attention to the habitual definition of a slave as someone without a legal personality: “It is a fiction found only in western societies, and even there it has been taken seriously more by legal philosophers than by practicing lawyers. As a legal fact, there has never existed a slaveholding society, ancient or modern, that did not recognize the slave as a person in law.” Patterson proposes a theory of negative capability, while he remains silent about the disabling inherent in the very process of creating a legal personality, who has been granted statutory life only to be enslaved. Then, discussing what he calls “liminal incorporation” while trying to come to terms with the socially dead slave who yet remains a part of society, he writes: “Religion explains how it is possible to relate to the dead who still live. It says little about how ordinary people should relate to the living who are dead” (45).

The two passages refer to (1) the actually dead though alive in spirit, as opposed to the actually alive though dead in law; and (2) the supernatural relation of the believer to the dead who do not die, as opposed to the natural and daily relation of the living who are dead, who
have undergone what Patterson, following Claude Messailloux, calls “social
death.” Patterson’s insistence that slaves in every legal code are treated
as persons in law urges these questions: In what way and when were slaves
allowed to be persons? When resurrected as legal personalities, what can
they do, what are their possibilities? And if, finally, Patterson distinguishes
between the ontology of civil life and the realm of myth or religion, what
happens if we insist on bringing myth and social structure together or,
to be more precise, on juxtaposing the “social death” of slaves with the
“civil death” of felons? Could statute and case law then be more impor-
tant than social custom in upholding the racial line, in effecting rituals
of exclusion?

Using the legal fiction of “civil death” as anchor, I return to what
has been deemed a remnant of obsolete jurisprudence: the state of a person
who, though possessing natural life, has lost all civil rights. Unnatural or
artificial death as punishment for crime entailed a logic of alienation that
could extend perpetually along constructed lines of racial kinship.1 I argue
that its legal paradoxes, its gothic turns between tangible and intangible,
life and death, became necessary to the racialized idiom of slavery in the
American social order. The alternating moves between the idea of civil
death and the meaning of servitude operated both forward and backward
along a temporal continuum to exclude, subordinate, and annihilate. In my
pursuit of a conceptual framework for disabilities made indelible through
time, I follow the call of blood, its meaning and effects, both literal and
metaphoric, through three sites of disabling: from the feudal attainder, the
essence of which became “corruption of blood,” as punishment for crime,
introduced into English common law after the Norman Conquest; to its
transport to the colonies and its incarnation as the black taint that legally
inscribed slavery; to the post–Civil War period, when slaves were reborn
as criminals and translated into “slaves of the state.” I take this circuit of
stigmatization as a historical residue that turns “metaphoricity” into a way
of knowing, that is, acknowledging history.

Blood

In rereading the claims of civil death into the genealogy of slavery and incar-
ceration, I propose a continuum between being declared dead in law, being
made a slave, and being judged a criminal. The three principal incidents
that followed an attainder for treason or felony subsequent to a death sen-
tence were forfeiture, corruption of blood, and the extinction of civil rights,
more or less complete. Blackstone (1979, 1:129) referred to natural liberty
as “residuum,” and he figured this residue of nature, the savage essence that must be ferreted out, as a stain. The imprint of corruption becomes the legitimating metaphor for sacrifice. In other words, for the figurative distinction of civil and natural to function in the realm of action, the metaphor of corruption must be grounded in would-be observable fact. Blackstone’s language thus connected the figurative nature and the material body: “For when it is now clear beyond all dispute, that the criminal is no longer fit to live upon the earth, but is to be exterminated as a monster and a bane to society, the law sets a note of infamy upon him, puts him out of its protection, and takes no further care of him barely to see him executed. He is then called attaint, *attinctus*, stained or blackened” (4:380). The image of the “blackened” person, disabled but not dead, remained a more terrifying example of punishment than the executed body. I will suggest, moreover, that this stigma of incapacitation—and the twentieth-century reinvention of solitary confinement—became a chilling parallel to the death penalty. Strict civil death, the blood “tainted” by crime, set the stage for the discrimination that would produce the nonexistence of the person not only in the West Indies but in these United States. Furthermore, the racialized fiction of blood supplemented the metaphorical taint: not only defining property in slaves but fixing them, their progeny, and their descendants in status and location.

What is “corruption of blood”? According to doctrine, the blood of attainted persons was judged to be corrupt, so that they could not transmit their estate to their heirs, nor could their heirs inherit. As Thomas Blount (1670, n.p.) explained in his *Nomo-lexicon, a law dictionary*, “Corruption of Blood” is “an infection growing to the State of a Man (attainted of Felony or Treason) and to his issue: For, as he loseth all to the Prince, or other Lord of the Fee, as his case is; so his issue cannot be heirs to him, or to any other Ancestor by him. And if he were Noble, or a Gentleman before, he and his children are thereby ignobled and ungentiled.” How was this degradation enacted? In exploring this terrain, I appeal to a history that emphasizes the paradox and reciprocity of disabling registered in both legal fictions and religious fantasies. For depersonalization occurred in the marketplace as well as on the sacrificial altar, through commercial transactions and religious rites. Recall the general concept of corruption of blood in the curse of Psalm 109:

Let his posterity be cut off; and in the generation following let their name be blotted out.
Let the iniquity of his fathers be remembered with the Lord; and not let the sin of his mother be blotted out. Let them be before the Lord continually, that he may cut off the memory of them from the earth.

In this banishing ritual, the enemy of David and his descendants lie under sentence of corruption of blood, turned base and ignoble and thus barred from inheritance into the remotest generation.³

The term *corruption* itself must be considered cautiously. Although it meant “vile contamination,” “infection,” or “pollution” in early English as it does now, to the point of acquiring in Nathan Bailey’s 1721 *An Universal Etymological English Dictionary and An Interpreter of Hard Words* the immediacy of stench and the visibility of blemish, its fundamental meaning remained in the semantic range of destruction, breaking up, dissolution, and decomposition.⁴ That is, corruption of the convicted person’s blood meant not just that it was tainted but that it legally ceased to flow in either direction, operating “upwards and downwards,” so that an attainted person could neither inherit lands or anything else from his ancestors, nor could he transmit property to his heirs.⁵

The *Oxford English Dictionary* (OED), dating its lexical proof from 1563, defines corruption of blood in law as “the effect of attainer upon a person attainted, by which his blood was held to have become tainted or corrupted by his crime, so that he and his descendants lost all rights of rank and title; in consequence of which he could no longer retain possession of land that he held, nor leave it to heirs, nor could his descendants inherit from him.” What is most crucial to my mind about the definition of attainer is the way a probable mistake in philology became a useful means of exclusion. The OED focuses on what became the gist of attainer—corruption of blood—through false derivation of *attainer in taint or stain*. A. W. B. Simpson (1986, 20) in *A History of the Land Law*, writing about the doctrine of escheat following a felony, noted that “later, lawyers attributed the escheat in cases of felony to the biologically absurd notion that the felon’s blood was ‘corrupted,’ whatever that may mean, so that inheritance was impossible through him.”

Beneath an apparently inadvertent, false, or at least loosely mixed-up terminology in late medieval England, exists an anatomy of disabling.⁶ Words, once repeated and recalled, are endowed with a resonance that tells the story of greed and racism operating over a long period of time. When did
taint become allied with attinder? Can we trace the idea of tainted blood—that most critical mechanism for exclusion in the slave laws of the Caribbean and the American South—back to the metaphysics of metaphorical blood and biological destiny?

The duplicity in meaning—the blending of hit, touch, or knock (the original meaning of attaint) and tinge or tincture into stain, blemish, or contamination—suggests that this terminological history is cross-fertilization, not sequentiality. “Corruption of blood” in English law probably never had anything to do with ethnicity or biology, but everything to do with taking an attainted person’s property to the exclusion of any otherwise rightful heirs. In the late 1450s, the really harsh acts of attinder with the full legal force of corruption of blood came into frequent use. Who, one might ask, cared about the nil property that the poor or unlanded, such as blacks or any other potential slaves later on, had? Nor would considering them and their progeny goods or chattels in themselves be legally relevant.

But as slavery in the colonies became profitable, requiring the justification of the inner depravity of those enslaved, color counted as presumption of servitude. Extensive English participation in the slave trade did not develop until well into the seventeenth century, but alternative experiments in unfreedom—the subjugation of the Gaelic Irish, the Vagrancy Act of 1547, indentured servitude, and the English galleys—had already provided a template for domination. As early as 1562 Sir John Hawkins introduced the practice of buying or kidnapping blacks in Africa and transporting and selling them for slaves in the West Indies. According to Winthrop Jordan (1977), the sight of blackness had a powerful effect on the English as soon as they landed on the shores of Africa. In 1578 George Best decided that the blackness of Africans “proceedeth of some natural infection of the first inhabitants of that country, and so all the whole progeny of them descended, are still polluted with the same blot of infection” (quoted in Jordan 1977, 15).

The phantom language of colonial stigma would be literalized, especially in the eighteenth century, in juridical articulation. And though Blackstone denounced slavery, his description of the consequences of attainder promised a novel genealogical inscription of race that could be got from an old language of criminality and heredity. Blackstone described the king’s pardon of an attainted felon as rebirth with a gothic twist. A king’s pardon makes the offender “a new man,” but Blackstone (1979, 4:395) warned, “Nothing can restore or purify the blood when once corrupted . . . but the high and transcendent power of parliament.” Once pardoned by the king,
however, the son of the person attainted might inherit, “because the fa-
thert, being made a new man, might transmit new inheritable blood.” Law
can make one dead in life, and even determine when and if one is to be
resurrected.\footnote{Law can make one dead in life, and even determine when and if one is to be resurrected.} The restoration in blood or to blood, to be born again, even
when not possible for the attainted himself—who remained dead in law—
devolved on the son, who could receive the transmission of new blood, and
thus incarnate the privileges of birth and rank his father had lost.

Such transmission, or pledge of purification, would not apply to
those who suffered the incapacitation by fiat, the perpetual decimation of
personhood and property understood as domestic slavery. For what had
been forfeiture of property and corruption of blood—those few circum-
stances in which civil death was coextensive with physical death—became
the terms for a categorical redefinition of legal incapacity. Further, no longer
under legal quarantine, tainted blood extended down through the genera-
tions. In this light, colonial legal history can be examined with a view
to understanding how the construction of race (and racial stigmatization)
served as the ideological fulcrum that allowed a penal society to produce a
class of citizens who were dead in life: stripped of community, deprived of
communication, and shorn of humanity.

\textbf{Genealogies}

\textit{In Democracy in America}, Alexis de Tocqueville (1994) compares European
legally ordained inequality with that in the United States, drawing atten-
tion to the difference between “imagined inequality”—the “abstract and
transient fact of slavery” among persons “evidently similar”—and the “in-
feriority” that is “fatally united with the physical and permanent fact of
color.” He concludes by asking: “If it be so difficult to root out an inequality
that originates solely in the law, how are those distinctions to be destroyed
which seem to be based upon the immutable laws of Nature herself?”
\footnote{357–58}

Yet Tocqueville also recognizes that “nothing can be more fictitious
than a purely legal inferiority” (358). The degraded essence flows, like
blood itself, in and out of bodies either literally or figuratively stigmatized,
through the enslaved and the freed, the legally dead and the metaphorically
incarcerated. Racial markers, whether understood as those of lineage or
descent or those specifically linked to the blackness of Africans and their
progeny, mattered as they did because of the language of blood as inalienable
inheritance.
In the context of the eighteenth-century British West Indies, as in the Southern United States, the significance of blood becomes clear if incredible. Emphasis on blood as conduit for the stain of black ancestry became more necessary as bodies of color began to merge, to lose the biological trait of blackness. The supremacy of whiteness now depended on a fiction threatened by what you could not always see but must always fear: the black blood that would not only pollute progeny, but infect the very heart of the nation.\(^8\)

The site of slavery in the colonies rendered material the conceptual, giving a body to what had been abstraction. Through the stigma of race, the spectral corruption of blood found bodies to inhabit and claim. An idea of lineage thus evolved and turned the rule of descent into the transfer of pigmentation, which fleshed out in law the terms necessary to maintain the curse of color. This brand of servility had the magical effect of dislocation, out of the civil and into the savage, for colonial slave law was “not the law of England, but the law of the plantations,” according to one of the lawyers in *Somerset v. Stewart* (1772). While his argument smacks of the rather hypocritical shunting of impurity from England’s “pure air” (which remains pure because of this rhetorical maneuver, projecting dirt out from the “English garden” and onto the “West Indian hell,” as Rochester so aptly puts it to Jane in *Jane Eyre*), the fact remains that the local laws of the English colonies legalized extremes of dehumanization that harkened back to times Englishmen might well have judged barbarous, while they enjoyed the fruits of the labor that such treatment made possible.\(^9\)

By the 1660s, perpetual and hereditary servitude had been formalized in the British North American colonies. With independence, slave laws in the United States continued to sanction permanent, lineal bondage. The epistemology of whiteness depended on the detection of blackness: fantasies about hidden taints were then backed up by explicit legal codes, what Virginia Dominquez (1986, 202) in *White by Definition* has called “defacto a classification by ancestry.” Unlike the Spaniards and French, who accounted for some 128 gradations of color from absolute black to absolute white, and named combinations such as the French *quateron, métis, mamelouque, marabout, griffonne, sacatra*, the most commonly observed distinctions in the British West Indies were sambo, mulatto, mustee, and octoroon.\(^10\) In a 1733 edition of the *Journals of the Assembly of Jamaica*, the export of blood taint is made specific: “‘Corruption of blood’ was visited upon ‘not the sins of the fathers but the misfortunes of the mothers’ unto the third and fourth

In the United States, by the eighteenth century, all persons presumed tinged with black blood were legally “mulatto,” though the term was never as precisely defined as in the French colonies, where it meant not merely mixed blood (neither black nor white), but referred specifically to the offspring of a white man and a négresse on a genealogical scale of minute gradations of blood and nuances of color. Though an octroon was legally white and therefore automatically free in the British West Indies (permitted to the franchise and militia), the ancestral taint in the United States took on renewed importance after Emancipation and left the body with amended blood at the mercy of a jury. The concept of blackness, once reinforced through the law’s legitimation of whiteness, ensured the racial subordination that made possible continued enslavement. The turn to blood was crucial to this strategy. As a metaphysical attribute, blood provided a pseudorational system for the distribution of a mythical essence: blood = race. Once the connection is made, color can be referred to, but now it means blood. Like the word blood, color is fictitious, but the law—as in a colonial Second Coming—engineered the stigma that ordains deprivation (see Harris 1993, 1707–91).

Ghosts and Monsters

What was at stake inside England for the form that colonization would take? What laws became necessary for those who became masters and slaves? If Foucault’s metropolitan world of public torture, what he described as “the great spectacle of physical punishment,” died out by the eighteenth and the beginning of the nineteenth century, the punitive spectacle and the requisite bodies were resurrected in the colonies. In the English colonies, slaves, once reduced to a special kind of property, were to be governed as persons with wills of their own but fixed in their status as legal property, not, as with the Spaniards, an inferior kind of subject. According to Jonathan Bush (1993, 417–70), nothing “remotely like a jurisprudence of slavery emerged in the English colonial world”; instead, “only one body of significant slave law exists in the English colonies: the incomplete and analytically inadequate colonial statutes.” Given the lack of precedents in English law, the speed with which the institution of slavery took shape in the United States and the severity of the laws that effected it are exceptional. The sources of the legal rules and principles of slavery in the American South are much debated. Depending on whom you read on the origins of
slavery in the United States, Roman civil law and the influences of colonial slave codes in the West Indies, the French Antilles, and the Spanish and Portuguese possessions contributed to the composite rhetoric of disabling and protection in the statute law of the slaveholding states. Yet, as I have argued, strategies of divestment were already present in the rights of property and privilege at common law, which would later be tied to the definition of property in persons. Black slaves, regarded as outside the social order, gave new genetic capital to the principles of tainted blood, bondage, and servility.

Numerous eighteenth-century cases from Alabama to Mississippi to Virginia clarified the hybrid entity that could be both person and property. Thomas Cobb (1968, 84) in his 1858 Inquiry into the Law of Negro Slavery described the birthing of that legal personality called “slave”: “When the law, by providing for his proper nourishment and clothing, by enacting penalties against the cruel treatment of his master, by providing for his punishment for crimes, and other similar provisions, recognizes his existence as a person, he is as a child just born, brought for the first time within the pale of the law’s protecting power; his existence as a person being recognized by the law, that existence is protected by the law.” The slave, once recognized as a person in law, becomes part of the process whereby the newborn person, wrought out of the loins of the white man’s law—in a birth as monstrous as that of Victor Frankenstein’s creature—can then be nullified in the slave body. In superimposing Blackstone’s reblooded heir onto the reborn slave, we begin to see how the law, invoking the double condition of the unborn and the undead, can eject certain beings from the circle of citizenry, even while offering the promise of beneficent protection.

The law, in recognizing the existence of the slave as person, confers no rights except to protect that existence. Yet that existence is rigidly curtailed and qualified. When protected from cruel treatment, what are the terms by which such dispensation is defined? What words in a statute extend to these individuals, and how do words change in meaning when applied to this legal creature? In The State of Mississippi v. Isaac Jones (1820), slaves are first defined as both “ chattels” and “men.” They are deemed men when committing crimes. What happens to this trial of definition when crime is committed against a slave? Can murder be committed on a slave, the court asks; and if not, why not? The court explains that “the taking away the life of a reasonable creature, under the king’s peace, with malice aforethought, express or implied, is murder at common law.”
Reason is the crux here, but once attached to the slave, in what spirit is the word said? Can the assertion really be meant? Justice Joshua D. Clarke’s reasoning applies **only** to the anomaly the law has created. A series of questions undo the personhood of the slave even as they appear to retrieve it: “Is not the slave a reasonable creature, is he not a human being, for the killing a lunatic, an idiot, or even a child unborn, is murder, as much as killing a philosopher, and has not the slave as much reason as a lunatic, an idiot, or an unborn child?” At the center of this complex of metaphoricity lies the ostensibly uninhabited body, the cipher that waits to be filled by a cluster of beings who do not possess reason. Clarke claims that the law recognizes a powerlessness that actually exists, rather than effecting a removal of powers, as if the decision does not create incapacity but merely gives evidence of that incapacity. The apparent elevation of a piece of human property into the place of reason remains conditional. The dead slave gets the protection of positive law, but at great cost. In this sacrificial ritual, the slave has been not only murdered, but figuratively gutted: dispossessed of whatever autonomy had existed before the law recognized him. This radical qualification of legal identity is shored up by fictions of disability, which treat the figure of the slave as more or less human, not yet born and already dead.\(^{16}\)

**Cruel and Unusual**

Can it be argued that slavery in the United States resulted in a new understanding of the limits of human endurance, so that new, more refined cruelties could be invented? On the ruins of the rack, the thumbscrew, and the wheel, and the iron boot, the atrocities of a more enlightened age came into being. In his *Commentaries*, Blackstone (1979, 1:131) described how execution or confiscation of property without accusation or trial, though a sign of despotism so extreme as to herald “the alarm of tyranny throughout the whole kingdom,” is not as serious an attack on personal liberties as “confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten.” For imprisonment, being “a less public” and “a less striking” punishment is “therefore a more dangerous engine of arbitrary government.” Note that **attainder**, first affixed to the blood of a criminal capitally condemned—the consequence of a death sentence—later was understood to be a result of life imprisonment.\(^{17}\)

In the contemporary practices of punishment in the United States, singular and unparalleled not only in all the Western European countries and in most of the Eastern European nations, including Russia, both **civil**
death (the mandatory and permanent loss of a package of rights, privileges, and capabilities, once imprisoned) and literal execution join to give new meaning to “cruel and unusual punishment,” in the first case under cover of maintaining order and deterrence and in the second under cover of decency and humane extinction of life.

Confinement of prisoners in the United States thus became an alternative to slavery, another kind of receptacle for imperfect creatures whose civil disease justified containment. Though this resurrection of slavery is often discussed in the turn to convict labor and the criminalization of blacks in the postbellum South, I propose that the penitentiary, as zealously discussed and instituted in the North, offered an unsettling counter to servitude: an invention of criminality and prescriptions for treatment that turned humans into the living dead. Beaumont and Tocqueville (1833, 5) in their study On the Penitentiary System in the United States contrasted corporal punishment with “absolute isolation,” a unique and severe punishment, warning that “this absolute solitude, if nothing interrupt it, is beyond the strength of man; it destroys the criminal without intermission and without pity; it does not reform, it kills.” Depression, insanity, and suicide led Beaumont and Tocqueville to contrast the “punishment of death and stripes” for slaves with the “separate system” for criminals, implying that the unique deprivation fixed in the mind was far more cruel than corporal discipline (15). Although civil death might seem a more “decent” alternative than execution, the legal fiction molds the prisoner as if dead into the symbolically executed, a fate worse than death, proving in the words of Elisha Bates (1821–22, 171) that the penitentiary “where no light enters, where no sound is heard, where there is as little as possible to support nature that will vary the tediousness of life, by change” might come to “be regarded with more horror than the gallows.”

Before the abolition of slavery, William Crawford (1834, 26–27), reporting on “the Penitentiaries of the United States” to the House of Commons, noted the great proportion of black crime to white, concluding that these “oppressed people” are even more “degraded” in the free than in the slave states: “A law has been recently passed, even in Connecticut, discouraging the instruction of coloured children introduced from other States; and in the course of the last year a lady, who had with this view established a school for such children, was prosecuted and committed to prison.” The Thirteenth Amendment to the Constitution (1865) marked the discursive link between the civilly dead felon and the slave or social nonperson, articulating the locus of redefinition where criminality could be racialized
and race criminalized. The chiasmus that had previously made racial kinship a criminal affiliation, once readjusted to the demands of incarceration, resulted in a novel banishing and exile. This amendment, too often obscured by attention to the Fourteenth Amendment, is key to understanding how the burdens and disabilities that constituted the badges of slavery took powerful hold on the language of penal compulsion. Outlawing slavery and involuntary servitude “except as punishment of crime whereof the party shall have been duly convicted,” the amendment made explicit the doubling, back and forth transaction between prisoner and the ghosts of slaves past. Moreover, once the connection had been made, Southern slavery, now extinct, could resurface under other names not only in the South but in the North.

A criminal punished with “civil death” became the “slave of the state,” as so aptly put in Ruffin v. Commonwealth (1871), so that once incarcerated, the prisoner endured the substance and visible form of disability, as if imaginatively recolored, bound, and owned. The prisoner’s status still remains the most neglected area of correctional law, in contrast to that of the slave, whose legal identity formed the crux of Southern slave law. That the entity called “prisoner” remained undefined in both district and Supreme Court cases meant that ever more inventive deprivations could be legally allowed.

The great and awesome symbol of solitary confinement was Eastern State Penitentiary in Philadelphia, popularly known as Cherry Hill, completed in 1829 and immortalized by Charles Dickens (1957) in his American Notes. More than solitary horrors, however, Dickens describes the erosion of thought in terms that demonstrate how the prison had become the materialization, the shape and container, for what had been the language of civil death. “The system here, is rigid, strict and hopeless solitary confinement. I believe it in its effects to be cruel and wrong… I hold this slow and daily tampering with the mysteries of the brain, to be immeasurably worse than any torture of the body” (99). Once the black hood covers the face of the criminal condemned to Cherry Hill, the long process of executing the soul begins: “And in this dark shroud, an emblem of the curtain dropped between him and the living world… He is a man buried alive; to be dug out in the slow round of years; and in the meantime dead to everything but torturing anxieties and despair” (100).

The restraints of continuing solitude proved to be more corrective than corporal punishment. Critics of the Pennsylvania “separate system,” popularly known as “the discipline,” called it inhuman and unnatural.
William Roscoe (1827), the noted English historian, penal reformer, and ardent abolitionist, considered the system as “destined to contain the epitome and concentration of human misery, of which the Bastille of France, and the Inquisition of Spain, were only prototypes and humble models.” But numerous reformers argued that criminality called for expiation and recognized that only secret punishment and dishonor could compel repentance. Roberts Vaux (1827, 9), chief spokesman for the Philadelphia Prison Society and later on the Board of Commissioners appointed by the governor to erect Eastern State Penitentiary, responded to Roscoe in his “Letter on the Penitentiary System” by insisting on separation and silence as the only cures for the polluting threat of those whose “unrestrained licentiousness renders them unfit for the enjoyment of liberty.”

The language of contagion sustained the common-law definition of “corruption of blood” for the attainted felons. Though formally abolished in the Constitution, rituals of stigmatization never stopped, and the abolition of slavery summoned more devious means of exclusion. Once systematized, the residue of past methods of punishment—and the suggestive aura of taint— ensured degradation but under cover of decency. Francis Lieber in his “Preface and Introduction” to Beaumont and Tocqueville’s On the Penitentiary System in the United States (1833) defended the penitentiary as a fit container for the “poisonous infection of aggravated and confirmed crime” (xii), “contracted” bad habits (xviii), and “moral contagion” (xix). The diseased body must be extirpated from civil society; and once removed, the convict became the visible record of the sacrifice upon which civilization maintained itself. Not only did the gradual annihilation of the person, disabled but not dead, exemplify a punishment more harrowing than execution, but solitary confinement became the unique site for the drama of law. Further, in a singular conjunction of bad faith and cunning, race seemingly drops out of the intersection between civil and social.

Solitary confinement and execution both mark the continuum between unnatural (civil or spiritual) death and natural (actual and physical) death. These two forms of death remind us of a peculiarly American preoccupation with bodies and spirits, matter and mind. I also suggest, and perhaps here lies the proving ground of my argument, that cases concerning the difficult definition of cruel and unusual punishment give particular meaning to the status or identity of the prisoner. The Eighth Amendment to the U.S. Constitution reads: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” Though brief, almost ghostly in its final clause, as if punishment were an
afterthought, the Eighth Amendment is the only provision of the Bill of Rights that is applicable by its own terms to prisoners. As a limit on the state’s power to punish, the importance of this negative guaranty expands in the prison context. Because it includes nearly all parts of prison life that might be considered unconstitutional punishment, the Eighth Amendment remains the crucial ground for prisoners’ rights. Words like *decency*, *human*, and *dignity* jockey for preeminence in these cases and alternate with less expansive, more constrictive words like *basic human needs* or *minimal civilized measure of life’s necessities*.

Let us take the language of the law as a struggle between ways of thinking about what is human, what remains human even in instances of radical depersonalization. In *Louisiana Ex Rel. Francis v. Resweber* (1947), Willie Francis, “a colored citizen,” was sentenced to death by a Louisiana court, and a warrant for his execution was issued on 3 May 1946. The attempted electrocution failed, however, presumably due to mechanical difficulties, and Francis petitioned to the Supreme Court, arguing that a second attempt to execute him would be unconstitutionally cruel. Justice Stanley Reed, writing for the majority, ruled against Willie Francis. Even though Francis had already suffered the effects of an electrical current, that “does not make his subsequent execution any more cruel in the constitutional sense than any other execution. The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely” (464). While acknowledging that the Eighth Amendment prohibited “the wanton infliction of pain,” admitting that Francis had already endured the physical trauma associated with execution and would now be forced again to undergo the mental anguish of preparing for death, Reed concluded by shifting to the intentions of the one who pulls the switch: “There is no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution. The situation of the unfortunate victim of this accident is just as though he had suffered the identical amount of mental anguish and physical pain in any other occurrence, such as, for example, a fire in the cell block” (464). The dissenting justices, understanding Francis’s experience to be akin to “torture culminating in death,” no matter what the executioner’s state of mind, distinguished between “instantaneous death and death by installments” (473), demanding finally, “How many deliberate and intentional reapplications of electric current does it take to produce a cruel, unusual and unconstitutional punishment?” (476).
What, in this context, does the word *humane* mean? How does law use a specific history of punishment to authorize its decisions? Judges claim the ritual correctness of state-sanctioned execution by turning the Eighth Amendment against “cruel and unusual punishment” into assurances of *humane, clean, and painless* death. In *Louisiana Ex Rel. Francis v. Resweber*, Reed shaped the language that would become crucial in conditions of confinement cases: “unnecessary and wanton infliction of pain” as opposed to “inadvertence,” “negligence,” or “indifference.” Coercive cruelty takes many forms other than the corporal, but what is striking about contemporary Eighth Amendment cases, whether dealing with execution or confinement, is the legal acceptance of the corporal punishment paradigm, attending to the body not the intangible human qualities of the person (for example, psychological pain or fear).

In 1890, the Supreme Court decided two cases, both germane to my argument: *In Re Kemmler* and *Medley*, the first pursuing the cruel and unusual punishment standard in rites of execution and the second applying that standard to solitary confinement. The Court in *In Re Kemmler* held that a current of electricity scientifically applied to the body of a convict is a more “humane” even if “unusual” method of execution than hanging, since execution must result “in instantaneous, and consequently in painless, death” (443–44). Although *Medley* argued that solitary confinement gains its deterrent power not from the immediacy of punishment but rather through extended suffering, the Court did not rule on its unconstitutionality. Returning to the statutory history of solitary confinement in English law, the Court considered its “painful character” as “some further terror and peculiar mark of infamy,” so harsh that in Great Britain the additional punishment of solitary confinement before execution was repealed.

The Court in *Medley*, arguing against the 1889 Colorado statute that subjected the prisoner to “an additional punishment of the most important and painful character” as forbidden by the U.S. Constitution, emphasized the removal of the convict from the place where his friends reside, where the sheriff and attendants may see him, and where his religious adviser and legal counsel may “often” visit him (169). What matters to the Court is the removal to “a place where imprisonment always implies disgrace,” marking the prisoner as figure for “the worst crimes of the human race” and, most of all, extending indefinitely the days in confinement before execution, resulting in “uncertainty and anguish” (168–71). As in the perpetuation of civil death and execution, the United States has not only continued, but refined the forms of solitary confinement. In *Medley* the
Court drew attention to the peculiar effects of total confinement, a gradual spiritual degradation as brutal as bodily destruction.22 “A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community” (168). Decided nearly three months after Medley, In Re Kemmler reads almost as if suggesting the exceptional nature of separate confinement, affirming that “the punishment of death is not cruel, within the meaning of that word as used in the Constitution,” for it “implies there something inhuman and barbarous, something more than the mere extinguishment of life” (933).

The terms and the rules of judgment concerning punishment and victimization, as well as the assumptions about what constitutes the entity called “prisoner,” mobilize a drama of redefinition, where what is harsh, brutal, or excessive turns into what is constitutional, customary, or just bearable. Moreover, the language constructs a person whose status—and more precisely, whose very flesh and blood—must be distinct from the status of those outside the prison walls. The banishment and exile of feudal civil death are no longer necessary, for what Robert Cover (1992) has identified as “violence” operative on “a field of pain and death” is the terrain of law. What can be more violent than the conversion of the phrase “cruel and unusual” into “atypical but significant,” William Rehnquist’s turning of the extraordinary rites of punishment into nothing more than “the ordinary incidents of prison life”?23 Just as the Southern case law regarding slaves, their rights and disabilities, was unique, the current treatment of criminals in supermaximum security units and through state-sponsored execution remains singular in the so-called civilized world.

In the summer of 1997, death row inmates at the Arizona State Prison in Florence were moved from Cell Block 6 to Special Management Unit (SMU) II, the harshest of the segregation units in the Florence/Eyman Complex, reserved for “the worst of the worst.” What had been judged as a uniquely destructive punishment in Medley has now been reinstituted. This conjunction of natural and unnatural death permits the suffering of the soul before the death of the body. The spirit dies. The body awaits death. Or in the words of an inmate who once spoke words but now talks only in numbers: “If they only touch you when you’re at the end of a chain, then they can’t see you as anything but a dog. Now I can’t see my face in the
Dayan - Legal Slaves and Civil Bodies

mirror. I’ve lost my skin. I can’t feel my mind.” (I am withholding the name
of this prisoner, whom I interviewed at the Arizona State Prison in October
1996.)

Creatures of Law
The high-tech “prison of the future,” designed within the limits of the law,
is a clean, well-lighted place. There is no decay, darkness, or dirt. There
is, however, coerced isolation and enforced idleness. This is not the “hole”
popularized in movies like Murder in the First or Shawshank Redemption.
Instead, these locales are called—with that penchant for euphemism so
prevalent in the prison surround—“special management,” “special treat-
ment,” or “special housing units.” The old term solitary has been vacated,
leaving the benign and evasive terminology that allows public discourse to
remain noncommittal in the face of atrocity. By distorting the term’s core
meaning, the most severe of deprivations becomes “special care” for those
with “special needs.”

Nowhere does the power of legality to ensure the extinction of civil
rights and legal capacities become so evident as in the restricted settings
of special security units. As we have seen, prisons in the United States
have always contained harsh solitary punishment cells where prisoners
are sent for breaking rules. But what distinguishes the new generation
of supermaximum security facilities are the increasingly long terms that
prisoners spend in them, their use as a management tool rather than just
for disciplinary purposes, and their sophisticated technology for enforcing
social isolation and control. Prisoners are locked alone in their cells for
twenty-three hours a day. They eat alone. Their food is delivered through a
slot in the door of their eighty-square-foot cell. They stare at the unpainted,
concrete, windowless walls onto which nothing can be posted. They look
through doors of perforated steel. Except for the occasional touch of a
guard’s hand as they are handcuffed and chained to leave their cells, they
have no contact with another human being.

Like the qualifying practices of the Rehnquist Court that make a
history of deprivation matter only when “sufficiently serious,” or punish-
ment count only when involving “more than ordinary lack of due care,”
or conditions unconstitutional when they pose a “substantial risk of serious
harm,” verbal qualifiers gut the substance of suffering in favor of increas-
ingly rarified rituals of definition. What, after all, does the Court mean by
sufficiently, more than ordinary, or substantial? Though apparently harmless,
the impreciseness of these terms neutralizes the obvious, making it impossible to rule on Eighth Amendment violations, for who gets to judge how cruel an act must be to make the grade of “more than ordinary,” “substantial,” or “atypical”?

Discursive maneuvering sustains the identity of the slave in the person of the prisoner. Since I believe that judicial attention to terminology and definition can demolish the obvious claims of brutal treatment, I want to consider briefly how the legal turn to meaning vacates the human. In the repeated attempts to decipher the meaning of Eighth Amendment language, interpretation makes possible the denial of inmate claims while negating the humanity of the confined body. The legal demolition of personhood that began with slavery has been perfected in the logic of the courtroom.

In the wake of the formulaic appeal to “evolving standards of human decency” and the pursuit of the ever-elusive meaning of the phrase “cruel and unusual punishment,” contemporary courts have repeatedly judged that solitary confinement does not constitute an Eighth Amendment violation. When Eastern State Penitentiary and Alcatraz closed, new control units continued to be built or added to existing high-security prisons. Under the sign of professionalism and advanced technology, idleness and deprivation constitute the “treatment” in these units. Though taking trauma to its extreme, these places are rationalized as “general population units”: the general population of those judged to be the worst inmates who repeatedly offend. A rare and disciplinary condition once known as “solitary” has been redefined as a normal and general condition for those held under “close,” “special,” or “secure” management.

Inmates are not warehoused because of their crime, but for their “nature,” which makes them “institutional risks.” Whether alleged to be gang members, assaultive, prone to escape, in need of protective custody, or mentally ill, these groups, once stigmatized as “barbaric,” “violent,” or “deviant,” are safely disposed of. The labeling function matters more than crime control. How do you mark inmates as different, of no redeeming value, and inherently bad? By creating conditions so awful that you send a message telling people “outside the walls” who is dangerous, who must be treated as if an inferior and subordinate class of beings. As Justice Roger B. Taney in *Dred Scott v. Sanford* (1856) used the fact of slavery to prove degradation, conditions of confinement are manipulated in order to confirm depravity.
Isolation and lack of visual or intellectual stimulation do not matter to prisoners described by a deputy warden in SMU II in Arizona as “nothing but animals that we turn into senselessbums.” The nuances in naming mark the move from criminal to idler, from troublemaker to waste product. Such tags for negative personhood, giving substance and justification to those in lockdown, recall how proslavery apologists never tired of supplying reasons for the enslaving of those whose nature fit them for nothing else. Yet the argument of nature becomes more sinister when applied literally, not figuratively, to the prisoner. Whereas there is ambiguity in the case of the slave, what could be termed “retractable personhood” that accedes to the instrumental alternation between person and thing, the prisoner remains deprived of the moral, affective, and intellectual qualities sometimes granted to slaves.  

In contemporary cases, the old connection with slave status forgotten and negative personhood assumed, the prisoner as “dead-in-law” is never discussed, but assumed in a silence that assures that the actual habitats for incarceration, the technological nuts and bolts of brutalization, transform—not just rhetorically but in practice—prisoners into a mass of not just servile, but idle matter. In order to satisfy an Eighth Amendment violation, a condition of confinement must be shown to deprive the incarcerated of a basic human need, defined now as warmth, sanitation, food, or medical care. There is no place in these rockbottom necessities for thought, feeling, or will, what an earlier court judged essential to “human dignity” or “intrinsic worth.”

What are the terms of the dialogue between prison regulations and the law? In Laaman v. Helgemoe (1977), the federal district court held that confinement at New Hampshire State Prison constituted cruel and unusual punishment in violation of the Eighth Amendment. The court’s far-reaching relief order constituted the broadest application ever of the Eighth Amendment to prison conditions and condemned “the cold storage of human beings” (307) and “enforced idleness” as a “numbing violence against the spirit” (293). Yet by the nineties, conditions of confinement cases became the impetus for a new penology that emphasized incapacitation and retribution. Instead of determining that the closed, tightly controlled environment of prison might itself constitute punishment, especially if these conditions caused “degradation,” “imposed dependency,” “unnecessary suffering,” or “degeneration” (to take words from Laaman that would never again be applied to that entity called “prisoner”), the stage was set for the allowable suffering paradigm of Madrid v. Gomez (1995), the class action...
suit against Pelican Bay State Prison that signaled out the Special Housing Unit (SHU) as the locale for dehumanization.26

Heard by the federal district court of California in 1993, prisoners incarcerated at Pelican Bay challenged the constitutionality of a broad range of conditions and practices to which they had been subjected. Chief Judge Thelton Henderson opened the case by announcing: “This is not a case about inadequate or deteriorating physical conditions. There are no rat-infested cells, antiquated buildings, or unsanitary supplies. Rather, plaintiffs contend that behind the newly minted walls and shiny equipment lies a prison that is coldly indifferent to the limited, but basic and elemental, rights” of prisoners. Though Henderson’s decision offered partial relief to some inmates for some claims, he found generally that conditions do not violate “exacting Eighth Amendment standards.”

In the plaintiff’s favor, he found that “defendants have unmistakably crossed the constitutional line with respect to some of the claims raised by this action,” citing failure to provide adequate medical and mental health care and condoning a pattern of excessive force. Yet though he acknowledged that conditions in the SHU, the separate, self-contained supermax complex, “may well hover on the edge of what is humanly tolerable for those with normal resilience,” such circumstances remain within the limits of permissible pain.

How restrictive can prison confinement be? Henderson responded fervently to the habit of caging inmates barely clothed or naked outdoors in freezing temperatures “like animals in a zoo”; to the unnecessary and sometimes lethal force used in cell extractions; to the habit of using lockdown in SHU for treatment of the mentally ill; to the scalding of a mentally disabled inmate, burned so badly that “from just below the buttocks down, his skin peeled off.” Yet Henderson’s attention to excessive force on bodies distracts attention from the less visible effects of confinement in the SHU. Conceding “that many, if not most, inmates in the SHU experience some degree of psychological trauma in reaction to their extreme isolation and the severely restricted environmental stimulation,” he then turned to constitutional minima. Though minimal necessities extend beyond “adequate food, clothing, shelter, medical care and personal safety” to include “mental health, just as much as physical health,” Henderson nevertheless concluded that the SHU does not violate Eighth Amendment standards “vis-à-vis all inmates.” Isolation and sensory deprivation are cruel and unusual punishment only for those who are already mentally ill or those at an unusually high risk of becoming mentally ill: those who “are at a particularly high risk for suffering
very serious or severe injury to their mental health... such inmates consist
of the already mentally ill, as well as persons with borderline personality dis-
orders, brain damage or mental retardation, impulse-ridden personali-
ties, or a history of prior psychiatric problems or chronic depression” (1235–36).

Who is to decide which prisoners are at an “unreasonably high
risk” of suffering mental trauma? Henderson and the doctors who testified
in the case provided ample evidence that any extended stay in SHU causes
mental deterioration and psychological decompensation. Henderson ad-
mitted, when turning to the question of mental health, that “all humans are
composed of more than flesh and bone—even those who, because of unlawful
and deviant behavior, must be locked away not only from their fellow
citizens, but from other inmates as well” (1261). Yet though Henderson pro-
hibited punishment that would make the crazy crazier, he abandoned the
sane to their fate. The court’s decision suggests that inmates who become
“insane” while in the SHU are doomed to remain there. Even though “con-
ditions may be harsher than necessary,” they’re not “sufficiently serious,”
and the court must give “defendants the wide-ranging deference they are
owed in these matters.” The state, then, must exempt mentally ill inmates
from confinement in the SHU if the inmates’ illness stems from a previous
occurrence or existed before incarceration. But if the state itself, through
its methods of punishment, drives a prisoner insane, that imposition passes
constitutional muster.

What kind of victimization is understandable? At what point can
it be legally recognized? Even though Henderson referred to the prison
setting as the cause of “senseless suffering and sometimes wretched mis-
ery,” his real concern remains focused on abuse to the body or the al-
ready deficient mind. The intact person imprisoned in the SHU—who is
not stripped naked, driven out of his mind, caged, mutilated, scalded, or
beaten—disappears from these pages. Only the visible signs of stigma are
recognized. If the slave could only legally become a person—possessing
will and more than mere matter—when committing a crime, here the pris-
oner is legally recognized only insofar as he becomes a senseless icon of the
human, either mentally impaired or physically damaged.

Though it matters juridically if one is teetering on the brink of
insanity or already gone over the edge, it matters not at all if one is only
a little damaged, if, in Henderson’s words, one’s “loneliness, frustration,
depression, or extreme boredom” has not yet crossed over into the realm
of “psychological torture.” What is at stake here? If it is true that loss of
civil rights as a result of conviction for felony is punishment, the question
becomes one of degree. In the prison context, there is a crucial difference between complete loss of civil rights, as in the case of civil death, and a “residue of rights” that remains even behind prison walls. The distinction, especially during the past fifteen years, hinges on the word punishment.

In *Wilson v. Seiter* (1991), Justice Antonin Scalia focused on the meaning and extent of punishment. Adopting the “subjective component” standard of *Estelle v. Gamble* (1976), which concerned the “deliberate indifference to serious medical needs,” Scalia went further. In this decision, the Supreme Court ultimately required a separate subjective component for all Eighth Amendment challenges to prison practices and policies. The Court decided that if deprivations are not a specific part of a prisoner’s sentence, they are not really punishment unless imposed by prison officials with “a sufficiently culpable state of mind.” No matter how much actual suffering is experienced by a prisoner, if the intent requirement is not met, then the effect on the prisoner is not a matter for judicial review. In Scalia’s reasoning: “The source of the intent requirement is not the predilections of this Court, but the Eighth Amendment itself, which bans only cruel and unusual punishment. If the pain inflicted is not formally meted out as punishment by the statute of the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify.”

Punishment, outside of statutory or judicial decision, only counts if a prison official knows about conditions and remains indifferent. Cruelty in violation of the Constitution must depend on the intentions of those who punish and not on the physical act of punishment or its impact on the prisoner being punished. Obvious signs of violence disappear in quest of the unseen: What was the official thinking? Was he “deliberately indifferent”? Did he have a “sufficiently culpable state of mind”? Excess, then, is not a punishment, not an instrument of punitive power. Instead, the Supreme Court stages a drama of pursuit, seeking grounds and reasons after the fact.

Once the objective severity of conditions is only judged unconstitutional when the subjective intent of those controlling the conditions is present, Eighth Amendment violations are increasingly difficult to prove. As Justice Byron White noted in *Wilson v. Seiter*: “Not only is the majority’s intent requirement a departure from precedent, it likely will prove impossible to apply in many cases. Inhumane prison conditions often are the result of cumulative actions and inactions by numerous officials inside and outside a prison, sometimes over a long period of time” (310). The Court’s logic thus strips the victim of the right to experience suffering, to know fear and anguish. Legally, the plaintiff has become a nonreactive body, a
defenseless object. Subjectivity is the privilege of those in control. In other words, the “objective component”—serious deprivations of even the most basic human needs—do not matter once all the eggs of mental activity are in the basket of the perpetrator.

When does an emotional scar become visible? To make it visible is to stigmatize, yet only certain kinds of stigmatization are recognized: what accords with substandard, what prisoners are assumed to be. They are all bodies. Only some are granted minds: those who have already lost their minds or whose minds tend toward madness. And who is to decide? The same officers who punish? The mind is only recognized as worthy of saving if it has been lost, the body only worthy of saving if visibly harmed. The unspoken assumption remains: prisoners are not human. Or, at best, they are a different kind of human: so dehumanized that the Eighth Amendment no longer applies. If prisoners happen to be normal, then harm must become ever more brutal to be considered “significant.” Thus, the normal standards of human decency do not apply. If you happen to be a prisoner, without any status explicitly recognized in law, you possess rights only insofar as you have lost your skin or your mind.

The Cult of the Remnant
What remains after the soul has been damaged, when the mind confined to lockdown for twenty-three hours a day turns on itself? The Special Security Unit (SSU) is a room in the SMU I in Florence, Arizona. An inner sanctum, it is reserved for instruments of torture: lethal shanks made from bed frames or typewriter bars, darts made from paper clips and wrapped in paper rockets, razors melted onto toothbrushes, and pencils sharpened into pincers. The objects inmates use to mutilate themselves or others appear neatly displayed in rows on the contraband boards behind glass. “An amazing assortment of weaponry, isn’t it?” the young correctional officer asked me. On the other wall near to the door through which I entered, to the left of the display of weapons, are photos commemorating the dead and the dying: inmates with slit wrists, first-degree burns, punctured faces, bodies smeared with feces, and eyes emptied of sight and pouring blood. Above this exhibit is a placard that reads, “Idle Minds Make for Busy Hands.”

Justice William Brennan in his concurring opinion in Furman v. Georgia (1972), the landmark case declaring capital punishment to be cruel and unusual, and therefore unconstitutional, described what he later called (in Gregg v. Georgia [1976], which overturned Furman) the “fatal constitutional infirmity in the punishment of death”: it treats “members of the
human race as nonhumans, as objects to be toyed with and discarded” (273). The savage effects of solitary confinement, offered to visitors as the material fragments, the leavings of the doomed, urge us to ask how the law can allow such torture. In the over twenty years since Brennan’s moving condemnation of the death penalty, the court, I have argued, has been instrumental in mobilizing the arena for mutilation, by ensuring the legality of confinement that is beyond the limits of human endurance and then, having allowed for unbearable conditions (what might reasonably be expected in prison, to paraphrase Rehnquist), making the captives themselves responsible for, indeed deserving of, disfigurement.

How do we read not only the display in the Special Security Unit of SMU I, but the story told by the inmates through these objects and their uses? The room is filled with the concrete reminders of the effects of legal incapacitation. The inmates have reenacted the law’s process of deceration on their own bodies, making visible what the law masks. And as if in a drama of historical revision, these expressions of derangement recall the Quaker dream of spiritual rebirth through solitude, but instead the raw materials of legal authority, once turned on the prisoners’ bodies, commemorate the death of the spirit.

In Ruffin v. Commonwealth, the court created the “slave of the state,” bereft of everything except “what the law in its humanity allows.” Here, in this room, we have the doubled figure of state and captive: the state that records, photographs, and collects the emblems of coercion, and the inmates who speak through the display, giving utterance to the inhuman face of the law. They also register an alternative history to the argument for “evolving standards of human decency” that ordained, or so it seemed, the journey out from darkness into enlightenment. In a lengthy digression on the meaning of the words “cruel and unusual” in Furman, Justice Thurgood Marshall confessed them to be “the most difficult to translate into legally manageable terms,” lamenting that no adequate history exists “to give flesh to the words” of the Eighth Amendment. In this severe rephysicalizing of civil death, inmates make the wounding of the body recall the tortures of the mind. They have returned to the drawing and quartering, disemboweling, and bloodletting of old in order to testify to their continuation in other forms.

A Postscript: Querying the Spirit of Law
How does the supernatural, the dog without skin that began my inquiry, urge us to reconsider what within the workings of the law might first appear all
too natural? In conclusion, I want to offer another reading of the law. The idiom of divestment worked differently for those enslaved in Saint-Domingue and their descendants. Although I recognize the historical and geographical leap from Anglo-American concerns to the French colony, I cannot fail to mention the alternative history of those thought to have no thought worth knowing. I began with a story about a white dog, turned to the way a specter of corruption was embodied in the colonies, as blood elided into racial categories, and, finally, moved to the mechanisms of disabling that turn prisoners into society’s refuse. As I have argued, the fiction of civil death, shifted to varying locales when necessary, sustained the phantasm of criminality and exclusion. Further, being “dead in law” juridically sustained the potent image of the servile body necessary for the public endorsement of dispossession. I conclude by urging a subtext to what I acknowledge as a mimetic bind: the strategies of containment that constructed the terrain for colonial reciprocity and mutual adaptability.

In my attempt to make palpable a history beyond the reach of written history, I have claimed that the dispossession accomplished by slavery became the model for possession in voodoo: for making a man not into a thing but into a spirit. In this regenerative history, evil spirits or shape-shifting “monsters”—zobops, kochons gri, san pwèl, bizango, or baka—can be seen as the remnants of an institution that turned humans into beasts or things. Dehumanization and bondage worked differently for those who were not accumulating property or trying to justify mastery. Slaves responded to the monsters they knew to be human with an alternative epistemology, a discipline of mind ignored in many accounts of voodoo.

Though the focus on corporality and spectacular mutilation never stopped, once these practices resurfaced in Saint-Domingue, the historically nuanced processes of stigmatization, while recycling persons and property, formed the lineaments of religious practices that defied and transformed these institutional remnants. Could the rituals of voodoo, either unwittingly or by design, have resulted in a colonial creolization that extends the experience of “possession” and “divestment” codified in legal narratives? How, in other words, did voodoo practice imagine the give-and-take between categories such as persons and property, public or private, physical or incorporeal?

My study of the materiality of voodoo, its absorption of recalcitrant givens, leads me to view these practices not only as ritual reenactments of Haiti’s colonial past, but as rereadings of the law. Voodoo, I would argue, recapitulated the memory, themes, or arguments of colonial legal structures
by repeating or reenacting them in ritual. In Creole the word for law and god is the same: *lwa*. Those who ordained the *loi d’état* were countered by those possessed by the spirits. These reinterpretations tell a story of bondage, more deeply ambiguous than the precepts of law—most especially the Code Noir (1685), very often not followed in Saint-Domingue—could have been. In other words, the difficult but abiding connection between the spirit and the letter is demonstrated by the particular ways that ritual memory operates in voodoo practice to constrain law. Like law itself, the spirits form the locus of embodied history, pointing to something crucial about colonial religious practice. In inhabiting the blood of their devotees (the spirits live *nan san ou*), the *lwa* replace the imagined “*taint*” with the sacred, thus redeeming the law of the oppressor. Thus, possession itself becomes a form of transubstantiation. Not only do spirits embody the past, but they form the site where the present speaks to the future through acts of commemoration.

Ritualized decimation—the voodoo answer to being declared dead in law—is summoned by the zombie, which Zora Neale Hurston in *Tell My Horse* (1938, 181, 179) described as the reduction of the human to “an unthinking, unknowing beast,” “the broken remnant, relic, or refuse.” If the dispossession accomplished by legal slavery became the model for possession in voodoo, turning a person not into a thing but into a spirit, then the zombie remains as the reminder of legal incapacitation. The law perpetuates the unconditional maintenance of a servile order, but voodoo practice returns to that servility, and it resurfaces transmuted. The raw materials of colonial legal authority, and the practical dispossession of the majority of Haitians, remain the stuff of spiritual life. It is as if with every experience of disability there came a need for ever more terse and ingenious expressions of derangement.

Notes


1. See Blackstone 1979, 2:121, 4:374–81; 1937, 968–77; Damaska 1968; “Annotation” 1942; Bentson 1953; and Scheppele 1990.
2. In the U.S. Constitution, honors and crimes were to no longer be hereditary, yet though acts of attainder and forfeiture were claimed unknown to American jurisprudence and are prohibited by constitutional provisions, civil disabilities have continued to play a significant role in the treatment of criminals in the United States, whether as civil death or specific disability statutes (see Damaska 1968). Just as John Marshall Harlan knew in his dissent to the 1883 civil rights cases that the “substance and spirit” of constitutional amendments had been “sacrificed by a subtle and ingenious verbal criticism,” words would continue to work wonders on the meaning of the Constitution, perhaps nowhere so boldly as in their inventive perpetuation of civil death. Though article 3, section 3, note 2 declares that “no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted,” and article 1, section 9, note 3 provides that “no bill of attainder or ex post facto law shall be passed,” the numerous civil disabilities imposed on a convicted offender perpetuate the soul if not the letter of stigma. In some states, persons convicted of serious crimes are still declared civilly dead, and even if the words are not used, numerous civil disabilities sustain infamous status, sometimes even after release. These include denial of such privileges as voting, holding public office, obtaining many jobs and occupational licenses, entering judicially enforceable agreements, maintaining family relationships, and obtaining insurance and pension benefits. In October 1998, Human Rights Watch and the Sentencing Project published Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States, linking “slavery,” “civil death,” and contemporary legal disabilities “that may be unique in the world”: “An estimated 3.9 million U.S. citizens are disenfranchised, including over one million who have fully completed their sentences” (13 percent of African-American men).

3. Although the origins of the phrase are obscure, it might have originated in Psalm 29, line 10 (“What’s the use of my blood if I sink into corruption”), which tends to be translated as Psalm 30, line 9 in King James as, “What profit is there in my blood, when I go down to the pit?” I am grateful to my colleague Professor Carl Berkhout for sharing with me his understanding of the biblical sources for corruption of blood and his rigorous delineation of the history of attainder in medieval England.

4. Bailey (1773) defines taint as “a Conviction, a Spot or Blemish in Reputation”; links to taint to the sequential mixing of “to corrupt, to spoil, to bribe, to attain”; finds another definition of taint in “corrupted as meat, smelling rank”; and finally gives stench to the criminal, as he defines tainted as “convicted of a Crime, having an ill Smell.”
5. See Blount 1670; Cowell 1678; and Jacob 1811, 163–64, an American interpretation, far more precise and indicative of the collateral consequences of conviction—the disabilities that I argue carry the effects of slavery into the present.

6. The similarity of tainted and attainted, and especially their past participles, would make their blending almost unavoidable. Attain and attainder come through Norman French from Latin attingo, -tingere, -tigi, -tactum (the base of which is Latin tango, and so on, meaning to touch, strike, attack), which was then subsequently warped in its meaning by erroneous association with French taindre or teindre, which has a different Latin etymology from attain and attainder, from tingo (or tinguo), tinger, tinxi, tinctum, meaning to dye or to color (captured in our words taint and tinge).

7. The process whereby blood is restored and pardon granted is complex, utterly mangling the law of primogeniture. “The patent of Restitution” can only work to save the blood by “Act of Parliament.” As Cowell (1978, 49) writes, “So if a man have a Sonne, and then is attainted of Felonie or Treason & pardoned, and purchaseth Lands, and then hath issue another son, and dyeth; the sonne he had before he had his pardon, although he be his eldest Sonne, and the patent haue the words of restitution to his Lands, shall not inherit, but his second sonne shall inherit them, And not the first; because the bloud is corrupted by the Attainder, and cannot be restored by Patent alone, but by Act of Parliament.”

8. See Cobb 1968, sec. c, for a discussion of the contagion of slavery in Europe long before subjectio to Rome: “Frequently, the status of slavery attached to every inhabitant of a particular district, so that it became a maxim, ‘Aer efficit servilem statum’ [a servile status infects the air], a different atmosphere it must have been from that which fans the British shores, according to the boasts of some of their judges. It is a little curious that, by an ordinance of Philip, Landgrave of Hesse, the air of Wales was declared to be of the infected species.”

9. In The West Indian Slave Laws of the Eighteenth Century, Elsa V. Goveia (1970) demystifies the “moral” of Somerset’s case, while arguing that “police regulations lay at the very heart of the slave system.” Stressing the way English law in the West Indies decimated the possibility that the slave could ever be regarded as “an ordinary man,” since it legally reduced him to “mere property,” she argues that it was “the absence of laws providing sanctions for the enforcement of slavery” that enabled Somerset to win his freedom by refusing to serve any longer as a slave (20). Enforcement is the crux. Goveia claims that property in slaves “was as firmly accepted in the law of England as it was in that of the colonies,” but what did not exist was “the superstructure raised on this basis,”
the “police laws” that governed slaves as “persons with wills of their own,” but coerced these persons “to be kept in their fixed status as the legal property of their owners” (21).

10. For a discussion of the taxonomic intricacies and legal effects of French colonial mixing, see Bonniol 1992; Dayan 1995; and Debbasch 1967.

11. James Kent (1873, 4:25:72–73 n), discussing “the Rights of Persons” and considering the one-eighth rule in the French colonies of Louisiana and in South Carolina, reveals the illogical logic necessary to prove—without observable color—that one is part of the adulterated race: “A remote taint will not degrade a person to the class of persons of color; but a mere predominance of white blood is not sufficient to rescue a person from that class. It is held to be a question of fact for a jury, upon the evidence of features and complexion, and reputation as to parentage, and that a distinct and visible admixture of negro blood makes one a mulatto. If the admixture of African blood does not exceed the proportion of one eighth, the person is deemed white.”

12. Thomas Morris (1996, 23) explains how vague and sometimes capricious were definitions of the mulatto. Turning to the 1785 Virginia law (that would be copied in other jurisdictions) that “every person who shall have one-fourth part or more of negro blood, shall . . . be deemed a mulatto,” he notes that the taint varied in other states on a scale from one-eighth to one-sixteenth, while still other states “did not produce statutory definitions: it was a matter of observation in those jurisdictions.”

13. In British colonial law, according to Goveia (1970, 25), a respect for the rights of private property resulted in harsher treatment of slaves, recognizing the slave as “a person in a sphere far more limited than that allowed him in either Spanish or French law.”

14. James Kent (1873, 4:32:250) distinguishes between the severity and degradation of domestic slavery in the colonies and the feudal villein in England, for though the villein could be subjected to abuse, this treatment was limited to his master; he did not cease to be in his person a subject for religious instruction, a member of a family, or a member of society possessing some rights, however inferior: “No person, in England, was a villein in the eye of the law, except in relation to his master. To all other persons, he was a freeman, and as against them he had rights of property.”

15. See Morris 1988, the brilliant, early treatment of the quest for sources of the legal notions that helped to define American slave law.

16. What Patterson (1982, 3) called “the violent act of transforming free man into slave” is accomplished by law, I would argue, even more than by social relationships. Patterson knew how utterly crucial the legal slave became, for how could
you have slaves without making them legal? If the law did not deal explicitly with the slave in terms of “personhood,” then the natural, inalienable rights of persons would devolve onto the slave. The legal strategy worked first to recognize the slave as person only then to deprive him or her of what to white persons (who do not need the law in order to exist or be recognized) is due by nature or under God. Slave law thus both creates and contains the subject, scrutinizes and redefines the person in law.

17. See Burrill 1870, 156, where the author tracks civil death to its ancient consequences of “a man’s entering into religion [i.e., going into a monastery], or abjuring the realm,” noting that it is “still in England the consequence of being attainted of treason or felony.” He then moves to its existence in New York, where “it follows on a person’s being sentenced for imprisonment for life in a state prison.”

18. For examinations of this inventive reenslaving, see David M. Oshinsky’s (1996) argument that the postemancipation criminal code was initiated as a vehicle of racial subordination; Alex Lichtenstein’s (1996) study of convict lease and the subsequent public chain gang; and most recently, Scott Christianson’s (1998) exhaustive chronicle of imprisonment as crucial to the American experience.

19. Though the history is complex, the ban on cruel and unusual punishments drawn from the English Bill of Rights of 1689 forbade practices such as pillorying, disemboweling, decapitation, and drawing and quartering. It was unusual cruelty in the method that was condemned. By the nineteenth century, the provision was considered by many to be obsolete, aimed only at primitive practices that had long since passed away; and it was then established that the novelty to a punishment—the mere fact that it is unusual without any excessive cruelty—does not suffice to prohibit it constitutionally. Thus, electrocution was held to be a reasonable and humane means of inflicting capital punishment, which was not in itself cruel and unusual.

20. Early Supreme Court decisions interpreted the Eighth Amendment’s prohibition as against only “inhuman and barbarous punishments.” But two crucial cases expanded the phrase beyond the scope of the physical: Weems v. United States (1910), which abandoned the strict interpretation to include disproportionate penalties, and Trop v. Dulles (1958), where the Court held that fear and psychological uncertainty resulting from deprivation of citizenship as punishment for desertion is cruel and unusual punishment. Though the argument needs to be made in detail, the clause returned to the corporal paradigm in contemporary prison cases, which have closer affinities with the slave codes of the American South and the Caribbean colonies than with the 1689 English
Bill of Rights. American colonists omitted a prohibition on disproportionate punishments and adopted instead the prohibition of cruel methods of punishment, which had never existed in English law. See Granucci 1969.

21. The 1752 “Act for Preventing the Horrid Crime of Murder” added solitary confinement as a special mark of infamy to capital punishment. In 1836, “An Act for Consolidating and Amending the Statutes in England Relative to Offences Against the Person” repealed the former statute by limiting the period of time before the execution and defining prison discipline: “Every Person convicted of Murder should be executed according to Law on the Day next but one after that on which the sentence should be passed.” Note, however, that by the nineteenth century, solitary confinement was no longer illegal in England. Further, after the Prison Act of 1865, the “solitary confinement” that had been repealed, or, later, inflicted only for a limited amount of time, became under the new name of “separate confinement, inflicted in all cases as the regular and appointed mode of punishment” (Stephen 1883, 487). The source for the change and the renaming was the separate system in Philadelphia, news of which was reported to Parliament and to the prison commissioners on numerous occasions.

22. For two excellent articles that give a history to the corporal versus incorporeal punishment paradigm, as well as explain how recent conditions of confinement cases redefine harm in terms that make it increasingly difficult to prove an Eighth Amendment violation, see Robertson 1997 and Robbins and Buser 1977.

23. In Sandin v. Conner, Rehnquist legitimates “solitary” or the “hole” by adapting the vocabulary of decency to ever harsher conditions of confinement. By matching “atypical and significant hardship” with “ordinary,” and leveling the distinction between “disciplinary segregation” and “administrative segregation and protective custody” (the conditions mirror each other, he says, except for “insignificant exceptions”), Rehnquist replaces what actually happens in solitary with an increasingly vague series of qualifications that allow increasingly abnormal circumstances to be normalized. For a discussion of the Court’s rationalization of custody and control as a logic used by prison administrators to create special management or control units, see Dayan 1999.

It could be argued that *Rhodes v. Chapman* (1981) set the stage for the more extreme cases of the nineties, since the Court argued that work and educational opportunities are to be constitutionally mandated. The qualifications are crucial. Prison officials can, *Rhodes* argued, impose conditions that are "restrictive and even harsh" (at 347), leaving open to question just what degree of severity can violate the Eighth Amendment if part of the penological philosophy of prison officials. In *Holt v. Sarver* (1970), a gruesome case about severe conditions imposed upon confined beings, the court held that the Constitution, while not requiring rehabilitative programs, would not allow conditions that prevented "reform and rehabilitation." But *Rhodes*, as the concurring opinion by Brennan implies, could be "construed as a retreat from careful judicial scrutiny of prison conditions," abandoning the judicial intervention that would be borne out in later cases. Brennan singled out *Rhodes* as the first time the Supreme Court considered "what prison conditions constitute 'cruel and unusual punishment' within the meaning of the Eighth Amendment" (352).

26. See Romano 1996. Pelican Bay was patterned on Special Management Unit I (SMU I) in Florence, Arizona, although the Arizona system, which might well be more severe, has avoided scrutiny.

27. In *Bell v. Wolfish* (1979), then Justice Rehnquist, writing for the Court, reversed the decision of the circuit court favoring the inmate-respondent. In the crucial passage that changed a brief policy of advancing prisoners’ rights, he insisted that "prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed" (at 547).

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