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MATERIALIZING DEMOCRACY

*Toward a Revitalized Cultural Politics*

*Russ Castronovo and Dana D. Nelson, editors*



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25 Ibid., 167.

26 Neil Hertz, *The End of the Line: Essays on Psychoanalysis and the Sublime* (New York: Columbia University Press, 1985).

27 Ibid., 174.

28 Jacques Rancière, "Discovering New Worlds: Politics of Travel and Metaphors of Space," in *Traveller's Tales: Narratives of Home and Displacement*, ed. George Robertson et al. (London: Routledge, 1994), 35.

29 Ibid., 33.

30 Norman Birnbaum has remarked that "de Tocqueville wrote about a preindustrial society: the recurrence of his thought may suggest something else than a commendable desire to go to the historical roots of our political culture. The nation has changed immensely since de Tocqueville's visit. The French thinker, a recalcitrant liberal (in the European sense) with deep doubts about democracy, [may have served to legitimate ambivalence about democracy.] He, or his ideas have also served to avert our gaze from problems presented by industrialization, by immigration, by the end of slavery and by empire" (*Radical Renewal: The Politics of Ideas in Modern America* [New York: Pantheon Books, 1988], 66).

31 See Lisa Lowe, *Critical Terrains: French and British Orientalisms* (Ithaca: Cornell University Press, 1991), 31.

32 See Michel de Certeau, *The Practice of Everyday Life* (Berkeley: University of California Press, 1988), 123.

33 For an illuminating discussion of this dynamic, see Chantal Mouffe, "For a Politics of Nomadic Identity," in *Traveller's Tales: Narratives of Home and Displacement*, ed. George Robertson et al., 105–13.

JOAN DAYAN

## *Legal Slaves and Civil Bodies*



I begin with a 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.

During my last visit to Haiti, I heard a story about a white dog. Reclaimed by a *oungan*, or priest, who "deals with both hands" practicing "bad" magic, the dog comes back to life in skin bloated with spirit. Starving, its eyes gone wild, it appears late at night with its tongue hanging out. 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 disguise. 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 her own.<sup>1</sup>

What was once condemned as unreal or magical, shunted aside or projected onto those peoples and places deemed "uncivilized," remains, though hidden, at the heart of the modern state. My inquiry concerns the metaphysical hub that gives law the power both to preserve and to manipulate the categories of spirit and body. This transformation of categories—the double movement and complex relations between the extremes of flesh and mind, external and internal, and what can be removed and what must remain—gives the juridical order the power to redefine persons.

By taking the story of the white dog as model and code for understanding the

rituals of law, I intend to take spiritual belief as legal commentary and vice versa. In analyzing how the rhetoric of law both disables civil persons and invents legal slaves, I argue that the creation of an artificial entity, 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 unacknowledged mechanism of justice. From its beginnings, law traded on the lure of the spirit, banking on religion and the debate on matter and spirit, corporeal and incorporeal, in order to transfer the power of the deity and the dominion of the master to the corrective of the state. The rituals 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 new life to the residue of old codes and penal sanctions.

The law materializes dispossession, and in far more corporeal ways than its abstract precepts might first suggest. How, then, do the terms of law legitimate containment and exclusion? What are the conditions under which categories of identity are legally reconstructed? Which words act as revenants, haunting the precincts of law? In the United States, the pure principle of democracy exacted the most extreme practices of oppression. This essay seeks to analyze, on one hand, how this domination proffered to a society of equals depended on rituals of expulsion and exclusion; and, on the other, how these practices took their consummate form in the penitentiary. Punishment and prisons not only became critical to the ideology of democracy and freedom but also shaped a genealogy of property and possession essential to the "American project."<sup>2</sup> Beaumont and Tocqueville's *On the Penitentiary System in the United States, and Its Application in France* (never reprinted since its publication in 1833) must thus be read as a dark gloss to Tocqueville's *Democracy in America*. Like the furies buried beneath Athens so that the ideal city can be born, the idea of freedom became coterminous with the necessities of containment. As Beaumont and Tocqueville confessed: "Whilst society in the United States gives the example of the most extended liberty, the prisons of the same country offer the spectacle of the most complete despotism."<sup>3</sup>

#### SACRIFICE

In his *Commentaries on the Laws of England*, William Blackstone, 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."<sup>4</sup> Unlike the Pauline admonition to relinquish the trappings of the physical to be raised a spiritual body, Blackstone's version of new life depends not on belief in Christ but in the civil order. The rebirth of the individual in society does not depend on dying through and to the law. Instead, the civil, once codified in the institution of law, demands the dual gestures of submission and repression of the natural. In these fictions of juridical obeisance, the old nature first takes on the skin of the civil, then pacts to contain itself within that skin. In this way, by the very terms of Blackstone's contract, the state of society never completely transcends that of nature. The natural person, who existed before the social contract, though reduced to a repressed spirit in civil skin, nonetheless haunts the margins of the formal community. Blackstone thus reminds his reader that in heralding the rituals of renunciation and repression as essential to the promotion of a coherent legal order, he means much more than a one-off exchange for the greater good. For the tradeoff is merely one instantiation of what must be a quasi-religious process, a ritual of citizenship to be staged again and again in order to keep the facade of the civil intact, the natural residuum in check, and thereby reassure the stability of civilization.

The image of the dog skin that encases the spirit of the dead person can be related figuratively 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 human and property. In juxtaposing these two conditions of being, I suggest that the potent image of a servile body can be perpetually reinvented. In this ritual, both legal slave and civil body are sacrificed to the civil order. Although 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 distinctions between them, however, remain shaky. The two conditions interrelate in crucial ways. I will suggest that certain images recur; and words like *blood*, *corruption*, and *death* have a remarkable staying power.

In reconstructing this narrative of human unfreedom, I need briefly to confront the problem of juxtaposing civil bodies and legal slaves. I begin with the equivalence of free person and slave because 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, whom I suggest is the carrier of "negative personhood," who has undergone social death. Although the person declared civilly dead had property to lose, in most instances the slave never had property and was in fact property and could never have any relation to property. The institution of slavery depended on embodying the black as merely material, what could be described as a philosophy of denaturalization that turned humans into things or mongrels. The fiction of the "citizen," however, summons a somewhat less certain transit between restraint and freedom, capacity and disability. In bringing what might first seem to be an unlikely conjunction to the fore, the lethal machinery of juridical value becomes clear. Slaves and criminals form the two extremes of this analysis, but these exceptions put the citizen who is nonslave or nonfelon in a constant and fearful zone of ambiguity.

Rather than focusing on social attitudes and relationships, in this essay I instead trace a developing logic in modern law. I explore 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 the person with white skin and the law encases her 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 not to be reborn in the spirit but in the body of civil society, what kind of body is this?<sup>5</sup>

In *Slavery and Social Death*, Orlando Patterson 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."<sup>6</sup> Patterson proposes a theory of negative capability, while he remains silent about the disabling inherent in the very process of creating a legal personality that 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).

These two passages refer first to the actually dead though alive in spirit as

opposed to the actually alive though dead in law; and, second, 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" (38). Patterson's insistence that slaves in every legal code are treated as persons in law, urges upon us 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 legal practice together; or to be more precise, to juxtapose the "social death" of slaves with the "civil death" of felons in order to ask whether statute and case law could be more important than social custom in effecting rituals of exclusion, and, as I will emphasize, in maintaining the racial line. If we make slavery in the Americas our hypothetical still point, then we can consider what kinds of persons would end up being redefined as dead in law. It was as easy to deem the extinction of civil rights and legal capacities as punishment for, or the necessary consequence of, the crime of color as it was for the conviction of crime. For color, this appearance of moral essence or transmissible evil could stand in society as both a threat and a curse, or finally, as justification for the subjugation of those so tainted.

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.<sup>7</sup> 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. For what had been forfeiture of property and corruption of blood—those few circumstances in which civil death was coextensive with physical death and that were understood by Blackstone as caused by profession (as in a monk professed), abjuration from the realm (deportation for crime), and attainder and banishment (for treason)—became the terms for a specifically colonial rendition of legal incapacitation (1:128–29).

How did civil death affect rights of property and privilege at common law? There were three principle incidents consequent on an attainder for treason or felony: forfeiture, corruption of blood, and the *extincti* on of civil rights, more or

less complete. Of Saxon origin, forfeiture was part of the punishment of crime by which the goods and chattels, lands and tenements, of the attainted felon were forfeited. According to the doctrine of corruption of blood, introduced after the Norman Conquest, the blood of the attainted person was held to be corrupt, so that he could not transmit his estate to his heirs, nor could they inherit. According to Blackstone, this inequitable and "peculiar hardship" meant that the "chanel" of "hereditary blood" would not only be "exhausted for the present, but totally dammed up and rendered impervious for the future" (2:256, 253).

I distinguish civil death from other legal sanctions because this concept and its attendant disabilities maintained both a strictly hierarchical order and the blood defilement on which that order depends. Corruption of blood operated practically as a severing of blood lines, thus cutting off inheritance, and metaphorically as an extension of the "sin" or "taint" of the father visited on his children. If we treat *blood* and *property* as metaphors crucial to defining *persons* in civil society, then it is easy to see how "corruption of blood" and "forfeiture of property" could become the operative components of divestment. By a negative kind of birthright, bad blood blocked inheritance, just as loss of property meant disenfranchisement. Yoked together as they are, these terms loosely but powerfully define types of slavery. Whether applied to the slave or the criminal, both are degraded below the rank of human beings, not only politically but also physically and morally.

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; to the transport of blood to the British colonies and its incarnation as the black taint that legally inscribed slavery; to the disabilities of the post-Civil War, 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. How this project of incapacitation has continued to threaten the weak and socially oppressed, how old rhetorical strategies initiate new forms of containment, is what matters here.

#### BLOOD

In rereading the claims of civil death into the genealogy of slavery and incarceration, I propose a continuum between being declared dead in law, being made a

slave, and being judged a criminal. Blackstone referred to natural liberty as "residuum" (1:129), and he figured this residue of nature as a stain. The imprint of corruption becomes the legitimating metaphor for what I have described as the sacrificial formation of the civil person. 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 necessarily dead, remained a more terrifying example of punishment than the executed body. Moreover, the deficiency of hereditary blood and its consequences for the felon's descendants became an alternative death penalty: not actually but civilly dead. Strict civil death, the blood "tainted" by crime, set the stage for blood "tainted" by natural inferiority. This discrimination would produce the nonexistence of the person not only in the West Indies but in the United States. The racialized fiction of blood, moreover, supplemented the metaphoric taint, not only defining property in slaves but fixing them and their progeny and descendants in status and location.

What is "corruption of blood"? According to legal doctrine, the blood of the attainted person was, as I have noted, judged to be corrupt, so that he could neither inherit nor transmit his estate to his heirs. As Thomas Blount explained in his 1670 *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."<sup>8</sup> 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 took place in the marketplace as well as on the sacrificial altar, through commercial transactions as well as 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 let not 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.

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.<sup>9</sup> 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.

What is most crucial to my mind about the definition of "attainder" is the way a probable mistake in philology became a useful means of exclusion. The similarity of "tainted" and "attaint(ed)," especially in their past-participial forms, would make their blending almost unavoidable. The OED, dating its lexical proof from 1563, focuses on what became the gist of attainder—corruption of blood—through this false derivation of attainder in "taint" or "stain": "L. *atingere* to touch upon, strike, etc.; subsequently warped in meaning by erroneous association with F. *taindre, teindre*, to dye, stain."<sup>10</sup> Beneath an apparently inadvertent, false, or at least loosely mixed-up terminology in late medieval England, exists an anatomy of disabling.<sup>11</sup>

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 attainder? 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 *and* tinge or tincture into stain, blemish, or contamination—suggests that this terminological history is one of cross-fertilization and not of 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 truly harsh acts of attainder with the full legal force of corruption of blood came into frequent use. Who, one might ask, cared about the nil property had by the poor or unlanded,

such as blacks, or by any other potential slaves later on? Nor would considering them and their progeny goods and chattels in themselves be legally relevant.

But as slavery in the colonies became profitable, requiring the justification of the 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, 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 naturall infection of the first inhabitants of that country, and so all the whole progenie of them descended, are still polluted with the same blot of infection."<sup>12</sup>

The phantom language of colonial stigma would be literalized, especially in the eighteenth century, in juridical articulation. And although 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. According to Blackstone, the king's pardon of an attainted felon made the offender "a new man" with renewed "credit and capacity." But Blackstone 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 father, being made a new man, might transmit new inheritable blood" (4:395). Law can make one dead in life, and even determine when and if one is to be resurrected. The restoration in blood, 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 circumstances 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 extends down through the generations. 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 are dead in life: stripped of community, deprived of communication, and shorn of humanity.

#### GENEALOGIES

In the context of the eighteenth-century British West Indies, as in the southern United States, the significance of blood becomes clear if incredible. Blood penetrates into the inhabitants' bodies and racially marks them, granting them legal recognition according to degrees of mixture: either advancing toward white or regressing toward black. Emphasis on blood as conduit for the stain of black ancestry became more necessary as bodies of color began to merge and to lose the biological trait of blackness. The supremacy of whiteness now depended on a fiction threatened by what one 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.<sup>13</sup>

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, because colonial slave law was "not the law of England, but the law of the plantations," according to the lawyers in *Somerset v. Stewart*. Although the argument smacks of the rather hypocritical shunting of impurity out from England's "pure air" (projecting dirt out from the "English garden" and onto the "West Indian hell," as Rochester put 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.<sup>14</sup>

In *Democracy in America*, Alexis de Tocqueville compared the European's legally ordained inequality with what he found in the United States, drawing attention to the difference between "imagined inequality" (the "abstract and transient fact of slavery" among persons "evidently similar") and the "inferiority" that is "fatally united with the physical and permanent fact of color." He concluded 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"? Yet Tocqueville also recognized that "nothing can be more fictitious than a purely legal inferiority."<sup>15</sup> 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.

By the 1660s, perpetual and hereditary servitude had been formalized in the British North American colonies. With independence, slave laws in the United States began to sanction permanent, lineal bondage as the system of chattel slavery evolved and expanded. The epistemology of whiteness depended on the detection of blackness: fantasies about hidden taints were then backed up by explicit legal codes; by what Virginia Dominguez in *White by Definition* has called "*defacto a classification by ancestry*."<sup>16</sup> 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*, *metis*, *mamelouque*, *marabou*, *griffonne*, and *sacatra*, the most commonly observed distinctions in the British West Indies were sambo, mulatto, mustee; and octoroon.<sup>17</sup> Describing persons of "mixed blood," Bryan Edwards in his *The History, Civil and Commercial, of the British Colonies in the West Indies*, warned that although discriminations of color are not easily made, the civil law is clear: "In Jamaica, and I believe in the rest of our Sugar Islands, the descendants of Negroes by White people, entitled by birth to all the rights and liberties of White subjects in the full extent, are such as are above three steps removed in lineal digression from the Negro venter. All below this, whether called in common parlance Mestizes, Quadrons, or Mulattoes, are deemed by law Mulattoes."<sup>18</sup> In the *Journals of the Assembly of Jamaica* (1663–1826), 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 generation of intermixture from the Negro ancestor exclusive."<sup>19</sup>

In the United States by the eighteenth century all persons presumed tinged with black blood were legally "mulatto," although the term was never as precisely defined as in the French colonies, where it meant not merely mixed blood (neither black nor white) but specifically the offspring of a white man and *négresse* on a geneological scale of minute gradations of blood and nuances of



color. In the British West Indies, an octoroon was legally white and therefore automatically free in the British West Indies (permitted to the franchise and militia). Throughout the *Journals of the Assembly of Jamaica*, motions were made to present bills that would entitle free mulatto women and their children "to the rights and privileges of English subjects." Yet, unlike Jamaica, some southern states pushed the taint of negro ancestry from one-eighth to one-sixteenth part black blood, thus legally extending the stain to any product of intermixture. These degrees of blood, distinguished through the dubious means of observation, rumor, and reputation, reinforced the law's legitimation of whiteness.<sup>20</sup> After Emancipation, the ancestral taint took on renewed importance and left the body with amended blood at the mercy of a jury.<sup>21</sup> The concept of blackness 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.<sup>22</sup>

#### LEGAL PERSONALITIES

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 liturgy 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.<sup>23</sup> 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.<sup>24</sup> According to Jonathan Bush, 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."<sup>25</sup> 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 the source one reads on the origins of slavery in the United States, Roman civil law, the influences of colonial slave codes in the West Indies, the

French Antilles, and the Spanish and Portuguese possessions all contributed to the composite rhetoric of disabling and protection in the statute law of the slaveholding states.<sup>26</sup> 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, reanimated legal precedent and 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 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."<sup>27</sup> 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 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. Issac Jones* (1821), 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? Justice Joshua D. Clarke 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."<sup>28</sup>

Reason is the crux here, but once attached to the slave, in what spirit is the word said? Justice 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?" (84-86). At the center of this rhetorical question 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 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.<sup>29</sup>

#### CIVIL DEATH

It can 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, the wheel, and the iron boot, the atrocities of a more enlightened age came into being. In his *Commentaries*, Blackstone described how execution or confiscation of property without accusation or trial, although 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" (1:131). Civil death in the United States, although first affixed to the blood of a criminal capitally condemned, later was understood to be a result of life imprisonment, a consequence rare at common law.

Civil death and the consequent representation of the criminal imprisoned for life as being dead in law set the terms for a new understanding of punishment. Although slavery had ended, incarceration had not. Perpetual imprisonment, while promising humanitarian alternatives to physical torture, became a means of recreating an image of servility. How best could statutory law ensure that the

"badges and incidents of slavery" might continue to exist under cover of civil death? How far could the legal fiction of civil death be carried? When definitions of law responded to the theological split between the spiritual and the natural body by dividing the body into the artificial and the natural, something happened to the idea of personal identity. Slaves, though legally not *civil persons*, yet remained *natural humans*. When committing a crime, however, slaves could be recognized as possessing a legal mind, a status for which they paid by being punished as criminals. During Reconstruction, with the advent of convict lease and the chain gang, the logic of subordination clarified the law of the New South. The felon inherited something like a double debt to society: not only figuring as the intermediate category between slaves and citizens but also as a synthetic or unnatural slave. An entity held between life and death, this body would then resurface in late-twentieth-century case law as the *human* who is no longer a *person*. From this perspective, it is possible to see how the shifting identity of the slave could be reborn in the body of the prisoner.

In New York the connection between civil death and slavery became critical. In the Act of March 29th, 1799, which changed the language of civil death from the common-law wording "shall thereafter be deemed civilly dead" to the more severe "be deemed dead to all intents and purposes in the law," the legislature set up a system of laws for the gradual abolition of slavery in New York. Thus, as the gradual abolition of slaves began, the revised statute revived disabilities in a new context. The civil death statute declared that a sentence of perpetual imprisonment entailed the loss of personal rights, including divesting the felon of property, and, further, dissolving his marriage so that his wife and children owed him nothing; while the gradual abolition statute provided that children born into slavery, after July 4th 1799, would henceforth be free, although still liable to be servants of the mother's proprietor.<sup>30</sup>

As set out in the U.S. Constitution, honors and crimes are no longer to be hereditary. Yet although acts of attainder and forfeiture are claimed to be unknown to American jurisprudence and prohibited by constitutional provisions, civil disabilities—and civil death more or less extreme—have continued to play a significant role in the treatment of criminals in the United States. In his dissent to the 1883 Civil Rights Cases, Justice John Marshall Harlan suggested how the "substance and spirit" of constitutional amendments had been "sacrificed by a subtle and ingenious verbal criticism" that connected the past prerogatives of the "white race" and the present presumption of the "state."<sup>31</sup> Words would continue to work wonders on the meaning of the Constitution, perhaps nowhere so boldly

as in their inventive perpetuation of civil death. Although article 3 declares that “no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted,” and article 1 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.<sup>32</sup>

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. Called on to define the condition of the convict and consider the implications of civil death for the applicability of the Bill of Rights, Justice Christian decided: “The bill of rights is a declaration of general principles to govern a society of freemen, and not of convicted felons and men civilly dead. Such men have some rights it is true, such as the law in its benignity accords them, but not the rights of freemen. They are the slaves of the State undergoing punishment for heinous crimes committed against the laws of the land.”<sup>33</sup> The prison walls circumscribe the prisoner in a fiction that, in extending the bounds of servitude, became the basis for the negation of rights, thus reconciling constitutional strictures with slavery. It is not surprising that *Ruffin* acted as a memorial spot of time recalled by Justices Marshall, Brennan, and Stevens, as if exhuming for the Rehnquist Court the state-sanctioned bondage the Court will not name.<sup>34</sup>

What, then, is the status of inmates? Are they slaves of the state, wards of the state, or do they occupy some other status, perhaps “criminal aliens,” in the words of the 1996 Antiterrorism and Effective Death Penalty Act?<sup>35</sup> The prisoner’s status 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” has remained undefined in both district and Supreme Court cases means that ever more inventive deprivations can be justified. In the contemporary practices of punishment in the United States, singular and unparalleled not only in all the Western European countries but in most of the former Eastern European bloc of 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. I do not mean that slaves can be equated with criminals, as if slavery were the result of punishment. Rather, I am interested in how, once convicted of crime, the criminal can be reduced—not by a master but by the state—into a condition that is sustained under the sign of death. Justinian in his *Institutes* declared “slavery is death.” He knew that death takes many forms, including loss of status beyond which life ceases to be politically relevant. How, then—and this is the crucial question—can corpses be legally fabricated?<sup>36</sup>

Imprisonment offers the opportunity to apprehend how the condition of being *civiter mortuus* or dead in law marks the *disabled citizen* as symptom of afflictive punishment. For unlike slaves, felons remain citizens: citizens who are restrained in their liberty. The “character” of prisoners, the alleged “danger” they pose to prison order, the need for them to be transformed all became part of the discourse of the restriction of rights. This legal curtailment resonates with the ways exslaves were effectively deprived of civil rights and reduced to the status of incomplete citizens after Emancipation. As far as those imprisoned for life were concerned, the idea was to emulate the results natural death would produce. Numerous nineteenth-century cases demonstrated the staying power of civil death, as well as the manipulation of property, possessed or lost, as crucial not only to legal status but to personal identity, and the sacrifice of that identity to punishment. Instead of explicitly abolishing the status of the person, civil death means rather the incapacity to exercise the rights attached to persons, what much later in *Trop v. Dulles* (1958) would be judged cruel and unusual punishment: “No physical mistreatment, no primitive torture,” but “instead the total destruction of the individual’s status in organized society,” having “lost the right to have rights.”<sup>37</sup>

Although this resurrection of slavery is often discussed in the turn to convict labor and the criminalization of blacks in the postbellum South,<sup>38</sup> I propose that the penitentiary, as zealously discussed and instituted in the North—especially “solitary,” also known as “the discipline” or “the separate system”—offered an unsettling counter to servitude, an invention of criminality and prescriptions for treatment that turned humans into the living dead. Beaumont and Tocqueville in their study *On the Penitentiary System in the United States* contrasted corporeal 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 corporeal discipline.<sup>39</sup> 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 possibly than death, proving in the words of Elisha Bates 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."<sup>40</sup>

Before the abolition of slavery, William Crawford, reporting in 1834 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."<sup>41</sup> 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. Once readjusted to the demands of incarceration, the chiasmus that had previously made racial kinship a criminal affiliation 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 where of the party shall have been duly convicted," the exception in 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.

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 in his *American Notes*. More than solitary horrors, however, Dickens described the erosion of thought in terms that dem-

onstrate 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." Once the black hood covered the face of the criminal condemned to Cherry Hill, the long process of executing the soul began, "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."<sup>42</sup>

The restraints of continuing solitude proved to be more corrective than corporeal punishment. Critics of the Pennsylvania "separate system," popularly known as "the discipline," called it inhuman and unnatural. William Roscoe, 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."<sup>43</sup> But numerous reformers argued that criminality called for expiation and recognized that only secret punishment and ignominy could compel repentance. Roberts Vaux, 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."<sup>44</sup>

The language of contagion thus sustained the common law definition of "corruption of blood" for the attainted felon, just as civil death maintained forfeiture of property and the degradation attached to that loss. As I noted earlier, although formally abolished in the Constitution, rituals of stigmatization never stopped, and the abolition of slavery summoned more devious means of exclusion and containment. Once systematized, the residue of past methods of punishment and the suggestive aura of taint ensured continued degradation but under cover of civil necessity. Francis Lieber in his preface and introduction to Beaumont and Tocqueville's *On the Penitentiary System in the United States* defended the penitentiary as 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; once removed, the convict became the visible record of the sacrifice on which civilization main-

tained itself. Not only did the gradual annihilation of the person, disabled but not dead, exemplify a punishment arguably 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 dropped out of the intersection between civil and social.

#### CRUEL AND UNUSUAL

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 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." Although 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*, *humane*, and *dignity* jockey for preeminence in these cases, and alternate with less expansive, more constrictive phrases like *basic human needs* or *minimal civilized measure of life's necessities*.

Legal language has construed the alternating debates between abstract calls for dignity or decency and concrete examples of specific needs and quantifiable allowances in order to vacate the meaning of *human* when applied to prisoners. To understand how this double language or two-sided tactic works is to confront the unsettling possibility that the very notion of "evolving standards of decency" in *Weems v. United States* (1910) and the "dignity of man" in *Trop v. Dulles* narrowed the divide between the civilized and inhuman treatment of prisoners.<sup>45</sup> We must examine in this light the rite of punishment in *Trop* as contributing to what will become, due to the cynical logic of some contemporary justices, a ruse of beneficence. Recognizing the death penalty as an endpoint of abjection, "an index of the constitutional limit on punishment," the Court suggested that its

validation as constitutional should not allow "the Government to devise any punishment short of death within the limit of its imagination" (597). What is essential here is the belief that the death penalty is exceptional, or "different," to recall Brennan's compelling argument in *Furman v. Georgia* (1972), the landmark case that declared capital punishment to be cruel and unusual, and therefore unconstitutional.<sup>46</sup> For once that rule is established, it becomes possible to accept (or imagine) abandoning prisoners to a range of other extraordinary sanctions: a fate less than death that can become quite ordinary in comparison. The Rehnquist Court's ability to define away the substance of an Eighth Amendment violation depends on establishing the *ordinariness* of prison conditions, once they are applied to criminals who remain outside the social compact. The verbal maneuvering of this current juridical order thus renames "cruel and unusual," even as it reclaims "human status" for its own uses. Out of an assumption of barbarism comes a new understanding of the limits of civilization.

The use of a dichotomy such as brutality or decency to allow ever more sophisticated torture to pass constitutional muster depends on manipulating language in such a way that the distinction between apparent opposites can be emptied of meaning. On a kind of sliding scale back and forth between extremes, difference is neutralized. Distinctions are offered the more effectively to be qualified out of existence. Perhaps this maneuver can better be understood by turning briefly to Errol Morris's documentary *Mr. Death: The Rise and Fall of Fred A. Leuchter, Jr.* Concerned about the "deplorable condition" of execution hardware in prisons, Leuchter explains how he designed an electric chair that would perform "humane" killings. State-sanctioned murder is never questioned, nor need it be, because the terms of the argument are designated as two extreme conditions, one of which must be preferable to the other. On one hand is "torture" if the chair malfunctions and too much voltage makes "the meat come off the executee like meat off a cooked chicken"; on the other is the "decency" of lethal injection and its promise of "more humane, painless executions." But even Leuchter wonders if the absence of smoke and burning flesh masks a more awful though unseen agony. For it is more difficult, he reflects, to take away than to give life.<sup>47</sup> At what point, we might ask, do executions become "humane" or "painless"? With whom does that ritual of definition lie?

Let us take the language of the law as a struggle between ways of thinking about what is human and 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 May 3, 1946.<sup>48</sup> 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 Reed, writing for the majority, ruled against Willie Francis. Even though Francis had already suffered the effects of an electrical current, that “does not,” Reed explained, “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). How does punishment, no matter how insufferable, become legal? 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 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. The unspeakable might well become possible wherever the legal or literal promise of humanitarian punishment is made. If the prohibitions of the 1689 English Bill of Rights are summoned as backdrop—disemboweling, decapitation, and drawing and quartering—then the ban on cruel and unusual punishments might well seem obsolete, aimed only at “barbarities” that have long since passed away.<sup>49</sup> Yet it is possible that this selective recollection necessarily implies a decision concerning the threshold beyond which punishment ceases to be legally relevant. In other words, excessive harm can be redefined in

terms that put it outside the precincts of punishment, making it increasingly difficult to prove an Eighth Amendment violation. 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 corporeal, but what is striking about contemporary Eighth Amendment cases, whether dealing with execution or confinement, is the legal acceptance of the corporeal punishment paradigm, attending to the body not the intangible qualities of the person (for example, psychological pain or fear) or the social and civil components of confinement.

In 1890, the Supreme Court decided two cases, both germane to my argument: the first, *In Re Kemmler*, pursued the cruel and unusual punishment standard in rites of execution; and the second, *In Re Medley*, applied that standard to solitary confinement.<sup>50</sup> 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 its use must result “in instantaneous, and consequently in painless, death” (443–44). Electrocution was thus held to be a reasonable and humane means of inflicting capital punishment, not in itself cruel and unusual. Although *Medley* did not ultimately argue that solitary confinement was unconstitutional, the Court commented on how its deterrent power resulted not from the immediacy of punishment but rather through extended suffering. Further, the Court admitted that the 1889 Colorado statute subjected the prisoner to “an additional punishment of the most important and painful character.” The opinion emphasized the anguish that resulted when removing 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). Returning to the statutory history of solitary confinement in English law, to the early 1700s of King George II, 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.<sup>51</sup>

As in the perpetuation of civil death and execution, the United States has not only continued but refined the forms of solitary confinement, for the Supreme



Court has never judged that solitary confinement itself is an unconstitutional punishment.<sup>52</sup> In *Medley* the Court drew attention to the peculiar effects of total confinement, a gradual spiritual degradation as brutal as bodily destruction: "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).

In summer 1997, death row inmates at the Arizona State Prison in Florence were moved from Cell Block 6 to Special Management Unit II (SMU II), the harshest of the segregation units in the Florence/Eyman Complex, reserved for the "worst of the worst." What had been judged too painful to be constitutional in *Medley* has now been reinstated. 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 mirror. I've lost my skin. I can't feel my mind."<sup>53</sup>

#### TRIALS OF DEFINITION

How did the Court change over time, ultimately deciding that the anguish of solitary confinement, its slow but relentless assault on the mind of inmates, was no longer "cruel and unusual"? Further, how did the origins of solitary confinement in the belief in minds, which are, to paraphrase Jeremy Bentham, *subservient to reformation*, get recast as locales for *incapacitation* and *retribution*? Since the judicial involvement in prisons in the 1960s, both federal district courts and the Supreme Court have alternately extended and circumscribed the conditions deemed "humanly tolerable." The Rehnquist Court, in turning to the "subjective" expertise of prison administrators and "deference" to their special knowledge, has redefined the limits of pain through a language of fastidious distinctions and noncommittal formulas. The turn away from prisoners' enforceable

rights and the language of rehabilitation was signaled with then Justice William Rehnquist's opinion in *Bell v. Wolfish* (1979).<sup>54</sup> The winnowing away of the substance of incarceration (what actually happens to the inmate) in favor of a vague if insistent pragmatics of forms, rules, and labels has allowed increasingly abnormal circumstances to be normalized once in prison. Further, the Court has turned to a different history of punishment, indeed a novel translation of *malice aforethought* for murderers into the *maliciously wanton* standard for prison officials.<sup>55</sup>

Contemporary terms and rules of judgment concerning punishment and victimization, as well as the assumptions about what constitutes the entity called "prisoner," thus 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—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 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"; Chief Justice Rehnquist's turning of the often extraordinary rites of punishment after incarceration—disciplinary sanctions without due process or indefinite solitary confinement—into nothing more than "the ordinary incidents of prison life"?<sup>56</sup> Let us recall Rehnquist's order in *Atiyeh v. Capps* (1981), staying, pending appellate review, an injunction issued to alleviate prison crowding: "Nobody promised them a rose garden; and I know nothing in the Eighth Amendment which requires that they be housed in a manner most pleasing to them, or considered even by most knowledgeable penal authorities to be likely to avoid confrontation, psychological depression, and the like."<sup>57</sup>

In *Sandin v. Conner* (1995), for example, Rehnquist, writing for a majority of five, legitimated "solitary" (and refuted the plaintiff's due process claim) by adapting the vocabulary of decency to ever harsher conditions of confinement. Although Rehnquist chose trivial examples of prisoner due process cases, such as a claim to a tray instead of a sack lunch, DeMont Conner had raised a less trivial claim: he had been sentenced to thirty days lockdown in a special housing unit after a disciplinary proceeding that he claimed did not satisfy the procedural due process set forth in *Wolff v. McDonnell*.<sup>58</sup> First, Rehnquist juxtaposed "atypical and significant hardship" with "ordinary." Then he leveled the distinction between "disciplinary segregation" and "administrative segregation and protective

custody": the conditions mirror each other, except for "insignificant exceptions." What does "atypical" or "significant" mean in the prison context? As the dissenters complained, the majority left "consumers of the Court's work at sea, unable to fathom what would constitute an 'atypical, significant deprivation'" (32).

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 super-maximum 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 food 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.

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 treatment," 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."

Because I believe that judicial attention to terminology and definition can undermine 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. The qualifying practices of the Rehnquist Court, for example, make a history of deprivation matter only when "sufficiently serious," or punishment count only when involving "more than ordinary lack of due care,"

or conditions unconstitutional when they pose a "substantial risk of serious harm" or result in "grievous loss." Verbal qualifiers gut the substance of suffering in favor of increasingly rarified rituals of definition. What, after all, does the Court mean by *sufficiently, more than ordinary, substantial, or grievous*? Although apparently harmless, the imprecision of these terms neutralizes the obvious, making it impossible to rule on Eighth Amendment violations.

In the wake of the formulaic appeal to "evolving standards of human decency" and 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. Although 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 (including gang members or "strategic threat groups," the mentally ill or "special needs groups," and protective custody). As William Bailey, the classification specialist at the Arizona Department of Corrections, explained: "They're not detention units, they're not punishment units, contrary to what inmates would like you to believe. They are general population units for the highest risk inmates. In a lot of respects, they're just regular places."<sup>59</sup> By turning away from *punishment* and concentrating on *procedures*, the administration of exceptional punishment itself becomes unexceptional. Thus, a rare and disciplinary condition once known as "solitary" can be redefined as a normal and general condition for those held under "close," "special," or "secure" management.

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 senseless bums."<sup>60</sup> 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 enslaving those whose nature fit them for nothing else. Yet the argument of nature becomes more sinister when applied literally, not figuratively, to the prisoner. Whether deemed precious objects due to the trappings of romance (which often masked the extremity of violation) or evil agents insofar as they committed a crime, the slaves' legal status was continuously glossed. In the acuity and nuancing of these



debates lay the success of slavery in the southern United States. 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—it is striking that in contemporary case law the prisoner remains deprived of the moral, affective, and intellectual qualities sometimes granted to slaves.<sup>61</sup>

In contemporary cases, the old connection with slave status obscured and negative personhood assumed, the prisoner as dead in law is never discussed but simply assumed in a silence that assures that the actual habitats for incarceration—the technological nuts and bolts of brutalization—transform prisoners into a mass of not just servile but idle matter or waste product. 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 rock-bottom necessities for thought, feeling, or will; what an earlier court judged essential to “human dignity” or “intrinsic worth.”

Just as southern case law was unique regarding slaves and their rights and disabilities, the current treatment of criminals in super-maximum security or control units and through state-sponsored execution remains singular in the so-called civilized world. In response to the federal judicial activism of the late 1960s and early 1970s, cases as diverse as *Rhodes v. Chapman* (1981) and *Wilson v. Seiter* (1991) laid the ground for a theory of punishment that implied that incapacitation and vengeance, as well as barbaric prison conditions, might no longer be Eighth Amendment violations.<sup>62</sup> The slave codes of the southern United States delimited the bodily punishment of slaves and commanded that they receive clothing, food, and lodging *sufficient to their basic needs*. In *Creswell's Executor v. Walker* (1861), for example, slaves, although dead to civil rights and responsibilities, retained their “value as human beings . . . endowed with intellect, conscience, and will.”<sup>63</sup> Given this value, laws had to maintain slave lives. In other words, the subtext for these exercises in regulatory beneficence reads: “How much can you take away and still leave a ‘human being?’” *Creswell's Executor* argues that they must have “a sufficiency of healthy food or necessary clothing . . . and the master cannot relieve himself of the legal obligation to supply the slave's necessary wants” (237).

This legal drive to ordain *what will suffice* bears an unsettling resemblance to the way U.S. courts have traditionally interpreted the cruel and unusual punishment clause in the Eighth Amendment. Yet, as I suggest, in recent conditions of confinement cases especially, the Supreme Court has, through a series of qualifi-

cations, adopted the corporeal punishment paradigm for the claims of convicted criminals: recognizing only *tangible harm*, *significant injury*, or *visible marks* as valid for an Eighth Amendment claim. In a penal system that has become instrumental in managing the dispossessed and dishonored, the delimitation in *Rhodes v. Chapman* of the “minimal civilized measure of life's necessities” or the “basic necessities of human life” (347) implies something unique about “lives” caught in the grip of legal procedures. Like the slave whose servile body had yet to be protected against *unnecessary* mutilation or torture, the criminal is reduced to nothing but a physical entity, suggesting that the term *human* in the phrase “a single, identifiable human need such as food, warmth, or exercise” in *Wilson v. Seiter* both suspends and redefines what we mean by human.

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.<sup>64</sup> The court's far-reaching relief order constituted the broadest application ever of the Eighth Amendment to prison conditions, condemning “the cold storage of human beings” (307) and “enforced idleness” as a “numbing violence against the spirit” (293). By the 1990s, however, as if in response to the *Laaman* court's focus on practices that made prisoner “degeneration probable and reform unlikely,” conditions of confinement cases became the impetus for a new penology that emphasized incapacitation. 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).<sup>65</sup> This class action suit against Pelican Bay State Prison singled out the Special Housing Unit (SHU) as the locale for dehumanization.

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]” (1155). Although 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" (1279), citing failure to provide adequate medical and mental health care and condoning a pattern of excessive force. Yet although he acknowledged that conditions in the SHU, the separate, self-contained super-maximum complex, "may well hover on the edge of what is humanly tolerable for those with normal resilience" (1280), 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 the 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" (1167). 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 social isolation and reduced environmental stimulation" (1265), he then turned to constitutional minima. Although 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" (1260-61). 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 disorders, brain damage or mental retardation, impulse-ridden personalities, or a history of prior psychiatric problems or chronic depression" (1235-36).

Who is to decide which prisoners are at a "particularly 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 admitted, 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 although Henderson prohibited punishment that will 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 "conditions 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" (1263). 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 misery," his real concern remains focused on abuse to the body or the already 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 prisoner is legally recognized only insofar as he is either mentally impaired or physically damaged.<sup>66</sup>

Although 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" (1264). 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*. And the strict meaning of legal punishment, for Justices Scalia and Thomas, especially, gets its charge from a peculiar turn to eighteenth-century criminal law.<sup>67</sup>

In *Wilson v. Seiter* (1991), Justice Scalia focused on the meaning and extent of punishment. Pearly Wilson, an inmate at the Hocking Correctional Facility in Ohio, brought a *pro se* lawsuit alleging that conditions in the prison, including overcrowding, excessive noise, inadequate heating and ventilation, and unsanitary dining facilities violated the Eighth Amendment. Adopting the "subjective component" standard of *Estelle v. Gamble* (1976), which concerned the "deliber-

ate indifference to serious medical needs," Scalia went further. In this sharply divided decision, Scalia, writing for the five-member majority, defined "punishment" and elaborated Judge Richard Posner's return to the legal history of the term in *Duckworth v. Franzen* (1985) as "a deliberate act intended to chastise or deter."<sup>68</sup> The Supreme Court ultimately required not only an objective component ("was the deprivation sufficiently serious?") but also 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" (5). In other words, 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" (9).

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. If the objective severity of conditions (a "sufficiently serious" deprivation) is only judged unconstitutional when the subjective intent of those controlling the conditions is present, Eighth Amendment violations are increasingly difficult if not impossible to prove. As Justice 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 *Wilson* majority determined that "deliberate indifference" lay somewhere between the poles of "purpose or knowledge" on one hand and "negligence" on the other. Further, the personhood of the confined prisoner is caught between

two extremes, held in the grip of two prongs of analysis: the punishment "formally meted out" by the sentencing judge and the "wanton" state of mind of the inflicting officer. What, then, is the legal personality of the criminal, once caught between these acknowledged acts of will or agency? If we limit the task of definition to *Wilson*, the intangible self, the *thinking thing* becomes detached from the criminal while the body comes forth as the focus: only the physical harm arising from conditions of confinement matters as evidence. What happens when a prisoner wants to claim psychological pain or mental suffering? If we follow the logic of this case, the full force of the mental (it gets to be wanton, malicious, obdurate, willful) is transferred to the person of the government official, while the mind, through the defining claims of legal reasoning, is literally sucked out of the prisoner. 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"—the severity of conditions of confinement—no longer matters 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: that which accords with the substandard or 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 persons. 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 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 Brennan in his concurring opinion in *Furman v. Georgia* 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 non-humans, as objects to be toyed with and discarded."<sup>69</sup> 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 more than twenty years since Brennan's condemnation of the death penalty, the court 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 by having allowed 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 decreation 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*, Judge Christian created the "slave of the state," bereft of everything except "what the law in its humanity accords to him" (796). 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 of darkness into enlightenment. In a lengthy digression in *Furman* on the meaning of the words "cruel and unusual,"

Judge 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" (145) of the Eighth Amendment. In this severe rephysicalizing of civil death, inmates make the wounding of the body recall the tortures of the soul. They have returned to the drawing and quartering, disemboweling, and blood-letting of old in order to testify to their continuation in other forms.

#### A POSTSCRIPT: QUERING 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? The image of persons locked down in cells, where the senses are deprived (nothing to see, no one to touch, nothing to do), can be said, in a specific but extremely real sense, to appear virtually as a *Cartesianism in extremis*. In his "Second Meditation," Descartes supposes: "I have no senses. Body, shape, extension, movement and place are chimeras. . . . I have no senses and no body. This is the sticking point: what follows from this?"<sup>70</sup> In the maddening solitude of the special cell, the inmate left alone with his mind, a thinking thing, does not have the luxury of ruminating on doubt, experimenting with the limits of thought thinking itself through. Although immured in lack, his incapacitation does not serve as source of identity but rather as cause of imbecility or proof of invalidity: the self become perishable and managed as waste.

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, extended the logic of criminality and exclusion. Being dead in law thus sustained the image of the servile body necessary for the public endorsement of dispossession. That the juridical realm concerns itself now most with the inmate's body (whether beaten to a pulp or kept intact, treated brutally or decently) in considering Eighth Amendment violations becomes a cruel gloss on Descartes's method. For whereas he removes all that is bodily in order to confront the mind making personhood, the legal determination attends only to what is bodily in order to demolish personhood. Like the sorcery that chains the spirit to dog flesh, juridical reason defines a new legal body that buries the mind, recognizing only the corporeal husk emptied of thought. In their varying self-mutilations, then, inmates externalize their thought, making mind matter.

## NOTES

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- 1 Conversation (names withheld) Port-au-Prince, Haiti, June 1992.
- 2 Thomas Dumm, *Democracy and Punishment: Disciplinary Origins of the United States* (Madison: University of Wisconsin Press, 1987), 6. As I wrote in "Poe, Persons, and Property," *American Literary History* 11.3 (fall 1999): 406, Poe understood how the penitentiary, figured in tales such as "The Pit and the Pendulum" and "The Masque of the Red Death," became the material apparatus necessary to the ideal of a liberal republic.
- 3 Gustave de Beaumont and Alexis de Toqueville, *On the Penitentiary System in the United States, and Its Application in France*, trans. Francis Lieber (Philadelphia: Carey, Lea & Blanchard, 1833), 47.
- 4 William Blackstone, *Commentaries on the Laws of England*, 4 vols. (1769; Chicago: University of Chicago Press, 1979), 1:121. Subsequent citations are given parenthetically in the text.
- 5 For a rather different take on how the discursive construction of the legal body facilitates domination, see Alan Hyde, *Bodies of Law* (Princeton: Princeton University Press, 1997).
- 6 Orlando Patterson, *Slavery and Social Death: A Comparative Study* (Cambridge: Harvard University Press, 1982), 22.
- 7 See Blackstone, *Commentaries*, 2: 121, 4: 374–81; "Legislation: Civil Death Statutes—Medieval Fiction in a Modern World," *Harvard Law Review* 50 (1937): 968–77; and, especially, Kim Lane Scheppelle, "Facing Facts in Legal Interpretation," *Representations* 30 (1990): 42–77.
- 8 Thomas Blount, *Nomo-lexikon, a Law Dictionary: Interpreting Such Difficult and Obscure Words and Terms As Are Found Either In Our Common or Statute, Ancient or Modern Lawes: With References to the Several Statutes, Records, Registers Law-books, Charters, Ancient Deeds, and Manuscripts, Wherein the Words Are Used: and Etymologies, Where They Properly Occur* (England: In the Savoy; Printed by Tho. Newcomb, for John Martin and Henry Herringman, 1670).
- 9 Nathan Bailey, *An Universal Etymological English Dictionary: and An Interpreter of Hard Words* (London: Printed for J. Buckland, J. Beecoff, W. Strahan, Hinton, 1773). Bailey 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," then finds

another definition of "Taint" in "corrupted as meat, smelling rank," and, finally, he gives stench to the criminal, as he defines "Tainted" as "convicted of a Crime, having an ill Smell" (n.p.).

- 10 A. W. B. Simpson, 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" (*A History of the Land Law* [Oxford: Clarendon Press, 1986], 20).
- 11 "Attain" and "attainder" come through Norman French from Latin at *tingo*, *-tingere*, *-tigi*, *-tactum* (the base of which is the latin *tango*, etc., meaning to touch, strike, attack), which was then subsequently warped in its meaning by erroneous association with the French *taindre*, *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 the English *taint* and *tinge*). See John Cowell's singular exception in *The Interpreter: or Book Containing the Signification of Words*. (London: F. Leach, for distribution by Hen. Twyford, Tho. Dring, and Io. Place, 1658), where he recognizes the source of attainted (*attinctus*) in the French *teindre* or else of *attaindre*, with a further link to the French *estre atteint* and *vayncu en aucuncas*: "Which maketh me to think that it rather commeth from (*attaindre*) as we would say in English caught, overtaken, or plainly deprehended" (np).
- 12 Winthrop Jordan, *White over Black: American Attitudes toward the Negro, 1550–1812* (New York: Norton, 1977), 15.
- 13 See Thomas Cobb, *An Inquiry into the Law of Negro Slavery in the United States of America* (1858; New York: Negro Universities Press, 1968), for a discussion of the contagion of slavery in Europe long before subjection 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."
- 14 In *The West Indian Slave Laws of the 18th Century* (London: Ginn and Company, Caribbean Universities Press, 1970), Elsa V. Goveia 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 much reduced the possibility that the slave could ever be regarded as "an ordinary man," but must be legally reduced 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. See *Somerset v. Stewart*, 98 Eng Rep 499, KB 1772. 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" (20–21).

- 15 Alexis de Tocqueville, *Democracy in America* (New York: Everyman's Library, 1994), 357–58.
- 16 Virginia Dominguez, *White by Definition: Social Classification in Creole Louisiana* (New Brunswick, NJ: Rutgers UP, 1986), italics mine.
- 17 For a discussion of the taxonomic intricacies and legal effects of French colonial mixing, see Jean-Luc Bonniol, *La couleur comme maléfice: Une illustration créole de la généalogie des Blancs et des Noirs* (Paris: Albin Michel, 1992); Joan Dayan, *Haiti, History, and the Gods* (Berkeley: University of California Press, 1995); and Yvan Deb-basch, *Couleur et liberté: Le jeu du critère ethnique dans un ordre juridique esclavagiste* (Paris: Librairie Dalloz, 1967).
- 18 Bryan Edwards, *The History, Civil and Commercial, of the British Colonies in the West Indies*, 2 vols. (Dublin: Luke White, 1793–1794), 2: 17–18.
- 19 *Journals of the Assembly of Jamaica*, III, 124, of March 30, 1733, cited in Edward Brathwaite, *The Development of Creole Society in Jamaica, 1770–1820* (Oxford: Clarendon Press, 1971), 167–68.
- 20 James Kent, discussing the “Rights of Persons” in *Commentaries of American Law* (1826; Boston: Little, Brown, 1873), Vol. 2, Part 4, Lect. 25, considering the one-eighth rule in Louisiana, the French colonies, and 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” (72–73).
- 21 In *Southern Slavery and the Law*, Thomas Morris explains how vague and sometimes capricious were definitions of the mulatto. Turning to the 1785 Virginia law (which 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 other states “did not produce statutory definitions: it was a matter of observation in those jurisdictions” (Chapel Hill: University of North Carolina Press, 1996, p. 23).
- 22 See Cheryl L. Harris, “Whiteness as Property,” *Harvard Law Review* 106, no. 8 (June 1993): 1707–91.
- 23 Michel Foucault, *Discipline & Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Vintage, 1979), 34.
- 24 In British colonial law, according to Goveia, 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” (*The West Indian Slave Laws*, 25).
- 25 Jonathan A. Bush, “Free to Enslave: The Foundations of Colonial American Slave Law,” *Yale Journal of Law and Humanities* 5 (1993): 417–70.

- 26 See the brilliant early treatment of the quest for sources of the legal notions that helped to define American slave law: Thomas D. Morris, “Villeinage . . . as it existed in England, reflects but little light on our subject’: The Problem of the ‘Sources’ of Southern Slave Law,” *American Journal of Legal History* 32 (1988): 95–137.
- 27 Cobb, *An Inquiry into the Law of Negro Slavery*, 84.
- 28 *The State of Mississippi v. Issac Jones* 1 Miss 83, Mississippi 1821.
- 29 What Patterson in *Slavery and Social Death* 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 one 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 her of what white persons (who do not need the law in order to exist or be recognized) are due by nature or under God. Slave law thus both creates and contains the subject, scrutinizes and redefines the person in law.
- 30 Kent, *Commentaries on American Law*, 256–57.
- 31 Civil Rights Cases 3 S. Ct. P. 18 US 1883: 26.
- 32 These disabilities include denial of such privileges as voting, holding public office, obtaining any 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* (Washington, D.C.: Human Rights Watch; New York: Sentencing Project, 1998), 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,” concluded the report, “including over one million who have fully completed their sentences” (n.p.).
- 33 *Ruffin v. Commonwealth* 62 VA 790 (1871): 796.
- 34 See, for example, the dissents in *Jones v. North Carolina Prisoners Labor Union, Inc.*, 433 U.S. 119 (1977) (Marshall dissenting, joined by Brennan); *Meachum v. Fano*, 427 U.S. 215 (1976) (Stevens dissenting, joined by Brennan and Marshall); *Lewis v. Casey*, 518 U.S. 343 (1996) (Stevens dissenting).
- 35 104th Cong., 2d sess., S. 735, April 29, 1996. See Title IV, “Terrorist and Criminal Alien Removal and Exclusion,” Sec. 440, 62.
- 36 In *Remnants of Auschwitz: The Witness and the Archive*, trans. Daniel Heller-Roazen (New York: Zone Books, 1999), see Agamben’s compelling discussion of why Primo Levi, in dealing with the *Muselmänner*, states “one hesitates to call their death death,” and his explanation of the “fabrication of corpses” as a way to understand those who, in Heidegger’s words, do not die, but “decease. They are eliminated. They become pieces of the warehouse of the fabrication of corpses” (cited by Agamben on pp. 73–74).
- 37 *Trop v. Dulles*, 356 U.S. 86, 598 (1958).
- 38 For examinations of this inventive reenslaving, see David M. Oshinsky’s argument in “Worse than Slavery”: *Parchman Farm and the Ordeal of Jim Crow Justice* (New York:



- Free Press, 1996) that the post-Emancipation criminal code was initiated as a vehicle of racial subordination. See also Alex Lichtenstein's study of convict lease and the subsequent public chain gang in *Twice the Work of Free Labor: The Political Economy of Convict Labor in the New South* (London: Verso, 1996); and the exhaustive chronicle of imprisonment as crucial to the American experience in Scott Christianson's *With Liberty for Some: Five Hundred Years of Imprisonment in America* (Boston: Northeastern University Press, 1998).
- 39 Beaumont and Tocqueville, *On the Penitentiary System in the United States*, 5, 15.
- 40 Elisha Bates, *The Moral Advocate: A Monthly Publication on War, Duelling, Capital Punishments, and Prison Discipline*, (Mt. Pleasant, OH: Printed by the Editor, 1821–1822), 1: 171.
- 41 William Crawford, "Report on the Penitentiaries of the United States, Addressed to His Majesty's Principal Secretary of State for the Home Department" (London: House of Commons, August 11, 1834, 26–27).
- 42 Charles Dickens, *American Notes and Pictures from Italy* (1842; New York: Oxford University Press, 1957), 99–100.
- 43 William Roscoe, *A Brief Statement of the Causes which have led to the Abandonment of the Celebrated System of Penitentiary Discipline in Some of the United States of America* (Liverpool: Harris and Co., 1827).
- 44 Roberts Vaux, "Letter on the Penitentiary System of Pennsylvania, addressed to William Roscoe, Esquire" (Philadelphia: Printed by Jesper Harding, 1827), 9.
- 45 *Weems v. United States* 217 U.S. 349 (1910).
- 46 *Sullivan v. State of Georgia* 194 U.S. 410 (1972).
- 47 *Mr. Death: The Rise and Fall of Fred A. Leuchter, Jr.*, dir. Errol Morris. Quotations from the film are my transcriptions.
- 48 *Louisiana Ex Rel. Francis v. Resweber*, 329 U.S. 459 (1947).
- 49 See Anthony F. Granucci, "'Nor Cruel and Unusual Punishments Inflicted': The Original Meaning," *California Law Review* 57 (1969): 839–65.
- 50 *In Re Kemmler*, 136 U.S. 436 (1890); *In Re Medley*, 134 U.S. 160 (1890).
- 51 "An Act for Preventing the Horrid Crime of Murder," Act 25, George II, c. 37, 1752, 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," Act 6 and 7, William IV, c. 30, 1836, 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, came under the new name of "separate confinement, inflicted in all cases as the regular and appointed mode of punishment" (Sir James Fitzjames Stephen, *A History of the Criminal Law of England* [London: Macmillan, 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.

- 52 See Raymond H. Thoenig, "Solitary Confinement—Punishment within the Letter of the Law, or Psychological Torture?" *Wisconsin Law Review* 1 (1972): 233.
- 53 Conversation (name withheld). Port-au-Prince, Haiti, June 1992.
- 54 In *Bell v. Wolfish*, 441 U.S. 520 (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 the brief period of advancing prisoner's 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" (547).
- 55 The transfer of the criminal's requisite mental element (*mens rea*) to the prison official's state of mind (whether "sufficiently culpable," "unnecessary and wanton," "deliberately indifferent," or "malicious and sadistic") forms part of a chapter devoted to the subject of legal guilt and subjective blameworthiness in my book *Held in the Body of the State* (Princeton: Princeton University Press, forthcoming).
- 56 *Sandin v. Conner*, 515 U.S. 472 (1995). See Joan Dayan, "Held in the Body of the State: Prisons and the Law," in *History, Memory, and the Law*, ed. Austin Sarat and Thomas R. Kearns (Ann Arbor: University of Michigan Press, 1999), 202–14.
- 57 *Atiyeh v. Capps*, 449 U.S. 1312, 1315–16 (1981).
- 58 *Wolff v. McDonnell*, 418 U.S. 539 (1974).
- 59 Personal interview with William Bailey, Phoenix, Arizona (June 8, 1996). For an extended analysis of the Special Management Units in Florence, Arizona, and the strategic use of recent case law, see Dayan, "Held in the Body of the State."
- 60 Interview (name withheld), Arizona State Prison Complex, Tucson AZ, August 10, 1995.
- 61 Note especially the arguments of A. Leon Higginbotham Jr. and Barbara K. Kopytoff in "Property First, Humanity Second: The Recognition of the Slave's Human Nature in Virginia Civil Law," *Ohio Law Journal* 50, (1989) 511–40; and A. E. Keir Nash's remarkable and controversial analysis of the legal treatment of slaves, in "Reason of Slavery: Understanding the Judicial Role in the Peculiar Institution," *Vanderbilt Law Review* (January 1979): 7–218, which includes discussions of Robert Cover's *Justice Accused: Antislavery and the Judicial Process* (New Haven: Yale University Press, 1975); Mark Tushnet's *The American Law of Slavery 1810–1860: Considerations of Humanity and Interest* (Princeton, NJ: Princeton University Press, 1981); and Martin Hindus's "Black Justice under White Law: Criminal Prosecutions of Blacks in Antebellum South Carolina," *Journal of American Legal History* 63, (1976).
- 62 *Rhodes v. Chapman*, 101 S. Ct. 2392 (1981); *Wilson v. Seiter*, 501 U.S. 294 (1991).
- 63 *Creswell's Executor v. Walker*, 37 Ala. 233 (1861).
- 64 *Laaman v. Helgemoe*, 437 F. Supp. 269 (1977).
- 65 *Madrid v. Gomez*, 889 F. Supp. 1146 N. D. Cal. 1995.
- 66 Giorgio Agamben's *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Rozzen (Stanford: Stanford University Press), came to my attention after my experiences in and writing about the Special Management Units in Florence, Arizona. His analyses of *bare life*, the "life that has been deadened and mortified into juridical rule," the "life which ceases to be politically relevant . . . and can as such be eliminated

without punishment" (139) are necessary reading if we are truly to understand the function of the prison and the criminal in the contemporary United States.

67 See Thomas and Scalia's dissents in *Hudson v. McMillian*, 503 U.S. 1, 112 S. Ct. 995 (1992) and *Helling v. McKinney*, 509 U.S. 25, 113 S. Ct. 2475 (1993). The majority opinion in both cases broke with the severe delimitation of cruel and unusual punishment (the "significant injury" requirement, e.g. leaving permanent marks or requiring medical attention) as argued in *Wilson v. Seiter*. These two cases also expanded the concept of "injury," and yet in *Hudson* Blackmun in his concurring opinion (aware of what the Court had left unsaid) felt he needed to make explicit the inclusion of the "psychological" as well as the "physical": "As the Court makes clear, the Eighth Amendment prohibits the unnecessary and wanton infliction of 'pain,' rather than 'injury.' 'Pain' in its ordinary meaning surely includes a notion of psychological harm" (16).

68 *Wilson v. Seiter*, 501 U.S. 294 (1991). See also: *Duckworth v. Franzen*, 780 F2d 645, 652 (C.A. 7 (Ill.) 1985).

69 *Gregg v. Georgia*, 210 S.E. 2d 659, GA 1974.

70 René Descartes, "Second Meditation," *Meditations on First Philosophy*, in *The Philosophical Writings of Descartes*, 2 vols., trans. John Cottingham, Robert Stoothoff, and Dugald Murdoch (Cambridge: Cambridge University Press, 1984), 2: 16.

RICHARD R. FLORES

*Mexicans in a Material World:  
From John Wayne's The Alamo to Stand-Up  
Democracy on the Border*



*Republic. I like the sound of the word.*

*Means people can live free, talk free, go or come, buy or sell.*

—John Wayne (as Davy Crockett), *The Alamo*

DON: (dialing) (Here's) a story about a city in Texas, El Sneeze-O. Somebody threw pepper in my face. I have to El Sneeze-O. A tiny community 15 miles from Laredo . . . where they have made Spanish their official language. I cannot be more pissed off . . . (phone keeps ringing). Right there, right there, you've got your Mexican work ethic. They aren't answering the phone. (Using heavy accent) It's siesta time . . .

MIKE: I need a dreenk . . . I am obviously drunk . . . Make sure you leave the cellar open so we can come and sleep it off.—*The Don and Mike Radio Show*, August 17, 1999

Mexicans. Democracy. The public. In this essay I want to advance the notion of a generalized relationship between Mexicans, U.S. democracy, and the public through its crystallization in two events: John Wayne's film *The Alamo*, released in 1960 during the waning days of American high modernism, and a widely broadcast episode of *The Don and Mike Radio Show* from August 1999 when Don and Mike made a telephone call to the innocuous town of El Cenizo, Texas. These two examples are key markers in a generalized historical trajectory that demonstrates how U.S. democratic ideals of liberty and freedom continue to be forged on practices of cultural imperialism that advance a democratic nationalism founded on hierarchicalized and punitive practices of difference. We learn, I suggest, in anticipation of the full weight of my argument, how democracy in the United States—as a set of both practical and principled ideals—privileges not only wealth and property but more so the material relations of inequality that form the cornerstone of privilege and rank in our society. As such, the ideals of liberty, justice, and freedom serve as radical reminders of what democracy is not.