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Abstract

If Foucault's metropolitan world of public torture--"the great spectacle of physical punishment,"--died out by the beginning of the nineteenth century, the punitive spectacle and its requisite bodies were resurrected in the colonies. 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. Although strategies of divestment were already present in the rights of property and privilege at common law, and later tied to the definition of property in persons; black slaves, regarded as outside the social order, gave new genetic capital to the principles of tainted blood, bondage, and servility.

Cruel and Unusual: Parsing the Meaning of Punishment

Joan Dayan

> ...even a dog distinguishes between being stumbled over and being kicked. O.W. Holmes (1881)

If Foucault's metropolitan world of public torture--"the great spectacle of physical punishment,"--died out by the beginning of the nineteenth century, the punitive spectacle and its requisite bodies were resurrected in the colonies. 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. Although strategies of divestment were already present in the rights of property and privilege at common law, and later tied to the definition of property in persons; black slaves, regarded as outside the social order, gave new genetic capital to the principles of tainted blood, bondage, and servility.

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." How did civil death affect rights of property and privilege at common law? There were three principle incidents consequent upon an attainder for treason or felony: forfeiture, corruption of blood, and the extinction of civil rights, more or less complete. Of Saxon origin, forfeiture was part of the punishment of crime by which goods and chattels, lands and tenements of the attainted felon were forfeited to their victims' kin. 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." (1769: 254)

I distinguish civil death from other legal sanctions since the concept and its attendant disabilities maintained both a strictly hierarchical order and the race defilement on which that order depends. Corruption of blood operated practically as a severing of blood lines, thus cutting off inheritance, but also 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. 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.

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, though a sign of despotism so extreme as to herald "the alarm of tyranny throughout the whole kingdom," is not as serious an attack on personal liberties as "confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten." For imprisonment, being "a less public" and "a less striking" punishment is "therefore a more dangerous engine of arbitrary government." (I:131) Civil death in the United States, though 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. Though 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. 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 would henceforth be free, though still liable to be servants of the mother's proprietor. (Kent: 256-257) As the gradual abolition of slaves began, the revised statute revived disabilities in a new context. Chancellor James Kent, who had lamented the severity of colonial slavery in New York, what he called "that great moral pestilence," argued that the radical incapacities now attached to imprisonment for life were not "declaratory of the common law, but created a new rule." In *Platner v. Sherwood* (1822), he condemned this extended deprivation of property, the ban on inheritability: "The strict civil death seems to have been confined to the cases of persons professed, or abjured or banished the realm; and I do not find that it was ever carried further by the common law."

In the US Constitution, honors and crimes were no longer to be hereditary. Yet though 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." Words would continue to work wonders on the meaning of the Constitution, perhaps nowhere so boldly as in their inventive perpetuation of civil death. Though Article 3 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 upon 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.1 In October 1998, *Human Rights Watch* and *The Sentencing Project* published *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States*, linking "slavery," "civil death," and contemporary legal disabilities "that may be unique in the world." "An estimated 3.9 million U.S. citizens are disenfranchised," concluded the report, "including over one million who have fully completed their sentences."

A criminal punished with "civil death" became the "slave of the state," as so aptly put in *Ruffin v. Commonwealth*. (1871) Once incarcerated, the prisoner endured the substance and visible form of disability, as if imaginatively re-colored, bound, and owned. Called upon 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." 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, recalled by Justices Marshall, Brennan, and Stevens, as if exhuming for the Rehnquist Court the state-sanctioned bondage the Court will not name.2

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?." (104th Congress 1996: sec. 440, 62) 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? 3

Imprisonment offers the opportunity to apprehend how the condition of being *civilter 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 ex-slaves 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, and in *Trop v. Dulles* (1958) would much later be adjudged 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." (598)

Though this resurrection of slavery is often discussed in the turn to convict labor and the criminalization of blacks in the post-bellum South,4 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. De Beaumont and de Tocqueville in their study *On the Penitentiary System in the United States* contrasted corporal punishment with "absolute isolation", a unique and severe punishment, warning that "this absolute solitude, if nothing interrupt it, is beyond the strength of man; it destroys the criminal without intermission and without pity; it does not reform, it kills." (1833: 5) Depression, insanity, and suicide led Beaumont and de Tocqueville to contrast the "punishment of death and stripes" for slaves with the "separate system" for criminals, implying that the unique deprivation fixed in the mind was far more cruel than corporal discipline. (15) Although civil death might seem a more "decent" alternative than execution, the legal fiction molds the prisoner as if dead into the symbolically executed, a fate worse 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." (1821: 171)

In suggesting that prolonged solitary confinement operated as another form of death, I emphasize that

the deeply Cartesian understanding of punishment in the United States resulted in a kind of epistemological double whammy: the threat of bodily death countered by the spectacle of psychic degeneration. I am, therefore, arguing that the solitary environment must be figuratively understood as a place that entombs the inmate. As we will see, the legal understanding of punishment, once concentrated on the physical, would take advantage of the fact that mental disintegration does not necessarily leave any physical trace. And unlike the ritual of execution, there is no public audience inside the prison cell and thus no need to protect witnesses from blood, smoke, gasps, or jerks.

William Crawford (1834) reporting on "the Penitentiaries of the United States" to the House of Commons before the abolition of slavery, 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.." (1834: 26-27) The Thirteenth Amendment to the Constitution (1865) marked the discursive link between the civilly dead felon and the slave or social non-person, articulating the locus of redefinition where criminality could be racialized and race criminalized. The chiasmus that had previously made racial kinship a criminal affiliation, once readjusted to the demands of incarceration, resulted in a novel banishing and exile. This amendment, too often obscured by attention to the Fourteenth Amendment, is key to understanding how the burdens and disabilities that constituted the badges of slavery took powerful hold on the language of penal compulsion. Outlawing slavery and involuntary servitude "except as punishment of crime 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 demonstrate how the prison had become the materialization, the shape and container, for what had been the language of civil death.

> The system here, is rigid, strict and hopeless solitary confinement. I believe it in its effects to be cruel and wrong. I hold this slow and daily tampering with the mysteries of the brain, to be immeasurably worse than any torture of the body." 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. (1842: 99-100)

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." (1827) But the Quaker reformer Benjamin Rush argued that criminality called for expiation and recognized that only "secret punishment" and "ignominy" could compel repentance. Robert 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." (1827: 9)

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, though 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 de Tocqueville's *On the Penitentiary System in the United States* (1833) 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; and once removed, the convict became the visible record of the sacrifice upon which civilization maintained itself. Not only did the gradual annihilation of the person, disabled but not dead, exemplify a punishment 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 US Constitution reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Though brief, almost ghostly in its final clause, as if punishment were an afterthought, the Eighth Amendment is the only provision of the Bill of Rights that is applicable by its own terms to prisoners. As a limit on the state's power to punish, the importance of this negative guarantee 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, humanity, and dignity jockey for pre-eminence in these cases, and alternate with less expansive, more constrictive words 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* (1958) narrowed the divide between the civilized and inhuman treatment of prisoners. Both *Trop* and *Weems* extended the phraseology of punishment to mean more than physical torture. We must examine in this light the concept of dignity in *Trop* as contributing to what will become, due to the cynical logic of some contemporary justices, a ruse of beneficence. For Justice Earl Warren in *Trop*, deprivation of citizenship as punishment for desertion caused fear and psychological uncertainty, which he judged as violating the constitutional prohibition against cruel and unusual punishment. Yet the dignity formula, once used as part of the rhetorical arsenal of the Rehnquist Court, makes a fiction of rights. Recognizing the death penalty as an endpoint of abjection, "an index of the constitutional limit on punishment," the Court in *Trop*, while suggesting that loss of citizenship was inherently cruel, warned that the validation of state-sponsored execution as constitutional should not then allow "the Government to devise any punishment short of death within the limit of its imagination."

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 cruel and unusual those capital punishment statutes as had previously been enacted, and therefore instituted a constitutional moratorium. 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 upon 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, since the

terms of the argument are designated as two extreme conditions, one of which must be preferable to the other. On one hand, "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, 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's more difficult, he reflects, to take away than to give life. 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, 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. 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' 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. (Granucci 1969: 839-865) 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* (1947), 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. This paradigm attends to the body and not to 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: *In Re Kemmler* (1890) and *Medley* (1890), the first pursuing the cruel and unusual punishment standard in rites of execution and the second applying that standard to solitary confinement. The Court in *In Re Kemmler* held that a current of electricity scientifically applied to the body of a convict is a more "humane" even if "unusual" method of execution than hanging, since 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. *Medley* argued that solitary confinement, gaining its deterrent power not from the immediacy of punishment but rather through extended suffering, is unconstitutional. The Court in *Medley*, arguing against the 1889 Colorado statute that subjected the prisoner to "an additional punishment of the most important and painful character" as

forbidden by the US Constitution, emphasized the removal of the convict from the place where his friends reside, where the sheriff and attendants may see him, and where his religious adviser and legal counsel may "often" visit him. (169) What matters to the Court is the removal to "a place where imprisonment always implies disgrace," marking the prisoner as figure for "the worst crimes of the human race" and most of all, extending indefinitely the days in confinement before execution, resulting in "uncertainty and anguish." (168-171) 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. [5]

As in the perpetuation of civil death and execution, the United States has not only continued, but refined the forms of solitary confinement. In *Medley* the Court drew attention to the peculiar effects of total confinement, a gradual spiritual degradation as brutal as bodily destruction: "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 the summer of 1997, death row inmates at the Arizona State Prison in Florence were moved from Cell Block 6 to Special Management Unit II (SMU), 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 re-instituted. 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."

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 our 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 nineteen-sixties, 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 by "deference" to their specialist knowledge, has redefined the limits of pain through a language of fastidious distinctions and noncommital formulae. 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*. [6] (1979) 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. [7]

Though it might be argued that punishment earlier in the nineteenth and twentieth centuries revealed harsher examples of vengeance and retribution than those in contemporary cases, I want to suggest that there is something about the language of the contemporary Supreme Court in particular that masks what remained explicit in earlier cases. In *Ruffin*, as we have seen, Justice Christian delimited general principles such as "property" and "personhood" (yoked in the language of the Fourth, Fifth, and Fourteenth amendments) and employed an analogy to slavery in order to dislodge constitutional claims. But by the 1900s, the severity of his decree was tempered by a series of cases that dealt with convicts forced to labor without compensation as punishment for their crimes. Although the exact status of prisoners in this respect was never fully defined by the courts, in these turn-of-the-century Thirteenth Amendment decisions, both the limits of "involuntary servitude" and the means by which such servitude could be accomplished determined that the recent past of slavery weighed heavily on the argument for

basic rights. Confronting the pressures of an all-too-recent history, the memory of degradation and want, these cases reveal a grit and concreteness lacking in current legal decisions. Once contracted to labor for punishment, for example, judges were eager to remind their audience that *convicts* were not *slaves.* (Dayan 1999: 230-33)

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 plain bearable. Moreover, the language constructs a person whose status--and more precisely, whose very flesh and blood--must be distinct from the status of those outside the prison walls. The banishment and exile of feudal civil death are no longer necessary, for what Robert Cover 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"? (Dayan 1995: 202-14) Let us recall that in *Atiyeh v. Capps* Rehnquist stayed 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." (1981: 1315-6)

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. Though 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 lock-down 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*. (1974) 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.'"

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-lit 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 noncommital 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."

Since 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? Though apparently harmless, the imprecision of these terms neutralizes the obvious, and ultimately makes 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. Though taking trauma to its extreme, these places are rationalized as "general population units": the general population of those judged to be the worst inmates who repeatedly offend (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." [8] 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." 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 lock-down, recall how pro-slavery 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 in so far 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. [9]

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 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, let alone that which an earlier court judged essential to "human dignity" or "intrinsic worth."

Just as Southern case law was unique regarding slaves, 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. 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, though dead to civil rights and responsibilities, retained their "value as "human beings.. endowed with intellect, conscience, and will." Given this value, laws had to maintain slave lives. In other words, the subtext for these exercises in regulatory beneficence read: How much can you take away and still leave a "human being?" *Creswell's Executor* argued 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."

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 punishments clause in the Eighth Amendment. Yet, as I suggest, the Supreme Court has, through a series of qualifications, 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" 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. 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 nineties, 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) This class action suit against "Pelican Bay State Prison" singled out the Special Housing Unit (SHU) as the locale for dehumanization.

Before proceeding to a discussion of this lower-court case, I want to return briefly to *Rhodes v. Chapman*. The Supreme Court, concerned about the new federal judicial activism, sought to clarify the federal role in the operation of state prisons. In a series of cases, the Court entered into dialogue with the prisoners' rights movement, and as the Court legitimated continued deprivation, it made "lawful" the very structures critics had condemned. As Jonathan Willens writes: "the concern was not 'what to do' but 'how to do it.'" (1987: 45) *Rhodes* demonstrates how the terms of punishment, once defined as "reasonable," would initiate a legal grammar that turns rituals of discipline, no matter their severity, into necessity, the logical result of administrative security and regulation. In assessing the problems of overcrowding at the Southern Correctional Facility, a maximum-security state prison in Lucasville, Ohio, the Court explained that "for the first time," they would consider the Eighth Amendment's applicability to "the conditions in which a State may confine those convicted of crimes." Justice Powell, writing for the *Rhodes* majority, found no constitutional mandate for "comfortable prisons." Further, the Court argued that prison officials can impose conditions that are "restrictive and even harsh," leaving open to question just what degree of severity can violate the Eighth Amendment, if a practice is part of the penological philosophy of prison officials. *Rhodes*, as the concurring opinion by Brennan explained, could be "construed as a retreat from careful judicial scrutiny of prison conditions." As has been borne out by numerous lower-court cases, but perhaps nowhere so strikingly as in *Madrid v. Gomez*, what Justice Powell had clarified as "the penalty that criminal offenders pay for their offenses against society," would be extended and thus open the way for punishments to be deemed *unexceptional* and therefore legitimate in law and application.

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 were subjected. Chief Judge Thelton Henderson opened the case by announcing: "This is not a case about inadequate or deteriorating physical conditions. There are no rat-infested cells, antiquated buildings, or unsanitary supplies. Rather, plaintiffs contend that behind the newly-minted walls and shiny equipment lies a prison that is coldly indifferent to the limited, but basic and elemental, rights" of prisoners. Though Henderson's decision offered partial relief to some inmates for some claims, he found generally that conditions do not violate "exacting Eighth Amendment standards." In the plaintiff's favor, he found that "defendants have unmistakably crossed the constitutional line with respect to some of the claims raised by this action," citing failure to provide adequate medical and mental health care and condoning a pattern of excessive force. Yet though he acknowledged that conditions in the Special Housing Unit

(SHU), the separate, self-contained super-max complex, "may well hover on the edge of what is humanly tolerable for those with normal resilience," such circumstances remain within the limits of permissible pain.

How restrictive can prison confinement be? Henderson responded fervently to the habit of caging inmates barely clothed or naked outdoors in freezing temperatures "like animals in a zoo"; to the unnecessary and sometimes lethal force used in cell extractions; to the habit of using lock-down 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." Yet Henderson's attention to excessive force on bodies distracts attention from the less visible effects of confinement in the SHU. Conceding "that many, if not most, inmates in the SHU experience some degree of psychological trauma in reaction to their extreme isolation and the severely restricted environmental stimulation," he then turned to constitutional minima. Though minimal necessities extend beyond "adequate food, clothing, shelter, medical care and personal safety" to include "mental health, just as much as physical health," Henderson nevertheless concluded that the SHU does not violate Eighth Amendment standards "vis-a-vis all inmates." Isolation and sensory deprivation are cruel and unusual punishment only for those who are already mentally ill or those at an unusually high risk of becoming mentally ill: those who "are at a particularly high risk for suffering very serious or severe injury to their mental health.. such inmates consist of the already mentally ill, as well as persons with borderline personality disorders, brain damage or mental retardation, impulse-ridden personalities, or a history of prior psychiatric problems or chronic depression." (1235-1236)

Who is to decide which prisoners are at an "unreasonably high risk" of suffering mental trauma? Henderson and the doctors who testified in the case provided ample evidence that any extended stay in SHU causes mental deterioration and psychological degeneration. 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 though 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." The state, then, must exempt mentally ill inmates from confinement in the SHU if the inmates' illness stems from a previous occurence 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. [10]

Though it matters juridically if one is teetering on the brink of insanity or already gone over the edge, it matters not at all if one is only a little damaged, if in Henderson's words, one's "loneliness, frustration, depression, or extreme boredom" has not yet crossed over into the realm of "psychological torture." What is at stake here? If it is true that loss of civil rights as a result of conviction for felony is punishment, the question becomes one of degree. In the prison context, there is a crucial difference between complete loss of civil rights, as in the case of civil death and a "residue of rights" that remains even behind prison walls. The distinction, especially during the past fifteen years hinges on the word punishment. 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. [11]

In *Wilson v. Seiter* (1991), Justice Scalia focused on the meaning and extent of punishment. Pearly Wilson, an inmate at the Hicking 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 "deliberate indifference to serious medical

needs," Scalia went further. Writing for the five-member majority in a sharply divided decision, he defined punishment and elaborated Judge Richard Posner's return to the legal history of the term in *Duckworth v. Franzen* as "a deliberate act intended to chastise or deter." (1985: 652) 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." 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."

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" at 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, wilful) 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 non-reactive 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 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 in so far as you have lost your skin or your mind.

The cult of the remnant

What remains after the soul has been damaged, when the mind confined to lockdown for twenty-three hours a day turns on itself? The Special Security Unit (SSU) is a room in the SMU I in Florence, Arizona. An inner sanctum, it is reserved for instruments of torture: lethal shanks made from bed frames

or typewriter bars, darts made from paper clips and wrapped in paper rockets, razors melted onto toothbrushes, and pencils sharpened into pincers. The objects inmates use to mutilate themselves or others appear neatly displayed in rows on the contraband boards behind glass. "An amazing assortment of weaponry, isn't it?" the young correctional officer asked me. On the other wall near to the door through which I entered, to the left of the display of weapons, are photos commemorating the dead and the dying: inmates with slit wrists, first-degree burns, punctured faces, bodies smeared with feces, and eyes emptied of sight and pouring blood. Above this exhibit is a placard that reads, "Idle Minds Make For Busy Hands."

Justice 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." (273) The savage effects of solitary confinement, offered to visitors as the material fragments, the leavings of the doomed, urge us to ask how the law can allow such torture. Over twenty years since Brennan's moving condemnation of the death penalty, the court, I have argued, has been instrumental in mobilizing the arena for mutilation. It has ensured the legality of confinement beyond the limits of human endurance, and then, having allowed for unbearable conditions (what might reasonably be expected in prison, to paraphrase Rehnquist), it has made the captives themselves responsible for, indeed deserving of, their own 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 re-enacted the law's process of de-creation on their own bodies, making visible what the law masks. And as if in a drama of historical revision, these expressions of derangement recall not the Quaker dream of spiritual rebirth through solitude, but commemorate instead 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 allows." Here, in this room, we have the doubled figure of state and captive: the state that records, photographs, and collects the emblems of coercion, and the inmates who speak through the display, giving utterance to the inhuman face of the law. They also register an alternative history to the argument for "evolving standards of human decency" that ordained, or so it seemed, the journey out of darkness into enlightenment. In a lengthy digression on the meaning of the words "cruel and unusual" in *Furman*, 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" of the Eighth Amendment. (1972: 331) 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 bloodletting of old in order to testify to their continuation in other forms.

Postscript: Querying the spirit of law

The idea of punishment, like that of redemption, invites us to enter a place where body and mind, matter and spirit must be defined absolutely. Whether condemned or saved, God incarnate or devil's brood, the legal person, once brought into the precincts of juridical definition, is either disabled or enabled, nullified or given life. The law's power, like the rituals of belief that gave it presence, might well depend on the impossibility of definition, an impossibility that, as in the scenes of punishment I have described, becomes more palpable as the task itself becomes more obsessive.

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?" (1984: 16) 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. Though 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.

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' 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. Juridical reason thus defines a new legal body that buries the mind, recognizing only a corporeal husk devoid of thought. In their varying self-mutilations, then, inmates externalize their thought, making mind matter.

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Footnotes

1 These disabilities include denial of such privileges as voting, holding public office, obtaining many jobs and occupational licenses, entering judicially enforceable agreements, maintaining family relationships, and obtaining insurance and pension benefits.

2 See, for example, the dissents in *Jones v. North Carolina Prisoners Labor Uniton, Inc.*, 433 U.S. 119 (Marshall, J., dissenting, joined by Brennan, J.); *Meachum v. Fano*, 427 U.S. 215 (Stevens, J.,

dissenting, joined by Brennan, J. and Marshall, J.); *Lewis v. Casey*, 518 U.S. 343, (Stevens, J., dissenting).

3 In *Remnants of Auschwitz: The Witness and the Archive*, trans. by Daniel Heller-Roazen (New York: Zone Books, 1999), see Agamben's compelling discussion of why Primo Levi, in dealing with the *Muselmanner*, "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."

4 For examinations of this inventive re-enslaving, 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, 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 most recently, the exhaustive chronicle of imprisonment as crucial to the American experience, Scott Christianson's *With Liberty For Some: 500 Years of Imprisonment in America* (Boston: Northeastern University Press, 1998).

5 "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 Statues in England Relative to Offences Against the Person," Act 6 & 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, became 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 and Co., 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.

6 In *Bell v. Wolfish*, 441 U.S. 520, 547 (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 an practices that in their judgment are needed.

7 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 forthcoming *Held in the Body of the State*.

8 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."

9 Note especially the arguments of A. Leon Higginbotham, Jr. and Kopytoff, "Property First, Humanity Second: The Recognition of the Slave's Human Nature in Virginia Civil Law," 50 *Ohio Law Journal*, 511 (1989) and the remarkable A.E. Keir Nash's controversial analysis of the legal treatment of slaves, "Reason of Slavery: Understanding the Judicial Role in the Peculiar Institution," *Vanderbilt Law Review*, which includes discussions of Robert Cover's *Justice Accused*, Mark Tushnet's *The American Law of Slavery*, and Martin Hindus's "Black Justice Under White Law: Criminal Prosecutions of Blacks in Antebellum South Carolina," 63 *Journal of American Legal History*, 575 (1976).

10 Agamben's *Homo Sacer* (1999) 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" are necessary reading if we are truly to understand the function of the prison and the criminal in the contemporary United States.

11 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*. 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."