2012

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Publication Details
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Abstract
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Keywords
genealogies, usual, u, business, law, fantasies, perverts, terrorists

Disciplines
Arts and Humanities | Law

Publication Details

This journal article is available at Research Online: http://ro.uow.edu.au/lhpapers/436
“PERVERTS,” “TERRORISTS,” AND BUSINESS AS USUAL: FANTASIES AND GENEALOGIES OF U.S. LAW

Penelope Pether.

The indefinite detention camp at Guantánamo Bay, Cuba, is exceptional in diverse ways. It is not only the postmodern exemplar of the jurisdiction of exception into which, Raphael Gross has argued, Carl Schmitt’s political theory conjured a paradigm of nation and other rooted in anti-Semitism and other supremacist doctrines of hatred, which moved from theory to praxis in the death camps of the Shoah; it also embodies what I have called the New American Exceptionalism of the post-9/11 era. In that iteration, the U.S. makes imperialist war in the pattern of the Crusades, accompanied in the contemporary domestic political realm by a discourse of pseudo-Christianity that is authoritarian, militant, and violently intolerant, an uncanny refraction of Schmitt’s figuring of the Jew as the interpellator of a secularism that he claimed robbed Christianity of its authority within the Reich. And our lust for the spectacle of dead enemies evidences, pace Foucault, a recrudescence of the medieval desire for the spectacle of state power inscribed on the bodies of the enemies of the State.

That exported state violence was—until its various costs suddenly became visibly untenable to our political elites—discursively constructed as necessary to save what we have come to call—with a measure of forgetful tone-deafness—“the homeland” from threats caused by ex-

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3 I have in mind here the various contemporary state level initiatives in the U.S. to ban Sharia law, and Pastor Terry Jones’s Koran burning.

4 This was seen most recently in the furor over the video disseminated via the internet that purported to show members of the U.S. military urinating on the corpses of members of the Taliban.
cesses of former allies, colonially-fabricated “nations” whom we formerly supplied with cash and the technologies of war.

While the weaponry delivered to Saddam Hussein during the Iran–Iraq war—like that provided to the Mujahideen in Afghanistan—was funded by the military-industrial complex, but sourced elsewhere, the military training and special operations assistance and direct military involvement in that campaign were distinctively of our own manufacture, or as Ted Koppel reported in 1992 on ABC’s Nightline, “[i]t is becoming increasingly clear that George Bush, operating largely behind the scenes throughout the 1980s, initiated and supported much of the financing, intelligence, and military help that built Saddam’s Iraq” into the power it became and that the “Reagan/Bush administrations permitted—and frequently encouraged—the flow of money, agricultural credits, dual-use technology, chemicals, and weapons to Iraq.” Likewise, both Democratic and Republican administrators provided support to the Mujahideen in Afghanistan, which ran into billions of dollars and gave birth to the Taliban.

Fantastic, then, inscribed on that history as palimpsest, are the wars waged in the name of our postmodern Crusade: The first continued despite initiating on evidence that proved as elusive as a mirage, and maintained in the name of the possibility of democratic constitutionalism that eludes both the colonizer and the colonized; the second a bellissome repetition of the failures of empires whose histories we condemn ourselves to repeat. Both squandered the national capital that is the literal and symbolic lifeblood of the military-industrial complex, and we watched bodies, cities, civilizations, and money burn, oblivious, from this, the failing heart of the last empire, until suddenly, pressing domestic economic and political pressures convinced us to leave, under cover of fantastic rhetoric of what would be left in our wake, rhetoric already being given the lie by the material conditions of life in post-occupation Iraq.

That exported state violence which, together with the so-called “nation building” that is its Janus-face, purported to save both those

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5 This includes direct economic, technological intelligence and military training aid, indirect provision of weaponry, and direct involvement in warfare against Iran. Support from the U.S. for Iraq was discussed by the Senate and House of Representatives. See, e.g., Shaking Hands with Saddam Hussein: The U.S. Tilts toward Iraq, 1980–1984, The National Security Archive Briefing Book No. 82 (Joyce Battle ed., Feb. 25, 2003), http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB82.


fragile confected and invaded “nations” from themselves, and the shining city on the hill from the barbarians was perceived by many as cover for a buccaneering adventure for the oil for which our peculiar institutional colonizing of continental space has come to develop a lust that cannot be slaked. I am not here reinvoking the crude conspiracy theories impugning the (in the event equally fanciful) proximate justification for the invasion of Iraq. With the late Christopher Hitchens, writing in 2009 of the Iraqi state auction for oil field development rights, I am focusing on the longer view, albeit one presently occluded by the renewal of Iraqi political instability in the wake of the U.S. withdrawal:

The vulgar and hysterical part of the “war for oil” interpretation has been discredited: Iraq retains its autonomy, the share awarded to outsiders in development is far from exorbitant, and there is no real correlation between U.S. interests and the outcome. Except that we do have a very genuine interest in the success of this endeavor as it unfolds. If the recuperation of Iraq’s oil fields persists, and if production levels continue to rise, the country will begin to reacquire what it lost under the insane regime of Saddam Hussein, which debased the oil infrastructure and then squandered its proceeds. Current production is about 2.5 million barrels a day, which, on current projections, could rise to 7 million barrels in a relatively short time and which al-Shahristani, perhaps optimistically, believes could rise to 12 million barrels a day in 2016. The potential for this recovery certainly exists. Iraq has the third-largest proven reserves in the world at 115 billion barrels, and new explorations undertaken since the removal of Saddam Hussein and the lifting of sanctions suggest that even that figure could be on the low side.

What this means is that Iraq could quite soon be in a position to rival the output of Saudi Arabia and Iran. This is precisely what many of us in the regime-change camp used to point out: the huge, glittering prize of a democratic and federal Iraq situated between two parasitic theocracies and capable of challenging their oil duopoly.  

We are branded by the market we provide for oil because this nation needs it (as The Washington Post’s Steven Mufson aptly put it, “Our society and economy have been nursed on cheap oil, and the idea that oil security is a right as well as a necessity has become part of our foreign policy DNA, handed down from Franklin D. Roosevelt to Jimmy Carter to George H.W. Bush,”) to traverse highways and fuel jet-flight (whose practices and signification those conjuring “the homeland” comprehend as “changed utterly” post-9/11) and heat and cool weirdly flimsy residential buildings in conditions of heat and cold in-

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hospitable to dwelling in that way in this place.

My thesis in this essay and in the larger work-in-progress to which it forms an introduction, however, runs counter to those sheeting home to governmental responses to the attacks of 9/11 the exceptional authority to detain indefinitely those “others” whom the national interest conceives of as dangerous. Rather, I argue, indefinite detention is a national trope, sourced in the violence of colonialism in two distinct ways. First, the black lifeblood that is crude oil has come to function more or less invisible to the “haves” in de facto apartheid enclaves in the empire’s heart, pockets of deprivation eating out the last empire’s heart. Next, indefinite detention is a practice begun by Britain in its colonizing of another source of wealth where violence was needed to maintain hegemony and profit: India.

The at once real and symbolic war that our military incursions in Iraq and Afghanistan are proxies for is made upon a hydra-headed non-

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11 Christopher Tomlins notes that the legal difference between indentured servitude and chattel slavery in the early colonization of English America was that indentured servants were legally required to be provided by their masters with food, whereas slaves were not. Compare Christopher Tomlins, Freedom Bound: Law, Labor, and Civic Identity in English America, 1580–1865, at 266 (2010) (noting that early Virginia laws on indentured servitude empowered indentured servants to sue their masters for “want of diet”), with id. at 274 n.146 (indicating that as Virginia’s differentiation of slave and indentured servitude status developed, it became evident that only indentured servants had justiciable grounds to complain if their masters did not feed them). Tomlins also notes that “masters were forbidden to ‘whip a Christian white servant naked’ but could brutalize a slave . . . in the course of ‘correction’ for their resistance or disobedience,” even if the “correction” resulted in the slave’s death. Id. at 272; see also id. at 470. Slaves in eighteenth-century Virginia were forbidden by law from “gathering under pretence of feasts and burials [sic],” id. at 466. Castration of male slaves was frequently authorized by statute. See id. at 475, 491.


14 George Francis Dow, Slave Ships and Slaving 283 (1927).

state enemy by a nation that is, as Nan Seuffert’s account of the nation suggests,\textsuperscript{16} dependent for its sustenance on its imagined community of enemies as it is on the boundaries that collapse into a fantastic imagined unitary, a porous line stretching almost 2,000 miles which, it is hallucinated, might literally be fenced, perhaps twice,\textsuperscript{17} to keep the brown people out. At the same time the impoverishing labor of those brown people in postmodern peonage, which is as necessary as nonrenewable energy to live in what has become the American way, nightmare, or dream, truck farming and clipped lawns and irrigated golf-courses in gated communities (which keep black people and the danger they represent to whiteness symbolically outside), necessitates their regular traversing of border of nation and community. And, just as this national life-sustaining trade functions like the fluids necessary to maintain life as we know it cross cell membranes, so the drugs and guns that make us the nation we also are flow, fast and furious, this way and that.

Terrorism didn’t happen to \emph{us}, to the nation whose symbolic capital is Gotham: so went the discourse of the monstrous affront constituted by those jetliner-propelled mass homicides or opening battles in a new kind of war or the teeming middle between those possibilities. Such an accounting for our national history effaced the white on black domestic terrorism that so signally marked the nation during the 19th and 20th centuries, its traces visible in black and white photographs, “mirrors up to nature” in truth, that proliferated in the Jim Crow era of whites fêting and the bodies of dead black men twisted in the trees above them.

That domestic terrorism was the logical corollary of what the Reverend Dr. Martin Luther King Jr. comprehended as our distinctively barbaric iteration of chattel slavery:

\begin{quote}
The Negro family for three hundred years has been on the tracks of the racing locomotives of American history and was dragged along mangled and crippled. . . . American slavery is distinguished from all other forms because it consciously dehumanized the Negro. In other cultures slaves preserved dignity and a measure of personality and family life. Our institution of slavery began on the coasts of Africa and because the middle passage was long and expensive, African families were torn apart in the selective process as if the members were beasts. On the voyages millions died in holds into which blacks were packed spoon fashion to live on a journey often of 2 to 6 months with approximately the room for each equivalent to a coffin. The sheer physical torture was sufficient to murder millions of men,
\end{quote}


\textsuperscript{17} This latter variant was endorsed by former Republican presidential candidate Michele Bachmann. \textsc{See} Julia Preston, \textit{Some Cheer Border Fence as Others Ponder the Cost}, \textsc{N.Y. Times}, Oct. 20, 2011, at A17.
women and children. But even more incalculable was the psychological damage. For those who survived as a family group, once more on the auction block many families were ripped apart.

Against this ghastly background the Negro family began the process of organization in the United States. On the plantation the institution of legal marriage did not exist. The masters might direct mating or if they did not intervene marriage occurred without sanctions. There were polygamous relationships, illegitimacies, abandonment, and most of all, the tearing apart of families as children, husbands, or wives were sold to other plantations. But these cruel conditions were not yet the whole story. Masters and their sons used Negro women to satisfy their spontaneous lust or, when a more humane attitude prevailed, as concubines. The depth was reached in certain states, notably Virginia which we sentimentally call the state of presidents. In this state, slaves were bred for sale, not casually or incidentally, but in a vast breeding program which produced enormous wealth for slave owners. This breeding program was the economic answer to the halting of the slave traffic early in the 19th century.\(^{18}\)

Equally revelatory of our national history of using law and violence to build the nation on carceral inhumanity whose most life-denying aspect was its indefiniteness, its reaching to the point of death, are the observations of Hector St. John Crèvecoeur, an eighteenth century American farmer and man of letters who encountered in South Carolina “a nightmarish landscape polluted by law” in what we know as Charleston, described thus:

[The city] is, in the north, what Lima is in the south; both are Capitals of the richest provinces of their respective hemispheres: you may therefore conjecture, that both cities must exhibit the appearances necessarily resulting from riches. Peru abounding in gold, Lima is filled with inhabitants who enjoy all those gradations of pleasure, refinement, and luxury, which proceed from wealth. Carolina produces commodities, more valuable perhaps than gold, because they are gained by greater industry; it exhibits also on our northern stage, a display of riches and luxury, inferior indeed to the former, but far superior to what are to be seen in our northern towns. Its situation is admirable, being built at the confluence of two large rivers, which receive in their course a great number of inferior streams; all navigable in the spring, for flat boats. Here the produce of this extensive territory concentrates; here therefore is the seat of the most valuable exportation; their wharfs, their docks, their magazines, are extremely convenient to facilitate this great commercial business. The inhabitants are the gayest in America; it is called the centre of our beau

\(^{18}\) Dr. Martin Luther King, Jr., \textit{supra} note 12, at 402, 404–05.
monde, and is always filled with the richest planters of the province, who resort hither in quest of health and pleasure.\(^{19}\)

Crèvecoeur sees the law as central to this wealth, sourced in slave-produced commodities:

The three principal classes of inhabitants are, lawyers, planters, and merchants; this is the province which has afforded to the first the richest spoils, for nothing can exceed their wealth, their power, and their influence. They have reached the ne plus ultra of worldly felicity; no plantation is secured, no title is good, no will is valid, but what they dictate, regulate, and approve. The whole mass of provincial property is become tributary to this society; which, far above priests and bishops, disdain to be satisfied with the poor Mosaical portion of the tenth. I appeal to the many inhabitants, who, while contending perhaps for their right to a few hundred acres, have lost by the mazes of the law their whole patrimony. These men are more properly law givers than interpreters of the law; and have united here, as well as in most other provinces, the skill and dexterity of the scribe with the power and ambition of the prince: who can tell where this may lead in a future day? The nature of our laws, and the spirit of freedom, which often tends to make us litigious, must necessarily throw the greatest part of the property of the colonies into the hands of these gentlemen. In another century, the law will possess in the north, what now the church possesses in Peru and Mexico.\(^{20}\)

Crèvecoeur knew only too well the price of Charleston’s riches, the power of its lawyers:

While all is joy, festivity, and happiness in Charles-Town, would you imagine that scenes of misery overspread in the country? Their ears by habit are become deaf, their hearts are hardened; they neither see, hear, nor feel for the woes of their poor slaves, from whose painful labours all their wealth proceeds. Here the horrors of slavery, the hardship of incessant toils, are unseen; and no one thinks with compassion of those showers of sweat and of tears which from the bodies of Africans, daily drop, and moisten the ground they till. The cracks of the whip urging these miserable beings to excessive labour, are far too distant from the gay Capital to be heard. The chosen race eat, drink, and live happy, while the unfortunate one grubs up the ground, raises indigo, or husks the rice; exposed to a sun full as scorching as their native one; without the support of good food, without the cordials of any chearing liquor. This great contrast has often afforded me subjects of the most afflicting meditation. On the one side, behold a people enjoying all that life affords most bewitching and pleasurable, without labour, without fatigue, hardly subjected to the trouble of

\(^{19}\) J. Hector St. John de Crèvecoeur, *Letters from an American Farmer* 222–23 (1904).

\(^{20}\) Id. at 224–25.
wishing. With gold, dug from Peruvian mountains, they order vessels
to the coasts of Guinea; by virtue of that gold, wars, murders, and
devastations are committed in some harmless, peaceable African
neighbourhood, where dwelt innocent people, who even knew not
but that all men were black. The daughter torn from her weeping
mother, the child from the wretched parents, the wife from the loving
husband; whole families swept away and brought through storms and
tempests to this rich metropolis! There, arranged like horses at a fair,
they are branded like cattle, and then driven to toil, to starve, and to
languish for a few years on the different plantations of these citi-
zens.21

Crèvecoeur’s vivid image of the nation fashioned with words,
however, most starkly indicts our foundational practice of indefinite d
etermination and the inhumanity it breeds:

The following scene will I hope account for these melancholy reflec-
tions, and apologize for the gloomy thoughts with which I have filled
this letter: my mind is, and always has been, oppressed since I be-
came a witness to it. I was not long since invited to dine with a plant-
er who lived three miles from—, where he then resided. In order to
avoid the heat of the sun, I resolved to go on foot, sheltered in a
small path, leading through a pleasant wood. I was leisurely travel-
ing along, attentively examining some peculiar plants which I had
collected, when all at once I felt the air strongly agitated; though the
day was perfectly calm and sultry. I immediately cast my eyes t
oward the cleared ground, from which I was but at a small distance, in
order to see whether it was not occasioned by a sudden shower; when
at that instant a sound resembling a deep rough voice, uttered, as I
thought, a few inarticulate monosyllables. Alarmed and surprized, I
precipitately looked all round, when I perceived at about six rods dis-
tance something resembling a cage, suspended to the limbs of a tree;
all the branches of which appeared covered with large birds of prey,
flitting about, and anxiously endeavouring to perch on the cage.
Actuated by an involuntary motion of my hands, more than by any
design of my mind, I fired at them; they all flew to a short distance,
with a most hideous noise: when, horrid to think and painful to re-
peat, I perceived a negro, suspended in the cage, and left there to ex-
pire! I shudder when I recollect that the birds had already picked out
his eyes, his cheek bones were bare; his arms had been attacked in
several places, and his body seemed covered with a multitude of
wounds. From the edges of the hollow sockets and from the lacer-
tions with which he was disfigured, the blood slowly dropped, and
tinged the ground beneath. No sooner were the birds flown, than
swarms of insects covered the whole body of this unfortunate wretch,
eager to feed on his mangled flesh and to drink his blood. I found
myself suddenly arrested by the power of affright and terror; my

21 Id. at 225–26.
nerves were convulsed; I trembled, I stood motionless, involuntarily contemplating the fate of this negro, in all its dismal latitude. The living spectre, though deprived of his eyes, could still distinctly hear, and in his uncouth dialect begged me to give him some water to allay his thirst. Humanity herself would have recoiled back with horror; she would have balanced whether to lessen such reliefless distress, or mercifully with one blow to end this dreadful scene of agonizing torture! Had I had a ball in my gun, I certainly should have despatched him; but finding myself unable to perform so kind an office, I sought, though trembling, to relieve him as well as I could. A shell ready fixed to a pole, which had been used by some negroes, presented itself to me; filled it with water, and with trembling hands I guided it to the quivering lips of the wretched sufferer. Urged by the irresistible power of thirst, he endeavoured to meet it, as he instinctively guessed its approach by the noise it made in passing through the bars of the cage. “Tanke, you white man, tanke you, pute some poy’son and give me.” “How long have you been hanging there?” I asked him. “Two days, and me no die; the birds, the birds; aaah me!”

Oppressed with the reflections which this shocking spectacle afforded me, I mustered strength enough to walk away, and soon reached the house at which I intended to dine. There I heard that the reason for this slave being thus punished, was on account of his having killed the overseer of the plantation. They told me that the laws of self-preservation rendered such executions necessary; and supported the doctrine of slavery with the arguments generally made use of to justify the practice; with the repetition of which I shall not trouble you at present.22

Tomlins notes, aptly, that “[e]nslavement transmutes the imminence of physical death into social death. The social death of enslavement is not an alternative to Physical death, however, but a variation.”

Other variations on this originary and nationally constitutive practice include the forced labor and convict-leasing regimes of the post-Reconstruction South. They also include what is forced on those current U.S. prisoners, overwhelmingly men of color,24 serving death sentences or the much more frequent life sentences without parole, and thus left to die in cages; and others whose terminal sentence in what may be a lifetime of recidivism leaves them at the end of their lives likewise encaged. Prison industries compel those incarcerated persons physically capable of labor to work for token wages to support the military-industrial complex:

22 Id. at 242–45.
23 TOMLINS, supra note 11, at 422.
The prison industry complex is one of the fastest-growing industries in the United States and its investors are on Wall Street. "This multimillion-dollar industry has its own trade exhibitions, conventions, websites, and mail-order/Internet catalogs. It also has direct advertising campaigns, architecture companies, construction companies, investment houses on Wall Street, plumbing supply companies, food supply companies, armed security, and padded cells in a large variety of colors."

According to the Left Business Observer, the federal prison industry produces 100% of all military helmets, ammunition belts, bullet-proof vests, ID tags, shirts, pants, tents, bags, and canteens. Along with war supplies, prison workers supply 98% of the entire market for equipment assembly services; 93% of paints and paintbrushes; 92% of stove assembly; 46% of body armor; 36% of home appliances; 30% of headphones/microphones/speakers; and 21% of office furniture. Airplane parts, medical supplies, and much more: prisoners are even raising seeing-eye dogs for blind people.\(^{25}\)

The jurisdiction constituted by Guántanamo is, thus, the subject of constitutional fantasy insofar as the indefinite detention of people of color, treated inhumanely by law and the violence it authorizes, directly or not, is imagined as an exceptional national practice, responsive to the particular exigencies of the "War on Terror" and 9/11, a phenomenological exception to the way this "nation of laws" is itself constituted. Indeed, indefinite detention is, so many have asserted, un-American.\(^{26}\)

Adam Klein and Benjamin Wittes have recently made a careful and plausible historical case that while "[i]t is something of an article of faith in public and academic discourse that preventive detention runs counter to American values and law,"\(^{27}\) this "civic mythology is . . . an inaccurate description of [praxis]."\(^{28}\) They argue that while "[t]his meme has become standard fare among human rights groups and in a great deal of legal scholarship,"\(^{29}\) with even "[t]he more careful commentators . . . describe[ing its] . . . exceptions as narrow and limited, deviations from a generally strong rule,"\(^{30}\) "[p]reventive detention is not prohibited by U.S. law or especially frowned upon in tradition or practice."\(^{31}\)

The larger project for which this essay serves as an introduction


\(^{27}\) Id. at 85.

\(^{28}\) Id. at 86.

\(^{29}\) Id. at 85–86.

\(^{30}\) Id. at 86.

\(^{31}\) Id.
will take Klein’s and Wittes’ work as a starting-point for making a much more radical case about the U.S. practice of indefinite detention. First, following Ruth Wilson Gilmore’s work on the intersections of the political-economic geography of globalization and U.S. prison growth, I will argue, as outlined above, that indefinite detention is an unexceptional incident of American exceptionalism, whose antecedents lie in the legalized practices of chattel slavery that early came to characterize the law of labor and land which Christopher Tomlins has recently argued constituted the nation “from the start,” and whose iterations are visible today in the mass incarceration of others constitutive of contemporary U.S. law and society. Next, I will make the case for its specific origins in something explicitly recognized and legislated for as indefinite detention in colonial India.

The military-carceral-industrial complex is notable not merely for the barbarous company the maintenance of the death penalty enrolls us in, a barbarity made manifest locally and particularly during the spectacle that was the Florida Straw Poll, when spectators bayed, among other things, for a black man’s blood, much as their moral progenitors must have bayed for the blood of enslaved gladiators in the waning days of Rome. Since the Nixon presidency and the rise of life sentences without parole, we have also come to lead the (uncivilized) world in the numbers of prisoners or percentages of population sentenced for the term of their natural lives. First world democracies don’t even come close: for example, Britain currently has twenty-two persons serving life sentences without the possibility of parole; the U.S. total is 41,095 people sentenced to die in prisons, which now come equipped with hospice facilities and chemotherapy units; indeed, Virginia, the archetypal slave state, has a dedicated geriatric prison.

Those sentenced to die inside cages in this nation of laws include those tried and sentenced for offenses committed when they were under the age of eighteen, currently numbering 2574, with my present home state of Pennsylvania leading the nation both in the total number of those human beings—mainly black men—who will die in cages, and in those among them sentenced, thus, to be detained indefinitely, for offenses for which they were convicted when they were juveniles. A

32 Gilmore, supra note 24, at 172.
33 See Tomlins, supra note 11.
35 Given the decision in Miller v. Alabama, 567 U.S. __, (2012) to abolish the possibility of life sentences for those who committed crimes involving homicides while they were juveniles, but only where they received a statutorily mandated life sentence, this number seems likely to decrease as the implications of that decision for those currently serving (some) sentences of life without parole are worked through; thereafter, the numbers of such sentences are likely to grow at a modestly slower rate.
2009 Florida State University Report notes that “no other country in the world, in practice, imprisons juvenile offenders to life without parole sentences.” I will go on in the work that this essay introduces to explore the economic and other nation-building work done by indefinite detention in this guise and others, including as paradigm cases the indefinite detention of the black man, the dangerous (black) child, the suspected terrorist, the stateless undocumented immigrant, and the sexually violent predator.

But let me note two things by way of placeholders for that extended argument. First, mass incarceration of black men makes them invisible to most of us. It thus puts out of sight and mind phenomena of post-bellum U.S. life including the fact that since the great migration, which was prompted by the regime of neoslave and convict labor in the Jim Crow South, as by the proliferation of domestic terrorism, there has never been an adequate supply of jobs in the “white economy” for black men that would enable them to sustain a family. And when the Nixon Administration’s war on crime begat American mass incarceration, those who occupied the cages, which continue to be built to confine them, were, as they remain, predominantly both black men and “the working and workless poor.”

Their “controlling . . . offense” is trading in illicit drugs, the paradigmatic commodity of the nation’s black economy. The various ways in which the nation’s foundational constituting on coerced labor, or which slave labor came to be paradigmatic, shifted and changed from colonial foundering to the present as a critical but largely invisible sector of the national political economy will be examined with a view to establishing that the U.S. economic system from founding on depended on versions of black slave and neoslave labor, and that making visible that dependence would destabilize the story of origins, commitments, and possibilities that are an integral part of our constitutive documents and myths.

Next, the rise of sexually violent predator legislation operates, spectacularly, to mask the state’s disinclination to use the power of law to curtail the epidemic of sexual violence against women by men who look, because they are familiar, is, as I have recently written, a phenomenon of governmentality. The vast majority of rapes are committed by

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37 Gilmore, supra note 24, at 172.
38 Id.
39 See Penelope Pether, Reading the Northern Territory “Intervention” from the Margins: Notes Toward a Social Psychoanalytic Ethics of Governmentality, 33 Australian Feminist L.J. 19 (2010); Penelope Pether, What Is Due to Others: Speaking and Signifying Subject(s) of Rape Law, 18 Griffith L. Rev. 237 (2009).
family members or acquaintances of the victim; and female college students in the U.S. experience sexual victimization at high levels, as do black and Hispanic women. That at least makes us sisters under the skin, as the threat of sexual victimization keeps us in our places, where our work earns us less than the men with whom we labor side by side.

I will then turn to explore a different kind of exceptionalism in the U.S. practice of indefinite detention: the ways in which its regime for detention of post-9/11 terrorism subjects is markedly different from the models adopted in the U.K., Australia, and Canada. I will trace that carceral economy through the borrowings that paradigmatic British colonial practice both instantiated in early colonization of the U.S. and made from Imperial innovations in colonial India. Contrary to the claims of many historians, my research suggests that the first appearance in English colonial law of indefinite detention in its modern form was carried out under the aegis of Pitt’s East India Company Act of 1784, and the power of indefinite detention was encoded in the East India Company Act of 1793, which provided that detention of “any person . . . suspected of carrying on . . . any illicit correspondence dangerous to the peace and safety of any of the British settlement or possession in India,” rather than in the 1796 (Irish) Insurrection Act.

As I began this essay on the inhumane violence of indefinite detention as national “business as usual” with the invocation of my indefinitely detained colleagues, and then with that of Guantánamo, let me close with a story from the “heartland,” of a kind with this image from our national repressed. In this image, Charles Graner, the apparent architect of prisoner abuse at Abu Ghraib, celebrates over the body of Manadel al-Jamadi, an Iraqi prisoner:

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41 Manas Mohapatra, Learning Lessons from India: The Recent History of Antiterrorist Legislation on the Subcontinent, 95 J. Crim. L. & Criminology 315, 326 (2004). The actual date may be as early as 1773, the date of the earliest Government of India Act.
Charles Graner was born in Pittsburgh, learned his trade in the Iran-Iraq war in a prison camp where Iraqis were starved to the point of madness, and, before his deployment to Abu Ghraib, returned to civilian work as a prison guard in Pennsylvania. Graner worked in the Greene State Correctional Institution, a maximum-security prison in Greene County, Pennsylvania.

Almost seventy percent of the inmates at Greene were black, largely drawn from large cities, but more than ninety percent of the guards, drawn from the local rural community, were white. The practice of locking up black men who cannot find legitimate work that would enable them and their families to live with dignity, and compelling them to work in prison industries for what in Pennsylvania is a rate of seventeen to forty cents per hour, is, then, a distinctive phenomenon of “the homeland,” as is their guarding by a workforce organized on paramilitary

43 Id.
lines that, at least in rural areas where prisons are often sited by governments as correctives to weak local economies, is predominantly comprised of poor whites.

In 1998, guards at the prison were accused of inmate abuse that “included beatings, sexual assault and body cavity searches in full view of other guards and inmates.” Two guards were fired and 22 others suspended, demoted or reprimanded.\footnote{Charles Sheehan, MP Investigated in Iraq Was at Pa. Prison During Abuse Scandal, but Not Implicated, U-T SAN DIEGO, May 7, 2004, available at http://legacy.utsandiego.com/news/world/iraq/20040507-1742-prisonerabuse-guard.html.} Graner was not subject to these charges.\footnote{Id.} There were, however, also reports of violent racism, including this:\footnote{David Finkel & Christian Davenport, Records Paint Dark Portrait of Guard Before Abu Ghraib: Graner Left a Trail of Alleged Violence, WASH. POST, June 5, 2004, at A1.}

June 29, 1998. At State Correctional Institution-Greene in southwestern Pennsylvania, the inmates are eating mashed potatoes. Horatio Nimley, who is serving time for burglary, takes a spoonful. His mouth fills with blood. He spits out a razor blade. He screams for help. At first the guards ignore him. Then they take him to the nurse. And then they punch him, kick him and slam him to the floor, and when he yells, “Stop, stop,” one of the guards says, “Shut up, nigger, before we kill you.”

These are the allegations contained in a lawsuit Nimley brought against Graner, five other guards and the nursing supervisor in May 1999 alleging mistreatment. By that point, abuse allegations had become common at Greene, which opened in 1993. Among the allegations over the years: Guards beat prisoners, spit in their food, showered them with racial epithets and wrote “KKK” in one beaten prisoner’s blood. The allegations weren’t without merit: In 1998, two dozen guards were fired, suspended, demoted or reprimanded.

According to a prison spokesman, none of the allegations involved Graner, who was reprimanded three times and suspended four times for showing up late for work and taking unauthorized leaves. The allegation against him by Nimley, which Graner denied, was found to “have arguable merit in fact and law” by a federal magistrate and was proceeding when Nimley got out of prison, stopped responding to motions and disappeared. For those reasons, the case was dismissed, leaving the merits of the case unresolved.

Another inmate, Nick Yarris, who was recently released from Greene after DNA tests cleared him of rape and murder charges for which he had spent 22 years on death row, says that the kind of abuse Nimley described in his lawsuit was common at Greene, and that Graner was involved.

Yarris says that in May 1998, he was assigned to pick up lunch trays left outside the cellblocks when a prisoner deliberately flooded
his toilet. He says he saw Graner and four other guards pull the inmate out of his cell. He says the guards dragged the inmate by his feet and that Graner was holding a canister of pepper spray over the prisoner and saying, “We’re going to go get some.” He says that the inmate was dragged into another room out of his sight, and that the next time he saw him the inmate had been beaten and was being taken away on a gurney.

In addition to that one incident, Yarris says, Graner bragged about taunting anti-death-penalty protesters who would gather outside the prison, used racial epithets and once told a Muslim inmate he had rubbed pork all over his tray of food.

Thus the ineffable brutality of a political economy of incarceration is made literal, not merely immanent. The distinctive type of detention practiced at Guantánamo, Abu Ghraib, and the “black sites” then, is just another iteration of a much older and more variable practice that “we” have learned to deploy against others. For the U.S., indeed, as the book will go on to suggest, it has become a constitutive practice of the modern nation, and has transmuted itself into sites including the domestic carceral economy as a practice of population management perhaps never needed so much as when mass incarceration of men of color makes them not only literally invisible but also removes them from the unemployment rolls.