Legal Terrors

“I say that he will never be bodiless.”
—Vankirk, in Edgar Allan Poe’s “Mesmeric Revelation” (1844)

He proves himself no specter, for he is visible in his flesh. Take away what he claims as proper to the nature of his body; will not a new definition of body then have to be coined?

He can be reached only through his body, and hence, in cases not capital, whipping is the only punishment which can be inflicted.
—Thomas Cobb, An Inquiry into the Law of Negro Slavery in the United States of America (1858)

It might seem odd to begin an article on prisons and the law with these epigraphs, which suggest such different ideas about the nature of the body: Poe arguing against terms such as immateriality (a “mere word”); Calvin making reference to Christ’s resurrected body; and Cobb enlisting a particularly qualified form of personal embodiment for the slave. Yet the driving force of this article, the impulse that has shaped its argument, is my understanding of law as deeply affected by definitions of the physical and the spiritual. Punishment, whether in seventeenth- or twenty-first century America, turns on whether it is the body or the mind that receives the hard knock of the law. If, as I argue, the rules of law have formed a philosophy of personhood, then we must understand the underlying term person. I anchor my understanding of person, not in its general origins in persona or mask, but instead in its expropriation and transformation through legal discourse.¹ The particular ways in which different categories of persons are created or terminated, and the capacities and incapacities consequent to this formulation of status, are crucial to my argument. For whether we attend to spectacular public rituals of punishment or to those more rarified, radical qualifications of identity, the rules of law trade on the lure of the spirit—banking on religion and its debate between matter and spirit, the corporeal and the incorporeal—in order to transfer the power of the

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ABSTRACT This essay examines the conditions under which categories of identity are legally reconstituted. It argues that legal practice and spiritual belief in colonial North America and certain parts of the Caribbean shed light on current rituals of dispossession and torture in the United States. / Representations 92. Fall 2005 © 2006 The Regents of the University of California. ISSN 0734–6018, electronic ISSN 1533–855X, pages 42–80. All rights reserved. Direct requests for permission to photocopy or reproduce article content to the University of California Press at www.ucpress.edu/journals/rights.htm.
deity to the corrective of the state. This understanding of law summons persons as essential to its sustenance. “No person itself, the law lives in persons.”

This essay in large part responds to what I take to be the underlying compulsion of ritual, whether it is legal or religious: to keep the spiritual and material in suspension. By giving weight to gradations in terminology, depending on the context and what is being defined—the object of penance, the person to be judged, or the thing to be punished—the law performs rituals of knowledge. Before the state can punish, it must appear to know what is being judged.

Icons of Matter

Two different stories, in two different places, both about a particular kind of terror. One takes place in New England, the other in the English West Indies. Both stories—one an account of an execution in seventeenth-century Boston, the other a ritual of what I regard as a postmortem killing in seventeenth-century Barbados—invite a new definition of body, an improbable path to the spirit, and another sense of law. What is striking in both cases remains the materiality of spiritual promise, even when offered as supremely immaterial.

In Boston, on March 11, 1685, James Morgan admonished those who had gathered to watch his hanging not to drink because it was drunkenness that had led him to murder. Fleshly lust had killed what he called his “poor soul.” Unsure what would become of that soul “within a few moments of Eternity,” he prayed: “O Lord receive my Spirit, I come unto thee.” Increase Mather, in a practice common to divines in the North American colonies, took Morgan’s ritual punishment as the point of departure for a sermon on death and retribution. In his “Sermon Occasioned by the Execution of a Man Found Guilty of Murder,” he described how Morgan was suspended between two deaths: first he was killed physically and then he was killed spiritually in “eternal Death.” Mather moves from an “image of the man of dust” to an “image of the man of heaven.” He concludes, “It is not the spiritual that is first, but the physical, and then the spiritual.”

Certainty of “temporal Judgment,” Mather admits, does not ensure “everlasting punishment.” With repentance, a sinner might avert the severe decree. “This night your Soul shall be either in Heaven or in Hell for ever.” Though the body, once dead, is abandoned to worms, the “immortal Soul . . . shall appear before the Great God and Judge of all, and a Sentence of Everlasting Life, or Everlasting Death be passed upon you.” Thus, portraying the punishment of the soul as if it exists apart from the particularities of matter, Mather’s sermon proceeds from the body’s release from actual chains to the soul “hanged” in “Everlasting Chains”; from a body released from the literal prison and into an abode of “Spirits that are in a Prison”; from the darkness of the man-built dungeon to “that Dungeon, where is blackness for ever.” In interpreting Mather’s narrative, we confront an anatomy of
eternal punishment. What is the soul? Who are these imprisoned spirits? Mather’s dichotomy leaves intact and unquestioned the opposition between body and soul. The death of the body is nothing compared to what Mather recognizes as “a second death, on your never dying Soul.”

The second story takes us to the West Indies, twenty-eight years prior. This body is already a corpse when the second death takes place. In his True and Exact History of the Island of Barbados (1657, 1673), Richard Ligon, who lived in Barbados for three years until 1650, declares that most of his slaves are “as near beasts as may be” but then qualifies his statement with “setting their souls aside.” As for their religious beliefs, he writes: “Religion they know none; yet most of them acknowledge a God, as appears by their motions or gestures.” (We are left to wonder what these motions or gestures might be.) One example of what he takes to be slave “belief” is that they believe in resurrection: the dead do not die; rather, they return to Africa.

Ligon supposes that the return to Africa promised a renewal of youth. He then recounts the following events, which supply a subtext to his reflections. As he tells it, three or four of the best slaves on one Colonel Waldron’s plantation had killed themselves. The colonel came up with a way to end further losses. He cut off one of their heads, put it on a twelve-foot pole, and then brought forth his slaves. He ordered them, Ligon reports, to march around the head, to look at it, and then to decide “whether this was not the head of such an one that hang’d himself which they acknowledging, he then told them, that they were in a main errour, in thinking they went into their own countries, after they were dead; for, this man’s head was here, as they all were witness of; and how was it possible, the body could go without a head.”

Ligon’s account provides fertile ground for reconsidering the efficacy of ritual practice, what Roy Rappaport in “The Obvious Aspects of Ritual” called “the entailments of the ritual form.” How do the interpretation and application of rules—whether legal or behavioral—become ritual? Considering Waldron’s spectacle of terror as ritual action—that is, as perceived and experienced fact that is recalled and iterated over time—can we restrict belief to “spiritual beings” or the “supernatural”? Doesn’t that restriction simply intensify the ethnocentrism of the definition, leaving such imagined entities—those Spinoza condemned as being unintelligible—without verifiable truth conditions? This recourse to the indecipherable contributes not only to the refusal to understand those places called “heathen,” “irrational,” or “fanatic” but also to the misconstruing of law as something beyond the ken of ordinary, indeed the majority, of people—especially the oppressed. The will to repeat, the insistence on the already done that must be redone, accounts for the power and clarity of ritual, a practical action, both sacred and civil.

On this account, written law and scripture have the status of ordinary transactions that are quickened in their transport between persons and chattel, as the meanings of both change in the passage between Old World and New. The dis-
turbing of cause and effect, or original and copy, primitive and civilized, transformed a loose and shaggy world of old, superseded legal and sacred materials into the transatlantic domain of penance, punishment, and possession. In any inquiry into this domain, generalizations such as “soul,” “belief,” “human” or “brute” need to be disassembled and made concrete in order to give belief a practical form. In such rigorous visibility lies a politics that might not only subvert but also remake absolute subjection.

What is the nature of the slaves’ belief in a return across the waters to Africa? Let us take as guide Georges Buffon, who reminded his readers in A Natural History (1828–30), that “the prejudice with respect to specters . . . originates from nature; and such appearances depend not, as philosophers have supposed, solely upon the imagination.” One has only to read the 1685 Code noir of Louis XIV, the collection of edicts concerning “the Discipline and Commerce of Negro Slaves in the French Islands of America” or the harsher West Indian slave codes to understand how what first seemed phantasmagoric turned out to be a spectacle of servitude. Such surreal precisions in human reduction (how best to turn a man into a thing), just as other legal permutations on the categories of monkey, man, horse, and negro, demonstrate how inordinately natural—pushed to such extremes that they appeared as if unnatural—the claims to persons and property actually were.

In Haiti, History, and the Gods, I describe this ritual in Saint-Domingue, following the example of Moreau de Saint-Mery in his Description topographique de l’île St. Domingue (1797–98). Believing that they would return to Africa after their deaths, slaves hanged themselves, ate dirt, and swallowed their tongues. In order to prevent this destruction of property and to derail what Moreau called a “Pythagorean voyage,” masters contrived mutilations of the dead. They cut off either the head or only the nose and ears. Fixed to the top of a pole, the sight of these body parts would persuade slaves of the futility of suicide. In Moreau’s words, “the others, convinced that no one would ever dare reappear in his native land thus dishonored in the opinion of his compatriots, and, fearing the same treatment, renounce their ghastly plan of emigration.”

Slaves had reasons to be afraid of dismemberment over and above visible desecration, thwarted travel, or dishonor. Matter, especially dead matter, was particularly dangerous to the living. In both the English West Indies and the French Antilles, numerous were the rituals for the proper laying to rest of body parts. For not only were these relics of the dead sacred, but in the hands of the wrong person they could be given a false life and put to magical, malevolent uses. Thus, the reappearance of a person’s head on a pole in the midst of an audience of slaves presaged bad things to come, since that piece of prized matter could so easily be circulated in the world of the living.

The residue that I will call mind is crucial to spectacles of terror. Organized by masters in order to strike fear in slaves, these practices ushered in a new colonial form of life that demanded unexpected forms of death. Ligon assumes that the
slaves were persuaded by the “spectacle” of the suicides’ impaled heads not to hang themselves. For how could a youthful body be reborn without a head? What we see here are changing attitudes toward depersonalization, variously, if somewhat ambiguously, identified as European or African. The proximity of the common and the sacred, and the apparently arbitrary relation of the two, is a risky, fabulous, and very fleshly matter.

**Querying the Spirit of Law**

The social, economic, and even spiritual practices of remote times persist in legal forms and pronouncements. Their Black Codes, penal sanctions, and other strategies of enforcement form the skeleton of the body politic. The ominous leeway in the interpretation of American legal rules—from slave codes, to prison cases, to the Bush administration’s torture memos—has led to the redefining of persons in law. The redefinition—the creation of new classes of condemned—sustains a reasoning that goes beyond the mere logic of punishment. This legal metaphysics perpetuates a social dialogue that is unique to the Americas and exemplified by the perpetual need to condemn certain entities to be *dead in law*.

Is there another way of thinking that might provide the necessary background for an understanding of law that is fatal and infinite in its powers? The terms of law and their rationalization of custody and control not only devise a philosophy of personhood but, in creating the legal subject, also summon forms of punishment that are activated only when people of a certain “nature”—those labeled as unfit, subhuman, barbaric, or in numerous prison officials’, as well as Donald Rumsfeld’s, phrasing, “the worst of the worst”—are to be restrained in their liberty, deprived of rights, and ultimately, undone as persons. The uniqueness of contemporary punishment in the United States—its practices (anomalous in the so-called civilized world) of state-sponsored execution, prolonged and indefinite solitary confinement, excessive force, and other kinds of psychological torture—can be traced back to the country’s colonial history of legal stigma and obligatory deprivation. 9 I would go so far as to argue that statute and case law have been as important in the United States as social customs or beliefs in perpetuating the racial divide, effecting exclusion, and enforcing (under changing guises) an old genealogy of civil incapacity.

We must fix with precision these legal characterizations by looking at the inherited language of law for the place and the point of dispossession. As Orlando Patterson emphasized in his *Slavery and Social Death*, slaves were not simply “things,” but carefully construed, if necessarily degraded, *persons in law*. 10 Legislation and case law defined the needs of slaves—their “necessary wants” and their “personal security”—in great detail. In so doing, the Black Codes and slave courts in both North America and the Caribbean colonies often focused on protecting the bodies
of slaves while masking the extremity of their mutilation or ignoring the psychic effects of dispossession and ignominy.

In many legal restrictions, the chance to exceed what might be considered “human” lay in the unsaid—in those places where the law falls silent—or where the language is deliberately unclear or hypothetical. This spurious generality, operating under cover of excessive legalism, is perhaps nowhere so pronounced as in laws that made violence against slaves a “necessary” or “ordinary” incident of slavery. In John Haywood’s *A Manual of the Laws of North Carolina* (1808), a person would be judged “guilty of willfully and maliciously killing a slave” except when the slave died resisting his master or when “dying under moderate correction.” To style the “correction” of a slave that causes death “moderate” is to assure that old abuses and arbitrary acts would continue to be masked by vague standards and apparent legitimacy.

In order to reveal how law can create persons at the same time as it renders them dead, I grant language a materiality, an almost ethnographic intensity through a series of encounters I call “legal ritual.” Rituals of law are impelled by a rather tortured idea of the sacred, which commanded in seventeenth-century Britain and its West Indian and North American dependencies a colonial way of understanding not only crime and punishment but also body and mind. Less a Pauline substitution of the law of the heart for the written law, and more an elaborate return to Mosaic law—while incorporating a belief in civil rights and liberties inherited from the Magna Carta—these precepts were legitimated in documents as varied as Nathaniel Ward’s *Body of Liberties* (1641) or John Cotton’s code, *An Abstract of the Laws and Government* (1655), written for but never adopted in the Massachusetts colony.

The transformation of the old law in the New Canaan has left its traces on later jurisprudence and accounts for the severe rules of law and codes of penance in this corner of the New World. John Cotton, the Mathers, and Nathaniel Ward had depended on the Old Testament for their interpretation of a law that would be binding for proper conduct in Puritan society. But Jonathan Edwards turned away from the rationalism of the covenant: the doctrinal, ceremonial, and moral law. Instead, he affirmed the discipline of faith that ushered in the costly abandon to God’s grace. His rhetoric of the affections, will, and inclination, based in large part on John Locke’s sense of the bind of conscience, authorized equality in the experience of spirit. Keeping this distinction in mind, the *law of the heart* (the spirit) and the paradigmatic *law of the book* (the letter), we might try to gauge how these two religious strata were reconstituted in and remained indissociable from juridical and political idioms of punishment.

The Pauline assumption of the body made possible the transition from flesh to spirit. St. Paul knew that there could be no renunciation of the body. In antinomies such as the dualism conjured in flesh and spirit, he affirmed both a “physical body”
and a “spiritual body.” There has not been enough attention paid to the dialogue that Paul sets in motion between the law in his members and the law of his mind (Romans 7:23). I find in this call to mind an opportunity to reconsider the status of law, both in its carnal and spiritual meanings. His move from the law engraved on stone to the law of the heart ushered in a unique physicality that can be found in John Calvin’s admonition against hiding Christ’s “body under the mask of the bread” and in Jonathan Edwards’s emphasis on a “physical” rather than “moral” conversion.

Matter and mind were recuperated for the purposes of slavery in the colonies of the Americas, and nowhere so powerfully as in the birth of that legal personality called “slave” through the putting on and taking off of thought. Slaves, according to the natural historian and proslavery apologist Edward Long, in his History of Jamaica (1774), are not rational men, but mere bodies or carcasses with thought added on when appropriate: when they commit crimes, for example. Faced with the pseudo-Africa he had invented and the realities of the plantation zone, Long had recourse to gross and palpable similitudes in order to prove the natural inferiority of the “negro.” What Long called the progression “from a lump of dirt to a perfect human being” leads to the material shape that, once subject to law, marks the negation of civil existence. He buttressed that degradation with an elaborate taxonomy that relegated the reasonable person to the domain of whiteness, and the unreasonable—those he called “senseless icons of the human”—to the bottom rung of the hierarchic ladder.

Following gradations of being from “mere inert matter” to matter with thought and reason added on, Long converges on the “monkey-kind,” adding his opinion that “the orang-outang and some races of black men are very nearly allied, is, I think, more than probable.” He then argues with Buffon’s earlier attempt to prove the nonalliance of “orang-outangs” and negroes. For Long’s epistemology of whiteness depends on the systematic abasement of blacks. Though they might have organs, such outward bodily things do not necessarily house a reasoning mind, since the orangutan also has the form but not the intellect of humans. It is not only idiots, parrots, and orangutans that utter what might at first seem to be European words, but God has so diversified his works that sounds resembling negro utterance can be found in “the gabbling of turkies like that of the Hottentots, or the hissing of serpents.”

There is no rescue for unreason. Long’s creole taxonomies depended on the proximity of human and animal to systematize what might at first seem rampant incongruity. And in moving from taxonomy to punishment, he demonstrated how the legal status of animals had a great deal to do with the newly implemented rules for the correction of slaves. The proximity of the two categories in the Jamaican penal clauses revealed the relative status of animate and inanimate objects; wild animals or domestic species; and, ultimately, rights of possession and use (History of Jamaica, 2:486–87).
As the years have passed, the traces of an often fantastical logic continue to be read into the law by jurists, especially in cases dealing with cruel and unusual punishment. In the *Black Code of Georgia* (1732–1899), assembled by W. E. B. Du Bois for the Negro exhibit of the American section of the *Exposition Universelle* in Paris in 1900, the state penal codes are compiled, replete with their detailed adjustments overtime. In the penal code amended and approved in January 1851, an overseer or employer might inflict “unusual” or “inhuman” punishments, but the question remained whether this treatment was “cruel.” The particular acts of cruelty were listed: “unnecessary and excessive whipping, beating, cutting or wounding or . . . cruelly and unnecessarily biting or tearing with dogs . . . withholding proper food and sustenance.” In the very act of curbing gratuitous and extreme cruelty, the meaning of “human” is held in suspension for the slave for whom the use of whips, cudgels, and dogs was not only possible but expected. This commitment to protection thus became a guarantee of tyranny, and the attempt to set limits to brutality, to curb tortures, not only allowed masters to hide behind the law but also ensured that the guise of care would remain a “humane” fiction.

Since the eighteenth century, the adjectives *cruel* and *unusual* have been coupled in lasting intimacy in our legal language and courts, yet they have been vexed by a persistent rhetorical ambiguity that has been used alternately to protect and to legitimize violence. Unlike due process, the business of cruel and unusual punishment does not have a history so much as a kind of compulsive repetition; the history of its jurisprudence cycles interminably between these two poles: safeguarding rights and justifying their revocation.

First appearing in the English Bill of Rights in 1689, drafted by Parliament at the accession of William and Mary, the phrase “cruel and unusual punishment” seems to have been directed against punishments unauthorized by statute, beyond the jurisdiction of the sentencing court, or disproportionate to the offense committed. The American colonists included the principle in some colonial legislation, and after much debate the formula was incorporated into most of the original state constitutions. It became part of the Bill of Rights in 1791 as the Eighth Amendment to the U.S. Constitution: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” The American draftsmen intended that the phrase apply to “tortures” and other “barbarous” methods of punishment, such as pillorying, disemboweling, decapitation, and drawing and quartering. In other words, what mattered in the American context was unusual cruelty in the method of punishment, not the prohibition of excessive punishments.

In recent conditions of confinement cases, the Supreme Court of the late Chief Justice William H. Rehnquist—echoing the emphasis on the limits of the bodily punishment of slaves—has adopted the corporeal punishment paradigm: attending to the body, not to the intangible effects of the punishment (for example, psychological pain, agitation, or fear). Like the slave whose servile, brute body had yet to be protected against unnecessary mutilation or torture, the criminal is legally
reduced to nothing but the physical. Bodily suffering or the necessities of bare survival (food, clothing, shelter, or heating) have become the standards for Eighth Amendment cases. Although it has repeatedly been demonstrated that the practice of solitary confinement has devastating effects on the personality and mental health of prisoners, as well as on the social and civic components of identity necessary to the individual’s status in society, the Court has instead focused on physical signs of injury or pain. Through an often ingenious technical legalism, the Court has thus paved the way for cruelty that passes for the necessary incidents of prison life. Verbal qualifications make injury or deprivation matter only when “sufficiently serious,” when involving “more than ordinary lack of due care,” or inflicting “substantial pain.” Conditions are unconstitutional only when they pose a “substantial risk of serious harm.” We can get some perspective on the question of how the substance of slavery is preserved in the person of the prisoner by confronting what it is to be a person, or the limits of personal identity.

An example of the contemporary substitution of “unseen harm” for what had previously been public spectacles of cruelty can be seen not only in recent court decisions but also in governmental memos rationalizing progressively more serious conduct in U.S. interrogation centers. These documents scrupulously limit themselves to the categories and particulars of “severe physical or mental pain or suffering,” putting the burden of meaning on the perplexing and evasive nuances of the word “severe.” In contemporary U.S. prisons, both domestic and international—since the United States now exports its precincts of incapacitation not only to Iraq, Guantanamo, Bagram Air Base in Afghanistan, Diego Garcia in the Indian ocean, and other secret detention centers around the world but also to countries including Egypt, Syria, and Jordan, where terrorist “suspects” are “rendered”—what matters is the disabling of the mind through indefinite solitary confinement. This method of engendering incapacity offers the chance to understand how a new entity in law is to be codified. It also compels us to ask: How might one write a legal history of dispossession? In rethinking or laying out the terrain for the reconception of terms such as punishment, retribution, and resurrection, I want to ask how the physical and the mental, consciousness and flesh, come together in peculiar relations of tension and convertibility.

Confinement

In his Commentaries on the Laws of England (1769), William Blackstone warned that execution and confiscation of property without accusation or trial signaled a despotism so extreme as to herald “the alarm of tyranny throughout the whole kingdom.” Yet he added that even these practices were not as serious an attack on personal liberty as secret forms of imprisonment. The “confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or
Solitary confinement as a means of reforming criminals is a peculiarly American invention. Ever since “the discipline” or “separate system” was instituted in Eastern State Penitentiary in Philadelphia (1829), the restraints of extended solitude have been thought to provide a more effective correction than corporeal punishment. In his *American Notes* (1842), Charles Dickens described the psychic effects of the solitary system in Philadelphia’s Eastern State Penitentiary as a psychic annihilation far worse than physical death. “I hold this slow and daily tampering with the mysteries of the brain, to be immeasurably worse than any torture of the body.” Five years later, the *North American Review* criticized the punishment of isolation as a new kind of torture: “the savage tortured his victim by hot pincers and fiery arrows, the Inquisition doomed him to the rack and the stake; but neither the barbarian nor the bigot, with all their fiendish refinements in cruelty, ever invented a punishment as horrid as the privation of reason.” As I have argued elsewhere, the invention of the penitentiary and prolonged solitary confinement also operated as another form of civil death. Though first apprehended as if affixed to the blood of a criminal capitally condemned, in the nineteenth-century United States civil death was later understood to be the legal result of life imprisonment, a consequence rare at common law.

The immurement of wayward monks in stone, reconceived on Protestant soil, found its realization within the walls of the American penitentiary. Its chief architect, revolutionary America’s leading physician, Benjamin Rush, understood indefinite solitude and confinement as a “benevolent and salutary” advance over public execution and the indiscriminate mingling of prisoners. In “An Inquiry into the Effects of Public Punishments Upon Criminals, and Upon Society” (1787), Rush argued against the “reformation of a criminal” through “public punishment.” Rather than abolishing punishments, he chose to “change the place and manner of inflicting them.” Whereas Blackstone warned against private punishment as a sinister accomplice to arbitrary government, Rush urged his hearers to replace “certain and definite evil” with incarceration that was of “unknown” and indefinite duration in a remote “house of repentance.” The unknowability of punishment’s limits, as well as the loss of personal liberty, would, in increasing “terror,” cure “diseases of the mind.”

In “An Enquiry into the Consistency of the Punishment of Murder by Death, With Reason and Revelation” (1797), Rush revealed the questionable nature of what he had argued were “the duties of universal beneficence.” The gradual annihilation of the person, disabled but not dead, proved to be a punishment more harrowing than execution. Rush argued that if “the horrors of a guilty conscience proclaim the justice and necessity of death,” and if God inflicted these “horrors of conscience” as “punishment,” the most effective punishment would be to extend these torments through time, not to curtail them by execution: “Why, then should
we shorten or destroy them by death, especially as we are taught to direct the most atrocious murderers to expect pardon in the future world? No, let us not counteract the government of God in the human breast: let the murderer live—but let it be to suffer the reproaches of a guilty conscience." Rush presumed that without any human contact the prisoner; in a kind of premature burial, ultimately might be reborn.

In *On the Penitentiary System in the United States* (1833), Alexis de Toqueville, visiting the penitentiaries of the United States, wondered about the nature of this rebirth. He described it in terms that resonate, not with Quaker renewal as receiving “light” in the “inward parts” or the possession of “inner light,” but with the despair, fear, and personal effacement of Puritan conversion. But what is missing from the conversion sequence is the promised rebirth through God’s free grace. In Toqueville’s words, first “agitated and tormented by a thousand fears,” then succumbing to “the terrors” and uncertainty that nearly drive him insane, the inmate experiences “a dejection of mind” that promises not only “a relief from his griefs” but also a submission to the rules of the prison. This juridical redefinition of persons through solitary confinement, while appropriating the detailed, clinical analyses of the stages on the way to personal regeneration (“the morphology of conversion” that would become prescriptive in the evangelical churches) could bring about madness, the very thing that Jonathan Edwards argued was Satan’s work in *AFaithful Narrative of the Surprising Work of God* (1736), his testimony of the Northampton awakening of 1734–1735.

These sensibly and visibly manifested forms of conversion demanded not only an abstract conviction of sin but also what Edwards, following the Puritan pattern, called “legal terrors.” Yet what Edwards seized upon as “mere legal terrors” were, he reminded his readers, only the first stage in the alterations of mind that ultimately would lead to saving repentance, “evangelical humiliation,” and the spiritual regeneration that produced a new identity. Following the Pauline redemption from the curse of law, this true conversion reiterated what 1 Corinthians 3 acclaimed as “a new covenant, not in a written code but in the Spirit; for the written code kills, but the Spirit gives.” The excruciating travail of “legal terrors,” “legal distresses,” or “legal strivings,” as Edwards recounts in *AFaithful Narrative*, rather than being ends in themselves, bring persons, once “debilitated, broken, and subdued with legal humiliations” to “a sense of their exceeding wickedness and guiltiness” and to “the pollution and insufficiency of their own righteousness.” Only through this painful passage can the heart be changed and life infused “into the dead soul” through the grace of conversion.

Locke, in *The Reasonableness of Christianity, As Delivered in the Scriptures* (1695), had made an analogy between the torment of hell and the torture of secular punishment. “Could any one be supposed, by a law, that says, ‘For felony thou shalt die,’ not that he should lose his life; but be kept alive in perpetual, exquisite torments? And would any one think himself fairly dealt with, that was so used?” We must
find a way to understand how a state of extremity such as solitary confinement could have been devised as a humane answer to state-sponsored execution: how this misery worse than death was made legally viable by a religious assignation. Indefinite containment summoned a submission of mind that had been seduced by the physical and its temptations. Yet by stopping short of Edwards’s “converting light,” leaving the prisoner instead “buried alive,” in Dickens’s words, in the darkness of the tomb, only to be “dug out in the slow round of years,” the reformers who devised punitive isolation misunderstood and misconstrued the recognition of God’s justice in the sinners’ convictions. Although the new order of legal incapacitation claimed to bring divine dispensation into the prisons of the United States, it depended not on faith in Christ but in the civil order, not on a new spiritual sense or awakening but on sensory deprivation and its effects: mental suffering and emotional incapacity.

When Rush argued against capital punishment in Philadelphia, the old practices of drawing and quartering or other mutilations had ended. Rush wanted redemption to be possible on earth, but it is to the nature of this rebirth that we must again turn. For, using the abstract language of religion along with something vague and grand called “soul,” Rush masked what he knew to be the focus of this punishment: the thinking self. It is no accident that in precisely the period in which Rush and other reformers formulated their novel philosophy of regeneration, Lockean psychology had infiltrated the precincts of medicine. From that moment, what had once been “spiritual battles,” fought, in Ian Hacking’s formulation, “on the explicit ground of the soul,” now focused “on the terrain of memory.”

Rush’s claims of rebirth are miscarried, given the actual accounts of psychic disintegration and insanity, but the language of “soul death” can nonetheless be retained, since the power of the reformative ideals of solitary confinement were lodged in religious terms. But, again, the actual practice of this incarceration ritual depended on annihilating the idea of a person exemplified by Locke’s forensic person, with its articulation of forensic responsibility, whether before courts of law on earth or at the Last Judgment in heaven. Further, inasmuch as theological terminology can be understood to have effected the transformation of persons in law, the pretexts of beneficent punishment can be seen as a cover for radical depersonalization. And it is here, in the professed dichotomy between “brutality” and “decency,” that the dangers of the humanitarian project appear, most clearly perhaps in legal arguments for humane substitutes for the blood and gore of corporeal punishment.

When the state decided to punish criminals psychically without mutilating or executing them, a bold reimagining occurred. The criminal was circumscribed by the walls of a cell, condemned to solitude, locked in torment. Hell came into this world. The inversion of the spiritual and material substituted the law of earth for the law of heaven. In the legal fiction of civil death, broadly understood, the state reinvented what happens after literal death. In a secular world, the enthusiastic embrace of something vague called “soul,” once posited as if in an abstract beyond,
permitted one to ignore the actual, punitive sensory deprivation and consequent loss of “mind.” This romanticized pursuit of transcendent measures of humanitarian care thus became a novel playing ground for intense literalizing by the state.

The inversion—the civil death that trumped the promise of spiritual life—triggered a sort of magic that depends on the exchange between natural and supernatural. Instead of dying in the body to be reborn in Christ, one dies in the spirit. The soul is killed before the body dies. In the realm of the law’s authority, the change from what must be done to the body to what—to be more exacting in our terminology—is thrust upon the mind becomes the defining moment for understanding personhood. In the background hovered the resurrection body either resplendent in new skin or rotting in an old carcass.

Yet, as we will see, this metaphoric script registered a profound misunderstanding of a powerfully Pauline lineage, evidenced in the materialist legacy of Calvin, Locke, and Edwards. What passed as an enlightened endorsement of the “human” (in later legal language delimited in the phraseology of basic human needs or minimal civilized measure of life’s necessities) obliterated the claims of personhood. Such a substitution mimed but misunderstood the Pauline tension between flesh and spirit that required one’s wholehearted personal adhesion, what in Lockean terminology inhered in the “law of the mind,” and its components of memory, awareness, responsibility, and intent.

**Punishing the Residue**

*And though after my skin worms destroy this body, yet in my flesh shall I see God.*

—Job 19:26

What happens when punishment does not attack the body but instead seizes upon the mind? How do we categorize human matter that is no longer the subject of rights and duties; in other words, those persons restrained in their liberty, imprisoned in the flesh, or, in the remarkable *Ruffin v. Commonwealth* (1871), the criminal to whom laws and regulations attach “as certainly and tenaciously as the ball and chain which he drags after him?”

Job declares that although his body was consumed with sores and devoured by worms, he shall yet see God. Who is this “I”? And what kind of flesh is this? In the Judaica Press edition of *The Book of Job* (1989), which offers an intriguing contrast to Christian commentaries, the line is translated: “And after my skin [also translated from the Hebrew as “flesh” or “meat”], they have cut into this, and from my flesh I see judgment.” In his commentary on Job, published posthumously (1515), Rashi (Rabbi Solomon Izhaki) concentrates on the “vexation and persecution” of Job’s friends who judge him and interprets this ability to see God as if to see his “judgments.” As Rashi renders it: “And more than my flesh, I would perceive God. After my flesh was consumed, they broke this bone although I perceived God more
than I would perceive my own flesh.” Can the fleshly envelope, emptied of responsible agency, be given a second life—not by God, but in law? And if so, what kind of dispensation is this?

Two Christian commentaries, by Matthew Poole (1675) and Matthew Henry (1710), shed further light on the rigors of Pauline ambiguity. In these eschatological speculations on the meaning of redemption, we find another way of thinking about the origins of solitary confinement that would be developed most extremely in the United States. That nightmare life-in-death punishment haunts my reflections, since the point of indefinite solitude and sensory deprivation is to deprive of personality those who are incapacitated. In other words, the incapacitated are forced out of the personal identity that finds its gist in consciousness.

Poole interprets the same passage from Job as Job’s words uttered from the grave. “Worms,” he says, devour the body in the ground. (There are no worms in the Hebrew text.) But is it a “living body” or a “dead carcass”? Flesh is somehow “between both.” Once flesh and body are resurrected from the grave, then the “eyes of the flesh,” the “bodily eyes,” according to Poole, are “restored and reunited” to Job’s “soul.” Job speaks after death. He is raised up with the body, possessing a “corporeal vision.” Henry goes much further in his analysis of the redemption of the blessed, risen body. In the grave, Job’s body is wasted and consumed, but out of the body’s corruption, the flesh will see God: “That body which must be destroyed in the grave shall be raised again, a glorious body. . . . The separate soul has eyes wherewith to see God, eyes of the mind; but Job speaks of seeing him with eyes of the flesh, in my flesh, with my eyes; the same body that died shall rise again, a true body, but a glorified body . . . and therefore a spiritual body.”

Both Poole and Henry stress the union of body and soul in a ritual of reconciliation that Edwards would push further, using Lockean psychology to recount the multiple conversions of A Faithful Narrative. What had been severed on earth will come together after death, but only because a hub of perception, and hence of thought, remains—localized and materialized as residue, the core that survives mutilation and death. Defending a palpable and manifest conversion as evidence of grace, Edwards, just as Paul and Locke before him, summoned the spiritual force of a personal embodiment that would always exceed the regulatory beneficence of the authorities of both church and state.

In the second edition of his An Essay Concerning Human Understanding (1694), Locke added a section on personal identity that caused numerous theological disputes. In what, Locke asked, lies that self that makes a human a person? He concluded that sameness of person is indifferent to sameness of body. It did not matter, he argued, what the “frontispiece,” the shape or structure, was, for “person” is a “forensick term.” Edward Stillingfleet, then Bishop of Worcester, wrote a series of letters condemning Locke’s doctrine regarding personality and personal identity. Stillingfleet argued that not only was Locke’s way of Ideas inconsistent with the Christian doctrine of the resurrection—the same body in life as in judgment—but Locke’s
view of identity also threatened immateriality. “My idea of personal identity,” Locke replied in his third and last letter to the bishop, “makes the same body not to be necessary to making the same person, either here or after death and even in this life the particles of the same persons change every moment, and there is no identity in the body as in the person.” 40

Since God, in his omnipotence, could add to matter the thinking faculty, Locke contrived new places for thinking in matter. The supposition enraged the bishop, who believed God gave thought only to the immaterial, freestanding souls of humans. Yet, for Locke, you could look and talk like a human, or as a “man” in his nomenclature, but what granted you personhood was your awareness of your actions, not only in the present but into the past. Something called “soul” was simply unintelligible to Locke. “Can the soul think, and not the man? Or a man think, and not be conscious of it?” (Essay, 2.27.14).

Whatever was metaphysical in Locke’s thinking had also to be legal. Even if, as he suggested in the Essay, the same person could be incarnated in a series of bodies, or in constantly changing particles of matter—for example, “the infant Socrates” and “Socrates after the resurrection,” or “an embryo, one of years, mad and sober”—as long as the thread of self-consciousness is maintained, past experience can be revived, if not on earth, then in heaven (2.27.21, 7). The object of law, then, is not the body or the soul—the substance of each is equally unknowable—but persons who think, who remember, who can be held accountable. At the Last Judgment, punishment will be attached not to the body but to consciousness.

What does the word person stand for? A person is subject to law. “It is a Forensic Term appropriating Actions and their Merit; and so belongs only to intelligent Agents capable of a Law, and Happiness and Misery” (2.27.26). Locke’s person is a moral agent, responsible for his acts in light of future retribution. How do punishment on earth and subjective blameworthiness or guilt act as a kind of shadow play to the ultimate judgment of God? Only a person can be punished. Or, put another way, what makes one a person is the capacity to know the merit or demerit of one’s actions. Without accountability for past actions of good and evil, one can yet be a man, a “rational creature,” a horse or a dog. All are identifiable by the shapes of their bodies and by greater or lesser degrees of rationality. But what makes a person—and Locke implies that a dog with awareness might also be a person—is responsibility: the capacity to appropriate these past actions “to that present self by consciousness.”

It is quite possible, if we push this reasoning further, that all definitions of personhood rest ultimately on the ability to blame oneself. A drunk man, in one of Locke’s famous examples, is punished for what the sober man has no recollection of. On this earth, in the limits of human law, where we cannot distinguish “what is real, what is counterfeit,” ignorance claimed in drunkenness is not accepted as a plea. “Humane Judicatures justly punish him,” Locke writes, “because the Fact is proved against him, but want of consciousness cannot be proved for him.” But
on the “great Day,” when bodies will rise up and “the Secrets of all Hearts shall be laid open,” what remains? Here Locke gives a new body to what had before been abstract. “Doom,” or judgment, is realized when “Conscience,” which seems to be something like a combination of the law of the heart and the residue of thinking, will accuse or excuse the risen body, which might, as Locke had insisted to Stillingfleet, be quite unlike the man as he looked on earth.

In terms of the legal personality of the slave, for example, and the rules regarding mutilation and torture, Locke’s analytic of the self provides an unwitting precursor to a new ritual of punishment. He described the self as “that conscious thinking thing,—whatever substance made up of, (whether spiritual or material, simple or compounded, it matters not)—which is sensible and conscious of pleasure and pain, capable of happiness or misery, and so is concerned for itself as far as that consciousness extends.” And here is his example: “If you allow a piece of the body, e.g., the little finger, to depart from the whole, carrying consciousness with it, it is evident the little finger would be the person; and self then would have nothing to do with the rest of the body” (2.27.17). Locke’s demonstration that consciousness could as easily be in our little finger as in our mind presses us to test what we mean when we distinguish persons from things.

What kinds of metamorphoses would this thought-is-a-limb argument inspire in the annals of colonial punishment? If a piece of body could carry mind along with it, then we’re dealing with a world where the meaning of mind and matter, once rendered in codes of law, reconfigured the meaning of torture and the limits of correction. Locke had read numerous accounts of travel to the West Indies. He would have been familiar with the unwieldy coercion of human materials and the possibility that they, though dismembered, might resurface as the alternative, ghost-ridden histories of enlightened philosophical postulates. Many of his most fabulous thought-puzzles read as records of the rudiments of legal sorcery that turned humans into nonhuman animals, dull-witted men, reasonable beasts, or thinking things.

In his commentary on St. Paul’s Romans in Notes and Paraphrases on the Epistles of St. Paul (published posthumously between 1705 and 1707), Locke argued for the spirit as opposed to the letter of the law. He equated the “inmost self” and “the law of my mind”: “I delight in the law of God in my inmost self, but I see in my members another law at war with the law of my mind, making me captive to the law of sin that dwells in my members.” He concludes: “So then, with my mind I am a slave to the law of God, but with my flesh I am a slave to the law of sin.”

Let us recall that to enslave the mind to God’s law became the rule for “legal terror,” the initial stage in the saving ritual of conversion that coincided with conviction of sin, consciousness of unworthiness and fear of God’s vengeance. This inferiority, psychologically conceived, is essential to the idiom of personhood. “Spirit,” as Locke noted in his gloss of what Paul called “Flesh and Mind,” meant the mental as opposed to the bodily parts. How, then, are we to understand Paul’s statement
in 1 Corinthians: “But we have the mind of Christ.” Can we understand mind as
the legal residue that in the afterlife remains as another kind of body, a remnant
that draws accountability unto itself, and therein becomes present to God?

Theological obsessions formed one of the principle chapters in the evolution
of punishment in those places where life imprisonment and solitary confinement
would be established as humane alternatives to death and physical torture. If
Locke’s Second Treatise remains the foundational text for the civil government of the
United States—the understanding of the citizen, rights, and liberties, as well as
property—An Essay Concerning Human Understanding remains the foundational text
for theories of mind, personal identity, memory, and conversion. Locke’s isolation
of the mind prompted penal reform and underwrote solitary confinement in the
United States in the nineteenth century. In the section of his Essay, “Our Ideas and
Their Origin,” Locke addresses what happens when the materials of thought are
removed, when only memory is left and nothing comes through the portals of the
senses. Locke’s words, though certainly not his intent, were taken up by reformers such
as Benjamin Rush as they conceived solitary confinement.

Locke imagined a fetus in the womb as nothing more than a vegetable. But as
time passes, perception and thought come together to move the senses. And with
that movement out from a place “where the eyes have no light, and the ear so shut
up are not very susceptible of sounds,” the mind, once jostled by the senses, awakens,
and “thinks more, the more it has matter to think on.” In the chilling logic of
solitary confinement and its formidable extension in the images from Guanta-
namo—the kneeling and shackled bodies, hooded and blindfolded by blacked-out
goggles—we follow the execution of thinking matter. As we will see, the terminol-
ogy of persons and the ideal of responsible agency would matter a great deal to
Justice Antonin Scalia and to the writers of the “torture memos” of 2002 and
2003.

Who Gets to Be Wanton?

The undoing of personhood has a long history in the United States:
whether in the creation of slaves as persons or of criminals as dead in law, or in that
unique and perpetual recreation of the rightless entity. What happens to per-
sonhood when practices of detainment or conditions of confinement, excessive
force, or unendurable suffering are brought before a court? Prisons are locales cre-
ative of another kind of law. Rather than deeming certain practices beyond the law,
then, I would argue that the current transnational reinvention of civil life under
the sign of civil death depends on hyperlegality, the requalification not only of mat-
ters of public concern but of matters of the private sphere as well. We are witnesses
not only to the creation of a new kind of person in law but also to the demands of
an “infinite justice” that threaten to abolish the status of person. For, as I hope to
show, such justice is not meted out to individuals, to persons accused of criminal acts. Instead, its broad sweep calculates what is innumerable. Its generality subsumes ever-larger groups that can be named and claimed as “threats” in the perpetually shifting imperatives of this “war without end.”

After the revelation of abuses at Abu Ghraib, Secretary of Defense Donald Rumsfeld drew distinctions that actually specified nothing at all: “I’m not a lawyer, but I know it’s not torture—probably abuse.” Rumsfeld’s blurring of the distinction between obvious torture and possible abuse has a real legal history. The now-famous documents written by lawyers for the White House and the Departments of Defense and Justice—an August 1, 2002, memorandum prepared by Judge Jay S. Bybee for Alberto R. Gonzales, then Counsel to the President, and a March 6, 2003, memorandum entitled “Working Group Report on Detainee Interrogations in the Global War on Terrorism” (authorized by the Pentagon’s general counsel, William J. Haynes II)—in claiming the nonapplicability of the Geneva Conventions redefined the meaning of torture and extended the limits of permissible pain.44

It might seem that the rules for the treatment of Iraqi prisoners were founded on standards of political legitimacy suited to war or emergencies. Based on what Carl Schmitt called the urgency of the “exception,” they were meant to remain secret as necessary “war measures” and to be exempt from traditional legal ideals and the courts associated with them. But the ominous discretionary powers used to justify this conduct are entirely familiar to those who follow the everyday treatment of prisoners in the United States—not only their treatment by prison guards but also their treatment by the courts, their sentencing, corrections, and rights. The torture memoranda, as unprecedented as they appear in presenting “legal doctrines . . . that could render specific conduct, otherwise criminal, not unlawful,” refer to U.S. prison cases in the last thirty years that have turned on the legal meaning of the Eighth Amendment’s language prohibiting “cruel and unusual punishment.”45

In *Louisiana Ex Rel. Francis v. Resweber* (1947), Willie Francis, “a colored citizen,” was sentenced to death by a Louisiana court.16 The attempted electrocution failed due to mechanical difficulties, and Francis petitioned the Supreme Court, arguing that a second attempt to execute him would be unconstitutionally cruel. Justice Stanley Reed, writing for the majority, ruled against Francis. Even though he had already suffered the effects of an electrical current, that did not, in the Court’s opinion, “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.” Justice Felix Frankfurter called the failed execution “an innocent misadventure.” The dissenting justices understood Francis’s experience to be akin to “torture culminating in death” and asked, “How many deliberate and intentional reapplications
of electric current does it take to produce a cruel, unusual, and unconstitutional punishment?”

How does insufferable punishment become legal? Although granting that the Eighth Amendment prohibited “the wanton infliction of pain,” and admitting that Francis would now be forced again to undergo the mental anguish of preparing for death a second time, Justice Reed changed the focus in his conclusion from the experience of the prisoner to the intent 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 cellblock.” The intent requirement of Louisiana became the controlling precedent for later cases that analyzed how the “cruel and unusual punishments” standard applied to the conditions of a prisoner’s confinement. The limits of permissible suffering were subsequently established in a series of decisions.

In Duckworth v. Franzen (1985), Judge Richard Posner, writing for the U.S. Court of Appeals for the Seventh Circuit, concluded that although shackled prisoners were injured during transport when their bus caught fire, there was no Eighth Amendment violation. The intent requirement was not met, since the officers had not intended “maliciously” to cause harm. “Negligence, perhaps; gross negligence . . . perhaps, but not cruel and unusual punishment.” What happened was nothing more than “if the guard accidentally stepped on the prisoner’s toe and broke it.” Referring to Samuel Johnson’s Dictionary of the English Language, Posner defined punishment as “any infliction of pain imposed in vengeance of a crime.” In other words, punishment is decreed by the sentencing judge and has nothing to do with events that happen afterward, whether they are deprivations within or accidents outside a prison. Only “malicious intent” could make unconstitutional what prisoners suffered after incarceration, no matter how harmful conditions may have been to their minds and bodies.

In 1981 Pearly Wilson, an inmate at the Hocking Correctional Facility in Ohio brought a pro se lawsuit alleging that conditions in the prison, including overcrowding, excessive noise, inadequate heating and ventilation, unsanitary dining facilities, and lack of protection from communicable disease, violated the Eighth Amendment. In Wilson v. Seiter (1991), the Supreme Court reviewed its first prison “conditions of confinement” case in a decade. The plaintiff had argued that if prisoners are deprived of “the minimal civilized measure of life’s necessities,” the Eighth Amendment is violated regardless of anyone’s intent.

Writing for the five-member majority in this sharply divided decision—joined by Chief Justice Rehnquist, Justice O’Connor, Justice Kennedy, and Justice Souter—Scalia referred back to Posner’s definition of punishment in Duckworth v. Franzen: “a deliberate act intended to chastise or deter.” The Supreme Court 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 philosophies ("Did the officials act with a culpable state of mind?"). Adopting the "subjective component" standard of *Estelle v. Gamble* (1976), which had concerned "deliberate indifference to serious medical needs," Scalia went further in *Wilson*. Using the "intentional" denial of medical care to show cruel and unusual punishment, the Court determined that *Estelle's* deliberate indifference standard should apply to all conditions of confinement claims.

*Estelle*, referring to *Louisiana*, had presented a choice of alternatives for the validation of Eighth Amendment violations: either those that are compatible with the "evolving standards of decency that mark the progress of a maturing society" (*Trop v. Dulles*, 1958) or those that "involve the unnecessary and wanton infliction of pain" (*Gregg v. Georgia*, 1976). *Wilson* made no allowance for such a choice. Instead the Court maximized the subjective prong of the case and turned away from the progressive standard of "broad and idealistic concepts of dignity, civilized standards, humanity and decency" that had been cited in *Jackson v. Bishop* (1968) and in *Estelle*. The *Wilson* Court recognized only "obduracy and wantonness" and "inadvertence or error in good faith" as prohibitive. The Court’s preoccupation is with the knowledge, deliberation, or intent of those in control. Deprivations, if not a specific part of the prisoner’s sentence, are not punishment unless they are imposed by officers with "a sufficiently culpable state of mind." In other words, no matter how much actual suffering a prisoner experiences, it is not a subject for judicial review unless the intent requirement is met.

Elizabeth Alexander, now Director of the American Civil Liberties Union National Prison Project, argued for the plaintiffs in *Wilson* that no inquiry into state of mind should mitigate unconstitutional conditions, which are often the result of accumulated actions over time. Reminding the Court of the guarantee in *Hutto v. Finney* (1978), *Rhodes v. Chapman*, and *Estelle*, as well as the rationale (though rejected by Chief Justice Rehnquist) of *DeShaney v. Winnebago County DSS* (1989), Alexander explained that the "government has an affirmative duty to supply the basic necessities of life to those whom it has deprived of the ability to supply those necessities on their own." What is at issue here is not the structure of the two-pronged objective and subjective approach, but the appearance of objective conditions in the most obscure, indeed unverifiable place: the private thoughts of prison officials. Elizabeth argued, "Once continuing conditions of confinement in a prison are bad enough to violate the Constitution by denying the basic necessities of life, the point of injunctive relief is to end the suffering, not to fix the blame."

In attempting to curb the possibilities of proving an Eighth Amendment violation—which amounted to nothing less than gutting the meaning of cruel and unusual punishment, the only provision of the Bill of Rights that is applicable by its own terms to prisoners—Scalia in *Wilson* focused not on the meaning of "cruel and unusual" but on that long-overlooked word *punishment*. It now meant the decree of a sentencing judge and had nothing to do with whatever followed during confinement.
Locke stressed that the mind of the accused was something that granted personhood; a responsible agency capable of both memory and intention. But Scalia assumed something else about that entity to be punished. Not only was punishment limited to the sentence, but if a plaintiff lodged a claim that his constitutional right to be free of cruel and unusual punishment had been violated, that very claim was pulled out from under him. For the only way that whatever had occurred could be called “punishment,” following incarceration, would be to ascertain the distinctness of the offending officer’s mind, his self-awareness. Was the officer in control subjectively blameworthy? All that matters is the intent of the defendant. For only the defendant, who just happens to be the malefactor, possesses mind enough to summon the prerogative of mens rea (a guilty mind).

The language used to describe the criminal’s state of mind is now transferred to the prison official (whether it is “sufficiently culpable,” “unnecessary and wanton,” “deliberately indifferent,” or “malicious and sadistic”). The disintegration of mind that for Locke defined personhood literally—and legally—effectively puts the prisoner on the borderline between being a thing and a person. Though in the legal fiction the prisoner becomes something without will, agency, or affect, in the practice of solitary confinement a vestige of the person, a residue that looks upon the mind’s gradual decimation, remains.57

When the criminal language of subjective blameworthiness shifts to government or prison officials in order to excuse injustice—or to excuse torture—there has to have been a delicate, thoroughgoing calibration of the relationship between persons and things, between those capable of intent and the presumed unthinking recipients of their punishment. The joint opinion in Gregg v. Georgia (1976), which overturned Furman v. Georgia (1972), coined the phrase “unnecessary and wanton infliction of pain.” But it was Scalia’s opinion in Wilson that gave the intent requirement and wantonness their fiercest play. The characterization of wantonness matters a great deal to Scalia, who cannot stop repeating it: in his view, whether an act can be “characterized as ‘wanton,’” since “wantonness does not have a fixed meaning,” depends “upon the constraints facing the official.” In a prison riot that necessitates “excessive force” (Whitley v. Alpers, 1986), for example, “wantonness consisted of acting ‘maliciously and sadistically for the very purpose of causing harm,’” but in the context of inadequate medical care, as in Estelle, as we have seen, “deliberate indifference” defined “wantonness.”58 Scalia’s emphatic use of the word wanton—that seemingly least legal of words—invites us to look more closely at the use of law in reconstructing, indeed in summoning, a history of persons that is not only metaphysical but religious; and its notions of vengeance and retribution are really quite old.

How and when did the law (criminal and civil) come to presuppose the existence of minds? Is there a philosophy of personhood in the logic of law? Spiritual battles are fought, not on the ground of something vaguely imagined as soul, but on the exacting site of mind. Did the disappearance of the soul into the psycholo-
gized space of consciousness change the way the law would articulate the exchange or slippage between objects and persons, lifeless and living chattels?

As modern law appeared to scrutinize the medieval religiosity that underpinned ancient law, objects or things lost their ability to commit wrong, to be cursed. It was as if—in a world teeming with wantonness, where persons and things interacted in mutually adaptable if not belligerent ways—another kind of law came into being and removed the liability adhering to things or beasts. But old rules maintain themselves, even if they receive a new content. “The customs, beliefs, or needs of a primitive time,” Oliver Wendell Holmes wrote in *The Common Law* (1881), “establish a rule or a formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains.”59 Attitudes toward punishment, and the meanings of words such as *cruel* and *unusual* continued to function in rather similar ways in slave communities, where the nonhuman—a concept of great penetrating power, not unlike a virulent infection—engendered deeply unspecialized applications and entered the human community in any variety of circumstances.

The sacral element that Christianity could not wholly suppress remained in laws pertaining to animate or inanimate things that caused death. In ancient and biblical sources, for example in Exodus, the going ox had to be stoned. In Plato’s *Laws*, the law applied to any beast or thing that killed a person and commanded that the accused “offender” be sent beyond the boundaries of the country, “exterminated” in the literal and original sense of the term. The object of these measures was to appease the wrathful dead, since the claim of a soul that had been hurried out of this world outweighed the claim of the dead man’s kin. Vengeance had to be wreaked upon the object before the dead could lie in peace.60

What happened when the medieval English belief in “noxal surrender” returned in the eighteenth century, when it was resurrected in the early Americas? What was the relationship between dead bodies, haunting spirits, and political authority? The practice of *deodand*—the giving up to God of the inanimate or animate object, the soul-lacking thing, or more precisely, “any unreasonable thing,” whether horse, cart, or tree that has killed a man—had another use in the colonies. The old doctrines were ingeniously adapted to new goals. They gave way to new devotions to spirits that were cast sometimes in the form of animals, sometimes as trees. The relics and scraps of bodies that the slaves called “ebony wood,” “pieces of the Indies,” and “heads of cattle” returned as spirits, caught in the evil that had created them. Condemned to wander the earth in the form of pigs, cows, cats, or dogs, these evil spirits were the surfeit of an institution that turned humans into chattel.

The police law of slavery in the British colonies drew on English precedents.61 Even the punishment of *attaint* or *attainer*—a word meaning “to strike” or “to hit,” but which, through a false derivation in “taint or stain,” came to mean “corruption of blood”—traveled across the Atlantic. As Blackstone explains in his account of punishment for treason: “For when it is now clear beyond all dispute, that the criminal is no longer fit to live upon the earth, but is to be exterminated as a monster
and a bane to human society, the law sets a note of infamy upon him, puts him out of its protection, and takes no further care of him than barely to see him executed. He is then called attaint, *attinctus*, stained or blackened. 62 The crime of “compassing the death of the king” in the slave colony of Jamaica became in the 1698 Penal Clauses of the Jamaican Black Code “the crime of compassing or imagining the death of any white person by any slave or slaves, and being attainted thereof by *open deed* or *overt act*), before two justices and three freeholders, punished with death.”63 The consequences of attainder, once transferred to the colonies as tradition and precedent, insured that a novel genealogical inscription of race could be got from an old language of criminality and heredity. No longer under legal quarantine, tainted blood extends down through the generations. Further, the royal bearer of sovereignty is extended to *all* whites, no matter their status, for sacred power derived from the privilege of color and *dominium* over the enslaved.

The historical forms of sacred authority and servile law underwent a continual process of redefinition as they resonated with the demands of domination, the struggles within slavery, and the transatlantic domain of punishment and possession. The meaning of mind and matter reconstituted the logic of punishment as the language of sorcerers. The artificial unreason of law, shared by pagans and Christians alike, coalesced in a continuum of reinvention in the colonies. The complicated uses of intentionality extend through time into nineteenth-century understandings of crime and the minds of those who commit it.64 As I have noted, in English law this peculiar practice of forfeiting the object—any *personal chattel* that caused the death of any *reasonable creature*—effectively removed homicidal taint and malicious influence. Imagine the scene. If a man in a stiff drunk tripped over his dog, legally the dog would be judged as *moving to the death of the deceased*. In the antebellum South, the barter was more complicated. A slave delivered up to justice amounted to nothing less than the master’s redemption from his chattel’s sin and restitution for his chattel’s loss. Penal laws *in terrorem* (for dread or deterrence), the legal terror so much a part of the perpetuation of slavery, depended on keeping intact this fitful valuation of persons and things.

**Torture**

“Where there is no torture there can be little witchcraft,” writes Frederick Maitland in *The History of English Law* (1898). He concludes, “Sorcery is a crime created by the measures which are taken for its suppression.”65 For the purposes of the present argument, we might substitute “terrorism” for “sorcery.” Under the antiterrorist law of the Patriot Act, a person can be indefinitely detained for an immigration-related violation if he or she is “certified” as a terrorist. This certification requires the minimal “reasonable grounds to believe” standard. Though no indictments or charges have been lodged against them, they can be detained by
the Immigration and Naturalization Service in “preventive detention” without any chance to contact their families or attorneys and can be held indefinitely without due process. The interrogation centers at Guantanamo, Afghanistan’s Bagram Air Base, and the ever-proliferating, unnamed prisons throughout the world are filled with those arrested and held indefinitely without charges of wrongdoing, held only on a general presumption of guilt. What is decisive in these cases of detention is the status the person holds. Character and general disposition replace objective evidence. And, as in the ancient modes of proof, the current jural doings are pervaded by an essentially superstitious and irrational spirit. Instead of evidence of wrong done, such ordeals and exculpatory oaths are hunches about the essence, nature, or type of creature who is ripe and ready for domination. The judicatory fact that matters is not what the person has done, but what he is like. The judgment precedes the proof.

The irrational haunts the civilizing claims of the reasonable. Deaths by misadventure or mischance, would, as we saw in the law of deodands, demand that the thing, instrument or beast, be forfeit. Blood sticks to new rules: death by hanging; burning; loss of ears, nose, hands, or feet. But the worst cruelties belong to a politer time. After two Afghan men died in U.S. custody in Bagram Air Base in December 2002, Colonel Rodney Davis, when asked about autopsy reports that established the cause of death as “homicide” and “blunt force injuries,” confessed: “We tend to share the good, the bad and the ugly, and we’ve fessed up, if you will, to a few mishaps we’ve had here since we’ve engaged in the war on terrorism.”

Deaths in custody as “mishaps”? We now know that both Dilawar and Mullah Habibullah died after unmitigated torture. On May 20, 2005, the New York Times exposed the sadistic killing of the two Afghan detainees. Based on the army’s nearly two-thousand-page confidential file of its criminal investigation of the case, the Times reported that both men, first hooded, shackled and isolated in nine-foot by seven-foot isolation cells, were kicked to death, repeatedly struck with the “common peroneal strike” (a disabling blow to the side of the leg, just above the knee), while chained to the ceiling by their wrists. Routine incidents of abuse and humiliation were not only directed by interrogators to extract information or punishment but also carried out by military guards, who were often trained by police and prison correctional officers. “Sometimes, the torment seems to have been driven by little more than boredom or cruelty, or both.”

What does it mean to construct an analytic of power that takes seriously the law as its model, that looks closely at the continuum between offending animal or inanimate object: the slave, the prisoner, and the newly targeted “civilian” or “security detainee” or “enemy combatant”? The odd encounters between reasonable creatures and unthinking things became crucial to Oliver Wendell Holmes in his substitution of a mentalist with a behavioral history of the law. In his essay “Ontology, the Mind, and Behaviorism,” in The Problems of Jurisprudence (1990), Richard Posner credits Holmes with “standing the concept of the deodand on its head.” By
dealing with conduct rather than intent, “instead of treating dangerous objects as people,” Holmes, Posner argues, “was proposing to treat dangerous people as objects.” But if civilized good sense teaches us that “we cannot discover private thoughts” or “peer into people’s minds,” why do our federal courts not only expect but also demand this kind of ability? Although those in control are admonished to “neither mentalize nor moralize criminal law,” those who are controlled are now burdened additionally with proving the unprovable.

An archaic legal obsession with “mentalist” instead of “behavioral explanations” for crime has now resurfaced in the strangest of places, and for the most sinister, because cunning, of reasons. Since Scalia’s precedent-setting opinion in Wilson, as we’ve seen, the Supreme Court requires not only an objective component to prove an Eighth Amendment violation—deprivation of the “minimal civilized measure of life’s necessities”—but also a separate, subjective component for all cases concerning prisoners’ conditions of confinement.

Who gets to be wanton? Who now gets to bear that term’s marks of depravity, sexuality, effeminacy, frivolity, and excess? Among the odd consequences following the first leaks of the Abu Ghraib photos were the reports of “chastisement and c-prize,” “punishment and amusement” that the press used to describe the images. Glee and malice work together in the abuse of those earmarked for domination. Such arbitrariness becomes part of the punishment. A naked man pulled on a leash by Lyndie England. A man bent over and terrified as a dog appears ready to attack him. The smiling Charles A. Graner and a pyramid of bodies. “A certain amount of violence was to be expected,” said Guy Womack, Graner’s lawyer, adding, “Striking doesn’t mean a lot.... Breaking a rib or bone, that would be excessive.” Womack’s comments in his closing arguments of the prison-abuse case that would find Graner guilty were revealing. He argued that two of the most startling scenes pictured in the photos—seven naked, hooded detainees stacked into a human pyramid and a naked prisoner being held by England at the end of a leash—in fact showed legitimate disciplinary techniques commonly used inside prisons. The stacking was no different from what high school cheerleaders do all across America. Of the leashed prisoner, Womack concluded: “If it hurt his little psyche, it could have been a lot worse.”

If violence is authorized, how does one ascertain when it becomes impermissible? At what point does torment become illegal? In Australia on October 18, 2003, asked in a television interview whether two Australian nationals held in U.S. custody in Guantanamo Bay were being tortured, President George Bush offered a categorical denial: “No, of course. We don’t torture people in America. And people who make that claim just don’t know anything about our country.” Now, nearly two years later, horrific evidence of continued torture, and the governmental memoranda approving it, continue to be reported by the International Red Cross, Amnesty International, Human Rights Watch, and released detainees themselves in interviews.
What does it mean to be a “nation of laws” if these laws in their nonspecificity make possible torture and inhuman or degrading treatment? What is the measure of culpability that the governmental manuals and torture memos endeavor to maintain? Barbarity and coercion, as noted by many nineteenth-century commentators on slavery, had little to do with death. Hideous crimes against slaves, however torturous or wanton, were often not fatal. The discretionary range of torture was endless. And in the torture memos of August 2, 2002, and March 6, 2003, lawmakers pursues as its end, with violence as the means, the preservation of power: a power whose very sustenance is necessarily bound up with the violence it claims to abhor.

The Rehnquist Court’s Eighth Amendment cases make less surprising the verbal quibbles, fastidious distinctions, and parsing of definitions that characterize the recent memos. The legal decimation of personhood that began with slavery has been perfected in the logic of the courtroom and adjusted to prisoners. This reasoning—so long ignored, except by corrections officials who learned how to manipulate legal language—was carefully studied by the White House lawyers, who understood how the arbitrary formalism of words and phrases could by deliberate subterfuge leave an individual not only without recourse to the constitutional right of due process but also vulnerable to acts of extraordinary and random brutality.

Here I must draw attention to a crucial distinction between the two memos that has been ignored. In all news reports of the torture memos and especially when—in the week before Gonzales’s nomination as Attorney General, a new, diluted memorandum was issued that did away with all references to mental culpability or significant injury—reference was made only to the August 1, 2002, memo. Yet only the March 6, 2003, memorandum analyzes the Eighth Amendment proscription against cruel and unusual punishment. Referring to detainees undergoing interrogation, the memo reads: “The import of this looking is that, assuming a detainee could establish standing to challenge his treatment, the claim would not lie under the Eighth Amendment. Accordingly, it does not appear detainees could successfully pursue a claim regarding their pre-conviction treatment under the Eighth Amendment.”

Why does this assumption and its negation matter? The memorandum also discusses at length the U.S. Reservation to Article 16 of the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (proposed by the United Nations in 1984 and ratified by the United States in 1994). The prohibition against torture in Article 16 must be binding “only in so far as the term ‘cruel, inhuman or degrading treatment or punishment’ means and is, therefore, limited to the phraseology of ‘cruel and unusual punishment’ prohibited by the Constitution.” In refusing to include the words “degrading” and “inhuman,” the United States lowered the bar of acceptable treatment. According to Amnesty International’s Briefing for the UN Committee Against Torture (May 2000), the reservation to Article 16 “has far-reaching implications and can apply to any US laws or practices which may breach international standards for humane treatment.
but are allowed under the US Constitution, for example, prolonged isolation or the use of electro-shock weapons” (italics added).

In part III of the March 6 memo, under “Domestic Law,” the Working Group writers refer explicitly to recent Supreme Court cases that deal with the Eighth Amendment in its application to prison populations. As has too often been the case in academic constitutional law, the legal narratives associated with prisoners, their status and their conditions of confinement, continue to be ignored. This blind spot is especially significant now as the Washington authorities export their prisons, prison administrators, and even correctional officers to the Middle East and to other places such as Haiti, where they claim to ensure “democracy” through both judicial reform and prison management. Let us recall that the status of prisoners is the most neglected area of constitutional law. In the current reinvention of torture through solitary confinement, it is not surprising that the U.S. Supreme Court has never passed judgment upon the use of solitary confinement in any situation.

While adopting much of the legal language and logic of the August 2002 memo, the March 6 memorandum recapitulates a series of cases in the 1980s and 1990s, especially Wilson v. Seiter. These pages on the American penal practices legitimated by our courts, present in fractured, powerfully condensed form the Eighth Amendment standards analyzed: whether in the determination of mental culpability or significant injury, the question is what renders unconstitutional either conditions of confinement or excessive force. These few passages of the March 6 memo distill from pages of legal opinions the precise legal foundation for evading the character of punishment, only now the hypothetical plaintiffs are not criminals but terrorists. Whether or not the Eighth Amendment has been violated depends not on the cruel and inhumane treatment of prisoners but on the motivation or intention of prison officials—and, in this context, on the intent of military police guards. The memo also reiterates the unprecedented demand in Wilson that all prison condition claims under the Eighth Amendment must follow the “deliberate indifference” standard of Estelle v. Gamble. It even reiterates the Wilson majority’s refusal to recognize anything “so amorphous as ‘overall conditions’ of confinement,” focusing instead on the “specific deprivation of a single human need.”

In both memos, verbal qualifiers gut the substance of suffering in favor of increasingly rarified rituals of definition. The imprecision of such terms not only neutralizes the obvious but trivializes abuse. The legal analysis relies particularly on the definition of the term severe in the Torture Statute in Federal Criminal Law (18 U.S.C. 2340). Torture is defined as any “act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain.” Since the word is not defined in the statute, the authors of the memos decided to “construe a statutory term in accordance with its ordinary or natural meaning.” Their turn to dictionary definitions is a crucial gesture repeated throughout the memos. The pile-up of references—to Webster’s New International Dictionary, The American Heritage Dictionary of
the English Language, and The Oxford English Dictionary—introduces the next section on “severe mental pain or suffering,” which then leads to a list of what constitutes “prolonged mental harm,” which ushers in the further equivocation of “prolonged” or “lasting” but not “necessarily permanent damage.” Once schooled in these rituals of redefinition, the writers turned to their dictionaries. Then they parsed words to a degree that went far beyond the practice of the courts in order to derive legal standards of interrogation during this global “war without end.”

One of the most striking things about these torture memos is the obsessiveness of the intent requirement. Whether the interrogator has maimed, blinded, or killed the suspect does not matter, unless the interrogator intended to maim, blind, or kill. In the section titled “Specifically Intended,” it is explained that violation of the “Torture Statute” “requires that severe pain and suffering must be inflicted with specific intent” and that the defendant “must have expressly intended to achieve the forbidden act.” If we follow the legal logic, the full force of mental volition (characterized as wanton, malicious, obdurate, willful) is transferred to the person of the governmental official. He even gets another loophole: “a good faith belief” that whatever he did would not result in mutilation or death. Did he intend to harm? Did he act in good faith? The possibilities are endless. The results—the presence of a mutilated, blind, or dead body—get defined away by the vain search for intent, while the defendant who committed the act is vindicated. 70

Let us return to Posner’s analysis of Holmes. In treating persons as objects, Posner suggests that Holmes turned the deodand upside down. In carrying further the conceptual reversal of the prevailing sense of what must be given to God (Deo dandum)—whether slave, beast, or chattel—I want to articulate a possible rationale appropriate to the torture memos and to the needs of the “global war on terror,” which the Bush administration, in a sudden tactical shift, has now retooled as the “global struggle against violent extremism.” To judge governmental officials on the basis of intentionality is also to allege that they are morally innocent of harmful intent (acting in a good faith belief), as if the source of injury were pure misadventure—as in the previously discussed failed execution in Louisiana Ex. Rel. Francis v. Resweber, the fire on the prison bus in Duckworth v. Franzen, or the homicides dubbed as “mishaps” at Bagram. But in the case of people classified as unfit, criminal, or terrorist there is a problem about treating them as nothing more than inanimate things or animate beasts. Although the insistence on mental elements in determining criminality is not new, given that the purview of early English law was confined to intentional wrongs or subjective blameworthiness, yet the stakes of legality become disquieting when justices translate wrongdoing in criminal cases into wanton intention in civil law. Once states of mind characterized as “indifferent” or “malicious” are applied to those who harm without actual liability to legal punishment, something vicious is being done to the object of harm, now reduced to a mere body controlled by administrative power. 71

Legal Terrors
Wantonness, once adhering to those who dominate the stigmatized, becomes a term of privilege. It is striking that the word appears only in discussion of “penological justification” in the March 6, 2003, memorandum. What happens to the legal personality of the prisoner or detainee, once tethered to recognized acts of will or agency by torturers who, in the language of the Eighth Amendment cases we have mentioned, inflict pain unnecessarily or wantonly? The relevant legal categories become unstable or useless when what is to be proved remains unprovable. Relations between subjects and objects, once categorized as indistinguishable, now occupy a political landscape that makes arbitrary the already uncertain boundaries between legal and illegal.

What does it mean, in the words of Hannah Arendt in The Origins of Totalitarianism, “to be out of legality altogether,” to be “outside the scope of all tangible law”? We should not forget that the discussion of what it means to lose the right to have rights occurs in the midst of her analysis of the French Revolution’s Declaration of the Rights of Man, which, “supposedly inalienable, proved to be unenforceable—even in countries whose constitutions were based upon them.” And here again we confront the offending object, lacking reason, responsibility, or intent. “Innocence, in the sense of complete lack of responsibility, was the mark of their rightlessness as it was the seal of their loss of political status.”

Unlike Giorgio Agamben, who returns to Arendt in his cursory indictment of humanitarianism in “Biopolitics and the Rights of Man,” Arendt moves us squarely into the courts of law, just as she recognizes the paradoxes consequent upon new, secular, infinitely stronger rituals of exclusion than the ecclesiastical. To be made “superfluous” is to be outside the pale of human empathy. In her catalog of the deprived—the refugee, the stateless, the Jew made rightless before being exterminated, and the Negro “in a white community”—what matters is that their legal personality is distinct from that of the criminal. For unlike criminals, the deprived exist without being allowed responsibility. In other words, these entities exist outside the legal definition of persons. No longer the subject of legal rights and duties, these nondescripts are not even recognized as having the self-accountability so necessary to Locke’s criterion of personhood. As part of exigent public concern in a new global political situation, the dispossessed person seems to exist nowhere, as if “a stray dog who is just a dog in general,” in Arendt’s inimitable words. They “begin to belong to the human race in much the same way as animals belong to a specific animal species. The paradox involved in the loss of human rights is that such loss coincides with the instant when a person becomes a human being in general—without a profession, without a citizenship, without an opinion.” And when such persons take the designation of “enemy” or “unlawful combatant,” they are in effect without a country, without a cause, and hence unprotected by the Geneva framework.

Here, then, is another twist in the turn of the deodand. What comes to pass in these humanitarian-progressivist times is an ever-deepening, though surreptitious,
renewal of older practices called “obsolete,” “barbaric,” “primitive,” “superstitious,” “irrational,” or “ritualistic.” I must mark in conclusion the return to the state-sanctioned bondage of slavery as well as the reanimation of the servile as a legal status, not only of the criminal “type,” but perhaps far worse, of the unknowing cart, horse, tree, or of nothing more than matter, the stuff out of which human materials are made.

In supplanting the covenant of grace—and what Edwards, like Locke and St. Paul, had proclaimed as equality before God—the secular ethos, while promising enlightened reason, distrusts the discipline of faith and ignores the startling sense of human community generated by the proximity of the sacred. In rethinking the truth apprehended by faith, Reinhold Niebuhr warned against the dangers of giving “progress” a “moral connotation”: “The spiritual hatred and the lethal effectiveness of ‘civilized’ conflicts, compared with tribal warfare or battles in the animal world, are one of many examples of the new evil which arises on a new level of maturity.”76 For if human perfectibility was possible, the less-than-perfect, once-projected-as-lacking will, intent, or thought can be cast out from political society, or methodically disposed of by the instrumentality of the State.

**Coda: Voices from Lockdown**

What follows are the words of people who have been exiled to the solitary holds of our prison system.77 In these voices, we hear the vital remains, the accountability, intelligence, and consciousness of persons who, though suspended within a living death, survive mental torture to speak again to us, just as the detainees testifying from Guantanamo and Abu Ghraib have re-entered the public sphere, in spite of the distortions of the media, the lies of the U.S. president, and the complicity of its citizens, who in their silence abet the legal terrors committed in their name.

*SMU has what they call VCU, violent control unit. It used to be 2A but now it’s 1B, the “hole.” People in VCU are behind doors with Plexiglass over the front of the cell. . . . The box is where they put you until you go to the hole. It’s a small pie-shaped holding cell. It has a two-and-a-half foot high concrete block that’s one foot wide and about a foot long and it’s about five or six feet wide at the largest end and goes in closer with less room as you get toward the point of the pie. It has a toilet and sink and they don’t give you anything to sleep on except for the floor or on the block night after night.*

—— Inmate, Special Management Unit (SMU) II, Florence, Arizona (July 16, 1999)

*Dogs are being used in prisons in Arizona. Dogs attack us, are put on us by correctional officers for little things that could be handled by talking or by pepper gas, but more and more inmates here in the special management unit are victims to unreasonable dog attacks. People go crazy here in lockdown. People who weren’t violent become violent and do strange things. This is a city within a city, another world inside of a larger one where people could care less about what goes on in here. This is an alternate world of hate, pain, and mistreatment.*

—— Inmate, SMU II, Florence, Arizona (December 15, 1999)
Her treatment has been worse than grossly inadequate or inhumane. It has been barbaric. Over this period of time, the defendants have punished the plaintiff for her mental illness by throwing her in the “hole” for periods of time up to a year and leaving her there without any mental care in a highly psychotic state, terrified because of hallucinations, such as monsters, gorillas, or the devil in her cells. In fact, one psychiatric expert states he wouldn’t treat his dog the way defendants treated Daisy Harper.

—Judge Carl Muecke, Casey v. Lewis, 1992

The first matter on the Calendar this afternoon in Superior Court, State of Arizona, is in reference to the deposed patient, Daisy Harper, incarcerated for assault. During that time she was locked down for approximately 11 and 1/2 months in the Perryville Santa Maria Unit. During that time, she was seen only nine times by the psychiatrist.

Q. What have you noticed about Ms. Baker’s behavior in your various interviews or examinations?
A. Well, Ms. Harper is hallucinating and delusional. My diagnosis is chronic schizophrenia. She is a very belligerent lady, who screams and hollers at you, does not listen to what you are saying, is very uncooperative and threatens.

Q. In what manner does she threaten?
A. She threatens that if you don’t leave the room, she’ll—verbally threatens, not physically. Set fire to her cell. Covered her walls with feces. Clammed up and became mute. We had to lock her down twenty-four hours a day. If she strikes out again, they will automatically put her in the hole, and they’re liable to keep her there from six months to a year and a half. Which is incredible, and it will certainly—I mean, actually, it’s pathetic that we have to treat people this way. You know, they tell us, she’s in the Department of Corrections, she’s been sentenced, she’s got to carry out the sentence and whether she’s sane or insane or whatever. We’ve got ladies that are locked down from six months to a year, to a year and a half.

—Dr. Victor Pera, Psychiatrist, Arizona Department of Corrections

What I want to ask you is when I come out here they brought all my records with me in the van and my TV. That’s all I had of my own. Well, can you tell me—can you—what I want to ask you, could you extend—I mean I said—I got about four more years to do. Drop that and let me go home. Okay, now he say I haven’t had all my physical. I had it, my physical by doctor, the lady doctor, white lady doctor. I’m tired around here just let me go home.


Now this—this situation is—out of a prisoner of war camp situation or a concentration camp.


Notes

I am grateful to Stephen Best, Saidiya Hartman, and David Lloyd not only for the continued colloquy but also for their acute comments and suggestions as I completed this article, which forms part of a larger project on slavery, incarceration, and the law of persons.

1. Person is an indispensable word, often used without definition in the U.S. Constitution (articles I, II, III, IV; amendments IV, V, XII, XIV, XXII) and defined and redefined in such crucial cases as Slaughter-House (1873) and Civil Rights (1883), which undid the Civil Rights Act of 1866. It is also used in the privileges and immunities granted in the
Fourteenth Amendment, which was passed by Congress the same year and ratified in 1868. As the central figure in law, the natural person, as distinguished from the artificial person (as in a corporation), is characterized by personal attributes of mind, intention, feelings, weaknesses, and morality common to human beings and possesses rights and duties under the law.

2. John T. Noonan, *Persons and Masks of the Law* (New York, 1976), 4. If I may hazard this comparison: The law lives off persons in much the same way as the Haitian *lwa* (spirits or gods) can manifest themselves only in the human envelope. In the lineaments of the human, spirits experience life and unfold their potential. I develop the connection between what has been deemed supernatural and what we know as legal in a new book project *The Law Is a White Dog*.


4. Ibid., 189–91.


7. See Wyatt MacGaffey, *Religion and Society in Central Africa: The BaKongo of Lower Zaire* (Chicago, 1986), 10–18, for an exacting summons to rethink static categories such as “religion” and “economy.” MacGaffey demands a new understanding of the “focus of ritual,” which is not—as in the Durkheimian tradition it is assumed to be—the normative, administrative, corporate structure of society (the matrilineal descent groups) but its zones of stress, uncertainty, political activity, and change.” Ritual is not only historically specific, but it is “about power and is itself more or less political.”


9. For my appeal to “rituals of law” and a “conceptual framework for disabilities made indelible through time,” see Joan Dayan [Colin Dayan], “Legal Slaves and Civil Bodies,” in *Materializing Democracy: Toward a Revitalized Cultural Politics*, ed. Russ Castronovo and Dana Nelson (Durham, N.C., 2002), 53–94. Throughout this article I bracket the Supreme Court’s recent progressive opinions on the death penalty (judging the execution of the retarded [Atkins v. Virginia, 2002] and those under the age of eighteen as unconstitutional [Roper v. Simmons, 2005]), as well as its gutting of the California policy of segregating prisoners by race and its complicated decision on the due process right of detainees or “enemy combatants” regarding their ability to challenge their treatment and detention in courts or other judicial bodies. The conditions of confinement is my subject. I look at the language that delimits the reach of the Eighth Amendment in terms of prisoners’ rights, once restrained in their liberty, and which, ultimately, turns the incarcerated into an anomaly in law. The atrocities in plain sight continue within our prisons, and, as the United States now builds new prisons in Iraq and in those countries where detainees are to be sent, the forms of cruel and unusual punishment are exported in a new global logic of torture.


14. As I argue in “Melville, Locke, and Faith” (*Raritan* [Winter 2006]), in his *History of Jamaica*, Long ingeniously adapted Locke’s pre-Linnaean elucidation of a clearly divided series of species to an eighteenth-century slave colony. Though it might seem that Long took Locke’s obsession with consciousness to its logical conclusion, I discuss how Locke urged a practice of thought that not only radically destabilized species boundaries but also subjected the legitimacy of enslavement to sharp scrutiny. If blacks were compared in the proslavery apologist’s argument to nothing more than brute matter, Locke’s suggestion that the differences between animal and human consciousness are only of degree unsettled the legal category of slave. These exchanges between species designations kept open and tentative the hierarchy that Long later engaged.

15. State prisoners could not claim the protection of the Eighth Amendment until 1947. It is crucial to distinguish between “cruel and unusual punishment” and “procedural due process.” The Court in *Louisiana Ex Rel. Francis v. Resweber* clarified that the Fourteenth Amendment would prohibit “by its due process clause execution by a state in a cruel manner.” While questions of procedural due process ask whether there is a liberty or property interest that has been interfered with by the State—and, if so, whether procedures attendant upon the deprivation were constitutionally sufficient—the Eighth Amendment gauges the seriousness of the violation. For, and I insist upon this distinction, treatment during detention (e.g., the extent of injury or pain) is not met by the question of due process. Even if procedural due process has been met, there remains the question of the extremity of harsh or inhuman conditions (the extent of the deprivation of the formulaic “basic human needs”), and the consequent disintegration of the residuum of rights—and hence of officially recognized identity—that should remain attached to the person even while incarcerated.


17. The *Prisoner’s Litigation Reform Act* (PLRA; tacked onto a spending bill by Congress), which President Clinton signed into law on April 26, 1996, dramatically curtailed prisoner litigation into the next century. Designed to limit what was said to be a massive increase in “frivolous” inmate litigation, the PLRA permits injunctive relief related to prison conditions, but it erects substantial hurdles that must be negotiated before such relief can be given. In order to get an injunction, a plaintiff must prove that every plaintiff or member of the proposed class has suffered actual, physical injury, thus prohibiting damages for mental injury. The prisoner must prove that the request for relief is narrowly focused, extends no further than necessary to correct the injury, and is the least intrusive means necessary to correct or prevent the harm.

18. Twenty-three suspects held at Guantanamo Bay attempted a mass suicide in 2003. The detainees tried to hang or strangle themselves between August 18 and August 26 of that year. United Nations human rights experts and medical staff explained that the greatest cause of psychiatric deterioration, what they called “irreversible psychiatric symptoms,”
was the indefiniteness of confinement, being held virtually incommunicado with no information about the expected duration of their detention, causing an agitation and uncertainty that Benjamin Rush would have appreciated. Washington administration officials are preparing long-range plans for indefinitely imprisoning terrorism suspects they do not want to set free or turn over to courts in the United States or other countries. What is most remarkable about the plan is that these detentions will include those hundreds of people, now in military and CIA custody, for whom the government does not have enough evidence to charge in courts. The transfer of detainees from Guantanamo to U.S.–built prisons in their home countries—Afghanistan, Saudi Arabia, and Yemen—ensures the lucrative export of supermaximum security units. Thus, there is now a two-pronged approach to long-term solutions in the “war on terror”: (1) the lockdown of detainees in potentially lifetime solitary confinement and (2) the “extraordinary rendition” of suspected terrorists to countries known to use methods of torture in interrogation or prosecution (such as Egypt, Morocco, Syria, and Jordan) that are allegedly “illegal” in the United States.

19. Discussing how Oliver Wendell Holmes “made legal knowledge into an entity,” Noonan, in Persons and Masks of the Law, 3, gives the law something like flesh and blood, a character, a nature that could take morality and transmute it into objective experience. “So endowed with vitality,” Noonan writes, “law was a personification.”


22. Charles Dickens, American Notes and Pictures from Italy (1842; New York, 1957), 99–100.


25. 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 of the law,” the legislature set up a system of laws for the gradual abolition of slavery in New York. Chancellor James Kent, who had lamented the severity of colonial slavery—what he called “that great moral pestilence”—in New York—argued that the radical incapacities now attached to imprisonment for life were not “declaratory of the common law, but created a new rule.” In Platter 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.”

26. William Roscoe, the noted English historian, penal reformer, and ardent abolitionist in A Brief Statement of the Causes which have led to the Abandonment of the Celebrated System of Penitentiary Discipline in Some of the United States of America (Liverpool, 1827), considered the separate 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.” In England in 1752, “An Act for Preventing the Horrid Crime of Murder,” Act 25, George II, c. 37, 1752, added solitary confinement as a special mark of infancy to capital punishment. But in 1836, “An Act for Consolidating and Amending the Statutes in England Relative to Offences Against the Person,” Act
and 7, William IV, c. 30, repealed the former statute. By the nineteenth century, however, solitary confinement was no longer illegal in England. After the *Prison Act of 1865*—perhaps due to the reported efficiency of this method of correction in the United States, the “solitary confinement” that had been repealed or, later inflicted only for a limited amount of time, came under the new name of “separate confinement, inflicted in all cases as the regular and appointed mode of punishment.” See Sir James Fitzjames Stephen, *A History of the Criminal Law of England* (London, 1883), 3:487.


34. For my discussion of civil death—its legal history, its gothic turns between tangible and intangible, life and death—along a temporal continuum that became absolutely necessary to the racialized idiom of slavery and incapacitation in the American social order, see Dayan, “Legal Slaves and Civil Bodies.”

35. As I have argued in numerous venues, the legal fiction of “civil death” has long been assumed to be a remnant of obsolete jurisprudence: it is the state of a person who, though possessing “natural life” has lost all “civil rights.” 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.


37. In *The Book of Job: A New English Translation of the Text, Rashi and a Commentary Digest,*
ed. Rabbi A.J. Rosenberg (New York, 1989), Rashi's glosses from his commentary are included as notes to the text.

38. This resurrection of only the husk of the person, without consciousness, should be contrasted with Blackstone’s Christological rendering of the “new man” with renewed “credit and capacity,” resulting from the king’s pardon of an attainted felon. Once pardoned by the king, the son of the person attainted might inherit, “because the father, being made a new man, might transmit new inheritable blood.” See the discussion of Blackstone, Commentaries, 4:395, in Dayan, “Legal Slaves and Civil Bodies,” 61–62.


43. Ibid., 2:546–47.

44. The best edition of these memos, as well as the full texts of all the legal memoranda that sought to argue away the rules against torture—that Anthony Lewis in his introduction called “an extraordinary paper trail to mortal and political disaster: to an episode that will soil the image of the United States in the eyes of the world for years to come,” is The Torture Papers: The Road to Abu Ghraib, ed. Karen J. Greenberg and Joshua L. Dratel (Cambridge, 2003), 172–218 and 241–86. Mark Danner’s Torture and Truth: America, Abu Ghraib, and the War on Terror (New York, 2004) includes the August 1, 2002, memo, 115–67, but omits the crucial March 6, 2003, memorandum.

45. See my analysis of the use of recent prison cases in these torture memos: Joan Dayan [Colin Dayan], “Cruel and Unusual: The End of the Eighth Amendment” in Boston Review, October/November 2004, http://bostonreview.net/BR29.5/dayan.html. These local domestic cases were supplemented by international law and international agreements in the new “Memorandum for James B. Comey, Deputy Attorney General” (December 30, 2004). Omitting all reference to determination of mental culpability or significant injury, this memo turns to international agreements, such as the United Nations Convention Against Torture. Prepared less than a week before Chief Counsel Alberto Gonzales faced a Senate confirmation hearing where Judiciary Committee members had planned to grill him on his role in formulating interrogation policies, the seventeen-page memorandum was posted unannounced on the Justice Department’s website.


47. Louisiana, 464, 476.


49. Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985).


54. Wilson, 303.
55. See especially Rhodes v. Chapman, 101 S.Ct. 2392 (1981), which, after years of judicial activism on behalf of prisoners, sought to clarify the federal role in the operation of state prisons.
56. Elizabeth Alexander, oral argument on behalf of petitioners before the Supreme Court, January 7, 1991.
57. I must confess to an obsession with the effects of solitary on the inmates' minds and capabilities, a disintegration and decompensation discussed by psychiatrists who have testified in cases arguing against the new architectonics of sensory deprivation. As the Harvard Psychiatrist Stuart Grassian explained during the 60 Minutes program on California's “Pelican Bay” (broadcast on January 6, 1995): “In some ways, it feels to me ludicrous that we have these debates about capital punishment when what happens in Pelican Bay’s Special Management Unit is a form of punishment that’s far more egregious.” For my early, extended reflection on the matter of indefinite solitary confinement—a method of sure death-in-life that is now being exported to Guantanamo Bay, and to other sites for rendered terrorist suspects—see Dayan, “Held in the Body of the State,” and, esp., “Legal Slaves and Civil Bodies,” 66–87.
58. Whitley v. Alpers, 475 U.S. 312, 314 (1986); Estelle, 97, 104.
64. In “The Origin of the Doctrine of Mens Rea,” Illinois Law Review 17 (1922–1923): 117, 120, Albert Lévitt suggests that “the existence of the law of deodand is a beginning of our law of mens rea.” I deal with this transition from the idea of “evil influence,” “evil nature,” to a malicious mental state as key to understanding the designation of certain persons labeled as “criminals,” “terrorists,” or “extremists” as deserving of punishments that are beyond the bounds of what we would consider possible in this our civilized and enlightened century. My argument is repeatedly clarified in cases dealing with the Eighth Amendment in the United States, especially when words such as wanton or sadistic are transferred to those inflicting the damage on the incarcerated.
66. See Greenberg and Draytel, The Torture Papers, 268–76.
67. The continued internationalization of the U.S. prison project is the focus of “reform” in Haiti, where U.S. prison administrators direct the redefinition of civil life. Not only are Jean-Bertrand Aristide's supporters tortured, killed, and imprisoned, but on August 17, 2004, a trial in Port-au-Prince acquitted Jackson Joanis and Jodel Chamblain of the 1993 murder of businessman Antoine Izmyer. Chamblain, the cofounder and chief of operations of FRAPH (Front Revolutionnaire pour Avancement et le Progres haitiens), Haiti's notorious death squad, is supported by the American-backed government, which is not only reforming the Haitian judiciary but also supervising the reconstruc-

68. Though In Re Medley, 134 U.S. 160 (1890) noted the mental anxiety and extended suffering caused by solitary confinement before execution, the Court did not judge solitary as unconstitutional. It is only now in Wilkinson v. Austin that the Supreme Court has agreed to rule upon the constitutionality of solitary confinement in supermaximum security prisons, in this case the Ohio State Penitentiary. The custody and control of prisoners in solitary confinement, the lawyers for the plaintiffs argue, are “arbitrary and capricious, pursuant to vague and overbroad criteria, without meaningful due process.”


70. Torture is defined in the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (adopted December 10, 1984) as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person” in order to extract information or a confession. Terms such as torture, inhuman, and degrading treatment or punishment, though often considered to be placed in a hierarchy, are interlinked in article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which prohibits in absolute terms torture or inhuman or degrading treatment or punishment. There is no need for intention to justify abridgment of this fundamental right. See John Cooper, Cruelty: An Analysis of Article 3 (London, 2003).

71. According to John Boston in “Case Law Report,” The National Prison Project Journal 6, no. 3 (Summer 1991): 7, the Court’s opinion, while adopting the “subjective” standard (also known as the criminal law standard), “is not really about state of mind.” For “deliberate indifference” demands that an objective standard be applied, no matter how much the language appears to depend on “willfulness.”

72. Hannah Arendt, The Origins of Totalitarianism (1951), introduction by Samantha Power (New York, 2004), 371, 373, 372, 374. Arendt’s influence extends even to Chief Justice Warren’s opinion in Trop v. Dulles (1958), which emphasized a flexible interpretation of the Eighth Amendment and mental suffering or anguish as central to the meaning of cruel and unusual punishment. For Warren, nothing could be more cruel than the demolition of the capacity to exercise the rights of persons in the civil community. He emphasized that there had been “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.”


74. In southern case law, slaves were only granted a mind or legal personality when committing a crime. In Creswell’s Executor v. Walker (1861), the slave “has no legal mind, no will which the law can recognize” so far as civil acts are concerned. But as soon as he commits a crime, “he is treated as a person, as having a legal mind, a will, capable of originating acts for which he may be subjected to punishment as a criminal.”
77. Whether called “solitary confinement,” “administrative segregation,” “lockdown,” or currently (in the euphemisms so much a part of our expanding penal system) “special management,” “special treatment,” or “special housing,” these new control units underpin the penal philosophy behind entire prison facilities built to detain “incorrigibles” for indefinite periods of time. Under the sign of professionalism and state-of-the-art technology, idleness, deprivation, and torment constitute the “behavior modification” and “cognitive adjustment” in these facilities.
78. Name changed.