Book Review

Colin Dayan, *The Law Is a White Dog: How Legal Rituals Make and Unmake Persons*. Princeton: Princeton University Press, 2011, pp. 368, $29.95.

Reviewed by Dean Spade

> Who gets banned and expelled so that we can live in reasonable consensus? Let us name them now. Criminals. Security Threats. Terrorists. Enemy Aliens. Illegal Immigrants. Migrant Contaminants. Unlawful Enemy Alien Combatants. Ghost Detainees. These are new orders of life; they hover outside the bounds of the civil, beyond the simple dichotomies of reason and unreason, legal and illegal. The receptacles for these outcasts are in the wilderness, the desert, or islands cut off from sociocultural networks of daily life....[T]his ongoing global cultivation of human waste, brazen in its display, makes our sense of inclusion a rare and precarious privilege (22).

In *The Law is a White Dog*, Colin Dayan explores relationships between what are often considered separate and distinct areas and eras of legal history and substance, exposing important connections. Her aim is to trace the development and transformation of various hierarchical statuses of personhood in American law. To do so, she explores slave law, torture, 8th Amendment cases about conditions of confinement in prisons, civil law consequences in criminal punishment, and the legal statuses of dogs. Dayan artfully navigates historical and contemporary developments in contract, tort, property, constitutional, trusts and estates, and criminal law concerning people and animals that have been afforded complex and shifting statuses and capacities in law—those considered people *and* property, or a strange and hybrid form of property, or determined to lack legally recognizable mental capacities sufficient for civil action.

Dayan's method is evocative and departs from conventions of scholarly legal writing in ways that are richly productive for her inquiry. The book does not proceed through time or topic in a linear fashion, but rather offers textured and historically contextualized examinations of particular cases and law enforcement practices, and then returns to them after excavating phenomena that first can appear distinct but that she ultimately shows to be connected

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and illuminating.[1] The result is a provocative and rigorous analysis that makes a significant contribution both to legal scholarship and contemporary discussions about criminalization, national security, and racism.

The book examines how hierarchies of personhood are produced through the interaction of civil and criminal law, and asserts that domination, specifically racial domination in the U.S., requires the production of legal fictions to justify and rationalize the cruelty that has been an ongoing feature of American law and law enforcement from the first days of colonization through slavery and Jim Crow and continuing today in mass racialized imprisonment and "War on Terror" detention and interrogation practices. Employing a novel approach to questions of legal personhood, Dayan interrogates some key narratives of progress cherished in American law and popular culture: a narrative that the law has progressed toward rational, secular and scientific treatment away from mystical, religious and arbitrary pre-enlightenment approaches; a narrative that slavery was abolished in the U.S. and that law established a path to legal equality and full personhood for black people; a narrative that criminal punishment has progressed away from cruelty and toward rational and scientific guarantees of humane treatment. *The Law is a White Dog* offers novel insights to ongoing critical intellectual trajectories that have interrogated these progress narratives, innovating on the methodology of critical race studies and blending rigorous historical research that brings the broader context of important cases and other legal developments to light.

One example of this is Dayan's discussion of the 13th Amendment. In the last decade, scholars and anti-prison activists have increasingly articulated the argument made popular by Angela Davis' 2003 book, *Are Prisons Obsolete?*, that focuses on the 13th Amendment's qualification on the abolition of slavery, "except as punishment for crime, whereof the party shall have been duly convicted." Davis argues that this caveat served to transition the methods of control and violence targeted at black people under slavery into a new form: a racially targeted and quickly expanding criminal punishment system. Davis specifically traces how criminal punishment shifted after the formal abolition of slavery. Prisons suddenly expanded and were filled with black people, "Black codes" criminalized statuses like unemployment and vagrancy for black people only, methods of punishment popular in slavery like whipping were introduced in prisons, and convict leasing emerged to repopulate plantations with enslaved black workers.[2] Davis' examination of the transition of anti-black violence and forced labor from slavery to criminalization is central to her analysis of the contemporary U.S. prison system which continues to target black people and, to a lesser degree but still significantly, other people of color. Davis effectively exposes the connection between these forms of

1. Dayan aims to "dramatiz[e] a perplexing legal history too often lost in linearity, [and]. . . preserv[e] a discontinuous but thematically linked approach." As a result, she successfully reveals a relationship between past and present that undermines progress narratives that remain central to political and legal discourse in the U.S.(xiii).

2. Angela Y. Davis, Are Prisons Obsolete? 29 (Seven Stories Press 2003).

racialized control and violence and argues that the U.S.'s world leadership in imprisonment (we are the most imprisoning country in the world, with 5 percent of the world's population and 25 percent of its prisoners) is a feature of the country's fundamental white supremacy. As such, she argues that imprisonment is not an effective or legitimate approach to the range of social problems (drug use, violence against women and children, poverty-related property crime) that contemporary prison expansion efforts claim to address.

Dayan examines the 13th Amendment and provides further historical context to deepen this important inquiry. She looks at how the fiction of "civil death" for felons became more prominent in the U.S. after the legal elimination of slavery, and was used to remake the personhood of the criminal (a class of persons suddenly centrally racialized as black) in the image of the slave. She argues that the 13th Amendment, "too often obscured by attention to the Fourteenth Amendment, is essential to understanding how the burdens and disabilities that constituted the badges of slavery took powerful hold on the language of penal compulsion" (64). She writes, "'the badges and incidents of slavery' continued to exist under the cover of civil death. This legal fiction and the criminal ethnography it fostered miraculously remade persons. . . . [C]riminals were punished with the degradation that had once been the lot of slaves, especially if the criminals were former slaves or descendants of slaves" (58). The 13th Amendment "marked the discursive link between the civilly dead felon and the slave or social nonperson. Criminality was racialized and race criminalized." (64). Dayan describes how during the second session of the 39th Congress, Senator Charles Sumner raised significant concerns about the 13th Amendment's important caveat. He presented a notice from Arundel County, Maryland listing the public sale of "a negro man named Richard Harris for six months, convicted…for larceny, and sentenced by the court to be sold as a slave" (62).[3] Other evidence that black people were being sold as slaves as punishment for crimes was also presented (62).

Dayan connects her exploration of the medieval sanction of "civil death" to slave law and contemporary criminal punishment regimes in several ways that are useful to contemporary debates about race and criminalization. The popularity of Michelle Alexander's recent book, *The New Jim Crow*, has brought increased attention to these questions and further highlighted the analysis that Angela Davis,[4] Ruth Gilmore,[5] Dylan Rodriguez[6] and other prominent

3. Citing Alfred Avins, The Reconstruction Amendments' Debates 258 (Comm'n on the Const. Gov't, U.S. Cong., 1967).

4. *See* Davis, *supra* note 2; *see also* Davis, Abolition Democracy: Beyond Empire, Prisons, and Torture (Seven Stories Press 2005).

5. *See* Ruth Wilson Gilmore, Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California (Univ. of Calif. Press 2007); *see also*, Ruth Wilson Gilmore, Globalisation and US Prison Growth: From Military Keynesianism to Post Keynesian Militarism, 40 Race & Class 171 (1999).

6. *See* Dylan Rodriguez, Forced Passages: Imprisoned Radical Intellectuals and the U.S. Prison Regime (Univ. of Minn. Press 2006); *see also* Rodríguez, The Political Logic of the

scholars, along with grassroots organizations like Critical Resistance,[7] INCITE! Women of Color Against Violence[8] and GenerationFIVE,[9] have been cultivating in scholarly and community discussions especially in the last decade. Dayan's analysis of the 13th Amendment's role in shifting racialized labor exploitation, control and violence from a chattel slavery system to a system of criminalization is achieved through a novel analysis of the complex fictions of legal personhood required to produce ongoing racial domination in American law. She links "civil death" to the contemporary practice of felony disenfranchisement, which Human Rights Watch predicts will result in 40 percent of African American men being permanently disenfranchised in states with the most restrictive voting laws. Already, 13 percent of African American adult men, a total of 1.4 million, are disenfranchised, and African American men constitute 36 percent of the total disenfranchised population (60).[10] Dayan quotes Justice J. Christian, in 1871, describing the convict as the "slave of the state" in his elaboration on the extinction of civil rights of felons (61).[11] If convicted felons are something less than full legal persons, what are they, and how is their personhood like and unlike the less-than-full personhood of slaves?

Slaves, Dayan points out, were prevented from civil personhood under American slave law, but could be liable for criminal acts. To explore this, she examines *Bailey v. Poindexter's Executor*, an 1858 case concerning the will of a slave owner. John Lewis Poindexter's will provided that some of his slaves should have "their choice of being emancipated [under certain conditions] or sold publicly" after his wife's death (141). Poindexter may have willed this choice be given to the slaves because in the wake of the 1782 Virginia Manumission Act, slaves had to leave the state within a year of emancipation or be re-enslaved. Possibly, Poindexter wanted his slaves to have the choice of whether to be exiled from their home or be able to remain in Virginia (143). The court ultimately determined that Poindexter's wishes could not be adhered to, because slaves could not engage in a civil act of choosing that would be recognized by law. Dayan explains that given the national tensions

Non-Profit Industrial Complex *in* The Revolution Will Not be Funded (South End Press 2009).

7. *See* http://criticalresistance.org/about/.

8. *See* Critical Resistance and INCITE! Women of Color Against Violence, Gender Violence and the Prison-Industrial Complex, *available at* http://www.incite-national.org/media/docs/5848_incite-cr-statement.pdf.

9. GenerationFIVE, Towards Transformative Justice: Why a Liberatory Response to Violence Is Necessary for a Just World, (RESIST Somerville, MA) Sept./Oct. 2008, *available at* http://www.resistinc.org/newsletters/articles/towards-transformative-justice.

10. Citing Jamie Fellner & Marc Mauer, Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States, Human Rights Watch and the Sentencing Project (1998) *cited in* Alec Ewald, 'Civil Death': the Ideological Paradox of Criminal Disenfranchisement Law in the United States, 5 Wis. L. Rev. 1045,1132 (2002).

11. Citing Ruffin v. Commonwealth, 62 Va. 790 (1871).

over slavery emerging at the time, following such events as passage of the Kansas-Nebraska Act of 1854, the caning of Charles Sumner in the Senate chamber for giving an anti-slavery speech, and the murder of pro-slavery farmers by John Brown in Kansas in 1856, pro-slavery judges navigated complex legal framings and introduced important legal fictions to maintain racial domination (144). "Not simply things and not really humans, slaves occupied a curiously nuanced category. Examples ranging from proofs of animality to marks of reason or imbecility—and a great deal in between—became part and parcel of judicial work" (139). The majority in *Bailey*, like other pro-slavery judges, had to be careful not to ascribe total mental incapacity to slaves, since they were legally culpable for criminal activity (147).[12] They had to create a legal personhood that was capable only of criminal acts, but would not be recognized as having a legal capacity for civil action. John Howard, a lawyer for the heirs in *Bailey*, argued that slaves had no will, that they were property and that their actions "are but the acts of the master if authorized and ratified by him: otherwise, they are of no legal validity" (149).[13] According to Howard, because they had no legal mind, no ability to consent, decide or judge, slaves could not be parties to contracts. Howard argued that civilly alive persons possess "legal conscience, legal intellect, legal freedom, or liberty and power of free choice and action, and corresponding legal obligations growing out of such qualities"(150).[14] Slaves had to be articulated in law as people with no recognizable intelligence or mental capacity in order to maintain the capacity to enslave. In order to explain the fact that, as Howard conceded, "common observation teaches that our slaves, in some cases, have a very high degree of intellect and moral sense, . . . [and] a strong enough will of their own" (150),[15] yet were merely property that should be considered civilly dead, he compared slaves to "dogs, cattle, wild animals" (151)[16] and other animate property that the law recognized as property even though they are different than "a package of goods" (152). Howard convinced the court that slaves occupied this complex position—property with person-like attributes, including the mental capacity to commit a crime and be held responsible, but civilly dead and unable to make a legal choice to be emancipated. If Poindexter had ordered his slaves freed in his will, his wishes would have been honored, but because he gave them a choice that they were determined to lack the capacity to make, his heirs prevailed and the enslaved people were sold.

Throughout the text, Dayan reveals how the assignment of legally recognized mental capacity or incapacity of the depersonalized persons she examines is

12. Quoting Thomas Cobb, who wrote "An Inquiry into the Law of Negro Slavery in the United States of America" (1858) six months after Bailey, stating "The theory of a complete annihilation of will in the slave is utterly inconsistent with all recognition of him as a person, especially as responsible criminally for his acts" (302).

13. Citing Bailey at 6.

14. Quoting Bailey at 7.

15. Quoting Bailey at 10.

16. Quoting Bailey at 9.

used as evidence of their personhood. She looks at the "deliberate indifference" standard applied by the Supreme Court in cases where prisoners contest conditions of confinement. This standard focuses on the intent of the prison officials, rather than the injury experiences of prisoners, to determine whether cruelty has occurred.[17] Dayan argues that this standard "denie[s] interiority" to prisoners who are the objects of harm (181). Their pain and suffering have no meaning. If a prison official can invent an administrative reason that they were subjected to conditions common in American prisons, such as rape, medical neglect, nutritional deprivation, and brutal physical assault, then the cruelty will not be recognized by courts. Dayan's examination of this puzzling legal reasoning next to her discussion of the denial of mental interiority to slaves in *Bailey* and the reality that more than 40 percent of U.S. prison inmates are black men, presents a chilling picture of continued racialized hierarchies of personhood.[18] She argues that the deliberate indifference standard is a site of clear distinction in degrees of personhood, "between those capable of intent and the presumed unthinking recipients of punishment" (191).

Dayan's discussion of supermax prisons, of solitary confinement, that "peculiarly American invention," and of the torture of Guantanamo detainees, further illuminates these concerns about the legal fictions that legitimize and codify racialized violence (65). Dayan argues that prisoners' rights jurisprudence has not, as might be hoped, reduced or eliminated inhumane prison conditions, but has instead helped various government actors to reframe their worst practices to fit within what is legally sanctioned. In order to avoid prisoners making due process claims that would require prison administrators to provide a rationale for putting people in solitary confinement, prison officials have renamed it "administrative segregation," casting it as a matter of discretion for officials to use their expertise to determine (31, 78-79, 94).[19] Attorneys in the Bush administration closely studied 8th Amendment jurisprudence to

17. *See* Farmer v. Brennan, 511 U.S. 825 (1994) and Dayan at 186: "The full force of mental volition is transferred to the person of the prison official. The requirement that aggrieved prisoners show *deliberate* indifference by their keepers when claiming cruel and unusual punishment permits untoward rationalizations. This reasoning measures cruelty not by the pain and suffering inflicted but by the intent of the person who inflicts them."

18. *See* Michelle Alexander: More Black Men Are In Prison Today Than Were Enslaved In 1850, Huffington Post, (Oct. 12, 2011), *available at* http://www.huffingtonpost.com/2011/10/12/michelle-alexander-more-black-men-in-prison-slaves-1850_n_1007368.html. More than 60 percent of US prisoners are black or Hispanic; *see* Albert R. Hunt, A Country of Inmates, N.Y. Times (Nov 20, 2011), *available at* http://www.nytimes.com/2011/11/21/us/21iht-letter21.html?pagewanted=all.

19. Dayan discusses how determinations about placement in solitary confinement are both arbitrary and almost impossible to contest. Prisoners can be placed for reasons that are impossible to disprove such as for their own protection, based on accusations of gang membership, or for administrative convenience (79). Classifying it as "administrative segregation" rather than "solitary confinement" deprives prisoners of a due process demand, since the placement is not cast as additional punishment (94). She discusses in depth how harmful solitary confinement is for people subjected to it, a fact that has lead some to argue that it is actually a more severe punishment than death (85-6).

formulate arguments justifying torture, in the process renaming it "enhanced interrogation techniques" (31). Dayan argues that the range of changes that have occurred in the period after the swell of prisoner rights advocacy a few decades ago cannot be cast as progress. She writes,

> It is as if with each court case, with each decision to make the prison more legal or to tailor its confines to constitutional expectations in the face of proliferating claims of cruel and unusual treatment, punishment became more refined and hidden, less vulgar and obvious. . . . Expertise and professionalism mask the harsh effects of idleness and deprivation, the preferred "treatment" in these supermaxes (74).

The Law Is a White Dog places these contemporary practices in a longer history of the legal production of gradations of statuses of personhood, and of the construction of depersonalized persons, that have produced and sustained systemic racialized violence in the U.S. Dayan successfully demonstrates the complexities of the simultaneously lawless and hyper-legal violence of criminalization to which any lawyer working with highly policed and imprisoned populations in the U.S. today can attest. She argues that, "[i]t is not an absence of law but an abundance of it that allows government to engage in seemingly illegal practices" (72). The kinds of reasoning engaged in by the lawyers who wrote and signed the infamous "torture memos," the judges who enforce the deliberate indifference standard to dismiss challenges to inhumane prison conditions and justify the warehousing of people in supermax facilities, and those who defended slavery overlap in their manipulation of concepts of mental capacity and incapacity, reference to images and ideas of animality, and invocation of racialized "dangerousness" to sustain state violence. Dayan's innovative engagement with a range of legal areas and eras helps illuminate the continuity of phenomena consistently declared discontinuous. She argues that, "[t]he extremity of contemporary punishment in the United States—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 civil incapacity" (71). U.S. law and culture consistently proclaim a definitive historical break between the bad old days of slavery and Jim Crow, and the purportedly "post-racial" Obama era. People in the United States, and those around the world living in countries to which our law enforcement models are being exported, face the puzzling contradiction between this national progress narrative and the realities of rapid expansion of prison and immigration systems that target people of color—what could be understood as an overall expanding apparatus of racialized state violence.[20]

20. According to the ACLU, "[f]rom 2001 to 2010, the number of immigrants held in immigration detention each year nearly doubled, from 209,000 immigrants per year in 2001 to almost 392,000 in 2010." ACLU, Securely Insecure: The Real Costs, Consequences & Human Face of Immigration Detention (January 2011), *available at* http://www.detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/1.14.11_Fact%20Sheet%20FINAL_0.pdf. The Obama Administration has deported more people than

Dayan's research offers law reformers an opportunity to pause and consider the pitfalls of reform. In the case of prisoner's rights, years of legal reform efforts seem to have led to larger numbers of people being imprisoned in more high-tech prisons and prisons legally rationalized as less cruel, while inhumane conditions remain the status quo. Prison expansion projects are consistently articulated by their proponents as beneficial to the people who will be imprisoned in the new facilities. In California, advocates of "gender responsive prisons" proposed a policy that would expand the women's prison system in that state (already the largest women's prison system in the world) by 40 percent, in the name of helping women and children.[21] In Seattle in 2012, a tax levy to raise $210 million dollars to tear down and rebuild the city's youth jail (and, incidentally, sell off acres of land to private developers to build condominiums in a gentrifying historically black neighborhood) was pitched by proponents as a beneficial "youth and family justice center" and marketed through a now-defunct website called yeschildrenandfamilies.com.[22] In both these proposals, ever-growing systems of imprisonment are cast as inevitable and as reforms beneficial to those anticipated to be imprisoned. This logic of sustaining and increasing the largest imprisonment project in world history—the U.S. prison system—which many argue is motivated by profit-making opportunities available in a highly privatized system,[23] is being contested by those who argue that imprisonment fails to increase safety and

any other presidential administration in U.S. history, 1.5 million in his first term. Corey Dade, Obama Administration Deported Record 1.5 Million People, December 24, 2012, NPR, *available at* http://www.npr.org/blogs/itsallpolitics/2012/12/24/167970002/obama-administration-deported-record-1-5-million-people. The United States has the highest documented incarceration rate in the world. International Centre for Prison Studies, Prison Brief—Highest to Lowest Rates, World Prison Brief, King's College London School of Law, March 18, 2010, *available at* http://www.webcitation.org/5xRCN8YmR. According to a recent report by the Congressional Research Service, the federal prison population has increased by nearly 790 percent since 1980. Nathan James, The Federal Prison Population Buildup: Overview, Policies, Issues, Changes and Options, Congressional Research Service, Jan, 22, 2013, *available at* http://www.fas.org/sgp/crs/misc/R42937.pdf. In 2011, approximately one in every 34 adults, or about seven million people, were in prison or under correctional control of some kind. Lauren Glaze, Correctional Populations in the United States, 2011, November 29, 2012, United States Bureau of Justice Statistics, *available at* http://bjs.gov/index.cfm?ty=pbdetail&iid=4537.

21. Anti-prison feminist organizations, including Justice Now, A New Way of Life Reentry Project, and California Prison Moratorium Project organized to resist this policy. *See* Californians United for a Responsible Budget, How 'Gender Responsive Prisons' Harm Women, Children and Families, (May 2007) *available at* http://curbprisonspending.org/wp-content/uploads/2010/05/curb_report_v5_all_hi_res.pdf.

22. The community group opposing the project continues to argue that the resources being devoted to the project would better support children and families if they were spent on income support, affordable housing, health care, child care and other necessities criminalized communities are lacking. *See* Why Oppose the New Youth Jail?, *available at* https://nonewyouthjail.wordpress.com/.

23. *See* Davis, *supra* note 2; *see also* Cuéntame, *available at* http://www.mycuentame.org/immigrantsforsale.

propose that it produces harm and violence rather than prevents or resolves it. In a successful 2008-2009 campaign to stop the building of a new adult jail in Seattle, advocates exposed that Washington state agencies use the reading scores of fourth graders to calculate projections about how many prison cells will be needed in the future.[24] The reference to these nine-year-old students for whom the state is already preparing prison cells echoes Dayan's concerns about criminalization and depersonalized persons.[25] It is chilling to imagine bureaucrats sitting in government offices making these calculations, and perhaps more so to imagine advocates of prison expansion projects earnestly believing that their efforts will benefit the women or children for whom these cells are being built. Dayan's work helps us trace the role legal reasoning has played in producing a slave society, and a prison society, in which structures of racial violence appear inevitable, justifiable, rational and natural, even to those who see themselves as reformers seeking justice. "When law is called upon to ascertain a 'rational' basis for sustaining the dominion of the dead and the ghostly, much depends on assumptions that most of us claim to find intolerable. But recent events continue to prove how much we can tolerate. How easy is it for fear, dogma and terror to allow us to demonize others, . . . to do unspeakable things to them. In a morally disenchanted world, daily cruelty and casual violence accompany the call for order" (32–33).

24. These figures were cited during a January 28, 2009 panel entitled "Question Inevitability: Does Seattle Need a New Jail?" that I participated in at Seattle University. They can be found published in Eric S. Hall & Zorka Karanxha, School Today, Jail Tomorrow: The Impact of Zero Tolerance on the Over-Representation of Minority Youth in the Juvenile System, Power Play 4(1), at 20 (2012) *available at* http://www.emich.edu/coe/powerplay/documents/vol_04/no_01/ppj_vol_04_no_01_hall_karanxha.pdf, *citing* Henry A. Giroux, Youth in a Suspect Society: Democracy or Disposibility? (Palgrave Macmillan 2009).

25. She writes,

> If more or less tangible objects can be either 'property' or 'persons' in the eyes of the law, what we consider subjects of legal rights and duties can also be stripped of these attributes. We are obliged to consider the creation of a species of depersonalized persons. Deprived of rights to due process, to bodily integrity, or life, these creatures remain *persons in law*. The reasoning necessary to this terrain of the undead sanctions the irrational: the reasonable extension of unspeakable treatment to an unknowable future (32).