



THE LAW

HOW LEGAL RITUALS

IS A

MAKE AND

WHITE

UNMAKE PERSONS

DOG

COLIN DAYAN

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IS A
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DOG

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藏书章

COLIN DAYAN

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THE LAW IS A WHITE DOG

For David, again

... dogs believe in thieves and ghosts

—Nietzsche, *Thus Spoke Zarathustra*

PREFACE

THIS IS A BOOK ABOUT EXTRANEOUS PERSONS. SUBORDINATED AND expelled from society, they take on new shapes: humans, things, dogs, and spirits that are brought together under the umbrella of legal history. Their transformations prompt us to think about what it means to be considered in terms of law. I offer some broad perspectives on metamorphosis, invoking only some of the manifold ways that law dwells on, messes with, and consumes persons. It is through law that persons, variously figured, gain or lose definition, become victims of prejudice or inheritors of privilege. And once outside the valuable discriminations of personhood, their claims become inconsequential.

Law is the protagonist of this plot. The social, economic, and even spiritual practices of remote times persist in legal forms and pronouncements. My treatment of ghostly properties and human and nonhuman animal materials appeals for an understanding of legal reality, lively, ever-present, and reimagined by those outside the guild of lawyers. I see my task as unearthing what Sir Frederick Maitland described as the “dry bones” of law and giving them life in unexpected places. For some readers, it will seem that I make legal effects revel in what is least akin to judicial activities and the operations of law. But the generous reader will, I reckon, follow me on the journey through a series of haunts, sites that recapitulate, if fitfully, the transmutations that are so much a part of legal history.

I seek to know what happens to conventional historical and legal sources when they are pressed to answer unconventional

PREFACE

questions. But my main objective is to ask how law encapsulates, sustains, and invigorates philosophies of personhood. What I offer as *idioms of servility* demonstrate, I wish to suggest, that state-sanctioned degradation in America is propelled by a focus on personal identity, the terms by which personality is recognized, threatened, or removed. I treat the legal history of dispossession as a continuum along which bodies and spirits are remade over time. In this narrative I devote special attention to the obscene made lawful: slavery, torture, indefinite solitary confinement, preventive detention. Along the way I show how rituals considered otherworldly, primitive, irrational, and superseded maintain their presence in what we consider our truly civil and modern society.

The irrational haunts the civilizing claims of the reasonable. The shadows of the Furies, buried so that the polis could be born, still pursue the icons of order. So the modern state, its counterfeits and its terrors, betrays a subterranean legacy. Each chapter here explores a different site of incapacitation through what I think of as sinkholes of law where precedents gather, festering as they feed on juridical words, past and present. The animating principle of such an account of law is a challenge to chronology. Entwined and cumulative, these chapters proceed as episodes in making and unmaking persons.

In the long history of what I call "negative personhood," I focus on slaves, animals, criminals, and detainees who are disabled by law. Legal thought relied on a set of fictions that rendered the meaning of persons shifting and tentative: whether in creating slaves as *persons in law* and criminals as *dead in law*, or in the perpetual re-creation of the rightless entity. The medieval fiction of civil death lives on in the present. The felon rendered dead in law is no anachronism but a continuing effect of dehumanizing practices of punishment. What does it mean to exist in a negative relation to law? In my attempt to characterize legal disabilities, I analyze competing genealogies of race prejudice, as well as traditions of penalty that transform persons into cadavers. Rituals of old world vengeance like the *deodand*, corruption

PREFACE

of blood and civil death jostle with a philosopher of personal identity like John Locke, a critic of the common law like Jeremy Bentham, as well as dogs and ghosts, demons and zombies, judges and poets who bear witness to undying legal effects.

What I aim to do in this book is to question *the spirit of law*. In each chapter I try to lay a foundation for this questioning by bringing together different disciplines and modes of inquiry. Both the organization and the irresolution resulting from it are deliberate. While dramatizing a perplexing legal history too often lost in linearity, I preserve a discontinuous but thematically linked approach to the questions I raise. I want to make readers complicit in a world without demarcations such as those between past and present, primitive and civilized. For the oppressed and outlawed, such distinctions matter but they matter differently. They are more seamless and easily convertible. For those who adhere to a myth of progress or faith in reason, the continuum between past and present must be made to be deeply felt.

I choose not to spare my readers the experience of lingering phantoms that guarantee a politics that is both rigorous and visible, what Peter Geshiere calls "the modernity of witchcraft." The dispossession accomplished by slavery, as I have argued elsewhere, became the model for possession in vodou: turning a person not into a thing but into a spirit, filled with thought, armed with personality. In Creole, *lwa* is the term for both law and god. Those dispossessed by the *loi d'état* when possessed by their *lwa* communicate across species boundaries, breaking down and challenging legal taxonomies. So the white dog of my title is invested with ambiguous power.

Disabilities are made indelible through time in fictions of law, law words that wield the power to transform. I will argue that residues of terror are never really dead and gone but, through the terms of law, survive and always find new bodies to inhabit, new persons to target. I try to show how the ghosts of Enlightenment past become the demons of modernity. I also suggest how what we call *supernatural* or think of as ghostly is really quite natural, corporeal, easily recast as *reasonable*.

PREFACE

The spiritually injured entities I describe as *depersonalized*. Disfigured as persons, they are then judged outside the law's protection or most susceptible to its violence. Practices of law, I argue, become interchangeable with rituals of belief. The will to repeat, the insistence on the already done that must be redone, accounts for the power of ritual, an action both civil and sacred. I have taken seriously the need to give a material history of what might at first seem spiritual concerns.

Spirits experience life and unfold their potential through the business of humans, tightly bound up as they are with the stress and uncertainties of society. As with other rituals of remembrance and reenactment, both spirit possession and the legal idiom transmit traditions in a particularly historical way. But the meaning of civil life must be reconsidered when played out under the eye of the law. The cadavers, ghosts, and spirits that motivate this book originate in the life of chattels that have been passed around, injured, or consumed. This making of perishables, consumed by use, recalls the somber intelligence of ritual and the resistance of those who have suffered.

Much of this book has a contemporary resonance—obviously Guantánamo and the secret prison sites in this country and round the world, where our country has made others complicit in its deprivation of rights and willful disregard of the laws of nations and the international obligations which this country, like others, has taken upon itself. This is a political book, then, but it is not a tract. What I have tried to do is show that the shame that is Guantánamo has a history, in our nation and in its treatment of its own. Which brings me to the origin and real impetus of this book: the uses of incarceration in the United States to criminalize, exclude, and do such violence to persons that they are returned to their communities—when they are—diminished and harmed sometimes beyond repair, or redress.

I spent four years doing what I called “my prison work.” Every week from 1995 to 1999 I drove from Tucson north on the Pinal Parkway to the prison units in Florence, Arizona, or on I-10 East to Phoenix. In Phoenix I interviewed Terry Stewart, who be-

came director of the Arizona Department of Corrections in 1995. In May and June of 2003, he and three other corrections professionals from state prisons in the United States restructured and reformed the prisons in Iraq, including Camp Bucca and Abu Ghraib. Major-General Antonio M. Taguba of the U.S. Army later condemned both prisons as sites of “egregious acts and grave breaches of international law.” Attorney General John Ashcroft’s Justice Department implemented Operation Iraqi Freedom through American-style prison security. At the time, Stewart was head of a security consulting firm in Phoenix called Advanced Correctional Management. Stewart had other experience exporting U.S. prison practices. After the overthrow of President Jean-Bertrand Aristide, Stewart visited Haiti to oversee prison reform there. In a 2004 interview, he summed up his philosophy: “We need some place to put the criminals if we are going to have a civil society.”

When I interviewed Stewart in the summer of 1996, he was already known for “death-row chain gangs,” cell extractions with dogs, the cover-up of rape by correctional officers, and ever-harsher confinement of prisoners in supermax facilities. During our interviews he wore an elegant suit, gold cuff links, and a perfectly starched shirt with his initials “TLS” monogrammed in blue on the cuffs. We sat in a plush, wood-paneled office with mood music playing. I thought of it as “adult contemporary.” Its languid rhythms gave a surreal background to our conversation about executions, “drop dead” dates, rock busting (requiring prisoners to spend hours each day pointlessly breaking rocks), lockdown, and classification codes. His examples relied on “mythical inmates.” Instead of real prisoners, he used photographic stills in the series of films he directed about inmate work programs, chain gangs, correctional industries, and enhanced cell extractions. When I asked him why only mute images instead of live men, he answered: “What can inmates say? They’re liars, they’re thieves, they’re cheats. Who would believe an inmate anyway?”

Stewart coolly answered my questions about the unseen anguish of inmates during lethal injection: “What happens is that

the person goes to sleep. The most you would see is if the injection happens to be on the inhale and the chest is empty you might see movement in the abdomen, but if it happens to be on an exhale, then there's no movement at all.... We'll probably have executions once a week, like they do in Texas."

After these meetings, I sought relief in pages and pages of legal transcripts, depositions, and newspaper clippings from the late sixties on, all dealing with prisons in Arizona. I found the writings of inmates who had not only read but understood the law. They turned to it in the prisons as I did. In a journey that seemed appropriate to the subject to which I had become rather too devoted, I travelled between the Arizona State Prison Complex and the U.S. District Court in Phoenix, alternating between the prison and the law, two sites that were fast becoming reciprocal—sometime collaborators in a new form of punishment that could evade constitutional claims.

In the course of a project that began in the death house and supermaxes of Arizona and outside on the streets, asking officers about the public display of prisoners in chains, I observed much mistreatment. But, more importantly, I began to consider how institutions depend upon technologies of domination that are sustained by the rhetorically powerful forms of law. In anticipating the reactions of readers who feel as if they are being hit by a juggernaut of oppression, I should explain that I do not think that the calamities of state-sponsored exclusion and dehumanization would be removed by better jurists. Instead, I examine the poor treatment, the entombing of the living, not as historical contingency, but as something culturally inevitable in that the past haunts us.

The Law Is a White Dog contests the Enlightenment attachment to rationalism and limitless progress. Hence I dramatize the confounding nature of the encounter with what we identify as Western modernity, its projects, its violence and oppression. I grew up in the South during the sixties, when bloody sit-ins at Charlie Leb's Restaurant on Lucky Street made me know racial violence. It was a time when folks listened to Nancy Wilson sing

PREFACE

“Sufferin’ with the Blues” and gaped at men in zebra stripes working in chain gangs on the Atlanta highways. A southern girl brought up under the reasonableness of law, as well as evidence of the ghostly, I found life in making intelligible what authorities ridiculed as superstition.

Just as reason can abide quite comfortably with the unreasonable, I believe that ghost stories can be set alongside legal narratives. If, as I argue, the law creates persons much as the supernatural creates spirits, then such newly invented entities are not what we assume. A series of metamorphoses, both legal and magical, transform persons into ghosts, into things and into animals. But these terms—person, ghost, thing, animal—which we assume to have definite boundaries, lose these demarcations. Categories lose their distinctiveness. I trace this re-creation through various and conflicting sources: Pauline faith, Lockean epistemology, Haitian vodou. If I have made legal reasoning as blooded and vital as the lives of persons lethally affected by it, then I have succeeded in my aim.

THE LAW IS A WHITE DOG

CONTENTS

Preface xi

- 1 Holy Dogs, Hecuba's Bark 1
- 2 Civil Death 39
- 3 Punishing the Residue 71
- 4 Taxonomies 113
- 5 A Legal Ethnography 138
- 6 Who Gets to Be Wanton? 177
- 7 Skin of the Dog 209

Acknowledgments 253

Notes 259

Bibliography 303

Index 325



HOLY DOGS, HECUBA'S BARK

I knew a person in Christ above fourteen years ago,
(whether in the body, I cannot tell; or whether out
of the body, I cannot tell: God knoweth;) such
an one caught up to the third heaven.

—St. Paul, 2 Corinthians 12:2

A MOST UNNATURAL BARGAIN

As regards specters or ghosts, I have hitherto heard
attributed to them no intelligible property: they seem
like phantoms, which no one can understand.

—Spinoza to Hugo Boxel, 1674

IN 1989 HELEN ACKLEY SOLD HER FIVE-THOUSAND-SQUARE-FOOT, eighteen-room Victorian house on the Hudson River in Nyack, New York, to a young couple, Jeffrey and Patrice Stambovsky. After making a down payment of \$32,500 for the house, they learned that it was haunted. Although Jeffrey did not believe in ghosts and did not mind knowing that the house was thus occupied, his wife refused to live there. Ackley had enjoyed a good relationship with the ghosts for over twenty years, and had become accustomed to steps on the stairs, doors slamming, beds shaking, and chandeliers moving back and forth. She assured the couple that they had nothing to fear. The spirits were friendly