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With Law at the Edge of Life

The holes of oblivion do not exist. Nothing human is that perfect.

—Hannah Arendt, *Eichmann in Jerusalem*

The morning after the town meeting on the resolution to boycott Israeli academic institutions at the 2013 meeting of the American Studies Association in Washington, DC, I opened the Sunday *New York Times*. As usual, I dug for the Book Review section, and on the front page I saw “The State of Israel,” the long review by Leon Wieseltier, literary editor of the *New Republic*. Reading his commentary on Ari Shavit’s *My Promised Land: The Triumph and Tragedy of Israel*, I was struck by Wieseltier’s indifference to Palestinian life under occupation. At the end of the review, Wieseltier (2013) quotes Shavit’s take on Israeli reality: “the intensity of life at the edge.” That intensity, I thought, is nurtured, even stoked by its very real backdrop: Palestinian life cordoned off, trapped, demolished, bulldozed, expropriated, uprooted, bypassed.

I began to think about the holes of oblivion that exist in plain sight in this our twenty-first-century United States: whether multifarious prisons on the mainland, offshore at Guantánamo, or other “black sites” or “frozen zones,” unnamed and, for the most part, forgotten. Life at risk on the edges of life can entice or inspire. There anything is possible. But the holes persist where life has already been denied, encircled, held hostage.

Slow Death

Life without parole (LWOP), the novel substitute for state-sponsored execution, is for many a punishment worse than death. In “Sentenced to a Slow Death”

(Editorial Board 2013), editors at the *New York Times* reported that judges, bound by mandatory sentencing laws, are sentencing to life imprisonment—without possibility of parole—people, most of all African Americans, who have done nothing more than selling marijuana, ten dollars worth, “siphoning gas from a truck,” or simply possessing a crack pipe.

Though apparently shocking to the *New York Times*, the extreme and anomalous practices of punishment in the United States should come as no surprise. Civil death, though abolished in England, lived on in the young republic. Though first affixed to the blood of a criminal capitally condemned, it soon followed a sentence of life imprisonment, a consequence rare at common law. To be *dead in law* meant to be deprived of the right of vote, to sit as a juror or hold office, even to marry. It meant that you were forever distinguished from other civilly alive people. In the words of one nineteenth-century postbellum Virginia judge, prisoners were merely “slaves of the State” (Dayan 2011: 61).

Though this anachronism came into prominence with the abolition of slavery, we are still not out of the fog and beyond the fiction of medieval jurisprudence. Human Rights Watch has described the impact of contemporary US disenfranchisement laws: “In fourteen states even ex-offenders who have fully served their sentences remain barred for life from voting. . . . an estimated 3.9 million U.S. citizens are disenfranchised, including over one million who have fully completed their sentences.” A century and a half after slavery, 13 percent of African American adult males—1.4 million—are disenfranchised. The future is dire: black citizens in the United States, once convicted of crime, will be perpetually excluded from the society in which they live (60).

The continued criminalization of African Americans in this country is what drives our nation—legally, politically, and socially. That a city has elected a black mayor, a country a black president, changes nothing for many of our fellow citizens who face casual cruelty and enduring harm simply because they are black. In the *New York Times* two years ago at the height of Mayor Michael Bloomberg’s “stop-and-frisk” policy, Nicholas Peart wrote in “Why Is the N.Y.P.D. After Me?”: “Every time I go outside, I have good reason to think I may find myself up against a wall, handcuffed or lying on the ground with a gun pointed at me.” Racial profiling, random arrests, and arbitrary surveillance frighten and intimidate. But rationales for security always trump such systemic and momentous atrocities.

What we are seeing in our prisons and on our streets is not criminality but criminalization: the conjuring of phantasms of criminality. Much of our population is in thrall to labels like “criminal,” “threat,” or “thug”—as in the

acquittal of George Zimmerman for the murder of Trayvon Martin—or in the general indifference to the killing of a black man named Marlon Brown. Chased and mowed down by a squad car in a Florida garden, Brown was fleeing from police pursuit for an alleged seat-belt violation.

Reasonable Disposal

The national order of life is made possible, both in power and in reach, by these pockets of exclusion. No other president has been as busy as Barack Obama in converting civil life into penal life. From his attack on whistle-blowers and journalists to the continued disregard of mass incarceration in this country, Guantánamo, and universal Big Brother surveillance, Obama and the government that he heads have subordinated citizens to a new kind of legitimacy. Obvious injustice is repackaged, displacing actual wrongdoing with unlimited possibilities of rationalization.

The terms of such language, legal to the core, broaden the scope of what was before narrowly defined as penal and extend its activity to new fields. Extrajudicial imprisonment is Obama's special brand of justice. On May 21, 2009, he proposed the long-term incarceration of alleged terrorists here in supermax prisons. What he called a "legitimate legal framework" or, somewhat less courageously, "an appropriate legal regime" for preventive detention is indistinct from the worst though least-discussed treatment at Guantánamo: the use of indefinite isolation as psychological torture (Stolberg 2009; see also Glaberson 2009).

We live against this background of reasonable assault, where sanitized language leads us to accept unlimited restraint and its attendant terrors, less spectacular because legally inflicted. Whether in the precincts of Brooklyn, the suburbs of Florida, the city of Watertown after the Boston marathon bombing, or on the streets of our towns, the penal and disciplinary machine of governing elites functions by broad consent. In a country wracked by economic collapse, ingrained racism, and political paralysis, we become inured to the exclusion of large, easily labeled groups, whether persons of color, immigrants, or dissidents. But we ourselves are not exempt.

The militarization of the police and state violence variously applied bode ill for all of us, no matter our gates, no matter our so-called security from "terror." All we have to do is read the Patriot Act or the Military Commissions Act to know that labels like terrorist can be arbitrarily applied. To the extent that "probable cause" and "due process" protections of the Constitution are evaded in the hyperlegality of the war on terror, the penalty of "preventive detention" endangers us all. We are on a slippery slope.

What's Law Got to Do with It?

Is it possible that statute and case law were more crucial than social relations or moral assumptions in effecting these rituals of exclusion? Recalling Giorgio Agamben's (1995: 5–6) gambit with Michel Foucault in the opening of *Homo sacer*, I ask: Can we construct an analytic of power that would not take law as its model and code? I am perhaps too much attached to the law, attracted to a power that is most effective when least reasonable, most compelling when it flies in the face of the obvious.

Through ingenious technical legalism—and an overriding deference to prison officials—the Rehnquist Court (1986–2005) paved the way for abominations that pass for the “necessary incidents” of prison life. In *Sandin v. Conner* (1995), Chief Justice William Rehnquist redefined the constitutional limits of confinement. DeMont Conner's disciplinary confinement, the majority claimed, “did not present the type of *atypical, significant deprivation* in which a State might conceivably create a liberty interest.” Judged to be “ordinary,” “administrative” confinement and nothing more, Connor's removal from the general population—thirty days in the special holding unit of Halawa Correctional Facility in Hawaii—triggered no due process protection (*Sandin v. Conner*, 515 U.S. 472 (1995), 486).

Words matter, and nowhere more than in cases that use verbal qualifiers to gut the substance of suffering. How atypical must something be in order to be legally cognizable? What constitutes an “atypical, significant deprivation” in the prison context? In her dissent, Justice Ruth Bader Ginsburg, joined by Justice John Paul Stevens, asked, “What design lies beneath these key words?” (490n2). In this situation of administratively heightened captivity, a building that takes isolation and trauma to the extreme is rationalized as a general population unit, the normal condition for those held under “special” or “secure” management.

Once the courts established what constitutes “basic” or “fundamental” human needs—food, light, clothing, shelter—then prison administrators and the architects who serve them built deprivation into construction methods. There is a legal grammar to the spatial structure of the supermax. The winnowing away of the substance of incarceration (what actually happens to the prisoner) in favor of vague but insistent formulas of forms, rules, and labels has allowed increasingly abnormal circumstances to become the new normal.

In 1993 US District Court judge Thelton Henderson, in his first Eighth Amendment case at Pelican Bay State Prison, admitted that conditions in the security housing unit (SHU) “may well hover on the edge of what is

humanly tolerable for those with normal resilience.” He argued against the habit of caging inmates barely clothed or naked outdoors “like animals in a zoo”; the sometimes lethal force used in cell extractions; the habit of using lockdown for treatment of the mentally ill; the scalding of a mentally disabled inmate, burned so badly that “from just below the buttocks down, his skin peeled off” (*Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995), 1167).

But when he turned to the psychological trauma caused by “extreme social isolation and reduced environmental stimulation” in the SHU, he presented a choice of alternatives for making cruel and inhuman treatment constitutional. Although it matters constitutionally if one is teetering on the brink of insanity or has already gone over the edge, it matters not at all if one is only a little damaged—if, in Henderson’s words, one’s “loneliness, frustration, depression, or extreme boredom” has not *yet* crossed over into the realm of “psychological torture” (1235–36).¹

What is most sinister is how the language of *decency* and *dignity* masks injury. How, I have long asked, did the very notion of “evolving standards of decency” in *Weems v. United States* (1910) and the “dignity of man” in *Trop v. Dulles* (1958) blur the divide between the civilized and the barbaric treatment of prisoners? (*Weems v. United States*, 217 U.S. 349 (1910); *Trop v. Dulles*, 356 U.S. 86, 598 (1958)). The use of a dichotomy such as brutality versus decency allows ever more sophisticated and refined torture to pass constitutional muster, to be judged as within the limits of permissible pain.

The unspeakable is made palatable whenever the promise of humanitarian punishment is made. When the prohibitions of the 1689 English Bill of Rights are summoned as backdrop—disemboweling, decapitation, drawing and quartering—then the ban on cruel and unusual punishments might well seem obsolete, aimed only at “barbarities” that have long since passed away. Yet cruelty takes many forms other than corporeal. What is striking about contemporary Eighth Amendment cases, in particular, whether dealing with confinement or execution, is the legal recognition of the corporeal punishment paradigm. Courts attend to the body, not the intangible qualities of the person (e.g., psychological pain or fear) or the deadly social components of indefinite solitary confinement.

Salvific Hunger

The California hunger strikers are confined in state-of-the-art settings that make mental pain or intolerable suffering illegible. Despite numerous lawsuits relating to medical care, excessive force, overcrowding, and other forms

of mistreatment, state-backed and legally proper, corrections officials still refuse to respond in any meaningful way, and, in many instances, they retaliate against prisoners.

These prisoners know the law. They know how difficult it is to get judges to apply the Eighth Amendment prohibition against “cruel and unusual punishment” to the psychological harm caused by sensory deprivation and enforced idleness. They know how judges ignore due process claims when solitary confinement is labeled “administrative” and not “disciplinary.” They know that something else, something new and extralegal, must be enacted.

Treated as nothing more than flesh and bone, as having no mind worth legal regard, the hunger strikers give meat to this persistent psychic cannibalism. They make their *minds matter*. They condemn themselves to waste away while waiting for some minimum recognition of their claims by Governor Jerry Brown and the massive support system that undergirds the California Department of Rehabilitation and Corrections (CDRC). They oppose this self-inflicted and collective deprivation as captives to the deliberate and ongoing deprivations of the state. In their refusal to be nonreactive objects, they are no longer invisible. They have set themselves before us. They present themselves to us at the edge of life.

Force-Feeding

The Pelican Bay SHU Short Corridor Collective Representatives (2013) announced that the hunger strike would be suspended on September 5, 2013. “Our decision . . . does not come lightly. This decision is especially difficult considering that most of our demands have not been met.” The hunger strike—the third in two years, and the largest in history—ended after nine weeks.

Todd Ashker, Arturo Castellanos, Sitawa Nantambu Jamaa, Antonio Guillen, and eight other prisoner representatives made public their announcement after two events. In a surprise judgment, Judge Henderson gave prison authorities permission to force-feed inmates, and California state assembly member Tom Ammiano and state senator Loni Hancock declared that they would schedule joint public hearings about conditions at the security housing units throughout the system. On the one hand, prisoners faced possible physical assault under cover of medical care; on the other, they took these lawmakers’ proclaimed intention to confront the use and abuse of solitary confinement as proof of a commitment to change.

The threat and the promise, the fact of force and the sign of beneficence together ensure that nothing changes. When Senator Dick Durbin chaired the first-ever congressional hearing to “reassess” solitary confinement on June 19, 2012, that legislative chitchat turned out to be nothing more than icing on the cake of cruelty (“Senators Start a Review of Solitary Confinement” 2012). Just four months later, he engineered the purchase of the unused Thomson Correctional Center for the long-term isolation of federal prisoners. Modeled after the notorious supermax ADX Florence in Colorado and dubbed “Gitmo North,” it promises prolonged isolation for “dangerous terrorism suspects” while rationalizing torture without due (or indeed, any) process of law (Casella and Ridgeway 2013).²

The hunger strike in California came on the heels of the most recent hunger strike at Guantánamo. In a grim parody of medical care, that strike ended in midsummer 2013 with men strapped to restraint chairs, shackled, with tubes forced through their noses and down their throats into their stomachs. The military calls this “intensified assisted feeding” (Murphy et al. 2012). This practice has been condemned as “abusive” and “cruel, inhuman, and degrading” by the United Nations, the American Medical Association, and numerous human rights groups, including the American Civil Liberties Union. In July 2013, in response to the Guantánamo hunger strike, some Boston ethicists (2013) in the *New England Journal of Medicine* wrote: “Force-feeding a competent person is not the practice of medicine; it is aggravated assault.”

In his response to a request by state authorities, Judge Henderson ruled that California prison doctors may “refeed” inmates if the chief medical executive decides that a hunger striker is at risk of “near-term death or great bodily injury.”³ What does refeeding mean? After all, the hunger strikers had signed legally binding “do not resuscitate” requests. Some of them had already been moved to other prisons or to outside hospitals; others had already received IV fluids. Though no one in the mainstream media reported on the choice of this term, its ominous leeway—to be fed again, to be fed again and again—made me fear the worst: the practice of enteral feeding had reached our shores.

Most unsettling about Judge Henderson’s court order is that the same people who had consistently denied appropriate medical care to hunger strikers were now endowed with the power to force them to eat, to accept sustenance pushed down their throats. Deliberately and consistently indifferent to prisoners’ needs, these authorities could now feed them by force. And, again, the same judge who once condemned inadequate medical care in

suits against Pelican Bay—and who still oversees the ongoing lawsuit over inmates' medical care—granted blanket authority to these same corrections officials to keep prisoners “alive” by any means necessary. The logic of his orders cries out for explanation.

Liz Gransee, public information officer and spokesperson for the federal receiver overseeing health care in California's prisons, explained at the time that refeeding is “a long process” and demands “the highest level of care” (Johnson 2013). But claiming to care for prisoners who are competent to make choices for themselves is probably less about caring for their medical needs than taking away the only means that prisoners have to protest and make public their treatment. How easy it is to retool systematic debasement as emergency preservation.

That might well be the point of this dubious care. Not only is force-feeding yet another way to dominate those condemned to such treatment, but it also silences the hunger strikers' protest, their attempt to make their lives visible to us outside the prison walls. What kinds of lives are these, lives lived without human contact, educational possibilities, reading materials, appropriate health care, even natural light? In keeping prisoners alive against their will, the CDRC nullifies the strikers' decision to assert themselves as sentient beings—attentive, exposed, and, yes, resolute. And what about us? Do we find our ethics by forcing prisoners to continue living in a dying situation instead of granting them an escape from a life worse than death?

Dread

So total is the efficacy and reach of the state exercise of control and retribution that I wonder about the repeated attempts to describe the horrors of mass incarceration. How often must we read articles, editorials, and books about imprisonment American-style before things change? It is possible that the more we write about this particular form of injustice, the less response to it we risk. But we are not the point. The most astute readers of case law I have ever come across remain locked down in solitary confinement. The best conversations that I have had about dispossession are those on the streets of Nashville where men and women, though destitute, apprehend the meaning of freedom. For any of us who care about change, who want to think again about radical thought, it is more than possible that the ground for life lies in places of greatest constraint and particularized exclusion.

There are, I now realize, no *holes of oblivion*. That Hannah Arendt knew. But her knowledge came from a sense of human limitation and super-human perfection. It is time to move beyond spectacles of vulnerability and steer clear of the potholes of our cherished humanism. Can we, those of us in the groves of academe, cast doubt on the robustness and transportability of terms such as *culture* and *nature*? What are the implications of a legality that is moderated, legitimized, and even reproduced by the humanitarian concern that is, in fact, analogous to it?

The abuse of life is never due to some withdrawal of law; it occurs always because of a proliferation of legalities and illegalities. The creation of this judicial patchwork has no lawfulness of its own and keeps changing the law itself and the subject's own status before the law. The legal, where I remain rooted ever since I wrote about "black codes and bodies of color" in *Haiti, History, and the Gods*, is ever in league with ethnographic critique, with assumptions of taxonomies and the subsequent degradation or exaltation that count more than any visible or obvious facts (Dayan 1995: 199–237). So Justice Roger Taney's infamous decision in *Dred Scott v. Sanford* (1857) remains with us still, percolating in less obviously extravagant law-making now. To assume that there is an alternative law for prisoners where what is "cruel" or "unusual" or "atypical" or "significant" does not mean what it does for law-abiding citizens is more pernicious than to accept the "stigma of the deepest degradation" in Taney's wildly aberrant rendition of substantive due process.

Our courts no longer cordon off African Americans from the rights and duties of citizenship. Instead, prison cases use formulaic language to ensure that stigma lives on without reference to race. That is the horror. With stop-and-frisk, mandatory sentencing, and all the other color-blind hierarchical and authoritarian relations of command and obedience, we cannot so easily get a handle on the obvious coercion, the genuine power of *whiteness*. Frantz Fanon, Aimé Césaire, Walter Rodney, Sylvia Wynter, Michel-Rolph Trouillot, and others long understood that its power has little to do with skin color and everything to do with prestige or the trappings of culture. Such crude mystification lets a whole lot of folks right into the precincts of collegiality, the prudent care and good taste that enables the neoliberal establishment, no matter its epidermal qualities, to succeed.

How do social rationalism and the claims of decency permit the continued persecution of the unfit or superfluous? The language of threat and removal always applies to those deemed offensive or harmful. It is enough to

be marginal, undesirable, or aesthetically unpalatable. You can be inventively recolored, tarred with the brush of degradation. And much prison law makes sure that the division between the worthy and the worthless continues to be enforced no matter somatic distinctions. To put it another way, a social picture that is preeminently legal takes meaning and garners its effects from the division between value and disregard.

At a time when our government is labeling people as threats—illegal immigrants, alleged terrorists, ordinary people who want to get on airplanes—we need to ask how the seizure and incarceration of those called “criminals” becomes a medium for the intimidation of an increasing number of citizens in their turn—no matter whether they are liberal or conservative or radical. We need to consider how capacious is the ostracizing of certain kinds of human behavior through terms that are vague and loose and therefore powerful. Social rationalism and the claims of “public welfare” or “legal moralism” track and persecute not only the poor and the suspect but also anyone else who questions the claims of capital, the lure of consumption. So we have the early-morning raid on the occupiers on Wall Street, the violent crackdown on thousands of California college students, the continued police harassment of young activists.

Prisons are now the central public institution of our nation, its inhabitants our secret sharers. A new form of colonization has taken place within our very borders. Not to recognize the moral logic behind this massive state control is to realize the terms of our own subjugation. We will allow the extraordinary to become what it portends: a reign of terror that is the normal expectation of life in our new global order. A few months ago, asked during the nonviolent protest of prisoners in California why the strike matters for those of us in the “free world” outside prison walls, I answered: “There is no free world now” (Dayan 2013).

Notes

- 1 See my early discussion of *Madrid v. Gomez* in Dayan 2002.
- 2 On February 25, 2014, Senator Durbin held a follow-up hearing titled “Reassessing Solitary Confinement II: the Human Rights, Fiscal, and Public Safety Consequences” at which the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights again heard testimony about the uses and abuses of solitary confinement in the United States.
- 3 *Plata v. Brown*, Case No. C01–1351, TEH, “Joint Request for Order Authorizing Refeeding under Specified Conditions of Hunger Striking Inmate-Patients and Order Thereon,” solitarywatch.com/wp-content/uploads/2013/08/Plata-Hunger-Strike-Stipulation.pdf.

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