Colin Dayan


What if you bought a haunted house without knowing that you had done so because the seller failed to disclose that information, even though she, as well as the neighbors, were quite aware that ghosts inhabited the house? Would you be entitled to the return of your down payment? Apparently so—and this in 1989. And so begins a fascinating account of the constitutive power of law. As Colin Dayan argues, “In legal rationales, realities are created” (p. 246). In his ruling, Judge Israel Rubin, writing for the appellate division of the New York Supreme Court, made factual the existence of ghosts.

*The Law is a White Dog* is about many subjects. Dayan asks what it means to be a person, how persons are made and unmade in law, and why the question of who may be a person is tied inextricably to ideas about property and ownership. The book is about spirits, slaves, prisoners, terrorists, and animals. In treating these subjects, it draws eclectically and impressively from law, philosophy, mythology, literature, scripture, and historical treatises to chronicle many histories: of slavery, of punishment, of the war on terror, and of animal rights—all legal histories of “dispossession” (p. xii).

Much of the book is devoted to New World slavery. Dayan begins in the West Indies, bringing in sources well known to Caribbeanists, but her work is unusual in documenting the transitions that occurred in the definitions of “slave” and in contrasting these to laws in the mainland colonies. Lawmakers wrestled with the question of how a human could be both chattel and a criminal. Rationalizations for the laws rested upon acute racism. (Scholars familiar with the work of Edward Long, a plantation owner and chronicler of Jamaican history, will recall his argument that Africans constituted a different species of humanity.) Lawmakers changed the definitions of “slave” over time by reinterpreting earlier statutes, euphemisms, and legal fictions—all tools of the trade today.

Dayan demonstrates how earlier patterns and processes persist by tracing the history of the contemporary law of persons in the United States. She considers prisoners’ identities as persons and the punishments they endure by drawing on interviews with prison officials, inmates, and archival research in two maximum security prisons in Arizona during 1995–99, as well as statutes and court decisions. An earlier wave of concern for the inhumane treatment of inmates gave way in the 1980s to concern instead for the safety and security of prison administrators and security guards. A pattern has emerged in which judges defer to what prison “experts” have to say: “their concerns, thoughts, inclinations, fears, lapses, and strain,” rather than “the effects of their actions.
on the incarcerated" (p. 194). After 2000, questions about the civil rights of inmates appeared regularly before U.S. courts. Should prisoners be allowed to read newspapers? To receive letters and photographs of loved ones? To practice religious rites? We might find such questions astonishing, except that Dayan has shown us decisively the power of law to "summon up archaic debris" (p. 234).

In her discussion of "cruel and unusual" punishment, Dayan forces us to reconsider the notion of the barbaric. What are we to make of the reappearance of chain gangs in which men break rocks to no purpose—a practice common in concentration camps? If useless work is one path punishment is taking, there is another perhaps more insidious and pervasive one: the housing of inmates in solitary confinement for 23 hours a day. The implementation of solitary confinement at Eastern State Penitentiary in Philadelphia in the nineteenth century taught us its effects: "the mind's unraveling" (p. 70). Yet this practice has been revived in the United States. Prisons have been sanitized and made "uncrowded" for individual prisoners at the expense of their psyches.

"Cruel and unusual" punishment has also acquired new meaning in the "war on terror." Dayan is scathing in her indictment of the Bush administration's legal rationalizations and use of euphemisms that have enabled the long-term confinement of "terrorists" who have not been charged or tried, but who have endured solitary confinement, forced feedings, and "enhanced interrogation techniques" at Guantanamo and elsewhere. In this reading, "torture" is defined in terms of the "intent to torture" (p. 198).

And what of dogs? Like slaves, their value has depended on their owners' rights in property. Like prisoners, law has depicted them as nuisances and as dangerous. Studying the courts' rulings about dogs "helps us to understand how old forms of brutality were transfigured" and how "law can be used to make men dogs and dogs trash" (pp. 239, 241).

Curiously, there is no discussion in the book of the ways in which gender plays into and out of the legal history of slavery or punishment. Nor does Dayan discuss the legal status of indentured servants, who certainly occupied an important and liminal role in early colonial history and law. At times, too, there is a gap between her attention to slave law and what was happening "on the ground." If slaves were to be held publically accountable, they had to be brought to the law's attention. That did not always happen. And even when it did, courts sometimes ruled on the slaves' behalf or chose to dismiss the cases against them (Elsa Goveia in Lazarus-Black 1994; Schwarz 1988). Moreover, too little attention has been paid to the role of law and courts in the politics of slave resistance. Once slaves gained access to colonial law they argued publicly about rights and claimed an agentive role in courts (Lazarus-Black 1994).