

# A Theory of Civil Death: Legal Status and Security Under Neoliberalism

Tanya M. Monforte

Law, McGill University, Montréal

Submitted August 2021

A thesis submitted to McGill University in partial fulfillment of the requirements of the  
degree of Doctor of Civil Law (DCL)

©Tanya M. Monforte, 2021

## **Table of Contents**

|                                                                          |           |
|--------------------------------------------------------------------------|-----------|
| <b>List of Figures</b>                                                   | <b>v</b>  |
| <b>Abstract</b>                                                          | <b>vi</b> |
| <b>Acknowledgements</b>                                                  | <b>ix</b> |
| <b>Chapter 1 Introduction</b>                                            | <b>1</b>  |
| <b>1. Why Civil Death?</b>                                               | <b>2</b>  |
| 1.1. The Fuzzy Notion of Civil Death                                     | 12        |
| 1.2. Civil Death Has a History                                           | 17        |
| <b>2. The Argument of the Dissertation</b>                               | <b>20</b> |
| 2.1. The Thesis                                                          | 20        |
| 2.2. Approach                                                            | 24        |
| <b>Chapter 2 Mapping Civil Death</b>                                     | <b>28</b> |
| <b>1. Introduction</b>                                                   | <b>29</b> |
| <b>2. The Theoretical Landscape for Civil Death</b>                      | <b>31</b> |
| 2.1. Civil Death as Collateral Consequences of Criminal Convictions      | 31        |
| 2.2. Social Death                                                        | 35        |
| 2.3. Rightlessness, Bare Life, and the State of Exception                | 39        |
| 2.4. Overlapping Themes in the Academic Literature                       | 45        |
| <b>3. A Socio-Legal Approach to the Topic</b>                            | <b>47</b> |
| <b>4. Civil Death: A Typology</b>                                        | <b>53</b> |
| 4.1. Death Certificates                                                  | 54        |
| 4.2. Collateral Consequences of “Common” Criminal Convictions            | 56        |
| 4.3. Prisons                                                             | 60        |
| 4.4. Disability, Aging, Leprosy, and Other Relationships of Guardianship | 63        |
| 4.5. Divorced Women                                                      | 66        |

|                  |                                                                     |            |
|------------------|---------------------------------------------------------------------|------------|
| 4.6.             | Religious Orders                                                    | 67         |
| 4.7.             | Terrorism/Corruption/Political Dissent                              | 68         |
| 4.8.             | Corporations                                                        | 74         |
| 4.9.             | Citizen Identification Systems                                      | 77         |
| <b>5.</b>        | <b>Conclusion</b>                                                   | <b>82</b>  |
| <b>Chapter 3</b> | <b>A Conceptual History</b>                                         | <b>89</b>  |
| <b>1.</b>        | <b>Civil Death in the 19th Century</b>                              | <b>90</b>  |
| 1.1.             | Introduction                                                        | 90         |
| 1.2.             | Method and Frame                                                    | 92         |
| 1.3.             | The Political Economy of a Shrinking Globe                          | 97         |
| <b>2.</b>        | <b>The Legal Construction of Civil Death in the 19th Century</b>    | <b>103</b> |
| 2.1.             | A Historiography of 19 <sup>th</sup> Century Civil Death            | 103        |
| 2.2.             | Civil Death in the English Common Law                               | 110        |
| 2.3.             | Civil Death in the French Civil Law                                 | 114        |
| <b>3.</b>        | <b>North American Civil Death in the Second Half of the Century</b> | <b>119</b> |
| 3.1.             | Civil Death as Attainder in the U.S. Civil War                      | 120        |
| 3.2.             | Enacting Civil Death After the Civil War                            | 125        |
| 3.3.             | Civil Death in the Civil Code of Lower Canada 1866                  | 128        |
| <b>4.</b>        | <b>Oaths and Obedience</b>                                          | <b>137</b> |
| <b>5.</b>        | <b>Conclusion</b>                                                   | <b>141</b> |
| <b>Chapter 4</b> | <b>“Privative” Statuses and Civil Death</b>                         | <b>144</b> |
| <b>1.</b>        | <b>Introduction</b>                                                 | <b>145</b> |
| <b>2.</b>        | <b>Particular and Privative Statuses</b>                            | <b>148</b> |
| 2.1.             | Women                                                               | 153        |
| 2.2.             | Racialized Minorities                                               | 166        |
| 2.3.             | Religious Minorities                                                | 180        |
| <b>3.</b>        | <b>Sovereign Nations: From Dependency to Disestablishment</b>       | <b>192</b> |
| 3.1.             | Background to the Court Cases                                       | 196        |
| 3.2.             | From the Camps to Civil War to Civil Death                          | 211        |

|                            |                                                                 |            |
|----------------------------|-----------------------------------------------------------------|------------|
| 3.3.                       | Legal Status and Legal Death _____                              | 219        |
| <b>4.</b>                  | <b>Conclusion _____</b>                                         | <b>220</b> |
| <b>Chapter 5</b>           | <b>Civil Death as Transition _____</b>                          | <b>223</b> |
| <b>1.</b>                  | <b>The Persistence of Status _____</b>                          | <b>224</b> |
| 1.1.                       | From Status to Contract? _____                                  | 226        |
| 1.2.                       | Inscribing Status in Equality Regimes _____                     | 238        |
| 1.3.                       | Formal Equality and Status _____                                | 239        |
| <b>2.</b>                  | <b>A Category of Analysis for Civil Death _____</b>             | <b>242</b> |
| 2.1.                       | Civil Death and Status _____                                    | 249        |
| 2.2.                       | A Category of Analysis for Civil Death _____                    | 254        |
| <b>Chapter 6</b>           | <b>Security &amp; Global Civil Death _____</b>                  | <b>264</b> |
| <b>1.</b>                  | <b>Introduction _____</b>                                       | <b>265</b> |
| 1.1.                       | The New Civil Death is Neo-Civil Death _____                    | 267        |
| 1.2.                       | The Economics of Death _____                                    | 270        |
| <b>2.</b>                  | <b>Securitizing Domestic Spaces _____</b>                       | <b>275</b> |
| 2.1.                       | Criminal-Enemy Statuses are Future-Looking _____                | 283        |
| 2.2.                       | Future-Looking Statuses as Proxies _____                        | 287        |
| 2.3.                       | Enemy or Disobedient? _____                                     | 295        |
| <b>3.</b>                  | <b>Global Normalization of Neo-Civil Death Techniques _____</b> | <b>305</b> |
| 3.1.                       | International Organizations and Neo-Civil Death _____           | 305        |
| 3.2.                       | Banishment and the Liberty of Movement _____                    | 311        |
| 3.3.                       | Asset Forfeitures and Freezes _____                             | 316        |
| 3.4.                       | Fines _____                                                     | 321        |
| 3.5.                       | Economic Expulsion _____                                        | 327        |
| <b>4.</b>                  | <b>Conclusion _____</b>                                         | <b>331</b> |
| <b>Overall Conclusions</b> | <b>_____</b>                                                    | <b>332</b> |
| <b>Bibliography</b>        | <b>_____</b>                                                    | <b>337</b> |

## List of Figures

|                                                                         |     |
|-------------------------------------------------------------------------|-----|
| Figure 1 - Mapping Contemporary Civil Death _____                       | 86  |
| Figure 2 - Pollock and Maitland's Classification of Legal Persons _____ | 151 |
| Figure 3 - “Convicts Out-rank Women” _____                              | 158 |
| Figure 4 - Postbellum Oath for Property _____                           | 171 |
| Figure 5 - Postbellum Labor Contract _____                              | 173 |
| Figure 6 Announcement of Allotment Bill _____                           | 215 |
| Figure 7 - Compilation of Special Legal Statutes in 19th C. _____       | 221 |
| Figure 8 - Pollock and Maitland’s Classification of Legal Persons _____ | 250 |
| Figure 9 - Contemporary Civil Death _____                               | 252 |
| Figure 10 - Representation of Civil Death I. _____                      | 255 |
| Figure 11 - Representation of Civil Death II. _____                     | 256 |

## Abstract

This dissertation proposes a new theory of civil death that highlights the change in legal status as a technology of power in global security practices. Civil death, or death of the legal person, is often defined as the lawful abrogation of civil rights as a consequence of a criminal conviction. Although the legal definition of civil death is not normally considered controversial, a socio-legal survey of the many uses of the term inside and outside legal practice demonstrates that this definition limits the scope of conceptual inquiry. The readily available theories of civil death fall short of conveying the complexity and legal specificity of the concept. The theories of civil death outside law are often devoid of nuanced legal analysis, while simultaneously the legal uses of the concept are frequently under-theorized and cannot illuminate the significance of the re-emergence of the term at this moment.

The inquiry of the dissertation starts with an observation that the term civil death appears today in various places around the world after being considered a practically defunct legal institution in the twentieth century. In the United States, the concept has resurfaced in recent decades as a salient category for social and legal explanation about mass conviction in respect to post-conviction collateral consequences. It is frequently claimed that the origins of civil death are found in outlawry or *infamia*. Although civil death is often defined in relation to its history, a deep dive into the ways the concept was being constituted at the moment of its decline in the civil and common law traditions in the nineteenth century, reveals a somewhat different narrative than the typical teleological account. Additionally, the concept of civil death is used for political analysis in countries across the globe in different ways. In Turkey, commentators refer to the government confiscation of passports and the purge of political dissidents from university and civil service posts absent a conviction as a civil death in the name of national security. In India, activists have protested a national biometric registry on the grounds that it could facilitate civil death. While these cases are significant, there are many more cases and diverse uses of the concept. By meticulously mapping out the disparate uses of the term including formal state law, activist campaigns, and political theory a wide variety of uses of the concept surface. Civil death has been used in relation to incarceration, security practices, conservatorships, slavery, statelessness, marriage, and internment camps to name only a few examples. In the many contexts, the term is used somewhat differently with varying legal consequences and legal forms.

For my theory, I tease out a “category of analysis” and propose a new framework for civil death as a concept that denotes an invisible transition to one of several privative or formally unequal statuses in law. With a clear concept of civil death, the dissertation can shift its focus to contemporary securitization practices to grasp the novelty of the neoliberal configurations of civil death techniques that use legal statuses in conjunction with intelligent or predictive policing for social control. Civil death is emerging now because it is capable of controlling potential threat. In general terms, the analysis allows one to use the term coherently across its different uses, and also apprehend what the resurrection of civil death means at this moment in time.

Cette thèse propose une nouvelle théorie de la mort civile, qui met en relief le statut juridique comme une technologie de pouvoir dans le cadre de dispositifs de sécurité au niveau global. La mort civile, ou mort de la personne juridique, est souvent définie comme une abrogation des droits fondamentaux suivant une condamnation pénale. Bien que la définition juridique de la mort civile ne soit pas généralement controversée, une analyse socio-juridique des nombreuses utilisations du terme, à l’intérieur comme à l’extérieur de la pratique juridique, démontre que cette définition limite l’étendue de la réflexion conceptuelle. Les théories disponibles concernant la mort civile peinent à communiquer la complexité et la spécificité juridique du concept. D’une part les théories non-juridiques de la mort civile sont souvent dépourvues d’analyse juridique nuancée, et d’autre part les utilisations juridiques du concept sont fréquemment sous-théorisées et n’arrivent pas à mettre en lumière le sens de la réémergence contemporaine de cette notion.

Le questionnement mené dans cette thèse part de l’observation que le terme de « mort civile » apparaît aujourd’hui dans divers contextes, après avoir été considéré comme une institution juridique pratiquement défunte durant le XX<sup>e</sup> siècle. Aux Etats-Unis d’Amérique, le concept a refait surface durant les dernières décennies pour l’explication sociale et juridique des condamnations en masse (*mass conviction*) pour ce qui est des conséquences collatérales de la condamnation. Il est souvent suggéré que les sources de la mort civile se trouvent dans les statuts hors-la-loi et l’*infamia*. Alors que la mort civile est souvent définie historiquement, une recherche sur la constitution du concept au moment de son déclin dans la *Common Law* et la tradition civiliste au XIX<sup>e</sup> siècle révèle une intrigue différente du récit téléologique reçu. Le concept a par ailleurs été utilisé pour des fins d’analyse politique dans une variété de pays. En Turquie, par exemple, on s’est référé à la pratique gouvernementale de confiscation des

passports, ou la purge des personnes dissidentes dans les universités et la fonction publique, en l'absence de condamnation judiciaire, comme des cas de mort civile au nom de la sécurité nationale. En Inde on a observé des protestations contre un registre biométrique national parce que ce dernier faciliterait la « mort civile ». Ces exemples sont significatifs, mais il en existe bien d'autres, et tant d'autres usages du concept de mort civile. À partir d'une cartographie méticuleuse des usages du terme – dans le droit étatique formel, les campagnes militantes, ou la théorie politique – on voit émerger la variété importante des usages du concept. La mort civile a été invoquée par exemple en relation avec l'incarcération, les dispositifs de sécurité nationale, les tutelles, la mise en esclavage, l'apatridie, le mariage, et les camps d'internement. Le terme est employé de façon changeante suivant les contextes avec des conséquences et des formes juridiques distinctes.

Je suggère une élaboration de la mort civile comme « catégorie d'analyse », et propose un nouveau cadre pour concevoir la mort civile comme une transition invisible vers l'un des divers statuts privatifs et formellement inégalitaires dans le droit. Avec cette conceptualisation claire de la mort civile, la thèse déplace son attention vers des pratiques contemporaines de 'sécuritisation' pour saisir la nouveauté des configurations de mort civile qui utilisent les statuts juridiques en conjonction avec les méthodes de police prédictive. La mort civile est émergente en ce moment parce qu'elle permet d'assurer le contrôle sur un risque potentiel. En termes généraux l'analyse permet d'utiliser le terme de façon cohérente à travers ses différents usages, et de saisir ce que signifie la résurrection de la mort civile à ce moment-ci de l'histoire.



## Acknowledgements

I want to start by thanking my supervisor Frédéric Mégret who has been an incredibly sane, stable, and kind supervisor who gave me room to fully explore and develop my topic while still providing invaluable feedback and clarity in the writing process. His keen insights and elevated style have provided me with a model I aim for and against which I will always measure my own writing. He is an exemplary academic from whom I have learned a lot and I am sincerely grateful I had the chance to work with him. I also want to thank my full committee that included Richard Gold who provided tough but incredibly fair comments over the years and encouragement when it was needed. Mark Walters and Angela Campbell, who were only on my committee briefly, but both of whom asked deeply probing questions that pushed me to consider what I had not seen. Angela's sound judgement and big picture comments helped me finish and see where I can take this research in the future. Hoi Kong was a gift for me not only as a member of my committee but also as a co-author. He put together a writing group while he was still at McGill of graduate students that included Sarah Berger Richardson and Jeff Kennedy, all of whom provided helpful comments on early drafts. Hoi truly leads by example and his positive openness, disciplined mind, and ability to both listen and guide are a testament to his skills as a mentor.

I want to thank Martti Koskeniemi without whom I would not have been able to do a doctorate at all as he stepped in to recommend me on short notice. He also spent an entire morning discussing my dissertation during his brief stay in Montréal pointing me in a better direction for my legal history section. He is a model academic in all ways but what is most surprising is that he is first and foremost a wonderful human who is generous beyond measure. Mark Antaki has also been a tremendously generous interlocutor. I spoke with him on several occasions, and he read my introduction and provided detailed feedback when I most needed it. One professor I had at Harvard told me that loneliness was part of an academic career and to write was to be alone. When I got to Montréal and McGill, I discovered another model that emphasized community over the isolated academic and this made all the difference for me as a person and as a student. Sarah Berger-Richardson has been my constant writing companion and I want to thank Sarah and Amy Preston-Samson who provided companionship and support throughout the doctorate but especially during the pandemic period

helping to keep the writing going during a difficult time that included the loss of my mother. Eliza Bateman, Marika Giles-Samson and Anne Iavarone-Turcotte were conference co-panelists who provided fantastic feedback as well as much appreciated friendship and support. I would also like to thank Sébastien Jodoin who helped early on with my proposal in his course and provided me with a map for where I want to take this research in the future. The McGill Centre for Human Rights and Legal Pluralism has been my home since I arrived in Montreal. Nandini Ramanujam has created this welcoming and stimulating space I am privileged to be associated with. I cannot thank Nandini enough for everything she has done for me. Nandini was first described to me as a force of nature, and she has indeed created and sustained life in the Centre. I benefited immensely from presentations at the Centre over the years. I also benefited early on from participation in the intensive Yale Graduate Workshop. I would also like to thank Dr. Richard Reid Cooper, who I found through Graphos for editing work on the final draft. Graphos and Thesez-vous not only provided writing resources and workshops, but also a writing community. For me, and people like me, writing together is the best way to write. Last but certainly not least, I want to thank Alex Lorite for everything else. I cannot count the number of coffees we shared in which I took the entire break talking about my research. He listened to me when I needed an ear, he read sections of my chapters when I needed fresh eyes, and he held me up with footnote assistance after Mendeley crashed. All this despite his own deadlines. He encouraged and supported me through the process when I needed it most. Thank you all for your community-centered, innovative spirit. You all contributed to this work, and I benefited immensely from you. All mistakes are my own.

This research was made possible by funding from three fellowships: the O'Brien fellowship, the FRQSC, and from additional funding and fellowships from the McGill law graduate program. I was very cognizant that a government fellowship meant I was being paid by taxpayers for this research and there is an expectation that it is in the service of the public good. A wise woman once told me that the university is the conscience of the nation and I have taken this to heart and endeavored to use my work in this spirit, trying to speak truth to power. I am also aware that power runs through all of us and so I have interrogated my own beliefs, politics, interests, and actions making myself willing to face hard truths and challenges directed at me. For this opportunity, I am truly grateful.

I dedicate this work to my lovely Dorian, my family in this world and the other, and to the activists who continue the struggle despite the odds—you keep me grounded and inspired. I hope in everything I do I remember the lessons you have taught me.

## Chapter 1 Introduction

*La matière que je traite, est une des plus importantes de notre jurisprudence. Il y est question des liens respectifs de la société avec les membres, & des membres avec la société.*

François Richer, *Traité de la mort civile, tant celle qui résulte des condamnations pour cause de crime, que celle qui résulte des vœux en religion* (1775).

# 1. Why Civil Death?

Civil death defines the most basic relationships that bind societies together, for it contains the power within law to break social bonds. Understanding the significance of this concept is understanding that at its base, civil death provides the legal tools that permit domination, regulate inequality, align loyalties and fundamentally dictate who does and does not have the right to exist. But this grand realization came from a rather mundane observation.

This project came out of an observation that the term “civil death”—a legal concept that denotes a kind of death in law through legal deprivation—was being used in divergent ways in the contemporary academic literature as well as in activist campaigns around the world. Civil death-talk has re-emerged recently, sometimes in reference to what has been called the “new civil death,” to describe different contemporary state practices that have the effect of severely limiting the rights of different groups of people.<sup>1</sup> Within North America, civil death-talk is generally used in connection with the limitation of rights resulting from a criminal conviction,<sup>2</sup> but the term is frequently asserted without self-consciousness as people tend to assume that the definition is settled in its meaning and use. There are, however, difficulties in that there are many different rights that are being limited; and what triggers the limitation of rights, from a legal perspective, is diverse as well. The project then is to make sense not only of what a “civil death” means from the diverse uses, but also what the usage of this concept says contemporarily about law’s role in shaping our shared social world. By excavating the diverse uses and meanings of civil death, I formulate a coherent category for analysis; and from there I can say something meaningful about the significance of this concept in relation to the economic and political configurations civil death supports, creates, and expresses.

I will provide two vignettes to illustrate law’s capacity for legal deprivation within a world that presumes human equality. These two cases have been in the back of my mind and have animated my

---

<sup>1</sup> See e.g. Gabriel J Chin, “The New Civil Death: Rethinking Punishment in the Era of Mass Conviction” (2012) 160:6 University of Pennsylvania Law Review 1789. Alec C Ewald, “‘Civil death’: The Ideological Paradox of Criminal Disenfranchisement Law in the United States” (2002) 2002:5 Wisconsin Law Review 1045–1137. Luca Follis, “Resisting the Camp: Civil Death and the Practice of Sovereignty in New York State” (2013) 9:1 Law, Culture and the Humanities 91–113. Joan Dayan, “Legal Slaves and Civil Bodies” (2001) 2:1 *Nepantla: Views from South* 3–39. Bryan Lee Miller & Joseph F Spillane, “Civil death: An examination of ex-felon disenfranchisement and reintegration” (2012) 14:4 Punishment & Society 402.

<sup>2</sup> Joshua M Price, *Prison and social death* (New Brunswick: Rutgers University Press, 2015).

intuition that the concept of civil death can be useful to understand how law and rights can be used as techniques of deprivation for securitization and the observation that these techniques have been globalized. These two cases have informed my intuition that the term “civil death” can be useful for framing and naming what otherwise may appear to be dispersed, unconnected and uncontestable legal processes.

On November 8, 2015, Hossam Bahgat, a prominent journalist and human rights activist, was arrested by the Egyptian State when he was summoned to appear before military intelligence to answer for articles he had written in the post-coup aftermath as an investigative journalist.<sup>3</sup> Hossam was if not the most internationally recognized Egyptian human rights activist, one of the most well-known as a go-to guy for internationalists looking for smart, insightful analysis on current events in Egypt. He was so celebrated for being both clever and articulate that he had given a TEDTALK on the Arab Spring before his detention.

The day of his arrest, the international human rights community sprang into action, and press releases and news stories were issued calling for Hossam’s immediate release.<sup>4</sup> I was among those writing about Hossam and the circumstances of his arrest.<sup>5</sup> I was moved to action because he was one of the key voices who spoke on behalf of others, and he had been arrested in a country that has become known as one of the most dangerous places for journalists and dissidents, as disappearances, exceptional military trials, and the use of the death penalty for civilians critical of the military regime have become commonplace.<sup>6</sup> Hossam was, thankfully, promptly released. I suspect he was released largely because of his high international profile and the quick and massive mobilization of journalists and human

---

<sup>3</sup> Amnesty International “Egypt Arrest of Prominent Activist Hossam Bahgat Another Blow for Freedom of Expression, November 8, 2015, online: *Amnesty International* <<https://www.amnesty.org/en/latest/news/2015/11/egypt-arrest-of-prominent-activist-hossam-bahgat-another-blow-for-freedom-of-expression/>> (last visited July 15, 2021).

<sup>4</sup> Rupert Colville, “Press Briefing Notes on Egypt”, November 10, 2015, online: *The United Nations Office of the High Commissioner of Human Rights* <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?LangID=E&NewsID=16730>> (last visited July 15, 2021); Press release, “CPJ Calls on Egypt to Release Investigative Journalist Hossam Bahgat”, November 8, 2015, online: *Committee to Protect Journalists* <<https://cpj.org/2015/11/cpj-calls-on-egypt-to-release-investigative-journalist.php>>.

<sup>5</sup> Tanya Monforte, “Egypt Is No Place for Dissent”, November 11, 2015, online: *The Huffington Post* <[https://www.huffpost.com/entry/egypt-no-place-for-dissent\\_b\\_8537124](https://www.huffpost.com/entry/egypt-no-place-for-dissent_b_8537124)> (last visited July 15, 2021).

<sup>6</sup> The Committee to Protect Journalists, which compiles data on the dangers to journalists worldwide, notes the significant increase in the number of journalists killed and jailed since the 1990s. *See* “Journalists Attacked in Egypt Since 1992”, online: *Committee to Protect Journalists* <<https://cpj.org/mideast/egypt/>> (last visited July 15, 2021).

rights organizations around the world. He was released, but with certain legal restrictions placed on his person, according to the government, for security reasons. Hossam's passport was confiscated, his assets were frozen, formal restrictions were placed on what he could report, and he has been subjected to constant surveillance.<sup>7</sup>

These so-called “softer” forms of state control were different from what has become common place for protestors and dissidents, including prolonged detention without trial and physical torture. They were not exceptional measures, but presumptively *legitimate* legal techniques commonly used for so-called “security threats” in democratic states and at the international level by the United Nations Security Council.<sup>8</sup> It is not surprising, therefore, that while there was international outrage after Hossam was detained, these apparently softer forms of control have received comparatively little activist attention. The only thing that could be argued was that Hossam was in fact not a security threat—an observation that was made by people outside official positions of Egyptian national security and not privy to whatever confidential intelligence the state might have.

Now jump to a completely different context in which an unremarkable and unreported arrest would take place in a semi-rural, bible-belt, small town in Oklahoma. A teenage boy named Justin<sup>9</sup> was engaging in a same-sex relationship with another boy from his high school. Despite protests from their parents, the boys continued their relationship until Justin turned 18. The parents of both boys believed homosexuality to be a sin; and so seeing an opportunity to break the boys up on the day Justin turned 18, they reported the sexual relationship to the local police. Justin was subsequently charged with lewd molestation and forcible sodomy. He had originally been charged with sodomy, which was still on the books as a crime; but that charge was later dropped, and he was convicted of forcible sodomy. That is, he was convicted of rape of an underage boy since consent is supposed to start at age 18. Justin spent a few years in prison for his sexual relationship, and he also had to register as a sex offender upon release.

---

<sup>7</sup> The restrictions have changed over time. The surveillance, however, has been constant and I base this assertion on my experience in correspondence with Hossam. I have myself received vaguely threatening messages after chatting with him privately in messages over Facebook.

<sup>8</sup> There were 711 individuals listed on the UN Consolidated List of individuals and entities “subject to measures imposed by the Security Council”. See United Nations Security Council Consolidated List, July 15, 2021, online: *United Nations* <<https://www.un.org/securitycouncil/content/un-sc-consolidated-list#individuals>> (list generated on July 15, 2021).

<sup>9</sup> I have changed his name to protect his identity because, though the state does not agree, I believe this to be his right without giving consent for me to use it.

When Justin was finally released from prison without money or a job, he could not return to his childhood home despite his parents' having regretted their participation in turning their son in to the police. He could not return because the family house is too close to a park for him to reside legally. As a consequence, Justin's parents purchased a trailer home for him to live in on the periphery of town in an apparent attempt to make amends for their complicity in his conviction. The trailer had to be placed outside of town because he cannot reside close to schools or parks where children are present. The local government, according to one citizen, had planned the layout of the town, and the location of parks was strategically planned in order to keep "sex-offenders" out of the city limits. Whether that was their intention or not, the fact remains that persons on sex offender registries would find it difficult to find a home in the town with well-dispersed parks and schools. Further, in Oklahoma, sex offender registries are public, and the pictures and offences of the persons are available on the internet. The location of homes of registered sex and violent offenders are also searchable.<sup>10</sup> When Justin left prison, he had difficulty finding work with a criminal record, but he was finally able to secure employment as a male stripper in a club in Tulsa. Following his release, he was convicted twice more of felonies for failing to re-register as a sex-offender after being charged in 2017, 2018, and twice in 2020.

I met Justin through my nephew who had been close friends with him in school since they were kids. I have learned from afar that his life has been irreparably damaged. I knew Hossam from my time living and working in Egypt. He had previously studied human rights at the University where I taught, and we were occasionally thrown together in different events as we were of the same age and cohort within the Egyptian human rights community. I have watched as two people I know personally have suffered immeasurably by new legal techniques that do more than penalize people for "crimes" they committed. Rather, they are permanently stigmatized as the kinds of persons who might do something to harm society in the future. It seems that, through legal privations, "the state" —that is two different states on different sides of the world—have not only destroyed the lives of two people under the guise of making society more secure, but have used the law to create long-term legal disabilities based on potential threat. Concern for these cases and countless others have prompted an inquiry into the kinds

---

<sup>10</sup> Oklahoma Sex & Violent Offender Registry, online: *Oklahoma Department of Corrections* <<https://sors.doc.state.ok.us/svor/f?p=119:97:::NO:RP::>> (last accessed July 15, 2021)



of legal techniques involved and the uses states have for these sometimes difficult to name legal techniques.

There is something these two cases have in common in the ways the law is being used to contain and incapacitate persons who are deemed a risk to society. My intuition was that despite their obvious differences: they are on opposite sides of the world, different legal consequences, and constituted in two very different political and legal systems, they are the same legal techniques in function and form. My folk intuition was that the concept of civil death captured what was happening to both persons, but I could not articulate clearly why these cases were the same or what I intuited as the legal commonality between them from the available literature. After all, civil death has been an official punishment found in legal codes, but in neither case do the states call upon the institution of civil death by name. Also, the legal triggers were different: one set of consequences flowed from a criminal conviction and the other was purely preventive. One was triggered by a “common” crime while the other was about national security. The penalties were different as well. One person had his assets frozen, could not leave his country or work in his profession, and was made financially dependent on others. Justin, on the other hand, cannot sleep at his parents’ house, as he was physically cut off from his family and friends; but his property and assets were not ostensibly touched. Egypt and the United States are also very different states; they do not have a shared political, economic, or legal history. Still, there is something that joins these cases, and the work of this dissertation has been to hammer out the intuition into a full argument through the exploration of the concept of civil death.

A civil death, simply put, is supposed to be a legal death, or a death in law. There are two senses in which civil death is used. It has a rather quotidian, descriptive sense, which is quite literally the state’s pronouncement of the death of a person in a public registry. Even if you have a corpse in front of you, the legal person is not dead, and property cannot be transferred, nor can legal relations such as marriage be dissolved until the state has declared the person to be dead in law. There is no death without recognition. In modern society, this administrative power of recognition is within the domain of the state. This is quite commonly referred to as a “civil death” in civil law jurisdictions.

There is a second sense in which civil death is used and which has a less descriptive and more abstract sense. It is a death that happens within the rules of law that govern our social lives, a so-called

"fiction"<sup>11</sup> that occurs in the symbolic world of legal relations but nonetheless has real-life, material consequences. Civil death is contemporarily understood in the United States and Canada as the lawful suspension of a person's civil rights. Having basic rights as a citizen or legal person is contemporarily understood to be synonymous with what it means to have legal personality. Or as one scholar wrote in 1928, "To be a legal person is to be the subject of rights and duties."<sup>12</sup> He went on to write, "To confer legal rights or to impose legal duties, therefore, is to confer legal personality."<sup>13</sup> Legal persons are made by the state, and they are unmade by the same entity. "Civil death implies the lawful abrogation of legal rights."<sup>14</sup> The legal person dies while the living body remains. From the outset, we have a working definition of civil death; it is the death of the legal subject or, alternatively understood, an end to legal personality through the abrogation of rights. This is at least the way civil death is generally understood today.

But death is ephemeral, especially in its living form. In the contemporary literature, civil death has an eerie imagery associated with it, as it is understood to be nothing less than the ability of a state to produce walking, speaking, and breathing bodies but without rights and without legal personhood. Collin Dayan refers to the institution of civil death as a kind of supernatural inversion in which "the soul is killed before the body dies".<sup>15</sup> It is in this sense that the supernatural metaphors of the "living dead,"<sup>16</sup> "zombies,"<sup>17</sup> and "white dogs"<sup>18</sup> emerge as metaphors for the persons "existing but not living" under state control in the contemporary legal system.<sup>19</sup> The horrific condition of civil death is a fiction

---

<sup>11</sup> The language of civil death as a fiction gets reiterated throughout the literature. See e.g. Colin Dayan, "Legal Terrors" (2005) 92:1 Representations 42–80. Caleb Smith, "Detention without subjects: Prisons and the poetics of living death" (2008) 50:3 Texas Studies in Literature and Language 243–267. Bryant Smith, "Legal Personality" (1928) 37:3 The Yale Law Journal 283–299. And as Scheppele argues, understanding it as a fiction does not make it different from other legal fictions such as "murder" or any other legal term that describes a set of legal relations. It simply lends itself to the descriptor of fiction because civil death corresponds to a term that has the opposite meaning in the material world (the legal person is dead while there is a living body). See Kim Lane Scheppele, "Facing Facts in Legal Interpretation" (1990) 30 Representations 42–77. Kim Lane Scheppele, "Facing Facts in Legal Interpretation" (1990) 30 Representations 42–77.

<sup>12</sup> Bryant Smith, *supra* note 11 at 283.

<sup>13</sup> *Ibid.*

<sup>14</sup> Price, *supra* note 2 at 19.

<sup>15</sup> Dayan, *supra* note 11 at 54.

<sup>16</sup> "Civil Death Statutes: Medieval Fiction in a Modern World Source" (1937) 50:6 Harv Law Rev 968–977.

<sup>17</sup> Calvin John Smiley, "Existing but Not Living: Neo-Civil Death and the Carceral State" (2014) CUNY Academic Works 201, online: <[http://academicworks.cuny.edu/gc\\_etds/283](http://academicworks.cuny.edu/gc_etds/283)>. Smiley goes on to quote a 1937 Harvard Law Review note on civil death, "With living men regarded as dead, dead men returning to life, and the same considered alive for one purpose but dead for another, the realm of legal fiction acquires a touch of the supernatural under the paradoxical doctrine of civil death."

<sup>18</sup> Colin Dayan, *The law is a white dog: How legal rituals make and unmake persons* (2011).

<sup>19</sup> Smiley, *supra* note 17.

written in the laws of a state. Since such persons remain among their fellow citizens, but without being legal persons, they are imagined as the walking dead.

This unnatural imagery carries a kind of weight and critique that grounds the profound dehumanization often associated with civil death. In the contemporary legal academic literature, civil death has emerged recently as a salient way to think about a variety of legal consequences of criminal convictions not necessarily linked directly to someone's trial or sentencing as a mode of punishment. Civil death as a "lawful abrogation of civil rights,"<sup>20</sup> in the contemporary literature usually refers to various legal effects—sometimes called "collateral consequences of criminal convictions" or "civil disabilities,"<sup>21</sup> which are triggered as a consequence of conviction or incarceration. These legal regulations strip the convicted of fundamental civil rights, such as the right to vote or even citizenship, or else impose "disabilities," such as employment bars in certain sectors or barriers to living in specified places; they may even extinguish familial relationships.<sup>22</sup> But these are consequences that are anchored by a criminal conviction and a specific U.S. or Canadian context and history. A handful of legal scholars have begun using the concept of civil death to aggregate and give a name to the collateral consequences of a conviction,<sup>23</sup> but the concept of civil death is not straightforward, and understanding why scholars are turning to this concept is itself an important part of the saga that explains the contemporary significance of civil death.

Many questions arise when one wants to use the term civil death in the contemporary setting. What does the end of legal personality actually mean in relationship to rights? Can someone live among society and have no legal personality whatsoever? If civil death is the abrogation of legal rights, one

---

<sup>20</sup> Price, *supra* note 2 at 19.

<sup>21</sup> "Civil disabilities" is a term of art with a long legal history. While I use this term, I am cognizant of the potential danger from the use of it as a reification of "disability" as a burden or liability as opposed to a socially constructed difference. For this reason, I prefer to use "civil death" or "collateral consequences" rather than "disability" to convey the burden of the legal consequences of a conviction. However, for the purposes of clarity for the dissertation, I will use the language available in the literature.

<sup>22</sup> See e.g. Rainer Macklin, Audrey Bauböck, "The return of banishment: do the new denationalisation policies weaken citizenship?" (2015) 14 Robert Schuman Cent Adv Stud Res Pap No RSCAS.; Alec C Ewald, "Collateral Consequences in the American States" (2012) 93:1 Soc Sci Q 211–247; Ewald, *supra* note 1. Alec C Ewald & Marnie Smith, "Collateral Consequences of Criminal Convictions in American Courts: The View from the State Bench" (2008) 29:2 Justice Syst J 145–165.

<sup>23</sup> Michelle Alexander, *The new Jim Crow: mass incarceration in the age of colorblindness* (New Press, 2020) at 134.: "Myriad laws, rules, and regulations operate to discriminate against ex-offenders and effectively prevent their reintegration into the mainstream society and economy. These restrictions amount to a form of 'civic death'[sic] and send the unequivocal message that 'they' are no longer part of 'us.'"

has to ask if all rights have to be taken away and for what purposes. Or if it is a set of rights, are there specific rights that are unique to civil death? For example, does it include the right to life or the right to bodily integrity; and if not, why are these rights left out? As I will show in the following chapters, civil death as a legal concept is typically explained in relation to its historical uses, as are the rights associated with it, since the definition only gets one so far as a descriptor for social explanation. Nietzsche is said to have written that only something without a history can be defined, but the history of civil death is a long and winding one; it is sometimes credited as having started in Ancient Rome or Greece.<sup>24</sup> As one judge commented in 1888, anyone attempting to find the roots of civil death "will find that he has to grope his way along paths marked by obscure, flickering and sometimes misleading lights."<sup>25</sup> A history that crosses time, borders, and languages necessarily produces a fairly messy concept. The shifting of political and legal contexts results in shifting meanings. From the history of civil death, we might associate certain practices, such as taking away voting rights, with the concept when we see them; but the question remains, what makes them civil death practices? What does the concept really mean and how can we use the concept going forward? I am inclined to ask if there are new practices that should be called civil death but are being left out because of the history we tell. In short, what "death" means in relation to institutions, other persons in society, to legal personhood and legal status and what it means in law in general needs to be teased out.

Returning now to my two cases, positioned as someone who has been working in the field of human rights, I have been troubled by how human rights organizations have given little attention to cases in which there is a *lawful* abrogation of rights, often absent a criminal conviction or with a view to a future crime not yet committed. That is, within the human rights regime, it is written into the law that some rights can be forfeit as long as those rights are taken away in accordance with the law and for the protection of public safety or security. These claw back clauses and legal exceptions that allow states to take away rights, like the treaties and constitutions they are written into, have been written by states themselves so they do not have to violate the law in the name of security.<sup>26</sup> These are the

---

<sup>24</sup> "The most violent forms of civil death, however, belong to the traditions of punishment. In classical Greece, convicts could be politically excommunicated, "denied such fundamental rights ... as the right to vote and to appear in court." In Rome, where the phrase "civil death" was first applied, the criminal could be branded with 'infamia,' a mark signifying moral corruption and banishment from public life..." Smith, *supra* note 11 at 245–6.

<sup>25</sup> Avery v. Everett, 110 N.Y. 317 (1888)

<sup>26</sup> While I personally believe this places rights and security at odds with one another, that is beyond the scope of this dissertation.

equivalent to tax loopholes capable of providing a kind of political cover for the abrogation of rights. The factual lawfulness of the abrogation of rights makes mobilization on behalf of those whose rights have not been violated by the state, but withheld since the abrogation is lawful, difficult, to say the least. When human rights organizations have looked at the case of Hossam and other journalists and human rights activists in Egypt, their reports have been relatively muted or lacked the punch of reporting on torture, for example. Since they have to show something illegal, such as related cases with patterns of technical procedural irregularities, or procedural error in a specific case and these activists themselves say they are thankful to be alive and on the streets compared to the alternative, it is hard to make a compelling case that the government is acting egregiously. Amnesty International focused on the fact that the government had given “no reasons” for stopping activists and banning them from leaving the country, or that the bans were “arbitrary”.<sup>27</sup> This argument does not even hold for the case of Hossam, in which reasons were in fact given for his detention and the continuing control over his person. He had been accused of violating the Egyptian Penal Code for, among other things, “falsely attributing sources or involuntarily disseminating false information or forged documents that disturb public order, incite public panic and harm the public interest.”<sup>28</sup> This is a very broad law that can include involuntary action that harms the public interest, but what harms the public interest is a matter of contestation. What may be creating some difficulty in advocacy is that the sanctions Hossam and many other journalists and human rights activists face in their countries are exactly the same kinds of sanctions used by the United Nations and the European Union against human rights violators and terrorists.<sup>29</sup> In cases of national security, where many of the facts of a case are considered confidential, arguing on the substance of the case in a public forum is impossible.

In the case of Justin, these are examples of rights being taken away from someone who was convicted of a crime and is formally classified as a pedophile or sex-offender, a category that is supposed to denote the most morally blameworthy in society today. It might seem natural to many to say someone has forfeited their rights and to place sanctions on threats to security such as sex-offenders, as indeed

---

<sup>27</sup> “Egypt: Lift abusive and arbitrary travel bans,” November 2, 2016, online: *Amnesty International* <<https://www.amnesty.org/en/latest/news/2016/11/egypt-lift-abusive-arbitrary-travel-bans/>> (last visited July 15, 2021).

<sup>28</sup> Derek Davison, “Egypt: Hossam Bahgat Is One Of The Lucky Journalists,” November 17, 2015, online: *Lobe Log* <<https://lobelog.com/egypt-hossam-bahgat-is-one-of-the-lucky-journalists/>> (last visited July 15, 2021).

<sup>29</sup> See European Union Terrorist List, online: *European Council / Council of the European Union* <<https://www.consilium.europa.eu/en/policies/fight-against-terrorism/terrorist-list/>> (Last visited July 15, 2021).

I have encountered when I have presented research on restrictions of movement of sex-offenders at conferences. Couldn't I have found a more sympathetic class of persons than sex-offenders to make my point? Civil death appears to be connected at times to moral blameworthiness, but is this intrinsic to the concept? Another intuition that had been working in the background is that there is something special about the kinds or classes of persons associated with civil death (sex-offenders, felons, and national security threats) and the kinds of rights that are considered forfeit. If citizenship is a legal status that is determined by a certain set of rights and privileges, then under a system of equality, the removal of those rights and privileges is the "death" of the citizen.<sup>30</sup> This dissertation goes into depth about the history of the concept of civil death as well as the contemporary uses of the term in order to excavate what I propose to think of as the production of and transition to *privative legal statuses* in law associated with what I call *neo-civil death techniques*.<sup>31</sup>

To understand civil death is nothing less than to understand the productive and destructive force of law as a social ordering system that distributes power in its different forms. This dissertation explores the contemporary uses, history and theoretical underpinnings of the concept of civil death and, finally, I propose a theory and articulate a new definition of civil death in a way that it can be analytically useful for practitioners and academics who want to use the term. What I mean by analytically useful is that it allows one to use the concept to aggregate different legal techniques that may appear unrelated and to give not only a name and meaning to these techniques but also meaning to the evolution of human equality under the law. I address a series of new legal techniques that have come to be associated with contemporary civil death as well as a few more techniques that I believe should be included as neo-civil death techniques. The techniques that I want to include as neo-civil death techniques are sanctions used against security threats that include asset freezes, travel bans, arms embargoes on individuals, contract freezes, etc. that do not flow from a criminal conviction but from the designation of a particular status of threat.

---

<sup>30</sup> Calvin John Smiley makes the case that civil death is the death of the citizen. He does not, however, address citizenship as legal status. Smiley, *supra* note 17.

<sup>31</sup> I am building here on the work of Calvin John Smiley who aptly included in his thesis the concept of "neo-civil death," as well as Gabriel Chin who labelled collateral consequences of a criminal conviction the "new civil death." I will provide an analysis of the significance of status in later chapters. I also rely on the work and insights of Foucault to show that there are contemporary "*techniques of power*" that are different and signify a break from the older institution of civil death. By looking at the technique, we can see that the institution may change, but there is a continuity in the way power flows between institutions and bodies as punishment.[*emphasis added*] *Ibid.* Chin, *supra* note 1. Michel Foucault, *Discipline & Punish: The Birth of the Prison*, 2nd ed, Alan Sheridan, trans. (Vintage Books, 1995) at 101.

By excavating both a common and civil law history of the concept of civil death, I offer an alternative account of the way in which the concept was being re-constituted in the nineteenth century while it was fading away in Europe, and how a penal conception has become the foundation of the dominant understanding. By canvassing the contemporary uses of the civil death terminology and offering a slightly different historical excavation of the concept, and a different emphasis on historical factors, I offer an alternative explanation and a somewhat different analytic concept that is internally coherent and also can be useful in contexts outside North America. I then argue that the tools—or better stated for my conclusion, the neo-civil death techniques—have become paradigmatic for the securitization of both the international order and for domestic spaces around the world. Before getting into my alternative definition of civil death, I want to explain what I mean by a category for analysis and expand on some of the conceptual difficulties in using the term civil death.

### 1.1. *The Fuzzy Notion of Civil Death*

From the many definitions of civil death spanning the centuries and crossing borders and jurisdictions, there is a general congruence of meaning; but that congruence disappears as we bring the concept into a precise focus. Nora Demleitner claims that the definition of civil death is “undisputed”; and she writes, “Civil death ends a person’s legal capacity and renders him legally dead. The individual loses his property and can no longer perform any legal functions.”<sup>32</sup> Demleitner contends that civil death is about the end of legal capacity even if in its contemporary forms it is applied in a somewhat “attenuated way.”<sup>33</sup> This may be an undisputed definition, but it is not without problems. It outlines an ideal concept from history that serves as an ideal model from which all other applications are only used as analogies to that ideal. It does not capture the applications of “civil death” today. Most contemporary common law accounts of civil death, for example, do not refer to property at all or the term legal capacity, but instead focus on a civil death status and the rights that are forfeit. Additionally,

---

<sup>32</sup> After stating that the definition is “undisputed,” she then writes a definition that is internally incoherent. Her definition is, “Civil death ends a person’s legal capacity and renders him legally dead. The individual loses his property and can no longer perform any legal functions.” After this definition, the author goes on to explain the history of civil death. Even though she writes that the individual loses his property, she describes cases in which property was in fact not forfeited. It is a concept that is frequently defined by the consequences, despite the fact that the consequences are inconsistently applied in its “attenuated” application. Nora V Demleitner, “Civil death” in Paul Finkerman, ed, *The Encyclopedia of American Civil Liberties* (Routledge, 2013) 297.

<sup>33</sup> *Ibid.*



the rights forfeit are often understood as rights for convicted persons while they are imprisoned. Take this definition from a 1937 *Harvard Law Review* article that has become a core source in much of the contemporary American civil death literature: “Civil death is the status of a person who has been deprived of all civil rights. Eighteen American jurisdictions still impose that penalty on life convicts by statutes...”<sup>34</sup> In this definition, the denial of *all* rights forms the core of the understanding of civil death, but it is also here understood as an explicit denial of rights applied by statute as a penalty for persons with a prison sentence for life. This reference to rights is important, but it is equally important to note that it is an internally contradictory definition. By 1937 there were already many early civil death consequences that had been eliminated, such as the passing of property to one’s heirs upon conviction; and, of course, the right to life was not forfeit in the case of persons incarcerated with a civil death statute. It was patently not the case that a prisoner lost all rights, and there is no indication in the definition which rights are forfeit or why those rights were selected.

Civil death is commonly understood today in North America as a concept that is related to criminal law because it was written into statutory law. It is understood as the loss of one’s civil rights due to a conviction for a serious crime, in part because that was the form civil death took in the history of the concept on this continent; but this definition can take many different forms. Although civil death statutes were a feature of early American and Canadian law, civil death was effectively abolished as an archaic illiberal institution by the middle of the twentieth century.<sup>35</sup> Despite the near complete erasure of civil death from written law in North America, the legal concept has persisted through history and is understood as a vestige of legal mechanisms found in ancient regimes or else as an analogy to those mechanisms.<sup>36</sup> As contemporary civil death is not necessarily found in law by name, significant variations exist designating what civil death means in practice.

The concept of civil death is used in practice to designate a variety of social phenomena. Civil death is not only understood as a set of rights that are forfeit in the case of imprisonment, but it is also

---

<sup>34</sup> note 16 at 968.

<sup>35</sup> *Loi abolissant la mort civile* (9 mars 1906), online : *Bibliothèque de l’Assemblée nationale du Québec* <http://www.bibliotheque.assnat.qc.ca/guides/fr/le-code-civil-du-quebec-du-bas-canada-a-aujourd-hui/268-1906-bill-3?ref=85> (Last visited July 15, 2021); Chin, *supra* note 1.

<sup>36</sup> See e.g. Friedrich Carl von Savigny, *Jural Relations, or the Roman Law of Persons as Subjects of Jural Relations: Being a Translation of the Second Book of Savigny’s System of Modern Roman Law* (1884). Harry David Saunders, “Civil Death: A New Look at an Ancient Doctrine” (1970) 11 *William Mary Law Rev.*



closely associated with imprisonment as itself a blanket denial of rights in some accounts<sup>37</sup> and with banishment,<sup>38</sup> as well as the institution of slavery.<sup>39</sup> At times it has been used to describe cases where rights have been limited absent a conviction.<sup>40</sup> In other cases, it is difficult to say rights have in fact been limited as criminal punishment since those rights never formally existed in the first place.<sup>41</sup> There are also a slew of references to civil death as limitations of rights completely unrelated to criminal law or national security law, such as the limitations of rights for persons with disabilities, for refugees, for LGBTQ+ persons, for corporations, and very significantly for monks and nuns who enter a religious order and renounce all worldly ties and possessions.<sup>42</sup>

The variety of non-criminal uses of civil death pose a problem for the definitions of civil death. The definitions of civil death are not completely accurate in their application since counterexamples exist for each definition. Even the most widely accepted definitions of civil death, such as the denial of *most* civil rights, do not capture how the term is in fact used. While clearly some rights remain in force, such as the right to life, there are also cases in which a civil death statute can be based on the denial of a single privilege—the privilege of holding public office, for example.<sup>43</sup> Nor are the definitions sufficient for understanding civil death in the contemporary situation, since the definition alone does not allow one to sort through the contemporary cases as belonging to or not belonging to a category

---

<sup>37</sup> Price, *supra* note 2. Follis, *supra* note 1.

<sup>38</sup> “A state of civil death, or *civiler mortuus* as it was known at early English common law, resulted under certain circumstances in which a person though living, was considered dead. This status, very similar to natural death in that all civil rights were extinguished, resulted in three situations: (1) abjuration, (2) profession, and (3) banishment....The civil death that resulted from these sources is unknown in the United States.” Saunders, *supra* note 36 at 989.

<sup>39</sup> “Jurists and prison administrators invoked the ancient legal fiction of ‘civil death,’ divesting the inmate of rights and transforming him into a legal nonperson comparable to a slave.” Caleb Smith, *The Prison and the American Imagination* (Yale University Press, 2009) at 29. Dayan, *supra* note 11 at 64.: “the invention of the penitentiary and prolonged solitary confinement also operated as another form of civil death. As a court once put it, the convicted person ‘has as a consequence of his crime, not only forfeited his liberty but all his personal rights except those which the law in its humanity affords him. He is for the time being a slave of the state.’” *Ruffin v Commonwealth of Virginia*, 62 Va (21 Gratt.) 790, 796 (1871).

<sup>40</sup> See e.g. Douglas Kim, “Asset Forfeiture: Giving Up Your Constitutional Rights” (1996) 1 Campbell Law Rev. ; Ewald, *supra* note 11.

<sup>41</sup> See e.g. Uladzislau Belavusau and Dimitry Kochenov, “Kirchberg Dispensing the Punishment : Inflicting ‘ Civil Death ’ on Prisoners in Onuekwere ( C-378 / 12 ) and M. G.” (2016) 2016 ELReview 1.

<sup>42</sup> See e.g. Kathleen Ann Lahey, *Are We “Persons” Yet?: Law and Sexuality in Canada* (University of Toronto Press, 1999). John Dewey, “The Historic Background of Corporate Legal Personality” (1926) 35:6 Yale Law J 655–673! Smith, *supra* note 11.

<sup>43</sup> E.g. Demleitner, *supra* note 32 at 297: “Large-scale disenfranchisement after criminal conviction if the consequence of former civil death statutes as are the denial of the right to hold public office and to serve on a jury.”

of civil death. In short, if the term is not inconsistently applied, then the internal logic that creates the consistency of the concept is unclear from the literature.

To put the significance of the definitional problem as clearly as possible, the Supreme Court of Canada affirmed that the historical institution of civil death goes against human rights and the rule of law in the Sauvé case, when the majority denied the legality of a statute that took away convicted persons' right to vote while in prison;<sup>44</sup> and yet, today there are several practices, such as collateral consequences of criminal convictions in Canada<sup>45</sup> that many scholars refer to as a new form of civil death that are nonetheless legally permissible. While the Court ruled that prisoners' rights to vote had to be protected in part on the basis of the illiberal nature of civil death, one has to ask, why are new forms of civil death, if that is in fact what these new practices are, allowed by the Canadian Court? I would argue that an understanding of civil death that relies primarily on analogy to its historical uses is part of the problem.

Civil death is a “fuzzy” concept, as its definition is neither entirely true nor entirely false in its application; but the definition does give guidance on how to use it.<sup>46</sup> The idea that it is a status in which *all* civil rights have been forfeit is patently false. However, the definition provides a general direction and turns attention towards the notion of status and the targeting of legal capacity through the denial of rights. This seems to provide some guidance for how to use or apply the concept; and it is, after all, a concept that is getting a lot of use. Civil death is a term of practice, but in the contemporary setting there is more that can be done to make it analytically more precise.<sup>47</sup>

The introduction of the distinction between *categories of analysis* and *categories of practice* is useful for this project, since I propose both to clarify the concept of civil death and to use it. Brubaker and Cooper lay out the distinction between categories of practice and analysis rather well in their article “Beyond Identity,” in which they state that there are many words that are both categories of practice and categories of analysis, such as “citizenship,” “democracy,” and “identity”.<sup>48</sup> Many concepts are used

---

<sup>44</sup> Sauvé v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519, 2002 SCC 68

<sup>45</sup> *Collateral Consequences of Criminal Convictions: considerations for lawyers*, by Canadian Bar Association (2017).

<sup>46</sup> Radim Belohlavek & George J. Klir, “1. Introduction” in Radim Belohlavek & Et Al, eds, *Concepts and Fuzzy Logic* (MIT Press, 2011). George Lakoff, “Hedges: A study in meaning criteria and the logic of fuzzy concepts” (1973) 2:4 *Journal of Philosophical Logic* 458–508.

<sup>47</sup> Rogers Brubaker and Frederick Cooper, “Beyond ‘identity’” (2000) 29 *Theory Soc.*

<sup>48</sup> *Ibid* at 4.

and applied without themselves becoming the object of inquiry, as we can use the concept of democracy without writing an entire dissertation on its meaning; rather, we use it as a “folk” category.<sup>49</sup>

A category of analysis, in contrast, does not simply use the term but seeks to answer questions such as “what conceptual and explanatory work is the term supposed to do?”<sup>50</sup> Using a category of practice as a category of analysis risks confusion when a “heavily burdened” concept can have multiple and contradictory meanings in everyday use; and further, the practice can also reify a concept.<sup>51</sup> Civil death, it seems, is very similar to identity in that it is a concept that is frequently used as a category of practice; and as such it is a “burdened” concept in the way it has been articulated within a particular history. I am not, however, ready to dispense with civil death, despite the fact that its use makes it difficult to tease out a coherent meaning with clarity. I am not ready to dispense with it because it does precisely what we have been warned about; it has the ability to reify the categories and the uses of civil death. I want to use the concept of civil death both to explain something about law and society and to outline how civil death can be understood outside the North American context. I want to propose an understanding of the concept that provides for regional and international variations in use. But just as important, as I will show later in the dissertation, the term “civil death” and the use of the category can be a tool of resistance against legal techniques that are often cumulative, almost invisible and because they are “lawful” limitations on rights rather than violations of rights, they are difficult to challenge through judicial means. There is something happening globally with the use of the term “civil death” to assign a normative meaning to a set of disaggregated, invisible state practices, and these uses and the reification of the category has an important political function.

The task then is to excavate from the uses of the term “civil death” its meaning, its logic, and how it works in law to formulate a more precise socio-legal category of analysis. Before turning to the chapter

---

<sup>49</sup> The ways in which everyday social or political “native” “lay” or “folk” categories get used comprise the categories of practice. As an aside, I generally prefer to use the term category of “practice” as used by Brubaker and Cooper as opposed to “lay” or “folk” in relation to legal uses. As the authors observe the terminology of “practice” follows from Bourdieu’s theory, which has the advantage of denoting a category used in a professional setting (such as law) that is less than analytical but more than a lay or folk usage. Brubaker and Cooper’s distinction between “analysis” and “practice” is helpful, since discussions of judges’ use of “lay” categories may confound the argument. Legal terminology can encompass technical categories when used by specialists such as lawyers, judges, and even legal scholars and still be a “folk” category.<sup>49</sup> The term category of practice, rather than folk category, makes that more apparent. Legal scholars may use the category analytically or more likely practically when their methodology is purely doctrinal. It is following in this sense the doctrinal use of the term as it has developed in practice.

<sup>50</sup> Brubaker and Cooper, *supra* note 47 at 6.

<sup>51</sup> *Ibid* at 5.

outline, I will sketch out the challenge of using “civil death” as a term of analysis from the history that is readily available from the literature. The conceptual difficulties of civil death, I argue, gave rise to the methodological choices I make in this dissertation, including extensive historical research. These challenges, I further argue, necessitate an alternative conceptualization of civil death.

## 1.2. *Civil Death Has a History*

The definition of civil death, as I just proposed, only gets us so far; and it has, in fact, been the history of the concept of civil death that does the work of showing practitioners how to use the term. The concept of civil death is often described in relation to its history, but how one writes that history directs how one understands the concept. Lawyers often use history and historical legal concepts as judicial precedent in terms of *stare decises* so that historical legal influence in the form of precedent will be reconstituted as a conceptual chain. Legal history of concepts often bends towards doctrinal analysis if not anti-methodological history at times (this can exclude legal history conducted by legal historians of course). This has influenced the way the conceptual history of civil death has been written in the service of using the concept contemporarily.

Contemporary accounts of civil death draw the term out over centuries and across legal jurisdictions and different languages. Several different terms are often used together, and equivalences are drawn, and these similar terms are sometimes used interchangeably so that civil death has taken on rather fungible contours. It is difficult to trace it historically, especially when lawyers drift from the term “civil death” to functional equivalents of their understanding of civil death. As an example, civil death is sometimes used interchangeably with the concept of *attainder*, as some authors have written that civil death “became” attainder or vice versa.<sup>52</sup> Take as an example the following historical account in which historical equivalences are drawn: “In England ‘outlawry’ developed into the concept of ‘attainder’ or ‘civil death.’”<sup>53</sup> This sort of historical short hand has developed over the course of time,

---

<sup>52</sup> See e.g. the definition of civil death by Nora V. Demleitner in the *Encyclopedia of American Civil Liberties*. She writes, “Through the Roman Empire, civil death was later exported to Germanic tribes and England where the practice came to be known as ‘outlawry.’ It developed into a penal sanction referred to as ‘attainder,’ which triggered the forfeiture of all civil and property rights.” This definition has been replicated in the literature. See also Sarah C. Grady, “Civil death is different: An examination of a post-graham challenge to felon disenfranchisement under the eighth amendment” (2012) 102:2 J Crim Law Criminol 441–470 at 443.; Scheppele, *supra* note 11.

<sup>53</sup> Grady, *supra* note 52.

as the histories are drawn from earlier legal histories that were carefully constructed as comparative legal histories. The comparisons were themselves conceptual constructions that need to be dealt with as part of the legal history of civil death. While there was tremendous overlap between the historical institutions of civil death and attainder, the relationship is not entirely clear. Take the following note from a 1914 *Columbia Law Review* account of attainder in the “early common law”:

At early common law, a person convicted and sentenced for treason or other felony was placed, by operation of law, in a state of attainder. Three important incidents were consequent upon such attainder: first, forfeiture, whereby all the felon’s property, both real and personal, was forfeited to the Crown; second, corruption of blood, whereby the attainted person lost the capacity to inherit and the power to transmit his estate to his heirs; and third, the incident commonly termed civil death, which consisted in a substantially complete extinction of the felon’s civil rights. In England, this barbarous doctrine of attainder, forfeiture, and corruption of blood, has now been entirely abolished by statute, with the single exception of forfeiture consequent upon outlawry...”<sup>54</sup>

The terms civil death and attainder were used in this instance as two related but separate terms; and so whether or not we consider these to be different terms for the same concept as it has been frequently used by contemporary jurists should be questioned. Many of the legal consequences of attainder are not generally associated with contemporary forms of civil death and vice versa. For example, civil death was not only a criminal law concept prior to the nineteenth century, but also referred to entrance into an ecclesiastical community.<sup>55</sup> A man or woman taking vows to the Church would leave behind their property and their legal obligations in the civil realm and were said to undergo a civil death. While the terms civil death and attainder were both used in the nineteenth and twentieth centuries in different jurisdictions, one might assume there were differences between the two concepts since attainder was not used to describe nuns and monks while civil death was. Still, they are often used interchangeably in the contemporary literature.

In the field of criminology, the history of civil death has a long timeline and a teleological history that tends to start with the assumption that civil death is about punishment and then traces its origins back in England to *attainder* as a criminal penalty for a felony that resulted in the corruption of blood and

---

<sup>54</sup> “Civil Status of Convicts” (1914) *Columbia Law Rev* at 594, Civil death is different from attainder and corruption of blood, but the life estate of a person convicted of treason is subject to seizure.

<sup>55</sup> Francois Richer, *Traite de la Mort Civile* (Paris, 1755).

from attainder to the concept of *infamia* in ancient Roman law. In these accounts, it equates attainder = civil death = *infamia*. This teleological approach, which creates a chain of equivalences between concepts with different names and in different contexts, can make civil death look like a criminal penalty necessarily. In this kind of history, it not only tells a story of continuity; but without explanation about the variations in the different concepts and contexts, there is a failure to explain outliers in the contemporary uses of the concept of civil death that are not punitive, such as the use of civil death in connection to monks who join an ecclesiastical community.

A further complication is that the concept has travelled across the globe and across legal traditions. References in law to civil death can be found in both Common and Civil Law traditions and have been exported to the legal systems of former colonies. In these systems the reasons for legal pronouncements of civil death vary widely as well as the actual consequences that follow from a pronouncement of civil death. In Islamic law, as one example, there is a rather unique form of confiscation of property: “as the majority of Sunni jurists consider an apostate an outlaw, even if the death penalty is not imposed on him or her, civil consequences of death (so called civil death), such as confiscation of property by the ruler or its distribution among inhabitants could be imposed on him or her.”<sup>56</sup> The renunciation of religion triggered outlawry and a legal death. As we will see in later chapters, the failure to renounce one’s religion could trigger civil death in Europe. But the variation in the transfer of property is significant. The confiscation of property was a common consequence of civil death in the French civil tradition as well, but the redistribution of property to people other than the King or Queen or, as in feudal systems, the lord of the estate was not a common consequence. This is just to say that there are particularities over time and across borders that make the consequences of civil death difficult to pin down as consistent. The role of confiscation of property was incredibly important in earlier accounts of civil death but appears to have fallen out of interest in more recent American historical accounts, as it was one of the first legal consequences of civil death statutes to be challenged in court in the American colonies.<sup>57</sup>

While I do not reject the notion that there were influences from similar legal concepts, I will argue that the concept of civil death is not equivalent to the concepts of attainder or *infamia*, but rather that

---

<sup>56</sup> Kamran Hashemi, *Religious Legal Traditions, International Human Rights Law and Muslim States* (2008) at 38.

<sup>57</sup> Compare *War Powers under the Constitution of United States* by William Whiting (1871) with Chin, *supra* note 1.

civil death should be understood as a reconstituted and reappropriated term that uses similar legal techniques to fit the political context and the period in which it is used. I will expand on this in Chapter 3, but instead of telling a teleological history of civil death, I make space for the heterogenous ways in which the concept is used today around the world. I argue that it has a re-constituted meaning as primarily a penal concept from the nineteenth century, when penal logics were expanding in conjunction with expanding markets. As I will show in Chapter 2, discussion of the civil death of monks, “lepers,” corporations, stateless refugees, and persons with disabilities, all of whom are outside the criminal law setting, are important deviations from the criminal or security-centric concept. All these different uses, as I will show, also are rooted in the history of civil death when it is told with a less linear teleology. I will provide an account that does not view the civil death of monks who leave society to join a religious order as an historical quirk but rather as central to the concept as the civil death of the “traitor.” While I believe the teleological criminal history of civil death can limit the capacity of the concept to explain the variety of contemporary uses of the term and the techniques associated with it, it also limits the application of the concept in the field of security and criminal law when it anchors civil death to a criminal conviction or to a particular set of rights.

## 2. The Argument of the Dissertation

### 2.1. *The Thesis*

The dissertation is an exploratory attempt to address the questions: What is civil death; and what do the uses of this concept say about the political, legal, and economic systems from which it emerges? I have in the course of writing this dissertation begun to think about civil death as a legal death by a thousand juridical cuts that culminates in the expulsion of a person from one legal status, transitioning the person into another burdened legal status. *To this end, I have proposed a category of analysis for civil death in which civil death is understood as marking the transition from one legal status to a privative legal status.* My definition of civil death as a transition from one legal status to another is a subtle deviation from the way civil death is at present defined and understood as the end of legal personality or the end of legal capacity or itself a legal status, but it provides a more coherent explanation jurisprudentially. Further, through the systematic excavation I have conducted, I draw out what I will call the contemporary “neo-civil death techniques” that produce a myriad of privative legal statuses. I explain further that the new civil death has been difficult to conceptualize, in part because the ideal of formal equality in



modern liberalism makes it difficult to perceive that while the citizen is incapacitated through legal privations, the legal construction of the citizen (as a bearer of equal rights) effectively dies (understood here as transitions) while the body remains, and a new legal person is contained within a legally burdened and *formally unequal* status.

Conceptual clarification as a project can seem a bit esoteric especially in this age that looks to projects with real world impacts for relevance and, importantly, funding. I would argue, however, that a conceptual clarification of civil death can have many applications in different areas of law. The concept touches on countless areas of law from constitutional to property to administrative to criminal law to national security to human rights law, and the clarification of this concept can be useful for understanding the way the law works in different areas. Not only is civil death implicated in many different areas of law, but it touches on a fundamental problem for the rule of law, as it is itself “a lawful abrogation of rights”<sup>58</sup> and thus the lawful production of formal inequality and social expulsion. The lawfulness of legally unequal treatment that leads to social and economic expulsion is the most central problem civil death poses to modern political and legal systems in an age of rights. By creating a clear concept, this central problem can be more systematically addressed.

To formulate a category of analysis is to ask the subsequent question: What work is the category supposed to do? The contemporary and historical uses of the concept convey that it is deeply implicated in the generative power of the state. The pronouncement of life and death is a very particular power, and the ability to pronounce through a legal fiction someone dead to the community when they remain alive lends itself to all kinds of abuses as does the functional equivalent of removing the rights that give legal persons life. In the contemporary uses, the formulation of unequal statuses in law in a political system that is premised upon the idea of a single status within which all subjects share legal equality is nothing short of remarkable. The techniques of modern civil death are used to solidify state power; and, as I will show in the dissertation, the term “civil death” is also used by non-state actors to aggregate and to name state practices and legal techniques as abusive in order to unsettle state power. The contemporary uses of both the term “civil death” and the techniques associated with civil death by the state turn the power of the state onto the person by withholding the benefits of

---

<sup>58</sup> Price, *supra* note 2.



citizenship if not citizenship itself. But by naming these techniques “civil death,” civil society can use the symbolic power of the term to challenge abuses of state power.

A contribution of the dissertation is in drawing out and clarifying some key jurisprudential concepts as they relate to civil death. There are many questions about which we may have simply to understand the commonly accepted definitions of civil death, and those this dissertation seeks to answer through historical and conceptual analysis. Is in fact legal personality *extinguished* with civil death, or is the loss of legal capacity something different, and what relationship does this have with the civil rights of persons? Is civil death a status itself or does it point to a process? Does it require the elimination of all civil rights or merely some rights and privileges of citizenship and, if some, which ones and how many? Can a person's legal personality ever be fully extinguished? Does the meaning of civil death change, or do the particularities of how civil death manifests transform depending on the political system it is in? Since collectives can also have individual legal personality, are groups also potentially subject to civil death just as individuals? This dissertation seeks to clarify some of the confusions around legal personhood by arguing that contemporary civil death is not the end of juridical personality but the creation of and transition to new diminished legal statuses.

The contemporary constitution of a new form of civil death addresses itself to the significance of the re-emergence of the term and the form of civil death at this contemporary moment. In my final chapter, I turn to an application of the reconceptualized civil death term as a way to name the model of securitization that is being mobilized internationally and locally in different parts of the world. In different settings around the world, the term civil death is associated with a broad withholding of rights and privileges and subsequent limitations of juridical capacity, in other words the constitution in law of new legal statuses. *My argument for the application of the concept is that civil death techniques are a key legal form for contemporary securitization that is made possible by international and domestic human rights law that produces a baseline of equal rights while continuing to produce privative statuses marked by unequal rights as a mode of control.*<sup>59</sup> The shift in penology away from punitive theories towards risk management has serious

---

<sup>59</sup> Clear comparative advantages of using the techniques of the new civil death for states include the following: it is preventive rather than reactive, there is a reduction of state expenditure compared to incarceration, and it is generally considered more humane than other forms of punishment. A case in point is the already mentioned practice of the United Nations or the European Union relating to sanctions applied to individuals placed on terrorist watchlists or otherwise identified as international criminals. See *supra* notes 7 and 28

consequences inside a framework of domestic wars on crime and international wars on terror, as dissident citizens can easily be transformed into what are effectively new legal statuses along the lines of “criminal” and “enemy” statuses. Civil death is the death of one kind of legal person—that of the equal citizen—as the human is remade into another kind of legal person with diminished rights. To defend the relevance of civil death in the new security framework, this legal concept requires a more in-depth understanding into how the law functions. The description of the term requires a sociological, historical, and theoretical analysis that this dissertation provides.

This dissertation also contributes to the field of legal theory, for it reclaims the importance of the legal form to understand particular social processes relating to critical security studies. The concept of civil death has emerged as a key concept in political theories of critical security.<sup>60</sup> Yet, civil death has also been maligned by several theorists as too thin a concept for social explanation because of its juridical character. Authors have argued that it lacks texture for the profound impact the social phenomena it is meant to describe has in comparison to the thicker concept “social death.”<sup>61</sup> The reluctance to look head on at law itself as the object of inquiry, I argue, is a grave miscalculation and has allowed social theorists to ignore the ways in which the inner workings of the law adapt, operate and ultimately mask their worst tendencies. On the other hand, when civil death has been theorized, it is frequently collapsed with Giorgio Agamben’s serial works on *Homo Sacer* which also tends to miss some important legal nuance.<sup>62</sup> If I may make a quick observation, civil death is not the same as *homo sacer*. At least in some instances, it is the inverse of Agamben’s *homo sacer*; we are not considering the person who can be killed but not sacrificed; it is the person, like Hossam, who can be sacrificed but not killed.<sup>63</sup> That is, civil death is not total domination, but it is the first step towards it. Close attention to the legal form can clarify how civil death techniques work over the life and death of legal persons in complex and often contradictory ways. By bringing the security and criminal justice literature together

---

<sup>60</sup> Follis, *supra* note 1. Steven DeCaroli, “Boundary Stones: Giorgio Agamben and the Field of Sovereignty” in *Giorgio Agamben: Sovereignty and Life* (Stanford University Press, 2007).

<sup>61</sup> Price, *supra* note 2.

<sup>62</sup> Civil death has been conflated with Agamben’s idea of *homo sacer* by some social theorists. See e.g. Luca Follis, “Resisting the Camp: Civil Death and the Practice of Sovereignty in New York State,” *Law, Culture and the Humanities* 9, no. 1 (February 2013): 91–113, DeCaroli, *supra* note 60.

<sup>63</sup> “Life that cannot be sacrificed and yet may be killed is sacred life” Giorgio Agamben, *Homo Sacer: Sovereignty and Bare Life*, Daniel Heller-Roazen (Transl.), ed. (Stanford University Press, 1998) at 8.

and providing an alternative theoretical model that pays close attention to the legal form, I offer an explanation for the re-emergence of the term civil death in this moment in an age of rights.

Through careful attention to the history of civil death as a legal institution, an alternative conception to the Agambenian state of exception is drawn out to make sense of the ways persons are contemporarily being rendered, more closely related to Hannah Arendt's term, "rightless" in regular, normal legal processes. The legal framework provides the tools to convert persons not into bare life, but into thoroughly legally dominated, "superfluous" persons through non-exceptional forms of law. As Arendt observed, killing the juridical person in law is the first necessary step to total domination.<sup>64</sup> But legal death in an age of rights requires a better explanation than even Arendt offered. The precise legal form combined with a political theory of civil death has been neglected and the meaning of the creation of dominated superfluous persons needs to be unpacked.

The ambition of this project is to lay bare the internal mechanisms of civil death as well as the functional uses as a way to gather sets of state practices and *name* them in order to open them up to public scrutiny. It is intended to demonstrate the ways this legal institution has the potential to maim and destroy persons and in its neoliberal form to act invisibly, appear like a natural form of defending society by securitizing through neutral, merit-based legal processes that can expand outward to maim and destroy society.

## 2.2. *Approach*

The dissertation purports to offer a theory of civil death conceived through various methods grounded in empirical inquiry. While the dissertation was meant from the beginning to use civil death to understand the developments in contemporary securitization processes, the necessity to develop a theory of civil death was unexpected. The inquiry progressed through a process of iterative observation and theoretical adjustment that began from the observation that the legal theory of civil death didn't fit many of the ways the concept was being used. The theory has thusly been constructed upwards inductively from observation as I attempted to remain as open as possible to discovery. My approach that formulates a theory inductively from the various uses of civil death has many similarities

---

<sup>64</sup>Hannah Arendt, *The Origins of Totalitarianism* (Harcourt, 1968).

to the methods and tradition of grounded theory.<sup>65</sup> Instead of taking the legal definition of civil death as a given and filter out the outliers that didn't fit that definition, I began by asking how civil death is used in its many forms to construct a more comprehensive theory. The overall approach is most accurately described as a socio-legal analysis drawing on critical approaches and methods throughout, but the individual chapters employ distinct methodological choices and rest on different theories for their groundwork. Other socio-legal methods I draw from include the "living law" tradition of Eugene Ehrlich and the frequently associated theory of "the law in action" of Roscoe Pound.<sup>66</sup> That is to state from the beginning that I do not locate all the legal sources in state-based law, but rather I look both at state-based officially labeled instances of civil death and also to the ways the legal category of "civil death" gets used by societal actors as relevant for understanding this legal concept. I began with the assumption that civil death is a concept that serves certain societal needs; I came to conclude that it is used both as a way to signal a need for state action, thus solidifying state power; but it is also used to challenge or undermine state power and oppressive techniques.<sup>67</sup> My dissertation looks at the concept of civil death as a part of the living law.

As I stated, there are different methods used in the different chapters, and so each chapter will have its own methodological discussion. In particular, the history chapters required a significant amount of methodological leg work. Each chapter that warrants explanation of its methodology has an individual section on methods in that chapter.

Chapter 2 consists of a socio-legal analysis of the different ways in which civil death is being used in three languages around the world. The U.S. conception of civil death acts as a backdrop to a more global discourse of civil death. This chapter provides snippets of various ways the term civil death appears in different political and legal contexts in order to provide a picture of the multiple meanings

---

<sup>65</sup> See esp. Barney G Glaser & Anselm L Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Routledge, 1999). ; Peters writes, "GTM strove to develop empirically grounded middle-range theories by providing an unbiased and open approach" Ina Peters, "Too Abstract to Be Feasible?: Applying the Grounded Theory Method in Social Movement Research" (2014) German Institute for Global and Area Studies at 6.

<sup>66</sup> Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (Routledge, 1936). Roscoe Pound, "Law in Books and Law in Action" (1910) 12:44 *American Law Review*.

<sup>67</sup> The historian Daniel Beer made the argument that civil death in nineteenth-century Russia had a dual relationship to state power. If the public agreed that a severe punishment was warranted, the public nature of a civil death ceremony could solidify state power; but if the public thought it was an abuse of power, the ceremony would go off the rails and actually undermine state authority. Civil death as a ceremony had a signaling power. I have adopted this insight to frame the way civil death as a concept is used today. See Daniel Beer, "Civil Death, Radical Protest and the Theatre of Punishment in the Reign of Alexander II" (2021) 250:171–202 *Past and Present*.

and uses of the concept and, possibly, to unsettle or, at the very least, expand what has been a dominant understanding of civil death as an exclusively penal concept. Chapter 2 relies on discourse analysis in the socio-legal tradition, but this will be expanded on in that chapter.

The next two chapters are historical chapters that look at civil death as it was being consolidated as a globally intelligible legal concept in the nineteenth century. In Chapter 3, the English-speaking common law uses of civil death are compared with civil death in the civil law tradition. The meaning of the concept is placed within a context of rapid technological, political, and economic change, civil unrest, and a movement towards legal systems based on equal rights. It is also a period in which this rapid change is being mirrored by an exponentially expanding use of police, prisons, and security. In this chapter I anchor the analysis on uses of the actual term “civil death” by state actors. This is largely a mapping exercise to compare different uses during the same period, and it provides context for some of the legal transformations of the period.

Chapter 4 follows a different methodological path. Civil death is treated to a critical historical approach that is similar to a people’s history in that it adopts a lens from below and assesses civil death from the perspective of classes of persons who were subject to legal techniques of privation. In some cases, civil death is read back into history through the different categories of persons or legal statuses. I foreground marginalized voices and perspectives that have employed the term civil death in either heterodox forms or as a mode of critique. I anchor the examples and cases I analyze by looking at statuses that contemporary historians and lawyers have retrospectively called examples of “civil death,” since historically they were cases of legal disabilities placed on specific legal statuses. In this chapter, I provide a critical interrogation of the historical categorization that tackles both the function and form of civil death in history. The historical analysis in Chapter 3 is informed by the Cambridge school and contextualist approaches, while Chapter 4 commits a heresy and approaches the same nineteenth century from a critical approach that consciously reads the present into the past, using concepts and categories out of time and place in some instances.

In Chapter 5, a contemporary theory of civil death is proposed that conforms to the form and function of the concept to provide a useful template for understanding how civil death can function in the contemporary world. I propose a category for analysis of civil death. I explore the utility of the genealogy of civil death as more than an esoteric exploration of legal concepts, but ultimately as a

concept that captures several legal techniques that together have important implications for different areas of law.

Finally, in Chapter 6, I am able to use the reconstituted concept of civil death. I argue that the legal form of civil death is proliferating as a set of legal techniques used for securitizing domestic and global spaces. These forms are encroaching on democratic dissent and making the globe less responsive to social movements and consequently potentially more unstable. This chapter is an application of the concept of civil death as I have reconstituted it as a contemporary concept with potentially global reach.

As a final methodological observation, I am aware that there are very different schools of thought regarding the uses of multiple methods and contradictory approaches within the same work. I use radically different theoretical influences and methodologies throughout the dissertation that often come with conflicting epistemic assumptions. Care has been taken to provide a kind of internal coherence in the methods used. By internal coherence, I mean careful explanation such as the reasons for the choice of different methods for the history chapters in particular. My use of approaches and methods is nothing if not eclectic and possibly even somewhat eccentric. I do not pretend that there are not contradictions between the different theorists used or the critical approaches employed. Foucault and Arendt have radically different assumptions about truth and politics, and I use them both for different parts of the analysis to show different things. I do not expect coherence between the authorities used, only a kind of reasoned coherence in the ways they are used and in my own treatment of civil death. Ultimately, there are far more pragmatic benefits to expanding one's bibliography and employing different approaches than to staying siloed in a single tradition.<sup>68</sup>

---

<sup>68</sup> Tanya Monforte, "Thinking Through Transdisciplinarity in Urban Sustainability" in Hoi Kong & Tanya M Monforte, eds, *Urban Governance and Sustainability* (Toronto: University of Toronto Press). (Forthcoming 2022)

## Chapter 2    Mapping Civil Death

*A map of the world that does not include  
Utopia is not even worth glancing at.*

Oscar Wilde

## 1. Introduction

The meaning of contemporary civil death is something of a puzzle; and like a jigsaw puzzle, it has to be constructed systematically. A systematic approach requires starting with the edges to get the outline while sorting like things with like. That is how this chapter will proceed. In the introductory chapter, I suggested that there are problems with the contemporary definitions of civil death. This chapter will begin by revisiting this question to establish the justification for the mapping of the uses of the term civil death as a form of empirical inquiry. There are many definitions of civil death, as I will explore throughout the chapters; but the textbook definition captures the essence of the issue. Here is the full definition from the *Encyclopedia of American Civil Liberties*: “While there is disagreement about the origin of ‘civil death,’ its definition is undisputed. Civil death ends a person’s legal capacity and renders him legally dead. The individual loses his property and can no longer perform any legal functions.”<sup>69</sup> The author, Nora V. Demleitner, goes on to explain that in “ancient Athens, an ‘infamous’ offender could be precluded from participating in the function of citizenship. Through the Roman Empire, civil death was later exported to Germanic tribes and England where the practice came to be known as ‘outlawry.’”<sup>70</sup> The entry concludes by informing us that civil death had been largely abolished by the 1960s in the U.S. and that the few remnants of civil death today include disenfranchisement after a conviction and the denial of the right to hold public office and to serve on a jury. This is a rather standard definition and explanation of the concept of civil death; and this same historical sketch sidesteps some of the more contentious points, such as the precise origins of the concept, which often inform the way the definition is understood. The history that is told in this line about the concept is decidedly a continuous and punitive history of civil death that reaches into an ancient European past. This history is necessary to explain what civil death means, since the definition alone only goes so far in explaining the scope of the concept and tends to leave too many open questions. The authoritative

---

<sup>69</sup> Demleitner, *supra* note 32 at 297.

<sup>70</sup> *Ibid.*



definitions of civil death today are often interpreted so that the category appears to have a narrow meaning intrinsic to criminal justice.

However, a cursory review of civil death in the contemporary academic and legal literature, especially outside North America, reveals a broader concept that is not exclusive to criminal justice. Civil death is frequently connected to legal capacity in a broad sense. There is a question about what the end of legal capacity means since some rights are usually retained, and the rights that are denied are varied. One problem is that the standard definition does not go deep enough to help us make sense of the many ways in which the term “civil death” is used contemporarily. Consequently, it is difficult to assess whether a usage of civil death is a “true” case (for lack of a better word) in that it fits the definition or should be expressed as a case of civil death or not. Another problem, which I will explore in subsequent chapters, is that the history that is told seems to take as a given that *infamy* is the same concept as civil death, and this preemptively directs and narrows our understanding of the concept in a particular way. Before turning to the history of civil death, however, I would like to scratch a little deeper on the ways the concept is used contemporarily. In this section, I want to lay out the many ways the term civil death is used to get the edges of the concept outlined and to show that civil death as a category of practice is at present configured in more expansive and complex ways than the standard definition suggests.

I will be looking at the ways the term “civil death” is used both in the academic literature and in different everyday uses from various national and political contexts. The idea is not to do a comparative analysis of civil death in a set of countries, but to map out tendencies of how civil death is used and find commonalities for classification and analysis of the concept. That is, I propose that there is a “broad constellation of meanings” in the background concept of civil death, and the task of this chapter is to map out the uses in a systematic way.<sup>71</sup> The chapter will therefore first lay out the various uses of civil death in the academic literature. It will then explain the methodology I use for a grounded theory of the concept that starts from this socio-legal mapping of the many uses of the term civil death.

---

<sup>71</sup> Jens Meierhenrich, “Varieties of Reconciliation” (2008) 33:1 *Law & Social Inquiry* at 198. Meierhenrich notes that there is a multi-step process in the “new conceptualism,” which is a fancy way to say a rigorous approach to clarifying the meanings of concepts. I draw from some of the methods discussed herein to bolster the soundness of the reconceptualization I propose in the final chapters.

## 2. The Theoretical Landscape for Civil Death

The contemporary academic literature on civil death is represented by key works in the different disciplines of sociology, political science, literature, criminology, and law. Three distinct lines of inquiry can be identified which either rely on the concept to underpin the object of study or use the concept as a point of comparison to a different concept. These three areas are 1) the collateral consequences of criminal convictions literature, 2) the social death literature, and 3) the rightlessness, bare life, and state of exception literature. There are various authors associated with these different lines of analysis, and each author will be treated separately since there are unique ways and differences in the kinds of theorizing that accompany each usage and reflect, at times, disciplinary conventions by which differently situated academics approach the topic of civil death. There are also historical accounts that either work out the way civil death was used at a particular moment in time or context or else refer to different groups as having suffered a civil death in history.<sup>72</sup> The historical literature will be primarily addressed in the two chapters that deal with the history of the concept of civil death or as support for other areas of analysis. Leaving aside the history of civil death for the moment, I will turn to the three lines of inquiry in the academic literature.

### 2.1. *Civil Death as Collateral Consequences of Criminal Convictions*

One might get the impression that civil death is a fairly marginal legal concept, from the paucity of discussion of it for most of the twentieth century in the legal academy. Most of the academic literature on civil death has generally been very legal and focused specifically on the rights of prisoners and persons with criminal convictions in English-speaking or common law North America. Part of this scarcity can be explained by the kinds of legal protections that were created to protect against civil death. In the U.S., the application of civil death as a criminal punishment required a formal pronouncement in law as opposed to following from a common law practice for constitutional reasons. Thus, the term civil death was found in formal legal statutes that were tailored to prisoners

---

<sup>72</sup> Daniel Beer, “Civil Death, Radical Protest and the Theatre of Punishment in the Reign of Alexander II” (2021) 250:171–202 Past Present; Daniel Beer, “The Exile, the Patron, and the Pardon: The Voyage of the Dawn (1877) and the Politics of Punishment in an Age of Nationalism and Empire Forum: Rediscovering Siberia” (2019) 14:1 5–30.

with life sentences.<sup>73</sup> As mentioned previously, civil death statutes specified that the prisoner lost property rights and the rights to vote, marry, form contracts, and sue.<sup>74</sup> A person who was condemned for life lost many rights, as the person had been permanently removed from society. Since these statutes named civil death as a formal state-law practice, the debates about civil death in the academic literature were frequently in reference to these statutes.<sup>75</sup> There has been mutual influence of the academic literature and court cases, for the rights of prisoners were also being litigated in the courts. The right to continue to hold property was one of the first rights to be litigated in the U.S., and the divestment of property was one of the earliest civil death consequences to be prohibited as civil death as an institution was seen to be softened.<sup>76</sup> Throughout the twentieth century, the statutes were challenged in court as prisoners pleaded to be allowed to hold property or to sue, for example, in cases of negligence in prisons; and in many cases they were successful in claiming their rights.<sup>77</sup> As noted in much of the literature, over time, civil death statutes were being repealed and there were arguments in favor of eliminating civil death statutes altogether in the academic literature once parole had become more common and legal complications ensued that were procedurally tedious when life prisoners were paroled and then had to have their civil rights reinstated after release. Many academic articles challenging civil death turned on the lack of pragmatism of the statutes rather than the unconstitutionality of the punishment.<sup>78</sup> And after the civil rights movement there were also arguments formulated to challenge civil death statutes in rights-based language in the literature.<sup>79</sup> The Supreme Court of Canada has one decision, *Sauvé v. Canada*, that discusses civil death along these lines; it is a case of voting rights for prisoners, which was narrowly decided in favor of preserving the right to vote

---

<sup>73</sup> Chin, *supra* note 1.

<sup>74</sup> Saunders, *supra* note 36.

<sup>75</sup> Note, “Civil Status of Convicts” (1914) *Columbia Law Rev* 592–594, “Civil Death Statutes: Medieval Fiction in a Modern World Source” (1937) 50:6 *Harv Law Rev* 968–977.

<sup>76</sup> Property reinstated *Avery v. Everett*, 110 N.Y. 317 (1888) at 332: “The inference seems almost irresistible that the doctrine that civil death, consequent upon a life sentence, divests the criminal of his estate, has no foundation in our law.”

<sup>77</sup> Rhode Island: “ACLU Asks Court to Reject State's Claim that Inmates Serving Life Cannot Change Rights Violations,” September 7, 2017, online: *American Civil Liberties Union* < <https://riaclu.org/en/news/aclu-asks-court-reject-states-claim-inmates-serving-life-cannot-challenge-rights-violations> > (Last visited July 15, 2021).

<sup>78</sup> The lack of pragmatism in civil death statutes after the invention of parole is grounds for the argument for their abolition in this note. See *supra* note 16. The unworkability of civil death statutes in the modern legal system, rather than the unconstitutionality, has been criticized. Saunders, *supra* note 36.

<sup>79</sup> Grady, *supra* note 52.

for incarcerated persons.<sup>80</sup> In contrast to the United States, which preserved in name remnants of civil death, Canada did away with the formal institution as it existed in prisons through the *Sauvé* decision of the Supreme Court.

Although civil death talk is sprinkled throughout the twentieth century, it has exploded in more recent years. The term civil death re-emerged in the academic literature in the U.S. in writings interested in criminal justice across various disciplines around the beginning of the twenty-first century. The political scientist Alec Ewald's article "Civil Death the Ideological Paradox of Criminal Disenfranchisement" was published in 2002 immediately after the contentious U.S. election between George W. Bush and Al Gore was decided by 537 votes in Bush's favor in Florida. Ewald notes that one of the issues that came out of the election was the disenfranchisement of "hundreds of thousands of non-incarcerated Floridians" because of a felony conviction.<sup>81</sup> He defines civil death as "the condition in which a convicted offender loses all political, civil, and legal rights."<sup>82</sup> Ewald references the medieval roots of the concept, "quoting a medieval French author who wrote on civil death: 'it sunders completely every bond between society and the man who has incurred it; he has ceased to be a citizen ... he is without a country; he does not exist save as a human being, and this, by a sort of commiseration which has no source in the law.'"<sup>83</sup> Ewald's use of the term "civil death" to discuss voter restrictions was influential in linking the concept of civil death not only with felon disenfranchisement, but with the permanent disenfranchisement of persons with a criminal conviction in the contemporary legal literature.

Criminal disenfranchisement today is widely associated with civil death; and in the collateral consequences literature, the elimination of specific rights of prisoners or former prisoners frequently leads to a reference to civil death. Alec Ewald has worked on various aspects of the so-called collateral

---

<sup>80</sup> *Sauvé v. Canada (Attorney General)*, 1993 CanLII 92 (SCC), [1993] 2 SCR 438 (deciding "that s. 51(e) of the Canada Elections Act, R.S.C., 1985, c. E-2, contravenes s. 3 of the Canadian Charter of Rights and Freedoms" and is not saved by Section 1 of the Charter). *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519, 2002 SCC 68 (deciding that the revised Section 51(2) of the Elections Act, which "denies the right to vote to all inmates serving sentences of two years or more" is rendered invalid by the Charter.)

<sup>81</sup> Ewald, *supra* note 1 at 1045.

<sup>82</sup> Ewald, *supra* note 1 at 1049.

<sup>83</sup> *Ibid.* Ewald relies on the history referenced in Howard Itzkowitz and Lauren Oldak, "Restoring the Ex-Offender's Right To Vote" (1973) *Am Crim Law Rev.*

consequences of criminal convictions,<sup>84</sup> that is, the many collateral consequences that attach to a criminal conviction that are not formally part of a judge's sentence. These consequences include the automatic deportation of a temporary or permanent resident convicted of a serious crime or the loss of parental custody for certain crimes as just two examples. These are not part of the sentence given by the judge, but they are consequences that flow from or attach to a conviction.

Gabriel Chin's highly influential "The New Civil Death" outlines an argument that a new civil death has emerged in the U.S. whereby hundreds or thousands of collateral consequences attach to criminal convictions, at times permanently encumbering persons.<sup>85</sup> His argument proposes the following branding of the state practice of attaching collateral consequences to a criminal conviction:

This article [The New Civil Death] proposes that civil death has surreptitiously reemerged. It no longer exists under that name, but effectually a new civil death is meted out to persons convicted of crimes in the form of a substantial and permanent change in legal status, operationalized by a network of collateral consequences.<sup>86</sup>

For Chin, the new civil death is a criminal status. His argument traces many of the consequences and the constitutional questions of what he calls the new civil death as cumulative collateral consequences of a criminal conviction. He concludes that collateral consequences individually, because they are not technically viewed as punishment, cannot be found to be constitutionally prohibited as cruel and unusual punishment. These consequences of a conviction are thus hard to challenge constitutionally. He argues, however, that legislation that attaches so many disabilities is bad policy and judges should be cognizant of these consequences when making sentencing decisions, and legislators should consider the larger social impact when people are debilitated rather than rehabilitated with these disabilities. This is a rather modest conclusion given his use of the term. Still, it was sufficiently persuasive that Justice Sotomayor in a dissenting U.S. Supreme Court opinion cited Chin's article and civil death when considering the legality of stop and frisk laws.<sup>87</sup> There have been several articles that

---

<sup>84</sup> Alec C. Ewald and Marnie Smith, "Collateral Consequences of Criminal Convictions in American Courts: The View from the State Bench" (2008) 29:2 Justice Syst J 145–165; Alec C. Ewald, "Deportation, Effective Counsel, and Collateral Sanctions: Padilla v. Kentucky" (2010) 32:2 Justice Syst J 235–242.

<sup>85</sup> Chin, *supra* note 1.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Utah v. Strieff*, 579 US (2016) (Sotomayor J, dissenting).

follow this line of looking at the collateral consequences of convictions as a new form of civil death.<sup>88</sup> This approach in the literature also provides insights into the racialization of civil death and some political economic elements.<sup>89</sup> For the most part, however, this is a fairly undertheorized literature inasmuch as civil death is taken directly from a particular historical narrative, and it traces the development from a particular U.S. experience leading to a fairly contained criminal justice understanding of the term. The new civil death is understood by analogy to an old civil death that has a penal teleology.

## 2.2. *Social Death*

The collateral consequences literature suggests that civil death is something different from imprisonment because it is a specific institution that occurs to people either while incarcerated or, newly, outside of prisons. Rights that are taken away while in prison constitute civil death. Another strand of the literature suggests that civil death can be understood as the actual condition of being imprisoned or in an internment camp, concentration camp, or by being enslaved. Because this line does not necessarily draw directly from North American pronouncements of civil death by the state, this literature tends to be far more theoretically rich. The literature that connects civil death with the concept “social death” has been drawn in different ways.<sup>90</sup> In Orlando Patterson’s seminal work, *Slavery and Social Death*, slavery is described as a kind of death in which the enslaved person is cut off from the social connections they are born into.<sup>91</sup> Slavery is a kind of civil death, and from that argument a continuum between slavery and incarceration has been drawn out in the literature. I will first turn to slavery as civil death and will subsequently discuss incarceration itself as civil death.

Orlando Patterson developed a social theory for slavery that formulates a concept closely associated with civil death. Although Patterson would eventually speak directly to the relationship between social

---

<sup>88</sup> Victor J. Pinedo, “Let’s keep it civil: An evaluation of civil disabilities, a call for reform, and recommendations to reduce recidivism” (2017) 102:2 Cornell Law Rev 513–545.

<sup>89</sup> Smiley, *supra* note 17. Calvin John Nagel Smiley, *Existing But Not Living: Neo-Civil Death and the Carceral State* (PhD Dissertation) (2014), online: *City University of New York* < [https://academicworks.cuny.edu/gc\\_etds/283/](https://academicworks.cuny.edu/gc_etds/283/) > (Last visited July 15, 2021).

<sup>90</sup> The “social death” literature is itself quite varied, and complex. The term, it is said, was introduced as a way to get to a social and relational view of death first in hospitals and in medical care. From there it has been taken in different directions by different theorists. See Jana Králová, “What is social death?” (2015) 10:3 Contemporary Social Science 235–248.

<sup>91</sup> “What this meant then, was that to become the property object of another amounted to social or, as the Romans stated it, civil death.” Orlando Patterson, “Revisiting Slavery, Property, and Social Death” in *On Human Bondage: After Slavery and Social Death* (2016) 265 at 278.

and civil death in his later writings, in 1982 he opted for the term “social death” as a way to understand slavery as something that escapes legal definitions. His frustration with legal accounts of slavery led to his rejection of the legal language, but without dispensing with the importance of law. Patterson rejects the definitions of slavery based in legalistic terms such as definitions that turned on slaves being merely property or that the enslaved person is “someone without legal personality.”<sup>92</sup> He criticized G.B.J. Hughes for claiming that “a person in law is an entity which may be the bearer of rights and duties” and that the slave, according to this theory, is a person who is not a bearer of rights and duties and therefore does not have legal personality.<sup>93</sup> He claims legal philosophers who know more jurisprudence than law misunderstand that legal personality is a legal fiction.<sup>94</sup> He himself argues that this definition is absurd not only because slaves were held legally and morally responsible for their actions, but the legal arguments that claimed this produced a paradox missed the mark.<sup>95</sup> He points to the nonsensical way legal theorists at the time were dealing with questions of an enslaved person as property rather than a legal person. The enslaved person, he argues, is not dominated because the person is treated as property but because the person could not hold property.<sup>96</sup> Still, Patterson clarifies some forty years later that “to become the property object of another amounted to social or, as the Romans stated it, civil death.”<sup>97</sup>

To fill in the concept of social death, Patterson introduces the ideas of the slave as a non-being, “forever an unborn being (non-né).”<sup>98</sup> This is similar to the process of “natal alienation” he describes whereby social ties are severed between the enslaved person and family and home.<sup>99</sup> But the slave is also ritually made into a “permanent enemy on the inside” or the “domestic enemy” as well as the “defeated enemy.”<sup>100</sup> Patterson argues, “It is in Islamic religious and social thought that we find the purest expression of the intrusive conception of social death. The outsider was foreigner, enemy and infidel, fit only for enslavement after the jihad, to be incorporated as the enemy within.”<sup>101</sup> This internal

---

<sup>92</sup> Orlando Patterson, *Slavery and Social Death* (Harvard University Press, 1985) at 22.

<sup>93</sup> *Ibid* at 22.

<sup>94</sup> While I noted his apparent disregard for jurists, he is very familiar with the legal realists, and Patterson discusses slavery in relation to the bundle of rights analysis in different contexts in his later work. Even in his *Slavery and Social Death*, Wesley N. Hohfeld makes an appearance. Patterson, *supra* note 92 at 20–22.

<sup>95</sup> *Ibid* at 22–23.

<sup>96</sup> Patterson, *supra* note 91.

<sup>97</sup> *Ibid* at 278.

<sup>98</sup> Patterson, *supra* note 91.

<sup>99</sup> Patterson, *supra* note 92 at 38.

<sup>100</sup> *Ibid* at 39.

<sup>101</sup> *Ibid* at 41.



enemy is not simply enslaved, but “incorporated” into the society in a particular political and economic form.

The emphasis on the severing of ties from society, the incorporation of a threat into a specific political form is picked up by social theorists working on prisons. Josh Price follows Patterson in his treatment of modern-day prisons by using the concept of social death. Interestingly, Price explicitly rejects the use of civil death as a useful concept, since he sees it as too thin to capture the kinds of social relations that are implicated in imprisonment. He claims, “Civil death implies the lawful abrogation of legal rights”; and he then advocates for the use of the concept of social death in lieu of the more common concept of civil death because social death is “wider and more substantive” than civil death.<sup>102</sup> His critique is that civil death is “simply a question of rights accorded to citizens,” and that social death implies a change in “social status” in radical and permanent ways as opposed to the temporary change in rights of civil death.<sup>103</sup> For Price, ending civil death would simply require that the individual rights be restored; and this confirms, for Price, a sort of “liberal individualism” and civil rights agenda.<sup>104</sup> According to Price, an explanation of social death allows one to understand that to end civil death one must first end the social death, and that is understood as the contempt for and the dehumanization of other persons. This line in the social theory of slavery and incarceration makes very little use of and actually seems somewhat contemptuous of how legal jurisprudence has made sense of these institutions.

Along the same line as Patterson, but with very conscious differences, Colin Dayan has spent her career working out the ways in which law is used to “unmake persons.”<sup>105</sup> It is fair to say that her work in English literature is extremely careful in its attention to the language of law, and she provides the contours of civil death better than many of her legal peers while still overlooking some of the legal technicalities. She offers the most complete sense of civil death as an impressionistic picturing approach to the topic. Although civil death plays only a fleeting role in her explanation of how law unmakes persons, her overall project to show a juridical process of unmaking is incredibly rich and

---

<sup>102</sup> Joshua M. Price, *Prison and social death* (2015) at 19.

<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid.*

<sup>105</sup> “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. (...) Entwined and cumulative, these chapters proceed as episodes in making and unmaking persons.” Dayan, *supra* note 18 at 13.



informative. She writes, "the law defines how material considerations and a concern for order and discipline can produce the juridical nonexistence of the person through degrees of deprivation."<sup>106</sup> The observation that deprivation is central to how persons are unmade through law is a crucial insight, as is her emphasis in examples on the centrality of property.

Dayan is spot on in her analysis; however, it is rather difficult to pin down exactly what the concept civil death means upon close inspection of her writing. She writes, "In rereading the claims of civil death into the history of slavery and incarceration, we recognize the continuum between being judged a felon, being declared dead in law, and being made a slave."<sup>107</sup> For Dayan the historical institution of civil death in the Americas is tied to a colonial past; and so she writes, "The racialized idiom of slavery in the American social order depended on the legal fiction of 'civil death': the state of a person who though possessing *natural life* has lost all *civil rights*."<sup>108</sup> Dayan's understanding of civil death is that it is the loss of all civil rights, and so she uses civil death in her explanation while leaving aside the details of the concept. Following her argument, civil death is not necessarily a form of punishment, but derives from a form of punishment that gets inscribed with the idea of corruption of blood so that it is racialized in a particular way. Dayan makes the argument quite explicitly that the "black taint that legally inscribed slavery" would be remade after the abolition of slavery into legal disabilities so that "slaves were reborn as criminals and "translated into 'slaves of the state.'"<sup>109</sup> As I said, her take is somewhat impressionistic at times while still being meticulous, and her overall argument describes the unmaking of persons through law. One limitation of her method is that it is not entirely clear how to separate the concept as it was and is used outside North America, since her analysis takes a very contextual historical approach and the U.S. experience of civil death becomes fused with the concept.

---

<sup>106</sup> Colin Dayan, "Held in the Body of the Law: Prisons and the Law" in Austin Sarat and Thomas Kearns, eds, *Hist Mem Law* (Ann Harbor: University of Michigan Press, 2005) at 184.

<sup>107</sup> Dayan, *supra* note 18 at 46.

<sup>108</sup> *Ibid* at 44.

<sup>109</sup> *Ibid* at 45.

### 2.3. *Rightlessness, Bare Life, and the State of Exception*

Finally civil death has been linked to central concepts in the works of Hannah Arendt and Giorgio Agamben. Although there are differences between their work, I will address them here together, as their theories are intimately linked.

Although the concept of civil death only appears in one footnote in Arendt's work, terms that are often associated with civil death are scattered throughout *The Origins of Totalitarianism* and not only provide a link between rightlessness and civil death but provide insight into how someone not trained in law but who found herself at the mercy of it understood civil death. Arendt's concept of rightlessness materializes through the description of how totalitarianism functioned. She wrote about the deprivation of "citizens of legal status,"<sup>110</sup> the complete "loss of political status,"<sup>111</sup> and, later in the book, the killing of "the juridical person in man."<sup>112</sup> Arendt describes rightlessness as the paradoxical condition in which rights can be granted but not enjoyed.<sup>113</sup> She explains, a refugee might formally have the right to life, but without food or any means of earning an income, that right is meaningless. Rightlessness is therefore not about having every single right eliminated, but rather the condition in which even when rights are granted or not taken away, rights become meaningless to the life of the person. Arendt's description of rightlessness is similar to how legal scholars have described civil death. She unites many of the distinct lines from different definitions of civil death, but she describes it through a thoroughly modern situation, shedding light on what contemporary civil death can look like.

In the same section in which she outlines what is entailed in "the preparation of living corpses" for the camps, she argues, "The aim of an arbitrary system is to destroy the civil rights of the whole population, who ultimately become just as outlawed in their own country as the stateless and homeless. The destruction of a man's rights, the killing of the juridical person in him, is a prerequisite for

---

<sup>110</sup> Hannah Arendt, *The Origins of Totalitarianism* (Harcourt, 1968).

<sup>111</sup> *Ibid* at 295. "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."

<sup>112</sup> Arendt, *supra* note 20 at 451.

<sup>113</sup> Vivian Liska likens Arendt's use of the Pariah to Agamben's *Homo Sacer*. I think there is certainly something to her interest in pariah-type characters. However, it seems that the legal form is somewhat different between the pariah and the rightless. Perhaps it is one step in the process towards rightlessness, but the uses and emphasis between the terms tend not to completely overlap in Arendt. Vivian Liska, "A Lawless Legacy: Hannah Arendt and Giorgio Agamben" in *Hannah Arendt and the Law* (Hart, 2012).

dominating him entirely.”<sup>114</sup> There is little doubt for me that she is referencing civil death in this passage.

Arendt describes a state of being effectively outlawed in one's own country as entailing the destruction of civil rights and the killing of the juridical person. She juxtaposes this first step of killing the juridical person with the second step of killing the moral person in the next paragraph. She made the distinction between the legal and the moral and argued that the legal action was the foundation of totalitarian domination. Another way to understand her distinction could be to think of it as the distinction between civil death and Patterson's development of the concept of social death. She argued that there was a two-step approach. Denationalization was used to force the “nontotalitarian world into recognition of lawlessness.”<sup>115</sup> The second was placing the camps outside the normal penal system. She says this happened because the selection of inmates was not made so that a “definite crime entails a predictable penalty.”<sup>116</sup> She described “protective custody” as a “preventive police measure” or as “a measure that deprives people of the ability to act.”<sup>117</sup> That is to say, for Arendt it was important that persons be treated not for their actions, but for the kinds of persons they were purported to be. She claims that this distinguishes a system of law from a system of domination.

“Crime” and “criminality” play a particular role during the decay of a political and legal order. When Arendt uses the term “lawlessness” she describes it not as a system without law, but rather as a system in which the normative order is flipped upside down in the legal order. The police begin to act criminally, and crimes are replaced with “vices” so that what is punished are characteristics or attributes that are enduring or intrinsic to persons in ways in which actions are not.

The essential component of the new civil death in juridical terms is the killing of the juridical person through the proliferation of new unstable and unpredictable categories. She refers to “special categories” under Nazi rule as “criminals, political opponents, Jews, homosexuals” so that although these groups are singled out from the beginning, in the end, arbitrary rule touches every citizen. This is an alternate articulation of the destruction of the rule of law problem. If rights can be taken away, they become privileges. If we only have privileges then it is not just that we have no real rights, but as

---

<sup>114</sup> Arendt, *supra* note 64 at 451.

<sup>115</sup> *Ibid* at 447.

<sup>116</sup> *Ibid* at 447.

<sup>117</sup> *Ibid*.

I will argue later in the dissertation, that we have different categories of persons and the rights of each group are only secured by that group. In this way, however, every citizen is potentially subjected to absolute domination because the external sources of authority that kept the historical statuses in check were eliminated.

Following Arendt's work, rightlessness and the right to have rights are often reduced to a problem of statelessness. I want to claim, however, that understanding the how civil death works sheds a different light on Arendt's work. Arendt's theory of rightlessness, though certainly important for understanding modern statelessness as the societal group of persons she was most concerned about, is not only or even ontologically primarily about statelessness. It is about the deformation of the legal/political system in which the total subjugation of populations and persons becomes possible through the manipulation of an equal rights framework. I believe Arendt's work is suggestive of this, but she doesn't quite have the legal tools to bring out this argument to its full conclusion.

The philosophical exploration of the link between rightlessness and civil death has been insufficiently explored, despite the otherwise ample literature on Arendt's corollary concept "the right to have rights" and citizenship.<sup>118</sup> Allison Kesby's work is exceptional in this respect, as she has connected civil death and the right to have rights.<sup>119</sup> In Kesby's critique of the theory that a right to citizenship (or some articulation of a right that protects against statelessness) is the modern articulation of the right to have rights, Kesby offers civil death as a counterexample, citing the dual forms of the disenfranchisement of convicted persons and forced labor in prisons. She, however, devotes only a few pages to civil death.

Similarly, Ayten Gündoğdu touched on civil death in her beautifully crafted book on the rightless and migrants. She explores the loss of status in Roman law as *capitis diminutio media* and banishment or

---

<sup>118</sup> See e.g. Seyla Benhabib, "The right to have rights': Hannah Arendt on the contradictions of the nation-state" (2004) 49; Jacqueline Bhabha et al, "Arendt's Children: Do Today's Migrant Children Have a Right to Have Rights?" (2015) 31:2 410; Andrew Schaap, "Enacting the right to have rights: Jacques Rancière's critique of Hannah Arendt" (2011) 10:1 Eur J Polit Theory 22.

<sup>119</sup> Alison Kesby, *The Right to Have Rights: Citizenship, Humanity and International Law* (Oxford University Press, 2012).

outlawry as the “kind of civil death” “at the heart of Arendt’s analysis of statelessness.”<sup>120</sup> Neither Gündoğdu nor Kesby, however, expands on the idea of civil death itself, beyond linking it almost anecdotally to Arendt’s overall theory and to citizenship. Still, in both cases, there is a theoretical affinity between civil death and statelessness.

Also very prominent in this regard is the work of Giorgio Agamben. Several scholars have associated contemporary theorizing of civil death not with Arendt but with the works of Giorgio Agamben and his serialized account of *Homo Sacer*.<sup>121</sup> It is worth noting from the start how close Agamben’s work is to many of Arendt’s positions. Agamben’s philosophy has notoriously been influenced by Arendt, and I would go as far as to say Agamben’s most important observations about sovereignty and statelessness are restatements of Arendt’s insights. A young Agamben wrote to Arendt, describing the impact that discovering her writing had had on him and saying that he would continue the work in the “direction [she] pointed out.”<sup>122</sup> Agamben proposed his concept of *homo sacer* in the essay *We Refugees*, which he wrote as homage to Arendt, whose essay with the same title described the condition of being without a country. The similarities between their theories should not, however, eclipse the notable differences between Agamben and Arendt.<sup>123</sup> I will not go into detail here evaluating the two theories for their usefulness, but only say that these are two significant and related lines of theorizing.

Giorgio Agamben’s two theories of the state of exception and *homo sacer* have become the basis for important arguments in various disciplines that look at law and security, including the developing field of critical security studies.<sup>124</sup> Further, various authors have drawn links between civil death and Agamben’s state of exception and *homo sacer*.<sup>125</sup> As several people have interpreted civil death as a form

---

<sup>120</sup> Ayten Gündoğdu, *Rightlessness in an Age of Rights* (Oxford University Press, 2015) at 103. A. Naomi Paik also uses Arendt’s idea of rightlessness as a way to understand statelessness, but she links this to the camps and extends it to prison camps. The concept of rightlessness extends beyond statelessness. A Maomi Paik, *Rightlessness: Testimony and Redress in U.S. Prison Camps Since World War II* (University of North Carolina Press, 2016).

<sup>121</sup> Folliis, *supra* note 1; DeCaroli, *supra* note 60.

<sup>122</sup> Giorgio Agamben, “The Limits of Violence” (2009) 39:4 *Diacritics* at 111.

<sup>123</sup> Jaques Rancière argues that Agamben takes Arendt’s paradox of the rightless and transforms it, arguably improving it or at least making the political insights more apparent, by using Foucault and Carl Schmitt. Jacques Rancière, “Who is the Subject of the Rights of Man?” (2004) 103:2/3 *South Atl Q* at 299.

<sup>124</sup> See e.g. Suvi Alt, “Problematizing Life Under Biopower: A Foucauldian Versus an Agambenite Critique of Human Security” in David Chandler and Nik Hynek, eds, *Crit Perspect Hum Secur Rethink Emancip Power Int Relations* (Routledge, 2011).

<sup>125</sup> See e.g. Erdem Evren, “The Ones Who Walk Away: Law, Sacrifice and Conscientious Objection in Turkey” in Julia Eckert et al, eds, *Law Against the State: Ethnographic Forays Into Law’s Transformations* (Cambridge Core, 2012) 245.

of exclusion from law or being outlawed, it is easy to see how civil death has been drawn out from Agamben's work. Agamben wrote that *homo sacer* is always present, "[e]very society sets this limit; every society—even the most modern—decides who its 'sacred men' will be. Homo Sacer is the man who can be killed and not sacrificed, he is 'outside both human and divine law.'" <sup>126</sup> For Agamben, the theoretical work is done around an individual subject and although he never used the term civil death, his work is arguably suggestive of it. Agamben starts his chapter "The Ban and the Wolf" with a quote from Ihering in which he finds the root of *homo sacer* in the ancient European traditions of the outlaw. "'To ban' someone is to say that anyone may harm him' ... or [he] was even considered to be already dead." <sup>127</sup> The person who is already dead though living has been picked up by authors subsequent to Agamben in developing his theory as it relates to civil death.

Although Agamben himself does not use the term civil death, those who rely on his work have linked civil death with Agamben's central concepts. Steven DeCaroli, for example, makes this connection in his essay, "Boundary Stones: Giorgio Agamben and the Field of Sovereignty." <sup>128</sup> DeCaroli envisions the banished individual as the key figure for making sense of Agamben's understanding of the state of exception, *homo sacer*, and sovereignty. DeCaroli further links civil death to banishment and exile. He writes, "civil death brought on by exile is as effective as bodily death. The death of the citizen leaves standing 'the man only,' a condition that draws us back to Agamben's discussion of biopolitics." <sup>129</sup> DeCaroli's analysis is quite convincing in eliciting what he finds particular to civil death as killing the citizen and suggesting that what is left, "the man only," corresponds to Agamben's "bare life." <sup>130</sup> That is, a political person is reduced to the biological fact of life. DeCaroli delves into the historical precursors to civil death, the institution of banishment and social exile to make a claim about modern sovereignty and the place of *homo sacer* as someone metaphorically outside the state.

In opposition to incarceration, in which the body is directly governed by the state, in the case of civil death as a kind of outlawry, DeCaroli argues, the connection between the state and the person is made

---

<sup>126</sup> Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, 1st edition edited and translated by Daniel Heller-Roazen (Stanford, Calif: Stanford University Press, 1998) at 73.

<sup>127</sup> *Ibid* at 105.

<sup>128</sup> DeCaroli, *supra* note 60.

<sup>129</sup> *Ibid*.

<sup>130</sup> *Ibid*.

more remote.<sup>131</sup> DeCaroli contrasts the loss of liberty in the case of incarceration as an "intensification of the relation between the individual and the state," while the loss of citizenship, he claims, does the opposite.<sup>132</sup> The idea that through banishment or the loss of citizenship distance is created between the sovereign and the individual is an intuitive way to conceptualize civil death as a form of neglect or withholding on the part of the sovereign. However, this line of analysis misses the ubiquity of the modern state and the ubiquity of law. It assumes civil death creates distance. As I will discuss in the following subsection, I prefer Arendt's theoretical framework, as she has a much more legal perspective.

DeCaroli makes several references in the essay to the "withholding of law" in the case of civil death so that we get an understanding of civil death as an instance where law disappears.<sup>133</sup> Take as an example his point on exile,

When liberty is lost through incarceration or bondage, the person remains within the sovereign field insofar as the law continues to apply. In the case of the exile, however, freedom is preserved precisely because the law ceases to apply.<sup>134</sup>

Although DeCaroli makes several keen observations about the importance of banishment to the historical concept of civil death as well as status and citizenship, his argument misapprehends the relationship of the state to the individual in instances of civil death. The ubiquity of legal regulation as a tool for managing not only political inclusion, but also political exclusion is missed in this view. This confusion is made more explicit in the description that contrasts incarceration with banishment. Still, there are several authors who utilize Agamben for their analyses of prisons and camps, and they rely directly on the concept of civil death within an Agambenian theoretic.<sup>135</sup>

---

<sup>131</sup> *Ibid.*

<sup>132</sup> DeCaroli, *supra* note 60.

<sup>133</sup> *Ibid.*

<sup>134</sup> *Ibid* at 63.

<sup>135</sup> See esp. Follis, *supra* note 1.; Erdem Evren, "Chapter 10—The ones who walk away": in Julia Eckert et al, eds, *Law Against State Ethnogr Forays Into Law's Transform* (Cambridge Core, 2012) 245 at 253: "In some cases, this takes an extreme form whereby the positioning of certain bodies prior to the law enables the sovereign (read: the modern state) to mark them as 'killable'. Civil death falls within this most radical kind of exception as it implies the possibility of an actual death with impunity."<sup>135</sup>[?]



## 2.4. *Overlapping Themes in the Academic Literature*

These three lines of inquiry within the literature are of course intersecting and at times may influence one another. I do not want to overstate the extent to which these are distinct lines of theory. Although it is fair to say that each author is picking up on something unique that is found in the legal structure of civil death, if we were to read only one account, we would get very different ideas of what civil death is. Still, there is something in the deep theory that is common. Patterson's account of enslaved persons sounds similar in many ways to what Arendt discusses as superfluous persons as the basis for rightlessness.<sup>136</sup> Indeed, Arendt is continually drawing comparisons in her writing between slavery and what she calls the modern expulsion from humanity—that is, she draws comparisons and also contrasts slavery from expulsion, since the latter is ultimately different from slavery because there was a place in the political economy into which enslaved persons fit.<sup>137</sup> Still, the initial steps to full domination in different ways—be it enslavement or the modern expulsion from humanity—requires the same first step in destroying the juridical person in man for Arendt.<sup>138</sup> Patterson also picks up on lines that sound reminiscent of an Agambenian approach to bare life. He draws attention to the fully dominated status of slaves by relying on a quote that slaves were seen in “Arab-dominated society” as “moved by savage and irrational instincts; swayed by animal propensities; ... outside civilized life, if not outside humanity itself.”<sup>139</sup> Patterson's discussions of enslaved persons as internal enemies or inside outsiders touches on this complex and paradoxical relationships of persons who exist without having the status to live. I suggested that I preferred Arendt to Agamben for developing a theory of

---

<sup>136</sup> “If the lives of these people were of such little consequence, if their suffering and their bodies were deserving of no honor whatsoever, if they were so totally isolated from the community where they worked (no one knowing or caring that they were missing), if they were so completely devoid of natal rights (two fundamental elements of which being that one's birth be celebrated and recorded, and one's death be mourned and registered as normal, ...) then it seems to be splitting hairs wondering if these people were or were not slaves.” Patterson, *supra* note 91 at 274.

<sup>137</sup> Arendt, *supra* note 64 at 297.

<sup>138</sup> *Ibid* at 302.

The great danger arising from the existence of people forced to live outside the common world is that they are thrown back, in the midst of civilization, on their natural givenness, on their mere differentiation. They lack that tremendous equalizing of differences which comes from being citizens of some commonwealth and yet, since they are no longer allowed to partake in the human artifice, 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, without a deed by which to identify and specify himself—and different in general, representing nothing but his own absolutely unique individuality which, deprived of expression within and action upon a common world, loses all significance.

<sup>139</sup> Patterson, *supra* note 91 at 277.



civil death, but preference is not quite the point. I believe there is more work on the legal aspects of civil death that can be drawn from her keen legal insights. Arendt's acute knowledge of law and jurisprudence makes her work quite useful for pulling out a theory of civil death as a legal concept.

Dayan appears drawn to the same qualities and points in Arendt's work as I, and she also takes from Arendt's work the importance of law in developing the superfluousness of certain persons in societies. Dayan writes, "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..."<sup>140</sup> Dayan observes that these kinds of persons are not made into responsible persons, and she concludes, "In other words, these entities exist outside the legal definition of persons."<sup>141</sup> The conclusion that the deprived persons Dayan describes, or superfluous persons in Arendt's language, are not legal persons or are outside the legal definitions needs a clearer explanation. The different ways of understanding civil death as having something that links the legal person and the capacity or rights of the person to legal death or social expulsion need some sharpening.

In general terms, however, Arendt's work has some comparable advantages to that of Agamben for getting to the legal form of civil death since her two-pronged approach to the modern expulsion from humanity provides a space in the first instance for properly legal analysis. Although Arendt also tends to talk about being "outside the law" similar to Agamben, the legal processes she describes approaches legal relationships more honestly. Arendt's treatment of the stateless person is not Agamben's *homo sacer* who can be killed but not sacrificed, the stateless person can simply perish without anyone having killed him or her and without anyone having to take responsibility. It is the person who lives fully dominated by law, but no one action is taken and so no one has to take legal responsibility for the death of the refugee. Once that legal status is established, it is possible to *not* do anything to that person. This person is not outside the law, but rather outside the protection of the law while still experiencing the full force of law's productive and destructive power as expulsion.

The concept of civil death has a strength in that it is a thoroughly legal concept, unlike social death. Price's criticism that civil death appears too thin to be useful misses what a more complete and precise

---

<sup>140</sup> Colin Dayan, "Legal Terrors," *Representations* 92, no. 1 (2005): 70.

<sup>141</sup> *Ibid* at 70.

as well as theoretically informed legal explanation can bring to an understanding of how social relations and indeed social life are constructed and regulated through the legal mechanisms of civil death. But much of the purely legal literature on civil death does not delve deeply enough into theory to understand it in any way that is not entirely dependent on an analogy to historical institutions or else a teleological history of continuity that does not account for historical outliers. The three lines of analysis—collateral consequences of criminal convictions; social death; and the rightlessness, bare life, and the state of exception strands—provide a starting point. Each one is associated with different kinds of persons who are subjects of civil death. They include prisoners, the convicted, the enslaved, the stateless, or refugees. Each theory is made to make sense of their targeted subjects and perhaps only of those subjects. The academic literature suggests that civil death allows for states to fully dominate persons or unmake persons. These insights begin the exploration of how legal persons are made, unmade, and reconstituted in different forms.

### **3. A Socio-Legal Approach to the Topic**

Now that I have outlined three ways in which civil death has been theorized or used in the academic literature, the construction of a different theory can begin. While people use civil death in their theories, it is often in the service of a specific project. Civil death is used to understand the removal of specific rights in and outside prisons, as prisons themselves, as slavery, and as statelessness. Civil death itself is rarely the object of study, and a theoretically rich legal explanation is missing from the literature. Before I proceed to theorize civil death, it seems useful to begin by asking what I am theorizing. The remainder of this chapter will explore the topic through socio-legal observation.

The term civil death and the concept are used by state and non-state actors to *do* something in the world. This chapter explores through sociolegal methods, what that something is. Somewhere between the theories of Roscoe Pound and those of Eugene Ehrlich there is a way to look at both how state law produces an effect in the world and how persons in society appropriate legal concepts to produce an effect on state law. Pound's "law in action" conveys how state law is social engineering and law is

designed to affect society, and Ehrlich's "living law" explains how legal "norms" can be affected and changed by actions and uses outside officially sanctioned routes.<sup>142</sup>

I begin with the hypothesis that civil death sits upon a peak that tilts in either direction in relationship to the legitimacy of state power. Civil death as a concept is a tool of either legitimation or delegitimation, and this will ultimately tell us something important about civil death. Daniel Beer observed that civil death rituals in Russia in the nineteenth century, which were public ceremonies where persons were ritualistically stripped of their rank and honors, acted as public affirmations of state power; or else the people's displeasure with the proceeding would turn, and the ritual became a ceremony that challenged the state's legitimacy.<sup>143</sup> The civil death ritual, organized for state legitimation could end up subverting state power. Similarly, contemporarily, I have observed that the ways in which people designate certain legal technologies as civil death can be a way to either assert the state's legitimate exertion of power over a person or else to challenge that power. Ehrlich's and Pound's concepts of "living law" and "law in action" are useful for my approach to the question of what civil death is. Pound's emphasis on state law's effects on society or the action rather than a plurality of norms is useful as a way to understand a legal concept as having a social function.<sup>144</sup> Ehrlich is useful since he was less interested in law as social intervention, but rather in the way in which law develops from social forces.<sup>145</sup>

Using both, I can attune the observation to how state norms change behavior or state-based norms are supported or challenged by other norms that flow from societal rather than state-based sources. If we only look at civil death as the state has defined it, we might quickly believe that civil death has largely disappeared since judges and lawmakers very rarely use the term civil death today. However, if we bring in a theory that, following Ehrlich, views the act of naming a set of state practices and

---

<sup>142</sup> Pound, *supra* note 66. Roscoe Pound, "Jurisprudence" (1959) 1. Ehrlich, *supra* note 66.

<sup>143</sup> Beer, *supra* note 67.

<sup>144</sup> While Pound was not a functionalist, he shared some affinities with functional analysis. See Ralf Michaels, "The Functional Method of Comparative Law" in Mathias Reimann and Reinhard Zimmermann, eds, *Oxford Handb Comp Law* (Oxford University Press, 2006).

<sup>145</sup> It is not always obvious how clear the line is between Ehrlich and Pound, as Pound was also interested in the ways social action changes law: "... a distinction between law in the books and law in action ... show[s] where and how legal theory has yielded to the pressure of lay ideas and lay conduct." Pound, *supra* note 66 at 14–15.

classifying those practices as itself an informal norm, then the object of study must be extended outside the legal databases of court cases.<sup>146</sup> The act of naming a set of state practices civil death is, as in the Russian example, a way of making something public and opening it up to either legitimation or, importantly, subversion. One of the reasons Ehrlich is a useful source for this project is that his early approach to the living law was still practically connected to state law despite criticisms to the contrary.<sup>147</sup> The norms he looked at were not completely disconnected from state legal practice in form; they are not norms entirely disconnected from state law, but they live in a relationship to the state. Civil death is about state law practices, and Ehrlich's observational practice tells us something about how social actors can use state law concepts to challenge state law.

Adopting a living law and a law in action approach to the topic helps in developing a concept of analysis for civil death that ties the theoretical framework to systematically collected and developed grounded empirical data. The theory develops in conjunction with observations from the world, and each informs the other. The systematic collection of instances of uses allowed for my initial beliefs about the concept and my premises to be challenged through observation, so I could reformulate my theoretical approach to the concept of civil death. This observation-based approach is the basis of grounded theory and the basis for my theory of civil death.<sup>148</sup> I am interested in how the civil death concept has developed in relation to the state and to societal actors to say something about how civil death affects social life.

I have taken a sample of reports that use the term “civil death” over a twenty-eight-month period from different web-based databases. The terms were searched in English, Spanish, and French. The analysis covers over one hundred news reports, press releases, position papers, and online campaigns. The sample slice from 2017, 2018, and early 2019 incorporates stories from more than ten countries. The sample of written “artifacts” all use the term “civil death” at least once over this twenty-eight-month period.<sup>149</sup> They were collected from different web-based databases using a Google filter that

---

<sup>146</sup> David Nelken, “Law in Action or Living Law? Back to the Beginning in Sociology of Law” in *Beyond Law in Context: Developing a Sociological Understanding of Law* (2009) 29 at 34–35.

<sup>147</sup> Nelken, *supra* note 146.

<sup>148</sup> John W. Creswell, *Qualitative inquiry and research design: Choosing among five traditions* (Sage, 1998).

<sup>149</sup> I searched the terms in English, French, and Spanish as “civil death” or “*le mort civile*” or “*la muerte civil*.”

automatically conducts and returns searches of uses of the term. I supplemented this with occasional directed searches from different search engines. I take this slice of time as a sample of the many uses, not as an exhaustive list but rather as a way to open up the question of what civil death is by asking how it is used systematically in practice.

The terms were searched in English, Spanish, and French in order to get a sample of uses of the term in both the common and civil law traditions. As there are significant methodological challenges in doing a cross-national analysis of a concept, I have quoted extensively from the actual reports and articles in order to provide as much transparency as possible in terms of how I categorize the uses of the concept. I should also clarify that the categorizations and explanations are not precisely comparative law, as I refrain from drawing too many conclusions from the various uses. I used the NVIVO software not to perform any sort of statistical, empirical analysis of the uses but to compile, sort, and arrange the information in order to analyze the various usages in as systematic a way as possible.<sup>150</sup>

The texts are used as artifacts to demonstrate how civil death is being used, and I do not engage in questions about how accurate the texts are or if they represent the real meaning of the concept. I do not ask if they are describing or using civil death accurately or fairly. Instead of treating the texts as authoritative sources for what civil death is as an analytic category, I am treating these texts as artifacts to represent the breadth of usage. Methodologically, these texts present a challenge in the sense that many of the texts will not or have not left a trace. The websites they came from no longer exist. Since these come from different sources internationally and archival practices differ, I myself have archived the documents. That is to say, it is impossible to retrieve all of them from any web-based source except from my files. I have, however, only quoted from sources that have a longer life span. I have treated these texts like interviews that are to be studied for their content, not necessarily for their authority.

---

<sup>150</sup> Jakub Niedbalski and Izabela Ślęzak, “Computer assisted qualitative data analysis software. Using the NVivo and Atlas.ti in the research projects based on the methodology of grounded theory” (2017) 71:41 *Stud Syst Decis Control* 85–94.

Since many of these campaigns and reports have a short life span on the internet as searchable content, they would not appear in an academic search from a library or from legal reports and court decisions. Heinonline did not and would not return many of these reports and uses, for example. The sources are news releases, court reports, government sites, but also activist campaigns and events. Search engines that are not specialized in law or in permanent archives have a tremendous potential to harness the ways actors not in a position of “authority” mobilize language and legal concepts.

I should note that the sources, which are web-based, are of variable quality; but I do not want to overstate the speciousness of the sources used in this analysis. In most of the texts I analyzed, the usage of the term civil death originates in a direct or indirect way from a legal agent such as a lawyer, court, or academic who describes some social phenomenon as civil death or uses the concept to elucidate something about a social phenomenon described. The concept of civil death is special or rare enough in jurisprudence that it is usually known by a person trained in law or who has a deep historical knowledge, and that person uses it in reference to a civil death statute or ruling or applies it to a set of state practices. It then gets picked up by reporters or in an interview or else it becomes part of a campaign. In this sense the tendency is towards a legal interpretation that is grounded in law and knowledge of legal concepts. The uses of civil death in these texts are in fact largely in conformity with the conceptual history that I do in the following two chapters. The classification of the different uses of civil death was done in tandem with the construction of my historical analysis, and the two informed each other. There were very few instances in which I thought the uses of the term from the web-based sources seemed completely off base compared to the historical uses that have a more academic pedigree, since they made their way into official reports.

I did filter out some instances of “civil death” when the two words civil and death were used in what appeared to be an accidental way in two different sentences. This was filtered out because it was clear that the two terms were not meant as a single concept. I also stopped including the civil registries of deaths at some point as doing so was bringing back too many results of the same kind, and there was little content to analyze.

I want to highlight the variety of ways civil death is used at present on the global stage to lay out the dimensions of civil death that differ from the picture that is often presented in the academic literature and which is only concerned with criminal justice. They are mapped to reflect how civil death is being

mobilized differently around the globe: to understand the category of civil death in practice or as a practice.

I use this socio-legal method of mapping the uses of the civil death term as opposed to searching for civil death in court cases, codes and statutes, or other legal documents because of the need to uncover the uses the concept is being put to globally and the ways it is being mobilized that differ normatively from many state-based uses of the term. There is a secondary normative element to this chapter in which I outline how the civil death term acts as a signaling device about sovereign power. I want to map not only the variety of cases for which the term civil death gets invoked, but also as a secondary observation how the term is used politically either to affirm or subvert state authority. That is, I want to know if it is legitimating or delegitimizing of the legal practices.

Although what follows maps the uses of civil death thematically rather than through an in-depth country-to-country comparison of civil death, there were some national specificities that emerged worthy of attention and some elaboration. There appeared to be different propensities to call something “civil death” in different countries or else the search engines selected more stories from these countries for some reason.<sup>151</sup> Countries that had the most stories about civil death during this slice of time were by far the U.S., India, and Turkey. In each country there had been a campaign, a court case, or a trigger event that happened that led to reports, stories, or press releases that used civil death to describe a particular set of legal techniques. In the end, this is not a comparison of the meanings of the concept in the different national legal systems, and I note this as an explanation for what may appear to be overrepresentation in the discussion. The mapping attempts simply to understand the diversity in the concept and find commonality even if it is quite thin. I offer the map for future research, which could do a more contextual analysis of the different uses of civil death in different national legal systems.

I started by classifying the texts by searching out commonalities and themes. As a methodological point the preliminary classifications were made before any deep historical analysis of the concept of civil death had been conducted. I made slight adjustments to the classifications after having delved

---

<sup>151</sup> It is difficult to use the web to track social movements or usages to draw empirical quantitative conclusions in part because I cannot control how the actual uses enter the web. For this reason, despite rigorously coding and classifying the data I ultimately did not opt for a quantitative analysis to complement the qualitative analysis.

into the legal history of civil death, but I found that my initial classification mapped fairly closely onto nineteenth-century classifications of legal persons in Europe made by historians who discussed civil death.

## 4. Civil Death: A Typology

Below is a table that outlines the way in which I organized and classified the sample of the more than 100 texts that use the term civil death in various ways to provide a map of some of the uses of civil death today. I ended up classifying the uses of civil death on the basis of the kinds of persons rather than the kinds of penalties associated with civil death (which was my initial impulse) because after sorting through the many uses, the kind of person or the condition of the person percolated out as the most relevant factor for categorization. These uses of the term follow the outline below in terms of legal persons.

| <b><u>CLASSIFICATION OF SOME USES OF CIVIL DEATH</u></b>                                                     |  |
|--------------------------------------------------------------------------------------------------------------|--|
| <b><u>Legal Persons</u></b>                                                                                  |  |
| <b>1. Death certificates</b>                                                                                 |  |
| <b><u>Special Kinds of Persons</u></b>                                                                       |  |
| <b>2. Convicted persons: collateral consequences of “common” criminal convictions</b>                        |  |
| <b>3. Imprisoned persons</b>                                                                                 |  |
| <b>4. Persons in relationships of dependence</b>                                                             |  |
| <b>5. Married women</b>                                                                                      |  |
| <b>6. Persons in religious orders</b>                                                                        |  |
| <b>7. Persons who are security risks: terrorism/political dissident (persons who violate a public trust)</b> |  |
| <b>8. Corporations</b>                                                                                       |  |
| <b><u>Administration of Civil Death</u></b>                                                                  |  |



## 9. Citizen identification systems

Mapping the uses of civil death by social actors allows me to move beyond a state-centric use of civil death as it emerged from the common law to show how the term describes a much broader socio-legal landscape animated by a variety of popular and irreverent views of the notion. While there are states that continue to call upon civil death by name in their laws and judicial rulings, the term civil death is being used today in a legally pluralistic mode by persons with technical knowledge of law in ways to challenge certain state-based legal techniques. The central insight of this chapter is the manifold ways in which civil death emerges and their relationship to state-based law. One conclusion I draw from the samples was that the term civil death was not simply used, it was mobilized. That is to say, there was a signaling that was done with the civil death term in relation to the state. The iteration of the term civil death in the public sphere that is the worldwide web makes the mobilization of civil death as a term its own public spectacle. I look at the uses of civil death and their mobilization as either affirming or subverting state authority.

The sampling of cases suggests two things: first, on a global scale the uses of civil death are far more expansive than what many academic legal definitions of civil death suggest. They are, however, also contained; and there is a fairly coherent logic to the ways the concept is used. And secondly, because a more varied conception of civil death emerges through a socio-legal inquiry, I can suggest that construction of a category of analysis for civil death should provide a different understanding of civil death today.

### 4.1. *Death Certificates*

The first category is organized as an overarching use about legal personhood. The first class of uses deals with death without a body and a body without death. These are cases in which death and the body are quite separate, and civil death is revealed as a kind of legal fiction. For example, if a person goes missing, eventually a death decree must be issued by the state. There is death without a body, and in some instances a dead body without a legal death. The legal pronouncement by the state that a death has occurred is formally known as a civil death, especially in civil law countries. This may be the purest form of the concept of civil death; and it is the most commonly occurring, as it came up so many times in the searches that I had to begin to filter them out.

Death certificates are in many ways the cleanest example of civil death, as it is the state's recognition of something that in principle does not depend on the state to be known. A family does not need the state to tell them when their grandmother has died. However, the family must have this state-issued death certificate to activate a will, to settle debts in someone's name or to transfer property, and to remarry. There are many legal relationships that depend on state recognition of death. The state-issued civil death certificate severed the social relations with the living.

A second set of death certification uses reveals the more “fictitious” nature of civil death. These are cases in which there is a pronouncement of death without a body or, in the event the state refuses to recognize death, a body without death. The first cases refer to civil death in instances where a person goes missing. Generally, states have a period of time designated by statute that the person has been missing before he or she can be declared legally dead. The declaration of a person that has gone missing as civilly dead reveals the fictive element of civil death as something distinct from reality. In the absence of actual knowledge of death of the body, the state declares the person dead in law so that persons can remarry, land can be transmitted, etc.

The texts that elaborate on a civil registration of death as news, as opposed to a simple announcement, are generally newsworthy for some reason—that is, they are exceptional in some respects. This may help explain why there are several reports of persons who are declared civilly dead after having gone missing decades earlier and were thought to have been “forcibly disappeared” by the state. That is, the state must declare, by state law, that after a given amount of time the person is dead and is required to acknowledge, apparently at times begrudgingly, that the disappeared person or persons are dead. This happens even in cases where the person is disappeared by its own agents. The following excerpt refers to a case in which a court after two decades since the man went missing issued a declaration of death.

After years of futile attempts to locate him, his family initiated an over four-year-long legal battle with a plea to find ‘missing’ Balwant Singh, who was a senior auditor in the Audit Department of the Punjab Government at Chandigarh ... the counsel of Balwant Singh’s wife Upkar Kaur, said the decision about the declaration of ‘civil death’ of Balwant Singh was pronounced by the court of Civil Judge (Junior Division) Paramjit Rishi. The judgment came four years after the case was filed by the petitioner

on January 14, 2013. In the petition, Upkar Kaur had apprehended that her husband was “kidnapped and killed” by the police whereas the latter had been denying this.<sup>152</sup>

The civil death in this case is a judgement that emanates from the state while the state does not acknowledge that the police had killed the man. It declares the death of the man without a body because the state alone has the authority to do so. These state declarations of death when the state is the entity that purportedly “disappeared” the physical person sits in a strange relationship to state power. Family members seeking resolution for a missing person have to appeal to the state that disappeared the person in the first place to act for a legal resolution.

#### 4.2. *Collateral Consequences of “Common” Criminal Convictions*

The first category of special persons are persons with a criminal conviction, this is often classed in terms of the kinds of collateral consequences that follow “common” criminal convictions. Most of the reports and articles coming out of the United States were in relation to the civil death of persons with a criminal record. By far, most of the cases referred to restrictions on voting. While many articles focused on the actual collateral consequences, there were different angles taken in the use of the term civil death. Some stressed the severity of the kinds of problems that collateral consequences created for persons. The other angle regarding the collateral consequences was the procedural problems that often led otherwise undeserving persons to be hit with a slew of collateral consequences. The lack of adequate counsel and the propensity for persons to make plea deals were frequently cited as problems in the U.S. because, even without serving any prison time, persons face consequences for convictions.

In one report posted on the Davis Vanguard, David Buskey working for the ACLU Criminal Law Reform Project argued that when prosecutors get to decide who is given access to public defenders when resources are strapped, there is a problem. “Even without jail time, these convictions can irrevocably damage a life. The consequences of having a criminal record can include deportation, loss of employment or housing, and ineligibility for crucial public benefits, what many refer to as a ‘civil

---

<sup>152</sup> Varinder Singh, “26 yrs on, TADA convict Bhullar’s ‘missing’ father declared dead,” May 31, 2017, online: *The Tribune of India* <<https://www.tribuneindia.com/news/archive/punjab/26-yrs-on-tada-convict-bhullar-s-missing-father-declared-dead-415193>> (last visited July 15, 2021).

death.”<sup>153</sup> This is the classic, American conception of civil death. The use of the term civil death signals that the consequences for defendants are severe. The procedural challenge the lawyers present is that despite the prosecutorial discretion that decides that a right to counsel is only required for the most serious offences and when prison-time is on the line, then it seems the right to counsel becomes its own denied right that could lead to the forfeiture of more rights. The term civil death is mobilized to convey the severity of the collateral consequences in a campaign about the right to counsel. By creating press releases about these issues, it also becomes a public awareness campaign. They are not challenging the consequences as such in these articles, but rather the right to counsel.

In other cases, there is a direct challenge to collateral consequences, and the term civil death is mobilized to convey the severity of these consequences. The term civil death appears frequently in relation to the loss of custody of a child as a collateral consequence.<sup>154</sup> Proliferation also appears to be a theme that is found in the texts. An appeal is made based on the sheer numbers of consequences and persons affected and the increasing marginality of racialized persons who are disproportionately affected.

“In Philadelphia alone, we subject roughly 400,000 of our neighbors to various forms of social ostracism based on criminal records to our own detriment and with no public safety benefit.” M. Zane Johnson, managing attorney for Philadelphia Lawyers for Social Equity wrote last month in an op-ed for *The Legal Intelligencer*. This exclusion has been likened to a civil death.

Mass incarceration has resulted in the creation of a second-class citizen class, primarily comprised of young men of color, who face a bevy of post-prison obstacles including voter disenfranchisement, immigration problems, inability to obtain certain occupational licenses, permanent ineligibility for public housing, food stamps and welfare assistance, and difficulty in returning to school because of federal student aid. Just to name a few.<sup>155</sup>

---

<sup>153</sup> Lynette Hazelton, “Philadelphia Lawyers for Social Equity wants more policy changes for people with criminal records,” *Generosity*, August 28, 2018, republished by The Philadelphia Reentry Coalition, August 28, 2018, online: *The Philadelphia Reentry Coalition* < <https://www.philadelphiareentrycoalition.org/single-post/2018/09/10/philadelphia-lawyers-for-social-equity-wants-more-policy-changes-for-people-with-criminal> > (last visited July 15, 2021).

<sup>154</sup> One news source refers to the termination of parental rights as civil death, “a child’s removal from home or the termination of parental rights, also known as the ‘civil death penalty.’” Aleza Freeman, “Negotiating a Child’s Future,” April 6, 2018, online: *University of Nevada News Center* < <https://www.unlv.edu/news/article/negotiating-childs-future> > (last visited July 16, 2021).

<sup>155</sup> *Idem*.

The term civil death is useful in these kinds of campaigns because it appears to create a catch-all for collateral consequences that conveys the severity of the loss of benefits and denial of rights. In addition to campaigns that look at civil death as a phenomenon of cumulative disabilities, the campaign to end voter disenfranchisement is quite dominant in the sample. The disproportionate impact of voter suppression on racialized persons is represented in a significant number of texts, as this particular consequence disenfranchises Black Americans. There are different ways in which civil death and its impact on racialized communities get mobilized. The turn to history is one way. The NAACP's Campaign to restore the vote touches on civil death as seen in the following excerpt taken from a piece written in 2017 by Frederick Reese:

Felony disenfranchisement is linked to the ancient Greek and Roman concept of “civil death,” or the notion that a person ceases to exist as a member of society once he or she acts against it. Throughout history, the notion of “civil death” has played out in different ways. In the Middle Ages, “civil death” meant that no laws protected you. This means that an ex-felon then could be injured or even killed with impunity. In the Holy Roman Empire, ex-felons were declared “vogelfrei” or “free as a bird.” The term applied to not only the prisoner now being free, but to the sense that society was free of the prisoner—as a term of the release, the prisoner was banished from society.<sup>156</sup>

History is used to underpin the current legal practice of disenfranchisement on the basis of this now standard narrative of the history of civil death. It is interesting that this narrative roots the concept in a legal history and is very close to a legal narrative in the academic literature that has penetrated civil society and civil society campaigns. The interpenetration of law and civil society (which in many ways challenges the premise of law and society being separate or separable) demonstrates the ways the living law can develop to re-appropriate a legal term to challenge state authority.

The denial of the right to vote and particularly the racialized legacy within civil death is found in other common law English-speaking countries. In New Zealand this same appeal to history is perhaps more

---

<sup>156</sup> Frederick Reese, “Voting is Seen as a ‘Privilege’ Not a ‘Right’ As States Find New Ways to Suppress the Black Vote,” August 6, 2017, online: *The Atlanta Black Star* < <https://atlantablackstar.com/2017/08/06/voting-seen-privilege-not-right-states-find-new-ways-suppress-black-vote/> > (last visited July 16, 2021).

explicit as a way to discredit the institution. By appealing to medieval history, the author argues that civil death goes against the liberal universality of rights.

The denial of prisoners' rights to vote had its origins in Medieval Europe. 'Civil death', the forfeiture of rights applied to those convicted of grave crimes affecting public welfare. For these worst of crimes, those convicted became 'dead in law'. But since Medieval times, the voting franchise has been extended—to non-land holding men, to indigenous populations, and 125 years ago, to women in New Zealand. Through time, the march of progress has seen an extension of the franchise, not a reduction. The exclusion of prisoners therefore, makes a mockery of the 'fundamental', 'universally recognised' right to vote, and, hypocrites of politicians who previously recognised its abhorrence, but now fail to treat it as a priority, despite the Supreme Court's recognition that the ban on prisoners' voting is inconsistent with the Bill of Rights. When prisoners in New Zealand are disproportionately Māori, and more young Māori men are locked up than for similar crimes committed by their pakeha comrades and there's evidence of institutionalised racism.<sup>157</sup>

The mobilization of the history of civil death is used to project an ominous picture of how things used to be and how things should be. The progress narrative that acts as a backdrop to this usage provides the argument that civil death is backwards looking. The campaigns are perhaps a bit more spirited than law journal articles, but references to medieval history sound reminiscent of the title of the 1937 *Harvard Law Review* Note: "Civil Death Statutes: Medieval Fiction in a Modern World."<sup>158</sup> The argument is that the historical institution of civil death does not fit with the modern situation. *The Intercept* published a report on the potential law change in Florida that would allow former convicted persons to vote again. The article highlights that there was a grassroots campaign in Florida to change the law, and this might help explain in part why there were a large number of reports that focused on the Florida disenfranchisement law. In this piece, the reporter for *The Intercept* interviewed a lawyer at the Brennan Center for Justice who linked civil death to an "outmoded concept of government and criminal justice":

---

<sup>157</sup> Christine Rose, "Denial of Prisoners' Votes Medieval Injustice," December 1, 2018, online: *The Daily Blog* <<https://thedailyblog.co.nz/2018/12/01/denial-of-prisoners-votes-medieval-injustice/>> (last visited June 3, 2021).

<sup>158</sup> *Supra* note 16.

Disenfranchising criminals has a legal history that dates back well before the existence of the United States. Sean Morales-Doyle, a counsel in the Democracy Program at the Brennan Center for Justice, said the practice was prevalent in English common law and can likely be traced back to ancient Rome. “It comes from an outmoded concept of government and criminal justice, that if you commit a crime you become an outlaw, and in addition to potentially being subject to the actual death penalty, it is appropriate for you to suffer a ‘civil death’ and no longer be allowed to participate in society in any way,” he said.<sup>159</sup>

Not only is history used to discredit civil death as illiberal and medieval, but it also makes it visible. The use of the term civil death as part of a campaign turns the invisibility of the punishment into a public spectacle. The very invisible disabilities in modern administrative societies are very different from incarceration, flogging, or execution. By calling them a civil death, the punishment is made corporeal or real in some way even if it relies on a legal fiction. There is a gravity that is conveyed but also an immaterial materiality.

#### 4.3. *Prisons*

While there are far more examples in my sample of collateral consequences of a conviction, usually post-release, being called a form of civil death, there were also a fair number of texts that came back challenging civil death statutes for prisoners. A campaign to challenge the civil death statute in Rhode Island that is still on the books elicited several articles and releases about prison conditions in Rhode Island.

An ACLU Press release from Rhode Island in 2017 notes that the civil death statute in the state could possibly bar a lawsuit brought on behalf of a prisoner since, according to the Rhode Island Department of Corrections (DOC), the prisoner’s status as civilly dead while incarcerated bars him from having legal personality to bring a lawsuit.

---

<sup>159</sup> Rachel M. Rose, “Florida Has Been Stealing Votes From Black People Since the Civil War. That Could Change in November,” September 6, 2018, online: *The Intercept* < <https://theintercept.com/2018/09/06/florida-voting-rights-restoration-felons/> > (last visited June 3, 2021).

Without addressing the merits of Paiva's claims, the DOC has asked the court to dismiss the lawsuit, citing the state's "civil death" statute as barring Paiva from bringing a lawsuit against the state in the first place.

The state's "civil death" law, enacted more than a century ago, declares people sentenced to life in prison to be "dead" for virtually all legal purposes, even though most of them are eligible for parole after 20 years. Rhode Island remains one of only three states with a law like this on the books, despite the fact that as far back as 1976, a federal court noted that these laws had been "condemned by virtually every court and commentator to study" them.<sup>160</sup>

Citing the near universal condemnation of civil death statutes is another strategy against withholding certain rights for prisoners who are incarcerated. This is a variation of the use of history to condemn medieval laws. Importantly, however, the use of civil death laws against prisoners is not always to mobilize sentiments against an overly harsh approach by the state. The use of the term civil death also affirms state power to punish persons.

In the UK, the *Daily Mail* has used the term civil death while writing about prisoners' right to vote. This is the headline of the article: "Prisoners WILL be allowed to vote: Convicted sex offenders and violent inmates serving less than a year are to be given electoral rights."<sup>161</sup> This headline which uses the term civil death in the article signals that civil death, in this instance of "sex-offenders" and "violent inmates," is a proper use of state force. Instead of being a rallying cry to abolish the deprivation of rights, it is used to signal a reasonable form of punishment for persons who have committed serious crimes. The article's use of civil death sits in a complex relationship to state authority since it involves the European Court of Human Rights. The article reads, "People falling into this category were known to have suffered what is termed as 'civil death' upon conviction, meaning they lost a wide range of legal and civic rights enjoyed by the rest of the adult population—including the right to vote."<sup>162</sup> The article then goes into the 2005 European Court of Human Rights decision that claimed a blanket ban on voting rights of convicted persons is a violation of human rights law. The article concludes by

---

<sup>160</sup> Press Release, "ACLU asks Court to Reject State's Claim that Inmates Serving Life Cannot Challenge Rights Violations," September 7, 2017, online: *ACLU of Rhode Island*, < <https://riaclu.org/en/news/acu-asks-court-reject-states-claim-inmates-serving-life-cannot-challenge-rights-violations> > (last visited June 3, 2021).

<sup>161</sup> Shari Miller, "Prisoners WILL Be Allowed to Vote: Convicted Sex Offenders and Violent Inmates Serving Less Than a Year Are to Be Given Electoral Rights," online: *The Daily Mail online* < <https://www.dailymail.co.uk/news/article-5028497/Prisoners-allowed-vote-government-U-turn.html> > (last visited July 16, 2021).

<sup>162</sup> *Ibid*



noting that, “Then Prime Minister David Cameron resisted the move, saying the idea of letting prisoners vote makes him feel ‘physically sick.’”<sup>163</sup> The relationship to state authority is decidedly affirmative, but it can also be read as an appeal to state sovereignty and to a sovereign right to punish.

A *Huffington Post* article in the UK written by Alexander McLean, the founder of the African Prisoners Project, referred to the UK example and the European Court of Human Rights decision to advocate for prison reform and the right of persons in prison to vote in Kenya. Using the same definition as the one used by the *Daily Mail* to say convicted prisoners experience a civil death, the author goes on to write, “Most of us are in support of this. The argument being, ‘if you are willing to break the law, you can’t claim the right to make the law for everyone else.’ However few of us would feel that our vote has so significant an impact.”<sup>164</sup> The author concedes these points, but then goes on to write that disenfranchisement goes against reintegration efforts and lists other pragmatic considerations for reinstating the right to vote for convicted prisoners in Kenya. The author uses civil death as a neutral concept but makes the arguments specifically for the right of prisoners to vote a pragmatic issue.

While most of the reports about prisoners were relative to a civil death statute, there were also representations of prison as itself an example of civil death. *Truth Out* wrote about the campaign for prison abolition and the conditions of prisons as being civil death for the convicted.

Prison abolitionists have often discussed the concept of civil death—the manner in which incarcerated people are stripped of their civil and human rights and cut off from any meaningful participation in society. When the torturous nature of prisons is understood, it becomes clear that a life sentence is a civil death sentence, and that even upon release, many prisoners find themselves locked out of society, rather than locked into a prison. Measures like house arrest, disenfranchisement, barriers to education and employment, as well as the trauma of torturous prison conditions, prevent many formerly incarcerated people from experiencing what most of us would characterize as “freedom.”<sup>165</sup>

---

<sup>163</sup> *Ibid*

<sup>164</sup> Alexander McLean, “Kenyan Elections Provide Unlikely Source of Hope For Prison Reform”, August 11, 2017, online: *Huffington Post* (UK) < [https://www.huffingtonpost.co.uk/alexander-mclean/kenya-elections\\_b\\_17706018.html](https://www.huffingtonpost.co.uk/alexander-mclean/kenya-elections_b_17706018.html) > (last visited July 16, 2021).

<sup>165</sup> Kelly Hayes, “Prisoners Strike for Civil Resurrection,” September 9, 2018, online: *Truth Out* < <https://truthout.org/articles/prisoners-strike-for-civil-resurrection/> > (last visited June 3, 2021).

In this campaign the conditions of being in prison are continuous with life outside the prison, and the whole of losing one's rights inside and outside is described as civil death. It should be noted that this example deals with prison conditions in states that do not have civil death on the books. These are the "normal" deprivations of prisoners' rights. This text takes the stripping of rights as the unifying concept because it describes the kinds of deprivations prisoners are exposed to, such as the deprivation of family, political action, and even basic life conditions such as light and medical care. Ultimately the deprivations themselves become the source of a state of insecurity as they are linked to civil unrest inside prisons.

#### 4.4. *Disability, Aging, Leprosy, and Other Relationships of Guardianship*

Disability, physical differences, and aging persons were described as suffering a civil death when placed in a formal guardianship relationship. One report from the site *Disability Scoop*, self-described as "The Premier Source for Developmental Disability News," remarks on a report released by the National Council on Disability that concluded that guardianship is overused in the U.S. There are approximately 1.3 million persons under guardianship in the U.S., Phoebe Ball, who worked on the report commented, "We need to explore alternatives to guardianship such as supported decision-making that enable people to avoid this civil death."<sup>166</sup>

"Former Congressman Claude Pepper famously said of guardianships, 'The typical [person subject to guardianship] has fewer rights than the typical convicted felon.... It is, in one short sentence, the most punitive civil penalty that can be levied against an American citizen, with the exception, of course, of the death penalty,'" said Phoebe Ball, NCD Legislative Affairs Specialist who worked extensively on the report. "NCD chose to examine this topic at depth given the implications for someone's civil rights and liberty under guardianship—that an individual is losing the authority to make decisions regarding where to live, whether to work and where, where to travel, with whom to socialize, and how to manage

---

<sup>166</sup> Sean Heasley, "Federal Report Calls For Alternatives To Guardianship," March 23, 2018, online: *Disability Scoop* <https://www.disabilityscoop.com/2018/03/23/federal-alternatives-guardianship/24893/> (last visited June 3, 2021).

money and property. We need to explore alternatives to guardianship such as supported decision making that enable people to avoid this civil death."<sup>167</sup>

For persons living with disabilities, being placed under the authority of a guardian is the loss of authority over their life and is compared to the death penalty as the “most punitive civil penalty.” The severity comes from the loss of one’s rights and the totalizing loss of authority over one’s decisions, including one’s property.

These cases extend to the elderly as well. One news article cited two different cases in California of probate courts that would be investigated for placing elder persons in conservatorship when the person held a large estate. “O’Malley was concerned about the ‘Civil Death’ of Elinor Frerichs, a caucasian elder who was placed under conservatorship to ‘save’ her \$6 million estate after she married an African American man.”<sup>168</sup> These cases of guardianship and conservatorship involve losing one’s rights to one’s property and not being able to advocate for one’s own interests. This particular news report emphasized the economic interests of third parties sometimes involved in these cases.

A UN press release was directed to the civil death of persons affected by leprosy. This is a somewhat different case, as it seems less about guardianship and more about discrimination and the ways civil death can be formalized in structures other than being placed in the care of others but rather being expelled socially. The press release was from a human rights expert who urged states to end the civil death of persons with leprosy. It is somewhat long, but the following excerpt describes in detail the kinds of rights deprivations persons with leprosy sometimes face:

---

<sup>167</sup> Press release, “NCD Report Examines ‘Civil Death’ of the Rights of People with Disabilities and the Elderly under Guardianships, Calls on Department of Justice to Ensure Full and Fair Due Process Rights,” March 22, 2018, online: *National Council on Disability* <<https://ncd.gov/newsroom/2018/federal-report-examines-guardianships>> (last visited June 3, 2021).

<sup>168</sup> Alisa Partlan, “They Say Legal Guardians Ripped Them Off—and the State AG Let Them Down,” June 5, 2018, online: *City Limits* <<https://citylimits.org/2018/06/05/they-say-legal-guardians-ripped-them-off-and-the-state-ag-let-them-down/>> (last visited June 3, 2021).

“Persons affected by leprosy and their families have been subjected to serious human rights violations. They have been denied their dignity and their basic human rights; subjected to stigmatising language, segregation, separation from their families, and separation within the household, even from their children.

“They have been denied care, as well as any means of subsistence; denied property ownership and a place to live; shut out of education; prevented from marrying or having children, and have had their freedom of movement restricted,” the UN expert added.

“Persons affected by leprosy and their families have also been denied the right to participate in public and political life, and have been subjected to physical and psychological abuses and violence. Many have faced compulsory internment, forced sterilisation, institutionalised silencing and invisibility, and erasure from history. They have even been denied any acknowledgement of their humanity,” said Cruz. “The structural violence and denial of rights imposed upon those affected have led some of them to experience what might be called a ‘civil death.’”<sup>169</sup>

This is an important case because it points not only to the rights that are withheld, but also the “social exclusion,” the “disability produced by social discrimination,” so that structurally we can see that civil death is being used in a slightly different form by a law professor and rights expert who identifies a different category of civil death application: rights abuses of a group of persons by both state and non-state actors. The legal mechanism identifies the civil death rather than the denial of rights combined with the category of persons affected. Internment, separation from family, sterilization, and institutionalization are tied to a kind of social and political exclusion.

It is also interesting that the UN is less concerned about the theory of the state in their assessment, as the civil death in the analysis calls on states to protect persons with leprosy. It is not clear what mechanisms should be in place for state-generated deprivations and what mechanisms for society-generated exclusions. In this case it is both challenging and affirming state authority.

---

<sup>169</sup> Press Release, “UN Rights Expert Urges Action to End “Civil Death” of Persons Affected by Leprosy,” June 19, 2018, online: *United Nations Office of the High Commissioner for Human Rights* <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23214&LangID=E>> (last visited June 3, 2021).

Included in this section is the relationship between parent and child. It is difficult to classify this one since there appear to be two ways in which it is used. The parent/child relationship is one in which a rights analysis follows the line that children do not have all the rights of other citizens because they are special kinds of legal persons and in a dependent relationship with an adult or with the state. Children are citizens that are deprived of many of the rights of other citizens, such as the right to vote due to their mental capacity and their prescribed legal capacity. Another case that came up, however, involved instances in which what was being called civil death was when the parent's custody was severed and not in relation to a criminal conviction; and in this instance, the commentary was that it was a civil death for the parent: "We are using the civil death penalty to terminate the parental rights because of a disease,...It seems fairly unfair that we're using somebody's disability or disease against them."<sup>170</sup> This familial relationship is severed by the state when the parent no longer has custodial rights over the child. The example is a bit vague; but in this case, there was not much more context. Civil death is used to describe the loss of one legal relationship—the custodial relationship—to convey the gravity of losing parental rights. It is important to note, however, that it is a loss of a single legal relationship and not the cumulative loss of rights, benefits, and privileges described in the collateral consequences literature or other examples of civil death talk.

#### 4.5. *Divorced Women*

In one instance, Muslim married women who were subjected to their husband's instant divorce by triple *talaq* were said to suffer a "civil death for women." The senior counsel appeared before the Supreme Court of India to argue that divorce done outside the courtroom and initiated and completed by only one party amounted to a civil death.

As the Supreme Court today, on May 11, 2017, began hearing the arguments in what is easily one of the biggest cases in the history of personal and especially Muslim personal law debate, the senior counsel appearing for the Muslim women petitioners, Indira Jaising, dubbed the controversial practice of triple *talaq* as an "extrajudicial, unilateral act that's civil death for a Muslim woman".

---

<sup>170</sup> "Republican Family Law Bills Make it Easier to Use 'Civil Death Penalty'" Wisconsin Examiner, December 13, 2021 (this article was found to replace an earlier source that disappeared before archived.) <https://wisconsinexaminer.com/2021/12/13/republican-family-law-bills-make-it-easier-to-use-civil-death-penalty/> (Last accessed December 13, 2021)

TripleTalaq is an extrajudicial, unilateral act. Can status of a woman be unilaterally changed? It means civil death for her: Indira Jaising

— Krishnadas Rajagopal (@kdrajagopal) May 11, 2017<sup>171</sup>

In the related tweet, the term civil death was mobilized to talk about unilateral status change (from married to divorced) as a form of civil death for married women. It is unclear what the full argument is from the small report. It could be in reference to the change in status or it could be in reference to the change in control over property and relationship to children. In this case, the use of the term civil death is assigned to an extrajudicial process by private parties and so it is asking for the state to intervene.

#### 4.6. *Religious Orders*

There were only a few returns on this category of persons, and in both cases they originated in India from the same few court cases in which persons who had entered religious orders had given up their property and right to claim an inheritance, but after leaving the order wanted their rights reinstated. Despite the scarcity of present-day cases, this, as I will later show, is an important category for civil death. The academic histories of civil death, as I mentioned previously, describe an ancient history in criminal law that reaches into Roman law. In many of these histories, however, there is often an oddity that is described, cases of civil death for monks. It is largely a defunct form of civil death today since people in many liberal democracies are not required to give up their rights when they enter a religious order but may in fact relinquish all claims to property and take a vow of celibacy. There were a few stories in India that surfaced as the law had changed during the period when I was selecting cases. As one article wrote, “In 1954, the Indian Supreme Court ruled that any individual who entered a religious order or becomes a sanyasi dies a ‘civil death’—in other words, sanyasis or monks of any religious

---

<sup>171</sup> “Triple Talaq is an Extrajudicial, Unilateral Act that’s Civil Death for a Muslim Woman: Indira Jaising,” May 11, 2017, online: *The Daily O (India)*, <https://www.dailyo.in/politics/triple-talaq-uniform-civil-code-indira-jaising-muslim-women/story/1/17147.html> (Last visited June 3, 2021).

order effectively had no civil rights.”<sup>172</sup> What it means to have no civil rights in this case is not clear from the articles, but civil death is understood here as the forfeiture of civil rights, and in these cases the litigation was over rights to inheritance and property. What is interesting from these cases is that there is no apparent link to the cases of criminal civil death and history that is often given for civil death. It is at least not apparent why the loss of civil rights would originate in any Greek or Roman laws based on committing an infamous crime or from any other form of punitive outlawry.

In another article, the news reported that a Division Bench of the Kerala High Court had decided that inheritance rights would be reinstated over their family properties.

“That one would suffer civil death and be deprived of his property on entering into the Holy Order would be a naked infringement of Article 300 A of the Constitution (right to property),” the Bench observed. The court made it clear that the High Court’s earlier ruling that priests/nuns suffered “a civil death” on joining monastery was no longer good law in the case of civil rights.<sup>173</sup>

In this reported ruling, the civil deaths of priests and nuns were deemed to be unconstitutional. It was ruled no longer to be good law, meaning that there had either been a change in other laws or else there was some sort of legal reversal. The violation of a right to property under Indian law underpins the rejection of civil death in this case. There may be cases in which persons lose their rights to property, but entering a religious order is no longer one of them. It may be properly understood as state-affirming, since it refers to an outdated form of civil death that has been eliminated.

#### 4.7. *Terrorism/Corruption/Political Dissent*

---

<sup>172</sup> Anubha George, “Vow of Poverty: An Age-Old Tradition Practiced by Priests and Nuns Has Been Upended in Kerala,” July 25, 2017, online: *Scroll.In* < <https://scroll.in/magazine/843273/vow-of-poverty-an-age-old-tradition-practiced-by-priests-and-nuns-has-been-upended-in-kerala> > (Last visited June 3, 2021).

<sup>173</sup> “Priests, Nuns Have Right to Ancestral Property,” June 8, 2017, online: *The Hindu* <<https://www.thehindu.com/news/national/kerala/priests-nuns-have-right-to-ancestral-property/article18868692.ece>> (Last visited June 3, 2021).

Activities deemed to be terrorist action or that were politically motivated or could undermine state authority, violations of public trust, and challenges to state authority in some destabilizing way made up another large group of the sample. These texts were split, however, in relationship to state power.

On the one hand, some cases used the term civil death to signal the severity of the transgression as well as a sense of justice of the state's response. In these cases, governments were often explicitly calling for civil death statutes by name to mark that the government was providing an adequate response to a threat. It also appeared to signal more than severity for deterrence purposes against crime; it was used to demonstrate the extent to which the state created special laws to maintain social control. In these cases, the exceptional nature of the offence was highlighted. These examples take into account both the exceptional nature of the crime and the formality of creating special legislation providing for civil death in accordance with the law. That is to say, in all the cases the rights forfeit were taken away in accordance with the law.

In this instance, civil death is used to signal the activation of state power as a means to deal with a political threat. One quote from a politician in Peru simply reads, "*Apoyamos la muerte civil para los terroristas liberados*" [We support civil death for released terrorists (*my translation*)] to signal the idea that once terrorists are free, they are subject to civil death. In cases of amnesties or transitional justice in which there may have been no prison time or reduced prison time, it seems that civil death is a non-penalty used to signal not the severity of the measure, but a more complex social goal. The use of civil death specifically is to signal something about the extraordinary circumstances rather than the extraordinary nature of the penalty. Take the following two arguments in which civil death activates state power in ways similar to other laws and is not necessarily something extraordinary or terribly severe.

*El congresista fujimorista Héctor Becerril presentó hoy un proyecto de ley que establece la denominada muerte civil para quienes sean sentenciados por terrorismo y apología al terrorismo. Así, plantea que las personas que reciban condenas por estos delitos sean inhabilitados a perpetuidad para ingresar o reingresar al sector público.*<sup>174</sup>

---

<sup>174</sup> *Id.* "Today Fujimorist Congressman Héctor Becerril presented a draft bill that establishes so-called civil death for those sentenced on charges of terrorism or apology of terrorism. It thus provides that individuals that are condemned for these crimes will be ineligible for entering or reentering the public sector." [*My translation*]



*Asimismo, recuerda que hay antecedentes de carácter legal que prohíben el acceso a contratos o designaciones en la administración pública. Por ejemplo, menciona la Ley de Reforma Magisterial o Ley N° 29944, de noviembre del 2012, que dispone que para participar en el concurso público por una plaza docente se requiere “no haber sido condenado ni estar incurso en el delito de terrorismo, apología del terrorismo”, entre otros delitos.*<sup>175</sup>

Civil death in this case is not different from collateral consequences of a criminal conviction as understood in the U.S. A lifetime prohibition to public administration contracts is a collateral consequence of a criminal conviction. It is, however, referenced by the state in law as an instance of consequences exclusively in cases of terrorism. The expansion of these collateral consequences for persons deemed terrorists as formal civil death is presented as both extraordinary, since it is the crime of terrorism, and also in accordance with the law, since civil death is not different from laws on the books about collateral consequences.

In these cases, the particularities of what civil death means in law depends on the context. In Peru, the legal disabilities or the rights forfeit are likely different from those rights in other countries; and in Peru civil death “techniques” or the collateral consequences were only applied for a small number of crimes. such as terrorism and apology of terrorism. At least, by the end of the sample period, there was a call for a further expansion of the civil death legislation.

The kinds of crimes that fell under the civil death laws were expanded to include other offences: “[Cesar Villanueva] adelantó que el Gobierno presentará un proyecto de Ley de Ampliación de la Muerte Civil por narcotráfico, Lavado de Activos y Financiamiento del Terrorismo. ‘Hemos avanzado prohibiendo que personas condenadas por corrupción ingresen o permanezcan en la Administración Pública, pero tenemos que ser más rigurosos para garantizar la integridad en el Estado’, enfatizó.”<sup>176</sup>

---

<sup>175</sup> René Zubieta Pacco, « Becerril plantea muerte civil para sentenciados por terrorismo,» November 7, 2016, online: *El Comercio* < <https://elcomercio.pe/politica/congreso/becerril-planteta-muerte-civil-sentenciados-terrorismo-147162-noticia/> > (Last visited June 3, 2021). “Additionally, [Congressman Héctor Becerril, the legislation’s proponent] recalls that there is legal precedent that bars the signing of contracts or access to civil service. For instance, the Law on Judicial Reform, or Law No. 29944 of November 2021, which states that in order to participate in a competitive call for applications for a teaching position it is necessary “not to have been sentenced or to fall under the charge of terrorism, or apology of terrorism”, among other crimes” (*My translation*)

<sup>176</sup> Press release, “César Villanueva: Presentaremos proyecto de ley para ampliar la muerte civil por narcotráfico, lavado de activos y financiamiento del terrorismo,” May 2, 2018, online: *Presidencia del Consejo de Ministros, Gobierno de Perú* < <http://www.pcm.gob.pe/2018/05/cesar-villanueva-presentaremos-proyecto-de-ley-para-ampliar-la-muerte-civil-por-narcotrafico-lavado-de-activos-y-financiamiento-del-terrorismo/> > (Last visited June 3, 2021). “[Cesar Villanueva]

As the question of which transgressions are covered under civil death and how these laws may expand laws remains open, so too does the question about which rights or privileges are forfeit and what disabilities may be incurred.<sup>177</sup> In these cases, the kind of crime, that of terrorism, appeared to be something that was treated as special and requiring a civil death. These cases were used to strengthen the state in its legitimacy to punish or to regulate cases of terrorism, which needed to be treated as different from other kinds of transgressions. Presumptively, this is because it is an attack on the state or social peace.

In another set of cases, charges of terrorism were dealt with by a set of legal practices that persons not in a government position designed as civil death in order to challenge the use of the practices. The use of the term civil death signaled excessive use of state power.

Another large grouping of uses of the term civil death came from cases of threats to national security from Turkey. A failed coup attempt in Turkey culminated in the issuance of a state of emergency order in 2016. As a result, many different forms of political dissent were targeted. Political dissent in any form of government opposition and of various non-violent forms triggered expulsions from jobs and the confiscation of passports. The following two excerpts illustrate the kinds of penalties that people were being subjected to and the reported rationale.

---

announced that the government would propose a Bill for the expansion of civil death for drug trafficking, money laundering, and the financing of terrorism. We have moved forward with the prohibition of persons condemned for corruption from entering or remaining in Public Office/Public Administration, but we have to be more rigorous to guarantee the integrity of the country, he emphasized. (*My translation*)

This point is further developed in the rationale of the following: “*En ese sentido, considera que ‘los condenados por delitos de terrorismo han actuado en contra del Estado, demostrando una clara animadversión en contra del mismo. Dichas personas podrían aprovechar su posición dentro del Estado para continuar dañándolo en la administración pública.’*” René Zubieta Pacco, “Becerril plantea muerte civil para sentenciados por terrorismo,” November 7, 2016, online: *El Comercio* <

<https://elcomercio.pe/politica/congreso/becerril-plantea-muerte-civil-sentenciados-terrorismo-147162-noticia/>> (Last visited June 3, 2021).

<sup>177</sup> The triggers of civil death statutes in several of these cases seemed to be linked to special crimes, not just common crime. I found a couple of cases in which sexual assault of children was linked in some way to civil death. In Ecuador, the formation of a special commission called the “Aampetra Commission” was reportedly considering recommending the use of civil death for persons in the educational system who had engaged in the sexual abuse of children in February of 2018. “Analizan dos reformas adicionales por delitos contra niños,” February 23, 2021, online: *La Hora (Ecuador)* <<https://lahora.com.ec/imbabura-carchi/noticia/1102137836/analizan-dos-reformas-adicionales-por-delitos-contra-ninos->> (Last visited June 3, 2021).

More than 165,000 public sector workers have been subjected to a kind of civil death: their passports cancelled, they are officially barred from ever holding government jobs, the allegation of being terrorists likely forever stigmatizing them from any private sector employment.<sup>178</sup>

Every few weeks, Turks have awoken to a new decree, published online in the Official Gazette, announcing public sector workers to be purged, civil society groups to be shuttered, and media outlets to be banned for membership in or affiliation with “terrorist organizations and structures presenting a threat to national security.”<sup>179</sup>

In this instance, there is a reversal of the use of the language of civil death in targeting terrorism to activate state power. Instead, the same language is now used to show how the state abuses power.

In some cases, the use of civil death and the label of terrorism are undermined as inaccurate, and those targeted are represented as innocent.

But the vast majority of people negatively affected by the government’s purging of civil institutions had no role in the treasonous conduct, according to Emma Sinclair-Webb, Turkey director at Human Rights Watch. “We’re talking about guilt by association. What interests us is whether somebody committed a crime, and the answer is no. They couldn’t have foreseen that their sympathies would amount to terrorism in the eyes of a Turkish court,” Sinclair-Webb said. “There’s a huge abuse of terrorism laws.”<sup>180</sup>

The Human Rights Watch argument that the persons who are suffering a civil death are not really terrorists does not call into question the techniques of civil death, but rather the subjects.

But in some of the cases, the persons targeted are represented as political opposition and thus an element of instability. In the following excerpt, the use of the term goes beyond what is often treated as “civil death” techniques and includes, for example, the use of torture. It does, however, paint a picture that delegitimizes the state’s use of law to control the population, including political opponents,

---

<sup>178</sup> Umar Farooq, “A Witch-Hunt in Turkey,” July 19, 2017, online: *The Boston Review* < <http://bostonreview.net/war-security/umar-farooq-witch-hunt-turkey> > (Last visited June 3, 2021).

<sup>179</sup> *Idem*.

<sup>180</sup> Daniel Moritz-Rabson, “Two Years After Overcoming Attempted Coup, Turkey Plagued by Widespread Arrests and Purges of Civil Servants,” July 15, 2018, online *Newsweek online*: < <https://www.newsweek.com/arrests-plague-turkey-two-years-after-coup-attempt-1024287> > (Last visited June 3, 2021).

in a reversal that sounds like the government is terrorizing the political opposition by invoking the term civil death as an expression of the fear and control.

The main policy followed by the Government has been to create an atmosphere of “fear” for the opponent groups and thus a policy of ‘keeping them under control.’ With the help of the Government and the Judiciary under its control, thousands of opponents from every walk of life have been dismissed from their jobs, imprisoned, tortured, prevented from seeing their relatives and lawyers for a long time. Many incidents of kidnapping by the intelligence service have taken place; no information is available on those kidnapped to date. Even the incidents of abductions involving state officials abroad had reportedly taken place. Thus, abolishing the freedom to travel is practiced yet as another pillar of this ‘fear’ and ‘keeping under control’ policy.<sup>181</sup>

The abolition of the freedom to travel is highlighted as a technique of “fear” and “control” against a background of a larger set of technologies of power that are being questioned. The tension in these texts is reminiscent of one text that was written about the disenfranchisement of African Americans in the U.S. through felony disenfranchisement laws as a kind of civil death. The author cites the Fourteenth Amendment of the U.S. Constitution as the foundation for disenfranchisement in cases of rebellion as an ironic twist since it was the same law that expanded the rights to vote as a form of equality. “In the United States, disenfranchisement is tied into the Fourteenth Amendment of the Constitution, which explicitly gives the states the right to deny the right to vote to any citizen due to ‘participation in rebellion, or other crime.’”<sup>182</sup> This use of the constitutionality of civil death provisions to protect security and stability is an important observation. Although this example was used in a regular collateral consequences case, it speaks to the tensions in appeals to the rule of law to discredit civil death techniques while the power to suppress political instability is found throughout the very fabric of civil rights and human rights.

In many of these cases, the appeal is made not because it is a violation for states to withhold people’s rights, but because states cannot withhold rights without due process.

---

<sup>181</sup> “PPJ report: Turkish gov’t cancels passports to condemn critical citizens to civil death,” March 12, 2017, online: *Stockholm Center for Freedom* < <https://stockholmcf.org/ppj-report-turkish-govt-cancels-passports-to-condemn-critical-citizens-to-civil-death/> > (Last visited June 3, 2021).

<sup>182</sup> Frederick Reese, “Voting is Seen as a ‘Privilege’ Not a ‘Right’ As States Find New Ways to Suppress the Black Vote,” August 6, 2017, online: *The Atlanta Black Star* < <https://atlantablackstar.com/2017/08/06/voting-seen-privilege-not-right-states-find-new-ways-suppress-black-vote/> > (last visited June 3, 2021).

The passport cancellations started with the Emergency Decree Law No. 667 and continued with the following decree laws. While the Decree No. 6677 cancelled passports on the ground that the dismissed public sector employees and other staff posed a threat to the national security and they had membership, affiliation, link or connection with the terrorist organizations, the passports of the spouses of the aforementioned were also cancelled with the Decree Law No. 673 even though there were no administrative processes or investigations conducted in relation to them.<sup>183</sup>

The provisions in law that allow for special measures during rebellion or times of crisis both follow the rule of law and, because of the kinds of crimes that are being invoked, often suggest that civil death is used to protect the rule of law from a political threat. Still, in the Turkish cases of civil death, there are characteristics of reported state action that breach principles of due process, and the reports on civil death tend to look towards procedural shortcomings.

While there appears to be an absence of procedural protections in the Turkish cases, it is interesting that in the Peruvian proposed civil death laws, it is not simply the crime of terrorism that is covered, but also the crime of “apology for terrorism.” This crime exists in other jurisdictions, such as Spain. And the continuum of criminal action and criminal speech is fairly opaque during political unrest.

#### 4.8. *Corporations*

The civil death of corporations is one topic that can be readily found in a legal textbook. The death of a corporation is necessarily a civil death, since there is no bodily death for this legal person. Not surprisingly therefore, there are a number of cases of civil death that deal with financial penalties that put corporations out of business. The cases I came across tended to be discussions about fines that would put a corporation out of existence or financially shut it down for violations of environmental regulations or human rights norms. The normative valence on the corporate civil death is a bit tricky. The use of the term civil death is used at times simply to signal the natural consequence of holding a corporation responsible for its actions. It is also interesting that the interests of the corporation and the push back against a heavy fine were sometimes articulated as a civil death for the corporation.

---

<sup>183</sup> *Idem.*

Two reports criticize a Supreme Court decision in India that reportedly ruled against the civil death of a corporation despite the finding that it had compromised the health of the community and violated the law.

The Supreme Court upheld the judgment and the reasoning of the National Green Tribunal. Thus the civil death of an industry was regarded as a far more serious concern than the health of the community or compliance with laws.<sup>184</sup>

Here the case is one in which civil death is meant to signal an appropriate penalty by the state for entities to comply with the law. Corporate civil death in the literature shows the complicated relationship of “the community” to state power. The state is often dealt with as synonymous with the community, as the social contract is in fact occasionally invoked to justify the civil death; but then it is at other times, as in the case of the death of the corporation, split from the state. The intrinsic value of the corporation as an institution, but also as a legal person, is purportedly used by the state in this case to justify not imposing civil death despite violation of laws or hurting “the community.” This approach sees the corporate person as having intrinsic social value and any measures that could put its future in jeopardy as amounting to a civil death. The National Green Tribunal, a special tribunal in India established to deal efficiently with disputes over environmental conflicts, weighs the death of a corporation as a connected and interrelated entity that has important value for society. The following is the criticism from a journalist who considered the “economic-growth centric” stance of the Tribunal to be problematic.

Similarly, when TNPCB closed Sterlite for releasing toxic gases in 2013, NGT overturned the closure order on “technicalities” and said, “shutting down an industry amounts to ‘civil death’ of the company. A direction of closure in relation to a running unit not only results in stoppage of production but has far reaching economic, social and labour consequences. Before directing the civil death of a company, the decision making authority is expected to have before it some reliable and cogent evidence.” This

---

<sup>184</sup> Ritwick Dutta, “Thoothukudis Will Happen as Long as Delhi-NCR Remains the Focus of Environmental Violations in India,” online: *Scroll.In* <<https://scroll.in/article/880474/thoothukudis-will-happen-as-long-as-delhi-ncr-remain-the-focus-of-environmental-violations-in-india>> (Last visited June 3, 2021).

economic growth-centric view of development is the fundamental reason for most environmental conflicts in the country.<sup>185</sup>

Civil death is mobilized by the Tribunal to signal that it is too severe a penalty given the totality of the circumstances. A lawyer for an airplane company mobilized the civil death concept to signal the severity of a previous judicial order. This conveyed the idea that the corporation would cease to exist if the order was upheld. Civil death is mobilized to argue for the severity of the financial penalty.

In its appeal, SpiceJet said that the High Court's order imposed "an extremely harsh financial obligation which amounts to infliction of 'civil death' on the company."<sup>186</sup>

In these cases, the use of the term civil death signals the term is both used as normatively an appropriate response and also overly harsh, depending on the commentator. It is used to activate state power, to signal the importance of compliance with legal regulations, in one case even when it is criticizing the judiciary for not ruling in favor of a fine that would amount to civil death. It may not have a deeply subversive sense, but still it is used to persuade the media or the court that the order is too harsh. Civil death whether through fines or through an order to stop work signals severity. The corporation is often treated in these reports as something other than a legal person whose sole purpose is the pursuit of profit for shareholders and, instead, as a social actor with social value. Corporations are thus treated as persons in ways that some real persons are not.

Along the same lines, there are cases in which persons are treated to an analysis of civil death in cases of loss of income. In one case, a man who was removed civilly for erroneous reasons from his government job in India as a bus conductor. A judge ruled almost twenty years later that the Delhi Transport Corporation should compensate him for his back pay and all wages he would have earned through retirement. The Judge in the case ruled that "Removal of a low paid employee, such as a

---

<sup>185</sup> Chandra Bushan, "Environment Regulators to Blame for Tuticorin Killings—Explained Here," June 6, 2018, online: *Financial Express* < <https://www.financialexpress.com/opinion/environment-regulators-to-blame-for-tuticorin-killings-explained-here/1195032/>> (Last visited June 3, 2021).

<sup>186</sup> M.J. Antony, "Kalanithi Maran vs Ajay Singh: Blow to SpiceJet as SC Dismisses Petition," July 29, 2017, online: [https://www.business-standard.com/article/companies/kalanithi-maran-vs-ajay-singh-blow-for-spicejet-as-sc-dismisses-petition-117072800550\\_1.html](https://www.business-standard.com/article/companies/kalanithi-maran-vs-ajay-singh-blow-for-spicejet-as-sc-dismisses-petition-117072800550_1.html) (Last visited June 3, 2021).



conductor, from service, has far-reaching consequences. It amounts to a civil death....”<sup>187</sup> Here it is not the corporation that suffers the civil death, but a judge reportedly ruled that the loss of property or wages amounted to a civil death for a low-wage employee.

#### 4.9. *Citizen Identification Systems*

While national identity and even biometric identity systems are used in different places around the globe, in India the transition to a national identification system was being described as preparing the conditions for civil death. The Indian system, called Aadhaar, is based on both biometric data, such as an iris scan or fingerprints, a photo, and a 12-digit identification number. Although national identification systems are relatively widespread internationally, this case has been particularly controversial. As one source observed,

It was meant to be an innocuous 12-digit number, giving every Indian resident a unique, forgery-proof identification. But now it’s at the centre of an epic battle revolving around concepts of the welfare state, privacy and personal space, state surveillance, civil death and much more. The Big Aadhaar Battle is being fought as much in the media as in the Supreme Court, with an article a day from both sets of adversaries.<sup>188</sup>

There are several different arguments around the campaign against the ID system. Many of the bits on civil death stem from arguments about the deprivation of privacy rights, so that a biometric identification system itself is a form of civil death. There are, as well, arguments about the state becoming more empowered with a more complete system both to control and to determine the existence or non-existence of the person.

[T]he concept of limited governance [...] also finds place in the Constitution. By being empowered to deactivate or not issue Aadhaar numbers, the State has been given the switch to cause the civil death

---

<sup>187</sup> Manish Raj, “Pay Full Wages to DTC Man Sacked 18 Years Ago: HC,” November 11, 2017, online: *Indian Express online* <<https://indianexpress.com/article/cities/delhi/pay-full-wages-to-dtc-bus-man-sacked-18-years-ago-hc-4932116/>> (Last visited June 03, 2021).

<sup>188</sup> “The Idea of Aadhaar,” February 9, 2018, online *The Centre for Civil Society* <<https://ccs.in/idea-aadhaar>> (Last visited June 3, 2021).



of any individual. Instead of bringing about transparency in the government, the citizen is being compelled to become transparent to the State.<sup>189</sup>

This is quite a stunning argument; the administrative state requires of the citizen a transparency (which is reminiscent of a kind of nakedness or bare life) before the state. It is also noteworthy to observe that in this passage civil death is described as the state having the power of a “switch” in causing the civil death of the individual.

There are also a substantial number of arguments about the links of the identification system to overall transformations in systems of security. One of the most frequently quoted sources on the potential dangers of the Indian identification system is Edward Snowden:

Edward Snowden, the NSA leaker, has also criticized Aadhaar, calling it a mass surveillance system that will lead to “civil death” for Indians.<sup>190</sup>

Another source cited Snowden’s warning:

Mr Snowden, who exposed mass surveillance programmes run by the US government, intelligence agencies and big corporations, warned about excessive abuse and privacy violation through demanding Aadhaar for everything by the government and private players.

“You will be tracked, monitored, and recorded in a hundred different ways and not just by UIDAI, but by the Aadhaar number they created that is being used by every other company and every other group in society,” Mr Snowden said.<sup>191</sup>

The uses of biometric tracking by private companies and regular daily services beyond state-based welfare benefits seems to be of particular concern for many opponents of the system. Linking telephone accounts and bank accounts to the identification number has been highlighted as a way in

---

<sup>189</sup> The Invisible Lawyers Team, “‘Aadhaar Day 4: If Our Biometrics Do Not Match, Then a Living Flesh-and-Blood Person is no Better Than A Ghost’, says Shyam Divan,” May 25, 2018, online: *The Leaflet (India)* < <https://www.theleaflet.in/aadhaar-day-4-if-your-biometrics-do-not-match-then-a-living-flesh-and-blood-person-is-no-better-than-a-ghost-says-shyam-divan/> > (Last visited June 3, 2021).

<sup>190</sup> Lauren Frayer, “India’s Biometric ID System Has Led To Starvation For Some Poor, Advocates Say,” October 1, 2018, online: *National Public Radio* < <https://www.npr.org/2018/10/01/652513097/indias-biometric-id-system-has-led-to-starvation-for-some-poor-advocates-say> > (June 3, 2021).

<sup>191</sup> Moneylife Digital Team, “Aadhaar Is a Mass Surveillance Tool and There Should Be Criminal Penalty for Its Misuse, Says Edward Snowden,” August 22, 2018, online: *Moneylife* < <https://www.moneylife.in/article/aadhaar-is-a-mass-surveillance-tool-and-there-should-be-criminal-penalty-for-its-misuse-says-edward-snowden/55088.html> > (June 3, 2021).

which the legal person is being unified as a single traceable and, importantly, controllable entity and made available to private companies. Surveillance is not only a question of security for the state, but also related to security for the individual, as private companies have the possibility of tracking and manipulating information gained through access to the identification numbers.

Beyond the totalizing network for all legal persons, there are also potential class dimensions to this system, it is argued. It leaves the poorest, those the system was originally justified as being better able to serve, the most vulnerable to an actual civil death if something in the technology goes wrong.

They also don't want to risk what is known as a "civil death". The project that is meant to give people an incontrovertible proof of identity can sometimes take it away. Biometrics are easy to hack and, if fingerprints or iris scans are stolen, it is near impossible for a marginalised person to reclaim a lost identity.<sup>192</sup>

It is not merely that states will use these systems intentionally abusively, but rather that these cases speak to the potential abuse of the system as itself producing a kind of economic vulnerability.

The production of a kind of expulsion by economic vulnerability with this system is what has happened in some instances in which basic welfare benefits have failed to be delivered, according to NPR, especially in rural areas when the advanced tech fails to function.

One by one, he types people's Aadhaar numbers into the machine and then asks them to place their fingers on a small scanner. The machine checks their numbers against biometric data on government servers and prints out a receipt for food rations—bags of rice. But one customer isn't so lucky. Karu Bhuiya, 48, has done manual labor all his life. His fingertips are worn. Kumar tries to scan them five times, but gets an error message. The machine here is rudimentary, and only scans fingerprints—not irises. So Bhuiya is turned away. He goes home without food. Technical difficulties like this are blamed for pushing some of India's poorest into starvation. Jean Dreze, a Belgian-born economist who lives

---

<sup>192</sup> Sebastian Payne, Karuna Nundy, Frederick Studemann, and Tammy Lai-Ming, "The Question of Identity Cards," May 3, 2018, online: *The Financial Times* < <https://www.ft.com/content/2ec95b9a-4709-11e8-8c77-ff51caedcde6> > (June 3, 2021).

in Jharkhand, says he has counted a dozen such deaths in recent months. He provided NPR with a detailed list of their names and circumstances surrounding their deaths.<sup>193</sup>

The death of the body is secondary to the death of the legal person. It is because the poorest persons are already marginalized so that in the moment of linking social benefits to a legal person, if that link is protected only by having resources to claim one's identity, it could be argued, these persons are left rightless. This is the exclusion of the person from the political realm by extinguishing the legal personality, like a switch turned off.

There are a few paradoxes in this system that are explained in the texts. Prior state-issued identification is required to get different certificates necessary for one's life. Legal life cannot start until the person submits to a certain kind of legal verification of life. Only issuing legal documents to persons who already have a biometric identifying number can thus be understood as a kind of legal paradox.

“The State demanding disclosure of status itself is demeaning and contrary to affirmative duties of the State. Every child is required an Aadhaar to get a birth certificate. State is treating people like they are a flock of sheep. Even a flock of sheep requires someone more transcendental to lead!” [one commentator] added.<sup>194</sup>

It is not only in India, however, that the increased regulation over legal identity is occurring. India's Aadhaar system was compared to China's social credit system in an article in the Tech Journal *Wired*. The general idea of how these different systems are connected to civil death is that as the technological and the legal framework for legal personhood becomes more intermingled in the form of benefits that are tied to a totalizing web of legal regulations under the state's control. Then, the person becomes more vulnerable to the possibility of abuse from public and private entities who have control and access to one's legal person through the technologies that frame it.

Hence for example, an article criticizing China's social credit system was flagged as an illustration of civil death because in the comments section of the article, one reader wrote, “This is the concept of

---

<sup>193</sup> Lauren Frayer, “India's Biometric ID System Has Led To Starvation For Some Poor, Advocates Say,” October 1, 2018, online: *National Public Radio* < <https://www.npr.org/2018/10/01/652513097/indias-biometric-id-system-has-led-to-starvation-for-some-poor-advocates-say> > (June 3, 2021).

<sup>194</sup> Moneylife Digital Team, “Aadhaar Is a Mass Surveillance Tool and There Should Be Criminal Penalty for Its Misuse, Says Edward Snowden,” August 22, 2018, online: *Moneylife* < <https://www.moneylife.in/article/aadhaar-is-a-mass-surveillance-tool-and-there-should-be-criminal-penalty-for-its-misuse-says-edward-snowden/55088.html> > (June 3, 2021).

'Civil Death,'" in response to a short news report that seven million persons had been banned from taking either airplanes or high-speed trains for not paying debts they owed. China is creating a mandatory social credit system that penalizes persons for not being "good citizens" when they violate social and legal norms such as not paying their debts. One concern over these totalizing systems is that they can be exploited by governments that want to keep political dissent under control. This is also another concern regarding biometric identification in India.

"The profiling enables the State to stifle dissent and influence political decision making," petitioners had argued claiming the identification system to be akin to a "switch" in the hands of the government by which it can cause the civil death of an individual.<sup>195</sup>

The concern is that totalizing identification systems that are prerequisites for obtaining all state benefits and even private contracts makes people vulnerable to state and private pressure. The techniques have existed for a while and in many different locations, but perhaps the shift to call this civil death is because it is technologically and administratively possible to control more aspects of persons' lives or because the kinds of restrictions make them appear more like the withholding of rights in civil death cases in other contexts. In any event, the anxiety that states or private companies might exploit these systems is not entirely unfounded.

The last section in this series on security threats deals with the civil death of many Turkish dissidents in which the state is cancelling identity papers and activists are describing the state's use of this legal technique as civil death. While these cases in Turkey can be classed as dealing with special kinds of legal persons (security threats), they are also a way of understanding that the fear of transition to a technologically advanced administrative state that tracks persons or controls their legal identity may make the individual or groups more vulnerable to excessive use of state force.

Yildirim says that the Turkish embassy in Berlin refuses to issue her with any official documents, such as birth certificate and identification documents, saying that her personal identity number has been blocked.<sup>196</sup>

---

<sup>195</sup> Anurag Dey, "Aadhaar Can Cause the Civil Death of an Individual: Petitioners Tell SC," January 17, 2018, online: *Catch News (India)* < <http://www.catchnews.com/india-news/aadhaar-can-cause-the-civil-death-of-an-individual-petitioners-tell-sc-95682.html> > (Last visited June 3, 2021).

<sup>196</sup> "Turkish Academics Flee Abroad to an Uncertain Life Incognito," July 12 2017, online: *Qantara (Germany)* < <https://en.qantara.de/content/turkish-academics-flee-abroad-to-an-uncertain-life-incognito> > (July 3, 2021).

State control over legal personality through technology means that withholding identification papers or numbers can leave persons without legal recognition before the law. The taking of a passport and the restriction on travel can be viewed as an inconvenience for the person affected; or from this argument, the use of the term civil death can express the significance of not having a legal identity in a system that requires identity for everything from travel to owning a home or opening a bank account.

Civil death also appears in the case of citizen identification, as in one case in India when the state will not issue death certificates unless the person is first registered with the state. The entirety of the legal life, from birth to death, can only be made real with state recognition of the legal person.

Senior citizens in the city want Aadhaar enrolment and update at their doorstep following recent directives from the Centre and local bodies to link the unique identity number with various services. The most recent circular was the one stating that death certificates will not be issued without Aadhaar numbers. Though the state claims 100% enrolment of Aadhaar in accordance with the 2015 population, a large number of people is still left out. Among them are several senior citizens struggling to locate centres for registration without proper guidance.<sup>197</sup>

While Aadhaar may signal a change to a more efficient form of state governance, the use of the term civil death by persons who are challenging these systems is based in the increase in control over the legal person that is developing through more efficient and totalizing governance structures by the state.

## 5. Conclusion

This chapter reveals the wide variety of ways in which the concept civil death is contemporarily being mobilized by academics, governments, and other societal actors. This chapter opens many more questions about the meaning and significance of the concept. While it is not meant to be dispositive,

---

<sup>197</sup> Nisha Nambiar, "Senior Citizens Raise Pitch for Doorstep Aadhaar Enrolment," July 7, 2017, online: *Times of India* <<https://en.qantara.de/content/turkish-academics-flee-abroad-to-an-uncertain-life-incognito>> (Last visited June 3, 2021).

quantitative evidence of what the concept means, observing the variety of ways in which it is used directs us to widen the scope of the analysis and understand why we have both a supposedly uncontested definition of civil death that directs us towards criminal justice and a wide variety of uses that are not limited to criminality. This chapter also directs attention to the possibility that civil death is a reflection of the political tensions in a given context. This chapter opens up the possibility that civil death takes on the character of political fault-lines of a given community because it is about political belonging and expulsion and so it is not about criminality as such, but a crime-obsessed society might tend to use civil death in relation to criminality, as an example.

The uses of civil death are far more extensive than what many academic legal definitions of civil death suggest, so the scope of inquiry should be widened in the approach. The uses are, however, fairly contained and a certain logic begins to appear in the repetition of themes across the literature. This provides guidance for narrowing the inquiry. One of the important aspects when we open up the inquiry is that civil death talk, broadly understood, is about kinds of persons rather than only penalties or the kinds of rights that are forfeit. This is significant. In some of the academic literature, civil death appears to be the withholding of particular rights that are themselves coterminous with civil death. Is the loss of the right to vote or the loss of the right to hold office itself civil death? Civil death can appear to be little more than a complicated way to announce the loss of the right to vote or the right to hold office if we understand a specific set of civil rights to be the foundation of civil life. This misses the social significance of civil death, however. Across all the uses of civil death, the concept is ultimately tied to different kinds of legal persons.

Even when not associated with criminality, the language of civil death tends to have a stigma. I have attempted to use non-stigmatizing language in the discussion, referring to “persons with leprosy” as opposed to “lepers,” or “enslaved persons” as opposed to “slaves,” or “persons with a criminal conviction” as opposed to “convicts.” The less stigmatizing language while intended to avoid dehumanizing different groups of persons may, unfortunately, obscure an insight into the form or perhaps even the function of civil death and the techniques that construct a totalizing identity.

The lawyer Gabriel Chin tells us that civil death is a status. He does not elaborate on the significance of using this term, but calling civil death a status matters because status is a permanent or semi-permanent legal condition, and it sits in a particular relationship to other persons and to sovereign power in liberal theory. I question, however, whether civil death is itself a status (the civilly dead) or

civil death marks out different legal statuses. This question will be answered by the end of the dissertation as the latter. Civil death marks the transition to a privative legal status or the formation of a privative status that is contrasted to equal citizens. In the meantime, we can tell certainly that because civil death touches on the very construction of the legal person, the mobilization of the term civil death often signals something about the perceived legitimacy of the sovereign. The legal person sits in a relationship of mutual construction and legitimation with the state. Although this chapter has provided more questions than answers, I can suggest that the construction of a category of analysis for civil death should provide a different understanding and definition of civil death from what we have today. If we look at the groups or classes of persons associated with civil death and, instead of trying to retain their humanity by referring to them as “persons with a criminal conviction,” take seriously how law is marking them as kinds of persons, as “convicts” or as “disabled”—then the map of civil death is revealed to be a map of special legal statuses and it looks like the following:

| <b><u>Civil Death Statuses?</u></b>                   |
|-------------------------------------------------------|
|                                                       |
| <b>1. “Criminals”</b>                                 |
| <b>2. “Prisoners”</b>                                 |
| <b>3. “Disabled” “Elderly” “Lepers” “Children”</b>    |
| <b>4. “Married/Divorced Women”</b>                    |
| <b>5. “The Religious”</b>                             |
| <b>6. “Security Risks” “Terrorists” “The Corrupt”</b> |
| <b>7. “Corporations”</b>                              |

These are not only at times totalizing identities; but in many instances, they are stigmatized identities as well. The stigma may originate in an action attributable to the individual person, but not always. While I have suggested that this is a mapping of the uses of civil death around the globe, it is an incomplete map. In the survey of uses, there were some categories of persons missing if we take civil death in the academic literature seriously. Stateless persons, refugees, and slaves did not appear, for

example. I would also add LGBTQ+ people as another category that emerged in the related literature that will come up in later chapters. The literature that tied these topics to civil death was decidedly missing from my sample. Arguably, in some of the reports, the persons were being made into refugees or stateless by having their passports confiscated, but this was not explicitly or directly the point.

I want to suggest that through the press and political organizing, the term civil death has at this moment reemerged and is being used either, as Daniel Beer, wrote to “reactivate state power” after the state is injured and to signal a strong response to disorder or a harm, or else it is used as a way to invoke the cruelty of state power excesses and make publicly visible what have been invisible techniques in order to mobilize resistance and subvert state power.<sup>198</sup> The two normative ways civil death is used are: use 1. state law centered—from the perspective of the state as a way to create a legal effect. These are cases in which the state is affirming its power to dictate the legal life or death of the person. The most common usage is the state’s declaration of the actual death of a person. If the person is missing or the physical person has died, then it is with the declaration by the state that the person is dead that property can be transferred, or marriages dissolved. It is also used by the state to mark a serious punishment for certain serious crimes such as sexual abuse of children or terrorism. There are also cases such as corporations that cease to exist as legal persons as a result of fines for serious breaches. A second way civil death is used, use 2., can be characterized as “living law”—in which non-state agents name different legal techniques civil death to reappropriate the term and signal that a government has gone too far in its exercise of power. To mobilize a claim of civil death in this instance is to signal an abuse of state power. These are instances of, for example, collateral disabilities that flow from a criminal conviction, conservatorships that place a guardian in charge of the property of a person deemed incapable of acting in his or her own best interests, and cases of states’ potential use of biometric identification registries to quell political dissent.

In many ways civil death is useful to highlight the ways in which different legal persons may be constructed and viewed as valuable or not. In the corporations’ cases, there was an argument reported from a court that refused to penalize a corporation because there was a background assumption that corporations are socially valuable because they provide jobs and income and are part of the economic growth of a community. Despite the harm created by the corporation, the social and economic good

---

<sup>198</sup> Beer, *supra* note 67.



of the corporation had to be weighed against the damage done if the corporation were to be destroyed. In contrast, the value of prisoners or people with disabilities rarely entered the discussion apart from their guilt or lack of capacity. The social value of people who had erred or who were not “fully functional” rarely came into the discussions, outside those about the corporation, that is. The commission of a crime is more than a stain, it seems to be used to elide the very value of the person. Civil death seems at times at least to mark the creation of categories of persons who are superfluous to societies, such as “criminals,” “lepers,” “terrorists,” in legal categories that are treated differently from the corporation in the dominant discourse of value; and this can be seen by what an activist campaign is arguing against. Part of it can be explained by the idea that contexts may be different (the corporate cases are quotes from lawyers), while the criminal cases are frequently from grassroots mobilizations; however, these also frequently involve lawyers who are mobilizing civil death to capture the severity of state action. In any case, we see that there are classes of persons or even statuses that are associated with contemporary civil death. Below you will find a visual representation of persons associated with contemporary civil death.



*Figure 1 - Mapping Contemporary Civil Death*

Another important observation is the prevalence of the idea that civil death is linked to discrimination in various forms. A recurring theme across the civil death texts was the issue of targeting different marginalized groups, whether African Americans or Latinos in the U.S. or the Maori in New Zealand. There was particular concern about the use of a criminal justice system to deprive different minorities of their rights. The other “group” that recurred in the texts was economically marginalized persons. This is not a protected group in the same way that some national or racialized minorities are, but civil death and the possibility of taking away property in the form of real property or benefits would either produce or entrench poverty.

While it is difficult to abstain from making regional or national observations from this small sample of different uses in time, I would caution against drawing conclusions about the uses of civil death in different legal systems from this sample. This sample does, however, provide some direction for how future research could be directed towards national and even regional specificities in usage. It seems to mark out political realities or even tensions in different places. In Mexico and Peru, civil death laws are mentioned by name and explicitly justified on the grounds of rooting out corruption from the political system. This is less common in other languages that I observed and in common law jurisdictions. The term civil death rarely appeared in French, with the exception of civil death registries. Turkey and the United States have by far the most frequent uses of the term civil death as a way to mobilize people against a certain state’s legal practices. In India there was a wide variety of different uses of civil death.

There were country-specific tendencies. In Turkey, there are many texts, and they were all linked directly to the state response and the particular legal techniques used by the Erdogan government after the attempted coup as large numbers of persons were labeled and targeted as terrorists. Overall, the reports that came back from India appeared to use civil death in a diverse number of ways during this period of time. Texts came from India that linked civil death to corporations, persons in monasteries, and for a national identification system that approximated something like the potential for the end of legal personhood. In the U.S., in contrast, civil death is used rather narrowly and focuses mostly on criminal justice cases, but there are also a few cases referring to guardianship for elderly persons and persons with disabilities as cases of civil death. Additionally, some of the texts that use civil death are U.S.-based sources that quote Indian or Turkish jurists or advocates who use the term civil death. This

of course complicates the idea of a U.S.-specific penal concept of civil death. These are some of the tendencies observed from this period of time, but they do not speak to the deeper structures of civil death in any particular national or legal context. This could be an area for further elaboration and case studies.

The map of civil death may seem devoid of utopia, and yet the topic provides plenty of space for utopic thinking. The mobilization of the term civil death can have a kind of utopic quality, for it marks a path to progress not as a linear ascent, but rather as resistance to knowable forms of oppression or violence. Civil death is often mobilized to convey a serious consequence by the state, and sometimes a serious consequence may collectively be considered warranted while at other times the state action needs to be made visible as excessive and cruel. The term is mobilized to signal forms of utopia by different actors. The history of civil death is used to convey a kind of backwards slide or else a time when crime or vice was dealt with appropriately, depending on the speaker. Like Gabriel Chin's observation that the collateral consequences of civil death are difficult to challenge constitutionally, there is an ambiguity in how civil death relates to state authority. It both affirms and subverts it at different times in relation to different social problems and different kinds of legal persons. It sits in an uneasy relationship to the rule of law as both a tool in its service and a weapon against it. There is a social utility to the concept of civil death, and it is used as a powerful signaling device today. As civil death in practice is often given sense through the repetition of a particular history, we will now turn to an historical analysis of civil death. From many of the histories, we understand civil death to originate in ancient legal doctrines of punishment. One of the questions to open with as we now turn to a history of civil death is, are monks a curious example, or outlier, of civil death?

## Chapter 3     A Conceptual History

*"ALL history," said the lamented master Maitland, in a memorable epigram,  
"is but a seamless web; and he who endeavors to tell but a piece of it must feel that  
his first sentence tears the fabric."*

Editors, *A History of Continental Criminal Law*, ix

# 1. Civil Death in the 19th Century

## 1.1. Introduction

A proper book should be written only on the history of civil death. The purpose of this dissertation, however, is not to write a history. Like many legal scholars who have written on civil death in its different forms, I am driven to look at history as a way to say something about the present.<sup>199</sup> Still, the historical moments within which civil death appears and gets configured in new ways are important for laying out the ways the concept is used today. To this end, I will address how civil death was being constituted as an intelligible concept by an international community of speakers who were increasingly networked together through congresses and the exchange of letters, texts and expanding markets. There is a moment in which the term's meaning is constituted not only as a traveling concept, but as a transnational<sup>200</sup> one as well.

Although the civil death concept was likely far more robust in its uses and roots as an organizing category in different political orders in the eighteenth century, the notion is quite visible at the moment of its supposed decline in the nineteenth. And although the term civil death had been around for centuries, and the legal form that gets attached to the term would have possibly had a more central role institutionally in isolated legal orders of earlier periods, it is in the nineteenth century that the concept was constituted internationally and it is for this reason, among others, this chapter looks at the uses of civil death during the long nineteenth century.

---

<sup>199</sup> For a discussions of the methodological maneuvers and considerations this type of legal history requires see Mark D Walters, "Histories of Colonialism, Legality, and Aboriginality" (2007) 57:4 Univ Tor Law J 819. Walters writes, "But is sensitivity on the part of the legal historian to the way that historical analysis relates to present legal concerns always improper? The key to successful legal history, as to any history, may be not escaping 'presentist' concerns altogether but acknowledging and addressing their inevitability openly." See also G Edward White, *Intervention and Detachment: Essays in Legal History and Jurisprudence* (Oxford University Press, 1994).

<sup>200</sup> For a background explanation on how legal concepts can become transnational if one understands certain legal concepts as integral to a legal "consciousness," "*langue*" or vocabulary and set of concepts, see Duncan Kennedy, "Three Globalizations of Law and Legal Thought" in David Trubek & Alvaro Santos, eds, *The New Law and Economic Development* (Cambridge University Press, 2010).

The main argument I make in this chapter is that despite the multiplicity of meanings of civil death as a legal concept, it was being consolidated at the end of the nineteenth century in North America in practice as a penal concept. The sometimes heterogeneous uses of the term over the course of the century in the British common law and the French civil law traditions will be reduced to a penal conception through the jurisprudential decisions of courts taking cases on controversies in a particular political context. By observing how the role, legality and meaning of civil death are contested and transform over the course of the nineteenth century, compared with the attempts to consolidate and harmonize the meaning of civil death in law and treatises that deal with the conflict of laws in private law, a complex picture of the concept emerges. There is complexity in the variety of meanings civil death takes on in this period as civil death appears as a formal legal concept and properly modern in some locations while it is being abolished as a kind of barbarism in others. It is presented as a kind of mercy or more humane form of punishment in some cases, an unspeakable cruelty in others, as well as an almost neutral concept in a third set of instances. This complexity provides a glimpse at the roles civil death plays in North America in this period.

The term civil death was rendered visible in several texts during this period through the controversial and contested nature of practices, such as the divestment of property, that were associated with civil death and the move to regularize economic risk through a predictable legal system. This visibility during phases of contestation is remarkably useful for the purposes of legal history. A simultaneous turn to history in the legal academy during the same period brought civil death to an international community as a particular kind of concept. The underlying assumption is that the way the concept of civil death gets articulated in the nineteenth century would become foundational for the continuing reconceptualization and reconstitution of the civil death concept into the present as it is understood and being mobilized today.

The political and economic changes that were taking place over the course of the nineteenth century will be understood as transformative and constitutive of the concept of civil death as it was formed in a moment when jurisprudence was also changing. Hannah Arendt entitled book II of *The Origins of Totalitarianism*, Imperialism. In it, she discusses the three decades at the end of the nineteenth century up to 1914 as a prelude to the horrors that would follow in the twentieth century. She wrote, "[s]ome of the fundamental aspects of this time appear so close to totalitarian phenomena of the twentieth century that it may be justifiable to consider the whole period a preparatory stage for coming

catastrophes."<sup>201</sup> I take this as a prompt for understanding how law transformed during this period to understand the uses of law as a system of domination in an age of rights.

Part of Arendt's argument is that in the nineteenth century the growth of the bourgeoisie produced a break with the class-based society and older forms of authority, political and economic organization. She discusses in this chapter economic risk and the struggles for power that accompanied the expansion of European legal regulations over imperial investments. The social changes of the period produced nationalisms, wars, economic prosperity as well as economic crisis and most importantly for Arendt: the refugee crisis as a prelude to the camps. Drawing on some of these insights from Arendt and other historians of the nineteenth century, I argue this period is important to understand the logic of the contemporary civil death concept. The way in which civil death was constituted in this economically and politically transformative era is important to the argument that civil death was tied to conceptions of property, but property as a form of sovereignty which required alignment of political loyalties.

## 1.2. *Method and Frame*

In the contemporary literature, civil death is frequently articulated as a legal concept with an ancient pedigree. Many authors describe the similarities between ancient concepts and modern civil death and begin their work on civil death with a review of Roman or Greek law, often with the concept of *infamia*.<sup>202</sup> Others draw a historical path of civil death back to its Medieval origins.<sup>203</sup> The story they tell is one of coherence in the concept of civil death from Ancient times to the present as an idea that

---

<sup>201</sup> Hannah Arendt, *The Origins of Totalitarianism*, 1976th ed (Harcourt, 1968) at 123.

<sup>202</sup> See e.g. Mark Haase, "Civil Death in Modern Times: Reconsidering Felony Disenfranchisement in Minnesota" (2015) Minn Law Rev. p. 1913 where he writes, "Civil death is a legal status with roots in ancient Greece and brought to the American colonies from England." The roots are iterated from law journal to court decisions to law journal. Gabriel Chin cites the following: "in ancient Athens, the penalty for certain crimes was placement in a state of "infamy," which entailed the loss of those rights that enabled a citizen to participate in public affairs, such as the rights to vote, to attend assemblies, to make speeches, and to hold public office. The Roman Republic also employed infamy as a penalty for those convicted of crimes involving moral turpitude. The infamy practice in the ancient world over the years evolved into "civil death" laws in Medieval continental countries and into the "attainder" laws of Medieval England, which caused all family and political rights to be forfeited as additional punishment for crimes carrying sentences of death or life imprisonment. Chin, *supra* note 1. Citing the 2<sup>nd</sup> circuit Hayden v. Pataki, 449 F.3d 305, 316 (2d Cir. 2006) (en banc) (citing Mirjan R. Damaska, Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study, 59 J. Crim. L. Criminology & Police Science. 347, 351 (1968)) Steven DeCaroli, "Boundary Stones: Giorgio Agamben and the Field of Sovereignty" in *Giorgio Agamben Sovereignty Life* (2007) 43.

<sup>203</sup> "Civil Death Statutes: Medieval Fiction in a Modern World Source" (1937) 50:6 Harv Law Rev 968–977.

has always existed in the Western legal tradition and evolved almost naturally.<sup>204</sup> This is not the history I will tell and the history I will tell is different in part for its attempt to focus on a smaller slice of time. One might expect a longer history to provide a broader concept, however, this kind of teleological history of an idea poses certain methodological problems, and in the case of civil death it can narrow the scope and meaning of the idea without yielding an understanding about how it became so narrow. I will opt instead for a shorter history that focuses on the changes taking place in the nineteenth century in part because it is a story about the narrowing of the contemporary understanding of civil death not as a conceptual problem, but a political one in which heterogeneous meanings are maintained simultaneously with the domination of a penal one as a reflection of political changes. This therefore ultimately provides more analytical trenchancy for understanding the present with the same configuration of multiple meanings with the foregrounding of penal use.

I will argue that historical concepts, such as *infamia*, banishment, and other institutional forms that came before civil death certainly influenced judges and academics and the ways they use the term ‘civil death’. However, these older institutions or concepts were not an inchoate version of civil death. The teleological problem is the following: if we take *infamia* as the core of the concept of civil death, then we will be led to ignore, as I will illustrate below, many uses of civil death which are in no way associated with crime.<sup>205</sup> Instead, by narrowing the frame of analysis to a specified period of time and using a contextual methodological approach to uncover how civil death was used and understood by jurists in that period, the category of civil death expands and the concept changes from a narrow criminological one, and it being capable of informing a more general theory of law that also provides us with new insights into even the criminological uses of the concept.

As I stated before, the purpose of this history is to say something about how a particular view of civil death came to be dominant in the present, which requires a conceptual history.<sup>206</sup> Civil death as a

---

<sup>204</sup> See e.g. Jud Scott, “Civil Death in California : A Concept Overdue for Its Grave” (1975) 15:2 Santa Clara Law Review.

<sup>205</sup> There are certainly many similarities between infamy and civil death to be sure. My argument is simply that there are also very significant differences between the non-penal uses of the concept. For an explanation of the legal form and the importance of status to understanding infamy see Sarah Bond, “Altering Infamy: Status, Violence, and Civic Exclusion in Late Antiquity” (2014) 33:1 Classical Antiquity 1–30.

<sup>206</sup> “Any translation into one’s own present implies a conceptual history.” Reinhart Koselleck, *The Practice of Conceptual History: Timing History, Spacing Concepts*, Todd Samuel Presner, ed. (Stanford University Press, 2002). “The conceptual



concept has taken on different institutional forms at different times, and it has existed in very different national and linguistic contexts. There are, therefore, necessarily variations of meanings of civil death. The institutional form and different political and economic contexts will produce different meanings; this seems to be evident. A historian or comparative lawyer might ask whether or not we are even discussing the same concept if there are radical differences in meaning. It is a tricky methodological pivot to argue for heterogeneity of meaning and then also continuity of a changing concept. Doing a conceptual history across time and also across place requires special attention to the methodology to ensure that these pivots don't simply trigger a stumble in the analysis.<sup>207</sup>

For this reason, I have chosen to ground the analysis as a first step in the actual term “civil death” or “mort civile” in the French or “mortuus civiles” in the Latin when used in English or French texts. There is no presumption that any other term such as *infamia*, or even attainder, are synonymous with civil death—indeed part of the analysis is to understand how they became associated with the civil death term and what that tells us about the role civil death plays in political discourse. I also do not look at functional equivalents or texts that discuss state processes that look like civil death as if we already know what it is. This chapter attempts to understand how civil death came to be understood in the nineteenth century in North America. For the purposes of the formulation of a contemporary category of analysis for civil death, I will show how civil death was constituted as a concept in the nineteenth century by jurists who were communicating across national borders and looking to a more ancient history for authority. While scholars differed regarding the meaning of civil death, the practical uses of the term in this period left a deep channel for the more familiar, criminological form of civil death.

---

historian attempts to map the minefield, as it were, by examining the various historical turning-points or watersheds in the history of the concepts constituting modern political discourse.” Terence Ball, “Conceptual History and the History of Political Thought” in Iain Hamisiier-Monk, Kaiun Tilmans & Frank Van Vree, eds, *History of Concepts: Comparative Perspectives* (Amsterdam University Press, 1998) at 77.

<sup>207</sup> I confess this is far trickier than one might think. For a very smart articulation of some of the methodological considerations I have doubtlessly still tripped over, see Martti Koskenniemi, “A History of International Law Histories” in Bardo Fassbender & Anne Peters, eds, *The Oxford Handbook of the History of International Law* (Oxford University Press, 2012) 943.

I have chosen to contain the historical analysis to the nineteenth century not only for the reasons Arendt articulated, but also for methodological reasons.<sup>208</sup> The first consideration is that the words "civil death" appear as a known term in legal circles at this moment internationally. There are many ways in which the international was being constituted in this period, but two ways are particularly relevant. The first is the regularization of legal concepts through the practice of conflicts of law and the teasing out of variations among their corresponding institutions in this period through what Joseph Story would coin in 1846 as "International Private Law."<sup>209</sup> In the nineteenth century, jurists in the German legal science tradition of Friedrich Carl von Savigny began to systematize law across jurisdictions, thereby constituting a transnational concept of civil death.<sup>210</sup> At the same time these legal concepts were being used by judges who employed jurisprudential power to choose one interpretation over another in its use solidifying the criminological dominance of the concept.

Assuming that civil death is a constituted and reconstituted travelling concept that has transformed in different places and over time with different conditions, something significant happens to the concept in the nineteenth century. However, I rely on the coherence of a constructed international language game in which jurists speak to one another and use the term "civil death" meaningfully across jurisdictions to indicate a sufficient consolidation of the term at this moment in time to at least speak of a civil death concept despite the variations in its usage and meaning.<sup>211</sup> Further, although this is not a comparative project as such, what counts as the relevant context and the relevant scope of the

---

<sup>208</sup> The nineteenth century has been considered a significant period by various critical legal scholars. See esp. Duncan Kennedy, *The Rise & Fall of Classical Legal Thought* (Beard Books, 2006); David Kennedy, "International Law and the Nineteenth Century: History of an Illusion Symposium: Traditions of Thought about International Law" (1997) 17 QLR 99.

<sup>209</sup> Ralf Michaels, "Joseph Story" in Jürgen Basedow et al, eds, *Elgar Encyclopedia of Private International Law* (Edward Elgar Publishing, 2017) 1660.

<sup>210</sup> Susan G Gale, "A Very German Legal Science: Savigny and the Historical School" (1982) 18 Stanford Journal of International Law 123. Kennedy, *supra* note 200.

<sup>211</sup> I am relying here on Skinner's take on Wittgenstein's philosophy of language as methodological guidance for the history of ideas. That is to say that the meaning of a concept must be understood in part by how it is used. Quentin Skinner, "Meaning and Understanding in the History of Ideas" (1969) 8:1 Hist Theory 3. "For a given idea cannot ultimately be said in this sense to *have* any meaning that can take the form of a set of words which can then be excogitated and traced out over time. Rather the meaning of the idea must *be* its uses to refer in various ways." Supporting this reading, Pocock takes a Euro-Western context as a unified context in which there was sufficient overlap and shared references to speak of 'political thought' across national jurisdictions. I want suggest, and will make the argument, that the shared political texts and colonial histories created a context and the shared juridical uses create one 'language' for analysis. J GA Pocock, "On the unglobality of contexts: Cambridge methods and the history of political thought" (2019) 4:1 Global Intellectual History 1–14.

context will shift in different parts of the analysis.<sup>212</sup> These are difficult methodological challenges that have an element that is both comparative and historical.<sup>213</sup>

Despite the term civil death being at its height in the eighteenth century as it is used in legal treatises in both the common law and the civil law<sup>214</sup>, it is in the nineteenth century, as civil death is disappearing in Europe or at least disappearing by name, that there is evidence of it becoming an internationally intelligible concept and it being reignited in North America. Still, I will draw on some examples of texts from before the nineteenth century for points of comparison.<sup>215</sup> These earlier texts are important in themselves, but also crucially they are significant since nineteenth century jurists and judges were making selective readings in their own works. The primary sources used in this chapter are mostly manuscripts, treatises and letters rather than court cases which are featured in much of the twentieth century scholars' readings of the nineteenth century concept of civil death. It is unfortunate that the court cases get so much attention in the contemporary civil death literature since the development of the concept is given the greatest attention in treatises on law. It is not until the twentieth century that the court cases become the primary text of law. In the classical legal period, the law professor or jurist and not the judge was the agent of law developing legal concepts.<sup>216</sup>

Another consideration is that there is an abundant amount of available source material in the nineteenth century.<sup>217</sup> This means I can observe some meaningful methodological conventions in the discipline of history, such as relying on primary sources.<sup>218</sup> The focus on the nineteenth century allows

---

<sup>212</sup> Pocock refers to a wide understanding of what can constitute a context not necessarily dependent on national borders. See esp. *Ibid.*

<sup>213</sup> I would distinguish the approach I am following from Comparative Historical Analysis since there is less emphasis on drawing out causal relationships with civil death. See generally Daniel P. Ritter, "Comparative Historical Analysis," in *Methodological Practices in Social Movement*, ed. Donatella della Porta (Oxford University Press, 2014), 1–24.

<sup>214</sup> See Mathew Bacon, *A New Abridgement of the Law*, vol. 2 (In the Savoy, 1736), it contains the phrase "civiliter mortuus"; see also Richer, *supra* note 55.

<sup>215</sup> My exclusion of the eighteenth century was partly due to the uses of the term in that period appeared less regularly and not necessarily in conversation with one another and the spirit behind the term appeared less intelligible in the legal documents. While I use some texts extensively from the eighteenth century—notably Blackstone's Commentaries—I do this to show multiplicity in meaning not to understand how the meaning of the idea works in the political context of that moment.

<sup>216</sup> Kennedy, *supra* note 200.

<sup>217</sup> There are abundant sources and in languages that I am literate. If I were to go much earlier and into languages other than French or English, it would require better Latin.

<sup>218</sup> Orford, *supra* note 9.

me to use texts without translations<sup>219</sup> and without some of the other technical modernizations of the texts that are problematic when going further back in history and looking at the texts themselves. Where I do use earlier texts, and in translation, I use them as secondary sources that have informed my interpretation of how the concept became constituted in the nineteenth century context.

The problems associated with using texts in translation for a conceptual history are quite apparent in the case of civil death. For example, several of the Medieval texts that are cited in the literature on civil death are frequently written in Latin, and many contemporary authors rely on translations. For the purpose of a more rigorous historical analysis one should be fluent in the language of the original texts and not rely on translations. I have found at least one instance in which civil death was read into a text in a translation from the original Italian. There is an eighteenth-century iteration of the term “civil death” in the literature in Beccaria’s writings on Crimes and Punishments. In this text Beccaria wrote, “for in such a case the citizen dies, and only the man remains; and with regard to the political body *civil death* should produce the same effect as natural death.”<sup>220</sup> Present day translations, however, do not include the term civil death at all. I had to check the original Italian to be sure, but the words “civil death” were not found in the original Italian text.<sup>221</sup> Not only did this highlight the necessity of being able to read the original texts and not simply the translations for making historical comparisons, but it also reinforced the idea that something was happening in the nineteenth century that made civil death an important legal category, so much so that it could be apparently read into a text with ease by an English jurist doing a translation.

### 1.3. *The Political Economy of a Shrinking Globe*

The legal techniques of nineteenth century civil death come from a particular kind of legalism based in the legal sciences<sup>222</sup> of the period and the political and economic context in a moment when law was said to be shifting from status to contract.<sup>223</sup> The shift from status to contract within the English common law tradition, which emphasized “tenure over rank” meant that as land was democratized in

---

<sup>219</sup> In the texts of the international congress of penal reform it is not clear how the dialogue was translated from speakers from different countries. It is not clear if they were speaking in English or if they were translated through an interpreter or the notes were translated into English at the moment or later. It is also unclear how good the interpretations were.

<sup>220</sup> Cesare Beccaria, *On Crimes and Punishments*, James Anson Farrer, ed. (London, 1880),

<sup>221</sup> Cesare Beccaria, *Dei delitti e delle pene*, 1973d ed, Edizione di riferimento, ed. (Letteratura italiana Einaudi, 1973).

<sup>222</sup> Duncan Kennedy, *The Rise and Fall of Classical Legal Thought* (Washington D.C.: Beard Books, 1998).

<sup>223</sup> Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society and Its Relation to Modern Ideas* (1920).

significant ways in England and uniquely so in North America, equal status relations for many people were replacing feudal relations.<sup>224</sup> In the English system, different legal persons had been defined by different relations to property because the property had an interest in being protected.<sup>225</sup> A voting citizen was a propertied person. When status was replaced by what gets called the “normal” legal person (as I will show at the conclusion of this chapter), that normal person was imbued with its own economic meaning just as tenure had created meaning for legal persons in the English system.<sup>226</sup> Civil death as the death of the legal person, is deeply related to the transformations in law of a volatile moment because the legal person is a reflection of the political economy.

As travel and modes of communication were made rapid in the nineteenth century, revolutionary ideas of the previous era were no longer simply traveling, they were being constituted by communities made of members of different countries with international reach and influence. A “Euro-western” community that had been scattering outwards through the processes of imperial acquisition was simultaneously being stitched more tightly together.<sup>227</sup> Shared philosophical, legal and political texts did more than create imagined national communities, the invention of relatively quick transportation, aided in this period to create a sense of a shared Euro-western community of elite speakers tied through a colonial legacy and capable of sharing physical space through congresses, albeit infrequently.<sup>228</sup>

---

<sup>224</sup> Pocock uses the term “Euro-Western” to describe a potential category for contextualist methods to take on international analyses. Pocock, *supra* note 211.

<sup>225</sup> In explaining women’s status Pollock and Maitland wrote the following, “Undoubtedly a woman might owe suit to the hundred or the county, or rather (for this we think to be the truer phrase) the land that she held might owe suit.” Sir Frederick Pollock & Frederic William Maitland, *The History of English Law Before the Time of Edward I*, 2nd ed (Cambridge University Press, 1898) at 510.

<sup>226</sup> While status was being replaced by contract, it was also reappearing in the form of corporate entities and other kinds of “groups”. See e.g. “You know that classical distribution of Private Law under three grand rubrics-Persons, Things, Actions. Half a century ago the first of these three titles seemed to be almost vanishing from civilised jurisprudence. No longer was there much, if anything, to be said of exceptional classes, of nobles, clerics, monks, serfs, slaves, excommunicates or outlaws. Children there might always be, and lunatics; but women had been freed from tutelage. The march of the progressive societies was, as we all know, from status to contract. And now? And now that forlorn old title is wont to introduce us to ever new species and new genera of persons, to vivacious controversy, to teeming life; and there are many to tell us that the line of advance is no longer from status to contract, but through contract to something that contract cannot explain, and for which our best, if an inadequate, name is the personality of the organised groups.” Frederic William Maitland, “Moral Personality and Legal Personality” (1905) 6:2 *Journal of the Society of Comparative Legislation* 192–200 at 198.

<sup>227</sup> Pocock, *supra* note 211.

<sup>228</sup> Pocock uses the term “axial age” but I prefer his description as “language-contexts, spatially and temporally finite” *Ibid* at 8.

One such topic of international cooperation focused on criminal reform. Legal reform of crime and punishments as a goal of Enlightenment ideals might have been rooted in an earlier period, notably with Cesare Beccaria, but in the nineteenth century these ideas were being debated in real time in international meetings. Several international congresses on prison reform had begun.<sup>229</sup> The international interaction between states on criminal issues had become generalized and normalized by the end of the century.<sup>230</sup> At the end of a conference in 1872 the International Prison Commission (IPC) was founded with the mission of studying and encouraging penal reform before becoming affiliated with the League of Nations.<sup>231</sup> One of the questions addressed already in that moment was what alternative solutions exist to incarceration which was greatly expanding. Discussions of penal reform should be put into a context.

There are many ways to understand the significance of penal reform in the period, for example, Foucault reads the reforms of punishment as shifting from a focus on the body to the soul.<sup>232</sup> However, another way to understand how the reforms changed punishment is through framing the analysis as a political economy of punishment.<sup>233</sup> That is to say, there is a broad materialist approach that views penal politics as inextricably linked in one way or another to economic forces.<sup>234</sup> Bernard Harcourt has proposed that neoliberal penalty has a much earlier origin than is usually assumed. He argues that it has its roots in the eighteenth century, was entrenched in the nineteenth and perfected in the twentieth.<sup>235</sup> He argues that neoliberalism hides the relationship of market manipulations that were explicit in an earlier era. Within liberal theory, the “proper” place these market manipulations take is in the realm of criminal justice, through what was called in an earlier period the “police” but

---

<sup>229</sup> "In the nineteenth century, as large-scale police forces, court systems and prisons began appearing in the major cities, studies on the causes of crime drew widespread attention to the field of criminology. A series of conferences in Europe, of which the most notable was the First International Congress on the Prevention and Repression of Crime (London, 1872), brought together experts and professionals from various countries. Leading issues under consideration included the proper administration of prisons, possible alternatives to imprisonment, modes of rehabilitating convicts, treatment of juvenile offenders, extradition treaties and the "means of repressing criminal capitalists". UN Documents <https://www.unodc.org/congress/en/previous/previous-ippc.html>

<sup>230</sup> H Erle Richards, "Is Outlawry Obsolete" (1902) 18 Law Q Rev 297 at 297.

<sup>231</sup> "International Penal and Penitentiary Commission (IPPC)", (2019), online: <https://www.unodc.org/congress/en/previous/previous-ippc.html>.

<sup>232</sup> Foucault, *supra* note 31.

<sup>233</sup> See esp. Alessandro De Giorgi, *Rethinking the Political Economy of Punishment: Perspectives on Post-Fordism and Penal Politics*, 1st ed (Routledge, 2017).

<sup>234</sup> Alessandro De Giorgi, "Rethinking the political economy of punishment" (2007) 70:1 Criminal Justice Matters 17–18 at 17.

<sup>235</sup> Bernard E Harcourt, "Neoliberal Penalty: A Brief Genealogy" (2010) 14:1 Theoretical Criminology 74–92 at 3.

with a more expansive meaning of police as a state actor. Neoliberalism, according to Harcourt, made that already existing intervention invisible by pushing the fiction that markets are self-regulating and natural rather than controlled.<sup>236</sup> This model was then dispersed around the globe through Western legal expansion.

Civil death plays an important role in the ways the state manipulates markets through the regulation of legal status, but specifically through criminal legal statuses that are rendered invisible by making them appear as a natural consequence of vice or anti-social behavior. This section will set up a political economic framing for the analysis in this chapter. I will start this, however, by adding a caveat that the political economic analysis is not a Marxian analysis, nor is it Foucauldian. The economic work is not simply the context with law sitting above it as superstructure. Likewise, law doesn't frame the economic transformation. Law is dynamic and works within economic transformations—they are mutually constitutive. As Duncan Kennedy wrote, “framework and context are misleading terms for describing the relationship between legal and economic activities. This is because economic activity can't be understood as something autonomous in relation to a set of passive institutional and legal conceptual constraints” as the terms might suggest.<sup>237</sup> Penal reform was not simply a response to economic liberalization in the period; rather, legal transformations enabled the particular form of economic expansion that would take place in North America in the nineteenth century, but also economic transformations influenced the legal forms of civil death.

Despite unprecedented change, privilege had to be maintained. As the historian Eric Hobsbawm observed, “[h]enceforth the forces of conservatism, privilege and wealth would have to defend themselves in new ways.”<sup>238</sup> The contested social order would have to reconfigure privilege so that it could be preserved in ways that were based in the presumptive equality of men. Simultaneously, the tremendous changes occurring in Europe were pushing outwards and impacting European colonies and the rest of the world. These transformations unsettled the old ways of doing things and transformed them while retaining privileges in new forms.<sup>239</sup> Feudal relations were being upended by new legal structures and individualizing economic forces during this period, which was marked by

---

<sup>236</sup> Harcourt, *supra* note 235.

<sup>237</sup> Kennedy, *supra* note 200 at 19.

<sup>238</sup> Eric Hobsbawm, *Age Of Capital: 1848-1875* (Orion, 2010) at 25.

<sup>239</sup> Reva Siegel, “Why Equal Protection No Longer Protects : The Evolving Forms of Status-Enforcing State Action” (1997) 49:5 Stanford Law Review 1111–1148.



violent forms of unsettling. Uprisings and rebellions were met with sometimes violent suppression of those insurrections and revolutions.<sup>240</sup> The demands of capitalist expansion was supported by a legal system based in an expanding class of persons newly minted in a legal mold of formal equality, but this equality was tempered or at least hedged in by elites anxious about losing their traditional sources of privilege.<sup>241</sup> I will argue in Chapter 5 that while formal equality became the norm, unequal privative statuses were preserved but in new forms.

Civil death finds itself in this context as a marginal actor with a central role to play; that is to say, there are in fact very few cases where civil death is called upon *by name* in court cases or in legal documents. And although it remains marginal as a visible actor in this period and infrequently used in these terms specifically, the legal rules and practices that are described in this chapter and the rationale for its use during this period will carve out available tools for future legal innovations that touch the very heart of liberal legalism. As a legal form it will become central to understand how differences in legal personhood are maintained, that is how formally unequal legal statuses are maintained.

The changes taking place in Europe and their colonies needed legal techniques to facilitate them. Hobsbawm sees the new technological era with new modes of transportation and power to move tied to the age of mass production and international market competition as characteristic of this period.<sup>242</sup> Both Arendt and Hobsbawm link this capitalist transformation in the nineteenth century as having a particular link to Imperialism in a context of market expansion. Arendt describes a kind of protection of property rights and Imperialism as "the first stage of political rule of the bourgeoisie."<sup>243</sup> Arendt's chapter on Imperialism draws heavily from Rosa Luxemburg's *Primitive Accumulation of Capital*, but she replaces Luxemburg's idea of capital with power.<sup>244</sup> Arendt described Hobbes as having posited a theory of the bourgeoisie man, as essentially "private persons" since he makes the private interests the same as the public interests. Arendt links Hobbes' political theory to the bourgeoisie and Imperialism by claiming that a "community based solely on power must decay in the calm of order and stability;

---

<sup>240</sup> See Kennedy, *supra* note 222.

<sup>241</sup> William Wiecek, *The Lost World of Classical Legal Thought* (Oxford University Press, 2001).

<sup>242</sup> Hobsbawm, *supra* note 22.

<sup>243</sup> Arendt, *supra* note 19 at 138.

<sup>244</sup> Arendt's chapter on Imperialism draws heavily from Rosa Luxemburg's *Primitive Accumulation of Capital*, but she replaces Luxemburg's idea of capital with power. Arendt, *supra* note 64; Rosa Luxemburg, *The Accumulation of Capital* (Routledge, 2003).



its complete security reveals that it is built on sand.”<sup>245</sup> It must continually renew itself by acquiring more power outwards, what she refers to as “power accumulation” is what stabilizes the system. She writes, “Hobbes's Commonwealth is a vacillating structure and must always provide itself with new props from the outside; otherwise it would collapse overnight into the aimless, senseless chaos of the private interests from which it sprang.”<sup>246</sup> Private interest and economic expansion go hand in hand in this period as does the violence that expansion and conquest necessarily bring.

What does civil death have to do with property rights and economic expansion, one might ask at this point, given that civil death ostensibly is related to legal personhood and penalty? The argument here is that civil death as a legal technique was forged in ways that would facilitate economic expansion in North America as land and property are acquired and retained to loyal, obedient subjects, but in ways that are neither uniform nor even consistent. We learn different things about civil death from the legal historian as opposed to the judge enacting different forms of civil death. It is an adaptable legal tool and the theory of the concept has to be equally adaptable.

Throughout the century the continent suffered violent episodes. The war of 1812 set the stage for a tumultuous North American century marked by disputes over physical and legal borders between the Canadas and the United States as well as questions of loyalty of citizens, aliens and native inhabitants as the U.S. and Britain went to war and countless wars were waged against indigenous nations. Following the peace between Britain and the U.S. the rebellions in Upper and Lower Canada in 1837-1838, and the civil war in the United States two decades later provided sufficiently rebellious or disobedient populations for civil death to enter the political discourse. These uprisings were all taking place against a backdrop of colonial domination of indigenous peoples and Western expansion. In many ways the laws on civil death in this century responded to political unrest of the time and the economic transformations taking place. These political and economic conditions are the backdrop to the ways civil death gets configured as will be shown in this and the next chapter.

---

<sup>245</sup> *Ibid* at 142.

<sup>246</sup> Arendt, *supra* note 64.

## 2. The Legal Construction of Civil Death in the 19th Century

### 2.1. *A Historiography of 19<sup>th</sup> Century Civil Death*

The precise moment the term ‘civil death’ was first articulated is difficult to trace, and as one judge commented in 1888, anyone attempting to find the roots of civil death "will find that he has to grope his way along paths marked by obscure, flickering and sometimes misleading lights."<sup>247</sup> The constitution of the concept has involved continually looking at the past and bringing something from that past across time into the present. However, civil death as a legal category has been constituted differently at various moments, taking shape in part because of the contexts from which it emerged and re-emerged. There are characteristics of contemporary uses of civil death that even a cursory look at history will reveal to be novel. Still there are other parts of civil death that intuitively look like older legal institutions. Part of understanding why civil death is used as a category today requires an understanding of how it has been used and transformed in the past in reference to a more distant past.

The present-day narrative that *infamia* meant the same thing or was the inchoate version of civil death comes in part from present-day readings of nineteenth century jurists making analogies to understand the Medieval uses of Roman concepts relative to concepts of the day. Most legal scholars today, at least those writing on the topic, are not fluent in Latin and are simply unable to delve into the Ancient, Neo-Roman or even Medieval law in order to make the connections for themselves. While there is certainly continuity in the Western legal tradition, and English law was always influenced by Roman law, particularly in prerogative institutions<sup>248</sup>, there were also significant breaks and overt rejections over the centuries from Roman law.<sup>249</sup> The nineteenth century was the period of legal history according to Roscoe Pound, and it is from this period that many of the present-day legal histories are constructed.<sup>250</sup> In this chapter, I explain how there was significant variety in the meaning and uses of

---

<sup>247</sup> *Avery v. Everett*, (1888)110 N.Y. 317

<sup>248</sup> Martti Koskenniemi, "Sovereignty Property and Empire: Early Modern English Contexts" (2017) 18 *Theoretical Inquiries in Law* 355–390.

<sup>249</sup> There were periods in which Roman law was supposedly imported directly into British law. There were also periods of collective forgetting and transformation. Quentin Skinner, "Civil liberty and fundamental rights : a Neo-Roman approach" (2014) 1–22.

<sup>250</sup> "In law, as in everything else, the nineteenth century is the century of history. As every eighteenth-century decision and treatise and statute presupposes philosophy of law and is pro tanto consciously or unconsciously a bit of philosophical exposition, so every nineteenth-century decision and treatise and in its interpretation and application, if not in its very conception and enactment, every nineteenth-century statute presupposes legal history and, as the culmination of a bit of history" Roscoe Pound, *Interpretations of Legal History* (Cambridge University Press, 1930) at 7.

civil death before the nineteenth century, but that certain conditions at this crucial period in North America facilitated the triumph of the penal dimensions of civil death and this continues to influence the way the concept is understood today. Contemporary civil death was not chronologically and seamlessly constituted across the centuries, but persons using the contemporary term civil death still today continue reach back into history to pull out different aspects of the term to reconstitute it.

A brief aside may be helpful to clarify some of the ways the path and meanings of civil death became carved out in this period. My understanding of the relationships between contingency, choice and path dependence or determinacy in legal history are best described by an analogy.<sup>251</sup> Kevin Kelly, the cofounder of the technology journal *Wired* wrote about these questions relative to technology. He described “an old story about the long reach of early choices”<sup>252</sup> that recounts the way early British railroads were sized to approximately 4’ 8.5” wide using the same measurement as early Roman roads left in Britain. These roads were built on the paths of Roman carts that were fitted to match ruts left by war chariots also built this same width because this measurement was approximately the size of two horses side by side. Today, the space shuttle is built in different parts across the U.S. and shipped by railroad for assembly. As Kelly recounts, the size of the solid-fuel rocket engines are just around 4’ 8.5” because they had to pass through railroad tunnels. He writes, “As one wag concluded: ‘So, a major design feature of what is arguably the world’s most advanced transportation system was determined over two thousand years ago by the width of two horses’ arse.’”<sup>253</sup> Pushing the analogy to law as a technology, the uses of civil death are constrained by a particular legal history, but they are not determined by that history. It would be absurd to suggest that the Space Shuttle is the contemporary form of the Roman chariot even though they are both modes of transportation and in some senses the chariot constrained aspects of the way the Shuttle would develop. This kind of legal

---

<sup>251</sup> “Nobody knows what is going to happen because so much depends on an enormous number of variables, on simple hazard. On the other hand if you look at history retrospectively, then, even though it was contingent, you can tell a story that makes sense...” Hannah Arendt, “Hannah Arendt: From an Interview” *New York Rev Books*, (Oct. 26, 1978) online: <<http://www.nybooks.com/articles/1978/10/26/hannah-arendt-from-an-interview/?printpage=true>>. See also Susan Marks, “False Contingency” (2009) 62:1 *Current Legal Problems* 1. Although Marks explicitly states that things are not random but constraint in particular ways, I think the two would actually largely agree. For the full picture, see also Roberto Mangabeira Unger, *False Necessity: Anti-necessitarian Social Theory in the Service of Radical Democracy* (Verso Books, 2002).

<sup>252</sup> Kevin Kelly, *What Technology Wants* (Penguin Books, 2010).

<sup>253</sup> *Ibid.*

history requires more than a simple functional explanation<sup>254</sup>, it requires both functional analysis techniques as well as social analysis of what influenced the story that draws out both the constant and the contingent.<sup>255</sup>

This is another way to understand complexity for the purpose of social explanation. Morton Horowitz described his approach to the relationship of determinacy and contingency in the introduction to the second installment of the *Transformation of American Law*, where he wrote, “A complex, multi-factored interdependent world has lost confidence in single-factor “chains of causation” that were embedded in most nineteenth-century explanatory theories. My acceptance of multi-factored complexity has produced a certain tendency in this book toward multiple (and perhaps sometimes contradictory) explanations.”<sup>256</sup> This is more confessional than instructive which is why the Kelly analogy is useful for making visual the method I believe Horowitz is getting at as well. If we take law as a kind of technology, then these multi-factored explanations move us towards historical understanding that is less deterministic than some materialist histories, but still has explanatory power. For a conceptual history, we see that there can be legal technologies that follow paths of several concepts and are nonetheless completely new in every meaningful way.

Civil death as a concept was being forged in the English-speaking world in a new relationship to Roman law. The national systems of Canada, and the United States, have very different histories. Still, the English common law was extended into North America in the British colonies, and this has created significant historical continuity as Canadian and American legal scholars and practitioners were quite familiar with the laws of England. There were important points of commonality in the English-speaking legal academy during the nineteenth century such as the revival of the study of Roman law in England, Canada and the U.S. in the nineteenth century. Charles Sherman, an early twentieth century Yale law professor noted that Roman law had been neglected and treated with hostility as

---

<sup>254</sup> Hannah Arendt also makes a connection between history and technology in “The Modern Concept of History” in which she argues that nature and history are brought together by technology in the sense that we now *make* history and begin “acting into nature” with processes such as the splitting of the atom. We produce things in nature and in history as opposed to observing them. The seedling for viewing the social sciences as a form of technology in itself is found in this short essay. Hannah Arendt, “The Modern Concept of History” (1958) 20:4 *The Review of Politics* 570–590 at 587–588.

<sup>255</sup> For a discussion of the difficulties of simple functionalism, as well as the positive uses of functional analysis see Michaels, *supra* note 144.

<sup>256</sup> Morton Horowitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (Oxford University Press, 1992) at iii.

“foreign law” until a late nineteenth century resurgence of interest.<sup>257</sup> According to Sherman, the work of Sir Henry Maine significantly contributed to the incorporation of Roman law concepts into nineteenth century legal education. He noted the importance of the new “English Romanists” including the McGill Law professor and dean, Frederick Parker Walton who wrote the “Historical Introduction to Roman Law” as a notable contribution to this growing field.<sup>258</sup>

As the American editors of Von Bar’s 19<sup>th</sup> century classic, *A History of Continental Criminal Law* noted, “This seamless web of our own legal history unites us inseparably to the history of Western and Southern Europe. Our main interest must naturally center on deciphering the pattern which lies directly before us, — that of the Anglo-American law.”<sup>259</sup> I mention this, although it is in some senses quite obvious to legal scholars, to highlight that in the legal tradition of North America in the 19<sup>th</sup> century the U.S. and Canada were locations of reception from Euro-Western empires. The editors go on to say, “In short, there is a tangled common ancestry, racial or intellectual, for the law of all Western Europe and ourselves.”<sup>260</sup> The shared “racial” and intellectual ancestry is an important element in the ways the civil law gets imported for some purposes. Not only were American legal scholars reading Continental European legal history as legal authority for the creation of American law during this period, but it was understood as part of a political project that created a shared European community.

With the Roman resurgence in North American law there was a project of comparison between the Roman and Medieval histories. Frederick Pollock and Frederic Maitland’s *History of English Law Before the Time of Edward I* is a good case in point in which they note the Medieval categories of law as following from the Roman.<sup>261</sup> Early modern British jurists, and later American and Canadian jurists relied on Medieval law as foundational for their legal training. After the revival of Roman law, the Medieval concepts were often categorized within different classificatory schemes of Roman concepts. While of course North American jurisprudence still contains categories and concepts influenced by Roman law as structural elements of modern legal systems, the classificatory schemes are often analogical rather than tracing a natural legal evolution.

---

<sup>257</sup> Frederick Parker Walton, *The Historical Introduction to the Roman Law* (1901) at 624.

<sup>258</sup> Walton, *supra* note 257.

<sup>259</sup> Editors, Carl Ludwig Von Bar, *A History of Continental Criminal Law* (Boston: Little, Brown, and Company, 1916) at ix.

<sup>260</sup> *Ibid* at x.

<sup>261</sup> Pollock & Maitland, *supra* note 225.

Writing in the nineteenth century, for example, Pollock and Maitland cite an early thirteenth century iteration of civil death by Henry of Bracton, in which religious persons were classed as civilly dead. It is said then that the term ‘civil death’ is recorded in British law as early as the thirteenth century.<sup>262</sup> They translated from the original as “the villein being under the power of his lord may, like the monk, be considered as ‘civilly dead’”.<sup>263</sup> This is, however, not a case of civil death that is derived from a criminal stain on one’s person necessarily, but the civil death is derived from the relationship of fidelity. That is, the logical that unites the cases is the obedience owed which limits the legal capacity of the person and marks them as unfree; the monk is an unfree person and thus cannot act as a witness since his testimony cannot be trusted as freely given.<sup>264</sup> Indeed a few lines later Pollock and Maitland distinguish civil death in English legal history as something distinct from the yet “parallel and closely similar French law.”<sup>265</sup>

Legal histories of the period drew origins from earlier eras than the thirteenth century. Although it is not clear whether the term civil death or “mortuus civiles” was ever articulated in the Roman era, jurists have argued it was. At the end of the nineteenth century, the Italian professor and statesman, Carlo Calisse’s books on the history of Italian law came out. The jurist noted that neo-Roman law contained the phrase “quoad omnia pro mortuo habetur” in reference to the outlaw, or “in all things as if he was dead” which he then classified as forming part of civil death.<sup>266</sup> Outlawry then falls under the classification of civil death in his systematic history of legal concepts. Importantly, however, he then distinguishes the section on civil death from the next section on *infamia*.<sup>267</sup> Upon this reading, outlawry is civil death while infamy which is characterized by the mark it leaves on the person is not.

In the Anglo-tradition there were certain analogies that were being made that will become chains of equivalences for civil death. Take as an example an early twentieth century reading of Roman law as compared to “Modern” law. In his book *Roman Law in the Modern World*, Charles Phineas Sherman out of Yale Law School wrote that “Modern law recognizes only natural death; but Roman law held that

---

<sup>262</sup> *Ibid* at 457.

<sup>263</sup> Pollock & Maitland, *supra* note 225. “Est etiam mors civilis in servo in servitut sub potestate domini constituto.”

<sup>264</sup> Skinner makes several observations about the Bracton text, including that it was possibly only attributed to Bracton, but was imported a full century earlier. Skinner also claims that the freedom of the person is what was important in Bracton’s texts. Skinner, *supra* note 249.

<sup>265</sup> Pollock & Maitland, *supra* note 225 at 457.

<sup>266</sup> Carlo Calisse & Italian Law, *History of Italian Law* (1928), infamia and the section about civil death that includes outlaw (was translated as civil death) but they are separate sections. [*My translation from Latin*] at 423.

<sup>267</sup> *Ibid* at 423.

a person's legal capacity might be extinguished by 'civil' death."<sup>268</sup> Sherman distinguishes Roman law and modern law while he simultaneously builds the case to understand Roman law in relation to what was then contemporary law. He goes on to write,

Quite reminiscent of the Roman *infamia*, if not of civil death, is the Anglo-American deprivation of certain civil and political rights (more especially the political rights of suffrage and of holding public office) which arises from conviction for a felony or some grave criminal offense.<sup>269</sup>

The U.S. practice is distinguished from civil death and *infamia*, while simultaneously these are being read as comparable legal concepts and practices. As this quote from Sherman shows, the classification and cataloguing of the law in relation to ancient law can create equivalences through analogies to the concepts. Sherman distinguishes the different categories, but by putting them together, they can be understood as a string of equivalences. It was, however, in this period of late nineteenth and early twentieth century that law was being systematized and comparisons between different systems were being drawn and so the use of civil death in relation to the outlaw and to *infamia* became a significant contribution to the theory and uses of civil death.

Returning to Calisse's work in more detail, we can see how the analogies become equivalences. He first published the history of Italian Criminal Law in 1895 and his three volumes on The History of Italian law soon followed. In Vol. II, Calisse addresses civil death. He writes a proper history of the concept:

Civil death, originating in Germanic concepts and supported also by Roman precedents (cf. "capitis diminutio"), received a development in the period of the mediaeval Italian communes, by which it was classed with all those penalties termed capital, because destructive of the "caput", that is the capacity for civil rights. These, in addition to death, were perpetual exile, deportation, life imprisonment, and others. The condemned was no longer a person, he could not make a will, his heirs at law at once came into his estate unless already confiscated, and, although living, he lost every right, to the point that his wife was legally a widow and his children born subsequently were not recognized by the law. Thus strictly the civil death of the Italian laws was different from the Germanic loss of "peace", according to which, to be outside the law was the necessary consequence of all those privations which formed

---

<sup>268</sup> Charles Phineas Sherman, *Roman Law in the Modern World* (1917) at 40, Civil death different from *infamia*, different from declaration of civil death.

<sup>269</sup> *Ibid* at 41.



the very penalty inflicted. Later, on the other hand, civil death became itself a penalty, distinct from the principal punishment, to which it came to be added as an aggravation, though it might also be separate. Nevertheless, in this respect also, Italian laws never attained the degree of severity of other systems, particularly the French. All, however, recognized so-called civil death, and the term did not disappear from the laws, nor its effect from society, until the period of modern law.<sup>270</sup>

Calisse draws a very tentative line between civil death and Roman law. He argues that the civil death was “supported” by the Roman law. It is also interesting that Calisse draws the link not to *infamia*, but to *capitis diminutio* which is about status. Certainly, after having recently published the book on Roman criminal law, the concept of *infamia* would have been available to him. He finds the origins in Germanic concepts, but not a Germanic concept of civil death. To be “outside the law” according to Calisse originated from a “loss of ‘peace’”. Although I would be inclined to agree with Calisse’s reading that civil death is closer to *capitis diminutio* strictly speaking than to *infamia*, the relevant point to make explicit is that these links between civil death and Roman law were being constituted in the nineteenth century in different ways and consequently the meaning of civil death would be transforming given the process of constitution and the particular political and social context at that moment in time. This kind of approach to legal history also allows me to say, that civil death is tied to banishment, outlawry and *infamia* (for example) through inherited legal concepts of property and sovereignty. So *infamia* did not *become* civil death, rather jurists tied banishment, outlawry and *infamia* to their uses of civil death and arguably, this made sense because of the ways property and sovereignty were being constituted at the time and the penal role of law to not only secure property but also the uses of property to secure obedience. Nineteenth century jurists who were well versed in Roman legal concepts, made sense of civil death through analogies to Roman concepts and Roman concepts were made sense of through analogy to civil death. And, while early Roman concepts like *infamia* and *capitis diminuti*, may have left a path that later concepts appropriated for their own uses, they are not, strictly speaking, synonymous with civil death. Nor can one say they became civil death in the same way an acorn would become an oak tree. Arguably, all societies have mechanisms for the expulsion of persons who transgress the social norms, but the legal form of civil death is quite particular. Still, just as the law of persons has roots in Roman law, and these forms facilitated certain kinds of civil death, the form of social expulsion may have taken on its contemporary form through tracks left by early European law.

---

<sup>270</sup> Calisse & Law, *supra* note 266 at 511–12.



## 2.2. *Civil Death in the English Common Law*

Legal decisions of the nineteenth century that use the term civil death in North America draw directly from the English common law. In this section, I want to briefly outline some aspect of the English common law in order to better understand the trans-Atlantic textual dialogue taking place in the U.S. and in Canada during the period. According to Mirja Damaska, civil death was abolished in the majority of German-speaking countries by the middle of the nineteenth century, while in England, attainder, which is often cited as English civil death, disappears in 1870.<sup>271</sup>

The uses of civil death are not fully consistent in that there are multiple sources that convey somewhat different meanings and uses over the course of the century. Tracing the different uses and meanings would itself provide sufficient material for a book. It is a bit puzzling that at the end of the nineteenth century, A. V. Dicey claims that “civil death is unknown to English law”<sup>272</sup> as opposed to stating that civil death had been abolished (as Damaska claims) in English law when writing at the close of the century. Although English Courts do not recognize civil death, Dicey argues, if someone in a different country were to suffer a civil death and that person owned lands in England, the English law would recognize the death and pass the property on to their heirs. I want to simply convey that while civil death is a known concept in the nineteenth century in England, it was understood by Dicey that it was abolished when attainder was abolished in 1870.

Earlier jurists had a place for civil death and attainder in English law. Joseph Chitty, the prolific early-nineteenth century British author who wrote treatises on many legal topics from the law of nations, to contracts, to the criminal law, explained the concept of attainder in his book: *A Practical Treatise on the Criminal Law*. Chitty linked attainder to civil death. He wrote,

The word attainder is derived from the Latin term *attinctus*, signifying *stained* or *polluted*, and includes, in its meaning, all those disabilities which flow from a capital sentence (n). On the attainder, the defendant is disqualified to be a witness in any court (o); he can bring no action, nor perform any of the legal functions, which before he was admitted to discharge (p), *he is, in short, regarded as dead in law* (q). He is also incapable of making any will, for his property is no longer at his own disposal (r) ; though

---

<sup>271</sup> Mirjan R Damaska, “Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study (Part 1)” (1968) 59:4 *The Journal of Criminal Law, Criminology, and Police Science* 542 at 352.

<sup>272</sup> AV Dicey, “On Private International Law as a Branch of the Law of England” (1891) 7 *The Law Quarterly Review* 113–127 at 121, p. 121.

there is this difference between conviction and judgment, that if he die after the former, but before the latter, he may pass his real estate, but not his personal property; because the goods and chattels are forfeited on the verdict of guilty, but the lands are not divested until the attainder (s). ... (w) And it is to be observed, that this situation of *civiliter mortuus* is never allowed to protect him from the claims of private individuals, or the necessities of public justice; so that, though he can bring no action against another, he may be sued, and execution may be taken out against him (x)<sup>273</sup> [*Emphasis added*]

The attainder that had been part of the British common law tradition would be in this century not simply tied to civil death, but used as interchangeable terms in North America and possibly by most English jurists as well where it lived on. This line that links attainder and civil death is found in other earlier English texts as well. In Mathew Bacon's New Abridgement of the Law, an important 18<sup>th</sup> century text, he writes about forfeiture, "All customary estates are within this rule, unless there be some particular custom to the contrary, ..., because the person is *civiliter mortuus* by the attainder, and therefore is disabled to have or hold any estate or to have any property in any thing"<sup>274</sup> The person is *civiliter mortuus* because of the attainder and so the person cannot hold property.

All of this is fairly consistent and the use of civil death as a consequence of an attainder is one line in English law. There is, however, also a much broader concept of civil death, or at least three more ways in which it was used, at work in the Commentaries of Sir William Blackstone. The latter outlines two cases of civil death initially. The first is the case of banishment. For Blackstone, civil death "commences if any man be banished the realm by the process of the common law, or enters into religion".<sup>275</sup> In both cases Blackstone argues that the man is "cut off from society".

The banished and the monks are two iconic groups of persons who suffered a civil death in eighteenth century texts (as I will show this was also the case in the French civil code). Blackstone provides a rationale for including both monks and banished persons in the same group of those who would be considered dead in law. In the event of a man going into a monastery, Blackstone writes that his next heir would inherit. He introduces a social contract element that gives a more complete rationale for the civil death of the monk and a person banished. He writes, "the genius of the English law would

---

<sup>273</sup> Joseph Chitty, *A Practical Treatise on the Criminal Law with Comprehensive Notes on Each Particular Offence*, 3rd Americ ed (Springfield, MA, 1836) at 725.

<sup>274</sup> Bacon, *supra* note 214.

<sup>275</sup> William Blackstone, *Commentaries on the Laws of England Vol I*, first ed (Clarendon Press, 1765).

not suffer those persons to enjoy the benefits of society, who secluded themselves from it, and refused to submit to its regulations. A monk is therefore accounted *civiliter mortuus*...<sup>276</sup> This explanation hits the mark that civil death did not necessarily mean a person who had a stained reputation but rather the person who refused to submit to “its regulations”. Here the connection is made to a requirement of submission to the rules, and social obedience but not necessarily criminal or malicious disobedience. The social contract rationale which underpins Blackstone’s theory of rights is that the benefits of society are granted to those who meet the basic requirements of being good neighbors.

Banishment, then, it seems, was not a legal penalty but only permitted by act of parliament. Otherwise, it was a commutation of a penalty of death or imprisonment or if someone did not present themselves. Blackstone argues that banishment is not possible through a judicial process. “But no power on earth, except the authority of parliament, can send any subject of England out of the land against his will; no not even a criminal. For exile, or transportation, is a punishment unknown to the common law; and, wherever it is now inflicted, it is either by the choice of the criminal himself, to escape a capital punishment, or else by the express direction of some modern act of parliament.”<sup>277</sup> That is, it must be done as a political act to expel someone from the social contract, and not a judicial decision with its internal logic.

Blackstone says no inhabitant shall be sent as a prisoner, “but that all such imprisonments shall be illegal; that the person, who shall dare to commit another contrary to this law, shall be disabled from bearing any office, shall incur the penalty of a *praemunire*, and incapable of receiving the king’s pardon...”<sup>278</sup> The courts cannot banish a person, only a commutation of the sentence to death pleaded by the accused would send an English citizen out of England by judicial process. Blackstone considers this to follow from the second absolute right, that of personal liberty that one cannot be exiled unless it is done in accordance with law. It is in this sense that civil death then in the common law would have been considered a kind of mercy in lieu of killing someone but also something that turned on the limits of the social contract. He concludes with this point just before he gets to the absolute right to property.<sup>279</sup> Penalties or disabilities that are often today associated with civil death such as the

---

<sup>276</sup> *Ibid* at 128.

<sup>277</sup> *Ibid* at 134.

<sup>278</sup> *Ibid*.

<sup>279</sup> In pre-classical thought there was no need to address the contradiction between creating the conditions under which one would lose their property just before outlining property as an absolute right.

prohibition to enter public service for a felony are not only not included as instances of civil death, but they are called upon to defend against improper procedures for banishing someone who would incur a civil death. Blackstone elaborates on this point by listing the exclusions for holding office. This list includes persons “alien born,” and minors. It also includes certain groups with rationales of where they “fit”; he includes here judges, “for they fit in the lord’s house” he also includes the clergy “for they fit in the convocation; nor persons attainted of treason or felony, for they are unfit to fit anywhere.”<sup>280</sup> That is to say, while the concept of civil death did not have the punitive character in Blackstone’s commentaries necessarily, disabilities for treason and for felons did not count as civil death according to Blackstone.

It is equally important to note that the 18<sup>th</sup> century articulation of civil death from Blackstone, included more cases of civil death than the two he initially outlines and more than what is generally discussed in a more limited way in many 19<sup>th</sup> century texts that focus on criminal law or even the conflicts of law. Civil death in the Commentaries is also outlined as it relates to artificial persons or groups of persons. In this instance, there is no normative character assigned to civil death. Civil death includes the dissolution of parliament—it simply is the “civil death” of parliament; then goes into the conditions of the civil death of a corporation.<sup>281</sup> He writes, “But the body politic may also itself be dissolved in several ways; which dissolution is the civil death of the corporation”<sup>282</sup> In this case, he was talking about monasteries, universities and towns—the collective organizations in which property was owned by a fictitious legal person made of individual persons.

Any particular member may be disenfranchised, or lose his place in the corporation, by acting contrary to the laws of the society, or the laws of the land; or he may resign it by his own voluntary act. But the body politic may also itself be dissolved in several ways; which dissolution is the civil death of the corporation: and in this case their lands and tenements shall revert to the person, or his heirs, who granted them to the corporation;(487)

Blackstone goes on to discuss Henry VIII, and what he saw as the King’s transgression against the private and public rights of those heirs of the founders of monasteries when he dissolved them. The property should have reverted back to the persons who founded the monasteries upon their

---

<sup>280</sup> Blackstone, *supra* note 275 at 169.

<sup>281</sup> *Ibid* at 180.

<sup>282</sup> *Ibid* at 472.

dissolution. Monasteries, universities, towns –all the corporations in which property was held in common required a fictive legal person in whose legal name the property was held. The idea of a corporation was invented to hold the property in common and be able to transfer property from individuals to the collective and vice versa. I think it is suggestive that Blackstone ends his First Book, *Of the Rights of Persons*, on the civil death of the corporation.

The concept of civil death in Blackstone’s Commentaries is an almost normatively neutral concept in which universities, monks and the banished alike were considered “dead in law” through dissolution of a legal relation, a kind of divorce from the social compact. In contrast, at roughly the same period in time Mathew Bacon used civil death, or to be precise the term “*civiliter mortuus*” as a consequence of an attainder.<sup>283</sup> Although Blackstone is the better known of the two jurists, as we will see later in the chapter, the narrower, penal use of the term had a more lasting influence in North America.

### 2.3. *Civil Death in the French Civil Law*

Civil death, it is said, had a long history in France. In France civil death does not appear in the revolutionary constitution, but it is said to appear in a statute in 1793<sup>284</sup> and is subsequently codified into the Napoleonic Code at the beginning of the century.

The moral character of civil death in Europe was controversial or at the very least it was contested. In some instances it was considered a sanitized penalty that was contrasted to the brutal, bloody executions that had been the norm especially for crimes such as treason. It was, in this sense, part of a reformist agenda that transformed the nature of punishment.<sup>285</sup> However, not all commentators agreed that civil death was a civilizing transformation, but rather it was itself a “barbaric” form of punishment.<sup>286</sup> It is perhaps because not all legal forms of civil death were in fact the same and the consequences of civil death varied significantly depending on time and place. Civil death in the French civil code had had the reputation for being in some ways more severe than civil death in other jurisdictions and yet through codification it was said to have already tamed the earlier more brutal

---

<sup>283</sup> Bacon, *supra* note 214.

<sup>284</sup> Damaska, *supra* note 271 at 352.

<sup>285</sup> Beer, *supra* note 67. Beer, *supra* note 72.

<sup>286</sup> “La mort civile nous parait une barbarie que la logique et la morale condamnent également. Les Etats qui l’ont abrogée comme telle, ne peuvent être tenus de la respecter provenant d’une législation étrangère. C’est la un genre d’esclavage qui n’est pas reconnu sur le territoire.” Charles Brocher, *Théorie du droit international privé* (Geneve, 1873) at 29.

customs. There were two major civil law codes in Europe in the nineteenth century with civil death provisions. The French and the Russian codes were according to Friedrich Carl Von Savigny, the German father of modern jurisprudence writing on the conflicts of laws, the two important instances of civil death on the continent.<sup>287</sup>

Savigny contrasts civil death as a legal institution to that of slavery which was unenforceable extraterritorially due to its moral repugnance. He notes that civil death was a harsh penalty, but it was no harsher than any other severe penalty and was not “totally immoral” to make it unenforceable in other legal jurisdictions.<sup>288</sup> In contrast to Savigny’s assessment, Charles Brocher, the Swiss academic and judge, wrote civil death “is a barbarity that logic and morality equally condemn.”<sup>289</sup> Francis Wharton concurred with Brocher, quoting him as saying that civil death “raises a feeling of repulsion, whether the incapacity is presented singly or as a consequent of another punishment. It is a barbarism condemned by justice, by reason, and by morality. The states which have abolished it cannot be held to accept it from the hands of a foreign legislature.”<sup>290</sup> Just as today people arguing against legal techniques that have been labelled “civil death” refer to them as “anachronistic,” in the middle of the nineteenth century, the call to ban civil death as a punishment referred to the penalties as “anachronismes qui doivent mettre les critiques en grande méfiance d’eux-mêmes...”<sup>291</sup> It was considered already in the nineteenth century, an anachronism. The lawyer F. Genaudet, argued for the abolition of civil death in France in a document published in 1854 in which he writes, « La mort civile rompt tous les liens qui l’unissaient à la société, pour ne laisser subsister en lui que l’état de nature et avec l’existence purement physique les moyens de la garantir et de la conserver. ».<sup>292</sup> Similar to Blackstone, there is an idea of civil death as being a legal concept that manages the barrier between the inside and the outside of the social contract. Importantly, however, the “outside” in this instance is not necessarily a physical outside as banishment suggested in the case of Blackstone. According to Genaudet civil death was only legal in the case of being condemned to natural death or when

---

<sup>287</sup> Friedrich Carl von Savigny, *Private International Law: A Treatise on the Conflict of Laws and the Limits of Operation in Respect of Place and Time*, William Guthrie, ed. (1869) at 36–7.

<sup>288</sup> von Savigny, *supra* note 287.

<sup>289</sup> Brocher, *supra* note 286.

<sup>290</sup> Francis Wharton, *A Treatise on the Conflict of Laws: Private International Law 3d ed*, 3d ed, George H. Parmele, ed. (1905) at 252, Great bit on civil death as being immoral.

<sup>291</sup> F Genaudet, *Etude sur la Mort Civile: et la necessite de son abolition* (1854) at 15.

<sup>292</sup> *Ibid* at 6.

condemned to forced labor in perpetuity because banishment had been prohibited by then.<sup>293</sup> In a French version of the ancient history of civil death, Genaudet links particular practices to Roman law that are not as frequently found in the English common law tradition.

La mort civile est un emprunt fait à la législation romaine : à Rome, la déportation dans une île, la condamnation au travail des mines, l'interdiction de l'eau et du feu entraînaient la privation absolue des droits de cité. Les condamnés désignés sous le nom d'APOLLIDES ou d'*extorres*, devenaient les esclaves de la peine, et telle était la puissance du lien qui les retenait dans cette sorte d'esclavage (*servitus poenae*) que les libéralités à eux faites par testament à autre titre qu'à titre d'aliments étaient considérées comme non écrites et ne profitaient point au fisc. La raison que les jurisconsultes romains en donnent est qu'ils sont les esclaves de la peine et non pas de César (I)<sup>294</sup>

While exile triggered civil death as did condemnation to work in the mines, they are joined by the interdiction of fire and water. The history of French civil death, according to this author at least, had a social character in terms of creating obligations on others. The rights of the condemned were understood to stand in relation to other members of society so that the interdiction of fire and water, life-sustaining aid, created an obligation on everyone else in the society not to come to that person's aid. The privation of rights of the city created a social obligation on others. He also refers to a specific case in which a will was not executed in which something was left to the condemned person. He calls this *servitus poenae*, in which the condemned is made into a slave of the penalty. The parts of ancient Roman law Genaudet picks up on are different from the ones picked up on during roughly the same period in North America or in England. There is not a single narrative, however, for what French civil death meant or its legal form in relation to older legal concepts. One hundred years earlier, François Richer, whom Genaudet cites, argued for a somewhat different meaning of civil death.

The French jurist, François Richer's treatise in 1755 on civil death is a comprehensive book on the topic. Like Blackstone's Commentaries, Richer provides a significant amount of political analysis and justifications for the law, but he also goes into extreme detail about all the legal intricacies of civil death as it is his sole topic. Richer divides up the topic on civil death into a short introduction and

---

<sup>293</sup> "En 1801, lorsque le code civil fut rédigé, il n'existait pas en France d'autre peine perpétuelle que la mort. C'est en 1810, lors de la confection du code pénal, que deux nouvelles peines perpétuelles furent créées, les travaux forcés à perpétuité et la déportation. Aujourd'hui, donc, deux peines perpétuelles seulement produisent la mort civile : la mort naturelle et les travaux forcés à perpétuité. » *Ibid* at 19.

<sup>294</sup> *Ibid* at 7.



then roughly the same amount of attention is paid to both the civil death as a consequence of a crime and civil death for those who enter a religious profession. Since different religious orders would have different legal requirements, the book looks in detail at the origins of the disabilities for religious vows and the variations in consequences. Through the book, he also tells the story about persecution of religious communities in Europe, to the large amassing of property for the communities and the isolation and insular regulation of a different normative order and legal space within monastic life.

In his general approach to civil death, he looks at the Roman law as a source of law rather than simply comparison (as in the Anglo-tradition which has the feel of rediscovery) though comparison between different legal structures with differently organized societies is also part of the analysis. Also, importantly, he is himself constructing the category of civil death through his analysis. He writes: “J’ai examiné, relativement à mon objet, le droit écrit & chacune des coutumes, dans lesquelles j’ai trouvé quelque relation directe out indirecte avec la mort civile.”<sup>295</sup> Richer makes links between civil death and Roman law so that when he articulates his theory of civil death based in the social contract, it is a social contract framed alongside differentiated statuses or differentiated rights. He outlines the different kinds of rights that are available to different kinds of statuses. The rights that come from the law of peoples (*jus gentium*) are essentially private rights—the right to buy and to sell and to own goods. He states that these are not reserved just for the French in France but are available to anyone in the city. He describes a kind of private citizenship.

While he is distinguishing the French law from Ancient Roman law on civil death in various respects, he draws an analogy between civil death and the Roman *capitis diminutio*.<sup>296</sup> Richer claims that all men are necessarily free or a slave, and they are also necessarily either a citizen or alien. In Roman law, he explains, if a man is free, a citizen and also head of the house then it is called *caput*. This status of person takes part in public deliberations and has a voice in the decisions in the assemblies. If someone were to lose any of those three “qualities” of being a free, citizen, and head of family, then he loses his voice, and so it is called, *capitis diminutio*.<sup>297</sup> Richer distinguishes the Roman law of *caput* from French law of statuses on the basis that first, he argues, there is no slavery known in France and anyone born in France is French. For Richer, there is thus no equivalent of loss of one or all qualities as in *maxima*

---

<sup>295</sup> Richer, *supra* note 55 at iij.

<sup>296</sup> Richer, *supra* note 55.

<sup>297</sup> *Ibid* at 11.



*capitis diminutio* in France (or the loss of all three qualities). There is no equivalent in France, and so the loss in legal rank in France “se Reduit a la perte de la qualité de citoien” that is, it is the person loses all rights; to be condemned, then, and lose citizenship means the loss of civil life in its totality, and so it is also “la mort civile.”<sup>298</sup>

French law did not have the same structure of different kinds of persons in the same way as the Roman law, and yet Richer argues that the loss of rights is the loss of citizenship as the loss of civil life. Richer’s project was simply to lay out the law as it was. It was a different document from Genaudet’s critique of civil death. Although there would have been then, like today, disagreements based on what is considered to be unreasonably harsh based on one’s political sensibilities, there was something else going on as well based on the ways in which the techniques of civil death could adapt to different national contexts in different moments. Since the legal entailments of civil death varied greatly from national context to context and over time in the same country as did the offences or actions for which it was used, the assessment of it normatively varied as well.

The moment that rights enter a kind of political maturity with the nation state in the eighteenth and nineteenth century, is the same moment their lawful denial is codified in the French and Russian legal codes. On the one hand it can be argued that to codify the specific instances in which rights can be alienated from the person protects the system of rights or the rule of law. On the other hand, a tension manifests between the impulse to withhold rights as a form of punishment or social control, and the discourse that makes rights inalienable.<sup>299</sup> Civil death in the French Civil Code was considered to be a taming of civil death in some ways from its earlier history of French *Coutume*. Under the Code Napoleon, civil death was defined as the “privation of civil rights in consequence of judicial proceedings.”<sup>300</sup> It was regularized, arguably, as a form of protection. Still, civil death did not last long in the French Code and it was abolished in name completely in 1854.<sup>301</sup> According to Mirjan Damaska, much of the legal form of civil death, or the state’s ability to create disqualifying disabilities remained

---

<sup>298</sup> *Ibid* at 15.

<sup>299</sup> Kennedy, *supra* note 222. The natural rights in the pre-classical period were both inalienable while also limitations were spelled out explicitly. There was not seen to be contradiction in this.

<sup>300</sup> George Spence; Richards France, Robert Samuel, *Code Napoleon; or, the French Civ Code* (New-York: Halsted and Voorhies., 1841)

<sup>301</sup> It was regularized, arguably, as a form of protection. Still, civil death did not last long in the French Code and it was abolished in name completely in 1854. Damaska, *supra* note 71 at 352.

intact in French code systems while the formal institution or at least the term disappeared.<sup>302</sup> In this sense the nineteenth century was a period in which the legal contradictions that were embedded in the philosophical and legal theory of the age of revolutions were being worked out in practice. David Kennedy, has observed an "explosive break" writing on the nineteenth century as a period marked by the combustion of the emergence of the "classic" at the same time as its "critique."<sup>303</sup> Rather than seeing legal consciousness as sequential, Kennedy proposes simultaneously competing ideologies. This kind of agonistic relationship makes civil death visible as a contested category in this period and as it disappears in Europe, it is newly entrenched in the colonies. Between Richer and Genaudet a hundred years pass and while the critique of civil death gains strength in France, in North America civil death would be getting a new life. The Napoleonic Code of 1804 would influence the civil codes throughout Europe as well as in the Americas later in the century.

### 3. North American Civil Death in the Second Half of the Century

In the second half of the century the civil death concept gets collapsed with attainder in North America. In the 1860s in both the U.S. and Canada, something interesting happens in which civil death and attainder become practically linked in what appears to be a novel way. While civil death was sometimes understood as a consequence of an attainder, in this period they are used as interchangeable concepts. This is significant in part because if civil death simply is attainder, then all the other instances of dissolution of political bodies, of monks, of being placed in a privative status as a civil death then potentially also becomes a kind of stain or mark. Alternatively, if civil death is not simply attainder then it is not only a punishment. Civil death could be any number of ways of incapacitating legal subjects.

---

<sup>302</sup> Mirjan R Damaska, "Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study (Part 2)" (1968) 59:4 The Journal of Criminal Law, Criminology, and Police Science 542. "The statute of 1854 abolished 'civil death' and substituted twofold incapacity which attaches by operation of law to all life sentences and continues even if the life sentence is commuted. Twofold incapacity includes the incapacity to receive gifts or take by way of succession and the incapacity to make a valid will or make donations. Obviously, only the most objectionable disqualifications contained in 'civil death' were rejected." Damaska, *supra* note 271 at 352.

<sup>303</sup> Kennedy, *supra* note 12 at 103.

### 3.1. *Civil Death as Attainder in the U.S. Civil War*

While attainder and civil death were distinct legal concepts by my reading of the treatises of Lord Blackstone and Lord Coke within the British common law before the nineteenth century, the two concepts would become deeply entwined in their usage thereafter. A precise definition is helpful for advancing the argument even though attainder has already been mentioned. W.W. Thornton, a legal librarian, judge and prolific writer on law at the end of the nineteenth century and beginning of the twentieth wrote on the history of bills of attainder. Thornton quoting the decision *Gaius v. Buford* defines a bill of attainder as "a legislative act, passed for the special purpose of attainting particular individuals of treason or felony, or inflicting pains and penalties beyond or contrary to the common law."<sup>304</sup> Since the U.S. Constitution explicitly prohibits "Bills of Attainder" in Article 1, and there is a prohibition of attainder beyond the life of the attainted in Article 3, the issue of the legality of functional attainder for persons in open rebellion became an important legal question for the president. The Constitutionality question first came up regarding the legality of forfeiture of Confederate rebel property. Between 1862 and 1863 letters were exchanged on the legal question of whether or not rebels, who were deemed guilty of treason, should forfeit their property. In correspondence between W.D. Wilson and New York appeals judge Samuel Foot, the question was dealt with at length.

William Dexter Wilson was at that time professor of history as well as Christian ethics, logic, and philosophy at Hobart Free College, and would later become the dean of St. Andrews Divinity School. Judge Samuel Foot was an outspoken critic of slavery authoring a resolution critical of the Dred Scott decision in 1857, while a Republican member of the New York Assembly. He would later become a close friend and informal advisor to President Lincoln. I mention this because their involvement and arguments for the uses of what many may call civil death techniques and attainder makes the history of civil death complicated. In this case, the President's legal advisors made an important historical

---

<sup>304</sup> WW Thornton, "Ex Post Facto Laws and Bills of Attainder" (1884) 5:3 *The Criminal Law Magazine* at 352.

"...[T]here are certain characteristics which distinguish bills of attainder from all other penal statutes. 1. They always inflict the penalty of death upon the offender, or of outlawry, which is equivalent to death. They are always ex post facto laws, being passed after the crime was committed which they are to punish. 3. They never allow the guilt or innocence of the persons attainted to be ascertained by trial; but the guilt is attributed to them by act of Parliament. They always impose certain penalties, among which are corruption of blood and forfeiture of estate. The essence of attainder is in corruption of blood, and without the corruption of blood no person is by the English law attainted." Whiting, *supra* note 57 at 92–3.

argument in favor of the use of legal techniques that are quite difficult to disentangle between attainder and civil death as they are framed in the letters. What's more, they do it in defense of the abolition of slavery. It is in short, an instance in which it could be said civil death and attainder did not carry the racialized taint, but instead were to be used for racial justice.

In a letter addressed to Foot, Wilson responded to a request from Foot to investigate the legality of Congress confiscating the property of rebels for a period longer than the lifetime of the rebel. That is, he was asked whether or not the government could disinherit heirs if their fathers were rebels. Wilson begins his letter by noting the importance not only of being able to quash the rebellion and "punishing the rebels," but he also asserts that this question is important for the national debt that he estimated at "a thousand millions of dollars."<sup>305</sup> The question arises because along with the prohibition of bills of attainder, the U.S. Constitution Under Article 3 section 3, reads "The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted." In the letter, Wilson argued that attainder was in fact legal as a consequence of a conviction for treason, rebellion or another serious crime, "only it must be by trial and conviction."<sup>306</sup> The prohibition, then, was not against attainder but against the absence of due process. The prohibition of the bill of attainder in U.S. law, as opposed to a judicial attainder distinguishes the American theory of individual rights protection from Lord Blackstone's argument. In the U.S. the framers were more concerned with political attainder (acts of Congress naming a person as guilty of treason without a judicial process) and they believed in the judicial process as protection from the worst forms of state excess.<sup>307</sup> The penalties were also softened by Article 3. Blackstone, one recalls, in contrast was more concerned with individual judicial excesses and argued for the logic of only allowing attainder by Parliament in a political process.

Wilson then outlines what attainder as forfeiture meant: "The forfeiture or loss of civil rights may be resolved into three elements:..."<sup>308</sup> Those three elements were the right to vote or hold office, the right to hold property "as that right in England...was not allowed to any foreigner or alien"<sup>309</sup> and a

---

<sup>305</sup> William Dexter Wilson, *Attainder of Treason and Confiscation of the Property of Rebels: a Letter to the Hon. Samuel A. Foot, LL. D., on the Constitutional Restrictions Upon Attainder and Forfeiture for Treason Against the Public Domain* (Albany: Weed, Parsons and Co. Printers, 1863) at 3.

<sup>306</sup> *Ibid* at 7.

<sup>307</sup> See e.g. Whiting, *supra* note 57.

<sup>308</sup> Wilson, *supra* note 305 at 6.

<sup>309</sup> *Ibid*.

right to protection when abroad. But the most important part is that this is reduced to the forfeitures of “attainder” as “a loss of all civil rights –all the rights and privileges of citizenship.”<sup>310</sup> Under this interpretation, attainder doesn’t have the sound of condemnation from the corruption of blood or a taint, it is reduced to the loss of civil rights. The definition in this sense – a loss of all civil rights – is simply the same understanding as that of civil death and it is operationalized in specific terms that are the rights of citizenship.

The American reform of these laws were procedural as well as prohibiting torture. They keep the civil death though while jettisoning the procedural injustices as well as the bodily brutality. Justice Foot states that his views are in conformity with Wilson's, writing, "Our fathers, in framing our Constitution, have provided for us a humane, yet efficient mode of punishing treason."<sup>311</sup> The rebels would not be tortured or disembowelled, but nor would they live a life like any other citizen. The forfeiture from attainder is used interchangeably with the loss of all civil rights. The gravity of the loss of all civil rights including one’s property is measured against the gravity of the offenses.

And there is something peculiarly appropriate in the punishment of treason by confiscation of property. It has been practiced, I believe, under every form of municipal law and by every government that has existed. For lighter offences we punish by fine and imprisonment. We take the life of him who has merely taken the life of a fellow man, with malicious intent. But for the man who has aimed at the life of the nation, not death only, but utter loss of all civil rights and privileges, would seem to be the natural and appropriate manifestation of the nation's sense of the enormity of the wrong that had been attempted against it. <sup>312</sup>

According to Wilson, the loss of civil rights and of property are presented as worse than death and appropriate in cases in which the person has gone after the state itself. The confiscation of property is the fitting punishment for someone who has “aimed at the life of the nation” as it is not a normal crime. Still, there is some vacillation between the loss of all civil rights as a mercy in comparison to the old bill of attainder in England as well as a harsh consequence. In the midst of the civil war, when the Emancipation Proclamation had been written, but not yet made public the question of property

---

<sup>310</sup> Wilson, *supra* note 305.

<sup>311</sup> Samuel Foot, *Attainder of treason and confiscation of the property of Rebels : a letter to the Hon . Samuel A . Foot , LL . D . , on the constitutional restrictions upon attainder and forfeiture for treason against the Public Domain* (Weed, Parsons and Co. Printers, 1863).

<sup>312</sup> Wilson, *supra* note 305 at 453.

was central to the war. Confiscation of property of Confederate rebels of course also included the slaves that continued to work supporting the economic machine in the South while freeing up White men to fight as soldiers. Civil death was a form of liberating the Black enslaved men, women and children and simultaneously exerting a death blow to the South. Wilson, who would become the dean of a Divinity school and teacher of ethics went on to write the following:

Let the people feel how priceless are their blessings under a benign government and a righteous administration of laws. Let them see, in the utter destitution and wretchedness to which they are reduced who wantonly raise the murderous hand of treason against it, how sacred was that life, the life of the nation, which they had imperiled—how worse than the midnight assassin and the highway robber is he who commits treason against that government and those laws which have been for him and for the millions of his fellow-men the source of all their earthly enjoyments.<sup>313</sup>

The consequences of the attainder including the taking of property are aimed to both reduce the person to “wretchedness” and at the same time, reinforce that the United States has a “benign government and a righteous administration of laws.” The rule of law is both the means by which the person is rendered destitute and also the source of an almost divine justice that requires submission and obedience. It may feel like a contradiction and these lines quite naturally bring us to ask how the rule of law functions in times of crisis and how thin the line is between tyranny and justice. This form of punishment reduces the person to wretchedness through economic destitution and it does so by attacking the legal person.

These questions all turned on the system of property. Wilson argues first that the distinction of the life of the person attainted was a reference to the system that had a large part of the land held by an entail. Since it was a life's interest and not the actual property, the forfeiture for the length of the life of the person attainted only meant that there was no “corruption of blood” so that the next family member in line would inherit directly from the original testator after the bodily death of the condemned. Wilson interpreted the Constitutional prohibition of bills of attainder that it “will work no forfeiture except during the life of the person attainted” to mean that it abolished the corruption of blood, so that the line of inheritance of an entail would not be broken by the attainted family member. However, if the estate was held in fee-simple, the forfeiture would be an absolute forfeiture

---

<sup>313</sup> *Ibid.*

in the sense that it would not pass to the children of the attainted. This was not unjust for Wilson and meets the meaning of the Constitutional wording on the prohibition of bills of attainder. Never mind that the properties in the United States, unlike the estates of England, were largely held in fee-simple. President Lincoln did not agree with this point in their legal opinions and he himself regarded it prohibited to take the property from the heirs. So, some forms of property could be confiscated but not the lands.

There were other forms of contraction of the meaning of attainder during the civil war to carve out a larger expanse for all that was still legal. William Whiting, the U.S. Representative from Massachusetts wrote *The War Powers of the President and the Legislative Powers of Congress in Relation to Rebellion, Treason, and Slavery* (1862) while solicitor for the War Department. Writing in the moment of the civil war he submitted a very clever legal argument that contracted the meaning of the prohibition of Bills of Attainder. Only in the event of a sentence of death or outlawry would a legislative act be considered a bill of attainder. He drew a distinction between bills of attainder and bills of pains. Making the distinction that can appear a bit circular, he wrote, “The essence of attainder is in corruption of blood, and without the corruption of blood no person is by the English law attainted.”<sup>314</sup> A legislative act then could be used as long as they were not death sentences. The permissible form of punishment is contrasted with what is described as the excessive British punishments, as bills of attainder in England, “By these statutes, famous in English political history, tyrannical governments have usually inflicted their severest revenge upon traitors. The irresistible power of law has been evoked to annihilate the criminal, as a citizen of that State whose majesty he had offended, and whose existence he had assailed. His life was terminated with horrid tortures; his blood was corrupted, and his estates were forfeited to the king. While still living, he was deemed, in the language of the law, as “civiliter mortuus.”<sup>315</sup> Commentary at the time classifying a series of cases that touch on the U.S. Constitutional prohibition of bills of attainder and ex post facto laws clarified that bills of attainder were frequently understood to include bills of pains as well, that is lesser penalties that do not work a corruption of blood.<sup>316</sup>

---

<sup>314</sup> Whiting, *supra* note 57 at 92.

<sup>315</sup> *Ibid* at 84.

<sup>316</sup> “In some cases a less severe penalty was inflicted, and, in that event, the judgment was denominated a bill of pains and penalties. However, as the two kinds of bills partake of the same nature and characteristics, and as the one is more shocking to our sense of right and justice only because it inflicts a more terrible punishment, they are evidently to be classed in the same category, - and, in fact, the term “bill of attainder”



It is important to keep in mind that these arguments were made in the midst of a civil war and the way in which Wilson and Foot and even Whiting dealt with these questions had a context. Samuel Foot wrote a letter to President Lincoln in which he not only detailed his own personal loss of two of his three sons who had already died fighting for national unity, but he used his family's sacrifice as a moral position to urge the President to abolish slavery. He said "This priceless contribution which I have been called to make to sustain our institutions and the integrity of our country entitle me,"... to say, "it is perfectly clear to my mind that the rebellion cannot be effectually suppressed, and we become a united people, unless slavery is destroyed".<sup>317</sup> It is a profound irony that the same legal structures Foot argued were necessary to end the war and to defeat slavery would later be used for what some have argued is the inscription of a criminal caste system with racialized dimensions in the United States.

### 3.2. *Enacting Civil Death After the Civil War*

Post-reconstruction cases of civil death continue to deal with questions of property, and the construction of property as being a different kind of right. A landmark civil death case was decided by the Court of Appeals of New York in 1888 called *Avery v. Everett*. This decision ruled on whether a civil death statute meant that property would necessarily pass to the heir of a man convicted of murder in the second degree; this case was decided in the same court Judge Foot had presided over only a decade before. In the *Avery* case, the property which was left to a convicted man by his father had a provision in which if his son died without children the property would be passed in possession to his cousin. The case decided whether to eject a third-party lessor from the property if it passed in fee to the cousin. The court took on the task of statutory interpretation in which a person sentenced to life in prison "shall thereafter be deemed civilly dead." The court decided that civil death did not mean that the convicted would be divested of his property, claiming, "[b]ut there is a guiding principle which, in the present case, greatly aids in solving the question presented, and that is, that no one can or ought to be divested of his property *in invitum*, except by the clear warrant of law, and this, we think, is not found in the statute relating to civil death."<sup>318</sup> The Court does not make it illegal to take the

---

*has come to be used in a generic sense, including also a bill of pains and penalties. It is in this comprehensive signification that it is used in the Federal Constitution."* Henry Campbell Black, *An Essay on the Prohibitions Against Legislation Impairing of Contracts and Against Retroactive and Ex Post Facto* (1887) at 314.

<sup>317</sup> Samuel Foot, "No. LIX\_Vol. 1, Abolition of Slavery, Geneva, Dec 15, 1862" in *Autobiography: Collateral Reminiscences, Arguments in Important Causes, Speeches, Addresses, Lectures, and Other Writings* (New York, 1873) at 430.

<sup>318</sup> *Avery v. Everett*, 110 N. Y. 317, 18 N. E. 148 (1888)



property, the interpretation only states divestment of property must be done by express statute. There are two important aspects of this case to highlight.

The first is the way the history of civil death played an important part in the decision and the second is the way property rights are articulated as a special kind of right. The court relies on the treatise by Chitty to determine the meaning of civil death through the authority of "the ancient common law" by claiming the offender was in "a state of attainder." The court divides up the three distinct consequences for the attainder: "forfeiture, corruption of blood and the extinction of civil rights, more or less complete, which was denominated civil death."<sup>319</sup>

On the topic of criminal law, Chitty, when discussing attainder, describes the law of forfeiture as having a distinct origin from the feudal system. He claims that forfeiture came from the Saxons and was part of "old Scandinavian constitution"<sup>320</sup> The Appeals Court uses this distinction of historical origins as a way to separate civil death from forfeiture and corruption of blood. The court asserts,

Forfeiture was a part of the punishment of the crime, and was of Saxon origin, ...The doctrine of corruption of blood was of feudal origin, introduced after the Norman Conquest...The incident of civil death attended every attainder of treason or felony, whereby, in the language of Lord COKE, the attainted person 'is disabled to bring any action, for he is *extra legem positus*, and is accounted in law *civiliter mortuus*,...The forfeiture of the estate of the attainted felon to the king or to the lord, was not a consequence of the situation in which he was placed, of *civiliter mortuus*, but proceeded upon distinct and independent reasons, and this, we think, is rendered plain when we consider how the law of forfeiture was construed.<sup>321</sup>

The question of whether property rights were considered as part of the civil rights of the civilly dead was decided as a matter of divergent legal histories in the negative. The court appeared to be anxious about the taking of property and the apparent links to civil death even as far as devolving the property to the heirs of the person declared civilly dead. The far more controversial point of property being taken by the sovereign was not even a consideration in this case. Property was separated out from the

---

<sup>319</sup> Avery v. Everett, 110 N. Y. 317, 18 N. E. 148 (1888)

<sup>320</sup> Joseph Chitty, *A Practical Treatise on the Criminal Law* (Banks, 1847).

<sup>321</sup> Avery v. Everett, 110 N. Y. 317, 18 N. E. 148 (1888)

rest of the rights in civil death as a separate matter of the attainder, and part of a more ancient doctrine that was not the American form of attainder since there was no corruption of blood.

The dissent in this case, Judge Earl read the divestment of property as part of quashing one's civil rights. "As the convict could no longer discharge any of his obligations to society, he was to possess no civil rights whatever...He no longer possessed any rights growing out of organized society or depending upon or given by law. As to all such rights, he was, in law, dead and buried;"<sup>322</sup> Property rights were part of the rights forfeit in the dissent, but not for the majority. In order for the majority to come to the conclusion that property rights are different, civil death and attainder had to be collapsed even as they are enumerated separately. That is to say, the special treatment of the property consequences of attainder (corruption of blood and forfeiture) are extended to the meaning of rights in civil death as well. Permissible civil death and attainder in the U.S. then together means the extinction of rights excluding property rights unless explicitly stated by law. Importantly, in this case, this is a "regular" murder case and the taking of property is decided as extraneous to the statute. The history, in this case, served a particular purpose.

The question was not whether the taking of property was part of ancient law or not. The court used legal history to determine that the taking of property had a distinct origin, extraneous to civil death statutes, that allowed for a greater protection of property rights. It is a particular use of history. In the late nineteenth century, property rights become separated out from other rights and the court maneuvered to protect a claim to property as a different kind of right. Importantly, at the same time the other consequences of civil death were extended to less serious offenses as high treason and normal crime are treated in similar fashion. The Avery case was not an instance of treason or open rebellion, but second-degree murder. This case could be read as a protection of private property for the purpose of creating predictability for the functioning of the economy in the decades after civil war. On the other hand, the protection of property in this period was not universally experienced. As we will see in the next chapter, some people's property rights were seemingly sacred through particular readings of civil death, yet property protections were being shifted back toward White ownership in the South after reconstruction ended through other legal processes that have also been called civil

---

<sup>322</sup> Avery v. Everett, 110 N. Y. 317, 18 N. E. 148 (1888)

death. Before getting to these questions which require a different methodological approach, I will turn to the transformation of civil death in Lower Canada.

### 3.3. *Civil Death in the Civil Code of Lower Canada 1866*

In Canada, the question of attainder arose in a few cases, but relative political calm meant a relative silence on the attainder front as well. In May 1803 when the British declared war on Napoleon, there was a brief moment when it was unclear where French-speaking Canadians would put their loyalty. The British Register in June published in Quebec *The Criminal Laws of England* with the header, that since “we have the happiness to live under the law” that they “may be a terror to offenders and an assurance to the peaceable and honest subject.”<sup>323</sup> It is a possible coincidence that this is published at this moment, but it is also possible it was a political message. The abstract in the paper included the penalties for treason. The brutal bodily consequences of treason in this period contained a description of the different ways of being put to death that include being drawn and quartered, beheaded, and “embowled alive”.<sup>324</sup> Attainder was also outlined and it included forfeiture to the King and corruption of blood. As it happened, French Canadians were perhaps more critical of Napoleon than even their English-speaking neighbors, and a crisis averted also meant an archive unfilled.

In North America, oaths of loyalty were pivotal to the legal order during the War of 1812 as porous borders were hardened and relationships between trading partners were strained. Oaths of loyalty were tied to civil death. First, civil death accompanied treason which means that questions over who owed allegiance and who was thus treasonous and subject to a civil death as opposed to prisoners of war became a question. The trials of those captured in the Canadas during this period turned in many cases on whether a person had taken an oath and owed allegiance to the Crown.<sup>325</sup> If an oath had been taken, the person was considered a traitor and so civil death, including the taking of property, would be applied. This is contrasted with the deportation of enemies captured in the rebellions who were often simply deported as there was no breaking of an oath and this was considered less of a violation.

---

<sup>323</sup> “Abstract of the Criminal Laws of England”, *The British-American Register* (November 1803).

<sup>324</sup> *Ibid.*

<sup>325</sup> Paul Romney & Barry Wright, “State Trials and Security Proceedings in Upper Canada during the War of 1812” in F Murray Greenwood & Barry Wright, eds, *The Canadian State Trials: Law, Politics and Security Measures 1608 - 1837* (University of Toronto Press, 1996) at 380.

With the outbreak of the War of 1812 there were important legal changes that took place governing the Canadas. First, in 1800 following the attempted assassination of King George III, the Act for regulating Trials for High Treason and Misprision was passed that made trials for high treason just like any other murder trial. The Act made high treason into an offence that was not exceptional and did not carry special processes, but like any other murder it provided for the attainder of the accused.<sup>326</sup> Paul Romney and Barry Wright have argued that this act amended the British acts of 1709 and 1744 “which had provided for the future abolition of estates upon attainder of treason.”<sup>327</sup>

The earlier legislation attempted to restrain the sovereign from using his power to attack his political enemies by taking their estates which had been politically contentious. With the assassination attempt, the Act of 1800 settled that treason was, at the turn of the century, made an offence for which one would be attainted if convicted and property would be forfeited to the Crown; but it was also made into a normal offence. The second important legal change that would take place as a consequence of the war was a series of legislative acts passed to confiscate the estates of traitors. There were “summary deportation and criminal proceedings” but for the American-born persons who had either taken oaths of allegiance to Britain while residing in the Canadas or else had not, special legislation had to be passed introducing “outlawry” if they returned to the United States or else declaring them “enemy aliens” if there was no oath pending an inquiry.<sup>328</sup> In any event, special legislation was introduced so that the persons who left the territory or were convicted on these grounds had their land confiscated and given to the Crown even if they were in absentia.

The Rebellions against British rule and trials of 1836-7 along with the brutal response to them and the imposition of martial law is generally accepted as a watershed moment in Quebec history.<sup>329</sup> The uprisings were followed by executions and deportations and the porousness of the borders changed as did the presumption of loyalty. After this it was no longer possible to choose one’s allegiance to the Crown or occupy the lands as a non-aligned subject. The Civil death statute in the Code of Lower Canada would become a particularly harsh iteration of what can be entailed in civil death laws.

---

<sup>326</sup> 39 and 40 George III (1800), c. 93 *An Act for Regulating Trials for High Treason and Misprision of High Treason in Certain Cases*.

<sup>327</sup> Romney & Wright, *supra* note 325 at 396.

<sup>328</sup> *Ibid* at 381–396.

<sup>329</sup> Donald Fyson, “Between the Ancien Régime and Liberal Modernity: Law, Justice and State Formation in colonial Quebec, 1760-1867” (2014) 12:5 History Compass 412–432 at 417.

As in the French Civil Code, in the Quebec Code the civil rights that would be implicated are first and foremost property rights. As previously described, as natural rights theory takes root and rebellious populations begin to challenge state authority, the techniques of taking rights away are also formulated explicitly in law. By the second half of the century, these earlier conflicts and legal structures set up the codification of civil death in the legal code.

In 1859 meetings began in Quebec City to draft a new code based on "Roman, customary, and statutory jurisprudence."<sup>330</sup> All three of the codifiers, Rene-Edouard Caron, Augustin-Norbert Morin, and Charles Dewey Day had been according to the historian Brian Young "practitioners of commercial rather than academic law."<sup>331</sup> Their ideology has been described as fitting with the dominant elite at the time, "a social conservatism centered on the family, and an economic liberalism that gave priority to the individual and to the rights of contract and property."<sup>332</sup> Despite what was primarily a commercial expertise of the Commissioners, their work outlined all the rights of British subjects in the Code.

Young, writing on the process of codification, described the dynamics of the period in which attempts to expand the English laws over lower Canada intensified nationalist sentiments buttressing a counter movement to codify the civil law as it was being practiced. The result was "a consensus among French Canadian legal intellectuals in favor of a strengthening of the Civil law, of the need for immigrants and peasants to be instructed on the responsibilities of the citizen, and of the necessity to unify the law so that inheritance, notarial, and landholding practices became uniform"<sup>333</sup> The need for uniformity is a first indication that the practices that were being put under pressure, and particularly the landholding practices, were to be codified so that although they purportedly supported traditional practices, were to be framed in some ways within a classical legal consciousness to transition from the pre-classical hierarchical organicism and regularize law to promote a new economic order. Young's analysis of the historical significance of the codification process emphasizes that it was a means of taking control of the breakdown of the existing legal system and the way property was already transforming in this era.<sup>334</sup> While there was already a change in the legal rules themselves as the

---

<sup>330</sup> Brian Young, *The Politics of Codification: The Lower Canadian Civil Code of 1866* (McGill-Queen's University Press, 1994).

<sup>331</sup> *Ibid.*

<sup>332</sup> Young, *supra* note 4 at 4.

<sup>333</sup> Beccaria, *supra* note 220.

<sup>334</sup> Young, *supra* note 330.

Seignorial system was eroding away, the attempt to codify the remnants of the legal practices resulted in a unique version of civil death that was both pre-classical and classical or something like “capitalism maintained in feudal form.”<sup>335</sup>

Just after civil death was expunged from the French Code, the codification process began in Quebec and civil death was brought into the Code. The 1866 code and the civil death articles should be read in this context of safeguarding the right to property and making the transformation to a more bourgeois-friendly system of property within a larger system that was fighting to maintain territorial sovereignty. Civil death was brought in when there is political upheaval and economic liberalization. It is in some ways the prescription in law of the conditions under which property can be taken away by the state that asserts a fully-fledged property system in the nineteenth century model.<sup>336</sup> There was a push-pull relationship that pulled towards property rights as an absolute source of popular sovereignty in one instance and also a conditional privilege that aligned political obedience in another.<sup>337</sup> There was a simultaneous expansion of formalization in criminal justice and property system so that both were taken out of the hands of communities and placed in the hands of the state in the forms of uniformed police forces, and the establishment of registry offices for property as two examples.<sup>338</sup> The protection of rights and the prescription of the conditions under which property can be taken away and allocated to someone else seem to go hand in hand. Territorial sovereignty in liberal theory relies on the respect of property rights, but without respecting sovereign authority, there is no protection of property by the sovereign.<sup>339</sup> But, to make this more apparent, let’s turn to the text of the Code.

---

<sup>335</sup> I am using pre-classical and classical in the sense used by Kennedy. However, it is not a clean use of his theory. The thing that the codifiers attempt to preserve were traditional land tenures to the extent they could while systematizing the legal order. See Kennedy, *supra* note 200.

<sup>336</sup> Morton Horowitz makes a similar argument when he describes the transformation of the property law system from the 18<sup>th</sup> to the 19<sup>th</sup> century in Morton J Horowitz, *The Transformation of American Law, 1780-1860* (Cambridge: Harvard University Press, 1979).

<sup>337</sup> Private law jurists sometimes critique the demise of “strong property rights” and refer to a golden age in which property was supposed to be sacrosanct. But property was always conditioned upon a certain degree of obedience to the sovereign who in turn ensured the protection of the property rights. This can be seen even in Blackstone’s Commentaries when he refers to property as an absolute right on the one hand just after he outlines the conditions under which property can be alienated for treason or other forms of disobedience. Blackstone, *supra* note 275.

<sup>338</sup> Fyson, *supra* note 329 at 417.

<sup>339</sup> See Daniel Lee, “Private Law Models for Public Law Concepts : The Roman Law Theory of Dominium in the Monarchomach Doctrine of Popular Sovereignty” (2008) 70:3 *The Review of Politics* 370–399. Morris R Cohen, “Property and Sovereignty” (1927) 13:1 *Cornell Law Review* 153–176.

According to the Code of Lower Canada, the loss of civil rights is prescribed by law in two instances: the first in cases which are provided for by the laws of the British Empire and the second, by civil death. The instances of civil death are outlined in articles 31-36. Section I. outlines four instances that result in civil death in cases persons are condemned to “certain” corporal punishments or corporal punishments for life and for persons condemned to death; the law also outlines civil death for vows taken in the Catholic profession.<sup>340</sup>

There is a lot in this law, so I will tease out a couple of key issues. First, it is notable that the Code outlines the cases of condemnation that carry civil death *as well as* the cases of religious vows taken in the Catholic faith. It is important to make clear that civil death in Quebec was not exclusively associated with criminal conviction but was also used in cases where there was no fault or guilt associated with it. It was quite the opposite of a moral stain in the case of joining a religious order. This, like the cases mentioned before which other nineteenth century jurists had made visible, were not simply the uses of civil death as a punishment, but civil death as an exit from civil sovereignty to an ecclesiastical sovereignty. In the same segment of law, there is both an acknowledgement of British Imperial legal sovereignty as well as an assertion of French Catholic nationalism in which the religious tradition of civil death is formed in law.

What is also unique in this case are the effects of civil death. This is a bit lengthy, but it seems the full text is useful to illustrate not only the content of the articles but also the order in which they are presented and their exact wording.

35. Civil death carries with it the loss of all the property of the party attainted, which is confiscated to the crown.

36. A person civilly dead,

---

<sup>340</sup> *The Civil Code of Lower Canada*, 1866.

31. Civil death results from condemnation to certain corporal punishments.

32. Condemnation to death carries with it civil death

33. Civil death also results from the condemnation to any other corporal punishment for life.

34. The disabilities which result as regards persons professing the catholic religion, from religious profession by solemn and perpetual vows made by them in a religious community recognized at the time of the cession of Canada to England and subsequently approved remain subject to the laws by which they were governed at that period



1. Cannot take or transmit by succession.
2. He can neither dispose of nor acquire property, whether *inter vivos* or by will, and whether by gratuitous or onerous title; he can neither contract, nor possess property, but he may receive maintenance.
3. He can neither be appointed tutor nor curator, nor take part in the proceedings relative to such appointment.
4. He can not be a witness to any solemn or authentic deed, nor can he be admitted to give evidence in a court of justice, or to serve as a juror.
5. He cannot be a party to a suit, either as plaintiff or defendant.
6. He is incapable of contracting a marriage that will produce any civil effect.
7. Marriage previously contracted by him is dissolved for the future, in so far as regards its civil effects only; the marriage tie subsists.
8. His consort and his heirs may respectively exercise the rights and actions to which natural death would give rise; saving rights of survivorship, to which civil death only gives rise when that effect results from the terms of the marriage contract.<sup>341</sup>

It is striking that so late in the nineteenth century it is written into law that the Crown confiscates the property in the case of civil death. It runs counter to all other codes in Europe and statutes in the U.S. Even after consulting the Travaux on the drafting of the Code, it is difficult to know exactly what was behind the way this section was drafted. It is also worth noting that the first article and the first subsections of the second article are about property. It is possible it was because the drafters were commercial lawyers or because in the French Code property was also the legal relation that was severed from civil death. It is also possible something else was behind the significance of property in the new world which was a political space founded on the promise or at least the possibility of private property for everyone.<sup>342</sup> That is to say, the promise of property requires protection of individual property

---

<sup>341</sup> *Ibid.*

<sup>342</sup> “The ordinary settler is not a man of great capacity; he is honest, generally industrious, willing to work hard and long to have a farm all his own, and frequently with the thought of handing it down to his children as a main motive; but he is not gifted [...] If he were a superior man in his economic gifts and economic training he would not be a settler in a new country.” Richard T Ely, “Private Colonization of the Land” (1918) 8:3 *The American Economic Review* 522–548 at 526.



rights, it is a promise that comes with strings and it is a mode of producing obedient civil subjects drawn from Europe to a new world in which full citizenship as property owners is a possibility.

This iteration of the Code is in direct contradistinction to the French Civil Code. Not only is the Quebec Code adopted after civil death as a punishment is abolished in France, it is adopted with a different meaning from civil death as it existed in the French Code. In the French code, there is no mention of an “attainted” person. It is simply the “privation of civil rights in consequence of judicial proceedings.”<sup>343</sup> In the French Code the purpose of civil death is to “deprive the party condemned of all participation in the civil rights hereafter mentioned.”<sup>344</sup> It is a specific set of rights and there is no mention of attainder. Historian David Head argued that in the fourteenth to the fifteenth century in England, “Parliamentary acts of attainder were used mainly to seize the property of convicted traitors and dead, captive, or fugitive rebels.”<sup>345</sup> Attainder was considered to be an exceptionally harsh penalty in England. It was not simply a penalty, but it was also a source of revenue for sovereign powers and one that did not require judicial condemnation, but only legislative condemnation or political designation. It is fairly certain that the inclusion of attainder in this moment had a significant property dimension while it also united the French and English legal authorities.

In the commentary on the drafting of the Code, there is little information given regarding the considerations of this change between the Napoleonic Code and the Code of Lower Canada. The drafters note that civil death had already been abolished in France at the time of drafting the Quebec Code.<sup>346</sup> They even note that the Code Napoleon had “much mitigated” civil death as it had previously existed.<sup>347</sup> I take this to mean that in the Code Napoleon civil death had been reformed and the effects had been significantly softened. They are likely referring to the fact that the property of the condemned persons, if they were not outlawed, would devolve to the heirs. There are likely other rights also involved that were restored. On the effects of civil death, the commentary weighs in on the issue of

---

<sup>343</sup> *The Code Napoleon or French Civil Code* (1827), Codification of legal system -- Civil death provisions.

<sup>344</sup> *Ibid.*

<sup>345</sup> David M Head, “Beyng Ledde and Seduced by the Devyll’ The Attainder of Lord Thomas Howard and the Tudor Law of Treason” (1982) 13 *Sixt Century J* at 4.

<sup>346</sup> Commissioners for the Codification of the Laws of Lower Canada, *Code Civil du Bas Canada: Premier, Second et Troisieme Rapports* (Quebec: George E. Debarats, 1865) at 153.

<sup>347</sup> *Ibid* at 153.

the property being confiscated by the crown. Noting that confiscation is compatible with the “old French law”, they write,

The Code Napoleon (art. 25) transfers the property to the heirs of the person condemned. This rule is more liberal and more just toward the family, but the other is more in accordance with the acknowledged rights of the crown, and on a matter which is so intimately connected with the public law, the Commissioners confine themselves to submitting the law as it is without suggesting any change.<sup>348</sup>

This is interesting since, as noted earlier, the question of the morality of civil death provisions in general are controversial, but specifically civil death provisions that provide for confiscating property for the Crown’s use are the most contentious. It not only unfairly harms innocents as collective punishment (the wife and children of the condemned) but it also provides an incentive for the Sovereign to abuse the power as it can become a source of revenue. It is significant that in an area that touches on public law the Commissioners would choose to err on the side of a much harsher penalty unless there were extenuating circumstances. Mark Walters has demonstrated that “[t]he view emerged that those parts of French-Canadian law that formed ‘part of the public law’ were ‘superseded’ and questions of ‘constitutional law’ were regulated by ‘the political law of England’.”<sup>349</sup> It is probable that the Commission followed this manner of harmonizing the British and French law, and the superiority of British law in public law matters was considered more powerful of a consideration than the very controversial and harsh nature of the provision for the persons condemned to civil death. In terms of my argument, this is important in the North American context as civil death mediated a tension between both British sovereignty and a kind of Franco nationalism embodied by the French Code, but the mediation is a strict measure that allowed for confiscations of private property in the event of disloyalty to the Crown.

The commentary goes on to further explain their choice of laws when framing the civil death provisions. In one passage, they explain the choice between old and new French laws in the person’s right to contract when civilly dead. “Old” or unreformed civil death laws make it impossible to make a contract or exchange goods in any way. The person is only allowed to receive “aliments” and is

---

<sup>348</sup> Canada, *supra* note 153.

<sup>349</sup> Mark D Walters, “The British Legal Tradition in Canadian Constitutional Law Oxford Handbooks Online” (2017) November 1–24 at 10.

essentially economically dead in law and becomes an object of charity rather than a proper legal subject. They say, “The Commissioners think it better to adhere to the old rule, which they prefer as being more in accordance with the principles applicable to the subject.”<sup>350</sup> That is to say, they prefer the more punitive old rule as opposed to one that would allow the person to trade, or “make all acts and contracts which result from natural law or the laws of nations.”<sup>351</sup> Their choice of laws in this period is buttressed often by appeals to Roman law.<sup>352</sup> The commentary notes that the drafting of the civil death provisions was guided in part by a desire to stay as true to the subject as possible in that, “...in our system, according to which he who is civilly dead, no longer exists as a person.”<sup>353</sup> It is another use of the history of the concept, but unlike the case used in the U.S. to separate out the confiscation of property, the appeal to history is used to justify the confiscations. In the U.S. case of *Avery*, there was a form of general disobedience but not in terms of competing sovereignties and property rights were protected, while in the *Canadas* there was a risk of competing sovereignties and property rights were not protected.

The choice of laws and harmonizing of the French and English legal systems in the Civil Code of 1866 meant that the Common law notion of attainder was mixed with the civil law notion of the deprivation of rights in a unique form of civil death. In the French code, it was a cleaner severing of rights. The harshest version of civil death was constructed through a series of choices that permits the most severe forms of confiscation of property. It is curious that this severe penalty is constructed by a group of nationalist, commercial lawyers in the case of disloyalty to the Crown. In each decision, it becomes clear that the harshest possible punishment, including the taking of property, is in some ways the best or most *natural* form of protection of property interests for the overall system. The severe intervention in private law matters occurs as a criminal penalty.

---

<sup>350</sup> Canada, *supra* note 155.

<sup>351</sup> *Ibid.*

<sup>352</sup> *Ibid.*

<sup>353</sup> *Ibid.*

## 4. Oaths and Obedience

Throughout this chapter there have been references to obedience and requirements of submission. I have been developing an implicit argument that disobedience is central to the historical concept of civil death in its various forms. Oaths and obedience have been part of the political and legal tapestry through the ages and seem to continually pop-up during periods of unrest, but it is also central in periods of peace and stability. Obedience is a central tenet in civil death.

Pollock and Maitland's *History of the English Law* is framed as a recovery of Medieval legal history and makes several links to obedience as being central to the early legal order. Pollock and Maitland organize the history paying attention to the particular relationships in which obedience and fealty are owed.

Obedience was a central issue in the fourteenth century uses of civil death according to Brady Spangenberg who also argues in his doctoral dissertation that civil death is located right on the dividing line between the “obedient citizen and the disobedient criminal.”<sup>354</sup> There is, however, more unity in the concept than what Spangenberg's binary between the citizen and the enemy conveys. Elsewhere in his text he quotes Lord Bracton as saying “there is no greater crime than disobedience...and thus the divine law agrees with human law”<sup>355</sup> There is no tolerance of a subject that is not obedient. Spangenberg claimed that Lord Bracton was looking for “a correlation between canon and civil laws.” The requirement for obedience then is not a dividing line that distinguishes the monk from the criminal as if divine law was in fact in concert with human law since the monk loses his place in society because he adheres to divine law. Instead, obedience is central because it is about the alignment of loyalty to authority. Obedience or the capacity to be obedient is also the mark of freedom and so these two converse concepts in fact unite all the different cases of civil death. The monk relinquishes his fealty to the Sovereign to serve God, but to serve God through allegiance to an Abbott. What the criminal and the monk have in common is that they are not obedient to the sovereign and so their property as its own form of political power cannot be protected by the Sovereign.

---

<sup>354</sup> Brady J Spangenberg, *Civil Death in Early Modern Europe From Jack Cade to Luther, Hamlet and Raleigh* \_Dissertation (2011) at 44.

<sup>355</sup> *Ibid.*

Pollock and Maitland follow Lord Bracton's lead, from whom their work largely draws, who organizes his own legal treatise in what they call "familiar" to all lawyers: persons, things and activities in the Roman law tradition. Pollock and Maitland discuss at length the different kinds of legal persons in medieval England including that of the villein. Like a serf the villein was not considered free, and he worked for his lord and was unable to deny the demands of the lord in the prescribed powers the lord had over the villein. Pollock and Maitland quote Bracton as saying "the villein being under the power of his lord may, like the monk, be considered as 'civilly dead'".<sup>356</sup> They explain the linking of the villein and the monk in terms of obedience, "a vow of obedience is a different matter; it is not very unlike a submission to slavery."<sup>357</sup> They extend out civil death from the monk to the villein because they owe their allegiance to someone other than the sovereign and so they cannot be obedient to the sovereign. Their lack of obedience to the sovereign is what makes them unfree, like the slave.

Although Pollock and Maitland made distinctions between different kinds of legal persons, they also argued that compared to France or Germany, "our law of status is poor" claiming in England men are either freemen or serfs, but that "when compared with tenure, status is unimportant."<sup>358</sup> English law, according to Pollock and Maitland, differed from French law especially in that the status relationships as privileges in themselves based on nobility or position almost disappear when compared to how estates in the property dictate the privileges and obligations. English land law, according to Pollock and Maitland, had been more important than the law of ranks so that when they said, you would read more in law books about "tenants by knight's service...than of knights" and all distinctions between persons "appear in practice rather as a distinction between tenures than as a distinction between persons."<sup>359</sup> This is a profound commentary in terms of what is brought to the law of status by English law, and what is brought to civil death as propertied or unpropertied persons. As the English legal system dominated North America in terms of the reception of law in the nineteenth century, this particular mode of status as a hyphenated status-property takes precedence.

Pollock and Maitland note that the term *felony* came from France and there, like in other places, it covered only feudal crimes, defined as "those crimes which were breaches of the feudal nexus and

---

<sup>356</sup> Pollock & Maitland quoting Bracton in the original Latin, "Est etiam mors civilis in servo in servitut sub potestate domini constituto." Pollock & Maitland, *supra* note 225 at 457.f

<sup>357</sup> *Ibid.*

<sup>358</sup> *Ibid* at 431.

<sup>359</sup> *Ibid.*

which would work a forfeiture or escheat of the fief,” that is to say not even homicide was considered a felony nor theft, but only “some breach of that faith and trust which ought to exist between lord and man”<sup>360</sup> So a felony would be a serious crime because it was a breach of loyalty such as particular murders, when a wife murdered her husband or a villein his lord. Felony crimes were the only ones at one point that would result in civil death. The authors note that changes in English law already by the early nineteenth century made it so that everything would be considered a felony so that “every crime that is to be punished by death or mutilation” had become a felony and the only vestige of this older law is that the land still escheats to the lord of lands. They speculate, “possibly the lords saw no harm in a change which brought them abundant escheats”.<sup>361</sup> They note, “All the hatred and contempt which are behind the word felon are enlisted against the criminal, murderer, robber, thief, without reference to any breach of the bond of homage and fealty.”<sup>362</sup> I would argue that the change to understand social relations in terms of the social contract assumes that any violation of the contract is a violation against the whole of society. Further, the protection of one’s property relies on the sovereign for that protection, so it is always in one’s own interest to protect the sovereign against anyone who challenges it. Through the social contract then the war of all against all becomes a war of all against an enemy whether the enemy is internal or external to the community. Obedience thus, continues to police the boundaries of the political-legal order.

As an example, in drafting the Civil Code of lower Canada, there were two instances for which a person would lose their civil rights: abdication of allegiance to British authority and civil death. However, the Commissioners while drafting the Code questioned whether or not it was possible to abdicate allegiance. They concluded that while someone cannot abdicate the obligations that come with allegiance, if he withdraws his allegiance, he loses the protection of rights owed from the sovereign.<sup>363</sup> That is to say, the entire point of owing allegiance to the sovereign is that it cannot be withdrawn if it becomes inconvenient or if you disagree with particular policies. Allegiance requires unconditional obedience.

---

<sup>360</sup> *Ibid* at 321.

<sup>361</sup> *Ibid* at 321–2.

<sup>362</sup> *Ibid* at 322.

<sup>363</sup> *Code Civil Du Bas Canada: Premier, Second et Troisieme Rapports*, by GE Desbarats (Quebec, 1865) at 151.

Civil death as a particular kind of legal consequence tied and later untied to treason that has a socially productive power in the sense that it is aimed at demarcating what is possible within a political system from what is impossible as it produces a particular kind of political subject. E. Kay Harris wrote on a history of prosecution of treason in mid-fifteenth century England. In it, Harris argues that through the "prosecution of unkind or treasonous words" against the king, the extension of control over the things that could be said and thus the things that entered into the cultural memory, produced loyal subjects while making disloyal subjects a political impossibility.<sup>364</sup> It was not just acts against the sovereign, but also the collective imagination that veered from imaginations of sovereign power that were prohibited. It would be impossible that a person could be both a subject and disloyal. There is a kind of contradiction definitionally. To be a subject is to be loyal; as a tautology if you are not loyal you are definitionally an enemy (and not a subject). Attainder or civil death would ensure loyalty because to affirm the system requires the impossibility of disloyalty – *that is, the rules make it so that a disloyal subject no longer exists*. Harris' argument is that,

Bills of attainder not only offered the court a means to confiscate lands and goods held by enemies of the king, but they also provided a means to dispossess these persons of intangible property as well. In effect, by declaring persons to be disabled at law or dead in the law and their blood to be corrupt, bills of attainder deprived them of the civil status of life that they had once enjoyed, reidentifying them as social outcasts.<sup>365</sup>

To make a person dead in law though he still lives in fact is to bring the fictitious legal world into agreement with political theory that certain subjects should not exist, even if they do. To understand the laws of civil death simply as an exclusion misses the point that it was a way of systemic correction. It makes the disloyal subject – a contradiction in the way the legal person gets cast—nonexistent. The law used different tools such as the attainder to exclude, but these punitive rules had as much productive power to police what is to be within a social order and to create the kinds of subjects that were included as it excluded others. What may have been in earlier periods a political impossibility according to Harris, or a spiritual doubling into submission according to Pollock and Maitland would be turned into a rule of law problem in the nineteenth century. Observance of the law itself becomes

---

<sup>364</sup> E Kay Harris, "Censoring Disobedient Subjects: Narratives of Treason and Royal Authority in Fifteenth-Century England" in Douglas L Biggs et al, eds, *Reput Represent Fifteenth Century Eur* (BRILL, 2004).

<sup>365</sup> *Ibid* at 211–212.

a way to understand political loyalty. While the Code of Lower Canada had much harsher civil death laws, it arguably had a more limited scope as compared to the civil death statutes in the U.S. which were being applied to “regular” criminal cases already by the end of the nineteenth century. In any case, I have dealt only with the law in the books in this chapter, and there is nothing about how the Code was applied in practice. To get at the history of civil death, I have endeavored to show how the history has been constructed and used by jurists for some purpose. It had a signaling power.

## 5. Conclusion

This chapter reveals a more complicated history of civil death than the clear-cut linear account that is often depicted in the literature. There are complex meanings to the concept. The regularization of private law along with the turn to history provides a wealth of conflicting and contradictory competing meanings of civil death. Pollock and Maitland in particular, provide a very complex picture of civil death in their history of English law. But their observation that “the fiction of ‘civil death’ seems called in to explain and define rules of law which have been gradually growing up”<sup>366</sup> is both bitingly honest and most perplexing. That is to say, they observe that the term is used to explain many different legal rules that had developed over the course of history. Many different legal concepts get pulled into the concept of civil death.

The criminal justice concept that we have today for civil death could have been otherwise, but the funneling of the concept through the nineteenth century sieve of North American turbulence of competing sovereignties and not simply economic liberalization, but neoliberalization, rendered punitive interventions in property relations natural at a time it was disappearing in Europe. In the case of treason, property confiscations by the government were permitted. Although it could only work during the lifetime of the attainted in the U.S. under Lincoln’s legal interpretation, and in Quebec, civil death was codified in a severe form. At the same time civil death as forfeiting certain rights gets extended to regular crime in the U.S., in one interpretation of the history, civil death is collapsed with attainder and provides a more narrow interpretation for when property can be confiscated. Property

---

<sup>366</sup> Pollock & Maitland, *supra* note 225 at 457.



can still be taken, but it must be explicitly stated in statutes. In all cases, there is a connection to sovereignty as a way of aligning loyalties, and thus sovereignties through property.

This history of civil death has been largely a history told about and for European men or men with European roots. The land system aligned political loyalties by rewarding loyalty, punishing disloyalty, and protecting the system of property for those European men when they submitted to the proper authority. Civil death worked towards keeping control over the territory through property and the political system through political participation based on property. In this chapter, we understand that a civil death in its broadest sense is the incapacitation of a legal person through the attachment of legal disabilities. An unencumbered free man suffers a civil death when new disabilities are attached to him either because of some action that demonstrates disloyalty or because he takes a vow of loyalty to someone else. These are the situations for which civil death happens to a free man, but the world is not only made up of free men. Under the header, “The Sorts and Conditions of Men” Pollock and Maitland claim that thirteenth century laws of England have much to say about the classes of men.

There are men who are “normal” *legales homo* and there are others who have disabilities attached.

Among laymen the time has indeed already come when men of one sort, free and lawful men (*liberi et legales homines*) can be treated as men of the common, the ordinary, we may perhaps say the normal sort, while men of all other sorts enjoy privileges or are subject to disabilities which can be called exceptional.<sup>367</sup>

As Pollock and Maitland conclude that most men in England even in the thirteenth century are “the normal sort,” they explain what it is to be a free and legal man and so by consequence what it is not to be the normal sort. By the second half of the nineteenth century, supposedly most men were considered equal according to Pollock and Maitland, but they also concede that there were still some who were not the normal sort.<sup>368</sup>

Juridical capacity is not only based on obedience, it is also premised upon the capacity to obey, --to be “oathworthy” in the sense that is used to describe the free and lawful men or the *liberi et legales homines*, as the juridical opposite of the person subject to disabilities. In the next chapter we will deal

---

<sup>367</sup> *Ibid* at 430.

<sup>368</sup> Pollock & Maitland, *supra* note 225.

with the kinds of legal persons left over in the nineteenth century who are not the “normal sort” of free and lawful men.

## Chapter 4    “Privative” Statutes and Civil Death

*The first essential step on the road to total domination is to kill the juridical person in man.*

Hannah Arendt

# 1. Introduction

This chapter addresses in some depth the existence and challenges of the legal disabilities that were attached to four legal statuses in the nineteenth century. The different sets of legal privileges will be examined for what they tell us about civil death. In the previous chapter, there was a reliance on the use of the term "civil death" to methodologically anchor the selection of the examples for the historical analysis. Although this chapter is based roughly on the same period, it departs from that methodology. This chapter focuses on self-representation of having suffered a civil death or else groups of persons that have been *retrospectively* designated as having suffered a civil death by historians, academics, and legal scholars. These scholars and practitioners often use the term of civil death as a category of practice because the legal form of civil death, the way certain legal disabilities were applied to persons, looks similar to the legal form of disabling legal subjects.

In this chapter, I adopt a critical historical approach that consciously adopts a history from below perspective and implements a legal label and frame that would likely be foreign to most jurists during that period.<sup>369</sup> It is anachronistic in some respects, for I intentionally group together different categories of persons that nineteenth-century jurists would not necessarily have recognized as persons suffering a civil death. That being said, the groupings do not come from nowhere and the history from below approach can tell us more about the form of civil death than limiting ourselves to the myopic view of dominant jurists in order to be historically true to their perspective. Within the historical record, the term "civil death" appears in direct relation to two of these classes who representing themselves were represented on their behalf as suffering a civil death—one example comes from a sympathetic politician arguing against legal disabilities of Irish Catholics, and the other by the lawyer of the Choctaw nation as the tribal government was being dissolved during the allotment period. While legal historians and jurists at the time might not have recognized all these cases as examples of civil death, they did recognize similarities in legal treatment, as their maps of legal persons show classes of persons for which legal disabilities had appeared natural and in a formal relationship

---

<sup>369</sup> "History from below is essentially an approach to the past that concentrates not on the traditional subjects of history, not the kings and the presidents and the philosophers, but on ordinary working people, not simply for what they experienced in the past but for their ability to shape the way history happens. I think that's key: look for an active engagement with history." Carl Grey Martin and Modhumita Roy, "Narrative Resistance" (2017) 22 Cult Log A J Marx Theory Pract 54–70 at 56.

to the concept of civil death. While they were not typically included in nineteenth-century jurists' schemata of classes who suffered a civil death, what these groups have in common are the legal disabilities that attach to the person. This chapter will develop in more detail the way in which certain legal disabilities can be understood as techniques of incapacitation and privation.<sup>370</sup> A present-day lens can take the stance, politically, that these groups should be understood as having been deprived of equal rights and had a different status from other similarly situated persons or collectives through the same legal techniques that comprised civil death. It is through political mobilization on the part of persons in these groups that the unnaturalness of their subordination and privative status has become visible today.

There are at present many different ways civil death is mobilized around the world, as was shown in Chapter 2. The state proclaims the beginning and end of life. The state further creates different categories of human life marked by different legal statuses entailing different sets of rights and privileges. The kinds of legal persons created and characterized by modern civil death extend beyond the categories of the clergy and criminals. This chapter explores the historical roots of the expansion of the uses of civil death. It argues that the legal form that creates different categories of over- and underprivileged individuals, namely, the legal privation of classes of persons, is the essential legal form of civil death.

With a general orientation of doing history from below, I intend in this chapter to interrogate and further draw out the legal form that lawyers, historians, and other academics (many of whom are persons included in these groups) have picked up on, as they claimed, for example, that women suffered a civil death before and through the nineteenth century despite the absence of the term "civil death" being attached to women as such. A normal question that could be asked is how someone can suffer a legal death without assuming that someone was once alive in law. For the many groups in this chapter, one could argue that they could not formally suffer a legal death or be deprived of their rights since they never had "full" or equal rights to begin with. This, however, takes the norm too seriously, as I intend to show in this chapter. While the function of a civil death may have been to demarcate a loss of status for free men, the legal form of civil death is a legal privation. This chapter takes the legal

---

<sup>370</sup> Dicey uses the term "privative" when referring to statuses characterized by disabilities such as civil death. AV Dicey, "On Private International Law as a Branch of the Law of England" (1891) 7 Law Q Rev 113–127 at 121.

form of a comparative lack as that which constitutes civil death rather than simply the movement from a free and equal man as the starting point to a privative status.

This chapter is organized around the idea of “privative statuses” in law. I introduce this concept and explain how legal disabilities impacted different classes of individuals in the nineteenth century. I look at four statuses in this chapter. The first three are individual statuses: women, racialized minorities, and religious minorities. These are specific groups that historians have in hindsight classified as having suffered a civil death because of the legal disabilities that attached to them that created distinct legal statuses. By mapping the discourse around legal statuses with different rights and privileges in the moment in history when those legal differences were being contested in the public sphere generally and in legal institutions specifically, the intention is to further draw out the characteristics and legal techniques of civil death. These three cases were selected because of their contemporary representation as cases of civil death.

In the final section of the chapter, I look at a particular case of the creation of a new status in law that was somewhat unique in North America—the statuses that were created for indigenous persons as either individual statuses such as “Indian” or a “dependent sovereign” as a collective status. In this section, I address the legal process of absorption of sovereign peoples into the hegemonic legal framework in order to appropriate their land as a form of civil death. In this case, there is in fact a memorial authored by a legal representative of the Choctaw nation that refers to the “civil death” of the nation at the end of the nineteenth century in the U.S. I want to extend the analysis to the legal process of systematic disabling of the Choctaw, Muscogee, Cherokee and other nations in what was called the “Five Civilized Tribes” that occurred over the period. By exploring this as an instance of civil death of a collective and the death of nations, we get a more complete picture of the versatility of the techniques associated with civil death. By delving into the case of Removal of five nations from the East to the West of the Mississippi and their subsequent dissolution, I intend to explore the argument that civil death as a technology of power was perfected in the nineteenth century as a precursor to its use as a tool of totalitarianism in the twentieth. This legal technique solidified state authority by appropriating land, redistributing property and rendering persons incapable of contesting the appropriation through legal and democratic means. It is during this period that the globe gets closed as the totalizing forces of sovereignty and property collapse into one another and loyalties are forcibly reconfigured. Civil death in this moment of collapse becomes an efficient legal tool to facilitate

the transition to the new economic and political order that must find new ways to preserve elite privileges. It does this through disciplining disloyalty and disabling others deemed incapable of loyalty.

## 2. Particular and Privative Statuses

Civil death as a technology is organized around differentiated and unequal rights. This is in one light the essence of the legal form of civil death. But civil death for whom? There are many persons who do not and did not share in equal rights. Although there is some agreement about the concept of civil death applying to specific groups in the nineteenth century (persons guilty of treason for example), the way the concept “grew up”, as it were, reveals stability in its instability around who in fact suffered a civil death.

Civil death is used rather loosely referring to various groups of persons who had privative statuses. In his reflection on conflict of laws in international private law in England, Dicey highlights the categorization of “Jews,” “slaves,” and “others” as having a particular “privative” status in other jurisdictions, arguing: “English Courts do not recognize any penal (or privative?) status arising under a foreign law, as, for example, the status of civil death, or the civil disabilities or incapacities which may be imposed on priests, nuns, Jews, Protestants, slaves, or others, by the law of the country to which they may belong.”<sup>371</sup> Although the meaning of this passage is ambiguous, since it comes from a very short text with little context to fully grasp the intended meaning, the grouping of civil death with other privative statuses may reveal something more substantive about the legal form of civil death. Civil death is separated from other disabilities or incapacities, but the list of those subjected to these kinds of “privative” statuses include priests and nuns (commonly understood as subjected to civil death) and Jews and Protestants who may or may not have been recognized as suffering civil death from the weight of the disabilities attaching to them at the end of the nineteenth century when almost all of the disabilities on these groups had been removed in England. That is, Dicey at least saw the commonality in the legal construction of different kinds of legal persons—the creation of particular legal statuses—through privative legal techniques. Importantly, the father of the concept of

---

<sup>371</sup> *Ibid* at 121.

the rule of law may have been making a statement about the normative character of legal disabilities and civil death, as he remarked that civil death is not recognized by English courts. It could not have been the case that civil death and disabilities were always unknown to England, but perhaps the legal cut he makes in the conflict of laws is intended to make a clear separation between a past that dominated religious minorities, enslaved persons, and others through disabilities and his present day in which civil death was no longer part of English law.

Across the jurists writing at the time, there was instability in who precisely was grouped within the category of civil death in this period. The American jurist Francis Wharton writing on the conflict of laws has an illuminating classificatory system of personal status laws. Under Personal Capacity, he includes the subheading “Particular Relations.” Here civil death is distinguished from slavery and serfdom as well as attainder and infamy and distinctions of creed and caste. These are all, however, “particular” kinds of legal relations. Civil death gets its own heading which refers exclusively to cases of persons joining a religious order and persons who have gone missing. It is not as inclusive as other classificatory systems or definitions of civil death and, very importantly, excludes the cases that relate to criminal law or treason.

Similarly, Pollock and Maitland in *The History of English Law Before the Time of Edward I: Vol. I* fail to mention civil death in relation to “outlaws and convicted felons,” at least not outright, though they mention civil death in other parts of the text. The classificatory systems for different kinds of legal persons they constructed in the nineteenth century about English law refer to the “Sorts and Conditions of Men,” and they separate different kinds of persons into different sections; here they include “The Religious,” where they mention civil death more than twenty times. They separate the religious from “The Clergy,” “Aliens,” “The Jews,” “Outlaws and Convicted Felons,” “Excommunicates,” “Lepers, Lunatics and Idiots,” “Women,” “Fictitious Persons,” and “The King and the Crown.”<sup>372</sup> Importantly, convicted felons and outlaws are treated separately from the civilly dead, which is used only in reference to “the religious,” and, incidentally also excluding the category of the clergy. This classification may not contradict other classificatory schemes in which outlaws and convicted felons are explicitly linked to civil death, but the omission is at least interesting. It is not clear if they are trying to be true to the period or if it is an influence of their own time onto the

---

<sup>372</sup> Sir Frederick Pollock & Frederic William Maitland, *The History of English Law before the Time of Edward I*, 2nd ed (Cambridge University Press, 1898).



categories. For example, they very consciously include “women” in their categories of persons, though they note that no author in the materials they are working with would mention women at all. They say it is only because women make up half of England that they mention women at all. They also seem to be under the impression that women were in all practical ways treated legally the same as men except in marriage. Their somewhat reluctant inclusion of women as a category of special persons in the thirteenth century is by their own admission ahistorical. These different classificatory systems reveal the following: first, there is a slipperiness in the concept of civil death. For these authors civil death was a medieval concept that had religion rather than crime as the center of the concept and was only applied to criminal cases by analogy. Secondly, in a period when legal meaning was being formalized and solidified in legal treatises, the turn to history was both a way to create continuity in the legal systems as well as to mark a break. Maitland would write a few years later that the law of persons is disappearing in English law except in the area of corporations, which he claims was proliferating at the time.<sup>373</sup> Finally, there is something common to all these special categories of legal persons, as they all were in status relationships that were made of different legal rights and privileges from what would be considered the “normal” legal subject. Take the following passage to understand the way in which the law of persons was developed in relation to a norm, and how law is used to over- and underprivilege the rest of society:

The lay Englishman, free but not noble, who is of full age and who has forfeited none of his rights by crime or sin, is the law’s typical man, typical person. But besides such men there are within the secular order noble men and unfreemen; then there are monks and nuns *who are dead to the world*; then there is the clergy constituting a separate “estate”; there are Jews and there are aliens; there are excommunicates, outlaws and convicted felons who have lost some or all of their civil rights; also we may here make mention of infants and of women, both married and unmarried, even though their condition be better discussed in connexion with family law, and a word should perhaps be said of lunatics, idiots and lepers. Lastly, there are “juristic persons” to be considered, for the law is beginning to know the corporation.<sup>374</sup> (*My emphasis added*)

---

<sup>373</sup> Maitland, *supra* note 226.

<sup>374</sup> Pollock & Maitland, *supra* note 225 at 390.

In this passage not only do we see that particular legal persons are contrasted to what the authors regard as the normal Englishman, but also that those “dead to the world,” such as monks and nuns, are separated from those who have lost “some or all of their civil rights.” Civil death is used to explain how otherwise full citizens or supposedly “normal” men would or could lose their rights or their capacity to act. The “particular” forms of legal capacity are groups present in English society and classified as Other, that is not fully political men. It takes the religious case as foundational for civil death, like the cases of declarations of death absent a body, as true to the legal form. The groups of persons with “particular relations” or differentiated personal capacity were excluded from the kind of legal capacity that other men enjoyed, though the social exclusion took varied forms. There were different kinds of legal subjects, and not all of them were citizens. Below is a visual representation of the classificatory scheme of special kinds of legal persons.

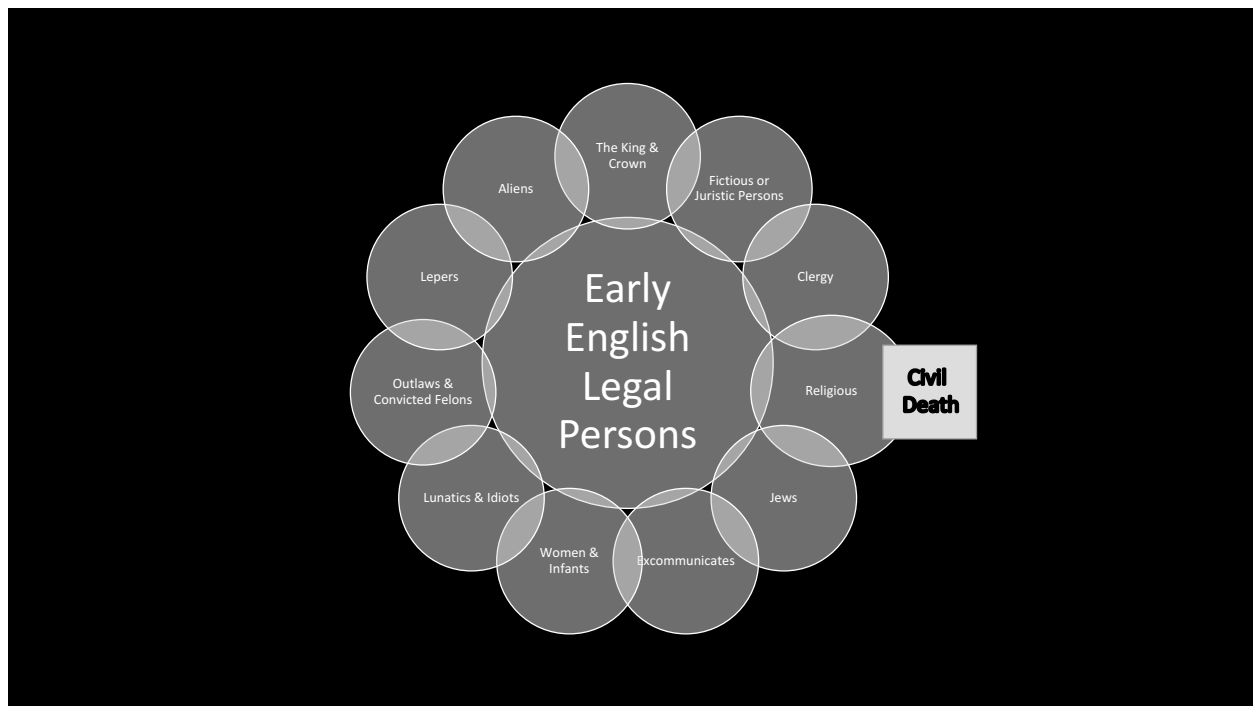


Figure 2 - Pollock and Maitland's Classification of Legal Persons

The normal men of the thirteenth century would be the same normal men of the nineteenth, and it is against this legal condition of normal men that all other privative statuses are made. In the same passage Pollock and Maitland write about exceptional sorts of persons: "... the time has indeed already

come when men of one sort, free and lawful men (*liberi et legales homines*) can be treated as men of the common, the ordinary, we may perhaps say the normal sort, while men of all other sorts enjoy privileges or are subject to disabilities which can be called exceptional.”<sup>375</sup> The free and legal men of the thirteenth century will continue to define everyone else.

Formalizing the classifications of legal persons in early English history occurred at the same time status relations were said to be giving way in many cases.<sup>376</sup> While these historical categories were drawn up, women, religious minorities, African Americans, and, though differently situated, Indigenous groups and persons, among many others were all fighting for different legal rights and recognition as full legal subjects and bearers of rights. It was in this historical period that the movement towards formal equality was coming to an apex, and the contradictions between principles and the actual formal inequality highlighted the unequal statuses of certain groups of persons. Slaves, women, and children all had their own particular status positions under different ancient legal systems, including Roman law, with privileges and obligations flowing from the legal relationship with someone of a different status or power. They were not considered citizens at all, since under Roman law “citizen” signified necessarily a specific set of rights and duties. In contrast, in the nineteenth century the legal world was struggling with what kind of citizens women, African Americans, Indigenous persons, and “criminals” were, if they were at all, and which rights they were entitled to. Indigenous groups were differently situated as sovereigns, but as groups several nations were also struggling for legal recognition. In all of these classificatory schemes, the status of the legal person, in Savigny’s terms the “[c]apacity to have rights and the capacity to act,” is in question.<sup>377</sup>

There are many groups that were enumerated in these classificatory schemes of the nineteenth century that I will not address in this chapter. There are also other groups of persons who did not become visible as a group worthy of equal rights but were regulated by the same legal technologies of control and have subsequently been included by historians or others as groups subjected to civil death. LGBTQ+ persons were not politically visible in the nineteenth century in the same way as Catholics, Jews, enslaved persons, and women were. Sexual minorities would not have had pamphlets distributed

---

<sup>375</sup> *Ibid.*

<sup>376</sup> See Reva B Siegel, “The Rule of Love: Wife Beating as Prerogative and Privacy” (1996) 1 Yale Law Journal; Reva B Siegel, “The Modernization of Marital Status Law: Adjudicating Wives’ Rights to Earnings, 1860-1930” (1994) 1 Georgetown Law Journal 1860–1930; Kennedy, *supra* note 222.

<sup>377</sup> von Savigny, *supra* note 287.

claiming, as women did, they were endowed with natural rights. Historians today have addressed the treatment of same-sex relations, for example, as being subjected to criminal sanctions and unequal rights that rendered them civilly dead in law. Kathleen Lahey has made the case that sexual minorities indeed suffered a civil death historically even though it would be much later that they would be considered as constituting a group at all.<sup>378</sup> This is also the case for persons who live with mental illness or who have mental disabilities and elderly persons classed as having a legally dependent status. Visibility in history in some ways may paradoxically indicate a glimmer of legal capacity as opposed to the idea of civil death, which is the incapacitation of a group or person in law. It may be that the most severely oppressed groups or persons would not be visible because they have neither the capacity to write and publish, special advocates on their behalf, or enough numbers for political mobilization.

In the following sections, I sketch out some of the ways law dealt with particular “sorts” or “conditions” of persons. The legal disabilities applied to “particular” groups named by nineteenth-century jurists busy cataloguing different kinds of legal persons in legal history. There are four legal statuses that were referred to as classes of persons subjected to a civil death in the nineteenth century or subsequently by historians writing on the period. They have all been either listed as “particular” sorts of persons, and the legal treatment was classed in common with civil death at the time, or they were referred to as suffering a civil death by their contemporaries, or modern historians looking at the special treatment of these classes of persons have regarded it as a civil death. In the next sections I will look at the cases of women’s disabilities and *coverture*, racialized groups from slavery to criminal disenfranchisement, Jewish and Catholic disabilities; and in the last section I will address the case of the dissolution of sovereignty for Native Americans.

## 2.1. *Women*

The women’s movement in the U.S. focused widely on a large range of issues for women in the second half of the nineteenth century, but it coalesced as a movement for women’s suffrage. Many of the early activists were also abolitionists who agitated for equality in citizenship for women and African Americans. Elizabeth Cady Stanton’s “Declaration of Sentiments” modeled after the Declaration of

---

<sup>378</sup> Lahey, *supra* note 42 at 171. She argues that LGBTQ persons continue to suffer civil death in Canada.

Independence was a draft of the various inequalities women were subjected to that prevented them from participation in and enjoyment of “all the rights and privileges which belong to them as citizens of the United States.”<sup>379</sup> This movement led by women was later taken up by John Stuart Mill, who outlined the essence of his essay *The Subjection of Women* in the following sentence: “The principle that regulates the existing social relations between the two sexes—the legal subordination of one sex to the other—is wrong itself, and is now one of the chief obstacles to human improvement; and it ought to be replaced by a principle of perfect equality that doesn’t allow any power or *privilege* on one side or *disability* on the other” (*emphasis added*).<sup>380</sup> Published in 1869, this philosophical argument for women’s formal equality placed the illegitimacy of women’s subordinated legal status squarely on the table in the English-speaking world.<sup>381</sup> Mill challenged the then common notion that women’s subordination to men was natural and thus necessarily required a legal relationship of care from another party. Framing women’s historical subordination within the institution of slavery, he argued that the subordination in the law was transformed to a milder form as a relationship of dependence.<sup>382</sup> The subordination of women in marriage was still a form of slavery for Mill, since the analogy of marriage to slavery was intentionally and thoughtfully chosen, according to Mary Lynden Shanley.<sup>383</sup> What many political philosophers miss in reading Mill are the particulars of the legal form of the status relationship and the words common in that era to describe legal relationships, such as “privilege” and “disability.” That these differentiated rights and privileges formed a separate legal status is sometimes difficult to grasp against a contemporary setting in which formal equality is the norm.

We are reminded, however, that the understanding of women as having a separate legal status, even then, may have been undermined by jurists writing around the same time. The natural and rational basis for women’s different legal treatment made the historical disabilities women suffered appear almost a trifle. Pollock and Maitland writing just a few decades later insisted on the almost complete equality between men and women already in the thirteenth century, at least when it came to private law, as women could own land, create a will, and inherit despite what is “not a very strong preference”

---

<sup>379</sup> Elizabeth Cady Stanton, *The Declaration of Sentiments* (Ayer Company Publishing, 1985) at 70–71.

<sup>380</sup> John Stuart Mill, *The Subjection of Women* (D Appleton & Company, 1869) at 1.

<sup>381</sup> For the problematic implications of this work as it was used to frame women’s emancipation globally within the British empire, see esp. Eileen Hunt Botting and Sean Kronewitter, “Westernization and Women’s Rights: Non-Western European Responses to Mill’s Subjection of Women, 1869-1908” (2012) 40:4 *Polit Theory* 466–496.

<sup>382</sup> Mill, *supra* note 380.

<sup>383</sup> Mary Lyndon Shanley, “Marital Slavery and Friendship : John Stuart Mill’s *The Subjection of Women*” (1981) 9:2 *Polit Theory* 229–247.

for male heirs.<sup>384</sup> Although it is difficult to interpret their intentions in terms of what they thought their history did for women contemporary to them, they seem to look for instances in which women were allowed political privileges. Though in public law women were not allowed the vote or generally to sit on juries, they pass over these disabilities; and when they discuss the almost complete incapacitation of married women, they write that that topic would be better left for discussion in family law.<sup>385</sup>

The different statuses that existed and were being challenged in the nineteenth century included women's status in general, but married women's status in particular. It had been the practice that women in English common law jurisdictions lost certain legal capacities the moment they married.<sup>386</sup> When women married, they lost whatever independent legal status they had and were said to be "covered" by the husband's status. This concept of *coverture* regulated women's legal capacity and particularly their rights to property in Great Britain and later in Canada and the United States, where it was imported by colonists.

### 2.1.1. *Reclassifying Civil Death*

In the 1990s historians and literary scholars began to address women's status in marriage and in particular the legal concept of *coverture* as a form of civil death.<sup>387</sup> Coverture is the legal relationship between a man and women formed at the moment of marriage so that as a woman was considered to be joined in body with the husband, the woman's legal person would cease to exist before the law. Lori Chambers begins her book *Married Women and the Law of Property in Victorian Ontario* with the following claim, "In all common law jurisdictions, marriage, for women, represented civil death."<sup>388</sup> A married woman could not sue or sign a contract on her own, nor could she become the guardian of

---

<sup>384</sup> Pollock & Maitland, *supra* note 225 at 508.

<sup>385</sup> Pollock & Maitland, *supra* note 225.

<sup>386</sup> Tim Stretton & Krista J Kesselring, *Married Women and the Law: Coverture in England and the Common Law World* (McGill Queens University Press, 2013).

<sup>387</sup> Elizabeth Flower, "Civil Death and the Maiden: Agency and the Conditions of Contract in *Piers Plowman*" (1995) 70:4 *Speculum* 760–792.; Lori Chambers, *Married Women and the Law of Property in Victorian Ontario* (University of Toronto Press, 1997).

<sup>388</sup> Chambers, *supra* note 387 at 3. Chambers writes in a footnote to her claim that marriage was civil death for women that her account of the common law comes from a reading of the following sources: "In addition to Blackstone, this account of the common law is based upon Dicey, *Law and Public Opinion*; Holdsworth, *History of English Law*; Jenks, *Short History of English Law*; Graveson and Crane, eds, *A Century of Family Law*; Redman, *Law of Husband and Wife*, Underhill, *Law Reform*; and Wharton, *Exposition of Laws*." Note 6 at 15.

her underage children in the event of her husband's death. Any wages she earned while married were legally the property of her husband, as was any other wealth created through her labor. She was only potentially entitled, in the event of divorce or death, to the dower she brought to the marriage. Citing the same history but writing on the civil death of sexual minorities, Lahey writes:

Thus Norman-Anglo common law revitalized Roman civil disabilities in constructing, for the purposes of a military colonial regime, 'civil death' for women who married. Under Blackstone's codification of the common law relating to women, as it emerged during the 1100s and 1200s, married women in England had no juridical rights, participation rights, or private-law rights. Any legal rights married women might have had if they had been unmarried passed to their husbands upon marriage. Even if wives survived their husbands, these rights were given back to them in severely attenuated form, if at all.<sup>389</sup>

General limitations on women's status of course also included exclusions from voting, many professions, sitting on juries and military duty. By the end of the nineteenth century, however, many of these legal disabilities that had been commonly imposed on women were being challenged and some of them even removed. The historical picture Pollock and Maitland present on women's legal status was very different from the picture presented by contemporary historians. It should be noted that there were not a lot of female jurists writing when Pollock and Maitland were writing, and their partial standpoints formed their partial worldview. The disabilities on women seemed minor in their view or even not properly the subject of private law because it was a family law matter.

Pollock and Maitland conclude their section on women as particular kinds of persons that the way to understand what happens to the married woman is not properly understood as "unity of person" but rather as a relationship of guardianship. They write about "the *mund*, the profitable guardianship, which the husband has over the wife and over her property."<sup>390</sup> While it was certainly a status relationship of dependence, it is also a status relationship of protection. The concept that makes civil death analogous to other relationships for Pollock and Maitland, for example, that which defines the relationship between the abbot and monk or the lord and villein, as well as the husband and wife, is the Germanic

---

<sup>389</sup> Lahey, *supra* note 42.

<sup>390</sup> Pollock & Maitland, *supra* note 225 at 512.

concept of *mund*.<sup>391</sup> They describe the idea of *mund* in modern terms, though they admit them to be a feeble rendering, as “guardianship” and “protection.”<sup>392</sup> They do not deny the disabilities but simply emphasize the relationship of guardianship.

Although the historical literature focuses on *coverture* as a form of civil death, it is fair to say any of the disabilities women suffered at the time would also be considered as part of the civil death in form. The suffragist movement made explicit comparisons in voicing the injustice of women’s political exclusion claiming that women’s incapacity to vote was like the legal disabilities convicted persons suffered, except that men convicted of a crime were capable of being pardoned and of regaining their rights. The injustice of women having a status similar to that of a “criminal,” despite their not having done anything wrong, was a starting point of the political and normative critique of women’s legal disabilities.

---

<sup>391</sup> *Ibid* at 462–3.

<sup>392</sup> *Ibid* at 463.



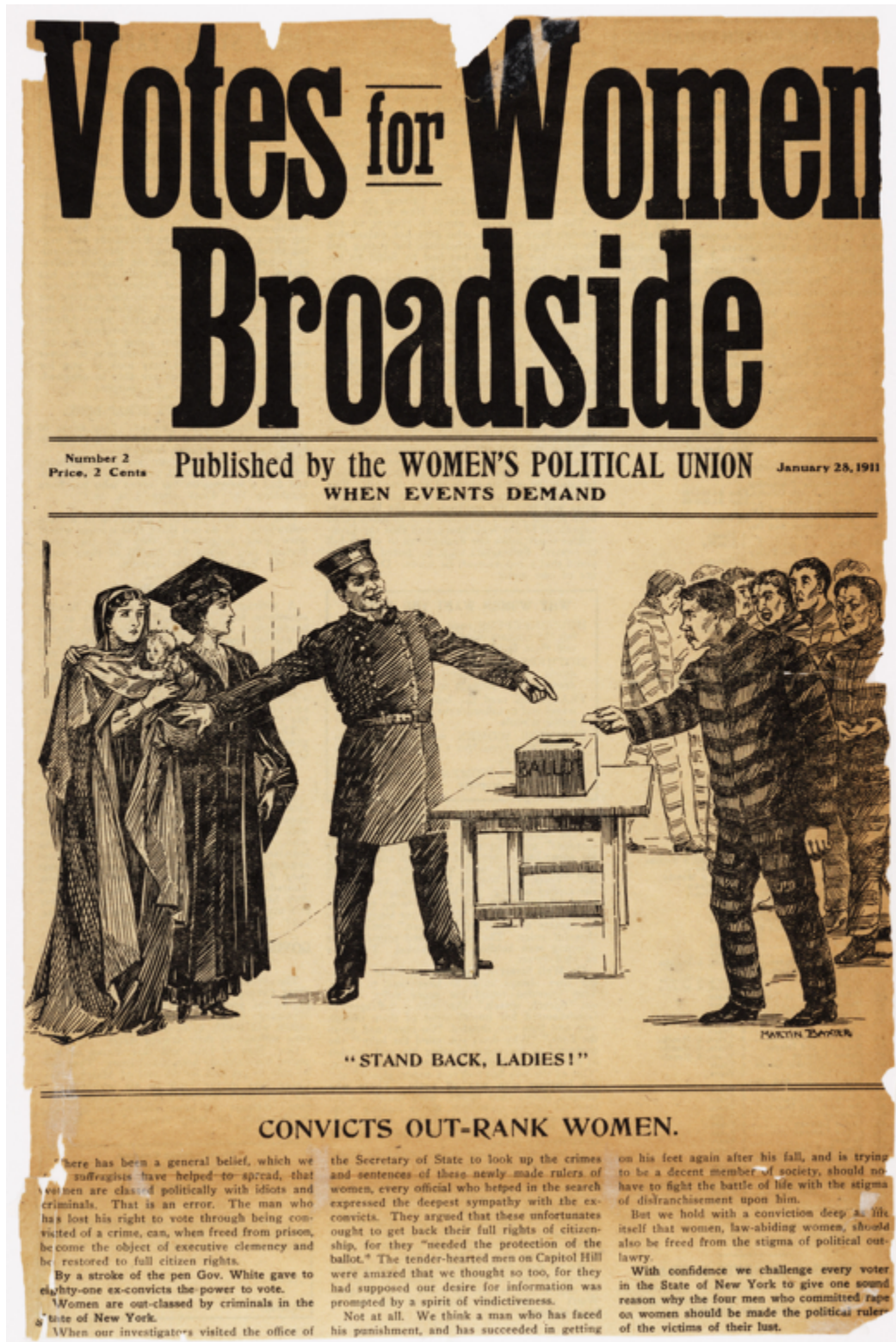


Figure 3 - "Convicts Out-rank Women"

In this newspaper article from 1911, women challenged the governor of New York's move to give executive clemency to released prisoners. The women's suffragists argued, "There has been a general belief, which we suffragists have helped to spread, that women are classed politically with idiots and criminals. That is an error. The man who has lost his right to vote through being convicted of a crime ... can ... be restored to full citizen rights." They go on to clarify, "We think a man who has faced his punishment, and has succeeded in getting on his feet again after his fall, and is trying to be a decent member of society, should not have to fight the battle of life with the stigma of disenfranchisement on him. But we hold with a conviction deep as life itself that women, law-abiding women, should also be freed from the stigma of political outlawry."<sup>393</sup> The ideas the suffragists pulled from the case of criminal disenfranchisement, linking the rights of citizenship of the convicted with the concepts of "outlawry" and "stigma," are in line with the analysis feminist historians many decades later would use to read civil death back into the legal treatment of women during this period. The feminist methodology, which takes the epistemic position of the dominated to challenge and upset what were considered common-sense categories, produced by a class that permits a radical re-cataloging of civil death in this earlier era.

The right to vote was deeply entwined with property rights at that time; and as property was changing, it impacted voting as well. The question at the end of the nineteenth century of who was a *liber et legalis homo* is similar to the more contemporary question: who is a citizen, or who is a bearer of rights? Although most of the attention in the nineteenth century focused on women's rights such as the right to vote and rights to property, women's political duties were also being fought for. One of the few legal duties placed on citizens in the British common law systems is jury duty. Consequently, this duty in part defines in law who has full legal personality; so not surprisingly, this became an issue that courts dealt with to determine to what extent women were included politically in British common law countries. Blackstone had weighed in definitively in the negative on the question of whether or not women were considered *liber et legalis homo*, the common law requisite for jury duty, claiming: "[u]nder the word homo, though a name common to both sex, the female is excluded propter defectum sexus. (Because not of the right sex)."<sup>394</sup>

---

<sup>393</sup> "Votes for Women Broadside," Women's Political Union, New York, January 28, 1911, online: *The Library of Congress* < <https://www.loc.gov/resource/rbcmil.scrp7003401/?st=text> > (last visited July 22, 2021).

<sup>394</sup> Elizabeth M Sheridan, "Women and Jury Service" (1925) 11:12 *American Bar Association Journal* 792–797 at 792.

### 2.1.2. *Women's Legal Status Contested*

A set of cases in the Territory of Washington arose after the passage of legislation that removed certain disabilities from women, including limitations on property and custody over their children in the event of death of the husband. The question arose in 1884 in the Territory of Washington when two married women were seated as grand jurors to hear a case on a hunting violation. At the same time women had achieved the vote in the Territory of Washington, their competence to serve as jurors was also being litigated. A decision was appealed to the Territory of Washington Supreme Court on the argument that the married women who sat on the grand jury in question were not eligible for jury duty since they were not considered *liber et legalis homo*. It was primarily a question of *married* women's eligibility to sit on a grand jury

The definition and touchstone of qualification for jury duty, at the time of the adoption of the Constitution and its amendments, was the ancient phrase, "*Liber et legalis homo*." It rested the qualification on a threefold basis—freedom, law, and humanity; in other words, the juror must be free, lawful, and of the human race. This definition was rigid as far as freedom and humanity were concerned, but elastic as to lawfulness. Custom and statute prescribed the lawfulness. For a jury to try one sort of an issue, males were not *Liber et legalis homines*, and females were; for a jury to try another sort, both men and women were; for the trial of other and all ordinary issues, males only were competent.... We are free to change by statute the legal qualification of jurors so long as we do not transgress limitations imposed by acts of Congress, and so long as we do not put on juries those who are under duress of servitude, or who are monkeys or angels; but do put on them those only who are free beings, sympathetic, and schooled in the lot of human kind.<sup>395</sup>

This decision allowing women to sit on certain juries would be reversed by the same court just three years later when it decided women were not *liber et legalis homo*. In *Harland v. Territory of Washington*, the Court reinterpreted a legislative act passed November 14, 1879, entitled "An act to establish and protect the rights of married women," to maintain a status for women. The legislative changes that had taken place in the Territory to remove the civil disabilities placed on women, including women's right to vote and rights to property, were interpreted not to impact women's capacities to sit as jurors.

---

<sup>395</sup> *Hayes v. Washington Territory*, 2 Wash. Terr. 286, 5 P. 927, 1884 Wash. Terr. LEXIS 17, 2 Wash. Terr. 286, 5 P. 927, 1884 Wash. Terr. LEXIS 17.

In their decision, the Court noted that they were reversing the earlier ruling despite the authors of the previous decision now sitting as the minority on the bench and against their strong objections. The majority argued that the women's ability to hold property should not change the legal status of women or their legal capacities that are not enumerated explicitly in the legislation. Relying in part on Blackstone's assertion that women are excluded by virtue of their sex, the decision goes on to elaborate the reasons for legal exclusions. Regarding the natural roles of women and men, the Court states that man is woman's natural "protector and defender," and that women's "physical constitution" makes them unsuitable for the task of jury duty, which is "onerous".<sup>396</sup> That is to say, the Court believed they had rational reasons for the differential treatment in law between men and women and opted to hold to the most narrow interpretation of the legislation possible.

In a concurring opinion, the issue of the relationship of women's civil disabilities and property is elaborated:

Civil disabilities are abolished as to the wife, but if the right to vote is a civil right, it was not abolished by this act. The words "civil disabilities" are explained by the context. For any "usurpation of her natural or property rights she may appeal to the courts," etc. It was simply intended to give her a *status* in court to protect her civil rights, i.e., her natural or property rights.<sup>397</sup>

The concurring opinion goes on to argue that married women do not become heads of house simply because the law was changed to protect them against bad husbands and to protect the property against poor male management. But as far as jury duty goes, married women's oath of obedience to their husbands alone should be a reason to disqualify a woman from the category of free and legal. That is, despite owning property, if women have taken a marriage oath to honor and obey, then they are *de facto* not free in the legal sense.

Historians have used the concept of civil death to highlight the totalizing legal consequences of marriage up until the end of the nineteenth century when reform in criminal law had not impacted women's legal capacity as it was held to be different from men's. The idea that women were not *liber*

---

<sup>396</sup> *Harland v. Territory*, 3 Wash. Terr. 131, 13 P. 453, 1887 Wash. Terr. LEXIS 11, 3 Wash. Terr. 131, 13 P. 453, 1887 Wash. Terr. LEXIS 11.

<sup>397</sup> *Harland v. Territory*, 3 Wash. Terr. 131, 13 P. 453, 1887 Wash. Terr. LEXIS 11, 3 Wash. Terr. 131, 13 P. 453, 1887 Wash. Terr. LEXIS 11.



*et legalis* would survive well into the twentieth century, as the following excerpt from a speech in 1956 at the American Bar Association suggests. When describing man as a legal person, Edwin Savory Herbert states, “[s]cratch any one of them and what do you find under the skin? I suggest, gentlemen, that what you find under the skin is the *liber et legalis homo* of the common law—the free and responsible man, whose character sustains and shapes the law and whose freedom and responsibility it is the function of the law to sustain and fortify.”<sup>398</sup> In a tongue-in-cheek, conversational manner, he goes on to comment on why women were not included in this exposition on free and legal man as he contrasts the common law and the civil law man as two versions of the same person.

Finally we must admit that so far as the common law man is concerned, words importing the masculine gender do not include the feminine also. There is no such thing at common law as the reasonable woman. This is not because the common law man is a misogynist; far from it, he is very much akin to l’homme moyen sensual. But he is full of common sense and he knows well that if women were of reason all compact, he would have little chance of finding a wife. So he ranks together infants, lunatics and married women, to whom my witty namesake, A. P. Herbert, would add cattle demented, a point I wish the late lamented Ephraim Tutt had lived to argue. So marriage continues and the race of man goes on thanks to the steadfast refusal of the common law to insist on a form of sex equality which would result in a Rule against Perpetuities more stringent than any devised by any court of equity.<sup>399</sup>

The categories from Blackstone that women are excluded continued to underpin the idea of the legal person into the twentieth century. The speaker provides continuity of a category that groups together “infants, lunatics, and married women” as naturally having a legal capacity that is diminished; and women, in particular, are made dependent on men while excluding them from full legal personality for the sake of perpetuating the species. Although Edwin Savory Herbert was speaking satirically to get a laugh, one cannot ignore that he was speaking exclusively to a group of men and things are only funny if they resonate by striking at shared sentiments. The threat that women’s full legal capacity poses to society is more subtle than the treatment of the threat others pose, but there is a clear notion even when conveyed partly in jest the privation of women’s rights is based on the protection of society. The common law man is the legal person; but also the person who is legal is a man made of and in law. It is an articulation of the continuity between legal personality between the common law and the

---

<sup>398</sup> Edwin Savory Herbert, “As Between Friends: The Common Law Man” (1956) 42:11 American Bar Association Journal 1019–1022, 1093–94 at 1020.

<sup>399</sup> *Ibid* at 1022.

civil law as two versions of the same idea that some equality exists as legal constructions of persons permitted into the body politic as free and legal persons. It is also a not too subtle argument for the protection of privilege through legal categories. The capacity to exclude or expel from the category of legal persons maintains power within the group excluding. But it is still based on what must have appeared to many as good arguments. Women were considered biologically and fundamentally different from men. This is why it was not considered a form of discrimination in each moment. To be different in kind meant to have different rights. Like persons with disabilities, their differences were considered rational reasons for their exclusion from legal personality. Women were not only not given the same rights; they were also not subject to the same kinds of obligations or penalties because they were not considered to be part of the society as oath-worthy subjects.

Under feudal and more ancient forms of organizing property and society, oaths of fidelity were given in exchange for protection. Oaths produced a very specific kind of loyal subject. To take an oath was to become a legal person because he would enter into the society of other men sworn to the same lord. Under the section on Outlawry, “Against whom Process of Outlawry May be Awarded,” the jurist Mathew Bacon corrected what he saw as a legal error when women were outlawed on the basis of the legal status of women and the impossibility of women to be outlaws. He wrote:

A woman is said to be waived, and not outlawed; and the reason, says my Lord Coke, why the outlawry of a woman is legally called *waivaria mulieris* is, because women are not sworn in leets and torns, as men are, who are above the age of twelve; and therefore, says he, men are called *utlagati*, i.e. *extra legem positi*; but women are *waiviata*, i.e. derelict, left out or not regarded, because they are not sworn to the law. Therefore, where a *capias* and exigent were awarded against three men and two women, it ought to have been *waiviatae existunt* this was held to be in error.<sup>400</sup>

Women were “derelict, left out or not regarded, because they are not sworn to the law.” They were not capable of being outlawed because that would assume their having first been included in the community of men and owing allegiance to the community. If we were to take as a given for a moment that outlawry relies on a legal institution of civil death as the annulment of certain rights, then this

---

<sup>400</sup> Bacon, *supra* note 214.

distinction of being outside the protection of the law and not worthy of outlawry is an interesting knot. Formally, it makes sense in periods before the twentieth century that women were not considered to suffer “civil death” since their inequality or diminished rights did not emanate from breaking a vow or taking a vow (as did the criminal and the monk). Their exclusion from the category is also the basis of their exclusion from society, and that is from their disqualification from taking a vow in the first place. One can only be made civilly dead if one were previously civilly alive. When contemporary historians focus on the loss of property rights for women when they marry exclusively for the historical case of civil death, it is a purely functional analysis. It is a history from below in the sense that it takes the women’s perspective that they are indeed subjects of equal rights, but that those rights are being denied—they are being rendered civilly dead through the law that refuses to regard them.

The exclusions, however, did not simply impact jury duty in the nineteenth century. It was the basis of or possibly a pretense for many different kinds of exclusions. Justice Turner, who wrote the opinion of the Territory of Washington Court, cited an earlier case that denied women access to the legal profession. In it, the Court argued that women should not be allowed in the profession in part because law as a profession protects the well-being of society and for women to betray their natural duties to enter into a profession which puts society at risk is treasonous to nature and seemingly to society.

The profession enters largely into the well-being of society; and to be honorably filled and safely to society exacts the devotion of life. The law of nature destines and qualifies the female sex for the bearing and nurture of the children of our race, and for the custody of the homes of the world and their maintenance in love and honor. And all life-long callings of women, inconsistent with these radical and sacred duties of their sex, as is the profession of the law, are departures from the order of nature; and when voluntary, treason against it.<sup>401</sup>

Women who do not take up their proper roles as mothers are rebellious against the natural order of things and, in this Justice’s eyes, treasonous. Women seeking equality were seen as threatening, as threat, as dangerous, and full citizenship (citizenship without disabilities) for women as destructive of

---

<sup>401</sup> In the Matter of the Motion to admit Miss Lavinia Goodell to the Bar of this Court, 39 Wis. 232 (Supreme Court of Wisconsin, 1875).

the nation and, importantly, “our race”. Women’s reproductive labor was tantamount to bring up the nation of White men, and any other labor that would imperil this threatened the entire society. As a point of comparison, when the French Declaration of the Rights of Man was penned, a French feminist writing under the name Olympe de Gouges wrote a counter declaration on the Rights of Woman in 1791. When asking for women’s equal rights with men, she observed that “Liberty and justice consist of restoring all that belongs to others; thus, the only limits on the exercise of the natural rights of woman are perpetual male tyranny; these limits are to be reformed by the laws of nature and reason.”<sup>402</sup> She went on to make a case similar to that slavery abolitionists had made: “No one is to be disquieted for his very basic opinions; woman has the right to mount the scaffold; she must equally have the right to mount the rostrum.”<sup>403</sup> She argued that women were not exempted from state terror, and so they should not be exempted from having the rights to their political opinions as representatives. She was, incidentally, executed as an “unnatural” woman and for being a counterrevolutionary for her feminist political positions that advocated pacifism. As the only woman killed during the French Terror for her political positions, she rather poetically proved her point through her death.

Keeping straight the various meanings of civil death in the historical and contemporary uses of the term can get a bit messy. In revolutionary France, fleeing without express permission resulted in civil death and confiscation of property. Women who fled France without official permission and were consequently penalized with “mort civile or the loss of all rights and titles in France” argued, as Bacon did, that since women were not citizens and sworn as men were, they could not betray their country by fleeing and consequently could not be penalized by losing their rights as French women.<sup>404</sup> This argument was refused and the women were condemned to mort civile for betraying France. It may be tempting to think of a “true” version of civil death as the state-named penalty, and the ahistorical form to be an analogy. But we have to ask if the state pronouncement of the penalty is the essence of civil death or the privation of the rights of citizens. Looking at how historians have classed the loss of rights of women, coverture as civil death, and the distinction between how women and criminals were deprived of their rights, it seems to me that it had less to do with the state pronouncement of “civil

---

<sup>402</sup> *The Declaration of the Rights of Woman*, by Olympe de Gouges (1791).

<sup>403</sup> *Ibid.*

<sup>404</sup> Jennifer Ngairé Heuer, *The Family and the Nation: Gender and Citizenship in Revolutionary France, 1789-1830* (Cornell University Press, 2005) at 20, 60–61.



death” and more the legal technology of control as the background ontology of particular persons as threats.

## 2.2. *Racialized Minorities*

### 2.2.1. *Slave Status*

The academic literature on civil death, which is predominantly U.S. focused, often reads as if it is synonymous with Black oppression. There is something to the way in which America’s history is defined as its relationship to Black Americans that is revealing about the depth of the racialized division that the country was built on. The racial cut between black and white defined in many ways all the forms of racialized identity, as it was the very basis of freedom or unfreedom as two radically distinct political forms. Prior to the 1820s American citizens were entered in the census without distinctions to race, except of course that there were slave schedules kept separately. Enslaved persons were not regarded, as they were not citizens. In 1820 the first U.S. censuses to record “race” included the category of “free colored,” this signaled a transformation since this “modification allowed citizenship and related civil rights to hinge on color rather than on condition of servitude, a policy that heralded nearly a century and a half of race-based policies...”<sup>405</sup> Citizenship was not defined simply on the basis of being free, but on the basis of being free and white. Subsequent censuses included “white,” “black,” and “mulatto”; and those categories were expanded outwards to include other “races.” Keeping track of persons according to their race provided the state with information to designate which rights of citizenship each person was allowed according to their racial classification.<sup>406</sup> As race begins with slavery in the U.S., it is the American story in many ways. Or, as James Baldwin put it, “The story of the Negro in America is the story of America—or, more precisely, it is the story of Americans.... Our dehumanization of the Negro then is indivisible from our dehumanization of ourselves: the loss of our own identity is the price we pay for our annulment of his.”<sup>407</sup> Race started out in the U.S. to mark out free or unfree status, but it rippled out to create a racial caste system at the moment slavery was being dismantled. Roscoe Pound suggests that Darwin’s theory influenced jurists in the latter third of the nineteenth century as they began to see everything as biology and a sociological

---

<sup>405</sup> Kenneth Prewitt et al, “Racial Classification in America: Where do we go from here?” (2005) *Dædalus* at 7.

<sup>406</sup> Prewitt et al, *supra* note 405.

<sup>407</sup> James Baldwin, *Notes From a Native Son* (1955) at 24–5.

school of ethnological studies began.<sup>408</sup> One school of thought provided the grounds for interpretation of legal history “in terms of race” as well as a belief that “the true method of jurisprudence was that which sociologists have called the demographic.”<sup>409</sup> Race in the census did not denote a natural fact; the census documented and kept a legal record of everyone’s constructed race as a legal status through a negotiation between the state and the individual. The idea of race was created as a relevant category in the U.S. for political privileges; it is therefore not surprising that civil death is tied to racial oppression and also importantly to a kind of economic oppression through the institution of property. As Elizabeth Catte has remarked,

Thinking of eugenics more broadly as a world-building enterprise has helped me understand how a quest for economic purity was just as important to eugenicists as racial and genetic purity were. Early twentieth century eugenicists argued for the elimination of the unfit based on what they saw as the group’s potential to siphon resources away from the more deserving and to transmit debts onto future generations.... It would relieve the burden on prisons, institutions, and welfare offices and end the need to help engineer the survival of people who had no right to be alive and yet were.<sup>410</sup>

The relationship between “economic purity” and “racial purity” is world building at the end of the nineteenth century in America. This unholy marriage comes out of the end of slavery as one legal form frequently referred to as civil death is replaced with another. I have yet to discover a text from the nineteenth century in which slavery is discussed explicitly as civil death, yet civil death and slavery are deeply intertwined in contemporary theory.<sup>411</sup> Civil death and the closely associated concept of “social death” are very much part of the contemporary understanding of slavery and its legacy.<sup>412</sup> Although

---

<sup>408</sup> Roscoe Pound, “The Scope and Purpose of Sociological Jurisprudence. [Concluded.] III. Sociological Jurisprudence Author(s)”: (1912) 25:6 Harvard Law Review 489–516 at 495.

<sup>409</sup> *Ibid* at 497.

<sup>410</sup> Elizabeth Catte, *Pure America: Eugenics and the Making of Modern Virginia* (Belt Publishing, 2021) at 23.

<sup>411</sup> Savigny discusses civil death laws as distinct from slavery; yet by bringing them together in his discussion, he also draws a comparison: “6. This is the case with the legal incapacity arising from the civil death of the French and the Russian laws. The judge of a state in which the institution of civil death is unknown will make no application of it, and therefore cannot observe the law of the domicile (§ 349, d). 7. The same is true of the incapacity of a negro slave, if that comes into question in a state which does not recognise slavery as a legal institution (§ 349, e).” von Savigny, *supra* note 287 at 123.

<sup>412</sup> D Marvin Jones, “A Bronx Tale: Disposable People, the Legacy of Slavery, and the Social Death of Kalief Browder” (2015) 6 University of Miami Race and Social Justice Law Review 31–50, online: <<https://heinonline.org/HOL/Page?handle=hein.journals/umrsj6&id=40&div=&collection=>> at 40.

Orlando Patterson convincingly argues that there is more to slavery as an institution than merely the taking of rights, a person whose rights as a citizen are recognized and respected cannot be enslaved. Further to this point, the legal form of civil death enables the enslavement of persons because it starts with the dispossession of the legal person.<sup>413</sup> Patterson claims that the property relationship that was peculiar for slavery was not that enslaved persons were made into property (he offers a counter-argument that sports players are the property of the team owner and are traded like objects in some senses, but athletes are not enslaved), but rather that the relevant property relationship that makes slavery is that enslaved persons could not own property.<sup>414</sup> I take his argument to mean the following: the capacity to own property provides a political power as a continuation of the political relationship of holding property as the basis for full political identity or participation. A claim to private property is the basis for one theory of sovereignty under the British common law, and each individual person as a constituent part of the nation has a share in that sovereignty.<sup>415</sup> A propertied person or potentially propertied person is the sovereign over the self. The enslaved person who has no right to property can thus also have no share in the sovereign power and is thus only an object of sovereign power, not a subject of that power.

Ancient forms of slavery were generally premised on the idea that capture and servitude were seen as the natural consequences of defeat in war. But European thinkers also formulated arguments for enslaving others who were not part of the spoils of war when encountering new peoples.<sup>416</sup> Aristotle's idea of "natural slaves" was embraced by colonists as a kind of spiritual justification for an economy supported by slavery.<sup>417</sup> While slavery has existed in different parts of the world and across time in different forms, the uniqueness of colonial slavery was built in part on the institutionalization of a racialized servitude that fit into the idea of "natural slaves" when the blackness of one's body, they said, revealed a kind of moral corruption much like the corruption of blood that emanated from attainer.<sup>418</sup> This designation of persons as "natural slaves" by virtue of their "race" was supported by

---

<sup>413</sup> Colin Dayan, *The Law is a White Dog: How Legal Rituals Make and Unmake Persons* (2011).

<sup>414</sup> Orlando Patterson, "Revisiting Slavery, Property, and Social Death" in *Hum Bond After Slavery Soc Death* (2016) 265.

<sup>415</sup> "Property was a creation of, and dependent on the 'sovereign' to whom the multitude had transferred their rights: 'they have authorized all his actions, and in bestowing the Sovereign Power, made them their own.'" This did not signify tyranny. "In transferring their rights to the sovereign, the multitude authorized the sovereign to act on their behalf, and accepted 'ownership' of the sovereign's acts." Koskenniemi, *supra* note 248 at 370.

<sup>416</sup> James Muldoon, "Spiritual Freedom—Physical Slavery: The Medieval Church and Slavery" (2005) 3:1 Ave Maria Law Rev 69–94.

<sup>417</sup> *Ibid* at 84.

<sup>418</sup> Dayan, *supra* note 39 at 48–9.

laws that not only disabled the enslaved person, but also created obligations on other members of society to keep the enslaved person isolated to protect the stability of the economy. While war had been the origin of slavery for some people, it would bring slavery to a close in the U.S. In the years leading up to the Civil War, hundreds of enslaved persons filed lawsuits in U.S. courts for their freedom. In the end, Dred Scott would bring his case to the U.S. Supreme Court. Dred Scott had traveled between free and slave states with his enslaver over the course of the latter's military career. In the case, Scott argued that when he had entered Illinois, a free state that did not recognize the institution of slavery, he had as a consequence been freed. As jurists worked out the consequences of conflicts of laws over the course of the century, the legal argument would rest on the non-observance of slavery in one jurisdiction. The infamous Dred Scott case, in which Justice Taney wrote the decision holding that neither slaves nor freed Black persons could be considered citizens of the U.S. with all the rights and privileges pertaining thereto is widely considered the worst Supreme Court decision in U.S. history and was a catalyzing event for the war. As Frederick Douglass continued to agitate that no man was free until he could vote, the 13<sup>th</sup> and 14<sup>th</sup> Amendments to the U.S. Constitution were passed in 1865 and 1868, in which slavery was nullified and all men were given full voting rights, all men that is except for persons with certain criminal records who were "lawfully" denied voting rights.

### *2.2.2. Oaths and Contracts as a Break*

The U.S. Civil War, as addressed in the previous chapter, had a politically ambivalent relationship to legal incapacitation. If we take slavery as one form of civil death, and also the incapacitation of Southern rebels as another example, then civil death is revealed in this period to be more about dueling sovereignties than simply about race, at least until it is subsumed into a new ideological framework. During Reconstruction, the establishment of a single sovereignty under which states were subordinate meant that all forms of loyalty had to be aligned or rather re-aligned.

Loyalty oaths emerged, again, as tests for full admission into society. The refusal to take an oath of loyalty would be grounds for the incapacitation of legal persons during this period, and oaths served an important social function after the civil war as the gatekeepers to property. The freedmen in the South during Reconstruction were required to swear an oath of allegiance to the Union and in

exchange for the oath of fealty were to be given 40 acres of land.<sup>419</sup> The Freedmen's Bureau was in charge of registering the formerly enslaved persons in order to register them to vote. While the formerly enslaved were being awarded land and enrolled to vote, some of the former Confederates were being disenfranchised. Anyone could be "disenfranchised for participation in the rebellion, or for felony at common law,' or who refused to take the iron-clad oath."<sup>420</sup>

The image below is an example of one of the postbellum oaths swearing not to have been disenfranchised for rebellion or for violating laws. But the person taking oath also had to swear that he was not one of the political leaders or had sworn and subsequently violated an oath by fighting for the South. It was a performative act of aligning sovereignties by aligning loyalties—property could only be held by persons who were not in open rebellion and had not already violated an oath. Ironically, that condition was verified by having to swear an oath.

---

<sup>419</sup> Paul Skeels Peirce, *The Freedmen's Bureau: A Chapter in the History of Reconstruction, Vol 3* (1971).

<sup>420</sup> Paul Skeels Peirce, *The Freedmen's Bureau: A Chapter in the History of Reconstruction, Vol 3* (1971) at 162.

STATE OF GEORGIA, No. 918

COUNTY OF Gordon } PERSONALLY APPEARED before me this 26 day

of July 1867, William M. Anglin

who states that he resides in the 993 Election Precinct of Gordon COUNTY,

GEORGIA, and who makes oath as follows:

"I, William M. Anglin do solemnly swear

in the presence of Almighty God, that I am a citizen of the STATE OF GEORGIA; that I have resided in said State for 12 months

in the County of Gordon in said State; that I

preceeding this day, and now reside in the County of Gordon in said State; that I

am 21 years old; that I have not been disfranchised for participation in any rebellion or civil war against the United States, nor for felony

committed against the laws of any State or the United States; that I have never been a member of any State Legislature, nor held any

executive or judicial office in any State, and afterwards engaged in insurrection or rebellion against the United States, or given aid or comfort

to the enemies thereof; that I have never taken an oath as a member of Congress of the United States, or as an officer of the United States,

or as a member of any State Legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States,

and afterwards engaged in insurrection or rebellion against the United States, or given aid and comfort to the enemies thereof; that I will

faithfully support the Constitution and obey the laws of the United States, and will to the best of my ability, encourage others so to

do help me, God."

The said William M. Anglin further swears

that he has not been previously registered under the provisions of "An act supplementary to 'an act to provide for

the more efficient government of the rebel States'—passed March 2, 1867—and to facilitate restoration," under this

or any other name, in this or any other Election District; and further, that he was born in

and naturalized by on the day

of , 18 in the

SWORN TO AND SUBSCRIBED before me

L. P. Gudge

Register of the 43 Registration District.

Figure 4 - Postbellum Oath for Property

These oaths marked a break with the past and a realignment with a future sovereignty. These performative speech acts used civil death techniques, such as legal incapacitation, to create a symbolic break with a competing sovereign claim and political reality.

The labor contract below from 1866 issued by the Freedmen's Bureau is visual evidence of the move from the status of slave to a free man who can make contracts as a form of recognized legal capacity for formerly enslaved persons. This transition from slavery to contract was worked out in the United States Freedmen's Bureau to oversee that property in the form of both land and wages would be



transferred for equity but also in terms of loyalties. The labor contract for one year appears to be written to guarantee wages for one year for work done by a formerly enslaved person.<sup>421</sup>

---

<sup>421</sup> United States, Freedman's Bureau Labor Contracts, Indenture and Apprenticeship Records (1865-1872) National Archives and Records Administration (RG 105) 434.



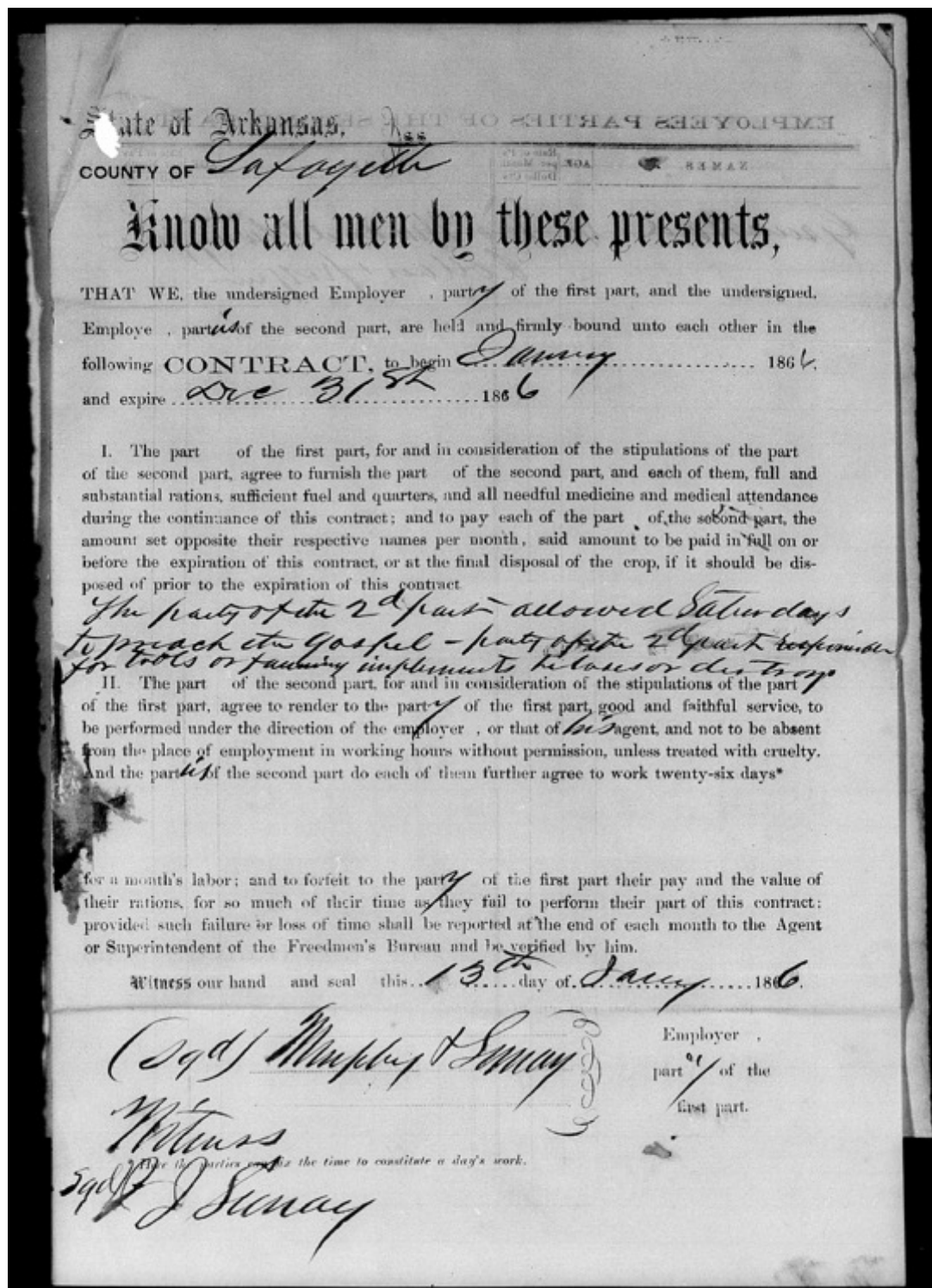


Figure 5 - Postbellum Labor Contract

Although the contract and the loyalty oath are arguably two very different kinds of documents, they are also the visual evidence of the profound institutional transformation that was to take place after the war. They also demonstrate in some ways the feebleness of these forms of speech to in fact realign loyalties and fundamentally transform the kinds of racialized prejudices that allowed for the total domination of a group of people.

### 2.2.3. *Continuity in Incapacitation*

It is not accidental that the contemporary U.S. literature on civil death is mostly about the legal incapacitation of African Americans from slavery through Reconstruction into the era of Jim Crow laws and the contemporary carceral system. I would like to echo the already ample and solid literature that makes the case that civil death is deeply intertwined with White supremacy in the U.S. and that White supremacy is also premised on a particularly anti-Black ideology. In his dissertation “Existing but Not Living: Neo-civil Death and the Carceral State,” Calvin John Smiley writes,

... establishing how neo-civil death operates in contemporary United States, scholars have shown the profound connections and correlations to race relations, particularly the use of exclusion prohibited by law as well as custom to further White supremacy. Historically, there was a rise in civil death statutes and legislation in the form of disenfranchisement during the end of the 19th century as newly freed Blacks acquired voting rights (Fellner and Mauer 1998, Pinaire et al 2003, Manza and Uggen 2006, Alexander 2010). Furthermore, these laws once again reinvented citizenship for Black Americans, even after the passage of the Reconstruction Amendments.<sup>422</sup>

Collin Dayan has written that the “stain of attainder” as used in the U.S. had a racial dimension inscribed into its very being as it existed on a continuum with slavery. There is a significant and well-documented literature about the use of felony disenfranchisement laws to target and disenfranchise Black Americans after the Civil War. The case has been solidly established through carefully documented histories of disenfranchisement laws that Black voters were in fact targeted by White law makers. Jeff Manza, Christopher Uggen, and Angela Behrens even note in their quantitative analysis

---

<sup>422</sup> Calvin John Smiley, “Existing but Not Living: Neo-Civil Death and the Carceral State,” *ProQuest Dissertations and Theses*, 2014, 14,

of the racial impact of disenfranchisement laws that in some cases these laws were drawn up only to target Black voters. They give the example of disenfranchisement laws in Mississippi for several minor offenses that Black persons were uniquely charged and convicted of and subsequently lost their vote, while the vote was left intact for violent offences that were predominantly committed by White persons. In defense of these laws (and their selective enforcement), the Mississippi Supreme Court wrote in 1896:

The [Constitutional] convention swept the circle of expedients to obstruct the exercise of the franchise by the negro race. By reason of its previous condition of servitude and dependence, *this race had acquired or accentuated certain peculiarities of habit, of temperament and of character, which clearly distinguished it, as a race, from that of the whites*—a patient docile people, but careless, landless, and migratory within narrow limits, without aforethought, and its criminal members given rather to furtive offenses than to the robust crimes of the whites. Restrained by the federal constitution from discriminating against the negro race, *the convention discriminated against its characteristics and the offenses to which its weaker members were prone.*<sup>423</sup>

The authors noted that accused persons, in the event they were Black, would often have been lynched before they would be convicted of a felony. It was thus less important to disenfranchise violent offenders than it was to find criminal laws that disenfranchised Black people. The authors offer a comprehensive history of disenfranchisement that extends beyond the post-war period and Southern states and concludes with statistical evidence that shows, “When African Americans make up a larger proportion of a state’s prison population, that state is significantly more likely to adopt or extend felon disenfranchisement.”<sup>424</sup> But the ways in which persons of color were disabled through law extends far beyond criminal law and vote suppression.

As legal status relationships were being abolished over the course of the century, U.S. courts enforced race-based statuses through alternative legal means.<sup>425</sup> In 1911, a legal scholar, Dudley McGovney, published in the *Columbia Law Review* an article on the various legal categories of “citizens” that had different privileges and yet were nationals living within the U.S. He published this at the same moment that American eugenics was becoming an established “scientific” movement in American society, as

---

<sup>423</sup> Citing the quoted text from Jeff Manza & Christopher Uggen, *Locked Out: Felon Disenfranchisement and American Democracy* (Oxford University Press, 2006) at 42.

<sup>424</sup> *Ibid* at 67.

<sup>425</sup> Reva Siegel, “Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action” (1997) 49:5 Stanford Law Rev 1111–1148.

the Eugenics Record Office out of the Cold Spring Harbor Laboratory was financed by respected tycoon families in New York. It is also the same moment Native American sovereign governments were being “dissolved” and the tribal land was being individualized through allotments, new territory and islands were being annexed, and the relationship between the state and African Americans had hit a particularly critical moment in the construction of American citizenship. As formal status was disappearing, new legal arguments were being developed to justify differential treatment in law. McGovney commented on Taney's decision in the Dred Scott Case. He arrived at the conclusion that Taney was correct in his legal reasoning at the time, but that if African Americans were to be incorporated as citizens, they would have been citizens without full rights. He argued,

They were citizens in every respect internationally and constitutionally but not clothed with those special privileges which the nation did not intend to confer upon them. Thus the status of this anomalous class of persons may be accounted for without a departure from the established meaning of "citizen" as used in the Constitution.<sup>426</sup>

As a reminder, the Dred Scott Case was called by chief justice Charles Evans Hughes, the nation's “greatest self-inflicted wound,” in which it decided not only that slaves were not citizens, but also that free African Americans should not be considered citizens, as they were not given all the rights and privileges of other citizens. McGovney claims that Taney's argument was that African Americans were nationals and not citizens, even though in the U.S., citizenship is intended to be synonymous with nationality. He makes the lengthy argument that unlike France or other places that conferred citizenship only on a specific class of persons, all Americans were citizens, but that African Americans simply were not regarded. His argument, which he claims is not a non sequitur, rests on the reasoning that there are many citizens that do not have all the rights of others, such as the right to vote. He includes here women and children who are not aliens, so they must be citizens despite their inability to vote; he then coins the concept of “unincorporated peoples” to describe the space carved out for other kinds of people.<sup>427</sup> As McGovney's argument reveals, reforms did not exclude differentiated kinds of citizens under the U.S. Constitution. As the so-called “naturalness” of women's differences

---

<sup>426</sup> Dudley O McGovney, “American Citizenship . Part I . Definitional” (1911) 11:3 Columbia Law Review 231–250 at 248–9.

<sup>427</sup> McGovney, *supra* note 426.

and subsequent different legal status endured though transformed, so too was the attribution of natural differences between “races” of persons.<sup>428</sup>

The uses of civil death techniques to disable Black Americans is well established in the literature. W.E.B. DuBois, an American father of sociology, wrote in the middle of the twentieth century that the particular experience of African Americans is marked by a continuity in which a social unity is created “born of slavery, of common suffering, prolonged prescription and curtailment of political and civil rights; and especially because of economic and social disabilities.”<sup>429</sup> This, however, says more about how deep and pernicious anti-Black racism runs in American society and history than it does about the essence of the concept of civil death. Civil death techniques can in fact be used to construct race in a particular way.

There are in the United States of America, fifteen millions or more of native-born citizens, something less than a tenth of the nation, who form largely a segregated caste, with restricted legal rights, and many illegal disabilities. They are descendants of the Africans brought to America during the sixteenth, seventeenth, eighteenth, and nineteenth centuries and reduced to slave labor. This group has no complete biological unity, but varies in color from white to black, and comprises a great variety of physical characteristics, since many are the off-spring of white European-Americans as well as of Africans. Similarly, there is an equal and perhaps even larger number of white Americans who also descend from Negroes but who are not counted in the colored group nor subject to caste restrictions because the preponderance of white blood conceals their descent.<sup>430</sup>

The disabilities DuBois speaks of for African descendants went beyond the criminal justice system and created laws and practices permitted by willful omission of laws that themselves created race. In this he reveals Whiteness as a status rather than a biological fact. It is the use of legal disabilities to create the caste restrictions that have enabled White supremacy. The particular case of how civil death fit into the history of racialized slavery in the U.S. can obscure the ways in which the tools associated with civil death can be used in different ways and against different groups. Legal disabilities were used against African Americans, but this practice is not exclusive to this history. That being said, America’s history begins with slavery, was built on the institution of slavery and the expropriation of black labor,

---

<sup>428</sup> Siegel, *supra* note 239.

<sup>429</sup> WEB DuBois, “An Appeal to the World: A Statement of Denial of Human Rights to Minorities” (1947) 1–6.

<sup>430</sup> *Ibid.*



and the black citizen was configured and reconfigured in law to maintain racial hierarchy. Starting from the status of slavery and remade into economic and social disabilities that effectively constituted a new social status that kept African Americans apart from their fellow citizens, disabilities worked their legal power to maintain separation and subordination. As race became a suspect category for discrimination, “criminality” would become a substitute for a formal status based on race. Civil death was adapted in part to perpetuate racial hierarchy relative to African Americans, but it also was built on maintaining racial hierarchy with other racialized groups.

#### 2.2.4. *Race and Exclusion*

Ethnocultural minorities were subject to legal disabilities on a large scale. In the U.S. the Chinese Exclusion Act passed in 1882 would not be repealed until 1943.<sup>431</sup> Not only were the laws designed to exclude immigration of Chinese nationals to the U.S., but the laws were applied to anyone of Chinese descent in a way that naturalized the construction of “Chineseness” as a race. A wealthy law student, Klindt Kentwell, living in Hawaii whose father was of English descent and mother of Chinese, gave the following account of an interaction with immigration officers when returning to the U.S. from travelling abroad. He said the officer had “‘hinted sarcastically’ that he knew Kentwell ‘had Chinese blood in his veins,’ and, according to Kentwell, treated him like a ‘common criminal.’”<sup>432</sup> Kentwell’s surprise led him to file a claim against the legal classification of himself on the basis of the attribution of race. What he had supposed up to that point was that his class privilege had largely provided him cover from being subjected to the laws. When he lost the case for misclassification, he began to challenge the Exclusion Laws themselves as discriminatory. The Exclusion Laws did more than police the border; they were not possible without the ability to exclude anyone suspected of being in the country illegally. The question of citizenship for Chinese Americans was under consideration. Another case went to the U.S. Supreme Court and affirmed birthright citizenship for Chinese Americans even if the parents were not citizens. In that case, the D.A. Henry S. Foote argued that a baby born in the U.S. to Chinese parents would be “an alien loyal to the country of his father and indifferent to the country of his birth.”<sup>433</sup> The question of loyalty again resurfaced in this case, though ultimately the Court decided in favor of absolute citizenship for babies born in the U.S. The consequence still was

---

<sup>431</sup> Erika Lee, *At America’s Gates: Chinese Immigration During the Exclusion Era, 1882-1943* (2003) at 3–4.

<sup>432</sup> *Ibid* at 78–79.

<sup>433</sup> *Ibid* at 105.

that as the Chinese exclusion laws remained in force, Chinese Americans had to carry identification papers and were subjected to arbitrary stops to check the legality of their presence in the country. Only White Americans could serve as witnesses in favor of the case of a Chinese American's legality. These legal incapacitations turned on questions of racialized loyalty.

McGovney went on in Part II of the article "American Citizenship" to outline the particular status of Native Americans and then to touch on the question of what to do with inhabitants of unincorporated territories such as Puerto Rico. The concept of status is transformed to reinforce the idea of "abnormal" groups.

Just as the citizen privileges of the free negro were qualified by reason of his peculiar incorporation, just as Congress can deal with abnormal legislative freedom with the groups of stateless Indian aliens, because of their peculiar relation to the United States, so Congress is vested with abnormal power over these abnormally incorporated citizens ... as to unincorporated people and abnormally incorporated people, our law seems to be that their children wherever born have no higher status or privileges than their parents.<sup>434</sup>

Twenty years later, the same author published "Our Non-Citizen Nationals, Who Are They?" in the *California Law Journal* and went further to elaborate on the question of citizenship and status when discussing the issues of Puerto Ricans and Filipinos and the possibility of acquiring nationality or full citizenship. He claimed that "we" have "lost our fear" of the Puerto Ricans mixing with the rest of the country since they are "a mixture of whites and Africans quite homogeneous with the similar elements that constitute the greater part of the population of the Continental United States."<sup>435</sup> He declares that Filipinos, on the other hand, irrespective of one's belief in "race purity," would pose "risks" if too many were to move into areas where there is "racial antagonism" toward that group, and that Congress has the power to restrict the movement of nationals without citizenship.<sup>436</sup>

---

<sup>434</sup> Dudley O McGovney, "American Citizenship . Part II . Unincorporated Peoples and Peoples Incorporated with Less than Full Privileges" (1911) 11:4 Columbia Law Review 326–347.

<sup>435</sup> Dudley O McGovney, "Our Non-Citizen Nationals, Who Are They?" (1934) 22:6 California Law Review 593–635.

<sup>436</sup> *Ibid.*



Dudley O. McGovney, a law school dean, wrote more plainly than most about how the withholding of rights and the imposition of legal disabilities on racialized minorities were used to inscribe a new legal status to maintain distinctions between people, often based on the idea of race and threat, and in the service of political stability. The different legal disabilities McGovney wrote about reveal a sort of legal toolbox that Congress was empowered with: restrictions on movement and where people could live, confiscation of territory/property, dissolution or denial of family relations, denial of legal personality in court. These are some of the ways in which the withholding of rights constructed a legally subordinate and dependent legal status after the historical moment when status relationships were supposedly replaced with a liberal construction of free and equal individuals.

The question about race and civil death harkens back to Arendt's insight that the nineteenth century seemed to be a blueprint for the horrors that were to come in the twentieth century. That is, fascism is an ideology built on the supremacy of one race over others. Over the course of the nineteenth century in the U.S., race gets configured and reconfigured through law as it supports White supremacy. There is without a doubt embedded in the U.S. a particular form of anti-Blackness that is different from the treatment of all other ethno-cultural groups. But the original division between Black and White in the U.S. created a template against which all other laws that regulate race would fit.

### 2.3. *Religious Minorities*

From the time of the Reformation until Catholic and Jewish emancipation in the United Kingdom of Great Britain and Ireland, legal disabilities were used to promote religious conformity.<sup>437</sup> Various legal disabilities had been imposed on religious minorities in Great Britain and Ireland and it was during the nineteenth century that these minorities managed legislative triumphs—after many decades of defeats—in order to remove the formal legal barriers barring them from equal citizenship. Jewish demands for the same status as Christians in European states would follow Catholic mobilizations for political emancipation. The debates in the forms of speeches and essays reveal not only the legal mechanics of stripping legal privileges, but also the underlying rationale for these political moves.

Withholding rights from religious groups dates back at least to the fourth century under Roman law under the doctrine of *infamia* in which religious minorities such as Jews, heretics, pagans, and apostates

---

<sup>437</sup> Colum Kenny, "The Exclusion of Catholics from the Legal Profession in Ireland, 1537-1829" (1987) 25 *Irish Historical Studies* 337–357.

were treated in the same category as persons who committed crimes.<sup>438</sup> It is not a new phenomenon, but calling the withholding of legal protection or imposing specific disabilities onto religious minorities “civil death” did not appear to be a dominant use of the term in the nineteenth century. The use of the term civil death to refer to the treatment of religious minorities is more properly associated with the twentieth century. There are several texts that look at the history of Nazi law, labeling some of the particular legal maneuvers that destroyed Jewish legal personality “civil death” statutes in the years leading up to the creation of the camps.<sup>439</sup> Some of the disabilities placed on Jews under Nazi law, however, looked similar to the disabilities that were placed on them in the nineteenth century in England and across the European empires. But, to see this, it is necessary to lay out the kinds of disabilities and the rationales that were imposed on Jewish and Catholic minorities. The United Kingdom in the nineteenth century was important since there are public records showing political challenges to the legal disabilities of Catholic and Jewish minorities. These early arguments display not only the legal form but also the functional characteristics of civil death.

### 2.3.1. *Catholic Land Transfers*

These disabilities were onerous in many different ways for the people bearing them, but the immediate effect was a mass transfer of land in Ireland. Mark Connelly notes that the “penal laws” pushed out many Catholics to France so that while in 1640 Catholics possessed two-thirds of the land, by 1703 Catholics were only in possession of 7%.<sup>440</sup> The expropriation of lands and the juridical death of the person go hand in hand. The juridical death of the Catholic was expressed by the Chief Justice who declared, “The law does not suppose any such person to exist as an Irish Roman Catholic.”<sup>441</sup> A Roman Catholic was a disloyal subject, which was a contradiction in terms. It was thus an impossible legal subject, and the law made that subject disappear.

---

<sup>438</sup> Bond, *supra* note 205 at 2. In the fourth century CE the legal category of *infamia* was expanded from a category applied to persons after criminal trials or who were employed in certain professions to include religious groups such as Jews, heretics, pagans, and apostates. Sarah Bond notes that the expansion of *infamia* to include religious groups supports the documented anxiety over the religious transition in late antiquity, but also the fungibility of the category of *infamia*.

<sup>439</sup> Ingo Muller, “Protecting the Race” in Deborah Lucas Schneider, ed, *Hitler's Justice* (Harvard University Press, 1991); Kristen Rundle, “The Impossibility of an Exterminatory Legality: Law and the Holocaust ” (2009) 59:1 Univ Tor Law J 65–125.

<sup>440</sup> Mark Connelly, *The IRA on Film and Television: A History* (McFarland, 2012) at 9.

<sup>441</sup> Mark Connelly, *The IRA on Film and Television: A History*, 2012, 9.

I have found at least one instance, as early as 1829, in which religious disabilities placed against a group were explicitly labeled civil death. In a speech to Parliament, the Irish author and politician Sir Henry Parnell argued that eighteenth century laws against the Catholics under Queen Anne had the effect of imposing civil death on the group.

... [T]he House will do well to take into consideration the state to which Ireland had been reduced by the penal laws, and the condition in which the Roman Catholics were placed by their operation. Under these laws, the Roman Catholics were deprived of all political power and reduced to such a state of degradation as almost justify me in saying, that they were deprived of the use of their understanding. Such was the condition of the Catholics under the operation of these laws, the effects of which was to inflict on them *civil death*, from the reign of Queen Anne up to the time of the period of the relaxation of the penal code.<sup>442</sup> [*emphasis added*]

The “penal laws” as they were popularly known were a set of laws that attached to Catholics and regulated everything from offices and employment, marriage, voting, oaths, land and property to weapons, and also criminal law.<sup>443</sup> The level of incapacitation was, at least in Parnell’s mind, a deciding factor for whether or not the technique should be called civil death. In that case, the speaker seemed to think that the remaining disabilities preventing certain kinds of public offices were not sufficiently onerous to call it civil death. He does, however, categorize the techniques of incapacitation together, even if they do not rise to the level of civil death in his mind, as when the techniques were used in their totality against the Catholics.

Parnell labeled these disabilities civil death even though they were placed on the group and not individualized—because unlike the way in which civil death would often be applied in criminal law, it attached to a status. There was an individual element to these disabilities as well, since religious affiliation was seen as a choice and the way to avoid the disabilities was either through religious conversion or else by “passing” as a member of the dominant religion. Parnell as a writer was known both for his economic writings and also his authoritative work on the penal laws, and he did not make a distinction between individual penalties as civil death and penalties placed on a group as distinct legal

---

<sup>442</sup> Sir Henry Parnell, “Treaty of Limerick” in John Henry Barrow, ed, *The Mirror of Parliament* (1828).

<sup>443</sup> “Irish Penal Law”, online: *University of Minnesota Law Library* <<https://www.law.umn.edu/library/irishlaw/subjectlist>> (last visited July 22, 2021).

techniques.<sup>444</sup> Calling the disabilities “penal laws” in the first place implies that when states do not individualize the application of law but treat groups as a whole, there is no need to then at the back end make a distinction between legal techniques that are applied to individuals versus those applied to groups. The legal technology of civil death remains the same whether it is applied individually or collectively.

There are two characteristics of status disabilities for religious groups in this period worth noting from the outset. First, disabilities were experienced and observed as punitive despite the fact that no crime had been committed. Disabilities are frequently associated with civil death despite not necessarily or exclusively being derived from criminal law when the distinction between criminal and other areas of law is not considered determinative. The second important dimension is that the groups were seen as threats to society and public order, so the debilitating and punitive quality of the disabilities would have appeared justified. As matters of public safety, oaths once again play an important role in civil death.

This same argument that Catholics continued to be subjected to laws that are privative, and thus punitive, for their religion is made again and again. Understanding that the disabilities had a punitive dimension and formally were privative goes a long way to seeing that special statuses are part of the legal form of civil death. In the words of Henry Grattan:

Yet may We humbly represent to this Honourable House, and We do so at this perilous crisis with sincere regret and deep solicitude—that the Roman Catholics of Ireland still remain subject to severe and humiliating Laws, rigidly enforced, universally felt, and inflicting upon them divers injurious and vexatious disabilities, incapacities, privations and penalties—by reason of their conscientious adherence to the Religious Doctrine of their forefathers.<sup>445</sup>

“Severe” and “humiliating” convey the penal form of what are not formally criminal laws. The privative form as a punitive tool, however, is only one way of understanding civil death as religious persecution. The function of civil death as a way to domesticate threatening populations, to make

---

<sup>444</sup> Marie Hughes, “The Parnell Family” (1961) 16:3 Dublin Historical Record 86–95.; see also Alfred Webb, *A Compendium of Irish Bibliography*, Dublin, M H Gill & Son (1878) at 428–429 (“Sir Henry Brooke Parnell”).

<sup>445</sup> Henry Grattan, *Speech Upon his Motion, That the Petition of the Catholics of Ireland be referred to a Committee to Consider the State of the Laws Imposing Civil Disabilities on His Majesty’s Subjects Professing the Roman Catholic Religion* (W. Smith and Co., 1812) at 11.

them obedient and loyal is crucial. Oaths and questions of loyalty go hand in hand. The oaths were designed both to secure loyal subjects for the Crown and to create a religiously homogenous group. What made religious minorities appear threatening at that time (at least in part) was that they were perceived to owe their loyalty to authorities outside the state, whether they were the Pope or else each other as an insular community; in either case they were not considered obedient subjects.

Like the cases of civil death for priests who took a vow of poverty and owed their fealty to the Abbot, or for persons who committed a crime, the implementation of religious disabilities often turned on an oath. The oath was socially axiomatic as a promise without which no crime could be committed because no vow would be violated. It was a promise of loyalty to a sovereign and subsequent belonging to a political community. Oaths in England and Ireland functioned so that one could not be both a fully functioning political person and also hold to one's faith if it was not that of the Church of England or Ireland. Oaths were gatekeepers to certain positions and full legal capacity. They were not, however, religiously neutral and were sometimes specifically worded to force conversion.<sup>446</sup>

---

<sup>446</sup> The following is an example of Oath of Abhorrence, indicating a rejection of papal authority over the Crown's religious legitimacy.

I, A.B., do swear, that I do from my heart abhor, detest, and abjure as impious and heretical, that damnable doctrine and position, that princes excommunicated or deprived by the pope or any authority of the See of Rome, may be deposed or murdered by their subjects, or any other person whatsoever, and I do declare, that no foreign prince, prelate, state, or potentate, hath or ought to have any jurisdiction, power, superiority, pre-eminence, or authority, ecclesiastical or spiritual, within this realm.

*An Act for the Abrogating the Oath of Supremacy in Ireland and Appointing other Oaths*, 3 Will & Mary, c.2 (1691) Sec 1-3.

The following is an Oath of Abjuration, indicating a rejection of claims to the throne by people other than Queen Anne. I, A.B., do truly and sincerely acknowledge, profess, testify and declare in my conscience, before God and the world, that our sovereign lady Queen Anne is lawful and rightful queen of this realm, and of all other her Majesty's dominions and countries thereunto belonging. And I do solemnly and sincerely declare, that I do believe in my conscience, that the person pretending to be Prince of Wales, during the life of the late King James, and since his decease pretending to be and taking upon himself the style and title of King of England by the name of James III, hath not any right or title whatsoever to the crown of this realm, or any other the dominions thereto belonging, and I do renounce, refuse, and abjure any allegiance or obedience to him. And I do swear that I will bear faith and true allegiance to her majesty Queen Anne, and her will defend to the utmost of my power against all traitorous conspiracies and attempts whatsoever, which shall be made against her person, crown, or dignity. And I will do my best endeavour to disclose and make known to her majesty, and her successors, all treasons and traitorous conspiracies, which I shall know to be against her and any of them. And I do faithfully promise to the utmost of my power to support, maintain, and defend the limitation and succession of the crown against him the said James, and all other persons whatsoever, as the same is and stands limited by [those acts settling the Protestant succession of the crown]. And all these things I do plainly and sincerely acknowledge and swear, according to the express words by me spoken, and according to the plain and common sense and understanding of the same words, without any equivocation, mental evasion or secret reservation

Here are two examples from the eighteenth-century targeting Catholics:

To the end that none of the aforesaid purchased forfeited estates may ever descend to any Papist but shall remain to be held and enjoyed by Protestants for the strengthening of the English interest and Protestant religion, if any person educated in the popish religion, or professing the same, and being under the age of 18, shall not, within 6 months of attaining the age of 18, take the oaths of allegiance and supremacy, and the declaration against transubstantiation in the courts of Chancery or Kings-bench in England or Ireland, or in the quarter-sessions where such person shall reside, and continue to be a protestants, such person in respect of himself only, and not his heirs or posterity, shall be disabled to take by decent, devise, or limitation, any of the forfeited estates purchased in Ireland, and during the life of such person, or until he shall take the oaths etc., the protestant next of kin shall enjoy the premises.<sup>447</sup>

Before voting, every person shall take the following oath: I, A.B., do solemnly and truly affirm, that I am a freeholder ... of the clear yearly value of 10 pounds, or of 40 shillings (as the case shall happen to be) ... and that I am not a papist, or married to a papist, and that I do not educate or suffer to be educated, any of my children under the age of 14 years in the popish religion. So help me God.<sup>448</sup>

The Oath of abjuration passed in 1643 required the person taking the oath to swear, “And I do make this recognition, acknowledgement, abjuration, renunciation and promise, heartily, willingly, and truly, upon the true faith of a Christian.”<sup>449</sup> The oaths were designed to exclude persons holding these religious beliefs from exerting political influence, to redistribute lands and create a docile population,

---

whatsoever. And I do make this recognition, acknowledgement, abjuration, renunciation and promise, heartily, willingly, and truly, upon the true faith of a Christian. So help me God.  
*An Act to Prevent the Further Growth of Popery*, 2 Ann c.6 (1704), Sec. 15.

We can similarly mention the Oath of Abjuration imposed by the *Security of the Sovereign Act* of 1714, which also demanded a rejection of the Pretender to the throne. See *An Act for the further security of his Majesty's person in government, and the succession of the Crown in the heirs of the late Princess Sophia, being Protestants; and for extinguishing the hopes of the pretended Prince of Wales, and his open and secret abettors*, 1 Geo I c.13 (1714) Secs. 1 and 33. Amends the oaths to refer to King George rather than Queen Anne and apply it to Ireland.

<sup>447</sup> *An Act for the Relief of the Protestant Purchasers of the forfeited Estates in Ireland*, 1 Ann. c. 26 (1702) Sec. 7.

<sup>448</sup> *An Act to amend and make more effectual an Act, intituled, An Act for better regulating Elections of Members to serve in Parliament, and for the more effectual quieting of Corporations, and securing the Rights of Persons, who have been or shall be elected into the Offices of Alderman and Burgesses within any Corporation of this Kingdom* (“Newton Act”), 21 Geo II c.10 (1747) Sec. 3.

<sup>449</sup> *An Act for the further Security of His Majesties Person and the Succession of the Crown in the Protestant Line and for extinguishing the Hopes of the pretended Prince of Wales and all other Pretenders and their open and secret Abettors* (“Security of Succession Act”), 13 & 14 Will. III. c. 6 (1701) Sec. 1.

and to secure allegiance to one leader. These oaths were attached to owning land or else to voting or taking office. They were updated over the centuries until they were challenged and ultimately removed.<sup>450</sup> The political debates on these laws are enlightening to understand the legal form.

### 2.3.2. *Catholic and Jewish Loyalties*

In the debate over the Bill for Removal of Jewish Disabilities in 1830, Lord Belgrave objected on the basis that they “were scattered over the face of the earth, united to each other, and destitute of those local attachments which constituted the patriotism of other people ... the Jew, so long as he continued truly such, could never feel himself bound up in the fortunes of a country in which he only considered himself a sojourner.”<sup>451</sup> Also opposing the Bill, Lord Darlington, quoting first a Mr. Huskisson, said, “The Strength, and security, and prosperity of the empire mainly depend on the present system.”<sup>452</sup> And he concluded by alluding to Jewish influence in banking and his vote as positioning himself as an enemy of the Jewish population in England; he then quoted the line about lending to an enemy from Shakespeare’s *The Merchant of Venice*.<sup>453</sup> Not surprisingly, in 1830, the Bill for Removal of Jewish Disabilities did not pass. Two passages reveal the similarity in the ways both Jewish and Catholic minorities were framed as disloyal, but for different reasons:

The English Jews, we are told, are not Englishmen. They are a separate people, living locally in this island, but living morally and politically in communion with their brethren who are scattered over all the world. An English Jew looks on a Dutch or a Portuguese Jew as his countryman, and on an English Christian as a stranger. This want of patriotic feeling, it is said, renders a Jew unfit to exercise political functions.<sup>454</sup>

---

<sup>450</sup> As an example, the 1858 Jews Relief Act provided for public offices to open to Jewish subjects by authorizing the Houses of Parliament to remove the words “and I make this Declaration upon the true Faith of a Christian...” in the “Oaths of Allegiance, Supremacy, or Abjuration” to be taken by persons “professing the Jewish religion.” *An Act to provide for the Relief of Her Majesty’s Subjects professing the Jewish Religion*, 21 & 22 Vict c.49 (1858) Sec. 1.

<sup>451</sup> *Bill for the Removal of Jewish Disabilities*, Hansard (UK), HC Deb 17 May 1830 vol 24 c787.

<sup>452</sup> *Ibid.* at c789.

<sup>453</sup> *Ibid.* at c790.

<sup>454</sup> Lord Macaulay, *Essay and Speech on Jewish Disabilities*, Israel Abrahams & Rev. S. Levy, eds. (Edinburgh: Jewish Historical Society of England, Ballantyne, Hanson & co, 1910) at 27.



It was in this way that our ancestors reasoned, and that some people in our time still reason, about the Catholics. A Papist believes himself bound to obey the pope. The pope has issued a bull deposing Queen Elizabeth. Therefore every Papist ought to be hanged, drawn, and quartered. To this logic we owe some of the most hateful laws that ever disgraced our history.<sup>455</sup>

Loyalty, patriotism, and obedience were the rationale behind the legal privations. Appeals to these were consequently used as counterarguments to secure legal rights. In France, Jewish persons were given full citizenship rights before the beginning of the nineteenth century; but as some scholars have pointed out, it was implicitly understood that in exchange for the privileges of full citizenship they would give up any “separate legal status or identity as a distinctive ‘nation’ within France.”<sup>456</sup> In a South African speech, an American rabbi made the argument in a transnational plea for the removal of disabilities on South African Jews. He recounts the many battles and wars American Jews had fought in the U.S. The rabbi appeals to courage and heroism arguing Jews are true patriots.<sup>457</sup> Dropping words like “traitor” and “extermination,” his appeal reveals what is at stake:

Anti-Semitism always fights with a strange weapon, and the strategy of its attack is ever new. It can no longer advocate the extermination of the Jew; fortunately there are to-day limits to human degradation. Neither can it long maintain its charge that the Jew is a traitor. For, even fickle France knows that the latest attempt in this direction is nothing less than a diabolical plot concocted by men who would be the greatest criminals of the age if they were not its greatest lunatics.<sup>458</sup>

The arguments for political emancipation were generally not radical positions but were often couched in the same terms as the discourses for excluding religious minorities.<sup>459</sup> Their arguments mirrored the

---

<sup>455</sup> *Ibid* at 35.

<sup>456</sup> Ngaire Heuer, *supra* note 404 at 20.

<sup>457</sup> Joseph Herman Hertz, *The Jew as A Patriot: A Plea for the Removal of the Civil Disabilities of the Jews in the Transvaal* (Johannesburg: M.J. Wood & Co., 1898). See also Simon Wolf, *The American Jew as Patriot, Soldier and Citizen* (The Levytype Co, 1895).

<sup>458</sup> Hertz, *supra* note 457 at 5.

<sup>459</sup> The debate between Bruno Bauer and Karl Marx on the “Jewish Question” was formed over the issue of legal disabilities. The distinction between political and human emancipation turned on the question of what the ultimate

language of those who sought to exclude them from the political community. The reasons given for why they were worthy of equal rights was because these groups were actually “patriots”; they were just as loyal and obedient to the state as any other citizen. In this sense, the use of the disabilities, even in the moments when they were removed, was effective in creating obedient subjects.

Although the legal form of group emancipation contemporarily is based within an equal rights discourse, the case was argued politically around issues of security broadly construed. There are very few references to equality as such. Some of the closest passages simply refer to partiality in law making. Henry Grattan, the Irish Politician, in a speech said, “You assume a right to make partial laws, or laws against the very principles of legislation. You govern one part of the society by one code; and the other, by a distinct one.”<sup>460</sup> In this passage the idea of equality is bound up with something that sounds vaguely like an appeal to the rule of law in the sense that partiality goes against “the very principles of legislation.” Catholic disabilities, it should be conceded, were supposedly imposed because of the threat Catholics posed to the Crown, but were also argued against on the basis of the threat a dominated and large population posed to the Crown. Grattan is strongest in his appeal to the ways in

---

intention of mobilizing for emancipation meant. The question was whether or not the end goal was equality in the sense of being equally exploited.

When Bauer says of the opponents of Jewish emancipation: “Their error was only that they assumed the Christian state to be the only true one and did not subject it to the same criticism that they applied to Judaism” [...], we find that his error lies in the fact that he subjects to criticism *only* the “Christian state,” not the “state as such,” that he does not investigate *the relation of political emancipation to human emancipation* and, therefore, puts forward conditions which can be explained only by uncritical confusion of political emancipation with general human emancipation. If Bauer asks the Jews: Have you, from your standpoint, the right to want *political emancipation*? We ask the converse question: Does the standpoint of *political* emancipation give the right to demand from the Jew the abolition of Judaism and from man the abolition of religion? [...]

The decomposition of man into Jew and citizen, Protestant and citizen, religious man and citizen, is neither a deception directed *against* citizenship, nor is it a circumvention of political emancipation, it is political emancipation itself, the political method of emancipating oneself from religion. Of course, in periods when the political state as such is born violently out of civil society, when political liberation is the form in which men strive to achieve their liberation, the state can and must go as far as the abolition of religion, the destruction of religion. But it can do so only in the same way that it proceeds to the abolition of private property, to the maximum, to confiscation, to progressive taxation, just as it goes as far as the abolition of life, the guillotine. At times of special self-confidence, political life seeks to suppress its prerequisite, civil society and the elements composing this society, and to constitute itself as the real species-life of man, devoid of contradictions. But, it can achieve this only by coming into *violent* contradiction with its own conditions of life, only by declaring the revolution to be permanent, and, therefore, the political drama necessarily ends with the re-establishment of religion, private property, and all elements of civil society, just as war ends with peace.

Karl Marx, “On the Jewish Question” in Richard Tucker, ed, *The Karl Marx-Friedrich Engels Reader*, 2d ed (New York: WW Norton, 1978) at 30,35-36.

<sup>460</sup> Grattan, *supra* note 445 at 33.

which partial laws would impact England. He argues that the penalties against the Catholics threaten the security of England.

The gentlemen who are invited by the call, think, perhaps, they are presiding over a few penal laws affecting the Irish, or exercising a lazy tyranny in the easy chair of pride and security: Depend upon it they are mistaken.... The scales of your own destinies are in your own hands; and if you throw out the civil liberty of the Irish Catholic, depend on it, Old England will be weighed in the balance, and found wanting: You will then have dug your own grave, and you may write your own epitaph.<sup>461</sup>

Talking of the Protestant “neighbors” who petition alongside the Catholics for equal rights, Grattan makes the following plea,

Thus you perceive, it is no longer a question between the different sects of Ireland, no longer a question regarding the security of the Protestant property or the Protestant Church. Far from looking for that security in civil disqualifications, they deprecate those disqualifications as their principal danger, and they reduce the subject to a question between the people of Ireland, and the ministers of the Crown.<sup>462</sup>

The security question had emerged and was flipped in this passage. As the purpose of civil disabilities was to ensure security, there was a recognition on the part of the petitioners, Catholic and Protestant, that the disabilities as an oppressive force were making everyone (including their property) less secure. He goes on in the next paragraph to argue, on the “Catholic question”; if they decide against it, “you abandon the idea of governing Ireland by affection, and you adopt the idea of coercion in its place.”<sup>463</sup> The idea of course being that anyone who is ruled by coercion cannot feel loyalty to a government. The person is positioned as an enemy by the very legal tools designed to create obedience. It is, rightly observed, metaphysical warfare, as Grattan concludes: “I call upon ... you to guard your empire, in this perilous moment, from religious strife, and from that death-doing policy, which would teach one part of the empire to cut the throats of the other in a meta-physical, ecclesiastical, unintelligible warfare.”<sup>464</sup>

The punitive nature of non-penal laws is frequently associated with the legal disabilities of the period. The term used in the following passage on Jewish disabilities is “persecution,” but this furthers the

---

<sup>461</sup> *Ibid.*

<sup>462</sup> *Ibid* at 30.

<sup>463</sup> *Ibid* at 31.

<sup>464</sup> *Ibid* at 50.

idea that drawing a line between punitive and administrative (or something else) misses the phenomenological experience of the person subjected to legal disabilities. According to Macaulay, the punitive character is established by the debilitating nature of the disabilities regardless of whether they are punitive in a narrow legal sense of the term:

My honourable friend should either persecute to some purpose, or not persecute at all. He dislikes the word persecution, I know. He will not admit that the Jews are persecuted. And yet I am confident that he would rather be sent to the King's Bench Prison for three months, or be fined a hundred pounds, than be subject to the disabilities under which the Jews lie. How can he then say that to impose such disabilities is not persecution, and that to fine and imprison is persecution? All his reasoning consists in drawing arbitrary lines.<sup>465</sup>

In this speech, Lord Macaulay's position, according to Israel Abrahams, the editor of the published version, had become so popular that it was known as the "main statement of the Jewish case."<sup>466</sup> Macaulay turns to the phenomenological experience of living with these legal disabilities. What made the legal exclusions a kind of persecution was based on what it was like to live with legal disabilities rather than legalistic distinctions based on what it was called or what the law-makers intentions were. Persecution does not belong only to criminal law with its purpose to punish and the use of moral rules to protect society. All of law can work in the same way, which means civil law can be just as punitive and imbued with society's creating morality as criminal law.

The oppressive power of legal disabilities provoked a revolutionary energy. The movement for political emancipation for religious minorities in Europe sparked a political debate over what emancipation should mean in a period of massive transformation. The question Marx controversially argued in his criticism of Bruno Bauer's position in "On the Jewish Question" was why focus only on political emancipation as opposed to human emancipation.<sup>467</sup> The removal of legal disabilities, formal equality as it were, would not free the human according to Marx. What Marx saw at that moment was

---

<sup>465</sup> Macaulay, *supra* note 454 at 48.

<sup>466</sup> *Ibid* at 11–12. It should be remarked that while Macaulay was the voice for the Jewish cause, he would not necessarily be remembered for his liberal position on Jewish disabilities as much as his imperial relationship to India. On Macaulay's "Minute on Education" (1835), e.g., Elmer H. Cutts, "The Background of Macaulay's Minute," *The American Historical Review*, Volume 58, Issue 4, July 1953, Pages 824–853

<sup>467</sup> "Political emancipation certainly represents a great progress. It is not, indeed, the final form of human emancipation, but it is the final form of human emancipation within the framework of the prevailing social order." ("On the Jewish Question," *supra* note 88 p. 35).

the connection between the legal disabilities, property, and economic power as the feudal land system was being cast aside. Lawmakers on the side of maintaining disabilities argued that they secured the political and economic system they enjoyed. The argument against the disabilities was that they had to be set aside since they threatened the security of the political and economic system. As noted in the Introduction, by the end of the century, both Catholic and Jewish disabilities would be removed in Great Britain.

There would have to be several pieces of legislation that had to be passed either to make exceptions to allow for religious diversity in the form of the oath taken for specific offices or to repeal a targeted oath. It was frequently observed that the United States and France had removed any legal privation on religious minorities in the form of oaths.<sup>468</sup>

We can appeal confidently to the Sacrifices which We and our Forefathers have long made, and which We still make, (rather than violate conscience by taking Oaths of a Spiritual Import contrary to our belief,) as decisive Proofs of our profound reverence for the sacred obligation of an Oath.<sup>469</sup>

It is perhaps a small irony that legal disabilities were imposed on persons who refused to take a false oath since monks taking religious vows formed the legal form of civil death. The solemnity of oaths formed a seal that would either include or exclude someone from a community.<sup>470</sup> Their very inability to violate the implicit oath of lying by taking a false oath for religious reasons would exclude Catholics and Jews from full rights as citizens.

These loyalty oaths were of course based in a particular political economy for England to keep power and land. The colonies faced a different reality. In Canada because of population demographics and migration patterns, the argument was made that loyalty oaths should not include religious assimilationist wording, as there were so many French-speaking Catholics settling in Canada while the English-speaking immigrants were slower to come. The Quebec Act of 1774 provided loyalty oaths

---

<sup>468</sup> See e.g. Francis Henry Goldsmid, *Remarks on the Civil Disabilities of British Jews* (London: Henry Colburn and Richard Bentley, 1830).

<sup>469</sup> Grattan, *supra* note 445 at 7.

<sup>470</sup> Civil death is often used in an almost legal pluralistic form as a way to demarcate one religious community from another. The religious “legal” order is in some sense the originator for civil life and thus of civil death. “Luxima the exile, doomed to a life of civil death, is the embodiment of a liminality created by her crossing over into another religious space, as she clings to past relics of her earlier, happier life in the community from which she is now cast off.” Gauri Viswanathan, *Outside the Fold: Conversion, Modernity, and Belief* (Princeton University Press, 1998) at 30–31.

that did not require religious conversion a full century before the religious exceptions would be enacted in England and Ireland. The Roman Catholics would have their legal disabilities removed in 1829 in Ireland, but it was not until 1890 that both Jews and Catholics achieved formal legal equality with fellow citizens. Full emancipation meant having access to public positions, access to property, and the right to vote.

### 3. Sovereign Nations: From Dependency to Disestablishment

In this last section I will discuss the destruction in law in the nineteenth century of the so-called “Five Civilized Tribes,” that is the Creeks, Cherokees, Chickasaws, Choctaws, and Seminoles, in “Indian Territory” (present-day Oklahoma). I will outline the series of legal processes that resulted in what was referred to by the Muscogee (Creek) Nation as the “civil death of the Muscogee Nation” in an 1897 communication to the U.S. Congress.<sup>471</sup> The Muscogee’s use of the term civil death to name the legal process of dissolution is useful for extracting the characteristics of the legal processes of the death in law of collective entities. Indigenous nations in the United States have a status still today that is both particular and peculiar and that has allowed for a kind of territorial dispossession, loss of control over self-governance, and individuation of communal bonds. In this section, I examine the relationship between the creation of the status of “dependent sovereign nation” as the creation of a new category of dependent status and the charge of civil death through dispossession of Indigenous Nations in the U.S.<sup>472</sup>

In the previous sections, different classes of legal persons were revealed to be created through legal disabilities that attached to particular attributes such as being Catholic or being a woman. In many instances these disabilities created specific individual relationships of dependence, as in the case of married women to their husbands. Collective civil death is different from these examples and deserves particular attention. Much like a corporation, which has juridical personality and is said to suffer a civil

---

<sup>471</sup> Creek Memorial, S. Doc. No. 111, 54th Cong., 2d Sess. 1, 5-6, 8 (1897).

<sup>472</sup> The status of Indigenous nations in Canada is somewhat different, however, I would argue that again there have been significant cross-border influences, shared legal historical influences and categories, and the same model as an ideal type. Peter Scott Vicaire, “Two Roads Diverged: A Comparative Analysis of Indigenous Rights in North American Constitutional Context” (2013) 58:3 McGill Law Journal 607.

death upon dissolution, a nation as a collective can be dissolved. Indeed, as noted in the previous chapter, Blackstone cited the dissolution of corporations—described as political bodies—as one of the few enumerated instances of civil death.<sup>473</sup> A case of a sovereign nation that is entirely dependent on another nation for its legal personality, leaves that nation vulnerable. I want to argue that civil death occurs through the incapacitation of collective identities through the establishment of particular kinds of dependent relations and legal privations against a backdrop of economic liberalization. This section deals with the civil death of a political body—the Cherokee nation. Here, I want to propose that the creation of the legal category of “dependent sovereign nation” by the U.S. Supreme Court under Justice Marshall was the creation of a new status category that disabled the Cherokee nation and subsequently all Indigenous nations within the United States and allowed for land transfers through legal means. I will address both mainstream and critical approaches to the Marshall trilogy as well as what the concept and centering of civil death brings to the analysis.

This final section in this chapter marks a critical departure from the other cases thus far discussed, as it is a case of a collective with a single legal identity, and the imputed legal death is the death of the collective. The legal processes of “Removal” of the Five Tribes from the East to the West of the Mississippi, the creation of removal camps, and the subsequent “disestablishment” of the Five Nations through legal and economic manipulations will collectively be addressed as an example of civil death in line with the ways individuals have their property disposed, are denied legal personality, and are made vulnerable to state power.<sup>474</sup> This last section is somewhat more narrative than the previous sections, and this is because I want to draw out what is common with the previous examples as well

---

<sup>473</sup> “We come now, in the last place, to consider how corporations may be dissolved. Any particular member may be disfranchised, or lose his place in the corporation, by acting contrary to the laws of the society, or the laws of the land: or he may resign by his own voluntary act. But the body politic may also itself be dissolved in several ways; which dissolution is the civil death of the corporation.” Chapter 18 Blackstone’s *Commentaries*. Of Persons.

<sup>474</sup> See the U.S. amicus brief in which the government argues that “The Creek also recognized that Congress had proposed ‘disintegrating the land of our people,’ which would mean ‘the civil death of the Muscogee Nation’ so that it could ‘be transformed into a State of the Union.’ Creek Memorial, S. Doc. No. 111, 54th Cong., 2d Sess. 1, 5-6, 8 (1897). The Creek sought to ‘preserve unimpaired’ their ‘chief safeguard, the national title to the land patented to us,’ until they had negotiated an agreement...” That is to say, despite the “allotment” process and the move to break up all the lands that were held in common in favor of individual properties, the court recognized that all the land in Eastern Oklahoma remained “Indian” land. The “disestablishment” of the Creek nation in Oklahoma (formerly known as Indian Territory) did not have full effect, and the U.S. Supreme Court recognized in *McGirt* that Eastern Oklahoma remains reserved lands for the purposes of criminal jurisdiction.



as the legal processes that culminated in political dissolution. Historian Angie Debo observed at the beginning of her acclaimed 1934 book *And Still the Waters Run*,

... the second stage in dispossessing the Indians is not so generally and romantically known. The age of military conquest was succeeded by the age of economic absorption, when the long rifle of the frontiersman was displaced by the legislative enactment and court decree of the legal exploiter, and the lease, mortgage, and deed of the land shark.<sup>475</sup>

The dispossession was accomplished through a combination of economic absorption and legal acts, as Debo writes. As I explain the connections between key U.S. Supreme Court decisions early in the 1830s and the establishment of the Dawes Commission at the end of the century, it will become apparent that the process of bringing the Nations under the legal jurisdiction of the United States as a dependent sovereign, along with the impossible requirement of unconditional loyalty, created an untenable political form. In an age built on free contract and *laissez-faire* economics between equals, status relationships are a disastrous combination for the dependent party. The Cherokee were transformed from having a particular legal status as a foreign sovereign to a dependent status relationship without emphasizing the obligations of the U.S. Further to this point, the dependency enabled the “lawful” dissolution of the dependent party some seventy years later. Through an analysis of the legal language that established a particular status and the material conditions of deprivation, we can understand how the point is reached at which the lawyer for the Muscogee nation uses the term civil death in his argument when the five nations are ultimately disestablished. It is arguably not a single act that associates the term civil death with Native Americans in the nineteenth century. The legal process that permitted the removal and territorial disestablishment was a form of brutality enabled by economic ideologies that severed social bonds and made peoples invisible through violence in the legal language of relational care. The dual process of incorporation of the Nations into the legal framework and jurisdiction of the U.S. government and simultaneous expulsion from the community of nations was accomplished by stripping the Nations of formally equal legal personality among sovereigns.

It is important to recognize from the beginning that although there were a series of legal privations of the forms of government through the disestablishment of the territory to a dissolution of tribal

---

<sup>475</sup> Angie Debo, *And Still the Waters Run: The Betrayal of the Five Civilized Tribes* (Princeton University Press, 1973) at ix.

governments, it was not the end of the cultural or political identity completely. The Five Tribes adapted in their organization and form; and while there was a transition to a different kind of political identity, they did not disappear, and their active resistance in many different forms has permitted them to continue to exist today.<sup>476</sup>

The Eastern Band of Cherokee today describes its own legal status as that of a sovereign. “Cherokee is a sovereign nation, meaning it has its own laws, elections, government, institutions, and the like. Though it certainly has relationships with the United States federal government and the North Carolina state government that are vitally important, students and the general population may be interested to know that the Cherokees are self-governed and autonomous.”<sup>477</sup> Official U.S. policy today defines native tribes as “domestic dependent nations.”<sup>478</sup> The tension between these two definitions in practice has not yet been resolved. Because the sovereignty issue implicates present-day rights individually and collectively, a history of the relationship of the nation and individual citizens as members of Indigenous groups is politically weighty. Still, there are good reasons, both politically and analytically, to look at what happened to the Five Tribes in the nineteenth century as a case of civil death. This chapter will proceed with a little background information and an explanation of the Marshall Trilogy as creating a legal form for civil death. It is argued that the creation of a dependent status relationship within a liberal economic ideology incapacitates the dependent sovereigns. The non-alignment of loyalty and the *sui generis* status of dependent sovereign without protections enabled land transfers similar to classic civil death property loss.

---

<sup>476</sup> The Cherokee Nation is now the second largest Native American Nation in the U.S. There are three mutually recognized as well as federally recognized bands of Cherokee. The legal form has indeed changed; however, this is an ongoing history. See Rennard Strickland, “Cherokee”, online: *Oklahoma Historical Society* <<https://www.okhistory.org/publications/enc/entry.php?entry=CH014>> (last visited July 23, 2021).

<sup>477</sup> See the Eastern Band of Cherokee Indians Government website, online:< <https://ebci.com/government/>> (last accessed July 21, 2021).

<sup>478</sup> “The Department of Justice Policy on Indian Sovereignty and Government-to-Government Relations with Indian Tribes reaffirms the Justice Department’s recognition of the sovereign status of federally recognized Indian tribes as domestic dependent nations and reaffirms adherence to the principles of government-to-government relations; the Policy also informs Department personnel, other federal agencies, federally recognized Indian tribes, and the public of the Department’s working relationships with federally recognized Indian tribes ...” United States Department of Justice, “Native American Policies”, online: *United States Department of Justice* <<https://www.justice.gov/oij/native-american-policies>> (Last visited July 23, 2021).

### 3.1. *Background to the Court Cases*

Between the years 1830 and 1862, several nations were forcibly "removed" from the eastern United States to territories West of the Mississippi. The Five Tribes, including the Cherokee, which by that time was quite wealthy, took steps to protect themselves through the establishment of a formal government that resembled the structure of the U.S. government and through the use of the U.S. legal system. By the time Congress passed the Indian Removal Act of 1830, the Cherokee had a constitution, large plantations farming the land<sup>479</sup>, were drawing rent from leasing their precious mineral mines, had already established their own syllabary and written language, and had founded a newspaper with a working press. They used all of these resources to actively resist removal. Despite these advantages, the Cherokee would succumb to removal in the end from 1838 to 1839 as the remaining Cherokee who had not already relocated were rounded up and placed in camps until they were finally marched halfway across the continental U.S. to what was then called "Indian Territory" in present-day Oklahoma. Through the Court cases, the newspapers, and other legal documents, we have a record of the legal form of dispossession and dissolution.

The historical conflict or basis of removal was generated by the states surrounding the Cherokee Nation who claimed exclusive rights over the territory guaranteed to the Cherokee through the treaty of Hopewell.<sup>480</sup> Despite the legally binding treaty, Georgia asserted a claim that they had full rights over parts of the Cherokee territory on the basis of an agreement the state had entered into with President Thomas Jefferson—the Compact of 1802. Jefferson entered into this Compact to resolve conflicts between the state of Georgia and the Choctaw and Chickasaw Nations. In the agreement, the President of the U.S. promised Georgia a claim to territory in the East of the state in exchange for territory in the West of the state where the conflict had gotten violent. The Eastern territory Jefferson

---

<sup>479</sup> Both the Cherokee and Choctaw had begun trading in enslaved persons of African origin, and this was part of the plantation structure that was adopted by some Cherokee families. The Cherokee slavery issue is a complex one in which the marks of "civilization" and economic development encompass multitudes and several levels of domination. This is an important part of the discussion, but one that I cannot devote sufficient attention to in this section. It was a long battle for freed slaves to receive tribal citizenship.

For contemporary developments, see Harmeet Kaur, "The Cherokee Nation acknowledges that descendants of people once enslaved by the tribe should also qualify as Cherokee," February 25, 2021, online: CNN < <https://www.cnn.com/2021/02/25/us/cherokee-nation-ruling-freedmen-citizenship-trnd/index.html> > (last visited July 23, 2021).

<sup>480</sup> Treaty of Hopewell, November 28, 1785, online: *The Cherokee Phoenix* < [https://www.cherokeephox.org/news/1785-treaty-of-hopewell/article\\_321e6d88-2afd-5152-b0ea-d8238641ebaf.html](https://www.cherokeephox.org/news/1785-treaty-of-hopewell/article_321e6d88-2afd-5152-b0ea-d8238641ebaf.html) > (last visited July 23, 2021). See esp. Arnold Krupat, "Representing Cherokee Dispossession" 17 *Studies in American Indian Literatures* 16-41 (2005).

offered Georgia was territory that was claimed by the Cherokee, and the Cherokee Nation had neither been consulted nor had they agreed to the cessation of lands.

The result was that the Cherokee formalized their governance structure to organize against the cession of lands. In 1822, pressure to cede lands began in earnest, and the Cherokee Council took the preventive step of passing a formal resolution declaring that the Council unanimously and with one voice refused to "make any cession of lands being resolved not to dispose of even one foot of ground."<sup>481</sup> Over fifty-four members of both branches of the legislative council and committee signed this resolution. Still, Georgia enacted new legislation in 1830, after Jackson signed the Indian Removal Act, annexed Cherokee lands, and began forcibly excluding Cherokee from those lands.<sup>482</sup> Georgia started dividing up Cherokee territory that December.

In response, the Cherokee nation entered the legal battle in the 1830s. Following the passage of the Indian Removal Act of 1830 and the increasingly aggressive approach taken by Georgia to seize Cherokee lands, the Cherokee Nation brought a case to the Supreme Court. The cases of the Cherokee Nation v. Georgia (1831) and, in the following year, Worcester v. Georgia (1832) would form the basis of the modern-day understandings of native sovereignty in the U.S. The Cherokee Nation having failed the political battle to stop the bill from passing in the U.S. Congress, then put their faith in the U.S. court system that their rights would be protected. The fundamental belief that the legal system would provide justice was coupled with a good faith determination to proceed "by all lawful and peaceable means."<sup>483</sup>

The newspaper, *The Cherokee Phoenix*, became exceptionally important to communicate with the community but also to provide a unified, externally accessible public voice. The *Phoenix* responded to the passage of the Removal Act in 1830, expressing a fear that the U.S. government would "deliver their weak allies to their enemies"; and it spoke of a tribunal that could interpret their "treaties."<sup>484</sup> In the a from the editor, the Cherokee were represented as one nation appealing to the conscience of another nation to recognize the legal promises—in the form of treaties between two sovereigns—that

---

<sup>481</sup> *Cherokee Nation Resolution*, 23 October 1822 [*Cherokee Nation Resolution*]. SOURCE: Laws of the Cherokee Nation, Adopted by the Council at Various Periods, Tahlequah, Cherokee Advocate Office (1858) at 23-24.

<sup>482</sup> Brian Hicks, "The Cherokees vs. Andrew Jackson", March 2011, online: *The Smithsonian Magazine* <<https://www.smithsonianmag.com/history/the-cherokees-vs-andrew-jackson-277394/>> (last visited July 23, 2021).

<sup>483</sup> Editorial, May 15, 1830, online: <*The Cherokee Phoenix*> (last visited July 23, 2021).

<sup>484</sup> *Ibid.*

had been made. It is the language of international relations. The *Phoenix* responded to the passage of the Removal Act in 1830 as follows:

Letter from the editor

... we confidently think justice will be done, even if the Cherokees are not in the land of the living to receive it—posterity will give a correct verdict. But we are not now making such an appeal—we hope we are not yet at the end of our row—we hope there is yet a *tribunal* where our injured rights may be defended and protected.... We will no more beg, pray and implore, but we will *demand* justice, and before we give up and allow ourselves to despondency we will, if we can, have the solemn adjudication of a tribunal whose province is to interpret the treaties, *the supreme law of the land*. Let us be *firm* and *united*. Fellow citizens, we have asserted our rights...<sup>485</sup>

The legal arguments were based on the rights of the collective, through the unity of the Nation. The rights of the nation were to be asserted to the U.S. Supreme Court that had original jurisdiction in disputes with either a foreign power or else state-to-state disputes.<sup>486</sup> The *Phoenix* wrote, “we confidently think justice will be done, even if the Cherokees are not in the land of the living to receive it—posterity will give a correct verdict.”<sup>487</sup> The legal death of the Nation was foretold in this passage, as was the belief that the justness of the legal claim would come to light eventually. The Cherokee held a firm commitment to deal with the threat through negotiation and law, claiming in the end “we will defend them by all lawful and peaceable means....”<sup>488</sup> This approach, to not take up arms against the forcible transfer of land but to challenge it through judicial processes, provides the record of the legal arguments.

### 3.1.1. *Marshall Trilogy*

There were three important cases decided by revered Chief Justice John Marshall in the nineteenth century that would ground the relationship of the U.S. government to Native Americans. Two of those decisions were on the question of the Cherokee removal. The importance of Justice Marshall's

---

<sup>485</sup> Editorial, May 15, 1830, online: <*The Cherokee Phoenix*> (last visited July 23, 2021).

<sup>486</sup> US Const art. III, §§ 1-2.

<sup>487</sup> *Supra* note 112.

<sup>488</sup> Elias Boudinot, *Cherok Phoenix* (15 May 1830).

decisions cannot be underestimated, for they continue to provide a rubric for present legal understanding. However, these cases are exceptionally complex and ambiguities in the decisions continue to provide openings to serve different political purposes today. The legal scholar Joseph Singer writes, "the courts continue to cite, or rather to miscite, the older cases as a way to remove responsibility from themselves. Those Marshall Court opinions contain convenient ambiguities that can be cited for both broad and narrow interpretations of Indian rights."<sup>489</sup> The way these cases are usually presented highlights the constraints of the Court during a period of rising tension between the states and the federal government as well as the creativity of Justice Marshall to deal with a complex and potentially explosive political situation. These cases have resulted in a particular kind of legal personality for the tribes. They are exemplary nineteenth-century cases that involve property, political conflict, and questions of loyalty mediated through a legal rights discourse that alienates rights from the people while simultaneously entrenching rights as the sole legitimate basis of justice.

### 3.1.2. *M'Intosh*

The first of the three cases that form "The Marshall Trilogy" was decided in 1823 and did not involve the Cherokee. *Johnson v. M'Intosh*<sup>490</sup> was decided on the basis of the Discovery Doctrine or Manifest Destiny.<sup>491</sup> First discovery was grounded in colonialist axioms that the "first European country to discover new areas unknown to other Europeans gained property and sovereign rights over the lands and inhabitants."<sup>492</sup> This case established that the U.S. government had title to the land and asserted that Native Americans had occupancy rights.<sup>493</sup> Or, at least, this is a mainstream reading of this case.

---

<sup>489</sup> Joseph William Singer, "Well Settled?: The Increasing Weight of History in American Indian Land Claims" (1994) 28 Ga Law Rev 481 at 529.

<sup>490</sup> *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

<sup>491</sup> Dieter Dorr, "The Background of the Theory of Discovery" (2014) 38:2 Am Indian Law Rev.

<sup>492</sup> Robert J Miller, "American Indians, the Doctrine of Discovery, and Manifest Destiny" (2011) 11:2 Wyo Law Rev 329 at 333.

<sup>493</sup> *Johnson v. M'Intosh*, 21 U.S. 587-88:

We will not enter into the controversy, whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted. The British government, which was then our government, and whose rights have passed to the United States, asserted title to all the lands occupied by Indians, within the chartered limits of the British colonies. It asserted also a limited sovereignty over them, and the exclusive right of extinguishing the title which occupancy gave to them. These claims have been maintained and established as far west as the river Mississippi, by the sword. The title to a vast portion of the lands we now hold, originates in them. It is not for the Courts of this country to question the validity of this title, or to sustain one which is incompatible with it.

This is an important case since it frames the arguments and the legal and political strategy the Cherokee would pursue in subsequent legal cases. This case along with the doctrine of Manifest Destiny provided that one of the underlying issues was whether or not the Cherokee had “reached the level of civilization” necessary to be considered a sovereign nation and worthy of legal recognition.

I say this is one reading of the case, but Joseph Singer argues it is a misinterpretation to read M’Intosh as only giving occupancy rights to the Nations. He argues, quite convincingly, that this was in fact a conflict of laws case and was signaling U.S. claims against France or other European nations, but not against title for first nations in the U.S. This case was harmonizing international legal spheres since the first nations and the federal government were not alone in the international universe. It did not extinguish legal title, but it did require alignment of title. Sovereignty is rightly being reread now, to understand that title was not extinguished. Within Singer’s analysis of M’Intosh, and narrowly reading the implications of this, there is still space for critical understanding of the decisions. We can make sense of what Marshall did to the Cherokee nation by understanding the form of civil death, which could also provide a path to new forms of resistance.

### 3.1.3. *The Cherokee Nation v. Georgia*

The Supreme Court heard the complaint of the Cherokee in the Case of the *Cherokee Nation v. Georgia* (1831).<sup>494</sup> Georgia had started dividing up Cherokee territory that December marking out distinct counties, and the Georgia Assembly at the same time authorized a land lottery for Cherokee territory despite the Cherokee never having ceded the lands. The nation filed a motion for an injunction to prevent execution of the legislation enacted by Georgia.<sup>495</sup> The Court would find they did not have jurisdiction to hear the case. While much attention has been given to the case that would follow in 1832, *Worcester v. Georgia*, in which Marshall found in favor of the Cherokee, though they were not a party to the case, I believe the jurisdictional decision is important for understanding what would follow.

The Cherokee nation filed for the injunction in the Supreme Court, arguing that the Court had original jurisdiction since the Cherokee nation is a foreign state under Article 3, Section 2 of the Constitution.

The Court was asked to offer an injunction against laws issued by the state of Georgia that “go directly

---

<sup>494</sup> *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

<sup>495</sup> Brian Hicks, “The Cherokees vs. Andrew Jackson”, *Smithson Mag.*



to annihilate the Cherokees as a political society.”<sup>496</sup> The Court did not enforce an injunction to stop the annihilation of the Cherokee, as the case was decided on the basis of jurisdiction. The question of jurisdiction in this case determined whether or not the Cherokee as a political society would be recognized as a legal person with the capacity for rights. Marshall asserted the following while denying the motion for the injunction, “If it be true that the Cherokee nation have rights, this is not the tribunal in which those rights are to be asserted.”<sup>497</sup> The problem of course was that there was no other tribunal in which the Cherokee could have their rights recognized. It may be good law today domestically, but the absence of a domestic remedy is a violation of international human rights law in the most basic sense.

In this case, Marshall first articulates the concept of “domestic dependent nations.” He writes, “They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupillage. Their relation to the United States resembles that of a ward to his guardian.”<sup>498</sup> At the moment in history when other dependent status relationships are being erased in the United States in favor of equal contract relationships, Marshall invents a *new* status relationship modeled on old legal status categories. To decide for a dependent status is to decide against full legal capacity. But instead of starting the analysis by going through the case as it was decided, it may help to start with the dissent to present an alternative view and an alternative possibility for the legal interpretation of Indigenous sovereignty. The dissenting opinion written by Justice Thompson, which was joined by Justice Story, claimed it is impossible to escape the conclusion that the Cherokee were a sovereign state. Relying on the law of nations, he wrote:

The terms *state* and *nation* are used in the law of nations, as well as in common parlance, as importing the same thing, and imply a body of men, united together to procure their mutual safety and advantage by means of their union. Such a society has its affairs and interests to manage; it deliberates, and takes resolutions in common, and thus *becomes a moral person*, having an understanding and a will peculiar to itself, and is susceptible of obligations and laws. Vattel 1.<sup>499</sup>[*emphasis added*]

---

<sup>496</sup> *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

<sup>497</sup> *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

<sup>498</sup> *Cherokee Nation v. Georgia*, 30 U.S. 17.

<sup>499</sup> *Cherokee Nation*, 30 US 52 (Thompson J, Story J, dissenting).

Justice Thompson relies on the will theory of legal personality and asserts that being a moral person means having a will of a collective that is independent of the individuals. This is consistent with Marshall's opinion as he would also find that the Cherokee were a nation in the sense of the Constitution. The point over which Marshall along with the majority split with this dissent was technically on whether or not the first nations were *foreign* nations. The dissent, however, focuses on the form of the nation as a moral person, which implies a legal person as well. Thompson sets up the argument that the Cherokee nation's rights should be recognized in law in whatever tribunal was available as a point of justice. This dissent would be consistent with modern international human rights law, as it provided a legal remedy, whereas the majority opinion did not. Thompson also makes a point to say that he understands that what the Court was able to do at that political moment may have been limited. Perhaps the Court could not in fact do anything to stop the forcible transfer given the political configuration and the economic interests. He states that it may be the executive and not the judiciary who are responsible for resolving the political question, as "relief to the full extent" asked by the plaintiffs "may be beyond the reach of this court."<sup>500</sup> He states, "this court can grant relief so far only as the rights of person or property are drawn in question and have been infringed."<sup>501</sup> It is not entirely clear what he means; but, perhaps, it is that the remedy the court could in fact enforce may be one of compensation, but an injunction against Georgia in this case would be considered a "political power." Thompson was clear, however, that the facts supported the recognition of the Cherokee as a foreign state. The treaties made with the Cherokee and the jurisdiction within Cherokee territory were entirely independent from the federal or state governments and conveyed the character of a foreign nation on the Cherokee.

The structure of government was important in many of the justices' opinions, and in Thompson's analysis it perhaps allowed a minority of the justices to see the Cherokee nation as a "moral person" who deliberates, takes resolutions in common, and is subject to obligations and laws. As seen in the previous section on civil death statutes following the civil war, one line of reasoning holds that being subject to laws and obligations is what renders persons moral subjects and thus legal subjects. Only moral persons can be subject to obligations and consequently be proper and full subjects in law. While Marshall and Thompson differed on the question of whether or not the Cherokee were considered

---

<sup>500</sup> *Cherokee Nation*, 30 US 51 (Thompson J, Story J, dissenting).

<sup>501</sup> *Cherokee Nation*, 30 US 51 (Thompson J, Story J, dissenting).

foreign or domestic nations, though they believed the Cherokee to be moral persons, Johnson's and Baldwin's opinions concurred with Marshall's decision against jurisdiction and turned on whether or not the Cherokee were a *sovereign* state.

Despite Marshall's apparent sympathy for the justice claims of the Cherokee, he found against the Cherokee by way of denying that the Court had jurisdiction to hear the case. He finds that there is no jurisdiction by setting up the question in the following manner:

Though the Indians are acknowledged to have an unquestionable, and heretofore unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government, yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations.<sup>502</sup>

While Justice Marshall found the Court did not have jurisdiction to hear the case since neither the Cherokee nation, and by extension from the wording of Article 3 Section 2 of the Constitution, nor its citizens or subjects constituted a proper party, as the Cherokee Nation is not a *foreign state*. At the end of his decision, he wrote, "If it be true that the Cherokee Nation have rights, this is not the tribunal in which those rights are to be asserted. If it be true that wrongs have been inflicted, and that still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future."<sup>503</sup> Many commentators who are experts on Justice Marshall have recognized his political prowess in a charged moment and argue that he might take with one hand while giving with the other. He asserts that the Cherokee are a moral person, that sovereignty exists, and, further, that the Cherokee have a right to their lands unless they are voluntarily ceded. His approach is arguably conciliatory, splitting the difference in this case, as he recognizes sovereignty and the absolute right over the land against the opinions of other justices who refused to recognize the Cherokee as a nation, but still stating that he cannot prevent the future from happening. He was in a dilemma with Jackson in the presidency and Georgia as a hostile entity unwilling to bind itself to the jurisdiction of the Supreme Court if it did not like the ruling.

---

<sup>502</sup> *Cherokee Nation*, 30 US 17.

<sup>503</sup> note 49.

In a concurring opinion, Justice Baldwin did not mince words, asserting, "In my opinion there is no plaintiff in this suit...."<sup>504</sup> He complained that if the Cherokee nation were recognized as a state, "each of their subjects or citizens, aliens, capable of suing in the circuit Courts ... in their collective and individual characters as States or aliens, will rush to the federal Courts in endless controversies...."<sup>505</sup>

The *sui generis* status was a pragmatic concession to overt racism. The Court makes pragmatic calculations repeatedly by different Justices. The Court asserted that Native Americans would be denied a legal status as an independent nation because if they were considered foreign states, the situation would become too onerous. As one justice writes, the result of a jurisdictional decision in favor of the Cherokee would have a result which "must operate greatly against its admission":

Where is the rule to stop? Must every petty kraal of Indians, designating themselves a tribe or nation, and having a few hundred acres of land to hunt on exclusively, be recognized a State? We should indeed force into the family of nations, a very numerous and very heterogeneous progeny.<sup>506</sup>

The overtly racist underpinnings of a pragmatic legal decision still form the basis of some understandings of what dependent sovereignty means.

By opting for a legal category well established in English law, the relationship of a ward to its guardian, Marshall made the case with a majority that nevertheless wanted to deny any form of sovereignty to Indigenous nations. The constraints of the Marshall Court can be viewed as being in struggle against both the State of Georgia and President Jackson, and this is the view many scholars have often highlighted when reading these cases, but the assertion of dependent sovereignty is exceptionally similar to the way President Jackson dealt with the Nations.

---

<sup>504</sup> *Cherokee Nation*, 30 US 20.

<sup>505</sup> *Cherokee Nation*, 30 US 31.

<sup>506</sup> *Cherokee Nation*, 30 US 25.

By losing the argument and the status of a foreign state, and being assigned the status of a dependent nation, like that of a woman under coverture, it is a status without full legal capacity. The nation is not outside law as such, but the nation does not have juridical personality as a rights-bearing subject who can demand their rights—even in court. In Johnson’s concurring opinion, he explains with vitriol the “reasoning” at the time:

The argument is that they were States, and if not States of the union, must be foreign states. But I think it very clear that the Constitution neither speaks of them as States or foreign states, but as just what they were, Indian tribes, an anomaly unknown to the books that treat of States, and which the law of nations would regard as nothing more than wandering hordes, held together only by ties of blood and habit, and having neither laws or government beyond what is required in a savage state.<sup>507</sup>

It could be argued that the Cherokee were not incapacitated through law; they were just given a *sui generis* status. The disabled legal status was not called civil death by jurists at the time since it is in fact its own thing; and civil death was an established legal concept at that moment in time. If it is *sui generis*, then one simply needs to look at what this status does to understand why civil death would be associated with the treatment in law of the first nations by the end of the century. The involuntary privation of lands and the impossibility of being represented in law denoted a kind of erasure of legal capacity similar to the ways persons convicted of crimes were not able to sue in courts and their property taken. In the decision, the Court pulls the nation inside the legal jurisdiction of the U.S. while simultaneously denying a particular set of rights and privileges to the collective that are in fact considered constitutive of legal subjectivity as rights bearers.

In Baldwin’s concurring opinion he argues against recognizing dependent sovereignty, claiming, “Indian sovereignty cannot be roused from its long slumber, and awakened to action by our fiat” he makes an important admission, establishing that sovereignty was not even recognized at that moment in history.

In his interest to protect the Cherokee nation in a hostile context, Marshall created a form of dependency in a rapidly transforming context. What has been called the “trust doctrine,” which placed the relationship as a fiduciary relationship between the federal government and the first nations, not

---

<sup>507</sup> *Cherokee Nation*, 30 US 28.

only failed to outline the full obligations of the federal government, but placed the Cherokee in a comparative disadvantage when the two states were set to negotiate. This dependency will become the basis for the dissolution of the nations. Pollock and Maitland describe the relationship of guardianship and protection, the *mund*, as the basis for civil death and also the organizing idea that links different sorts of persons together. In a note in the margins, they write, “Civil death as a development of the abbot’s *mund*.”<sup>508</sup> As already mentioned, they use the idea of *mund* to link the civil death of the monk through his relationship of dependence on the abbot to that of the villein to his lord and the wife to her husband. They also discuss *mund* in relation to “lepers, lunatics and idiots” when a “non-profitable” guardian relationship is created.<sup>509</sup> Pollock and Maitland refer to the Germanic concept of “*mund*,” which they translate as guardianship or protection, as the “radical idea” that organizes the concept of civil death and unites such disparate relationships.<sup>510</sup> Native Americans are given the status of dependent sovereign nations, and this status definitionally limits the legal capacity of the political unit.

I will describe how this relationship was established in law next. But first, to describe how it could have been otherwise. In Thompson’s dissent he considered the case and started by asserting the Cherokee are a sovereign foreign nation and the boundaries of the United States (or the fact that Cherokee were inside the external border to be precise) to be irrelevant to the question. He goes on:

The laws of Georgia set out in the bill, if carried fully into operation, go the length of abrogating all the laws of the Cherokees, abolishing their government, and entirely subverting their national character.... The state of Georgia certainly could not have intended these laws as declarations of hostility, or wish their execution of them to be viewed in any manner whatever as acts of war; but merely as an assertion of what is claimed as a legal right: and in this light ought they to be considered by this court.<sup>511</sup>

For Thompson the Court was asked to resolve a question of conflicting rights even though another way to read the situation would have been one of violent aggression. The Court could legitimately

---

<sup>508</sup> Pollock & Maitland, *supra* note 225 at 462.

<sup>509</sup> *Ibid* at 508.

<sup>510</sup> Pollock & Maitland, *supra* note 225, 462-3

<sup>511</sup> *Cherokee Nation*, 30 US 75 (Thompson J, Story J, dissenting).

resolve a legal question that should not be considered a political question simply because it is an issue that was controversial or would be a matter of political conflict if there were not a judicial remedy. By denying what Thompson argues, namely, that the Nation is subject to obligations and laws and is thus a "moral subject," and their rights claims needed a venue to be heard (foreign or not, although truth be told the U.S. had always dealt with the Indigenous nations as foreign nations by making treaties). The Court rendered the legal capacity of the Cherokee diminished. Because dependent status relationships in the modern legal system of rights and privileges are an anomaly, this creative approach appears cruel in hindsight. It is a case in which judicial force with benevolence renders a collective people civilly dead in law.

### 3.1.4. *Worcester and Fallout*

In *Worcester*, the Cherokee indirectly had their day in court when the Supreme Court struck down the state laws that were infringing on the sovereignty of the Cherokee. It was a definitive case that provided the relationship between the tribal sovereigns as not being governed by state law.<sup>512</sup>

The settlement of the lands by Georgia meant a contestation over the applicability of law over the territory. Georgia asserted many things over the Cherokee's sovereignty, but also that only White people who had sworn an oath of allegiance to Georgia could then obtain the requisite permission to reside within the Cherokee territories. *Worcester* was charged for the following reasons:

For residing, on the 15th July, 1831, in that part of the Cherokee Nation attached by the laws of the State of Georgia to that County, without a license or permit from the Governor of the State, or from anyone authorized to grant it, and without having taken the oath to support and defend the Constitution and laws of the State of Georgia, and uprightly to demean himself as a citizen thereof, contrary to the laws of the said State.<sup>513</sup>

---

<sup>512</sup> There have been ebbs and flows in this respect, as noted in a *Harvard Law Review* note. Courts have incorrectly given more power to states against tribal sovereignty. "Rethinking the Trust Doctrine in Federal Indian Law" (1984) 98:2 *Harvard Law Review* 422–440.

<sup>513</sup> *Worcester v. Georgia*, 31 U.S. 523.



The facts of the case are interesting since Worcester was not only a missionary but also worked for *The Phoenix*. Georgia required all whites to get permission to live on Cherokee lands and also to take an oath swearing allegiance to Georgia.<sup>514</sup> His arrest was targeted because he was a White man living with the Cherokee and assisting the Cherokee in the establishment of their public voice. Worcester was arrested for failing to take the oath or acquire permission to be on the land. He along with another defendant were jailed and appealed to the Supreme Court. *Worcester v. Georgia* resulted in the last of the famous decisions Justice Marshall wrote establishing the "Marshall Trilogy" on Indian sovereignty.<sup>515</sup> In the Worcester case, Marshall made quite clear that states did not have the power to assert sovereignty over the territory or the body politic of first nations.<sup>516</sup> The fact that the decision of state sovereignty versus indigenous sovereignty was not respected by the executive is inconsequential to the legal validity of the Court's decision. Jackson famously stated that Marshall had rendered a decision he had no power to implement.

The legal category of dependent sovereign was also reiterated in this decision. The language and the legal categories of dependence the Court uses in many ways mirror the language of those less sympathetic to the cause. Jackson wrote in a letter the following about the transfer, "I am aware of your friendship for them and the great anxiety you have for their future welfare, but great as I know it to be, it cannot be more so than mine.... I beg of you to say to them, that their interest, happiness, peace and prosperity depend upon their removal beyond the jurisdiction of the laws of the State of Mississippi."<sup>517</sup> Jackson concludes that if they do not, then whatever befalls them will be of their own making, ending with, "I feel conscious of having done my duty to my red children and if any failure of my good intention arises, it will be attributed to their want of duty to themselves, not to me."<sup>518</sup> I am not sure to what extent we should believe the invention of the category of dependent sovereign was really a new legal category.

---

<sup>514</sup> *Worcester*, 31 U.S. 523.

<sup>515</sup> Nathan Goetting, "The Marshall Trilogy and the Constitutional Dehumanization of American Indians" (2010) XXI Indig Policy J. Philip Prygoski, "The Supreme Court's changing stance on tribal sovereignty" (3 February 2011), online: *Am Bar Assoc Mag*. Philip Prygoski, "From Marshall to Marshall: The Supreme Court's changing Stance on Tribal Sovereignty", 12 Compleat Law. 14 (1995).

<sup>516</sup> This would later be upheld in the *McGirt v. Oklahoma*, (2020) 591 U.S.

<sup>517</sup> Andrew Jackson to John Pitchlynn, August 5, 1830, online: *The Library of Congress* <[https://www.loc.gov/resource/maj.01075\\_0394\\_0397/?sp=1&st=text](https://www.loc.gov/resource/maj.01075_0394_0397/?sp=1&st=text)> (last visited July 23, 2021).

<sup>518</sup> *Ibid*.

A few years later, a minority party formed out of the Cherokee nation signed the Treaty of New Echota. They had lost faith since the Removal Act had been signed, the Federal government had not recognized the decision of the Court, and no action was taken from the “guardian” U.S. government to stop Georgia from asserting sovereignty over the Cherokee Territory. Georgia continued to aggressively terrorize the Cherokee during this period. As one telling example, “Rich Joe” Vann’s family was forcibly evicted from their home by the Georgia Guard. The house was the largest in the Cherokee nation built by Joseph Vann’s father, Chief Vann who had been the son of a Scottish trader who married into the Cherokee nation. One of the wealthiest and most powerful Cherokee families, their home was forcibly taken in the middle of the night. The Georgia militia entered the house with torches, setting parts on fire and began smoking out the family until they left. It is but one example of how neither wealth, power, nor even “Whiteness” protected individual Cherokee families. The Treaty ceded the territory East of the Mississippi to the U.S. government in exchange for money and other conditions. The minority party signed the Treaty made up of Cherokee “Old Settlers” who had already relocated West and a few Cherokee members left in the East, which included the editor of the Cherokee *Phoenix* who had previously pushed with full force against any cession of lands. He would later be killed for his signature by angry members of his nation after a quarter of the people would fall in their death march to the West. The members of several families were killed or had to flee, as this cessation of lands created one of the deep splits between the most prominent families that tore into the fabric of the nation by impossible pressure from external forces. The Treaty party who did not have the formal standing to sign a treaty, did it without the approval of the majority of Cherokee or even the majority of the political leadership. But even ignoring the internal issues for a moment, there was a structural problem of the signing of any treaty after the *Cherokee v. Georgia* decision. The Treaty was a contract formed between two parties that the Supreme Court had just declared as unequal and dependent on one another. The two parties had radically different bargaining positions formally in law, and these positions were set against a backdrop of violent incursions by European settlers who believed they had a claim to the land from some ideological right of “manifest destiny.” The members of the Cherokee nation had their hands tied at every moment. It was like playing chess but with every move you lost a piece, no matter how good a move you made, and still the game was played until the end. The U.S. Congress ratified the treaty despite objections from the majority of the Cherokee nation, including their primary chief who appealed that the treaty was not legally ratified. Congress proceeded under the color of law of a treaty that can only be described as having been concluded under coercion

by a small minority of self-appointed families with no binding authority trying desperately to negotiate a deal that would not lead to elimination. The impossibility of the circumstances forced wedges between families, as if the right move had been missed. It was a period of competing sovereignties, and the background norm was war and conquest.

Again, war and conquest were not sanctified by the Marshall Trilogy. One should appreciate very much Singer's reading of M'Intosh since he is looking for legal warriors to fight on behalf of Indigenous sovereignty, but the forward reading in which Singer recognizes that Marshall condemns the conquest and tries to save the soul of the U.S. should not obscure the fact that the states and the President at the time were only marginally concerned with judicial legitimacy for their actions. There was no right to take unless the land was sold or was ceded after defensively engaging in battle, but this still leaves open multitudes in terms of the appropriation of land. Singer suggests we only allow for a narrow reading. I fully agree and suggest the same for the other two cases, but we also have to be cognizant of the realism of the context. The status of dependent sovereign sets the nations up to fail. It spells out the formula for setting up what looks like an aggressive attack by a weaker party. The legal conditions were created so that every defensive maneuver on the part of the nations erases the aggression of the individual states or United States and is countered by a greater loss of territory legitimated in law. It spells out how the sales and cessation of lands can be coerced. As it has been observed, "The American right to buy always superseded the Indian right not to sell."<sup>519</sup><sup>520</sup> Or put another way, "Why should ostensibly sovereign nations, residing in territory solemnly guaranteed to them by treaties, decide that they are willing, after all, to surrender their ancestral homelands?"<sup>521</sup> The answer is simply, they would not unless they were coerced. No matter what move they would make, they were going to lose a piece from the chess game. Just as slavery was deemed illegitimate in law, even broad readings of the Marshall Trilogy should not preclude the political claim to a robust sovereignty guaranteed to the Cherokee by treaty under international law. The dependent sovereignty guaranteed by Marshall was insufficient under a system of law. The consequence of not respecting the sovereignty of the Five Tribes was not surprisingly a militarized removal.

---

<sup>519</sup> Patrick Wolfe, "Settler colonialism and the elimination of the native" (2006) 8:4 J Genocide Res 387–409 at 391.

<sup>520</sup> United States Indian Claims Commission, *Final Report: August 1946-September 1978*, US Government Printing Office (1979) at 1.

<sup>521</sup> Patrick Wolfe, "Settler Colonialism and the Elimination of the Native" 8:4 Journal of Genocide Research 387, at 391 (2006).

### 3.2. *From the Camps to Civil War to Civil Death*

By 1835 many of the Cherokee families had already relocated West to Indian Territory or else to the surrounding states of Texas and Arkansas. Prior to the final removal, the last of the Cherokee who had not already set out and moved West of the Mississippi were rounded up at gunpoint and placed in camps until they could be moved West. Before the removal, the U.S. Government instructed the Department of Indian Affairs to conduct a census of the remaining Cherokee.

The “Cherokee Census” of 1835 is a stunning document in which the U.S. government enumerated the names of heads of families, “the number of persons in each family, degree of blood, education, occupation, and family possessions”<sup>522</sup> Each section of the census is marked by the territory. There are descriptions of the lands and natural features in the areas they are surveying: “Hiwassee River: This river heads in Georgia and runs into North Carolina about 30 miles West of the Northwest corner of Georgia, runs nearly due west about 38 miles into Tennessee about 12 miles North of the Southwest corner of North Carolina, through a very poor and mountainous country, affording many valuable seats [sites] for machinery, and the country abounds in excellent beds of iron ore of superior quality. Gold has been found in this River and all its tributary streams that have been examined. A species of White and Grey marble is found in large quarries near the mouth of Valley River of very superior quality. I find about 10,000 acres of land fit for cultivation on this river of totally good quality.” It is followed by the description of the different Cherokee families that live in this river valley:

**“Sutawaga, Little Smoke,**

Sweetwater—Thirteen—six fullbloods, 7 quadroons [quarter-blood Cherokees], 1 farmer, 5 read English, 7 read Cherokee, 1 weaver, 5 spinsters”

“Alex Clingen—five Cherokee quadroons [quarter Cherokee] owning 1 slave. One intermarried white, a farm, 1 farmer, 2 weavers, 2 spinsters [spinnners].”

---

<sup>522</sup> *Census of the Cherokee of 1835* (Items of information taken from census of Cherokees within the limits of Tennessee in 1835 made by Daniel Henderson Esq., or which a copy was made by G.W. Currey in 1836), American Indian Archives at the Oklahoma Historical Society Research Division, Vol. 14, Office of the Superintendent for the Five Civilized Tribes, Muskogee, Oklahoma (1836), online: *Oklahoma Historical Society* <<https://www.okhistory.org/research/digital/foremantrans/foreman.sup14.pdf>> (last visited July 23, 2021).

“Hiram Linder—one fullblood, and 4 quadroons. One intermarriage with the white race. Two farmers, 1 mechanic, 2 readers of English, 1 weaver, 1 spinster, 4 descendants of reservees.”

“Lame Robin—Four Cherokee fullbloods, a farmer, one reader of Cherokee, 1 weaver.”<sup>523</sup>

The census is both a document that describes the capabilities of the land, and the capabilities of the persons. It was important to take a census to know what the government was acquiring, what resistance they might meet, and to make sure everyone was rounded up. The document transforms or translates the people into economic interests—that is the social capital—and it also surveys the numbers to fully comprehend the size of the threat that was possible during removal. The War Department and Andrew Jackson spoke of the Cherokee comprising the “true” Indians and the “halfbreeds,” and the assessment of threat and the policy was crafted to deal with what was perceived as different strategies depending on the blood quantum of each group.<sup>524</sup> The people and the land were surveyed in the same document as potential capital and potential threat, while blood purity was used to aid in evaluating both capital and threat.

In 1838, U.S. Army troops were dispatched to round up Cherokee and move them all to stockades in North Carolina, Georgia, Alabama, and Tennessee. The Army constructed 31 forts of temporary housing near Cherokee towns. Soon, the Cherokee were transferred to 11 internment camps to await their forced march.<sup>525</sup> The Removal West has been called “mismanaged”<sup>526</sup>; that is, of course, an understatement. The Removal, like the tandem operations of state terror on the part of Georgia and the Federal refusal to send in troops to protect their “ward” the Cherokee, was a constructed process that followed what Patrick Wolfe has called the “logic of elimination.”<sup>527</sup> It has been noted that

---

<sup>523</sup> *Census of the Cherokee of 1835* (Items of information taken from census of Cherokees within the limits of Tennessee in 1835 made by Daniel Henderson Esq., or which a copy was made by G.W. Currey in 1836), American Indian Archives at the Oklahoma Historical Society Research Division, Vol. 14, Office of the Superintendent for the Five Civilized Tribes, Muskogee, Oklahoma (1836), online: *Oklahoma Historical Society* <<https://www.okhistory.org/research/digital/foremantrans/foreman.sup14.pdf>> (last visited July 23, 2021).

<sup>524</sup> Andrew Jackson to Robert Butler, June 21, 1817, cited by Theda Perdue, “Mixed Blood” Indians: *Racial Construction in the Early South*, Athens, University of Georgia Press, 2005, at 95.

<sup>525</sup> “Cherokee Round Up”, August 29, 2017, online: *US National Park Service* <<https://www.nps.gov/fosm/learn/historyculture/cherokee-round-up.htm>> (last visited July 23, 2021).

<sup>526</sup> William L. Anderson & Ruth Y. Wetmore, “Cherokee, Part V: The Trail of Tears and the Creation of the Eastern Band of Cherokees”, January 1, 2006, online: *Encyclopedia of North Carolina* <<https://www.ncpedia.org/cherokee/trailoftears>> (last visited July 23, 2021)

<sup>527</sup> Wolfe, *supra* note 519.

approximately 2% of the U.S. population was killed during the Civil War. The U.S. Civil War has long been the benchmark for the most losses of American lives of all the wars, including both World Wars and Vietnam. It is supposed to be a reminder of the high cost of war. In comparison, it is estimated that 25% of the Cherokee nation died on the Trail of Tears. Likewise, the Choctaw nation has also estimated that they lost 25% of their population during the Removal.<sup>528</sup> These are staggering statistics to comprehend, and it is impossible to understand this as “mismanagement” as this process of removal has been attributed as the beginning of the administrative state.<sup>529</sup> It was through the willfully negligent administration of removal that so many died.

After the removal, it took 30 years for the nation to get back on their feet and to rebuild physically and institutionally. All of that would be decimated again at the outbreak of the U.S. Civil War in which again the Five Nations were asked not only to pick a side, but to fight in the war. It was a devastating war for the Cherokee for many reasons. While the Cherokee mostly fought for the Union, the nation was split and factions fought on both sides. The last command of the Confederate army to be surrendered in the War was in fact that of a Cherokee general, Stand Watie. Perhaps he was the last to concede in part because he knew the consequences would be devastating. Sometime after the conclusion of the Civil War, the move to dissolve the first nations and to align all loyalties with the United States began in earnest. It was doubtless a land grab, but it was a land grab that also facilitated a new alignment of loyalties.

The following from *The Indian Chieftan*, announced in 1902 the Allotment Bill.

---

<sup>528</sup> “The Treaty of New Echota and the Trail of Tears”, online: *North Carolina Department of Historical and Cultural Resources* < <https://www.ncdcr.gov/blog/2015/12/29/the-treaty-of-new-echota-and-the-trail-of-tears> > (last visited July 23, 2021). Jeffrey Ostler, “Disease Has Never Been Just Disease to Native Americans”, April 9, 2020, online: *The Atlantic* < <https://www.theatlantic.com/ideas/archive/2020/04/disease-has-never-been-just-disease-native-americans/610852> > (last visited July 23, 2021). Lenore A Stiffarm & Phil Lane Jr, “The Demography of Native North America: A Question of American Indian Survival” in M. Annette Jaimes (ed), *The State of Native America: Genocide, Colonization, and Resistance*, South End Press (1992), at 33.

<sup>529</sup> Ethan Davis, “An Administrative Trail of Tears: Indian Removal” (2008) 50:1 *American Journal of Legal History* 49–100.



## VOL. XX, NO. 19

We want your trade; we're after it.

After the allotments have been made, the surplus lands shall be sold at auction, and the funds derived therefrom apportioned, per capita, to the members of the tribe. The portion of the allotment, in excess of the homestead, may be sold by the allottee, one-fourth of the acreage in one year, one-fourth in three years and the balance in five years.



There was no longer a space for sovereign entities that controlled land European settlers wanted. The requirement that the first nations should just “go,” whether it was away, die, or be absorbed into the rest of society, can be seen in the following positions by two American politicians discussing how they experienced it as humiliating that they should have to continue to negotiate with sovereign nations in the Midwest:

Springer says: “It is to their interest to go. It is manifest destiny that they should go.” For his colleague Belford, government doesn’t have the right to block the citizens’ access to mines in virtue of treaties negotiated with savages. Laissez-faire demands of Americans full agency, and with the advance of settlement, it demands it of Natives.<sup>530</sup>

It was a scrimmage over the resources of the land, and the federal government was placed in a position that when it acted in good faith it had to fight against its own citizens to protect the resources and interests of a dependent sovereign against people who had no interest in respecting federal treaties.

It is in a Creek memorial to the U.S. Congress that the term “civil death” appears in reference to the imminent dissolution of the tribal government and the breakup of land through allotment in 1896. The nation counter-offered for a settlement, asking for “a method of settling claims and the payment of what should be confessedly due before the civil death of the Muscogee Nation makes settlement impossible, and that a method be provided before the dissolution....”<sup>531</sup>

Indian allotment was meant as a form of cultural assimilation. It was not enough that these nations were already farming, where already marrying non-native Americans, it was necessary that they be individualized, and the land be individualized as well. The civil death was not simply the breakup of the nation as a kind of corporate entity, it was the severing of the social and political relations between the persons. Not until 1950 was the United Keetoowah Band of Cherokee, one of the three federally recognized bands, incorporated as a political entity, but through a corporate charter that established

---

<sup>530</sup> David Bergeron, *Philosophy and Allotment: John Locke’s influence on Henry L. Daves* (Springer, 2020) at 28.

<sup>531</sup> Creek Memorial, S. Doc. No. 111, 54th Cong., 2d Sess. 1, 5-6, 8 (1897).

its “corporate purposes,”<sup>532</sup> which include protecting and defining the rights and powers of the Keetoowah as well as “advancing the standard of living of the Band through the development of its resources, the acquisition of land, the preservation of existing landholdings, the better utilization of land and the development of a credit program for the Band....”<sup>533</sup> It is through a corporate charter that the Band is recognized under American law.

Although allotment was generally understood as “... an attempt to apply Anglo-American notions of justice, which enshrined private property in land and freedom of contract as virtually absolute values, to Indian tribes whose tastes and traditions were otherwise,”<sup>534</sup> it was not so cut and dry with the Cherokee. The argument for taking the land was based on a Lockean argument of improvement of the land: “The superior capacity of the farmer to exploit the gifts of nature and of nature's God was one of the principal warranties of the triumph of westward-moving ‘civilization.’”<sup>535</sup> Mixing one's labor with the earth, thereby making it one's own, was the basis for the acquisition of land against the claims of others who simply “occupied” the lands. This justification for the dispossession was challenged by the existence of the so-called “Five Civilized Tribes” who were organized as agrarian societies and had significant “improvements” or developments built upon the lands that were confiscated in the East. As one historian put it, their “civilization” “embarrassed United States policy in more ways than one.”<sup>536</sup> The Cherokee had had a long history of European trade and intermarriage, and it was quite difficult to make the case that a people who had a mixed political heritage were in any way inferior. It was perhaps their superior capacity to take from both cultures that made the Cherokee so threatening.

Dawes spoke to the U.S. Senate, as was famously outlined in Rex Weyler's book on the American Indian Movement, where he said,

The head chief [of the Cherokees] told us that there was not a family in that whole nation that had not a home of its own. There was not a pauper in the nation, and the nation did not owe a dollar.... Yet

---

<sup>532</sup> Corporate Charter of the United Keetoowah Band of Cherokee Indians, Oklahoma; United States Department of the Interior: Bureau of Indian Affairs; Ratified Oct. 3, 1950. P.1

<sup>533</sup> Corporate Charter of the United Keetoowah Band of Cherokee Indians, Oklahoma; United States Department of the Interior: Bureau of Indian Affairs; Ratified Oct. 3, 1950. P.1

<sup>534</sup> Mary E Young, “Indian Removal and Land Allotment: The Civilized Tribes and Jacksonian Justice” (1958) 64:1 *The American Historical Review* 31–45 at 44–5.

<sup>535</sup> *Ibid* at 31.

<sup>536</sup> Young, *supra* note 534 at 32.

the defect of the system was apparent. [The Indians] have got as far as they can go, because they own their land in common.... There is no enterprise to make your home any better than that of your neighbor's. There is no selfishness, which is at the bottom of civilization. Until this people consent to give up their lands and divide them among their citizens so that each can own the land he cultivates, they will not make much progress.<sup>537</sup>

The fault was in not having paupers and homeless persons and an absence of selfishness as self-interest. The development required for “progress” was not human development, but economic development as exploitation. Again, this is a complicated line that is drawn, as the so-called “civilized tribes” were already largely agrarian. The appeals to manifest destiny that justified the taking of the territory, as land held in common when it was, was missing a theoretical justification. It was also not even clearly white supremacy, at least in the case of the Cherokee. As noted by census takers in the nineteenth century, it was sometimes difficult to know who was and who was not Cherokee, and they found themselves having to ask people if they were Cherokee or not since generations of marriage with Europeans who were integrated into the traditional matrilineal family structures (though obviously also at times challenging and transforming them from the inside)<sup>538</sup> made it difficult to assert a clearly racialized justification.<sup>539</sup> In this, one sees again Whiteness asserting itself as a status and not a description of the person’s skin color or “race”.<sup>540</sup> Andrew Jackson, it has been reported, while strategizing the Removal distinguished the “real Indians” or “full bloods” from the “half breeds” who he mistakenly thought were the holdouts making removal more difficult. The creation of a system of blood quantum (which continues today) based on the purity of blood as a determination of belonging was the precursor to the eugenics movement. It was also, notably, a very poor basis for making strategy, as Jackson was incorrect at every moment about how blood quantum would manifest as political positions.

---

<sup>537</sup> Rex Weyler, *Blood of the Land: the Government and Corporate War against the American Indian Movement* (Everest House, 1982). See also Matthew Atkinson, “Red Tape: How American Laws Ensnare Native American Lands, Resources, and People New Directions in Native American Law: Part Three: Traditional Legal Perspectives” 23 Okla. City U. L. Rev. 379, at 394 (1998).

<sup>538</sup> Gregory D Smithers, *The Cherokee Diaspora: An Indigenous History of Migration, Resettlement and Identity* (Yale University Press, 2015) at 31.

<sup>539</sup> See e.g. Fay A Yarbrough, *Race and the Cherokee Nation: Sovereignty in the Nineteenth Century*, Philadelphia: University of Pennsylvania Press (2008) at 25 ff.

<sup>540</sup> See esp. Cheryl Harris, “Whiteness as Property” (1993) 106:8 Harvard Law Review.

The allotment period had terrible consequences for the nations. After years of persecution for being a member of a nation, subsequently tying tribal membership to large benefits such as individual property had the perverse effect of flooding the nations with citizenship claims. But the real benefits that were being reallocated were the “excess” lands. In fact, once again, the allotment, like the land grab in the East, was a way to appropriate lands into the U.S. structure. “The act allowed for a large amount of ‘surplus’ land to pass immediately into the hands of white Americans.”<sup>541</sup> That is, the Dawes Commission was set up to adjudicate tribal membership in order to divvy up the land. It is not clear from the record whether or not the nations knew ahead of time that they would lose what was considered “surplus” property as opposed to its being allocated back to tribal members. The majority of the applications for tribal membership were denied by the Dawes Commission for lack of evidence of previous tribal connection. Prior emigration out of tribal lands and government structures to the United States of many of those who had intermarried with Europeans were then formally excluded in many cases, as they had become in one generation too White and their connections had been severed to be reintegrated back into Cherokee society. The political conflicts between different Cherokee families around the Treaty Party’s role in Removal, especially among those who had married Europeans and were White enough to pass, contributed to the loss of citizens exiled to the surrounding states. The “diaspora” was forever excluded from tribal connection as enrollment during the Dawes Commission would serve as the test for all future belonging.

The Cherokee case was both unique in some ways, but also shared in others by all the Five Tribes during this period. As the Creek signed away their collective existence, forced into signing each allotment allocation, the Chief looked desperately for any manner of protecting his people. Asking for some form of political protection, the Creek asked for a “property qualification to the right of suffrage” so that they would not be overwhelmed by “an alien and strange population at the first election” and to protect against discrimination.<sup>542</sup> This was not granted and as large swaths of land were transferred for individual purchase by Europeans. The ritualistic oaths that had been required for native Americans to become citizens were simply made by fiat as the different tribal governments were dissolved and everyone was made into citizens of the U.S. with or without their consent. The

---

<sup>541</sup> Source *Frontiers, A Journal & Women Studies*, “The Benefits of Being Indian : Blood Quanta , Intermarriage , and Allotment Policy on the White Earth Reservation , 1889-1920 A” (2008) 29:2/3 *Frontiers: A Journal of Women Studies* 81–105 at 82.

<sup>542</sup> Creek Memorial, *supra note* 159.

making of individual citizens through the incorporation of the collective into the structure of the U.S. could only be brought about through the making of neoliberal subjects.

### 3.3. *Legal Status and Legal Death*

I have outlined the course of the nineteenth century almost in its entirety in this section in lieu of simply focusing on the allotment period to demonstrate one thing about civil death. It is not simply the dissolution of the collective government that kills the juridical subject. This is certainly one form, and it is the most complete form, but the creation of a dependent sovereignty without clear obligations imposed on the other party is a disabling project. This allowed for the creation of camps, the removal, the allotment of the land, and the ultimate dissolution of the nations. Killing the juridical person in man, as Arendt wrote, as the first step in total domination is the removal of the juridical personality, as was the initial legal ruling that allowed for the rest. Debo's initial observation that a quiet legal unmaking through the transformation in property and the relationship to the land was not as spectacular as the wars, but it certainly obtained a similar result.

The importance of Justice Marshall's decisions cannot be underestimated as they continue to provide a rubric for present legal understanding. However, these cases are exceptionally complex, and ambiguities in the decisions continue to provide openings to serve different political purposes today. The legal scholar Joseph Singer writes, "the courts continue to cite, or rather to miscite, the older cases as a way to remove responsibility from themselves. Those Marshall Court opinions contain convenient ambiguities that can be cited for both broad and narrow interpretations of Indian rights."<sup>543</sup> He cautions against overly critical readings that can take away tools for first nations in the present moment. The way these cases are usually presented highlights the constraints of the Court during a period of rising tension between the states and the federal government as well as the creativity of Justice Marshall in dealing with a complex and potentially explosive political situation. Still, one can look at these cases not simply internally as "still good law" and unlikely to change internally. The way we interpret can also take external forces into account as well. Under international human rights law,

---

<sup>543</sup> Joseph William Singer, "Well Settled?: The Increasing Weight of History in American Indian Land Claims" (1994) 28 Ga Law Rev 481 at 529.

the imposition of a dependent status does not come without tools for reinterpretation of what the dependence means and the kinds of obligations implied on states.

These cases have resulted in a particular kind of legal personality. They are exemplary nineteenth-century cases that involve property, political conflict, and questions of loyalty mediated through a legal rights discourse that alienates rights from the people while simultaneously, entrenching rights as the basis of justice. There is something to Singer's argument that we should read the cases narrowly or forward-looking to secure rights for the future of tribal sovereignty. There is something, however, to understanding the context and limitations of the rulings for forward-looking activism in times of crisis as well.

Arendt described the nineteenth century as a precursor and practice run for the horrors of the twentieth century. Fascist governments facilitated the creation of a racialized ideology that used the forces of law to achieve the nefarious forms of government through administratively organized racial privilege. At the close of the nineteenth century, the eugenics movement stepped in as status relationships were disappearing and everyone was becoming supposedly free and equal individuals. It is estimated by the U.S. Government General Accounting Office that approximately 50% of all Native Americans were sterilized in the 1970s.<sup>544</sup>

Dependent sovereignty in moments of negotiation where there is competition for resources and particularly property is farcical. There cannot be an assumption after the establishment of a relationship of a ward to its guardian that meaningful negotiations or protection between the two parties are secured. While arguably the U.S. government (like the Canadian government) will frequently negotiate and act in good faith with first nations, the vulnerability of the other's position by anyone who does not feel bound by unwritten and unofficial obligations in a *laissez-faire* context can exploit the relationship.

## 4. Conclusion

As a reminder, a person civilly dead in the Quebec Civil Code is subject to the following, "He can neither dispose of nor acquire property...; he can neither contract, nor possess property, but he may

---

<sup>544</sup> Catte, *supra* note 410.

receive maintenance. [...] He can neither be appointed tutor nor curator. [...] He can not be a witness to any solemn or authentic deed, nor can he be admitted to give evidence in a court of justice, or to serve as a juror.”<sup>545</sup> The statuses that were described in this chapter suffered many of the same legal disabilities and yet their civil death had not been widely remarked upon.

I have outlined only a handful of the cases in this chapter that could be described as involving “particular” legal persons. These are legal persons which are both individual and collective. That means the rights involved are both individual and collective rights that have been denied. The cases of women, racialized minorities, religious minorities, and dependent sovereigns map onto the kinds of privative statuses that were recognized in the nineteenth century by scholars working on the topic of legal persons. Below I graphically illustrate some of the special kinds of legal persons identified by scholars writing in the nineteenth century.

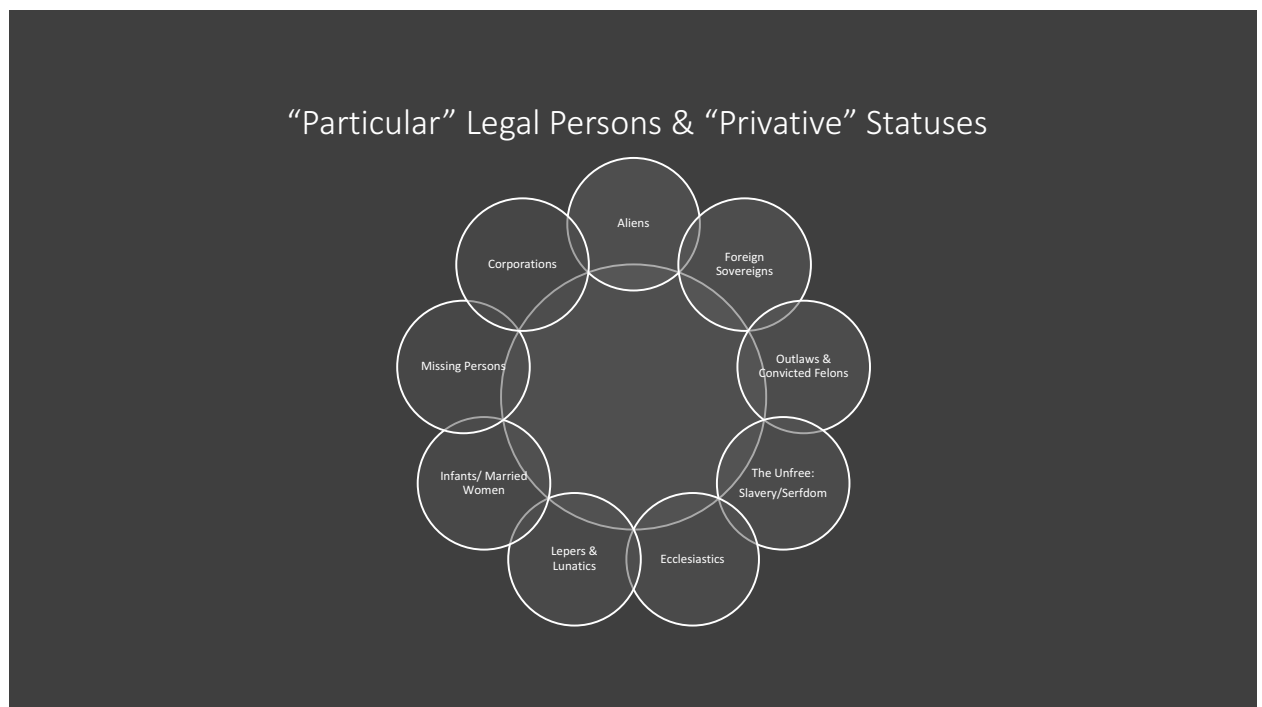


Figure 7 - Compilation of Special Legal Statuses in 19th C.

<sup>545</sup> *The Civil Code of Lower Canada*, *supra* note 340.



This visual representation of the classification of special kinds of persons leaves out by name several of the categories of persons historians have classed as suffering a civil death.<sup>546</sup> Still, others are included. Women and infants are often classed together as special kinds of “legal persons” who are not legal persons at all and are derived from family law. The unfree can include both slave and serf statuses. Dependent sovereigns fall into the category of foreign sovereigns as a special status within the kinds of sovereigns. Aliens can include refugees and stateless persons. There were different classificatory schemes that focused on different “particular” kinds of people. Some were regarded in their marginality. There are many other persons who were simply not regarded. Still, the recognition of some of the particular statuses that persisted reveals a legal form that was similar across the board in terms of the kinds of legal disabilities and the existence of privative statuses.

---

<sup>546</sup> Francis Wharton, *A Treatise on the Conflict of Laws Private International Law* 3d ed (1905); Dicey, *supra* note 2; von Savigny, *supra* note 9.

## Chapter 5      Civil Death as Transition

*Religion explains how it is possible to relate to the dead who still live. It says little about how ordinary people should relate to the living who are dead.*

Orlando Patterson

## 1. The Persistence of Status

The dissertation has been up until this point an exercise in pooling the different uses of the term “civil death,” the different theories of civil death, and the closely related ideas that are often used interchangeably with the term. I have done this in order to tease out inductively the characteristics and legal form that is common across the different uses. I have asked how the concept has been used as a term of practice in order to extract from its various uses the commonalities and underlying logic of the concept with a view to formulating a category of analysis. All this has laid the groundwork to contest an assumption about formal equality that is quite basic to liberal democracies.

It is generally accepted, as Jeremy Waldron has claimed, that “we are a single status society,”<sup>547</sup> and yet I will argue that the re-emergence of civil death suggests otherwise. In this chapter, I will propose a somewhat refined definition of the concept of civil death. Specifically, I will make the case that different statuses continue to exist in liberal democracies, that these statuses are often organized hierarchically, and that it is possible to transition from the status of equal citizen to a burdened, “privative” legal status.<sup>548</sup> Civil death should be understood as the transition from one status to an unequal, privative legal status. That is to say, civil death is better understood not as “the end of legal personality” as it is commonly understood, but rather as a transition from one legal status to another status, the latter being characterized as either burdened or privative. This is in some ways a minor refinement in the contemporary understanding of the concept of civil death, but it carries with it profound significance. The significance of the re-emergence of the uses of the term civil death and of the actual legal form civil death techniques take challenges the very foundations of formal equality of our liberal legal systems. I make this proposition on this basis of the foregoing, which has consisted

---

<sup>547</sup> Jeremy Waldron, *One Another's Equals* (2017) at 8.

<sup>548</sup> I will further explain the idea of a privative status throughout this chapter, but it is the term introduced by Dicey as a question of either a “penal or (privative?) status” in which he refers to statuses that have legal disabilities. A.V. Dicey, “On Private International Law as a Branch of the Law of England” (1891) 7 Law Q Rev 113–127, p. 121.

in a survey of uses of the civil death constructs that are both explicit and implicit, historical and contemporary, individual and collective.

I explained why we need to look at both formal legal institutions and law in action in order to describe the adaptive legal techniques of civil death since they are themselves potentially the tools of totalitarianism. As described in the introductory chapter, my contemporary theory of civil death draws heavily from Hannah Arendt.<sup>549</sup> She provided an almost descriptive theorization of “the modern expulsion from humanity.”<sup>550</sup> Her juxtaposition of this concept with civil death in one of her footnotes is underscored by her description of how persons are deemed “superfluous” economically and are rendered “rightless” through a process that is more “radical” than “outlawry;” in this she has been influential on me and many contemporary writers who use the concept civil death.<sup>551</sup> But in my account, close attention is paid to the legal form in its contemporary setting and consequently to the wide range of legal tools, such as regulatory, administrative techniques, that can constitute privative statuses. By gathering these practices together and naming them, this dissertation contributes to more than an esoteric debate about definitions, I demonstrate how the underlying logic of civil death is the inscription of privative and, hence, unequal statuses in law.

In this chapter, I intend to explain how there is a coherence in the category of civil death and expand on the ways that coherence sharpens the boundaries of the concept. In Part One, I will introduce my argument challenging Waldron’s claim that we are in fact a single-status society by turning to the legal disabilities that attach to or flow from being a member of one of several different classes of persons that persist in liberal Western democracies. I will further explain the significance of the historical transition in Western legal systems from “status to contract,” whereby society was supposedly transitioning from laws for classes of persons to formally equal individual persons. In Part Two, I will challenge the received understanding of civil death as an end to legal capacity in relation to legal status. By formulating a new definition of civil death, I not only foreground the coherence in the various uses

---

<sup>549</sup> The attempt to clean up some of the fuzziness of the current definitions, uses, and theories of civil death is in large part a desire for more precision as an end in itself. There is also a secondary motivation which has a political dimension behind my particular approach to the topic. Arendt’s work on the production of “superfluous” persons has been a guiding inspiration throughout the development of my argument on civil death, and her body of work is a constant reminder of how political liberalism fails to protect against totalitarian movements. Arendt, *supra* note 64; Hannah Arendt, “Ideology and Terror: A Novel Form of Government” (1953) 15:3 *The Review of Politics* 303–327.

<sup>550</sup> Arendt, *supra* note 64 at 302.

<sup>551</sup> *Ibid.* Arendt has cast a long shadow, influencing Giorgio Agamben, Colin Dayan, and the literature they have subsequently inspired (see chapter 2).

of the concept in order to offer a coherent concept for application, but I also provide for a new understanding of the persistence of legal status. Finally, to explain where this is leading, in the following chapter, I conclude with an application of the newly refined concept for critical security studies. I demonstrate how different civil death techniques are being deployed globally to create new legal statuses and I describe some of the problems with these techniques.

### 1.1. *From Status to Contract?*

What is supposed to be distinctive about modern Western political systems is the equality built into the legal structure so that society is organized around free and equal individuals and is no longer stratified along permanent classes, statuses, or groups of persons, as it had been for centuries. According to Jeremy Waldron, there are no longer different kinds of persons, “[w]e now hold that there is just one sortal status: the status of being a human person.”<sup>552</sup> For Waldron a “sortal status” is a permanent status that is about the kind of person one is; it is not derived from one’s actions. He goes on to assert that we are “a single status society.”<sup>553</sup> There is only one kind of legal person according to Waldron: the human person.

I will return to Waldron in a moment; but as a point of comparison, in non-liberal societies that used to have or continue to have status laws, legal distinctions of groups or classes of persons are the basic mode of social organization.<sup>554</sup> Under this system, discrimination based on certain characteristics is the norm and is considered natural. Gaius wrote in the *First Book of Institutes*: “The principal distinction in the law of persons is this, that all men are either free or slaves. Next, of free men some are *ingenui* (freeborn), others *libertini* (freed).”<sup>555</sup> This categorization of kinds of persons differs radically from the liberal ideal of formal equality among all human persons. The Gaian conception of citizenship was status-dependent: differentiated and in many cases hierarchical. The legal and social order was based on being able to make distinctions between classes of persons. Slaves and freemen were two important categories of persons. For most of Western history, societies have thus generally consisted of

---

<sup>552</sup> Jeremy Waldron, *supra* note 547 at 8. Below I explore in more detail the relevance of Waldron’s distinction.

<sup>553</sup> *Ibid.*

<sup>554</sup> I am using status here in the legal sense, not simply relative social ordering of perceived hierarchy such as defined by Nestor Davidson which he distinguishes from a “rigid” status from the legal order as discussed by Sir Henry Maine. The “relative rank or position” does not quite get to the legal relations involved, though I do believe his discussion in fact approaches the stronger legal sense at times. See Nestor M Davidson, “Property and Relative Status” (2009) 107:5 Mich Law Rev 757–817 at 759.

<sup>555</sup> Jane F Gardner, *Being a Roman Citizen* (London; New York: Routledge, 1993).

categories of different kinds of persons with differing legal statuses. Differentiated legal statuses are perhaps obviously not a uniquely Western legal feature, as personal status laws within Islamic law jurisdictions, as just one example, show us: differentiated statuses for two kinds of humans with different rights and duties for men and women continue to exist.<sup>556</sup>

Differentiated legal statuses in relation to “kinds” of legal persons were part of ancient Roman law and have formed part of the civil law tradition. An intrinsic part of having different kinds of persons under the law of status is what Jane Gardner's book, *Being a Roman Citizen*, describes as the legal disabilities and privileges that accompanied the different statuses. Of particular importance to the present study is the category of *infames*, the “citizens whose behavior has lost them some of the legal rights enjoyed by other citizens ... connected with something in them which is regarded as morally blameworthy.”<sup>557</sup> Gardner goes on to observe, “the actual legal handicaps they suffer are suffered also by certain other people, such as women, irrespective of whether or not the latter have incurred any moral blame.”<sup>558</sup> While there were some “privative” statuses that did not have a moral character, others did, especially those in which privileges were lost after some action. In different status-based societies, morally condemnable actions often left behind a kind of moral taint that changed forever the kind of person someone was. One did not simply commit a crime, rather one became a criminal. This is fundamental for understanding how people in status-based societies moved from one status to another. Some were born into a status and would remain in it for life (like women), but for others the nature of their actions changed the kind of person they were perceived to be and fundamentally their permanent legal status. It is useful to set out a little groundwork of how legal status works in the old and new legal orders.

Until the idea of distinctions between the kinds of persons came into crisis in the eighteenth and nineteenth centuries in Europe and the Americas, status was understood as a natural condition from which different “rights and duties, capacities and incapacities” flow.<sup>559</sup> Status, according to Sir Frederick Pollock was nothing less than “the sum total of a man’s personal rights and duties ... or, to

---

<sup>556</sup> See e.g. the Family Code in Algeria in which there are different rights and duties for men and women in marriage. *Code de la Famille* Republique Algerienne Democratique et Populaire Ministere de la Justice 4<sup>ème</sup> Edition Depot Legal 406 -2003 (2005) [https://droit.mjustice.dz/code\\_famille.pdf](https://droit.mjustice.dz/code_famille.pdf) (last accessed Feb. 2021)

<sup>557</sup> Gardner, *supra* note 57 at 5.

<sup>558</sup> *Ibid.*

<sup>559</sup> Austin referenced in Duncan Kennedy, *The Rise & Fall of Classical Legal Thought* (Beard Books, 2006) at 194.

be verbally accurate, of his capacity for rights and duties.”<sup>560</sup> Status as a legal ordering system was based on hierarchy and differentiated rights, or more correctly, differentiated privileges.<sup>561</sup> That is to say, if someone can be stripped of their privileges because they inhabit a political space in which different humans have different legal privileges, then those privileges are not actually rights.

The transformation that took place in Europe over status starting in the eighteenth century; but crystalized as a legal consciousness in the middle to late nineteenth century,<sup>562</sup> meant that legal disabilities based on immutable characteristics were challenged as illegitimate forms of discrimination in law. “The special strength of rights lies in their being more than privileges endowed by legislation. They claim to set a limit to what may be legislated. In this sense, rights claim to exist beyond the political system.”<sup>563</sup> With the promise of universal rights, and equal rights among persons, also came the promise of a status-less society. The legal transformation is characterized as a movement from societies in which formal discrimination was considered not only acceptable but proper to an equality-based system in which all citizens were considered equal.<sup>564</sup> Women, for example, were in principle outside the category of all men and had their own status complete with its own set of privileges and legal disabilities as compared to freeborn men. Women could not vote or hold office or sit on juries.<sup>565</sup> And as may be recalled from earlier chapters, an 1830 document called *Remarks on the Civil Disabilities of British Jews* describes in detail the various laws that prevented Jewish persons from holding property, conducting trade in certain areas, and being able to vote.<sup>566</sup> It is a remarkable document insofar as it describes the assignment of disabilities on the basis that despite being naturally born in Britain, they

---

<sup>560</sup> Sir Frederick Pollock in Maine, *supra* note 223. [PAGE]

<sup>561</sup> For a discussion of the distinctions between a right and a privilege, see Wesley Newcomb Hohfeld, “Fundamental Legal Conceptions as Applied in Judicial Reasoning” (1917) 26:8 Yale Law J 710–770; “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning” (1913) 23:1 Yal 16–59; “The Foundations of a Theory of Rights” (1924) 10:8 Virginia Law Regist 549–562.

<sup>562</sup> I use the term “legal consciousness” as a nod to Duncan Kennedy’s use of the concept “classical legal consciousness.” Kennedy, however, only accounts for a particularly American legal consciousness, and so I am not using the term to indicate that I rely on his overall argument of classical legal consciousness to ground the movement from status to contract. He writes, “[a consciousness] is a set of concepts and intellectual operations that evolves according to a pattern of its own and exercises an influence on results distinguishable from those of political and economic interests.” Kennedy, *supra* note 222.

<sup>563</sup> Martti Koskenniemi, “Human Rights, Politics and Love” in *The Politics of International Law* (Hart, 2011) 33 at 35.

<sup>564</sup> As Pollock put it, “Nowadays we presume every man to have the full legal rights of a citizen in the absence of apparent reason to the contrary.” Sir Frederick Pollock, “Divisions of Laws” (1894) 8:4 Harvard Law Review 187–199 at 197.

<sup>565</sup> Women were outside the legal categories that would even have them punished as an outlaw since they had never taken an oath of allegiance in the first place: “but women are *waiviata*, i.e. derelict, left out or not regarded, because they are not sworn to the law.” Mathew Bacon, *New Abridgement of the Law* (1832).

<sup>566</sup> Francis Henry Goldsmid, *Remarks on the Civil Disabilities of British Jews* (London: University of London, 1830).



were considered "aliens" and were therefore prevented from taking oaths unless they assimilated.<sup>567</sup> If one did not take an oath of fealty for religious reasons, then this formed the legal justification for (partial) preclusion from British society in the form of a privative status. There were many such statuses in British law (and all of Europe for that matter) that included both over- and under-privileged groups so that noblemen would have more privileges and different obligations, while serfs would not have the same legal privileges as a freeman and would be in a relationship of dependence and owe fealty to another.<sup>568</sup> The loyalty owed on the part of a dependent meant that that person had no rights against any claim made by their protector or benefactor. It is in this sense that the legal historians Pollock and Maitland refer to the serf as "rightless" in relation to his lord.<sup>569</sup> These forms of legal status were supposed to have disappeared as we turned from a legal system based on classes or groups to one based on equal individuals.

The transformation away from legal statuses to formally equal individuals occurred both in Europe and North America into the twentieth century. Duncan Kennedy refers to the transformative movement in classical American legal thought in which it was widely accepted that status, as it existed in ancient regimes and feudal systems, was being replaced in liberal, progressive societies with a concept of citizenship for persons in which formally equal individuals all enjoy the same rights and obligations.<sup>570</sup> Social and legal hierarchy between classes of persons within a single political system had been replaced with equality between individuals.<sup>571</sup> All men were now free-men (supposedly), and the free and equal men contracted and negotiated their private relations rather than having them predetermined as a status relationship. In 1920, the British jurist Sir Henry S. Maine wrote that status had been replaced in modern law with a new legal and political ordering system. Maine argued that jurists were largely in agreement that what was distinctive about modern society was that status had given way to contract.<sup>572</sup> Individuals, not social classes or kinds of persons, could contract into

---

<sup>567</sup> *Ibid.*

<sup>568</sup> Sir Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I*, 2nd ed (Cambridge University Press, 1898).

<sup>569</sup> *Ibid.*

<sup>570</sup> Kennedy, *supra* note 222.

<sup>571</sup> Reva Siegel, "Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action" (1997) 49:5 Stanford Law Rev 1111.

<sup>572</sup> See e.g. Siegel, *supra* note 63.; Knop, *supra* note 64.

relationships presumptively on the basis of their formal equality and their roughly equal capacity to enter into a bargain. He gave several examples of this transformation, referencing Roman law.

Thus the status of slave has disappeared—it has been superseded by the contractual relation of the servant to his master. The status of the Female under Tutelage, if the tutelage be understood of persons other than her husband, has also ceased to exist; from her coming of age to her marriage all the relations she may form are relations of contract. So too the status of the Son under Power has no true place in the law of modern European societies ... we may say that the movement of the progressive societies has hitherto been a movement *from Status to Contract*.<sup>573</sup>

The movement from status to contract was not only a description of a different form of ordering society; but normatively, it was also seen as a form of progress by Maine. Several contemporary commentaries on status law reference the transformation from status to contract outlined in Maine's book, so often in fact that it has practically become a trope in that it is commonly accepted that we no longer have status laws.<sup>574</sup> Although it has been widely accepted that modern law no longer organizes legal persons through status relations, the account that status was in fact replaced by contract is not universally agreed upon.<sup>575</sup> Maine himself carves out exceptions in his argument and gives as an example the exclusion of women in relation to their husbands under *coverture*. This qualification is exceptional, however. Maine's pupil, Sir Fredrick Pollock, on the other hand, in the notes found within Maine's treatise on *Ancient Law* further elaborated on the qualification of Maine's argument that status had yielded to contract.<sup>576</sup> Not only does he state that he believes it may only be in the area of property law that status has been replaced by contract, but he makes the following observation as well:

Paramount consideration of the *stability of society*, or the general convenience of third persons, override the freedom usually left to parties in their own affairs. The law of persons may be and has been cut short; but, *so long as we recognize any differences at all among persons*, we cannot allow their existence and

---

<sup>573</sup> Sir Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society and Its Relation to Modern Ideas* (London, 1920) at 173–4.

<sup>574</sup> See esp. Kennedy, *supra* note 62. Karen Knop, “Citizenship, Public and Private” (2008) 71:3 *Law Contemp Probl* 309.

<sup>575</sup> Walker B Kennedy, “From Contract to Status?” (1926) 4:2 *New York Law Review* 49–54.

<sup>576</sup> Maine, *supra* note 223.

nature to be treated merely as a matter of bargain. Status may yield ground to Contract, but cannot itself be reduced to Contract [*emphasis added*].<sup>577</sup>

The position that not all status relations had been replaced by contract or negotiation was in fact rather common in classical American legal thought. Status was generally thought to be only for exceptional, discrete categories of persons in law, for those whose freedom to contract was in some way impaired, typically for persons deemed incapable of full rationality or full freedom. These classes of persons were deemed in fact unable to enter into a meaningful contract. Included here were "married women, children, lunatics, drunkards, and spendthrifts."<sup>578</sup> I would also include in the list of offensive nineteenth-century status categories, the neglected "status Indians" who have been both collectively and individually placed in dependent status relations.<sup>579</sup> There were many others of course who remained in status relations. The argument was that the law of persons would become "the law of 'abnormal' persons," as this is the only area in which there are differences in kinds of persons with different privileges attaching to the person, and was to be separated out from so-called "normal" contracts.<sup>580</sup> As Duncan Kennedy has observed, the attention paid to the law of status in American thought arose because it supposedly represented "regulation, paternalism, community and informality," but the reforms targeted "communal solidarity" of status relations in favor of individualism.<sup>581</sup> The value of communalism and solidarity was replaced by a celebration of free will and the legal rights to form contracts among persons who were considered to have the capacity for equality, so the slogan of status to contract became "a slogan of laissez-faire."<sup>582</sup> While I agree largely with Kennedy's argument, I would argue that the historical account that status was in fact replaced by a citizen-based system of equality and economic competition for "normal" persons is only one part of the story, and that supporting the transition to laissez-faire for "normal" men required the maintenance of unequal statuses and unequal competition to persist for many others. Kennedy is interested in the legal category of normal persons and what happens to them after the turn to contract. I am interested in the abnormal. Although one could argue that the abnormal legal person is

---

<sup>577</sup> Pollock's notes are found throughout the text in Maine, *supra* note 66 at 185.

<sup>578</sup> Kennedy, *supra* note 62.

<sup>579</sup> Angie Debo, *And Still the Waters Run: The Betrayal of the Five Civilized Tribes* (Princeton University Press, 1973).

<sup>580</sup> *Ibid* at 191.

<sup>581</sup> *Ibid* at 196.

<sup>582</sup> *Ibid* at 199.

diminishing as married women, Black Americans, and other groups have been granted full political rights, status categories are evolving. As I will show in the final chapter, the normal person in law is diminishing as the category of abnormal legal persons expands.

As I indicated in the opening of this section, my redefinition or the adjustment that I propose to the dominant understanding of civil death conflicts with Jeremy Waldron's argument that we are now a single-status society.<sup>583</sup> I want to take up the discussion now and tease out where there are conflicts in our visions. His point seems to be that liberal democracies no longer make distinctions based on different kinds of humans because we now have equality-based political systems. He points out, however, that there are "conditions" people fall into, but these are different from the "sortal" statuses that, according to Waldron, once existed. Sortal statuses for Waldron were based on the differentiation of classes of persons so that the "[s]ortal status represents a person's permanent situation and destiny so far as the law is concerned. It is not acquired or lost depending on actions, growth, circumstances, or vicissitudes. The idea behind sortal status is that there are different kinds of person."<sup>584</sup> Waldron writes that while contemporarily there is only one sortal status, there are other conditions people find themselves in. He distinguishes conditional status as a condition someone is in, but it is not about the person as such. He includes in this category: "infancy" and "bankruptcy" as two examples.<sup>585</sup> Pay close attention here to his word choice: he states that these are stages or conditions, so we are not dealing with the infant as a kind of person but rather with the state of infancy. Within the category of conditions he includes the "choices" people make, such as "marriage" and "felony"; but then he also includes here "being an alien."<sup>586</sup> He remarks about the conditions that "[t]hey tell us nothing about the underlying personhood of the individuals who have them: they arise out of conditions into which anyone might fall."<sup>587</sup> Waldron argues that we have difficulty finding true examples of sortal statuses today since they have been abolished, but he references historical examples such as serfdom and villeinage, race in apartheid South Africa, nobility, and slavery in the U.S.<sup>588</sup>

---

<sup>583</sup> I take his meaning of "we" to be we in the U.S. and the Commonwealth, as he is originally from New Zealand but writing in the U.S.

<sup>584</sup> Jeremy Waldron, *Dignity, Rank and Rights* (Oxford University Press, 2012) at 59, Lecture 2.

<sup>585</sup> Jeremy Waldron, *supra* note 547 at 8.

<sup>586</sup> Jeremy Waldron, *supra* note 584 at 58.

<sup>587</sup> *Ibid.*

<sup>588</sup> Jeremy Waldron, *supra* note 547 at 7.

I want to suggest that the distinction Waldron draws between sortal and conditional statuses as a basis for asserting that we now live in a single-status society is rather flimsy. To start with, as I look at the list of examples Waldron provides, I find the distinction to be largely artificial, even according to the criteria that he offers, as it does not appear to create a system that is in fact compatible with a system of equality. Even if we take it as a tangential counterexample that the contemporary persistence of nobility makes the claim that we are a single-status society bizarrely myopic within his own examples, his basic distinction fails in its criteria for classifying the two kinds of statuses. His distinction for sortal statuses appears to rely on an assumption that the classification must be based on an intrinsic quality of the person; and from that immutable characteristic, persons are sorted, and different rights are given. The immutability requirement is presumptively why he writes about slavery in the U.S. as one example of a sortal status as opposed to simply writing slavery. Waldron cites the *Dred Scott*<sup>589</sup> case in his footnotes, arguing that the exclusion of individuals as kinds of persons and the language of “beings of an inferior order” indicates a kind of permanency that conditional statuses do not.<sup>590</sup> While I agree this is certainly one of the cruelest forms that status can take—in which one’s privative status is attributed to a quality in oneself and there is little one can do to change one’s lot in life—permanence cannot be the primary criterion. Slavery was not necessarily a permanent status in Rome, and an enslaved person could be freed. The impermanence of slavery meant that slavery was not even necessarily based on something intrinsic to the person. It was a condition one could fall into. Turning back to the classes of persons according to Gaius, presumably Waldron would consider these to be sortal statuses and not merely conditional statuses for which human equality is an organizing norm. It is from the Roman law of status that the Western legal tradition derived the law of persons so that different kinds and classes of persons existed with differing legal rights. Waldron does not elaborate on the issue of slavery and the different kinds of slavery that existed historically. While I would like to ask Waldron for clarification on this point, I do not think it is a stretch to say that since Waldron refers only to “American slavery” as incompatible with a single-status society, then he may be drawing a distinction between kinds of slaveries. The U.S. slave codes are different from the Roman law in that enslaved persons were classed as property in the U.S. rather than persons; but certainly the laws treated

---

<sup>589</sup> *Scott v. Sandford* (60 US (19 How) 393, 15 L Ed 691 (1857)).

<sup>590</sup> Jeremy Waldron, *supra* note 547 at 7.

them as persons, but without the same rights as free white men.<sup>591</sup> While Waldron does not provide guidance on this point, we could ask if it is possible that someone can move in and out of slavery (as a condition) even if it is quite difficult to do so, then is the Roman form of slavery compatible with a single-status society? I believe this may be his argument, but it is difficult for me to imagine a system in which slavery exists and it is possible to claim with any degree of coherence that it is a single-status society. The distinction between conditional and sortal seems artificial in this sense, as neither a conditional nor a sortal status-based society (at least as Waldron has defined it) is more compatible with human equality.

Furthermore, if conditional statuses are supposed to be based on choice or one's actions, according to Waldron, then his examples fail to meet his criteria in another sense. It seems that becoming an alien when one is made stateless is no more a choice or based on one's actions than becoming a slave or being born a woman. Within Waldron's argument, there is simply no discussion of why being an alien, a refugee, or a stateless person is considered a "choice" or is based on one's action. If someone is born in a refugee camp or flees almost certain death from war, how is this any different from being born a girl or born with dark skin? The fact that it could happen to anyone does not somehow negate the radically different privileges associated with citizenship as compared to not being a citizen.

There are also permanent statuses one is born into and are based on blood that nonetheless can be given up, such as being a noble. Waldron claims that contemporary nobility is different from sortal nobility, which would amount to "more than a moniker and seat in the House of Lords."<sup>592</sup> So, he appears to make the claim that nobility today does not carry with it many benefits and, thus, is not sortal. The grounds of his argument shift here; and instead of his classification being based on the kind of person one is, sortal status is based on the kinds of privileges one has. But I want to address the question of permanence first. It would be easier (even when nobility was more than a moniker) to

---

<sup>591</sup> Take as an example Georgia's criminal code that has provisions for enslaved persons in 1848. Under the rules of evidence, slaves were obliged to bear witness if called to as long as that person "believes in God", and "free persons of color" were dealt with in the same codes and had different rights and obligations from slaves. The movement from Roman law and the categorization between persons and things was certainly muddled in its incorporation into American colonial law dealing with slaves. *A Codification of the Statute Law of Georgia*, 1848.

<sup>592</sup> Jeremy Waldron, *supra* note 547 at 7.

give up one's status of nobility than to give up one's status as an alien.<sup>593</sup> While some may accept that contemporary nobility is not based in a sortal status, the idea that people are born to certain entitlements, while others are not, appears to be strong evidence that sortal designations persist in our collective imaginaries. The criterion of choice or impermanence for a conditional status seems a rather poor criterion, for it fails precisely to distinguish between the two kinds of statuses he provides even within his own examples.

Rather than the nonsensical distinction Waldron has proposed, I would suggest that we can understand status as A.V. Dicey suggested in 1880 when he introduced the problem (similar to part of the problem Waldron is concerned with) of the infinite number of classes we belong to as members of society. He wrote, "Every man belongs of necessity to an indefinite number of classes. He is a husband, a landlord, a tenant, a seller, a buyer, and so forth. Are we to say that in each of these cases he acquires a status?"<sup>594</sup> No, Dicey states in plain terms. This would lead to an absurd conclusion and a law of persons that is unmanageable. Instead, he draws on the crucial feature of a status observed by Sir William Anson; "the essential feature of a status is that the rights and liabilities affecting the class" are such that "no member of the class can vary by contract."<sup>595</sup> A status is not the class you fall into because of some voluntary action, it is the class you cannot exit by voluntary action. It is not merit or choice that makes a status conditional, but rather the capacity to contract into a citizen status.

To provide a fair interpretation of Waldron's argument, I should say: the common-sense aspect of Waldron's argument seems to be that in modern liberal democracies, there are common-sense reasons some people do not have the same privileges as others. It is not all arbitrary and unjust; and we are not just born to a permanent lot in life; but ideally, we are supposedly largely given the same possibilities. There is something to the conditional criteria Waldron proposes that seems to imply a kind of meritocracy and rationality that is implicit in his present-day conditional status categories.

---

<sup>593</sup> According to the Canadian Council for Refugees it is becoming more difficult to move from alien to citizen status in Canada: "In recent years, it has become harder for newcomers to get Canadian citizenship. Increasingly difficult tests, more costly applications, additional requirements, longer waits and frustrating red tape have stood in the way of newcomers becoming citizens and thus being able to participate fully in Canadian society with all rights. These barriers are having a disproportionate impact on more vulnerable newcomers, such as refugees and more isolated or low-income newcomers." "Barriers to Citizenship for Newcomers to Canada" Canadian Council for Refugees, May 2014 <https://ccrweb.ca/en/barriers-citizenship> (last accessed January 2021).

<sup>594</sup> AV Dicey, "The Study of Jurisprudence" (1880) 5:4 Law Magazine and Review; Quarterly Review of Jurisprudence, and Quarterly Digest of All Reported Cases 382–401 at 397.

<sup>595</sup> *Ibid* at 398.



Following Waldron's argument, one falls into bankruptcy because of one's actions, not because of what or who one is. One commits a felony, but one is not destined to be a felon. Privileges are given to all persons on the basis of their inherent human qualities unless there are good reasons for them to be withheld. What I want to argue is that this idealized version of the common-sense rationality behind the conditional status argument is itself also being questioned as we move towards laws that in fact do pre-emptively designate different sorts of persons but call it merit-based.

In the last chapter I will argue that the law is moving towards the designation of kinds of persons as opposed to dealing with actions. The transformation in law is multifaceted. On the one hand, the stigma that attaches to the act of committing a crime persists beyond conviction and incarceration in contemporary criminal justice in the Canada and the U.S. to mark someone as a kind of person, as opposed to a person who happens to have committed an indictable offense or a felony.<sup>596</sup> Even without the last chapter as a descriptive counterexample to Waldron's argument about the disappearance of sortal statuses, on its own terms, the distinction between sortal and conditional statuses is made by assertion rather than argument. Waldron's position is therefore perhaps better understood as prescriptive theory rather than a descriptive account about the world we inhabit.

In more descriptively accurate terms, old legal forms continue to manifest themselves despite being supposedly exiled to the history books. Pollock remarked that "any difference among persons" as it relates to the very "stability of society" could *not* be treated as a matter of contract. In the nineteenth century, as I demonstrated in previous chapters, there were some such statuses that were based on a kind of rationality and considered necessary for the social order. Women were not deprived of the right to vote simply to be cruel, but rather because some people sincerely believed women were not mentally capable of voting or that women could not reliably vote independently from their husbands

---

<sup>596</sup> Perhaps a more relevant distinction would be something about the totality of the privileges and disabilities that are attached to different statuses. Someone who undergoes bankruptcy is not cast out from society despite the legal disabilities that may attach to their person. In contrast, a felon may have so many disabilities that attach to that status that it becomes a totalizing privative status. It is the legal designation, and the kinds of privations that attach to that designation make the condition coterminous with the person.

when married.<sup>597</sup> Likewise, the liens placed on the property of Native Americans stipulating that they could not sell their land after the allotment period were considered necessary by some at the time for their own protection against “unscrupulous whites.”<sup>598</sup> These legal forms of privation were upheld by law and given political, rational justifications. Pollock himself thought that some status relations would not go away because in those cases status would persist as a mechanism for maintaining social stability. Although Pollock had in mind a limited category of persons deemed “abnormal,” we will see in the final chapter how the logic behind the law of status remains in various pockets of the law, and how it has been reconfigured and greatly expanded in the field of security. This allows nowadays for a proliferation of persons that can be deemed “abnormal” legal subjects as security risks, but without status protections or the solidarity that Kennedy argued humanized the old regime. The formal legal stigma of a conviction defines future legal relations and, much like that of *infamy*, is retained in some cases for life in several modern legal systems. There is no way to contract out of it. In a social context that is wedded to the idea of equality and transactional economic freedom, the reemergence of civil death signifies merit-based statuses, an explicit legal ordering system in which one is defined by and one’s actions are limited by legal status; and thus, formal inequality as well as one’s social and economic exclusion are one’s own fault. The new forms of civil death as privative legal statuses, in this sense, take on a neoliberal form in criminal justice and security.<sup>599</sup>

But this is putting the cart before the horse. In the next section, I consider the persistence of status despite legal transitions and even revolutions from explicit status-based legal orderings. This will lead to the next step on the ways in which old legal statuses can be reinscribed into formally equal legal systems.

---

<sup>597</sup> Many of these arguments around women’s supposed natural incapacity for full citizenship took place in the language and rationality of science. See e.g. Marina Koren, “Why Men Thought Women Weren’t Made to Vote” (2019) *The Atlantic*: “According to the mainstream science of the time, ‘Women simply had inferior brains, which made them unsuited to the rigors of voting,’ says Cheryl Jorgensen-Earp, a professor at the University of Lynchburg who studies rhetoric in science and the British women’s-suffrage movement. ‘Anti-suffrage cartoons poked fun at women’s reasoning ability ... which showed [the interior of a woman’s head](#) filled only with letters, puppies, hats, chocolates, and the faces of admiring young men.’”

<sup>598</sup> Katherine Ellinghaus, “A Little Home for Myself and Child” (2015) 84:3 *Pacific Historical Review*.

<sup>599</sup> Harcourt, *supra* note 235.

## 1.2. *Inscribing Status in Equality Regimes*

"Preservation-through-transformation" is the phrase coined by Reva Siegel to describe the way law transforms during moments of reform, while something from the old legal form is preserved.<sup>600</sup> Siegel's groundbreaking work on the modernization of personal status law has made the careful case that status law did not disappear for women or racialized minorities when the law was reformed. She argued in respect to gender that status law was not abolished and replaced with something new and entirely different. Rather, gender-based status was transformed into a modern legal form. She explains, "[r]ather than assume we are examining the abolition of an antiquated body of marital status law, we might approach coverture's reform with another possibility in view: that we are examining changes in an antiquated body of marital status law that modernized it to accord with contemporary gender mores."<sup>601</sup> In the previous chapter we saw that although the law had changed from the end of the nineteenth century to the nineteen fifties, the arguments for women's exclusion from professions and public life had not. Siegel argued that, absent the specific intent to discriminate, judicial deference to state laws had deleterious effects on sex and racial relations that were status-enforcing. This equality framework was supposed to have transplanted the social stratification of ancient regimes in which different groups of people were formally classified by status. Unfortunately, the equality regime in fact masks the ways status is preserved socially through old forms of privilege and also the ways law continues to enforce "social stratification."<sup>602</sup> She explains that status-enforcing laws are not static but transform and react to social contestation.

In Siegel's account of women and Black Americans, status was not eliminated with legal reforms, but gender and race are now no longer formal categories that can explicitly modify the rights and duties of persons belonging to that class. As such, the production of inequality is often invisible, while rules that enforce status remain. Different classes of persons in different conditions will have differing privileges and burdens, but those privileges and burdens will not always be formally organized as flowing directly from that class. The regulation of reproductive health, including things like banning abortion, for example, impacts women differently and can enforce a status without ever mentioning women. The categories therefore are not explicitly status in the sense of the Roman code of "citizens,"

---

<sup>600</sup> Reva B Siegel, "The Rule of Love: Wife Beating as Prerogative and Privacy" (1996) 105:8 Yale Law J 2117.

<sup>601</sup> Reva Siegel, "The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930" (1994) Georgetown Law J at 2132.

<sup>602</sup> Siegel, *supra* note 63 at 1113.

"free persons," and "slaves," but rather will take on less static, explicit, and clearly delineated forms. Siegel's argument is quite subtle about the ways in which rights were or are in fact tailored to assumptions about women as a group, or Black persons as a group, and how those assumptions are reinforced through other areas of law. Siegel makes a very compelling case that formal legal equality can still be configured to enforce status.

Siegel's analysis speaks to the ways in which law supports structural inequality within an equality regime by reinforcing old status categories even though there is formal equality in law. However, what I want to argue is that there are also explicit status categories that are maintained as statuses, and that those explicit statuses also adapt through transformation. They are so "natural" to the dominant cultural groups in liberal societies that they are in fact practically invisible. The preservation through transformation can speak to the ways old status categories that target immutable characteristics are substantively preserved through other ostensibly action-based statuses. While Jim Crow laws are no longer legally permissible, the maintenance of formal status categories that on the surface appear to be neutral as non-racialized statuses (such as "terrorist" or "felon") in practice disproportionately affect racialized persons. Furthermore, there are also potentially new status categories (semi-permanent economic class categories or a new form of serfdom) that have emerged as we continue to fixate on presumptive equality and non-discrimination based on immutable characteristics under the mistaken belief that we are a "single status society." In the next section, I turn to an ideal type of permanent status in supposedly contract-based societies to examine how statuses are formed.

### 1.3. *Formal Equality and Status*

Waldron is not alone in holding the belief that the shift from the eighteenth century to the nineteenth marked a tremendous legal shift in which privileged statuses lost their legal privileges and everyone including the nobility and clergy were "subjected to the civil-judicial principle of equality."<sup>603</sup> The most obvious examples of differentiated statuses in modern societies surround the status of citizenship. While Waldron argues that to be an alien is different from a sortal status, as it is a "choice," I would argue that this understanding of "choice" requires a very broad interpretation of agency.

---

<sup>603</sup> Reinhart Koselleck, *The Practice of Conceptual History: Timing History, Spacing Concepts*, Todd Samuel Presner, ed. (Stanford University Press, 2002) at 211.

Hannah Arendt's most striking observation in the essay *We Refugees* is about the different kind of humans that persons without a state have become. She writes, "apparently nobody wants to know that contemporary history has created a new kind of human beings—the kind that are put in concentration camps by their foes and in internment camps by their friends."<sup>604</sup> The observation speaks directly to Waldron's assertion that we are a single-status society, and that that single status is the human person. Arendt goes as far as to claim that a new kind of human had been created, and her point highlighted that there are different sets of laws for different kinds of humans. That is to say, legal statuses have consequences. There were and remain different human rights for different humans. What other conclusion can be drawn as long as such radically different treatment is allowed by law for different kinds of persons? If being an alien is not a sortal status, then nothing is. Arendt goes further, however, and observes that having over- and underprivileged persons in society has a corrosive effect on the legal system of liberal democracies. In the chapter on "Imperialism" in the *Origins of the Totalitarianism*, Arendt elaborates on the process of distinguishing among people within the legal system on the basis of nationality, and how this creates precedents to treat others in the same manner—by effectively destroying the single-status society ideal.

For the nation-state cannot exist once its principle of equality before the law has broken down. Without this legal equality, which originally was destined to replace the older laws and orders of the feudal society, the nation dissolves into an anarchic mass of over- and underprivileged individuals. Laws that are not equal for all revert to rights and privileges, something contradictory to the very nature of nation-states. The clearer the proof of their inability to treat stateless people as legal persons and the greater the extension of arbitrary rule by police decree, the more difficult it is for states to resist the temptation to deprive all citizens of legal status and rule them with an omnipotent police.<sup>605</sup>

The existence of the refugee or stateless person as a person without *equal rights* in the same political and legal space as the citizen, who is supposedly endowed with full rights, makes it possible to render others rightless as well. But this is not a slippery-slope argument: it is a legal ontological one. It is an argument about legal and political ontology, about the nature and structure of political community

---

<sup>604</sup> Hannah Arendt, "We Refugees" in Marc Robinson, ed, *Altogether Elsewhere: Writers on Exile* (Faber and Faber, 1994) at 265.

<sup>605</sup> Arendt, *supra* note 4. at 290.

and belonging. Treating basic rights as privileges—meaning that they can be taken away or forfeit—generates a corruption of the legal and political system as no longer based on formal equality because formal equality is nothing but the recognition of equal, inalienable rights. Just like the status laws of old, today there are legal distinctions ordering different classes of persons as having different kinds of privileges. The rights’ system ceases to have the aspirational character of universal rights to ensure equal human dignity, as indicated in the preamble of the UDHR. The rights system becomes instead a means of control, as rights can be granted or, more importantly, *withheld* by an omnipotent state, a state read by Arendt as “an omnipotent police,” in which rights become an administrative system of control.

The problem Arendt so aptly points out is not only that there are different statuses in society which impact the persons who are less than full citizens, but that, in fact, such scaling of statuses as bundles of privileges arguably constitutes a total corruption of the aspirations of human rights. Daniel Beer described a slightly different, but very informative problem of rights in nineteenth-century Russia. In the face of over- and underprivileged persons and the ideal of universal rights, “rights were not just practically meaningless in the absence of a state willing to recognise or enforce them; the ‘imperial rights regime’s’ tangle of complex, discretionary provisions gave ‘both rulers and subjects perspectives on politics that differ from those fortified by the ideals (and tensions) of natural and universal rights.’”<sup>606</sup> I would like to pick up on this insight and suggest that there cannot be a shared vision of society or universal rights as long as there are different statuses in society and as long as civil death remains a legal possibility. For Beer, as a historian, the institution of civil death as a public ceremony in Russia provided a visible wedge between the ideal and the reality that itself produced a kind of tension.

The problem with rights is that there are always limitations to what are held up as absolute rights. Rights when written into law give escape valves so that the rights themselves are conditioned by exception clauses such as “necessary in a democratic society” or in case of “clear and present danger.”<sup>607</sup> In the end, the promise of rights to create formally equal citizens is a promise unkept. We end up with over and under privileged persons living in the same political space. There will be some persons who are more “burdened” than others legally speaking. One possible reading of Arendt’s

---

<sup>606</sup> See Beer, *supra* note 67 at 6.

<sup>607</sup> Koskenniemi, *supra* note 563 at 36.

critique of what it means to be “rightless” is to be in a severely burdened or privative legal status such as slavery. Once slavery or some other burdened legal status is possible, then we can no longer say we live in an equal or single-status society. This is what I mean by arguing that Arendt’s claim is not simply a slippery slope argument but an ontological one. Rights are not rights when they can be taken away even, and perhaps especially, when rights are removed in accordance with the law as long as the state is the entity that writes the law. There is a kind of conflict of interests that exists in the individual’s relationship to the state as both the author of rights and their limitations as well as the guarantor of those same rights. Still, the ideal of universal human rights and the practical reality of differentiated legal statuses, as in nineteenth-century Russia,<sup>608</sup> means that the institution of civil death can become the visible wedge to break open this paradox. Because there is still a claim to universal rights, the concept of civil death provides a name for the legal techniques that bring reality so far from the ideal. The power of naming state practices that are techniques of domination provides a form of resistance to the same technologies of power.

## 2. A Category of Analysis for Civil Death

As I mentioned in the introductory chapter, civil death is a “fuzzy concept”<sup>609</sup> of which there is already an understanding and somewhat vague definition that allows it to be a useful and used concept; but it is, nonetheless, neither completely true nor completely false in the explanation for its historical development nor in its contemporary application. According to this concept, legal personality or legal capacity come to an end or are extinguished with the pronouncement and application of civil death. As I have endeavored to show this legal fiction of finality requires some suspension of disbelief for it to make sense, since legal capacity is never fully extinguished, and there is always a person who remains no matter how burdened or “abnormal.” Still, the definition provides enough fuzzy boundaries that people can understand what is meant and use the concept in a coherent way. In much of the literature,

---

<sup>608</sup> Beer, *supra* note 67.

<sup>609</sup> Radim Belohlavek and George J. Klir, “1. Introduction” in Radim Belohlavek et al, eds, *Concepts Fuzzy Log* (MIT Press, 2011). The authors do not use the term “fuzzy concept” but concepts and fuzzy logic. They quote George Lakoff who provides an explanation in “Hedges: A study in meaning criteria and the logic of fuzzy concepts” (1973) 2:4 J Philos Log 458–508. The question is about category membership; and as such, people have a sense of whether or not different cases belong to the category of civil death: “natural language concepts have vague boundaries and fuzzy edges and that, consequently, natural language sentences will very often be neither true, nor false, nor nonsensical, but rather true to a certain extent and false to a certain extent, true in certain respects and false in other...”



civil death is defined rather quickly and almost as repetition of the ways the concept has been used by other academics and authors who readily accept the received concept within the equality framework and move on to apply it to name something as civil death in the world. The concept is not frequently the object of inquiry in itself, perhaps partly because it is an historical concept and partly because there is significant agreement on the definition; the concept is settled in many respects.

But the requirement for the suspension of disbelief is troubling (do we really believe there is no legal personality?), and there are more problems with the definition. We simply do not have a satisfactory definition of civil death capable of making sense of the many uses of civil death or of being internally coherent and reflective of how the concept is to be used. Returning to Nora Demleitner's "undisputed" definition of civil death as the end of "a person's legal capacity," she states that civil death "renders him legally dead. The individual loses his property and can no longer perform any legal functions."<sup>610</sup> Demleitner claims that this older definition was imported into North America and continues to function in an "attenuated" manner. Of course, herein lies the difficulty: an attenuated manner means a person can perform some legal functions but cannot perform others. In contemporary uses of the concept of civil death, how could we distinguish between proper cases of civil death and incorrect uses of the term? While the strong definition of civil death, in which no legal functions can be performed, patently does not capture how the concept is used contemporarily, it arguably does not describe how civil death functioned historically in the eighteenth or nineteenth centuries either.<sup>611</sup> Demleitner's definition of the institution of civil death and her qualification of its application in "an attenuated way" mean that the application of the concept of civil death in certain cases is done by analogy as a matter of practice, but the definition itself fails to get to an analytically or even descriptively accurate account of the concept in its use or significance.

The lack of precision in the concept matters because maintaining the suspension of disbelief that a civil death is the end of the juridical person when he or she loses some or even most rights means that we never fully understand how law functions in its power over life. The power of civil death over life

---

<sup>610</sup> Nora V. Demleitner, "Civil Death," in *The Encyclopedia of American Civil Liberties*, ed. Paul Finkerman, 2013, at 297.

<sup>611</sup> The possible exception is its use in conjunction with a death sentence in which the death of the legal subject facilitated the immanent eventuality of the severing of legal relations that would take place with the death of the physical or bodily subject.

is the power of the state over the construction and destruction of the human person, but by only conceptualizing civil death as an on and off switch over life, we fail to apprehend the political significance of the way law splits the legal and “real” person and forms many *kinds* of legal persons—and so the concept fails in its basic explanatory function. Instead of an absence of life, the world is populated with many different kinds of persons. This is one version of the problem identified in Orlando Patterson’s work on slavery when he offers the concept of “social death” as a non-legal, if not anti-legalistic account of slavery while denouncing legal philosophers as incapable of understanding the institution of slavery because they failed to grasp how legal personality functioned in the law or in the life of the slave. Patterson argues that slaves were always treated as a kind of person and not merely as objects or property, and legal academics failed to recognize this basic supposition because of another legal split: the split between persons and things. The law provided the slave with a kind of legal personality that was distorted, debilitating, and different; and that legal personality contained fewer privileges for slaves than that of free men, but slaves were still a kind of legal person. Patterson seems to point to a flaw in the idea that the law only conceives of full legal persons and objects and that slavery was not the end of the legal person, but rather slavery creates a different kind of legal person.

Legal scholars failed as well because legal explanations could not make sense of the manner of cruelty that the law was able to wield by forcing a human person into a slave status. The fiction that there is no legal personality for a slave thus misses the mark profoundly, according to Patterson. As a scholar situated in law, I take this as an intellectual and political challenge to go deeper into the meaning of civil death, legal personality, and legal capacity. What legal scholars have failed to perceive as meaningful distinctions in law are often based on how the law acts in the world as opposed to the ideal legal fictions that have been formulated. I want to foreground the observation that North American legal systems never in fact fully moved from status to contract, but instead the legal system maintained various status categories, just as Pollock wrote, for the maintenance and security of society. In the present case, the legal person does not cease to exist even in the most extreme forms of civil death. What has in fact ceased to exist is the status of a free and equal human. Challenging the dominant understanding of civil death means understanding that we exist in a legal universe which is

“peopled” by many different statuses or kinds of persons with varying degrees of legal privilege.<sup>612</sup> Although we are often concerned with ensuring substantive equality, we can see by foregrounding the persistence of status that formal equality itself remains elusive. My explanation at the end of this dissertation is that *civil death does not end legal capacity, it transitions a person from one legal status as a free and equal person to a new privative legal status.*

In summary:

| Problems with Contemporary Accounts of Civil Death |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
|----------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1. Civil Death definitions are inaccurate          | <p>Civil death definitions require one to ignore contrary evidence of the basic premise of the fiction of the “death” of the legal person.</p> <p>Orlando Patterson described the inaccuracy of legal theory to explain slavery in his important work on slavery and social death. He wrote that it is absurd to pretend that persons enslaved were treated as if they did not have legal personality, or as non-persons in law, since they were treated as persons though they obviously did not have the same rights as citizens. The capacity to be charged of a crime, as slaves were, implies the capacity to be treated as a legal person, albeit as a different kind of legal person. His account of social death was a reaction to the absence</p> |

---

<sup>612</sup> This is Maitland’s term for the many kinds of legal personality. Maitland, *supra* note 226.

|                                                                                            |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
|--------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|                                                                                            | of an adequate legal explanation of different legal statuses and what he deems shallow theory.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
|                                                                                            |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| <b>2. Civil death theories are often tailored to a North American history or narrative</b> | <p>The vast majority of major contemporary works on civil death in the academic literature focus on civil death as a legal concept that focuses on the array of disabilities that flow from a criminal conviction.</p> <p>Many of the theories of civil death are meant to explain something about American criminal justice, and they frequently construct the same history that draws a line to a European past but is tailored to the ways in which the concept is being used contemporarily by criminal justice advocates in the U.S. By looking too narrowly at civil death for the purpose of constructing a criminal justice concept, we lose some of the nuance of the legal form in its broader application even if, as in the present case, the ultimate purpose is an application in criminal justice.</p> <p>When people, and especially public law scholars, connect the concept of civil death to its history, they gloss over historical details that are inconvenient to the received understanding, such as monks and corporations. This skews the description of the concept in a particular way, which makes it useful for analysis of criminal justice concepts but tends to create a narrow narrative about civil death. It also tends to ignore the political economic dimensions of the concept and the connections to property. The monk is as fundamental to the concept of civil death as is the felon in part because of the</p> |

|                                                                                                                            |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
|----------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|                                                                                                                            | relationship to property, obedience, and a particular view of free will.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
|                                                                                                                            |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| <b>3. Civil death as a concept used to label state practices by non-state actors as well as state actors and state law</b> | Civil death is sometimes found in statutes and in judicial cases, but there are also many state-based legal techniques that are designated as civil death practices or techniques by non-state actors, such as legal academics, activists, and others. These non-state actors often use the term to challenge social control or to give meaning to a legal technique or set of techniques by calling attention to the effects of those legal techniques in the world. This use in practice means that we need to have a good category for analysis to make sense of the applications of the term and to give the application weight. |
|                                                                                                                            |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |

Some of the questions asked in the introduction that were unclear from the contemporary academic definitions of civil death included the following:

- Is civil death a status or a process?
- Is civil death an institution or a concept?
- Is civil death only state law or is it better defined as a label for state practices?
- Is civil death necessarily tied to criminal law and punishment?

These are some of the questions that are to be answered by pointing to the underlying structure and logic and ultimate coherence of the concept. As a fuzzy concept, civil death was used in such a way that the questions remain without evident answers. The concept has often been used in what can

appear to be contradictory ways: civil death was depicted as an institution and a concept, a status and a process, or even more vaguely as a label for critically marking state practices. But civil death was also found in law as a formal legal sentencing practice or as a statutory consequence of a sentence while convicts are or were incarcerated. Recent uses of civil death point to the absorption of the concept by criminal justice, even if speakers do not actually point to a specific civil death statute in a criminal code. In all cases, the question remained as to how historical references to civil death outside the criminal law related or were connected to the understanding of civil death as a legal institution or phenomenon essentially tied to criminal justice.

The contradictions and confusions in respect to the concept were noted by the sociolegal scholar Roscoe Pound. Pound argued in the middle of the twentieth century that civil death was “a happily passing anachronism” and a legal confusion that arose from “analogies and inept application” by “judges, legislators, and jurists.”<sup>613</sup> As the concept of civil death has re-emerged in the U.S. and in the Canadian academy, many authors rely on the very same historical references that Pound disparaged as “analogies” or “inept application[s]” inadequate for clarity in the concept. While Pound and others were calling for civil death as a formal legal institution to be abolished in the prison system, perhaps due in part to its supposed passing away, the inadequacy of the concept to capture something other than an end to legal capacity or the extinction of all rights has remained. It has resulted in part from the neglect of jurists to clarify how the multiple uses fit together and explain the concept rather than simply to apply it with a passing nod at past institutions.

Through a rejection of the status-to-contract narrative, which overlooks the operation of background norms on property, contracts, etc. as methods of diffuse entrenchment of status stratification (as also Siegel demonstrates), I attempt in the next sections to meet Patterson’s challenge. I want to propose a jurisprudential understanding of civil death that does not rely on the assumption that legal death is an end to legal capacity, instead I will propose a detailed argument for civil death as a transition to a privative status.

---

<sup>613</sup> Roscoe Pound, “Tort Claims Act: Reason or History” (1963) 1 *Tulane Law Rev* at 691.

## 2.1. *Civil Death and Status*

Through observing the different uses of the term civil death, we can discern that there are two sets of legal phenomena associated with it: classes of persons and legal techniques. The first is the legal arrangement of persons into classes or groups, and the second is the legal techniques that effect the transition from one class to another. Together a proper understanding of civil death requires linking it to the transition from one status to another.

On the one hand, I will address the importance of legal status as the key to understanding civil death. The historical use of the term civil death has served to indicate precisely a change in status from one class of persons to another when an individual was stripped of their class-specific privileges,<sup>614</sup> such as from nobleman to commoner, from citizen to enslaved person,<sup>615</sup> or from free man to monk.<sup>616</sup> These are different legal statuses, as each is associated with different rights, privileges and obligations that flow from being legally recognized as belonging to that class of persons.

There are also different legal techniques associated in practice and in history with “civil death.” The various techniques associated with civil death historically or in use today include stripping the person of honors (such as military honors or titles of nobility), stripping them of rights (such as voting rights), removing civic obligations (such as sitting on a jury), and levying particular sanctions (such as the exclusion from a trade or profession), the taking of property, or banishment. I want to suggest that rather than focusing on the individual techniques used as a way to sharpen the concept, instead attention should be paid first to the creation of different legal statuses as a definitive signal of civil death. The techniques can change over time or place, but in all cases, they are techniques of privation that constitute legal statuses that are either privative or burdened, or in some other way isolate the individual from society by severing the legal channels that connect us to one another. The consequence is the expulsion of the person from the protection and benefits of a community of equal citizens. The materiality of the technique or the real-world impact is a consequence of the legal privation. A flight ban, for example, while not existing in ancient forms of civil death and not being a fundamental right

---

<sup>614</sup> Beer, *supra* note 67.

<sup>615</sup> Price, *supra* note 2.

<sup>616</sup> Pollock and Maitland, *supra* note 20.



per se, can impact a person's capacity for work if it involves travel. What might appear as a minor legal privation impacts a person's ability to find work and then to pay for food and housing. These techniques of minor prohibitions or exclusions can have tremendous impacts on someone's social embeddedness. The techniques (which can change over time) reveal less about the nature of civil death than the emergence of different kinds of legal persons based on forms of privation. I will now turn to comparing the legal persons that have been discussed in previous chapters to the historical and contemporary uses of civil death to show the overlap in the ways in which the contemporary categories map onto the historical law of persons constituting different, privative legal statuses. The following chart represents the conceptual frame of different historical legal persons.

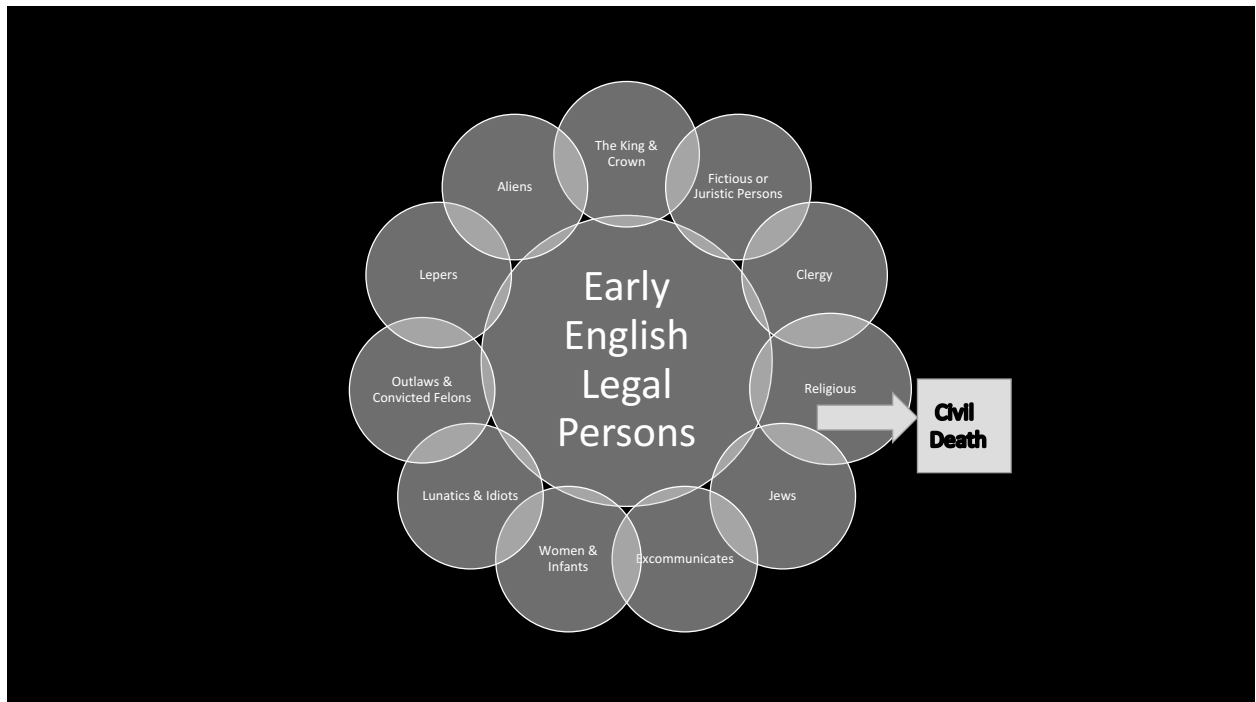


Figure 8 - Pollock and Maitland's Classification of Legal Persons

We are reminded that Pollock and Maitland link the concept of civil death not with the outlaws and convicted felons in this history, but with the “religious” or those entering religious orders, such as the

“monks, nuns ... and friars who have taken vows of poverty and obedience and quitted this world.”<sup>617</sup> The law of persons was “teeming with life” in Maitland’s words, as there were before the nineteenth century (according to him) many classes of persons with different sets of legal privileges and obligations.<sup>618</sup> Figure 1 above is the chart from Chapter 4 on legal status in early English law. This legal fecundity in early English law could be contrasted to the flattening and erasure of the different kinds of legal persons according to Maitland in another publication about the nineteenth-century law of persons.<sup>619</sup> Maitland also observes that we had been moving towards a single-status society until the corporation began to take off as an important kind of legal person.<sup>620</sup> So, as status relations were supposedly replaced by economic transactions based on the free will of formally equal persons, and while the myth of moving towards a single-status society took hold, it is significant that the purely economic person in the form of the corporation reinvigorated what had been a largely vanishing subject in the common law.<sup>621</sup>

Now, let us move to the contemporary discourse on civil death for a comparison to the early English law. Below is the chart from Chapter 2, which is a sampling of some of the contemporary uses of the term “civil death” across the globe. With the exception of the “biometric registries,” a category that also encompasses “social credit systems” as all-encompassing systems that link benefits and access to economic goods to a regulatory regime,<sup>622</sup> all of the uses can be linked to different classes of persons that are marked by legal disabilities, collateral consequences, or some other form of legal privation that sets them apart from other citizens.<sup>623</sup> They are in this sense “privative” legal statuses, a term that I borrow from Dicey’s discussion of the classes of persons that were different from the free and equal

---

<sup>617</sup> Sir Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I* (Cambridge University Press, 1898), 416.

<sup>618</sup> Maitland, *supra* note 226.

<sup>619</sup> *Ibid.*

<sup>620</sup> *Ibid.*

<sup>621</sup> The corporation as a legal person existed since medieval England, but it takes off as a legal form in the moment that voluntary economic relations take the place of group solidarity-based economic relations. Market principles not only dictate the good, but economic persons with a single will populate the area of law. As John Dewey put it, it is a tautology to say that a legal person is what the law says is a legal person. “In saying that ‘person’ might legally mean whatever the law makes it mean, I am trying to say that ‘person’ might be used simply as a synonym for a right-and-duty-bearing unit.” Dewey asks for a cleaner theory before legal personality can be used. It seems, however, this is not the more popular view as legal personality has not disappeared. John Dewey, “The Historic Background of Corporate Legal Personality” (1926) 35:6 Yale Law J 655–673 at 656.

<sup>622</sup> See discussion Chapter 2.

<sup>623</sup> The biometric registries and social credit systems are in fact often criticized for their potential to target and disable disobedient persons as well.

man, which became the model ideal person for the late nineteenth-century legal imagination. He wrote: “English Courts do not recognise any penal (or privative?) status arising under a foreign law, as, for example, the status of civil death, or the civil disabilities or incapacities which may be imposed on priests, nuns, Jews, Protestants, slaves, or others, by the law of the country to which they may belong.”<sup>624</sup> The uses of civil death in the chart below, I argue, constituted different privative statuses.



Figure 9 - Contemporary Civil Death

Figure 2 maps the classes of persons and institutions that civil death has been associated with in practice today. Nuns and monks continue to be discussed as a class of persons who undergo a civil death when they take vows and relinquish all rights to their family’s properties, as one example. There are also different criminal legal statuses contemporarily associated with civil death, such as the “sex-offender,” the “convicted person,” or the “security threat.” Within or between the class of convicted criminals and the class of security threats there are many other classes that could be identified, as well as their own individual classes or subcategories, such as “felons,” “persons with a criminal record,” “persons known to law enforcement,” “enemy combatants,” “parolees,” “terrorists,” and “human

<sup>624</sup> Dicey, *supra* note 272 at 121.

rights violators.” A proper comparative law analysis of this preliminary sketch would make this list even more complicated if we look for comparable legal categories other than the shared legal categories (such as terrorist) which are now global. It is, however, still important to note the persistence of the monk and the “criminal” as two statuses that have persisted. The two statuses today that form the cross-section of legal persons who suffer a civil death, monks and “criminals,” mirror the uses of civil death in the eighteenth century in France before civil death came to have a normative connotation and to be most closely associated with a criminal sanction in the late nineteenth century.<sup>625</sup>

Despite the dominance of the criminological notion of civil death, the contemporary uses of the term still have clusters of outliers that represent a wide range of classes of legal persons, which to a great extent still can be mapped onto the various classes of privative statuses that were in use before the nineteenth century. There is structural continuity in the persistence of special classes of persons. These uses include different kinds of dependent classes of persons, such as minors, persons with mental illness, and persons with disabilities. That is, different classes of persons are placed in distinct legal statuses, such as persons who are elderly and deemed unable to represent themselves and their legal interests. Once they are classed in a certain category, they are placed in various types of relationships of dependence with another person or the state. This “guardianship” is quite explicitly a status relationship in which the person has a privative, dependent legal status. Certain relationships of dependence may be different from other privative statuses in the event that the person is in that case not only unable to act as a free and equal citizen, but some bonds of solidarity or responsibility are simply not owed, they are widely felt to be owed from other persons and society to dependent persons. Dependent persons lack the full array of rights of free and equal citizens, but they are not necessarily (or always) atomized as individuals without relations to others in society. A minor is deprived of the rights of an adult, but the status relationship established with the parent or guardian has a different quality from that of other dependent persons. A person with a felony conviction and a slew of legal disabilities or a person classed as a “dangerous offender” is not only in a different legal status from free and equal citizens; but frequently the legal relations between a person classed as a “criminal” and society are severed, as in the case of familial relationships, work relations, and more. In all cases, these privative legal statuses exist as privative because they are formed in comparison to a full citizen with all the rights and privileges that are accorded to that status. While Arendt argues the over- and

---

<sup>625</sup>See esp. the work of François Richer, *Traité de la Mort Civile* (Paris, 1755).

underprivileged classing of persons corrupts the whole human rights system, it is not because full citizens are eliminated; in fact, it is the opposite, their enjoyment of full privileges are made possible by the creation of privative statuses. Civil death is one of the means of distribution of legal privilege.

## 2.2. *A Category of Analysis for Civil Death*

This entire discussion about status has been to close in on a more precise understanding of civil death. In this section I will contrast two versions of civil death to highlight the novelty of my argument. I propose for analytic clarity, there are two kinds of civil death: Civil death I and Civil death II. Civil death I is an official, legal pronouncement of death (with or without a body) issued by a state<sup>626</sup>; it is the state's ruling that a physical and legal person no longer exists. This is the legal death certificate, and it signifies the death of the legal person as a consequence of the death of the physical person. The second kind of civil death, or Civil death II is what the dissertation has endeavored to make sense of. It is a figurative death that is attributed to a legal person. This form of civil death does not speak to the death of the natural or physical person. Civil death II signals a change in status. We are not left with an absence, but instead the legal person transitions to a new legal status: a privative legal status that translates either to a legal person without certain rights or to a burdened or encumbered status in society. The physical person continues to exist, and legally *a* person continues to exist, but they are a different kind of legal person. They lose the legal privileges and obligations of other free and equal legal persons. One kind of legal person has ceased to exist and is replaced with another kind of legal person. In a sense, “the citizen dies, and only the man remains,” as Beccaria commented, is specifically accurate I would argue because the concept of the citizen rests upon an idea of certain rights of citizenship and is premised on the principle of legal equality between citizens not people.<sup>627</sup> The legal citizen is replaced with a new status that is not equal to the “normal” or full status citizen. The citizen is dead and is replaced by a privative status, such as the status of “slave,” “felon,” “stateless,” or “terrorist.” In that sense, we can understand the uses of civil death as marking the persistence of status-based societies.

---

<sup>626</sup> In civil law jurisdictions the connection between “civil death” and “civil status” is quite explicit. For example, in Quebec, the state requires the reporting of three forms of civil status—birth, marriage, and death. It is reported by individuals or institutions but required by the state and entered into the official register of the state. See e.g. <http://www.etatcivil.gouv.qc.ca/fr/deces/deces.html>

<sup>627</sup> Cesare Beccaria, *On Crimes and Punishments*, James Anson Farrer, ed. (London, 1880), at 183.

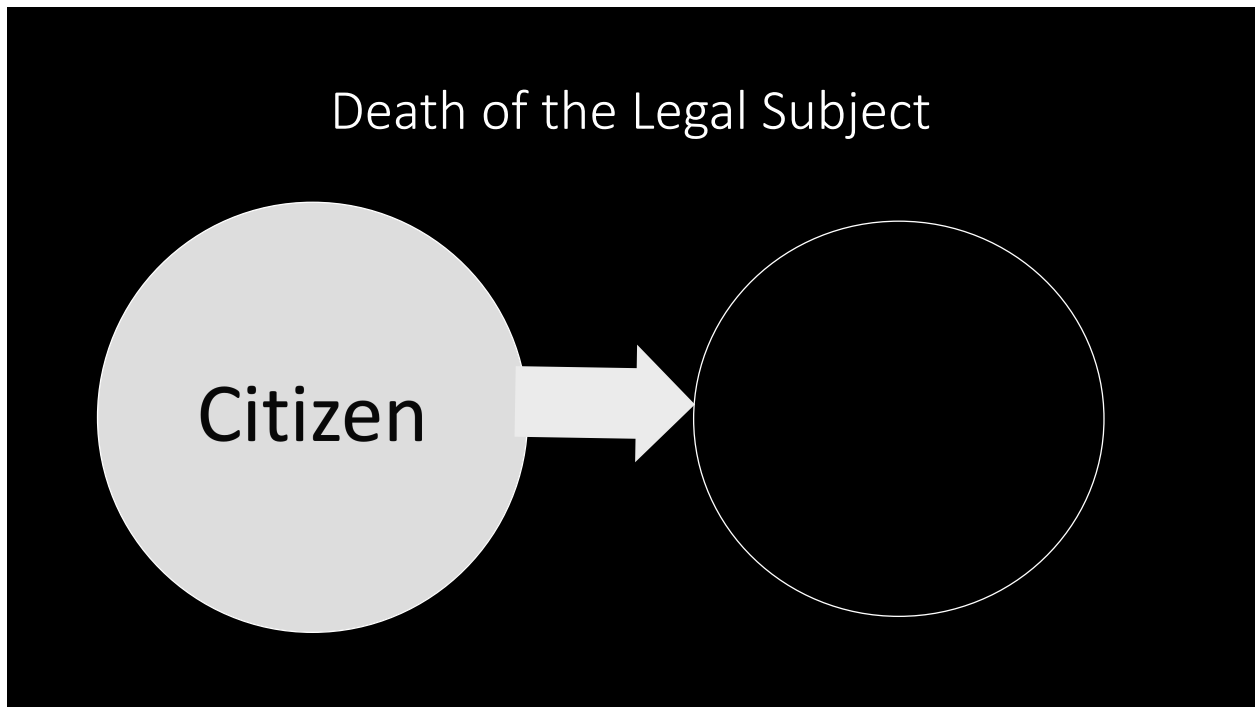


*Figure 10 - Representation of Civil Death I.*

In Civil death I, the legal person or legal capacity ends with the physical person. There is nothing left after the legal person is pronounced dead; there are no rights or privileges of any kind, nor are there obligations owed of any kind for the legal subject. Likewise, there is no indication that some legal subjectivity is carried over as a new legal person in law. We are left with a void. The confusion comes from the use of this model to understand Civil death II. It is an on/off switch—understood as there is or is not legal capacity or legal personality. This is a legal confusion.

In contrast to the finality of an official pronouncement of a death in law that accompanies the death of the body, a legal death in the second sense signals a transition from one legal status to another. Much like the spiritual talk of death as a “passing on” to an afterlife, there is no finality in civil death. In different religions, discussion of an afterlife maintains that the spirit endures, and the person transforms into something else; or as it is spoken of in parts of South Africa, death is a “transition.”<sup>628</sup>

---

<sup>628</sup> See e.g. Robi Ilemona Ekore and Bolatito Lanre-Abass, “African Cultural Concept of Death and the Idea of Advance Care Directives’ *Indian Journal of Palliative Care* 22(4) 2016.

Civil death as a concept has some roots in medieval Christian religious theology and is based on this spiritual model in which death is not an end but a transformation to another form of existence.<sup>629</sup> Civil death, like natural death in Christian theology, is only an end to a present reality. It is in this sense that civil death is a transition from one status to another (Figure below).

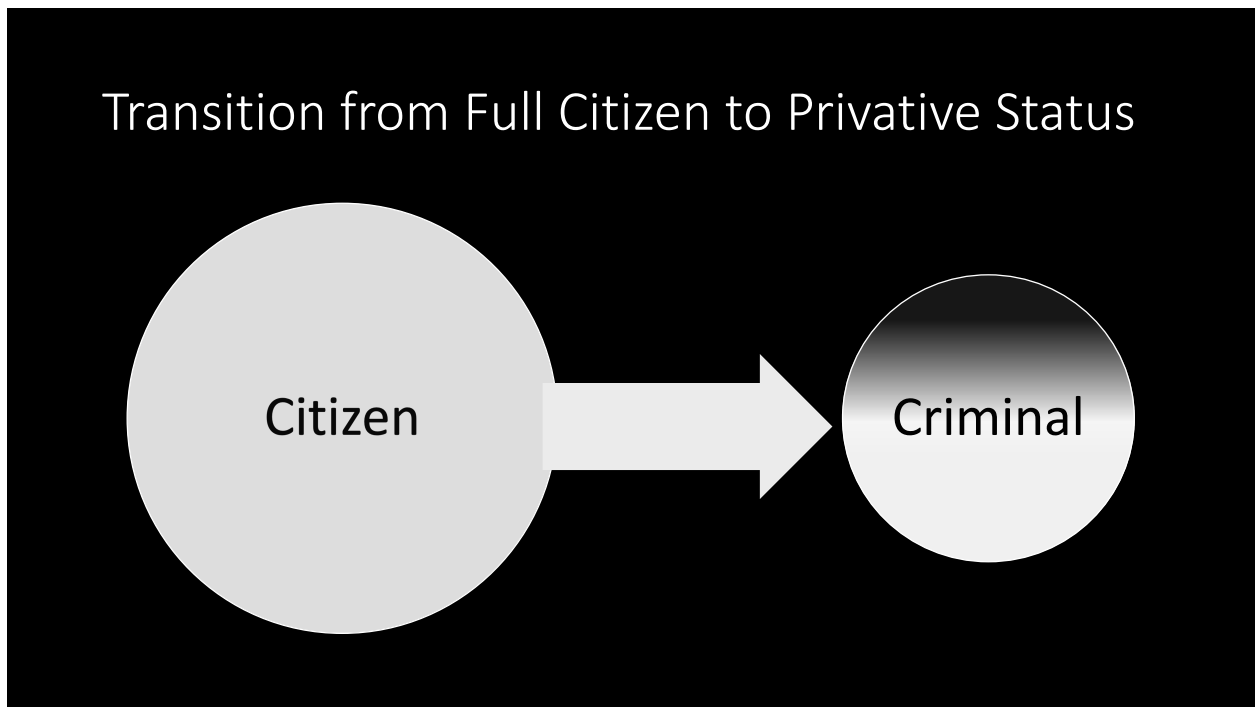


Figure 11 - Representation of Civil Death II.

Unlike in *Figure 10*, in which there is finality in the death of the legal subject and the end of legal personality since nothing remains, in Civil death II (*Figure 11*), there is a transition from citizen to some other status. This transition would have been more obvious historically when there was no presumption of formal equality and no fantasy of living in a single-status society, but rather a broad

---

<sup>629</sup> Eva Christina Eichhorn in her dissertation argues that there are different global conceptions of death, but that we can distinguish between two conceptions of death as “(1) the difference between death as transition and death as end.” Eva Christina Eichhorn, citing G. Ebeling, , *Dogmatik des Christlichen Glaubens*, Vol 1: *Prolegomena*, Erster Teil: *Der Glaube an Gott den Schöpfer der Welt* (Tübingen: Mohr Siebeck, 1979).

Terminal Care as Life Care: A Pastoral Approach to Death and Dying” University of Stellenbosch (December 2007) p. 114



sense that a variety of legal persons populated our imaginaries. In the late nineteenth, twentieth and twenty-first centuries, the presumption of legal equality, especially in liberal democracies, makes discussion of unequal legal statuses less apparent; and instead, we discuss the end to legal personality.

There are some legal statuses that are so common and normalized now that we hardly think of them as privative. Unless one has a developed critique of the existence of classes of legal persons (to denaturalize citizenship,<sup>630</sup> for example) it does not tend to even raise eyebrows that there would be differentiated privileges for different kinds of persons. Minors, migrants, persons with disabilities, and refugees come to mind. The same way that the legal privileges of aristocracy and serfdom seemed natural before the eighteenth and nineteenth centuries, the “naturalness” of citizenship or of underage persons is difficult to unsettle. As an example, the legal statuses of non-citizens for work, housing, education, movement, etc. is a privative status in comparison to that of citizens that touches all parts of one’s life.<sup>631</sup> Further, Waldron’s argument that sortal statuses are different from conditional statuses can contribute to the idea that these differences somehow do not count as real (privative) statuses. The rational basis on which inequality is justified for a privative status (because minors do not have the experience or intellectual capacity to make informed decisions, or because non-citizens are not loyal subjects, or because not every human person can be accepted into a particular national system) makes the statuses appear “natural,” that is, justified in juxtaposition to the irrationality of privative statuses for immutable characteristics such as ethnicity or religion. I would argue, however, that it is the extent to which the legal person is burdened as well as the extent of the social expulsion that make these statuses just as significant, legally, politically, and socially as any other historical status, whether it is called sortal or conditional.

The disabling practices that are part of a privative status apply to various other categories of persons as well. A person who is convicted of a crime loses many of the rights of other citizens. The capacity to be imprisoned for life (as an example) can only happen if the person has a different set of privileges from other citizens, and in most cases these legal exceptions are carefully crafted in law to set out whose rights and which rights have been forfeited by some action. Perhaps along the lines of the prison abolition movement, some criminologists have linked civil death to incarceration itself and the many losses of freedoms prisoners experience that do not necessarily include the loss of the right to

---

<sup>630</sup> See e.g. Moria Paz, “The Law of Walls” (2017) 28:2 *European Journal of International Law* 601–624.

<sup>631</sup> See Martha C Nussbaum, *Frontiers of Justice* (Harvard University Press, 2007).

vote or to complete contracts.<sup>632</sup> This seems to make some sense as the state cannot randomly take people off the streets and put them in prison; it can only be done to persons who do not have the same rights as other citizens including the legal right to movement. People lose their right to freedom through a legal process, and the free citizen is either temporarily or for life converted to a criminal status. Why do I call this a status as opposed to a legal penalty that follows from an action? The application of the penalty of incarceration is different from a penalty of being flogged, for example.<sup>633</sup> If the person is flogged, there is a clear legal penalty outlined in law. When someone becomes a prisoner, they are placed in a relationship of complete dependency on the state. In practice there are a slew of rights that are also forfeit during this time, though they are not spelled out in law. Although civil death as statutory law found in U.S. criminal law splits incarceration from what was called “civil death,” which takes away different rights, such as the rights to vote, marry, or form contracts,<sup>634</sup> other forms of punishment that were similar to incarceration or had a form of incarceration as part of the penalty, such as “transportation,” were also considered a form of civil death.<sup>635</sup> Civil death has had many different penalties associated with it in different moments and national contexts. In its various forms, however, despite the historical variations and contradictions, civil death has always been about incapacitating the legal person by transitioning him or her to a privative legal status.

Legal status can be framed in different terms, depending on the legal institution that is curtailing the privilege, denying the benefit, or excluding the person by severing legal channels of connection in some way. So here is a list of some of the different privative statuses in liberal democracies that are legally permissible as a matter of territorial residence: permanent resident, temporary resident, tourist, refugee claimant or refugee.<sup>636</sup> There are also collective forms of privative statuses such as “domestic nations” in the U.S. and “Bands” in Canada and quasi-collective statuses such as “status Indian” in

---

<sup>632</sup> Price’s critique of the use of the concept of civil death is not that incarceration is not itself a form of civil death, but rather that the legal concept is insufficient to grasp what the loss of rights does to persons or the kinds of remedies society needs for the institution. Price, *supra* note 2.

<sup>633</sup> Peter Moskos, *In Defense of Flogging* (Basic Books, 2013).

<sup>634</sup> See e.g. Pinedo, *supra* note 88.

<sup>635</sup> See e.g. Beverly Boissery, *A Deep Sense of Wrong: the Treason, Trials, and Transportation to New South Wales of Lower Canadian Rebels after the 1838 Rebellion* (Osgoode Society for Canadian Legal History, 1995); Beverly Boissery, “The Punishment of Transportation as Suffered by the Patriots” in F Murray Greenwood and Barry Wright, eds, *Can State Trials Vol II Rebellion Invasion Canadas, 1837-1839* (University of Toronto Press, 2002).

<sup>636</sup> Canada: Immigration and Refugee Protection Act (IRPA) [Canada], SC 2001, c. 27, 1 November 2001, available at: <https://www.refworld.org/docid/4f0dc8f12.html> [accessed 12 April 2021]

which the privative nature of the status can only be understood in relation to a collective.<sup>637</sup> Other privative statuses around criminality can include a person with a criminal record, sex-offender, felon, terrorist or ex-convict, person known to law enforcement, and an at-risk youth. The relationship of guardianship or conservatorship for different classes of persons deemed unfit to care for themselves, their legal relationships and possessions can include minors, persons with mental disabilities, and the mentally ill. There are also persons who do not share the same rights as others, such as LGBTQ+ persons who have in different legal systems been targeted as classes of persons, or by targeting actions, such as the act of sodomy, who have been criminalized by status-enforcing laws.<sup>638</sup> At different times and places persons have lost the capacity to marry, adopt, or gain citizenship.<sup>639</sup> These are all different classes of persons who have a specific legal designation that indicates a different set of rights from other legal persons, but particularly from the standard of the hetero-adult, able-bodied citizen without a criminal record. Some statuses are more privative or burdened than others. These are all statuses for which visible, differentiated treatment exists in law. The differential treatment is often considered to be rationally justified and done in accordance with the law, which is why it is legal.<sup>640</sup>

Arendt was most concerned with stateless persons, or the categories of persons she considered wholly innocent in their conduct; however, the expulsion from political society was something that she described as impacting other groups of persons equally *undesirable* for society. I have endeavored to show, at the very least, that we are far from being a single-status society. While Waldron argues that there is only one sort of person, the human person, Arendt's profoundly personal and honest account of the production of new kinds of humans pushes back against this assertion. Not only in political

---

<sup>637</sup> In Canada the Indian Act (R.S.C., 1985, c.I-5) and in the U.S. *Worcester v. Georgia*, 31 U.S. (6 pet.) 515 (1832).

<sup>638</sup> *Toonen v Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994)

<sup>639</sup> There is always some debate and discussion about whether or not LGBTQ+ is an identity in the same way as other statuses, such as, for example, being a woman. See e.g. Joseph Massad, *Desiring Arabs* (University of Chicago Press, 2007). However, the way in which law constructs status does not require an identity as such, but the withholding of legal privileges in a particular way builds up a status. For example, the inability of same-sex couples to adopt in many places on the basis of the legal status of a non-hetero marriage as opposed to an action is important to establish a status. Non-binary persons and trans persons face even more pernicious legal challenges, as gender non-conformity is frequently considered legitimate grounds for differential treatment/discrimination.

<sup>640</sup> The laws on illegal forms of discrimination often rely on immutable characteristics and the idea that discrimination can only be acceptable when there is a reasonable cause for the differential treatment. The specifications of the tests are, however, highly specific to different legal systems. See e.g. Marie Mercat-Bruns, "The Multiple Grounds of Discrimination" in *Discrimination at Work: Comparing European, French, and American Law* (University of California Press, 2016). Heightened scrutiny for certain groups, such as visible minorities or women, does not provide protection necessarily for certain individuals and groups in cases where there are supposedly rational grounds for the distinctions (such as age). Status seems to circumvent the logic of antidiscrimination or, better stated, rests on it.

theory, but also as a legal form, we have maintained the essential components to status societies, except for the fact that we have omitted the protections that unequal social arrangements used to also provide. As Kennedy focused on the evisceration of solidarity in the supposed turn from status to contract for the normal man, I want to focus on the way that status was first remade for abnormal persons but then extended the attack on communal solidarity to create isolated individuals made even more vulnerable through a relationship of dependence and social marginalization. Pollock remarked in the notes on Maine's *Treatise of Ancient Laws*, "It is curious that the word 'estate,' which is nothing but the French form of 'status,' should have come to stand over against it in an almost opposite category. A man's estate is his measurable property; what we call his status is his position as a lawful man, a voter, and so forth."<sup>641</sup> The status of the excluded is not simply the loss of one's right to vote, but the material conditions that define one's person and one's life. Privative statuses provide one way through mostly material and economic consequences of legal labeling and constraints to inscribe class in a classless society.

In summary, as a category for analysis: civil death marks a transition from one legal status to a privative legal status through formal legal techniques of privation. Although there are various legal techniques that can be associated with civil death, the techniques touching on the contours of legal personality (legal capacity, rights, privileges) that are in fact privative are civil death techniques, understood specifically as providing for a transition to a new configuration of rights and privileges. Civil death is triggered by the removal of rights and privileges or by the formal addition of legal disabilities. It seems important here to note that not all differentiated and privative legal statuses possibly rise to the level of a civil death, as some legal statuses do not in fact isolate the person from society or constitute a burdened existence for more than a short period of time. Civil death is transition, and what people have understood as the status of civil death is *civil death effecting social death*,<sup>642</sup> that is, reconfiguration of rights and privileges in such a way as to put the individual in a class of mostly socially disconnected people. But as the slave shows, nobody is totally dead (apart from forcibly disappeared persons). There may be a phenomenological component to the extent to which a privative legal status could be considered a civil death. Or perhaps it is that there is a minimum amount of privation that is required

---

<sup>641</sup> Pollock's notes in Maine, *supra* note 223 at 192.

<sup>642</sup> Patterson, *supra* note 92. Price, *supra* note 2.

for something to be a new status. The phenomenological character of civil death is, however, a topic for further exploration at another time.

In the next chapter, I will turn my attention to the way privative legal statuses are used in contemporary security frameworks so that persons who fall into some sort of “criminal” legal status, be it a “terrorist” or “felon,” are in a kind of super-enemy status. The purpose of the analysis is to understand the particularity of the civil death techniques used today and to interrogate further why Gabriel Chin termed collateral consequences the “new” civil death.<sup>643</sup> I ask how the use of differentiated legal statuses in itself provides the tools for incapacitation of persons considered security risks. It is in the category of persons considered “criminal” that a justification for any number of cuts against the rights of the person are justified by arguments for security against a threat which seemingly justifies the application of totalitarian forms of law. While I have firmly established that civil death is in fact a legal concept that brings into its logic far more than simply criminal law, the purpose of this section has been to use the concept in the field of criminal justice and security. This may seem like a great deal of work to get to the same conclusion; however, by expanding the scope of what is being analyzed, I have foregrounded the role of status in civil death as opposed to the erosion of rights or stigma. In laying out the full argument, I will be able to show how legal statuses do not have to be permanent to be “sortal,” but that the privation is what gives it the civil death character. The logic of civil death is not an exclusively criminal justice logic, but “criminality” is central to understanding how social expulsion works around issues of loyalty and the severing of legal channels between persons in society.

Hannah Arendt, we are reminded, was particularly interested in the way the concept of criminality worked in the formation of totalitarian forms of law. She argued that the inclusion of “criminals” in the camps was necessary for propaganda purposes to ensure that an “asocial” class of people was seen as those who were targeted. However, it was necessary that a “criminal” only be discarded to the camp from the prison or jail once he had already served his full sentence. The way to kill the juridical person in someone who committed a crime required their entitlement to return to society.

[I]t is harder to kill the juridical person in a man who is guilty of some crime than in a totally innocent person ... In order ... to keep the camp system itself intact, it is essential as long as there is a penal

---

<sup>643</sup> Chin, *supra* note 1.

system in the country that criminals should be sent to the camps only ... when they are actually entitled to their freedom.<sup>644</sup>

Arendt describes a system by which humans are transformed so that they are no longer capable of either normal or criminal *action*. She places the emphasis on punishment for *being* something as opposed to *doing* something. For Arendt that means that the person is not punished for a crime, but for being a criminal. This is the element that distinguishes a system of law from a system of domination for Arendt.<sup>645</sup> Another way to understand the distinction Arendt makes could be akin to the distinction between conditional and sortal statuses for Waldron. A person can be punished for a crime but that punishment must end, otherwise the person is not being punished for their actions but for the kind of person they are. Arendt goes on to describe the importance of separating out the actions from the person so that prevention in the form of "protective custody" takes the place of punishment.<sup>646</sup> Contemporarily, we are living in a time of mass convictions in North America in which a high percentage of the population in both Canada and the United States is being caught in the criminal justice system. The effects of a criminal conviction or of even being "known to the police" can follow a person for their lives and are not part of their punishment but are created because they are supposedly the kinds of persons who pose a risk to society. As crime prevention turns to future-threats legal status becomes centrally important for systemic coherence. Furthermore, through international agreements, security laws are being rolled out to deal with security threats for domestic and international terrorism. Under these laws it is not a criminal justice system that decides who should be punished for their actions, but rather intelligence agencies decide who is a threat and must be incapacitated. International Organizations use security laws to incapacitate individuals and groups for being threats based in part on crimes they have committed, but also for the prevention of crimes they could commit. Civil death is emerging as a fulcrum in the best practices for securitizing international and domestic spaces. In the following chapter, I will explore the development of new civil death

---

<sup>644</sup> *Ibid* at 448.

<sup>645</sup> Arendt has been described as a conservative, and her language and treatment of crime certainly seems to fit that description. Her use of the term "criminal" can feel anachronistically dated compared to how deeply visionary her overall theory is.

<sup>646</sup> Arendt, *supra* note 87.

techniques that use a legal status in the name of security to incapacitate the legal person for *being* a threat, whether that threat is understood as *being* a terrorist or *being* a criminal.



## Chapter 6      Security & Global Civil Death

*Les hommes normaux ne savent pas que tout  
est possible. Même si les témoignages forcent leur  
intelligence à admettre, leurs muscles ne croient pas.*

David Rousset

## 1. Introduction

In November 2020 the Office of the High Commissioner of Human Rights called on Egypt to release three human rights activists who had been arrested on charges of terrorism. The experts called for their release stating, “We deeply regret that despite several calls from the United Nations human rights mechanisms and the international community, Egypt continues to use counter-terrorism legislation to target civil society.”<sup>647</sup> Although the three were released after intense international pressure, several human rights defenders in Egypt have now been placed on the terrorist watch list which has resulted in varying degrees of incapacitation.<sup>648</sup>

I will use the newly constructed category of civil death from the previous chapter to make the case that a wide set of security practices rely on formal, privative legal statuses such as suspected terrorist and have become globalized techniques that target the legal person, are relatively invisible and have no need of the body to exert control. From the previous chapters, I have endeavored to demonstrate that the concept of civil death in fact transverses many different areas of law and is not simply about a criminal or punitive stigma. Civil death is bigger than what many criminologists have made it out to be. It may appear strange after directing the reader to view civil death as a legal technique that is not-specifically criminal, to then end on an argument about civil death in national security and criminal law. The purpose of expanding the scope to examine the civil death concept has served to see new elements of civil death that may have been less apparent without the work. Additionally, the end result is that it is now possible to coherently assemble various techniques in security and criminal justice that were not apparently associated with civil death but can now be affirmatively classed as civil death

---

<sup>647</sup> Lawlor, Mary; Nyaletsossi Voule, Clément et. Al. “UN Experts Call for Release of Egyptian Human Rights Defenders Jailed After Meeting Diplomats” (November 30, 2020), at [https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26549&LangID=E&fbclid=IwAR2qzm c9XnB\\_vdYxv57Yf6EjDzqZsXvZNy4Ke2DwKSCTKdVqjDeg2Rq9hmg](https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26549&LangID=E&fbclid=IwAR2qzm c9XnB_vdYxv57Yf6EjDzqZsXvZNy4Ke2DwKSCTKdVqjDeg2Rq9hmg) (last accessed July 3, 2021)

<sup>648</sup> Cairo Institute for Human Rights Studies “How Egypt Weaponizes Counter Terrorism Laws to Target Human Rights Defenders” (June 28, 2021) at <https://ifex.org/how-egypt-weaponizes-counter-terrorism-laws-to-target-human-rights-defenders/> (Last accessed July, 3, 2021)

techniques without hesitation. These techniques include several economic sanctions such as fines and asset freezes.

Furthermore, the articulation of a category of analysis allows one to see the ways civil death works in relation to other political, legal and economic structures and processes. One aspect of articulating a category of analysis is not simply to be able to use the category to organize the civil death techniques (which can be done by a category of practice), but it is also to mobilize the concept to illuminate something about the way the world is organized. Civil death techniques are part of securitization practices that are currently transforming the way threat and security are being regulated through law. In this chapter, I will further elaborate on and depart from what has become widely accepted as the “new civil death” as outlined in Gabriel Chin’s work.<sup>649</sup> That is, civil death in its contemporary configuration is not only the collateral consequence of a criminal conviction as formal, legal regulations that flow from the conviction like the taint of attainder and stays with someone long after a crime was committed. I will incorporate the collateral consequences of a criminal conviction as an important aspect of civil death techniques, but by establishing that civil death is a status, I can turn the focus towards the ways civil death techniques attach to statuses or form statuses that ground the security practices that are preventive and future oriented. That is, risk analysis needs legal statuses to designate enemies for securitizing domestically as it does against foreign threats. I want to suggest that the collateral consequences are better understood not as consequences of a conviction but as techniques of incapacitation that are not (only) dependent on past convictions but are also future looking as well.

Furthermore, in this chapter, I will bring together the various civil death techniques that comprise the global “best practices” of managing and incapacitating security risks—from “common crime” to national security. I will argue that the “new civil death”<sup>650</sup> is “neo-civil death”<sup>651</sup> as civil death is cast in a neo-liberal framework. The focus can then move to outlining the “neo-civil death techniques” that are capable of both targeting persons who are in economically precarious situations as well as produce economic precarity. Ultimately, in this last chapter security, neoliberalism and legal status come

---

<sup>649</sup> Chin, *supra* note 1.

<sup>650</sup> *Ibid.*

<sup>651</sup> Smiley, *supra* note 17.

together to make sense of the potential of civil death techniques within a technologically, administratively advanced world.

### 1.1. *The New Civil Death is Neo-Civil Death*

I want to start off by flagging the political economy of the new civil death techniques and this requires some elaboration in its own right. New security practices are developing in relationship to market forces and a political ideology that has adopted economic metrics for the normative valuation and construction of social policy. The essence of the argument is quite simple, the growth not only of the carceral system, but of the criminal justice system in general has created economic pressure. As more persons become or are remade into criminals or enemies, inexpensive means are needed to deal with troublesome populations in the name of security. As such I will explore some of the ways the “new civil death” techniques in administrative states are in fact “neo-civil death” techniques. Calvin John Smiley first used the term “neo-civil death” in his doctoral dissertation, in which he used it in reference to private companies profiting off of re-entry programs.<sup>652</sup> He focused on the private and for-profit aspect of the programs, and argues that this is what makes them neoliberal. Although we are using the term in similar ways, there are still significant differences in how neoliberalism plays into our respective analyses.

---

<sup>652</sup> Smiley presents neo-civil death in the following terms:

“The term “neo”-civil death (referred to as neo-civil death from here on) seeks to critically understand how the loss of civil rights not only affects collateral consequences of incarceration but also (de)constructs identity surrounding citizenship for those convicted of a crime. In other words, understanding the differences between “can’t” and “won’t” when it comes to the notion of civic engagement, political participation, and social responsibility. The convicted population is consciously omitted from democratic practices by the State, thus are denied access to many of the rights and privileges other Americans have the opportunity to be involved in. Additionally, American felons become a category unto themselves because they are not a total in-group as well as not a total out-group when it comes to their citizenry. It is this fundamental concept of citizenship that becomes crucial in understanding and establishing the current effects of civil death on both the individual experiencing the loss of rights as well as the impacts on democratic values, specifically underdevelopment of community (Rodney 1970, Marable 2000).” He goes on to explain: “Finally, the use of “neo” might make one think of neo-liberalism, which advocates deregulation and privatization. This is true of contemporary civil death. It will be shown in later chapters that there is private interest and investment in securing and maintaining “reentry” for the purposes of profit by private entities. Thus, it is appropriate to conceive modern civil death (i.e. neo-civil death) as an extension and growth out of neo-liberalism.”

This is a key insight, and while I found Smiley’s work a bit late in the writing, I want to acknowledge his prior-use of the term in connection to the new civil death. I would also like to distinguish my take on civil death from his as he suggests neoliberalism is simply a form of deregulation and privatization. The new forms of civil death occurs in a highly regulatory system which allows for targeting of the legal person without concern for the body. *Ibid* at 13–14.

When I refer to civil death as neoliberal in this chapter, I use the term in three senses. David Harvey refers to neoliberalism as “a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade.”<sup>653</sup> Harvey specifies that within a neoliberal theory the role of the state is to ensure the protection of private property through the “military, defence, police, and legal structures.”<sup>654</sup> The policing and use of the criminal justice system for the protection of private property is one dimension of what I refer to as the neoliberal character of civil death techniques, but it is not the only one. While this definition provides the beginning of a framework, it is more complicated than that since there is a conflict between different property rights. Some property is protected by the state, while the criminal justice system also confiscates and redistributes wealth with a legal structure that configures the distribution of wealth through differentiated property rights. The taking of a car in relation to a drug crime, for example, is not on its face a strong protection of property rights. Neoliberalism can also be understood as a more dispersed power. In the Foucauldian sense, neoliberalism is a kind of rationality and as such it is the reconfiguration of human subjectivity into an economizing subjectivity as well as the translation of all of human life into an economic matrix.<sup>655</sup> That is, the value of human life becomes itself calculated in terms of its economic potential and the merit of social programs is measured by its economic efficiency.

Neoliberalism provides alternative points of reference and measurement by which concrete economic incentives are found to justify the shift to a different form of penal sanctions that target the legal person more directly and as such are cheaper and more efficient than incarceration. Finally, Bernard Harcourt uses neoliberalism in a slightly different way as he describes “neoliberal penalty” as having a much longer history from Foucault’s account while still taking on the idea that it is a rationality that draws the state towards interventions in the market through the penal system and through penal sanctions.<sup>656</sup> The neoliberal logic mandates state intervention through criminal sanctions because “that

---

<sup>653</sup> David Harvey, *A Brief History of Neoliberalism* (Oxford University Press, 2005) at 2.

<sup>654</sup> *Ibid.*

<sup>655</sup> Michel Foucault, *The Birth of Biopolitics: Lectures at the College de France 1978-1979* (Palgrave Macmillan, 2008); Wendy Brown, *In the Ruins of Neoliberalism: The Rise of Antidemocratic Politics in the West* (Columbia University Press, 2019) at 19.

<sup>656</sup> Harcourt distinguishes his own account of neoliberalism from Harvey’s and provides an alternative periodization from Foucault. I take Harcourt to be a synthesis between the two accounts but he distinguishes all three to emphasize that these are different accounts. See Harcourt, *supra* note 235 at 74.

is the proper sphere of governing” as opposed to the market which is supposed to be an intervention-free zone; “neoliberal penalty unleashes the state on the carceral sphere.”<sup>657</sup> For Harcourt, neoliberal penalty has a much longer history than the twentieth century and directs state intervention in particular ways. One important theoretical point Harcourt adds in his theory, is that while liberalism made the interventions in the market explicit, neoliberalism renders it invisible. Harcourt’s qualification or addition to Foucault’s insights are central for understanding the complicated ways civil death techniques protect some property and confiscate or take away other property simultaneously as market interventions rendering the whole process less visible and more “natural.” I use neoliberal in these senses as I think each gets to meaningful insights about the contemporary uses of civil death techniques.

There are three points that are woven into this section. First, the configuration of “order maintenance” through incapacitation is reconfigured for economic reasons away from incarceration towards a disaggregation of penalties that incapacitate by targeting the legal person in other ways.<sup>658</sup> It is cheaper to strip a naturalized citizen of their citizenship and deport them than to imprison them, and it can be a net gain to confiscate their property. Second, the use of some civil death techniques is designed to change behavior based on economic calculations. Subjectivities are transformed so that they are economically motivated at the individual and societal level. As civil death techniques proliferate, they target the legal person and by creating a privative status another, cheaper way to manage segments of the population emerges as “superfluous” persons can be expelled from a well-functioning economy based on full equality. That is, it makes a supposedly level playing field less level so that there is an economic tilt in favor of some and against others so that under conditions of competition privilege is protected. Finally, there is a way in which civil death lends itself to the protection of certain property while simultaneously redistributing wealth away from dissident populations and political opposition. Due in part to the economic efficiency of civil death techniques and the possibility to use them expansively, they become tools against public forms of protest that are non-violent, but disruptive and

---

<sup>657</sup> Harcourt, *supra* note 235.

<sup>658</sup> Bernard Harcourt claims that order maintenance dates back to the nineteenth century. *Ibid.* See e.g. the rationale as stated in the U.S. Bureau of Justice Assistance in which they begin the report on fines with the following observation, “As prisons continue to be overburdened with an ever-increasing number of inmates, States are searching for punishment options that are less costly than incarceration, yet limit the freedom of convicted criminals.” 1996 The Justice Management Institute and the Vera Institute of Justice, *How To Use Structured Fines (Day Fines) as an Intermediate Sanction*, Washington DC: Bureau of Justice Assistance (1996).

can threaten a particular kind of economic security. These are three strands that together form the argument that civil death is neoliberal.

As I will go into more depth later in this chapter, the risk analysis paradigm for criminal justice comes from the discipline of economics and in its speculative nature attempts to control the future in the present. A Foucauldian insight tells us that there is a neoliberal logic in that the risk can be quantified, measured, and contained, but also this risk analysis underpins all dimensions of social life. Predictive policing is a kind of economization of human behavior and is deeply neoliberal in this sense as well. Risk analysis is an integral part of preventive policing and criminal justice as crime prevention has a neoliberal side that fits with contemporary civil death techniques. As I will argue in this section, the maintenance of differentiated legal statuses and the expansion of these categories to include more persons is a manner of intervening in the economy without intervening in the market directly. The expansion of civil death techniques works to support the expansion of the number of persons caught in the criminal justice net.

## 1.2. *The Economics of Death*

I want to draw two things from the historical doctrine of civil death to keep in the back of the mind while reading this section: there is an economic incentive for financial penalties or disabilities, and historically the confiscation of property was often considered the most egregious form of civil death.<sup>659</sup> Secondly, the attribution of a biological cause to criminality, to "racialize" it or to make it in some way about kinds of persons rather than about behavior is facilitated by the creation of privative statuses in

---

<sup>659</sup> This is possibly one of the motivations behind the prohibition of Bills of Attainder in the U.S. Constitution. See Madison, James "Federalist Papers: No. 44: Restrictions on the Authority of the Several States" Lillian Goldman Law Library (2008).

Bills of attainder, [...] are contrary to the first principles of the social compact, and to every principle of sound legislation. [...] they are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us nevertheless that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favor of persons security and private rights [...] The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting person rights, become jobs in the hands of enterprising and influential speculators, and snares to the more-industrious and less informed part of the community."



which tainted persons are relegated.<sup>660</sup> Financial incentives are sometimes explicitly part of the rationale for civil death techniques by states, and yet this aspect has received insufficient attention.<sup>661</sup> There are deep economic roots within the ways civil death was configured as an institution that follow along the line Bernard Harcourt explained as early neoliberal penalty. Civil death was associated in the eighteenth and nineteenth centuries with practices that stripped persons of property by using fines and forfeitures to debilitate the person but also to generate income for the Crown or state and to redistribute wealth to loyal subjects. Finally, recalling from the previous chapter the way old status relationships yielded to contract under the banner of *laissez faire* economics meant that in its new incarnation the security status relationships were remade without the protections of old regime status solidarity.

Arguably, civil death as the collateral consequences of criminal convictions in the United States is emerging in part due to cost efficiency calculations.<sup>662</sup> While rates of governmental expenditure have sharply increased in recent decades, politically both the right and left converge in the conclusion that more than \$80 billion spent annually on corrections in the U.S. is too much.<sup>663</sup> Likewise, in Canada the approximately \$20 billion spent annually is a tremendous sum compared to its overall GDP.<sup>664</sup> Within the Canadian criminal justice system, older models are giving way to more managerial modes of policing. Under the header, *Economics of policing, intelligence-led policing in Newfoundland* the new models are described in the following way:

---

<sup>660</sup> See e.g. chapter 4 in which the Catholic and Jewish penalties were used to either redistribute property or else to direct who had control of the economy. See also Il Van Jaarsveld, “The History of In Rem Forfeiture: A Penal Legacy of the Past” (2006) 12:2 *Fundamina* 137.; Savigny directly refutes the claim that civil death is necessarily linked to the confiscation of property and he provides counter examples for cases in which it is not. Historically there may not have always been an economic dimension to the “notion” of civil death as Savigny puts it. However, it was always available as a collateral consequence of civil death and it seems it is a facet of the concept and thus deserves serious inquiry. Friedrich Karl von Savigny, *Jural Relations, Or, the Roman Law of Persons as Subjects of Jural Relations: Being a Translation of the Second Book of Savigny’s System of Modern Roman Law* (1884)

<sup>661</sup> The exception is of course the work by Smiley, *supra* note 17.

<sup>662</sup> *Ibid.*

<sup>663</sup> U.S. Department of Education “Report: Increases in Spending on Corrections Far Outpace Education” (July 7, 2016), online: *US Department of Education* <<https://www.ed.gov/news/press-releases/report-increases-spending-corrections-far-outpace-education>> (Last Accessed July 27, 2021).

<sup>664</sup> “Financial Facts on Canadian Prisons” (Aug. 23, 2018), online: *John Howard Society of Canada* <<https://johnhoward.ca/blog/financial-facts-canadian-prisons/>> (Last Accessed July. 27, 2021)

The Royal Newfoundland Constabulary implemented intelligence-led policing in 2011 as a business model and managerial philosophy. Intelligence-led policing uses data and crime intelligence to support objective, informed decision making that maximizes police efficiency. The approach has been adopted as a best practice in many police organizations around the world.<sup>665</sup>

The language displays an inching in of economic logics into the way public services are being reconfigured. It is interesting that policing has a business model to speak of while it is also described as a “managerial philosophy” in order to “maximize police efficiency.” This model of policing requires a targeted approach that is designed not to police everyone equally, but instead to identify *a priori* problem persons in society for increased scrutiny in order to incapacitate them to prevent future crime.

In this moment, everyone is looking for alternatives to costly public expenditures such as mass incarceration, lengthy and costly court trials, and police patrols on the streets. Through targeted, intelligence-led policing that finds criminal persons and uses collateral consequences after a conviction or some form of legal privation before a conviction, these techniques offset what is already a very costly segment of public spending. These cost-efficient models of policing are being shared among allies and International Organizations alike.<sup>666</sup> Once a model is used at the international level by UN police-keeping forces, it becomes a legitimized form of international best practices.<sup>667</sup>

---

<sup>665</sup> “Intelligence-Led Policing”, online: *Public Safety Canada* <<https://www.publicsafety.gc.ca/cnt/cntrng-crm/plcng/cnmcs-plcng/ndx/snpss-en.aspx?n=37>> (Last Accessed July 27, 2021).

<sup>666</sup> See esp. Stuart Schrader, *Badges without Borders: How Global Counterinsurgency Transformed American Policing* (University of California Press, 2019).

<sup>667</sup> See e.g. *Deploying the Best: Enhancing Training for United Nations Peacekeepers*, by Alberto Cutillo (2013) at 11. Alberto Cutillo, *Deploying the Best: Enhancing Training for the United Nations Peacekeepers* (2013), online: *International Peace Institute* [https://www.ipinst.org/wp-content/uploads/publications/the\\_3.pdf](https://www.ipinst.org/wp-content/uploads/publications/the_3.pdf) (last visited July 26, 2021):

At their 2004 meeting in Sea Island, leaders of the G8 adopted an “Action Plan for Expanding Global Capability for Peace Support Operations.” This involved supporting other countries in training their national forces to make them more effective in peace operations. The Action Plan made an explicit pledge to develop activities aimed at supporting UN-led operations and made a specific commitment to train a total of approximately 75,000 troops worldwide by 2010, with a special focus on Africa. As part of this training target, special emphasis was put on police forces, through a commitment to both continued support to existing centers dedicated to training Carabinieri/Gendarme-like forces, and by supporting relevant new initiatives. In particular, the G8 countries pledged to “support the Italian initiative to establish, on a multinational basis, an international training center that would serve as a Center of Excellence to provide training and skills for peace support operations. The center will build on the experience and expertise of the Carabinieri, Gendarmerie and other similar forces to develop Carabinieri/Gendarme-like units of interested nations, including those in Africa, for peace support operations. (footnotes omitted)

The ever-increasing numbers of Americans and to a lesser extent Canadians who have come into contact with the criminal justice systems, and the financial pressures on the respective carceral systems have led to a situation in which large swaths of citizens are living outside the prison system but under state control that often include debilitating consequences of criminal convictions.<sup>668</sup> Perhaps not surprisingly, the majority of persons currently under state supervision are not even inside prisons or jails. The number of Americans and Canadians living under state-surveillance outside a penal institution far exceeds the more visible high number of persons inside the prisons.<sup>669</sup> As higher percentages of persons come into contact with the criminal justice system in the U.S., there are simultaneously higher numbers of consequences for criminal records.<sup>670</sup> In the United States, although rates have not increased uniformly, every state has had a significant increase in the percentage of citizens with a felony conviction from 1980 to 2010.<sup>671</sup> “Most of the growth in U.S. correctional supervision has been among nonincarcerated probationers and parolees who are supervised in their communities.”<sup>672</sup> John Calvin Smiley’s work on civil death goes into detail about the connection of civil death and parole as economically efficient but with debilitating if not cruel conditions built-in, so the state can punish inexpensively while not giving up on a tough on crime stance.<sup>673</sup> Further, the

---

<sup>668</sup>The calls to reduce the cost of the criminal justice system come from all sides. The economic crunch can lead to better policy outcomes as it opens up more space to resist tough on crime stances and there are good policy and economic reasons to reduce incarceration. A difficulty can occur when the calls to reduce the prison population are couched inside an overall framework that views a tough on crime stance as the only way to deal with crime. Changes will tend to expand as the market expands as Hadar Aviram explains, “It is therefore more accurate to present the correctional regime not just via the concept of actuarial risk assessment, but as the outcome of a cost/risk equation.” They go on to say, there is a strong correlation between how much a state can spend in general and how much it spends on corrections in particular, and as we saw in chapter 2, some of the major changes in law enforcement, sentencing, and corrections corresponded with cycles of the market.” Hadar Aviram, *Cheap on Crime* (University of California Press, 2015) at 121.

<sup>669</sup> There are important differences between the American and Canadian rates of incarceration and rates of convictions, however, both states have relatively high rates of incarceration and high rates of community supervision. See e.g. Michelle S Phelps, “Ending Mass Probation: Sentencing, Supervision, and Revocation” (2018) 28:1 *Future of Children* 125–146.

<sup>670</sup> Sarah KS Shannon et al, “The Growth, Scope, and Spatial Distribution of People With Felony Records in the United States, 1948–2010” (2017) 54:5 *Demography* 1795–1818.

<sup>671</sup> Tim Henderson, “Felony Conviction Rates Have Risen Sharply, But Unevenly”, January 2, online: *The Pew Charitable Trust* <<https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/01/02/felony-conviction-rates-have-risen-sharply-but-unevenly>> (last visited July 26, 2021).

<sup>672</sup> Shannon et al, *supra* note 670 at 1796.

<sup>673</sup> Smiley, *supra* note 17.

conditions built into parole and other forms of conditional sentencing become themselves the cause of the majority of criminal violations as people are set up to fail once they enter the criminal system.<sup>674</sup>

Discussions about the U.S. as a carceral state are shifting as the net-widening effects with the proliferation of consequences of a felony conviction even without imprisonment, are a new troubling trend for criminologists. Studying the trends in the changing patterns of convictions and incarceration, Sarah Shannon and her co-authors observed, “although incarceration levels are stabilizing or decreasing, the broader population of those with felony records will likely continue to grow as states turn to community supervision as an alternative to incarceration.”<sup>675</sup> The trends in Canada are different as the prison population is going down and the number of persons under community supervision is trending downward since the change in government.<sup>676</sup> Still, significant numbers of persons have criminal records that are kept by the government but there is no way to track this number as it includes records where there was no conviction as well as where there were no formal charges brought against the person; these can include non-criminal forms of contact as well such as mental wellness checks.<sup>677</sup> The literature that addresses community supervision and collateral consequences domestically has created a fairly consistent line in terms of issues and problems. There is a danger of further “net widening effect” with the use of collateral consequences as incapacitating techniques since they are cheap compared to incarceration.<sup>678</sup> The effects of these consequences are difficult to challenge with legal means since the consequences are regulatory and often not subject to the same level of judicial scrutiny as criminal penalties that are explicitly punishment. Moreover, since the effects

---

<sup>674</sup> Nora Demleitner, “How to Change the Philosophy and Practice of Probation and Supervised Release: Data Analytics, Cost Control, Focus on Reentry, and a Clear Mission” (2016) 28:4 Federal Sentencing Reporter 231–238 at 235.

Ron Corbett, project director for the Robina Institute’s Community Sanctions and Revocations Project and a former acting commissioner of the Massachusetts Probation Department, calls “the sinister side of probation” the place “where the promise of redemption is subverted by a lurking punitiveness.” In this view, the large number of revocations is due to “closer enforcement and increased requirements imposed on probationers.” Sanctions imposed for probation violations, however, frequently lead to disproportionate sentences, with probation merely becoming “a staging area for eventual imprisonment.”

<sup>675</sup> Shannon et al, *supra* note 670.

<sup>676</sup> Jamil Malakieh, “Adult and youth correctional statistics in Canada, 2018/2019” (December 20, 2021), online: *Statistics Canada* <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2020001/article/00016-eng.htm>> (last visited July 26, 2021).

<sup>677</sup> *Help Wanted: Reducing Barriers for Ontario’s Youth with Police Records*, by John Howard Society of Ontario (2014) at 14.

<sup>678</sup> See e.g. Michelle Phelps, “The Paradox of Probation: Community Supervision in the Age of Mass Incarceration” (2013) 35:1–2 Law & Policy 51.

are often cumulative and invisible compared to say incarceration or the infliction of bodily pain, they don't necessarily appear terribly harsh individually while the cumulative effects are difficult to track.

## 2. Securitizing Domestic Spaces

The expanding framework of domestic wars in the U.S. such as the war on drugs,<sup>679</sup> the war on crime,<sup>680</sup> and the war on terror,<sup>681</sup> has contributed to the securitization of criminal justice.<sup>682</sup> But further, as will be shown, the very slippery definition and assignment of anticipatory crimes, especially around the war on terror has transformed the international legal order in its use of civil death. My intention through this chapter, is to show that the creation in law of the domestic war-logic in general and the crime of terrorism in particular require domestic statuses that designate the enemy in order for international security practices to work domestically. This kind of use of privative legal statuses is dangerous for liberal democracies and the rule of law as it forces the category of crime to morph into something new. The new anticipatory crime practices rely on civil death statuses and the withholding of rights often without legal hearings or convictions in order to work. This is not only bad for countries domestically, but it is providing a model for totalitarian governments around the world. The definitions of terrorism, often slippery, are almost always defined as acts that are politically or ideologically motivated, and a significant problem is that as criminal justice in general becomes more about regulating risk, and anticipatory crimes proliferate, what constitutes a terrorist threat become the ideological beliefs behind it. As I will show in this chapter, two things happen when the crime of terrorism collapses with “normal” criminal law to create a framework for the incapacitation of threat by creating classes of threatening persons. First, dissent itself can become the target as a threat to security, and secondly, persons get classed for being threats in lieu of dealing with criminal or even threatening actions.

---

<sup>679</sup> Eric L. Jensen & Jurg Gerber, “The civil forfeiture of assets and the war on drugs: expanding criminal sanctions while reducing due process protections” (1996) 42:3 *Crime Delinquency* 421; Derrick Wilson, “Drug Asset Forfeiture: in The War On Drugs, is The Innocent Spouse the Loser?” (1991) 30:1 *Univ Louisville J Fam Law* 1991.

<sup>680</sup> Elizabeth Hinton, *From the War on Poverty to the War on Crime* (Harvard University Press, 2017).

<sup>681</sup> Justin Florence, “Making the No Fly List Fly: A Due Process Model for Terrorist Watchlists” (2006) 115 *Yale Law Journal* 2148.

<sup>682</sup> For an account of the influence counterinsurgency missions abroad have had on regular domestic criminal justice, see esp. Bernard Harcourt, *The Counterrevolution* (Basic Books, 2018).

As security frameworks become globalized and internationalized through security partnerships that incorporate nations and multinational organizations, America's so called "war on terror" has become a global war on terror. Canada, the United Kingdom, the EU, Egypt, and Ethiopia, to name only a few, now have their own "wars on terror" that employ similar legal techniques to deal with security threats. Securitization techniques that include sanctions, which are often administrative or rely on police powers,<sup>683</sup> provide an internationally legitimized framework for securitizing domestic spaces globally. In this section, I will show how securitization practices are morphing into practices that establish privative and debilitating legal statuses that are used to regulate risk. That is, I intend to establish that certain security practices or sanctions are civil death techniques and as such threaten the legal capacity of persons.

Securitization practices are collapsing many different distinctions that previously existed in the law and in the political institutions of the state. Nations in a post 9/11 world started legislating for the crime of terrorism, whether it be foreign or domestic, within a single legal framework.<sup>684</sup> The crime of terrorism brings different institutions and agencies together so that law enforcement and national security agencies as well as the private sector and other security-related organizations are being drawn in to cooperate and work together.<sup>685</sup> As different political bodies or institutions lose the strong barriers of separation such as between the military and the police, so too are domestic and foreign logics and techniques collapsing into one another through legal frameworks. While historically within a Westphalian system, states would deal at least in principle with other states in foreign relations, increasingly it is accepted that security practices are piercing the veil of sovereignty so that states and International Governmental Organizations such as the UN Security Council also deal with individual

---

<sup>683</sup> Frédéric Mégret, "Terrorism and Human Rights A Decade of Canadian Practices" (2011) 1–25. FORMAT: online: SSRN < [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1762763#](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1762763#) > (last visited July 26, 2021).

<sup>684</sup> See e.g. USA PATRIOT Act (Pub. L. No. 107-52) (October 26, 2001) Sec 802 (definitions) and 806 (asset forfeiture), online: *United States Congress* < <https://www.congress.gov/107/plaws/publ56/PLAW-107publ56.pdf> > (last visited July 26, 2021).

<sup>685</sup> *The Views of Canadian Scholars on the Impact of the Anti-Terrorism Act*, by Thomas Gabor (Ottawa, 2004) at 17. Thomas Gabor, (February 15, 2005), online: *Government of Canada, Department of Justice* < [https://www.justice.gc.ca/eng/rp-pr/cj-jp/antiter/rr05\\_1/index.html](https://www.justice.gc.ca/eng/rp-pr/cj-jp/antiter/rr05_1/index.html) > (last visited July 26, 2021).



persons belonging to other states. This came about through different forms of state-to-state cooperation and apparent integration.<sup>686</sup>

The world-changing 9/11 attack on the U.S. meant that the American response to terrorism would influence the domestic terrorism frameworks of other nations.<sup>687</sup> Likewise, since the particular threat the U.S. faced was itself already a global movement threatening states and their interests, it was relatively easy to create a global “war on terror” based on international cooperation and the sharing of information, intelligence, and best practices. After Bin Laden made clear his intention to topple the government of Saudi Arabia and the governments of the Arabian Peninsula in 2003, the Middle East and the U.S. joined in a global war on terror. Drawing from the testimony of Daniel Glaser, the Deputy Assistant Secretary in the Office of Terrorist Financing and Financial Crimes, who testified to Congress stating that “In the years after 2003, the governments of the Arab Gulf increased their counterterrorism cooperation with the United States across the board in the military, intelligence, and law enforcement worlds.”<sup>688</sup> There was a comprehensive transformation of the ways in which these countries cooperated and the ways in which the institutions for both foreign and domestic issues began to integrate. Material changes in the ways a global war on terror transforms countries around the world is manifested in integrating security systems. A country like Senegal, which struggles economically, nonetheless has state of the art security equipment in their airports which has been financed by other countries to protect international borders as a common concern.<sup>689</sup> Bahrain and Iraq have trained under U.S. Department of Justice programs for International Criminal Investigations.<sup>690</sup>

---

<sup>686</sup> Caroline Dunton & Veronica Kitchen, “Paradiplomatic Policing and Relocating Canadian Foreign Policy” (2014) 69:2 183–197. Caroline Dunton & Veronica Kitchen. “Paradiplomatic policing and Relocating Canadian foreign policy” (2014) 69:2 International Journal: Canada's Journal of Global Policy Analysis 183. FORMAT: Journal title

<sup>687</sup> Austen D Givens, Nathan E Busch & Alan D Bersin, “Going Global: The international dimensions of U.S. homeland security policy” (2018) 11:3 J Strateg Secur 1–34.

<sup>688</sup> Thomas Warrick & Joze Pelayo, *Improving Counterterrorism and Law Enforcement Cooperation between the United States and the Arab Gulf States* (October 20, 2020), online: *The Atlantic Council* < <https://www.atlanticcouncil.org/in-depth-research-reports/improving-counterterrorism-and-law-enforcement-cooperation-between-the-united-states-and-the-arab-gulf-states/> > (last visited July 26, 2021).

<sup>689</sup> APO Group, “Department of State Equipment Grant Boosts Security at Senegal Airport” (December 9, 2019), online: *African News* <https://www.africanews.com/2019/08/01/department-of-state-equipment-grant-boosts-security-at-senegal-airport/> (last visited July 26, 2021).

<sup>690</sup> Thomas Warrick & Joze Pelayo, *Improving Counterterrorism and Law Enforcement Cooperation between the United States and the Arab Gulf States* (Atlantic Council, 2020).



Nigerian police are trained alongside their military in the same tactics by U.S. companies.<sup>691</sup> The police, the borders and the administration of justice have been changed in countries around the world as they respond to terrorist threats in an integrated and transnational response to terrorism.<sup>692</sup>

Canada is in a special security relationship with the United States comparatively speaking. Canada and the U.S. interests have been aligned in various ways and according to global affairs Canada, “the partnership is forged by shared geography, similar values, common interests, deep personal connections” as well as “the world’s largest trading relationship.”<sup>693</sup> The two countries have an integrated economic relationship, a shared land border, and Canada also shares with the U.S. a special defense relationship in which intelligence and personnel are shared as well.<sup>694</sup> The integration of security personnel as well as the integration of security practices is rather unique but similar to more integrated nations under shared political and legal frameworks such as the European Union. Canadian public safety has changed in relation to the U.S. war on terror, as one Public Safety Minister was quoted as saying, “We have to satisfy the Americans that we are also concerned about security and that we are a reliable partner because if we don’t, that will impact our economic wellbeing...”<sup>695</sup> Despite some important differences, the U.S.’s war on terror is, in this special relationship, also Canada’s war on terror.<sup>696</sup>

This integration of different states and the simultaneous integration of foreign and domestic institutions impact the ways states securitize foreign and domestic threats in terms of conceptual

---

<sup>691</sup> Nosmot Gbadamosi, “Foreign Governments Are Aiding Nigeria’s Violence Against Protesters” *Foreign Policy* (December 2020) 1. Nosmot Gbadamosi, “Foreign Governments Are Aiding in Nigeria’s Violence Against Protesters” (December 20, 2020), online: *Foreign Policy* < <https://foreignpolicy.com/2020/12/02/foreign-governments-are-aiding-nigerias-violence-against-protesters/> > (last visited July 26, 2021).

<sup>692</sup> Schrader, *supra* note 666.

<sup>693</sup> “Canada-United States Relations”, online: *Government of Canada* <<https://www.international.gc.ca/country-pays/us-eu/relations.aspx?lang=eng>> (Last accessed January 5, 2021)

<sup>694</sup> Stéfanie von Hlatky, Jessica N Trisko & Marjolein BM Zweekhorst, “Sharing the Burden of the Border : Layered Security Co-operation and the Canada-US Frontier” (2012) 45:1 *Canadian Journal of Political Science / Revue canadienne de science politique* 63–88.

<sup>695</sup> *Ibid* at 74.

<sup>696</sup> There are some very important differences between the two countries and their approach to terrorism. I will touch on this later in the chapter, but Canada carves out purposeful exceptions in the crime of terrorism for acts that are property crimes as forms of protest or expressions of political dissent. *E.g.* Simeon, James. “The evolving common Law Jurisprudence combatting the threat of terrorism in the United Kingdom, United states, and Canada” (2019) 8:1 *Laws* 5; “Understanding Bill C-51 in Canada: The Anti-Terrorism Act, 2015” (May 19, 2015), online: *Canadian Civil Liberties Association* < <https://ccla.org/understanding-bill-c-51-the-anti-terrorism-act-2015/> > (last visited July 26, 2021).

paradigms as well. The field of security is one that occupies itself with the management of risk.<sup>697</sup> In a post 9/11 world, when terrorist threats shifted from relatively low casualty campaigns to instead pose potentially catastrophic destruction and loss of life, the field of security transformed to incorporate risk analysis into its legal framework.<sup>698</sup> The concept of risk, it has been observed, was developed in the field of economics and presumes that risk can be “classified, quantified, and to some extent, prevented.”<sup>699</sup> It is thus a way to establish “the future in the present,” by making certain calculations about what might happen in the future.<sup>700</sup> While security is historically understood in IR theory as a concept that deals with external relations, there is a merging of security and risk so that both categories converge simultaneously along with the domestic and the international. It is now commonplace for police to gather “intelligence” on citizens and prison wardens in Canada to talk about “intelligence gathering” on inmates as the inside and outside of prisons and the insides and outsides of states bleed into one another. I believe it fair to say that in Canada’s attempt to not be the U.S. —to not be a country driven to punish anyone who offends—Canada turns to risk management as a more humane form of securitizing its population.<sup>701</sup> In all these cases, the reintroduction of permanent classes of persons or

---

<sup>697</sup> Lund Petersen argues that though they were disciplinarily separated, risk analysis and security have converged as threats that include terrorism and climate change have potentially devastating impacts. Karen Lund Petersen, “Terrorism: When Risk Meets Security” (2008) 33:2 *Altern Glob Local Polit* 173.

<sup>698</sup> Richard Posner, *Catastrophe: Risk and Response* (Oxford University Press, 2004). As an example of the shift in the treatment of different acts classed as terrorism, successfully hijacking a plane in the early 1970s could carry a penalty as minor as a few years in prison and allied countries would even grant asylum to “terrorists”. One Black Panther member who hijacked a plane to Algeria at gunpoint commented that hijackings were rather common in the early 1970s. Consequently, the story of this member of the Black Panthers is that he settled in France and became a social worker as the French Government saw the cause of the struggle exculpatory for the hijacking. That is no longer the case as allies are drawn into a common struggle against terrorism. see Chris Bockman, “The Black Panther who hijacked a jet to Algeria and started again in France”, *BBC Stories* (6 December 2020) 1. See also Karen Lund Petersen, “Terrorism : When Risk Meets Security” (2008) 33:2 *Alternatives: Global, Local, Political* 173–190.

<sup>699</sup> Petersen, *supra* note 698 at 177. In Posner’s account of evaluating the risk of catastrophic events he argues that while economic analysis should not be the only metric for the evaluation it should be an important one. His argument for the evaluation requires quantifying things like the cost of extinction of the human race. “But now suppose the cost of extinction of the human race, which as we’ll see later in this chapter can be very conservatively estimated at \$600 trillion (an estimate that therefore biases the analysis in favor of RHIC), is discounted by a .0000001 (1 in 10 million) probability.” Posner, *supra* note 698 at 141.

<sup>700</sup> Petersen, *supra* note 698 at 177.

<sup>701</sup> Stefanie Rezanoff, Akm Moniruzzaman & Julian Somers, “Prolific and Priority Offenders in British Columbia, Canada: A Preliminary Analysis of Recidivism1” (2012) 7:2 *International Journal of Criminal Justice Sciences* 562–574. In Canada there is comparatively more governmental surveillance after release of “high risk sex-offenders” compared to the American model, which makes the information public for personal monitoring. It is justified as a more humane approach. Patrick Lussier et al, “Community Risk Management of High-Risk Sex Offenders in Canada: Findings From a Quasi-Experimental Study” (2014) 31:2 *Justice Quarterly* 287–314.

a legal status based on how threatening or risky they are perceived to be facilitates the state's management of risk-mitigation practices.

National security and regular policing have turned to intelligence-led security. The way “we” in North America conduct military campaigns abroad, is how “we” conduct domestic counterinsurgency at home.<sup>702</sup> Abroad, we have moved from large scale battles to “total surveillance, surgical operations, targeted strikes to eliminate small enclaves, psychological tactics, and political techniques to gain the trust of the people.”<sup>703</sup> At home, we use the same techniques including surveillance and intelligence gathering, targeted policing and targeted legal incapacitations but it is “untethered” from any specific threat or war as it has become a form of governance.<sup>704</sup> In all cases, the legal status of persons (civilian/combatant in war, and lawful/criminal in domestic spaces) support, or in fact, are necessary to this mode of governance.

While the metaphors of war take over the manner of securing domestic spaces, a continuity is established between everyday crime and high treason. Under the rubric of internal war, post-conviction restrictions proliferate as a way to incapacitate and control “security risks” from common crime. The same post-release civil death techniques are also being applied to persons without convictions as “security risks” under anti-terrorism legislation. In Canada, the situation is somewhat muted and yet still, risk-analysis and security threats have been instrumental in expanding police-powers to reduce rights protections such as rights to privacy against state surveillance at every level of the police force from the national to the local.<sup>705</sup> Post-conviction disabilities are recognized today in the U.S. as a form of civil death, but the legal techniques of civil death are more widely applied than simply in the form of consequences of criminal convictions. They extend beyond the criminal justice system altogether by blurring the limits between criminal law and administrative law, criminal justice and national security, crime and threat, foreign and domestic, and between past and future when it is subsumed under the “war” heading. In a state of war, enemies are the targets, not acts. That is to say, an army does not wait until the enemy attacks its base to take them out, militaries and security forces abroad look preemptively to take out the enemy because it is not about punishing someone but

---

<sup>702</sup> Harcourt, *supra* note 682 at 131.

<sup>703</sup> Harcourt, *supra* note 682.

<sup>704</sup> *Ibid.*

<sup>705</sup> Christopher Murphy, “Securitizing’ Canadian Policing: A New Policing Paradigm for the Post 9 / 11 Security State ?,” *The Canadian Journal of Sociology* 32, no. 4 (2007): 455.

neutralizing the threat. Under an internal war logic, the move to designate internal enemies before crime is committed is more acceptable and the techniques of civil death facilitate the containment of threats—imagined and real.

When used for this new paradigm of security, new civil death techniques differ in the logic from punishment which disciplines the body or soul through physical force or detention for the purpose of rehabilitation of the person. Civil death techniques attaching to and establishing differentiated legal statuses rest on an assumption that there are different kinds of persons. These distinct types of legal persons either do not deserve the same legal status or rights as others, or else they must be managed differently because they are inherently dangerous because of varying capacities for obedience and loyalty to society and subsequently to the state. While it is easy to trace many of the legal techniques to America's war on terror, in reality the techniques of civil death are visible in every legal system that distinguishes between the legal and natural person and provides for differentiated statuses. The techniques of civil death simply take on a new meaning in the present context as safety becomes security and it becomes synonymous with the management of risk.

Turning now to “regular” criminal law, the same movement towards looking pre-emptively towards violence in general in the “war on crime” and the “war on drugs” which have been around for much longer than the “war on terror” and has been the trend in criminal justice for several decades now. What was called the “new penology” is not so new now, having emerged as a trend in sentencing and punishment at the turn of the 21<sup>st</sup> Century. “New penology” deals in risk and managing populations rather than punishment. In the new penology literature, it was observed that increased interest in managing risk in society, as opposed to punishing for a crime, resulted in an increased reliance on incarceration and the emergence of the idea of mass incarceration.<sup>706</sup> The observation holds that there was a shift from individual punishment to managing populations and preventing crimes from occurring. In its latest incarnation, we have moved to a more disembodied form of incapacitation.

---

<sup>706</sup> D Mackenzie, “Sentencing and Corrections in the 21st Century: Setting the Stage for the Future” (2001) Department of Criminology and Criminal Justice 1–38, online: <<https://www.ncjrs.gov/pdffiles1/nij/189106-2.pdf>> at 29. Doris Layton Mackenzie, “Sentencing and Corrections in the 21st Century: Setting the Stage for the Future” (November 30, 2001), online: *United States Department of Justice, Office of Justice Programs* <<https://www.ojp.gov/pdffiles1/nij/grants/189089.pdf>> (last visited July 26, 2021).

The targeting of the legal person can sometimes come off as sterile and even a more humane alternative to punishing someone after committing a crime. This notion should be dispelled immediately. Some civil death techniques are not as apparently brutal as others, but the legal preparation that designates threat and ultimately disposability is anything but humane as it allows for all other brutalities. As Foucault so aptly observed the turn in punishment in the nineteenth century moved from the all-out physicality of torture where the body was the object of punishment to imprisonment, transportation, forced labor in which the body becomes an “intermediary” or the body is used as an instrument to deprive the person of freedom.<sup>707</sup> In the neo-civil death techniques that are made possible now through a combination of technological and administrative advances, and the penetration of an economic ordering system, the body is no longer even needed as an intermediary. Control now takes place through a computer system that turns on or off the person’s capacity to be by locking a bank account or revoking a travel permit. It is the purest expression of Foucault’s vision but it does away with the need for reform.<sup>708</sup>

Civil death can be organized around the management of risk that targets the legal person by removing legal privileges as both an old and a new form of state control. This dissertation has looked at the uses of civil death as a technology of power generally and a set of legal techniques specifically that are being resurrected in part because they are a cheap and efficient form of social control.<sup>709</sup> New ways of targeting the legal person have emerged in recent years and are becoming an alternative form of incapacitation. There are so many penalties or techniques associated with civil death, that I have to limit the scope by necessity. Because many of the new civil death techniques are relatively inexpensive compared to other forms of incapacitation, and they are also relatively invisible and difficult to challenge with legal means, it is not only debilitating but its use is widespread and can be used as a form of state control against forms of political dissent. In the two historical chapters, I paid special attention to the ways that the historical institution of civil death was used against populations that

---

<sup>707</sup> Foucault, *supra* note 31 at 11.

<sup>708</sup> I want to distinguish this from pastoral governmentality. Although it shares much with this form of social control, civil death sits on the far end of the disciplinary power. This is a topic for another paper.

<sup>709</sup> Foucault has been in the background of the entire approach. He often goes unnamed, but the approach is obviously influenced by his writing. “It is a question of situating the techniques of punishment - whether they seize the body in the ritual of public torture and execution or whether they are addressed to the soul - in the history of this body politic; of considering penal practices less as a consequence of legal theories than as a chapter of political anatomy.” Foucault, *supra* note 31 at 28.

were considered either disloyal to the sovereign, or incapable of showing loyalty. The oaths of fealty were important for full citizenship and for full rights. In this next section, I want to connect once again the idea of disobedience to legal incapacitation. In the following, I develop the idea that legal techniques of privation form around certain criminal statuses. The different classes of “criminals” in the twenty-first century (whether merely a security threat or a terrorist or a sex offender), become an expansive privative legal status for disobedient populations and persons and this class can be applied indefinitely. Turning now to the problems generated by the paradigm of risk management when the state replaces punishing illegal acts with the use of state force against potential threat.

### 2.1. *Criminal-Enemy Statuses are Future-Looking*

In this section I will lay out the ways in which the designation of persons as classes of security threats and the techniques of civil death work hand in hand to create practices of legal privation that are transforming law and society within the framework of what Bernard Harcourt refers to as a “counterinsurgency warfare model of politics” that dominates the “military, its foreign affairs, and now its domestic policy.”<sup>710</sup> The new statuses are built on old ones: within the old status of “criminals” there are new classes such as persons with a felony conviction, sex offenders, and terrorists. But these new kinds of criminals are designated as enemies. Jennifer Daskal introduced the term “crenemy” as an important figure to discuss the collapsing paradigms of security and criminal law around the crime of terrorism.<sup>711</sup> The “crenemy” as a metaphor or universal figure not tied to any specific legal category neatly captures the criminal and enemy figure behind the various new securitizing statuses found in legal systems around the world. Legal protections for persons are determined in part by what kind of person they are supposed to be—ie. what legal category they fall into. Different countries provide more or less expansive definitions or designations for different persons such as a person with a criminal conviction or a suspected or convicted terrorist. As one example, there is a much lower threshold of procedural protections for individuals who may fall into the category of “suspected terrorist” in the interest of preventing a catastrophic event.<sup>712</sup> The preventative construction of the

---

<sup>710</sup> Harcourt, *supra* note 682 at 9–10.

<sup>711</sup> Jennifer Daskal, “The Terrorist Crenemy” in Austin Sarat, Lawrence Douglas & Martha Merrill Umphrey, eds, *Criminals and Enemies* (Amherst: University of Massachusetts Press, 2019).

<sup>712</sup> James M Lutz & Georgia Wralstad Ulmschneider, “Civil Liberties, National Security and U.S. Courts in Times of Terrorism” (2019) 13:6 Perspectives on Terrorism 43–57 at 48. (footnotes omitted):



terrorist as future terrorist (or suspected terrorist) or financing terrorism without a clear designation of what peripheral organizations are terrorist and the legal expansion around the crime of terrorism is thus extraordinarily important for democratic governance.

Criminal law models for dealing with “regular” crime are shifting in ways that corresponds to and even at times couples with the shifts in national security. While the administrative security framework transforms, so too has the regular criminal law incorporating a shift towards risk management. David Garland discussed the shift towards prevention and security as a form of “de-differentiation” in which the field of criminal justice loses its defined boundaries already at the turn of the century.<sup>713</sup> Garland couldn’t have anticipated all the changes that would take place at that moment as the security apparatus took on a much more central role after 2001. Like the new penology literature indicates, a shift in penal logics away from reform towards varying techniques of crime prevention and social control means that incapacitation can become a dominant paradigm for managing populations.<sup>714</sup> It should be noted that future deterrence and incapacitation of potential risk are two different things. Both are future looking, but in the case of deterrence a person convicted of a crime is made an example for everyone else. In the case of incapacitation of threats, the state is not looking to make someone change his or her mind about offending but rather to take away their capacity to commit future crimes. While an important trend in the U.S. and Canada at the turn of the century emphasized incapacitation of convicted persons through incarceration, the turn towards other, cheaper forms of incapacitation such as “strategic incapacitation” that uses intelligence gathering and pre-emptive policing are now having a more visible impact, even becoming “the new normal in many Western states.”<sup>715</sup>

There are new techniques of incapacitation that do not require incarceration; these new forms of penalty are often not thought of as penal at all since they are designed to reduce risk of offending or reoffending. These new techniques can form part of the formal punishment at times, but because they

---

An additional area of concern involves the use of warrants issued by the Foreign Intelligence Surveillance (FISA) Court established in 1978 and later given increased powers under Presidents William J. Clinton and George W. Bush. The increases in power that occurred after the bombing in Oklahoma City in 1995 were in the interests of furthering national security. The court has the power to issue warrants for foreign individuals who are under suspicion of working for other governments or involved in terrorist groups or maintain contacts with these or US citizens or residents who have contacts with such outside interests.

These are classes of people against whom there is a lower threshold for the protection of the right to privacy. .

<sup>713</sup> David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press, 2001).

<sup>714</sup> *Ibid.*

<sup>715</sup> Miles Howe & Jeffrey Monaghan, “Strategic Incapacitation of Indigenous Dissent: Crowd Theories, Risk Management, and Settler Colonial Policing” (2018) 43:4 Canadian Journal of Sociology 325–349.



are not supposed to be punishment as such, they are for managing risk, they are often not considered “true penal consequences”<sup>716</sup> at all and they can bleed into pre- and post-conviction periods. These new techniques are sometimes in other contexts formal punishments, but because the same techniques are aimed at incapacitation, they are also designed to keep persons who have “served their time” (in Arendt’s words) from being threats on the streets or in prisons. This can take various forms from the traditional uses of parole,<sup>717</sup> to the Canadian practice of conditional sentencing, to the U.S. variant of collateral consequences of a conviction. In all cases, these techniques rely on the person being classed within a privative status category in which these various legal disabilities can be attached because the person is considered dangerous, threatening or simply undeserving of full human and civil rights.

While much of the literature on the collapsing of distinctions between the enemy and the criminal through the merging of foreign policy and domestic policy has focused on the crime of terrorism<sup>718</sup>, Gunther Jakobs takes as a given that a relatively new trend exists in which regular criminal law has been transforming criminals into internal enemies. The transformation in criminal law to a system that manages risk as opposed to punishing crimes, is one way national security merges with criminal law. Gunther Jakobs’s work on the “Criminal Law of the Enemy” describes a shift in contemporary criminal law in Germany as it has moved away from criminal law for its citizens to a criminal law that produces enemies.<sup>719</sup> Yet, the basic legal shift he describes is as relevant in North America as it is in Europe, and it provides another layer to the emergence of a kind of predictive policing in contemporary societies that increasingly relies on statistics and probabilities in order to assess danger rather than to punish crime.<sup>720</sup> The central thesis of Jakobs’ criminal law of the enemy concerns itself with the emergence of the criminalization of acts in preparation of a crime, as opposed to the punishment of a crime itself. The new “anticipatory” crimes emphasize the character of the criminal

---

<sup>716</sup> *R. v. Wigglesworth*, [1987] 2 R.C.S. 541; *R. v. Shubley*, [1990] 1 R.C.S. 3.

<sup>717</sup> Arguably parole doesn’t fall into this category since a person on parole is let out of jail or prison before they have lawfully served their full sentence or else in lieu of prison or jail. Parole and probation, however, its historical expansion begs the question whether it is discipline for action or for being a member of a social group. For a history of the use of parole as a means of control, see Jonathan Simon, *Poor Discipline: Parole and the Social Control of the Underclass, 1890-1990* (Chicago: University of Chicago Press, 1997).

<sup>718</sup> See e.g. Daskal, *supra* note 711.

<sup>719</sup> Günther Jakobs, *Derecho Penal del Enemigo*, Manuel Cancio Melia, transl. (Madrid: Thomson/Civitas, 2003). His work, though very influential in Europe especially in Germany and Spain, is not yet as well known in the English-speaking world. The authority on Jakobs in English is Daniel Ohana, *see esp.* Daniel Ohana, “Günther Jakobs’s Feindstrafrecht: Dispassionate Account” in *Foundational Texts in Modern Criminal Law* (Oxford University Press, 2014).

<sup>720</sup> Harcourt, *supra* note 682.

as opposed to actual actions or crimes.<sup>721</sup> Anticipatory crimes, therefore, are designed to regulate risk; they are designed to prevent crime rather than to punish someone for a criminal act in itself. The “cremeny” status is an umbrella status that marks a large-scale transformation in law.

Criminal codes that legislate on terrorism certainly meet Jakob’s criteria for enemy criminal law as well, as there are new crimes that emerge for the preparation of a crime even when a crime is never committed. For example, in the Canadian Criminal Code under Section 83.18 (1) & (2) stipulates that persons whose participation or contribution even indirectly of any activity of a terrorist group is guilty of an indictable offence “whether or not (a) a terrorist group actually facilitates or carries out a terrorist activity.”<sup>722</sup> Prevention of crime in general, but of terrorism in particular seems intuitively to be good policy as the acts of terror are almost definitionally horrific. It is better to stop a massive loss of life rather than to punish someone for it after the fact. But like the legal category of a felony, the crime of terrorism is expanding out to cover things that begin to challenge what seems like the intuitive, common-sense soundness of catastrophe prevention. While the Canadian Code keeps a bit of a hedge around the crime of terrorism, as I will show later in this chapter, other legal codes have allowed for tremendous expansion.<sup>723</sup>

Like the crime of terrorism and the various crimes around terrorism, there are many “regular” crimes that are now managed through a logic of the amelioration of risk.<sup>724</sup> The prevention of crime is not only behind intelligence-led policing, but also conditional sentencing as well as many collateral consequences of criminal convictions.<sup>725</sup> Canada had in the past done well, comparatively speaking, to protect against the perpetual stigma of a crime by cementing voting as an actual right that could not

---

<sup>721</sup> Ohana, *supra* note 719.

<sup>722</sup> Criminal Code (R.S.C., 1985, c. C-46)

<sup>723</sup> There is an interesting debate that is beginning to emerge around the expansion of the classification of groups and persons deemed “terrorists” after the designation of the Proud Boys as a terrorist organization, while the U.S. did not follow suit (yet). This would be an interesting case study to examine the extent to which the formal legal designation of the crime of terrorism can limit the expansion as the government decides who is and who is not a terrorist. However, that being said, there are several procedural protections in Canada’s anti-terrorism law. See e.g. Leigh Philips, “Placing the Proud Boys on Canada’s Terrorism List Is a Threat to the Left” (March 3, 2021), online: *Jacobin Magazine* <https://www.jacobinmag.com/2021/03/proud-boys-terrorism-act-canada-far-right> (last visited July 26, 2021).

<sup>724</sup> Danna Mechelle Lewis, “The risk factor - (Re-) visiting adult offender risk assessments within criminal justice practice” (2014) 16:2 Risk Management 121–136 at 123. “By systematically bringing together static and dynamic factors expert discourse claims to identify and measure an individual’s risk (and subsequently, needs) and future risks, to assist in the implementation of treatment, rehabilitation and sentence planning.” See also Howe & Monaghan, *supra* note 715.

<sup>725</sup> *Intelligence-led Policing No.248*, by Jerry H Ratcliffe (2003). *Ibid.* Format: John Ratcliffe, *Intelligence-led Policing* (Issues and Trends in Crime and Criminal Justice No. 238, April 2003), online: *Australian Institute of Criminology* <https://www.aic.gov.au/sites/default/files/2020-05/tandi248.pdf> (last visited July 26, 2021).

be taken away (or as the Legal Realists might call it, a privilege).<sup>726</sup> Under the new paradigm of risk management, however, it is becoming increasingly difficult to resist the creation of categories that permanently class some persons so that they are stigmatized as dangerous or a threat to society.

## 2.2. *Future-Looking Statuses as Proxies*

In this section, I intend to show that through intelligence gathering, the designation of a person or group as potential threat can effectively render that person as having fewer rights protections as a result of belonging to a privative legal class or for proximity to a privative class.

Drawing from the idea of enemy criminal law, the collapsing of the boundary between domestic criminal justice and an international security framework that designates anyone outside its boundaries as either an ally or an enemy, means domestic status laws are taking on new significance.<sup>727</sup> Like humanitarian law, which is based on the principle of distinction of statuses between combatants and civilians etc., in times of crisis and in the name of security, distinctions re-emerge among peoples; these distinctions (terrorist, sex-offender, felon, parolee, formerly incarcerated person, ex-felon, etc.) are seen as natural, and through the creation of legal classes, the status itself becomes the grounds for reduced legal protection. A parolee, for example, does not have First and Fourth Amendment rights as a condition of parole.<sup>728</sup> These statuses, as themselves techniques of social control, create new social relations and hierarchies.

Another troubling aspect of these criminal statuses is that they can become proxies for controlling and debilitating members of historically discriminated against groups. The status itself can become a proxy for controlling different groups as they designate persons rather than penalizing actions. What is possibly different from the legal statuses that were disappearing in the nineteenth century is that new legal statuses are not explicitly based on race or gender or other immutable characteristics or firmly held beliefs such as religion. And yet those “old” statuses that create disabilities for religious membership can be brought back surreptitiously as risk becomes “a proxy for race,”<sup>729</sup> religion, or

---

<sup>726</sup> *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519, 2002 SCC 68. On the distinction of rights, privileges and immunities, among other concepts, see Wesley Newcomb Hohfeld, *supra* note 561.

<sup>727</sup> See e.g. Ayten Gundogru, *Rightlessness in an Age of Rights: Hannah Arendt and the Contemporary Struggles of Migrants* (Oxford, New York: Oxford University Press, 2015).

<sup>728</sup> Price, *supra* note 2 at 11.

<sup>729</sup> Bernard Harcourt, “Risk as a Proxy for Race: The Dangers of Risk Assessment” (2015) 27:4 Federal Sentencing Reporter 237–243 at 237.

class. Political beliefs and neighborhoods can become opaque proxies for historically distinct statuses. They are opaque at least in law, since the use of certain classifications such as an “at risk youth” is not seen as targeting a protected or suspect class that would trigger heightened judicial scrutiny.

Anticipatory policing relies on the mitigation of risk by policing “dangerous persons” which can be extrapolated by mapping the geographical places where these dangerous persons congregate. The reduction in Constitutional and Charter Rights occur not only in the form of collateral consequences of a criminal conviction, but also in relation to space or the geographical, cultural or political proximity to crime. The relationship between land and status is not a new one. Geography in particular plays a significant role in the reduction of certain populations’ rights protections through intelligence-led policing. We are reminded that Pollock and Maitland argued that the English legal system in the nineteenth century privileged land tenure for differentiated ranks among people rather than status based on the person in the French system.<sup>730</sup> The kind of property determined the privileges and rank of persons rather than the other way around. Police are given not only permission but often directives to police more heavily in “high-risk areas,” and if someone lives or is present in a high-risk area, at least in the U.S., their Constitutional rights and protections are lowered for stop and frisk regulations. Similarly, presence or proximity to a crime can be sufficient for a police officer to stop someone in Canada for a check. Subsequent non-criminal but suspicious behavior can result in their detention and ultimate arrest even for an unrelated crime. That is to say, if someone lives in an area with a relative high number of crimes that have been committed, then if the police detain and search a person in relation to any of those crimes, evidence is admissible for a different crime (such as drug possession). This may appear to make sense for protection of persons in these areas, but given that there are high percentages of white collar crimes that take place on Wall-street but are not policed in the same way, the reduction in rights in poorer neighborhoods can be baffling. Intelligence-led policing has emerged in the UK in the 1990s and has been used in the UK, Australia, Canada and the U.S. Manuals such as the “Intelligence-led Policing Manual” from Pasco in Florida designates “problem-people/priority offenders”, “problem-places/targeted areas” and “problem groups/criminal networks.” The high-risk areas are generally differentiated from other areas based on economics and often also by socio-cultural backgrounds. Geography often differentiates the sets of rights different groups of persons hold and these frequently emerge as being cut along socio-economic-cultural lines. The race as a proxy for risk

---

<sup>730</sup> Pollock & Maitland, *supra* note 225.

analysis, can be extrapolated so that living in a poor, Black, or immigrant neighborhood becomes grounds for creating a different legal status for persons living in these neighborhoods similar to English land-tenure statuses. The legal rights of the person are tied and ranked based on the property rather than strictly speaking to the person. But, status does also get filtered through individualized personal statuses. As previous contact with the criminal justice system in Canada can count as grounds for investigation, if someone lives in an immigrant neighborhood and has been questioned by the police for living in that neighborhood, then they could subsequently fall into the status of a “known person”. Geography provides a cover for the use of legal status to police differently, different populations.

In the U.S. there is mounting evidence that a school-to-prison pipeline involves state agencies such as schools and police departments’ responses to what was previously non-criminal behavior in youth. New relationships between schools and police programs begin the process of grooming young people in certain socio-cultural and socio-economic groups towards an adversarial relationship with the state by effectively criminalizing disruptive adolescent behavior.<sup>731</sup> Police programs use school resource officers not only to resolve conflict in schools, but they are often also there to gather intelligence on youth. Police manuals have been known to instruct police to simultaneously designate some minors as “at risk youth” and “priority offenders” while using that status to increase surveillance over them even conducting home visits and truancy checks.<sup>732</sup>

Someone with a criminal record, not even a criminal conviction, but a history of contact with law enforcement falls into its own kind of status in the sense that it is permanent unless the record is

---

<sup>731</sup> Nancy A Heitzeg, “Criminalizing Education: Zero Tolerance Policies, Police in the Hallways, and the School to Prison Pipeline” in Anthony Nocella II, Priya Parmar & David Stovall, eds, *From Education to Incarceration Dismantling School-to-Prison Pipeline* (Peter Lang, 2014) 11.

<sup>732</sup> Performance expectations of SRO included in one police manual states: “Identify any priority offenders who attend your school and look to collect information about their activities and associates in school. If a priority offender is absent from school, coordinate with the applicable zone deputy for a truancy check.” Pasco Sheriff’s Office, *Intelligence-led Policing Manual* (January 2018), online: *NAACP Legal Defense Fund and Educational Fund* < [https://s3.documentcloud.org/documents/20412738/ilp\\_manual012918.pdf](https://s3.documentcloud.org/documents/20412738/ilp_manual012918.pdf) > < <https://www.naacpldf.org/press-release/pasco-coalition-demands-school-district-end-illegal-surveillance-program/> > (last visited July 26, 2021). The *Manual* was removed from public access following the program’s cancellation due to public pressure. See Editorial, “It’s about time Pasco schools and the sheriff ended surveillance program” (May 6, 2021), online: *Tampa Bay Times* < <https://www.tampabay.com/opinion/2021/05/06/its-about-time-pasco-schools-and-the-sheriff-ended-surveillance-program-editorial/> > (last visited July 26, 2021).

expunged. In Canada, it is possible, though costly, for many people to get formal pardons.<sup>733</sup> In the U.S. it is exceptional to get a formal pardon.<sup>734</sup> That means a person who has served a sentence will continue to have a record and any background check will show that the person has a previous conviction, but even more troubling is that even having a charge that someone may not know about can become a life-long and life-altering “criminal record”.<sup>735</sup> There is nothing to be done of course for simply living or existing in the geographical proximity of crime as this increases the likelihood of being caught up in the criminal justice system. Being under surveillance for living in a high crime area might mean a truancy check and if a young person is skipping school that first contact can snowball into increased targeted surveillance and a subsequent criminal record. Further, the rational basis on which policing rests their arguments for the use of criminal records or contact with law enforcement provide a kind of merit-based argument for the status that sets it apart from statuses that are based on arbitrary grounds and permanent characteristics such as skin color or heritage.

As noted earlier, the historical legal status of “criminal” and contemporary variations (such as a felon or a “person known to law enforcement” or with previous contact with law enforcement) disproportionately encompasses Black and indigenous people in North America. Civil death definitions that look specifically at the collateral consequences of criminal convictions have already been used to help us understand how racialized persons are disproportionately impacted by the criminal justice system, but my definition of civil death also helps us understand how racism becomes systemic. I will start with tracing the disparate impact of civil death techniques on racialized persons.

---

<sup>733</sup> The cost of applications to have one’s record expunged is \$657.77 for the application to the Parole Board of Canada. “Record Suspensions” (2021), online: *Government of Canada* < <https://www.canada.ca/en/parole-board/services/record-suspensions.html> > (Last visited July 26, 2021). Firms that assist individuals in filing the application charge from \$700 and more for their service. Additional fees are incurred in the pardon process for the collection of court and police documents. See e.g. “How much does it cost to get a pardon?” (April 12, 2016), online: *National Pardon Centre* < <https://nationalpardon.org/how-much-does-it-cost-to-get-a-pardon-in-canada/> > (last visited July 26, 2021).

<sup>734</sup> Lobbyists for Presidential pardons exist and the going rate under President Trump was \$2 million U.S. See Michael S Schmidt & Kenneth P Vogel, “Trump’s last days fuel lucrative market for presidential pardons”, online: *The Irish Times* < <https://www.irishtimes.com/news/world/us/trump-s-last-days-fuel-lucrative-market-for-presidential-pardons-1.4461112> > (Last visited July 26, 2021).

<sup>735</sup> One woman who had an unreturned movie was unknowingly charged with “felony embezzlement”. She only learned of the charge when she applied for a new driver’s license. She was never informed of the charge and suspected that having the charge on her “record” accounted for several lost job opportunities when a background check was conducted. Vaughn, Hayley “Sabrina the Teenage Witch VHS tape rented in 1999 leads to felony charge for Texas woman” (April 29, 2021), online: *NBC News* <https://www.nbcnews.com/pop-culture/pop-culture-news/sabrina-teenage-witch-vhs-tape-rented-1999-leads-felony-charge-n1265476> (last visited July 26, 2021).



Collateral consequences of criminal convictions, what Gabriel Chin has called the “new civil death,” disproportionately impact racialized persons.<sup>736</sup> This is significant not only because collateral consequences impact all areas of a person’s life, but also because one of the political rights that is withheld represents a kind of civic belonging—that is the right to vote. The disproportionate conviction rates in the U.S. of Black men in particular means that collateral consequences are a serious issue for African Americans. By 2010, the rate of felonies among the general population had swelled from 3% of all adults to approximately 8% in 1980.<sup>737</sup> Among African American men, however, the rate rose from 13% to a staggering 33%.<sup>738</sup> The study that compiled the data of state-based conviction and imprisonment rates remarked that disaggregating this data is important as is noting the systemic racism in arrests and convictions. The Canadian rates of incarceration are significantly different from U.S. rates and the Canadian rate has been going down overall. There are, however, disproportionate rates of Indigenous Persons in Canada being incarcerated and of being charged with a crime, both of which are increasing.<sup>739</sup> According to Public Safety Canada, within the “offender” population, Indigenous persons have increased by 10.9 % from 2012 to 2017.<sup>740</sup> The collateral consequences for persons with convictions in Canada is also different from the consequences in the United States although some things remain constant such as deportation for non-citizens, bars to some professions, and the rights of access to firearms are lost. These are all significant and have been explored extensively in the civil death literature as well as in the collateral consequences literature.<sup>741</sup>

Civil death as an analytic concept does more, though, than simply catalogue the kinds of rights that are withheld as a consequence of a criminal conviction. The two jurisdictions between the U.S. and Canada have three things in common that are tied to rising rates of racialized minorities in the criminal

---

<sup>736</sup> Natasha V Christie, “Racial Neutrality by Any Other Name: An Examination of Collateral Consequence Policies in the United States” (2014) 95:2 Social Science Quarterly 541–562.

<sup>737</sup> Shannon et al, *supra* note 670.

<sup>738</sup> *Ibid.*

<sup>739</sup> “Justice System an ‘Industry’ Profiting off Indigenous Offenders and Victims” (March 28, 2019), online *APTIN News* <<https://aptinnews.ca/2019/03/28/justice-system-an-industry-profiting-off-indigenous-offenders-and-victims/>> (Last visited July 26, 2021).

<sup>740</sup> The overall numbers of Indigenous persons considered federal “offenders” has increased, but the overall rate of conviction is not available. “2017 Corrections and Conditional Release Statistical Overview” (February 7, 2019), online: *Public Safety Canada* <<https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/ccrs-2017/index-en.aspx>> (last visited July 26, 2019).

<sup>741</sup> See e.g. *Collateral Consequences of Convictions* (February 2017), online: *The Canadian Bar Association* <[https://www.cba.org/CBAMediaLibrary/cba\\_na/PDFs/Sections/CollateralConsequencesWebAccessible.pdf](https://www.cba.org/CBAMediaLibrary/cba_na/PDFs/Sections/CollateralConsequencesWebAccessible.pdf)> (July 26, 2021).



justice system. The first is a shift in the criminal justice system that views community-custody as both a more humane and less expensive alternative to incarceration. The second is a shift from retributive justice to risk management, and finally there is an overrepresentation of certain groups with a longstanding history of being racialized, colonized or discriminated against in some other way. These trends are important for understanding the reemergence in North America of the concept of civil death as these trends represent an expansion of penal control over the population in general and a shift in the way legal persons are being regulated and some racialized identities are regulated differently.

It is not new to observe that the attribution of crime is bound up with the racialization of populations. I would like to address how this has happened in another moment and in another context. Criminality and the criminal are important categories throughout Hannah Arendt's texts and are treated ambivalently or perhaps more accurately as a necessary part of the paradox of rendering persons rightless. Criminality is not simply deviance for Arendt; it is the ultimate form of disloyalty. That is, Arendt has certainly been influenced by European liberal philosophy that views a breach in the laws that protect the public order as a breach of the social contract. It is a form of disloyalty to the community. However, Arendt traces the way that a presumption of disloyalty of a minority group is reinforced by criminal actions by some then becomes justification for differential treatment of the group.<sup>742</sup> Anarchist movements, the nineteenth and twentieth century precursors to national liberation movements and contemporary terrorism, often included Jewish activists whose involvement in ideological criminal activities then became part of the antisemitic tropes.<sup>743</sup>

Contemporarily Muslims often find themselves in similar situations after a terrorist attack as the guilt and responsibility for the act are often imputed and experienced collectively.<sup>744</sup> Arendt mentions the impoverishment of Jewish migrants as a precursor to small forms of crime such as theft. She then plays on the terms “crime” and “vice” as a way to describe the move from individual crime to a racialized criminality: “the transformation of the ‘crime’ of Judaism into the fashionable ‘vice’ of

---

<sup>742</sup> Arendt, *supra* note 64.

<sup>743</sup> “While Jews were involved in some forms of organized criminal activity and Jewish immigrants did join anarchist groups, the image of anarchists in Britain before the First World War was shaped by a racialized conception linking anarchism with Jewishness and criminality.” Paul Knepper, “The Other Invisible Hand: Jews and Anarchist in London Before the First World War” (2008) 22:3 *Jewish History* 2008–2010 at 296.

<sup>744</sup> Gabe Mythen, Sandra Walklate & Fatima Khan, “‘I’m a Muslim, but I’m not a terrorist’: Victimization, risky identities and the performance of safety” (2009) 49:6 *British Journal of Criminology* 736–754.

Jewishness."<sup>745</sup> Birmingham described this as Arendt's biopolitical account of the "racialization of the Jewish people."<sup>746</sup> Crime had become the rationale for targeting different groups and "the criminal" as a status can become the cover for the persecution of a whole people. The ways criminality becomes racialized can be subtle as it can be filtered through geography or temporality but these processes of iteration that contribute to the framing of groups as criminal or threat in certain ways can also be measured. Take for example the over representation in the media of ideologically motivated violence perpetrated by Muslims as one study showed, "Acts of violence linked to Muslims received [in Canadian National News], on average, 1.5 times more coverage than those linked to right-wing extremists and White supremacists—despite the fact that the latter produced 11 times more deaths."<sup>747</sup>

Dominant or outside public perceptions about racialized groups get filtered through or mixed into the mortar of legal structures and have differential impacts on different groups and communities. Bernard Harcourt's argument that actuarial risk analysis becomes a proxy for race can be made even more concrete given that privative legal statuses are only acceptable if they are seen as merit-based as opposed to irrational categories that are based on immutable characteristics.<sup>748</sup> Siegal's argument from previous chapters about status-enforcing laws, and Harcourt's proxy argument are two different approaches to demonstrate how historical, race-based status categories, that are now considered discriminatory, are being reinscribed or reinforced through the statuses of the criminal justice system.<sup>749</sup> My argument takes this insight a step further and points out that while some of the old status laws have been eliminated, status is in fact being expanded or proliferating as new sub-statuses of purportedly threatening or dangerous persons fall into the criminal status. By doing away with procedural formalities that require a criminal conviction for one to fall into a criminal status, we are moving towards a new model perhaps not an end to punishment, but as states create statuses that designate future threat rather than a breach in conduct, the criminal status is expanded. It pushes discrimination underground or into the structures so that, as an example, racialized groups are not targeted with specific codes or laws that clearly discriminate, instead it becomes disaggregated, part of the system. In other words, these are the practical tools of law that enable racism to designate groups

---

<sup>745</sup> Arendt, *supra* note 64.

<sup>746</sup> Peg Birmingham, *Hannah Arendt and Human Rights: The Predicament of Common Responsibility* (2006) at 87.

<sup>747</sup> Azeezah Kanji, "Framing muslims in the 'war on terror': Representations of ideological violence by muslim versus non-muslim perpetrators in Canadian national news media" (2018) 9:9 Religions 1–26.

<sup>748</sup> Harcourt, *supra* note 729.

<sup>749</sup> Siegel, *supra* note 239.

of people as potential threat and to create a racism that is both systemic (so difficult to pin as clearly racist) and yet still deeply oppressive.

So, it is not legally possible today to simply designate black Americans, black Canadians, Muslims, or indigenous persons (individually) with a lower level of Constitutional protection, but by using facially neutral policies such as anyone living in a high crime area of a city or anyone with a prior criminal justice contact, the legal status of “criminal” draws into it persons in its proximity. The criminal status is a merit-based proxy, and since it is not exclusively racial, or explicitly racist, it may capture many members of historically discriminated against groups, while maintaining facial neutrality. Not only do these merit-based statuses often act as proxies for groups which the law cannot legally target, but the mechanisms of systemic discrimination are often seen or made to appear as a political necessity and are thus protected behind the legally inscrutable veil of “security”.<sup>750</sup> While civil death had historically at times been reserved for the most serious crimes, for acts of treason, this form of disobedience to the sovereign becomes dispersed. The new enemy is seen as threat and thus enemies of society and so the logic of incapacitation of offenders becomes, in a rights-based world, a legal debilitation of persons as a seemingly necessary evil to keep society safe and secure.

The way civil death is being re-constituted in the present moment through political, economic and legal structures differs in some ways from how civil death functioned historically. From previous chapters, I have endeavored to show that historically the presumption of disobedience came as a stigma that remained from the taint *after* being convicted of a crime –it remained as a corruption of blood.<sup>751</sup> Or, alternatively, there were race-based statuses that were formed in part on assumptions about threat and disobedience. These two (race-based statuses and criminal-status) often worked together. Collin Dayan pointed to the racial dimensions of attainder in the historical institutions of slavery and criminal justice as she drew a connection to the practice of racializing civil death in the colonies.<sup>752</sup> The racialized character of contemporary civil death has been drawn from the historical institution in the contemporary practices of incarceration and parole in the works of criminologists

---

<sup>750</sup> Greg Martin & Rebecca Scott Bray, “Discolouring Democracy? Policing, Sensitive Evidence, and Contentious Deaths in the United Kingdom” (2013) 40:4 *Journal of Law and Society* 624–656.

<sup>751</sup> Anthony Dick, “The substance of punishment under the bill of attainder clause” (2011) 63:5 *Stanford Law Rev* 1177; “The Bill of Attainder Clauses and Legislative and Administrative Suppression of ‘Subversives’” Published by: Columbia Law Review Association.

<sup>752</sup> Dayan, *supra* note 83.

such as Smiley and Price.<sup>753</sup> Criminologists often use civil death in the historical-institutional sense that looks to past crime as a permanent stain. In many of the contemporary cases, however, preventive measures are used to single out potential security risks before a crime is committed or before someone is convicted of a crime. In these cases, the racialization of threat can come as a presumptive taint and is future-looking. Harcourt's argument on risk as a proxy for race is homing in on the same tendency of preventive and future looking racialization, but it lacks the connection to a legal status or to civil death. Informal legal statuses such as "criminal" or "security threat", then, are not co-terminus with a racial status, but they can carry with them racialized mechanisms for capturing certain groups in a way that appears neutral and necessary. The "cremeny" has become a kind of all-encompassing category that encompasses all the different security threats of criminal statuses.

### 2.3. *Enemy or Disobedient?*

In previous chapters, I explained that civil death as a criminal law concept had in the eighteenth century been reserved for the most serious crimes, such as treason. However, over the course of the nineteenth and twentieth centuries the legal concept of a felony in the U.S. as well as an indictable offense in Canada have expanded to encompass less serious acts or new actions that were not previously classified as crimes. The meaning of felony crimes as a serious crime is almost meaningless in the U.S. today as we consider cases such as a man charged with a felony for stealing a \$1 roll of toilet paper from an unlocked car because he had previous marijuana possession charges.<sup>754</sup> The statutory application of civil death in prison meant some civil death techniques were applied to "regular" crime as well as for actual treason or existential threats against the state. The expansion of actions that constitute a serious crime is met with a simultaneous expansion of legal techniques of incapacitation. The new civil death techniques can appear to be "softer" which for less serious, serious crimes (a felony for stealing a roll of toilet paper) to be met with what can appear to be an appropriately soft punishment. As the categories of crimes expand, they are met with a larger swath of techniques to incapacitate. It is possible to then use the legal techniques of incapacitation to meet the least amount of political resistance.

---

<sup>753</sup> Price, *supra* note 2. Calvin John Smiley, "Existing but Not Living: Neo-Civil Death and the Carceral State," *ProQuest Dissertations and Theses*, 2014, 201,.

<sup>754</sup> See the Pinellas County (Florida) criminal complaint in "Amidst Toilet Paper Runs, Florida Man Busted" (2021), online: *The Smoking Gun* <<http://www.thesmokinggun.com/file/toilet-paper-theft>> (last accessed July 26, 2021).

In the contemporary context of security law, the creation of the crime of terrorism has occupied a new and important space for technologies of dealing with “enemies” of the state and other forms of disobedience. The anti-terrorism laws have been likened to Bills of Attainder in various ways.<sup>755</sup> There are certainly similarities in the ways persons are designated through processes that are not strictly speaking judicial in many cases and the techniques that target the legal person. In this section, I intend to outline how a transformation in the idea of security has become a kind of unifying and totalizing logic that renders persons who are dissidents or who commit acts of non-violent civil disobedience, or think and speak in a disobedient way, as internal enemies by outlining some of the civil death techniques associated with the war on terror. Like a felony, the crime of terrorism is already expanding and gathering to encompass many more actions not previously considered illegal. Not all acts that fall under the definition crimes of terrorism, however, are dealt with in the same way and especially in cases where no violent act has occurred civil death techniques have potential utility even as they pose a danger to the concept of the rule of law.

The war on terror, partly because it is an ill-defined war<sup>756</sup> and partly because it bridges the gap between past crime and future threat, has created a framework in which many forms of dissent, civil disobedience, and social movements critical of government policies can easily become associated with if not outright defined as terrorist activity. In both Spain and the UK, two countries with long, drawn out armed political conflicts over territory and rights of national minorities, the crime of terrorism includes speech that can be seen as a “glorification” or “apology” for terrorism.<sup>757</sup> In the Basque Country it was almost a ritualistic speech act in which political representatives discussing political violence from the minority group had to begin with a condemnation of violence in order to protect the subsequent language that provided context for the underlying political conflict—this was the case even for the purpose of resolving the conflict. France and other European countries are following suit or are considering going in that direction after a sharp increase of attacks against civilians by radicalized individuals. There are still clear differences in the approaches from different states. In France the apology of terrorism must refer to actual acts, while in Spain, the commemoration or celebration of

---

<sup>755</sup> Duane L Ostler, “Legislative Judging: Bills of Attainder in New Zealand, Australia, Canada and the United States” (2014) 22 *Waikato Law Review* 78.

<sup>756</sup> Will Potter, *Green is the New Red: An Insider’s Account of a Social Movement under Siege* (City Lights Publishing, 2011) at 37–42.

<sup>757</sup> Human Rights Watch, “France’s Creeping Terrorism Laws Restricting Free Speech” (May 30, 2018), online: *Human Rights Watch* <<https://www.hrw.org/node/318546/printable/print>> (Last visited July 26, 2021).

the lives of militants can be cited as an apology of terrorism.<sup>758</sup> Logical fallacies that attribute actions of a part to a whole group abound in cases of national minorities and political struggle and apparently as well in anti-terrorism laws. The failure to vocally condemn violence committed by a subsection of a group becomes itself the cause for attribution for violence.

The tendencies I have drawn out as transnational practices should be mentioned with a caveat that how speech gets criminalized, if at all, is dependent on the legal system and there are significant variations depending on the national legal system. Still, one of the key modalities of the War on Terror is the use of expansive definitions of terrorism that, over time, can end up encompassing behavior that is merely a form of political opposition. In the United States the definition of terrorism has already expanded to include not only environmental and animal rights groups such as the Environmental Liberation Front (ELF) and the Animal Liberation Front (ALF), who though largely non-violent have been known to commit property crimes and aggressive harassment, but it also has the potential and has been pushed to expand to incorporate Green Peace protests, PETA, water protectors and First Nations, and many other non-violent groups that rely on protest and forms of civil disobedience.<sup>759</sup> Arguments for the inclusion of these groups already circulating in the political sphere are partly based on guilt by association and financial donations to more militant groups.<sup>760</sup> Freedom of speech is a zealously protected right in the U.S., and while the FBI is adamant that it focuses on criminal actions and not speech, the line between the two relies in large part on police discretion. Where it is already pretty clear that the line between protest and terrorism is blurred in the U.S. context is over the contestation of critical infrastructure. The introduction of Bills to penalize social protests over pipelines with fines that would force most persons into insolvency demonstrates how difficult it

---

<sup>758</sup> See "Apologie du terrorisme – Provocation au terrorisme" (October 1, 2020), online: *République française, Service public* <<https://www.service-public.fr/particuliers/vosdroits/F32512>> (last visited July 26, 2021); La Fiscalía de la Audiencia Nacional investigará 196 actos de enaltecimiento de ETA celebrados en 2018 » (June 26, 2019), online: *Libertad Digital* <<https://www.libertaddigital.com/espana/2019-06-26/fiscalia-audiencia-nacional-enaltecimiento-eta-1276640983/>> (last visited July 26, 2021).

<sup>759</sup> There is suggestion that new anti-terrorism legislation will be proposed by the Biden administration during his term. Luke Savage, "We Should Be Very Worried About Joe Biden's 'Domestic Terrorism' Bill" (January 12, 2021), online: *Jacobin Magazine* <<https://jacobinmag.com/2021/01/joe-biden-domestic-terrorism-bill-capitol-building>> (last visited July 26, 2021). It remains to be seen whether it will take a measured or more expansive approach to classifications as terrorism.

<sup>760</sup> See Committee on the Judiciary, *Animal Rights: Activism vs. Criminality Hearing Before the Committee on the Judiciary United States Senate* (2004). *Animal Rights: Activism vs. Criminality, Hearing before the United States Senate Committee on the Judiciary*, S. Hrg. 108-764, 108<sup>th</sup> Congress (May 18, 2004), online: *United States Government Information (govinfo)* <https://www.govinfo.gov/content/pkg/CHRG-108shrg98179/pdf/CHRG-108shrg98179.pdf> (Last visited July 26, 2021).



is in fact to maintain meaningful protection of speech if that speech threatens what is considered to be critical to national security.

There is no single definition of terrorism as different bodies even within the same country often define it differently, yet there are some common attributes for making a claim about anti-terrorism laws as a general category. Despite differences, there is still significant agreement between the U.S. and Canada as “threats” “violence” and “politically motivated tactics” are common to the definitions.<sup>761</sup> While much of the U.S. Patriot Act has expired, it has a lingering impact and did provide in some instances a template for other countries dealing with domestic terrorism. As the American Civil Liberties Union noted, in the U.S. under the Patriot Act, “[t]he definition of domestic terrorism is broad enough to encompass the activities of several prominent activist campaigns and organizations. Greenpeace, Operation Rescue, Vieques Island and WTO protesters and the Environmental Liberation Front have all recently engaged in activities that could subject them to being investigated as engaging in domestic terrorism.”<sup>762</sup> In Canada the government recognizes violence rather broadly and include: “Activities recognized as criminal within this context include death and bodily harm with the use of violence; endangering a person’s life; risks posed to the health and safety of the public; significant property

---

<sup>761</sup> “Memorializing the Victims of Terrorism”, online: *Government of Canada Department of Justice* <[https://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr09\\_6/p3.html](https://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr09_6/p3.html)> (last accessed July 26, 2021):

In Canada, section 83.01 of the *Criminal Code*<sup>44</sup> defines terrorism as an act committed “in whole or in part for a political, religious or ideological purpose, objective or cause” with the intention of intimidating the public “...with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act.” Activities recognized as criminal within this context include death and bodily harm with the use of violence; endangering a person’s life; risks posed to the health and safety of the public; significant property damage; and interference or disruption of essential services, facilities or systems. It is useful to briefly contrast this definition with those adopted by other nations operating under law systems similar to that of Canada.

<sup>762</sup> American Civil et al, “How the USA PATRIOT Act redefines ‘Domestic Terrorism’” (2002) 33:107 *American Civil Liberties Union* 173–190, online: <<http://www.aclu.org/national-security/how-usa-patriot-act-redefines-domestic-terrorism>>. The U.S. government official website from the Justice Department contests this position and responds with the following:

“Reality: The Patriot Act limits domestic terrorism to conduct that breaks criminal laws, endangering human life. “Peaceful groups that dissent from government policy” without breaking laws cannot be targeted. Peaceful political discourse and dissent is one of America’s most cherished freedoms, and is not subject to investigation as domestic terrorism. Under the Patriot Act, the definition of “domestic terrorism” is limited to conduct that (1) violates federal or state criminal law and (2) is dangerous to human life. Therefore, peaceful political organizations engaging in political advocacy will obviously not come under this definition. (Patriot Act, Section 802)

“Dispelling Some of the Major Myths about the USA PATRIOT Act” (no date), online: *United States Department of Justice* <[https://www.justice.gov/archive/ll/subs/u\\_myths.htm](https://www.justice.gov/archive/ll/subs/u_myths.htm)> (last accessed July 26, 2021).



damage; and interference or disruption of essential services, facilities or systems.”<sup>763</sup> Because “interruption of essential services” is considered a criminal act under the terrorism definition in Canada, one can see how easily non-violent protest could become classed as terrorism. There are significant forces and pressures emanating from corporations that already have their own internal security and intelligence apparatus to push for protection of supply chains as part of national security strategies.<sup>764</sup>

Environmental activists have long complained of a misplaced emphasis on environmental activists as terrorists.<sup>765</sup> A spokesman for the FBI mentioned in a 2004 Senate hearing that “the FBI’s investigation of animal rights extremists and ecoterrorism matters is our highest domestic terrorism investigative priority.”<sup>766</sup> In the same hearing, Senator Hatch made the following comment:

Well, I know very wealthy people who love animals and have given hundreds of thousands of dollars to PETA, for instance, because they believe that they are really trying to protect animals. Yet, without animal research, we would soon fall behind a lot of other countries and we would fall behind in these life-saving treatment therapies that are essential for mankind.<sup>767</sup>

Chairman Hatch mentions that the intention to stop some forms of animal testing touches on American competitiveness internationally. The cross between the domestic and the international as these are seen as well to have an international dimension as some of the online campaigns come from Europe. In some of the testimony, the harassment campaigns had as a goal to change the modes of production and the complaint of the executives invited to speak at the hearing, was that it would cost \$50 million U.S. The hearing was based on the ways to bump animal and environmental action and harassment into the category of terrorism. Among the complaints of executives of certain corporations who gave testimony were complaints that the system as it stood in 2004 had insufficient fines and

---

<sup>763</sup> Department of Justice “Memorializing the Victims of Terrorism” [https://www.justice.gc.ca/eng/rp-pr/cj-ipp/victim/rr09\\_6/p3.html](https://www.justice.gc.ca/eng/rp-pr/cj-ipp/victim/rr09_6/p3.html) (last accessed July 26, 2021)

<sup>764</sup> Anthony Bergin, Donald Williams & Rhys De Wilde, “From Board Room to Situation Room” (2019) Australian Strategic Policy Institute, online: <<http://www.jstor.com/stable/resrep23021>>.

<sup>765</sup> Potter, *supra* note 756.

<sup>766</sup> Judiciary, *supra* note 760.

<sup>767</sup> *Ibid.* at 19

insufficient penalties to stop the harassment. Notably, there is currently talk of a new domestic terrorism law in the U.S. that may take up the issue of fines.

As organizations that are considered too moderate for many such as PETA and Greenpeace begin to be pulled into a logic of being a threat to national security, they face anti-terrorist surveillance and tougher anti-protest laws. Increasingly the language of terrorism (eco-terrorism or economic terrorism) is being used and justifying the ratcheting up of penalties for civil disobedience. “This is a miscasting of protestors as economic terrorists” according to Vera Eidelman, a staff attorney with the ACLU.<sup>768</sup> GOP sponsored laws in areas where the oil industry is particularly strong increase penalties for “impairing or interrupting” pipeline construction to a felony that is punishable by up to two years in jail, and a \$10,000 fine.<sup>769</sup> “The laws purport to only criminalize violence and property damage in service of pipeline safety, but critics say their greater intent appears to be to deter nonviolent civil disobedience by framing it as potentially violent in itself.”<sup>770</sup> The potentiality for violence over critical infrastructure that is deemed necessary to economic security by the state and persons with strongly held political beliefs considered “extremist” by many in law enforcement creates the conditions for an expansive criminal/security framework that effectively criminalizes potential actions. Because these groups are membership based, the status of belonging to an environmental group creates the grounds for inclusion to a potentially dangerous class that will at the very least be subjected to heightened surveillance.

Demonstrations in opposition to the XL pipeline that connects Canada and the U.S. saw a heavily militarized police response in North Dakota. In the summer of 2017 at least 700 persons were arrested, some faced minor charges such as trespass, but several faced felony charges.<sup>771</sup> In the same year the FBI Terrorism Taskforce was investigating the Standing Rock protests.<sup>772</sup> Lauren Regan, a civil rights

---

<sup>768</sup> Susie Cagle, “‘Protesters as terrorists’: growing number of states turn anti-pipeline activism into a crime | Environment | The Guardian” (2019), online: <<https://www.theguardian.com/environment/2019/jul/08/wave-of-new-laws-aim-to-stifle-anti-pipeline-protests-activists-say>>. Susie Cagle, “Protesters as terrorists’: growing number of states turn anti-pipeline activism into a crime” (July 9, 2019), online: *The Guardian* <https://www.theguardian.com/environment/2019/jul/08/wave-of-new-laws-aim-to-stifle-anti-pipeline-protests-activists-say> (last accessed July 26, 2021).

<sup>769</sup> *Ibid.*

<sup>770</sup> *Ibid.*

<sup>771</sup> Sam Levin, “Revealed: FBI terrorism taskforce investigating Standing Rock activists” (February 10, 2017), online: *The Guardian* < <https://www.theguardian.com/us-news/2017/feb/10/standing-rock-fbi-investigation-dakota-access> > (Last accessed July 26, 2021).

<sup>772</sup> IDEM

lawyer, commented regarding FBI inquiries into the demonstrators, “The idea that the government would attempt to construe this indigenous-led non-violent movement into some kind of domestic terrorism investigation is unfathomable to me...”<sup>773</sup> Protests around pipelines are not objectively a particular kind of crime—that is to say it is discretionary whether to treat it as a felony, misdemeanor or act of terrorism.

There are aspects of these protests that allow for water protector protests to fall under international terrorism laws. Several of the indigenous protestors are formally citizens of Canada as the first nations in the North are not contained by U.S. and Canadian borders, nor are the environmental protests. Pipelines are considered critical infrastructure. It is a complex situation as environmental protection is also bound up with treaties and sovereignty over the land and you essentially have police presiding over an international conflict. As one water protector commented regarding engaging in civil disobedience by chaining himself to the pipeline, he did it “to protect the treaties that my ancestors failed to uphold.”<sup>774</sup> There is a significant risk of turning these protests into full-fledged political conflicts.

Other non-violent environmental movements are also turning to obstructive civil disobedience as environmental destruction advances and environmental protection becomes all the more urgent. Extinction Rebellion, also known as XR, which was founded in the UK in 2016 is now a global movement and has groups throughout Canada including in Montreal. While they are committed to non-violence, they view their ends as a defense against environmental collapse and extinction. They also specify that “our governments have failed to act.”<sup>775</sup> Their stated methods are non-violent, but they advocate violating the law. “Traditional strategies like petitioning, lobbying, voting and protest have not worked due to the rooted interests of political and economic forces. Our approach is therefore one of non-violent, disruptive civil disobedience – a rebellion to bring about change, since all other means have failed.”<sup>776</sup> Despite XR’s commitment to non-violence and the scientific soundness of their cause (it is not alarmist to cite the best scientific evidence that we have a small

---

<sup>773</sup> IDEM

<sup>774</sup> Common Dreams, “Water Protectors Arrested in Minnesota after Chaining Themselves Inside Enbridge Line 3 Pipe” (January 15, 2021), online: *Ecowatch* <<https://www.ecowatch.com/water-protectors-arrested-enbridge-2649950795.html?rebelltitem=2#rebelltitem2>> (last accessed July 26, 2021).

<sup>775</sup> Extinction Rebellion landing webpage, online: <https://rebellion.global> (last accessed July 26 10, 2021)

<sup>776</sup> Extinction Rebellion landing webpage, online: <https://rebellion.global> (last accessed July 26, 2021)

window of under 10 years to stave off climate disaster) police are finding it difficult to classify the activists. Counter-terrorism police in South-East England had originally listed the group as an extremist group under a program to prevent youth at risk of extremism. They delisted the group after a news report from Guardian and cited “an error in judgment”<sup>777</sup> Under the header “Why are they a threat?” The police wrote the following: “An anti-establishment philosophy that seeks system change underlies its activism; the group attracts to its events school-age children and adults unlikely to be aware of this. While non-violent against persons, the campaign encourages other lawbreaking activities.”<sup>778</sup>

While non-violent protest is not often prosecuted as terrorism, this is a matter of prosecutorial discretion rather than a matter of law. Often, I would argue, the non-violent character of civil disobedience and disruptive social movements that activists use to further environmental goals (such as the reduction of carbon emissions, for example) that have been legitimized at the international level by treaty, but are not being realized at the national level, could make some of the supposed “softer” mechanisms of civil death more palatable to the public. Instead of throwing protestors into jail, for example, it is economically better and politically safer to fine them out of existence. This is indeed the movement in legislation that sees the spectrum of political dissent as a nuisance.<sup>779</sup> That is not to say the state uses only “soft” mechanisms such as asset forfeiture, as incarceration is still an available tool and for some states there is no more efficient way to target the legal person than through disappearances and summary executions.<sup>780</sup> The soft and hard mechanisms of legal incapacitation work hand in hand with outright death at the most extreme end.

These are troubling trends in themselves, but what is clear is that the new civil death techniques used against “common criminals” are also being used expansively within the security framework to

---

<sup>777</sup> “Extinction Rebellion: Counter-terrorism police list group as ‘extremist’ in guide” (January 10, 2020), online: *BBC News* <<https://www.bbc.com/news/uk-51071959>> (last accessed July 26, 2021).

<sup>778</sup> “Extinction Rebellion: Counter-terrorism police list group as ‘extremist’ in guide” (January 10, 2020), online: *BBC News* <<https://www.bbc.com/news/uk-51071959>> (last accessed July 26, 2021).

<sup>779</sup> See e.g. *Arresting Dissent: Legislative Restrictions on the Right to Protest*, May 20, 2020), online: *PEN America* <<https://pen.org/wp-content/uploads/2020/05/Arresting-Dissent-FINAL.pdf>> (last visited July 26, 2021).

<sup>780</sup> Maged Mandour, “Egypt’s Invisible Executions” (April 25, 2019), online: *Carnegie Endowment Int Peace* 2018–2020, online: *Carnegie Endowment for International Peace* <<https://carnegieendowment.org/sada/78998>> (last accessed July 26, 2021) at 1:

“Egyptian security forces are using extrajudicial killings in a systematic way in place of official executions, which have decreased in recent years despite the higher rates at which death sentences have been issued.” This is explained due to the push back against official death sentences from the citizenry and international organizations.

encompass civil dissent or broad notions of threat around the world. Administrative incapacitation of the legal person through techniques such as restrictions on movement, one's profession, and one's property (to name only a few) are becoming commonplace. Further, as the Trump administration has revealed, liberal democracies are always only one election away from turning legal tools used with restraint into weapons. Travel bans for persons who have committed acts of violence against a country can be used to target Muslims.<sup>781</sup> Exclusion orders for non-citizens can be used to strip citizens of their rights as well.<sup>782</sup>

The new civil death techniques are being globalized as "best practices," and in the context of the international war on terror, they can easily become (if they are not already) the best practices of state oppression. The softer forms of incapacitation are debilitating, but very difficult to challenge both legally and politically. In Turkey, a NATO ally, political dissidents have lost their jobs, been banned from holding positions in the public and private sectors, lost their benefits, and had their passports suspended by presidential decree following a failed coup. Activists critical of the government were implicated and called terrorists despite purportedly having no links to the attempted coup or to any criminal activity. Their only "crime" was signing a petition for Kurdish rights. As noted in Chapter 2, activists have used the terminology of "civil death" to describe the state crackdown as a way to challenge the state's use of security measures in reaction to their protests.<sup>783</sup>

The saying used to be that one man's terrorist was another man's freedom fighter, but in the age of anticipatory crimes, one man's terrorist is another man's human rights defender. In 2020, several members of the Egyptian Initiative for Personal Rights (the ACLU's "sister" organization in Egypt) were charged with the crime of terrorism after meeting with European and Canadian officials to discuss the state of human rights in Egypt.<sup>784</sup> They were held for several days in prison as international pressure mounted for the activists to be released. They were promptly released. Following the Arab

---

<sup>781</sup> See President of the United States, "Protecting the Nation from Foreign Terrorist Entry into the United States", Executive Order No. 13769, 82 Fed Reg 8977 (2017).

<sup>782</sup> Miriam Jordan and Michael D. Shear, "Trump Suspends Visas Allowing Hundreds of Thousands of Foreigners to Work in the U.S." (June 22, 2020), online: *The New York Times* <<https://www.nytimes.com/2020/06/22/us/politics/trump-h1b-work-visas.html>> (last accessed July 26, 2021).

<sup>783</sup> Zammataro, "The Purge of Academics in Turkey" (2017) 28:1 Advocate. Eylül Fidan Akıncı, "The Purge of Academics in Turkey", (March 5, 2017), online: The Advocate <https://gcadvocate.com/2017/03/05/purge-academics-turkey/> (last accessed July 26, 2021).

<sup>784</sup> Lawlor, Mary and Ni Aolain, Fionnuala "Defending Human Rights Is Not Terrorism: The Egypt Arrests as a Case in Point" (November 30, 2020), online: *Just Security* <https://www.justsecurity.org/73606/defending-human-rights-is-not-terrorism-the-egypt-arrests-as-a-case-in-point/> (July 26, 2021).

Spring, Egyptian activists (like Hossam Bahgat) who enjoy international support and high profiles, in lieu of detention or disappearance, have had their assets frozen, communications monitored and travel restricted for dissident journalism in the name of security.<sup>785</sup> A Saudi Arabia women's rights activist has been sentenced under anti-terrorism laws for her activist work. The CBC wrote that "State-linked Saudi news outlet Sabq reported that Alhathloul, 31, was found guilty by the kingdom's anti-terrorism court on charges of agitating for change, pursuing a foreign agenda, using the internet to harm public order and co-operating with individuals and entities that have committed crimes under anti-terror laws."<sup>786</sup> Mary Lawlor the UN Special Rapporteur on the situation of human rights defenders has taken note of the different tactics used in China against human rights attorneys; if they are not detained or disappeared, they are surveilled and harassed or disbarred and prevented from practicing law on the grounds of "national security concerns."<sup>787</sup> In all cases, the classing of a person as a "security risk" is often sufficient to target the legal personality with different techniques of incapacitation. The Special Rapporteur noted as well that there were "security measures" that resulted in socio-economic disabilities from loss of income. Turkey, China, Saudi Arabia and Egypt are just a few examples of the ways a new range of civil death techniques are becoming a global phenomenon of state action in response to political dissent. While the language of civil death may not have entered the discourse everywhere, the "softer" security practices that incapacitate or kill the citizen by a thousand cuts have been widely used.

The arrest, detention and charges of belonging to a terrorist organization laid against the staff of the Egyptian Initiative for Personal Rights can seem like an aberration and corruption of the rule of law. But for the Egyptian state, they can also seem like the logical end to anti-terrorism legislation. Civil

---

<sup>785</sup> "Egypt releases journalist Hossam Bahgat after interrogation", online: <<http://america.aljazeera.com/articles/2015/11/10/egypt-releases-journalist-hossam-bahgat.html>>; Robert Mackey, "Egypt Bars Journalist From Leaving Country as Crackdown on Dissent Widens", (23 February 2016), online: *The Intercept* <<https://theintercept.com/2016/02/23/egypt-bars-journalist-from-leaving-country/>>. Renee Lewis, (November 15, 2020), online: *Aljazeera America* <"Egypt releases journalist Hossam Bahgat after interrogation", online: <http://america.aljazeera.com/articles/2015/11/10/egypt-releases-journalist-hossam-bahgat.html> (last accessed July 26, 2021);

<sup>786</sup> "Saudi women's rights activist Loujain Alhathloul sentenced to nearly 6 years in prison" (December 28, 2020), online: *CBC News* < <https://www.cbc.ca/news/world/loujain-alhathloul-saudi-arabia-womens-rights-activist-sentenced-1.5855769>> (Last accessed July 26, 2021).

<sup>787</sup> "China: Shock at continued crackdown on human rights defenders and lawyers – UN expert" (December 16, 2020), online: *United Nations Office of the High Commissioner for Human Rights* < [https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26612&LangID=E&fbclid=IwAR0Uao7qE7dpQ9iQ7GX-0bincq13\\_5jZ8sAyHh9dYcB0wqwtuEjqsue2zU](https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26612&LangID=E&fbclid=IwAR0Uao7qE7dpQ9iQ7GX-0bincq13_5jZ8sAyHh9dYcB0wqwtuEjqsue2zU)> (last accessed December 16, 2020).

disobedience and protest can topple governments as we saw in Tahrir Square in Egypt a decade before, and from the state's perspective there is a conflict between different international norms playing out. The call for democracy and the protection of human rights by protestors and dissident journalists could make a fragile government threatened by prodemocracy minorities and extremist majorities unstable. From the perspective of the state, it is difficult to say that activists are not some kind of threat to the government. The anticipatory crimes coupled with privative legal statuses become entwined so that people who challenge the law even through nonviolent methods are becoming captured in the legal security apparatus.

### **3. Global Normalization of Neo-Civil Death Techniques**

Civil death techniques have been normalized as acceptable practices for security threats at the global level. The techniques of neo-civil death that are legal forms of control through social expulsion are widespread from liberal democratic to authoritarian states – they are used around the world as best practices, and this reinforces their use in their most repressive form. While a particularly repressive form of neo-civil death techniques exists in the U.S. to incapacitate normal criminal threats, it is not surprising that at the global level similar techniques are practiced. As practices are exported to other countries directly in the form of security partnerships, these practices also make up the security practices of international organizations responsible for collective security. Now, international organizations also use these techniques that are a cheap way to enforce political obedience by targeting the legal person. The new civil death techniques are not only becoming globalized but are becoming the global best practices.

#### *3.1. International Organizations and Neo-Civil Death*

Civil death is generally understood as a domestic phenomenon, but it is also being increasingly constituted by specifically international technologies. These include, for example, international sanctions. The United Nations Security Council shifted from applying sanctions normally reserved for



states to individual persons.<sup>788</sup> This shift from states to non-state entities is a kind of supranational power with far-reaching effects. While there have been legal challenges to this turn<sup>789</sup>, it has not created large political backlash at the international level. In part, probably because it has been used against individuals and entities accused of heinous crimes and because their composition as groups outside of formal state structures lends itself to individual targeting with state cooperation. Still, this is a significant transformation in international peace and security.<sup>790</sup> The ability of international institutions to simply switch off the material sustenance of a person, stop them from moving from one place to another and turn them into a person outside the protection of any state—all without ever having to touch the physical body—is a stunning advance in power.

The development of the individual sanctions regime at the international level, however, does not exist without difficult questions and potential contradictions. The protection of legal personality as a fundamental right that should be protected by international treaties was discussed in the United Nations following WWII.<sup>791</sup> The question remains regarding the extent to which contemporary civil death techniques and specifically the establishment of privative legal statuses could be considered violations of international treaties and basic human rights. In the U.S.’s 1993 report to the UN Human Rights Committee,<sup>792</sup> the U.S. specified that under Article 16, Recognition as a person under the law

---

<sup>788</sup> Gasem MS Al-Own & Maysa Said Bydoon, “Evolution of Asset-Freezing through the UN Security Council” (2017) 6:4 Journal of Arts and Humanities 53.

<sup>789</sup> See e.g. ECtHR, *Nada v. Switzerland*, no. 10593/08, 12 September 2012 (violations of the right to liberty and privacy resulting from a travel ban imposed by the Security Council); ECtHR, *Al-Dulimi and Montana Management Inc. v. Switzerland*, no. 5809/08, 21 June 2016 (violation of the right to fair trial as a result of implementation of asset forfeiture measures on the basis of a Security Council resolution).

<sup>790</sup> Marcos Tourinho, “Towards a World Police? The Implications of Individual UN Targeted Sanctions” (2015) 91:6 International Affairs 1399–1412.

<sup>791</sup> Commission on Human Rights Drafting Committee on an International Bill of Human Rights, First Session, Report of the drafting committee to the Commission on Human Rights, E/Cn.4/21, July 1, 1947; Commission on Human Rights Drafting Committee, International Bill of Rights, Documented Outline, Part I -Texts, E/CN.4/AC.1/3/Add.1.; see also Michael Galchinsky, “Quaint and Obsolete: The ‘War on Terror’ and the Right to Legal Personality” (2013) 14:3 International Studies Perspectives 255–268, online: <<https://doi.org/10.1111/j.1528-3585.2012.00482.x>>.

<sup>792</sup> *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, United States of America (CCPR/C/79/Add.1)*, by United Nations Human Rights Committee (1994) at Section 514, Article 16 - Recognition as a person under the law

513. All human beings within the jurisdiction of the United States are recognized as persons before the law. Slavery and involuntary servitude were outlawed in 1865 by the Thirteenth Amendment to the U.S. Constitution, as discussed in greater detail under article 8. Aliens are granted basic constitutional rights and entitled to the protection of the courts, as discussed under articles 2 and 13.

514. The common law doctrine of civil death, which provided that a convicted felon was deprived of legal personality and could not perform legal functions such as entering into

stipulates that “the common law doctrine of civil death, which provided that a convicted felon was deprived of legal personality and could not perform legal functions such as entering into contracts, does not exist today.”<sup>793</sup> As a form of acknowledgement of the fundamental nature of this internationally protected right, the U.S. made the case that all humans “are recognized as persons before the law” and that slavery was outlawed and “aliens are granted basic constitutional rights and entitled to the protection of the courts.”<sup>794</sup> The norm codified by the United Nations that protects legal personality against the historical institution of civil death is now, arguably, being violated by the United Nations itself. When sanctions target the legal personality and they also extend beyond the prescribed sentence or the formal punishment of a crime, or in cases that sanctions are used to prevent a crime from happening that has not occurred, we begin to see the grounds that this is a contradiction within human rights.

The Security Council has exercised its Chapter VII powers to apply certain sanctions to individual persons. In 1999 under Security Council Resolution 1267, two sanctions were applied to the Taliban and they included an air restriction so that no airplanes were allowed to take off or land in the territory of the Taliban. The other sanction was the freezing of all funds and financial resources derived from Taliban controlled property. Already by 2011 The Security Council was applying the sanctions against the assets, contracts and travel to individuals of Al-Qaida.<sup>795</sup> Al-Qaida, as a sub-state actor was still tied to territory in a particular way. These early sanctions, however, became the model for organizations that would then extend to individual members of the group as they crossed borders and became less territorially connected. Security Council Resolution 2368 (2017) which was unanimously adopted extended the practice of placing sanctions on individuals.

---

contracts, does not exist today, although prisoners sometimes are not permitted to vote (see discussion under article 25). Federal and state prisoners enjoy a constitutional right of access to the courts. See *McCrary v. Maryland*, 456 F.2d 1 (4th Cir. 1972); *McCuiston v. Wanicka*, 483 So.2d 489 (Fla. Ct. App. 1986). Prisoners frequently file actions in the federal courts seeking writs of habeas corpus and suing governmental authorities for alleged violations of their civil rights under 42 U.S.C. section 1983.

<sup>793</sup> United Nations. Human Rights Committee, *supra* note 792.

<sup>794</sup> *Ibid* at section 513.

<sup>795</sup> Under Resolution 1989 (2011) Security Council draws the thread that connects the movement from groups to individuals in terms of sanctions: “Recalling its resolutions 1267 (1999), 1333 (2000), 1363 (2001), 1373 (2001), 1390 (2002), 1452 (2002), 1455 (2003), 1526 (2004), 1566 (2004), 1617 (2005), 1624 (2005), 1699 (2006), 1730 (2006), 1735 (2006), 1822 (2008), 1904 (2009) and 1988 (2011).” SC Res 1989, UN Doc S/RES/1989 (17 June 2011).

The EU is expanding in the direction of individual sanctions that target the legal person as well. These are used rarely, but the fact that they are used makes the case that these are the best practices at the international level for states who are looking for legal and legitimate forms of sanctioning and preventing political instability in their own countries. I will turn to the EU sanctions as it is becoming more entrenched as a model and because Europe is relatively transparent in their practices.

The trend towards state sanctions is designed to change behavior by targeting the economic relations of entities or persons.

Restrictive measures (sanctions) are an essential tool in the EU's common foreign and security policy (CFSP), through which the EU can intervene where necessary to prevent conflict or respond to emerging or current crises. In spite of their colloquial name 'sanctions', EU restrictive measures are not punitive. They are intended to bring about a change in policy or activity by targeting non-EU countries, as well as entities and individuals, responsible for the malign behaviour at stake.<sup>796</sup>

The EU, like different civil death techniques in individual states, specify that the sanctions are considered to be security measures and “not punitive.” This distinction seems to be widely accepted in Constitutional law. In Canada, a similar distinction between security procedures and “true” penal consequences allows for the use of similar sanctions without violating the law.<sup>797</sup> While an entire chapter should be devoted just to this question, as it is the kind of legal fictions that would make Roscoe Pound turn over in his grave, it gets to the heart of the true danger of civil death techniques. These preemptive policing techniques at the international level reduce the rights protections for certain classes of persons even though the individual has not been tried or convicted of any crime. The procedures are also fairly opaque to the public as they often rely on confidential intelligence and the protection of the source is important. The question of how to deal with violence on the part of non-state actors is obviously complex. However, it should also be pretty clear that there is at least the potential to fall into what Hannah Arendt discussed as the first step to totalitarianism domination by killing the juridical person in man in persons through these kinds of sanctions.

---

<sup>796</sup> Restrictive measures (sanctions), online: European Commission < [https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/restrictive-measures-sanctions\\_en](https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/restrictive-measures-sanctions_en) > (last accessed July 26, 2021).

<sup>797</sup> See *supra* note 61 and accompanying text.

The United Nations along with the European Union as well as individual European states have a legal regime for sanctions for different kinds of security threats. “The EU has over forty different sanctions regimes in place. Some are mandated by the United Nations Security Council, whereas others are adopted autonomously by the EU.”<sup>798</sup> Best practices for “restrictive measures” can include bans on arms exports, asset freezes and prohibition to make funds available, prohibition to satisfy claims, and restrictions on admission. While some of these restrictions are different from the kinds of restrictions that are used in cases of collateral consequences of criminal convictions, there is an uncanny overlap in the emerging sanctions regime used against violators of human rights at the international level and what legal scholars have been calling a “new civil death” when dealing with persons with a criminal conviction. Proponents of the EU sanctions regime go as far as to call it a new “blacklist” for human rights abusers.<sup>799</sup>

The United Nations and The European Union “Sanctions Map” outlines the list of legal restrictions available for the EU and for EU members as well as the restrictions in place against specific countries. It is organized both by country and by thematic restrictions. The themes include: chemical weapons, cyber-attacks, and terrorism. These are some of the thumbnails that act as a guide to the comprehensive list of sanctions available to the EU.

---

<sup>798</sup> Restrictive measures (sanctions), online: *European Commission* <[https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/restrictive-measures-sanctions\\_en](https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/restrictive-measures-sanctions_en)> (last accessed July 26, 2021).

<sup>799</sup> Clara Portela, “A Blacklist is (ALMOST) Born: Building a Resilient EU Human Rights Sanctions Regime” (2020) 2020 European Union Institute for Security Studies (EUISS). FORMAT: Clara Portela, “A Blacklist is (ALMOST) Born: Building a Resilient EU Human Rights Sanctions Regime” (March 17, 2020), online: *European Union Institute for Security Studies* <<https://www.iss.europa.eu/content/blacklist-almost-born>> (Last visited July 26, 2021).

## Restrictive measures



**Arms export**



**Asset freeze and prohibition to make funds available**



**Prohibition to satisfy claims**



**Restrictions on admission**

Not only are the kinds of techniques used in domestic civil death and the sanctions very similar, but the targeting of the legal person overlaps as well. There is often no available body to take into custody due to the person being in hiding, or the person is very heavily armed, or else the person is under the protection of a state and seizing the body would be understood as an act of aggression. The European Union, like the United Nations, tend to focus on the legal relationships that can be controlled and many of these are economic such as bank accounts and contracts. That is, they target the legal personality of the person in non-physical ways. There are some uses of travel bans that would also work in this same way. A travel ban would take effect when the person cannot be located. But the increasing use of sanctions against political enemies, to hold them accountable by targeting the legal person amounts to legal incapacitation. It is in this sense a pure form of modern civil death as a designation creates a legal status and restrictive measures are attached to that designation.

There are some procedural protections in place for the sanctions. The protections seem, however, to often be aimed at protecting individuals in cases of mistaken identity as opposed to some other form of procedural protection that might challenge substantively belonging on the list. The best practices include a measure of designation of the legal person and a review of the identifying factors for “targeted persons”. “After designation of a (natural or legal) person or entity, a constant review of

identifiers should take place.”<sup>800</sup> There is now a special committee established that reports to the Security Council, and an ombudsperson to the ISIL Committee at the UN that handles the applications to be “delisted” from the sanctions list. At the writing of this, there had been 93 requests filed for delisting.<sup>801</sup> There are now in place procedures for getting off the lists, they include the “delisting” processes.<sup>802</sup> There is, however, never a mention of what evidence counts for inclusion on the list or what specific crimes and evidence legitimates inclusion. Whether civil death or bills of attainder historically were “true penal consequences” or simply security measures, there was a reason so many jurists intervened to prohibit the practice on humanitarian grounds or else to limit the worst versions of it such as application without a trial. In the next section, I will address one sanction that is becoming widespread as a technology of securitization: control over movement. I include this sanction as it is both cheap and so can be easily expanded, and because it is both widely used by liberal democracies and authoritarian governments, and it hits at the crux of the fundamental contradiction in international human rights law.

### 3.2. *Banishment and the Liberty of Movement*

There is a relationship between historical accounts of banishment or restrictions of entry into a community or territory and civil death, but that relationship is a complicated one. Both civil death and banishment have been linked in nineteenth century reconstructions of Roman law to the Roman idea of *caput* or status. Banishment was associated with “*caput lupinum*, because he might be put to death by any man, as a wolfe that hateful beast might.”<sup>803</sup> Of all the ancient and Roman legal forms civil death has been associated with, it seems that it is closest in form to *capitis diminutio*, as a diminished status. Still, many authors have linked civil death to banishment as there is a sense of losing the legal rights

---

<sup>800</sup> CFSP Guide: Compilation of Relevant Texts, Council of the European Union, 21 March 2007, EU Doc 16074/1/06 REV 1 (LIMITE) , online: *European Union* < <https://data.consilium.europa.eu/doc/document/ST-16074-2006-REV-1/en/pdf> > (last visited July 26, 2021).

<sup>801</sup> UN Security Council, Office of the Ombudsperson to the ISIL (Da’esh) and Al-Qaida Sanctions Committee, online: *United Nations Security Council* <<https://www.un.org/securitycouncil/ombudsperson>> (July 26, 2021).

<sup>802</sup> See Appendix for the “unofficial” UN Delisting graphic for the process of getting delisted. “Procedures for delisting”, online: *United Nations Security Council* [https://www.un.org/securitycouncil/sanctions/1267/aq\\_sanctions\\_list/procedures-for-delisting](https://www.un.org/securitycouncil/sanctions/1267/aq_sanctions_list/procedures-for-delisting) > (last visited July 26, 2021).

<sup>803</sup> H Erle Richards, “Is Outlawry Obsolete?” (1902) 18 *Law Quarterly Review*.299.

and protection of the sovereign.<sup>804</sup> Hannah Arendt distinguishes the historical legal forms of civil death from banishment while simultaneously acknowledging their similarity to the modern forms of expulsion from humanity in *The Origins of Totalitarianism*.<sup>805</sup> Despite the right to leave any country and right to enter one's own country enshrined as rights under Article 12 of the ICCPR, contemporary restrictions on movement are done in accordance with national security concerns (Art. 12 (3) holds national security and public order as legal exceptions to Article 12 rights). The modern forms of banishment can include what Arendt described as the modern expulsion from humanity as having nowhere to go—it is a kind of internal banishment as the globe is now completely regulated without an outside—so travel restrictions often effectively mean someone cannot leave a territory so that the border is converted to the walls of a prison.

In Security Council Resolution 1267 (1999) the two sanctions applied to the Taliban were 1. a travel restriction as a kind of isolation technique (no planes could land or take off from Taliban controlled territory) and 2. an economic sanction of freezing assets. I will deal with the asset freezes and the economic sanctions in the following sections of this chapter, but first in this section, I want to explore the expansion and ultimate ends of travel restrictions. I will now turn to further discuss the importance of travel restrictions as a way of targeting the legal person and a means for creating a privative legal status.

There are many forms the loss of a right to movement can take: deportation, the inability to cross international borders in cases of felony convictions or indictable offenses, inability to visit certain places in cases of parole conditions and conditional release programs, these are all kinds of restrictions of movement placed on persons with a criminal record.<sup>806</sup> Unlike incarceration, travel restrictions and banishment are relatively inexpensive. To banish someone an official only has to place that person on a plane and drop them off at the airport in another country and the expenses and obligations end

---

<sup>804</sup> Spangenberg, *supra* note 354. See also Charles Phineas Sherman, *Roman Law in the Modern World* (1917) at 40.: Modern law recognizes only natural death; but Roman law held that a person's legal capacity might be extinguished by 'civil' death. To lose either freedom or citizenship produced civil death or the loss of all the rights given to a person by private law—as to these rights the unfortunate individual was regarded as dead. A Roman citizen ordinarily suffered civil death when he was punished for the commission of a serious crime, for instance if condemned to exile, or sentenced to be deported to an island, or if condemned to the mines. But Roman law provided that the Emperor might fully pardon the offender and restore him to his original state as a citizen.

<sup>805</sup> See discussion in chapter 2

<sup>806</sup> Association, *supra* note 45.



there. Travel restrictions are administratively simple as it only requires confiscating travel documents, nullifying travel documents or placing some other restriction on their travel documents.

In Canada and the U.S. a criminal conviction for a non-citizen can result and frequently does result in deportations in many normal criminal law cases even when the person has lived most of their lives in Canada or the U.S.<sup>807</sup> Deportation is one of the collateral consequences of a criminal conviction that Gabriel Chin outlined in his argument about the “New Civil Death.”<sup>808</sup> The stripping of residency, the banishment from a person’s home is one of the potential consequences of criminal convictions in various national jurisdictions including Canada, the U.S. and the UK and is properly classified as the revocation of a legal privilege<sup>809</sup> But now, as a sharp departure from historical precedent, if someone is suspected of terrorism and travels abroad, they can be stripped of their citizenship and effectively banished in some jurisdictions. The stripping of citizenship of persons, or denationalization, is a legal technique in the national security toolkit and arguably the most explicit example of contemporary civil death within modern liberal democracies.<sup>810</sup>

The UK, Canada and the United States have all introduced legislation to strip citizenship from people although the standards differ from country to country. In Canada, before the Liberal Party gained power and revoked the law introduced by the previous administration, a person convicted of a crime of “treason, spying or any terrorism” could be stripped of citizenship. In the UK, the standard is much lower and the Secretary of State for Home Affairs can deprive citizenship in the case the Secretary “is satisfied that deprivation is conducive to the public good” which Macklin notes is the same “low and vague standard for depriving a person of permanent resident status.”<sup>811</sup> It expanded to citizens who were born in other countries, became naturalized citizens and were subsequently involved in terrorist activities. These citizens had their citizenship revoked. It has now culminated in the Justice

---

<sup>807</sup> *Ibid* at 10. Miller & Joseph F. Spillane, *supra* note 1 at 407.

<sup>808</sup> Gabriel J Chin, “The New Civil Death : Rethinking Punishment,” *University of Pennsylvania Law Review* 160, no. 6 (2012).

<sup>809</sup> See e.g. Association, *supra* note 45. at 30

<sup>810</sup> Macklin properly notes a long history of revocation of citizenship until the late 20<sup>th</sup> century of political dissidents. However, the discontinuity from that history starts in the post WWII era of human rights and is relevant in this argument as citizenship was seen as a fundamental and irrevocable right. A new logic is required to make sense of this departure. Audrey Macklin, “Kick-Off Contribution” in *The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?* (European University Institute, 2015). See esp. Kesby, *supra* note 119.

<sup>811</sup> Macklin, *supra* note 810 at 1.

Department's creation of an Office for Denaturalization.<sup>812</sup> The New York Times has noted that in the U.S. under President Trump “the administration’s desire to prioritize denaturalizations underscores the idea that naturalized citizens have fewer rights than those born in the United States, and that immigrants should not assume that they cannot be deported even if they go through the naturalization process.”<sup>813</sup> It purportedly targets “terrorists, war criminals, sex offenders and other fraudsters.”<sup>814</sup> Even before the Trump administration, under President Obama, the “tactic” used was to place U.S. citizens, while they were physically abroad, on the no-fly list which effectively banished them.<sup>815</sup> Audrey Macklin’s work has documented that the person targeted by the technique of denaturalization is almost always Muslim and male. It is troubling that these techniques once normalized through a process of finding the internal enemy as a Muslim man can then expand to find other internal enemies. A right is not a right if it can be taken away; it is a mere privilege.

In the recent case of the insurrection at the U.S. Capitol, it was after the union of flight attendants asked that many of the protestors were added to the no-fly list and were forcibly removed from planes in some instances. While the addition of hundreds of White-identified Americans to the no-fly list certainly cuts against some of the previous claims that these civil death techniques tend to be proxies for race or have a racial remnant, there is more to the ways in which security measures are used against racialized persons. A video shot a year before the insurrection of an unruly, White-identified passenger and Trump supporter shows the man being wrestled to the ground by police for refusing to comply

---

<sup>812</sup> “The Department of Justice Creates Section Dedicated to Denaturalization Cases” (February 26, 2020), online: *United States Department of Justice* <<https://www.justice.gov/opa/pr/departments-justice-creates-section-dedicated-denaturalization-cases>> (last accessed July 29, 2021).

<sup>813</sup> Katie Benner, “Justice Dept. Establishes Office to Denaturalize Immigrants” (February 27, 2020), online: *The New York Times* <<https://www.nytimes.com/2020/02/26/us/politics/denaturalization-immigrants-justice-department.html>> (last accessed July 26, 2021).

<sup>814</sup> “The Department of Justice Creates Section Dedicated to Denaturalization Cases” USDOJ (2020) <https://www.justice.gov/opa/pr/departments-justice-creates-section-dedicated-denaturalization-cases> Katie Benner, “Justice Dept. Establishes Office to Denaturalize Immigrants” (February 27, 2020), online: *The New York Times* <<https://www.nytimes.com/2020/02/26/us/politics/denaturalization-immigrants-justice-department.html>> (last accessed July 26, 2021).

<sup>815</sup> Andrew Christy, “Legal Remedies for Citizens Exiled Overseas by the No Fly List” (2012) 1 *Dartmouth Law Journal* 94 at 95.

with an order; he is recorded as crying out, “You are treating me like a fucking black person.”<sup>816</sup> While the category of threat is not reserved only for racialized persons, perceptions of the legitimate uses for these mechanisms have been seen through a default lens in North America that tends to view security threats as occurring to Other people.

This is of course not restricted to European and North American countries. The travel bans are becoming a normalized practice the world over. According to the Economist, under the state’s social credit system that gives ratings for good behavior, prohibition of travel is one of the important sanctions available for disobedient citizens claiming, “China’s tourist authority keeps a no-fly list for ill-mannered travelers, who can be banned from going abroad for up to ten years.”<sup>817</sup> The story goes on to provide a list of persons who have defied a court order and the sanctions people face can be extensive, “people on the list can be prevented from buying aeroplane, bullet-train, or first- or business-class rail tickets” and the list goes on.<sup>818</sup>

Deportations and the stripping of passports even of citizens is being normalized as state prerogatives for security reasons. The stripping of nationality or residency is used the world over for anyone seen as a threat. Under the headline “Human Rights Lawyer Ordered to Leave Russia: Seeking and Securing Justice for Victims of Abuse Seen as ‘Threat’”, Human Rights Watch has described the case of Vanessa Kogan who was given two weeks and ordered to leave Russia for her human rights work on behalf of domestic violence victims and other victims of violence. Her organization has taken the Russian state to the European Court of Human Rights hundreds of times. While she is American, her husband and children are Russian nationals and her residence permit was annulled on the legal pretext that she is “advocating for violent change of constitutional regime or otherwise presents danger to the Russian

---

<sup>816</sup> Video <https://www.youtube.com/watch?v=d6x8MeeHHIU> (last accessed July 26, 2021). “Outrageous Video Of White Man Screaming ‘You’re Treating Me Like A F—ing Black Person’ During Arrest”(August 17, 2018), online: *Black Entertainment Television (BET)* < <https://www.bet.com/news/national/2018/08/17/outrageous-video-of-white-man-scream-youre-treating-me-like-a-fi.html> > (last accessed July 26 2021). Luke Darby, “White Man Caught on Tape Screaming at Airport Police for “Treating Me Like a F\*cking Black Person” (August 18, 2018), online: GQ online < <https://www.gq.com/story/white-man-airport-treating-me-black-person> > (last accessed July 26, 2021).

<sup>817</sup> “China Invents the Digital Totalitarian State” (December 17, 2016), online: *The Economist* < <http://www.economist.com/news/briefing/21711902-worrying-implications-its-social-credit-project-china-invents-digital-totalitarian> > (last accessed July 26, 2021).

<sup>818</sup> Economist, “China invents the digital totalitarian state” (2016) *The Economist* 1–8, online: <<http://www.economist.com/news/briefing/21711902-worrying-implications-its-social-credit-project-china-invents-digital-totalitarian>>.

national security or to its nationals.”<sup>819</sup> Travel restrictions proliferate now for individuals from the United Nations, the European Union and states around the world. Many of these restrictions that effectively render citizenship rights moot are being applied without any form of trial. Not only are there procedural shortcomings to these legal techniques, but there are also other important implications for the international human rights system as a whole when access to state protection is no longer a right. It is a bit of a circular movement in security between stripping persons of citizenship or citizenship protections and the ways in which persons who are already stateless are already also subject to increased security scrutiny as security threats.<sup>820</sup>

### 3.3. *Asset Forfeitures and Freezes*

While probation is one way for the state to incapacitate persons outside of state institutions, the new or neo-civil death techniques I want to focus on target the legal person to incapacitate him or her as either sanctions or else as consequences of conviction. They include several sanctions that target the legal person and are either explicitly or else implicitly economic or material in nature. These include asset forfeiture, the elimination of benefits, the freezing of assets, and I want to include in this group of neo-civil death techniques the proliferation of small, cumulative fines as well as extraordinary fines. The collateral consequences of criminal convictions that have been written about in the literature are cheap relative to incarceration, and Gabriel Chin is certainly right to include them in the new forms of civil death, but as I will argue in this section, they are not the only new forms of civil death.

To expropriate one’s property is a way to render someone dead in law. Reflecting on the relationship of things and life and the institution of civil death, the following observation is rather helpful, “people take their belongings into themselves as part of their personality. Just as people internalize their belongings in their life, so they externalize their belongings at death.”<sup>821</sup> The forced externalization of all belongings or a taking of property can be considered a kind of civil death. This process of being legally severed from all possessions by the monk and by the convicted is one common thread behind Medieval forms of civil death. In the new techniques of civil death, fining a corporation to the point

---

<sup>819</sup> Damelya Aitkhozhina “Human Rights Lawyer Ordered to Leave Russia” (Dec 2, 2020), online: *Human Rights Watch* <https://www.hrw.org/news/2020/12/02/human-rights-lawyer-ordered-leave-russia> (last accessed July 26, 2021).

<sup>820</sup> Christiane Wilke & Paula Willis, “The Exploitation of Vulnerability: Dimensions of Citizenship and Rightlessness in Canada’s Security Certificate Legislation” (2008) 26:1 Windsor Yearbook of Access to Justice 26.

<sup>821</sup> Robert D. Cooter & Wolfgang Fikentscher, Indian Common Law: The Role of Custom in American Indian Tribal Courts (pt. II), 46 AM. J. COMP. L. 509, (1998) at 534

of bankruptcy is considered the “civil death” of the corporation.<sup>822</sup> The economic expulsion of a legal person from society by the state seems to be a characteristic in the contemporary era of a new or neo civil death. As Hannah Arendt observed, capitalism does not, in fact, protect property any better than socialism.<sup>823</sup> What she meant by this I believe was similar to Harcourt’s observation about the use of the criminal justice system in neoliberalism that in both cases property is never really secure for everyone—it is always being redistributed, just through different mechanisms.<sup>824</sup> Civil death is one mechanism of property redistribution under neo-liberal conditions.

The first civil death technique that I want to address as overtly economic is the confiscation of property or asset forfeitures also known as asset recovery. The seizing of property is the most explicitly true to form of the civil death techniques in that it was one of the most controversial aspects of civil death and of attainder in past centuries. What makes asset forfeitures particularly interesting today is that they are often conducted with limited procedural protections. Since many of the economic techniques are in fact found in civil law and not criminal law, then forfeitures, as one example, do not require a criminal conviction in the U.S. As Stefan D. Cassella, a federal prosecutor and expert on money laundering and forfeitures explained, “Civil forfeiture is simply a procedural device that the criminal prosecutor uses to recover property in a situation in which all of the interests of the potential property owners may be adjudicated at one time, without the necessity of obtaining a criminal conviction of the property owner or of anyone else.”<sup>825</sup>

Many of these civil tools are used in the criminal justice system by prosecutors intending to disrupt crime or prevent future crime by targeting the property as “tainted” or the persons who are tainted as criminals, which is why I am dealing with them as techniques in the service of creating a criminal status.<sup>826</sup> A person accused of dealing drugs can have his or her car forfeited on the basis that it was

---

<sup>822</sup> W Robert Thomas, “Incapacitating criminal corporations” (2019) 72:3 Vanderbilt Law Review 905–973.

<sup>823</sup> Arendt argued that in both cases private property are not secure for the individual. Arendt, *supra* note 92 at 145. “A social system based essentially on property cannot possibly proceed toward anything but the final destruction of all property.”

<sup>824</sup> Harcourt, *supra* note 235.

<sup>825</sup> Stefan D Cassella, “Civil Asset Recovery: The American Experience” (2013) 3 *Eucrim: the European Union Criminal Law Associations’ Forum* 98.

<sup>826</sup> The use of terms that designate persons as being criminal or deviant rather than actions or the crime is pervasive and underlies the argument that the person is himself corrupted. Take as an example from the U.S. Department of Justice, “Third, forfeiture serves as a deterrent. If one fraudster, child pornographer, corrupt politician, or drug dealer is not permitted to retain the fruits of his crime, perhaps the next person will be less likely to travel the same road.” *Ibid.*

used for the commission of a crime even if a criminal conviction is never obtained.<sup>827</sup> One advantage of using civil tools for criminal purposes is that the procedural protections for the accused are much lower in civil proceedings and so if there is, as an example, insufficient evidence for a criminal conviction, the prosecutor may still be able to get sufficient evidence for an “asset recovery.” Asset forfeiture had become an important tool in the war on drugs, the war on crime and the war on terror.<sup>828</sup> There has been, however, significant resistance to forfeitures especially in the war on drugs and this has been litigated and is currently in flux.<sup>829</sup> Likewise in Canada, asset forfeiture has been ruled legal by the Supreme Court of Canada<sup>830</sup>, but with the provision that priority for distribution of the proceeds of a confiscation goes to the victim of the crime.

While asset forfeiture has become most widely associated with the war on drugs in large part because the sale and trafficking of drugs has economic profit as its end and so the tools of forfeiture have taken hold in these areas to make sure that crime doesn’t pay.<sup>831</sup> It is, however, also an important technique in the war on terror. Under the U.S. Patriot Act, the U.S. government is authorized to seize the property of any entity foreign or domestic that is planning any act of domestic or international terrorism “against the United States, or their property...”<sup>832</sup> While this may appear to be a sensible form of disrupting a chain of events before a massive and catastrophic attack, legally speaking there are not a lot of safeguards built into preventing this from becoming a tool of oppression. As a definitional matter, it is possible that Green Peace could have their vessels seized for planning to disrupt a whale hunt or the laying of an underwater pipeline.

Another form of asset freeze or forfeiture is the forfeiture of benefits. The elimination of access to benefits does not garner widespread political opposition. Access to benefits, arguably property in a

---

<sup>827</sup> This is still the case even if it has to meet a proportionality test. Rachel Weiss, “The Forfeiture Forecast After Timbs: Cloudy with a Chance of Offender Ability to Pay” (2020) 61 Boston College Law Review 3073.

<sup>828</sup> Note, “Asset Forfeiture: Giving Up Your Constitutional Rights” (1997) 1 Campbell Law Review. at 528. “Even though forfeiture finds its roots in English law and this country has recognized it since the colonial period, an unprecedented expansion in the power of law enforcement to seize property has occurred in recent years. Consequently, forfeiture has become one of the greatest weapons in the war on crime.”

<sup>829</sup> Laura Dhillon Kane “B.C.’s Plans to Expand Civil Forfeiture Program Called Unconstitutional” CBC (March 10, 2019), online: *CBC News* <https://www.cbc.ca/news/canada/british-columbia/b-c-s-plans-to-expand-civil-forfeiture-program-called-unconstitutional-1.5050800> (Last accessed July 26, 2021).

<sup>830</sup> *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19, [2009] 1 S.C.R. 624

<sup>831</sup> Note, “The Civil-Criminal Distinction in Ohio’s Drug Forfeiture Laws” (1993) 1 Ohio State Law Journal 1463.

<sup>832</sup> “How the USA PATRIOT Act redefines ‘Domestic Terrorism’” (2002), online: *American Civil Liberties Union* < <http://www.aclu.org/national-security/how-usa-patriot-act-redefines-domestic-terrorism> > (last accessed July 26, 2021).



different form,<sup>833</sup> can be eliminated through legal privation. In the U.S., a criminal record can bar one from accessing educational grants and access to subsidized housing.<sup>834</sup> This form of property does not share the same bipartisan support and so it is much easier to expel someone from an economy nowadays than to simply take his or her property. Exclusion from social solidarity via welfare is a form of social expulsion.

While the challenges many persons with a criminal record face in finding a home to rent or employment because of informal discrimination by private entities is well documented<sup>835</sup>, there are also many formal legal disqualifications as well. In many cases, the absence of legislation prohibiting discrimination on the basis of a criminal conviction is the first example of a legal disqualification.<sup>836</sup> Formal, legal disqualifications from certain benefits such as educational grants or subsidized public housing expels certain persons from access to the labor market or to the housing market.<sup>837</sup> When, for example, persons with criminal convictions are barred from government educational grants, there are often no economic options for improving a work situation for the barred person, but it is an economic

---

<sup>833</sup> David A Super, “A New New Property” (2013) 113 Columbia Law Review 1773.

<sup>834</sup> “Individuals with limited resources may be denied public housing assistance for low-level offenses, such as prior alcohol and drug use. Further, incarcerated individuals also disproportionately suffer from chronic diseases, HIV, mental illness, and substance abuse, and have poor access to health care and may be excluded from important supportive programs after they are released” “Economic perspectives on incarceration and the criminal justice system” (April 2016) “Economic Perspectives on Incarceration and the Criminal Justice System” (April 2016), online: *The Obama White House* [https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160423\\_cea\\_incarceration\\_criminal\\_justice.pdf](https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160423_cea_incarceration_criminal_justice.pdf) (last accessed July 26, 2021).

<sup>835</sup> Devah Pager, “The Mark of a Criminal Record” (2003) 108:5 American Journal of Sociology 937–975. Samantha McAleese & Catherine Latimer, “Reforming the Criminal Records Act” (2017) The John Howard Society of Canada, online: <<http://johnhoward.ca/wp-content/uploads/2017/04/Criminal-Records-Act-Reform-Final.pdf>>; Howard Society of Ontario, *supra* note 677.

<sup>836</sup> Quebec provides legal protections for persons with criminal records from employment discrimination. See *Québec Charter of Rights and Freedoms*, R.S.Q., c. C-12, sec 18(2).

<sup>837</sup> Bradley D. Custer “Federal Financial Aid for College Students with Criminal Convictions” (December 17, 2020), online: *Center for American Progress* < <https://www.americanprogress.org/issues/education-postsecondary/news/2020/12/17/493904/federal-financial-aid-college-students-criminal-convictions/> > (last accessed July 26, 2021):

Federal lawmakers determine which students get financial aid for college, and perhaps no population has been viewed as less deserving of aid than college students with criminal convictions. The timeline below plots each time the federal financial aid eligibility rules were changed for these students, and the trend is clear: Since the 1960s, federal lawmakers have repeatedly sought to restrict financial aid access from students with certain criminal convictions and students in prison. Only a few times has Congress expanded aid to these students, mostly in recent years. Now, as momentum grows for restoring Pell Grants to students in prison and removing the drug conviction question from the Free Application for Federal Student Aid (FAFSA), this timeline makes clear that it will not be a simple task to reverse the long-running trend of taking away financial aid from these students

See also “No Second Chance: People with Criminal Records Denied Access to Public Housing” (Nov. 18, 2004), online: *Human Rights Watch* <<https://www.hrw.org/report/2004/11/18/no-second-chance/people-criminal-records-denied-access-public-housing>> (last accessed July 26, 2021).



net gain for the government who doesn't have to pay out for an educational grant for an "undeserving" "criminal". A ban on someone from holding a public position or a professional membership is a well-known historical "civil death" technique used continuously into the present.<sup>838</sup> What is perhaps new in the contemporary context is the sheer number of jobs that are contemporarily governed by professional associations and regulations that legally exclude persons with criminal records out of their fields. These exclusions include professions that require public trust such as public office, but it also encompasses professions from cutting hair to driving a truck.<sup>839</sup>

In addition to these exclusions that are well documented in the collateral consequences literature<sup>840</sup>, there are creative ways lawmakers attempt to exclude persons with a criminal conviction from full access to the economy. A recent example is found in Florida. A Florida ballot initiative to raise the minimum wage was overwhelmingly passed but soon after a proposal emerged to change the state constitution to allow lawmakers to "reduce the minimum wage for employees convicted of a felony" along with employees under 21 years of age.<sup>841</sup> While one lawmaker suggested that the intention of the measure was to "protect" persons with a felony conviction (so that they would still be employable despite the raise), there is a clear differentiation in statuses between persons with and without a felony conviction. Economic incapacitation is a crucial step in killing the juridical person. By raising the minimum wage to a living wage for everyone except persons with a felony conviction the symbolic message and actual consequences are that persons with a felony conviction are not worthy of living.

The Freezing of assets of organizations and individuals is arguably a necessary move to cut off the mobilization of resources for networked criminal acts. This technique is common not only for states such as the U.S. and Canada, but also it is considered a best practice for international organizations

---

<sup>838</sup> *Washington v. State*, 75 Ala. 582, 585 (1884): "The presumption is, that one rendered infamous by conviction of felony, or other base offense indicative of great moral turpitude, is unfit to exercise the privilege of suffrage, or to hold office, upon terms of equality with freemen". *Harvey c. Nouveau-Brunswick* (Procureur général), [1996] 2 R.C.S. 876: "...assuming the application of the Charter, the provisions of s. 119(c) of the Elections Act violate the rights guaranteed under s. 3 of the Charter but do not constitute cruel and unusual punishment under s. 12 of the Charter. However, s. 119(c) is saved under s. 1 as it is a reasonable limit demonstrably justified in a free and democratic society." [S. 119(c) of New Brunswick Elections Act provides for 5 years of ineligibility for a "person who is convicted of having committed any offence that is a corrupt or illegal practice."]

<sup>839</sup> Pager, *supra* note 835.

<sup>840</sup> Ewald, *supra* note 22.

<sup>841</sup> Lexi Lonas, "Florida state lawmaker seeks to exclude felons from minimum wage hike" (January 29, 2021), online: *The Hill* < <https://thehill.com/homenews/state-watch/536513-florida-state-lawmaker-seeks-to-exclude-felons-from-minimum-wage-hike> > (last visited July 26, 2021).

and bodies from the UN to the EU as a tool of counterinsurgency against terrorists and other human rights violators. It is an efficient tool, and it can be a truly debilitating technique at the disposal of states. What makes this potentially challenging is that the procedural protections are difficult to assess since there is frequently no trial before freezing assets and the security measures and procedures and evidence that determines who is and who is not a terrorist is not in the public sphere to debate. On the one hand, we can imagine that it would be difficult from a security perspective to counter particularly with well-funded and wealthy organizations bent on violently attacking civilians such as Bin Laden. On the other hand, we are really banking on the wisdom and good judgement of the states and organizations to determine who is and who should not fall into these lists. Hossam Bahgat had his assets frozen by the Egyptian state and he was essentially placed in an economic status that made him unable to provide for himself financially. Civil death both requires status to attach legal consequences, but it also is status enforcing as someone without the same economic access. The market manipulations of asset freezes and forfeitures and property exclusions that take place around criminal justice statuses reinforce Harcourt's observation about the unique role of criminal justice in the maintenance and functioning of neoliberalism.

### 3.4. *Fines*

While fines have always been a penalty available in criminal law, and civil suits have been available to recover damages, fines are an alternative mode of securitizing spaces and incapacitating persons. In regular criminal law in the U.S. fines are not graduated to income as they are in Europe.<sup>842</sup> Fines in the U.S. with vast wealth inequality is debilitating for low-income persons.<sup>843</sup> Like civil asset forfeiture had become a civil tool for prosecutors to create criminal statuses, fines on the periphery of criminal justice can work in the same way. They can be large or extraordinary fines, or many small fines directly withdrawn from bank accounts. Alternatively, even small fines against those in precarious situations are devastating.<sup>844</sup> The changes and possible expansion of the use of fines is a technique of incapacitation that is getting re-organized.

---

<sup>842</sup> The Justice Management Institute and the Vera Institute of Justice,

*How To Use Structured Fines (Day Fines) as an Intermediate Sanction*, Washington DC: Bureau of Justice Assistance (1996).

<sup>843</sup> Alec Schierenbeck, "The Constitutionality of Income-Based Fines" (2018) 85:8 The University of Chicago Law Review 1869–1925.

<sup>844</sup> Marie Eve Sylvestre, "Disorder and public spaces in Montreal: Repression (and resistance) through law, politics, and police discretion" (2010) 31:6 Urban Geography 803–824.

As a point of comparison, in 1987 in the U.S. a group of protesters climbed a fence and chained themselves to logging equipment. Six persons were charged with criminal mischief, spent 30 days in jail and were fined \$500 each. A subsequent civil suit was brought, and they were required to pay an additional \$25,000 in damages in total in a suit that was subsequently called a SLAPP. It had been a misdemeanor offence to protest industry in 1987. While SLAPPs provide for inconsistent results depending on the judge and the damages awarded and they require a trial, the fines structure has changed after lobbying for automatic fines that start at \$25,000.

The introduction of bills to increase the baseline of fines for protest in the U.S. is a relatively new phenomenon. There has been a wide array of new bills introduced to curb political protest over the last few years.<sup>845</sup> In the area of pipelines, new legislation has been introduced in several U.S. states that designates pipelines as “critical infrastructure” in order to turn protests of pipelines from misdemeanor offences to felony offences.<sup>846</sup> It further expands what is considered to be critical infrastructure so that cellphone towers and truck terminals are all also considered critical.<sup>847</sup> Additionally, it makes organizing entities potentially financially liable as well.

Legislation similar to that in the U.S. has been introduced in Canada as well. Bill 1: The Critical Infrastructure Defense Act, came into law in Alberta in 2020. “Public order” fines have been introduced in Canada following similar legislation in the U.S. to stop protests against and sabotage of what is considered critical infrastructure.<sup>848</sup> This law introduces fines for individuals of \$10,000 for trespass, and \$25,000 for subsequent offences and \$200,000 for organizations that assist the trespass.<sup>849</sup> While critics of this legislation have noted that there is already existing laws against trespass on the books, the severity of fines are designed to securitize the gas and oil sector against protest. Notably it

---

<sup>845</sup> Christopher Ingraham, “Republican lawmakers introduce bills to curb protesting in at least 18 states ” (February 24, 2017), online: *The Washington Post* [https://www.washingtonpost.com/news/wonk/wp/2017/02/24/republican-lawmakers-introduce-bills-to-curb-protesting-in-at-least-17-states/?utm\\_term=.5c914478bb58](https://www.washingtonpost.com/news/wonk/wp/2017/02/24/republican-lawmakers-introduce-bills-to-curb-protesting-in-at-least-17-states/?utm_term=.5c914478bb58) (last accessed July 26, 2021).

<sup>846</sup> Maggie Ellinger-Locke, “Anti-Protest Legislation is Threatening Our Climate” (May 6, 2019), online: *Ecowatch*. <https://www.ecowatch.com/anti-protest-legislation-2636409012.html?rebelltitem=2#rebelltitem2> (last accessed January 6, 2021).

<sup>847</sup> See e.g. Andrew Graham, *Canada’s Critical Infrastructure: When Is Safe Enough Safe Enough* (December 2011), online: *MAcDonal-Laurier Institute* <<https://www.macdonaldlaurier.ca/files/pdf/Canadas-Critical-Infrastructure-When-is-safe-enough-safe-enough-December-2011.pdf>> (last accessed July 26, 2021).

<sup>848</sup> “Protecting critical infrastructure” (2020), online : *Government of Alberta* <<https://www.alberta.ca/protecting-critical-infrastructure.aspx>> (last accessed July 26, 2021).

<sup>849</sup> “Protecting critical infrastructure” (2020), online : *Government of Alberta* <<https://www.alberta.ca/protecting-critical-infrastructure.aspx>> (last accessed July 26, 2021).

covers the protest movements that have been largely organized by Indigenous land and water protectors.<sup>850</sup>

Canada had been reticent to go as far as the U.S. to legislate severe penalties for disruption to the energy infrastructure, but as one early position paper coming out of the Canadian Centre of Intelligence and Security Studies at Carleton University argued in 2008, negligence in U.S. court cases should influence Canadian policy. “Given this reality, governments in Canada should not take lightly the emerging body of case law in the United States that suggests that inadequate counter-terrorism practices could be deemed negligent in light of reasonably foreseeable risks.”<sup>851</sup> The paper goes on to claim that since the energy sector is largely private, the protection of Critical Energy Infrastructure (CEI) under most public-private partnerships means that private security firms in partnership with the government are creating emergency management plans that deal with all forms of security “risk” that would disrupt normal operations.

...inadequate counter- terrorism practices by the government may be deemed to be negligent in light of what are now surely reasonably foreseeable terrorism-related risks in a post 9/11 world, and neglect by government of its emergency management related responsibilities by taking actions that harm the public.<sup>852</sup>

One form of normal operations that seems to have drawn the attention of many legislators in the U.S. are protests that block traffic. Taking one’s political message to the streets is increasingly seen as a form of interference with critical infrastructure. Lawmakers are looking at higher fines to curb this form of disruptive disobedience. In the state of Washington, a Bill was up for consideration to increase penalties for anyone who impedes access to highways or railways calling the action “economic terrorism”<sup>853</sup> The American Civil Liberties Union has argued that the bills to fine protestors for blocking roads

---

<sup>850</sup> Boritse Mene, “The Constitutionality of the Critical Infrastructure Defence Act (CIDA)” (July 23, 2020), online: *ACLRC* < <http://www.aclrc.com/blog/2020/7/23/the-constitutionality-of-the-critical-infrastructure-defence-act-cida> (last accessed July 26, 2021).

<sup>851</sup> Jacques JM Shore, “The Legal Imperative to Protect Critical Energy Infrastructure” (March 2008), online: *Canadian Centre of Intelligence and Security Studies at Carleton University* < <http://cip.management.dal.ca/publications/The%20Legal%20Imperative%20to%20Protect%20critical%20energy%20i%20nfrastructure.pdf> > (last accessed July 26, 2021).

<sup>852</sup> *Ibid.*

<sup>853</sup> Christopher Ingraham, “Republican lawmakers introduce bills to curb protesting in at least 18 states - The Washington Post” (2017) *The Washington Post* 2–8, online: <[https://www.washingtonpost.com/news/wonk/wp/2017/02/24/republican-lawmakers-introduce-bills-to-curb-protesting-in-at-least-17-states/?utm\\_term=.5c914478bb58](https://www.washingtonpost.com/news/wonk/wp/2017/02/24/republican-lawmakers-introduce-bills-to-curb-protesting-in-at-least-17-states/?utm_term=.5c914478bb58)>.

or classifying it as a form of economic terrorism is not out of a need to fill “some gap in the law”<sup>854</sup> since everywhere in the United States there are already laws prohibiting the obstruction of traffic on busy roads. Instead, the clear intention is to increase “the penalties for protest-related activity to the point that it results in self-censorship among protestors who have ever intention to obey the law.”<sup>855</sup>

This also seems to be the case for the laws that are passed that bar criminal prosecution for people who drive into protestors. Setting the default rules in favor of drivers who hit protestors may be intended in part to protect drivers who are caught in the middle of violent protests, but they are certainly also if not primarily intended to make protestors self-censor to stay off the roads and out of the way. The use of the category: terrorist allows for deterrence against future action that was only a risk. Protestors are being cast as presumptively threatening since protests have a potential for violence.

How much of a fine would be sufficient to protect the infrastructure and how much would be considered excessive? In *Timbs v Indiana* the U.S. Supreme Court in 2019 reversed a ruling that the Eighth Amendment prohibiting excessive fines and forfeitures does not apply to states and local government. The Court ruled that it does apply now reversing a decision by the Indiana Supreme Court that allowed a \$40,000 car to be taken from a drug addict who sold a few grams of heroin to support his addiction. The Court ruled that this was an excessive forfeiture and that Constitutional protections are not limited to Federal fines but also to state and local fines. While this case is certainly a move in the direction of protecting private property of “criminals”, this case marks a pretty low bar for what counts as “excessive” and allows for wide breadth of interpretation. Protection of property rights tends to get the most support across the political spectrum as it is offensive to those sympathetic to less punishment as well as to conservatives who ideologically are more invested in protecting private property.

In 2005 a protest by the organization “Voices in the Wilderness” was fined for violating the U.S. trade embargo against Iraq. The group brought medicine to Iraqis as a form of protest to the Sanctions against the country. Years later, the group was fined \$20,000. Bert Sacks, was one of the activists who was fined \$10,000 for violating the embargo against Iraq in the 1990s, which he challenged and the

---

<sup>854</sup> *Ibid.*

<sup>855</sup> *Ibid.*

suit was eventually summarily dismissed.<sup>856</sup> What the lawyer for Voices in the Wilderness noted was that the group was fined only years after the initial actions in 2002 after they were “prominently involved in anti-war protests.”<sup>857</sup> It was not without irony the group noted that the U.S. oil companies had violated the embargo for profit motives but were not penalized, while a humanitarian organization was penalized for violating the embargo for humanitarian motives. In the end, however, the courts have historically stood as a bulwark against excessive fines and takings in these cases.

The introduction of Bills that share bipartisan support in the U.S. Congress to prohibit boycott campaigns can carry with them extraordinary fines. Because the relationship between Israel and the U.S. is outlined as both a security arrangement and also an economic one, the coupling of anti-boycott laws with the designation of a security arrangement would mean fines for organizations or individuals who call for boycott between \$250,000 to \$1,000,000 for advocating for a boycott of the state of Israel.<sup>858</sup>

Still, fines do not have to be extraordinary for them to be debilitating. Small fines that are automatically deducted from bank accounts and from salaries and cumulative can have the same consequence as being fined a large sum. There was an informal practice of police in Spain against Basque separatists of deducting small civil fines from persons suspected of being in the “ambito” of terrorism. That is, there were no formal charges of terrorism brought against them and there was no actionable evidence that a crime had been committed. Instead, they would be fined for protesting. Because the fines were not criminal, but civil, the funds could be drawn directly from a bank account. Because the person could be fined frequently, it would quickly leave the person without money in the bank account and unable to hold property in his or her name. Fines against the Catalan politicians held in prison for organizing a referendum have been charged with sedition and misuse of public funds. “Meritxell Borràs and Carles Mundó have instead been found guilty of disobedience, and ordered to pay a fine

---

<sup>856</sup> “Peace Activist Challenges U.S. Fine over Iraq Sanctions” (July 16, 2007), online: *DemocracyNow* <[https://www.democracynow.org/2007/1/16/headlines/peace\\_activist\\_challenges\\_us\\_fine\\_over\\_iraq\\_sanctions](https://www.democracynow.org/2007/1/16/headlines/peace_activist_challenges_us_fine_over_iraq_sanctions)>

<sup>857</sup> “U.S. Government Fining Activists for Taking Medicine to Iraq” (July 6, 2005), online: *Institute for Public Accuracy* <http://accuracy.org/release/1082-u-s-government-fining-activists-for-taking-medicine-to-iraq/> (last accessed July 26, 2021).

<sup>858</sup> Faiz Shakir, “Critics of U . S . ‘ Israel Anti-Boycott Act ’ say even requests for information could expose citizens to penalties”, *Mondoweiss* (2017). FORMAT Philip Weiss, “Critics of U . S . ‘ Israel Anti-Boycott Act ’ say even requests for information could expose citizens to penalties” (July 22, 2017), online: *Mondoweiss* <<https://mondoweiss.net/2017/07/information-citizens-penalties/>> (last accessed July 26, 2021).



rated at 10 months, or €200 per day. They are also barred from holding public office for one year and eight months.”<sup>859</sup>

Fines and forfeitures are newly configured, old tools of government which are often underexamined forms of contemporary securitization.<sup>860</sup> While the U.S. has gotten significant attention for the pernicious use of fines in relation to indigent persons<sup>861</sup>, Canada also uses fines for security that have the potential to fully incapacitate. The targeting of persons without housing for fines, (homeless if we want to understand it as an informal status) occurs largely through police discretion.<sup>862</sup> The ticketing of actions which are constitutive of the existence of the person is a quintessential status-enforcing law. That is to say, tickets that target someone for loitering or sleeping in public, for example, target persons who exist in public and have no private dwelling. Along the same lines, in Canada, the criminal code and the P-6 municipal bylaw were used to target protestors with fines of no less than \$500 and no more than \$3,000.<sup>863</sup> These kinds of regulations not only have a chilling effect on protest, which is the purpose, but can also split social mobilization by “gentrifying” street dissent or political contests so that only those financially capable of taking a fine can be engaged in public mobilizations. \$3,000 could bankrupt many persons in Montreal.

In Spain someone considered a risk or a member of ETA, or in the “ambito del terrorismo” that is the environment of terrorism, who had not committed a chargeable crime or who had not been caught for a crime was subjected to a kind of financial harassment. Fines such as the demonstrating would be charged directly and taken from the bank account. There was no recourse as these were not criminal fines but were civil. It left targeted persons without funds, unable to hold a bank account and

---

<sup>859</sup> Rincon, R. et al., “Supreme Court find Jailed Catalan Secession Leaders Guilty of Sedition” (Oct. 14, 2019), online: *El Pais* < [https://english.elpais.com/elpais/2019/10/04/inenglish/1570178504\\_315132.html](https://english.elpais.com/elpais/2019/10/04/inenglish/1570178504_315132.html) > (last accessed July 27, 2021).

<sup>860</sup> Tim Prior & Florian Roth, “Disaster , Resilience and Security in Global Cities” (2013) 6:2 *Journal of Strategic Security* 59–69; Murphy, *supra* note 705.

<sup>861</sup> Myesha Braden, Lea Watson, Talia Gilbert and Jason Enos, *Too Poor To Pay: How Arkansas’s Offender-Funded Justice System Drives Poverty & Mass Incarceration* (March 20, 2019), online: *Lawyers’ Committee for Civil Rights Under Law* < <https://www.lawyerscommittee.org/too-poor-to-pay-how-arkansas-offender-funded-justice-system-drives-poverty-mass-incarceration/> > (last accessed July 26, 2021).

<sup>862</sup> Catherine T Chesnay, Céline Bellot & Marie Ève Sylvestre, “Taming disorderly people one ticket at a time: The penalization of homelessness in Ontario and British Columbia” (2013) 55:2 *Canadian Journal of Criminology and Criminal Justice* 161–185.

<sup>863</sup> RBCM, “Ville De MONTRÉAL: P-6 Bylaw” (2012) 6 3–5. For arguments on the impact of fines on political activism as well as the economic disparities fines have on different populations, see esp. Marie-Eve Sylvestre et al, “Le droit est aussi une question de visibilité: l’occupation des espaces publics et les parcours judiciaires des personnes itinérantes à Montréal et à Ottawa” (2011) 26:3 *Canadian journal of law and society* 531–561. Sylvestre, *supra* note 844.



ultimately unable to hold property. If someone was not part of a clandestine organization before this happened, they just might be afterwards as their only means of survival is living off of others either by charity, family or through an organized network. In the next section, I will address directly how economic sanctions can be problematic from a security perspective.

### 3.5. *Economic Expulsion*

Neo-civil death techniques provide the tools for massive expulsions of economically “superfluous” persons. Under the heading “The Savage Sorting,” Saskia Sassen writes that there is a crisis in our global political economy as an increasing number of political and economic “expulsions” are taking place.<sup>864</sup> She says not only that more people and enterprises are being “expelled from the core social and economic orders of our time” but that this is in fact a global phenomenon which she explains as a set of complex processes.<sup>865</sup> While Sassen describes different processes from the ones I have outlined in this dissertation, she proposes that the expulsions are an economic adjustment for shrinking economies. She concludes that “[t]he reality at ground level is more akin to a kind of economic version of ethnic cleansing in which elements considered troublesome are dealt with by simply eliminating them.”<sup>866</sup> The new civil death techniques should be placed alongside her account as a technology of power that is contributing to the complex interplay that constitutes the modern forms of social and economic expulsion. That is the case whether the person is convicted of a felony offense, charged with a felony, convicted of the crime of terrorism, or is a terror suspect. Troublesome or threatening persons can be expelled from the social life through neo-civil death techniques.

While I have focused in this section on the fines, asset freezes and confiscations, there are many ways in which civil death techniques target the economic viability of a person. There is a unique form in which civil death plays out in respect to the rights and privileges of persons in a privative legal status. Sanctions and fines and confiscations, the barriers to benefits, the inability to conclude a contract, the impossibility to access the labor market through one’s trained profession, these are some of the different ways people are cut off from economic activity. A death in law for a non-living legal person (like a corporation) is the freezing of assets, the fines that make that legal person insolvent. The taking of property is effectively a death sentence for a non-living legal entity because they are simply their

---

<sup>864</sup> Saskia Sassen, *Expulsions: Brutality and Complexity in the Global Economy* (Harvard University Press, 2014) at 1.

<sup>865</sup> *Ibid.*

<sup>866</sup> *Ibid* at 36.

economic interests. In the new civil death, our subjectivities have already been reconfigured as economic beings. The deliberate targeting of economic activity severs connections through the new techniques of civil death. While there may be good reasons to target the economic relations to disrupt an imminent terrorist attack, the fact is that these techniques are so widespread now and so readily available that we are effectively creating an economic caste system through these security measures.

The irony is that legal privations as security measures can make society less secure. Individuals with a criminal record or with an economic lien placed on their property often have a more difficult time with reintegration as they are made more vulnerable to labor exploitation or they may resort to criminal activity as a means of survival.<sup>867</sup> State-sponsored economic precarity does not tend to breed loyalty. Even more pernicious still, since no one is in fact an atomized individual, but each person lives connected to others in many important ways, it means these techniques have a cumulative impact on society at large. Estimates suggest that almost half of all American children have at least one parent with a criminal record.<sup>868</sup> This is a staggering statistic with wide social effects. This means that not only are persons with criminal records denied housing, unable to get federal student loans, or advance economically, but their children born into a family that suffers from a privative status are also impacted by these measures.

The deep economic dimension to historical cases of civil death through property forfeiture and the externalization of property from the self, has been reconfigured in the new civil death techniques as a way to incapacitate the disobedient through a transition from one kind of citizen to another that can only be described as a privative legal status. The techniques of civil death are made more efficient by a well-developed regulatory or administrative state. The kinds of EU sanctions can be triggered in an administrative state that has tight administrative control over its borders, is pervasive in terms of the regulation of economic relations, and this costs very little since they are privative sanctions. Neoliberalism not only foregrounds efficiency and cost-effectiveness, but it also uses criminal law as an intervention in the market as Harcourt argues. Legal manipulations of property as non-regulatory

---

<sup>867</sup> Howard Society of Ontario, *supra* note 677.

<sup>868</sup> Lottie Joiner & National Journal, “Families Pay the Never-ending Price of a Criminal Record” (2015) *The Atlantic* 1, online: <<https://www.theatlantic.com/politics/archive/2015/12/how-families-pay-the-never-ending-price-of-a-criminal-record/433641/>>. Lottie Joiner & National Journal, “Families Pay the Never-ending Price of a Criminal Record” (December 15, 2015), online: *The Atlantic* <<https://www.theatlantic.com/politics/archive/2015/12/how-families-pay-the-never-ending-price-of-a-criminal-record/433641/>> (last accessed July 26, 2021).

market manipulation appears normal, though it is in fact a way to maintain system economic stability. The economic expulsion of some is a form of market redistribution to others.

It is sometimes difficult to get to the phenomenology of these techniques, and so I will end this section with a short cut from an interview. Rachel Schuyler, a woman living without a home outside Austin Texas was interviewed on how she had previously ended up in prison for passing bad checks and then lost everything including custody of her daughter and her house and is stuck in a world of exclusion. She said:

It's just, once you're in the system, even though I got time served, and I have — I'm done, I'm not on probation, I have — my cases are finished, I'm still going to be punished for up to the next 10 years, via I can't get a place to live, or it's going to be difficult for me to get a job, to actually start a career.

I have done my time, and I'm — I have done my rehabilitation. But now I'm screwed.<sup>869</sup>

It should be abundantly clear that the fine line between what may be considered legitimate uses of legal incapacitation of persons and what Hannah Arendt described as a step towards totalitarian rule is incredibly fine and may be harder to see when one is up close. It is easier to identify excess in the practices of other states, though the legal techniques are essentially the same. The tilt towards totalitarian uses of law, and the power over the legal person or legal status is not determined by the kind of state – if it is a country that follows the rule of law or not—since civil death is constructed within the language of law in liberal democracies and authoritarian states alike. The ever-expanding notion of what constitutes protection of national security and which organizations, groups and individuals are deemed grave threats, terrorists, or deviants may be useful in differentiating between the “rule of law” and “rule by law”.<sup>870</sup> The distinction is between laws that provide tools for communities versus laws that provide states with the legal justification for ruling over or dominating.

---

<sup>869</sup> Nawaz, Amna “The Vicious Cycle of Incarceration and Homelessness” (December 8, 2020), online: *PBS Newshour* <<https://www.pbs.org/newshour/show/the-vicious-cycle-of-incarceration-and-homelessness>> (last accessed July 27, 2021).

<sup>870</sup> “The thinnest formal version of the rule of law is the notion that law is the means by which the state conducts its affairs, ‘that whatever a government does, it should do through laws.’... Rule by law carries scant connotation of legal

Although one of the topical pulls motivating this project has been the ways economically superfluous persons can be made legally superfluous through techniques that frequently are configured as economic mechanisms, this has not been the primary object of focus in this last chapter. I have focused the attention of this last chapter on the uses of civil death that span the spectrum from normal criminal sanctions to national security for important “security” reasons. Environmental destruction and the warming of the planet is the biggest security crisis we currently face.<sup>871</sup> States are, however, slow to respond to this crisis and especially democratic countries that have many different constituencies to answer to. To some extent, disruptive environmental action and protest may be an important if not necessary component to staving off the climate crisis that will bring war and human insecurity. Even mainstream, nonpartisan value-based organizations such as the Aspen Institute recognize the importance of direct action to stave off climate catastrophe.<sup>872</sup>

While neo-civil death techniques are purportedly tools for human security, environmentalists, human rights activists, racialized minorities and persons in economic insecurity frequently face the hard consequences of civil death techniques. As a powerful tool of the state in the contemporary setting, civil death is reconfigured in a neoliberal manner, shaped by market forces as the isolation or atomization of the individual corresponds to the creation of significant portions of any given populace as internal enemies and expelled as “superfluous” humans. Ultimately, I have sought to explore how the civil death concept has come to support a security paradigm that can expand exponentially especially in moments of political crisis, and the conditions and legal techniques that underpin this new way of regulating our shared social lives.

---

limitations on government, which is the sine qua non of the rule of law tradition.” Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004) at 92.

<sup>871</sup> Kate Guy & Et Al, “A Security Threat Assessment of Global Climate Change How Likely Warming Scenarios Indicate a Catastrophic Security Future the National Security, Military, and Intelligence Panel on Climate Change (Nsmip)” (2020) February, online: <<https://climateandsecurity.org/wp-content/uploads/2020/03/a-security-threat-assessment-of-climate-change.pdf>>. Kate Guy & Et Al, “A Security Threat Assessment of Global Climate Change How Likely Warming Scenarios Indicate a Catastrophic Security Future the National Security, Military, and Intelligence Panel on Climate Change (Nsmip)” (February 2020), online: *Center for Climate and Security* <https://climateandsecurity.org/wp-content/uploads/2020/03/a-security-threat-assessment-of-climate-change.pdf> (last accessed July 27, 2021).

<sup>872</sup> Greg Gershuny, “Driving Climate Action with Direct Action” (March 18, 2019) online: *The Aspen Institute* <<https://www.aspeninstitute.org/blog-posts/driving-climate-action-with-direct-action/> (July 27, 2021).

## 4. Conclusion

The uses of merit-based privative statuses within the law of persons constitute a much more economical and efficient way to deal with mass convictions and security threats than traditional forms of incarceration. The new civil death is constituted through the use of neo-civil death techniques that exert control over the legal person diminishing legal capacity. Simultaneously, the use of privative statuses “fits” well with the new security practices that are designed to deal with risk. The designation of enemy statuses within domestic spaces and international spaces alike works to produce classes of legal persons (often without a physical body that is readily located) as targets that need to be incapacitated. It also, in some instances, sidesteps criminal proceedings altogether. This division is not one between authoritarian governments and democratic ones, as these are competing versions of the same tools in modern legal systems today and at the international level. The targeting of the legal person in the new configuration of legal sanctions is particularly expedient at the international level where control over a body is not always possible.

By targeting the legal person, the techniques for incapacitation are being re-created within technologically and administratively advanced societies. Civil death and the synthetic control through bureaucracies over the legal person becomes increasingly possible. The stunning conclusion we are facing is that the need to control the body to control the person may itself become obsolete.

## Overall Conclusions

This dissertation set out to work through and clarify the concept of civil death, in order to better understand what the uses of the term tell us about the legal and political systems from which it has emerged and the epoch in which we live. I have argued that the historical legal institution of civil death is important to capture the transversal logic of a variety of contemporary legal arrangements more extensive than what the literature typically refers to as the “new civil death.” By pushing the contemporary North American centered, domestic understanding of civil death further, this project has provided a view of the ways this concept was constituted historically. With this conceptual history we can then better understand the constitution of civil death on the global stage as being both more complex and varied as well as the dominance of a narrower meaning following from a particular set of conditions. A theory of civil death has been formulated that provides both for the broad uses of the term as well as the dominance of the punitive, criminological meaning. It holds that certain legal techniques force a change from an equal legal status to a differentiated and privative status in law. My refined definition of civil death proposes that a legal death is a transition from one legal status to another. This provides a cleaner analysis for the ways the concept is used contemporarily and a better socio-legal explanation for the re-emergence of civil death as a legal concept within neo-liberalism.

The issue this project set out to solve in the introduction was a conceptual and political problem. Many people have intuitions about the application of the concept of civil death, but the definition and the theories associated with civil death do not quite explain if any given case is a so-called *real* case of civil death or not. Within the dominant definitions and theories of civil death, it is difficult to know which cases fall in and which ones are excluded based on a concept that is largely defined by its history and then only as an analogy to that history. I set out to come up with a category of analysis that provided better guidance for future use and also provided social explanation for the re-emergence of the concept in this moment in history. In the introductory chapter, I set up the problem with the definitions and theories. That problem is that the definition we have directs us towards criminal uses of the term and does not explain important known outliers like the monk, nor does it provide a criteria for including or excluding different cases that are similar to criminal cases but in the field of security.

The new civil death cases hinge on a criminal conviction for collateral consequences and hence are not useful in many security scenarios in which there is no conviction but rather intelligence has designated someone as responsible for past criminal acts.

In chapter 2, I mapped out the theories of civil death and proposed that the narrow definitions we have are insufficient for capturing the ways theorists conceptualize civil death for different purposes. I also identified a gap in the legal literature in which the concept of civil death tends to be undertheorized, while the theories in other disciplines often miss some important legal insights. I proposed that a grounded theory of civil death should be rooted in law, and that an initial socio-legal mapping exercise could help to understand the ways the term is used contemporarily. Rather than simply focusing on the techniques of civil death or the rights that are suspended, the mapping exercise conveyed that there were a wide variety of kinds of persons that were associated with civil death. There were many more kinds of persons than what has been labelled as a civil death status in criminal justice. This opened up the scope of inquiry for the historical analysis.

In chapter 3, I proposed a different historical method for understanding civil death that was less teleological and more contextual. Instead of tracing a continuous history back to the ancient European roots of civil death, I proposed that the construction of legal history in a particular moment when nineteenth century comparativists doing private law created the narrative that civil death simply was the Roman institution of *infamia* carried into the contemporary context. Looking primarily at the nineteenth century in North America, I suggested that the political and economic context created the conditions that made certain criminal justice interpretations of civil death percolate to the top and become the most dominant interpretations of civil death despite a wide variety of theories available at the time. The importance of civil death for aligning loyalties through property rights was evident by looking at the different ways in which civil death was used in that period in North America, and in comparison to and contrast against eighteenth century and European interpretations.

In chapter 4, I offered another historical chapter that followed a different methodology that was not rooted in the term civil death, but in the methods of looking at history from below. It examined the legal situation of different groups to understand why contemporary historians and theorists have used civil death to describe the kinds of legal disabilities that were attached to four different classes of persons. I also looked at one class of a collective identity that self-described as suffering a civil death at the end of the nineteenth century: the sovereign nations that are now classed as indigenous nations.



By looking at four historical cases, the legal disabilities that controlled these groups for their lack of loyalty or lack of freedom provides a better understanding of the ways in which legal techniques of privation work.

In chapter 5, I offered a theory of civil death as a category of analysis in which we understand civil death not to be the end of legal personality, but rather a transition to a privative legal status. Civil death is the mark of a burdened status. In an age of rights and an age of presumptive formal equality, civil death is almost unintelligible in part because it is hard to grasp what it means to live without formal equality. The significance of civil death today is that we live in a period in which sortal statuses are in fact proliferating and yet they are difficult to see as sortal statuses in part because they are understood as merit-based statuses or rationally justified differentiated legal statuses. This chapter makes an important contribution to understanding the ways in which the promise of rights and the reality of rights grounded in law differ. We inhabit a world of over and under-privilege persons.

Finally in chapter 6, the dissertation moved from the newly formed theory of civil death to the application of the concept. In this last chapter we were able to better understand how privative legal statuses are crucial for the collapsing of the domestic/foreign security framework. Status is used to designate internal enemies in domestic security practices and status is used to control persons when their bodies cannot be brought under control internationally. In this last chapter, we also were able to move from the importance of status for identifying civil death practices to the different techniques that are not often included in civil death analyses such as fines and asset freezes that are new forms of property confiscation. The uses of property to control political subjects gets further elaboration in this last section. The targeting of the legal person, often through property relations or movement, is a new-old technique for incapacitation as it is being re-created within technologically and administratively advanced societies. The synthetic control through bureaucracies over the legal person has become a present-day reality. The conclusion of this last chapter is that we are facing the possibility that we no longer need to control the body to control the person.

A series of questions that were asked at the outset of the dissertation have been answered. Very briefly, some of the more central questions included: is civil death a status or a process? Is it the end to legal personality and is it possible to live without any legal personality whatsoever? How do we know which rights are associated with civil death? The theory of civil death I have offered answers these questions. We can say that civil death is not itself a status, but it marks the transition to or the formation of a

privative status. As a privative status, it is not the end of legal personality but rather the end of full, formal equality as a citizen. Civil death techniques can be attached to a status and flow from a particular status such as being a married woman before the formal legal disabilities were removed from married women's status, or they can be status enforcing. A person who is convicted of a felony has a felon status in the U.S. and the legal effects of that status can prevent them from voting, accessing benefits, etc. The civil death techniques are ways a status can be disabled through law. The same techniques can also be status enforcing so that an informal status that is not explicitly named in law, such as being trans, does not have a legal designating status as such, and yet laws that prohibit gender change on official identification can enforce informal status. Civil death techniques are used across the different fields of law and across the different ways of being human. In the nineteenth century, civil death statuses were deemed particular legal persons, or even "abnormal" persons. In the current moment, many of the ways of being "abnormal" are being heavily regulated through securitization practices.

We live in societies in which there are in fact multiple legal statuses under the guise of formal legal equality created around the kinds of threats different persons pose. Civil death as burdened human existence appears as a counterforce to international human rights law but a counterforce that is, paradoxically, being used to protect human rights at the international level. As calls for enforcement of rights get stronger, so too are the punitive mechanisms to incapacitate persons who violate those rights. In the end, even the international bodies that are responsible for the protection of international human rights are advocating neo-civil death techniques in the service of protecting human rights. That is, despite the impact of fragmenting the universal legal person into a range of legally over and under-privileged persons in society, civil death techniques that target the legal person are emerging as a dominant form of security. Systems of rights lose their meaning when those "rights" in question are in fact only privileges that can be taken away or forfeited. The move towards grounding international human rights in more and more punitive terms as if this makes rights more real misses the aspirational and utopic promise of the human rights movement. Jay Bernstein argues for a left reconstruction of human rights, "the political equivalent of a new music" for human rights in which progress is not equated with a linear steady ascent, but rather progress is, to use Adorno, a continual resistance to relapse.<sup>873</sup> Civil death sits in an ironic tension between being itself the manifestation both of the

---

<sup>873</sup> Jay Bernstein, "Problems of Progress: Human Rights and the Rights Character of the Human" (Tel Aviv University Van Leer Institute Public Lecture, June 20, 2017), online: *Youtube* <<https://www.youtube.com/watch?v=orUixDFMprA>> (July 27, 2021).

difference between promise and reality as well as a concept that makes that difference visible. Showing that neo-liberal techniques of incapacitation are a new form of civil death is one weapon in the resistance against what has become an invisible death by a thousand juridical cuts.

Better enforcement will not necessarily protect the human rights system. The creation and wide use of legal statuses that are individualizing and isolating and do not even have the social solidarity of old status systems do not promote human dignity. The neo-civil death techniques that are becoming a globally normalized phenomenon are a new form of creating legally diminished persons and pose a threat of relapse; the only form of progress available is resistance to that relapse. The first step to counter this move is knowing the legal form and naming it. But this project proposes a step forward as well. The destructive power of civil death comes from its capacity to sever social connection. These are essentially invisible processes. By ensuring social connections rather than blocking legal channels and fostering deeper social embeddedness societies can become safer.

As I draw this dissertation to a close, I have learned that Hossam Bahgat has been called to appear before investigators for the charges that were brought against him in 2011. It has been ten years since a case was opened against him and five years since he has been banned from traveling and from having access to his own money. His latest communications through social media have been reporting the status of his hearing as well as about the high numbers of persons who have been hanged in Egypt in the last six months. He also posted a quote from Kafka without commentary:

Kafka's last diary entry:

"The only consolation would be: it happens whether you like it or not. And what you like is of infinitesimally little help. More than consolation: You too have weapons.

## Bibliography

## Bibliography

- Abstract of the Criminal Laws of England. (1803, November). *The British-American Register*.
- Agamben, G. *Homo Sacer: Sovereignty and Bare Life*, Daniel Heller-Roazen (Transl.), ed. (Stanford University Press, 1998).
- Agamben, G. (2009). The Limits of Violence. *Diacritics*, 39(4).
- Al-Own, G. M. ., & Bydoon, M. S. (2017). Evolution of Asset-Freezing through the UN Security Council. *Journal of Arts and Humanities*, 6(4), 53.
- Alexander, M. (2020). *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. New Press.
- Alt, S. (2010). Problematizing Life Under Biopower: A Foucauldian Versus an Agambenite Critique of Human Security. In D. Chandler & N. Hynek (Eds.), *Critical Perspectives on Human Security: Rethinking Emancipation and Power in International Relations* (pp. 144–156). Routledge.
- Arendt, H. (1953). Ideology and Terror: A Novel Form of Government. *The Review of Politics*, 15(3), 303–327.
- Arendt, H. (1958). The Modern Concept of History. *The Review of Politics*, 20(4), 570–590.
- Arendt, H. (1968). *The Origins of Totalitarianism*. Harcourt.
- Arendt, H. (1978). Hannah Arendt: From an Interview. *The New York Review of Books*.
- Arendt, H. (1994). We Refugees. In M. Robinson (Ed.), *Altogether Elsewhere: Writers on Exile*. Faber and Faber.
- Association, C. B. (2017). *Collateral Consequences of Criminal Convictions: considerations for lawyers* (Vol. 41, Issue 4).
- Bacon, M. (1832). *New Abridgement of the Law* (21st ed., Vol. 2). In the Savoy.  
<https://archive.org/details/newabridgementof02baco/page/n5>
- Baldwin, J. (1955). *Notes From a Native Son*.
- Ball, T. (1998). Conceptual History and the History of Political Thought. In I. Hamisiier-Monk, K. Tilmans, & F. Van Vree (Eds.), *History of Concepts: Comparative Perspectives*. Amsterdam University Press.
- Bar, C. L. Von. (1916). *AHistory of Continental Criminal Law*. Little, Brown, and Company.
- Beccaria, C. (1880). *On Crimes and Punishments* (J. A. Farrer (Ed.)).

- Beccaria, C. (1973). *Dei delitti e delle pene* (Edizione di riferimento (Ed.); 1973rd ed.). Letteratura italiana Einaudi.
- Beer, D. (2019). *The Exile , the Patron , and the Pardon : The Voyage of the Dawn ( 1877 ) and the Politics of Punishment in an Age of Nationalism and Empire Forum : Rediscovering Siberia The Exile , the Patron , and the Pardon*. 14(1), 5–30.
- Beer, D. (2021). Civil Death, Radical Protest and the Theatre of Punishment in the Reign of Alexander II. *Past and Present*, 250(171–202).
- Belohlavek, R., & Klir, G. J. (2011). 1. Introduction. In R. Belohlavek & E. Al. (Eds.), *Concepts and Fuzzy Logic*. MIT Press.
- Bergeron, D. (2020). *Philosophy and Allotment : John Locke ' s influence on Henry L. Daves*. Springer.
- Bergin, A., Williams, D., & Wilde, R. De. (2019). From Board Room to Situation Room. *Australian Strategic Policy Institute*. <http://www.jstor.com/stable/resrep23021>
- Birmingham, P. (2006). *Hannah Arendt and Human Rights: The Predicament of Common Responsibility*. <https://philpapers.org/rec/BIRHAA-2>
- Black, H. C. (1887). *An Essay on the Prohibitions Against Legislation Impairing of Contracts and Against Retroactive and Ex Post Facto* (Vol. 1).
- Blackstone, W. (1765). *Commentaries on the Laws of England Vol I* (first). Clarendon Press.
- Bockman, C. (2020, December 6). The Black Panther who hijacked a jet to Algeria and started again in France. *BBC Stories*, 1–13.
- Boissery, B. (1995). *A Deep Sense of Wrong: the Treason, Trials, and Transportation to New South Wales of Lower Canadian Rebels after the 1838 Rebellion*. Osgoode Society for Canadian Legal History.
- Boissery, B. (2002). The Punishment of Transportation as Suffered by the Patriotes. In F. M. Greenwood & B. Wright (Eds.), *Canadian State Trials Volume II: Rebellion and Invasion in the Canadas, 1837-1839*. University of Toronto Press.
- Bond, S. (2014). Altering Infamy: Status, Violence, and Civic Exclusion in Late Antiquity. *Classical Antiquity*, 33(1), 1–30.
- Botting, E. H., & Kronewitter, S. (2012). Westernization and Women ' s Rights : Non-Western European Responses to Mill ' s Subjection of Women, 1869-1908. *Political Theory*, 40(4), 466–496.
- Brocher, C. (1873). *Théorie du droit international privé*.
- Brown, W. (2019). *In the Ruins of Neoliberalism: The Rise of Antidemocratic Politics in the West*. Columbia University Press.
- Brubaker, R., & Cooper, F. (2000). Beyond “identity.” *Theory and Society*, 29.
- Cagle, S. (2019). “Protesters as terrorists”: growing number of states turn anti-pipeline activism into a crime |

*Environment* | *The Guardian*. <https://www.theguardian.com/environment/2019/jul/08/wave-of-new-laws-aim-to-stifle-anti-pipeline-protests-activists-say>

- Calisse, C., & Law, I. (1928). *History of Italian Law*.
- Canada, C. for the C. of the L. of L. (1865). *Code Civil du Bas Canada: Premier, Second et Troisieme Rapports*. George E. Debarats.
- Cassella, S. D. (2013). Civil Asset Recovery: The American Experience. *Eucrim: The European Union Criminal Law Associations' Forum*, 3, 98. <https://doi.org/10.4337/9781783475797.00054>
- Catte, E. (2021). *Pure America: Eugenics and the Making of Modern Virginia*. Belt Publishing.
- Chambers, L. (1997). *Married Women and the Law of Property in Victorian Ontario*. University of Toronto Press.
- Chesnay, C. T., Bellot, C., & Sylvestre, M. È. (2013). Taming disorderly people one ticket at a time: The penalization of homelessness in Ontario and British Columbia. *Canadian Journal of Criminology and Criminal Justice*, 55(2), 161–185. <https://doi.org/10.3138/cjccj.2011-E-46>
- Chin, G. J. (2012b). The New Civil Death: Rethinking Punishment in the Era of Mass Conviction. *University of Pennsylvania Law Review*, 160(6), 1789.
- Chitty, J. (1836). *A Practical Treatise on the Criminal Law with Comprehensive Notes on Each Particular Offence* (3rd Americ, Vol. 1).
- Christie, N. V. (2014). Racial Neutrality by Any Other Name: An Examination of Collateral Consequence Policies in the United States. *Social Science Quarterly*, 95(2), 541–562. <https://doi.org/10.1111/ssqu.12034>
- Christy, A. (2012). Legal Remedies for Citizens Exiled Overseas by the No Fly List. *Dartmouth Law Journal*, 1, 94.
- Civil, A., Union, L., Warrick, T., Pelayo, J., Welsh-Huggins, East, M., Bockman, C., & Petersen, K. L. (2002). How the USA PATRIOT Act redefines “Domestic Terrorism.” *American Civil Liberties Union*, 33(107), 173–190. <http://www.aclu.org/national-security/how-usa-patriot-act-redefines-domestic-terrorism>
- Civil Death Statutes . Medieval Fiction in a Modern World Source. (1937). *Harvard Law Review*, 50(6), 968–977.
- Cohen, M. R. (1927). Property and Sovereignty. *Cornell Law Review*, 13(1), 153–176. <https://doi.org/10.3138/9781442627918-011>
- Connelly, M. (2012). *The IRA on Film and Television: A History*. McFarland.
- Creswell, J. W. (1998). *Qualitative inquiry and research design: Choosing among five traditions*. Sage.
- Cutillo, A. (2013). *Deploying the Best: Enhancing Training for United Nations Peacekeepers*.
- Damaska, M. R. (1968a). Adverse Legal Consequences of Conviction and Their Removal: A

- Comparative Study (Part 1). *The Journal of Criminal Law, Criminology, and Police Science*, 59(4), 542. <https://doi.org/10.2307/1141836>
- Daskal, J. (2019). The Terrorist Crenemy. In A. Sarat, L. Douglas, & Marhta Merrill Umphrey (Eds.), *Criminals and Enemies*. University of Massachusetts Press.
- David Harvey. (2005). *A Brief History of Neoliberalism*. Oxford University Press.
- Davidson, N. M. (2009). Property and Relative Status. *Michigan Law Review*, 107(5), 757–817.
- Davis, E. (2008). An Administrative Trail of Tears: Indian Removal. *American Journal of Legal History*, 50(1), 49–100. <https://doi.org/10.1093/ajlh/50.1.49>
- Dayan, C. (2005a). Held in the Body of the Law: Prisons and the Law. In A. Sarat & T. Kearns (Eds.), *History, Memory, and the Law*. University of Michigan Press.
- Dayan, C. (2005b). Legal Terrors. *Representations*, 92(1), 42–80.
- Dayan, C. (2011). *The law is a white dog: How legal rituals make and unmake persons*.
- Dayan, J. (2001). Legal Slaves and Civil Bodies. *Nepantla: Views from South*, 2(1), 3–39.
- De Giorgi, A. (2007). Rethinking the political economy of punishment. *Criminal Justice Matters*, 70(1), 17–18. <https://doi.org/10.1080/09627250708553682>
- De Giorgi, A. (2017). *Rethinking the Political Economy of Punishment: Perspectives on Post-Fordism and Penal Politics* (1st ed.). Routledge.
- Debo, A. (1973). *And Still the Waters Run: The Betrayal of the Five Civilized Tribes*. Princeton University Press.
- DeCaroli, S. (2007). Boundary Stones: Giorgio Agamben and the Field of Sovereignty. In *Giorgio Agamben: Sovereignty and Life*. Stanford University Press.
- Demleitner, N. (2016). How to Change the Philosophy and Practice of Probation and Supervised Release: Data Analytics, Cost Control, Focus on Reentry, and a Clear Mission. *Federal Sentencing Reporter*, 28(4), 231–238. <https://doi.org/10.1525/fsr.2016.28.4.231.FEDERAL>
- Demleitner, N. V. (2013). Civil death. In P. Finkerman (Ed.), *The Encyclopedia of American Civil Liberties* (p. 297). Routledge.
- Desbarats, G. E. (1865). *Code Civil Du Bas Canada: Premier, Second et Troisieme Rapports*.
- Dewey, J. (1926). The Historic Background of Corporate Legal Personality. *The Yale Law Journal*, 35(6), 655–673.
- Dicey, A. V. (1880). The Study of Jurisprudence. *Law Magazine and Review; Quarterly Review of Jurisprudence, and Quarterly Digest of All Reported Cases*, 5(4), 382–401.
- Dicey, A. V. (1891). On Private International Law as a Branch of the Law of England. *The Law Quarterly Review*, 7, 113–127.



- DuBois, W. E. B. (1947). *An Appeal to the World: A Statement of Denial of Human Rights to Minorities*. 1–6.
- Dunton, C., & Kitchen, V. (2014). Paradiplomatic Policing and Relocating Canadian Foreign Policy. *International Journal: Canada's Journal of Global Policy Analysis*, 69(2), 183–197.
- Economic perspectives on incarceration and the criminal justice system. (2016). *Corrections and Criminal Justice Reform: Economic Perspective and Educational Comparisons*, April, 1–90.
- Economist. (2016). China invents the digital totalitarian state. *The Economist*, 1–8.  
<http://www.economist.com/news/briefing/21711902-worrying-implications-its-social-credit-project-china-invents-digital-totalitarian>
- Ehrlich, E. (1936). *Fundamental Principles of the Sociology of Law*. Routledge.
- Elizabeth Cady Stanton. (1985). The Declaration of Sentiments. In *History of Woman Suffrage, Vol. 1 (1843-1861)*. Ayer Company Publishing.
- Ellinghaus, K. (2015). A Little Home for Myself and Child. *Pacific Historical Review*, 84(3).
- Evren, E. (2012). Chapter 10 - The ones who walk away : In J. Eckert, B. Donahoe, C. Strumpell, & Z. Ozlem Biner (Eds.), *Law Against the State: Ethnographic Forays Into Law's Transformations* (pp. 245–265). Cambridge Core.
- Ewald, A. C. (2002). “Civil death”: The Ideological Paradox of Criminal Disenfranchisement Law in the United States. *Wisconsin Law Review*, 2002(5), 1045–1137.
- Ewald, A. C. (2010). Deportation, Effective Counsel, and Collateral Sanctions: Padilla v. Kentucky. *The Justice System Journal*, 32(2), 235–242.
- Ewald, A. C. (2012). Collateral Consequences in the American States. *Social Science Quarterly*, 93(1), 211–247.
- Ewald, A. C., & Smith, M. (2008). Collateral Consequences of Criminal Convictions in American Courts: The View from the State Bench. *The Justice System Journal*, 29(2), 145–165.
- Florence, J. (2006). Making the No Fly List Fly: A Due Process Model for Terrorist Watchlists. *Yale Law Journal*, 115, 2148.
- Flower, E. (1995). Civil Death and the Maiden: Agency and the Conditions of Contract in Piers Plowman. *Speculum*, 70(4), 760–792.
- Follis, L. (2013). Resisting the Camp: Civil Death and the Practice of Sovereignty in New York State. *Law, Culture and the Humanities*, 9(1), 91–113. <https://doi.org/10.1177/1743872111402029>
- Foot, S. (1863). *Attainder of treason and confiscation of the property of Rebels : a letter to the Hon . Samuel A . Foot , LL . D . , on the constitutional restrictions upon attainder and forfeiture for treason against the Public Domain*. Weed, Parsons and Co. Printers.
- Foot, S. (1873). No. LIX.\_Vol. 1, Abolition of Slavery, Geneva, Dec 15, 1862. In *Autobiography: Collateral Reminiscences, Arguments in Important Causes, Speeches, Addresses, Lectures, and Other Writings*.

New York.

Foucault, M. (1995). *Discipline & Punish: The Birth of the Prison* (A. Sheridan (Ed.); 2nd ed.). Vintage Books.

Foucault, M. (2008). *The Birth of Biopolitics: Lectures at the College de France 1978-1979*. Palgrave Macmillan.

Frontiers, S., Journal, A., & Studies, W. (2008). The Benefits of Being Indian : Blood Quanta , Intermarriage , and Allotment Policy on the White Earth Reservation , 1889-1920 A. *Frontiers: A Journal of Women Studies*, 29(2/3), 81–105.

Fyson, D. (2014). Between the Ancien Régime and Liberal Modernity: Law, Justice and State Formation in colonial Quebec, 1760-1867. *History Compass*, 12(5), 412–432.

Gabor, T. (2004). *The Views of Canadian Scholars on the Impact of the Anti-Terrorism Act*.

Galchinsky, M. (2013). Quaint and Obsolete: The ‘War on Terror’ and the Right to Legal Personality. *International Studies Perspectives*, 14(3), 255–268.

Gale, S. G. (1982). A Very German Legal Science: Savigny and the Historical School. *Stanford Journal of International Law*, 18, 123.

Garland, D. (2001). *The Culture of Control: Crime and Social Order in Contemporary Society*. Oxford University Press.

Gbadamosi, N. (2020, December). Foreign Governments Are Aiding Nigeria’s Violence Against Protesters. *Foreign Policy*, 1–6.

Genaudet, F. (1854). *Etude sur la Mort Civile: et la necessite de son abolition*.

Givens, A. D., Busch, N. E., & Bersin, A. D. (2018). Going global: The international dimensions of U.S. homeland security policy. *Journal of Strategic Security*, 11(3), 1–34.

Glaser, Barney G & Anselm L Strauss. *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Routledge, 1999).

Goldsmid, F. H. (1830). *Remarks on the Civil Disabilities of British Jews*. Henry Colburn and Richard Bentley.

Gouges, O. de. (1791). *The Declaration of the Rights of Woman*.

Grady, S. C. (2012). Civil death is different: An examination of a post-graham challenge to felon disenfranchisement under the eighth amendment. *Journal of Criminal Law and Criminology*, 102(2), 441–470.

Grattan, H. (1812). *Speech Upon his Motion, That the Petition of the Catholics of Ireland be referred to a Committee to Consider the State of the Laws Imposing Civil Disabilities on His Majesty’s Subjects Professing the Roman Catholic Religion*. W. Smith and Co.

Gündoğdu, A. (2015). *Rightlessness in an Age of Rights*. Oxford University Press.

- Guy, K., & Al., E. (2020). *A Security Threat Assessment of Global Climate Change How Likely Warming Scenarios Indicate a Catastrophic Security Future the National Security, Military, and Intelligence Panel on Climate Change (Nsmip)*. February. <https://climateandsecurity.org/wp-content/uploads/2020/03/a-security-threat-assessment-of-climate-change.pdf>
- Hadar Aviram. (2015). *Cheap on Crime*. University of California Press.
- Harcourt, B. (2015). Risk as a Proxy for Race: The Dangers of Risk Assessment. *Federal Sentencing Reporter*, 27(4), 237–243.
- Harcourt, B. (2018). *The Counterrevolution*. Basic Books.
- Harcourt, B. E. (2010). Neoliberal Penalty: A Brief Genealogy. *Theoretical Criminology*, 14(1), 74–92.
- Harris, C. (1993). Whiteness as Property. *Harvard Law Review*, 106(8).
- Herbert, E. S. (1956). As Between Friends: The Common Law Man. *American Bar Association Journal*, 42(11), 1019–1022, 1093–1094.
- Hertz, J. H. (1898). *The Jew as A Patriot: A Plea for the Removal of the Civil Disabilities of the Jews in the Transvaal*. M.J. Wood & Co.
- Hlatky, S. von, Trisko, J. N. ., & Zweekhorst, M. B. M. (2012). Sharing the Burden of the Border : Layered Security Co-operation and the Canada-US Frontier. *Canadian Journal of Political Science / Revue Canadienne de Science Politique*, 45(1), 63–88.
- Hohfeld. (1924). The Foundations of a Theory of Rights. *The Virginia Law Register*, 10(8), 549–562.
- Horowitz, M. (1992). *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy*. Oxford University Press.
- Horowitz, M. J. (1979). *The Transformation of American Law, 1780-1860*. Harvard University Press.
- A Codification of the Statute Law of Georgia, (1848).
- Howard Society of Ontario, J. (2014). Help Wanted: Reducing Barriers for Ontario's Youth with Police Records. In *Centre of Research, Policy & Program Development* (Vol. 91, Issue 3).
- Howe, M., & Monaghan, J. (2018). Strategic Incapacitation of Indigenous Dissent: Crowd Theories, Risk Management, and Settler Colonial Policing. *Canadian Journal of Sociology*, 43(4), 325–349.
- Hughes, M. (1961). The Parnell Family. *Dublin Historical Record*, 16(3), 86–95.
- Ingo Muller. (1991). Protecting the Race. In D. L. Schneider (Ed.), *Hitlers Justice*. Harvard University Press.
- Ingraham, C. (2017). Republican lawmakers introduce bills to curb protesting in at least 18 states - The Washington Post. *The Washington Post*, 2–8. [https://www.washingtonpost.com/news/wonk/wp/2017/02/24/republican-lawmakers-introduce-bills-to-curb-protesting-in-at-least-17-states/?utm\\_term=.5c914478bb58](https://www.washingtonpost.com/news/wonk/wp/2017/02/24/republican-lawmakers-introduce-bills-to-curb-protesting-in-at-least-17-states/?utm_term=.5c914478bb58)

- International Penal and Penitentiary Commission (IPPC)*. (2019).
- Itzkowitz, H., & Oldak, L. (1973). Restoring the Ex-Offender ' S Right To Vote : *American Criminal Law Review*.
- Jaarsveld, I. Van. (2006). The History of In Rem Forfeiture: A Penal Legacy of the Past. *Fundamina*, 12(2), 137.
- Jakobs, G. (2003). *Derecho Penal del Enemigo* (M. Cancio Melia (Ed.)). Thomson/Civitas.
- Jeremy Waldron. (2012). *Dignity, Rank and Rights*. Oxford University Press.
- Jeremy Waldron. (2017). *One Another's Equals*.
- Joiner, L., & National Journal. (2015). Families Pay the Never-ending Price of a Criminal Record. *The Atlantic*, 1. <https://www.theatlantic.com/politics/archive/2015/12/how-families-pay-the-never-ending-price-of-a-criminal-record/433641/>
- Jones, D. M. (2015). A Bronx Tale: Disposable People, the Legacy of Slavery, and the Social Death of Kalief Browder. *University of Miami Race and Social Justice Law Review*, 6, 31–50. <https://heinonline.org/HOL/Page?handle=hein.journals/umrsj6&id=40&div=&collection=>
- Joseph Massad. (2007). *Desiring Arabs*. University of Chicago Press.
- Judiciary, C. on the. (2004). Animal Rights: Activism vs. Criminality Hearing Before the Committee on the Judiciary United States Senate. In *Senate Hearing S. Hrg. 108-764*.
- Kanji, A. (2018). Framing muslims in the “war on terror”: Representations of ideological violence by muslim versus non-muslim perpetrators in Canadian national news media. *Religions*, 9(9), 1–26.
- Kelly, K. (2010). *What Technology Wants*. Penguin Books.
- Kennedy, D. (1998). *The Rise and Fall of Classical Legal Thought*. Beard Books.
- Kennedy, D. (2010). Three Globalizations of Law and Legal Thought. In D. Trubek & A. Santos (Eds.), *The New Law and Economic Development*. Cambridge University Press.
- Kennedy, W. B. (1926). From Contract to Status? *New York Law Review*, 4(2), 49–54.
- Kenny, C. (1987). The Exclusion of Catholics from the Legal Profession in Ireland, 1537-1829. *Irish Historical Studies*, 25, 337–357.
- Kesby, A. (2012). *The Right to Have Rights: Citizenship, Humanity and International Law*. Oxford University Press.
- Knepper, P. (2008). The Other Invisible Hand: Jews and Anarchist in London Before the First World War. *Jewish History*, 22(3), 2008–2010.
- Koren, M. (2019). Why Men Thought Women Weren't Made to Vote. *The Atlantic*.
- Koselleck, R. (2002). *The Practice of Conceptual History: Timing History, Spacing Concepts* (T. S. Presner (Ed.)). Stanford University Press.

- Koskenniemi, M. (2012). A History of International Law Histories. In B. Fassbender & A. Peters (Eds.), *The Oxford Handbook of the History of International Law* (p. 943). Oxford University Press
- Koskenniemi, M. (2017). Sovereignty Property and Empire: Early Modern English Contexts. *Theoretical Inquiries in Law*, 18, 355–390.
- Králová, J. (2015). What is social death ? *Contemporary Social Science*, 10(3), 235–248.
- Lahey, K. A. (1999). *Are We “Persons” Yet?: Law and Sexuality in Canada*. University of Toronto Press.
- Lakoff, G. (1973). Hedges: A study in meaning criteria and the logic of fuzzy concepts. *Journal of Philosophical Logic*, 2(4), 458–508.
- Lee, D. (2008). Private Law Models for Public Law Concepts : The Roman Law Theory of Dominion in the Monarchomach Doctrine of Popular Sovereignty. *The Review of Politics*, 70(3), 370–399. <https://doi.org/10.1017/S0034670508000557>
- Lee, E. (2003). *At America’s Gates: Chinese Immigration During the Exclusion Era, 1882-1943*.
- Lewis, D. M. (2014). The risk factor - (Re-) visiting adult offender risk assessments within criminal justice practice. *Risk Management*, 16(2), 121–136.
- Liska, V. (2012). A Lawless Legacy: Hannah Arendt and Giorgio Agamben. In *Hannah Arendt and the Law*. Hart.
- Lussier, P., Gress, C., Deslauriers-Varin, N., & Amirault, J. (2014). Community Risk Management of High-Risk Sex Offenders in Canada: Findings From a Quasi-Experimental Study. *Justice Quarterly*, 31(2), 287–314. <https://doi.org/10.1080/07418825.2011.649694>
- Lutz, J. M., & Ulmschneider, G. W. (2019). Civil Liberties, National Security and U.S. Courts in Times of Terrorism. *Perspectives on Terrorism*, 13(6), 43–57.
- Luxemburg, R. (2003). *The Accumulation of Capital*. Routledge.
- Macaulay, Lord. (1910). *Essay and Speech on Jewish Disabilities* (I. Abrahams & R. S. Levy (Eds.)). Jewish Historical Society of England, Ballantyne, Hanson & co.
- Mackenzie, D. (2001). Sentencing and Corrections in the 21st Century: Setting the Stage for the Future. *Department of Criminology and Criminal Justice*, 1–38. <https://www.ncjrs.gov/pdffiles1/nij/189106-2.pdf>
- Macklin, A. (2015). Kick-Off Contribution. In *The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?* European University Institute. <https://doi.org/10.2139/ssrn.2563555>
- Maine, H. S. (1920). *Ancient Law: Its Connection with the Early History of Society and Its Relation to Modern Ideas* (Vol. 1).
- Maitland, F. W. (1905). Moral Personality and Legal Personality. *Journal of the Society of Comparative Legislation*, 6(2), 192–200.

- Manza, J., & Uggen, C. (2006). *Locked Out: Felon Disenfranchisement and American Democracy*. Oxford University Press.
- Marie Mercat-Bruns. (2016). The Multiple Grounds of Discrimination. In *Discrimination at Work: Comparing European, French, and American Law*. University of California Press.
- Martin, C. G., & Roy, M. (2017). Narrative Resistance: *Cultural Logic: A Journal of Marxist Theory & Practice*, 22, 54–70. <https://doi.org/10.14288/clogic.v22i0.190850>
- Martin, G., & Bray, R. S. (2013). Discolouring Democracy ? Policing , Sensitive Evidence, and Contentious Deaths in the United Kingdom. *Journal of Law and Society*, 40(4), 624–656.
- Marx, K. (1978). On the Jewish Question. In R. Tucker (Ed.), *The Karl Marx-Friedrich Engels Reader* (2d ed.). WW Norton.
- McAleese, S., & Latimer, C. (2017). Reforming the Criminal Records Act. *The John Howard Society of Canada*. <http://johnhoward.ca/wp-content/uploads/2017/04/Criminal-Records-Act-Reform-Final.pdf>
- McGovney, D. O. (1911a). American Citizenship . Part I . Definitional. *Columbia Law Review*, 11(3), 231–250.
- McGovney, D. O. (1911b). American Citizenship . Part II . Unincorporated Peoples and Peoples Incorporated with Less than Full Privileges. *Columbia Law Review*, 11(4), 326–347.
- McGovney, D. O. (1934). Our Non-Citizen Nationals, Who Are They? *California Law Review*, 22(6), 593–635.
- Mégret, F. (2009). Civil Disobedience and International Law: Sketch for a Theoretical Argument. *Canadian Yearbook of International Law*, 46, 143. <https://doi.org/10.2139/ssrn.1163270>
- Mégret, F. (2011). *Terrorism and Human Rights A Decade of Canadian Practices*. 1–25.
- Meierhenrich, J. (2008). Varieties of Reconciliation. *Law & Social Inquiry*, 33(1).
- Michaels, R. (2006). The Functional Method of Comparative Law. In M. Reimann & R. Zimmermann (Eds.), *The Oxford Handbook of Comparative Law*. Oxford University Press.
- Michaels, R. (2017). Joseph Story. In J. Basedow, G. Rühl, F. Ferrari, & P. de M. Asensio (Eds.), *Elgar Encyclopedia of Private International Law* (pp. 1660–1667). Edward Elgar Publishing.
- Mill, J. S. (1869). *The Subjection of Women*. D Appleton & Company.
- Miller, B. L., & Joseph F. Spillane. (2012). Civil death : An examination of ex-felon disenfranchisement and reintegration. *Punishment & Society*, 14(4), 402. <https://doi.org/10.1177/1462474512452513>
- Monforte, T. (n.d.). Thinking Through Transdisciplinarity in Urban Sustainability. In H. Kong & T. M. Monforte (Eds.), *Urban Governance and Sustainability*. University of Toronto Press.
- Muldoon, J. (2005). Spiritual Freedom--Physical Slavery: The Medieval Church and Slavery. *Ave*



*Maria Law Review*, 3(1), 69–94.

Murphy, C. (2007). Securitizing Canadian Policing: A New Policing Paradigm for the Post 9/11 Security State? *Canadian Journal of Sociology*, 32(4), 449–475. <https://doi.org/10.2307/20460665>

Mythen, G., Walklate, S., & Khan, F. (2009). “I’m a Muslim, but I’m not a terrorist”: Victimization, risky identities and the performance of safety. *British Journal of Criminology*, 49(6), 736–754. <https://doi.org/10.1093/bjc/azp032>

Nancy A. Heitzeg. (2014). Criminalizing Education: Zero Tolerance Policies, Police in the Hallways, and the School to Prison Pipeline. In A. N. II, P. Parmar, & David Stovall (Eds.), *From Education to Incarceration: Dismantling the School-to-Prison Pipeline* (pp. 11–36). Peter Lang.

Nelken, D. (2009). Law in Action or Living Law? Back to the Beginning in Sociology of Law. In *Beyond Law in Context: Developing a Sociological Understanding of Law* (pp. 29–46). <https://doi.org/10.1111/j.1748-121X.1984.tb00439.x>

Ngaire Heuer, J. (2005). *The Family and the Nation: Gender and Citizenship in Revolutionary France, 1789-1830*. Cornell University Press.

Niedbalski, J., & Ślęzak, I. (2017). Computer assisted qualitative data analysis software. Using the NVivo and Atlas.ti in the research projects based on the methodology of grounded theory. *Studies in Systems, Decision and Control*, 71(41), 85–94. [https://doi.org/10.1007/978-3-319-43271-7\\_8](https://doi.org/10.1007/978-3-319-43271-7_8)

Note. (1914). Civil Status of Convicts. *Columbia Law Review*, 592–594.

Note. (1993). The Civil-Criminal Distinction in Ohio’s Drug Forfeiture Laws. *Ohio State Law Journal*, 1, 1463. <https://doi.org/10.1525/sp.2007.54.1.23>.

Note. (1997). Asset Forfeiture: Giving Up Your Constitutional Rights. *Campbell Law Review*, 1.

Nussbaum, M. C. (2007). *Frontiers of Justice*. Harvard University Press.

Ohana, D. (2014). Günther Jakobs’s Feindstrafrecht: Dispassionate Account. In *Foundational Texts in Modern Criminal Law*. Oxford University Press.

Ostler, D. L. (2014). Legislative Judging: Bills of Attainder in New Zealand, Australia, Canada and the United States. *Waikato Law Review*, 22, 78.

Pager, D. (2003). The Mark of a Criminal Record. *American Journal of Sociology*, 108(5), 937–975.

Paik, A. M. (2016). *Rightlessness: Testimony and Redress in U.S. Prison Camps Since World War II*. University of North Carolina Press.

Parnell, S. H. (1828). Treaty of Limerick. In J. H. Barrow (Ed.), *The Mirror of Parliament*. <https://play.google.com/books/reader?id=YxIMlg-Is2AC&pg=GBS.PA526>

Patterson, O. (1985). *Slavery and Social Death*. Harvard University Press.

Patterson, O. (2016). Revisiting Slavery, Property, and Social Death. In *On Human Bondage: After*



- Slavery and Social Death* (pp. 265–296). <https://doi.org/10.1002/9781119162544.ch14>
- Paz, M. (2017). The Law of Walls. *European Journal of International Law*, 28(2), 601–624.
- Peters, Ina. “Too Abstract to Be Feasible?: Applying the Grounded Theory Method in Social Movement Research” (2014) German Institute for Global and Area Studies.
- Peirce, P. S. (1971). *The Freedmen’s Bureau: A Chapter in the History of Reconstruction, Vol 3*.
- Peter Moskos. (2013). *In Defense of Flogging*. Basic Books.
- Petersen, K. L. (2008). Terrorism : When Risk Meets Security. *Alternatives: Global, Local, Political*, 33(2), 173–190.
- Phelps, M. (2013). The Paradox of Probation: Community Supervision in the Age of Mass Incarceration. *Law & Policy*, 35(1–2), 51.
- Phelps, M. S. (2018). Ending Mass Probation: Sentencing, Supervision, and Revocation. *Future of Children*, 28(1), 125–146. <https://doi.org/10.1353/foc.2018.0006>
- Pinedo, V. J. (2017). Let’s keep it civil: An evaluation of civil disabilities, a call for reform, and recommendations to reduce recidivism. *Cornell Law Review*, 102(2), 513–545.
- Pocock, J. G. A. (2019). On the unglobality of contexts: Cambridge methods and the history of political thought. *Global Intellectual History*, 4(1), 1–14. <https://doi.org/10.1080/23801883.2018.1523997>
- Pollock, S. F. (1894). Divisions of Laws. *Harvard Law Review*, 8(4), 187–199.
- Pollock, S. F., & Maitland, F. W. (1898). *The History of English Law Before the Time of Edward I* (2nd ed.). Cambridge University Press.
- Portela, C. (2020). A Blacklist is (ALMOST) Born: Building a Resilient EU Human Rights Sanctions Regime. *European Union Institute for Security Studies (EUISS)*, 2020. <https://doi.org/10.4324/9781315605715>
- Posner, R. (2004). *Catastrophe: Risk and Response*. Oxford University Press.
- Potter, W. (2011). *Green is the New Red: An Insider’s Account of a Social Movement under Siege*. City Lights Publishing.
- Pound, R. (1963). Tort Claims Act: Reason or History. *Tulane Law Review*, 1.
- Pound, R. (1910). Law in Books and Law in Action. *American Law Review*, 12(44).
- Pound, R. (1912). The Scope and Purpose of Sociological Jurisprudence. [Concluded.] III. Sociological Jurisprudence Author(s): *Harvard Law Review*, 25(6), 489–516.
- Pound, R. (1930). *Interpretations of Legal History*. Cambridge University Press.
- Pound, R. (1959). *Jurisprudence*. 1.

- Prewitt, K., Hollinger, D. A., Pollak, L. H., Williams, K. M., Hochschild, J. L., & Fredrickson, G. M. (2005). Racial Classification in America: Where do we go from here? *Dædalus*.
- Price, J. M. (2015). Prison and social death. In *Prison and Social Death*. Rutgers University Press.  
<https://doi.org/10.5860/choice.194902>
- Prior, T., & Roth, F. (2013). Disaster , Resilience and Security in Global Cities. *Journal of Strategic Security*, 6(2), 59–69.
- R.B.C.M. (2012). *Ville De MONTRÉAL: P-6 Bylaw*. 6, 3–5.
- Rancière, J. (2004). Who is the Subject of the Rights of Man? *South Atlantic Quarterly*, 103(2/3).
- Ratcliffe, J. H. (2003). *Intelligence-led Policing* No.248.  
<https://www.publicsafety.gc.ca/lbrr/archives/cnmcs-plcng/cn35747-eng.pdf>
- Rethinking the Trust Doctrine in Federal Indian Law. (1984). *Harvard Law Review*, 98(2), 422–440.
- Rezanoff, S., Moniruzzaman, A., & Somers, J. (2012). Prolific and Priority Offenders in British Columbia, Canada: A Preliminary Analysis of Recidivism1. *International Journal of Criminal Justice Sciences*, 7(2), 562–574.
- Richard T. Ely. (1918). Private Colonization of the Land. *The American Economic Review*, 8(3), 522–548.
- Richards, H. E. (1902). Is Outlawry Obsolete? *Law Quarterly Review*, 18.
- Richer, F. (1755). *Traité de la Mort Civile*.
- Ritter, D. P. (2014). Comparative Historical Analysis. In D. della Porta (Ed.), *Methodological Practices in Social Movement* (Issue May 2019, pp. 1–24). Oxford University Press.
- Romney, P., & Wright, B. (1996). State Trials and Security Proceedings in Upper Canada during the War of 1812. In F. M. Greenwood & B. Wright (Eds.), *The Canadian State Trials: Law, Politics and Security Measures 1608 - 1837*. University of Toronto Press.
- Rundle, K. (2009). the Impossibility of an Exterminatory Legality: Law and the Holocaust . *University of Toronto Law Journal*, 59(1), 65–125. <https://doi.org/10.3138/utlj.59.1.65>
- Sassen, S. (2014). *Expulsions: Brutality and Complexity in the Global Economy*. Harvard University Press.
- Saunders, H. D. (1970). Civil Death: A New Look at an Ancient Doctrine. *William & Mary Law Review*, 11, 988–1003.
- Savigny, F. C. von. (1884). *Jural Relations, or the Roman Law of Persons as Subjects of Jural Relations: Being a Translation of the Second Book of Savigny's System of Modern Roman Law*.
- Scheppele, K. L. (1990). Facing Facts in Legal Interpretation. *Representations*, 30, 42–77.  
<https://play.google.com/store/books/details?id=PRotAQAAMAAJ&rdid=book-PRotAQAAMAAJ&rdot=1&p1=1>

- Schierenbeck, A. (2018). The Constitutionality of Income-Based Fines. *The University of Chicago Law Review*, 85(8), 1869–1925. <https://doi.org/10.4324/9781315193496-12>
- Schrader, S. (2019). *Badges without Borders: How Global Counterinsurgency Transformed American Policing*. University of California Press.
- Scott, J. (1975). Civil Death in California : A Concept Overdue for Its Grave. *Santa Clara Law Review*, 15(2).
- Shakir, F. (2017). Critics of U . S . ‘ Israel Anti-Boycott Act ’ say even requests for information could expose citizens to penalties. *Mondoweiss*.
- Shanley, M. L. (1981). Marital Slavery and Friendship : John Stuart Mill ’ s The Subjection of Women. *Political Theory*, 9(2), 229–247.
- Shannon, S. K. S., Uggen, C., Schnittker, J., Thompson, M., Wakefield, S., & Massoglia, M. (2017). The Growth, Scope, and Spatial Distribution of People With Felony Records in the United States, 1948–2010. *Demography*, 54(5), 1795–1818. <https://doi.org/10.1007/s13524-017-0611-1>
- Sheridan, E. M. (1925). Women and Jury Service. *American Bar Association Journal*, 11(12), 792–797.
- Sherman, C. P. (1917). *Roman Law in the Modern World* (Vol. 1).
- Shore, J. J. M. (2008). The Legal Imperative to Protect Critical Energy Infrastructure. *Critical Energy Infrastructure Protection Policy Research Series*.
- Siegel, R. (1997). Why Equal Protection No Longer Protects : The Evolving Forms of Status-Enforcing State Action. *Stanford Law Review*, 49(5), 1111–1148.
- Siegel, R. B. (1994). The Modernization of Marital Status Law: Adjudicating Wives’ Rights to Earnings, 1860-1930. *Georgetown Law Journal*, 1, 1860–1930.
- Siegel, R. B. (1996). The Rule of Love: Wife Beating as Prerogative and Privacy. *Yale Law Journal*, 1.
- Simon, J. (1997). *Poor Discipline: Parole and the Social Control of the Underclass, 1890-1990*. University of Chicago Press.
- Skinner, Q. (2014). *Civil liberty and fundamental rights : a Neo-Roman approach*. 1–22.
- Smiley, C. (2014). Existing but Not Living: Neo-Civil Death and the Carceral State. *CUNY Academic Works*, 201. [http://academicworks.cuny.edu/gc\\_etds/283](http://academicworks.cuny.edu/gc_etds/283)
- Smith, B. (1928). Legal Personality. *The Yale Law Journal*, 37(3), 283–299.
- Smith, C. (2008). Detention without subjects: Prisons and the poetics of living death. *Texas Studies in Literature and Language*, 50(3), 243–267. <https://doi.org/10.1353/tsl.0.0009>
- Smith, C. (2009). The Prison and the American Imagination. In *Voices of a City Market* (Issue Yale). Yale University Press. <https://doi.org/10.21832/9781788925105-001>
- Smithers, G. D. (2015). *The Cherokee Diaspora: An Indigenous History of Migration, Resettlement and Identity*.

Yale University Press.

Spangenberg, B. J. (2011). *Civil Death in Early Modern Europe From Jack Cade to Luther, Hamlet and Raleigh \_Dissertation* (Vol. 9).

Stretton, T., & Kesselring, K. J. (2013). *Married Women and the Law: Coverture in England and the Common Law World*. MQUP.  
<https://ebookcentral.proquest.com/lib/mcgill/reader.action?docID=3332666&ppg=103>

Super, D. A. (2013). A New New Property. *Columbia Law Review*, 113, 1773.

Susan Marks. (2009). False Contingency. *Current Legal Problems*, 62(1), 1.

Sylvestre, M.-E., Bellot, C., Ménard, P. A. C., & Tremblay, A. C. (2011). Le droit est aussi une question de visibilité: l'occupation des espaces publics et les parcours judiciaires des personnes itinérantes à Montréal et à Ottawa. *Canadian Journal of Law and Society*, 26(3), 531–561.  
<https://doi.org/10.3138/cjls.26.3.531>

Sylvestre, M. E. (2010). Disorder and public spaces in Montreal: Repression (and resistance) through law, politics, and police discretion. *Urban Geography*, 31(6), 803–824.  
<https://doi.org/10.2747/0272-3638.31.6.803>

Sylvestre, M., Ménard, F. V., & Blomley, N. (2017). Conditions Géographiques de Mise en Liberté et de Probation Imposée d'Expression De Réunion Pacifique et D'Association. *McGill Law Journal*, 62(4).

Tamanaha, B. Z. (2004). *On the Rule of Law: History, Politics, Theory*. Cambridge University Press.

The Civil Code of Lower Canada, (1866).

*The Code Napoleon or French Civil Code*. (1827).

Thomas, W. R. (2019). Incapacitating criminal corporations. *Vanderbilt Law Review*, 72(3), 905–973.

Thornton, W. W. (1884). Ex Post Facto Laws and Bills of Attainder. *The Criminal Law Magazine*, 5(3).

Tourinho, M. (2015). Towards a World Police? The Implications of Individual UN Targeted Sanctions. *International Affairs*, 91(6), 1399–1412. <https://doi.org/10.1111/1468-2346.12453>

Unger, R. M. (2002). *False Necessity: Anti-necessitarian Social Theory in the Service of Radical Democracy*. Verso Books.

United Nations. Human Rights Committee. (1994). *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, United States of America (CCPR/C/79/Add.1)* (Vol. 4).  
<http://goo.gl/Yqf8Wz>

Vicaire, P. S. (2013). Two Roads Diverged: A Comparative Analysis of Indigenous Rights in North American Constitutional Context. *McGill Law Journal*, 58(3), 607.

Viswanathan, G. (1998). *Outside the Fold: Conversion, Modernity, and Belief*. Princeton University Press.

- von Savigny, F. C. (1869). *Private International Law: A Treatise on the Conflict of Laws and the Limits of Operation in Respect of Place and Time* (W. Guthrie (Ed.); Vol. 1).
- Walters, M. D. (2007). Histories of Colonialism, Legality, and Aboriginality. *University of Toronto Law Journal*, 57(4), 819. <https://doi.org/10.1353/tlj.2007.0037>
- Walters, M. D. (2017). *The British Legal Tradition in Canadian Constitutional Law Oxford Handbooks Online*. November, 1–24. <https://doi.org/10.1093/law/9780190664817.003.0005>
- Walton, F. P. (1901). The Historical Introduction to the Roman Law. In *Faculty Scholarship Series*. <https://archive.org/details/historicalintrod00waltuoft/page/88>
- Warrick, T., & Pelayo, J. (2020). *Improving Counterterrorism and Law Enforcement Cooperation between the United States and the Arab Gulf States*. Atlantic Council.
- Weiss, R. (2020). The Forfeiture Forecast After Timbs: Cloudy with a Chance of Offender Ability to Pay. *Boston College Law Review*, 61, 3073.
- Wesley Newcomb Hohfeld. (1917a). Some Fundamental Legal Conceptions as Applied in Judicial Reasoning. *The Yale Law Journal*, 26(8), 710–770.
- Wesley Newcomb Hohfeld. (1917b). Some Fundamental Legal Conceptions as Applied in Judicial Reasoning. *The Yale Law Journal*, 23(1), 16–59.
- Weyler, R. (1982). *Blood of the Land: the Government and Corporate War Against the American Indian Movement*. Everest House.
- Wharton, F. (1905). *A Treatise on the Conflict of Laws: Private International Law 3d ed* (George H. Parmele (Ed.); 3d ed., Vol. 1).
- White, G. E. (1994). *Intervention and Detachment: Essays in Legal History and Jurisprudence*. Oxford University Press.
- Whiting, W. (1871). *War Powers under the Constitution of United States* (Vol. 1).
- Wiebeck, W. (2001). *The Lost World of Classical Legal Thought*. Oxford University Press.
- Wilke, C., & Willis, P. (2008). The Exploitation of Vulnerability: Dimensions of Citizenship and Rightlessness in Canada's Security Certificate Legislation. *Windsor Yearbook of Access to Justice*, 26(1), 26. <https://doi.org/10.22329/wyaj.v26i1.4541>
- Wilson, W. D. (1863). *Attainder of Treason and Confiscation of the Property of Rebels : a Letter to the Hon . Samuel A . Foot , LL . D . , on the Constitutional Restrictions Upon Attainder and Forfeiture for Treason Against the Public Domain*. Weed, Parsons and Co. Printers.
- Wolf, S. (1895). *The American Jew as Patriot, Soldier and Citizen*. The Levytype Co.
- Wolfe, P. (2006). Settler colonialism and the elimination of the native. *Journal of Genocide Research*, 8(4), 387–409. <https://doi.org/10.1080/14623520601056240>
- Young, B. (1994). *The Politics of Codification: The Lower Canadian Civil Code of 1866*. McGill-Queen's

University Press.

Young, M. E. (1958). Indian Removal and Land Allotment : The Civilized Tribes and Jacksonian Justice. *The American Historical Review*, 64(1), 31–45.

## List of Cases

### Supreme Court of Canada

Sauvé v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519, 2002 SCC 68

R v. Shubley, [1990] 1 R.C.S. 3.

R. v. Wigglesworth, [1987] 2 R.C.S. 541

### U.S. Supreme Court

McGirt v. Oklahoma, (2020) 591 U.S.

Johnson v. M'Intosh, (1823) 21 U.S. (8 Wheat.) 543

Cherokee Nation v. Georgia, (1831) 30 U.S. (5 Pet.) 1

Worcester v. Georgia (1832) 31 U.S. (6 Pet.) 530

### U.S.

Avery v. Everett, (1888) 110 N.Y. 317

Harland v. Territory, 3 Wash. Terr. (1887) 131, 13 P. 453, Wash. Terr. LEXIS 11,

Hayes v. Washington Territory, (1884) 2 Wash. Terr. 286, 5 P. 927, Wash. Terr. LEXIS 17, 2 Wash. Terr. 286, 5 P. 927, (1884) Wash. Terr. LEXIS 17.

## List of Digital Sources

Alexander McLean, “Kenyan Elections Provide Unlikely Source of Hope For Prison Reform”, August 11, 2017, online: *Huffington Post* (UK) < [https://www.huffingtonpost.co.uk/alexander-mclean/kenya-elections\\_b\\_17706018.html](https://www.huffingtonpost.co.uk/alexander-mclean/kenya-elections_b_17706018.html) > (last visited July 16, 2021).



Aleza Freeman, “Negotiating a Child’s Future,” April 6, 2018, online: *University of Nevada News Center* < <https://www.unlv.edu/news/article/negotiating-childs-future> > (last visited July 16, 2021).

Alisa Partlan, “They Say Legal Guardians Ripped Them Off—and the State AG Let Them Down,” June 5, 2018, online: *City Limits* < <https://citylimits.org/2018/06/05/they-say-legal-guardians-ripped-them-off-and-the-state-ag-let-them-down/> > (last visited June 3, 2021).

Amnesty International “Egypt Arrest of Prominent Activist Hossam Baghat Another Blow for Freedom of Expression, November 8, 2015, online: *Amnesty International* <<https://www.amnesty.org/en/latest/news/2015/11/egypt-arrest-of-prominent-activist-hossam-baghat-another-blow-for-freedom-of-expression/>> (last visited July 15, 2021).

Andrew Jackson to John Pitchlynn, August 5, 1830, online: *The Library of Congress* < [https://www.loc.gov/resource/maj.01075\\_0394\\_0397/?sp=1&st=text](https://www.loc.gov/resource/maj.01075_0394_0397/?sp=1&st=text) > (last visited July 23, 2021).

Anubha George, “Vow of Poverty: An Age-Old Tradition Practiced by Priests and Nuns Has Been Upended in Kerala,” July 25, 2017, online: *Scroll.In* < <https://scroll.in/magazine/843273/vow-of-poverty-an-age-old-tradition-practiced-by-priests-and-nuns-has-been-upended-in-kerala> > (Last visited June 3, 2021).

Anurag Dey, “Aadhaar Can Cause the Civil Death of an Individual: Petitioners Tell SC,” January 17, 2018, online: *Catch News (India)* < <http://www.catchnews.com/india-news/aadhaar-can-cause-the-civil-death-of-an-individual-petitioners-tell-sc-95682.html> > (Last visited June 3, 2021).

Brian Hicks, “The Cherokees vs. Andrew Jackson”, March 2011, online: *The Smithsonian Magazine* < <https://www.smithsonianmag.com/history/the-chokees-vs-andrew-jackson-277394/> > (last visited July 23, 2021).

Canada: Immigration and Refugee Protection Act (IRPA) [Canada], SC 2001, c. 27, 1 November 2001, available at: <https://www.refworld.org/docid/4f0dc8f12.html> [accessed 12 April 2021]

*Census of the Cherokee of 1835* (Items of information taken from census of Cherokees within the limits of Tennessee in 1835 made by Daniel Henderson Esq., or which a copy was made by G.W. Currey in 1836), American Indian Archives at the Oklahoma Historical Society Research Division, Vol. 14, Office of the Superintendent for the Five Civilized Tribes, Muskogee, Oklahoma (1836), online: *Oklahoma Historical Society* < <https://www.okhistory.org/research/digital/foremantrans/foreman.sup14.pdf> > (last visited July 23, 2021).

Chandra Bushan, “Environment Regulators to Blame for Tuticorin Killings—Explained Here,” June 6, 2018, online: *Financial Express* < <https://www.financialexpress.com/opinion/environment-regulators-to-blame-for-tuticorin-killings-explained-here/1195032/> > (Last visited June 3, 2021).

Christine Rose, “Denial of Prisoners’ Votes Medieval Injustice,” December 1, 2018, online: *The Daily Blog* <<https://thedailyblog.co.nz/2018/12/01/denial-of-prisoners-votes-medieval-injustice/>> (last visited June 3, 2021).

Daniel Moritz-Rabson, “Two Years After Overcoming Attempted Coup, Turkey Plagued by Widespread Arrests and Purges of Civil Servants,” July 15, 2018, online *Newsweek online*: < <https://www.newsweek.com/arrests-plague-turkey-two-years-after-coup-attempt-1024287> > (Last visited June 3, 2021).



Derek Davison, "Egypt: Hossam Bahgat Is One Of The Lucky Journalists," November 17, 2015, online: *Lobe Log* <<https://lobelog.com/egypt-hossam-bahgat-is-one-of-the-lucky-journalists/>> (last visited July 15, 2021).

February 23, 2021, online: *La Hora (Ecuador)* <<https://lahora.com.ec/imbabura-carchi/noticia/1102137836/analizan-dos-reformas-adicionales-por-delitos-contra-ninos->> (Last visited June 3, 2021).

Frederick Reese, "Voting is Seen as a 'Privilege' Not a 'Right' As States Find New Ways to Suppress the Black Vote," August 6, 2017, online: *The Atlanta Black Star* <<https://atlantablackstar.com/2017/08/06/voting-seen-privilege-not-right-states-find-new-ways-suppress-black-vote/>> (last visited July 16, 2021).

Frederick Reese, "Voting is Seen as a 'Privilege' Not a 'Right' As States Find New Ways to Suppress the Black Vote," August 6, 2017, online: *The Atlanta Black Star* <<https://atlantablackstar.com/2017/08/06/voting-seen-privilege-not-right-states-find-new-ways-suppress-black-vote/>> (last visited June 3, 2021).

Harmeet Kaur, "The Cherokee Nation acknowledges that descendants of people once enslaved by the tribe should also qualify as Cherokee," February 25, 2021, online: *CNN* <<https://www.cnn.com/2021/02/25/us/cherokee-nation-ruling-freedmen-citizenship-trnd/index.html>> (last visited July 23, 2021).  
<<https://cpj.org/2015/11/cpj-calls-on-egypt-to-release-investigative-journalists/>>.  
<<https://en.qantara.de/content/turkish-academics-flee-abroad-to-an-uncertain-life-incognito>> (Last visited June 3, 2021).

Kelly Hayes, "Prisoners Strike for Civil Resurrection," September 9, 2018, online: *Truth Out* <<https://truthout.org/articles/prisoners-strike-for-civil-resurrection/>> (last visited June 3, 2021).

Lauren Frayer, "India's Biometric ID System Has Led To Starvation For Some Poor, Advocates Say," October 1, 2018, online: *National Public Radio* <<https://www.npr.org/2018/10/01/652513097/indias-biometric-id-system-has-led-to-starvation-for-some-poor-advocates-say>> (June 3, 2021).

*Loi abolissant la mort civile* (9 mars 1906), online : *Bibliothèque de l'Assemblée nationale du Québec* <<http://www.bibliotheque.assnat.qc.ca/guides/fr/le-code-civil-du-quebec-du-bas-canada-aujourd-hui/268-1906-bill-3?ref=85>> (Last visited July 15, 2021);

Lynette Hazelton, "Philadelphia Lawyers for Social Equity wants more policy changes for people with criminal records," *Generocity*, August 28, 2018, republished by The Philadelphia Reentry Coalition, August 28, 2018, online: *The Philadelphia Reentry Coalition* <<https://www.philadelphiareentrycoalition.org/single-post/2018/09/10/philadelphia-lawyers-for-social-equity-wants-more-policy-changes-for-people-with-criminal>> (last visited July 15, 2021).

M.J. Antony, "Kalanithi Maran vs Ajay Singh: Blow to SpiceJet as SC Dismisses Petition," July 29, 2017, online: [https://www.business-standard.com/article/companies/kalanithi-maran-vs-ajay-singh-blow-for-spicejet-as-sc-dismisses-petition-117072800550\\_1.html](https://www.business-standard.com/article/companies/kalanithi-maran-vs-ajay-singh-blow-for-spicejet-as-sc-dismisses-petition-117072800550_1.html) (Last visited June 3, 2021).

Manish Raj, "Pay Full Wages to DTC Man Sacked 18 Years Ago: HC," November 11, 2017, online: *Indian Express online* <<https://indianexpress.com/article/cities/delhi/pay-full-wages-to-dtc-bus-man-sacked-18-years-ago-hc-4932116/>> (Last visited June 03, 2021).

Moneylife Digital Team, “Aadhaar Is a Mass Surveillance Tool and There Should Be Criminal Penalty for Its Misuse, Says Edward Snowden,” August 22, 2018, online: *Moneylife* < <https://www.moneylife.in/article/aadhaar-is-a-mass-surveillance-tool-and-there-should-be-criminal-penalty-for-its-misuse-says-edward-snowden/55088.html>> (June 3, 2021).

Nisha Nambiar, “Senior Citizens Raise Pitch for Doorstep Aadhaar Enrolment,” July 7, 2017, online: *Times of India* <

Oklahoma Sex & Violent Offender Registry, online: *Oklahoma Department of Corrections* <<https://sors.doc.state.ok.us/svor/f?p=119:97::NO:RP::>> (last accessed July 15, 2021)

Press Release “Triple Talaq is an Extrajudicial, Unilateral Act that’s Civil Death for a Muslim Woman: Indira Jaising,” May 11, 2017, online: *The Daily O (India)*, <https://www.dailyo.in/politics/triple-talaq-uniform-civil-code-indira-jaising-muslim-women/story/1/17147.html> (Last visited June 3, 2021).

Press Release, “ACLU asks Court to Reject State’s Claim that Inmates Serving Life Cannot Challenge Rights Violations,” September 7, 2017, online: *ACLU of Rhode Island*, < <https://riaclu.org/en/news/aclu-asks-court-reject-states-claim-inmates-serving-life-cannot-challenge-rights-violations>> (last visited June 3, 2021).

Press release, “César Villanueva: Presentaremos proyecto de ley para ampliar la muerte civil por narcotráfico, lavado de activos y financiamiento del terrorismo,” May 2, 2018, online: *Presidencia del Consejo de Ministros, Gobierno de Perú* < <http://www.pcm.gob.pe/2018/05/cesar-villanueva-presentaremos-proyecto-de-ley-para-ampliar-la-muerte-civil-por-narcotrafico-lavado-de-activos-y-financiamiento-del-terrorismo/>> (Last visited June 3, 2021).

Press release, “CPJ Calls on Egypt to Release Investigative Journalist Hossam Baghat”, November 8, 2015, online: *Committee to Protect Journalists* <

Press release, “NCD Report Examines ‘Civil Death’ of the Rights of People with Disabilities and the Elderly under Guardianships, Calls on Department of Justice to Ensure Full and Fair Due Process Rights,” March 22, 2018, online: *National Council on Disability* <<https://ncd.gov/newsroom/2018/federal-report-examines-guardianships>> (last visited June 3, 2021).

Press Release, “UN Rights Expert Urges Action to End “Civil Death” of Persons Affected by Leprosy,” June 19, 2018, online: *United Nations Office of the High Commissioner for Human Rights* < <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23214&LangID=E>> (last visited June 3, 2021).

Rachel M. Rose, “Florida Has Been Stealing Votes From Black People Since the Civil War. That Could Change in November,” September 6, 2018, online: *The Intercept* < <https://theintercept.com/2018/09/06/florida-voting-rights-restoration-felons/>> (last visited June 3, 2021).

René Zubieta Pacco, “Becerril plantea muerte civil para sentenciados por terrorismo,” November 7, 2016, online: *El Comercio* < <https://elcomercio.pe/politica/congreso/becerril-plantea-muerte-civil-sentenciados-terrorismo-147162-noticia/>> (Last visited June 3, 2021).

René Zubieta Pacco, « Becerril plantea muerte civil para sentenciados por terrorismo,” November 7, 2016, online: *El Comercio* < <https://elcomercio.pe/politica/congreso/becerril-plantea-muerte-civil-sentenciados-terrorismo-147162-noticia/>> (Last visited June 3, 2021).

Rennard Strickland, “Cherokee”, online: *Oklahoma Historical Society* <<https://www.okhistory.org/publications/enc/entry.php?entry=CH014>> (last visited July 23, 2021).

Rhode Island: “ACLU Asks Court to Reject State's Claim that Inmates Serving Life Cannot Change Rights Violations,” September 7, 2017, online: *American Civil Liberties Union* <<https://riaclu.org/en/news/aclu-asks-court-reject-states-claim-inmates-serving-life-cannot-challenge-rights-violations>> (Last visited July 15, 2021).

Ritwick Dutta, “Thoothukudis Will Happen as Long as Delhi-NCR Remains the Focus of Environmental Violations in India,” online: *Scroll.In* <<https://scroll.in/article/880474/thoothukudis-will-happen-as-long-as-delhi-ncr-remain-the-focus-of-environmental-violations-in-india>> (Last visited June 3, 2021).

Rupert Colville, “Press Briefing Notes on Egypt”, November 10, 2015, online: *The United Nations Office of the High Commissioner of Human Rights* <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?LangID=E&NewsID=16730>> (last visited July 15, 2021);

Sean Heasley, “Federal Report Calls For Alternatives To Guardianship,” March 23, 2018, online: *Disability Scoop* <https://www.disabilityscoop.com/2018/03/23/federal-alternatives-guardianship/24893/> (last visited June 3, 2021).

Sebastian Payne, Karuna Nundy, Frederick Studemann, and Tammy Lai-Ming, “The Question of Identity Cards,” May 3, 2018, online: *The Financial Times* <<https://www.ft.com/content/2ec95b9a-4709-11e8-8c77-ff51caedcde6>> (June 3, 2021).

See European Union Terrorist List, online: *European Council / Council of the European Union* <https://www.consilium.europa.eu/en/policies/fight-against-terrorism/terrorist-list/> (Last visited July 15, 2021).

Shari Miller, “Prisoners WILL Be Allowed to Vote: Convicted Sex Offenders and Violent Inmates Serving Less Than a Year Are to Be Given Electoral Rights,” online: *The Daily Mail online* <<https://www.dailymail.co.uk/news/article-5028497/Prisoners-allowed-vote-government-U-turn.html>> (last visited July 16, 2021).

Tanya Monforte, “Egypt Is No Place for Dissent”, November 11, 2015, online: *The Huffington Post* <[https://www.huffpost.com/entry/egypt-no-place-for-dissent\\_b\\_8537124](https://www.huffpost.com/entry/egypt-no-place-for-dissent_b_8537124)> (last visited July 15, 2021).

The Committee to Protect Journalists, “Journalists Attacked in Egypt Since 1992”, online: *Committee to Protect Journalists* <<https://cpj.org/mideast/egypt/>> (last visited July 15, 2021).

The Eastern Band of Cherokee Indians Government website, online: <<https://ebci.com/government/>> (last accessed July 21, 2021).

The Invisible Lawyers Team, “‘Aadhaar Day 4: If Our Biometrics Do Not Match, Then a Living Flesh-and-Blood Person is no Better Than A Ghost’, says Shyam Divan,” May 25, 2018, online: *The Leaflet (India)* <<https://www.theleaflet.in/aadhaar-day-4-if-your-biometrics-do-not-match-then-a-living-flesh-and-blood-person-is-no-better-than-a-ghost-says-shyam-divan/>> (Last visited June 3, 2021).

Treaty of Hopewell, November 28, 1785, online: *The Cherokee Phoenix* < [https://www.cherokeephoenix.org/news/1785-treaty-of-hopewell/article\\_321e6d88-2afd-5152-b0ea-d8238641ebaf.html](https://www.cherokeephoenix.org/news/1785-treaty-of-hopewell/article_321e6d88-2afd-5152-b0ea-d8238641ebaf.html)> (last visited July 23, 2021).

Umar Farooq, “A Witch-Hunt in Turkey,” July 19, 2017, online: *The Boston Review* < <http://bostonreview.net/war-security/umar-farooq-witch-hunt-turkey>> (Last visited June 3, 2021).

United Nations Security Council Consolidated List, July 15, 2021, online: *United Nations* < <https://www.un.org/securitycouncil/content/un-sc-consolidated-list#individuals>> (list generated on July 15, 2021).

United States Department of Justice, “Native American Policies”, online: *United States Department of Justice* < <https://www.justice.gov/otj/native-american-policies>> (Last visited July 23, 2021).

Varinder Singh, “26 yrs on, TADA convict Bhullar’s ‘missing’ father declared dead,” May 31, 2017, online: *The Tribune of India* < <https://www.tribuneindia.com/news/archive/punjab/26-yrs-on-tada-convict-bhullar-s-missing-father-declared-dead-415193>> (last visited July 15, 2021).

“Votes for Women Broadside,” Women’s Political Union, New York, January 28, 1911, online: *The Library of Congress* < <https://www.loc.gov/resource/rbcmil.scrp7003401/?st=text>> (last visited July 22, 2021).

“Barriers to Citizenship for Newcomers to Canada” Canadian Council for Refugees, May 2014 <https://ccrweb.ca/en/barriers-citizenship> (last accessed January 2021).

“Cherokee Round Up”, August 29, 2017, online: *US National Park Service* < <https://www.nps.gov/fosm/learn/historyculture/cherokee-round-up.htm>> (last visited July 23, 2021).

“Egypt: Lift abusive and arbitrary travel bans,” November 2, 2016, online: *Amnesty International* < <https://www.amnesty.org/en/latest/news/2016/11/egypt-lift-abusive-arbitrary-travel-bans/>> (last visited July 15, 2021).

“Irish Penal Law”, online: *University of Minnesota Law Library* < <https://www.law.umn.edu/library/irishlaw/subjectlist>> (last visited July 22, 2021).

“PPJ report: Turkish gov’t cancels passports to condemn critical citizens to civil death,” March 12, 2017, online: *Stockholm Center for Freedom* < <https://stockholmcf.org/ppj-report-turkish-govt-cancels-passports-to-condemn-critical-citizens-to-civil-death/>> (Last visited June 3, 2021).

“Priests, Nuns Have Right to Ancestral Property,” June 8, 2017, online: *The Hindu* < <https://www.thehindu.com/news/national/kerala/priests-nuns-have-right-to-ancestral-property/article18868692.ece> > (Last visited June 3, 2021).

“The Idea of Aadhaar,” February 9, 2018, online *The Centre for Civil Society* < <https://ccs.in/idea-aadhaar>> (Last visited June 3, 2021).

“The Treaty of New Echota and the Trail of Tears”, online: *North Carolina Department of Historical and Cultural Resources* < <https://www.ncdcr.gov/blog/2015/12/29/the-treaty-of-new-echota-and-the-trail-of-tears>> (last visited July 23, 2021). Jeffrey Ostler, “Disease Has Never Been Just Disease to Native Americans”, April 9, 2020, online: *The Atlantic* <

<https://www.theatlantic.com/ideas/archive/2020/04/disease-has-never-been-just-disease-native-americans/610852>> (last visited July 23, 2021).

“Turkish Academics Flee Abroad to an Uncertain Life Incognito,” July 12 2017, online: *Qantara (Germany)* < <https://en.qantara.de/content/turkish-academics-flee-abroad-to-an-uncertain-life-incognito> > (July 3, 2021).