

BOOK REVIEW

Who Let the Dogs Out?!

A Review of Colin Dayan's *The Law is a White Dog*

ALEXIS ALVAREZ-NAKAGAWA*

What do humans, dogs and spirits have in common? wonders Colin Dayan at the beginning of her book *The Law is a White Dog*.¹ Her answer is not long in coming: they all share the way in which the law makes and unmakes their personhood; in other words, how the law can consider them as persons or objects—or even both at once—depending on the context and the historical circumstances. With this in mind, Dayan embarks on the arduous task of studying how slaves, prisoners, things, dogs and spirits can gain or lose personhood through the law, and how through these processes ‘disabled entities’ can be created. Dayan uses dogs and ghosts to enter into that realm where dispossessions and incapacitations materialise, where some human and non-human entities are placed beyond the boundaries of the community and at the edges of civilisation, in an area haunted by criminals, outcasts, beasts and monsters where myth and reality intertwine, showing in flesh what it means to be ‘creatures of the law’. Dayan’s argument is highly original and often controversial, and it is clear that her contribution has attracted attention in academic and intellectual circles since her book has been selected by *Choice* as one of twenty-five ‘Outstanding Academic Books’ in 2011.

As Dayan says, this book is a search for the ‘spirit of the law’; a quest into how the law is haunted by its past of violence, but also into how the law works to create these ghostly figures. Dayan’s argument is that the law works in a very similar way to magic, as a

* Alexis Alvarez-Nakagawa is a PhD candidate and associate tutor at Birkbeck University of London.

¹ Colin Dayan, *The Law is a White Dog: How Legal Rituals Make and Unmake Persons* (Princeton University Press 2011).

tool that creates realities and, in turn, undoes them; realities that, although fictional, have very material effects for all those who are involved in legal proceedings. Indeed, as she argues, ‘disabilities are made indelible through the fictions of law, law words that wield the power to transform’.² Perhaps the most amazing aspect of this book is how it tracks in history, almost obsessively, the irrational aspect and the magical thinking in law, and how this search becomes a way of understanding the bizarre legal alchemy by which people can become objects or even property, how things can acquire spirit and how spirits can become persons before the law. Thus, at a general level, the book seeks to address how personhood is built and shaped by law and, on a particular plane, how certain people and certain things—spirits, criminals, slaves, prisoners, dogs—have been subjected historically to different forms of metamorphosis through legal rituals. Dayan shows that this process is highly problematic given that it involves a simultaneous movement towards creation and destruction, where modern demarcations between humans, animals, things and ghosts are both weakened and strengthened. In this regard, these metamorphoses expose that the transmutations between people and objects are and have been ubiquitous in history and that these categories are floating signifiers that can be filled by different entities. However, these passages from one category to the other occur within the existing demarcation between persons and things, and reinforce the hierarchy between them, where persons have rights and things are ‘rightless objects’.

The book is far from what we are used to reading in academic works. On the one hand, it is inspired by various sources and combines memoir, literature and legal cases. On the other, the narrative style fully departs from the conventions of academic writing: is it that there are things, *ghostly things*, that cannot be conveyed through dry academic language? This particular writing style allows Dayan to trace connections, analogies and similarities, and to show that not all that seems strange is unreasonable and that not everything that we believe reasonable, after careful scrutiny, ceases to be strange. In this regard, Dayan wants to show ‘how what we call *supernatural* or think of as ghostly is really quite natural,

² *ibid* xiii.

corporeal, easily recast as *reasonable*'.³ Dayan's way of proceeding is characterised by looking at the uncanny with amazing calmness, and at the quotidian and normalised with absolute amazement. It is almost like the reverse of classical anthropology; here the narrator plunges not into a distant tribe but into our everyday life to show how unnatural our practices are, and how naturalised they have become. Dayan's book does not progress in a linear way over the time or the topics covered, but—recalling Walter Benjamin's style—traces constellations and makes temporal jumps following cases, stories and forgotten clues, thus drawing a complex but extremely rich narrative texture. As a result, Dayan reveals surprising connections between the past and the present, between current practices and forgotten ones, thus undermining the progressive narratives that are so common in legal studies today. The result of all this is a provocative and illuminating analysis of how 'the magic of law' works in our contemporary societies. The book therefore makes a significant and original contribution in the field of legal theory and contemporary discussions on criminalisation, racism and animal studies.

The book begins with a ghost story. Dayan describes in detail the case of *Stambovskey v Ackley*, which concerned the transaction of a haunted Victorian house in Nyack, New York. The buyers judicially claimed that the operation should be nullified because the previous owner had not warned them that the house was inhabited by ghosts. While the case was dismissed at the outset, on appeal the nullification of the purchase is granted—even if the rule of *caveat emptor* would not allow it—arguing that the 'spirit of equity' indicated that the rigid application of the law could be abandoned. Dayan shows that, incredibly and against any logic, the law can give legal entity to the ghosts that inhabit the house. Thus, she exposes the strange play between fiction and facts in law; how it can be accepted, on the one hand, that a house cannot be actually inhabited by ghosts, while, for legal ends, the haunting can produce legal effects. Dayan also explores in this chapter some aspects of the philosophy of Jeremy Bentham, a philosopher of great influence in the Anglo-American legal tradition. Here she shows how much of the legal clarity that Bentham demanded and his struggle against the

³ *ibid.*

fictions that populate the law was guided by an amazing infantile fear of ghosts, which he knew to be unreal, but nevertheless, for this very reason, found all the more terrifying.

The Greek myth of Hecuba, finally, allows Dayan to show, at the end of the chapter, the metamorphoses that occur in the realm of the law. After avenging the death of her son, in her eternal grief, Hecuba becomes a spectral dog; at the same time both ghostly and corporal, she is in the interstices of the human and the animal, the people and the gods, the living and the dead. In the various versions of this myth over the years, from Ovid to Lycophron, in her successive transformations throughout history, Hecuba captures and exemplifies the experience of the ‘tombless dead’.

This experience, in particular, is deeply explored in chapter 2. Dayan shows how people still alive can be completely dead in the eyes of the law: living dead, zombies, ghosts, figures possessed by dispossession. Dayan draws a rich history of how the medieval category of ‘civil death’ has reached our days, materialising particularly in convicts and prisoners in the US—people who do not enjoy certain rights and who cannot vote or participate in civil society. In this regard, she points out how the characteristics of modern imprisonment are related to the medieval figures of ‘attainder’ and ‘blood corruption’ that had been assigned to certain felons at that time. Starting with Alexis de Tocqueville, Dayan also discusses here how these two legal categories served to justify and sustain slavery in the US in a fashion that is reminiscent of the famous study by Angela Davis in *Are Prisons Obsolete?*⁴ Dayan argues that Amendment Thirteen of the US Constitution—which abolished slavery ‘except as punishment for crime, whereof the party shall have been duly convicted’—was the way through which the old forms of slavery and segregation survived in the post-abolition era, which would explain the high rate of black American inmates and the exploitative working conditions in prisons today. Apart from that, it is particularly interesting how Dayan analyses the philosophical assumptions of certain ideas that made possible the category of ‘social death’. Dayan shows, analysing the writings of William Blackstone, how the ‘civilised space’ is constituted from the

⁴ Angela Davis, *Are Prisons Obsolete?* (Seven Stories Press 2003).

denial and the elimination of ‘nature’. These ideas, which are common among the social contract theorists, from Hobbes to Locke—who would be highly influential in subsequent legal thought—clearly show how the space of civil society is defined in opposition to the natural state. Dayan argues that ‘the civil, once codified in the institution of law, demands the dual gestures of submission and repression of the natural’.⁵ Thus, the writings of Blackstone remind us that this form of sacrifice and renunciation are essential for the promotion of the legal order. However, since the marginalised natural state haunts the borders of the political community, this violent act of legal institution needs to be constantly reaffirmed through rituals of citizenship that will be represented once and again to maintain the façade that the civil society is intact and the natural substrate controlled, thereby ensuring the stability of the civilised space. Then, the process by which certain ways of being are expelled to the margins, where civil society and nature intertwine, are part of the violence necessary to ensure the ‘civilising process’. Indeed, slaves and convicts are those who, while possessing natural life, are socially dead, given that ‘to be civilly dead is to be granted a natural life, while encased in unnatural death’.⁶ Those subjects identified with nature have to be uprooted from civil society, since once expelled they become the visible record of the sacrifice by which the civilised space is constituted and maintained.

In chapter 3, Dayan rightly calls into question the characteristics that punishment has taken in this ‘civilised space’, showing the contradiction of current forms of incarceration with the alleged enlightened progress in the treatment of criminals and the supposed reduction of the cruelty of penal practices in modern societies. At this point, Dayan brings to light how US prisons have legalised forms of violence far more cruel and inhuman than those existing in the past, putting into question not only the whole civilising narrative, but also many of the assumptions on which modern criminal law is based. Thus, Dayan asks: are these inmates, convicts in high-security prisons, detainees at Guantanamo Bay, these ‘rightless objects’, outside the law? Or it is that, on the contrary, their dispossession is embedded in the legal mechanisms

⁵ Dayan (n 1) 41.

⁶ *ibid* 57.

themselves? For Dayan, it is ‘not an absence of law but an abundance of it that allows government to engage in seemingly illegal practices’.⁷ For her, ‘we need to explore this hyperlegal negation of civil existence’.⁸ Dayan highlights, then, the extent to which violence and law are intertwined in our societies. Or, even more, to what extent violent practices are obscured and are even made possible thanks to the law.

In chapter 4, Dayan analyses in depth how taxonomic classifications, which established ontological hierarchies that ranged from ‘inanimate to animate matter’—something very common in the eighteenth century—were used to degrade colonised people, especially black populations, and to politically justify different forms of exploitation based on an imaginary natural scale where things, animals and humans were ordered at the rhythm of the interests of the Western nations. Domination and slavery were justified then on the basis of comparisons that placed black people in proximity to animals and things, and therefore as naturally inferior beings. Thus, Dayan connects the treatment of slaves with the treatment of animals, bringing to light that ultimately our forms of punishment are partnered with the ancient practice of *deodand*—a Latin word that means ‘what must to be given to God’—which was the ancient ritual of punishing—and banishing—animals or even objects as a way of atoning for human sins. Dayan also shows how the philosophical thought of John Locke and especially his definition of personhood as the capacity of self-consciousness and awareness, has influenced modern conceptions of legal personhood. It has to be said, nevertheless, that Locke’s concept of personhood did not make physical distinctions and did not require any biological trait to consider an entity a person. It was sufficient that this entity could show or manifest the signs of consciousness to be taken as a person. Although, this peculiar metaphysics of personhood—which initially could have shown that the hierarchies based on biological traits were arbitrary and fictitious—has been used, paradoxically, to sustain these very distinctions in law. In this regard, slaves, who for all legal effects were considered property, given their self-consciousness could, in turn, be punished for committing crimes. Thus, laws during this

⁷ *ibid* 72.

⁸ *ibid*.

period considered slaves incapable of civil acts—as they were mere chattel or property—but capable of criminal behaviour—since they had awareness of their actions.

Chapter 5 discusses this paradoxical position of slaves: property to civil law and persons to criminal law. This chapter focuses on analysing a US case from the nineteenth century, *Bailey v Poindexter's Executer*, where a slaveholder had declared in his will that after his death some of his slaves would have the opportunity to choose to stay enslaved or to be released. However, his heirs, who intended to hold the slaves, demanded the annulment of the will. The court decided that the wishes expressed in the will represented a legal impossibility, since the slaves, for their legal nature, were unable *to decide* to be free. Dayan then shows how the law created different forms of disability at the time, by which children, madmen and women were deprived of civil capacity and agency. However, the case of the slaves was particular since here the disability was usually permanent and total. In connection with this, there is also a very revealing discussion of manumission in this chapter. US laws accepted this practice by which the owner of slaves could release them; and it is interesting to notice that this institution produced a transformation of slaves into ‘new beings’, recalling the act by which the royal pardon could ‘civilly rebirth’ felons declared as ‘attainder’ or ‘civilly dead’. Returning to her arguments about the contrast between civil order/natural order, Dayan then states that ‘to take on the skin of the civil and thus be protected by law, a human being must die to the natural order and be born again as a civil person’.⁹ But the reverse movement is also possible as is shown in the institution of ‘civil death’; one could die in the civil order, which meant that in the eyes of the law one would become merely a body, that is to say, simply a part of the natural order, such as animals and objects.

Chapter 6 takes up this issue, putting even more in evidence the connection between the treatment of animals and criminals. On the other hand, Dayan especially shows here how the Enlightenment opposition between ‘civilised’ and ‘barbaric’ practices—by which certain physical punishments will be gradually eliminated—is still

⁹ *ibid* 155.

very present in contemporary legal discussions, and how, particularly, cruel penal practices are currently disguised in a humanist and rationalising legal discourse. Dayan explores in detail how the prohibition of ‘cruel and unusual treatment’ of the Eighth Amendment of the US Constitution has been interpreted in such a way that, although cruel physical punishments are prohibited by the courts, brutal psychological treatments are legally permitted. This again brings us to the terrain of fictions and to law’s enormous power to create realities where the words ‘cruel’ and ‘unusual’ no longer have the same meaning as in common language. Thus, Dayan shows how solitary confinement, the death penalty and detentions in the context of the ‘War on Terror’ can be carried out not only in the name of ‘civilisation’, but also with legal justifications.

The last chapter of the book turns to the legal treatment of dogs, drawing interesting parallels between the status of slaves, prisoners and animals in our societies. Thus, the book closes its exploration of various forms of legal dispossession showing how the treatment of dogs, mostly in the US, has stunning connections with the practices that come into play in relation to certain human beings who are considered disposable. Dayan analyses here in detail the legal status of dogs in the common law, which have been considered wild animals (and, therefore, subject to elimination by anyone and for any cause), then as qualified or imperfect property, and finally as full property. In any case, dogs live in a liminal space, frequently humanised by their owners, but at the same time easily discarded as mere waste. In other words, the dog inhabits ‘this intermediate space between person and property, between the most loved and the most disdained, the dog exists nowhere in itself’.¹⁰ Thus, Dayan shows a connection in the legal rhetoric and a discursive affinity between the mechanisms that make it possible to consider dogs and people disposable. Very interesting, in this regard, is the analysis of *Sentell v New Orleans and Carrollton Railroad Company*, where Dayan discusses a judgement in which legal redress is refused to the owner of a dog hit by a car. This case was sentenced by the judge of the famous *Plessy v Ferguson case*, in which a legal basis was given to racial segregation in the US. The comparison between the two cases serves to bring to light how ‘law can be used to make men dogs and

¹⁰ *ibid* 248.

dogs trash,' showing that both processes are inextricably linked.¹¹ The book thus closes its route with a story about the treatment of dogs, after starting with a story of ghosts and having studied several scary stories about how human beings are dehumanised and depersonalised.

It can be said that, in general, Dayan's book analyses how the law is applied in different areas and in different historical moments, studying the contexts in depth and helping to illuminate the continuity of certain practices that have usually been considered as discontinuous. Thus, the past illuminates the present and this latter allows us to see the past in a new light, where violence is exposed in a long chain of interlaced instances. Moreover, current practices in areas considered isolated and different intersect and explain each other, showing sets of affinities and reciprocities, toppling epistemological walls and thus enabling a clearer perspective on the long marriage between law and violence. Furthermore, Dayan's work can be partially characterised as an attempt to dismantle the rationality of the Enlightenment and the belief in the indefinite progress along with the modern boundaries and dichotomies—subject/object, human/animal, etc. Placing on the spot the gloomy nature of the law, how the law is haunted by its violent past and exposing its connections with magical practices, Dayan not only shows the lack of rationality of one of the symbols of modern thought but also attempts to point out that the law and the world we inhabit continue to be 'enchanted' and that our ways of thinking are still magical.

It is clear that the 'profane metamorphoses' that the law produces are part and parcel of practices carried out in all so-called 'primitive' societies. This could be exemplified very well with shamanic beliefs in the possibility that, through certain rituals, humans could become animals, objects or spirits; or that the latter could become humans. An interesting aspect that the book overlooked in this regard, however, is how the metamorphoses of the law are clearly distinguishable from some archaic magical practices and how these practices could even have the potential to open a door to new forms of law or to alternatives to the law. If we take some

¹¹ *ibid* 241.

recent anthropological works—such as Eduardo Viveiros de Castro’s on the Tupinambá;¹² Roy Wagner’s on the Melanesian cultures¹³ or Kopenawa and Albert’s on the Yanomami,¹⁴ among others—in the primitive world the metamorphoses were a manifestation of a cosmology that claimed the ontological indivisibility of the world and the continuum between the different entities—humans, animals, things, spirits—whilst according to Dayan’s description, the metamorphoses that the law performs, in contrast, seek to support distinctions and borders set out in modern thought. In this regard, I would suggest that even if the magic of the law has a similar structure to shamanism—as Dayan seems to suggest—it also has an opposite function, which sustains the barriers that place humans as distinct entities instead of allowing them, like shamanism, to cross boundaries to the realms of other forms of being in the world. If this is the case, then an array of interesting questions arises: what are the possibilities of contaminating practices of law with the logic of shamanism? In other words, considering the sameness in the structure of law and shamanism, can we change the function of the former to throw down the barriers that isolate humans from the world they inhabit? What would remain, in this case, of the modern divide of persons/things? Would this be a way to open up a space for new law? Or, from another point of view, can shamanic practices be a good way to fight back against the calamitous effects of law in our societies? Can this be the instrument with which we can face the bad magic of law and the mystifying fog of modern thought?

Moreover, it would be interesting to extend Dayan’s argument about how modern political thought posed a rift between civil society and nature, and how this opposition shaped our modern law. For this purpose, it should be noted that the contractualist theorists were strongly influenced by the colonial enterprise and, especially, by the perception of the New World as a ‘natural’ world; from Hobbes to Rousseau, America has been used to exemplify the hypothetical ‘state of nature’ in opposition to which the contractualist analysis

¹² Eduardo Viveiros de Castro, *Cannibal Metaphysics* (University of Minnesota Press 2009).

¹³ Roy Wagner, *The Invention of Culture* (University of Chicago Press 1981).

¹⁴ Davi Kopenawa and Bruce Albert, *The Falling Sky: Words of a Yanomami Shaman* (Harvard University Press 2013).

constructs ‘civil society’. Let us not forget then that these thinkers wrote with an eye on the Americas, a land from which fantastic news kept coming; the world where everything was possible, and where changelings, magic objects, chattering animals, vengeful spirits and bloodthirsty gods were constantly reported in the chronicles of the explorers and voyagers.¹⁵ Thus, it can be argued that modern political theory appeared as a means of constituting a society in the Americas, in an imaginary and hypothetical plane at the beginning, but with very real practices afterwards. In other words, it has emerged as a way to open up a ‘civilised’ space in an untamed place where humans and animals, people and gods were still mingled in a kind of magical realism. The law, then, was the device by which this enchanted world, this space of impudent naturalness, that Garden of Eden where animals and gods still communicated with men, was rationalised, removed from its primitive darkness. The law was the European profane magic that served to counteract the primitive magic in which the people of the Americas still believed: then, along with the sword and the cross, the law should be added to the arsenal used in the process of acculturation, colonisation and domination. The law was the instrument through which a natural world, of which so many wonders were reported but that was also a classificatory chaos, was disciplined and modelled through the legal practices. Not coincidentally, for Locke, one of the main characteristics of *persons* was precisely to have law and to be accountable to it: this was the main difference between the civilised European and the native wild man of the Americas.¹⁶ Arguably, then, the metamorphosis that the law guaranteed, ultimately, through the particular transmutations of persons/things, was at a more general level the metamorphosis of an untamed nature in a civil society made in the image and likeness of the European, and therefore subjected to it.

In this regard, if Dayan has been criticised for her localism—in other words, for focusing too much on the history and the cultural

¹⁵ About this fantastic European imaginary of the Americas, see Lewis Hanke, *Aristotle and the American Indians: A Study in Race Prejudice in the Modern World* (Hollis & Carter 1959) 1-11.

¹⁶ John Locke, *An Essay Concerning Human Understanding* (Oxford University Press 1975).

logic of the US—on the contrary, in my opinion, this work might be criticised for certain omissions and some lack of specificity in the analysis of this context. I believe that the book should not only have analysed how the law depersonalised and dispossessed the slaves—a practice which, moreover, had been common in various parts of the world—but how these forms of dispossession were exercised in axis and in parallel with the colonial conquest; that is to say, with the elimination of the US indigenous populations. Thus, what is missing here is the study of the most fundamental of dispossessions in the American history: the ethnocide of the original inhabitants of the land. American indigenous people—it would not be difficult to argue—have suffered similar forms of classification, depersonalisation and dispossession as black Americans, and these practices are also closely related to the existence of slavery in the US. In other words, the transatlantic slave trade and slavery in the US cannot be explained separately from the enterprise of the conquest and the dispossession of the inhabitants of the Americas. Moreover, the history of dispossession of the indigenous has had, as slavery had, an important impact on current penal practices. Let us not forget that if in the US an important part of the prison population is black, the other part is ‘Latino’ or, more properly, ‘mestizo’. Thus, in the genealogy of dispossessions, especially in the American context, there is a point at which the subjugations that indigenous and black people suffered, intersect with each other, and that could explain, in conjunction, some of the current characteristics of US imprisonment. Localism in itself does not necessarily indicate a deficit of research—on the contrary, the specificity may be necessary to bring to light a particular historical and cultural context—but the absence of a very characteristic aspect of the place that has been analysed, such as is the treatment of the indigenous people in the practices of dispossession, is an omission that, in my opinion, is significant. In any case, the valuable theoretical lens and materials that Dayan’s book provides makes possible this analysis in the future, which could reveal new clues to understand how the law makes and unmakes people, or moreover, on a different plane, to what extent certain indigenous rituals and magical practices can be understood as a way of resisting the alchemy that the law has imposed—and imposes—on them. Thus, this could become an opportunity to also distinguish the characteristics of indigenous traditional magical forms from the profane magic of law, as I suggested earlier.

To conclude, let's reveal the mystery: Why is the law a white dog? In her extensive account of how the law works, Colin Dayan tells two stories that could well be two stories about the law. The first shows us how the law is now and how it has been; the second indicates how the law could be, or alternatively, how there could be a world without the law. Both stories are about a white dog. In the first story, Dayan mentions that there is a Haitian legend about how bad magic can revive the spirit of a dead ancestor and trap it on the skin of a ghostly white dog doomed to wander at night to rob the souls, to rend the skins and steal the minds of the wretched.¹⁷ Throughout her entire book, Dayan shows that this demonic and ghostly dog—not coincidentally 'white'—is what the law is in our societies for all those who have been expelled to their margins. However, the second story tells of what could be a redeeming alternative. In this case, it is a story of Apollonius of Tyana, a prophet of the first century AD who could rival Christ for the miracles and cures he performed. This story tells how Apollonius saves a child bitten by a white dog with rabies by finding the dog so that it can heal the child by licking the wound. By this act, not only the child is cured, but also the dog. Perhaps, then, 'if there is a remedy for the bad magic, the damages of law, we must try to describe what such a healing metamorphosis would look like. The dread of threat and stigma can be countered by a healing that is not so much segregation as coalescence'.¹⁸ This story offers, as Dayan herself says, a possibility of redemption through a different form of healing, a different practice of social metamorphosis, where the dog is not punished, imprisoned or excluded, and nor does it become a pariah or less than other beings; a practice that seeks a metamorphosis that tends to the healing, personification and cohabitation with other entities, ultimately a practice that allows crossing the barriers erected in modern times and that reminds of shamanic practices. Nevertheless, interestingly, the story also shows that perhaps the only possible cure available is through the white dog, the same source that caused the damage. Now, is this source the law? Is it the law that can remedy its ills? Is this practice, this good magic, an alternative law, a law embedded with another logic, or

¹⁷ Dayan (n 1) 252.

¹⁸ *ibid* 36.

simply an alternative to the law? Dayan does not give us an answer to these questions but only hints about where we might find the gates of redemption.