Towards a Reintegration of the Human Being in Law

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Abstract

The person has in theory been at the center of the law since Gaius divided the private law into persons, things, and actions. In constructing the person, however, the law takes apart and sets aside the human being, replacing it with a legal abstraction that diverges markedly from it. This gap is partly due to the way the law has been structured conceptually, as a set of bounded categories clearly distinguished from each other. Viewing the person as the result of a series of either/or classificatory decisions privileges the liberal model of the person: a partimonialized, transactionalized bearer of rights. If instead we reconceptualize the persons-things-actions structure of the private law to emphasize the dynamic interactions between the categories, we can bring back into the concept of the person some aspects of the human being—such as personal relationships—that have traditionally been outside legal analysis.

Résumé

En principe, la notion de personne est au cœur du droit depuis la division du droit privé par Gaïus en personnes, choses et actions. Toutefois, en échafaudant le concept de personne, le droit a divisé et laissé de côté la personne humaine pour la remplacer par une abstraction juridique qui en diverge considérablement. Cet écart s'explique en partie par l'architecture conceptuelle du droit, fondée sur des catégories fermées et nettement distinctes les unes des autres. Envisager la notion de personne comme une succession de décisions classificatoires disjonctives favorise une conception libérale axée sur un détenteur de droits "patrimonialisé" et "transactionalisé". Repenser les divisions traditionnelles du droit privé en privilégiant les interactions dynamiques entre personnes, choses et actions permettrait la réintroduction de certains aspects de la personne humaine dans la notion juridique de personne. Parmi ceux-ci figurent les relations personnelles, qui ont traditionnellement été exclues de ce cadre analytique juridique.

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Contents

Introduction

From at least the time of Gaius, the person has enjoyed a structural primacy as the first of the fundamental categories of Western law. For Gaius (as well as for Justinian, who adopted Gaius' schema and so ensured its success), private law was to be divided into persons, things, and actions, with persons first, since the law exists for their benefit.[1] Since then, Gaius' structure—and its implicit hierarchy—has cast a long shadow, and has been carried forward in the organization of civil codes, of the modern Roman Catholic canon law, and even of the Common law, such that it has become one of the principal conceptual foundations of the Western legal tradition.[2] This traditional ordering of the categories of legal analysis meshes well with the popular conception of the person as more or less identical to the human being, but this structural legal anthropocentrism hides an increasing gap in substance, for the human being has been replaced by the person as defined by the law, and the person has been overshadowed by the things (property) and actions (ways of acquiring property)[3] with which the law is more comfortable dealing. My purpose in what follows is to suggest different ways of conceptualizing this structure

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[1] G. 1.8; Inst. 1.2.12 (trans. Birks & McLeod). On the later influence of the institutional schema (so called because of its origins in Gaius' and Justinian's *Institutes*), see Alan Watson, *Roman Law and Comparative Law* (Athens, Ga.: University of Georgia Press, 1991) at 147-81.

[2] See generally Donald R. Kelley, "Gaius noster: Substructures of Western Social Thought" (1979) 84 American Historical Review 619 [Kelley, "Gaius noster"]. In the Common law, this structure is evident in William Blackstone's *Commentaries on the Laws of England*, 1st ed., 4 vols. (Oxford: Clarendon Press, 1765-1769), online: Avalon Project at Yale Law School <http://www.yale.edu/lawweb/avalon/blackstone/blacksto.htm>, as well as in the recent synthetic work Peter Birks, ed., *English Private Law*, 2 vols. (Oxford: Oxford University Press, 2000) [*English Private Law*], both of which are of course indebted to civilian ways of thinking.

[3] As we will see in chapter 1, early modern jurists reconceived Gaius' third category variously as obligations or ways of acquiring property, thus moving it away from procedure. In what follows I will generally use the original "actions" to stand for these later versions, and in chapter 3 I will argue that a useful way to think of this third category is as "interactions".

in order to rearticulate the substance of the categories, and in so doing to reconstruct or reconstitute the concept of the person in law to bring it closer to the human being.

The person in law is not the human being, just as a contract is not simply a promise and a homicide is not simply a killing. The person is rather a particular construct—a mask, or a role in a drama—that the law has set up for human beings to fit themselves into and has invested with particular meaning.[4] In other words, the law reconstructs the human being on its own terms and according to its own convenience, and names the result the person or legal subject, distinguishing it from legal objects on the one hand and legal relationships on the other. It is my argument that one reason for the increasing divergence between the legal idea of the person and the human beings for which it stands is precisely the either/or characterizations to which Gaius' schema gives rise. According to the logic of the system, something must be either a person or a thing, either a thing or an action; never both, never neither. Treating the law as a series of pigeonholes into which social reality is classified fundamentally shapes the way legal analysis proceeds. In particular, such a view forces us to adapt material to the exigencies of the taxonomic system, rather than other way around. As we will see, in practice each shapes the other, but the interchange is not balanced, since the normative power of legal discourse is such that it tends to shape the subject matter being classified more than the material shapes the legal categories into which it is put.

The process of legal classification translates into the language of law those aspects of the human being that the law as presently constituted can recognize and accept, and leaves aside those aspects that it cannot. To be a person, one must fit the mold the law provides: one must resemble as closely as possible those entities that the law already recognizes as persons. The result is that some human values, aspirations, and emotions are transformed into the economic, rational, transactional language of modern Western

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[4] See John T. Noonan, Jr., *Persons and Masks of the Law: Cardozo, Holmes, Jefferson, and Wythe as Makers of the Masks* (New York: Farrar, Straus and Giroux, 1976); Joseph Vining, *Legal Identity: The Coming of Age of Public Law* (New Haven: Yale University Press, 1978) at 123 (on the law as "masked ball"). The person in law is also a category open to other entities like corporate groups, ships, even (historically) statues, but my focus here will be on the category as it relates to individual human beings.

law, while other human values, aspirations, and emotions are left outside the structure of formal law, to be dealt with by other normative systems such as religion and community. Regarding those aspects of the human being brought inside, law's transformative force leads to concerns such as the patrimonialization of personality rights like privacy and reputation. Regarding those aspects of the human being left outside, law's exclusionary force leads to a legal system whose formal institutions—while perhaps true to the persons the law creates—are nevertheless increasingly at odds with the human beings they serve.[5]

The crux of the problem, I argue, is that the law treats the human being as a bundle of easily separable, discrete interests, rather than as an integrated whole whose rational, emotional, material, and spiritual sides all inform each other. As the law becomes an ever more dominant discourse in society, especially with the decline of other normative systems such as religion that long dealt with particularly human areas of life like sexuality and death, it colonizes more and more aspects of human activity, while imposing on them its increasingly disaggregated view of the human being. If it is to be the law that determines the parameters of what it means to be a person in contemporary society—an assertion that should by no means remain uncontested—it is important that the law not exclude or devalue aspects of personhood associated with alternative or competing views of the human being.

What is needed, as the double entendre of my title suggests, is a two-fold reintegration of the human being in law. First, the human being must be brought back into the legal concept of the person. To an extent this has begun with the blurring of the boundary between public and private law that has given new scope to the law of persons.[6] Once the realm of slaves, children, lunatics, and women—that is, those exceptional cases

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[5] Compare Vining, *ibid.* at 148: "The 'persons' who speak to the legal mind may not be reducible to individual human beings, but they cannot be separated either from individuals who 'as individuals' give them life."

[6] On the softening of this conceptual frontier, see *e.g.* John E.C. Brierley & Roderick A. Macdonald, *Quebec Civil Law: An Introduction to Quebec Private Law* (Toronto: Emond Montgomery, 1993) at 156-57; Manfred Rehbinder, "Status, Contract, and the Welfare State" (1971) 23 Stan. L. Rev. 941 at 949-50; Peter Stein, *Legal Institutions: The Development of Dispute Settlement* (London: Butterworths, 1984) at 123.

whose legal personality was imperfect or qualified—the law of persons has come to be the locus for the legal expression of human values like dignity, privacy, even humanity generally within the private law, values well beyond the scope of the early law of persons, which centered on questions of status.[7] Despite these developments, however, the law still tends to deal with these human values in the terms it understands and prefers, as the stuff of discrete patrimonialized transactions rather than as values in themselves.

Second, the human being that is reintegrated into law must itself be an integrated entity, rather than a bundle of separate rights or interests whose interrelationships and interactions are not taken into account. This idea of interaction is crucial, I will argue, since it allows us to treat the boundaries between legal categories as fluid, contingent, and productive of meaning, rather than as simple heuristic markers. Just as human beings cannot separate out their material needs from their affective relations, or their rational from their spiritual sides, so legal categories cannot properly be understood in artificial isolation from one another. Rather than deciding whether something is a person or a thing or an action, we need to appreciate that categories can and should blur and so inform each other. Contextualizing the person in law within Gaius' entire system—appreciating, for example, the interactions that help constitute the self—will provide a richer substance to the category of persons, and bring it closer to the human being.

My argument proceeds as follows. Chapter 1 looks at the paradigm of persons-things-actions in Gaius' *Institutes* and how it has structured legal thinking. I argue that the traditional view of Gaius' categories as separate and distinct places in which social reality is put limits the model's explanatory power by neglecting the points of ambiguity where the different categories meet. This conceptually limited notion of legal classification, however, has benefited from the normative power of legal discourse to privilege the emergence of a particular view of the person in law.

Chapter 2 turns to examine how the law has constructed the person, and how this construction contrasts with the human being. Legal classification translates social reality

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[7] See *e.g.* Bernard Edelman, *La personne en danger* (Paris: Presses Universitaires de France, 1999) esp. at 503-50. On the history of the person in law, see especially Anne Lefebvre-Teillard, *Introduction historique au droit des personnes et de la famille* (Paris: Presses Universitaires de France, 1996) [Lefebvre-Teillard, *Introduction historique*].

into the language of law, and like any translation much of the original is altered or left out entirely and new resonances are introduced. I argue that the liberal paradigm predominant in Western law tends to engage the person primarily as the subject of transactions of patrimonial value, a view that disaggregates the human being into a collection of discrete rights to be dealt with individually. This is in part an outgrowth of viewing legal categories as distinct and bounded from each other: to move beyond these limitations, our categories need to reflect and embody the complexity of their subject matter.

In chapter 3 I move away from looking at persons as an isolated category, and argue instead that legal categories must be viewed as dynamically interacting with one another. Viewing categories as interacting with each other rather than as independent allows us to appreciate the interfaces between the categories as zones in which legal and social meaning is produced. In the case of persons, this enables us on the one hand to reclaim from the law of things aspects of the person that have become patrimonialized, and on the other hand to bring into the concept of the person ideas of relationship and interaction characteristic of the law of actions. Contextualizing persons within things and actions, I argue, gives us a conceptual language with which to grapple with human complexity within the law.

Finally, in the conclusion I look at the issues of privacy and status to illustrate some of the ways that my deconstruction and reconceptualization of the concept of the person can help us grapple with human complexity within the structure of the law. Privacy is an example of a legal concept that the traditional bounded view of the person has difficulty accommodating, while a rehabilitated idea of status can provide a conceptual framework within which to understand the relational and interactive aspects of the human being so crucial to the reconstruction of the person in law.

Chapter 1
Legal Classification: Persons-Things-Actions and Beyond

Classification is essential to law, and the act of grouping like and distinguishing it from unlike gives the unruly mass of law a structure and hence meaning. From the alphabetical subject headings of the *Canadian Abridgement* to the numbered and grouped provisions of a civil code, classification gives an order to the "one great blooming, buzzing confusion" of human activity and experience, a sense that things are in control and that reason prevails.[8] As Charles Loyseau put it in the course of a discussion of the social orders of early seventeenth-century France, "Il favt qu'il y ait de l'Ordre en toutes choses, & pour la bienseance & pour la direction d'icelles."[9] That classification has two aspects—an empirical side (finding the suitable place for everything) and a normative side (using structure to govern)—is as true today as it was in 1613, and both aspects are crucial to understanding the roles classification plays in law.

How legal matter is organized—what material is included, what excluded, and what order is imposed on it—reveals the underlying structure of the law, which in turn reveals many of the underlying (and often unspoken) assumptions about the law that go into producing and maintaining this structure. Though classification can take many forms and reflect many purposes, it is not a neutral exercise of impartial scientific method: it both reflects the ideas of order that the classifier brings into the process, and it produces a new order. Over time, categories—however provisional or arbitrary they started out—unavoidably become reified, and the divisions they set up assume an authority that itself takes on a kind of legal force. In the end, however, classification is about the rhetorical and political structuring of disparate, even random external reality for particular purposes.

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[8] William James, *The Principles of Psychology*, 3 vols. (Cambridge, Mass.: Harvard University Press, 1981), vol. 1 at 462. Compare also Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences* (New York: Vintage Books, 1994) [Foucault, *Order of Things*].

[9] Charles Loyseau, *Traité des ordres et simples dignitez* ([Gex?]: Balthazard l'Abbé, 1613) at 5.

Any taxonomic system, then—even the ostensible absence of such a system—is about the contingency of history (about choices made or rejected), and not about the inevitability of nature or science.[10]

Moreover, and this is a key point for what follows, if we look at classification according to its effects rather than its purposes, we see that it divides as well as groups, and so it is as much about fences as bridges, as much about exclusion as it is about inclusion. Any attempt to group material involves countless choices between multiple alternatives, with each choice standing for many others that might have been made instead. In law especially, since the stakes can be high, calling something a crime rather than a tort, or a patrimonial rather than an extrapatrimonial right is a significant choice with more than just semantic effects. Separating or joining together concepts or institutions can have the effect of separating or joining people.

In this chapter I will look at how legal categorization and classification structure the law and produce meaning. I am especially interested in how a particular classification scheme—the institutional persons-things-actions trichotomy of Gaius and Justinian—has provided a bedrock structure upon which Western law has been built. This structure has created a particular kind of legal universe, and within that legal universe, it has created a particular kind of person in law, with certain aspects of human life included, others left out. The dynamics of classification, I will argue, privilege a reading of the institutional structure as exclusionary categories, into which the entirety of the private law can be properly sorted. What this does, I argue, is neglect the zones of interface between the categories, and it is precisely by grappling with these boundaries or gray areas between categories that the law can begin to embrace human and social complexity. This critical survey of the history and effects of the institutional structure will serve as background for the deeper analysis in the next chapters, which will focus on the category of persons and its relationships with its neighboring categories.

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[10] Compare Jacques Derrida, "The Law of Genre" (1980) 7 Critical Inquiry 55 at 60.

I. Classification: Three Examples

As an initial foray into some of the problems of classification as it relates to law, let us look at three very different examples of classifying activity, each from outside modern Western law. These examples, drawn from fiction, from psychology, and from medieval canon law, graphically illustrate how different ways of classifying structure knowledge in different ways, and moreover how classification in the humanities and social sciences differs from the scientific model based on the rules of biological taxonomy.[11]

First is Jorge Luis Borges' well-known story about a system of classifying animals, purportedly "attributed by Dr. Franz Kuhn to a certain Chinese encyclopedia entitled *Celestial Emporium of Benevolent Knowledge*."

> On those remote pages it is written that animals are divided into (a) those that belong to the Emperor, (b) embalmed ones, (c) those that are trained, (d) suckling pigs, (e) mermaids, (f) fabulous ones, (g) stray dogs, (h) those that are included in this classification, (i) those that tremble as if they were mad, (j) innumerable ones, (k) those drawn with a very fine camel's hair brush, (l) others, (m) those that have just broken a flower vase, (n) those that resemble flies from a distance.[12]

Given Borges' tongue-in-cheek style and love of the absurd this story is doubtless apocryphal (though Franz Kuhn is a real Sinologist). It does, however, illustrate a mode of classification that is jarring, even antithetical to Western ideas of rationality, since it presents categories that are overlapping rather than exclusive, and that divide the material simultaneously according to different kinds of criteria. Privileging reason as we do, we tend to look at a classification system and demand that it cover the field—that it provide a gapless system into which any conceivable subject can be put—biological taxonomy and

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[11] Geoffrey Samuel, "Can Gaius Really Be Compared to Darwin?" (2000) 49 I.C.L.Q. 297 [Samuel, "Darwin"].

[12] Jorge Luis Borges, "The Analytical Language of John Wilkins" in *Other Inquisitions, 1937-1952*, trans. by Ruth L.C. Simms (Austin: University of Texas Press, 1964) 101 at 103. The story is discussed, among many other places, in Foucault, *Order of Things*, *supra* note 8 at xv-xxiv and Pierre Legrand, "What Borges Can Teach Us" in *Fragments on Law-as-Culture* (Deventer: W.E.J. Tjeenk Willink, 1999) 63-81.

library classification systems are good examples. From this perspective, the Chinese encyclopedia is irrational, since it includes overlapping categories (for example *h* with any of the others), inherently subjective ones (*i*, *n*), an impossible category (*j*), and categories that are logically closed and so useless for further classification (*m*).[13] Our demand for rationality in classification, however, is misplaced, and this is precisely Borges' point: "obviously there is no classification of the universe that is not arbitrary and conjectural. The reason is very simple: we do not know what the universe is."[14]

The second example comes from the cognitive psychologist A.R. Luria's fieldwork on illiterate peasants in Uzbekistan and Kirghizia in the 1930s, as reported by Walter Ong:

> Subjects were presented with drawings of four objects, three belonging to one category and the fourth to another, and were asked to group together those that were similar or could be placed in one group or designated by one word. One series consisted of drawings of the objects *hammer*, *saw*, *log*, *hatchet*. ... A 25-year-old illiterate peasant: "They're all alike. The saw will saw the log and the hatchet will chop it into small pieces. If one of these has to go, I'd throw out the hatchet. It doesn't do as good a job as a saw."[15]

Leaving aside the obvious divergence between literate and pre-literate forms of reasoning, what we see here is that reason—represented by the abstract category of "tools"—is itself a cultural construct into which we are indoctrinated: its ways of thinking are neither self-evident nor natural, but rather learned and agreed-upon.[16] Both of the

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[13] The original Spanish of class (*m*) reads "que acaban de romper el jarron," and so suggests a particular vase or water pitcher, rather than any one. Other translations more satisfactorily read "having just broken the water pitcher"; e.g. in Foucault, *Order of Things*, *ibid.* at xv.

[14] Borges, *supra* note 12 at 104.

[15] Walter J. Ong, *Orality and Literacy: The Technologizing of the Word* (London: Routledge, 1982) at 51, citing A.R. Luria, *Cognitive Development: Its Cultural and Social Foundations* (Cambridge, Mass.: Harvard University Press, 1976).

[16] This is why IQ tests, which privilege this particular kind of rational thinking, are so problematic. See Stephen Jay Gould, *The Mismeasure of Man* (New York: W.W. Norton, 1981).

conflicting classification systems, the examiner's and the peasant's, are valid, of course: neither is right, and neither is wrong, they simply represent different constructions of reality.

The third example brings us to the law, but it is no less foreign and full of difficulties of interpretation because of that. The very first canon in Gratian's *Decretum*—the foundational text of medieval canon law—gives the *summa divisio* of the law:

> Omnes leges aut diuinae sunt, aut humanae. Diuinae natura, humanae moribus constant: ideoque hae discrepant, quoniam aliae aliis gentibus placent.
>
> Fas lex diuina est: ius lex humana. Transire per agrum alienum fas est, ius non est.
>
> [All ordinances are either divine or human. Divine ordinances are determined by nature, human ordinances by usages; and thus the latter vary since different things please different people.
>
> Morality is divine ordinance. Law is human ordinance.
>
> To pass through another's field is moral, but it is not legal.][17]

There is of course a translation issue here—the difficulties in understanding the precise meaning of the original Latin mirrors the cultural gulf of almost nine centuries. (The words *fas* and *lex* in particular are impossible to render directly into English, since both "morality" and "ordinance" have overtones that would have puzzled Gratian.) But even leaving that aside, it is difficult to say exactly what the different distinctions set out mean. "All ordinances" purports to be exhaustive (at least once we determine what law is), and yet as the excerpt indicates, any human activity—such as the quotidian example of going through someone else's field—engages both kinds of law, though in different ways. Thus as with the Chinese encyclopedia, Gratian's classification scheme is both explicitly exhaustive, purporting to embrace any matter falling within the concept of law, and yet

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[17] Decr. D. 1 c. 1. The Latin is cited from *Decretvm Gratiani emendatvm et notationibus illvstratvm vnà cum glossis, Gregorii XIII pont. max. ivssv editvm ad exemplar Romanvm diligenter recognitum* (Lyons: n.p., 1584) at col. 2, online: Bibliothèque Cujas <http://cujas.synasoft.fr/page.asp?Ouvrage=201&Ftime=1>, the English from Gratian, *The Treatise on Laws (Decretum DD. 1-20) with the Ordinary Gloss*, text trans. by Augustine Thompson, gloss trans. by James Gordley (Washington, D.C.: Catholic University of America Press, 1993) at 3-4 (section numbering omitted). This canon derives originally from Isidore of Seville's *Etymologies*.

internally non-exclusive, since a single subject matter might fall within more than one category.

The point I wish to draw from all three of these examples is the contingent, even political nature of classification, both in how the categories are constructed and in how they are filled. As Geoffrey Samuel notes, unlike the physical or biological sciences, in which categories reflect outside reality, in the humanities and social sciences (including law) categories are rhetorical constructs that both reflect and shape what they classify.[18] This oversimplifies, of course, since to a true constructivist scientific reality is also constructed. The difference, however, is that in scientific classification the external signified effectively remains the same, while in the human sciences the signified changes constantly through its relationship with the category. In other words, classificatory systems are both empirical (they must in some way reflect the material they classify, and vice versa) and normative (they define the material they classify, since they label it in a particular way and so exclude other possible labels).[19]

The implication of this is that we should understand classification not as finding where something fits, but rather as putting things where we want them to fit. And we can of course classify a given thing in a potentially infinite number of places. Take as a further example the Library of Congress classification system, which groups books of like subjects together under a unique set of up to three letters.[20] As new subjects outside

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[18] Samuel, "Darwin", *supra* note 11 esp. at 311-12.

[19] This reflexive interplay between social structure and human agency is a concern of sociological theory as well, such as Pierre Bourdieu's theory of habitus and Anthony Giddens' idea of structuration. See Pierre Bourdieu, *Outline of a Theory of Practice*, trans. by Richard Nice (Cambridge: Cambridge University Press, 1977), esp. at 72-95; Anthony Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (Berkeley: University of California Press, 1984); Anthony Giddens, "Structuration Theory: Past, Present and Future" in Christopher G.A. Bryant & David Jury, eds., *Gidden's Theory of Structuration: A Critical Appreciation* (London: Routledge, 1991) 201 [Giddens, "Structuration Theory"]. Compare also Gunther Teubner, *Law as an Autopoietic System*, trans. by Anne Bankowska & Ruth Adler, ed. by Zenon Bankowski (Oxford: Blackwell, 1993).

[20] See the overview of system at Library of Congress, Cataloging and Support Office, *Library of Congress Classification Outline*, online: Library of Congress <http://www.loc.gov/catdir/cpso/lcco/lcco.html>.

the existing classes appear, new such identifiers are created.[21] Where in the system a new subject is placed, however, reveals how its classifier interprets it, and can in turn have an influence on how others interpret it as well. Works of feminist history, for example, are frequently classified (many would say ghettoized) under HQ (Family, Marriage, Women) rather than in the D-E-F hierarchy (History). In the legal K hierarchy, the main division (after the general and theoretical works classed under K and KA) is between religious law (KB-KC) and secular law (KD-KZ), with the latter subdivided geopolitically. This has the effect of separating common institutions and ideas that arise in different legal systems, thereby accentuating national legal differences.[22]

Categorization both reveals and conceals, therefore, and both of these effects must be taken into account in understanding a classificatory system. On the one hand the process of classification sets up resonances between formerly separate subject matter.[23] Calling a corporation a "person", for instance, brings out links to physical human beings that arise solely through the act of classification.[24] There is a rhetoric of nomenclature that needs to be taken into account in classification, as semantic links bring out (even forge) conceptual links. On the other hand, classification also draws boundaries, that is, it separates things that might otherwise go together if the rules were determined differently. Seen according to one set of taxonomic rules (physiology), a killer whale is closer to a mouse than to a great white shark; viewed according to other criteria (size, habitat, diet) the mouse is the odd one out.

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[21] In law, for instance, material relating to Nunavut will have to be accommodated somewhere, probably in a new subdivision of the KE (Canada) hierarchy (most likely in the already crowded KEN class).

[22] See Nicholas Kasirer, "'K' as a Structure of Anglo-American Legal Knowledge" (1997) 22 Canadian Law Libraries 159.

[23] On resonance, see especially Stephen J. Greenblatt, *Learning to Curse: Essays in Early Modern Culture* (London: Routledge, 1990) at 161-83, esp. at 170.

[24] On the undesirability of such resonances, see Alexander Nékám, *The Personality Conception of the Legal Entity* (Cambridge, Mass.: Harvard University Press, 1938) at 39.

Where boundaries are placed—that is, how categories are set out, named, and filled—can thus privilege one particular point of analysis, while suppressing or excluding others. The new civil union provisions in the *Civil Code of Québec* illustrate both of these effects of classification. In English, the same word—"spouses"—is used to describe both the civil union partners (*e.g.* art. 521.5 C.C.Q.) and the partners in a marriage (*e.g.* art. 119 C.C.Q.). In French, by contrast, partners in a marriage are referred to as "les époux", while partners in a civil union are "les conjoints" (*e.g.* art. 521.5 C.C.Q.). The more neutral French term *les conjoints* thus excludes the etymological resonance of a sacred promise behind spouses/*les époux*, thus differentiating the relationships for which the words stand. The positioning of the civil union within the code brings up similar issues, since despite its intended equality of status with marriage, it is placed within the book on the family in a subordinate position to marriage, as "Title One.1" to marriage's "Title One".[25]

All this has particular importance for law, where the nuances of similarity and difference, of inclusion and exclusion, move beyond the world of semantics to bring about real-world effects. Law is both the subject and the object of classification at the same time: it is a rhetorical space within which concepts develop, but it is in turn shaped by the very concepts that it creates. This dynamic between the empirical and the normative will become clearer as we examine Gaius' persons-things-actions scheme, the predominant structural paradigm in law.

II. Gaius' Classification and Its Long Shadow

The most venerable—and influential—conceptualization of the scope and organization of the private law is Gaius' division of the law into persons, things, and actions. Gaius sets out this division near the beginning of his *Institutes*, in a rather by-the-way remark that serves as a transition from the first few sections on the sources of law to

[25] On the positioning of the civil union within the code, see Roderick A. Macdonald, "Triangulating Social Law Reform" in Ysolde Gendreau, ed., *Mapping Society Through Law* (Montreal: Thémis, 2003) [forthcoming].

the law of persons that follows:[26] "Omne autem ius quo utimur uel ad personas pertinet uel ad res uel ad actiones. et prius uideamus de personis. [The whole of the law observed by us relates either to persons or to things or to actions. Let us first consider persons.]"[27] Gaius' schema (if not Gaius himself, who remains a shadowy figure[28]) achieved immortality through its wholesale incorporation—with surprisingly little change or updating—into Justinian's *Institutes*,[29] from which it entered the modern civil law, with the third category becoming variously obligations or ways of acquiring things.[30] Its influence is much wider than this, however, and Common lawyers with a flair for the

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[26] Its transitional role is even clearer in Justinian's *Institutes*, where it falls at the end of section 1.2 ("The Law of Nature, of All Peoples, and of the State"), just before the traditional break that begins section 1.3 ("The Law of Persons").

[27] G. 1.8 (trans. de Zulueta). Gordon and Robinson translate the passage as "All our law is about persons, things or actions. We turn to persons first," which Birks and McLeod use as the translation for the virtually identical language in Justinian (Inst. 1.2.12).

It is worth noting that what is important regarding the classical institutional system is the categories themselves, not the number of books ancient works are divided into. The reason the threefold institutional structure does not map directly onto the division into books (both Gaius' and Justinian's *Institutes* are divided into four books) is that the length of a classical book has nothing to do with the substance of the work, but rather depends on the physical size limitations of the roll format in which ancient works were transmitted. This explains, for example, why the law of things spills from Book 2 to Book 4 of Justinian's *Institutes*.

[28] See A.M. Honoré, *Gaius* (Oxford: Clarendon Press, 1962).

[29] Inst. 1.2.12.

[30] On the historical transition from actions to obligations/ways of acquiring, which developed in the sixteenth and seventeenth centuries especially as a result of the separation of substantive law from procedure in the work of Donellus and Grotius, see Peter Stein, "The Quest for a Systematic Civil Law" (1995) 90 Proceedings of the British Academy: Lectures and Memoirs 147 at 156-57 [Stein, "Quest"]. This reorganization involved at the same time a narrowing of the ambit of things, since in classical law both obligations and successions logically had to be classed as incorporeal things. See Watson, *Roman Law*, *supra* note 1 at 168.

civil law have been able to apply modified forms of the institutional structure to that legal system as well.[31]

Because of its wonderful intuitive simplicity, it is easy to think of Gaius' scheme as natural or inevitable, a deep structural truism of legal thinking that was there even before Gaius drew it out. At the same time, however, this apparent obviousness hides a more subtle foreignness and obscurity, so that the scheme is at once eminently portable and yet inherently problematic.[32] Both of these views were voiced during the preliminary work on the French *Code civil*, for example. Commissioner Tronchet praised the proposed persons-things-ways of acquiring structure as "conforme ... à la marche naturelle des idées,"[33] while the tribune Jaubert made similar points at greater length:

> Les titres décrétés embrassent toutes les matières; il ne s'agissait plus que d'assigner à chacun sa place naturelle. C'est ce qu'a fait le projet qui vous est présenté, en réunissant tous ces titres en un seul corps de lois, sous la dénomination de Code civil des Français.
>
> La distinction née de la nature des choses sera conservée. Le premier livre traite des personnes; le second, des biens; le troisième, des moyens d'acquérir, ce qui comprend les actions; car les actions ne sont autre chose que le produit d'un droit acquis.[34]

Peter Birks has taken a similar view in arguing strongly that the person-things-actions paradigm is latent in the "disorderly heap" of the Common law as well, and has devoted

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[31] For discussions of the influence of the institutional system in modern law, see Watson, *Roman Law*, *ibid.* at 166-81; *Justinian's Institutes*, trans. by Peter Birks & Grant McLeod (Ithaca: Cornell University Press, 1987) at 18-26 [*Justinian's Institutes*]; Michael H. Hoeflich, *Roman and Civil Law and the Development of Anglo-American Jurisprudence in the Nineteenth Century* (Athens, Ga.: University of Georgia Press, 1997).

[32] Michel Villey, *Leçons d'histoire de la philosophie du droit*, nouvelle édition (Paris: Dalloz, 1962) at 173.

[33] P.A. Fenet, *Recueil complet des travaux préparatoires du Code civil*, 15 vols. (Paris: Au dépot, 1827-28), vol. 1 at lxix. Reactions to the proposed structure of the code are quoted and discussed in Shael Herman & David Hoskins, "Perspectives on Code Structure: Historical Experience, Modern Formats, and Policy Considerations" (1980) 54 Tul. L. Rev. 987 at 992-93.

[34] Fenet, *ibid.*, vol. 1 at cxiii.

considerable energy to making it manifest.[35] Others, however, see in the structure more historical accident and simple expediency than traces of *ratio scripta*. Jacques de Maleville, for example, another commissioner working on the French code, rejected the effusions of Tronchet and Jaubert, arguing instead that the marked asymmetry in size of the three books of the *Code civil*—as well as the inevitable overlaps in content—indicate that the system is hardly preordained. He did note, however, that the system worked well enough, despite the usual limitations of any classification system:

> Cependant la division que le Code civil présente, peut aussi se défendre par de bonnes raisons; elle est simple; chaque livre présente des objets très-distincts; elle est certainement meilleure que celle des Institutes de Justinien, qu'on a toujours vantée; et, au fond, il faut convenir que les mêmes objets pouvant s'envisager sous différens rapports, toute division dans ces grandes matières est nécessairement un peu arbitraire.[36]

Still, Gaius' schema has been one of the great success stories in Western legal and social thought.[37] Though medieval civilians preferred the *Digest*, particularly after the bulk of that work was recovered in the eleventh and twelfth centuries, in the early modern period lawyers increasingly turned towards the *Institutes*, using its structure as the template upon which to order the various developing national laws.[38] The adoption of the institutional scheme in the *Code Napoléon* assured that it would continue to structure

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[35] See especially Peter Birks, "Definition and Division: A Meditation on *Institutes* 3.13" in Peter Birks, ed., *The Classification of Obligations* (Oxford: Clarendon Press, 1997) 1 (quotation at 1), as well as *English Private Law*, *supra* note 2. For a different perspective on the relationship, compare Samuel, "Darwin", *supra* note 11 esp. at 307-08.

[36] Jacques de Maleville, *Analyse raisonnée de la discussion du Code civil au Conseil d'État*, 4 vols. (Paris: Nève, 1822), vol. 1 at 2-3 (quotation at 3).

[37] Kelley, "Gaius noster", *supra* note 2.

[38] On the later history of the institutional genre, see especially Watson, *Roman Law*, *supra* note 1 at 166-81. See also, for French works, Lefebvre-Teillard, *Introduction historique*, *supra* note 7 at 11. Still useful for its listing of *Institutes*-derived early modern works is Maurice Hauriou, "Note sur l'influence exercée par les Institutes en matière de classification du droit" (1887) N.S. 16 Revue critique de législation et de jurisprudence 373.

legal thinking in the modern world,[39] and it remains present in the background in newer codes—such as the *Bürgerliches Gesetzbuch*, the *Civil Code of Québec*, even the 1983 Catholic *Code of Canon Law*—that have moved away from the classic three-book structure.[40] In the Common law too, Gaius' scheme has influenced academic thinking from Blackstone to the recent debates about a Common law of obligations.[41]

Gaius' classification scheme purports to be exhaustive, embracing any and every conceivable subject matter falling within the concept *ius* and distributing it between persons, things, or actions. Even before we look at these divisions, however, we should note that it is not the entire law that is divisible into these three categories, but only the private law. There is, in other words, a higher division—implicit in Gaius, made explicit in Justinian[42]—between public and private law. Though Gaius does not discuss public law, it does exist as an alternative normative space, and so the private law itself already represents the result of taxonomic decision.[43] The institutional structure, in other words,

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[39] Besides the various progeny of the *Code Napoléon* (for example, the *Civil Code of Lower Canada* and the *Civil Code of Louisiana*), the 1917 Catholic *Codex Iuris Canonici* follows the persons-things-actions institutional structure.

[40] In the *Civil Code of Québec*, despite the proliferation in the number of books beyond the three of the French *Code civil*, the institutional structure is explicitly alluded to in the Preliminary Provision, which states that the code "governs persons, relations between persons, and property."

[41] On Blackstone's debts to Gaius see Watson, *Roman Law*, *supra* note 1 at 166-81. The work of Peter Birks has been most influential among the recent common-law systematizers. See especially Birks, *supra* note 35, and the discussion of the Birks-piloted *English Private Law*, *supra* note 2 collection in Nicholas Kasirer, "*English Private Law*, Outside-In" (2003) Oxford University Commonwealth Law Journal [forthcoming]. See also D.J. Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford: Oxford University Press, 1999).

[42] Inst. 1.1.4 (trans. Birks & McLeod): "There are two aspects of the subject: public and private. Public law is concerned with the organization of the Roman state, while private law is about the well-being of individuals. Our business is private law."

[43] Moreover, there is implicit in Gaius an even higher-order classificatory division as well, between law and not-law, and even this division is not primordial, since it rests on the presumptive normative primacy of the discourse of law, and uses that primacy to determine what is not law. See generally Jean Carbonnier, "L'Hypothèse de non-droit" in

applies only to one corner of the legal world seen broadly, though, since for Gaius it dealt with all aspects of human interaction, it comprised an absolutely crucial part.

Given that persons, things, and actions exhaust the possibilities in the private law, what do these categories mean? Neither Gaius nor Justinian ever defines them directly and explicitly. On the one hand this is in keeping with the longstanding civilian suspicion of definition, captured in Javolenus's maxim "Omnis definitio in iure ciuili periculosa est: parum est enim, ut non subuerti posset. [Every definition in civil law is dangerous; for it is rare for the possibility not to exist of its being overthrown.]"[44] On the other hand, however, these categories would likely have seemed self-evident to contemporaries,[45] as indeed they are often taken to be today.[46] As such, it is important to note that every matter that falls within *ius* not only "relates to" persons, things, and actions, but must be a person, a thing, or an action: there can be no gray areas, no category-straddling, no ambiguities. For Gaius, everything had a place in the system.

It is hard to see, however, how a strictly formal reading of the categories of persons, things, and actions—that is, seeing them as something real against which legal facts are to be measured—can account for the tremendous and enduring influence of Gaius' scheme. The role and influence of these categories would be better understood if they were viewed more dynamically, as rhetorical spaces that contribute to creating meaning from what is put within them. Thus De Zulueta's suggestion that Gaius' categories might be thought of as status, patrimony, and remedies respectively[47] seems a

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Flexible droit: pour une sociologie du droit sans rigueur, 8th ed. (Paris: Librairie générale de droit et de jurisprudence, 1995) at 23-47

[44] Dig. 50.17.202 (trans. Watson).

[45] *The Institutes of Gaius*, ed. by Francis de Zulueta, 2 vols. (Oxford: Oxford University Press, 1946-53), vol. 2 at 7 [*Institutes of Gaius*].

[46] Modern French textbooks, for example, deal with subdivisions of the categories (e.g. natural vs. legal persons, corporeal vs. incorporeal things), without defining the categories more generally. See *e.g.* Henri & Léon Mazeaud, Jean Mazeaud & François Chabas, *Leçons de droit civil: Introduction à l'étude du droit*, t. 1, vol. 1, 12th ed. by François Chabas (Paris: Montchrestien, 2000) esp. at 63, 267.

[47] *Institutes of Gaius*, *supra* note 45, vol. 2 at 23.

rather static modernization, without a clear sense of how the categories function together as a system. Donald Kelley suggests a linguistic reading of persons-things-actions as subject-object-verb,[48] a view that carries forward into modern civilian thinking, which has devoted a good deal of attention to the primary distinction between *être* and *avoir*.[49]

For our purposes, I think it would be more revealing to translate Gaius' categories into more general concepts that highlight the ways in which they relate to one another and inform each other, for it is these links and relationships between and within categories—rather than the categories themselves—that are the crucial elements in the functioning of a legal system. Following this logic, persons becomes subjects, things becomes objects, and actions (or obligations or ways of acquiring, in its later versions) becomes interactions between subjects and objects or between subjects and subjects. Viewing the institutional scheme in this way privileges not the categories themselves, but rather the different possible relationships to which they give rise, something we will examine more closely in chapter 3. Here, it is enough to look briefly at how this dynamic system of related categories has been understood. For traditionally threefold structures have been difficult to grasp, and are frequently reduced to sets of binary oppositions: the Manichean dualist cosmos is more readily comprehensible than the Christian Trinity, even if the latter is far richer in possibilities. The difficulty, however, and a reason for the inherent slipperiness of any classification scheme, is the impossibility of finding any *a priori* necessary starting point upon which to base the structure.

Gaius' schema, as we have seen, itself rests on a prior distinction between public and private law, and implicitly on further possible distinctions between law as he conceived it and other systems of social ordering. Unsurprisingly, though, within private law Gaius' system has traditionally been boiled down to a twofold *summa divisio*

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[48] D.R. Kelley, *The Human Measure: Social Thought in the Western Legal Tradition* (Cambridge, Mass.: Harvard University Press, 1990) at 9 [Kelley, *Human Measure*].

[49] See *e.g.* Alain Sériaux, "La notion juridique de patrimoine: brèves notations civilistes sur le verbe avoir" [1994] R.T.D. civ. 801 [Sériaux, "Patrimoine"].

between persons and things,[50] a focus that leaves actions to a second-order division, since the category is incomprehensible without subjects and objects to constitute the relationships it represents. Denisart, for example, writing in the eighteenth century, gives the *summa divisio* as persons and things, with a clear hierarchy between them: "L'ordre du droit, veut que l'on parle d'abord des *personnes*, puis des biens."[51] The structure of civil codes on the French model, in which persons, things, and obligations are treated in that order, reflects this same hierarchy.[52] This is related to long-standing ideas of the natural order of the world (and hence of the law): Donald Kelley has argued that anthropocentrism and anthropomorphism have been defining characteristics of Western law since before the Romans.[53] Gaius' system served to inscribe this hierarchy into the very structure of the law by putting the person at the beginning of legal analysis,[54] and Justinian made this explicit: "There is little point in knowing the law if one knows nothing about the persons for whom it exists."[55]

Despite this "natural" ordering of material, however, in Gaius' (and Justinian's) scheme it is things and not persons that has to bear most of the weight, suggesting a

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[50] See *e.g.* H.F. Jolowicz, *Roman Foundations of Modern Law* (Oxford: Clarendon Press, 1957) at 63-64 [Jolowicz, *Roman Foundations*]; Jean-Pierre Baud, *L'affaire de la main volée: une histoire juridique du corps* (Paris: Éditions du Seuil, 1993) at 11; Edelman, *supra* note 7 at 308.

[51] J.B. Denisart, *Collection de décisions nouvelles et de notions relatives à la jurisprudence actuelle*, 8th ed., 3 vols. (Paris: Desaint, 1773), vol. 3 at 587 (*s.v.* "personne").

[52] The *Bürgerliches Gesetzbuch*, however, both upholds and subverts the traditional order. In the General Part, the institutional persons-things-obligations order is preserved, while in the remainder of the code obligations (Book 2) are treated before things (Book 3), and there is no separate book on persons.

[53] Kelley, *Human Measure*, *supra* note 48.

[54] For the inherent primacy of persons in the civil law, see H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (Oxford: Oxford University Press, 2000) at 116-56.

[55] Inst. 1.2.12 (trans. Birks & McLeod).

practical if not a theoretical primacy.[56] Austin, though he saw persons and things as "the first great distinction of Law" considered as to its purposes and subjects, felt that it was things and not persons that was the lynchpin—indeed, he suggests that persons did not comprise part of the law at all: "The Law of Things in short is The Law—the entire *corpus juris*; *minus* certain portions of it affecting peculiar classes of persons, which, for the sake of commodious exposition, are severed from the whole of which they are a part, and placed in separate heads or chapters."[57] Indeed, we might even read Justinian's remark just quoted in this way: persons must naturally be considered first, but by setting them in opposition to "the law", Justinian seems to place them outside it.[58] Today, it is probably closest to the truth to say that either things or obligations (or both) are at the center of the law, with persons pushed to the margins.[59] The imbalance between the three books of the French *Code civil* (where the bulk of the provisions fall under Book 3, "Des différentes manières dont on acquiert la propriété") is an example of this normative shift, which is captured in Maine's famous dictum on the transition from status to contract as the primary ordering mechanism in historical societies.[60] In isolating the change from viewing legal relationships as comprising a social web to seeing them as the interactions of individual discrete rights holders, Maine charted the shift from the centrality of the

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[56] Stein, "Quest", *supra* note 30 at 151.

[57] John Austin, *Lectures on Jurisprudence, or the Philosophy of Positive Law*, 4th ed. by Robert Campbell, 2 vols. (London: John Murray, 1879; reprint Bristol: Thoemmes Press, 2002) at 708.

[58] Note that this passage (quoted above, text accompanying note 55) does not appear in Gaius' *Institutes*.

[59] Redressing this imbalance and thereby affirming and protecting human dignity were central to the aims of the drafters of the *Civil Code of Québec*; see Paul-André Crépeau, "Foreword" in Civil Code Revision Office, *Report on the Québec Civil Code*, vol. 1 (Quebec City: Éditeur officiel du Québec, 1978) xxiii at xxix.

[60] "[W]e may say that the movement of the progressive societies has hitherto been a movement *from Status to Contract*." Henry Sumner Maine, *Ancient Law: Its Connection With the Early History of Society and Its Relation to Modern Ideas*, 10th ed. (1861; reprint Boston: Beacon Press, 1963) at 165 (emphasis in original). On Maine's thesis, see R.H. Graveson, "The Movement from Status to Contract" (1941) 4 Mod. L. Rev. 261; Rehbinder, *supra* note 6 at 941-47.

person to the centrality of transactions, something we will come back to in chapter 2. Still, the point is that though there may be variation in the relative size of the categories, the classes themselves remain fixed.

Setting persons versus things as the prime division is not the only possible solution, of course. Domat put persons and things into the preliminary book of his *Les lois civiles dans leur ordre naturel*, to serve as a kind of background for the main division, that between obligations and successions.[61] To Domat, the division between subjects and objects is given; what is crucial is the distinctions between ways of acquiring and relating: from the living or from the dead; according to one's own will or according to another's will; and so on.[62] Blackstone, for his part, divided his *Commentaries* into rights and wrongs, dividing the former into rights of persons and rights of things, the latter into private and public wrongs.[63]

Though Gaius' persons-things-actions scheme is just one ordering possibility among many, it has proved tenacious in its hold on the Western legal mind. One important reason for this success is that the scheme helps to bridge the gap between law as a closed system and wider (even popular) knowledge.[64] Persons, things, and actions (or interactions) make intuitive sense as categories with which to describe social reality, since who we are, the things we surround ourselves with, and our relations with each other and with our things neatly summarize key aspects of modern life. What must be remembered, however, is that these categories also structure that reality in peculiarly legal terms, and moreover in legal terms of a particular character.[65] Nothing passes

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[61] Compare Austin, who relegated persons to the status of preliminary matter for things; see above, text accompanying note 57.

[62] Jean Domat, *Les lois civiles dans leur ordre naturel* in *Œuvres complètes de J. Domat*, rev. ed. by J. Remy, vol. 1 (Paris: Alex-Gobelet, 1835) 75. See also Alain Levasseur, "On the Structure of a Civil Code" (1970) 44 Tul. L. Rev. 693 at 695.

[63] Blackstone, *supra* note 2, bk. 1, ch. 1 (vol. 1 at 118).

[64] Samuel, "Darwin", *supra* note 11 at 309.

[65] These points will be developed further with reference to persons in chapter 2.

unchanged through the process of classification; just how it changes varies according to historical and social factors whose relationship to the law are complex.

III. Implications of the Institutional Structure for Modern Law

This transformative role is precisely the point of the institutional structure, however. As the etymology suggests, the *Institutes* is an educative (or doctrinal, another term with the same etymological resonance) work, rather than a simply descriptive one: it creates rather than reflects reality.[66] In contrast to a practitioners' work like the *Digest*, which gathers material largely in the order it is found (that is, following the customary order of legal practice as captured in the praetor's edict), the *Institutes* is an academic work whose purpose was specifically to structure and order the law.[67] In its implications, Gaius' structure goes well beyond simply describing what the law is. As I will argue in chapter 3, when we divide legal reality into three categories, and place the three categories into dynamic relation to each other,[68] this structure creates a framework whose tensions can be exploited for legal change.

Though Gaius set out to structure the law, this is not to say that the *Institutes* was explicitly radical. Like all textbooks, Gaius' (and Justinian's) were generally conservative in substance:[69] on a superficial level the *Institutes* teaches "young enthusiasts for law" the

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[66] Samuel, "Darwin", *supra* note 11 at 327. On Gaius' pedagogic innovations, see especially Honoré, *supra* note 28 at 126-30.

[67] Geoffrey Samuel, "Comparative Law and Jurisprudence" (1998) 47 I.C.L.Q. 817 esp. at 829-32.

[68] On the dynamism of Gaius' classification, see Geoffrey Samuel, "Classification of Obligations and the Impact of Constructivist Epistemologies" (1997) 17 L.S. 448 at 457-48.

[69] On the inherent conservatism of Common-law legal treatises, see A.W.B. Simpson, "The Rise and Fall of the Legal Treatise: Legal Principles and the Form of Legal Literature" (1981) 48 U. Chi. L. Rev. 632 at 675. Simpson's conclusions apply generally to institutional works as well.

broad scope of Roman law, much as a nutshell does today.[70] Gaius' paradigm provides a memorable structure within which to comprehend the complexities of Roman law, a much friendlier introduction than if students were forced to grapple with the *Digest* at the outset.

On a deeper level, however, to see the institutional structure simply as a delivery mechanism for substantive law misses its real importance, something that Donald Kelley and Geoffrey Samuel, among others, have pointed out.[71] The division of human social activity into persons, things, and actions gives the "young enthusiast" not only convenient pigeonholes for substantive law, but also a structure within which to interpret the world generally, not just the world of legal facts. This aspect of the institutional structure has potentially radical implications, but it is a radicalism that easily leads to dogma and constraint. As Samuel notes, "Gaius was not mapping a country; he was creating one which could then be imposed on a range of different 'territories'."[72] The institutional structure, by providing a theoretically gapless heuristic that ostensibly embraced virtually all human social activity, provided a language for law in its colonialist guise, a framework that facilitated pulling more and more within law's empire. In this sense, the institutional scheme becomes a straitjacket, albeit a subtle (and useful) one: it inculcates modes of legal thinking that through long usage come to seem ever more natural, and hence become ever more powerful forces in shaping human experience to its own terms. We see this tendency in the varied modern progeny of the institutional paradigm: Duncan Kennedy has identified it in the aristocratic conservatism of Blackstone's *Commentaries*,[73] André-Jean Arnaud in the bourgeois paternalism of the *Code Napoléon*.[74]

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[70] Inst., dedicatory epistle (trans. Birks & McLeod). Alan Watson sees Gaius as the first nutshell writer: Alan Watson, "The Importance of 'Nutshells'" (1994) 42 Am. J. Comp. L. 1 at 5.

[71] See especially Kelley, "Gaius noster", *supra* note 2; Samuel, "Darwin", *supra* note 11; *Justinian's Institutes*, *supra* note 31 at 15-16.

[72] Samuel, "Darwin", *ibid.* at 320-21.

[73] Duncan Kennedy, "The Structure of Blackstone's *Commentaries*" (1979) 28 Buffalo L. Rev. 209 at 210: "[T]he activity of categorizing, analyzing, and explaining

In other words, an important effect of the institutional scheme (and indeed of all presumptively exhaustive classificatory schemes) is that it is imperial: it colonizes human experience, claiming jurisdiction over subject matter and then shaping it to its structure.[75] To accept Gaius' paradigm is to accept that everything in private law must be either a person or a thing or an action—the frontiers between the categories can shift, but there can be nothing within the (private) law but outside this structure. The paradigm sets up a normative universe with a particular internal structure; whatever falls within this universe must conform to the structure, whatever is outside it is by definition beyond the law, with all the implications that implies, from unenforceability to outlawry.[76]

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The problem with the institutional scheme—and here we move into the concerns that I will develop in the next chapters—is that as in any exhaustive classificatory

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legal rules has a double motive. On the one hand, it is an effort to discover the conditions of social justice. On the other, it is an attempt to deny the truth of our painfully contradictory feelings about the actual state of relations between persons in our social world." Classification thus becomes "an instrument of apology—an attempt to mystify both dominators and dominated by convincing them of the 'naturalness,' the 'freedom' and the 'rationality' of a condition of bondage."

[74] The code "n'apparaît plus guère que comme la bonne conscience du paternalisme"; André-Jean Arnaud, *Essai d'analyse structurale du Code civil français: la règle du jeu dans la paix bourgeoise* (Paris: Librairie générale de droit et de jurisprudence, 1973) esp. at 152-55 (quotation at 155). Compare as well P.G. Monateri, "Black Gaius" (2000) 51 Hastings L.J. 479, who argues that the Roman legal tradition was used conservatively to create a particular genealogy for Western culture.

[75] See *e.g.* François Grua, "Les divisions du droit" (1993) 92 R.T.D. civ. 59 at 71, and Ronald Dworkin, *Law's Empire* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1986) at vii: "We live in and by the law. It makes us what we are: citizens and employees and doctors and spouses and people who own things. ... We are subject of law's empire, liegemen to its methods and ideals, bound in spirit while we debate what we must therefore do." See also the critique of Dworkin's expansionist model in Alan Hunt, "Law's Empire or Legal Imperialism?" in Alan Hunt, ed., *Reading Dworkin Critically* (New York: Berg, 1992) 9.

[76] See the discussion of inside and outside the law in Jacques Derrida, "Before the Law" in *Acts of Literature*, ed. by Derek Attridge (New York: Routledge, 1992) 181, esp. at 204.

scheme, Gaius' categories tend to grow in scope by poaching from their neighbors. Liminal cases—those falling within the zones of transition between categories, must be classified, or the law will not know what to do with them. This involves putting a label on them, and labeling narrows, restricts, even imprisons its objects. Once these liminal cases enter the normative space of persons or things or obligations, however, they act on that space, subtly shifting the boundaries between categories and thus changing both the meaning of the categories and the legal roles they play.

The law of persons has been one victim of these shifting boundaries. As a fundamental category its existence is necessary to the integrity of the paradigm, but it has seen a steady erosion of its scope, as legal matters intimately connected to the human being have been defined in law either as obligations or—more usually—as property. Such shifts of the boundaries between fundamental legal categories—and the shifts in meaning that accompany them—reflect how society values different things and what purposes it views for the law. The category of persons, traditionally the apex of the institutional scheme and the dominant partner of the *summa divisio* between persons and things, has moved to the margins of the private law.

Chapter 2
Human Beings and Persons

"There is little point in knowing the law if one knows nothing about the persons for whom it exists."[77] So wrote Justinian just after setting out the persons-things-actions structure, and his words still ring true, at least on a superficial level. But what exactly is a person?[78] We know that if we look at the law in terms of the closed institutional structure, the person is defined negatively, as that which is neither a thing nor an action. This does not get us very far, however. In colloquial usage "person" is more or less equivalent to "human being", and includes elements of identity and the self, but this obviously cannot be the legal sense, or else the controversy engendered by the Persons Case of the 1920s—in which the Supreme Court of Canada declared that women were not "persons" under the terms of section 24 of the *British North America Act, 1867* and so were ineligible for the Senate, only to be overruled by the Privy Council which declared women to be

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[77] Inst. 1.2.12 (trans. Birks & McLeod). Compare Hermogenian in Dig. 1.5.2: "Therefore, since all law is established for men's sake, we shall speak first of the status of persons and afterward about the rest [of the law] ..."

[78] The literature on the person is vast, and touches diverse disciplines such as philosophy, psychology, anthropology, and history, as well as law. I have found the following particularly useful for general orientation: Baud, *supra* note 50; P.W. Duff, *Personality in Roman Private Law* (Cambridge: Cambridge University Press, 1938); Edelman, *supra* note 7; John Lawrence Hill, "Law and the Concept of the Core Self: Toward a Reconciliation of Naturalism and Humanism" (1997) 80 Marq. L. Rev. 289; Lefebvre-Teillard, *Introduction historique*, *supra* note 7; Raymond Martin, "Personne et sujet de droit" [1981] R.T.D. civ. 785; Marcel Mauss, "A Category of the Human Mind: The Notion of Person; the Notion of Self," trans. by W.D. Halls, in Michael Carrithers, Steven Collins & Steven Lukes, eds., *The Category of the Person: Anthropology, Philosophy, History* (Cambridge: Cambridge University Press, 1985) 1; Ross Poole, "On Being a Person" (1996) 74 Australasian Journal of Philosophy 38; Charles Taylor, "The Person" in Michael Carrithers, Steven Collins & Steven Lukes, eds., *The Category of the Person: Anthropology, Philosophy, History* (Cambridge: Cambridge University Press, 1985) 257 [Taylor, "The Person"]; Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Cambridge, Mass.: Harvard University Press, 1989).

persons after all—becomes utterly incomprehensible.[79] Moreover, a person in law need not even be human: medieval lawyers first saw corporate bodies as *personae fictae* ("made" or "contrived" persons), and Western law continues to treat corporations and some other collective entities as persons today.[80]

The person in law is a construct fashioned for particular reasons and for particular ends.[81] It serves to mediate between physical beings and the normative structures within which they live, accomplishing this by replacing the "real" human being with a distilled, disincarnated, abstracted, and legalized version of the human being, a new entity suited to the world of law. For though human beings make law, obey law, and break law, the law in fact pays little attention to them: it deals instead with persons. The *Civil Code of Québec*, for example, mentions "human being" only once, in article 1, and then promptly replaces it with the concept of legal personality, and the human being is never heard from

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[79] *Edwards v. Canada (A.G.)* (1929), [1930] A.C. 124, rev'g [1928] S.C.R. 276 (*sub nom. Reference re: the Meaning of the Word "Persons" in Section 24 of the British North America Act, 1867*). The popular tendency to sensationalize this case by overgeneralizing it beyond the narrow confines of the provision with which the reference dealt is an example of the distance between legal and popular discourse.

[80] The classic discussion of medieval corporate theory remains Ernst H. Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology* (Princeton: Princeton University Press, 1957). On the modern corporation as a person see especially Katsuhito Iwai, "Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance" (1999) 47 Am. J. Comp. L. 583; Warren J. Samuels, "The Idea of the Corporation as a Person: On the Normative Significance of Judicial Language" in Warren J. Samuels & Arthur S. Miller, eds., *Corporations and Society: Power and Responsibility* (New York: Greenwood Press, 1987) 113; Meir Dan-Cohen, *Rights, Persons, and Organizations: A Legal Theory for Bureaucratic Society* (Berkeley: University of California Press, 1986).

[81] This idea of the human person as construct comes from analogy with the fiction theory of corporate personality. See *e.g.* Nékám, *supra* note 24 at 24-26. The predominant trend today is to regard both the corporate person and the human person equally as constructs. See *e.g.* Martin, *supra* note 78 at 787: "La question n'est plus celle de la fictivité de la personne morale par rapport à la réalité de la personne physique, si cette dernière est elle-même l'effet d'un certain artifice. La question est celle du rapport entre deux artifices."

again.[82] Joseph Vining even goes so far as to assert that "[t]here is no such thing as a natural person":[83] any discussion of persons must be at a level of abstraction beyond the human being. If we identify the human being with *homo sapiens*, then, the person is a specially constituted simulacrum, a new creature created to play particular roles in particular contexts.

The person is more than a simple fiction of the law, however, a term that trivializes the role it plays. Like other legal categories (such as "things") that borrow their names from the general pool of language, the person is given new life within the system of law, and within that context becomes the only entity that matters. A good way to look at the transformation through which the human being is brought into the law as the person is the metaphor of translation. As we saw in chapter 1, the category of persons is at once empirical and normative: it is both shaped by the material put into it, and also shapes that material. Similarly, a translation is constrained by the original text upon which it is based, and yet replaces the original for its target audience.[84] In the end, the person in law is not the human being, just as a translation is not the original work.[85] Precisely how the person in law diverges from the human being is the subject of this chapter.

The process by which this transformation or translation of the human being into law takes place is the crucial point, since it reveals the political assumptions underlying legal taxonomy. If translation in literature is inextricably tied up with the politics of

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[82] The adjective "human" occurs three more times (once in art. 44 ¶2 and twice in art. 2572 ¶2). The "human being" appears frequently in the *Charter of Human Rights and Freedoms*, L.R.Q., c. C-12, however, which operates "in harmony with" the Civil Code (preliminary provision C.C.Q.). The distinction between the terms "human being" and "person" in the Quebec *Charter* is interesting, and it is not always clear that they are used precisely. Are there for instance situations in which a corporation (embraced by "[e]very person") must provide assistance to a "human being" in peril (s. 2 ¶2)?

[83] Vining, *supra* note 4 at 59.

[84] André Lefevere, *Translation, Rewriting, and the Manipulation of Literary Fame* (London: Routledge, 1992) at 8.

[85] This is of course without mentioning that as a category the human being itself is already a particular construct of *homo sapiens*, just as the "original work" is a translation of experience ("reality") into written form.

language and culture, the translation from human being to person in law is an even more political act. As a construct of the law, and fashioned according to the law's dictates, the person is a trade-off: we gain something by allowing ourselves to be characterized in this law-friendly way, but we lose aspects of ourselves that we value and that play important roles in our social interactions. This stripping away of nuance and variety, however, is unavoidable: it is the price of admission to the law and to the social and normative world it represents.[86]

This chapter is an exploration of the process by which the social is translated into the legal, and of the gaps that are the byproducts of that process. Building on the discussion of the normativity of legal classification in the previous chapter, I turn now to consider how legal categories function as normative spaces that produce meaning. As an example of this process, I will examine how the category persons works to construct a particular kind of legal actor or subject, one that is very far removed from the human beings who must often occupy this role. I will argue that the law has made a particular view of the person—the liberal paradigm of the autonomous individual within society, an independent agent acting primarily according to market logic—central to its discourse, and so has displaced other aspects of the human being that might have grounded other conceivable "persons". The "person" of modern Western law is a particular translation of reality into law, which reconstructs the human being into a form recognizable to and workable within the law. The problem, as I see it, is that this creates a tension between the richness of the human being in its various guises (self, identity, personality, subject, moral agent, and so on) and the relative unidimensionality (even poverty) of the legal concept of the person. The law prefers a unidimensional person, or at least a person whose different aspects can be isolated and dealt with individually, one after the other, rather than all at once. The law must, in other words, transactionalize the human being, disaggregating him or her into discrete and legally cognizable rights, interests, and transactions. It is when the normativity of the law takes up and promotes (or normalizes)

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[86] See Poole, *supra* note 78 at 52: "We are not by nature persons. Becoming a person is the price we pay, and perhaps the reward we receive, for participation in certain forms of social life."

this view of the person, and indeed forces the human being to adopt this narrower role, that the danger of this tension is manifest.

To understand this, we can posit two axes in the move from human being to person, axes that represent a two-way process of translation and constitution, a process that arises from the intersection of the empirical and normative dimensions of classification set out in chapter 1. Moving in one direction is a gradual process of translation, in which the human being was gradually reworked into a form congenial to the law. This process proceeded (and continues to proceed) diachronically, as the category of persons was shaped by its slow articulation and refinement from Gaius' time to the present. This movement was the result of incremental changes of emphasis within the category, as well as different influences being brought to bear on it from outside. In other words, this axis represents the influence of society on legal categories, as the reality continually being brought into law shapes the categories into which that reality is put.

Moving in the other direction is the normative influence of a legal category like persons, which uses the authority and coercive power of the law to normalize its version of the human being, both within law and beyond. Here again is the law in its imperial guise that I introduced in the last chapter: this axis represents the influence of legal categories on society, as legal discourse recursively shapes the society that feeds it.[87] What the discussion in this chapter will bring out is the tension between these two sides of the role of the category of persons. On the one hand there is the residue of the human being (or social reality), which means that the person in law will only ever be part of the story. On the other hand there is the normative power of legal categories, which seeks to drive competing concepts from the field and replace them with its simulacra. Both contribute to the construction and function of the category of persons in law.

In the next chapter I will take this analysis further by moving beyond the category of persons to look at how the very structure of the law—in particular the tripartite schema of persons, things, and actions—provides points of contact between the different categories that allow interactions between them. These interfaces—between persons and things, between persons and actions, between things and actions—are the points at which

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[87] Compare Giddens, "Structuration Theory", *supra* note 19 at 204.

the dynamic relations within the structure are most evident, and they serve to introduce into each category elements of the others. This interplay between the categories, as we will see, challenges the ambition of legal discourse to create a particular and unitary person. The discussion in this chapter of the category itself is thus a necessary prelude to the reworking of the structural understanding of the law in the next.

I. Translating the Human Being into Law

From Gaius' time to the present, the label "person" has shifted subtly in meaning as the category of persons has embraced different kinds of entities. At the same time, social changes have influenced how the person is configured in law, and this too influences what can be categorized as a person. Like the category of things, which continues to evolve according to changing social needs and values,[88] the person too has shifted in meaning as different kinds of entities have come under or been removed from its umbrella. John Chipman Gray surveyed some of the various kinds of entities that have been classed as persons at one time or another in history:

> In various systems of Law different kinds of persons are recognized. They may be classified thus: (I) Normal human beings; (II) abnormal human beings, such as idiots; (III) supernatural beings; (IV) animals; (V) inanimate objects, such as ships; (VI) juristic persons, such as corporations.[89]

Others might be added, as for instance the marital relationship, which was declared a legal person in the county of Castell in Germany in 1801.[90] What has been common is the

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[88] See *e.g.* Anne Marie Patault, *Introduction historique au droit des biens* (Paris: Presses universitaires de France, 1989).

[89] John Chipman Gray, *The Nature and Sources of the Law*, 2d ed. (New York: Macmillan, 1921) at 27-28.

[90] Friedrich Ebel, "Die Ehe als juristische Person: Bemerkungen zu einer halbvergessenen Idylle" (1978) 25 Zeitschrift für das gesamte Familienrecht 637 at 638, cited in Gunther Teubner, "Piercing the Contractual Veil? The Social Responsibility of Contractual Networks" in Thomas Wilhelmsson, ed., *Perspectives of Critical Contract Law* (London: Dartmouth, 1992) 211 at 228.

role of the law in constituting the category: as a creation of the law, there are no theoretical limits to what can be called a person. John Dewey put a fine point on this idea, arguing that "put roughly, 'person' signifies what law makes it signify."[91] Traditionally, the person in law has encompassed only a small subset of human beings, which Christopher Stone has termed "contemporary normal proximate persons", or "normal members of a common moral community."[92] This view excludes, among others, "humans who have not yet been born, those who live on the other side of the world, and those afflicted with such a serious defect that their capacity to form social bonds is impaired."[93] In short, though anything in theory might be a person in law (or a thing, or an action), in practice the categories are limited by the structural grammar of the legal system itself, which predivides the world and provides models against which new material to be classified must be judged. In other words, the categories of a given time and place are limited to what can be analogized to their existing content.

We can understand this gradual and subtle shift in the meaning of legal categories as the byproduct of a continual process of translation, in which the empirical reality of the human being is managed and sorted by the law in accordance with the needs, interests, and assumptions of the legal system and of society more broadly. Translation takes a text in one language and filters it through the consciousness (aesthetic, cultural, political) of an individual (the translator) in order to produce a new text in a different language. It is important to stress the newness and influence of the translation: the translator is more than a neutral conduit, but is an author, and the translation a rewriting.[94] Similarly, legal classification takes human experience (human beings, objects, relationships) and applies to it the rules, sensibilities, and needs of the law, in order to produce new entities

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[91] John Dewey, "The Historical Background of Corporate Legal Personality" (1926) 35 Yale L.J. 655 at 655.

[92] Christopher D. Stone, "Should Trees Have Standing? Revisited: How Far Will Law and Morals Reach? A Pluralist Perspective" (1985) 59 S. Cal. L. Rev. 1 at 9-10.

[93] Christopher D. Stone, *Earth and Other Ethics: The Case for Moral Pluralism* (New York: Harper & Row, 1987) at 20 [Stone, *Earth*].

[94] See generally Lefevere, *supra* note 84.

("persons", "things", "actions"). A legal category such as persons thus plays a complex mediating role between the reality of human experience and the normativity of law, and it takes its shape from this dialogue between reality and normativity.

It is a truism to say that something is always lost in translation, but we should note that though there is inevitable loss, translation can also elicit new insights and resonances beyond the original. Translation is a political process of turning something into what it was not before, and moreover this new creation "function[s] as reality" for those who have no experience of anything but the translation.[95] Whether in literature or in law, translation replaces the existing text (or human being, or object) with a particular new creation, shaped according to the needs and values of the context within which it will function. There are overtones of God the creator in this process, both in literature and in law,[96] though in neither case is the power to create unfettered by outside constraints. Still, traditionally the law had the power to set both the beginning and the end of the "life" of the person. Corporate personality, for example, shows the law creating a person where there was none before, giving collective life to a group of human beings simply by fiat.[97] The law surrounding the point at which life begins in the transition from fetus to child is another example. At the other end of the conceptual life cycle, the old idea of civil death shows the law-as-God taking away what it had earlier granted.[98] Similarly, the traditional notion of the outlaw captures this same idea: in the eyes of the law, the outlaw was

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[95] *Ibid.* at 8.

[96] See Baud, *supra* note 50 at 60ff on the law as "créateur" of the person.

[97] On the language of corporate legal personality, see generally James Boyd White, "How Should We Talk About Corporations? The Languages of Economics and of Citizenship" (1985) 94 Yale L.J. 1416.

[98] The literature on civil death remains sparse. See the detailed exposition of the old French law in 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* (Paris: Ganeau, 1755). Recently, see also Aline Terrasson de Fougeres, "La résurrection de la mort civile" [1997] R.T.D. civ. 893.

entirely beyond its protection, and so as if dead.[99] And between these two extremes of legal birth and legal death, the law determines what will get the status of person and what will not, and what the nature of that status will be.

What is important for our purposes is to understand how this process of translation takes up the persons-things-actions paradigm and inscribes it with particular values, and how these values come to symbolize a particular kind of life. In the modern West, this tends to be the liberal and bourgeois ideal of the autonomous self, the self's things, and the ways in which the self interacts with others and with things. This is of course a historically contingent and politically-charged reading of the paradigm, one that is not inherent in Gaius, but rather has been read into Gaius through the historical use and elaboration of these categories. In other words, translation through classification points out the rhetorical convergence between empiricism and normativity in classification, and shows how this convergence can produce a politically specific meaning over the long term.

The modern notion of the person in law is the result of countless acts of classification that gradually and incrementally clarified, refined, and shifted the Roman concept of *persona* into something very different. The teleological force of history is such that we tend to assume that the way things are now is natural, forgetting that legal concepts and institutions are manifestations of particular social and cultural milieux. Moreover, we tend to read present-day concerns back into the past, emphasizing continuity and coherence at the expense of an appreciation of difference. The search back for the origins of the idea of subjective rights is a good example of this, since one's position in the debate in large part rests on what degree of abstraction one is prepared to allow the term *ius* at various times in history.[100] The evolution of the concept of the

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[99] See generally H. Erle Richards, "Is Outlawry Obsolete?" (1902) 18 L.Q. Rev. 297; Anthony Musson, *Medieval Law in Context: The Growth of Legal Consciousness from Magna Carta to the Peasants' Revolt* (Manchester: Manchester University Press, 2001) at 171-72.

[100] Among the contributions to this long-standing debate see especially Villey, *supra* note 32 at 167-88, 221-50 (arguing for the modern rather than Roman origins of subjective rights); Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150-1625* (Atlanta: Scholars Press, 1997) esp. at 13-42

person is similar, and rests on the degree of concreteness or abstraction we allow to the idea of *persona* at various points in history.

A. From Persona to Person

The earliest meaning of *persona* was not an abstraction at all, but the mask that actors in the ancient world wore on stage. The view of the person as a role played by an actor has found resonance among modern scholars[101] (and we will consider some of its implications below), but the gradual metonymization of the word from the mask to the role behind the mask and finally to other analogous situations outside the theater is a complex and still imperfectly understood process.[102] What is clear is that the terminological and metaphoric changes mirror the gradual shift of the conception of the person away from simple equivalence with the human being. As we will see, this shift is at once a broadening of the concept (bringing more and more within the category by analogy) and a circumscription (limiting the concept to particular characteristics only). The tension between the two is what has driven change in the law of persons over the centuries.

In Roman law the notion of the person was much less abstract than today. For analogous qualities that today would be subsumed under "person" the Romans used a variety of notions, such as *caput* (often translated as "status"), *corpus* (which can mean either a physical or a corporate body), and *universitas* (used for collectivities).[103] *Persona*, in fact, seems to have been largely unrelated to the development of the idea of

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(pushing the origins of subjective rights back to the fourteenth century); Baud, *supra* note 50 at 61-62 (arguing that the notion of subjective rights grew out of Gaius' removal of the sacred from the civil law).

[101] *E.g.* Noonan, *supra* note 4; Vining, *supra* note 4 esp. at 123.

[102] A good overview of the semantic and social shifts is Mauss, *supra* note 78. On the Roman developments, see especially Duff, *supra* note 78 at 2-25.

[103] On these terms, see Duff, *ibid.* at 25-36.

legal personality in Roman law, which was more closely connected these other terms.[104] It would be a mistake, however, to view the more concrete *persona* of Roman law as closer to the human being than the person in law is today: the two are still not identical, and Latin had another term (*homo*) to capture the physical entity outside the law. Though *persona* did not have the full abstract resonances that it would later come to have in law (and outside formal law[105]), it was already a step removed from the human being.

The key development that I want to stress is the increasing hegemony of a disaggregated, patrimonialized view of the person, whereby the abstract person that had developed out of ancient and medieval law became the sum total of its transactable rights and attributes. This development, I believe, is crucial to understanding both the distance between the human being and the person in modern law, and the particular roles the category of persons has come to play in the structure of the law. This gradual development of what I will call the "transactionalized person" is closely related to two other changes. First is the increasing centrality of the liberal paradigm in law and the diffusion of market concerns into the law of persons. This change created the person as isolated individual, and led to the increasing isolation of the category of persons from things and actions. Second is the expanding ambit of what the law claims as its particular area of relevance. As alternative normative orders (particularly religion, but also social values like civility, community, and the like) have declined, law tends to move in as the sole remaining normative force capable of mediating disputes and organizing society.[106] As we saw in chapter 1, however, law constructs as well as reflects social categories and social relations, and so the person in law has tended to become something different from (or perhaps less than) the human being outside the law.

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[104] *Ibid.* at 24-25.

[105] Particularly in the Christian theological notion of the persons of the Trinity, which would have influenced the legal idea of *persona* both in the late imperial period and in the Middle Ages. See Mauss, *supra* note 78 at 19-20.

[106] See generally Roderick A. Macdonald, "European Private Law and the Challenge of Plural Legal Subjectivities" The European Legacy [forthcoming] [Macdonald, "European Private Law"].

The change was long and gradual, and marked by different stages in both the abstraction of the concept of the person from the human being, and in ways of hierarchizing the fundamental persons-things-actions structure of the law. Among the key steps in the change were Domat's view of a rationally constituted person, coherent within the law[107] and the divorce between the intrinsic nature of persons and their social role evident in the philosophy of Hobbes, Locke, and Kant.[108] The *Déclaration des droits de l'homme et du citoyen* of 1789 captured this change in its first article, which posited the legal subject of rights as the human common denominator: "Les hommes naissent et demeurent libres et égaux en droits. Les distinctions sociales ne peuvent être fondées que sur l'utilité commune."[109] The *homme* of the *Déclaration* was no longer simply a human being, but rather a new entity, reconstituted by the law according to its needs.

B. The Road to the Modern Person in Law: From Status to Rights

In general terms, this story of the development of the modern person is the story of the change from a society (and a law of persons) based on status to one based on rights. Historically, the law has treated the human being in one of two ways: collectively based on hierarchy or status, or individually based on personal characteristics.[110] Examples of the former include the old Germanic idea of law as ethnic rather than territorial[111] and the medieval concept of the three orders, which provided a model for the social world of the *ancien régime* by dividing all of society into those who fight, those

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[107] See Bernard Edelman, "Domat et la naissance du sujet de droit" in Edelman, *supra* note 7 at 47-82.

[108] See Poole, *supra* note 78 at 40-45.

[109] *Déclaration des droits de l'homme et du citoyen*, online: France, Ministère de la justice <http://www.justice.gouv.fr/textfond/ddhc.htm>.

[110] Alain Sériaux, *Les personnes* (Paris: Presses Universitaires de France, 1992) at 19 [Sériaux, *Personnes*].

[111] Katherine Fisher Drew, "Introduction" in *The Burgundian Code*, trans. by Katherine Fisher Drew (Philadelphia: University of Pennsylvania Press, 1972) 1 at 3-4.

who pray, and those who work.[112] An example of the latter is the *Civil Code of Québec*, which in its early provisions sets up the person as the sum of patrimonial and extrapatrimonial rights, which combine to produce a unique individual.[113] Each model has strengths and weaknesses, desirable and undesirable consequences. What is important is that neither model is natural or complete in itself, but rather captures particular moments in the legal translation of the human being into the person, with the inevitable give-and-take that such a process of political negotiation entails. For example (and I will develop this idea below), the reworking of the category of persons from status-based to rights-based brought many new elements into the mix (the notion of equality is an obvious example), but at the same time de-emphasized or excluded other elements (such as the strong sense that society is an interconnected web of community relationships). Moreover, neither model existed (or exists) exclusively: what changes over time is the relative position and dominance of each model.[114] The most important thing that the shift

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[112] See generally Georges Duby, *The Three Orders: Feudal Society Imagined*, trans. by Arthur Goldhammer (Chicago: University of Chicago Press, 1980); Roland Mousnier, *Les hiérarchies sociales de 1450 à nos jours* (Paris: Presses Universitaires de France, 1969). This order is evident in Loyseau, *supra* note 9; Robert Joseph Pothier, *Traité des personnes et des choses*, in *Œuvres posthumes de M. Pothier*, vol. 2 (Paris: de Bure, 1778) 553.

[113] After art. 1 creates the person, arts. 2 and 3 together outline its attributes. This conceptualization of the person was a central part of the revision plan: "It is not by accident that the first article of the Draft reads as follows: 'Every human being possesses juridical personality'. This proceeds ... from a determination to put the human person, with its rights and duties, in its rightful place as the cornerstone of Private Law relationships." Crépeau, *supra* note 59 at xxix.

[114] Even today, a definition of the person can encompass both status and rights:

> Unité substantielle composée d'une âme et d'un corps, la personne physique est doublement appréhendée par le droit. Classiquement, la personne est considérée en tant que membre du groupe social au sein duquel elle occupe une place déterminée. Cette place, fixée par le droit, constitue son état: l'état des personnes. Plus récemment, la personne a été saisie au contraire dans son individualité irremplaçable, dans ce qui constitue sa personnalité même. Cette nouvelle approche a donné naissance à ce que l'on appelle les droits de la personnalité. ... Le droit actuel des personnes est le reflet de ce dualisme.

from status to rights illustrates is how changes to the conceptualization of the category of persons can fundamentally change which characteristics of the person the law deems to be central, and which marginalized or excluded.

The difference between status and rights can be subtle, since status confers privileges (which can look very much like rights), and rights can imply duties that inhere in certain status relationships. The old exemptions of the clergy from many civil duties (such as serving on juries) are an example of the former,[115] while a child's rights to life and security imply the alimentary obligation of his or her parents.[116] The crucial difference, however, is that status relations emphasize connections to others, particularly (though not exclusively) to similarly constituted others, while rights emphasize underlying universal characteristics that manifest themselves in specific differences that constitute unique individuals. To Austin, status was a "conspicuous character", which resided within the individual as a member of a class and not as an individual:[117] an individual arises from the particular confluence of such distinguishing characteristics, rather than from anything inhering in the individual him or herself.

The lists of statuses in the treatises of the *ancien régime*, which one modern commentator has described as "repulsive",[118] are fascinating precisely because they reveal such a radically different view of the human being and his or her place in society, foreign to our liberal assumptions of the primacy of rights and of the individual over the community.[119] Civil death, for example, was conceptualized in the eighteenth century not in individual terms as the removal of rights, but rather in social terms, as the removal of

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Sériaux, *Personnes*, *supra* note 110 at 19.

[115] See *e.g.* Blackstone, *supra* note 2, book 1, chap. 11 (vol. 1 at 364ff).

[116] Art. 32 C.C.Q. See generally Brierley & Macdonald, *supra* note 6 at 262-65.

[117] Austin, *supra* note 57 at 709-12. See also H.F. Jolowicz, *Lectures on Jurisprudence*, ed. by J.A. Jolowicz (London: University of London, Athlone Press, 1963) at 375, 378.

[118] Jeanne Louise Carriere, "From Status to Person in Book I, Title 1 of the Civil Code" (1999) 73 Tul. L. Rev. 1263 at 1273.

[119] A good example of such treatises is Loyseau, *supra* note 9.

the individual from the benefits and responsibilities of life in society. (The notion of the outlaw is a more colloquial illustration of this idea of banishment from the community of law.[120]) As François Richer wrote in 1755,

> Ainsi, tout particulier, qui trouble cet ordre [i.e. of society], auquel il doit sa propre sûreté, qui nuit à la société, de laquelle il a retiré, & retire tous les jours tant d'avantages, est un monstre d'ingratitude, qu'on ne peut trop se hâter de priver des biens qu'il ne mérite pas, & dont il ne se sert, que pour nuire à ceux de qui il les reçoit. C'est cette privation, qui se nomme *Mort civile*.[121]

There are in Richer's use of social contract theory the seeds of individualism—the change from status to rights was after all a continuum rather than an abrupt break—but the social aspects of the person are still in the foreground, and linkage rather than separation is the dominant image.

A comparison of the table of contents of an eighteenth-century treatise on persons and a modern one strikingly illustrates the difference between a legal order structured around status and one structured around individual rights. Pothier's *Traité des personnes et des choses*, published posthumously in 1776, begins by placing persons within a social structure: the first divisions are based on attributes like nobility and citizenship that link the person to the collective, rather than individualized attributes that distinguish the person from others. Even attributes like legitimacy of birth, age, sex, marital status, and so on link the person to a subset of similarly identified others, rather than to humanity generally.[122] By contrast, Édith Deleury and Dominique Goubau's treatise on the modern Quebec law of persons is structured so as to bring out universal characteristics of the individual as representative of all human beings. They begin with existence, and move from there to the personality rights that inhere in and constitute the person.[123] The law of

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[120] See the literature cited *supra* note 99.

[121] Richer, *supra* note 98 at 4.

[122] Pothier, *supra* note 112 at xxx-xxxii of the table of contents.

[123] Édith Deleury & Dominique Goubau, *Le droit des personnes physiques*, 3d ed. (Cowansville, Qc.: Yvon Blais, 2002) at xi-xvi.

persons no longer begins by analyzing the structure of society; it now begins by analyzing the structure of the individual within society.

In addition to constituting the category of persons differently than does rights, status is also a different way of categorizing persons. To Domat writing in the seventeenth century, for example, personal status broke down into a series of opposed binary pairs, some natural, others established by human law: one was either free or enslaved, a father or a son, of major age or minor age, a legitimate child or a bastard, and so on. These qualities of personal status, he writes, "sont de telle nature, que chacune est comme en parallèle à une autre qui lui est opposée, et que l'une des deux opposées se rencontre toujours en chaque personne."[124] Each binary pair exhausted the possibilities, and served to localize the individual ever more precisely in a web of social relations. A rights-based discourse works differently. A person is not either autonomous or not, free or not, and so on. Rather, all persons are endowed with the panoply of rights and duties simply by virtue of their being persons. Differences arise not from outside the individual, but from within, from unique characteristics that others do not share. To generalize, we might say that a status-based system begins with difference, and works from there to bring people together into a single though hierarchized society, while a rights-based system begins with sameness, and works from there to differentiate individuals. In short, the former moves towards community, the latter away from community.[125]

This change from status to rights is nicely summed up in the different connotations of the French terms *droit des personnes* and *droit de la personne*, a nuance for the most part lost in English, which tends to speak only of the "law of persons".[126] A law of *persons* assumes that there is a variety of ways to be a person: one might be an ecclesiastic, or a noble, or a spouse, or a serf, and in each case be a person. A law of *the*

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[124] Domat, *supra* note 62 at 94-95, quotation at 95.

[125] Compare Roderick A. Macdonald, "Transdisciplinarity and Trust" in Margaret A. Somerville & David J. Rapport, eds., *Transdisciplinarity: reCreating Integrated Knowledge* (Oxford: EOLSS, 2000) 61 at 62-64 on the tensions between unity and diversity in language and epistemology.

[126] Lefebvre-Teillard, *Introduction historique*, *supra* note 7 at 16.

person assumes that there is only way to be a person, the only other option being non-person (that is, a thing). This conceptual shift was gradual and not stark, and was tied up in the development of the notion of subjective rights and particularly of personality rights—those attributes of the person in law that capture key aspects of the liberal individual, such as autonomy, privacy, individuality, and so on.[127] As rights came to stand for the human being, the category of persons became more starkly defined and more homogeneous. Paradoxically as a result, at the same time as the law of persons came to focus on the individual as abstraction, it became less accommodating of the individual as particular human being.

By outlining this conceptual shift from a community-oriented "person" based on status to an individually-oriented "person" based on rights, I do not want to imply that the former was a more faithful translation of the human being into law, nor that we have taken a step backwards in our conceptualization of the person. Rather, I want to stress that both paradigms reflect particular (but different) legal conceptions of society and the place of the person within it, and that these differences manifest themselves in fundamentally different views of the person. Today we have largely subordinated status (at least as traditionally conceived) to a view of the person that privileges rights (though some argue that status is making a comeback, such as in the relationships of subordination and clientage arising in some long-term relational contracts).[128] How does this rights-bearing, transactionalized person of modern Western law compare to the human being?

II. The Transactionalized Person

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[127] See generally Bernard Beignier, *Le droit de la personnalité* (Paris: Presses Universitaires de France, 1992).

[128] Erich Schanze, "Symbiotic Contracts: Exploring Long-Term Agency Structures Between Contract and Corporation" in Christian Joerges, ed., *Franchising and the Law: Theoretical and Comparative Approaches in Europe and the United States* (Baden-Baden: Nomos Verlag-Gesellschaft, 1991) 67 at 86-87. See generally Macdonald, "European Private Law", *supra* note 106.

William MacNeil, in a provocative essay, argues that the liberal view of the person can be likened to Frankenstein's monster.[129] According to MacNeil, what the rise of hegemonic liberalism in the aftermath of the French Revolution did by exalting individual rights was to replace an integrated view of the human being with one that saw the person as a bundle of disparate rights, stitched together—like Frankenstein's creation—into something the law calls a person. This person, however, bore little resemblance to the flesh-and-blood humans to which it metaphorically referred, and who were forced into playing that role within the discourse of law. Instead the person in law was a monstrous amalgam of ill-fitting pieces, a whole much less than sum of its parts.

Coupled with nascent capitalism, MacNeil argues, the result was a conception of the person that leaves behind as much as it embraces. The problem with such rights discourse, as Martha Minow points out, is that it presents the illusion that anything and everything can be adequately translated into its language:[130] like a supposedly gapless civil code, the person-as-rights purportedly covers the field, leaving nothing behind. In fact, however, like the civil code, what rights discourse does is force everything to fit its categories. In the case of persons, MacNeil's insight is that rights discourse will sketch an approximation of a person, but closer examination reveals that the sketch is incomplete, even monstrous.

MacNeil's essay gives a terribly literal reading to the idea that the person is the creature of the law, and points out the problems in placing at the center of the law not human beings, but rather rights personified. What is important to remember, however, is that the law does not create persons willy-nilly, but rather according to particular purposes and plans. The law may be god-like in its ability to bestow and take away legal personality by its own fiat, but it does so according to a particular logic, a structure that grows out of the recursive interaction between reality and normativity that we examined in chapter 1. Richard Tur might be right in viewing legal personality as "an empty slot

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[129] William P. MacNeil, "The Monstrous Body of the Law: Wollstonecraft vs Shelley" (1999) 12 Australian Feminist Law Journal 21.

[130] Martha Minow, "Interpreting Rights: An Essay for Robert Cover" (1987) 96 Yale L.J. 1860 at 1910.

that can be filled by anything that can have rights or duties,"[131] but it is crucial to remember that the slot is already there (and must be there in order for the law to function), and this circumscribes the possibilities.

A. The Person vs. the Human Being

The persons that the law creates are all patterned on the paradigm dominant at the time of their creation, and in the modern West that paradigm remains the liberal individualist model of autonomy, agency, and market transactions.[132] Though liberalism has become something of a whipping boy of late, and its doctrines and assumptions are often caricatured to provide a convenient straw man in argument,[133] the liberal person—vague and multivalent though that expression might be—usually serves as the express or implied point of departure for critiques of the concept of the person in law. This is perhaps as it should be, since both the consolidation of the Common law beginning in the late eighteenth century and the codification of the civil law in the nineteenth century inscribed liberal values into the positive law,[134] and for practitioners and many theorists alike these values (and especially their economic aspects) represent the unspoken and assumed bedrock of Western law.

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[131] Richard Tur, "The 'Person' in Law" in Arthur Peacocke & Grant Gillett, eds., *Persons and Personality: A Contemporary Inquiry* (Oxford: Basil Blackwell, 1987) 116 at 121.

[132] On the liberal paradigm, see generally Michael J. Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982); Charles Taylor, "Atomism" in *Philosophy and the Human Sciences: Philosophical Papers 2* (Cambridge: Cambridge University Press, 1985) 187 [Taylor, "Atomism"]; Jennifer Nedelsky, "Law, Boundaries and the Bounded Self" (1990) 30 Representations 162 [Nedelsky, "Bounded Self"].

[133] This is the complaint of neo-liberals in particular. See especially the review in Linda C. McClain, "'Atomistic Man' Revisited: Liberalism, Connection, and Feminist Jurisprudence" (1992) 65 S. Cal. L. Rev. 1171 [McClain, "Atomistic Man"].

[134] On this process in the Common law, see Kennedy, *supra* note 73. For the civil law, the case of Quebec is a good example: see Brian Young, *The Politics of Codification: The Lower Canadian Civil Code of 1866* (Montreal and Kingston: McGill-Queen's University Press and Osgoode Society for Canadian Legal History, 1994).

Effectively, the person in law bears no real relationship to a living human being: the natural person of the civil law, for example, is just as much a construct as the corporation, since it has only those attributes and capacities that the law sees fit to grant it. In Western law, where the positivist tradition is still strong, this means the grant of rights in particular.[135] Rights, however, as universalized attributes of the person, make little sense without some core concept of the self to which to anchor them,[136] and the liberal construction of the person includes a specific vision of the self, as Jennifer Nedelsky notes:

> That self is an autonomous, rational agent that exercises its capacity for self-determination by choosing its relationships and obligations, especially through the legal vehicles of private property and contract. This picture of the self then generates a set of claims about the rights it must have in order to exercise its capacity for self-determination and rational agency.[137]

What emerges is clearly not a flesh-and-blood human being, nor even a single coherent entity, but rather a series of abstractions—capacities, rights—that the law gathers together and designates as a person.

This construction of the person inevitably leaves much out: Frankenstein's monster had all the parts, but lacked precisely those links and relationships between the parts that make the human being human. What the law of persons (at least in its current forms) does is create legally cognizable individuals who can be distinguished both from their society and from other individuals. The activities—indeed, the attributes—of such individuals are most easily viewed separately and seriatim in terms of legal or market transactions, rather than integrally and globally as part of a coherent entity. H. Patrick Glenn has argued that a central characteristic of the civil law is that it brings the human being out of the social fabric and, through the idea of subjective rights, puts the human

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[135] Ngaire Naffine, "In Praise of Legal Feminism" (2002) 22 L.S. 71 at 98-99.

[136] Jennifer Nedelsky, "Embodied Diversity and the Challenges to Law" (1997) 42 McGill L.J. 91 at 98.

[137] Jennifer Nedelsky, "Citizenship and Relational Feminism" in Ronald Beiner & Wayne Norman, *Canadian Political Philosophy* (Oxford: Oxford University Press, 2001) 131 at 132 [Nedelsky, "Citizenship"].

person at the center of the law.[138] This is a positive liberal humanist reading of what might also be given a negative interpretation. In reducing the human being to a sum total of subjective rights, the law legalizes the human being, breaking him or her down into a bundle of discrete and disaggregated rights with which it can more comfortably deal. In other words, in constructing the person, the law isolates the human being, separates out particular actions and attributes, and individually wraps them for its convenience. The rest is left behind, as is the sense that there might be a whole greater than the sum of these parts. The danger is when the legal construct of the person comes to stand for the human being, so that it begins to look like the person is all there is.

Often the concept of the person is treated unproblematically and unreflectively, without taking into account the normative implications of the replacement of the human being by the person. The superficial closeness of the concept to the human being tends to be exaggerated, while its political role in the translation of the human being into legal form is downplayed. John Chipman Gray, to cite an early example, takes the view that "a man's a man, for a' that", and the person is a good enough functional stand-in for the human being:

> Jurisprudence, in my judgment, need not vex itself about the "abysmal depths of personality." It can assume that a man is a real indivisible entity with body and soul; it need not busy itself with asking whether a man be anything more than a phenomenon, or at best, merely a succession of states of consciousness. It can take him as a reality and work with him, as geometry works with points, lines and planes.[139]

Today the degree of convergence between the person in law and the human being continues to be overemphasized, as in Deleury and Goubau's discussion of the law of persons in the new *Civil Code of Québec*:

> Alors que dans le *Code civil du Bas-Canada*, fidèle sur ce point à son modèle, le Code Napoléon, la personne humaine était envisagée comme

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[138] Glenn, *supra* note 54 at 129. This was the explicit intention of the Civil Code Revision Office in the drafting of the *Civil Code of Québec*, and Deleury and Goubau see this as the hallmark of the law of persons in the new code. Crépeau, *supra* note 59 at xxix; Deleury & Goubau, *supra* note 123 at xxx-xxxi.

[139] John Chipman Gray, *supra* note 89 at 29, quoted in Hill, *supra* note 78 at 291.

> une entité abstraite, désincarnée, la personne, telle qu'elle apparaît dans le *Code civil du Québec*, se présente à la fois comme un concept opératoire et une valeur fondamentale du droit civil. *L'être humain dans toute sa plénitude* est aujourd'hui au cœur des préoccupations du droit civil. Le respect de la personne, telle est en effet l'assise sur laquelle repose *le Code civil du Québec* ainsi que les lois qui le complètent.[140]

We see a similar downplaying of difference in favor of sameness in various other writers who argue that nuances of terminology matter little in the end. Raymond Martin is one example: "L'homme se présente donc naturellement comme étant le sujet du droit. On l'appelle alors 'personne'. Sujet de droit, personne, homme, c'est tout un."[141] If nothing else, the elision (or better excision) of *femme* here is an obvious indication that terminology does in fact matter.

The standard definition in modern law (both civil and Common), however, is that the person is "a subject of legal rights and duties,"[142] a formulation that is clearly some distance away from the popular view of the person as human being. Its divergence from the popular view, however, should signal that we are dealing with something different than *homo sapiens*: something at once narrower but also potentially more expansive. The idea of civil death, for example, is a stark illustration of the distance between the human being and the person: loss of civil status meant that it was possible to be a human being who was not a person.[143] The person in law, then, is less an existential status in its own

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[140] Deleury & Goubau, *supra* note 123 at xxxi (emphasis added).

[141] Martin, *supra* note 78 at 785. Against this view, however, see Madeleine Cantin Cumyn, "La fiducie, un nouveau sujet de droit?" in Jacques Beaulne, ed., *Mélanges Ernest Caparros* (Montreal: Wilson & Lafleur, 2002) 129 at 141.

[142] John Chipman Gray, *supra* note 89 at 27. Compare for the Common law P.J. Fitzgerald, ed., *Salmond on Jurisprudence*, 12th ed. (London: Sweet & Maxwell, 1966) at 299 ("Persons are the substances of which rights and duties are the attributes. It is only in this respect that persons possess juridical significance, and this is the exclusive point of view from which personality received legal recognition.") and for the civil law *Private Law Dictionary and Bilingual Lexicons*, 2d ed. by Robert P. Kouri et al. (Cowansville, Qc.: Yvon Blais, 1991) *s.v.* "Person".

[143] Brierley & Macdonald, *supra* note 6 at 214.

right than a modulation of the human being: a way of being that is suited to a particular context.

A useful metaphor for the difference (and the relationship) between the person and the human being is the original meaning of *persona* as a mask worn by an actor.[144] The person is a mask (or more broadly a role) that the human being either chooses or is forced to adopt in order to function within the law. As Joseph Vining notes, "Litigants search for a personality that will fit the demands of the court, tailor their attributes, paint their faces, manipulate their identities, and attend a masked ball where they hope to receive a prize for the imagination and ingenuity they display."[145] This role playing turns the human being from a multifaceted entity into one channelled to a particular purpose, that is to fit into the legal framework.

This happens outside the law as well, of course: we present different aspects of ourselves when we act as parents, as friends, as employees, as parishioners, as writers of letters to the editor, as sports fans, and so on. My point, however, is that the role is not—cannot be—the whole person. Our identity from a social perspective might be seen as the sum of all of these roles we play, and yet aspects of our self always remain outside the roles, and indeed may serve as the connection between the roles.[146] John Noonan emphasizes the dehumanizing aspect of this isolation of roles in arguing that masks are "ways of classifying individual human beings so that their humanity is hidden and disavowed."[147] This view, however, sees the law as something relatively fixed, to which human beings must react and adapt when they seek redress. If we look at law as process rather than as a defined normative space, however, we get a more nuanced view of the

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[144] See the literature cited *supra* note 101.

[145] Vining, *supra* note 4 at 123.

[146] Compare Angela P. Harris, "Race and Essentialism in Feminist Legal Theory" (1990) 42 Stan. L. Rev. 581 at 584: "It is a premise of this article that we are not born with a 'self,' but rather are composed of a welter of partial, sometimes contradictory, or even antithetical 'selves.' A unified identity, if such can ever exist, is a product of will, not a common destiny or natural birthright."

[147] Noonan, *supra* note 4 at 19.

roles that categories like the person provide. Looked at in this way, the human being is not simply lost in his or her role, but rather plays an active role in constructing the reality within which the role is to function. The drama then becomes less a set, scripted piece than an improvised dialogue between the essential human being and the constructed alter ego the law seeks.

This calls to mind the idea of performance, which has come to be a central metaphor in postmodern discussions of identity. The roles we perform are neither fully imposed on us, nor fully chosen. Identity is rather contextual, dynamic, and strategic: it is at the same time a positioning of the self in relation to a given problem or institution, and a construction of the particular constraints and demands of the context. For Judith Butler, "performativity" is "the reiterative and citational practice by which discourse produces the effects that it names"[148]—a give-and-take between creativity and constraint. Identity, in other words, comes not from simple assertion by the individual, nor from societal imposition, but from the repeated and mutually reinforcing interplay or dialogue between the two. To apply this insight to law, we might say that the law creates a role (or mask, or category) called "the person" so as to manage the human beings that enter its world. The human beings attempting to play this role follow the script, but at the same time attempt to shape it to their own needs; the resulting "person" is somewhere in between the two positions.[149] What is important about this is that the product of this process of negotiation plays a normative role in defining the human being outside the law. As the discourse of law becomes more and more central to modern life, it becomes necessary in an ever wider range of situations for human beings to take up the role of the person constructed by law. The danger lies in losing sight that there are other options—other ways to be a "person"—than the legal construct.

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[148] Judith Butler, *Bodies That Matter: On the Discursive Limits of "Sex"* (New York: Routledge, 1993) at 2.

[149] Compare James Boyle's notion of the "professional subject", where reified disciplinary roles constitute those who play them; James Boyle, "Is Subjectivity Possible? The Postmodern Subject in Legal Theory" (1991) 62 U. Colo. L. Rev. 489 at 516-18.

B. Critique of the Person in Law

The roles that the law permits the human being to play tend to have particular characteristics that reflect the ideology of the dominant liberal paradigm. This is not surprising, since the law plays a gatekeeper function, and itself sets the rules for entrance. This leads, however, to an emphasis on sameness in the person in law—on inherent or universal characteristics that all persons are seen to possess, whereas a crucial aspect of the human being is difference. In law it is easier to deal with things that are similar: the image of blindfolded justice is a vivid invocation of the biblical idea of God as a judge who "regardeth not persons, nor taketh reward."[150] The liberal view of the individual, which draws on the earlier humanist idea of the inherent dignity of the human being,[151] posits an abstract sameness—even an essence—across individuals, a levelling of difference that on the one hand leads to concepts like human rights, but on the other can lead to dehumanization.[152] Once again, it also worth recalling the difference between *le droit des personnes* and *le droit de la personne*.[153]

Taxonomy in itself tends to emphasize similarity rather than difference, as we saw in chapter 1, though the process of classification necessarily implies both. The normative influence of categories in law is such that once in place, the categories tend to collect things, since things have to go somewhere ("all our law is either ..."), and things are expected to adapt to the category, rather than the other way around. In this section, I

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[150] Deut. 10:17, cited and discussed in Noonan, *supra* note 4 at 15-16. The reduction of individuals to their basic sameness is also one characteristic of Foucault's idea of a disciplinary society. See generally Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. by Alan Sheridan (New York: Vintage Books, 1979).

[151] The classic discussion of human dignity in the humanist tradition is Giovanni Pico della Mirandola, *Oration on the Dignity of Man*, trans. by A. Robert Caponigri (Chicago: Regneri Gateway, 1956).

[152] See generally Anne Barron, "Legal Discourse and the Colonisation of the Self in the Modern State" in Anthony Carty, ed., *Post-Modern Law: Enlightenment, Revolution and the Death of Man* (Edinburgh: Edinburgh University Press, 1990) 107 at 110-13.

[153] Above, text accompanying note 126.

would like briefly to survey several aspects of the person as it has been constructed within the liberal paradigm, as preparation for a more wide-ranging deconstruction of the category of persons in the next chapter. Though many other aspects might be isolated and discussed, three are particularly important in underscoring the differences between the human being and the person. First, persons in law are disaggregated, which means that they are considered not as integrated wholes, but rather as bundles of threads to be pulled apart and dealt with separately. Second, they are patrimonialized, which means that they are identified primarily by those attributes that have market value, and so the patrimony comes increasingly to stand for the person. Third, they are transactionalized, which means that they enter legal view mainly when they are involved in transactions of economic or legal value with another legal actor.

1. Disaggregation: The Person as Rights

MacNeil's depiction of the person in modern law as Frankenstein's monster is telling, since it emphasizes the disaggregation of the human being effected by the discourse of rights at the heart of the liberal model of law.[154] Noonan makes a similar point, when he criticizes the notion of "interests" as "so many severed heads, detached from the persons who carried them," with the result that the mask (the person) comes to stand for the human being.[155] The development of rights—subjective rights in general, and personality rights in particular—has been central to the development of the person in modern law,[156] yet rights tend to take qualities of the human being and make them abstract, turning them in the process from integral parts of the human being into something outside and separate from their titularies. Rights, after all, are "held". What

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[154] MacNeil, *supra* note 129 at 27: "First, the body is metonymised by rights, cut into bits and pieces of linguistic hands and feet, as well as eyes, ears and mouth. Then, second, these body parts are metaphorised as, in the latter case (eyes, ears and mouth) in rights of speech, belief and thought; or, in the former case (hands and feet) as rights of movement or association."

[155] Noonan, *supra* note 4 at 7.

[156] Jolowicz, *Roman Foundations*, *supra* note 50 at 69.

rights do is provide a language with which to discuss and analyze the liberal person, but it is a language that accentuates the divergence between the person and the human being. On the one hand, rights discourse individualizes the human being by granting autonomy, liberty, and other characteristics of agency.[157] On the other hand, rights make the human being commensurable with similarly constituted others by dividing the person up into discrete parts that can be compared with the corresponding parts of other individuals. In short, rights make the person at the same time unique and fungible. The problem with rights discourse is that one cannot take the uniqueness without the fungibility.

Personality rights, which we might think of as together comprising the "self" of the person in law, in many ways represent the apotheosis of rights culture, since they serve to define the liberal individual within the law. Though there were earlier antecedents—notably the role played by the personal name in law[158]—personality rights are of relatively recent invention: they were only clearly articulated at the end of the nineteenth century and the beginning of the twentieth.[159] The problem with such rights, however, is that they present an image of the personality in law that is at odds with the non-legal view. In general, personality is supposed to be an integrated thing, since behind its fragmentation loom schizophrenia and bipolar disorder. In law, however, the personality is divided up into discrete rights, each a separate strand that can be pulled out and judicially evaluated on its own.[160] The language of rights fosters this sort of

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[157] See Taylor, "Atomism", *supra* note 132 at 188.

[158] Anne Lefebvre-Teillard, *Le nom: droit et histoire* (Paris: Presses Universitaires de France, 1990).

[159] Among the earliest expressions of the concept is E.H. Perreau, "Des droits de la personnalité" (1909) 8 R.T.D. civ. 501. In their groundbreaking article on privacy, Warren and Brandeis make an early argument for the principle of "inviolate personality" and "the right to one's personality" in the Common law; Samuel D. Warren & Louis D. Brandeis, "The Right to Privacy" (1890) 4 Harv. L. Rev. 193 at 205, 207 respectively. On the earlier antecedents, see Eric H. Reiter, "Personality and Patrimony: Comparative Perspectives on the Right to One's Image" (2002) 76 Tul. L. Rev. 673 at 675-80, and see generally Beignier, *supra* note 127. On subjective rights more generally, see the literature cited *supra* note 100.

[160] We see this in the Supreme Court of Canada's typical methodology of rights analysis under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution*

dissection of the person into separate parts, each with an individual character and function, and each separately protected. The law looks for a violation of a right—of a particular and discrete legally cognizable part of the person—rather than of the person as a whole. Where no cognizable right has been violated—as is usually the case with adultery outside the context of divorce, for instance—there is deemed to have been no violation of the person in a legal sense, despite how the individual in question might view the situation.[161]

Of course, such dissection of the complex reality of the human being into something more readily comprehensible is as necessary in law as it is anywhere else. The translation of the human being into law is essential to the working of the legal system, and it is a process that (as we saw above) takes place both through scripting by the law and performance by the human being. Joseph Vining captures this interplay:

> [H]uman beings must be made abstract before their concerns can become relevant to a system of general rules. They must be personified in some way other than their concrete reality. But the point is that human beings do not focus, abstract, and personify their concerns simply in response to requirements of law. They do so as they live, in each spontaneous leap of caring that occurs when they face a situation that cries out to them. The law rides on the back of these living values.[162]

Frankenstein's monster arises when the person in law, or more specifically the rights of the person in law, come to stand for the human being. When rights are abstracted from their holder, they become in theory holdable by anyone, even an

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Act, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Canadian Charter*], which analyzes each right separately. See *e.g. Rodriguez v. British Columbia (A.G.)*, [1993] 3 S.C.R. 519. This is of course the result of the separation of different rights into the individual provisions of the *Charter*, yet it is not the only methodology imaginable.

[161] An earlier example is the development of legal recourse for nervous shock; see Denise Réaume, "Indignities: Making a Place for Dignity in Modern Legal Thought" (2002) 28 Queen's L.J. 61.

[162] Vining, *supra* note 4 at 128.

anthropomorphized corporation.[163] It is this divorce of rights from their underlying anthropology that has been central to many critiques of the modern liberal view of the person in law. The emphasis on individuality and separation that flows naturally from a rights-based discourse, particularly one that places liberty at its center, tends to turn rights into an either/or balancing act, with the person as the product.[164] Jean Bethke Elshtain, for example, has argued that in contemporary thinking rights tend to be naturalized, so that much of the anthropological "deep background and justification" for rights is either forgotten or actively discarded:

> A shopping lists of rights distorts the matter by putting all declared "rights" on a par: in this way a right to a paid vacation is just one right on a list with the right to religious and political freedom. Absent a way to sift and winnow rights—a complex anthropology, including the recognition that human beings are drawn toward the truth by their very natures—rights easily become distorted and even trivialized: a most unfortunate development indeed.[165]

What is missing from the libertarian and separation view of rights is precisely the idea of connection that comes out of the associated ideas of responsibility, duty, and obligation.[166] Rights obviously have power implications: they grant exclusions that serve to define a space around the individual for autonomous thought and action. But they also

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[163] Some rights contained in the *Canadian Charter*, *supra* note 160, have been held to apply to corporations, particularly freedom of expression; see Robert J. Sharpe & Katherine E. Swinton, *The* Charter of Rights and Freedoms (Toronto: Irwin Law, 1998) at 66-67. Art. 302 C.C.Q. states that a legal person "has the extra-patrimonial rights and obligations flowing from its nature."

[164] See, for an example of this view of rights, J. Braxton Craven, Jr., "Personhood: The Right to Be Let Alone" [1976] Duke L.J. 699 at 706: "This is the essence of personhood: a rebuttable presumption that all citizens have a right to conduct their lives free of government regulation."

[165] Jean Bethke Elshtain, "The Dignity of the Human Person and the Idea of Human Rights: Four Inquiries" (1999) 14 J.L. & Religion 53 at 55-56, 62 (quotations at 55 and 62, respectively) [Elshtain, "Dignity"].

[166] See especially Elshtain, "Dignity", *ibid.* at 60-61; Jennifer Nedelsky, "Reconceiving Rights as Relationship" (1993) 1 Rev. Const. Stud. 1 [Nedelsky, "Reconceiving Rights"]. See also Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1991).

have a social dimension: they necessarily implicate others, and how they are defined determines how they mediate these social relationships. Both of these aspects of rights are essential to understanding their role in the construction of the person in law.

2. Patrimonialization: The Person as Value

In theory the patrimony and the person are supposed to be analytically separate,[167] which is why private-law "human rights" such as the rights to privacy, to one's name and image, to reputation, and so on are considered to be extrapatrimonial and *hors commerce*. Increasingly, however, patrimony is coming to be a stand-in for the person, a kind of catch-all category into which aspects of the person are translated in order to make them comprehensible to law.[168] This is perhaps most especially true of the Common law (though it lacks the concept of patrimony), where the category of property steadily grows to embrace attributes of the person, but it is true as well of the civil law.[169] The reason for this is the difficulty the law has in dealing with many attributes of the person in other than economic terms. Damages are a convenient though not always satisfactory means of redressing moral injury, but they create the illusion that anything can be tallied in monetary terms. The tables of dollar equivalents for specific injuries (such as loss of an index finger versus loss of a pinkie, scarring of the face versus abdominal scarring, and so forth) at the back of many treatises on civil liability are a grisly illustration of this.[170]

Personality rights are again a good example. These attributes of the person have (for some people, at least) market value, and so are readily (if doctrinally suspiciously)

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[167] Louis Josserand, "La personne humaine dans le commerce juridique" D. 1932.chron.1 at 1.

[168] See Roderick A. Macdonald, "Reconceiving the Symbols of Property: Universalities, Interests and Other Heresies" (1994) 39 McGill L.J. 761 at 769-85.

[169] See Edelman, *supra* note 7 at 118, 140; Reiter, *supra* note 159.

[170] *E.g.* Jean-Louis Baudouin & Patrice Deslauriers, *La responsibilité civile*, 6th ed. (Cowansville, Qc.: Yvon Blais, 2003) at 1387-1514.

becoming patrimonialized.[171] The frontier between the person and the patrimony blurs as a result. Individuals seeking protection of their personality (such as against unwanted photographs) must translate highly personal feelings and emotions such as outrage or shock or loss of peace of mind into economic terms in order to get redress, however difficult or unsatisfactory this might be.[172] The normative power of the law is such that it is a small step from necessary translation into the language of law to commodification of these attributes, such as we see in some of the American celebrity jurisprudence.[173] This phenomenon quickly filters out from the law as well. An example is the currently fashionable idea of "identity theft".[174] The language of property is more viscerally evocative in the liberal West than alternative terms like "appropriation of personality" (which itself still echoes property language) or "violation of personality", which conceptualize the problem (more naturally) as a persons rather than a property issue. The association with theft serves to patrimonialize a nebulous and impossible to define concept into an object of property, and links it to ownership, the most powerful right in the arsenal of the liberal world. Litigants need to do what it takes to win their cases, of course. But the role-playing process of litigation is itself a law-making process, and terminological slippage like this tends to blur the categories to which the terms refer.

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[171] See generally Grégoire Loiseau, "Des droits patrimoniaux de la personnalité en droit français" (1997) 42 McGill L.J. 319.

[172] Vining, *supra* note 4 at 29, arguing that since the self cannot have market value, assessing harm in monetary terms is impossible.

[173] Among the most notorious examples is *White v. Samsung Electronics America*, 971 F.2d 1395 (9th Cir. 1992). This tendency towards commodification is hardly limited to the United States, however, as the example of Quebec shows. See especially *Deschamps v. Renault Canada* (24 February 1972), Montreal 05-810-140-71 (Sup. Ct.), reproduced in (1977) 18 C. de D. 937; *Malo v. Laoun*, [2000] R.J.Q. 458 (Sup. Ct.), aff'd [2003] R.J.Q. 381 (C.A.). Outside the celebrity realm, however, extrapatrimonial understandings of personality rights still hold their own. See *Aubry v. Éditions Vice-Versa*, [1998] 1 S.C.R. 591 and the discussion in Reiter, *supra* note 159.

[174] *E.g.* Sean B. Hoar, "Identity Theft: The Crime of the New Millenium" (2001) 80 Or. L. Rev. 1423.

3. Transactionalization: The Isolation of the Person

Along with the focus on rights and on pecuniary value, the person in law is transactionalized, that is, separated into isolated and discrete legally cognizable events. Just as rights tend to be substituted for attributes of the human personality, and pecuniary valuations and preferences replace intangible ones, so too are transactions substituted for relationships and ongoing interactions. Again, this is unavoidable to an extent, since people often must use law for settling problems, and the law naturally deals with people in the context of the matter in question. This does, however, intensify the isolation or abstraction of the person from the web of relationships—whether natural, voluntary, or imposed—within which he or she lives and acts. In other words, in conceptualizing and dealing with legal problems, the law interposes itself in the fabric of the human being's life, and works to structure life according to its own requirements.

This observation again recalls Maine's insight about the shift from status to contract, which may be understood as an insight about the legalization of human interactions.[175] As Manfred Rehbinder notes, "When medieval society was replaced by bourgeois liberal society, law no longer fixed the individual in his place in a divinely ordained order; instead it aimed to enable him to determine freely and responsibly his social relations as an equal member in a homogeneous society consisting of all citizens. The tool to achieve this result was contract."[176] Status—at least as conceived in the *ancien régime*—presumed the existence of a community into which individuals were born. Contract, as a relationship in theory freely chosen, erodes this sense of community, since—in the classical view of contract—the relationship is coterminous with the contract. Such relationships become legalized, because they tend to be links between strangers rather than the bonds between (relative) intimates.[177] David Daube notes a similar legalization of relations in ancient civilizations, associated with the introduction

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[175] See above, text accompanying note 60.

[176] Rehbinder, *supra* note 6 at 944-45.

[177] Compare Donald Black, *The Behavior of Law* (New York: Academic Press, 1976) at 41-55.

of money into what had hitherto been primarily a gift exchange economy: "In the absence of money, fellowship prevails, with no need for outside directive. Money leads to partnership and justiciability."[178]

The substitution of arm's length, even adversarial dealings for more intimate relational dealings, particularly when combined with the patrimonialization of these dealings and the disaggregation associated with the rights-based model of the person, leaves aside various aspects of the human being that are important not only in everyday life, but also in dealings with the law. In recasting both social and legal relations in terms of liberal autonomy and market exchange, the law emphasizes separation and inter-personal distance, a view antithetical to notions of duty and obligation. This isolation of the person is captured in Blackstone's remark that

> every wanton and causeless restraint of the will of the subject, whether practiced by a monarch, a nobility, or a popular assembly, is a degree of tyranny. Nay, that even laws themselves, whether made with or without our consent, if they regulate and constrain our conduct in matters of mere indifference, without any good end in view, are laws destructive of liberty.[179]

MacNeil gives this another reading, lamenting "the pathological logic of liberalism which holds loneliness to be a virtue rather than a vice, calling it autonomy."[180] This emphasis on liberty, the cornerstone of liberal values, is particularly problematic for the concept of the person, as Ross Poole notes:

> It is hard to overestimate the calamitous consequences, for moral philosophy in particular, of the construction of a concept of a person which is differentiated in so absolute a manner from the human. In one move, it dissociates the moral subject from some of the most morally significant aspects of our existence. It draws attention away from the

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[178] David Daube, "Money and Justiciability" (1979) 96 Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, römische Abteilung 1 at 9.

[179] Blackstone, *supra* note 2, book 1, chap. 1 (vol. 1 at 122).

[180] MacNeil, *supra* note 129 at 37.

> fundamental fact that in order to live we must enter into physical interaction with our physical environment.[181]

Even beyond the physical environment, what is crucial is interaction with others, and interactions of a more meaningful kind than arm's-length transactions involving patrimonialized rights. Scholars from a variety of perspectives have sought to reassert the "social matrix" within which the liberal individual necessarily lives, to argue that it is in this embeddedness that the individual's humanity arises.[182] As we will see in the next chapter, however, it is precisely these relational or interactive aspects of the human being that are problematic for the liberal model of law, since they challenge the very construction of an individual upon which the model rests.

Another consequence of this view of the person is the disappearance, even repression of the body and corporeality from the law.[183] Jean-Pierre Baud sees the disappearance of the body as "une manifestation de la civilité des civilistes," which shunted issues of corporeality away from secular law and towards canon law and ultimately towards medicine by moving away from the corporeal human being and towards the abstract person.[184] Metaphoric corporealization (such as using "corporate bodies" to describe legal persons) is telling, since it points to a rhetorical need for a link to the human being, even when the person has been abstracted to such an extent that the link is purely illusory. With the abstract, transactionalized person, the body breaks up and

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[181] Poole, *supra* note 78 at 47.

[182] Taylor, "Atomism", *supra* note 132 at 209. Other perspectives along these lines include Sandel, *supra* note 132; Will Kymlicka, *Liberalism, Community, and Culture* (Oxford: Clarendon Press, 1989); Ian R. Macneil, "Relational Contract Theory: Challenges and Queries" (2000) 94 Nw. Univ. L. Rev. 877; Kathryn Abrams, "From Autonomy to Agency: Feminist Perspectives on Self-Direction" (1999) 40 Wm. & Mary L. Rev. 805. See also Law Commission of Canada, *Strategic Agenda and Research Plan*, online: Law Commission of Canada <http://www.lcc.gc.ca/en/about/agenda.asp>, especially the discussion of personal, social, economic, and governance relationships.

[183] MacNeil, *supra* note 129 at 22.

[184] Baud, *supra* note 50 at 48-49, 212 (quotation at 48). See also Edelman, *supra* note 7 at 290.

disappears, and what remains is mainly its traces: those events and acts of the individual that the law chooses to recognize.

The human being is a far more extensive concept than the person, and there are aspects of the human being that are ill-protected by the liberal construct of the person. It has been suggested that the idea of dignity is becoming a stand-in for those aspects of the human being that the law has long left behind.[185] Bernard Edelman notes that "si la liberté est l'essence des droits de l'homme, la dignité est l'essence de l'humanité,"[186] a remark that suggests a shift from a private-law to a public-law conception of the person. Emergent concepts like dignity and privacy do not fit easily into the persons-things-actions paradigm of the private law, and yet they would seem to be clearly connected—even central—to the person. What is needed is a broader conception of the person that seeks to capture more of the human being. If law is to be the dominant normative discourse in modern society (and for the time being it has few serious challengers), it cannot continue on with a concept of the person constructed solely with the needs of liberal commerce in mind.

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The liberal individualized person of modern Western law is a person largely considered in abstraction from family, from friendships, from society generally, and this isolation (theoretical or conceptual more than actual, but influential nonetheless) mirrors the isolation of the legal category of the person, starkly set off from things and actions. By isolating the person from society, we reinforce the isolation of the legal category of the person, and we fail to understand that the conceptual structure of the law can and should be seen as one allowing the dynamic interaction of legal categories, and not one that seals them off from one another.

In this chapter we have examined the category of persons separately from its neighbors, in order to see how the person in law is a particular translation of the human

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[185] *E.g.* Baud, *ibid.* at 226; Edelman, *ibid.* at 507; Elshtain, "Dignity", *supra* note 165; Réaume, *supra* note 161.

[186] Edelman, *ibid.* at 509.

being into the language of law, one that emphasizes certain characteristics while omitting others. The view of the person that comes out of the classical liberal reading of Gaius' structure—inscribed in the law of persons or *le droit de la personne* today—is peculiarly one-dimensional, an entity that owes more to the controlled conditions of the laboratory of legal theory than to the world of human activity. Like human beings, however, legal categories do not exist in analytical splendid isolation: they interact with one another in a kind of dynamic tension, with boundaries continually being renegotiated and meaning coming out of this process of give and take. Indeed, it is impossible fully to understand one branch of Gaius' trichotomy without understanding the other two: in the closed system of Gaius' private law, each category presupposes the others, and each affects the meaning and scope of the others. We move now away from looking at the category of persons as a closed system in its own right, and turn to draw out the interrelationships—the dynamic interfaces—between persons and its neighbors.

Chapter 3
Boundaries and Interfaces

In Jean Domat's *Les lois civiles dans leur ordre naturel* of 1689, in the course of his discussion of the status of persons resulting from nature (rather than from law), he lists a number of liminal states to illustrate particular analytical problems.[187] The list includes children born dead, children still in the womb, premature children, posthumous children, hermaphrodites, eunuchs, the insane (*les insensés*), the completely deaf and mute, and those suffering dementia or other mental deficiencies (*Ceux qui sont en démence et dans ces autres imbécillités*). The list ends, however—most interestingly—with "monsters who do not have human form" (*Les monstres qui n'ont pas la forme humaine*). Domat notes that these monsters are considered to be neither persons nor the children of their parents, though those with deformities but "having the essentials of human form" (*ayant l'essentiel de la forme humaine*) are considered to be the children of their parents.[188]

This discussion seems odd within the context of the rest of the list, almost an irruption of a magical world into the human world. And yet the monster appears also in Blackstone, who notes that

> A MONSTER, which hath not the shape of mankind, but in any part evidently bears the resemblance of the brute creation, hath no inheritable blood, and cannot be heir to any land, albeit it be brought forth in marriage: but, although it hath deformity in any part of its body, yet if it hath human shape, it may be heir. This is a very ancient rule in the law of England; and its reason is too obvious, and too shocking, to bear a minute discussion.[189]

Blackstone's source for this is Bracton, and his veiled reference at the end of this passage is fleshed out in Bracton's own discussion of monsters: "Those born of unlawful intercourse, as out of adultery and the like, are not reckoned among children, nor those

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[187] Domat, *supra* note 62 at 96-102.

[188] *Ibid.* at 102.

[189] Blackstone, *supra* note 2, book 2, chap. 15 (vol. 2 at 246-47).

procreated perversely, against the way of human kind, as where a woman brings forth a monster or a prodigy."[190]

Ultimately, all these discussions trace back to Justinian's *Digest*, where both Paul and Ulpian discuss the status of monstrous births,[191] and beyond that to the Laws of the Twelve Tables, which stated (characteristically laconically) that "a dreadfully deformed child shall be [quickly] killed".[192] Moreover, these remarks tap into a long popular tradition of associating such deformed children with presumptions of the sexual impropriety of their parents on the one hand, and portents of disaster and divine disfavor on the other.[193] Clearly, the monster's status as a human being was popularly in doubt, and the law followed suit in its hesitance to treat such children as persons.

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[190] Henry de Bracton, *Bracton on the Laws and Customs of England*, Latin ed. by George E. Woodbine, trans. by Samuel E. Thorne (Cambridge, Mass.: Belknap Press of Harvard University Press in association with Selden Society, 1968-77) vol. 2 at 31. Blackstone also cites Coke, who repeats Bracton's remarks. See Edward Coke, *The First Part of the Institutes of the Laws of England; or, a Commentary Upon Littleton*, 2 vols., ed. by Francis Hargrave & Charles Butler (Philadelphia: Robert H. Small, 1853) at 7.b, 29.b.

[191] Dig. 1.5.14 (trans. Watson): "Paul, *Views, book 4*: Not included in the class of children are those abnormally procreated in a shape totally different from human form, for example, if a woman brings forth some kind of monster or prodigy. But any offspring which has more than the natural number of limbs used by man may in a sense be said to be fully formed, and will therefore be counted among children."; Dig. 50.16.135 (trans. Watson): "Ulpian, *Lex Julia et Papia, book 4*: Someone will ask, if a woman has given birth to someone unnatural, monstrous or weak or something which in appearance or voice is unprecedented, not of human appearance, but some other offspring of an animal rather than of a man, whether she should benefit, since she gave birth. And it is better that even a case like this should benefit the parents; for there are no grounds for penalizing them because they observed such statutes as they could, nor should loss be forced on the mother because things turned out ill."

[192] XII. Tab. 4.1 (trans. Warmington).

[193] See David Cressy, "Monstrous Births and Credible Reports: Portents, Texts, and Testimonies" in *Travesties and Transgressions in Tudor and Stuart England: Tales of Discord and Dissension* (Oxford: Oxford University Press, 2000) 29; Zakiya Hanafi, *The Monster in the Machine: Magic, Medicine, and the Marvelous in the Time of the Scientific Revolution* (Durham, N.C.: Duke University Press, 2000); Dudley Wilson, *Signs and Portents: Monstrous Births from the Middle Ages to the Enlightenment* (London: Routledge, 1993).

Like the bees that regularly swarm into the civil law to illustrate the subtleties of the concept of occupation,[194] the monster is something of a test case, an exception to prove the rule. It is a problem deliberately posed because it challenges categories, while at the same time having practical importance. But how does the monster fit into Gaius' paradigm, a structure that underlies the work of all of these authors? Domat, in treating the monster under persons, follows the *Digest*, which puts the main discussion of the monster under the title "Human Status", thus emphasizing the monster's nature. Blackstone, however, puts the monster in his book on the rights of things, emphasizing not what the monster is, but rather what the monster can and cannot do (inherit). The subject matter in both cases is the same, but the logic of the respective systems leads to two markedly divergent results. This point is crucial: where we start the analysis in large measure determines where it will end up.

Domat gives us some hints as to taxonomy, which helps make explicit what the *Digest* left implicit. He says specifically that monstrous births that do not have human form "ne sont pas réputés du nombre des personnes" and are not counted as the children of those who bear them.[195] Those with "l'essentiel de la forme humaine," by contrast, are considered to be the children of their parents, though Domat does not say whether or not they are legally reputed to be persons. Domat (again following the *Digest*) recognizes the difficulty of this position, since such children "tiennent lieu [des enfants] à l'égard des parens," and so they are considered to be their children for the purposes of privileges and exemptions dependent on the number of offspring.[196] Domat adds a footnote that goes beyond his Roman sources, however, noting "On peut ajouter, pour une autre raison de cette règle, que ces monstres sont plus à charge que ne sont les autres enfans."[197] This

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[194] *E.g.* art. 428 C.C.L.C.; arts. 961-64 of the *Bürgerliches Gesetzbuch*; arts. 700, 719 ¶3, 725 ¶2 of the *Code civil Suisse*; art. 3415 of the *Louisiana Civil Code*. The source of the bees example is G. 2.68 and Inst. 2.1.14. Interestingly, the French *Code civil* does not mention bees explicitly in the usual places.

[195] Domat, *supra* note 62 at 102. Compare Dig. 50.16.135.

[196] *Ibid.*

[197] *Ibid.* at 102 n. 3. This point occurs neither in the *Digest* nor in its medieval gloss, and may originate with Domat.

kind of situational definition of the person points out the tensions between taxonomy and the human needs of the material to be classified. Domat's ambivalent treatment of the monster has parallels with the treatment of slaves under antebellum United States law: non-persons in some situations, persons in others, three-fifths persons in still others.[198] What these historical examples teach us is that personhood is not an integrated, coherent concept with a primordial logic, but rather an idea whose different aspects link to particular situations: an instrumental concept, created and recreated to do what is needed.

Still, if such monstrous children are not persons (or are only persons imperfectly and for specific purposes), what are they? According to the logic of Gaius' schema, they must fit somewhere, since the tripartite division is an exhaustive structuring of the private law. They would seem not to be things, which Domat defines as "tout ce que Dieu a créé pour l'homme,"[199] but since Domat divides things into those in commerce and those not in commerce, a non-person monster might be considered a thing not in commerce.[200] At the same time, however, Domat's remarks about the esteem of the parents and the care that such children require point in a different direction, towards the language of relationship and obligation, and thus to the third branch of Gaius' schema. While the monster is not itself an obligation (though how do we conceptualize an obligation without in part reifying it?), it clearly engages that aspect of the law: by its very nature it embodies dependence on others (its parents, society more generally), and so it elicits bonds of relationship.[201]

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[198] See Thomas D. Morris, *Southern Slavery and the Law, 1619-1860* (Chapel Hill: University of North Carolina Press, 1996); Don E. Fehrenbacher, *The Slaveholding Republic: An Account of the United States Government's Relations to Slavery*, completed and ed. by Ward M. McAfee (Oxford: Oxford University Press, 2001) esp. at 1-10, 24-25; William W. Fisher III, "Ideology and Imagery in the Law of Slavery" (1993) 68 Chi-Kent L. Rev. 1051 at 1054-55.

[199] Domat, *supra* note 62 at 113.

[200] Compare Baud, *supra* note 50 at 78-88, who argues that the human body should be considered a thing not in commerce rather than a person. Baud cites the *Digest* on monsters as well; *ibid.* at 71.

[201] This recalls Levinas' idea of proximity as relationship with the Other: see Emmanuel Levinas, "The Proximity of the Other" in *Alterity and Transcendence*, trans.

The example of the monster illustrates the difficulty in isolating and circumscribing reality in such a way that it can fit neatly into a preordained category. Domat's monster is neither a person nor a thing nor an obligation, and yet it is all three at the same time. Wherever we might put it, it reaches into (or holds onto) the other categories, claiming aspects of all of them. Even concentrating on the *summa divisio* of the paradigm and limiting the choices to either a thinglike person or a personlike thing is insufficient, since as Domat indicates the relations between such a child and others are crucial to its nature. Moreover, the monster simply points out in greater relief what is true also for ordinary human beings: in different aspects and from different points of view they partake of all three categories, and so when viewed integrally the human being defies the neat categorization that Gaius' schema demands.

In this chapter I turn from looking at persons as an isolated category to exploring how it interacts with the other two categories in the institutional paradigm. I argue that the persons-things-actions structure should be understood not as a line divided into three discrete zones, but rather as a triangle, enclosing an area within which the three categories interact in varying proportions. This model of Gaius' structure creates three meaningful interfaces between the categories: between persons and things, between persons and actions, and between actions and things, plus the different possible relationships between members of each category. Consideration of these interfaces makes Gaius' static conception of the categories as pigeonholes into a dynamic structure, in which each category affects the other two. What I want to do is use these dynamic interactions between the categories both to reclaim a space for the person against encroachments by its neighboring categories, and to add dimensions to the concept of the person that have been underemphasized or ignored in the law.

By recasting Gaius' scheme to emphasize the interactions between the categories rather than the categories themselves, legal classification changes from the empiricism of simple either/or choices to the rhetorical and normative process of constructive and

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by Michael B. Smith (New York: Columbia University Press, 1999) 97; Emmanuel Levinas, "Signature" in *Difficult Freedom: Essays on Judaism*, trans. by Seán Hand (London: Athlone, 1990) 291 at 293.

constitutive interaction between different areas of legal knowledge that we examined in chapter 1. In other words, my contention in what follows is that legal categories in general—and persons in particular—cannot be understood as exclusive, antagonistic entities, self-contained and insulated from their neighbors. Rather, each category includes—*as part of itself*—a zone of slippage or ambiguity, in which aspects of the neighboring category intrude to make classification uncertain. This ambiguity, however, provides an opening for reworking the legal concepts that the categories deal with, a way to add resonance and richness to the concepts and so to make them a closer reflection of the society upon which they draw.

I. Boundaries

Gaius' schema divides the world of private law into persons, things, and actions, and in so doing creates not only these categories, but also the boundaries between them, points of contact where one category gives way to another. Categories have a seductive effect, however, and draw attention to their centers, leaving their edges (as well as their interactions with their neighbors) largely unexamined. We saw in chapter 1 that the process of classification is a way of structuring reality, and this normative role of classification is nowhere clearer than in these liminal zones between categories.

Boundaries are metaphorical constructs rather than natural *a priori* distinctions, and so they operate in the realm of language, where things tend to be fluid, provisional, and contested. In other words, boundaries depend on community negotiation, with both their placement and their meaning coming out of this social process of compromise and recognition.[202] As such, boundaries are not simply the divisions between pigeonholes, but rather represent the interfaces between different—and fundamentally contested—realms that the community has viewed as conceptually distinct. If we treat boundaries not as defined and impervious walls, nor even as selectively porous membranes, but rather as zones or spaces within which one realm gives way to another, we can bring forward the

[202] Minow, *supra* note 130 at 1883.

process of negotiation and transaction central to legal classification, the give-and-take between categories and the concepts associated with them.

By opening up these interfaces to scrutiny we shift how we analyze legal concepts, since it is no longer only the categories themselves that are meaningful, but also the boundaries between them. These interfaces are normative spaces: they play a dynamic role in producing meaning, since classification is the byproduct of the interplay among the categories. Domat's monster, for example, is not clearly a person or a thing or an action, and so classifying it as one or the other means not simply assigning it a label, but making a choice to emphasize particular characteristics and downplay others.

In Gaius' taxonomy—at least as it is usually understood—something must fit into one and only one of the categories: since the system is exhaustive, something must be either a person, or a thing, or an action. There can be no fourth option (no "others" as in Borges' Chinese encyclopedia), and no boundary straddling. Roman lawyers picked apart the coherence of this system long before its categories were challenged by owned corporate entities granted legal personality or biotechnological innovations. Ulpian, for example, noted that the household (*familia*) partakes of both persons and things, depending on the point of view from which it is examined.[203] The very nature of actions challenges the system as well, since the category divides into actions *in rem* and actions *in personam*, each part thus looking towards one of the other categories.[204]

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[203] Dig. 50.16.195.1 (trans. Watson): "Let us consider how the designation of 'household' is understood. And indeed it is understood in various ways; for it relates both to things and to persons: to things, as, for instance, in the *Law of the Twelve Tables* in the words 'let the nearest agnate have the household.' The designation of household, however, refers to persons when the law speaks of patron and freedman: 'from that household' or 'to that household'; and here it is agreed that the law is talking of individual persons."

[204] *E.g.* Dig.50.16.178.2 (Ulpian): "The word 'action' is both specific and general; for everything is called an action whether it is a claim *in rem* or one *in personam*; but for the most part we are accustomed to call those things actions which are *in personam*. But actions *in rem* seem to be meant by the word 'petition.' ..." See also Dig. 50.16.36 (Ulpian): "The word 'suit' covers every action whether *in rem* or *in personam*."

The logic of legal classification is still however largely driven by an understanding of boundaries between categories as either/or choices.[205] The effect of this is to keep the categories conceptually insulated from one another: as boxes within which legal data are filed, the emphasis is on difference rather than overlap and connection. In the case of Gaius' schema, the tendency is to view it as a series of binary oppositions arranged linearly, unfolding following the structure of Gaius' *Institutes* as persons then things then actions. This linear view creates two interfaces between categories, and scholars have recently begun exploring their implications: the persons-things interface[206] and the things-actions interface.[207] This sort of relational thinking is welcome, since it begins to make Gaius' static structure more dynamic, but the either/or binary oppositions in this view are too limited to deal with the sort of taxonomic mixing we saw in Domat's monster.

Even if we loop the linear paradigm around, however, and create a new interface between persons and actions, our problem is not solved, since the system still breaks down into a series of binary either/or pairs. This third shadowy persons-actions interface is important, however, even crucial to understanding the system, since it highlights aspects of persons and things that are otherwise left out. What we need is a model that incorporates the multivalence and fluidity of all three categories, a model that can account for the constantly shifting alliances between them. Conceptualizing these interfaces is difficult, since multivalent legal concepts do not lend themselves to easy naming: the heritage of Gaius' pigeonholes severely constrains the possibilities, since in the end it always demands a single and definite answer to the question "well, what is it

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[205] Christopher Stone has argued that this binary view of categories is an outgrowth of what he calls "moral monism", or the idea that a single coherent body of principles governs the moral universe; Stone, *Earth*, *supra* note 93 at 159.

[206] *E.g.* Richard Gold, "Owning Our Bodies: An Examination of Property Law and Biotechnology" (1995) 32 San Diego L. Rev. 1167 [Gold, "Owning Our Bodies"]; Radhika Rao, "Property, Privacy, and the Human Body" (2000) 80 B.U. L. Rev. 359; Baud, *supra* note 50; Christopher D. Stone, "Should Trees Have Standing?—Toward Legal Rights for Natural Objects" (1972) 45 S. Cal. L. Rev. 450.

[207] *E.g.* Thomas W. Merrill & Henry E. Smith, "The Property/Contract Interface" (2001) 101 Colum. L. Rev. 773.

then?"

We can approach a visualization of the dynamic model of Gaius' paradigm that I have in mind if we think of the system not as the usual spectrum, nor even as a circle (with actions linking back to touch persons), but rather as a triangle, with classification taking place within the area enclosed by the triangle, rather than along its perimeter. This visualization, I think, makes it clear that Gaius' is a closed system, while at the same time graphically illustrating the interrelations between all three categories. Each point of the triangle is one of the categories, either persons, or things, or actions. As we move towards the center of the triangle, we get a more and more balanced mingling of all three categories—we might think of the blending of three colors at the center, rather than sharp lines dividing the three zones. Interactions primarily between two categories take place close to the sides of the triangle, while relatively unproblematic examples of each category would be close to the triangle's points.

This kind of structuralist modelling should not be pushed too far, but it does offer two heuristic advantages. First, it brings into play the third (hitherto neglected) interface, that between persons and actions, and so allows us to bring ideas of interaction and relationship into our legal concept of the person (as well as of the thing). Second, it makes it clear that all three of the categories play a role in any classificatory decision: it is extremely rare (and probably impossible) that something will unproblematically belong to one category, without influence from the others. The paradigmatic examples of the toothbrush or the wedding ring that we find in property theory would seem unambiguously to be corporeal things, yet their intimate connections with one particular individual touches personhood issues as well.[208] In other words, this model can help us move away from the limited view of taxonomy as the either/or process of deciding on which side of a line to put something. Instead, it puts all three categories into dynamic relation with one another, recognizing the role each plays a role in constituting the others.

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[208] See *e.g.* Margaret Jane Radin, "Property and Personhood" (1982) 34 Stan. L. Rev. 957 at 959-60; Margaret Jane Radin, "The Consequences of Conceptualism" (1986) 41 U. Miami L. Rev. 239 at 243; C.B. Macpherson, "Human Rights as Property Rights" in C.B. Macpherson, *The Rise and Fall of Economic Justice and Other Papers* (Oxford: Oxford University Press, 1985) 76 at 79.

Though binary oppositions might be cognitively easier for the mind to grasp, the addition of a third option—particularly one in dynamic relation to the others—opens up additional analytical nuances and possibilities. A good example is the "middle voice" in language that Hayden White has discussed. Unlike the active and the passive voices, in both of which the subject is exterior to the action of the verb (I hit; I am hit), the middle voice (as in Greek) "is used especially to indicate those actions informed by a heightened moral consciousness on the part of the subject performing them"—in other words, the subject is interior to the action expressed by the verb.[209] The middle voice thus works somewhat like the modern reflexive verb, though with a stronger merging of subject, action, and object. This sense of involvement and interiority provides a useful way to conceptualize the interrelationships between legal categories, since it suggests that something can partake of several categories at the same time, rather than being one or the other only.

Reconceiving Gaius' schema in this way has important implications for understanding the person in law, as it forces us to shift our attention from ontological status (is something a person or a thing?) to its positioning or embeddedness in a social matrix.[210] This view of legal categories as essentially related to each other helps us challenge still further the view of the person predominant in law, such as presented in the previous chapter. Examining the persons-things interface allows us to bring forward aspects of the person that are not linked to the market, and so to challenge the patrimonialization of the person. Examining the persons-actions interface allows us to introduce relational elements into our view of the person, and so to challenge the transactionalization of the person. Both together help move the person closer to the human being.

By focusing on the interfaces between the categories and on the interactions that take place at these zones of juncture, I have two goals for what follows. First, to reclaim

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[209] Hayden White, "Writing in the Middle Voice" (1992) 9 Stanford Literature Review 179 esp. at 185-86.

[210] This term is particularly associated with the work of Charles Taylor, *e.g.* Taylor, "Atomism", *supra* note 132 at 209. See the discussion below in Part III of this chapter.

space for the person (and the human being) from the encroachments of the neighboring categories, each of which deals with matter more congenial to the liberal model of law: objects of wealth on the one hand, and means of acquiring objects of wealth on the other. In particular, I would like to look at the persons-things interface to see how the power of property discourse has worked to circumscribe the category of persons by commodifying aspects of the human being. Second, to use the neighboring categories to add dimensions to the concept of the person that are frequently ignored. Here the persons-actions interface is particularly important, since it brings the idea of interaction into analysis of the person, and so allows us to analyze the person as embedded in social and legal relationships, rather than as an isolated economic actor.

In a sense, then, our concept of the person is a byproduct of how we construct its neighboring categories, things and actions. But where we start analysis is a normative choice, and analyzing persons in the light of things and actions leads to the problems of patrimonialization and transactionalization that we examined in chapter 2. Instead, it is important to look at persons not as the residue of our other classificatory decisions, but rather as both informed by and informing the other categories. Things and actions add to our view of the person, and the person adds to our view of things and actions; none of these categories are inert conceptual material walled off in their own compartments.

II. The Persons-Things Interface

Since Gaius' time, the categories of persons and things have enjoyed an implicit primacy as the *summa divisio* within the institutional system. Unlike actions or obligations, persons and things have a common-sense appeal: they are (or seem to be) ordinary words with common and accepted meaning outside the law. It could even be argued that Gaius' system might function perfectly well with just these two categories: actions (or obligations, or ways of acquiring) is really a second-order category, which works with persons and things. We will see in the next section that this binary view of the law is insufficient, and that the third category—particularly if we recast it as interactions—plays an essential role in constituting both persons and things. For now, however, this implicit hierarchization of the institutional schema shows how important

the persons-things interface is: if much of the law really can boil down to persons and things, it is essential to understand the processes of negotiation—both in law and popularly—that determine what is a person and what is a thing.

Traditionally, the category of things has done the lion's share of work in Western legal systems, with persons relegated to the ever-shrinking remainder. In Justinian, things comprised the whole of what in modern civilian parlance would be property, obligations, and successions, while Austin regarded the law of things as The Law writ large, with persons simply some minor exceptions to it.[211] The problem, however, is that in neither Gaius nor Justinian (nor in Domat, Pothier, or Blackstone, for that matter), is there a definition of things as an overarching category, just as there is no definition of what a person is: each category is implicitly defined negatively, as whatever is not the other.[212] What the category itself means is taken to be self-evident; the taxonomic effort is instead put into subdividing the material once it has been categorized. The implicit message this sends is that the categories are coherent, clear, and distinct, and taxonomic difficulties arise primarily at a lower level, within the categories rather than between them.

Moreover, the traditional view has been that within the institutional structure persons and things have (indeed, must have) a clear boundary between them, which corresponds to the distinction between subject and object—between *être* and *avoir*,[213] being and having, the self and the world—that is regarded as central to, even inherent in, the nature of human society. This distinction between persons and things is the cornerstone of the liberal paradigm as envisaged by Locke and Kant,[214] and today the placement of this boundary (whose existence is seldom questioned) is the source of considerable conflict in areas such as fetal rights and biotechnology. Conflict arises in part from (or at least is exacerbated by) the fact that the nature and location of this

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[211] Austin, *supra* note 57 at 708.

[212] Edelman, *supra* note 7 at 308.

[213] See generally Sériaux, "Patrimoine", *supra* note 49.

[214] Margaret Davies & Ngaire Naffine, *Are Persons Property? Legal Debates about Property and Personality* (Aldershot: Ashgate, 2001) at 2; Poole, *supra* note 78 at 46.

boundary engages so many different normative discourses. Law, religion, science, philosophy, and morality each address the basic question of what is a person and what is a thing, and give widely divergent answers to it.

As we saw in chapter 1, however, categories in law (as elsewhere) are rhetorical constructs, not simple reflections of outside reality; indeed, they help to construct that reality. For this reason, there can be no *a priori* division between the category of persons and that of things: the law is not, as J.E. Penner would have it, "criss-crossed with ready-to-tear perforated lines,"[215] but rather marked by gray areas that defy generalization and compartmentalization. Though the categories we do have, whether we view them as time-honored ways of thinking or as oversimplified pedagogical crutches, grow out of and depend on the system to which they belong, any legal system includes gray areas and ambiguities, and these undermine the coherence of the categories. In some contexts, for instance, human beings are treated as things (for example as objects of the power of the state or of employers),[216] and sometimes certain things are (or should be) treated as persons or parts of persons (such as human body parts, or objects with particular emotional connections to a human being). It is precisely the contested relationship between our notion of persons and our notion of things—each of which overlaps the other—that creates these classificatory difficulties, and we cannot get around the problem simply by asserting that categories have an ontological necessity. We are faced with a version of the hermeneutic circle: we cannot define a category without first defining what will go into it, and we cannot put anything into a category until the category has been defined.

The boundary between persons and things naturally blurs, because it rests on little more than the anthropocentric bias towards self-awareness and reason that distinguishes human beings from other animals, and animals from things.[217] Even with slavery

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[215] J.E. Penner, *The Idea of Property in Law* (Oxford: Oxford University Press, 1997) at 41 [Penner, *Idea of Property*].

[216] See *e.g.* Barron, *supra* note 152 esp. at 109.

[217] Kelley, *Human Measure*, *supra* note 48 at 8. For a challenge to this anthropocentrism, see Stone, *supra* note 93.

abolished in modern legal systems, the patrimonialization of aspects of the person (name, image, voice) has worked towards the assimilation of persons into things: in cold instrumentalist logic, whatever can be treated as a thing is treated as one, unless there are compelling reasons (which generally derive from this anthropocentric bias) to the contrary.[218] Given this prevailing drift between the categories, as well as the central importance of both persons and property in Western liberal and humanist ideologies, the question then becomes not whether there is an interface between persons and things, but rather on whose terms this conceptual interaction will take place. It makes a profound difference in the character of a legal system whether classification proceeds from the basis of the primacy of persons or the primacy of things, and different justifications are required for each.

Our liberal world grants property discourse tremendous power to transform our view of what constitutes a thing and in so doing to colonize other areas of law. For this reason, the negotiation between the categories of persons and things has generally taken place from the standpoint of the latter.[219] As Austin suggested, it is more common to view persons as exceptions to universal reification than to see things as exceptions to universal agency, and the comparative historical fates of the law of property and the law of persons bear this out. Property is a flexible and malleable institution, which can be shaped to reflect and protect the needs almost any kind of society.[220] There is a danger, however, in being overly accommodating and allowing property to do too much, to steadily shrink the domain of persons as things ever more integral to the human being are redefined as objects of property. Particularly in the United States, but elsewhere as well,

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[218] An early critic of this was Josserand, *supra* note 167 at 4.

[219] Compare Macpherson, *supra* note 208 at 84, who argues that hitching other concepts (such as human rights) to the power of property might be useful in establishing them.

[220] J.W. Harris's imaginary societies, each with a different property system, are a vivid illustration of this point. See J.W. Harris, *Property and Justice* (Oxford: Oxford University Press, 1996) at 15-22.

aspects of the human being from one's privacy[221] to one's image[222] to body parts and genetic information[223] have been designated objects of property and subjected to the market. In part this is due to the atrophying of the concept of the person in the Common law, which has left courts little choice but to designate as property anything that has no more obvious category, but even in the civil law the power of property rights gives litigants both the potent means and lucrative goal they want, and the extrapatrimonial is increasingly becoming patrimonialized.[224]

The problem with allowing our view of property to set the boundary between persons and things is that in law today property is largely conceived in market terms: courts (if not individuals) deal more comfortably with things considered as wealth valued in money than with things considered as unique objects valued subjectively.[225] The ostensibly universal logic and language of the market make property seem the great equalizer, a vulgate into which it is easy for things to shift if care is not taken to consider its normative implications. How dominant in this interaction property will be, however, depends on how we define property: as Duncan Kennedy has noted, the definition goes a long way to determining the extent of the institution:

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[221] For an early discussion of privacy as a form of intangible property see "Modern Developments of the Jurisdiction of Equity" Note (1907) 7 Colum. L. Rev. 533 at 534, cited in Kenneth J. Vandevelde, "The New Property of the Nineteenth Century: The Development of the Modern Concept of Property" (1980) 29 Buffalo L. Rev. 325 at 334. The recasting of certain aspects of privacy as a form of property right continued in William L. Prosser's influential article "Privacy" (1960) 48 Cal. L. Rev. 383.

[222] In the United States, though there were earlier antecedents, the line of cases interpreting the right to one's image as a proprietary right begins with *Haelan Laboratories v. Topps Chewing Gum*, 202 F.2d 866 (2nd Cir. 1953), which established the "right of publicity" in American law.

[223] E. Richard Gold, *Body Parts: Property Rights and the Ownership of Human Biological Materials* (Washington, D.C.: Georgetown University Press, 1996). See also the famous decision in *Moore v. Regents of the University of California*, 793 P.2d 479 (Cal. S.C. 1990).

[224] See Reiter, *supra* note 159 at 681-705.

[225] See generally Bernard Rudden "Things as Thing and Things as Wealth" (1994) 14 Oxford J. Legal Stud. 81.

> If property means "absolute dominion over the external things of this world," then it is only a small part of private law. If it means absolute dominion or some lesser legally protected interest in external things of this world, then the category is larger, but by no means all-inclusive, since the whole field of what are called "obligations" is excluded. If property means simply "right," then it includes all of private law.[226]

Once, property seemed in danger of being swallowed by contract, as the bundle of rights overshadowed the thing.[227] Now, property is the aggressor, threatening to devour most forms of rights, many aspects of personhood, and even much of contract and tort as well.[228]

As things stand, our language for taking things out of the property system presupposes evaluative market language as the norm. The very linguistic form of concepts like extrapatrimoniality, *hors commerce*, and inalienability presents them as exceptions to the predominant paradigms of patrimony, commerce, and alienability respectively. It seems perverse to say that there are things that are "not in commerce" but still property. This is particularly so with regard to the person and the rights closely connected to personhood (such as privacy, bodily integrity, and so forth—the extrapatrimonial personality rights of the civil law). Though not all alienability need be market driven, as Margaret Radin has argued,[229] and though a patrimony also theoretically contains things of value that are not owned, the rhetorical power of property discourse within liberal society is such that fine gradations are difficult to sustain against

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[226] Kennedy, *supra* note 73 at 319.

[227] This derives especially from the implications of Wesley N. Hohfeld, *Fundamental Legal Conceptions As Applied in Judicial Reasoning* (1919; reprint New Haven: Yale University Press, 1964). See the commentary in J.E. Penner, "The 'Bundle of Rights' Picture of Property" (1996) 43 UCLA L. Rev. 711; Penner, *Idea of Property*, *supra* note 215 at 153-201.

[228] Some implications of this are discussed in Carol M. Rose, "The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems" (1998) 83 Minn. L. Rev. 129.

[229] Margaret Jane Radin, "Market-Inalienability" (1987) 100 Harv. L. Rev. 1849.

it.[230] The result is a slippery slope whose bottom is the position where anything to which the creativity of a market-dominated society can assign a value is brought within the property regime to be subjected to the full panoply of broad rights of ownership.

Allowing the persons-things interface to become a one-way membrane allowing only ever-increasing commodification misses the potential of the other kinds of conceptual exchanges that might take place between persons and things. An interface between categories means that the categories are related to one another, mutually, and not simply as colonizer-colonized. This allows us to see not just how aspects of the person can function as things, but also how our concept of the person as bounded individual depends on connections to certain things. Categorization at this interface is more than simply coming up with two definitions, one for persons, another for things, and choosing the proper pigeonhole; more than drawing a boundary "between what we have or do, on one hand, and what we are, on the other."[231] It really involves setting the terms of our interaction with the world and of the influence of the world on us. If we define the persons-things interface around concepts foreign to the analysis of the person—concepts like commodification, fungibility, and alienability—the battle is already lost. By reducing classification to a question of the scope of property rights, we have privileged property (and market) discourse to such an extent that the category of persons becomes largely a placeholder.[232] In such a case we do not have an interface—a site of interaction—but rather a boundary that shifts as one category grows at the expense of the other.

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[230] See, for instance, Stephen Munzer's argument "that persons do not own their bodies but that they do have limited property rights in them"; Stephen R. Munzer, *A Theory of Property* (Cambridge: Cambridge University Press, 1990) at 41.

[231] Hill, *supra* note 78 at 313.

[232] Compare Kevin Gray, "Property in Thin Air" (1991) 50 Cambridge L.J. 252 at 256: "[T]he refusal to propertise a given resource is absolutely critical—because logically anterior—to the formulation of the current regime of property law. The decision to leave a resource outside the regime is, pretty clearly, a fundamental precursor to all property discourse."

The standard site for discussing issues like these is with respect to the human body and rights of personality like privacy.[233] Both of these examples sit squarely in the liminal zone between persons and things, since they are associated with the human being but detachable and so transactable in market terms. As such, our analytical starting point has a strong effect on how we conceptualize them. In cases like these, market discourse presents problems, since society is generally unwilling to treat kidneys like automobiles. But in a system with a severely circumscribed category of persons, the conceptual alternatives to commodification are lacking, and such things have nowhere to go except somewhere along the property spectrum. Once classed as things, the assumptions about the property institution take over, and we are faced with market commodification as the default position.[234]

But human body parts and abstract, "thingless" rights like privacy are in many ways extreme examples that mask the real issue: that certain things are so closely connected to the person that thinking of them as "valuable resources" or even as "things" at all is to misunderstand what is happening at the interface. Though in appearance a wedding ring is a thing, emotionally and symbolically it functions as part of the person. In the case of objects like this—and also with intangibles like one's name or image or privacy—we see the category of persons reaching out to exert its own normative pull in the contested zone of interface between the two categories. Things like wedding rings or body parts or one's name are connected fundamentally and unavoidably to both categories, and they cannot satisfactorily be limited to one or the other. Their "personness" is essentially shaped by their material qualities, while their "thingness" is tempered by the affective, symbolic, and spiritual resonances that come out of their connection with human beings.

The civil law distinction between extrapatrimonial and patrimonial rights perhaps gets closest to what happens at the interface, since it distinguishes between the personal

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[233] See the literature cited *supra* note 206.

[234] See Gold, "Owning Our Bodies", *supra* note 206 at 1230-31. I am more skeptical than Gold about the appropriateness of applying even a changed property discourse to things intimately connected to the person.

aspects of rights (their personhood qualities) and their public aspects (their value- or market-oriented side). The problem, however, is that concepts like extrapatrimoniality and *hors commerce* do not do justice to what is going on at the persons-things interface, since they already assume both the language of property discourse and an either/or view of classification. Jean-Pierre Baud suggests that what is needed to deal with the taxonomic problems at the interface between persons and things is an intermediate category to accommodate what is too personlike to be a thing but too thinglike to be a person.[235] Baud argues that the human body requires such an intermediate category, but the family,[236] Domat's monster, even the ubiquitous toothbrushes and wedding rings might in certain contexts go here as well.

Baud views this intermediate category as things without price, however,[237] whereas I have argued that the concept or *hors commerce* presumes the logic of the property system, and so leaves inadequate space for persons. Rather than an intermediate category, it seems to me we are in the realm of interface: of a zone that is strongly linked to persons and so can resist the normative pull of property discourse, but is at the same time filled with things like body parts and subjectively personal property that cannot be considered persons in their own right. An interface is not simply a new either/or choice: it is a space where the answer is "both", where either category alone would be insufficient to deal with the complexities of the subject matter, and would result in an unacceptable narrowing or distortion of what was being categorized.

III. The Persons-Actions Interface

The third category in Gaius' schema is by far the most fluid both in conceptualization and in content, particularly after it was defined away from its original incarnation as procedure (actions) to either obligations or ways of acquiring property in

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[235] Baud, *supra* note 50 at 217.

[236] See above, text accompanying note 203.

[237] Baud, *supra* note 50 at 222.

its modern versions. Unlike persons and things, based originally on physical material that can be seen and touched, and then developing in analogy to this physical material, the category of actions is based on intangibles. Donald Kelley has described it as "the theoretical point where self-consciousness becomes social consciousness and where the defining faculty of human will, as expressed in language as well as behavior, becomes essential both for social activity and for legal regulation."[238] It represents, in other words, links or interactions between persons or things, and so touches qualities of movement between categories, of moral engagement, and of relationship.

This category embraces a wide variety of subject matter, one reason why it is so difficult to pin down. Peter Stein has called obligations the "joker in the pack of civil law categories,"[239] and his description is just as apt applied to the third category however it is characterized. The definitional shifts surrounding this category over the centuries are fascinating, and indicate a searching for a way to generalize the different possible links between persons and things.[240] We see this clearly in the differences between the modern successor categories to "actions": "obligations" looks one way, in that it recharacterizes actions to bring out interpersonal relations, while "ways of acquiring property" looks the other way by emphasizing the relations between persons and things.

As I suggested above, the traditional linear model of Gaius' paradigm is misleading, since it relates the third category only with things, and not with persons. In law persons interact both with other persons and with things: in the law of contract, for example, while contracts such as sale, lease, and deposit involve things (and persons too, of course), others such as mandate and partnership involve persons, their status, and their interpersonal relationships much more than their things. The third category has two interfaces, and both are important, in particular (for our purposes) the persons-actions interface. This interface, which has received little attention, might be characterized—

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[238] Kelley, *Human Measure*, *supra* note 48 at 8.

[239] Stein, "Quest", *supra* note 30 at 158.

[240] Arnaud, *supra* note 74 at 92 makes a similar point with reference to the mixture of subjects found in book 3 of the French *Code civil*. See also Baud, *supra* note 50 at 64.

following Kelley's description—as the area of interactions between the individual and the community. In economic matters this might be seen as the interplay between competition and cooperation, in social relations we might view it as the tension between autonomy and dependence, but in each case the basic idea is the same: a move from the separate to the joined.

Viewed broadly, then, this third category brings to the statically conceived categories of persons and things in Gaius' schema relationships and interactions of all kinds, from social or affective relationships (such as aspects of family), to legal relationships (such as employer/employee and aspects of parent/child), to relationships with things (such as custodial obligations). These various kinds of interactions, moreover, call attention to qualities such as affect and power that are crucial to understanding how legal systems actually function, but that are otherwise missing from the schema. In short, if we view persons as the realm of *être* and things as *avoir*, this third category works with the others to emphasize the intermediary states of being, getting, and having. And as we will see, these transitional states, by focusing on process rather than product, bring into focus moral and ethical aspects of the law that otherwise tend to remain hidden.

In this way, by acting with and on the other two categories, the category of actions serves to change the meaning of both persons and things through its interactions with them at the two interfaces. If we look at the persons-actions interface in these terms, what we see is a zone in which different kinds of relationships of different intensities bind individual actors together. As the intensity of the relationship increases, the links become more and more closely connected to the individuals involved, such that the relationships bring out new, collective dimensions of the individual.

This emphasis on the person's constitutive relationships puts the metaphor of the person in law on a different footing. What it means is that our legal understanding of the person differs significantly when we broaden our inquiry beyond purely ontological questions (what is a person) to include functional questions (what role does the construct play in the legal system). Concentrating analysis exclusively on ontology tends to throw up boundaries around the person, isolating it from other parts of the legal system and from other similarly constituted persons. Looking to the social and legal roles that individual actors play, however, brings these external interactions to the foreground, and

makes firm boundaries around the individual untenable. The traditional view of the liberal subject as atomistic and competitive rather than as connected and cooperative has justly been criticized as a caricature in relation to human beings,[241] and yet it proceeds naturally from a construction of legal categories as bounded from each other rather than as interacting. The idea of boundaries sharply constrains the analytic possibilities of a more fluid view of the interfaces between the categories, since it creates either/or dichotomies rather than allowing the possibility of "both".

Caricature or not, as we saw in the last chapter the liberal conception of the individual—that is, an autonomous agent whose flourishing (closely linked to the idea of liberty) requires insulation from the potential interference of both other individuals and the state—continues to exert a strong influence on the legal conception of the person in law. While this liberal paradigm is far from useless, exclusive reliance on it ignores the significant relational aspects of personhood for which both feminist and sociological theorists have made persuasive cases. Charles Taylor and Jennifer Nedelsky have been among the more prominent exponents of this relational view of the person, which tempers the individualism of liberal autonomy by stressing that autonomy is a restrictive and ultimately empty concept if it is dissociated from the relations with others that characterize and give meaning to any human or social action.[242] William MacNeil captures the essence of this critique when he decries "the pathological logic of liberalism which holds loneliness to be virtue rather than a vice, calling it autonomy."[243]

One insight that relational feminism brings to this analysis is that autonomy is more than independence (which is really a static human characteristic), and should instead be seen as "a capacity that requires the right kind of sustaining relationships."[244]

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[241] See especially McClain, "Atomistic Man", *supra* note 133.

[242] See especially Taylor, "Atomism", *supra* note 132; Taylor, "The Person", *supra* note 78; Jennifer Nedelsky, "Reconceiving Autonomy" (1989) 1 Yale J. Law & Feminism 7 [Nedelsky, "Reconceiving Autonomy"]; Nedelsky, "Bounded Self", *supra* note 132; Nedelsky, "Reconceiving Rights", *supra* note 166.

[243] MacNeil, *supra* note 129 at 37.

[244] Nedelsky, "Citizenship", *supra* note 137 at 138. On the idea of autonomy as capacity see also Nedelsky, "Bounded Self", *supra* note 132 at 168.

In other words, autonomy is not freedom from society, but rather the capacity to be a part of society and to draw strength and meaning from this link.[245] The recalls Carol Gilligan's work on the role of relationships in constituting the female "different voice",[246] but more generally it also captures the importance of the persons-actions interface and the meaning that comes from it. Since everyone is unavoidably socially (and also legally) embedded in a variety of networks of different kinds of relationship, these connections are fundamental to what it means to be a human being.

The relational critique of the liberal subject does not discard the notion of the individual entirely, nor does it argue that the self is constructed by its relationships. Interplay between individual and society is crucial: the relational critique seeks to bring out the social dimensions of autonomy (and agency) alongside their individual aspects.[247] How the self is constituted requires awareness of one's place in society and one's relations with other individuals. The idea of a clear boundary between the individual and society hides the tension between them: indeed, the notion of relationship calls into question the extent to which the individual and society can even be thought of as distinct at all.[248]

This underscores the political nature of boundaries in law. By positing a rupture between the individual and society by retaining the normative liberal vision of the bounded individual as the paradigmatic person, the law makes competition and antagonism central. We see this for example in aspects of the classical law of contract,

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[245] Naffine, *supra* note 135 at 84. On historical aspects of this idea, see Natalie Zemon Davis, "Boundaries and the Sense of Self in Sixteenth-Century France" in Thomas C. Heller, Morton Sosna & David E. Wellbery, eds., *Reconstructing Individualism: Autonomy, Individuality, and the Self in Western Thought* (Stanford: Stanford University Press, 1986) 53.

[246] Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, Mass.: Harvard University Press, 1982), esp. chap. 2.

[247] Nedelsky, "Reconceiving Autonomy", *supra* note 242 at 8; Abrams, *supra* note 182 at 806.

[248] See Nedelsky, "Bounded Self", *supra* note 132 at 162.

such as the absence of a duty to volunteer information.[249] Autonomy, then, and the concept of the person built around it, are defined in market-like, transactional terms. The law thus sets up a false dichotomy between two opposing choices: either one acts in a selfish manner, denying relationships that are in fact present (the course that the law, given the operative paradigm of the person, recommends), or one acts altruistically, creating relationships that the law then views as supererogatory and so beyond its ken.[250] This perhaps facilitates commerce and the adjudication of disputes, but it does so at the expense of values such as cooperation and caring that provide the basis for a very different model of human interaction.[251]

Central to this critique of the liberal individual is a critique of the pernicious aspects of rights culture. Rights, as the hallmark of the liberal individual in law, can be antithetical to community: they construct barriers by arming the individual with legally-recognized and enforced weapons against any interactions with others not specifically chosen. This is the pathology of rights, and of the boundaries they create. The bounded liberal subject of rights, closed off in an autonomous world of liberty, privacy, and individualism, may be an efficient economic actor and a "reasonable man" for legal purposes, but is hardly a healthy human being in social, ethical, or moral terms. Nedelsky goes so far as to call the application of the metaphor of boundaries to persons "destructive", even perverse.[252] By inscribing a kind of misanthropy into the very idea of the person, the law effectively abandons any aspirational ideals in favor of the efficient fiction of atomistic individuals achieving a precarious *modus vivendi* with each other.

Rights, however, can also be seen as linking the individual to the community, if we move away from seeing rights as trumps and towards the implicit obligations and

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[249] On classical contract law and its liberal underpinnings, see P.S. Atiyah, *Essays on Contract* (Oxford: Clarendon Press, 1986), esp. at 13-17, 121-49.

[250] Jean Bethke Elshtain, "Law and the Moral Life" (1999) 11 Yale J.L. & Human. 383 at 393.

[251] Colleen Sheppard, "Caring in Human Relations and Legal Approaches to Equality" (1993) 2 N.J.C.L. 305 at 338.

[252] Nedelsky, "Bounded Self", *supra* note 132 at 163, 170.

duties that rights include.[253] Charles Taylor has spoken of rights as implying "an obligation to belong", an interesting idea that views society not as a threat to an atomistic individual and his or her autonomy or liberty, but rather as a responsibility all humans have to work together.[254] If obligation means duty, then belonging imposes on the individual responsibility—both in the sense of commitment and in the sense of responsiveness.[255]

By recasting rights as duties and obligations in this way, the persons-actions interface can be seen as reintroducing the idea of agency into the category of persons, but agency of a particular kind, distinct from liberal individualism and embedded instead in what Taylor has called the "social matrix".[256] Liberal agency looks inward, in a frankly selfish way: one need act only when one's promises or one's other actions (that is, one's will) compel it. From the traditional resistance of the Common law to impose a duty to rescue to the rejection of lesion among capable adults in many of the nineteenth-century liberal civil codes, the law in its liberal guise is content to let the individual choose his or her relationships. The agency of the relational view of the person, by contrast, looks outward to active affective, intellectual, or spiritual links with others, links that play a key role in constituting the self. Viewed in this way, neither autonomy nor agency are individualistic. Rather, they are social qualities that arise from one's relationships, and that draw their meaning from these relationships. The point is that persons are both individual and social, but that liberal theory has paid scant attention to the social

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[253] See Minow, *supra* note 130 at 1871-82; Nedelsky, "Reconceiving Rights", *supra* note 166.

[254] Taylor, "Atomism", *supra* note 132 at 200, 206. See also Nedelsky, "Reconceiving Autonomy", *supra* note 242 at 21.

[255] Carol Gilligan, "Remapping the Moral Domain: New Images of the Self in Relationship" in Thomas C. Heller, Morton Sosna & David E. Wellbery, eds., *Reconstructing Individualism: Autonomy, Individuality, and the Self in Western Thought* (Stanford: Stanford University Press, 1986) 237 at 238. Compare Levinas' work, cited *supra* note 201.

[256] Taylor, "Atomism", *supra* note 132 at 209. Note however that Christopher Stone points out the often limited nature of such relationships, which tend to be restricted to one's immediate community; Stone, *Earth*, *supra* note 93 at 20.

dimensions of personhood.[257] By conceptualizing an interface between the person and interactions, we bring this social dimension within the category of persons, and personhood concerns within the category of actions. As we saw with the persons-things interface, the persons-actions interface underscores the essential linkages and mutual influences between categories. Relating persons and actions in this way brings forward both the centrality of interactions to our concept of the person, and the importance of moral, ethical, and social aspects of agency and autonomy to our concept of legal interactions.

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To return to the example of Domat's monster with which we began, we see more clearly how it challenges the static and linear view of Gaius' schema. Although Domat clearly excludes the monster without human form from the category of persons, we see that it is precisely the human qualities that it does have (particularly its parentage, but also any physical resemblance to humans it might have) that keeps it from fitting clearly into the category of things. Similarly, its lack of most of the usual formal attributes of humanity keeps it out of the category of persons: in cases where the monster has a sufficiently human form, it becomes a person. Both its personness and its thingness, however, are colored by its interactions—with its parents especially, but also with society generally and its assumptions. And it is these interactions, with their overtones of duty and obligation, that really add complexity—but also interest—to the problem of the monster.

It is significant that Domat put the emphasis in his treatise on Gaius' third category: persons and things are part of the *livre préliminaire*, while the treatise proper comprises *Des engagemens*. Domat was in some ways a proto-liberal in his view of the person,[258] and yet in many respects he retained an older conception of the person as strongly linked to its community. Though his treatment of the monster would not be the

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[257] Nedelsky, "Reconceiving Rights", *supra*, note 166 at 13.

[258] See generally Bernard Edelman, "Domat et la naissance du sujet de droit" in Edelman, *supra* note 7 at 47-82, esp. at 74.

way the law treats it today, his recognition of the interplay between form, spirit, and particularly community is an excellent illustration of the issues that categorization in law must engage. By moving away from the limitations of the liberal paradigm in the law of persons—a paradigm that stresses the discrete, coherent, and bounded nature of the legal subject—we can bring back into the law's construction of the person some of the attributes of the human being that have long been written out.

Conclusion

To this point I have concentrated on pointing out how the prevailing construction of the person in law is at some distance from the human beings behind the category, and suggesting ways in which the person might be brought more into line with the human being. I have argued that the dynamic and interactive view of legal categorization that I developed in chapter 3 can help us develop a fuller view of the person in law, one that moves beyond the dominant liberal paradigm of the person as a transactionalized, patrimonialized bearer of rights to bring forward the social relationships, human interactions, and responsibilities that the law has traditionally discounted. In short, my argument has been that in constructing the person, the law has first taken apart and then set aside the human being, and it is only by examining and challenging the assumptions behind this process of translation and replacement that we can begin to reintegrate the human being in law. By way of conclusion, I would like to explore two issues—privacy and status—that I have suggested already, but that can now help pull together various strands of my argument and suggest ways in which it might be pushed still further.

Privacy is a non-concept to some, a fundamental concept to others, and resistant to definition in general.[259] The problem with privacy as a legal concept is that it is fundamentally at odds with the law's construction of the person, and for this reason resists classification. Privacy has proved difficult to accommodate within existing legal systems since it stands at the intersection of so many received categories, such as private law and public law, the individual and society, the public sphere and the private sphere, the person and property, patrimonial rights and extrapatrimonial rights, tort and crime. Multi-faceted and hydra-like, it resists the identity between titulary and right that the

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[259] Among critics, see Raymond Wacks, "The Poverty of 'Privacy'" (1980) 96 L.Q. Rev. 73. Among proponents, see Anita L. Allen, "Coercing Privacy" (1999) 40 Wm. & Mary L. Rev. 723; Linda C. McClain, "Reconstructive Tasks for a Liberal Feminist Conception of Privacy" (1999) 40 Wm. & Mary L. Rev. 759 [McClain, "Reconstructive Tasks"]. See generally Ken Gormley, "One Hundred Years of Privacy" [1992] Wisc. L. Rev. 1335; Robert C. Post, "The Social Foundations of Privacy: Community and Self in the Common Law Tort" (1989) 77 Cal. L. Rev. 957; Daniel J. Solove, "Conceptualizing Privacy" (2002) 90 Calif. L. Rev. 1087.

liberal paradigm of the person demands, but at the same time it is a concept that the popular imagination intuitively associates with the discourse of law: the response to aggressive paparazzi or unwanted telephone solicitations is often "there ought to be a law against that."

The problem with privacy, however, is that though it unquestionably touches the person,[260] it deals with the person not (ironically) in isolation from others, but rather as that person relates to society and to things. Privacy is unthinkable outside community: its function is not to distinguish the self from others, but rather to distinguish the relationships we choose from those we do not. Though on one level privacy might be conceptualized as a right in the liberal tradition, for instance as an individual's liberty-based right to determine the terms under which others may have access, on another level the limits of privacy are determined not by the individual but rather by community norms concerning space, morality, propriety, neighborliness, shame, and so on. The law is happy to operate on this first level; it is much less comfortable with the second. Human beings, however, operate on both levels simultaneously, and a legal concept of privacy needs to take this into account.

Reconceptualizing legal categories as I have done gives us a conceptual framework to use to understand concepts like privacy that are difficult to accommodate within the existing structure of the law because they relate more closely to human beings than to persons as the law defines them. Treating privacy strictly as a matter for a coherent and bounded category of persons privileges a libertarian construction of privacy (and the person), while leaving aside its relational aspects that the feminist critique of privacy in particular has seen as essential.[261] This is the crucial point: shoehorning an

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[260] The personhood aspects of privacy have been an important aspect of privacy theory from the start. See Warren & Brandeis, *supra* note 159 at 205 (privacy as the protection of "inviolate personality"); Edward J. Bloustein, "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser" (1964) 39 N.Y.U. L. Rev. 962.

[261] The feminist critique of privacy began with Catherine A. MacKinnon, "Privacy v. Equality: Beyond Roe v. Wade" in *Feminism Unmodified: Discourses on Life and Law* (Cambridge, Mass.: Harvard University Press, 1987) 93. More recently, see Anita L. Allen, "The Jurispolitics of Privacy" in Mary Lyndon Shanley & Uma Narayan, eds.,

expansive concept like privacy into a single category (whether persons or things) indicates clearly the limitations of the classificatory system. One of the perennial critiques of privacy has been that it is amorphous, a slippery concept that can mean whatever we want it to mean, and so means nothing at all.[262] Though this is true to a limited extent, the problem is less with the concept than with the context: privacy is amorphous only because it does not fit the categories that are available to it. Because it implicates the whole human being—physical being, relationships, emotions, spirituality—and not simply a single discrete and definable interest that can be isolated, privacy, like the human being, requires the interaction of different categories to do it justice. In this privacy connects to concepts like the self and identity as they have emerged from the feminist reconstruction:[263] because human beings are both complexly integrated internally and intricately interconnected externally, and because the line between internal and external itself is problematic, it becomes difficult to view privacy or identity as attributes or characteristics of the person

The second issue is the concept of status, which has been lurking at the edges of my analysis throughout this thesis. Maligned for its connotations of the *ancien régime* and rigid, divinely-ordained hierarchy, status is an old idea that deserves updating, since it is also rich in connotations of community and relationship that I have argued are essential to a reconstruction of the person in law. Though status was ostensibly jettisoned forthwith during the French Revolution by article 1 of the *Déclaration des droits de l'homme et du citoyen*,[264] the concept is impossible to escape when dealing with the human being in law, even in liberal legal systems as in the modern West. Whether in the

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Reconstructing Political Theory: Feminist Perspectives (University Park: Pennsylvania State University Press, 1997) 68; McClain, "Reconstructive Tasks", *supra* note 259.

[262] *E.g.* Wacks, *supra* note 259.

[263] See *e.g.* Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990); Iris Marion Young, *Intersecting Voices: Dilemmas of Gender, Political Philosophy, and Policy* (Princeton: Princeton University Press, 1997).

[264] *Supra* note 109.

idea of *l'état civil*, or in the patron-client symbiosis of relational contracts, or in the various situational statuses such as consumer, employee, tenant, spouse, or child, examples of status relations are ubiquitous in modern law.[265] What is particularly important for my purposes, however, is how—despite its aristocratic overtones—the traditional concept of status captures many of the relational and interactive aspects of the person that I argued are so crucial to the reintegration of the human being in law. A reconstructed and rehabilitated idea of status can provide some of the conceptual framework within which to understand the person in law.

The various modern status relationships in law are more than simple vestiges of the estates of the *ancien régime* described by Domat or Pothier, however, which located the individual globally in a particular place in the cosmos. They point instead to status as multiple, flexible, and local, qualities quite unlike the global but relatively static status of the *ancien régime* in which one was either clergy, nobility, or third estate. Status today might be seen as more akin to the idea of interactions that I developed in chapter 3: it is an indication of the individual's place within the different overlapping and shifting webs of relationship within which the human being lives—some chosen, others imposed by law, still others imposed by religion, community, or other normative forces in one's life.

This idea of status thus carries forward the crucial notions of relationship and social embeddedness that were central to pre-modern law but that have been neglected in modern law, while at the same time indicating that social (and legal) position is in part personal to the individual. In other words, conceiving status as a balance between the static (position in relation to others) and the dynamic (choices of self-presentation and connection) aspects of interaction can give us a way to reconcile the universal qualities of human beings with the personal qualities of the individual. This might help us in turn work towards the goal of a legal concept of the person that neither neglects particulars in the face of universal affirmations, nor sacrifices humanity in the face of individual choices.

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[265] See generally Rehbinder, *supra* note 6.

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