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From Odysseus to Capgras: Seven Episodes of Personal Identity in Law

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FROM ODYSSEUS TO CAPGRAS: SEVEN EPISODES OF PERSONAL IDENTITY IN LAW

Robert Birmingham[†]

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I. SHIPS

A ship is the most living of inanimate things.

— Oliver Wendell Holmes¹

I introduce personal identity with ships for several reasons. I like ships. Holmes wrote of ships as persons in *The Common Law* (though seldom in his opinions: read *Southern Pacific Co. v. Jensen*).² Ships are legal persons. Various inanimate things—trees and railroad engines—were subject to forfeiture as deodands;³ ships alone could commit torts and enter contracts. The initial puzzle of identity, in modern philosophy anyway, involves a ship: the ship of Theseus. And nautical fact meets and surpasses the philosophical maritime imagination.

a. Start with the ship of Theseus.⁴ Theseus was a (legendary) king of

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1. OLIVER WENDELL HOLMES, *THE COMMON LAW* 25 (Mark DeWolfe Howe ed., 1963) (1881).

2. 244 U.S. 205, 218 (1917) (Holmes, J. dissenting).

3. See *Bennis v. Michigan*, 1995 WL 712350 (U.S. Oral Arg.); *infra* p. 121.

4. See NORMAN DAVIES, *EUROPE: A HISTORY* 91 (1996).

Athens.⁵ He killed Procrustes.⁶ He escaped a plot by Medea, his mother-in-law, to poison him.⁷ Minos, the king of Crete, received annually as tribute from the Athenians seven youths and seven maidens to feed the Minotaur.⁸ A result of improbable mating, like ligers or tigrons,⁹ the Minotaur was half man and half bull, confined in a labyrinth. A ringer if ever there was one, Theseus disguised himself as one of the youths, killed the Minotaur, and escaped the labyrinth guided by the thread Ariadne.¹⁰ Theseus deserted her on Naxos and sailed on to Athens—neglecting to hoist a white sail to signal his safety.¹¹ Upset, his father hurled himself from the Acropolis or into the sea.¹² Probably it was the sea, it being named after him (Aegeus).¹³

For these and other exploits, Athens preserved his ship as a memorial.¹⁴ There she is sitting on the beach. Plutarch writes of her.¹⁵ If a plank or other part decayed, the Athenians replaced it. Manifestly, she was the same ship.¹⁶ Here is something of the paradox of the heap, the sorites paradox, since removing one grain of sand from a pile of sand still leaves a pile of sand—yet at some stage of progressive removal you have no pile, or no sand.¹⁷ Eventually all the parts of the ship of Theseus were replaced. Hobbes, reading Plutarch, pondered whether the ship kept her identity despite the complete discontinuity of her parts.¹⁸ Go one step beyond to imagine the parts of the ship replaced successively; and not dispersed, but reassembled, the two ships standing alongside each other on the shore. Or the one ship standing alongside herself.¹⁹

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. See PIERRE BALDI & SOREN BRUNAK, BIOINFORMATICS: THE MACHINE LEARNING APPROACH 21-22 & Plate I, (1998).

10. See DAVIES, *supra* note 4, at 91.

11. *Id.*

12. See Emily Kearns, *Theseus*, in THE OXFORD CLASSICAL DICTIONARY 1508 (Simon Hornblower & Anthony Spawforth eds., 3d ed. 1996).

13. See DAVIES, *supra* note 4, at 91.

14. *Id.*

15. PLUTARCH, *Theseus*, in THE LIVES OF THE NOBLE GRECIANS AND ROMANS 3, 14 (John Dryden trans., 1834) (1617).

16. *Id.*

17. See *Stanford Encyclopedia of Philosophy: Sorites Paradox* (visited Nov. 5, 1998) <<http://plato.stanford.edu/entries/sorites-paradox/>>.

18. THOMAS HOBBS, THE ELEMENTS OF PHILOSOPHY, in 1 THE ENGLISH WORKS, 136-37 (1834) (1656).

19. See *Theseus* (visited Nov. 5, 1998)

<<http://www.as.wvu.edu/coll03/phil/www/theseus.htm>>.

b. We know *Raffles v. Wichelhaus* from Contracts.²⁰ The plaintiff argued triumphantly and incorrectly that of two ships named *Peerless*, his uses of referred to one ship, the uses of the defendant to the other, so that the parties failed to contract over a sale of cotton ex *Peerless*.²¹ As Professor Gilmore points out, the clause 'ex *Peerless*' means only that were the ship lost, the contract would conclude.²² Simpson counts a fleet of ships named *Peerless*.²³ The case anticipates Capgras, as we will see.²⁴

c. *The Salem* raises the inverse perplexity: one ship with two names. Think back to the oil embargo of 1979: crude is scarce, the market unsettled, traders opportunistic and incautious.²⁵ Our protagonists, crooks, buy the tanker *Salem* for \$12.3 million on credit.²⁶ The crooks voyage charter her to transport 200,000 tons of crude from Kuwait to Italy.²⁷ On a voyage charter, the owners of the vessel, i.e. the crooks, supply captain and crew.²⁸ The oil belongs to the charterer.²⁹ Meanwhile, the crooks have sold 200,000 tons of oil in South Africa for \$56 million.³⁰ Tankers as large as the *Salem* cannot negotiate the Suez Canal, and consequently reach Italy from Kuwait around the Cape of Good Hope.³¹ The captain and crew, minions of the crooks, load the agreed crude at Kuwait and proceed down the east coast of Africa.³² Shell purchases the oil at sea.³³ The *Salem* reaches Durban as the *Lema*, her crew having painted out the 'SA' of 'SALEM' and appended an 'A'.³⁴ The *Lema* off-loads the oil at Durban, the crooks collecting the \$56 million, of which \$12.3 million pays for the ship.³⁵

The now nearly empty *Lema* continues toward Italy.³⁶ The crew scut-

20. *Raffles v. Wichelhaus*, 159 Eng. Rep. 375 (Ex. 1864).

21. *Id.*

22. See GRANT GILMORE, *THE DEATH OF CONTRACT* 39-47 (2d ed. 1995).

23. See A.W. Brian Simpson, *Contracts for Cotton to Arrive: The Case of the Two Ships Peerless*, 11 CARDOZO L. REV. 287 (1989).

24. See *infra* Part 3.

25. *Shell Int'l Oil Co. v. Gibbs (The Salem)*, 1 All E.R. 225 Q.B. (1982), CA rev. in part 1 All E.R. 1057 (1982).

26. *Id.* at 227.

27. *Id.* at 225-28.

28. *Id.* at 227-29.

29. *Id.*

30. *Id.* at 227.

31. *Id.*

32. *Id.*

33. *Id.* at 230-32.

34. *Id.* at 231.

35. *Id.* at 230.

36. *Id.*

tle her off the West African coast.³⁷ They set off inconsequential explosions and discharge a puny oil slick.³⁸ The *Lema* sinks within sight of another ship, who rescues the crew.³⁹ The circumstances are suspicious.⁴⁰ The crew, sequestered first in Senegal then in Liberia, escape.⁴¹ Shell recovers some of the loss from the South African purchasers, who converted the oil, having acquired possession but no title. But most of the proceeds are gone.⁴² The marine insurers deny coverage.⁴³ Shell sues them and loses.⁴⁴ The scheme is larceny by trick.⁴⁵ The trick happened at Kuwait or Durban, not at sea, hence the policy does not cover the loss.⁴⁶ The crooks are \$37.7 million ahead and at large. The admiralty bar thinks this hilarious.⁴⁷

d. Now some history. Lincoln Paine in his fine, usually reliable *Ships of the World* writes that the frigate *HMS Macedonian* "has the distinction of being the only British warship [the Americans] captured and returned to an American port during the War of 1812."⁴⁸ Not quite, although Paine's oversight is trivial.⁴⁹ The frigate *USS United States*, commanded by Stephen Decatur, engaged and captured the *Macedonian*.⁵⁰ The victory was unexpected, especially by the British, who had never lost a frigate in individual combat.⁵¹ It heartened the Americans who otherwise were not doing well.⁵² But the *United States* was more boat, rating forty-four guns to the *Macedonian*'s thirty-eight, being 175' and 2200 tons to 154' and 1082 tons.⁵³ The disparity makes a legal difference.

The *Macedonian*, thenceforth an American frigate, has a supporting role in three cases. Two of the cases apply interesting particulars of the law of prizes. Prizes were the big incentive in naval life as the novels of

37. *Id.* at 228, 231-32.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. Oral communication from Carolyn Shields, Lane Powell Spears Lubersky, (June 5, 1998).

48. LINCOLN P. PAINE, *SHIPS OF THE WORLD: AN HISTORICAL ENCYCLOPEDIA* 315 (1997).

49. *See infra* p. 103.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

Patrick O'Brian dramatize.⁵⁴ So here comes the first case. In *Decatur v. Chew*, the frigate *Chesapeake*, under Captain Evans, had captured the *Volunteer* (evidently a merchantman).⁵⁵ The issue was whether at the time of capture Evans was under Decatur's command.⁵⁶ In that case, Decatur got a twentieth share of the prize, else nothing.⁵⁷ Decatur sued Chew, the prize agent, for this portion.⁵⁸ Justice Story riding circuit decided for Decatur, although his command was nominal—a legal fiction.⁵⁹ For as Story relates, "Commodore Decatur soon afterwards sailed from Boston, captured the frigate *Macedonian* in a memorable engagement, and returned with his prize to the United States, previous to the sailing of the *Chesapeake*, and has ever since been unable to put to sea, in consequence of the superior blockading squadrons of the enemy."⁶⁰ Hence Decatur got money while enjoying Boston.⁶¹

In 1814, the sloop-of-war *U.S.S. Peacock* engaged and defeated the brig *H.M.S. Epervier*.⁶² Both ships were small, although the American ship (117.9 feet and 509 tons) was stronger, twenty-two guns to eighteen, 160 men to 128.⁶³ The *Peacock* brought her prize into Savannah (Paine tells us the war was still on).⁶⁴ Recommissioned, the *Epervier* fought on the American side for the rest of the war. *Chubb v. United States*, in the Court of Claims, tardily (1859!) settled the prize money from the engagement (the *Epervier* carried \$117,903, significantly increasing the stakes).⁶⁵ "[T]he proceeds of all ships and vessels, and the goods taken on board of them, which shall be adjudged good prize," the prize statute directed, "shall, when of equal or superior force to the vessel or vessels making the capture, be the sole property of the captors, and when of inferior force, shall be divided between the United States and the officers and men making the capture."⁶⁶ The 'equal or superior' was the rub.⁶⁷ The *Peacock* claimed all and got half.⁶⁸ Decatur had gotten all for the *Macedonian*, but

54. See PATRICK O'BRIAN, 1-16 THE COMPLETE AUBREY/MARTIN SERIES (1994).

55. 7 F. Cas. 322 (C.C.D. Mass. 1813) (No. 3,721).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. See PAINE, *supra* note 48, at 389.

63. *Id.*

64. *Id.*

65. 7 U.S. Cong. Rep. C.C. 195.

66. *Id.* at *11.

67. *Id.*

68. *Id.*

should not have.⁶⁹ His recovery figured as an unpersuasive precedent in the plaintiff's Exhibit K.⁷⁰

Dahlgren rather famously invented a naval gun that fired a larger shell for its weight, used less powder, and was less likely to explode killing everybody nearby than previous guns. Dahlgren did the inventing while a naval officer (ultimately an admiral), the service funding his research. Thus there was the question, partly answered by a statute particular to the occasion, whether and how much he might recover for his work. In *The Dahlgren Gun Case* the Court of Claims awarded the estate of the inventor \$65,000.⁷¹ In a letter of 1853 that accompanied his submission of drawings for the gun, Dahlgren describes the *Macedonian* as she was then armed without his guns as embarrassingly inferior to British and French ships.⁷²

Reviewing these successive cases, decided in 1813, 1859, and 1880, we start to wonder how a wooden ship (forty acres of oak went into her) stayed commissioned so long (from the opinions at least until 1853). Indeed the *Macedonian* does not disappear from the record until 1922, when an inn on the Brooklyn waterfront, the Macedonia House, made partly from her or her timber, burns down. The answer, applying to Lord Nelson's *Victory* too, is that a ship may be rebuilt. The *Victory* was last damaged in battle at dockside from a German bomb in World War II.⁷³ The *Macedonia* was rebuilt pursuant to a statute, mostly in 1833.⁷⁴ She was rebuilt not in the anemic sense of being repaired: in 1833 the *Macedonian* that Decatur captured stood alongside herself as the ship of Theseus might have stood at Athens millennia before.

[T]here were now at Gosport two distinctly different *Macedonians*, a brand new one awaiting completion, and a seastained old hulk rotting away on the Virginia mudflats The continuing presence of both versions at the same location threatened to become an embarrassment [T]he navy could have only one *Macedonian*, but it was important [that] the Gosport *Macedonian* be seen to be, if not the same vessel, at least the same entity Frozen in time, the two versions sat out the winter of 1833-44 like Jekyll and Hyde, one shining and fresh, the other scarred and rotten.

....

69. *Id.*

70. *Id.*

71. 16 Ct. Cl. 30, 36-37 (1880).

72. *Id.*

73. See PAINE, *supra* note 48, at 550-51.

74. JAMES T. DE KAY, CHRONICLES OF THE FRIGATE MACEDONIAN: 1809-1922, at 203-04, 206 (1995).

Was she the same ship as the one Biddle brought back from Rio a decade before? . . . She looked the same. . . . The navy would never have built her if she was merely to be a new ship. The navy wanted—desperately wanted—the same ship that Stephen took as prize on October 12, 1812. The *Macedonian* that made her way into the Chesapeake was, as far as men could make her, that very ship. She was the same in size, in design, and in spirit, insofar as the guile and determination of John Rogers and the Board of Naval Commissioners could make her.⁷⁵

The idea of being a different vessel but the same entity is a naïve and sound application of modal logic.⁷⁶ We are approaching more of this kind of thing.

II. SOURCES

You probably think that the legal meanings of the word 'person' arise from and are parasitic upon antecedent uses in natural language. Blackstone apparently assumes so when distinguishing, without inquiring after priorities, natural persons, being "such as the God of nature formed us," from artificial persons "created and devised by human laws."⁷⁷ Obviously to Blackstone the Creation antedates human laws. Yet oddly the etymology moves in the opposite direction.

a. We earliest encounter *πρόσωπον*, the Greek cognate of 'person', in Homer.⁷⁸ The wily Odysseus has returned to Ithaca in disguise after twenty years' absence besieging and sacking Troy and having adventures.⁷⁹ The Trojan War was only one in a succession of wars over reciprocal woman-stealing, which Davies describes as giving "tit for tit."⁸⁰ Argus, the dog of Odysseus, recognizes him, wags his tail, and dies.⁸¹ Odysseus does not know what kind of welcome otherwise to expect.⁸² So still disguised he approaches his wife Penelope, claiming to be the friend and companion of himself (he looks like a beggar but is anything but).⁸³ Penelope has not seen him for two decades;⁸⁴ and in my experience and Odysseus' your average dog surpasses human companions in memory and

75. *Id.*

76. See ANIL GUPTA, *THE LOGIC OF COMMON NOUNS* (1980); G.E. HUGHES & M.J. CRESWELL, *AN INTRODUCTION TO MODAL LOGIC* (1996).

77. 1 WILLIAM BLACKSTONE, *COMMENTARIES* 123 (1809).

78. HOMER, *ODYSSEY* 201-58 (Richard Lattimore trans., 1967).

79. *Id.*

80. DAVIES, *supra* note 4, at xvi.

81. *Id.* at 260-61.

82. *Id.*

83. *Id.* at 283-91.

84. *Id.* at 1.

fidelity. Discommoded by 108 suitors, Penelope has been entertaining them while putting them off.⁸⁵ Odysseus (with modest help from his perennially immature son Telemachos) will kill them all.⁸⁶

The servant Eurykleia is Odysseus' old nurse.⁸⁷ She is twenty years older too.⁸⁸ Offering Odysseus customary hospitality, Penelope directs, "Come then, circumspect Eurykleia, rise up and wash the feet of one who is the same age as your master. Odysseus must by this time have just such hands and feet as you do, for in misfortune mortal men grow old more suddenly."⁸⁹ Washing his feet, Eurykleia recognizes Odysseus by a scar on his thigh a boar inflicted.⁹⁰ Odysseus was hunting with his grandfather, "who surpassed all men in thievery and the art of the oath."⁹¹ Circumspect Eurykleia may be, yet she is moved:

γρηῦς δὲ κατέσχετο χερσὶ πρόσωπα.⁹²

Eurykleia is weeping (literally, shedding hot tears).⁹³ But exactly what else is she doing? γρηῦς is 'old woman'—i.e. Eurykleia. δὲ is a particle we need not translate. κατέσχετο is 'covered'. χερσὶ is 'with her hands'. We are left with πρόσωπα, neuter accusative plural (Homer always uses the plural). κατέσχετο is the middle voice, indicating that Eurykleia acts on something that belongs to her. So you have this image of this old woman sobbing. What does she do with her hands? Look at the image. Stanford has us translate "covered her face with her hands."⁹⁴ Her face belongs to her and is a physical thing, or the surface of a physical thing.

Of course Penelope was twenty years older too, and Odysseus did not stay long in Ithaca. Tennyson recounts his restless discontent: "It little profits that an idle king, / By this still hearth, among these barren crags, / Match'd with an aged wife, I mete and dole / Unequal laws unto a savage race . . ."⁹⁵ Hence he is off on a ship, with words that we may underinterpret as a claim of identity: "that which we are we are."⁹⁶

b. The oracle at Delphi has warned Laius and Jocasta, king and queen

85. *Id.* at 2.

86. *Id.* at 321-34.

87. *Id.* at 291.

88. *Id.*

89. *Id.*

90. *Id.* at 292.

91. *Id.*

92. 2 HOMER, ODYSSEY 112 (William B. Stanford ed., 2d ed. 1965).

93. *Id.* at 291.

94. *Id.* at 330, n.361.

95. Alfred, Lord Tennyson, POEMS OF TENNYSON 164 (1916).

96. *Id.* at 165.

of Thebes, not to have a son, lest he kill his father and marry his mother.⁹⁷ They have Œdipus, despite the warning.⁹⁸ One hardly doubts the Oracle knew they would have son, as in Calvinist belief, which we are coming too, God knew Adam would transgress. Jocasta gives the infant to a shepherd to expose, somewhat standard practice, so she imagines she and Laius are in the clear.⁹⁹ Disobeying Jocasta, the shepherd gives Œdipus to a shepherd from Corinth with whom he shares summer pasture.¹⁰⁰ Œdipus grows up thinking that he is the son of the king and queen of Corinth.¹⁰¹ He too visits the oracle at Delphi, who tells him the same thing: that he will kill his father and marry his mother.¹⁰² So he knows what to do. On the road from Athens, where it forks, Œdipus turns left to Thebes instead of right to Corinth.¹⁰³ He cannot kill his parents at a distance, he reasons.¹⁰⁴ Unaware that Laius is a king or his father, Œdipus kills him at a crossroads.¹⁰⁵ The shepherd escorts Laius and witnesses this too.¹⁰⁶ The shepherd is around a lot, finally confessing to Œdipus that he did not kill him as Jocasta ordered.¹⁰⁷ You can see a photograph of the shepherd or some shepherd at *The Classics Pages*.¹⁰⁸

Œdipus solves the riddle of the Sphinx, who was oppressing Thebes (what walks on four legs in the morning, two legs at noon, and three legs in the evening?—man); and, becoming king of Thebes, marries the widowed Jocasta.¹⁰⁹ Now he is in big trouble. At the start of Sophocles' *Œdipus Tyrannus*, plague afflicts Thebes, ostensibly brought on by the murderer of Laius being at large, polluting the city.¹¹⁰ Œdipus summons Tiresias to identify the murderer.¹¹¹

It is worth pausing briefly at Tiresias. He is blind. (*Œdipus Tyrannus*, like Lear, has much play on sight.) Here is how Tiresias became

97. *The Classics Pages: The Old Shepherd* (visited Nov. 3, 1998)

<<http://www.users.globalnet.co.uk/~loxias/oldshepherd.htm>>.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *The Classics Pages: The Riddle of the Sphinx* (visited Nov. 3, 1998)

<<http://www.users.globalnet.co.uk/~loxias/sphinx.htm>>.

109. *Id.*

110. *Id.*

111. *Id.*

blind.¹¹² He was changed into a woman for a while.¹¹³ I will not go into the causes, but he is changed back now. Zeus and Hera are bickering as usual, this time over the somewhat metaphysical question, who enjoys sex more, men or women?¹¹⁴ Zeus is saying that his infidelities, while a royal duty, are a burden to him. Hera is very much put off. The decision procedure here is to ask Tiresias: having been both, he alone knows. The question has something to do with the methodological error in economics of comparing utilities across persons, and raises interesting identity issues connected with rigid designators.¹¹⁵ Yet I have only so much time. Tiresias answers that women do by a factor of nine, and Hera blinds him.¹¹⁶ Tiresias being a blind seer knows who killed Laius but is not telling Oedipus, who threatens him.¹¹⁷

οὐ τὸ σὸν δέισας πρόσωπον.

Tiresias is responding to Oedipus' threats. He tells Oedipus that he does not (οὐ) fear (δέισας) something (πρόσωπον) that belongs to Oedipus.¹¹⁸ A note by Jebb instructs: "πρόσωπον: 'thy face,'—thy angry presence: the blind man speaks as though he saw the 'vultus instantis tyranni.' Not, 'thy person' (i.e. thy royal quality): πρόσωπον is not classical in this sense."¹¹⁹ Horace and Tacitus use the quoted Latin phrase. Yeats translates πρόσωπον as 'frown'.¹²⁰ Here the term has shifted from unequivocally naming (the surface of) a physical thing to naming something less concrete: in the first instance a face that shows anger. By synecdoche we reach the underlying anger, Tiresias being blind. Even the mistranslation that Jebb cautions against would have πρόσωπον refer to a role rather than to a colloquial person.

Oedipus will find out that he has killed his father and married his mother. Jocasta, understanding before him and failing to persuade him to stop asking, will hang herself. Oedipus will tear at his eyes with Jocasta's broach, blinding himself. The chorus have the last lines: "Now as we keep our watch and wait the final day, / count no man happy till he dies, free of

112. See *Greek Mythological Characters: Tiresias* (visited Nov. 3, 1998) <<http://www.cybercomm.net/~grandpa/grkgdstz.html>>.

113. *Id.*

114. *Id.*

115. See SAUL KRIPKE, *NAMING AND NECESSITY* (1982).

116. See *supra* note 112.

117. See William Harris, *Greek Myth: Medicine and Pharmacopoeia* (visited Nov. 3, 1998) <<http://www.middlebury.edu/~harris/GreekMyth/chap5Medicine.html>>.

118. SOPHOCLES, *OEDIPUS TYRANNUS* 55 (Richard C. Jebb ed., 4th ed. 1912).

119. *Id.*

120. SOPHOCLES, *OEDIPUS REX* (William Butler Yeats trans., Caedmon Recording TC 2012, 1957).

pain at last.”¹²¹ Classical opinion occasionally goes beyond this, reserving judgment until we see how a person’s children turn out. Of course why stop there?—God in the Old Testament did not.

c. *πρόσωπον* also appears twice together biblically and familiarly in St. Paul’s first epistle to the Corinthians.¹²²

βλέπομεν γὰρ ἅπτι δι’ ἐσόπτρου ἐν αἰνίγματι,
τότε δὲ πρόσωπον πρὸς πρόσωπον.¹²³

New Testament Greek is simpler than classical Greek, approaching ordinary speech. *βλέπομεν* is ‘we see’.¹²⁴ *ἐσόπτρου* (*ἔσοπτρον*) is ‘mirror’.¹²⁵ *αἰνίγμα* is ‘a dark saying’ (cf. ‘enigma’).¹²⁶ The King James Version¹²⁷ and Lattimore¹²⁸ translate the first clause similarly: “For now we see through a glass, darkly . . . ,”¹²⁹ and “But now we see by a mirror, obscurely”¹³⁰ Certainly Lattimore is more accurate, but you can’t beat the King James Version for language. They continue identically: “. . . but then face to face.”¹³¹ St. Paul carries the initial metaphor of sight, sustained throughout Sophocles’ *Œdipus*,¹³² through the passage, so that the matching instances of ‘face’ may be read literally as denoting the physical thing, as in Homer,¹³³ and figuratively, importing comprehension.

d. Here at the other end of the story from Blackstone is where the law enters. The shift in the meaning of *πρόσωπον* is from face (Homer and in not completely a physical sense St. Paul) to dramatic mask or expression (Sophocles) to dramatic role.¹³⁴ *πρόσωπον* or its Latin cognate *persona* then changes from specifying a dramatic role to specifying a legal role. So we reach religion. Christianity, although with grace easy to believe, is no-

121. SOPHOCLES, *Oedipus the King*, in THE THREE THEBAN PLAYS, 1351-53 (Robert Fagles trans., 1982).

122. 1 *Corinthians* 13:12, in THE GREEK NEW TESTAMENT (Barbara Aland et al. ed., 4th rev. ed. 1994).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. WALTER BAUR, A GREEK-ENGLISH LEXICON OF THE NEW TESTAMENT AND OTHER EARLY CHRISTIAN LITERATURE 720-21 (William F. Arndt & F. Wilber Gingrich, eds. 2d ed. 1919).

128. THE NEW TESTAMENT 378 (Richmond Lattimore trans., 1996).

129. BAUR, *supra* note 127, at 720-21.

130. THE NEW TESTAMENT, *supra* note 128, at 378.

131. *Id.*

132. *See supra* p. 108 and note 120.

133. *See supra* p. 106 and note 92.

134. *See* HENRY GEORGE LIDDELL & ROBERT SCOTT, A GREEK-ENGLISH LEXICON 1533 (Henry S. Jones ed., rev. ed. 1977).

toriously hard to explain. Hence exactly what one believes is unclear. Typically the Church Fathers (most engagingly, Tertullian) were Roman lawyers, who in their helpful clarifications naturally, indeed inevitably, used the Latin legal vocabulary at hand to express the new Christian ideas. So Tertullian interpreted God as an especially vindictive judge in criminal court.¹³⁵ The Trinity became legal entities—i.e. persons: God in three *persons*.¹³⁶ Hirzel, who has studied the etymology more deeply than anyone else, teaches us that persons “appeared as bearers of legal relations, and as such easily came to be talked about in ordinary language, the more so because the life of the people was mixed thoroughly with legal relations.”¹³⁷ As still it is.

III. CAPGRAS

a. Start with Leibniz’s law (or Leibniz’s lie).¹³⁸ More descriptively it is the principle of the identity of indiscernibles. It asserts that if two things (x and y) have all (represented by the initial parentheses) their properties (F) in common, they are the same thing ($x = y$).¹³⁹

$$\text{Equation 1: } (F)(Fx \leftrightarrow Fy) \rightarrow x = y.$$

That is for every property F , if x has F if and only if y has F , then x is identical to y .¹⁴⁰ Res judicata presupposes this. Leibniz’s law neglects aspects of modal logic, hence its name ‘Leibniz’s lie’ among philosophers who reason semantically in possible worlds.¹⁴¹

b. Think about my friend Kraut, then a student, now a professor of philosophy at Ohio State University. He met Rebecca. He was as Erdős would say captured.¹⁴² Soon he began to worry obsessively that Rebecca loved him for his properties, not for himself (by properties I mean qualities, not wealth, which he lacked). His properties were not that great, hence had

135. See HASKINGS RASHDALL, *THE IDEA OF ATONEMENT IN CHRISTIAN THEOLOGY* 254 (1920).

136. See ALFRED N. WHITEHEAD, *PROCESS AND REALITY: AN ESSAY IN COSMOLOGY* 342, 343 (1978).

137. RUDOLF HIRZEL, *DIE PERSON: BEGRIFF UND NAME DERSELBEN IN ALTERTUM* 51 (reprint ed. 1976).

138. See *Identity of Indiscernibles*, *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (visited Nov. 5, 1998) <<http://plato.stanford.edu/-entries/identity-indiscernible/>>.

139. *Id.*

140. *Id.*

141. Nuel Belnap taught us the name.

142. See PAUL HOFFMAN, *THE MAN WHO LOVED ONLY NUMBERS: THE STORY OF PAUL ERDÖS AND THE SEARCH FOR MATHEMATICAL TRUTH*; BRUCE SCHECHTER, *MY BRAIN IS OPEN: THE MATHEMATICAL JOURNEY OF PAUL ERDÖS* (1998).

I been Kraut (or someone exactly like him), I would have settled for love any way it came down. But my properties are not that great either. Kraut wanted Rebecca to love him as a Lockean substance, a bare particular, an entity stripped of its properties.¹⁴³ That is if Kraut had different properties, for instance if Kraut were a turnip, Rebecca would love him just as much. Or if he had no properties. Of course maybe Kraut could not be a turnip (is no turnip in any possible world). But I doubt that, knowing Kraut.

c. Ohio convicted Fred Milo of murdering his brother Dean.¹⁴⁴ Milo appealed, precipitating *State v. Milo*,¹⁴⁵ which affirmed the conviction in an opinion by Judge Norris. We can be grateful for the case while deploring Milo's act that made it possible. Let me state the facts: you will see immediately that Milo will not get off. He and his siblings Dean and Sophie were the children of Sotir Milo, founder of the Milo Beauty and Barber Supply Co.¹⁴⁶ Sotir intended that the children succeed him as owners and managers.¹⁴⁷ Things did not work out that way. Dean was CEO.¹⁴⁸ He removed Fred and Sophie from the board, then fired them.¹⁴⁹ He removed Sotir from the board.¹⁵⁰ Understandably Milo did not like this. He might have hired an attorney. Instead he hired a hit man, Harris, who caught up with Dean in Akron.¹⁵¹ Harris told Dean to lie on the floor and when he did so shot him in the head.¹⁵² Then, Harris placed a pillow over Dean's head and shot him again.¹⁵³ So Dean was dead.¹⁵⁴

Unwisely Milo had not located Harris in the yellow pages under 'Soldiers of Fortune'.¹⁵⁵ He had asked around; everyone he asked was willing to help, but then rolled over and testified against him.¹⁵⁶ So did Harris. Hence Milo was left holding the bag—but it was his bag. Milo half-heartedly objected to rulings that admitted all this testimony, and, his objections failing, pleaded insanity.¹⁵⁷ His hopeful appellate brief asserts:

143. See *The Internet Encyclopedia of Philosophy: John Locke (1632-1704)* (visited Nov. 5, 1998) <<http://www.utm.edu/research/iep/l/locke.htm>>.

144. *State v. Milo*, 451 N.E.2d 1253 (Ohio App. 1982).

145. *Id.*

146. *Id.* at 1255.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 1257.

157. *Id.* at 1256.

FRED MILO was in a state of raging internal conflict, despite his external submission to both his brother Dean's and his parents' conflicting pressures and demands. The treatment meted out by Dean was not only threatening family unity and the family business, it was uncharacteristic and grossly disrespectful to the head of the family. Determining that Dean could not be acting in such a manner, FRED decided that a substitute was destroying the family (emphasis added).

....

The Defendant presented the testimony of Dr. Emanuel Tanay, a forensic psychiatrist, who concluded after extensive interviews, review of the tapes of those interviews, research into family and ethnic background, and study of the statements which the alleged co-conspirators gave concerning FREDERICK MILO'S conduct, that FREDERICK MILO suffered from a paranoid disorder, and had a paranoid delusion that his brother had been replaced (Capgras' syndrome); such mental illness caused a severe defect in his rational powers, leading him to act to solve the terrible family and business conflict by removing its source—Dean Milo's replacement. FREDERICK MILO, in the doctor's opinion, was unable to refrain from acting in such a manner (emphasis added).¹⁵⁸

So Milo did not believe he was killing Dean but some intruder like Dean.¹⁵⁹ This is not a winning argument. The trial court did not buy it.¹⁶⁰ Judge Norris did not buy it.¹⁶¹

d. Yet there is such a syndrome, which nicely implicates the principle of the identity of indiscernibles and evokes the problem that preoccupied Kraut. As the appellate brief indicates, sufferers from Capgras believe that persons close to them have been spirited away, replaced by identical impostors. Capgras assumes many forms, one of which, the inverse Capgras, has the removed person as close as she can get to the sufferer of this disease. That is the sufferer believes that she herself has been thus replaced. Maybe a replacement cannot be *exactly* identical, lest there be no basis to suspect her. The syndrome appears only thrice in the case law, a second case being like (yet not exactly like) *Milo*.¹⁶² The criminal defendant lost here too.¹⁶³

158. *Id.* at 1258.

159. *Id.*

160. *Id.*

161. *Id.*

162. *People v. Singer*, 628 N.E.2d 592, 596 (Ill. App. 1993); see also *In re Sea*, 904 P.2d 182 (Ore.App. 1995). The first case is *Milo*.

163. *Id.* at 596.

IV. GOD

And when the woman saw that the tree was good for food, and that it was pleasant to the eyes, and a tree to be desired to make one wise, she took of the fruit thereof, and did eat, and gave also unto her husband with her, and he did eat.

— Genesis 2:4.

a. As I mentioned, the Church Father Tertullian represented God as a judge in criminal court.¹⁶⁴ Calvin (and antecedently, St. Augustine) taught that God holds us to account for the sin of Adam.¹⁶⁵ The antelapsarian understanding of original sin asserts that before God created Adam, God knew that he would fall (how could God being omniscient not know?) but created him anyway.¹⁶⁶ Only 100,000 among us will be saved.¹⁶⁷ God selects these arbitrarily, lest a rule diminish his sovereign power.¹⁶⁸ Hence, faith does not help. Neither do good works. The nice thing about this way to think is that one cannot bargain with God—which preserves everyone's dignity. Talk about unequal bargaining power.

The American theologian and philosopher Jonathan Edwards had this problem: by the middle of the eighteenth century, to the uninstructed, the Calvinist doctrine lacked transparent, i.e. self-evident truth. Hence, he explained and justified original sin by recourse to the criminal law,¹⁶⁹ much as Tertullian did in other circumstances.¹⁷⁰ The theological effort is poorly received by the uninitiated (it is best to be born a Calvinist). The extreme assessment of this justification compares Edwards unfavorably to Himmler, on the ground that Himmler at least understood he did wrong. Remorse is a good thing.¹⁷¹

Edwards presented what corresponds to a relative consistency proof that original sin is acceptable.¹⁷² Here is an example of a relative consis-

164. See *supra* p. 110.

165. See RASHDALL, *supra* note 135, at 89-90.

166. JOHN CALVIN, CONCERNING THE ETERNAL PREDESTINATION OF GOD 19 (J.K.S. Reid trans., 1961).

167. *Id.*

168. *Id.*

169. JONATHAN EDWARDS, THE GREAT CHRISTIAN DOCTRINE OF ORIGINAL SIN DEFENDED, in 2 THE WORKS 305 (Sidney Austin ed., 9th ed. 1858) (1758).

170. See *supra* p. 13.

171. See Jonathan Bennett, *The Conscience of Huckleberry Finn*, 49 PHIL. 123 (1974).

172. EDWARDS, *supra* note 169, at 309.

tency proof: that we cannot prove Euclidean geometry consistent is a consequence of Gödel's incompleteness theorems.¹⁷³ Nor can we often prove that an esoteric geometry that we favor is consistent. But often we can prove that if Euclidean geometry is consistent, our geometry is too. Likewise, Edwards proved (or believed he proved) that if the criminal law is acceptable, so is God's punishing us for Adam's sin.¹⁷⁴

Here is Edwards' proof (substitute justice for consistency). It also borrows from Locke.¹⁷⁵ The power of God sustains us in existing. God's doing so is equivalent to God's creating us anew each instant,¹⁷⁶ hence our existence at each instant is a separate existence. So, if we consider matters strictly, there is no such thing as any identity or oneness in created objects, existing at different times, but what depends on "*God's sovereign constitution.*"¹⁷⁷ Think of persons then as temporal successions of these individuals each of which exists only at a single instant. We punish one of them (existing at time₁ for instance) for what another of them (existing at time₀) did. And this is all that God does, connecting Adam to us. Hence, if the criminal law is just, what God does by punishing us for the sin of Adam is correspondingly just.¹⁷⁸

b. Before anesthetic, surgical procedures were painful. Perhaps still they are; introspection does not decide the issue, as we will see shortly. History first:

The man who advanced amputation most in this country was Robert Liston (1794-1847), Professor of Surgery at University College Hospital, and he performed the first operation under anaesthesia there on 21 December 1846. He held the reputation as 'The fastest man with a knife in England'—so necessary if the patient were not to die of pain and shock. He was a giant of a man with great physical strength, his arms and hands likened to Hercules, who loved the job and operated with great zest and relish, often cutting notches on his knives for each operation in which they had been used. He was said to be a fearsome sight when operating as he held the knife between his teeth while he tied the

173. Stephen C. Kleene, *The Work of Kurt Gödel*, 41 J. SYMBOLIC LOGIC 761, 763 (1976).

174. EDWARDS, *supra* note 169, at 309.

175. See *The Internet Encyclopedia of Philosophy: John Locke (1632-1704)* (James Fieser et al. Eds., 1998), *supra* note 143.

176. See DUNS SCOTUS, GOD AND CREATURES 274 (Felix Alluntis & Allen B. Wolter trans. 1975) (1580); RENÉ DESCARTES, MEDITATIONS OF FIRST PHILOSOPHY, in 1 THE PHILOSOPHICAL WORKS OF DESCARTES 131, 168 (Elizabeth Haldane & G.R.T. Ross eds., 1970) (1641).

177. EDWARDS, *supra* note 169, at 340.

178. See RODERICK M. CHISHOLM, PERSON AND OBJECT: A METAPHYSICAL STUDY (1977).

ligature on the blood vessels. He would amputate a thigh single-handed, compress the artery with the left hand, using no tourniquet, and do all the cutting and sewing with the right hand. One man was so terrified at the thought of his impending operation he went and hid in the lavatory. Liston strode after him, cut open the lock with his amputation knife, hauled him out, strapped him down, and cut for stone in two minutes. He was once said to be so anxious to break his own record for speed (and bets were placed on his performance) that in amputating a leg he took off one of the patient's testicles and two of his assistant's fingers at the same time.¹⁷⁹

Anesthesia purportedly alleviates surgical pain. Curare is "a blackish-brown resinous bitter substance, obtained as an extract from *Strychnos toxifera*, and other plants of tropical South America."¹⁸⁰ It is "used by the Indians to poison their arrows. When introduced into the blood it acts as a powerful poison, arresting the action of the motor nerves."¹⁸¹ Curare was the anesthetic of choice in the 1940's. Patients given it reported pain in surgery, but surgeons disbelieved them. The use of the drug continued until a medical doctor tried it out and unexpectedly felt pain too.

Amnestics make you forget. A common amnestic is scopolamine (C₁₇H₂₁NO₄), a belladonna alkaloid used also in light doses to prevent motion sickness.¹⁸² Surgeons use curare as a general anesthetic today combined with an amnestic. "Sometimes," an anesthesiologist called prominent remarks, "when we think a patient may have been awake during surgery, we give scopolamine to get us off the hook. Sometimes it works and sometimes not."¹⁸³ The idea is that the patient experiences but forgets the pain.¹⁸⁴

Perhaps pain is merely remembering. A legal issue relates to persons understood as individuals arbitrarily (conventionally) connected, as Edwards argued.¹⁸⁵ Think why we care about our future or past as opposed to our present pain. The care is a kind of altruism. Patients are curiously dissociated from, often completely indifferent to, the prospect of forgotten pain, as though it were not they who experience it. The legal issue then is whether the individual who is connected to and speaks on behalf of the in-

179. ELIZABETH BENNION, *ANTIQUE MEDICAL INSTRUMENTS* 55 (1979).

180. OXFORD ENGLISH DICTIONARY (2d ed. CD-ROM 1992).

181. *Id.*

182. See *SAILING WORLD*, March 1998, at 21-22.

183. Quoted in DANIEL C. DENNETT, *BRAINSTORMS: PHILOSOPHICAL ESSAYS ON MIND AND PSYCHOLOGY* 210 n.* (1978).

184. See Drakon Nikolinakos, *General Anesthesia, Consciousness, and the Skeptical Challenge*, 91 J. PHIL. 88 (1994).

185. EDWARDS, *supra* note 169, at 340.

dividual who awakens after surgery, yet is uninterested in the pain of the individual(s) who suffer during it, is properly their surrogate: *can* consent for them. The theory reads itself out of court, making the threat of legal liability of the surgeon or the consenting individual to the individuals who experience the pain remote. Neither the consenting individual nor the surgeon exists to compensate. Nor do the victims exist to be compensated. Probably the individual who might sue lacks standing. You cannot step into the same river twice, because it is not the same river, and you are not the same you.

c. Land law, the common law of estates, works something like original sin, connecting colloquial persons. For an English fee tail, from the fourteenth through the nineteenth centuries, there are three candidate entities for legal persons: colloquial persons, families, land. Simpson, Holmes, and Marx, advocate them respectively.

Simpson (the same Simpson who writes of ships)¹⁸⁶ in the second edition of his *A History of the Land Law* writes of the importance of the landed estate as a source of family power.¹⁸⁷ The strict settlement let English families keep their properties intact over successive generations and centuries. The controlling principle was that a tenant in tail never come into possession of the estate—that possession be always kept in a life tenant.¹⁸⁸ Otherwise the tenant in tail could break the entail by common recovery.¹⁸⁹ The counterparts in conveyancing of Edwardian constituent individuals are the successive tenants. The larger entity is the family. “[E]ntailed lands were treated as family property, not the property of any individual, but the theory of the law did not explicitly recognize the family as an entity capable of owning,” Simpson writes.¹⁹⁰ “So an underlying conception of family ownership had to be expressed in terms of individuals holding estates in land.”¹⁹¹

Earlier we met Holmes likewise writing of ships—as persons.¹⁹² Later in *The Common Law* he quotes Baron Parke going linguistically, probably also conceptually, beyond Simpson to assert that the privity between an ancestor and his heir is identity of person.¹⁹³ Holmes then invokes the term

186. See *supra* p. 101.

187. A.W. BRIAN SIMPSON, *A HISTORY OF THE LAND LAW* 235 (2d ed. 1986).

188. *Id.* at 235.

189. *Id.* at 233-40.

190. *Id.* at 90.

191. *Id.*

192. See *supra* p. 99.

193. HOLMES, *supra* note 1, at 272.

persona, the Latin cognate of 'person',¹⁹⁴ explaining that although in Roman law the *persona* is "the aggregate of the ancestor's rights and duties," in English law "[E]very fee is a distinct *persona*."¹⁹⁵ I cannot make out the extent of synecdoche here: whether the land (if one reads the sentence literally) or the sequence of tenants (as the reference to Parke suggests) is the *persona*. The result is plainer, more hyperbolic, and more metaphorical in Marx, who writes, "The beneficiary of the entail, the eldest son, belongs to the land. The land inherits him."¹⁹⁶

V. MULTIPLES

a. "Who would have guessed," Elaine Showalter writes in the preface to the paperback edition of her instructive *Hystories*, that "a Wisconsin doctor would be sued for diagnosing a patient with 120 personalities, including a duck, and for billing her insurance company for group therapy?"¹⁹⁷ Edwards' individuals are diachronic: one individual eats the apple, commits the crime; another individual is punished for it. The criminal individual no longer exists. The individuals—ducks and so forth—that constitute a sufferer from multiple personalities, that is, dissociative identity disorder (DID), are synchronic, or at least less diachronic, conceptually allowing, if not justifying, the billing for group therapy.¹⁹⁸

The pathogen of DID is sexual abuse in childhood.¹⁹⁹ DID is a defense: the victim conjures others to protect her or to suffer in her place. It is not happening to her. In the early history of the disease, two alters were usual, including the host; but their numbers have multiplied.²⁰⁰ One hundred twenty is still on the high side. Often transitions among alters are striking and abrupt.²⁰¹ Some alters may not know of others.²⁰² Especially, the host self may be unaware that she suffers from DID until treatment—even deny her disease early in therapy.²⁰³ In these refractive cases her therapist must teach her to understand her condition.²⁰⁴ An alter may observe

194. See *supra* p. 109.

195. HOLMES, *supra* note 1, at 274.

196. Quoted in A. Brian Simpson, *Introduction to Book II*, in 2 WILLIAM BLACKSTONE, COMMENTARIES at iii (1991).

197. ELAINE SHOWALTER, *HYSTORIES* at ix (1997).

198. EDWARDS, *supra* note 169.

199. See IAN HACKING, *REWRITING THE SOUL: MULTIPLE PERSONALITY AND THE SCIENCES OF MEMORY* 55 (1995).

200. *Id.*

201. *Id.* at 27.

202. *Id.*

203. *Id.*

204. *Id.*

other alters, themselves unaware of the observer.²⁰⁵ Or alters may jointly undertake projects, argue, snarl, or console. Although DID occurs in epidemic proportions throughout North America, it is nearly unknown elsewhere.²⁰⁶ The exception is the Netherlands, to which the disease has been carried by medical apostles, much as by some accounts sailors accompanying Columbus brought syphilis from the New World.²⁰⁷

The attorney not herself thus afflicted must view victims of DID with pity and empathy, while preparing sensitively to counsel and sue them and their physicians. I am told confidentially of an instance yet unresolved in which a host personality desperately seeks and receives psychiatric help, while an alter sues the provider of this help for malpractice. Or perhaps the host is undertaking the litigation. Often it is hard to discern who is the legal entity.

b. Or perhaps everyone is a legal entity, as in *Wall v. Fairview Hospital*.²⁰⁸ Routt was a psychiatrist.²⁰⁹ Physician heal thyself. Two of his patients, Slavik and Wall, sue his estate, nurse, and hospital for malpractice, negligence, and so forth.²¹⁰ Routt, Slavik, and Wall had been sexually abused as children.²¹¹ Also, Routt's wife did not love him, even with his properties.²¹² Eventually Routt committed suicide.²¹³ Slavik and Wall allege that he sexually abused some of their alters, swearing everyone to secrecy.²¹⁴

Here is how the plaintiffs' case went:

Counsel for Slavik called forth: Jessica, who witnessed the abuse of Elizabeth; Elizabeth, age four, who testified to sexual abuse from Slavik's father and Dr. Routt; and Anne, age ten, who testified to abuse by Dr. Routt . . .

Similarly, counsel for Wall was able to call out: Kay, age eight, who testified to abuse by Dr. Routt, both in his office and in the general "smoking room" in the hospital; Tootie Kay, age three, who testified that, in addition to Wall's grandfather and another man, the doctor abused her and "the Little Girls" and told them to keep his conduct a secret; and Michael, a teenager, who witnessed the doctor abuse Kay

205. *Id.*

206. *Id.* at 14.

207. *Id.*

208. *Wall v. Fairview Hosp. & Healthcare Servs.*, 568 N.W.2d 194 (Minn. 1997).

209. *Id.* at 197.

210. *Id.*

211. *Id.* at 198.

212. *Id.* at 198-99.

213. *Id.* at 197.

214. *Id.* at 198.

and the Little Girls. When Kay began to testify, she requested a special soft shirt of a friend because he "makes me feel safe."²¹⁵

There are many witnesses to the abuse because the court treats each of Slavik, Wall, Jessica, Elizabeth, Anne, Kay, Tootie Kay, etc. as legal entities.²¹⁶ But only for some purposes: the treatment raises issues of standing, of hearsay.²¹⁷ For instance, how can Wall recover for abuses to Tootie Kay? Imagine cross-examining Tootie Kay.

The trial court directs a verdict for the nurse and dismisses the claims against her.²¹⁸ It also dismisses some claims against the other defendants.²¹⁹ The jury finds for Slavik and Wall on every claim presented to them.²²⁰ The plaintiffs appeal the directed verdict and the dismissal of the claims against the nurse.²²¹ Norton, J., in the Minnesota Court of Appeals reverses the dismissal of some claims and otherwise affirms.²²²

c. The sticking point is the testimony of the alters. The appellate court does not know what to do here. Neither does it reflect long upon its choices: a court must do one thing or another, decide the case. *Wall* is unprecedented in Minnesota and almost everywhere. *American Home Assurance Co. v. Smith* is the only nearly identical case.²²³ Here, a therapist doubtless abused someone (concealed police witnessed him do it), although the identity (which alter?) of the victim was uncertain.²²⁴ The issue in *Smith* was insurance coverage.²²⁵ Cases with a family resemblance involving recovered memories recently have shifted their focus from criminal actions against abusers to civil suits by the accused against the therapists who recovered the memories.²²⁶

We have these extravagant possibly true claims of abuse. Slavik and Wall do not remember being abused. The court accepts the claims because the jury does. Or, Norton just washes his hands of the issue. The nurse "approaches this case by attacking the credibility of various witnesses and arguing that Slavik and Wall were per se prone to concocting bizarre and

215. *Id.* at 199.

216. *Id.*

217. This from discussions with David Fitzgerald and Carolyn Shields.

218. 568 N.W.2d. at 194.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. 462 S.E.2d 441 (Ga. App. 1995).

224. *Id.*

225. *Id.*

226. See *State v. Hungerford*, 697 A.2d 916 (N.H. 1997); *Hungerford v. Jones*, 988 F. Supp. 22 (D.N.H. 1997).

incredible stories because they suffer from DID," Norton relates. "Such arguments were better placed before the jury at trial."²²⁷

Wall confines a trial court more closely than *Daubert*²²⁸ does a federal district court: as clarified by *Joiner*,²²⁹ *Daubert* would test determinations of methodological reliability below only for abuse of discretion.²³⁰ *Daubert* allows a lot of discretion.²³¹ Hence, a federal district court can more easily exclude the testimony of alters.

Wall is intractable. Watch tapes of DID: I see patients pretending to be alters, doctors pretending to believe them—the acting level is low. "Dissociative Identity Disorder must be distinguished from Malinger in situations where there may be financial or forensic gain," the authoritative and politically responsive *DSM-IV* cautions.²³² I count three possibilities in order of increasing medical gravity: DID is a fantasy of psychiatrists, iatrogenic, or actual ('actual' means antedating therapy). Probably each category has cases. An interesting new book, *Guilty by Reason of Insanity* by the psychiatrist Dorothy Lewis, makes a compelling case for the reality of the disease.²³³ She is smart and believes there is such a thing. So we should too. This despite or because of her pervasive distrust of attorneys, infantile sense of humor, and eagerness to subordinate her views to those of some male colleagues.

Freud famously identified the pathogen of the neuroses of his female patients as their being sexually molested as children, then recanted.²³⁴ It takes a Tertullian (the incarnation "is by all means to be believed, because it is absurd")²³⁵ to accept every claim of abuse. Splitting is dividing into alters. "I remember splitting for the first time when I was about four and my father was trying to force me to sodomize my pet rabbit with a roofing nail," a patient recounts. "When I came back to myself after the experience there were three parts of me . . . Benjamin—ageless, spiritual, and protective; Bunny—little and worried; . . ." ²³⁶ Yet the subjects of the book by

227. 568 N.W.2d at 204.

228. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

229. *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997).

230. *Daubert*, 509 U.S. at 579.

231. *Id.*

232. AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 487 (4th ed. 1994).

233. See DOROTHY OTNOW LEWIS, *GUILTY BY REASON OF INSANITY: A PSYCHIATRIST EXPLORES THE MINDS OF KILLERS* (1998).

234. See *Masson v. New Yorker Magazine*, 501 U.S. 496 (1991); JANET MALCOLM, IN THE FREUD ARCHIVES (1984).

235. Max More, *In Praise of the Devil* (visited Nov. 4, 1998) <<http://www.lucifer.com/lucifer.html>>.

236. Joan Acocella, *The Politics of Hysteria*, NEW YORKER, Apr. 6, 1998, at 65.

Lewis, among them sufferers of DID, routinely endure and inflict abuses as bad as this.

Wall evokes the Salem trials,²³⁷ in which children testified to abuse by the defendants—sometimes happening to them on the witness stand. So they would cry out that *X*, in the defendants' box, was jabbing them with pins *right now*. A difference is that twenty-two people died in Salem, no one as a result of *Wall*. That DID manifests itself only to physicians trained to treat it proves nothing, being consistent with their finding or provoking the disease. Russian peasants in the nineteenth century correlated outbreaks of plague with doctors dispatched to treat it. They killed the doctors, confusing cause with effect, as a lay witness with DID is prone to do. Ninety percent of multiples are female.²³⁸ Acocella polemically models the pathogen of DID not as childhood sexual abuse but as present disillusion.²³⁹ Many women—undereducated, and immobilized by parenthood—do not share the conspicuous triumphs (still incomplete) of women in the last decades: they want to go to law school but can't. Their declaration of DID provides two benefits. It relieves them of responsibility for their predicament (their fathers caused it with roofing nails). And it offers entry into the close-knit and sympathetic community of multiples (treatment, support groups, newsletters in which one can publish one's poetry). Yet that being sick has advantages does not demonstrate that no one is actually sick. Also, as Hacking describes throughout the best philosophical inquiry into DID,²⁴⁰ pleas for help take socially determined forms: from hysteria in the time of Freud to DID in ours. But again, that DID is partly conventional does not disprove it.

d. Still, something elusive troubles *Wall*. It comes down to the role of the jury. Approach obliquely, with the verdict of a tribal court that is the subject of *Burlington Northern Railroad Co. v. Red Wolf*.²⁴¹ The Burlington Northern had run down and killed two Crow women, a mother and daughter, at a grade crossing.²⁴² The women were, at the time of the accident, intoxicated.²⁴³ The train was where one should expect it to be, on its tracks.²⁴⁴ It was travelling forty miles per hour—twenty miles per hour un-

237. See, e.g., FRANCES HILL, A DELUSION OF SATAN: THE FULL STORY OF THE SALEM WITCH TRIALS (1997).

238. See Acocella, *supra* note 236, at 65.

239. *Id.*

240. See HACKING, *supra* note 199, at 15.

241. 106 F.3d 868 (9th Cir. 1997).

242. *Id.*

243. *Id.*

244. *Id.*

der the speed limit.²⁴⁵ The railroad had not killed anyone right there in forty years.²⁴⁶

Relatives of the deceased sue the Burlington Northern in tribal court.²⁴⁷ The judge addresses the jury in Crow.²⁴⁸ The railroad lawyers do not understand Crow.²⁴⁹ He tells the jurors that bodies are scattered along the railway.²⁵⁰ He tells them that being Crow, they know what to do.²⁵¹ All except one of the jurors are relatives of the plaintiffs.²⁵² The railroad lawyers do not know what is happening. The jurors do know what to do, returning a verdict that the Burlington Northern pay the plaintiffs \$250,000,000.²⁵³ To appeal within the tribal system, the Burlington Northern must post bond for that amount. So the railroad is stuck. There is no way it will turn over \$250,000,000 to Indian Country. The Constitution does not require state courts to respect the resulting judgment, to give it full faith and credit, because the Crow reservation is not a state.²⁵⁴ Enforcement, if at all, is by comity. But the Crow can tear up the tracks and sell them for scrap. It is analytic or nearly so that a railroad without tracks operates at a handicap. And that the tracks must run from one end of the railroad to the other uninterrupted, somewhat as legs must be long enough to reach from the trunk to the ground.

The district court enjoins the tribal court; and the Ninth Circuit reverses over a strong dissent, deciding the railroad must exhaust tribal remedies.²⁵⁵ The Supreme Court vacates and remands²⁵⁶ for consideration in light of *Strate v. A-1 Contractors*.²⁵⁷ That case decided that a tribal court lacks jurisdiction over non-tribal travelers upon a federal or state highway.²⁵⁸ Hence the remand suggests that the tribal court lacks jurisdiction over Burlington Northern, because the railway is something like a highway, or because the road that intersects it at the grade crossing is exactly that.

Jurors do not write on a *tabula rasa* (more Locke).²⁵⁹ They come to

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. See U.S. CONST. art. IV, § 1.

255. Burlington N. R.R. Co., 106 F.3d at 868.

256. Burlington N. R.R. Co. v. Estate of Red Wolf, 118 S. Ct. 37 (1997).

257. 520 U.S. 438 (1997).

258. *Id.*

259. See *The Internet Encyclopedia of Philosophy: John Locke (1632-1704)*, *supra*

court trailing prior probabilities, adjust these priors in the light of evidence to reach posterior probabilities, and determine verdicts by these posteriors. Adjudication can fail several ways. It fails in the tribal court in *Randy Red Wolf* because the jurors' priors about liability are one or nearly so and resilient against whatever evidence the railroad might present.²⁶⁰ *Wall* has the converse trouble. Lacking antecedent experience with DID, the jurors start with soft (unresilient) priors pointing every which way. Neither have they any basis by which to assess the evidence. I know of no other context in which a juror must decide not only the truth of what a witness says but even whether the witness (Tootie Kay) exists. Here *Daubert* enters, or should enter—although again a court, unlike an academic, must decide a case, one way or the other.

VI. ERROR IN EXTREMIS

a. Recall that my friend Kraut worried that his wife loved him for his properties, wanting her to love him as a bare particular.²⁶¹ Through scholarly intensity and professional commitment, overcoming the distractions of what Einstein called the merely personal, Kraut wrote free of his perhaps clinical depression.²⁶² He recorded his achievement in an introspective autobiographical postscript to his essay "Love *De Re*."²⁶³ This record anticipates (in a discipline more nearly mathematical) the narratives that embellish contemporary legal studies of race and gender.²⁶⁴

The instrument of the recovery of Kraut was philosophical (not pharmacological, as one would expect). It came to him out of his analysis that love is not grounded in judgment.²⁶⁵ But let Kraut speak for himself: "I discovered an article by the psychologist Robert Zajonc,²⁶⁶ who claims to have provided evidence for the 'primacy of affect'—for the view, that is, that certain 'gut' reactions, though intentionally directed, may precede the formation of belief."²⁶⁷ I recapitulate the liberating research of Zajonc.

Show a subject a sequence of unfamiliar pictures—polygons or Chinese characters. Allow her ample time to study each before replacing it

note 143.

260. See *Burlington N. R.R. Co.*, 106 F.3d at 868.

261. See *supra* p. 110-11 and note 142.

262. See Robert Kraut, *Love De Re*, 10 *MIDWEST STUD. PHIL.* 413 (1986); See also Robert Kraut, *Feelings in Context*, 83 *J. PHIL.* 642 (1986).

263. See Kraut, *Love De Re*, *supra* note 262.

264. See, e.g., PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991).

265. See Kraut, *Love De Re*, *supra* note 262, at 429.

266. See R.B. Zajonc, *Feeling and Thinking: Preferences Need No Inferences*, 35 *AM. PSYCH.* 151 (1980).

267. Kraut, *Love De Re*, *supra* note 262, at 429.

with another. Subsequently show the pictures one at a time again, now mingled with others, themselves unfamiliar. Regarding each picture, ask the subject two questions: "Have you seen this polygon (character) before?" and "Do you like it?" With few shapes and extended time committed to introductory display, the subject consistently answers the first question correctly. She does not know what to make of the second question, which looks like a category mistake, for how can you like a polygon? Gradually increase the number of shapes you initially display, and reduce the time the subject may consider them. Her answers to the first question become less accurate. Eventually they are random, so that whether she has seen a shape before has no bearing on whether she says that she has. Throughout, the subject is responding to the second question, saying that she likes or dislikes the shape or character. Oddly, "Do you like it?" becomes a more accurate surrogate for "Do you recognize it?" That is the subject responds that she likes the shapes she has seen before, that she dislikes the interpolated shapes. She just does not *know* that she has seen them before.

Zajonc interprets:

We sometimes delude ourselves that we proceed in a rational manner and weigh all the pros and cons of the various alternatives. But this is probably seldom the actual case. Quite often 'I decided in favor of X' is no more than 'I liked X.' Most of the time, information collected about alternatives serves us less for making a decision than for justifying it afterward.²⁶⁸

Zajonc proposes an affective response (*liking*) that is independent of the expected cognitive response (*recognition*). He asserts that "some discrimination, however primitive or minimal, must have taken place" to ground the affective response.²⁶⁹ That is true anyway. "There is a strong path from stimulus exposure to subjective affect that is *independent of recognition*," he concludes, proposing the *locus coeruleus* as the place in the brain establishing preferences.²⁷⁰ New and familiar stimuli excite it disparately; it is sensitive to incentives; it responds fast. "Affect was there before we evolved language and our present form of thinking," he contends.²⁷¹ Said differently, down at the bottom of our brain, as the limbic system, we retain its reptilian predecessor, overwritten but not disconnected. We use

268. Zajonc, *supra* note 266, at 175.

269. *Id.* at 163.

270. *Id.* at 162.

271. *Id.* at 169.

it, circumventing consciousness, for fast (quick and dirty) responses.²⁷²

b. Blind sight is similar. A person whose brain is damaged, yet whose optic nerves are intact, may unconsciously acquire visual information. To test this acquisition, display a pattern: a large X or O; a red or green light (likely the subject can distinguish only gross differences). You ask the subject whether there is an X or an O in what would be her visual field, whether the light is red or green. The subject replies impatiently: "I am blind; I see nothing." Then you ask the subject to guess. With "impressive accuracy," the subject guesses correctly.²⁷³ Likewise, she can point to the part of her visual field (if she had one) at which a light is shining.²⁷⁴

I append a caveat more necessary in a less theoretical paper. A practitioner (as contrasted with an academic) must in the current state of our understanding only timidly appeal to the limbic system: invoke blind sight, or affective rather than cognitive insight. Patterns of testimony or investigation arguably premature include:

Attorney: Was the light red or green?

Witness: I don't know.

Attorney: Guess.

* * *

Assistant District Attorney (indicating lineup): Do you recognize any of these persons as the perpetrator?

Victim: No.

Assistant District Attorney.: Do you like any of them?

Kraut and Rebecca remain happily married, despite having children.

c. Better than law landside, the maritime doctrine of error in extremis takes into account the responses of the limbic system. Error in extremis is the converse of last clear chance. I illustrate by a Second Circuit opinion written by Learned Hand.²⁷⁵

The *Voca* (a tanker, 394') and the *Gypsum Prince* (a freighter, 347') collided off Delaware Bay on March 2, 1942.²⁷⁶ They were traversing a channel 1.5 miles wide between minefields, the *Gypsum Prince* outward

272. See ROSALIND W. PICARD, *AFFECTIVE COMPUTING* 5-45 (1997).

273. PATRICIA S. CHURCHLAND, *NEUROPHILOSOPHY* 226 (1986).

274. *Id.*

275. *Socony Vacuum Transp. Co. v. Gypsum Packet Co.*, 153 F.2d 773 (2d Cir. 1946).

276. *Id.* at 774.

bound.²⁷⁷ It being still dark (the ships collided at 6:46 AM), both ships carried the statutory running lights.²⁷⁸ Being to starboard, the *Voca* had right of way.²⁷⁹ The *Gypsum Prince* would cross her bow.²⁸⁰ The *Voca* altered course eight degrees soon after the ships were visible to each other.²⁸¹ In the dark at a distance of several miles, the *Gypsum Prince* could not have made out the change.²⁸² As ships converged, the *Gypsum Prince* sounded a double blast to signal that she would cross.²⁸³ Responding correctly to the signal, the *Voca* slowed and put her rudder hard left.²⁸⁴ The *Gypsum Prince* precipitously put her rudder hard right, turning to starboard across the bows of the *Voca*, which, "in extremis," as Hand finds, immediately put her rudder hard right and went full speed astern.²⁸⁵ The *Voca* struck the port side of the *Gypsum Prince* at an angle of seventy degrees, eighty feet from her bow.²⁸⁶ The *Gypsum Prince* sank in 1000' of water within ten minutes.²⁸⁷

By an act like Indiana (nearly) legislating an incorrect value of π ,²⁸⁸ Icelandic law announces, "It is prescribed that there shall be no such things as accidents."²⁸⁹ Practice mitigates the prescription.²⁹⁰ Two admiralty doctrines lie nearby. A court may declare inscrutable cause where some ship erred but the court cannot tell which. Second, here contradicting Icelandic law, a court sitting in admiralty may declare inevitable accident: the thing just happened and was the fault of no ship.

The district court exonerated the *Voca*, holding the *Gypsum Prince* at fault, citing her for not keeping a proper watch, for not keeping out of the *Voca*'s way, for sounding a wrong signal, and for changing her course.²⁹¹ So neither inscrutable cause nor inevitable accident applies here. Yet admiralty law is not so simple.

277. *Id.*

278. *Id.* at 775.

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

288. See PETR BECKMAN, HISTORY OF π 174-77 (5th ed. 1982); LET'S GO: THE BUDGET GUIDE TO USA 1996 at 419 (Michelle C. Sullivan ed., 1996). I thank my student Stacy Volante for this reference.

289. WILLIAM IAN MILLER, BLOODTAKING AND PEACEMAKING 62 (1990).

290. See Puerto Rico Ports Auth. v. M/V *Manhattan Prince*, 897 F.2d 1 (1st Cir. 1990).

291. 153 F.2d at 775.

Hand affirms.²⁹² A problem is the change of course of eight degrees by the *Voca*, imperceptible to the *Gypsum Prince*.²⁹³ It is a statutory violation: a ship having the right of way, as the *Voca* did must maintain her course.²⁹⁴ In admiralty, a statutory violation does not create just a presumption of fault. By the *Pennsylvania* rule,²⁹⁵ a ship committing a statutory violation must show not only that the violation did not cause the collision, but that *it could not have done so*. The apparent modality ('could not') seems in the cases to collapse into only high probability. Still the rule is Draconian. Hand agrees with the district court that the initial change of course by the *Voca* could not have caused the collision; and that her subsequent slowing and change of course, responding to the signal of the *Gypsum Prince*, was not a statutory violation.²⁹⁶ The *Gypsum Prince* in effect requested the *Voca*'s response.

The actions that engage the response of admiralty to limbic system are the final hard right rudder and backing by the *Voca*. Hand decides that these were the *Voca*'s correct actions in the exigency; that anyway they occurred too late to contribute to the collision; and, significantly, that had they been error, they are excusable as in extremis.

Hence Hand invokes error in extremis contingently.²⁹⁷ The doctrine relieves a ship of liability for acts taken without deliberation in contexts of imminent peril.²⁹⁸ Admiralty recognizes that navigation often needs rapid response, by its nature inexact, sometimes mistaken. The distinction here is that which separates reflective cortical behavior from reflexive, reptilian, limbic response. At error in extremis, equity and efficiency seem to coincide. A ship thus erring, although mistaken, is not at fault—morally ought not be liable.²⁹⁹ A limbic response is unlearned and unlearnable, a result of natural selection and genetic composition. Thus punishing it does not deter it (except by selecting against it over thousands or millions of years).

The *Gypsum Prince* erred grievously. A common lawyer asks, why did Hand so scrupulously exonerate the *Voca*? In admiralty, before *Reliable Transfer*,³⁰⁰ parties to a loss divided it equally unless one was (or both were) wholly faultless—as at common law slight contributory negligence

292. *Id.* at 778.

293. *Id.* at 776.

294. *Id.*

295. *The Pennsylvania*, 86 U.S. 125 (1873).

296. 153 F.2d at 776.

297. *Id.*

298. *Postal S.S. Corp. v. The El Iselo*, 308 U.S. 378 (1940).

299. *See* 153 F.2d at 777.

300. *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975).

completely barred recovery. Error in extremis avoids the rule of equal division (as last clear chance avoids contributory negligence), at the occasional cost of entirely relieving from liability the vessel that successfully invokes it. The doctrine has disappeared from the cases with the reason for it. No case has considered in extremis since the date of *Reliable Transfer*, 1968. One opinion mentions it, comparing it with another bad rule.³⁰¹ Hand ends:

It would have been indeed an unfortunate outcome to charge the 'Voco' with half damages; at most her proportion of the loss ought to have been very small indeed. It is hard to see why we continue to insist upon an equal division which almost all the civilized world has repudiated, and for which it had substituted proportionate fault. Nevertheless, although in the case at bar, we have not been called upon to apply that doctrine, which has nothing to commend it and everything against it, it must not be supposed that we should have hesitated to do so, had the facts warranted.³⁰²

Error in extremis by that name does not appear in state cases. The absence is expected, the doctrine being from admiralty, state courts often either not applying or misapplying this law. The exception is Virginia, which has its own rule of in extremis, applied landside, or held as Hand held it in reserve, when, for instance, a driver "unwisely" runs down a telephone pole.³⁰³

VII. ANTIGONE

a. Antigone is about law, of course among other things. I will look at just one legal aspect of Sophocles' drama. Recall the myth.³⁰⁴ Edipus and Jocasta have two sons and two daughters (also his brothers and sisters, her grandchildren).³⁰⁵ The sons, Eteocles and Polynices, kill each other outside Thebes, Eteocles defending, Polynices attacking the city.³⁰⁶ Creon rules Thebes.³⁰⁷ He decrees that Polynices lie unburied as an enemy of and traitor to the city.³⁰⁸ Exposing a corpse is sacrilegious.³⁰⁹ Antigone (although not her sister Ismene) symbolically buries Polynices by throwing dirt on his

301. *Getty Oil Co. (Eastern Division) v. S.S. Ponce de Leon*, 409 F. Supp. 909, 915 (2d Cir. 1976).

302. 153 F.2d at 777-78.

303. *Wyatt v. Chesapeake & Potomac Tel. Co.*, 163 S.E. 370, 372 (Va. 1932).

304. *See supra* p. 9.

305. OLD SHEPARD, *supra* note 97.

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

corpse, thus flaunting Creon's decree.³¹⁰ Tiresias shows up here too.³¹¹ Despite his warning that this is a poor idea, Creon orders that Antigone be locked in a tomb to die.³¹² Antigone hangs herself there.³¹³ Haemon the son of Creon loves Antigone and kills himself with his sword beside her.³¹⁴ Eurydice the wife of Creon hangs herself.³¹⁵ Things have not worked out well for Creon (or for that matter for anybody else). The chorus conclude the drama, "The mighty words of the proud are paid in full / with mighty blows of fate, and at long last / those blows will teach us wisdom."³¹⁶

So we have Antigone acting very nobly.³¹⁷ Now go back to the scene in which she in her final speech purports to tell Creon why she has buried Polynices:

Never, I tell you, if I had been the mother of children, or if my husband died, exposed and rotting—I'd never have taken this ordeal upon myself, never defied our people's will. What law, you ask, do I satisfy with what I say? A husband dead, there might have been another. A child by another too, if I had lost the first. But mother and father both lost in the halls of Death, no brother could ever spring to light again.³¹⁸

She is not expressing noble sentiments here.

So philologically there is a problem. Philologists sometimes resolve it by cutting the Gordian knot, repudiating the lines as interpolated. For example, Jebb says, "after long thought, I cannot bring myself to believe that Soph[ocles] . . . wrote" them,³¹⁹ adding that some of the lines, 909-12, are especially "unworthy of Soph[ocles]."³²⁰ The textual evidence against authenticity is unpersuasive, however: hardly more than that the lines are undistinguished and that they avoid the expected *αὐτὸς* for 'husband'.³²¹ Also, Aristotle cited the lines without alluding to any inauthenticity in 338 BC, hence within a century of Sophocles' death (although the *Antigone* is early Sophocles).

If the passage is authentic, why did Sophocles write it? It is a safe generalization that most philologists are male and few are attorneys. Start

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

316. SOPHOCLES, *THE ANTIGONE*. 1351-53 (Richard C. Jebb ed., 1902).

317. See GEORGE STEINER, *ANTIGONIES* (Yale ed. 1996).

318. *Id.* at II. 905-12.

319. SOPHOCLES, *supra* note 316, at 182.

320. *Id.*

321. *Id.*

from universal agreement that the argument Antigone makes is invalid. Take the male philologists first. They believe that logical argument is the (male) norm, but graciously excuse a "girl" from logicity: "Antigone is neither a philosopher nor a devoté, but a passionate, impulsive girl, and we should not expect consistency from one such."³²² Antigone was between twelve and fifteen—old enough to be betrothed but too young to marry. Marriage occurred promptly upon menarche, we are told.³²³ That said, the complaint is that to depict a woman realistically in this respect contravenes the elevated conventions of classical drama: "In real life, no doubt, a girl facing death might talk illogically; but this is a speech in a Greek tragedy . . ."³²⁴

A female commentator calls the argument sophistic, crass, illogical, inappropriate, and male.

Soph[ocles] gives her this bit of contemporary sophistry, a crass "masculine" exercise in mental gymnastics. But An[tigone] is no sophist. Here she is pure woman, trying to justify herself to herself. Because her reason is not logical but instinctive, her analysis can only produce a formal "masculine" tone and an illogical, inappropriate syllogism.³²⁵

Recall Kraut and the limbic system.³²⁶

b. A little law on the side. Philologists also criticize the lines as inscrutably morally obtuse *because legalistic*. For example, Sophoclean drama has a "forensic element . . . when the character assumes the quasi-legal mode, so that we must conceive of Antigone retreating from the *engagement* of her living plight in order to offer an alternative formal defence of her conduct, as if she were pleading in a court of law."³²⁷

So we turn to the legal literature. That will set the record straight, we anticipate. It doesn't. At least I think it doesn't—I can't understand it:

Similarly, if the ethical substance is the union of opposites, of man and woman, of consciousness and unconsciousness, of universal and singular, of state and divine law, Antigone shows that the pleasure of the copulation and concep(tion) never fully arrives and that, contra Hegel, the law of reason and man will be judged in the (nocturnal) light of desire and woman.³²⁸

322. H.D.F. KITTO, *FORM AND MEANING IN DRAMA* 170-71 (1954).

323. See Andrew Wilson, *The Classics Pages: Odysseus' Page* (visited Nov. 4, 1998) <<http://www.users.globalnet.co.uk/~loxias/antigone02.htm>>.

324. ANDREW BROWN, *SOPHOCLES: ANTIGONE* 200 (1987).

325. JOAN V. O'BRIEN, *GUIDE TO SOPHOCLES' ANTIGONE* 104 (1978).

326. See *supra* p. 124.

327. JOHN JONES, *ON ARISTOTLE AND GREEK TRAGEDY* 197 (1962).

328. Costas Douzinas, *Law and the Postmodern Mind: Law's Birth and Antigone's*

c. Herodotus has a precedent that is at once the source of the passage and not in point. Darius, the Persian king, has ordered his servants to admit Intaphranes unannounced unless Darius is with a wife.³²⁹ Darius being thus engaged, his servants deny access to the king. Piqued, Intaphranes cuts off the noses and ears of the servants, stringing these around their necks.³³⁰ The servants complain of this treatment to Darius, who confines and intends to kill Intaphranes and his (male) relatives.³³¹

Then Intaphranes' wife came ever and anon to the palace gates, weeping and lamenting; and at last her continual so doing moved Darius to compassion; and he sent a messenger to tell her that Darius would grant her the life of one of her imprisoned kinfolk, whomever she chose. She, after counsel taken, answered that if this were the king's boon she chose the life of her brother. Darius was astonished when he heard her answer, and sent one who said to her: "Woman, the king would know for what reason you pass over your husband and your children and choose rather to save the life of your brother, who is less close to you than your children and less dear than your husband." "O King," she answered, "another husband I may get, if heaven so will, and other children, if I lose these; but my father and mother are dead, so I can by no means get another brother; that is why I have thus spoken." Darius was pleased, and thought the reason good; he delivered to the woman him for whose life she had asked, and the eldest of her sons besides; all the rest he put to death.³³²

Intaphranes' wife acts to save her brother because she cannot have another, while Polynices is dead and the issue Antigone resolves is whether to bury him.³³³ Hence that Antigone cannot have another brother should be irrelevant.

d. Here identity helps out, in the form of Jones explaining the contested lines.³³⁴ "Num Deus potuerit suppositare mulierem? Num Diabolum? Num asinum? Num cucurbitam?" Erasmus writes, that is, "Could not God have assumed the (earthly) form of a woman, the devil, a donkey, or a pumpkin?"³³⁵ So imagine a pumpkin: "[H]ow could a pumpkin have

Death: On Ontological and Psychoanalytical Ethics, 16 CARDOZO L. REV. 1325, 1356 (1995).

329. 2 HERODOTUS, THE HISTORIES, bk. 3, §119 (A.D. Godley trans., 1938).

330. *Id.*

331. *Id.*

332. *Id.*

333. *Id.*

334. See JONES, *supra* note 327, at 197-200.

335. 3 JACOB BRUCKER, HISTORIA CRITICA PHILOSOPHIAE 878 (1756).

preached, or been crucified?"³³⁶

Erasmus (and Hegel) are writing counterfactually. A counterfactual is a sentence that has the form, 'If *A* were true, then *B* would be true.' Note the subjunctives: the form presupposes that the antecedent of the conditional is false. One determines the truth of a counterfactual by inspecting the possible worlds in which the antecedent is true. If the consequent is true in all of these worlds, the counterfactual is true. Jones observes that Antigone speaks counterfactually: "Never, I tell you, if I had been the mother of children, or if my husband died, exposed and rotting—I'd never have taken this ordeal upon myself, never defied our people's will."³³⁷ Antigone would bury her husband or children nowhere—in *no* possible world.

The law uses counterfactuals all the time. Cause is often interpreted counterfactually: "*But for* such and such, so and so." Rose in *Sherwood v. Walker* was not the cow the parties tried to contract about because Rose is pregnant in no possible world.³³⁸ Expectation damages are what would have happened less what did.

Use of counterfactuals requires some sophistication. Especially, a counterfactual about the speaker requires that she identify herself in possible worlds other than the actual world. A prerequisite to her doing so, therefore to her successful use of the linguistic form, is that she be robustly self-aware—she must have a concept of herself strong enough that she can locate herself in these other worlds. Jones argues that the Greeks, including Sophocles, lacked a solid concept of themselves.³³⁹ Hence Antigone, unable to imagine herself as married or a mother, speaks ungroundedly, as would any Greek. "In short," Jones says, Antigone "knows no adequate modern 'you' which would give an adequate modern sense to the question: 'What would you do if it were a husband or child lying unburied?'"³⁴⁰

One version of a legal person is someone able to make this identification. Contracting presupposes insight about consequences (here to oneself) across temporal worlds. So does sanity, if one takes a consequentialist view of right and wrong, or imagines that having free will assumes an ability to do otherwise.

336. 3 GEORG W. F. HEGEL, LECTURES ON THE HISTORY OF PHILOSOPHY: THE LECTURES OF 1825-1826 at 67 (Robert F. Brown ed., 1990).

337. See JONES, *supra* note 327, at 197-200.

338. *Sherwood v. Walker*, 33 N.W. 919 (Mich. 1887).

339. See JONES, *supra* note 327, at 197-200.

340. JONES, *supra* note 327, at 197.

CONCLUSION

What have I provided beyond entertainment? Evidently, persons and personal identity are not data to law—not exogenous variables, but determined within it. Neither the idea that something that looks presupposed is endogenous nor the idea that law makes up things is new. Outside law, gender is socially constructed, feminists tell us.³⁴¹ And perhaps quarks are too.³⁴² And within law, consciousness of legal fictions has been with us from Fuller,³⁴³ who did not invent them. I have connected the insights—no great thing. Yet the unanticipated richness of the result delights me.

341. See JUDITH P. BUTLER, *BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF 'SEX'* (1993); JUDITH P. BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990).

342. See ANDREW PICKERING, *CONSTRUCTING QUARKS: A SOCIOLOGICAL HISTORY OF PARTICLE PHYSICS* (1986).

343. See LON FULLER, *LEGAL FICTIONS* (1970).

