

*Faculty of Law*

*Faculty of Law - Papers*

---

*University of Wollongong*

*Year 2008*

---

Flesh and the Person

R. Mohr

University of Wollongong, [rick.mohr@uow.edu.au](mailto:rick.mohr@uow.edu.au)

This article was originally published as Mohr, R, Flesh and the Person, Australian Feminist Law Journal, 29, 2008, 31-52.

This paper is posted at Research Online.  
<http://ro.uow.edu.au/lawpapers/41>

# Flesh and the person

Richard Mohr<sup>\*</sup>

## Abstract

What connection is there between flesh and the legal person? Flesh is the most material aspect of human existence, while the legal person is one of its most abstract manifestations. The method is a phenomenological analysis of legal records of the body and identity, including everyday documents such as credit cards. These are analysed in terms of the information they contain or refer to, and the physical processes by which they are compiled or activated. These physical traces are linked to law and selfhood by narratives, including those by which we make sense of our lives as well as forensic narratives that seek to ascribe responsibility for actions. Tracing its ancient origins from theatre, law and theology, the concept of the person is found to have continuing relevance to a conception of self that is dynamic and performative, mediating between the physical and the social. It is capable of attributing identity and responsibility, while at the same time admitting play and indeterminacy into our constructions and narratives of our selves.

---

<sup>\*</sup> Director of the Legal Intersections Research Centre, Faculty of Law, University of Wollongong NSW 2522 Australia, and Managing Editor, *Law Text Culture*.  
rmohr@uow.edu.au

# Flesh and the person

## ***Methods***

This is an inquiry into the relationship between flesh and the legal person. Flesh is the most material aspect of human existence, while the legal person is one of its most abstract manifestations. The comprehension and reconciliation of these elements is integral to living a life, or, to use other words, constructing an identity. The very notion of 'identity', which I will later distinguish from that of 'person', begins to indicate some of the other terms used to speak about people, each of them variously emphasising different aspects of our physical, social, cultural or legal beings. By focusing on the physical and legal ends of such a spectrum I hope to cast some light on the whole project of being one's self.

The objects of this study are the documents and representations of our physical being that are directed to constructing legal personhood. After an overview of the history of the 'person', there is an analysis of the *things* that make us *persons* in the eyes of legal administration. Specifically, it considers documents and marks that purport to represent legal identity, such as identity cards, credit cards and passports, and the information they contain. Finding that those things fail to capture notions of agency or the passage of time, I consider the implications of that limited version of identity, frozen in time and essentialising physical characteristics, and then turn to look for other legal traces of persons that might account for these missing elements. These include the signature which performs a commitment, and historical records of events which form the building blocks of legal narratives. I will conclude by exploring the possibility of comprehending identity, agency, experience—in short, a life—out of

these legal and administrative traces. The notion of legal personhood, and its relationship to other ways of being a 'person', is essential to that comprehension.

The inquiry adopts a phenomenological approach to those physical objects that make us subjects, which steps out of the 'natural attitude' by which we see them as means of proving 'who we are', purchasing goods or crossing borders, by 'bracketing' such approaches in order to reflect on them from another perspective.<sup>1</sup> This reflection allows new connections to be made between the data on the documents and the physical, social and legal entities that they represent. In reflecting on those connections, I am seeking a better understanding of the nature of those entities and the processes by which they are constructed.

Terms like 'construct' and 'project' are used in order to draw attention to the ongoing and cumulative nature of these processes of living, growing up or, simply, being.<sup>2</sup> The aim of this paper is to explore those processes through the role played by physical and legal manifestations of self. If the physical self, our flesh, simply 'is', then it is necessary to discover the means by which it enters into relationships with the social and cultural world around it. We know ourselves to be in such relationships: we grow into families, know ourselves as others relate to us, learn language and other cultural attributes. We are used to thinking about ourselves in these terms. I hope to be able to show the promise of a phenomenological reduction of our relation to the world that stretches the boundaries of self beyond the social, the personal and the cultural to physical flesh, at one extreme, and personhood at the other.

---

<sup>1</sup> Husserl Edmund *Ideas: General Introduction to Pure Phenomenology* Allen & Unwin London 1931 at §31-33; Schutz Alfred *Collected Papers* Martinus Nijhoff The Hague 1970 at 169-170.

While a phenomenological bracketing of our natural attitude is a promising approach to flesh and identity, I must mention another approach by way of methodological introduction. The other aspect of this inquiry will be to consider the origins and meanings of the term 'person'. I have indicated that, in its abstraction, it is at an opposite and abstract, pole to that of the flesh, which might be seen as the concrete: material flesh in contrast to the 'ideal' of personhood. The notion of the person, however, has a long, rich and complex history that embeds it in generations of understanding and millennia of culture. It may be seen as a trope or, more tellingly, as a paradigm. In Agamben's sense, a paradigm is 'a way of understanding that is neither inductive nor deductive, but analogical, that moves from the singular to the singular' (not requiring generalisation); 'it does not have an origin or an *arché*: each phenomenon is the origin, each image is archaic'.<sup>3</sup> So in this sense, to give examples, both Foucault's panopticon and Agamben's own *homo sacer* are paradigms, each symbolising and embodying the whole ('*l'insieme*') of a way of thinking and of being; a category of epistemology as well as ontology.<sup>4</sup> This approach promises a deeper understanding of our ways of being a 'person'. Despite its abstract legal character, the term has deep ontological roots, in theatrical masks and in our relationship to the gods. Not only that, but we know ourselves to *be* persons in a sense that may be related to legal fictions (as will be seen in more detail) but that is also, and fundamentally, about our way of being in the world.

Neither the choice of methodology nor subject matter is innocent of theory. In considering the objects that represent us as subjects I will have occasion to review various sorts of texts. There is a proud tradition of this line of inquiry, in the work of

---

<sup>2</sup> See the nuanced discussion of 'construction' in Butler Judith *Bodies That Matter: On the Discursive Limits of "Sex"* Routledge New York 1993 at 9-10.

<sup>3</sup> Agamben Giorgio *Signatura rerum: sul metodo* Bollati Boringhieri Torino 2008 at 32-33.

Legendre and Goodrich, expanded by Vismann. In this tradition the Text is the province or domain of Law. The use of capital letters here follows Legendre, who thereby emphasises both the fetishistic nature of the Text, *le livre-fétiche*,<sup>5</sup> and the patriarchal authority of the Law. In this reading, the Text of Law 'does not belong to any subject', and indeed 'the Text without subject signifies the principle of paternity'.<sup>6</sup> The Text lays down law in a pre-time and functions as a barrier to the law, even as it transmits it.<sup>7</sup> This is a law that is transmitted in a dead form, by a 'process of cancellation which establishes the Law',<sup>8</sup> 'a tradition in which the text is immediately a relic, a ruin'.<sup>9</sup>

The domineering role of the law and the fetishised nature of the text are less conspicuous in Vismann's full exploration of the relationship between files, subjects and law, now published in English. Working outward from the archive, she shows that efforts to record all administrative and legal acts turned to an impetus towards self-administration, in the diary and personal archive as well as in the state registry. The nineteenth century saw the rise of universal literacy, self-administering civil servants, and self-reflective individuality. Now subjects and states alike 'produce themselves by administering themselves'.<sup>10</sup> As she moves on to the twentieth century, concerns

---

<sup>4</sup> 'The intelligibility that is in question in the paradigm has an ontological character, not referring to the *cognitive* relationship between a subject and an object, but to *being*.' As above at 34 (emphasis added).

<sup>5</sup> Legendre Pierre *La passion d'être un autre: Étude pour la danse* Éditions du Seuil Paris 1978 at 58.

<sup>6</sup> Legendre Pierre *Law and the Unconscious: A Legendre Reader* Goodrich Peter (ed) Macmillan Basingstoke 1997 at 69. Emphasis in original. In writing of law and texts I will not use capitals, since my theoretical impulse is to question and even unsettle those features of law and writing that lay down tracks that we have no choice but to follow. Compare: 'every archive ... is at once institutive and conservative. Revolutionary and traditional'. Derrida Jacques *Archive Fever: A Freudian Impression* University of Chicago Press Chicago 1995 at 7.

<sup>7</sup> Vismann Cornelia 'Cancels: On the Making of Law in Chanceries' (1996) 72 *Law and Critique* p 131 at 138.

<sup>8</sup> As above at 137.

<sup>9</sup> Goodrich Peter *Languages of Law: From Logics of Memory to Nomadic Masks* Weidenfeld & Nicolson London 1990 at 140.

<sup>10</sup> Vismann Cornelia *Files: Law and Media Technology* Stanford University Press Stanford, CA 2008 at 112.

emerge on both sides of the Atlantic that government records of individuals are a means of 'social control, identity-giving and memory-tracing'.<sup>11</sup> This reaches its end point with the Stasi files which were so detailed and, after the fall of the East German regime, so sought after as a means of understanding the role of the state in one's 'personal fate', that they could 'be used for the purpose of self-enlightenment in much the same way as keeping and reading a diary'.<sup>12</sup>

Having attended the opening of an exhibition at the National Archive of Australia<sup>13</sup> with family members whose files from the Australian Security and Intelligence Organisation were being displayed for the first time, I would like to expand on this simple reading of the reaction of those whose lives have been documented by secret police. There was a sense of the uncanny, that intimate scenes were part of a secret public record, and of dialogue with the 'official' but secret record of their lives, as well as a sense of relief and celebration that a dirty history of denigration and covert surveillance had turned to recognition.<sup>14</sup> Stories, whether told by families or by secret police, in diaries or archives, are never definitive and are always open to revision and dialogue. I return, below, to the role of competing and alternative narratives in the construction of personhood.

Unconvinced by a state- and registry-focussed view of personal experience, my own analysis begins from the viewpoint of individuals, focusing on identity documents and legal texts of which we subjects are the authors, in order to reveal the legal register of our selves, our commitments and our obligations. While many of these may relate to records kept in various depositories and data bases, the point of view is personal.

---

<sup>11</sup> Wheeler Stanton (1969) quoted by Vismann as above at 147.

<sup>12</sup> Vismann above note 10 at 154.

<sup>13</sup> 'Memory of a Nation', National Archive of Australia, Canberra, 22 March 2007.

<sup>14</sup> The family had cooperated in the exhibition and provided some of their own photographs of great-grandparents.

This reverses the direction of the analysis of legal texts from the starting point of the chancery or the registry office, to the encoded cards we carry around with us and the documents we sign on a quotidian basis. This is the distinction made by Vismann in a sparkling chapter covering the middle ages to the renaissance, between ‘records’ kept in archives, and ‘documents’ which ‘were not stored in any central repository, for they stored themselves. Documents follow a distributive mode; they are kept by the recipient.’<sup>15</sup> Vismann discusses the interaction between records and documents, while directing her insightful semiotics to the material being of the files where the records are stored. I hope to better understand how we interact with the law in the everyday world by starting from the material being of the ‘documents’ (e.g. plastic cards) and practices (signing, entering a personal identification number or password) that mark a border with the immaterial legal persona.

### ***Discourse***

While criticising a certain determinism in Legendre or Goodrich, I will be careful to avoid a naïve or unbounded voluntarism. I am helped in this by Butler, who fully recognises the structures of power that seek to enforce gender roles or heterosexual ‘normality’, while elaborating the subject’s role in performing and reiterating what it is to be ‘male’ or ‘female’. Performativity can only be successful within the constraints of the authorised, yet this authority can only be called into effect by the performance. We will see later some of the ways in which the performative can exhibit play and flexibility. Butler’s performative, ‘that discursive practice that enacts or produces that which it names’,<sup>16</sup> is a ritual reiterated within a context that defines the meanings of acts, and even compels the ‘shape of the production’ through threats and taboos, but is not ‘fully determined in advance’.<sup>17</sup>

---

<sup>15</sup> Vismann above note 10 at 72.

<sup>16</sup> Butler above note 2 at 13.

In ordinary discourse we speak of a person, a woman, a man, people, human beings. In describing who we are, we use any number of terms, each carrying with them a variety of other connotations of various social categories. To speak of women and men refers to gender; to speak of human beings has a strangely biological and asocial connotation, like 'homo sapiens' only more so. For instance, to speak of 'humans' (or 'homo sapiens') arriving in Australia more than 40,000 years ago is to distance those people from ourselves, to lose something of what we have in common, a commonality that is remembered when we think of us all as persons.

I have referred to the common usage of the terms 'person' and 'people', and used both of them myself in the previous sentence. In contemporary everyday English the plural of person is people. Yet each of those words has a very different origin and connotations. The 'people' is traditionally used as a collective, rather than simply a plural, term. The people are, originally, the 'popular' masses; the term itself has implied exclusion and invoked compassion ('*le peuple toujours malheureux*'), while the 'ordinary people' may be distinguished from the aristocracy.<sup>18</sup> After the rise of democracy, the collective term has taken on a new dignity, so that now constitutions are written and laws are invoked 'in the name of the people', who are now a sovereign people in contrast to the unfortunate masses. Agamben points out that both senses of the term now coexist, so that the word contains within itself the 'fundamental biopolitical fracture' between 'naked life (people) and political existence (People), exclusion and inclusion, *zoë* and *bios*'.<sup>19</sup>

---

<sup>17</sup> As above at 95

<sup>18</sup> The distinction is stronger in the Latin languages: *il popolo, le peuple*. The '*malheureux*' quote is from Sieyès, cited by Arendt in Agamben *Giorgio Means Without End: Notes on Politics* University of Minnesota Press Minneapolis 2000 at 28-29.

<sup>19</sup> As above at 31.

While 'people' has this dual signification, and 'person', as will be seen in more detail shortly, carries extraordinary legal and theological baggage, there are few other terms we can use to refer to ourselves that are as general and humane. I have already mentioned the gender specific terms, and the biologically oriented terms, while many others which may be more socially oriented refer to various aspects of belonging to a group. Politicians are fond of invoking nationally-specific terms ('friends, Romans, countrymen'; 'my fellow Americans'), while Indigenous languages often refer to the group by the general word for a person ('*Anangu*', for instance, in Pitjatjantjara).

These terms that are specific to a gender, national or ethnic group might be gathered together, as in much academic and political discourse, under the heading of 'identity'. When we come to consider how people are identified by the law it will be seen that even though some of these social categories have physical referents (sex, aspects of appearance such as skin colour), they float free of human flesh and take on meanings that go beyond their biological foundation in the body. Maintaining an interest in questions of identity, I hope that by going to extremes, to the material flesh and to the abstract person, and seeing how these relate to each other, it may be possible to rethink some of the assumptions we make in that natural attitude of everyday discourse about who we are.

### ***Person***

The 'legal person' has a bad name. Writers as diverse as Teubner, Goodrich and Kelsen have defined it in ways that are both thin and ultimately fictitious.<sup>20</sup> It is an entity, conjured by legal discourse, whose existence is more substantial in law than in everyday life. Kerruish has written,

---

<sup>20</sup> Mohr Richard 'Identity Crisis: Judgment and the Hollow Legal Subject' (2007) 11 *Law Text Culture* 106 - 128 at 109.

'Each person in this sense counts the same as every other and becomes an object of law. ... The particularity of an individual as developed by the exercise of his or her subjectivity is left out of account.'<sup>21</sup>

This study is motivated by an urge to discover whether the legal person may be subject as well as object. Of course we need to distinguish the sense of 'subjectivity' as used by Kerruish from that of an older legal meaning of the legal subject as literally one who is 'cast under' the law.

In a contemporary sense, an inversion of the previous one,<sup>22</sup> the subject is a grammatical one, the acting 'I' who is subject of a verb. Mauss addressed this issue in 1938, when he enquired into the development of the idea of the self (*moi* or *je*) from an earlier sense of the person. Within his evolutionary paradigm, Mauss distinguished an archaic conception of the person as one who fulfills a role, be that by assuming certain names (as demonstrated in anthropological studies) or by having a certain legal status (as in Rome), from the later Christian and Enlightenment sense: 'a moral sense is increasingly added to the legal sense; a sense of a conscious, independent, autonomous, free, responsible being'.<sup>23</sup> For Mauss, the moral sense developed as an advance on the 'mere masquerade' or mask, even indicating a certain superiority of the western trajectory.<sup>24</sup> He saw the modern sense of self as having overtaken and superseded an earlier, hollower and less moral version. The purpose of this study is to review the concept of personhood to find its contemporary relevance as well as the crucial remnants of its origins, many of which have been preserved in law.

---

<sup>21</sup> Kerruish Valerie 'Persons and Available Identities: Gender in Hegel's Philosophy of Law' (1996) 7 2 *Law and Critique* 153-172 at 169.

<sup>22</sup> 'Subjective', Williams Raymond *Keywords: A Vocabulary of Culture and Society* Fontana Paperbacks London 1983

<sup>23</sup> Mauss Marcel 'A Category of the Human Mind: The Notion of Person, the Notion of 'Self'' in (eds) *Sociology and Psychology* Routledge & Kegan Paul London 1979 57-94 at 84.

A 'person' is legally defined by an authoritative Australian legal dictionary as, 'a separate legal entity, recognised by the law as having rights and obligations.' The dictionary cross references the term to 'Association; Company; Incorporation; Incorporated association; Man; Unincorporated association'.<sup>25</sup> Seeing that the term can apply to a 'man', one can pursue that meaning to discover the intentional gender specificity of this term: it is defined as a 'person of the male sex'.<sup>26</sup> So in the world of contemporary legal meaning the term 'person' seems more comfortably applied to legal fictions, to those 'bodies corporate' that have neither body nor corporeality, than to women of flesh and blood.

Is there anything of value to be excavated from these ruins of medieval fictions and contemporary gender assumptions? My answer is yes, based precisely on the fictitious, abstract and underdetermined nature of the very concept of the person. I will base this affirmation on the role that narrative plays in law and in life, drawing parallels between the processes by which law frames arguments and those by which we make sense of a life. Based on the bare facts and material objects of documents, evidence and bodies, we can construct narratives, cases and arguments. None of these is determinate; all can be contested. We live our lives in a such a mode. The material substratum of our existence—nourishment, shelter, flesh—is the ground onto which we project our dreams and sketch out the alternative plot lines of our biographies.

The 'person', as a paradigm of Western thought, has ancient roots in theatre and theology, has significance in Roman law and thought and subsequently acquired

---

<sup>24</sup> As above at 90.

<sup>25</sup> Nygh Peter E. and Butt Peter *Butterworths Concise Australian Legal Dictionary* LexisNexis Butterworths Sydney 1998 at 334.

particular attention and meanings in early Christian thought, which, as I will show, had far reaching implications for later Western philosophy. This palimpsest of significations and cultural connections comes through to us in the various ways we use the word today.

Savona proposes a threefold character and a developmental trajectory to the term 'persona' or 'person'. Over the centuries, the term has placed increasing value on the relationship of humans to the world, in sacred-symbolic, historical-cultural and legal-institutional dimensions. Throughout this course, he sees the person as expanding its scope (its 'personality'), while at the same time differentiating itself from the world and individuating itself from others. He sees this process as being supported by cultural, social and legal means, which 'protect the conditions and status of the being of the person'.<sup>27</sup>

Just as the term 'person' masks and projects so many other possible meanings and projects, so it grew out of the notion of the theatrical mask which may even have had the function of projecting the voice. The Greek *prosopon* referred to the mask worn in ancient theatre, deriving from a word for a front (as of an army) or the prow of a ship. Bettetini notes that Aristotle used the term to refer to the theatrical mask as well as the character which the mask portrayed. While it is commonly held that the notion and possibly also the word was adopted by the Romans from the Greek, she points out that the Latin *persona* may also have derived from '*per-sonat*', the capacity of the mask to resonate to the actor's voice.<sup>28</sup> The theatrical origins of the term survived in

---

<sup>26</sup> As above at 281.

<sup>27</sup> Savona Pier Francesco *In limine juris: La genesi extra ordinem della giuridicità e il sentimento del diritto* Edizioni Scientifiche Italiane Napoli 2005 at 112.

<sup>28</sup> Bettetini Maria *Figure di verità: La finzione nel Medioevo occidentale* Einaudi Torino 2004 at 109-110.

the 'dramatis personae' of Shakespearean and later theatre, and in the notion that we can adopt a 'persona', in the sense that we may play a role.

The theological roots of the term are intertwined with its Greek and theatrical origins. Bettetini points out that the Greek bible used the term *prosopon* for the face of God which Moses dared not look at, and holds that *kata prosopon* referred to the presence of God.<sup>29</sup> The Greek theatrical mask also had a theological function in relation to taboos of the gods:

'the actor of the Greek theatre put on the 'mask' that turned the actor into a 'persona' also to signify that there was no intention to challenge the gods by this conduct but only to play a 'role', which could be done with impunity just because this was a conduit between the divine and the human'.<sup>30</sup>

The theatrical sense of the person was broadened in Latin by Cicero and Livy, who used 'persona' to refer to the functions or roles played by a Roman citizen. At the same time, however, it is important to distinguish this term from that of 'status', given that status had legal implications, and a derivation, in the verb 'to be', implying a fixed, ascribed legal status. Persona, on the other hand, refers to 'the function carried out by someone not only in a specific situation, but vis à vis their whole history'.<sup>31</sup> I will return to the distinction between one's essence or *being* (status) and the roles one may *play* (as a person).

The term became central to various theological debates, including the mystery of the Holy Trinity. Mauss points to the role of the Council of Nicaea (325 CE) in resolving questions of the unity or diversity of persons: '*Unitas in tres personas, una persona in*

---

<sup>29</sup> As above. The biblical reference is to *Exodus* 3:6.

<sup>30</sup> Savona above note 27 at 105.

<sup>31</sup> Bettetini above note 28 at 110.

*duas naturas*'.<sup>32</sup> By 500 CE a Christian definition of *persona* was required, and was famously supplied by Severinus Boethius as '*naturae rationalis individua substantia*': rational nature in an individual substance.<sup>33</sup> This suggests the distinction between divisible or discrete material bodies and a reason which cannot be so located.<sup>34</sup> To map this definition onto our later terms, the individual substance is the biological body, while the rational nature develops in line with various epistemological, social and theological assumptions.

It is possible to see in this theological definition the seeds of Descartes' later distinction between mind and matter, *esprit* and *res extensa*. A great deal hinges on the way we perceive the rational or the mental side of this distinction. In the Cartesian model, the individual mind is to achieve certainty within its own thinking. At this high point of self-consciousness it becomes hard to see the connections between people. Some corrective is found in the Kantian notion of 'enlarged thought', which Arendt developed into a humanistic recognition of the other: we enlarge our 'own thought so as to take into account the thoughts of others'.<sup>35</sup> Ultimately, however, this separation of mind and body, together with the privileging of the former, led to a 'crisis of reason' that requires a rethinking of notions of the body as much as of mind and epistemology.<sup>36</sup>

While the notion of personhood overflowed into philosophy and theories of individualism and relations to the other, the origin of the modern legal person may be traced directly to medieval law and its roots in Christian theology. The term has its

---

<sup>32</sup> Mauss above n 23 at 86

<sup>33</sup> Bettetini above note 28 at 113.

<sup>34</sup> The meanings of mask and representative were left sleeping in this definition, later revived in the ideas of a *persona ficta*, a fictitious person such as a corporation.

<sup>35</sup> Arendt Hannah *Lectures on Kant's Political Philosophy* University of Chicago Press Chicago 1982 at 42.

origins in Roman law and literature, while its flowering as a legal fiction must be traced to the middle ages. The importance of the fiction in medieval law derived from the challenge of 'Christianising Roman law', which derived from a view of the world as instituted by human artifice. Following St Augustine, legal techniques were to be substituted for nature as a way of calling forth the institutional facts conjured by the Romans. This led to the development of 'numerous institutional procedures contrary to the evidence, even of facts: "artifices" (*artificia*), "forgeries" (*figmenta*), ... *simulacra*, ...*fictiones*.' The legal person of the medieval period was just one of these fictions. From this Roman creation and its adaptation into Christian theology the medieval jurists developed a self consciously fictitious entity which was called into being to explain corporations from churches to universities, and which was even found useful as a way of recreating the natural person in the realm of a law dominated by fictions and artifices.<sup>37</sup>

The modern legal person, born of this edifice of fictions, is an identifiable unit, to whom may be allocated responsibility, blame, entitlement or obligation. It certainly does not have to be flesh and blood. My interest here is to understand the relationship between the legal concept of the person and real people. I return, below, to consider the role that fiction might play in our own self-constitution as persons. But first I will ask what data our legal administration deems to be necessary to defining a legal person. Contemporary ideas and practices, despite their ancient origins, are also a product of more recent developments, from surveillance to the war on terror, and of technologies from photography to magnetic codes. How is it that we can be legally identified by a plastic card, a passport or a file server?

---

<sup>36</sup> Grosz Elizabeth 'Bodies and Knowledges: Feminism and the Crisis of Reason' in Alcoff Linda and Potter Elizabeth (eds) *Feminist Epistemologies* Routledge New York & London 1993 187-215 at 195.

<sup>37</sup> Thomas Yan 'Fictio Legis: L'empire de la fiction Romaine et ses limites médiévales' (1995) 21 *Droits* 17-63 at 39.

## ***Records of physical identity***

People are represented by physical objects at two levels: first, we have identity documents and cards of various types; beyond those, I will explore the data which they contain in order to identify us, which leads to another level of physicality, referring to bodies and events.

Each of us carries numerous records of identity that we use in everyday life: credit cards, a drivers licence, a health insurance card. These are so crucial to our everyday life, and so integral to our identity or sense of self that to lose the bag or wallet they are in, or to have it stolen, threatens our sense of integrity and conjures up the spectre of 'identity theft'.

The traditional versions of identity documents contain the requisite data in a visually accessible form on the document itself. The passport is the best example of this type of document: it includes a photograph (of a face, maybe of an iris), signature, data about the person and certain legal commitments from governments in the form of visas and records of entry. The passport also contains various unique numbers, from the passport number to individual visa or permit numbers, which can then be linked to the data bases of the issuing authorities. As documents shrink to the size of credit cards and can be magnetically coded, they contain less visual information, while more information is contained in those external data bases to which the legal document is linked.

The photograph is a direct record of biological data which is considered to be sufficiently specific to a particular person to be useful for legal purposes of

identification. Photographs, together with fingerprints or DNA profiles, are records of information physically taken directly from our bodies, and, apart from the cut of the hair, are beyond our volitional power to modify. Such records could be taken from a person in a coma or from a corpse, so they can be used to identify dead or unconscious bodies. The point here is that the data is biological, and (barring occasional scars on finger-tips) has no more to do with our lived experience than with our free will. There is other identifying data which is likewise a record of our physical characteristics. Various authorities require height, eye colour or 'distinguishing marks' to be recorded. These are usually self reported, while being to some degree visually verifiable by the officer receiving the data.

Physical data of these types is based on the need for a stable and unchanging legal identity. Data on physical characteristics such as height, eye colour or 'distinguishing marks' have been used less in official records over recent decades. It is as interesting to consider why such physical characteristics were included as why they have been phased out. On the latter point it can be noted that they are not as constant as once thought. Our height changes over our lifespan; plastic surgery can remove or change 'distinguishing marks'. Eye colour can be manipulated. It is also a characteristic we share with many others. The iris scan may be a more individualising substitute for eye colour. The inclusion of broad physical characteristics, on the other hand, may have been related to the administration of populations<sup>38</sup> or to the scientific fashion of the late nineteenth and early twentieth centuries for essentialising physical characteristics, most notoriously in eugenics and the identification of personality,

---

<sup>38</sup> Foucault Michel 'Governmentality' in Burchell Graham Gordon Colin and Miller Peter (eds) *The Foucault Effect: Studies in Governmentality* Harvester Wheatsheaf London 1991 87-104. Height as an indicator of the robust physical character of the population and the suitability of candidates for military service would be an instance of the use of such data. In this situation the data would be used to gain a statistical picture of the population rather than as individual identification.

including criminal, 'types'.<sup>39</sup> The more recent omission of such data could thus be attributed to the discrediting of these scientific theories and the more strictly individual nature of identification.

There are, however, at least two categories of identifying data which continue to have a social rather than an individual reference. Sex or gender is still one of the most universal of identifiers, while 'race' is used in certain jurisdictions (notably the United States). Sex and race have little value as unique identifying characteristics, since they are characteristics we share with very large numbers of other people. As such they are primarily social identifiers, placing us in a category of others rather than contributing to uniquely identifying an individual.

While sex and race purport to be based in some physical referents, they are only produced through reiterated performances, as discussed earlier.<sup>40</sup> Their physical basis is as much that of the performance as of any bodily physical givens (or 'facts' in the modern sense). The arguments for the social nature of race or gender are well-worn and hardly need repeating here. However, it is worth clarifying the relevance of the social or physical nature of sex and race to this inquiry. Having come upon them as characteristics which are recorded on those documents which identify persons to the law, the concepts are notable for their ambiguity between the bodily and the socially or legally constructed characters of persons.

Both sex and race are socially ascribed to persons on the apparent basis of physical characteristics. United States officials expect 'race' to be self reported. Officers issuing passports do not have information on our chromosomes nor sight our genitals

---

<sup>39</sup> See 'Il linguaggio del volto' in Eco Umberto *Sugli Specchi e Altri Saggi. Il segno, la rappresentazione, l'illusione, l'immagine* Bompiani Milano 1985 45 at 51-52.

<sup>40</sup> Butler above note 2 at 14-15

when we report that we are either 'male' or 'female'. Yet problems do arise—notably in the case of sex and gender—where the physical body differs from the social attribution. It is this very physical determinism—the assumption that a physical characteristic defines a social role—that has made these categories so hotly contested. No other identifying characteristics form the basis of political disputes like sex and race. The conjunction of identification with political contest has even given a name to a recent form of polemics: identity politics.

'Identity' in this phrase is used in a dual sense. We are to be identified as unique individuals on the basis of certain characteristics which result in a *legal identity*. Yet some of these characteristics are also adopted as part of a social or *personal identity*, something inherent and essential to our being. The purely physical characteristics of fingerprints or height are seen as randomly distributed or accidental characteristics, with little or no bearing on 'who we really are'. From a forensic point of view, legal identity should, as far as possible, be unique, identifying one person as distinct from all others. It should also remain constant. The body, from birth to death, is the physical guarantee of this constancy in the eyes of the law.

Social characteristics, as those determined by our experience and our own actions, inevitably change throughout our lives. Legal identity needs to fix us with some constancy over time within a uniquely identifiable set of characteristics. The data on legal documents are generally those that are regarded as unchanging and beyond our free will to revise. That some of these are essential to who we are—to our identity in a personal sense—has important implications for the interface between law and its subjects. Is it possible that, beyond a fixed and immutable identity there can be an evolving and dynamic legal person? Can personhood, deriving from its original legal

sense, contribute to our understanding of our own lives, over time and in relation to our corporeal being?

### ***Corporeal experience and personal identity***

The personal sense of identity, that we feel *ourselves* to be the same person we were yesterday, is closely bound to our sense of physical integrity, our embodied-ness. De Certeau has connected these to law by recognising that law 'writes on' our bodies using the techniques of text and identification, as well as less subtle instruments 'from the police bludgeon to the dock'. Through these techniques flesh is changed 'into a body. Such is the movement, to conform a body by means of tools to what a social discourse defines it as'.<sup>41</sup> Grosz has elaborated this argument.

[T]he tools of body engraving—social, surgical, epistemic, disciplinary—all mark, indeed constitute, bodies in culturally specific ways; the writing instruments—pen, stylus, spur, laser beam, clothing, diet, exercise—function to incise the body's blank page. ... The messages or texts produced by this body writing construct bodies as networks of meaning and social significance, producing them as meaningful and functional "subjects" within social ensembles.<sup>42</sup>

I want to continue this line of argument in two directions. First, if flesh becomes body through legal identification, surveillance and discipline (recalling Foucault as well as de Certeau) we still have not quite accounted for the parallel development of the body into the person. Grosz points to the construction of the legal subject, but I propose to explore the development of the broader concept of the person, through a critique of de Certeau. In its original sense, as the face we present to the world, our social character, this process may be seen as both socially imposed and individually

---

<sup>41</sup> De Certeau Michel de 'Tools for Body Writing' (1988) 21/22 *Intervention* 7-11 at 9.

<sup>42</sup> Grosz Elizabeth *Volatile Bodies: Toward a Corporeal Feminism* Indiana University Press Bloomington & Indianapolis 1994 at 117.

propelled. To adopt a view of personality consistent with Cicero or Livy's roles of the full citizen in a political framework, it is impossible to distinguish our self-actualising development from the sense we have of our place in a wider physical and social environment. We learn language and grow to maturity within a society that makes that development possible. This development is both physical and social at the same time: we learn how to act, move, eat and drink just as we learn how to reason, argue, speak and think. The important question for this present analysis of law and the person is how the law enters into this development, constraining or enhancing our possibilities. De Certeau, following Foucault, sees law in a disciplining role, *writing on* our bodies, just as Legendre see that 'Law functions in the imaginary by means of a political theory played out on the human body'.<sup>43</sup> I propose a more contingent role, by which we have an active role to play in interacting with the prevailing legal, political and epistemological conditions. Just as it is important to distinguish the 'violence of the word' from real physical violence of the sort that draws blood, so we need to distinguish the forms of body writing used in the early colony of New South Wales, inflicted by the lash, from the far subtler and more consensual forms used in New South Wales today.<sup>44</sup>

In the schools and sporting fields, beaches and bars of contemporary New South Wales, whether in country towns or downtown Sydney, flesh is being 'written' into bodies and people are emerging as citizens, consumers and members of social groups. To be sure, some of that writing is done by the legal apparatus of the state, through the registration of births, immunization records, school enrolment and syllabuses, tax file numbers and drivers licences. Some people may be directly subject to police surveillance and detention. Aboriginal people, in particular, normally

---

<sup>43</sup> Legendre above note 6 at 38.

<sup>44</sup> Foucault would do no less: the significance of epistemological regimes for socio-political ones is his key insight.

experience this (post-)colonial form of discipline from their earliest years. Others are able to perform their own codes of conduct and social relationships more freely, yet still within an overall framework laid down by a legal, political and epistemological regime. That regime includes certain expectations and demands placed upon people as a result of such physical *identifying* characteristics as age and sex. Within and around those constraints people are growing into their bodies. As athletes, dancers, television viewers and beach-goers, people develop bodies, images of bodies, and ways in which their bodies relate to others which jibe with or cut across dominant expectations. In doing so they rehearse and expand the repertoire of personal-cum-physical *identity*. Whether we frequent the stadium bleachers or the glamorous beaches, the gay bars or the coffee bars, we are exploring and choosing forms of being ourselves with others, as a person among people, going beyond the mere transformation of flesh to body. We emerge from all this social, physical and legal interaction (or performance, in Butler's terms) as embodied people, not, to be sure, from a *tabula rasa*, but with far more free will and consciousness than a deterministic model, or imprints on identity documents, would suggest.

This discussion illustrates two elements missing from the physical imprints of identity used in identity documents. Passive biological data deny our free will and agency by essentialising our physical being. To the extent that these imprints try to freeze our identity in time they deny change, development and maturation. There are, however, other marks on our identity documents that refer our legal personality to agency and the passage of time. In the next two sections I will deal first with the signature as a record of our freely made commitment, and then with dates as traces of time.

### ***Signature: record of commitment***

I mentioned above that de Certeau's idea of body writing needed to be developed in two directions. Building on Grosz's work, I have dealt with the need to recognise the active interplay between the body, the person and the community. In the second place, I suggest there is great scope to consider aspects of law beyond punishment and the prison, where Foucault originally developed his analysis of discipline and surveillance. I referred above to the limitations of reducing the texts of law to the relics of cancelled documents. To trace all of law's workings to the criminal law or the texts and codes of the chanceries risks ignoring the manifestations of law in everyday dealings between citizens. It is just as important, for law's purposes, to attribute a stable identity to the person who enters a contract, incurs an obligation or owns an item of property. These relationships require a record of our identity in the process of making a commitment. Some are held in registries, others circulate more freely, but all originate by an act of the will and the body.

I have discussed those physical imprints, like photographs or fingerprints, which might be termed 'passive', and which could as easily be linked to the submissive citizen as to the dead body. The signature and the personal identification number (PIN) are active forms of 'imprints'. While these perform very similar functions, particularly in banking transactions, they spring from different sources. The PIN, either allocated or chosen, is committed to memory so that the number in one's own mind mirrors the number in the external database. This is a voluntary act, just as reproducing it when we want to make a transaction is also voluntary. Unlike our face or fingerprints, the PIN—its recall and reproduction—can only be used as identification in a conscious state. However the fact that the number mirrors the number in the database is an indication that external data has been etched into our consciousness. While the fingerprint involves our unique mark etched onto an official document or

database, the PIN involves the etching of an arbitrary number from the database into our mental processes. This etching of a few digits may be understood as a form of 'body writing', in de Certeau's sense, by which the requirements of legal identity are internalised as part of our mental and bodily make-up. But note that in this case it establishes an identity which, as well as being the subject of surveillance, is more significantly an acting subject, empowered to operate a bank account, make purchases and access funds anywhere in the world.

The signature is a more complex and, needless to say, older way of establishing a legal identity. It is voluntary and conscious, like the PIN, yet it is also physical. It follows from the form of the individual hand, and it is the learned, self-taught outcome of our being able to write, of our judgement as to which initials or full names to include, and of the habitual writing of all our signatures over many years. To compare ones own signature of early adulthood with that of years later shows signs of development: laziness, hurriedness, practice, aesthetic maturation, which could not have been seen in the younger signature. Just like comparing photographs of the same person at different ages, we can see the resemblance of signatures as they develop over time, but we could never have predicted how they would change from the earlier imprint. Every signature we write is different even though they are similar enough to be attributable *with legal certainty* to the one person. Indeed, each iteration is the product of all our previous signatures, so much is it the product of habit and the tracks we wear in our own patterns of movement. It is a performative act which is always repeatable but never the same.<sup>45</sup> The signature itself has an identity which links it to the legal identity of a person, even though each signature is a unique event and is never exactly the same as any other.

---

<sup>45</sup> Derrida Jacques *Limited Inc* Northwestern University Press Evanston, IL 1988 at 19-21

Originally the product of the style of handwriting we are taught in school, together with our own conscious or unconscious emphases and angles, the signature becomes more pronounced in its individuality over the years. The signature illustrates the elements of Bourdieu's concept of habitus: official learning, individual achievement, conscious mind, unconscious bodily movements. Indeed, by linking the conscious decision to the bodily habit, the signature enacts habitus in bearing witness to a commitment. Taylor sees the notion of habitus in a similar light to Grosz's prescriptions for overcoming the 'crisis of reason', pointing out that it 'puts the role of the body in a new light. Our body is not just the executant of the goals we frame or just the locus of the causal factors which shape our representations. Our understanding itself is embodied.'<sup>46</sup>

Yet there is more to the signature than the sign and habitus. I have referred already to the conscious decision which precedes or accompanies the signature. To look behind this decision to sign one's name is to find another decision to which it refers, because to sign is always to make a commitment.<sup>47</sup> In fact, it is impossible to distinguish the signing from the deciding, because this is how it is known in law that we have made a particular decision. The signature, required in so many legal dealings, is a material trace in these two ways: it is a physical trace on a document, and it is traceable back—through both the name which it records and the bodily act which recorded it—to a specific, identified physical person. It is law's way of linking a concrete, embodied person to an obligation. This connection between responsibilities and physical, nameable persons is central to law's concerns. As Bruno Latour concluded in his 'ethnographic' study of the French administrative court, the *Conseil d'État*:

---

<sup>46</sup> Taylor Charles 'To Follow a Rule...' in Calhoun Craig LiPuma Edward and Postone Moishe (eds) *Bourdieu: Critical Perspectives* Polity Press Cambridge UK 1993 45 at 50.

'[L]aw re-connects enunciations to particular speakers, attaches people to responsibilities by chains of signatures, imputes a crime to the proper name of a human.... The whole of law can be grasped as an obsessional effort to make the enunciation *assignable*.'<sup>48</sup>

Because the law is written into us even as we write, we know that when we sign our name we are making a decision, identifying ourselves as authors of that decision, and making a commitment to carry it through. The act of signing is the basic performative event in any of our dealings with the state or our legal dealings with each other. Here we see the significance of J. L. Austin's recognition of the performative as a distinct type of utterance, having nothing to do with truth or falsity. The performative connects speaking with acting as a way of changing the configuration of the social world. Once made, the commitment requires or, better, *is* the act. The signature, as the fundamental legal performative bodily action, reunites the decision with corporeal experience. The act of signing a document is an exemplary moment of the connection between the legal person and the body. We know that in signing a document we are making binding commitment by sealing our decision with a bodily act which is imputable to us as legal persons.

### ***Dates: historical traces***

Signing a document is a personal decision and a public event at the same time. Its status as an event is signified by the need, in most cases, to put a date to the signature. Unless the signature is a specimen for purposes of identification it is important to record the date on which the commitment was sealed by the signature. Identity documents issued by the state also record events as part of the process of

---

<sup>47</sup> Nancy Jean-Luc 'The Jurisdiction of the Hegelian Monarch' (1982) 49 2 *Social Research* 481-516

<sup>48</sup> Latour Bruno *La fabrique du droit. Une ethnographie du Conseil d'État* La Découverte Paris 2002 at 294-5.

identifying people. Our date of birth is generally the next most important fact after our name. Other historical data recorded in the process of identifying people includes information about our heritage and forebears and the places in which events (such as our birth) occurred.<sup>49</sup>

As another record of biodata, our date of birth helps to identify us by distinguishing us from any other person who may happen to have the same name or other characteristics. It records that primary event in our 'legal biography', the date at which we first had a presence before the law. And yet in common with any date recorded by law, it is nothing more than a point in time, telling us nothing of the event beyond the day on which it occurred. Other dates on official documents, such as passports, refer to the document itself, and to the legal or bureaucratic procedures through which it was created: the date of issue. The issuing authority has placed two dates on my passport to record moments of coming-into-being: mine and the passport's. On the passport they carry equal weight: they are both dates, they both locate a legal event on a particular date in the past. My passport also has a date in the future: the date on which the validity of the passport expires, as do my credit cards. Unlike the documents themselves, our personal expiry date is as unforeseen as it is inevitable.<sup>50</sup>

Documents can have a commencement date and a future expiry date, while personal data can only record past events. Goodrich<sup>51</sup> refers to 'the harsh reality of linear time' in which 'the individual life is always already past', and yet the harshest reality is that moment which cannot be recorded until it can be placed on our death certificate. That

---

<sup>49</sup> Data about places, like places themselves so crucial to who we are in legal and personal senses, requires another study in itself.

<sup>50</sup> Even though the dates of birth or death form defining points in the legal documentation of personhood, as will be seen below 'neither constitutes a narrative opening or a closure. Just as much as all life's vicissitudes, they remain in search of narrative configuration'. Ricoeur Paul *Parcours de la reconnaissance: Trois études* Gallimard Paris 2004 at 169.

<sup>51</sup> Goodrich Peter *Reading the Law. A Critical Introduction to Legal Method and Techniques* Basil Blackwell Oxford 1986 at 222.

is the event which the law cannot foresee or pronounce (except as a death penalty, the most awful pronouncement law can make) because it is always in the unknowable future: the law does not deal with what it does not know and cannot pronounce. The legal biography is a record of past events, but it records them only as ciphers, points on a time line, telling only of the event's temporal location vis à vis any other legally recorded event.

In some cases, such as those of the dates of enactment of legal instruments, the matter is internal to the law, which may then be applied to other events: that law applies to events which come after, in the normal course of law's prospectivity. Records of the dates of events in our own lives may be required for the calculation of our passage through life: have we reached the age of eighteen? The legal events of interest here are ones involving the identity of a specific person, the dealings between people and their relationships to things-as-property, events with legal consequences such as crimes or torts. The significance which law affords dates indicates that a key activity of the law is to keep track of events in time.

The staccato and disconnected records of dates on identity cards and other legal documents provide markers for legal narratives, but they don't describe, connect or make sense of events in either a forensic or personal context. In their recording of past events these dates only look backward, and do not help to determine actions or map out future projects. In the following section I deal with the role of narrative in reconnecting the random facts of our existence—bodily traces, dates—as a means of reconnecting and reimagining ourselves as whole entities, as *seives*.

### ***Narratives: forensic and personal***

The recorded dates of our dealings with others lie dormant, for the law, until they are required for the construction of a narrative of sequence and consequence. Could I have known something before I acted thus? Did a tort or a crime follow my action? Here we begin to see the limits of the information the date gives us about an event. The date on which an event occurred (no more than dd/mm/yyyy) tells us so little, and yet it is law's fundamental record of the event. In legal affairs knowing the date allows matters to be arranged in time, before or after each other, and that is all. The creative work of the law builds upon such bare mnemonic foundations. Law records what it decrees to be worth remembering by its date: after that we must look to the evidence: documents or memories, imperfect or selective as they may be.

'[T]he road that leads from the event to the individual case through the establishment of facts, is both norm-dependent and ... also world-picture dependent.'<sup>52</sup>

Any case or 'fact situation' is built up through forensic narratives which, according to Cicero, may be about events or they may serve to situate persons. Cicero classifies narratives which deal with events as being either legendary (*fabulum*), historical, or arguments (*argumentum*). Presumably the first two categories are established by reference to some oral or written authority. Arguments, however, are 'reconstructions of events *as they could have occurred*, like the plots of comedies'.<sup>53</sup> Dates enter into this narrative process to limit the range of possible reconstructions. In the abstract and definitive form of the day, the month and the year, according to an agreed calendar, dates tell us nothing about the event itself, but everything about its

---

<sup>52</sup> Varga Csaba *Theory of the Judicial Process: The Establishment of Facts* Akadémiai Kiadó Budapest 1995 at 75.

<sup>53</sup> *ficta res quae tamen fieri potuit* Cicero Marcus Tullius *Rhetorica ad Herennium* Caplan HarryWilliam Heinemann London 1954 at 24-25.

juxtaposition in relation to the dates ascribed to other events. Dates are constructed to be available for reconstruction within the framework of law and legal argument.

So far I have maintained that our identity is established in law by reference to a number of characteristics, which I have organised here as: biodata, which purports to record natural and unchanging facts about us as biological individuals; and historical data, which records dates and antecedent facts about our heritage. A third type of legal record meshes with these other two, typified by the signature, which traces our commitments to others. What each of these have in common is that they are all available to enter the discourse of law ready made for the construction of narratives.

Administrative legal identity is frozen in time, lacking any account of agency or experience. The signature, as a bodily gesture recording a commitment, reintroduces the possibility of agency albeit in a curious, coded form. Other records of dates and events provide further signs and clues from which legal narratives can be developed. Yet these are always contingent upon the possibilities of law's narrative reconstruction of events 'as they might have been'. While law always looks to the possibility of reconstructing a forensic narrative out of data about identity, commitments and dates, we use analogous processes to reconstruct our own and other people's life stories, even as we are living them. Indeed, I am suggesting, the ideas of legal identity and the forensic narrative have, like the concept of the 'person' overlapped and intersected with our ideas of what it is to lead our lives and to reflect on them through personal narratives.

This overview of the legal attribution of identity to persons highlights the importance of permanence. Law requires us to be the same person today as yesterday. We are changed by our experiences and the ravages of time, yet the individual who signed

the document or pulled the trigger must be the same one who is to be held responsible. The things that record our identity must also persist over time. The birth record, the passport, the data base that records our PIN number: each has its own order of permanence. In pinning us down in the eyes of the law, these physical indicators of identity extract exactly those things that are beyond the ravages of time or the growth of experience.

The narratives that have been woven over, around and into this system can be unpicked and rewoven. It is in the nature of narratives, whether Cicero's comedies, forensic narratives or life stories, that they reconstruct a possible, plausible or fictitious sequence of events. Recognising that they could have occurred otherwise opens the way to alternative understandings of ourselves and others.

Each of the operations of law in identifying people is a means for abstracting data. This follows a twofold logic, one ancient and the other modern. Law has developed out of ancient techniques of working with the possible rather than the real. The event, crime scene or conversation cannot be brought into the courtroom as original experience, so it must be reconstructed out of narrative building blocks. The central concept of persona derives from the theatrical mask or the role of the character. Each of these representations of reality must be brought into legal argument in a form that is manipulable, from which attributions can be reconstructed. These include the modern techniques of bio-data and forensic evidence, equally well adapted to the portability and narrative reconstruction required of legal narrative.

The data of forensic narrative and legal administration is abstracted and condensed so that it records only the elements from which reconstruction is possible, but not the experience itself. This two thousand years of western legal tradition, so entwined with

religious and philosophical conceptions of the person, results in a picture of the person as a mask of forensic data and narrative possibilities, a set of representations but not an experienced life.

The legal origins and implications of the term 'person' are bound up with the very idea of what it is to be human. The way we understand 'personhood', therefore, is a key factor in the ways we are able to understand ourselves and others. Legal documents construct a thin and inadequate conception of humanity in the image of masks and characters available for use in 'the plots of comedies'. To find another concept of the person, let us enter through the signature. As I said before, the signature brings together the decision, the body and the performative public record. It too is a highly condensed and portable form of evidence, but it carries with it the action and experience of the person making the commitment, and in this way cuts through the mask and the abstraction. It overcomes the Cartesian rupture in a flourish.

The person who signs the document is not simply a forensic reconstruction but is one who makes a commitment, who determines the right way to act, who enters into a world of social obligations. Masks or data sets cannot do that, but real people must.

What on paper is a set of dictated exchanges under certainty is lived on the ground in suspense and uncertainty. This is partly because of the asymmetrical time of action, but also because of what is involved in actually acting on a rule. A rule doesn't apply itself; it has to be applied, and this may involve difficult, finely tuned judgments.<sup>54</sup>

Whether these rules are legal commands or ethical principles, we live them out as acting subjects. In order to make the judgments necessary to a well-lived life we must

already be living it. Experience is as necessary to judgment as it is to action. Agamben charges that the Enlightenment 'model of man' is nothing more than the 'I' which is the subject of the verb, 'who cannot mature, but only grow consciousness.'<sup>55</sup> The disembodied person cannot experience or act as *rationalis naturae*, or as Cartesian mind: for that we need bodies, desires and a physical environment. Without experience we do not know how to act. Nor can we interpret each others' actions.

Constructions of the law as universal rules make the same error of overlooking the material that was identified in epistemology. Davies' corrective is to see 'law as a performance, not as a static set of norms' in order to turn our attention back to the contingent and the heterogeneous, which brings into focus 'the exception, the particular, the practical, the ethical and the other.'<sup>56</sup> The notion of narrative, developed above in relation to law, can also be used as a means of comprehending these specifics in the construction of personality.

### ***Personal narratives and the experience of identity***

Personal narratives may be constructed in the same way as legal narratives. The data which represent our persona are etched into our self-conception. These are also bare facts out of which a narrative may be constructed. We can construct personal narrative, just like forensic narratives, out of the personal data of identity: family anecdotes and childhood snapshots; commitments and dates. The process of constructing such a personal narrative is a project of moulding, shaping, working from the representations that already exist. This same process is seen in legal

---

<sup>54</sup> Taylor above note 46 at 57.

<sup>55</sup> Agamben Giorgio *Infanzia e storia: Distruzione dell'esperienza e origine della storia* Einaudi Torino 2001 at 14-17. Experience thus became something which the disembodied I could do (fare) but not have, while the will-less body could only have it but not do it. See also Mohr above n 20 at 112 and following.

narratives, in the plots of fiction, and in biography or autobiography. With each new experience or event we lay down tracks: memories, symbols and records of events. Once past, none of these is the event or experience itself, but simply a representation of it. This is equally true of the events and facts recorded on our identity documents.

When we work the data of our lives into a personal narrative, this is a personal but not a private act of reconstructing our self from our experience. It involves interpersonal communication and recognition, as well as engagement with the institutional facts by which law, society and the state recognise us as persons, as people. It is a project which forces us to engage with the potentially oppressive imposition of identity which is bound up in the positivist conception of 'the facts about us'. It involves the rejection of any over determined interpretation of the codes 'M/F' or 'dd/mm/yyyy' that always accompany our official recognition. We may construct our own narratives of 'M' or 'F', in the process of understanding and deconstructing their place in official narratives, even as we perform or subvert those narratives in doing so. Those narratives too, for all their claims to hegemony, are underdetermined and contingent.

The connection between a physical and a personal identity is graphically illustrated in Louis Nowra and David Page's play *Page 8*.<sup>57</sup> We see David Page, the eighth child of an indigenous family in Queensland, on stage in an autobiographical presentation of his many roles: a child pop star on seventies television, chatting to us over a kitchen table wearing a navy blue singlet, bursting onto the stage as a spectacular drag queen. After this vertiginous display of alternative ways of being, and in the midst of

---

<sup>56</sup> Davies Margaret *Delimiting the Law: 'Postmodernism' and the Politics of Law* Pluto Press London 1996 at 98 - 100.

<sup>57</sup> Performed 29 April 2006 at the Illawarra Performing Arts Centre, Wollongong.

swirling images of murri children playing, David proclaims his own sense of identity in celebratory terms that could be a parody of Descartes' famous *cogito ergo sum*: 'I know who I am!' Page subverts the essentialised notion of physical identity in the play of body images and of change over time. But there is more to it than the pure physicality. Page's personal narrative is one of agency and experience combined with physical activity. He proclaims his identity in the face of a background of colonisation, and amid shifting appearances according to age, gender, style and fashion, as a result of a restless assertion of agency. His early years were characterised by impulsive shifts of direction, from window dressing to concreting to music school to caring for his aging aunty. All the elements of a lived life are essential to Page's 'I know who I am.' Agency and experience, physicality and narrative are brought together to show us how much richer a person can be than the ascription of a fixed and immutable legal identity.

Narrative can be constructed from the abstract and disconnected data of physical identity, signature, and dates. But for all these possible narratives of self, there is still one life that is lived, through the totality of a body: *habitus and* interpretation, agency *and* experience.

The data of legal identification, derived from the law's obsessional concern to attribute actions—torts, crimes or commitments—to identifiable persons, are based on a need to arrest the flow of time and the continual changes wrought in us by experience. It must also freeze the indeterminacy of narrative. This is not done because narrative is not a part of law. On the contrary, the story is one of the law's key building blocks, for which it needs a set of fixed points upon which to construct its competing edifices of the way things might have been. If the facts of bodily identification are the essentialising element of forensic narratives, the alternative

stories that can be built upon them are indeterminate, expressing the degrees of freedom that we also seek in our own personal narratives. I am proposing that the processes are analogous: we construct the narrative of a life on similar foundations to those used by law. From a date of birth, an identifiable body and a set of demands and commitments, we build up narratives of a life. Like the narratives of law, these are contingent on interpretation: the reinterpretation of hindsight and subsequent experience as well as the construction and reconstruction of foresight and the aims of our projects.

Beyond freezing time so that we are always the same, legal identification of our bodies has this other peculiar character: it cuts us off from others. In the life of narrative and the narrative of a life these boundaries are never so strict. As social, acculturated beings we always find an indeterminacy in efforts to ascribe words, ideas, causes and effects. In the flow of lived experience we do not keep a contemporaneous record of ultimate responsibility for directions our lives may take, or for the situations we find ourselves in. Those narratives defining boundaries between people are constructed and reconstructed in recollection and projection, in reverie and in conversation, in argument and agreement. The players in these narratives can be seen as the *dramatis personae* of our lives, whose actions, no less than their identities, can be arranged and rearranged in the process of living. Identity itself, unlike the fixed and permanent identity of law's ascriptions, is a continuing project of story-telling. One of the necessary attributes of the capable person, in Ricoeur's formulation, is to be able to tell stories, of others as of oneself (*'pouvoir raconter et se raconter'*).<sup>58</sup> How else, he asks, could we give 'an ethical description of our own life if this life could not be reconstructed in narrative form (*en forme de*

---

<sup>58</sup> Ricoeur above note 50 at 163. Ricoeur also refers here, without specific citation, to Alastair MacIntyre's 'narrative unity of a life'.

*récit*)'<sup>59</sup> Far from being the determinate, individualised and permanent thing of identity documents, lived identity is a fluid project, interacting with others and developing over time.

The link between the determinacy of bodily identification and the contingency of personal narrative reproduces the division within the person already seen in Boethius's definition: *naturae rationalis individua substantia*. Law's need to individuate requires a substance around which a boundary can be drawn. Yet the person also has a nature that is not so easily individuated. The boundaries cannot be drawn around our reason, which today can be understood as our shared understanding of and discourse about and with the world, as they can around our bodies. This is the continuing relevance of the paradigm of the person, with its origins in ancient theatre, Roman law and Christian theology. Indeed, recalling Agamben's identification of the *ontological* character of the paradigm, it can be said that it is not simply a relevance to knowledge, but a presence in being. Not only do we know what it *means* to be a person, we know ourselves to *be* persons.

Each of us exists as a person, since this is a way of being. It may not be a universal way of being, having such deep western roots, but it is a way of being shared by those of us from that tradition. To be a person is to have—to *be*—an individual substance with the objective character and points of reference proper to an object: an appearance, a date of coming into being. But that is not all: we are not determined by those physical records, which in themselves only add up to points on a chart. We have another nature that is capable of joining these points in different ways, of plotting a course, or alternative courses, from these points. They are the physical raw

---

<sup>59</sup> As above at 168.

material of the narratives we tell to make sense of and give an ethical account of our lives. These plots are the self construction of the drama of our lives.<sup>60</sup>

Only our substance, flesh, is unequivocally individual. It sets us apart from others. Yet we experience ourselves as social, only partly bounded while being connected and belonging to a world of others. 'Why should our bodies end at the skin?'<sup>61</sup> The rest of our nature as persons allows us degrees of freedom, the play we need to project and revise our plots. 'Play is the disruption of presence. ... [It] is always play of absence and presence.'<sup>62</sup>

That the ancient duality of flesh and 'rational nature', role or spirit is reproduced in legal practices, and in the continuing paradigm of the person, does not take away from the integrity of what it is to be a person. It indicates some of the fault lines within this ontology, while retaining traces of the origins of the paradigm. The person is our performative presence as a member of the *dramatis personae* of our own lives. It is the character that makes commitments and performs attributable acts, while also being the mask through which that performative voice resonates, and which admits our humility before the gods. Those gods that now command us cannot tolerate our total freedom to change, to be someone different tomorrow than we were today. We wear a mask of identity that fences us around with dates and descriptors so that we can be held to account as individual substance. Yet the mask, signifying a realm of fiction, opens possibilities for hesitation, revision and play. While marking our presence it may also allow for its disruption through flights to alternative stories of the past, plots for the future, and to other ways of being ourselves.

---

<sup>60</sup> Ricoeur relates '*mise en intrigue*' to Aristotle's concepts of *muthos*, one element of epic and tragedy, the other two being representation (*mimèsis*) and character (*personnages*). Ricoeur above note 50 at 164. Blamey and Pellauer translate '*mise en intrigue*' as 'emplotment'. Ricoeur Paul *Time and Narrative* University of Chicago Press Chicago 1988 at 4.

<sup>61</sup> Harraway Donna *A Manifesto for Cyborgs*, quoted Butler above note 2 at 1.

---

<sup>62</sup> Derrida Jacques *Writing and Difference* University of Chicago Press Chicago 1978 at 292.