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# RETHINKING CIVIL-LAW TAXONOMY: PERSONS, THINGS, AND THE PROBLEM OF DOMAT'S MONSTER

Eric H. Reiter\*

Since the time of Gaius, whose *Institutes* divided private law into persons, things, and actions, the categories of persons and things have enjoyed an implicit (and sometimes explicit) primacy as the *summa divisio* within the private law. Though the third category—"actions" in Gaius and Justinian, today reinterpreted as "obligations" or "ways of acquiring property"<sup>1</sup>—has by now perhaps outstripped the others, "persons" and "things" continue to have pride of place in civil codes, and by setting up legal subjects and legal objects, respectively, they make possible the law of obligations in which persons and things interact.

Gaius' structure—and its implicit hierarchy—has cast a long shadow.<sup>2</sup> It still provides the basic architecture of the civil law—sometimes explicitly,<sup>3</sup> sometimes more

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1. See Peter Stein, *The Quest for a Systematic Civil Law*, 90 PROC. BRIT. ACAD.: LECTURES & MEMOIRS 147, 156-57 (1995) (discussing the early-modern developments). In what follows I will use the term "obligations" except in cases where the historical category "actions" is specifically meant.

2. See generally Donald R. Kelley, *Gaius noster: Substructures of Western Social Thought*, 84 AM. HIST. REV. 619 (1979).

3. For example in Books 1-3 of the French *Code civil* (*Des personnes; Des biens et des différentes modifications de la propriété, Des différentes manières dont on acquiert la propriété*) or Books 1-3 of the Louisiana Civil Code (Of

subtly<sup>4</sup>—and for this reason it is unlikely to disappear any time soon. Even in the common law, the influence of this structure is evident in Blackstone’s *Commentaries* and in the recent *English Private Law*, to name just two examples.<sup>5</sup> My purpose in what follows is recast the dichotomy between persons and things as a problem not of classification (what goes where) but of the construction and function of legal categories as normative spaces within which classification takes place. To do this, I think we need to replace a static view of legal categories as discrete pigeonholes with a dynamic view that emphasizes their interactions. This idea of interaction is crucial, I will argue, since legal categories do not exist in analytical isolation. Rather, they are in tension with each other, their fluid and contingent boundaries continually being renegotiated, with meaning coming out of this process of give and take. Human interactions themselves are inconceivably complex—what William James called a “great blooming, buzzing confusion”<sup>6</sup>—and a static view of legal categories as boxes labeled “persons,” “things,” and “obligations” belies this complexity. My point is that the blurring of the boundaries between categories is not a failure of taxonomy, but a valuable tool for enriching legal analysis and bringing it into closer alignment with human experience.<sup>7</sup>

Two puzzles of categorization—one recent, the other historical—can serve to introduce and illustrate my point about the importance of an interactive understanding of legal categories. Both

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Persons; Things and the Different Modifications of Ownership; Of the Different Modes of Acquiring the Ownership of Things).

4. For example in the General Part of the *Bürgerliches Gesetzbuch* (which begins with the divisions Persons, Things/Animals, and Legal Transactions) or in the Preliminary Provision of the Civil Code of Québec (“The Civil Code of Québec, in harmony with the Charter of human rights and freedoms and the general principles of law, governs persons, relations between persons, and property”).

5. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765-69) (1979); ENGLISH PRIVATE LAW (Peter Birks ed., 2000).

6. 1 WILLIAM JAMES, THE PRINCIPLES OF PSYCHOLOGY 462 (Frederick H. Burkhardt et al. eds., 1981).

7. See generally STEPHEN WADDAMS, DIMENSIONS OF PRIVATE LAW: CATEGORIES AND CONCEPTS OF ANGLO-AMERICAN LEGAL REASONING (2003) (discussing blurring and overlapping of categories in judicial reasoning in the common law).

underscore some of the difficulties in negotiating the boundary between persons and things by putting into the foreground the constructed and hence normative nature of legal categories.

The first puzzle comes from an unusual news story.<sup>8</sup> John Wood of South Carolina failed to make payments at a self-storage facility, and found his possessions had been sold at auction in North Carolina. Another man, Shannon Whisnant, purchased a barbecue smoker at the auction, and found when he brought it home that it contained a dried-out, severed human leg—Wood’s leg, in fact, which he had lost in a plane crash some years before, had hung on his fence to dry out, and was keeping so he could be cremated with it after his death. Whisnant, who said he was “freaked out” by his find, called the police, who confiscated the leg. But Whisnant quickly had second thoughts, realizing, a bit belatedly, the profit potential. With Halloween coming, he began charging people for a peek inside the now empty smoker, \$3 for adults, \$1 for children, and he sought to reclaim the leg to improve gate receipts.

The dispute quickly became legalized, with each side groping for legal vocabulary to characterize claims that fell into the gray area between persons and property. Whisnant asserted a property right, claiming that since he had bought the smoker and its contents, he was now rightful owner of the leg. Wood on the other hand called this “despicable,” and asserted a personhood claim: the leg—though currently detached—was integral to his plans for post-mortem bodily reunification.<sup>9</sup> Sensing trouble—he no longer had the leg, remember—Whisnant suggested a joint custody arrangement, the details of which unfortunately did not make it into the papers, but which in any case Wood refused. The police sided with Wood, but on property rather than personhood grounds. They gave him back his leg because, by their way of thinking, “The guy don’t have a leg to stand on.” Whisnant had given up ownership when he surrendered the leg to the police.<sup>10</sup> In the end, perhaps inevitably, the affair left behind the realms of personhood

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8. *Up in arms over a leg*, THE GLOBE AND MAIL, October 4<sup>th</sup>, 2007, at A2.

9. In many ways this is a real-life analogue of the hypothetical “case of the stolen hand” discussed in JEAN-PIERRE BAUD, *L’AFFAIRE DE LA MAIN VOLÉE: UNE HISTOIRE JURIDIQUE DU CORPS* 9-16 (1993).

10. *Amputee gets leg, princess wins case*, THE GLOBE AND MAIL, October 6<sup>th</sup>, 2007, at A2.

and property for a different branch of law: obligations and contract, as the parties agreed to settle their dispute before the cameras in the television courtroom of Judge Greg Mathis.<sup>11</sup> Judge Mathis opted for personhood, or did he? Wood got his leg back, but Mathis ordered Wood to reimburse Whisnant \$5,000 for the cost of the leg.<sup>12</sup>

My second puzzle is more serious in intent but it touches the same problem of the tension, even the competition, between the categories of persons and things. It comes from the seventeenth-century French jurist Jean Domat. In his 1689 treatise *The Civil Law in Its Natural Order*, in the course of his discussion of the status of persons resulting from nature (rather than from law), Domat lists a number of liminal states to illustrate particular analytical problems.<sup>13</sup> Domat's list includes children born dead, children still in the womb, premature children, posthumous children, hermaphrodites, eunuchs, the insane (*Les Insensez*), the completely deaf and mute, and those suffering dementia or other mental deficiencies (*Ceux qui sont en démence, & dans ces autres imbécillitez*). The list ends, however—most interestingly—with “monsters that do not have human form” (*Les monstres qui n'ont pas la forme humaine*). Domat writes:<sup>14</sup>

Monsters that do not have human form are not considered to be persons, nor are they counted as the children of those who give birth to them. But those that have the essentials of human form and just have something extra or something missing count like other children.

Although monsters that do not have human form are not considered to be persons nor to be children, they count as such with respect to their parents, and they are counted among their children for the purposes of any privileges or

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11. Eric Connor, *TV judge to decide who gets amputated leg*, USA TODAY, October 10<sup>th</sup>, 2007, available at [http://www.usatoday.com/news/offbeat/2007-10-10-amputated-leg\\_N.htm](http://www.usatoday.com/news/offbeat/2007-10-10-amputated-leg_N.htm) (last visited November 6, 2008).

12. *TV judge rules South Carolina man can keep amputated leg, but must pay \$5,000*, INTERNATIONAL HERALD TRIBUNE, November 1<sup>st</sup>, 2007, available at [www.ihrt.com/articles/ap/2007/11/01/america/NA-ODD-US-Abandoned-Leg.php](http://www.ihrt.com/articles/ap/2007/11/01/america/NA-ODD-US-Abandoned-Leg.php) (last visited November 6, 2008).

13. 1 JEAN DOMAT, *LES LOIX CIVILES DANS LEUR ORDRE NATUREL* 11-13 (Luxembourg: André Chevalier, 1702). The list that follows translates as directly as possible Domat's terminology.

14. *Id.* at 13 (author's translation).

exemptions granted to fathers or mothers according to the number of children.

Both Domat's monster and Wood's leg are taxonomic puzzles because they fall squarely between our categories of "persons" and "things." Wood's leg clearly has a dual nature—a money-making commodity to Whisnant, a severed part of himself to Wood. Domat's monster, though it appears in the discussion of persons, is explicitly not a person, but a taxonomic riddle that challenges the integrity of legal categories and the binary either/or classificatory decisions that taxonomy is normally held to require. I would like to leave aside the severed leg for the time being and look more closely at the problem of Domat's monster and its implications for our understanding of the workings of legal taxonomy.

Domat is not alone in his discussion of monsters. In his *Commentaries on the Laws of England*, for example, Blackstone writes:

A MONSTER, which hath not the shape of mankind, but in any part evidently bears the resemblance of the brute creation, hath no inheritable blood, and cannot be heir to any land, albeit it be brought forth in marriage: but, although it hath deformity in any part of its body, yet if it hath human shape, it may be heir. This is a very ancient rule in the law of England; and its reason is too obvious, and too shocking, to bear a minute discussion.<sup>15</sup>

Blackstone's modestly veiled reference at the end of this passage is fleshed out by his source, Bracton, writing in the more brazen 13<sup>th</sup> century:

*Who may and may not be called children and reckoned as such.* Those born of unlawful intercourse, as out of adultery and the like, are not reckoned among children, nor those procreated perversely, against the way of human kind, as where a woman brings forth a monster or a prodigy.<sup>16</sup>

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15. BLACKSTONE, *supra* note 2, at book 2, chap. 15 (vol. 2 at 246-47) [orthography modernized].

16. 2 HENRY DE BRACTON, BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 31 (George E. Woodbine ed., Samuel E. Thorne trans. 1968-77). Blackstone also cites Coke, who repeats Bracton's remarks. See EDWARD

Ultimately, all these discussions trace back to Justinian's *Digest*, where both Paul and Ulpian discuss the status of monstrous births,<sup>17</sup> and beyond that to the *Laws of the Twelve Tables*, which stated (characteristically laconically) that "a dreadfully deformed child shall be killed."<sup>18</sup> The evident discomfort behind these remarks relates to long popular traditions regarding unusual births—for example conjoined twins. On the one hand, such children were historically associated with presumptions of the sexual impropriety of their parents, specifically with bestiality. On the other hand they were held to be portents of disaster and divine disfavor.<sup>19</sup> Clearly, popular opinion, at least, put the monster's status as a human being in doubt, and the law followed suit in its hesitance to treat such children as persons.

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COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; OR, A COMMENTARY UPON LITTLETON 7.b, 29.b (Francis Hargrave & Charles Butler eds., 1853).

17. Dig. 1.5.14, in THE DIGEST OF JUSTINIAN (Alan Watson trans. & ed., 1985):

Paul, *Views*, book 4: Not included in the class of children are those abnormally procreated in a shape totally different from human form, for example, if a woman brings forth some kind of monster or prodigy. But any offspring which has more than the natural number of limbs used by man may in a sense be said to be fully formed, and will therefore be counted among children.

Dig. 50.16.135, *id.*:

Ulpian, *Lex Julia et Papia*, book 4: Someone will ask, if a woman has given birth to someone unnatural, monstrous or weak or something which in appearance or voice is unprecedented, not of human appearance, but some other offspring of an animal rather than of a man, whether she should benefit, since she gave birth. And it is better that even a case like this should benefit the parents; for there are no grounds for penalizing them because they observed such statutes as they could, nor should loss be forced on the mother because things turned out ill.

18. XII. Tab. 4.1, in 3 REMAINS OF OLD LATIN 441 (E.H. Warmington trans., 1961).

19. See David Cressy, *Monstrous Births and Credible Reports: Portents, Texts, and Testimonies*, in TRAVESTIES AND TRANSGRESSIONS IN TUDOR AND STUART ENGLAND: TALES OF DISCORD AND DISSENSION 29 (2000); ZAKIYA HANAFI, THE MONSTER IN THE MACHINE: MAGIC, MEDICINE, AND THE MARVELOUS IN THE TIME OF THE SCIENTIFIC REVOLUTION (2000); and DUDLEY WILSON, SIGNS AND PORTENTS: MONSTROUS BIRTHS FROM THE MIDDLE AGES TO THE ENLIGHTENMENT (1993).

Domat's monster is something of a test case, an exception to prove the rule. It is a problem deliberately posed because it challenges categories, while at the same time having a certain practical importance.<sup>20</sup> But how does the monster fit into Gaius' paradigm of persons-things-obligations, a structure that underlies the work of all of these authors? Domat, in treating the monster under persons, follows the *Digest*, which puts the main discussion of the case of the monster under the title "Human Status," thus emphasizing the monster's nature. Blackstone, however, puts the monster in his book on the rights of things; he is less concerned with what the monster is than with what the monster can and cannot do (namely, inherit). This point is crucial: where we start the analysis in large measure determines where it will end up.

Domat gives us some hints as to taxonomy by bringing forward issues that remain implicit in his Roman sources. Following Paul, he says specifically that monstrous births that do not have human form "are not considered to be persons" and are not counted as the children of those who bear them.<sup>21</sup> Those with "the essentials of human form," by contrast, are considered to be the children of their parents, though Domat does not say whether or not they are legally reputed to be persons (most likely they would be). Again following the *Digest*, this time Ulpian, Domat recognizes the difficulty of this position, since such children "count as [children] with respect to their parents," and so they are considered to be their children for the purposes of privileges and exemptions dependent on the number of offspring.<sup>22</sup>

At this point Domat breaks from his Roman sources and adds a footnote that changes the terms of the question. He notes, "We can add, as another explanation for this rule, that these monsters are a

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20. As is amply demonstrated today by the difficult moral, legal, and ethical issues raised by the separation of conjoined twins. See the fascinating English case *Re A (Children) (Conjoined Twins: Medical Treatment)* No. 1, [2000] H.R.L.R. 721 (England, C.A.). For commentary on this case, see especially George J. Annas, *The Limits of Law at the Limits of Life: Lessons from Cannibalism, Euthanasia, Abortion, and the Court-Ordered Killing of One Conjoined Twin to Save the Other*, 33 *CONN. L. REV.* 1275 (2001); the symposium in 9:3 *MED. L. REV.* (Autumn 2001); and ALICE DOMURAT DREGER, *ONE OF US: CONJOINED TWINS AND THE FUTURE OF THE NORMAL* (2004).

21. DOMAT, *supra* note 13 at 13. *Compare* Dig. 50.16.135, which suggests the opposite.

22. DOMAT, *id.*



greater burden than other children.”<sup>23</sup> This note changes the terms of the discussion in an interesting way, because we get a hint of exactly what rides on the solution to the taxonomic question of what the monster is. Domat’s footnote moves us in a very different direction: it presents a situational definition of the person that points out the tensions between taxonomy and the social function—in this case the human needs—of what is being classified. I will come back to this point shortly.

Still, we have not answered the question: if these children that our pre-modern forebears viewed as monstrous are not persons (or if they are persons only imperfectly and for specific purposes, rather like slaves in the antebellum American South),<sup>24</sup> what are they? According to the logic of Gaius’ schema, they must fit somewhere, since the tripartite division is an exhaustive structuring of the private law—as Gaius put it, “All our law is about persons, things or actions.”<sup>25</sup> These children would seem not to be things, which Domat defines as “everything that God created for man,”<sup>26</sup> but since Domat divides things into those in commerce and those not in commerce, perhaps monsters without human form (and also Wood’s severed leg?) might be things not in commerce.<sup>27</sup> Indeed, there is evidence that in England parents or others sometimes exhibited such children for profit, and these cases periodically came before the courts of common law or Equity. Though not

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23. *Id.* at 13 n. x (*On peut ajoûter, pour une autre raison de cette regle, que ces monstres sont plus à charge que ne sont les autres enfans*). This point occurs neither in the *Digest* nor in its medieval gloss, and seems to have originated with Domat. It occurs regularly in the other editions of Domat I have examined—for example in (Paris: Aux dépens de la Société, 1745), vol. 1, p. 13 and (Paris: Nyon, 1777), vol. 1, p. 19—but confirmation of its origins must await further study of the earliest editions of the work.

24. Slaves were non-persons in some situations, persons in others, three-fifths persons in still others. See Malick W. Ghachem, *The Slave’s Two Bodies: The Life of an American Legal Fiction*, 60 WM. & MARY Q. 809 (2003).

25. G. 1.8, in THE INSTITUTES OF GAIUS 23 (W.M. Gordon & O.F. Robinson trans., 1988).

26. DOMAT, *supra* note 13 at 16 (*tout ce que Dieu a créé [sic] pour l’homme*).

27. Compare BAUD, *supra* note 9 at 78-88 (arguing that the human body should be considered a thing not in commerce rather than a person). Baud cites the *Digest* on monsters as well; *id.* at 71. See generally ISABELLE MOINE, LES CHOSES HORS COMMERCE: UNE APPROCHE DE LA PERSONNE HUMAINE JURIDIQUE (1997); and Grégoire Loiseau, *Typologie des choses hors du commerce*, 2000 REV. TRIM. DR. CIV. 47.

surprisingly the courts did not deal explicitly with the question of classification (though as always the issues are there, in the background), the results suggest that these children were viewed as being outside the market, for moral if not taxonomic reasons. In the 1682 Chancery case *Herring v. Walround*, for example, a “monstrous birth” (conjoined twin girls) was shown to the public for money, and the exhibition continued even after the children died. The Chancellor reportedly “most disliked these Doings” and ordered the body (bodies?) buried forthwith.<sup>28</sup> Treating Domat’s monster as a thing—even a thing not in commerce—would however seem to be at odds with Domat’s remarks about the esteem of the parents and the care that such children require, which point in a different direction, towards the language of relationship and obligation, and thus to the third branch of Gaius’ schema. While the monster is not itself an obligation (though how do we conceptualize obligations without in part reifying them?), it clearly engages that aspect of the law. By its very nature the monster embodies dependence on others (its parents, society more generally), and so it elicits bonds of relationship and interconnectedness that call for a situational understanding that is at odds with the more ontological analysis characteristic of the categories of persons and things.

The examples of the monster and the severed leg illustrate the difficulty in isolating and circumscribing the physical world (not to mention the world of human interactions) so as to make it fit neatly into a single preordained category. Domat’s monster is neither a person nor a thing nor an obligation, and yet it is all three at the same time. Wherever we might put it, it reaches into (or holds onto) the other categories, claiming aspects of all of them. Even concentrating on the *summa divisio* of the paradigm and limiting the choices to either a thinglike person or a personlike thing is insufficient, since as Domat indicates the relations between such a child and others are crucial to its nature. Moreover, the monster simply points out in starker relief what is true also for everything we subject to legal analysis: in different aspects and from different points of view everything partakes of all three categories, and so defies the neat categorization that Gaius’ schema as classically conceptualized demands.

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28. *Herring v. Walround* (1682), 2 Chan. Cas. 110, 22 E.R. 870 (England, Ch.) (“A monstrous Birth shown for Money, a Misdemeanor”).

I would like to turn now to a closer examination of Gaius' schema and the function it and legal categories more generally serve in the civil law. Gaius divided the world of private law into persons, things, and actions, and in so doing he created the three fundamental categories of the civil law. But by this he also—and this is my point in what follows—necessarily posited the existence of boundaries between the categories—points of contact where one category gives way to another. Categories have a seductive effect, however: like black holes, they tend to pull things towards their centers, leaving their edges, as well as their interactions with their neighbors, as ill-defined areas of discomfort. In what follows, I want to turn attention away from the middles of the categories and focus instead on the boundaries between them. In so doing, I hope to shift our understanding of legal classification away from a process of binary, either/or decisions that place material in the appropriate pigeonhole and towards a more dynamic model that emphasizes the interactions between categories such as “persons” and “things.” I am particularly interested in the possibilities of rethinking the category of persons, since I believe it has not been given its due, at least in part because it tends to be on the losing side of binary taxonomic decisions. Exploring the dynamic interactions between categories can, I think, reclaim a space for the person against encroachments by its neighboring categories, while at the same time add dimensions to the concept of the person that have been underemphasized or ignored in the law. Since the civil law is an integrated system, rethinking persons necessarily involves rethinking things and obligations, as we will see, though I leave it to others to explore these implications.

## I. BOUNDARIES

Gaius' taxonomy privileges a view that something must fit into one and only one of the categories, and distinct sets of rules are engaged and different legal actions made possible depending on where something is put. Since the system is exhaustive, Domat's monster, for instance, must be either a person, or a thing, or an obligation. No fourth option exists (like the categories “others” or “et cetera” beloved of common lawyers),<sup>29</sup> and no straddling of boundaries is possible. This is not to say classificatory problems

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29. See WADDAMS, *supra* note 7, at 11-12.

do not exist. Roman jurists long ago pointed out difficulties—Ulpian, for example, noted that the household partook of both persons and things, depending on the point of view from which it is examined.<sup>30</sup> More recently, we can point to the examples of the corporation—which can be seen as a person in status, as a thing in relation to its shareholders, and as a nexus of contracts organizationally<sup>31</sup>—or of profitable biotechnological innovations derived from the human body.<sup>32</sup>

The logic of legal classification is still however largely driven by an understanding of the boundaries between categories as clear lines necessitating either/or choices—difficult choices, to be sure, but choices nonetheless. We see this in the logic of civil codes, which locate different issues in distinct books, and in legal education, which in the civil law world usually mirrors the structure of codes and treats persons, things, and obligations in separate courses and in separate textbooks. The effect of this is to keep the categories conceptually insulated from one another: viewing them as boxes within which to file legal data puts the emphasis on difference rather than on overlap and connection.

In the case of Gaius' schema, the tendency is to view it according to the structure of Gaius' *Institutes*, and so as a series of binary oppositions arranged in a linear fashion, first persons then things and finally actions (now obligations):

Persons	Things	Obligations
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This linear view creates two interfaces between categories, and scholars have recently begun exploring their implications: the

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30. Dig. 50.16.195.1, *supra* note 17:

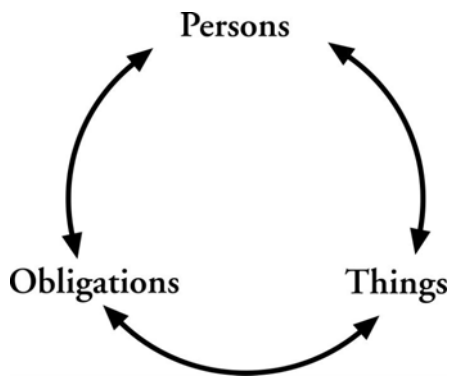
Let us consider how the designation of 'household' is understood. And indeed it is understood in various ways; for it relates both to things and to persons: to things, as, for instance, in the *Law of the Twelve Tables* in the words 'let the nearest agnate have the household.' The designation of household,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

31. Katsuhito Iwai, *Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance*, 47 AM. J. COMP. L. 583 (1999).

32. E. RICHARD GOLD, *BODY PARTS: PROPERTY RIGHTS AND THE OWNERSHIP OF HUMAN BIOLOGICAL MATERIALS* (1996).

persons-things interface<sup>33</sup> and the things-obligations interface.<sup>34</sup> This sort of relational thinking is welcome, since it begins to make Gaius' static structure more dynamic, but the either/or binary oppositions in this view are too limited to deal with the sort of taxonomic mixing that cases like Domat's monster bring up.

If we loop the linear paradigm around into a circle, we create a new interface between persons and obligations, which gives us a place to analyze issues such as the relationships raised in Domat's footnote mentioned earlier:



This does not fully solve our problem, however, since the system still breaks down into a series of binary either/or pairs. This third—and still shadowy—interface between persons and obligations is important, even crucial to understanding the system, since it brings into the analysis issues of relationship that are otherwise left out.<sup>35</sup> What is needed is a model that incorporates the multi-valence and fluidity of all three categories, a model that

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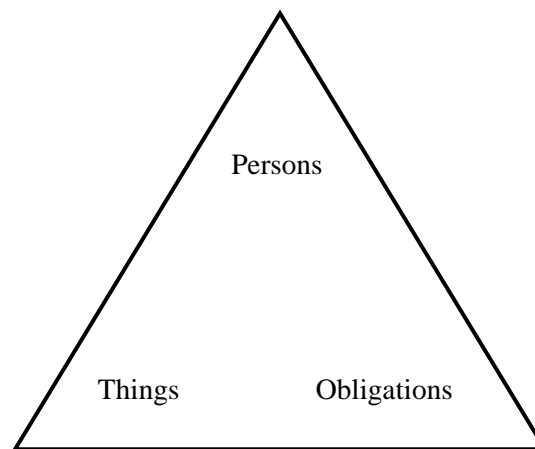
33. Besides the other contributions to this workshop, see especially Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982); BAUD, *supra* note 9; Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359 (2000); and MARGARET DAVIES & NGAIRE NAFFINE, *ARE PERSONS PROPERTY? LEGAL DEBATES ABOUT PROPERTY AND PERSONALITY* (2001).

34. *E.g.* Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131 (1970); Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773 (2001).

35. See the fascinating article by Catherine Labrusse-Riou beginning to explore this interface: *De quelques apports du droit des contrats au droit des personnes*, in *ÉTUDES OFFERTES A JACQUES GHESTIN: LE CONTRAT AU DEBUT DU XXIE SIECLE* 499 (Gilles Gouveaux et al. eds., 2001).

can account for the constantly shifting analytical alliances between them.

I would like to suggest that we can approach a visualization of the dynamic view of Gaius' paradigm that I have in mind if we think of the private law not as the usual spectrum, nor even as a circle (with obligations linking back to touch persons), but rather as a triangle, where classification takes place within the area enclosed by the triangle, rather than along its perimeter:



This model, I think, makes it clear that Gaius' schema represents a closed system, embracing the private law.<sup>36</sup> At the same time, I believe it provides a more realistic graphical illustration of the interrelations between all three categories than does the more familiar linear model.

Each point of the triangle, then, represents one of the categories, either persons, or things, or obligations. As we move towards the center of the triangle, we get a more and more balanced mingling of all three categories—we might think of the blending of three colors at the center, rather than sharp lines dividing three zones. Interactions primarily between two categories take place close to the sides of the triangle, while

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36. The ambiguities and difficulties of classification between public law and private law are significant in themselves and require analysis, but are beyond the scope of this article. It seems clear that an interface does exist between private and public law (one thinks of the fluid boundary between delict and crime, or between the private and public aspects of fundamental rights and freedoms), though representing this interface graphically presents challenges (what is the area outside the private law triangle: public law? non-law? both?).

relatively unproblematic examples of each category would be close to the triangle's points.<sup>37</sup> For example, we might place things without an owner (such as wild animals) at the extreme point of the things category—though clearly things and so within the private law, until occupied by an owner they do not interact with persons.<sup>38</sup>

I do not want to push this kind of structuralist modeling too far, but I think it does offer at least two heuristic advantages. First, it brings into play the third interface between persons and obligations, and so it allows us to bring ideas of interaction and relationship into our legal concepts of persons and things, rather than isolating them from these ideas. Second, it makes it clear that all three of the categories play a role in virtually any classificatory decision: as I just indicated, it is extremely rare that something will unproblematically belong to one and only one category, without influence from the others.

In other words, this model can help move the process of legal taxonomy away from the empiricism of simple either/or choices and towards a rhetorical and normative process of constructive and constitutive interaction between different areas of legal knowledge. Though binary oppositions might be cognitively easier for the mind to grasp, the addition of a third option—particularly one in dynamic relation to the others—opens up additional analytical nuances and possibilities. Our legal categories are fictions<sup>39</sup>—they

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37. I do not want to suggest that moving towards the triangle's points moves us closer to essences or archetypes. All three categories—persons, things, and obligations—are juridical constructions that work normatively to structure legal problems and subject matter rather than as strictly empirical labels. Instead, moving towards the points of the triangle reflects a decreasing intensity of interrelations with the other categories. For an insightful example of the analysis of the normative implications one of the categories—persons—see Ngaire Naffine, *Who Are Law's Persons? From Cheshire Cats to Responsible Subjects*, 66 MOD. L. REV. 346 (2003).

38. In passing, one might ask whether the other two points of the triangle—persons untouched by things or obligations, and obligations untouched by persons or things—are conceptually possible. Obligations, it would seem, are not, since by definition they involve both persons and an object: *see e.g.* 1 ROBERT-JOSEPH POTHIER, TRAITÉ DES OBLIGATIONS in ŒUVRES DE POTHIER 79 (nouvelle édition 1821). By contrast, persons, or at least human persons, are inextricably linked to other persons (if not to things), which gives rise to certain natural obligations linked to status (as between parent and child).

39. *See* Yan Thomas, *Fictio legis: l'empire de la fiction romaine et ses limites médiévales*, 21 DROITS 17 (1995), discussed in Alain Pottage,

have a long pedigree in the civil law, of course, but they are fictions nonetheless—and it is essential to ask what we are calling on our fictions to do and how well they are doing it.

Reconceiving Gaius' schema as interactive has important implications for understanding the person in law, as it forces us to shift our attention from ontological status (is something a person or a thing?) to how it is positioned or embedded within a social matrix of relationships—a concern central to the feminist critique of traditional views of personhood in law.<sup>40</sup> At the same time, by focusing on the interfaces between the categories and on the interactions that take place at these zones of juncture, we can begin to counter the colonization of one category by another, which is an inevitable byproduct of binary taxonomy and clear boundaries between categories. The category of persons has I think long suffered encroachments by its neighbors, each of which deals with matter more congenial to the liberal model of law: objects of wealth on the one hand, and means of acquiring objects of wealth on the other. I would like to turn now to look at these issues in the context of the persons-things interface.

## II. THE PERSONS-THINGS INTERFACE

The traditional view has been that there is (indeed, that there must be) a clear boundary between persons and things, which corresponds to the distinction between subject and object, being and having, the self and the world.<sup>41</sup> Given the anthropocentrism at the heart of liberal humanism, this boundary is regarded as central to, even inherent in, the nature of human society.<sup>42</sup>

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*Introduction: The Fabrication of Persons and Things, in LAW, ANTHROPOLOGY AND THE CONSTITUTION OF THE SOCIAL: MAKING PERSONS AND THINGS 1, 12-18 (Alain Pottage & Martha Mundy eds., 2003).*

40. See especially Jennifer Nedelsky, *Reconceiving Autonomy*, 1 YALE J. LAW & FEMINISM 7 (1989); Jennifer Nedelsky, *Property in Potential Life?: A Relational Approach to Choosing Legal Categories*, 6 CAN. J.L. & JURIS. 343 (1993); and ROBERT LECKEY, *CONTEXTUAL SUBJECTS: FAMILY, STATE, AND RELATIONAL THEORY* (2008).

41. See generally Pottage, *supra* note 39; and Alain Sériaux, *La notion juridique de patrimoine: brèves notations civilistes sur le verbe avoir*, 1994 REV.TRIM. DR. CIV. 801.

42. See generally DAVIES & NAFFINE, *supra* note 33, at 2; Ross Poole, *On Being a Person*, 74 AUSTRALASIAN J. PHIL. 38, 46 (1996); and DONALD R.



Disagreement largely centers on the placement of this boundary (particularly in areas like the status of embryos or fetuses<sup>43</sup> or biotechnology<sup>44</sup>) rather than on its existence. Conflict arises from (or at least is exacerbated by) the fact that the nature and location of this boundary engages so many different normative discourses. Law, religion, science, ethics, and morality each address the basic question of what is a person and what is a thing, but give widely divergent answers to it.

In practice, however, the boundary between persons and things blurs. In some contexts, human beings are effectively treated as things (for example as objects of the power of the state or of employers),<sup>45</sup> while sometimes certain things are (or conceivably should be) treated as persons or parts of persons (such as human body parts,<sup>46</sup> or objects with particular emotional connections to a human being,<sup>47</sup> or certain animals,<sup>48</sup> or things of common benefit like the environment<sup>49</sup>). The problem is that in a system with a

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KELLEY, *THE HUMAN MEASURE: SOCIAL THOUGHT IN THE WESTERN LEGAL TRADITION* 8 (1990). This is of course a hotly contested question, which has inspired a vast literature. For one challenge to this anthropocentrism, see CHRISTOPHER D. STONE, *EARTH AND OTHER ETHICS: THE CASE FOR MORAL PLURALISM* (1987).

43. See e.g. Robert Kouri, *Réflexions sur le statut juridique du foetus*, 15 R.J.T. 193 (1980); Martine Herzog-Evans, *Homme, homme juridique et humanité de l'embryon*, 2000 REV. TRIM. DR. CIV. 65; Timothy Stoltzfus Jost, *Rights of Embryo and Foetus in Private Law*, 50 AM. J. COMP. L. 633 (2002); and Jessica Berg, *Owning Persons: The Application of Property Theory to Embryos and Fetuses*, 40 WAKE FOREST L. REV. 159 (2005).

44. See e.g. GOLD, *supra* note 32; Alain Pottage, *Our Original Inheritance*, in *LAW, ANTHROPOLOGY AND THE CONSTITUTION OF THE SOCIAL: MAKING PERSONS AND THINGS* 249 (Alain Pottage & Martha Mundy eds., 2003).

45. See e.g. Anne Barron, *Legal Discourse and the Colonisation of the Self in the Modern State*, in *POST-MODERN LAW: ENLIGHTENMENT, REVOLUTION AND THE DEATH OF MAN* 107, 109 (Anthony Carty ed., 1990).

46. BAUD, *supra* note 9; and Stephen R. Munzer, *An Uneasy Case Against Property Rights in Body Parts*, 11 SOC. PHIL. & POL'Y 259 (1994).

47. Radin, *supra* note 33, esp. 959-61.

48. Alain Roy, *Papa, Maman, Bébé et... Fido! L'animal de compagnie en droit civil ou l'émergence d'un nouveau sujet de droit*, 82 CAN. BAR REV. 791 (2003); and Simon Cushing, *Against "Humanism": Speciesism, Personhood, and Preference*, 34 J. SOC. PHIL. 556 (2003).

49. Stone, *supra* note 33; and Christopher D. Stone, *Should Trees Have Standing? Revisited: How Far Will Law and Morals Reach? A Pluralist Perspective*, 59 S. CAL. L. REV. 1 (1985).

clear boundary between persons and things, a choice must be made for one category or the other, which amounts in most cases to a choice between treating something as extrapatrimonial or patrimonial, as outside or within the market.

Our liberal Western world grants property discourse tremendous power to transform our view of what constitutes a thing and in so doing to colonize other areas of law. Personhood discourse, by contrast, has largely lacked countervailing power, both because it has been less coherently theorized and because its characteristic concerns are less easily translated into the language of law. For this reason, the negotiation between the categories of persons and things has generally taken place from the standpoint of the latter.<sup>50</sup> John Austin argued a century and a half ago for the logic of viewing persons as exceptions to universal reification rather than seeing things as exceptions to universal agency,<sup>51</sup> and the comparative historical fates of the law of property and the law of persons bear this out. In cold instrumentalist logic, whatever can be treated as a thing is treated as one, unless there are compelling reasons to the contrary (which generally derive from the anthropocentric bias just mentioned).<sup>52</sup> Even with the abolition of slavery, the most egregious commodification of the human being, the patrimonialization of aspects of the person—one thinks of

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50. Compare C.B. Macpherson, *Human Rights as Property Rights*, in *THE RISE AND FALL OF ECONOMIC JUSTICE AND OTHER PAPERS* 76, 84 (1985), who argues that hitching other concepts (such as human rights) to the power of property might be useful in establishing them.

51. 2 JOHN AUSTIN, *LECTURES ON JURISPRUDENCE, OR THE PHILOSOPHY OF POSITIVE LAW* 686 (5th ed. by Robert Campbell, 1885): “The Law of Things in short is The Law—the entire *corpus juris*; minus certain portions of it affecting peculiar classes of persons, which, for the sake of commodious exposition, are severed from the whole of which they are a part, and placed in separate heads or chapters.”

52. An early critic of this was Louis Josserand, *La personne humaine dans le commerce juridique*, D. 1932.CHRON.1, 4.

privacy,<sup>53</sup> image,<sup>54</sup> body parts and genetic information<sup>55</sup>—has worked towards the assimilation of persons into things. In common-law jurisdictions this is perhaps unsurprising, as the concept of the person in the common law has steadily atrophied, which leaves the courts little choice but to designate as property anything that has no more obvious category.<sup>56</sup> But even in the civil law the power of property rights makes them a beacon for litigants, and the extrapatrimonial is increasingly becoming patrimonialized.<sup>57</sup>

Boundaries constantly move, which means categories are fluid. Given the central importance of both persons and property in Western liberal and humanist ideologies, defining what happens in the zone of interaction between the categories of persons and things becomes crucially important. It makes a profound

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53. For an early discussion of privacy as a form of intangible property, *see* Note, *Modern Developments of the Jurisdiction of Equity*, 7 COLUM. L. REV. 533, 534 (1907), cited in Kenneth J. Vandeveld, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325, 334 (1980). The recasting of certain aspects of privacy as a form of property right continued in William L. Prosser's influential article *Privacy*, 48 CAL. L. REV. 383 (1960).

54. In the United States, though there were earlier antecedents, the line of cases interpreting the right to one's image as a proprietary right begins with *Haelan Laboratories v. Topps Chewing Gum*, 202 F.2d 866 (2d Cir. 1953), *cert. denied*, 346 U.S. 816 (1953), which established the "right of publicity" in American law. *See generally* Eric H. Reiter, *Personality and Patrimony: Comparative Perspectives on the Right to One's Image*, 76 TUL. L. REV. 673 (2002).

55. GOLD, *supra* note 32. *See also* the famous decision in *Moore v. Regents of the University of California*, 793 P.2d 479 (Cal. S.C. 1990), *cert. denied*, 499 U.S. 936 (1991).

56. *See* Eric H. Reiter, *Gaius, le droit des personnes et la common law anglo-américaine*, in 2 PERSONNE ET RES PUBLICA 163 (Jacques Bouineau ed., 2008).

57. An example is the legal status of clientele (particularly a physician's patients), which has been the object of vigorous debate in France. *See* Thierry Revet, *Clientèle civile*, 2001 REV. TRIM. DR. CIV. 167; Judith Rochfeld, *Les ambiguïtés de la 'patientèle' ou comment une chose qui n'en est toujours pas une peut désormais constituer licitement l'objet d'un contrat de cession...*, J.C.P. 2001.I 301.432; François Vialla, *Un revirement spectaculaire en matière de patrimonialisation des clientèles civiles*, J.C.P. 2001.II 10 452.69. On the patrimonial/extrapatrimonial distinction, *see generally* Grégoire Loiseau, *Des droits patrimoniaux de la personnalité en droit français*, 42 MCGILL L.J. 319 (1997); and Reiter, *supra* note 54, at 681-705.

difference in the character of a legal system whether classification proceeds from the basis of the primacy of persons or the primacy of things, and different justifications are required for each.

The problem with allowing the category of things—and more particularly the concept of property—to set its own boundaries is that property today is largely conceived in market terms: courts (if not individuals) deal more comfortably with things considered as wealth valued in monetary terms than with things considered as unique objects valued subjectively.<sup>58</sup> This insulates the category “things” from both the personhood concerns of the category “persons” (which touch on subjective value) and from the relational issues of the category “obligations” (which touch on responsibility and duty), both of which potentially bring to our analysis of things important concerns not captured in market calculus. The ostensibly universal logic and language of the market make property seem the great equalizer, a vulgate into which virtually anything may be translated. The normative implications of this process are too important to be accepted uncritically.

Even our language for taking things out of the property system presupposes evaluative market language as the norm.<sup>59</sup> The very linguistic form of concepts like “extrapatrimoniality,” “not in commerce,” and “inalienability” presents them as exceptions to the predominant paradigms of “patrimony,” “commerce,” and “alienability” respectively. The association between things and the market is so close that it seems somehow perverse to say that there might be things that are “not in commerce” yet still property. This is particularly so with regard to the person and the rights closely connected to personhood (such as privacy, bodily integrity, and so forth—the extrapatrimonial personality rights of the civil law<sup>60</sup>). Though not all alienability need be market driven,<sup>61</sup> and though a patrimony also theoretically contains things of value that are not

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58. See generally Bernard Rudden, *Things as Thing and Things as Wealth*, 14 OXFORD J. LEGAL STUD. 81 (1994).

59. See Alain Pottage, *The Inscription of Life in Law: Genes, Patents, and Bio-Politics*, 61 MOD. L. REV. 740, 765 (1998) (noting that “to create or defend an exception is to concede the claims of the rule”).

60. See generally Adrian Popovici, *Personality Rights—A Civil Law Concept*, 50 LOY. L. REV. 349 (2004).

61. Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987).

owned, the rhetorical power of property discourse within liberal society is such that fine gradations are difficult to sustain against it.

Consider the popular notion of “identity theft.”<sup>62</sup> The language of property is more viscerally evocative in modern Western society than alternative terms like “appropriation of personality” (which itself still echoes property language) or “violation of personality,” which conceptualize the problem (more naturally) as a personhood rather than a property issue. The association with theft serves to patrimonialize identity (itself a slippery concept) into an object of property and thus to link it to ownership, the most powerful right in the arsenal of the liberal legal world.

This subtle politics of labeling is closely related to the equally subtle politics of taxonomy. If we reduce classification at the interface between persons and things to a question of the scope of property rights, we create a slippery slope whose bottom is the position where anything to which the creativity of a market-dominated society can assign a value is brought within the property regime to be subjected to the full panoply of broad legally-enforced rights of ownership. The category of persons hardly stands a chance against this—it becomes little more than a placeholder for things not yet propertized.

Allowing the persons-things interface to become a one-way membrane that permits only ever-increasing commodification misses the potential of the other kinds of conceptual exchanges that might take place between persons and things. Categorization at the persons-things interface is more than simply coming up with two definitions, one for persons, another for things, and choosing the proper pigeonhole in which to file something new. An interface between categories means that the categories are related to one another, mutually and on equal terms, and not simply as colonizer-colonized. This allows us to see not just how aspects of the person can function as things, but also how our concept of the person depends on connections to certain things.

Pushing things further, persons and things are just part of the analysis: questions of classification really involve all three parts of the private law—persons, things, and obligations—working together to set the terms of our interaction with the world and the degree of

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62. E.g. Sean B. Hoar, *Identity Theft: The Crime of the New Millenium*, 80 OR. L. REV. 1423 (2001); and Daniel J. Solove, *Identity Theft, Privacy, and the Architecture of Vulnerability*, 54 HASTINGS L.J. 1227 (2003).

influence the world will have on us. Broadening the analysis beyond a binary opposition—and away from the transactional overtones of property discourse—allows us to enrich the persons-things interface with the relational concerns characteristic of the third part of our triangle. I think this allows a better understanding of the role things play in human relationships and the ways in which personhood and market concerns interact in defining these relationships.<sup>63</sup>

The standard sites for discussing issues like these are with respect to the human body and personality rights like privacy.<sup>64</sup> Both of these examples sit squarely in the liminal zone between persons and things, since they are associated with the human being but are detachable and so transactable in market terms. At the same time, they touch on ideas of relationship, interconnection, and responsibility associated with the language of obligations. A stark binary choice—person or thing—is unsatisfactory. Market discourse makes us uncomfortable in this context, since we are generally unwilling to treat kidneys like automobiles, but at the same time a kidney is no more a person than Buick is (unless we are willing to get creative with the fiction of legal personality<sup>65</sup>). In a system where the category of persons is rigidly circumscribed in opposition to things, the taxonomic possibilities for things like kidneys or one's image are lacking, and such things have nowhere to go except somewhere along the property spectrum. And once classed as things, the assumptions about the property institution take over, and some degree of market commodification is the result.<sup>66</sup>

The civil law distinction between extrapatrimonial and patrimonial rights perhaps gets closest to what I mean, since it distinguishes between the personal aspects of rights (their

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63. For interesting insights into this question, see Jennifer Nedelsky, *Reconceiving Rights as Relationship*, 1 REV. CONST. STUD. 1 (1993); and David Lametti, *The Concept of Property: Relations Through Objects of Social Wealth*, 53 U.T.L.J. 325 (2003).

64. See the literature cited *supra* note 33.

65. Naffine, *supra* note 37 (on the different arguments and justifications behind the idea of legal personality).

66. See Richard Gold, *Owning Our Bodies: An Examination of Property Law and Biotechnology*, 32 SAN DIEGO L. REV. 1167, 1230-31 (1995). I am more skeptical than Gold about the appropriateness of applying even a changed property discourse to things intimately connected to the person.

personhood qualities) and their public aspects (their value- or market-oriented side). The problem, however, is that concepts like extrapatrimoniality and “not in commerce” do not do full justice to what is going on at the persons-things interface, since they already assume both the language of property discourse and an either/or view of classification. To address this problem of the insufficiency of binary choices, various writers have made a case for intermediate categories—examples include Jean-Pierre Baud’s idea of “things without price,” or Gérard Farjat’s idea of “centers of interest,” or Geoffrey Samuel’s work on “interests” in the common law.<sup>67</sup> Such intermediate categories, these authors argue, could encompass things like the human body or the family relationship or even Domat’s monster that do not fit easily elsewhere.

Multiplying categories is not the answer, however, since it simply adds new boundaries and thus creates new either/or dilemmas. Nor is it feasible, I think, to abandon categories entirely and adopt a more pragmatic, situational model of private law in the manner of the common law, where categories are infinitely expandable, overlapping, and non-exclusive (as in *Halsbury’s Laws of England*<sup>68</sup> or the *Canadian Abridgement*<sup>69</sup>). The civil law comes with a structural history that has become part of the law itself. This structure can be modified (an example is the consolidation of family law from elements drawn from persons, things, and obligations), but the traditional foundation based on Gaius has proved resilient and of continuing utility.

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67. BAUD, *supra* note 9, at 217-22; Gérard Farjat, *Entre les personnes et les choses, les centres d’intérêts: prolégomènes pour une recherche*, 2002 REV.TRIM. DR. CIV. 221; and Geoffrey Samuel, *The Notion of an Interest as a Formal Concept in English and in Comparative Law*, in *COMPARATIVE LAW BEFORE THE COURTS* 263 (Guy Canivet, Mads Andenas & Duncan Fairgrieve eds., 2004).

68. HALSBURY’S LAWS OF ENGLAND (4th ed. 1973). The categories in *Halsbury*, of which there is a growing list of more than 160, range from the highly general (Contract, Tort, Real Property, Restitution) to the narrowly defined (Agriculture, Animals, Auction, Aviation, Barristers). Overlap is common: for instance we find both Tort and Negligence, Contract and Sale of Goods, and so on.

69. CANADIAN ABRIDGEMENT (2d ed. 1992). As with *Halsbury*, here the categories are numerous (about one hundred), of varying degrees of generality, and frequently overlapping (Contract, but also Sale of Land, Insurance, Employment Law, and so on).

It seems to me more useful to explore the possibilities of the idea of interfaces. By this I mean a zone where the categories mingle and blend: where the linkages between personhood and property can be articulated while resorting neither to full market commodification nor to full legal subjectivity. An interface is not simply a new either/or choice: it is a space where the answer is “both,” a zone of interaction where either category alone would be insufficient to deal with the complexities of the subject matter, and would result in an unacceptable narrowing or distortion of what was being categorized. This idea of interaction, however, points to the relational ideas characteristic of the third area of our triangle—the law of obligations—and indicates that the analysis around the concepts of persons and things is more complicated than even a dual persons-things interface alone can capture.

### III. BRINGING IN THE PERSONS-OBLIGATIONS INTERFACE

The third category in Gaius’ schema has been the most obviously fluid both in conceptualization and in content, which is at least partly due to its role as the legal site for concepts that mediate between self and society.<sup>70</sup> It represents links or interactions between persons or things, and so, I would argue, touches qualities of movement between categories, of moral engagement, and of relationship.

This category embraces a wide variety of subject matter—Peter Stein has called obligations the “joker in the pack of civil law categories”<sup>71</sup>—and this is one reason why it is so difficult to pin down. The definitional shifts surrounding this category over the centuries are fascinating, and indicate a searching for a way to generalize the different possible links between persons and things:<sup>72</sup> “obligations” looks one way, putting the stress on interpersonal relations, while “ways of acquiring property” looks

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70. KELLEY, *supra* note 42 at 8 has described it as “the theoretical point where self-consciousness becomes social consciousness and where the defining faculty of human will, as expressed in language as well as behavior, becomes essential both for social activity and for legal regulation.”

71. Stein, *supra* note 1 at 158.

72. ANDRÉ-JEAN ARNAUD, *ESSAI D’ANALYSE STRUCTURALE DU CODE CIVIL FRANÇAIS: LA RÈGLE DU JEU DANS LA PAIX BOURGEOISE* 92 (1973) (making a similar point with reference to the mixture of subjects found in Book 3 of the French *Code civil*).



another way, emphasizing the relations between persons and things.

As I have suggested, the traditional linear model of Gaius' paradigm is misleading, since it relates this third category only with things, and not with persons. In law persons interact both with other persons and with things: contracts of sale, lease, and deposit, for example, involve things (and persons too, of course), while contracts of mandate, partnership, and employment involve persons, their status, and their interpersonal relationships much more than their things. The element common to both is the creation and governance of relationships.

Viewed broadly, then, this third category brings to the statically conceived categories of persons and things relationships and interactions of all kinds: from social or affective relationships (such as aspects of family), to legal relationships (such as employer/employee and aspects of parenthood or marriage), to relationships with things (such as custodial obligations). These various kinds of interactions, moreover, call attention to qualities such as affect and power that are crucial to understanding how legal systems actually function, but that are otherwise missing from the schema. In short, if we view the category "persons" as the realm of being and the category "things" as the realm of having, this third category works with the others to emphasize the intermediary states of becoming and getting. Brought into the persons-things mix, this focus on process rather than product brings into focus moral and ethical aspects of the law that otherwise tend to remain hidden and so difficult to articulate or conceptualize, and that work to change the terms of analysis of both persons and things.

#### CONCLUSION

To return to the examples with which I began, I think we can now see more clearly how both the leg in the barbeque smoker and Domat's monster challenge the static and linear view of Gaius' schema. The leg, being too recognizably human to be clearly a commodity, but at the same time too detached to be clearly a person, fits neither category and so engages neither set of rules unproblematically. As for monsters without human form, although Domat clearly excludes such beings from the category of persons,

we see that it is precisely the human qualities they do have (particularly their parentage, but also any physical resemblance to humans) that keep them from fitting clearly into the category of things. Similarly, their lack of most of the usual formal attributes of humanity keeps them out of the category of persons: only in cases where such monsters have a sufficiently human form do they become persons.<sup>73</sup> Their connection with each category—persons and things—is however colored by their interactions: with their parents especially, but also with society generally and with the assumptions of others about their nature, their abilities, and their origins. And it is these interactions, with their overtones of duty, responsibility, and obligation, that really add complexity—but also interest—to the problem of Domat’s monster.

Though Domat’s treatment of the monster would not be the way we would discuss this issue today, his recognition of the interplay between form, nature, and particularly community is an excellent illustration of the issues that categorization in law must engage. Taxonomy is a necessary evil in law, but how we do it is anything but necessary and need not be evil. Categories shape the material being categorized, and discrete, coherent, and bounded categories invite us to view persons and things as themselves discrete, coherent, and bounded, though the richness of human experience says otherwise. Moving beyond the limitations of this view of taxonomy and emphasizing instead fluidity and interaction can help us embrace rather than avoid complexity and multivalence in legal analysis, whether we are dealing with intangibles like the right to privacy or very tangible things like legs discovered in barbeque smokers.

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73. This pre-modern emphasis on the formal rather than the moral or other characteristics of humanity is interesting historically, though shocking in modern ethical terms. It is however disquieting to compare the often alarming rhetoric surrounding conjoined twins cited in DREGER, *supra* note 20.