

The Conversion of Actions into Legal Designations

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1. The Source of Greek Philosophy's Obsession with Permanence

Nearly all the Greek philosophy that shaped Western thought was conceived between 470¹ and 323² B.C., a time littered with coups and warfare, and recorded in just the latter half³ of that time, well under a century. Not only did power abruptly change hands from year to year, and sometimes month to month, but the Athenian polis tried all forms of government—dictatorship⁴, monarchy⁵, oligarchy⁶, democracy⁷, and various hybrids. The Athenian Counsel once declared war, sent out warships, then the next day retracted the declaration and sent ships to catch up with their warships and recall them. Dependent on foreign wheat⁸, ringed by enemies the Athenians loved to irritate⁹, thriving on predatory marine commerce¹⁰, served by frequently discontented peasants and slaves¹¹, playing erratically with land reforms¹², and litigating everything imaginable¹³, Athens was wracked by conflict. How did such a chaotic state manage to hold together for over a century? It had discovered that craftsmanship and trade, combined with military adventures, were far more lucrative than the agriculture surrounding states relied on. As with Britain, Germany, Japan, and the United States in the last century, centralized economic energy led to and demanded military conflict and imperialism. Athenian mercantile energy created a problem it could not solve: Athenian society was a well-fueled machine without brakes or oil, and it shook itself apart, a self-destroying mobile sculpture.

The Greek philosophers whose works survived to influence Western thinking were nearly all¹⁴ aristocrats raving after the stability they thought their ancestors had promised them. Aristotle was raised in the court of Philip of Macedon; Plato was the heir of one-time rulers of Athens; Parmenides was the scion of nobility of Elea; and Pythagoras was held to have had divine birth, which probably meant he was heir to a theocratic state. Heraclitus, traditionally held to be “heir to the royal family of the priest kings of Ephesus,”¹⁵ and famous for his regal arrogance, so despaired of permanence in the human world that he left society to live on the grasses that sprouted reliably each Spring, and told students time was a river that could not be stepped into twice. His student Cratylus¹⁶ thought Heraclitus had underestimated the problem, for the same river could not be stepped into even once, but so despaired of communication that he signaled this belief only by reprovably raising just one finger when he heard his master's saying mentioned. A Cynic, he preferred dogs to men. More loyal to their leaders, dogs offered more stability.

The intellectual obsession with permanence spread from politics to ethics—and from there to epistemology, metaphysics, and logic. Plato and Aristotle both saw a firm bridge from politics to ethics because both were convinced that unless quarrels among the ruling class divides it into factions, the lower classes will never rebel. The political key

to ethics was habituation to strong relations among “men of honor,” the elite. In the personalized political world of decaying feudalism, the disappointed heirs of aristocratic families conceived of political instability as the result of unsteady character: the problem, they thought, was that powerful people had not been trained to the good habit of deep and sustained thought, so they made their decisions on impulse, then reversed them on impulse when they found they had misjudged others’ characters or failed to anticipate responses to their orders. Hence the first business of the polis was moral education. In his ethical advice to his son, Aristotle rings endless changes on an unchanging theme: the good man, the magnanimous man, is steady, stolid, reliable, unchanging, uninfluenced by flattery, temptation, and riches. His only desire is to be honored by men of honor. He is the rock of Gibraltar. Plato portrays Socrates in battle as the stout man who never yields his position but steadily wades into the enemy ranks, an irresistible force even when those around him think all is lost. As Greek aristocrats found their power waning and realized with rage that they had one master one day and another the next, they attributed their plight to the personal misdeeds of others, to fickleness of purpose, misrepresentation of intentions, and failure to fulfill promises. In the Republic Plato recommends that the rulers of the good state will control every aspect of its life, including all details of education and culture, with the single purpose of producing only and exactly those virtues that will in turn produce stability. After three disastrous experiences of trying to create such a state in Sicily¹⁷, in his old age Plato returned to the topic, writing the Laws, in which the details he believed necessary to create stability are spelled out with bizarre precision: there must always be exactly 5040 citizens, because 5040 has sixty¹⁸ divisors, which makes apportionment of duties and taxes easy. (Extra citizens are imperfections and may be destroyed. Stability comes first.)

From politics and ethics the demand for stability spills over into epistemology. The polis is infected with false beliefs. They come from wishful thinking, vanity, and deceit. To whom should one listen? Whom can one trust to discover the truth? Who is worth talking to? Only one who thinks to the bottom of the world before speaking. One like Socrates, who is so devoted to discovering the truth that he stands all night pursuing a thought. The changeable cannot discover the truth, and the truth cannot be discovered in change. That which changes is like a compulsive liar, making up one story one time and another the next. If you ask for the truth from the changeable, the moment you entrust yourself to what you believe you’ve learned, it will be pulled away from you and you will find your life destroyed. These aristocrats, despising manual toil, went so far as to claim that the truth was not to be found in sensory experience at all, but only in reflection, and that reflection was really reminiscence of pure forms known before birth.

What many commentators have called Plato’s doctrine of ideas is the best known articulation of this position, but it is not so clear or pure as the visions of Parmenides and Pythagoras. Though Pythagoras’ own words have vanished, he evidently held that the world was made of numbers, and that the numbers were eternal, so that the truth was to be found in mathematics while the changing world was to be ignored. A philosophical poem of Parmenides, however, has survived. It tells of a hero, instructed by a goddess, and traveling on “The Way of Truth.” Because the goddess requires him to inquire into everything, he must find both “the motionless heart of well-rounded Truth and also the opinions of mortals, in which there is no true reliability.” From the goddess he learns that

“it is the same thing to think and to Be” and that because no part of Being can be Nothingness, Being cannot perish and cannot come to be; it alone is true and takes no part in Becoming. People fall into falsehood because they have tried to follow the Way of Becoming, but that leads only to destruction, to Nothingness, and hence to false opinion. Opinion is false because it is infected with non-Being. Because Being itself has no Nothingness in it, it is continuous, indivisible, the same at every point, does not move or change, and is “held by Necessity in the bonds of a Limit because it is decreed by divine law that Being shall not be without boundary.” Therefore it is “like the mass of a well-rounded sphere, equally balanced from its center in every direction....”¹⁹

2. The Need for Substance and Essence in Standard Syllogistic Form

In this milieu and tradition Aristotle set out to discover all the valid argument forms.²⁰ An argument consisted of three propositions with exactly three terms, a major term, a minor term, and a middle term. The last two each occurred once in the two premises and again in the conclusion, where they rested securely wedded together. The middle term occurred once in each premise but disappeared in the conclusion; it was the matchmaker who disappeared at the wedding.

How had Parmenides shaped this idea of how truth could be conveyed from one statement to another? Only one verb was allowed, the verb “to be,” called the “copula” because it couples the terms into propositions. A term had to be equally capable of serving as a subject or a predicate, so they had to be either nouns, noun phrases, or adjectives ready to serve as nouns. Other qualities attributed to nouns could be phrased as gerunds, participles, or infinitives, and they could be discussed as “having the attribute of” or “having the quality of” or “partaking of the quality of” and so on. But no verb could upset the timeless being of the copula. However peculiar Parmenides’ poem seems now, however much one thinks Aristotle escaped the mysticism of Plato’s forms, this restriction on the realm that could be made logically consistent was the heritage of Parmenides. Aristotle explained his metaphysics of substance this way:

And all other things are said to be because they are, some of them, quantities of that which *is* in this primary sense, others qualities of it, others affections of it, and others some other determination of it. And so one might raise the question whether ‘to walk’ and ‘to be healthy’ and ‘to sit’ signify in each case something that is, and similarly in any other case of this sort; for none of them is either self-subsistent or capable of being separated from substance, but rather, if anything, it is that which walks or is seated or is healthy that is an existent thing. Now these are seen ***to be more real because there is something definite which underlies them***; and this is ***the substance or individual***, which is implied in such a predicate; for ‘good’ or ‘sitting’ ***are not used without this***. Clearly then it is in virtue of this category that each of the others *is*. Therefore that which is primarily and *is* simply (not is something) must be substance.²¹ (emphases added)

Note how Aristotle tied substance to existence; individuals with substance are more real than what is “not self-subsistent or capable of being separated from substance.” Note that in the clause “for ‘good’ or ‘sitting’ are not used without this” he admits that he is

analyzing language.²² One grand proclamation of this naïve belief that the analysis of language could substitute for the analysis of reality—this belief that, more than any other, delayed the creation of science for 2000 years—was that “The Order of Knowing follows the Order of Being.”²³ *Things* had the privilege of being tied uniquely to *existence*. Processes and relationships were not so knowable because they did not exist on their own; their lack of knowability was linked to presumptions about the faulty quality of their being. They partook of “Becoming;” they came and went, were born and died, and so were foreigners to Being, interlopers and deceivers. If the terms could not be trained and domesticated on the Farm of Logic, they could not enter the great Circus of Being where in extended sorites they could prove one truth after another like plumed riders jumping from horse to horse.

So those were good days to be—or to have—a noun. Nouns had Substance. Better yet, they could be defined, and that gave them Essences. Essences were Knowable. Mind wanted everything to be a noun so that Mind could possess it. Mind, of course, was a leisured aristocrat’s. It thought of knowing things as owning them. The *hoi polloi*, the *Helots*, had no more Mind than they had possessions. They were the Many, and they did not know the One.

Now for something to have an Essence—that is, for it to be definable so you could use it in propositions that had stability and that reliably passed on their stability to their heirs—it had to have Substance, just as only a “Man of Substance” could pass on his substance through his essence. Metaphysics put all its weight on the idea that nouns had substance.

3. The Logical End of the Illusory Doctrine of Substance

Nouns bore that weight until 1900. Boole, DeMorgan, Peirce, Peano, and Frege had been working on the foundations of logic for fifty years. But the nouns finally cracked under the weight of thought because Bertrand Russell, in his search to extend and purify logical forms, realized that the idea of Substance, which dictated that terms be limited to substantives and that connectives be limited to the copula, was an artificial and unnecessary limitation imposed by false beliefs about language, not by conditions of reality.²⁴ Russell focused on this because he intuited that mathematics and logic had to be consistent and that this could only be so if mathematics could be derived from logic. He found that to prove this he had to develop the logical calculus, the symbolic form of propositional logic²⁵, which he could show was more fundamental than Aristotelian predicate logic because he could derive predicate logic from it but not the reverse. Propositional logic had no need for a concept like substance. While Russell was formalizing propositional logic, moreover, he went on to develop the logic of relations and the logic of classes, neither of which needed any concept like substance.

It was finally clear to everyone who was looking that it was not true that because there was a word there was a thing, and therefore words that appeared to designate things turned out to be no more solid and permanent than words that designated actions,

qualities, relationships, ways of being, or “anything” else.²⁶ (A few years later, to demonstrate that the inertia of an object depends on its energy, Einstein produced the physical counterpart of the insight: matter is a form of energy.) Russell’s realization cut him off from the Hegelian idealism that dominated Cambridge because Hegel’s logic was based on the assumption that logical terms represented substances in the world. In fact, the entire history of Western metaphysics, with the partial exceptions of Leibniz and Hume, shared that assumption. So Russell’s Principles of Mathematics, expanded over the next 13 years into Principia Mathematica, contained a call to abandon all previous metaphysics and to subordinate the Aristotelian syllogism to a quite subordinate role without metaphysical pretensions. Substance, the supposedly permanent sovereign whose Charter of Essence gave nouns their extraordinary privileges, had been dethroned, leaving nouns to wander the streets among lowly prepositions and adverbs. Being, the Pope who had joined nouns in the Holy Matrimony of Conclusion, had been found to be a meaningless word, and descended to the role of Handmaid to the tenses of rowdy Verbs. This was clear to everyone who was listening. But nearly all of the listeners were mathematicians, who learn early in life that it is futile to try to publicize their conclusions, which appeal only to people who prefer non-verbal to verbal thought. Publicity came only from fragments of Russell’s non-technical writings, then from the elaborations of some consequences of the new priority of mathematical logic drawn by Ordinary Language philosophers, Ayer and Austin. At the center of that movement, but quite unpublic, was Wittgenstein. Hart, after absorbing Wittgenstein, published The Concept of Law, 61 years after The Principles of Mathematics, and for the first time some of the consequences of the new understanding of the relationship between logic and reality began to touch law. But 2400 years of the practice of associating truth with thinghood has created far more confusion than can be straightened out in a few decades.

4. Social and Political Consequences of the Doctrine of Substance

Contrary to common belief, philosophy is not confined to the Floating Island of Laputa, where Jonathan Swift found it. Philosophy reflects shared cultural assumptions and in turn shapes them. Philosophy’s apparent isolation from current life comes from its preoccupation with the necessary and the possible, which leads it to the past, the future, the eternal, and the hypothetical in preference to the actual and the probable. But in the West the ruling classes have always prized the powers of definition, inquiry, and argumentation that philosophers have taught.

The reason for this is clearest in the Alcibiades. Plato—or a student or imitator of his—portrays Socrates inquiring privately into young Alcibiades’ fitness to lead Athens. Socrates brings Alcibiades to confess that he has no appropriate knowledge and that his sole motive is vanity, and that only with Socrates’ help can he save himself from the terrible fate he afterwards met—presumably because he did not stay close to Socrates. Plato’s Dialogues created the grand image of philosophy as an activity that simultaneously revealed the truth and transformed the soul. Philosophy claimed to be the master and judge (or in its more kindly moments, the creator or mother) of all other studies, and so the quickest route to overall competence. No one ever forgot that

Aristotle tutored Alexander, even though there was no evidence the tutoring included any military strategy. Most prominent philosophers in the Western tradition sought politicians, purportedly to train them to establish the good state, and most prominent sovereigns sought out philosophers, apparently to learn how to gain and keep power.

Between 400 A.D. and 1800 education was almost entirely a privilege of the leisured elite in Europe, and all schools were church schools, all of which taught Latin and Greek, and sometimes Hebrew, before the local language. Greek was taught primarily through the texts of Plato and Aristotle, so the children of wealthy and powerful families all got an early dose of philosophy. The *Dialogues* appealed to the powerful because they taught children how to question. Questioning was an elite skill because only by it could its possessor master a situation in which people who knew more than himself were his subordinates. The prince thus learned to cope with conquered territory. Aristotle's "Logoi"²⁷ appealed to the powerful because they appeared to contain a system of all knowledge, a system that relieved one of the burden of learning new facts, which could appear to be merely accidental and changeable in comparison, and could thus be left to one's subordinates. And both Plato and Aristotle were conveniently reconciled to Christianity, so that the Church in its schools could go on serving its two masters without being reminded of the Biblical injunction against this. Augustine adopted Plato and Aquinas adopted Aristotle; the "idealists" were handed Plato and the "realists" took Aristotle. The Church used the two philosophers the way detectives make up teams of the "good cop" and the "bad cop;" one suspect will confess to the "good cop," Plato, to avoid interrogation by the "bad cop," Aristotle; another will accept the cynicism of the bad cop if the good cop seems too unrealistic to be reliable. The two poles of Plato and Aristotle thus set the limits of secular thought acceptable to the Church, and this was a large enough range to prevent any show of rebellion until Descartes and Spinoza.²⁸ In fact, because both Plato and Aristotle accepted the priority of nouns, things, substance, and definition, the ideational preference for materiality hidden in that supposed stronghold of the spirit, the philosophies to which nearly all Christian theology had reconciled itself, that predisposition to believe that things are more knowable than any other aspect of the world lasted until 1900.

An attorney, a counselor, in Britain is an "Esquire" which means a landholder and a knight. As a knight the lawyer is in fealty to the King; as a landlord his tenants are in fealty to him. A judge, of course, is also both. For hundreds of years there were virtually no lawyers or judges—or Lords in Parliament—who had not gone to ecclesiastical schools. The entire body of British law was thus written by people trained in Plato and Aristotle, in rhetoric, logic, and grammar, trained to believe that the hallmark of knowledge was its convertibility to standard logical form, and that the first requirement of that form was a noun term representing a substance and definable as an essence. So the metaphysics of the common law tradition, and of most of the rest of Europe, has always rested on the assumptions about logic of the fourth century B.C.

5. The Preference for the Illusion of Substance in Everyday Thinking

That Substance was a doctrine of philosophers does not mean that belief in it is confined to philosophers. As Levi-Strauss looks at them, philosophers are simply a special breed of native informant; they are people expert at articulating the unconscious abstract structures that hold a culture's world-view together.²⁹ Social conflict, in the intellectual realm, appears as a war of definitions; in that war the concept of Substance formed the semi-conscious basis of a wide array of beliefs typical of feudal society and the heritage of property it created, and that is still with us. It made reality appear to be stuff, and thus ownable; this was the intellectual foundation of dominion over territory. It made people appear to be definable from the outside, prior to and in spite of any testimony they gave of themselves;³⁰ this produced the court's ability to determine *mens rea*—the “mental thing”—despite contrary evidence from the accused. It made change appear to be an illusion; this was the rhetorical prop of all conservative regimes, which asserted that their opponents were trying to escape from reality itself. But Substance was merely a kind of mental block, a barrier erected everywhere to the rulers' secret fearful imagination, their fear that their security, their domination of everyone else through their dominion over Things, might be lost.

In ordinary speech, the preference for Thinghood that Substance conceptualizes has its most continuous expression in patterns of use of what Aristotle called “paronymous terms:”

When things get their name from something, with a difference of ending, they are called *paronymous*. Thus, for example, the grammarian gets his name from grammar, the brave get theirs from bravery.³¹

Many languages provide extensive networks of paronymous terms; one concept can be embodied in words used as different parts of speech, (for instance, run (verb), runner (noun: the person), run-down (adjective: deteriorated, as if worn out by running), running (adjectival participle),) and sometimes in multiple related forms as one part of speech (run (noun: a strip of land where an animal runs), run (noun: a stream), run (noun: a continuous step-like sequence)) so that lexicographers list them sometimes as different definitions of the same word, at other times as different words. And if one is not satisfied with paronymous terms, many languages offer other options—verbals (participles, gerunds, infinitives), subordinate clauses, relative pronouns, prepositional phrases, and so on, if the paronym one wants does not obediently spring to mind. Aristotle hints at his assumptions about these terms in his examples. In the first case he claims the grammarian, that is an individual (and therefore a being of primary substance³²) with a certain competence gets his name from an abstract noun, grammar, which he apparently regards not as a practice but as a form, that is, something having a kind of abstract substance. In the second case he claims a mass noun designating an undifferentiated group of people, the brave, (and therefore a being of secondary substance, on the model of a species or genus³³) get their name from the noun for an abstract quality. At this point the implications of the preference for substantives begin to reveal themselves.

Presumably Aristotle regards “the brave” as a fairly unequivocal name of a group because those who had shown valor in battle were so designated in Greek. But why did he believe that the group “got their name from bravery,” from a pre-existing quality?

Why didn't he instead think that the brave got their name from *brave actions* or from *acting bravely*—from an adjective or adverb—or from a transitive verb, such as “*to brave*” a danger? He could have noted that a warrior was said to be one of the brave because he had passed certain tests, qualified himself in others' eyes, or that others gave him the designation because they had the practice of watching for certain patterns of action, repeating stories about them, and deriving epithets from the stories. It seems obvious to us now that “the brave” get their name from a set of social activities involving both the brave and their observers, but Aristotle, though we may presume he knew this, did not regard the situation this way. Why? Because he had already committed himself to the doctrine of substance, and believed his language and culture had, and he regarded social practices as unreliable, *because he mistrusted what people do*, while he thought substances secure and permanent. *He wanted to believe that in acting bravely a person manifested a pre-existing quality.*³⁴ But to prove this he offered nothing better than circular reasoning.³⁵

What Aristotle was accepting has remained an inveterate habit of legal thinking, as it is the habit of most everyday social thought, which reifies or naturalizes collective human creations. For a large domain it seems unimpeachable: we routinely refer to the person who leads the orchestra as “the conductor” without reflecting that he or she acquired that appellation through repeated actions. Casual concert-goers are content to think of it the other way around: the person who conducts the orchestra performs that action because he or she is the conductor. To a practicing musician this is an obvious mistake, but the practicing musician does not control the language—a multitude of speakers do. And so it is generally for professional designations. Thinking it appropriate to call the person who works on our teeth “the dentist” and perhaps too thinking the name comes from “dentistry” adds to more to our security than considering how many mouths exactly like ours the dentist has worked on. Users of professional services, unlike professionals themselves, do not want to think in detail about the origin of professional certifications, but want only assurance that some certification exists. But it is an *activity* that justifies the use of the noun designating the professional, not a substance.

If such nouns designating categories of people are best regarded as brief ways of referring to complex patterns of actions, when do we content ourselves with nouns and when do we find it odd to do so? Clearly the type of action matters. I'm content to call the man who hacks up carcasses a butcher for a medley of reasons: the actions of butchering are significant, repeated, intentional, public—I presume the butcher wants to be known as a butcher because being a butcher only in secret is bad for business. But I can't remember ever calling a woman applying fingernail polish to her own fingers “that fingernail polisher.” And if one now often calls a person smoking a cigarette “that smoker” it is because smoking is likely to be regarded as an action more significant than fingernail polishing; smoking shortens lives, irritates and sometimes injures non-smokers, and so is regarded as requiring some internal commitment by the smoker, while fingernail polishing is presumed to require less intentionality because it is not done against social resistance.

Already it is apparent that there are a number of features involved in the naturalness of regarding the agent of an action as a noun derived from the action. An

action that is rare or unusual; significant; apparently intentional; habitual or repetitive; either strongly approved or disapproved; important to a way of life either for the agent or for others, hence relied upon; physically, morally, or intellectually difficult; public; having notably beneficial or injurious effects on others—any of these properties tends to increase the ease with which we designate a person by an action performed. Actions that are common or insignificant; apparently accidental or negligent; unrepeated; neither strongly approved nor disapproved; private; unimportant to the actor's life or the lives of others, hence not relied upon; physically, morally, and intellectually easy; not having notable effects on others—any of these properties tend to make it seem odd to designate a person by a paronym derived from the action.

Perhaps a number of rules govern the preference for reification of actions, but it is not possible to discover them without statistical analysis. Nor is it necessary. It is obvious that there are a number of variables, some closely related, others loosely. What is significant for law is that legal language practice, though rooted in common practice and affecting common practice through its prestige and power, is nevertheless at variance with common practice on a number of points, that at variance with a large body of social science and most developments of logic and philosophical analysis in the last century. The rigidity of legal language practice points to the feudal and aristocratic features of its Platonic³⁶-Aristotelian heritage and the routines of political and cultural imperialism that enshrined it.

6. Legal Designations of Persons by Paronyms Based on Actions

I'll discuss seven salient features common to the language of criminal law in its use of hypostatizing paronyms: 1) The law allows a person to receive a designation because of a *single* action. 2) The designations are freighted with arbitrary metaphysical assumptions. 3) The use of legal labels for people involves a loss of information. 4) Each designation acts as a label behind which all the designee's other actualities and potentialities are denigrated or hidden. 5) The intentionality of actions is decided by officials, not actors. 6) The designations justify actions by the state's monopoly of force, and frequently the action state officials propose to take is a greater determinant of the designation than the designee's action used to justify the designation. 7) Most designations so given have grave consequences not only for an individual's legal and political rights and status, but for economic viability and social status, and consequently even psychological condition.

I do not mean to claim that by treating actions as substantives legal actors are able to perform acts they could perform in no other way. It is possible to speak in circumlocutions, to give information noun forms do not require, to justify treatment separately from the term conventionally used to justify it, and so on. But traditionally legal language does rely on the treatment of actors as if they could be designated satisfactorily by names derived from actions, and the conceptualization that lurks behind that habit does in fact rely on demonstrably false ontological and metaphysical assumptions designed to implement the peremptory and anti-democratic will of rulers.

Let's go through the some of the peculiar features of how the law conceives of persons through paronyms of names of actions they have performed or suffered.

First, the law allows a person to receive a designation because of a *single* action. In all the rest of language, this is rarely done; a ball player becomes a home-run hitter not by hitting one home-run, but many; a person does not become a teacher by teaching one class; a first drink does not make one a drunkard. But if, with some awareness that my action can inflict grave injury, I kill a person, I become a murderer, and if I take something I know belongs to someone else, and intend to keep it, I am henceforth a thief. These usages of criminal law are supposed to be justified because I have broken a clear rule and injured someone. I am supposed to deserve the name I have shown I am willing to break a law—that is, my soul is supposed to be marked by its having accommodated a criminal *mens rea*—and because the person I injured and others who fear similar injury are supposed, by proxy, to demand through the court system that I be treated not according to my other characteristics, accomplishments, and needs, but according to the consequences of my having broken this law. Because the purported seriousness of the law requires that there be no excuses (apart from the conventional defenses, which vitiate *mens rea*), a single offense is *supposed* to justify designating a person by it.³⁷

Designating a person by the name of the forbidden action is necessary to justify treating the person in a way that would be illegal and immoral if the person were innocent. For instance, if I have not committed a theft but am imprisoned, barring the difficulties of suing a sovereign, I should be able to sue for false imprisonment and claim consequential and punitive damages. I am designated by the illegal action ascribed to me because I must be cut off from all the rights I would have were I not so designated. The designation is designed to make me powerless, to raise a presumption against everything I say that should be nearly impossible for me to rebut. If I succeed in having the judgment reversed, someone *else* is to blame—a perjurer, an unapprehended criminal, an incompetent attorney, a prosecutor guilty of misconduct. Law raises the stakes of social action: like the Joel Chandler Harris' Tar Baby, once it is touched, it has to stick to someone. All of procedure and evidence law being devoted to creating certitude that the designation of a criminal is only given to someone who in fact committed a forbidden act, a single act is supposed to be sufficient to reveal such a grave character defect that the virtuous are justified in perpetrating otherwise heinous acts against him or her.

And why, in turn, is this? It is because the defendant's personality is regarded as thoroughly knowable, because it has a fixed thing in it, "*mens rea*." *Mens rea* is the materialization of spirit, the real person, the substance that the act made manifest.

Second, legal designations are often freighted with arbitrary metaphysical assumptions. Immigrants and visitors to countries, for instance, are arbitrarily assumed to have single motives for their presence, an assumption never made about citizens. Judges may deem various facts to exist; legal fictions may declare the existence of facts known not to exist; rebuttable and irrebuttable presumptions may be raised; character may be assumed to be better revealed by unattributable rumor than by the testimony of intimates; self-interest can be assumed to the norm, and so on. Such assumptions are usually justified by the convenience for the various purposes of the court and government

officials. These other purposes are presumed to be congruent with the search for the truth. Assumptions about what a person can be, can intend, and can be known to be—these must be counted as metaphysical because they are justified merely by the belief that authority has some prior knowledge of the possibilities of human nature and human action.

Third, the use of legal labels for people involves a loss of information. For instance, a transitive verb taking an indirect object requires the statement three beings or objects: in “Jack gave Bill the ball,” “gave” is the center of a four-part relationship. If use this relationship to denominate Jack as a “giver” I’ve relieved myself of having to mention the ball and Bill. If I use the passive voice to express what Bill undergoes, “The ball was given to Bill,” I relieve myself of having to mention Jack. If I say, “Bill, the receiver,” I needn’t mention the ball. Legal designations of persons on the basis of actions have the same atomizing power as these statements. They allow events and persons to be described so that crucial elements need not be stated, thus placing the entire onus of a situation on one person. Whether or not it is true that only one individual in an interaction broke a law, designating the purported law-breaker by a paronymous noun involves a loss of information, a loss intended to render ambiguity invisible.

Fourth, each designation acts as a label behind which all the designee’s other actualities and potentialities are denigrated or hidden. The label singles out the individual at the same time that it makes him or her invisible. Whatever a convict says is held to be suspect because the person is a convict. The label invalidates its bearer. Because the convict is invalidated, objections to treatment received cannot be heard. This frees the state officials to punish arbitrarily and with impunity. Attempts by the inmate to assert the existence of his or her personality from behind the label are taken to be rebellious efforts to be recognized as an unstigmatized person, and are therefore used to justify repression. Consequently rebellion against the label is taken to confirm the label. Again, the reasoning is circular.

Fifth, the intentionality of actions is decided by officials, not actors. It does not matter that actual intentions arise in relationship to the totality of the situation as an individual perceives it, that the individual may not have perceived any legal significance in a situation, or that actual intentions are nested within larger intentions that cannot be assessed without knowledge of what the actor envisions the future to hold. The court presumes to be competent to judge the *mens rea* of an accused solely on the basis of external evidence; the accused need not say a word, or may give a story entirely at odds with the intentionality assigned. The accused is objectified while the court is presumed to gather all the qualities of a pure subject to itself;³⁸ the court purports to know the accused as the accused cannot know him- or herself. Condemned, the accused loses the capacity of self-representation, and in being unreliable to the sovereign, is supposedly revealed to be the sovereign’s spoiled property, a thing to be counted three to a thousand times a day, a person whose intentions are spoiled.

Sixth, the designations justify actions by the state’s monopoly of force, and frequently the action state officials propose to take is a greater determinant of the designation than the designee’s action used to justify the designation. The prosecutor’s

argument comes down to two final syllogisms. The first argues for guilt: the major premise states the relevant law; the minor premise the elements of the crime, and the conclusion states that the perpetrator of the elements has broken the relevant law. The second argues for the sentence: the major premise states that the relevant crime carries the relevant sentence; the minor premise is the previous conclusion that the accused is guilty of the crime, and the conclusion is that the accused should receive the punishment of the major term. From the beginning everyone defines the crime in terms of the punishment. The prosecution and defense debate the definition of the crime the evidence will bear because of the sentences the definition makes available. The sentences are the actions of the state, but the action of the accused is defined in terms of them. A “lesser included offense” to which the accused pleads guilty because of the prosecution’s and the defense’s calculations of court’s judgments on the evidence may not be an offense the accused was aware of at all. This derives from the state’s view of its uncluttered capacity to define violations of law without prior knowledge of any action. As a property-owner defines his property according to what he intends to do with it, so state authorities define legal roles in terms of what they take to be the state’s intentions.

Seventh, most designations given under these pressures have grave consequences not only for an individual’s legal and political rights and status, but for economic viability and social status, and consequently even psychological condition. State power is so overwhelming that it has the ability to produce much behavior that can be interpreted to justify the its decision, even when the state is provably wrong—for instance, when another person confesses to the crime an inmate is supposed to have committed—and even when cause and effect need to be reversed in order to explain the state’s characterization of an individual. For instance, an individual charged with a crime is likely to act irrationally because adjustment of perception to the possibilities of state action throws one’s normal assumptions about life into chaos. During trial an individual undergoes such duress that regression and erratic behavior are normal. The disjunction between the individual’s self-perception and his understanding of how others objectify him is likely to be so great that the effort to dispell the objectification is likely to overwhelm the organization of his own perceptions. The state tends therefore to be a cause of many disorders it purports to cure.

People are not things and they are not owned by rulers. Nor can they be defined before they are encountered.

Substance does not need to be thought to underlie actions, or thought, or personality. Things are not more real than actions or persons, and therefore are not more knowable than either. It is pointless and destructive to pretend that complex phenomena can or should be reduced to the structure of things. The metaphysics that assumes otherwise is the self-flattery of the powerful. The epistemology that assumes otherwise leads to systematically false conclusions. Legal rationalization based on such discredited foundations should be abandoned in favor of more democratic procedures based on assumptions of mutual knowledge akin to those of contract law.

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¹ At the time of Socrates' birth Parmenides, who was famous for his skill in dialectic, was approximately 45 and philosophy was a going concern in Athens; before that evidence is extremely fragmentary and it is

difficult to determine whether the gnomic remains were products of reasoned argument or merely appealed to belief in the speaker's godlike intuition.

² The date of Aristotle's death.

³ Plato's writings did not begin in earnest until after Socrates' death in 399.

⁴ Peisistratus was tyrant intermittently between 561 and 528, Hippias in 528-527, various followers of Peisistratus until 510, Miltiades in the 490's.

⁵ Erechtheus, Aegeus, Pandion, and Cecrops may have been mythical; Codrus is supposed to have ruled in the 11th Century B.C. Though the title of King was abolished after his death, most royal families of Athens claimed descent from him and the title Archon (used, for instance by Isagoras in 508-507, by Themistocles in 492, and by Diagnetus in 264-263) seemed to have much the same meaning. Despite the official abolition of the title "King," Theseus used it until his death in 475, which may mean he was a tyrant.

⁶ For example, governments headed by The Four Hundred in 411, then The Five Thousand in the same year, The Thirty in 404.

⁷ Starting with Cleisthenes in 507, then Ephialtes in 461, then various democratic governments until overthrown by the Four Hundred in 411. Democracy was reinstated in 410, lost again in 404, reinstated in 403, then lasted through most of the Fourth Century.

⁸ "The Later Archaic Periods," sub-section in article on "Ancient Greek and Roman Civilizations" on Encyclopedia Britannica 99 CD.

⁹ The whole of Thucydides' History of the Peloponnesian War (Hertfordshire, G.B.: Wordsworth, 1997) testifies to this.

¹⁰ See note 8 above.

¹¹ In 462 Cimon led 4,000 Athenian troops to put down a rebellion by *helots* (state-owned serfs) in Sparta. The *hektamoroi*, share-croppers originally obligated to yield 5/6ths of their produce to landlords, generally formed the support for tyrants.

¹² In 594 Solon freed the hektamoroi. The effect of the reform was short-lived. In 561 Peisistratus gained power on the basis of hektamoroi discontent and managed more complete land reform that lasted 33 years until his death. Pericles instituted more reforms fifty years later.

¹³ See Robert J. Bonner, Lawyers and Litigants in Ancient Athens, (Chicago: University of Chicago, 1927)

¹⁴ The works of the three conspicuous exceptions, Socrates, Democritus, and Leucippus, have not survived. Socrates, son of a stonemason-sculptor and midwife, was not known to have written anything, and the two main accounts of him were written by aristocrats, Plato and Xenophon. By middle age Plato simply used the figure of Socrates as a mouthpiece. Nothing remains of Leucippus' work but two titles, nine terms, and one sentence. 309 fragments, mostly titles and single sentences, remain of Democritus. See Kathleen Freeman, Ancilla to the Pre-Socratic Philosophers, (Oxford: Blackwell, 1952) pp. 90-120. A rumor held that followers of Plato and Aristotle destroyed the works of Leucippus and Democritus because they advocated democracy.

¹⁵ Karl R. Popper, The Open Society and its Enemies, vol. 1, Plato, (Princeton, N.J.: Princeton University Press, 1962/71) p. 12.

¹⁶ Aristotle, Metaphysics, 1010a13.

¹⁷ The account most likely to be authentic, and certainly the most complete, is Letter (or Epistle) VII, Plato: The Collected Dialogues, ed. Edith Hamilton & Huntington Cairns, (Princeton, N.J.: Princeton Bollingen Series LXXI, 1961) pp. 1574-1598

¹⁸ Every integer up to 10, all non-primes below 22, plus 24, 28, 30, 35, 36, 40, 42, 45, 48, 56, 60, 63, 70, 72, 80, 84, 90, 105, 112, 120, 126, 140, 144, 168, 180, 210, 240, 252, 280, 315, 336, 360, 420, 504, 560, 630, 720, 840, 1008, 1260, 1680, 2520, and, of course, itself. Probably only number mysticism could inspire anyone to persist in combinatorial experiments long enough to discover that there existed so small a number as 5,040 that could be divided so many ways. See Laws VI in Dialogues, 771b, p. 1348.

¹⁹ Freeman, Ancilla, pp. 42-44. (The image still lives: see the recent film "Sphere," in which entry into a sphere makes all thoughts become actual.)

²⁰ This is primarily the work of the Prior Analytics. The analyses that have a bearing on logical issues, however, are scattered through six works, the other five being the Categories (the main analysis of substance is in Chapter 5 to which Chapters 1-4 form the necessary groundwork,) On Interpretation (the analysis of propositions, including that of parts of speech, is in Chapter 1-11,) the Posterior Analytics, (the main epistemological tract, primarily concerned with the relationship between syllogisms and other features

of knowledge) the Topics, (a compendium of intellectual tactics) and On Sophistical Refutations (the Stoic fallacies.)

²¹ Aristotle, Metaphysics, Book VII (Z) Chapter 1, p. 1028a lines 20-30 in A New Aristotle Reader, J.L. Ackrill, ed., (Princeton, N.J.:Princeton U.P., 1987),pp. 284-285.

²² He assumed that the analysis of language is identical to analysis of reality. He apparently believed either that the Greek language had a unique relation to reality or that all languages conceived of such basic issues the same way. The first belief might have been a result of cultural imperialism; the Greeks called all non-speakers of Greek “Barbarians.”

²³ It seems odd now that this statement, for over 2000 years (that is, at least until Newton in practice and Kant in theory) held to be the lynchpin of metaphysics and epistemology, actually implied that one knew what one claimed not to know. That is, how could it be possible to know that Knowledge followed Being unless one knew what Being was prior to knowing it? If Knowledge was the chicken and Being was the egg, who laid the egg? (The invited answer, of course, was “God;” it is easy to see in Berkeley that subconsciously the philosophers were confusing God with Themselves, as they had to if they sincerely believed that they knew that Knowledge followed Being.

²⁴ See Chapter 5, “Revolt into Pluralism” in Russell’s My Philosophical Development, (London: Routledge & Kegan Paul, 1959/97) pp. 42-50. In 1898 Russell and Moore rejected Hegelianism and the logic it depended upon because of their conclusion that relations were external, not internal. What they called Hegel’s “doctrine of internal relations” derived from traditional assumptions about Substance.

²⁵ Some propositional logic was known to Aristotle, but he did not develop it. The Stoic Chrysippus, in a corpus probably larger than Aristotle’s, did develop it, but his works were lost and so did not affect posterity. See “History and Kinds of Logic” article, subsection “The Megarians and Stoics” in Encyclopedia Britannica 99 CD.

²⁶ Note that the priority of things is so deeply embedded in English—and other Indo-European languages—that it is virtually impossible to talk about “anything” without resorting to a thing-privileging word like “anything.” But linguistic habits should not define metaphysical convictions.

²⁷ All the remaining texts attributed to Aristotle were actually “Logoi,” notes prepared by students to be memorized by other students in order to prepare them to speak to the Master.

²⁸ Though they both refused to accept the traditional accounts of substance, Descartes, after believing he had proved its existence by reflecting on a wax candle, merely turned it into his own mind; Spinoza, after believing he had proven the non-existence of everything else, turned it into god. Neither they nor anyone else recognized substance as a linguistic artifact. Leibniz came closest, but kept the secret in his desk.

²⁹ As Aristotle inadvertently confessed in his Metaphysics: see Section 2 above.

³⁰ In France, the intellectual rebellion against Substance came with Sartre’s Being and Nothingness (Hazel E. Barnes, trans., (New York: Philosophical Library, 1956.) Sartre conceived of the Scholasticism he had been raised under as Essentialism, to which he opposed the assertion that Existence precedes Essence, that is, that what one is to oneself determines one’s actions, not what one has been proclaimed to be. Sartre’s argument against Substance appeared on the first page: there is nothing “behind” the appearances.

³¹ Aristotle, Categories, chapter 1, 1, lines 13-15 in A New Aristotle Reader, p. 5.

³² Id., chapter 5, 2a line 33—2b line 8, p. 7. The Categories are not consistent with the Metaphysics on the point of primary and secondary substance. If, as the Metaphysics states, primary substance is more real than secondary substance, how could “the brave,” presumably bearers of the primary substance, get their name from “bravery,” which designates a secondary substance? The Categories’ statement that this is so is a remnant of Plato’s doctrine of ideas.

³³ Id., 2b line 8—3a line 6, pp. 7-8.

³⁴ Aristotle’s second claim, that “grammarian” derives from “grammar” is stronger because it is easier to believe that a practitioner of language analysis cannot be named before the *intellectual structure* is named than that brave actions or their agents cannot be identified without an abstract name designating a *quality attributed to persons*. It would nevertheless be possible *to act as a grammarian*, that is to do everything a grammarian does, without a unique word for grammar, so in some language a grammarian could be named prior to the invention of the word grammar. Abstract nouns certainly don’t have the privilege Aristotle claims for them—who would hold that “god” necessarily derived from “godliness” or “burglar” from “burglary” rather than the reverse? Is it plausible that “walker” derives the noun “walk” rather than the verb? The dominant theory of Indo-European languages, for that matter, holds that the core of the ur-

language was a set of agglutinative verbs, and that other parts of speech were separated out from them. So historical linguists would also hold that Aristotle's assumptions are wrong.

³⁵ It could be that he and Plato had an esoteric doctrine on this point, and that they did not want to entrust it to writing. Plato's 7th Epistle makes it clear that Dionysius of Syracuse kept imprisoning Plato because Dionysius believed that Plato condescended to him by refusing to reveal his esoteric (Pythagorean) doctrines. But if it was also true that Plato and Aristotle were most disciplined in teaching their students logic, and that Plato's Dialogues were largely written to give students skill in detecting fallacies, and Aristotle's Logoi were preparatory texts with some similar purpose, then one would expect that students were required to notice fallacies and contradictions between the Metaphysics and Categories. If this is true, then the esoteric doctrine could be expected not to supply the missing argument that the *petitio principii* masked, but to contradict the conclusion of the circular argument.

³⁶ Mary Margaret Mackenzie, in Plato on Punishment (Berkeley: University of California, 1981) argues 1) that it is impossible to produce a theory of punishment that is both consistent and morally unobjectionable, but 2) that the powerful of all organized societies nevertheless seem to believe themselves compelled to practice it and 3) Plato's best arguments are inadequate. No surviving work of Aristotle's devotes as much attention to punishment as Plato's Dialogues give it, and there is no evidence that Aristotle believed he had superseded Plato on the subject. No direct commentary on the basis of legal language survives from the Greeks. In general I concur with Mackenzie's position on Plato. In this paper I am confining myself to examining the largely unconscious logical and linguistic basis for treating persons as spoiled or damaged substances. What consequences should follow for punishment is a larger issue.

³⁷ The theories of punishment--retribution, deterrence, prevention, and reformation--upon which this practice is justified, however, are not consistent, so there is no explanation of *why* a person should be designated by an offense that is good for all the rationales for punishing him or her. Theories of punishment are constructed on arbitrary metaphysical presuppositions about the punished. Retribution theory that the offense reveals or creates the true nature of the offender, which is different in essence from the victim; hence injuring the offender is not reprehensible, as injuring the victim was.

Reformation theory holds that because the offense reveals or creates a bad condition of the offender's soul, this condition can be known by another better than the offender knows it himself, so the paternalistic principles justifies the state in detaining or otherwise injuring the offender for the offender's own good until the condition of the soul is changed. Prevention theory argues that because the offender is defined by the offense, it can be known that the offender will offend again, and it is therefore justifiable to detain or kill the offender to prevent injury to others. Deterrence theory says that because the action defines the offender, it is justifiable to injure the offender even though the purpose of injuring him is neither to change nor punish him but rather to affect those who have not yet offended.

³⁸ Purporting to be a pure subject, like Husserl's Transcendental Ego, the court admits no impediments, internal or external to its view, and therefore claims to be capable of purely objective statements about facts. The subjectivity of the state is concealed like that of the guard in Bentham's Panopticon who can see everything but cannot be seen (see the concluding sections of Michel Foucault's Discipline and Punish.) In earlier personalized forms, it purports to be the sovereign's gaze, the gaze of Aristotle's magnanimous man.