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# The Mystery of the Individual in Modern Law

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## Donald A. Giannella Memorial Lecture

### THE MYSTERY OF THE INDIVIDUAL IN MODERN LAW

JOSEPH VINING\*

“TO their murderers these wretched people were not individuals at all. They came in wholesale lots and were treated worse than animals.”<sup>1</sup> This was Telford Taylor, beginning the presentation of the “Medical Case” at the Nuremberg Trials.<sup>2</sup> The “Medical Case” was not about genocide or war or the conduct of war. It was about experimentation on human beings, and it was this trial that produced the “Nuremberg Code,” the first control of such treatment of human beings by one another, so surprisingly late in the history of modern scientific investigation, mid-twentieth century, and so surprisingly absent everywhere before, despite the ancient law of assault and homicide.

The word “individual” came naturally to Taylor the lawyer, as a starting point, and with it the contrast with animals. The connection between what kind of treatment these units of flesh and blood might receive, and whether they were individuals “at all,” came naturally to him too. Thought in law, perception in law, is intrinsically connected with action.

Taylor’s opening at Nuremberg echoed—whether deliberately I do not know—the Nazi representative Joseph Goebbels’s explanation in 1938 of German programs of eugenic sterilization and euthanasia, themselves experiments, programs which of course the United States had also.<sup>3</sup> “Our starting point is not the individual,” Goebbels said.<sup>4</sup> He knew this was the

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\* Hutchins Professor of Law, University of Michigan Law School. B.A., Yale University; M.A., University of Cambridge; J.D., Harvard Law School. This is the 2006 Giannella Memorial Lecture at the Villanova University School of Law. I am grateful to students and faculty at the Villanova University School of Law for their helpful questions in discussions after the lecture, and am indebted to James Boyd White for detailed comments since on the speaking draft.

1. 1 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, OCTOBER 1946-APRIL 1949: “THE MEDICAL CASE” 27 (U.S. Gov’t Printing Office) [hereinafter Nuernberg].

2. *See id.*

3. *See, e.g.*, DANIEL J. KEVLES, IN THE NAME OF EUGENICS: GENETICS AND THE USES OF HUMAN HEREDITY (Harvard Univ. Press 1995); MARTIN S. PERNICK, THE BLACK STORK: EUGENICS AND THE DEATH OF “DEFECTIVE” BABIES IN AMERICAN MEDICINE AND MOTION PICTURES SINCE 1915 (Oxford Univ. Press 1996).

4. *See* U.S. HOLOCAUST MEM’L MUSEUM, DEADLY MEDICINE: CREATING THE MASTER RACE 8 (Univ. of North Carolina Press 2004) (citing MICHAEL BURLEIGH &

critical point in thought and then action, and he knew just what Taylor meant later by “individual.” Goebbels made explicit the implication of not starting with the individual: “[A]nd we do not subscribe,” he said, “to the view that one should feed the hungry, give drink to the thirsty or clothe the naked . . . . Our objectives are entirely different: We must have a healthy people in order to prevail in the world.”<sup>5</sup>

We know the word “individual” in Telford Taylor’s reference,<sup>6</sup> or in Joseph Goebbels’s,<sup>7</sup> is not referring merely to a unit, something discrete, an atom, a particle. Moving from units separate but interchangeable because of their sameness to the particulars of the experienced world that are each and always unique does not take us to the individual either. It takes us only to the little pebble or the rusting old car which there is nothing in the universe exactly like. Surprising though it may be, because “life” has such resonance, the uniqueness of a living thing is just that, of pebble or rusty car, if it is only the product of those familiar elements of genetic “nature” and environmental “nurture,” the two poles of modern inquiry typically presented as exhausting the sources of particularity.<sup>8</sup> Biological parlance has a special name for it, the “phenotypic,” which is the current state of the mutual interaction of internal system and external system. Seeing the individual is looking in reality to something else besides, a third element. The individual, in the flesh—not the individual person, or the person that is not an individual, but the individual, the starting point.

What did the twentieth century threaten in the deepest way? What might have been lost to humanity if things had gone another way than they did in the end? I cannot imagine the loss would have been absolute—what would have been lost is too fundamental, intrinsic to human existence itself, not to have been found and seen again, like a light shining again after a storm cloud passes. But what were those who were eventually defeated at such staggering cost fighting from the start? What was the great twentieth-century struggle about? The individual, I think, the sacredness and value of the individual, and spirit itself, seen in us in being seen as an individual, and seen beyond us. The individual and spirit: they are linked, and their absence together defines the world of those two

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WOLFGANG WIPPERMANN, *THE RACIAL STATE: GERMANY 1933-1945* 69 (Cambridge Univ. Press 1991) [hereinafter *Holocaust Mem’l Museum*].

5. *Id.*

6. See Nuernberg, *supra* note 1, at 27.

7. See *Holocaust Mem’l Museum*, *supra* note 4, at 8.

8. For an effort to celebrate uniqueness of this kind, see URSULA GOODENOUGH, *THE SACRED DEPTHS OF NATURE* (Oxford Univ. Press 1998). For a treatment of units that are separate but interchangeable, see PETER PESIC, *SEEING DOUBLE: SHARED IDENTITIES IN PHYSICS, PHILOSOPHY, AND LITERATURE* (M.I.T. Press 2002).

books emblematic of what the twentieth-century might have brought us to, 1984<sup>9</sup> and BRAVE NEW WORLD.<sup>10</sup>

What I want to suggest to you today is that the home in the secular world for both these, the individual and spirit, is the legal mind and the legal form of thought, and that both these connect law with the religious sensibility and its work in us and in the world—the sensibility that the human, the human at least, if not also the sentience of other creatures, is spoken to and touched from beyond the world of the here and now, bounded by birth and death. I want to suggest further that with whatever support from this connection, acknowledged or unacknowledged, it is the legal mind—rooted in and the possession of people in circles out and out from those of us professionally involved with it—that can protect humanity and the rest of the sentient world from reliving the twentieth century in the twenty-first.

The individual in modern law is a mystery because its presence runs counter to the whole thrust of what are called “modern” efforts to understand the world. The individual is associated with openness, each individual new and a new source of understanding by others of the world, “world without end,” as the phrase goes, while modern thought presses toward finality of understanding, “theories of everything,” “final theories.” The individual human being’s use of language<sup>11</sup> is a source of newness and meaning, with translation of it on a presupposition of identity despite difference—more than presupposition, a *sense* of identity—that makes each of us a gift to the other. That identity coexisting with difference is a mystery. And the individual is the carrier of creativity in the actual world, not merely a world of hope or fantasy, despite views of the world, voiced of course by individuals, that have no place for creativity, in which everything in the world, and all thought itself, is the product of units of some sort operating by rules of some sort, Newtonian or post-Newtonian. The modern future, it is said, must be in principle predictable as the product of what has gone before, probabilistically or otherwise, even if it cannot in fact be predicted because of non-computability or some other inadequacy in our technical equipment—there simply is no creative force operating at any level to point to or produce what comes in the world unfolding before

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9. GEORGE ORWELL, NINETEEN EIGHTY-FOUR (Secker & Warburg eds., 1949).

10. ALDOUS HUXLEY, BRAVE NEW WORLD (First Perennial Classics ed., HarperCollins Publishers 1998).

11. For some exploration, on my part, of the connection between the individual and the meaning of language, see Joseph Vining, *Fuller and Language*, in REDISCOVERING FULLER: ESSAYS ON IMPLICIT LAW AND INSTITUTIONAL DESIGN 453 (Willem J. Witteveen & Wibren van der Burg eds., Amsterdam Univ. Press 1999). On families of languages and what is lost when a linguistic family becomes extinct, see A.L. BECKER, BEYOND TRANSLATION: ESSAYS TOWARD A MODERN PHILOLOGY (Univ. of Michigan Press 1995). See generally JAMES BOYD WHITE, THE EDGE OF MEANING (Univ. of Chicago Press 2001); LIVING SPEECH: RESISTING THE EMPIRE OF FORCE (Princeton Univ. Press 2006).

us. The intrinsically unpredictable is now a mystery, even though—we see it every day—with each of us there comes into being a whole world.

The recognition of individuality in animals illustrates what perception of the human individual does in thought and means in practice. Telford Taylor spoke of the wretched in the laboratories at Dachau or Buchenwald as not individuals “at all.”<sup>12</sup> They were treated “*worse than animals*,” “as *less than beasts*.”<sup>13</sup> Nine years ago, it appeared that chimpanzees had not proved as suitable a “model” as expected for AIDS research, in themselves and because of their expense and, interestingly, because of the widespread and persistent opposition to their use. The question what to do with them came to the National Research Council Committee on Long-Term Care of Chimpanzees and eventually to Congress.

The minority statement of the National Research Council Committee took the view that euthanasia of some was “an appropriate strategy for maximizing the quality of life of the remaining population while facilitating the continued production of chimpanzees to fulfill critical needs in biomedical and behavioral research . . . .” It observed, “[j]ust as the viability of the species rather than of individual animals is proposed as the primary motivation for management strategies in the zoo situation,” here “the long-term viability of the resource for addressing biomedical research needs should be the primary concern.”<sup>14</sup> The majority, however (and we move naturally to something other than an individual voice in that term “the majority”), observed that the “phylogenetic status and psychological complexity of chimpanzees indicate that they should be accorded a special status with regard to euthanasia that might not apply to other research animals,” and that while not “‘the moral equivalent’ of humans, . . . they are more like humans than other laboratory species might be with respect to some features relevant to the question of euthanasia.”<sup>15</sup>

This led to a Senate Report in Congress adopting the majority position and to the Chimpanzee Health Improvement, Maintenance, and Protection Act of 2000,<sup>16</sup> which set up a federal sanctuary for them and provided not only that once in sanctuary they could not be transferred out and no experimentation whatever could be done on them, but, further, that “none of the chimpanzees may be subjected to euthanasia, except as in the best interests of the chimpanzee involved.”<sup>17</sup>

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12. See Nuernberg, *supra* note 1, at 27.

13. See *id.* at 27-28.

14. Comm. on Long-Term Care of Chimpanzees, Inst. for Lab. Animal Research, Comm'n on Life Scis., & Nat'l Research Council, *Chimpanzees in Research: Strategies for Their Ethical Care, Management, and Use* app. at 88, 92 (Nat'l Acad. Press 1997).

15. *Id.* at 38-39.

16. See S. Rep. No. 106-494, at 2 (2000); Chimpanzee Health Improvement, Maintenance, and Protection Act, Pub. L. No. 106-551, § 481C(d)(2), 114 Stat. 2753 (2000).

17. Chimpanzee Health Improvement, Maintenance, and Protection Act § 481C(d)(2)(I).

“[T]he best interests of the chimpanzee involved.”<sup>18</sup> The animal emerges as an individual, here and, I may say, from time to time elsewhere in law even when the animal is phylogenetically “below” the higher primates. The individual recognized begins to block weighing of costs and benefits, justification by relative numbers, thinking in terms of systems and processes, “at the start” to use Goebbels’s phrase.<sup>19</sup> And it is this blockage, this shift in *kind* of thinking, that is signaled when we begin to speak of an individual “right.”

The connection between recognition of a being (including a being that is human) as an individual, and the possession of a “right,” an “individual” right, draws on the image of property, the castle or the cottage, security within it and dominion over it, and a “right” is said sometimes to “trump” other considerations. Those who work with legal argument and legal reasoning know a right is not a thing, bundled or unbundled, that one holds in one’s hand in advance of legal argument or a legal proceeding. Lawyers know that whether or not one will be “found” to have a right is determined by argument on the merits in which public values are considered, “weighed” we say, and the value reflected in the putative right-holder’s argument may not trump the rest. But in some cases what is represented by the words “individual right” does trump, and holds back the interests of all—that or those we refer to as all. It “takes the hand,” to extend that gaming analogy. No torture is the example often before us today, if the individual is a human being.<sup>20</sup> No slavery, under the Thirteenth Amendment,<sup>21</sup> may be another, looked to most recently when the Patent Office declared unpatentable a proposed being that would be grown to maturity after blending human and chimpanzee genetic material.<sup>22</sup> In Canada, under charters of rights, no absolute denial of medical care to a human being in a time of pain may be another.<sup>23</sup> No human experimentation without true consent may be gradually emerging as another, now two generations after Nuremberg<sup>24</sup>—Article 3(b) of the 2005

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18. *Id.*

19. See Holocaust Mem’l Museum, *supra* note 4, at 8.

20. See J. HERMAN BURGERS AND HANS DANIELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE 114-19, 123-24 (Martinus Nijhoff ed., 1988).

21. See U.S. CONST. amend. XIII.

22. See Rick Weiss, *U.S. Denies Patent for a Too-Human Hybrid*, WASH. POST, Feb. 13, 2005, at A03; Aaron Zitner, *Patently Provoking a Debate*, L.A. TIMES, May 12, 2002, at A1 (discussing part-human, part-mouse hybrid); see also Consolidated Appropriations Act, Pub. L. No. 108-99, § 634, 118 Stat. 3, 101 (2004) (providing that no funds could be “used to issue patents on claims directed to or encompassing a human organism”).

23. See *Chaoulli v. Quebec* (Attorney General), [2005] 1 S.C.R. 791; cf. *Case C-327/04, The Queen, on the Application of Yvonne Watts v. Bedford Primary Care Trust, Secretary of State for Health* (European Court of Justice, 16 May 2006), available at <http://curia.europa.eu/en/content/juris/index.htm> (addressing issue in European Union).

24. See, e.g., *Burton v. Brooklyn Doctors Hosp.*, 452 N.Y.S.2d 875, 881 (N.Y. App. Div. 1982); *In re Cincinnati Radiation Litig.*, 874 F. Supp. 796, 819-22 (S.D.

UNESCO Universal Declaration on Bioethics and Human Rights provides that “[t]he interests and welfare of the individual should have priority over the sole interest of science or society.”<sup>25</sup>

When this happens, in the case of an animal or a human being, I suggest that understanding what is happening must involve shifting focus to the recognition of the individual. It is not the possession of a right, but the effect of perceiving one as an individual that holds back the interests of the rest of the world. Nor is it suffering that does it. We use metaphors of quantity as we contemplate and speak of suffering as more or less, acute, extreme, unbearable or mild, and as we detach it from individual experience and seem to aggregate it. In utilitarian reasoning the “amount” of suffering of one would be put against the “amount” of suffering that could be prevented or alleviated for others alive or to be born. But on any supposed calculus of suffering, the suffering of one would be a drop in the oceans of the world’s present suffering, human, animal, that is now connected with life itself and that only death fully eliminates, and not even a drop but barely an atom when placed against the eons of suffering that might be alleviated or prevented in the future, human and animal. In fact we can see that the suffering of one can be as great as the suffering of all the world, the point made in the proposed bargain for the happiness forever of all mankind in the passage preceding the Grand Inquisitor

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Ohio 1995). The various utilitarian justifications for dispensing with true consent—scientific knowledge, medical advance, and military effectiveness—were forcefully argued at Nuremberg, and are argued still. Children and the military have had least recognition as individuals in the current use of human beings in scientific and medical experimentation.

25. General Conference of UNESCO, 33d Sess., Universal Declaration on Bioethics and Human Rights, art. 3(2) (Oct. 19, 2005). The language echoes the 1997 European Convention on Human Rights and Biomedicine, “Primacy of the human being: The interests and welfare of the human being shall prevail over the sole interest of society or science.” European Convention on Human Rights and Biomedicine, art. 2, Apr. 4, 1997, 36 I.L.M. 817; *see also* World Medical Association, *Declaration of Helsinki: Ethical Principles for Medical Research Involving Human Subjects*, as amended through 2004, Sec. A5, available at <http://www.wma.net/e/policy/pdf/17c.pdf>. (setting out most recent of successive “Helsinki Declarations” by World Medical Association beginning in 1964: “In medical research on human subjects, considerations related to the well-being of the human subject should take precedence over the interests of science and society.”). But it should be noted that though Nuremberg at mid-century used “absolute” with reference to voluntary consent, the Helsinki Declarations and others later in the century have contemplated “surrogate consent” for individuals incapable of giving or withholding consent—which in much-publicized cases state courts have resisted as fundamentally inconsistent with respect for the individual. *See generally* *Grimes v. Kennedy Krieger Inst., Inc.*, 782 A.2d 807 (Md. 2001); *T.D. v. N.Y. State Office of Mental Health*, 626 N.Y.S.2d 1015 (N.Y. Sup. Ct. 1995), *aff’d and modified*, 650 N.Y.S.2d 173 (N.Y. App. Div. 1996).

scene in *THE BROTHERS KARAMAZOV*<sup>26</sup> and made, I think, at every celebration of the Eucharist. But in seeing that, we are seeing the individual.<sup>27</sup>

Perhaps I can foreground what it is, in law, to recognize an animal as an individual, by asking the kinds of questions we used to hear in the mid-twentieth century as we were contemplating “nuclear winter.” Would the death of all human beings be a loss? I think we would say yes, and not that humanity’s passing would merely be evolution at work. Would the death of a group of human beings, leaving behind a “remaining population” that might benefit from resources freed up, be a loss? Again, we would say yes. Would the death of a single human being be a loss? Again, we would say yes, a loss not only to other individuals who knew or individually valued him or her, but to the world, and we express that in so many ways, not least the real impossibility, the acknowledged fiction, in calculating a measurement or monetary value of a single human life so that human lives could conceivably come in Telford Taylor’s “wholesale lots.”

So, in the same vein, would the death of all animals, or all of a kind of animal—extinction we call it—be a loss? If we said yes, rather than that this is only evolution at work, I think our minds would likely be focused on the ecological and the environmental, on systems that support the systems within us. But, is the death of a single animal a loss to the world? To the extent an animal is an individual “at all” we may begin to feel pressure within, and pull from without, to say yes, as we do contemplating the death of a single human being.<sup>28</sup>

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26. See FYODOR DOSTOYEVSKY, *THE BROTHERS KARAMAZOV* 219 (Trans. Constance Garnett, Vintage 1955).

27. Arguments can be put by one human individual to another that no unit described as of one kind or another be treated in one or another way whatever the hoped-for gain, because of the effect over the long term on shared interests or “self-interest” given the way the world should be predicted to work. But such arguments do not have the immediate force of a perception that is a starting point. They shift away from the reality of the individual to the different reality of persons who join us over time, and to their connection to such reality as we can bear of the values for which they speak. And, of course, an argument is not generally made by an animal.

28. To the extent an animal is an individual “at all”—for what animals might this be the case? Individuals reveal that, and experience of a fellow human being has always been the platform for experience of a fellow creature. The legal definition of “animal” varies widely from one context to another where the environmental or the ecological is not the sole focus, from regulation of game prizes at fairs to humane killing, and interpretation of the “definitional” language is often the framework for discussion of the critical issues for decision. Legislation sometimes seems clear in its exclusions, adopting biological terminology such as species names or biological lines such as “vertebrate” or “mammal.” Sometimes legislation leaves the question to judicial development in light of changing understandings. (Indeed sometimes statutory terminology hardly overlaps the biological—reference may be made to the inclusion within a circle of protection any “dumb creature,” “brute creature,” or “living creature”). The recent amendment to the German Constitution giving animals constitutional status as such does not define “animal,” nor does the Brazilian Constitution in its references to cruelty, the Indian Constitution in its reference to compassion, or the Florida Constitution in its reference to inhumane treatment. For a detailed discussion of current scientific



The pressure and pull from recognition of the individual is there in the legal mind and has its effect whether or not it holds back others' interests in the definitive way it does when torture or slavery are proposed. It was natural to Taylor at Nuremberg to say "not individuals *at all*" as he presented humans conceived as "less than beasts."<sup>29</sup> There is a metaphorical "degree" in "at all"—and in "pressure" or "pull"—with quantification once more implicitly behind it. But what is happening is blunting, slowing, and interfering with thinking that is quantitative, as so much of our thought is and necessarily is, capturing in definitions, categorizing, unitizing, systemizing, and "rationally" calculating. Think how often modern thought—your mind and mine—moves to systems, and to units that can fit into a system. The pressure recognition of the individual introduces is toward imaginative escapes, reconfigurations, compromises that are temporary, actually facing the tragic in tragic choices made and moving into the world of remorse, forgiveness, and beginning again to which calculation, "cold," is utterly foreign.<sup>30</sup>

The effect is easily seen, familiar really, in criminal law both as formulated and as applied. Judges, prosecutors, juries, legislators all feel it. The classic holding back of what is proposed to be done to a human convict for purposes of general deterrence, "to make an example of him" to others, or as Voltaire reversed it, "pour encourager les autres,"<sup>31</sup> and the insistence that a criminal sanction be linked in some proportional way to the mind condemned, is a turning of decisional attention to the individual who is at the mercy of the decision maker. When we say the "retributive" purpose of a criminal sanction limits its utilitarian use, it is this to which we are referring. Procedure and procedural choices are affected throughout

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contributions to recognition of "sentience" in animals, *see generally* SIMON CONWAY MORRIS, *LIFE'S SOLUTION* (Cambridge Univ. Press 2003); *see also* Barbara Smuts, *Reflections*, in J. M. COETZEE, *THE LIVES OF ANIMALS* 107-22 (Amy Gutmann ed., Princeton Univ. Press 1999). For an introduction to work in philosophy on the human and the animal that seeks to take into account these contributions, and individuality, *see* ALASDAIR MACINTYRE, *DEPENDENT RATIONAL ANIMALS: WHY HUMAN BEINGS NEED THE VIRTUES* (Open Court 2001). Opening before us as human individuals is the possibility that among individual animals there may be many that have their own capacities for creation and mutual creation with other animals, and with us.

29. *See* Nuernberg, *supra* note 1, at 27-28 (emphasis added).

30. That individuals are not fungible is the root of what we call "human equality." "Equal treatment" in law is focused on the individual person and the values that are alive to us. For exploration of human equality and equal treatment in law, *see* JOHN E. COONS & PATRICK M. BRENNAN, *BY NATURE EQUAL: THE ANATOMY OF A WESTERN INSIGHT* (Princeton Univ. Press 1999); PETER WESTEN, *SPEAKING OF EQUALITY: AN ANALYSIS OF THE RHETORICAL FORCE OF "EQUALITY" IN MORAL AND LEGAL DISCOURSE* (Princeton Univ. Press 1990). Where lives seen with an "equal eye" are in question, if some are made to die so that others may live there is no justification in the numbers. The deaths are a failure, pressure to start over, think again, change.

31. VOLTAIRE, *CANDIDE*, ch. 23 (1759), *available at* <http://www.guipry.com/lire/voltaire/candide23.htm> ("to encourage the others").

criminal law, as are the placing and relative heaviness of burdens of proof. "Strict" or "vicarious" criminal liability introduced in the aptly named "public policy offenses," apparently eliminating any inquiry at all into the mind and particular situation of an individual before criminal condemnation, is demonstrably molded into liability that is neither strict nor vicarious. The more serious the proposed suffering of the individual, the greater is insistence on such inquiry, constitutionally pushed by the very notion of "law" in "due process of law" and by the constitutional word "cruel."

Then, on the animal side, the legal mandate to scientific investigators, and to the federal mini-agencies that are set up to "represent society's concerns regarding the welfare of animal subjects"<sup>32</sup> in scientific experimentation, is first to reduce the absolute number of animals suffering, not the percentage of the kind but the absolute number, and second to refine experimental procedure to lessen individual animals' suffering. And, as a training manual for members of these required "Institutional Animal Committees" instructs, "[f]inally, there comes a point in a number of research studies in which further pain and suffering by the animal is unjustified, no matter how noble the cause. It is the [committee's] role to recognize when this point has come and end the research trial at this time."<sup>33</sup> Inquiry into the justification for the actions of human beings accused of the felony of animal cruelty is pulled and molded by the suffering of animals without regard to number. Perhaps the most striking examples are in the law of trusts and estates. On its owner's death an animal moves for the moment out from under the law of property and into the world of wills acts and probate codes, and there are now cases in which courts have voided an order put into a will to destroy an animal left behind, and fashioned something like a temporary judicial sanctuary for it, when a challenge to the order, as against basic legal values, is brought by an executor or an intervener or, in one instance, by the state attorney general.<sup>34</sup> Simi-

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32. 7 U.S.C. §§ 2132(n), 2143(b)(1) ("Animal Welfare Act" of 1966 as amended); Congressional Finding (4) for Pub. L. No. 99-198, §§ 2142-46, 99 Stat. 1645 (1985) ("[M]easures which help meet the public concern for laboratory animal care and treatment are important in assuring that research will continue to progress.").

33. Sally K. Wixson, *The Role of the IACUC in Assessing and Managing Pain and Distress in Research Animals*, in *THE CARE AND FEEDING OF AN IACUC: THE ORGANIZATION AND MANAGEMENT OF AN INSTITUTIONAL ANIMAL USE AND CARE COMMITTEE* 115, 117 (M. Lawrence Podolsky & Victor S. Lukas eds., CRC Press 1999). The Animal Welfare Act itself now prohibits, for any animal it covers, surgery using paralytics without anesthetics, something which had been done before. The prohibition is absolute, without regard to motive or context. See 7 U.S.C. § 2143(a)(3)(C)(iv) (1985).

34. See, e.g., *Capers Estate*, 340 D. & C.2d 121, 135-38 (Orphan's Court, Pa., 1964); In the Matter of the Estate of Clive Wishart, 129 N.B.R.(2d) 397, 401-02, 408-09, 412-24 (New Brunswick Court of Queen's Bench [Canada], 1992) (reviewing both United States and Canadian law). For discussion, see SONIA S. WAISMAN, PAMELA D. FRASCH & BRUCE A. WAGMAN, *ANIMAL LAW: CASES AND MATERIALS* 587-98 (3d ed., Carolina Academic Press 2006). The legal situation is not unlike that of

larly, the new Uniform Trust Code<sup>35</sup> provides for trusts for an animal effective for its life, in which the animal is an equitable beneficiary and persons interested in the animal's welfare are given standing to intervene and seek enforcement of the terms of the trust.<sup>36</sup> Time and again attention is paid to the individual animal, quite apart from any ecological, environmental, or species preservation concerns. It is recognized, it presses, as if, in law, it can look you directly in the eye.<sup>37</sup>

I also take up the case of the individual animal—whose own best interests can not only press but can govern decisions about it on the question of life or death—to focus upon and titrate out, as it were, the third element to which I have referred. What evokes respect is not entirely contained in what we call “the human.” That of which respect is the operative part, an animal can have—“the individual” is not merely an expression of human self-regard. Noting this can also remove us from the growing question what is human and what is not, raised by genetic engineering and mixing human systems with animal systems, and from the impossible question of relative degrees of humanness, especially based on likenesses between physical systems, which is cousin to the impossible question of degrees of perfection within humanness in current eugenic discussion of “selection in” or “termination” using the tools of reproductive technology.

Consideration of the individual that is an animal also pulls us away from mistaking recognition and experience of the individual with experience of persons. An animal may be an individual, but not a person. On

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the “escaping” slave contemplated by Article IV of the United States Constitution, who moves out from under the law of property and into a state where the human owner can no longer be heard to issue an order as owner.

35. See generally UNIF. TRUST CODE (2005).

36. See UNIF. TRUST CODE § 408 (2005); Official Commentary to § 408 (“The concept of granting standing to a person with a demonstrated interest in the animal's welfare is derived from the Uniform Guardianship and Protective Proceedings Act, which allows a person interested in the welfare of a ward or protected person to file petitions on behalf of the ward or protected person.”); see also UNIF. PROBATE CODE § 2-907(b), (c) (2006).

37. A survey across the board of this aspect of the law of human-animal relationships would divert us here. I might note, however, that the animal as individual can be seen not only in particular contexts such as these, but in arguments over relatively technical matters of legal procedure, such as human standing to argue the merits of a case involving an animal or the ripeness of a case for immediate judicial attention. From the mid-twentieth century on, the rise of sensitivity to the environmental and ecological consequences of legislative and administrative decisions has tended to sharpen the difference, by way of contrast, between the long-standing concern in law for individual animals and concern for the ecological and environmental systems that make possible their life and ours. See, e.g., *Babbitt v. Sweet Home Chp. of Commun. for a Great Or.*, 515 U.S. 687, 709-11 (1995) (O'Connor, J., concurring) (discussing place of individual animals within scheme of Endangered Species Act); *Animal Welfare Inst. v. Kreps*, 561 F.2d 1002, 1011-12 (D.C. Cir. 1977) (finding in particular provisions of Marine Mammal Protection Act that “Congress meant to refer to individual animals, not groups or populations . . . . There is surely no ‘resource management’ explanation for [the provisions in issue]”).

the human side, a slave may be property, a thing bought and sold, flogged and kicked, not a citizen,<sup>38</sup> even thought “not fully human,” but presses nonetheless for entry into the perceived world as an individual.<sup>39</sup> To allude again to current and unresolved issues arising from the biological manipulation that is now possible, the line often drawn or recommended between treating a discrete human unit—let us call it that—as an animal is usually treated, and staying the hand at experimenting, is the fourteenth day of development.<sup>40</sup> One of the reasons advanced for that line is the possibility of twinning before fourteen days, posing the challenge that the possibility of twinning would present to perception of an “individual.”<sup>41</sup>

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38. Units of several kinds populate the world conceived in the United States Constitution, and are pointed to in various ways. Article I, Section 2, introduces “free persons, including those bound to service for a term of years,” “Indians not taxed,” “citizens,” and “other persons.” U.S. CONST. ART. I, § 2. The terms “slave” and “slavery” do not appear until the Thirteenth and Fourteenth Amendments, but the phrase “migration or importation” of “persons” in Article I, Section 9, indicated the difference between free persons and “other persons,” with “importation” (as opposed to “migration”) possibly subject to a “tax or duty.” U.S. CONST. ART. I, § 9. The Dred Scott decision decided further that while “other persons” might become “free persons” they and even their descendents could never become “citizens” of the United States, an understanding of federal constitutional language superseded by the Civil War amendments which eliminated this barrier between “citizens” and “other persons” at the same time slavery was prohibited. *See generally* Scott v. Sandford, 60 U.S. 393 (1857). The legal person not centered in a human individual enters the constitutional world through the text’s references to “law and equity,” “common law,” and “admiralty” with its “vessels” that are “obliged” and “pay duties,” and, of course, through the nature of the references in various contexts to “courts,” “departments,” “legislatures,” “the congress,” “houses,” “states,” and indeed “the United States.” Contemplation of non-individual entities suing and being sued, themselves owning property, and enjoying duties running to them from human beings associated with them was clear, and, depending on their type, they came to claim some constitutional protections (written often with reference to “any person”) that were traced out by decisions both before and after the Civil War. Interestingly, “legal persons” might own but need not themselves be owned as constitutional language implied “other persons” necessarily were, members or shareholders not being essential to the “existence” of “legal persons” and even where present having often quite limited claims on them or claims on them linked to fiduciary duties to them.

39. For a sweeping examination of the normality of slavery before the recent past, and of what is seen when a slave is seen, and for the history of the development of perception leading to a prohibition of slavery that is “absolute,” *see* JOHN T. NOONAN, JR., A CHURCH THAT CAN AND CANNOT CHANGE: THE DEVELOPMENT OF CATHOLIC MORAL TEACHING 3-123 (Univ. of Notre Dame Press 2005).

40. *See, e.g.*, Human Fertilisation and Embryology Act 1990, ch. 37, § 3(3), (4) (Great Britain); NAT’L RESEARCH COUNCIL AND INST. OF MED., GUIDELINES FOR HUMAN EMBRYONIC STEM CELL RESEARCH 57 (Nat’l Acads. Press 2005) (United States).

41. *See, e.g.*, NAT’L INSTS. OF HEALTH, REPORT OF THE HUMAN EMBRYO RESEARCH PANEL (1994), vol. 1, at 45-47, 65, 67; Anthony Kenny, *Life Stories: When an Individual Life Begins—and the Ethics of Ending It*, TIMES LITERARY SUPPLEMENT, Mar. 25, 2005, at 3, 4 (quoting from *Parliamentary Debates*, Sixth Series, vol. 73, 15 February 1985, at 682, remarks to House of Commons by Kenneth Clarke, Minister for Health in Great Britain: “The basis for the fourteen-day limit was that it related to the stage of implantation which I have just described, and to the stage at which it is

For many who would adopt that line and response to perception of an individual—self-restraint thereafter—the individual after fourteen days is not yet a person. Then at the end of life, the person may fade away. The individual stays—whom you do not experiment on or “harvest” from—though the person fades. The individual is centered on the flesh, though that is something with which we do struggle, the continuing challenge of gnosticism in Christianity being only a more than usually clear example of struggle with it.<sup>42</sup>

Questions about how to use the terms “individual” and “person” are deep and tearing. But the terms as used do reflect an underlying sense of the difference between a person and an individual, indeed the difference between a person centered on an individual’s body and the individual en-fleshed there.<sup>43</sup> A person, both in mundane or ordinary or daily or unself-conscious talk, and in the considered language of law, may be en-fleshed. But a person need not be en-fleshed and can speak through one or another individual. We can and do take on various legal identities without losing our individuality. They are not identities all our own. Persons join us together, and the standard assumption, that one can always be challenged when one speaks on behalf of a person that is not an individual, is evidence of such joining rather than separation. Identification with persons that are not individuals is what links us, in a real way, to future individuals beyond our span of life, even the distant future, with responsibility to them and hope for them. It is what links us, in obligation and gratitude, to individuals before our individual time, indeed what makes the past even relevant and interesting to us so that we are willing to spend precious individual time, the most wasting resource there is, working to determine what is authentic in our understanding of the past, and what is unreal.

As for the “individual person,” this is mutually developed in our conscious and unconscious understanding and experience, over time. Other individuals are continually sifting and sorting through what an individual says and does as an individual, identifying it with him or her as a person, who exists over time, or putting it aside as mistake or inauthentic. We do the same with ourselves (and in light of the unfolding judgments of

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still uncertain whether an embryo will divide into one or more individuals, and thus to the stage before true individual development has begun.”). Compare DAVID ALBERT JONES, *THE SOUL OF THE EMBRYO: AN INQUIRY INTO THE STATUS OF THE HUMAN EMBRYO IN THE CHRISTIAN TRADITION* 224-27 (Continuum 2004). The fourteen day point is also the point after which appear “the precursors of the brain and central nervous system.” GUIDELINES, *supra* note 40, at 55.

42. For history and discussion, see PHILIP J. LEE, *AGAINST THE PROTESTANT Gnostics* (Oxford Univ. Press 1993); WALTER BRUEGGEMANN, *PRAYING THE PSALMS* (Saint Mary’s Press 1993).

43. I first worked on these problems, against the background of twentieth century developments in “standing,” in *LEGAL IDENTITY*. See JOSEPH VINING, *LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW* 2-3, 6-7, 145-48, 179-81 (Yale Univ. Press 1978).

others), ourselves creating, proposing, doubting, trusting ourselves, persuading ourselves and believing, and sitting in judgment on what we ourselves say and do.

The person perceived or heard is “half-created” *over* time, real and alive to us because of our work, something of our own—this is what joins us. The individual is always in the present. If time moves or if one moves through time, the individual is always with us. Anything said is always in the past, immediately so, evidence with which we work, but evidence only, not the same as what it is evidence of. The individual here and now is silent and lives with us in silence. As starting point the individual always remains central. The person prevents the individual as starting point, this ongoing centrality, from ending in radical ignorance and isolation, solipsism and relativism.<sup>44</sup>

But again, its “third element,” beyond systems internal and external, is what gives the individual its distinctive force in perception and action that demands so to be fitted into our ongoing effort to put together the bits and pieces of our experience into a coherence that does not close the eyes to any of it. Without this third element, the individual’s place in the worlds of other individuals would not be begun to be understood, and even if there is no real possibility—precisely because of the recognition of the individual—of anyone’s tying up understanding of individuality into a finished package by the end of his or her life in the world, a beginning can serve a purpose, opening a door, moving to the side of systems in general, and stepping once more into the parts of the mind where quantification and calculation lose purchase.

Some might reach for the term used in professional philosophy, “agency,” to refer to this third element. But “agency” is too pale and neutral a term to evoke the force recognition of the individual has, and this is I think because “agency” remains in its connotations attached to its origins in philosophic discussion and to language there that speaks of “properties” of units and “emergent properties” of systems of units, envisioning capturing all parts of experience, “unitizing” them so that they can be put in classes and groups of the same, and then manipulating them in ways logical or otherwise—rather than listening to them.<sup>45</sup> “Agents” need not call as individuals do, appeal, stop, reveal as individuals do. “Agency” tames experience.

What to call the third element? The American pragmatist Richard Rorty summed up in the most wonderful way much of what we have been talking about here in his response to a request six years ago for reflections

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44. I take “half-create” from Wordsworth—“[a]ll the mighty world/ Of eye and ear, both what they half-create,/ And what perceive.” WILLIAM WORDSWORTH, *Lines Written a Few Miles Above Tintern Abbey*, in WILLIAM WORDSWORTH: THE MAJOR WORKS 131, 134 (Stephen Gill ed., 2000).

45. See Nuernberg, *supra* note 1, at 27 (setting out Telford Taylor’s contrast that we noted, between individuals and what comes in “wholesale lots,” which looks to such unitizing, and to “properties” and “ownership” that come with it).

upon the coming third millennium. He looked to “accomplishing” a “thorough-going secularization” before the fourth millennium. “It will probably take,” he said, “at least a thousand years for human beings to give up the last remnants of the idea that they contain a spark of the divine: to see Beethoven and Jefferson as animals with extra neurons.”<sup>46</sup> He went on to speak of individuals in modern history who have “unwittingly collaborated with each other . . . to force us”<sup>47</sup>—“us,” that person “us”—and “force,” you note—to his conclusion about the nature of the sources of life and thought we have when we enter the world for our time in it. Rorty, so oblivious it seems to the phenomenon of human law and its recognitions, and so oblivious to what might even be his own commitment to law’s recognitions and certainly his dependence on them in his life taken as a whole, calls the third element a “spark of the divine.” We can pay him the respect of thinking these words, “spark of the divine,” have meaning for him, that they are not noise, empty ciphers, ignorant quotation. He is speaking of the third element, and the individual, “Beethoven,” “Jefferson,” as he calls to mind the animal that seems for him representative of mere system, and as he, an individual and a person, proposes to us that the differences between Beethoven and an “animal” or indeed other human individuals are only bits of system, “extra neurons.”

I will let him say “spark of the divine,” and myself use the word “spirit.” Sparks go out, spirit continues. Sparks are units, spirit is not capturable. And it is because spirit is not capturable and is not predictable, and takes form in the human in language the meaning of which is the meaning of its utterer and itself irreducible to any system, that “spirit” stands against the full thrust of thought that is “modern” and distinctively twentieth century.

Not against thought of a religious kind, that continued through the century, not against legal thought, that has if anything flourished<sup>48</sup> and become more central to human life as the number of human individuals has increased, and not against “ordinary” thought of “ordinary” individuals: spirit stands against thought that, because in its own terms it has no place for spirit, would squeeze spirit out from thought itself, elite, informed thought that views success in manipulating the systems of the world to human ends as authority to teach the nature of the world as a whole. Distinctively twentieth-century thought is cosmological, agitatedly and aggressively so, and thus for many, not most but many, one aspect of the mystery of the individual in modern law is the individual being there at all after the twentieth century.

Full recognition of the individual human being may be described, and I think in a way not inconsistent with spirit being the “third element,”

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46. Richard Rorty, in *International Books of the Year—and the Millennium*, TIMES LITERARY SUPPLEMENT, Dec. 3, 1999, at 11.

47. *Id.*

48. See generally STEVEN D. SMITH, LAW’S QUANDARY (Harvard Univ. Press 2004).

as accepting into one's world something analogous to the acceptance of the Big Bang into physics and into contemplation of the physical world. The individual is a "singularity," a word nicely taken over by physicists from their own experience of being individuals—not a unit playing a part in the working of rules and quantities governed by rules, nor explained by them. Each individual has a view of the reality of the world, the cosmos itself, that cannot be different from his or her view. He cannot say, "I see the world in this way or see this in the world, but what I see is mistaken or an illusion." He sees it the way he sees it, he sees what he sees. He can struggle with doubt and be open to change if open-minded and working with perceptions that themselves open out into the new and surprising. But he cannot truthfully say to another, "The way you see the world is true, not the way I see the world." Even if he hears himself saying such a thing, the world remains for him the way he sees it, and another individual, who is only one, trying to dismiss it with the word "solipsism," is merely denying that one is an individual like himself or herself.

When individuals are recognized by one another they acknowledge this sense on the part of each that each is at the center of the world, which is reflected in the sense that when an individual dies there is a loss not just to the world but of the world. The "public" value of an individual life is bedrock natural rather than a mysterious anomaly. "Not for all the world," we say, and thought of "all the world" and reference to "all the world" is a quite understandable and common response to a proposal that something be done to an individual, a meaningful response, not hyperbole or nonsense. It is this ontological or cosmological sense, not of the smallness of the individual among the billions, but of the largeness of the individual up to the level of the largeness of the world itself, that lies behind the blocking or blunting or continuous creative compromise with thinking, often called "rational," that must work with fungible units. Since each of us is an individual, a cosmology that has a place for us will always be truer, or closer to truth, or have a greater claim to truth, than any cosmology that does not. All this comes before and is not supplanted by the joining of individuals in persons and in the experience of living value. The first question of understanding each of us faces is not how can I be an individual or how could there possibly be an individual, but how can there be more than individuals, as there is, and how, in what can only be continuous acts of generosity, do we each see we are one among many.

However paradoxical such a sense of reality or such a cosmology may appear to be, and whatever the way it differs from consistently radical "subjectivity" on the one hand and consistently impersonal "objectivity" on the other, that contend so in the history of philosophy and indeed in one's own mind, this does seem to me to be the sense of reality displayed to each of us individuals in the practice of law, expressed by law, making law possible, underlying what we do. As Stephen R. L. Clark says so very nicely of "objectifying" visions, "Fortunately—or providentially—our own sense of self, and our sense of significant others as individual selves, keeps breaking



in. Our attention is always being drawn to individuals as something more than episodes or anecdotes within a single story. Instead of *one* world, there are, in a way, very many though each unitary world experiences itself as a fragment or an echo of the wider realm.”<sup>49</sup> Trinitarian Christianity has its words for this, and in its ecumenical reach seeks to understand the words for it in other enduring religious teachings. It is an “ontology” that, in addition to recognizing the world of each individual, recognizes faith in a reality beyond the worlds of each individual, which each of us is a new window on and from and for which each of us is a voice when we are, as we say, “really” ourselves, authentic, not pretending, not false—a reality in which move the persons who join us and who are half-created by us all, but only half-created—a reality on which our individual action, each of us one among the billions, may have a “causal” effect neither we nor anyone else can ever trace.

But I should say too—or try to say—that all this, internal system, external system, the third element that moves a unique unit to individuality, the individual person and the person beyond—all can be put aside, and still the individual remains. Happily or unhappily, anything I may say or anyone else may say in description of the individual or the place of the individual in thought is soft when it comes up against the hard reality of the individual. The world just is as you see it and not otherwise. When you speak about anything (including about the “individual”) you just are only one speaking. I am and you are prior to our understanding. The past does not produce us—we come before the past, the existence, nature, and effects of which we are individually persuaded to, or not. I am tempted to say that whatever may be thought generally of Creation, we each are created, for there is no other language of understanding that begins to reach us as individuals. The current language of “emergent properties” or of “complex adaptive systems” certainly does not.

The individual has a secure home in law, I think, because law is realistic in ways many other forms of thought are not. Perhaps in the end the most helpful contribution from law to realism beyond it would be a procedural proposal, just what might be expected from law. In the ongoing discussion of visions of the world, when someone says “I” while talking it might be asked more frequently who that “I” is, not so frequently of course as to interrupt a train of thought, but frequently enough that saying “I” does not pass unnoticed. When someone says “we,” it might be asked more frequently what “we” is referring to, so that the answer can become part of what is being said. When someone says he or she is persuaded or believes something is true about the world or the nature of the world, or that we do, asking who is persuaded or who is doing the believing should

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49. STEPHEN R. L. CLARK, *BIOLOGY AND CHRISTIAN ETHICS* 315-16 (Cambridge Univ. Press 2000). Clark speaks of this breaking in as a “spiritual tension” that “is echoed in the biological.”

not undermine the belief or persuasion or truth that is being offered, but clarify it.

A book I published a couple of years ago, which was part of the exploration I have continued with you today, had the title *THE SONG SPARROW AND THE CHILD*<sup>50</sup> with a subtitle, *CLAIMS OF SCIENCE AND HUMANITY*. I contrasted the song sparrow with the child throughout, and then at the end touched on the question how great the difference really was and how long it will continue in our perception, thought, and action. Once while I was working on the book I opened the National Science Foundation's webpage setting out the call of scientific work, and there a song sparrow was on the screen, the first thing seen, with a reference to investigation of its neurobiological mechanisms.<sup>51</sup> The methods of investigation are not pretty. What is done to a song sparrow would not be done to a child today—though the twentieth century witnessed such things done to children where the individual was obscured from view. Song sparrows are of particular interest to science, in part because a young song sparrow comes to sing a song that is special not just to its kind but to its individual throat and tongue—rather like your or my language.<sup>52</sup>

I left the song sparrow to do its own work in the book, and did not spell out all the reasons for the choice of this creature rather than another to compare with a child, if indeed I knew them all myself. I would like to close by attempting to do so with you and with your indulgence.

The song sparrow is not exotic but common, as common as a child. Its smallness sits with the smallness of the child. It was a dependable example because well known, like the standard laboratory mouse. There was the echo of its music. But beyond this, I can suppose also some part of the attractiveness of the sparrow was its resonance with the comparison of human being and sparrow in the Gospel of Matthew. Emblems take flight from their origins. Forgetting its origin I had remembered the linkage in

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50. *THE SONG SPARROW AND THE CHILD: CLAIMS OF SCIENCE AND HUMANITY* (Notre Dame Univ. Press 2004).

51. National Science Foundation, <http://www.nsf.gov/od/lpa/news/publicat/frontier/4-96/4sparrow.htm> (last visited June 6, 1998).

52. A young song sparrow may be deafened, or may be isolated during its development. It might be proposed that just one child be selected for isolation from human contact throughout childhood as an experiment to investigate the acquisition of speech, a pilot project. In animal research pilot projects are sometimes required by review committees before weighing a cost-benefit justification for going forward. If the results were suggestive, experimental isolation might then move from one to a number of children, still comparatively small, that would satisfy the presuppositions of statistical thought. The legal mind would see this as the most serious kind of crime. If done under government auspices, what would stop it would be appeal to constitutional protections or, ultimately, the Convention Against Torture. Compare DEBORAH BLUM, *LOVE AT GOON PARK: HARRY HARLOW AND THE SCIENCE OF AFFECTION* (Perseus 2002) (describing current and past maternal deprivation and social isolation experiments on young primates), with ROGER SHATTUCK, *THE FORBIDDEN EXPERIMENT: THE STORY OF THE WILD BOY OF AVEYRON* (Farrar Straus Giroux 1980) (studying children raised without human contact).

the form of a saying, "Not a sparrow that falls but the eye of God is upon it," as in the folk hymn that in its various forms Mahalia Jackson and the blues singer Ethel Waters made a signature piece:

Why should I feel discouraged?  
 Why should the shadows come?  
 Why should my heart be lonely,  
 And long for heav'n and home?  
 I sing because I'm happy.  
 I sing because I'm free.  
 His eye is on the sparrow  
 And I know He watches me.<sup>53</sup>

If you go to the original in the Gospel, there will be found in it a comparison but not an equation. The actual words can be something of a surprise:

Are not two sparrows sold for a farthing? And one of them shall not fall on the ground without your Father. But the very hairs of your head are all numbered. Fear ye not therefore, ye are of more value than many sparrows.<sup>54</sup>

A line is drawn between the sparrow and the human being, at least to begin with (as in fact we do). The translators' farthing was the smallest coin, a quarter of a penny (and I recall that when I first saw a modern farthing, before decimalization, it was stamped with the image of a small bird). An *a fortiori* case builds on an image of the least. One sparrow was not worth even the smallest coin, in the market.

There is a further tension in the original. Every hair, every detail of life is significant; but there is more than a hint of determinism within a concern that would value us to the point of counting the hairs on our head. Again, like the line between sparrow and human being, we may think this not inappropriate as a reflection of our situation. The limit on what we can do and be, the fact that we are in systems, is part of what makes a scientist of all of us. Shakespeare plays on all this when Hamlet, going forward at the end and presenting us with decision at last, individual decision, famously remarks to Horatio, "There's a special providence in the fall of a sparrow."<sup>55</sup>

But I think that as the image of the sparrow has come down, it has more and more represented one of no importance becoming of transcen-

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53. See Donna Britt, *Amazingly, an American in Paris*, WASH. POST, Mar. 7, 1977, at D1, D6; *Mahalia Jackson Gospels, Spirituals, and Hymns*, Columbia 47084 (1991), Commentary by H.C. Boyer, 25; LAURRAINE GOREAU, JUST MAHALIA, BABY 181, 561 (Word Books 1975); ETHEL WATERS WITH CHARLES SAMUELS, HIS EYE IS ON THE SPARROW: AN AUTOBIOGRAPHY (Doubleday 1951).

54. *Matthew* 10:29-31 (King James).

55. WILLIAM SHAKESPEARE, *HAMLET* act 5, sc. 2, 205, 217 (Yale Univ. Press 2003).

dent importance. It had appeared long before the Gospel comparison, in the Psalms—the altar of God a nesting place for the sparrow.<sup>56</sup> Those who first sang “His eye is on the sparrow” included many who knew what it was to be “properties,” fungible units in a system. Even the hard words of the Gospel original shift to the single sparrow, before returning to the many—there are “two sparrows” bundled and sold for a farthing, it is “one” who shall not fall. And the providence that Hamlet saw in the “fall of a sparrow” was a special providence.

For me as for others, including the blues singers who returned to it so often, the image blends with the extraordinary statement of human equality and individual value further along in the *Gospel of Matthew*.<sup>57</sup> You will see that I have read to you from it already. It is a radical passage, of which I think the sparrow can be taken as an emblem. It carries on the oldest prophetic tradition and demands what seems impossible. It is still today a source of that side of the political spectrum we call “individualistic.” It is read around the globe, in unlikely places, by Christian and non-Christian, by scientist and nonscientist. And, it must be said, it can have been a source of the kind of totalitarianism that begins in an effort to realize it, before closing into the total. It addresses both action and inaction, commission and omission, doing with the hand and staying the hand, almost as if in anticipation of modern dilemmas. There is hierarchy in it, a “least.” But then something happens, and happens to “one.” The words are worth reading, for the first time, or again. They end:

I was thirsty, and ye gave me no drink: I was a stranger, and ye took me not in: naked, and ye clothed me not: sick, and in prison, and ye visited me not. Then shall they also answer him, saying, Lord, when saw we thee an hungred, or athirst, or a stranger, or naked, or sick, or in prison, and did not minister unto thee? Then shall he answer them, saying, Verily I say unto you, Inasmuch as ye did *it* not to one of the least of these, ye did *it* not to me.<sup>58</sup>

One of no importance, the least, can become of transcendent importance.

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56. See *Psalms* 84, 102 (King James).

57. See *Matthew* 25:42-45 (King James).

58. See *id.*