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Deodand

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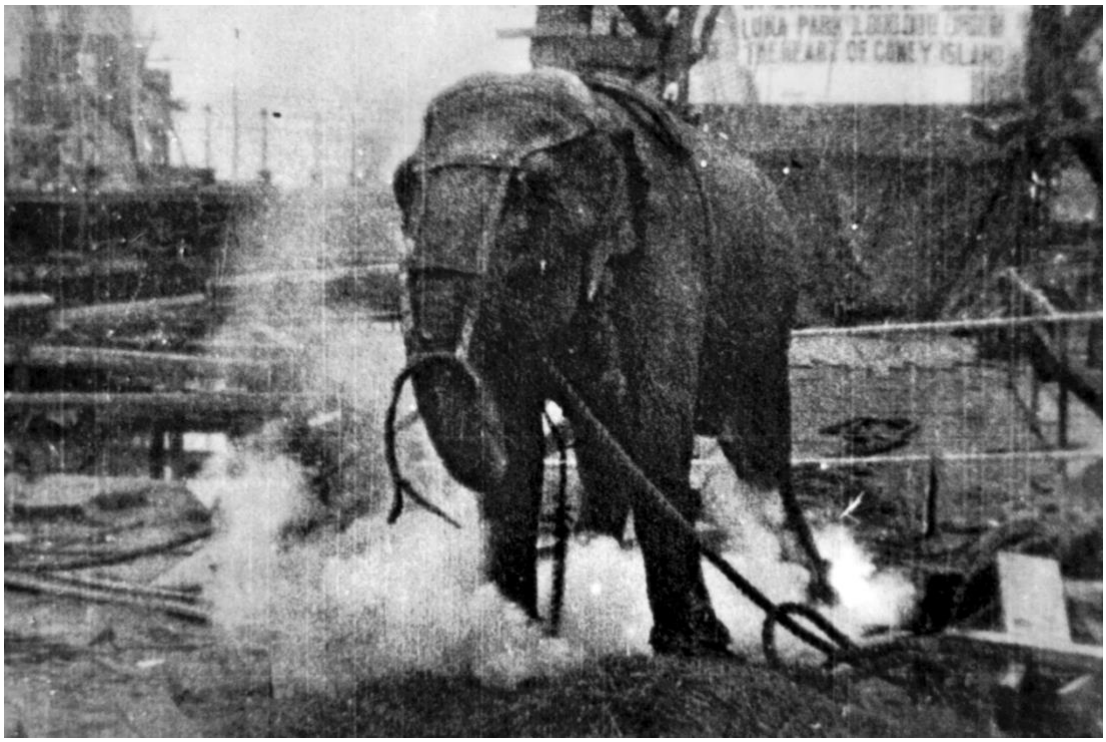

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Law is a funny thing. Nobody really knows what it is.[1] And there's so much of it![2] If you started reading the United States Code out loud today, you'd be hoarse before you got to Title 17.[3] Even still, you'd barely be getting started. The Library of Babel[4] has nothing on the mountain of laws we've already got or the avalanche we keep creating. No one could possibly read them all, let alone remember what they say.[5] What a conundrum!

And yet, as a practical matter, we still seem to have a pretty good idea of what the law expects and requires. Most people live their entire lives without reading a single law but somehow manage to stay out of trouble. It's a mystery how they manage. Or is it?

HOW IT STARTED

When Sir Henry Maine reflected on the early history of the common law, he famously observed that "substantive law has at first the look of being gradually secreted in the interstices of procedure."[6] Most people think Maine was trying to describe how the common law developed. I'm not so sure. Maybe he was only trying to describe how it *appears* to have developed. They aren't the same thing. For better or worse, we don't know what actually happened—and probably can't—because we can only ever see the development of the common law through a glass, darkly.

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* Spears-Gilbert Professor of Law, University of Kentucky College of Law. This Article is dedicated to Maybell Romero, who made me happy enough to write it. The cover image is a still from the motion picture *Electrocuting an Elephant*. ELECTROCUTING AN ELEPHANT (Edison Manufacturing Co. 1903).

1. *But see* H.L.A. HART, THE CONCEPT OF LAW (1st ed. 1961).

2. Or at least it seems like there is. But how would we know?

3. 17 U.S.C. *et seq.*; *see, e.g.*, ZORZNIJOR, TITLE 17 IN SONG: SECTION 101. DEFINITIONS (2016), https://open.spotify.com/album/37nXRP046vg7ARt0CYO2uO?si=1vkh7qchRCCS3Jfb9B65Iw.

4. *See generally* JORGE LUIS BORGES, *The Library of Babel*, *in* THE GARDEN OF BRANCHING PATHS 73 (Norman Thomas Di Giovanni trans., 1941).

5. *See, e.g.*, MIKE CHASE, HOW TO BECOME A FEDERAL CRIMINAL: AN ILLUSTRATED HANDBOOK FOR THE ASPIRING OFFENDER 2 (2019).

6. HENRY JAMES SUMNER MAINE, DISSERTATIONS ON EARLY LAW AND CUSTOM: CHIEFLY SELECTED FROM LECTURES DELIVERED AT OXFORD 389 (London, John Murray 1883).

Of course, we do know a lot about the history of the common law. Its practitioners left us mountains of documents in the form of writs, pleading, opinions, and eventually treatises. Indeed, they left so much that we're still sorting through it all. But most of what they left was ephemera, intended only to record legal proceedings for bureaucratic convenience, not to memorialize the legal culture that produced them. No wonder those documents appear impossibly gnomic today. They're the marginalia to a lost text, in a language we longer speak, describing a world we can't understand. And yet, they still give us a glimpse of a lost world, illuminated ever so faintly through the lens of philology.

Everyone knows that medieval law looks exceedingly strange today—to the extent we have any idea what medieval law was actually like. We know a considerable amount about what medieval lawyers did. But we don't always know why they did it or what it meant. And we certainly don't know how people understood the significance of legal proceedings.

One of the more unusual features of medieval common law was the deodand, or chattel forfeit to God because it caused the death of a person.[7] While the doctrinal origin of the law of deodands is unknown, it probably emerged sometime in the 11th century and existed until it was abolished by Parliament in 1846.[8] The word deodand is "derive[d] from the Latin phrase *deo dandum*, which means 'to be given to God.'"[9] Under the law of deodands, if a coroner's jury found that a chattel caused someone's death, then the chattel was forfeited to the Crown. Then, the Crown was supposed to sell the chattel and use the proceeds to honor God. So, if a person was killed by a horse, then the Crown could confiscate the horse. And if a person was killed by a falling rock, then the Crown could confiscate the rock.[10]

As is typical of common law rules, the law of deodands gradually developed a set of guiding principles, which helped determine whether a chattel was a deodand and therefore forfeit. But the principles in question

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7. *See generally* Anna Pervukhin, *Deodands: A Study in the Creation of Common Law Rules*, 47 AM. J. LEGAL HIST. 237 (2005).

8. A member of Parliament introduced the Deodands Abolition Bill to the House of Lords in 1845, and Parliament passed the Act for Abolition of Deodands in 1846. HL DEB (17 Mar. 1845) (78) col. 949, https://hansard.parliament.uk/lords/1845-03-17/debates/34af00ca-a389-4d8b-92a6-467ff91228ea/DeodandsAbolitionBill [https://perma.cc/FQ64-EG2V]; Pervukhin, *supra* note 7, at 238, 250 n.80. Of course, other medieval legal systems had doctrines analogous to deodands, which led them to conduct trials of animals and objects, among other things. *See, e.g.*, Sonya Vatomsky, *When Societies Put Animals on Trial*, JSTOR DAILY (Sept. 13, 2017), https://daily.jstor.org/when-societies-put-animals-on-trial/ [https://perma.cc/4RSC-SD39].

9. Pervukhin, *supra* note 7, at 237; *see also Deodand*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/deodand [https://perma.cc/2T6H-RW6C].

10. Pervukhin, *supra* note 7, at 238, 245–46.

were quite peculiar. The most important principle was "*omnia quae movent ad mortem sunt deodanda*,"[11] or "what moves to death is deodand."[12] In other words, if a moving thing killed a person, it was a deodand. But there were many exceptions, like a moving part of a house or a church bell. And a stationary thing could also be a deodand, if a moving person collided with it. Unless of course the person was a child. In which case, the law didn't apply. Don't ask why; they just died.

In any case, just about anything could be a deodand, depending on the circumstances. A woman fell into a vat of boiling water? The vat was deodand. A drunkard fishing with a net fell into the water and drowned? The net was deodand. A man fell from a boat onto the rocks and died? The rocks were deodand. Anything could be deodand, if the jury said it was.[13]

In theory, deodands went to charity. And sometimes they did! But often, the Crown just kept them.[14] And eventually, it began selling off the right to collect deodands to others. In practice, deodands became a kind of tax on tragedy, an opportunity for the Crown to generate revenue by confiscating the property of tortfeasors.

And it seems juries were probably wise to the grift. The reports of deodand actions are often comically implausible, recounting an absurd series of events or assigning blame to a chattel of trivial value.[15] Presumably, juries tailored their findings to serve the equities. When property owners were culpable, juries imposed a substantial penalty, but when property owners were innocent, juries gave them a break.

Amusingly, common law jurisprudes still did their level best to derive abstract rules from the congeries of deodand cases that accumulated. The results were delightfully cracked. After all, there's nothing like a common law doctrine that can provide any answer you desire, depending on which precedent you call the rule.

But I digress. The point is that deodands are amusing, not because we understand them, but because we don't. They are a relic of the "old, weird England," a quaint practice that is both charming and discomfiting, because it makes so little sense.[16] And yet, surely medieval judges, lawyers, and juries understood precisely what deodands were supposed to accomplish. After all, legal doctrines don't exist for centuries if they don't make any sense. Or do they? Perhaps the most disconcerting aspect of deodands is the disturbing possibility that we don't understand the law any

11. *Id.*

12. *Id.* at 238 n.6.

13. Pervukhin, *supra* note 7.

14. *See id.* at 238.

15. *See id.* at 244–45.

16. *Cf.* GREIL MARCUS, THE OLD, WEIRD AMERICA: THE WORLD OF BOB DYLAN'S BASEMENT TAPES (2011).

more coherently than our medieval predecessors. Maybe we're still looking for meaning that never existed.

Anyway, deodands are a delightful example of a common law doctrine that caused something to happen: the Crown was enabled to tax tortfeasors. But not in a way anyone expected at the time or anyone understands today. Look on their logic and despair. You'll never figure it out, no matter how hard you try. And that's what makes them so lyrical. The concept of the deodand is beautiful even though we can't understand it. Or rather, it's beautiful *because* we can't understand it. If we understood deodands, surely they would be as prosaic as life insurance and conceptual art.

HOW IT'S GOING

In 1964, Yoko Ono self-published the first edition of her iconic book *Grapefruit*.[17] She titled it *Grapefruit* because she thought grapefruits were a man-made hybrid of oranges and lemons and considered herself "a spiritual hybrid" of Asian and European culture. In fact, grapefruits are a natural hybrid of oranges and pomelos, which probably originated in Barbados in the 18th century. But it didn't matter. Ono's metaphor worked because no one cared about the origin of grapefruits. Her story was better than the truth because it meant something. "When the legend becomes fact, print the legend."[18]

Grapefruit consisted of about 150 "event scores," or instructions for realizing a work of conceptual art, which Ono also called "pieces." Each piece consisted of a brief text, formatted like a blank verse poem, in which Ono described a set of actions, the performance of which constituted a work of conceptual art. Or no, the *description* of which constituted a work of conceptual art? Or no, the *contemplation* of which constituted a work of conceptual art? Or, maybe all three?

Regardless, *Grapefruit* consisted of pieces like the following[19]:

> COLLECTING PIECE II
>
> Break a contemporary museum into pieces with the means you have chosen. Collect the pieces and put them together again with glue.

It was a hit. Ono had taken Duchamp's observation that anything can be art, if an artist says it is, and gone one step farther. She observed that anyone can be an artist if they want to be. In a sense, *Grapefruit* was

17. The first edition of *Grapefruit* was published in Tokyo on July 4, 1964, by Ono's Wunternaum Press, in an edition of 500. *See generally* YOKO ONO, GRAPEFRUIT (1st ed. 1964).

18. THE MAN WHO SHOT LIBERTY VALANCE (John Ford Productions 1962).

19. ONO, *supra* note 17.

conceptual art paint-by-numbers. But only in the best sense, because you can't create conceptual art without becoming a conceptual artist, whether you like it or not.

In any case, the second edition of *Grapefruit* was published by Simon & Schuster in 1970.[20] It added an introduction written by John Lennon, about 80 more event scores, and some essays written by Ono. And it was an even bigger hit. It's still in print today, and it's probably Ono's best-known work.

WHAT'S NEXT?

As Ono observed, art is everywhere. But there's still more of it in some places than others. Unfortunately, legal scholarship usually contains very little art. Or at least, legal scholarship has a hard time seeing itself as an art form. It's a shame because legal scholarship is as good a medium as any for art—especially conceptual art. After all, every genre has aesthetic qualities, even legal scholarship. If it's a struggle to make legal scholarship aesthetically pleasing, all the better! Artists have always had to struggle, and there's no own like a self-own. What's more, legal scholarship is all about concepts. Usually the concepts are boring and scholastic, but they still matter. There are a lot of mediocre genres. Even if legal scholarship is a mediocre genre, it's entitled to a little representation, isn't it, and a little chance? We can't have only painting, sculpture, and music. Conceptual art is promiscuous. It loves the genre that loves it back.

So, this article is an homage to Ono's *Grapefruit* in the genre of legal scholarship. It consists of a number of "pieces" intended to encourage reflection on the nature and practice of legal scholarship. Of course, it reflects my own particular interests, *inter alia* discussing the concept of plagiarism, especially as articulated in the context of legal scholarship.

Notably, this is the first article in which I have (intentionally) plagiarized anything. At a certain point, you just have to jump in. For what it's worth, a considerable part of the plagiarism in this article is self-plagiarism, which is really just plagiarism for plagiarists without the courage of their convictions. But many of the pieces in this article plagiarize other legal scholars. Like any self-respecting plagiarist, I only plagiarized the legal scholars I love the very most. See if you can spot their work. I hope I added something to it.

20. *See generally* YOKO ONO, GRAPEFRUIT (Simon & Schuster 1970) (1964).

Plagiarism Piece 1
Pay an essay mill to write an article explaining why plagiarism is wrong.
Submit the article for publication under your own name.

Plagiarism Piece 2
Pay an essay mill to write an article explaining why plagiarism is wrong.
Submit the article for publication under your own name, explaining that it was written by an essay mill.

Plagiarism Piece 3
Pay an essay mill to write an article explaining why plagiarism is wrong.
Write a review of the article, explaining why it is wrong.
Submit the review for publication under your own name.

Plagiarism Piece 4
Pay an essay mill to write an article explaining why plagiarism is wrong.
Pay a different essay mill to write a review of the article.
Submit the review for publication under your own name.

Plagiarism Piece 5
Write an article that consists of nothing but quotations.
Provide a citation for every quotation.

Plagiarism Piece 6
Write an article that consists of nothing but quotations.
State that the article consists of nothing but quotations.
Provide no citations.

Plagiarism Piece 7
Write an article that consists of nothing but quotations.
Don’t tell anyone.

Plagiarism Piece 8
Identify an important, but forgotten, article.
Submit the article for publication as your own.

Attribution Piece 1
Write articles.
Offer to reattribute the articles you wrote to the highest bidder.
Reattribute the articles.

Attribution Piece 2
Write articles.
Offer to reattribute the articles you wrote to the person who likes them the most.
Reattribute the articles.

Attribution Piece 3
Write articles.
Reattribute the articles to people who need them.

Attribution Piece 4
Write articles.
Reattribute the articles to people who should have written them.

Attribution Piece 5
Write articles.
Reattribute the articles to people who could not have written them.

Landlord Piece
Create or buy the kind of property you want to own.
Allow people to use your property, but only if they pay for it.
Remind the people who use your property that you have done them a favor.

Judging Piece 1
Become a judge.
Hear a case.
Reflect on the information provided by the parties to the case.
Decide the case in the way you think will produce a good outcome.

Judging Piece 2
Become a judge.
Hear a case.
Reflect on the information provided by the parties to the case.
Decide the case in the way you think the law requires.

Judging Piece 3
Become a judge.
Hear a case.
Reflect on the information provided by the parties to the case.
Tell the parties how you will decide the case.

Judging Piece 4
Become a judge.
Hear a case.
Reflect on the information provided by the parties to the case.
Ask the parties why they should lose.

Genre Piece 1
Write an article using an historical development in popular culture as a metaphor for the development of the law.

Genre Piece 2
Write an article using your personal experiences as a metaphor for the law.

Genre Piece 3
Write an article describing the structure of a law review article.

Genre Piece 4
Write an article in a literary genre other than the law review article.
Call it a law review article.

Genre Piece 5
Write an article in the style of a conceptual artwork.
Call it a conceptual artwork.
Make it a law review article.

Hierarchy Piece 1
Obtain a job at a prestigious institution.
Write an article criticizing its institutional norms.
Keep your job.

Hierarchy Piece 2
Write an article criticizing academic hierarchy.
Publish the article in the most prestigious journal you can.

Letter Piece
Write a letter of recommendation.
Reconsider writing a letter of recommendation.
Write an article about reconsidering writing a letter of recommendation.

Poetic Justice Piece
Write an article that uses an unflattering metaphor to describe the police.

Submission Piece 1
Write an article.
Submit the article for publication.
Receive a publication offer from the most prestigious law review.
Reject the offer.
Ask the least prestigious law review to publish the article.

Submission Piece 2
Write an article.
Offer the article to anyone who wants to publish it.
Accept the first publication offer.

Submission Piece 3
Write an article that people don't understand.
Offer the article to anyone who wants to publish it.
Keep offering the article for publication, even though no one wants to publish it.
The article has always been available to anyone who wanted to read it.

Submission Piece 4
Split the work into individual sections.
Submit each via a different method.
Let the one who claims the most segments publish the whole.
Alternatively, let the one who claims "the baby cannot be split" publish it.

Submission Piece 5
Split an article into individual sections.
Submit each section to law journals for publication via a different method.
Publish the article in the law journal that accepts the most sections.
Publish the article in the journal that is only willing to accept the whole article.

Publication Piece 1
Create a law journal.
Solicit submissions.
Publish everything submitted.

Publication Piece 2
Create a law journal.
Solicit submissions.
Select articles for publication at random.

Publication Piece 3
Create a law journal.
Publish the most downloaded articles.

Publication Piece 4
Create a law journal.
Publish the most popular articles.

Publication Piece 5
Create a law journal.
Don’t bother publishing anything.

Conceptual Art Piece 1
Create a work of conceptual art.
Offer to sell it to anyone who wants it.
Argue that selling it is illegal.

Conceptual Art Piece 2
Create a work of conceptual art.
Put it on the blockchain.
Allow people to pay you for nothing.

Conceptual Art Piece 3
Pretend to create a work of conceptual art.
Sell it to people.
Confess that you defrauded them.

Deaccessioning Piece 1
Purchase a work of authorship.
Realize you hate it.
Sell it to a sucker

Deaccessioning Piece 2
Purchase a work of authorship.
Realize you love it.
Sell it to a bigger fan.

Deaccessioning Piece 3
Purchase a work of authorship.
Wait until it appreciates in value.
Sell the work of authorship.
Buy another work of authorship.

Deaccessioning Piece 4
Purchase a work of authorship.
Wait until it appreciates in value.
Sell the work of authorship.
Donate the proceeds to charity.

Legal Scholarship Piece
Write an "article" that purports to be a "legal scholarship."
Fail to satisfy any of the conventions of legal scholarship.
Reflect on what it means to be a legal scholarship.

Marriage Piece
Fall in love.
Realize you can't get married.
Write an article about why you can't get married.
Propose in the article.

"A sow on trial in at Lavegny in 1457 from The Book of Days."[21]

21. James Bridgden, *The Law Is an Ass: 8 Famous Animal Trials from History*, HIST., https://www.history.co.uk/articles/the-law-is-an-ass-8-famous-animal-trials-from-history [https://perma.cc/WZB7-9SV8].