

## Law & The Sacred: Unmasking the Stranger American Welfare Residency Rules and the Encounter with the Other

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One American welfare doctrine that refuses to die embarrasses the American optimist-modernist credo that time always brings progress. That doctrine, most recently resurrected in President Clinton's welfare reform legislation, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA),<sup>1</sup> permits states to impose what euphemistic bureaucrats call a "durational residency requirement" on impoverished citizens seeking government assistance to provide food, clothing, and shelter for their families. Where this rule once meant that impoverished citizens could be denied all welfare benefits for up to a year after they moved to a new state,<sup>2</sup> in its current less draconian form, the PRWORA residency rule permits an individual state to provide the lesser of either its own minimum benefit or the benefit from the newcomer's state of origin for a year. However, this apparently kinder and gentler doctrine has ominous consequences for real people: for example, Edwin and Maria Delores Maldonado, who moved from Puerto Rico received \$ 304 per month (the benefit level in Puerto Rico) when they arrived at their new home in Pennsylvania, instead of the \$ 836 per month that Pennsylvania's long-term needy residents were getting to meet their subsistence needs.<sup>3</sup> Similarly in *Roe v. Anderson*, a case argued in the United States Supreme Court in early 1999, the lower federal court noted that a family of four moving from Mississippi, where \$ 144 would provide a subsistence living, would be hard-pressed to survive on that amount in Los Angeles, where the highest housing costs help push the minimum subsistence level for that family to \$ 673 a month.<sup>4</sup>

These durational residency rules, which can be traced back to European poor relief laws, may surprise those used to thinking of the United States as a nation of unity in diversity, and individual opportunity through mobility. Indeed, they run counter to twentieth century trends eradicating most other legal and socio-economic barriers to movement between states.<sup>5</sup> In the United States, workers are commonly transferred by their employers from one end of the country to another as job advancements open up; children of divorced parents regularly fly from one state to another for parental visits; and residents cross state borders to work, attend sporting events, and even to buy cigarettes, clothes and liquor to avoid higher taxes in their home state. It would not occur to an average American citizen that he or she could be legally prevented or discouraged from traveling through, or moving to, another state. Indeed, most poverty advocates had thought that rules discouraging indigents from moving from state to state were permanently dead after the U.S. Supreme Court's ruling in *Shapiro v. Thompson* that these rules violate citizens' federal right to travel or migrate from place to place,<sup>6</sup> even though states occasionally would try to reinstate them after *Shapiro*. In fact, the *Shapiro* case has been a cornerstone of the Court's holdings in many areas that new state citizens cannot be treated differently than long-time residents on similar issues. Yet, the residency rule has risen from the dead: more than fifteen states reinstated residency rules since Congress authorized them to do so in PRWORA, arguing that the *Shapiro* rule does not apply because they are not completely refusing benefits to newcomers, just reducing them.<sup>7</sup>

In a nation that takes pride in its escape from tradition, the durational residency rules seem particularly anomalous because they can be so directly traced to ancient (by American standards) fourteenth and fifteenth century poor laws in England and Europe that permitted local communities to send away strangers in need.<sup>8</sup> Yet, the current residency rules are not easily explained as a response to the economic upheaval, as their progenitors were: modern Americans see nothing like the human turmoil following the mass economic dislocations of the fourteenth and fifteenth centuries, when the poor marched in the streets and begged aggressively, even maiming themselves and their children to gain sympathy.<sup>9</sup> Nor can the contemporary trend towards 'devolution', the return of welfare program design to the states,<sup>10</sup> entirely explain the states' desire to keep strangers out. In a society that still identifies itself as Christian in some sense, this lingering doctrine also seems to fly in the face of clear, consistent Biblical demands for hospitality and succour for the stranger (Keifert 1992: 59-73).<sup>11</sup>

I would suggest that residency requirements cannot be fully explained by socio-economic practicalities: they betray what are thought to be American expectations and values more than they support such values. Instead, these residency requirements are symptoms of a more deep-seated, timeless human fear and dislike of the stranger, the Other; and it is only by awakening lawmakers to the ethical encounter with the Other that these fears can be faced.

I propose to consider the nature of this fear through the metaphor of the masks of the law, utilizing the work of U.S. federal Judge (and former law professor) John T. Noonan, Jewish philosopher Emmanuel Levinas, and German theologian Martin Luther. Though Noonan and Levinas insightfully accuse us of masking the human face, the fear we are probing requires that we attend to Luther's description of God's hiddenness through the metaphor of the mask to fully understand why local communities persist, generation after generation, in banning the needy stranger from their midst.

### **Noonan and Levinas on Masking the Neighbour**

In *Persons and Masks of the Law*, Judge John T. Noonan took to task some of America's most respected judges and legal philosophers, including Oliver Wendell Holmes, for personifying the law, imagining it as an autonomous entity "which acted by the very necessity of its nature to transform moral standards into external or objective ones" (Noonan 1976: 3). Thus personified, Noonan argued, the law was made morally independent and un beholden to any living person; permitting Thomas Jefferson and George Wythe, for example, to discuss slaves as property without feeling any moral need to recognize their humanity (Noonan 1976: 55-61.). Noonan argued that the law, objectified and separated from human law-makers in this fashion, became a mask over the face of human beings. That is, in the positivist, objective conception of law, persons are classified "so that their humanity is hidden and disavowed", and they are known only by their masks (Noonan 1976: 19-20).<sup>12</sup> The law is a particularly invidious form of coerced masking, for it is "stamped with official approval by society's official representatives of reason", enabling lawmakers and judges to put on their own masks, convincing themselves that they are not personally responsible for the consequences of their decisions and deeds (Noonan 1976: 22-25).

At some level of analysis, Noonan's mask metaphor seems to explain the persistence of residency requirements. If legislators can coin such innocuous words as "durational residency requirements" and structure welfare rules so it appears that the state gives aid and succour to the poor while in reality it provides them too little to live on, the reality of the face of the suffering person can be masked. The mask that legislators place over the face of the incoming poor may be the mask of a caricature they have seen on a TV cop show depicting big-city violence in LA or New York or Chicago, someone they do not want coming into their sleepy town or well-scrubbed suburb (itself masked as a land of Sheriff Andy Griffith and Aunt Bea, or Ozzie and Harriet). They may press onto the true faces of the poor, following urban legends, the mask of evil superhuman gang members or welfare cheats who amass a fortune bilking the government. Moreover, state officials, legislators and judges can put on their own masks, keeping up the appearance that they are not to blame for the plight of the suffering, for it is 'the law' that requires them to grant insufficient aid. Or perhaps, they might claim, making yet another mask, that their plight is the fault of the poor themselves, because they are too shiftless to work or too profligate to spend their allotments wisely, or because they have foolishly risked their families' security by coming to the new state for a dream of opportunity that does not await them.

Noonan takes off only the first mask of injustice, however. His critique is most satisfying to modern philosophical or religious thought, for he leaves the oppressor with merely deontological reasons for removing his victim's mask: the oppressor should uncover the anguished face of the other because it is right or perhaps because God commands it. Yet, there is a deeper way to describe why oppression is as wrong for the oppressor as for the victim. As Levinas might claim, Noonan's critique is founded on ontology, not ethics. That is, Noonan is speaking to the lawmaker or judge as an ethical subject who continues to exercise his autonomous will against a passive object, the impoverished person, using his power as a separate self coercively to hide "the human face [of the other]... where emotion and affection are visible" (Noonan 1976: 19-20). He may hide himself as well, even hide himself to himself in the recesses of his conscience, so that he can justify to himself that he is acting for the best (Noonan 1976: 21-22). Of course, the oppressed object, also a choosing self who exists prior to the ethical relation, may act in self-defence, masking himself protectively in disguises of power or in his roles, masking himself against his own psyche (Noonan 1976: 19-20). But, Levinas says, what starts as an either-or, the choice between totalizing the other into the same or into a means to the oppressor's end, or conversely being absorbed into the other, leads to the permanent possibility of war.

The state of war suspends morality; it divests eternal institutions and obligations of their eternity and rescinds ad interim the unconditional imperatives... The act of foreseeing war and of winning it by every means -- politics -- is henceforth enjoined as the very exercise of reason. But violence does not consist

so much in injuring and annihilating persons as in interrupting their continuity, making them play roles in which they no longer recognize themselves, making them betray not only commitments but their own substance, making them carry out actions that will destroy every possibility for action. Not only modern war, but every war employs arms that turn against those who wield them... War does not manifest... the other as other; it destroys the identity of the same (Levinas 1969: 21).

In probing this horrifying, ongoing threat, Levinas takes off the second mask: the illusion that we, oppressors or victims, are choosing selves who exist prior to ethics, that we can and will either absorb the Other (as oppressors) or be absorbed (as victims). The mask he removes is the illusion that ontological freedom, "the identification of the same, not allowing itself to be alienated by the other", is true freedom rather than a philosophy of injustice (Levinas 1969: 45-46). For ontology pretends not to notice that, while I am drawn to that Face, desiring its absolute otherness in a way that my desire only deepens (Levinas 1969: 33-34), at the same time I am drawn to totalize the Face, to annihilate Otherness into the self-Same. Noonan's theory of the mask, of course, recognizes this instinct to totalize the Other into the Same. What his theory of the masks fails to acknowledge is that the Face of the Other refuses to be contained, it "cannot be comprehended, that is, encompassed", and "remains infinitely transcendent, infinitely foreign" (Levinas 1969: 194, 197). Indeed, I do not bend over the Face in my oppressive power, as Noonan's view of the masks of law would have it. Rather, as Levinas understands, it is the Face that towers over me; the dimension of height opened up displays "the alterity of the Other and of the Most High" (1969: 33-34). More significant than the moment when oppressors recognize that they totalize or mask the Other in the attempt to annihilate otherness is the moment that they concede that the Face towers over them in need. The moment we, the 'powerful', take off our own masks to see this, Levinas argues, we have "time to avoid and forestall the instant of inhumanity" (1969: 35), the moment of totalization of the Other.

On Levinas's account, our ambivalence towards the other, exemplified in the exclusion of the 'vagabond beggar' of the fourteenth century and the welfare family of the twentieth, is a surprising riddle. If the stranger is most clearly the Other, why is it that we, who desire otherness, have refused to see what is clear -- the call of Face of the Other in her need and invitation -- and have refused to extend hospitality to the stranger through the welcome of language? Why would we, century after century, speak the words of diminishment to the stranger, the one who, after all, can make it possible for us to be who we are, in relationship to alterity; unique, and not annihilated into the other?

### **Luther's Mask of God**

Levinas calls upon the Face-to-Face, the encounter with the Other, the Most High. Luther chides those who would seek the Most High:

True Christian divinity... commandeth us not to search out the nature of God, but to know his will set out to us in Christ... There is nothing more dangerous than to wonder with curious speculations in heaven, and thereto search our God in his incomprehensible power, wisdom and majesty... If thou seek thus to comprehend God, and wouldest pacify him without Christ the mediator, making thy works a means between him and thyself, it cannot be but that thou must fall as Lucifer did, and in horrible despair lose God and all together. For as God is in his own nature unmeasurable, incomprehensible, and infinite, so is he to man's nature intolerable (Luther 1909: 43).

If Levinas is right that the welcome of the Face is what makes us at home, makes us who we are, then Luther's answer seems incomprehensible: to be face-to-face with the Most Other would seem to be the ethical moment par excellence, the moment for which we long and strive.

But at least where God was concerned, Luther entertained a very different notion of the encounter than Levinas. In Luther's theology, God comes to us as hidden, as hiding His self. Brian Gerrish suggests the two 'strands' of this theology of hiddenness. Hiddenness is God hiding God's self in revelation, working in a "paradoxical mode" in which God's "wisdom is hidden under folly", God's "strength [is hidden] under abject weakness", his Self in the suffering of Christ (Gerrish 1973: 268). Hiddenness is lifegiving through death, salvation by judgment of damnation, extending righteousness to the unrighteous (Gerrish 1973: 268; Grislis 1967: 82). The second theological strand, on which I would focus, is Luther's reference, as suggested above, to God's hiddenness outside of God's revelation. This

God is, among other things, a wrathful, terrifying, One: "ever an impersonal 'It' of sheer power and energy signified by such metaphors as abyss, chasm, chaos, even horror" (Tracy 1996: 10). This is the God who chooses to direct the will of some toward salvation and others toward damnation (Gerrish 1973: 271-73). Indeed, even in faith, this hidden God is always waiting, dark and threatening, unable to be cabined even by God's own promise in Christ, unable to be understood, or even to be approached without dread. We approach only at the risk of annihilation (Forde 1992: 114, Tracy 1996: 9-10).

As theologian Gerhard Forde explains, God is hidden, lying "in wait for us in our attempts to speak of him", and at the same time, God actively hides His self "and so will not be caught or used by us. God is... 'the absconder', the one who wills not to be seen by us in his 'naked majesty'" (Forde 1992: 114).

In Luther's theology, every living thing is a mask of this hidden and awful God -- every person, every creature. Moreover, Forde claims, our speaking of God through figures of speech, describing him as, for instance, Father or King, is also masking: whether we speak the words given to us, the Our Fathers, or words that we create to name God, we are speaking the law back to ourselves -- in a demand that will tear us apart from Christ (Forde 1992: 114-115). To be sure, Luther in the 'Smalcald Articles' recognizes the law as "a promise and offer of grace and favour", the mask of an inviting God (Russell 1995: 73, 133). But the words naming the Most High, conveying the law of the utterly Other, are not simply welcoming or hospitable or urging as in Levinas' face-to-face. As the utterly Other towers over us, it is also with a demanding wrath. This is not the God who is "just pure love, love, love and nothing but love" (Forde 1992: 115). We are found out in the end. Our shortcomings, our inability to answer the voice of the Other or apprehend His Face, kill us. And so, Forde argues, "it must be our project to get rid of such a God" (1992: 115).

The poor stranger coming to our community similarly approaches us in our ambivalence. People are afraid of the stranger for good reason, for the stranger not only challenges every value and hope on which the community depends, but also presents himself as someone who is not known, not knowable. As a mask of God, the stranger approaches us in invitation and in wrath; we tremble to know whose invitation and whose wrath we encounter.

The stranger is a particularly easy target in our confusion about whom we see, for unlike those needy people with whom we co-exist every day, the stranger comes with no history to help us know what we might expect from him, whether violence or invitation. We have not had the chance to totalize the stranger in the way we have with other needy people we pass by each day on the street, or see in the welfare office. And yet the fact that we select out the stranger for peculiar treatment in residency rules is our lie to ourselves, for those familiar to us mask themselves just as the stranger does; we simply have come to believe that we control the masks, as Noonan would have it, rather than understanding that the stranger has as much control over the masks as we.

Because the mask of God is a metaphor, suggesting that what we see is both like and unlike God, we are never quite sure who and what it is we encounter when we encounter the stranger. We will almost certainly be encountering a mask of the stranger himself, and we fear what the mask conceals. The mask may be a winsome child's or a suffering old woman's, only to be revealed as a scam after we have let down our guard. If the mask compels compassion but the unmasked person is a deceiver, we face the threat of personal violence or of being foolish, the threat of having our lives and our goods taken away by force, or by fraud. And so our welfare programs concoct elaborate rules, including the residency requirement, to ensure that we are not made fools or victims, that cheaters do not take what we have worked for, or what we ourselves and truly desperate others need. Conversely, if the mask engenders the response of revulsion in us -- we encounter a dirty, sullen able-bodied man who seems unwilling to work to live. For example, we may deceive ourselves into turning our backs on the Face of the Other and find ourselves accused by his real need; we may be justly accused of masking his Face with the law, and refusing our own responsibility by masking ourselves in the law. Indeed, we may miss the welcome of the stranger under his mask, the response of the Face to our longing for alterity that Levinas so convincingly describes. To complicate matters further, we may find the stranger hiding from us, refusing to be caught or used by us: the parent who cannot admit that his children are starving because his pride will be demanded as payment for good; the child who pretends vulnerability to manipulate us, or toughness masking a broken life to avoid being labelled by us as pitiful; the woman who pretends naive complacency to avoid being beaten by us or others.

At the same time, Christians as well as others must take seriously that if each person is a mask of God,

the encounter with the Other is an encounter with the hidden God, though how much the encounter reveals about God is not only beyond our knowing but, as Luther suggests, it is beyond our asking. If we ask too many questions, if we pretend to understand too clearly what we are seeing of God when we encounter the Other, Luther tells us that we face the loss of God. For one thing, to pull off the mask is to look into a Face too mighty to be apprehended; as human creatures, we would be terrified to our eternal death. For another, to take off the mask is, as Forde says, to be accused of our shortcomings. Whether it is the need of God or of the Other ("the voice of God's weakness in the suffering of the oppressed of all history" Tracy 1996: 14) that we confront when we unmask the stranger -- a thing we do not know -- we are inescapably incapable of the compassion necessary to behold that Other. Scriptural encounters with God, theologian Edward Schroeder points out, were "not grace-events at all, to say nothing of concluding with any sort of 'happy end'. In such episodes God 'counts trespasses'... and no sinner facing God in such a transaction ever calls it grace" (Schroeder 1993: 28). We also face the reality that we are destined never to know when we face the unmasked Most High and when we simply face another mask; there may be masks "all the way down". To begin to believe that we have unmasked The Most High and we see God truly is to see a mirror mask: a mask which shows us back our own ugly face, our pretension to understand that One who actively escapes, absconds, from our understanding. Such a mirror mask is the firm conviction that our society can ensure fully just outcomes through the ways in which it provides for basic needs, by setting work rules and standard benefit levels and even residency requirements, when history tells us that evil and disorder triumph in the world, even in the bureaucratic world, that the goods of life are not distributed according to strict desert, that "the justice of God is hidden from us" (Gerrish 1973: 280-81).

Finally, of course, there is the possibility that even in the apparently most threatening mask, we encounter the invitation of God, in preparation for God's work in saving us. Luther warned that only by clinging to the Redeemer can we have some assurance we are hearing the invitation of God; for in the Redeemer, God "has bound himself [to be gracious in] his Word and Sacraments", even though God continues to be hidden even in the Christ-revelation (Gerrish 1973: 266-268). But we cannot know that God has bound God's self to be gracious ONLY in Word and Sacraments; indeed, the creation raises the question, though it cannot answer it, whether God keeps God's self free for other encounters of grace, even among those who do not confess (Schroeder 1993: 28-29; Tracy 1996: 10). Thus, the encounter with the Other may -- just may -- be the invitation of God as well, albeit an invitation conveyed to us only indirectly through the apparently threatening stranger. If we mistake this invitation for a threat, we are undone.

If the Other is a mask of God, portending perhaps both the stranger's impending violence and welcome, as well as possibly serving to convey, obliquely, both the wrath and the invitation of the Most High, then our ethical response to the Other becomes difficult. What seems impossible is to mask the stranger in the masks we know to be fictions of our own fears, the danger Noonan warns about. We cannot simply imagine everyone who comes into 'our' country or town or state, for instance, as bringing drugs, violence, laziness and disorder to our community, and thus actively discourage them with a blanket rule refusing them necessary aid. Such masks, as Noonan points out, are the worst form of self-justification, for they permit us to claim that we are not responsible for the Other in his need. Beyond this clearly unethical form of the mask, however, we face risk; for we cannot know which mask hides the threatening stranger and which the welcoming or needing one, which hides the wrath of God and which is God's invitation. At the least, some risk-taking in the administration of welfare is required, risk-taking that admits that the stranger is not a set of behaviours that can be cabined nor re-formed through law. Indeed, the stranger cannot be understood in "common sense" legal categories; what seems required is a regulatory scheme that recognizes the possibility that we are being welcomed by the other, not simply assuming that he is out to defeat or defraud us. Yet, to take risks of this kind throws us back on the deepest fears and longings we have as human beings, rather than helping us escape them. But the fear is preferable to mistaking the invitation, for who we are -- ethical persons -- is inescapably bound up in our response to the Other.

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## Footnotes

1 42 U.S.C. s 604 (c) 1998.

2 The original Social Security Act passed in 1934 permitted, but did not require, states to deny Aid to Families with Dependent Children (AFDC) benefits, and thus related benefits such as Medicaid, to those who had not been residents of the state for at least a year. This provision was designed to ensure that states concerned about burgeoning welfare populations would not unnecessarily restrict the influx of poor people. See *Shapiro v. Thompson* (1968), 394 U.S. 618, 634-40.

3 *Maldonado v. Houston* (3d Cir. 1998) 157 F.3d 179, 183. In most states, American welfare benefits also include food vouchers called Food Stamps based on income level and medical benefits, which are paid directly to providers for services provided. The Maldonados' qualified for \$ 720 in Food Stamps as well as a one-time grant of \$ 213 to defray job-search expenses but both were certified as temporarily unable to work so this amount was returned to the government.

4 *Roe v. Anderson* (E.D. Ca. 1997), 966 F. Supp. 977, aff'd 134 F. 3d 1400 (9th Cir. 1998), cert. granted, U.S., 119 S.Ct. 31 (1998).

5 The United States Supreme Court has bolstered this trend by steady assaults on state laws that burden interstate movement, through the Commerce Clause, art. I, section 8, granting Congress the power to regulate interstate traffic, along with the so-called "dormant commerce clause", a principle of construction that state laws that burden interstate movement are unconstitutional even where Congress has not spoken. While *United States v. Lopez* (1995), 514 U.S. 549 broke sixty years of precedent upholding Congressional power to invalidate state laws that barely touched commerce, the Court's Commerce Clause jurisprudence, along with that under the Privileges and Immunities Clause, Article IV, sec. 2, has been a juggernaut for erasing barriers to free movement.

6 394 U.S. (1969) 618, 638. A central moral holding of *Shapiro* is that states may not constitutionally try to fence out indigents, the rule the Supreme Court first announced in *Edwards v. California* (1941), 314 U.S. 160, which made it criminal for people without means of support from entering California during the

Great Depression. As the Court suggests, since states do not deter or penalize the non-poor who may also migrate to new states in search of better public services or more congenial communities, they may not punish or stop the poor who move from state to state for these same reasons.

7 The federal statute enacting PRWORA gives ostensible permission for states to utilize a two-level benefit standard for newcomers, thus reinstating a durational residency requirement, so long as the floor from the previous state is met and the two-level standard lasts for only one year. 42 U.S.C. s 604(c). States reintroducing this requirement have argued that PRWORA has introduced a whole new welfare scheme to the U.S., in which welfare discretion and responsibility has "devolved" to the states rather than being highly regulated by the federal government and Congress, as in the past. Under this state-focussed scheme, Congress's permission is sufficient legal authorization for their rules. However, as most courts have noted, the argument that Congress gave approval to residency requirements was met by the Supreme Court in *Shapiro* with the declaration that "Congress cannot authorize the states to violate the [Constitution's] Equal Protection Clause" (*Shapiro*, 397 at 641).

8 In England, for example, the first statute to regulate the provision of poor relief, in 1531, provided that the new class of wandering poor, the "beggars and vagabonds," created by dislocation of tenant farmers and the disappearance of medieval occupations, should be sought out, and any person begging who was not aged or "impotent" should be imprisoned (Quigley 1996: 92-93). Similarly, when Lyons, France experienced an influx of "beggars and vagrants" due to the dislocation of agricultural workers to the city and attendant fears of disorder, city fathers established a charitable administration that provided relief tickets for local poor, and gave foreigners a night's lodging before they were sent away (Riven & Cloward 1971: 9-11). Spain similarly instituted poor laws in 1534 prohibiting the "undeserving" poor from begging and providing that they should be sent to "houses of charity" (Backer 1997: 44-45).

9 Whilst such an argument may have some plausibility with respect to international immigration, it has almost none for interstate migration: the number of destitute people moving from state to state is too small, and their behaviours too hard to distinguish from those of local residents. Moreover, some states that have instituted these rules are sitting on unprecedented economic wealth. For instance, the state of Minnesota, which has twice attempted to implement this rule since 1994, only to be prevented by the courts, has had a \$ 6 billion budget surplus projection during the last four years. A second explanation some people will give but no one can prove is racial: the underground word in at least state where whites are in a large majority is that the requirements will keep minorities from more violent communities from bringing their problems to the "safer" state.

10 In this view, residency requirements would be a natural social parallel to federal devolution: as citizens have become increasingly disillusioned with the ineffectiveness and waste of large federal programs, devolution encourage people to naturally start identifying with their local communities instead of their federal neighbours.

11 See also Backer 1997: 31 (describing the Spanish monk Fra Domingo de Soto's argument "the natural law of hospitality is best exercised on the poor beggars of another land, and the spiritual rewards for giving to them shall surely be all the greater").

12 Noonan distinguished this use of mask from the notion of disguise by which one conceals one's inner psyche from the world on a daily basis, not putting the person's humanity aside, or roles, which all of us necessarily play as a way to work in the world in security and with ease of performance.