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# The Priority of Persons Revisited

John Finnis\*

**Abstract:** This essay, in the context of a conference on justice, reviews and reaffirms the main theses of “The Priority of Persons” (2000), and supplements them with the benefit of hindsight in six theses. The wrongness of *Roe v. Wade* goes wider than was indicated. The secularist scientific or naturalist dimension of the reigning contemporary ideology is inconsistent with the spiritual reality manifested in every word or gesture of its proponents. The temporal continuity of the existence of human persons and their communities is highly significant for the common good, which is the point and measure of social justice, properly understood. Forms of injustice that are more or less independent of this temporal dimension are nonetheless important. The nation and its lasting are neglected in much of the social-political theory assumed by contemporary legal theory. So too is the family and the “covenant” between its generations, a neglect that opens the door to euthanasia.

**Keywords:** Person, Justice, Common Good

*Oxford Essays in Jurisprudence, Fourth Series*, published in the millennial year, began with “The Priority of Persons,”<sup>1</sup> and I gave the essay similar priority in *Intention and Identity*, volume II of my *Collected Essays* (2011).<sup>2</sup> The “priority” of the essay’s title was, first, the priority of status and importance—persons are the most important part of law’s concerns and law’s nature—and second, the priority of the past as preceding the present.

That chronological priority of the past has more than one aspect. Past legal thought may be superior to present, by recognizing more plainly that priority of importance; Roman legal thought, even in its pre-Christian classical forms—and certainly in its definitive, semi-codified form, settled long ago by Christian jurists under the emperor Justinian in the early sixth century—was superior to most present-day legal theory by its explicit recognition that persons are the point of law. Again, what *makes* law and rules of law is the *past* acts of persons who acted, legislatively or judicially, to lay down law, by acts which referred forward to the

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<sup>1</sup> John Finnis, “The Priority of Persons,” *Oxford Essays in Jurisprudence: Fourth Series*, ed. Jeremy Horder (Oxford: Oxford University Press, 2000), 1-15.

<sup>2</sup> John Finnis, *Intention and Identity, Collected Essays: Volume II* (Oxford: Oxford University Press, 2011), 19-35. Subsequent references to this essay are given parenthetically in the text.

future which includes both *our* present and the future that we can make better and fairer for ourselves or our successors by deploying the rules resulting from those acts. Talking about the “existence” of rules, an existence that philosophers of law find challenging to explain, is in fact talking about a relationship between persons: some are persons now in the past, some are in the future, to be benefited, and some are us in the present, deliberating about how to make decisions that keep faith with the relevant past persons and have due care for the relevant future persons.

## I

“The Priority of Persons” showed in detail how the refusal by Hans Kelsen, the twentieth century’s greatest legal theorist, to allow persons any place in his legal theory save as the subjects of legal duties encouraged New York’s Court of Appeals to hold—in a judgment silently quoted six months later by Justice Blackmun in *Roe v. Wade*—that whether human beings of a certain sort are in law *persons* is a mere question of policy, quite outside the competence of courts and legal reasoning. The judgment was in *Byrn v. New York City Health and Hospitals*.<sup>3</sup> Byrn was a Fordham law professor who was doing what he could to slow the advance of legalized abortion, before the *Roe* Court swept away all impediments in a maelstrom of historical falsifications, broken-backed logic, and blatant special pleading.

In my essay I coupled both the *Byrn* judgment and the *Roe* judgment with *Dred Scott v. Sandford*: all three are cases where the judges professed themselves helpless in the face of a just, law-based argument by or on behalf of real human beings. These judges asserted, in each case, that the law’s own theory of persons and legal personality—of who counts as a person—prevented those arguments about unjust and unlawful treatment from having any purchase in judicial reasoning. The court in *Dred Scott* was persuaded (or professed to be persuaded) by “the attitude of the founders” that black Africans can never be constitutionally made US citizens; the court in *Byrn* was professedly persuaded by Hans Kelsen—and the court in *Roe* professedly by the inapplicability to the unborn of some of the 14<sup>th</sup> Amendment’s references to persons—that the unborn cannot be constitutional persons even though corporations *are* (by judicial fiat)<sup>4</sup> despite the inapplicability to corporations of some of the 14<sup>th</sup> Amendment’s references to persons. In each of these cases the court should have thought, like the Romans, that law is for the sake of persons. It should, therefore, have judged that, prior to all legislation and prior even to constitutional text, we and our courts ought to have a realistic and just account of what persons are and who are persons, and ought then to interpret legal and constitutional provisions so as to align them as far as possible with that just and realistic juridical, juristic, legal account and principle. After all, the world

<sup>3</sup> 286 NE 2d 887 (1972).

<sup>4</sup> *Santa Clara Co v. Southern Pacific Railroad*, 118 US 394 (1886). At the time, the Court was doubtless looking through the corporation to its shareholders and their constitutional rights as natural persons, but by 1910 the Court ceased to do this, and attributed constitutional rights to corporations precisely as real entities in themselves: see Morton J. Horwitz, “*Santa Clara* Revisited: The Development of Corporate Theory,” *West Virginia Law Review* 88 (1985): 178, 182, 189.

community, reflecting on the disaster of the Nazi years, came up in 1948 with a Universal Declaration of Human Rights that silently quotes the Roman lawyers' saying, at the beginning of Justinian's *Digest*, that by nature all human beings are born free—meaning free and equal in dignity and rights. That saying comes only a few sentences away from the *Digest*'s definition of justice itself: the firm and lasting willingness to give to all others their right(s). Here the "all others" is quite open-ended, and implicitly extends naturally to all human beings.

Interpretation of the sort that ought to have occurred in *Dred Scott*, and *Byrn*, and *Roe*, and *Planned Parenthood v. Casey*, is a matter of basic openness to justice and to those who are by nature entitled to equal justice. There is interpretation of another sort: it is a matter of understanding, not so much words, or a language, as *people*, people who are using (or did in the past use) words in statements meant by them (those same people) to convey a meaning, a proposition, they wanted to convey. It is a matter of understanding persons in one of the very most personal of activities, intending and communicating. And the essay concluded:

What, then, are the 'natural facts' which should inform juristic thought about the persons whom law exists to serve? What is this human nature, which in its bodiliness is known to lawyers as injured in crimes and torts, and sustained by the resources always somehow disposed of in property rights (howsoever artificial); and which in its irreducible intellectuality is known to us as the maker of signs, signatures, and meanings, and subject of intentions? (33)

The essay suggested a strategy for answering those questions: reflective attention to a lawyerly human activity:

In the act of, say, speaking to my partner in discourse—perhaps, the court I am addressing as advocate, or the client I am advising as jurisconsult—I understand my utterance as the carrying out of a choice *which I made*, and in the same act I am aware of my audible uttering, see the hearers register their comprehension, feel, say, confidence or anxiety, remember a past misunderstanding, and hope my statement will make my point. This experience and understanding of the *unity (including continuity)* of my being—as a feeling, willing, observing, remembering, understanding, physically active, and effective mover or cause of physical effects and equally [simultaneously] an under-goer and recipient of such effects—is a datum which philosophical exploration of human and other natural realities can account for adequately only with great difficulty and many a pitfall. Still, prior to all accounts of it, this intelligible presence of my many-faceted acting self to myself is a datum of *understanding*; one and the same I—this human being—who am understanding and choosing and carrying out my choice and sensing, etc., is a reality I already truly understand, albeit not yet fully (explanatorily, with elaboration). (Indeed, it is only given this primary understanding of one's understanding, willing, and so forth, that one can and typically does *value* such understanding, freedom, voluntariness, unity of being, and so forth.) (33–34)

This reflective strategy goes back perhaps to Aristotle and certainly to Aquinas, who argues explicitly<sup>5</sup> that (in my words) any account proposing to explain these realities—

<sup>5</sup> See Aquinas, *De Unitate Intellectus*, III.3 [79]; John Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford: Oxford University Press, 1998), 177–9.

must be consistent with the complex data it seeks to explain, data which include the proposer's performance, outward and inward, in proposing it. It will not do to propose (as many today propose) an account of personhood such that spirit-person and mere living body are other and other, for 'spirit-person' and 'mere living body' are philosophical constructs neither of which refers to the unified self, the person who had set out to explain his or her own reality. Both of these constructs purport to refer to realities which are other than the unified self yet somehow, inexplicably, related to it. (34)

Like my earlier discussion of these issues in my *Aquinas*, the 2000 essay argued that—

The only account which meets the condition of consistency with the explainer's own reality and performances will be an account along the lines argued for by Aristotle and Aquinas: the very *form* and lifelong *act(uality)* by which the matter of my bodily make-up is constituted the unified and active subject (me myself) is a factor, a reality, which Aristotle (after Plato) calls *psychē* and Aquinas calls soul (*anima*). In the human animal... from the very outset of his or her existence as human, it is this one essentially unchanging factor, unique to each individual, which explains (a) the unity and complexity of the individual's activities, (b) the dynamic unity in complexity—in one dimension, the programme—of the individual's growth as embryo, fetus, neonate, infant... and adult, (c) the relatively mature individual's understanding of universal (for example generic) immaterial objects of thought (for example classes of entities, or truth and falsity of propositions, or soundness/unsoundness in reasoning), and (d) this unique individual's generic unity with every other member of the species. In members of our species the one factor unifying and activating the living reality of each individual is at once vegetative, animal (sentient and self-locomotive), and intellectual (understanding, self-understanding, and, even in thinking, self-determining by judging and choosing). (34-35)

Of course, as the essay pointed out, the manifold activations of these bodily and rational powers are variously dependent upon the physical maturity and health of the individual.

But the essence and powers of the soul seem to be given to each individual complete (as wholly undeveloped, *radical* capacities) at the outset of his or her existence as such. And this is the root of the dignity we all have as human beings. Without it claims of equality of right would be untenable in face of the many ways in which people are unequal.

This metaphysics of the activity of discourse, advocacy, adjudication, lecturing, and writing enables jurisprudence to stabilize its most fundamental concepts: the good which, because it is the good of members of a group who all are persons, can and should be a *common* good; and the rights which justice essentially consists in respecting and promoting unyieldingly. (35)<sup>6</sup>

<sup>6</sup> Those were the 2000 essay's final words. They mentioned membership "of a group" because the essay had a topic besides true persons: legal "personality." As mentioned above, n4, the Supreme Court in 1886 extended 14<sup>th</sup> Amendment protection to corporations, holding them to be persons and refusing to explain, even in a single sentence, why they should be so regarded. The essay glanced at an old chestnut, the favorite law school topic—In what ways are corporations legal persons, subjects of legal rights, deemed to enjoy "legal personality"?—a phrase that hovers between the two historic sources of the word "person": *persona* as mask—to which corresponds the law's carefree attribution of legal personality to anything that figures as subject (topic) of legal relations (say, 44

Those, in bare outline, were some salient elements of my thought about persons a baker's dozen years ago. Without subtracting any of those, I would today add another six themes, theses, or thoughts.

## II

I soon realized that I had been too easy-going in alluding to the position of the Supreme Court. So in the long essay on Natural Law theory for the *Oxford Handbook of Legal Philosophy* in 2002 (an essay which in my *Collected Essays* I call "A Grand Tour of Legal Theory") I said:

Since law and legal thought are entitled to little respect or consideration unless they serve, or can be brought to serve, every person whom they could benefit, all the basic human rights should be regarded as controlling every otherwise open question of interpretation. The basic error of the US Supreme Court in *Dred Scott v Sandford* was to approach the interpretation of the Constitution's provision, for example, in relation to the congressional power of naturalization, without a strong presumption that, whatever the assumptions and expectations of its makers, every constitutional provision must, if possible, be understood as consistent with such basic human rights as to recognition as a legal person. An essentially identical error is made by those judges, such as Justice Scalia, who interpret the Fourteenth Amendment's unelaborated references to 'persons' as permitting [state legislatures or electorates] to treat as non-persons and to authorize the killing, or the enslavement (in embryo banks), of the unborn, whom these same judges know to be in reality human persons.<sup>7</sup>

Gerard Bradley has shown how the law as it has developed in most US states, in healthy reaction to *Roe*, denies Equal Protection of the Law to those persons who are convicted of offences of homicide or child destruction committed against an unborn child by way of conduct that is substantially identical to the kind of conduct by mothers and their agents that *Roe* and *Casey* declare to be incapable

barrels of rum at New York's harborside, or an idol in a temple in old British India)—and on the other hand *persona* as "individual substance of a rational nature" (as Boethius defined it early in the same most fruitful decade that closed with Justinian's corpus of Roman law). But that academic lawyers' topic is in truth less interesting, I suggested, than the question alive in the more open fields and horizons of social theory: Are groups real? Do they act? Or is the case that any group can act only by and through the acts of its constituent members? The essay's answer was:

A human group or community has all the reality of group action, as well as of the group's members'—human persons'—acts and dispositions to act, dispositions which are manifested in the members' readiness to participate in, and emotional responsiveness to, the group's action, for the sake of the good(s) which give(s) point to that action. That is to say, the reality of a group is the reality of an order of human, truly personal acts, an order brought into being and maintained by the choices (and dispositions to choose, and respons[iveness]s to choices) of persons. A group's act is defined by . . . the form in which it is proposed to members of the group, for them to participate in or not. Social acts, though irreducible to the acts of people in the acting group, are constituted exclusively by those acts—acts of individual human persons (30-31).

<sup>7</sup> *Philosophy of Law, Collected Essays: Volume IV* (Oxford: Oxford University Press, 2011), 153.

of being made a crime when done by *them*.<sup>8</sup> In some cases, these mothers would be entitled to the legal (and I think moral) justification of their conduct as self-defense against a threat of death or very serious bodily harm. But *Roe* and *Casey* hold that they need never even plead such a justification—that is, that their conduct in aborting and killing the unborn child cannot be subjected to any requirement that it be justified or defended at all in legal proceedings. Justices who recognize the constitutional-doctrinal falsity of *Roe* and *Casey* can (I suggest) no longer treat the issue as one of states' rights, but must in reason recognize that the Fourteenth Amendment's requirement—that no state “deny to any person within its jurisdiction the equal protection of the laws”—is a requirement the content of which is determined by the truth about persons.

Making this argument would or will not be the easiest task an advocate, jurist or Justice could face. But it is doable. Think 1868: If told that the proposed Fourteenth Amendment would have the constitutional effect of protecting not only former slaves and their descendants but also unborn children, there is scant reason to judge that the requisite majorities for ratification in 1868 would have fallen away. In that year the Supreme Court of Iowa declared<sup>9</sup> that:

The common law is distinguished, and is to be commended, for its all-embracing and salutary solicitude for the sacredness of human life and the personal safety of every human being. This protecting, paternal care, . . . not only extends to persons actually born, but, for some purposes, to infants *in ventre sa mere*. 1 Black. Com. 129. The common law stands as a general guardian holding its aegis to protect the life of all.

On less originalist criteria of constitutional interpretation and development, the Amendment's phrase “any person” should be taken, and should have been taken, as including the unborn child, for the purposes of those (and only those) protections relevant to, and reasonable in light of, its condition, on a footing of fair equality (and no more than that) of right to life with its mother<sup>10</sup>—*a fortiori*, by criteria of interpretation sufficiently accommodating to make possible the attribution of unarticulated constitutional rights in *Griswold v. Connecticut*, *Eisenstadt v. Baird*,<sup>11</sup> and *Lawrence v. Texas*, not to mention *Roe v. Wade* itself and many other less dubious developments of constitutional doctrine. The legitimate interpretative development in relation to “any person” should have occurred as soon as the issue was squarely raised. Robert Byrn raised it squarely enough, when New York began to lead the nation towards a relaxed abortion law. His arguments received no fair hearing, not least by the *Roe* Court, in Justice Blackmun's lazy

<sup>8</sup> Gerard V. Bradley, “Constitutional and Other Persons,” in *Reason, Morality, and Law: The Philosophy of John Finnis*, ed. John Keown and Robert P. George (Oxford: Oxford University Press, 2013), 247-68. See also my reflections on it, *ibid.*, 528-31.

<sup>9</sup> *State v. Moore*, 25 Iowa 128, 135-6 (1868).

<sup>10</sup> On the fragility of the reasons adduced in *Roe v. Wade* for denying the constitutional status of “person” to the unborn, see Finnis, *Reason in Action, Collected Essays: Volume I* (Oxford: Oxford University Press, 2011), 268-9, 275-6n; “Priority of Persons,” 27-8.

<sup>11</sup> On the illegitimacy of the interpretative neutrality between good and evil in *Eisenstadt* and *Planned Parenthood v. Casey*, see Finnis, *Religion and Public Reason, Collected Essays: Volume V* (Oxford: Oxford University Press, 2011), essay 3 (“Secularism's Practical Meaning” [1997]) at 70-1.

majority opinion. Bradley's new discussion shows how the law is now squarely at odds with itself; having broken free from the old categories such as "inducing a miscarriage" or "terminating pregnancy," typical state laws, regularly upheld in the courts, look (despite *Roe*) to "destruction of the life of the unborn child." The conservative Justices' willingness to turn a blind eye to all this cannot reasonably be sustained. Their basic view of abortion and the Constitution is that the Constitution says nothing about and thus has nothing to do with abortion. But this stance ignores altogether the import of these many feticide laws, and the entailments of them for the Constitution's express guarantee of "equal protection" of the laws to any and all "person[s]."

### III

The *Roe* majority, and all those succeeding jurists who have shared their devotion to liberalized abortion laws, have showed themselves to be concerned with results, not doctrine or sound, coherent reasoning. The secular liberalism that entirely dominates the modern state, most politicians in both parties, the educational system in all its state or public and most of its private forms, and almost the entire mainstream media, is strongly reminiscent of the two-truths theory, often called Latin Averroism, that Thomas Aquinas hurried back to Paris in 1268 to combat, and did combat with zeal and efficacy. There in the University of Paris, leading professors were teaching as if, or insinuating that, there can be two truths: those propositions taught by Catholic faith and the contrary propositions taught and proved by philosophy, in particular the cutting-edge philosophy of the newly rediscovered Aristotle (as they read him).

George Orwell's indispensable word "doublethink" captures this sort of talk as the intellectual corruption and blindness to reality that it is. The modern equivalent is more widely taught: there is nothing real but matter, nothing of real, fundamental order but chance, nothing free in choosing, and nothing really good but what I freely choose—yet people truly are entitled to the real good of autonomy and equality of rights. But we can see through this web of error and doublethink, by noticing even the simplest of our signs or pointers—say, to take Elizabeth Anscombe's example, the act of pointing to some figure to distinguish its shape from its color (perhaps, to compare, analogize, the figure's shape with Bunker Hill on old Boston Harbor and the color with the red coats of the redcoats struggling up it). Or take again the act of *attending to* the pointer to understand the precise point being made, by the pointing, about the figure and then perhaps about the comparison or analogy. Both pointing and attending are intentional acts whose intended objects are spiritual, in two ways: they are (i) intelligibilities (shape and color, as concepts; and as elements in analogies; and as what the person pointing intended and meant); and are (ii) the communicating of these to an audience. Even so simple an exemplary situation gives us a way of grasping the kind of radically trans-material, spiritual objects of human action. And thus of grasping human capacities, and thus of understanding something of what it is to have a human and personal nature.



Acts of meaning (say pointing, or poetic composition, or rigorous scientific reflection), like other intentional acts (say resolving to act fairly, or betraying, promising, or rescuing), are understood by those who choose to do them, and by intelligent participants and observers, as actions of an individual, a responsible person, author of and answerable for his or her conduct. Even when they are successful deceptions (though in that case in an extended sense), they express the person, someone whose complete, nonfungible distinctness from other human persons the human baby begins to be aware of, and soon enough to understand, as the baby locks onto and follows eyes and begins to learn to read them, that is to make inferences from them as if they were windows of the soul—intentionality, emotionality, sensitivity—of the person whose eyes they are. To that person, his or her *own* individuality, responsibility (authorship), and subsisting identity are vastly more transparent. At the same time, the fact that other persons have the same kind of—and therefore thoroughly particular, non-replicably individual—*identity*, transparent-to-self and partially self-shaped, is a fact as indubitable as if it were transparent rather than inferred. Despite their difference, each of these logically distinct kinds of knowledge of the person fits easily within our idea of the experienced and perceived.

Together these ways of knowing oneself and others as not only intelligible but also intelligent, not only active but each a doer and maker, provide the stable *factual* element presupposed by the practical, normative standards of reasonableness in action, standards centering on “Do to others as you would wish them to do to you, and don’t do to them . . .” Such norms or principles, being about what is needed to instantiate the good of being reasonable and the good of friendship, are not inferred from their factual foundation. Rather, they take the facts as the matrix, so to speak, for the practical insight they articulate: that a way of relating personally and humanely to other persons is not only factually possible but also *desirable*, intelligent, and in itself incalculably superior to alternative ways of relating (such as sadistic harm-doing, or indifference to the baby lying abandoned in the snow alongside one’s path). So those principles’ “being about what is needed to instantiate the good of being reasonable . . . , etc.” turns out to mean: their being about what is needed to be a person who respects other persons, for their own sake, and sees the need to give to each of them their due, and indeed to (in ways involving all manner of prioritization and nothing merely sentimental) love—will the good of—these neighbors as oneself.

These goods are not mere abstractions, still less the sort of willful fictions or projections that secularist relativism and doublethink claims they are. They are states of affairs such as my coming to understand something that had puzzled me, and knowing something of which I was ignorant—the benefit of being informed rather than ignorant, healthy rather than ill or disabled, alive rather than dead, living in friendship rather than hatred . . . . In every case one understands these goods as good for me and anyone like me. The at first indefinite extensional and intensional reference of “anyone like me” is clarified, in reflection, as: “any human person.”

For: reflection on the continuity of one’s identity and life—through sleep, through traumatic unconsciousness, through the unrememberable eventfulness

of one's infant life, through one's life in the womb and, as it may be, one's future life in senility and dementia (Shakespeare's "second childishness")—makes evident that what is valuable for oneself is valuable and significant in a qualitatively similar way for any being with the same kind of capacities as oneself. For all of us, those dynamic capacities were once only radical, and then by maturation and good health became active capacities, ready for immediate actualization in actions made intelligible by their objects—mostly intended objects of the kinds I recalled just now in exemplary form. So it is the sharing in radical dynamic capacities that is the basic unity of the human race or species and, by virtue of the true goodness and directiveness of the basic human goods, is the ground and foundation of the human rights which are specific objects of that directiveness in its interpersonal implications. What is fundamentally good (and bad) for me is fundamentally good (and bad) for you.

One's identity (as a person with interests that are truly intelligible goods) goes all the way back to one's beginning as a pre-implantation embryo with the radical capacities whose ultimate objects, those same intelligible goods, one now participates in and deliberately intends. That identity is the ontological foundation of one's human rights, because it is the foundation of one's judgment that "I matter" and of one's duties to respect and promote one's own good, and therefore of one's judgment that "others matter" and of one's duties to other persons to respect and promote their good, the duties we call the content of justice. For they too, those persons, similarly have such identities (all the way back, and all the way forward to the end of their lifetimes), such radical capacities, and intelligible forms of flourishing (and harm) of just the same kind as one's own. Just as immaturity and impairment do not, in one's own existence, extinguish the radical capacities dynamically oriented towards self-development and healing, so they do not in the lives of other human persons. *There*, again, is the ontological unity of the human race, and the radical equality of human persons which, taken with the truths about basic human goods, grounds the duties whose correlatives are human rights—duties to, responsibilities for, persons. Duties, that is to say, of justice.

Where these duties are negative duties of respect—duties not to intentionally damage or destroy persons in basic aspects of their flourishing—they can be unconditional and exceptionless: "absolute rights." Where they are affirmative responsibilities to promote well-being, they must inevitably be conditional, relative, defeasible, and prioritized by rational criteria of responsibility such as parenthood, promise, inter-dependence, compensation and restitution, and so forth. Such criteria of priority in responsibility, in combination with other conditions of securing common good, are in play in shaping the reasonable specification of the obligations of membership in one or other of the communities, political and non-political of which one is non-voluntarily or voluntarily a member. And many such obligations are correlative to rights. Thus, for example, the obligations of parents to their children are correlative to rights of those children to support, nurture, education, protection, and so forth, rights which in their basic aspects, at least, can reasonably be called human. (On gross parental default, such obligations pass to surrogates specified by or under law, against whom the

rights avail thereafter.) I shall say a word more about such obligations in a few minutes.

Understood as grounded in the truths about human make-up and wellbeing that I have been briefly recalling, human rights and the justice of respecting them are vindicated against general moral skepticism, against the scientistic materialist or “naturalist” half of secular liberal ideology, and against the charge of speciesism. For they are predicated of all human persons not as members of the class “our race/species,” nor out of an emotional or arbitrary sympathy of like with like, but as beings *each and all* of whom have the dignity of having the at least radical capacity of participating in the human goods that are picked out in practical reason’s first principles (first and foremost the good of human existence/life) and that make sense of all human intending. For *dignity*, to repeat, denotes a rank of being, and all beings of this rank have the worth that we reasonably predicate of beings and ways of being that participate (even if only radically) in those intelligible goods, participate in them (even the bodily and earthy goods) in the remarkable way I earlier called spiritual, and so when flourishing maturely participate in them intentionally and with intent that others of the same rank share such participation and flourishing. And the “each” and “all” in the preceding sentences demarcate the sense in which we all are basically equal and entitled to the concern and respect appropriate for human persons, and to the substantive human rights applicable to our state of maturity, health, and activated capacities. Differences of innate intelligence and aptitude that are properly relevant to the distribution of educational opportunities (say, amongst one’s own children), and of occupational responsibilities, are differences quite irrelevant to this dignity of the human over all that is subhuman, and to the human rights to equal concern and respect, life, and so forth.

One of the realities of personhood, and of the truths about justice, that is often underplayed or overlooked is time, continuity, the past that this moment will so soon belong to, as will the minutes still in the future of this address and our conference and our own lives. This aspect provides the remaining four additional themes.

#### IV

One’s direct, unmediated, non-inferential knowledge of oneself is of what one experiences as happening to one corporeally (which includes psychologically) *and* of what one is *doing* or actively inclined to do, whether spontaneously or compulsively, or by one’s free choices. And one knows oneself as a being *extended in time*, who can decide to respond to a question with reflective search for an answer, discover what seems to be the answer, communicate it to the questioner, and when it has been communicated know that the question was given a relevant answer—know that I who heard the question also found and gave an answer, and know whether it is or is not the same answer as I gave or would have given when I first came across a question of that content in another context 55 years ago. Time and the passing of human existence in time is a necessary condition for all my

opportunities of commitment and achievement, for all the perils of deflating failure, discredit, and humiliation, and for the truth and dignity of gratitude.

The experience of all this is made possible, of course, only by memory, prime witness and testimony to one's personal identity. But we should not be impressed by thought-experiments such as those that tempted John Locke and his followers to take memory, "*consciousness* of the past," to be not merely a witness and testimony to one's subsisting personal identity but its very reality, that in which that identity consists. Such an account of one's subsisting identity as one and the same human being would defy our most elementary knowledge of ourselves and others as beings who subsist and who can and must acknowledge our authorship of our own acts notwithstanding decay or loss of memories.

Perhaps surprisingly, our reflections about the relevance of time can be helped forward by noticing something about the idea of justice expressed by the term "social justice" as introduced into the magisterial teaching of the Catholic Church in Pius XI's encyclical *Quadragesimo Anno* (1931). The term had entered French, Italian and English discourse in the half-century after 1830, with something like its elusive modern secular meaning. Pius XI's use of the phrase gives us a main part, at least, of its useful meaning. His encyclical says that "the law of social justice" is "that the common good of all society be kept inviolate."<sup>12</sup> And the document articulates this principle in the context of the institution of property: that institution is for a purpose, the common good (or advantage) of all; and not every distribution of private property rights is compatible with that purpose. Claims that the sole just title to ownership is labor are as contrary to social justice as claims by the wealthy to retain all the fruits of their ownership without distributing any of it to workers. Again (sec. 71), "social justice demands that changes be introduced as soon as possible whereby every adult workingman will be assured of a wage large enough to meet ordinary family needs adequately."<sup>13</sup> More generally, social justice demands (sec. 74) that wages be "so managed by agreement of plans and wills" that they are set neither too high (thereby causing unemployment and consequent social disorder) nor too low to provide adequate means of livelihood, measured by the needs of a family. And looking at the economic system as a whole, the encyclical says (sec. 88) that social justice calls for control of monopolies and cartels that displace free competition—a competition which itself needs to be kept within certain limits by public authority. Capital (the class of owners) violates social justice (and the common good, and the dignity of workers) when it controls the non-owning working class, and the whole economic system, to its own will and advantage rather than the common good (sec. 101).

<sup>12</sup> Sec. 57; similarly, sec. 110 says that the "norm of social justice" is "the needs of the common good."

<sup>13</sup> Modern readers are often repelled by same paragraph's statement: "For it is an intolerable abuse . . . that mothers are forced, on account of the father's low wage, to engage in gainful employment outside the home to the neglect of their proper cares and responsibilities, especially the upbringing of children." But taken with all its terms, "forced," "to the neglect," etc., this should be judged sound, today as in 1931.

What is common to these uses of the term “social justice” is that they concern, not—or not directly and primarily—the distribution of some common stock, but the impact and side effects of relationships which are (at least primarily) between private individuals or entities, such as relationships of employment, or of spouses and children. We need a concept of social justice to supplement the Aristotelian categories of distributive and corrective or compensatory or (more broadly) commutative justice, because we cannot adequately gauge the requirements of justice without asking how some distribution or measure of compensation, or some imposition or recognition of duties of care or performance, is likely to affect the common good of one’s society.

And that common good cannot reasonably be assessed without full attention to one’s society’s extension through time—the time of its past in which undertakings and contributions were made, wages were earned, crimes and negligence were committed and suffered, children were conceived, commitments were entered into, and so forth.

## V

Of course, some sorts of injustice are done (and can be understood) *without* reference to the past. To take a couple of obvious examples: there is the grave injustice done to those children who come-to-be through processes of multi-variant “parenting” of the kind promoted by any social institution of “same-sex marriage”: children who have *some* father, *some* egg-donor mother, *some* gestation mother, and after birth *some* adoptive father. This injustice is a deplorable extension of the injustice intrinsic to every generation of a human child—conceptus or embryo—by IVF. For every form of IVF involves a choice that, precisely as a choice, reduces the child at the time of its conception to the status of a product and thus to a fundamental subordination to its makers—a radical inequality manifested by the all but universal practice of submitting all such embryos to scrutiny to decide whether they shall live or shall be consigned to death because in some way defective or of the wrong sex or other characteristics, or simply because surplus to current requirements or needed as an organ bank.

The assault on social justice entailed by the epochal disconnect between sexual intercourse and procreation which is characteristic of our age goes further. One of its most important elements obtains wherever same-sex relationships are held out by a society and its laws as marriages, that is, as publicly and privately approvable. For: approval of the pseudo-marital sex acts of same-sex couples, *or of any of the many kinds of non-marital sex act*, entails a kind of conditional willingness to engage in sexual activity in a way that is in truth non-marital, that is, in a way that does not allow the parties to the act to thereby actualize, express and experience their marriage as a committed, permanent, exclusive friendship open to procreation. Such willingness, while it endures, is incompatible with genuinely marital acts, and thus wounds the marriage of those couples one or both of whom has such a willingness, however remote and conditional. And such a wound is not

only an injustice to the other spouse, and to the children impaired by consequently limping or failed marriages and to those later injured by those children. It also is contrary to social justice in the additional and fundamental respect that it makes vanishingly unlikely the sustainability, long- or even medium-term, of the societies, the peoples, that have wounded their institution of marriage by encouraging and endorsing such false and harmful ideas. The wounding of marriage to bring it into line with the contraceptive, abortifacient, feminist, and other marriage-dissolving demands and practices of many heterosexuals has already put all our societies on an ever-steepening path to extinction, a downward path only concealed, in the United States, by the country's willingness to allow other peoples to enter, lawfully or unlawfully, to replace (and in a good many instances with a pretty explicit purpose of replacing) the now indigenous people—a willingness that in the European and British cases does not even succeed in masking the population trend towards disappearance. Since social justice, like the social charity that Pius XI couples with it, is about actions and dispositions that affect other people in ways which respect or promote the common good of a definite body of people, the wounding of marriage is a real, true and grave violation of social justice.

This brings us back to violations of justice that presuppose the lastingness of persons, their duration, their past and its continuity with their present and futures. Two kinds of injustice within this very broad range are such that the priority—the pre-eminence and fundamental significance of persons, each person—takes on the other, chronological sense of priority, where we acknowledge what is owed to persons because of what happened in their past. Even before we get to the promises we made or were made in the past, or the work we did, the contributions and savings we made, the degrees or grades we earned, or the crimes and torts we committed, each of us has two fundamental facts about us: one's family and one's nation.

## VI

In his very last personal work, meaningfully entitled *Memory and Identity*, composed in the 1990's and appearing within two weeks of his death in 2005, Karol Wojtyła wrote:

The term “nation” designates a community based in a given territory and distinguished from other nations by its culture. Catholic social doctrine holds that the family and the nation are both natural societies, not the product of mere convention. *Therefore, in human history, they cannot be replaced by anything else.*<sup>14</sup>

The right way of avoiding unhealthy nationalism, he wrote, is—

through patriotism. Whereas nationalism involves recognizing and pursuing the good of one's own nation alone, without regard to the rights of others, patriotism . . . is a love of

<sup>14</sup> Karol Wojtyła, Pope John Paul II, *Memory & Identity* (London: Orion, 2005), 77–8 (emphasis added); likewise, 75.

one's native land that accords rights to all other nations equal to those claimed for one's own.<sup>15</sup>

And—

the native land (or fatherland [*patria*]) is in some ways to be identified with patrimony, that is, the *totality of goods bequeathed to us by our forefathers*. In this context... one frequently hears the expression 'motherland.' Through personal experience we all know to what extent the transmission of our spiritual patrimony takes place through our mothers. Our native land is thus our heritage and it is also the whole patrimony derived from that heritage... the land, the territory, but more importantly... the values and the spiritual content that go to make up the culture of a given nation.<sup>16</sup>

From those statements we can look backwards to the Second Vatican Council, which in its document on the Church's universal mission, *Ad Gentes* (Sent to the Nations/Peoples), taught:

Christians belong to the nation [*ad gentem*] in which they were born. They have begun to share in its cultural treasures by means of their education. They are joined in its life by manifold social ties... They feel its problems as their very own... They must give expression to [Christian] newness of life in the social and cultural framework of their own homeland [*patriae*], according to the traditions of their own nation [*nationis*], a culture which they should get to know, heal, preserve, develop in accordance with contemporary conditions, and finally perfect in Christ. (sec. 21)

Or we can look forwards to Benedict XVI addressing in September 2008 the bishops of France, a state whose nation and culture have been strained by an immigration policy insufficiently attentive to the thoughts and admonitions just quoted:

I am convinced... that nations must never allow what gives them their particular identity to disappear. The fact that different members of the same family have the same father and mother does not mean that they are undifferentiated subjects: they are actually persons with their own individuality. The same is true for countries, which must take care to preserve and develop their particular culture, without ever allowing it to be absorbed by others or swamped in a dull uniformity. "The Nation is in fact"—to take up the words of Pope John Paul II—"the great community of men who are united by various ties, but above all, precisely by culture..."<sup>17</sup>

In the same address to UNESCO in 1980 from which Pope Benedict was quoting, his predecessor had spoken of "the right of the nation to the foundation of its culture and its future," of "a stable element of human experience and of the humanistic perspective of man's development," namely "a fundamental sovereignty of society which is manifested in the culture of the nation... through

<sup>15</sup> Ibid., 75.

<sup>16</sup> Ibid., 66 (emphasis added). Here and elsewhere Wojtyla refers to and quotes (96–7) from his papal address of 2 June 1980 to UNESCO: see n18 below.

<sup>17</sup> Address to the Bishops of France, Lourdes, 14 September 2008: [http://www.vatican.va/holy\\_father/benedict\\_xvi/speeches/2008/september/documents/hf\\_ben-xvi\\_spe\\_20080914\\_lourdes-vescovi\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/speeches/2008/september/documents/hf_ben-xvi_spe_20080914_lourdes-vescovi_en.html) (last accessed March 8, 2013).

which, at the same time, man”—he means each individual person—“is supremely sovereign.”<sup>18</sup>

Consider those last words. Like the others just quoted, these are words of an authoritative spokesman of a religious body whose very name, “Catholic,” expresses its self-understanding as embracing people of every nation equally, and as transcending every nation by its universality. They are words pointing to an urgent question in no way theological, “religious” or “sectarian.” What might that individual, personal sovereignty or autonomy mean, such that it is enjoyed “through” a fundamental sovereignty of that same individual person’s nation and its culture? One may get a first indication of its meaning, and its truth, by reflection that your freedom to listen to and debate or reject my talk this evening presupposes a shared language, a shared fund of knowledge of the kinds of things that I have mentioned and that I am presupposing you know—not to mention the vast stock of material culture manifested in our surroundings, and in the whole way of life and course of education that brought us all here, in every case by sovereign individual choice. All this belongs to what John Paul II called the vast patrimony, the totality of goods bequeathed to us by our forebears.

And what might be the “manifold social ties” and “various ties,” besides culture, that give a nation its reality and enable its service to human and personal wellbeing? In his book, significantly entitled *The Law of Peoples*, John Rawls, like John Paul II and John Stuart Mill, takes shared culture to be central to the reality of a particular people, and analyses this cultural reality into (a) first, and primarily, the members of this people being “united among themselves by common sympathies which do not exist between them and others,” which (b) “make them cooperate with each other more willingly than with other people . . .” and (c) may result from various causes, such as commonality of race, descent, language, and religion but “strongest of all is identity of political antecedents . . . of national history, and consequent community of recollections, collective pride and humiliation, pleasure and regret, connected with the same incidents in the past.”<sup>19</sup> Then he articulates the legitimate fundamental interests of peoples (his word for nations): their political independence and their free culture; the security, territory and well-being of their citizens; and “their proper self-respect of themselves as a people, resting on their common awareness of their trials during their history and of their culture with its accomplishments.”<sup>20</sup>

These popes and philosophers are drawing on their and our knowledge of history, and of the formation of their own and our mentalities and character, to reach conclusions which provide a foundation for thinking responsibly about

<sup>18</sup> Address of Pope John Paul II to UNESCO, Paris, 2 June 1980, *Acta Apostolicae Sedis* 72 (1980): 745. The paragraph continues: “And when I speak thus, I think also—with deep feelings—of the cultures of so many peoples of old who did not surrender when they found themselves confronted by the civilizations of invaders . . .”

<sup>19</sup> John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), 23n17, quoting J.S. Mill, *Considerations on Representative Government* (1862), ch. 16. For Rawls’s tentative speculation about how far all these elements are necessary for a just constitutional regime, see *Law of Peoples*, 24–5.

<sup>20</sup> *Law of Peoples*, 23n17 quoting with approval J.S. Mill, *Considerations on Representative Government* (1862), ch. 16.



the question—in at least some respects the most important question of justice today—whether the undoubted right of individuals and families to *emigrate* carries with it a right of individuals and families to migrate and demand entry to and the right to remain permanently in a country of their choice (say, yours). In circumstances (such as the present) where there is no dire necessity (or none that could not be relieved by our provision of aid to be used in the country concerned), is it the case that those who make up, say, the 1.2 billion people of India have the moral right, as a matter of justice, to migrate to the United States? Or a million a year of them? And the people of Pakistan and Bangladesh, as numerous as the present population of the United States? Or a million a year of them too? And a million from Indonesia? And so on?

Here is another ecclesiastical text offering a framework for answering these questions:

2241 The more prosperous nations are obliged, to the extent they are able, to welcome the foreigner in search of the security and the means of livelihood which he cannot find in his country of origin . . . .

Political authorities, for the sake of the common good for which they are responsible, may make the exercise of the right to immigrate subject to various juridical conditions, especially with regard to the immigrants' duties toward their country of adoption. Immigrants are obliged to respect with gratitude the material and spiritual heritage of the country that receives them, to obey its laws and to assist in carrying civic burdens.<sup>21</sup>

Views corresponding to a wooden interpretation of “to the extent they are able” are often presented, even at very high levels, as if it meant that (subject to those legal conditions about criminality and payment of taxes) you are required as a matter of justice and rights to admit foreigners at their choice until the internal security and *per capita* wealth of your country is degraded to the level at which there would no longer be an incentive to immigrate. But the phrase “to the extent they are able” needs interpretation.

Prosperous countries have a duty to receive foreigners just to the extent that that is compatible with justice, and those foreigners are and remain genuinely willing to “respect with gratitude the . . . spiritual heritage of the country.” In assessing the justice of immigration, the political authorities (a term which at election time includes all voters) are obliged to use the “law of social justice,” the common good including not only those goods of culture that the Pope today warns can be swamped and lost but also the goods threatened by the very real prospect of injustice by neglect of many obligations of justice that have been incurred to those indigenous, that is non-immigrant, citizens who have contributed to the prosperity and/or security (that is, the peace and law-abiding order) of the country, and who in many cases may be thrust into more or less permanent unemployment by a constant flow of immigrants or, if not, may in many more cases be burdened with much higher taxes and much reduced pensions or other welfare provisions, and much inferior educational facilities for their children and

<sup>21</sup> *The Catechism of the Catholic Church*, 2d ed. (Vatican City: Libreria Editrice Vaticana, 1997), para. 2241 (which cites no prior teaching).

grandchildren. Nor can we pass over in silence the threat of injustice to all who, generation after generation, may suffer grievously or subtly from the violence, unfairness, and lack of civic friendship that are characteristic of multi-cultural and multi-ethnic communities such as the Yugoslavia that after seventy years disintegrated with grievous, bloody brutality, destruction and expropriation into six separate countries.

A detailed analysis of this kind of injustice or of the consequently intricate issues of justice involved in these great questions of immigration and multi-culturalism is beyond the scope of this essay. These are questions often pronounced upon with a carelessness and lack of frankness. Those who on these matters appeal to the authority (as they suppose) of Christian teaching often lack the care shown by Pope Leo XIII in 1891. He affirmed the truth that all the non-personal resources of the world are morally available and for the benefit of all human persons, and at the same time firmly and plainly vindicated the rights and justice (within wide limits) of acquiring and holding private property and receiving rents and profits. This he did in full consciousness of the widespread calls for socialist or communist redistribution and leveling or conversion of property rights into claims upon the welfare distributions of a state universal-owner/manager presumed to be the representative of divine providence—calls which at first glance might be thought implications of Christian charity and of a love that transcends justice. Communism about property is not so popular as it once was amongst the secular wealthy elites to which we belong. But these elites, today, easily grant their favor to its close analogue: a cosmopolitan, trans-national vision of open borders.

## VII

A few words, finally, about the related second kind of injustice arising from neglect of the temporal dimension of our life as persons in families, nations and humankind as a whole. “The family and the nation are both natural societies, not the product of mere convention. *Therefore, in human history, they cannot be replaced by anything else.*”<sup>22</sup> In the works of political liberals such as Rawls and Dworkin, Raz and Habermas, the family makes little or no appearance. Yet real political order begins only when the menace to it of unduly dominant familial loyalties is overcome by the proper relationship of mutual respect and support between families and nations. And the dream of an autonomously self-created self must be judged another one-third- or quarter-truth, in face of the reality that *what I have* is so substantially what my parents chose for me in cultural and moral formation that even if I chose to follow another call by, say, conversion to the gospel of Christ and his Church, I would substantially be what I am, through and through: the beneficiary of and shaped by my parents and the national culture to which they belonged. Even if one lived through and lived out such a conversion, one could scarcely hope to do more than *heal* in oneself and a few others that culture which willy nilly is part of one’s identity.

<sup>22</sup> *Memory and Identity*, 78.

Nor is the family merely a category needed for a sound political theory and social teaching; in its central form it is the living reality of father and mother, children and grandchildren and perhaps great-grandchildren, linked not only by genetics and language and beliefs and skills but also by a “covenant between generations.” Justice cannot be respected unless this covenant is honored in all its mutuality, parents and grandparents honoring it by love and service for the children and grandchildren, who in turn honor it by rejecting the thought: “time’s up!”