Contents

The Priority of Persons

John Finnis

> So, since all law is made *for the sake of human beings*, we should speak first of the status of persons.[1]
>
> Justinian, *Digest* 1. 5. 2

> Knowledge of law amounts to little if it overlooks the *persons for whose sake* law is made.[2]
>
> Justinian, *Institutes* 1. 2. 12

What it is to be a person, and why it matters that one is, are issues no longer thematic in general accounts of law. But the very concept of law, of an existing and projected reality profoundly, and deliberately, different from both anarchy and tyranny is shaped by the recognition that (i) we human beings are all persons and each other's equals in that respect even if in no other; (ii) persons of sufficient maturity and health can understand and communicate what they and other persons mean, and can intend and choose many other ways of behaving, too; and (iii) persons, their well-being, and their intentions matter in ways that nothing else in our environment does. This essay outlines some reasons for bringing these issues, rather neglected in modern jurisprudence, back into focus.

I LAW IS 'FOR THE SAKE OF . . .'

Hart's rejection of 'the positivist thesis that "law may have any content" ' appealed to the 'natural necessity' of 'the minimum forms of protection for persons, property, and promises which are . . . indispensable features of municipal law', 'if it is to serve the minimum purposes of beings constituted as men are'.[3] A 'natural' necessity of this kind is in the first instance a *rational* necessity. As Hart himself remarks, his discussion of the minimum content of law[4] is trying to identify 'the distinctively *rational*

[1] '*Cum* . . . hominum causa *omne ius constitutum sit, primo de personarum statu . . . dicemus*' (emphasis added, here and elsewhere unless otherwise indicated).

[2] '*Nam parum est ius nosse si* personae quarum causa *statutum est ignorentur*.'

[3] H.L.A. Hart, *The Concept of Law* (Oxford University Press, Oxford, [1961], 2nd edn. 1994) 199. The word omitted is 'similarly', referring to the same 'setting of natural facts and aims, which make sanctions both possible and necessary in a municipal system' (ibid.). The Postscript, ibid. 248–9, seems to retreat from the book's clear and well argued rejection of the above-described 'positivist thesis': '[l]ike other forms of positivism my theory makes no claim to identify the point or purpose of law and legal systems as such . . . In fact I think it quite vain to seek any more specific purpose which law as such serves beyond providing guides to human conduct and standards of criticism of such conduct.' But ibid. 251 reverts to speaking of 'aims [besides certainty] which law should cherish'.

[4] He called it 'the minimum content of natural law' but meant, rather, the minimum content of positive law (content which, being necessary, one can call natural law).

connection between natural facts and the content of legal and moral rules'.[5] And this 'connection' is 'rational' given the 'minimum purposes' or 'natural aims' of 'beings constituted as men are'. The rationality, then, is that of practical reasoning—reasoning along the following lines (for example): we want to survive; but, given that we are vulnerable and the altruism of others is limited, we cannot survive without rules prohibiting the free use of violence; *so* such rules are necessary and other rules are worthless without these.

Though Hart spoke often enough of human beings' natural aims, plural, his official list of them famously admitted only the aim just mentioned: 'survival'.[6] Fortunately for jurisprudence, his real list of the minimum purposes which give law and legal system their complex, shaping point tacitly went wider. It included the aims or purposes relative to which people—not least Hart and the readers he anticipated—count certain aspects of 'pre-legal' conditions as 'defects', defects to which the minimally adequate response is, as Hart argues, the 'amenity' of power-conferring rules and the 'remedy' of 'secondary rules', the amenities and remedies which make law what it essentially is.[7]

Law, then, is for the sake of serving certain purposes of 'beings constituted as men are', and Hart speaks of serving these purposes as law's *point*. For Ronald Dworkin, on the other hand, 'the most abstract and fundamental *point* of legal practice' is: 'to guide and constrain the power of government [by insisting that] force not be used or withheld . . . except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified'.[8] And Dworkin favours a specific conception of that point, 'law as integrity'; 'law insists', he holds, that collective force be licensed by rights and responsibilities 'flowing from' past decisions, in order that the law will thereby benefit 'society' precisely 'by securing a kind of equality among citizens'.[9] And rights and responsibilities only 'flow from' a political community's decisions if that community's practices 'show not only concern but an *equal* concern for all members'.[10]

So law's point, on Dworkin's conception, is to serve the interests of 'citizens' or (equivalently, it seems) 'members of the group'—and if it fails to try to do so, it lacks legitimacy, authority, and obligatory force, and fails to justify the coercion it pretends to justify. Dworkin's restriction of the point to citizens or members of the community seems deliberate. True, one of his summaries of the equality condition says that

[5] Ibid. 193, where the treatment of the minimum content begins: 'it is important to observe that in each case the facts mentioned afford a *reason* why, given survival as an aim, law and morals should include a specific content' (Hart's emphasis).

[6] Ibid. 191. On his argument here, see my *Natural Law and Natural Rights* (Oxford University Press, Oxford, 1980) 30–1, 82.

[7] See *The Concept of Law*, n. 3 above, 28, 41–2, 196–7 (on the 'huge and distinctive amenity' conferred by the institution of power-conferring rules, 'one of the great contributions of law to social life' and 'a step forward as important to society as the invention of the wheel'); 91–9 (on the remedies required to overcome the defects of a social structure of primary rules of obligation restricting the free use of violence, theft and deception); and 155 (on the union of primary and secondary rules as 'the "essence" of law').

[8] Ronald Dworkin, *Law's Empire* (Harvard University Press and Fontana Press, 1986) 93.

[9] Ibid. 95–6.

[10] Ibid. 200 (Dworkin's emphasis).

the 'command of integrity assumes that each *person* is as worthy as any other, that each must be treated with equal concern',[11] and there is mention of the concept of 'general duties [a group's] members owe equally to persons outside it'.[12] But no such general duty is affirmed as having a place in the account of law's empire, and in its context the summary's reference to 'persons' seems to be no more than shorthand for 'members'. Moreover, membership is said to be a matter of 'genetic or geographical or other historical conditions identified *by social practice*'.[13] (Some elements of American legal history which I recall in section IV make these restrictions noteworthy.)

Thus there are telling differences in the conceptions of law's point proposed by Hart and Dworkin as internal to the very idea of law. For Dworkin, 'securing' an equality understood as incompatible with counting 'some members as inherently less worthy than others'[14] is central to law's point and idea. For Hart, concern for any such kind of equality, though 'deeply embedded in *modern* man'[15] and '*now* generally accepted as a statement of an ideal of obvious relevance in the criticism of law',[16] is extrinsic to the concept of law, and the question whether such concern or criticism is warranted 'cannot be investigated'[17] in his book on that concept. But the contrast between these two theorists is softened by Dworkin's noticeable unwillingness to affirm that the equality intrinsic to law's point is the equality of all human beings or of all persons or of any other class of beings identifiable prior to a social practice—a practice, such as the law's, of defining the membership whereby moral and legal rights are 'given'.[18]

II ON LAW AS FOR THE SAKE OF ALL

To the thought that the primary element in law's point is not merely promoting 'survival' but respecting and appropriately promoting the survival of *all* human beings within its jurisdiction, Hart has a simple response, tirelessly deployed throughout his work. Legal systems, he reminds us, 'have long endured though they have flouted these principles of justice'.[19] Moreover, 'it is conceivable that there might be a moral outlook which did not put individuals on a footing of reciprocal equality'.[20] Well, neither the facts nor the logical possibilities are in doubt. But Hart's own strategy of displaying law as a kind of *reason* apt for being counted as a *common standard* for action undercuts this response. Just as fallacious arguments earn a place in a treatise

[11] Ibid. 213. [12] Ibid. 199. [13] Ibid. 201. [14] Ibid. 201.
[15] *The Concept of Law*, n. 3 above, 162. [16] Ibid. 206.
[17] Ibid. 206. Notice that in his book *Punishment and Responsibility* (Oxford University Press, Oxford, 1968) he is willing to say things like (at 22): '[j]ustice simply consists of principles . . . which (i) *treat all alike as persons* by attaching special significance to human volutary action and (ii) forbid the use of one human being for the benefit of others except in return for his voluntary actions against them.'
[18] See Ronald Dworkin, *Life's Dominion* (Alfred A. Knopf, London; Harper Collins, London, 1993) 23
[19] *The Concept of Law*, n. 3 above, 206. [20] Ibid. 165.

on argumentation only as instances of what, despite appearances and popularity, is really *not an argument*, so unreasonable kinds of law and legal system should be attended to in legal theory precisely as instances of law diluted with the effluents of what law *essentially opposes*: the arbitrary exercise of one person's or group's power over other persons and groups. Dworkin is right to hold that 'any full theory of law'[21] will go beyond Hart's explicit and tacit accounts of the benefits which differentiate law from the commands of powerful people, and will include a reference to equality and its moral entailments, 'principles of justice, fairness, and procedural due process'.[22] But, as we have seen, he leaves in shadow the question *who* is equal, and should be treated as equal, to whom.

Roman law, which long endured though flouting some of the principles of justice, gave its students and practitioners a better account of law's point. The opening sentence of the *Institutes* directs us towards it: justice, understood precisely as a disposition to act for a certain kind of purpose: 'Justice is the stable and lasting willingness *to give to each his right*'.[23] 'Each' who? The Birks translation quite properly renders this object as 'to acknowledge all men's rights'. For the closing words of the introductory sections (titles 1–3 of book 1) tell us that law exists 'for the sake of persons', and the following sentence, opening the whole treatise on the law of persons, stakes out the essential position: all men are persons.[24] Slavery is bluntly defined as the subjection of 'someone' to another's ownership and mastery 'contrary to nature',[25] indeed, more precisely, 'contrary to natural law/right'.[26] 'For by natural law/right, from the beginning, all human beings are born free.'[27]

The requirements of justice-for-persons are thus affirmed and flouted in almost the same breath. No attempt is made to deny that slaves are persons and are their owners' equals in human nature. The institution is presented not as justified but as a fact of life and a product of the arbitrament of war—of sheer power. The frankness, to be sure, has its limits; the fact is here veiled that slavery as an institution of the law is maintained by sheer power, long after any war or war-captivity, and is imposed upon persons who were never party to war. Law's point is stated by Roman law's self-interpretative doctrines, but its implications are not pursued with undeflected practical reasonableness.

Law's point—what, or better, whom it is for the sake of—is identified in the opening words of Article 1 of the Universal Declaration of Human Rights (1948), adopting the phraseology of the Roman jurists: '*[a]ll human beings* are born free and equal in dignity and rights'. Article 1's subject, 'all human beings', is equated with the preamble's 'all members of the human family' and 'the human person', so that the

[21] See *Law's Empire*, n. 8 above, 110.

[22] See ibid. e.g. 225.

[23] *Digest* 1. 1. pr.; *Institutes* (*Inst.*) 1. 1. pr.

[24] *Inst.* 1. 2. 12; 1. 3. 1: '[t]he main classification in the law of persons is this: all men are either free or slaves' (*summa itaque divisio de iure personarum haec est, quod omnes homines aut liberi sunt aut servi*).

[25] *Inst.* 1. 3. 2.

[26] *Inst.* 1. 2. 2.

[27] Ibid.: '*servitutes . . . sunt iuri naturali contrariae—iure enim naturali ab initio omnes homines liberi nascebantur.*'

reference of the remaining articles,[28] 'everyone', 'all', and 'no one', is clear. So it is all human beings who are 'equal before the law' and entitled to its 'equal protection' (Article 7); and 'everyone' has the 'right to recognition everywhere as a person before the law' (Article 6).

III ON RULES AS RELATIONSHIPS OF THE DELIBERATING PERSON TO OTHER PERSONS

What is a rule of law? It is certainly not well defined as an 'assemblage of signs declarative of a volition', as Bentham supposed. It is not, indeed, to be defined as any kind of assemblage of signs, for rules of law are no more than evidenced and, in some instances, performatively *effected* by the assembling of such signs. Nor is it, ultimately, the meaning of a set of signs or of an act of signifying, for, while meaning remains constant, validity and obligatoriness may come and go. In my general account of law, I tried to answer the question:

> legal thinking (i.e. the law) brings what precision and predictability it can into the order of human interaction by a special technique: the treating of (usually datable) past acts (whether of enactment, adjudication, or any of the multitude of exercises of public and private 'powers') as giving, *now*, sufficient and exclusionary reason for acting in a way *then* 'provided for'. In an important sense the 'existence' or 'validity' of a legal rule can be explained by saying that it simply is this relationship, this continuing relevance of the 'content' of that past juridical act as providing reason to decide and act in the present in the way then specified and provided for.[29]

The explanation is, I think, sound. But we will get still closer to the bottom of the matter if we say that a rule is a relationship between persons. To say that a rule of positive law exists is to say (i) that its subjects (those upon whom it imposes duties or confers powers, etc.) stand in a certain relationship to the class of person who—whose interests—would be served by the rule-subjects' adherence to their duties or exercise of their powers, etc., and (ii) that those rule-subjects stand in that relationship to persons of that class because they (and in some way also the persons whose interests are thus to be served) stand in a certain relationship to the person(s) whose 'past juridical act' therefore provides 'reason to decide and act in the present in the way then specified and provided for'.

Why give explanatory priority, thus, to the relationship between persons? Well, nothing short of an acknowledgement of the reality and value ('dignity') of other persons, as my equals in reality and value, will suffice to make sense of law's most elementary claims on my attention: its claim to *direct* certain choices of mine, to *override* my self-interest in certain respects, to stipulate *conditions* for lending me its assistance in pursuing my purposes, and so forth.

[28] There is one exception, Art. 16, which has as its subject 'men and women of full age', to signify that marriage is between persons of opposite sex (gender).

[29] *Natural Law and Natural Rights*, n. 6 above, 269 (emphases in original).

The history of jurisprudence since Bentham is, in some important respects, the history of failure and regression. The Benthamite strategy of describing, analysing, expounding law as a kind of mechanism supposed to be fully intelligible by reference exclusively to its origin in a 'volition'—excluding, that is to say, all reference to its point (i.e. its rationale)—was pursued with unsurpassable pertinacity and ingenuity, across more than half the twentieth century, by Kelsen. Its *dénouement* was the spectacular debacle in which Kelsen, rightly acknowledging the failure of his legal philosophy from 1911 to 1960[30] to explain or even coherently describe law's validity, its normativity, its elementary particle (the norm), and its coherence, severed all links between law and practical reasonableness, embraced even the most open contradiction between legal norms,[31] denied the possibility of legal reasoning even by subsumption of an uncontroversial instance under the corresponding norm,[32] and proposed an admitted fiction as the 'scientific' explanation of validity.[33] Kelsen's lifelong aversion from any resort or reference to practical reasonableness to understand, describe, and interpret law became, in the end, a headlong flight. It was, in the last analysis, an aversion from understanding law as a set of implications of one's seeing the point of serving—respecting and promoting—other persons, and so their interests or well-being, as equal in dignity and value to oneself and one's own. But there is, I am suggesting, no other way of understanding law's claims and directives, their grounds and origins, their force, their limits, and their pathological forms.

IV CONSEQUENCES OF CONSIDERING LAW WITHOUT ACKNOWLEDGING PERSONS AS ITS POINT

Kelsen's refusal to treat human persons and their interests and well-being as the point of law, a refusal generally shared by analytical jurisprudence from Bentham on, is plainest in his treatment of persons in the law, in the first instance 'physical (natural) persons'.[34] To say that a human being A has a right 'means only that certain *conduct of* the individual A is the object of a legal right . . . that certain conduct of the individual A is, in a specific way, the contents of a legal norm'.[35] Likewise, of course, with

[30] On the phases of Kelsen's work, see e.g. Stanley L. Paulson, 'Four Phases in Hans Kelsen's Theory? Reflections on a Periodization' (1998) 18 *Oxford Journal of Legal Studies* 154–66 at 161.

[31] Hans Kelsen, *General Theory of Norms* (trans. Michael Hartney, Oxford University Press, Oxford, 1991) 214 ('[a]s far as conflicts between general norms are concerned, it is not the case—as I claimed in my *Pure Theory of Law*—that a conflict of norms which cannot be resolved by the principle *Lex posterior derogat legi priori* makes no sense . . . Each of the two general norms makes sense and both are valid.'), 223–5.

[32] Ibid. 232–8.

[33] Ibid. 256 ('the assumption of a Basic Norm—for instance, . . . the Basic Norm of a legal order, "Everyone is to behave as the historically first constitution specifies"—not only contradicts reality, since there exists no such norm as the meaning of an actual act of will, but is also self-contradictory. . . . The cognitive goal of the Basic Norm . . . can be attained only by means of a fiction.')

[34] Hans Kelsen, *General Theory of Law and State* (trans. Anders Wedberg, Harvard University Press, Cambridge, Mass., 1945) 95.

[35] Ibid. 94.

A's duties. Hence: '[i]n juristic considerations we are concerned with man only insofar as his *conduct* enters into the contents of the legal order.'[36] 'The person exists only insofar as he "has" duties and rights' (these rights pertaining, remember, only to that same person's own conduct); 'apart from them the person has no existence whatsoever.'[37] So:

> That man and person are two entirely different concepts may be regarded as a generally accepted result of analytical jurisprudence. . . . the physical (natural) person is the personification of a set of legal norms which by constituting duties and rights containing the conduct of one and the same human being regulate the conduct of this being. The relation between the so-called physical (natural) person and the human being with whom the former is often erroneously identified consists in the fact that those duties and rights which are comprehended in the concept of the person all refer to the behavior of that human being.[38]

In short: juristic thought as such knows nothing of any human person save that person's conduct as specified in legal norms, and does not have as its primary or any concern the interests and well-being of this or any other person.

In the decades of Kelsen's greatest influence, judges confronted by the practical problems of identifying law and rights after revolution turned to Kelsen's account of revolutionary transition. They found no guidance, but some material for rationalizing conclusions reached on other grounds.[39] So too, Kelsen's treatment of the person has been called upon to rationalize judicial abdication from such disciplined and critical concern with the interests and well-being of real people.

Of course, such an abdication can and has, from time to time, occurred without the aid or encouragement of analytical jurisprudence. Among the most striking examples is the justly infamous judgment of the Supreme Court of the United States in *Scott* v. *Sandford* (1857), holding that members of 'the African race' imported into or born in the United States (whether or not they had become free) were not citizens of the United States, and could never be made citizens by Congress even under its undoubted power of naturalization.[40] The decision rested on the fact that, at the time of the Declaration of Independence (1776) and the founding of the Constitution (1789), public opinion—real enough though the Court vastly exaggerates its unanimity—considered that 'the negro might justly and lawfully be reduced to slavery' as 'beings of an inferior order'.[41] At the time of the framing and adoption of the Constitution, 'neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free' had any 'rights or privileges but such as those who held the power and the Government might choose to grant them'.[42] And 'the duty of the court is . . . to administer [the instrument they have framed] as we find it, according to its true intent and meaning when it was adopted.'[43] The Court's radical failure, then, was to approach its duty of doing justice according to law

[36] Ibid. [37] Ibid. [38] Ibid. 94–5.

[39] See Finnis, 'Constitutional Law', in *Annual Survey of Commonwealth Law* [1967] at 83, 91–5, [1968] 75, 112, [1969] 76–7.

[40] 60 US 393 at 417, 420, *per* Taney CJ for the Court (7: 2).

[41] 60 US at 407, *per* Taney CJ. [42] 60 US at 405, *per* Taney CJ. [43] Ibid.

without recognizing that law, the whole legal enterprise, is for the sake of persons, and that the founders' intentions were therefore to be interpreted—not, as the Court did, so as to promote their background prejudices (from which the Court dissociated itself) against the people they wished to treat as mere property, but rather—in favour of the basic interests and well-being of every person within the jurisdiction so far as was possible without contradicting the Constitution's provisions.

A post-Kelsenian version of *Dred Scott* can be found in the judgment of the New York Court of Appeals in *Byrn* v. *New York City Health and Hospitals* (1972). Discussing the status of children before birth, the Court says:

> What is a legal person is for the law, including, of course, the Constitution, to say, which simply means that upon according legal personality to a thing the law affords it the rights and privileges of a legal person (e.g. Kelsen, General Theory of Law and State, pp. 93–109; Paton, Jurisprudence [3d ed.], pp. 349–356, esp. pp. 353–354 as to natural persons and unborn children; Friedmann, Legal Theory [5th ed.], pp. 521–523; Gray, The Nature and Sources of the Law [2d ed.] ch. II). The process is, indeed, circular, because it is definitional. Whether the law should accord legal personality is a policy question which in most instances devolves on the Legislature, subject of course to the Constitution as it has been 'legally' rendered. . . . The point is that it is a policy determination whether legal personality should attach and not a question of biological or 'natural' correspondence.[44]

The judgment concludes: '[t]here are, then, real issues in this litigation, but they are not legal or justiciable. They are issues outside the law unless the Legislature should provide otherwise.'[45] Like the Supreme Court's presumptionless positivism in *Dred Scott*, this New York judgment foreshadows the Supreme Court's holding, six months later, in *Roe* v. *Wade* (1973), that children *en ventre sa mère* are not persons 'within the meaning of the Fourteenth Amendment'.[46] The Court's reasoning to this holding simply recites the uses of 'person' in the Constitution, remarks that 'none indicates, *with any assurance*, that it has any possible pre-natal application', adds (quite misleadingly)[47] that 'throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today', and then simply says that these two facts 'persuade us' of the conclusion.[48]

What we see in these cases is a notable failure of judicial reasoning, of intellectual and moral responsibility in face of the law's most fundamental point and meaning: the service of persons. Here, where juristic thought should be most fully and carefully deployed, we find abrupt ukase. The failure and the abruptness are not peculiar to the court's dealings with the unborn. In 1886 the Supreme Court was asked to settle the question whether the 14th Amendment's provision forbidding any state to deny

[44] 286 NE 2d 887 at 889, *per* Breitel J for the Court (5: 2). [45] 286 NE 2d at 890.

[46] 410 US 113 at 157, *per* Blackmun J (7: 2). At 162 Blackmun J quotes verbatim, though without acknowledgement, a whole sentence from *Byrn* at 888.

[47] See Finnis, ' "Shameless Acts" in Colorado: Abuse of Scholarship in Constitutional Cases', *Academic Questions*, Fall 1994, 10–41 at 1–18, 36–7.

[48] 410 US at 157–8.

the equal protection of the laws to any *person* within its jurisdiction applies to corporations. Its judgment in *Santa Clara County* v. *Southern Pacific Railroad Co.* is prefaced by the answer: '[t]he court does not wish to hear argument on the question. . . . We are all of opinion that it does.'[49] As Justices Black and Douglas observed in 1949, 'there was no history, logic, or reason given to support that view. Nor was the result so obvious that exposition was unnecessary.'[50] But though this dissenting judgment of Black and Douglas JJ deploys powerful reasons against that 'result', developing the reasons deployed many years earlier in another dissent by Black J,[51] neither the Court itself nor any Justice supporting the result has ever added even a single sentence of justification to the ukase of 1886. Perhaps we should not be surprised, though we are entitled to be dismayed, that no Justice has ever tried to reconcile the 'conclusion' in *Roe* with the 'result' in *Santa Clara*.

As Black and Douglas JJ remark, after demonstrating the arbitrariness of the Court's checkerboard rulings about the application to corporations of the 14th Amendment's several uses of 'person' and 'citizen', and the good sense of a finding that the Amendment's protection is of human beings, natural not artificial persons: '[h]istory has gone the other way'. To which they add, however, that it is not too late for the Court to overrule its error on 'a question of vital concern to the people of the nation'.[52] It is increasingly accepted, by legislative and judicial authorities in most US states,[53] that the unborn child is entitled to protection and remedies in tort even if born dead, and likewise to the protection of the criminal law. These developments, though restricted rather arbitrarily by the constitutional maternal rights declared by the Supreme Court in *Roe*, mark a retreat from simple refusal to take account of the realities of personal existence before birth.

V ON NATURAL AND ARTIFICIAL PERSONS IN LAW

In a realistic moral, political, or legal analysis of human associations and their actions, 'personality' is a distracting metaphor. For it is a metaphor always tugged between its two historic sources. On the one hand, there is *persona* as mask; to this corresponds the law's carefree attribution of legal personality to *anything* that figures as subject (topic) of legal relations, particularly of property and/or litigious relationships: idols, funds, parcels of property on the quayside, the Crown, and so forth. On the other hand, there is *persona* as individual substance, of a rational nature;[54] to this corresponds nothing (save metaphorically) in the many orderings of human interaction and association

[49] 118 US 394 at 396.

[50] *Wheeling Steel Corporation* v. *Glander* 337 US 563 at 577.

[51] *Connecticut General Legal Insurance Co.* v. *Johnson*, 303 US 77 (1938) at 85–90.

[52] 337 US at 580, 581.

[53] See e.g. Clark D. Forsythe, 'Human Cloning and the Constitution' (1998) 32 *Valparaiso University Law Review* 469 at 497–502.

[54] '*Persona est rationalis naturae individua substantia*': Boethius, *De Duabus Naturis* c. 3 (Migne, *Patrologia Latina* 64, 1343); see Aquinas, *Summa Theologiae* I q. 29 a. 1.

which we call groups[55]—nothing except the people who are members. Still, there is a link between these two sources and poles of meaning of 'person'. For the actor's mask is or creates an assumed identity. But a being of a rational nature can, with sufficient health and maturity, make choices (because understanding different kinds of benefit and different ways to one and the same benefit), and by making choices one shapes one's character/identity—one comes to have, and in that sense assumes, a personal identity (one's character). A day-old baby has—*radically*, albeit not yet in actually usable form—this capacity to choose (with such self-determining, intransitive effects). A mouse, whether day-old or mature, lacks that radical capacity, though even as a day-old embryo it has the radical capacity, unlike an acorn or an oak seedling, to run.

Hart recommended that we 'put aside the question "What is a corporation?", and ask instead "Under what types of conditions does the law ascribe liabilities to corporations?" ', since this would, he thought, clarify 'the precise issues at stake' in 'extension to corporate bodies of rules worked out for individuals'.[56] The advice to look for the truth conditions of propositions, to understand analogies, and to seek for the principle upon which rules are extended from one context to another was sound. But it was mistaken to assume that such techniques of analysis would dissolve the underlying question whether corporations are entities in the same plane of reality as the human persons whom Hart referred to by his term 'individuals'. The suppression of that question, a suppression implicitly defended if not proposed by Hart, opens the way to the agnosticism, arbitrariness, and consequent injustice of cases such as *Byrn* v. *New York City Health and Hospitals*.

Without doubting or challenging the legal rules which distinguish a corporation's rights and liabilities from those of its members, one can make more progress in understanding the relevant realities and interests by first going beyond and behind Hart, to Hohfeld's masterly demonstration that 'transacting business under the forms, methods, and procedure pertaining to so-called corporations is simply another mode by which *individuals* or *natural persons* can enjoy their property and engage in business'.[57] One does not well understand corporate[58] liability (or rights, duties, etc.)

[55] Here and elsewhere in this essay I use 'group' in the second, more specified sense of that highly ambiguous term, whose two basic poles of meaning are (i) class or category, regardless of cohesiveness, co-operation or interaction, e.g. all women in Pakistan (held to be a 'particular social group' for the purposes of the Art. 1A(2) of the Convention relating to the Status of Refugees (1951): *R.* v. *Immigration Appeal Tribunal, ex parte Shah* [1999] 2 WLR 1015), and (ii) a number of persons who co-ordinate their activity over an appreciable span of time by interactions with a view to a shared objective (see Tony Honoré, 'What is a Group?' in his *Making Law Bind: Essays Legal and Philosophical* (Oxford University Press, Oxford, 1987), Finnis, *Natural Law and Natural Rights*, n. 6 above, 150–3).

[56] 'Definition and Theory in Jurisprudence' (1953) in Hart, *Essays in Jurisprudence and Philosophy* (Clarendon Press, Oxford, 1983) at 43, also 45, 47.

[57] Wesley Newcombe Hohfeld, 'Nature of Stockholders' Individual Liability for Corporation Debts' (1909) 9 *Columbia Law Review* 285 at 288, reprinted in Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and other Legal Essays* (ed. W.W. Cook, Yale UP, Princeton, NJ, 1923) 194 at 197. Hart's partly critical remarks about Hohfeld's account of corporations ('Definition and Theory in Jurisprudence', n. 56 above, at 42 n. 22) seem beside the point.

[58] Note that, as Hohfeld incidentally makes clear, the distinction between bodies formally incorporated and unincorporated associations is in many respects much less clear-cut than is often supposed. There is

until one understands how the liabilities etc. of human persons, such as shareholders, directors, employees and other agents, are implicated and affected. The same will be true of the rights and liabilities of other juristic entities such as idols, parcels of goods, etc.; these rights and liabilities are not well understood until one can point, directly or through corporate intermediaries, to individuals with control over ascertainable funds, and so forth.

Hohfeld's more famous analysis of jural relations, though making possible (with a few further specifications) a complete analysis of such relations between persons at any given moment, still leaves something to be explained in terms of the continuity and rationale of rights.[59] Similarly, his demonstration that a corporation's rights etc., as they exist at any moment, are analysable without remainder into individuals' rights etc. should not be understood as showing that a group of persons has no reality. 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 responses to choices) *of persons*. A group's act is defined by its 'public' proposal—i.e. 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.[60]

VI ON PERSONS AS PRIMARY BEARERS OF MEANING AND OBJECTS OF INTERPRETATION

Interpretation is primarily and focally a matter of trying to understand the person or persons whose utterance or other significant performance is under consideration.

Decided entirely by Oxford members of the House of Lords, *Mannai Investment Co. Ltd.* v. *Eagle Star Life Investment Co.*[61] might be deemed an Oxford essay in jurisprudence. Does '12th' mean 13th? At large, it clearly does not. But someone who uses the word '12th' may in fact mean 13th, and a proper interpretation of that

evidence of this in the provisions of the Interpretation Act 1978, s. 5 and Sched. (adapted from the Interpretation Act 1889 s. 19): '[i]n any Act, unless the contrary intention appears . . . "Person" includes a body of persons corporate or unincorporate.' Notice also that this definition would be mired in an infinite regress but for the fact that the term 'person' also 'includes' individual persons such as those who are the paradigmatic members of bodies, corporate or unincorporated, of persons.

[59] See e.g. Finnis, *Natural Law and Natural Rights*, n. 6 above, 201–2.

[60] See Finnis, 'Persons and their Associations', *Proceedings of the Aristotelean Society*, Supplementary Vol. 43 (1989) 267–74.

[61] [1997] AC 749, [1997] 3 All ER 352. The Lords divided 3:2, with the two University College judges in the majority (supported by a Scot from Corpus Christi College).

person's use of the word, in the relevant and properly admissible circumstances of the utterance, may determine that that, being what the person meant to convey and would reasonably have been understood to mean to convey, was the utterance's real meaning, properly construed. As Lord Hoffmann says, 'It is a matter of constant experience that people can convey their meaning unambiguously although they have used the wrong words.' It is true, he adds, that:

> the law is not concerned with the speaker's subjective intentions. But the notion that the law's concern is therefore with the 'meaning of his words' conceals an important ambiguity. The ambiguity lies in the failure to distinguish between the meaning of words and the question of what would be understood as the *meaning of a person* who uses words. . . .
>
> When . . . lawyers say that they are concerned, not with subjective meaning but with the meaning of the language which the speaker has used, what they mean is that they are concerned with what he would objectively have been understood to mean. This involves examining not only the words and the grammar but the background as well. So, for example, in *Doe d. Cox* v. *Roe* (1802) 4 Esp 185, 170 ER 685 the landlord of a public house in Limehouse gave notice to quit 'the premises which you hold of me . . . commonly called . . . the Waterman's Arms'. The evidence showed that the tenant held no premises called the Waterman's Arms; indeed, there were no such premises in the parish of Limehouse. But the tenant did hold premises of the landlord called the Bricklayer's Arms. By reference to the background, the notice was construed as referring to the Bricklayer's Arms. The meaning was objectively clear to a reasonable recipient, even though the landlord had used the wrong name. . . .There was no need to resort to subjective meaning.[62]

In an academic essay in jurisprudence, there is no need to employ the rather misleading lawyers' jargon of 'subjective' and 'objective'. But Lord Hoffmann's meaning emerges clearly despite that lawyerly opacity. As he put it later: 'words do not in themselves refer to anything; it is people who *use* words to refer to things'.[63] And again: '[i]n this area [commercial contracts] we no longer confuse the meaning of words with the question of what meaning the use of the words was intended to convey'.[64] The decision of the House was that, similarly, a notice to terminate a lease 'on 12 January 1995' unambiguously conveyed, in all the circumstances of the giving of the notice (including such circumstances as the terms of the lease itself)—as they would have been apparent to and considered relevant by a reasonable bystander at the time—the intention to terminate the lease on 13 January 1995. For that was what a reasonable person aware of the relevant background would have understood to have been the intention and therefore the meaning of the person giving the notice.

Since the law is for the sake of persons, and its rules are fundamentally relationships between persons, it is a mistake to try to understand legal interpretation on the

[62] At 376. Lord Goff, dissenting, accepts that *Doe d. Cox* v. *Roe* was rightly decided—i.e. that the court in that case 'properly construed' the notice—and he does not succeed in explaining satisfyingly why the majority's construction of the notice in *Mannai* itself is not equally 'proper'.

[63] At 378 (his emphasis).

[64] At 380. On interpreting commercial contracts, see also *Investors' Compensation Scheme Ltd* v. *West Bromwich Building Society* [1998] 1 WLR 896, [1998] 1 All ER 98 at 114e–116f, *per* Lord Hoffmann.

model of the creation and representation, recital, or rendering of works of art.[65] So, if jurists seeking to understand the place of interpretation in law were obliged to choose between 'conversational' and 'artistic' models, they would be well advised to choose the conversational. But the alternatives are not exhaustive.

Like participants in conversation, legal interpreters seek to understand the author who, in making some statement, has exercised a private power or public authority. But legal interpreters are entitled and required to treat that statement, especially when made in the exercise of the public powers of legislation or adjudication, as taking its place in the legal system as a whole—in a complex of persons and their institutions, as well as of principles and rules, including techniques and conventions of drafting and interpreting, all presumptively oriented towards justice and common good. Dworkin has proposed that the political, legally organized community be personified, so that such cohering with a larger whole, like integrity of personal character, be taken as axiomatically required.[66] The proposal shows vividly enough that his general assimilation of legal with artistic rather than conversational interpretation is a choice of the less fitting of the two models he puts forward as the alternatives. True, in legal interpretation as in conversation the intent of the author really matters, as the very concept of authority to make or declare law entails.[67] But a properly juridical interpretation will not be as ready to consider authoritative an unjust as it will a just meaning. Thus it differs from sensible conversationalists, who like good historians are quick to detect, and not too ready to overlook, their interlocutors' perhaps vicious purposes and deficiencies of personal character.

VII ON THE NATURE OF PERSONS AND THE GROUND OF THEIR RADICAL EQUALITY

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? Here jurisprudential reflection can helpfully go back to its origins, perhaps in Plato's reflections on the trial and execution of Socrates.

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

[65] See Finnis, 'Natural Law and Legal Reasoning' in Robert P. George (ed.), *Natural Law Theory* (Oxford University Press, Oxford, 1992) 134–57 at 139–43.

[66] *Law's Empire*, n. 8 above, 167–75; see also e.g. 225: '[t]he adjudicative principle of integrity instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were created by a single author—the community personified—expressing a coherent conception of justice and fairness.'

[67] See Joseph Raz, 'Intention in Interpretation' in Robert P. George (ed.), *The Autonomy of Law* (Oxford University Press, Oxford, 1996) 249–86 at 268.

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 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 an undergoer and recipient of such effects—is a datum which philosophical exploration of human and other natural realities can adequately account for 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.)

So, as Aristotle and (plainly) Aquinas argue more or less explicitly,[68] any account proposing to explain these realities 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.[69]

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—the very same animal whose interests in every individual case are to be taken equally into account, in Plato's as in present-day ethics aspiring to be 'postmetaphysical'—from the very outset of his or her existence as human, it is this one essentially unchanging factor, unique to each individual, which explains (1) the unity and complexity of the individual's activities, (2) the dynamic unity in complexity—in one dimension, the programme—of the individual's growth as embryo, foetus, neonate, infant . . . and adult, (3) the relatively mature individual's understanding of universal (e.g. generic) immaterial objects of thought (e.g. classes of entities, or truth and falsity of propositions, or soundness/unsoundness in reasoning), and (4) 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 intel-

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

[69] See Finnis, '*Bland*: Crossing the Rubicon?' (1993) 109 *Law Quarterly Review* 329–37 at 333.

lectual (understanding, self-understanding, and, even in thinking, self-determining by judging and choosing). Of course, 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[70] 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.

[70] On personal unity and identity as actuated in the activity of writing, see Finnis, 'Persons and their Associations', n. 58 above, at 267–8.