**Personhood Theory and the Value of Home for Disabled Persons and their Families**

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There is a debate in the property law literature regarding the elevated status of “home.” Personhood theory links one’s home with human flourishing. Theories relying upon economic, sociological and psychological data challenge this link. My article hypothesizes that personhood theory about “home” is a more apt framework for capturing the relationship between disabled individuals, their families and their homes. It will examine the medical and sociological literature about disabled individuals and their families, and the federal and state laws and cases treating living environments for persons with disabilities. Finally, it will offer recommendations for new ways of promoting stable and dignified homes for disabled persons and their families.

**Belonging and Trust: Divorce and Social Capital**

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A recent (March, 2010), Census report shows, among its other findings taken from the National Survey of Family Growth (2002), that while about half of Americans between 15 and 44 cohabit at some point, they are significantly more likely to do so (outside of marriage) if their parents were not living together at the time the young people were 14. (The change is between 47.5% and 60.8%.) (If the wife’s parents divorced, they were 1.73 times more likely to divorce; this finding from the mid-1990s is echoed in the recent Census report (for women aged 15-44, the probability of first marriage surviving 10 years is only two-thirds as high if the woman’s parents were not living together when she was 14). Venturing away from the respondents’ parents themselves, my earlier work with Steve Nock reported that respondents to the National Survey of Families and Households were 2.67 times more likely to divorce if they lived in a state where the divorce rate was high in the year they were 16.

Proponents of social capital theory argue that in neighborhoods where trust decreases and there is less social cohesion and more disorder, there will eventually be more crime. While this hypothesis does not go unchallenged, it is at least easy to follow. This paper will go still further,
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showing from recent Chicago divorces (Cook County divorces from 2002-2009) that, holding other aspects of the community constant, disruptions in social capital also precede increased divorces. Trust between spouses keeps marriages together. It is more difficult to maintain without trust in the institution of marriage itself (as with the divorce of one’s parents or others one knows). Apparently generalized trust that others in your neighborhood will “be there for you” affects one’s sense of belonging as well.

Belonging to America
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In 1948, an African-American attorney arguing in the U.S. Supreme Court in Shelley v. Kraemer, regarding the validity of racially restrictive covenants, ended with this statement: “Now I’ve finished my legal argument, but I want to say this before I sit down. In this Court, this house of the law, the Negro today stands outside, and he knocks on the door, over and over again. He knocks on the door and cries out, ‘Let me in, let me in, for I too have helped build this house.’” 1 This plea was not only central to the agenda of the Black civil rights movement during successive decades but it was also the core complaint of other groups – some in both litigative and legislative institutional advocacy (such as women, people with disabilities, gays and lesbians) and other groups principally relying on less formal avenues of social advocacy (such as religious minorities). The underlying imagery was that America was home only to a favored, dominant group – the Establishment comprised of White Anglo-Saxon Protestant men – while subordinated groups were excluded or were confined to the basement or kitchen.

In one sense, however, this inclusionary agenda – this plea for admission into the American house, the so-called “mainstream” of America – has not succeeded in its own terms because its original target has vanished. Indeed, by many measures the WASP Establishment has vanished in a way that seemed inconceivable in 1948. America today has an African-American president, a white Catholic male Vice-President and a white Catholic female Speaker of the House of Representatives. With the recent replacement of John Paul Stevens by Elena Kagan, the Supreme Court has zero Protestant Justices but is comprised of six Catholics (five men and one woman) and three Jews (two women and one man).

In another sense, however, this inclusionary agenda – this plea for admission into the American house, the so-called “mainstream” of America – has not succeeded in its own terms because its original target has vanished. Insofar as the excluded or subordinated groups sought admission (or, as it was often called, “assimilation”) into the American house, this agenda has effectively become impossible to achieve. The intense polarization of our politics today – itself inconceivable in 1948 when social conflict was viewed as exceptional and regrettable rather than the defining characteristic of our politics – has in effect meant that no one feels at home in this

country. Our political struggles are now widely understood as an irreconcilable contest between radically different conceptions of American society – notwithstanding candidate Obama’s rhetorical insistence that we are not “red states and blue states but the United States.”

My goal is to explore this seemingly paradoxical outcome, that the campaign by groups that understood themselves to be excluded from acceptance, from a sense of “belonging,” in American society has apparently ended with the virtual disappearance of an encompassingly inclusive conception of American society. The campaign in itself may have causally contributed or it may be that exogenous forces have principally led to this outcome. In exploring this causal nexus in particular, I will focus attention on the current campaign for legal recognition of same-sex marriage. Proponents of legal recognition make the same plea that the African-American lawyer made in *Shelley v. Kraemer* – “let us into this house”; opponents say that this admission will destroy the very foundations of the house. The contradictory claims mirror the reception of civil rights advocacy generally since 1948. If the inclusion of previously excluded groups did not destroy the old house, the virtual dissolution of the WASP Male Establishment at least speaks to a transformation of the old house, so much so that it is hardly recognizable as the same house. Has something of value been lost in the process – some sense of “belonging” to a common enterprise? Or should we say “good riddance” and set aside our communal longing to belong?

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**Are You My Mother? Defining Mothers and Fathers When There is No Marriage**

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Many children live in nontraditional families either through the use of adoption, assisted reproduction, or a same sex partner living with the child from the partner’s previous union. In some instances, a single woman has a child through assisted conception with anonymous or known sperm donors. When, if ever, should those sperm donors have rights and responsibilities with these children? In the five (six) states which recognize same sex marriage, if the child is born into a same sex marriage, then both the biological and nonbiological partner are considered "parents." In the majority of states, however, courts are struggling with determining when, if ever, to give custody or visitation rights to a nonbiological, nonadopting, or otherwise legal parent. Some courts are using parenting by estoppel, de facto parenthood, broad interpretations of the Uniform Parentage Act or other equitable theories. If children are the focus, then should we have different results than if we are looking at the laws that govern the "rights" of parents?

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**Where (in the World) do Children Belong?**
Many children live in families that form and extend and dissolve across international borders. The question of where these children “belong” is complicated, with different answers in different contexts. Belonging is sometimes determined in formal terms, based on citizenship or legal immigration status. Belonging is sometimes a matter of fact, as with the “habitual residence” concept used in the Hague Children’s Conventions. Belonging may be understood more subjectively, as a matter of identity and affiliation, based on daily life or ties of family, culture, language, and heritage. Belonging can be as simple as a matter of the child’s presence in a place. Children in the global village rarely belong to just one place, and, in general, the broadest conception of where children belong helps to assure that governments will act to protect their welfare.

This paper develops a thick account of “recognition.” To recognize something is more than just to observe it or to notice it (so: “I saw him, but at first I did not recognize that he was the judge.”). To recognize someone involves characterization. It involves the accreditation of the recognized person or thing as a member of a set. (For example, recognition of a regime, in international law, implies acknowledging the regime as a government.). Recognition requires insight into the nature of the set or category to which the object is recognized as belonging; and thus it should be founded upon deliberation about the fundamental characteristics which qualify an item for membership and about the ways in which members of the set are bonded with one another.

This paper explores legal recognition. It proposes that recognition is a characteristic and fundamental project of a well-functioning legal system. It observes that deliberation and discourse about recognition: about fundamental categories and what includes or excludes a candidate for membership – is a continuous and carefully pursued project of common-law adjudication. It proposes that the reasons for this project transcend the most obvious instrumental ones (like getting things straight so as to promote consistent deterrence, for example). It proposes that basic goods of knowledge and self-understanding are promoted by the law’s deliberation about recognition. Deliberation by legal officials – especially judges – and their development and articulation of fundamental categories to which people belong, is a process which grounds much of the good of a legal and social order. It helps people understand themselves and their social relationships. It establishes the foundations of justified self-respect.

This paper applies these insights to matters involving legal discourse about the family, and especially marriage. This paper proposes that a decent legal system will recognize families
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and – echoing a theme of this conference – that it will recognize “belonging”: family membership. This paper proposes that a decent legal system will recognize marriage. Thus this paper contests the thesis, sometimes advanced, that it would be well for the law to “get out of the marriage business.”

Amae and Belonging
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Belonging is the key concept which characterizes the lifework of Professor B. Hafen, especially in the field of his family research.

Amae is also the key concept of speculation by Takeo Doi, a Japanese psychiatrist, whose name is known as the author of The anatomy of dependence the key analysis of Japanese behavior.

Having read the works of Doi, in 1991, Prof. Hafen wrote a excellent cross-cultural paper titled, Amae and the Longing to Belong.

In the presentation, I would like to focus my attention on the historical and philosophical meaning of this interesting encounter of two concepts from East and West - Amae and Belonging.

Dimensions of Belonging and Aging in Our Culture:
Private and Public Responses and Responsibilities
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All humans have the need to belong: to belong perhaps in the sense that you are not alone, or that someone cares for you, or you are not isolated from others, or you matter to others than only to yourself, or you are valued, or even a sense that you matter as a citizen to your state and county. Aging in the United States raises its own dimensions and challenges when one thinks of it in the sense of belonging. One of the many complications in this interrelationship between aging and a sense of belonging is that the aging process itself is influenced by a number of factors. The major ones are biological, sociological, psychological, economical, and attitudinal factors. Each of these factors has its unique impact on aging and a sense of belonging. Acerbating these factors when we think of aging and a sense of belonging are society's negative attitudes toward aging, identified as ageism.

This paper will explore the dimensions of belonging and aging from several perspectives and will argue that the problem of belonging while aging is primarily the concern of the individual and hopefully of his or her family, but that both the private and public sectors have the
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responsibility to help facilitate the individual and the family. Why? Many of the factors affecting aging and influencing belonging issues are beyond the individual’s or family’s abilities to manage, and the private and public sectors can better assist them.

On Child advocacy and Neglect of the Need ‘to be’ Oneself
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Current legal protection of the child’s right to human dignity does not guarantee protection of an individualized identity. The notion of individualized identity draws support from an ideal of authenticity, in the sense of being true to oneself and to one’s particular way of being. It implies that if you are not true to yourself you miss what being human means for yourself.

Alongside the child’s need ‘to become’, to develop and change, to fulfil dreams and plans, there is another need. This is often neglected by advocates of children’s rights, though it is well embedded in social science literature. This is the child’s need ‘to be’, to be his or her authentic self and to be recognized as ‘somebody’ when simply being that self.

A children’s rights regime should ideally be responsive to the complementing needs ‘to be’ and the need ‘to become’. The granting of a right to autonomy, responding to the child’s need ‘to become’ and overcoming adult paternalism, is often perceived as the most advanced and most problematic stage in the evolution of child law. However, a child who has not been empowered to develop a unique personal identity, whose sense of belonging was ignored, may see himself simply in terms of his biological needs. Such a child may become indifferent to his human rights or misuse them in a reductionist way to satisfy only momentary desires and impulses totally divorced from their noble purposes as envisioned and described in human rights theory and in case law.

Through an evolutionary process of choice between different identifications and values, the child constantly creates and recreates his own identity until, hopefully, it crystallizes in adulthood. Classical portrayals of such evolutionary processes of changing identifications are found in the lives of Nelson Mandela and Mahatma Gandhi. Both individuals reached the stage of courageous commitment to a cultural identity despised and belittled by mainstream society only through lengthy processes of personal growth in their personal alliances and identifications. Both rejected sectarian conceptions of their identity often imposed or suggested by social and legal norms. Both allowed themselves to be themselves despite pressures to conform and to adopt a conventional identity.
In reflecting on the primary themes of our discussions today – belonging, families and recognition, and the issue of exemptions from general and neutral laws – my mind has been drawn to one of the great Constitutional controversies of the twentieth century: the battle over mandatory participation in saluting the flag and reciting the Pledge of Allegiance. The dispute centered on the conditions for creating and sustaining national unity at a time of peril, about the meaning and requirements of patriotism, and the relationship between public morale and national security.

It was also about two very different visions of the American creed, different visions of how to inculcate citizenship and belonging, about the respective roles of the family and the state in the education of children, and how to accommodate differences. Although this controversy was acted out more than seventy years ago, its lessons ring remarkably contemporary, not only because of recent disputes about the constitutionality of the words “under God” in the Pledge, but much more broadly in the dialectic about coercion and conscience that lay at the very heart of the controversy.

In the 1940 case, Gobitis v. Minnerrville School District, the Supreme Court, focusing on the state’s right to determine appropriate means to inculcate patriotism in children, upheld a state statute compelling flag salutes in public schools, which made no exemption for religious objectors. The Court emphasized that this was a general secular regulation, and that national unity, which it said underpinned national security, was a constitutional value of the highest order.

Only three years later, the Supreme Court completely reversed course. In West Virginia State Board of Education v. Barnette, the Court held that when state officials compel participation in the flag salute and pledge, they “transcend[] constitutional limitations on their power and invade[] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official conduct.” In one of the most quotable (and quoted) lines in the history of the Supreme Court, Justice Jackson, writing for the Court declared:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”

The story of these two great cases, as well as what transpired between them, is one of the most remarkable episodes in twentieth century U.S. constitutional history.
The yearning to belong is said to be inherent in human nature. One of the paradoxes of belonging is that the need to belong creates also a need to exclude; in order for belonging to occur, there must be boundaries, standards defining the relationship. The law can have a powerful influence regulating belonging and exclusion.

This paper will focus on belonging to particular types of communities, marriages. All communities have membership requirements that define the boundaries of the community. A variety of disciplines and theories of belonging, community, identity, inclusion, etc., help us understand how to draw such boundaries. A key point is the need to reflect, protect and promote the purpose of the community.

The family is the primary expression of and preferred locus for the most meaningful forms of belonging. Like other relationships, inclusion in family relationships requires some understanding of the boundaries of those relationships, some exclusion. Some kinds of belonging are wrong even (or especially) in families. The trend towards inclusiveness in public policies is present in family law, as evidenced many examples. Recent controversies about legalizing same-sex marriage, recognizing alternative adult intimate relationships, and alternative forms of parenting are the most recent examples of this trend towards inclusiveness if family law. Applying the standards distinguishing beneficial from detrimental inclusion or exclusion in public policies to these developments, we see that some of the inclusiveness developments in family law have been beneficial and others have been harmful or are potentially harmful. The inclusiveness of a proposed law reform is just one factor in assessing its wisdom; some forms of boundary-erasure or removal are harmful to society, families and individuals.

Exclusion for the political community because of views on where the boundaries of the social institution of marriage are drawn will also be considered.
Religious Liberty Exemptions and Same-Sex Marriage Laws
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Same-sex marriage has been legalized in five states and the District of Columbia. Additionally, same-sex marriage was legal in California for nearly five-months, before passage of an amendment to the state constitution (Prop. 8) defining marriage as the union of one man and one woman.) In three states and the District of Columbia, same-sex marriage was legalized by legislative action – positive law. Few of these jurisdictions have enacted explicit religious exemptions. Enacting into positive law exemptions to protect religious liberties of people of faith and religious organizations has turned out to be a “hard sell.”

This paper will discuss the reasons why enactment religious exemptions to or in laws allowing the legalization of same-sex marriage has been difficult to achieve.