

RETHINKING RIGHTS—INSTITUTIONS, BOROUGHES, AND THE UNITED NATIONS

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The central theme of the three papers presented in this section is the nature of individual rights in the context of group rights.¹ All three papers discuss rights in different ways. Bruce Frohnen makes a useful contribution to this discussion when he notes, “We must re-integrate our understanding of human nature, and the person’s social nature in particular, in order to understand human rights.”² Similarly, Jonathan Chaplin highlights the thought of Heinrich Rommen as useful for properly understanding the role of subsidiarity in public order.³ Finally, William Wagner shows how the Catholic Church’s use of the newer rights talk found in the United Nations *Universal Declaration of Human Rights*⁴ may undercut its authority when proclaiming the dignity of the person.⁵

All three of these papers provide useful insights about rethinking rights—although from radically different vantage points. However, all of these papers are influenced by one element of modern culture: each considers the dynamic of distinctions between the individual and the group. By so doing, the three accept the notion of the “individual” as a concept full of “rights” and the “group” full of other “rights.” The fact that the very notion of the “individual” possessing rights is itself of fairly recent vintage is not discussed. Moreover, by accepting the modern notion, these papers generally fail to consider

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1. For the purpose of this article, the term “group rights” refers to the rights that exist for any social or legal entity, including the state.

2. Bruce P. Frohnen, *Individual and Group, Natural and Acquired Rights: On the Need for Unclear Distinctions*, 3 AVE MARIA L. REV. 171, 178 (2005).

3. See Jonathan Chaplin, *Toward a Social Pluralist Theory of Institutional Rights*, 3 AVE MARIA L. REV. 147, 165 (2005).

4. *Universal Declaration of Human Rights*, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948).

5. See generally William Joseph Wagner, *Universal Human Rights, the United Nations, and the Telos of Human Dignity*, 3 AVE MARIA L. REV. 197 (2005).

the single most important rights issue today, the family, and how a proper understanding of the family may help to bridge the gap in much of the rights talk. All three authors fail to recognize how marriage and the family form the natural mediating entity tying together the individual and social groups.

If the authors were looking for this fundamental notion, they would not have far to look. Aristotle notes that “[i]n the first place there must be a union of those who cannot exist without each other; namely, of male and female.”⁶ He further notes, “The family is the association established by nature for the supply of men’s everyday wants.”⁷ In the Christian era, this notion was articulated by Pius XI when he stated that “the family is more sacred than the State.”⁸ To the degree that all rights talk is considered from this vantage, it will take into account the fulcrum of rights historically and as understood by those who happen not to live in the Western modern world. In short, rights talk will be anchored to tradition and much contemporary practice. If one wants to properly discuss rights talk, one should include in it the enduring notion of married and family life as it has existed for most of two millennia. With modern rights talk oscillating between individual autonomy and world organizations, a grounding of the discussion on the family would have been helpful to each of the papers.

Professor Wagner begins his paper by proclaiming that “following World War II, the Church clearly and unambiguously converted to the newer rights approach.”⁹ This newer rights approach is an acceptance of “universal rights guarantees” rather than an approach emphasizing general norms “formulated in terms of moral duty and grounded in fidelity to traditions of right behavior.”¹⁰ Wagner’s evidence for this thesis is selective. Certainly, John XXIII and John Paul II have emphasized the universal nature of human dignity in *Pacem in Terris* and *Redemptor Hominis*.¹¹ However, neither of these encyclicals has stood at the center of Catholic life in twentieth century

6. ARISTOTLE, POLITICS, Book I, ch. 2, in THE BASIC WORKS OF ARISTOTLE 1127 (Richard McKeon ed., Benjamin Jowett trans., 1941).

7. *Id.* at 1128.

8. Pope Pius XI, *Casti Connubii* [Encyclical Letter on Christian Marriage] ¶ 69 (St. Paul ed. 2001) (1930).

9. Wagner, *supra* note 5, at 198.

10. *Id.* at 197-98.

11. *See id.* at 198-99. *See generally* Pope John XXIII, *Pacem in Terris* [Encyclical Letter on Establishing Universal Peace in Truth, Justice, Charity and Liberty] (St. Paul ed. 1963); Pope John Paul II, *Redemptor Hominis* [Encyclical Letter, The Redeemer of Man] (St. Paul ed. 1979).

America. Instead, it is *Humanae Vitae* that clearly stands as the key encyclical for modern life.¹² It, of course, was not filled with high-minded calls for individual rights, but for moral action.

Perhaps what the Church actually has done can best be seen in Paul VI's pontificate. He published seven encyclicals.¹³ Their subject matter was as follows: the Church; prayer for peace during the month of May; the Holy Eucharist; prayer for peace during the month of October; the development of peoples; priestly celibacy; and human life. This is hardly a list of the issues that the United Nations would find important. Indeed, Paul VI's encyclicals show the Holy Father discussing the mysteries of the faith, moral action in family life, and the progress of peoples.

Certainly, John Paul II has been a more prolific writer than Paul VI. Moreover, his "world stage" presence has afforded him the opportunity to speak truth to power. He has met with and preached before huge crowds of common people, as well as princes, premiers, and presidents. When he speaks to world leaders, his words, especially those that catch the ear of the media, are reported. Predictably, these statements concern universal human rights, and therefore may be seen as overemphasizing some issues at the cost of the Church's moral authority.

Despite failing to distinguish what the Church has done from what the media reports the Church as doing, Wagner makes a variety of useful points in his essay showing how the Church should be careful in its relationship with the United Nations and its political affairs. The differences are as follows: 1) even though the U.N. and the Church may use the same language, they do not mean the same thing, and the Church should be careful that its use of terms is clear;¹⁴ 2) norms or human rights often do not tell us what to do in particular

12. See Pope Paul VI, *Humanae Vitae* [Encyclical Letter on the Regulation of Birth] (St. Paul ed. 1968) [hereinafter *Humanae Vitae*].

13. The seven encyclicals of Pope Paul VI are *Ecclesiam Suam* [Encyclical Letter on the Church] (1964), *Mense Maio* [Encyclical Letter on Prayers During May for Preservation of Peace] (1965), *Mysterium Fidei* [Encyclical Letter on the Holy Eucharist] (1965), *Christi Matri* [Encyclical Letter on Prayers for Peace During October] (1966), *Populorum Progressio* [Encyclical Letter on the Development of Peoples] (1967), *Sacerdotalis Caelibatus* [Encyclical Letter on the Celibacy of the Priest] (1967), reprinted in CLAUDIA CARLEN, I.H.M., *THE PAPAL ENCYCLICALS 1958-1981* (1981), and *Humanae Vitae*, *supra* note 12.

14. See Wagner, *supra* note 5, at 200-05.

circumstances;¹⁵ and 3) practical difficulties exist in ensuring rights in particular instances.¹⁶

Overall, Wagner clearly articulates a major problem with the *Universal Declaration of Human Rights*—that its broad language and broad outlines do not tell us much, and may be used by those who want to oppress others. Although this criticism is well founded with regard to the United Nations, it is far less telling for the Church. The Church does have philosophies that can undergird the rights talk, with that of St. Thomas Aquinas being the highest expression of these. She has discussed countless ways in which good men and women should lead their lives; and therefore, the Church is capable of pouring content, a great degree of content (though maybe not specificity), into its rights talk in order to guide good government.

Finally, Wagner is concerned that the Church's embrace of "universal rights" may result in the Church compromising its theological authority. Although it is correct to say that the Church's position is "theological,"¹⁷ Wagner seems to define theology in a modern way—as religious or sacramental in the sense of a *cultus*. However, the Church's theology, properly understood, is meant to encompass all the lesser studies. Therefore, its theology—of the State and of the Body—may be manipulated by many, but properly understood, can serve the needs of the entire world.

Bruce Frohnen takes a far different and rather refreshing approach to rethinking rights in *Individual and Group, Natural and Acquired Rights: On the Need for Unclear Distinctions*. In his brief essay, he shows how the modern state has been created by the stripping away of intermediary institutions—the example he provides is the borough or city.¹⁸ Frohnen pens several passages that are well worth noting and that serve to highlight his theme.

First, rights in medieval times "were not seen as goods in themselves; they, by nature, served higher ends, rooted in a religious vision of natural law and the nature of a good life."¹⁹ Frohnen ends his critique of modern failure in this area by seeking to "re-integrate our understanding of human nature, and the person's social nature in

15. *See id.* at 205-14.

16. *See id.* at 214-20.

17. *Id.* at 220-22.

18. *See* Frohnen, *supra* note 2, at 183-84.

19. *Id.* at 175 (citing R. H. Helmholz, *Natural Human Rights: The Perspective of the Ius Commune*, 52 CATH. U. L. REV. 301, 318 (2003)).

particular, in order to understand human rights."²⁰ However, what Frohnen fails to acknowledge is that modern man cannot re-integrate these things, because modern man lives in a world governed by casual relationships from parenthood to employment to marriage. Only the state today is a stable society.

Frohnen's section dealing with "Rights, Towns, and Persons" well describes the way in which a pre-modern life was integrated.²¹ However, one could just as easily note that the modern world is integrated by "Rights, States, and Individuals." Although such integration is not the one Frohnen wants, it is wanted by a multitude of Americans. For moderns, Frohnen accurately sees that life is divided into "public" and "private."²² But how do we move from the modern atomized mind to Frohnen's borough? It seems that absent revolution, modern man is stuck being a pinball in today's world.

Although Frohnen recognizes that the state has largely torn away "group rights," he does not recognize that such rights could be constructed or reconstructed by a rich notion of contracts—encompassing more than passing economic interests. Indeed, in our world which has torn apart the family, the rethinking of rights should or could begin with allowing persons to contract their marriage in a way they deem fit, and for churches and other groups to make decisions on the basis of such contracts. This could be the start to what Professor Frohnen seeks in his return to mediating institutions.

Professor Chaplin can be seen as tying Frohnen's and Wagner's essays together in a theoretical way. His paper, *Toward a Social Pluralist Theory of Institutional Rights*, considers the writings of Otto von Gierke and Heinrich Rommen as they relate to describing social bodies. These could apply to any group of two or more persons, thus encompassing Frohnen's borough and Wagner's universal society. Chaplin notes that Rommen "presents a complex social landscape in which, as he puts it, a 'plurality of social forms and of cooperative spheres that proceed from the person, serve independent particular ends in the order of the common good.'"²³ Most societies are thick with such social institutions—formal as well as informal. The difficulty for Chaplin becomes how the jural spheres of these bodies can be "distinguish[ed] in a non-arbitrary fashion" from the jural

20. *Id.* at 178.

21. *See id.* at 179-83.

22. *Id.* at 190.

23. Chaplin, *supra* note 3, at 162 (quoting HEINRICH A. ROMMEN, *THE STATE IN CATHOLIC THOUGHT* 143 (1945)).

sphere of the state.²⁴ However, Frohnen has already created the answer to that problem—we should not seek excessive clarity.²⁵ Wagner disagrees with Chaplin’s approach by noting that rights must be constructed in the “righting of relations between or among persons, all pertinent circumstances having first been taken into account.”²⁶ That is, rights are always heavily particularized.

Chaplin ends by noting that the culmination of the state’s work against institutions is at its apex as even the most free of bodies, historically—charities and religious bodies—are increasingly regulated by the state. Certainly, such is the case. However, Chaplin does not note how the charities and religious bodies have often allowed such regulation to take place—few, if any, are willing to stand on principle or to close their doors and move to another jurisdiction.²⁷

All three of these essays help us to rethink how rights and duties should or could be rethought in the modern world. My only concern with them is their failure to take into account how the family—which continues to endure in societies throughout the world and in the most trying circumstances—may be the means by which rights talk is reinvigorated. Certainly, the current debate about marriage brings to the fore enduring notions such as ownership by the entirety, spousal privilege, and inheritance rights. Within these concepts—already accepted in society—are theological, philosophical, and political notions of groups and individuals showing that although a distinction between a person and a group may exist, there is a new reality, enduring, and recognized for centuries, that also exists.

24. *Id.* at 169 (emphasis removed).

25. Frohnen, *supra* note 2, at 171.

26. Wagner, *supra* note 5, at 209.

27. *See generally* Chaplin, *supra* note 3.