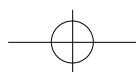
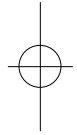
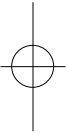
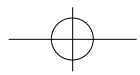
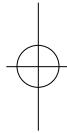
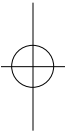


A Personalist Jurisprudence, The Next Step





A Personalist Jurisprudence, The Next Step

*A Person-Centered
Philosophy of Law for the
Twenty-First Century*

Samuel J.M. Donnelly

Foreword by

Hon. Joseph R. Biden, Jr.
United States Senator from Delaware

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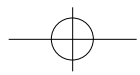
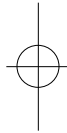
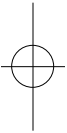
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To Mary Ann



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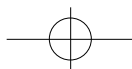
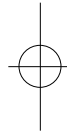
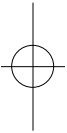
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Foreword

Senator Joseph R. Biden, Jr.

Oliver Wendell Holmes, Jr. famously remarked that the life of the law is not logic, but experience. After close to forty years as a law professor and practitioner, Sam Donnelly knows this to be true. The central theme of his book is that the law is primarily about persons and their relations, a theory which he labels “personalism.” Under this “person-centered” interpretation, he offers not simply another definition of “the law,” but expounds a vision of the law as an activity engaged in by a variety of players, including judges, advocates, scholars and the general public. I am attracted to Donnelly’s thesis on many levels, but perhaps most because I believe that it has the power to enhance the legitimacy of law. Why? Because it is grounded in respect and concern for each and all persons and is continually open to the needs, interests and circumstances of all members of a democratic society. Without a strong and abiding respect to the law and its institutions, no democracy can thrive and survive.

Donnelly offers two insights that caught my attention. First, he argues convincingly that the central achievement of twentieth century jurisprudence was the gradual recovery “of a role for the person.” By this Donnelly means recognition of the great American ideal that each person is worthwhile and entitled to government protection of our lives, liberties and property. Second, he maintains that recent schools of constitutional interpretation—whether conservative or liberal—both often avoid the robust debate and difficult interpretative work needed to best unpack Constitutional concepts.

“Personalism” offers an interpretation of and reflections on American law. At its core, Donnelly argues, personalist theory maintains that respect for the human dignity of each person, as well as protection of the common good, is the core American insight which has emerged (albeit episodically) over two centuries. Hence, the personalist judge offers a theory of our Constitution as an ongoing action designed to promote

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that ideal. While a personalist judge would prefer to ground his rulings in constitutional concepts, this judge recognizes that in some cases he may be handicapped by the law's "limited vision" of some great national dispute. Personalist theory accepts such limitations, recognizing that the articulable principles that undergird landmark rulings may only be apparent in hindsight.

Donnelly points to the Warren Court's landmark ruling in *Brown v. Board of Education of Topeka, Kansas* as such an example. He applauds the Court's use of "means-end reasoning" to achieve our national ideals in public education. In so doing, the Court took giant steps to restore "a role for the person" in American jurisprudence. The central theme of Chief Justice Earl Warren's opinion was that the law evolves and should change to keep pace with significant cultural and sociological developments. While legal scholars have tried to read back into Warren's opinion a discussion of deliberation on the concept of equality or equal protection, Donnelly is willing to concede that the *Brown* decision is devoid of any principled analysis (in the Wechslerian sense) in support of the Court's position. Yet, far from concluding that *Brown's* reasoning is morally and intellectually bankrupt, Donnelly maintains that it is Warren's personalist-oriented approach which gives it its unsurpassed moral force. "Indeed, the result in *Brown* could be supported by ultimate legitimacy, that is, by reasons that have the possibility of being acceptable to all persons at all times because they are based on respect and concern for each person."

In his most provocative and original of insights, Donnelly takes both conservatives and liberals to task over their respective views of constitutional interpretation. Conservative thinkers want to preserve in stone the founding generation's supposed interpretation of the drafters' deliberately written general provisions. In contrast, liberal thinkers often want to advance political goals by arguing for decisions supported by their favored narrow principles. Ironically, both methods evidence a "refusal to deliberate" on the moral concepts contained within the Constitution, to discuss competing reasons or consider competing interests. Donnelly describes "the great quarrel over method" as becoming "particularly acrimonious" when these opposing constitutional camps discuss constitutional interpretation. Having served as Chairman of the Senate Judiciary Committee and chaired six Supreme Court nomination hearings, I can assure the reader that such debates over constitutional interpretation are, to say the least, heated.

Donnelly cites Judge Robert Bork's jurisprudence as an example of a conservative judicial philosophy that rejects the personalist approach.

Bork's emphasis on "established constitutional values" permits him to oppose the recognition of new unenumerated rights, whether by development of the due process or equal protection clauses or under the Ninth Amendment. For example, in considering the Fourteenth Amendment, Bork seeks to uncover "the values held by the generation which adopted the Fourteenth Amendment." Thus, for example, Bork opposes *Shelley v. Kraemer* because he does not believe that its finding of state action in the enforcement of a racially-restrictive covenant can be supported by a principle that will be neutrally applied in all situations. Rather, Bork attempts, in his own words, to "develop the values of the Constitution's drafters in a principled way" by limiting his analysis to what he thinks the founder's intended, even where the textual language supports a more expansive reading. In doing so, however, Donnelly argues that Bork avoids the hard and controversial work of deliberating on and explaining the great moral concepts in the Constitution.

Lest the reader think that Donnelly just likes to pick on conservatives, he next turns his critical analysis to liberal scholars who do the same thing in different analytical garb. For example, he criticizes Professor John Hart Ely for his "ingenious attempt to justify the work of the Warren Court," which "while offering a theory of judicial restraint, is an example of a liberal theory which produces liberally desirable political results while purporting to restrain judicial activism." Likewise, he questions Professor Laurence Tribe's model of an "aspirational penumbra" of uncertain constitutional dimensions. Donnelly maintains that Tribe's paradigm, like Ely's, allows him to avoid deliberation of contested constitutional concepts and instead to offer "a formula for judicial restraint which supports results admired by liberal activists."

Having rejected what he considers the extremes of right and left, Donnelly endorses the approach of a "personalist judge" who uses means-end reasoning to promote constitutional goals and to enhance protected primary social goods. He cites Justice William Brennan's opinion in *New York Times v. Sullivan* as a good model for a personalist judge. There, Brennan modified the common law of libel by holding that a public official suing a newspaper for libel must show malice in addition to the elements of the common law action. This holding balanced the interests of Commissioner Sullivan and other public officials in their reputations against the freedom of the press of *The New York Times* and the black ministers who published the allegedly libelous advertisement. According to Donnelly, this is an example of a personalist

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judge at his best, forcefully pressing a “sparkling vision of concern for the human dignity of each person.”

After almost thirty years in the United States Senate, I have been called on to consider the nomination for each of our nine Supreme Court Justices, as well as chair numerous Supreme Court nomination hearings. Virtually every nomination has witnessed a “quarrel over method,” to use Donnelly’s phrase—a robust debate over the judicial philosophy of the nominee. I think Donnelly’s work may well be an invaluable guide in considering what counts most in a Supreme Court justice; nominees who fall into the “personalist camp”, and evidence, in his words, “a theory of our Constitution and a method for interpretation which will be in accord with his commitment to afford all persons deep respect and concern and try to understand persons, their needs and their horizons.”

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