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PEOPLE WHO ARE NOT LEGAL AND WHO ARE NOT ALIVE
IN THE EYES OF THE LAW

RICHARD W. PAINTER*

I. INTRODUCTION

IN *Persons and Masks of the Law*,¹ John T. Noonan, Jr. juxtaposes legal rules based upon abstract principles with the persons whose lives are affected by these legal rules. Judges and legal commentators articulate and expound upon legal rules and abstract principles, but often ignore the persons who are the subjects of the law. *Persons and Masks of the Law* addresses this imbalance by introducing the reader to the people in famous and not so famous cases, ranging from the coincidental plaintiff, Mrs. Palsgraf in 1928,² to the slaves subjected to Virginia's colonial laws.³

This Essay explores the interaction of persons with the law in two contexts. The first is a person who is considered to be "illegal" in a particular jurisdiction because he or she is not legally present in the jurisdiction. The second is a factual dispute about whether or not a person is "alive," an issue that arises when judges try to define the boundaries of human life, both the very beginning of human life and the very end. This Essay raises questions about personhood and the law in these two contexts. This Essay's normative conclusions, however, are limited. Meaningful conclusions about what courts and lawmakers should do with respect to persons who are present in the jurisdiction but are not legally here, or about persons who may or may not yet/still be alive, requires more thoughtful consideration than space or time allows here. The question raised here is whether abstract "masks of the law" imposed by legislatures and/or by courts avoid difficult questions about persons and their legal rights and instead take the path of justice down a short cut that treats some people as if they do not exist.

II. WHEN COURTS RULE THAT PERSONS ARE NOT "LEGAL"

Sometimes the law acknowledges that a person exists, but labels that person "illegal" because he or she is not lawfully present in the jurisdiction. "Illegal immigrant" and "illegal alien" are common terms for such a person, although sometimes the person is simply said to be an "illegal."

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1. JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, & WYTHE AS MAKERS OF THE MASKS* (5th ed. 2002).

2. See *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

3. See NOONAN, *supra* note 1, at 35–51, 142.

This shorthand phrase allows an adjective embodying the mask of illegality to become a noun describing the person, conveying the fact that our society deems other aspects of personhood in this context to be irrelevant. A different and more specific noun is ordinarily used to describe an object illegally imported into the jurisdiction or illegally manufactured in the jurisdiction, such as an illegal drug or an illegal rendition of a copyrighted movie, but an illegal person can simply be referred to as an “illegal.”

This “illegal” label—whether used as an adjective or noun—sometimes attaches to entire families of people but sometimes attaches only to fathers and/or mothers, but not to their children, or vice versa. Relationships between parents and their children and other familial ties are important for determining legal status only if the law says so, for example, if one or both of a child’s parents are citizens. If not, and if the law designates some family members as legal and others as illegal, separation may be required.⁴

What impact does using the word “illegal” to describe a person have on a person’s legal rights? Does our practice of deeming people “illegal” because they are illegally present in the jurisdiction invite courts to deny to these persons fundamental rights, including the right to due process?

While the Constitution does not define due process differently for persons legally and illegally present in the United States, our courts in practice do treat “illegals” differently. Consider the following account of the procedures used by federal magistrates in “Operation Streamline,” which began in 2005 as part of a “zero tolerance” policy toward illegal immigration:

Most of the new deportees passing by describe having been shackled hand and foot for the Streamline court in Tucson. Many have just spent 30 days or more at a facility in Florence, one run by Corrections Corporation of America, a private prison behemoth that jails Streamline convicts for the U.S. government. . . .

Migrants—who once would have been removed from the country through a civil-administrative process and barred from legal re-entry—now return home with a criminal record that could expose them to escalating punishment if they cross the border again to escape poverty, find work, and/or reunite with loved ones.

Streamline began as a “zero tolerance” approach to border enforcement during President George W. Bush’s administration. Before its advent in 2005, aliens apprehended by the Border Pa-

4. Laws that compel splitting up families because of a person’s legal status are not new to our legal system; before the Emancipation Proclamation, slaves were also subjected to this experience because some were deemed to be the property of one person and some the property of another person.

trol generally were not prosecuted under existing criminal statutes. . . .

[The magistrate judge] dispenses with the men and women in his court in seven-person bursts. The defendants before him are dressed in the dirty, sweaty clothes they were captured in, their hands shackled to their waists, their ankles in fetters.

They look weary and morose. They have not had baths or showers after several days in the desert, and the funk from this forced lack of hygiene pervades the courtroom. Indeed, the wall nearest to where the remainder of the defendants are still seated is blackened with the dirt from countless bodies.

Beside each defendant in front of [the magistrate] is a lawyer, often a private attorney hired by the court for \$125 an hour under the provisions of the U.S. Criminal Justice Act, which guarantees counsel to the indigent. Some are represented by salaried federal public defenders. Each lawyer has four to six clients in a day's Streamline lineup.

[The magistrate] runs through a series of questions relayed to each migrant with the rapidity of an auctioneer, mumbling as he goes, head down.

Individually, he asks them compound questions, translated into Spanish by an interpreter and transmitted to them via headphones: Do you understand your rights and waive them to plead guilty? Are you a citizen of Mexico (or Guatemala or El Salvador), and on such-and-such a date near such-and-such a town, did you enter the United States illegally?

The answers never vary: "Sí."

Then he asks them, as a group, whether anyone has coerced them into a plea of guilty. "No," the chorus replies.

Again, they're asked, as a group, whether they are pleading guilty voluntarily because they are in fact guilty. The chorus cries, "Sí."

First-timers receive time served for the petty offense of illegal entry.

Those charged with illegal reentry, a felony, plead guilty to the lesser offense of illegal entry and get anywhere from 30 to 180 days. . . .

However, in December 2009, the Ninth U.S. Circuit Court of Appeals found in *U.S. vs. Roblero-Solis* that Streamline hearings violated Rule 11 of the Federal Rules of Criminal Procedure, [requiring] that judges "must address the defendant personally

in open court” and determine whether the defendant’s guilty plea and waiver of rights is voluntary. . . .

The Ninth Circuit did not tackle constitutional issues, leaving it up to magistrates as to how they should proceed. Nevertheless, the Ninth Circuit made clear that it frowned upon magistrates taking pleas *en masse*, which was occurring prior to *Roblero-Solis*.⁵

The opinion referenced in this news article, *United States v. Roblero-Solis*,⁶ was written by Judge Noonan. Marginal improvements have resulted in the due process rights of accused illegal immigrants, but these cases continue to be dispensed with very quickly and with minimal due process.

John Noonan has addressed this problem in both his scholarship⁷ and in written opinions on the Ninth Circuit.⁸ Noonan acknowledges that the law sometimes requires that a person who is here illegally be deported, usually to return to the country from which he or she came. However, Noonan also recognizes that when a judge makes such a decision about a person, that person is entitled to the same due process rights as other persons who are parties to civil or criminal cases in our courts.⁹

By embracing political principles that deem a person to be “illegal” because that person is illegally present in the country, our society perhaps invites such due process abuses. We fail to recognize that these cases involve parties who are persons—a fact that does not change because these persons are accused of doing something illegal, usually the act of entering the country without permission and sometimes other illegal acts as well.

Ironically, we got to this point incrementally; the law has not always been this way. Many of our ancestors came to America without permission from the people who were already here. The Mayflower passengers in 1620 were among the earliest of these immigrants, but there were tens of thousands more. The Mayflower passengers left their home country illegally (they did not get permission to emigrate from England), and went to another country (Holland), where they obtained a ship and sailed to America. They did not know if they would be welcome. They did not ask permission to come. They simply came.

The Americans who were already here could have killed the Mayflower passengers, or they could have detained them and sent them

5. Stephen Lemons, *Grinding Justice: Operation Streamline Costs Millions, Tramples the Constitution, Treats Migrants like Cattle, and Doesn’t Work*, PHOENIX NEWTIMES (Oct. 21, 2010), <http://www.phoenixnewtimes.com/2010-10-21/news/grinding-justice-operation-streamline-costs-millions-tramples-the-constitution-treats-migrants-like-cattle-and-doesn-t-work/>, cited in JOHN T. NOONAN, JR. & RICHARD W. PAINTER, *PERSONAL AND PROFESSIONAL RESPONSIBILITIES OF THE LAWYER* 658–60 (3d ed. 2011).

6. 588 F.3d 692 (9th Cir. 2009).

7. See, e.g., John T. Noonan, Jr., *Immigration Law 2006*, 55 CATH. U. L. REV. 905 (2006).

8. See, e.g., *Roblero-Solis*, 588 F.3d 692.

9. See generally *id.*

back to England. Or, they could have welcomed them to America and taught them how to support themselves here. These Americans—sometimes referred to as “Indians” or “Native Americans”—apparently chose the latter course of action, a choice we are reminded of each year when we celebrate Thanksgiving.¹⁰ Descendants of the Mayflower passengers now number in the hundreds of thousands, and some have joined a society that honors the memory of these pilgrims and the Native Americans who helped them.¹¹

Many subsequent waves of immigrants came to America, and some did not fare so well with Americans who were already here. Altercations sometimes broke out, with violence on both sides. King Philip’s War was one of the most noted early conflicts in Massachusetts.¹² The immigration story in America is a complex one. Fear, prejudice, and violence sometimes predominate, while at other times, new immigrants make a genuine effort to integrate themselves into the existing order of society, and that society makes a genuine effort to accept the immigrants. For more than a century, however, all of this took place in the absence of federal laws imposing meaningful restrictions on who did and did not have a legal right to be here.

By the latter half of the nineteenth century, the United States embarked on a concerted effort to regulate and limit the flow of new immigrants to its shores.¹³ Although our population is not as dense as those of other major world powers, including China, India, and the European Union, these laws presumably assume that we can accommodate only a

10. The comedian and entertainer Will Rogers, himself of Cherokee descent, once jokingly suggested that the Native Americans in this instance should have taken a harsher stance against immigration:

ROGERS: Well, I think I am, folks Indian. Both mother and father had Cherokee in their blood in them born and raised in the Indian Territory. Course I’m not one of these Americans whose ancestors come over on the Mayflower, but eh, we met them at the boat when they landed. It’s always been to the everlasting discredit of the Indian race that we ever let them land. What, it’s the only thing I blame the Indians for, the biggest bonehead they ever pulled

CAL. STATE PARKS, *Video Transcript, Will Rogers: American*, <http://www.parks.ca.gov/pages/735/files/willrogersorientation.pdf> (last visited July 31, 2014) (alteration in original).

11. See MASS. SOC’Y OF MAYFLOWER DESCENDANTS, *Scholarships from the Society*, <http://www.massmayflower.org/membership/benefits/scholarships/scholarships.htm> (last visited July 31, 2014) (announcing scholarship applications for Wampanoag Nation descendants in honor of that tribes’ assistance to Mayflower passengers and requiring “proof of membership in the Wampanoag Nation by a tribal official’s certification that the applicant is a *bona fide* member of a Tribe of the Wampanoag Nation” for scholarship eligibility purposes).

12. See generally JILL LEPORE, *THE NAME OF WAR: KING PHILIP’S WAR AND THE ORIGINS OF AMERICAN IDENTITY* (2009).

13. See The Geary Act, ch. 60, §§ 2–9, 27 Stat. 25 (1892); The Immigration Act of 1882, ch. 376, § 2, 22 Stat. 214 (current version at 8 U.S.C. §§ 1551–1574 (2012)); The Chinese Exclusion Act, ch. 126, § 1, 22 Stat. 58 (1882) (repealed 1943); The Page Act, ch. 141, 18 Stat. 477 (1875) (repealed 1943).

limited number of new immigrants and that we need to enforce these limits. We have to varying degrees and in various ways enforced these laws, at one point sending boatloads of Jewish refugees back to Nazi Germany to face extermination because America did not choose to make room for them.¹⁴ Immigrants who were allowed to come from, among other places, Ireland, Italy, Germany, Russia, China, and Japan, often faced prejudice upon arrival and occasionally violence from those who were already settled here. The law sometimes offered relief, but at other times stood idle or was prejudiced against immigrants, even if that prejudice resulted in the taking of human life¹⁵ or the internment of people without trial, including U.S. Citizens, simply because of their ancestry.¹⁶

Like the Pilgrims who came before them, millions of people still come to the United States, some without permission. However, many new Americans today are deemed to be here illegally because their act of entering the country without permission violated a specific provision of the United States Code. They are “illegal” persons.

Judges should recognize that these immigrants are persons rather than nonentities hidden behind the mask of illegality and should allow these immigrants the same due process rights as other persons in their courts. There is, however, little else that judicial officers can do to address the situation. A broken immigration system created by federal statutes invites both unauthorized immigration to the United States and mass processing of cases against persons accused of coming here illegally. Presidents Bush and Obama have urged Congress to fix our immigration system,¹⁷ but Congress has so far done nothing. Giving people hope—substantial and meaningful hope—of being permitted to come to the United States legally and to work here legally is a necessary part of any reform that would reduce the number of people who enter the country illegally. Reduced illegal immigration would lighten our courts’ immigration caseloads and perhaps allow meaningful attention to the concerns

14. See SARAH A. OGIIVIE & SCOTT MILLER, *REFUGE DENIED: THE ST. LOUIS PASSENGERS AND THE HOLOCAUST* 105–06 (2010).

15. See *Commonwealth v. Sacco*, 255 Mass. 369 (1926); see also NOONAN & PAINTER, *supra* note 5, at 619–49 (discussing trial transcript).

“I met Judge Thayer once. This too was some years after the trial. We were in his chambers in Boston settling an automobile accident case . . . I realized that Judge Thayer was no longer talking about our case, but strutting up and down and boasting that he had been fortunate enough to be on the bench when those sons of bitches had been convicted.”

Id. at 564 (quoting Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3 (1951)) (excerpting Charles Curtis’s account of his later meeting with Judge that presided over *Sacco* trial).

16. See *Toyoaburo Korematsu v. United States*, 323 U.S. 214, 223 (1944) (holding that internment of persons of Japanese ancestry during World War II was constitutionally valid).

17. President Bush and President Obama have proposed numerous bills during their administrations.

Judge Noonan and others have raised about fundamental due process rights.

Our present immigration system is a grave threat to the rule of law in our country, not because people emigrate without permission, as many have done before them, but because the immigration system has become so chaotic that our judicial officers cannot enforce the law without violating constitutional rights. Our present immigration system is also a threat to our national identity, which embraces—with conviction, even if sporadically in practice—substantive and procedural rights of persons in their relationship with the state, individual rights often described by the word “freedom”. We also embrace the concept of America being a nation of many cultures, and the custom of welcoming immigrants goes back to the days of the Mayflower. These are the reasons so many people want to live here. Making our immigration system conform to the traditional values of our Country is a critically important task and a task that ultimately can only be accomplished by the President and Congress.

III. WHEN COURTS SAY PERSONS ARE NOT ALIVE

Judges sometimes must decide if a live person exists in a particular case. In the temporal realm as we know it, human life has a beginning and an end, or at least the law assumes as much (there is no secular legal recognition of the concept of “eternal life”). Courts struggle, however, to discern the beginning of human life as well as to discern the end of human life. To make these distinctions, courts sometimes look to abstract principles and legal rules that higher courts previously articulated for defining the span of human life. Alternatively, as Judge Noonan’s scholarship suggests would be preferable, at least when possible, courts could make findings of fact about whether there is a live human being in each particular case in which a party alleges that the case concerns the interests of a live human being.

One risk of allowing abstract legal principles to define human life is that courts can apply the prevailing principles of the day and decide that a being is not fully “human” or is not fully “alive,” even if faced with overwhelming evidence of a live human being. Legal principles are thus allowed to constrict that person’s existence in the eyes of the law. The person is deemed not to be a person or only partially a person, having some legal rights, but not others, presumably because some abstract principle requires it. Judge Noonan wrote about just such a legal regime in his account of colonial Virginia’s laws with respect to slaves.¹⁸ The abstract principles applied in these instances may be designed to protect another person’s actual or perceived legal rights (in Judge Noonan’s example, the rights of the slave holder) and/or to prevent the political crisis that could result if the other person’s “rights” are threatened. These abstract legal principles, however, have little to do with the facts.

18. See NOONAN, *supra* note 1, at 35–51, 142.

The Supreme Court in *Dred Scott v. Sandford*¹⁹ thus weighed the legal rights of slaves against the claimed property rights of slave owners. Because the Court did not recognize slaves to fully be persons under the law, it found in the slave holders' favor. This result was overturned by a bloody Civil War and the Thirteenth Amendment to the Constitution, but the decision was grounded in the Court allowing abstract legal principles, including principles embodied in the Constitution at the time, to be the basis for factual assumptions about human beings. The Court knew there was no such thing as "three-fifths" a person in the real world, but it nonetheless followed an abstract legal principle that a slave was barely half a person.

Nearly 120 years later, the Court in *Roe v. Wade*²⁰ faced a situation that was much more difficult to decide: whether or not a human life worthy of protection under the law is taken away by an abortion. Specifically, the legal question in *Roe* was whether or not there existed a compelling state interest in prohibiting abortion that overrides the privacy rights of the mother. This legal question turns in large part on a factual question of whether the aborted fetus is a live human being. The Court discussed this question at length, relying on abstract legal principles—some dating back to Greek and Roman law—and also on then-modern medical facts related to fetal development during the first six months of gestation.²¹ In concluding, the Court articulated a legal principle that defined the beginning of human life, or at least human life worthy of protection by the law, drawing the line at three months.

"End of life" situations are another category of cases in which a court may decide whether an alive person exists or whether a person is deceased in-fact (these definition-of-death cases are different from the "right to die" cases in which it is acknowledged that a person is alive and steps are taken to end that life at that person's direction or the direction of another). In definition-of-death cases,²² courts decide when a person who once existed no longer exists, either because they have disappeared or because their bodily and mental functions have eroded to a point where a person is deemed to be dead. Once again, abstract legal principles could determine the outcome of these cases regardless of the actual facts—saying that a person is "legally dead" or "legally alive" regardless of whether the person

19. 60 U.S. 393, 427 (1856).

20. 410 U.S. 113 (1973).

21. *See id.* at 160–61 ("The Aristotelian theory of 'mediate animation,' . . . continued to be official Roman Catholic dogma until the 19th century, despite opposition to this 'ensoulment' theory from those in the Church who would recognize the existence of life from the moment of conception."); *see also id.* at 160, 160 nn. 59–60 (discussing medical evidence on viability of fetus).

22. *See, e.g.,* *Strachan v. John F. Kennedy Mem'l Hosp.*, 109 N.J. 523, 533 (1988) (defining death related to young man's suicide attempt and doctor's subsequent diagnosis of "brain dead"); *In re Quinlan*, 70 N.J. 10 (1976) (discussing evolving definition of death regarding "brain dead" child and medical technology advancement).

is in fact dead.²³ Alternatively, the decision could be less grounded in abstract principles and based instead upon the facts in each case.

This distinction between abstract principles based jurisprudence and facts based jurisprudence makes a big difference in both abortion and end of life cases. Abstract legal principles defining the human life span may originate from human perceptions of factual evidence of there being life or no life in a particular instance, but after one court articulates a legal principle, others may follow it. The *Roe* Court even cited Roman law, although it did not follow it. *Stare decisis* requires courts to follow the legal principles of higher courts in their jurisdictions. By contrast, factual conclusions depend upon facts in a particular case and are not binding precedent. Indeed, what some other court decided about factual evidence—even similar factual evidence—in some other case, is usually only marginally relevant or not relevant at all in a new case involving new facts.

In situations where advances in science inform human perception of factual evidence, human perception of even very similar facts is likely to change as science changes over time. To the extent courts decide cases defining the beginning and end of the human life span based upon scientific analysis of evidence, courts' conclusions about the existence of human life in very similar factual scenarios could change.

But changes to factual assumptions and the legal rules that follow from those assumptions can have a political cost.²⁴ Particularly, if some people could have their legal rights curtailed, all three branches of government could be threatened with political turmoil when a court attempts to make what it believes to be an accurate finding of fact that diverges from what other courts have done before. Courts may choose instead not to change their decisions about a controversial fact, even if scientific evidence has changed and even if the question of fact is as important as the existence or nonexistence of a human life. A court can avoid the uncertainties of scientific analysis and instead use abstract legal principles to resolve the factual question. In countries where the Catholic Church still has great influence, the abstract principle defining the beginning of human life might be based upon the factual conclusion that human life begins at conception because the Church says so. In more secular coun-

23. These cases turn, to varying degrees, on the factual circumstances that put certain legal principles into play, but the legal principles sometimes control the analysis at a very early stage, leading to absurd conclusions. See, e.g., John Schwartz, *Declared Legally Dead, as He Sat Before the Judge*, N.Y. TIMES (Oct. 11, 2013), http://www.nytimes.com/2013/10/12/us/declared-legally-dead-as-he-sat-before-the-judge.html?_r=0 (reporting case of Donald Miller, Jr., Ohio man who went missing for several years, was declared dead, and then later re-emerged, appearing at court where Hancock County Court still declared Mr. Miller to be dead for Social Security purposes). This man was still legally dead even if he could stand before the Court and make it obvious to everyone present that he was in fact alive! See Joseph Vining, *Reading John Noonan*, 59 VILL. L. REV. 715, 722–23 (2014).

24. This cost may be substantial, even if it is not as dramatic as a civil war that the Supreme Court apparently tried to avoid with its abstract—and morally offensive—definition of personhood in *Dred Scott*.

tries such as the United States, the operative principle might be that human life—or at least viable human life—begins three months after conception because the United States Supreme Court said so in 1973 and has not announced that it has changed its mind.

Legal precedent is thus allowed to do something that precedent normally does not do, which is to control determinations of fact in subsequent cases for years or perhaps decades. This continues until the precedent is revisited by a court that is sufficiently influential, informed, and courageous to do so when and if the scientific evidence suggests that the court should make a determination of fact anew. Until then, lower courts that feel compelled to follow precedent on questions of fact simply fall into line and follow the precedent, refusing to consider evidence that might contradict it. Precedent does not account for subsequent advances in medicine and other sciences unless it is affirmed by a court that has actually considered those factors. Precedent is still precedent, nonetheless.

To what extent is the weight of opinion in the medical community in 1973, about when a human fetus becomes a human being, if there was any consensus in 1973, relevant for deciding that same question of fact in a case forty-one years later in 2014? The answer to this question is that the view of the medical community in 1973, which influenced the opinion in *Roe v. Wade* (it was authored by Justice Blackmun, who was the former General Counsel of the Mayo Clinic) is very relevant—and indeed far more relevant than what the medical community believes in 2014—whether or not those views have changed.²⁵ The earlier opinion is incorporated into a legal rule²⁶ that is widely believed to be binding precedent in 2014 cases. If, however, the legal rule in *Roe* is really only a factual conclusion now forty-one years old about the beginning of human life, one wonders what a judge should do with that opinion in 2014.

Judge Noonan wrote a lot on this question, mostly in the decade after *Roe* was decided²⁷ and before he joined the Court of Appeals. This author is not certain he agrees with what Judge Noonan said on that question (defining the beginning of a human life is then as now a conceptually and factually difficult task). This author, however, has serious concerns about assigning too much weight now to anyone's conclusions about that ques-

25. This author does not express an opinion here as to whether those views in the medical community have in fact changed or whether they are likely to change in the future other than to point out the obvious: perceptions of empirical evidence are different now than they were in 1973 and will likely be yet more different in the future. Consensus about ultimate conclusions may or may not be the same.

26. See *Roe*, 410 U.S. at 116–17 (“[W]e have inquired into, and in this opinion place some emphasis upon, medical and medical-legal history and what that history reveals about man’s attitudes toward the abortion procedure over the centuries.”).

27. See, e.g., John T. Noonan, Jr., *An Almost Absolute Value in History*, in *THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES* 1–60 (John T. Noonan, Jr. ed., 1970).

tion in the 1970s and 1980s. Facts are facts, and when human observation of facts is shaped by quickly evolving medicine and science, courts and commentators are obligated to reexamine those facts continuously to ensure to the best of their ability that these observations are correct. This is particularly true when facts concern the existence or nonexistence of a human life. No court—not even the Supreme Court—should consider itself too busy to undertake that inquiry as often as needed to make the best possible effort to get the facts right.

