

BOOK REVIEW SYMPOSIUM

Belonging and Identity: Past and Present

In memory of Professor Ruth Gavison (1945–2020)

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Abstract

Discussed: *Kinship, Law and Politics: An Anatomy of Belonging*. By Joseph E. David. Cambridge: Cambridge University Press, 2020. Pp. 156. \$110.00 (cloth); \$88.00 (digital). ISBN: 9781108499682.

Like many others, I believe that the information revolution is a constitutive moment in human history, and not only because of the development of technologies that change our habits and improve the quality of our lives. More than anything else, it is because the information revolution profoundly and dramatically changes our self-concept. That revolution is changing our understanding of the place we occupy in the universe (the erosion of anthropocentrism), forcing us to rethink our uniqueness as human beings and our human essence. I believe that the preconditions of our existence are changing dramatically nowadays, and consequently, our notions of belonging and identity require revision.

Keywords: jurisdiction; identity; belonging; vulnerability; human dignity; territoriality; information revolution; data-driven technology; profile; privacy

I am grateful to the scholars who participated in this symposium about my book, flattered by their interest in my work, appreciative of the profound and compelling responses, and more than happy for the dialogue that the *JLR* allows us—a dialogue that invites a deeper conversation with respondents' works as a whole. Such literary dialogues are never a substitute for joint conversation and learning, but they have their own important place. Among other functions, they provide a wonderful opportunity for me to review my analyses and refine my insights and articulations. The dialogue enriches my thoughts. For all these I am thankful to the commenters and the *JLR*.

The intriguing responses of Ari Mermelstein, Lenn Goodman, Nina Caputo, and Paul Mendes-Flohr encompass many points, of which I shall address only a few that allow me to draw a comparative line of thought between the conceptual history of belonging and identity, and the deep conceptual transformations that these ideas are undergoing nowadays.

Privacy, Belonging, and Vulnerability

In my book, I discuss configurations of belonging as a concept that traverses various aspects of human life, and I focus on three spheres of belonging: kinship, law, and politics. The concept of privacy, so I thought, does not interface with this theme, is not contained within it, and is not related to it, and I do not purport to address it in the book. However, the

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dialogue with the respondents caused me to rethink the relationship between privacy¹ and belonging and made me aware of the tension between them.

In the discussion of the mythical roots of “belonging as sameness,” I noted that the earliest expressions of this idea describe the notion of belonging as a resolution for the predicament of human solitude (5). Similarly, the idea of privacy, based on the pattern of separation and individuation, can be seen as a counter-reaction or an answer to total belonging that might erase the existence of the individual. According to this line of thought, while belonging saves the individual from the danger of solitude, privacy saves her from the opposite threat: the danger that the individual will be erased by frameworks of belonging. In this sense, privacy stems from recognizing the danger of a belonging that is absolute and oppressive of its individual members. Privacy thus protests and remedies totality of belonging. It might be seen as antithetical to belonging, permitting an escape from belonging or suspension of belonging within certain temporal and spatial boundaries. Insofar as belonging expresses a longing for a dialectical escape from solitude (“being” and “longing”), privacy expresses the opposite longing: for a return to solitude.

In the spirit of the biblical description of the problem of solitude—“It is not good that the man should be alone”²—the appeal for privacy echoes an opposite voice: “never stop allowing yourself to retreat ... and be renewed.”³ Privacy marks the possibility of retreat from belonging, a suspension of identity, a regression to the primordial state of affairs where solitude is a natural comfort zone. In the spirit of Hannah Arendt, privacy in our day is not a deprivation from involvement in public affairs, but the very possibility of pausing or denying utter totality to belonging.⁴ Privacy confers legitimacy, if relative and limited, to actions and behaviors in conflict with the codes and dictates issued by frameworks of belonging. It marks the boundaries of belonging and permits refuge from it, heralding the possibility of a balance between solitude and belonging. The link between the concept of privacy and the phenomenology of belonging may yet be recognized as an important component in contemporary discussions about privacy concerns in the information age.

Privacy is a contested concept that is neither unified nor coherent and is crucial to our existence independently of our capacity to conceptualize it.⁵ It is a matter of consensus that the subject of modern privacy concerns is the individual,⁶ whereas the diversity of definitions of privacy represents different understandings of the antithetical tension between belonging and privacy. Thus at the core of the traditional American conception of privacy is legitimacy of retirement to a private space—a liberating return to the space where the

¹ I suspect that I was misunderstood by Mermelstein, who consistently attributed to me a perception that belonging is a “private matter” or one that is “private and internal.” I have nowhere linked privacy and belonging, and in no way do I think that this is so. We disagree on the intrinsicality of emotion to the concepts of belonging and identity. The emotional perception of belonging and identity is interesting and thought-provoking, but I am not sure that an emotionally based definition of belonging would not confuse a sense of belonging with belonging as such. (Are justice and a sense of justice identical or overlapping concepts?) In any event, defining belonging as “emotional attachment” limits its relevance to human beings and excludes entities that do not have emotions. See Ari Mermelstein, “Between Belonging and Identity in Ancient Judaism: The Role of Emotion in the Production of Identity,” *Journal of Law and Religion* 37, no. 2 (2022) (this issue).

² Genesis 2:18 (my translation).

³ Marcus Aurelius, *Meditations*, trans. and ed. Robin Waterfield (New York: Basic Books, 2021), 4:3, at 89 (“People try to find retreats for themselves A marked longing for such a haven has been a habit of yours too.... So never stop allowing yourself to retreat there and be renewed.”).

⁴ See Hannah Arendt, “The Public and the Private Realm,” in *The Human Condition* (Chicago: University of Chicago Press, 1958), 22–78.

⁵ See Bert-Jaap Koops et al., “A Typology of Privacy,” *University of Pennsylvania Journal of International Law* 38, no. 2 (2017): 483–576; Neil Richards, *Why Privacy Matters* (Oxford: Oxford University Press, 2022).

⁶ See Rafael Capurro, “Privacy: An Intercultural Perspective,” *Ethics and Information Technology* 7, no. 1 (2005): 37–47; Soraj Hongladarom, *A Buddhist Theory of Privacy* (Singapore: Springer, 2016).

individual goes unobserved by the public eye.⁷ European conceptions of privacy, on the other hand, emphasize autonomy and self-determination as core ideas—a restoration of the individual’s control over herself and her personal concerns.⁸ The gaps between the different conceptions of privacy are not negligible and are reflected in perceptual differences and principled approaches to contemporary concepts.

The two views of privacy, as a legitimate retreat and as autonomy, reflect different versions of anthropocentric liberalism that aim to protect and empower the human individual. A remark by Goodman is eye-opening: “The biblical laws regarding ... incest seem to me meant to safeguard human dignity ... graphically described in terms of nakedness, the biblical emblem of vulnerability.”⁹ I read him as suggesting a refreshed and insightful attitude toward human dignity as a principle that justifies the value of privacy. The core concern embodied in the dignity of every human, accordingly, is not the potency, or the capacity, of the human being, but her vulnerability. Respecting and protecting human dignity thus is not necessarily about enabling exercise of human capabilities, but about avoiding exploitation of vulnerabilities resulting from human nature and circumstance. Whereas a capability-based approach to human dignity reflects a positive commitment to empower or to enable the empowerment of human beings,¹⁰ a vulnerability-based approach is a defensive one more akin to the biblical rationale of incest regulations, in which the key terms are *gilluy* (revealing) and *’ervah* (nakedness).¹¹

The two approaches to human dignity do not necessarily contradict or exclude each other, but they do emphasize different rationales and different goals for the protections of human dignity.¹² I can envisage two advantages of the vulnerability-based approach that are especially relevant to our time. First, the capability-based approach is predicated on ideas and forms of thought that are essentially limited to Western values and views. Whether these are Aristotelian metaphysical foundations,¹³ secularized versions of biblical anthropocentrism (stemming from the theological idea of *imago dei*),¹⁴ or Kantian ethics that celebrate human beings as rational creatures, they rest on Western sources and values. These foundations, however, are not necessarily accepted in non-Western cultures that are not founded on the Judeo-Christian celebration of the human being as the crown jewel of creation and the creature closest to divine perfection. It might be reasonably speculated that a vulnerability-based approach to human dignity that refers to existential experiences rather than anthropocentric metaphysics would have broader application, and perhaps better odds of justifying the universalization of human rights.

Second, we may now face a turning point regarding the traditional glorification of the capable self, or *homo capax*. The view of certain capabilities as unique to the human species

⁷ See Jill Lepore, “Privacy in an Age of Publicity,” *New Yorker*, June 17, 2013, <https://www.newyorker.com/magazine/2013/06/24/the-prism>.

⁸ See James Q. Whitman, “The Two Western Cultures of Privacy: Dignity versus Liberty,” *Yale Law Journal* 113, no. 6 (2003–2004): 1151–1222.

⁹ See Lenn E. Goodman, “Belonging, Identity, and Identification,” *Journal of Law and Religion* 37, no. 2 (2022) (this issue).

¹⁰ See Ingrid Robeyns and Morten Fibieger Byskov, “The Capability Approach,” in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, 2020, <https://plato.stanford.edu/archives/win2021/entries/capability-approach>.

¹¹ See Goodman, “Belonging, Identity, Identification.”

¹² The difference between the capability-based and the vulnerability-based approach largely reflects the phenomenological difference between positive liberty and negative liberty, both of which play an important role in theories of the value of privacy.

¹³ See Martha C. Nussbaum, *Creating Capabilities: The Human Development Approach* (Cambridge, MA: Belknap Press of Harvard University Press, 2011).

¹⁴ See Y. Michael Barilan, “From *Imago Dei* in the Jewish–Christian Traditions to Human Dignity in Contemporary Jewish Law,” *Kennedy Institute of Ethics Journal* 19, no. 3 (2009): 231–59.

took shape in late ancient times as part of *imago dei* theology, but the focus on capabilities as an essential attribute of humanity is a central theme of secularized humanism.¹⁵ The emergence of artificial intelligence, like other scientific revolutions, has undermined the traditional anthropocentric picture, pulling the rug out from under the premise of the exclusivity and superiority of human rationality. It is not inconceivable that with the development of even more-monumental machine capabilities, our attitude toward the connection between capabilities and humanity will undergo a revision. Also not inconceivable is that instead of glorifying the capable self, we will turn our attention to the vulnerable self and its needs.

Jurisdiction and Identity Territorialized

My discussion in the third chapter focused on the theo-legal innovation of Nahmanides embodied in the maxim “the law of the God of the land.” My analysis demonstrated the originality and uniqueness of his radical conception, which was a possible motivation for his immigration to Israel.¹⁶ I am delighted with Caputo’s endorsement of my determination that Nahmanides’s legal theology is an important chapter in the history of the relationship between law and religion in the Jewish tradition. Nahmanides developed a conception that combines halakhah and mysticism, associates biblical polycratic imagination with medieval feudal structures, and illustrates an intellectual correspondence of rabbinic thought with basic theological ideas of the Crusaders.

The focus on the theological aspects of Nahmanides’s original conception left too little emphasis on the novelty of his contribution regarding two concepts whose importance and implications go beyond Jewish medieval thought: territorial jurisdiction and territorial identity. These two concepts are pivotal to the ethos of the modernist political order, and the manner in which they were defined in this thirteenth-century case is intriguing. Such a formulation in a premodern theological context is a remarkable fact that recommends its use in confronting contemporary challenges.

The significance of Nahmanides’s innovations in relation to these two concepts can be well understood through the lens of Richard Ford’s history of jurisdiction.¹⁷ Ford argues that in contrast to the common view of territorial jurisdiction as an ahistorical and inevitable concept, it is in fact a relatively new one, a result of technological advancement (modern cartography) and not a product of reorganization of political power.¹⁸ Accordingly, the territorialization of the law, consisting of the conceptual overlay of sovereignty and territory together with the emergence of the modern, territorially defined state, emerged from an epistemic rather than a political change. In other words, a novel perception of space enabled, rather than stemmed from, the reduction of political power and law to territorial boundaries.¹⁹

¹⁵ Paul Ricoeur’s philosophical anthropology focuses on the capable human being, or the capable self: *homo capax*. According to this view, the human being is not only a victim, but also capable of developing actions. See Brian Gregor, *Ricoeur’s Hermeneutics of Religion: Rebirth of the Capable Self* (New York: Lexington Books, 2019).

¹⁶ On Nahmanides’s motives to immigrate to the Land of Israel, see M. Kayserling, “The Jews of Spain,” review of *An Inquiry into the Sources of the History of the Jews in Spain*, by Joseph Jacobs, *Jewish Quarterly Review* 8, no. 3 (1896): 486–99.

¹⁷ Richard T. Ford, “Law’s Territory (A History of Jurisdiction),” *Michigan Law Review* 97, no. 4 (1999): 843–930.

¹⁸ “[T]erritorial jurisdictions ... are relatively new and intuitively surprising technological developments. New, because until the development of modern cartography, legal authority generally followed relationships of status rather than those of autochthony.” Ford, “Law’s Territory,” 843.

¹⁹ “This history calls into doubt the common intuition that territorial jurisdiction is a timeless feature or foundation of government. Instead, jurisdiction was invented at a specific historical moment and deployed to

Ford's thesis illustrates the deep linkage between law (jurisdiction) and identity, and how their territorial architecture is essentially a modern project. Territorial jurisdiction not only reduces political sovereignty to territorial limits, but also creates a new mechanism for addressing human differences and diversity. In short, the emergence of territorial jurisdiction introduced a concept of identity that is defined not in accordance with group belonging, but according to spatial location—a concept of territorial identity. The modern territorialization of law and identity posed an alternative to premodern concepts, with territorial jurisdiction replacing group-based jurisdiction and territorial identity replacing group-based identity (derived from belonging to a class, ethnicity, religion, gender, racial group, etc.).

Territorial identity challenges the priority of group-based identity. It posits that the identity of an individual is determined by her location—her passive and objective presence.

The territorialization of law and identity expressed the modern design of shaping impersonal sovereignty and political identities that transcend group-based identities. Territorial identity pretends to be a natural and pre-political trait, on one hand, and superior to group-based identities, on the other. The concept of territorial identity introduces a hope for a new style of politics that is not dependent on group-based identities. It does not refute or call to erase group-based identities, but would weaken them or subordinate their political and legal significance to that of territory. The territorial articulation of jurisdiction and identity aimed to homogenize the political realm by ignoring the human differences reflected by group-based identities. The modern political vision of territorialized law and identity encourages us to take these concepts as self-evident features of any political or legal form. Group-based jurisdiction, like that of religious law, still exists in various places, but only as a remnant of premodern patterns whose legitimacy is limited to personal and private matters.²⁰ Territorial identity also corresponds to the foundations of modern democracy and the modern ethos of the rule of law in that it emphasizes the equality of individuals and marginalizes group-based identities as secondary considerations before the law.

Territorialization Incomplete

The geopolitics of modern times bears witness that the territorialization of law and identity has met with only partial success. Although territorial jurisdiction was accepted with relatively broad consensus in the international arena and established as the exclusive form of legitimate jurisdiction, it did not lead to political homogenization transcending group-based identities. Nationalist ideologies and European world wars demonstrated that group-based identities had not been successfully marginalized or suspended. In fact, the persistence of group-based identities motivated struggles for the hegemony of group-based identities over territories and the purification of these territories from other group-based identities.

Not only did the territorialization of law and identity not fully take root in practice, but intellectual critiques challenged its theoretical foundations. Post-colonialist criticism has shown how the pursuit of political homogenization, with its downplaying of group-based identities, has served the imperial and ideological interests of Western and European

advance certain identifiable projects. Jurisdiction transformed both the way government operated and, ultimately, the structure of government itself." Ford, "Law's Territory," 846.

²⁰ Another view sees this development as the marginalization qua privatization of group-based jurisdiction and law. See Talal Asad, "Reconfiguration of Law and Ethics in Colonial Egypt," in *Formation of the Secular: Christianity, Islam, Modernity* (Stanford: Stanford University Press, 2003), 205–56.

supremacy. Although the resurgence of identity politics in recent decades has been due to the demand for redress of injustices and discrimination committed in the name of political homogenization, the jurisprudence of differences has disclosed the theoretical failures of this modern project. Various intellectual critiques problematized the latent ideological assumptions of individualistic liberalism and its disregard for the vitality and necessity of group-based identity. They demonstrated that the very pretension to transcend group-based identities served the interests of hegemonic groups and furthered the discrimination, oppression, and exploitation of marginal groups.

The geopolitical instability of the Middle East, according to Francis Fukuyama, is a function of insistence on group-based identity politics and rejection of the Western territorialization project.²¹ This claim encourages speculation about the role and weight of identity politics in determining global geopolitical tensions and conflicts, and whether the capability to transcend or suspend nationalist identity politics would indeed contribute to stability and prosperity.

The Israeli case vis-à-vis territorialization of law and identity is a peculiar and interesting one. Israeli political and legal culture reflects an ambivalent and perhaps even paradoxical attitude toward the territorialization project. The Zionist movement that established the State of Israel was driven by the recognition of the failure of political homogenization for Jews, who were persecuted in Europe, and therefore placed the Jewish group identity at the top of its political agenda. At the same time, the birth of the State of Israel as a democratic polity took place with a commitment to territorial jurisprudence, including political homogenization and equal civic rights and duties transcending group-based identities.²²

This ambivalence remains unresolved in Israeli political and legal culture and has corresponded to a polarization in Israeli politics since the establishment of the state. Here again, we can only speculate as to whether the Nahmanidean conception would contribute to resolving, or at least softening, this ambivalence. To a great extent, Nahmanides's conception permits an embrace of a coarse version of the territorialization of law and identity as a genuine Jewish conception that is rooted in biblical principle. To the best of my knowledge, Nahmanides's legitimization of transcending group-based identity in the Land of Israel never was fully considered as a basis for mitigating the tension between the Jewish and the democratic in modern Israel.

Jurisdiction and Identity in the Information Age

Objections to the territorialization project nowadays appear from another direction that is neither behavioral nor intellectual: they emerge from changes imposed on us by the information revolution and ensuing technologies. The reality created by data-driven technologies redefines our environment in such a way that our comprehension of space does not coincide with territoriality, so that many features and expectations of territory no longer relate to either law or identity. Such a concept of territorial jurisdiction is not obviously territorial, in that it refers to existing and acting in an essentially non-territorial space. Within territorial jurisdiction, the dual model that distinguishes between the internal

²¹ Francis Fukuyama, "Expressive Individualism," in *Identity: The Demand for Dignity and the Politics of Resentment* (New York: Farrar, Straus, and Giroux, 2018), 48–54.

²² On one hand, the Israeli Declaration of Independence states a territorial jurisprudence that ignores group-based identities: "The State of Israel ... will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex." "Declaration of Independence," *Official Gazette* 1 (May 14, 1948): 1, <https://main.knesset.gov.il/en/About/Pages/Declaration.aspx>. On the other hand, various fundamental laws, such as the Law of Return (1950) and the Nation-State Law (2018), prioritize the group-based identity of Jewishness.

and external sovereignty of a nation-state loses its relevance in the infosphere.²³ We are currently at a stage where our existence in space has undergone a fundamental transformation that requires a reconceptualization of our sense of space and its pertinence to both law and identity. It is widely accepted that the concept of territorial jurisprudence is insufficient or no longer applicable, and a conceptual revision of jurisdiction in supra-territorial terms is urgently required.

The Rise of Profile-Based Identity

The onlife²⁴ in the infosphere also impacts our sense of identity and thus requires a conceptual revision of the basics of that concept, because the current framework is clearly inadequate for the unfolding of conceptual changes in identity in modern times and the information age. The distinction between group-based identity and territorial identity is essential to the territorialization project and its modernist vision. Yet beyond the competition between group and territory, the modernist conceptualization of identity centers on the idea that identity is about the individual's true inner self and the balance between subjective aspects of identity (*ipse* identity) and its objective aspects (*idem* identity).²⁵

The idea of identity that is developing in response to the information revolution and data-driven technologies differs from previous conceptions of identity in three salient features:

1. Externalization. Unlike previous conceptions, identity in the information age does not rely on any of the three components of selfness, authenticity, and inwardness. The emerging conception of identity is reductive to data; it is external and behaviorist in nature.
2. Hybridization. While previous conceptions of identity were subject to categorization (either Jew or Christian, either British or French, either Caucasian or African, etc.), identity in the information age appears to be rather mixed, fused, and hybrid.²⁶
3. Personalization. Since the new conception of identity includes a great deal of quantifiable data, the particularization and accuracy of identities are much greater and much more personalized.

In the absence of any other consensual characterization, we can refer to an identity thus conceptualized as a profile-based identity. Unlike previous conceptions, profile-based identity reflects the synthetic uniqueness of each individual. An individual's identity thus does not merely reflect his membership, as an organ, in a larger group (group-based identity) or his being an entity located in a defined space (territorial identity). Profile-based

²³ The term *infosphere* was first coined by Kenneth Boulding in 1970 and was redefined by Luciano Floridi in 1999 to denote the whole informational environment constituted by all informational entities (including informational agents) and their properties, interactions, processes, and mutual relations. See Betsy Van der Veer Martens, "An Illustrated Introduction to the Infosphere," *Library Trends* 63, no. 3 (2015): 317–61, esp. 332–33.

²⁴ The term *onlife* was coined by Mireille Hildebrandt to denote the hybrid life world composed of and constituted by combinations of software and hardware that determine information flows and the capability to perceive and cognize one's environment. Mireille Hildebrandt, *Smart Technologies and the End(s) of Law: Novel Entanglements of Law and Technology* (Northampton: Edward Elgar, 2015), esp. 8.

²⁵ For analysis of this distinction and its operation, see the seminal work of Paul Ricoeur, *Oneself as Another*, trans. Kathleen Blamey (Chicago: University of Chicago Press, 1992).

²⁶ Consider the case of a hybrid ethnic identity emerging from DNA tests: Antonia Noori Farzan, "A DNA Test Said a Man Was 4% Black. Now He Wants to Qualify as a Minority Business Owner," *Washington Post*, September 25, 2018, <https://www.washingtonpost.com/news/morning-mix/wp/2018/09/25/a-dna-test-said-he-was-4-black-now-he-wants-to-qualify-as-a-minority-business-owner/>.

identity emphasizes the particularity and hybridity of each individual and in doing so undermines the pretension of homogenized identities, whether based on groups or on space. Moreover, as many theorists emphasize, profile-based identity does not necessarily serve the subjective individual. Profile-based identities seemingly are much more valuable and beneficial to third parties' interests than to the individuals who are their subject.

Transformations such as those suggested here, of course, require a much broader and deeper discussion. An acknowledgment of these profound changes in the concept of identity underlies the warnings about dangers that data-driven technologies bring and the threat they pose to democratic values achieved after lengthy and painful historical processes.²⁷

Like many others, I believe that the information revolution is a constitutive moment in human history, and not only because of the development of technologies that change our habits and improve the quality of our lives. More than anything else, it is because the information revolution profoundly and dramatically changes our self-concept. That revolution is changing our understanding of the place we occupy in the universe (the erosion of anthropocentrism), forcing us to rethink our uniqueness as human beings and our human essence. I do not doubt that the preconditions of our existence are changing dramatically nowadays, and consequently, our notions of belonging and identity require revision.

²⁷ See, for example, Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (London: Profile Books, 2019); Carissa Véliz, *Privacy Is Power: Why and How You Should Take Back Control of Your Data* (London: Bantam Press, 2020).