

CONCEPTUALIZATION OF THE PERSON IN AMERICAN LAW

MARY ANN GLENDON

The Academy's decision to explore concepts and conceptualizations of personhood in the various social sciences challenges each one of us to look deeply into the implicit assumptions that shape our respective disciplines. Where law is concerned, that task is especially challenging because modern law touches nearly every aspect of human life, and different areas of the law typically emphasize different aspects of the person.

The close relationship between a country's law and its culture, moreover, leads one to expect variation among legal systems in the ways they conceptualize human personhood. And, as the papers prepared for this Plenary Session indicate, we do find interesting differences, even within families of legal systems that have much in common. Many of these differences are attributable to the fact that law – in addition to all the other things it does – is part of a society's 'distinctive manner of imagining the real'.¹ Like a nation's art, literature, songs, and poetry, law both reflects and helps to shape the stories we tell ourselves and our children about who we are as a people, where we came from and what we aspire to be.

Perhaps nowhere has law played a more prominent role in a nation's conception of itself than in the United States. The early Americans' peculiar attachment to the law was one of the first things Tocqueville noticed as he traveled about the new nation. 'The spirit of the law', he wrote, 'born within schools and courts ... infiltrates through society right down to the lowest ranks, till finally the whole people have contracted some of the ways and tastes of a magistrate'.² As the population has increased in size and diversity, the law has arguably become the principal carrier of the few values that

¹ Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983), 175.

² Alexis de Tocqueville, *Democracy in America*, Vol I, Part 1, Chapter 8.

command broad allegiance among citizens of many different cultural backgrounds. In such a country, it was perhaps inevitable that political ideas originating in English power struggles between Crown and Parliament would sometimes acquire the status of myth and symbol when they were incorporated into American law at the time of the Founding. And in such a country, it was perhaps inevitable that legal images of personhood would exert an especially strong influence on the attitudes of the citizenry.

In this paper, I propose that one image of the human person has predominated in the U.S. legal system throughout the life of the republic: the image of a free, self-determining, and self-sufficient individual. That such a creature has never existed does not prevent it from having a hold on popular imaginations. Tocqueville testified to its prevalence among the inhabitants of early nineteenth century America. Today, comparative opinion studies tell us that Americans occupy one end of the world spectrum in three respects that are relevant here: in the proportion who say they value freedom over equality, in the proportion who say they believe that success in life is determined by individual efforts, and in the proportion who attach more importance to freedom from state interference than to state guarantees of minimum subsistence in cases of need. According to a 2002 survey, the percentages of Americans who expressed those views were more than double the European figures.³

In this essay, I attempt to trace – in a very preliminary way – how such a flawed idea about human nature migrated from early modern political theory into law and evolved into a leading cultural myth. I will begin with a brief discussion of the ideas about personhood that were held by the framers of the U.S. Constitution. The bulk of my discussion, however, will focus on how those notions underwent further transformations in U.S. Supreme Court decisions where they continue to hold their own among the ideas that are vying for influence in the legal narrative.

The American Founders' Concept of 'The Nature of Man'

The eighteenth century was a time when revolutionaries and, later, statesmen in France and America were open, to an unusual degree, to the ideas of philosophers. That, perhaps, explains why the writings of the

³ John Leland, 'Why Americans See the Silver Lining', *New York Times*, *Week in Review*, June 13, 2004, p. 1. See also, Pew Global Attitudes Project, *Views of a Changing World* (Washington, D.C., 2003).

American founders contain a good deal of discussion about human nature. There are, in fact, dozens of references to 'the nature of man' in *The Federalist Papers*, a series of newspaper articles written in 1787 and 1788 by Alexander Hamilton,⁴ James Madison⁵ and John Jay⁶ to explain the new Constitution to the American public.⁷ In those essays, one can see the influence of English political theorists who, in their efforts to de-legitimate monarchical claims of divine right, had painted vivid pictures of man as free and solitary in an imaginary 'state of nature'. The state of affairs that writers like John Locke presented as 'natural' bears little relation to what the social sciences tell us about human beings and simple societies. Family life and other forms of human sociability, not to mention women, are scarcely visible in their accounts. They had much to say about conflict among human beings, but little about cooperation.

With good reason, Cardinal Cottier, in his contribution to this conference, traced the roots of many contemporary threats facing human personhood to the early modern political philosophers. And with good reason he observed that many of these threats come disguised as progress. In the case of American legal thought, one might add that many of our dilemmas arise from the fact that we owe real progress in constitutional government to many of the same thinkers from whom we inherited flawed concepts of the person!

The authors of *The Federalist Papers* followed Locke and his forerunner Hobbes in placing greater emphasis on the dangers human beings pose to one another than on the human capacity for cooperative living. Though acknowledging that there are 'qualities in human nature which justify a certain portion of esteem and confidence', they asserted that 'men are much more disposed to vex and oppress each other than to cooperate for their common good'.⁸ In their view, it was the dangerous propensities of human beings that give rise to the need for government, and that pose a constant threat to governments once established. The U.S. Constitution was devised, accordingly, with structures to hold selfishness and ambition in check, and to channel potentially divisive energy into the pursuit of wealth, comfort, and security.

⁴ Member of the Constitutional Convention and first Secretary of the Treasury.

⁵ Member of the Constitutional Convention and fourth President.

⁶ First Chief Justice of the Supreme Court.

⁷ Mary Ann Glendon, 'Philosophical Foundations of the Federalist Papers: Nature of Man and Nature of Law', 16 *Harvard Journal of Law and Public Policy* 1301 (1993).

⁸ *The Federalist*, Nos. 10 and 55 (Madison).

Mistrust of human nature went hand in glove with mistrust of government, which, after all, is composed of men. In the most famous passage of *The Federalist*, Madison wrote:

It may be a reflection on human nature that such devices (as checks and balances) should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, no external or internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.⁹

A careful reading of *The Federalist*, however, discloses something puzzling about its vision of personhood. On the one hand, the authors took an exceedingly dim view of human nature, saying things like: 'If impulse and opportunity be suffered to coincide, we well know that neither moral nor religious motives can be relied on as an adequate control'.¹⁰ Yet at the same time they recognized that the success of the democratic experiment would be crucially dependent on the support of virtuous and public-spirited citizens and statesmen. (Indeed, Madison specifically acknowledged that republican government required a higher degree of civic virtue than any other form.)¹¹

So the question naturally occurs: How can one explain the framers' apparent unconcern about where they would find citizens with the qualities of character which their innovative design for self-government demanded? The simplest and most probable explanation is that they relied on the small structures of civil society – families and tight-knit communities – to inculcate the republican virtues of self-restraint and care for the common good. The founding fathers must have thought they could take the necessary cultural conditions for granted. They had good reason to do so: The non-slave population of the thirteen states (about three million people) was mainly composed of farmers, merchants, and artisans who lived in self-governing townships bound together by widely shared moral and religious beliefs. Biblical religion was pervasive, as were habits of associating

⁹ *The Federalist*, No. 51.

¹⁰ *The Federalist*, No. 10.

¹¹ See *The Federalist*, No. 55.

for all sorts of cooperative ventures, from building a neighbor's barn to keeping the town roads and fences in repair.

The apparent contradiction between the ideas about man informing the Constitution and the sociable reality of life in the colonies diminishes, moreover, when one recalls that *the Constitution was constructed as a framework for a federal government. It specifically provides that all powers not specifically delegated to the federal government are reserved to the states.* The laws of the states, at the time of the founding and until the mid-20th century, were influenced in countless ways by biblical and classical understandings of human nature. Those local arrangements (which in some states even included established churches) were promoted and protected by the Constitution's federal structure. So, even though 'fraternity' (or, as we would say today, 'solidarity') was absent from the political vocabulary of the founders, habits of cooperative living were fostered in numerous ways by local laws and customs. Tocqueville, again, gave us memorable testimony to the penchant for associating that co-existed with a sturdy self-reliance in early American townships.

As the U.S. population expanded, however, common understandings grew fewer, and national law assumed more importance as a carrier of values. The stage was set for ideas that had served well enough for the purpose of establishing limited government to migrate from political theory into law where they acquired a life of their own. One of the first legal commentators to remark critically upon the unusual degree of individualism in U.S. law seems to have been the 20th century legal philosopher and comparatist Roscoe Pound. Pound noted that the idea of an 'isolated individual was at the center of many of our most significant legal doctrines'.¹² While all modern legal systems could be said to be individualistic in comparison to pre-modern law, Pound regarded American legal thought as distinguished by 'an ultra-individualism, an uncompromising insistence upon individual interests and individual property as a focal point of jurisprudence'.¹³ He speculated that this was due to a unique fusion of Puritanism with the pioneer spirit and with eighteenth-century ideas of natural right. These factors combined, he wrote, to give an 'added emphasis to individualist ideas in the formative period of our legal system that served to stamp them upon our

¹² Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1991), pp. 37-75.

¹³ Roscoe Pound, *The Spirit of the Common Law* (Boston: Beacon Press, 1963), 37.

theory and practice and keep them alive and active' even after English legal thought had taken a different direction.

Concepts of the Person in Modern U.S. Constitutional Law

The view of man as naturally independent, together with the idea of government as involving a necessary but regrettable sacrifice of some, but not all, of our natural liberty fueled the mistrust of government that has long been characteristic of American constitutionalism. Even after the United States established its social security system in the 1930s, and even though the power of the federal government has vastly expanded, the U.S. legal system has never accepted the positive vision of an affirmatively acting state that informs many constitutions in the Romano-Germanic tradition.¹⁴ The U.S. rights tradition has long emphasized political and civil liberties, framed as 'negative rights' (i.e. restraints on government), but has not incorporated the post-World War II trend in many other liberal democracies to accord constitutional status to certain programmatic obligations on the part of the state toward citizens.¹⁵

The main points of contrast between the dignity-based constitutional tradition described so well in Professor Kirchhof's paper and the more 'libertarian' U.S. approach can be briefly summarized. The U.S. rights tradition confers its highest priority upon individual freedom from governmental constraints. Rights tend to be formulated without explicit mention of their limits, their relation to responsibilities, or to other rights. Personal freedom is protected by procedures, but lacks an explicit normative structure.

A more complex dialect of freedom and responsibility characterizes the dignitarian rights language that one finds in several post-World War II documents – such as the German 1949 Basic Law and the 1948 Universal Declaration of Human Rights, as well as in the social teachings of the Catholic Church as elaborated by Popes John XXIII and John Paul II. In these documents, rights are envisioned not only as protected by fair

¹⁴ See, e.g., German Grundgesetz, Art. 1: 'The dignity of man shall be inviolable. To respect and protect it shall be the highest duty of the state'.

¹⁵ Mary Ann Glendon, 'Rights in Twentieth Century Constitutions', 59 U. Chicago L. Rev. 519 (1992).

¹⁶ E.g., Universal Declaration of Human Rights, Art. 16 (3): 'The family is the natural and fundamental group unit of society and is entitled to the protection of society and the State'.

procedures, but as grounded and situated in a normative framework based on human dignity. Specific rights are typically formulated so as to make clear that they are related to one another, that certain groups as well as individuals have rights, and that political entities, as well as citizens, have responsibilities.¹⁶

Underlying these divergent concepts of rights are somewhat different notions about the person who is endowed with rights. While the rights-bearer in the U.S. constitutional tradition tends to be imagined as an independent, highly autonomous, self-determining being, the dignitarian systems tend to make explicit that each person is constituted in important ways by and through his relations with others. For example, U.S. judges and lawyers frequently quote former Justice Louis Brandeis' dictum that the 'most comprehensive of rights and the right most valued by civilized men' is 'the right to be let alone' (an idea that would sound rather strange in many parts of the world).¹⁷ The German Constitutional Court, by contrast, takes a more relational view of personhood, as expressed in its oft-cited 1954 decision stating: 'The image of man in the Basic Law is not that of an isolated, sovereign individual. [T]he tension between the individual and society [is resolved] in favor of coordination and interdependence with the community without touching the intrinsic value of the person'.¹⁸

A post-modern touch was added to the portrait of the lone rights-bearer in U.S. constitutional law in 1992 when a plurality of Supreme Court Justices advanced a vision of the self as invented and reinvented through the exercise of the individual's will, limited by nothing but subjective preference. Ruling on the constitutionality of a state abortion law, the Justices shifted the ground for abortion rights from privacy to liberty. To require a married woman to notify her husband of her intent to have an abortion, they held, would violate a woman's liberty. In so holding, they announced a theory that endows human personhood with the freedom 'to define one's own concept of existence, of the meaning of the universe, and of the mystery of human life'.¹⁹ That freedom, they said, 'lies at the heart of liberty' because 'beliefs in these matters could not define the attributes of personhood were they formed under compulsion of the State'.

In that passage, the Court came very close to adopting the concept of freedom that Pope John Paul II memorably described as follows in *Veritatis*

¹⁷ *Olmstead v. United States*, 277 U.S. 438, 478 (1928), Brandeis J., dissenting.

¹⁸ *Investment Aid Case I*, 4 BverfGE 7 (1954).

¹⁹ *Casey v. Planned Parenthood*, 505 U.S. 833, 851 (1992).

Splendor (46): 'This ultimately means making freedom self-defining and a phenomenon creative of itself and its values. Indeed, when all is said and done man would not even have a nature; he would be his own personal life-project. Man would be nothing more than his own freedom!'

Despite criticisms that such an unbounded definition of liberty, if taken seriously, would undermine the basis of all law, a majority of the Court reaffirmed it in 2003, *in haec verba*, in a decision invalidating penalties for homosexual sodomy.²⁰

The U.S. Court majority's current notion of freedom is thus quite distant from understandings of freedom that stress the dignity of the person as actualized through relations with others and through the development of one's ability to exercise freedom wisely and well.²¹ Compare, for example, the German Constitutional Court's statement in its *Life Imprisonment Case* that, 'freedom within the meaning of the Basic Law is not that of an isolated and self-regarding individual but rather that of a person related to and bound by the community'.²²

It may be noted that what is absent from both the U.S. and the German Court's formulations is the concept of the constitutive effect of choice: the way in which the exercise of our freedoms affects the kind of persons we become, and the way in which the choices of citizens collectively affect the kind of society that we are bringing into being. With awareness of those effects comes awareness of another matter on which the law is silent: the issue of responsibility for one's choices. Perhaps it is too much to expect that law can promote the responsible exercise of freedom. Nevertheless, in legalistic, pluralistic societies, there is no escape from the fact that the silences of the law speak and send messages.

The highly individualistic concept of personhood advanced by the current U.S. Supreme Court majority both reflects and legitimates attitudes that have gained ground in American culture – especially elite and media culture – in the late twentieth century. A latter-day Tocqueville might observe that the sturdy self-reliance and independence of mind he so admired have been eroded in many quarters by understandings of liberty as individual freedom from all forms of social and legal constraint.

²⁰ *Lawrence v. Texas*, 539 U.S. 558, 574 (2003).

²¹ See John Coughlin, 'The Human Being, Catholic Social Teaching and the Law', 1 *Journal of Catholic Social Thought* 313-333 (2004).

²² *Life Imprisonment Case*, 45 BverfGE 227 (1977).

The Isolated Individual in Various Fields of U.S. Law

At this point, I must emphasize there are many social and legal forces that serve to mitigate the effects of excessive individualism in American law. Nevertheless, there is reason to believe that the country's common stock of moral beliefs has been adversely affected – though to an unquantifiable degree – by legal concepts and images. In a legalistic and heterogeneous society, there is a certain tendency to regard the Supreme Court's pronouncements not merely as legal rulings but as moral teachings grounded in the country's most sacred civic document. Thus, when nine Justices in black robes solemnly announce that something is legally permissible – or constitutionally required – many people take such decisions as assurance that the behavior in question is morally acceptable as well. Manifestations of the 'ultra-individualistic' anthropology outlined above can be traced in numerous laws and policies relating to the family, schools, religion, and voluntary associations. American church-state law, for example, is so dominated by the notion of religion as a private affair 'between an individual and his God' that it has often failed to protect the associational and institutional dimensions of religious freedom.²³

In private law, the influence of the myth of the self-sufficient individual connected to others only by choice is strikingly illustrated by two doctrines that are quite widely at variance with common sense, one in family law and the other in tort law.

Modern, gender-neutral, American divorce law has accepted the principle that economic self-sufficiency should be the goal for both spouses after marriage comes to an end. This unrealistic principle leaves one large class of women, namely mothers, with fewer legal protections than they would have in most other countries at comparable levels of economic development.²⁴ In some countries, such as France and Germany, post-divorce dependency is addressed through vigorous enforcement of the support obligations of former providers, while in the Nordic countries a large part of the cost is borne by society at large through relatively generous public benefits for single parents. The United States, by contrast, is both more lax than the former in requiring former providers to fulfill

²³ Mary Ann Glendon and Raul F. Yanes, *Structural Free Exercise*, 90 *University of Michigan Law Review* 477 (1991).

²⁴ Mary Ann Glendon, *The Transformation of Family Law* (Chicago: University of Chicago Press, 1989), 237.

their support obligations and less generous than the latter where public assistance to single mothers is concerned.

My second example concerns the American tort law doctrine that a person has no legal duty to come to the aid of another person in peril, even if he can do so without harm to himself. The doctrine, as it exists in all but a handful of states, is usually introduced to American law students by asking them whether an Olympic swimmer has violated any law if he notices a child drowning in a swimming pool and stands by without coming to her aid. The absence of a legal duty to rescue in such a case is so profoundly at odds with ordinary moral intuitions that it comes as a shock to most students. Yet the doctrine, as described in a leading treatise, is clear: "The law has persistently refused to impose on a stranger the moral obligation of common humanity to go to the aid of another human being who is in danger, even if the other is in danger of losing his life".²⁵ The explicit distinction between law and morality is significant here, as is the use of the word 'stranger' as a technical legal term. (Unless persons have entered into a legally recognized relationship with one another, American tort law treats them as having no duty to one another except to avoid the active infliction of harm. The law regards them as 'strangers', rather than fellow citizens or fellow members of the human family.)

The law in the Romano-Germanic systems, by contrast, imposes both civil and criminal penalties for a failure to rescue where the deed could have been accomplished without undue risk of harm to the rescuer. The practical significance of this difference is small, in the sense that actual cases of failure to rescue rarely arise. But as a leading French scholar has pointed out, the chief importance of the legal duty to rescue is pedagogical: it is 'to serve as a reminder that we are members of society and ought to act responsibly'.²⁶ By the same token, one might speculate that the chief importance of legal silence on this point in the U.S. is that it represents a lost opportunity to reinforce the sense of being part of a community for which all share a common responsibility.

In U.S. public law, there is a precise parallel to the absence of a duty to rescue, as illustrated in a 1989 case where a little boy and his mother sued a state social services department for the brain damage he suffered after state agents failed to remove him from the home of his violent father in

²⁵ Prosser and Keeton on the Law of Torts, 5th ed. (St. Paul, MN: West, 1984), 375.

²⁶ André Tunc, 'The Volunteer and the Good Samaritan', in *The Good Samaritan and the Law* (Gloucester, Mass.: Peter Smith, 1981), 43.

whose custody they had placed him. The U.S. Supreme Court affirmed the denial of liability in that case, saying that the Constitution imposes no duty on government to protect the health and welfare of the citizens 'even where such aid may be necessary to secure life, liberty or property interests of which the government itself may not deprive the individual'.²⁷

In another such case, where police negligently failed to remove a man from a burning automobile, lawyers argued that the constitutional right not to be 'deprived of life, liberty or property without due process of law' included the right to receive basic services from the State. But that claim was rejected in an opinion that speaks volumes about the attitudes toward government that are ingrained in the U.S. legal system. 'The problem with this argument', a prominent federal judge wrote, 'is that the Constitution is a charter of negative rather than positive liberties... The men who wrote the Bill of Rights were not concerned that government might do too little *for* the people, but that it might do too much *to* them'.²⁸ It is difficult to imagine judges in continental European liberal democracies making such a statement. (To avoid misunderstandings, I must note that the absence of a *constitutional* right to protective services does not mean that the injured persons in the cases just mentioned had no remedies at all. The officials involved would have been subject to discipline, and the injured boy was entitled to limited compensation under a statute.)

The most significant countervailing example to the individualistic trends I have outlined here is probably that of the U.S. social assistance programs where the implicit concept of personhood seems at first glance to be completely opposite to that which I have described. Yet even in the social welfare area, an ingrained ideal of self-sufficiency shows its power by fostering a certain institutionalized disdain for adults who cannot be self-sufficient. That disdain for dependency may well explain why social assistance is so often offered grudgingly and administered disrespectfully. In recent years, proposals have emerged to encourage more of a sense of solidarity on the part of contributors, while respecting the dignity of the recipients. But the future of these proposals, which involve experiments with delivery of social services through the intermediate institutions of civil society, is uncertain.

²⁷ DeShaney v. Winnebago County Dept. of Social Services, 109 S.Ct. 998 (1989).

²⁸ Jackson v. City of Joliet, 715 F. 2d 1200, 1203 (7th Cir. 1983).

Concluding Observations

The foregoing survey represents an attempt to frame an initial response to the difficult challenge laid down by the organizers of this Plenary Meeting. A complete treatment of the subject would need further research, and no doubt would result in a more nuanced presentation than has been offered here. With that caveat, I will nevertheless submit a few tentative concluding observations.

The American framers' concept of the human person, while incomplete from a philosophical or anthropological point of view, was appropriate for the limited purpose of designing a federal framework within which civic life could flourish under conditions of ordered liberty. What needs to be kept in sight (but unfortunately is too-often forgotten) is that *the liberal principles enshrined in the U.S. founding documents were political principles that were never meant to serve as moral guides for all of social and private life*. Those principles, with their encoded image of the free self-determining individual, grounded important and lasting political achievements: the establishment of a republic with democratic elements, the protection of liberty, and the promotion of individual initiative. I believe a convincing case can be made that the U.S. Constitution contains implicit principles of subsidiarity that could have fostered the development of stronger moral and juridical foundations for the American version of the democratic experiment. But that concept is little understood in the United States, and the tendency to think in terms of individual, state and market without intermediaries is very strong.

The framers understood perfectly well that the success of the democratic experiment would depend on the habits and attitudes of the citizenry, but they relied on social, rather than legal, norms and institutions to inculcate the necessary qualities. Their vision for America was that of a people 'free by the laws, and restrained by the manners' (as Montesquieu once described the English). But as the population expanded and became more diverse and mobile, common understandings grew thinner, and national law assumed more importance as a repository of common values. With the expansion of federal power in the twentieth century and the corresponding limitation of the power of state and local governments, the ability of citizens to have a say in shaping those values has diminished. In the latter half of the twentieth century, the U.S. Supreme Court removed a great many issues from ordinary local, democratic, political processes. Initially, this was done to protect racial minori-

ties. But in later cases, such as those involving abortion, education, and religion, courts drastically restricted the rights of citizens in general, and parents in particular, to help establish, through legislation, the conditions under which they live, work, and raise their children.²⁹ This experience in the U.S. should serve as a cautionary example for other nations embarked on ambitious experiments with supra-national governance.

With the growing influence of legal, as distinct from social, norms, the flaws in legal concepts of personhood began to be more problematic – as did the founders' silence regarding matters they had taken for granted (the family, the common good, the responsibilities that are correlative with rights).³⁰ Ideas that had been useful for the purpose of establishing limited government began to pervade social discourse, to the detriment of the cultural supports on which a liberal democratic regime depends. Decreasingly tempered by social norms, legal structures designed to channel human energy into the pursuit of private satisfactions may have fostered materialism and personal alienation, discouraging active citizenship.

By embracing the notion of individual autonomy as fully as it has, and by ignoring or downgrading healthy forms of interdependence, the U.S. legal system may have rendered our society less hospitable to the weak, the vulnerable and the dependent – as well as to those who care for them. Certainly it has distanced legal norms from the lives that many Americans are struggling to live. There is often, as Charles Taylor has observed, 'a lack of fit between what people officially and consciously believe, even pride themselves on believing, on the one hand, and what they need in order to make sense of some of their moral reactions, on the other'.³¹

²⁹ See *Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (abortion); *Stenberg v. Carhart*, 530 U.S. 914 (2000) (partial birth abortion); *Engel v. Vitale*, 370 U.S. 421 (1962) (school prayer); *Abington School District v. Schempp*, 374 U.S. 203 (1963) (school prayer); *Stone v. Graham*, 449 U.S. 39 (1980) (Ten Commandments posting in school); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (voluntary moment of silence for prayer or meditation in school); *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (public nativity display); *Lee v. Weisman*, 505 U.S. 577 (1992) (school graduation prayer); *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (1999) (student prayers at high school football games); *Texas v. Johnson*, 491 U.S. 397 (1989) (flag-burning); *Stanley v. Georgia*, 394 U.S. 557 (1969) (pornography).

³⁰ Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1991).

³¹ Charles Taylor, *Sources of the Self* 9 (Cambridge: Harvard University Press, 1989).

Now, to conclude, I wish to come back to the issue of the way in which law both reflects and shapes culture. The main concern I have expressed here is closely related to the study of democracy that our Academy has just completed. It is that ideas based on a flawed anthropology can undermine the very conditions are essential for the maintenance of a free republic. Moreover, if hyper-individualistic, ultra-libertarian ideas are spreading from one country to another through globalization, they also can wreak havoc on the more capacious notions of personhood that have informed dignitarian legal systems in other parts of the world.

The best hope for an eventual correction, I would suggest, resides in that aspect of human personhood to which John Paul II referred in the conclusion to his great encyclical *Fides et Ratio*:

I ask everyone to look more deeply at man, whom Christ has saved in the mystery of his love, and at the human being's unceasing search for truth and meaning. Different philosophical systems have lured people into believing that they are their own absolute master, able to decide their own destiny and future in complete autonomy, trusting only in themselves and their own powers. But this can never be the grandeur of the human being... (107)

The capacity of men and women to reflect upon their existence, to make judgments concerning the good life, to review those judgments in the light of reason and experience, and to take responsibility for their decisions, is one upon which all successful legal systems depend. That human capacity for reflection and responsible choice is what makes the difference between being carried along by events and being able to shift probabilities in a more favorable direction.