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LAW AND THEOLOGY: REFLECTIONS ON WHAT IT MEANS TO BE HUMAN FROM A FRANCISCAN PERSPECTIVE

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When I was first asked in March of 2000 to speak at this conference on the topic of “law and theology,” many thoughts crossed my mind. I could address: the role of religion in American political life, euthanasia, medieval canon law and theology, the death penalty, the Jewish origins of the Pauline perspective on law, the ethics of DNA experimentation, Muslim theology and law, the relation between Marxist political theory and Christian eschatology, or several other “light” issues. Upon second thought, perhaps a more straight-forward approach would be beneficial. I might review the plan of salvation history, and then as a true academic, propose alternatives! Because the ten days in March, during which I prepared these remarks, coincided with a not uneventful time in my own life, I decided to remain on familiar terrain. As an unworthy disciple of the “lesser brother” from Assisi, I chose to speak briefly about Franciscan theology and law.

Specifically, I shall consider a question that has been the focus of a great deal of theological discussion during the course of the last century: “What does it mean to be a human being?” The perennial nature of this broad issue, the “anthropological question” as the theologians refer to it, guarantees that its discussion will continue well into the current century. Desiring to maintain at least some semblance of intellectual prudence, I have elected to use my twenty minutes simply to introduce the question within the context of my own modest understanding of

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Franciscan theology and spirituality. I must acknowledge that the Jesuits sponsor most of the Catholic law schools in this country. Moreover, our own beloved St. John's University abides in the tradition of the great Vincentian visionaries, Saints Vincent de Paul and Louise de Merillac. As a product of both Vincentian and Jesuit education myself, I am certainly deeply grateful. Among us at today's conference are also representatives of law schools from other faith traditions. Aware of the various faith traditions, what I shall discuss from a Franciscan perspective is a fundamental anthropology in the best meaning of the words "catholic" and "ecumenical." My remarks this morning are shared with the hope that the connection between the theological query and the law will be evident. Please allow me to speak first of liberal theory, then of the Franciscan insight, and finally to pose some questions for us as legal educators.

I. LIBERAL THEORY

Every system of law reflects certain foundational assumptions about what it means to be human.¹ The concept of justice operative in the legal culture of the modern liberal state, for example, tends to manifest the anthropological assumptions of the classical liberal political theory.² Leading proponents of the pristine liberal theory, such as Hobbes and Locke, placed a great deal of importance on individual autonomy. The liberal theorists viewed the human person as a radically autonomous individual, who consented to leave the freedom of the state of nature, and to enter the social contract in order to protect the natural rights of life, liberty, and property.³ This fundamental

¹ On several occasions, Pope John Paul II has highlighted the importance of correct anthropology for law. See Ioannes Paulus PP. II, "*Allocutiones: Ad Rotae Romanae Auditores coram admissos*," 79 ACTA APOSTOLICA SEDIS 1453, 1454-58 (1987) (hereinafter AAS); Ioannes Paulus PP. II, "*Allocutiones: Ad Romanae Rotae Auditores simul cum officialibus et advocatis coram admissos, anno forensi ineunte*," 80 AAS 1178, 1180-81 (1988); see also GIANFRANCO GHIRLANDA, *IL DIRITTO NELLA CHIESA MISTERO DI COMUNIONE*, COMPENDIO DI DIRITTO ECCLESIALE 15-29 (1990).

² See MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 115-16 (1987).

³ See THOMAS HOBBS, *LEVIATHAN* 82-84 (Michael Oakeshott, ed. 1957); see also JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 364-365 (Peter Laslett ed. Cambridge Univ. Press 1988) ("There is another *Power* in every Commonwealth, which one may call *natural*, because it is that which answers to the *Power* every

anthropological assumption has produced a great deal of individual freedom that remains characteristic of the modern democratic society. When understood in the proper perspective, I see autonomy and the correlative suspicion of government power as important goods. At the same time, the hermeneutics of autonomy and suspicion have tended to affect the legal order and culture in ways that seem, to me, to detract from a balanced anthropological perspective.

As an illustration, one might consider the statement of Justices O'Connor, Kennedy, and Souter in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁴ where the plurality opined: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."⁵ At first glance, the dicta might seem perfectly unremarkable. On a deeper level of analysis, however, one might pose the anthropological query: does the plurality's reasoning on liberty reflect the anthropological assumptions of classical liberal political theory? Does it repudiate a more complete and traditional understanding of the human person which has been operative in the Western tradition, and continues to underpin our very notions of culture, law, and the human good? More specifically, the *Casey* pronouncements seem to reveal at least two broad areas of concern regarding the anthropological foundation of the law: (1) the relativity of all moral value; and (2) an incomplete account of the human good.

First, the notion of autonomy embedded in the *Casey* dicta lends itself to an image of the individual who is in possession of unrestricted freedom, and whose conscience constitutes its own moral legislator.⁶ Because the individual consents to be

Man naturally had before he entered into Society."). Espousing a more optimistic view of human nature, later philosophers, such as Jean-Jacques Rousseau and Ralph Waldo Emerson, sought to liberate the native and spontaneous goodness of the human person which, they thought, was inhibited and warped by society. Whatever their stance toward the state of nature, all of the theorists championed the triumph of individualism. See generally JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT AND DISCOURSES* 4-18 (G. D. H. Cole trans., 1950); RALPH WALDO EMERSON, *ESSAYS* 389-401 (1951).

⁴ 505 U.S. 833 (1992).

⁵ *Id.* at 851.

⁶ See Ioannes Paulus PP. II, *Litterae Encyclicae: Cunctis catholicae Ecclesiae episcopis de quibusdam quaestionibus fundamentalibus doctrinae moralis Ecclesiae*, 85 AAS 1133, 1133-1228 (1994).

governed, the only purpose for which coercive government power may be used is to prevent harm to others.⁷ The absence of an objective moral measure makes it difficult to know what constitutes the harm. Consequently, discussion of a universal human nature through which transcendent principles of moral law are available to each person is met with skepticism at best.⁸ Rather, all moral value is understood as contextual and relative. Unfortunately, a long line of United States Supreme Court precedents such as *Dred Scott v. Sandford*⁹ and *Korematsu v. United States*¹⁰ demonstrate the contextual value of human freedom. As the Supreme Court's abortion decisions illustrate, starting with *Roe v. Wade*, relativity applies even to the value of human life in the womb.¹¹

The contextual and relative meaning attributed to moral value deprives law of an objective moral basis. This rift between law and moral value raises a serious question about the law's power to bind.¹² Apart from the coercive power of the state, why

⁷ See JOHN STUART MILL, *On Liberty*, UTILITARIANISM, LIBERTY AND REPRESENTATIVE GOVERNMENT 95-96 (1951) reprinted in SELECTED WRITINGS OF JOHN STUART MILL (Maurice Cowling, ed., The New American Library 1968) ("[t]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others"). This principle exerted an enormous influence on the development of the modern Anglo-American legal tradition.

⁸ The prominent and influential American jurist, Oliver Wendell Holmes, Jr., drew a sharp distinction between law and morality. Legal positivism and relativism so suited the needs of the radically autonomous individual that even the common law with its deep roots in natural justice and English custom and tradition was for the most part abrogated in favor of statutory provisions and administrative regulation. See Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 461-62 (1897).

⁹ 60 U.S. (19 How.) 393, 403-04 (1857) (preventing a human being, born in the United States, from exercising federal diversity jurisdiction on the ground that no Negro, free or slave, could be a citizen of the United States).

¹⁰ 323 U.S. 214, 223-24 (1944) (upholding the federal government's incarceration and deprivation of liberty of all human beings of Japanese origin during World War II).

¹¹ 410 U.S. 113, 162 (1973) (noting that "the unborn have never been recognized in the law as persons in the whole sense").

¹² This is not to suggest that positive law ought to be absolutely synonymous with the moral order. It is not the purpose of the civil government to prohibit or penalize an immoral act simply because it is immoral. The law of the state extends its competence over morality only to the extent that it affects the public realm. Libel, for example, is illegal because it violates the personal right of another to a good reputation; likewise, perjury prevents the administration of justice; and abortion destroys innocent and powerless human life. A human being's personal

should a given individual follow the dictates of law if it has no power to bind him in conscience? The contextual and relative meaning of the moral value could place the individual in the position to reject the law as eviscerated of moral authority. Rather, it is the just person who, even in the face of legal decisions that plainly affront human decency, contributes to public life while exercising every lawful means to correct the societal inequity.¹³

Second, the anthropological assumption of a radically autonomous individual may enshrine certain values as foundational to the law at the cost of excluding other significant human values. When legal relationships are defined primarily in terms of individual rights, this language of rights would seem to value the individual over and against the common good.¹⁴ In the free market, this anthropology of self-interest dictates competition and success that is measured in terms of prestige, wealth, and power.¹⁵ The law is designed to ensure equality and neutrality as individuals compete.¹⁶ Such an understanding of

commitment to the virtue of honesty, however, per se, has only a proximate relationship to the public order. Thus, purely internal acts of virtue and vice, while the subject of morality, do not necessarily and always constitute part of the public realm. Moral principles, of course, do influence and contribute to the development of law. The *mens rea* requirement for criminal liability was a principle of the natural law long before it was accepted in the common law. See, e.g., JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 260-90 (1980). For an opposing view in which the role of natural law is rejected, see H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.* 593 (1958).

¹³ From the Christian perspective, this is in no way intended to diminish the important role of non-violent civil disobedience in certain circumstances. See generally DIETRICH BONHOEFFER, *THE COST OF DISCIPLESHIP* 22-23 (R. H. Fuller trans., 1959) (stating that Bonhoeffer believed that it was not enough to follow Christ by preaching, teaching, and writing, but called earnestly for "Christian action and self-sacrifice").

¹⁴ Some would go so far as to suggest that there is no common good. For a description of this as a possible position among several alternatives, see Frank Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 *IND. L.J.* 145, 145-48 (1977).

¹⁵ See generally ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (Edwin Canaan ed., The Modern Library 1957) (1776) (discussing the prime psychological drive of men; self interest, and its beneficial impact on the free market).

¹⁶ See, e.g., U.S. CONST. amend. XIV, §1 (guaranteeing all citizens equal protection under the law); Jane Rutherford, *The Myth of Due Process*, 72 *B.U.L. REV.* 1, 4 (1992) (stating that the unifying theme of due process has been a commitment to the values of law, participation, and equality).

the human person may leave little room for other human values such as self-sacrifice and self-transcendence. One might ask whether such an anthropological understanding provides an adequate and balanced account of the human good. The paradox for the liberal state remains that even as it defines freedom as the absence of government restraint on the individual, it depends on acts of self-sacrifice—indeed sometimes of heroic proportions—for its continued well being and survival. A possible danger for law, thus understood, lies in its inability to embody the deepest ideals and aspirations of culture. That the gruesome methods of partial-birth abortion, described by both the majority and the dissent in *Stenberg v. Carhart*, now enjoy constitutional protection raises grievous doubt about the law's pedagogical role in relation to human ideals and aspirations.¹⁷

The problems with the anthropological perspective are perhaps self-evident, and others from diverse viewpoints have adequately demonstrated the limited horizon into which it forces the possibilities for the human person.¹⁸ In the philosophical and religious language of one thinker: "this order distorts the correct proportions in the relations between the person and the society or community and—on a different level—between the human creature and the Creator."¹⁹ Dissenting in *Stenberg v. Carhart*, Justice Antonin Scalia labeled the five-member majority's reasoning "absurd," but nonetheless, expressed optimism that the whole line of abortion decisions would someday be overruled.²⁰ Consistent with this "catholic optimism," Cardinal Joseph Ratzinger has described the possibility of an essential change in culture and society at the dawn of the third millennium:

[T]here is [something] apparent... a consciousness of the incomparable newness of the present situation, of a change in

¹⁷ 120 S. Ct. 2597, 2605-8, 2624-25, 2637-40 (2000).

¹⁸ See GLENDON, *supra* note 2, at 114-42 (discussing the consequences of an anthropological perspective on theories of legal rights); see also YVES R. SIMON, *THE DEFINITION OF MORAL VIRTUE* 1-45 (Vukan Kuic ed., 1986) (discussing the confusion created for an understanding of moral virtue). For a radical critique from the perspective of the human possibilities, see ROBERTO MANGABEIRA UNGER, *PASSION: AN ESSAY ON PERSONALITY* (1984).

¹⁹ KAROL WOJTYLA, *THE ACTING PERSON* 165 (Andrzej Potocki trans., D. Reidel Publishing Co. 1979) (1969).

²⁰ See *Stenberg v. Carhart*, 120 S. Ct. at 2621-22 (Scalia, J., dissenting).

the world and mankind that cannot be measured by the usual norms of historical change as they have always existed but rather signifies an epochal transformation for which there is no adequate comparison. This fact—that something wholly new is happening to man and to the world in a culture in which scientific and technical self-determination is becoming ever more total—is the reason for the crisis that is occurring in a tradition that has no compunction about explaining itself, if need be, in terms of the scientifically proven behavioral patterns of higher animals but can discover no binding force in human history as such and, in consequence, raises afresh the whole question of validity even with respect to tradition-bound institutions like the Catholic Church which seem to be unequivocally characterized by clearly defined norms.²¹

If Ratzinger's analysis of an "epochal transformation" is correct, the time may be ripe for a revision of fundamental anthropology.

Among the anthropological assumptions embedded in classical liberal political theory remains its dislocation from history and tradition. Not only does this assumption tend to relativize moral value, but also it is an understanding of the human person that seems to belie the notion of an objective moral truth precisely because it rejects the tradition from which the objective norm developed in history. Reading the signs of the times of the advent of a major cultural shift, Ratzinger calls for a new anthropological foundation that remains fully faithful to the tradition of Christian faith and truth.²² Given that the modern liberal state also tends to be characterized by secularism and religious pluralism, the possibility of finding acceptance for such a traditional Christian anthropological perspective will be a great challenge.

²¹ JOSEPH RATZINGER, *PRINCIPLES OF CATHOLIC THEOLOGY: BUILDING STONES FOR A FUNDAMENTAL THEOLOGY* 15-16 (Sr. Mary Frances McCarthy trans., Ignatius Press 1987) (1982). After setting out the problem, Cardinal Ratzinger addressed the issue in "Anthropological Foundation of the Concept of Tradition." See *id.* at 85-100.

²² See *id.* at 89-94. Such an understanding would seem to require a multidisciplinary approach that typifies comparative legal analysis. In the words of John Paul II, "L'antropologia cristiana . . . considera la persona umana in tutte le sue dimensioni: la terrena e l'eterna, la naturale e la trascendente." ("Christian anthropology . . . considers the human person in all dimensions . . . earthly and eternal, natural and transcendent."). AAS, *supra* note 1, at 1181; see also 1 LUIGI M. RULLA, S.J., *ANTHROPOLOGY OF THE CHRISTIAN VOCATION: INTERDISCIPLINARY BASES* 71-77 (1986) (stating that "one cannot respond to the call of the Father through Christ and in the Spirit if one holds that man is self-sufficient").

A prominent twentieth-century theologian, Hans Urs von Balthasar, proffered that one possible element to the resolution lies in a retrieval of the Franciscan insight into the human person situated in history.²³ To develop a complete Christian anthropology is far beyond what can be said in these brief remarks.²⁴ Rather, what follows is intended as one element in the anthropological foundation, and is proffered to redress the anthropological assumption of the modern liberal state.²⁵ In particular, it challenges the relativism of moral value and offers an account of the human good of post-Enlightenment anthropology.

²³ HANS URS VON BALTHASAR, *A THEOLOGICAL ANTHROPOLOGY* 133 (1967).

²⁴ Consistent with its methodological principles, Vatican II sought to cull the elements of a Christian anthropology with a grounding in Sacred Scripture. There are five biblical themes that seem essential: (1) the human being as creature; (2) the human being in a covenant relationship with the Lord; (3) the effects of original sin, "lapsarian man;" (4) the Redemption wrought by the "new Man" in the person of Jesus Christ; (5) the possibilities for self-transcendence. See LUIGI M. RULLA ET AL., *Anthropology of the Christian Vocation, Conciliar and Postconciliar Aspects, in, VATICAN II ASSESSMENT AND PERSPECTIVES: TWENTY-FIVE YEARS AFTER (1962-1987)*, vol. 2, 402, 402-59 (Rene Latourelle trans., 1989).

²⁵ As a complement to its biblical foundation, Christian anthropology has long included certain philosophical principles. Its classic expression can be found in the work of St. Thomas Aquinas. Thomas understood the human person to be a composite of body and soul created by God. The soul possesses rationality, free will, and immortality as its primary characteristics. Although the human being shares appetites for self-preservation with all other animals such as fear, anger, hunger, thirst, and sex-drive, the rational soul places humanity a quantum leap above instinctual drives. What distinguishes the human being from the other animals is his ability to think, reflect, and act freely. These are both the prerequisites and constitutive elements of the human act. 1 ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, 363-502 (Fathers of the English Dominican Province trans., Benziger Brothers, Inc. 1st American ed. 1926).

The Thomistic notion of the human being as a rational animal derives in part from the thought of Aristotle. Nature in the physics of Aristotle signifies entity, essence, whatness, quiddity in relation to action, movement, growth, and development. A nature is a way of being which does not possess its state of accomplishment instantly but is designed to reach it through progression. Building upon the Aristotelian framework, St. Thomas transcended it to articulate a Christian synthesis of faith and reason. See FREDERICK C. COPLESTON, *AQUINAS* 220-23 (1970); see also BERNARD J. F. LONERGAN, *METHOD IN THEOLOGY* 13-20 (1979) (discussing contemporary attempts to fashion theological anthropologies consistent with the Thomistic understanding); BALTHASAR, *supra* note 23.

II. THE FRANCISCAN INSIGHT

St. Francis of Assisi lived during the twelfth and thirteenth centuries, when Western Europe found itself in the midst of an epochal transformation.²⁶ The old feudal ways and customs were eroding as commerce and trade shifted the center of culture to the emerging city-states. The monastic communal life, that kept culture alive after the demise of ancient Rome, was proving too insular to satisfy the spiritual hunger emanating from the new urban form of life. The new centers of learning at Paris, Bologna, and Oxford were expanding into influential universities.²⁷ The law, along with the universities, was pointing to the need for a revival of the ancient notions of *ius naturale* which, grounded in human nature, would yield principles universally applicable to all peoples and cultures.²⁸ Thus, the complex interaction of many different levels of reality—cultural, religious, legal, and financial—evoked the need for a fresh articulation of what it meant to be human. The new anthropological perspective did not exclude a certain degree of personal autonomy nor the suspicion of established institutions such as the feudal form of government and the corruption of the Church. It remained, nonetheless, a fundamental understanding of the human person set forth in the ancient truth of the Hebrew Bible and further developed in Christian tradition.

A. *The Faith Experience of St. Francis*

Francis Bernadone, the son of a prosperous cloth merchant, was a gifted and popular citizen of Assisi, one of the new thriving city-states replacing the feudal system.²⁹ As a citizen of Assisi, the young Francis experienced military defeat by the neighboring city of Perugia. He was also incarcerated and suffered a prolonged illness that proved to be a powerful purgation reforming his interior life.³⁰ He had a religious

²⁶ See ARNALDO FORTINI, FRANCIS OF ASSISI, 1-84 (Helen Moak trans., The Crossroad Publishing Co. 1981).

²⁷ See HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 160-64 (1983).

²⁸ See BRIAN TIERNEY, THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL LIGHTS, NATURAL LAW AND CHURCH LAW 76 (1997).

²⁹ See FORTINI, *supra* note 26, at 113.

³⁰ See *id.* at 119-65.

experience that gifted him with a deep faith in Jesus Christ as “the way and the truth and the life.”³¹ Francis left his family and sought solitude to discern the meaning of the supernatural stirrings within his soul.³² He entered into the process of discerning his vocation. Transformed by the humility that flows from acceptance of one’s own “creaturehood,” Francis of Assisi renounced his status in the rising bourgeois class of the thirteenth century.³³ His faith led him to embrace the fullness of time in Christ with respect for all of creation, gratitude for its redemption, and hope for its consummation. This consciousness was grounded in the Christian understanding of one universal human nature and moral law. This consciousness enabled a harmonious weave of interpersonal and environmental relationships.³⁴

In the faith experience of St. Francis, there remained a tension between suspicion of the institution and the Saint’s profound love for the Church and its Sacraments. Rather than entering traditional monastic life or becoming a priest, Francis discovered a way to contribute to the cultural shift of the thirteenth century. He and his followers vowed to live in poverty, chastity, and obedience—they called themselves the “lesser brothers” (friars minor).³⁵ Living in the cities, they preached the gospel of Christ’s love for all humanity to the new urban populous.³⁶ When Clare of Assisi, whose family was of the noble class, joined Francis, she and her followers formed a communal compliment to the friars.³⁷ Soon thereafter, many lay persons committed themselves to living the Franciscan vision in their familial and professional lives. Francis and Clare insisted that Franciscan life and ministry be centered in the eucharistic life of the Church. Francis traveled to Rome to obtain approval

³¹ *John* 14:6.

³² See FORTINI, *supra* note 26, at 185-203.

³³ See *id.* at 113, 203-06, 229.

³⁴ See *id.* at 1-84 (describing the social and economic conditions in thirteenth-century Assisi).

³⁵ See *id.* at 292-306. “During the day they went into the fields to help the farmers with their work; at night they remained for long periods kneeling before a bare wooden cross.” *Id.* at 278.

³⁶ See *id.* at 266-326. “Love and fear God and make worthy penitence for your sins.” *Id.* at 278.

³⁷ See *id.* at 327-66. “Francis cut Claire’s hair himself and gave her a new name: Agnes.” *Id.* at 349.

for the Franciscan way of life from the Pope.³⁸ The Pontiff's blessing opened the institutional Church to receive the charism of the many brothers, sisters, and laity who followed the little poor man from Assisi. The early Franciscans thus initiated a movement that helped to reform the Catholic Church and transform the war-torn society of the medieval city-states.³⁹

B. *Creation and Anthropology*

St. Bonaventure of Bagnoregio,⁴⁰ as a member of the Order of Friars Minor and a professor at the University of Paris, set the experience of Francis into logical order. The starting point for Francis's theological reflection can be located in his deep appreciation of creation and nature. In his poem, *The Canticle of Creation*, Francis referred to "Brother Sun, Sister Moon, Sister Water and Brother Fire."⁴¹ According to Bonaventure, this anthropomorphic tendency in Francis's thought disclosed a perspective on what it means to be a human person. In accepting the reality that he was created in the image and likeness of the Creator, Francis humbly recognized his place in the created order as a being subject to a higher and life-giving law. The Franciscan insight into anthropology commences with the fundamental dignity of the human person. This dignity is ontological in the sense that it belongs to every human being in virtue of creation from the moment of life's beginning in the womb to its passing through death to a new life. Moreover, as Bonaventure interprets it, Francis understood that material creation reveals the glory of the divine mystery. While humanity represented the zenith of material creation, all created life and nature were sacred as a manifestation of the divine love. In creation, the Creator emptied Himself in a super-abundant beauty. Rather than understanding the human being as relating to other individuals, institutions, and the environment as the

³⁸ See *id.* at 293-302. "So it was that they found themselves facing each other, the fool of Assisi, kneeling with his companions on the rich mosaic, and the most powerful of all the popes who has succeeded to the throne of Saint Peter." *Id.* at 294.

³⁹ See *id.* at 252-326.

⁴⁰ For a biography of St. Bonaventure, see Jacques Guy Bougerol, *SAINT BONAVENTURE: UN MAÎTRE DE SAGASSE* (1966).

⁴¹ Francis of Assisi, *The Canticle of Brother Sun*, in FRANCIS & CLARE: THE COMPLETED WORKS 37-39 (Regis J. Armstrong, O.F.M. CAP. & Ignatius C. Brady, O.F.M. trans., Paulist Press 1982).

means to a private end, Franciscan anthropology posited a communal harmony based on a common "creaturehood." The material environment was not valued because it supplied a pleasant backdrop for gratification of subjective preferences. Instead, the Franciscans respected the environment because it revealed the glory of God. The human person was thus in relation to material creation as an aspect of the human quest to discover the divine.

C. *Christology and Anthropology*

Bonaventure's interpretation of history focused on the Incarnation, so that in Christ, the fullness of being having been revealed, new possibilities were opened for human experience.⁴² In his biography of St. Francis, Bonaventure described the ongoing process of *conversio*, in which self-centeredness was transformed.⁴³ The culmination of the process in the life of St. Francis was, for Bonaventure, the stigmata in which Francis became so Christlike that he developed the very wounds of the Savior.⁴⁴ As then Fr. Ratzinger stated it in his doctoral thesis, "Bonaventure sees Francis as the eschatological *praeco Dei*."⁴⁵ In his humility and poverty, the Poverello entered the fullness of time, the redemptive moment, and in joy and peace embraced all material creation. Bonaventure interpreted history in such a way that the Paschal event revealed the fullness of the human possibilities. The emptying, death and resurrection of the Son, especially as modeled by the humility and poverty of Francis, served as the paradigm for all human meaning.⁴⁶

⁴² See BALTHASAR, *supra* note 23, at 133-35.

⁴³ "De perfecta conversione eius ad Deum et de reparatione trium ecclesiarum," 8 S. BONAVENTURAE, *Legenda Maior*, in OPERA OMNIA 507-10.

⁴⁴ See *id.* at 542-45.

⁴⁵ JOSEPH RATZINGER, THE THEOLOGY OF HISTORY IN ST. BONAVENTURE 32 (1971).

⁴⁶ The theological anthropologies of Saints Thomas and Bonaventure shared the following characteristics:

- (1) essence common to all human beings which has remained unchanged since Adam, and which includes rational nature and free will
- (2) the preternatural human being became the natural human being through the Fall as a result of original sin
- (3) each human being has a historical existence which makes the person unique, identical to none other, in the eyes of God
- (4) the natural state of humanity needed the Redemption wrought by Christ for fulfillment.

Balthasar suggests that the christocentric interpretation of history may be understood by analogy to the aesthetic in human experience.⁴⁷ Art requires the harmonious relationship of every part to the whole. To strike a single word from the poem, to distort a chisel groove in the sculpture, to remove a patch of color from the painting, or to miss a solitary note from the symphony impairs or even destroys the whole.⁴⁸ So too it is the complex and dynamic unity of spirit and matter, body and soul, that comprises the human person. In this sense, the human person may be understood as the longing of all creation, the unity of spirit and matter. As Bonaventure puts it:

For the human body possesses the noblest constitution and organization that exists in nature, and therefore it finds its fulfillment only in the noblest form of nature. The character of the soul through which she is able to be united to a body is something that touches what is most essential to her and is the most excellent character of the soul.⁴⁹

The glorified body of the risen Christ "shows an example destined for all risen human bodies," the reflection of the spirit in materiality.⁵⁰ In Bonaventure's thought, the *impressio* of the stigmata signified that humanity sits always prone on the edge of an eschatological era. The salvation event was not understood as something strange and different, or as something wholly apart from human experience and history, but rather as the example of transformation which permitted the fulfillment of the individual, the community, and all humanity.

Bonaventure expressed a medieval longing for a deeper meaning within human experience, and for institutional structures that foster such meaning. What he expressed may

Id. For a more nuanced comparison of Saints Thomas and Bonaventure on the human soul, see ETIENNE GILSON, *THE PHILOSOPHY OF ST. BONAVENTURE* 285-308 (Iltyd Trethowan & Frank J. Sheed trans., 1965).

⁴⁷ BALTHASAR, *supra* note 23, at 170.

⁴⁸ *See id.*

⁴⁹ 2 SENT., distinctio 1, pars 2, articulus 3, quaestio 2, S. BONAVENTURA OPERA OMNIA, vol.II, 50 ("Corpus enim humanum nobilissima complexione et organizatione, quae sit in natura, est organizatum et complexionatum; ideo non completur nec natum est compleri nisi nobilissima forma sive natura. Illud ergo, quo anima est unibilis corpori, tale dicit quid essenziale respiciens, quod est nobilissimum in anima . . .").

⁵⁰ "[E]xemplarem praeferens pulcritudinem suscitandorum corporum humanorum . . ." 8 S. BONAVENTURAE, *Lignum Vitae*, in OPERA OMNIA 81.

contribute to the resolution of the anthropological question at the heart of justice. For the Christian, the ideas of Christ should never be separated from his humanity. The dynamic action of the fully human, fully divine Christ in world history should not be separated from the culture and legal order either. The Christian perspective does not focus merely on the external juridical structure, but on the *intellectus* that animates the outward form. Franciscan humanism rests upon the truth revealed in the human person of Christ that informs the anthropology underpinning the culture and legal order.

D. *Eschatology and Anthropology*

The context of Bonaventure's approach was in no small part a response to Joachim of Fiore's interpretation of history.⁵¹ Joachim was the intellectual spokesperson for a millennialist movement that interpreted history as moving beyond the need for institution, law, and sacrament. The departure point of Joachim's interpretation of history was not linear in the sense that the New Testament followed upon the Old Testament, rather he posited a symbolic mirroring of one in the other.⁵² Based on this diptych of the Testaments, Joachim developed a triadic scheme in which the New Testament or Age of the Son was to be fulfilled in a third, eschatological period, the Age of the Spirit.⁵³ The dawning of the Joachimist "spirit age" would mark the demise of sacrament and law as symbolic expressions of the objective moral order.⁵⁴

Bonaventure, without entirely repudiating Joachim's approach, developed the Franciscan insight that creation or materiality already contains within it the possibility of the eschatological. For Bonaventure, the spirit age, although incomplete, already existed in the here and now within the

⁵¹ On the influence of Joachim's thought in the thirteenth century, see MARJORIE REEVES, *THE INFLUENCE OF PROPHECY IN THE LATER MIDDLE AGES: A STUDY OF JOACHIMISM* 3-228 (1969).

⁵² See *id.* at 16-27.

⁵³ See *id.* In his doctoral dissertation, then Fr. Ratzinger provided a full analysis of the relation of Joachim's thought to St. Bonaventure's understanding of history. RATZINGER, *supra* note 45, at 104-18. See also BALTHASAR, *supra* note 23, at 131-35.

⁵⁴ See REEVES, *supra* note 51, at 16-27; see also BALTHASAR, *supra* note 23, at 131-35.

visible structures and signs of the institutional Church.⁵⁵ While it maintained a linear notion of history, Bonaventure held that the fullness of time had already been revealed, although in a veiled manner, through the Word and the Incarnation. This was not merely a theological debate. When he was called to serve as the seventh General of the Franciscan Order, Bonaventure combated Joachim's view of history, which had been adopted by the spiritualist members of the Order.⁵⁶ Bonaventure described the freedom and autonomy of the young Francis who renounced the comfortable yet oppressive world of his wealth-consumed father so as to discover a form of participation in solidarity with others. The Seraphic Doctor also appreciated the healthy suspicion of Francis and his early followers toward the institutions of the medieval Church. Bonaventure affords an understanding of Franciscanism that exhibits a deep trust and respect for the Church, its authority, and sacraments—even while it recognizes that the Church remains *semper reformanda*. In Bonaventure's interpretation of the early Franciscan experience, the Church's sacraments and law were to reflect an anthropology of freedom, participation, solidarity, healthy suspicion, respect, trust, and self-sacrifice in the human person created in the image of the divine mystery.

Rejecting a dualism between materiality and spirit, body and soul, and in the human person and the Church, Bonaventure posited a dynamic unity in which the outward form is itself graced because it manifests the inner *intellectus*. All of creation is the vestige of the Creator,⁵⁷ and the wounds of the Redeemer, as mirrored in the body of St. Francis, are the sacred signs of self-emptying love.⁵⁸ Similarly, the outward structure of the Church serves as sacrament to reveal a deep inner reality. San Damiano and the Portiuncula must be repaired so that Francis may dwell within them in joy and peace.⁵⁹ The Rule must be approved by the Roman Pontiff to allow the Order "to proceed in

⁵⁵ See *Lignum Vitae*, *supra* note 50, at 79–80.

⁵⁶ See JOHN MOORMAN, *A HISTORY OF THE FRANCISCAN ORDER: FROM ITS ORIGINS TO THE YEAR 1517*, 140–54 (1968); ROSALIND BROOKE, *EARLY FRANCISCAN GOVERNMENT: ELIAS TO BONAVENTURE 270–85* (1959).

⁵⁷ See 5 S. BONAVENTURAE, *Itenerarium Mentis in Deum*, in *OPERA OMNIA*, 296–99.

⁵⁸ See *Legenda Maior*, *supra* note 43, at 542–45.

⁵⁹ See *id.* at 507–10.

holiness and justice" before God.⁶⁰ For, the grace of *conversio* does not replace nature, but transforms it.

As Balthasar stated it, Bonaventure's thought exemplified "the medieval longing to move from the letter to the spirit, from the institution and the sacrament to the *intellectus* within them . . . a growing awareness that the 'peoples' could only take from the Church (and its mission) its 'form' if they found in the form that *intellectus* which would impart to it, beyond its naked factualness, an inner necessity of salvation history."⁶¹ For this reason, Balthasar explained: "the spiritualists, following Joachim, reform out of a secret resentment against the hierarchic institution Bonaventure, on the other hand, reforms out of childlike obedience to the Church, in which he sees no rigid, separate institution, but the living Body of the incarnate Christ."⁶² The early Franciscans exhibited a certain autonomy from, and healthy suspicion of, the prevailing institutional authorities. Yet, the sense of vocation, humility, participation, solidarity, and self-sacrifice led them to an anthropological perspective that transformed the structures of medieval government and church.

E. Anthropology Reformulated

To pose the anthropological question in a theological context may certainly seem somewhat novel to the secular jurist. What possible connection could there be between theological insight and law in the modern liberal state? More specifically, given the pluralism of the modern secular society, the christocentric paradigm of self-emptying love seems to have little relevance, and may even be offensive to some. The plurality opinion in *Casey* observed: "Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."⁶³ At the same time, it seems perhaps just as bizarre that a tradition-bound institution, such as the United States Supreme Court, apparently feels free to jettison history and overlook the anthropological assumptions of its jurisprudence. The definition of the human person is at issue every time the

⁶⁰ *Id.* at 513.

⁶¹ BALTHASAR, *supra* note 23, at 162-63.

⁶² *Id.* at 135.

⁶³ *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992).

High Court renders a decision that considers the profound question as to whether or not human life in the womb merits any level of constitutional protection.⁶⁴ Certainly, it cannot be a question of imposing a certain religious understanding of human person unto the law of the state. Even if such an approach were possible, it would be quite undesirable. Among other problems, it would tend to erode the freedom guaranteed by democratic law. Rather, the theological anthropology may offer insight into the human person that serves to afford a more balanced idea of freedom and a more complete account of the human good. It is intellectually barren to ignore the traditional religious anthropology and proceed, as if in a historical vacuum, in the reinvention of what it means to be human.

The religious understanding of the human person, as illustrated here by the Franciscan perspective, teaches that true freedom subsists not in the assertion of individuality alone, but from participation and solidarity with others in a common endeavor.⁶⁵ This is the antidote to the alienation, which is a poisonous byproduct of anthropology focused on the radically autonomous individual. Thus, theological anthropology offers the law the insight that legal relationships need not be defined exclusively in terms of individual rights. It informs the law that a balanced notion of human freedom involves the correct proportions between individual rights and responsibilities. The definition of freedom as the absence of restraint needs the corrective supplement that one constitutes oneself as a human person by giving oneself away. Bonaventure recognized that the mere assertion of moral doctrine was to ignore its inner logic. Instead, reflection of the religious experience of Francis led Bonaventure to the conclusion that the understanding and acceptance of the traditional moral order required a prior anthropology. Only through self-sacrificial love could the human being possess the poverty and humility to know and love the immutable truth. As society experiences the kind of epochal transformation described by Cardinal Ratzinger, it might find direction in navigating the uncharted course by a legal order that does not repudiate traditional Christian anthropology.

⁶⁴ See *id.* at 851.

⁶⁵ See Michelman, *supra* note 14 and accompanying text.

Such an anthropological perspective would provide a necessary supplement to the account of the human good functioning within the legal order of the modern liberal state. When freedom is defined as the absence of constraint on the individual, the law tends to focus on the protection of individual legal rights. Legal relationships are defined primarily in terms of individual rights, and this language of rights may sometimes obscure the common good. For example, the interaction between the law and anthropological assumptions is critical to society since the family unit constitutes the societal foundation. A system of law that is primarily concerned with individual rights may not readily enhance the goal of supporting family life. Indeed, the language of individual rights may result in a legal culture that seems hostile to the family unit. Pursuant to the liberal anthropology, the traditional understanding of the family could be seen merely as a legal relationship consisting of any set of willing participants, who may initiate and terminate the relationship at whim. Not only does such a subjective notion reject the wisdom of tradition, it also threatens to destabilize society itself. In contrast, human experience teaches that a stable and healthy family requires self-sacrifice on the part of the spouses and their progeny. The traditional religious understanding of the human person offers balance to the legal order based upon the anthropology of liberal political theory. As a compliment to autonomy and suspicion, equilibrium might be restored by a recognition of the human person as a spiritual being created in the dignity of the divine image who finds meaning in solidarity with others through acts of participation and self-sacrifice.

III. LEGAL EDUCATION

The anthropological problem posed by liberal theory may be corrected through Franciscan anthropology. The Franciscan anthropological corrective can be applied to rights language, the protection of innocent human life, and the traditional religious understanding of the family. Moreover, the anthropological assumptions embedded within our legal culture raise a host of questions for legal educators in religiously affiliated law schools. Utilizing Franciscan theology and spirituality, the remainder of

this article will focus on three issues: vocation, participation, and hope.

First, given the various faith traditions that have played an important role in the foundations of our respective institutions, what do we communicate to our students about the self-understanding of being a lawyer? In the religious understanding of the human person, as exemplified here by the Franciscan insight, the spiritual or interior life constitutes the unifying and dynamic force of all of one's projects and endeavors. As a young man, Francis of Assisi spent time discerning his vocation. Do we encourage and nourish such discernment of vocation among our own students? Do we even consider law a profession, in the sense inherited from the Medieval Universities, such that it involves a vocation to a higher good for a noble purpose?

Second, what is the image of human fulfillment that we present to our students? Upon graduation, do students go forth primarily as radically autonomous individuals anxious to compete in the market place so as to satisfy subjective desires? Or, do they realize the importance of participation and solidarity with other human beings in family life, in religious associations, and other fundamental communal forms of human fulfillment. Does the ideal of human happiness depend primarily on prestige, victory, and financial gain? What do we communicate to our students about the ontological dignity of every human person? Does the wisdom of paradoxical self-sacrifice for the common good, at least occasionally, enter one's consciousness?

Third, does the process of legal education leave our students disconnected from history? Without memory of the past, how is it possible for the human person to form hope for the future? If our teaching depends solely on prevailing economic, political, and social critiques, do we breed cynicism among future lawyers about the rule of law and its relation to fundamental human goods? Does not a knowledge of tradition and custom, which were the fonts of the common law, afford a wisdom about the present? Does our educational process result in a professional training that affords hope for the future?

The dignity of the human person is not enhanced by juridical structures that encourage the radically autonomous individual. At its worst, the political theory of the modern liberal state leaves the human person disconnected from history,

isolated in the present, and unconcerned for the future. In contrast to that quality of meaning available through the pursuit of the private good alone, the theological paradigm offers the hope that the human person might discover the fuller possibilities through solidarity with others. As one author describes it: "The commandment of love is also the measure of the tasks and demands that have to be faced by all men—all persons and all communities—if the whole good contained in the acting and being 'together with other' is to become a reality."⁶⁶ Perhaps, then it is not so farfetched to speak of loving self-sacrifice for the greater good as having something to contribute even to secular culture and legal structures. To conclude with the words of St. Bonaventure:

For the glory of the kingdom to be perfect, there is required not only exalted power but also resplendent wisdom so that the government of the kingdom is directed not by arbitrary decision but by the brilliant rays of the eternal laws emanating without deception from the light of wisdom. And this wisdom is written in Christ Jesus, as the book of life in which God the Father has "hidden all treasures of wisdom and knowledge." (Col. 2: 3).⁶⁷

⁶⁶ WOJTYLA, *supra* note 19, at 298-99.

⁶⁷ The Latin translation is as follows:

Ad gloriam regni perfectam non solum requiritur potestas excellans, verum etiam sapientia fulgens, ut non secundum indeterminatae voluntatis arbitrium disponantur gubernacula regni, sed secundum fulgores aeternarum legum a luce sapientiae indecepte manantium. Et haec quidem sapientia scripta est in Christo Iesu tanquam in libro vitae, in quo omnes thesauros sapientiae et scientiae . . .

BALTHASAR, *supra* note 23, at 84.