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## ESSAY

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### THE CHRISTIAN JURISPRUDENCE OF ROBERT E. RODES, JR.

*Thomas L. Shaffer\**

*Hope is the power of being cheerful in circumstances we know to be desperate.*  
—G.K. Chesterton<sup>1</sup>

When I had the chance to leave law practice and become a full-time law teacher, I turned, in the time-honored fashion, for advice from my law teachers. The most memorable and persistent of these—the most cheerful, too, and therefore the most hopeful—was Robert E. Rodes, Jr., then a young (36), transplanted New Yorker, Harvard law graduate, and Boston lawyer. He had already come to flourish, in the Aristotelian sense, in the Midwest—in a Catholic university known more for its football players than for its lawyers.

Rodes told me he had come to teaching and to Notre Dame because he wanted a contemplative life—not an obvious vocation for the father of seven, teaching four sections of law classes per semester, faculty advisor for the law review, and already a prolific scholar.<sup>2</sup> Thirty-five years later those who continue to learn from him, as his seventieth birthday has come and gone, would guess that he has done what he wanted to do when he came to Notre Dame in 1956, and that this is nowhere more evident than in his unique theological jurisprudence.

In the spring of 1995, a group of Rodes's friends read through his work in jurisprudence and gathered to talk with him about it and

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1 G.K. CHESTERTON, *HERETICS* (1905), reprinted in 1 *THE COLLECTED WORKS OF G.K. CHESTERTON* 37, 125 (David Dooley ed., 1986).

2 See Appendix, *infra* note 116, for a list of Rodes's publications.

about his current (seventh) book, *Pilgrim Law*.<sup>3</sup> That book and what these friends said to one another in 1995 are the basis of these reflections.

### I. RODES'S THEORY OF HISTORY

"My awareness of the inadequacy of traditional legal categories is . . . more academic than experiential," he writes. "My intellectual formation in the law was dominated by sociological jurisprudence articulated in technological metaphors like 'social engineering' and 'legal apparatus.' Legal scholars of my generation had a substantial hope of improving society by deploying our professional skills in much the same way civil engineers hope to improve the highway system by deploying theirs. It was a serious disappointment when we had been at it for some years to find that the hoped-for improvements did not come about as rapidly and as unambiguously as the Indiana Toll Road."<sup>4</sup>

The negative end of Rodes's changing his mind has been in his theory of history—a matter, as I read it, of his jurisprudence being corrected by his study of liberation theology and by the three decades of careful work that went into his three-volume study of the established church in England, a study in which the focus of his interest has been not so much in the government as in the church: "My interest is that of a Christian looking at the role of the church in society, rather than a student of society looking at the effect of the church on society. . . . When church and society part company, I go with the church, and not with society."<sup>5</sup>

Which is to say that he looked at the legal solutions compounded by American sociological jurisprudence both as a realist who saw that the solutions crafted by social engineering don't seem to work out, and often make things worse, and as one who trusts the God of history, a God Whose purposes are, if benevolent, nonetheless mysterious. Rodes came to understand that yesterday's political, economic,

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3 ROBERT E. RODES, JR., *PILGRIM LAW* (forthcoming 1998).

4 *Id.* at xi–xii.

5 Recorded conversation of Michael J. Baxter, David B. Burrell, James T. Burchaell, Drew Christiansen, Frederick J. Crosson, Patrick D. Gaffney, John H. Garvey, Richard H. Helmholz, Vinodh Jaichard, Mary Kate Kearney, Douglas W. Kmiec, Thomas Kohler, William M. Lewers, David T. Link, John R. Martzell, Anjelika Mueller, John T. Noonan, Jr., Mary Lee Noonan, Leo J. O'Brien, Gerard Powers, John H. Robinson, David Rodes, Jane Rodes, Jeanne Rodes, Robert E. Rodes, Jr., Maura A. Ryan, Thomas L. Shaffer, Paul Titus, Paul J. Weithman, and John Howard Yoder at the University of Notre Dame (March 25, 1995) (on file with author) [hereinafter Conversation].

and legal solutions are the recurrent source of today's dilemmas and tragedies: History is both ambivalent and intractable.

The positive end is the faith that the Lord nonetheless wants Bob Rodes's law students to do what they perceive needs to be done—"to pursue an unknown end by inefficacious means."<sup>6</sup> In 1995, he and his friends, at the end of the day (literally), expressed this in a limerick Rodes quotes to his students but cannot account for:

God's world made a hopeful beginning  
But man marred his chances by sinning.  
We trust that the story  
Will end in God's glory,  
But at present the other side's winning.<sup>7</sup>

His students—many of whom now send their children to learn law from him—cannot see very far down the road to the Eschaton, but they can see some of the way, enough to notice what the Second Vatican Council referred to as the joys, the hopes, the griefs, and the anxieties of the children of this age.<sup>8</sup> Such lawyers' "work is a practical way of loving our neighbors. God calls us to it and blesses it."<sup>9</sup> He and his students can learn "well enough to recognize an obstacle when we see one."<sup>10</sup>

The obstacles (and, I suppose, the opportunities) are in significant part institutional, which means that they are in significant part the product of lawyers' work and therefore vulnerable, in significant part, to lawyers' resistance and subversion. "[D]oing what we can to reform or dismantle them is an act of justice to people whose achievement of their God-given destiny is impeded by them. . . . [It] is often a matter of making or applying laws in ways that our professional train-

6 RODES, *supra* note 3, at 11; cf. Karl Rahner, *Utopia and Reality*, 32 THEOLOGY DIG. 139, 142 (1985), quoted and discussed in Paul G. Crowley, S.J., *Rahner's Christian Pessimism: A Response to the Sorrow of AIDS*, 58 THEOLOGICAL STUD. 286, 299 (1997).

We come from a beginning we did not choose and go to an end that is lost in God . . . . We never know with ultimate certitude how we relate with our freedom to the inescapable situation of our existence; we have to accept our beginning, give our ultimate love to the end we call God, and with hope leave whether or not we do it in God's hands.

*Id.*

7 Conversation, *supra* note 5. "I learned it in college," he said. "I have no idea from whom." *Id.*

8 Second Vatican Council, *Gaudium et Spes: Pastoral Constitution on the Church in the Modern World*, in CATHOLIC SOCIAL THOUGHT: THE DOCUMENTARY HERITAGE 166 (David J. O'Brien & Thomas A. Shannon eds., 1992).

9 RODES, *supra* note 3, at 12.

10 *Id.*

ing has shown us.”<sup>11</sup> In the conversation, he said: “The role of the individual in historical change is neither to advance it nor to resist it, but to enhance the good and resist the evil within it. . . . The pursuit of social justice is eschatologically validated; it need not be empirically validated. The attempt to bring about justice in society is one to which God calls us, and which He blesses, and which will be ultimately successful, not because it is inherently capable of accomplishing what it sets out to accomplish, but because of God’s gratuitous will to bring about His Kingdom. . . . From there you get the pursuit of social justice as the reform of the institutions of society.”<sup>12</sup>

The obstacles, the confrontation of obstacles, and the fact that today’s solutions bring tomorrow’s problems are, to Rodes, evidence of the tragic nature of human life. He appeals then, finally, to his faith, a faith that, as the sixteenth-century rabbi Judah Loew ben Bezalel said, “God listens to the weeping that teaches Him about the world He has created.”<sup>13</sup> Rodes’s appeal is in part to what he calls “pilgrim law,” a jurisprudence that recognizes life in this world as an open-ended pilgrimage, and “opposes any philosophy, any politics, or any jurisprudence that commits individuals or humanity in general to a known and therefore spurious destiny, or to no destiny at all.”<sup>14</sup>

Part of Rodes’s scholarly journey has been an interest in Marxism and an acceptance both of Marxist class analysis (which Rodes calls “class dialectic” rather than “class warfare,” for reasons that will appear) and of significant parts of Marx’s and Engels’s reading of history.<sup>15</sup> For example, Rodes identifies, throughout western history, the existence and influence of ruling classes and the tendency of the ruling classes to use both their political ideology and the law they preside over to serve their own ends. He recognizes the enduring presence of false consciousness<sup>16</sup> and hegemony as protections of ruling-class ideology. And he identifies as the principal apostolic business of Christian jurisprudence—the work of lawyers and judges—confronting the

11 *Id.*

12 Conversation, *supra* note 5.

13 AVIVAH GOTTLIEB ZORNBERG, GENESIS: THE BEGINNING OF DESIRE 376 (1995).

14 RODES, *supra* note 3, at 13.

15 Rodes acknowledges HUGH COLLINS, MARXISM AND LAW (1984), as his principal source on Marxist theory—along with Karl Marx & Friedrich Engels, *Manifesto of the Communist Party*, in BASIC WRITINGS ON POLITICS AND PHILOSOPHY I (Lewis S. Feuer ed., 1959).

16 Collins defines Marxist notions about false consciousness in terms of ruling-class ideology, citing two perspectives:

(i) the epistemological: “[A]ll knowledge is false consciousness or at least . . . the present dominant conceptions of the world are false and only Marxism has truly understood reality”; and

insular power of ruling classes, in service to the exploited classes and particularly in service to the poor. "If [Marx's and Engels's] account of the succession of dominant classes has to be taken with a grain of salt," he says, "it still has to be taken."<sup>17</sup>

He does not, of course, accept Marxist teleology. Rodes does not foresee a utopian epoch in which there will be no classes, and he goes beyond Marx's description, to hold that the existence of a ruling class is *inevitable*. But he also reads history to say, as to the "values" of the ruling class, that class follows values (not the other way around) and that ruling-class values are not always and everywhere as narrowly self-serving as Marx thought they were. He is cheerful in circumstances he knows to be desperate because he hangs on to a Catholic (and Jewish) view of human nature, and to his own version of a theology of hope, more than to Marxist determinism.

These two modifications—the inevitability of a ruling class, and a modified account of class instrumentalism<sup>18</sup>—lay the groundwork for a jurisprudence of lawyering that Rodes sums up by saying that the proper business of the law is to make the ruling class (whatever it happens to be at the time) *accountable*. They are two of the four pillars of his jurisprudence. (The other two pillars are his somewhat unique account of natural law and his appeal to what he calls "transcendent values.") His object in *Pilgrim Law*, he says, is to describe "a relativized class structure within a context of wholly or partially transcendent values."<sup>19</sup> He celebrates, then, not only a positive view of the human person but also an optimistic view of lawyering: "Whatever we believe in, whatever we have been, whatever we wish to be, when the time comes for us to choose out of the available material specific principles

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(ii) using the metaphor of reflection: "[C]ultural achievements, scientific ideas, religious and legal thought [are] all merely reflections of the relations of production."

COLLINS, *supra* note 15, at 35–36. Marx himself (whom Collins quotes) held that social being determines consciousness, so that ideas, knowledge, and motivation are constructed in response to practical experiences. That is, it is experience that drives history, not ideas. *See id.* at 37.

By the way, Marxist analysis has of late attracted surprising allies, not least of which are Wall Street and Pope John Paul II (before he became pope). *See, e.g.*, John Cassidy, *The Return of Karl Marx*, NEW YORKER, Oct. 20 & 27, 1997, at 248; Jonathan Kwitny, *Neither Capitalist Nor Marxist: Karol Wojtyla's Social Ethics*, COMMONWEAL, Oct. 10, 1997, at 17.

17 RODES, *supra* note 3, at 31.

18 Rodes follows COLLINS, *supra* note 15, at 27–28, who treats class instrumentalism as it applies to the law. For Marx, Engels, and Lenin, law was a creation of the state apparatus to further the ends of the ruling class.

19 RODES, *supra* note 3, at xv.

for the ordering of our life together, we draw on the skills of the legal profession."<sup>20</sup>

## II. THE NEW CLASS

This is a high view of lawyering, but also, as one might expect from a contemplative thinker, a penitential view, one that focuses on the fact that lawyers and most of their clients are at present the ruling class which Rodes's jurisprudence seeks to make accountable. The ruling class today, in all of Europe and the New World, is not the landholder or the capitalist of Marxist analysis, but the *apparachik*—the manager and the lawyer. Rodes makes recurrent and creative use of Milovan Djilas's *The New Class*.<sup>21</sup> Djilas's startling thesis was that in European socialist economies, capitalism had been replaced, not by the classless rule of the proletariat, but by bureaucrats. (Discussions of Djilas were prominent in the essays that were used by members of the 1995 conversation.)

Rodes applies Djilas's analysis to capitalist economies and then adds traditional Jewish and Christian morality on the uses of wealth and power. We lawyers, for example, as we live well and as we use power we do not have, are among the principal beneficiaries of class injustice; and, he says, "We should be no more content with being oppressors than we would be with being oppressed."<sup>22</sup> We American lawyers, as much as the growing underclass in the economy of the United States, are captives of class injustice, and we, as much as the underclass, stand in need of liberation from it: "It is this principle of joint liberation that reconciles participation in an ongoing class struggle with a Christian commitment to universal brotherhood and solidarity."<sup>23</sup> Rodes in this way can appeal to the scriptural concepts of forgiveness of enemies and stewardship of wealth and power, both to explain circumstantial (or historical) advantage and to point to moral principles that, in less subtle hands, might come across as *noblesse oblige*.

If Rodes approaches the Marxist doctrine of class instrumentalism<sup>24</sup> with caution, he nonetheless recognizes that Marxist characteri-

20 *Id.* at 3.

21 MILOVAN DJILAS, *THE NEW CLASS* (1957).

22 RODES, *supra* note 3, at 23.

23 *Id.* at 24.

24 See, e.g., EVGENY B. PASHUKANIS, *LAW AND MARXISM: A GENERAL THEORY* (Barbara Einhorn trans. & Chris Arthur eds., Ink Links 1978) (1929); JOSE PORFIRIO MIRANDA, *MARX AND THE BIBLE: A CRITIQUE OF THE PHILOSOPHY OF OPPRESSION* (1974). Rodes identifies what Djilas called the "new class" under socialism with the "managerial class" in so-called free-market economies. Rodes's historical analysis is similar in

zations on the validity and the uses of ruling-class morals are accurate more often than not. "If, for instance, we enroll industrialists in our ruling class, it is because we want to motivate more people to become industrialists . . . to practice the supposed virtues of . . . ambition, resourcefulness, and hard work; or because we consider people with those virtues morally superior to other people.

"Rationales of this kind presuppose first that positions of wealth and power are in fact occupied by people who meet the ostensible criteria for occupying them, and second that those criteria are themselves just and reasonable. Neither presupposition is very realistic. . . . [What] will prevail in a given time and place depends on historical

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many ways to the analysis of "managerial capitalism" among students of business, most notably that of Alfred D. Chandler, Jr.:

As technology became more sophisticated and as markets expanded, administrative coordination replaced market coordination in an increasingly larger portion of the economy. By the middle of the twentieth century the salaried managers of a relatively small number of larger mass producing, larger mass retailing, and large mass transporting enterprises coordinated current flows of goods through the processes of production and distribution and allocated the resources to be used for future production and distribution in major sectors of the American economy. By then, the managerial revolution in American business had been carried out.

ALFRED D. CHANDLER, JR., *THE ESSENTIAL ALFRED CHANDLER: ESSAYS TOWARD A HISTORICAL THEORY OF BIG BUSINESS* 396 (Thomas K. McCraw ed., 1988). Chandler's analysis depends on size and complexity, and size and complexity depend on growth that is consequent on capitalistic success. He does not use class analysis, but he could. His "new class" would grow out of historical circumstance, the key economic development in which appears to be the decline of what he and other scholars call "market coordination."

Another of these scholars, William Lazonick, focuses on what Rodes calls accountability and sees a significant shift in American business from discipline within organizations to the discipline of professional groups, so that experts move from enterprise to enterprise. They move between systems of accountability without leaving the managerial class; Lazonick appears to regret the transition:

[T]he historical significance of managerial capitalism is that there was a time when the strategic managers of U.S. industrial corporations were also disciplined by their membership in their own business organizations and saw their own individual success as dependent on the long-term growth and stability of the organization as a whole. That also happened to be a time when U.S. industry dominated the international economy.

William Lazonick, *Controlling the Market to Corporate Control: The Historical Significance of Managerial Capitalism*, in *ENTREPRENEURSHIP, TECHNOLOGICAL INNOVATION, AND ECONOMIC GROWTH: STUDIES IN SCHUMPETERIAN TRADITION* 153, 194 (Frederic M. Scherer & Mark Perlman eds., 1992).

I am grateful to Professor Brian C. Shaffer, who brought this parallel to my attention; to Brian Nettleingham, who worked it out for me; and to Professor Nancy F. Koehn.



developments related very tenuously, if at all, to the deserts of those affected."<sup>25</sup>

The managerial elite took control of western capitalistic societies because capitalists became dependent on the managers of their wealth, as it took control of socialist societies because the proletariat lacked the skills for implementing the revolution; both capitalists and revolutionaries needed surrogates, administrative experts. "Where nineteenth century capitalists had hired their managers as they did the rest of their work force, twentieth century managers were hiring their capital as they did their labor. Managers were still theoretically responsible to their investors, but the responsibility sat no more heavily upon them than responsibility to the workers sat on the managers of the Sverdlovsk Motor Works or the Odessa Bread Trust."<sup>26</sup>

The managerial ruling class may some day, in either or both economies, be replaced with some other kind of ruling class. But in that event there will still be a ruling class. "Djilas has permanently put out of the running any hope that the solution to the class struggle is to abolish one or more of the participating classes. The best we can hope for is that the ruling class will use its advantages for the benefit of the whole society. . . . [T]his is what we should be trying to accomplish with our laws."<sup>27</sup>

Invocation of false consciousness and hegemony have been important in Rodes's teaching—of students from upper-middle-class families who can pay or borrow the cost of private legal education—as well as in his scholarship. His annual short talk to law students who use some of their winter break time to visit legal services offices and police stations, for example, has for years used the anecdotal examples of false consciousness that now appear in *Pilgrim Law*.

But it is history that lives for Rodes, not anecdotes. He strides across the centuries as confidently as he walks along the paths by the lakes at Notre Dame.<sup>28</sup> When he writes about the feudal ideology of

25 RODES, *supra* note 3, at 25.

26 *Id.* at 35.

27 *Id.* at 36.

28 Richard Helmholz on the one side, and Rodes and John T. Noonan, Jr. on the other, had a passing exchange during the conversation on the way lawyers write history. Helmholz said:

Historians criticize lawyers who write about the past. Commonly they say that they just see the past as precedent for the future. They miss all of the economic and social factors that really determine things. The law has never really been autonomous and so it . . . shouldn't be looked at in isolation.

Conversation, *supra* note 5. He gave as a small example Rodes's account of Erastianism within the Church of England: Rodes "pushes the doctrine . . . further than it

Providence he could be speaking—he no doubt sometimes is—to his students, about their third- or fourth-generation-immigrant, suburban families: “God was seen to have more of a hand in your being born to a particular set of parents than in your gaining wealth and power by skill, patronage, or hard work.”<sup>29</sup> When he identifies the false consciousness of industrial capitalism he confronts a cherished, persistent, American point of view: [“T]he wrongs that could not be put right within the fundamental restraints of a market economy . . . were [are] solemnly declared to be inevitable, or were [are] not addressed at all.”<sup>30</sup>

It is when he talks about managerialism that he gets closest to the modern American hegemony of his students: [“W]hat is axiomatic is The System. . . . Each individual has a particular part to play in this overall enterprise. The concerns addressed are too vast and too complicated for anyone to understand exactly where his or her particular piece of the puzzle fits in, but things will go generally well if everyone works according to plan.

“It follows that people who act in accordance with approved procedures are not to be held accountable for the consequences of what they do. This principle . . . leads a lawyer to feel no responsibility for succeeding by superior advocacy in returning an abused child to the

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should be pushed [and] loses touch with the voices within the church that were calling for the independence of the church.” *Id.*

However, more generally, Helmholz does not criticize the way Rodes does legal history:

I do think historians criticize lawyers for using legal history for precedents for the future, but I did not mean to say that Bob had done this. In fact, I think the reverse. His work shows a real sensitivity to the times about which he is writing. He does not look at law in isolation. This is one of the strengths of his work.

*Id.* On the remark about Erastianism, Helmholz later added, “This is a matter of emphasis. It does not . . . suggest that Bob had fallen into the trap of simply looking at history as a large source of precedents for modern problems.” *Id.* Helmholz later wrote that he regrets not having said more in the conversation about Rodes’s history of the Church of England as “a real accomplishment (as a historical work).” Letter from Richard H. Helmholz, Ruth Wyatt Rosenson Professor of Law, University of Chicago, to Thomas L. Shaffer, Robert and Marion Short Professor of Law Emeritus, University of Notre Dame (Sept. 23, 1997) (on file with the author).

In any event, Noonan defended his fellow lawyer-historian: “There are advantages in seeing an idea in its various forms [as ‘vertical’ historians do]. Horizontal historians usually miss the nuances, because they haven’t seen the antecedents.” And, in any event, “Most historians are inhibited about the law.” Conversation, *supra* note 5.

29 RODES, *supra* note 3, at 57.

30 *Id.* at 58.

custody of an abusive parent. Or a high school principal to feel no responsibility for graduating students who cannot read . . . [or] insurance claims representatives [to] pursue a lawsuit to its bitter end even though both sides are insured by the same company . . . .

“What the moral authority of the hereditary elite was to feudalism, and what the inviolability of property and contract was to capitalism, the internal integrity of The System is to managerialism. The deployment of managerial skills to make The System better is to be commended, but efforts to bypass it are to be condemned.”<sup>31</sup>

### III. THE PRACTICE OF LAW

The persistence of The System, in recent American legal history and in the law practices that Rodes’s students will take up, has become part of ordinary law-classroom legal principle. It is in the hornbooks and cases law students read as the stuff of legal education:

- The feudal understanding of property was that it was God-given; “the Roman law understanding of property as that which is subject to my will is incorporated into the liberal understanding of what scope my will should have.”<sup>32</sup>

- “The courts have tended to accord to corporations the same protections they give natural persons, without paying much attention to the fact that corporate managers [and the lawyers who serve them] are the only natural persons who actually profit from the protection they give.”<sup>33</sup>

- Modern managerialism serves itself by making values private: “Since liberal ideology offers no governing value by which . . . contradictions and inconsistencies may be resolved, it does nothing to check the natural tendency to resolve them in favor of the ruling class,” in which lawyers are prominent members.<sup>34</sup>

- “Since the power of the managerial class is based on expertise, and since an ideology is the only thing a lay person can call on to challenge an expert, [modern] ideological neutrality became a powerful force for the prevention of accountability.”<sup>35</sup>

- The liberal ideologies of freedom and equality that lawyers protect “in the end . . . make freedom a principle that members of the

31 *Id.* at 61–62.

32 *Id.* at 64.

33 *Id.*

34 *Id.* at 68.

35 *Id.* at 66. I think of the fact that law schools are the most secular places—the places where ideological neutrality is the most prominent dogma—on university campuses.

ruling class should not be interfered with in the use of their privileges, and equality a principle that no differences count except those that characterize the ruling class.”<sup>36</sup>

• Managerial ideology says that “positions in society should be assigned on the basis of ability and industry without regard to either wealth or birth. But aside from a few entertainers and ball players, the people who have the best positions in society are managers and professionals. Therefore, the forms of ability and industry that qualify people for advancement are the ones characteristic of managers and professionals.”<sup>37</sup>

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False consciousness is overcome by truthful description of ruling-class power, and ruling-class power can be deployed morally (*pace* Marx) if it is made to account to what Rodes calls “the wider society” (prototypically because law forces the accounting and prescribes the forms for it). The morality then examined, by managers and their lawyers (for example) who have become accountable, is a morality Rodes finds in his account of natural law and in the “transcendent values” he finds in theology, notably in the theological discipline modern Roman Catholic social doctrine has come to call “the preferential option for the poor”: Because “judging between the ruling class and the wider society is always done by the ruling class, an antiseptic impartiality in the judgment is not to be hoped for. The only way to avoid an inadvertent bias in our own favor is to adopt a deliberate bias the other way.”<sup>38</sup> In the conversation, he said: “A preferential option for the poor is the remedy for false consciousness. The most important thing, then, is that you are getting beyond the interest of your own class. . . . I see it not so much as a requirement of justice as an *ascesis* for the ruling class. . . . For the poor themselves, it is a claim. . . . It is a method for arriving at the common good, because it is a method for overcoming false consciousness.”<sup>39</sup>

The apostolate Rodes identifies here for his readers and his students is sustained by hope, by a confidence in the benevolent purposes of the God of history, the benevolent Lord Who, in the end, will triumph in justice. In this way, a modern American lawyer, who can only see a little way down the road, but who believes that there are things God wants her to do as she moves along that little way, can take

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36 *Id.* at 68.

37 *Id.* at 73.

38 *Id.* at 103.

39 Conversation, *supra* note 5.

the risk that she might be right. She can allow herself the circumstantial confidence that "the pursuit of justice through law is eschatologically validated even if its historical fruition is problematical."<sup>40</sup>

In the 1995 conversation, John T. Noonan, Jr. asked Rodes about the practice of corporate lawyers, and Paul J. Weithman asked him about lawyer complicity in corporate evil. Rodes imagined himself back in the general counsel's office where he practiced law in the 1950s. "If my advice . . . was habitually violated," he said, "I would find myself another job." I tried to match such a concrete circumstance to his eschatology: "You are going to have to feel that, over a longer period of time, you are going to do some good," I suggested, in my non-directive way. Rodes said, "Um hmm."<sup>41</sup>

What is hoped for in ordinary, prosaic, Wednesday afternoon law practice is therefore mysterious, but it is also flagrant in mysterious promise: "Christian eschatology does not teach us to hope for a restoration of the state from which we have fallen. Rather, it speaks of a new heaven and a new earth, and tells us that eye has not seen nor ear heard, nor has it entered into our hearts, what good things God has prepared for those who love Him."<sup>42</sup>

Meanwhile there are the problems, the dilemmas, and the tragedies: "Rodes's theological vision is driven by a commitment to universal human dignity and to the creation of social, political, and economic conditions necessary for human flourishing—a theological commitment that is self-conscious about the limits of human action and even the purity of our best intentions, and that is, therefore, eschatological; that we are to take on as our own the griefs and anxieties of the people of God, especially the poor," Maura Ryan said in the conversation. "Rodes seems equally sure that when we pursue justice in the name of those who are oppressed, we are not simply fulfilling some spiritual duty, but honoring a universal ethical obligation."<sup>43</sup>

The legal enterprise is, though, modest, even if it is universal. The material available for use in the law comes more from the lawyer's perception of human nature than from his confidence in the mysterious purposes of God: "Laws are to serve people; therefore, reflection on human nature"—which is how Rodes understands and teaches natural law<sup>44</sup>—"will enable us to evaluate laws in terms of what they are

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40 RODES, *supra* note 3, at xii.

41 Conversation, *supra* note 5.

42 RODES, *supra* note 3, at 11 (quoting 1 *Corinthians* 2:9). One of the rare instances in which Rodes quotes scripture—from memory, of course.

43 Conversation, *supra* note 5.

44 See ROBERT E. RODES, JR., *LAW AND LIBERATION* 7-8 (1986).

for."<sup>45</sup> In *Pilgrim Law*, Rodes provides a few of the pointers for practice that those of us who took his course in natural law remember, from discussions there and from his 1976 book, *The Legal Enterprise*:<sup>46</sup>

- "[C]lass privileges are never the natural order of things. . . . We probably cannot make them go away, but we can insist that they be exercised in strict and continuing subordination to the values that occasioned them, and to other values equally important. Law is, or should be, the primary instrument for securing that subordination."<sup>47</sup>

- Law is both a teacher and a doer. "To reduce the whole enterprise to its didactic operation will lead us to concentrate on values to the exclusion of realizations; to reduce it to the instrumental will lead us to do the opposite."<sup>48</sup>

- Law is institutional: "The drive for social justice is neither continuous nor overwhelming, but it cannot be permanently ignored. If it is not effectively institutionalized, it will find ways, often harsh ways, to become so."<sup>49</sup>

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The ideal for practice that Rodes suggests to his students depends on their exercise of the virtue of prudence, and not a little on the intuitive morality he has insisted is inherent in natural-law ethics.<sup>50</sup> "[H]uman purposes . . . , while they cannot be fully discerned, are well enough understood to provide criteria for the law's contribution to them."<sup>51</sup> For example, not all laws serve the ruling class; there is more to law than Marx thought there was. (This was the thesis and the substance of Rodes's 1986 monograph on liberation jurisprudence, *Law and Liberation*.<sup>52</sup>) "[C]lass instrumentalism, although it is a pervasive quality of law, is not an inherent one. Since it is pervasive, we should try to do something about it, and, since it is not inherent, we should be able to."<sup>53</sup>

Here an important Rodesian inversion of Marxist theory comes into view—an example of how law practice calls for prudence and intuition: The ruling class did not invent the legal order that sustains it; the legal order came first, and the ruling class took advantage of it.

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45 RODES, *supra* note 3, at xiii.

46 ROBERT E. RODES, JR., *THE LEGAL ENTERPRISE* (1976).

47 RODES, *supra* note 3, at 89.

48 *Id.* at 10.

49 *Id.* at 29.

50 See RODES, *supra* note 46, at 119–23.

51 RODES, *supra* note 3, at 123.

52 RODES, *supra* note 44.

53 RODES, *supra* note 3, at 41.

"[C]lasses arise and take shape from the effort to implement values . . . . [V]alues precede class rather than the opposite as Marxists suppose."<sup>54</sup> "When a law appears on the books, the people whose interest it serves seem to materialize out of nowhere. Having found a new source of prosperity, they proceed to prosper. . . . It scarcely took twenty years for new understandings of the First Amendment in the 1960s to create a flourishing pornography industry out of what was formerly a small under-the-counter operation. . . . The evolution of whole classes is a longer and more complicated process, to be sure, but . . . the chronology is similar: each evolution was attributable in great part to the effect of laws that were already in place."<sup>55</sup>

The moral impulses giving rise to laws that turned out to be opportunities for the ruling class were not necessarily unworthy impulses, either. Many of them illustrate the ambivalence of history, that yesterday's solutions brought today's injustices: "Laws enhancing the power of corporate managers rested sometimes on a belief that they would make more money for investors if left alone and sometimes on a belief that if left alone they would consult public interests other than making money. But any way we look at the situation, it is clear that the legal framework for managerial ascendancy was adopted in order to bring about greater general prosperity and a fairer distribution of the amenities of life."<sup>56</sup>

Reflection on the Wednesday afternoon practice of law is as significant for the contemplative lawyer as it is for the county-seat practitioner or the partner in a large urban law firm. In the conversation, John Robinson said, "It is the ability to invest detail with meaning that animates . . . much of Bob's historical project, and much of his jurisprudential project. . . . This even goes to Bob's taste in poetry, where he tends to like pedestrian poems about particular episodes—inordinately, I would say—especially when he's reciting them to you. . . . In Bob's historical work, and for sure in his jurisprudential work, Bob delights in the 'determinations' of principles. He delights in the particular facts of human interaction, venturing from them towards tentative generalizations. In this, Bob is true to his common law roots, and he is offering a needed corrective to the abstractions of pure theory."<sup>57</sup>

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54 *Id.* at 112.

55 *Id.* at 42–43.

56 *Id.* at 52.

57 Conversation, *supra* note 5.

## IV. "VALUES"

Rodes is an uncommonly adept wordsmith; but, nonetheless, he uses "values," with apologies,<sup>58</sup> in two ways that overlap and restate one another but that he treats separately in *Pilgrim Law*. When he has managed to envision a ruling class brought to accountability, and has to turn to substantive morals for evaluating the account, he has mostly decided that "values" means the partial and somewhat uncertain product of natural-law thought (that is, reflection on what people are) coupled with the partial (because mysterious) normative content in orthodox Christian theology.

When he strides across history and there identifies the morals that moved ruling classes and those who sought to confront them, he uses a three-part analysis that divides these morals into (i) ruling-class values (what the Marxists would call instrumental values), (ii) independent values ("that enable the wider society to examine whether members of the ruling class are doing what they are supposed to do, but that do not challenge either the functions or the authority of the class"<sup>59</sup>), and (iii) inchoate values ("those that enter into the *prise de conscience* [which] are perceived in terms of something wrong with society that ought to be put right,"<sup>60</sup> a category that reminds his reader of the importance, in Rodes's ethic, of intuition).

He deploys one part of this system or the other to good effect and as the occasion requires. For example, he considers with some sympathy the passion for deconstruction of the Critical Legal Studies movement, and then applies the latter three-part analysis of values to conclude that the Crits are not only hegemonic but also nihilistic: If "the ruling class cannot gain legitimacy by improving its performance, there is no basis for calling it to account. It can only be replaced by a different ruling class, one that will be just as subject to false consciousness and just as unaccountable as its predecessor. Meanwhile, the claim to delegitimize tends to mask the participation of its proponents

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58 Mark Van Doren tells of reading to his brother Carl from a draft of Mark's:

[He] would lie on the floor, a pillow doubled under his handsome head, and read every word I had written since yesterday; and most of the time he would approve, though one night when he found that I had said "values" when the word meant nothing, as usually it does in literary criticism, he leaped to his feet and said with a kind of moan: "'Values!' Good God, you can't say 'values!' Decide what you mean and then say that!"

THE AUTOBIOGRAPHY OF MARK VAN DOREN 99 (1958).

59 RODES, *supra* note 3, at 126.

60 *Id.* at 131.



either in the current ruling class or in the one with which they hope to replace it.”<sup>61</sup>

He employs the former system (natural law plus “transcendent values”) when he reflects on the fact that American law teachers have one foot in the university and the other in the market place: “In one society, we may be too academic—so sophisticated in our analysis of the transcendent that we lose track of what is actually going on. In another, we may be too pragmatic—so aware of the things we can make happen that we hardly stop to think whether they ought to happen or not. But our situation in today’s managerial society is more problematic than ever, because we are so firmly established as members of the ruling class. We are unique in being so large a part of the problems we are supposed to be solving.”<sup>62</sup>

Rodes employed both systems in the 1995 conversation, when Maura Ryan and several others asked him to expand on his notion of what poverty is. “Today,” Ryan said, “liberation theologies are being pressed to look beyond material oppression . . . to seek out the interconnections between class, race, ethnicity, gender, sexual orientation, even age, as elements of oppression. . . . What does it mean to be poor? What does it mean to live in poverty?” She suggested that Rodes’s “concept of poverty” does not include enough.<sup>63</sup>

Rodes’s answer seemed to me to be that his concept of poverty is material and (given that material wealth in one time and place will be destitution and in another time and place luxury) cultural as well. And then, as I expected, he invoked his three-part, historical analysis of values: “I am thinking of material forms of oppression, and particularly . . . those forms of oppression which can be reached by the means available to law. . . . [When] you turn aside from material concerns, it’s easier to change the way you talk about somebody than it is to change the way you treat them. I notice, for instance, that whenever we begin to develop a poor record on racism, we develop a new thing to call black people. . . . I saw Derrick Bell’s . . . proposal [to allow] white people to pay for the privilege of practicing race discrimination.<sup>64</sup> What that turns out to be is ruling class whites paying ruling class blacks for the privilege of continuing to oppress the underclass. . . . I notice also that the current version of integration coincides with the replacement of capitalism by managerialism, just as the

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61 *Id.* at 94.

62 *Id.* at 132.

63 Conversation, *supra* note 5.

64 Rodes later added: “In fairness to Bell, it should be pointed out that his ‘proposal’ wasn’t a serious proposal; it was to make a point about racial attitudes.” *Id.*

liberty of the slave to work for starvation wages, the same as the free person, coincides with the passage from feudalism to capitalism."<sup>65</sup>

But he finished the thought with a turn to his "transcendent" values: "What I tell people, in talking about the preferential option for the poor, is, in any transaction you encounter, look and see who's on the bottom. What's the effect of this transaction on the people at the bottom of it? See how you take care of them."<sup>66</sup> I put this among "transcendent" values, as Rodes does, because I see it as scriptural: Unaided human reason will not lead the thinker to the idea that he should *prefer* the poor; he gets there by revelation telling him that God prefers the poor and that he is called to imitate God.<sup>67</sup>

R.H. Helmholz and James T. Burtchaell invoked Ryan's question and Rodes's answer to suggest that his notion of who is poor is similar to his notion of the shifting of the ruling class. Rodes's historical observation, Helmholz said, is like the medieval canon law's definition of a *miserabilis persona*. That definition was capacious enough (or ambiguous enough) so that parents with children and parents without children could both be considered *miserabiles*. (Rodes allowed that that legal shift was like benefit of clergy in medieval English law.) Rodes, though, clung to the pragmatic, with an ironic jab from his principal source for liberation theology: "[Gustavo] Gutierrez said when he was here that you know in a minute who the rich are, but you spend hours talking about who the poor are."<sup>68</sup>

Rodes's friends endured the irony and persisted in variant ideas about who the poor are, so much so that, at one point, John R. Martzell said, "The definitions eat you up."<sup>69</sup> A few instances:

- Douglas W. Kmiec suggested that the Augustinian notion of liberation from poverty should not be understood as liberation from the love of God (and implied that an over-concentration on material well-being may enslave or misdirect the poor, toward a materialistic conception of God). Rodes responded: "To the extent that we are the

65 *Id.*

66 *Id.*

67 The test, as the actor Martin Sheen expresses it, is: "Would this decision help or hurt this person?" *Actor Swings to the Left*, SOUTH BEND TRIB., March 7, 1996, at C12. The question then is why this (poor) person, rather than that (better off) person, given that any use of power will help some people and harm others. *Imitatio Dei* is in my opinion a sounder theology than the preferential option seen as the consequence of a particular duty of *care*, based on relative need, or because we better-off people have something to learn from the poor. See generally Stephen J. Pope, *Proper and Improper Partiality and the Preferential Option for the Poor*, 54 THEOLOGICAL STUD. 242 (1993).

68 Conversation, *supra* note 5.

69 *Id.*

beneficiaries of the institutions by which our neighbors are impoverished, we are not in a position to talk about selflessness to our neighbors. . . . What you owe the poor is a reform of the institutions by which you are enriched and they are impoverished."<sup>70</sup>

• James T. Burtchaell said this debt is even more urgent as "to those who are in power. . . . The salvation of the oppressor is at least as urgent a call on our need to reform social institutions." Rodes: "I suppose it is. Just as the salvation of bank robbers is a reason for preventing the robbery of banks."<sup>71</sup>

• Leo J. O'Brien invoked Mother Teresa on poverty of spirit. (Burtchaell had quoted her to say that the United States was the poorest country in the world.) Patrick Gaffney helped Rodes out: "A Marxist would say, in the social and economic situation that we are in, . . . that argument in itself becomes a form of false consciousness. To de-materialize poverty is something you do when you're wealthy."<sup>72</sup>

• Paul J. Weithman suggested that the poor are those who are unloved, but, he said, "the injunction to give to the poor in material terms is going to be a very strong rule of thumb . . . ; a way of showing them our love. . . . If we give our stuff to them without loving them, we haven't done, ultimately, what we're supposed to do."<sup>73</sup> But, finally and stubbornly, Rodes declined such oil for his troubled waters and returned to what I have identified as his three-part historical sense of what "values" means, and to being historian as lawyer: "Being entitled to charity is a contradiction in terms. What the poor are entitled to is justice . . . , a reform of the institutions by which they are impoverished. For those of us who are lawyers, they are entitled to the deployment of our professional skills, as best we can deploy them, to that end. Having decided to what end my professional skills should be employed, I can go home, and let somebody else worry about the rest of it."<sup>74</sup>

## V. THE "WIDER SOCIETY"

My suspicion has been that when Rodes talks about the ruling class being accountable to the "wider society," the aggregation of people he imagines listening to the accounting of their masters is political and geographical: It is those living in a modern, Western nation-state. He accepted this, when I put it to him, as I prepared this Essay. He

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70 *Id.*

71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.*

wrote me a note: "I mean the society governed by whatever laws or proposed laws I am scrutinizing." But, he added, "Certainly, the flourishing of subordinate communities is one of the values to be considered, in any such scrutiny."<sup>75</sup> Perhaps he would agree with Karl Barth: "God meets us where He has put us,"<sup>76</sup> but Rodes's notion of where he has been put by God is America; after that, his theory about communities is as pragmatic as his notion of who the poor are.

Ryan suggested to him that his jurisprudence is individualistic, that most of us who set out to look a little way down the road need more support from our organic (not political) community than Rodes seems to need: "I think that someone like Gutierrez would say you have to begin and end in a community of faith, because otherwise you can't do it. . . . We can't send the students . . . out into the world without a praying community to which they're constantly related. . . . I think that's one of the practical problems we have as a university, that we do send students out into a world, to live in a certain way, and they don't necessarily have much support."<sup>77</sup> In other words (and I admit to putting a spin on Ryan's point), New Testament discipleship is not played out primarily in reference to the modern nation-state.

Rodes would not accept Ryan's suggestion that a congregation of believers is particularly significant even as a praying community, let alone as a place of moral discernment—this even though he is a man of prayer and a faithful member of his local parish church. In the conversation, he described in an informal, thumbnail way his conversion from the Episcopal Church to the Roman Catholic Church as he found it in post-World War II Boston. He describes this change as a private journey; if it was, to use his image, a pilgrimage, it was not a journey in company. The account seems to me enlightening with regard to what the theologians would call his *ecclesiology*, and, from there, enlightening with regard to his jurisprudence:

"I went to the Church of the Advent in Boston, and I spent a summer reading some fairly obscure stuff and ended up wanting to be a Roman Catholic, and said good-bye to the Church of the Advent and went padding out to the church at the foot of the hills near Jeanne's house and said, 'I want to be a Catholic.' [The person I talked to there] said, 'Do you want to take instructions?' I said, 'No. I don't want to take instructions. I want to be a Catholic.' Finally, one [Fa-

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<sup>75</sup> Letter from Robert E. Rodes, Jr., Professor of Law, University of Notre Dame, to Thomas L. Shaffer, Robert and Marion Short Professor of Law Emeritus, University of Notre Dame (July 26, 1997) (on file with author).

<sup>76</sup> KARL BARTH, *ETHICS* 190 (Geoffrey W. Bromiley trans., 1981).

<sup>77</sup> Conversation, *supra* note 5.

ther] Arthur J. Dunigan, curate of St. Joseph's in Belmont, showed up, and—I think from nine in the evening until about two in the morning—we talked, and I ended up persuading him that I knew enough to be a Catholic, being as how the difference between what I had been and what I wanted to be was very narrow, and I'd already read about it.

“So he got a guy out of bed to sponsor me in conditional baptism. . . . He shook my hand and said I was now one with Augustine and Jerome . . . and off I went. And the next Sunday I went to mass at the church nearest where I lived. I didn't like that too much. There was a Polish church just down the street, and, except for the fact that they said the 'Hail Mary' in Polish, I liked it better. And here I am.”<sup>78</sup>

After conversion, then, as much as before, the worshiping congregation was incidental to personal sacramental observance. It was not significantly or uniquely a place to join in communal worship, let alone communal moral witness. Nor was it, nor did it become, a place of moral discernment. Organic ecclesial communities (which, I think, are what Ryan was asking about) are fungible for Rodes, and none of them is in any but a sacerdotal way what Rodes means when he talks about the church.

In the conversation, I thought for a moment that perhaps he meant that one's being a member of a geographical parish might be a place to begin thinking that God finds us where He puts us. “We're plopped down into a parish structure—at least in the Roman Catholic Church—and we just about have to make something of it,” I said (asked). Rodes said, “Well, you never used to [have to] be. . . . All you did at the parish was go to mass.”

“What Maura is pressing you to say,” I said, “is that this journey [pilgrimage, I meant] you talk about, that you are working on in *Pilgrim Law*, this picking one another up, encouraging one another, witnessing, politicking—it implies companions.”

“Oh, absolutely,” he said. “I look around this room and see them all over. . . . But perhaps, pursuant to my Erastian proclivities [of which more below], I see the various kinds of civil community in which I participate as part of the community structure in which I live . . . so that I am not as interested in the idea of a particular, localized faith community. . . . I am more inclined to find community where I find it. I am very skeptical [for example] of the effort to bring the Latin American base-community movement into the United States, because it tends to be elitist in the United States, whereas it is

not in Latin America. The only people that talk about base communities, that I know of, are university faculty."<sup>79</sup>

The place in which Rodes might imagine the ruling class making its accounting to "the wider society" is, then, probably not a Christian congregation. It is probably not a neighborhood or town, either. It is more likely a place from which both the people of God and the political society are seen more broadly. And, given that he defines his playing field by legal order, it is ultimately and definitionally the modern nation-state.

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Much of Rodes's scholarship has been in the field American legal academics call "the law of church and state." (His interest in that field is how he accounts for taking up the history of the established church in England.<sup>80</sup>) And while he says that, when church and state part ways, he will go with the church, the foundation of his church-state theory is that the two are so intertwined—so much the remnant of Christendom—that they could not part even if they wanted to.<sup>81</sup>

That is a strikingly unique position among Rodes's contemporaries in the church-state field. It leads Rodes to treat the church less as the people of God than as a cultural institution. Or, to be fair, to treat political culture as manifested both in the nation-state and in organized religious activity—the ruling class as evident in one place as in the other, the oppressed as oppressed in one place as in the other, and the manner of discourse about the same in both places and in places that are as much the state as they are the church, and vice versa. "It is not so much a matter of the way things are," he said, "as it is a matter of how you choose to look at it. And I choose to look at it this way. . . . The structures of the church, like the structures of the state, are a problem for the Christian living in the world. The whole idea of Christendom is that church and state are institutions with which the Christian must deal."<sup>82</sup>

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79 *Id.*

80 Rodes chose the English church because of its adherence to medieval Christendom. "Both the Reformation and the Counter-Reformation involved a return to first principles . . . whereas the English experience was a constant [effort] to update the original nexus, so that all of the changes were incremental. . . . I have the idea of church and state as an integral phenomenon." *Id.*

81 Robert E. Rodes, Jr., *Pluralist Christendom and the Christian Civil Magistrate*, 8 *CAP. U. L. REV.* 413 (1979); *Law, History, and the Option for the Poor*, 8 *LOGOS (USA)* 61 (1985) and 9 *COMMUNIO* 321 (1982).

82 Conversation, *supra* note 5.

John Garvey noticed that, in political rhetoric (and other American-lawyer rhetoric), there are two institutional languages, "especially among mainline Christian lawyers who are embarrassed at the idea of talking about Jesus in elections. . . . The usual kinds of arguments against pitching your candidate or your platform in Christian terms are, one, . . . that . . . it would sell better if you appealed to utility. And, two, that it might be offensive to the other guys."<sup>83</sup>

Rodes insisted on the remnants of Christendom, even as a matter of language: To the extent that public moral discourse in America is coherent at all, it remains significantly religious. For example: "The translation Jack [Martzell] referred to, natural law as about people, is one that I would make more easily along religious lines than I can along philosophical lines. That is, if you line up ten people chosen at random and ask them whether they think people should love their neighbors, they'll all say, 'Yes,' despite the fact that this is not a philosophical principle; it is a principle of theology. There is probably no philosophical principle that will command as much allegiance. . . . The kind of society that Christianity supposes is one of fairly broad appeal. That is why I keep quoting *Gaudium et Spes*. . . . If you take it seriously, if you start talking about joys and hopes, griefs and anxieties, you're talking Christianity; you're not talking anything else. . . . That's what you ought to talk about."<sup>84</sup>

Rodes's ecclesiology led him, as he worked out his early church-state theory, to encounter the political theology of the late Father John Courtney Murray, S.J.<sup>85</sup> Rodes said: "I took exception to his views. I noted that he and I were having the same difference of opinion that was going on between the clergy and the laity in the medieval period. That is, the clergy tended then . . . as it tended thirty years ago, to believe that nothing could be religion once it was run by a layman. I felt that Murray, because he was a priest, was able to separate his life as a Christian from his life as a student of secular institutions, in a way that I as a layman, being in secular institutions, could not . . . ."<sup>86</sup>

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83 *Id.*

84 *Id.*

85 In my horseback understanding of Murray's project: He thought that natural-law moral argument, from Catholic theology but not identified as such, could be a language for political dialogue with American Protestants. See generally JOHN COURTNEY MURRAY AND THE GROWTH OF TRADITION (J. Leon Hooper, S.J. & Todd David Whitmore eds., 1996), especially therein Jean Porter, *In the Wake of a Doctrine: A Reassessment of the Doctrine of Natural Law as Developed in We Hold These Truths*, at 24.

86 Rodes later noted, "I wrote Murray along these lines with a reprint of an article. I still remember with gratitude the kindness and generosity of his response, en-

"The separation of church and religion, on the one hand, and clergy, on the other, is basic to medieval thought, and it is the way I would respond to the notion that the state is a problem for the church and the church a problem for the state. . . . Murray's notion of civic friendship didn't take with me . . . because my understanding of society is more familial: You choose your friends, but you don't choose your relatives. There are a lot of people involved in political life in the United States that I can understand as my relatives, but not as my friends. I prefer the model of relatives throwing the family china at one another to Murray's model of civic friendship."<sup>87</sup>

Douglas Kmiec suggested (what I have often thought) that Murray's project was benignly disingenuous, "so that it was this natural-law talk, without revelation . . . , with always this winking going on to the Catholics: 'I'm still okay. I know that revelation really moves this project.'"<sup>88</sup> Rodes said, "That is a way in which Murray's philosophy could be experienced. . . . It isn't my experience of him. . . . Murray has a critique [in which he asks], 'Are the principles of religious freedom articles of faith or articles of peace?' He comes down saying they are articles of peace. Now I think, if you follow *Gaudium et Spes*, that they are articles of faith. . . . [One might be asked,] 'What are you doing imposing [your] religion on other people?' [My answer is,] 'Freedom of religion is, for me, a religious principle. Therefore, to the extent I make religious freedom good in society, I am imposing my religion on other people.'"<sup>89</sup>

Drew Christiansen wondered, given the inadequacy of natural-law language in political discourse, about more advertent and focused religious witness. Rodes, he said, comes "to the point of talking about the new humanity, and how the achievement is not our own. . . . The people you are in dialogue with—Father Burtchaell, [John Howard] Yoder, maybe [Stanley] Hauerwas—would suggest that the new humanity ought to have an influence on the law now. It is not just there in mystery for the future, but it ought to have some bearing on society."<sup>90</sup>

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couraging me to keep working on a line of thought so different from his own." Conversation, *supra* note 5.

87 *Id.* If each of these is in some circumstances the sort of organic community Ryan suggested, neither is for Rodes a place of moral discernment.

88 *Id.*; see also J. Leon Hooper, *Theological Sources of John Courtney Murray's Ethics*, 57 THEOLOGICAL STUD. 19 (1996). *But see* Thomas Hughson, S.J., *John Courtney Murray and Postconciliar Faith*, 58 THEOLOGICAL STUD. 480 (1997).

89 Conversation, *supra* note 5.

90 *Id.*



Rodes, of course, would not deny that. (In *Pilgrim Law*, he depends on Roman Catholic social teaching as announced by the U.S. Catholic Bishops, and quotes at some length a poetic pastoral letter of the Appalachian Bishops.<sup>91</sup>) But, he said, he is more comfortable thinking of Christian lawyering as prosaic (what I would call Wednesday afternoon law practice) than as the broad, prophetic witness Christiansen (who works for the U.S. Catholic Bishops) may have had in mind. “The scriptural picture of a new humanity has bearing on society,” he said, “but if you look at the concrete case, the human condition runs to certain things, including tragedy. The way I got into the pilgrim-law project was to worry about natural law as being inadequately equipped to deal with tragedy. That is, natural law is based on the state from which we have fallen; we are called to return to some other state—which is consistent with our nature, but it is not simply where we came from. We’re not going back. But we don’t know any more about it than that. At the same time we’re on a journey in company, and it’s our business, with the law, as with other tools, to pick each other up when we fall.”<sup>92</sup>

Michael Baxter, apparently putting together Christiansen’s question and Rodes’s view on the limits of natural law, wondered about a theory of the common good—a concept that was important to Murray and that Rodes has tended to approach with caution.<sup>93</sup> “This common good is not operative, not palpably felt by many people in society,” Baxter said. “Society is skewed, so that we’re somehow in a situation where we live in a life where there is not human flourishing, in the way there should be. Then *you* call for an attempt to restore the common good. I read this point as very much pointing toward what Murray was trying to do. . . . Murray sort of pictured himself in this scenario in which . . . America is in trouble, on the brink of barbarism, and the Catholics are going to be the ones to restore stability to the public. And they’re going to do it by reasserting the grounds on which it was really formed. That would be some notion of natural law as a common good.

“I question, when I read Murray . . . , what we do with the possibility that trying to restore the sense of the common good won’t work. I might connect this question to your comment that in the medieval synthesis there was a sense of organic unity of church and state. . . . It

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91 RODES, *supra* note 3, at 163–66 (quoting *This Land is Home to Me*, in *RENEWING THE EARTH: CATHOLIC DOCUMENTS ON PEACE, JUSTICE AND LIBERATION* 472 (David J. O’Brien & Thomas A. Shannon eds., 1977)).

92 Conversation, *supra* note 5.

93 See RODES, *supra* note 3, at 37–44.

occurs to me that [a] notion of organic society suffused with principles of religion and justice and the natural law—even though it's based on the natural law, . . . on the notion of the common good— . . . may, in this society, end up looking counter-cultural. It might end up looking . . . a lot more apocalyptic than Murray or you might want it to."<sup>94</sup>

Rodes might at that point have invoked his reworked Marxism, but he didn't. He said, "The kind of thing I am talking about is not an empirical observation. It's a choice. I *choose* to treat the society in which I live as this kind of society, rather than that kind of society. We might end up with a situation where that choice is no longer rational. But I don't think we're there yet. We are now at a point where you can choose. . . . I choose to treat it this way."<sup>95</sup> He seemed to me to imply that neither common-good theory nor Murray's political theology were necessary to his choice, a choice he identifies as Constantinian.<sup>96</sup>

Martzell then suggested that the "melding of religion and government never comes to anything but grief." Rodes's view of that possibility, much like his view of the class dialectic, is that such "melding" is a given: "There is no government that is free from some kind of religion." The original idea of religious freedom in America, he said, was that all churches in the United States had the same position as dissenting churches in England. "There was a basic Christian doctrine, without a single coercive institutional or liturgical expression. We lived with that until fairly far along in this century, until we began including

94 Conversation, *supra* note 5.

95 *Id.*

96 "My approach is irretrievably Constantinian and will go on being." *Id.* The substance of this is, I think, in what Rodes calls Erastianism. But the use of Constantine is, as John Howard Yoder puts it, a symbol:

During the Christian Middle Ages Constantine became [a] symbol. . . . The assumption [about him] tends to be that in order to continue being a sovereign, he [needed] to continue to act the way a (non-Christian) sovereign "naturally" acts, thereby creating some tension with what the latter prophets and Jesus taught about domination, wealth, and violence.

JOHN HOWARD YODER, *THE PRIESTLY KINGDOM* 82 (1984). More specifically (in a note to the statement I quote here), Yoder writes that Constantine was "the first Roman emperor to tolerate, then to favor, and then to participate in the administration of the Christian churches." Constantine then became, for later centuries, a symbol hailed by "mainstream" theologians and historians from Eusebius onward, and regretted by "radical historians" who argued "that the change was not all for the good." *Id.* at 201-02 n.4.

Rodes's genius in *Pilgrim Law* is to combine the claim he makes about being a Constantinian with a Marxist analysis of legal and economic history—to, in other words, turn the Emperor Constantine into a dissenter.

more and more people in the synthesis, and it began to become threadbare.

"My own notion here is that, in the way our class dialectic has developed, as the managerial class has become the ruling class, we have excluded religion, because the power of the managerial class is based on expertise, and religion is one of the few ways a layman can challenge an expert. And therefore the security of the power of expertise is maintained by a general exclusion of ideology. Most ideology is religious."<sup>97</sup> That is, Constantinians would, if they could, subvert the ruling class.<sup>98</sup>

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I found this exchange insightful and stimulating, but I should add from *Pilgrim Law* that Rodes has for a long time held to a coherent theory of the church that makes what he said in the conversation more understandable. He has argued that the church as an institution takes on two different "forms" in the culture. One of these is an "Erastianism," in which there are few or no functional or principled distinctions between church and state.<sup>99</sup> "There is a Christian way of running the church, and a non-Christian way. . . . That is what I call the Erastian outlook. It is what I have gotten out of Anglicanism as an update of the medieval synthesis. The question is: Is the medieval synthesis worth saving? If I were a clergyman, I would say, 'No.' But, as a lawyer, I am inclined to want to hang in with it a little longer. . . . The response to religious pluralism in the whole rest of the Christian world [has been] to privatize religion. The whole skill of my own profession was devoted in England to avoiding that solution. The avoid-

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97 Conversation, *supra* note 5.

98 It probably began (begins) with a bid for the cooperative influence on which Erastian success depends: "[T]he mainline church's core problem: The Christendomesque aspiration to be a respected, mainstream cultural authority dominating every Main Street in a properly Christianized society." Christian Smith, Book Review, 54 *THEOLOGY TODAY* 258, 260 (1997). Rodes often seems to me to discount the danger that Christian faith would then disappear into secular culture. See, e.g., Charles R. Morris, *A Tale of Two Dioceses*, *COMMONWEAL*, June 6, 1997, at 11, 18 ("[O]nly 'high-tension' religions prosper in America. Once a religion assimilates to the culture, it almost invariably diminishes into a social center or a kind of low-cost group therapy. There are now fewer Episcopalians in America than there are Catholics in Los Angeles."). This is a rather different risk than the one he identifies as the managerial class's excluding religion.

99 "Erastus [1524-83] was a Swiss theologian who taught that the church had no proper coercive jurisdiction independent of the civil magistrate. His name became attached to those Anglicans who were content with the substantial role played by Crown and Parliament in the affairs of their church." RODES, *supra* note 3, at 141.

ance was at least in part successful. I think we are now in a period in which the privatization of religion is coming unstuck. . . . It is now being seriously contended that no religiously motivated measure is legitimate. . . . If you are going to be a religious person, you have got to have religious motivations in your actions in the world.”<sup>100</sup>

The other form is the “High Church” form, in which the church is seen as, or sees itself as, separate enough from the culture around it to be able to be to the society what the Hebrew Prophets were to Israel. Each of these forms has had legal expression in Britain and in the United States. The tension between them expresses for Rodes much of what it means to be a modern Christian lawyer. The Erastian end of the tension includes “any view of the church as one of the complex of institutions, public and private, through which Christians hope to implement an agenda for the whole society in a given time and place.”<sup>101</sup> The high-church end of the tension is “the vision of the church as standing over against society.”<sup>102</sup> “[I]t points to human purposes beyond the reach of society, and to social shortcomings for which society has no remedy. These include . . . eternal salvation . . . , the final consummation of history, and the fact that the world as we know it is not the Kingdom of God. . . . [I]n the Gilded Age of capitalism, the witness was against greed, selfishness, and ostentation. Today, it is against anomie, licentiousness, destruction of the environment, and marginalization of the poor.”<sup>103</sup>

## VII. CAREER CHOICES

Seven of those who joined in the 1995 conversation were Rodes’s students and three of them have practiced law with him. Their professional careers range from trial practice (John Martzell and Paul Titus) to legal-aid practice (Angelika Mueller), to teaching (G. Robert Blakey, Mary Kate Kearney, David T. Link, and Thomas Shaffer), and to service in the church (Gerard Powers). As they joined in the jurisprudential discussion, they recognized Rodes’s influence on them when they were in his classes: “What I remember most is a comment he made on the first day of law school,” Kearney said. “Think about who you are . . . and remember who that person is. . . . When you leave . . . make sure you take part of the person you brought into this law school, with those ideals and those aspirations, out with you. Make sure that part of what the law school does is help bring out those

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100 Conversation, *supra* note 5.

101 *Id.*

102 *Id.*

103 RODES, *supra* note 3, at 142–43.

ideals and aspirations.’ That is a message I have always remembered, and, as a law teacher now myself, it’s a message I give my students on the first day of class.”<sup>104</sup>

Martzell remembered two lessons: “Natural law comes from the nature of man. . . . Law is about people,” and, “Law is God-centered, but centered through man.” Link, who is Dean of the Notre Dame Law School, said that if the student vote on teacher of the year comes to be taken “about four years after law school, then Rodes will get it every time.” (That brings to my mind an observation made by the late Dean Joseph O’Meara, who persuaded Rodes to come to Notre Dame and who was Link’s and my law dean: “Rodes has a long fuse.”) Link, who was a corporate practitioner before he became an educator, said Rodes “taught me how to think about corporations, and about my client, and my client’s responsibilities.”<sup>105</sup>

Titus also remembered two lessons: “Bob was the great proponent of self-help. . . . There may be easier ways to do things than going into court. That is one thing. . . . The other one was his view of corporations, and that is that, contrary to what our professional-code teachers say, when we represent a corporation, we represent an entity. Bob always said, ‘You don’t. You represent people.’ I think that’s right. I think in corporate practice it has been a valuable insight. Sometimes . . . it is constituencies, but you’re always representing people.”<sup>106</sup>

David Rodes pointed out that law firms are teaching institutions, for good or for ill. “Before you have the kind of influence that Dean Link could have, in this day and age, it takes eight to ten years, and probably a lot of luck.” Meanwhile the firm is teaching its own (ruling class) doctrine to its young lawyers. “That makes it very important to have a teacher in your background that can make a strong and lasting impression,” he said. “That’s what my father has done for me.”<sup>107</sup>

Powers said Rodes is “sort of the ‘Crit’ of the Notre Dame Law School, [although] his prescriptions are somewhat conservative and, at best, reformist, in terms of what he would *do* about the injustices he criticizes from a very radical perspective. In looking *forward*, he’s very much a reformist—in part, I think, because he argues, ‘You’re not going to eliminate these bureaucracies; they’ll continue to recreate themselves. And so a radical critique isn’t very helpful. . . . Instead you have to push at changing the structure when you can, knowing

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104 Conversation, *supra* note 5.

105 *Id.*

106 *Id.*

107 *Id.*

that you might succeed at one point, but, then, you might create new problems which you'll have to address again. . . .' But the critique is quite radical. So . . . I see some sense in how you can trash the corporations, in terms of your analysis, but still go to work for them . . ."108

Powers identified Rodes's theory of legal careers. Rodes assumes that students in his upper-division, required ethics course will represent and advise the ruling class. He says to his students, "You won't be listened to all the time, but you'll be listened to some of the time." He adds: "I have said, over and over, that the burdens on the poor are being fashioned in the corporate law offices faster than they can be alleviated in the public-interest offices. If you go into the corporate law offices with the preferential option for the poor in mind, you may not do a lot, but you can always do something."<sup>109</sup>

He regularly tells formal and informal gatherings of students that what Powers called his "radical critique" is not a recommendation that they serve the poor as lawyers for the poor. He prefers that his students *accept* their almost unavoidable orientation toward law offices that represent business clients. He does not think they need to aim at public-interest jobs, and he often seems to say that he would prefer that they do not aim at representing poor people in the courts. He seems to prefer the thought that his students will represent poor people *to their clients*.<sup>110</sup>

He recognizes the fact—which any corporate lawyer would say *is* a fact—that business lawyers have moral influence on their clients. He argues that the ruling class are bureaucrats, notably including corporate managers. And then he claims that the way to practice the preferential option for the poor is as *ascesis*, discipline—and that the place to practice the preferential option for the poor is in the relationship between business lawyer and business client.<sup>111</sup> And this even with the

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108 *Id.*

109 *Id.*

110 Rodes is kind enough to credit this point to me, and to refer to an anecdote or two I have written about, from my own years in a corporate law firm. See THOMAS L. SHAFFER, *FAITH AND THE PROFESSIONS* 131–40 (1987).

111 Thomas Kohler was less romantic about his memories of being a corporate lawyer: "As an associate, I had absolutely no power . . . . I once refused to sign a challenge to the conduct of a National Labor Relations Board election, and that almost ended my time there." He said he had two problems with Rodes's theory of using natural law as the measure of law practice: "One of them is, How do you talk to outsiders for whom these are not legitimate questions. . . . So that there is no *telos* for the person. . . . The second is, How do we recapture the natural-law tradition in a fashion such that we can begin to move forward with it?" Both questions, as well as the aspiration that natural law is a *lingua franca* for moral discourse in America, he said, are about how to talk to people (e.g., clients) "who are not convinced that you even

understanding that the objective is "to go over the heads of the ruling class to the real people."<sup>112</sup>

Patrick Gaffney, William M. Lewers, and John T. Noonan, Jr. did not argue with the possibility of influence on which this career-choice theory depends. They instead turned to the current situation of young lawyers who might be following such advice—something Ryan had suggested when she asked Rodes about communities to support the people she and he train. Gaffney, a Holy Cross priest who teaches anthropology to undergraduate pre-law majors, said that he wondered "whether the discrepancy Gerry [Powers] points out, between a radical analysis of the legal profession . . . and . . . a reformist solution that [says] you need to work with institutions, leads to disorientation—inability to work—because you have to pay off your debts. . . . There is a sense [among graduates he talks to] that they have been given the wrong advice."<sup>113</sup>

The wrong advice, most evidently, Lewers and Noonan said, because these lawyers end up being unhappy. "Some of the stories I heard this afternoon, about corporate law practice, may relate back to an earlier era," Lewers said. "I am not sure they are quite possible in the large law firms we know today." Noonan said he "wondered whether the law school does not have some obligation to try to create a counter-environment. . . . Bob's writing, particularly on law and liberation, sort of predicts this is what is going to happen; this is the way the culture is going. . . . It is really awful for the law schools to be turning out excellent people who are not satisfied with their lives. Nearly all of them," referring to those who have been his law clerks, "are unhappy people. The metaphor has been expressed: strip-mining the brightest young people in America. That is what the corpo-

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have questions they want to hear." Rodes's answer to this was partly the sort of critique Powers identified, and partly an appeal to something more revolutionary:

Our politics is based on two factions of the ruling class trying to appropriate the outrage of the whole society with the whole class. Somehow the corporate wing has been winning. But it is possible to go over the heads of the ruling class to the real people. . . . One way or another it has to be done.

Conversation, *supra* note 5.

112 *Id.* David Burrell picked up on a couple of Rodes's illustrative anecdotes from in-house corporate law practice; he told about a telephone-company lawyer who threatened to resign over his client's mistreatment of women—and his client reented. "He saw himself as a kind of prophetic part of management—for the good of the company." Rodes accepted the story but pointed out that the particular situation of the lawyer in such a business story is that the lawyer has a discursive advantage: "Such a lawyer is in part exercising simple management responsibility, which any other officer could exercise. But, in addition, lawyers threaten with the law." *Id.*

113 *Id.*

rate law firms seem to be doing.” Link said, perhaps gently referring to Rodes’s jurisprudence as it compares with his advice on career choices, “We’re teaching them one thing and then putting them into a position where they cannot exercise the choices being discussed with them.”<sup>114</sup>

Rodes’s position on his students’ career choices displays his high view of *lawyering* (as distinguished from law). Law is measured, at best, from perceptions of human nature, perceptions that cannot account for tragedy, for what Chesterton called desperate circumstance. But a lawyer’s work in human relationship with her clients is not limited in the same way. In *Pilgrim Law*, he suggests that living in the daily relationships of law practice (that follow from a career choice) may not employ his theoretical distinction between a jurisprudence resting on natural law and the “transcendent values” that measure a life but do not measure the adequacy of the law: “In our personal moral life, to be sure, it makes sense to include our eschatological calling, our spiritual journey into the unknown, among the requirements of our nature, and to try to make a harmonious synthesis of the whole. But structuring the intervention of the civil magistrate in the process—which is what jurisprudence is about—is a very different matter.”<sup>115</sup> *Ascesis* is, then, possible in a law office—even *ascesis* guided by such witness to the ruling class as the preferential option for the poor. Career is less important than the way a lawyer deals with a client—both of them oppressors of the poor, both of them called to liberate one another from being oppressors.

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Rodes’s theory on career choice comes across as more prosaic than his jurisprudence. It is tempting for me to think that it is not dependent on his jurisprudence, nor his jurisprudence dependent on it. So tempted, I might speak more for myself than for him and think that training altruistic young people for service to business, and then arranging our institutional finances so that these young people are in thrall to lenders (in amounts approaching one hundred thousand dollars each at graduation), and thereby feel that they are denied employment for poor people in a traditional professional way, is a disturbing moral problem.

But it might be more instructive to see Rodes’s theory on career choice—which is, operationally, a theory on what to say to students about how to be Christians and lawyers in the twenty-first century—as

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114 *Id.*

115 RODES, *supra* note 3, at xiii.



the way he pulls together the elements of his jurisprudence that are fitted into *Pilgrim Law* and that came up in the conversation:

- His teaching on the exercise of moral influence on business clients—the moral influence reflecting his powerful assertion of the preferential option for the poor.
- A theology of hope that says the liberation of the oppressor is as important as the liberation of the oppressed.
- His teaching on the ambivalence of history—that the solutions of yesterday were the beginnings of the injustices of today, and those of today contain the beginnings of future injustice.
- His reflection on how a Christian might practice law within the class dialectic (an Erastian enterprise, I think).
- The interplay, as he sees them, of ruling-class, independent, and inchoate values.
- Natural law, as he sees it operating in a handicapped way in the formation of law (jurisprudence narrowly understood) and, augmented by transcendent values, in the relationship between a lawyer and her business client.
- The way he sees accountability operating not so much within the church as against it.

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Thinking of advice on career choice as a focus, rather than a proposal for debate among teachers, justifies and provides the substance of a lawyer's moral influence within the ruling class, as it also permits a business lawyer, pursuing such an agenda, to tell herself that she is acting for the best interests of her client (who is, after all, paying her well enough that she can hold the money lenders at bay).

I don't know whether this focus relieves the concern Gaffney identified; I doubt that it offers comfort for the anomie Noonan and Lewers spoke of. And I can imagine a critic wondering whether Rodes's theory on career choices might come to a different emphasis (or perhaps a different set of qualifications) if he were to submit it to the discernment of an organic Christian community. On the other hand that may be what he did at Notre Dame in the spring of 1995.

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116 Prepared by Lucy Salisbury Payne, Librarian, Notre Dame Law School.

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IN MEMORIAM  
WILLIAM MCINTYRE LEWERS, C.S.C.

