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Abstract

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PILGRIM FINALLY AT REST: THE JOURNEY OF ROBERT E. RODES, JR.

Marie A. Failinger*

When one first met Robert Rodes, it was easy to match him with his fascination for the legal workings of the Anglican Church. He looked the part of an English gentleman, tall, genial, dignified, even vaguely regal. But then he would begin to speak, or write, and the Robert Rodes who studied Marx and Djilas, who was as prophetic in his engagement with lawyers and the law as any scholar in a mainstream American legal institution, would surprise and sometimes sting.

The many and varied roads Robert walked in the discipline of law and religion became a gift to the *Journal of Law and Religion*, where he served as an author, article reviewer, and trusted adviser. In 2007, we published a symposium in honor of his work in law and religion, a deep, critical engagement with the variety of themes in his law and religion work,¹ and, to understand how he came to these arguments, a jurisprudential and theological autobiography and bibliography.² Although there is much more to discover in that symposium, I want to reflect briefly on three interrelated testimonies Robert

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1 Symposium articles included Richard P. Church, *Engaging Robert Rodes*, 22 J.L. & RELIGION 433 (2006–2007); Richard W. Garnett, *Pluralism, Dialogue, and Freedom: Professor Robert Rodes and the Church-State Nexus*, 22 J.L. & RELIGION 503 (2006–2007); Emily Albrink Hartigan, *Pilgrim to Nowhere—the Mysterious Journey of Robert Rodes*, 22 J.L. & RELIGION 481 (2006–2007); M. Cathleen Kaveny, *Erastian and High Church Approaches to the Law: The Jurisprudential Categories of Robert E. Rodes, Jr.*, 22 J.L. & RELIGION 405 (2006–2007); Vincent D. Rougeau, *Pilgrim Law: Overcoming False Consciousness Through the Witness of London’s Economic Migrants*, 22 J.L. & RELIGION 489 (2006–2007); and Amelia J. Uelmen, *Traveling Light: Pilgrim Law and the Nexus Between Law, Politics and Catholic Social Teaching*, 22 J.L. & RELIGION 445 (2006–2007).

2 *Robert E. Rodes, Jr. Bibliography*, 22 J.L. & RELIGION 401 (2006–2007); Robert E. Rodes, Jr., *On Professors and Poor People—A Jurisprudential Memoir*, 22 J.L. & RELIGION 527 (2006–2007) [hereinafter Rodes, *Jurisprudential Memoir*]. While his friends apparently called him Bob, I did so only with great difficulty, because his persona always resonated with the Norman, English, and Scottish noble tradition associated with his given name, yet to refer to him as “Rodes” seems too unfamiliar here.

made that are reflected in that symposium, and what they might mean for lawyers and judges today as we struggle through an uncertain time in the American legal profession. These are the themes of pilgrim law, of sin and class struggle, and of the calling of Christian lawyers and legal academics.

Robert was "famous" in law and religion circles, if one can be famous in such a smallish community, for his book *Pilgrim Law*.³ He argued that the first principle of liberation jurisprudence, as he labeled the legal philosophy that flowed from liberation theology,⁴ is that "individuals, communities, and humanity as a whole are called to a journey, a pilgrimage, to a destiny that fulfills human nature but transcends it in ways we do not understand,"⁵ one in which "we are called to pursue an unknown end by inefficacious means."⁶

Robert had no time for a theologically romantic vision that we moderns might associate with pilgrimage. Rather, he meant to describe the reality of a human life course, the hard, gritty task of a traveler wearily climbing over boulders and pushing beyond exhaustion to reach the next barren shelter on the path at night's end. That journey is at once solitary and communal: only the pilgrim herself can push on to the next shrine, but she walks with others silently trudging the same steep incline she must pass over and still others who extend simple hospitality to her at the day's end. The pilgrim way is full of the conflict that always comes with genuine pluralism, accompanied by the aspiration toward fraternity.⁷ For Robert, a Catholic, what lay in sight for each person, indeed each lawyer and judge, through the power of moral imagination was the fulfillment of not only his purpose but his very essence, a fulfillment that transcended any list of accomplishments or earthly qualities of one's life.

Speaking to the calling of a lawyer in *Pilgrim Law*, Robert contextualized the preferential option for the poor in the institutional structures of modernity that resembled, but did not mimic, Marx's theories of class structure. In terms of factual analysis, he came to see that Marx had it wrong about who were oppressors and who were oppressed: he realized that any class, now the managerial class and potentially those who once occupied the status of victims, if given enough power, would turn oppressive.⁸ Describing his version of "false consciousness" as "adherence to a purported value that in fact sup-

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

4 For Robert, "[l]iberationist theories acknowledge that everyone who is caught in the tangle of structures of injustice needs liberation, 'victims' and 'beneficiaries' alike, and this is the principle 'that reconciles participation in an ongoing class struggle with a Christian commitment to universal brotherhood and solidarity.'" Uelman, *supra* note 1, at 473 (quoting RODES, *supra* note 3, at 24).

5 Rodes, *Jurisprudential Memoir*, *supra* note 2, at 538.

6 RODES, *supra* note 3, at 11.

7 See Garnett, *supra* note 1, at 518.

8 Rodes, *Jurisprudential Memoir*, *supra* note 2, at 537 ("[L]aws, once adopted, can sometimes support the rise of new classes to take advantage of those laws rather than maintaining the hegemony of classes already in place. Even if they were enacted for the sake of justice, they can become unjust through the new class structures to which laws give rise, and thereby can give rise to a class of victims to set off against the class of beneficiaries.").

ports the ruling class in its freedom from accountability to the wider society,"⁹ Robert detailed this self-delusion:

It is easy to believe that we live (and prosper) under a basically beneficent system, that the misfortunes of those who (unlike ourselves) fail to prosper under it are either the result of their own improvidence or the inevitable consequences of an imperfect world, and that if we tinker more than incrementally with the system, unimaginable disasters will ensue.¹⁰

A Lutheran myself, I have always thought that this was very Lutheran of him, to understand that all human beings have the capacity and willingness to organize social structures into sinful instrumentalities built on not just ignorance of the good, but their own self-interest and willfulness. Luther understood that every human being not only engages in wrongful behavior against his or her fellow human beings on a regular basis, but often finds an explanation that will justify his or her behavior. That self-justification does not arise from our institutional position, but from our stubborn refusal to trust God's mercy, God's willingness to justify us so we do not have to justify ourselves.

However, in some readings, like that of Amelia Uelmen, the preferential option for the poor does not simply give the oppressed the opportunity to behave like oppressors and justify that they properly do so.¹¹ Rather, it has both experiential and eschatological¹² life-giving dimensions. Experientially, it allows us to put on new glasses in seeing our world: instead of our "self-centered interpretations of liberty and equality,"¹³ we can identify the reality embedded in human community. And—here she challenged Robert—instead of seeing the poor as simply dependent victims who must be "'rescued' from oppressive economic and social institutions," as "insignificant" or "nameless,"¹⁴ we can see them and their advancement truly, as Pope John Paul II suggested, as "'a great opportunity for the moral, cultural and even economic growth of all humanity.'"¹⁵

In seeing with clearer eyes, Uelmen argues, following Pope Paul VI, we understand that social life is "an essential dimension of human nature," which "'through [one's] dealing[] with others, through reciprocal duties, and through fraternal dialogue [the human person] develops all his gifts and

9 RODES, *supra* note 3, at 85–86.

10 Rodes, *Jurisprudential Memoir*, *supra* note 2, at 542.

11 See generally Uelmen, *supra* note 1 (analyzing the preferential option for the poor in light of Catholic social teaching).

12 Rick Garnett notes that Rodes' vision of the Christian church was eschatological, a community that "'waited confidently for God to bring about the consummation of history,'" though before Constantine, with no vision for its responsibilities to society in this life. Garnett, *supra* note 1, at 517 (quoting Robert E. Rodes, Jr., *Pluralist Christendom and the Christian Civil Magistrate*, 8 *CAP. U. L. REV.* 413, 413 (1979)).

13 Uelmen, *supra* note 1, at 458.

14 *Id.* at 468, 470 (citing RODES, *supra* note 3, at 94, 99).

15 *Id.* at 469 (quoting POPE JOHN PAUL II, *CENTESIMUS ANNUS* ¶ 28 (1991)), available at http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jpii_enc_0105_1991_centessimus-annus.html).

is able to rise to his destiny.’¹⁶ Or as Vincent Rougeau argues, the lived Catholic faith:

requires a recognition of the centrality of the other to our salvation and to any real understanding of justice. It is, as the philosopher Emmanuel Lévinas tells us, moving toward the person from whom we would normally recoil and reworking the intellectual or instinctual justifications for ignoring, rejecting, or hating him.¹⁷

Here, again as a Lutheran, I think both Robert and Uelmen have it right: our world is simultaneously fallen and redeemed—as Robert tells us, Christians must view the ways in which the poor, perhaps especially among others, are disregarded and exploited and made vulnerable in the pervasive conditions of sin in which we live. And, as Uelmen tells us, as saved persons, we can, entirely through God’s grace and none of our own doing, understand that this is a truly false understanding of our relationships with our fellow human beings, created like us in the image of God and sent to us so we can serve them as truly freed—one of the great paradoxes of faith identified by Luther. To give up either lens is to not see our fellow human beings and, indeed the whole of creation, truthfully and rightly. Or, to fully embrace the Trinitarian essence of our faith, we can confess, with Robert, “that the God who created us and the God who redeems us in Jesus Christ are one and the same.”¹⁸ Yet, Robert is also right in prescribing what Lutherans call the first use of the law: we cannot wait until everyone comes to understand this second truth about the solidarity we share with our fellow human beings, particularly with the poor, or even to see on “this worldly” grounds why it is philosophically or morally problematic not to respond to the “this worldly” needs of the poor. Instead, we have to “make do” as best we can, crafting human institutions that respond in this current world we inhabit to the facts of sin:

[The poor] cannot wait for us to weigh in an exact balance the claims of the prosperous classes to go on prospering. Our calling as Christians is to resist known evils even at an unknown cost. We cannot know all the consequences of our actions, and some of the consequences we may well regret. But a world in which we do what we can about the poverty we encounter, and then do our best to cope with the consequences as they arise, is a better world than one in which we pusillanimously allow our neighbors to languish in a poverty that we could alleviate if we would.¹⁹

What Robert adds to the experiential analysis, however, is the eschatological diagnosis that the Christian tradition also makes: that the pilgrim journey is hard, and that we cannot see the shrine toward which we are travel-

16 *Id.* at 471 (second alteration in original) (quoting SECOND VATICAN ECUMENICAL COUNCIL, PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD [GAUDIUM ET SPES] § 25 (1965)), available at http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19651207_gaudium-et-spes_en.html).

17 Rougeau, *supra* note 1, at 500.

18 Kaveny, *supra* note 1, at 407.

19 Rodes, *Jurisprudential Memoir*, *supra* note 2, at 542–43.

ing, does not mean that the meaning of our lives is defined only by the here and now, the daily hard journey of picking ourselves up and trudging yet farther down the road. There is a destination to this journey, mysterious to us, unimaginable, and yet as real as the blisters on our feet, the cold as we wrap our garments around us, and the pounding of our heart as we ascend yet one more slope. What turns out to be really real is not what we see with our eyes or hear with our ears, but a promise from beyond, a promise that we have no part in making or keeping, but of which we are the utterly passive recipients.

What did Robert think this double reality of the harsh conditions of sin and the freeing conditions of promise means for lawyers, and particularly for the teachers of law? Here, Robert understood in a powerful way the meaning of vocation. Vocation is not a professional game plan; it is being called by God, sometimes repeatedly as we, like Samuel, do not recognize God's voice, until we come to meet the promise by answering, "Here I am . . . Speak, for your servant is listening."²⁰ It means, first, we must think and speak, difficult though it may be. We must engage in prophetic truth-telling, first and especially to ourselves, and then to others, about the unjust nature of human interactions and institutions. If we are telling ourselves the truth about the self-justifying ways in which we see and live in our world given God's desire and expectation for human flourishing, as the Christian doctrine that Robert confessed insists, we have hardly any other choice but acknowledge our own sin and helplessness, and to throw ourselves upon the mercy of God. Second, we must humble ourselves, embracing our creatureliness and acknowledging our fallenness. Borrowing from Emily Hartigan, our unfortunate response to God's love is to try to regain power over our own narrative by living "in guilt over not giving enough to those in material need, in our fear and thus insecurity, in our lack of self-love and thus competition."²¹ Lawyers especially, and especially lawyers for the poor, are afflicted with the "fix-it" sin, the belief that if we just work smarter and harder, we can fix what ails our clients and our legal system. Rather than thinking of the preferential option for the poor as a "career choice" or a "power base," we need to understand that our calling is simply to give our hearts and minds to the project at hand, the vocation God has given us to be among certain of God's beloved creatures in this time and place, creatures who need the response of hearing, of accompanying, of advocacy, of problem solving from us lawyers, their neighbors. As Robert described that pilgrim way for lawyers:

We can deal with problems as they arise, and when, as often happens, our solutions give rise to new problems, we can deal with them as well. When people fall by the wayside, we can pick them up, dust them off, set them on their feet, and do the same thing again if they fall again a few paces down the road.²²

20 1 *Samuel* 3:8–10 (New International).

21 Hartigan, *supra* note 1, at 487.

22 Rodes, *Jurisprudential Memoir*, *supra* note 2, at 538–39.

Next, practically, we must not turn away but act, for "we owe it to our neighbors to rescue them from these [unjust] institutions by reforming or dismantling them."²³ In this regard, Robert called lawyers the "retailer[s] of justice" (after his good friend Tom Shaffer) and legal academics the "wholesalers" of justice.²⁴ By this, he meant that law professors were "responsible for the coherence, integrity, and utility of the whole system as well as for the outcome of individual cases and transactions."²⁵

Finally, eschewing the ultimate efficacy of law even while embracing its necessity in combating temporal injustices, we must trust: "It is our faith that our efforts will not ultimately be in vain."²⁶ In a finish to his jurisprudential autobiography, Robert concludes:

The Second Vatican Council tells us:

"... [W]e will find [the values of human dignity, brotherhood and freedom and indeed all the fruits of our enterprise] again, but freed of stain, burnished and transfigured, when Christ hands over to the Father: a kingdom eternal and universal, a kingdom of truth and life, of holiness and grace, of justice, love and peace. On this earth that Kingdom is already present in mystery. When the Lord returns it will be brought into full flower."

Jurisprudence cannot assure us of this consummation. Faith can.²⁷

23 *Id.* at 536.

24 *Id.* at 542.

25 *Id.*

26 *Id.* at 543.

27 *Id.* (quoting SECOND VATICAN ECUMENICAL COUNCIL, *supra* note 16, § 39) (footnote omitted) (internal quotation marks omitted).

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