

2007

On Professors and Poor People - A Jurisprudential Memoir

Robert E. Rodes

Notre Dame Law School, robert.e.odes.1@nd.edu

Follow this and additional works at: https://scholarship.law.nd.edu/law_faculty_scholarship



Part of the [Jurisprudence Commons](#)

Recommended Citation

Robert E. Rodes, *On Professors and Poor People - A Jurisprudential Memoir*, 22 J. L. & Religion 527 (2006-2007).

Available at: https://scholarship.law.nd.edu/law_faculty_scholarship/743

This Article is brought to you for free and open access by the Publications at NDLScholarship. It has been accepted for inclusion in Journal Articles by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

ON PROFESSORS AND POOR PEOPLE— A JURISPRUDENTIAL MEMOIR

*Robert E. Rodes, Jr.**

But let the brother of low degree glory in his high estate: and the rich, in that he is made low.—*James 1:9-10*

I am starting this paper after looking at the latest of a series of e-mails regarding people who cannot scrape up the security deposits required by the local gas company to turn their heat back on. They keep shivering in the corners of their bedrooms or burning their houses down with defective space heaters. The public agency that is supposed to relieve the poor refuses to pay security deposits, and the private charities that pay deposits are out of money. A bill that might improve matters has passed one House of the Legislature, and is about to die in a committee of the other House. I have a card on my desk from a former student I ran into the other day. She works in the field of utility regulation, and has promised to send me more e-mails on the subject. I also have a pile of student papers on whether a lawyer can encourage a client illegally in the country to marry her boyfriend in order not to be deported.

What I am trying to do with all this material is exercise a preferential option for the poor. I am working at it in a large, comfortable chair in a large, comfortable office filled with large, comfortable books, and a large—but not so comfortable—collection of loose papers. At the end of the day, I will take some of the papers home with me to my large, comfortable, and well heated house.

It is easy to wonder if I have opted for the poor in any meaningful way when I am so far from being one of them. But, as I keep telling my students as they head for the Wall Street law firms, the preferential option for the poor is not a career choice. It is a matter of giving priority to the interests of the poor in whatever situation you encounter. That is what God calls all of us to do. Some people He calls to a life of voluntary poverty. All honor to those who have that vocation and live up to it, but voluntary poverty is not the condition of the poor. The poor are people who have things happen to them that they do not want to have

* Paul J. Schierl/Fort Howard Corporation Professor of Legal Ethics, Notre Dame Law School, Notre Dame, Indiana.

happen. As I grow old and my body starts to creak, I begin to feel some solidarity with such people, but that is hardly an option. My real option—what I am really called to do—is to use my material and intellectual resources, such as they are, for the benefit of poor people.

What it comes down to is that I am a law teacher, and my task is to prefer the poor when I teach law, or, if you like, is to teach my students how to prefer the poor. I propose in this paper to indicate how I have learned—if I have learned—to do this. I call the paper a jurisprudential memoir because the study of what laws ought to do and how to make them do it is called Jurisprudence.

I. INTELLECTUAL FORMATION

I graduated from Harvard Law School in 1952. My teachers were the last of the great scholars of the first half of the twentieth century who founded a practical and realistic American jurisprudence with which they hoped to save the world, or a good part of it. It was said in those days that the way to Washington was to go to Harvard and turn left, and most of us were not inclined to disagree.

The twin pillars of our legal thinking were Oliver Wendell Holmes's American Legal Realism and Roscoe Pound's Sociological Jurisprudence. The first told us what the law was, and the second told us what it was for. Law, said Holmes, is "[t]he prophecies of what the courts will do in fact, and nothing more pretentious. . . ."¹ But we were not only to predict what courts would do; we were to persuade them to do what they should. Pound set before the whole enterprise "a great task of social engineering,"² to make the limited resources of the world meet as many human wants as possible with the least possible friction and waste. Pound's technological metaphors dominated our aspirations, and infected them with a pervasive hubris.

The growth of social legislation beginning in the late nineteenth century, and culminating under the presidency of Franklin Roosevelt represented for us a new understanding of the proper way to put our profession to work. Much of our study of Constitutional Law consisted of deploring the mossback judges who used to strike these statutes down, and praising their enlightened successors who let them stand. I studied Labor Law under Archibald Cox, who was to become the nemesis of Richard Nixon. I was one of the first generation of law students to take a course in Administrative Law, the operation and

1. O.W. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 461 (1897).

2. Roscoe Pound, *Social Control through Law* 64 (Yale U. Press 1942).

control of government agencies. Two years later, when I was working for Liberty Mutual Insurance Company administering compensation for injured workers, I found myself in a roomful of the best insurance lawyers in Massachusetts, convened in an emergency meeting to discuss a proposed Administrative Procedure Act for the State. I was the only person in the room who had taken a course in Administrative Law, and the only person (or so I thought) who had a clue as to what was going on.

Those of us who were Catholic—not a lot—connected all this beneficent legislation with something called Catholic Social Teaching, to which we were exposed on a parochial level, and ultimately with Natural Law, of which we got fleeting glimpses in Lon Fuller's Jurisprudence course, and in undergraduate courses in Philosophy or Theology. Part of the teaching involved the concept of social justice, the virtue we practice by doing our best to reform the structures of society so that they will render to people what is due them. A few older scholars hinted that a number of these Catholic teachings had entered into our social legislation through their influence on some of Roosevelt's advisers.³

Two years out of law school, I left Liberty Mutual and started teaching. One of my first assignments was Modern Social Legislation, out of a casebook by that name.⁴ It dealt with the Elizabethan poor law that was in force pretty much unchanged in many states, with other forms of relief, with Social Security, with Workmen's (now called Workers') Compensation, and with Wages and Hours Laws. It gave firm support to the conviction that justice, not charity, was behind these laws, and at least tacit support to the idea that these laws were doing what needed to be done.

The actual poor were largely invisible in those days. I remember a national magazine, *Time*, I think, saying that a charitable organization that distributed Christmas turkeys to poor families could not find enough poor families to dispose of all its turkeys. At least for me, and I believe for many others, the poor were brought back into view by two people, Bill Stringfellow and Michael Harrington. One I knew personally, the other I knew from his book.

3. See George Q. Flynn, *American Catholics & the Roosevelt Presidency: 1932-1936* (U. Ky. Press 1968); David J. O'Brien, *American Catholics and Social Reform: The New Deal Years* (Oxford U. Press 1968).

4. Stefan A. Riesenfeld & Richard C. Maxwell, *Modern Social Legislation* (Found. Press 1950).

In the summer of 1959, when I had been teaching for five years, and at Notre Dame for three, I came upon an article in the Harvard Law School Bulletin, *Christianity, Poverty, and the Practice of the Law* by William Stringfellow, 1956.⁵ He had come directly from law school to East Harlem, then the most miserable part of New York City, "to live there, to practice law there, to take some part in politics, to be a layman in the Church."⁶ He described his milieu in terms that were soon to become familiar, although I found them a revelation at the time:

Poverty is my very first client in East Harlem—a father whose child died from being bitten by a rat Poverty is a widow on welfare whose landlord cuts the heat knowing that the winter will end before the complaint is processed. Poverty is an addict who pawns the jacket off his back to get another "fix." . . . Poverty is the payoff to a building inspector not to report violations of the building code. . . . Poverty is the relentless daily attrition of contending with the most primitive issues of human existence: food, cleanliness, clothes, heat, housing, and rest. Poverty is an awful vulnerability.⁷

He had no answers to the problems he set forth in five pages of careful description and analysis. He simply said that "[t]he awful vulnerability of the poor is in fact the common vulnerability of every man to death. And from the power of death no man may deliver his brother"⁸ The Christian presence in the world of the poor is not "some commitment to generous charity, nor fondness for 'moral and spiritual values'"⁹

It is, instead, the knowledge that there is no pain nor privation nor humiliation nor disaster nor scourge nor distress nor destitution nor hunger nor striving nor anxiety nor temptation nor wile nor suffering nor frustration nor poverty which God had not known and borne for all in Jesus Christ. He has borne death itself on behalf of all, and in that event He had broken the power of death once and for all.¹⁰

We brought Stringfellow out to talk to our students in the spring of 1960. He began by telling them that his main distinction was that he was the lowest paid graduate of the Harvard Law School. He described

5. William Stringfellow, *Christianity, Poverty, and the Practice of the Law*, 8 Cap. U. L. Rev. 451 (1979) (1st published in 10 Harv. L. Sch. Bull. 4 (1959)).

6. *Id.* at 451.

7. *Id.* at 451-452.

8. *Id.* at 457-458.

9. *Id.* at 458.

10. *Id.*

for them the situation in East Harlem and the work that he did. Hand after hand went up at the end of his talk, with students asking how these problems could be solved. He said that the world does not solve its problems; it only rearranges them. He was scornful of the social workers that commuted in from Westchester with a view to making East Harlem like Westchester. But he did not insist on all Christian lawyers joining him in East Harlem. His concern was death, and death is everywhere. What he said that most impressed me was that the role of a Christian is to bring out the witness to Christ that is latent in every situation.

Ultimately, I could not accept Stringfellow's insistence on total alienation from the powers of this world.¹¹ I kept believing that there is a Christian way to exercise power, and that the role of a Christian lawyer is to persuade those who exercise power to exercise it in that way. I had started on a decades-long study of the legal development of the Church of England as an attempt to retain the medieval church-state synthesis in a pluralist world.¹² I came up with an ecclesiology that accepted at least the theoretical possibility of a public order conformable to God's will. In 1979, I published an article entitled *Pluralist Christendom and the Christian Civil Magistrate*.¹³ It appeared in the Capital University Law Review with various other papers on theology and law, including a republication of Stringfellow's piece from the 1959 Harvard Law School Bulletin.¹⁴ But my encounter with Stringfellow had permanently raised my consciousness regarding the condition of the poor. When I read Michael Harrington's *The Other America*¹⁵ in 1962, I learned a lot more about poverty, but none of it came as a surprise to me.

I cannot remember when I first read *The Communist Manifesto*. It was probably when I was in law school. At any rate, it has been part of my intellectual furniture for most of my academic life. It is quite wrong in many respects, but no one who has studied the nineteenth century can fail to take it seriously. Where it went wrong was not in its description

11. See William Stringfellow, *Christ and the Powers of Death*, in *A Keeper of the Word* 192 (Bill Wylie Kellermann ed., Eerdmans 1994); Walter Wink, *Stringfellow on the Powers*, in *Radical Christian and Exemplary Lawyer* 17 (Andrew W. McThenia, Jr. ed., Eerdmans 1995); Andrew W. McThenia, Jr., *An Uneasy Relationship with the Law*, in *id.* at 167.

12. See Robert E. Rodes, Jr., *Ecclesiastical Administration in Medieval England: The Anglo-Saxons to the Reformation* (U. Notre Dame Press 1977); Robert E. Rodes, Jr., *Lay Authority and Reformation in the English Church: Edward I to the Civil War* (U. Notre Dame Press 1982); Robert E. Rodes, Jr., *Law and Modernization in the Church of England: Charles II to the Welfare State* (U. Notre Dame Press 1991).

13. Robert E. Rodes, Jr., *Pluralist Christendom and the Christian Civil Magistrate*, 8 Cap. U. L. Rev. 413 (1979).

14. Stringfellow, *supra* n. 5.

15. Michael Harrington, *The Other America: Poverty in the United States* (MacMillan 1962).

of its own time, but in its prediction of the future. It had become obvious by my time that capitalism was not about to destroy itself as Marx and Engels had predicted it would. Keynes had shown that capitalists did not have to eat each other up in battles over markets because they could create their own markets by not underpaying their workers.

But I found the Marxist version of class dialectic persuasive. It shed a good deal of light for me on the legal developments of the nineteenth and early twentieth centuries. I never accepted the idea that law must inevitably serve the interests of the ruling class, but I realized more and more that that was what it would do unless we made it do something better.

My picture of class dialectic was completed by two books, *The Organization Man* by William H. Whyte,¹⁶ published in 1956, and *The New Class* by Milovan Djilas,¹⁷ published in 1957. Djilas, a leading Yugoslav Communist until he wrote this book, argued that the assumption of power by the proletariat as Marx and Engels envisaged it could not come to pass because the proletariat were not adequately organized. Accordingly, a class of surrogates grew up to exercise power on their behalf. With rigorous Marxist methodology, Djilas showed how this class, more or less coextensive with the Communist Party, had acquired power in the Soviet Union and in the Communist states of Eastern Europe, and how they exercised their power when they had it.

Djilas believed that the bureaucracies of the capitalist states did not constitute a class as the ruling Communist parties did.¹⁸ There I parted company with him. It seemed to me that the class I belonged to had become powerful in about the same way the Eastern Communists had. Corporate managers as surrogates for the suppliers of capital, labor organizers as surrogates for workers, government officials as surrogates for the general public, and lawyers as surrogates for everybody had more in common with each other than with their respective constituencies. Capital was no longer in control of industry: managers hired their capital as they did their labor, and when they lost their capital, they proceeded under the bankruptcy laws to get more. Whyte's book was a persuasive description of the ethos of this class, and of the way they exercised power. Putting the two books together, I came to the conclusion that just as the transition from feudalism to capitalism came peacefully in England while it required a revolution in France, so the transition from

16. William H. Whyte, Jr., *The Organization Man* (Simon & Schuster 1956).

17. Milovan Djilas, *The New Class: An Analysis of the Communist System* (Prager 1957).

18. *Id.* at 42-44.

capitalism to managerialism came peacefully in the West while it required a revolution in Russia. This perception gave me useful insights into a number of legal developments during the last half of the twentieth century.

At this point, I had come a long way from Sociological Jurisprudence. The renewed awareness of continuing poverty undermined confidence in Pound's technological metaphors. If social engineering is what lawyers do, they are not doing it very successfully. At the same time, the class dialectic of Marx and Djilas indicates that social change is being brought about by forces quite other than law.

I came upon Jacques Maritain's *On the Philosophy of History*¹⁹ shortly after it came out in 1957. Maritain presented a complex and sophisticated philosophy, one of whose tenets was what he called the law of the "ambivalence of history":

[A]t each moment human history offers to us two faces. One of these faces gives grounds to the pessimist, who would like to condemn this period of history. And the other gives grounds to the optimist, who would like to see the same period as merely glorious.²⁰

The role of human endeavor—and therefore the role of law—in any period, therefore, is to enhance the good and resist the evil that is inevitably present in any historical situation.

This introduction to the philosophy of history provided a further critique of Sociological Jurisprudence. Law, unlike other social forces, is under human control. We have this or that law because people in authority choose that we shall have it. In the last analysis, the project of Sociological Jurisprudence is to use this power of choice to take control of history. The thing cannot be done. We can have considerable success in solving this or that problem, but the overall course of history can be neither predicted nor controlled. As Herbert Butterfield put it in *The Whig Interpretation of History*,²¹ a book that made a profound impression on me when I encountered it in my study of English church history: "Perhaps the greatest of all the lessons of history is this demonstration of the complexity of human change and the unpredictable character of the ultimate consequences of any given act or decision of men"²²

19. Jacques Maritain, *On the Philosophy of History* (Joseph W. Evans ed., Scribner 1957).

20. *Id.* at 52.

21. H. Butterfield, *The Whig Interpretation of History* (Scribner 1951).

22. *Id.* at 21.

So it would seem that the role of our profession in history is neither to follow it and implement it as the Marxists say, nor to take control of it as the project of Sociological Jurisprudence supposes. Rather, it is to stand outside the process, making incremental infusions of justice as the opportunity presents itself. This formulation has a certain affinity for traditional natural law doctrine: that too envisages a stance outside history, and values to be introduced into the process from without.²³

At this point in my thinking, I had to cope with Jacques Ellul's radical undermining both of natural law and of any pursuit of justice by the legal profession. Bill Stringfellow gave me Ellul's *The Theological Foundation of Law*²⁴ to read when it first came out in English in 1960, and I did a review of it for the Natural Law Forum.²⁵ Ellul argued that natural law is a fact of creation that you have to take into account when you make laws, just as you have to take the shape of the body into account when you make clothes, but as all creation was corrupted by the Fall, there is no basis for regarding natural law as either just or good. The purpose of human law is not to implement natural law, and not to support a good life, but simply to preserve the world for judgment:

Law is commissioned to make life possible for man and to organize society in such a way that God may maintain it Just as rights are granted to man for the sake of the covenant, the world is preserved with a view to the coming judgment The world is preserved in order that the Word may be proclaimed and that salvation in Jesus Christ be announced.²⁶

This doctrine precludes any attempt of law to be salvific, and considerably discourages any attempt to be utilitarian, or even just:

The demonic temptation of law consists of a vision of society without a purpose, or of a purpose other than the judgment of God, realised *hic et nunc* in the preaching of the gospel. Again we must point out that when law organizes society exclusively for the sake of man's happiness, of production, of power and glory or of riches, and not for the sake of the judgment, it ceases to preserve the world.²⁷

23. See Robert E. Rodes, Jr., *Books Reviewed*, 3 Nat. L. Forum 210 (1958) (reviewing Jacques Maritain, *On the Philosophy of History*).

24. Jacques Ellul, *The Theological Foundation of Law* (Marguerite Wieser trans., Doubleday 1960).

25. Robert E. Rodes, Jr., *Books Reviewed*, 8 Nat. L. Forum 188 (1963) (reviewing Jacques Ellul, *The Theological Foundation of Law*).

26. Ellul, *supra* n. 24, at 103-104.

27. *Id.* at 104.

Within his understanding of preserving man for the covenant and the world for judgment, Ellul left room for only a modest aspiration to use the law for what other people would see as social justice: "[T]he social, economic, and political conditions of life, brought about by law, must prevent man from being cornered by death."²⁸

In 1975, I put together a sweeping critique of the Sociological Jurisprudence of my youth in a little paper called *Law, Social Change, and the Ambivalence of History*.²⁹ I drew heavily on Maritain and Butterfield. Reading the piece today, I see Ellul lurking in the background. I do not mention him, but I seem to be groping for a way to transcend the limited role he assigns to law without returning to the discredited and hubristic metaphors of social engineering.

What I came up with was a project for replacing technological metaphors with verbal ones:

When we make or invoke laws we are using words to make claims on other people, and through people, on history. There are manipulative elements of course, but fundamentally we are not manipulating people, we are addressing them. We are not being "engineers" or using "instruments," we are being spokesmen.³⁰

I managed to work this spokesmanship into a pretty high aspiration, but not one that could be pursued with much confidence in the outcome: "To demand justice passionately, resourcefully and against all odds is the mark of humanity in its pilgrimage through time."³¹ I ended up saying that "[t]he lawyer should, after all, be content with the role of advocate," and that in the advocacy of social change, "though he is no stranger to bizarre tribunals and equivocal results, he has the word of the Lord of history that those who hunger and thirst after justice will be filled."³²

It was not until 1979 that I read Gustavo Gutiérrez's *A Theology of Liberation*.³³ I had been working on other things, and had only gradually become aware of the important place Liberation Theology was beginning to occupy in Catholic social doctrine. But finally I went to a colleague more current on such matters than I and asked him what book on the subject I should read if I were to read only one. Naturally, he gave me Gutiérrez.

28. *Id.* at 103.

29. Robert E. Rodes, Jr., *Law, Social Change and the Ambivalence of History*, in *Philosophy and Civil Law* 164 (George F. McLean ed., Cath. U. Am. 1975).

30. *Id.* at 167.

31. *Id.* at 169.

32. *Id.* at 170.

33. Gustavo Gutiérrez, *A Theology of Liberation: History, Politics, and Salvation* (Caridad Inda & John Eagleson eds. & trans., Orbis 1973).

Gutiérrez's teachings as I extracted them from his book were these: People's response to God is blocked by unjust economic, social, and political institutions, so that we owe it to our neighbors to rescue them from these institutions by reforming or dismantling them. God calls us to the work of doing so, and assures us of its value in building up His Kingdom. Unjust institutions create a class struggle between victims, who have a stake in reforming or dismantling them, and beneficiaries, who have a stake in leaving them intact. Human solidarity is achieved not by disregarding class struggle, but by siding with the victims. The reform or dismantling of unjust institutions, in addition to liberating the victims, liberates the beneficiaries from living on the flip side of other people's misery.³⁴

These doctrines filled gaps in my thought like missing pieces of a jigsaw puzzle. The focus on liberation permits a purposeful deployment of legal skills without buying into the tattered project of Sociological Jurisprudence. Instead of trying to put together a globally effective structure, we can work at reforming or demolishing institutions that we have in front of us in order to remedy evils and injustices that we observe. Because liberation is open-ended, we can pursue it with good purpose despite Butterfield's warning that we cannot foresee all the results of what we are doing. Liberation is just, and justice is to be done although the skies fall. By the same token, because the work of liberation is eschatologically validated, we do not have to worry about validating it historically. The ambivalence that Maritain perceives is no problem for us. And where Ellul assigns us the static function of preserving the world for judgment, Gutiérrez allows us to work to bring about God's Kingdom. Even though we cannot accomplish the work, God values it, and will use it in some way:

Faith proclaims that the brotherhood which is sought through the abolition of the exploitation of man by man is something possible, that efforts to bring it about are not in vain, that God calls us to it and assures us of its complete fulfillment, and that the definitive reality is being built on what is transitory. Faith reveals to us the deep meaning of the history which we fashion with our own hands: it teaches us that every human act which is oriented toward the construction of a more just society has value in terms of communion with God.³⁵

Gutiérrez's eschatological emphasis clarified for me a problem I had begun to notice in traditional natural law doctrine—its failure to

34. *Id.* at 275-276.

35. *Id.* at 237-238.

cope with tragedy. Our nature may teach us how we ought to behave, and our laws may profitably implement the teaching, but the hard work of our profession is done where the teachings are violated and we are left with the pieces to pick up. Nature does not tell us about picking up pieces, but theology does. And what it tells us is that, since the original Fall, we all have pieces to pick up, and that God does not intend for us to be put back together the way we were. He intends for us to be on our way to a destiny which eye has not seen nor ear heard. That destiny is compatible with our nature, but not defined by it. Our job, whether as lawyers or simply as human beings, is not to deliver people to that destiny, for we do not know how to do that, but to set them on their feet and take the stumbling blocks out of their path.

Unlike Marx, Gutiérrez relativizes class struggle. By doing so, and by attributing class divisions to unjust institutions, he clarified for me the role of law in the dialectical process. Anyone who studies legal history enough will recognize that laws can often be adopted not because they serve the interests of the ruling class, but because they are deemed just whosever interests they serve. Reflecting on the same history in the light of Gutiérrez's observations, I came to see that laws, 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. Given these perceptions, I could see each dominant class in its turn appropriating in support of its hegemony the values behind the laws that had first empowered it—whether or not it continued to implement those values. I attached to this phenomenon the name false consciousness—a term which Marxists use in a somewhat different way.

It was as a remedy for false consciousness that I adopted the liberationists' "preferential option for the poor." The actual term did not appear in Gutiérrez's book. In his Introduction to the revised edition, he says that its first official use was by the Latin American bishops at Puebla in 1979, although "it was a formula that theologians in Latin America had already begun to use in preceding years."³⁶ It was used by John Paul II in a number of places, including his major social encyclical *Centesimus Annus* (1991).³⁷ The American hierarchy used it in their

36. Gustavo Gutiérrez, *A Theology of Liberation: History, Politics, and Salvation* xxvi (Caridad Inda & John Eagleson eds. & trans., 2d rev. ed., Orbis 1988).

37. Pope John Paul II, *On the Hundredth Anniversary of Rerum Novarum: Centesimus Annus*

1986 pastoral *Economic Justice for All*.³⁸ I began using it in about 1985. I equated it with the view that Charles Kingsley, in a novel I had read a little earlier, *Yeast* (1851), puts into the mouth of his protagonist, Lancelot Smith:

I think, honestly . . . that we gentlemen all run into the same fallacy. We fancy ourselves the fixed and necessary element in society, to which all others are to accommodate themselves. "Given the rights of the few rich, to find the condition of the many poor." It seems to me that other postulate is quite as fair: "Given the rights of the many poor, to find the condition of the few rich."³⁹

Putting together all these different influences, experiences, and reflections, I have come up with what I have, perhaps too sanguinely, labeled a Jurisprudence of Liberation.⁴⁰ In what follows, I will set forth the principles of that jurisprudence as briefly as I can, and try to show how they point to the preferential option for the poor, and support its exercise.

II. LIBERATION JURISPRUDENCE

The first principle 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. That destiny is adumbrated in every historical situation—as the Second Vatican Council puts it, the Kingdom of God is "already present in mystery."⁴¹ We can know the general direction of the journey. We can discern and attempt to cope with obstacles and deviations. But we cannot know the end well enough to adopt a definitive strategy for reaching it. Institutions and systems committed to a known and therefore spurious destiny are simply additional obstacles. For this reason, liberation has a primary place among the objects of law. It relates the enterprise to obstacles that can be observed and understood rather than to goals that can be perceived only in mystery.

Our professional skills can therefore be deployed for purposes to which they are adequate. We can deal with problems as they arise, and

57 (U.S. Cath. Conf. 1991).

38. Natl. Conf. of Catholic Bishops, *Economic Justice for All: Pastoral Letter on Catholic Social Teaching and the U.S. Economy* 52 (U.S. Cath. Conf. 1986).

39. Charles Kingsley, *Yeast* 108 (Coop. Publication Socy. 1899).

40. My theory is set forth at greater length in Robert E. Rodes, Jr., *Pilgrim Law* (U. Notre Dame Press 1998).

41. Second Vatican Council, *Pastoral Constitution on the Church in the Modern World: Gaudium et Spes* 38 (Pauline Books & Media 1965).

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. The historical indeterminacy of the work is made up for by its eschatological fruition. As Gutiérrez says, it has value in terms of communion with God.

When we serve our clients, we do not merely improve their situation in the existing legal landscape; we change the landscape itself. We propose statutes and regulations and sometimes get them enacted. Our advocacy can bring about new developments in the judge-made law. And our transactional lawyering can establish new ways to use the law and show new changes that it requires. In all these works, our ultimate commitment is to justice. As Sir William Blackstone, author of the primary textbook in our legal system, put it when he embarked on the study of his profession:

Then welcome business, welcome strife,
Welcome the cares, the thorns of life;
The visage wan, the pore-blind sight,
The toil by day, the lamp at night,
The tedious forms, the solemn prate,
The pert dispute, the dull debate,
The DROWSY BENCH, the babbling Hall,
For thee, fair JUSTICE, welcome all!⁴²

Our pursuit of justice involves the replacement of unjust laws and institutions. It is a task that will not be completed this side of the eschaton, because the forces of history and the creativity of evil are constantly making just laws and institutions operate unjustly.

When new laws and institutions appear, new classes arise to take advantage of them. The feudal landholding class came to power through legal arrangements calculated to provide local administration and police in countries with no effective infrastructure. The capitalist class came to power through legal arrangements calculated to allow for more creative use of resources as society became more settled and more prosperous. The managerial class came to power through legal arrangements calculated to distribute more fairly the wealth created by capitalists and the people they hired to work for them.

Each of these classes, when its power has been consolidated, has tended to take control of the legal system. While I do not believe a ruling class makes laws merely to protect and perpetuate its own hegemony, it does tend to overvalue its contribution to the common

42. David Lockmiller, *Sir William Blackstone* 193 (U. N.C. Press 1938).

good, and that of the laws and institutions on which its power is founded. It was common for feudal landholders to believe that only their paternal benevolence kept the peasantry from anarchy and ruin, and for capitalists to believe that only the free operation of the market could provide enough goods and services to keep society from collapsing. It is common for managers and professionals today to believe that the interplay of economic, social, and technical forces is too complicated for any but themselves to understand. And each class has tended naturally to make and apply laws in accordance with its beliefs.

It is false consciousness that leads a whole society to believe that the ruling class continues to implement the values that led to the adoption of the laws on which its power is based, and that those values continue to be the ones most in need of being implemented. For Marxists, consciousness is false only when it leads other classes to support the hegemony of the ruling class. Members of the ruling class may have the same consciousness, but for them, it is not false. The distinction between truth and falsehood, like everything else in the Marxist system, is class-bound. But as Christians we believe in an objective reality beyond class. Any consciousness that does not conform to that reality is false for everybody.

The preferential option for the poor is the primary remedy for false consciousness. It involves, as the name implies, preferring the interests of the poor to those of other people involved in whatever project is under consideration. It is a claim for the poor and an ascesis for the ruling class. I call it an ascesis because I cannot see that strict justice requires it. If it were possible to judge evenhandedly between rich and poor, I should suppose strict justice would be satisfied. But it is common Sunday school morality that if we set out to do no more than is required of us, we will end up doing less. As a practical matter, we of the ruling class can do justice to the poor only by preferring them.

III. LIVING WITH THE OPTION

If we are to succeed in implementing a preferential option for the poor, there are a couple of points that we have to make clear at the outset. First, as I tell my students, the preferential option for the poor is not a career choice. I stress this point because I am a law teacher, and my students have immediate choices before them. If they take what they call "public interest" jobs—as prosecutors, public defenders, legal aid lawyers, or counsel to government agencies—they will serve the poor a good deal of the time, but the pay is so low that they believe they will not be able to support their families and pay off their student loans. If

they go with the major law firms that pay astronomical salaries, they will be financially secure, but they will mostly serve the rich. I tell them that the burdens of the poor are being fashioned in the major law firms faster than they can be relieved by the public interest offices. One way of opting for the poor, therefore, is to bring their claims to the attention of one's corporate clients, who are often thoughtless rather than malicious in the harm they do, or at least are willing to alleviate the harm if it is not too expensive to do so.

Next, the preferential option for the poor is not a power base. The poor, like the proletarians in Milovan Djilas's analysis, cannot take power for themselves because they lack the organization and expertise required to exercise power in a modern state. But there are many politicians with the requisite credentials ready and willing to exercise power on their behalf, or on behalf of this or that constituency among them. Such politicians easily fall prey to false consciousness. Having been elected to serve the poor, they keep believing that they are doing so, whatever compromises they accept. Worse, having come to power through the victimization of their constituents, they have a stake in that victimization continuing, a stake which may unconsciously color their attitude toward efforts to make things better. It is important for politicians, like other members of the elite, to exercise a preferential option for the poor, but those who serve poor constituencies do not necessarily have a privileged way of doing so. We can serve the poor at least as effectively by confronting and challenging power on their behalf as by exercising it on their behalf.

In the end, it seems that the preferential option for the poor is not so much a doctrine as a habit of heart and mind, a way of looking at situations to which our doctrines may apply. Nor, it seems, is there a discrete body of people who are always and everywhere the poor. The poor are those who, in a particular situation, lack something that they need for a fully human existence. It may be useful employment in one place, education or health care in another. Or in a particular transaction, the poor are those whose needs are left out of account. In a corporate merger or a plant closing, the poor are the workers who will lose their jobs. In a condominium conversion, the poor are the tenants who cannot afford to buy the converted units. When a new medicine is put on the market, the poor are the sick people who cannot afford to buy it. In the War on Drugs, the poor are the Bolivian peasants who try to eke out a modest living growing coca leaves. All these transactions involve lawyers and, as lawyers committed to the preferential option for the poor, we must look steadily at the poor people affected by them, and

keep their concerns on the table as we deploy our advocacy and negotiating skills in the affairs of our various clients.

My friend and colleague Tom Shaffer, preeminent among thinkers and writers on the lawyer-client relation, has paid a good deal of attention to the idea that the practicing lawyer is a retailer of justice.⁴³ The metaphor comes from Arthur Train's fictional lawyer, Ephraim Tutt.⁴⁴ If it is a good one—and I think it is—then I suppose academic lawyers such as myself, along with legislators and appellate judges, must be wholesalers. Unlike practicing lawyers, we are responsible for the coherence, integrity, and utility of the whole system as well as for the outcome of individual cases and transactions.

That responsibility offers important additional opportunities for false consciousness. 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. The belief sometimes takes the form of a global methodology—cost-benefit analysis—or of a jurisprudential theory—Law and Economics. In other cases it simply fuels opposition to a particular reform. If we free the slaves, they will all starve. If we give women the vote, families will be destroyed. If we make employers hire blacks, all their white workers will quit. If we pay workers a living wage, we cannot compete with manufacturers based in Guatemala or Thailand.

Against any manifestation of this argument, the preferential option for the poor prevails by virtue of the maxim *fiat justitia ruat coelum*, let justice be done though the skies fall. The maxim applies to social justice as surely as to other forms of justice. And to achieve social justice, we must prefer the poor. They are the ones who are not receiving their due under the system as it stands. They 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

43. Thomas L. Shaffer, *American Legal Ethics: Text, Readings, and Discussion Topics* 495 (Matthew Bender 1985).

44. *Id.*

could alleviate if we would.

It is our faith that our efforts will not ultimately be in vain. The Second Vatican Council tells us:

[A]fter we have obeyed the Lord, and in His Spirit nurtured on earth the values of human dignity, brotherhood and freedom, and indeed all the good fruits of our nature and enterprise, we will find them 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.⁴⁵

Jurisprudence cannot assure us of this consummation. Faith can.

45. Second Vatican Council, *supra* n. 41, at 38 (footnote omitted).

