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Lawyers and Liberations

Robert E. Rodes
Notre Dame Law School, robert.e.rodes.1@nd.edu

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ROBERT E. RODES, JR.*

The Jesuit educational tradition stresses the importance of service to the community and especially to its underprivileged members. Much of the discussion at the Ignatian Year celebration held at St. Louis University centered on the role of the law school in the Jesuit educational tradition. However, I would like to propose that this discussion take on a much larger focus.

The ideas of community service, solidarity with the poor and professionalism within an ethical context, although integral to the Jesuit tradition, are relevant to society as a whole. Furthermore, integration of these concepts into law school education is merely a starting point. The larger task is to graft these concepts onto the role of the legal profession, and indeed the entire ruling managerial elite in society.

When I thought up the title for this piece, I was thinking of liberation as in *liberation theology*. It was serendipitous that the word was put into the plural when the program was printed, because I can now begin with another liberation that has been on everyone's mind in the past few months—the liberation of Eastern Europe.

Because the events in Eastern Europe have been so exciting, so unexpected, and so ideologically congenial, we are in danger of drawing the wrong lesson from them. They do not prove that capitalism is better than Communism, or that politicians are fools to mess around with the market. I recall that Michael Novak, one of our strongest supporters of capitalism, characterized the Eastern European home of his ancestors as a place where nothing good had happened for five hundred years. Of those five hundred years, Communism was in control for a little over forty. Capitalism, in contrast, had the better part of a century to accomplish whatever good it was going to accomplish.

In fact, much of Eastern Europe remained feudal through the end of the Second World War, and, but for the Communists, much of it would be feudal still. There is no reason to suppose that the corporate giants of the western world, if left to their own devices, would have done any better by Poland or Bulgaria than they have done by southern Italy or Peru. The success of Communism has been in providing a transition from rule by a feudal aristocracy to rule by a managerial elite in countries that did not have enough capital to go through an intermediate capitalist phase.

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* Professor of Law, Notre Dame Law School

Despite the well-publicized activities of some of the manipulators of capital, the developed nations of the West are also more managerialist than capitalist now. An issue of *Business Week* has a cover story on the class of 1970 at the Harvard Business School, a number of whom are top executives in the American business world.[1] It also has a review of a book called *How Gorby got to the Top.*[2] The success stories are remarkably similar. One of the reasons the Cold War has been winding down is that it has become apparent that the same kind of people—managers and other professionals—are running things on both sides. But what has become increasingly apparent is that the people running things in Eastern Europe have been running them badly. Whether the wider society was concerned with moral, cultural, or spiritual values or just with consumer goods, the governing managerial and professional elite has not been delivering.

There is an old joke about a citizen of a Communist country who is asked how things are, and he begins recounting one misery after another, but after each item he adds, "But I can't complain." Finally, his interlocutor asks him why he keeps saying he can't complain when he has so much to complain about. He answers, "Try to complain!" The point is that in the Communist countries, the governing elite were shielded both ideologically and institutionally from being called to account for how they were doing their jobs. Marxist ideology as understood in these countries identified the Communist party—the governing elite—with the interest of the working class—and therefore of the whole society. This identification was a philosophical tenet and therefore not subject to empirical refutation. Because of it, there were no courts, no legislatures, no political processes, no economic processes by which accountability could be imposed. When the pressure for accountability got strong enough, the system had to give way. It could no longer accommodate.

Whatever lessons economists may draw from all this, I think the lesson for lawyers is fairly clear. Ultimately, the people running a society are going to be called to account. If the ideologies and institutions of accountability are not built into the system, the system will ultimately give way. T. S. Eliot, in one of his *Choruses from The Rock*, referred to the attempt to construct systems so perfect no one will have to be good.[3] There are no such systems. If the dictatorship of the proletariat envisaged by the Marxists is illusory, the invisible hand envisaged by the nineteenth century proponents of laissez faire capitalism is equally so. No system will work without someone watching how it is doing and correcting it when it is doing badly. The capitalist countries learned that some time ago; the Communist countries are learning it

1. Business Week, June 18, 1990, at 160.
2. *Id.* at 15.
3. T.S. ELIOT, 6 THE COMPLETE POEMS & PLAYS 1909-1950 at 106 (1971).

now.

So the liberation of Eastern Europe is taking the form of the imposition of accountability on the governing elite. Individual members of the elite will perhaps be punished, or at least moved into positions of obscurity, but when the smoke has cleared away, the managers and the professionals will still be there. You cannot hope to run a modern society without them. So in our own society, such liberation as we have achieved has come through imposing accountability first on capitalists, and now on managers and professionals.

We are fortunate in the West to have (if we care to use them) both ideological and institutional bases for imposing accountability on our governing elite. As a society, we have at least a residual commitment to values transcending procedure, and a willingness—sometimes tenuous to be sure—to abandon cherished practices that turn out to do more harm than good. Whether our concern is with industrial accidents, abortion, alcoholism, child support, or acid rain, we expect some kind of moral principles to be brought forward and used to criticize the people in charge.

And we have the institutions to give these expectations effect. Whatever some cynics may say about our political process, it remains relatively open, and not entirely subject to the ability to design and pay for catchy television spots. Both the electorate and their elected representatives can be reached by effective advocacy in terms of right and wrong. This is also true of the courts. If the moral arguments that persuade the judiciary are not the ones that persuade us, we may complain about the judges deciding morality instead of law, but in fact, in our legal system there is no way they can leave moral principles out of account. The intelligibility of our positive law rests on the moral judgments behind it. A judge who refused to evaluate the power wielders in our society in the light of the moral commitments of the society would be false to his oath of office.

Both ideologically and institutionally, the accountability of the power wielders in our society is heavily dependent on the integrity of the legal profession. We are part of the ruling elite, but we have a special role. We provide the bridge between the ideology and the institutions, the values and the procedures for implementing them. The political process is not complete until it has resulted in laws that we have drafted, and the judicial process does not get underway until we have been consulted. Those who seek to call the power wielders to account need our help in order to do so. Those who are called to account need our help in order to respond.

The second point probably needs more emphasis than the first. Taking our profession as a whole, we are probably better at calling other people to account than we are at either helping our clients be accountable or being accountable ourselves.

The ideologies of non-accountability are always in place, and there

has never been a lack of lawyers to accept them. Lawyers worked to shield the nineteenth century robber barons from accountability, and lawyers are working to shield managers and professional people from accountability today. Many of these lawyers were and are the top people in our profession, the role models of our law schools and the leaders of our bars.

For the most part both lawyers and clients have in good faith accepted the ideologies that have supported the ruling elite. Any such ideology must be reasonably persuasive, otherwise no elite could retain its hold on a decent society. In our country, the capitalists were supported by an ideology of harnessing technology for abundance, the creative development and efficient use of resources through the discipline of the market. The managers and professionals are supported by an ideology of effective deployment of skills for the common good. In both cases, the governing elite have been able to take credit for good intentions and for a certain amount of genuine achievement.

It is generally part of the ideological package that the governing elite should not be accountable outside their own ranks. There is a price to be paid for their achievements and they are generally not the ones who pay it. The prevailing ideologies tend to assure them that they are the only people with the hardheaded realism to see that it must be paid. Here is Macaulay, speaking in 1842 against letting poor people vote:

> The inequality with which wealth is distributed forces itself on everybody's notice. It is at once perceived by the eye. The reasons which irrefragably prove this inequality to be necessary to the well-being of all classes are not equally obvious. . . . I would not yield to the importunity of multitudes who, exasperated by suffering and blinded by ignorance, demand with wild vehemence the liberty to destroy themselves.[4]

In the nineteenth century, the price of order and prosperity under capitalism was the grinding poverty of a substantial part of the working class. In our time, the price under managerialism is many people's lack of opportunity for creative or productive activity. In both cases, the elite who have derived material and psychic rewards from systems that send other people down the tubes have consoled themselves by saying that the casualties are the inevitable result of a basically beneficent system. You can't make an omelet without breaking eggs. And you can't get the eggs to understand.

Lawyers' support of the governing elite has always been reinforced by their own particular ideology—that of disinterested advocacy. We are constantly telling each other that everyone is entitled to have his

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4. Macanlay, *The People's Charter*, in SPEECHES ON POLITICS & LITERATURE, 189, 196 (1936).

case effectively presented, that lawyers are not judges but advocates, and that if the law gives someone a right it is not for the lawyer to take it away by denying effective representation. With the growth of moral relativism, we often continue along this line of reasoning by saying that people have no business imposing their moral standards on other people—*a fortiori* lawyers have no business doing so.

In addition to keeping lawyers from encouraging accountability on the part of their clients, this rationale tends to keep them from being accountable themselves. Lawyers, the argument runs, are not responsible for what they help their clients do. They are acting for their clients, and acting in accordance with the law. The responsibility is that of the clients or that of the legislature. Note that the upshot of this rationale is that we shield our clients from responsibility without taking any ourselves. The client can hide behind the lawyer and the lawyer can hide behind the ethics of advocacy. That way, both lawyer and client can be more hard-hearted people—in fact, worse people—than either would be acting alone.

Now, what is the accountability that these ideologies resist? Naturally, accountability as a legal or political principle requires institutions explicitly empowered to demand and receive an account. If this were a piece about law or politics, I would turn at this point to what institutions of this kind we have and how we can set up better ones. However, the subject here is ethics, and we must consider what accountability means as a moral principle.

I think it means mainly giving up the ideologies that tell us that the ordinary decencies of human encounter do not apply when we are engaged in our managerial or professional tasks. As Atticus Finch puts it, "I can't live one way in town and another way in my home."[5] Elaborating on this statement of Atticus's, Tom Shaffer describes the moral situation in Atticus's home town of Maycomb, Alabama:

> The town understood and believed, as Atticus did, that there was not one set of morals for official life and another set for life at home. A leader there, whether he wielded authority formally, as the Sheriff did, or informally, as Atticus did, could not escape the public and even official burden of his relationships; he could only choose whether or not to be responsible in his relationships.[6]

When it comes to moral principles, being accountable and being responsible would seem to amount to about the same thing.

This brings me to the theological liberation—or liberations—that I originally had in mind. Before God, before our neighbors, and before our own consciences, we are free to be responsible in this way. The

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5. H. LEE, TO KILL A MOCKINGBIRD (1960) *quoted in* Shaffer, *The Moral Theology of Atticus Finch*, 42 U. PITT. L. REV. 181 at 199 (1981).

6. *Id.*

good news of Christianity is freedom from sin and death, and, as a necessary corollary, freedom from oppression. For the victims of our institutions, that means a firm rejection of every claim that their victimization is inevitable. Things do not have to be this way. We do not have to let anybody go down the tube. If our system is pushing them down, we are free to reform it or to replace it with another.

For us who are beneficiaries of the same institutions, the good news is freedom from being oppressors. We do not have to live on the flip side of someone else's misery—at least, we do not have to be content with living there. We are free to practice social justice by supporting a reform of the institutions by which others are impoverished and we are enriched. At the same time, we are free as individuals to deal decently with our neighbors within the constraints imposed by the institutions now in place.

And for us who are lawyers, the good news is that we are free to bear witness to this freedom before our clients and to help them implement it. Just as our clients do not have to deal oppressively, we do not have to encourage them to do so, or to shield them from responsibility when they do. We do not have to be worse people in handling our clients' affairs than we are in handling our own. And our clients do not have to be worse people when they have lawyers representing them than they are when they are acting in person.

The practice by which we witness these freedoms and live out these liberations in a flawed community is the preferential option for the poor. I think for us lawyers a preferential option for the poor involves looking at each transaction we engage in with our hearts and minds clearly focused on the people at the bottom of the social scale or the people nobody notices—in a plant closing case, the workers; in a divorce case, the middle aged housewife with no marketable skills; in a slum clearance case, the slum dwellers; in a drug importation case, the Bolivian peasant who ekes out a marginal living growing coca leaves; in an abortion case, the unborn child. We need this focus to avoid the sellout traps that are spread out before us—to see through the rationalizations and denounce them, to reject the claims of inevitability and bear witness to freedom.

Note that the preferential option for the poor is neither an identification with them nor a sharing of their condition. Gustavo Gutierrez, the liberation theologian, points out when he speaks of this option that he cannot be one of the poor because to be poor is to be insignificant, and a priest and theologian such as he is cannot be insignificant. But a lawyer cannot be insignificant any more than a priest and theologian can. Because we are lawyers, we have useful skills and positions of importance in society. It would be irresponsible to not use those skills and those positions for whatever good we can do with them. Granted, God calls some people, even lawyers, to a state of voluntary poverty. But voluntary poverty is not the condition of the poor.

Note also that the preferential option for the poor is an ascesis, an attitude of heart and mind. It is not a career choice. It has nothing to do with whether you work for a public interest law firm, or whether you put in a couple of evenings a week at a legal aid office after a hard day in your corporate practice. The legal burdens of the poor are being fashioned in the corporate law firms faster than they can be alleviated in the public interest offices. If you spend the morning putting through a corporate takeover that abolishes a few thousand jobs, you will not make up for it by spending the evening in a battered women's shelter dealing with the legal problems of a woman whose unemployed husband has taken out his frustrations in beating her up.

In saying this, my point is not to detract from legal aid and public interest work, or from pro bono work generally. They are important career options and we badly need more people to take them up. But they are not the same as a preferential option for the poor. That option can and should be exercised any time in any office. If you keep your heart and mind focused on the poor, you have a good chance of turning your clients' hearts and minds in the same direction. At least, you will not feel you have to stand in the client's way.

To show what I mean by standing in the client's way, let me read this item. It appeared in an article on family history in our Notre Dame Magazine:

> The lawyer asks the man with the foreclosure notice crumpled in his right fist to please sit down, but the man, my grandfather, declines. Once more he explains that he's an ironworker and he broke two ribs and bruised a lung on the first job he's had in seven months, but as soon as he returns to work he'll resume payments on the house. Who, he asks once more, is he actually buying the house from? Again the lawyer explains he's not at liberty to reveal whose estate he's managing and he regrets having to foreclose. Once more my grandfather reminds the lawyer that he has eight children and nowhere else to live. Perhaps the lawyer feels safe with an injured man because he stands up and breaks the gelid politeness by telling my grandfather he should have put away money for a time like this; then he asks him to leave and not return without two months of mortgage payments.
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> On his way to the lawyer's downtown Buffalo office, my grandfather had passed on the streets the Great Depression beggars, ragged wandering families, men selling pencils. Suddenly he's straddling the lawyer's chest, his hands squeezing the lawyer's neck, and the lawyer, face turning blue and arms and legs thrashing, is trying to spit out a name and address.
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> The next confrontation is with a butler, who informs my grandfather that Madam does not wish to be disturbed. Then she appears, an elderly woman in a wheelchair, and asks what the problem might be. He removes his hat, steps past the butler and quietly explains. She had no idea, she says; of course he and his family can keep their home. She offers him a seat in the plush parlor, which he accepts,

and directs the butler to push her to the telephone.

Before leaving, my grandfather asks, "and, Ma'am, how many children did you raise?"[7]

What is central to this story is the woman's statement that she had no idea. If your client has no idea of the human consequences of what you are doing for her, the representation has gotten off on the wrong foot. And the reason it has gotten off on the wrong foot is probably that you assumed without asking that your client is less morally sensitive than you are. Tom Shaffer, in a piece called "The Moral Theology of the Law Firm"[8] (a sequel to "The Moral Theology of Atticus Finch," which I quoted earlier on) says, "Caring for clients means caring for them as moral persons, not merely as consumers of expert, even artistic, services." This is a theme that has run through most of his work on professional ethics. One of the liberations we have to witness is that we are free to care for our clients in this way.

Granted, not all clients will appreciate this kind of care. In some cases, they will take their business elsewhere. In others, we may send them elsewhere, because we cannot work out with them an agenda for the representation that is morally acceptable both to them and to us. But clients as a group are not morally inferior to lawyers as a group. If we are open to doing the right thing, there is no reason to suppose that they will be any less so.

7. Phillips, *Family Man,* 18 Notre Dame Magazine, No. 1, p. 39 (1989).

8. Shaffer, *Henry Knox and the Moral Theology of Law Firms,* 38 WASH. AND LEE L. REV. 347 (1981).