1994

Pilgrim Law

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

PILGRIM LAW*

*Robert E. Rodes, Jr.***

A people's laws are deeply imbedded in its culture. They embody its collective moral reflection, its common understanding of the terms on which human beings are to live together, its customs, its historical experience, and its aspirations for the future. It is perhaps to be expected that Americans should enshrine their constitutional documents, build courthouses like temples, deploy their laws with ruthless practicality, and not take kindly to the suggestion that their laws are less practical than they think. Or that Italians should maintain a legal system like an old palazzo, with imposing staircases you can lose your breath climbing, bizarre opening hours, a wing or two closed for restoration, and a few kindly people who will sometimes show you where the elevator or the back door is hidden.

It is the cultural range of the subject matter that makes the study of jurisprudence interesting. There are philosophies of law, some good, some bad, some indifferent, but philosophy does not exhaust the subject of jurisprudence, because major jurisprudential questions (for example, what is a corporation) are not philosophical. There are theologies of law also, but they do not exhaust the subject either. As Christopher St. Germain had a sixteenth century theologian point out to a law student, the law of God is not concerned with land titles.[1] Granted, it would be possible to distribute land titles in such a way as to offend the law of God, but the point stands nevertheless. It would also be possible to build a theologically unacceptable house (say a firetrap), but that does not make architecture a branch of theology.

Historians, anthropologists, sociologists, and economists have also made law into grist for their respective mills, but they too have failed to produce exhaustive treatments of the subject. Take these three questions: should the civil jury be abolished; should a husband be liable for rape of his wife; should there be a steeply gradu-

---

* This essay, with a few modifications, will be the first chapter of a book of the same name currently in preparation.

** Professor of Law, University of Notre Dame Law School.

1. Christopher St. Germain, *Doctor and Student* Dialogue I, chap xxi. One edition of this work is T.F.T. Plucknett and J.L Barton, eds, *St. Germain's Doctor and Student* (Selden Society, 1974).

ated income tax. No one of the listed disciplines is capable of answering all three. But an adequate system of jurisprudence will have to answer them.

Anything people do will eventually bring some of them into contact with the law and the law with them. Any adequate legal system guides the whole ongoing life of the community it serves. But it will not do to say that law is coextensive with the whole of life and let it go at that. We deploy professional skills that are not common to all who share our culture (that is why we have to go to school to learn them), and that are to a considerable extent transferable from one culture to another (as was shown by a few Roman bishops in England in the seventh century, and by a few English lawyers in Asia and Africa in more recent times). The foundation task of jurisprudence is to define those skills and the principles for their proper and effective deployment.

There seem to be two elements that distinguish law, the subject matter of jurisprudence and of the skills in question, from other manifestations of the culture in which it operates. One is that law is in some way chosen; the other is that power is deployed in support ("enforcement") of it. As H.L.A. Hart has pointed out, we do not *decide* what shall be right and what shall be wrong as we decide what shall or shall not be legal.[2] We may look to our moral judgments to decide what laws we shall make, and we may include among our moral principles one that says it is right to obey the law and wrong not to. But whether shooting rabbits or drinking vodka is right or wrong is something we try to discern, not to decide. Nor do we decide on our historical experience, or on our customs except to the extent that we try to change them by making laws. 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 for the ordering of our life together, we draw on the skills of the legal profession.

This is the case whether or not we deploy power in aid of the principles we choose. But it is true a fortiori if we do. The exercise of power is subject to moral and customary principles distinct from the ones on behalf of which we exercise it, and those principles are particularly appropriate for the legal profession to learn and apply.

The work of the legal profession, the whole enterprise of making, analyzing, and applying laws, provides a kind of bridge be-

2. H.L.A. Hart, *The Concept of Law*, 171-73 (Oxford U Press, 1961).

tween the society we would like to be and the society we are, between our values and their realization. The term "value" has had so frequent and so fuzzy usage in recent decades that I am reluctant to adopt it. But I have not been able to come up with a satisfactory alternative. The legal enterprise is concerned with a great variety of things that people would like to have happen—the restoration of Christianity in Eastern Europe, the survival of elephants on the Serengeti, affordable automobile insurance in California, the suppression of subliminal satanism on MTV, the introduction of the works of Kate Chopin into the local high school curriculum—things that often have nothing much in common except that someone is trying to use legal dispositions to bring them about. It is the whole body of these desiderata that I have in mind when I refer to values.

Of course, in an open society, different people will offer different values for the law to implement. My own proposals are derived from a general Christian understanding of human beings and their affairs, and from what seem to me to be philosophical and cultural corollaries of such an understanding. Despite the development of religious pluralism in recent times, I believe Christianity can still offer an agenda for those who are not Christians. On this point, I have relied heavily on the Second Vatican Council's teaching document *Gaudium et Spes*, and on the development of the teaching of that document in the theology of liberation, and in the social teachings of the popes and of various national episcopal conferences.[3] All of these suggest that the message of the Gospel must be presented in dialogue with the world, and that Christians fulfill their mission by affirming whatever is fully human in human life.

The values arrived at in this way come in different categories. Some are permanent and universal (they are often called transhistorical and transcultural, usually by people who do not believe in them), while others belong to a particular historical situation or a particular culture. The permanent and universal values are often presented systematically under the name of natural law. The claim is that they are common to all people everywhere. To make laws that disregard them is all of a piece with making six-fingered mittens or wagons with square wheels. Whether the principles of natural law can be discovered by unaided philosophical reflection, or

3. *Gaudium et Spes* and a large selection of other documents are gathered in D.J. O'Brien and T.A. Shannon, eds, *Renewing the Earth* (Image Books, 1977). The premiere work of liberation theology is Gustavo Gutierrez, *A Theology of Liberation* (Orbis, 1973).

whether some assistance from divine revelation is needed has been much debated among proponents of the doctrine. But either way they rest primarily on shared intuitions of what it means to be a human being.

The historical and cultural values in the law have engaged the attention of a good many theorists. The most important of them have been connected with the historical school or the sociological school of jurisprudence. The former, a product of nineteenth century German romanticism, attributes laws to a *Volksgeist*, the spirit of a people. The latter, coming out of the social science of the late nineteenth and early twentieth centuries, and carrying the immense prestige of Roscoe Pound, sees law as a way of adjusting with the least possible friction or waste the competing interests that appear in a particular condition of society. The two approaches, though they may emphasize different values in a particular situation, are not inherently inconsistent. A people does not have to include either friction or waste as part of its spiritual heritage. Nor is there inconsistency between either approach and the perception that some values transcend both history and culture. If we let our thoughts and our sympathies range through different times and places, we will find both ways in which we differ from other people and things we have in common with them.

Some of the values the law pursues are personal: they call for realization in the lives of individuals. Others are economic or social, to be realized in the ordering of a whole society. On the personal side, traditional writers on natural law have called for promoting virtue and suppressing vice, or for commanding what is right and forbidding what is wrong. More recent formulations have set goals of human happiness, flourishing, or fulfillment. Other schools of thought have been more concerned with freedom or with the pursuit (as distinguished from the achievement) of happiness. While it is possible to carry one or another of these formulations to such an extreme as to make it inconsistent with the others, I think they can best be understood as complementary. They express in various ways the requirements for a fully human existence.

The traditional economic and social value in the law is the common good, i.e., the sum total of those good things such as clean air or paved and lit streets that must be in place for everyone in the community if anyone is to have them. Modern writers have often preferred other terms. Jeremy Bentham proposed utility, which is often characterized as the greatest good for the greatest number,

although greatest wish fulfillment might be more accurate.[4] Roscoe Pound, as we have seen, called for distributing resources to produce maximum satisfaction of wants with minimum friction and waste.[5] The contemporary law-and-economics school calls for "wealth maximization," which seems to be a matter of putting everything into the hands of those who set the highest price on it. Other modern writers look for peace, security, or some kind of welfare. All these values have something to be said for them, but I do not believe that any of them can be accepted as telling the whole story.

Legal dilemmas are often presented as clashes between economic or social values on the one hand and personal values on the other. Not only is this true under revolutionary or dictatorial regimes that seem to be founded on the maxim that you cannot make an omelet without breaking eggs; there are many examples in our own system as well. We are told that to secure full employment we must deprive workers of minimum wage laws and laws for the protection of their health. Then we are told that to combat inflation we must deprive them of laws for the protection of their jobs. The dilemmas that these claims present are very real, but the proposed dichotomy between economic or social values on the one hand and personal values on the other is spurious. Whatever economic or social values deserve to be implemented must be in some way ancillary to personal ones. In the long run, the only right ordering of society is one that makes it possible for individual human beings to live as they are meant to live. For a Christian, of course, there is a longer run in which both personal and economic or social values will find a single consummation in the Kingdom of God.

Whatever values the law pursues, it has two ways of pursuing them, and they exist in some tension. We can call them instrumental and didactic. The law operates instrumentally when it affects people's behavior by deploying incentives and disincentives. These can be simple and straightforward, rewards for good behavior and punishments for bad, or they can be complicated and indirect, as when we try to discourage the poaching of alligators by forbidding the sale of alligator bags or when we try to encourage investment by lowering taxes.

4. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, Chapter II "Of the Principle of Utility" in Clarence Morris, ed, *The Great Legal Philosophers* 261, 262-3 (U of Pennsylvania Press, 1959).

5. Roscoe Pound, *Social Control Through Law*, 65 (Yale U Press, 1992).

The didactic operation of the law is simply a matter of witnessing the moral standards, the moral reflection, and the social customs of the community. While we do not generally regard our lawmakers as wiser than we or morally superior to us, most of us are prepared to accept the law as embodying a mainstream consensus about how people ought to live, or as exercising leadership in bringing such a consensus about. The law plays a role that some of the political theologians refer to as consciousness raising. And even without raised consciousness we prefer, other things being equal, to obey the law and think of ourselves as law-abiding citizens.

In some cases the instrumental and didactic operations of the law work harmoniously together to the same end. The classic example is in the area of civil rights. The same statutes and judicial decisions that produced injunctions, contempt citations, reinstatement with back pay, and cease and desist orders made people who practiced discrimination with impunity ashamed of themselves, or at least defensive, made victims of discrimination assertive, encouraged people who believed in equality to make their presence felt, and brought home the moral objections to discrimination to people who had not previously thought about the matter one way or the other.

In other areas, and perhaps more common ones, the two sets of operations clash, producing serious professional dilemmas and inconclusive political debates. For instance, in a famous entrapment case, Felix Frankfurter weighed the catching and punishing of particular criminals against "public confidence in the fair and honorable administration of justice, upon which ultimately depends the rule of law,"[6] and found the latter, the didactic, concern more weighty than the former, the instrumental. On the other hand, when it comes to sex and drugs, there is a good deal of feeling that didactic considerations in favor of chastity and against drug abuse should give way to instrumental ones of preventing unwanted pregnancy, venereal disease, and AIDS. Accordingly, there is considerable support for free condoms and sterile needles, as well as for compulsory sex education, despite the resulting impairment of the moral witness of the law.

It is possible to argue that either of these operations of the law is a mere instance of the other: either moral witness is an additional

6. *Sherman v US*, 356 US 369, 380 (1957) (Frankfurter concurring).

weapon in the arsenal of incentives and disincentives, or the deployment of incentives and disincentives is one of a number of forms of moral witness. As the two arguments are about equally persuasive, they tend to cancel each other out. Accepting one or the other offers a certain philosophical convenience, but either of them leads to an impoverished jurisprudence. To refer the whole enterprise to its didactic function tends to stifle creativity in the enforcement process. Once you have commanded what is right and forbidden what is wrong, and laid on the stocks and the lash for lesser infractions, the ax and the gibbet for greater ones, you can rest content with your fulfillment of the practical responsibilities of your profession. You can devote your intellectual energies to refining your values and their application to more and more complicated fact patterns, without regard to their realization in the world. On the other hand, referring everything to the instrumental function tends to obfuscate the applicable values. You tend to find more and more sophisticated ways of accomplishing things, while paying less and less attention to what it is you are trying to accomplish. The end result is apt to be a legal system that is all realizations and no values.

Classical and medieval legal scholarship were particularly subject to the first of these reductive perils. The late fifth-century Theodosian Code bears witness to the last days of the Roman Empire,[7] when the supreme authority could find nothing better to do with the legal system than sit in the midst of the growing chaos issuing more and more commands that fewer and fewer people obeyed. To my mind, a sort of legal nadir was reached when the Emperor, discovering that the burdens of municipal magistrates had become so great that they were running away, ordered troops to find them and bring them back.[8] It evidently did not occur to him or his legal advisers to find ways to make the job more attractive.

This kind of unreality was carried over into medieval Roman and canon law scholarship.[9] The Romanists organized and applied the enactments of their fifth-century predecessors without regard to who if anyone was going to enforce them. The canonists applied their enactments *ipso jure* if, as was often the case, they thought no one would apply them in fact. The result was that both systems

7. Clyde Pharr, ed and tr, *The Theodosian Code* (Princeton U Press, 1952).

8. Id, 12:1:16.

9. See my *Ecclesiastical Administration in Medieval England*, 68-72 (Notre Dame Press, 1977).

offered elegantly elaborated sets of values with severely attenuated realizations—a state of affairs that modern historians have found more unacceptable than medieval lawyers seem to have.

The concentration on values at the expense of their realization has not been limited to Roman and medieval times. Macaulay's description of the effect of Puritan legislation on Restoration drama indicates that similar forces were at work in the time of which he writes.[10] I can attest to similar attitudes with similar results among those who sought—sometimes successfully—to give legislative effect to Roman Catholic natural law doctrines during the 1950s. Campaigns over contraception in Massachusetts and divorce in New York come readily to mind. In neither case was there much attention paid to the possibility that the immorality of a practice might not be a fully sufficient reason for a law forbidding it, or that the practical results of a prohibition ought to be taken into account before the prohibition is enacted. Catholics, of course, were not alone in taking this attitude: some Protestants approached the sale and consumption of alcohol in the same way.

But most modern legal thought falls into the opposite error. It is rigorously instrumentalist. It concentrates on realizations with only token regard for the values being realized. It is dominated by technical metaphors such as Roscoe Pound's "social engineering."[11] It licenses the deployment of more and more sophisticated legal technologies with less and less regard for what they are supposed to be accomplishing. Some authors happily characterize this state of affairs as the "end of ideology." Others content themselves with simple ideologies of giving as many people as possible whatever they want, or, under some doctrines, whatever they want and can pay for. But whether you accept one of these ideologies or opt for no ideology at all, the end result of your technical skill is apt to be increasing legal support for consumerism, the one value whose hold on our people it does not take much philosophical reflection to discern.

My point is this. Because law provides a bridge between our values and their realization, an adequate account of it must be the product of reflection on both. And for such reflection we must maintain some balance between the didactic and the instrumental operations of the law. To reduce the whole enterprise to its didac-

10. Thomas Babington Macaulay, "Comic Dramatists of the Restoration," in Lady Trevelyan, ed, *The Miscellaneous Works*, 109, 121, 126 (Harper, 1880).

11. Pound, *Social Control* at 64 (cited in note 5).

tic 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.

But a balanced reflection on the whole enterprise will not lead us to a philosophically or theologically compelling account: it will lead us to a mystery. It will show us that the values are open-ended and the realizations are intractable. No more than love, art, education, hospitality, or any other major human activity can law be assigned a specific set of values and held to the task of realizing them. Law is one of the major forms of human encounter and common life. The end of law is no less than the end of humankind. And we are not to know our end, nor are we to achieve it by our own devices.

Granted, if we accept, as I do, a Christian theology of origins, we will recognize at the roots of our consciousness a lingering intuition of a primordial state of innocence from which we have fallen, and to which we would like to return. We will believe also that we have knowledge of that state by revelation, and that it is partly accessible, at least in theory, to philosophical reflection. This is the state envisaged by doctrines of natural law.

But 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. We are called, both individually and collectively, to a new state of being, one both foreign to our experience and foreign to our thought. Since what we have lost is a requirement of our nature, it must be included in some way in what we are to find. What our eschatology envisions is a radical change in our original condition, yet one in which our original condition is respected and affirmed. It follows that natural law is a part, but only a part, of an account of the values to be realized in law, and that the rest of the account is radically unknowable.

That we cannot know where we are supposed to be going might seem sufficient in itself to establish that we cannot know how to get there. Still, it is important to point out also that by elementary Christian doctrine we cannot hope to bring about our personal salvation by our personal efforts and we cannot hope to bring about the Kingdom of God by bringing history under control. Our legal technologies and the schools of jurisprudence based on them

do not merely participate in the inadequacy of our value systems: they suffer from inadequacies of their own. Like natural law doctrines, they have their uses, but they cannot tell the whole story.

The foundation of a Christian jurisprudence, then, is the understanding that we are called to pursue an unknown end by inefficacious means. Because the pursuit has often been likened to a pilgrimage, I will refer to its jurisprudential consequences as pilgrim law. The principles of this pilgrim law should be regarded as complementary to the more familiar principles of natural law and sociological jurisprudence, rather than opposed to them. Despite the uncertainty of both ends and means, reflection on the pilgrimage will show us what some of the principles are.

First, the pilgrimage, along with its legal consequences, is intrinsic to the human condition. It does not separate Christians in particular, or even believers in general, from a mass population headed in some other direction. As the Second Vatican Council puts it, the joys, the hopes, the griefs, and the anxieties of people in general are the joys, the hopes, the griefs and the anxieties of the followers of Christ.[12] Laws to celebrate the joys, fulfill the hopes, assuage the griefs, and relieve the anxieties may be Christian in their inspiration, but they are universal in their concern.

Second, while we are not to know the end of our—and everyone's—pilgrimage, we can understand the general direction well enough to recognize an obstacle when we see one. In deploying our professional skills to avoid or eliminate such obstacles, we are not assuring any final consummation, for as long as history continues other obstacles will arise to take their place. But the work is a practical way of loving our neighbors. God calls us to it and blesses it.

Third, the obstacles in question are not always merely personal. They are often built into our economic, social, and political institutions. To the extent that we are part of the society that maintains these institutions, we are in some part responsible for them, and doing what we can to reform or dismantle them is an act of justice to people whose God-given destiny is impeded by them. Doing what we can is often a matter of making or applying laws in ways that our professional training has shown us. It is here that pilgrim law complements the traditional doctrines of sociological jurisprudence, providing a deeper awareness of the goals of the

12. *Gaudium et Spes*, ¶ 1.

legal enterprise, and a more realistic awareness of what the legal enterprise can accomplish.

Fourth, the human condition is beset by the tragic failures of individuals and communities to achieve the high purposes to which God has called them, or even to persevere in the pursuit of their God-given ends. A Christian jurisprudence, therefore, must cope with tragedy. It must bear witness to redemption, and, as far as possible, implement it. It is here that pilgrim law provides an essential complement to natural law, which is prelapsarian in its outlook, and has no answer to anyone's failure to live up to what it prescribes.

Finally, pilgrim law supports the open-endedness of the pilgrimage itself. It 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. Here, of course, pilgrim law intersects with the Enlightenment understanding of freedom, as it is embodied in our familiar constitutional doctrines.

But it also responds to a deeper understanding of freedom. In a good deal of medieval thought, freedom is seen as the power of a created being to move without hindrance in the way God intended. This line of thought seems to underlie a number of modern theological formulations both Jewish and Christian, including Gustavo Gutierrez's idea of liberation as the unfolding capacity to love God and neighbor. Formulations of this kind suggest that freedom to pursue the pilgrimage is basic to the whole scope of what I have described as pilgrim law. I see pilgrim law, accordingly, as the fundamental jurisprudential manifestation of the theology of liberation.

It remains of course to situate this particular manifestation within the general framework of a Christian jurisprudence. In doing so, I shall no doubt increase my debt, already substantial, to John Noonan's profound and continuing Christian reflection on the alliance between law and history. I had hoped to illustrate with a quotation, but I find that after thirty years of exposure my appropriation of his thought has gone too far to submit to the discipline of chapter and verse. I will, however, give him the last word on what I like to think is our common undertaking:

> The central problem, I think, of the legal enterprise is the relation of love to power.[13]

That is the problem whose solution awaits us at the end of our pilgrimage.

13. John T. Noonan, Jr., *Persons and Masks of the Law*, xii (Farrar, Strauss, and Giroux, 1976).