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ERASTIAN AND HIGH CHURCH APPROACHES TO THE LAW: THE JURISPRUDENTIAL CATEGORIES OF ROBERT E. RODES, JR.

*M. Cathleen Kaveny**

INTRODUCTION

It is a great honor for me to have been asked to contribute to this issue of the *Journal of Law and Religion* focusing on the work of my colleague and friend, Robert E. Rodes, Jr. In June 2006, Professor Rodes celebrated his fiftieth anniversary as a member of the faculty of Notre Dame Law School. His long career has marked him as a founding father of interdisciplinary scholarship at the intersection of faith, law, and morality—the very sort of scholarship which this journal is dedicated to fostering and preserving.

The topics that Professor Rodes has considered over the years are wide-ranging; for example, he has written insightfully on both sexual ethics¹ and economic justice.² The methods that he has used are diverse; he has deftly deployed the tools of historiography³ as well as logic.⁴ Moreover, the normative stances that he has taken defy location on the normal liberal/conservative spectrum as it plays itself out in American political life. He has argued in favor of a legal system that would encourage a more traditional sexual morality, while emphasizing the need to compassionately accommodate those whose lives do not

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1. See e.g. Robert E. Rodes, Jr., *On Law and Chastity* (Carolina Academic Press 2006).

2. See e.g. Robert E. Rodes, Jr., *Law, History, and the Option for the Poor*, 6 LOGOS (USA) 61 (1985).

3. See e.g. Robert E. Rodes, Jr., *This House I Have Built: A Study of the Legal History of Establishment in England* (series) (consisting of 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)) [hereinafter Rodes, *This House I have Built*].

4. See e.g. Robert E. Rodes, Jr. & Howard Pospesel, *Premises and Conclusions: Symbolic Logic for Legal Analysis* (Prentice Hall 1997); Robert E. Rodes, Jr., *De Re and De Dicto*, 73 Notre Dame L. Rev. 627 (1998).

conform to its strictures.⁵ He has also maintained the importance of assessing social and economic structures from the perspective of the most marginalized members of the society, without succumbing to romantic illusions that technology, progress, or the dynamism of history will eliminate class stratification and its ensuing divisions of humanity into the “haves” and the “have nots.”⁶ His writings at the intersection of law and religion reflect neither the Democratic Party nor the Republican Party at prayer—and neither party at a town hall meeting, for that matter.

Professor Rodes’s work is holistic in that it stems from an integrated vision of the nature and purpose of human flourishing, a coherent account of why human beings frequently impede their own flourishing and that of others, and a realistic understanding of both the potential and limitations of human institutions, including the institutions created and sustained by human law in all of its forms and manifestations. The most succinct expression of the metaphysical world view underlying his writings can be found in the Nicene Creed,⁷ which is professed by most Christian denominations, including the Roman Catholic community to which Rodes belongs.⁸ Rodes situates his

5. See e.g. Rodes, *On Law and Chastity*, *supra* n. 1.

6. See e.g. Robert E. Rodes, Jr., *In Defense of Liberation Theology*, 170 *Am. J.* 18 (Feb. 5, 1994).

7. For more information, see T. Ryan, *Nicene Creed*, in *New Catholic Encyclopedia* vol. 10, 354 (Bernard L. Marthaler et al. eds., 2d ed., Thomson/Gale 2003).

8. Roman Catholics generally recite the Nicene Creed during the Liturgy of the Word in Sunday Mass. The most commonly used text is as follows:

NICENE CREED:

We believe in one God, the Father, the Almighty,
 maker of heaven and earth, of all that is seen and unseen.
 We believe in one Lord, Jesus Christ, the only Son of God,
 eternally begotten of the Father,
 God from God, Light from Light, true God from true God,
 begotten, not made, one in Being with the Father.
 Through him all things were made.
 For us men and for our salvation he came down from heaven:
 by the power of the Holy Spirit
 he was born of the Virgin Mary, and became man.
 For our sake he was crucified under Pontius Pilate;
 he suffered, died, and was buried.
 On the third day he rose again in fulfillment of the Scriptures;
 he ascended into heaven and is seated at the right hand of the Father.
 He will come again in glory to judge the living and the dead,
 and his kingdom will have no end.
 We believe in the Holy Spirit, the Lord, the giver of life,
 who proceeds from the Father and the Son.
 With the Father and the Son he is worshiped and glorified.
 He has spoken through the Prophets.
 We believe in one holy catholic and apostolic Church.

particular vocation as a lawyer, a scholar, and a Catholic layman within this broad understanding of reality and the place of humanity within it.

It is important not to underestimate the complexity and nuance with which Professor Rodes draws upon various aspects of his integrated vocation to further our common scholarly reflection. At a 1995 symposium organized to discuss his work at the University of Notre Dame, he reflected upon the thrust of his scholarly work:

My interest is that of a Christian looking at the role of the church in society, rather than a student of society looking at the effect of the church on society. . . . When church and society part company, I go with the church, and not with society.⁹

One who reads this quotation out of context, without adequate acquaintance with Professor Rodes's work might be tempted to think that it was dedicated to advancing the interests and perspectives of the institutional Church, as it understands them, in a secular environment that is at best indifferent and at worst hostile to religious truths. Nothing could be further from the truth. Rodes understands that the God who created us and the God who redeems us in Jesus Christ are one and the same. He therefore recognizes that the desire to know and love God, and to serve those made in God's image and likeness, is not limited by the boundaries of the institutional Church, although the institutional church bears special responsibility for proclaiming Christ's teaching and making available his sacraments until the end of time.

Moreover, Professor Rodes realizes that neither Church nor secular society has been blessed with a perfect blueprint of what is to be done in building up the kingdom of God, which will be fully realized only at the end of time, in God's own time and manner, and by God's own grace. In fact, Rodes's model of the Christian life is that of a *pilgrimage* toward the kingdom of God, a pilgrimage on which "we are called to pursue an unknown end by inefficacious means."¹⁰ It is also his model of life in general; he believes that "the pilgrimage . . . is intrinsic to the human condition. It does not separate Christians in particular, or even believers

We acknowledge one baptism for the forgiveness of sins.
We look for the resurrection of the dead,
and the life of the world to come. [Amen.]

Nicene Creed, <http://catholic-resources.org/ChurchDocs/Mass.htm#Word> (accessed Mar. 23, 2007).

9. Thomas L. Shaffer, *The Christian Jurisprudence of Robert E. Rodes, Jr.*, 73 *Notre Dame L. Rev.* 737, 738 (1998) (quoting a recorded conversation of the symposium on Mar. 25, 1995).

10. Robert E. Rodes, Jr., *Pilgrim Law* 11 (U. Notre Dame Press 1998) [hereinafter Rodes, *Pilgrim Law*].

in general, from a mass population headed in some other direction."¹¹ Rodes's Christian faith in God's ultimate grace and mercy toward humanity is complemented by a healthy humility regarding the mystery of God's ways. That humility leads him to recognize and honor insight, compassion, and wisdom where he finds it, both in the secular world and in the Church. It also leads him to apply his own insight, compassion, and wisdom wherever it is needed, both for the secular world and for the church.¹²

If we look at Rodes's body of work as a whole, we can divide it into three basic groups. First, he has investigated the relationship of the institutional Church and the broader society in a systematic and detailed way. Most impressively, he has produced a massive and detailed historical study of the established Church in England, which has given him a tremendous factual background upon which to draw in formulating his own normative reflections on the relationship of the Church and society, particularly as that relationship is instantiated through the law, both civil and canonical.¹³ In my judgment, this historical study is immensely important for understanding his more theoretical and explicitly normative work, because it reinforced his understanding that human relationships, human events, and human causality are complicated and frequently ambiguous. It also means that the categories he develops in his normative work have grown inductively as well as deductively.

Second, Rodes has devoted a great deal of time and energy to the task of bringing the perspective of Christian anthropology and eschatology to bear upon the legal enterprise. The fullest example of his work falling into this category is his book, *Pilgrim Law*,¹⁴ which is the most comprehensive articulation of his Christian jurisprudence. He writes, "[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."¹⁵ The five principles of pilgrim law, I believe, illuminate Professor Rodes's perspective on the course of human life more broadly. First, as I noted

11. *Id.* at 11-12.

12. For example, Rodes's understanding of the way in which social structures, including legal structures, ought to incorporate an "option for the poor" is deeply influenced by socialist political philosophy, see Milovan Djilas, *The New Class: An Analysis of the Communist State* (Praeger 1957), as well as by Christian liberation theology, see Gustavo Gutierrez, *A Theology of Liberation: History, Politics, and Salvation* (Orbis Books 1973).

13. Rodes, *supra* n. 3.

14. Rodes, *Pilgrim Law*, *supra* n. 10.

15. *Id.* at 11.

above, he tells us that “the pilgrimage, along with its legal consequences, is intrinsic to the human condition.”¹⁶ Second, it is easier to identify road blocks than final destinations. “[W]hile 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.”¹⁷ Third, obstacles can be both personal and social; “[t]hey are often built into our economic, social, and political institutions.”¹⁸ Fourth, “[a] Christian jurisprudence . . . must cope with tragedy. It must bear witness to redemption, and, as far as possible, further it.”¹⁹ Rodes tells us that “[i]t 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.”²⁰ Fifth, and 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.²¹

Finally, Rodes has also dedicated significant effort to using the intellectual skills he has acquired as a lawyer and a law professor to illuminate questions and controversies that have arisen in our time within religious communities, and in particular the Roman Catholic community.²² Rodes argues, to my mind persuasively, that some “important theological concepts have an inescapable juridical dimension that must be recognized and addressed if the concepts are rightly to be understood.”²³ More specifically, he has contended that some of the most neuralgic disputes about doctrinal and moral matters (e.g., the status of non-Christian religions, the morality of the use of contraception by married couples) can be more fruitfully understood if approached with the analytical tools that allow us to distinguish among various types of legal pronouncements, as well as to discern the type of response that each type of pronouncement calls for. Rodes is not attempting to reduce theology to law, anymore than he attempts to reduce law to theology.

16. *Id.* at 11-12.

17. *Id.* at 12.

18. *Id.*

19. *Id.* at 12-13.

20. *Id.* at 13.

21. *Id.*

22. See e.g. Robert E. Rodes, Jr., *What O’Clock I Say: Juridical Epistemics and the Magisterium of the Church*, 14 *J.L. & Religion* 285 (1999-2000) [hereinafter Rodes, *What O’Clock I Say?*]; Robert E. Rodes, Jr., *On Juridical Elements in Theology*, 28 *Louvain Stud.* 113 (2003) [hereinafter Rodes, *On Juridical Elements in Theology*].

23. Rodes, *On Juridical Elements in Theology*, *supra* n. 22, at 114.

He is suggesting, however, that greater sensitivity to the ways in which theological claims can at times function rather like legal claims will assist the religious community in grappling with them appropriately.

Leaving First Amendment scholarship to one side, it seems clear that most normative scholarship falling within the general genre of "law and religion" is similar in its thrust to the second group of Rodes's work. That is, most normative interdisciplinary work in this genre attempts to take theological insights into the nature of the person, the function of society, and the meaning of moral responsibility and apply those insights to jurisprudential questions. Theology, in other words, is conscripted to provide additional strength, purpose, and richness to legal studies. But there is no reason to think that the process of interdisciplinary enrichment cannot go the other way. As the third group of Rodes's writings suggest, the sort of analysis characteristic of the legal profession can provide additional focus, precision, and nuance to theological studies. This directionality in interdisciplinary work in law and religion is not as prominent as its counterpart. It is, however, equally important.

In the remainder of this essay, I would like to concentrate my attention on material developed in Rodes's third group of writings. More specifically, I would like to explore three sets of categories that he has articulated over the years, which are rooted in an analytical perspective characteristic of law, and which are also useful for understanding theological disputes, as well as disputes about the implications of theological claims, within a religious community. The first set of categories, a distinction among "epistemic," "normative," and "constitutive" legal pronouncements, articulates three different functions of legal pronouncements within a complex and well-functioning legal system such as our own.²⁴ The second set of categories focuses on the two ways in which law can instantiate moral values: it can do so instrumentally, by employing a system of incentives and disincentives, or it can do so didactically, by holding up a certain pattern of behavior as worthy of emulation. The third set of categories, involving a distinction between "Erastians" and "High Church" Christians, focuses on two fundamentally different ways of relating the Church to the culture that both have sturdy roots in the Christian tradition.²⁵

Although Rodes has developed these three sets of categories more-or-less independently of one another, it is my thesis that their

24. Rodes, *What O'Clock I Say*, *supra* n. 22, at 286.

25. Rodes, *Pilgrim Law*, *supra* n. 10, at 140-144.

explanatory power is exponentially increased when they are combined. “Erastians” and “High Church” Christians tend to give priority to different functions of pronouncements in the law, for reasons internally related to the way each understands the function of law in communicating the moral vision of the community. They also tend to emphasize a different method by which law accomplishes its goals. My manner of proceeding will be as follows. I will begin by sketching Rodes’s three sets of categories. I will then attempt to construct an integrated analytical framework that combines these three sets of categories. Finally, I will attempt briefly to test that integrated framework, by using it to illuminate the recent controversy that developed among Massachusetts Catholics about the decision of Catholic Charities of Boston to cease functioning as an adoption agency rather than continue to place a small number of hard-to-place children with homosexual parents.

I. THE THREE FUNCTIONS OF THE LAW: NORMATIVE, CONSTITUTIVE, AND EPISTEMIC

Professor Rodes has argued that we need to distinguish among three functions of legal dispositions: the normative, the epistemic, and the constitutive. The *normative* function is what most non-lawyers associate with the role of law; normative pronouncements tell people what to do and what not to do, “with ancillary provisions perhaps saying what will happen to us if we fail to obey.”²⁶ The classic example of the normative function of the law, of course, is found in the criminal code. Do not murder, do not rape, and do not rob. If you do commit such an act, and are found guilty of doing so by a jury of your peers, you will suffer a significant penalty, most likely imprisonment. To those who focus exclusively on this aspect of the legal system, it appears that the function of law is essentially negative; its role is limited to impeding potential malefactors from imposing their unjust will upon the rest of society.

Other functions of law are far more positive, or at least neutral. Rodes observes that law also performs a *constitutive* function; that is, it “creat[es] a state of affairs.”²⁷ Two examples of how law does so are found in the law of property and the law of marriage. “The execution and delivery of a deed in proper form will make A the owner of what was formerly B’s house. A marriage ceremony in proper form will

26. Rodes, *On Juridical Elements in Theology*, *supra* n. 22, at 122.

27. *Id.*

make a couple husband and wife.”²⁸ Constitutive legal dispositions are creative; they generate real relationships that were not previously in being and are not physically observable. Rodes states,

[c]onstitutive legal dispositions do not as such impose obligations at all. Their effect is metaphysical or ontological. They tell you how to bring about some juridical state of affairs, some condition such as adoption, marriage, tenure of a public office, or ownership of a house that is not physically observable, and that is subject to control by operation of law.²⁹

In other words, one cannot, properly speaking, disobey a constitutive legal provision. If we fail to comply with the process it sets forth, we simply fail to bring about the set of relationships that provision contemplates. We do not become the legal owners of a piece of property, we do not become husband and wife, or we do not become the legal parents of a child born to someone else if we do not follow the specified procedures.

Third, legal pronouncements often have, or entail, an *epistemic* function, which Rodes describes as

involv[ing] an authoritative determination that such-and-such is the case, based on an investigation or a hearing of evidence by some person in authority, who then decides in good faith that it is in fact the case.³⁰

Rodes notes that an obvious example is a jury verdict; other examples include legislative findings of fact used to justify the enactment of a particular law, or factual determinations by administrative agencies.³¹

Rodes argues that these three functions of legal pronouncements have analogies in how various pronouncements of the Roman Catholic Church function. This fact is not surprising to him; the Church is a community, a “polity,” and it must therefore have a structure that gives it organization and stability. Rodes writes

The basic polity of the Church—that is, its government by pope and bishops—is established by divine positive law. The deployment of people and resources in accordance with that polity is done by human law, mostly that of the Church itself, although the state played a major part in earlier times. At every level, the applicable laws combine constitutive and normative forms.³²

28. *Id.*

29. *Id.* at 125.

30. *Id.* at 123.

31. *Id.*

32. *Id.* at 130.

The clearest place to see the intersection of the constitutive and normative functions is in the Church's law of marriage. Natural law prohibits sexual relationships between persons of the same sex and between close relatives; these prohibitions are normatively recapitulated in the Church's positive moral norms. Furthermore, they are incorporated in the Church's constitutive norms; a purported wedding conducted in violation of these prohibitions does not result in either a natural marriage or a sacramental marriage.³³ In other words, these normative prohibitions relating to partners of the same sex and to consanguinity shape the constitutive requirements for marriage. There are also normative requirements relating to the performance of a sacramental marriage that are not constitutive, such as the requirement that a marriage between a Catholic and a non-Catholic receive advance permission from the bishop. If this requirement is violated, the resulting marriage is illicit, but not invalid.³⁴

Finally, Rodes describes how the Church also exercises epistemic authority, both judicially and legislatively. One paradigmatic case of judicial epistemic authority is the proceeding for the annulment of a marriage, which makes the factual finding that a valid marriage either does or does not exist. A second paradigmatic case is the canonization process, which makes a determination about whether the candidate proposed for sainthood possessed the requisite degree of holiness.³⁵ The legislative exercise of epistemic authority, according to Rodes, lies in the determinations of the magisterium, the teaching authority of the Church expressed by the Pope and his brother bishops. As Rodes notes, "it extends to all questions of doctrine and morals, although in the practical application of moral principles its scope is limited by the coordinate authority of the individual conscience."³⁶ He observes as well that sometimes pastors are called to apply Catholic doctrine and morals to matters involving factors on which they have no special expertise.

It is often desirable for popes and bishops to address public questions outside the strict scope of their epistemic authority in order to ensure that Christian principles are taken into account in public debate. Interventions of this kind (say supporting a particular amendment of the federal minimum wage law, as opposed to proclaiming the right of workers to a living wage) are

33. *Id.*

34. *Id.*

35. *Id.* at 131.

36. *Id.*

not really exercises of the magisterium.³⁷

Rodes argues that various ecclesiastical pronouncements are fruitfully understood by analogy to legal pronouncements, not only in terms of their functions, but also in terms of their limits of their authority. "Normative dispositions are binding [in conscience] if they are just, possible, and known."³⁸ An unjust law, in Catholic tradition, loses much of the binding force of law.³⁹ If compliance with a particular legal disposition is impossible either physically or morally (e.g., one is compelled under grave duress to do otherwise), through no fault of one's own, then one cannot be bound in conscience to comply.⁴⁰ In contrast, purely constitutive obligations do not impose obligations at all; as Rodes says, "[t]heir effect is metaphysical or ontological."⁴¹ For example, if a constitutive requirement for a valid marriage is a blood test on both parties, failure to obtain the blood test does not violate a norm—it simply means that the parties do not become husband and wife. They are not penalized; they simply do not assume the status of a married couple.

Epistemic pronouncements, as Rodes notes,

have the effect of justifying actions taken on the supposition that what they determine to be the case is in fact the case, and condemning action taken on the opposite supposition. In the Church, they have the further effect of calling on us actually to believe what they tell us.⁴²

According to Rodes, epistemic dispositions are binding only upon those "subject to the authority" of those making the disposition, and "who are not better informed on the matter in question."⁴³ He goes on to note that "[a]nyone who is better informed has a right to disagree, and may have a duty to act accordingly."⁴⁴ An example he gives comes from a court martial of a German submarine commander who had fired upon and sunk a plainly labeled hospital ship in World War I. His defense, accepted by the court, was that the German Admiralty had informed him that the British were disguising troop ships as hospital ships. As Rodes notes, however, if the commander had had personal knowledge that this particular ship was, in fact, a hospital ship, he would not have been

37. *Id.* at 131-132.

38. *Id.* at 123.

39. *Id.*

40. *Id.*

41. *Id.* at 125.

42. *Id.* at 126.

43. *Id.*

44. *Id.*

entitled to rely upon the epistemic determination of his superiors to justify sinking it.⁴⁵

In sum, Rodes's distinction among the three functions of law, in both civil society and the Church, recognizes that legal pronouncements create complicated patterns of relationship. The obligation that each form of pronouncement elicits depends upon its function, and its implicit presuppositions. A sophisticated understanding of law, and of how communities are constituted in part by legal bonds, will recognize and preserve these distinctions.

II. THE TWO METHODS BY WHICH LAW PROMOTES VALUES: DIDACTIC AND INSTRUMENTAL

Obviously, all three functions of the law pursue moral values, by facilitating their instantiation in a given society or social structure such as the Church. Cutting across the three functions are two methods by which the law pursues value: the didactic and the instrumental. The *didactic* operation of the law, says Rodes, "is simply a matter of witnessing the moral standards, the moral reflection, and the social consensus of the community."⁴⁶ The fact that the law prohibits some activities (e.g., mayhem and murder) and encourages others (e.g., marriage) publicly proclaims various aspects of the community's value system, even to persons who are not directly involved in those activities. Rodes notes that

[t]he 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.⁴⁷

The law achieves its goals *instrumentally* "when it affects people's behavior by deploying incentives and disincentives."⁴⁸ The design and implementation of these incentives can require thought and planning. As Rodes observes, they

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.⁴⁹

45. *Id.* at 126-127.

46. Rodes, *Pilgrim Law*, *supra* n. 10, at 6-7.

47. *Id.* at 7.

48. *Id.* at 6.

49. *Id.*

As I noted above, the use of the didactic and instrumental methods cuts across the three functions of the law. For example, the paradigmatic example of the normative function of the law, a criminal statute, includes both didactic and instrumental components. A statutory provision against murder proclaims the inviolability of innocent human life, while the penal sanctions provide an incentive for those not convinced by the provision's moral vision to comply with its prohibition anyway. The institution of legal marriage is a paradigmatic example of the constitutive function of the law. Tax breaks given to couples who marry proclaim the centrality of this relationship to our broader social structure and provide an incentive to heterosexual couples to get married rather than live together. Jury deliberations constitute a central case of the epistemic function of law. Rules of evidence specify what can be presented to the jury. The rule against hearsay evidence is instrumental; its purpose is to insure that only reliable evidence be presented to the jury. A rule against compelling one spouse to testify against another, or prohibiting the introduction of evidence obtained under torture, is didactic; it communicates to the society that the fact-finding process cannot be conducted in a way that will destroy other values of deep importance to the community.

The didactic and instrumental methods can stand in harmony with one another;⁵⁰ at least as often, however, they seem to be in some tension. For example, Rodes remarks upon the tension between instrumental and didactic approaches to sexual behavior. Should the law encourage chastity, or should it provide free condoms to minimize the risk of AIDS and birth control to minimize the risk of pregnancy?⁵¹ We are all familiar with the political battles that have at their root a desire to give priority to one or the other method in this context. It can be tempting to reduce one method to a mere tool of the other, but Rodes urges us to resist the temptation:

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

50. Rodes notes that a good example of such harmony is civil rights legislation. "The same statutes and judicial decisions that produced injunctions, contempt citations, and reinstatement with back pay, and cease and desist orders made people who practiced discrimination with impunity ashamed of themselves or at least defensive. . . ." *Id.* at 7.

51. *Id.*

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 realization and no values.⁵²

In Rodes's view, therefore, we need to keep both methods in mind if we are to design an adequately balanced legal system. He contends that classical and medieval legal systems succumbed to the temptation to focus nearly exclusively on the didactic method.

The late fifth-century Theodosian Code bears witness to the last days of the Roman Empire, 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.⁵³

In contrast, most modern legal thought places almost exclusive emphasis on the instrumental method.

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." It licenses the deployment of more and more sophisticated legal technologies with less and less regard for what they are supposed to be accomplishing.⁵⁴

III. THE TWO STRATEGIES FOR RELATING THE CHURCH TO THE WORLD: ERASTIAN AND HIGH CHURCH

Rodes's historical study of the relationship of Church and state in England has led him to the conclusion that there are two basic strategies for relating the Church to the world: Erastian⁵⁵ and High Church.

52. *Id.* at 8.

53. *Id.* at 8.

54. *Id.* at 9.

55. Rodes describes the origin of this label in the following way:

The vision of the church as sharing the historical vicissitudes of the rest of society I call Erastian. Erastus (1524-83) was a Swiss theologian who taught that the church had no proper coercive jurisdiction independent of the civil magistrate. His name became attached to those Anglicans who were content with the substantial role played by Crown

According to Rodes, the *Erastian* approach is “based on a general unity of function between church and state”; it is operative “to the extent that Christianity is viewed as a social agenda and a lifestyle for whole peoples.”⁵⁶ Rodes notes that Erastians emphasize filling the gaps in the social service work of the government. “The provisions of schools and hospitals and the relief of the poor have been examples in many times and places.”⁵⁷ Rodes observes that the Erastian approach has historically been concerned with inculcating ideals of sexual morality. “The enforcement of chastity has usually fallen into this category: the significant involvement of the coercive power of the state has generally proved unfortunate, as in *The Scarlet Letter* or *Measure for Measure*.”⁵⁸ Rodes also notes that social justice and civil rights have been matters for concern for the Church on its Erastian side rather than for the state.

Either the values concerned, like chastity and temperance, have commanded a moral consensus that society was not prepared to enforce coercively, or they have formed part of a Christian agenda that the church was more willing to propose than the society was willing to accept.⁵⁹

In contrast, Rodes denominates as *High Church* those who present an eschatological witness over and against society.⁶⁰ He uses the term to cover any view of the church as an institutional embodiment of the transcendence, the otherness of God and of the divine judgment that attaches to every existing society for not being the Kingdom of God.⁶¹

Centrally, High Church views do not see themselves as advancing a political program.

The High Church component of the Church's presence cannot exactly be called an agenda. The reason it is High Church is that it points to human purposes beyond the reach of society, and to social shortcomings for which the society has no remedy.⁶²

High Church views, according to Rodes, tend to promote a vision of the

and Parliament in the affairs of their Church.

Id. at 141.

56. Robert E. Rodes, Jr., *Pluralist Christendom and the Christian Civil Magistrate*, 8 Cap. U. L. Rev. 413, 418 (1979) [hereinafter Rodes, *Pluralist Christendom*].

57. Rodes, *Pilgrim Law, supra*, n. 10, at 141.

58. *Id.* at 142.

59. *Id.*

60. He notes that “[t]he term was originally applied to those Anglicans who saw the polity and autonomy of the church as divinely established, or who stressed the sacramental and liturgical aspects of the Christian life rather than the personal and evangelical aspects.” *Id.* at 141.

61. *Id.*

62. *Id.* at 142.

institutional Church as a sanctuary against the corrupt world. But there are times when the High Church approach does venture into political life: He notes that

[h]igh Churchmanship sometimes goes beyond an eschatological stance, but when it does, it tends to move toward a domination of civil society by ecclesiastical authority which is not acceptable either theologically or politically.⁶³

Rodes recognizes that both approaches to the relationship between Church and culture are necessary. He also sees that it is difficult to distinguish them at times; which one is more prominent may depend upon the way things are going in a particular society.

When a work is progressing nicely and attracting good support, utilitarian, Erastian perceptions of it are apt to be uppermost in people's minds. Conversely when the effect on society becomes harder to achieve, or more limited by considerations proper to the art of the possible, those involved in the work are more apt to content themselves with a non-utilitarian, High Church witness, and the mutual support that they derive from bearing that witness in common.⁶⁴

Rodes also argues that these approaches take somewhat different forms in different cultures and their associated economic and political systems. Drawing upon the insights of Milovan Djilas's *The New Class*,⁶⁵ Rodes has maintained that the ruling class of both capitalist and socialist economies was composed of bureaucrats and managers, who alone were capable of providing the expertise that allowed such complicated economies to function.⁶⁶ Consequently, in our society today, "[m]anagerial Erastianism enlists the Church in an extensive consortium of organizations and experts engaged in the solving of problems."⁶⁷ Spiritual concerns, maintains Rodes, can take too much of a back seat to the need to ameliorate social injustice and human suffering.⁶⁸

What form does a High Church approach take in a capitalistic economic framework dominated by managers? Rodes argues that "[w]ith the advent of managerialism, a good deal of High Church

63. Rodes, *Pluralist Christendom*, *supra* n. 56, at 418.

64. Rodes, *Pilgrim Law*, *supra* n. 10, at 143.

65. Djilas, *supra* n. 12.

66. For a succinct summary of the influence of Djilas on Rodes's work, see Schaffer, *supra* n. 9, at 742-746.

67. Rodes, *Pilgrim Law*, *supra* n. 10, at 153.

68. *Id.* at 153-154.

thinking has shifted from the individual to the group.”⁶⁹ High Church sensibilities tend to be the prerogative of an elite; “people who had enough education to appropriate a fairly complex set of doctrines and who did not need to spend much time and thought on material needs.”⁷⁰ Rodes contends that

[w]here Erastianism creates a danger of reducing the Word and the sacraments to the level of a class-bound secular agenda, High Churchmanship creates a danger of exalting some class-bound secular agenda to the level of Word and sacraments.⁷¹

IV. INTEGRATING THE THREE SETS OF CATEGORIES

Robert Rodes has provided us with a set of helpful analytical tools with which to approach not only past disputes about how to instantiate the Gospel in a given culture, but also to consider the disputes which currently divide many Christian communities. I would like to suggest, however, that the power of these tools will be greatly increased if we make some effort to integrate them. More specifically, I would like to suggest that Erastians and High Churchpeople tend to give priority to different functions of the law, as well as to different methods for achieving its end.

This difference in priority ought not to be surprising. High Churchpeople are acutely sensitive to the radical way in which the Kingdom of God differs from all worldly kingdoms. While God’s kingdom will be fully manifest only in the eschaton, it is present among us in embryonic form in the Church, particularly the sacramental life of the Church. The primary task of believers, therefore, is to witness to the values of the divine Kingdom, to prevent their submersion in the hopelessly compromised value system of the secular world. When they turn their attention to the secular world, High Churchpeople tend to see their major role as proclaiming and protecting the basic insights of the natural law, which represents God’s basic intent for the normative shape of human life and human society. They see those insights as under constant threat by secular values, and in need of constant reinforcement by religious believers, whose commitment to the natural law is fortified by situating it in its proper place in the divine plan, to which they have access through the divinely guided magisterium of the Church.

69. *Id.* at 156.

70. *Id.* at 157.

71. *Id.* at 154.

In the context of their dealings with the secular world, Erastians tend to emphasize creation and incarnation rather than the eschatological consummation of the divine plan. They tend to focus on the many corporal and spiritual works of mercy that need to be performed here and now, rather than devoting too much attention to the nature and function of the eschatological kingdom of God. Moreover, they are not leery about cooperation with all people of good will, whether or not they are believers, because they emphasize our common character as children of the God who created, redeems, and sustains us all. They are more open to the discernment of the requirements of natural law inductively rather than deductively; they take seriously not only the moral wisdom of the institutional Church, but also the moral wisdom of ordinary people whom they consider to be of good character, whatever their professed belief systems.

So how would this difference in emphasis with respect to the relationship of the Church to the world affect the way in which Erastians and High Churchpeople approach Rodes's two other sets of categories? Let us begin with Rodes's distinction among the three functions of law, the normative, the constitutive, and the epistemic. In my view, Erastians are more likely to emphasize the normative aspect of law, while High Churchpeople are more likely to stress its epistemic function. At first, this may seem counterintuitive: High Churchpeople, after all, tend to be rigorists, while Erastians tend to be more willing to compromise with political necessity.

Yet a deeper consideration of the situation may reveal some surprising twists. It seems, to me at least, that High Churchpeople consider it their primary duty to preach the kingdom of God, unseen but already present in embryonic form in our midst. They see their task as breaking through the confusion and self-deception caused by both individual sin and collective patterns of sin, in order to convey a clear and uncompromising understanding of God's loving plan for human life. To the extent that secular law touches upon matters determined by that plan (e.g., matters determined by natural law), secular law must also be clear and unequivocal about the moral truth. For many Catholic High Churchpeople, the emphasis on the epistemological function of the law is consonant with their definition of law, which finds its roots in the *Summa Theologica* of Thomas Aquinas. According to Aquinas, the eternal law is nothing more or less than God's plan for the entire world.⁷² Whereas non-rational creatures participate in the eternal law

72. Thomas Aquinas, *Summa Theologica* vol. 2, 993, pt. I-II, q. 91, art. 1 (Fathers of the

solely by instinct, human beings also participate in the eternal law by using their practical reason. Natural law, for Aquinas, is nothing other than the human person's participation in the eternal law, in and through the exercise of his or her practical reason.⁷³ The making of positive law involves articulating the requirements of natural law for those who are unable to grasp them, and fleshing out those requirements in particular ways to fit the needs of a particular community.⁷⁴ Consequently, in a just community, the positive law reliably reflects the basic content of the natural law.⁷⁵

The overwhelming priority for High Churchpeople in both dogmatic and moral theology is purity and comprehensiveness of teaching. High Churchpeople believe that no human measures are likely to be effective in bringing about the kingdom of God, that kingdom will be made manifest in God's own time. Consequently, they are less interested in moving incrementally toward a realization of the kingdom's values than they are in proclaiming those values in all their radicalism, all their fullness. In a nutshell, they are concerned with ensuring that the law reflects and proclaims the truths of the natural law—the epistemic function of law is primary.

In contrast, Erastians are centrally concerned with improving this world, despite its enduring imperfections. As Rodes notes, Erastians focus on “presenting and even implementing a practical agenda for the whole society, and for offering a lifestyle within the reach of people with average or below average spiritual capacity and moral fiber.”⁷⁶ Erastians are concerned, therefore, with accomplishing certain pragmatic goals in order to better society, and moving persons and resources in order to accomplish those goals. Consequently, they are most concerned with the normative function of the law; they want to regularize means for insuring that the basic social welfare needs of the most vulnerable members of society are met. Because they are more likely to see Church and state as more-or-less harmonious partners in the betterment of society, they are more likely to see the secular legal system as one tool that can be used in accomplishing their goals. In a nutshell, the normative function of law is primary.

What about the constitutive function of law? In my view, it is a mediating category, which Erastians and High Churchpeople both tend

English Dominican Province trans., Christian Classics 1981).

73. *Id.* at 996, pt. I-II, q. 91, art. 2.

74. *Id.* at 1013-1017, pt. I-II, q. 95.

75. *Id.*

76. Rodes, *Pluralist Christendom*, *supra* n. 56, at 417.

to interpret in terms of the requirements of the more extreme category which they favor. So Erastians see the constitutive function of the law as one more tool to use on the pilgrimage to the kingdom of God, and in particular in providing for the basic needs of suffering and sinful people. They are more inclined, therefore to recognize, organize, and attempt to ameliorate relationships and patterns of behavior that are already in existence, whether or not they are morally appropriate from the point of view of the Kingdom of God fully instantiated. For example, Erastians would be more likely to create a category of legal prostitution, which would confer legal protection to a brothel on the condition that it met certain public health and safety requirements.

Erastians would indignantly deny the charge that such a strategy amounted to condoning prostitution; instead, they would argue that they were minimizing the unjust effects of a pattern of behavior that was impossible to eradicate from human society. Similarly, Erastians would be more likely to endorse the creation of institutions and bonds that facilitated responsibility and mutual care among human beings, no matter how fallen. The creations of legal categories to cover gay marriage, polygamous marriage, or even “marriage lite” (a set of defined but limited responsibilities for those who have decided to live with one another without benefit of marriage) would be justified by Erastians on the basis of the empirical evidence: if such institutions were thought capable of minimizing injustice by insuring that parties actually were not penalized excessively for making and relying upon promises of some sort of support and protection to one another. It is not, of course, that Erastians are unable to appreciate the importance of upholding ideals in areas of marriage and sexuality; however, they would be more likely than High Churchpeople to consider whether proclaiming the ideal was more likely than regulating the reality to produce a more just and humane set of relationships.

In contrast, High Churchpeople will be more inclined to say, at the very least, that the constitutive function of the secular law should not undermine or contradict God’s providential determinations about what is and is not the case. So marriage, for example, by God’s metaphysical and moral design, simply *is* the lifelong commitment of one man and one woman. The constitutive arrangements recognized by the state, and a fortiori, by the Church, ought not to proclaim that the impossible is possible, no matter how much good might result from a pragmatic perspective. The most important task of the Church is to proclaim the unadulterated truth. Ideally, the legal system would do the same in matters pertaining to natural law. If, however, Christians are

unfortunate enough to be in a legal system where sin and self-deception have masked the requirements of the natural law, their primary responsibility is to proclaim those requirements clearly and without any appearance of compromise.

So in an environment that they perceive as determinedly secular and therefore hostile to Christian faith, High Churchpeople are especially reluctant to approve what the Catholic moral tradition has traditionally called “cooperation with evil”—the performance of an action which facilitates in some way the wrongful action of another. From their perspective, cooperation with evil is one thing in a society that as a whole honors and accept Christian values, including the basic requirements of natural law; it is different thing entirely in a secular society that treats those values with contempt or indifference.⁷⁷ Whereas Erastians tend to accept with resignation the inevitability of some form of cooperation with evil, High Churchpeople are far more worried about its deleterious effect upon the purity of the Christian witness.

The issue of cooperation with evil is instructive. The Catholic moral tradition has developed an elaborate, if not abstruse, matrix in order to help people differentiate between permissible and impermissible cooperation with evil.⁷⁸ Both Erastians and High Churchpeople acknowledge the relevance of that matrix; nonetheless, they frequently come to different judgments about whether cooperation is acceptable.⁷⁹ Their differences, in my judgment, come down to different priorities: Erastians place a greater emphasis on performing the corporal works of mercy to assist people in need, and High Churchpeople give greater importance to proclaiming the holiness of life in the Kingdom of God. So Erastian Catholics are likely to justify giving condoms to persons at

77. It seems to me that the position of Australian Bishop Anthony Fisher, O.P., reflects this sensitivity to the moral stance of the broader culture. See Anthony Fisher, *Cooperation in Evil: Understanding the Issues*, in *Cooperation, Complicity & Conscience: Problems in Healthcare, Science, Law, and Public Policy* 27 (Helen Watt ed., Linacre Centre 2005) [hereinafter Fisher, *Understanding Cooperation in Evil*].

78. As a technical term of moral theology, “cooperation with evil” is generally used to describe a situation in which one agent (the “cooperator”) faces a situation in which his or her act will somehow contribute, in a subordinate way, to a morally unacceptable action plan designed and controlled by someone else (the “principal agent”). For a good introduction to the categories of the matrix used by traditional moralists, see Anthony Fisher, *Co-operation in Evil*, 44 *Cath. Med. Q.* 15 (Feb. 1994).

79. Compare Fisher, *Understanding Cooperation in Evil*, *supra* n. 77; with M. Cathleen Kaveny, *Tax Lawyers, Prophets, and Pilgrims: A Response to Anthony Fisher*, in *Cooperation, Complicity & Conscience: Problems in Healthcare, Science, Law, and Public Policy*, *supra* n. 77, at 65. In Rodes’s terms, Bishop Fisher could be understood as adopting more of a High Church approach to cooperation with evil, while I could be seen as adopting more of an Erastian approach to the question of cooperation with evil.

risk of AIDS in sub-Saharan Africa under the principle of cooperation with evil, while High Churchpeople are likely to resist such a program on the grounds that it could be construed to encourage sexual activity outside of marriage, which is inconsistent with the natural law.

Finally, and not surprisingly, Erastians and High Churchpeople differ in the respect and emphasis each places on Rodes's two methods of law, the didactic and the instrumental. Needless to say, High Churchpeople favor the didactic; they see the central job of the Church's magisterium (and by extension, the secular government) as proclaiming the truth of the matter about various controverted moral issues. For reasons described above, they are less concerned about whether the mere proclamation of the truth is the best method of bringing about the social reality they seek to bring about; it is God's job, not theirs, to render human fidelity to divine truth effective. In contrast, Erastians are more concerned with using the instrumental methods of the law to bring about incremental improvement in the human situation. If the best way to secure a particularly desirable state of affairs is not to preach about it, but to provide incentives to facilitate its implementation, so be it.

Erastians see High Churchpeople as myopically focused on idealized visions of reality; this myopia, they believe, leads them to ignore the possibilities for incremental improvement. High Churchpeople, for their part, see Erastians as too focused on the immanent to give proper respect to the true source and ground of all that is: God and God's plan for human beings, as set forth in Scripture and (for Catholics) in the authoritative tradition as well. An example of this difference in viewpoint can be found in different strategies pro-life Catholics have taken regarding abortion law in recent years. Erastians tend to favor incentives to reduce abortion rates, such as prenatal support, generous subsidies to unwed mothers, and high quality public education from preschool to college. In contrast, High Churchpeople tend to place more emphasis on the unequivocal didactic power of an absolute prohibition. (It is important to note that most people in this camp do not favor criminal penalties against the woman seeking an abortion, but against the doctor performing it instead.) Erastians point out that the lowest abortion rates in the West are found in those countries which do not penalize abortion, at least in the early weeks, but instead provide incentives for a woman to carry her baby to term.⁸⁰ In response, High Churchpeople will state that the fundamental purpose of

80. For a modified Erastian viewpoint that makes this argument, see Mary Ann Glendon, *Abortion and Divorce in Western Law* ch. 1 (Harv. U. Press 1987).

the law is not primarily to be immediately and tangibly effective, but instead to proclaim the unequivocal dignity of unborn human life. From the High Church perspective, a legislative compromise may undermine the crucial didactic function of the law.⁸¹

V. A TEST CASE: CATHOLIC CHARITIES OF BOSTON AND ADOPTION BY
HOMOSEXUAL PARENTS

I would like to conduct a brief test of my theory that an integrated approach to Rodes's three sets of categories powerfully increases their explanatory power. The subject matter of my test will be the contretemps that developed in the fall of 2005 and the spring of 2006 over whether or not Catholic Charities of Boston should have continued to place children with homosexual couples as a condition of maintaining their status as a licensed adoption agency in the state of Massachusetts. In the end, Boston Catholic Charities decided to cease all work in the adoption area rather than directly contravene a directive of the Vatican prohibiting Catholic organizations from placing children with same-sex couples as adoptive parents.

In examining this controversy, my remarks will be narrowly restricted: they will not encompass the broader societal and religious debate over whether or not homosexual acts are morally justified. Quite obviously, if one thinks that the official teaching of the Catholic Church on this matter is misguided, one will have little sympathy for the ultimate decision of Boston Catholic Charities. My concentration, therefore, will be upon the disagreements that developed between and among Catholics (and others) who do not seem themselves as challenging the underlying teaching of the Church on the morality of homosexual activity. These disagreements centered on whether respect for that teaching required Catholic Charities to cease its good work in placing children with adoptive families rather than place a small number of children with gay couples.

But first, some background. In the fall of 2005, The Boston Globe reported that Catholic Charities of the Archdiocese of Boston had placed thirteen children for adoption with homosexual couples.⁸² These adoptions had taken place over an eighteen-year period, in which Catholic Charities had arranged for the adoptions of a total of seven

81. For a passionate High Church viewpoint that makes this argument, see Colin Harte, *Changing Unjust Laws Justly: Pro-Life Solidarity with The "Last and Least"* (Cath. U. Am. Press 2005).

82. Patricia Wen, *Archdiocesan Agency Aids in Adoptions by Gays*, The Boston Globe A1 (Oct. 22, 2005).

hundred twenty (720) children.⁸³ The agency was between a rock and a hard place. On the one hand, the Commonwealth of Massachusetts required that all adoption agencies agree to abide by its non-discrimination clause as a condition of licensure.⁸⁴ On the other hand, in 2003, the Vatican's Congregation for the Doctrine of the Faith issued a document on same-sex marriage and civil unions, which claimed that it was gravely immoral to place a child for adoption with a same-sex couple.⁸⁵ In a nutshell, then, the State seemed categorically to require Catholic Charities to engage in practices which the Church categorically prohibited.

The controversy continued for approximately six months. The Massachusetts Catholic Conference formed a committee to review the issue in November 2005,⁸⁶ its work resulted in a statement⁸⁷ issued on

83. *Id.*

84. Agencies that provide adoption services need a license from the Massachusetts Department of Early Education and Care. 102 Code of Mass. Reg. 1.03 (1) (2005) provides that
The licensee shall not discriminate in providing services to children and their families on the basis of race, religion, cultural heritage, political beliefs, national origin, marital status, sexual orientation or disability. A statement that the program does not discriminate on these bases shall be made part of the written statement of purpose where required.

Operating without a license is not an option. *Id.* at 1.03 (2) ("No persons shall operate or purport to operate a program licensable by the Office of Child Care services without a license or approval.").

85. Congregation for the Doctrine of the Faith, *Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons* Pt. III, sec. 7, ¶ 3 (June 3, 2003) (available at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html):

As experience has shown, the absence of sexual complementarity in these [homosexual] unions creates obstacles in the normal development of children who would be placed in the care of such persons. They would be deprived of the experience of either fatherhood or motherhood. Allowing children to be adopted by persons living in such unions would actually mean doing violence to these children, in the sense that their condition of dependency would be used to place them in an environment that is not conducive to their full human development. This is gravely immoral and in open contradiction to the principle, recognized also in the United Nations Convention on the Rights of the Child, that the best interests of the child, as the weaker and more vulnerable party, are to be the paramount consideration in every case.

86. Patricia Wen, *Church Reviews Role in Gay Adoptions*, *The Boston Globe* B2 (Nov. 4, 2005).

87. *Statement of the Massachusetts Catholic Conference on Behalf of Archbishop Sean P. O'Malley (Boston), Bishop George W. Coleman (Fall River), Bishop Timothy A. McDonnell (Springfield), and Bishop Robert J. McManus (Worcester)* (Mass. Cath. Conf. Feb. 28, 2006) (available at <http://www.macathconf.org/06-Bishops%20Statement%20on%20Adoption%20FINAL%2002-28.pdf>). The key paragraph reads as follows:

Because of the Church's teaching, Catholic agencies may not provide adoptions to same sex couples. Hence we intend to seek relief from the regulatory requirements of the Commonwealth on this issue. We do this in the hope that we will be able to continue focusing our attention on serving children in need of adoption, and to do so in a way which does not conflict with Catholic teaching and practice. We are asking the

February 26, 2006, by the Commonwealth's four Catholic bishops.⁸⁸ They called upon state legislators to grant Catholic adoption agencies an exemption to the requirement of equal treatment of same-sex couples on the grounds of religious freedom. This stance put them at odds with the board of trustees of Boston Catholic Charities, which had voted unanimously in December 2005 to support the continued placement of children with gay couples for adoption.⁸⁹ In response to the statement, seven members of the board resigned.⁹⁰ Governor Mitt Romney stated that he could not waive the anti-discrimination laws, and suggested that the bishops file a bill to that effect with the legislature.⁹¹ State legislators informed Church leaders that such a proposal had no chance of passing.⁹²

All efforts to reach a political compromise failed. In March, the board of trustees of Boston Catholic Charities voted to end all adoption services.⁹³ In a joint statement issued on March 10, 2006, the organization's president, Rev. J. Brian Hehir, and the chair of its board of trustees, Jeffrey Kaneb, acknowledged,

[W]e have encountered a dilemma we cannot resolve. In spite of much effort and analysis, Catholic Charities of Boston finds that it cannot reconcile the teaching of the Church, which guides our work, and the statutes and regulations of the Commonwealth.⁹⁴

The agency then began the work of transitioning its caseload, which included many hard-to-place children, to other adoption agencies, a task which it projected to be completed by the end of June 2006.⁹⁵ There was

Commonwealth to respect the Constitutional guarantee of religious freedom and allow the Catholic Church to continue serving children in need of adoption without violating the tenets of our faith.

Id. at ¶ 4.

88. Patricia Wen, *Bishops to Oppose Adoption by Gays*, *The Boston Globe* A1 (Feb. 16, 2006).

89. *Id.*

90. Patricia Wen, *Seven Quit Charity Over Policy of Bishops*, *The Boston Globe* A1 (Mar. 2, 2006). Later, an eighth member resigned as well. Patricia Wen, *In Break from Romney, Healy Raps Gay Adoption Exclusion*, *The Boston Globe* B4 (Mar. 3, 2006).

91. Patricia Wen, *Bishops Dealt Setback in Pursuit of Gay Adoption Exemption*, *The Boston Globe* B3 (Feb. 17, 2006).

92. Patricia Wen, *Bishops' Gay Ban May Cost Millions: Private Donors Wary of Adoption Policy*, *The Boston Globe* A1 (Mar. 5, 2006).

93. Patricia Wen, *Catholic Charities Stuns State, Ends Adoptions*, *The Boston Globe* A1 (Mar. 11, 2006).

94. J. Bryan Hehir & Jeffrey Kaneb, *Statement of Catholic Charities, Archdiocese of Boston, On Adoption Programs* ¶ 3 (Mar. 10, 2006) (available at <http://www.rcab.org/News/releases/2006/statement060310-2.html>).

95. Viewed from a financial perspective, adoption services constituted only a small portion of the portfolio of Boston Catholic Charities. In the fiscal year 2005, its total revenue was \$37 million; its reimbursement for adoption services comprised only \$1 million. Catholic Charities,

a great deal of public chagrin because no one doubted that Catholic Charities had proven itself to be a tireless advocate of children, particularly hard-to-place children. Patricia Wen, the reporter for The Boston Globe who broke the story the previous fall, wrote an article describing how the agency was preparing to end over a century of providing adoption services to the greater Boston area.⁹⁶ It reads like an obituary.

So how do Professor Rodes's categories, used in an integrated manner, help us to understand this heart-wrenching controversy? Let us begin with a High Church approach, which I believe is exemplified in the interview conducted by The Boston Globe with Archbishop Sean O'Malley immediately before he went to Rome to be created a cardinal by Pope Benedict XVI in March 2006. When pressed to articulate the Vatican's concern in these matters, he emphasized the importance of a clear and unambiguous witness to the nature of marriage proclaimed by the Church:

I understand the Holy See's concern that in our works of mercy, in our social programs, that we must be consistent in teaching the Catholic faith in one voice. And certainly the church's teaching on marriage is very central to our beliefs and how we see that the institution of marriage in today's world is very much threatened on many fronts, and yet it is the very cornerstone of society. And the best way for a child to be raised is to be conceived and nurtured by committed, loving parents in marriage. And so, for the church, in our social services activities and other works of mercy, we need to be consistent. And it was your newspaper that pointed out the anomaly to us, and we have tried to deal with that.⁹⁷

The overriding concern for O'Malley is the purity of the message conveyed by the participation of Catholic institutions in the adoption process. The most important function of the secular law, especially in this time of moral confusion, is its epistemic function: It should embody the definition of marriage and family demanded by natural law and promulgated in season and out by the Church. The constitutive function of the law; i.e., the institutions and relationships that it brings into being,

Archdiocese of Boston, *Catholic Charities of Boston to Transition Adoption Placement Services to Child & Family Services* (Apr. 28, 2006) (available at http://www.ccab.org/whats_new.htm#adoption_transition).

96. Patricia Wen, "They Cared for the Children": Amid Shifting Social Winds, Catholic Charities Prepares to End its 103 Years of Finding Homes for Foster Children and Evolving Families, *The Boston Globe* A1 (June 25, 2006).

97. *A Globe Conversation with Archbishop O'Malley*, transcript, *The Boston Globe* Question 7 (Mar. 19, 2006) (available at http://www.boston.com/news/local/massachusetts/articles/2006/03/19/omalley_transcript).

should harmoniously reflect and support its epistemic function. The clarity of the Church's moral message, and the congruence of its charitable activities with that message, is particularly important, in view of the fact that the Commonwealth of Massachusetts has extended the definition of marriage to include same-sex couples.

More specifically, to those who adopt this position, the fundamental problem with the 2003 decision of the Supreme Judicial Court of Massachusetts declaring it unconstitutional to limit marriage to heterosexual couples⁹⁸ is epistemological, not moral. More specifically, the fundamental problem with the decision is not primarily that it legitimates sexual activity between two people of the same sex. It is rather that it incorporates an incorrect definition of marriage, as something other than the permanent and exclusive union of one man and one woman.⁹⁹ Constitutively, then, the institution of marriage as defined by the Commonwealth of Massachusetts subverts the epistemic function of the law—its duty to embody the truth about the nature of marriage. Normatively, in this time of great epistemic crisis, it is of paramount importance that Catholic institutions behave in ways that testify to that threatened truth. What good is it, from this perspective, if Catholic Charities helps hundreds of children in crisis if it undermines the stable family life of thousands more in the process?

The Erastians approach the situation from a very different vantage point, which is encapsulated in the title to a *Commonweal* editorial on the controversy: "Abandoned Children." Here are the first two paragraphs:

In any given year, tragedy, family dysfunction, poverty, neglect, and abuse separate hundreds of thousands of children from their birth parents.

When adoption cannot be arranged, many of these children find themselves moved from one foster family to another. Finding a permanent home for abused, handicapped, or troubled children is especially hard. In such cases, objections are rarely raised when prospective adoptive parents happen to be gays or lesbians. Whatever one's views about the morality of homosexuality, it is hard to understand how an orphaned or abandoned child does not benefit from being placed in a loving home.¹⁰⁰

98. *Goodridge v. Mass. Dept. Pub. Health*, 440 Mass. 309, 798 N.E.2d 941 (2003).

99. From this perspective, same-sex marriage is not so much wrong as *impossible*—a contradiction in terms. See e.g. William E. May, *On the Impossibility of Same-Sex Marriage: A Review of Catholic Teaching*, 4 Natl. Cath. Bioethics Q. 303 (2004).

100. Editorial, *Abandoned Children*, 100 *Commonweal* 5 (Mar. 24, 2006) (available at

For the Erastians, the primary imperative for both the state and the Church at this point in time is to help the vulnerable members of the community pick up the pieces after sin and misfortune have worked their ravages. The Erastians, in other words, are most concerned about the normative function of law: the law's purpose in this context is to ensure that as children are cared for by loving families, by encouraging as many people as possible to respond compassionately to children in desperate need of a home. The constitutive function follows the normative function: if the only people willing to take a bruised or battered child are not exactly Ozzie and Harriet, so be it. It may not be perfect, but it's much better than the alternative of leaving hard-to-place children to languish in foster care. To those who take this position, the primary imperative is to care for the particular children now in our charge. To refuse to ameliorate their situation by placing them for adoption with a same-sex couple because of a general commitment to the social value of heterosexual marriage strikes Erastians as heartless.

I suspect that underlying the differences between these two groups can be accounted for by differing perspectives on how to deal with tragedy. In the introduction to this essay, I noted Professor Rodes's insistence that the ability to deal with tragedy is an essential feature of pilgrim law. He writes,

[a] Christian jurisprudence, therefore, must cope with tragedy. It must bear witness to redemption, and as far as possible further 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.¹⁰¹

Broken families. Bruised children. Moral uncertainty. Practical uncertainty about the best way to pick up the pieces. All are aspects of the tragic nature of human life. Although we are redeemed from sin, we are not fully healed from its effects, individually or collectively. In this debate about Boston Catholic Charities, Erastians place their emphasis on picking up the pieces after tragedy has wreaked its devastation—they see the faces of the particular children languishing in foster care and in need of a loving home. They fear that the High Churchpeople are pressing the requirements of natural law in the manner alluded to by Rodes: they “have no answer to anyone's failure to live up to what it

http://www.commonwealmagazine.org/article.php3?id_article=1566&var_recherche=...abandoned+children) claims that “both the bishops and the Massachusetts legislature are wrong”—the legislature for not granting an exemption to Catholic Charities in the first instance, and Catholic Charities for not continuing to provide adoption services despite the refusal of the exemption.

101. Rodes, *Pilgrim Law*, *supra* n. 10, at 12-13.

prescribes.”¹⁰² And indeed, some High Churchpeople may be guilty as charged. But at their best, High Churchpeople are arguing on behalf of prevention: the best way to prevent this type of tragedy from expanding its sway upon human life is by promoting and protecting the only institution that has proven more-or-less capable of raising healthy children under a variety of adverse and even tragic social and economic circumstances: the traditional family.¹⁰³

Thinking of the debate among Catholics in Boston as a disagreement about the best way to respond to human tragedy will not, of course, resolve the debate. Furthermore, it does nothing to address the more wide-ranging debates that I deliberately set to one side in this essay, such as the moral status of the traditional family itself. Nonetheless, by conceptualizing the debate in this way, we might be less inclined to demonize those who disagree with us on hard questions. And that outcome, it strikes me, would be one which Robert Rodes would heartily support.

102. *Id.*

103. See *Commonweal*, *supra* n. 99, at 5 (explicitly acknowledging this point about the track-record of the traditional family).