

# University of Dayton Law Review

---

Volume 14  
Number 1 *Vincent R. Vasey Symposium: A  
Christian Theology for Roman Catholic Law  
Schools*

Article 3

---

10-1-1988

## A Christian Theology for Roman Catholic Law Schools

Thomas L. Shaffer  
*University of Notre Dame*

Robert E. Rodes Jr.  
*University of Notre Dame*

Follow this and additional works at: <https://ecommons.udayton.edu/udlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Shaffer, Thomas L. and Rodes, Robert E. Jr. (1988) "A Christian Theology for Roman Catholic Law Schools," *University of Dayton Law Review*. Vol. 14: No. 1, Article 3.  
Available at: <https://ecommons.udayton.edu/udlr/vol14/iss1/3>

This Symposium is brought to you for free and open access by the School of Law at eCommons. It has been accepted for inclusion in University of Dayton Law Review by an authorized editor of eCommons. For more information, please contact [mschlengen1@udayton.edu](mailto:mschlengen1@udayton.edu), [ecommons@udayton.edu](mailto:ecommons@udayton.edu).

# A CHRISTIAN THEOLOGY FOR ROMAN CATHOLIC LAW SCHOOLS

*Thomas L. Shaffer\* & Robert E. Rodes, Jr.\*\**

## I. INTRODUCTION

Catholic universities in America go through periodic exertions to define themselves and state their institutional goals. We had a colleague fresh from a career at a British university during one of these episodes; he reviewed the current draft memorandum on the Catholic character of Notre Dame, with the current sense of urgency to define our goals, and he said, "A university doesn't have *goals*. It doesn't *define* itself. It just *is*." He no doubt felt the same way about the law school.

We would not be here to talk about a Christian theology for Roman Catholic law schools if we agreed with our colleague. But, still, what he said is common sense. It gives us a place to begin. The first thing in a theology for law schools is that we have them; for present purposes, we have them at universities that claim an identity within and *as* the Roman Catholic Church. Your university maintains one such law school; ours maintains another. The question in both instances is: Why? Or, if you like: Why bother? The question was no doubt important to Father Vincent R. Vasey, who contributed richly to both of our law schools, and in whose memory we come among you to talk about it.<sup>1</sup>

One answer is that we maintain law schools at our universities for the reason Mr. Iacocca maintains automobile factories: He makes money by making cars. We make money by making lawyers. We well-paid law teachers make money for ourselves and our families, and ours and most Catholic universities operate their law schools at a net institutional profit. In terms of the income statement, law schools at church-affiliated universities serve the same function as the book store and, at

---

\* B.A., J.D., LL.D.; Robert and Marion Short Professor of Law, University of Notre Dame; member of the Indiana Bar.

\*\* A.B., J.D.; Professor of Law, University of Notre Dame; member of the Massachusetts and Indiana Bars.

1. Rev. Vincent R. Vasey, S.M., was a graduate of the Notre Dame Law School (J.D., 1977) and a member of the law faculty at the University of Dayton. He was a scholar and teacher of theology and of history, as well as of the law. Father Vasey's biography of the founder of the Society of Mary, CHAMINADE: ANOTHER PORTRAIT (1987), was completed shortly before Vasey's death in 1985. The interdisciplinary symposium—of which this lecture was a part in 1989—was established in his memory.

our university, the football program.

But if profit is the reason for Catholic law schools, the faculties of the law schools are not honest. We do not say that our law schools exist to contribute to the cost of undergraduate university education; we say that our law schools exist to provide legal education to people who propose to become lawyers. Once profit is discounted, or at least set aside, the answer to the question of why our Roman Catholic universities maintain law schools should be theological. The Roman Catholic Church should not be providing education of any sort unless its doing so has a theological purpose. The theological answer need not exclude the many Jews and Protestants and other non-Catholics who work at our universities and who care about them. We think the theological discussion can be carried on in a way that will *interest* non-Catholics. We suspect it cannot be carried on well without the participation of Jews and non-Catholic Christians. Their participation will not keep the answer from being theological; nor will it keep the theological answer from being Catholic theology.

## II. WHY A ROMAN CATHOLIC UNIVERSITY MAINTAINS A LAW SCHOOL

We suggest that there are five steps in a theological answer to the question of why a Roman Catholic university maintains a law school.

First, the law school is the presence of the church. The church is present in the law school, and the law school is present in the church. It is present *as* the church.

Second, this is a radical presence of service and not of power. To be present and to be subordinated to service in the world—to be as Jesus said, a servant rather than a benefactor—is radical. It goes to the root of our tradition, which is the good news of the coming of the Kingdom.

Third, it is a presence in the world. The law school is present in the world. It is present *because of* the world.

Fourth, this is a presence enacted vicariously. We who both ponder and preserve a theology for law schools do not go into the world to be present there as the church; our students do that. Our presence as educators is a presence involved in the world because it is involved in the lives of those who are being formed to go into the world.

Fifth, ours is then a presence that reaches into the world in order to learn from the world how we should form those who are to go into the world.

*A. The Presence of the Law School Is the Presence of the Church (Shaffer)<sup>2</sup>*

Our Roman Catholic universities maintain facilities to educate people to be lawyers, because legal education is a way for the church to be in the world. This may not sound earth-shattering at first, but when applied to a Catholic law school in the United States—ours, yours, or anybody's—this is a radical thing to say. The evident mission of Catholic legal education in the United States, since the enterprise started after the Civil War, has been to get power to the children and grandchildren of the late immigrants. To get power for our own by getting them onto the ladder of American vertical mobility, into positions of political influence, into judgeships, into partnerships in big law firms, on law faculties other than those at Catholic universities.<sup>3</sup>

Maybe the implicit purpose was like the purpose implicit in St. Ignatius Loyola's training missionary priests and sending them to Asia: Maybe the implicit purpose in beginning law schools at American Catholic universities was so that graduates could take up Christian apostolates in places of power in America. Catholic law schools sometimes say that;<sup>4</sup> but we suspect that getting political and legal clout for the Irish, the Italians, the Poles, and the Germans, had a lot to do with why the law schools were set up, with the way they were operated, and with the things the dean says in the annual report to the alumni. What the American Catholic law schools were about, in other words, had more to do with power than it had to do with service, which brings up our second point.

*B. The Presence of the Law School, As the Church, Is a Presence of Service and Not of Power (Shaffer)*

Our presence is in aid of the church's being in the world, which is a presence of service and not of power. "[T]he community of faith . . . gives itself to the service of all," Gustavo Gutierrez says.<sup>5</sup> The Pastoral

2. When this paper was presented orally, it was divided between us, in the way that is indicated in these topic headings. We preserve the division here because it allows us an uncluttered way to refer to first-person experiences and to direct the reader to other work each of us has done on these themes. Both of us participated in writing the paper, and each of us is prepared to answer for all of it.

3. Shaffer, *The Mission of a Church-Related Law School: The Catholic Tradition*, 22 VAL. J.L. REV. 669 (1988); cf. R. O'BRIEN, *LEGAL EDUCATION AND RELIGIOUS PERSPECTIVE* (1985).

4. See, e.g., NOTRE DAME LAW SCHOOL, *BULLETIN OF INFORMATION* 1989-1990 at 4. The bulletin states that "[t]he Notre Dame program aims to educate men and women to become lawyers of extraordinary professional competence who possess a partisanship for justice, an ability to respond to human need, and compassion for their clients and colleagues. Notre Dame lawyers are actively involved in public service."

Constitution on the Church in the Modern World—a principal outcome of the second Vatican Council—says, “The joys and the hopes, the griefs and the anxieties of . . . this age . . . these are the joys and hopes, the griefs and anxieties of the followers of Christ.”<sup>6</sup>

You may notice that we are proceeding here in an ascending order of awesomeness; first a Peruvian theologian, a liberation theologian, then the Vatican council. We might as well complete the progression: “The greatest among you must behave as if he were the youngest, the leader as if he were the one who serves. For who is the greater: the one at table or the one who serves? The one at table, surely? Yet here am I among you as one who serves.”<sup>7</sup> The service involved here is not a service that seeks power; neither is it a service that serves power: It is a service in powerlessness, a service of sacrifice and of reconciliation. It is immediate, local, personal, and pastoral.

### C. *The Law School's Presence Is a Presence in the World (Shaffer)*

The theology we are using here, according to Gutierrez, “implies openness to the world, gathering the questions it poses.”<sup>8</sup> Pastoral theology does not dream up its issues in the academy; it goes out and finds them. Vatican II said that the church depends on things outside itself and it depends on these things in order to know what to do to serve outside itself:

[T]he Church believes she can contribute greatly toward making the family of man and its history more human. . . . [S]he is firmly convinced that she can be abundantly and variously helped by this world in the matter of preparing the ground for the gospel. This help she gains from the talents and industry of individuals and from human society as a whole.<sup>9</sup>

Or, to put that in terms of clear dependence on the world, “[S]he . . . ought to be enriched by the development of human social life . . . so that she may . . . adjust . . . more successfully to our times.”<sup>10</sup>

We see a couple of directions coming from this modern Catholic theology of presence in the world, directions that are useful in a theology of legal education. One direction is to notice that we are present where we are—in Western Ohio, in Northern Indiana and Southern Michigan, in our middle-sized, mid-Western, heart-of-America, ethnic,

---

6. *Gaudium et Spes, Pastoral Constitution on the Church in the Modern World*, ¶ 1, in RENEWING THE EARTH: CATHOLIC DOCUMENTS ON PEACE, JUSTICE AND LIBERATION 178 (D. O'Brien & T. Shannon eds. 1977) [hereinafter *Gaudium et Spes*].

7. Luke 22:26–27.

8. G. GUTIERREZ, *supra* note 5, at 12.

9. *Gaudium et Spes, supra* note 6, at ¶ 40.

10. *Id.*, at ¶ 44.

rust-belt cities, and in the legal profession as it functions in these communities. The Vatican document takes into account that inevitably local way of being in the world, "the world" meaning what is around us. As Karl Barth said, God finds us where He put us.<sup>11</sup> The Vatican Council also said that, but it added that this local presence is the presence of the church and it is how the church finds out what is going on.

The other direction suggested by this theology of being-in-the-world is more threatening, threatening because it seems to be neglected in American Catholic law schools. That is attention to our side of the dialogue with the world, the church's side, when the church is a law school. We don't find the "political hermeneutics of the Gospel" coming out of teaching and scholarship in Catholic law schools; that is Gutierrez's phrase.<sup>12</sup> It means, in its use of the technical word "hermeneutics," a point of view that governs interpretation—interpretation, in this case, of what is going on in Northern Indiana and around here. We think the political hermeneutics of the Gospel, if present among us and in our scholarship, would indicate that the church is present in what we offer through our students and in print for the edification of the legal profession. The church is not much present, in this sense, in this local, physical sense, in Catholic law schools. We in our silence, to use a phrase of Jurgen Moltmann's, "limp after reality."<sup>13</sup>

There is a reason for this silence, and the reason relates to our past as a ladder of vertical mobility for the children of immigrants. Our first and best customers were the children of poor, alien people who came into a Protestant, parochial America. They brought their cultures with them, but their cultures were not admired—often not even by their own children. Their cultures were not American. In that era, what was not American was not desirable.<sup>14</sup>

There is a photographic history of the Italian-Americans that includes newspaper cartoons from the first 20 years of this century. There are drawings there that show Italians as lawless, violent, small, dark, and dishonest: It was un-American to be Italian—that was the message.<sup>15</sup> Or Polish. Or Irish. Or German.

The common reaction of the immigrants to that American hostility was to prove themselves American, and nowhere with more vehemence than on the campuses of Roman Catholic universities. Atop one of the side doors to the main church at Notre Dame are the words, carved in

---

11. K. BARTH, *ETHICS* 193 (G. Bromiley trans. 1981).

12. G. GUTIERREZ, *supra* note 5, at 13.

13. J. MOLTANN, *THEOLOGY OF HOPE* 36 (1967).

14. T. SHAFFER, *FAITH AND THE PROFESSIONS* 173–228 (1987).

15. CENTER FOR IMMIGRATION STUDIES, *IMAGES: A PICTORIAL HISTORY OF ITALIAN AMERICANS* (1981).

stone, "God, Country, and Notre Dame." When I was a student at Notre Dame, a part of the commencement ceremony every spring was a presentation to the president of the university, by the senior class, of a huge American flag. Father Hesburgh blessed it, with all the graduates and parents looking on, and it was run up on the flag pole in front of the Golden Dome. Every winter the senior class elected a prominent citizen who came to campus and spent several days as our "patriot of the year." In my last year, 1961, our patriot was Richard Nixon.

We seemed to be determined to prove we were as American as anybody else. Princeton, Stanford, and the University of Wisconsin seemed less moved to offer evidence of their love of country.

The theological lesson is that we seemed less concerned then than we would be today that we were turning the American nation-state into an idol.<sup>16</sup> The sort of thing Catholic universities did in those days, to prove they were patriotic American institutions, seems to me, today, inconsistent with being the church, and, as the church, being in the world. I tend to think of the Hebrew prophets when I think of models for being the church, rather than of Nathan Hale and Betsy Ross.

"The prophet," Oscar Cullman said, "explains to the people the true meaning of all events; he informs them of the plan and will of God at the particular moment."<sup>17</sup> Some of the prophets were put in prison for being unpatriotic—and God seemed to say to them that their being thrown into jail was what He had in mind for them. The plan and will of God is not necessarily in the national interest; it may not be congruent with the nine goals of the American Bar Association. We are, in our presence in the world, and in the American nation-state, powerless and even sacrificial. We are, to use a distinction I learned from John Howard Yoder,<sup>18</sup> subordinate but not subservient to the institutions of society. Our subordination has a radical—even, according to Yoder, a revolutionary—end in view. Our purposes as the church in the world depend on a prophetic perspective that the God-and-Country tradition in American Catholicism left out of account.

It follows from these thoughts about patriotism and the prophets that the presence of the church, in the world, and in service outside of itself, is a presence that is suspicious of established truths. Prophets are usually wary of established truths; that is what makes them so troublesome, troublesome especially to the state and to those who govern the business and ecclesiastical establishments. The church, as prophetic,

---

16. Shaffer, *The Tension Between Law in America and the Religious Tradition*, in *LAW AND THE ORDERING OF OUR LIFE TOGETHER* 229–68 (R. Neuhaus ed. 1989).

17. O. CULLMAN, *THE CHRISTOLOGY OF THE NEW TESTAMENT* 14 (S. Guthrie & C. Hall

<https://www.dayton.edu/udlr/vol14/iss1/3>

18. J. YODER, *THE POLITICS OF JESUS* 163–92 (1972).

tells the truth about what is going on and about how much things cost. If we need current examples of this, we might usefully notice how much this is true of the American bishops' pastoral letters on nuclear weapons and on the economy.<sup>19</sup>

*D. The Presence of the Law School in the World Is Enacted Vicariously (Shaffer)*

A theology for the Catholic law school, from this point of view, is a truthful contemplation of what lawyers do. "Theology does not produce pastoral activity,"<sup>20</sup> Gutierrez says. "Rather it reflects upon it. Theology must be able to find in pastoral activity the presence of the Spirit inspiring the action of the Christian community."<sup>21</sup> I read Gutierrez to mean that the activity that goes on in our students' and graduates' professional world, with which we are in conversation, is in a vital way to be brought into our educational world and there subjected to theological reflection.

That assumes, of course, a presence in the law school that is clearly and thoughtfully the presence of the church; clearly and thoughtfully prophetic. It assumes that the Catholic presence in Catholic legal education is more than a matter of having mass in the law building, or nearby. (One thinks of the prophets' raging against those who followed the Torah in Temple worship and did not notice the poor.<sup>22</sup>)

But our conversation with the world is conducted through those we send into the world, to be lawyers there. It is in this vicarious way that our principal conversation with the world occurs; our more direct conversations—in public service, in accommodating the Bar and the courts in our scholarship and in small fraternal ways—is insignificant by comparison. Our presence is overwhelmingly vicarious.

Consider in this regard the long tradition we have in Catholic law schools of giving words of comfort to our graduates. Not to our students: God knows we give our students little enough comfort. But to our graduates, whom we invite in from the world of law practice, so that we can tell them they are doing all right. Their struggle for place and prosperity in the hierarchical world of American legal institutions, we say to them, is what we hoped they would be doing—and this especially if they land jobs or, better yet, eventual partnerships, in big law

---

19. UNITED STATES CATHOLIC CONFERENCE, ECONOMIC JUSTICE FOR ALL: PASTORAL LETTER ON CATHOLIC SOCIAL TEACHING AND THE U.S. ECONOMY (1986); UNITED STATES CATHOLIC CONFERENCE, THE CHALLENGE OF PEACE: GOD'S PROMISE AND OUR RESPONSE (1983).

20. G. GUTIERREZ, *supra* note 5, at 11.

21. *Id.*

22. Amos 5:21–27.



firms—especially big law firms in the East.

These words of comfort are certainly a kind of vicarious reflection on our graduates' pastoral activity in the world; but I wonder about it. I wonder about the presence of the Spirit in it. I don't aim to be moralistic here: I went to a large law firm and enjoyed the words of comfort I got from Notre Dame about being there. In fact, I was hungry for those words, as our graduates more often than not are. Life in a law firm is not spiritually easy. I was the first Catholic my law firm hired, and the firm acted not out of disinterested egalitarianism, but so that its Catholic clients would not complain about the fact that the firm excluded Catholics. The clients were introduced to a young lawyer from Notre Dame. They didn't ask about the young lawyer's church; they forgot, maybe, that Rockne was a Lutheran and Parseghian a Presbyterian. They got their Catholic lawyer, in any case. I got words of comfort from Notre Dame, and I was glad to get them.

There does not seem to be much radicalism, though, in the routine practice of giving comfort to lawyers in big law firms—not much biblical radicalism. I doubt that Gustavo Gutierrez, whom I have been quoting, whose pastoral activity is as a parish priest in the poorest part of Lima, Peru, would give these words of comfort that we give our graduates, and those who want to be our graduates, who are, in Auden's phrase, trudging on time to a tidy fortune.

Our vicarious presence in the world means that we are engaged in forming those who are going into the world. That verb suggests the old-fashioned Catholic noun, "formation." The church, as legal education, is entrusted by God with the formation of people who will go out from legal education to be the presence of the church in the world. This is not a secondary or penultimate activity we are engaged in, though. It is not behind the scenes. We are the church in the world as we do it. (That means we will then have to ask in what sense we are in the world when we are not in it, which is a good question.<sup>23</sup>)

We are here forming those who form: The church, according to Vatican II, "is composed of . . . members of the earthly city who have a call to form the family of God's children during the present history of the human race, and to keep increasing it until the Lord returns."<sup>24</sup> Formation means the formation of moral character. It is a word we used to hear in discussions of religious life—of monasteries and convents. People who went to those places had to be formed for the professional lives they were to lead.

That part of the agenda for the church as law school is in some

---

<sup>23</sup> Shaffer, *supra* note 16, at 229-68.  
<sup>24</sup> *Gaudium et Spes*, *supra* note 6, at ¶ 40.

ways the clearest and easiest part of a theology for us. It is also, and in other ways, the most difficult and maybe even the most painful, because, as Pogo said, the enemy is us.

God blesses us as He gives us this task of formation. His blessings to us formers of lawyers are the virtues our students bring to us from their families, their neighborhoods, and the religious congregations they grew up in. Some of these communities are biological—organic. Some are serious in their use of organic metaphors to describe themselves; they are still in significant part ethnic communities.

The old church in the old Catholic law school reinforced the early formation of its students without articulating—perhaps without articulating even to itself—that that was what it was doing. At Notre Dame, when I was a law student there, we were put in church for mass and for retreats; our law classes were begun with a prayer; we lived under paternal restrictions having to do with automobiles, alcohol, and the opposite sex; we heard talks given by priests on why Catholic lawyers could not act for plaintiffs in divorce cases; we got, thrice weekly, a “religious bulletin,” from a person who was described as the “prefect of religion.” It was full of chatty advice of the sort you might expect from Bing Crosby in “Going My Way” and we were told about the natural law as if it were in a code. These conventional ways of preserving home and family virtues were naive, but they were often effective. They certainly provided something you could not find at Harvard or Indiana University.

Catholic universities no longer observe these conventions. If the conventions are observed on campus at all they are not observed in the law school. The old way preserved home virtues without explication; the modern way neither preserves nor explicates.

We have come, with secular legal education, to describe ourselves as distrusting virtues learned at home. It has been the educational boast of American legal education that it displaces these marks of ordinary good character, that it produces in their place the analytical disposition we refer to as “thinking like a lawyer.”<sup>25</sup>

The removal of marks of character has been the stated purpose of “Socratic” teaching in first-year law courses, and particularly so since the legal positivists took charge of our educational agenda. “Here’s a dime,” Professor Kingsfield says. “Go call your mother and tell her you will never be a lawyer.” As another Harvard law teacher of legend put it, “If you wanted to study justice, you should have gone to divinity school.”

Whatever complexity we may talk about in the task of forming

law students, the point of beginning may involve nothing more than getting out of our own way—getting out of our students' way. Letting the influence of their families shine through. We can begin to form them by persuading them that their moral impulses are useful things for a lawyer to have.<sup>26</sup> This is not a sentimental point about mothers. Nor is it as narrow and crude as a theory of moral development. It is a point about formation and a recognition of the profound dependence we have had, in Catholic schools, on the ethnic traditions that send us their children in the hope for a better life.

*E. The Presence of the Law School in the World Is a Searching Presence that Reaches into the World to Find Out How to Form Those Who Are to Go into the World to Be the Presence of the Church (Rodes)*

The Second Vatican Council teaches that the church is "at once a sign and a safeguard of the transcendence of the human person."<sup>27</sup> I think the old-model Catholic law school—the one that was just being superseded when Tom came to Notre Dame to study and I came to teach—fulfilled this role of the church for its students and their families and the parishes and neighborhoods from which they came. But it did not fulfill this role for the wider society. It was equipping its students for what Gutierrez calls "a peaceful coexistence of privatized faith within a secularized world."<sup>28</sup> Our students were not prepared in their professional lives to signify and safeguard the transcendence of the human person, because they did not understand where and how their profession was challenging and belying that transcendence. They did not understand because we did not teach them. We did not teach them because we did not know. We did not know because we did not ask the right questions of the world. In the Catholic Harvards, Yales, and Stanfords, or whatever we are striving to become, I wonder whether we are asking even now.

If we ask the world the right questions, the world will tell us the truth about law and the legal profession, and we will be able to place that truth in Christian context and share it with our students and the readers of our scholarship. But the world does not encourage us to ask the right questions. I was struck by a quotation from Helder Camara, the Archbishop of Recife in Brazil, who said, "When I gave bread to the poor they called me a saint. When I asked why the poor have no

---

26. Shaffer, *Maximizing the Law School Experience*, 12 STETSON L. REV. 551 (1983) (preface to symposium of same name).

27. *Gaudium et Spes*, *supra* note 6, at ¶ 76.

28. *Id.*, *supra* note 6, at ¶ 76.

bread they called me a Communist.”<sup>29</sup>

We can be thankful that bread is more plentiful here than it is in some places, but there are plenty of people who lack what they need for a decent life, and what Catholic social teaching tells us they have a right to. For some it is a roof over their heads, for some it is education or medical care, for some it is the opportunity to be contributing and participating members of society. The world does not like to be asked why this is the case, and we may well not like to hear the answer.

Material and cultural poverty in American life is not like cancer or heart disease; still less is it like the winds and the tides. It is a result of our institutions, economic, social, and—I am sorry to say—legal.<sup>30</sup> There would be enough money in our society to provide for everyone’s needs if we did not choose to spend it on other things. There would be enough to do in our society to keep everyone productively occupied if we did not choose to get it done in other ways. Poverty and unemployment are human artifacts as surely as highways and bridges—as surely as deforestation and acid rain.

It follows—and this is what we would rather not hear—that the same institutions that support our own prosperity are the ones that impoverish the poor among us. Whatever good there is in our laws and institutions—and there is a great deal—has a price, and the poor in our society are the ones who pay it. Back in the fifties, William Stringfellow, a Christian radical lawyer who lived and worked as a solo practitioner in the seamiest part of Harlem, told an audience of Notre Dame law students, “The people of Harlem are suffering vicariously for you.”<sup>31</sup>

What we will hear of, then, if we diligently question the world, is our own complicity in the injustices we strive to eradicate. The institutions by which other people are impoverished and degraded are the very ones we have devoted ourselves to studying and serving, the very ones from which we draw our material and psychic rewards. But there is no easy way out of this complicity. We who study the institutional complex know better than anyone else how cohesive and interdependent it is. We see no way to make it work justly, and yet we see no way to dismantle it without exposing rich and poor alike to anarchy and starvation.

Our tendency as scholars and teachers is not to ask the hard questions. We are comfortable, and marginally useful, in fine-tuning the

29. I observed this quotation on a poster and frankly, I do not know where it came from.

30. R. RODES, *LAW AND LIBERATION* 1–21 (1986); Rodes, *Greatness Thrust Upon Them—Class Biases in American Law*, 28 *AMER. JOUR. OF JURIS.* 1 (1983).

31. For the shortest, and, to my mind, the most moving statement of Stringfellow’s doctrine, see *Stringfellow on Law, Economics, Poverty, and the Practice of Law*, 8 *CAP. U.L. REV.* 451 (1979).

distribution of benefits among the beneficiaries of our system, deploying safety nets for the victims, and generally keeping the machinery running and doing as much good as it is able to do. We are apt to content ourselves with that.

In doing so, we are apt to fall into what the Marxists call false consciousness. There are always rationalizations in place for continuing our privileges, for leaving intact the institutions that make us comfortable and others poor. The rationalizations are generally built around the genuine values that led us to set up the institutions in the first place. They are easy to buy into and hard to see through. The only trouble with them is that they leave out some aspect of the truth.

The rationalizations most commonly encountered in legal scholarship and teaching these days are cost-benefit analysis and trickle down. Cost-benefit analysis teaches that we must make no change in the status quo until we are satisfied that the benefits of doing so will outweigh the costs. For most proposed changes, the costs and benefits have already been weighed, and the benefits have come up short. In reality, though, costs and benefits are much less predictable than the analysts suppose. Often, too, they are incommensurable. How much more are you willing to pay for your shirt to keep a textile worker's lungs from filling up with cotton dust?<sup>32</sup> How much more will you pay for a head of lettuce to provide migrant farm workers' families with toilets? Questions like these cannot and should not be answered. To live in the truth is to expose ourselves to risk. We are called to meet known evils at an unknown cost.

Trickle down has been condemned in many manifestations, but it keeps taking on new ones. What it amounts to whenever it crops up is a claim that we must be content with our privileges because the poor are better off with the scraps from our table than they would be with a main dish from their own. The prevalence of the claim is poignantly illustrated in a column that appeared a few years ago in our student newspaper. The author told of emerging with some of her friends at eleven o'clock at night from a bar on Rush Street in Chicago. On the street, they came on some little boys—so little they should have been in bed long ago—out making money by shining shoes. Having spent a good deal of money on her evening out, the author was moved and disconcerted by the difference between these children's condition and her own. In her heart, she was ready to give up some of her wealth to redress the balance. But her mind told her differently: "Realistically, we all learned in economics that the world does not work this way. Wealth is the product of capitalism and capitalism is the result of indi-

---

32. See *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490 (1981).

vidual incentives and competition. Consequently, some have and some have not." That economics class is a source of false consciousness. It has taught this student to ignore what is before her eyes and trust the academic constructs that support the status quo. If we inquire faithfully of the world, it will teach us the opposite.

The sovereign remedy against false consciousness is what the theologians of liberation call the preferential option for the poor.<sup>33</sup> The term comes out of documents adopted by the Latin American hierarchy at Puebla in 1979; it has since been picked up by the American bishops in their economics pastoral, and by the Vatican in its instruction on liberation theology. What this option entails, as I see it, is examining carefully the interests at stake in any political, economic, or social decision we have to make, and then favoring the interest of the poor over the interests competing with it. The reason we must do this is not that the poor are more valuable in God's eyes than other people. They just need more help. Also—and this is the more important point for us as teachers and scholars—they are less visible. We are so far the victims of false consciousness that we will not notice the poor unless we go out of our way to do so. If we set out to deal evenhandedly between rich and poor, we will inevitably end up favoring the rich. If we set out to do no more for the poor than justice requires, we will end up doing less. This is as true of our teaching and scholarship as it is of other lawyers' corporate practice.

What we must steadily ask of the world, then, if we are to be truthful teachers and scholars, is what effect legal transactions have on the people underneath them. How does our real estate law affect people who need places to live? How does our law on corporate mergers affect working people and their families? How does our criminal justice system affect the ability of the urban poor to walk out on their streets? How does the first amendment affect their ability to teach their children to live decent lives?

The preferential option for the poor, understood in this way, is not an ideology. It does not simply call us to replace our old institutions with new ones. It calls us to examine carefully all institutions, new and old, and take such control of them as is required to see that they serve the whole society. Despite what they say about Helder Camara, his doctrine is not a form of communism. Communism is not a perception of the problem; it is a proffered solution, and one at least as subject to false consciousness as any other.

Also, the option for the poor is not a career choice. We are very

---

33. R. RODES, *supra* note 30, at 214; Rodes, *Law, History, and the Option for the Poor*, 6 *LOCOS* 87 (1983).

right to give our graduates who go in for legal services or public interest law at least as much positive reinforcement as we give the ones who make partner on Wall Street, but to be content with that would be more false consciousness. The burdens of poverty are fashioned in the Wall Street offices faster and more effectively than the legal services and public interest offices can lift them. If you spend the day on corporate takeovers and plant closings without thinking about the people you put out of work, you cannot make up for the harm you do by giving a woman free legal advice in the evening when her unemployed husband takes out his frustrations by beating her.

The option for the poor is fundamentally a Christian ascetic practice. It can be undertaken wherever we are and whatever we do. It calls for thinking habitually how a proposed course of action will affect the poor, the powerless, the invisible among the people involved in it. If you work on a corporate merger, it involves asking what will become of the employees and their families. If you work on an urban renewal project, it involves asking where the people you are displacing are to live, and whether they will like it there. If you work on a debt collection, it involves asking whether the debtor has been overreached.

### III. CONCLUSION

What we are more likely to hear than anything else, at the end of a talk such as this, is that nothing we can think of to do will work. No one is going to argue—we guess—that law faculties at our two schools should not seek to form our students to be the church in the world; or that they should not listen to the world to learn what the gospel requires of them; or that our masters in Columbus or Indianapolis or Washington should not consider the preferential option for the poor in making legal and political decisions. What we are far more likely to hear is that ideas dreamed up by two professors at an academic symposium are not useful because they will not work.

The good news the church brings, and the law school as the church should bring, is the good news that we need not be afraid to be right.

Gutierrez says, "Faith proclaims that the brotherhood which is sought through the abolition of the exploitation of man by man is something possible, that efforts to bring it about are not in vain, that God calls us to it and assures us of its complete fulfillment."<sup>34</sup> He says that "the definitive reality is being built on what is transitory."<sup>35</sup> Our feeble efforts are worth making. We need not be afraid to be right, not even in an academic symposium.

---

34. G. GUTIERREZ, *supra* note 5, at 237-38.  
35. *Id.* <https://ecampus.udayton.edu/udlr/vol14/iss1/3>

“Faith reveals to us the deep meaning of the history which we fashion with our own hands,” he says.<sup>36</sup> Faith “teaches us that every human act which is oriented toward the construction of a more just society has value in terms of communion with God.”<sup>37</sup>

---

36. *Id.*

37. *Id.*  
Published by eCommons, 1988



