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BOOK REVIEW

THE LEGAL ENTERPRISE. By Robert E. Rodes, Jr.* Port Washington, N.Y.: Kennikat Press. 1976. pp. x, 181. \$13.50.

*Vincent R. Vasey, S.M.***

This essay in jurisprudence is a well wrought urn created by a judicious choice of Aristotelian, Thomistic, Existential materials and much more. Rodes might characterize his synthesis, borrowing from Tennyson's Ulysses, as a book that is part of all he has met. And Rodes has met many authors and many people in the course of years of study and living, individuals motivated by divers convictions and ideals. He has tested what is good and held fast to that which answered his own aspirations. The book tries to describe, in the terms of Cicero, what lawyering must be—interest in everything that touches men in daily life as they meet in social intercourse or transact affairs.

Those four pillars of Aristotelian and Scholastic thought, the efficient, material, formal and final causes, provide the structure upon which Rodes builds his synthesis. Society, the efficient cause, is the agent which brings about changes in the ordering of itself; the material cause, that out of which a new being arises, furnishes the substance out of which the ways and means of social control are made; the formal cause, the power which determines and energizes, is justice, moulder of men and institutions; and last of all, the final cause, the *raison d'être* of the entire legal enterprise is man, each man and all men together.

This abstract philosophical structure, however, has in no way cabined Rodes. He gives his humanistic leanings full scope. The book that he offers, therefore, is a readable presentation of what could have been a heavy and unapproachable subject. He capitalizes on his knack for exemplification, illustrating abstract principles with examples and cases drawn from various fields of law, as torts, family, welfare, procedural and constitutional law.

Rodes' basic philosophy is natural law. It does not come as a

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surprise, then, that he pays homage to discretion under its proper name, prudence, and refurbishes what old theorists from Aristotle on called *epikia*, or rational excuse for not obeying law in a particular instance. Rodes rejects the existence of purely penal laws and, in so doing, he joins a host of eminent moralists.

To capture the method and spirit of the work, one could cite, after the manner of Rodes, a Latin maxim, *finis primus in intentione, ultimus in executione*. Applied here the dictum would mean: The end and be-all of the legal enterprise is the human person. The tone of the work is set by the ultimate worth of persons. Such a *point de départ*, proper to a natural law philosopher, necessitates recognition for men's intellectual autonomy and elicits sincere reverence for personal liberty, and leads to the exposition of the legal enterprise as dialogue.

The kind of government chosen by a particular society evolves from a dialogue, that is, interaction of historical forces at work within. These forces weight society in one direction or another, determine the form of government, be it monarchy, dictatorship or democracy, and create its spirit and character. But whatever be the modality of government, the legal enterprise, even in the most outrageous expressions of government, must be a rational exercise, an attempt at explanation of its conduct and of its people. On the other hand, the people make demands and claims upon government and the government responds. His predilection for metaphysics does not keep Rodes from ferreting out of the anti-metaphysician Scandinavian Realists the element of response as one of its important contributions.

Despite his efforts to find what is valid in Analytical Positivism and Historical and Social Jurisprudence, Rodes faults the various schools of jurisprudential thought from which he differs as focusing on either one or the other of the protagonists of the legal dialogue, rather than on the dialogue itself. Analytical Positivists, for example, concentrate on government and analyze what government does; Historical Jurisprudence and Scandinavian Realists rivet their attention on the community; American Realists concern themselves rather with the prediction of what government will do and how government controls; and the Sociological School looks to the reaction of the country and the processes by which society can be engineered. Rodes prefers to see law as a rational dialogue between community and government with accent on dialogue.

The expectations of government and community are articulated in rules. Though Rodes concedes that skeptics like Jerome Frank are right not to consider rules as absolutes, he shows, by

examples from Workmen's Compensation laws, that rules are efficient. His demonstration of the validity of rules provides him with the occasion to point out how legal dialogues develop in the elaboration of arguments of litigants. Each contestant in the dialogue grounds his expectations in rules which embody the principles upon which his case rests. The government, too, uses its discretion in the application of rules, principles and analyses; the community, as either plaintiff or respondent, invokes the discretion of government; in a word, the parties engage in a true exercise of dialogue.

Social control exercised by the state and acceptance of that control by the community entails yet another kind of dialogue. The government asserts a claim to obedience and the citizen weighs that claim with the other demands that conscience makes on him. For his part, the lawyer is often called upon to mediate this dialogue. He tells his client what the law is and explains how the law fits into his client's life. If just laws are to be obeyed and unjust laws are to be disobeyed, upon whom does the burden of proof lie as to the establishment of justice or injustice? Presumption of justice lies with the law, some answer, so that the citizen must demonstrate the immoral quality of the law. Others maintain that the state must justify Vietnam wars and unjust prescriptions.

The legal enterprise is a many-faceted dialogue which provokes the intervention of all interested parties: lawyers, judges, legislators, administrators, jurors, witnesses, plaintiffs, defendants, accusers, accuseds, clerks, bailiffs, turnkeys, even teachers and students of law. All are embarked on a common and arduous enterprise and must beat out solutions for the common good.

The community continuously develops its rules, principles and analogies by the exploitation of its inner riches: religion, morality, philosophy. Moral judgments have always entered into the legal enterprise and still do, as for example, in the late resolution of the segregation problem. The personal, moral, and religious determinations of the groups just mentioned contribute to the dialogue process. History, too, and social development have their word in legal institutions as in the evolution of the duty of alimony to be paid by a wife, the use in courts of other languages than English, the extent of due process—for the simple reason that history and sociology tell us what our people have become and are on the way to becoming.

Not the keeping of the peace nor preserving the political—economic system, but the promotion of the common good is the purpose of law. Though this sounds like a mere restatement of Thomas Aquinas' essential property of law, Rodes stakes out once again his personal insight. He points out the hazards of determining

the common good by standards of higher and lesser values, or some quantitative theory. This observation leads him to a critique of Utilitarianism—Bentham's greatest good for the greatest number. Quantitative standards must yield, he is convinced, to value judgments on the quality of life. He suggests an approach balancing individual versus social interests in order to reconcile the contradictory expectation of various elements in community. Social security interest, buttressed by Brandeis' briefs have proved helpful in some cases, but data is never enough when used independently of moral, philosophical and historical considerations.

Rodes suggests a corrective of Thomas Aquinas' conditions for a just law: (1) competent authority, (2) common good, and (3) equal burdens on citizens. Rodes would phrase number two and three in this way: [T]he common good is the pursuit of a good end by fair means. A propos, civil disobedience (the refusal to obey an unjust law), Rodes takes issue with a long line of thinkers, moralists and jurists who concede the right to disobey a law that offends conscience, but do not allow the conscientious objector to go unpunished. He would not accede to Abe Fortas' statement that "[i]t [peaceful non-violent refusal to comply with the law] assumes that the protester will be punished, and it requires peaceful submission to punishment."¹

Rodes' position on civil disobedience with regard to laws which command or forbid, some might say, fringes anarchy, but on the whole what he says coincides with the great tradition of moral principles on one's duty with respect to unjust laws.

The legal enterprise must not only care for personal needs but must order the interpersonal relations that are common to human society. Here Rodes touches upon the theme of Buber's I-Thou philosophy. He stresses the importance of bettering the social context, the urgency of improving the quality of social life. In fact he manifests a concern throughout the work for the moral environment, in which people are born, pass their lives and die. He calls attention to the humanity that bottoms that practice of criminal law which requires the presence of the accused and determines the selection of a jury from among ordinary folk—people capable of sympathizing with the accused—and at the same time of evaluating the accusation in all its comprehensiveness. Rodes maintains that the impersonal application of law increases or diminishes, as the case may be, in proportion as the needs for efficiency, expertise, economics, soci-

1. A. FORTAS, CONCERNING DISSENT AND CIVIL DISOBEDIENCE 34 (1968).

ology and psychology, criteria and formality are recognized.

Rodes' analysis of love and marriage is heartening at a time when one out of every three marriages ends in divorce. It is refreshing to hear the ring of the Portuguese's sonnet to Robert Browning on true love in a context of how the law stands by marriage by institutionalizing love and matrimony.

In homage to human dignity, Rodes thinks that law should prohibit both the migration of poor people into affluent societies unless the immigrants be integrated, and the touring of the rich in impoverished lands, where accommodations have been created to give the tourist the illusion that "this is just like home." He discovers other duties of the law to persons, protection of one's identity with his own society, a person's desire to prolong his own personality by expressing himself in property and contracts. Man's roots in land and property must be safeguarded and above all the state should see to it that a man may, if he wishes, realize his dreams. Rodes would like to see tax considerations encourage individual craftsmanship and small businesses, so that among the aims of government would be counted job satisfaction.

The book closes with an interesting discussion of social and commutative justice. Rodes contemplates a few cases where the two seem to clash and decides in which circumstances social justice should prevail and in which commutative justice should win out; perhaps a more rewarding approach would be to show how these two justices cooperate, mutually sustain each other in view of the common good. From the personal interest approach throughout the work, to the final adhesion to the principles of subsidiarity, equality and pluralism, Rodes' vision of a natural law philosophy emerges clear and unmistakable, suffused with varying intensity of personalist and existentialist light.

