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RESPONSE TO RODES AND SHAFFER'S "A CHRISTIAN THEOLOGY FOR ROMAN CATHOLIC LAW SCHOOLS"

*Richard B. Saphire**

In a sense, it might seem odd for a non-Catholic and a non-Christian to be asked to comment on a paper entitled "A Christian Theology for Roman Catholic Law Schools." In another sense, however, it seems to me perfectly natural. For the last dozen or so years, I have been a member of the Law Faculty at the University of Dayton. From my vantage point, I have had the opportunity to participate in the culture of a Roman Catholic University which has seen itself as deeply embedded within, and a steward of, its theological and philosophical traditions. During that time, I have also had the chance to observe, and the opportunity and challenge of helping to educate, a student body which I believe has been largely Catholic. This experience has qualified me as an informed observer of the ways in which the University's religious commitments relate to its educational mission and aspirations.

There is much that is provocative and illuminating in the Shaffer-Rodes analysis. So much so that, in the present context, I can only touch on some of its central themes.

One of the paper's central propositions is that "*the Church is present in the law school, and the law school is present in the Church. It is present as the Church.*" In what way is the Church present in the law school? One way in which the statement appears not to be true is in its most literal sense. Our law school—and I suspect most Catholic law schools—is not, or has seemed to me as not, directly involved in an effort to teach a set of values which can be understood as Catholic, or at least uniquely Catholic. (Indeed, the paper acknowledges that the theological discussions that should be carried on in a Catholic law school "cannot be carried on well without the participation of Jews and non-Catholic Christians."¹) This is not to say that we do not, or should not, expose our students to Catholic or Christian theological principles as they relate to law and legal institutions. In our catalogue of courses, we have several courses which might explicitly lend themselves to such

* Professor of Law, University of Dayton School of Law. This essay is a somewhat revised version of a response to the principal paper, delivered by Professors Thomas L. Shaffer and Robert E. Rodes, Jr., of the Notre Dame School of Law, presented at the Vincent R. Vasey Symposium, held at the University of Dayton School of Law on January 25, 1989.

1. I would include non-Christians and non-religious or irreligious persons as well.

a discussion—such as Judeo-Christian Ethics and the Law, Religion and the Law, and Comparative Law. And our Jurisprudence course would no doubt also make such discussions relevant—at least I suspect this was so when Vince Vasey taught the course. But we do not as a law school make an effort, whether in specific courses or throughout our curriculum, to inculcate our students with Christian theological principles, *as such*, or to teach such principles as truth. And in my judgment, it is proper that we do not.

If we do not teach Catholic/Christian principles in this way, in what other way is the “Church present in the law school”? Perhaps it could be argued that the Church is present in the law school—inevitably and unmistakably present—because our students are so predominantly Catholic. In such a context, it might be expected that our students would bring to their study of the law a vision of the world or of our society which is, in some way, uniquely Catholic/Christian. That is, perhaps it is the case that our students bring to their legal studies a distinctly Catholic perspective—that they analyze and evaluate the law through a set of theological premises generally or uniquely associated with the teachings of the Church. But my experience, and my intuition, suggests that this is also not the case. Aside from their consideration of discrete issues such as the question of whether there should be a constitutional right of privacy broad enough to encompass the abortion decision, students seldom evoke self-consciously a Catholic/Christian theology in class discussions or research papers. Indeed, I suspect that the tone and nature of class (as well as extra-class) discussions in most of our courses is not much different than one would find in a state law school or a non-church related private law school.

A third possible way in which the Church might be viewed as present in the law school is suggested by the interesting and informative observation by Professors Shaffer and Rodes that a Catholic law school has been in the past, and continues to be, an institution used by Catholics to gain entre to certain circles of status and wealth in our society that were once closed to them. By doing so, perhaps the law school might be viewed as a means through which Catholic youth can not only seek upward social and economic mobility, but through which they can more effectively bring their “Catholic vision” of the world to bear in the formation of public policies and institutions. I doubt, however, that Catholic law schools today provide a unique instrument for the achievement of economic status to Catholic students, and I doubt that those who run Catholic universities would see this as an especially important aspect of a religious mission. And, in any event, I doubt that most of our students come to our law school so that they can more effectively spread the Church’s teachings. Instead, as is the case gener-

ally, most of our students come to law school for the same reasons all law students do—because they see a law degree as a vehicle for personal, material advancement and/or (hopefully) because they believe that the study and practice of law will be personally and intellectually rewarding and fulfilling.

What other way, then, is there in which a Catholic law school is or can be an embodiment of the Church? In what way is it present *as* the Church? Professors Shaffer and Rodes suggest a more salient response to this question: "We think the political hermeneutics of the gospel, if present among us and in our scholarship, would give some hint—some indication—that the Church is present in what we offer through our students and in print for the edification of the legal profession."² They go on to state, after criticizing—in my judgment, appropriately criticizing—a past effort by some Catholic officials and legal educators to conflate a Catholic legal education with patriotism, that "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."³

The notion that the law school is a place where political hermeneutics is taken seriously, a place where students are invited and even cajoled to assume a critical posture toward secular legal institutions and policies, is a powerful and compelling one, and one which, I believe, lies at the heart of a Catholic law school's role and mission. On this conception, legal education is seen as a process which facilitates—and, I fear in too many cases initiates—a life-long conversation between law students *qua* citizens and *qua* lawyers and the broader culture in which they will live and which they will help to shape.

The conversation I—and I believe Professors Shaffer and Rodes—have in mind is the kind of conversation which gives meaning to—which defines—what our law school means in our mission statement when we speak of our special commitment to training graduates who not only "will become highly qualified and competent practicing attorneys who will uphold the highest professional standards," but also graduates "who are sensitive to the impact of Judeo-Christian ethics on the law." It is a conversation which does not end—indeed which only begins—once students learn the rules and principles of law which are the stuff to which their analytical skills will be applied in the professional world. This conversation is one in which students *qua* lawyers bring to bear theological and moral principles and values in a self-con-

2. Shaffer & Rodes, *A Christian Theology for Roman Catholic Law Schools*, 14 U. DAYTON L. REV. 5, 9 (1988).

scious way to seek a truer understanding of the laws and institutions which, as members of the bar, they will take an oath to preserve and defend.

From this perspective, the achievement of such an understanding is only part of the task. The understanding we seek, or should seek to foster, is a self-critical one. Professors Shaffer and Rodes argue that we would further the process by "getting out of our students' way. Letting the influence of their mothers shine through."⁴ By doing this, we give recognition to "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."⁵

My conception of the educational process necessary to this critical process is somewhat different. While I agree that it is essential that we begin to form law students "by persuading them that their moral impulses are useful things for a lawyer to have,"⁶ we must do far more than this. For while our students' moral impulses are important starting points for legal analysis, it is our function to help them (1) become self-consciously critical of those impulses and (2) to move beyond those impulses in an effort to work out some sort of coherent and comprehensive moral system within which those impulses can be systematically brought to bear in understanding and evaluating the law.

The Shaffer-Rodes' conception of the mission of a Catholic law school is one that, in general, I find congenial and compelling. They argue that a fundamental aspect of a Catholic law school's mission to be "present in the world" is its duty—our duty, through our teaching and scholarship—to encourage students and others to "ask the right questions,"⁷ questions with which they might not prefer to be confronted. These questions demand answers to why, in a world and a nation as wealthy as ours, so many go hungry, homeless and sick; why, in a nation which professes its commitment to equality, racism and sexism and homophobia are still so conspicuous; and perhaps why, in a nation so professedly committed to the value of human life and the inherent dignity of each person, capital punishment is viewed as so acceptable and (at least some) abortions are viewed, by many, as morally unproblematic. I share Shaffer and Rodes' sense of outrage at a legal system which permits so much poverty and racism to exist. I share the outrage of some that the state, which professes allegiance to human life, can so casually execute even the most evil and dangerous of its

4. *Id.* at 14.

5. *Id.*

6. *Id.*

citizens. And I share the view of many that, at the very least, abortion presents one of the most profound moral dilemmas confronting our society today.

Given these premises, what is the obligation of the Catholic law school in educating its students? I would like to say that its obligation is to instill in its students a sense of obligation to engage in what my religion's tradition refers to as a *tikkun olam*—a transformation of the world which will result in the exposure and correction of its many injustices.

There are, it seems to me, at least two ways in which this can be done. First, we as teachers can try to persuade our students to see the injustices we see and to convince them of the need, and their duty, to correct them. This seems to be part of the Shaffer-Rodes proposal, but for reasons I cannot pursue here, I am quite skeptical that we can or should take this approach as teachers, although I think it is imperative for us to do so as lawyers and scholars. The second approach seems to me more promising: We can invite (cajole) our students to, in the words of Shaffer and Rodes, "examine carefully the interests at stake in any political, economic, or social decision we have to make"⁸ By doing this, we ask our students to engage in the political hermeneutics of which I believe Shaffer and Rodes speak. By imploring them to see (instead of allowing them to deny) the ways in which "[t]he institutions by which other people are impoverished and degraded are the very ones we [as lawyers] have devoted ourselves to studying and serving,"⁹ we can show them that law is not neutral in ways they might have supposed. By forcing them to see how law embodies and often masks specific substantive values, we can hope that they will come to understand, and perhaps even take seriously, the fact that they must be morally accountable for the work they will do: That, as lawyers, they will not simply use or serve a legal system—they will create or preserve it, and that they must bear the responsibility for doing so.

In closing, I offer two final thoughts. First, it is clear to me that the "theology" for a Catholic law school I have described, and the one propounded by Professors Shaffer and Rodes, is not uniquely a Catholic or a Christian theology. It is one that is congenial to, and indeed, I believe required by, the Jewish tradition from which I come. Indeed, it seems to me odd to call it a "theology" at all. For the role of legal education implicit in my remarks is, in my view, inherent to the mission of any law school in the modern context.

Finally, I must end on a pessimistic—or at least a realistic—note.

8. *Id.* at 17.

The self-critical stance of which Professors Shaffer and Rodes speak is one which many students seem to resist. In their struggle to master the law's principles and rules, students often perceive the kind of conversation implicit in this theological perspective as irrelevant, or at best only tangential, to the lawyers' mission. Efforts to encourage students to subject legal rules and institutions to moral and philosophical critique are often construed as quixotic forays into meaningless theoretical swamps by law professors too long cloistered in their ivory towers. But even if this perception is correct, it seems the lasting message of Shaffer and Rodes is not to despair. For it is only by conceptualizing legal education as they do that we can truly be faithful to the profound obligation that our participation in a Catholic law school challenges us to accept.