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Brenner: Response to Rodes and Shaffer's "A Christian Theology for Roman Catholic Law Schools"

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

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Good evening. My name is Susan Brenner, and I am a new member of the law faculty, which means that I did not know Father Vasey. I would like to begin by saying that I am very honored to have been asked to respond to the comments offered by Professor Rodes and Professor Shaffer, and to add my comments to those which have been offered by Professor Saphire and will be offered by Father Heft.

In doing so, I am at something of a disadvantage: I know very little about Catholic theology, and law teaching is a relatively new enterprise for me. But I would like to comment on one issue that was raised in the presentation.

That issue is false consciousness: Professor Rodes suggests that one remedy for false consciousness is "the preferential option for the poor," an option which he very ably described.

Professor Shaffer discussed the evolution of Catholic legal education in this country, and suggested it began with an uncritical acceptance of "the law." He attributed this acceptance to the predominance of immigrants or the immediate descendants of immigrants in the Catholic population at that time.

For these immigrants and near-immigrants, "the law" was a quintessentially American construct. To learn "the law" was to *become* American. To question the law was to *be* un-American. Therefore, one "learned the law" *uncritically*; and, if "learning the law" meant *unlearning* beliefs which one had learned in one's home, or in one's church, then this was a necessary price to pay for the process of "becoming American."

What I believe Professors Shaffer and Rodes are suggesting is that Catholic law schools have outgrown this model, and have reached the point at which they can embark on a challenging endeavor: That endeavor is the task of making the *law itself problematical.*

What does it mean to make the law problematical? And is it something that we routinely do under the prevailing model of legal education?

We *do* teach our students to take specific laws as problematical. I

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teach a course in federal criminal law, for example, and in that course we look at *particular* federal criminal laws. I ask the students to consider each such law as problematical, by which I mean that they must critically analyze the inception, purposes and application of that law. And I know that my colleagues do the same thing in other areas of the law.

We also teach our students to take specific case law as problematical: In teaching our courses, we all require that the students analyze *particular* cases in terms of *why* that particular court reached that particular decision. And we all require that our students consider whether or not that particular case law is a "good" decision in terms of certain types of criteria, which is an issue I shall return to in a minute.

My point is that we *do* ask our students to take particular laws as problematical. And we also ask our students to take the *application* of particular laws as problematical.

But what we do *not* ask our students to do, at least, not in my experience, is to take *"the law,"* the social fact of *"the laws,"* as problematical.

What do I mean when I refer to the process of taking *"the law"* as problematical? In order to explain what I mean, I have to say a few words about "the law."

Why do we go to law school? To learn "the law." What do we learn when we learn the "the law"? We learn some substance—a little torts, some contracts, a little criminal law, some tax, and so on. We also learn some process—a way of thinking about the substance we have learned and a way of applying it to new situations that arise.

Who do we learn this from? Who *did* we learn this from? *We* learned this from another generation of law teachers, who learned it from an earlier generation of law teachers who may very well have learned it from a generation of practitioners turned law teachers. And this generation learned it from an earlier generation of practitioners, and so on.

So what we have here is a body of knowledge that has been handed down from one generation of law teachers to another for centuries. And how did this body of law develop?

It developed in response to cases that arose between people that were presented to lawyers. And because it developed in response to cases that arose between people, it developed rules that prescribed how people should behave in regard to each other. Some of these rules evolved into the law of torts, some evolved into the law of crimes, some into the law of contracts, and so on.

The rules that evolved were not created in a vacuum. They evolved in a social context, and that social context influenced the particular

rules that developed. It is difficult, for example, to imagine the American Indians as ever having developed a concept such as the law of trespass onto land, since they did not have a concept of land ownership. If land cannot be owned, then it cannot be "trespassed upon," and no law can develop in this area.

If we do not take the law as problematical, then we do not realize, or we tend to forget, that it evolved against the background of a particular social context, and was articulated to meet particular social needs. We tend to assume, for example, that the law of trespass is a "given," that it is an inevitable *fixture* of "the law."

If we do not realize that "the law" evolved against a particular background, and was articulated to meet particular social needs, then we tend to operate as if the law were real, were something more than a collection of routine practices and understandings, generated in a particular social context.

And if we begin to operate on the assumption that the law is real, in an external, exterior sense, then we tend to forget that it is something we created. And if we forget that it is something we created, we also forget that it is something we can (and perhaps *should*) change.

In the sociology of knowledge, there is a concept known as the *taken for granted reality of everyday life.* This concept refers to the ideas, beliefs and implicit assumptions that guide us through our everyday life. For lawyers, "the law" is an essential element for their taken for granted reality of everyday life. For economists, economics is an essential element of their taken for granted reality of everyday life.

It is in this sense that law becomes *false consciousness*: Professor Rodes described an economics student who relied upon economics to justify the proposition that "some have and some have not." Her reliance upon economics in this instance was an exercise in false consciousness because she did not *question* her taken for granted reality—her adherence to the economics principles taught to her in class.

The central characteristic of false consciousness is that it is obeyed without question: Those who are enmeshed in a system of false consciousness, like the economics student, do not question the ideas, beliefs and implicit assumptions which constitute that false consciousness. Because they do not, indeed, *cannot,* question these ideas, beliefs, and implicit assumptions, their false consciousness dictates their behavior.

Those who study the sociology of knowledge will tell you that false consciousness can be overcome by making the elements of a particular false consciousness problematical. In the story about Rush Street, for example, *if* the economics student had *questioned* the information she had learned in her economics class, she might *not* have concluded that "some have and some have not."

It is *not* particularly difficult to suggest that one should scrutinize one's taken for granted reality. It is *not* particularly difficult to suggest that lawyers should take "the law" as problematical in order to avoid, eliminate or at least alleviate the problems of "false consciousness."

It *is* particularly difficult to put this into practice. When I was in graduate school, trying to become a sociologist of knowledge, we devoted a great deal of time and effort to the philosophical and sociological techniques that one can utilize in scrutinizing one's taken for granted reality. The purpose, of course, was to test the validity of the assumptions which constitute this reality in an atmosphere in which they were no longer "taken for granted." The process, therefore, was to make one's professional and personal beliefs "problematical."

It seems to me that this is what *the preferential option for the poor* accomplishes: If the economics student had applied this option to her experience on Rush Street, for example, she would have been able to take the knowledge which she had learned in her economics classes as problematical. If she had taken her economics knowledge as problematical, she would not have been *required* to reach the conclusion that it was unnecessary and improper to redistribute wealth to the poor boys on Rush Street because "some have and some have not."

This is not to say that she might *not* have reached that conclusion. This *is* to say that if she *did* reach the same conclusion, i.e., that distributing money to the boys was incorrect because "some have and some have not," she would have done so by some means *other than* false consciousness.

I think what our distinguished visitors are saying is that the preferential option of the poor is a device which law faculty can utilize in an attempt to teach their students to *identify* false consciousness in "the law."

How might this work? How could the preferential option for the poor contribute to *making the law problematical*?

I teach criminal law, so I shall use that as my example: According to Professor Rodes, the preferential option for the poor "calls us to examine carefully all institutions and take such control of them as is required to see that they serve the whole society."

We begin, therefore, with the criminal law as a social institution: What purpose does the criminal law serve? Does it, in fact, serve *any* purpose for the poor boys on Rush Street? Or does it serve *only* the patrons of the bars on Rush Street?

If one does *not* take "the criminal law" as problematical, then the response will be superficial, on the order of "criminal law puts the bad guys in jail" or, "criminal law keeps order." Such responses are the product of false consciousness.

The false consciousness that produces these responses can be the product of various factors, including education in the home, education prior to attending law school or even education in law school.

I agree with Professors Shaffer and Rodes that one of the goals of legal education should be to overcome false consciousness. It seems to me that false consciousness is the antithesis of the analytical thinking and sense of social responsibility which we attempt to inculcate in our students.

And for that reason, I agree that one of the tasks of legal education is to *make the law problematical.* If we can *make the criminal law problematical,* then we can generate something more than superficial answers to the questions I posed earlier, about the function of the criminal law.

I would also agree that the preferential option of the poor is a strategy that can be used to make the law problematical in *one particular respect*—in regard to its obligations to those who may have very little ability to influence the specific precepts of "the law." And I believe that this is an endeavor which should be pursued.