INTRODUCTION

Coming out of a church whose marks of identity include unity, holiness, and universality, it is ironic—and painful—that the “Catholic vote” has become a “metaphor” for polarization in United States culture and politics. As one reporter described the scene in the weeks before the 2004 presidential election:

Some rail against their own bishops, while others cheer what they see as a long-awaited stand of conscience. The tension seemed to reach a peak yesterday, when the Vatican felt compelled to publicly dismiss the claims of a Catholic lawyer who said he had Vatican support to seek [Senator] Kerry’s excommunication.

Tensions have also manifested themselves in the variety of Catholic “voter’s guides.” Some list a limited number of “non-negotiable” issues—particular actions that are identified in Catholic moral theology as “intrinsic evil” and suggest that candidates be evaluated according to their stand on these particular issues. For example, the Catholic Answers Voter’s Guide for Serious Catholics, first distributed prior to the 2004 election, named “five non-negotiables”: abortion, euthanasia, embryonic stem-cell research, human

---

* Director, Institute on Religion, Law & Lawyer’s Work, Fordham University School of Law, New York, New York. Thanks especially to Bob Rodes for his characteristic gracious generosity in reviewing the manuscript and responding with important and helpful suggestions. Thanks also to Tsvi Blanchard, Ana Dias, Edward McGlynn Gaffney, M. Cathleen Kaveny, Howard Lesnick, Elizabeth McKeown, Anne-Claire Motte, Russell G. Pearce and Thomas L. Shaffer, for their editorial advice and wise counsel, and for being wonderful fellow pilgrims in the journey toward legal structures which foster social and economic justice.

1. See Catechism of the Catholic Church ¶ 811, at 232 (Doubleday 1995) (“[I]t is Christ who, through the Holy Spirit, makes his Church one, holy, catholic, and apostolic, and it is he who calls her to realize each of these qualities.”).


3. Id.

4. For a definition and discussion of “intrinsic evil,” see infra n. 45.
cloning and homosexual marriage. As these moral principles “do not admit of exception or compromise,” the Guide reasoned that political consequences should be clear: “You should avoid to the greatest extent possible voting for candidates who endorse or promote intrinsically evil policies.”

In the interim between the 2004 and 2006 elections, a few organizations congealed to formulate competing guides. Others rallied around Faithful Citizenship, the United States Bishop’s long-standing official commentary on the nexus between the principles of Catholic social teaching and political participation. Others directly challenged the Catholic Answers guide as a distortion of Catholic social teaching and argued that its partisan activities were a potential threat to the Roman Catholic Church’s tax-exempt status.

In response, the 2006 version of the Catholic Answers Guide included an appendix explaining why it focused on only five issues. “These were selected because they involve principles that never admit of exceptions. . . .” In contrast, questions about waging war, applying the death penalty, helping the poor, managing the economy, handling immigration, and so on, allow a legitimate diversity of approaches:

While the underlying principles (such as solidarity with the poor) are non-negotiable, the specific applications being debated politically admit of many options, and so are not “non-negotiable” in the sense that this guide uses the term.


10. Id. at 16.
For future elections, there is some indication that the Catholic Church’s leadership may attempt to clamp down on distribution of voter’s guides outside of Catholic parishes. Shortly before the 2006 election, Cardinal William Keeler, head of the U.S. Conference of Catholic Bishops’ Committee for Pro-Life Activities, warned that voter guides may be “influenced by a partisan agenda,” and could present “legal entanglements” for parishes. The Committee thus advised bishops that the guides should not be distributed.11

But even in the absence of voter’s guides, it seems that the impasse will continue. Vatican journalist John Allen’s 2004 diagnosis continues to ring true: “there seems to be near-universal despair about the absence of public spaces for conversation among Catholics of different opinions, outlooks, and temperaments.”12

Why is reasoned conversation so difficult? This essay locates part of the tension in conflicting interpretations of the nature and the role of law. It suggests that Pilgrim Law, Robert E. Rodes’s work of jurisprudence,13 might serve as a creative and constructive resource to melt current polarization enough to begin working our way through the thicket of how Catholic social teaching might inform how we think about law and politics.

This essay unfolds in three parts. The first part is essentially descriptive, outlining some of the constructive resources that Pilgrim Law promises. The second part is essentially appreciative, finding in Pilgrim Law an image that can help us to understand and navigate tensions both within Catholic social teaching and in our current political climate. The third part is somewhat critical. It tests some of the Pilgrim Law framework by probing a central aspect of Rodes’s analysis, the “preferential option for the poor,” and discusses Catholic social teaching resources that might provide both a thicker description of the eschatological goal of our common social “pilgrimage” and a tighter nexus between that eschatology and its practical implications.

I. TRAVEL LIGHT: PACKING ADVICE

A portion of Rodes’s Pilgrim Law analysis critiques the principal
trends in jurisprudence from a Roman Catholic perspective. His central concern is that, without some larger transcendent or “eschatological” point of reference, law can easily become a tool for class-bound power. But he also notes the weaknesses in some streams of natural law jurisprudence which, according to Rodes, focus too intently on a transcendental point of reference and thus lose sight of more pragmatic and practical questions. “Pilgrim law” emerges as Rodes’s suggestion for a complementary mid-level analysis that appreciates both the importance of natural law’s transcendental point of reference and the fact that reasonable people may have different prudential judgments about the paths to travel from that point.

A. What Not to Bring

Rodes points out a number of limitations in some main streams of jurisprudence, particularly the tendency for the law to devolve into an instrument for class-bound power. History has shown the theoretical and practical limitations of the Marxist system of thought. Building on work of Milovan Djilas, Rodes notes the marked contrast between the power that Marx and Engels expected the proletariat to assume, and what they could in reality effectively exercise. Because they lack the organizational and technical skill required to run a modern industrial state, “their ostensible power is exercised on their behalf by a class of surrogates whose interests quickly diverge from those of the people in whose name they act.”

Liberal theories of jurisprudence also have significant limitations. As Rodes describes, this approach extracts from the medieval and classical philosophical synthesis its broadly attractive principles of personal autonomy, dignity, and worth, while leaving behind its more controversial and therefore more divisive principles regarding the ultimate destiny and purpose of human beings.

But history has proven the limitations of this system as well. “Freedom and equality, important as they are, cannot stand on their own as values. If they are not controlled by other values, they become self-contradictory and inconsistent with each other.” In the absence of a

15. Rodes, Pilgrim Law, supra n. 13, at 33.
16. Id. at 66-67.
17. Id. at 68.
“governing value” to resolve such contradictions, liberalism is powerless in front of “the natural tendency to resolve them in favor of the ruling class.”

The more recent Critical Legal Studies (CLS) jurisprudence, according to Rodes, suffers from the defects of both liberalism and Marxism. The CLS agenda is essentially negative: it rejects both formalism (“the belief that legal analysis free of ideological content is possible and necessary”) and objectivism (“the belief that the positive law . . . displays an intelligible moral order”).

“[W]hen pressed for positive principles to replace the ones they dismantle,” Rodes describes, “they tend to fall back on the liberal standbys of freedom and equality, with the class-bound consequences I have already taken up.”

As history makes clear, these theories would only be impediments on the journey. Rodes thus turns his gaze to theories of jurisprudence which include a transcendent point of reference and, in particular, to “natural law” jurisprudence.

B. What to Bring

1. The Journey Requires Both a Compass and a Map

Natural law relies heavily on a transcendent point of reference in order to define the heart of human experience and human flourishing. But its limitation, according to Rodes, is that it is grounded in a “pre-lapsarian” vision of the human condition—before it was corrupted by sin. He describes:

It tells us where we have come from, but not where we are going or how to get there. It has no answer to the tragic failure of individuals and societies to live up to either their origin or their

18. Id. See also id. at 93:
Liberalism, by contrast, with its twin principles of freedom and equality, permits distortion of values not by appealing to high-level moral principles, but by rejecting them. As long as people live together, the price of freedom for one person will be the coercion or constraint of other people. To the extent that the government and the legal system are prevented from coercing, others may coerce all the more. And those who are able to coerce the most will be the members of the ruling class. So unless freedom is referred to some higher value, it will serve only to keep the government or the law from interfering with that class taking full advantages of its privileges. Similarly, as it is impossible to make everyone equal in every respect, the pursuit of equality is necessarily a matter of determining which differences shall be significant and which shall not. In the absence of any higher principle, the differences that are found to matter will naturally be those that distinguish the ruling class from the rest of society.

19. Id. at 84-85.
20. Id. at 85.
destiny, and therefore no answer to a vast area of concern for both law and government. Furthermore, in the law’s constant tension between values and their realization, natural law deals almost exclusively with values. It offers no basis, therefore, for criticizing institutions that fail to serve the values they claim to, or for challenging people whose intentions are good.21

Because natural law “is content to leave most practical questions to the prudential judgment of the lawgiver” it currently results in a thin and incomplete basis for jurisprudence.22 But this does not mean that it should be discarded. Natural law’s abstract and “eschatological” orientation is important and helpful, but it needs to be complemented with a more practical orientation.

One could certainly argue with this account of the limits of natural law jurisprudence, or at least note that Rodes’s critique would not apply to all theories of natural law jurisprudence, but only certain streams. But in this essay I will table that conversation in order to focus on the how the dynamic he sets out might serve as a constructive resource for our current political climate.23

What drew me to Rodes’s analysis is its capacity to hold in harmony two dimensions that in many other jurisprudential accounts are held in tension. It recognizes the importance of maintaining a “transcendent,” even “eschatological” dimension for our social and political life. Values are important, for we need to understand where we are going. But at the same time, we also need to recognize that it is not always immediately clear how to realize these values as we navigate the concrete on-the-ground obstacles. How Rodes described his project to a group of colleagues is telling:

The way I got into the pilgrim-law project was to worry about natural law as being inadequately equipped to deal with tragedy. That is, natural law is based on the state from which we have fallen; we are called to return to some other state—which is consistent with our nature, but it is not simply where we came from. We’re not going back. But we don’t know any more about it than that. At the same time, we’re on a journey in company, and it’s our business, with the law, as with other tools, to pick each

21. Id. at 75.
22. Id. See also id. at 93 (“Natural law doctrine, with its appeal to high-level moral principles, its technical naiveté, and its lack of allowance for the consequences of sin or failure, can be made to judge the ruling class entirely on its aspirations, without regard to its effect in the real world.”).
23. For further discussion of Rodes’s vision of natural law, see generally Robert E. Rodes, Jr., The Legal Enterprise 119-139 (Kennikat Press 1976).
other up when we fall.24

This is the picture his Pilgrim Law framework conjured up in my mind: I imagine a group of hikers working to make their way westward through a difficult passage of the Rocky Mountains. One part of the team is focused on the compass, which gives an accurate but fairly general sense of direction. Another part of the team is focused on a topographical map, and has carefully marked out the paths that have been closed due to rockslides or other obstacles.

At some points in the journey, what might seem to be the most direct route for the compass readers would actually end in an impasse if the topographical map-readers did not offer their on-the-ground observations. At other points the compass readers challenge the map-readers to work their way through some of the on-the-ground obstacles, to insure that their westward hiking expedition does not ultimately end up in Iowa.

We could debate whether natural law jurisprudence is like a more general and abstract compass, or whether it also includes consulting a topographical map. But in any case, whether Pilgrim Law should be categorized as a more complete stream of natural law jurisprudence or as natural law “plus,” the core of the Pilgrim Law project is to highlight the need for both elements.

Certainly we need a sense of “where we have come from”25 in order to have a general sense of direction for where we are going. As Rodes reflects, “The pursuit of justice through law is eschatologically validated even if its historical fruition is problematical.”26 At the same time the project also recognizes the need to employ other resources in order to figure out how to reach this goal. As Rodes describes it:

What our eschatology envisions is a radical change in our original condition, yet one in which our original condition is respected and affirmed. It follows that natural law is a part, but only a part, of an account of the values to be realized in law, and that the rest of the account is radically unknowable.27

Of course there are several important assumptions built into the Pilgrim Law project; each of them could each be the ground for a separate analysis. In affirming the validity and viability of a natural law perspective, the project assumes that people want to travel, and that they

25. Rodes, Pilgrim Law, supra n. 13, at 75.
26. Id. at xii.
27. Id. at 11.
can identify and agree on some common goals (such as whether to travel west or east). For this reason I would place Rodes’s project within a broadly Christian framework which assumes at least a rough sense of agreement that humanity’s ultimate destiny is God, and that human nature embraces both the sacred and the social. This essay works within Rodes’s basic assumptions, and simply flags for deeper analysis the question of whether it is helpful for philosophical systems that tug against these assumptions.

2. A Question of Trust, a Quality of Soul

Returning to my metaphor of the group of hikers, what seems to happen often in discussions among Catholics about politics is that part of the group tends to fix its attention on the compass, and another part tends to focus intensely on the practical pitfalls of the topographical terrain. At this point, what sneaks into the dynamic is a certain layer of distrust which might express itself like this: “The real reason the topographical crowd does not want to forge through this rock pile is because they really do not want to travel westward, and are trying to find every possible way to slow up our journey.” Or, “the real reason that the compass-obsessed want to force us through this rock pile is that, in their heart of hearts, they do not care about the weaker hikers and want to weed them out of our group.”

This dynamic is evident, for example, in reactions to the February 2006 “Statement of Principles” signed by fifty-five Democrats in the U.S. House of Representatives which included the following paragraph on abortion policies:

We envision a world in which every child belongs to a loving family and agree with the Catholic Church about the value of human life and the undesirability of abortion—we do not celebrate its practice. Each of us is committed to reducing the number of unwanted pregnancies and creating an environment with policies that encourage pregnancies to be carried to term. We believe this includes promoting alternatives to abortion, such as adoption, and improving access to children’s healthcare and child care, as well as policies that encourage paternal and maternal responsibility.28

Because the statement included neither a specific commitment to changing the Democratic Party’s platform on abortion nor clear

opposition to partial birth abortion, it was interpreted by some as a “sham” and nothing more than a “statement of politics.”

One might find a remedy for these type of interpretive clashes in Rodes’s introduction of another resource for the journey: a quality of soul, a cheerful disposition that leads one to give fellow travelers the benefit of the doubt. This quality transpires from the tone of the Pilgrim Law text itself. For example, Rodes does not mince words in his sharp critique of “false consciousness.” The beauty of his analysis is that he manages not to attribute motives to those who are instrumental in making law come into being. Analyzing the legal bases of class privileges, he qualifies: “My claim is that the people running society often adopt such laws because it seems right to adopt them—despite, not because of, the effect that they will have on transferring power to a new ruling class.”

With careful attention to the historical evidence that runs counter to common assumptions, Rodes draws out the complexity of how law and values intertwine:

The legal dispositions under which a class rises to dominance reflect values accepted by the wider society independent of the class. As a result, they tend to include provisions through which the class can be held accountable to the wider society for implementing the values in question.

In contrast to other streams of thought which reason that “if a philosophical or theological position supports the ruling class, the ruling class probably thought it up for that purpose,” Rodes opts to interpret the evidence with a certain generosity of spirit: “For my own part, however, I believe that the human intellect is quite capable of falling into error without any ulterior motive.”

The core of Rodes’s packing advice, then, is to travel light. The essentials for this journey are a compass, a map, and a generous quality of soul which allows one to be attentive to fellow travelers, appreciating that if their contributions to the group seem limited or even counter-productive, that might be due to well-intentioned error or to the formidable challenges of the journey itself.

30. Rodes, Pilgrim Law, supra n. 13, at 50.
31. Id. at 52.
32. Id. at 87. See also Gaffney, supra n. 14, at 695-696 (describing Rodes’s “characteristically gracious, even generous” spirit in his critique of Critical Legal Studies scholars Mark Kelman and Roberto Mangameira Unger).
II. **A Light for the Journey**

A. **Law as a Bridge**

What is the role of law in the *Pilgrim Law* project? For Rodes, law is a “bridge” between values and their realization. Law, and the process of developing positive law, must bring together both worlds: the conviction that an orientation toward values—a general sense of direction, the compass—is important; and the mid-level analysis required to reason through the concrete ways to realize these values in social life. To see law as a bridge between the abstract and the practical is already a light for understanding a series of perhaps inevitable tensions in political and social life.

Law’s “bridge” work involves a further set of tensions. As Rodes describes,

> Whatever values the law pursues, it has two ways of pursuing them, and the two exist in some tension. We can call them instrumental and didactic. The law operates instrumentally when it affects people’s behavior by deploying incentives and disincentives... The didactic operation of the law is simply a matter of witnessing the moral standards, the moral reflection, and the social customs of the community."}

One might be tempted to accept just one or the other of these paths out of “a certain philosophical convenience,” but, Rodes warns, one without the other “leads to an impoverished jurisprudence.” Just as we need both the compass to identify basic values and the topographical map of prudential political judgment, an “adequate account” of the law as “a bridge between our values and their realization” requires reflection on both the didactic and the instrumental functions of law. Rodes further explains, “And for such reflection we must maintain some balance between the didactic and the instrumental operations of the law.”

B. **How *Pilgrim Law* Illuminates the Nexus between Law, Politics and Catholic Social Teaching**

This section tests the extent to which the *Pilgrim Law* project might illuminate some of the tensions over the nexus between law,
politics, and Catholic social teaching. The first part explores an example of how the project might illuminate some of the tensions within Catholic social teaching itself. The second part returns to the opening example of Catholic voter’s guides to explore how the project might apply to a few aspects of the debates regarding the application of Catholic social teaching to political life. The third part focuses on how the Pilgrim Law project might shed light on current analyses of the role of rhetoric in debates about Catholic social teaching and political life.

1. Pilgrim Law Illuminates Tensions within Catholic Social Teaching

To what extent does Catholic social teaching define itself as a rhetorical clarion call to the eschatological destiny of humanity? To what extent is its essential purpose to give concrete guidance? And to the extent it attempts to give concrete guidance, does it aim to serve as a general didactic compass? Or does it hope to provide a detailed and instrumental map to direct the course of law and policy?

A cursory glance at the corpus of Catholic social teaching reveals that it tries to do all of the above, and that various aspects of these analyses are often in tension with each other. Evangelium Vitae, Pope John Paul II’s analysis of the application of Catholic social teaching to the issues of abortion, euthanasia and the death penalty, illustrates the tensions. On one hand, the encyclical includes a broad and sweeping eschatological vision of human dignity, and a powerfully clear condemnation of the cultural elements that do not foster such a vision. Such is evident, for example, in the “culture of death” imagery:

In fact, while the climate of widespread moral uncertainty can in some way be explained by the multiplicity and gravity of today’s social problems, and these can sometimes mitigate the subjective responsibility of individuals, it is no less true that we are confronted by an even larger reality, which can be described as a veritable structure of sin. This reality is characterized by the emergence of a culture which denies solidarity and in many cases takes the form of a veritable “culture of death.”

Values are the indispensable point of reference for any democracy:

[T]he value of democracy stands or falls with the values which it embodies and promotes. Of course, values such as the dignity of every human person, respect for inviolable and inalienable human rights, and the adoption of the “common good” as the end and criterion regulating political life are certainly fundamental and not

to be ignored.\textsuperscript{38} As such, John Paul explained, “the acknowledgment of an objective moral law which, as the ‘natural law’ written in the human heart, is the obligatory point of reference for civil law itself.”\textsuperscript{39}

The encyclical provides a broad sense of direction—a compass, perhaps. But it is important to keep in mind that the letter is addressed to the universal church, and thus to people of a variety of political cultures and legal systems. Given this context, it would be practically impossible and certainly unwise to provide a detailed and instrumental map that attempts to direct the course of law and policy. Given the genre, it is not surprising that the analysis leaves a number of important questions unanswered: Should the primary legal instrument for achieving this vision be the coercive force of the criminal law? Tax incentives? Administrative schemes for positive educational and cultural projects?\textsuperscript{40}

However, the lack of specific guidance should not be interpreted as a failure to appreciate the complexities of constructing legislative and policy solutions within the constraints of current legal structures. For example, John Paul explains:

\begin{quote}
[When it is not possible to overturn or completely abrogate a pro-abortion law, an elected official, whose absolute personal opposition to procured abortion was well known, could licitly support proposals aimed at limiting the harm done by such a law and at lessening its negative consequences at the level of general opinion and public morality. This does not in fact represent an illicit cooperation with an unjust law, but rather a legitimate and proper attempt to limit its evil aspects.\textsuperscript{41}
\end{quote}

Other sections note the social and cultural work entailed in building a “culture of life.” The discussion at the end of the encyclical opens out toward an enormous and complex social and cultural project:

\begin{quote}
. . . it is not enough to remove unjust laws. The underlying causes of attacks on life have to be eliminated, especially by ensuring proper support for families and motherhood. A family policy must be the basis and driving force of all social policies. For this reason
\end{quote}

\textsuperscript{38. }\textit{Id.} at ¶ 70.
\textsuperscript{39. }\textit{Id.}
\textsuperscript{41. }\textit{Evangelium Vitae supra} n. 37, at ¶ 73 (emphasis in original).
there need to be set in place social and political initiatives capable of guaranteeing conditions of true freedom of choice in matters of parenthood. It is also necessary to rethink labour, urban, residential and social service policies so as to harmonize working schedules with time available for the family, so that it becomes effectively possible to take care of children and the elderly.42

How does the Pilgrim Law project illuminate these tensions? It clarifies the need for a multi-dimensional analysis. The journey requires a compass of values, a topographical map to get us started in the prudential reflection on the best path to our goal, and the readiness to give fellow travelers the benefit of the doubt as we sift through a variety of policy proposals.

For example, to move past the polarized impasse on how to deal with the problem of abortion, we undoubtedly need clear and courageous statements that abortion is a grave moral and social evil. But the conversation should not stop there. We also need careful and thoughtful reflection about the complex legal and policy choices that will practically and effectively reduce abortion in our society. Currently these two dimensions of the political conversation appear as opposite ends of the spectrum with advocates on either side in a mutually suspicious stand-off. Thus perhaps the first and most urgent task before us is to create relationships of trust in which Catholics with differing views might begin to see themselves as potential partners in the same project.

The Pilgrim Law framework might also provide resources to encourage some politically involved Catholics to move beyond a tendency to mine Catholic social teaching for snippets to proof text a unidimensional analysis that props up partial and particular political agendas. Yes, Evangelium Vitae is a clarion call to the eschatological destiny of humanity, to set the compass of social and political life so as to respect the values that will foster steps toward this goal. But it is also an invitation to the hard work of prudential reflection on how to develop a social map with the capacity to both deal with tragedy and implement practical and constructive social policies that encourage a culture of life.

As a document directed to the universal church, Evangelium Vitae’s approach is necessarily a broad and general articulation of values that should be brought to the fore in a variety of cultural and political terrains. But this certainly does not negate the fact that the process of realizing these values in a particular concrete situation is often complex.
and difficult. And on those questions, Catholic social thought teaches that reasonable people may disagree.43

The Pilgrim Law lens helps us to see how in the “bridge” work of reflection on how the values of a culture of life may be concretely realized in social life and legal structures, the two dimensions are both indispensable, and must be held together in the same conversation.

2. Pilgrim Law Illuminates Tensions in the Application of Catholic Social Teaching

Returning to my opening illustration, competing “voter’s guides” are one of the most recent manifestations of the tensions over how the principles of Catholic social teaching should be applied. How might the Pilgrim Law project illuminate the tensions within the voter’s guide debates?

In light of Rodes’s call for a generous and gracious spirit, we might first attempt to understand why many might be attracted to the analysis in the Voter’s Guide for Serious Catholics. In the current political climate many Catholics fear that the culture has completely lost its mooring, and thus gravitate toward a strong anchor of moral principles that “do not admit of exception or compromise.”44 The Pilgrim Law framework acknowledges these concerns by appreciating and highlighting the importance of clearly identifying the transcendent values that lead society beyond self-centered interpretations of liberty and equality in order to foster true human flourishing. For those who believe that an unborn fetus is a human life, as many Catholics believe, it is jarring when political rhetoric fails to acknowledge that abortion is a profound moral and human tragedy. Under Rodes’s analysis, it is a non-starter for political actors to be unwilling to entertain that sort of moral

43. See e.g. Congregation for the Doctrine of the Faith, Doctrinal Note on Some Questions Regarding the Participation of Catholics in Public Life ¶ 3 (Nov. 24, 2002) [hereinafter Doctrinal Note]:

On the level of concrete political action, there can generally be a plurality of political parties in which Catholics may exercise especially through legislative assemblies their right and duty to contribute to the public life of their country. This arises because of the contingent nature of certain choices regarding the ordering of society, the variety of strategies available for accomplishing or guaranteeing the same fundamental value, the possibility of different interpretations of the basic principles of political theory, and the technical complexity of many political problems. It should not be confused, however, with an ambiguous pluralism in the choice of moral principles or essential values. The legitimate plurality of temporal options is at the origin of the commitment of Catholics to politics and relates directly to Christian moral and social teaching. It is in the light of this teaching that lay Catholics must assess their participation in political life so as to be sure that it is marked by a coherent responsibility for temporal reality.

44. Voter’s Guide for Serious Catholics, supra n. 5.
dimension when discussing the problem of abortion.

But *Pilgrim Law* also functions as a critique—or better, an invitation for those who stop at enunciating principles to move with a generous and gracious spirit toward those who seem to be more focused on the practical question of how to construct a “bridge” between values and their realization. If the “compass” readers give fellow travelers the benefit of the doubt, they might see how intense focus on the “topographical map” of practical and prudential difficulties may not necessarily indicate a desire to skirt a commitment to the broader values in question. It may instead reflect the complexity of the work required to “bridge” values and their realization in social life and legal structures.

To be concrete, let’s start from the baseline of a legislator who agrees that abortion is an “intrinsic evil.”\(^{45}\) When a legislator raises a question about the shape of laws and policies to deal with, in Rodes’s words, the “tragic failure of individuals and societies to live up to either their origin or their destiny,”\(^{46}\) this does not necessarily mean a negation of the value in question. It may be an acknowledgment that against the backdrop of “tragic failure,” many aspects of the development of abortion law and policy are difficult and complex.

---

45. For a discussion of “intrinsic evil” (the category of actions which Catholic moral theology defines as always wrong, regardless of the circumstances), see John Paul II, *Veritatis Splendor* (The Splendor of the Truth) ¶ 80 (Libreria Editrice Vaticana 1993):

Reason attests that there are objects of the human act which are by their nature “incapable of being ordered” to God, because they radically contradict the good of the person made in his image. These are the acts which, in the Church’s moral tradition, have been termed “intrinsically evil” (*intrinsece malum*): they are such always and per se, in other words, on account of their very object, and quite apart from the ulterior intentions of the one acting and the circumstances. Consequently, without in the least denying the influence on morality exercised by circumstances and especially by intentions, the Church teaches that “there exist acts which *per se* and in themselves, independently of circumstances, are always seriously wrong by reason of their object.”

Interestingly the examples listed in this discussion move far beyond the five “non-negotiables” discussed above. Compare examples discussed supra at n. 5 with *Veritatis Splendor* ¶ 80:

The Second Vatican Council itself, in discussing the respect due to the human person, gives a number of examples of such acts:

- Whatever is hostile to life itself, such as any kind of homicide, genocide, abortion, euthanasia and voluntary suicide; whatever violates the integrity of the human person, such as mutilation, physical and mental torture and attempts to coerce the spirit; whatever is offensive to human dignity, such as subhuman living conditions, arbitrary imprisonment, deportation, slavery, prostitution and trafficking in women and children; degrading conditions of work which treat labourers as mere instruments of profit, and not as free responsible persons: all these and the like are a disgrace, and so long as they infect human civilization they contaminate those who inflict them more than those who suffer injustice, and they are a negation of the honour due to the Creator.

(quotting *Gaudium et Spes* ¶ 27).

Defining abortion as an intrinsic evil does not answer the practical question of how we get from here (more abortions) to there (fewer abortions). If law is a bridge between values and their realization, definitions are only the beginning of conversations about law and the political process. Even if one’s compass is oriented toward broad respect for human dignity, complex and controversial issues pervade the question of how might one bring into being a society in which abortion happens less often. This—and not the baseline question of the morality of abortion—is often the core of public debate.\textsuperscript{47}

The Pilgrim Law framework may also provide some tools to parse the argument that “some things matter more than others.” It acknowledges that a compass is indispensable, and appreciates the dangers of traveling without a clear reference to transcendent values, such as the value of life or the principle that all human beings should be treated with dignity and respect. But it also highlights that every issue requires a mid-level discussion about how we are to arrive at such a goal.

The Pilgrim Law framework does not downplay the moral tragedy of abortion or the importance in political life of clearly identifying abortion as an intrinsic evil. But it does emphasize that the process of translating this conviction and concern into a legal agenda and specific public policies requires several additional steps, all of which fall into the realm of prudential political judgment. On these decisions, Catholic social thought teaches that reasonable people of faith may disagree.\textsuperscript{48}

3. Pilgrim Law Illuminates Debates about the Rhetoric to Describe the Nexus Between Law, Politics and Catholic Social Teaching

Prior to and since the 2004 election, thoughtful commentators and scholars have probed some of the rhetorical aspects of the tensions discussed above. In an October 2004 op-ed column, journalist David Brooks captures well the “two different sorts of minds” at work in the presidential campaign.\textsuperscript{49} In Brooks’s view, the “atmosphere” of John Kerry’s mind is “rationalistic”: “He thinks about how to get things done. He talks like a manager or an engineer.” In contrast, George Bush’s mind could be described as “more creedal or ethical”:

\textsuperscript{47} See generally Robert E. Rodes, Jr., Classic Problems of Jurisprudence 45-46 (Carolina Academic Press 2005) (discussing German Constitutional Court’s approach to the problem of abortion).

\textsuperscript{48} See e.g. Doctrinal Note, supra n. 43, at ¶ 3.

He talks about moral challenges. He talks about the sort of personal and national character we need in order to triumph over our enemies. His mind is less coldly secular than Kerry’s, but also more abstracted from day-to-day reality.

Brooks then proceeds to characterize the strengths and weaknesses of each cast of mind. Kerry’s weakness is his inability “to blend his specific proposals into guiding principles.” In contrast, Bush’s weakness is “statecraft”—“the task of relating means to ends, of orchestrating the institutions of government to achieve your desired goals.” Brooks concludes: “Bush sometimes acts as if it’s enough for a president to profess his faith. But a coach can’t just dream up a game plan. He has to understand what his specific players can and can’t do, and adapt to those realities.”

Another extraordinarily thoughtful commentator, Rodes’s Notre Dame colleague, and professor of law and theology Cathleen Kaveny, recently parsed the 2004 presidential election as an example of the clash between two forms of moral discourse: prophecy and casuistry. Kaveny quotes ethicist James Gustafson to describe the “utopian nature” of prophetic discourse:

> [P]rophets sometimes proclaim and depict an ideal state of affairs which is radically in contrast with the actual state of affairs in which we live together in society. . . . Of itself, the utopian vision does not precisely show how we are to get . . . to the fulfillment of the alluring ideal future.

Casuistical discourse, in contrast, is

> a way of engaging in practical reasoning—it is a form of our day-to-day moral discourse, in which we consider the rightness or wrongness of particular actions in light of applicable moral principles, particular features of the action and particular characteristics of the agent performing it.

According to Kaveny, prophets and casuists clash on a number of levels, including the priority they assign to issues, the nature of their first-order moral analysis, the manner in which they assess those engaged in morally troublesome practices, the proper response of society, and the temporal horizons of their proposed solutions. For these reasons, she concludes, prophetic and casuistic discourse “do not make

50. Id.
52. Id. at 507.
53. Id. at 511.
tranquil companions.”

In fact, the choice to use one or the other mode of moral reflection to frame a particular topic sets one down a path that is virtually guaranteed to make it difficult to have a fruitful conversation with someone who has chosen to use the other mode, even if the prophet and the casuist share the same basic moral and religious values.

Prophets tend to emphasize the need for radical and unambiguous compliance with the patterns of action appropriate for denizens of the kingdom of God—no matter what the circumstances. Casuists, on the other hand, tend to focus on the fact the God’s kingdom is not yet perfectly instantiated in our midst, and that our responsibility to those made in God’s image and likeness requires that we take due account of this fact.

Kaveny illustrates the tensions by exploring how those on the political right tend to apply prophetic discourse to the problem of abortion and casuistic discourse to the problem of torture, while those on the political left flip the discourses on the same issues.

Does Kaveny see any hope for a way to move beyond the impasse between prophecy and casuistry? In some sense, each needs the other—not only as a corrective to its rhetorical excesses, but as essential to the core process of realizing particular values in a given concrete situation.

We cannot do without casuistry or practical reasoning about what to do in concrete cases. Moreover, we cannot deny the significant potential for casuistry to go deeply awry. . . . What is the remedy? In my view, the remedy is prophecy.

But her analysis is also skeptical about the potential for constructive engagement in the course of day-to-day moral discourse between the two modes of rhetoric. Prophecy, according to Kaveny, should be viewed as a kind of “moral chemotherapy,” “a brutal but necessary response to aggressive forms of moral cancer, whose uncontrolled growth threatens to corrupt practical reasoning, and ultimately to destroy the very possibility of it.” The analogy suggests that in contrast to casuistry as the normal discourse of morality, prophecy should be used sparingly, in cases of grave and serious danger, and perhaps only after the wisdom of the treatment is confirmed by a

54. Id. at 514.
55. Id.
56. Id. at 515.
57. Id. at 572.
58. Id. at 574.
second opinion.

How would current tensions over rhetoric be viewed through the Pilgrim Law lens? In contrast to Kaveny, Rodes might see a broader and perhaps more day-to-day role for some types of prophecy, because of their capacity to remind us of the importance of the eschatological goal and of clearly defined values without which the legal categories devolve into resolutions in favor of class-bound power. But neither would he downplay the importance of casuistry, the element of practical reason, of discerning in a given situation the rightness or wrongness of particular actions in light of applicable moral principles, as the appropriate vehicle for reflection on the questions of how to “deal with tragedy” and how to “pick each other up when we fall.” Within the Pilgrim Law metaphor of law as a bridge between values and their realization, it is clear that in the political process of building the bridge, prophets and casuists need each other, and so must work to find the rhetorical tools that lead to constructive and fruitful discourse.

What kind of vehicles might the Pilgrim Law framework suggest to bring together these “different sorts of minds”—creedal and practical, the prophetic and the casuistic? If we are to get beyond the “near-universal despair about the absence of public spaces for conversation among Catholics of different opinions, outlooks, and temperaments” that John Allen described, we must recognize that at the heart of the current polarization is a lack of trust. This suggests that vehicles should aim first and foremost at building relationships of trust, and only once this foundation is solid, work toward a constructive exchange of ideas. In this process Pilgrim Law’s third element—the quality of soul which leads fellow travelers to give each other the benefit of the doubt, even if at first they might find the other’s mode of reasoning jarring—might make all the difference.

III. TRAVELING LIGHTER: THE “PREFERENTIAL OPTION FOR THE POOR” AS EXCESS BAGGAGE?

So far my analysis has been essentially appreciative. I would now like to pose a critical challenge that simultaneously hopes to echo

59. Shaffer, supra n. 24, at 760 (quoting Rodes).
60. Id. (quoting Rodes).
appreciation for the potential of the Pilgrim Law framework. I compare Rodes’s discussion of the “preferential option for the poor” with other resources in Catholic social thought to probe whether a thicker description of the eschatological vision might push the analysis beyond the categories of class conflict. The first two parts briefly set out the foundations for the preferential option for the poor according to the liberation theology that informs Rodes’s analysis and probe some of the potential limitations of this framework. The third part explores other texts from Catholic social teaching that might provide an alternative foundation for social and economic justice. This section concludes with a brief consideration how these alternative texts might inform the jurisprudential categories of freedom and equality.

A. Elements of the Liberationist Preferential Option for the Poor

As Rodes indicated in the preface, Pilgrim Law is actually his second venture into “liberation jurisprudence.” His first, Law and Liberation sets out some of the overarching principles of liberation theology that are woven into his work. This section highlights a few of the central insights from liberation theology that form the basis for Rodes’s discussion of the “preferential option for the poor.”

At the beginning of his analysis, Rodes highlights the context for the development of liberation theology:

The theology of liberation has grown up in a social context of unjust structures supported by law, and in an intellectual context influenced by Marxist perception of law as an instrument of the dominant class for perpetuating its dominance.

For this reason, Rodes notes, those who “try to use the law in pursuit of the higher ends of justice and human fulfillment have found in [liberation theology] scant contribution” to jurisprudence. Rodes, in contrast, believes that liberation theories hold great promise for jurisprudence, and thus submits that legal theorists ought to take another look.

---

64. Id.
66. Id.
67. Id.
He describes the “primary liberationist insight” as “eschatological.” \(^68\) “God calls all mankind to work with Him toward the consummation of history in His kingdom, a state of enhanced union of all people with Him and each other.” \(^69\) The *Exodus* story is the paradigm for a people called to cooperate with God in carrying forward His Kingdom. But—and this is the second major liberationist insight—“our cooperation in God’s purposes is powerfully impeded by unjust economic and social structures.” \(^70\) It follows that, liberation—the freeing of the worker from this alienation through reforming or dismantling the economic and social structures that bring it about—is itself a major work of cooperation in the coming of God’s Kingdom. \(^71\)

This, however, generates class conflict: “[T]he classes of people who benefit from the structures in question are generally unwilling to have them reformed or dismantled.” \(^72\) Here is the core source of the liberationist articulation of the preferential option for the poor:

Liberationists insist that Christians must accept the reality of class conflict, and must identify themselves with the oppressed classes. Christians, as such, did not create the class struggle, and are not responsible for it, but if they ignore its existence or profess neutrality in it they are in effect siding with the oppressor class. \(^73\)

Liberationists recognize the tension between participation in class struggle and a Christian commitment to peace and universal brotherhood. In response, they highlight that the oppressor also needs to be liberated from oppressive social structures, and to the extent one clings to those structures, “the only way to love him may be to confront him.” \(^74\) Liberationists also envision the possibility of a certain reconciliation of the classes “by insisting that if the rich understood their true interests they would hate the institutions that make them rich.” \(^75\)

Drawing heavily from this analysis, a significant portion of the *Pilgrim Law* project focuses on the jurisprudential implications of liberation theology. As Rodes describes, “the claim that Christianity has no political dimension is incompatible with the rudimentary duty to love

---

68. *Id.* at 2.
69. *Id.*
70. *Id.*
71. *Id.* at 3.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* at 4.
your neighbor.”76 As such, Christians must probe the roots of structures of oppression and respond: “Rescuing your neighbors from oppressive economic and social institutions is not less a part of your Christian duty than rescuing them from plagues, fires, earthquakes and floods.”77

This duty may also be articulated as in the terms of the preferential option for the poor:

[T]he church, while not ceasing to recognize God’s universal love for the whole human race, should teach that He has a special love and concern for the poor—for those deprived of the material necessities of life and condemned to live on the margins of society—simply because they need more from Him than other people do.78

The Pilgrim Law project accepts the reality of class conflict, and the importance of “siding” with the “victims” in that conflict:

Christianity does not teach us to ignore this struggle between competing interests. What it teaches us to do is side with the victims even if we ourselves are beneficiaries. If our prosperity is the flip side of someone else’s misery, we are, like it or not, oppressors. We should be no more content with being oppressors that we would be with being oppressed.79

Concretely, the preferential option for the poor informs a definition of justice: “We owe everyone without exception a recognition of their humanity: the duty cannot be quantified against any other values, much less subordinated to it.”80 The demands of justice require an intense focus on insuring that basic needs are met. As Rodes put it, we must work to insure that “the members of every class have enough resources and enough power to live as befits human beings,” a demand that requires us to probe economic and social structures, asking whether “the privileged classes, whoever they are, be accountable to the wider society for the way they use their advantages.”81

The Pilgrim Law project also incorporates the liberationist analysis of “false consciousness” as at the root of the problem of persistent poverty: “We, for our part, are all too apt to lack the resources of heart and mind to penetrate the placid surface and see what is really happening to the people in our society who are not as well off as we

76. Rodes, Pilgrim Law, supra n. 13, at 94.
77. Id.
78. Id. at 96.
79. Id. at 23.
80. Id. at 99.
81. Id. at 26.
are.”82 As Rodes describes, false consciousness is “fundamentally a deficiency of heart and mind. To overcome it, we need a change of attitude, a new opening of hearts and minds to the truth.”83 According to Rodes, the preferential option for the poor is the way out of false consciousness: “The only way to avoid an inadvertent bias in our own favor is to adopt a deliberate bias the other way.”84

As for liberationists, the full dimensions of “liberation” involved in the Pilgrim Law project are profound:

The beneficiaries of unjust institutions, like the victims, need liberation, and the replacement of unjust institutions by just ones, if it could be accomplished, would liberate beneficiaries and victims alike. It is this principle of joint liberation that reconciles participation in an ongoing class struggle with a Christian commitment to universal brotherhood and solidarity.85

B. Limitations of the Liberationist Preferential Option for the Poor

I wholeheartedly agree with the underlying commitment and the urgency of arriving at a jurisprudence that facilitates a more just distribution of material resources. But a few elements of the analysis lead me to consider whether at this point in our eschatological journey the preferential option for the poor as set out in Law and Liberation and Pilgrim Law should be considered excess baggage that impedes us from moving more quickly and with lighter hearts. What follows are a few questions, not about the overarching commitment to social justice, but about how to articulate it.

First, acceptance of class conflict as an essential reality, and of the necessity of “siding” with the oppressed, affirms a negative dynamism in the work for structural change. As a part of a privileged class, the reason we should work for change is because we feel bad about the fact that our prosperity “is the flip side of someone else’s misery,” and “[w]e should be no more content with being oppressors than we would be with being oppressed.”86 Even though we have some sense that our own “liberation” is also at stake, the way out is not so much based on an alternative positive vision, but on adopting a deliberate bias against what we perceive to be our own interests.87 The tension and the obscurity in

82. Id. at 86.
83. Id. at 96.
84. Id. at 103.
85. Id. at 23-24.
86. Id. at 23.
87. Id. at 103.
the vision is evident in this Law and Liberation account of the need to
“recognize the special interests of the ruling class and to decide against
them”:

It insists that those who lack the minimum conditions for a decent
and contributing life must be provided with those conditions
regardless of the cost in social amenities for anyone else. . . . We
cannot know as a matter of prediction or analysis that giving the
poor their rights will not cost us more than we care to pay. But we
can and must believe as a matter of faith that God calls us to it and
will turn it to our good.88

We walk by faith, not by sight.89 We may vaguely believe that
meeting the basic material needs of others coincides with our ultimate
liberation, but on a practical concrete level, we still feel the pinch of the
“cost” of giving up our privileges because we perceive that to do so is in
fundamental tension with our own interests. Even as we choose a
deliberate bias in favor of the poor, the analysis still holds within itself a
fundamental tension between “victim” and “beneficiary” and their
conflicting interests. Is there some other way to imagine the
relationship?

My second concern is that the analysis tends to cast the poor into
the role of essentially passive “victims.” In Rodes’s view, the preferred
option posits that the poor are dependent. In fact, the reason that God
has a special love and concern for the poor is “because they need more
from Him than other people do.”90 They must be “rescued” from
oppressive economic and social institutions, as one must be rescued
from a natural disaster.91 As Rodes explains, the consequence of “our
equal eschatological significance”—the equal importance that each
person achieve his or her final destiny—is that

we have equal responsibility to ensure as far as possible that each
person who falls by the wayside is picked up and set back on the
path. It follows that whatever advantages are possessed by the
ruling class should be used for the eschatological benefit of the
whole society, and that the class can be held accountable for any
failure to use them in that way.92

But are we sure that the poor are really the ones who have fallen by
the wayside and are we sure that they are the ones who need to be

88. Rodes, Law and Liberation, supra n. 65, at 214 (emphasis in original).
89. 2 Cor 5:7 (all Biblical citations are from the Revised Standard Version).
90. Rodes, Pilgrim Law, supra n. 13, at 96.
91. Id. at 94.
92. Id. at 95.
picked up? In *Centesimus Annus*, the 1991 analysis of economic systems that marked the hundredth anniversary of the Catholic social teaching tradition, Pope John Paul II emphasized the importance of getting beyond a mentality in which the poor are seen as “a burden, as irksome intruders trying to consume what others have produced.”

Instead, he pushed toward a vision in which “[t]he advancement of the poor constitutes a great opportunity for the moral, cultural and even economic growth of all humanity.”

*Centesimus* and other Catholic social thought texts pose a direct challenge to the idea that the materially poor “need more” from God than other people do. For example, John Paul’s definition of poverty pushes far beyond those deprived of material necessities:

> [I]t is well known that there are many other forms of poverty, especially in modern society—not only economic but cultural and spiritual poverty as well. . . . In the countries of the West, different forms of poverty are being experienced by groups which live on the margins of society, by the elderly and the sick, by the victims of consumerism, and even more immediately by so many refugees and migrants.

Some have chided John Paul for including within the preferential option the spiritual poverty of “victims of consumerism.” Doesn’t that gut the whole project? But a closer look reveals that without detracting from the importance and urgency of meeting material needs, some streams within Catholic social teaching are working to articulate a deeper nexus between the need to share material resources, and the spiritual void at the heart of much of consumer culture.

I think Rodes would agree that these are important questions. In *Law and Liberation* he devotes considerable space to a critique of the trivialization, rootlessness and commodification that plague consumer culture. In *Pilgrim Law* his quotation from liberation theologian Gustavo Gutiérrez also indicates his recognition of the deeper roots of
the problem: the failure to see ourselves as part of the same community. Gutiérrez writes:

To be poor is to be insignificant—that is to be poor. One reason is the deprivation according to some standard—economically and socially speaking—but it is not only that. To be poor is to be nameless, not relevant for our society and for our Church—that is to be poor.99

On many levels, Rodes acknowledges that the deeper project at stake points beyond class struggle, and hopes to harmonize commitments to material social justice with the Christian vision of universal brotherhood. The core of my critique is not that the Pilgrim Law project completely neglects these central concerns. It is rather that its concessions to the negative dynamics of class conflict tend to obscure the powerful positive role that the eschatological dimension might inspire in re-imagining jurisprudential categories.

C. Catholic Social Thought Resources for a Thicker Eschatological Vision of the Unity of the Human Family

The Exodus story is not the only image that Catholic social thought employs to depict our eschatological destiny. The next sections explore other Catholic social thought resources and images for a thicker vision of the unity of the human family, and then, in light of the questions raised in the previous section, begin to draw out what might be jurisprudential consequences for the categories of freedom and equality.

One of the richest depictions of the eschatological vision emerges from one of Rodes’s favorite Catholic social thought documents, the Second Vatican Council’s Pastoral Constitution on the Church in the Modern World, Gaudium et Spes. As part of its initial discussion of “The Church as Man’s Calling,” the Council describes the deep eschatological roots for its vision of the “community of mankind”:

Indeed, the Lord Jesus Christ, when praying to the Father, “that they may all be one . . . as we are one” (Jn 17:21-22), has opened up new horizons closed to human reason by implying that there is a certain parallel between the union existing among the divine Persons and the union of the children of God in truth and love. It follows, then, that if man is the only creature on earth that God has willed for its own sake, man can fully discover his true self only in

99. Rodes, Pilgrim Law, supra n. 13, at 99. See also Rodes, Law and Liberation, supra n. 65, at 10-11 (noting Gutiérrez’s argument that the work of evangelization must be “to conscienticize, to politicize, to make the oppressed person become aware that he is a person”).
a sincere giving of himself.\textsuperscript{100}

In the same section, the practical implications are clear: “God, who is a father to everybody, wants all men to be one family and behave to each other as brothers.”\textsuperscript{101} Social life and social commitment are not something “added on” but an essential dimension of human nature: “through his dealings with others, through reciprocal duties, and through fraternal dialogue [the human person] develops all his gifts and is able to rise to his destiny.”\textsuperscript{102}

A similar pattern runs through John Paul’s description of the “spirituality of communion” as set out in the Apostolic Letter \textit{Novo Millennio Inuente}. Here is his vision:

A spirituality of communion indicates above all the heart’s contemplation of the mystery of the Trinity dwelling in us, and whose light we must also be able to see shining on the face of the brothers and sisters around us. A spirituality of communion also means an ability to think of our brothers and sisters in faith within the profound unity of the Mystical Body, and therefore as “those who are a part of me.”\textsuperscript{103}

What follows could be characterized as a set of practical suggestions for implementing this vision:

This makes us able to share their joys and sufferings, to sense their desires and attend to their needs, to offer them deep and genuine friendship. A spirituality of communion implies also the ability to see what is positive in others, to welcome it and prize it as a gift from God: not only as a gift for the brother or sister who has received it directly, but also as a “gift for me.” A spirituality of communion means, finally, to know how to “make room” for our brothers and sisters, bearing “each other’s burdens” (Gal 6:2) and resisting the selfish temptations which constantly beset us and provoke competition, careerism, distrust and jealousy.\textsuperscript{104}

The liberationist’s account of the preferential option for the poor depicts a struggle between inevitably competing interests in which Christians should side with the victims even if they are beneficiaries of the oppressive system. But other resources in Catholic social teaching have a different analytical flow: If humanity is one family, if we are

\textsuperscript{100} Second Vatican Council’s Pastoral Constitution on the Church in the Modern World, \textit{Gaudium et Spes} ¶ 24 (Libreria Editrice Vaticana 1965).

\textsuperscript{101} \textit{Id.} at ¶ 24.

\textsuperscript{102} \textit{Id.} at ¶ 25.

\textsuperscript{103} John Paul II, \textit{Apostolic Letter Novo Millennio Inuente} ¶ 43 (Libreria Editrice Vaticana 2001).

\textsuperscript{104} \textit{Id.}
brothers and sisters, then there are economic consequences which follow
from that vision, including the sharing of material resources. In this
dynamic, we discover our most profound identity by opening up to the
needs of others.

Perhaps this dynamic could be described as, in some sense, moving
beyond “false consciousness.” But these texts reach beyond simply a
“bias” in the other direction. According to these Catholic social
teaching texts, “true” consciousness—a clear vision of the unity of the
human family—is within our reach through the life of grace. The
Compendium of the Social Doctrine of the Church captures well the
connection between the eschatological vision and its practical—even
jurisprudential—consequences:

This law [of the new commandment of love] is called to become
the ultimate measure and rule of every dynamic related to human
relations. In short, it is the very mystery of God, Trinitarian Love,
that is the basis of the meaning and value of the person, of social
relations, or human activity in the world, insofar as humanity has
received the revelation of this and a share in it through Christ in
his Spirit.105

According to this text, the practical consequence of a Christian
eschatological vision is best expressed not in the negative dynamic of
siding with victims over beneficiaries, but more in the positive
commitment to let relationships of love permeate social structures as a
logical consequence of the eschatological vision of the unity of the
human family, and to work to construct vehicles of material and spiritual
communion which express this reality.

Is it completely unrealistic to think that the new commandment of
mutual love might inform jurisprudential categories? Does a
“Trinitarian” model of relationships, or a spirituality of communion,
apply only to the internal dynamics of Christian communities? These
enormous questions reach far beyond the context and space of this essay.
The next sections simply note a few exploratory ideas for re-imagining
the definitions of freedom and equality that form the basis of theories of
jurisprudence.106

105. Pontifical Council for Justice and Peace, Compendium of the Social Doctrine of the
Church ¶ 54 (Libreria Editrice Vaticana 2004).
106. For the seeds of many of the ideas that follow, I am indebted to the Focolare Movement’s
international “Communion and Law” project. See Russell G. Pearce & Amelia J. Uelmen,
the initial project emerged as a group of lawyers and judges from different countries began to
reflect together how their own efforts in their course of their work to build relationships of mutual
love, brotherhood and solidarity was transforming their approach to their legal work and their
D. Jurisprudential Consequences

1. Freedom and Identity in the Gift of Self

Liberationist theories acknowledge that everyone who is caught in the tangle of structures of injustice needs liberation, “victims” and “beneficiaries” alike, and this is the principle “that reconciles participation in an ongoing class struggle with a Christian commitment to universal brotherhood and solidarity.”

“Joint liberation” is the ultimate result of the struggle for justice.

Other Catholic social teaching texts pose perhaps not a direct contrast but a different emphasis. Freedom is found not only in the end result of being “liberated” from unjust and oppressive structures, but in the process of opening oneself to relationships of solidarity and communion. As John Paul explained in *Centesimus*:

> The concept of alienation needs to be led back to the Christian vision of reality, by recognizing in alienation a reversal of means and ends. When man does not recognize in himself and in others the value and grandeur of the human person, he effectively deprives himself of the possibility of benefiting from his humanity and of entering into that relationship of solidarity and communion with others for which God created him. Indeed, it is through the free gift of self that man truly finds himself.

This vision has obvious social and structural implications. John Paul continues: “A society is alienated if its forms of social organization, production and consumption make it more difficult to offer this gift of self and to establish this solidarity between people.”

At several points in *Pilgrim Law*, Rodes reaches for similar dimensions. For example, he describes freedom as “a continuing openness of each person to his or her transcendent destiny.” He pushes toward a definition of freedom that resists all forms of closure, whether ideological, such as materialism or totalitarianism, or tragic, such as addiction or

conceptions of jurisprudential categories); Amy Uelmen, *Relationships in Law: Is There Room for Fraternity?*, 45 Living City 14 (Mar. 2006) (describing the project’s first international conference gathering of 700 legal professionals in Castelgandolfo, Italy) (Living City is the Focolare Movement’s North American monthly magazine). What follows are tentative ideas that I and others in the project hope to expand in future scholarship.

108. *Centesimus Annus*, supra n. 93, at ¶ 41.
109. See id. at ¶ 41.
poverty. In this way, openness becomes a higher value than choice, and the ruling class can be held accountable both for the closures they accept for themselves and the closures they impose on the wider society.111

But to the extent that the analysis remains bound to categories of inevitable class conflict, it does not completely break open the profound consequences of the eschatological vision of the unity of the human family as set forth in these Catholic social teaching resources.

What about all those people and groups of people—and there are many—who show no signs of accepting this invitation to discover their own identity in the freedom that results from openness to the needs of others? What about the deeply entrenched structures of injustice that persist as a result of their closure to these needs? Isn’t direct confrontation the only solution? And what does this have to do with law? Here I will note just one potential application.

As a fellow-traveler in Rodes’s strong critique of the limitations of cost-benefit analysis,112 I have set out a few initial reflections on how a definition of freedom as openness to relationships of solidarity and communion might inform a theory of products liability.113 On a descriptive level, I believe that what I define as a “Trinitarian” lens might serve as a key to understanding why juries often reject the harder edges of cost-benefit analysis.114 On a normative level, this alternative understanding of freedom leads to a completely different definition of “rationality”: If the heart of what it means to be a reasonable person is to open oneself to relationships of respect, service and attentive care for others, then it is “reasonable” that the production of material goods should express these values.115

Might litigation be simply an expression of highly organized class conflict to confront and “liberate” those who cling to these structures?116 My argument for letting a richer eschatological vision inform the jurisprudential category of freedom is not that this will eliminate all conflict. It is rather a suggestion—in Pilgrim Law terms—that the eschatological goal and vision can help us to see more clearly how the tools we need to build structures of justice might be re-defined and re-

111. Id.
112. See id. at 99-100; Rodes, Law and Liberation, supra n. 65, at 213.
114. Id. at 632-635.
115. Id. at 630-632.
116. See Rodes, Law and Liberation, supra n. 65, at 3 (“... the only way to love him may be to confront him.”).
imagined in light of that vision.

According to Rodes’s liberationist account,

[w]e cannot know as a matter of prediction or analysis that giving the poor their rights will not cost us more than we care to pay. But we can and must believe as a matter of faith that God calls us to it and will turn it to our good.117

When freedom is defined through a Trinitarian lens, the privileged classes can know that “giving the poor their rights” is their own door to human fulfillment, and this enables them to move beyond the limitations of the cost-benefit calculus, or any kind of over-simplified “us-them” balancing dichotomy.

According to Rodes’s account, “joint liberation” is the end result of an often painful negative process of conflict. Through a richer eschatological vision of the unity of the human family, the re-definition of freedom as gift of self has the potential to become a positive dynamic that not only leads to the end result of building structures of justice, but also informs the process of construction. If law is a “bridge” between values and their realization,118 the eschatological vision can illuminate our path, making it easier to see how our steps toward the ultimate goal may be permeated with the light and the life of the vision.

2. Equality through the Lens of Reciprocal Love

How might the richer eschatological vision inform jurisprudential reflection on equality? While Pope John Paul’s 1980 reflection on divine mercy, Dives in Misericordia, is not strictly within the canon of Catholic social teaching as most would define it, the analysis nonetheless serves as a rich source for reflection on how to re-imagine definitions of equality.

The encyclical’s image of “reciprocity” is not so much “I scratch your back, you scratch mine,” but rather the discovery that the possibility to give is itself a gift for which we should be grateful. Within this framework, the heart of human existence is to love and be loved; and what is important in life is to participate in that dynamic. In fact, to welcome love is itself an act of love because, for the one who loves, it is the possibility for human fulfillment.

This leads to a very different understanding of human need and dependency. Our dependency on each other, ultimately a reflection of our dependency on God, is at the core of human existence, not just at the

117. Id. at 214 (emphasis in original).
118. Rodes, Pilgrim Law, supra n. 13, at 10.
margins of life. John Paul explains:

In reciprocal relationships between persons, merciful love is never a unilateral act or process. Even in the cases in which everything would seem to indicate that only one party is giving and offering, and the other only receiving and taking . . . in reality the one who gives is always a beneficiary.\(^{119}\)

In this light, perhaps the deepest dimension of “false consciousness” to be overcome is the victim-beneficiary dichotomy. John Paul explains:

An act of merciful love is only really such when we are deeply convinced at the moment that we perform it that we are at the same time receiving mercy from the people who are accepting it from us. If this bilateral and reciprocal quality is absent, our actions are not yet true acts of mercy, nor has there yet been fully completed in us that conversion to which Christ has shown us the way . . . .\(^{120}\)

For John Paul, mercy, understood in this light, becomes “the most perfect incarnation of ‘equality,’ and therefore the most perfect incarnation of justice as well.”\(^{121}\)

What might be the jurisprudential consequences of this framework for equality? If we are all radically dependent, then I no longer see the poor as passive “victims,” who need to be “rescued.”\(^{122}\) I no longer see my task as to “pick up” and “set back on the path” those who have greater need of material resources.\(^{123}\) Instead, the eschatological vision of reciprocity leads me to see the opportunity to create structures of communion as an expression of the essential dynamic which leads to human fulfillment—not only for those who receive the goods they need to lead a dignified human life, but also for myself.

This vision of reciprocity calls for volumes of analysis but I will note just one potential application. As part of a symposium on religious values and corporate decision making, Italian economist Luigino Bruni and I have set out some of these relevant characteristics in a project known as “The Economy of Communion.”\(^{124}\) The project began in Brazil in 1991, as the Focolare Movement’s effort to meet the needs of those lacking material resources within its own communities. Currently,

\(^{119}\) John Paul II, Dives in Misericordia ¶ 14 (Libreria Editrice Vaticana 1980).

\(^{120}\) Id.

\(^{121}\) Id.

\(^{122}\) Rodes, Pilgrim Law, supra n. 13, at 96.

\(^{123}\) Id. at 95.

more than seven hundred businesses worldwide participate in the project by dividing their profits into three parts: direct aid to the poor, educational projects which further a culture of communion, and the development of the business.\footnote{Id. at 646-651. For more extended descriptions of and reflection on the project, see generally The Economy of Communion (Luigino Bruni ed., Lorna Gold trans., New City Press 2002); Lorna Gold, The Sharing Economy (Ashgate 2004).}

One of the most striking dimensions of the project is its vision of how those who lack material resources play an active role in building the life of communion. The poor are not considered “assisted” or “beneficiaries,” but part of a dynamic process in which everyone gives and receives with equal dignity, as a reflection of relationships of mutual love.\footnote{Bruni & Uelman, supra n. 124, at 653-657.} The act of sharing one’s material needs with dignity and sincerity is received as a contribution to increase the life of communion. A Croatian family of nine living in a two-room apartment captured the dynamic well: “The assistance we receive means so much to us, not just because it is helping us to survive, but because by sharing our need, we can be part of this ‘sacred’ reality.”\footnote{Id. at 654-655.}

Rodes laments the tendency to see “poor people as losers rather than as one of the constituent elements of the community.”\footnote{Rodes, Law and Liberation, supra n. 65, at 33.} He also notes the urgency of eliminating the indignities of the bureaucratized welfare system which “stem from a feeling that we are conferring on [the poor] a gratuitous benefaction for which they should be humbly grateful.”\footnote{Id. at 654-655.} He applauds a shift to recognizing “the rights of the many poor.”\footnote{Id. at 38.} But even a shift to a “rights” framework does not necessarily get us beyond a mentality in which the poor are seen as, in the words of John Paul, a “burden” or “irksome intruders.”\footnote{Rodes, supra n. 13, at 103 (emphasis added).} Neither does it get us to the goal line of recognizing that, as John Paul put it, “the advancement of the poor constitutes a great opportunity for the moral, cultural and even economic growth of all humanity.”\footnote{Centesimus Annus, supra n. 93, at ¶ 28.}

Viewing equality through the lens of reciprocal love helps everyone to see their own radical dependence on others, and the value of building structures in which, to paraphrase John Paul, forms of social organization, production and consumption make it easier for people to offer the gift of self and to establish solidarity between people.\footnote{See id. at ¶ 41.}
Rodes might have several questions about this account of what he might term “interdependence.” In *Law and Liberation*, he noted: “If you accept as a principle that I have a stake in my neighbor’s well-being, then in principle nothing is private. It is not possible to draw a principled distinction between what is and what is not my business.”¹³⁴ I would simply note that further and more extended reflection could explore how such definitions of freedom and equality would intertwine with other important principles in Catholic social teaching such as subsidiarity and the common good, concepts often in creative tension with each other. Here Rodes’s own insight is especially helpful: “What has to be done in deciding how far to carry a principle is not to explore the limits of its applicability, but to weigh it against competing principles that also apply.”¹³⁵

**CONCLUSION**

In our current political climate it is no small feat to bring into one conversation important values, suggestions for their realization, and the quality of soul necessary to form the basis of a respectful and open dialogue. And it is no small service to help citizens discover the role of law “as a bridge between values and their realization” in our common social pilgrimage. Rodes is also to be commended for courageous and careful attention to the ways in which “false consciousness”—fundamental deficiencies of heart and mind—call for a change of attitude, a new opening of hearts and minds.¹³⁶ The *Pilgrim Law* project brings us quite a good piece down the road.

My slight critique—or perhaps extension—of Rodes’s *Pilgrim Law* analysis places more confidence in the clarity and power of the eschatological vision of the relationships of love at the heart of the life of God, and, as *Gaudium* describes, the “parallel between the union existing among the divine Persons and the union of the children of God in truth and love.”¹³⁷ According to this Trinitarian image, we find the deepest dimensions of freedom and equality in the gift of self to others and in openness to others’ needs. Images of beneficiaries rescuing victims, or of the privileged classes assuming a deliberate “bias” against their own interests fail to fully capture the richness and depth of profoundly relational Trinitarian dimensions.

¹³⁴ Rodes, *Law and Liberation*, supra n. 65, at 95.
¹³⁵ *Id*.
¹³⁷ *Gaudium et Spes*, supra n. 100, at ¶ 24.
The eschatological vision of the love and solidarity that can inform human relationships not only pushes beyond the dynamics of class conflict and the victim-beneficiary dichotomy. That vision also becomes the positive dynamic that fuels our common work to insure that all people “have enough resources and enough power to live as befits human beings.”\footnote{138}

\footnote{138. Rodes, \textit{Pilgrim Law}, supra n. 13, at 26.}