

# Book Reviews

## A Citizen's Obligation to the Law

*The Ideal in Law.* By Eugene V. Rostow. Chicago: University of Chicago Press, 1978. Pp. 295. \$20.00.

### Reviewed by Patrick Devlin†

This is a book of lectures on various subjects and its title is as descriptive of their highest common factor as can reasonably be expected. This means that the reader, if he hopes for a monograph on idealism in law, will be disappointed. But it does not mean that the book is no more than a jumble of pieces. Professor Rostow is frequently invited to give public lectures, some of them very prestigious: naturally he chooses a subject that is suited to time, place, and audience. But he is also a man who has thought deeply and widely on the nature of law, its ethical content, and its relation to the social process, and come to general conclusions. These conclusions link the chosen subjects.

I do not think that any of these lectures is printed exactly as it was delivered. Lectures are drafted, delivered sometimes more than once, revised sometimes, amplified and amalgamated, so that each of the subjects has been thoroughly thought out. The first subject is a study, historical and analytical, of "The Negro in our Law." The second is on the obligation of the citizen to the law; mainly this deals with the duty of obedience, but there is also an excellent discussion of the relationship between lawyer and client. The third is on the ethics of competition: it includes a very informative comparison between American and British law on restraint of trade and a chapter on the responsibility of corporate management. From the latter I am astounded to learn that "takeover bid" has crept into the language from British usage; I have always thought it to be an uncouth Americanism. The fourth subject concerns force and morals in international law; the author asks whether the United Nations Charter is going the way of President Wilson's Covenant.

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I have now told the prospective reader all that he or she needs to know, except that the writing is lucid and elegant with the consequence that the book, however learned, is easy to read. This he or she may well know already, since Professor Rostow has published a number of similar books of essays and lectures which have given pleasure and instruction to many.

A reviewer, who has discharged his proper task of saying what a book is about and what its readers may expect from it, is conventionally allowed a certain license to air his own views on any topic that has particularly interested him. I shall take it in this case in relation to the second of the four subjects, the citizen's obligation to the law. I choose that one, partly because of its great contemporary importance and partly because it affords a good illustration of Rostow's clear analytical approach which stimulates thought and even cautious disagreement. The author has a lot of ground to cover and he wastes no words. He explores the theories of Rawls, Hart, Wolff, and Dworkin. He does not touch on Bickel's view as expounded in *The Morality of Consent*<sup>1</sup> which in effect comes later. Rostow finalized his thought on this subject in 1970 while Bickel was writing in 1972 and 1973.

Has the citizen a moral obligation to obey the law? He has of course a legal duty, enforceable by fines and imprisonment. But if the only way of obtaining obedience is by the use of the "police power," the height of repression necessary to produce the requisite degree of fear would produce also the sort of life which most of us would dislike. So there is wide agreement that a generally law-abiding population is as necessary to the good of society as are the laws themselves. The existence of the law-abiding population cannot be ensured without a sense of mutual obligation which can only be moral in character.

It is generally agreed that the moral obligation is not absolute. I think that of its very nature it cannot be. It is an obligation that is binding only on conscience and if the law requires the citizen to do something which his conscience declares to him to be wrong, only he can resolve the conflict. A society which accepts freedom of conscience must accept his judgment as final: provided that his examination of his conscience is thorough and ends with his conclusion that like Luther he can do none other and provided also that he accepts the legal penalties, the suffering for conscience's sake, as the price which society exacts from the man who puts his own judgment

1. A. BICKEL, *THE MORALITY OF CONSENT* 91-123 (1975).

above that of his peers. Professor Rostow cites Socrates as speaking for the laws when he refused to flee from the death sentence validly, but as he thought unjustly, imposed upon him. Two thousand years later an Englishman paid the ultimate penalty for disobedience to a statute which he did not challenge but could not obey, on the scaffold exchanging his mortality for immortal words: "I die the King's good servant, but God's first."

But in the common herd there will be many breaches of the law which cannot be morally justified on grounds of conscience. Acceptance of a moral principle is one thing and obedience to it when it hurts, or sometimes when it is no worse than troublesome, is another. Who is there among us who has not disregarded a legal speed limit? Since morality works on conscience, so it must be rooted in an ethic—or be a part of some ethical complex such as religion—which compels the conscience. In my childhood this presented no difficulty. Christianity taught the duty to obey the lawful government in all that was not sin. Every child knew about rendering to Caesar the things that were Caesar's and about "the powers that be" that were ordained of God: "whosoever therefore resisteth the power, resisteth the ordinance of God."<sup>2</sup> This teaching or the attitude that has arisen out of it is probably still the backbone of obedience to the law. But it is weakening and in the secular state cannot be invoked. So it is up to moral philosophers to find a principle acceptable to the irreligious. Their findings vary from the old idea of allegiance at one end to Rousseau's theory of the Social Contract at the other. According to the former,

each person is bound by ties of allegiance to the sovereignty of a nation, to its laws and to its social code, by the fact of residence or citizenship. Allegiance, the lawbooks have said for centuries, is the reciprocal of the protection each person receives through living in an organized community.<sup>3</sup>

This is what we now call the rule of law. The Social Contract, by contrast, is a metaphor embodying "a core of quintessential ideas, values and customs, defining the ultimate norms of the society, and binding all who share its culture. . . . The Social contract binds the state as well as the citizen. The two sets of obligations are reciprocal."<sup>4</sup>

2. *Romans* 13:1-2.

3. E. ROSTOW, *THE IDEAL IN LAW* 96 (1978) [hereinafter cited by page number only].

4. P. 94-95.

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These two descriptions are very alike. There is, however, at any rate for those who accept Jefferson on Rousseau, a sharp distinction. "The essence of Jefferson's thesis . . . is that unless the citizen can participate responsibly in the making of the laws, he is not morally bound to obey them."<sup>5</sup> This makes the existence of democratic government essential to an obligation to obey the law. I find this a startling proposition. The obligation to obey the law is much older than any post-Rousseau democracy. Are philosophers going to release the subjects of all nondemocratic states of all moral duty to obey the law of their countries? That experiment was tried in 1570 when Pope Pius V released all Queen Elizabeth's English Catholic subjects from their duty of obedience to "the powers that be"; it was not a success.

Professor Rostow does not make it quite clear to me where he stands on this. He hardly notices the grey area between tyranny and democracy. He describes what I take to be the Rousseau-Jefferson theory as "the only modern rival for the doctrine that power proceeds from the barrel of a gun."<sup>6</sup> He dislikes Professor Hart's theory (Hart, he says, infers "a promissory obligation, either from the citizen's voluntary participation in a society he is free to leave, or from the reliance of other citizens, who have obeyed the law in the expectation of his obedience in turn") because it "does not permit a discrimination between the citizen's obligation to the law in a tyranny and in a democracy."<sup>7</sup> This distinction, Rostow says, is the heart of the matter. He is of course writing of and for a country that was borne straight into democracy; in Georgian and Victorian Britain two centuries intervened between the glorious revolution of 1688 and the universal suffrage (male only) of 1918.

But then Professor Rostow writes that "the substantive content of the social contract is not the same in all societies."<sup>8</sup> What is meant by "the substantive content" of the Contract? In the preceding paragraph Rostow writes:

It may be more direct, and more realistic, to draw the moral element in the citizen's obligation to the law from the necessary conditions of social cooperation within different kinds of societies. The obligation to the law of a citizen in a liberal, democratic society is necessarily greater than that of a citizen under condi-

5. P. 93.

6. P. 94.

7. P. 93.

8. P. 94.

tions of tyranny. The spacious tolerance of a free society is possible only if the laws are generally accepted and respected voluntarily, so that the role of force and coercion in the society can be kept to a minimum. The idea of a free society posits a much higher degree of civic responsibility on the part of each citizen than the concept of a tyranny or a system of paternalism.<sup>9</sup>

This is a passage, which if it is read as the language of exhortation, I find very appealing. But I cannot accept it as qualifying the obligation. Whatever the nature of the society, the citizen's obligation, if it exists, is an obligation to obey *all* law so far as his conscience permits. It is not an obligation that can vary in size or strength or substantive content. The variable can find a place only in the way in which it is discharged. It is right to remind the citizens of a liberal democratic society that they should be especially scrupulous in their observance of the law. But the terms of the obligation, when it applies, must surely be the same for all; it cannot be drawn up so as to give the subjects of paternalism a limited license to disobey the more irksome laws.

The Jeffersonian requirement of responsible participation in law-making raises another difficulty with which Rostow deals. No one would dispute that a man who in his own person consents to a law, participates thereby in the making of it; nor, if he sat on the jury that convicted a man of a breach of it would it be disputed that he had consented to its application. Thus certainly is the requirement that government shall be with the consent of the governed fulfilled. But, so Professor Wolff contends, nothing short of a law adopted unanimously by all the citizenry will satisfy: to be bound each must consent individually.<sup>10</sup> This is not in modern democracy what Rostow calls "an operational idea."<sup>11</sup> In modern democracy, which is representative and not participatory, the consent that is required from the individual can be no more than consent to the process by which laws are made and administered. A citizen may disapprove of a particular law and his disapproval may be shared by a majority of his fellow citizens, since in representative democracy a minority is frequently effective. But, if it has emerged constitutionally out of the legislative machine, the citizen is deemed to have consented to it.

Why adorn this assumed consent by calling it a Social Contract? It is not a contract in any sense of the term, metaphorical or literal.

9. P. 93.

10. See Wolff, *In Defense of Anarchism*, in *IS LAW DEAD?* 110 (E. Rostow ed. 1971).

11. P. 105.

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It is based on the pretense that a man is free to choose the nation or group to which he wishes to belong and to make a bargain with it. In truth no one is free to choose the society in which he is born and to be brought up. But in that society he has to stay at least until he is old enough to apply for a passport to leave. If then he decides to stay, whatever bound him as a juvenile continues to bind him as an adult. You may say it is force of circumstances, or you may describe it romantically as allegiance or group loyalty or prosaically as a necessary condition of social cooperation. Or you may fictionalize it as a contract, but the fiction is dangerous because it spawns a lot of questions about exactly what the subject is supposed to have consented to and by what, if anything, the young and unenfranchised are bound and so forth, with all of which Professor Rostow has to deal.

For myself I like Professor Hart's way of putting the case. When benefits and obligations are interdependent, a man cannot take the benefit and refuse the burden. But he should be free to refuse both and to make another choice of domicile if he can find one that suits him better. It is the existence or denial of this freedom that is the test. In determining whether or not the citizen has a moral obligation to obey the law, the test is not whether the state is autocratic, oligarchic, or democratic, but whether it will permit a dissident to leave on reasonable terms. If it will, he must either quit or obey.

A disbelief in the existence of God does not clothe the individual with original sovereignty. A force, far-seeing or blind but outside his control, determines his birth, his domicile and his character, and shapes his destiny. With exceptions too rare to be taken into account, a man cannot live without society and society cannot live without laws. So whatever the nature of a society, a man born into it is born under allegiance which he can cast off only by flight or by rebellion. Of the right to rebel there is much to be said, but it cannot be said by lawyers.

## Variations on a Theme by Thomas Jefferson

*The Pursuit of Equality in American History.* By Jack R. Pole. Berkeley, Los Angeles, and London: University of California Press, 1978. Pp. xv, 380. \$14.95.

Reviewed by Philip B. Kurland†

Thomas Jefferson, in whose memory the lectures collected in this book<sup>1</sup> were delivered, played little or no role in the framing of the American Constitution. The notion of James Madison as Jefferson's messenger at the Convention of 1789<sup>2</sup> is no longer creditable, if it ever was. Jefferson was, however, as we all know, the principal author of the Declaration of Independence. And today a case could well be made that a single sentence of that Declaration has become *de facto* "the supreme law of the land": "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness."<sup>3</sup> The Supreme Court may soon discover that this sentence is to be found in the Ninth Amendment and/or in the privileges and immunities clause of the Fourteenth Amendment, after which the rest of the Constitution can be regarded as auxiliary if not redundant.

Perhaps this suggestion is no more than hyperbolic shorthand for the proposition that courts are in the process of rejecting the positive law engrossed in the words of the Constitution in favor of the natural law implicit in the Declaration, just as some of our most prominent jurists would have it.<sup>4</sup> Certainly it must be conceded that the Supreme Court has given priority to whatever values it thinks are represented by

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1. J. POLE, *THE PURSUIT OF EQUALITY IN AMERICAN HISTORY* (1978) [hereinafter cited by page number only].

2. See E. MORGAN, *THE BIRTH OF THE REPUBLIC 1763-89*, at 131 (1956) ("Jefferson's views were ably represented by James Madison"); A. KOCH, *JEFFERSON AND MADISON* 3-96 (1950) (describing "great collaboration" between these two men at time of Convention).

3. What the sentence was intended to mean is still an unresolved question. For the most recent and interesting parsing of the sentence, see G. WILLS, *INVENTING AMERICA* 167-255 (1978).

4. See, e.g., R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); C. FRIED, *AN ANATOMY OF VALUES* (1970).

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the concept of equality,<sup>5</sup> although the word itself is not to be found in the Constitution except in the phrase of the Fourteenth Amendment commending equal protection of the laws for all persons.<sup>6</sup>

Professor Pole's book is concerned with tracing equality as a recurrent theme in American history. It is not a constitutional history, except in the recognition that the Constitution may absorb dominant moral themes in American society. Thus, the notion of equality appears in different guises at different times in our history, beginning with a meaning that calls for the abolition of state-sponsored or state-protected privileges, continuing through "equality of opportunity," and arriving today at the notion of what Pole calls "equalization of results."<sup>7</sup>

Throughout this volume Pole is concerned with the problem of reconciling the concept of equality with the concept of individuality, a reconciliation that he believes to be constitutionally commanded. He notes at the very outset of the book:

I see egalitarian principles in the light of a Western tradition in which they are legitimized by a profound, not a merely perfunctory, respect for individuality, and which emphasizes the distinctions among people as well as their similarities; and I regard this emphasis as logically consistent with the requirements of the United States Constitution, more especially since the Fourteenth Amendment.<sup>8</sup>

Not surprisingly, then, he ends where he began:

This burden [to justify disparities of "equality of results"], however, contains several imperfectly reconciled ingredients of which the most important is that the Constitution extends its protection equally to all—to every individual on American soil—in his or her capacity as an independent and irreducible individual. No constitutionally acceptable outcome can conflict with that obligation. It is the individual whose rights are the object of the special solicitude of the Constitution and for whose protection the Republic had originally justified its claim to independent existence.<sup>9</sup>

5. See P. KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT* 98-169 (1970).

6. It is apparently heresy to suggest that the contemporary interpretation of the equal protection clause is not based, as it should be, on the intentions of those who framed the Fourteenth Amendment. Thus, Raoul Berger's recent book, see R. BERGER, *GOVERNMENT BY JUDICIARY* (1977), has been roundly trounced by the academic priests of the dominant egalitarian dogma, not because its scholarship is invalid—it has not been shown to be in error on this score—but because it is a sin to suggest that we should be controlled by the "original meaning." See, e.g., Brest, *Berger v. Brown et al.*, N.Y. Times (Book Rev.), Dec. 11, 1977, at 10, col. 1; Miller, *Do the Founding Fathers Know Best?* Wash. Post, Nov. 13, 1977, at E5, col. 1. For Berger's response, see Berger, *Government by Judiciary: Some Countercriticism*, 56 TEX. L. REV. 1125 (1978).

7. P. 358.

8. P. x.

9. P. 358.



This is not merely an academic problem; it was the underlying issue dividing the Supreme Court in the recent notorious case of *Regents of the University of California v. Bakke*,<sup>10</sup> even if the jurists did not directly confront the dilemma. Indeed, some of the Justices—those who would have denied Bakke's admission—assumed that the concept of "equality of results" is implicit in the Constitution,<sup>11</sup> though Mr. Justice Powell<sup>12</sup> and presumably the Justices who joined in Mr. Justice Stevens's opinion<sup>13</sup> asserted the traditional position that the Constitution was concerned with the protection of individuals rather than classes.

Pole is no more successful in unraveling this Gordian knot than was the Court. He chooses to cut it by use of the "co-ordinate principle of interchangeability."<sup>14</sup> He writes:

The advance of equality as a principle of constitutional law has been based in the United States as in other Western countries on the precept of legal and moral individualism. The individual, being of full age and sound mind, is held to be accountable and responsible for his, or her own conduct, and it is each individual who is entitled to claim the full and unalienable rights of man. The individualist principle dissociates people from the context of family, religion, class, or race and when linked with the idea of equality in the most affirmative sense—a sense widely accepted throughout a large part of American history—it assumes the co-ordinate principle of interchangeability.<sup>15</sup>

The "co-ordinate principle of interchangeability," however, is either a rejection of the notion of the uniqueness of each individual so that persons are fungible, or it means no more than the proposition that family, religion, class, or race are invalid bases for governmentally created privileges or sanctions. The first meaning is, of course, totally destructive of "individuality . . . which emphasises the distinctions among people as well as their similarities."<sup>16</sup> The second meaning—the classic view that government cannot classify on the basis of factors irrelevant to its legitimate legislative ends—would call for a definite

10. 98 S. Ct. 2733 (1978).

11. See *id.* at 2766 (opinion of Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting).

12. See *id.* at 2738 (opinion of Powell, J.).

13. See *id.* at 2809 (Stevens, J., concurring and dissenting). The opinion was joined by Chief Justice Burger, and Justices Stewart and Rehnquist.

14. P. 293.

15. *Id.*

16. P. x.

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withdrawal from some of the rules of "equality of results" recently written into our national laws both by Congress and by the courts.<sup>17</sup>

But this fatal flaw in Pole's thesis does not destroy the very great worth of this history of the idea of equality, an idea of no mean importance in the development of American society. That history is well told. Certainly, it will be enlightening, if not consoling, even to those who think that they already know all they need to know about the subject. The defect does not lie in the author's capabilities, but, as he acknowledges, is intrinsic in the intractable nature of the subject:

The pursuit of equality was the pursuit of an illusion, because equality was a complex concept and not a simple or single goal. The mere fact of occupying new and higher ground in the pursuit changed the perspective of the viewer. The concept of equality, once unfolded, was a source of intense gratification, challenge, and excitement, but it was found also to be full of variations, or proliferating rewards and deceptions.<sup>18</sup>

The conclusion of at least this reader, though, is that we shall soon have greater and greater governmentally imposed "equality of results," just as the academic bible commands.<sup>19</sup> And so, hail to equality; farewell to individuality, farewell to excellence, farewell to civility. Government, like religion and war, is indeed a great leveller.

17. See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16, at 991-1136 (1978).

18. P. 292.

19. See J. RAWLS, *A THEORY OF JUSTICE* (1971).