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*[1] 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."[2] 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.[3]

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."[4]

2. *Romans* 13:1-2.
3. E. Rostow, The Ideal in Law 96 (1978) [hereinafter cited by page number only].
4. P. 94-95.

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."[5] 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."[6] 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."[7] 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."[8] 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.[9]

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 lawmaking 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.[10] This is not in modern democracy what Rostow calls "an operational idea."[11] 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.

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 dissentient 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.