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Rostow: Is Law Dead?

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RECENT BOOKS

BOOK REVIEWS

IS LAW DEAD? Edited by *Eugene V. Rostow*. New York: Simon & Schuster. 1971. Pp. 416. \$8.95.

This book is part of a literature that has burgeoned in recent years. A substantial number of volumes (many in symposium form) have appeared which attack issues of undoubted importance: the philosophical and moral bases of political obligation, the legitimacy of law, the justification (if any) of civil disobedience, the contribution to social reform (if any) that may be expected from the law, the "right" of revolution. Harold Laski once observed that "in no age are fundamental questions raised save where the body politic is diseased."¹ If so, this literature provides striking evidence of social pathology for anyone remaining to be convinced. It would be pleasant to report that the exposition in these books regularly reaches the level of the great themes it treats. Unhappily, this is not true. Too often the writing is turgid, repetitive, and tendentious. One who samples modern disputation on questions of political and legal obligation may be reminded of George Orwell's observation on religious controversy: "the most absorbing game ever invented, because it goes on forever and because just a little cheating is allowed."²

The book under review avoids the worst faults of its genre. I find the title a little slick and deceptive: the essays are concerned less with the death of law than with the prospects and conditions for its revitalization. There is some ideological posturing on the part of a few participants, some of the inevitable sanctimoniousness that characterizes the prevailing polemical mode and which today is widely confused with seriousness. Compared with the very substantial virtues of the book, however, these complaints are rather trivial; for it is, in fact, a useful and impressive volume and maintains a higher and more consistent level of quality than do most symposia. No doubt, a large part of the credit for this achievement belongs to Professor Eugene V. Rostow, who is editor of the volume and who was selected by the Association of the Bar of the City of New York to organize the conference, held in the spring of 1970, at which the papers were first presented.

The editor offers the eleven principal papers under two headings. Part I is entitled "The Citizen's Moral Relation to the Law in a Society of Consent." Part II bears the heading "The Capacity of the American Social Order To Meet the Changing Demands for Social Justice Through the Methods of Law." Curiously enough, none of

1. H. LASKI, *POLITICAL THOUGHT IN ENGLAND FROM LOCKE TO BENTHAM* 212 (1920).
2. G. ORWELL, *A CLERGYMAN'S DAUGHTER* 78 (1935).

the papers in the second part was written by a lawyer. Whether for this or for other reasons, I found the papers in Part I more interesting; but a reader scanning the second part ought not to overlook the elegant and impressive essay by the late historian, David M. Potter.³ Each paper is followed by the critique of at least one commentator. Although the quality of this commentary is far from uniform, much of it is lively and illuminating.

In addition to his services as editor of the volume, Professor Rostow contributed what must be regarded as the central essay in the collection, a paper entitled "The Rightful Limits of Freedom in a Liberal Democratic State: Of Civil Disobedience." I do not mean to say that this paper is clearly the best of the symposium or even that its quality will be perceived and acknowledged by all readers. It is the paper, however, which provides the springboard for a great deal of what is said by other participants; it performs the function of catalyst and irritant. In this essay Professor Rostow opposes the tide of contemporary writing (if not of popular feeling) and undertakes a systematic ethical and political justification of fidelity to the law. His thesis, he says, is "that our society—as a society of consent—should not and indeed cannot acknowledge a right of civil disobedience; that the moral and philosophical arguments advanced in support of such a right are in error; and that the analogies invoked in its behalf are inapplicable" (p. 45). The defense of such a thesis, if pursued seriously and with reasonable intellectual rigor, is a formidable endeavor. It is remarkable how infrequently such attempts have been made in the tumultuous years just past and how few persons have arisen to meet the challenge of those championing quite different propositions.

Professor Rostow premises his argument on the principle of consent, on the assertion that the just powers of government derive from the consent of the governed. Since the argument very nearly embraces traditional social-contract theory, certain evasive maneuvers are required to avoid some of the pitfalls identified by critics of compact theory during the past two and one-half centuries. Thus, Professor Rostow would not rest his case for the support of government and its law simply on the ground that the citizen receives benefit from government. Otherwise (as the specter of Hobbes makes manifest) the citizen may be thought to owe allegiance to a tyranny, for even despotism confers some benefits upon its subjects. Instead, it is argued, the moral obligation arises "from the necessary conditions of social cooperation within different kinds of societies" (p. 47). A greater obligation to obey the law is imposed on the citizen of a liberal, democratic nation because the freedom and tolerance of a

3. "Changing Patterns of Social Cohesion and the Crisis of Law Under a System of Government by Consent" (pp. 260-85).

free society presuppose voluntary adherence to the laws and the minimization of coercion. "Errors" and moral failures of the political society do not relieve the citizen of his moral obligation to obey the law, unless such failings "breach the essential terms of the social contract itself" (p. 49).

What about the usual justifications of civil disobedience? They do not withstand scrutiny, says Professor Rostow. The example of Gandhi fails, for his movement was directed against laws not founded on the consent of the Indian people. The American revolution establishes no general "right" of revolution. The position of the colonists was that British rule had breached the social compact, and broader theories of the "right" were rejected for all time by the outcome of the Civil War. Does past treatment of the Negro exempt him from obligation to the law? This, says the writer, "is the most difficult problem of social theory in American life" (p. 69). Yet the conclusion is the same, and is rested on the pragmatic grounds that progress is being made to extend equality to black persons and that this progress is the achievement of the law, not of its violation. Law has led, not followed, public opinion in this area. Indeed, in many areas, such as labor relations, in which illegality and violence have sometimes been pointed to as successful political tactics, lawlessness may have delayed progress; and when reform came, it came through the law, not outside it.

For Professor Rostow, however, the case for compliance with the law is not simply a product of utilitarian calculation; it has a profound ethical dimension as well.

Individual liberty can be respected and protected only in a society based on a shared understanding as to the broad aspirations of the law. Social concord in this sense requires a general acceptance of the citizen's moral obligation to obey valid law. Respect for the agreed limits of social conflict is essential if men are to live in liberty, and not, in Hobbes's phrase, as wolves. [P. 91.]

Professor Rostow's essay is the subject of a searching and sensible critique by Professor Christopher D. Stone. I shall not summarize Professor Stone's argument other than to say that in the course of his analysis he exposes what is for me the primary difficulty in the Rostow essay. That the law imposes a moral obligation of compliance on the citizen is the teaching of most of humanity's great ethical teachers, and Professor Rostow has illuminated the bases and range of that obligation. The difficulty, however, is that the obligation to obey the law is not the *only* moral obligation imposed on men (or which men impose on themselves); and Professor Rostow does not establish the absolute priority of legal obligation over all competing moral claims, even in a society of consent. The question of dividing what is Caesar's from what is God's remains. Thus, I suspect that Professor Stone is

right when he asserts that the Rostow essay "stops far short of—indeed, is quite indecisive with respect to—convincing anyone in a real dilemma" (p. 97).

It seems to me that the great threat to the viability of the legal order today is not posed by the individual offender who after sober deliberation concludes that he cannot conscientiously comply with the law's commands in a given particular. Ever since *Antigone*, individuals have concluded that "it was not Zeus that had published me that edict"; and our own history abounds with like examples. Moreover, given the almost inevitable deficiencies in the mechanisms of consent, I am not sure that it is entirely a bad thing that those possessed of political authority should be aware that history may repeat itself. We have not done very well with the problems of conscientious dissent. On the other hand, our record is far from total failure, and greater wisdom and skill are within our capabilities. What is of very grave concern is the erosion of the moral authority of the law throughout the community, and here I believe the weight of Professor Rostow's essay, if read and fairly considered, could contribute to rectifying the balance. The imbalance is in part the product of a widespread and wholly unjustified insouciance about the *costs* of law violation even in a good cause, a tendency which I think I see in the remarks of some of the contributors to the volume, notably Professors Robert Paul Wolff⁴ and Ronald Dworkin.⁵ As Professor Rostow notes, a significant decline in voluntary law compliance raises the levels of official coercion. Political liberty does not flourish in a state of internal war, however complete the legal justification for the use of force by the government may be. One may also hope, even if he cannot really expect, that Professor Rostow will succeed in tempering the moral absolutism of some of those who feel called to reform this society—a series of attitudes best described in old-fashioned theological language as the "sin of pride," a sin that apparently holds few terrors for many modern theologians.

The papers that follow Professor Rostow's in Part I of the volume fall conveniently into two groups: those concerned primarily with the problems of political obligation created by the antagonistic confrontation of the individual conscience with the state, and those which view as most significant the problems arising from the activities and aspirations of organized groups in a pluralistic, democratic society. These categories are not mutually exclusive at all points: group demands, of course, may reflect the conscientious conviction of individuals. As these papers demonstrate, however, this difference in focus tends to expose quite dissimilar insights and concerns.

Professor Wolff's paper "In Defense of Anarchism" reveals his

4. See, e.g., pp. 116-18.

5. See, e.g., pp. 182-83.

overriding concern with the individual conscience by posing at the outset the hypothetical case of Stephen, a young man debating his response to an induction order and believing that "the American cause in Southeast Asia is immoral—not simply imprudent, or short-sighted, or unpolitical, or on balance a mistake, but immoral" (p. 111). As I understand Professor Wolff's thesis it is that, in the final analysis, no intelligible or defensible basis for political or legal obligation can be stated. Obligation arises from the exercise of moral autonomy by the individual human being. If a law offends the moral judgment of the individual it possesses for him no greater claim to obligation by reason of the fact that it is the product of a democratic majority instead of a dictator's edict. In neither case can an autonomous man promise obedience without surrendering his moral freedom. This, of course, is not to say that an individual, on prudential grounds, may not comply with laws he did not make, or, in the exercise of moral autonomy, conclude that the consequences of noncompliance sometimes require adherence even to dubious laws. Given this qualification, the practical thrust of the argument is far from clear. Professor Wolff does make more than one startling observation, however. Referring to his hypothetical case of the young war resister, he says:

First of all, let us be clear about the nature of Stephen's debt. He owes nothing to the *government* of the United States. It is the American *people* whose collective efforts have sustained and protected him throughout his life. . . . Stephen's debt is to the farmers who grew his food, to the workers who made his clothes, to the policemen who stood ready to protect his life, not to the legislators who made the laws under which he lived. [Pp. 118-19.]

The only assumption upon which this statement becomes intelligible to me is that the laws under which young men live make *no* contribution to their lives. It seems to follow that Stephen has no interest in whether laws are good or bad. Perhaps because he is more squarely challenging traditional concepts than most of the other contributors, Professor Wolff's paper suffers most from the inevitable constriction of scope imposed by the symposium format. In any event, it seemed to me that some of the criticisms of the paper made by other contributors to the volume were not fairly responsive to Professor Wolff's argument. I shall not add further misunderstanding.

Professor Dworkin's paper "Taking Rights Seriously" provides other difficulties. Some of these arise from his methodology and nomenclature, especially his use of the term "rights": at times Professor Dworkin seems more intent on demonstrating the death of Hohfeld than of law. Certainly the "rights" he addresses encompass moral rights—rights above and beyond the law. A citizen by reason of his humanity possesses a range of rights against government. These are rights "in the strong sense," *i.e.*, actions or abstentions which "the

government would do wrong to stop . . . by arresting and prosecuting him" (p. 175). I suppose that Professor Dworkin would say that if these rights are not honored by the law, an individual is "justified" in violating the law. Although he sometimes speaks the language of civil disobedience, the main thrust of his argument is toward an enlargement of the law to recognize and "respect" these rights. Obviously, however, if the legal order respects these claims of right, they become part of the corpus of the law; in short, they become legal rights.⁶ Hence, the essay is less a justification of civil disobedience than an exegesis on what the law ought to be.

It is clear that Professor Dworkin would give strong support to claims of individual right against government and would place a heavy burden of persuasion on those urging countervailing considerations of social interest. Much of what he has to say in developing these points is persuasive. "Necessity" is the tyrant's plea; and the recognition of a body of basic individual rights presupposes a willingness to sacrifice some quantum of social advantage in particular cases and to see the will of the majority sometimes frustrated. On the other hand, notions of the "preferred position" of basic liberties and of "absolute" rights of speech are hardly new, and it is not clear how or how far Professor Dworkin diverges from the now almost traditional academic libertarian stance. Professor Dworkin expressly founds his moral calculus on the Kantian respect for individual human personality and on the principle of equality. The former idea presumably underlies his argument that governmental interference with an individual's abstention from any war for which he has strong moral scruples constitutes an improper invasion of personality. Yet viewed from the individual's perspective, governmental interference with anything he seriously and strongly wishes to do is likely to be seen by him as an invasion of personality. I do not mean that distinctions cannot be made between the trivial and the fundamental. They can and must be made. Perhaps my basic complaint is that I do not find Professor Dworkin's categories and distinctions as crisp or manageable as he appears to feel I should. Accordingly, the unruly realities of concrete cases remain for me about as puzzling and difficult as before.

It is, however, in those papers that view the challenge to the legitimacy of law as essentially a group phenomenon that the most interesting and important insights are to be found. Professor Gidon Gottlieb writes, "The most salient feature of recent forms of disobedience is the communal or group character of the phenomenon"

6. To the extent that "respect" entails appropriate exercise of prosecutors' or police discretion, one might view the official reaction as creating other than legal "rights." Professor Dworkin does not deal with these questions in the essay under review although he has done so heretofore. See his well-known article, *On Not Prosecuting Civil Disobedience*, *NEW YORK REVIEW OF BOOKS*, June 6, 1968.

(p. 194), not the instances of challenge by individuals to state authority. So seen, the modern experience with disobedience becomes another chapter in the history of efforts by the American democracy to reconcile the interests and power of minority groups with the institutions of majority rule. This view of the matter is expressed most clearly by Professor Gottlieb and Professor Hannah Arendt. In addition Professor Charles Dyke brings to the discussion the approaches and vocabulary of welfare economics, which tend to a somewhat comparable emphasis. The paper of Professor David M. Potter on changing patterns of social cohesion in the United States adds important historical dimensions.

It may well be that the most effective contribution to the symposium is that of Professor Gottlieb, which he submitted as commentary to Professor Dworkin's paper. Modern resistance to law, says Professor Gottlieb, represents most significantly the activities of groups. These groups (he believes) are not capable of conducting a successful revolution. As events have demonstrated, they are, however, abundantly capable of creating disorders and preventing the effective enforcement of policies from which they have withheld consent. Hence they possess the power of veto. The state is helpless to preserve the status quo through the use of traditional instrumentalities of coercion, in part because the magnitude of the effort at repression would itself transform society into something quite different from what it has been or aspired to be. In essence, the state has lost the monopoly of power, and our situation today resembles that which obtains in the international community: a collocation of semiautonomous groups whose aspirations and conflicting interests summon the skills of negotiation and accommodation rather than the enforcement of consensus through the coercive powers of a hierarchical political society. If this view of our situation is accepted, it follows that a whole arsenal of new legal instrumentalities must be devised whereby group interests may be asserted and advanced and accommodation achieved; and something like a revolution in traditional legal attitudes must be effected.

This is not the place to subject these and related ideas to any very searching test or even to attempt an adequate articulation of them. It is fair to say that these writers are more persuasive at diagnosis than at prescription, that they see the future through a glass darkly. The shape of a legal order devised in response to these views of our present predicament is, to say the least, obscure. Nevertheless, it is difficult to escape the basic insight which these papers express and which many other observers have arrived at independently. The hopes for a liberal society in the future require some basic revisions of American pluralism. There is nothing new about the existence of "veto groups" in our society. New centers of power have arisen

throughout our history and, after experiencing trauma, we have granted tacit recognition to the new groups and conceded them rights of participation. The trauma of the present at least appears to be of unusual seriousness. These difficulties may arise in part from the fact that some of the groups now demanding rights of participation in American society practice styles of life quite different from those of the established groups and often seriously uncongenial to them. This circumstance makes the problem of accommodation painfully visible and demands a degree of tolerance seldom achieved in the past. Whatever the future may require of the law, especially the penal law, it will demand a sensitive and accurate capacity to distinguish substance from style. Sumptuary regulation has become more than futile; it is a threat to our capacity to achieve unity out of diversity. This is only the beginning of the matter, not its end. There remain such doubtful and unpleasant questions as whether after the demands for diversity now being made are accommodated any viable unity will remain, and whether the threat to unity will engender pressures to preserve it even at the cost of diversity—and of freedom.

This book constitutes less a map of the future than a device to indicate which way the wind is blowing. For one whose expectations are appropriately modest, it will repay an evening's reading.

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