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Discretion to Disobey: A Study of Lawful Departures from Legal Rules

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Reviews

Discretion to Disobey: A Study of Lawful Departures from Legal Rules. By Mortimer R. Kadish and Sanford H. Kadish. Stanford University Press, 1973, Pp. x + 241.

The authors' purpose in this important and intriguing book is to contribute to what they call "the jurisprudence of departures from rules" [p. 5]. They try to establish that non-compliance with rules of law may sometimes be justified not only on moral grounds but also on legal grounds — that is, that the legal system itself has considerable built-in tolerance of non-compliance with its own rules, and that an official or an ordinary citizen who contravenes a legal rule may well be able to make out a claim that he is acting "legally" after all.

It is central to the authors' thesis that they do not see the legal system merely as a system of standards, whether the standards be called rules, or rules and principles, or even rules, principles and policies. In addition to standards, the legal system sets up a large number of roles of two general kinds: official roles and citizen roles. A role, whether part of the legal system or not, has a "context of evaluation" consisting of certain means and certain ends. Sometimes legal roles expressly include discretion as one of the means available to the person who fills the role (the "role agent"). For example, a judge may have statutory discretion to decide the severity of a sentence or to waive a certain rule in certain situations. But even if the means expressly or implicitly available to the legal role agent do not include any such discretion, the ends of his role may, in the authors' view, justify his non-compliance with legal rules. Some role ends are of too low an order to provide such justification — those ends, that is, which refer only to the role's specific task ("task ends") or to its function within the larger institution of which it is a part ("institutional ends"). However, other role ends, called "background ends" by the authors, are more fundamental and may be based in "commitments to norms that transcend any institutionalized role" [p. 23]. Some of these background ends may be recognized by society. Others may be ignored by society for the time being, and yet others may be "ends that perhaps no system of rules has ever achieved or could be expected to achieve in full measure: ends such as a finer justice,

kindliness, respect for other people, or human creativity'' [p. 23]. Not all roles are elastic enough to include background ends in their contexts of evaluation, but the role of legal official and the role of citizen as recognized by the legal system do in the authors' view envisage the resort to background ends by the role agents in order to justify departures from the specific legal rules which set out the lower-level ends of those roles and which set out the means by which those lower-level ends are to be met.

The distinction between the two sorts of reasons which the authors call ''role reasons'' and ''excluded reasons'' is an important one. Role reasons are, in effect, reasons for action that are appropriate to the role, given its particular context of evaluation. Excluded reasons are those that the role agent ''may recognize as an individual but that in his role he cannot take into account'' [p. 27] — that is, reasons which make an action meritorious or unmeritorious if considered out of context, but which are irrelevant to its appropriateness to the agent's particular role. A role agent will ordinarily act only on role reasons, but if there are excluded reasons which conflict with role reasons in a particular case, he need not necessarily disregard the excluded reasons. Rather, ''he acknowledges his obligation to his role by imposing an extra burden, or surcharge, so to speak, on the excluded reasons, so that they must have significantly greater weight, in order to sway him'' [pp. 27-28]. Depending on his attitude toward his role, any particular role agent will tend to levy either a ''finite'' surcharge or an ''infinite'' surcharge on excluded reasons. Levying an infinite surcharge means that he will never act on reasons other than role reasons, however strong those other reasons may be. Levying only a finite surcharge means that he will act on excluded reasons if they are compelling enough. Whether any particular set of excluded reasons is strong enough to overcome any particular surcharge is, in the authors' words, a question of ''social philosophy'' [p. 28]. Departures from rules, *i.e.*, acting on excluded reasons rather than on role reasons alone, may sometimes be not merely permissible but actually necessary if the role agent is to play his role well. As examples, the authors suggest that a good soldier will sometimes disobey an officer's order to shoot civilians, and a good physician will sometimes give pain-killers to a patient at the cost of decreasing the likelihood that the patient will survive. Such departures, in the authors' view, cannot be justified merely by saying that the role's requirements are indeterminate. The requirements are indeed

determinate, but the role itself includes "a liberty, often of a sort that the role agent takes advantage of at his peril, to undertake actions outside the role's prescribed means to achieve the role's ends" [p. 31]. Roles that include such a liberty are called "recourse roles" by the authors, apparently because the role agent is entitled to have recourse to role ends where they conflict with prescribed means. Not all roles are recourse roles, the authors admit, for many of them are too narrow to permit the agent ever to depart from authorized means in order to achieve certain ends (for example, a clerk's role), or are so structured as to give the role agent explicit authority to depart from stated rules in order to achieve certain ends. However, the roles of official and citizen, even when they are not so structured, "may sometimes function as recourse roles by virtue of the way they are embedded in the legal system" [pp. 35-36].

In going on to deal more specifically with how the legal system envisages rule departures by officials ("legitimated interposition"), the authors construct a variant of what they call, after Weber, the "rational-bureaucratic model of a legal system." They name this variant the "rule-of-law model" — the model which "requires those who exercise government authority to conform strictly to the rules." Dicey's writings are taken as an early and extreme expression of that model, Dicey being of the view that the "rule of law" excluded not only what the authors call "deviational discretion" [p. 42] (*i.e.,* any right on the part of government officials to disregard the law), but that it also excluded or virtually excluded what they term "delegated discretion" (*i.e.,* the explicit conferring of discretionary power, by statute or statutory instrument, upon government officials). In the eighty years or so since Dicey wrote, delegated discretion has been widely accepted, and has been the basis of an immense growth in administrative decision-making. Yet it is not this sort of discretion, but rather *deviational* discretion, which interests the authors. As their prime example of deviational discretion, they deal at some length with the development of the jury's function "not only to guard against official departures from the rules of law, but on proper occasions themselves to depart from unjust rules or their unjust application" [pp. 53-54]. If a criminal jury, after hearing the judge's instructions on the law, chooses in the course of its deliberations to disregard those instructions and to base an acquittal on their feeling that the law ought not to be applied, there is no way the acquittal can be

reversed. The following passage illuminates the authors' use of the jury example.

> Because the jury's role is a recourse role extending a liberty to depart from the judge's instructions, does it follow that every jury verdict contrary to those instructions is necessarily legitimated? Certainly in at least one case it does not follow. This is the case where the decision to depart is grounded on considerations that do not even purport to be part of the accepted ends of the role. A bribed juror, or one who responds to a familial relationship with the defendant or to personal fear, cannot be regarded as acting legitimately in his role. Such a juror abuses his authority in order to serve a personal interest. Yet what should we say of a jury that seeks to serve the ends of its role but grossly misinterprets them? For example, consider a Southern jury that acquits a white segregationist of killing a civil rights worker, on the grounds that in the public interest carpetbag troublemakers must be discouraged from venturing into their community, and that in any event the defendant's act was a political act that should not be punished as a common crime. Is this an instance of legitimated rule departure? The answer, we think, has to be yes. One is entitled to say that this jury is egregiously wrong in its interpretation of the ends of its role, both institutional and background; that its ventured justification rests on premises that contravene the basic ethos of the Constitution and the legal system founded on it; even that it has violated the law insofar as one may regard policies and ends of this kind as part of the law, as we do. But if our argument is correct, one cannot say that this jury has acted lawlessly, in the sense of usurping an authority it did not have, any more than one could say of a judge that he acted lawlessly when in good conscience he grossly misread the law. The liberty to make a judgment on role ends is precisely what is entailed in recourse roles; so long as the agent's judgment is conscientiously made on his view of those ends, his rule departure is legitimated. Of course, there is always the grave danger in recourse roles that the agent will act in crass and damaging ignorance, with no possibility of check or control. Any liberty may be misused. But if our interpretation is right, the law has chosen to take that chance in the case of the jury. [pp. 68-69].

It would not do, the authors assert — or at least, at an earlier date it would not have done — for the law explicitly to recognize that juries have the liberty to disregard the judge's instructions on the law whenever they feel that the application of the law would lead to an unjust conviction. The reason: "the very technique of explicitly instructing the jury, without qualification, that they are obliged to apply the law given by the judge helps ensure that they will impose the required extra surcharge on any decision to depart from the

rule.'' [pp. 64-65]. In other words, to create a legal rule giving the jury an explicit right to do what it now has only a ''liberty'' to do, would increase the danger that inadequately principled jury decision-making would undermine existing legal rules, thereby jeopardizing the symbolic steadfastness of the criminal law.

Of the authors' other examples of legitimated interposition, only that of the judge need be raised. Both Jeremy Bentham and Jerome Frank, the authors assert, based their criticism of free-wheeling judges on a misapprehension of what is appropriate to the judicial role. The authors quote Bentham's criticism of judges for using legal fictions to bring about results that the judges thought just but that were not in accord with the law — for example, the fiction that a plaintiff child trespasser is ''invited'' onto the defendant's land if some object that is alluring to children is put there. Also quoted is Frank's opposite-extreme criticism of judges for not explicitly accepting that they had the right to make new law whenever they wanted, and for not then going ahead and making the best law that they could make, free from the damaging illusion that they were bound by precedent or statute or anything else. In preference to the rule-positivism of Bentham and the rule-nominalism of Frank, the authors propose the following account of the judge's role, while acknowledging that they could not enter upon the ''full-scale treatment of the nature of judicial reasoning'' [p. 88] that would be required to support it. ''. . . . the judge is indeed bound by the rules of law, and he is bound to administer justice through those rules. But sometimes the ends of justice may be disserved by following those rules. In those cases the judge's role, unlike the clerk's, extends him a liberty to make this judgment and to depart from the rules to achieve results consistent with the ends for which his role is set up. In sum, the judicial role is a recourse role.'' [p. 90].

With respect to rule departures by ordinary citizens (''legitimated disobedience'') the authors suggest that a second variant of the ''rational-bureaucratic model of a legal system'' captures the essence of the now prevalent view of the citizen's obligation to obey the law. This variant they call the ''law-and-order model.''

> However the laws are made and whatever they provide, the law-and-order model requires the citizen always to comply: thus a citizen in a democracy may be free to denounce a law and to seek changes in it through the political process, but until the law is changed it commands obedience of him. While the law stands the citizen complies. The rule provides all that is necessary to

> guide action. There is no place for his own judgments, however persuasive the grounds. To depart from the rule amounts in principle to an act of rebellion, and though such an act might at times be justified morally, it can never be justified by the legal system being rebelled against. [p. 97].

More responsive in the authors' view to the realities of modern legal systems — or at least to the realities of the American legal system — is their concept that disobedience of a law by a citizen is legally justified (not merely morally justified, but *legally* justified) when four conditions are present.

> First, the legal system must recognize what we shall call a legitimating norm, the applicability of which falls within the final authority of a legal official, usually but not necessarily a court of law, to determine. Second, the norm must have the effect, when found to apply, of relieving the citizen of the usual liability to punishment for disobedience. Third, the norm must function not as a qualification of the rule but as a justification for the citizen's disobeying the rule. And fourth, the citizen must make a colorable appeal to the norm as the justification for a departing from the rule. [p. 99].

What do the authors mean by "legitimating norm"? They put forward, and discuss in very interesting detail, three types of norm which, they argue, meet each of the four conditions set out above. The first of these types, the norm of constitutional validity (or invalidity, which perhaps makes its meaning clearer), is based in the obvious point that a citizen is not obligated to obey an unconstitutional law. If it is a statute that he disobeys, and he turns out to be right in the sense that the statute is held unconstitutional by the courts, then he will probably suffer no punishment at all. If it is not a statute that he disobeys but a court order or an administrative order, and that order is held to be unconstitutional, then it is much more likely that he will still be given some punishment for "taking the law into his own hands." Because it seems to be considered a more direct affront to the symbolic authority of the law for a citizen to disobey a specific, individualized order of a judicial or administrative tribunal than to disobey the more olympian terms of a statute, "the surcharge exacted on the citizen's reasons for disobeying is increased" [p. 114]. It is therefore by no means clear, as the authors recognize, that the norm of validity meets the second of their four conditions for legitimated disobedience — the condition that the norm, when held applicable by the court, should serve to exempt the citizen from punishment. In addition, although

the provisions of the constitution do not of course form a part of every legal rule, it is surely a fundamental principle of any legal system with a written constitution that every law will be read as being subject to the terms of that constitution. It is therefore difficult to see how it is, in the authors' words, "self-evident" [p. 123] that the norm of constitutional validity meets their third condition — the condition that the norm not serve as a qualification or exception to the rule "but as a justification for the citizen's disobeying the rule." It should be added that because the American constitution protects a far wider range of rights from legislative interference than the Canadian constitution, the norm of validity provides much more scope in the United States than in Canada for questioning the existence of what appear to be legal rules.

The authors' second legitimating norm is the norm of the lesser evil, otherwise known as the defence of necessity in criminal law, and perhaps most accurately called the norm of the "ultimate ends of criminal law." It is the norm which permits a legal rule to be disobeyed in order to avoid the doing of a greater evil, and "essentially its standard is whether in the circumstances and on balance it is better in terms of the ultimate ends of criminal law for a person to violate a given rule than to obey it" [p. 120]. As the authors point out, the "necessity" to which judicial and extra-judicial statements of this norm sometimes refer is "not physical necessity . . . (that is another defence) but moral necessity, which, of course, is not necessity at all but choice" [p. 120]. Among the examples which the authors quote from the commentary in the American Model Penal Code are the following: "Property may be destroyed to prevent the spread of fire. A speed limit may be violated in pursuing a suspected criminal. An ambulance may pass a traffic light. Mountain climbers lost in a storm may take refuge in a house or may appropriate provisions."[p. 121]. This norm of the lesser evil clearly meets the condition that it must relieve the citizen of punishment for disobedience of the "greater evil" rule, and the authors may be right in arguing that it also meets their third condition that it not be merely an exception to the rule, for a defendant who relies on it is "appealing to the judge to exercise the authority vested in him by the law to create an ad hoc qualification where none existed before on the basis of the ends of the criminal law" [p. 124]. It is the appeal to the ends of a particular area of law rather than to the terms of a written constitution which makes this norm more interesting than the norm of constitutional validity,

especially in a country where the existing written constitution is incapable of being tortured into making the judiciary the same sort of all-purpose overseer of legislative and executive action that it has become in the United States. Yet the authors recognize, by their definition of the lesser evil norm as relating only to criminal law, that as things now stand this norm is not available to justify rule departures on the basis of "moral necessity" in other areas of law.

In putting forth their third legitimating norm, the norm of "justifiable nonenforcement," the authors start with the fact that police and prosecutors have wide discretion not to enforce even clearly valid legal rules, and go on to assert that such official discretion not to enforce gives rise to "the possibility that nonenforcement decisions may in some circumstances accord the citizen a liberty to depart from the unenforced rule comparable to that accorded him by the norms applied through the courts" [pp. 127-28]. Whether or not the prior nonenforcement on which the citizen seeks to rely was based on a systematic policy of the enforcing agency, it seems that such nonenforcement is becoming recognized by the American courts as the basis for a constitutional defence on the part of someone who is prosecuted under the previously unenforced law. Therefore, in cases where the invocation of the "justifiable nonenforcement" norm is based on a pre-existing pattern of nonenforcement of the law in question, that norm itself would appear to be based in the American constitutional protection of equal treatment, and thus to be in substance indistinguishable from the authors' first legitimating norm — that of constitutional validity. The authors posit another situation where the "justifiable nonenforcement" norm might be applicable, but I find that situation virtually incomprehensible. I can only summarize it as follows: "The authorities *ought not* to enforce this law. Therefore, if I disobey it on the assumption that they will not enforce it, the court ought not to convict me if they do seek to enforce it."

In their last two chapters, entitled "Legitimation as a Social Strategy" and "Legitimation and the Idea of a Legal System," the authors come to grips in a very interesting and instructive fashion with the question whether existing social and legal systems — in reality, the existing American social and legal system — could live with rule departures of the types and on the scale that would seem to be legitimated by the arguments they put forward in their earlier chapters. In discussing the risks of legitimation, they express the recognition that "no legal system other than one built solely on

force can function without general acceptance among its citizens of the obligation to comply with the rules'' [p. 173], and that extending the scope of legitimated rule departures might ''threaten both our freedom from the tyranny of office and our orderly and consistent mode of conducting social affairs'' [p. 177]. But, they insist, it is safer for society to recognize a fair amount of leeway for rule departures within the legal system, and then try to ensure that rule departures occur only within that area of leeway, than to make the boundaries of the legal system coextensive with the boundaries of the positive law and then implicitly or explicitly accord some sort of right or liberty to citizens or officials to step outside those boundaries in exceptional cases. Essential to this conclusion is a two-faceted view of the symbolic effect of the law. Facet 1: if a standard or a liberty is called a legal standard or a legal liberty, the bulk of the populace are more likely to obey it (in the case of a standard) or less likely to abuse it (in the case of a liberty) than if it is called an extra-legal standard or an extra-legal liberty. Facet 2: as long as a legal rule is thought to be absolutely binding by the great majority of unthinking or ill-educated citizens and officials, its symbolic authority will not be destroyed if a few thoughtful people violate it when they really think it right to do so. I will say more about this ''calculated hypocrisy'' (to use the authors' term for it) in a moment.

As an alternative to the ''rule-of-law'' and the ''law-and-order'' models of legal obligation, both of which are part of the ''rational-bureaucratic'' or the ''producer's'' view of legal obligation, the authors propose what they term a ''checks and balances'' model of a legal system, borrowing the name commonly given to the network of interwoven constraints that bind the three branches of government under the American constitution. In the context in which the authors use it as well as in its broader constitutional context, the checks and balances model has the attractive theoretical feature of preventing an undue concentration of power. It is anti-majoritarian. The devices of legitimated interposition and legitimated disobedience are designed to make it even harder than it already is under the American constitution for an electoral majority that might have control of both the legislative and executive branches to claim that it also has the law on its side.

However, the anti-majoritarianism of the checks and balances model of a legal system, as developed by the authors, has its unattractive side as well. The authors' model is based on the

existence of a significant gap between what the rules of law say and what the legal system permits. This gap can be exploited by those who know what sorts of considerations have to be invoked in order to persuade legal authorities to permit departures from what the rules seem to require, or by those who have access to those who know. For individuals or groups who do not move in circles where such knowledge is readily available, the legal system inevitably appears much more rigid and perhaps much more repressive. I see disturbing implications in the authors' apparent readiness to tolerate this unequal incidence of the symbolic force of the law. They seem to accept that the law often relies on what they term "calculated hypocrisy" [p. 180] to secure obedience from those who, if they knew better, would realize that they could, with impunity, withhold obedience under certain circumstances and under the cover of certain "legitimating" arguments. "Some tension between what is said and what is done in the legal system as elsewhere may be benign and useful. There is an element of theater in the law, but this is not to say that it is all farce." [*id.*]. A similar note is struck in a passage from Ronald Dworkin, quoted by the authors [p. 135n], giving reasons why draft law violators should not be prosecuted if they have acted on the basis of conscience. "One is the obvious reason that they act out of better motives than those who break the law out of greed or a desire to subvert government. Another is the practical reason that our society suffers a loss if it punishes a group that includes — as the group of draft dissenters does — some of its most thoughtful and loyal citizens."

It would be unfair to overstate the extent of the authors' acceptance of "calculated hypocrisy" as a preservative of social order. It is true that in considering whether police discretion in criminal law enforcement ought to be characterized as a discretion to deviate from the rules or as a discretion included in the rules themselves, the authors do suggest that the former characterization has the advantages of "allowing the official rule of full enforcement to be maintained" [p. 77] and of avoiding "acknowledgment of the extent to which important matters, even those directly affecting the citizen's liberty, are left to the official's discretion — an acknowledgment that would undoubtedly be an affront to the rule-of-law tradition" [pp. 78-79]. However, they insist in the very next sentence that "we are not arguing that it is better to permit the police to operate outside the rules than to recognize their discretionary authority and seek to control it within a rational

structure, thereby ensuring equal treatment of citizens before the law.''

Still, the authors' acknowledgment of the importance of the difficult ideal of equality before the law begs the essential issue of gross inequality of access to the type of legal logic and rhetoric that is necessary to develop a case for any of the various sorts of legitimated departures that they talk about. Basically, the unwashed are to be kept under the illusion (which for them may not be an illusion at all) that the law will always be strictly enforced, while the suitably informed can safely be allowed to realize the truth as long as they do not flaunt their realization. As well as being even more bankrupt in terms of social justice than the ''rule-of-law'' and ''law-and-order'' models which the authors explicitly (and I think rightly) reject, an approach based on ''calculated hypocrisy'' simply could not work. The unwashed are not always so slow to realize what is happening, and would certainly be no slower if confronted with the more widespread elite disobedience that the authors seem to think can be legitimated in terms of the law itself. If the man near the bottom of the social totem pole sees the legal system itself allowing higher-ups to escape punishment for breaking draft laws or marijuana laws or abortion laws, why should he feel inhibited from stealing or robbing to better his lot, or from beating his wife when she deserves it? To tell him that there is structured into his role as citizen a liberty to depart from legal rules if he can invoke a legitimating norm, and that it just happens to be easier to make a case for the applicability of such a legitimating norm with respect to the laws that bother other people than with respect to the laws that bother him, is not to tell him anything very helpful or very convincing. On the other hand, if the focus is taken off the question of what can or cannot be justified by a legitimating norm that might somehow be nudged or squeezed into the legal system and is placed instead on the question of whether or not a strong moral case can be made for compliance with (or strict enforcement of) the legal rules that are admitted to apply in the particular case, I think large steps will have been taken toward making the whole matter more comprehensible.

Implicit in the authors' approach is a rejection of legal positivism for its refusal to give legal permission to the official or the ordinary citizen to depart from even a plainly unjust law until the legislature is moved to act (or, as is perhaps more often the case in the United States, until the higher courts are moved to act). However, the

appropriateness of positivist attitudes toward the law largely depends, I think, on the sort of role one has in the legal system — first, the role of judge or practicing lawyer; second, the role of legal researcher or law reformer; or third, the role of ordinary citizen. First, with respect to judges and lawyers, rejection of the positivist approach is amply justified. To the overworked or lazy lawyer or judge, the positivist distinction between law and morals all too readily serves as an excuse for dismissing as totally irrelevant to his job any consideration of the moral and social implications of what he is doing. The few great Canadian judges have seen their roles very much as recourse roles and have been fully aware that the law is open at innumerable points to be formed, influenced or changed by moral reasoning. The authors' central notion that the judge's or lawyer's role is not coterminous with any body of legal rules is a useful vehicle for communicating the capacity of those role agents to make constant improvements in the law and to design just solutions in individual cases. To legal researchers and reformers, however, the positivist model of law as a system of rules has great value as a basic research tool enabling areas of law to be decontextualized in order to facilitate, first, the analysis of their structure and content, and second, the empirical study of their actual or likely social effects. The recourse role notion is certainly not without its usefulness to the researcher and reformer, but its value to him is as a sort of secondary causal factor which might help to explain differences between the intended or expected social effects of legal rules and their actual effects. Finally, to the ordinary citizen who lacks familiarity with legal reasoning and who seeks guidance on the extent of his obligation to obey the law, the recourse role notion seems, as I have suggested above, to offer less prospect of enlightenment than the more straightforward notion of a legal duty to obey coupled with a moral duty to evaluate and, in a strong enough case, to disobey.

The obvious questions arising from what I have just said are, first, what is a strong enough moral case for disobedience, and second, on what basis may a judge appropriately withhold punishment from an individual who has made out such a case? Any hope that satisfactory answers could be developed to these questions over time would, I think, depend on the explicit incorporation into the law, perhaps at the constitutional level, of a broad moral principle somewhat similar to the authors' second kind of legitimating norm — the norm of the lesser evil. As for the criterion

that such a principle might provide for the use of officials and citizens in weighing the relative evils of compliance and non-compliance, the principle of utility which has become so embedded in British and Canadian legal philosophy over the past century, and which has been subjected to close and continued scrutiny by many moral philosophers, would still appear to be the most promising candidate. That there might be insuperable difficulties in getting agreement on such a principle, or in wording it appropriately, or in deciding its application in concrete cases, is all too apparent. Yet the result might be sufficiently more meaningful to sufficiently more people than what the authors propose, and sufficiently more in accord with the constitutional traditions of common-law countries other than the United States, to make the entire effort worthwhile.

The authors' undertaking, if I may attempt to restate my perception of it, is to use the concept of role to bridge the "is-ought" gap in the context of the legal system. Rules of law and other legal standards remain on the "is" side, but the legal roles of official and citizen are seen as broad enough to stretch over to the "ought" side. As those roles are part of the legal system, the boundaries of that system therefore also extend across the gap. To judges and practicing lawyers, this concept of role speaks eloquently and probably intelligibly. To the ordinary citizen — at least to the ordinary non-American, and perhaps to the ordinary American as well — who wonders about his obligation toward laws that seem to him unjust, it does not speak plainly enough.

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*This review is based on a paper read to the Philosophy Department Colloquium, Queen's University, Kingston, November 21, 1974.