BOOK REVIEW


Kurt Baier†

Discretion to Disobey, coauthored by a lawyer and a philosopher, has to a very high degree the best of the qualities one can expect from such a collaboration. It sheds new light on important problems in law, sociology, politics, and philosophy, introduces powerful new concepts, and makes important policy suggestions. It draws from its central thesis, by lucid and persuasive argumentation, conclusions of far-reaching significance for the whole of practical philosophy. The book is far too rich for me to discuss even those topics on which I have some competence, let alone all the interesting and controversial matters the authors touch on. In view of this, the most useful thing that I, a philosopher, can do in this review is to give a summary outline of the main themes¹ and then examine in detail certain central theses with philosophical implications which should be of interest to lawyers and philosophers alike.²

I

The central problem to which the book addresses itself is, as the authors note, as old as Aristotle: the relation of the legally just and the equitable. The authors treat it not as a theoretical problem that can be solved, like the problem of free will, but rather as an inescapable practical one that can at best be mitigated by suitable institutional arrangements. The problem arises out of the inevitable clash between two principles neither of which we can surrender: formulating in advance universally binding legal rules for the guidance of citizens and treating individuals equitably even in cases which doing so require departures from these rules.³ The authors think that the problem can

† Professor of Philosophy, University of Pittsburgh.
¹ Text accompanying notes 3-97 infra.
² Text accompanying notes 98-123 infra.
be mitigated by going beyond the two solutions usually offered: delegated discretion to legal officials within the legal system and civil disobedience and revolution outside it.\(^4\) Their chief contribution is the identification, definition, and detailed description of a legal practice, the "recourse role,"\(^5\) which allows the role agent to depart from the mandatory legal rules that apply to him. Their main contention is that in our legal system the roles of some legal officials and of the citizen are such roles.\(^6\)

Chapter One erects the conceptual framework for the inquiry. The authors think it desirable that the conflict between legal justice—that is, conformity with the mandatory legal rules—and action in accordance with the merits of the individual case should be resolved, as far as possible, within the legal system itself. They therefore regard as undesirable those legal theories that have to rely for such conflict resolution entirely on extra-legal devices such as civil disobedience or revolution. In their view, the maximal scope for equity should be provided to the law-abiding—to those, whether private citizens, officials, or other role agents, who feel obligated "to justify [their] actions before the law."\(^7\) Justification before the law involves not merely justification of actions on their merits, but justification of the "appropriateness" of undertaking the action.\(^8\) Mandatory legal rules serve to provide the latter justification by imposing legal obligations and so depriving those to whom they apply of the right to act in accordance with their judgment of the merits of the case.

The authors maintain that there are various domains—"political, legal, economic, familial, and so on"—in which one is required to justify oneself, that is, justify undertaking one's action. They then make the important claim that "for any such domain, the argument to appropriateness demands as a necessary condition an institutional program for the allocation of authority to make decisions along with whatever arguments are needed to sustain such an institutional program."\(^9\) This seems to me a mistake because it conflates two matters that should be kept separate: (1) the institutional program that sets up mandatory rules depriving a person of the right to act on his own judgment of the merits and imposing the duty or obligation to follow the mandatory rule, and (2) the institutional program that allocates

\(^4\) Id. 144-46.
\(^5\) Id. 35.
\(^6\) Id. 35 et seq.
\(^7\) Id. 4.
\(^8\) Id. 8-12.
\(^9\) Id. 11-12.
authority to decide what someone shall do. In the case of promising, for instance, we have a case of (1) but not of (2). If I promise my son that I will take him to the circus, I am no longer free to judge on the merits whether or not to do so. But he and I remain free to act on our own judgments of what I have promised and of whether I have kept my promise. It will become clear presently that this failure to distinguish between (1) and (2) leads the authors into important difficulties and errors.10

The second half of the chapter then places the task of justification in the context of people acting in social roles, that is, in "established and continuing parts in a social enterprise or institution" so as to "serve an accepted social purpose."11 Justification is made possible by social roles because they create "contexts of evaluation" against which not only can others tell whether the agent's acts are justified but also the role-agent himself can "weigh his options" so that he knows what actions he would be justified in undertaking.12 Such "contexts" have two elements: "prescribed means and prescribed ends."13

Prescribed means create four types of constraint: on the reasons that may or may not be taken into account by a role agent (a judge and a legislator, a prosecutor and a defense attorney, a judge and a private citizen take into account quite different kinds of reasons),14 on the actions the role agent must or must not perform (a soldier may not leave the battlefield without the permission of his commander),15 on the actions that count as actions in the role (a judge who acts in excess of his jurisdiction has in effect taken no action at all),16 and on what the role agent must decide at his own discretion (a trial judge is often required to act at his own discretion in sentencing a criminal, though he must set the sentence within certain prescribed limits on the basis of facts the law deems appropriate for him to consider).17

Role ends, on the other hand, set three types of constraint: "the specific task [the] role is designed to accomplish" (task ends),18 the "role's function within a larger institution, which may itself be embedded in an entire network of institutions" (institutional ends),19 and the "norms that transcend any in-

10 See text accompanying note 121 infra.
11 M. Kadish & S. Kadish, supra note 3, at 15-16.
12 Id. 19.
13 Id.
14 Id. 19-20.
15 Id. 20.
16 Id. 20-21.
17 Id. 21.
18 Id. 22.
19 Id. 22-23.
stitutionalized role,” such as justice, respect for people, and the like (background ends).\textsuperscript{20}

A person will thus always have two sets of considerations when deciding what to do:

The first consists of what we call “role reasons” —reasons based on the constraints of his role tempered by whatever discretion recourse to role ends may afford him. The second consists of reasons that he may recognize as an individual but that in his role he cannot take into account, of what we call “excluded reasons.” . . . [When reasons from these two sets conflict, he does not then] simply weigh the role reasons equally against the excluded reasons, and then act according to whichever set of reasons is greater. Instead 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 than the role reasons, rather than merely greater weight, in order to sway him.\textsuperscript{21}

The appropriate magnitude of the surcharge must then be defended by a social philosophy.\textsuperscript{22}

In some roles, the authors claim, “the role agent is permitted to incorporate into his decision what would ordinarily be excluded reasons, or to put the matter differently, to convert excluded reasons for an action into role reasons.”\textsuperscript{23} In this way, the role itself may permit role agents to depart from the requirements of the role. Such flexibility “reduces the instances in which people simply step out of their roles in order to do what must be done.”\textsuperscript{24} Such departures from role requirements, however, cannot be justified unless (1) extra weight is given to achieving the role’s ends through its prescribed means, and (2) there are some standards of relevance that must be met before such departures are undertaken, so that justifiable rule departure remains clearly distinct from “the exploitation and misuse of such roles.”\textsuperscript{25}

Finally, the authors make clear that such justified role departures can occur only in certain suitable roles. They cannot occur in those such as a clerk’s in which the “context of evalua-

\textsuperscript{20} Id. 23.
\textsuperscript{21} Id. 27-28 (footnote omitted).
\textsuperscript{22} Id. 28.
\textsuperscript{23} Id. 29.
\textsuperscript{24} Id.
\textsuperscript{25} Id. 30.
tion consists simply of prescribed means”; or in those such as a judge’s in which the agent is authorized to make decisions in the light of role ends, for there is no question of rule departures where the rule obliges the agent to act on his own judgment; or in those such as kings’ and spies’ in which role agents have complete freedom to do as they think best in accomplishing their ends.\(^{26}\) It is possible only in those roles, which the authors call “recourse roles,” in which the agent is authorized to take action in situations when, in his own judgment, “the role’s prescribed ends conflict with its prescribed means.”\(^{27}\)

Chapters Two and Three are the legal heart of the book, in which the authors attempt to show that the American legal system contains certain recourse roles and that these include not only those of certain officials but that of the private citizen as well.

Chapter Two deals with legal officials.\(^ {28}\) The authors claim that a certain traditional understanding of the obligation of legal officials, which they call the “rule-of-law model,” requires those who exercise governmental authority to conform strictly to the rules and that, therefore, to the extent that this interpretation can allow discretion at all, it severely restricts it.\(^ {29}\) For this model must forbid any exercise of power not delegated by law and any action taken on the basis of considerations excluded by law, and it must require that the action authorized and the grounds for taking the action be sufficiently clear and complete to permit no major exercise of judgment by the officials.\(^ {30}\)

It can therefore allow the three forms of discretion distinguished by Ronald Dworkin (the exercise of judgment in the application of rules, the absence of review of the official decision, and the absence of standards by which the official is bound), but it cannot allow what the authors call “deviational discretion,” meaning “discretion to determine competence to exercise discretion.”\(^ {31}\) Under the rule-of-law model, a community governed not by law but by persons exists if the law “grants [officials] freedom to redefine their authority and role to assume a competence denied by the rules.”\(^ {32}\)

The authors further claim that there is an alternative model for the obligation of officials which can accommodate recourse

\(^ {26}\) Id. 33-34.
\(^ {27}\) Id. 35.
\(^ {28}\) For an earlier version of this chapter, see Kadish & Kadish, On Justified Rule Departures by Officials, 59 CAL. L. REV. 905 (1971).
\(^ {29}\) M. KADISH & S. KADISH, supra note 3, at 40 et seq.
\(^ {30}\) Id. 42.
\(^ {31}\) Id. 44.
\(^ {32}\) Id.
rules, deviational discretion, and thus legitimate rule departure; and that in fact there are several roles in the American legal system thus granted a deviational discretion. The role agent's proper exercise of authority then constitutes "legitimated interposition," the title they choose for legitimated rule departure by officials. The recourse roles discussed are those of the criminal jury, the police, the prosecutor, the judge, and finally the President and Congress.

The role of the criminal jury, to which the authors devote the most detailed discussion, will serve here to illustrate the key features of deviational discretion and legitimated interposition. The key legal question for a long time has been whether the jury in criminal cases has the right to determine the law as well as the facts. The problem is that the juror seems to be obliged to accept and follow the law as instructed by the judge but also seems to be free to act as he thinks best. It seems he cannot do both when following the judge's instruction would lead to a verdict he is convinced ought to go otherwise.

The authors argue that the only way of construing the role of the jury consistent with actual American legal practice is to construe it as a recourse role. In the words of Justice White, "The essential feature of a jury obviously lies in the interposition between the accused and his accuser of the common sense judgment of a group of laymen, and in the community participation and shared responsibility which results from that group's determination of guilt or innocence." Such interposition must be regarded as legitimate, and thus a criminal jury has both a legal obligation "to take the law from the court, and apply that law to the facts as they find them to be from the evidence" and a liberty to depart from these instructions.

The necessary and sufficient conditions of an official's role that provide for legitimated interposition are (1) "that the constraining rule of competence not be constitutive and hence that it not deprive the official's action of legal or practical effectiveness

33 Id. 45-66.
34 Id. 73-80.
35 Id. 80-85.
36 Id. 85-91.
37 Id. 91-94.
38 Id. 47.
39 Id. 56.
when it is departed from";\(^42\) (2) "that the system provide no means for holding the official himself accountable for his disregard of the rule,"\(^43\) for if it did provide such means, the official could not be said to have the liberty to depart from the constraining rule of competence; and (3) that "the system must establish and make available to the agent who proposes to depart from a rule some body of policies, principles, and ends in virtue of which the departure may be justified."\(^44\) The authors then consider but reject four interpretations which attempt to make the role of the jury consistent with the rule-of-law model for legal officials.

The first two, the "conventional interpretations," both assume "that the law must present itself to an agent in a univocal sense, revealing a single, consistent directive fixing the agent's duty and, so far as the law extends, leaving nothing up to him."\(^45\) Both, therefore, simply deny half the conflict between the jury's duty and its liberty. Interpretation I maintains that the jury has the legal duty to follow the judge's instructions but does not have the liberty (though it has the power) to depart from them.\(^46\) Interpretation II holds that the jury has the liberty to judge as it thinks best but does not have the duty to follow the judge's instructions.\(^47\) The authors reject these two interpretations, and the assumption underlying them, because both of them stand in need of but cannot provide "a normative principle to select one part of the evidence rather than the other as determinative."\(^48\) Interpretation I cannot explain why the juror is "afforded every protection" in doing as he thinks best and why "his function as a juror is extolled because jurors sometimes do."\(^49\) Interpretation II cannot explain why the judge tells the jurors that it is his duty

\(^42\) M. Kadish & S. Kadish, supra note 3, at 67.
\(^43\) Id.
\(^44\) Id. Otherwise the unchallengeability of the official and his act "may only demonstrate the lamentable shortcomings of the system." Id. Thus "[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," id. 68; but 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, id., must be regarded as acting legitimately so long as the judgment is made conscientiously on the basis of the jurors' view of the ends of their role.
\(^45\) Id. 66-69.
\(^46\) Id. 56.
\(^47\) Id. 56-57.
\(^48\) Id. 57-58.
\(^49\) Id. 58.
to instruct them in the law that applies to their case and that it is their duty to follow the law as he states it to them.

The third interpretation,\(^5\) which I shall call "Interpretation III," tries to maintain that the law gives the jurors a single, consistent directive by construing the judge's instructions as imposing a merely conditional obligation: "If you don't have overriding reason—damn good reason—to do otherwise, then do as the judge tells you."\(^5\) The authors' main reason for rejecting this interpretation is that a legal system could design the role of the jury as an "ordinary discretionary role"\(^5\) but that as a matter of fact our legal system has not done so. It has made the obligation to follow the judge's instructions unconditional. "Perhaps one reason why the jury exercises its very real power so sparingly is because it is officially told that it has none."\(^5\)

The fourth interpretation, which I shall call "Interpretation IV," holds again that there is no clash between the jury's obligation to follow the judge's instructions and its liberty to depart from them, not because the jury has a liberty to depart from a mandatory rule but because the judge's instructions lay down not a rule but a principle or policy for the jury, and policies and principles merely "point in a direction" rather than require a particular decision.\(^5\) The authors reject this interpretation—that the obligations arising out of policies and principles are observed only so long as the appropriate weight is given to them—mainly on the ground that the distinction is of no use to the agent in resolving his dilemma of whether or not to follow the authoritative directive that confronts him. It is of no use because the distinction between a rule on the one hand and a principle or policy on the other is not one that the agent can discern clearly. Whether "Keep off the grass" or stare decisis is a rule or a principle does not depend on the degree of generality and precision of these directives but on how they are to be taken. We afterwards call it a rule if the obligation to follow the directive cannot come into conflict with other obligations, a principle or policy if it can. "[C]alling a rule a principle or a policy may be a way of saying the agent's departure from it was legitimated."\(^5\) But that judges the decision in retrospect; at the time of action, "[t]he agent's dilemma remains whether to depart from the con-

---

\(^5\) Id. 62-65.
\(^5\) Id. 62.
\(^5\) Id. 64.
\(^5\) Id. 65 (quoting H. Kalven & H. Zeisel, The American Jury 291 (1966)). See generally M. Kadish & S. Kadish, supra note 3, at 152 et seq.
\(^5\) M. Kadish & S. Kadish, supra note 3, at 71-72.
\(^5\) Id. 72.
Chapter Three extends the idea of legitimated rule departure to the role of citizen, making two main points paralleling those of Chapter Two. The first is that there is a model of the role of the citizen—analogous to the rule-of-law model for legal officials—which the authors call "the law-and-order" model, according to which it is impossible "that the law itself might make provision for a citizen to judge whether or not he should be bound by the law under certain circumstances." The second and main point is that "the citizen's role is at many critical points a recourse role, totally incompatible with the law-and-order model."

The mandatory rules to which the citizen is subject are not, of course, constraining rules of competence, as in the case of officials, but peremptory rules which carry a penal sanction, thus making clear that they impose a legal obligation on the citizen to comply. If the citizen's role is to be in certain contexts a recourse role, then in those contexts it must be appropriate for him to undertake to disobey a mandatory rule. The authors list four conditions a legal system must meet if it is ever to legitimate a citizen's disobedience: (1) it must recognize a legitimating norm whose applicability is to be authoritatively determined by a legal official; (2) if that norm applies, then the citizen is not punishable for disobedience; (3) the norm must function, "not as a qualification of the rule but as a justification for the citizen's disobeying the rule"; (4) the citizen must make "a colorable appeal to the norm as the justification for departing from the rule." The main differences between legitimated disobedience and legitimated interposition, therefore, are that in the case of the former but not the latter the individual's judgment, on the basis of which he departs from the rule, might not be sustained and if so he is liable to punishment for his rule departure. There is thus a difference between the appropriateness or legitimacy of his undertaking to depart from a mandatory rule and his actual rule departure; presumably there must be a sense in which if his judgment is found mistaken his actual rule departure was not legitimate (lawful), for otherwise it would surely be wrong to insist on punishing him. I shall return to this point.

56 Id.
57 Id. 96.
58 Id. 97.
59 See id. 37 et seq.
60 Id. 95 et seq.
61 Id. 99.
The authors then discuss three legal norms—the norm of validity, the norm of the lesser evil, and the norm of justifiable nonenforcement—to which citizens can in our legal system appeal for a legitimation of their rule departures. In the first case, the law entitles the citizen to depart from mandatory directives issuing from legal officials—whether legislators, judges, or administrators—when, in his own judgment, these directives are objectionable on grounds that serve, "under the Constitution, to make that law unconstitutional as well as wrongful," whether or not the citizen knows that this is so.\(^6\)

In the second case, a citizen may legitimately depart from a peremptory rule when in his own judgment "the evil produced by breaching [the] rule is less than the evil that would follow from complying with it."\(^3\) Here too, of course, his judgment is not final: If the court does not agree with his assessment of the balance of evils, he is subject to punishment.

In the third case, the citizen appeals to a norm applied not by courts but by officials: the norm of justifiable nonenforcement.\(^4\) These are the cases in which citizens infer from the facts "that the police do not always arrest when they know they have probable cause, that prosecutors do not always prosecute when they know they have a provable case, and that juries do not always convict when they know the defendant is guilty under the law"\(^5\) that citizens have "a correlative ground for departing from the rule"\(^6\) not enforced by these officials. This case is extremely complex and I cannot summarize its details.

Chapter Four, after providing a succinct and helpful comparison of legitimated interposition and disobedience\(^7\) deals with two main questions. First, by what signs can one recognize the degree of openness of a given legal system to legitimated rule departures?\(^8\) Second, and in order to "create legal systems that under given historical circumstances may attain the most salutary mix of individual autonomy and supervening law,"\(^9\) what are the values and risks of legitimation?\(^10\)

In the case of legitimated disobedience, the authors distinguish two criteria of openness, the extent to which the legitimating legal norms are formulated and recognized:\(^11\)
and the extent of the citizen's liability to punishment for rule departure. Thus

a system will be increasingly open to legitimated disobedience to the extent it recognizes norms that furnish a basis for justifying a rule departure, whether these norms be superior substantive norms or norms of nonenforcement, and to the extent that it grants discretionary authority to its officials to interpret and apply these norms.

The extent of liability to punishment is determined by the answer to two questions: How much does it count against the citizen if he turns out to be right in acting autonomously, that is, in taking it upon himself "to make the judgment that he was at liberty to depart from the rule?" How much does it count for him, if he turns out to be wrong, "that he acted in conscientious reliance on the legitimating norm?" The authors distinguish six different responses, varying from the unqualified law-and-order position—that acting autonomously makes him liable to punishment irrespective of whether he turns out to be right or wrong—to the position most open to legitimated disobedience: if he turns out to be right, he is not liable to punishment; and if he turns out to be wrong, it counts maximally for him that he conscientiously judged the norm to be applicable, however mistaken his judgment may have been.

In the case of legitimated interposition, the main point made by the authors is that the extent of the openness of a system depends largely on "unformulated legal norms and informal relationships" and, therefore, that increasing the openness to this form of legitimated rule departure is "much less amenable to manipulation" and thus to deliberate modification by policy.

In the final section of this chapter the authors provide a balanced review of the dangers and the advantages of various degrees of openness to legitimated rule departures. It must suffice to say that their exposition is concise, judicious, and persuasive.

---

72 Id. 153-70.
73 Id. 153.
74 Id. 154.
75 Id.
76 Id. 155.
77 Id. 168.
78 Id. 170 et seq. Examples of the slow pace of evolution are plea bargaining, see generally id. 80-85, and juror independence, see generally id. 45-50.
79 Id. 171-83.
In Chapter Five, the authors pull together the several philosophical threads with which they have woven their survey of legitimated rule departure. They are well aware that this notion will seem to many "like a foreign body to be removed as quickly as possible from the eye of jurisprudence." In particular, they try to explain and dispel the impression of self-contradictoriness that adheres to their account of legitimated departure from obligation-imposing mandatory legal rules. In brief their explanation is that "legal theories as diverse as natural-law theory, legal realism, and Hart's version of legal positivism—not to mention sovereignty theories like those of Hobbes and Austin—have overlooked principles of acceptance." These principles go beyond those which "determine . . . what the individual's obligations are." They are necessary, especially in developed legal systems, to provide adequate guidance for citizens and officials under the rules, by telling them "how those obligations are to be taken" or "how obligations are to be accepted by receivers of the law."

The understanding of the nature and function of principles of acceptance and the explanation of why they have been overlooked so consistently also helps to dispel the impression of self-contradictoriness that attaches to the definition of recourse roles. They have been overlooked because legal theory has for long been in the thrall of one model of the legal system which, following Max Weber, the authors call the "rational-bureaucratic" model. The social philosophy embodied in this model is by no means the only defensible one and, as we shall see, is not, according to the authors, the one embodied in the American legal system.

The four characteristics of the rational-bureaucratic model are the following: (1) "[T]here is a sharp functional division between the ruler and the ruled" according to which some members of a society (the officials) have exclusive authority to determine the legal obligations of all members of the society (the citizens). (2) Those in authority are required to rule solely according to law; hence the ruled, who have an obligation to obey, have a correlative right to be ruled in accordance with the law; but because authority is a monopoly of the rulers, there must be

---

80 Id. 184.
81 Id. 194.
82 Id. 185-86.
83 Id. 200.
84 Id. 196-97. It is important to realize, in this context, that an individual may in one set of circumstances be an official and in others a citizen, to the extent, for example, that he is forbidden to accept bribes, in such a case being constrained by threat of penal sanctions. Cf. id. 4-5, 17-18.
legal recourse through a hierarchical system of appeals.\(^8\) (3) A legal system must be both consistent and complete; every legal issue must be capable of being decided by some rule or rules of law, and incompatible decisions cannot be equally grounded in the law.\(^6\) (4) The ruled are entitled to "justice according to the rules": they can demand that their obligations be clearly stated and that the rules be correctly applied, but they are not at liberty ever to function as the judge in their own case.\(^7\)

In keeping with this model of legal systems is the prevalent theory of legal obligation, "the producer's view." Its main characteristics are that (1) legal obligations exist to rule the actions of men, (2) all mandatory rules impose legal obligations, (3) the legal obligation imposed by a mandatory rule can be fulfilled only by doing the thing demanded or abstaining from the thing prohibited, and (4) a departure from a mandatory legal rule may be justifiable on moral or social, but not legal, grounds.\(^8\) In the authors' view, this conception of legal obligation "makes legitimated rule departures anomalous"\(^9\) and self-contradictory. If the rational-bureaucratic model of a legal system and the producer's conception of legal obligation were the only acceptable ones, then legitimated rule departures would have to be dismissed as contradictions in terms.

But, of course, as we have noted already, there are other possible models of the legal system embodying different social philosophies. One of them, the "checks-and-balances" model, significantly modifies each of the four salient features of the rational-bureaucratic model: (1) Not only the law-makers but at least some of the law receivers (legal officials as well as citizens) "have some authority to determine legal obligations." (2) The effective and proper working of a legal system is quite consistent with "recurring doubts concerning the legal justification of the judgment reached by authoritative voices." (3) "[I]ncompleteness and inconsistency must be accepted as necessary concomitants of the system's response to social change and to the complexity and indeterminacy of social objectives." (4) The receiver of law is entitled not to "the one uniquely correct decision," for there may be none, but only to "a claim to influence or to participate in the processes by which judgments are made . . . ."\(^{10} \) The authors then advance the thesis that "the

---

\(^8\) Id. 197-98.
\(^6\) Id. 198-99.
\(^7\) Id. 199-200.
\(^8\) Id. 194 et seq.
\(^9\) Id. 195.
\(^{10} \) Id. 203.
traditional way in which American political theory and practice have adopted Montesquieu's famous principle that to avoid the abuse of government power, matters must be so disposed (in constitutions) that one power of government will check another" would favor, if not actually require, a legal system that conforms with the four principles of the checks-and-balances, rather than those of the rational-bureaucratic, model.

Of course, because a legal system conforming to the checks-and-balances model requires other principles of acceptance, it also must involve a theory of obligation that differs from the producer's view. In particular it need not adhere to theses (3) and (4) of that view, because these theses do not follow solely from the meaning of "legal obligation" but rather from that meaning together with the particular principle of acceptance adopted by the rational-bureaucratic model that fits the producer's view: "The unremitting character of legal obligations in rational-bureaucratic systems stems from the special principles of acceptance that it incorporates." In a legal system conforming to the checks-and-balances model, "the obligations imposed by mandatory rules are not necessarily unremitting" but may be remitted by principles of acceptance while remaining a genuine obligation. Hence one cannot argue for the producer's theory of obligation simply "by appealing to the incoherence of remittable obligations." Rather, one must do so by a substantive argument for principles of acceptance that make all obligations imposed by mandatory rules unremitting. One might for instance try to show that "law is a question of authority; the flow of authority is one way; break the flow of authority and the gravest consequences ensue for society."

The authors conclude with a plea to legal theorists to reject the traditional account of legal systems which, by incorporating the peculiarities of the rational-bureaucratic system into the very nature of legal systems, "employs restrictive definitions that exclude real possibilities from consideration."

II

As should be clear from my summary, the Kadishes have made an impressive case for their claim that the American legal system provides for legitimated rule departures and that the

91 Id. 204-05 (footnote omitted).
92 See text accompanying note 88 supra.
93 M. KADISH & S. KADISH, supra note 3, at 211.
94 Id. 211-12.
95 Id. 215.
96 Id. 216.
97 Id. 217.
presence of such roles expresses a social philosophy based on an extended version of Montesquieu’s principle of checks and balances. However, as the authors are well aware, their central idea, legitimated rule departure, has about it an air of self-contradiction. The authors seem to embrace the contradictory contentions that the recourse role agent is both legally obligated to comply and free not to comply with mandatory legal rules. This impression is strengthened by the authors’ rejection of Interpretations I-IV. These four Interpretations would avoid this contradiction by denying that the recourse role agent is obligated to comply (Interpretations II, III), that he is free to depart (Interpretation I), or that a departure from the mandatory rules constitutes a departure from his obligation (Interpretation IV).

The authors’ argument to dispel the appearance of self-contradiction can be put schematically as follows: The obligation to comply with a mandatory rule is inconsistent with the freedom to depart from it if and only if the obligation is unremitting. Legal obligations are “a species of garden-variety obligations” and therefore are not necessarily unremitting. Whether or not they are unremitting depends on the legal system’s principles of acceptance, which tell the receiver of the law whether they are remitting or unremitting and, if remitting, how they are remitted. Therefore, given the appropriate principles of acceptance, a role agent may have a legal obligation to comply with a mandatory rule and yet, because his obligation is remitted, be free to depart from the rule and so rightly fail to discharge his obligation while yet fulfilling the rule in departing from it.

Thus, the question whether the authors have provided an account of recourse roles that, contrary to appearances, is free from self-contradiction hinges on their distinction between remitting and unremitting obligations and the nature and function of principles of acceptance. Unfortunately, their explanation of these crucial terms is not on the same level of clarity and rigor as the rest of the work. They frequently advert to this main problem; but the suggestions they offer for its solution are obscure and, even on the face of it, inconsistent. An example of this flaw is their statement that “[t]he obligatory force of the rule remains, but it is overcome in the particular instance by considerations of merit measured by role ends.” This suggests that an obligation

98 See, e.g., id. 69 et seq., 184.
99 See text accompanying notes 45-56 supra.
100 M. KADISH & S. KADISH, supra note 3, at 212.
101 See id. 213.
102 See id. 60 et seq.
103 Id. 98.
is remitting or remittable if it can be overcome and that it is remitted if it is overcome. But what do the authors mean by “overcome”? I can think of three ways in which this claim might be interpreted, but none of them would eliminate the contradiction:

(a) The words “overcome in the particular instance” may suggest that the obligatory force remains only in the sense that the mandatory rule is not abrogated and so will obligate other people in other instances. But what are we to say of this agent in this particular instance? If the obligatory force remains in this instance, then there is still a contradiction. If not, he is not obligated to comply, and so it is not true that by not complying he fails to fulfill his obligation. In any case, this interpretation seems indistinguishable from Interpretation II\textsuperscript{104} which the authors have rejected.

(b) Do the Kadishes perhaps mean that the role agent has \emph{two} obligations, one of which “overcomes” the other? Even if we ignore the fact that the recourse role agent is free, rather than obligated, to depart from the mandatory rule, it is not plausible to ascribe two incompatible obligations to the role agent. Admittedly, when someone has two obligations (say, to repay a sum of money he borrowed and to buy medicine for his child whose life is in danger) and when he has enough money for only one of these two obligations,\textsuperscript{105} then the second obligation does indeed “overcome” the first and does so without freeing the promisor from the obligation to return the money; he is justified only in not returning the money \emph{at the promised time}.\textsuperscript{106} But surely the Kadishes cannot mean that the recourse role agent has both the obligation to comply with the mandatory rule and the obligation to do something else incompatible with such compliance and that this second obligation “overcomes” or “overrides” the first one while requiring the role agent to discharge the overridden obligation at the earliest opportunity. Surely, the two obligations of the role agent are not cumulative, as in this example, but mutually exclusive. They are not merely in the circumstances jointly undischARGEABLE so that their discharge must be staggered but rather such that if one is to be discharged the other is cancelled, not merely postponed. The recourse role agent is exempted from following the prescribed role means if and only if they

\textsuperscript{104} See text accompanying notes 47-49 supra.

\textsuperscript{105} The authors use this hypothetical as an example of remitting obligations, M. Kadish & S. Kadish, supra note 3, at 212 et seq.

\textsuperscript{106} It is therefore somewhat misleading of the authors to say that the fact “that the promisor’s child would die if he did not buy medicine with the money he had promised to return would constitute more evidence than the promisor needed to justify, morally, his not returning the money.” Id. 213 (emphasis supplied).
frustrate the role ends; but by the same token the obligation to adopt these means (to comply with the rule) is terminated without giving rise to a suitable successor obligation.

(c) A third interpretation is that the obligation imposed by a mandatory rule can be discharged by conduct other than compliance. The authors suggest this interpretation by their claim that a true account of legal obligation must reject premise (3) of the producer's view, which holds that "[t]he legal obligation imposed by a mandatory rule can be fulfilled only by doing the thing demanded or abstaining from the thing prohibited." But in the absence of further explanation, this is a puzzling and unhelpful suggestion, for what obligation other than to comply could a mandatory rule impose? If one can discharge an obligation by departing from a mandatory rule, then surely this must be an obligation other than that imposed by that rule. But when a mandatory rule is valid, the obligation, if any, that it imposes is surely like that of the obligation one assumes in a valid promise, that is, an obligation to do as spelled out in the directive contained in the rule or the promise.

The Kadishes must show that their characterization of recourse roles involves only the appearance of self-contradiction. They could accomplish this by a definition of the remittability of legal obligations and the nature of principles of acceptability that would explain how someone can both be and not be legally obligated to do $A$ at time $t$ because his legal obligation to do $A$ at $t$ has been remitted without its thereby ceasing to be legally obligated to do $A$ at $t$. They do not succeed in doing this. Their central thesis seems to me sufficiently important to warrant the labor necessary to dispel the air of contradiction, particularly because this can be done by distinguishing prima facie from final obligations. This important distinction was first introduced by Sir David Ross; but in spite of extensive discussion since, the

107 See text accompanying note 88 supra.
108 M. Kadish & S. Kadish, supra note 3, at 194.
109 If one makes an immoral promise, say, to pay $10,000 for the assassination of an inconvenient leader, then one does indeed incur obligations as a consequence of making this promise: to dissuade the person from carrying out the assassination, to inform the police, and so on, all of course, obligations one is not likely to discharge and none of them the obligation to pay as promised. For in this case, one has failed to assume the obligation to do as promised, which one normally assumes when one gives a promise.
110 It is not completely clear whether this distinction is what the authors had in mind when they contrasted "prima facie obligations that one satisfies by according them a certain weight" with "obligations that under certain circumstances one rightly fails to discharge," id. 212-13; but if not, they certainly do not explain how their distinction differs from Ross' distinction, see W.D. Ross, The Right and the Good (1939).
relationship between the two terms has never been adequately explained. Whatever Ross may have had in mind, his terminology does not make clear that it covers a double distinction: the first is between two kinds of obligation claim, that is, two kinds of ascriptions of obligation to someone; the second is between two kinds of obligation, namely, particular legal obligations and overall obligations under the law.

Sometimes "prima facie obligation" refers, somewhat misleadingly, not to a certain sort of obligation, but to a certain sort of obligation claim, namely, one that is made "prima facie," "other things being equal," that is, on the basis of certain available evidence. Thus if I know that a mandatory rule applies to someone, I may claim, on the basis of this knowledge, that he has, prima facie, an obligation to act as required by that rule. In the same way, if I say that something is prima facie red, I do not mean that it is a certain peculiar shade of red, called "prima facie red," but rather that as far as the available evidence goes it seems or appears to be red. Similarly, "final obligation" refers to an obligation claim that is made without such qualification, "all things considered," that is, relative to all the evidence that can bear on it.

For our purposes, the important thing is to distinguish three different kinds of modification which additional evidence can make to a prima facie obligation claim: it can "invalidate," "terminate," or "override" the claim. The first kind of evidence shows that, contrary to appearances, the person never had the claimed obligation; the second, that though he did have it, he no longer has; and the third, that he has another obligation with which it conflicts and which has a stronger claim on him.

Suppose I know that Jones promised on Monday to pay Smith $10,000 on Saturday and I therefore claim that Jones prima facie has an obligation to pay that sum to Smith on Saturday. But now I discover that the money was promised for an assassination. Then I must withdraw my claim. The new evidence is invalidating. Or suppose that I discover that Smith has released Jones from his promise. Then I must admit that, although Jones had this obligation between the time of the promise and the release, he no longer has it. The evidence is terminating. Or suppose I discover that his child has become dangerously ill and he needs the money for medical treatment; this shows that he has a second incompatible obligation which overrides the first. The two obligations themselves are perfectly consistent with one another but, given Jones' limited credit, they are simultane-

---

112 Note 109 supra.
113 Text accompanying note 105 supra.
ously undischargeable. The recognized principles of priority tell us which of these two consistent obligations has precedence; they do not invalidate or terminate either of them.

Of course, when someone fails to discharge one of his obligations, then we can say that this failure terminates the old obligation and that he incurs a new and different obligation because of this failure. We could say that the new obligation is the offspring or successor of the old one. Or we could say that it is the (appropriately modified) old obligation. If Jones acts in accordance with the principles of priority, he will fail to discharge the overridden obligation; but it is legitimate for him to do so, and it would be illegitimate for him to discharge the overridden obligation because it is overridden only because he cannot discharge them both. This is, therefore, a case in which Jones continues (in a sense) to have the original obligation, yet legitimately fails to discharge it.

To see why this is not contradictory, we must turn to the above-mentioned distinction between discharging a particular legal obligation and complying with one's overall obligation under the law. So far we have spoken of particular obligations, a given person's obligation to do a given thing at a given time. In this use, a person really can have, and not merely prima facie seem to have, more than one obligation, and indeed incompatible obligations. That is, even when all the evidence is in it may turn out that more than one prima facie obligation claim remains uninvalidated or unterminated. And it may be that it is, practically, impossible for him to discharge all these obligations at their due time. If we now look at this situation from the point of view of what the law requires of this person at any one time, then we must take into account the legal principles of precedence which are designed to guide the law-abiding person in precisely such cases. Hence if we consider Jones' overall obligation under the law at the time his two incompatible obligations must be discharged, we can say that because of the principles of precedence he does not have an overall obligation under the law to pay the money to Smith even though he really has, and does not merely at first sight (prima facie) have, the particular legal obligation to pay that money to Smith. The main reason for insisting that he really has that particular obligation is that if he did not have it at that time, his not paying would not amount to a failure to discharge his obligation. We could not then say, as we in fact can, that that failure had given rise to a new, successor obligation.

Nor is it contradictory to say that Jones had the first obligation at that time and also that it was replaced by the successor obligation at that time: The successor obligation would not have
come into being had the first obligation been terminated before
the due time of discharge, and the failure to discharge an obli-
gation may well terminate that obligation, if only to give rise to its
successor obligation. What is more, it is not plausible to say, as
we have seen, that the successor obligation really is the old obli-
gation though suitably modified.\textsuperscript{114}

This latter distinction enables us to maintain without self-
contradiction that a person can both be and not be legally obli-
gated to do \textit{A} at time \textit{t}, because the particular legal obligation to
do \textit{A} can be overridden by another particular legal obligation. If
this is what "remitting" means, then the remittability of legal
obligations would indeed explain why the Kadishes' seemingly
contradictory explanation of recourse roles is not contradictory.
There can be little doubt that the Kadishes construe the situation
of the recourse role agent as that of someone who, because of
the system's special principles of acceptance, at a certain time
does not have an overall obligation under the law to comply with
a given mandatory legal rule and is therefore free not to dis-
charge his concurrent particular legal obligation to comply with
that rule. But although the distinctions just drawn would indeed
enable the Kadishes to describe recourse roles the way they do
without self-contradiction, this description has two fatal weak-
nesses. It does not fit the case of recourse role agents and it does
not provide a role for principles of acceptance. Let me explain
these points in turn.

It should be plain by now why this description does not fit
the case of the recourse role agent: as suggested above,\textsuperscript{115} it
simply is not the case that the recourse role agent simultaneously
has two mutually consistent though incompatible obligations.
Rather, he appears to fall under two principles of obligation—to
comply with mandatory legal rules and, in certain cases, to pro-
mote the role ends in ways other than by such compliance. If
these two principles were applied to the same case, then this
would give rise to two mutually inconsistent, not merely incom-
patible, obligations. But because this is not possible, it is not the
case that he in fact \textit{has} two obligations which he cannot simultane-
ously \textit{discharge}. It is the case, rather, that he cannot \textit{have} both
these obligations. He can have the second only if he does not
have the first. The only reason why he has the second one is
that, in his peculiar circumstances, it would be so undesirable to
comply with a particular mandatory rule that the obligation to

\textsuperscript{114} We can leave open the question, until we are clearer about how to individuate
legal obligations, whether or not the successor obligation \textit{is} the same obligation as the one
it succeeds.

\textsuperscript{115} Text accompanying note 105 \textit{supra}. 
do so is invalidated (not terminated). There is, therefore, no reason for us to say that his failure to comply with the mandatory rule is a failure to discharge his obligation to comply with the mandatory rule, for he has no such obligation. Hence his failure to comply with the mandatory legal rule cannot give rise to a successor obligation. Therefore, it is not the case that his legitimated interposition or disobedience is a case of a legitimated failure to discharge an obligation to comply with a mandatory legal rule, though it is a case of a legitimate failure to comply with a mandatory legal rule.

How, then, are we to characterize the obligation of the recourse role agent? The best way would seem to be that his obligation has a content whose formulation contains an exception: *unless compliance seriously frustrates some of the role ends*. In that case, he does not have the obligation to employ the prescribed means (follow the mandatory rule);\(^{116}\) but if he does not employ these means, he has another obligation, namely, to act in another way that best serves those ends.\(^{117}\) This formulation satisfies all three requirements that the Kadishes rightly stress: (1) The obligation is not a conditional one; for although the formulation of the content lists a condition (unless . . . ), its satisfaction is not necessary for the agent's *having* an obligation but rather sufficient for his *ceasing to have* one obligation and having another instead. (2) Even if that condition is satisfied and the agent therefore does not have the obligation to comply with the mandatory legal rule, he is not thereby released from all legal obligation and so free to act on his judgment of the merits of the case. (3) If the condition is satisfied, he is free to comply or not to comply with the mandatory rule as he sees fit; but in

\(^{116}\) There are two possibilities here: that the recourse role agent has an obligation not to follow the mandatory rule or that he is free either to follow or not to follow it, as he sees fit. Below, I take the position that he is free to follow or not to follow the mandatory rule as he sees fit. But, of course, different recourse roles may have to be construed differently on this point.

\(^{117}\) It has been pointed out to me, by Professor M. B. E. Smith, that an overridden obligation need not give rise to a successor obligation. I may have promised to visit a friend on his deathbed but be prevented from doing so by a morally more pressing obligation. If my friend dies before I can visit or explain, the obligation would seem to be terminated without successor. Could not the Kadishes then say that the obligation of the recourse role agent to follow the mandatory rule is one which can be overridden without giving rise to a successor obligation? I think not, for there can be no question of a successor obligation unless it is possible for him to have two obligations but impossible for him to discharge both. However, it is not merely impossible for the recourse role agent to discharge both the obligation to pursue the role ends by the prescribed means (complying with a relevant mandatory rule) and the obligation to pursue these ends by other means, but it is (logically) impossible for him to have both these obligations at the same time. Hence there can be no question of one of them overriding the other, and so no question of a successor obligation to the overridden one.
the latter case he is obligated to act in accordance with the general principle referred to in the statement of the obligation—to act so as best to serve his role ends.

It is a consequence of this formulation that the position of the recourse role agent can be stated without reference to what the Kadishes call principles of acceptance. The recourse agent simply has an obligation whose formulation contains an exception. Anyone, including himself, who is considering his case and knows that the mandatory rule applies to him can say on the basis of this knowledge that he has, prima facie, an obligation to act as the rule requires; anyone, including himself, who knows that he is in the situation stated in the exception—in other words, that his complying with the rule would seriously frustrate some of his role ends—can say on the basis of this knowledge that, all things considered, he does not have the obligation to comply with the mandatory rule but is free to depart from it. He is not free, however, to act on his judgment of the merits of the case but has an obligation to do whatever best serves the role ends.

There does not, therefore, seem to be adequate reason to reject Interpretation III.118 While it is of course true that the exception to the obligation (when compliance would seriously frustrate the role ends) is not stated with the precision of such a rule as "Assign applicants to windows according to their last names unless the line exceeds ten persons,"119 I can see no adequate reason for the Kadishes' claim that it simply will not do to treat the introduction of an ultimate end into the deliberations as though one had merely introduced another condition in a conditional directive for attaining some end, thereby producing a consistent directive requiring the juror to decide only whether to comply or not. To mask the conflict by a conditional statement does not resolve it.120

It is, of course, true, as I have already pointed out, that this is not a conditional obligation in the sense of an obligation whose existence depends on the satisfaction of this condition. On the contrary, its existence depends on its nonsatisfaction. We can say that an exception is a condition whose satisfaction invalidates or terminates the obligation. But then this is so for the exception to a rule as much as for the exception to an obligation. We can formulate the analogies between the two cases in the following

---

118 Text accompanying notes 50-53 supra.
119 M. Kadish & S. Kadish, supra note 3, at 63.
120 Id.
way: (1) in both cases the role end is frustrated by following the rule (if there are twenty people whose name begins with "F," then having them all line up at one window will slow down their being processed); (2) in both cases, the role agents are released from the requirement to comply with the rule and asked to act as is best for the attainment of the role ends; (3) in neither case are they given explicit instructions for the exceptional case. Of course, the amount of interpretative discretion given the receivers varies considerably, because the directives differ considerably in the degree of specificity with which they are formulated.

The distinction between recourse role agent and others, and so between deviational and delegated discretion, can therefore be drawn also by Interpretation III, and so without reliance on specific principles of acceptance. All we need attend to is the distinction between obligations with exceptions and rules with exceptions. Role agents with delegated discretion are free to depart from certain general practices because the very mandatory rules with which they are obligated to comply have exceptions built into them. When these exceptions apply, the role agents are not obliged to comply with the rule but are free to act on their judgment of the merits of the case. Role agents with deviational discretion, in contrast, have obligations with exceptions, even if the mandatory rules they are obligated to follow have no built-in exceptions. In the exceptional case (for example, when compliance would frustrate the role end) the relevant principle of obligation (to comply with the mandatory rule except when ...) does not apply to the role agent and so he is free not to comply. But, of course, unlike the agent with delegated discretion, he is not free to act on his judgment of the merits of the exceptional case.

What, then, is the true function of what the Kadishes call principles of acceptance? I have already made brief reference to this question early in my summary. They serve not to tell receivers of the law whether or not their legal obligations are remitting (overridable) and what will remit (override) them, but rather to tell exactly how the agent's performance under the law will be assessed. We must distinguish among three different tasks: determining at any time what is the overall legal requirement (obligation) on the agent (the theoretical task); the agent's measuring up to what is legally required of him, a task that only the agent himself can perform (the practical task); and determining the extent to which a given agent has measured up to what is legally required of him (the agent-assessment task). In rational-

---

121 Text accompanying note 10 supra.
bureaucratic systems of law, the incorporated principles of acceptance construe the third task as one entirely for officials. The same is true for the task of determining how a particular citizen's behavior measures up to the relevant official's (not the citizen's) determination of the citizen's theoretical task. In such rational-bureaucratic systems, the principles of acceptance do not permit the citizen's assessment of what the law requires of him to be taken into consideration at all.

In a checks-and-balances type of system, in contrast, the incorporated principles of acceptance allow some scope for the citizen's own performance of the theoretical task. Such principles of acceptance will furthermore authorize citizens, and receivers of the law generally, to act in accordance with their own judgment, not indeed of the merits of the case, but of what the law requires of them. Of course, the final judgment of what the law requires of them need not rest with them. In the case of citizens, it normally does not and perhaps never should; but in the case of officials, as the Kadishes have shown, it often does. In the case of officials, such checks-and-balances principles of acceptance are not nearly as revolutionary as they at first seem, for they do not turn officials into judges in their own case in the same strong sense as they would if citizens had the last word on what the law required of them. What officials take into their own hands in these cases are always the affairs of others, not their own affairs.\footnote{If this is right, then principles of acceptance assign to officials and citizens a specific degree of authority to act on their own interpretation of what the law requires of them. Where the law is complex, it would perhaps be unfair to expect all citizens to know what the officials think the law requires of citizens. It may be fairer to charge the officials with finding out what the citizens thought it required of them and then judging their performance of both that theoretical task and of the corresponding practical task of acting in accordance with the outcome of their performance of the theoretical task.}

As a last point, it seems to me that the Kadishes have not given a wholly satisfactory account of legitimated disobedience, especially in the case of disobedience of an invalid statute or other official directive. They criticize the tendency of supporters of the rational-bureaucratic model to try to solve the problem by resorting to retroactive decisions.\footnote{But cf. note 84 supra.} But is this always wrong? Suppose the Supreme Court now rules that the death penalty is cruel and unusual punishment. It may then be plausible to say
that this ruling terminates the society’s right or obligation to impose this penalty rather than that it invalidates it, that is, deems it never to have existed at all. But what of an ordinance requiring blacks to occupy only the rear section of buses? Do we not want to say that such an ordinance was unconstitutional (and so invalid) all along?

Let us waive this point. There is still the problem of what we are to say about the citizen who has judged a certain statute to be unconstitutional but is judged by officials to have been mistaken in his judgment. It will not do merely to distinguish, as the Kadishes do, between actually violating a statute and undertaking to do so, as if we could then say that the law authorizes the citizen to undertake to violate the statute but not actually to violate it. For the Kadishes say that the principles of acceptance incorporated in our legal system authorize the citizen to undertake to violate a statute he judges unconstitutional but that he is rightly punished if the court finds that the law was not unconstitutional. This shows that and explains why the citizen is rightly punished if, by violating such a statute, he is guilty of a crime and liable to punishment. For surely if he is free to violate such a statute, he is not rightly punished, because not guilty of a crime.

If, however, he is not free to violate the statute, how can he be free to undertake to violate it? If we say that the citizen is free to undertake to violate a statute, surely we must allow that he is free to violate it. It may be argued that the seriousness of such breaches, even of an unconstitutional law, requires some deterrent. Perhaps so, but then let it be some noncriminal penalty or burden, and let there be no talk of crime and liability to punishment when his judgment turns out to be mistaken.

Perhaps an altogether different construction would be better, which would permit talk of guilt and punishment. Perhaps we could say that the citizen is free to violate an unconstitutional statute and that he is not punishable if he has either correctly performed his theoretical task (correctly judged the statute to be invalid) or performed the task conscientiously even though it has led him to an incorrect legal conclusion. This solution would exclude as morally objectionable one possible set of principles of acceptance (indeed, the one embodied in our legal system), which requires the citizen to violate a statute he judges to be unconstitutional if he is to obtain a determination of its constitutionality and then punishes him if his judgment is mistaken, though conscientiously made.