

# Lawful Departures From Legal Rules: “Jury Nullification” and Legitimated Disobedience

George C. Christie\*

DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES, by Mortimer Kadish & Sanford Kadish. Stanford, California: Stanford University Press, 1973. Pp. xi, 241. \$8.95.

Even the most law-abiding among us has on some occasion knowingly refused to conform to what he accepts as a valid legal norm directing him to do something or to refrain from doing something. How do we account for this phenomenon? Is it always merely laziness, viciousness, rebelliousness, or evidence that we are after all only human? Or are there occasions when the refusal to obey the directives of a legal system is in fact sanctioned by that legal system and perhaps even is part of our legal obligation? In an important new book, *Discretion to Disobey: A Study of Lawful Departures from Legal Rules*, Professors Mortimer R. Kadish, a philosopher, and Sanford H. Kadish, a lawyer, argue that the second explanation is the correct one. Their argument is subtle, sensitive to the nuances of the complicated structure of a functioning legal system, and full of real insight. Whether the argument is completely persuasive is a question each reader must answer for himself. Personally, I am not fully persuaded. Since the underlying question is one which any observer of the contemporary legal and political scene with even the slightest philosophical bent is bound to confront, it might be useful to state the difficulties I have with their argument. If, by so doing, I can help to initiate the public discussion which their stimulating book deserves, then I shall have paid *Discretion to Disobey* the homage it merits. For, lest there be any doubt about it, I think it is a very good book which deserves careful reading.

## I

### RECOURSE ROLES

Central to the entire argument of the book is the notion of “recourse roles,” which are defined as “roles that enable their agents to

---

\* Professor of Law, Duke University. A.B. 1955, J.D. 1957, Columbia University; Dip. Int. Law 1962, Cambridge University; S.J.D. 1966, Harvard University.

take action in situations where the role's prescribed ends conflict with its prescribed means, including grants of discretion broad or narrow."<sup>1</sup> All of us have certain roles in the complex set of activities regulated by the legal system. In these roles we are confronted with sets of legal directives prescribing what we may or may not do. We have a recourse role when, in the event we are confronted with a legal directive requiring us to do something or refrain from doing something, we nevertheless may be justified in refusing to follow that directive because to do so would conflict with some more basic end of the legal and political order. It is the central argument of the book that, in the United States at any rate, both officials and private citizens sometimes have recourse roles.

That both officials and private citizens do on occasion refuse to obey legal directives is indisputable. That they are legally justified in so doing is another matter. The authors argue that they sometimes are. In this regard, they of course distinguish civil disobedience from the rule departures they are talking about.<sup>2</sup> In the paradigm case of civil disobedience, the actor refuses to obey a legal norm because of overriding moral considerations. In the cases in which the authors are interested, the actor's refusal to follow a legal norm may or may not be justified by moral considerations.<sup>3</sup> His refusal is, however, legally justified or, to use their term, it is "legitimated."

The authors divide the universe of justified or legitimated rule departures into two basic categories, those by officials and those by private citizens. They wish to distinguish those instances where the rule departed from provides a direct sanction for disobedience, such as a fine or imprisonment, from those where it does not. In the typical case of a rule departure by a private citizen, the rule that is "departed from" provides a direct sanction for noncompliance. Officials, of course, can be confronted with this type of legal directive not only in their capacity as private citizens but also in their official capacity. Officials, however, are often confronted with legal directives which are in a sense legally "binding" upon them but which do not carry any direct sanction for noncompliance. Prosecutors, for example, arguably may be under a legal obligation to enforce the criminal law against all known violators, but of course they usually

---

1. M. KADISH & S. KADISH, *DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES* 35 (1973) [hereinafter cited as KADISH & KADISH].

2. *Id.* at 181-82; *see id.* at 8-9.

3. Normally, of course, an actor who is deciding whether to appeal to a notion of legitimized or lawful disobedience has already decided that his reasons for refusing to obey are morally meritorious. In deciding to act on those reasons, he makes the further decision that he properly may disobey the applicable legal imperatives, even though he accepts the legitimacy of the legal system.

4. KADISH & KADISH, *supra* note 1, at 67.

choose not to. Or, a jury may be under a legal obligation to convict a defendant if it finds, beyond a reasonable doubt, that he has committed certain criminal acts, but nevertheless it can decide to acquit the defendant even when it has no reasonable doubt that the defendant committed the acts charged. These rule departures by officials, when legally justified, the authors call instances of "legitimated interposition."<sup>4</sup> Justified rule departures from legal norms carrying direct sanctions, whether by private citizens or by officials, the authors call instances of "legitimated disobedience."<sup>5</sup> Because the considerations underlying legitimated interposition are somewhat different from those underlying legitimated disobedience, it is best to consider each of them separately, as do the authors.

## II

### LEGITIMATED INTERPOSITION

The notion of rule departures by officials resembles the notion of official discretion—the resemblance is often very close—but the notions must be kept separate even when admittedly it is hard to do so. The functioning of final courts of appeal provides an example. The complexity and unpredictability of life, coupled with the inevitable vagueness and even ambiguity of the language used in constitutions and statutes, requires that courts exercise an interpretive role that always involves at least some discretion. In performing this role of applying the "written law" to the factual setting of concrete legal controversies, courts normally are not engaging in rule departures even if, in the course of interpretation, the law "changes." In the administrative process, the evolutionary development of the law in the course of its application is even more apparent. But sometimes the development of the law is marked by abrupt changes of direction, as, for instance, when the United States Supreme Court overrules one or more of its past decisions and enunciates new constitutional doctrine. Courts, of course, also occasionally change their minds about the proper construction of a statute. Finally, courts have even been known to change directions rather abruptly in the development of the common law. All these are instances of what the authors call rule departures and not the discretionary application of existing rules.<sup>6</sup>

The distinction between discretion in applying the law and rule departures is easily grasped in the abstract, although it is not always easy to see in practice. This is because the law is really not a set of precise rules.<sup>7</sup> For understandable reasons, practicing lawyers,

---

5. *Id.* at 97-98.

6. *See id.* at 89-91.

7. *See Christie, Objectivity in the Law*, 78 *YALE L.J.* 1311, 1313-18 (1969).

judges, scholars and other users of the law characterize it in terms that are more precise than its underlying raw materials—the constitutions, statutes, and cases. This is true particularly with regard to attempts to “restate” the common law or set out the “meaning” of the Constitution as developed by the cases; it is, however, also true to some extent of attempts to state the “meaning” of a statute and the cases interpreting it. Moreover, even when some specific case is being overruled—a process usually described in terms of overruling the “holding” of the case—it is not always easy to describe exactly what it is about the case that is being overruled or departed from. Nevertheless, it is undoubtedly true that there are occasions when legal development is marked by abrupt changes which have not been foreshadowed in previous cases and which we might characterize, with the authors, as “rule departures.” I merely wish to add the caveat, pedantic perhaps but nonetheless important, that the characterization by observers of particular perceived changes in the doctrinal basis of the law as “rule departures” often depends upon prior oversimplifications of what the law really is. Indeed, it is precisely this tendency to oversimplify the complexity of the law that, in the actual operation of the legal system, blurs the distinction between the notion of discretion in the application of legal “rules” and that of “rule departures.”

The distinction between those two concepts is also blurred because courts engaged in an admitted rule departure are generally exercising a discretionary role. It is of course a different type of discretion. It is not discretion in the application of existing rules but discretion to make new rules. In the exercise of this discretion courts perform, in a particularly heightened way, a “legislative” role.<sup>8</sup> Our system allows courts to perform this legislative function, at least to some extent. Since the courts have the last word *within* our legal system, rule departures by the courts in the course of performing this legislative role are always in a sense legitimate. To argue that they are not requires the postulation of a more basic law that the courts cannot directly affect. I am not saying there is nothing to this notion. We need not jump to the notion of a higher moral law but only accept as plausible, for example, the notion of a more basic constitutional law which can only be changed through the political process. The authors seem to suggest as much in the one instance of this type that they do discuss, namely a conflict between the President and the Congress over their respective roles.<sup>9</sup> The authors seem to suggest that the Supreme Court might not, and arguably should not, always have the last

---

8. The authors sometimes describe this phenomenon as “deviational discretion,” to distinguish it from the ordinary types of discretion. KADISH & KADISH, *supra* note 1, at 43-46.

9. *Id.* at 92-94.

word on the basic issues involved. I suggest that the same might be true of some conflicts between the Court and the Executive or the Congress.

At any rate, instances of legitimated rule departures by courts are philosophically interesting only if we are prepared to postulate a higher law; otherwise, we lack a basis for judging whether the rule departure was legitimate in the sense of being authorized, or, given the abstractness of the concept, at least justified, by the basic ends of the higher law. One such instance might arise in the fundamental constitutional disputes just mentioned. The authors suggest that the legitimacy of rule departures in ordinary constitutional adjudication and in nonconstitutional adjudication might be judged against another, higher law encapsulated in something like the notion of the "proper function of a court."<sup>10</sup> They quote, for example, Cardozo's statement:

Judges have, of course, the power, though not the right, to ignore the mandate of a statute, and render judgment in despite of it. They have the power, though not the right, to travel beyond the walls of the interstices, the bounds set to judicial innovation by precedent and custom. Nonetheless, by that abuse of power, they violate the law.<sup>11</sup>

For what it is worth, I agree that there are ill-defined limits to what judges can do in ordinary litigation and that, if they continually transgressed those limits, perhaps, to use Llewellyn's words, "we should have to get rid of the guilty judges; we might in the process and for a while get rid even of the courts."<sup>12</sup> Whether these limits profitably can be said to constitute a higher law is another matter. At any rate, whatever may be true in the exceptional case, in the ordinary case it is impossible to speak meaningfully of a higher law that restrains the courts. For this reason, the notion of legitimated rule departures by final appellate courts is not, from a theoretical point of view, particularly interesting. This is not to say that a judge's perception of the limits upon what he can do is not an important determinant of what he in fact does. The more strongly these limits are felt, the greater the justification—or "surcharge," to use the authors' term<sup>13</sup>—needed by the judge to persuade himself of the rightness of transgressing these limits. In the operation of a legal system, this is obviously an important factor. It is time now, however, to turn to instances of rule departures by officials that are more philosophically challenging.

---

10. The role of judges is discussed in *id.* at 85-91.

11. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 129 (1921), quoted in KADISH & KADISH, *supra* note 1, at 87-88.

12. K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 220 (1960).

13. KADISH & KADISH, *supra* note 1, at 27-28.

The authors discuss at some length three basic instances of justified rule departures by subordinate officials, namely jurors, police, and prosecutors. In all these instances, the authority to engage in rule departures seems to be accepted as an integral part of each official role. This seems particularly clear for the prosecutorial role.<sup>14</sup> Indeed, the propriety and desirability of rule departures by prosecutors seems to be so generally accepted in our legal system that prosecutors may now have more than authority to depart from the legal rules that seemingly require prosecution of all known criminals; their role may have become sufficiently discretionary so that their failure to prosecute a particular case should not be considered a rule departure at all.<sup>15</sup>

As we have seen, the authors find the possibility of justified rule departures by officials in what they call a "recourse role." When an official has a recourse role, the possibility arises of justified rule departures, of which legitimated interposition is one type. For circumstances to give rise to an instance of legitimated interposition, it is further necessary that the rule departed from not be constitutive, that is, that departure from the rule should not deprive an official's action of either legal or practical effect.<sup>16</sup> The authors also impose the requirement that the system provide no means for holding the official himself accountable for disregarding the rule.<sup>17</sup> This lack of accountability is what makes the concept of justified rule departures by officials interesting. The official must make his own decision whether he ought to depart from the rule in question. As might be expected, the instances which the authors discuss are also instances in which, for all practical purposes, the official's rule departure finally disposes of the case before him. Rule departures where the official's decision is not final are much less interesting because the legal system itself provides the means for judging the legitimacy of the particular rule departure, namely some kind of appeal to a higher official.

The authors are quick to point out, however, that these conditions—departure from a rule that is not constitutive, lack of accountability, and final disposition—are not sufficient to mark a rule departure as a case of legitimated interposition.<sup>18</sup> Two more conditions are necessary. First, it must be accepted that it is a legitimate part of the official's role to engage in rule departures; and second, there must be

---

14. *Id.* at 81-85.

15. As the authors state, "[i]n our terms, deviational discretion in the prosecutor's role has been substantially converted into delegated discretion." *Id.* at 82. They note that the policeman's role likewise has evolved in that direction. *Id.* at 78-80.

16. *Id.* at 67; *see id.* at 37-38.

17. *Id.* at 67.

18. *Id.* at 67-69, 86-88.

“role ends,” or what we might call ultimate ends and policies of the legal system, to which the official can appeal to justify his decision and which others can use to criticize it.<sup>19</sup> In the case of final courts of appeal, which have the last word in the interpretation of the law, we saw that this last requirement imposes a need for something like a higher law against which the supposed rule departures by these final appellate courts can be judged. In the case of officials who do not have ultimate authority for the proper interpretation of the law, no such higher law is needed; the ultimate ends and policies can and should be found in the existing legal structure.

But how do officials get this authority to depart from rules—an authority which, if exercised often enough, can have the effect of making their roles discretionary? The authors suggest that in the instances which they emphasize—jurors, police, and prosecuting authorities—the authority comes after the event. Because officials have departed from legal rules in the past and will probably continue to do so on occasion in the future the behavior comes to be socially accepted. That a subordinate official’s action is insulated from effective review, as in the case of jurors and prosecutors, may thus suggest that it might be appropriate for these officials to exercise a recourse role which includes rule departures. But this is not enough, however, to legitimate those rule departures. They must be accepted as actions proper to the legal roles performed by those officials. Since our legal system does not seem to contain a means for conferring this sense of legitimacy before the first rule departures occur, it follows that the notion of justified rule departures has its genesis in the exercise of naked power that gradually comes to be publicly accepted or, to use the authors’ term, “institutionalized.”<sup>20</sup> This indeed is accepted by the authors as the usual historical explanation of the evolution of these interpositional roles.

For me this is one of the difficulties with the authors’ concept of justified or legitimated rule departures by officials. The notion seems to require illegitimate conduct (or rule departures) by officials before the possibility of legitimated rule departures can arise. For this reason, we might be tempted to ask whether or not the function performed by justified rule departures might not be performed in other ways, such as by making the roles of these officials more openly discretionary while, at the same time, trying to prevent the abuse of this discretion. For example, juries might be told expressly when they might acquit a defendant whom they otherwise thought was guilty, and prosecutors might be told by the legislature when they might be

---

19. *Id.* at 61-62; *see id.* at 67-69.

20. *Id.* at 66-67.

justified in not prosecuting known criminals.<sup>21</sup> Of course, in actual practice we could not foresee every situation in which an official might be tempted to engage in rule departures and thus, where it seems desirable to accommodate this impulse, enlarge and guide in advance officials' discretion. But we could certainly cut down the number of situations in which we would be tempted to recognize the possibility of justified rule departures by officials.

Some of the additional problems raised, for me at any rate, by the notion of justified rule departures by officials are illustrated in the context of rule departures by jurors. Since this is the context which the authors discuss most extensively, it seems appropriate to focus on the role of juries in our legal system. The lack of accountability of jurors for their verdicts in English and American law is generally considered to date at least from the decision in *Bushells Case*<sup>22</sup> in 1670. It is this lack of accountability together with the right of a jury in a criminal case to bring in a general verdict<sup>23</sup> that makes the jury's role a particularly good candidate for designation as a recourse role. But for the authors, and here I agree with them, the notion of justified rule departures, of which legitimated interposition is one instance, requires more than that the official's action is final or that he cannot as a practical or legal matter be held legally accountable for his action. The authority of the official to engage in rule departures must be widely accepted and the exercise of that authority must be guided by principles and standards, lest its exercise be arbitrary. For the authors these principles and standards are the ultimate ends of the legal and political order. The authority of the jury to engage in justified rule departures is said by the authors, who here present the traditional explanation, to follow from the frequent and recurring judicial statements that the jury exists to temper the rigor of the criminal law and to interpose the common sense of the community between the individual and the state.<sup>24</sup> And unquestionably the jury has served in the past as a check upon what we would now agree was arbitrary government or arbitrary enforcement of the law. The jury has also been said to be the "conscience of the community." That, of course, is not the same thing as

---

21. Professor Kenneth Culp Davis argues that prosecutorial discretion must be reduced, although he emphasizes the need for rule-making by the prosecutorial authorities themselves. See K. DAVIS, *DISCRETIONARY JUSTICE* 188-214 (1969). On similar suggestions for confining the "discretion" of the police, see *id.* at 90-96. Professor Davis's suggestions deserve careful consideration, although the degree of clarity that he apparently seeks may be neither obtainable nor desirable.

22. 124 Eng. Rep. 1006 (C.P. 1670).

23. This right recently has been reaffirmed in *United States v. Spock*, 416 F.2d 165, 180-83 (1st Cir. 1969).

24. KADISH & KADISH, *supra* note 1, at 50-55.



saying that it exists to hear appeals to conscience,<sup>25</sup> particularly appeals by the defendant to be judged according to the standards of his own conscience. Exactly what authority the jury is supposed to have, however, is not at all clear from these statements by the courts. When a jury trial is waived in a criminal case, the judge as the trier of fact has the power to acquit the defendant in the face of the evidence; his action is final and, as a practical matter, he is not accountable for his action. The standard learning on the subject takes it for granted, however, that the judge has no authority to do this.<sup>26</sup> What is the basis and nature of the authority that the jury possesses but the trial judge acting without a jury does not?<sup>27</sup>

The question of the jury's power and authority to reach a verdict at variance with the judge's instructions and the evidence has, of course, been the focus of the recently renewed discussion of jury nullification. The controversy concerns exactly this issue of the jury's right to reject the instructions of the judge and to render a general verdict of acquittal in the face of the law and the evidence. Should the jury be informed that it has the power to reject the instructions of the court and bring in a general verdict of acquittal? Perhaps more to the point, should the defendant and his counsel be permitted to argue the matter to the jury? Certainly there is historical warrant for the conclusion that the jury should be so informed and even perhaps permitted to hear argument on the matter.<sup>28</sup> In the course of the nineteenth century, however, most American courts, including the United States Supreme Court, rejected whatever precedent there was the other way and chose to follow the contemporary English practice of not instructing the jury on the point and of not permitting the matter to be raised in argument to the jury.<sup>29</sup> This position has now been reaf-

---

25. With respect, I cannot agree with the authors' suggestion that *Duncan v. Louisiana*, 391 U.S. 145, 153 (1968), supports the assertion that the jury has the power "to displace law by appeal to conscience." KADISH & KADISH, *supra* note 1, at 53 & n.51.

26. For a discussion of the differences (and similarities) between a judge acting as the trier of fact and a jury, see *United States v. Maybury*, 274 F.2d 899, 901-03 (2d Cir. 1960) (Friendly, J.); Curtis, *The Trial Judge and the Jury*, 5 VAND. L. REV. 150, 157-66 (1952).

27. The authors suggest that a judge who consistently ignored mandatory sentencing provisions might come to be recognized as possessing authority to engage in legitimated interposition. KADISH & KADISH, *supra* note 1, at 85-86. Under this view, there is no theoretical barrier to keep the authority of the trial judge from approaching that of the jury.

28. See *Sparf v. United States*, 156 U.S. 51, 114-77 (1895) (Gray, J., dissenting); Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 588-613 (1939) [hereinafter cited as Howe].

29. *Sparf v. United States*, 156 U.S. 51, 106-07 (1895). For a discussion of the state cases, see Howe, *supra* note 28, at 590-613. Justice Harlan's opinion for the Court in *Sparf* contains many quotations, as well as citations, to state authority. See *Sparf v. United States*, 156 U.S. 51, 79-90 (1895).

firmed in a number of recent cases by the federal courts of appeals.<sup>30</sup> It is the earlier and now largely rejected authority, mainly from the eighteenth and the first part of the nineteenth centuries, to which the modern advocates of jury nullification have turned.<sup>31</sup>

One difficulty, however, with pitching the present argument for jury nullification on this old line of cases is the important theoretical difference between the justification for the more active role of the jury advocated in these older cases and the justification now offered for the modern doctrine of jury nullification. Almost all the older cases are based on the notion that the jury had the ultimate responsibility for determining the law applicable in a criminal prosecution. The trial judge was entitled to give the jury his view of the applicable law, but his statement was only his opinion. It was assumed that lay jurors had some knowledge of the law and, in some cases, it was even recognized that some of the jurors might have better knowledge of the relevant legal rules than the trial judge.<sup>32</sup> No doubt the prevalence of the belief in the declaratory theory of law made it easier to accept this rationale for a more active intervention by the jury in criminal trials. The comparative simplicity of the criminal law at that time was certainly another important factor,<sup>33</sup> as was the reaction, in post-Revolutionary America, to the heavy-handed efforts of Royal judges to dominate colonial juries, and the fact that many of the judges at the time were not very learned in the law.<sup>34</sup> This willingness of the courts to allow lay jurors to determine the law was qualified, however, in several important respects. First, some courts refused to recognize any such independent role for the jury when a matter of

---

30. *United States v. Dougherty*, 473 F.2d 1113, 1130-37 (D.C. Cir. 1972); *United States v. Boardman*, 419 F.2d 110, 116 (1st Cir. 1969), *cert. denied*, 397 U.S. 991 (1970); *United States v. Moylan*, 417 F.2d 1002, 1005-09 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1969).

31. See Sax, *Conscience and Anarchy: The Prosecution of War Resisters*, 57 *YALE REVIEW* 481, 483-93 (1968); Schefflin, *Jury Nullification: The Right to Say No*, 45 *S. CAL. L. REV.* 168, 169-77 (1972) [hereinafter cited as Schefflin]; Van Dyke, *The Jury as a Political Institution*, 16 *CATHOLIC LAWYER* 224, 225-41 (1970) (first published in an abridged version under the same title in *THE CENTER MAGAZINE*, vol. 3, no. 2, Mar. 1970, at 174).

32. *Fisher v. People*, 23 *Ill.* 218, 230-31 (1859).

33. Consider, for instance, the following statement from Justice Gray's dissent in *Sparf v. United States*, 156 U.S. 51, 173 (1895):

The rules and principles of the criminal law are, for the most part, elementary and simple, and easily understood by jurors taken from the body of the people. As every citizen or subject is conclusively presumed to know the law, and cannot set up his ignorance of it to excuse him from criminal responsibility for offending against it, a jury of his peers must be presumed to have equal knowledge, and, especially after being aided by the explanation and exposition of the law by counsel and court, to be capable of applying it to the facts as proved by the evidence before them.

34. See Howe, *supra* note 28, at 590-91.

constitutional law was involved.<sup>35</sup> Second, and most important, the trial judge had the sole voice on questions involving the admissibility of evidence and the various procedural aspects of a trial.<sup>36</sup> This seeming inconsistency was the basis of some of the arguments used in the effort—ultimately largely successful—to restrict the scope of the jury's announced authority.<sup>37</sup>

Modern arguments for jury nullification, on the other hand, are not primarily based upon a feeling that the jury should be permitted to find the law. Indeed, to guard against the possibility that a jury expressly instructed on nullification might convict in the face of the law, it is generally argued by proponents of jury nullification that certain constitutional provisions—those concerning the procedural rights of the accused—are beyond the jury's power either to construe or to ignore.<sup>38</sup> Rather, the proponents of jury nullification are concerned with the right of the jury "to refuse to apply the law, as it is given to them by the judge . . . if in good conscience they believe the defendant should be acquitted."<sup>39</sup> The grounds for its refusal are openly recognized as being "moral reasons"<sup>40</sup> and not a different view of the law. While the modern doctrine of jury nullification might in practice operate in much the same way as the older notion that the jury is the final arbiter of the law as well as the facts—a doctrine still ostensibly the law in three states<sup>41</sup>—it rests on a completely different conceptual basis. It thus receives only indirect support from the now largely overruled older cases. If the modern

35. *Sparf v. United States*, 156 U.S. 51, 164 (1895) (Gray, J., dissenting); *cf. Howe*, *supra* note 28, at 602-03, 615.

36. *Sparf v. United States*, 156 U.S. 51, 165-66, 171 (1895) (Gray, J., dissenting). In the first of these two references, Justice Gray cites Chief Justice Marshall's statements in the Aaron Burr trial.

37. *Montee v. Commonwealth*, 26 Ky. 132, 149-51 (1830); *Commonwealth v. Anthes*, 71 Mass. (5 Gray) 185, 220-21 (1857).

38. Should the jury convict under these circumstances it "ceases to act as the conscience of the community because it violates commitments to legal procedures and protections upheld as normative values by that community" and "makes a mockery of the social commitment to a government of laws and not men." Schefflin, *supra* note 31, at 214-15. See also *id.* at 210-11; Van Dyke, *supra* note 31, at 226-27.

39. Schefflin, *supra* note 31, at 169.

40. *Id.* at 213.

41. GA. CONST. art. 1, § 2-201; IND. CONST. art. 1, § 19; MD. CONST. art. XV, § 5. One must use the qualifying word "ostensibly" because in Indiana it has been held *not* to be error to refuse to instruct the jury that it might "' disregard [the judge's instructions] altogether if you desire and to determine what the law of this case is for yourselves.'" *Beavers v. State*, 236 Ind. 549, 554, 141 N.E.2d 118, 120 (1957). See also *id.* at 554-65, 141 N.E.2d at 120-25. In Georgia, the courts have gone further and actually instruct the jury that it is bound by the judge's instructions on the law. *Hopkins v. State*, 190 Ga. 180, 8 S.E.2d 633 (1940); *Myers v. State*, 151 Ga. 826, 108 S.E. 369 (1921); *Edwards v. State*, 53 Ga. 429, 433 (1874). In Maryland, where the jury is instructed that it may disagree with the trial judge, that freedom has long been restricted

doctrine of jury nullification is to be adopted, it must be adopted on its own merits and not because it is required by the weight of ancient authority.

I now return to the authors' thesis about the jury's right to engage in justified rule departures—the nub of the jury nullification doctrine. What authority does the jury have and what authority should it have? The jury certainly has the power to acquit whom it will, and occasionally to convict as well. But is its authority that extensive? And what criteria should the jury use in exercising its admitted power? For the authors, these criteria are found in the ultimate ends of our legal and political order. In this regard, as well as in others, they are departing from the line of argument advanced by most supporters of the doctrine of jury nullification, who urge that the jury be told that it may resort to purely moral considerations. For the authors, moral considerations are only relevant insofar as they are reflected in the ultimate ends of our legal and political order.<sup>42</sup> Their thesis is reminiscent of the old notion of the jury as the final judge of the law but with, of course, a profound difference. The jurors must accept the judge's interpretation of the ordinary law. The jurors' function, if they are to act legitimately when they acquit in the face of the judge's instructions, is to resort to a higher law—the “deeper structure” of our law, to use the argot of structuralism—of which they are ultimately the interpreters. But it is difficult to identify these ultimate ends of our legal and political order, and even more difficult to decide what they might require in a particular case. Moreover, why should the articulation and ordering of these ends be the function of private citizens who are randomly selected and largely unable to assess the importance of consistency in applying the law in question? Should not this function be left to a popularly elected legislature?

The process of enunciating and applying these criteria seems fairly subjective. It might be helpful, therefore, to see how the jury might perform its interpositional role in some concrete cases, so that we can understand when it may be said to be acting legitimately and when illegitimately.

The authors discuss several types of recent cases where a jury legitimately might wish to exercise its interpositional role. They indicate that prosecutions of “Vietnam War resisters and protesters” might

---

by refusing to let questions of constitutionality be argued to the jury *and* by making the trial judge the sole arbiter of questions of admissibility of evidence and competency of witnesses. For a recent reaffirmation see *Hamilton v. State*, 12 Md. App. 91, 97-98, 277 A.2d 460, 464 (1971), *aff'd*, 265 Md. 267, 288 A.2d 885 (1972).

42. For a discussion as to how officials and others are to proceed when they perceive a conflict between the ends of the legal and social order and some particular legal provision, see KADISH & KADISH, *supra* note 1, at 184-94.

be an appropriate occasion.<sup>43</sup> Another such occasion, albeit one in which they would not so act if they were jurors, would be "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."<sup>44</sup> A somewhat different case easily comes to mind, and I wonder how the authors might treat it. Defendant is being prosecuted for armed robbery and assault with a deadly weapon. On cross-examination, in an attempt to impeach the defendant's testimony, his prior convictions of serious crimes of violence are brought out. The case is a very close one. The judge lets the case go to the jury with proper instructions, because a reasonable jury could find the defendant guilty beyond a reasonable doubt. Several jurors, although believing that the defendant is guilty, are not convinced of his guilt beyond a reasonable doubt. Nevertheless, they vote to convict because they believe it is in the public interest to remove defendant from society, and because they believe that, with the rise of crimes of violence in American society, conviction is necessary in order to deter others. Moreover, as already noted, these jurors are pretty sure that defendant is in fact guilty of the crime charged. Is this legitimate? If not, why not? Protecting society from violence is surely one of the ultimate ends of the legal system.

It might be argued, however, that the case I have posed should be distinguished from the two posed by the authors, because the judge in my case would vacate the verdict if the facts were revealed to him. I am not so sure the fact that the lack of absolute finality for the jury's determination is such a crucial point of distinction. After all, absolute finality of decision is not required before an official is said to have a recourse role. A prosecutor who refuses to prosecute can change his mind, and of course, if the statute of limitations has not run, his successor could decide to prosecute. Moreover, as a practical matter, proving the state of mind of the jurors would be extremely difficult, particularly since normally it is not considered proper to inquire into their mental processes; as a practical matter, their finding of guilty would be very nearly as final as a jury's finding of not guilty in the Vietnam War and Southern civil rights cases posed by the authors. Accordingly, if the slight difference in finality is not enough to account for the conclusion that the jury is functioning "illegitimately" in the case I have posed, what is? The fact that the jury has ignored the judge's instructions cannot be the distinguishing factor, because this

---

43. *Id.* at 64; *cf. id.* at 8.

44. *Id.* at 68.

has happened in all three cases. Indeed, that is why they are classed by the authors as rule departures. The remaining possibility is that some ultimate end or rule of our legal order legitimates rule departures when they result in acquittal but not when they result in conviction. But how does the jury know this? The jury is never told about the legitimacy of rule departures, even in the few jurisdictions where it is supposedly the "judge of the law."

The authors do examine the arguments for instructing the jury on its power to acquit a defendant in the face of the facts and the law, but they are too diffident of their own judgment to make any definite recommendations. While they have some sympathy for the argument that logic requires that the jury be told what it can do, they nonetheless are not prepared to urge that the present practice of not instructing the jury be changed.<sup>45</sup> They recognize the validity of the oft-expressed fear that if juries are expressly told that they can acquit in the face of the law and the facts, they will do it too often. To use their terminology, the "surcharge" upon the juror's interpositional role might become too small. This notion of "surcharge" is crucial to the authors' argument;<sup>46</sup> it is the means they use to prevent their argument for justified rule departures from becoming a defense of anarchy. Roughly speaking, the essence of surcharge is that an official (or anyone else, for that matter) should behave in the manner in which the legal rules ostensibly prescribe unless, to use the authors' term, he has a "damn good reason" not to.<sup>47</sup> The surcharge will be higher, they presume, and I am not prepared to disagree, if the jury is not expressly told it may acquit "if it has a damn good reason." The jury's sense of doing something arguably improper, by disregarding the judge's express instructions, will increase the surcharge.

I agree that the jury should not be told specifically that it may ignore the judge's instructions and acquit in the face of the law and the facts, but only because I do not agree that it is proper to speak of the jury's role as one that permits justified rule departures. I am not saying that if the jury does acquit against the law and the evidence it necessarily is acting illegitimately, I am saying merely that it is not engaging in legitimated interposition. It should be remembered that what the authors term justified rule departures, of which legitimated interposition is one type, are those rule departures not

---

45. *Id.* at 64-66; *see id.* at 59-63. In discussing this issue the authors take note of the conclusion of the most exhaustive study ever undertaken of the jury system in the United States: "Perhaps one reason why the jury exercises its very real power so sparingly is because it is officially told it has none." H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 498 (1966), *quoted in* KADISH & KADISH, *supra* note 1, at 65.

46. *See* KADISH & KADISH, *supra* note 1, at 27-28.

47. For a discussion of this point as it applies to the jury's role, *see id.* at 62.

merely permitted, but in a very real sense authorized by the legal system. It seems to me that if the legal system really does recognize justified rule departures by juries, then a defendant is entitled to have the jury instructed on that subject.<sup>48</sup> Otherwise, his fate depends upon whether the jury chosen to hear his case happens to be sufficiently cantankerous or tough-minded or imaginative to disregard what the judge tells them and look instead to the deeper structure of the legal system. I do not see how anything so chancy can be called legitimate; the stakes are too high to resort to a lottery.

But if the jury's acquittal in the face of the judge's instructions is not legitimate, what is it? Must it not then always be illegitimate? My own answer is, not necessarily. The legal order is not a closed system. The law need not command nor even authorize what it permits. If it did, every act done by an individual would have to be traced back to some precept or rule of law; everything done by an individual would become state action.<sup>49</sup> The power that juries have to ignore the judge's instructions is the price we pay, and I think should pay, to insulate the jury as much as we can from official pressure. It is like academic freedom. Instructors are free to teach nonsense. Is this because it is legitimate to teach nonsense? Of course not. It is the price we pay to free teachers from the control of authority. If an instructor "seeking truth" is in fact propagating nonsense, is he acting illegitimately? Again the answer is, not necessarily. The legal and moral universes are not always two-valued.

The question may be posed, however, why not legitimate the jury's interpositional role? That is, why not instruct the jurors that the law expressly authorizes them to depart from the rules enunciated

---

48. This is what makes me uncomfortable with Judge Leventhal's opinion for the court in *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972). Relying in part upon an earlier, law-review version of the authors' theory of rule departures by juries, Judge Leventhal accepted the legitimacy of rule departures by juries but was apprehensive about "the danger of removing the constraint provided by the announced rules." *Id.* at 1135. This apparent inconsistency was powerfully exploited in Judge Bazelon's dissent. *Id.* at 1138. Judge Sobeloff's opinion for the court in *United States v. Moylan*, 417 F.2d 1002 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1969), seems to provide a more satisfactory basis for refusing to instruct the jury on nullification. All Judge Sobeloff was prepared to do was to recognize the power of juries to bring in a general verdict of acquittal contrary to the law and the evidence. *Id.* at 1006.

49. The underlying issue here illustrates one of the basic differences between the legal philosophies of Jeremy Bentham and his disciple, John Austin. For both men, laws were commands. The question arose: What happens when the legal system enforces the commands created by private power-holders, such as property owners? For Bentham, the sovereign not only *enforced* but by that very action *adopted* the commands of private power-holders. For Austin, the sovereign merely enforced the commands of private power-holders; it did not adopt them. His notion of a legal power was accordingly much less complex. I find Austin's view much more in accord with common experience. See G. CHRISTIE, *JURISPRUDENCE* 598 & n.222 (1973).

by the judge, but only if they have a "damn good reason," or, to reinforce the point, a "goddamn good reason." My reason for opposing such legitimation is only partially dependent on a fear that juries might exercise their power too freely if it became an accepted part of the folklore. More basically, I object to legitimation of the role because I believe it erodes the jury's sense of responsibility. To legitimate the jury's interpositional role is to declare that the law authorizes, even requires, a jury to acquit if the jurors feel strongly enough about the matter. By acquitting, they are performing their civic function. I am against instructing the jury on its power to acquit in the face of the evidence and the judge's instructions because I believe that the jurors alone bear responsibility for acquitting in these circumstances, not the law which permits them to get away with doing so.<sup>50</sup> To ask whether they have acted legitimately is to ask basically a moral question. The answer depends on your moral principles. It does not shock me that a legal system, by insulating an official from legal accountability, permits him to exercise his moral judgment in certain cases. But instructing the jury that it may acquit for good reason not only erodes its moral responsibility if it acquits—the point that has just been made—but also, without paradox, increases its moral responsibility if it convicts. For, if jurors have legal authority to engage in rule departures, they can no longer completely disavow responsibility for convictions by relying on a lack of authority to do otherwise; they are responsible as moral agents not only for the exercise of their authority to acquit for good reason, but also for their failure to exercise that authority. That is why the jurors must be told expressly what their authority is. I am opposed both to eroding their heavy moral responsibility for acquittals in the face of the evidence and the law and to increasing their moral responsibility for convictions. The appropriateness of conviction has already been passed upon by the legislature subject to the safeguard of proof beyond a reasonable doubt.<sup>51</sup>

---

50. Justice Baldwin's charge to a jury that it could disagree with his rulings on questions of law, has not lost its significance, even though such instructions are no longer given in most jurisdictions:

[W]hen the law is settled by a court, there is more certainty than when done by a jury, it will be better known and more respected in public opinion. But if you are prepared to say that the law is different from what you have heard from us, you are in the exercise of a constitutional right to do so. We have only one other remark to make on this subject—by taking the law as given by the court you incur no moral responsibility; in making a rule of your own there may be some danger of a mistake.

United States v. Wilson, 28 F. Cas. 699, 708 (No. 16,730) (C.C.E.D. Pa. 1830). Under the modern theory, the point is not so much that the jury may be mistaken in acquitting in the face of the judge's instructions, but that it has incurred the moral responsibility for its choice, for better or for worse.

51. Judge Bazelon has recognized that proponents of jury nullification must indeed



If my argument is unpersuasive, however, if jury nullification must be considered "legitimate," first, because it does occur and, second, because people are not prepared to say it should not occur—and I accept both premises although not the conclusion—then I submit that the only course is to try to articulate criteria the jury can use in disregarding the evidence and the judge's instructions. Moreover, the jurors must be told that they are free to apply these criteria. "Damn good reason" they must have, but more is required before the jury's exercise of its power is to be considered legitimate or legally authorized.

### III

#### LEGITIMATED DISOBEDIENCE

I now turn to the question of justified rule departures by private citizens,<sup>52</sup> a phenomenon the authors call "legitimated disobedience."<sup>53</sup> They point out that the notion of legitimated disobedience is required by the normal operation of the American legal system. In our federal system, how else can one explain the individual's undoubted right to refuse to obey state law that he claims to be contrary to paramount federal law. Many of the same considerations apply when the asserted conflict is between federal law and the provisions of the Constitution. Moreover, in the early days of the Republic, we retained the English practice of requiring an individual to violate a criminal statute in order to gain standing not only to challenge its validity but also to ascertain its scope. While there are now other ways to challenge criminal statutes, they are not always available and, at any rate, it is still usually possible to challenge the validity of a law by violating it. If the challenge is upheld, the violator is not punished—his disobedience is legitimated. If the challenge is not upheld, he loses his gamble and suffers the prescribed penalty. The severity of the penalty and

---

deal with the fact that the legislature has already expressed the conscience of the community. *United States v. Dougherty*, 473 F.2d 1113, 1140 n.5 (D.C. Cir. 1972) (Bazelon, J., dissenting).

52. For the authors' detailed discussion of this subject, see KADISH & KADISH, *supra* note 1, at 95-140.

53. *Id.* at 97-100. As will appear in the discussion in the text, the necessary conditions for legitimated disobedience are:

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 departing from the rule.

*Id.* at 99.

the likelihood that his challenge will succeed are factors that determine the "surcharge" an individual must pay in order to exercise his right to engage in justified rule departures.

The authors are well aware, of course, that in the normal case, the individual does not have a right to challenge judicial decrees in this way.<sup>54</sup> As the authors point out, this is anomalous. Why does respect for law preclude violation of an assertedly unconstitutional judicial order but permit this method of challenging an assertedly unconstitutional statute?<sup>55</sup> I suggest that the difference in treatment between challenges to judicial orders and challenges to statutes is indeed inconsistent whenever, as is now so often the case, other means of challenging a statute are available. However, to the extent that an individual has had a chance personally to be heard before entry of a judicial order, it may make some sense to restrict the means he may employ to challenge that order, even if no such restrictions are placed upon the means he may employ to challenge an unconstitutional statute. To the extent that an individual has not been heard before entry of a judicial order—and I would be very strict in considering one person as "representing" another for these purposes—the difference in treatment seems to be a vestige of the historical fact that at one time criminal statutes could only be challenged by violating them. To the extent that this is no longer true, the different treatment is no longer justified. That is not to say, however, that the proper solution is to expand the right of the individual to defy judicial orders. Rather, it might be appropriate to restrict the right of an individual to challenge a statute by violating it.

But the most interesting instances of justified rule departures or, if you will, legitimated disobedience by private citizens, involve the application of what the authors call the "norm of the lesser evil."<sup>56</sup> The authors' use of this notion depends in large part on their earlier distinction between judicial discretion in the application of supposedly pre-existing rules of law and judicial power to depart from these rules.<sup>57</sup> Suppose, for example, that a statute makes it a crime to wound a person with a firearm. In a criminal prosecution, defendant argues that he should be exonerated because he was acting in self-defense. Is his appeal to the court directed at the process of applying the statute or is he asking the court

---

54. *Id.* at 110-15. The authors note that the courts have recognized that in extreme cases, such as where the "court's claim of authority to act is so weak that it may be called 'frivolous'" the individual is permitted to challenge a judicial order by refusing to obey it. *Id.* at 114. He is not confined to seeking relief from the courts themselves.

55. *Id.* at 111.

56. *Id.* at 120.

57. For the authors' restatement of this point as it applies to legitimated disobedience, see *id.* at 97-100.

to depart from the statute just as he himself apparently has departed from it? The authors suggest that although many exceptions are read into statutes in the process of applying existing norms, some exceptions are created by departing from existing norms. This latter position requires the assumption that the meaning of a statute, or of a common-law "rule," can be stated with sufficient clarity so that one may be fairly confident of exactly what is and is not encompassed within it. I have elsewhere argued that this assumption normally is not warranted.<sup>58</sup> The instances often cited to support the contention simply do not withstand detailed analysis.<sup>59</sup> Upon such analysis the prior rule normally appears less clearly defined and the asserted judicial modification less abrupt and certainly less unexpected than it appeared at first glance. But if and when, in circumstances like those in the hypothetical case, an accused appeals to a court to "depart" from an established rule so as to legitimate his own departure from the rule, he is appealing to what the authors call "the norm of the lesser evil." That is, he is claiming that it is a lesser evil to depart from the rule in the given circumstances than to enforce it. As in all instances of what the authors call legitimated disobedience by private citizens, there are four requirements: (1) the legitimating norm, such as the norm of the lesser evil or the norm that constitutional law supersedes ordinary law, lies within the province of a judge or other official to apply; (2) it is asserted that the norm relieves the citizen of the obligations and punishments imposed by the rule departed from; (3) the norm functions not as a qualification of the rule but as a justification for departing from the rule; and (4) the citizen is in fact appealing to the norm as the justification for his departure from the rule.<sup>60</sup>

The surcharge that the individual must pay in order to appeal to the norm of the lesser evil is determined again by the severity of the statutory penalty discounted by the likelihood of success.<sup>61</sup> The surcharge is the same whether the accused is appealing to the norm of the lesser evil or to the court's discretion in applying existing law or, for that matter, to the constitutional invalidity of a statute. What difference does it make, then, how the defendant's challenge is characterized? I suggest that the difference is this: If, in a significant number of decisions, defendants have succeeded in persuading courts to depart

---

58. Christie, *The Model of Principles*, 1968 DUKE L.J. 649, 656-69; Christie, *Objectivity in the Law*, 78 YALE L.J. 1311, 1313-18 (1969).

59. See Christie, *The Model of Principles*, 1968 DUKE L.J. 649, 660-67.

60. See note 53 *supra*.

61. The situation is actually a little more complicated: the defendant's assessment of his chances of success will affect his decision to plead to a lesser offense. Hence, it becomes even more unfair to encourage defendants to assert the defense when in reality they have little chance of success.

from an existing "rule" of criminal law by resort to the norm of the lesser evil, then this fact itself would be a strong argument in favor of institutionalizing defendant's right to present this defense. For example, the Model Penal Code permits the defense where "the harm or evil [to himself or another] sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged."<sup>62</sup>

As the authors point out, however, New York's recently enacted version of the lesser evil defense highlights some of its difficulties.<sup>63</sup> First, in order to confine the defense within narrow limits, it is made available to justify only "conduct which would otherwise constitute an offense when . . . [s]uch conduct is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur . . . through no fault of the actor . . . ." Second, the injury sought to be avoided must be of "such gravity that according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding such injury clearly outweigh the desirability of avoiding the injury to be prevented . . . ." Third, "the necessity and justifiability of such conduct may not rest on considerations pertaining only to the morality or advisability of the statute, either in its general application or with respect to its application to a particular class of cases arising thereunder." The emphasis on emergency situations and the attempt to prevent or at least restrict appeals to purely moral principles obviously reflects a fear—in my opinion justified—that the lesser evil defense has certain anarchic tendencies which will be accentuated by permitting appeals to considerations that might be considered relatively subjective. Nevertheless, this restrictive approach presents certain difficulties. By recognizing the defense, the statute may encourage people to resort to it but at the same time its actual wording greatly diminishes the chances that a citizen's appeal to the defense will be successful. In this regard the broader provisions of the Model Penal Code or the following Illinois statute seem preferable:

Conduct which would otherwise be an offense is justifiable by reason of necessity if the accused was without blame in occasioning or developing the situation and reasonably believed such conduct was necessary to avoid a public or private injury greater than the injury which might reasonably result from his own conduct.<sup>64</sup>

---

62. MODEL PENAL CODE § 3.02(1)(a) (Proposed Official Draft, 1962).

63. N.Y. PENAL LAW § 35.05 (McKinney 1967).

64. ILL. STAT. ANN. ch. 38, § 7-13 (1961). In *People v. Dalton*, 7 Ill. App. 3d 442, 287 N.E.2d 548 (1972), the court declared:

It is the opinion of the court that the type of necessity contemplated as a defense to a crime under [this statute] is not the emergency repair of a water heater on a Sunday afternoon at a Nike site where some 40 other employees are employed.

But the vagueness of terminology in these provisions—even in the Model Penal Code version—can again make the defense a trap for the unwary.

The authors argue that recognizing the possibility of legitimated rule departures, of which the successful appeal to the norm of the lesser evil is one instance, provides a certain flexibility which enables the legal system to respond to “the disparity between the rule’s demand and the demand of the moment.”<sup>65</sup> In this way, “[r]ule departures become not simply extralegal actions of individuals that compensate for the inadequacy of law, but sometimes, when legitimated, a part of the legal framework itself by which rule ordering is made adaptive to unforeseen circumstances, change, and conflict.”<sup>66</sup> These are admirable goals but I wonder if the courts can achieve them through the technique of legitimization. For instance, the device of prosecutorial discretion can achieve some of the same results as appeal to the norm of the lesser evil, although perhaps on a more ad hoc basis. If, however, the courts are to be permitted to hear appeals to the norm of the lesser evil, I think that fairness to the defendant requires that the vagueness of the norm be taken into account in assessing the penalty to be imposed on him if he is unsuccessful, even though a reduced penalty will itself encourage more rule departures by private citizens. The various ways in which the burden of the surcharge for unsuccessful defendants can be eased are discussed by the authors and need not be entered into here.<sup>67</sup> Whether society should recognize openly and encourage resort to the norm of the lesser evil depends in part on how much energy society can afford to devote to conceptual challenges to the legal structure. It also depends in part on the competence of the courts to determine the “evils” that should be avoided and to compare them with the evils sought to be prevented by the criminal law, in areas so diverse as littering, speeding, and smoking marijuana. Would the courts be forced to construct some common morality for our society in order to assess and compare these evils? That prospect makes me somewhat uncomfortable. Finally, if for some the norm of the lesser evil seems desirable because of dissatisfaction with government policy towards Vietnam, does it still seem as desirable after Watergate?<sup>68</sup> Is a Daniel Ellsberg more justified in re-

---

*Id.* at 444, 287 N.E.2d at 550-51. The offense charged was driving with a revoked license. The defendant was also convicted of driving while intoxicated.

65. KADISH & KADISH, *supra* note 1, at 146.

66. *Id.*

67. *Id.* at 153-83.

68. Cf. Bickel, *Watergate and the Legal Order*, COMMENTARY, vol. 57, no. 1, Jan. 1974, at 19.

sorting to it than an Egil Krogh and, more to the point, is this for a court to determine?

#### CONCLUSION

Even in as lengthy a discussion as this, I could not hope to touch on all the types of justified rule departures discussed by Professors Kadish. I found their book well-reasoned and extremely thought-provoking. I was impressed by their analysis, although there are parts of it which I find unconvincing. Some of their specific conclusions I cannot accept. The overall theme of their book, however, is not one that a person can accept or reject. I have no hesitation in stating that this is one of the best written and most stimulating books I have read in a long time. The question they raise—whether there are legally justified rule departures either in the form of legitimated interposition by officials or legitimated disobedience by private citizens—is a basic and recurring one. It seems indisputable that our society recognizes, at least to some extent, the validity of these notions. How far and to what extent is the subject of their book. A thoughtful person, if he lives long enough, stands a good chance of confronting these issues in his personal experience. He could find no better way to prepare himself for the crisis than to read, carefully and thoughtfully, Kadish and Kadish's *Discretion to Disobey*.

# California Law Review

VOL. 62

JULY-SEPTEMBER

No. 4

## BOARD OF EDITORS

### *Editor-in-Chief*

BRUCE A. COHEN

### *Executive Editor*

JANE W. HALL

### *Managing Editor*

H. LEE WATSON

### *Articles*

BRUCE MAXIMOV  
JOANNE B. GROSSMAN  
PAMELA S. JUE  
JOHN BARNETT MARKS  
DOROTHY ROBINSON  
EARL J. WAITS

### *Research*

DOUGLAS W. BECK  
MICHAEL J. LAWSON

### *Membership*

LAURA W. S. MACKLIN  
FRANCIS E. FERNANDEZ  
GARY GREENFIELD  
JUDITH DROZ KEYES

### *Supreme Court Editor*

ANN BRICK

### *Assistant Managing Editor*

RICHARD M. TRAVIS

### *Note & Comment*

FEDERICO CASTELAN SAYRE  
JEFFREY S. ALLEN  
ADRIAN ARIMA  
KATHARINE T. BARTLETT  
ALLEN M. FENNING  
LAWRENCE L. HOENIG  
PETER S. MUNOZ  
NORMAN PINE  
RAND C. SCHMIDT  
JAMES SEVERSON  
EVELYN R. SINAIKO  
LOUIS S. WELLER

### *Associate Editors*

CAROL AMYX  
MANUEL ARAUJO  
DOROTHY BERNDT  
WILLIAMSON B. C. CHANG  
JOHN DANNER

ROBERT A. DESTRO  
LANI LIU EWART  
JOSEPH FERRARA  
ALAN M. KATZ

THOMAS JOHN MILLS  
HOWARD M. MOFFETT  
ARTHUR LARRY PASSAR  
PAUL M. ROSE  
RALPH J. SHAPIRA

CHUCK ADAMS  
THOMAS BARLETTA  
JAMES A. BOWEN  
HAROLD A. BROWN  
KATHRYN J. BURKE  
REGINALD ARMSTRONG CLAY  
ROBERT E. DARBY  
JUDY A. FLYNN  
LINDA FOUST  
FRED FRIEDMAN  
CHARLES F. GORDER, JR.  
LAWRENCE GRAZE  
J. MICHAEL HEMMER  
JOEL G. HIRSCH  
LAWRENCE A. HOBEL

RICHARD E. HYLAND  
GEORGE A. JUAREZ  
KATHLEEN M. KELLY  
GARRY KOENIGSBERG  
LEWIS A. KORNHAUSER  
CORALTA LEWIS  
DANIEL B. MAGRAW, JR.  
NENA MANLEY  
EDWARD MARSHALL  
JOHN B. MCNEECE III  
JAMES L. MILLER  
TONY MIRANDA  
ERNEST A. NAGATA  
CRAIG N. OREN  
ALAN PEDLAR

PHIL PETERS  
ROBERT J. PETTLER  
THOMAS G. QUINN  
JOHN D. ROBERTSON  
ED ROYBAL  
ANDY SAWYER  
SUE ANN LEVIN SCHIFF  
MARJORIE MAGUIRE SHULTZ  
MARY B. SEYFERTH  
CATHY R. SILAK  
MARGARET S. SMITH  
ELISABETH A. WERBY  
ALEX WILES  
RENIE EIKO YOSHIDA  
DOUGLAS R. YOUNG