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SYMPOSIUM

FOREWORD: THE CONSTITUTION OF RESPONSIBILITY

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The American legal academy is decidedly nationalistic. Comparative law tends to be a minor part of the law school curriculum, and discussion of alternative legal systems almost never finds its way into mainstream courses like constitutional law. As a result, much that is distinctive about American constitutionalism, and the American legal system in general, is often taken for granted. The federal Constitution, for example, says much about governmental structure, power, and limitations, but virtually nothing about the obligations of citizens to one another or to the government.¹ This feature of the American Constitution starkly sets it apart from many of its foreign counterparts. On the international scene, the responsibilities of individual citizens are a major topic of constitutional conversation.

A few examples will illustrate the point. The 1947 Italian Constitution expressly guarantees to citizens "the inviolable rights of man," but also "imposes the performance of unalterable duties of a political, economic and social nature."² More particularly, article 4 declares that "[e]very citizen shall undertake, according to his possibilities and his own choice, an activity or a function contributing to the material and moral progress of society";³ and Part One of the document, entitled "Rights and Duties of Citizens," proclaims a number of specific citizen obligations, such as the duty to support and educate one's children,⁴ the duty to vote,⁵ and the duty to con-

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¹ The one exception is the Thirteenth Amendment. There is plainly nothing about citizen obligations in the constitutional text or the Bill of Rights.

² COSTITUZIONE art. 2 (Italy), translated in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 47 (Albert P. Blaustein & Gisbert H. Flanz eds. & Gisbert H. Flanz trans., 1987).

³ *Id.* art. 4.

⁴ *Id.* art. 30.

⁵ *Id.* art. 48.

tribute to public expenditures in proportion to one's resources.⁶ The 1978 Spanish Constitution similarly contains a section on "The Rights and Duties of Citizens,"⁷ which specifies such civic obligations as the duty to work,⁸ the duty to support one's children,⁹ and the duty to preserve "an environment suitable to the development of the person."¹⁰ And perhaps the best-known example is the constitution of the former Union of Soviet Socialist Republics, whose 1977 version proclaims that "[t]he exercise of rights and freedoms is inseparable from the performance by the citizen of his duties"¹¹ and lists such obligations as the duties to "safeguard and strengthen socialist property,"¹² to be "intolerant of anti-social behavior,"¹³ to "protect nature and safeguard its riches,"¹⁴ and to "promote the development of friendship and cooperation with peoples of other countries and the maintenance and strengthening of world peace."¹⁵

The obvious conclusion is that the American Constitution is less concerned with responsibility than are the fundamental documents of other nations. The obvious conclusion, however, is wrong. One should not expect our Constitution of 1787 to speak openly of citizen responsibilities, even of responsibilities that are more consistent with Western liberal traditions than some of the more extravagant obligations described in European or Communist constitutions. The American charter is a constitution of *government* rather than a constitution of *society*—unlike some of its twentieth-century foreign counterparts which self-consciously seek to define

⁶ *Id.* art. 53. See also *id.* art. 52 (duty to defend the country); *id.* art. 54 (duty of fealty).

⁷ CONSTITUCION, tit. I, ch. 2, § 2 (Spain), translated in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 49 (Albert P. Blaustein & Gisbert H. Flanz eds. & Gisbert H. Flanz trans., 1991).

⁸ *Id.* art. 35.

⁹ *Id.* art. 39.

¹⁰ *Id.* art. 45. See also *id.* art. 30 (duty to defend the country); *id.* art. 31 (duty to contribute to public expenditures according to economic capacity).

¹¹ KONSTITUTSIJA SSSR art. 59 (Union of Soviet Socialist Republics), translated in THE CONSTITUTIONS OF THE COMMUNIST WORLD 352-68 (F.M.J. Feldbrugge & William B. Simons trans., 1977).

¹² *Id.* art. 61.

¹³ *Id.* art. 65.

¹⁴ *Id.* art. 67.

¹⁵ *Id.* art. 69. See also *id.* art. 59 (duty to uphold law and comply with standards of socialist conduct); *id.* art. 60 (duty to work); *id.* art. 62 (duty to defend the State); *id.* art. 63 (duty to serve in the military); *id.* art. 64 (duty to respect the national dignity of other citizens); *id.* art. 65 (duty to help maintain public order); *id.* art. 66 (reciprocal duties of parents and children); *id.* art. 68 (duty to preserve historical monuments and cultural values).

the entire social fabric.¹⁶ But precisely for this reason, one should not mistake silence for disregard.

The Framers made no such mistake. While they sought to structure the federal government to avoid reliance on the good motives of either the citizens or the governors,¹⁷ the Framers recognized that their constitutional order *presupposes* concepts of responsibility. George Washington eloquently expressed these sentiments in his farewell address in 1796, in words that still have power even for those who do not share his view of the connection between morality and religion:

Of all the dispositions and habits, which lead to political prosperity, Religion and Morality are indispensable supports. In vain would that man claim the tribute of Patriotism, who should labor to subvert these great pillars of human happiness, these firmest props of the duties of Men and Citizens. The mere politician, equally with the pious man, ought to respect and to cherish them. A volume could not trace all their connexions with private and public felicity. Let it simply be asked, Where is the security for property, for reputation, for life, if the sense of religious obligation *desert* the oaths, which are the instruments of investigation in Courts of Justice? . . .

It is substantially true, that virtue or morality is a necessary spring of popular government. The rule, indeed, extends with more or less force to every species of free government. Who, that is a sincere friend to it, can look with indifference upon attempts to shake the foundation of the fabric?¹⁸

The fact that these moral values did not find expression in the federal Constitution does not detract from their importance. Without a general cultural insistence on a sense of personal honor—and, more importantly, on a sense of shame—any form of social organization is doomed. This obviously does not mean that one should charge the federal government, or government at any level, with fostering a social ethic of individual responsibility; private institutions like families and churches are surely the appropriate conveyors of social values. Much less does it mean that the *content* of individual obligations should follow the Italian, Spanish, or Soviet models. But one at least would hope that the government, through the legal system,

¹⁶ The preamble to the 1977 Soviet Constitution declares that the document's purpose is to "affirm the foundations of the social system and the policies of the USSR, establish the rights, freedoms, and obligations of citizens, and the principles of organization and the aims of the socialist all-people's state, and proclaim them in this Constitution." *Id.* pmb. Modern European constitutions are a bit subtler, but on the whole follow that path to a much greater extent than does our own Constitution.

¹⁷ See THE FEDERALIST Nos. 10 & 51 (James Madison).

¹⁸ George Washington, Farewell Address, in DOCUMENTS OF AMERICAN HISTORY, vol. I, 173 (Henry S. Commager & Milton Cantor eds., 10th ed. 1988).

would not actively undermine the fundamental sense of individual responsibility that is the necessary precondition for a civilized legal order.

We suspect, however, that the modern American legal system has become, and is becoming, increasingly hostile to the idea of individual responsibility in a wide variety of private and public law contexts. The possible causes of such a movement are many: undue focus on the federal Constitution as the foundation for public life; relativism and nihilism, especially among the intellectual classes; and the fascination of intellectuals with socialism, which supports a view of law as a device for central planning rather than law as a tool for facilitating coordination. This Conference will test our suspicions against a broad range of legal topics. If we are right about the extent and consequences of the erosion of individual responsibility in the law, identification of the problem is the necessary first step towards rescuing the concept of individual responsibility implicit in the Founders' legal and constitutional order.