The John Marshall Law Review

Volume 21 | Issue 3 Article 13

Spring 1988

Conflicts of Law and Morality, 21 J. Marshall L. Rev. 691 (1988)

Todd Volker

BOOK REVIEW

CONFLICTS OF LAW AND MORALITY BY KENT GREENAWALT

Oxford University Press, New York, 1987. The Clarendon Press of the Oxford University Press, New York. The Clarendon Law Series. 397 pp., $32.50.

Reviewed by Todd Volker*

A mountaineer about to fall off a precipice cuts the rope that holds a life below in order that at least one man may live. A shotgun blast takes a life in a gang killing. Murder? Manslaughter? Morally justified? The rule of law is sovereign over us all, and the letter of the law is a social prescription we all are bound to follow and obey. Like cold rain, the law's demands fall upon the good and the evil, the unjust and the upright; legislators and legal scholars formulate law with an eye toward the average citizen and the ordinary circumstances of justice. Good law is usually inclusive law, and it treats us alike, equally, as citizens both competent and responsible for our actions. Good justice may not have quite the same character.

The above examples illustrate rather well Aristotle's observation that "an action may be rendered just or unjust by the circumstances in which it is done."[1] There are instances when there are clear conflicts of law and morality; when the demands made upon us by universally applied law conflict with the particularistic and peculiar moral demands in an unusual instance.

Political and legal philosophy have together undergone a tremendous rebirth in the past twenty years. This change began largely with John Rawls' *A Theory of Justice*,[2] published in 1971, and has continued in the work of Ronald Dworkin, Robert Nozick, Michael

* B.A. 1985, Knox College, Magna Cum Laude, Phi Beta Kappa, A.M. Candidate in Philosophy at University of Illinois, Urbana-Champaign. Author is completing his masters essay on Ronald Dworkin's criticism of H.L.A. Hart's legal positivism, PROBLEMS IN DWORKIN'S CRITIQUE OF HART'S ROLE OF RECOGNITION THESIS.

1. ARISTOTLE, ETHICS, bk. 5, ch. 8, 159 (J.A.K. Thomson trans. 1953).
2. J. RAWLS, A THEORY OF JUSTICE (1971).

Sandel and Michael Walzer.[3] John Rawls' work fights against the comfortable English accommodation of utilitarianism in political philosophy; Ronald Dworkin's writings clearly adumbrate this antiutilitarian theme, going so far as to claim exclusively that individual rights trump society's claims.[4] The implications for legal philosophy are substantial. It is now how we are to understand law in a nonconsequential, hence, non-utilitarian, way that strongly bears on how present jurists will deal with the hard cases, the troublesome cases, the cases in which the demands of law conflict with the requirements of morality.

Dworkin's solution is extreme. His rights-based theory goes so far as to argue that an exact right to win exists for a litigant.[5] John Finnis in *Natural Law and Natural Rights* argues a contemporary version of Aquinian natural law.[6] H.L.A. Hart leads present-day legal positivists who argue that while law may well be influenced by a society's moral values, law need not always have such a deep connection to morality.[7] His view is endorsed by some significant legal philosophers, including Rolf Sartorius, Neil MacCormick and Kent Greenawalt.[8]

Kent Greenawalt, the Benjamin N. Cardozo Professor of Jurisprudence at the Columbia University Law School, has written an almost encyclopedic work in his new *Conflicts of Law and Morality*.[9] This book is a most recent addition to the distinguished Clarendon Law Series of the Clarendon Press of the Oxford University Press, New York. The series is famous to both philosophers and legal scholars for Finnis' book, *Natural Law and Natural Rights*,[10] and for H.L.A. Hart's book, *The Concept of Law*.[11]

Professor Greenawalt's book has less to do with pure analytic legal philosophy than some of the other selections in the series might indicate. This is exactly why it has its value. *Conflicts of Law and Morality* takes many of the precise-though-distant arguments of legal philosophers and fashions them into something useful to those involved throughout the legal system. The book, then, is also

---

3. *See generally* R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977); R. NOZICK, ANARCHY, STATE, AND UTOPIA (1974); M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982); M. WALZER, SPHERES OF JUSTICE (1983).

4. *See* DWORKIN, *supra* note 2, at xi.

5. *Id.* at 81.

6. J. FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980) [hereinafter FINNIS].

7. *See* H.L.A. HART, THE CONCEPT OF LAW (1961).

8. *See generally* K. GREENAWALT, CONFLICTS OF LAW AND MORALITY (1987); N. MACCORMACK, H.L.A. HART (1981) [hereinafter GREENWALT]; R. Sartorius, *Posivitism and the Foundations of Legal Authority*, in ISSUES IN COMTEMPORARY LEGAL PHILOSOPHY (R. Gavison, ed. 1987).

9. GREENAWALT, *supra* note 8.

10. FINNIS, *supra* note 6.

11. H.L.A. HART, THE CONCEPT OF LAW (1961).

an introduction to some of the major thoughts of the principle legal thinkers, searching through the work of Philip Soper, John Simmons, John Mackie and John Rawls in a hunt for viable philosophical principles upon which to base a description of legal obligation.

Philip Soper, for instance, argued in his *A Theory of Law* the interesting position that because government and laws are positive human goods, citizens should respect the good faith efforts of officials and authorities, and show this respect by obeying their rules and laws.[12] Such a prima facie obligation is developed, according to Soper, because of this respect for those acting with an eye toward our own good.

Kent Greenawalt examines Soper's position, and his critical appraisal finds its flaws: many violations of the law are trivial—unlikely to give offense or affront to officials. The idea of such a relationship would involve making demonstrations of respect for officials a strong duty, although Soper does not wish to do this. The idea of a prima facie duty is not always understood as involving a moral reason to comply with a law; the concept of duty need not always involve a moral element.

Chief among the virtues of *Conflicts of Law and Morality*, then, is Greenawalt's great talent at untangling the arguments of famous philosophers. Greenawalt's book is a kind of courtroom for several influential legal theories. The work is a deposition of arguments and counter-arguments, a record of philosophical challenges analyzed and resolved. Through it all, Professor Greenawalt is a perennially inquiring prosecutor.

His concentration on the philosophical bases of law and of legal obligation does finally result in some real, concrete rewards. Lawyers and judges are increasingly asked to solve difficult ethical dilemmas, and the courts, like it or not, have become the arbiter and seer of legal and moral possibilities. Competency in the letter of the law, in the writing of statutes and in their reading, should hardly preclude sophistication in understanding the law's spirit, and legal philosophers have much to offer to lawyers or judges working upon immediate, real life cases.

Professor Greenawalt's work begins with a modest discussion of the claims of law and the claims of morality in a contemporary liberal order. For Greenawalt, the law's demands for universal compliance are occasionally wrongfully claimed, and he argues that any claim the law makes to ultimacy must be skeptically treated. There are moral reasons to obey the law on many occasions, argues Profes-

12. *See* P. SOPER, A THEORY OF LAW (1984); *see also* P. Soper, *The Obligation to Obey the Law*, in ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY (R. Gavison, ed. 1987).

sor Greenawalt, and he proceeds to examine the many arguments other legal philosophies have offered to prove moral reasons to obey the law.

The early sections of *Conflicts of Law and Morality* form an exhaustive account of the bases of these moral reasons. We find various solutions, and problems in these solutions offered by social contract theorists, by utilitarians, by philosophers of natural duties to obey, and by philosophers of a duty of fair play as the basis of legal obligation.

This section is Greenawalt's highest level of philosophical abstraction and philosophical criticism; his investigation of John Rawls' account of fair play, and his uncovering of the defects of utilitarianism are equally well-reasoned and dispassionate inquiries. His discussion of act and rule utilitarianism is truly worthwhile. We find Professor Greenawalt is able to appreciate the worth of both consequentialist (utilitarian) and non-consequentialist (deontological) perspectives. He is unable to endorse either philosophical position. Rather, he works to incorporate the morally relevant characteristics of each position which he can unhesitatingly support into his own approach.

The flaw in social contract theory, a position Robert Nozick popularizes as a correct philosophical base of legal obligation, is that while there are ties we create that are binding upon us, not all citizens have a similar promise and a similar obligation to comply with the law's demands. Greenawalt cites the usual argument that in no real political order have citizens ever taken express vows to abide by the terms of a social contract, and because of this, the assumption in contractuarian theory that citizens have an obligation to the law's requirements is rather weak. Certain varieties of promises, tacit and implicit, are yet able to offer a way to view obligation. Professor Greenawalt fortunately does not mire into the vagaries of these less than explicit pledges. He offers the forthright assertion that citizens generally understand the psychological factors and social conventions about these internal psychological attitudes as concomitants to explicit promises. His analysis readily shows the problems of relying upon beliefs about mental states as totems of genuine commitment to obey the law.

Greenawalt argues that voting and political participation are not in themselves constitutive of a broad social promise to obey the law, nor does the receipt of even basic social benefits such as military protection or emergency services. The formal value, the contribution of social contract theory to legal philosophy is the recognition that oaths bind officials to fulfill duties in their particular roles, and these oaths are morally relevant. Greenawalt also explores the grounds and premises of promise making, and he finds that "long-

term promises carried implied exceptions for changed circumstances,"[13] an avenue that loosens up a rather rigid philosophical position. Such implied exceptions are rarely talked about, and Greenawalt's discussion is a good beginning look at a troublesome topic. In seriously studying the act of promise making, Greenawalt has made a solid survey of the very essence of the contractuarian tradition in legal thought.

Theorists often use utilitarian arguments to clinch public debate over conflicts of law and morality. Theorists have argued against acts of civil disobedience, for instance, which have detrimental social consequences, and among the most insistent was Justice Fortas. But Greenawalt finds that utilitarian arguments are unable to form sufficiently strong justifications for legal obligation. Professor Greenawalt presents a good summary of act and rule utilitarianism and explores the many philosophical pratfalls of these positions. He also shows that utilitarianism presents a false picture about how people view their responsibilities to the law, that calculating costs and benefits involved in obeying the law is a genuinely bizarre approach, and that utilitarianism asks too much of the average citizen by its excessive reliance upon benevolence and altruism, against our own claims to right and justice. "Good laws have a moral claim on us," says Greenawalt, "that goes beyond the negative consequences of disobedience."[14]

His look at utilitarianism is important because he finds rule-utilitarianism to be the chief contender as a theory of legal obligation as it offers itself as a system of rules which is morally grounded, and yet which admits of morally desirable exceptions. Rule-utilitarianism gives a general reason to obey the law, but allows for ethical exceptions when the consequences of rule-breaking seem morally justified.

A deep paradox exists, however, in rule-utilitarianism: "If desirable consequences are the standard for judging possible rules, how can it ever be right to follow the rules when one knows that breaking them will produce better consequences?"[15] Professor Greenawalt's examination of rule-utilitarianism's relevance to legal and political philosophy is among the best features of his *Conflicts of Law and Morality*, because it is strikingly thorough in defusing the utilitarian position, and lucidly demonstrates the tight connection between law and philosophy.

Professor Greenawalt next turns to the moral reasons to obey the law understood in terms of a duty of fair play to fellow citizens.

---

13. GREENAWALT, *supra* note 8, at 81.
14. *Id.* at 101.
15. *Id.* at 107.

He picks out difficulties in the Rawlsian position presented in *A Theory of Justice*,[16] and his criticisms may largely appeal to persons interested in contemporary political philosophy. The implications for legal obligation Greenawalt finds in his commentary is that the duty of fair play is a "significant source of moral duty to obey the laws, although its precise contours for the complex responsibilities imposed under a legal order are debatable."[17] The duty of fair play's contribution is that a reciprocal duty exists among citizens. We benefit those citizens who benefit us. Violation of the law's demands, then, can be understood as morally blameworthy for this reason. Obligation to the law is understood as morally compelling. Yet questions arise about the terms of participation in such a common endeavor, and about how one understands participation and the receipt of social benefits. Greenawalt's position is strong-brewed: he rejects the idea that non-voluntary benefits raise corresponding political duties in a system of fair play; he discovers problems about how to reasonably elucidate membership in an association that one can hardly characterize as voluntary.

The major difficulties he finds in the approach is that citizens have a hard time making a substantive determination of just what constitutes "fair" behavior and "fair" expectations of others' behavior. Furthermore, a person may well believe that no duty arises in certain matters; that non-compliance with the law is possible, granted one's ability to pay the cost of bringing about compliance; that it may appear that one can obtain benefits at an unfair cost to the individual citizen.

Professor Greenawalt, however, favors the approach. Understanding legal obligation as stemming from a mutually beneficial system of fair play provides a check on a person's need to assess the fairness of the political community. There is no constant questioning of the consequences of legal obligation, but rather, citizens understand laws as reasonably fair and just.

The discussion of moral justification of legal obligation in *Conflicts of Law and Morality* concludes with a discussion of the approach Greenawalt classifies as promoting a "natural duty" of legal obligation. Here again there is commentary upon John Rawls' work, as well as upon natural law theory. The remarks on Rawls are illuminating in contrast to a number of other Rawlsian critiques, for Professor Greenawalt does not embark upon a general task of theory-smashing as much as he cleverly penetrates to certain problem areas of Rawls' theory. He understands the Rawlsian effort, and he works to expose deeply embedded flaws in the structure of the the-

16. *See* RAWLS, *supra* note 2, at 112.
17. GREENAWALT, *supra* note 8, at 153.

ory. A look is given to Tony Honore's and Philip Soper's positions, finding faults and merits in both legal obligation understood as a demand of necessity and as a duty from respect for the officials working toward our good.[18] John Mackie's conventionalist argument is likewise scrutinized.[19] Greenawalt finds that each man's position offers compliance with the law as a moral duty because it contributes to "an essential social objective."[20]

What Professor Greenawalt himself offers to his readers, once the vast task of analyzing and criticizing the salient offerings of present-day legal theorists is complete, is an attempt at a best reconciliation. He offers a lawyer-like resolution, a negotiated settlement among a deontological and a utilitarian position, but which is not quite rule-utilitarianism. He suggests a generally non-consequentialist approach to understanding the moral grounds of legal obligation, citing the duty of fair play. This favored approach, which Greenawalt chronicles much too briefly in *Conflicts of Law and Morality*, is almost a kind of inductive culmination of his preceding criticisms. He devotes a scant twenty pages to explaining this approach, and so one must understand Greenawalt's position, as he himself admits, as an initial exploration of this approach.

> My own conclusion is that no simple principle exists for ordering justice and utility or for ordering negative deontological duties (duties to avoid present wrongs) and morally worthwhile consequences. About the most that can confidently be said is that if a negative duty is present, consequential reasons to the contrary can override its power only if they are substantial *in relation to* the strength of the duty in that context, and that serious injustice should not be caused unless the utilitarian reasons for doing so are very strong. These formulations may be so vague as to provide little help, but they do realistically acknowledge that negative deontological standards themselves differ tremendously in their moral force, that they can be overridden by substantial considerations of consequence to the contrary, and that justice does not always win out over utility, when the two are genuinely distinct.[21]

Actually, Greenawalt occupies a mature position although it is one rarely favored among current philosophers. It in no way falls into either the camp of the deontologists nor into that of the utilitarians. What Greenawalt offers in *Conflicts of Law and Morality* is a non-consequentialist position that admits of occasional consequentialist determinations. This has its benefits to both law and philoso-

---

18. *Id.* at 168-72. *See generally* T. HONORE, MAKING LAW BIND (1987); P. SOPER, A THEORY OF LAW (1984).

19. GREENAWALT, *supra* note 8, at 172-74. *See generally* J. MACKIE, ETHICS (1977).

20. GREENAWALT, *supra* note 8, at 174.

21. *Id.* at 219-20.

phy. There usually will be no excuse not to follow the law predicated upon moral obligation, although there may be particular contexts or certain situations in which one may consider the consequences of violating the law, and in which some such violations may be morally justified. What matters finally in figuring out whether one is morally justified to break the law are the ends of the state—the ends of our social union. This is a result Greenawalt takes from proponents of a "natural duty" of legal obligation.

> Lest too much turn on individual calculation, one might understand the duty as one to comply with laws of the state directed toward what are the state's proper ends, including security, liberty, justice, and welfare, when one's compliance and that of one's fellows may reasonably be thought necessary to success. Such a duty would have important non-consequential elements, incorporating the generalization principle, and having some power to outweigh a competing balance of consequences; but it would not reach evidently foolish laws or applications of laws when general noncompliance plainly will not interfere with the state's legitimate ends.[22]

The indeterminacy of Greenawalt's scheme is its greatest advantage. It is easy to see that it offers a good many things. With a moderated, non-consequentialist position, one need not be a slave to rules, bound fast regardless of their injustice to present circumstances. We can break the speed limit to save life. This flexibility is welcome and this position rather well mirrors the course of moral thinking we typically make. Results morally matter—so do principles. At times, the conflict of these is a painful and tragic thing, and Greenawalt's eye to the point and purpose of social union and the state provides a view toward that which reconciles our concerns with the conflict of rules and utility.

Criticism of Professor Greenawalt's position must begin with the difficulties of determining the circumstances within which a utilitarian calculation of consequences is needed. Secondly, criticism may fall upon how a policeman, prosecutor, judge or jury will be able to objectively establish a defendant's mental states.

The first criticism would involve arguing that social goals such as justice, security, liberty and welfare are still far too vague for one to rely upon as a determinant of when to move away from a strict non-consequentialist approach. The second criticism centers upon the difficulty in formally discerning which violators have a moral basis to their law breaking. While others may stone National Guardsmen as an expression of moral objection to a war, someone may do the same act from a host of different, though not necessarily mutually exclusive, intentions. How can a judge determine whether the

22. *Id.* at 185.

violation stems from a reasonable concern for the bad consequences of following the law, from a reasonable concern for the ends of social union? While I may break the law in favor of pursuing generally shared social ends, these ends may actually be distant in relation to the law that is broken. Greenawalt argues that some close relationship is preferred, yet such a relationship is not always possible.

One can see why Greenawalt argues as he does. The rule of law has all citizens as subjects. The law necessarily is an inflexible-because-universal tool. There will be times when the universal application of law will cause considerable and unforeseen damage in certain instances. Professor Greenawalt's suggestion is that law be made more amenable to the moral concerns that arise in these instances when the application of law would confound or offend our moral sensibilities. Certainly this means that citizens should not always follow legal rules, nor will judges and courts always properly apply legal remedies against law breakers. This calls for introducing as significant to the justice of laws, the importance of particular and morally relevant consequences.

The kind of instances in which particularistic moral judgment tempers the law are actually rather rare, in Greenawalt's view. He offers in *Conflicts of Law and Morality* such things as civil disobedience, violent disobedience, and conscientious objection as several examples. These are case-book dilemmas in legal and political philosophy, with many offered resolutions.

Professor Greenawalt argues that the Model Penal Code's general justification defense, Section 3.02, provides a fine and valuable model for accommodating a moral concern for consequences with a normally non-consequentialist approach.[23] With the general justification defense, Professor Greenawalt has the device with which to mediate and to mitigate the conflict of law and morality. Greenawalt notes:

> Morally justified acts tend on balance, not to be harmful to the legitimate interests of the members of society; and society should not try to discourage those acts by means of incapacitation, general and individual deterrence, and norm reinforcement. When moral delin-

---

23. Section 3.02 states in pertinent part:

(1) conduct that the actor believes to be necessary to avoid harm or evil to himself or another is justifiable, provided that:
   (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
   (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
   (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

MODEL PENAL CODE § 3.02 (1962).

quency is absent, and understood to be absent, retribution, reform of character, and vengeance are also inappropriate.[24]

The general justification defense is a solution for a heterogenous society, where a consensus about alternative moral principles to resolve conflicts of law and morality does not exist. "What the justification defense does, in effect, is place the actor who aims at a net savings of lives on a parity with the actor who refuses to breach ordinary moral standards. That is the appropriate posture for the law when society is divided over the morally preferable choice."[25] With the general justification defense, Greenawalt reveals his association with H.L.A. Hart's contemporary formulation of positivism. Such a defense is morally neutral among a multiplicity of moral viewpoints and is based upon a view of the legal system that does not impose or derive a morality from law.

Professor Greenawalt moves ahead from the general justification defense to elaborate just how the judicial system may accommodate ethically based legal violations. Prosecutors may decide to forego prosecution, looking to a thick complex of considerations such as the law, the intentions of legislators and the needs of the community. The police may carefully exercise their discretion as well. Greenawalt sees judge or jury nullifications or acquittals as able to provide moral remedy to law's demand for prosecution of trespassers. The investigation Greenawalt makes here is extensive, and the final section of *Conflicts of Law and Morality* is essentially a series of proofs upon proofs that the American legal system has within itself the resources to judiciously deal with ethical violations of the law. Discretionary nonenforcement of the law, unauthorized nonenforcement, and leniency are considered options.

Where the general justification defense permits a strictly legal justification of a moral violation of the law, Professor Greenawalt is ready to consider keeping the case from appearing in court. An ethically minded restraint in pursuing the letter of the law is sometimes in greater obedience to the law's spirit. This kind of concern for justice is frequently feared and suspected of concealing all sorts of prejudices, not to mention dangers. The law bids universal complicity. This is both its strength and its greatest weakness, because no lawmaker is omniscient and able to imagine every possible circumstance in which a law may be applied.

Kent Greenawalt's addition to the Clarendon Law Series is a solid one. While its examination of contemporary legal philosophers is at times disjointed and inaccessible, and at times, too brief, Greenawalt's appreciation of both legal theory and legal institutions

24. GREENAWALT, *supra* note 8, at 272.
25. *Id.* at 296.

makes *Conflicts of Law and Morality* a valuable work. Professor Greenawalt's own approach may not measure up to the objectives of analytic philosophy—concepts and reasoning able to be applied across a universe of circumstances, a realm of situations. Nevertheless, I believe the direction of his reasoning is more sound than shallow reasoned. This is because, as Alasdair MacIntyre notes, "analytic philosophers . . . seem to be determined to go on considering arguments as objects of investigation in abstraction from the social and historical contexts of activity and enquiry in which they characteristically derive their particular import."[26] Professor Greenawalt's efforts to introduce a consequentialist dimension to a generally nonconsequentialist approach is a recognition of the problems particulars have for analytic philosophy, as well as for the deontological approach. *Conflicts of Law and Morality* is a solid attempt to bridge theory and practice, and lawyers and philosophers alike should appreciate Kent Greenawalt's work.[27]

26. A. MACINTYRE, AFTER VIRTUE 267 (2d rev. ed. 1981).

27. For another recent publication by Kent Greenawalt, see K. GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE (1988).