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CONFLICTS OF LAW AND MORALITY. By *Kent Greenawalt.* New York: Oxford University Press and Oxford: Clarendon Press. 1987. Pp. ix, 383. Cloth, $32.50; paper, $12.95.

It is now widely agreed that a person can be morally justified in breaking a law, even a valid law in a democracy whose institutions are by and large just. There is much less agreement, however, about the sorts of considerations that constitute good moral reasons in support of disobedience. There are a variety of situations in which a person might think himself morally justified in breaking a law, and it is a distinguishing merit of Professor Greenawalt's impressive book that it discusses not just "civil disobedience" (the favorite topic of the 1960s), but all of the other categories of principled disobedience, too — from violent confrontation to conscientious objection, from forced choice of the lesser evil to jury nullification. But if there are moral reasons that tend to justify disobedience in special circumstances, it is usually an uphill struggle to find such justification, since there are also a number of weighty considerations supporting a duty of obedience — reasons that exert a relatively constant and substantial force against a claimed moral right in particular circumstances to disobey. Greenawalt has catalogued the reasons on both sides and given rough assessments of their respective weights when they are involved in a citizen's decision whether to obey. He concludes, among other things, that there are almost always powerful reasons for obedience, but that there are some infrequent situations in which citizens have even more powerful reasons to disobey.

To a large extent, then, *Conflicts of Law and Morality* is an extended essay in moral philosophy. The question, "Is it ever morally right (justified on balance) to disobey a law, and if so, under what conditions?" appears exactly the same in form as the moralist's question, "Is it ever morally justified to break a promise, tell a lie, inflict pain on others, etc., and if so under what conditions?" The answer to the former question, I would think (and Greenawalt agrees), is that disobedience can be morally justified, but only when the weighty reasons that tend to support a moral duty of obedience are outweighed in a particular set of circumstances by even weightier reasons that support a moral duty (or at least a moral right) to do something inconsis-

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tent with obedience. The answers to the parallel questions about lying, promise breaking, etc., have the same form: One can justify telling a lie, for example, but only when the normally powerful reasons that tend to support a duty of veracity are overridden in a particular set of circumstances by even more powerful reasons supporting a moral duty (or at least a moral right) to do something inconsistent with telling the truth. Whether a moralist, in either case, can give a more precise answer than this to the general moral question is one of the nagging perplexities that is not quite laid to rest by this book.

A large part of Greenawalt's book is addressed to problems of individual citizens who are faced with apparent conflicts between the claims of morality and law; but another large part of the book raises moral problems from a legislative perspective, asking what legal mechanisms can be designed for the treatment of lawbreakers whose disobedience can, at least to some degree, be morally justified. I found the concluding section of the book, entitled "Institutions of Amelioration," to be the most suggestive part. Greenawalt discusses in illuminating and persuasive ways the necessity defense (a "general justification"), conscientious objection and how the law should accommodate it, discretion not to arrest or not to prosecute, judge and jury nullification, and pardon as techniques for responding to lawbreakers who exhibit a genuine and plausible moral conviction that their disobedience was morally justified. The possibility that some morally justified acts of disobedience might be (or with legislative action, become) legally justified as well raises some terminological confusions. If the act in question is in fact legally justified, then it is not an act of disobedience at all, not an instance of lawbreaking. After all, we do not call killing in self-defense "justified lawbreaking"; we call it "justified killing" and deny that it is lawbreaking at all. One way out of this merely terminological muddle is to adopt Mortimer and Sanford Kadish's usage of the term "rule-departures"[1] instead of "lawbreaking," so that legally unjustified rule-departures are acts of lawbreaking, but legally justified rule-departures are not.

I. The Individual Citizen's Moral Problem

Early in the book, Greenawalt draws on certain nonlegal examples of rules from games, private clubs, and the like to illustrate how "mandatory rules may do less than demand behavior they seem to require" (p. 7). By "demand" Greenawalt means "seriously claim[] obedience" (p. 6), so his view appears to be that the people subject to the rule are sometimes not unqualifiedly morally bound to obey, "[s]ince a general moral requirement to obey is unlikely to be *broader* than the law's demand for obedience" (p. 6). One of Greenawalt's

1. M. Kadish & S. Kadish, Discretion to Disobey (1973).

nonlegal examples (with many obvious legal analogues) is a club's rule specifying certain conduct as a condition of membership in the club but not as a serious unconditional demand. Legal analogues include power-conferring (but not duty-imposing) rules. The law does not demand that you make a will but only that if you choose to make a will you must take certain steps if you are to be successful. (Similarly, the club rules do not demand that anyone remain or become a member.)

Greenawalt's most interesting example, however, is drawn from the rules of basketball which seem to wink at "acceptable fouls" in certain circumstances, and their analogues of "acceptable breaches of legal duty":

> At certain points in a game, strategy dictates committing fouls that referees will call, and experienced players know when such fouls should be committed. As long as the fouls are not too flagrant, they are considered a normal part of the game . . . . The "sanctions" applicable to such fouls . . . are not severe enough to stop their intentional commission, and it is generally felt that were sanctions severe enough . . . , the game would be less interesting, particularly because it would reduce the chance of a losing team catching up in the final minutes. [p. 10]

These rules, then, can plausibly be interpreted as merely stating the price that must be paid for an "infraction." If you wish to interfere in certain ways with an opposing player, the price is two foul shots. A similar way of interpreting criminal statutes is normally implausible,[2] but Greenawalt argues that there are examples (which I will come to shortly) that approximate the basketball model. In both cases the theorist must explain how we can say what the rules *really* demand when "the proscriptive language of the rule book cannot be taken at face value" (p. 11), and the answer is that to speak of what the rule demands is shorthand for speaking of "what is demanded by the people concerned with the rules" (p. 11) — the rule makers, referees, opposing players, and spectators.

Greenawalt's example of "acceptable breaches of legal duty" analogous to acceptable fouls in basketball is an imaginary statute that makes gambling for money by "any person" a Class A misdemeanor. He imagines that the legislative majority, wishing to deter and penalize only professional gamblers, "but believing that a law cast in those terms would be too difficult to enforce and having confidence in the state's enforcement officials [and their prosecutorial discretion], adopt[s] the broader prohibition whose terms where [sic] designed to reach gambling between friends as well" (p. 12). After a time, the prosecutorial policy of not bringing charges against amateur gamblers becomes well-known and generally approved, so that "to say the 'law demands' that people refrain from gambling would be artificial and excessively formal" (p. 13).

2. *See* H.L.A. HART, THE CONCEPT OF LAW 39 (1961).

In clear cases, it would be a mistake to say that an intentional foul in the last minutes of a basketball game by a player on the team that is behind, is an instance of *justified disobedience* to the rules, or that a friendly game of poker in a private living room is a deliberate and justified act of *disobedience* to the criminal statute, for they do not defy what the rule actually demands but only what it appears to require. But it is easy enough to tamper with the relevant variables, as Greenawalt acknowledges (pp. 13-14), so that the expectations of the relevant parties are mixed or unclear as to legislative intent, enforcement policy, and appropriateness of prosecution. In those cases (which may well include actual as well as hypothetical examples) there is simply no clear answer to the question of what the law demands.

In Part II, Greenawalt surveys the leading categories of reasons proposed by political philosophers in support of a general moral obligation to obey valid laws in a generally just democracy.[3] (All bets are off in a totalitarian state like Nazi Germany.) Chapter four, the first chapter in this section, argues subtly but persuasively that a general duty to obey does not follow from the legitimacy of the government that makes and enforces the law, at least not as a matter of direct conceptual linkage. Chapter five discusses the most famous theory of political obligation, that which derives the moral obligation of obedience from the consent of the governed and the associated promise to obey valid laws. This historically dominant theory, whose leading spokesman was John Locke,[4] has fallen on hard times recently,[5] and Greenawalt gives it little encouragement. He undermines the Lockean idea of tacit consent, and concludes, after a long and careful discussion, that "many persons do apparently have promissory obligations to obey laws and other rules but . . . on no plausible account have all or nearly all citizens or residents of liberal democracies promised to obey" (pp. 62-63). Even those who have undertaken to obey by explicit oath or "in a promiselike way" (p. 63) often do not become morally obligated in a sweeping fashion because of defects in their promises, such as duress. Greenawalt acknowledges, however, that proper promises *can* generate substantial moral reasons for obedience, and that there is no reason in theory why the state could not come to rely more on explicit promises to generate moral obligations of obedience in its citizens (p. 87). Nevertheless, he concludes, there are powerful reasons to oppose enforced programs of oath taking as a means of providing a moral sanction for law enforcement: First of all,

> . . . an unqualified oath to obey all laws on all occasions is not one that can sincerely be given by thoughtful persons. Finding language that is

3. For another recent work that covers this ground, see A. SIMMONS, MORAL PRINCIPLES AND POLITICAL OBLIGATIONS (1979).

4. J. LOCKE, TWO TREATISES OF GOVERNMENT (P. Laslett rev. ed. 1963) (3d. ed. 1698).

5. A. SIMMONS, *supra* note 3, argues very effectively against Locke.

> less absolute but clear in its significance and comprehensible to ordinary persons is virtually impossible. We would be left with some vague undertaking to be law-abiding. [pp. 86-87]

Secondly, while some might be led by their promises to be more law-abiding, others would understandably be offended by the pressure to promise. (Asked once why he should object to taking a loyalty oath given that he was in fact loyal, a prominent philosopher asked mockingly why his wife, who is certainly faithful, should object to taking an oath at the start of each of her dinner parties promising that she will not commit adultery with one of the guests!)[6] Finally, "extensive use of oaths and promises," Greenawalt says, "risks devaluing the currency" (p. 87). If some might take their duties of obedience more seriously, others might take promises less seriously, and others might come to underestimate nonpromissory bases of moral duty.

None of the other standard theories of the moral foundation of a duty to obey the law succeed in establishing a set of reasons which apply to all possible instances of law-breaking. There is a general moral duty of "fair play," for example, that is violated even by criminal acts that do not have harmful consequences on balance. Instances of "free-riding," for example, make possible a gain for the lawbreaker that is possible only because other riders honorably forbear from taking similar advantages for themselves. In these cases, even when the honorable parties are in no way injured by the free-riding, they have been taken advantage of and treated unfairly. There are indeed many examples of legal disobedience that do exploit unfairly the law-abiding behavior of others. Most traffic infractions provide one class of examples. Income tax evasion provides another. But too many counterexamples exist for there to be a perfectly general obligation of obedience derived from the basic moral obligation of fair play. There are many types of cases where violating the law doesn't take advantage of anyone, and since the element of taking unfair advantage of the compliance of others is not involved *necessarily* in every instance of law-breaking, "fair play" is by no means a perfect moral model.[7] Running a red light on empty streets late at night under perfect conditions of visibility is one example, and such "victimless crimes" as smoking marijuana and cohabitation are others. In other cases, there is a clear moral duty to obey the law not simply because it *is* the law, but because there is a prior moral duty not to inflict on others the harm that is forbidden by the law. Yet, even much wrongful law-breaking of that class cannot be thought of as exploitative of other parties who are *not* its victims. When *A* rapes *B,* may all the rest of us males complain

6. Informal conversation with the late Professor Curt John Ducasse, Brown University (approximately 1955).

7. Here I draw on my own work. *See. e.g.,* Feinberg, *Civil Disobedience in the Modern World,* 2 HUMANITIES IN SOCY. 37, 54 (1979), *reprinted in* PHILOSOPHY OF LAW 129, 138-40 (J. Feinberg & H. Gross eds. 3d ed. 1986).

that *A* took unfair advantage of our compliance with the rape law to benefit at *our* expense? When *B* murders her husband in a fit of wrathful jealousy, may all the other married people complain that she was able to get her way only because of their forbearance, that it is unfair to *them* that she acted on her wrath while they repressed theirs? Not very likely.

Greenawalt agrees with this conclusion after his own much more thorough examination of the duty of fair play, which he claims plausibly to be a "significant source of moral duty to obey laws, although it does not support a general obligation to obey all laws" (p. 153). That conclusion is similar to the conclusion of his discussions of the other traditional grounds for a moral obligation of obedience (promise, social utility, gratitude, the natural duty to promote just institutions). None of these theories establish "any single ground of duty to obey all laws, or all just laws, on every occasion of their application," but the collection of them establishes "multiple grounds for obedience in various circumstances" (p. 207), and there are some rare circumstances in which *none* of them provides a very forceful reason in support of a moral duty of obedience. In these latter circumstances, therefore, provided there are independent moral reasons of relatively substantial weight to do what is forbidden by the law, there may be overall moral justification for disobedience.

The more philosophically interesting problems regarding a duty to obey, then, are typically raised by conflicts of moral reasons, where acknowledged moral reasons tending to support a duty to obey are opposed by other acknowledged moral reasons tending to support a duty (or in some cases merely a right) to do something inconsistent with obedience. Greenawalt devotes Part III, and particularly chapter nine, "Resolutions Among Competing Moral Grounds: The Absence of Clear Priorities," to a consideration of these conflicts. The conflicting reasons are easily identified. They are all the ordinary moral principles that provide the familiar reasons underlying our moral duties. Since there are a plurality of such reasons, no one of them, considered in the abstract, can be a necessary condition for moral duty. Moreover, since more than one of these principles can be applicable and since sometimes they exert their weight on opposite sides of the scale, no one of them considered in the abstract is always a sufficient condition for moral duty. All a moralist can do with any certainty, then, is to provide "signposts to identify critical features" (p. 207). These will include such familiar moral principles as those enjoining promise keeping, truth telling, and benevolence, as well as more subtle principles requiring fair play, mutual aid, and promotion of just institutions.

Since these principles can conflict, some writers speak of them as imposing "prima facie obligations" (PFOs) — considerations that generate obligations proper unless some other PFO, or combination of

PFOs, with more weight in these circumstances, counterbalances them.[8] Thus, if a person has a PFO to do *A,* then he has a moral reason to do *A* which is such that unless he has a moral reason or combination of reasons *not* to do *A* that is at least as strong, then not doing *A* is wrong, and he has an actual obligation to do *A.* Greenawalt wisely avoids speaking of prima facie obligations, partly because his concern is not only with moral obligations but with the moral preferability of actions that are not morally obligatory (acts of supererogation). Nevertheless, his complex pluralistic view of reasons leads him (like the writers who speak of PFOs) inevitably to use the metaphor of balancing. When reasons of acknowledged relevance sit in both pans of the balancing scale, we must find a way to determine which has the greater weight in the circumstances. I think a more fitting metaphor would be that of a decision maker who lacks scales but must do his weighing intuitively, first by lifting one object and then the other. In any case, the weigher has no simple formulas to apply which tell him that one kind of consideration is invariably heavier — or even usually heavier — than the other kind.

One might complain that the plight of the weigher is not as dismal as this picture suggests, that there are simple rules of thumb that put different considerations into some kind of priority relation. But Greenawalt easily finds exceptions to the most commonly proposed of these, that which gives automatic priority to the law's moral claim to obedience over any competing moral claim, and that which gives priority to the claims of justice over the claims of welfare. The moral philosopher and the legal theorist can help us make these difficult judgments of comparative "weight" by alerting us to the full variety of moral considerations that can be involved; by showing the various ways they apply and how their conflicts have been resolved in other circumstances; by exposing and helping to correct our prior biases, so that, like a rifleman who adjusts his aim to account for the wind direction and velocity, we can compensate for them; and especially by helping us determine to what extent, if any, the accustomed weight of a given kind of moral consideration is actually exerted in the case at hand. But in the end, "people facing decisions about obeying the law must do their uncertain best to take appropriate account of the relevant claims without plain rules of guidance" (pp. 222-23).

Greenawalt's discussions of civil (open and nonviolent) disobedience in chapter ten and violent disobedience in chapter eleven show how his "guidance" through the labyrinth of these personal moral problems, even without "plain rules," can be helpful. His analyses are informed and sophisticated, and his balance and common sense commendable, but the reader who expects more than Greenawalt's cautious methods permit will find no excitement here. On the other hand,

8. *See* Smith, *Is There A Prima Facie Obligation to Obey the Law?,* 82 YALE L.J. 950 (1973).

one can never accuse Greenawalt of oversimplification. And the truth itself in this area, insofar as it can be expressed in general terms, may be so complex that it too is "unexciting."

II. Institutions of Amelioration

Can legal practices be designed which treat morally conscientious rule breakers with respect and appropriate leniency while at the same time not weakening the public's general fidelity to law? Greenawalt devotes the final section of his book, four chapters in all, to this question, which he addresses with his customary thoroughness. I will discuss here his recommendations with respect to only three practices of accommodation from among the many he discusses, namely the general "necessity" justification, the exemption for conscientious objection to war, and jury nullification.

The general justification defense in the criminal law has functioned as an open-ended exception to liability. The law does lay down some specific justification defenses (self-defense, for example), but the necessity defense, in effect, refers to any other moral justifications (left largely unspecified) that similarly ought to exempt the actor from liability. Greenawalt chooses as his example of a formulation of the defense the influential section 3.02 of the Model Penal Code, the relevant parts of which are as follows:

> Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to 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.[9]

With such a defense, for example, one can be acquitted of car theft for having "borrowed" another's car without permission in order to rush a heart attack victim to the hospital when no other mode of instant transport was available, or for exceeding the speed limit on the way to the hospital. That the otherwise criminal act was in fact *necessary* to avoid the evil is not required by the defense provided the defendant's belief that it was necessary was genuine, but that the evil sought to be avoided (likely death of the heart attack victim) was in fact greater than the evil sought to be prevented by the law (property loss and increased *risk* of accident), must be proved to the jury's satisfaction. The defendant's honest belief in the correctness of that comparative evaluation is not sufficient.

No reasonable person would want to punish the emergency

9. Model Penal Code § 3.02 (1974).

speeder and other clearly justified lawbreakers, so Greenawalt is generally in favor of rules like that exemplified by the Model Penal Code. He rejects the argument on the other side that rare cases of emergency "necessity" can be "trusted to the good sense of prosecutors and judges," citing the need for "a safeguard against prosecutorial abuse" (p. 287). Anyway, even when enlightened prosecutors do not bring charges, genuinely justified rule-breakers "should have legal confirmation that they have acted appropriately" (p. 287). But there are controversial cases of apparently forced choices of a lesser evil (mostly hypothetical cases) that are much more difficult than the standard textbook examples, and which create serious difficulties, in particular for the Model Penal Code's formulation. Greenawalt is undaunted by these difficulties, but he does admit that they seem to call for some "modest additions to statutory language" (p. 306). Most of these difficulties stem from the Code's "undilutedly consequentialist" approach to the assessment of evils (p. 293).

A "deontologist" in moral philosophy would insist that a person might indeed violate the law in order to bring about the lesser of the harms he is forced to choose among, such as causing harm to one person instead of two, and yet be morally *unjustified* in doing so. Perhaps he had some special responsibility to protect that one person from harm and should not have treated him as just another number in his calculations. Perhaps that person is a close friend or family member, one's spouse, or parent, or child, and the other two are strangers. If we are to give people with whom we have special relationships a greater weight in our moral deliberations, then the tidy determinateness of the Model Penal Code rule will be shattered and the use of numbers to weigh evils will begin to appear arbitrary. So one can understand part of Greenawalt's motivation for maintaining the consequentialist approach of the Code, regardless of the deficiencies consequentialism might have in moral philosophy. Moreover, he writes, "One underlying principle of the criminal law is to encourage people to respect the fundamental interests of strangers, and the creation of ad hoc exceptions justifying special protection of friends and family members would be ill-advised" (p. 293). (He makes no more than implicit mention in this connection to special contractual obligations of protection, *e.g.,* those of nurses or bodyguards.) The argument on the other side is that the whole point of the necessity defense is to give proper respect in our legal judgments to the requirements of morality, and this goal is not achieved by a legal requirement that demands that a person do what he is not truly morally justified in doing.

Another class of cases in which the comparative harms approach of section 3.02 yields highly controversial judgments are those in which the defendant is charged with homicide, and the possibility of a consequentialist justification of his killing flies in the face of widely

held convictions that certain types of intentional killing are inherently wrongful whatever their consequences, and are therefore categorically prohibited. The Roman Catholic doctrine of "double effect" permits a person to cause another's death as an unwanted but virtually certain byproduct of an act intended to save others, but not as a deliberate means to an end, however worthy the end. Thus, "townspeople may not kill their mayor (who is in hiding) under the credible threat by a foreign invader that everyone in the town will otherwise be destroyed, nor may a surgeon kill a healthy person to acquire body parts whose transplant will save the lives of five others" (p. 295). The surgeon will not, and surely should not, win legal vindication of his judgment of moral justification (though it is not clear why he doesn't qualify for justification under the Model Penal Code rule). But the townspeople, unjustified by the doctrine of double effect, would nevertheless have a potential justification under the Model Penal Code rule. Moral absolutists, in short, would be outraged at a legal rule which rejects their deep moral convictions.

Is there any way of redrafting the rule that would be less offensive to moral absolutists? One way that Greenawalt mentions is to give some flexibility to judges and juries "to reject a claim of justification if they thought fundamental moral standards had been transgressed" (p. 295). But that could be even more unfair to defendants who hold honest consequentialist moral convictions than the Model Penal Code consequentialist rule would be to moral absolutists. If a consequentialist killer who is morally justified in his own eyes should happen to find an absolutist jury he will be severely punished for his convictions, whereas under the Model Penal Code rule no absolutist will even be tried much less punished for doing anything required by *his* moral convictions. On the other hand, juries seem to need some way of rejecting the Model Penal Code's comparative harm approach when it seems to justify defendants like our hypothetical transplant-surgeon who have "clearly transgressed accepted moral standards without a sufficiently overwhelming reason" (p. 295). Greenawalt suggests appending to the Model Penal Code rule the independent requirement that the act "justly respect the interests of everyone involved" (p. 296). This would have the additional advantage of requiring the use of fair selection procedures, like lotteries, by those who would kill in those desperate emergencies which require that some people be sacrificed so that a greater number might survive, as in the famous lifeboat cases, *Regina v. Dudley and Stephens*[10] and *United States v. Holmes*.[11]

In chapter fourteen, "Conscientious Objection and Constitutional Interpretation," Greenawalt considers the multifaceted question of "whether, and when, society should excuse people from obligations

10. 14 Q.B.D. 273 (1884).

11. 26 F. Cas. 360 (C.C.E.D. Pa. 1842).

because they strongly feel that performing them would be morally wrong" (p. 311). As the chapter title indicates, he considers this question both as a problem for legislators deciding what new legal defenses to create and also as a problem in American constitutional law for courts deciding how to interpret the rights we already have. I will discuss here only Greenawalt's treatment of the legislative problem, taking exemption from military service as an illustration.

Not all people who think that military service is morally wrong can be said to be "conscientious objectors." The genuine conscientious objector believes that entering military service (or accepting combat duty, if *that* is what he objects to) would be a "grave moral wrong." Part of the test for gravity, Greenawalt suggests, is "what the objector thinks he should be willing to suffer rather than commit the act" (p. 313). The person who has a moral objection to military service but thinks that in his own case such service would be morally preferable to going to jail is not "conscientious" in this sense. The objector who believes that "one should submit to penalties that society (or any decent society) has deemed appropriate" rather than perform the act *is* conscientious in the appropriate sense (p. 313). (Greenawalt doesn't notice the makings of a paradox here. His view seems to imply that only those who can demonstrate their conscientiousness by submitting to punishment deserve exemption from punishment.)[12]

Respect for conscientiousness dictates some special treatment for the conscientious objector, but distributive justice would be violated if the conscientious objector were exempted altogether from onerous burdens that others must shoulder. After all, people who are physically unable to shoulder the burdens of combat are given desk jobs rather than being excused altogether from service, and the conscientious objector should be treated like them, since their moral convictions in a parallel way render them "incapable of combat." Taking justice seriously requires equalizing the burdens as much as possible. Criminal punishment would do this but at the cost of inappropriately severe symbolic condemnation and the waste of social resources. So productive alternative service seems to be the answer.

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12. The late Cambridge philosopher, C.D. Broad, actually embraced this paradox in his contribution to a symposium in the 1930s. *See* C. BROAD, *Ought We to Fight for Our Country in the Next War?*, in ETHICS AND THE HISTORY OF PHILOSOPHY 232 (1952). Broad argued that it is virtually impossible for a person to know (or for another to know about him) that one of his actions (*e.g.*, his refusal to serve in a war) truly is conscientious. Indeed, Broad claims, the truly conscientious person is likely to have the strongest doubts about the purity of his own conscientiousness. Moreover,

> [p]lainly there is a *prima facie* obligation not to put yourself in this situation of one-sided dependence on what you must regard as the wrong actions of people who are less virtuous or less enlightened than yourself. This complication would be avoided if the conscription-law imposed the death penalty for refusal to undertake military or other war service. I am inclined to think that this ought to be done, and that really conscientious objectors to military service should welcome it.

P. 241.

The main problem for schemes of alternative service is that of selecting out, from those who morally disapprove of military service for one reason or another, those who should be offered alternative service. Greenawalt argues effectively against various ways of employing a religious test — requiring membership in a traditionally pacifist sect, or "acceptance of a Supreme Being," or fear of "extratemporal consequences."[13] Greenawalt does not strongly object to exemptions for sincere pacifists, whether religious or not, or for those who object on religious or other grounds to a particular war (though "[they] much more closely than pacifists resemble persons who have ordinary political objections to particular wars . . . [and] are more difficult for others to identify") (pp. 326-27).

The original contribution of Greenawalt to the debate, however, is not his criticism of other principles of selection but his proposal of a scheme of self-selection as an alternative which "circumvents all the difficulties that accompany even the best tests of eligibility":

> If a draft is reinstituted, Congress should establish an alternative civilian service that anyone could choose. Since the draft's aim is to get soldiers, the conditions of civilian service should be set so that the great majority of people will prefer military service, but the conditions should be no more onerous than are needed for this objective. Civilian service could carry substantially less pay and subsidiary benefits or be for a longer period of time, or both. If a lottery were used for military service, young men (and perhaps young women) might choose between a certainty of two years of civilian service and a chance of two years of military service. For a more nearly universal draft, the choice might be between two years of military service and two and a half or three years of civilian service. [p. 327; footnotes omitted]

Greenawalt's voluntary self-selection scheme has much to recommend it, but it is not a better way of selecting out the genuinely conscientious objectors. Rather it is a system with wider objectives, one of whose incidental advantages is that all of the genuinely conscientious objectors may exempt themselves from military service, though not all of those who will exempt themselves will be conscientious objectors. Many will have less grave moral objections to military service; some will simply *dislike* such service so intensely that they would prefer alternative service for less pay and a longer period. The great merit of the proposal is that it does justice to the conscientious objectors in the most certain and economical way while raising an army of just the size policymakers think is needed. And above all, "[i]t eliminates the incredible practical problems of accurately identifying sincere conscientious objectors. . . . [and n]o one in the military could feel unfairly treated by the choice of others to do civilian work, as long as he or she could have made the same choice" (p. 327).

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13. The phrase is Jesse Choper's. *See* Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579, 597-601 (1982).

There will be a class of extremely sensitive conscientious objectors, unmentioned by Greenawalt, who will still exclude themselves, but there is probably no helping that. I refer to those who are so opposed to the very existence of a standing army that they will have nothing to do with *any* system of conscription, fair or not, which supports a fighting force. These persons will refuse both military and civilian service. I suspect that the small number of objectors in this category will welcome the opportunity to dramatize their opposition by undergoing penal servitude for a comparable term. Surely, it would be prima facie unfair to impose a draft on everyone else, and leave *them* as they were, free to avoid their share of the burdens. Presumably, the class in question, those with especially sensitive consciences, would not wish to receive any kind of preferential treatment, so they might welcome an appropriate period of imprisonment (but for its inevitable stigma) as the least unacceptable form of "alternative service."

The status of jury nullification in common law countries is one of the law's most intriguing anomalies. On the one hand, juries have the unrestricted power, if they choose, to disregard the judge's instructions, and acquit a defendant even though they believe that the evidence shows beyond a reasonable doubt that he is guilty of the crime charged. Jury deliberations are secret; they are not subject to review after the trial; jurors may not be subjected to any penalty for dereliction of official duty; and acquittal verdicts may not be appealed or overturned because of the double jeopardy rule. On the other hand, juries are told that they have an unqualified duty to follow the judge's instructions and to decide on guilt or innocence according to the evidence. Each juror takes a solemn oath to do just that. So it appears that the law in a quite explicit way deliberately confers a power on juries to do what they have an equally explicit duty *not* to do.

Greenawalt's resolution of this puzzle is much the same as that of Mortimer and Sanford Kadish.[14] A juror has no moral right to violate his solemn oath on the ground that there would be some unfairness in punishing the defendant even though he is plainly guilty, or because the juror disapproves of the statute the defendant is charged with breaking. Rather the jurors must place a substantial "surcharge" on departures from their official obligations. Conviction must seem more than unfair; it must seem *unconscionable,* a *gross injustice* given the defendant's *undeniable moral right* to do what he did. A single juror who makes these moral judgments can nullify the judge's instructions quite surreptitiously, so that no one will ever know what has happened. Sometimes, in morally desperate circumstances, that is what a juror should do, since secret nullification does less damage to a just institution (jury trials) than open and clear nullification would do.

As things now stand, conscientious jurors in morally difficult cases

14. M. KADISH & S. KADISH, *supra* note 1, at 45-66.

are in an unenviable position. "Because no one tells them under what conditions they may nullify the law, they are likely to feel themselves being pulled in two different directions, with the uneasy feeling that whatever they do will be wrong from some point of view" (p. 364). The Kadish-Greenawalt analysis of their moral plight, especially if it is uncommunicated to them by any legal authority, will not dissolve their perplexities or alleviate their discomforts. For that reason, Greenawalt is not content to leave things as they stand. He concludes his discussion by considering possible reform of the rules. But here too he finds a dilemma: "If jury nullification could be effectively discouraged, jury power to prevent injustice would be diminished. If jury nullification were formally approved, the proper authority of the written law might be undermined" (pp. 366-67). Nevertheless, Greenawalt is hopeful that language can be found that would "alert all jurors to the existence of the nullification power" (p. 367) but would warn them emphatically that it should be used only in the most extreme cases. "The gains in openness and consistency," he concludes, "should outweigh any harm from a slight increase in instances of nullification" (p. 367).

I suspect, however, that a stronger case could be made for the status quo, anomalous though it may be. If jurors know what a promise is, they know that it creates a moral obligation that cannot be overridden by the prospect of gain or the avoidance of minor harm or routine injustice, but only to avoid disastrous losses or unconscionably gross injustice.[15] However, to make that implicit understanding explicit by means of official judicial instructions is likely to make the desperate option seem ordinary and one deserving of routine consideration in all cases. There is no foretelling, of course, what the actual effects of the proposed instructions might be, but there is a danger that explicit legal recognition of a moral right whose existence goes without saying would further distort juries' understanding of the nature and extent of that right. Anomaly cannot be eliminated in any case. A solemn oath with a vague exceptive clause will be at least as befuddling a basis for action as the deliverances of a juror's own conscience. Another implicit message to jurors that goes without saying is, "I never told you it would be easy."

It is not possible in a brief review of *Conflicts of Law and Morality* to do justice to the wide range of issues discussed in this large and comprehensive work. No facet of the conflicts between law and morality is left unexamined. There are clear summaries and transitions, and very useful "illustrations," specially marked and numbered, in the form of hypothetical examples and stories, most of which come from rule-governed practices outside the law. Numerous excellent works by

15. *See* Rawls, *Two Concepts of Rules,* 64 PHIL. REV. 3 (1955); Feinberg, *Duty and Obligation in the Non-Ideal World,* 70 J. PHIL. 263, 272 (1973).

other authors exist on the subjects of this book's individual chapters, but I know of no book that is as good a guide to the whole area.