CONFlicts OF LAW AND MORAlITY — THE
RELEVANCE OF MORAL REASONING

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Professor Greenawalt's thorough examination of the means of resolving conflicts between law and morality\(^1\) raises a persistent question: Why does the weight to be given to moral arguments depend on the sincerity of the agent's asserted moral convictions and the extent to which these are shared by others in his society and not just on the strength of the moral arguments themselves? On Greenawalt's view, sincerity and popularity appear to count for at least as much as moral reasoning. He confines his discussion to lawbreakers who sincerely assert a moral claim that violation of the criminal law was justified\(^2\) and begins by distinguishing moral claims that follow "both the moral evaluations of a majority of the community and any higher standards that may be applicable"\(^3\) from moral claims that only conform to higher standards. Greenawalt argues that sincere moral claims of the first kind present stronger arguments against punishment than sincere moral claims of the second kind, which should be taken into account primarily as evidence of the agent's character and the advisability of punishing him.\(^4\) Related to this distinction is the question whether public officials outside the legislature should ever have the authority to refuse to enforce legislative enactments and, if so, in what circumstances.\(^5\) If those who administer the criminal law—police, prosecutors, judges, juries, parole boards, and prison officials—are free to evaluate moral claims according to their views of majority opinion and the higher standards of morality, they possess the power to nullify the legislature's enactments. Nevertheless, Greenawalt concludes that some such power should be granted to officials who

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2 See id. at 178.

3 Id. at 179.

4 See id. at 184, 212-22.

5 See id. at 183.
administer the criminal law, notably prosecutors and judges. Several elements of this position deserve critical examination. The agent’s sincerity in making a moral claim, or even his making a moral claim at all, is irrelevant to some conflicts between law and morality. Some moral arguments for allowing violations of the law do not depend on the agent’s acceptance of those arguments. It is, for instance, no part of the moral defense of a poor man who steals bread to feed his starving children that he believes, sincerely or otherwise, that he had a moral right to do so. The Model Penal Code, in its definition of the defense of general justification, requires only a belief that the prohibited conduct is “necessary to avoid a harm or evil to himself or to another,” not a belief that the conduct is morally justified. Even apart from the Code, the poor man who believes his conduct to be immoral, or who is in a moral quandary, should not receive harsher treatment than the poor man who sincerely asserts a moral claim. The poor man who believes his conduct to be immoral, but testifies otherwise, may deserve punishment as a perjurer, but not as a thief. Such cases fall outside the focus of Greenawalt’s discussion and similar discussions that emphasize conscientious objection and civil disobedience, because the sincerity of the actor’s stated moral views is crucial to such defenses. From a legal perspective, the potential for dishonest assertion of moral views and the practical difficulty of detecting such dishonesty require thorough examination of the agent’s sincerity. Constitutional doctrines protecting freedom of speech and religion also confine legal inquiry into the agent’s sincerity by limiting evaluation of his supporting moral arguments, particularly in cases of conscientious objection. Although understandable, this emphasis on the agent’s state of mind diverts attention from the moral arguments for permitting disobedience in the range of cases in which such arguments are open to examination.

A more controversial element in Greenawalt’s position is that an agent’s moral views are to be examined for conformity with prevailing moral opinion. The need to rely on public opinion is puzz-
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The fact that most people believe certain conduct is morally permissible does not constitute a reason to believe that the conduct is indeed morally permissible. The poor man's stealing to feed his starving children is morally justified, but not because most people think it is. The appeal to prevailing moral opinion must be licensed by some further reason. For Greenawalt, this reason appears to be tied to the theory of legislation in a representative democracy. Greenawalt argues that because the literal terms of legislative enactments do not always reflect the views of the majority, officials who administer the criminal law should sometimes take account of public opinion to bring the law, as applied, into greater conformity with those views. Such officials should take account of public opinion to remedy some of the defects of the legislative process. It is doubtful, however, that legislative enactments should always conform to the views of the majority, at least under a constitution that protects minority rights. Still less does it follow that administrators of the criminal law should conform their decisions to the views of the majority, either in general or in particular, in evaluating moral arguments that otherwise criminal conduct should not be punished. The obligations of these officials are different from the obligations of legislators, whatever might be the obligation of legislators to follow public opinion.

Indeed, there are good reasons why administrators of the criminal law should not take account of prevailing moral views. Such officials have no greater expertise than legislators at the difficult task of determining what prevailing moral views are. Many of them are appointed officials—in the extreme case, federal judges with life tenure—who are immunized from the influence of public opinion. Many others are elected officials who are responsive only to a narrow, geographically defined segment of the electorate. None of them is likely to be as representative of the public and as responsive to public opinion as the legislature itself. Consequently, their evaluations of prevailing moral views are likely to produce a distorted view of public opinion and to usurp the role of the legislature as the principal lawmaking body. As Greenawalt himself suggests, principles of representative democracy require that the authority to transform public opinion into law rest primarily with

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10 See id. at 180-83.
Of course, these principles do not wholly preclude officials outside the legislature from considering public opinion. Elected officials may take account of the views of their constituents and, even apart from considerations of reelection, are probably under some obligation to do so. An elected prosecutor, for instance, should probably defer to the opinion of his constituents in determining what crimes pose the greatest threat to their interests. Even judges must examine public opinion in determining whether their decrees are likely to be effective or whether their interpretations of statutes are likely to secure obedience. In such cases, however, the majority's opinion is taken into account as a fact, like other facts about society, to which officials must adapt their decisions; it is not used as a standard for evaluating moral claims. An official is no more bound to accept the public's errors in moral reasoning than to accept its errors in scientific reasoning. What an official is legally bound to accept, regardless of errors in reasoning, are the constitutional enactments of the legislature, but these are law, not just samples of public opinion.

A more drastic argument for considering prevailing moral views might be some version of moral relativism: prevailing moral views are all the morality there is; what is right is just what the majority thinks is right. This does not appear to be Greenawalt's position, because he distinguishes between "'higher' standards of morality" and "the moral evaluations of a majority of the community." In any event, moral relativism is either too crude to be plausible or too sophisticated to be immediately helpful. In the absence of some distinction between what is right and what the majority thinks is right, the theory is subject to obvious counterexamples in which prevailing moral views are barbaric; it yields inconsistent results if prevailing moral views change; and it is self-defeating if the prevailing moral view is that one should not always conform to prevailing moral views. A sophisticated relativistic theory must account for the distinction between what is right and what the majority thinks is right, and having done so, it is faced

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11 See id. at 200-01, 208-09, 221-22, 230-31.
12 Id. at 179. Greenwalt effectively withdraws his quotation marks from the word "higher" later in his article. See id. at 213-14.
13 Id. at 179.
again with the initial problem of using what the majority thinks is right as a standard for evaluating moral claims.

Even if prevailing moral views should not affect the evaluation of moral claims, they may still affect conflicts between law and morality by influencing the interpretation of legal prohibitions. Greenawalt contends that “when a law does reflect the moral sentiment of the community, that moral sentiment need not support every potential application of the law.”\(^4\) For example, few citizens “would say that a speed limit should not be broken if that is necessary to save the life of a critically injured person.”\(^5\) But again, unless prevailing moral views are considered only as facts to which the law must accommodate, their relevance remains questionable. A court might examine the public’s reliance on speed limits to determine whether an exception for speeding in emergencies would pose an undue risk of accidents, but it need not rely on popular opinion in favor of such an exception. An alternative analysis, suggested by Greenawalt himself, can account for apparent reliance on prevailing moral views without departing from orthodox methods of legal reasoning. In interpreting a specific prohibition, judges are usually entitled to examine “the whole body of law,” whether authorized to do so by a particular statutory provision, such as the defense of general justification, or by general principles of statutory construction.\(^6\) These familiar methods of interpretation eliminate any need to refer to prevailing moral views. In the speeding example, even in the absence of a defense of general justification, a judge could justify an exception for speeding in emergencies by analogy to the recognized exceptions for ambulances, police cars, and fire trucks. A prosecutor could rely on the same argument or on the further argument, also noted by Greenawalt, that his office could better spend its time prosecuting more serious offenses.\(^7\) Generally, the relevant legal sources either require the same result as prevailing moral opinion or require that prevailing moral opinion be ignored. Cases of the latter kind, such as the Bisbee Deportation case,\(^8\) in which an armed posse kidnapped members of the

\(^4\) Id. at 180.
\(^5\) Id. at 181.
\(^6\) See id. at 194. For similar remarks about constitutional adjudication and prosecutorial discretion, see id. at 210, 216-17.
\(^7\) See id. at 210-11.
\(^8\) State v. Wootton, Crim. No. 2685 (Cochise County Ct., Ariz. Sept. 13, 1919).
I.W.W. and avoided conviction because of a prevailing view that the I.W.W. was a subversive organization,\textsuperscript{19} supply an additional argument for ignoring prevailing opinion as a standard for evaluating moral claims.

Having eliminated the moral views of the majority from the process of resolving conflicts between law and morality, it remains to give some account of how these conflicts are resolved. Greenawalt is surely correct in asserting that legal and moral arguments cannot be considered in isolation from one another: moral arguments affect the interpretation of legal sources and legal obligations affect the strength of moral arguments.\textsuperscript{20} Moral arguments or similar legal arguments can be made in support of a wide range of constitutional, statutory, and common-law claims. This fact dispels some of the doubts surrounding prosecutorial and judicial competence to refuse to enforce legislative enactments in response to moral arguments. When prosecutors and judges accommodate legal rules to moral arguments, they do not resort to extraordinary techniques to decide special cases. Instead, they turn to ordinary methods of legal reasoning. The competence of these officials to resolve conflicts between law and morality must be seen in the broader perspective of their authority, and the limitations on their authority, to change the law in the process of administering it.

Conversely, the relevance of legal obligations to moral arguments depends on the existence of a general moral obligation to obey the law, either because it is the law or because it is just. The more extensive that obligation, the more likely that moral arguments for violation of legal prohibitions must be rejected on moral grounds. Conflicts between law and morality can be resolved as much by moral arguments that take account of legal obligations as by legal obligations that accommodate moral arguments. By their very nature, conflicts between law and morality are likely to be more apparent than real.

The controversial questions, of course, concern the extent of the moral obligation to obey the law and the consequences of a genuine conflict between law and morality. Greenawalt addresses these questions in his discussion of Ronald Dworkin's "strong rights"

\textsuperscript{19} See S. Kadish & M. Paulsen, Criminal Law and Its Processes 554-55 (3d ed. 1975); Greenswalt, supra note 1, at 198.
\textsuperscript{20} See Greenswalt, supra note 1, at 183-84, 185-86, 210, 217-20.
thesis.21 Dworkin argues that some legal rights against the government are also moral rights against the government: as legal rights, they override prospective utilitarian gains to he had from their infringement; as moral rights, they also override erroneous laws and legal decisions that fail to give them overriding effect in competition with utilitarian gains.22 Such rights negate the usual moral obligation to obey the law. Moral rights acquire their peculiar force because they exist regardless of positive legal enactments. "If citizens have a moral right of free speech, then governments would do wrong to repeal the First Amendment that guarantees it, even if they were persuaded that the majority would be better off if speech were curtailed."23 Because moral rights exist regardless of positive enactments, they also survive erroneous decisions.

Although Dworkin does not himself consider the issue, moral rights also outweigh whatever rights others might have to have the law obeyed just because it is the law. Such general rights to have the law obeyed just because it is the law must he distinguished from particular rights to have particular laws obeyed, such as property rights to have property laws obeyed. General rights to obedience apply to all laws; particular rights to obedience may, or may not, apply to particular laws. A moral right must outweigh general rights to have the law obeyed. If it did not, those rights could be invoked to require obedience to erroneous decisions to disregard the moral right. Because those rights would outweigh the moral right, the moral right would not negate the obligation to obey. The moral right would not be a right that overrides erroneous decisions.

Greenawalt offers several criticisms of Dworkin's account of moral rights. The first is premised on a social contract theory of the obligation to obey the law.24 On such a theory, failure to abide by a legal decision erroneously denying a moral right violates the rights of others to compliance with agreed upon legal rules, including rules for settling legal disputes.25 This argument, however, is

22 See id. at 191-95. Dworkin is not explicit about the legal status of moral rights after an erroneous decision. Perhaps they lose force as concrete legal rights but retain force as abstract legal rights. See generally id. at 93-94.
23 Id. at 191.
24 Greenawalt does not himself accept this premise. See Greenawalt, supra note 1, at 219.
25 See id. at 218.
not at all persuasive when applied to the clearest cases of moral rights, for instance, the moral right not to be enslaved. There is a moral right to laws against slavery and, therefore, on Dworkin's view, a moral right to disobey laws and legal decisions allowing slavery. Even supposing a slave has voluntarily agreed to obey the law, does he violate the moral rights of other slaves and slave-owners by violating laws and decisions permitting slavery? Presumably not; nor does he do so if, as Greenawalt himself believes, disobedience is not a violation of rights conferred by a social contract, but "a kind of disrespect for or insult towards one's fellow citizens, a subtle affront to their dignity."

Even in cases in which the moral right is controversial, Greenawalt's arguments are not persuasive. His example is a moral right in an institutional context: an assumed, but controversial, right to teach *Miranda v. Arizona* in a course on constitutional law. The crucial first step in applying Dworkin's account of moral rights to this example is specifying just what the moral right amounts to. It is, first, a right that overrides utilitarian gains. In the example, this component of the moral right is the right not to be prohibited from teaching the case in constitutional law solely for utilitarian reasons. The moral right is, second, a right that outweighs the rights of others to have the law obeyed just because it is the law. In the example, this second component of the moral right outweighs, on a social contract theory, the right to compliance with agreed upon institutional rules, or on Greenawalt's view, the right to respect through obedience. Now, suppose the law school decides, solely for utilitarian reasons, to prohibit the teaching of the case in constitutional law. The professor's obligation to obey this decision is supported by the utilitarian gains supporting the decision and, on a social contract theory, by the right of other faculty members to compliance with agreed upon law school rules, or on Greenawalt's view, by their right to respect through obedience. The first component of the professor's moral right overrides the utilitarian gains, and the second outweighs the rights of other faculty members. The professor has a right to disobey. Generally, a moral right entails a right to disobey, even if the right is controversial.

26 Id. at 219.
28 See Greenawalt, supra note 1, at 218-19.
The simplicity of this entailment suggests that Greenawalt's real disagreement is not with the step from moral rights to rights to disobey, but with the recognition of moral rights in the first place. It is doubtful that he would deny the existence of such rights, because in clear cases like slavery, the existence of a moral right, or something very much like a moral right, appears to be unassailable. A more plausible claim is that only clear moral rights exist. This appears to be one theme in Greenawalt's second criticism of Dworkin: "[T]he reasons for accepting the principle that governments cannot interfere with rights in order to achieve marginal gains in the general welfare may not apply with equal force to the proposal that individuals should properly view their rights as overriding general benefits of obedience to law." 29

This claim requires two qualifications. As Greenawalt and Dworkin agree, 30 if an individual possesses a moral right to disobey, it follows that it would be morally wrong for the government to compel obedience, but not that it would be morally right for the individual, all things considered, actually to disobey. Exercise of the right might violate other moral obligations. Thus, even extensive rights of disobedience might not justify extensive disobedience, still less actually result in extensive disobedience. A related qualification concerns the causal claim that extensive rights of disobedience would erode the general benefits of obedience to law. This claim depends on a causal connection, first, between rights of disobedience and actual disobedience and second, between actual disobedience and erosion of the general benefits of obedience. As Professor Woozley has emphasized, general causal claims about the destructive effects of morally justified violations of the law are questionable. 31 Greenawalt makes a similar point: only deliberate and open violations and violations that are likely to be repeated pose a significant threat to the general benefits of obedience to law. 32

Greenawalt's criticism leaves unclear just what he means by "the general benefits of obedience to law." In some passages, he suggests that these benefits include respect for legal officials and for

29 Id. at 220 (footnote omitted).
30 See R. Dworkin, supra note 21, at 196; Greenawalt, supra note 1, at 218 & n.95.
32 See Greenawalt, supra note 1, at 212-15.
one's fellow citizens.\textsuperscript{33} Assertion of a doubtful moral right that is rejected by legal officials and not asserted by fellow citizens does show some disrespect, but only in the sense that acting according to one's own judgment and contrary to the judgment of others shows disrespect. Disrespect in this sense is simply irrelevant to moral issues. This follows from the general irrelevance of opinions about what is right to the question of what indeed is right. An agent's assertion of a moral right, without his having good reasons to believe the right exists, does show disrespect for others, but in a different sense. Those who offer reasons for denying the existence of the right must suffer the insult of having their reasons ignored. Disrespect in this sense is not diminished if the assertion of the right happens to be correct. Even if there is a right to respect in this sense, it does not appear to be of the same magnitude as moral rights, even controversial moral rights, against the government. The insult resulting from violation of the right to reasoned assertion of rights is not of the same dimensions as the losses resulting from violation of moral rights against the government.\textsuperscript{34}

Another aspect of "the general benefits of obedience to law" suggested by Greenawalt is the benefit from averting incorrect claims of moral right.\textsuperscript{35} If individuals have only clear moral rights against the government, they are less likely to be mistaken about their moral rights. So long as the effect of mistaken claims of right is to reduce the utilitarian gains from obedience to law, this argument does nothing to cast doubt on correct, but controversial, claims of moral right. One aspect of a moral right is that it overrides utilitarian gains. On Dworkin's view, the overriding effect of a moral right is itself overridden only by overwhelming utilitarian gains.\textsuperscript{36} As Greenawalt suggests, however, general disobedience is not a likely consequence of most instances of morally justified violation of the law.\textsuperscript{37} A stronger argument is that correct, but controversial, claims of moral right cause incorrect claims of moral right that result in infringement of other rights, both rights against the government and private persons. This argument succeeds if the asserted

\textsuperscript{33} See id. at 215, 219.\textsuperscript{34} Reasons, however, do count for something. Uncontroverted reasons for denying the existence of a right provide an excuse for disregarding it. See text accompanying note 41 infra.\textsuperscript{35} See Greenawalt, supra note 1, at 219-20.\textsuperscript{36} See R. DWORKIN, supra note 21, at 191-92.\textsuperscript{37} See Greenawalt, supra note 1, at 213-15.
causal connection in fact exists and if the rights that are infringed are more important than the controversial rights that are correctly claimed. Under these conditions, the controversial rights are opposed, not just by utilitarian gains, but by other rights of greater weight. Whether these conditions obtain for all correct, but controversial, claims of moral right is another matter. Only some such claims will result in justified disobedience, and only some of these instances of justified disobedience are likely to cause other instances of unjustified disobedience, and only some of these will infringe other rights of greater weight. Hence, this argument does not cast doubt generally on disobedience based on controversial moral rights.

A final criticism advanced by Greenawalt is that Dworkin's account is incomplete because it fails to address the various roles of public officials. On Greenawalt's view of Dworkin's account, if an individual has a moral right against the government, then the government is morally wrong to infringe that right, and the officials who act on behalf of the government are wrong to do so. Greenawalt concludes, however, that government officials are under "an obligation to accept the underlying distribution of political power and basic judgments of superior legal authorities" that "goes beyond mere utilitarian calculation." It is doubtful, however, that Dworkin would disagree. For instance, if a prosecutor were under a political duty in a particular case to prosecute in violation of a moral right, and if violation of his duty would in fact cause violations of other rights, then he must weigh those rights against the right that would be infringed by prosecution. If those rights are stronger, he would not be wrong to prosecute; if they are not, he would be wrong to prosecute and his moral obligation would be either to decide dishonestly not to prosecute or to resign. Dworkin does take account of the allocation of political roles insofar as they affect the protection of rights.

The difficult case posed by Greenawalt concerns the duty of prison officials to obey the decisions of higher legal authorities. Suppose a prisoner's correct, but controversial, claim of moral

38 Id. at 221.
39 Id. at 221-22.
41 See Greenawalt, supra note 1, at 234-35.
right has been rejected by the courts and that a prison official could, without jeopardizing other rights of greater weight, allow him to escape. Is it wrong for the official to keep him in prison? He could not be blamed for doing so if he was, through no fault of his own, unaware of the violation of the prisoner's right and of the fact that an escape would not jeopardize other rights. Unless the legal system in question were extraordinarily unjust, the prison official's ignorance of these facts would probably be excusable. Knowledge of such facts requires extensive inquiries that a prison official is in no position to make. In most cases, the prisoner's moral right would have no practical moral consequences, because the prison official would have an excuse. This account accords, although in a roundabout way, with the common-sense conclusion that the official could not be blamed for keeping the prisoner confined. It does not accord with the stronger common-sense conclusion that the official is right to keep the prisoner confined, but this inconsistency with common sense simply reflects the force of the assumption that the prisoner has a moral right not to be confined, and hence that the government is wrong to keep him in prison.