Assurances of Objectivity

Kent Greenawalt, *Law and Objectivity*. New York: Oxford University Press, 1992. Pp. x, 288. $45.00.

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I

Is law objective? The question is oddly unsatisfactory—Objective in what sense? Objective compared with what?—and one is naturally curious to know why it is being asked. The best way to approach Kent Greenawalt's latest book[1] is to begin with the accusations made against traditional legal reasoning by members of the Critical Legal Studies (CLS) movement. Legal reasoning has been called "indeterminate and contradictory"[2] by CLS scholars: it "cannot resolve questions in an 'objective' manner,"[3] for it is "not a method or process that leads reasonable, competent and fair-minded people to particular results in particular cases."[4]

Professor Greenawalt is sensitive to this critique, and though he says his purpose in *Law and Objectivity* "is not to defend some pre-existing version of 'traditional legal thought' " (p. viii), his sensitivity often seems very personal. He tells a familiar autobiographical story about the confidence in objective rules and right answers that he brought with him to law school:

> I thought that law was a set of legal rules that applied straightforwardly to events in life, that the lawyer's task was to know a lot about these rules and use them in trying cases and giving advice. I am not quite sure just how I developed this view. Perhaps it was from listening to radio dramas—my parents did not purchase a TV during my formative years—in which the law of criminal guilt was

1. KENT GREENAWALT, LAW AND OBJECTIVITY (1992). All parenthetical page references in the text are to this work. The book is an expansion of Professor Greenawalt's Julius Rosenthal Lectures, delivered at Northwestern University School of Law in 1988 and 1989.

2. Joseph Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 6 (1984), cited in GREENAWALT, *supra* note 1, at 34.

3. *Id.*

4. David Kairys, *Law and Politics*, 52 GEO. WASH. L. REV. 243, 244 (1984), cited in GREENAWALT, *supra* note 1, at 34.

> clear and the only issue was "Who done it?" Perhaps I had a deep psychological need for certainty (p. 5).

Greenawalt relates the rude awakening he suffered when he discovered in his "1L" classes that legal argument was a malleable and manipulative technique, that reasons could be adduced for either side in the cases set out in the textbooks, and that the vaunted objectivity of law might be nothing more than "a cruel, patronizing delusion" (p. 5).

There can be no question of recovering that original innocence; Greenawalt acknowledges that the radio days are gone forever. Indeed, he says, there is a chance that his remaining shreds of certainty are simply artifacts of his "insufficient familiarity with the work of critical legal scholars, feminist legal scholars, and scholars writing about how legal interpretation resembles other interpretive efforts" (p. vii). Nevertheless, he cannot help feeling that the radical critics of law are exaggerating their skepticism for theoretical effect: "Does anyone *really* think the law *usually fails* to provide answers to legal questions, in a sense of 'fails' that has some practical significance?" (p. 11).

That last phrase—"practical significance"—turns out to be very important. Greenawalt does not explicitly present himself as a pragmatist: he does not argue as a matter of jurisprudence that claims to legal certainty are to be tested in the realm of practice and not dismissed merely for want of abstract epistemic credentials. It is significant, however, that the one brief chapter in which he addresses philosophical grounds for legal skepticism is presented as a "theoretical digression" which uninterested readers "may skip" (p. 69). Thus, as far as I can tell, the aim of *Law and Objectivity* is not to make a rigorous philosophical case for certainty in the law. Its aim is to discredit the more hyperbolic CLS formulations and to redeem a sense that there is still enough certainty in the application of legal rules and in the techniques of legal argument to warrant the pride that many practitioners take in the intellectual respectability of their profession.[5] Though Greenawalt's *style* is that of an analytic philosopher—with fine distinctions and concocted examples—he insists that his intention is "to speak comprehensibly to nontheoreticians" (p. 6). And though his readers are bound to be mainly law professors, he suggests that his argument will have succeeded if it convinces those among his colleagues who concentrate like practitioners on particular areas in the law, rather than on "the shifting fashions of legal theory" (p. 5).

II

Greenawalt's case for legal objectivity is based in part on what he takes

5. The very first endnote in the book mentions that the author developed his adolescent belief in legal certainty "despite the fact that my father was a lawyer who knew better" (p. 237).

to be the indisputable determinacy of ordinary language. The first substantive chapter of the book is devoted to an analysis of the following encounter:

> When Sam enters the office of his boss, Beth, she says, "Good morning, Sam, please shut the door." . . . If nothing in Beth's tone of voice[footnote omitted] or in Sam's past relations with Beth suggests other than a straightforward significance to Beth's words, [footnote omitted] Sam has a clear idea of what he needs to do to comply. He is supposed to walk to the door of Beth's office and shut it immediately. Sam's understanding does not depend on any prior relationship between Beth and Sam; he will know what to do even if it is the first day on the job for him or Beth. . . . If Sam walks over to the door and shuts it, he has complied with Beth's directive. If in full command of his faculties, he sits down in a chair and doesn't budge for five minutes, he has failed to comply [footnote omitted] (pp. 13-14).

Greenawalt thinks that this happy example shows "that imperative language can be substantially determinate in context" (p. 14). One suspects that whether this optimism is justified will depend, in large measure, on the ellipses—"[footnote omitted]"—that I have indicated; and that indeed is the way it will turn out. For the moment, however, let us trace Greenawalt's argument as he presents it in the body of his book.

The basic idea is that since Beth and Sam share a linguistic competence in English, they have a common understanding of the meaning of "shut" and "door," of the syntactical significance of their arrangement in this utterance, and of the tones and conventions associated with the imperative mood. Beth knows what Sam is likely to think she intends when he hears these sounds, he knows that she knows that and that that is the reason she is making them, and so on. In addition to the coordination that these strictly linguistic conventions enable Beth and Sam to establish, Sam is likely also to make certain contextual assumptions. He knows, for example, that the customary time for compliance with such requests in a business setting is immediately upon receiving them, and that it is usually the door to the office that the maker of such a request wants closed rather than, say, the door to a drinks cabinet or to the private bathroom behind her.

Of course, the interaction between Beth and Sam concerns a one-on-one directive rather than a legal rule. But the basic point about linguistic and contextual determinacy translates, Greenawalt believes, into the legal case. Suppose a city ordinance reads "Persons walking dogs in public parks must have their dogs leashed." A citizen of the town, whom Greenawalt calls "Olive," knows the meaning of "dog" and "park" and knows that these terms apply, respectively, to her pedigree Alsatian Angus and to the green area set aside for recreation in the center of town,

if they apply to anything at all. She also knows what "walk" means when used as a transitive verb, and she knows the meaning of "leashed"—controlled by the person walking the dog, specifically by means of a thong, one end of which is held in the hand, the other end attached to the dog. There is simply no room for disagreement about the fact that she would be violating the ordinance if, for example, she were to bring Angus to the park and deliberately set him loose—detaching him from the thong she was holding—to run free over the lawns as he pleased. Though the authors of the ordinance did not have this particular situation in mind, as Beth had in mind *Sam's* closing the door that very morning, they had it in mind nevertheless to issue a directive in language that happens to apply uncontroversially and thus, as Greenawalt wants to say, *objectively* to Olive's situation (pp. 42-44).

In the light of examples like this, Greenawalt concludes that CLS scholars are exaggerating when they say that the application of legal rules is always indeterminate. But unless his point is *simply* to show them up as having exaggerated their thesis, the case for objectivity must be taken a little bit further than that. What is it about Olive's case or the Sam-Beth interaction that enables us to speak of the determinacy of rules? What is it in these examples that casts real light on the issues and quandaries of modern jurisprudence?

It cannot be merely the existence of natural languages and linguistic conventions, assigning semantic value to words like "dog" and "door" or significance to syntactical arrangements like "[noun] [adjective phrase] must have [noun] [verb]-ed." Greenawalt is right to insist that skeptics cannot build anything on indeterminacy at this level; such skepticism would be belied by their own practice of publishing (skeptical) books and articles in English for others to read. This is not to say that natural language provides terms that apply themselves deductively and unproblematically to determine the outcome of particular cases.[6] Nor is it to say that we currently possess a good account of linguistic conventions. It is simply to say that, in law as in other areas of life, we take

6. Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV.795, 798 (1989), alleges:

> In the traditional conception of the nature of rules, a rule is self-applying to the set of particulars said to fall under it; its application is thought to be analytic. . . . Another way of putting this is to think that somehow the applications to particulars are already present in the rule itself.

If the traditional view is supposed to be that words light up or click like geiger counters in the presence of the particulars to which they apply, it is of course, as Radin notes, absurd, and it is no surprise that no one held it. Perhaps Radin means that traditional jurists thought that the meaning of a general word was a set-theoretic list of the particulars to which it applied; one could then "deduce" particular applications from an understanding of the general concept. But a moment's reflection reveals that this also is too absurd to have been held by any respectable philosopher, let alone to have been "the traditional conception." At any rate, neither of these positions is the one that Greenawalt is defending.

advantage of the conventional existence of languages and of their place in our ordinary dealings with one another.

In this regard, critics have made much of certain arguments in Ludwig Wittgenstein's later work, in particular his suggestion that it is impossible to provide determinate criteria for assessing whether or not one is following a given rule (like the rule for generating a numerical series by addition, or the rule for the use of the word "pain").[7] Greenawalt is right to notice that the fact that this is generally referred to as an argument about "*rule*-following" does not mean that it has any particular relevance to the law. It has relevance only at the level of the determination of ordinary language meaning, on which law, like other social institutions, may rely:

> No one denies that for ordinary cases, human beings have practical rules for adding and for describing standard instances of doors. If legal applications can achieve that degree of certainty, they are certain enough. . . . The general skepticism about rules offers no basis, because it does not consider the question, for saying that legal applications are subject to some uncertainty that does not beset standard instances of addition and naming objects (p. 72).

All the same, Greenawalt's discussion of the Wittgensteinian issue is rather peremptory. It is not at all clear what use there is for a jurisprudential work on legal objectivity, if it devotes no more than a page and a half to a topic that has provoked as much misunderstanding as this has. John Stuart Mill once remarked that the hard thing about political argument was not convincing your audience of the plausibility of your opinion, but convincing them that there were no other considerations on the matter which, if brought up, would cast doubt upon it.[8] This reviewer, for example, is sure that Greenawalt's conclusion on the Wittgenstein issue is correct, but that is only because he has read something more than Greenawalt's brisk assurances on the matter.[9] Greenawalt says nothing to convince anyone who thinks that the force of the "rule-following" problem for law lies in the *detailed* application of Wittgenstein's argument to the legal context.

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7. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 56e-88e paragraphs 143-242 (G.E.M. Anscombe ed., 1967).

8. See John Stuart Mill, *On the Spirit of the Age, II*, in 22 COLLECTED WORKS OF JOHN STUART MILL 238, 243 (Ann P. Robson and John M. Robson eds., 1986). In this essay, Mill concedes that ordinary people are capable of following complicated arguments in economics and philosophy. "But," he continues, "when all is done, there still remains something which they must always and inevitably take upon trust: and this is, that the arguments really *are* as conclusive as they appear; that there exist no considerations relevant to the subject which have been kept back from them; that every objection which can suggest itself has been duly examined by competent judges, and found immaterial."

9. For a deeper discussion, see Brian Bix, *The Application (and Mis-Application) of Wittgenstein's Rule-Following Considerations to Legal Theory, in* WITTGENSTEIN AND LEGAL THEORY 209 (Dennis Paterson ed., 1991).

Besides natural language, Greenawalt rests the case for determinacy in the Sam-Beth and Olive examples on the existence of shared contextual assumptions. When Sam hears the instruction, "Please shut the door," in a room where there are several doors, he must quickly infer which one is meant. There are two ways in which he can approach this. His first clue is Beth's use of the phrase "*the* door" without any further qualification. This indicates that she intends him to shut the door which will most quickly occur to him as the object of her intention: the door he has just opened, for example, or the door he has walked through, or the door whose handle he is holding. If she had intended him to shut some door other than the one she expected him to think of first, she would have added something to the phrase. Choice of door here is like identifying a salient point in the solution of a coordination problem. Alternatively, Sam may ask himself what the purpose of her directive might be, and take his clue as to choice of door from that. Bosses often want to conduct conversations with employees without being overheard or casually interrupted: these are reasons for focusing on the door to the outer office, rather than on the door to the drinks cabinet or the door to the bathroom.

This second strategy is particularly important in the case of a legal directive. It may occur to Olive, in our example, to wonder whether the leashing ordinance—"Persons walking dogs in public parks must have their dogs leashed"—has the same logic as "Persons walking dogs in public parks must have their dogs vaccinated." Owners are not expected to be actually vaccinating their pets while they are walking them around the park; accordingly, Olive may wonder whether it is sufficient to comply with the leashing ordinance that Angus has been held on a leash at some time in the past twelve months. This possibility, however, does not survive any speculation as to the point or purpose of the ordinance. No plausible purpose could be served by it except on the assumption that the leashing referred to is leashing during the period that the dog in question is actually being walked in the park (p. 43).

Olive might try another tack. Angus is an exceptionally well-behaved dog and is much less of a menace off the leash than most dogs are on it. Can he not then be considered constructively leashed, by a sort of legal fiction? According to Greenawalt, this question can often be answered firmly in the negative: "[T]his sort of minor offense needs simple enforcement. Police and park officials can see if dogs are unleashed; control is more subtle" (p. 44). If Olive's interpretation were adopted, probably only owners whose dogs caused serious havoc would end up in court. The legislature has used the literal language of leashing rather than the general language of control, and presumably had a reason for making that choice. And so on.

The same appeal to underlying purposes may help in dealing with a

problem that is often taken to be the basis of legal uncertainty—the problem of exceptional cases. Let us return to Sam and Beth. As Sam goes to close the door he sees the company president approaching the entrance, evidently intending to enter. Should he interpret Beth's directive as instructing him to close the door in the president's face? Clearly not; but what happens to determinacy and objectivity, once this sort of exceptional case is admitted? Sam may conjecture that Beth would not *want* him to close the door in these circumstances; but that may not be a route to rule-determinacy in general, involving as it does one person's subjective speculations about what another's intentions might have been in some given circumstance. Alternatively, Sam may base his hesitation on a consideration of the purpose underlying the directive, and the broader purpose served by his subjection in general to directives from his superiors in the organization:

> If purpose is put at the very abstract level of the company's welfare, shutting the door [as the president approaches] will disserve the very purpose that led Beth to ask Sam to shut the door. . . . Sam and others in similar situations are expected to act with some sensitivity to the reasons for the directives, not carrying them out when unexpected events raise exceptionally strong countervailing reasons (p. 18).

Greenawalt toys briefly with the idea that the requirement that Sam should exercise this sensitivity is built into the very *meaning* of Beth's directive (that is, what she means is "Please shut the door unless . . ."). He rejects that, however, and wisely, in my opinion, because it would undermine the point about the determinacy of natural language, which, as we have seen, is the first premise of his position. His considered view is that the "implied exceptions" for cases like this go to the imperative force of the directive, in the hierarchy of Beth over Sam, rather than to the meaning or content of the directive itself (pp. 16-17).

Even so, this approach to rules involves some theoretical difficulty. Greenawalt notes Frederick Schauer's suggestion that the "ruleness" of a rule is undermined if the addressee is required to consider and act on the balance of reasons as they occur to him; in these circumstances the directive itself would be little more than a "rule of thumb" reminding him of the (defeasible) advantages of door-shutting for the organization.[10] More generally, Joseph Raz has argued that the authority of rules is to be understood on the basis that they provide "exclusionary reasons," that is, reasons for the addressee not to act on the balance of reasons as they appear to him.[11] Inasmuch as he works out for himself whether company

10. *See* Frederick Schauer, *Formalism*, 97 YALE LAW JOURNAL 509, 534-38 (1988).

11. *See* JOSEPH RAZ, PRACTICAL REASON AND NORMS 58-84 (1975). Greenawalt, however, does not cite or discuss Raz's work.

welfare is best served by shutting the door in the face of the president, it seems that Sam is no longer treating Beth's directive as an exclusionary reason for action.

Greenawalt's response to this is that the rule remains authoritative *qua* rule for all ordinary cases. Though exceptions can always be imagined, "[m]any, many standard circumstances will remain," he says, in which Sam's duty in regard to the directive is clear (pp. 18-19). But this misleadingly suggests that the issue is a purely quantitative matter: "The reader's experience will attest that in *an extremely high percentage* of situations in which someone is directed or requested to shut the door, no genuinely exceptional circumstance intervenes" (p. 18; my emphasis). Percentages like this are precisely what rules of thumb are based on; whereas rule-following in the authoritative sense is qualitatively different from that.

Occasionally Greenawalt gestures towards the real solution to this difficulty—that Beth's directive is understood by Sam to be exclusionary of certain reasons and not others. He is not to consider the effect of closing the door on his own well-being, nor even its marginal effect on Beth's well-being; but it may be understood that there is a range of other considerations which, if they are present, are not excluded by the force of the directive. The idea that a norm may be exclusionary of some reasons and not others—and that that distinction may be quickly recognizable as one of kind and not involve fresh calculations by the addressee on every occasion—has emerged in recent discussions of Raz's work.[12] Now it is by no means clear whether it can be sustained. Nevertheless I think it a pity that Greenawalt did not alert his more theoretically-minded colleagues to the existence of this discussion.

In the examples we have been considering, the role of shared assumptions and underlying purposes is relatively clear, as are the relevant assumptions and purposes themselves. It is not hard for Sam to figure out the point of Beth's directive and the organizational reasons for his subordination to her; and the range of purposes that Olive, even at her most contrary, can attribute to a dog-leashing ordinance is fairly limited. There are two directions one could go from there. One could take these examples as models of the determinacy of actually existing legal systems: that is, one could say, in Greenawalt's rhetoric, that "an extremely high percentage" or "many, many" applications of legal rules are as determinate as this, and use that conclusion to discredit legal skepticism. Alternatively, one could use these examples to model the *in*determinacy of actually existing legal rules, highlighting the happy ease with which Sam

12. See particularly the articles by Michael S. Moore, Yasutomo Morigiwa, Stephen Perry, and Joseph Raz in *Symposium: The Works of Joseph Raz*, 62 S. CAL. L. REV. 827, 897, 913, 1153 (1989).

and Olive can reach confident conclusions about underlying purposes to throw into relief our *in*ability in many hard cases to do just that.

The second approach is more subtle and surely the more illuminating, and it pays better tribute to whatever strengths the skeptical position has. After all, people do disagree and disagree radically about the purposes to be attributed to legal and constitutional provisions, about the methods for determining and imputing such purposes, and about the underlying purpose of legal authority and subordination in general. The way that Greenawalt establishes the determinacy of Sam's case and Olive's case implies clearly, though in a backhanded way, that such disagreement and uncertainty about purpose are bound to undermine the determinate and objective application of the law. If Sam were as torn about the underlying purpose of "Please shut the door" as, for example, contemporary constitutional scholars are about whether the First Amendment serves expressivist or civic republican purposes, he would stand paralyzed on the threshold to Beth's office not knowing what to do, whether the president were approaching or not.

Now, as a matter of fact, constitutional adjudication is not paralyzed—exactly at the point at which Greenawalt's analysis of "objective" decision-making suggests that it ought to be. So the conclusion is obvious: adjudication proceeds in the cases where the indeterminacy thesis *really* bites on a basis that has little or nothing to do with objectivity as Greenawalt conceives it. Needless to say, this line of argument is not considered in *Law and Objectivity*; indeed there is very little attempt by the author to stand back from his examples and reflect in a subtle and reasonably open-minded manner on what they may show about the plausibility of his opponents' positions

I said at the beginning of this section that whether Greenawalt's analysis of Sam and Beth works may depend on some of the footnotes I omitted from the quoted passage. Recall that Beth has said to Sam, "Please shut the door," and that Greenawalt expects Sam to proceed immediately to close the office door unless there is something in his past relations with his boss that suggests "other than a straightforward significance to Beth's words" (p. 14). At this point, Greenawalt adds in a footnote: " 'Shutting the door' might mean cutting losses on a project Sam is supervising" (p. 238 n. 6). In other words, language may be used in a way that is special to this type of interaction, a way that is belied by the ordinary conventions of English usage.

That possibility is remote enough to be dismissed and relegated to a footnote for the purposes of the example, but it is by no means clear that this dismissal should hold as we extrapolate from Sam's case to the more difficult issues of modern jurisprudence.

As I understand it, the argument that law is indeterminate is often based, first, on the existence of a specialized legal vocabulary and legal

hermeneutics, and, secondly, on the realization that the conventions that constitute this special discourse are highly equivocal and contested. Both points are relevant to the issues Greenawalt is discussing. The first undermines the transparency of legal standards in terms of natural language and calls into question an important legitimating connection between legal determinacy and some of the ideals associated with the rule of law.[13] The second contradicts the claim that legal rules can serve as an objective basis for settling social and political disagreements even among those who have been acculturated in its ways. If a conservative group of lawyers and scholars have one specialist understanding of a legal provision and a liberal group another, then the idea that the determinacy of the standard is what settles disputes between them is simply hopeless.

Certainly there is more to be said on the matter than this, but Greenawalt's relegation of the issue of specialist understandings to a two-line footnote does not advance the discussion at all. There is a brief insistence late in the book on the transparency of legal reasoning. According to Greenawalt, all legal reasons have counterparts in the ordinary reasoning processes of common sense (pp. 199-201):

> [W]hen I think of major decisions in fields I know something about, constitutional law, criminal law, torts, and contracts, I cannot recall one whose underlying basic arguments would be incomprehensible to a person of ordinary intelligence and a high school education (p. 199).

But even if that is true, the situation may be that there are multiple and competing connections between ordinary modes of reasoning and those accepted in the law; and then something must be said to address the specter of contestability that competing modes of reasoning give rise to. Also, there is some discussion in Chapter Three of what counts as a shared understanding of some legal provision among practitioners. Greenawalt insists that unanimity is not required: "If . . . there is only slight dissent from the prevailing understanding—one person out of a hundred takes a view different from the other ninety-nine—we can still speak of a shared understanding" (p. 53). But that is almost all he says on the matter. His discussion, again, is misleadingly quantitative and entirely defensive—insisting that the standards for consensus should not be as high, and that there is not as much disagreement, in fact, as the CLS scholars claim. He makes no attempt to state the opposing case in its strongest terms, in a way that would add interest as well as self-satisfaction to its rebuttal.

I do not think, then, that this part of Greenawalt's book will convince any one who has been troubled by the indeterminacy critique and who

13. *See, e.g.*, the discussion of promulgation and clarity in LON FULLER, THE MORALITY OF LAW 49-51 and 63-65 (1964).

has an open mind on the philosophical issues that underlie it. One or two of the points that Greenawalt makes may convince such a person that the critical case is overstated. He does a good job of showing that "[t]he norms of any legal system are determinate in their nonapplicability to countless human activities" (p. 37):

> Pushing someone during an argument is not a larceny, or a taxable transaction, or acceptance under the law of contract, and it is not a tort (civil wrong) against a stranger who witnesses the pushing on the television news. If a citizen of Poland pushes another Polish citizen in Warsaw, that is not a crime in Vermont (pp. 36-37).

Arguments like this are no doubt useful in establishing Greenawalt's thesis that, for practical purposes, it is "ridiculous" to suggest that no legal questions have determinate answers. But I'm afraid his discussion seldom rises above this level of argumentation, and even when he addresses the issue of genuinely hard cases, he shies away from hard argument with a bland but unconvincing assurance:

> The percentage of determinate answers may decline as we move from the multitude of instances when an individual thinks about possible liability, to instances when such thoughts lead to discussion, to instances when an expert (or a published guide) is consulted, but even in the last category many answers to legal questions will be indisputable (p. 37).

III

Consideration of the determinacy of legal rules takes up only the first part of the book. The remainder is devoted to brief discussions of a variety of topics which have very little in common, except that each raises questions that could be phrased using the term "objectivity." These topics include: (1) the law's interest in controlling external behavior rather than thoughts and attitudes; (2) the use of "reasonable person" standards rather than subjective standards in determining liability; (3) the meaning of "bias" and "discrimination"; (4) affirmative action; (5) the feminist critique of generality in law; (6) law and economics; and (7) the relation between legal standards and moral and religious standards.

With the exception of (7), which I shall consider in section IV, the discussion of these issues is brisk and cursory. I think I can save the reader time by relating the main conclusion on each topic. (1) "Few people in American society would wish the law to alter radically in this respect" (p. 97). (2) "Even if the difference between being aware of a risk and not being aware of it is of moral importance, the attempt . . . to discern what a particular individual thought is . . . altogether too complicated for the crude fact-finding methods of criminal trials" (p. 102). (3) "To turn all disagreements about acceptable use of categories of race and

gender into issues of whether people are 'biased' is to inflate rhetoric and obscure various bases of disagreement" (p. 128). (4) "[T]he likely benefits of [affirmative action] classifications often outweigh the likely harms and . . . these likely benefits are sufficient to justify them" (p. 133). (5) "[S]ome aspects of particular activities rightly call for a more principled approach than others" (p. 158). (6) "Any argument that wealth maximization is the proper objective of a political system is demonstrably fallacious, though I shall not attempt the demonstration here" (p. 174). Those are Greenawalt's positions. I will not bore the reader with the details of his defense of them. The arguments, such as they are, are scarcely more interesting (or, for that matter, very much more substantial) than the conclusions.

The unsatisfying nature of these discussions raises a question about the overall strategy of the book. The book is supposed to comprise a discussion of the various senses in which law might be thought to be, or not be, objective. Now Greenawalt acknowledges at the outset that the word "objectivity" may be unhelpful: "Perhaps 'objectivity' has become so unclarifying and controversial a label, we would do better to find another vocabulary" (p. 3). "Objective," after all, can mean external (as opposed to internal), provable (as opposed to conjectural), constrained (as opposed to discretionary), reasoned (as opposed to arbitrary), grounded (as opposed to autonomous), fair (as opposed to biased), general (as opposed to particular), and so on.[14]

Indeed, in several of these senses, it is not clear that *objective* is necessarily a good thing for the law to be. Defenders of legal reasoning have often stressed its autonomy and independence, rather than its being objectively grounded in some other reputable discipline such as moral philosophy or social science.[15] In criminal law, there is often a call for standards that are tailored more to the subjective beliefs and apprehensions of particular persons than to the objective standards of "the reasonable man."[16] Feminist jurisprudence, too, has attacked the "abstract universality" implicit in liberal conceptions of the rule of law, stressing the need for particularized and relational concern rather than impersonal and objective standards.[17] The discussion of these topics in the book does not fit easily with the overall sense that the objectivity of law and legal reasoning is something to be vindicated against a radical or skeptical critique.

I think that Greenawalt's initial impulse was to address the issue I identified in sections I and II: the determinacy of legal standards, the intellectual respectability of legal reasoning, and the defense of all that

14. I have adapted this from a list Greenawalt provides, *supra* note 1, at 93.
15. For Greenawalt's discussion of this issue, see *id.* at 197-202.
16. Greenawalt devotes a chapter to this: *id.* at 93-120.
17. See the discussion in *id.* at 154-159.

against the CLS onslaught. Noticing that this was often presented as a concern about the objectivity of law, Greenawalt responded initially with the classic analytical riposte that "objective" has a number of different senses, not all of which are addressed by CLS scholars. His own patient analysis of those different senses, however, revealed an array of other intriguing topics, on some of which—as it happened—Greenawalt also had a view. Calling his project "Law and Objectivity" enabled him to combine a discussion of those topics with the pursuit of his main theme. The result, then, is not really a sustained argument in defense of legal determinacy at all, but a volume consisting of a series of general remarks on a variety of issues of interest to the author, combined under what he himself concedes is a very "broad rubric" (p. vii).

I doubt that anyone engaged in the detailed discussion of any of these topics will come away from the book with the thought that it has advanced that discussion very much. A reader may come away with an assurance that there is a sensible middle-ground on many of these issues and that Kent Greenawalt occupies it. But whatever comfort accrues from knowing that is likely to be offset by the rather bad name that assurances without arguments give to traditional jurisprudence in the eyes of the more radical critics of the law.

IV

The last part of *Law and Objectivity* deals mainly with the various relations that can exist between law and morality—"morality" both in the sense of existing community standards, and in the sense of the transcendent standards to which we aspire in our critical moral thinking. The idea is that a connection here might assure us that

> the law is rooted in something broader, that it is not spun out of the web of an autonomous law, is not floating free as the mere fiat of those who happen to make it, and is not simply a series of *ad hoc* compromises emerging from clashes of personal preferences (p. 168).

In his discussion of this possibility, Greenawalt shows a refreshing willingness to take the skeptical position seriously, in detail, and on its merits. He notes, first, that "[f]acile talk about dominant cultural morality" often assumes simplistically that there *is* a single moral consensus in society (p. 166). But on many vexed questions that the law has to face—he cites the obvious example of abortion—there is sharp moral division. Indeed, to the extent that there is a shared consensus on certain matters—the wrongness of racism, for example—that may be partly a *product* of the law and thus not something that in itself can be cited as an independent anchoring for legal standards (p. 168).

In any case, such grounding would beg the question of whether the

dominant consensus on morality is itself respectable from a critical point of view. Parts of the dominant morality may benefit some in society at the expense of others—enshrining dominant patterns of class or gender, for example. "Obviously," says Greenawalt, "if law fits with these undesirable aspects of cultural morality, that fit does not show conformity with any objective standard of goodness or rightness" (p. 169). On the other hand, there is wisdom, he says, in avoiding the tension and resentment that arises inevitably from a dislocation between legal norms and local moral standards (p. 169). And he summarily dismisses Roberto Unger's argument that even respectable local standards should not be set in stone, observing that "being dragged in different directions does not usually enhance people's freedom in a significant sense" (p. 169).

More interestingly, Greenawalt criticizes a position advanced recently by my colleague, Mel Eisenberg, to the effect that common law reasoning involves the use of moral standards simply on the basis that they are socially accepted rather than on the basis of any critical or philosophical assessment.[18] Greenawalt insists that in a pluralistic society, where there is a diversity of views, and where accepted standards wax and wane, it is impossible for courts to follow Eisenberg's prescription without making critical moral judgments in their own voice. For they must determine, when a community standard is contested, how much support is enough support, and they must decide also what weight to give a standard dominant in the community against other standards (say, standards laid down in the constitution) when they conflict. These questions cannot be addressed without an appeal to standards of appropriate political morality (pp. 217-18).

What is to be said, then, about the grounding of legal standards in critical morality? Greenawalt accepts that legal standards often explicitly require judges to answer moral questions in their own voice,[19] and he accepts also the position (associated with Ronald Dworkin's jurisprudence[20]) that, even when moral questions are not posed explicitly in the law, legal interpretation requires in part that a court make judgments about moral rights and justice (p. 215). Greenawalt's initial position is that, if we focus on legal questions whose answer depends on sound judgments of morality, we may conclude that the legal questions have objec-

18. MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW 15 (1988): "The question then arises, what criteria should a moral norm satisfy if it is to figure in common law reasoning? The answer is that when moral norms are relevant to establishing, applying, or changing common law rules, the courts should employ social morality, by which I mean moral standards that claim to be rooted in aspirations for the community as a whole, and that, on the basis of an appropriate methodology, can fairly be said to have substantial support in the community, can be derived from norms that have such support, or appear as if they would have such support."

19. See his discussion (pp. 188-90) of the "good moral character" standard in immigration law, as discussed in Repouille v. United States, 165 F.2d 152 (2d Cir. 1947).

20. *See* RONALD DWORKIN, LAW'S EMPIRE 249 (1986).

tively correct answers only if the moral questions have correct answers (p. 221).

However, the view he ultimately adopts is a little more complicated than that. If moral skeptics are correct, and there are no right answers to questions of critical morality, then that skepticism provides a ground for legal skepticism. On the other hand, refuting moral skepticism, though necessary, is not sufficient to refute legal skepticism (in regard to the moral underpinning of legal standards). Everything depends on the *basis* of the right answers in morality and on the sources and character of moral reasons. Greenawalt asks us to concentrate on the possibility—a possibility he personally embraces (p. 221)—that moral objectivity is based on the will and understanding of God, and that it is reasonable for us to follow God's will to the extent we can ascertain it. It does not follow, he says, from this theologically grounded moral objectivity that legal questions which turn on moral issues also have correct answers.

> The moral question has a correct answer only in light of sources of understanding that are connected to . . . theological truth. These sources are not subject to interpersonal reason and validation by persons who do not accept the theological premises. The central issue is whether reasons based on these sources count for a "balance of reasons" that constitutes a correct answer in law (p. 222).

The trouble, he indicates, is that our political and constitutional heritage precludes appeal to reasons of certain kinds in public life. "Given principles of religious liberty and separation of church and state . . . , a reason that rests on a theological truth that is not generally accepted should not count as a reason for what the existing law provides" (p. 222). The critical moral reasoning that we use in legal settings must be limited to arguments that do not rest on unshared religious claims. Unfortunately, by that limited set of considerations, many of the moral issues implicated in law are "radically inconclusive" (p. 226). It follows—and Greenawalt acknowledges this—that the legal questions that implicate them do not have right answers, though he adds that it is no doubt part of the mentality of judges to go on addressing them as if they did.

I hope I have indicated that this part of *Law and Objectivity* is much more interesting than the rest. In this discussion, Greenawalt is revisiting themes that he took up in his earlier work,[21] and he is sufficiently engaged with them not to bypass the tough issues with the brusque but unconvincing reassurances of common sense that pass for argument in the rest of the book.

There are, of course, a number of questions that can be raised about his position on religious arguments. Do religious liberty and church-state separation really entail the wrongness of appeals to theologically

21. *See* KENT GREENAWALT, RELIGIOUS CONVICTION AND POLITICAL CHOICE (1988).

grounded truth in legal argumentation? Couldn't we allow such argumentation, but still insist that it must never be used to justify religious establishment or restrictions on individual freedom of worship? If religious reasons are not adduced in favor of religious restrictions, why exactly is it wrong to appeal to them? Greenawalt suggests that it is because they involve modes of reasoning that are not shared in the community. But that could be said, in the last resort, of any mode of reasoning, including scientific, sociological, and historical reasoning. There is a growing literature on these matters in modern political philosophy,[22] and Professor Greenawalt is of course well aware of it. One could have wished that he had gone on to address that literature directly in this discussion: much more, as he concedes, could be said (p. 222). But by the end of *Law and Objectivity*, one is sufficiently relieved to have found at last *some* argument, *some* detail, and *some* engagement, that its author may be excused for having run out of space at the crucial moment.

22. *See, e.g.*, Thomas Nagel, *Moral Conflict and Political Legitimacy*, 16 PHIL. & PUB. AFF. 215 (1987); Joseph Raz, *Facing Diversity: The Case for Epistemic Abstinence*, 19 PHIL. & PUB. AFF. 3 (1990).