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Annual Review of Law and Ethics

Band 11 (2003)

Herausgegeben von
B. Sharon Byrd
Joachim Hruschka
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Criminal Law and Legal Philosophy

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Vorwort

Der vorliegende Band des Jahrbuchs unternimmt es, kurz nach Anbruch des 21. Jahrhunderts einen Überblick über den Stand der aktuellen Diskussion zum Verhältnis von Strafrecht und Rechtsphilosophie zu geben. Dass dies nicht mit dem Anspruch auf Vollständigkeit erfolgen kann, liegt angesichts der Fülle einschlägiger Themen und von Stellungnahmen dazu auf der Hand. Zumindest zeigen die Beiträge, dass die Debatte keineswegs als abgeschlossen betrachtet werden kann und dass das Strafrecht nach wie vor von seiner traditionellen Nähe zur Rechts- und Moralphilosophie profitiert.

Für ihre Unterstützung bei der Drucklegung dieses Bandes des *Jahrbuchs* danken die Herausgeber insbesondere Frau *Ayke Darius* (Erlangen), Frau *Anette Hübner* (Frankfurt / Oder), Frau *Susen Pönitzsch* (Frankfurt / Oder) und Frau *Anja Richter* (Frankfurt / Oder). Frau *Richter* hat auch die dem Band angefügten Register erstellt. Herrn *Lars Hartmann* im Verlag Duncker & Humblot, Berlin ist für die verlagsmäßige Betreuung des Bandes zu danken.

Das Jahrbuch stellt im übrigen auf seiner Internetseite

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im Hinblick auf schon erschienene Bände weitere Informationen zur Verfügung, insbesondere auch englische und deutsche Zusammenfassungen der Artikel sowie Bestellinformationen. Der nächste Band des *Jahrbuchs* wird dem Themenschwerpunkt „Zur Entwicklungsgeschichte moralischer Grundsätze in der Philosophie der Aufklärung – The Development of Moral First-Principles in the Philosophy of the Enlightenment“ gewidmet sein.

Die Herausgeber

Preface

This volume of the *Annual Review* provides an overview of current discussions on the relationship between criminal law and legal philosophy as they appear shortly after the beginning of the twenty-first century. It obviously can make no claim to completeness in light of the multitude of relevant issues and positions taken toward them. Still the contributions reveal that the discussion is far from being replete. They also show that criminal law continues to profit from its traditional proximity to legal and moral philosophy.

The editors would like to express their gratitude particularly to *Ayke Darius* (Erlangen), *Anette Hübner* (Frankfurt / Oder), *Susen Pönitzsch* (Frankfurt / Oder), and *Anja Richter* (Frankfurt / Oder) for their support in preparing the *Annual Review* for publication. *Anja Richter* also compiled the index included in this volume. *Lars Hartmann,* at Dunker & Humblot Publishers, Berlin, deserves our thanks for supporting us through the publication process.

The *Annual Review's* homepage:

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provides further information on past volumes and includes both English and German abstracts of the articles published as well as information on ordering the *Annual Review.* The next volume of the *Annual Review* is devoted to the topic „The Development of Moral First Principles in the Philosophy of the Enlightenment."

The Editors

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Philosophische Grundlagen des Strafrechts – Philosophical Foundations for Criminal Law

"Obey the Law" as a Moral Rule

Bernard Gert

I. Theoretical and Practical Problems

One of the standard problems in political and legal theory is that of accounting for our obligation to obey the law. Closely connected with this theoretical problem is one that has more practical impact. Under what conditions are we justified in not obeying the law? The two problems are obviously closely related, for it seems that if we provide an account of our obligation to obey the law, this will yield an answer to the question of when we are no longer obliged to do so. In fact, these two questions have generally been considered together. However, contrary to what seems to be the relationship between these two questions, the answer to the theoretical one being prior to the answer to the practical one, for the most part the desired answer to latter question usually determines the answer that is given to the former one. Philosophers look for an answer to the theoretical question that will yield the answer they desire to the practical question.

One result of this primacy of the practical is that the theoretical answer does not provide support for the practical. Once it is known that the theoretical answer is formulated so as to yield a given practical answer, and we disagree with that practical answer, we have no independent reason for accepting the theoretical answer. This can be seen by examining one of the most common answers to the theoretical question, viz., that our obligation to obey the law is based upon our consent. Because it is quite clear that most of us have never given explicit consent, all theories of consent make use of implicit consent. Although the concept of implicit consent has significant problems in this context, I shall not be concerned with them. For the purpose of this discussion, I shall examine only the conditions of that consent that are put forward by its proponents.

II. Hobbes and Locke

Comparing Hobbes and Locke, both of whom base our obligation to obey the law on consent, shows quite clearly the primacy of the practical. Hobbes does not want to allow disobedience to the law except under the most extreme circumstances, viz., when obeying the law will result in your death or serious injury. Thus

his theoretical account posits a state of nature that is so bad that in order to escape it, people consent to obey the law or sovereign without any limitations except, of course, for the inalienable right of self-defense.[1] Hobbes realizes that this means that a criminal condemned to death has no obligation not to escape, and he accepts this implication, pointing out that the way we guard those condemned to death shows that we do not regard them as having any further obligation to obey the law.[2]

Locke wants to allow for civil disobedience whenever the law or the sovereign imposes on the subject unfair or unjust burdens. The obligation to obey the law is based on a consent that is much more limited than that which Hobbes posits. Hobbes and Locke agree that people consent to obey only so long as the sovereign or law creates a civil state that is better than the natural state from which they are escaping. But Locke then puts forward an account of the state of nature such that it is not all that bad, thereby severely limiting what burdens the law can impose.

How are we to decide between these two theoretical solutions? The answer seems too obvious, we accept the one that allows for the amount of civil disobedience that we favor. If we want to allow for almost no civil disobedience, then we accept Hobbes's account, if we want to allow for more civil disobedience, we accept Locke's. Although Hobbes's account of the state of nature is more plausible than Locke's, I do not want to limit civil disobedience quite as much as Hobbes does. Thus I was led to the view that the connection between the conditions of the implicit consent and the obligation to obey the law are not as close as they are often claimed to be.

Why should the obligation to obey the law be based on consent at all? Why are we obliged to do what we consented or promised to do? Hobbes gives a kind of Kantian answer, breaking a promise is a kind of self-contradiction.[3] But the mere fact that he tries to give an answer shows that it is not self-evident that we ought to keep our promises. Further, basing the obligation to obey the law on consent suggests that all moral obligations are based on consent. Is the obligation not to kill innocent persons when killing them does not eliminate any threat to anyone, based on our consent?[4] If so, then it is not morally wrong to kill innocent persons if we happen to come across them outside of a civil state, even when doing so does not eliminate any threat to anyone. If not, then why is it morally wrong to kill such persons?

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[1] "In such condition, ... the life of man [is] solitary, poor, nasty, brutish, and short." Leviathan, Chapter XIII, paragraph 9.

[2] Leviathan, Chapter XIV, paragraph 29

[3] Leviathan, Chapter XIV, paragraph 7.

[4] Hobbes sometimes claims that it is, holding that all of the laws of nature are based on the consent that people give to the laws necessary for their preservation. However, this is not the kind of consent that is involved in giving up a right to someone else and on which our obligation to obey the law is supposedly based.

In what follows I shall no longer talk of why we have an obligation to obey the law and of the limits of that obligation, because I think the term "obligation" has been so consistently misused that it is difficult to discuss this issue clearly when using it. Instead I shall talk of why morality prohibits breaking the law and when it is justified to break it.

III. Common Morality and Moral Theory[5]

Common morality refers to the moral system that is used by thoughtful people, usually not consciously, to make their moral decisions and judgments. It determines what counts as morally prohibited, required, discouraged, encouraged, and allowed. A moral theory is used to justify, insofar as it is possible, this common moral system. It consists of the analysis of the concepts of morality, rationality, and impartiality, plus showing how they are related to each other. I shall provide a summary of the common moral system that shows how it both accounts for its being immoral to break the law unless one has an adequate justification and determines when it is morally justified to break it. I shall use the moral theory to show that this common morality is justified, so that it is justified to regard breaking the law as prima facie immoral and yet sometimes justified to break it.

IV. Common Morality

Common morality is an informal public system for guiding and judging the behavior of all rational persons. A public system is one that all persons whose behavior is to be guided and judged by that system, (1) understand it, that is, know what behavior the system prohibits, requires, discourages, encourages, and allows; (2) it is not irrational to accept being guided or judged by it. The clearest example of a public system is a game such as soccer or bridge. Such games have a built-in goal, and rules that determine the allowable ways to gain that goal. The game is a system that is understood by all of those playing the game and it is not irrational for all of them to act according to the rules. A formal public system has procedures for settling all disputes. An informal public system does not. A professional game of soccer is a formal public system; a neighborhood game is an informal one. But in both, all playing the game know the goal of the game and the rules that they are required to follow in order to gain that goal and know that all of the other players also know these. Although a game is a public system, its goal and rules apply only to those who are playing the game. Morality is a public system that applies to all rational persons.

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[5] This account of common morality and moral theory is derived from the account in my book, Morality: Its Nature and Justification (Oxford, 1998). For further clarification and supporting arguments see that book.