

## A TRIBUTE TO R. KENT GREENAWALT: A MOST KIND AND THOUGHTFUL COLLEAGUE

*Jeremy Waldron\**

Professor Kent Greenawalt was a kind and exceedingly thoughtful man. To sketch out the life he led is to reflect on the nature of those virtues, for the traits I have mentioned were connected with one another. His thoughtfulness was conveyed in the gentlemanly quality of his personal and collegial interactions. He always cared how his colleagues were faring and he showed quiet concern when someone was ill, for example, or when things were not going well for them. Kent's personal kindness carried over, too, into the way he participated in debates about law and legal theory. He always listened carefully to what was being said; he didn't treat another's presentation as just an opportunity to shoot up a hand and ask a knockout question. Sometimes Kent just wanted to improve the theory that was being set out. He was invariably considerate of all the views being expressed, even—perhaps especially—those opposed to his own.

I don't mean that he was uncommitted or that he didn't take any debate in academic life seriously enough to get angry about. Over the years, Kent developed a number of careful positions in the areas that interested him—such as church and state, free speech, and legal interpretation. He defended his positions and persevered with them doggedly, convinced that some of the best arguments against them were based on an over-hasty elaboration. But always, when Kent defended the views that he held, it was without a trace of bitterness or anger. Without pyrotechnics either. The positions he adopted were, for the most part, conventional and moderate. He espoused their intuitive appeal and defended them against fashionable ridicule. He always believed there was more to ordinary decent analysis than met the eye. The impression Kent conveyed was that if people would only work thoughtfully through various layers of understanding, they would see the good sense of the conventional approach. In all of this, what was most noticeable was his kindness and his readiness to listen. These qualities made him an excellent teacher—one of Columbia's best—and a most valued colleague.

Kent spent all of his academic career at Columbia Law School. His intellectual presence and his good-hearted collegiality were markers of the continuity of the institution. In 1991 he was honored with Columbia University's highest and most exclusive academic rank, that of University Professor.

---

\* University Professor, New York University Law School. This author was professor at Columbia Law School from 1997 to 2006 and University Professor at Columbia University from 2005 to 2006.

He was the author of a stunning nineteen books (by my count), each of them presented with his hallmark clarity, patience, and personal touch. Some of what he wrote was general jurisprudence, as in his books *Conflicts of Law and Morality*<sup>1</sup> and *Law and Objectivity*,<sup>2</sup> both published by Oxford University Press. The latter was based on lectures he gave in 1989 at Northwestern Law School.<sup>3</sup> (His books often developed out of lecture series, for Kent was much in demand as a speaker.) The preface to *Law and Objectivity* exemplifies more than anything else the humanity of his academic engagement. After setting out his ambitions for the book, Kent went on, as we all do, to thank those who helped while he was delivering the lectures and then rendering them in book form.<sup>4</sup> But readers quickly become aware that these are no ordinary thanks. Kent lamented friends he had lost to illness during this time, some troubles he had with his own health, and then—terribly—the sudden loss of his beloved wife, Sanja, to cancer;<sup>5</sup> all this while he was preparing his lectures at Northwestern. He spoke at the end of the preface of “those who have cared for me and for Sanja,” colleagues and friends who “made the burden of these days a little less heavy and have contributed to my finding renewed meaning in what I do.”<sup>6</sup> And he mentioned his three sons, Sasha, Andrei, and Robert, whose “love for each other and for me, largely the gift of Sanja’s love for us all, has been a powerful assurance. My understanding that their lives give meaning to my own has remained strong in even the worst moments.”<sup>7</sup> One is not often afforded such a glimpse into another’s heart in a book titled “Law and Objectivity.”

Thumbing through his oeuvre, one finds other glimpses of Kent’s warm and loving nature. In his work on statutory interpretation, he devoted more than ten pages to the textualist views of John Manning, now Dean of Harvard but then a junior colleague at Columbia.<sup>8</sup> Manning’s textualism was opposed to Kent’s intentionalist approach, but, for Kent, that was an opportunity for detailed intellectual engagement, making his opponent’s arguments the best they could be while setting out his careful and nuanced alternative.

Kent’s positions were always generous and open, sometimes even self-doubting in their thoughtfulness. Listen to him on flag burning in his book *Fighting Words*:

---

1. Kent Greenawalt, *Conflicts of Law and Morality* (1987).

2. Kent Greenawalt, *Law and Objectivity* (1992).

3. *Id.* at vii.

4. *Id.* at viii.

5. *Id.* at ix–x.

6. *Id.* at x.

7. *Id.*

8. Kent Greenawalt, *Statutory and Common Law Interpretation: Core Elements and Critical Variations* 32–42 (2008).

Perhaps at this stage of history, humankind needs less emphasis on nationhood. Reverence for the flag, the symbol of our nationhood, may impair our sensitivity to this possibility.

My last comments disturb me, partly because of my own feeling for the flag and also from a sense that casting doubt on its place is disloyal. But I have a more developed basis for my disquiet. Any society needs symbols of unity and cohesion as well as perceptive criticisms. One of the diseases of intellectuals is their predominant attention to the latter. Our job is to provide thoughtful criticism. My temperament and occupation may disqualify me from giving due weight to the value of symbols. Perhaps so, but I hope I have pointed out that reverence for symbols can carry costs. Honor for the flag is not an undiluted good.

Given uncertainty about the overall effect of a constitutional decision, either way, on the flag as a symbol, and uncertainty even about the desirable degree of honor for the flag, my own conclusion is that the Supreme Court did well . . . not to carve out an exception from ordinary First Amendment principles.<sup>9</sup>

His work on free speech was enriched by his awareness of what was happening elsewhere in the world. On hate speech—on which he argued for a conventional First Amendment view—Kent provided a detailed discussion of Canadian cases, stretching over seven pages.<sup>10</sup> It was not a cursory or dismissive treatment, even though the position he reached was that the statutes vindicated in Canadian cases like *Regina v. Keegstra*<sup>11</sup> would certainly (and he thought rightly) flunk the test of U.S. First Amendment law.<sup>12</sup>

And then there is his work on church and state—again measured and thoughtful, defending a secular position, but with an implicit awareness of why these issues mattered, an awareness born of his own religious faith, which he always described as tentative and of which he spoke, when he had to, reticently and modestly. This is Kent on moments of silence in a 2005 book, *Does God Belong in Public Schools?*:

If we strip the issue down to its core, the question is whether public schools properly set aside a brief period of time during which silent prayer is obviously one appropriate activity, given the reality that many students will realize that the main reason parents and educators typically want the practice is to allow prayer. I think the answer is yes. So long as legislators and

---

9. Kent Greenawalt, *Fighting Words: Individuals, Communities, and Liberties of Speech* 44–45 (1995) [hereinafter *Greenawalt, Fighting Words*] (footnote omitted).

10. *Id.* at 64–70.

11. [1990] S.C.R. 697 (Can.).

12. Greenawalt, *Fighting Words*, *supra* note 9, at 65 (discussing *Keegstra*, [1990] S.C.R. 697 (Can.)).

teachers do not encourage prayer beyond these two minimal senses, this concession to those who would like to start the school day with prayer, a concession that does not impose on others, seems acceptable. But we should not fool ourselves into believing that the moment of silence is to be explained entirely apart from prayer. Someone might conceivably defend silence as an otherwise desirable practice, allowing students to collect their thoughts, and instituted for reasons having nothing to do with prayer; but the overarching reason why people in the United States are interested in classroom moments of silence is that they allow for prayer.<sup>13</sup>

In these few passages, I have tried to give a taste of Kent Greenawalt's kindness and his frank and patient engagement with the issues that mattered to him over decades of scholarly consideration. But lest this tribute end too solemnly, let me finish with an instance of Kent's personal touch and gentle good humor. We have seen already that a lot of his writing was devoted to a discussion of interpretation in the law. It was a discussion that he brought to life with ordinary language hypotheticals. So, for example, he considered cases where a literal reading of some text proved inadequate. A child, told by her parent, "Stay in your room for an hour and do not come out for any reason," failed to leave when the curtains caught fire.<sup>14</sup> "That was not the sort of reason I meant," said the chastened father.<sup>15</sup> Then Kent added this:

I once had a personal experience that involved the possible application of a legal standard that was somewhat similar. I was stopped for driving too fast, and effectively instructed to pull over and park on the side of a street that said "No Parking." I answered honestly to the policeman about my speed; he was generous and gave me a modest parking ticket instead of a speeding ticket. Now, when the law authorizes a sign that says "No Parking," no one would suppose it actually applies if the only reason you are parking there is because a police officer has directed you to do so. *If I had chosen to litigate the parking ticket itself, I would probably have succeeded.*<sup>16</sup>

But he didn't. Kent had enough respect for his good fortune not to press a point. He didn't try to figure out whether the sign should be reinterpreted in light of the police officer's direction or the officer's direction reinterpreted in light of the sign. Both raise intriguing possibilities, and I can't imagine a better person to explore them with than R. Kent Greenawalt.

---

13. Kent Greenawalt, *Does God Belong in Public Schools?* 50 (2005) (footnote omitted).

14. Kent Greenawalt, *Realms of Legal Interpretation: Core Elements and Critical Variations* 9 (2018).

15. *Id.*

16. *Id.* at 10.