
Ethicism

March 5, 2001 at 8:00 am

This book review originally appeared in *The New Republic*.

Conflict of Interest in American Public Life by Andrew Stark (Harvard University Press, 352 pp., \$49.95)

A leading journalist married to a wellconnected member of the foreign policy wing of the executive branch arrives on the scene eighteen hours ahead of a surprise American military operation, beating her colleagues to the breaking story by a full news cycle. A prominent professor's faculty votes to offer an appointment to a distinguished scholar from another university with whom the professor is having an affair. A critic who has proved himself quite capable of discoursing at length about the myriad ways in which a fine writer has gone astray reviews a friend's book and finds in it relatively little to reproach and much to admire. A consultant to the White House involved not only in publicizing policy but also in making policy quits his job and, scarcely breaking stride, turns up on television offering commentary on the administration whose policies he has only recently been devising and disseminating. A holder of high office makes herself a multimillionaire by signing a nearly record-setting book contract with a powerful New York publishing house whose parent company is likely to have a substantial stake in government business that will come before her in her official capacity. In the waning hours of his administration, while packing his bags and preparing to leave town, the president, circumventing customary procedures, uses the kingly prerogative of pardon entrusted to him by the Constitution to grant immunity from prosecution to an indicted billionaire who fled the country to avoid trial for criminal tax fraud and whose socialite ex-wife hobnobbed with the president, and lobbied him on her ex-husband's behalf, and contributed big bucks to the president's party.

Such lamentably familiar scenarios arouse a vague sense of uneasiness (and in some instances produce a lasting stench), though it can be a challenge to put your finger precisely on the reason. In any of these cases it would be rash, without more information, to infer wrongdoing. But it is right to detect a specter of wrongdoing hovering over each of these cases, a distinguishing mark of the morally compromised and compromising condition known as "conflict of interest."

But “conflict of interest” is something of a misnomer. In fact, without constituting what we commonly call a conflict of interest, interests conflict all the time. You must decide whether to marry for love or for money. You wish to advance your career but also to spend quality time with the kids. You seek to lose weight and to develop abs of legendary definition even as you want to dine out every night, eating and drinking to your heart’s content. In these situations, and in an infinite variety of others that crop up every day, interests conflict in such a way that satisfying one interest necessarily impinges upon the satisfaction of another.

What distinguishes a conflict of interest from situations in which interests conflict is the interest’s conflict with a demand of duty or an imperative of justice. The paradigmatic cases of conflict of interest occur in the performance of professional roles. A conflict of interest afflicts a judge who presides over a lawsuit to which a friend is a party, because the judge’s interest in seeing his friend prosper is likely to interfere with the obligation to administer the law impartially. A conflict of interest enmeshes a professor who becomes romantically involved with a student in his class, because the professor’s capacity to fulfill his responsibility to evaluate all his students fairly is directly threatened by the temptation to prefer—or to punish—his romantic interest. A conflict of interest besets an investment counselor who finds himself in a position to make a killing by dumping a powerful client’s declining shares on a less powerful client, because the investment counselor owes complete and accurate information to all his clients.

It is a curiosity of conflicts of interest that the conduct that they isolate is not in itself unfair or criminal. We can imagine, if with some strain, a judge meting out justice as impartially to friends as to strangers, and a professor managing to evaluate all of his students—including his romantic interest—fairly, and an investment counselor giving sound advice to competing clients. This is not to say that the notion of conflict of interest fails to isolate a real wrong. The wrong of conflict of interest, the wicked or criminal conduct, consists in occupying a position in which one is exposed to a powerful temptation to act in an unfair or criminal fashion.

Accordingly, conflicts of interest are dependent on broad generalizations about the vulnerabilities and the weaknesses of human nature, and they are also acutely sensitive to context. They arise in an endless variety of circumstances, but the determination of whether and in what way any particular set of circumstances constitutes for a specific individual a conflict of interest often requires supple thinking and a reliable moral compass. Fortunately, supple thinking and a reliable moral compass are just what Andrew Stark brings to bear in his admirable book on the types of conflict of interest that arise in American public life, the laws that govern them, and the moral and political principles that inform and confuse conflict of interest law.

Stark’s book has roots in a hybrid and relatively new academic discipline known as professional ethics. All the best universities now have scholars (“ethicists”) and courses devoted to research in this burgeoning field, which specializes in analyzing the moral

dilemmas that arise for doctors, lawyers, business executives, and politicians as they do their jobs and carry out their professional responsibilities. Unlike many in the field, Stark forgoes the pleasures and the comforts of abstraction. He does not undertake to provide a moral formula or to construct a procedural framework for separating the innocent from the guilty. Without begrudging the ambition or questioning the aspiration, he leaves it to others to derive universal moral principles that define “fair terms of social cooperation” and to apply them to various fact patterns in order to ascertain the morally correct verdict.

Far from seeking to tidy up what he calls “conflict of interest discourse,” Stark makes it his aim to account for the thicket of law and moral judgment in which the actual discourse—the laws, the political debates, the public discussions—is in fact entangled. His book can on occasion get academic in the bad sense—lumbering and dense, proliferating definitions and distinctions, confusing pettiness with precision. And his analysis displays common limitations of the field of professional ethics, in particular its impoverished understanding of liberalism and its highly attenuated conception of democracy. Still, Stark does honor to his discipline by winning a number of valuable and unexpected insights from his immersion in the nitty-gritty of realworld public service and its complex opportunities for wrongly benefiting oneself and others, and for being wrongly accused of wrongly benefiting oneself and others.

The big thesis of Stark’s book is that in the last fifty years or so the discourse about conflict of interest in America has undergone two apparently contradictory but intimately connected changes. On the one hand, the conflicts governed by conflict of interest law—self-dealing, undue influence, abuse of office, private payment for public acts, private gain from public office—have become increasingly objective: well-defined, specifiable in advance, and applicable to all. On the other hand, the interests regarded as inappropriate, once primarily pecuniary, have become increasingly subjective: imprecise, psychological and ideological, and dependent upon how the person in question views the particulars of the situation. Both the objectivization of conflicts and the subjectivization of interests, Stark sets out to show, reflect pressures exerted by those features of American liberalism—devotion to individual rights, tolerance, the rule of law, and the reluctance to establish a single authoritative conception of the public good—that remain, in his view, constitutive of American political culture as a whole.

But the bulk of the book, in which Stark lays out a taxonomy of conflicts of interest and provides a topology of the discourse, does little to advance this big thesis. Instead, the case studies demonstrate a second thesis, substantial and noteworthy in its own right. Though he does not clearly articulate it, the vindication of this second thesis represents perhaps Stark’s principal contribution, with ramifications not only for how conflict of interest discourse is best understood but also for the way the discipline of professional ethics ought to be practiced. Call it the “centrality of judgment” thesis: that deciding the hard cases involves the exercise of a form of judgment that resists reduction to a rule or formula or theory. Such

judgment consists, rather, in a weighing and evaluating of particulars, an application of cross-cutting principles to ambiguous and incompletely understood circumstances, an organization of the passions that serves reason and not rationalization.

The formidable array of questions that Stark culls from the past couple of decades of public discourse reveals that there is no shortage of hard cases:

Should we penalize officeholders for allowing the mere appearance of impropriety to arise surrounding their official activities, even if they have engaged in no actual wrongdoing? Should we investigate officials' personal character on the assumption that doing so will shed light on their public performance? Should we curtail public financial disclosure as an affront to officials' privacy or, alternatively, rely on it as the only remedy necessary for conflict of interest? Should we punish officeholders for profiting privately from public office even if they could not possibly have compromised their official performance in the process? Should we regard officials who take positions inconsistent with their personal interests as courageous or, alternatively, as hypocrites? Should we treat those who adopt views compatible with their interests as self-serving or as reassuringly genuine? Should we encourage congressmen to share pecuniary interests with their constituents, on the grounds that their doing so will make them better representatives? Should we worry that officials' beliefs, predispositions, and commitments can, under some circumstances, be every bit as encumbering of their judgment as their pecuniary interests? Should we restrict the careers of officials' spouses in any way, and if so why? Should we visit particularly heavy restrictions on officials who leave government to work for foreign as opposed to domestic-owned businesses, and if so why?

Consistent with the centrality of judgment thesis, Stark's answer is always the same: yes and no, depending on the particulars. But Stark does not oppose the proffering of formulaic answers in a formulaic manner. Instead he shows theoretically why judgment is inevitable, and uses his cases to illustrate judgment in action.

Consider stark's analysis of the "perils of prophylactic law." He approves of, and elaborates, Blackstone's classical explanation of the scruple at the core of conflict of interest law: "no temporal tribunal can ... fathom the intentions of the mind otherwise than as they are demonstrated by outward actions, it cannot punish for what it cannot know." And yet, as Stark observes, the very purpose of conflict of interest law is to prevent encumbered or tainted mental states. The solution is to prohibit actions—the receiving of gifts, the making of certain contacts—that, given what we know about human nature and social and political life today, are likely to impair official judgment or make it irresistibly easy for an official to use his office to improperly advance inappropriate interests. The peril of prophylactic law is that it will rely upon the lowest common denominator to establish its expectations concerning human weakness and its baseline for determining illegality:

One might sympathize with Anthony Lewis, who—bristling at the conflict of interest charges leveled against then-United Nations ambassador-designate Richard Holbrooke—insisted that “everyone knows that Richard Holbrooke is ambitious—but not for money. The notion that he would try to gain improperly from the use of a rent-free room in a friend’s house is laughable, as is the idea that he had financial motives when he met American diplomats abroad.”

But to defend him, Lewis was forced to appeal to Holbrooke’s internal dispositions and motives, the very sort of appeal to mental states that prophylactic conflict of interest laws seek to avoid.

Disconcerting reversals abound in conflict of interest discourse. Consider Stark’s discussion of the complex relation between policy views and subjective interests. Limousine liberals are criticized for supporting welfare programs and other progressive state measures while personally enjoying the comforts that wealth brings. In contrast, comfortable and wealthy country-club conservatives are criticized for advocating tax cuts from which they will directly benefit. While limousine liberals are taken to task for hypocritically supporting political positions that are at odds with their personal interests, country-club conservatives are reproached for selfishly adopting a political position that furthers their personal interests. And yet, as Stark deftly points out, perhaps limousine liberals should be congratulated for overcoming self-interest to champion policies they think just but from which they will not benefit. And perhaps country-club conservatives should be applauded for scorning to dissemble and honestly advocating for their entire society policies they think right, whose benefits to them are plain.

That appearances can be exasperatingly misleading and routinely susceptible to contradictory interpretations heightens the difficulties associated with a relatively new entry into the arena of conflict of interest discourse: “the appearance of official impropriety.” It is understandable, as in *Wild v. U.S.* (1982), that the Department of Housing and Urban Development would contend (correctly, according to Judge Richard Posner’s ruling for the Seventh Circuit) that HUD’s prohibitions on the appearance of official impropriety were violated by an employee whose dilapidated rental properties qualified him as a slumlord. And the political justification for the appearance standard is also understandable. After all, how can we maintain confidence in our public officials if their private conduct flies in the face of their public responsibilities? And yet the appearance standard raises troubling moral and legal questions. Whereas a conflict of interest involves exposure to temptation, the appearance standard makes unlawful the creation of the impression in others that one is so exposed. But whoever heard of punishing someone for appearing to speed, or steal, or assault?

In the face of these perplexities and many others that he assiduously investigates, what does Stark think ought to be done? Those who believe that the real practicality of professional ethics consists in devising dramatic reforms and crafting novel laws will be disappointed. For

Stark remains steady in his purpose, calling in the end for measured judgment, disciplined by a knowledge of morality and politics and law, concerning the circumstances under which the impairment of an official's judgment should be subject to reprimand or criminal sanctions.

It is not for want of rigor or perspicacity that Stark refrains from drawing bright lines and issuing clear-cut judgments. Indeed, his achievement is to analyze rigorously and perspicaciously the destabilizing ambiguities, and the fluid boundaries, and the chameleon-like concepts that cause the lines in the discussion of conflict of interest to be shifting and obscure and the judgments to seem slippery and so often in danger of collapsing in on themselves. He leaves the reader not with a method for producing right answers but with a refined appreciation of the subtleties of the question, and therefore better equipped to draw decent lines and craft defensible judgments.

In laying bare the twists and turns of contemporary conflict of interest discourse, Stark also provokes mischievous questions, including some about the conflicts of interest that afflict those whose self-proclaimed task it is to clarify them, the professional ethicists. Who will evaluate the ethicists? Others lack the professional expertise, the status, and the resources. And the ethicists, curiously, seem to lack the interest. How else to explain the remarkable fact that while platoons of professors busy themselves with minute and exhaustive examination of the ethics of other people's professions, they have left their own profession's ethics virtually unexamined?

Surely academic life generates an abundance of ethical dilemmas and conflicts of interest. Are "mandatory sensitivity training" sessions for freshmen and speech codes for all a legitimate effort by universities to create an unthreatening intellectual environment, or are they anathema to the vigorous and free exchange of ideas on which liberal learning depends? Is it proper for professors to assign their own books, thereby forcefeeding their views to the class while lining their pockets at students' expense? What rules and regulations should govern the increasingly common circumstances in which a spouse in the administration exercises power over, and participates in the making of decisions affecting the material and professional interests of, his or her spouse on the faculty? Why, in the process known as peer review, do university presses inform scholarly referees of the identities of the authors whose books they are evaluating for publication but keep the identity of the scholarly referees hidden from the author, a practice that invites scholarly referees, under the cover of anonymity, to reward friends and punish enemies? What kind of process is due students in disciplinary hearings and faculty in grievance procedures? What justifies the institutionalized dependency of graduate students on senior faculty—a relationship without parallel in other professions, in which the younger professional, after more than half a decade of professional training, teaches his teacher's undergraduate students and provides research and clerical assistance for his teacher's scholarly projects in exchange for an occasional audience with the adviser, less than a living wage, and highly uncertain job prospects?

Could it be that the professors of professional ethics have neglected to examine urgent and obvious questions about academic ethics, the examination of which would appear to be a matter of professional duty, in order to protect their interests—to shield the system that has so richly rewarded them from systematic scrutiny? And if the professional ethicists did decide to examine their own profession's ethics, would it not be reasonable to infer that their interests would impair their judgment and preclude them from examining the issues impartially and accurately? Such at least are the sort of mischievous questions provoked by Stark's adroit analysis.

Stark's stimulating inquiry fails to account adequately for the tendencies in contemporary conflict of interest discourse that he brings to light. In his view, it is the liberalism that we share that has caused the conflicts covered by conflict of interest law to have grown increasingly objective and the interests deemed suspect to have grown increasingly subjective. Our liberalism compels us to view conflicts objectively, for fear of policing thought: to avoid intruding into the realm of opinion and conscience, we prohibit not states of mind that may impair judgment but various classes of objective relationships likely, given what we know about human nature, to make good judgment or impartial judgment impossible. And we are constrained to view interests subjectively, since our liberalism forbids us to establish a common conception of the public good, with the result that any particular person's interest must always be determined on a case-by-case basis and with reference to his or her circumstances and beliefs.

But hallowed liberal principles prohibiting efforts to regulate thought cannot alone explain the growth in the variety of the conflicts that are now publicly recognized. This growth is also a function of our tendency to legalize moral and political questions, to seek objective and impartial rules and regulations to govern an evergrowing range of controversies, no matter how knotty and delicate. The quest for legal solutions is driven in part by a loss of faith in the reliability of our officials' internal moral compasses, which perhaps reflects our increasing doubts about the effectiveness of our own moral compasses. As good democrats, we believe that our officials are like us, and that is why we worriedly turn to law. Thus it is not only liberal concerns about privacy but also democratic doubts about the efficacy of the conscience that spur us to bring an increasing variety of relations under the aegis of conflict of interest law.

Nor can the liberal repudiation of the idea of a public good explain why we view an increasingly wide range of subjective interests with suspicion. For one thing, no such repudiation is inherent in liberalism. Unfortunately, Stark embraces the communitarian canard that liberalism lacks a conception of the public good, a piece of scholarly flimflam that over the last couple of decades has proven to be as resilient as it is false. Locke could not have been more clear in the first chapter of the *Second Treatise of Government*, nor could Jefferson in the second paragraph of the Declaration of Independence have conveyed more succinctly, what the fabric of our political life demonstrates: that the public good in a liberal democracy is the system of laws and political

institutions whose purpose it is to protect the rights that all individuals share. Yet while we share a liberal public good, democratic doubts about the authority of a greatest good, and the capacity of individuals to transcend the particulars of identity and circumstance, compel us to focus attention on the forces—psychological and sociological—to which all individuals are equally subject. Democracy hates distinctions; and what better way to insure equality than to interpret each as equally under the sway of impersonal forces, filtered though they be by one's subjective experiences and one's personal point of view?

Contrary to the impression created by Stark's book, liberalism is much more than a theory that sets out legal limits on the exercise of government power, and democracy goes beyond establishing by whom government power is exercised. Modern liberalism, which puts freedom first, provides a moving principle and a spring of action. It gets under your skin, enters your blood, penetrates to the bone. It inflects perceptions, feelings, thoughts. It is a way of life. While it can recognize and even admire other goods, modern liberalism demands that they must all eventually bow before freedom's authority. Much the same could be said about modern democracy, to which modern liberalism is wedded; but modern democracy's moving principle and spring of action, the good which it puts first and before which all others must defer, is not freedom but equality.

For most of us, freedom and equality are non-negotiable and inseparable. But they also make an unstable pair. We tend to understand democratic equality in terms of liberal freedom: we are equal in regard to our rights. But we tend to understand our liberal freedom in terms of aristocratic superiority: we are free in the sense that we need submit only to our own reason and desire. To get to the roots of the morally compromising condition that we call conflict of interest, it would be necessary to explore how we play off—in public life no less than in private relations—our hunger for freedom against our commitment to equality, and how they collaborate to play off our various interests against each other and the claims of duty and justice.

To get to the roots of conflict of interest would also require an extended examination of the very notion of self-government, which includes both what we commonly think of as politics, or the rule of individuals over other individuals, and what we commonly think of as personal morality, or the rule of the individual over himself. In the famous tenth paper of *The Federalist*, James Madison, echoing Locke, gave expression to the idea that self-government depends on laws that prevent public officials from advancing their interests at the expense of others and the public good:

No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.

Yet Madison immediately makes clear that conflict of interest is no more removable from democratic self-government than selfishness is from the moral life:

With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time; yet what are many of the most important acts of legislation but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? And what are the different classes of legislators but advocates and parties to the causes which they determine? Is a law proposed concerning private debt? It is a question to which the creditors are parties on one side and the debtors on the other. Justice ought to hold the balance between them. Yet the parties are, and must be, themselves the judges; and the most numerous party, or in other words, the most powerful faction must be expected to prevail. Shall domestic manufacturers be encouraged, and in what degree, by restrictions on foreign manufacturers? are questions which would be differently decided by the landed and the manufacturing classes, and probably by neither with a sole regard to justice and the public good. The apportionment of taxes on the various descriptions of property is an act which seems to require the most exact impartiality; yet there is, perhaps, no legislative act in which greater opportunity and temptation are given to a predominant party to trample on the rules of justice. Every shilling with which they overburden the inferior number is a shilling saved to their own pockets.

Madison's words should be sobering for those who indulge the hope that refinements in theory will someday enable us to purify our politics of partiality and perfidy. Interests can be arrayed against interests, and ambition can be organized to counteract ambition. Shrewd institutional design can eliminate egregious conflicts of interest and mitigate others, but they can never be entirely overcome or removed from our politics, for the simple reason that the causes of conflict of interest are inscribed in our nature and presupposed by our political institutions.

To conclude his book, Stark borrows with minor caveats Judith Shklar's striking words in *Ordinary Virtues*, her quirky and incisive study of liberal character, which she described as a "ramble through a moral minefield, not a march toward a destination." Shklar's captivating metaphor evokes the dashing image of a fearless academic inquirer. It also dissimulates, and disguises a certain abdication. For one cannot pass through a minefield, moral or otherwise, without loads of luck and much careful planning, years of study, and expert execution. It is reckless to suggest otherwise.

Like Shklar, Stark exhibits a salutary skepticism about the facile hope that drives so many of his colleagues: that theory, if it is carefully enough calibrated and finely enough tuned, can throw the errors of others into sharp relief and release us from our moral dilemmas. But one would not want such skepticism to become the justification for the creation of a new intellectual no-trespassing zone, legitimating a truncated exploration of the principles that motivate us to action, give tone and texture to our desires, and color and constrain our politics.

There is a time and a place for everything, and the intellectual world requires its division of labor. But when and where better to explore the principles that move us and their practical

ramifications than here and now, when everybody feels the craving for personal freedom but even progressives are skeptical about liberalism's integrity and viability, when the just claims of equality appear self-evident even to elites but across the political spectrum citizens are losing sight of the moral conditions and the moral limits of democracy? To be truly practical, ethical inquiry must also be philosophical.