Lect 17

Return to positivist theories

Shapiro

* Let’s start with the idea of a plan –
* Let’s say you make a plan to cook dinner
* But you don’t do anything about it, you don’t follow through
* That is irrational
* To make a plan or to establish an intention has a certain normative force
  + One ought to act in accordance with the plan absent compelling reasons for reconsideration
* Imagine as well that having made the plan to cook dinner you didn’t make subplans
  + You did make a plan about what to cook or what food to buy
  + That too is irrational
* To make a plan rationally compels one to create subplans that are nested within the original plan
* Notice that the normative force of a plan is not moral
* Having made a plan to torture a kitten, I ought to continue with the plan absent compelling reasons for reconsideration
* Recognizing the immorality of my choice is of course a compelling reason
* Groups can also establish plans
* Having done so, the members of the group ought to follow through with the plan absent compelling reasons for reconsideration
* And they have a reason to go along with subplans made by other members of the planning group
* There is a reason for them to cooperate with one another

OK – what is the foundation of a legal system for Shapiro?

* The foundation of a legal system is a master plan for a community created by officials within that community
* Subplans made pursuant to the master plan are the laws of the legal system

But the master plan has a certain purpose

Moral Aim Thesis: The fundamental aim of legal activity is to remedy the moral deficiencies of the circumstances of legality

* custom, tradition, persuasion, consensus and promise are not enough as a society becomes larger and more complex
* Moral problems arise whose solution is arbitrary, contentious, or complex
* The master plan is meant to solve these moral problems

compare Hart – the law does not have an essential purpose

Note that for Shapiro the fact that the law has a moral purpose does it mean that officials have gotten that purpose right

The Nazis sought to remedy the moral deficiencies of the circumstances of legality by adopting the master plan: do what Hitler says

Notice that plans have as their purpose settling things

so the fundamental purpose of law according to Shapiro is settling

It is not essential to the law that it settles under either Hart’s or Dworkin’s theories of law

Indeed under Dworkin theory of law nothing seems to be settled – the content of the law seems to be always a matter of disagreement

What about custom, which can be the source of law?

Custom is not created through plans

Shapiro claims that not all laws identified by the master plan need to be subplans

Some can be plan-like norms, that is norms that perform much the same settling function as plans but are not created through an act of planning

Custom is an example

* But couldn’t the master plan itself arise not through an act of planning but as a form of custom?
* Think of England, which does not have a written constitution

Notice that because officials plan in order to overcome the circumstances of legality, it makes sense that they would consider common citizens subject to the law, even though citizens have not engaged in any act of planning

* That does not mean that the officials are right of course
* It does not follow that citizens actually have a duty to obey the law

But officials of an extra reason to follow the law compared to private citizens, namely the force of a plan

Shapiro thinks that there are other requirements for a legal system

It must be compulsory in the sense that one does not have a choice about whether one is subject to the law

This distinguishes the planning that goes on in a legal system from the planning that goes on in the boy scouts

The boy scouts also has a master plan that is there to settle moral problems whose solution are arbitrary contentious are complex

But one is not bound by the boy scouts’ settlements of these matters unless one consents

He also adds the requirement that the law is self certifying

Unlike a condo association, which before it can enforce its rules through coercion must get permission from the gov’t, state officials do not have to get such permission

That is why state rules are law but the condo association rules are not

We spent a good deal of time on the question of self help and how it fits in with the self certification requirement