**Notes: 1/30/17**

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**Lecture Notes**

1. Pre-Discussion Topics
   1. Important to get more class discussion
   2. History of philosophy is a history of mistakes
      1. Don’t be afraid of making mistakes
      2. Even understandable to make a clear error because the readings are hard sometimes
   3. Reading philosophy generally
      1. Do a quick read the first time
      2. Then read it again, and you will understand it better
      3. Preferably read it several times
2. Duty to Obey the Law
   1. Generally
      1. This topic keeps shifting over time
      2. People that write on this topic tend shift the definitions of what the obligation to obey the law is
         1. narrowing what they mean by a “duty to obey the law”
            1. e.g. not general duty, but duty to obey law of just state (which can still have bad laws)
            2. or, for Dworkin, duty to obey law of an interpretive community
      3. This is bad in teaching philosophy, because the whole point in philosophy is to be very specific about what we are talking about
   2. Problems with the Consent Argument
      1. One problem is finding consent
         1. Seems often absent, even when one looks for implicit consent
         2. furthermore, it is not clear that even explicit consent would work
            1. promise to obey law is too open ended, given the possibilities of what could be law
         3. Additionally, is it even possible to consent to obey the law at all?
            1. Can we create a duty to do whatever someone else says?
            2. May not be morally feasible
            3. not clear that a promise can create a duty, even a prima facie duty, to do something wrong

can I give myself a prima facie duty to torture a kitten simply by promising to do so?

this is tied to whether there actually is a duty to keep your promises

* 1. Duty of Gratitude and Duty of Fair Play
     1. Tends to meld into consequentialist argument, rather than an argument that is dependent upon the receipt of benefits from the gov’t
     2. We have a duty to create the gov’t as a means of bringing about the benefits that it produces, and this duty, it is argued, generates a duty to obey the law. This is a duty whether or not we have previously received benefits from the government.
  2. Consequentialist
     1. Two types of arguments
        1. Act utilitarian
           1. There is an important distinction here between act utilitarianism as a general moral theory that determines absolutely what one ought to do and simply a prima facie act-utilitarian duty to bring about good consequences, a duty they can be trumped by other considerations.
           2. We spent some time talking about the problems of act-utilitarianism as a general moral theory.

For example it seems to follow from act-utilitarianism that one should cut up the UPS driver in give his organs to the five people who need them

* + - * 1. However, this the general moral theory of act utilitarianism isn’t the same as the argument put forward with respect to a duty to obey the law

Because it isn’t an absolute duty in this context

It’s all tied to the prima facie duty

It isn’t odd to say that there is a moral duty to, prima facie, cut up the UPS guy

And it just may be trumped by other moral concerns

* + - * 1. Trolley Problem as an example of defining the existence and scope of the prima facie duty to bring about good consequences

Classic unstoppable trolley

You stand by the track with the lever

Turn the lever, the trolley will kill one person

Don’t turn the lever, and the trolley will kill five persons

There is a prima facie, moral duty to kill one person in order to save five people

But in some situations that prima facie duty is trumped by other concerns

Steve: is there a difference between the trolley problem and the UPS guy?

Enormous literature on this topic

Lots of philosophers have problems with this

* + - * 1. But, in any event, there is at least a prima facie moral duty to kill one person to save five.

However, it can be trumped by other moral concerns (UPS example)

* + - * 1. So, there is clearly a prima facie obligation to do that which causes good consequences

A prima facie utilitarian obligation

* + - * 1. But, this isn’t the problem with the act utilitarian argument for a duty to obey the law

The problem with the act utilitarian argument for a duty to obey the law is that obeying the law will not always have good consequences

Such as the anti-sodomy law

There aren’t any bad consequences to others by breaking that law

* + - 1. Rule Utilitarian argument for a duty to obey the law
         1. Argument

Individual bad acts will not force the government to fall apart

But if everyone commits bad acts, then the government will fall apart

* + - * 1. This is also an argument for a prima facie duty

Usually rule utilitarianism is about what is the right thing to do, full stop.

The right act as the act that when universalized maximizes utility

But, this is somewhat different; here, we are talking about a rule that, when universalized, will produce good consequences as something that creates a prima facie duty

Green is confused about this very definition of a prima facie duty. This is independent of the question of whether one can use a rule-utilitarian argument for a prima facie duty to obey the law.

1. Legitimacy without the Duty to Obey
   1. Traditionally, if we think of the Government as legitimate
      1. It means not merely that it is morally permissible for that government to punish people for violating the law
      2. Most people say that in a legitimate government, there is a duty to obey the law.
         1. And other governments cannot interfere with such governments as well
   2. So there appear to be two options here.
      1. Understand legitimacy merely as the permission to punish those who break the law, without there necessarily being any duty of obedience
      2. Or understand legitimacy as entailing a duty to obey the law.
      3. Applbaum is trying to say that these are the only possibilities
         1. That there can be no duty to obey the law, and the government can nevertheless be legitimate by virtue of having something more than a mere permission to punish
   3. Hohfeld’s Defining of Rights
      1. Hohfeld was a law professor and wrote about “rights”
         1. Hohfeld said that when judges and lawyers use the word “right” it’s a mess
         2. So, we have to understand what we are actually talking about and redefine what we mean by “right”
         3. Hohfeld adopted new terms to narrowly define these “rights”
      2. Terrorist example
         1. There is a terrorist that intends to kill a lot of people
         2. If the police cannot kill the terrorist, bad things will happen
         3. The terrorist grabs you and uses you as a shield
         4. Terrorist gives you a gun to shoot back (can’t shoot the terrorist)
            1. Police begin shooting at you
            2. Do you have a right of self defense to shoot at the police?
            3. Not a prima facie right, but an “all things considered” right?
            4. Green says yes, but some people balked, so…
      3. Falling Person in the Well
         1. You are at the bottom of the well
         2. And if the falling person lands on you, you are going to die
         3. You have a ray gun to blast the person who is falling; and the falling person has a clear view of you, and has a ray gun as well.
         4. Is there a right to self defense?
            1. Do they both have a right to self defense?
            2. Green says yes
            3. How can two people have that right?
      4. If you have a right, it usually means it stops people from doing things which interfere with the exercise of those rights
         1. Your right entails their duty.
            1. we think that a right puts a duty on others not to interfere
         2. But that can’t be how are using the word right in the falling well example
         3. Each is interfering with the other’s exercise of his right
      5. So, we must be using the term “right” in a different way than how we traditionally understand it.
      6. Hohfeld would say, throw out the word “right,” and replace it with a number of words
         1. A has a \_\_\_ with respect to B to do or not to do X (i.e. some act)
            1. In property, A has a claim right with respect to B to drink his coffee
            2. And this claim right is correlative with: B has a duty with respect to A to not interfere with A’s drinking of coffee
            3. That is the most common understanding of a right – a claim right that is correlative with a duty on the part of the person against whom one has a claim right
         2. No claim right of self defense
            1. because that would mean that the other person in the well would have a duty not to interfere
            2. but such a duty doesn’t exist (because he also has self-defense interest)
            3. So really, self-defense is a privilege

A has a privilege with respect to B to shoot the ray gun, if B has a no claim right with respect to A shooting the gun – in other words, A has no duty not to shoot the gun

Both people in the well example have privileges to shoot their guns, in the sense that neither is violating a duty to the other by shooting their guns

So, in this case, there was no violation of a duty; and both parties were doing something permissible

So, a privilege is just the bare permissibility of an act; and that by performing it, there is no violation of a duty

* + 1. Other examples
       1. Economic relationships often involve privileges, not claim rights
          1. One has a privilege to undercut another, and drive them out of business

There is no claim right

Because then the other would have a duty to go out of business, or a duty to let the competitor drive him out of business

That is not so, the other has a privilege to interfere

The point is only by driving the other out of business, there is no violation of duty

* + - 1. Same thing with union/employer relationships
      2. In the law, the existence of privileges is usually circumscribed by some duties.
         1. What duties do economic relationships have?
         2. competitor has a duty not to commit fraud/arson/theft/etc.,
         3. Therefore, the other has a claim right against the competitor with respect to those matters
    1. Imagine a legal system with just privileges
       1. This is the Hobbesian state of nature
       2. Anyone can do whatever they want
       3. And you violate no duties in the process
    2. Privileges are defined negatively (privilege to x, when you don’t violate a duty by doing it)
       1. Does one’s shoe have privileges then?
          1. Does the shoe have a duty not to hit someone else?

No, it has no duties.

* + - * 1. So that means it has privileges…?
      1. It seems like this isn’t right
         1. The mere absence of a duty would mean that there is a privilege
         2. Maybe there is something positive about assigning a privilege – a positive permission
         3. Still even if it is a positive permission, that permission does not entail any duty on the part of others
    1. Remember that stuff about property rights being a bundle. Privileges can be part of that bundle
       1. Say that I own a cup of coffee. What would it mean if I only gave you the privilege to drink the coffee?
          1. A license, for instance would entail a claim right (and a duty on my part not to interfere)
          2. By giving a privilege, however, there is no such duty. If the owner interferes, he is not violating a duty. But unlike before the privilege was given over, the owner now cannot complain that a claim right was violated if the other person drinks a copy
          3. It seems like the mere giving of a privilege invites conflict
    2. Privileges to batter another
       1. Boxing
       2. Before they start the match, there is a claim right (and duty) to not batter
       3. When the into the ring, When one hits the other, there is no violation of a duty
       4. But the interference of the hit isn’t a violation of a duty either
       5. Therefore, there is a mutual privilege to batter
  1. This is important because one definition of a legitimate state is that it has a privilege to punish for disobedience of its laws
     1. Which means we do not necessarily have a duty to obey
     2. But, we can’t complain when we get punished
     3. And they can’t complain when we resist that punishment
  2. Applbaum has argues for something in the middle of the government only having a privilege to punish, and the government having a claim right to obedience of its laws
     1. To understand this, we need to understand what Hohfeld means by powers
  3. Hohfeld Powers
     1. Powers are a higher order for Hohfeld
     2. A has a power with respect to B to change B’s \_\_\_ (and place in the blank space “rights,” i.e. duties, claim rights, etc.)
     3. If A has a power with respect to B to change \_\_\_, B has a liability to A with respect to A to have his rights \_\_\_ changed
     4. Power is a capacity to change rights
     5. Example
        1. Professor Green can assign a duty of notetaking, which creates on one student a duty to all others
     6. Power by virtue of having a property right
        1. Power to give others a claim right
        2. A has the power to gift (give a claim right) of his coffee to B
        3. That also means that A has the power with respect to himself – namely that the power to give himself a duty not to interfere
     7. Can you give an irrevocable claim right, but not the power?
        1. Life estate or trust
        2. Claim right with respect to the property, but no capacity to change that