R. Rozanski

Ladenson

-It’s natural to think that if you have a privilege, then it entails a duty of non-interference. But this is not analytically true.

-Under Ladenson, if the government has a privilege to punish, we don’t necessarily have a duty to accept the punishment. That is the Applbaum approach.

-Under Ladenson, when the government passes a law, that does not change our moral situation at all.

But Green has a problem with this: When the government enacts a law, it seems like this *gives* government the privilege to punish. Ladenson may require a government to announce a law before it can permissibly punish you. That would mean that announcing the law is the exercise of a power

Still – this is less than the type of powers that Applbaum says a legitimate govt has

Shapiro, Chapter 1

-We are trying to come up with the necessary and sufficient conditions for something being law, wherever it occurs.

-There may be borderline cases (this is *almost* law, but I’m not sure):

-church law 🡪 rules that the church community abides by

-a college’s parking regulations

-These are problematic examples because there are enforcement mechanisms but those mechanisms are confined to the specific community. The church will not put me in prison for violating its rules.

-Additionally, with a church and a college, I am only subject to their rules when I *choose* to associate myself with the institutions. That is not possible concerning eg US law

-International law does have a universality element, but international law does not have its own police force/method of enforcement.

-This inquiry is not about words and definitions. We are talking about the concept of law

What is the content of the concept of law?

associated criteria?

What if two people have different associated criteria?

Do they have different concepts of the law?

Some people draw a distinction between concept and conception

-People in the sixteenth century and people now have different “conceptions” of water (clear liquid vs. H20). The **concept** of water is what both of these groups share

Shapiro is working with an understanding of a concept as more than the criteria you associate with it –

Meanings (contents of concepts) ain’t in the head…

One reason meanings aint in the head is that what our concept is about (water) fixes the content of the concept

But might say that the reason sometimes is that what our community thinks fixes the content

Eg I say “my bone has arthritis”

This could be contrary to my concept of arthritis because I am pegging it to socially accepted criteria and under those criteria only joints can have arthritis, not bones.

- but this social approach may not be enough to explain why meanings aint in the head because it would still follow that social groups with different criteria would have different concepts

That’s a problem – southerners before civil war would have a different concept of justice than us

It would follow that when we disagree about whether slavery is just we would simply be talking past one another

That seems wrong

It seems like we are talking about the same thing, not choosing to talk about different things

That means we need an idea of the content of our concepts that is independent even of socially accepted criteria

NOTE: even if it were true that the content of a concept is just the criteria we have for using the concept some people could be right about the content and other wrong

-people can be bad at introspectively identifying criteria. A great tennis player, for

instance, may be very bad at describing how to make a good move

-you may have criteria in your head, but need a counterexample from someone to

identify it (realizing that “bachelor” excludes the Pope).

-**Reflective Equilibrium**: start out with truisms about law and try to come up with a theory that captures them. We may, along the way, throw out some truisms because they do not align with the theory.

-Reflective equilibrium attempts to strike a balance between your intuitions and the proposed theory.

-Why bother coming up with a theory of law?

Shapiro:

-It will help us determine which proclamations are actually law. We’re not confused about whether the Securities Exchange Act is law, but cases are unclear.

This is especially true of how to interpret law

-Does the death penalty violate the 8th Amendment? Different approaches may give different answers.

1) The drafters used “cruel” to identify something objective and it’s our job reach a conclusion about what “cruel” means.

2) Or we should track what the drafters *thought* was cruel

-can a theory of law inform us on the correct interpretive method?

Shapiro says Yes

Green is skeptical

It would mean that the people who come to the wrong answer are actually conceptually confused about what law is

That seems unlikely

BUT sometimes even Green wants to say this

Some people will say things like: EPA regs are unconstitutional because they violate the Commerce Clause, which allows the fed gov’t only to regulate what is really interstate commerce (they reject Wickard v Filburn…)

Green wants to say that these people are conceptually confused about what the law is:

Using positivist theory of law the law is determined by what officials generally accept as law right now – and they accept the EPA regs as law

-**Positivism**: the law is ultimately *solely* about social facts within a community.

-but isn’t something like “cruel” in the 8th A a moral fact?

Doesn’t that show that positivism is false?

-you can still explain 8th A in a positivist universe.

This moral consideration is relevant ultimately solely because of social facts

What are these social facts?

That officials treat the 8th A as law

The existence of a legal system with laws (some of which may refer to morality) is just a question of social facts.

-**Natural law theorist**: in order to identify what law is, you obviously have to start with social facts in a community, but you are also going to have to think morally too

Positivism and natural law theory will come to different answers about how to interpret laws

Shapiro, Chapter 2

-**Possibility Puzzle**: Just as first-time job seekers often find themselves in the awkward position of needing job experience in order to be able to get job experience, acquiring legal authority too seems to involve a catch-22: **in order to get legal power, one must already have legal power**.

-What gave a ruler the authority to make himself a rule-maker?

- Phil’s Objection:

Egg: Somebody has power to create legal norms only if an existing norm confers that

power.

Chicken: A norm conferring power to create legal norms exists only if somebody with

power to do so created it.

-There has to be something fundamental to legal reasoning – you cannot go on forever tracing back chains of authority.

-**Chicken Approach**: Stop with a law-maker.

-Natural law version: the law-maker is God

-but mustn’t there have been some moral principle that gave God power…?

-Positivist version: find a sovereign – someone who is habitually obeyed and who habitually obeys nobody else

-**Egg Approach**: Stop with a rule that authorizes a law-maker

-Natural law version: an ultimate moral principle that gives authorization to a community

-Positivist: by officials having a certain practice, that creates an authorization