Class Notes – Philosophy of Law

March 28, 2018

* + Nature of authority
    - Seem to make a particularly unusual demand upon people
      * Not just they issue a command and think command gives person a reason to do it
      * Think they issue a command and person should do it without really thinking about it
        + i.e., parent tells kid to clean room, kid shouldn’t weigh that against other things, but should just clean the room
    - Can the law give us something stronger than overriding obligation, but an obligation that requires us to not even think about other obligations?
      * Government seems to claim something like that
    - we will discuss later
* Big challenges to conventionalist theories of law (review/preview)
  + Dworkin challenging Hart
  + Hart Response
    - Inclusive legal positivism
    - Hart says that moral considerations can be built into rule of recognition
      * Officials have accepted morality in consideration of law
    - Whether morality is included in in the criteria of law or not is social fact –so the position is still positivism
    - In certain circumstances (hard case), look to morality to answer case
      * Official practice is telling you to do that
    - Moral standard being part of official practice satisfying legal requirement examples
      * X is proper law, unless person profits from it then it is not proper
      * In United States, something is law unless it violates constitutional right, then it is not
    - it is possible for there to be no gap in the law in the hard case because official practices have already identified that morality fills the gap
      * Example of moral standard that is itself law
    - Not essential to the law that it settles matters (unlike exclusive legal positivism)
      * i.e., Montana standard of reasonableness when driving, reasonable standard is law and that’s no problem
      * even though it does not settle the question of what is reasonable
  + Dworkin Response to Hart Solution
    - Even stronger than the first (more problematic to Hart)
    - Officials disagree on ultimate criteria of law
    - disagreement goes all the way up to the rule of recognition itself
      * Things get filled in over time, have to characterize it (under Hart) as an example of legal system changing
        + Revolutions; no legal answer because no rule of recognition to answer them, so even if in the end there is agreement among officials that’s not law
      * Dworkin says judges act as if there are legally right answers, which means the ultimate source of law cannot just be officials agreement
* Dworkin’s theory of law, by contrast, can explain why there is law even though there is disagreement among officials about the ultimate criteria of law
* idea of legal obligations as associative obligations that arise from legal practices
* Duty to Obey Law – we discussed this early in course
  + As an American, have a duty to obey US law?
    - Some people think there is an obligation
      * associative obligation argument - Source is based in the fact that you are an American, even though you didn’t choose to be one
    - Dworkin explains why obligations by virtue of participating in a community are not the same as what people think at any given moment
      * Not reducible to social facts
      * to discover the associative obligations must interpret practice morally, but in a way that is constrained by practice
        + Restrained by figuring out morally what the practice means

i.e., what does it mean to tip your hat

Is it out of respect? If so, why not tipping to everyone?

Could have the obligation to tip to everyone even if most people don’t realize it yet

Discover it over time by revealing inner moral meaning of practice

* + - * What do courts do when deciding cases?
        + Restrained by legal practices, have to do justices to preexisting legal practices

But always interpreting them morally, not just filling in gaps with morality, but trying to figure out best moral meaning of existing practices

What they interpret they claim is already law, already true

i.e., Brown v. Board, segregated education was always unconstitutional,

* + Rule of Recognition
    - Dworkin wouldn’t call it Rule of Recognition anymore
      * Would say that in every legal system, morality is required for law
        + For Hart, morality being law depends on social facts/official practice
  + remember, this is morality as the moral realist thinks
    - People have views about morality and think they’re right, etc.
      * But there is a fact of the matter about whether beliefs are correct or incorrect
    - When we say “morality” we are talking about the normative facts, not what someone’s views are
  + Dworkin response to American laws that don’t comply with morality
    - Not law, Dworkin is able to explain that something was legally wrong
      * Whereas positivist might have more difficulty