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Applbaum

3 Theories about what it means to say that a government is legitimate

* (1) Razian theory – when a government enacts a law it entails a duty of obedience
* (2) Hobbesian theory – permission to punish, but people are in the same moral position that they were in before.
* (3) Applbaum (infinite number of theories) – the government has the capacity to change people’s moral status but not necessarily through a duty of obedience

Clam Digger Example

The clam digger was privileged before and after the legal judgment, but it changed the status of the beach owner. He has the privilege to put up fences after the judgment. The beach owner morally changed through having permission to put up the chain.

Red Light Example

Under Raz, when the red light goes up, there is a duty to obey

Under Hobbes, red light doesn’t change anything. It’s an announcement and you might be punished for turning right.

3rd theory – duty to pay after turning the red light, similar to civil disobedience. Civil disobedience has a public aspect. Before there was no duty to pay a fine, after the red light exists, there is. Your moral status has changed.

The government will claim more than legitimacy in Applbaum’s sense. We are not talking about what the government is asserting. They are likely asserting the Razian view.

Indeed, government is likely claiming something *stronger* than the duty to obey.

Example of telling children to clean their rooms. You don’t want the children to reason about the duty to clean their rooms. You want them to short circuit their reasoning and clean their rooms independent of their views about their reasons for action. Irrational for people to obey an authority in this way? Asserting a moral power that might be impossible to have. It preempts and displaces all other duties just be saying so. This is a puzzling conception. We will discuss it later.

Applbaum draws a distinction between the enforcer and the government in order to distinguish the Ladenson theory from his power theory. The government can order people to enforce the law. Under the Applbaumian theory, the government has the power to make it permissible for someone else to punish. This power is not with respect to citizens, it is with respect to government agents. Under the Ladenson theory there is no power exercised. they have the privilege to punish and simply give it to their agents.

Green: If the government is legitimate under A’s theory, it has the power to change citizens’ rights, but it sounds weird to only change the rights of agents. This sounds too weak to be legitimacy.

Green: I now realize that when I was articulating the Ladenson theory, I was assuming that it would be impermissible to punish without declaring a rule. But that means that announcing the rule is the exercise of a power – the power to make one’s punishment permissible.

To really be the Ladensonian theory, the gov’t must be permitted to punish without laws. If they are permitted to punish without announcing laws, then they would not have a power. Green thinks (1) that the idea of creating permissibility of punishment doesn’t sound like legitimacy and (2) he was always thinking of Hobbes’ theory as a power theory. They can make it permissible to punish through announcing laws.

Notice that unlike a legitimate government, when the Nazis announce laws, they don’t make it permissible to punish. It is a way to distinguish legitimate from illegitimate governments, but we probably mean more than that.

Keep in mind – not all governments are legitimate. What does it mean to be illegitimate? Under the Applbaumian theory it doesn’t change anyone’s rights at all. Under Hobbes’ theory illegitimate governments cannot permissibly punish. We also have no theory of illegitimacy. But we have said that enacting a bad law is not enough to make gov’t illegitimate. The bad law has some moral consequences even if the law is bad if the government is legitimate.

Green thinks that the Appl theory should be one in which the moral power of the government is tied to the rights of citizens. It announces its judgment and it changes their moral status.

NOTE: we got on a discussion of whether punishment is essential to law (even illegitimate law). If it is not essential, how do we understand a government that does not have the ability to punish. It has been common recently to say that the capacity to punish is not essential aspect of law.

International law

There seems to be three motives for Applbaum’s theory. (1) He thinks he is correct, but he also (2) wants to explain civil disobedience, and (3) free up an account under international law where you can say that a government is legitimate and yet another country can permissibly interfere with it.

Under Raz, this is incoherent. If they have a duty of obedience, why is someone else interfering with what they have a duty to abide by? This created a problem. You should be able to intervene in a government (e.g. Rwanda), but in order to say so you have to say that the government has to be illegitimate.

Under Applbaum, you can say that the government is legitimate and still intervene. Idea is that a government has two groups in its population, As and Bs, they enact a law where the As enslave the Bs. The Bs resist the As, and another government intervenes, but the law is still legitimate. The government changed As legal status. After the law changed, the As have a privilege to enslave the Bs. They have changed people’s moral status, but the Bs can still have a privilege to resist. It wouldn’t be strange to say that we can come in and interfere. The government is legitimate because they had the capacity to change people’s rights.

NOTE: It is hard to imagine the enslaving law having this effect. But this example is an explanation as to why it might be compatible to interfere with a legitimate government.

The idea is that we don’t have a rich theory about intervention. International lawyers are always assuming that once a government was declared legitimate, it would be impermissible to intervene. (This is a problem because they were working under the Razian theory). This is not a war. Intervention in Rwanda is an example. They are going in to try to solve some sort of problem.

Shapiro

We are now discussing the nature of law. We talked about the formal structure of legal and moral rights. What is the consequence of the legitimacy of the government? Now, we are talking about what is law?

We want to know the necessary and sufficient conditions of law. If something has them, necessarily, it is law, and it is only law that has such conditions.

Necessarily human beings that are male and unmarried are bachelors and that is sufficient for them to be bachelors. But maybe law is a concept where it has a cluster of criteria, and if you have some of the criteria, it doesn’t have to satisfy all of them. Think of a game – not every game satisfies all of the criteria.

Nevertheless, we should try to come up with necessary and sufficient criteria for the law.

Here are some of the big questions in coming up with a theory of law. Is the law necessarily connected to morality? Will we also have to appeal to morality to recognize something as law? An alternative is positivism: the existence and content of law is ultimately a matter solely of social facts. First view is natural law theory – the law is in its essence partially moral. Positivist view – ultimately a matter of social facts.

Another problem – the law seems to be a matter of rules. What are these rules? We think we are not talking about the law when we talk about social facts about officials’ beliefs, attitudes and behavior. We tend to think of law as sets of rules. Social facts about official practice is not the law. It’s a different issue.

What are we doing when we come up with a theory of law – a theory of the necessary and sufficient conditions for law?

First approach – you are talking about the definition of the word “law.” We are looking at the dictionary and semantics. Shapiro thinks this can’t be true. If the theory of law was about the definition, it would only be correct with respect to English speakers. The word law is also very variable. It seems like we’re tracking something else, and we’re not interested in the word itself.

What we want to do is find out what the law essentially is (Shapiro thinks it involves a social institution). How do you find out what is essential to bachelorhood? How do you find out the necessary qualities? When you’re finding out a theory of X and you’re not looking at lexigraphy, what are you looking to? For example, bachelors tend not to have full sets of cookware. You’re talking about what happens to contingently be true about bachelors. It is not something essential to bachelors. We are talking about what is essential to law, not what is contingently true about law.

How do you find out what is essential to something? We want to know what is essential to law, but it is a curious thing to do. People usually want to find out contingent facts. But when you find out what is essential, you are not going out in the world and empirically observing. This seems to be non-empirical but it is about bachelors themselves and not the words.

A theory of bachelorhood and a theory of law is making claims about necessary truths.

What is the thing we know when we make these claims about necessity? Compare mathematics. Numbers have necessary qualities. We’re not talking about the numeral – but the numbers. You can know things about numbers without observing them. What is it we know – something platonic? Do we have to say the same thing about the theory of law, we are knowing something platonic?

Here is an alternative – when we make claims about what is necessary we are making claims about a concept – something psychological. Concepts are in your head. We don’t need an abstract platonic object out there. Maybe we are just talking about our thoughts, which are different from our words. Our word law may not correspond with our thoughts of law.