Law and Philosophy Workshop
October 6th, 2008

Questions for Greenberg

Our questions concern the two main parts of your paper: the critique of what you call the Standard Picture, and your alternative to it. The questions below are in reverse order.

I. The Alternative to the SP.

If we understand your alternative view correctly, it is based on the following points:

(1). The legal system is supposed to change the moral profile of the relevant community.

(2). It does so by changing the general circumstances that constitute moral reasons for action.

(3). Authoritative pronouncements are not essential for (2), and even when they exist, their legal impact is only via the changing of circumstances that constitute moral reasons for action.

(4). When the law operates as it is supposed to, the content of the law is tantamount to its impact on the moral profile.

1. We had some questions about your concept of a moral profile of a community: does it consist in the totality of moral reasons for action that apply to all members of the community, or only those that apply to them in common? And do we have to assume that a moral profile is necessarily a coherent set? If a moral profile in a pluralistic society is likely to be fragmented and morally incoherent overall, how can we determine what would count as a positive change in such a profile (which is what the content of the law is supposed to amount to)?

2. We were wondering whether the alternative picture tells us something that is unique to law. It would seem that there are other social institutions that function as described by (1) to (3), without being legal in any sense whatsoever. (Basically, any institution or social practice that solves a collective action problem, say, like Oxfam, or practices of etiquette, etc.) Is there nothing, in your view, that makes the law a special kind of social institution?

3. On p. 61, you suggest that when the law operates as it is supposed to, the content of the law is constituted by (or consists in) its impact on the moral profile. Does it follow that a law which has no impact on peoples moral reasons for action has no content? And does it follow that if you are a moral skeptic, the law has no content for
you? In short, does it not confuse the question of what is the content of the law with
the question of what is the moral impact of such content, if and when it has one?

4. Finally, we were wondering how your overall picture of the law could be
employed to explain some of the mundane features of law, such as –

a. The fact that some putative legal directives can be ultra vires, or constitutionally
challenged and found invalid, etc. Or, perhaps more generally, the fact that it may
matter, both philosophically and practically, that the putative authority is legal or,
legally of the appropriate kind.

b. The fact that a great deal of legal practice, in courts and outside them, consists in
the interpretation of specific legal directives. And as part of it, the fact that in
numerous contexts it seems to matter, legally speaking, what the relevant
authority's intentions, purposes, etc., may have been.

II. The critique of the Standard Picture

5. If we understand correctly, the main theses of the SP are:

(i.) The law consists of authoritative pronouncements.

(ii) The content of an authoritative pronouncement is its communicative content.

(ii.). The content of the law consists of the overall or aggregated content of the
authoritative pronouncements.

a. Would you agree that any SP theory of law would also need to have an
explanation of who counts as a (relevant) legal authority? Is it not an essential part
of what a theory of law is concerned with?

b. Does (iii.) follow from (i.) & (ii)? Could it not be the case that the content of the
law consists of the content of the authoritative pronouncements and content that is
implied by those pronouncements in various ways, such as their organizing
principles and doctrines, etc.?

6. On pp. 22-23 you point out some difficulties with the idea that the content of
authoritative pronouncements would consist of rules. We were not quite sure that
we understood the difficulties. Can rules not be the contents of linguistic
communication?

7. Around pp. 30-32 and ff, you list a number of difficulties relating to the fit of the
SP with legal practice. We had some difficulties with those alleged problems for the
SP, on two main grounds. First, it seems that what you take to be improbable is
exactly how lawyers would describe what they are doing; namely, that they are trying to figure out the content of the authoritative decisions, one by one, and then perhaps the underlying legal doctrine that those decisions instantiate. Second, it seems that some of your examples ignore the various layers of understanding linguistic communication, particularly its pragmatic aspects. For example, that the same utterance can be meant to be understood differently by different hearers, or that an utterance may implicate some communicative content even when the implied content has not been asserted, etc.

8. On the SP and the concurrence hypothesis (p. 51ff)

a. You seem to suggest the following argument:

(1). SP has to assume that for legal obligations to match moral obligations, there is a general obligation to obey the law.

(2). None of the arguments which have been offered to establish such a general obligation to obey the law succeeds in doing so.

(3). Therefore, SP makes it difficult to see how law can operate as it is supposed to.

If this is basically the argument you make here, we were not quite sure about (a) what exactly justifies the first premise? (e.g. suppose all legal obligations were of the mala per se kind; they would match moral obligations without a duty to obey the law.) And (b.) what justifies the conclusion – even if the obligation to obey the law is not a general one, namely, it does not apply to all subjects in all circumstances, the obligation to obey the law might cover enough ground to meet the requirements of the concurrence hypothesis.

b. On p. 55-56, you seem to suggest the following diagnostic explanation for the failure of the SP: issuing authoritative directives is “a poor way to create moral obligations”. Do you assume here that the main purpose of the law is to create moral obligations? This would be a much stronger thesis than the concurrence hypothesis, would it not?

c. In support of the concurrence hypothesis, on p 41, you suggest an analogy to the deficiency of having a false belief; indeed, it makes sense to say that to have a false belief is a deficiency because to believe that P is to believe that P is true. However, it is not so clear that such a conceptual relation exists between law and its moral content. In other words, one cannot coherently say that “I believe that P even if I know that P is false”; but one can surely say that “I order your to Q even if there is no moral reason for you to Q.”

9. On p 56ff, you suggest some considerations to show that the law can change the moral profile without the intermediary of the content of the law. We were not quite
sure how this figures in your general argument. First, we thought that the main thesis is that the content of the law is ill conceived in terms of authoritative pronouncements; not that we can have law without content. Second, your conclusion here would not be contested by the SP – the latter is perfectly consistent with the (plausible) view that the existence of the law itself, regardless of its specific contents, has moral significance, that it is good in some respects.