Lecture Notes 1/11

What is this class?

* Philosophy, not law
  + Philosophical reflection on the law
* Examples of questions we will ask:
  + Is there a moral duty to obey the law?
    - anarchism
  + do you need a duty to obey the law to have a legitimate government?
  + what is the nature of law?
    - is it composed of social facts, morality, something else?

A bit on the attempt to find the nature of law

* we will use conceptual analysis
  + attempt to figure out the content of our concept of law
  + the necessary and sufficient criteria for something’s being law
* why do this? what makes this of philosophical problem?
  + not just because it is challenging
  + it is challenging to come up with the content of the concept of a bachelor
    - problem cases like 2 year old boys and the pope
  + but that doesn’t mean there is a philosophy of bachelorhood
* the reason philosophers engage in conceptual analysis is because of puzzles (conceptual *conflict* generating problems at high level of abstraction) – you try to clarify your concept to solve the puzzle
  + Example:
    - determinism looks true (from science and psychology) – nothing could be otherwise than it is (given antecedent events and laws of nature)
    - But we also speak about free will (in connection with morality), which suggests that one could have done otherwise than one did
    - that’s a puzzle
    - engage in conceptual analysis to try to solve this problem
      * what do we mean by free will, by determinism?
* Why is anyone motivated to engage in conceptual inquiry with respect to what the law is?
  + puzzles that have to do with the relation between law and ethics on one hand and law and social facts on other
  + law is strange ontologically – where is it? can’t really bump into it

Anarchist question – Is there a prima facie moral obligation to obey the law?

we are concerned with whether there is a generic duty to obey the law

* the fact that there are laws whose content is good is irrelevant to whether there is a generic duty
* so it does not show that there is a duty to obey the law that there is a duty to obey a law that says do not murder

There are many moral reasons for obeying the law besides the fact that it is the law – these do not show that there is a generic duty to obey the law

e.g.

* the content of the law happens to be good
* violation of the law happens to be likely to result in punishment

Spent a long time on another question

* is there a prima facie moral duty to keep your promises?
* That means that making a promise itself must give you a moral duty to keep your promise, not something that is contingently associated with making a promise
* Example – if the reason we should keep our promises is that others reasonably rely on them, then there is no duty to keep promises, because one can have promise w/o reasonable reliance (and reasonable reliance w/o a promise)
* If there is a duty to keep your promises because you need to keep the social practice of promise-making-and-keeping going, then there is arguably no duty to keep a promise because there might be a promise without the practice
* but some believe that the promise itself creates a prima facie moral duty to keep it even without reasonable reliance – those people really believe in a moral duty to keep your promises – tied to idea of our autonomy

Must do the same with the law – what gives as a duty to obey the law must be essential to the law, not just contingently associated with it

BUT we are not concerned whether there is an Absolute Moral Duty – if an absolute moral duty exists to X means that one must always X, no matter what the countervailing moral considerations

* there are probably no absolute moral duties

We are interested in a prima facie moral duty to obey the law – this can be overridden by weightier moral duties

Smith draws a distinction between 3 types of argument for a duty to obey the law:

* 1. Consequentialist
     1. the duty to avoid bad consequences (which is a duty we all have by virtue of being human beings), justifies the duty to obey the law – if we break any law bad consequences will result
  2. Consent
     1. the duty to obey the law is one that we have willingly accepted through and actual or implicit promise to obey – doesn’t matter if there are bad consequences from disobedience
  3. Arguments based on the state having conferred benefits
     1. different from consent because one did not ask for the benefits
     2. different from consequentialist argument because it is not clear that there will be any bad consequences from disobedience