**Philosophy of Law – Class Notes – 02/15/17**

1. **Austin’s Theory of Law**
   1. Problem of understanding all laws as commands
      1. Looks like there are laws that are not duty imposing but they are power-conferring (making a will for example)
         1. Hard to turn this into a command by turning the nullity into a sanction
            1. Rules doesn’t care if you create a will or not, that is not the purpose of the rules concerning making wills or making contracts
            2. If you take away nullity, there is nothing left of the rule in this situation BUT you can understand a true command or rule (don’t murder) as having some quality independent of the sanction – if nullity is the sanction you cannot separate it from the rule
   2. Idea of Sovereignty under Austin
      1. All laws are commands that have their source in a sovereign
         1. Sovereign is legally unlimited / all laws emanate from this sovereign
      2. **Democracy and the Sovereign**
         1. Can the people be the sovereign? / Do people make the laws, even in a pure democracy?
            1. Not all the people can be the sovereign but rather it is the majority that makes rules, it is the majority that makes laws
         2. Austin doesn’t say that the sovereign has to be a single person but they would still have to have others owe obedience to them and owe obedience to no one else
            1. The majority are the sovereign (the majority is the chicken)
            2. People are in the habit of obeying whatever the majority decides
            3. BUT, there is a problem with the sovereign being in the habit of not obeying anyone else because there are checks and balances in most democracies (federalism)

Not possible for the Austinian theory for the sovereign to be legally limited because all legal limits come from the sovereign / Austin says that there cannot be this type of division of sovereignty

* + - 1. \*\*However, Austin doesn’t actually think of the American legal system as a democracy where the majority is the sovereign / Austin says that the sovereign in the US is 3/4 of the states (therefore the US is not a democracy because the majority cannot get what it wants because it is 3/4 of the states that have the final say
         1. Changes to the Constitution are ratified by 3/4 of the states (the sovereign is not just the majority of the people; the sovereign is 3/4 of the states because they seem to have the closest to absolute power because the amendment popwer to the Constitution is the law that cannot be overridden and only 3/4 of the states can amend the Constitution

BUT, even 3/4 of the states has some limits that cannot be changed, (even if 3/4 of the states want to get rid of the representation of a state in the senate, they cannot do that without the consent of that state) –

Who put this limitation into place, are they the sovereign? / The Austinian theory needs to find out the answer to this question

* + 1. **Criticisms**
       1. Continuity or Delegation –
          1. One criteria of sovereignty is that people habitually obey the sovereign but when there is a transfer of power from one sovereign to another (death or succession) the people are not in the habit of obeying this new sovereign yet

that means we do not know if the next person is a lawmaker until there is a habit of obedience

in addition, even if you did know, there would still be a revolution separating them – they would not be the same legal system

but we think that you can have multiple ultimate lawmakers in the same legal system

* + - * 1. Austinian response: When people are obeying the new sovereign, the people are thinking they are doing what they think the first sovereign wanted (first sovereign wanted us to obey this successor) and when the new sovereign appoints another sovereign or dies and a new sovereign steps up, the people still think that by obeying that new sovereign they are doing what the first sovereign wanted (first sovereign wanted the new sovereigns to be able to appoint successors and have us obey them as well)

BUT, at what point does this become too disconnected from the first sovereign and the people are no longer doing what they think that the first sovereign wanted)

This is the problem with delegation and therefore not all legal systems can rely on this

theory because it doesn’t explain all legal systems (delegation occurs in some legal systems but not all legal systems)

* + - 1. Persistence of Laws –
         1. If all laws are the commands of Rex I and then when Rex I dies, and Rex II comes in how are the laws still in place? (Rex II, the new sovereign, did not make these laws)

when there is a real break in legal systems, in a revolution, you need some sort of reception statute that keeps all the previous laws in place or else there are no laws under the new sovereign

* + - * 1. But that doesn’t seem to be the case with Rex II – so once again we seem to need an overarching rule that allows laws to persist, separate from the sovereign’s powers (this is the egg theory)
      1. Division of Sovereignty
         1. Under Austin, sovereignty cannot be divided (the chicken theory does not allow this BUT egg theory does allow this)

Austin says that there has to be some unitary sovereign (there cannot be two separate law makers or sovereigns that have their own separate and absolute sphere of influence like domestic powers to one and foreign powers to another)

* + - * 1. In the US, many argue that sovereignty is divided by federalism and checks and balances (Austin would not agree with this because he says this isn’t possible)
      1. Democracy – See above example
      2. Nullity as a Sanction
      3. Habit v. Rule
         1. Just because people are in the habit of doing something (obeying sovereign) doesn’t mean that they ought to do it – It is a habit, not a rule
         2. Habits don’t create authorizations / Authorizations have “oughts” associated with them whereas habits do not / Habits have no normative quality
         3. Laws seem to have “oughts” tied to them because people use normative language when talking to each other about the law (ought to do what Congress says in the US, not what Parliament says or the Queen says)

There is a sense that this is wrong, not just different

Austin can’t explain this idea that “oughts” are tied to this idea of law because he seems to rely on habits

* 1. Answers given by Austin
     1. Solves possibility puzzle
     2. There is no moral obligation to obey the law
     3. Explains the system of law and how all the various systems of law fir together (they all emanate from the sovereign and are all connected in this way)
     4. Avoids Hume’s Challenge because it doesn’t offer any normative quality it is DIDO (there are no “oughts” under Austin, it is all descriptive about the probability of sanctions, not normative at all)

1. **H.L.A. Hart’s Theory**
   1. It is an egg theory (at the apex of the legal system there is a rule)
      1. That rule can persist even though the law makers authorized by the rule constantly change
   2. Trying to explain, in a sociologically way, how a normativity can arise (looks at social rules)
   3. Social Rules – Social rules are the foundation of laws, not habits of obedience
      1. For there to be social rules, Hart says that
         1. (1) Everyone must follow this rule (everyone removes their hat in church); and
            1. This is not enough alone because that would just be habit
         2. (2) If someone doesn’t follow this rule, people think that it is wrong (using normative language to express that it is wrong to not remove your hat in church)
            1. This isn’t necessarily morality that makes this wrong, it can be separate from morality
      2. There is a normativity that just emerges from social facts
   4. Moving to Legal System from Social Rules
      1. You can have a society without law that is made up of social rules (primary rules) but certain problems give rise to a legal system that require rules about rules (secondary rules)
         1. When people disagree about what the primary rules are, it creates a need for a legal system to identify what the rules are (rule of recognition)
         2. You also need a legal system to change the primary rules (without secondary rules that allow you to change the rules quickly it would take far too long to change social rules/primary rules)
         3. and you need a means of determining when rules are violated – rules of adjudication
   5. Requirement for Legal Systems
      1. **Rule of Recognition**
         1. Rule for identifying what are the enforceable rules
      2. **Rule of Change** – confers power on a person or institution to create, modify, or extinguish rules and may also specify the procedures to be used in exercising that power
         1. Since the rule of change empowers certain persons or bodies to amend the rules, behavior may be shifted in the desired direction through the exercise of legal authority
      3. **Rule of Adjudication** – Deals with the argument over the application of rules to the facts / Confers the power on certain bodies to apply the rules to the facts of each situation /
         1. To determine whether a rule has been satisfied or violated on a particular occasion, and specifies the method to be followed in adjudication
      4. \*\*However, some things seem to satisfy all of these rules but are not considered a legal system (like the Boy Scouts) / These bodies that are not legal systems are missing some form of sovereignty that seems to be necessary
         1. Hart doesn’t address this apparent need for a sovereign under these three rules / You need more than these three rules to create a legal system as it is recognized by society
         2. Officials that have the rule of recognition, rule of change, and rule of adjudication need also to have some form of sovereignty