Lecture 12

You should be pretty confused at this point

There are lots of issues floating around

But one basic issue is the fact that law seems to have both a social/factual and a normative quality to it

The question is explaining the oughtness of the law without resorting into the view that the law is moral

Hart tries to do it through the idea of a social rule

To repeat, for Hart a social rule (such as the rule *remove your hat in church*) exists for a community when people do not merely generally remove their hat but criticize those who do not remove their hat using normative language – this normative language expresses their acceptance of the rule

This expression is intended to explain the normative quality to the rule – it is normative from the internal point of view

At the basis of a legal system, according to Hart, is a social rule among officials (the rule of recognition) which identifies the standards that are enforceable by them

It is this rule that authorizes lawmakers in the legal system (note – there are also rules of change and of adjudication)

it is also a requirement that the general population by and large obeys the laws, but they need not take the internal point of view concerning them – they may obey solely to avoid sanctions

Normativity Problem

Revolutions bring about changes in legal systems because they reflect changes regarding what people actually do and think, not underlying morals

* This shows us why positivism and social facts are compelling answers to the Philosophy of Law
* But don’t we want to have some kind of normativity (and “ought”) to the law?
* This non-moral normativity is what Hart tries to explain to the idea of a social rule

Shapiro criticizes the way that Hart attempts to explain the normativity of the law

* Two issues
  + The first is plenty obscure
  + The claim is that for Hart social rules *are* social practices
  + But a rule is an abstract object with an infinite scope
  + Practices are finite
  + The idea is roughly this – when you think about rules (the rules of chess, the Constitution) there is an infinite number of things that can fall under the rule
  + For example, there is an infinite number of games of chess, games that can last longer than a human life
  + An infinite number of laws can be enacted under the constitution
  + But it is not true that an infinite number of laws could be enacted by a human practice or that an infinite number or extremely long games could be played by actual human beings
  + When people are thinking about law they are thinking about abstract objects, not practices
  + That is the stuff you learn in law school (e.g. the Securities Exchange Act, not official practices)
  + Judges don’t talk about the interplay of social facts about legal practices & morality or prudence; they talk about the Constitution and statutes passed by Congress
    - This is the “category mistake ” problem Shapiro brings up, whereby rules are abstract, infinite objects, and thus cannot be reducible to social practices
    - If judges & other people in our legal system *did* speak solely about the existence of their practices as social facts and the moral or prudential consequences of those social facts, would it cease to be a legal system?
      * Green says yes. E.g. if there was a chess game and the players talked about moving pieces according to social facts & morality rather than moving pieces according to the **rules**, it seems like there isn’t truly a game – just a moral relationship between two people moving figurines around. There seems to be something more to a game of chess than just a moral relationship.
      * Opposing view: rules are merely time-savers that represent the intersection of social facts & morality or prudence

The second Shapiro argument is directed at a reformulation of Hart’s argument - that social practices (of the sort that Hart describes – with people generally following the standard and with criticisms of non-conformity using normative language) necessarily generate social rules

Problem Shapiro argues is that not all Hartian practices generate social rules

* What does Shapiro mean by a social rule?
* It appears to be a rule giving people a reason for action that exists for the group only – it exists because of their practice
  + Do Hartian social practices always create social rules?
    - Shapiro says “no”,
      * Baseball example: 3rd basemen come into the infield when the batter shows bunt. This is a Hartian social practice. Third baseman generally do this, and they criticize those who do not. However, there is no social rule that 3rd basemen must do this in the same way that “3 strikes, you’re out” *is* a social rule. The teammates yelling at the 3rd baseman who stays back are doing so not because some social rule is violated, but because it’s generally just a bad idea to stay back; the batter is more likely to get on base or score.
      * the reason people have to move forward has nothing to do with the fact that people generally do it
      * Even if others didn’t move forward, one would have a reason to move forward oneself

So what is an example of some social practice creating a social rule

**coordination convention**

* The fact that everyone drives on the right side of the street gives us a reason to do the same
* a reason that is applicable only to those who are part of the drive-on-the-right practice
  + - * We’re really looking for something whereby the social practice of doing X *is the reason* that most people do *X.*
        + and that the rule applies only to participants

BUT even assuming that coordination conventions can generate social rules, they cannot be basis of legal system

R o R not a conventional rule

Judges don’t talk about convicting a criminal because that’s what most judges do, while being generally indifferent to whether or not criminals are convicted. A judge definitely thinks that criminals should be convicted based on something more than just other judges doing it!

officials are not indifferent between the Nazi and the US constitution as long as everyone else abided by it

another problem is Alienated officials

Officials want to collect a paycheck

Will do that even if others do not

Green:

Maybe Hart’s idea is that when there is a social practice, because people develop a desire to act in accordance with the practice, independent of whether morality or prudence recommends it given social facts. They start seeing the action as having intrinsic value.

Think of the example of money, which can start seeming as if it has intrinsic value, even though its real value is only on the basis of a social practice and considerations of morality and prudence

* the idea would be this – when people all do something and criticize those who don’t, they develop an special disposition to do it and that disposition is expressed in normative statements

The social rule would exist only for participants, because only participants would have developed this view that the action has intrinsic value.

Intermission

Greenawalt Article

An attempt to apply Hart’s rule of recognition model to the American legal system

Shows how problematic the idea of a rule of recognition is

Draws a distinction between an ultimate rule and a supreme rule

* Ultimate rules (in the legal context)are the final source of all other law; where legal justification stops
* Supreme rules are such that they defeat other rules.
* Example: State Law
  + Looking at a Virginia statute, we can trace it back to the Virginia constitution and no further - this is the ultimate rule of Virginia law.
  + However, federal laws are supreme to Virginia law. The federal constitution and federal statutes are supreme.

Austin wrongly assumed that ultimacy and supremacy were always connected

Start with the Supreme law in the US legal system

* what is it?
  + probably the amendment power – since constitutional amendment can trump any other law, including the preexisting constitution
    - Are there any limits on amendment? Besides the Article V restrictions on amendment regarding representation in the Senate and the bit about slavery and 1808
  + “The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.”
    - possible examples of limits on article five:
    - cannot get rid of states (except for rump senate repr?)
    - Or cannot get rid of president
  + Another question of limits on article five: Can Art. V be used to amend itself? E.g. 3/4ths of states ratify an amendment to require 4/5ths of states to ratify future amendments. If this could be changed only through 4/5 states, article five would have been used to amend itself
    - We will talk about this later
  + How can we tell if there are limits on article five amendment?
    - Well, how can we tell whether the rule of recognition puts other limits on lawmaking?
    - What would answer this question?
      * If the limit were violated officials would treat the result as invalid
      * That is the reason that I can’t make laws – officials simply treat them as nullities
  + Problems: sometimes it’s hard to tell the difference between amendments that are disregarded because they are considered to violate the rule of recognition (regardless of whether people like them), and amendments that are disregarded because of moral considerations (like civil disobedience) – if the latter happens then there’s basically a revolution
  + Consider the following analogy – can Congress pass a law making a day Osama bin Laden day, in honor of Osama bin Laden?
    - One wants to say that it is legally possible for Congress to do this - it is accepted by the rule of recognition
    - But if it were done it might cause such an uproar that there would be a revolution
    - We want to distinguish between a continuous rule of recognition that puts limits on lawmaking power and extralegal concerns that would lead to revolutions
  + Even if the supreme law consists of amendments under article five, there are lots of gaps to article five. Can states rescind their ratification of Amendments? How long do states have to ratify?
    - Congress actually decides the validity of amendments (not the courts), so it might be said that Congress is actually supreme, since it decides whether a putative amendmen is an amendment
    - This is a general problem in the philosophy of law. When there is an entity that decides disagreements about the application of law, what is inclined to say that the entity is actually the lawmaker
    - So for example people will say that the constitution is whatever the supreme court says it is
    - But one needs to be careful here
      * Are there examples where officials might disregard what Congress validates as an amendment? Certainly; if Congress met today and decided by a coin flip that the age of suffrage is now 17 years old, officials would probably ignore that.
      * Where is the dividing line between acceptable resolutions by Congress and unacceptable ones, in the eyes of officials? In other words, why would officials ignore these hypothetically unacceptable resolutions?
        + Not done in good faith?
        + Not a reasonable interpretation of Art. V
      * If so, that means that the rule of recognition for lower officials concerning amendments is that an amendment is valid if Congress, through a reasonable good faith exercise of its power, says that it’s valid, but not through an unreasonable exercise of its power or one not done in good faith
      * What is the rule of recognition for Congress itself?
        + Does Congress consider itself to have power to call anything an amendment has long since are reasonable and is done in good faith?
        + That seems wrong –Congress considers itself to be bound by article five
      * Helpful to think of an umpire. An umpire decides questions of whether someone is out. The players are bound even if the umpire is in error. But he can’t call someone “out” for any reason; the umpire can only call someone “out” when it’s reasonable.
        + Thus we can say that for the players, the rule is that it is out if the umpires says that it’s out, provided that the umpire makes a reasonable (even if erroneous) call
      * does the umpire think himself as having unrestricted power to determine whether it is out, provided that his judgment is reasonable? Probably not. He considers himself bound by the rules of baseball.

This suggests that there are different rules of recognition for different members of a legal system

Congress has one rule of recognition for amendments, and other officials have another

* + - * True of lower courts with respect to the decisions of higher courts as well
      * Does that mean that there are different legal systems?