* Some issues that came up from reading papers…
* 1) You don’t want to say too much follows from the gov’t being legitimate; it does not necessarily follow that they can enact any law they want
  + - That would be unlikely
    - remember that a gov’t is deemed legitimate because of some moral good that it performs - hard to imagine that there would be these moral consequences if a govt could enact any laws it wants
  + three theories of what it means to say a gov’t is legitimate (will not discuss again)
    - Raz
    - Applbaum
    - Ladenson
* 2) do not confuse two issues
  + a) **does agreement among the people who use a concept determine the content of the concept (including the concept of law)?**
    - the people agreeing here are the people who use the concept – that is anyone who thinks about the thing
    - people can use the concept of law even though they do not participate in legal practices
    - people in conditions of anarchy can think about the law
  + b) **does agreement among officials in jurisdiction determine what is the law of that jurisdiction?**
    - the people agreeing here are the officials in a particular jurisdiction (e.g. American officials)
  + Dworkin confused these two things (accd to Green)
  + The **first issue** has to do with the methodology of the philosophy of law
    - that is, how we determine the essence of law
  + concerning this issue, Shapiro adopts a view that people can share the same concept even though they might have different criteria
  + disagreement among those who use the concept of law does not mean they are speaking past one another
  + the content of a concept is determined through reflective equilibrium
  + The second issue arises after one has gone through reflective equilibrium, has determined the content of the concept of law, and so has arrived at a theory of law
    - under a positivist theory of law the law of a jurisdiction is roughly whatever the officials of that jurisdiction agree is law
    - But others might conclude that agreement is not dispositive in determining what the law of a jurisdiction is

You have an agreement theory of concepts and a non-agreement theory of law

* + - * this is how we’re going to find the correct theory of law
        + We’re going to see what people are agreeing upon when using the concept of law
        + as it turns out what people agree upon is that the law of a jurisdiction is not determined by what officials agree upon
        + or you could get a positivist theory

You can have a non-agreement theory of concepts and an agreement theory of law

* + - Example: you can also have a non-agreement theory of concepts like Shapiro
      * It can generate a theory in which agreement among officials is determinative of the law – that is, roughly, Shapiro’s theory

Now that we have the process for determining the theory of law, we have to figure out the theory of law

big competitors are positivism and natural law

* What’s next
  + Possibility puzzle (Shapiro)
  + Different views about what is “ultimate” for in your theory of law
  + is what stands at the top a lawmaker who is not authorized (chicken) or an authorization that is not enacted by a lawmaker (egg)
  + Most philosophers are egg theorists

Notice that we do not think it is OK to say that the chain of justification goes on forever

* + - You’ve got an end justification, but you need to decide where do you end it?
      * Chicken → end with a person
        + Natural chicken approach → God is the end game for all, it’s just his will and from him you get the authority for the lawmakers of particular jurisdictions
        + Austin is the positivist chicken approach
      * Egg → end with an authorization
        + Natural law egg approach → moral right of communities to determine the terms and direction of social cooperation
        + Positivist egg – we shall see this in Hart
* Hume's challenge
  + One puzzle is the chicken/egg problem, but then there’s a particular problem for the positivist
* Assume that source of legal system is social facts
* Whence the obligation to comply?
* Since legal obligations exist and “obligations” sounds normative, it sound like the positivist thinks that social facts (something descriptive) can generate obligations (something normative)
  + - * In saying legal obligations are normative, do we mean there is a duty to obey the law?
      * not necessarily
        + The ought may be different
        + We’re referring to obligations → we don’t know what kind of obligations they are

But deriving the normative from the decsriptive violates Hume’s law – you cannot derive an ought from an is

you cannot derive the normative from the descriptive

a normative conclusion must have a normative premise

you cannot have DINO inferences – only NINO

* + - What’s the ought like stuff of the law?
      * Odd because we’ve spent so much time saying there’s no duty to obey the lwa
      * One way to think about it is legal sentences
        + Do judges ever shy away from ought or duty?

No, they use them all the time (violating duties, ought to pay things)

* + - * If we treat these as real oughts, then we’re just normalizing what officials do
        + It becomes normative what legal rights are
  + There’s one way to solve the problem → you can’t give up the descriptive premises
    - All of the oughts that seem to be in the law have to be reinterpreted
      * They sound normative, but they are just descriptive
  + The idea is that the reasoning is not DiNo, it’s DiDo
    - Legal oughts are descriptive premises and just sound normative
    - Becomes a problem for the positivists because you get all this normative language
  + What are some examples of some bad inferences from what is the case to what ought to be the case? in violation of Hume’s law – it is sometimes called the naturalistic fallacy
    - Sexual mores → people makes decisions on what they should do based on what people actually do
      * Heterosexual relationships create procreation, so because it is the case this is the only relationship we should be engaging in
* Wait – what about promises – those are factual and they give rise to duties
* I promised to take you to the zoo, therefore I ought to take you to the zoo
  + - I promise I’ll take you to the zoo → that’s an is, and doesn’t it generate a duty to take you to the zoo

there is a normative premise that is assumed, the duty to keep one’s promises

I promised to take you to the zoo and one ought to keep one’s promises, therefore I ought to take you to the zoo

* + - What about the following example:
    - If you don’t do this, then a disaster will happen, doesn’t it follow that you ought to do it
      * No – even then there is a Normative premise
        + that you ought to preserve life
      * Idea that normative conclusions need normative premises doesn’t mean that you need only normative premises often reasoning to a normative conclusion is from normative and descriptive premises, but Hume’s law is that there must be a normative premise if there is a normative conclusion
    - Acid will destroy your eye, therefore you ought not pour acid in your eye
      * + suppressed normative premise → you ought not hurt yourself

Natural law theory does not have the same problem – it assumes that determining the law is a normative matter, so it is not a problem that normative conclusions follow from the law

* + What’s the problem for the natural law theorists?
    - If you say that the normative conclusions are really normative, are really the ought, then you could say that fascism is a real ought
      * People would have a real ought with respect to fascist law, which sounds false
  + Both the positivist and the natural law theorists have a problem here
    - Problem the positivist has is explaining the normative language we use in connection with the law
      * Duty, authorization, and so on
    - Problem the natural law theories is that they can explain how they satisfy Hume’s law, but then you end up with this idea that even Nazi law is normative
      * Already explained how this is problematic
  + Each (natural law and positivist) is trying to explain the law in something more fundamental
    - There’s another option that is to claim that the law is irreducible
      * It just can’t be reduced to anything else
      * Like morality, is it reducible to something else?
        + You could say that morality can be explained by natural selection theory
        + Or moral is reducible to the influences of our community
        + These are all easier things to explain, but it doesn’t seem to be an adequate account of morality
        + that is why many people think that morality cannot be reduced to anything else
  + Now we’ve got a feel for things that can’t be reduced to anything else – is law one of those things?
    - Shapiro says no. What makes us think that the law is not an ultimate fact?
      * + consider how we go back in legal justification
        + Creating a statute by hand raising → it’s a social fact, but that isn’t what the statute is

Social effects only have an effect because of a law but that law is also created by the social facts

You keep on going and you end up at a terminus, and if you thought the law was irreducible, you would just say it is a legal principle that can’t be explained

eg as we go back in legal justification we end with something like the ratification of the US Constitution – it would simply be legally fundamental that the people who enacted the constitution were legally authorized to do so

tthat sounds weird

* + - * + but could be a principle of international law
* Let us assume, with Shapiro, that legal facts just can’t be ultimate facts
  + What explains the legal framework?
    - 2 ways:
      * Purely social facts
      * Social and moral facts
* Austin’s Theory of Law
  + The ways that it goes wrong teaches us a lot about what we will need for an adequate of law
  + What is Austin’s theory of law?
    - All law is just a series of commands that are issued by someone (or a group) that everyone habitually follows and does not habitually follow anyone else
      * The commander doesn't follow anyone else (you don’t want to talk about a police officer as a sovereign because they follow other people)
  + based on two ideas
    - Command → an expression of a wish that is backed up by some form of sanction
    - and sovereignty
  + What about judgments of courts? Are they commands?
    - Judgments are a little bit weird
    - but can be understood as commands → if it’s for the plaintiff, the defendant must comply/do the thing that they are told
      * What’s the sanction?
        + Contempt

Can ALL LAWS be understood as commands?

* + Example: trying to give an example of a legal bad but there’s no sanction
    - how about a case where there is an affirmative defense
      * there are some situations where the affirmative defense means you didn’t do something wrong (you’re excused)
      * But there are places where you did something wrong but it’s still an affirmative defense and so you are not liable
      * if you were negligent you violated the law, even though the plaintiff was also negligent and so you are not liable
      * that is a general problem for Austin – legal commands that have no sanctions for non-compliance
  + Another problem for Austin – there is a sanction (in the sense that you pay damages) , but we’re going to say that what you did was OK
    - Efficient breach → break your contract but it was for a good reason
      * Setting this aside
    - Vincent and Lake Erie case → big storm and the owner of boat ties it to a dock and in the storm it damages the dock and the owners win and get money
      * Was it wrong to tie the boat to the dock? No, but it would be wrong to get the benefit without paying
        + No time to enter into a deal, so it’s just getting a market deal
      * Tying the boat to the dock was the right thing to do
    - Maybe we can make this compatible with Austin’s theory?
      * There’s an element that shouldn’t be there → nothing wrong about tying it, what’s wrong is the hurting
        + There’s still a sanction and a wrong (have to pay for doing damage)
      * Austin doesn’t have any view that the command has to be something you’re capable of fulfilling
    - We still have the problem of the cases where the law wants to say you’re wrong, but it still lets you off the hook
  + The theory of what a law is is that it is a command to do/not do something with a sanction for performance
    - You may have to tweak a little for contract and tort law
    - What other laws could create a problem?
      * Authorizing laws (rules for creating a valid will is one of them or legislative authority)
    - Individual people can create their own mini laws like with wills
      * How do you understand this under the Austin view as a command?
        + THat’s the problem with Austin, it can’t account for power conferring rules
        + If you tried to see the sanction as not having your assets distributed at the time of your death, it would be that you are commanded to do things in this way

Austin says this → sanction would be the nullity of your will

What’s wrong with that? → Shapiro spends time saying this doesn’t work and that something is missing here

One way to think about this is that when we say don’t do X because you’ll be sanctioned and when someone does X, something bad happens

But when you don’t get 2 witnesses to sign a will, is the law saying this is something that we don’t want?

It just doesn't capture what is going on with these laws that create powers

The powers enable, they aren’t commanding people to do things

We just give people a sphere where you’re able to do something\

Here is another option:

* + - You can say that there are laws that look like they sit by themselves, but they can only be understood by looking at other laws
      * They’re made up of parts of other more complicated things that we would call the real laws
    - How might you say the power conferring rule is in the end about sanctioning people?
    - it is a fragment of a longer law that is about commands for officials to sanction people in certain situations
      * THink of a will case in which someone eventually gets some money extracted from them or somebody might even get thrown in jail
    - We can have these long if/then laws that end up with sanctions
      * If will say $ to X, then admin needs to give the $ to X or will be sanctioned
        + If the money does not go to X, then sanctions
      * Are there more thing that have to be the case besides this power conferring rule?
        + Kelsen thinks the legal rules are incredibly complicated
        + Say the will law was passed by the state legislature, there is an empowering law that is being taken for granted here

State legislature might not be empowered to create these laws so it would be a nullity, so we need to add to it that someone is authorized to promulgate and provid e this in the first place

* + - * + Antecedents of this law are complicated, but it all ends in sanctions (Kelsen’s view)
    - Shapiro criticizes the view
      * The whole legal norm seems to be saying to officials, here are the circumstances you can extract money from people and here are the circumstances where you can throw people in jail
      * One of the thing that’s being left out is that this is being conferred to you
        + It’s telling people they can make rules
        + It’s not just telling officials what to look at when throwing people in jail
      * Bad man argument → it just thinks about the recalcitrant people’s relationship to the legal system
        + It’s about people who don’t obey the laws and want to break them
        + Example: imagine angels, people who want to do what is moral
        + they know they shouldn’t disagree and have fights, but imagine they have disagreements about what is morally right

they can be mistaken about principles

or mistaken about what has actually happened –nthat is, the application of the principles

Could you imagine a legal system where they have a legal system with authority and a court system but there’s not sanctions at all?

Could you have such a system?

Because they are angels you don’t need a police force

They disagree with one another, but they create a legal system to solve this problem so there are no disagreements

when the law is announced everyone follows it

if there is a disagreement about the facts, when it is resolved by a court everyone follows it

Could this actually be a legal system?

No police but a legislature

Sounds like a legal system, but Austin can’t account for this legal system

This legal system has account for the ought part of the law but doesn’t account for the sanction part of the law

* + - * + Fundamental problem → Austin has a bad man theory

Not essential to the law that we have sanctions

* + - * + This takes care of Kelsen as well because he says we need sanctions