Theory of Law

* Philosophers have trouble explaining how it’s possible to arrive at a theory of law
* Find the necessary and sufficient qualities of something. Need to figure out how to identify them.
  + In the end, don’t have contact with platonic entities, but instead we have contact only with our own thoughts. Hence disagreements could simply be people thinking about different thoughts – not meaningful
  + While the above is a possibility, we don’t necessarily think this is the answer. We assume that we could be talking about the same object or thing and meaningfully disagreeing on the necessary and sufficient conditions of that thing.
* For our purposes, we assume conceptual analysis is possible. Something like the reflective equilibrium approach is used. Today, we talk about why we engage in conceptual analysis.
  + Some think it will make a difference in legal analysis, but Green is skeptical.
  + if so why pursue the answer to the question what is essential to law if it won’t help us be better lawyers?
    - We engage in conceptual analysis in philosophy because puzzles arise in connection with our chosen object
    - Have paradoxes or questions pushing us in different directions
    - so we try to engage in conceptual analysis to solve the puzzles
    - puzzles about skepticism are what leads us to engage in conceptual analysis of knowledge
    - puzzles about freedom and determinism are what leads us to engage in conceptual analysis about freedom
    - puzzles also arise in connection with the law

Shapiro’s Puzzles

* Possibility Puzzle - Law is not possible
  + Ancient village. One guy establishes laws. Next person challenges his ability to make law, claiming no law exists to give him authority to make laws. In fact, there is no law giving anyone the ability to give anyone else the ability to make law.
  + Natural law may be the only answer to stop the regress.
    - Could claim God-given right to make law.
    - or Appeal to moral principles. Morality exists independent of people and entities and thus start with moral principles and show how those moral principles give the power to (for example, the people) to give power to someone else to, or to themselves, make law.
      * Moral duty to create a state? To have laws?
    - Problem – Nazi Problem
      * Bad law. We want to say that there is law and legal authorization that is valid, even where the laws have bad moral content.
        + If all legal systems have moral authorization, we have to either say Nazis had no law or Nazi law is moral.
    - Answer – Positivism
      * Regress doesn’t end with morality, but rather brute social facts.
        + End point, where when you ask further, the answer is there is nobody/nothing beyond this point

End with lawmaker who is not authorized (Chicken Approach)

Constituted by a set of social facts

End with authorization not created by a lawmaker (Egg Approach)

Constituted by a set of social facts

* + - Problem for Positivism – Talk of Oughts
      * Sounds too normative
      * Can’t get to something normative with only factual and descriptive inputs.
        + Descriptive facts are insufficient on their own to create obligations. Need a normative premise as well.

the descriptive “is” cannot spawn an “ought”.

* + - * when it seems like you can get from is to ought there was a Normative principle that was always there: wasn’t created by the descriptive “is” because you would need an “ought” to create the normative principle.
      * Need more than the “is” to explain the “ought”. Maybe morality?

First Theory of Law – John Austin

* Unless law is non-reducible, can’t define law using law.
  + We don’t think law is non-reducible. If law exists, inadequate to state “Law is Law”.
  + must explain the law in terms of non-law
* Need to explain how laws hang together in legal systems.
  + e.g. each nation has its own legal system
* Austin’s theory does this
* **Theory:** Law is a rule issuedby the sovereign or one of the sovereign’s delegates or agents
  + **Rule –** command with the probability of sanctions for disobedience
  + **legal Obligation –** must obey or you will be punished
    - Austin starts with the descriptive and ends with the descriptive. All an obligation is an “is” that leads us to another “is”. There is no ought.
    - All we have is obligation is that you obey or you will be punished. There is no ought to obey or not – just a description as to what happens.
  + What does it take to be a sovereign?
    - One who is habitually obeyed and who habitually obeys no one.
    - Full descriptive and reductive account that doesn’t rely on normative account and is not itself a normative account
* Example: A democracy
  + Who is the sovereign?
    - **The People** are the sovereign. The majority is habitually obeyed and does not habitually obey the individuals or the minority in the society.
      * Think of The People generically as the sovereign, which is obeyed by people individually.
* Example: The US
  + what is the highest law in the US?
  + not the constitution – it can be changed
  + so what is the entity that has the power to change the constitution – that would be the sovereign
  + The peoples of the states, acting such that ¾ of them (the states) say something.
    - But there is a provision that says no amendment can be passed taking away a state’s representation in the senate w/o its consent
      * Maybe the sovereign is just more complicated? ¾ of the states unless the question is repr in senate in which case it is ¾ of th3e states plus the acceptance of the state affected?
      * remember the sovereign can be made up of multiple entities
* What about international law?
  + Doesn’t exist. No sovereign. There is no law binding the various sovereign of the law – it seems entirely voluntary for a sovereign to obey or ignore.
  + of course could be understood as moral o obligations between nations or questions of prudence, but that isn’t law for Austin
* Changes of sovereigns (revolutions) are not legal – just change of legal system – changes of the habits of obedience
  + - Change is without, not within, the legal system.