* Recap:
  + We are playing around with Austin’s theory of law, which is basically the theory you’d present your 5 year-old. We want a reductive account of the law that can be explained not in legal terms (so social facts or morality.) Austin’s theory is dependent on social facts. It explains how all the laws in a given system hang together, and it accounts for the existence of different legal systems.
  + Austin’s theory of law solves Hume’s problem because legal obligations aren’t normative, instead it’s just a matter of being punished. AKA Austin is not saying there is any duty of moral obligation, just a descriptive fact that there is going to be punishment. And assuming beyond that regarding morality goes beyond the existence of the law.
  + Also Austin’s theory also arguably solves the possibility puzzle. It’s just a matter of social fact, you end with a chicken, or the person issuing the laws (the sovereign.) The issue of how the sovereign gets the power isn’t a problem because they aren’t in a habit of obedience to anyone else and everyone has a habit of obeying the sovereign.
  + How to you explain democracy? Not hard, each individual person has a habit of obeying the majority. So this isn’t a problem. (AKA sovereign in US is ¾ of the states 🡨 constitutional amendment)
* Now:
  + Problems with Austin’s theory
    - Problem: Laws are commands backed up by threats for disobedience
      * This seems to explain tort and criminal law, but not other things.
        + Example: Vincent case, person brings a boat up against the dock and it harms the dock
      * Why is that a problem for the Austinian theory?
        + Paying the money to the dock owner is the punishment for violating the command. We wouldn't understand this situation that way, instead we view it permissible if not obligatory to put the boat up against the boat given the storm.
      * So how do we understand the reparations in the context of Austins theory.
        + Maybe the sovereign can issue contradictory demands? Example you are violating a command regardless.
        + Maybe the problem is less about that he tied up his boat to the dock, but a command not to do damage to other peoples property? So that explains the punishment of having to pay money.
        + Compensatory orders: So if Alex is commanded to pay Stephanie, then doesn't. The sovereign has the ability to make Alex pay by just seizing the money aka the sanction of forcing him to.
      * Maybe try an example of a normal contract under Austin’s theory. In a normal contract the command is abide by the obligation you committed to in the contract, and the penalty for not is payment of damages

How is the sovereign authorizing contracts?

This is the problem of how the sovereign can create power-confirming rules.

Aka where is the command and where is the sanction?

* + - * + Similarly, how do we understand a policeman telling us to do something within a monarchy system? Since the policeman isn’t the sovereign, the command would be do what the policeman says or there will be sanctions of X.

You could say something similar in contracts, where it isn’t a separate issue anymore just part of the command. It is the antecedent (conditional command), IF A&B exchange certain things/certain words they have to do what they say or face sanctions… or IF you exchange promises with consideration with another person you are commanded to fulfill your promise or face sanction. (Lets assume there isn’t efficient breach)

* + - * But that sanction seems to be conditioned on not paying damages, breaking the promises, etc, so its just a fragment approach a lot of If statements.
        + The law is directed at officials telling them the criteria for sanctioning people. So empowering rules are just the If clauses. (Kelsen)
    - Can we explain all authorization in if clauses of commands?
      * Whats the problem?
        + Judges – lets set that aside
        + Does contract law come out of no where? Who is empowered to make contract law? Lets say Congress/state legislatures…

So… If the constitutional convention creates article 7 and if the constitution is ratified by Article 7 then If the people authorize legislatures, then if the Congress says contract law and if you say things to one another and if you or the other person don't do those things then you pay sanctions

🡨 thought by Kelsen that the real law is really complicated instruction to officials of lots of antecedents/if/then statement. Cant just look at the surface, you have to look at the deep structure of laws to understand

* + - * + at some point we are going to have to stop and will either do so in social facts or morality
      * So question: was there an authorization of the Constitution? No, came from no where there was a revolution.

Under an Austinian view you would say there is just a habit of obedience (but this sounds weird)

Kelsen is an egg person and says we have to presuppose there is a basic norm that is authorizing the first constitution 🡨 setting that aside

However, seems like we have explained power-conferring rules as fragments (antecedents) of commands

How can we have a number of nations come together and make one nation? It seems like you cant because they decide to do that, and it seems like you need something higher, not just a bunch of little legal systems as authority 🡨 we will talk about this later.

Ex: If the states cant leave, example NH cant just bow out, then the power has to come from somewhere other than just the mini legal systems of the states.

Why are we discussing this? Trying to explain commands in terms of authorization in fragments of commands to solve Austin’s problem..

* + - How does Austin himself explain authorizing rules?
      * Nullity
        + Ex: need two witnesses for a will to be valid, if you don't do it the sanction is the will is not upheld.

Ex of why this doesn't work: Don't murder, when you take away the penalty there still seems to be a command not to murder. If you take away the nullity for a will there doesn't seem to be a command independent, it seems again like it’s an empowerment.

The fragment theory seems to fix this… we treat the founding fathers like gods anyways, so maybe everything can be reduced back to them and their power they created. (The fact that they are dead may or may not be a problem because arguably it is questionable if they are still being followed/if people are actually in a habit of obedience to them because the commands were issued by the dead person. But this is a side note to what we are discussing.)

* + - Nullity doesn't seem to fix concerns, the idea of fragments of commands (things that aren’t laws in their own right) are fine.
      * Shapiro critiques this:
        + (1) because people don't think about law that way
        + (2) Contract law or sanctions is really being directed at the sanctioners when we think of it in terms of fragments, however we don't think about it that way in reality. We think about it as being directed to the people contracting. We feel like Constitution gives Congress the power instead of being like hey Congress if you do blah then blah.

Couldn't it be both? By fiddling with the antecedents we can bring about certain consequences in terms of the sanctioners (Green doesn't know if this is much)

Really question is if authority goes to the actual people being limited or if the fragments are instructions for the sanctioners.

* + - Question: is the sovereign bound by law? Green – no. Will talk about later
    - Essential to Austin’s theory is sanctions. So is it possible to have a legal system without sanction/punishment? Austin is thinking about the bad guys who has bad motives and the law keeps him in check. But what about the good person?
      * Shapiro argues it isn’t necessary to have sanctions/punishment at all. While they may all have them it isn’t necessary.
      * Theory of angels/good citizen argument: we can imagine a legal system where there are rules but no sanctions because the citizens will just follow them
        + (1) The empowering aspect of needing empowering rules (aka situation where the angels don't know what situations they should abide by their agreements, but they will do what they should do once they know. Or, once the rule is settled it will be followed.) 🡨 need the settlement aspect

Another example: what side of the road should we drive on?

This can be the nail in the coffin for Austin’s approach if we can understand the law without punishments. This is the primary view now, but some people still think that sanctions are necessary (and maybe the rules created with the angels aren’t law/a legal system, but something else)

Shapiro is talking about the law filling some moral function, which is already distinct from Austin because for Austin the law is not a tool that provides a specific service or function, but instead is just what it is.

Hart criticizing Austin

* + Focusing on the sovereignty part
  + Rex 1 and Rex 2 dilemma
    - The view that the law ultimately emanates from a person who is habitually obeyed and is legally unlimited will not work.
      * Why? Transition of power.
        + When Rex 1 dies and give power to Rex 2 lots of different ways to think about it

(1) revolution and the creation of new legal system… but this seems wrong cause we have continuity and then all the rules would have to come from the sovereign Rex I (can’t talk about some empowerment or rule that gives sovereign authority because then Austin is dead)

maybe there is a revolution and the old laws are just reissued under the new government (this is common, don't want a legal void) Don't want to say this is what always happens though, because arguably he doesn't reissue them he just assumes they are still there and this gets a little vague

(2) Rex 1 commands everyone to follow Rex 2, so the authority still goes back to Rex 1. But does that work? What is a possible problem?

Seems like its possible but I don't know if we want to say it has to always be absent a revolution.

What if it has existed so long that the people don't know why they are obeying and they are in a habit of obeying Rex 1 and don't know they are obeying Rex 1?

Careful if you start explaining why you don't need an individual person but an empowering rule then you are dependent on social facts and getting away from Austin’s view. Austin’s view is dependent as habit of obedience to one specific person.