Class Notes – Wednesday February 21, 2018

Review

* Problems with Austin’s Theory of Law
	+ Commands and Punishment
		- Possible to have legal system without punishment
		- “Confused angels” example – Shapiro
	+ Unenforced Laws
		- What about laws that have no enforcement, such as celebrating Arbor Day?
		- Under Austin, such “laws” wouldn’t be actually law, as they are commands without the possibility of punishment
* Sovereignty
	+ **Continuity problem**
		- Are laws issued by Rex I still laws under Rex II? Question of whether there is still a habit of obedience towards Rex II; may look more like a “revolution” under Austin’s theory
		- Even if a habit of obedience is immediately established under Rex II, there is still a problem that apparently two legal systems exist
			* Could be solved by arguing that people obey Rex II and so on because “Rex I said so”
			* However, then Rex II wouldn’t “qualify” as a sovereign, as he would be legally limited by the commands of Rex I; sovereigns cannot be legally limited
				+ besides – what happens if people forget Rex I – can’t be in a habit of obedience to someone you don’t know
				+ plus it doesn’t seem to be necessary that there is obedience to rex I with delegation by him of his power to rex II, III etc. for there to be continuity
				+ could we say the people are sovereign

they provide the continuity?

but then the monarchy would actually be a democracy

* + - Limitations on the sovereign
			* sovereign cannot enacted certain laws
				+ that cannot be explained by Austin
			* Austin could explain away the “limitation” as a mere social restraint, not a legal one; for example, Congress has the **power** to enact Osama bin Laden Day, but of course **practically** never will
			* A sovereign could mistake moral limitations for actual legal limitations; Austin would say that there is no actual legal limitation, sovereign is just confused
			* but it does not seem necessary that the sovereign is legally unlimited – Austin’s theory forces us to say that this is necessarily the case
				+ needn’t be thought of ads a moral limitation

if they are violated it just means that the sovereign has not made law

eg sovereign must hold scepter to make law

if he doesn’t it is not a moral wrong, he just hasn’t made a law

* + - * Hart – any limitations only come into being because of social practice; normativity exists because of how we practice it
	+ **Divisions of sovereignty**
		- Austin – not possible to have a divided sovereign
		- What about the US? Potentially doesn’t have a unitary legal system; instead a legal system with various sources of power
		- or could have two sovereigns – Red Rex for external affairs and Blue Rex for internal affairs
			* Austin must say that these are two independent legal systems, but why can’t they be understood as one?
* Hart’s solution – basis of legal system is a social rule among officials
	+ this social rule explains limitation, continuity and division of sovereignty
		- an egg approach rather than a chicken approach
		- a rule at the basis of the legal system (authorizing the lawmaker) rather than a lawmaker at the apex
* let’s start with the general idea of a social rules, without considering the law
* what is a social rule
	+ for Hart a social rule exists when people all do something and criticize those who deviate using normative language
		- eg everyone takes his hat off in church and those who don’t are criticized
	+ What are the social rules at the basis of a legal system?
		- certain rules created to solve problems as the society becomes more complex and there is more disagreement
		- these are rules about rules – secondary rules
		- Disagreement in the group about what the enforceable norms of the group are and what their content is
			* solved by *Rule of recognition* –
				+ e.g.
				+ whatever is on the tablet is an enforceable norm
			* Can explain unenforced law; rules of recognition themselves **identify** enforceable norms (the primary rules)
			* the rule of recognition must be a social rule to exist, but the primary rules identified by the rule of recognition do not have to be social rules
				+ they can be widely violated
		- problem that social rules can change only slowly
			* *Rules of change* – are rules about how to change rules
				+ *e*.g. law can be changed by the Queen in Parliament
		- problem that people can disagree about the application of social rules to the facts
			* *solved by Rules of adjudication –*
			* binding decisions about the application of rules to concrete facts
	+ Whose rules are they?
		- The “officials”