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”