Class notes – 3/12

Recap

-we are trying to account for a theory of law. We have an idea that there are different legal systems, e.g. roman, german–setting aside the idea that there is a supranational legal system that validates them all–which gives up on the chicken approach. Authorization of the law maker is the egg. Authorization is (1) moral or (2) positive (that is, based in social facts). We are looking at category (2), that a legal system is based in a set of social facts. What is necessary is a social rule among officials, not a rule among the population as a whole. Officials recognize they are obligated to enforce these rules, not others. E.g. American officials enforce American laws, not German.

-Hart: Does he have a decent account of what a social rule is? Hart characterizes a social rule when there is a pattern of behavior they all follow and criticize those who deviate. -Critiques of Hart’s definition of a social rule. Not hitting yourself on the head with a hammer. We all have a pattern of not doing this and criticize those who do. But it is not a social rule. We all have a reason not to do this regardless of what the group thinks.

-If there is a rule that the group sees as generally applicable -- could that still be a social rule? Can imagine a rule not to touch chickens on Sundays which the group thinks applies universally. Does it matter if the group thinks it applies to everyone and not just themselves? Green thinks it does not. So the problem is not that the group might think it is a generally applicable reason but that it might actually be a generally applicable reason.

-Other question for Hart: has he explained the normativity of law? Why should we do what the law says in the system? The existence of the practice doesn’t imply that it ought to be followed.

-For Hart there really are no normative facts. The law does not create normative facts. Normative talk is really just talk. If saying you ought to keep your promise, are just expressing a pro-attitude toward keeping promises. E.g. hooray for my team: is neither true or false. That is how he avoids Hume’s challenge.

- Here is another possibility - in which the practice at the basis of a legal system does create a genuine reason for action for officials. Understanding rule of recognition as a Lewisian coordination convention: there needs to be a coordination problem that recurs, the choice is arbitrary in the sense that people primarily want to do what everyone else does. Although you may prefer one or the other, you strongly prefer doing what everyone else does. E.g. driving on the right hand side of the street. You can’t know what you want to do until you know what everyone else is doing.

-Problems with Lewis: this works for arbitrary rules like which side of the street to drive on. Are not indifferent between certain constitutional issues, like choosing democracy over dictatorship.

-Marmor’s criticism: Chess, the reason people play chess is not because it is a solution to a coordination problem. We play chess because we created it. Have no reason to do the thing until the practice is in place. Contrasted with driving on the right side of the road.

-Marmor says the reason to abide by certain conventions is morality. Why should an American official adjudicate in accordance with the constitution. Morality. Existence of the convention does not give a reason to abide by it.

-What if two people play chess. Why should they follow the same rules. It is not morality. It’s because they want to play chess. Cannot successfully play the game without following the rules. Moral could be to do something successfully.

-Does participation create normativity?

-Greenwalt: What are the ultimate standards of the American legal system?

-Ultimate Rules and supreme rules

-Ultimate rules are what you end with when justifying something in the legal system. Supreme rules identify laws that cannot be trumped. Ultimate laws are not supreme and vice versa.

-examples of ultimate rule in US: the rule identifying state law. It is ultimate – not justified through federal law. The constitution presumes the existence of the law of the 13 states. But it is not supreme – can be trumped by federal law (esp constitutional amendments). What about states that joined the union later, e.g. Illinois. It was originally governed by federal law. Is this state law ultimately based on federal law? Or is is the creation of each state besides the original 13 a revolution…?