I. Summary of course materials

5. Dworkin, Law's Empire (Harvard UP 1986)

Supplements. The handouts or “supplements” are to be labeled as “Suppl. # 1”, “Suppl. # 2”, etc. The numbering facilitates easy reference: Suppl. # 1: Radbruch, “Five Minutes of Legal Philosophy”; Suppl. # 2: Austin’s classification of law (distributed in class). Others supplements will follow, although the bulk of our reading will be from the books listed above.

Office and office hours. Law School, Room 463. Thursdays, 11:00-1:00.

Notes on the initial reading. Our first readings are from John Austin, and in this connection I might offer a few general remarks. In reading Austin, you should ask yourself: In what respects does the legal system in fact resemble a scheme of commands, the view Austin is defending? In what respects is the legal system, as we know it, quite different from what Austin describes?

Note that Austin’s theory, insofar as it is represented in our short selection, breaks down into three parts:

(1) Lectures I and V: the classification of laws, the nature of legal positivism (types of commands, “legal positivism” as the modern form of law as convention, the role of coercion)

(2) Lecture VI: the characterization (or definition) of sovereignty, consequences thereof for federalism, and for the idea of constitutional law.

(3) “Note” appended to Lecture V: law and morality.

The Austinian theory, or something very much like it, prevailed in Britain until the mid-twentieth century. The most persuasive critique of the Austinian theory, at any rate from a British point of view, is H.L.A. Hart’s The Concept of Law (1961), a celebrated work, easily the most famous English-language treatise in legal philosophy in the last century. (In the opening round students often find Hart a bit difficult, but they then catch on and in many cases come to appreciate it as a rich and rewarding work. I recommend it to you!)

Our reading and discussion of Austin is important for several reasons: First, the idea of “law as a set of commands”, “law as the sovereign’s command”, and so on, turns up again and again in discussions in legal philosophy as a view of the nature of law, and it is useful to reflect a bit on this position. Second, Austin’s theory is the most straightforward example extant of legal positivism qua reduction of the law to brute fact (see especially Lecture VI, pp. 193-194). Other
philosophers, including Hans Kelsen, have powerful reasons for rejecting the "reduction to fact". Third, some exposure to Austin’s theory is presupposed for a close study of Hart’s book.

Finally, please be assured that the Jurisprudence course is in no way, shape, or form an offering on "British jurisprudence". It simply happens that the English writers Austin and Hart offer us the most accessible statements on positions of great interest and importance. Later we will read from Ronald Dworkin’s treatise, Law’s Empire, which is focused on American issues. We’ll also read from translations of leading figures on the European continent – Hans Kelsen and Gustav Radbruch, in particular – and also, from the thirteenth century, Thomas Aquinas.

**Week II (W, 23 Jan)**

1. **(W, 23 Jan)** Introduction: law as power, and law as (a species of) morality: Xenophon, Dialogue (repr. in Kelsen, pp. xxii-xxiii), and Radbruch, “Five Minutes” (1945), Suppl. #1. Austin, Lecture I, pp. 1-33, and Suppl. #2. Topics in Austin include: the idea of “legal positivism”, classification of laws, the properties of the command.

2. **(F, 25 Jan)** For Friday, please read Austin, Lecture V, pp. 118-144 (to end of carryover para.), “Note”, 184-191, and Lecture VI, pp. 191-200 (to end of carryover para.), 245 (at first new para.) to 271 (to end of carryover para., including note 24). Topics: positive morality, critical morality, and the debate over law and morality, “factual” definition of sovereignty, Austin’s characterizations of federalism and constitutional law. Ask, in reading Austin (“Note” at end of Lecture V): Does he have a good argument against Blackstone’s position, or can Blackstone respond simply by pointing out that Austin is begging the question?

**Week III (W, 30 Jan)**

3. **(W, 30 Jan)** Please read Hart, chs. 1-3, with special emphasis on ch. 3, sec. 1 (pp. 27-42); on legal powers, see also ch. 4, sec. 3 (at pp. 69-71): Topics include: the idea of legal powers, and the critique of Austin. Ask: How are legal powers distinguished from commands, and how, in particular, does Hart explicate the distinction (as a part of his reply to Austin)?

4. **(F, 1 Feb)** Hart, ch. 4, with special emphasis on sec. 1 (pp. 51-61, see also Hart’s note at pp. 288-9 on the question of succession): the distinction between habitual behavior and rule-governed behavior, see especially pp. 54-57, and the notion of acceptance. It behooves you to study this material with great care; here Hart introduces his idea of a rule and rule-governed behavior.

**Week IV (W, 6 Feb)**

5. **(W, 6 Feb)** Hart, ch. 4 (review), and ch. 5, emphasizing all three sections: the idea of obligation (“obligation” vs. “being obliged”), primary, secondary rules, and their significance.
At the end of ch. 5, Hart invites attention to the significance of the developments thus far: "The union of primary and secondary rules is at the centre of a legal system."

6. (F, 8 Feb) Hart, ch. 6, emphasizing secs. 1-2: the nature of the legal system. Holmes, "The Path of the Law", Suppl. #3, and Korematsu, Suppl. #4 (reading both supplements at this point in the course in order to anticipate Hart’s criticism of American Legal Realism in ch. 7, secs. 2-4).

Week V (W, 13 Feb)

7. (W, 13 Feb) Holmes and American Legal Realism (from above), con’d. Hart, ch. 7, all four sections, and read, along with sec. 3 in Hart, Korematsu, Suppl. #4. The import of Hart’s theory of rules emerges clearly here, for Hart, unlike the Realists, is able to distinguish clearly between rules of law and mere holdings. Korematsu, a badly mistaken decision, counts as a holding, but not as a rule of law.

8. (F, 15 Feb) Hart, chs. 8-9. Hart on justice and morality. Interesting material and arguments, even if not at the very core of Hart’s theory. We’ll pay special attention to Ch. 9, sec. 2 (pp. 193-200). Hart’s title to the contrary notwithstanding, this is not a “natural law” theory at all, and it’s important to see why.

Week VI (W, 20 Feb)

9. (W, 20 Feb) Mid-term examination, held in class, but with study questions distributed in advance.

10. (F, 22 Feb) Summary of Hart, chs. 8-9. New topic: natural law theory and, in particular, Thomas’s classical natural law theory. Please read d’Entrèves, “Two Questions about Law”, Suppl. #5, and Thomas Aquinas, Treatise on Law, Questions 90-96 (pp. 1-62). This will be tough sledding. We’ll look, in particular, at the question of the validity of unjust laws. Unlike the naive view of would-be natural law theorist Blackstone (Austin, Lecture V, “Note”), Thomas on this issue is subtle and discriminating.

-to be continued-