Hart’s Objections to Austin

Kevin J.S. Zollman

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Nature of Law
Last week...

“Law” for Austin

Something is a law if and only if it is a general command of a sovereign backed by a threat if it is not followed.
Austin’s Definition

A command is an expression of a desire directed at another person.

- Commands must be backed by threats.
- To be law, these commands must be general and not particular.
- A sovereign is a person who is habitually obeyed, but obeys no one.

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Hart’s Objections to Austin

1. Objections to Commands
   - Wills and Other Sanctionless laws
   - Self-Directed Laws
   - Customs as Laws

2. Objections to Sovereign
   - Continuity - Of Sovereignty
   - Continuity - Of Laws
   - Identifying Sovereign

3. Objections to Both
   - Internal/External Distinction
   - Normativity
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Wills

- Laws regarding wills say “If you want to make a will, do it this way”
  - For instance, “If you want to make a will, be sure it’s signed by two witnesses”
- Other laws have this same form:
  - Jurisdictional laws
  - Contract laws
- How can this be thought of as a command backed by a threat?
  - Hart considers two possible responses...
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Nullity as a sanction

Perhaps the sanction here is nullification. “If you don’t write your will in this way, I will punish you by not enforcing it.” Hart responds:

- This is not always bad.
- What action is required or prevented? Not making a will...
- We cannot separate the action required from the sanction imposed.
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Fragments of laws

Perhaps laws like this are only part of a law. The actual law is longer, so the sanction is different. “If the bank refuses to hand over John’s assets and John made a will (conforming to such and such requirements), then punish the bank.” Hart responds:

- Maybe sanctionless laws are possible.
- This distorts the law to make it uniform.
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Other regarding

- Commands are directed at others.
- Laws can often apply to oneself.
- Some laws only apply to the creator.
- In what sense are we talking about commands here?
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- He considers “tacit agreement”.

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The sovereign is habitually obeyed by most of the population.

- This is used to distinguish the sovereign from some other yahoo giving orders.
- This also allows for anarchy, where no one obeys anyone.

The sovereign does not habitually obey others

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- The sovereign cannot be bound by laws since all laws come from the sovereign.
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A problem of succession

A story
- Rex I is a glorious ruler who fits Austin’s sovereign.
- Rex I dies and is succeeded by his son, Rex II.
- Rex II issues a command, intended to be law.

The point
- The people are not in a habit of obeying Rex II, he just showed up.
- Therefore, Rex II is not a sovereign (according to Austin).
- Therefore, Rex II’s command is not a law (according to Austin).
- But this seems crazy (according to us), so Austin must be wrong.
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Much later, in the empire of Rex...

- Suppose we are now much later, Rex IX.
- People still regularly follow a few of Rex I’s commands, they still seem to be laws.
- But why? No one around here had a habit of obedience to Rex I, they weren’t even alive.
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What about other societies

Who is the sovereign in the U.S.?

Suggestions:
- Congress, President, and Supreme Court
- The state governments
- The people

It seems strange to say that people habitually obey themselves.
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Difference between a fine and a tax

What is the difference between a fine and a tax?

- A tax or a charge...
  - ...is something one is obligated to pay.
  - ...is something one is only obligated to pay if you have done a particular thing.
  - ...is imposed if there is nothing wrong with doing the thing (so long as you pay the tax).

- A fine or penalty...
  - ...is also something one is obligated to pay.
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Internal/External attitudes about law

- **External Attitude**
  - Everything is a tax.
  - If doing something is worth paying the fine/tax, then one does it, otherwise not.
  - One does not feel bad about doing illegal things, nor does one criticize others for doing so.

- **Internal Attitude**
  - One avoids doing illegal things, because one sees them as wrong.
  - One criticizes others and allows others to criticize them for breaking the law.
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Internal/External attitudes about the sovereign

- **External Attitude**
  - That’s the guy that everybody follows.

- **Internal Attitude**
  - That’s the guy that is *entitled* to be followed by everybody.
  - Austin’s theory cannot account for this difference.
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One ought to...

- **The law is suppose to proscribe behavior.**
  - One ought to obey the law
  - One ought not break the law

- The gunman who orders one to do something “proscribes” behavior, but only in the pragmatic sense (external attitude).

- The law should be seen as proscribing behavior in a stronger sense (internal attitude).

- Austin’s theory cannot draw this distinction because everything is a command.
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Outline

1. Objections to Commands
   - Wills and Other Sanctionless laws
   - Self-Directed Laws
   - Customs as Laws

2. Objections to Sovereign
   - Continuity - Of Sovereignty
   - Continuity - Of Laws
   - Identifying Sovereign

3. Objections to Both
   - Internal/External Distinction
   - Normativity