



# *The Origins of Law and Jurisprudence*

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# The origin of law

- The ultimate source of law and jurisprudence
  - Division of labor
- Natural law
- Positive law
- Agency problem

# A short history of Jurisprudence

# *Antigone*

- *Antigone*
  - B.C. 5c.
  - Creon, the ruler of Thebes, decree on denial of honorable burial of traitor
  - Polynices, the traitor to Thebes
  - Eteocles
  - Antigone claimed law as conformity to the dictates of nature, which requires a proper burial for her brother.

# Republic

- *Republic*
  - Thrasymachus
    - “if one reasons correctly, one will come to agree that the just [*dikaion*] is the same thing everywhere—whatever is to the profit or advantage [*sumpheron*] of the mightier [*kreittonos*].”
  - Legal positivism
  - Might makes (legal) right, and nothing else can do so.

# *Republic*

- *Republic*

- Socrates

- proposed a conception of justice as something that man discovers rather than creates – that exists literally apart from him, in the Heaven of Forms.

- Belief in natural law

# James I vs. Edward Coke

- James I vs. Edward Coke
  - 17<sup>th</sup> century
  - Why James is not competent to deliver legal judgments?: law is founded on reason, and his reasoning powers are as good as the judges.
- Edward Coke
  - Chief justice of England
  - Artificial reason
  - Formalism

- Coke
  - Law is reason, not fiat; that it is a special sort of reason and not just common sense, applied moral philosophy, or policy analysis; and a related point, that only lawyers know it.
  - Training and experience of lawyers
- Legal positivism – legal formalism
- Natural law – legal realism (conceived as antiformalism)



# Realism

- Philosophical realism; the belief that reality exists independently of observers
- Platonic realism; a philosophy articulated by Plato, positing the existence of universals
- Legal realism; a theory that law is made by human beings and thus subject to human imperfections

# James I vs. Edward Coke

- Coke provided a foil for Hobbes, who argued that law is the command of sovereign.
  - Training and experience of the judges gave them privileged access to a body of authoritative norms; natural law.
  - The compromise of the king's sovereignty; that is what troubled Hobbes and set him against Coke.

# Blackstone

- Blackstone
  - Blackstone tried to give the common law a transcendental aura.
  - English common law; natural law; the law of God
  - Judges as the “oracles” of the law
  - Only lawyers can understand them; lawyers translate the oracular discourse for the laity.
  - He downplayed the creative role of judges.
  - Blackstone provided a natural target for Jeremy Bentham.

# Jeremy Bentham

- Jeremy Bentham
  - He wanted to refashion the law into an instrument for *maximizing the greatest happiness of the greatest number*.
  - From judges to parliament; codifying in detail and minimizing the discretion of judges
  - Bentham tried to place law on a scientific footing – to make it a practical human instrument for the achievement of definite social ends.

# Jeremy Bentham

- Jeremy Bentham
  - Utilitarianism
  - Rejection on the one hand of every moralism(except for utilitarianism itself) as a foundation for law, and on the other hand of every emotive, traditional, rhetorical, or (in short) unreflective and unsystematic approach to law.
  - The originator of the pragmatic concept of law

# Jeremy Bentham

- Jeremy Bentham
  - The codes would be drafted in ordinary language and so require no professional training to decipher.
  - Comprehensive scheme for making law a true and complete expression of popular sovereignty.
  - It seems that he is on the line of Creon, Thrasymachus, James I, Hobbes, albeit with a democratic twist.
  - An accident of Bentham's mistaken belief?

# Jeremy Bentham

- Jeremy Bentham
  - “natural law”? in Darwinian nature.
  - If the common law did not come from the God, where did it come from?
  - If not from God or nature, where could the common law have come but from the judges themselves?
  - The concept of an elective judiciary

# Langdell

- Christopher Columbus Langdell
  - One of the best known among the American legal formalists
  - Law in formalism as an inductive science
  - Principles
  - The use of induction to derive principles from cases
  - Filling the gap between “is” and “ought” by induction and the verdict of time?



# Holmes

- Holmes
  - Three repelling features of formalism
    - The conceptualism and scientism
    - The static quality of formalism
    - The separation of law from life
      - A formal system like geometry
  - Holmes's outlook was severely though imperfectly pragmatic.

# Holmes

- There are no conceptual entities; the meaning of an idea lies not in its definition, its Form, its relation to other ideas, but rather in its consequences in the world of fact.
- A man of the century of Darwin, Spencer, Hegel, Marx, and Nietzsche, Holmes thought that the best judge was the one who shaped the law to conform most closely to, even to anticipate, the desires of the dominant groups in the community, who jumped on history's bandwagon.
- *The Common Law* (1881)

# Holmes

- The evolution of law
- Power shift to the working power
  - Labor union
  - Principles derived from judicial opinion
- The belief that law should not be an obstacle to social change
- Freedom of speech

# Holmes

- Holmes's approach invites the student of law to seek an explanation for its rules and outcomes, its doctrines and institutions, outside the law itself, at least as "law" is conventionally defined.
- He remains the leading figure in American jurisprudence.
- Holmes and legal positivism

# Positivism in law and in philosophy

- Positivism in law
  - Can mean that legal obligation does not depend on moral obligation or,
  - Law can emanate only from judges and other duly authorized government officials, that ethical obligation alone cannot create a legal obligation.
- Positivism in philosophy
  - Is the idea that only perceptible things are real: succinctly, “seeing is believing”.

# Judicial discretion

- Holmes
  - Argued that law is a prediction of what the judges will do when confronted with a specific set of facts.
  - Law is the activity of licensed persons, the judges, rather than a body of concepts(rules, principles, whatever).
  - In the end, the law is what the judges do with your case.

# Judicial discretion

- If, much of the time, and certainly in the most interesting cases, judges are legislators, why are they not subject to the same political – today, democratic – controls as legislators?

# H.L.A. Hart

- Positivism
- Conventionalism
- *The Concept of Law* (1961, 1994 with new postscript)
- Law as Coercive Orders
- Rule of Recognition



# Ronald Dworkin

- Principles
  - The considerations that judges are entitled to use in deciding whether to create or modify a rule
  - The principles take the place of the Form of Justice or the law of God.
- Dworkin claims that every legal question has a right and wrong answer.
  - What if more than two right answers exist?
  - Isn't it that judges *have to* exercise discretion?

- Hercules doing politics?
- Principle vs. public policy
- Right & Wrong?
- Interpretive character of law
- Dworkin has created a rich vocabulary for masking discretionary, political decision making by judges?

- *Taking Rights Seriously* (1977)
- *Law's Empire* (1986)
- *Justice in Robes* (2006)

# Richard Posner

- Legal pragmatism
- Economic analysis of law
- *The Problem of Jurisprudence* (1990)
- *Law, Pragmatism, and Democracy* (2003)
- *How Judges think* (2008)