Contemporary Anglo-American Jurisprudence

- Important to remember that these are not just movements, they are ideas, ideas or perspectives on the law which are simultaneously alive in the law today.

I. Formalism (Late Nineteenth Century)

1. A view of reason: reason was detached from the details of cases. Reason ORGANIZED the cases through the advancement of principles. It was the task of these principles to make sense of the cases, to show some as mistaken and to produce a theory of the subject matter.

2. Methodological Commitments: CASES were important NOT as embodiments of principles, but as fodder/tools for thought. You asked of the cases "What are concepts which make the best sense of these materials?"

3. Personage: Christopher Columbus Langdell
   a. Organizing Principles
   b. Role of the Case Method
      (i) description of the case method
      (ii) use of cases

II. Legal Realism (1920-1940)

1. The basic idea is to look at "what the courts do in fact" (Holmes, 1897). What does this mean?

2. To reject the idea that rules decide cases.

3. The FACTS of a case are more important that the RULES which are implicated in a case.

4. The judge's response to a case is most importantly a matter of individual PSYCHOLOGY and SOCIALIZATION.
   a. So the most important aspect to the understanding of adjudication is understanding how the interaction of the judicial sensibility with the particulars (facts) of individual case.

5. Names: Jerome Frank; Felix Cohen; Max Radin; Underhill Moore; Karl Llewellyn

6. Strong emphasis on empirical work.

7. Greatest legacy is a LEGISLATIVE one, the UCC. This achievement belongs to Llewellyn.
   a. What is "commercial law"? Goods; paper; security interests.
   b. Situation prior to 1950.
   c. The Code project- unitary.
   d. Emphasis on "business context"
   e. Key concept: Agreement-- four elements: express terms, course of performance, course of dealing, usage of trade.
III. Legal Process: 1938-1969

1. The Second World War: Raised Questions About the Moral Foundations of Law. The demise of formalism, coupled with the triumph of realism, made for a cynical view of the moral foundations of law. People were searching for a theory of law that gave it something of a moral foundation without resort to formalist metaphysics.

2. Philosophical foundations: Work of Lon Fuller at Harvard. Law is premised on a certain view of human flourishing. It is the purpose of law to foster interdependence and that law should foster that interdependence.

3. The idea that law should be interpreted "purposefully" was taken up by two other Harvard Law Schools members, Henry M. Hart, Jr. and Albert M. Sacks. In 1958 they assembled what they called materials on "The Legal Process." As they put it, "Law is a doing of something, a purposive activity, a continuous striving to solve the basic problems of social living." (1958, 166).

4. The core of the Hart and Sacks theory was a theory of statutory interpretation. Because "every statute . . . has some kind of purpose or objective", the overall dynamic of a statute can be discerned from its purpose. Moreover, statutes could be "purposefully" interpreted in a manner consistent with morally defensible ends.

5. An example: Riggs v. Palmer. [tell facts]

6. Plain meaning is rejected, purpose becomes all important, and purpose is massaged with moral content (e.g., Riggs).

IV. The Present Age 1961-Present

   a. There are 2 central aspects to Hart's theory: theory of Law or the Legal System and the Theory of Adjudication: How Judges Decide Cases
      C. Central Ideas: Theory of Law (CL, Chs. 1-6)
         (i.) attack on John Austin's "Command Theory" of law: the law has to be more than orders backed by threats, for if it is not, then there is no difference between law and the order of a gunman to turn over one's valuables. But in law, people have resort to rules as a ground of criticism and evaluation. Hart referred to this as the "internal point of view." It was this element of legal systems that he felt was missed by the Austinian Command theory of law.

         (ii) Advanced systems of law are composed of two sorts of rules: Primary and Secondary. Primary Rules: Rules about what the law permits, prohibits, or requires. Secondary Rules: Rules for the promulgation or amendment of Primary Rules. Examples here include rules for the constitution of courts and rules for altering the constitution.

      The Master Secondary Rule is the Rule of Recognition. This is a master rule in that it provides validity criteria for all other rules of the system. This rule, often likened to a Constitution, "exists" or is "valid" only by virtue of social acceptance. The validity of all other rules depends on their finding their source here.

      C. The Theory of Adjudication
(i) nothing in the previous discussion says anything about how cases are to be decided. Nor how they are in fact decided.

(ii) Hart was one of a generation of post-war scholars to be influenced by the then-emerging later philosophy of Ludwig Wittgenstein.

(iii) Hart begins by looking at concepts in general. Concepts, which are a central element in legal rules, have both a CORE and a PENUMBRAL meaning. The core meaning is the meaning the concept has under any circumstance. The penumbral meaning is the meaning the concept has only after it has been interpreted.

A. An example: The rule "No vehicles are allowed in the park." Vehicle: core meaning--examples--cars, trucks. But what about a skateboard? How does a judge decide whether that is part of the core or the penumbra? Hart's answer is that the judge must engage in interpretation, and that the details of the act of interpretation consist in asking the degree to which the penumbral case "sufficiently in relevant aspects." Of course, judgments of sufficiency and relevancy can be controversial. For that reason, Hart says that judges have discretion.


A. Critic of Positivism: attacked the Positivist ontology of law. In addition to Rules, the law contains Principles. E.g., "No man shall profit from his own wrong."

B. The Rights Theory: Litigants have rights which determine the outcome in lawsuits. These rights are discovered not created; there is always a right answer to every lawsuit.

C. Deep connection between law and morality. Law is an INTERPRETIVE enterprise. The task of a judge is to find a moral principle which puts the law in its best light.

3. Law and Economics

A. Descriptive and Prescriptive Points of View.

   (i) Descriptive: It turns out that judicial decisions often achieve results which are, in fact, "efficient." So, one way of "understanding" law is to see the law as an activity which tries to achieve efficiency in outcome. (Priest on warranties; early Posner).

   (ii) Prescriptive: Legal decisionmakers should openly seek to reform the business of adjudication in ways which openly achieve efficient results. The language of law should be translated in the language of economics. Posner, e.g., states the following:

[I] think that economic principles are encoded in the ethical vocabulary that is the staple of legal language, and that the language of justice and equity that dominates judicial opinions is to a large extent the translation of ethical principles into legal language." (William M. Landes & Richard Posner, The Economic Structure of Tort Law 23 (1987)).

4. Critical Legal Studies

A. Began in the 1970s. Two elements or orientations: (a) increased empirical work, and (b) development of "left" political critique of substantive law.

B. Major theorist: Roberto Unger. KP, LMS; Passion; and Politics.

C. Central Idea: Indeterminacy
5. The New Minimalism

A. Informed by recent work in the philosophy language, in particular that of Wittgenstein. Also work by the American philosophers W.V.O. Quine and Hilary Putnam (truth).

B. Positive and Negative Jurisprudential Aspects

(i) Negative: a critique of the general picture of what it means to say that a proposition of law is true. Most legal theories try to find the thing in virtue of which the proposition is true. This view rejects such an undertaking, because the idea of beliefs "being made true" is misleading or, worse, empty.

(ii) Positive aspects: the truth of propositions of law is a matter of "forms of legal argument." Lawyers use these forms of legal argument to show that propositions of law are either true or false.

- Put this in perspective with a larger account of argument in general, one that shows how disciplines are organized. I develop this account in my book Law and Truth.

V. Conclusions

1. We are experiencing balkanization in the American legal academy.

2. It is not clear when this trend will end. It seems to be increasing steadily.

3. What is being lost is a common discourse, one that can be identified as "legal" in character.

4. Where this will all lead is anyone's guess.

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IV. The Present Age (1961-Present)

Positivism: H.L.A. Hart (The Concept of Law, 1961)- Law and Morality

Naturalism: Ronald Dworkin (1963-Present): Deep connection between law and morality. Law is an INTERPRETIVE enterprise. The task of a judge is to find a moral principle which puts the law in its best light.

Law and Economics: Descriptive and Prescriptive Points of View

Critical Legal Studies: Roberto Unger - Indeterminacy

Practice Theory- Minimalism, Truth and Forms of Argument