

## **Jurisprudence: Evolving Paradigms**

### **A. Natural law theory** (Aristotle, St. Thomas Aquinas, Declaration of Independence)

justice and law inseparable  
eternal, universal, immutable  
law external to society  
part of the natural order of things  
humanly created law is only law if just, i.e. conforms to eternal, a historical  
principles of natural law  
judges find and apply law  
laissez-faire - status quo - the ways things are is natural order of things; law  
cannot actively change the world; law *demand*s a different way of  
doing things

### **B. Legal positivism, Analytical jurisprudence** (J.L. Austin, H.L.A. Hart)

law and morality distinct realms  
"law is the command of the sovereign"  
rules and laws analyzed for their internal logic and consistency  
primary and secondary principles  
concern with authority and responsibility for making law, proliferation  
of legal authority (regulation, administration, adjudication and alternatives)

### **C. Legal Realism: The mask falls** (Holmes, Cardozo, Llewellyn)

law is what courts do (thus ushers in empirical social science studies of law in action)  
separation of law and morality (this is not same as claiming that law is necessarily  
immoral)  
deconstruction of claims of legal logic and formalism  
pragmatic approach to law/ since is human creation we must take responsibility for its  
consequences

### **D. Fuller's Morality of Law: 8 ways law can fail**

rejects bad man theory, reintroduces morality to law  
while natural law theory centers around a morality external to law, to which law  
must conform, Fuller's morality is internal to law itself, a process  
the morality consists of 8 standards to which law *aspires*

Eight ways law can fail to be law:

1. No rules; every issue decided on ad hoc basis
2. Failure to make rules public or known to those who will be subject to them
3. Retrospective law (making rules in the present and applying to past actions)
4. Failure to make rules understandable
5. Enactment of contradictory rules
6. Rules that require conduct beyond the powers of those affected
7. Frequent, unpredictable rule changes
8. Lack of congruence between rules and administration or enforcement