

What Is Law?

When the state or federal legislature passes a law, they create and approve what's called a *statute*. American society has traditionally considered the large body of statutes to be the law. In fact, our federal and state Constitutions are set up so that the legislatures make the law, the President or Governor (through their justice departments) enforce the laws, and the judges interpret the laws at trial. The exception is what is called *Common Law*. Some bases for law suits (civil or criminal) and their exceptions are created by judges when faced with a factual situation not falling clearly under any existing statute, yet clearly running the risk of producing an unfair result (although Louisiana has adopted the *Napoleonic system* where all law is statutorily based). In other words, if a judge created a cause of action in a case heard a long time ago, that rule has no force of law anymore. This is the theory of "*Legal Positivism*."

Positivism

Positivism was introduced by Bertram Russell, and later championed by H.L.A. Hart. It holds that the law is what the legislature has created by enacting statutes. When faced with a fact pattern and no statute to govern it (and assuming that an omission by the legislature was not intended to leave the relevant conduct legal), judges may decide a case anyway they choose. This is a relatively conservative approach to the judiciary. Judicial conservatism is not the same thing as political conservatism, so Democrats shouldn't jump ship here. A judge is judicially conservative if, when faced with a law, the judge comes to a legal conclusion by following the letter of the law as closely as possible. (On the other end of the spectrum is judicial activism, which we'll get to in a moment.) For example, let's say a judge is faced with a law that states that, "All motor vehicles must be registered with the state and receive a license plate," but there is no other statute clearly defining what exactly is a motor vehicle. Well, some genius comes along and invents the riding lawn mower. Until the laws are amended, a positivist judge will require that all riding lawn mowers have a license plate before being used to cut grass even though that clearly was not what the legislature intended.

So what are some of the problems with Positivism? Consider the first case of self-defense. We have a rule on the books that says that homicide is illegal, so there is a law that covers the situation; however, it doesn't contain a justification of self-defense. A positive judge would convict. Now this may seem to be a strong argument against Positivism (or judicial conservatism for that matter), but consider that – as unfair as the conclusion to the case may be – that is one reason why we have the executive power of a *pardon*. The President or state governor has the power to pardon a criminal convicted in his jurisdiction. (Even some attorneys are unaware that the President of the United States can't pardon violations of state law.) This clears the person of the charges against her despite the holding, and the theory of our government holds that the President or state governor is better positioned to make that kind of call. With regard to the lawn mower example above, maybe the only reason the legislature didn't consider riding lawn mowers is because they hadn't been invented yet, but in fact the dangers associated with riding lawn mowers would justify registration with the state. That is a question that our system of government holds the legislature most competent to resolve, so judges should stay out of it.

Natural Law Theory

Consider, however, the following questions: If a law is immoral, is it really a law? Did the Nazi officers on trial at Nuremberg have a legitimate defense when they said, "I was just following orders"? This brings us to the second theory of what the law is: *Natural Law* theory. This theory goes back all the way to St. Thomas Aquinas, was supported by the Founders of our country, and has a relatively recent, well-known proponent in Lon Fuller. Natural Law theory holds that there is some abstract absolute law, whether religious or not, with which all human made law must abide. If a law, such as many of those passed in Nazi Germany and other totalitarian states, contradicts the Natural Law, then that man-made law is invalid, and a citizen has no responsibility to obey. In fact, in the case of committing murder under the authority of the state, a citizen would have the responsibility to disobey.

If this seems funny, consider that we have a similar setup in our current system. If the legislature passes a statute that the Supreme Court (state or federal) later determines to be a violation of the Constitution (state or federal), then that law is deemed invalid. It contradicts a higher law. Natural law theory advances the idea that there is yet another even higher law above the United States Constitution.

I'm sure you can all see what the problem is with this theory. What is the Natural Law? Everyone has their own idea of what is moral and what is not. Although most people in America would agree on some of the basics (e.g., murder, rape), there are always large disagreements over even those seemingly no-brainer issues. For example, can a man rape his wife? Going back just a few decades, the answer wasn't so simple. Is abortion murder? That's still a hot one, and probably always will be. Needless to say, this is the classic example of a view that supports judicial activism. A judge may downright ignore the law if, for example, they think killing a cat is as wrong as killing a human being, leaving you to face vehicular manslaughter charges for the road kill you just created.

Of course, that's not the idea. Judges are supposed to separate their personal views from their application of the Natural Law. However, unless one speaks directly to God, Mother Nature, or whoever writes the Natural Law – and I'm very suspicious of the sanity of anyone who has such conversations – how can we truly separate our personal views from our concept of the ultimate authority on the matter? It seems impossible. And why should a single judge determine under what laws the rest of us will live anyway? At least when the legislature decides the laws, they're doing so at the demand of the citizens, and will always be accountable to them. This is a democracy, which means that our system is based on the laws upon which we, the People, decide. The legislatures better respect that system through their accountability to us at the voting booth, and are better able to reach the right answers because of their ability to spend weeks holding hearings on complex subjects.

Dworkinism

Moving right along, remember the positivists? Apply the statutory law, but where none applies, wing it. There's another theory called Dworkinism, named after its founder, Ronald Dworkin, which is often seen as a middle ground between Positivism and Natural Law, though

I'd say that's the wrong way to view it. Although Dworkinism contains elements of both theories, it is actually a more conservative theory than Positivism. (I don't know if Mr. Dworkin would agree with me.) On the only scale that really matters, activism to conservatism, Dworkinism definitely does not fall between the other two.

So what is it? Basically, the theory is Positivism with a twist. Like a positivist, a Dworkinist follows the statute as closely as possible. In that area where a positivist judge would basically wing it, though, a Dworkinist says that there is still something binding a judge that forces him to hold a certain way. Sounds conservative, right? These are the moral principles on which the law is based. When the legislature creates statutes, it doesn't just pick random thoughts out of the air and write them onto paper. No, the legislators consider a more vague sense of right and wrong, and then write a law to make sure that wrong actions are punished and the right actions are left alone. For example, in the self-defense scenario above, the defendant would potentially be out of luck depending on which positivist judge heard her case. However, the principle of self-preservation would demand that a judge reach the conclusion of not guilty in her case. Because this decision would be based on the same moral principle on which the legislature relies in writing laws, in theory – most of the time at least – the judge would come to the same answer that the legislature would anyway if it had considered that possibility.

Another important example is the principle that “no man should benefit from his own wrong doing.” In what has commonly become known as “Elmer's case,” a man murdered his father and inherited his father's fortune. If it were not for his immoral act, he wouldn't have had the benefit of the inheritance. The judge that decided the case of dividing up the father's estate saw this principle as so important that he denied Elmer's inheritance despite the plain language of the inheritance statute. In other words, in some cases a principle is so strong that it overrides even a statute. The best example of such a principle is any provision of the Federal Constitution, such as the First Amendment's protection of speech, which can override any statute. Of course, abiding by a Constitutional provision is very different from a judge being able to make up law himself on the fly, and this form of activism (as well as the general appeal to *moral* principles) is why people often mistakenly place Dworkinism ‘between’ Positivism and Natural Law. However, the net effect of an appeal to principles is far more conservative than activist, because there are very few cases where principles are given a higher priority than a statutory rule. Most of the time, they're used just to guide the judge where there is no law available.

So, what are the problems with Dworkinism? Although Dworkinism can be seen as the best of both worlds, it can also be seen as the worst of both worlds. On the one hand, an appeal to abstract principles, especially where those principles can be given preference over a law, gives judges a lot of power to abuse their position. On the other hand, although the vast majority of cases would still be subject to an application of existing law, there would be no reliable solution to cases falling outside the scope of existing laws and possibly even outside the scope of existing principles. Which problem is actually a problem depends on your personal view on how conservative a judge should be.

Legal Realism

Ok, we're almost there; just one more theory. Elmer's case is one of the landmark cases often cited to support *Legal Realism*^[1] (sometimes called Judicial Realism). The statute governing that case was the Statute of Wills for the relevant jurisdiction. Statutes of Wills are the most detailed, comprehensive statutes in American law, with many people believing that there is nothing that could occur relating to inheritance that wouldn't be covered by the statute. Elmer's case, however, demonstrates that this isn't really true. There is always something that could occur that would be outside the scope of even the most thorough statute. So what does that mean? It means that the law isn't the statute that's written in the code books, but rather the judicial decision itself. That's what we follow. That's what determines our fate. No one is guilty until the court says so. Because every law has a *penumbra* – a vague area not quite covered by the law but very closely related to the law – judges will always have the ability to interpret a statute in a way not anticipated, or even wanted, by the drafters of that statute. Realistically, the law is what the judge says it is.

Problems? Talk about activism! This theory has just as much potential for judicial activism as Natural Law theory, and a judge who sets his mind towards advancing his own personal agendas, despite whatever law comes before him, will be able to do so. The judge will always find a loophole or interpretation of the words in a statute that suits his agenda. Also, this cuts against the Constitution as written. According to the Constitution, the legislatures make the law; the judges just interpret it, and for good reason. Legislatures have fact finding committees that can spend months, if necessary, determining precisely what the law should be, and they are ultimately and directly responsible to the voters themselves, thus preserving our democratic system. Acknowledging that judges write the laws to this great an extent could be very dangerous and cuts against everything on which our system is based.

Rob's Soapbox

After all of that gloom and doom, believe it or not, I'm a Legal Realist. If judge made law cuts against our concept of government, tough luck people. The law is what it is, and we can't change that. Sorry James Madison, but practically speaking, the law consists of judicial decisions. However, the problems with activism scare the heck out of me (as I'm sure you can tell). Personally, I'd like to see judges take the oh-so-conservative approach of Dworkinism (as if it is a correct interpretation of what law is) to make sure that they don't advance their own agendas. Judges who fail to do so should never be promoted to higher courts, and even impeached (that is, thrown out of office) if necessary. In the vast majority of cases, the law applies pretty clearly, so there's little excuse for activism, but as I said above, there is always some wiggle room in any statute, and there will always be some cases requiring a fix. As our society grows, reliance on pardons will become even less plausible even in death penalty cases. The judges need to get it right, and as I suggested above, what's "right" in a constitutional democracy is what we, the People, say it is.

In conclusion, I draw your attention to what was, on paper, the worst decision ever written. It still causes problems today for judges trying to decide cases without overruling this one. The case is *Shelley v. Kramer*^[2], 334 U.S. 1 (1948)

(<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=334&invol=1>). This was, technically-speaking, one of the worst decisions by a judge in American history, but if it hadn't gone the way it did, we'd live in a much uglier place today. Cases like this will always keep the door open at least just a crack for legitimate judicial activism.

Footnotes

[1] The other is *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (N.J. 1960).

[2] In this case, private citizens all living in the same residential development agreed not to sell their homes to potential residents who were black. Because it was a private contract, and not state action, the *Equal Protection* and *Due Process* clauses of the 14th Amendment didn't apply. When one of the residents decided to sell to a black family, the other residents sued for breach of contract. The judge held that the contract was valid and legal in all respects but refused to enforce the judgment against the defendants because the enforcement itself would represent a state action in furtherance of a racially discriminatory practice contrary to the 14th Amendment. The idea that judge can't enforce his own judgments is preposterous, and is danced around by courts today to make sure that they can enforce their decisions without upsetting the *Shelley* decision.

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