

Divine Law

Those who support divine law say that law is the product of God's will, which people incorporated into their own legal codes. Therefore, unless human laws follow God's will, they are invalid.

Natural Law

Natural law may be seen as a set of ideal, enduring, inflexible rules of conduct from which all human law should originate. Natural law theorists do not necessarily bring God and religion into their perspective. Instead, they merely argue that certain standards have existed, and will always exist, and that law and justice should reflect these enduring standards. There is a strong sense of morality and ethics in natural law theory. Natural law theory sees a necessary relation between law and morality, they cannot be separated. For example, today people who follow international news may argue that certain rights are "inalienable", that they belong to all people at all times. Anything less is unjust in their eyes. If there is a conflict between natural and positive law, in the opinion of natural law theorists, natural law should override positive law.

Positive Law

Positive law is derived from the belief that law is simply what the law makers say it is. This theory has its roots in the Reformation, specifically the reign of King Henry VIII of England. Henry VIII's reign marked a decline in the power of the church and greater empowerment of the government (the king and later Parliament). The authority to make laws was shifted from religious authorities to secular ones. Thus, the monarch, and later the government, was given ultimate authority over law making.

To Positive Law theorists, justice is conformity to the law of the land, nothing

more. For example, in the eyes of a positive law theorist, condemning the Nazi regime for its laws may not be an issue: the Nazi's formed the government of Germany in the 1930s and 1940s, which gave them the authority to pass laws. Positive law theorists do not care to debate the morality of those laws, to them the laws were passed by the political authorities, and that is it. To a positive law theorist, there is no conceptual overlap or relation between law and morality.

"Spirit of the Law"

Theorists who support a "spirit of the law" approach differ greatly from legal formalists. While those who advocate a spirit of the law approach start with the law as written, they advocate much greater flexibility in terms of applying and interpreting it. Spirit of the law theorists propose that judges should consider the underlying purposes and values of the law when they attempt to apply it. They advocate that judges do not merely read the law as written, but also read in between the lines of the law, and speculate as to the intent of the lawmakers who wrote the law. Thus, a spirit of the law theorist advocates a much more flexible approach to interpreting and applying the law.

Sociological Jurisprudence

Sociological jurisprudence theory argues that legal decisions ought to be judged in light of the effects they will have on society. This approach to applying and interpreting the law does not see law as an autonomous sphere, but as a deeply connected with all aspects of society. Thus, legal decisions are about more than law, they are going to have an effect throughout society. Therefore, a court's decision must be shaped by the social effects it will create. The approach rejects the moral absolutism of natural law theorists, favouring a more flexible approach to applying and interpreting law that takes in to account the effect of legal decisions on society.

Popular Morality

Popular morality theory sees a strong connection between law and society just like sociological jurisprudence. However, popular morality theorists argue that the voice of the community should shape a court's decisions in difficult cases. Popular morality theory sees a strong link between the law and the community it serves. This theory argues that justice should reflect the moral will of the majority of the community. The guiding principle of this theory is that the law should support what most people in the community believe to be right or desirable. Thus, according to this theory, the majority opinion of the public should guide legal decision making.

Critical Morality

The theory of Critical Morality starts with the same basic principle that popular morality theorists support: the legal system should listen to the voice of the community. However, critical morality theory differs, arguing that decisions of the legal system should follow the most defensible, most reasonable view offered by the community, not necessarily the will of the majority. Think of this as advocating quality over quantity when taking public opinion into account.

Virtue Jurisprudence

Theorists who support the perspective of virtue jurisprudence argue that the purpose of law is to promote development of virtuous behaviour by citizens. Thus, in any legal case, virtue jurisprudence would look for the decision of the court to do something to promote character or the excellence of humans. Those who support this theory feel strongly that the function and purpose of law is to educate and act as a moral example or guideline.

Critical Legal Studies

The critical legal studies movement argues that meaning depends on circumstance and human choice. Thus, theorist arguing from this perspective believe that no method of lawmaking is truly neutral and objective. For them, law is about value choices. They argue that the law itself is not neutral, it reflects struggles among factions within society, who have competing conceptions of justice and morality. Thus judge, acting on slanted or flawed laws, will interpret them in their own individual ways depending on the circumstances of each case and their own choices. Therefore, critical legal studies supporters would argue that law always has the ability to be radically unpredictable. They feel that judges nearly always decide cases by making new law. Supporters of this view would argue that the notion of a legal system that is predictable and objective because it uses laws and precedents is an illusion.

Marxist Jurisprudence

You may be familiar with Karl Marx. Marx was a nineteenth century political theorist who co-authored The Communist Manifesto. Put simply, Marx saw things in history being determined by materialism and by class struggle. He argued that capitalist systems were doomed to be destroyed by violent revolution of the working classes once they grew weary of being exploited. When Marxist political theory is applied to law the concept of exploitation remains central to the theory. Marxist jurisprudence argues that the law is merely a tool of the ruling classes, the rich and powerful. It is a device to maintain the status quo. It is not a tool for change and reform. When seen this way, the law is slanted, biased, and not a device for achieving social justice.

1. Capital punishment, commonly known as the death penalty, is a legal topic that is often debated in our society. When polled, more than 50% of Canadians were in favour of re-instating capital punishment. Which theory would argue that it should be reinstated because more than 50% of the population wants it?

- Popular morality
- Critical morality
- Sociological jurisprudence

2. Although successive governments know that more than 50% of the population favours reinstating the death penalty, government policy on the issue has been shaped by reasonable, well researched, convincing arguments from the minority that reinstating capital punishment is a mistake, will not deter crime and will lead to greater injustices. By following the well reasoned arguments of the minority of public opinion, government policy is acting according to which theory of law?

- Legal formalism
- Critical legal studies
- Critical morality

3. What if the argument in favour of reinstating capital punishment focused on its value as a deterrent? That is to say, if a person argued that capital punishment should be reinstated simply because it would benefit society by preventing future criminal behaviour, what theory is being used to support this view?

- Virtue jurisprudence
- Marxist jurisprudence
- Sociological jurisprudence

4. Another controversial legal issue is that of legalizing abortions. In a debate over legalizing abortion, if someone argued that all life is precious, that under no circumstances can life be taken, without exception, what legal theory are they arguing from?

- Legal realism
- Natural law
- Feminist jurisprudence

5. The Irish poet Oliver Goldsmith once remarked: "Law grinds the poor, and rich men rule the law." What legal theory best describes Goldsmith's opinion?

- Critical legal studies
- Virtue jurisprudence
- Marxist jurisprudence

6. Musician Frank Zappa once remarked: “The United States is a nation of laws; badly written and randomly enforced.” Which theory of law best suits Zappa’s perspective?

- Critical legal studies
- Spirit of the law
- Legal formalism

7. Henry Ward Beecher, an American clergyman, writer, performer and reformer, once remarked that “a law is valuable not because it is law, but because there is right in it.” What theory best describes Beecher’s opinion of the law?

- Sociological jurisprudence
- Natural law
- Positive law

8. English historian James Froude once noted that “Our human laws are but the copies, more or less imperfect, of the eternal laws, so far as we can read them.” Froude’s statement shows guidance from which legal perspective?

- Virtue jurisprudence
- Feminist jurisprudence
- Natural law

9. John Milton, the famous English writer and poet, once said that “laws can discover sin, but not remove it.” Which of the following theories does Milton definitely not believe in?

- Marxist jurisprudence
- Critical legal theory
- Virtue jurisprudence

10. A judge recently made the following comment to a lawyer during a case: “you are asking me to not only bend the law, but in doing so, to create new law. My job is to apply the law, not write new ones.” What theory was behind the judge’s perspective?

- Sociological jurisprudence
- Critical legal studies
- Legal formalism

11. A person looking at a particularly difficult court case, an extreme issue or situation, and arguing that the law cannot be applied as written, but that the court needs to look at the original intent of the law, is arguing from which theoretical perspective?

- Critical morality
- Critical legal studies
- Spirit of the law

“Now that you have an understanding of the various theories of law, you can appreciate how they lead people to differing opinions and decisions in legal cases. When you hear people speaking on legal topics, pay close attention; look for the theoretical basis of their opinions. If you can understand which theory is shaping their view, you can better understand the merits of their points.

You should consider the strengths and weaknesses of each theory. None of these theories is perfect. They apply with varying degrees of effectiveness to different cases and issues.

Lastly, you should also consider which theories shape the formation of your opinions on legal issues. Ask yourself which theories shape your views. Think about why you favour those perspectives on legal issues.