May It Please The Court

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May It Please the Court
by David F. Forte

May It Please the Court.
So the advocate begins...with a prayer. What is it that the counsel prays may please the court? We know that what pleases a legislator is having enough votes. What pleases a governor or president is having his orders obeyed. But what pleases a court is its being convinced of the rightness of the cause. The court wants reason, reason that persuades.

In the Anglo-American scheme of justice, more than any other, courts must give reasons for their judgment. They have to justify their conclusions before all. They are obliged to be transparent in reaching the conclusion that will change the lives or fortunes of those before them. Having enough votes is not a sufficient justification. Having the prerogative of executive decision is not enough for the judges. As Alexander Hamilton noted, judges have no power of the purse. They have no army. Their only weapon is the reasons they proffer.

Hadley Arkes offers a brilliant manifesto for natural law. In it, he suggests that judges do not pay enough attention to reason, that their realm of reason is too circumscribed—and he levels the criticism at both modern liberal and conservative judges. He urges them to reach out specifically to the principles of the natural law. Yet the judges resist the invitation. They seem always to have resisted the invitation.

Why is that so? Why are natural law reasons resisted? Arkes asks. Why do judges not seek a proper grounding of their judgment in natural law?

Two Kinds of Natural Law

When Arkes speaks of natural law, he does so in two forms, though in his narrative, he seems to collapse the two. In one, which we may call “right reason,” Arkes speaks to the “nature of the thing.” This form of demonstration, or right reason, is implicit in the art of judging. In fact, this form of demonstration does often please the court, and it should.

Arkes himself notes that even the conservative justices, whom he otherwise criticizes, often correctly use this form of natural law, i.e., right reason. So, for example, Arkes applauds Justice Scalia’s employment of principles of “propositional logic” when he disputes Justice Kennedy’s definition that whatever “affects” waters is itself “waters within the United States” (as defined in the Clean Water Act and its subsequent regulations and judicial interpretations).

But there is another aspect to the natural law that Arkes describes, which we may call moral axioms. It is here where he finds the conservative justices falling short. He regrets it when a court has an opportunity to base its decision on moral axioms and instead turns to original understanding or other devices. Thus in District of Columbia v. Heller (2008), establishing the right to bear arms as an individual right under the Second Amendment, Arkes criticizes Justice Scalia for considering the right of self-preservation not as a moral axiom applied to the human person as such, but as a principle that was in the positive law of the Constitution. The right of self-preservation can be a ground for the decision, according to Scalia, because it is part of the original understanding, not because it is a principle that supervenes the Constitution itself.

Scalia recoils from the use of moral first principles as a basis for judicial decision-making. He has opined,

Maybe my very stingy view, my very parsimonious view, of the role of natural law and Christianity in the governance of the state comes from the fact that I am a judge, and it is my duty to apply the law. And I do not feel empowered to revoke those laws that I do not consider good laws. If they are stupid laws, I apply them anyway, unless they go so contrary to my conscience that I must resign.

And so, here, Arkes is correct in the observation that forms the basis of his regret. It is the enunciation of moral axioms as the ground of decision that does not please the court. Justice Scalia, of course, is not alone. In fact, he is heir to a long and articulate tradition, which Professor Arkes knows very well. But what animates this tradition? Why are otherwise wise, intelligent, and morally acute judges so averse to going outside the positive law to search for first principles, as Arkes urges them to do? The answer is that the positive law itself binds the judge within a moral framework, and Anglo-American judges find that moral framework sufficient unto itself.

The Nature of Positive Law

To understand the tension between the moral imperatives of the natural law and the way judges come to actual decisions, we need to complete our picture. We need to see what the actual moral experience of judging is, not just what it would be if confined to propositional logic.

Of all the founders, Hamilton best understood the nature of judging. In Federalist 78 he described the Constitution’s tripartite division of powers. He ascribed “FORCE” to the executive, “WILL” to the legislature, and the more circumspect “JUDGMENT” to the judiciary. He said that the judiciary would be the least dangerous branch. Why would it be the least dangerous branch? As Hamilton’s Anti-Federalist opponents asked, do not judges in robes have the same passion for power as do congressmen in frock coats?

Hamilton agreed with James Madison that mere parchment barriers would not keep the judges from abusing the rights of others. Nor did he rely upon the force of philosophic logic to restrain the judge. And Hamilton and the framers intentionally left the courts free from most of the checks placed on the other departments of government, precisely to leave the judiciary independent. If not parchment rules, if not the force of philosophical logic, if not checks and balances, what then can we rely upon to restrain judges?

Hamilton, joined by the other framers, has an answer: it is virtue. The particular kind of virtue that inheres in the positive law of the court. Through the moral matrix of the positive law, the judge learns the art of virtue, literally the Aristotelian habit of acting rightly. Everywhere a judge turns, he is bound by the instructive moral limits of his craft. Let us consider them.

There is, to begin, the positive law of statutes, of administrative regulations, and of
Thomas Aquinas writes that “In these earthly laws, though men judge about them when they are making them, when once they are established and passed, the judges may judge no longer of them, but according to them.” Thus the courts are bound by rules of statutory interpretation. By respecting the authority of the legislature and the executive, the courts affirm the political legitimacy of those branches that have a closer accountability to the people. Courts that are faithful to the positive law of statutes thereby strengthen the legitimacy of the polity.

A second element in the moral matrix of positive law is the law of the court, or the rules of precedent or stare decisis. Precedent operates as a form of judicially created statute, which, like a legislative statute, is binding but which still must be interpreted. There is, to be sure, a lively contemporary debate over whether incorrect interpretations of the Constitution should be maintained under the rule of stare decisis. Whatever the correct resolution of that conflict should be in particular cases, it is nonetheless telling that the debate would have no traction at all if precedent did not have a binding function on courts.

There is an additional parallel between the law of statutes and the law of precedents: both direct a judge’s attention to what has gone before. Both testify to the fact that the law that comes to the judge is de lege lata, something already laid down, as opposed to de lege ferenda, law as it ought to be. Thus do both the law of statutes and the law of the court channel the judge away from subjective preferences. We should mention here that part of the law of the court is the law of judicial system, by which lower courts follow the rules laid down by superior courts within their jurisdiction. The system provides consistency and coherence in the law throughout the country in its thousands of applications.

A third element is the law of process, which limits what a court can hear, what evidence may be admitted, and how a court may dispense legal justice. As every law student learns—and what every lawyer and judge knows—courts may not choose what issues to decide. They are limited to cases, which means that there must be a plaintiff (or petitioner), a defendant (or respondent) and a legal cause of action. The parties must have standing, the issue must be ripe, must not be moot, and the court must have jurisdiction.

A fourth element of the law is the positive law of the subject, or legal doctrine. Every legal dispute is brought in one or more subject area, each of which has its own complex concepts, standards, and history. Each subject—whether it be contract law, tort law, anti-trust law, tax law, bankruptcy law, divorce law, corporate law, or any of the other myriad substantive subjects taught at law school and continued on in the practice of lawyers—has a coherent and definable content, known in legal studies as “doctrine.” The vast detail and the motivating principles in every area provide a positive law of direct relevance to the resolution of each particular legal dispute.

A fifth element is the positive law of the case, or res judicata. Once a case has been fully and completely decided, no court may revise or re-open the litigation. Although the legislature may change the underlying law and affect the legal rights of the parties even in an ongoing case, once the dispute has been resolved judicially, not even a legislative act can change the rights and duties of the parties decisive determined by the court.

A sixth constraint is the positive law of the judge, or judicial ethics. The appropriate behavior of judges has been part of Western legal concern for centuries. In the United States, the American Bar Association first adopted Canons of Judicial Ethics in 1924. In 1972, the Canons were revised and redacted into a Code of Judicial Conduct that served as the basis for nearly all state codes of judicial conduct. The Code covers such areas of judicial conduct as compliance with the law, diligence and impartiality, conflict of interest, and electoral activities. In addition, federal statutes cover disqualification and recusal of judges.

A seventh element is the positive law of law, or what makes an enactment truly binding. For law to have certain internal elements for it to be law, and not just an arbitrary or absurd act. The principle of legality was helpful illuminated in the famous 1958 debate between Leon Fuller and H.L.A. Hart in the pages of the Harvard Law Review. Although Fuller referred to his theory as “internal natural law,” his view is more of a delineation of the nature of positive law, qua law, and the outer moral limits of what a judge can enforce as true positive law. For positive law to be legal, argues Fuller, it needs to have certain internal attributes: the rules must be general, publicly promulgated, prospective, clear and understandable, consistent, capable of being complied with, relatively stable, and administered faithfully. Without these elements, an enactment would be void for vagueness, or for arbitrariness. It simply would not be law.

An eighth ingredient of the moral fabric of positive law is the law of reason, or more exactly, the law of reasons. As noted, the Anglo-American legal system’s hallmark is the judge’s moral accountability for his decision, particularly at the appellate level. He must give reasons, publicly stated, justifying his decision, open for criticism and rational impeachment. It is
not enough for the judge to follow the various elements of the positive law, as outlined above. He must demonstrate to the people and the polity that he has been faithful to the positive law. Not only, therefore, is the judge bound by the moral constraints of the positive law, he must be transparently bound.

All of the above impels a judge in the American legal system to adhere to the law of the Constitution, which provides the moral basis for originalism. Professor Arkes has criticized originalism, partly because it is indeterminate and there are multiple disagreements about what the original understanding is. But if disagreement about the principles of natural law are no logical barrier to there being a right interpretation of natural law, so too disagreement about the original understanding of the Constitution is no barrier to there being a right understanding of what the founding generation meant by the Constitution. Besides, the moral suasion of originalism is necessary to the virtue of the judicial craft.

In Marbury v. Madison (1803), Marshall insisted that “[t]he Framers of the Constitution contemplated [i.e., intended] that instrument as a rule for the government of courts, as well as of the legislature.” In words that judges and academics might well contemplate today, Marshall said,

                      Why, otherwise, does the Constitution direct judges to take an oath to support it? This oath certainly applies in an especial manner to their conduct in their official behavior [i.e., their judicial craft]. How immoral to impose it on them if they were to be used as the instruments, and the knowing instruments for violating what they swear to support.”

Judicial Craft

The judge who faithfully abides by the positive law in all the ways outlined above performs a rationally moral task without the need to refer to natural law principles that lie at the base of law’s function, and, in many cases, of law’s substance. This is the phronesis of the judge, the practical wisdom, the virtue of prudence. Prudence does not mean, “let’s compromise until the time is ripe for getting what we want.” Prudence is the ability to do what is optimally right in a situation of contingent variables. It is not what is temporarily right. It is right in the moment of deciding what is right. Abraham Lincoln, let it be remembered, practiced prudence, while William Lloyd Garrison would not let anything contingent stand in the way of his categorical imperative. Garrison was the advocate of moral absolutism, while Lincoln was the true originalist.

Many of us are familiar with a scene in Robert Bolt’s play A Man for All Seasons, in which Thomas More engages his son-in-law William Roper in a debate over the problem of too many positive laws standing in the way of getting at what’s right.

Roper: So, now you give the Devil the benefit of law!

More: Yes! What would you do? Cut a great road through the law to get after the Devil?

Roper: Yes, I’d cut down every law in England to do that!

More: Oh! And when the last law was down, and the Devil turned ‘round on you, where would you hide, Roper, the laws all being flat? This country is planted thick with laws, from coast to coast, Man’s laws, not God’s! And if you cut them down, and you’re just the man to do it, do you really think you could stand upright in the winds that would...
I WILL and not JUDGMENT. We'd get of judging, when they urged judges to follow of legality, or to the justification by reason, or ethics, or to legal doctrine, or to the principle of legality, or to the justification by reason, or to originalism? What would happen if we did that? What would we do then when the Devil turned round on us?

We'd get the wages of what the legal realists did to the traditional moral constraints of judging, when they urged judges to follow WILL and not JUDGMENT. We'd get Roe v. Wade (1973) and over 40 million dead human beings.

The problem with Roe v. Wade is not that it violated the norms of natural law. Certainly it did so manifestly. The true problem with Roe v. Wade is that it did not follow the ethical norms of positive law of the court. In that case, Justice Blackmun violated the law of the court by ignoring the tradition of cases opposed to such an innovative "right." He violated the principle of legality by proposing a rule that had little internal consistency. He violated the law of reason, for the opinion was simply a diktat declaring a result that had no colorable reasoning behind it with a flippant disregard of the norms of justification and transparency. Blackmun violated the positive law of the Constitution, for there was no privacy right encompassing abortion in the original understanding of liberty or in any reasonable application of the original understanding.

Roe v. Wade is not just censurable because it violates natural law. It is censurable because Justice Blackmun violated the most fundamental moral norms of the positive law, prompting the famous observation of John Ely, "It is...a very bad decision...because it is bad constitutional law, or rather because it is not constitutional law and gives almost no sense of an obligation to try to be."

The natural law song has many notes. Thus I suggest that the renewed natural law project can succeed if we take the categorical imperatives of Kant, and place them in the practical wisdom of Aristotle, within the prudence of Aquinas, and come to see the phenomenological vibrancy of the morality of the judicial craft itself.

May it please the court.

David F. Forte is a professor of law at the Cleveland-Marshall College of Law and an acting municipal judge in Lakewood, Ohio. Portions of this essay were drawn from an article in A Second Look at First Things: A Case for Conservative Politics, edited by Francis J. Beckwith, et al. (St. Augustine's Press).

The Need for Natural Law

by Michael M. Uhlmann

In Hadley Arkes's "manifesto" we have an elegant restatement of the case for natural law and an elegant summary, as well, of the ideas that have informed Arkes's thinking over four decades. It is a fitting inaugural to the establishment of the Claremont Institute's new center for the study and application of natural law principles. The Center has many godfathers, but none more influential than Harry V. Jaffa. Natural law, it has been said, always returns to bury its pallbearers, and few in our time have done more than Professor Jaffa to revive interest in the subject.

We have in David Forte's response an equally elegant commentary on why judges— even judges who are friendly to the idea of natural law as a philosophical proposition—may be indisposed to acknowledge the authority of natural law as a guide to adjudication. Professor Forte, no less than Professor Arkes, recognizes the limits of legal positivism; but he also reminds us that positive law has moral virtues that natural law enthusiasts are sometimes prone to disregard. As Forte puts it, "We need to see what the actual moral experience of judging is, not just what it would be if confined to propositional logic."

Because I recently wrote at some length, and favorably, about Professor Arkes's effort to in-...
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