

U.S. Positive Law

by Sophia



WHAT'S COVERED

In this lesson, you will learn about some of the basic concepts and distinctions in United States positive law. Specifically, this lesson will cover:

1. Moral Minimums in a Democratic Society

Most of what we discuss here is **positive law**— U.S. positive law in particular. The term positive law simply refers to a body of man-made laws that regulate conduct.

However, the law does not correct (or claim to correct) every wrong that occurs in society. At a minimum, it aims to curb the worst kind of wrongs— the kind of wrongs that violate what might be called the moral minimums that a community demands of its members. These include not only violations of criminal law, but also torts and broken promises.

➞ **EXAMPLE** It may be wrong to refuse to return a phone call from a friend, but that wrong will not result in a viable lawsuit against you. But if a phone (or the Internet) is used to libel or slander someone, a tort has been committed, and the law may allow the defamed person to be compensated.

There is a strong association between what we generally think of as ethical behavior and what the laws require and provide.

➞ **EXAMPLE** Contract law upholds society's sense that promises - in general - should be kept. Promise-breaking is seen as unethical. The law provides remedies for broken promises (in breach of contract cases), but not for all broken promises; some excuses are accepted when it is reasonable to do so.

For tort law, harming others is considered unethical. If people are not restrained by law from harming one another, orderly society would be undone, leading to anarchy. Tort law provides for compensation when serious injuries or harms occur.

As for property law issues, we generally believe that private ownership of property is socially useful and generally desirable, and it is generally protected (with some exceptions) by laws.

➞ **EXAMPLE** You obviously can't throw a party at someone's house without permission, but your right to do whatever you want on your own property may also be limited by law. You can't, without the public's permission, operate an incinerator on your property and burn heavy metals, as toxic ash may be deposited throughout the neighborhood.



TERM TO KNOW

Positive Law

A body of human-made laws that regulate conduct.

2. Common Law

Even before legislatures met to make rules for society, disputes happened and judges decided them.

IN CONTEXT

In England, judges began writing down the facts of a case and the reasons for their decision. They often resorted to deciding cases on the basis of prior written decisions. In relying on those prior decisions, the judge would reason that since a current case was pretty much like a prior case, it ought to be decided the same way. This is essentially reasoning by analogy. Thus the use of precedent in **common law** cases came into being, and a doctrine of **stare decisis** (pronounced STAR-ay-de-SIGH-sus) became accepted in English courts. *Stare decisis* means, in Latin, “let the decision stand.”

The thirteen original colonies had been using English common law for many years, and they continued to do so after independence from England. Early cases from the first states are full of references to already-decided English cases. As years went by, many precedents were established by U.S. state courts, so that today a judicial opinion that refers to a seventeenth- or eighteenth-century English common-law case is quite rare.

Courts in one state may look to common law decisions from the courts of other states where the reasoning in a similar case is persuasive. This will happen in “cases of first impression,” a fact pattern or situation that the courts in one state have never seen before. But if the Supreme Court in a particular state has already ruled on a certain kind of case, lower courts in that state will always follow the rule set forth by their highest court.

Most judicial decisions that don’t apply legislative acts (known as **statutes**) will involve one of three areas of law:

- Property
- Contract
- Tort



TERMS TO KNOW

Common Law

Court-created law; the body of court decisions creating precedents by which future cases will also be decided.

Stare Decisis

Latin term referring to the doctrine courts apply to case law to adhere to precedents; to follow rules made by prior decisions and not to unsettle things that have already been established.

Statute

An act of a legislature declaring, requiring, or prohibiting something. Also known as a law.

2a. Property Law

Property law deals with the rights and duties of those who can legally own land (real property), how that ownership can be legally confirmed and protected, how property can be bought and sold, what the rights of tenants (renters) are, and what the various kinds of “estates” in land are (e.g., fee simple, life estate, future interest, easements, or rights of way).

2b. Contract Law

Contract law deals with what kinds of promises courts should enforce.

➞ **EXAMPLE** Should courts enforce a contract where one of the parties was intoxicated, underage, or insane? Should courts enforce a contract where one of the parties seemed to have an unfair advantage? What kind of contracts would have to be in writing to be enforced by courts?

2c. Tort Law

Tort law deals with the types of cases that involve some kind of harm and/or injury between the plaintiff and the defendant when no contract exists. Thus if you are libeled or a competitor lies about your product, your remedy would be in tort, not contract law.

3. State Courts and the Domain of State Law

In the early years of our nation, federal courts were not as active or important as state courts. States had **jurisdiction** (the power to make and enforce laws) over the most important aspects of business life.

The power of state law has historically included governing the following kinds of issues and claims:

- Contracts
- Torts
- Property
- Corporations
- Partnerships
- Domestic matters
- Agency law
- Insurance

Over the past eighty years, however, federal law has become increasingly important in many other areas, including banking, securities, and environmental law.



TERM TO KNOW

Jurisdiction

A general term referring to the power and authority of a court; areas of authority including geographical areas covered by a court as well as subject matter areas and the ability to determine personal rights.

4. Civil vs. Criminal Cases

Most of the cases we will look at in this course are civil cases; however, criminal cases are certainly of interest to business, especially as companies may break criminal laws. A criminal case involves a governmental decision - whether state or federal - to prosecute someone (named as a defendant) for violating society's laws.

The law establishes a moral minimum and does so especially in the area of criminal laws; if you break a criminal law, you can lose your freedom or your life (if you are convicted of a capital offense). In a civil action, you would not be sent to prison; in the worst case, you can lose property, such as money or other assets.

➔ **EXAMPLE** Ford Motor Company lost a personal injury case, and the judge awarded \$295 million to the plaintiffs.

Some of the basic differences between civil law and criminal law cases are illustrated in the following table.

Case Component	Civil Cases	Criminal Cases
<i>Parties</i>	Plaintiff brings case; defendant must answer or lose by default	Prosecutor brings case; defendant may remain silent
<i>Proof</i>	Preponderance of evidence	Beyond a reasonable doubt
<i>Reason</i>	To settle disputes peacefully, usually between private parties	To maintain order in society
<i>Remedies</i>	Money damages (legal remedy) Injunctions (equitable remedy) Specific performance (equity)	Fines, jail, and forfeitures

Regarding plaintiffs and prosecutors, you can often tell a civil case from a criminal case by looking at the caption of a case going to trial. If the government appears first in the caption of the case (e.g., *U.S. v. Lieberman*), it is likely that the United States is prosecuting on behalf of the people.

The same is true of cases prosecuted by state district attorneys (e.g., *State v. Seide*). But this is not a foolproof formula. Governments will also bring civil actions to collect debts from or settle disputes with individuals, corporations, or other governments.

Governments can be sued, as well; people occasionally sue their state or federal government, but they can only get a trial if the government waives its sovereign immunity and allows such suits.



SUMMARY

In this lesson, you learned that the law aims to cover **society's moral minimums**, but cannot account for all wrongs that may occur. In the United States, there is a fairly firm distinction between **criminal law** (for actions that are offenses against the entire society) and **civil law** (usually for disputes between individuals or corporations).

Basic ethical norms for promise-keeping and not harming others are reflected in the **common law** of **contracts, torts, and property**. Both the states and the federal government have roles to play, and sometimes these roles will overlap with standards set in both **state courts** and federal courts.

Best of luck in your learning!

Source: This content has been adapted from Lumen Learning's "U.S. Positive Law" tutorial.



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