

Words and Apples: The Ladder Approach in Judicial Decision Making*

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In the first half of the twentieth century, American legal realists captured the imagination of the juridical world with the startling revelation that a judicial decision was the epicenter and not merely the outcome of the law.¹ Jerome Frank indicated that everything which constituted the legal process up until the moment the judge spoke the decision were just so many words or contextual variables, but certainly not law in the true sense. Felix Cohen was less ambitious, perhaps, in locating law closer to the rules, and not as far as the decision *per se*, but certainly in those same variables which led to a judge's decision.² Later in the century, after legal realism had been designated as the honorary wallflower of Western legal theory, the Natural Law writings of Lon Fuller³ provoked another clarion call to arms by, perhaps, the last important positivist of this recent era, H.L.A. Hart.⁴ As the century came to a close, positivist theories were again displaced by theories more closely adhering to Natural law, such as those of John Finnis,⁵ and the Integrity approach of Ronald Dworkin.⁶ If positivism continued at all, it did so in the guise of its close cousins, the post modernists/legal realists, who have, often from the grave with the assistance of pilot-fish critical legal theorists, pulled the legal process apart so that it appears as only one large lake of words from which judges

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¹ Jerome Frank, *Law and the Modern Mind* (New York: Coward-McCann, 1930); Jerome Frank, "Are Judges Human," 80 *University of Pennsylvania Law Review* (1931): 17-53. Karl Llewellyn, *The Bramble Bush: On Our Law and Its Study* (Dobbs Ferry, New York: Oceana Publications, 1981) (1930).

² Felix Cohen, "Transcendental Nonsense and the Functional Approach," 35 *Columbia Law Review* (1935): 809-849.

³ Lon L. Fuller, *The Law in Quest of Itself* (Chicago: The Foundation Press, 1940); "Positivism and Fidelity to Law – A Reply to Professor Hart." *Harvard Law Review* 71.4 (1958): 630-672; *The Morality of Law*. New Haven and London: Yale University Press, 1964.

⁴ H.L.A. Hart, "Positivism and the Separation of Law and Morals," 71.4 *Harvard Law Review* (1958): 593-629; *The Concept of Law* (Oxford: Clarendon Press, 1961;1994).

⁵ John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980).

⁶ Ronald Dworkin, *Law's Empire* (Cambridge, Mass. : Belknap Press, 1986).

can fish out what they like and throw back whatever does not fit their particular worldview when promulgating their decisions. I see this state of affairs as both mistaken and unhelpful to both the discipline of legal theory and to the relationship between society and the judicial system generally.

While jurisprudence has never been the same since O.W. Holmes⁷ emphasized the fact that the law is fundamentally a dynamic phenomenon, I suggest even he would shudder to see the listless state of legal theory brought on by a hysteria around the indeterminacy of what words mean and what judges are actually doing. Like Holmes and the realists, I too see the judge as one of the most important actors in the growth and life of our laws. Yet, I part ways with the realists as soon as we are told that every piece of constitutional and statutory law which allows the case to find its way to the judge in the first place are merely so many words. I grant such instruments *are* words, but they are important words which only exist in aggregate at the various ascending levels of a, for instance, section, chapter, and whole. Constitutions, for example, are not simply a collection of words to which the judge can ascribe any meaning to, precisely because the words are subordinate to their corresponding sentence, as the sentence to its section, and the section to the whole. Judges serve the all important role of overseeing the engagement of the law with the citizens who live *with* it, not under it. Fundamentally, judges are necessary in the delivery of laws because they “give the sense”⁸ of the law to the larger part of society who may well suspect their only contact with it is at its limits: places where there is a dire need for both clarity and some explanation of the benefits or consequences which flow from various courses of legal action. Of course, for every benefit conferred, there is a corresponding consequence for someone else, and *visa versa*, and both parties before a

⁷ O.W. Holmes, “The Path of the Law,” *Harvard Law Review* 10 (1897).

⁸ Of course, in the biblical book of Nehemiah, we read that when Ezra read the law to the people, he and others were also there to “give the sense” of what meaning was intended by the words. The relevant verse reads: Nehemiah 8.8, So they read from the book, from the law of God, with interpretation. They gave the sense, so that the people understood the reading (New Revised Standard Version).

judge have the right to be heard, but also to hear. The judge, *inter alia*, ensures both of these things take place. So, in the nomenclature of the realists, yes, judges take “words” from statutes and justify the engagement of them to the parties with more words, but, importantly, they deliver these words in a context of accountability, a context which is authorized by the society in the form of those very same and important constitutional and statutory words.

Judges grapple with the important expressions of our laws at the intersection of the legal and non-legal confluence within Western common law countries. These expressions and their concomitant written underpinnings are important to understanding how law works. I will demonstrate this using a simple metaphor of a person climbing a ladder to reach an apple. In this case, the ladder has five rungs, all of which lead upward to the apple, which represents the point of intersection between the law and the community. The rungs represent logical steps forward in the process of legal decision making, and cannot be skipped at the whim of a judge. The first rung is the constitution of the society in question; second, the statutes or rules which rest on the authority of the constitution; third, the rung representing case law, the tested interpretations of those statutes and rules; the fourth rung consists of all those factors and variables – such as the particular facts of the case, the unwritten principles of justice, and the voices of both sides of an action – which make up the judges decision; the fifth and final rung is the decision itself, which allows the metaphorical judge to bring the apple of outcome down from the tree to those who partake of it, on a ground level, where the legal decision engages with society in substantive ways: hence, the apple is eaten and aids the subsistence of the community who engage it. The important consideration for this metaphor is that rungs cannot be skipped or taken out, they must follow in that order or the whole process fails due to lack of both integrity and logical consistency.

Judges serve an instrumental role in Western common law societies by overseeing a kind of “town-hall-gathering” of understanding and responsibility where the participants include the citizens involved, representatives of law’s interpretation (the lawyers and judges), and, even if only by proxy in the written instruments of law, the political representatives of the citizens who have crafted and approved of these laws. Importantly, lawyers and judges are under the strictures of the laws and all they may do is suggest an understanding of these laws which makes more sense given the whole of the judicial enterprise, and this is Ronald Dworkin’s point exactly: that integrity employed by judges involves appealing to the community’s sense of what is, essentially, right and wrong.⁹

The judges, as I have tried to demonstrate, must climb each rung of the ladder as they explain their decisions: they may not skip the constitution, the statutes, case law, context, and reasonable decision. Further, their apples/words must not be under-ripe, bringing an overly literal sense to the law which might have been acceptable in another age; conversely, their apples must not be over-ripe, such as interpreting the law too loosely so that it fits a particular partisan world view. These apples must be ripe so that when they are brought down to the street level for consumption, they don’t make citizens sick but rather add to the healthy development of the whole bodies of those societies in the Western common law world.

If you live in a state like this, when you read about a court’s judgment in the newspapers or hear about it on the news, ask yourself whether it seems like these “ladder approach” considerations – the constitution, the statutes, case law, context, and reasonable decision – are being adhered to. If they are, the decisions are then reflective of the democratic processes of the society to which you belong. If they are not, or if you think the law itself is not reflective of what your fellow citizens would agree with, then you have a

⁹ Dworkin, *Law’s Empire*.

representative in your country's parliament whom you can contact and who can then take your concern to the entire body of your country's representatives for consideration. If enough fellow citizens agree with you, your representatives will be obliged to change the law.