

Realism and the Law

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*Legal realism arose as a distinctive school of American jurisprudence in the early decades of this century. Describing their opponents as "formalists," legal realists argued that the law is essentially normative and that judges exercise wide discretion; a judge's values and beliefs about society have a large impact, they argued, on how cases are decided. Law is not a "seamless web" and, more important, it places few rational restraints on how judges rule. Jerome Frank, who served as an appeals court judge, was among the most outspoken of the legal realists. In the following essay, taken from his book *Law and the Modern Mind*, he first describes the "conventional" view of law, which fails to acknowledge that judges often make new law. He then describes how the judge's personality affects the laws he or she makes, and attacks the "myth" that precedents and reason control judges. He concludes with a brief discussion of the nature of law from the perspective of the legal realist.*

JUDICIAL LAW-MAKING

Have judges the right and power to make law and change law? Much good ink has been spilled in arguing that question. A brief survey of the controversy will illuminate our thesis.

The conventional view may be summarized thus:

Law is a complete body of rules existing from time immemorial and unchangeable except to the limited extent that legislatures have changed the rules by enacted statutes. Legislatures are expressly empowered thus to change the law. But the judges are not to make or change the law but to apply it. The law, ready-made, pre-exists the judicial decisions.

Judges are simply "living oracles" of law. They are merely "the speaking law." Their function is purely passive. They are "but the mouth which pronounces the law." They no more make or invent new law than Columbus made or invented America. Judicial opinions are evidence of what the law is; the best evidence, but no more than that. When a former decision is overruled, we must not say that the rule announced in the earlier decision was once the law and has now been changed by the later decision. We must view the earlier decision as laying down an erroneous rule. It was a false map of the law just as a pre-Columbian map of the world was

false. Emphatically, we must not refer to the new decision as making new law. It only seems to do so. It is merely a bit of revised legal cartography.

If a judge actually attempted to contrive a new rule, he would be guilty of usurpation of power, for the legislature alone has the authority to change the law. The judges, writes Blackstone, are "not delegated to pronounce a new law, but to maintain and expound the old law"; even when a former decision is abandoned because "most evidently contrary to reason," the "subsequent judges do not pretend to make new law, but to vindicate the old one from misrepresentation." The prior judge's eyesight had been defective and he made "a mistake" in finding the law, which mistake is now being rectified by his successors.

Such is the conventional notion. There is a contrary minority view, which any dispassionate observer must accept as obviously the correct view:

"No intelligent lawyer would in this day pretend that the decisions of the courts do not add to and alter the law," says Pollock, a distinguished English jurist. "Judge-made law is real law," writes Dicey, another famous legal commentator, "though made under the form of, and often described by judges no less than jurists, as the mere interpretation of law. . . . The amount of such judge-made law is in England far more extensive than a

student realizes. Nine-tenths, at least, of the law of contract, and the whole, or nearly the whole, of the law of torts are not to be discovered in any volume of the statutes. . . . Whole branches, not of ancient but of very modern law, have been built up, developed or created by action of the courts."

Judges, then, do make and change law. The minority view is patently correct; the opposing arguments will not bear analysis. What, then, explains the belief so tenaciously held that the judiciary does not ever change the law or that, when it does, it is acting improperly? Why is it that judges adhere to what Morris Cohen has happily called "the phonographic theory of the judicial function"? What explains the recent remark of an eminent member of the Bar: "The man who claims that under our system courts make law is asserting that the courts habitually act unconstitutionally"? Why do the courts customarily deny that they have any law-making power and describe new law which they create to deal with essentially contemporary events, as mere explanations or interpretations of law which already exists and has existed from time immemorial? Why this obstinate denial of the juristic realities?

We revert to our thesis: The essence of the basic legal myth or illusion is that law can be entirely predictable. Back of this illusion is the childish desire to have a fixed father-controlled universe, free of chance and error due to human fallibility. . . .

But if it is once recognized that a judge, in the course of deciding a case, can for the first time create the law applicable to that case, or can alter the rules which were supposed to exist before the case was decided, then it will also have to be recognized that the rights and obligations of the parties to that case may be decided retroactively. A change thus made by a judge, when passing upon a case, is a change in the law made with respect to past events,—events which occurred before the law came into existence. Legal predictability is plainly impossible, if, at the time I do an act, I do so with reference to law which, should a lawsuit thereafter

arise with reference to my act, may be changed by the judge who tries the case. For then the result is that my case is decided according to law which was not in existence when I acted and which I, therefore, could not have known, predicted or relied on when I acted.

If, therefore, one has a powerful need to believe in the possibility of anything like exact legal predictability, he will find judicial lawmaking intolerable and seek to deny its existence.

Hence the myth that the judges have no power to change existing law or make new law. . . .

THE JUDGING PROCESS AND THE JUDGE'S PERSONALITY

. . . As the word indicates, the judge in reaching a decision is making a judgment. And if we would understand what goes into the creating of that judgment, we must observe how ordinary men dealing with ordinary affairs arrive at their judgments.

The process of judging, so the psychologists tell us, seldom begins with a premise from which a conclusion is subsequently worked out. Judging begins rather the other way around—with a conclusion more or less vaguely formed; a man ordinarily starts with such a conclusion and afterwards tries to find premises which will substantiate it. If he cannot, to his satisfaction, find proper arguments to link up his conclusion with premises which he finds acceptable, he will, unless he is arbitrary or mad, reject the conclusion and seek another.

In the case of the lawyer who is to present a case to a court, the dominance in his thinking of the conclusion over the premises is moderately obvious. He is a partisan working on behalf of his client. The conclusion is, therefore, not a matter of choice except within narrow limits. He must, that is if he is to be successful, begin with a conclusion which will insure his client's winning the lawsuit. He then assembles the facts in such a fashion that he can work back from this

result he desires to some major premise which he thinks the court will be willing to accept. The precedents, rules, principles and standards to which he will call the court's attention constitute this premise.

While "the dominance of the conclusion" in the case of the lawyer is clear, it is less so in the case of the judge. For the respectable and traditional descriptions of the judicial judging process admit no such backward-working explanation. In theory, the judge begins with some rule or principle of law as his premise, applies this premise to the facts, and thus arrives at his decision.

Now, since the judge is a human being and since no human being in his normal thinking process arrives at decisions (except in dealing with a limited number of simple situations) by the route of any such syllogistic reasoning, it is fair to assume that the judge, merely by putting on the judicial ermine, will not acquire so artificial a method of reasoning. Judicial judgments, like other judgments, doubtless, in most cases, are worked out backward from conclusions tentatively formulated.

As Jastrow says, "In spite of the fact that the answer in the book happens to be wrong, a considerable portion of the class succeeds in reaching it. . . . The young mathematician will manage to obtain the answer which the book requires, even at the cost of a resort to very unmathematical processes." Courts, in their reasoning, are often singularly like Jastrow's young mathematician. Professor Tulin has made a study which prettily illustrates that fact. While driving at a reckless rate of speed, a man runs over another, causing severe injuries. The driver of the car is drunk at the time. He is indicted for the statutory crime of "assault with intent to kill." The question arises whether his act constitutes that crime or merely the lesser statutory crime of "reckless driving." The courts of several states have held one way, and the courts of several other states have held the other.

The first group maintain that a conviction for assault with intent to kill cannot be sustained in the absence of proof of an ac-

tual purpose to inflict death. In the second group of states the courts have said that it was sufficient to constitute such a crime if there was a reckless disregard of the lives of others, such recklessness being said to be the equivalent of actual intent.

With what, then, appears to be the same facts before them, these two groups of courts seem to have sharply divided in their reasoning and in the conclusions at which they have arrived. But upon closer examination it has been revealed by Tulin that, in actual effect, the results arrived at in all these states have been more or less the same. In Georgia, which may be taken as representative of the second group of states, the penalty provided by the statute for reckless driving is far less than that provided, for instance, in Iowa, which is in the first group of states. If, then, a man is indicted in Georgia for reckless driving while drunk, the courts can impose on him only a mild penalty; whereas in Iowa the judge, under an identically worded indictment, can give a stiff sentence. In order to make it possible for the Georgia courts to give a reckless driver virtually the same punishment for the same offense as can be given by an Iowa judge, it is necessary in Georgia to construe the statutory crime of assault with intent to kill so that it will include reckless driving while drunk; if, and only if, the Georgia court so construes the statute, can it impose the same penalty under the same facts as could the Iowa courts under the reckless driving statute. On the other hand, if the Iowa court were to construe the Iowa statute as the Georgia court construes the Georgia statute, the punishment of the reckless driver in Iowa would be too severe.

In other words, the courts in these cases began with the results they desired to accomplish: they wanted to give what they considered to be adequate punishment to drunken drivers: their conclusions determined their reasoning.

But the conception that judges work back from conclusions to principles is so heretical that it seldom finds expression. Daily, judges, in connection with their decisions,

deliver so-called opinions in which they purport to set forth the bases of their conclusions. Yet you will study these opinions in vain to discover anything remotely resembling a statement of the actual judging process. They are written in conformity with the time-honored theory. They picture the judge applying rules and principles to the facts, that is, taking some rule or principle (usually derived from opinions in earlier cases) as his major premise, employing the facts of the case as the minor premise, and then coming to his judgment by processes of pure reasoning.

Now and again some judge, more clear-witted and outspoken than his fellows, describes (when off the bench) his methods in more homely terms. Recently Judge Hutcheson essayed such an honest report of the judicial process. He tells us that after canvassing all the available material at his command and duly cogitating on it, he gives his imagination play,

and brooding over the case, waits for the feeling, the hunch—that intuitive flash of understanding that makes the jump-spark connection between question and decision and at the point where the path is darkest for the judicial feet, sets its light along the way. . . . In feeling or ‘hunching’ out his decisions, the judge acts not differently from but precisely as the lawyers do in working on their cases, with only this exception, that the lawyer, in having a predetermined destination in view,—to win the law-suit for his client—looks for and regards only those hunches which keep him in the path that he has chosen, while the judge, being merely on his way with a roving commission to find the just solution, will follow his hunch wherever it leads him. . . .

And Judge Hutcheson adds:

I must premise that I speak now of the judgment or decision, the solution itself, as opposed to the apologia for that decision; the decree, as opposed to the logomachy, the effusion of the judge by which that decree is explained or excused. . . . The judge really decides by feeling and not by judgment, by hunching and not by ratiocination, such ratiocination appearing only in the opinion. The vital motivating impulse for the decision is an intuitive sense of what is right or wrong in the particular case; and the astute judge, having so

decided, enlists his every faculty and belabors his laggard mind, not only to justify that intuition to himself, but to make it pass muster with his critics. [Accordingly, he passes in review all of the rules, principles, legal categories, and concepts] which he may find useful, directly or by an analogy, so as to select from them those which in his opinion will justify his desired result.

We may accept this as an approximately correct description of how all judges do their thinking. But see the consequences. If the law consists of the decisions of the judges and if those decisions are based on the judge’s hunches, then the way in which the judge gets his hunches is the key to the judicial process. Whatever produces the judge’s hunches makes the law.

What, then, are the hunch-producers? What are the stimuli which make a judge feel that he should try to justify one conclusion rather than another?

The rules and principles of law are one class of such stimuli. But there are many others, concealed or unrevealed, not frequently considered in discussions of the character or nature of law. To the infrequent extent that these other stimuli have been considered at all, they have been usually referred to as “the political, economic and moral prejudices” of the judge. A moment’s reflection would, indeed, induce any open-minded person to admit that factors of such character must be operating in the mind of the judge. . . .

ILLUSORY PRECEDENTS

Lawyers and judges purport to make large use of precedents; that is, they purport to rely on the conduct of judges in past cases as a means of procuring analogies for action in new cases. But since what was actually decided in the earlier cases is seldom revealed, it is impossible, in a real sense, to rely on these precedents. What the courts in fact do is to manipulate the language of former decisions.¹ They could approximate a system of real precedents only if the judges, in rendering those former decisions, had reported

with fidelity the precise steps by which they arrived at their decisions. The paradox of the situations is that, granting there is value in a system of precedents, our present use of illusory precedents makes the employment of real precedents impossible.

The decision of a judge after trying a case is the product of a unique experience. "Of the many things which have been said of the mystery of the judicial process," writes Yntema, "the most salient is that *decision is reached after an emotive experience in which principles and logic play a secondary part*. The function of juristic logic and the principles which it employs seem to be like that of language, to describe the event which has already transpired. These considerations must reveal to us the impotence of general principles to control decision. Vague because of their generality, they mean nothing save what they suggest in the organized experience of one who thinks them, and, because of their vagueness, they only remotely compel the organization of that experience. The important problem . . . is not the formulation of the rule but the ascertainment of the cases to which, and the extent to which, it applies. And this, even if we are seeking uniformity in the administration of justice, will lead us again to the circumstances of the concrete case. . . . The reason why the general principle cannot control is because it does not inform. . . . It should be obvious that when we have observed a recurrent phenomenon in the decisions of the courts, we may appropriately express the classification in a rule. But the rule will be only a mnemonic device, a useful but hollow diagram of what has been. It will be intelligible only if we *relive again the experience of the classifier*."

The rules a judge announces when publishing his decision are, therefore, intelligible only if one can relive the judge's unique experience while he was trying the case—which, of course, cannot be done. One cannot even approximate that experience as long as opinions take the form of abstract rules applied to facts formally described. Even if it were desirable that, despite its uniqueness, the judge's decision should be

followed, as an analogy, by other judges while trying other cases, this is impossible when the manner in which the judge reached his judgment in the earlier case is most inaccurately reported, as it now is. You are not really applying his decision as a precedent in another case unless you can say, in effect, that, having relived his experience in the earlier case, you believe that he would have thought his decision applicable to the facts of the latter case. And as opinions are now written, it is impossible to guess what the judge did experience in trying a case. The facts of all but the simplest controversies are complicated and unlike those of any other controversy; in the absence of a highly detailed account by the judge of how he reacted to the evidence, no other person is capable of reproducing his actual reactions. The rules announced in his opinions are therefore often insufficient to tell the reader why the judge reached his decision.

Dickinson admits that the "personal bent of the judge" to some extent affects his decisions. But this "personal bent," he insists, is a factor only in the selection of new rules for unprovided cases. However, *in a profound sense the unique circumstances of almost any case make it an "unprovided case" where no well-established rule "authoritatively" compels a given result*. The uniqueness of the facts and of the judge's reaction thereto is often concealed because the judge so states the facts that they appear to call for the application of a settled rule. But that concealment does not mean that the judge's personal bent has been inoperative or that his emotive experience is simple and reproducible. . . .

Every lawyer of experience comes to know (more or less unconsciously) that in the great majority of cases, the precedents are none too good as bases of prediction. Somehow or other, there are plenty of precedents to go around. A recent writer, a believer in the use of precedents, has said proudly that "it is very seldom indeed that a judge cannot find guidance of some kind, direct or indirect, in the mass of our reported decisions—by this time a huge accu-

mulation of facts as well as rules." In plain English, . . . a court can usually find earlier decisions which can be made to appear to justify almost any conclusion.

What has just been said is not intended to mean that most courts arrive at their conclusions arbitrarily or apply a process of casuistical deception in writing their opinions. The process we have been describing involves no insincerity or duplicity. The average judge sincerely believes that he is using his intellect as "a cold logic engine" in applying rules and principles derived from the earlier cases to the objective facts of the case before him.

A satirist might indeed suggest that it is regrettable that the practice of precedent-mongering does not involve *conscious* deception, for it would be comparatively easy for judges entirely aware of what they were doing, to abandon such conscious deception and to report accurately how they arrived at their decisions. Unfortunately, most judges have no such awareness. Worse than that, they are not even aware that they are not aware.

. . . Swayed by the belief that their opinions will serve as precedents and will therefore bind the thought processes of judges in cases which may thereafter arise, they feel obliged to consider excessively not only what has previously been said by other judges but also the future effect of those generalizations which they themselves set forth as explanations of their own decisions. When publishing the rules which are supposed to be the core of their decisions, they thus feel obligated to look too far both backwards and forwards. Many a judge, when unable to find old worn-patterns which will fit his conclusions, is overcautious about announcing a so-called new rule for fear that, although the new rule may lead to a just conclusion in the case before him, it may lead to undesirable results in the future—that is, in cases not then before the court. Once trapped by the belief that the announced rules are the paramount thing in the law, and that uniformity and certainty are of ma-

ior importance and are to be procured by uniformity and certainty in the phrasing of rules, a judge is likely to be affected, in determining what is fair to the parties in the unique situation before him, by consideration of the possible, yet scarcely imaginable, bad effect of a just opinion in the instant case on possible unlike cases which may later be brought into court. He then refuses to do justice in the case on trial because he fears that "hard cases make bad laws." And thus arises what may aptly be called "injustice according to law." . . .

The judge, at his best, is an arbitrator, a "sound man" who strives to do justice to the parties by exercising a wise discretion with reference to the peculiar circumstances of the case. He does not merely "find" or invent some generalized rule which he "applied" to the facts presented to him. He does "equity" in the sense in which Aristotle—when thinking most clearly—described it. "It is equity," he wrote in his Rhetoric, "to pardon human failings, and to look to the law giver and not to the law; . . . to prefer arbitration to judgment, for the arbitrator sees what is equitable, but the judge only the law, and for this an arbitrator was first appointed, in order that equity might flourish." The bench and bar usually try to conceal the arbitral function of the judge. (Dicey represents the typical view. A judge, he says, "when deciding any case must act, not as an arbitrator, but strictly as a judge; . . . it is a judge's business to determine not what may be fair as between A and X in a given case, but what according to some principle of law, are the respective rights of A and X.") But although fear of legal uncertainty leads to this concealment, the arbitral function is the central fact in the administration of justice. . . .

. . . We may now venture a rough definition of law from the point of view of the average man: For any particular lay person, the law, with respect to any particular set of facts, is a decision of a court with respect to those facts so far as that decision affects that particular person. Until a court has passed on those facts no law on that subject is yet

in existence. Prior to such a decision, the only law available is the opinion of lawyers as to the law relating to that person and to those facts. Such opinion is not actually law but only a guess as to what a court will decide.

Law, then, as to any given situation is either (a) actual law, *i.e.*, a specific past decision, as to that situation, or (b) probable law, *i.e.*, a guess as to a specific future decision.

Usually, when a client consults his lawyer about "the law," his purpose is to ascertain not what courts have actually decided in the past but what the courts will probably decide in the future. He asks, "Have I a right, as a stockholder of the American Taffy Company of Indiana, to look at the corporate books?" Or, "Do I have to pay an inheritance tax to the State of New York on bonds left me by my deceased wife, if our residence was in Ohio, but the bonds, at the time of her death, were in a safety deposit box in New York?" Or, "Is there a right of 'peaceful' picketing in a strike in the State of California?" Or, "If Jones sells me his Chicago shoe business and agrees not to compete for ten years, will the agreement be binding?" The answers (although they may run "There is such a right," "The law is that the property is not taxable," "Such picketing is unlawful," "The agreement is not legally binding") are in fact prophecies or predictions of judicial action. It is from this point of view that the practice of law has been aptly termed an art of prediction. . . .

While the majority of lawyers deny that judges make law, a vigorous minority assert, realistically, that they do. But when does a judge make law? The minority here splits into two groups.

John Chipman Gray is typical of the first group. His contribution to hard-headed thinking about law was invaluable. He compelled his readers to differentiate between *law* and the *sources* of law. "The Law of the State," he wrote, "is composed of the rules which the courts, that is the judicial organs of that body, lay down for the determination of legal rights and duties." He felt it absurd

to affirm the existence of law which the courts do not follow: "The Law of a State . . . is not an ideal, but something which actually exists." His thesis was that "the Law is made up of the rules for decision which the courts lay down; that all such rules are Law; that *rules for conduct which the courts do not apply are not Law; that the fact that courts apply rules is what makes them Law; that there is no mysterious entity 'The Law' apart from these rules; and that the judges are rather the creators than the discoverers of the Law.*"

According to Gray, the "law of a great nation" means "the opinions of a half-a-dozen old gentlemen. . . ." For, "if those half-a-dozen old gentlemen form the highest tribunal of a country, then no rule or principle which they refuse to follow is Law in that country." Of course, he added, "those six men seek the rules which they follow not in their own whims, but they derive them from *sources . . . to which they are directed, by the organized body (the State) to which they belong, to apply themselves.*"

And those sources of law—*i.e.*, sources of "the rules for decision which the courts lay down"—are statutes, judicial precedents, opinions of experts, customs and principles of morality (using the term morality to include "public policy"). That none of these factors is, in and of itself, Law is best exemplified by a consideration of a most important source—statutes. For, says Gray, after all it is only words that the legislature utters when it enacts a statute. And these words can get into action only through the rules laid down by the courts: it is for the courts to say what those words mean. There are limits to the courts' power of interpretation, but those limits are vague and undefined. And that is why statutes are not part of the Law itself, but only a source of law: "It has sometimes been said that the Law is composed of two parts—legislative law and judge-made law, but in truth all the Law is judge-made law. The shape in which a statute is imposed on the community as a guide for conduct is that statute as interpreted by the courts. The courts put life into the dead words of the

statute. To quote . . . from Bishop Hoadly: 'Nay, whoever hath an *absolute authority to interpret* any written or spoken laws, it is *He* who is truly the Law Giver to all intents and purposes, and not the Person who first wrote and spoke them.'

Gray was indeed a hardy foe of the Realist fundamentalists. Judges, he saw, make the law and, until they make it, there isn't any law, but only ingredients for making law. When a handful of old gentlemen who compose the highest court announce the law, that is the Law, until they change it, whether anyone else, however wise, thinks it good or bad, right or wrong. *But*, for all his terse directness, you will detect more than a trace of the old philosophy in Gray's views. You will note his constant reiteration of the words "rules" and "principles." Gray defines law not as what courts decide but as the "rules which the courts lay down for the determination of legal rights and duties" or "the rules of decision which the courts lay down." If a court in deciding a particular case fails to apply the "rule generally followed," that decision is not law. The rule for decisions usually laid down by the courts in Massachusetts is that a payment made on Sunday discharges a debt. "A judge in Massachusetts once decided that payment on Sunday was no discharge of a debt, but that has never been the Law of Massachusetts," said Gray. Judges make law, according to Gray, when they make or change the rules; lawmaking is legal rule-making, the promulgation by a judge of a new rule for decision.

Now this stress on generality as the essence of law is a remnant of the old myth. And a vigorous remnant. It is found in the thinking of perhaps ninety percent of even those who, like Gray, scoff at the idea that law making occurs anywhere except in the court-room. Unless, they say, a court announces a new rule—announces it expressly or impliedly—it is not making law. Law equals legal rules—rules which the courts use, not anyone else's rules, but rules nevertheless; such judge-made rules constitute the law.

But in 1897 a new attitude was expressed

when Holmes wrote, "A legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by a judgment of the court; and so of a legal right. . . . *If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict. . . .* What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of his mind. *The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by law.*"

That was in 1897. In 1899 Holmes said, "We must think things not words, or at least we must constantly translate our words into the facts for which they stand if we are to keep to the real and the true. I sometimes tell law students that the law schools pursue an inspirational method combined with a logical method, that is, the postulates are taken for granted upon authority without inquiry into their worth, and then logic is used as the only tool to develop the results. It is a necessary method for the purpose of teaching dogma. But inasmuch as the real justification of a rule of law, if there be one, is that it helps to bring about a social end which we desire, it is no less necessary that those who make and develop the law should have those ends articulately in their mind. . . . *A generalization is empty so far as it is general. Its value depends on the number of particulars which it calls up to the speaker and the hearer.*"

Holmes's description of law can be stated as a revision of Gray's definition, thus: Law is made up not of rules for decision laid down by the courts but of the decisions themselves. All such decisions are law. The fact that courts render these decisions makes

them law. There is no mysterious entity apart from these decisions. If the judges in any case come to a "wrong" result and give forth a decision which is discordant with their own or any one else's rules, their decision is none the less law. The "law of a great nation" means the decisions of a handful of old gentlemen, and whatever they refuse to decide is not law. Of course those old gentlemen in deciding cases do not follow their own whims, but derive their views from many sources. And among those sources are not only statutes, precedents, customs and the like, but the rules which other courts have announced when deciding cases. Those rules are no more law than statutes are law. For, after all, rules are merely words and those words can get into action only through decisions; it is for the courts in deciding any case to say what the rules mean, whether those rules are embodied in a statute or in the opinion of some other court. The shape in which rules are imposed on the community is those rules as translated into concrete decisions. Your bad man doesn't care what the rules may be if the decisions are in his favor. He is not concerned with any mysterious entity such as the Law of Massachusetts which consists of the rules usually applied by the courts; he regards only what a very definite court decides in the very definite case in which he is involved. . . .

Often when a judge decides a case he simultaneously publishes an essay, called an opinion, explaining that he used an old rule or invented a new rule to justify his judgment. But no matter what he says, it is his decision which fixes the legal positions of the litigants. If Judge Brilliant decides that Mr. Evasion must pay the federal government \$50,000 for back taxes or that Mrs. Goneril is entitled to nothing under the will of her father, Mr. Lear, the contents of the judge's literary effusion makes not one iota of practical difference to Mr. Evasion or Mrs. Goneril. Opinion or no opinion, opinion-with-a-new-rule-announced or opinion-with-old-rules-proclaimed—it is all one to the parties whose contentions he adjudicated.

To be sure, this opinion may affect Judge

Conformity who is later called on to decide the case of Rex vs. Humpty Dumpty. If Judge Brilliant in Mr. Evasion's case describes a new legal doctrine, his innovations may be *one* of the factors which actuates Judge Conformity to decide for Humpty Dumpty, if Judge Conformity thinks the facts in Humpty Dumpty's case are like those in Mr. Evasion's case. But—need it be reiterated?—the new doctrine will be but one of the factors actuating Judge Conformity.

The business of the judges is to decide particular cases. They, or some third person viewing their handiwork, may choose to generalize from these decisions, may claim to find common elements in the decisions in the cases of Fox vs. Grapes and Hee vs. Haw and describe the common elements as "rules." But those descriptions of alleged common elements are, at best, some aid to lawyers in guessing or bringing about future judicial conduct or some help to judges in settling other disputes. The rules will not directly decide any other cases in any given way, nor authoritatively compel the judges to decide those other cases in any given way; nor make it possible for lawyers to bring it about that the judges will decide any other cases in any given way, nor infallibly to predict how the judges will decide any other cases. Rules . . . are not law.

NOTE

¹There are the two following effective methods employed by the courts for "distinguishing" (i.e., evading or sterilizing) a rule laid down in an earlier case:

(a) The rule is limited to the "precise question" involved in the earlier case. "*Minute differences in the circumstances of two cases,*" said a well-known English judge, "*will prevent any argument being deduced from one to the other.*" The "decision consists in what is done, not in what is said by the court in doing it," writes Judge Cuthbert Pound. The United States Supreme Court has stated that every "opinion must be read as a whole in view of the facts on which it was based. The facts are the foundation of the entire structure, which cannot safely be used without reference to the facts." The generality of expressions used by a court must, according to Lord Halsbury, "be governed and qualified by the particular facts of the case in which such expressions are found. . . . I entirely deny that [a case] can be quoted for a proposition that may seem to follow logically from it."

(b) It is often asserted that the "authoritative" part

of a decision is not what was decided or the rule on which the court based its decision but something (lying back of the decision and the rule) called the "ratio decidendi"—the "right principle upon which the case was decided." In determining whether an earlier decision is

a precedent to be followed, a judge need pay scant heed to what the court in the earlier case decided, nor even to what the court stated or believed to be the "ratio decidendi" for its judgment. . . .

REVIEW AND DISCUSSION QUESTIONS

1. Describe the "conventional view" of law that Frank attacks.

2. Why does he think precedents are "illusory"?

3. If legal rules and principles do not usually decide particular cases, how then *should* a responsible judge make a decision, according to the realist?

4. Describe the distinction between "sources" of law and "law" according to Frank.

5. What, finally, is law according to realists?

6. "What Frank calls the 'conventional view' is really the 'legal formalism' of Langdell and Field." Discuss this statement.

7. Frank was an appeals court judge, not an ordinary criminal or civil judge hearing day-to-day cases. How might this fact have influenced his thinking?