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# Recent Developments in Legal Theory: How to Compare Apples and Oranges

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## RECENT DEVELOPMENTS IN LEGAL THEORY: HOW TO COMPARE APPLES AND ORANGES

Recent advances in legal thought have shed new light on old conundrums. Among these is the old, vexing problem of comparing two apparently dissimilar things. Although the task of comparing apples and oranges (or Jones's first amendment free-speech interest and Smith's right of privacy) still eludes definitive solution, new techniques offer hope that answers may be forthcoming soon. In this Note, we outline four such approaches—law and economics, feminism, Critical Legal Studies, and law and literature.

*Law and economics.* For law and economics, the problem is essentially one of quantification. Assign a value to an apple and one to an orange, and the comparison follows easily. But what values? The most obvious measure is fair market value—what a consumer would pay for an apple or an orange under ordinary market conditions. Note that these values will vary according to the law of supply and demand. During the late winter, oranges are hard to find but apples plentiful, and conversely for the spring. The comparison thus varies over time, just as market theory would predict. Around the time of the winter solstice, the two curves cross. At that time, apples and oranges are worth exactly the same.<sup>1</sup>

*Feminism.* For feminism, the problem is a little more complex. Because we have been living in a patriarchal system, no one knows what value we would assign to apples and oranges in a nonpatriarchal system. Apples are hard, and so may be valued because of their presumed connection with masculinity, while oranges, being softer, may be devalued for the same reason. At the same time, apples may be unconsciously devalued because of their connection

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1. That "comparing" has become "valuing" may pass unnoticed as one applies the law and economics heuristic. The nature of the apples/oranges problem arises not so much out of the difficulty of comparing apples and oranges on any one dimension—size, weight, color, acidity, or durability—as out of the need to make all these comparisons simultaneously. Like most intellectual difficulties however, this problem can be made to disappear by acknowledging it in a footnote.

with nurturing,<sup>2</sup> caregiving,<sup>3</sup> Halloween,<sup>4</sup> and other activities associated with women's sphere.<sup>5</sup> No fair comparison of apples and oranges can be made until society eliminates all vestiges of patriarchy.

*Critical Legal Studies.* CLS contains a number of sub-schools. One, the "irrationalist" wing, believes that things have no core values,<sup>6</sup> a tenet with ominous implications for apples.<sup>7</sup> Indeterminists would hold that the question of which fruit has greater value is insoluble except in political terms. It all depends on whether the apple or the orange lobby has the greater political clout at a given period in history. Many Crits would reject the question as posing a false dichotomy, stemming<sup>8</sup> from a deeper contradiction underlying our attitudes toward food. We both want it and don't want it (or—to push the limits of instrumental rationality<sup>9</sup>—we don't *want* to want it).

*Law and literature.* The law and literature movement would approach this problem from the perspective of the world's great texts. In the Bible, for example, the serpent used an apple to tempt Adam. Adam, representing mankind, proved weak; hence, the Fall. Oranges lack any such original taint, and so might be thought more valuable. Yet the choice of apples by the serpent may reflect an eternal truth: apples are more tempting than oranges—are, indeed, the icon of temptation. So are apples worth more because they are more tempting, or less? It depends. If apples are metaphors for temptation and the pleasures of the flesh, while oranges represent spirituality and purity, the law, in an effort to mediate between these two poles of human nature, the Appollonian and the Dionysian, will oscillate, embracing, so to speak, first the apple, and then the orange.<sup>10</sup> To determine the cultural standing of these symbols

2. For example, who among us does not recall his or her own mother exhorting him or her to eat more fruit by reciting, "An apple a day keeps the doctor away?"

3. Compare e.g., the maxim cited in *supra* note 2 with the caregiving symbolism of homemade apple cobbler, applesauce and apple turnovers.

4. We are thinking, of course, of the Halloween game, bobbing for apples.

5. The authors have a difference of opinion about whether bobbing for apples is an activity associated with women's sphere. The authors also disagree as to whether further research is warranted to resolve this dispute.

6. This is a principal tenet of anti-essentialism, a mainstay of Critical jurisprudence. See Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

7. The metaphor of core and periphery has obvious parallels as one considers the edibility of apples and oranges; in one case we discard the core, and in the other the periphery. Quære: a previously unidentified antinomy?

8. Please excuse the pun, but only after you have acknowledged it.

9. See Tribe, *Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality*, 46 S. CAL. L. REV. 617 (1973).

10. The perennial movement back and forth between formalist and antiformalist legal theories exemplifies this polarity. See also (perhaps inevitably) H. MELVILLE, BILLY BUDD (1951), wherein we learn of the ship captain's dilemma as he struggles to choose between

in a particular era, all we need do is consult the exemplifying texts.

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upholding the letter or the spirit of the law in the trial of the sailor, poor Billy. *See generally* W. SHAKESPEARE, *THE MERCHANT OF VENICE* (1600). Farther afield, see Farber, *The Deconstructed Grocery List*, in this issue.

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