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The Innocent Bystander

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Recommended Citation

Gavit, Bernard C., "The Innocent Bystander" (1932). *Articles by Maurer Faculty*. 1124.
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larger factors in the training of a lawyer, as in his later professional life. A fourth year of college may not be the best possible way the time can be spent in developing these powers, but it should not be condemned by any test which assumes a perfected technic of law teaching and examination. In other words, the mature college graduate is believed to be in a much better position to evaluate the more significant factors which enter into law and its administration than is his less mature brother, and if these are made the basis of his study and examination, the seeming advantage of his less mature brother in grasping the teachings of formal discipline will doubtless vanish immediately.

LEON GREEN.

THE INNOCENT BYSTANDER

To the Editors of the ILLINOIS LAW REVIEW:

Even if the battle which is being waged by Mr. Jerome Frank and his allies on the one side and their opponents¹ on the other is a public rather than a private fight I have no desire to get into it. The principal reason is a congenital inability to swim in the elastic ether of higher philosophy. It is solely as an innocent bystander that I would speak, because it seems that the time has come when the battle can be brought down to brass tacks, with the result that those on the sidelines can profit by a narrowing of the front and an offensive aimed at a particular point. In other words we should be through the stage where one side pins a label on the other side and where we argue about the appropriateness of the label; and where each denies the other's facts. Apparently both sides are willing to be labelled, provided each has the right to define the term applied to it (which is as it should be);² and each admits some weight to the other's facts.

Can we suggest an issue upon which the debate can profitably proceed as far as the interested spectator is concerned?

As usual we must start with some assumptions. It would seem that both sides would concede that if we have any rules of law they most certainly have no metaphysical content. That is all to the good, and it is to be hoped that a united front on that proposition will succeed in driving the metaphysicians to a complete extermination. There is no greater handicap to the practicing lawyer than a naïve acceptance at their face value of the assumptions that "law" exists and is eternally "true."

As a corollary to that first proposition we must assume that if and when we assume rules of law, any science of the law dealing with that phase of the judicial process is a conceptualistic science,

1. This letter is a direct consequence of the recent articles of Jerome Frank, "Are Judges Human" (1931) 80 U. of P. L. R. 17, 233, and "What Courts Do in Fact" (1932) 26 ILLINOIS LAW REVIEW 645, 761, and the articles and books there cited.

2. Mr. Frank now concedes that he believes in "Cadi justice"—provided he is allowed to define the term.

on an exact parity with mathematics. The test of "truth" here is simply whether or not there is logical consistency between our mental postulates and our mental conclusions.

For that reason it is well to point out a little more clearly than has been done heretofore the exact similarities and distinctions between the natural sciences and the science of the law. Except a person be a Behaviorist to the bitter end science and philosophy are inseparable. It is well to remember that Pragmatism is merely a scientific philosophy; and it is to the so-called social sciences what the general scientific attitude is to the other sciences. Every scientist, unless he be an extreme Behaviorist, employs both philosophy and experiment; he deals both with concept and fact. (Of course the Behaviorist is a philosopher of a sort; his philosophy is that there is nothing worth while but the observation of facts.) Few scientific "discoveries" are the result of accident; they are the result of an attempt to prove or disprove a previous postulate on the subject. So the so-called true scientist starts with a postulate and he measures it by experiment with the natural universe. Even if he is a physical scientist his postulate may be the product purely of his imagination. Much of the science of radio started with the mathematical equations of Clerk Maxwell.³ At best, however, the postulate may only be based on a so-called reasonable inference from rather slender evidence. Einstein's general theory of relativity is based upon the postulate that in empty space nothing can travel faster than the speed of light. There is some experimental evidence, which if true, forms a basis for that conclusion; but the practical difficulties in measuring the speed of light make the evidence far from conclusive although the conclusion is commonly accepted at its face value. Einstein's conclusions in his general theory while they are logically sound are so far based upon experimental evidence which is both disputed and at best rather meagre.⁴ It is really startling to learn the rather insecure factual basis upon which much of our science today rests, whether we are dealing with the concept or the fact side of it. Legal science has nothing to be ashamed of if some of its footings seem insecure.

The purpose of natural science is to explain the physical universe. The test of "truth" in the physical sciences is whether or not the postulates are isomorphic with experience. There can be no such test in law, because the purpose of law is not to explain life but to regulate it, and to regulate it in the "best" way. There can be no test of the "truth" of the postulates of law other than logical consistency. On that score all law is to start with and to finish with a postulate having solely a conceptualistic existence. On that phase legal science and natural science are quite similar. But while the natural science postulate can be tested for truth as against the facts of nature, legal science postulates cannot be so

3. *Davis* "Philosophy and Modern Science" (1931) 73-77.

4. "A Debate on the Theory of Relativity" (1927, The Open Court Publishing Company).

tested. That the legal postulate does not work in practice merely proves that it does not work; it does not prove that it is not a postulate, nor does it necessarily prove that it is a bad postulate. It may be entitled to another chance, or any number of other chances. The fact that a mathematician can find no immediate practical use for his mathematics does not disprove his scheme. He may be only a little ahead of his time. In the field of the law we are not only dealing with concepts and results, but also contrary and wilful man. That man does not obey a given rule may prove that man is bad and not that the rule is bad, or it may prove only that we have not sufficiently willed that the rule work. Ultimately, after a fair trial, the fact that it does not reasonably work ought to persuade us that the rule is bad, and we should discard it. But when we do, we discard it because it is a bad rule; not because it is no rule. On the other hand natural science discards a rule which is not isomorphic with experience because it is no rule.

Finally then because we use postulates in the law we cannot be condemned as unscientific; and because some rules do not work does not here prove that they are "untrue." Postulates or rules in the law perform two functions; they give a form to the law, and they constitute a summation of ripe philosophical inquiry.

As I understand Professor Dickinson's position, it is that we must not discard our present form in which the law is stated simply because it can be shown that some rules are not isomorphic with experience. If anything should be done about it, it is that we should emphasize our present form.

Although Mr. Frank disavows a belief in Behaviorism in the field of psychology, does he not espouse what we may call Behaviorism in the field of the law? No postulates—only results. At least if that is not his position, he and Professor Dickinson are quarrelling over words, because both now apparently agree that both rules and judges affect the results. It could be said that while Professor Dickinson wishes to over-emphasize the postulate side of the law Mr. Frank wishes to over-emphasize the result side of the law. If both wish simply to emphasize their point of view there is nothing to argue about.

The facts are rather clear. Rules of law and the judges are not the same concept. Practical results often give the lie to the rules, while the rules often are the controlling factor in the practical results. It is admitted that there is no way of proving whether one outweighs the other, because the real reasons for most decisions remain in the breast of the court. But if we could prove one side or the other we would not thereby prove that there was no force to the facts of the other side; and it really does not matter on which side the weight of authority rests. Is it not another of those cases where two things are partially true and one side takes the position that one thing is wholly true and the other wholly untrue; while the other side insists upon the opposite interpretation of the facts? If that is not the situation here let each side

clarify its position. Perhaps we do an injustice to both sides, but it seems from the general tenor of the discussion that each is saying to the other: you *cannot* think that way, rather than, you *ought* not to think that way. The first is the old 'tis and 't isn't; whereas the latter is the one which will prove helpful to the interested spectator.

It is to be hoped therefore that the debate will simmer down to these propositions: Ought science in law necessarily to deny the usefulness of legal rules; ought we to make no attempt to provide a form for the law; ought we not to attempt to consider the philosophical implications from "the facts"; have we not done our full duty to the students of the law if we emphasize both "truths" without over-emphasizing either?

It will be noticed that the first three propositions start with the word "ought." As pointed out above apparently both sides have thus far argued that the other view was an impossibility, but it is perfectly obvious that it is not impossible, as evidenced by the fact that the opposition held it. It must be remembered that in the first phase of legal science we are dealing with a conceptualistic science, and the facts have nothing to do with that side of it, except that they suggest that it might be well to change a given postulate. To start with, the postulate can be anything we wish to imagine it to be, so long as it is logically consistent. It is, for example, often said that we *cannot* have a right without a remedy; but what is really meant is that we *ought* not to conceive of a right without a remedy. Obviously it is as easy to *imagine*⁵ the one as the other, and the solution of that problem turns upon philosophical and practical considerations rather than dogma.

Ought we to say that because some legal rules do not work at all, that all legal rules sometimes fail; and because some rules have at best an *ex post facto* existence, that we ought not to imagine legal rules? Is the conceptualistic and philosophical side of legal science to be entirely discarded; and if so what are the considerations which compel that conclusion?

Suppose we accept a pragmatic test as to the validity of rules (we cannot, as pointed out above, accept it as a test of the "existence" of rules), ought we therefore to deny the usefulness of all preconceptions? Would that not render the law formless, and strictly a science of Behaviorism? What practical and philosophical considerations make that desirable? It is a question of what we ought to think, rather than what we can or cannot think. It is perfectly obvious that we can accept pragmatism in law and retain our legal postulates and rules. Its form remains much the same although its substances may change, and the results and the form may not coincide in a considerable number of cases. But does that necessarily or reasonably prove that a form is valueless? Have we not fulfilled our obligations to the law student if we emphasize

5. We must not here confuse the word "imagine" with "think"; at this point it is purely a matter of the imagination as that word is commonly used.

the truths that the Common Law dogma against changing the law was against changing its form; that there never was any dogma against changing its substance; that the court has the actual power to decide any case as it sees fit, and that it often and usually does; and that in any event the court has the same control over the postulates of the law as it has over results? Once we deny any metaphysical content to legal rules and postulates it is easy for the court to reframe the postulates and rules to conform to the desired result. If we admit the validity of the result our quarrel is simply one of language and form.

When all is said and done do we not need something more than the simple theory of relativity as to the law, if we are to circumscribe it in one definition? Clearly there is space-time here also. Legal results depend upon both the when and the where. But that is purely an axiomatic or an observational statement. Few certainly can doubt the overwhelming evidence which Mr. Frank produces and every intelligent practicing lawyer knows that he has not over-stated the evidence. But even so the question still remains, what are its philosophical implications? What shall we do about it? Shall we be so overawed by the facts that any attempt to rationalize them is profane?⁶ Do we have to stop there, or can we go on to a general theory of relativity and attempt to construct a workable theory which will encompass all of the observed phenomena? It can be remembered that space-time by itself was a variable; but when Einstein incorporated it into his general theory of relativity it became an invariant. Here too rules and results are irreconcilable if we start with the assumption that the one or the other is the whole truth. Should we try to bring them together; make them invariant; or must they always be kept separate? And if so, why?

On those general propositions I for one would like enlightenment, and I believe that they present the material issues in the case.

BERNARD C. GAVIT.*

6. The tenor of the discussion indicates also that the parties believe that we are dealing with much the same contradictions which exist in physics and psychology between determinism and free-will. Even if we were, the situation would not be hopeless because the leaders of scientific thought today accept the reconciliation made possible by the Heisenberg Principle. See *Planck* "The Universe in the Light of Modern Physics"; *Eddington* "The Nature of the Physical World" ch. IV, V, VI. But we do not need a Heisenberg Principle in law, because as pointed out above there can be no real conflict between the two sides of legal science; our legal rules or postulates do not explain but control human nature. Most law is written upon the assumption of the principle of free-will, but even if you accept the "proof" of the principle of determinism it does not disprove that assumption, because that latter remains what it was to start with—a conceptualistic assumption. The encouraging part about the entire picture is, however, that under the Heisenberg Principle we could give to it the element of "truth" and reconcile it with facts of nature.

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