

**BETLES, FROGS, AND LAWYERS: THE SCIENTIFIC  
DEMARCATIION PROBLEM IN THE GILSON THEORY  
OF VALUE CREATION**

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human affairs.<sup>3</sup> In the late twentieth century, it came to dominate the study of law as a human institution. In the meantime, however, philosophers of science (usually not the scientists themselves) spilled gallons of ink trying to demarcate between true science which takes on a privileged epistemic status and pseudo-science, like phrenology or astrology, disciplines we want to argue are not so

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even if they are ultimately shown not wholly to explain natural phenomenon. On the other hand, very few of us accord the same level of epistemic respect to the Biblical account of creation in the first chapter of Gene

truths are not of the scientific kind. Somewhere in between the two extremes are the close cases over which philosophers of science demarcation probl

My argument is not that Gi

which, as discussed below, rests on the presupposition that the involvement of lawyers in a transaction can only be explained if they add to the total economic surplus fails as a matter of explanation. It is that the explanation is not entitled to privileged epistemic status, *i.e.*, worthy of being given respect as an approach to truth in a scientific way, particularly as compared to cultural or hermeneutical explanations of the role of the lawyer in the transaction process.<sup>4</sup> To put this a different way, Professor Gilson said this at a recent

<sup>5</sup> The implication is that

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3. THOMAS L. HASKELL, THE EMERGENCE OF PROFESSIONAL SOCIAL SCIENCE: THE AMERICAN SOCIAL SCIENCE ASSOCIATION AND THE NINETEENTH-CENTURY CRISIS OF AUTHORITY 3 (2000); *see* HABERMAS, *supra* note 2, at 2-3.

4. *See* George W. Dent, Jr., *Business Lawyers as Enterprise Architects*, 64 BUS. LAW.

pective.<sup>6</sup> I disagree, or at least I think the matter needs to be more fully explored.<sup>7</sup>

We can begin by positing an example of an economic hypothesis that seems both unremarkable and testable. Microeconomic theory predicts that firms will stop production of a good when the marginal cost of production exceeds the marginal revenue. There, it seems to me, the allusion to beetles and frogs as the objects of study make sense. We really do not care what is going on in their minds; rational beetles, frogs or clients should not be making widgets when the costs of the very last widget is more than the firm will receive in revenue. We can study hundreds of firms and see if the theory holds: if firms are producing and selling widgets at a loss on the marginal output, something needs to be done about the theory.

in a way that the foregoing theory is not. Indeed, my claim is that explanation is at the very edge, if not over the edge, of what may be called science. Here we need to unpack the economic view of value. All transactions occur because buyers value an asset more than sellers. The difference between the two values is surplus. Haggling over the split of the surplus is of no interest generally to economists; that is mere strategic bargaining. Each party, being rational, would know that hiring a lawyer to grab a bigger portion of the surplus  
rk because the other side will respond in kind, and the lawyers, not the parties, would get the benefit of the surplus. So, in the long run rational actors being what they are it must be the case  
ansaction,  
not merely in the distributive share of one of the parties. That is, a

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6. Professor Gilson has confirmed to me via e-mail that this is accurate. He also made clear something that was already obvious to me from the 1984 article: he was looking for a systematic way of explaining what he had done as lawyer. I am sympathetic to Professor  
wever, to

Neither before hearing him nor since then have I thought he was attributing privileged status to lawyer-entomologists over lawyer-

business lawyer must show the potential to enlarge the entire pie,<sup>8</sup> not

This is a key move (and one worthy of a good lawyer) because how Gilson frames the issue largely dictates the outcome. He identifies three perspectives on the question of value: those of clients, some of whom would suggest that lawyers reduce the value of transactions; those of business lawyers themselves, who would view their value-

positive view of<sup>9</sup> That is to say, everybody seems to agree that there is a relationship between the and the value of the transaction; rational actors hiring lawyers would not allow that involvement to reduce transaction value. Thus, the only remaining question is the uncovering of the regularities under which we can expect that lawyer involvement does indeed create value. Note how far we have already come. In the philosophy of the natural sciences, causation is a hotly debated issue. When we observe regularity in nature, theory now supplies an explanation regarding why there is regularity. But here we have simply assumed, on anecdotal evidence or the exercise of reason (not logic), that there is such a relationship.

What if there is no relationship? My theory is that lawyers sometimes add economic value to transactions and sometimes subtract economic value, but lawyers also appear during the deal for the same reason Hermes scarves or Neiman Marcus neckties appear in

have to be there. Lawyers like scarves or neckties may well have economic value, not because they necessarily make the pie bigger any more than scarves or neckties do so, but because somebody values the lawyer enough to pay more for her to be there than it costs the lawyer to be there (marginally speaking, of course expensive scarves and neckties and Raymond Weil watches as well.

in connection with the value of the transaction other than to buy the product. In other words, why not assume lawyers are there because





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resolve that issue, we need to revisit the demarcation issue: what distinguishes science from pseudo-science? Put another way, I am arguing conceptually that there is simply no way of ever proving or disproving the theory, and as such it loses its privileged status as a way in which scientific knowledge has progressed. As a way of making sense or explaining, it is no better and perhaps worse than cultural studies or hermeneutics (at least to the extent that those disciplines have not claimed privileged status for themselves as against other disciplines).<sup>15</sup> Again, I repeat, this is not a criticism of

is merely a denial of its privileged status as scientific truth.

I suggest it is a fair project to review the best thinking about what science is, and to let the observer decide if the value-creation

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essor Gil  
positively into the effi  
surprisingly, he concluded that there is a connection, and enough of

<sup>18</sup> Not





