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The Law-As I See It

E. Barrett Prettyman

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I suppose everyone who has written, taught or practiced law for a quarter-century has formulated a philosophy of law. I venture to phrase mine.

Law is the science of human relationships; or at least it is a part of that science.

That sentence may be my own, or I may have read it somewhere; but, in either event, it expresses precisely my idea. It seems an odd idea, because we are accustomed to think of science as something precise and law as just the opposite. The meaning of my thesis will become clear if we develop first, briefly, the characteristics of science and its difficulties.

Science, says the dictionary, is systematized knowledge. Sometimes it is said that science is truth, but that is merely a pleasant arrogance of lesser scientists. Science, as the real scientists know, is search for truth. What is currently called scientific fact is really no more than the best belief of the moment.

Much of accepted scientific fact is false, because scientists have not yet learned the truth. Illustrations in proof of that proposition troop to mind. For several thousand years, or longer, the scientific fact was that the earth is flat; Columbus was a scientific eccentric. Forty years ago, the chemistry books taught that there are ninety-two irreducible species of matter, called elements. Our present notion is that all matter is composed of electric charges and that the various species of matter are merely varieties of number arrangement of the charges in atoms. Until very recent years, medical authorities, including the pharmacopoeias, said that nicotinic acid was a deadly poison. But today it is recognized as one of the vitamins and a specific for pellagra. So we might go on indefinitely. Currently accepted scientific fact is the best we know to date, but some of it is true and some of it is not true. Science is the search for that which is true.

Some scientific facts are discovered and some are created by man. Electricity was discovered, but the generation of electricity by a whirling armature in a magnetic field and the conduction of the energy by copper wire to a light bulb are scientific facts which were

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†Based on an address delivered before the Washington and Lee chapter of Phi Delta Phi legal fraternity.

*Judge, United States Court of Appeals for the District of Columbia Circuit.
invented by man. This proposition, like our first one, could be illustrated almost indefinitely. When man has discovered a natural fact, he proceeds to use it or to nullify it, according to whether it is already useful or whether it is adverse to his interests.

Advance in science takes one of two courses, the discovery of natural truth or the production of a new fact. The facts of nature have existed from the creation of the earth, but, of course, they do not become part of science until they are discovered. The raw material for radio waves existed in the time of the Babylonian Empire, and so did the natural phenomena which support an airplane. Penicillin has always existed. So scientific effort is in part the discovery of unknown natural phenomena, in part the creation of processes for the use of useful facts, and in part the creation of processes for overcoming adverse facts.

The present whole of every science consists of two parts, (1) the application to daily problems of that which is the best presently known on the subject and (2) the never-ceasing search for answers not yet known. For example, engineers building an airplane must do the best they can with what they know. They would like very much to land the plane straight down, or start it straight up, but they do not as yet know how, except to the limited capacity of the present design of a helicopter. So they must design commercial planes to take off and land on long runways. And, again, the zoologists would like very much to eliminate the Japanese beetle and the Mexican bean bug, but they do not as yet know how. So they must do the best they can with poisons in limited areas, quarantines, inspections and other makeshifts, the best they know.

The never-ceasing search for new answers to old problems has two striking characteristics. One is the persistence of the search, and the other is the reluctant caution with which a new discovery or invention is accepted. Our friends, the doctors, are ever pressing for new cures, but they are just as skeptical about adopting a new discovery as they are keen about making it. The scientific way of accepting a new answer is to try it out experimentally until it has been proven. This balance between zealous searching for the new and caution in its adoption is a characteristic of the truly scientific method.

One of the great difficulties faced by scientists is that they do not know which of accepted scientific facts are true and which are not true. Often we are startled by the news that some hitherto accepted fact is not a fact at all. It is not now impossible for man to move faster than sound. Pneumonia, once probably fatal, is no longer so.
Cancer is today incurable, generally speaking, but scientific men are sanguine that its cure lies merely in the field of undiscovered truth, not in the field of the impossible. So, to a less poignant degree, are the broadcast of color, and the preservation of teeth, and the distribution of food products. Science asserts as fact or accepted theory the best of our knowledge to date, but which of it is true and which of it is false we do not know; and even as to much which we believe to be false, we do not know the truth.

Another great difficulty in the sciences is the selection and adoption of standards. Scientific determinations must be made by the application of standards, and until standards are established, science is in confusion. Again, by way of example, time is measured from a fixed geographical line; when the sun passes over that line, a new day and date begins. Six and six make twelve because the basic unit of the numerical system happens to be ten; if that unit had been twelve, six and six would have been ten.

Now let us look at the law, its characteristics and its difficulties. The law deals with human relationships. These are many and varied. There are the relationships between man and man, between man and woman, the family, partnerships, corporations, and finally governments, small and great. They revolve about people and property, actions and events. They involve an infinite variety of facts. They are utterly simple and unutterably complex.

Those relationships must be arranged and controlled, lest chaos be complete. The objective of these arrangements should be the well-being of mankind. What is good and what is ill for men is outside the scope of our present inquiry, but we can agree that human relationships should be arranged to achieve the well-being of mankind, whatever that is. To that end there must be rules. Those rules are the law.

That law is a science presupposes, of course, that there are true and correct ultimate solutions to the problems of human relationships. Of that I am firmly convinced. My own belief is that man was created by an Intelligence, but even if that were not so, I would still believe that animal-man can live in a state of maximum well-being, that that state is definable, that man desires to achieve it, and that it is achievable. I do not believe that mankind is necessarily condemned to an existence of disturbance, fear, oppression and economic want.

Some human relationships spring directly from natural physical facts. Such are the relationship between the sexes, or the ownership of physical property. Some relationships spring from natural non-
physical facts. Such are love, honesty, hatred, greed, jealousy. Other relationships are invented by men; such are future interests, negotiable paper and corporations.

To attempt to ignore a fact is wholly futile. We may use a fact or control it or suppress it, but we cannot ignore it. A law based upon the proposition that one acre of land might be two acres, or that two radio waves of the same frequency can be equally well heard at the same time at a spot where they are of equal intensity, would be futile. And this is true of intangible facts as it is of physical facts. That murder and theft are wrong is just as much a fact as is the law of gravity. That one man may cheat another is just as plain a fact as that iron rusts in damp air. Any law that attempts to disregard facts, whether tangible or intangible, is futile. At the same time, as we have said, there are many human relationships which do not involve natural facts. The double liability of a bank's stockholders was an invention of man; it was not discovered, it was invented. As such, it could be destroyed and thereafter ignored.

The whole of the law consists of two parts. One is the daily application of the best that is known, and the other is the unremitting search for new and better answers. The law is not merely that which has been established. The corporation, monogamy, and due process of law once were new. Something new has been added to the law from time to time, because the seeking mind of man discovered or invented a better rule for the service of men's well-being. That process has not ceased. The mind of man has not atrophied. Quite the contrary, more and more men, more and more actively, more and more intelligently are seeking answers to the problems in this vast labyrinth.

The adoption of that which is newly discovered or invented in the law should be with the same caution with which scientists in other fields accept the new. And lawyers have an additional peculiar obstacle to the adoption of the new. A legal problem usually involves not one person and his rights but two or more persons and their relative rights, and the answer to the problem usually denies to one that which it is affirming to another. So the adoption of a new solution after rights have accrued to one or the other of the parties usually involves a denial of the right already established. But when the new solution is not adopted retroactively by court decision but prospectively by legislative enactment, that difficulty is not encountered. Moreover, an established rule may in the course of the years, by the occurrence of events and change of customs, etc., become an
instrument of injustice rather than of justice; and so rights which now accrue under it may be inherently invalid and can be declared so. The point is that keen search for the new and better and extreme caution in adopting the new are not inconsistent. Together they constitute the truly scientific process; in the law as in every other science.

The difficulties and problems of the law are pretty much the same as those of other sciences. We know quite a bit, but we know that we do not know so much more. As a matter of fact, we are not certain of all the elements which make up the objective toward which we are striving. Some of the elements which constitute the well-being of mankind are known and generally accepted as such; for example, peace, justice and economic sufficiency. But many of the elements of human well-being are not known, and as to many others there are violent and conflicting theories.

Quite obviously, some of the answers which we seek have been found, and, equally obviously, some of them have not been. And some of the answers which have been accepted as correct are not correct. That a man should not steal is obviously a correct rule. But that nations should solve differences of opinion or of interest by slaughtering their prime specimens of physical and mental excellence is obviously an incorrect rule. And some other rules are obviously in a mere state of perplexity. The relationship between a man and a woman is one. Time was when a man had numerous wives and also had concubines. Then came monogamy, protected by rigid divorce requirements but supplemented by publicly protected prostitution. More recently, the latter has been more and more curbed in this country, and divorce requirements have been more and more relaxed. So that, generally and not too precisely speaking, the present effect of the rules is that a man may have as many wives as he pleases but only one at a time, and intercourse between the sexes, except in the marital state, is forbidden. It would be silly for one to say that we have discovered the correct rule in this area of human relationships. There are forty-nine sets of rules in this country alone.

Many, many other problems in the law are as yet unanswered. We have not solved the problems of crime prevention, or of commercial regulation, or of juvenile delinquency, or of the ownership of property, or the distribution of products, and many more. We do the best we can with what we presently know, but we know that the truth is not yet known. Men are still searching for the answers.

Another great difficulty in the law is the selection and adoption
of standards. For example, the correct rule which should govern some human relationships depends upon the ultimate nature of man himself. One of these is government. If man is a creature evolved by circumstance a few steps after the fish and the birds, government would seem to be merely a self-protective compact. If man is the creation of a supernatural Intelligent Being and is endowed by that Creator with natural rights, government would seem to be a necessary implementation of that endowment and so not susceptible of lawful antagonism toward those rights. If the Intelligent Creator of the universe has selected one human being and empowered him to rule over a group, tribe, nation or race—the divine rights of kings—government would seem to be the will of that person. Lacking absolute knowledge upon the ultimate nature of man, we have great difficulty, even bloody wars, trying to fix the rules as to this most complex of human relationships, government. The best we can do is to establish a theory as our standard and measure by that. The same difficulty exists as to many other human relationships. The necessity for standards is as great in the law as it is in other fields. The great difficulty is to establish standards that are true and sound.

The principal point of my thesis is that the law is not dead. It is alive. It is not an ancient language like classic Greek, the conjugation of the improper verbs of which is to be learned by rote and repeated parrot-like in answer to questions. It is not even a delightful literature of the past to be read for interest and studied for style. The law is the process of dealing with actual, present, live problems of human beings and their activities. Full comprehension of the law is not acquired by memory; the law requires the application of intelligence to the raw material of people and events.

Let me come closer to reality. Cases are not quiz program questions the answers to which are in a book somewhere. They are problems, mostly having to do with the relationships of human beings. A divorce case is not a compendium of plagiarized papers and stereotyped pronouncements. It is a complex problem of human relationships, the intricacies of human behavior, the requirements of a pressing society, the future of children, etc., etc. A will is not a jumble of unintelligible Seventeenth Century obscurities taken from a book. A will is usually the climactic act of a person's whole lifetime effort. The drawing of the simplest will, properly approached, is a problem in human relationships of the most intricate and delicate sort. A man wants to leave all his property to his wife. A flood of questions is unloosed by that simple idea, if the lawyer is the scientist he ought
to be. The fact is that the carelessness with which many lawyers permit hard-working, thrifty people to toss out the window, or into the outstretched hands of unscrupulous volunteers posing as advisers or investors, or into the maw of consuming litigation, the sweat-stained savings of a lifetime is appalling. An architect who drew plans for a building with care proportionate to the sad process of many lawyers drawing wills would be barred from practice long before he starved to death or was prosecuted. The same is true in respect to the drawing of contracts, the trial of lawsuits, and the argument of cases. The work of a lawyer is a series of problems, no two exactly alike, which concern the relationships of human beings, some simple and some bafflingly complex.

You hear people say, "He ought to make a good lawyer. He argues so well." What silly nonsense! He will make a good lawyer if he has stored in his mind the thought of past generations upon the topic at hand, has the vitality to keep abreast of that which is new and proven, can analyze and appraise people and their problems, and has the wisdom to formulate and apply the best available answer to the problem put to him. He may not thus make the biggest headlines, any more than do the foremost scientists in any branch of science; but he will make the best lawyer.

To say that the law is what the Supreme Court says it is depends for accuracy upon a narrow definition of "law." That Court changes its views, as we all know. And Congress may change the rule which the Court has announced, and the people may change the Congress and so again change the rule. There is, of course (because there must be), a present state of the law, composed of the rules which are presently established. They are the rules which must be followed in the absence of anything better. And, moreover, for the very necessary purpose of concluding specific controversies, an applicable rule must be declared in each dispute. In that sense, what any court in a final decision says is the law is the law. It is the law of that case and is an authoritative expression of the rule as presently best known. But the view of a temporary majority of two out of three or of five out of nine men cannot permanently make the law in a general sense. A mighty combination of many minds, much character, and vast experience evolves the law.

It is a major mistake, indeed a tragedy, for lawyers, particularly young lawyers, to have the idea that what has been established is the whole of the law. Much of the best of the law to date is that which has been added in comparatively recent times. Trial by jury is better
than trial by ordeal. The abolition of human slavery was good. The best of the law is yet to be discovered. However cautious we must and should be in adopting for general use new inventions, we must be, at the same time and equally, keen for the discovery and invention of that which is better.

The whole of the law is the whole of the truth as to human relationships. So, in part it is the application of that which has thus far been established, and in part it is the search for that truth which has not yet been discovered. The law, in my view, is the science of human relationships.
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