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THE NOBEL PRIZE FOR LAW

Alfred F. Conard*

There is no Nobel prize for law. This lack is not in itself a cause for concern, since the discipline of law is replete with its own rewards. But some cause for concern inheres in the implication that law provides very few examples of the kinds of contributions to humanity that merit Nobel prizes.

I. WHY NO NOBEL?

Nobel prizes are awarded to recognize extraordinary contributions to human welfare or human understanding. Very little that is done in the name of law would qualify, and the little that might qualify is hard to recognize.

Contributions that might qualify are hard to recognize because legal ideas are hard to evaluate before they are put into effect. By the time that a creative idea is put into effect, it has been reshaped by many minds or hands, and appropriated by even more numerous public figures. The genius of the original Bardeen¹ or Crick² is obscured by the overlay of revisions by others.

A more fundamental obstacle to awarding a Nobel prize for law is the difference between what scientists and artists do for humanity and what lawyers do. When a scientist discovers a means of making rice fields more productive, he adds to the food supply without taking food from anyone. When a poet provides us with a new insight, he makes us wiser without making anyone more ignorant.

Law, on the other hand, is largely concerned with taking from one person in order to give to another. In this respect it does not differ from government or commerce, the former of which ad-

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1. John Bardeen received the Nobel Prize in physics in 1956 for the discovery of the transistor effect and in 1972 for development of a theory of superconductivity.

2. Francis Crick received the Nobel Prize in physiology or medicine in 1962 for the discovery of the molecular structure of DNA (deoxyribonucleic acid).

ministers involuntary exchanges while the latter consists of voluntary ones. Law, government, and commerce are all essential to society, but the positive balance of benefits over costs of some of their applications is minuscule or doubtful.

The uncertainty of net benefit in some of the applications of law is particularly conspicuous in the law of torts. According to the fantasies of legal theory, tort-feasors are compelled to pay damages to tort victims, so that tort victims become richer than they were before the transfer, and tort-feasors correspondingly poorer. The arithmetic sum is zero, but the money transferred is assumed to do more good in the hands of the victim than in the hands of the tort-feasor. If the facts corresponded to the fantasy, one would have no reason to question the positive balance of benefit over cost.

But the idea that tort law transfers money from tort-feasors to tort victims is far from reality. Most of the money received by tort victims comes not from tort-feasors but from the general public through insurance premiums, and the public pays out more than two dollars for every one dollar that gets to a tort victim. When the victim who receives the payment is severely impoverished, one dollar in his hands is probably more beneficial than two in the hands of premium payers, but the opposite is likely to be true when the victim's needs are no more acute than those of the average payer of premiums.

If tort law's expensive transfers have a saving grace, it is their deterrent function. If the threat of liability induces a surgeon, for example, to use a little more care in counting sponges, it spares patients from enormous suffering and expense at very little cost to anyone. There must be some such cases, although it is far from certain that threats of retribution reduce the incidence of unintended errors. Instead of extirpating error, the threat of liability is likely to induce expenditures, up to the level of the probable damages, on additional personnel and sophisticated instruments. Procedures become safer, but consume a larger share of available resources. Whether the net effect on aggregate health is positive or negative remains conjectural. Whatever the balance may be, it is not in a class with the balance that results from discovering a more nourishing strain of food grains.

Because of these inherent characteristics of tort law, the great forward leaps in it that enthuse lawyers do not have the same appeal to the rest of humanity. Dramatic increases in the sums of money that are awarded for mental pain and suffering or for asbestos poisoning are presumably beneficial to the recipients, but most of the money comes from the pockets of investors and

consumers. In the rare case in which liability costs are not passed on to investors and consumers, a substantial fraction of them falls on taxpayers, since the companies that are held liable deduct their payments or insurance premiums from their taxable income.

If we turn our eyes from torts to the criminal law, large net gains for humanity are equally elusive. The most conspicuous activity of "justice" in this area is putting people into prison. The beneficial aspects of this activity consist partly of disabling the offenders (while they are in jail) from committing crimes against people who are out of jail, and partly of deterring them and their likes from committing future crimes. The direct costs are not only the deprivation of convicts' liberty and their dependents' support, but also the price of providing board and room to the convicts while they are imprisoned. Incalculable indirect costs inhere in the contagion of criminality that is propagated among convicts and their families by the prison experience. But nonimprisonment and early release seem to offer countervailing dangers for the potential victims of crime. The triumphs of lawyers—whether in putting suspects into prison or in keeping them out—often seem like hollow victories for the rest of the population.

Incremental gains are of course possible. Civil and criminal law are susceptible of improvement within their basic frameworks. Changes can be made that increase benefits a little more than they increase costs, although available methods of measurement will render the gains disputable. But hardly any of the improvements that are imagined and advocated by jurists can be compared in their cost-benefit ratio with a scientific discovery or a work of art.

II. POTENTIAL WINNERS

Are great gains with minor costs possible in the area of law and justice? Nobel prizes reward two very different kinds of gains. One kind is exemplified by the peace prize awarded in 1978 to Sadat and Begin, and in 1973 to Kissinger and Le Duc Tho. The prize was for stopping a conflict, with great benefit to everyone involved, and negligible losses to anyone.

The other kind of Nobel prize is awarded for an addition to knowledge or insight, in science or in art. It is awarded for achievements such as discovering the double helix, or writing the Gulag Archipelago.

Either kind of prize might be merited in the area of law and justice. I will discuss a few possibilities.

A. *Reducing Conflict*

Society confronts a number of expensive conflicts, other than war, which might be susceptible of resolution by less expensive means. At the end of the nineteenth century, disputes between employees and employers were commonly waged exclusively by deprivation and violence. As a result of labor legislation and other developments, weapons of deprivation and violence have been partially replaced by peaceful bargaining. If resort to deprivation and violence has actually decreased, the resulting amelioration of the costs of struggle may have deserved a Nobel prize.

A more basic treatment of conflicts between employers and employees may be seen in the European institution of codetermination. This is not merely a change of weapons, as in collective bargaining under the United States Labor-Management Relations Act, but the opening of an avenue for agreement on common objectives. Another promising institution, which is gaining ground in the United States and might lead eventually to a coalescence of employer and employee objectives, is employee stock ownership. All of these developments are imaginable Nobel candidates.

Another example of a big gain for humanity with little cost may be the program of "release on own recognizance," which was launched by the VERA project in New York. Thousands of suspects were saved from imprisonment and from the loss of opportunity to earn income pending trial, while the state was spared the expense of housing them in prison. One cannot be certain of the net gain without knowing how many crimes the released suspects committed between arraignment and trial, but the general appraisal of the program has been favorable.

A great leap forward in justice may have been achieved in New Zealand by abolishing tort claims for personal injury. Medical costs and wage losses are reimbursed largely by public funds, without the expenses of insurance administration and fault determination.

B. *Expanding Knowledge*

Major advances in law have occasionally come about through

flashes of insight followed by fortuitous waves of public acceptance, but similar advances are unlikely to occur frequently until there is more knowledge, and more recognition of knowledge, about how legal processes work. Thinking about law is constricted by underlying beliefs that are often little better than superstitions. In the area of crime, each of us "knows" in his or her own mind that crime would be immensely reduced by increasing welfare payments, or by increasing incarceration, or by sanitizing television, or by revitalizing religion, but there is no consensus among us, and no scientific basis for a consensus. In the area of torts, laymen, lawyers, judges, and professors talk as if malpractice damages were paid by negligent physicians, without knowing whether physicians sustain significant diminutions of their incomes, or manage to shift their liabilities to patients, to employers (via health insurance), or to taxpayers (via Medicare and Medicaid). In the area of mental injury, theorists advocate recovery of damages for invading privacy or for precipitating pain without knowing whether such damage suits increase or decrease privacy or pain.

Knowledge about the workings of legal processes is not gained by debating the meaning of statutes and constitutions, or even by examining their history, although these exercises are useful guides to society's evaluation of objectives. Statistics are not necessarily any more helpful. Decreases in the number of reported crimes do not necessarily indicate decreases in committed crimes; neither do decreases in the number of civil rights complaints indicate decreases in the number of civil rights violations.

Fortunately, more relevant knowledge is being accumulated. Empirical studies are disclosing the effects, or absence of effects, of exclusionary rules on the behavior of police officers and prosecutors. A few surveys, instead of collating police records, have asked ordinary citizens how often they experience assaults, burglaries, arrests, and searches. In the area of malpractice, physicians and hospitals have responded to queries about how malpractice liability affects their practices and their financial charges. The correlations of automobile accidents with enforcement of drinking-driver laws have been observed in various countries. Studies of these kinds bring us closer to discovering principles that can be used in framing laws whose net benefits are more certain.

III. PROPAGATING WINNERS

Scientific knowledge about the effects of laws on human behavior is not plentiful. It seldom appears in traditional law reviews, and is encountered more frequently in journals devoted to socio-legal research, like the *Law and Society Review*, the *American Bar Foundation Research Journal*, and the *Journal of Legal Studies*. It is not generated principally in law schools, but in departments of sociology and economics. This provenance probably results from two differences between the study of law and the study of social sciences. Law professors tend to think about what should be penalized and what rewarded, and to derive their information on the subject from constitutions, statutes, and judicial decisions. Social scientists tend to think about causes and effects in human behavior, and are trained in collecting data and deriving correlations between what people do and the influences bearing upon them. This way of thinking about the legal system is likely to precede creative developments in it.

The optimal organization of the pursuit of scientific knowledge about the legal system remains to be discovered. I will venture here a few tentative thoughts about it. The current concentration of empirical observation in departments of social science has the advantage of associating the investigators with colleagues who are oriented toward scientific methods of thought and analysis. It has the disadvantages of dispersing the investigators among different departments and of separating them from law teachers. Law teachers have, notwithstanding their doctrinal orientation, a considerable acquaintance with the realities of the legal system, which could illuminate the investigations made by social scientists. Besides, law teachers and law schools would be enriched by closer contacts with scientific investigations of the system whose doctrines they expound. If scientific study of the legal system continues to develop principally outside of law schools, law schools will become more and more separated from the frontiers of knowledge about their own field of learning.

Law faculties differ as to whether they want the scientific study of legal processes to be carried on in close association with the study of positive law or whether they want to let it develop in other settings. Those who favor a close association confront a puzzle about how to achieve it.

One approach consists of substituting social science courses for law courses in the standard curriculum. This suggestion re-

ceives aid and comfort from reductionists who believe that law students learn in their first year all the law that matters. Advocates of this solution underestimate, in my view, the difference between what a lawyer needs to know in order to play the games of which the practice largely consists and what a lawyer needs to know in order to reform the legal system. The difference is something like that between what a military officer needs to know in order to win battles and what a diplomat needs to know in order to negotiate treaties. Peace may be promoted by educating peace makers, but it is unlikely to be advanced by abandoning the education of soldiers. The wasteful ways of the legal system will not be reduced by suspending formal education in the gambits by which the existing games are played.

The study of how the legal system operates is very different from the study of what the legal rules are. Although the two should be on speaking terms, they are not interchangeable. The scientific study of the legal system calls for a program that is distinguishable from that of practitioner training, and bears a name of its own. It might be described as the "laws of law," meaning the scientific laws (like the laws of chemistry, physics and physiology) that govern the operation of society's laws (like civil and criminal codes). If it were to be christened in the academic tradition of Greek and Latin roots, it might be called *nomonomics*, *nomology*, *jurology* or *juridics*. For the nonce, I will call it *juridical science*.

Curricula in *juridical science* will start out on a modest scale because, among other reasons, there is no established demand for doctors of *juridical science*. Initially, these curricula may consist of traditional law courses mingled with experience in research on projects sponsored by grants from foundations or government agencies. A few brave candidates will choose to study in these curricula, as they have done in other nascent scientific endeavors, even though their opportunities for future employment are obscure. Some of the graduates will be hired as assistants to legislators and government executives. Law firms whose practice involves legislative and administrative advocacy—like those that make up Washington's "other government"—may seed their practitioner staffs with *juridical scientists*. A few of the *juridical science* courses will probably be useful to future practitioners, especially those that illuminate the evaluation of scientific and pseudoscientific evidence.

Although the curriculum in *juridical science* will not prepare a student very well for the private practice of law, I see no need for giving its graduates a different degree. "Juris doctor" seems

to befit a juridical scientist at least as well as it befits a practitioner. Juridical science may be regarded as a department of the law school that leads to the same degree with a different "major," alongside a major in legal practice or various majors in areas of practice, such as private law and public law. As in other departmentalized schools, diplomas and transcripts could disclose the area of the graduate's concentration, so that bar examiners and employers could draw such distinctions as they wish among graduates of different curricula.

Other and better arrangements for the propagation of juridical science can probably be imagined. The hospitality of its environment will affect the rate of its maturation, but the science will survive and multiply in some form. Juridical scientists may win no Nobel prizes, but some juridical scientists will deserve them.