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THE PRESENT KING OF FRANCE IS BALD
(The Ontologyy of Legal Schodarships)

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One of Bertrand Russell's examples of a fundamental problem in philosophy was the statement. "The present King of France is bald". How can we, he asked, say something of what is not?

We can, in fact, say a great deal but what we say is limited to linguistic reality. For example, we can say that the present King of France is a man and it is likely that this maternal grandfather was bald; that unless he had been serously ill, he is apt to be of middle age or older. We can say that if he is married his wife is the Queen of France and if they have children, the sons will be Princes and the daughters will be Princesses. The rules of inductive and deductive logic and of grammar apply. With a little ingenuity the entire typology that goes with the original proposition can be used to create a credible history. Obviously there is a problem. The sentence is untrue in fact. There is no entity that corresponds to the subject. The import of these comments is that many of the statements in the law journals are, more or less at different stages, of a kind with Russell's example. Worse yet, they are not evidently untrue and yet we do not generally try to find out which are true and which are not true.

Philosophical theories are not ordinarily tested by observation.[1] Philosophical questions about law are not about the specific facts of law and legal doctrine which are transient. It is implicity supposed that philosophers are not asking the kinds of questions that lawyers might answer, nor are they seeking information about law that could be found in the treatises.

There is with legal scholars, a subtle but quite distinct and perceptible shift from that philosophical posture to the assumption that the events related in an appellate opinion actually occurred in the man-

[1] The philosopher, it is said, "has no need to leave his study. He carries on without the help of observation or experiment".

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ner described and that the history is not incomplete in regard of matters that might make a difference; and that similar "cases" occur often enough to be significant and worthy of extended discourse.

The ontology of legal scholarship (and of much jurisprudence) too often assumes that the reported cases describe with reasonable accuracy another reality external to the opinions and, often enough for concern, assumes also that that reality is an instance of widespread and therefore significant practice; and, finally, that there will be certain roughly predictable effects from authoritative changes in the outcomes, the decisions of the reported cases.

Given these contentions, two questions are raised: What are the ontological commitments of the theories and assertions of legal scholars? What sorts of things (relations, processes, and external effects) are presupposed by the statements of legal theorists? Do legal scholars in their most common and characteristic role as theorists adequately respond to the question whether there is any widespread noncase reality that corresponds to what they write? Are they having commerce in what may be merely postulated entities?

Most legal scholars teach and write of recent history. I take it that the recent history we work with is valuable because it is true. And though being true is not the whole of its value, it is the foundation and condition of all the rest. This premise leads directly to the question what legal scholars mean when they assert (usually implicitly) that they know something. Evidently, something more than explication of the verb "to know" is required to analyze and understand the problems of knowledge which I will contend are mostly avoided or finessed by legal scholarship as seen in the law journals.

Many of the assertions made in the law journals depend for their truth value on their acceptance —i.e., a vulgar pragmatic theory of truth is mistakenly taken as establishing some sort of correspondence between the usual propositions asserted by legal scholars and some reality other than the reported cases. True statements in the sense of correspondence with empirical reality and frequency of occurrence of the empirical referent do not stand too high in the hierarchy of legal values.

Generally, legal scholars do not deal in and are not concerned with facts as defined in those manners acceptable to any truth-seeking discipline, i.e., any more or less scientific enterprise. But they are concerned with what will pass and be accepted on the basis of standards and tests that bear little or no relation to truth-seeking and truth-finding.

Other disciplines view their equivalents to reported cases (whether

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surveys, archival analyses, experiments, reports of observations, etc.) as statements about some other reality. These statements are verifiable by different means. (Some are not verifiable because the process of their being stated has so changed the "facts" that the usual means of verification are not available or will not work;[2] for others the fact of investigation precludes the same or even a closely similar investigation.)

Harry Jones refers to "the ultimate test of legal truth" as being "an authoritative adjudication". He means to comprehend in legal truths the correct answers to such questions as which of the stated facts assumed in an opinion are the correct minor premises and which legal doctrines are applicable as major premises. What is involved in this conception of "legal truth" is acceptance of the definition of truth as a social and political result. Professor Jones seems to make that clear by placing the expression "legal truths" within quotation marks in a sentence correctly pointing out that whatever legal scholars think or might agree on, their views are not "legal truths" until a court or legislature with the appropriate authority has "declared it is to be the law."[3]

Such usage of the term truth does clear away some underbrush. It seems, also, to state a limited correspondence theory of truth in legal scholarship: when a legal scholar says a proposition is true, what he means is that there is some authoritative declaration upon which he relies. Upon further inquiry the legal scholar can refer you to the cases or statutes or rulings which are authoritative (and he can state the rules which enable one to recognize authoritative statements) and which say that directly, or indirectly by analysis of the conventional type from the written opinions of judges to propositions.

To ask of the writers in the law journals how they know that many of their other assertions have been or are true in fact is not a simple question. It entails acceptable definitions of knowledge, true, and fact. First I take it that beliefs without more are excluded. One can believe P. but P can still be false.[4] Nor do I mean to carp about logic or competing logics or knowledge of them and their rules. My con-

[2] See K. Popper, THE POVERTY OF HISTORICISM 14-17 (1966 ed.); M. Brodbeck, ed., READINGS IN THE PHILOSOPHY OF THE SOCIAL SCIENCES 341-42 (1968) on the "paradox of predication".

[3] Jones, Legal Inquiry and the Methods of Science in H.W. Jones, ed., LAW AND THE SOCIAL ROLE OF SCIENCE 122, 125 (1966).

[4] "Knowledge of something is not a state of mind". Although the belief that one knows may be a necessary condition for knowledge, it is not sufficient. The belief that one has knowledge is quite different from other mental states. "Feeling knowledgeable is not related to being knowledgeable as feeling jealous or afraid is [related] to being jealous or afraid. Feeling knowledgeable is not a feeling of knowledge, but a feeling that one has knowledge". White, Knowledge Without Conviction, 86 MIND 224, 227 (1977).

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ventional use of knowledge is that what is stated in proposition (mostly sentences in natural languages for legal scholars) must be true and whether it is true depends upon the existence of the situation to which the words in the sentence refer.[5]

There must be something in legal scholarship which functions like basic or observation statements that are verifiable; usually by empirical examination of facts which I take to be objective states of affairs that exist regardless of whether or not anything is said, i.e., not as linguistic entities. For the social and natural sciences and for much of our thoughtful and purposive behavior, the objective existence of states of affairs that correspond to our basic statements is usually assumed. On the occasions when they are challenged or questioned, the professionals in those fields try to and often can satisfy most skeptics. The confrontation with the facts is not always or even normally direct. We must go through steps that involve various levels and different kinds of cognition. We may have to posit ideal conditions which can never be, such as perfect elasticity or the absence of friction. Sometimes we must assume the correctness of heuristic models not at all self-evident; we may have to reside some faith in statistical analysis the typical or average instance may not in the usual sense exist in fact so as to be found. And even the simplest of propositions are theory-laden. But though there are problems, the statements must be verifiable in principle and enough of the statements of a theory or model must be verified by some observations at some definite place and time. And those observations are not generally reading what another person has written.

Obviously, that may also be the case in legal scholarship, as, for example, when we ask whether it is true that a certain judge has said something of a certain thing. But ordinarily if we ask, we mean to inquire beyond the judge's statement and to find out whether his statement about that something else is true. And if the judge (like the legal scholar) has made more than a singular statement —i.e., if he asserts a general relation, a theory, we most certainly will want to confirm it by appropriate testing of some singular statements held by the theory. We may, depending upon the context, be satisfied to rebut the theory or be satisfied because we can find no rebutting instances or too few. Sometimes, but rarely I think, it may be anough that we can find no means of rebuttal.

But in legal scholarship, the basic statements —what the reported

[5] The conventional ability to state doctrine, i.e., the propositions induced from the reported cases and the statutes and rules is knowledge who consistently and accurately predict what a judge or jury will decide have knowledge of considerable value.

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cases say— themselves are the source of new and derived basic statements. For the most part there is little serious disagreement in the analytical and mostly inductive process from the reported cases to the propositions manipulated by legal scholars. Moreover, the determination of what is the correct proposition to be induced from a reported case is, as many have pointed out, made not by better investigation but by reference to a later or more authoritative reported case from which legal scholars induce a different proposition.

Thus, in legal scholarship, there are "facts" (what is said in those basic statements that come from the authoritative sources) and the derived "basic" statements which correspond to those facts. It seems a modest undertaking but one that describes the usual activity of legal scholars. My focus, however, is upon characterizing facts as, somehow, objective states of affairs, which exist (or existed) independently of our reports of them in reported cases. And then to inquire whether the basic statements in our reported cases are verified by observation, that is, by any means other than the reading of reported cases. For almost the entirety of legal scholarship that is not done.

What is it then that the reported cases tell us? What is the nature of the propositions that we induce from the reported cases? The reported cases are more or less of a kind with the hypotheticals that law teachers put to their students: If the facts are assumed to be and we posit that there are no other facts or events which might change our perceptions or organization of the hypothesized set, then what major premises, what doctrines in law, can or should be applied? This may be good pedagogy for teaching lawyer skills but short of considerable and often unwarranted leaps of faith, the process does not seem a good way to get at any other facts. The reported case is apt to "be a partial or truncated account"[6] even of the particular matters raised in the lawsuit. There is often very little basis for assuming that the reported appellate case is (or is not) a reliable account of what happened that led to the lawsuit.

It may be desirable to review what I contend ought to be the fundamentals, the theories of what is passable knowledge, a more limited assay than what is truth. Although I use a coarse net, it is enough for my purposes here to assume three theories of knowledge, of what is true and can be known. These are nonexclusive categories: (1) The most important, because basic, is the criterion of correspondence between a proposition and the reality external to it to which the proposition refers. (2) The coherence theory implies a model or some

6 Patterson, The Case Method in American Legal Education, 4 J. LEGAL ED. 1, 16 (1951).

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sort of theory which describes a structure. If a new assertion "fits" —that is, coheres with the structure into which what is known fits, then it may be accepted as fact even if otherwise not directly confirmable. There may, of course, be different cohering systems at any time and at different times. But at some point the truth of a cohering statement will be judged by more than how many other statements it coheres with. For this cannot be done with abstract propositions in a vacuum. In any such system there must be an adequate number of statements in the set of cohering statements that correspond with some basic observation statements.[7] Obiously at some point some antecedent elements in the structure had to be known by some means other than coherence. (3) But more important in legal scholarship is the pragmatic conception of truth. In its various forms, this theory holds that true propositions are those which are accepted. There are variants usually conjoined with mere acceptance.

In a peculiar manner legal scholars employ all three theories and the criteria that they involve. Their statements may be said to correspond, if only in a loose way, with the reported cases, the written opinions of judges. By various logical means these opinions are shown to cohere or the lack of coherence, the variance, is noted, and critiqued. The statements that satisfy the correspondance and coherence criteria as perceived by legal scholars are on the whole then accepted as true.[8]

For most persons the question "What is it that makes a statement true?" involves in inquiry "into the relations that must obtain between a statement, or sentence of judgement, or whatever else truth is ascribed to, and something in the world, something other than the statement itself, in order for it to be true."[9] That ordinarily involves some reality other than the proposition being examined. Legal scholars do not mean to assert tautologies; mostly they intend to state new theories, or conjectures which can be verified in a manner which shows them to be true or to have been true when stated. To put the matter in conventional terms, the truth of a sentence consists in its agreement with (or correspondence to) reality. The distinction stated

[7] Cf. Dauer, In Defense of the Coherence Theory of Truth, 71 J. PHIL. 791, 794-95 (1974).

[8] Theory is a loosely used word in law. Linde, Due Process of Lawmaking, 55 NEBRASKA L. REV. 197, 200 (1976), provides a serviceable and accurate statement. Ordinarily legal theory is about two aspects of the judicial process: the premises which explain the particular doctrines applied in a case or a set of cases and the implications which doctrines so explained have for future cases.

But it is not assumed that legal theory will predict except in the sense that judges may feel contrained to follow precedent. It is generally conceded that skilled judges can discard precedent without appearing to reject what went before.

[9] A.J. Ayer, THE CONCEPT OF A PERSON 168 (1963).

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is that between statements referring to some external and independent reality and those which, in themselves, are truth-determinable. Thus we come to statements made in law journals in regard to which we inquire (1) What is the empirical referent? and (2) How is the correspondence between the statement and its referent to be tested?

For most such statements, the empirical referent is taken to be another statement contained in a reported case from which the statement was induced, although induction has an unusual meaning in this context. Reported cases are read and analyzed. The result of that parsing is the reduction of the reported case to a proposition or some conjúnctions of propositions. There are conventions for deciding what reported cases are members of the same set. There are problems in creating the categories or sets and we revise the boundaries of our sets or categories of reported cases in the manner of pouring old wine into new bottles.

Writers in the law journals often exhort. They assert what the reported cases of a particular type (itself a "created" "family") ought to "hold" (a sometimes ephemeral term) —i.e., should decide usually given agreement on the proper category for the particular conjunctions of stated facts. This process can take at least two different forms; logical, where mistakes in case analysis by reasoning, induction or deduction, or all three are claimed. This is based on conventions with distinctly normative elements, Second, the writings in the law journals exhort that the external reality described or adverted to in the reported cases ought to be different, and, insofar as the doctrines of the positive law can affect that reality, the holdings should be different or the decision in a particular case should have been different.

Although it often seems that from the reported cases we infer the existence of external social realities, legal analysis may be some version of solipsism if the assertions that "Laeyer knows P" are of the form and type that refer only to the reported cases as the lawyers' equivalent to sense data. That may explain why the philosophy of law seems most concerned with the kind of understanding sought by the legal scholars and, in turn, conveyed by their writings. The concern with cases and rules reflects the way in which philosophers of law attempt to present an intelligible picture of the world of law as they perceive it from the literature of the law journals and a few reported cases. Many legal scholars and philosophers of law may be likened to imaginative persons who, having read Blake, go about looking for flaming tigers and write about them even while still searching.

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