

11-15-2008

# Beetles, Frogs, and Lawyers: The Scientific Demarcation Problem in the Gilson Theory of Value Creation

Jeffrey M. Lipshaw

*Suffolk University Law School*, [jlipshaw@suffolk.edu](mailto:jlipshaw@suffolk.edu)

Follow this and additional works at: [http://lsr.nellco.org/suffolk\\_fp](http://lsr.nellco.org/suffolk_fp)

 Part of the [Banking and Finance Commons](#), [Contracts Commons](#), [Corporation and Enterprise Law Commons](#), [Ethics and Professional Responsibility Commons](#), and the [Law and Society Commons](#)

---

## Recommended Citation

Lipshaw, Jeffrey M., "Beetles, Frogs, and Lawyers: The Scientific Demarcation Problem in the Gilson Theory of Value Creation" (2008). *Suffolk University Law School Faculty Publications*. Paper 51.  
[http://lsr.nellco.org/suffolk\\_fp/51](http://lsr.nellco.org/suffolk_fp/51)

This Article is brought to you for free and open access by the Suffolk University Law School at NELCO Legal Scholarship Repository. It has been accepted for inclusion in Suffolk University Law School Faculty Publications by an authorized administrator of NELCO Legal Scholarship Repository. For more information, please contact [tracy.thompson@nellco.org](mailto:tracy.thompson@nellco.org).

# BEETLES, FROGS, AND LAWYERS: THE SCIENTIFIC DEMARCATIION PROBLEM IN THE GILSON THEORY OF VALUE CREATION

*Jeffrey M. Lipshaw*\*

## ABSTRACT

Recently, Ronald Gilson described a transactional lawyer turned law professor as someone who was a beetle, but became an entomologist. This is not the first non-mammalian metaphor used by an economically inclined legal academic to demarcate those who study and those who are studied. As Richard Posner so colorfully explained rational actors as they appear to economists studying them objectively: "it would not be a solecism to speak of a rational frog." In this short essay, I suggest that both say something about the prevailing view of theorizing that is entitled to privileged epistemic status in the legal academy. I assess Professor Gilson's classic 1984 article on value creation by lawyers in terms of its implicit claims to (social) scientific truth.

In 1984, Ronald Gilson published what, by almost all accounts, has become a classic in the academic literature of the legal profession: a theory explaining how it is that lawyers add value to business transactions.<sup>1</sup> Though it will take a scholar of my great-grandchildren's generation to determine whether it was a classic in terms of explanatory power or was instead a cultural artifact, I will go out on a limb now, almost a quarter of century after its publication. I suggest its assumptions, methodologies and conclusion are those of a particular place and time, during which what Jürgen Habermas called the "nomological-deductive" approach to human interaction reached its peak.<sup>2</sup> In the eighteenth and nineteenth centuries, more and more of what used merely to fall within the broad reach of philosophy peeled away to become science. In the physical sciences, natural philosophy became the separate disciplines of physics, chemistry, biology and so on. What marked these fields as science was the substitution of observation and logic for metaphysics. The job of science was to observe regularities and to subsume them under hypotheses, theories, and

---

\* Associate Professor (Entomologist), Suffolk University Law School. Formerly Senior Vice President & General Counsel, Great Lakes Chemical Corporation; Vice President & General Counsel, AlliedSignal Automotive; Partner, Dykema Gossett PLLC (Beetle).

<sup>1</sup> Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239 (1984).

<sup>2</sup> JÜRGEN HABERMAS, *ON THE LOGIC OF THE SOCIAL SCIENCES* (tr. Shierry Weber Nicholsen & Jerry A. Stark, 1990).

laws capable of predicting, based solely on previous observation and logic, what would occur if the same conditions presented themselves in the future.

In the late nineteenth century, there developed for the first time something known as “social science,” in which this same “nomological-deductive” approach came to dominate the methodical study of human affairs. 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 now 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 privileged. My argument is not that Gilson’s theory of value creation fails as a matter of explanation. It is that the explanation is not entitled to privileged epistemic status (i.e., worthy of being taken as true), particularly as against cultural or hermeneutical explanations of the role of the lawyer in the transaction process. To put this a different way, Professor Gilson said this at a recent conference of a deal practitioner turned legal academic: “He was a beetle before he was an entomologist.” The implication is that the entomologist’s view of the beetle’s place in the world has a privileged epistemic status over the beetle’s perspective.<sup>3</sup> I disagree, or at least I think the matter needs to be explored. This is not the first non-mammalian metaphor used by an economically inclined legal academic to demarcate those who study and those who are studied. As Richard Posner so colorfully explained rational actors as they appear to economists studying them objectively: “it would not be a solecism to speak of a rational frog.”<sup>4</sup>

To be blunter about it, Professor Gilson’s explanation of value creation is on 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

---

<sup>3</sup> D. Gordon Smith, “He was a beetle before he was an entomologist,” *The Conglomerate*, <http://www.theconglomerate.org/2008/11/he-was-a-beetle.html> (Nov. 15, 2008). 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 Gilson’s overall project, in that I am also a beetle turned entomologist. I prefer, however, to think of what I do as “making sense” of my life as a beetle. Therein lies a subtle difference. I did not before hearing from him, nor since, think he was attributing privileged status to lawyer-entomologists over lawyer-beetles. Nevertheless, the reason the quip is clever is because it suggests that the objective study of the beetle provides access to scientific truth, whereas merely having the experience of a beetle does not.

<sup>4</sup> RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW*, 6<sup>th</sup> ed. 17 (2003).

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 won't work, 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 that "[t]he increase must be in the overall value of the transaction, not merely in the distributive share of one of the parties. That is, a business lawyer must show the potential to enlarge the entire pie, not just to increase the size of one piece at the expense."<sup>5</sup>

This is a key move (and one worthy of a good lawyer) because how Gilson frames the issue largely dictates the "scientific" 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-enhancing status favorably, and the "neutral but still positive view offered in the academic literature."<sup>6</sup> That is to say, everybody seems to agree there is a relationship between the lawyer's involvement and transaction value; 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 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 deals, sometimes subtract economic value, but also appear during the deal for the same reason neckties do: it's part of the ritual. There is no intrinsic reason they have to be there. Lawyers, like neckties, have value, not because they necessarily make the pie bigger, any more than neckties make the pies bigger, but because somebody values the lawyer enough to pay more for her to be there than it cost for her to get there (marginally speaking, of course). That's the reason we buy \$75 neckties and Rolex watches as well. But we don't feel a need to justify the presence of the necktie or the watch in connection with the value of the transaction other than to buy the necktie or the watch. In other words, why not assume lawyers are there because they have value to their clients, rather

---

<sup>5</sup> Gilson, *supra* note 1, at 246.

<sup>6</sup> *Id.*, at 241-43.

than assuming that they are there because they have value to the transaction?

It is the word “value” that is value-laden. What if lawyers’ involvement in business transactions is explained by economic value, but might be also be explained not in a nomological-deductive way, but by their cultural or hermeneutic significance? That is, we look not necessary for value in the lawyer-client relationship but *meaning*. I am persuaded by years of observation of great lawyers (I have met Jim Freund, whom Professor Gilson cites regularly, but I never saw him in action) that their involvement may be valuable, but it is also meaningful. The linkage of that involvement to the law, however, is attenuated. Some have suggested that the real role is akin to deal manager or quarterback. That strikes me as an aspect of leadership, something business schools teach, but with which law schools and law (qua law) struggle immensely.

Consider the analogy to the role of a rabbi in a Jewish wedding. A Jewish marriage is not a sacrament. It is a contractual relationship, evidenced by an agreement called the *ketubah*. The ketubah is a standard form drafted by rabbis, who in this regard can be considered practitioners of Jewish civil law. In traditional practice, it is signed at the betrothal or engagement, not at the actual marriage ceremony, and is considered more important than the ceremony. Nevertheless, the rabbi officiates at a ceremony, even though the marriage itself consists of commitments the bride and groom make to each other. Rabbis get paid for doing this. Should assume that rational spouses-to-be would only pay the rabbi if he (now or she) added value to the transaction, given that the rabbi is not a legally mandatory part of the process? Or is the role of the rabbi somehow meaningful to the participants apart from the impact the rabbi has on the marriage transaction?

As another beetle turned entomologist, I find just as much explanatory power in seeing lawyers’ involvement in the deal process as part of a ritual or ceremony that creates a physical contract, and which gives the parties some limited assurance of certainty in a highly uncertain and contingent world. I find it equally plausible that lawyers would continue to be present in deal making even if we found they do nothing to make the pie bigger. They are necessary, and they do have value, but value as meaning. Their value is in what they do to give the parties the courage to overcome fear, panic, seller's remorse, buyer's remorse, and risk averseness.

Professor Gilson might well concede all of this, but the implication is

that there is something privileged about his particular method of explanation, and that is what I want to address. Why do I mean by privileged status? In 1997, Nobel laureate Amartya Sen published an essay criticizing the foundations of rational actor theory, arguing that the prevailing rational theory of preference failed sufficiently to account for the behavior he termed “commitment.”<sup>7</sup> Some years later, Eric Posner responded: “[S]imply assuming that people operate out of principle *and* rational calculation gives one less methodological purchase than the ordinary rational choice assumptions do, without, as far as I can tell, compensating for this loss by producing a methodological gain.”<sup>8</sup> In short, if you cannot measure the variable sufficiently to prove the hypothesis, the hypothesis is not science, and therefore not entitled to privileged status as truth.

My point is that Sen’s concept of commitment or my theory of lawyering may well not be privileged as scientific truth, but neither is Gilson’s classic explanation of the value of lawyers to the transactional process. Robert Ellickson described the issue charitably as “creative tension between the yin of social-scientific universalizers and the yang of humanistic particularizers.”<sup>9</sup> Gilson, I think it is fair to say, expects that his explanation is an instance of social-scientific universalizing. My suggestion is that it is at best on the borderline of science. To resolve that issue, we need to revisit the demarcation issue - what distinguishes science from pseudo-science? Put another way, I am arguing conceptually there is simply no way ever of proving or disproving the theory, and as such it loses its privileged status as “scientific.” 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). Again, I repeat, this is not a criticism of the creativity or the brilliance or the power of Gilson’s explanation; it is 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 theory measures up. Professor Gilson acknowledges: “a truly empirical approach to measuring the impact of a business lawyer’s participation seems

---

<sup>7</sup> Amartya K. Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 PHIL. AND PUB. AFF. 317 (1977) (a transcript of the Herbert Spencer Lecture, delivered at Oxford University in October, 1976).

<sup>8</sup> ERIC A. POSNER, *LAW AND SOCIAL NORMS* 192 (2000).

<sup>9</sup> Robert C. Ellickson, *The Twilight of Critical Theory: A Reply to Litowitz*, 15 YALE J. L. & AND HUM. 333, 333 (2003)

impossible.”<sup>10</sup> Nevertheless, his methodology is an interesting one. He accepts the capital asset pricing model, a theory that describes what factors ought to matter to buyers and sellers in valuing the asset to be sold. He then engages in a thought experiment, walking through the provisions of a typical acquisition agreement to determine whether, as a matter of reason rather than observation, there is a connection between what the agreement does and the factors in the capital asset pricing model.<sup>11</sup> “That is,” Professor Gilson tells us, “it would be possible to inquire positively into the efficiency of the common ‘lawyer.’”<sup>12</sup> Not surprisingly, he concluded there is a connection, and enough of one to propose normative conclusions as to what lawyers should do if they want to enhance value.<sup>13</sup>

---

<sup>10</sup> Gilson, *supra* note 1, at 247.

<sup>11</sup> Professor Gilson spends many pages on the information-exchanging value of representations and warranties, and puzzles over the lack of any indemnification mechanism in public company deals (the representations and warranties expire at closing largely because once the proceeds in stock or cash are distributed to widely dispersed shareholders, there is no putting Humpty-Dumpty back together again). He acknowledges that indemnification may be partial or limited in time (there's also the "basket" or deductible, but he doesn't mention that), but the real questions, it seems to me, are (a) whether backward-looking information in the representations and warranties is all that important to the deal, versus the softer forward information that is extra-contractual and conveyed by management presentations, plant tours, customer interviews, etc., and (b) whether the actual instances of acting on the indemnification clauses warrant the investment in the representations and warranties, given that escrows may not be all that common. My guess is representations and warranties have a certain amount of *in terrorem* effect, but neither of us have a whole lot of data to go on. Professor Gilson also extols the value-creating potential of the earn-out provision, but it's not clear to me that lawyers invented that concept, nor that earn-outs turned out to be very successful tools for compromise.

The one empirical study of which I'm aware on this subject is by Steven Schwarcz, and it is based on surveys of clients who hire transactional lawyers. Steven L. Schwarcz, *Explaining the Value of Transactional Lawyering*, 12 STAN. J. L. BUS. & FIN 486 (2007). To quote Professor Schwarcz's SSRN abstract: "Contrary to existing scholarship, which is based mostly on theory, this article shows that transactional lawyers add value primarily by reducing regulatory costs, thereby challenging the reigning models of transactional lawyers as 'transaction cost engineers' and 'reputational intermediaries.'"

<sup>12</sup> *Id.*, at 249.

<sup>13</sup> If I were to apply an economic model to lawyers in deals it would be the Prisoner's Dilemma. Both clients would be better off cooperating by throwing all the lawyers out of the room for most of the issues in the deal, hence eliminating the transaction cost of arguing over myriad reps and warranties and other contract niceties that don't make any difference anyway. So imagine a Prisoner's Dilemma matrix with Party A and Party B, and the choice for each is "Lawyer" or "No Lawyer." The payoff for each side choosing "No Lawyer" is a huge reduction in costs (say, 5, 5) compared to both sides choosing "Lawyer" (say, 10, 10) But both sides keep their lawyers, for fear of the (1, 20) or (20, 1) outcomes in the Lawyer/No Lawyer boxes that are akin to one prisoner confessing but the other one not.

The first significant and influential theory of scientific demarcation was Popper's falsification principle. I will allow that Gilson's thesis cannot presently be falsified by empirical evidence, for the very reasons Gilson suggests. I do not intend to use that as my basis for challenging its privileged status because there are theories in the physical sciences that also cannot presently be falsified, nor is there any presently foreseeable means for learning how to falsify them. Instead, I propose "a tale of two theories" to demonstrate the point. The first theory is unquestionably scientific, but not presently falsifiable. Under the theory of genomic imprinting developed by David Haig, an evolutionary biologist at Harvard, certain conditions in pregnancy (e.g., the condition known as preeclampsia) is the result of maternal-fetal conflict over uterine resources.<sup>14</sup> Natural selection theory suggests that paternal genes expressed in the fetus favor the survival of the fetus over the survival of the mother, whereas maternal genes so expressed would favor the survival of the mother over the fetus. The experimental evidence has shown that genes indeed carry an imprint marking whether they come from the mother or the father. Two non-geneticists have recently applied the Haig theory to mental disorders. Brain chemistry genes expressed from the mother tend to create sensitivity to mood in oneself and

---

Indeed, Professor Gilson alluded to this as a way perhaps of a rational explanation to the sociological question about the relative paucity of lawyers in Japanese business, albeit by way of comparison to American business. The standard explanation of cooperation in Prisoner's Dilemma games is repeat play, where the prisoners learn to trust each other and to cooperate to the optimum solution. Gilson, *supra* note 1, at 310, n. 196. Professor Gilson's speculates that in Japan the players have learned by repeated play that they will work out their future differences without opportunism. That means lawyers are simply not as important in that society. Professor Gilson wants to argue, I think, that American lawyers *actually* constrain opportunism by contract as much as Japanese culture *actually* eliminates opportunism. That means accepting the empirical assertion that American contracts actually constrain opportunism. (I have argued elsewhere that they do not, at least to the extent that future disputes involve the conflicting interpretations of language as to which there is no other dispositive evidence of "mutual intention." Jeffrey M. Lipshaw, *The Bewitchment of Intelligence: Language and Ex Post Illusions of Intention*, 78 TEMP. L. REV. 99 (2005).)

What if the better explanation is that the Japanese really are less opportunistic, American lawyers indeed do not create value in transactions, but their presence in transactions is instead a rational game-theoretic response to what the sociologists would describe as American *gesellschaft* versus Japanese *gemeinschaft*? See ALEX INKELES & DAVID H. SMITH, *BECOMING MODERN* 15-35 (1974). Indeed, it may well be that it is American culture that is exceptional in this regard. At least until the onset of globalized law firms, German contracts were also shorter, and in the view of at least two other observers, explainable by a real difference in how the German business community viewed opportunism over cooperation. Claire A. Hill & Christopher King, *How Do German Contracts Do as Much with Fewer Words?*, 69 CHI.-KENT L. REV. 889 (2004).

<sup>14</sup> See DAVID HAIG, *GENOMIC IMPRINTING AND KINSHIP* (Rutgers U. Press, 2002).

others: at the extreme, psychosis like schizophrenia and bipolar disorder. Genes expressed from the father tend to favor focus on patterns, objects, and systems over social development: at the extreme, Asperger's Syndrome or autism. There is presently no experimental methodology for testing the theory. Nevertheless, it is a contribution to science, not pseudo-science. The *New York Times* reported:

“The reality, and I think both of the authors would agree, is that many of the details of their theory are going to be wrong; and it is, at this point, just a theory,” said Dr. Matthew Belmonte, a neuroscientist at Cornell University. “But the idea is plausible. And it gives researchers a great opportunity for hypothesis generation, which I think can shake up the field in good ways.”<sup>15</sup>

The value-creation theory, unlike the application of the genomic imprinting theory, is conceptually not falsifiable. The existence of a genomic marking that explains mental disorders is independent of theory. In contrast, value creation as posited by Professor Gilson is theory-laden in the sense that Ian Shapiro criticized in *The Flight from Reality in the Human Sciences*.<sup>16</sup> What comes first is the economic model and its assumptions about value and rationality, which is imposed on a linguistic exercise, which is in turn an imperfect model of a complex world. The economic theorist of human rationality would like the conclusion to have the patina of science, but it is not science. That is not to say it is without explanatory power, but that power is entitled to no greater deference as a statement of truth (rather than, say, belief or normative judgment) on account of science than hermeneutics, cultural studies, or philosophy. It is instead, perhaps, the social entomologist's delusion of objectivity.

---

<sup>15</sup> Benedict Carey, *In a Novel Theory of Mental Disorders, Parents' Genes are in Competition*, N.Y. TIMES, Nov. 10, 2008.

<sup>16</sup> IAN SHAPIRO, *THE FLIGHT FROM REALITY IN THE HUMAN SCIENCES* (2005).