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The Third Man

Philip C. Bobbitt
Columbia Law School, pbobbi@law.columbia.edu

THE THIRD MAN

PHILIP BOBBITT*

Sandy is a divided man. On the one hand he is captivated by the notion of the theoretical and the explanatory, an idea that has captivated all of us since the 17th century. For Descartes, for Newton, for Freud, for Marx, for Levinson: theory is the foundation for understanding, and understanding for practice. How do they calculate the attraction among the planets? They apply the inverse square law according to the theories of Newton. How does Freud cure his patients: he explains to them why they've been behaving so peculiarly; he does this by expositing his theory. How does Marx arouse the sleeping masses: he explains to them why they're not rich even though they, not the rich, are the ones working so hard. His explanation is an account of his theory.

This is why Sandy begins by saying: I want to address the question of why I do what I do. For Sandy, this is the foundational question, and he feels no self-consciousness in assuming he can answer it, even though he would be quite dubious if a judge purported to say in an opinion why he had reached a certain decision.

But there is a second Sandy, a man who is skeptical of theory as a guide for action. Indeed, having become disillusioned with an activist role—he tells us he became a lawyer to work for change, never dreaming that things would change all right, though precisely in the opposite direction from his hopes—he fled to theory for relief. One almost gets the idea that, like G.H. Hardy, he would be slightly appalled to discover a practical application of his work. Richard Rorty, not Rene Descartes, is his mentor. When Sandy asks: for whom do I write, he is describing a conversation, not an exposition; he is focusing on the vocabulary of shared approaches.

These two persons run through his paper like light and shadow, like two Commedia dell'Arte players running through a medieval city so that just as you catch a glimpse of one, the other disappears.

And there is a third man: the person after whom the first two are chasing. We never actually see him; we must infer his presence. This is the writer and scholar that Sandy will become. When Sandy says his goal is to encourage the other academic members of this conference to reflect on these questions, the third man must be one of them.

* The Counselor on International Law at the United States Department of State.

Let us follow these three through the paper. The first Sandy asks what he does and answers this by saying he is a meta-theorist. Indeed he preempts me from ridiculing this term by announcing that I am one too. By this he means that he and I are interested in descriptions of theory, as opposed to their applications. Yet while I have not renounced the ordinary work of distinguishing cases, fashioning doctrines, and worrying over the persuasiveness of my efforts, Sandy has clearly left this work behind. What else are we to make of a claim that, when asked how many amendments there are, he is at a complete loss?

When Sandy says the answer "26" is without "theoretical interest"[1] he means just the opposite. For Sandy, unlike the practicing lawyer or judge, the answer is of profound theoretical interest because it is so banal. Surely so momentous a question has a better answer. What were the true Ackerman changes that deserve the name of amendment? And what were the covert, McCloskeyean changes that were never formally ratified?

I confess I have a little trouble with this; the issue seems to turn on a pun, or double entendre played with the word "amend" and I think this can be clearly shown to be a non-issue if one simply asks how McCloskey or Ackerman can number their amendments. And if there is no agreed upon system or ordination, then they cannot in fairness claim to present a real alternative to "26." Sandy compares law to a Schubert sonata.[2] I wonder if there is some legitimate doubt as to the basis for their numbering?

Although his concerns are contemporary, his perspective is modern; that is to say, it accepts the premises of modern thought and simply applies them to new material.

And is that not the answer to Sandy's first question: why do he (and others) apply these rationalist techniques to subjects of presumably little relevance to the practice of law? The answer is: he is looking for new material.

And why does he need new material? Sandy can't do doctrinal articles for the Supreme Court because there just isn't that much more to say. The Court is already doing these articles. One might say that the U.S. Reports has become the largest law review in history, written by many of the same people who apprenticed the year before on the University reviews, and explicated at a length and with a decorum that

1. Sanford Levinson, *The Audience for Constitutional Meta-Theory (Or, Why, and to Whom, Do I Write the Things I Do?)*, 63 U. COLO. L. REV. 389, 391 (1992).

2. *Id.* at 392.

would impress even the most tyrannical 3rd year note editor. The reason why Sandy doesn't do doctrinal arguments is just that.

Also, Sandy doesn't believe anymore. He analogizes himself to those professors in religion departments who are really querulous anthropologists describing primitive practices with respect to which it would be a lapse in taste to ask if they actually engaged in such practices themselves.[3] Sandy doesn't believe in the integrity of the doctrine, or its purity. Most people don't I suppose. But, although such atheism may sound radically contemporary, it is in fact the product of the sort of rationalist expectations that undergird the social sciences and have their roots in essentially positivistic thought. Expecting scientific perfection, one can hardly bring oneself to believe in anything as personal as the outcome of a law case. There are two interesting questions the first Sandy (the meta-theorist allegedly without illusions) does not address: first, can there be a theory of no theory? (The Cretan or Liar's Paradox); and what does one do with the cultural artifacts of our age when these have lost their hold on us, as they will? For us, psychology, sociology, and political science are the pyramids of our age, our artifacts of the same imposing grandeur and the same fundamental uselessness. When these have been consigned to museums and vaults, what will the meta-theorist use to prosecute his or her enterprise?

I now turn to the second Sandy, the one who asks a very contemporary question: For whom do I write? Sandy rejects the first answer, "judges" but this may be premature. I would observe that, if the judge can manage the time for such learning, that he or she is more likely to be helped by Sandy's contributions on the literary or critical side than on the doctrinal side since the judge has ample resources for the latter but little connection between the outside culture of art and science and the daily practice of law. I think this goes to Tushnet's point about judgment, an important and I think right conclusion. Instead, Sandy says that he writes for other academics. And this is why I identify him as the second Sandy: for the recognition that the criticism of the legal enterprise is self-contained, like the recognition that the law itself is self-contained, is a post-modern idea and one that is more irritating than congenial to most persons.

But Sandy's statement raises some interesting questions too. First, what is the purpose in teaching these post-modernist ideas, since our students are unlikely, at Texas anyway, to become law professors? If Sandy is writing for other academics in the way that the articles in Speculum, for example, are meant for specialists in medieval history,

3. *Id.* at 393.

then is he writing for his students? And if not, doesn't this sever teaching from writing?

The third man is, as I say, the most elusive. Sandy's third objective, you will recall, is to promote others to reflect on these issues. Yet when Sandy writes, "Many of us meta-theorists assign some version of politics as the explanation [of a decision] rather than ascertainable fidelity to the judicial craft"[4] he is preempting others' independent reflection. Similarly, when he disclaims that any particular legal rationale is inevitable and says instead that "all could be explained by the contingencies of the surrounding social and political orders"[5] he is not engaged in prompting others to reflect on the work. He, like McCloskey, is simply telling them why they do what they do. Since this appears without a trace of embarrassment, as if the ways in which we described the "social and political orders" are not just as contingent as legal descriptions, I must hope that the third man slays this Oedipal Father McCloskey.

Similarly, I was perplexed by Sandy's story about the Justice and the academic. You remember: some weary Supreme Court Justice is visiting Austin and over dinner, for heaven's sake, a colleague of ours begins assaulting him with criticisms of a recent opinion of the Justice's. Sandy says: "What *was* disturbing, however, was what I perceived as [Scalia's] barely concealed lack of interest when [Laycock], one of the country's ranking scholars on the complex issues of religion and law, mentioned that he was about to publish an article taking issue with [Scalia's] extremely important and controversial opinion written the previous term. . . ."[6] Come now. If Sandy is right about the academic enterprise then the *least* helpful thing the professor could have done was to write an article, much less publish one and foist it off at dinner, on a subject and in a manner that meta-theory seems to disparage.

So, I put this question to Sandy: Is it true that theory in law is foundational in the way that theoretical physicists claim their work is foundational for experiments, or that physics itself is fundamental to, say, chemistry? Either way, whether theory is foundational or not, an article disclaiming foundationalism would be of little nourishment to the judge seeking guidance. But then perhaps it was the third man who was serving.

4. *Id.* at 400.
5. *Id.* at 402.
6. *Id.* at 405.