Vanderbilt Law Review

Volume 14
Issue 1 *Issue 1 - December 1960*

Article 16

12-1960

Justice, Language and Communication

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JUSTICE, LANGUAGE AND COMMUNICATION

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I. Conditions of Fruitful Inquiry Concerning the "Meaning" of Justice

A. Linguistic Inquiries as to the Meaning of the Concept of "Justice"

If, as has been urged,[1] difficulties of human communication center attention on basic concepts, it is right and proper that the search for clarity about the concept of "justice" should have received high priority in efforts to promote international understanding, such as those of the United Nations Educational, Scientific and Cultural Organization.[2] In order to promote "communication" and "understanding" elaborate studies have been entered upon to ask: "What does 'justice' mean?" No one can doubt the earnest idealism or devoted scholarship which have inspired both the planning and execution of these studies of the meaning of justice. But this fact only increases the importance of ensuring that methods of inquiry should not be adopted which, instead of helping people to be clear and improving "communication" and "understanding," in fact lead to "solutions" which produce only additional obscurities.

The present interest, then, is in the concept of justice and in certain methods of clarifying it. The methods under criticism pertain to the role of language and especially syntax in explaining the meaning of certain kinds of concepts, of which "justice" is an important example. But it will be found that at least some of the conclusions to be drawn have a bearing on the language of law as well as on that of justice. The studies of "justice" above-mentioned were part of a general plan laimched in 1950 to examine words which are (a) important to com-

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1. See McKeon, *The Meanings of Justice and the Relations Among Traditions of Thought*, 41 Revue Internationale de Philosophie 253-59 (1957); cf. Stone, Legal Controls of International Conflict xxxvii-xliv (1954); Stone, Problems Confronting Sociological Enquiries Concerning International Law, 89 Hague Recueil 93-114, 158-75 (1956).

2. On the UNESCO Project, see McKeon, *The Meanings of Justice and the Relations Among Traditions of Thought*, 41 Revue Internationale de Philosophie 253-59 (1957).

munication in a free world, and (b) used in different contexts with suspected differences of meaning-coverage. Pursued independently by scholars of different linguistic cultures, they were meant to fix the meaning which these words have historically assumed in each different language. In the project on "Justice," five scholars, namely E. Garin, L. Recasens Siches, G. Vlastos, Ch. Perelman and W. G. Becker, provided papers dealing with "the meaning of the term and its evolution within the context of the philosophical tradition" in the Italian, Spanish, English, French and German languages respectively.[3]

In all the languages considered, "justice" is in a grammatical sense the abstract noun corresponding to an adjective. In all the languages considered, excepting German, both the noun and the adjective derive from the Latin adjective and noun, *"iustus"* and *"iustitia."* In Latin, the noun derived from a noun *"ius,"* having a wider coverage than the English "law." It is controversial whether the noun *"ius"* originated as an adverbial form—the oldest texts seem to testify that *"ius"* is only found in phrases such as *"ius esto"* or *"ius est"*—where modern scholarship indicates that the usage of *"ius"* cannot be patterned exclusively as either a noun, or an adjective, or an adverb in the grammarian's sense.[4] In German the connection between the noun and the adjective is rather vaguer. First, there are there two adjectives *"richtig"* and *"gerecht"*; second, the connections of *"Gerechtigkeit"* with *"richtig"* are not so strong and manifest in German modern usage as in other languages. Both noun and adjective in German are connected with a noun *"Recht"* which, as is commonplace, has an ambivalent reference to both "law" and "right." In turn, this noun originated as an adjective, the original meaning of the root-word of *"recht"* being "straight." It was the vulgar Latin *"directum" (diritto, derecho, droit, right)* which early showed a tendency to become a noun and to replace *"ius"* and its derivations in contexts which now we would label as legal contexts.[5]

3. The essays are printed in 41 REVUE INTERNATIONALE DE PHILOSOPHIE (1957).

4. Attention has been called to this by Orestano, *Dal Jus al Fas,* 46 BULLETIN DELL' ISTITUTO DI DIRITTO ROMANO 194 (1939); *Elemento Divino ed Elemento Umano del Diritto di Roma,* 21 RIVISTA INTERNAZIONALE DI FILOSOFIA DEL DIRITTO 1 (1941). *Cf.* Pisani, *Fas e Jus,* 33 ARCHIVO GLOTTOLOGICO ITALIANO 127 (1941); Goidanich, *Fas e Jus: Concetti ed Etimi,* 3 ATTI DELLA R. ACCADEMIA D'ITALIA MEMORIE. CLASSE DI SCIENZE MORALI, 499 (S. VII, 1943). The latter has influenced the general thesis of M. Villey, *op. cit. infra* note 5.

5. The adjectival side of such a word has long been known. See, *e.g.,* W. CESARINI-SFORZA, "JUS" E "DIRECTUM" (1930); but for the present trend, especially in France, to stress the adjectival side in order to analyze their function, see VILLEY, LECONS D'HISTOIRE DE LA PHILOSOPHIE DU DROIT pt. I (1958). His point is that we cannot describe law in terms of "rule" or "norm" because it consists always of a set of adjectivations bearing elements of justice. Villey, *Une Definition du Droit* [1959] ARCHIVES DE PHILOSOPHIE DU DROIT 47-65. Professor Villey supports his thesis by stressing usages of the

B. Necessary Ambit of Linguistic Inquiries About Justice

The study of the range of meaning in different languages of roughly correspondent abstract nouns, such as "justice," indissolubly connected with an adjectival function of an "evaluative" character, entails a number of problems calling for stipulations as to the precise ambit of the proposed inquiry. These problems arise from the structure of an adjectival function of the above character. To illustrate these problems, we employ the symbol x to stand for "just" or its corresponding term in another language. We employ symbols a, b, c, to stand for particular descriptions of a course of action; corresponding capital letters A, B, C, to stand for classes of courses of action of which a, b, c, are respectively assumed to be members; the Greek symbols α, β, γ, to stand for proper names (nouns) in the grammarian's sense, and the same Greek symbols underlined for classes of men. In these terms the following types of statements about justice may be made:

Actions and Classes of Actions

a is x (John Doe's yesterday's giving his friend Richard Roe $100) was just.

A is x (John Doe's giving his friends $100) is just (1).
(John Doe's giving his friends in state of need) $100 is just (2).
(John Doe's giving his friends in state of need a sum of money) is just (3).
(One's giving sums to one's needy friends) is just (4).
(One's giving sums to needy men) is just (5).
(One's giving support to needy men) is just (6).

Examples of "A is x" need not be further multiplied.

Men and Classes of Men

γ is x John Doe is just.

$\underline{\gamma}$ is x The Chief of the State (*i.e., qua* Chief of the State) is just.

Now the study of the range of "meaning" of the abstract evaluative adjective x and of the abstract evaluative noun of the quality x-ness[6] divides itself up into the following different analyses:

1. Adjectivation in Terms of Just.—One is the analysis of what

term "droit" which are connected with the Aristotelian-scholastic tradition, which (we point out) are nowadays found in common language, rather than in lawyer's language.

We are not concerned in the present article with description of the legal phenomenon, but only with what some verbal symbols for it are used to do. It will reflect on Villey's positions (insofar as his ideas refer to *what law is*) only as to his failure to distinguish between common language and lawyer's language in modern times. On this see section IV *infra*.

6. We here use "quality" as the substantive of the adjective "*x*."

x-ness is predicated of, or has been predicated of, in common language and/or in one or several special, including technical, and "technicized" (*i.e.*, imperfectly technical) languages.[7] This entails a set of researches of a historical semantic kind on the "meaning" of "just," the lexical meaning of "just" being the result of an analysis of the sum-total of the contexts in which it has been and is employed. Such researches are complex and divide themselves in turn into different sub-researches.

Thus, the analysis of the propositions of the type "*A* is x," in which the phrase which is the subject of the proposition contains words which stand for classes (of actions or of men), requires analyses of cultural processes, sometimes extremely complex. What it may be just for a man to provide for his guests, as some supposed Eskimo rules of hospitality may suggest, is a function of such processes. The more abstract forms of this type (such as forms (4), (5) and (6), in particular), are of the patterns of generalizations inseparable from *Weltanschauungen*. These are the forms in which "ideologies"—in our case the ideologies of justice—usually[8] organize themselves.

But the analysis of what x-ness is predicated of, can also relate to the "γ is x" (John Doe is just") kind of statement. Here the inquiry entails the analysis of the characters of particular men, or of classes of men, who in a given culture are said to be x. They are analyses, in short, of the historical modifications of the γ or $\underline{\gamma}$ who is x. Adjectivations about a man as a whole in evaluative contexts have become in some instances keywords of a determinate culture, as *"honnête-homme"* in certain periods of French civilization.[9] They

7. For clarity in the following discussion we specify the meaning we attribute to certain key terms. *Special language:* usage of a particular group or class of persons. *Scientific language:* language where the terms are defined and the rules of transformation of propositions are agreed. *Technical language*: language where the terms are defined for the usage connected with some skill or art or profession. *Technicized language*: language where some *but not all* of the terms are defined for the usage of a skill or art or profession. Scientific languages, technical languages, and technicized languages are all special languages. In the last section of this essay we shall refer to a special language used by a professional group and structured on a system of (deductive) logic. Such a language is (a) special, (b) scientific (insofar as it is structured on a system of logic), (c) technical (insofar as it is used by a professional group). As will emerge in the last section, a special scientific technical language need not be the only language used by the professional group in question. For insofar as members of the professional group use undefined terms and transform sentences without predetermined rule, that part of their whole language is neither technical nor scientific. This, of course, does not imply that it is bad, or that it is possible for the group in question to speak only a scientific or technical language.

8. The connection between ideologies and the "*A* is x" form of expression is not a necessary one. (In fact some ideologies have found expression in "γ is x" statements, such as *"Hitler ist gerecht,"* and tended to be translated into "$\underline{\gamma}$ is x" form such as *"Der Führer ist gerecht."*)

9. Such studies are cultivated by linguists with strong sociological interests,

then become more and more "descriptive," but without losing their evaluative character. To a smaller degree, all evaluative adjectivations about men tend in a determinate culture to become descriptive to a certain extent; and to this "a just man" is no exception. It would be easy to find statements in which such an expression is used as a description of a person (in gross, as it were) although it would not be easy to formalize a research in this field. Such usages are normally connected with standards of convivance, of "live and let live," largely conditioned by social and economic structures.[10]

2. Translation of Adjective "Just" into a Substantive.—The second and different analysis entailed by the problem of what "justice" "means" is that of the transformations of the adjective into a substantive, the formation of a new adjective out of the substantive, and the degree of synonomy between the two adjectives. And this would have to include, essentially, factors of modification involved in the structure of a given language (but now in the sense of "tongue") as associations of sounds, and "tendencies" (for instance to produce abstract nouns).

3. Translations between Adjectivations of Acts and of Men.—Still a third and different analysis, also entailed, is the most complex of all. It is the analysis of historical modifications of the reciprocal relations of types of statement, for instance, like "*a* is *x*," "*A* is *x*," "γ is *x*," and "$\underline{\gamma}$ is *x*," with one another; and the analysis of the translations (as a matter of historical processes) of statements of one type into statements of either of the others.

This third kind of research is so complex because it covers a combined field resulting from the interplay of the results reached in the field of research *(1.)* and the field of research *(2.)*. It covers, for instance, the inquiry how far certain types of adjectivation of actions in terms of justice in determinate cultures, historical periods, and social conditions have controlled usage in later periods under different social and cultural conditions. So also usage in one language may have to be studied for its influence on usage in another language, through circulation of literature, translations, or personal contacts.[11]

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as G. MATORÉ, LE VOCABULAIRE ET LA SOCIÉTÉ SOUS LOUIS PHILIPPE (1951) and LA MÉTHODE EN LEXICOLOGIE (1953). On key-words see the latter book, at 67 *passim*, from which the example of the *honnête homme* has been taken. On this trend in historical semantics, to which belong also A.J. Greimas, B. Quemada and P.G. Wexler, some account and bibliographical notice can be found in S. ULLMAN, THE PRINCIPLES OF SEMANTICS 312 *passim* (2d ed. 1957).

10. We may observe that such usages give arguments (although not generalisable and therefore not conclusive) to philosophical theories about the descriptive nature of evaluations and imperatives.

11. Personal contacts, differently from circulation of literature and translations, affect not only the more educated classes (which provide diplomats, travellers and merchants), but also the less educated classes (as in the increasingly common cases of foreign armies settled for a time in a territory).

This is the field where the circulation of religious and political ideas is most relevant. It is well-known—and was an assumed basis for the UNESCO project—that religious and political groups create special usages in which common-language words assume different (and sometimes widely different) connotations, and are thus creative of breakdowns of communication. Educational patterns are another source of special usages in a determinate tongue. Thus, the English language, in general, seems to shun abstract nouns when adjectives can be used; but some abstract nouns, among them "justice" and "the rule of law," have become familiar, and have come to evolve independently from the related adjectives. One reason for such exceptions lies certainly in the fact that the Bible was for generations the most widely-read book in English-speaking countries, and that in the prevailing versions of it, the Bible speaks a language where "law" and "justice" are significant in their substantive abstract form, being related to God, whereas the adjectives generally refer not to God but to men, and have therefore independent and different connotations.

The interplay of usages with which this branch of the analysis is concerned creates shifts of meaning. For instance, a religious outlook furnishes a standard of approval, of "justice," according to which determined types of actions are approved or just. We are on the level of propositions "*A* is *x*." But suppose that the actions of the type *A* are practiced, in a determinate society by the more influential segment of the population, and that this part of the population for some reason insists very much on its actions being *x*. Now suppose also that for some reason the actions interpreted as being *x* are courses of action favorable to the acquisition or retention of power by the persons practicing them; and also that, for some reason, the men of that segment tend to exclude from normal relationships those elements of the community about whom it is not reasonably certain that their actions will in future be *x*. In that case the *x* as referring to the excluded individual is referred to a man, and we are confronted with a translation (roughly speaking) from "*A* is *x*" to "γ is *x*."

Such a translation, however, is not a true translation, for two reasons.

Firstly, there would, in fact, be no men whose actions are *all x*, such consistency being (happily or unhappily) not of this world. Thus, to say "γ is *x*" cannot be the same as saying: "All the actions of γ are *A* and therefore are *x*." In other words, to say that "γ is *x*" is not an elliptical form of speaking of a set of actions of the type *A*. Necessarily, in order to reach "γ is *x*," it is necessary to modify the very value of *x*. If *x* was a rigid standard now it becomes an elastic standard; the two standards are not really the same concept; for

instance, the concept of "sinner" is not *precisely* reducible to the concept of "sin."

Secondly, in attributing a quality to a man as a whole, it is extremely likely that the quality will be modified by some features which are not entailed by the quality when referred to an action or a type of action, but by some collateral feature of the man. In the exemplified hypothesis, it would be likely that other qualities, which together characterize the group of the influential and powerful members of the community, would enter into the process of excluding a person from full membership. It is even possible that, in the long run, the association of being x and being powerful in the group might become so close, that in order to decide whether a person is x, people may come to inquire whether he is powerful. Now, if the power is *simply* the result of being recognized as x, such inquirers are involved in circular reasoning, and they may be sent gravely wrong by the line of inquiry. For while power here does create an order, the order that they here see may be related not only to actions A, but also to actions B, which are neutral with respect to x, but relevant to the transmission of power, for instance through heredity or through co-optation. In that case, a person might become powerful, and yet be not x, even though he might have some interests which have the appearance of being x, in deference to the order which entails that actions be approved actions. In this case, then, a person deducing x from the presence of power may predicate x of persons who are not really x in the original sense. Once this practice becomes rather general, some theorist might well begin to theorize about x as a function of power, or of B, or of C actions. The concept x still exists, but its "meaning" has changed.

All these different fields of analysis are involved in the enterprise of clarifying terms like "justice," and they are all research in historical semantics. It is necessary to question the past, in order to grasp the associations which in a particular time and place are attached to a term, and to be able to establish in a reasonably warranted way what our fellow-man-of-another-culture may be implying when he uses such terms as "justice." It is clear that the UNESCO project was undertaken without adequate preliminary specification and differentiation of such fields of analysis. A part of the purpose of this article is to suggest the relation between this failure and the kind of results reached in one of the most notable of the contributions, thus setting the stage for the main problem indicated in the title.

C. "Meaning" of "Justice" and Common and Philosophical Usage

This, however, is not the only difficulty with the UNESCO project under discussion. Not only was its ambit inadequate for achieving its

stated purposes, but further examination also suggests that the research pursued was the wrong research to pursue for the stated purpose.

The stated aim of the research was to clarify the meaning of "justice," *as a word employed in common usage.* The "first step" was conceived as an analysis (1) *by philosophers,* (2) of the meaning of justice *in philosophical context,* (3) under a scheme of division of labor according to languages. This work-plan for "the first step" seems subject to the following questions.

First, since the main philosophical usages are already sufficiently well-known, why spend so much effort on them?[12] Second, since philosophical usages tend to be the ones more[13] independent of common linguistic vehicles, how could they be a key to common usage? Third, since, apart from philosophies which have become political ideologies, philosophical usage is not even one of the most influential among the usages, why does it call for such high priority? Fourth, so far as concerns philosophies which have become political ideologies, since their circulation generally transcends language borders, is not the method adopted, of division of work according to languages, a grave handicap? The fifth question arises from the fact that philosophical usage, besides influencing linguistic developments only little, is also little influenced by common linguistic usage. Philosophers often proceed rather by merely re-defining words for purposes of the knowledge-system or (more recently) the methodological-system, dropping segments of experience which do not fit, and contenting themselves that the examination of what remains *is to some purpose.*

12. There is a sea of literature on conceptions of "justice" in particular schools of thought, or in particular times or places, and there are books, in which all the philosophical conceptions of justice from the Greeks to the present purport to be recorded and classified. See, *e.g.,* G. DEL VECCHIO, JUSTICE, AN HISTORICAL AND PHILOSOPHICAL ESSAY (1952) (translation of 2d ed. of 1946) and numerous works of Roscoe Pound, the latest his *Jurisprudence,* vol. 1, at 463-547. Of course scholarly research in this history of ideas must go on, but it may be doubted whether a plan of research such as the UNESCO project on "justice" stimulates fruitful research in the history of ideas and of language, as distinct from merely turning over the existing heap of knowledge or arranging that heap according to the planners' classification.

13. In particular cases the dependence may still be very great. *Cf.* the much noted change of meaning or force of the German "Idealistic" vocabulary when translated into English, as compared with translation into French, Italian or Spanish. But generally the effects of the respective linguistic vehicles are greater in translation of common language terms than of philosophers' terms. The explicit *Weltanschauungen* of the philosophers, for instance, communicates better than the *Weltanschauungen* implicit in a tongue as a whole. Studies of these implicit *Weltanschauungen* are now beginning. See L. WEISBERGER, VOM WELTBILD DER DEUTSCHEN SPRACHE (1954). Comparative studies are still confined to linguistic cultures extremely remote from one another. *Cf.* especially LANGUAGE, THOUGHT AND REALITY—SELECTED WRITINGS OF BENJAMIN LEE WHORF (J.B. Carroll ed. 1956); CARROLL, THE STUDY OF LANGUAGE 43 *passim* (1953).

Whether such philosophies be systematical, methodological or ideological, their usage is thus consciously selective. How then can *their* usage be of first importance for understanding common usage? Sixth, in all these circumstances, it may be asked whether it is appropriate to charge philosophers rather than linguists and historians of culture, with the research involved. (Fortunately, in this particular project, however, the philosophers concerned were all interested in the history of culture.)

D. The Meaning of "Justice" and the Philosophic Study of Language.

The above remarks on philosophical usages of words apply also, for the most part, to philosophers and philosophies whose special concern is language. Many trends in modern philosophy are, of course, concerned to analyze linguistic expression from different aspects.

First, they have considered the structure of linguistic expressions to determine under what conditions a proposition can be said to be true; linguistic expressions are here considered as means for dealing with knowledge.[14] Second, such expressions may be considered as to their function, to determine the conditions under which their employment is correct; linguistic expressions are here considered as a means of conveying information, even though the information may not qualify as "knowledge" according to the more rigid verificational tests.[15] Third, attention has recently been given to linguistic expressions, still also in common language, as a means for conveying emotions, and in particular that of "approval."[16]

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14. We refer, generally, to the philosophical trends which analyze propositions as truth functions, such as atomism and neo-positivism. On atomism see B. Russell, *Logical Atomism*, in CONTEMPORARY BRITISH PHILOSOPHY (Muirhead ed. 1924). On neo-positivism see J. WEINBERG, AN EXAMINATION OF LOGICAL POSITIVISM (1936). On the relationship between atomism and neo-positivism, the problem of reductive analysis, the problems of propositions about generals, and of logical constructions, see URMSON, PHILOSOPHICAL ANALYSIS, pts. 1, 2 (1958).

15. For the beginnings of this way of analyzing, see URMSON, *op. cit. supra* note 14, pt. 3, with bibliography. On "dealing with knowledge" as distinct from "conveying information" see A. Sesonske, *Cognitive and Normative*, 17 PHILOSOPHY AND PHENOMENONOLOGICAL RESEARCH 1, 2-3 (1956).

16. This trend is nowadays very strong both in England and on the Continent. In England the title of Stephen Toulmin's book, *The Place of Reason in Ethics* (1950), might be more clearly expressed as "in what sense a moral statement can be said to be supported by a reasoned argument." The resulting reconsideration of argument in the sciences led to his essays now collected in *The Uses of Argument* (1958). After distinguishing the "force" of an argument from its "criterion," he advances the thesis that the "force" is independent of the field in which the criterion lies, so that we can study arguments as to their "force," without concern with the warrant of the criteria, which is of varying degrees for various fields. The thesis may be related to the old idea that arguments from necessary premises and from probable premises may be comparable (though of course the conclusions are in one case necessary and in the other only probable).

On the Continent, similar theses are related to the revival of studies of Greek rhetoric. Notable among juristic studies are: A. GIULIANI, IL CON-

Obviously, the first type of analysis of expression was mainly directed to the language of natural science, and of logic and mathematics, and tended to regard other propositions especially those about "values," or in terms of values, as meaningless,[17] unless they were translatable into propositions of the cognitive type.[18] And they also had difficulty with imperatives, and propositions about general terms, such as "England," or constructions such as "the average Englishman." The second type of this analysis, which is practiced in various ways, concentrated on common language; but being mostly concerned with the function of conveying information, it tended to select those patterns of usage which for one reason or another seemed to have this function. When confronted with evaluative or normative or imperative propositions, they tended to run to the employment of whole sets or systems of propositions. They tried to transfer methods of handling the cognitive to the study of evaluations and imperatives, choosing as subject-matter those imperatives which show tolerance for either the logic of indicatives or the patterns of usage of indicatives. The effect was to discard from study those aspects of imperatives not in this way tolerant, which are systematically disconnected and which amount to utterances and ejaculations. The third mentioned type of analysis is connected with the second insofar as its attention is mostly concerned with "reasoned" and not "rational" persuasion; its trend has been rather to reformulate demon-

CETTO DI PROVA (1960), to which we refer for bibliography, and T. VIEHWEG, TOPIK UND JURISPRUDENZ (1953). The main study is perhaps that of C. PERELMAN & L. OLBRECHTS-TYTECA, TRAITÉ DE L'ARGUMENTATION (1958). Toulmin's thesis (*The Uses of Argument*, ch. 1 *passim*) that logic is generalized jurisprudence, and the thesis of Perelman, that demonstration is a function of persuasion (on which see discussion of various papers on the *Theorie de la Preuve*, collected in 27-28 REVUE INTERNATIONALE DE PHILOSOPHIE (1954)) are supported with very similar argumentation.

17. See, *e.g.*, AYER, LANGUAGE, TRUTH AND LOGIC 107 (1946): "If I say to someone 'You acted wrongly in stealing that money,' I am not stating anything more than if I had simply said 'You stole that money' . . . . If I . . . say 'Stealing money is wrong,' I produce a sentence which has no factual meaning—that is, expresses no proposition which can be either true or false. It is as if I had written 'Stealing money!' "

18. Of course, this is not so if the value is in effect defined as a name for verifiable facts. So imperatives also raise no difficulty if they may be understood as an elliptical form of asserting that undesirable consequences will follow disobedience. But neo-positivists—especially English—did not regard imperatives as disguised indicatives—perhaps due to the general influence of Moore's attack on the "naturalistic fallacy." This does not, of course, involve for many English analysts, the acceptance of Moore's consequential ethical intuitionism. Pragmatism, and especially Dewey's instrumentalism, have shown that the distinction between cognitive propositions and imperatives and norms is not so sharp, insofar as a proposition is seen as a function of a whole process of inquiry. If the whole process is cognitive, then propositions which occur in it receive cognitive character, even if they are norms. *Cf.* H. Fingerette, *How Normativeness Can Be Cognitive but not Descriptive* 48 J. OF PHILOSOPHY 634 (1951); Sesonske, *op. cit.* 5. On the other hand, norms are thus a product of the process. *Cf.* G. Tarello, *Norma e Giuridificazione nella Logica di Dewey*, ATTI DEL IV CONGRESSO NAZIONALE DI FILOSOFIA DEL DIRITTO 280 (1960).

strations in terms of "persuasion" than to cover new ground.[19]

Now philosophical linguistic analysis of the problems of justice has had two great merits. It has certainly collected and systematized considerable information; and it has worked well and hard on the logic of value-judgments (or imperatives, or norms).[20] Yet, the concern of philosophical analysis is still remote from the problem of the meaning or meanings of emotionally charged words. It is concerned with those segments of language which are purposeful, which serve—and are employed—to convey knowledge, information, orders, and which, therefore, constitute more or less coherent segments of experience. The early concern of this philosophic trend was the formalized languages of mathematics and logic. When some analysts reverted to common language,[21] their reaction was mainly against the tendency to regard as meaningless whatever is neither an analytical nor an empirical proposition. But they remained concerned with the meaningful; they were willing to recognize as meaningful more propositions than their predecessors, but they never pretended to analyze what they regarded as meaningless. When they found segments of language to which a particular system of logic seemed unfitted, they were willing to recognize this fact. Yet the cases where they did so tended merely to be in areas where, though a particular principle (for instance, of contradiction) does not go, the conveyance of information is still possible and some statements are certain in their content, and objectively determinable (even if not by rigid verification) as to their truth.[22] When they examined evaluation,

19. The above is true even of those authors who do *not* believe that the study of the logical structure of imperative sentences is part of the study of the imperative function. For instance, R.M. Hare, believing that the connectives "if," "and," "or," and the signs of negation "are best treated as part of the phrastic of the sentences" (*Imperative Sentences*, 58 MIND (1949), and THE LANGUAGE OF MORALS I,2,3, and I,11,5 (1952), with qualifications as to the quantifiers), suggests that, "by using the ordinary logical connectives, as they are used in the indicative mood, in the phrastics of our remodelled imperative sentences, we could do with the revised imperative mood everything that we now do with the natural one."

In splitting the propositions analyzed into a phrastic and neustic part, Hare maintains that the phrastic can be logically manipulated whatever the neustic be; and Hare's fourth chapter on the "Decisions of Principle" makes it clear that the non-descriptive communication he has in mind is not that constituted by utterances and ejaculations which are not systematically related. Such utterances and ejaculations were, of course, the favorite theme of analyses of the first mentioned type.

20. See notes 16 ff.

21. Especially in England. For a very clear account of the beginning of the newer conception of analysis, see URMSON, PHILOSOPHICAL ANALYSIS, esp. pt. 3 (1958).

22. We are thinking, of course, of discussions about the distinctiveness of various language-fields or language strata; and in particular about the fact that, in some language-fields, the terms (words) are undefined and refer to "qualities" of degree, so that the language-field is not structured on a logic including the principle of excluded middle. Segments of common language, for instance the language of colors (as "yellowish"), are of this type. "If

they were concerned with value *judgment,* not with value utterances. (The neo-positivists, who spoke of these utterances, dismissed them as meaningless.) When they examined imperatives, they had in mind systems of imperatives, as for instance legal systems, where a certain amount of "meaningful information" can be conveyed and statements are correlatable by reference to the system.

So that the interest of the analyst-philosopher has tended to *begin* just where the problem of communication really *ends.*[23] There is perhaps, indeed, a temptation for the philosopher-analyst to deny the problem of communication precisely because he has chosen to use his analysis on expressions on which communication is apparently not lacking or is only slightly lacking. And even when he yields to this temptation, he may still feel, especially when he is concerned with a problem in which he himself is emotionally engaged, that his analysis has helped understanding.

Chaim Perelman's contribution on "Justice" is perhaps the most striking illustration of how a philosopher may be convinced that he

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several colors are shown to me which differ only slightly they do not exclude one another." F. Waismann, *Language Strata,* in FLEW, LOGIC AND LANGUAGE 11, 21 (2d series 1955). And see the end of section III *infra.*

These discussions interest us here, because reference had been made to color-terms to explain evaluation-terms (for instance the analogy between "yellow" and "good" in Moore). From Moore's intuitionalist ethical viewpoint the drive of the analogy was that both words stand for simple ideas, and therefore cannot be defined, since they (differently from complex ideas) cannot be analyzed into components. (See the critique of this in P.H. NOWELL-SMITH, ETHICS chs. 2, 3 (1954).) Independently of Moore's purpose, the analogy is also interesting, however, as suggesting—in the light of the language-strata viewpoint—that the logic of "yellowish" could be referred to "goodish" and (why not?) "justish." Admittedly "yellowish" is in common use, and "justish" is not; but may it not be the case that the "just" in some contexts has with the "just" in other contexts a relation similar to that of "yellowish" with "yellow." See notes 90, 91 *infra,* and accompanying text.

23. In the *Introduction* to A. FLEW, *op. cit. supra* note 22, which exemplifies the new analytical trend, Flew observes: "If it were true—which it certainly and fortunately is not—that there is no standard usage of words within any group at any time, then it would not be merely a few perverse philosophers whose position would be undermined. For though of course much of our usage is constantly changing, and does vary considerably from district to district, and from social group to social group, still it is only and precisely insofar as two people use and understand words in some accepted, standard way that communication between them is possible." (pp. 8-9) Accepting this, if we then assume that within a certain group there is no communication, what is the result of the philosophers being "so concerned about deviation from standard English (or whatever other language is being used or discussed), and the elucidation of the ordinary use of language"? (p. 8) Might this not endanger clarity, if there might be a tendency to entertain views of "standard" and of "ordinary," where in fact there is no standard nor usage which is ordinary? Flew asks: "[H]ow else could one investigate the concept of knowledge than by studying the various correct uses of the word know?" (p. 9) Let it be conceded that "correct" means "according to ordinary usage or standard"; yet if there is no standard this proposition resolves itself into a circle. Philosophical analysis, thus understood, therefore, is no substitute for research in historical semantics in areas where the problem involved is actual lack of communication.

has helped the understanding of a problem of communication, when in reality he has excluded that problem from the ambit of his analysis. And for this reason, it is worth the close attention of both jurists and philosophers.

II. Justice, Logic, and the Relativity of Values.

Perelman's contribution to the UNESCO project cannot be fully grasped except as a part of his general position, as seen in his major monograph on the problem of the analysis of justice. In fact, some features of the 1957 essay can only be understood at all if we place them in this wider context. In particular, as we shall see, the 1957 essay presupposes an acceptation of the term "justice" in which justice is not—or not only—the label for a conception, a feeling, a desire, an approval, a proposal, and so on, but is—or is chiefly—the name for a particular relation (of an act, or a man, or an inferior rule) to a governing rule.

It is notable that this main *analytical* research on the usage of this emotionally charged word, has as its cultural background a sort of relativism of values not dissimilar from the position advocated by Radbruch (especially in his first period).[24] While Radbruch chose a broad path of philosophy for reaching value-relativism, Chaim Perelman's work on justice is an impressive example of how similar positions can be reached via the science of logic, including mathematical science, leading by a very different route to similar postures of open-minded non-commitment to any particular content of the concept of justice.[25]

After some years of work on problems of logic and mathematical reasoning, this writer turned his attention to the techniques of rhetorical reasoning as a means to induce persuasion, and to a history and re-exploration of the old distinction between logical (cogent) and rhetorical (non-cogent) argument.[26] By this natural but unusual path, he approached the problems of legal and ethical reasoning on the apparent hypothesis that the distinction between logical (cogent)

24. It is hoped to develop this parallel in the forthcoming second edition of *The Province and Function of Law*.

25. Chaim Perelman, born in Warsaw in 1912, has lived in Belgium since 1925, and gained doctorates in law (1934) and philosophy (1938) at the University of Antwerp. He worked at the University of Warsaw in 1936-37, then a centre of neo-positivist logicians especially concerned with mathematics; and it was there that Perelman wrote his early contributions to logic. See especially his *Les Paradoxes de la Logique*, 45 Mind 204 (1936); *Une Solution des Paradoxes de la Logique et ses Consequénces pour la Conception de L'Infini*, 6 Travaux du IX Congres Int'l de Phil. 206 (1936); *L'Equivalence, La Définition et la Solution du Paradoxe de Russel* in 5 L'Enseignement Mathématique 350 (1937) (36 année nos. 5-6, 350).

26. Perelman's most important works of that period are *De la Justice* (1945); *Rhétorique et Philosophie* (1952); 1 & 2 *Traité de l'Argumentation* (1958).

argument and rhetorical (non-cogent) argument is correlated with the distinction between descriptive and normative language.[27] He sought in particular to identify the bounds within which it is possible to argue cogently about the conception of justice, and beyond which (by the same token) cogent argument is not possible.[28] He proceeds, as it were, on the hypothesis that the empirically found limits of men's agreement concerning justice were in some way correlated with the range of problems which could be isolated as the subject of cogent argument.[28a]

A. New Symbols and Old, as Used in Definition

The common assumption of logicians is that *every* definition is arbitrary (that is, conventional), insofar as the new symbol (used as the *definiendum*) has never anything more than the meaning of the whole set of symbols by which it is defined. But this is so only when symbols are used which *are* new. When the symbol which we define is a name which is (a) already part of a living language, and (b) charged with emotional connotations, the process of definition cannot be said to be arbitrary.[29] In fact, such a term, assumed as a *definiendum,* should be simply the equivalent of the symbol or set of symbols employed as *definiens;* but an emotionally charged term cannot be reduced to an equivalent of an arbitrarily chosen *definiens;* it will instead shift its emotional value on to the *definiens.*[30] Because of this difference, it is the case that whenever we give a conventional (arbitrary) definition of a *new* term, no one will have reason to challenge our definition (except on the grounds of its technical

27. The latter distinction may of course be traced well back in the British empiricists' tradition (from Hume onward), as well as in continental Kantian and post-Kantian (*Windelband*) traditions.

28. PERELMAN, DE LA JUSTICE (1945). We shall refer later to Professor Perelman's article for the UNESCO project, *La Justice (le Sens du Terme et son Evolution dans le Contexte de la Tradition Philosophique en Langue Française*), 41 REVUE INTERNATIONALE DE PHILOSOPHIE 344 (1951).

28a. *Cf.* his late explicit assertion of this in *La Règle de Justice,* 14 DIALECTICA 230, 230-31 (1960).

29. *Id.* at 10-11.

30. Suppose we say—(1) "Justice is going to the movies once a week." The result is the substitution of the word "Justice" for "going to the movies once a week." Suppose now that we say—(2) "Karabiri is going to the movies once a week." The result is the substitution of "Karabiri" for "going to the movies once a week." If the process of definition is arbitrary, the results would have exactly the same meaning. This is not so, because Justice is an old term, to which the general reaction is of approval, whereas Karabiri is not. How are the results different? The difference is as follows. If we, after the above (2), say "Karabiri," we simply entertain the thought "to go to the movies," and if we think of "going to the movies" the definition does not superimpose a judgment. Under (1), if we say "Justice" we still say "going to the movies"; but if we entertain the idea of "going to the movies" the definition will superimpose the judgment, "It is just." The difference is determined by the fact that to say, "It is Karabirian" does not add approval or, for that matter, disapproval, to "going to the movies," whereas "It is just" does add at least a conditioned approval.

utility); but whenever we define, apparently in the same way, the old conventionally and hence emotionally charged term "justice," discussions are liable to be endless. Such discussions seek to find an agreement on the values carried by the term as witnessed by the common usage of it: they would not make sense if *every* definition were arbitrary.

From this observation, Perelman might have moved to observe that the definition of such terms must await altogether general agreement on the values carried by the emotionally charged term, or that in view of the unlikelihood of such agreement, attempts at definition should be abandoned, or that many alternative definitions should be circulated each among the group of people so agreed. Perelman, however, chose another path (which we shall be concerned to question). For him, since the emotive component in such terms renders them intractable as a whole to ordinary logical definition, we must try to separate off by agreement the part not touched with emotive meaning. We must separate off the *conceptual* meaning, which we can define, from their emotive meaning, which we cannot. We must therefore split the *definiendum,* transferring the emotional charge to another complementary concept, and leaving for definition the residual emotion-free concept.[31]

B. The Term "Justice" in Common Use

The term "justice" is among the terms most in common use, and among the richest in the variety and conflict of emotive meanings associated with it. It is thus in Perelman's view a supreme example of the need to separate off the emotional from the conceptual elements before attempting definition.

Until this is done, the word as in common use conveys such numerous irreconcilable meanings as to make definition hopeless. These rival meanings, or some of them, Perelman states in terms of six formulae: (1) To everyone the same thing. (2) To everyone according to his merits. (3) To everyone according to his performance. (4) To everyone according to his needs. (5) To everyone according to his rank. (6) To everyone according to the law.[32] The first formula treats everyone as equal regardless of difference. The second differentiates between classes on the basis of an intrinsic property, "merit," which still has to be defined. The third formula differentiates between classes according to an objective fact of performance, as in examinations, and it implies a kind of material proportionality

31. PERELMAN, *op. cit. supra* note 28, at 13.

32. *Id.* at 15. In his recent paper, *Justice et Droit Naturel,* ANNALES DE PHILOSOPHIE POLITIQUE 13 (1959) (of the Institut International de Philosophie Politique), Hans Kelsen has elaborated upon Perelman's versions of the concrete formulae. And see note 75 *infra.*

as contrasted with the moral proportionality of the second.[33] The fourth formula, designed to reduce hardships (as in social legislation), also differentiates between classes according to "need," a term only less in need of definition than "merit." The fifth formula, according to Perelman, of treatment according to rank, differs from the other formulae because it is not universalistic, and divides men into classes to be treated differently. But this is misleading, since all the formulae except the first, and possibly the last, also make such a division. The only difference as to rank is that, if this is conceived as inherited rank, the entitlement is unalterable from birth.[34] The sixth formula, according to Perelman, is identical with Ulpian's maxim *suum cuique*; it resolves justice into a correct application of positive law, and thus cannot serve as a standard for criticising positive law.[35]

At this stage of his argument, it will be observed, Perelman has already moved from the term "justice" as the symbol for a concept, a symbol charged with varied emotive meanings among different people, to a consideration of six formulae which he has substituted for these six emotive meanings. (This is, in the present view, a source of much weakness in his analysis, to which we shall later refer, after following his own argument through.) Due to the fact that these six formulae "are as a rule irreconcilable" Perelman says, the inquirer must now choose one of three courses. First, he may conclude that "these different conceptions of justice have absolutely nothing in common," and therefore that the only sensible inquiry is as to their respective different meanings.[36] The question of the meaning of "justice" as common to them all is then treated as illusory. Second, the inquirer may "choose one of the different formulae" and insist and try to persuade others that that one is the only correct one. Third, he can choose (as Perelman does) to try and "determine what there is in common among the different conceptions of justice," which he takes to mean (as a practical matter) the six more usual conceptions of justice which he has enumerated.[37]

It will be noted that, strictly, the "conceptions" Perelman is here working with, just like the *Zwecke des Rechts* of Radbruch,[38] are

33. *Id.* at 16-17.
34. *Id.* at 18.
35. *Ibid.* The identification of this with Justinian's *suum cuique* depends on the word *suum* being rendered as "what each is entitled to according to law." In historical fact, though, the most important influence of the maxim has been when that word is rendered ambiguously as "what each is entitled to," thus compendiously restating the whole problem of justice.
36. *Id.* at 20.
37. *Id.* at 21.
38. See RADBRUCH, VORSCHULE DER RECHTSPHILOSOPHIE 26 (1947); Radbruch, *La Securité en Droit*, 6 ARCHIVES DE PHILOSOPHIE DU DROIT 86, 87 (1936); RADBRUCH, RECHTSPHILOSOPHIE (3d ed. 1932) (translated by K. Wilk in vol. vi of

not empirically derived, even though *the fact that there are* many conflicting conceptions is an empirically observed fact. In both cases, however, these writers have chosen to work with examples most familiar to their experience. But the strict position must still be remembered. Thus, Perelman's conclusions, to be valid, must be valid for every conceivable version of concrete justice.

C. Formal Justice Separated Off from Concrete Justice

Perelman claims, like Radbruch, that the essential task in defining the idea of justice is to clear away the confusions, and thus clarify what the problems are. And the main result he hopes to have achieved (as also Radbruch hoped) was not that men will then find themselves agreed upon a common conception of justice, but rather that they will see more clearly where the disagreements begin and what they are about. To fix the point at which disagreement about justice begins, also means fixing the point at which agreement about it ends, which means finding "a formula of justice" which will contain all that the various conflicting conceptions of justice have in common.

Provisionally, he takes as correct what he assumes to be agreed from Plato right through to contemporary thinkers, that "the idea of justice consists in a certain application of the idea of equality."[39] If,

Twentieth Century Legal Philosophy Series 45-224, at 91). This matter will be further developed in the forthcoming second edition of STONE, PROVINCE.

39. PERELMAN, *op. cit. supra* note 28, at 13. Perelman asserts that *"tout le monde est d'accord sur ce point."* But, even if this be true, it is only a verbal agreement. Firstly, the concrete forms of "equality" which have been envisaged as identical with "justice" are sometimes so different that the agreement is patently only verbal. Secondly, there is nothing "in common" between a concrete form of equality, as embodied for instance in a political programme, and "equality" as a contentless "proportio." To introduce the conception of equality in the analysis of justice does not permit a step forward because the conception of equality presents to the analyst just the same set of problems as the concept of justice.

Alf Ross, in his treatment of Justice (ROSS, ON LAW AND JUSTICE, ch. 12 (1958) follows the outline of Perelman, but does not stop at identifying justice with equality. He then proceeds "to show that the formal demand for equality as such does not mean much, and the practical content of the demands of justice depends on presuppositions lying outside the principle of equality, namely, the criteria determining the categories to which the norm of equality shall apply." Equality, in abstracto, as well as justice in abstracto, are both interchangeable names for merely "keeping to a rule." Insofar as, nevertheless, we find these names used as asserting a content of justice or equality, Alf Ross correctly says that "this content cannot be derived from the principle of equality but must spring from the other element in the formulae of justice, the presupposed material criteria."

To say that justice in abstracto means "keeping to a rule" and that this formula only has a meaning when there is an outside criterion to give it context, does not dispose of all discussions in terms of justice which arise in the moment of choosing the criterion, or, as Ross puts it, in the legislative moment. Here the question concerns the choice of a determinate criterion to cope with a particular problem in a particular social context. To such a question answers can be given supported by reasons. Insofar as "justice"

despite this, the formulae of justice still have remained in conflict it must be because each "contains an undetermined element," a "variable," yielding a different conception of justice. The general agreement that equal treatment is involved in the idea of justice will thus pertain to the common concept, yielding a *formal* or abstract definition of justice; and the different formulae of concrete justice will represent the innumerable competing values which different opinions graft on to this common concept.[40]

Now Perelman's acceptance as true of the supposed agreement as to the relation of justice to equality is only provisional. (He later rejects its claim to be *the essential* criterion of formal justice.) Moreover, there is no *a priori* reason why emotive meanings which compete in many situations may not nevertheless all coincide up to a point, that overlapping area constituting, if only we can discover it, a part of the common concept, or the formal definition of justice. In short, there is nothing in his argument thus far either compelling him to center his definition of the "common concept" of formal justice on equality, or excluding necessarily from this common concept some aspect of the emotive meanings, that is of substantive values.

In fact, as will later be elaborated, Perelman's argument proceeds otherwise, treating his six illustrative formulae of concrete justice as if they were themselves the emotive meanings. All these formulae, he thinks, though disagreeing as to what was the essential characteristic (being "a man," or having "merit," or having "objective performance," or having "needs," or having "rank," or being "legally entitled"), agreed that equality was essential as between all members of the class sharing this essential characteristic.[41] He concludes that "it is possible to define formal or abstract justice as *a principle of action by which persons of the same essential class ought to be treated equally.*"[42]

This definition of justice, says Perelman, is formal "because it does not determine the categories which are essential to the enforcement of justice." It does not, in other words, determine what is the essential by reference to which the class is to be identified; nor

becomes a compendious name for particular reason supported answers to such questions (and not a name for a metaphysical entity), Ross's statement that "justice is no guide for the legislator" and that its invocation means no more than "banging the table" (p. 274) is unacceptable, and it is an unwarranted leap even in his own argument. It is simply not permissible to dispose of a word which in different contexts may have different meanings, merely because it does not always have the same meaning. What is called for is not this, but rather for us to be aware of the meaning in the particular instance, and resist the tendency even to believe that a name must correspond with an entity comprehending all the possible particular meanings of the word.

40. PERELMAN, *op. cit. supra* note 28, at 26.

41. *Ibid.*

42. *Ibid.*

does it say how people within the class ought to be treated, except that they should be treated equally. Conversely, the various formulae conflict, because each chooses a different characteristic as the essential and only one for determining the class of equal entitlement. Disagreement, then, begins when the essential characteristic is to be chosen, and (we would add) at a point inevitably before any decision as to justice in a concrete situation can be made.[43] And the other side of this is, in turn, that the different conceptions of concrete justice, notwithstanding their differences, admit the same definition of formal justice, namely that men included in the same essential class be treated equally. The confusion arises from the fact that everybody seeking justice seems to feel obliged to define concrete justice, that is to include in the definition a determination of the essential characteristic which is to base the claim to equality given by formal justice.[44]

It is implied in all this that formal justice cannot direct us to any decision in a concrete case, that is to concrete justice, that the choice which we make of the essential characteristic of the class of equals to guide us to concrete justice is but a result of "our conception of the world, our way of distinguishing what something is worth from what it is not worth." For "to define concrete justice is to connect the definition of formal justice with a particular concept of the world."[45] Finally, it follows that the ideas of concrete justice will vary in time, as changing moral, social or political ideas modify the hierarchy of values actually held by men, and therefore the essential characteristics by which the classes of people entitled to equal treatment *inter se* are identified.[46]

This treatment implies that the idea of *formal* justice (that is, of justice before it has become concrete justice imbued with a content reflecting the proponent's conception of the world), coincides with that part of the various versions of concrete justice which can be agreed between the various proponents. We shall later give reasons for thinking this not to be established by Perelman's argument, as well as for thinking that the final outcome of his position implies a certain unwarranted condescension towards the conflict and confusion of definitions current among men.[47]

Perelman himself readily admits that the concept of justice, defined as formal justice, loses at once its prestige and nearly all its emotional meaning.[48] Another point, however, which he does not squarely face,

43. *Id.* at 28.
44. *Id.* at 41.
45. *Ibid.*
46. *Id.* at 40-41.
47. See p. 358 *infra.*
48. PERELMAN, *op. cit. supra* note 28 at 42-43.

is that it is not only natural but also sensible for men to be more concerned with the concept of justice at that point where its definition has, at any rate, a chance of influencing the course of events in our actual world. In Perelman's own terms, the definition of formal justice cannot do this. A sensible man can therefore sensibly answer the reproach at his distinterest in the possibility of agreement on the definition of formal justice, that what he is interested in is not just securing agreement, but rather securing justice in this world, as he sees justice. In other words, the "justice" that Perelman is concerned to define is not what men who are yearning for "justice" are really concerned with.

The contentless formulae of Perelman's (and in his own different way, also Radbruch's) main positions as to formal justice, may be important clarifications for the non-committed intellectual looking on at the human scene. For him it may be helpful always to keep asking the question: "Are we concerned with formal justice, or with one of the innumerable conceptions of concrete justice?" It will permit him to examine the problems peculiar to formal justice, including (Perelman thought) the relations between formal and concrete justice.[49] None of these activities, however, reach the point at which a "practitioner" of justice can be expected to surrender himself to them; and consequently certain observations will later be called for concerning the further duties which arise for men (including the "theoreticians" of justice) after Perelman has completed his analysis.[50]

D. Justice and Equality

While, for the purpose of discovering the precise areas of agreement as to the meaning of the concept of justice, Perelman took as provisionally correct the general assumption of philosophers that the idea of equality is the core of justice, he finally concludes that this is not the best mode of statement. It is more accurate, he thinks, to say that the core of formal justice is that individuals comprised in the same essential category ought to be treated in the same manner. Correspondingly, he thinks, the formulae of concrete justice "provide the criterion which permits us to tell when two beings are comprised in the same essential category," and what is the content of the identical manner in which all members of this category ought to be treated.[51]

While equality of treatment "for members of the same essential category" is a logical consequence of the above, the final basis or core of justice, even of formal justice, is simply (he thinks) "the

49. *Id.* at 43.
50. See p. 368 *infra.*
51. PERELMAN, *op. cit. supra* note 28 at 54.

application of the same norm to every member of an essential category," or even more simply that "we keep to a norm."[52]

When formal justice is thus seen as merely the correct application of a norm, it is easy to see that it is the element common to all conceptions of concrete justice, and that the difference between the various conceptions of concrete justice is simply that each enunciates a different norm, and says that justice consists in enforcing *its* norm. Thus seen, too, formal justice has its logical base because it enforces the imperative syllogism, and consists of "the observance of a norm which enunciates the obligation to treat in a determined manner each being of an essential category."[53]

Stated in terms of logic, action is just if it conforms with the conclusion of a reasoning whose premises have been accepted, and one of whose premises constitutes an imperative proceeding from a formula of concrete justice.[54] In brief summation, then, formal justice determines that an action is just in relation to any given norm, when it conforms to that norm. But *per contra* formal justice does not say when that norm is just.[55]

E. Justice, Equity and Arbitrariness

Perelman, like Radbruch, but for different reasons, gets into considerable difficulty in relating "equity" (of course, in the wider sense, not tied to the Anglo-American law of equity) as a separate concept to his idea of formal justice. What he appears to say is that equity is resorted to when (for some reason not provided for by the law,[56] especially during periods of transitional change of values)[57] the person judging feels that two or more essential characteristics basing two or more competing concrete ideas of justice, are simultaneously apt. Where these two concrete ideas would impose conflicting decisions in the particular case, the attempt to decide by way of compromise (usually by a complex formula in which both formulae of concrete justice are embraced without settling their coefficients of importance)[58] is a resort to equity. Equity is thus "a tendency to treat not too unequally men included in the same essential category."[59]

52. *Id.* at 54.
53. *Id.* at 54, 60-61, for his animadversions on the relations between formal justice and "scientific law" and the role of deduction in each, which seem to amount to saying that deductive logic is used in testing both.
54. *Id.* at 62. Perelman sees this position on formal justice as very similar to what E. Dupréel (2 TRAITÉ DE MORALE 485-86 (1932)) calls "static justice," and defines as consisting "in the observance of an established rule, whatever it may be." On the former's view, however, it is not of the essence that the rule in question be established. *Id.* at 62-63.
55. *Id.* at 63-64.
56. *Id.* at 51.
57. *Id.* at 51-52.
58. *Id.* at 51.
59. *Id.* at 48.

While this is not a historical account of equity in any system, it is coherent in itself. The difficulty arises because Perelman presents equity, not as the above would lead us to expect, as a going against ideas of concrete justice, but rather as going against formal justice itself.[60] This seems impossible to follow. For once formal justice has been defined as "a principle of action by which persons of the same essential class ought to be treated equally," and once it has been admitted that it is always possible to create new classes and to consider them "essential," it is difficult to see how "formal justice" in the above sense need ever be departed from. What can be departed from is a combination of (a) formal justice, and (b) a determination of what "essential category" stands for; but such a combination amounts to an "interpretation" of formal justice by way of a formula of concrete justice. Justice according to Perelman's premises is "formal" only so long as it is not "interpreted." To say, therefore, that the simultaneous application of more than one formula of concrete justice indicates a disapplication of formal justice amounts to a contradiction. If justice is formal, the justice alleged to be disapplied cannot be disapplied; while if it can be disapplied, it must be concrete justice.

When, indeed, he directly confronts the question of arbitrariness, Perelman is emphatic that where, owing to change in evaluation, it is felt necessary to "treat differently two beings included in the same essential category" it is always possible to give effect to this different evaluation without being formally unjust. For we can modify the norm by which the essential category is identified.[61] But, on this view, formal justice would be entirely tolerant of easy change in the content of norms, by the device of changing the essential characteristic fixed upon by the particular idea of concrete justice to determine the class of men among whom the very same norm must be properly applied. And, in that case, what purpose does the idea of formal justice serve at all in the actual world?

This, in substance, is the question which Perelman is brought to face when he says: "If we desire that formal justice be not an empty formula outside positive law, *i.e.*, a norm of moral or natural law, it is necessary to eliminate, as far as possible, arbitrariness from the norms that formal justice has to enforce."[62] He properly observes that this necessity to eliminate arbitrariness refers not to the form of the norms, but to their content. But he believes he can complete

60. *Id.* at 48, 49, 52. His reasoning is obscured by other phrases, *e.g.*, that equity intervenes between "two formalisms" and that it is a rejection of "legal formalism."

61. *Id.* at 65-67. He is here assuming, of course, that the existing norm is not authoritatively imposed on the person judging.

62. *Id.* at 67.

his consideration of formal justice by analyzing "the rational conditions which impose themselves on the norms of concrete justice," if these are to escape being arbitrary.[63]

To provide such an escape, he starts from his above conclusion that formal justice means conformity to the applicable norm. Where for some reason it has been necessary to have two norms on a matter, each with a different essential characterization of the class of persons to whom it is applicable, the condition of these norms not being arbitrary is this: "That these two norms with their difference are both deduced from a more extensive principle," being "but particular cases of that principle."[64] A norm not so deducible is arbitrary. A norm so deducible is justified in terms of that more extensive principle, but it is not necessarily "just" in the sense of concrete justice.[65]

In this latter sense, insofar as formal justice only means conformity with the applicable norm in the treatment of all members of the essential category specified by that norm, it cannot help us to determine which, as between two norms which *ex hypothesi* are not both deducible from a common more extensive principle, is to be regarded as the just one. For here *ex hypothesi* we are concerned with norms of concrete justice, and the task is to find a term of comparison of the essential categories, in order to justify, by means of the relation between each category and the species from which it derives, the difference of treatment of these categories themselves.[66] The justification of a norm thus challenged as unjustly favorable or unfavorable to the members of the essential category which it specifies, as compared with those of another category, must always be by demonstrating how that specified category is "integrated into a more general category," or that particular norm is derived from a more general one.[67]

At this point two questions arise. Why, finally, after a definition of formal justice which purports already to embody whatever is common to all ideas of concrete justice, as well as whatever is conceptual rather than emotive in them, should he attempt the daring enterprise of setting "the rational conditions which impose themselves on the norms of concrete justice"? Second, why, once having entered on such an enterprise, did he stop short of what might seem to be its expected climax? For this surely would be some overall imperative, not too unlike the Kantian categorical imperative, requiring action according to a maxim which may become a universal

63. *Id.* at 68.
64. *Id.* at 70.
65. *Id.* at 20-21.
66. *Id.* at 71.
67. *Ibid.*

law.[67a] But it seems to be offered by Perelman not as an *a priori* absolute, but rather as a kind of by-product of the process of finding a formula in which the empirically observed multiplicity of conceptions of justice is represented by a variable, that is, by theorizing the relativity of all ideas of concrete justice.

Clearly, Perelman did not feel that he could venture so far. There must, he says, be a point where we must stop in seeking to justify norms of concrete justice. "Even if that stopping point is only provisional, and is not the result of any necessity, it anyway determines the summit of a scientific situation, the top of a normative system."[68] If that point were not reached, the system would not be normative but would express a logical necessity or an experiential universality. For "every system of justice is but the development of one or more values, whose arbitrary character is connected with their own nature"; and as against persons who deny that value or values, the disagreement can only be recorded, not removed by reasoning.[69] When agreement on values has permitted the rational development of a normative system among certain men, arbitrariness consists of the introduction of norms which are "extraneous to the system." A norm, in short, is not arbitrary in itself, but only by its lack of justification within the system.[70]

Certain other consequences follow from this final position. Since any value may serve as a foundation of a system of justice, and justice lying in the relation of particular norms or actions to the particular value, it is not the *value* which bears the attribute of justice.[71] Further, "the arbitrariness of the foundation of justice explains why justice as a virtue is less overbearing than others," and why he who sincerely practices it being "always . . . aware of the arbitrary foundation of his own system" will not enforce its norms too blindly and too rigidly.[72]

Finally, and paradoxically, justice emerges on this view, as simultaneously "the only rational virtue," and yet as one founded finally on arbitrary irrational values, the foundations of which can be found only in the emotions associated with justice and injustice.[73]

67a. Only in his latest article, after the present paper went to press, (*La Régle de Justice*, 14 DIALECTICA 230, 230-31 (1960)) does Perelman address himself to the relation of his position to the categorical imperative of Kant, being (he says) *"un schéma d'action de caractère formel, qui ne soit pas dépourvue de toute portée et de toute utilité."*

68. The hint of indecisiveness is here notable.

69. PERELMAN, *op. cit. supra* note 28, at 72-73.

70. *Id.* at 73.

71. *Id.* at 73-75.

72. *Id.* at 80-81.

73. *Id.* at 81.

F. Summary and Criticisms

A number of doubts as to particular steps in Perelman's argument thus far have been raised *ambulando*.[74] It remains before proceeding to his theory of the "levels of justice" in section III to pull together his overall positions as to justice, and to state why, in the present view, it cannot be regarded as a decisive break-through in this difficult area.

Perelman's arguments may be thus summarized:

1. The nature of definition differs in relation respectively to new symbols, and to symbols such as the term "justice" already found in common usage. Only as to new symbols is the logician's view correct that all definition is arbitrary.

2. In the term "justice" we must distinguish between the "conceptual" meaning and the emotive meaning of symbols. The search for notional agreement about the theory of justice concerns the conceptual meaning.

3. The above distinction allows us to see the relation between the conceptual components of justice (the conception of "formal justice"), and the emotive meanings of the terms to particular men or groups of men (the conceptions of "concrete justice").

4. The emotive meanings (that is, conceptions of "concrete justice") are relative to particular *Weltanschaungen* held by men in a particular time and place, yielding "innumerable conceptions of concrete justice."

5. Equality, though provisionally acceptable as the test of formal justice is not the final test on full analysis. It is merely a logical consequence of the final test, which is that the same norm must be applied to every member of an essential category—or more simply that a norm must be applied according to its terms.

6. Formal justice thus exists whenever the same norm is applied to all members of one essential category (*i.e.*, to all who are classified together under the idea of concrete justice actually held for purposes of the norm). But formal justice says nothing as to whether the idea of concrete justice actually held, and which determines the essential category and therefore the content of the norm, is just in content.

7. By the same token, formal justice cannot judge the justice of the content of the different norms prescribed for the respective bodies of members. What it can say is only that if the respective different norms are all deducible from a single more general principle, they will all be formally just; and that if they are not so deducible, some or other of the rules or all of them will be formally unjust.

74. See this section *supra passim*.

8. Formal justice in this last case also would be justice only for each category relative to the other categories, and of the different norms relative to each other. It does not otherwise depend on the content of any of the norms which therefore may still not be concretely just.

9. The relation of "equity" to formal justice is that "equity" is an attempt to give effect by compromise to two or more inconsistent definitions of concrete justice, *i.e.*, to two or more norms not deducible from some more general principle. "Equity" in this sense is in inherent conflict with formal justice.

10. However high we are able to get in finding a more general principle from which the different norms can be deduced, the value embodied in that most general principle remains by its nature arbitrary. It is asserted, not demonstrated or demonstrable. As between those who agree on it there can then be sensible argument about concrete justice within the norms deduced from it. As between some who accept and others who reject it neither group can prove the other wrong, nor itself right.

11. But it is precisely this arbitrary value embodied in the final general principle which determines the meaning of concrete justice in the particular system. It still remains true that as between two or more norms and their sub-systems, based on different essential categories, formal justice cannot judge. All that it can say is that in proportion as these norms can all be deduced from a more extensive principle, the content of the whole body of law will approach conformity to the requirements of formal justice.

12. It is thus because "every system of justice is but the development of one or more values, whose arbitrary character is connected with their own nature," that there cannot be "only one system of justice."

13. A person really seeking justice, therefore, will be aware of the arbitrary foundation of his own system, and will not be blind and rigid in enforcing its norms.

The problem, then, which the learned writer set himself, was to define the "concept" of "justice" in such a way that it can be agreed upon regardless of differences in our ideas of material ("concrete") justice and in the related ideologies. The advantage gained would (he thought) be at least to clarify terms sufficiently to allow us to determine what disagreements are real and what are mere misunderstandings arising from use of ambiguous terminology. How far has he succeeded? And what result has been achieved? These are separate matters and we first address ourselves to the latter. Assum-

ing, in other words, that his arguments are accepted as leading to his conclusions, how is the problem of understanding justice advanced?

One capital conclusion is that the conceptual component in justice, which alone we can rationally argue about, consists merely of a relation of logical derivation between the norm itself and, on the one hand, every application of it downwards, and on the other, any superior norms from which the claim of that norm itself to be just purports to be derived. Beyond this relation of logical derivability of norm from more general norm (*i.e.*, his "formal justice") rational argument can determine nothing about justice. In particular, Perelman insists that it cannot determine what the content of a norm or a system of norms should be (that is, what value it should embody) in order to do justice to the category of persons within it. Nor can it settle any dispute between two or more conflicting views of that content (or embodied value) arising within a system of norms. In these circumstances, the critic may be content to put down the book with two questions and a sigh.

One question is: How, if at all, does the "formal justice" of a norm, which this elaborate study has finally identified as the only part of justice which can be rationally discussed, differ from its quality of being "law" as ascertained by testing it for consistency with the basic norm in Kelsen's "pure science of law"? There appears, with respect, to be no crucial difference, even to the point that in both cases the fixing of the content of the "most general" (Perelman) or "basic" norm (Kelsen) is from the standpoint of each arbitrary in terms of his theory, and not susceptible of rational demonstration or even argument concerning it. And if this is so, how is such a coincidence possible when the two thinkers are ostensibly talking about different things—one about "justice" and the other about "law"? This will be more fully examined in the last two sections of this article. The second question is whether a clarification of a concept ("justice") which (however attractive it may be as an exercise in logic) ends by relegating all parts of the concept with which men are seriously concerned to the limbo where rational argument about it is said to be impossible, can claim to be a serious contribution to the problem of understanding what justice stands for *in various historico-cultural situations*. The sigh is one of regret, that neither in 1945 nor in 1957 (in the essay shortly to be examined) does Perelman appear to have taken into account Kelsen's main positions.[74a] It certainly seems difficult to believe that, had he understood them, he could

74a. In his latest article on justice cited *supra* n.67a, at pp. 234*ff*., Perelman points out certain similarities between his and Kelsen's thought, but not the one here relevant.

have failed to ask himself at least the former of the above two questions. And this would surely have warned him that a use of logic which ended in so strange a coincidence ought to be re-examined for the validity of its argument.[75]

We must now ourselves examine some of the decisive difficulties within Perelman's logical arguments. First, *the problem* which Perelman set himself was in terms of the conceptions of justice as held by men—he was to seek elements which are (a) formal and (b) common to the six main conceptions of concrete justice which he enumerated. But for the purpose of solving it, he substituted for "conceptions of justice" (which is an indeterminate term embracing both rational thought and unrationalized feelings), the term "formulae of justice" (which has a narrower ambit denoting an organized body of rational thought). So that the reader and the author himself may continue to think that the conclusions so logically reached are conclusions about justice *tout court* (or perhaps we should rather say, *tout large*); whereas, in terms of the premises actually used, they only concern formulae into which attitudes towards justice are cast. And in particular there is excluded from the search for what is "common" to the "conceptions" any analysis of emotional components, these not being captured in the "formulae." It is scarcely surprising in these circumstances that the author's conclusions have little to say about what most moves men when they think and act in terms of justice.

Second, even if it were a correct procedure to render each conception of justice into a formula, before seeking what "is common in the more usual conception of justice," a research so directed should

75. The above paragraph concerns Perelman's notion of formal justice in relation to Kelsen's notion of law. In fairness, it should here be noted that when Kelsen addresses himself to Perelman's notion of justice he, like us, perceives that to resolve justice into equality understood as equal treatment of members of an essential category to be determined according to concrete formulae, leads nowhere. He observes that the above equality principle *"n'est que la conséquence logique du caractère général d'une norme qui prescrit que dans des constitutions déterminées un traitement determiné doit être appliqué. Si donc ce principe est une exigence de la logique et non de la justice, il ne peut être considerée comme l'element commun à toutes les normes de justice."* KELSEN, *op. cit. supra* note 32, at 57. For related reasons Kelsen also insists that what is spoken as equality before the law is nothing but *"l'application de la loi conformément à la loi." Id.* at 57.

It is curious that Kelsen here stops short of perceiving that if Perelman's notion of justice is thus but another name for *"une exigence de la logique,"* his own notion of "law" may need to be defended against a similar objection. See *infra* section III A, B, and section IV A, B, and *passim,* where we venture to suggest a partial defence. It is still more curious that even in relation to the notion of "justice" Kelsen's final position repeats, in terms of conformity with a basic norm, the very error above which he, as well as the present writers, perceive in Perelman. See note 80 *infra.*

In connection with our criticism of Perelman on the present ground, see sections III and IV *passim.*

surely take into account each formula *as a whole.* For it is still the meaning of the conception which is under inquiry, and this should not be confused, much less equivalated, to what is in common in the process of formulation itself, or the linguistic connectives present in each formula. To seek what is "common" (in Perelman's term) to —(1) "Every man is endowed with memory" and (2) "Every dog is endowed with memory" may mean quite different things. It may mean to seek—(a) what is common to the two statements as to their linguistic expression, *i.e.,* what is "common" to them as *sentences* ("Every" and "is endowed with"), or (b) what is common to men and dogs (the "memory"), or (c) what is common to the respective "memories" of men and dogs. If the whole search stems from an attempt to understand the "conception of memory," alternative (c) would obviously be the vital one; the concern would be whether the word "memory" has the same meaning-coverage (and if so what) in the human and canine contexts. If, when this was the assumed concern, the inquirer offered us the conclusion that what is common to our conception of "memory" were the linguistic connectives "every" and "is," this should certainly not be accepted without challenge. For while it is perfectly true that memory "is" predicated of "every" component when it is predicated of the class, this truth is merely a result of the very definition of the relation between "class" and "member of the class" and says nothing specific at all about "memory" or "memories."

Likewise, when Perelman says that justice suggests the idea of a certain equality, basing this on the fact that all the examined formulae provide equal treatment for a class of people (that is, for the same rule to be applied to each member of it), and finally offers as a definition of justice, "a principle of action by which persons of the same essential class ought to be treated equally" (or by which the same rule is applied to all members of it), he is saying nothing at all about justice (whether formal or other than formal). Rather he is stating the fairly obvious truth that once something is predicated of a class, it is predicated also of the members of it (whether the copula be "is" or "ought to be"); and that formulae of justice do not logically and/or linguistically differ from other formulae. One may feel inclined to think, in short, that Perelman's "formal justice" is really only an elementary illustration of an elementary principle of logic, telling us little that is new about logic, and nothing at all about "justice." And if we then translate Perelman's assertion that "disagreement about application of justice resulting from different conceptions of concrete justice" should not preclude agreement "on the definition of the formal part of justice," from what it *seems* to concern (formal justice) into what it really concerns (logic), it would

mean that the above disagreement should not preclude an agreement on the definition of the concept "class." And the present writers would agree that there is no reason whatever why it should.

III. JUST ACT, JUST RULE, JUST ACTOR

A. "Justice" at Different "Levels"

The view has been reached in section II that a merely logical-analytical method cannot make any decisive contribution to our understanding of men's experience with justice.[76] This conclusion, clearly warranted from Perelman's professedly analytical study of 1945, is further confirmed, and the reasons for it much illuminated, by his later study of 1957, which purports to be an historical account of the development of the conception of justice.

The development of this conception has, he thinks, been affected not only by different ideologies creating conflicting concrete ideas of justice, of which it was a main purpose of his 1945 study to dispose. No less important, he thinks in 1957, has been the tendency to theorize about justice at what he calls different "levels" (*nivcaux*),[77] and in particular as a "value" which can be predicated either of (a) an action, or of (b) a rule, or of (c) a reasonable agent.[78] From this triple illustration one would assume that what he calls "levels" should better be called "contexts" or "spheres of usage," especially since to call them "levels" is to beg *ab initio* a central question to which this essay is directed, namely, whether there is any hierarchical relation between them.[79]

Taking his departure from the variety of "levels" of speaking of justice which are found in discourse, he concludes that the "levels" are related to each other, building on his earlier monograph on *Justice* of 1945. In that study he essayed to find, behind the many conflicting conceptions of concrete justice, a single underlying conception of "formal justice" common to them all. Conformity to a rule becomes so crucial in all of Perelman's solutions that it will have to be considered whether when he speaks of justice, he may not really be thinking of law. It may also compel us to find that his

76. As distinct from the understanding of a particular body of legal propositions, positive or hypothetical.

77. Perelman, *La Justice,* 41 REVUE INTERNATIONALE DE PHILOSOPHIE 344 (1957), apparently reprinted in 3 ANNALES DE L'INSTITUT INTERNATIONAL DE PHILOSOPHIE POLITIQUE 124 (1959).

78. *Id.* at 344.

79. For this reason though this paper will follow Perelman, by translating "*niveaux*" as "levels," we shall render this latter in quotes wherever this is necessary to remind us of the danger of being misled by the word "levels" into believing that the question of hierarchy can in any way be affected by Perelmen's unexplained choice of this term. See also section IV *infra.*

belief (which it will be submitted is quite unjustified) that his analysis has helped the clarification of justice, may arise from the fact that his approach to the meaning of "justice" through a logical approach to language, has led him to discard from the meaning of "justice" most of what distinguishes "justice" from "law."

Perelman's overall aim, at any rate, appears to be to impose order on a confusion of "levels" and ideologies, and to show that something can be said of justice which is acceptable whatever the "level" and whatever the ideological content. Moreover, the imposition of such order involves in this treatment a recognition of hierarchy among these "levels"; a hierarchy which results from the thesis of his 1945 work that all are finally translatable in terms of rules. In *La Justice,* as has been seen, Perelman thought he had isolated the unity of formal justice common to all ideologies, that is, to all ideas of concrete justice. And he convinces himself in his 1957 essay that his historical survey demonstrates also the unity of the value called justice at all three "levels" of just rule, just action, and just actor.

It is with this latter purported demonstration that we are concerned in this section. The question is: What can be said about justice which is equally applicable when predicated of rules, actions and agents? But before approaching Perelman's answer, it must first be observed that Perelman gives no attention to the chief problem confronting the translation of justice on the level of actions into justice on the level of rules. Insofar as Perelman's view of the relation of just rule to just action resolves itself (as has been seen above) into the relation of a class to a member of the class, change of "level" from one to the other involves the problem of translatability of general propositions into particular ones, and *vice versa.* Suppose, for instance, we say: "Act a is x," and then we say "Class A is x" (where A = all a's, *i.e.,* Class A consists of all the known entities having in common the assumed essential characteristic "a"). When I say: "Act a is x" and also "Class A is x," I put forward two very different propositions. In fact, "a is x" can be verified if x is empirically observable, a being a particular act; but "Class A is x" (*i.e.,* that every particular fact "a," known and still to be known, is x) can never be verified, even if x is empirically observable, for we cannot empirically know all the a's which *might* fall within the Class A: it can only be falsified, if we meet an a which is not x. Such a difference between general and particular statements has long troubled the philosophy of science, giving rise to many theories not here relevant.

Insofar as Perelman does not feel himself confronted with this problem at all, his historico-semantic essay of 1957 must of necessity be proceeding on two tacit assumptions. One is that propositions of

justice are not factual statements; for if he regarded "act *a* is just" as analytically reducible into factual statements, then he would certainly have concerned himself with the instant problem of the relation between general and particular statements. Presumably, then, his first assumption is that propositions of justice are normative and not factual. Second, he must be assuming that whatever be the case as to the intertranslatability of general and particular statements *of fact,* there is no such problem in the normative field, where he places propositions of justice. These assumptions are of the same pattern as his explicit assertion that the basic normative statement is the general statement, that is, the rule, on which assumption it is always possible to infer the particular from the general, but not *vice versa.* In other words, Perelman assumes that when we speak in terms of justice, the primary level (that is, the one to which all others are referred) is the level of general statements. The term "justice," in other words, is assumed to be a predicate for a class of actions, and only for such, and therefore finally to be understood on the "level" of rules. Furthermore, he assumes that there is always translatability from the rule to the act,[80] this being the logical translatability of the property of a class into the property of each member.

On these assumptions the historical excursus runs fluently. The conception of "justice" is considered at different "levels."[81] At the "level" of the act, justice is adherence to a rule,[82] and the familiar discourse of the mechanical theories of the legal decision is reproduced.[83] When the process of legal decision appears to be based not on a rule but on a singular happening of a particular proposition

80. Moreover, as we pointed out in section I (B, 3), the translation from propositions of the type *"A is x"* to propositions of the type "γ is x" and *vice versa* cannot be a *true* translation. This is not seen by Perelman. It also seems to be overlooked by Kelsen (*op. cit. supra* note 32 at 1) where he says: *"On dit d'un homme, en particulier d'un legislateur ou d'un juge, qu'il est juste ou injuste. Dans ce sens, la justice est presentée comme une vertu humaine."* Then, after a few lines, he flatly states: *"La justice d'un homme est la justice de son comportement social. Et la justice de son comportement social consiste en ceci qu'il est conforme à une norme constituant la valeur de justice."* These norms, he adds, somewhat tautologically (norms being after all norms), have *"un caractère général."* It is clear that he is here talking of "justice" as he (Kelsen) understands it, and that in his understanding the test of justice is conformity with a basic norm within a system of norms. His test for justice, therefore, appears to be similar both to Perelman's test for "formal justice," and to his own test for "law."

As to Kelsen's failure to carry through his criticisms of Perelman's notion of "justice" as based on the principle of equality, see note 73a *supra.* As to its relation to his notion of "law," see section III A and section IV *passim.*

81. Perelman, *supra* note 77, at 344-45.

82. *Id.* at 345.

83. *"L'ideal de justice tend, à ce niveau, à se modeler sur les operations les plus élémentaries de l'arithmétique et de la physique: on voudrait que les décisions justes soient conformes à une pesée, à une mesure ou à un calcul."* Later on, referring to his previous *De la Justice,* Perelman observes that this is nothing but *"la conception formelle de la justice." (Ibid.)*

(or precedent), this precedent is converted into the application of a rule, that is, of the *schema* of reasoning embodied in it.[84] The adherence to the rule, whatever it may be, is what constitutes the justice of the act.

The result of this is to displace from the "level" of the just act to the "level" of the just rule, all discourse other than that of "mechanical" decision making. Yet, of course, most challenges to the possibility of mechanical application of rules have proceeded precisely at the "level" of inquiry concerning what act is to be deemed just. This is very clear when we think of the vast literature concerned with the law-creative role of judicial decisions, whether this is focused on the conflict between various legal propositions available to serve as premises, or with those arising from alternative methods of deriving a conclusion from a given premise.[85] It has been pointed out how difficult it is—starting with the single decision—to recognize the very pre-existence of a rule unaffected by the decision.[86] It has been remarked that the only way to speak of equity as distinct from law (in the general sense, of course, and not that of the settled part of Anglo-American "equity") is to refer to cases where decision is subordinated not to rules of law but to indeterminate standards.[87] All these discussions proceed on the basis that the intertranslatability of the statements "Class *A* is just" and "*a* is just" constitutes a serious problem in law and in jurisprudence. Perelman, however, having by his very assumptions already displaced all these discussions from under the heading of "just act," notes only that the problems of "interpretation" and of "equity" have reference to the heading "just rule."[88]

In a word, doubts about the possibility of translation from particular to general propositions or *vice versa* is interpreted by Perelman as a critique of the content of the general proposition in question; whereas in reality these doubts should lead him to rethink his whole position as to the primacy of the level of rules. For a central meaning of these doubts is that this primacy can only exist insofar as this translation is possible. From this vantage point it would become clear that, insofar as problems of "interpretation" and "equity" inevitably arise, this primacy of justice at the "level" of rule does not exist in the sense of Perelman's assumption.

It also thus becomes clear how Perelman's analysis finally leaves

84. *Id.* at 346: "*[P]récédents fournis par des judgments antérieurs, qui forment un schéma de raisonnement applicable au cas présent . . . .*"
85. See section IV *infra, passim.*
86. *Ibid.*
87. *Ibid.*
88. Perelman, *supra* note 77, at 348: *"Dès que . . . il y a désaccord quant à l'application de la loi, nait le problème de la règle juste." Cf.* 348-350.

him with a model of justice as an axiomatic system, a system of tautologies permitted by the axioms. At the level of an action, in Perelman's view, justice depends on deduction from a rule. But what about the justness of that rule itself? This question is to be referred to the conformity of that rule to some more extensive rule from which it is deduced. If so deducible, it is just *quoad* that more extensive rule; if not so deducible, it is not so just. Unless we so understand him, we cannot get beyond the first rule which covers the act. If the question is whether "action *a* is just," this is to be referred to Rule I, that "Class *A* is just." But if the question is whether Rule I is just, and he desires to answer the question without reference to some further rule, what can he say? For an affirmative answer, he could only say, " 'Class *A* is just' is just"; for a negative answer, only that " 'Class *A* is just' is not just." But these answers would, in Perelman's terms, merely restate or deny Rule I, unless he can refer them to the consistency of Rule I with some more extensive rule.

So he must always remain at the "level" of the rule, and it becomes understandable why all discussions about interpretation, judicial law-making, equity and the like are viewed by him in terms of the content of the rule in question, and proposals that some other rule should replace the one criticized. Inevitably, on this line of thought (which would read better for law than for justice, though not unquestionable even there), every question of justice (and somewhat more sensibly of law) becomes a question about what is the prevailing rule, and ultimately about what is the ultimately prevailing rule, that is, the axiom or axioms from which the whole system of normative rules can be derived.[88a]

It is in this sense, as already observed, that Perelman reaches a theory of justice which is in substance identical with Kelsen's pure theory of law. By this we not only mean that Perelman's view of "justice" resembles a legal system viewed as a static system of norms such as Kelsen describes, but we also mean that on closer inquiry Perelman's view of justice also resembles Kelsen's own view of the legal system as a dynamic system of norms. And when (as will further be discussed hereafter) the top-level rule is identified with God, and we are thus in presence of a *Grundnorm* of a dynamic system in the Kelsenite sense, distributing legislative authority, this latter resemblance approaches identity.

This identity of Perelman's description of "justice" with Kelsen's description of "a legal system" indicates that one or other (or

88a. In his article of 1960 (*supra* n.28a) after the present paper went to press, Perelman further entrenched himself in this position by substituting for the phrase *"la justice formelle,"* the phrase *"la règle de justice."*

perhaps both) of these theories, whatever the ostensible intent of its author, is not talking about a segment of experience, the one of law, the other of justice. Otherwise, how could these two fields, which human experience undoubtedly distinguishes, be described in precisely the same manner? The reason for this curious concurrence seems to be that each of these theories consists in essence of a framework of tautological propositions about variables. Each variable can be given different values according to different situations, to enable the student of a segment of experience to draw necessary conclusions from assumed premises. Clearly, whether their authors are aware of it or not, such theses amount to a kind of *Principia Mathematica* venture in the juristic field; and it becomes then crucial to ask what utility in the respective fields of justice (Perelman) and law (Kelsen) such a tautological system can have. The fourth section of this paper will attempt to answer this question in detail: but certain introductory observations must be offered immediately.

What is lacking in Perelman and, to a certain extent, in Kelsen too, allowing them to fall into such extreme formalism of position, is the recognition of the limited services that can be expected from efforts to state in "perfect" language, the meaning of assertions or judgments in terms of value found in experience *to be made in common language*. As is well-known, the conception of a "perfect" language was connected with atomism, and with the idea that there is only one mathematical system. Atomism—and, after it every kind of *reductive* analysis—was connected with the principle of verification. Moreover, atomism and reductive analysis assumed a universe of discourse in which the possibility of descriptions and conceptual constructions was excluded. The idea of a perfect language met its fate with the discovery of workable and useful systems of mathematics based on axioms different from the classical ones. A difficulty of reductive analysis was that general propositions could not satisfactorily be understood as conceptual constructions of particular ones. At levels where ordinary language uses irreducible concepts—such as State, England, and so on—the analytical trend in philosophy shifted its attention to usage.[89] The principle of the excluded middle was, for instance, suggested to be untenable as to discourses related to colors—"yellowish" being not wrecked between the Scylla of "yellow" and the Charybdis of "not yellow."

So that before providing a frame for studying justice on the model of mathematical systems, and especially on the model of a logic with the principle of the excluded middle, it would have been convenient,

89. See section I, D *supra*.

or even essential, to ask and answer a number of questions, of which the following are the most important: (a) Whether or not "justice" and similar terms have the same meaning coverage at all levels? (b) Whether "justice" and similar terms tend to become used in the same way in different cultures and/or in contexts of different ideologies, and/or in different positive institutions? (c) Whether "justice" predicaments are of the type of "it is yellowish" in some or in all contexts, and/or levels, so that derivation from a rule is not logically unambiguous, and the meaning of "equity"[90] may correspondingly vary for some or all contexts and/or levels? (d) Whether rules are constructions of particular propositions, or *vice versa*, at the different levels or contexts?

If these questions are not asked, or if they do not receive certain kinds of answers, any analysis *à la Principia Mathematica* must necessarily leave out those elements of the subject-matter of inquiry which its framework will not tolerate. In so doing, far from advancing his general analysis of "formal justice," he is cryptically proposing a particular content of justice, insofar as he proceeds on a kind of reasoning which may be different from that embodied in usage. Correspondingly, it alters the content wherever the excluded elements would otherwise suggest the need to modify the conclusions drawn.

Kelsen probably reached his position *via* Kantianism, rather than neo-positivism, as did Perelman. Kelsen's position may thus, as *a priorism*, be correspondingly vulnerable to other critiques not here relevant. Perelman studied mathematics in a period in which the newer systems were being discovered, but his main study, *La Justice*, appeared in 1945, when discussions of the "yellowish"[91] were only just beginning, and when failure to see their bearings upon his method of treating problems about "justice" is understandable. Yet his failure to take stock of them in his later writing of 1957 must be regarded as a startling example of how a method of inquiry, in one field, modelled on that in another field, may continue its pretentious way long after the pretentiousness has disappeared from the model itself.

Even without confronting the difficulties here raised, Perelman finally recognized that he was not able to characterize the just actor, as he had the just action, as a deduction from an applicable rule. He recognizes that historical experience presents the just agent in two distinct forms. We consider an actor just who applies the appropriate rule.[92] This, of course, raises no difficulty for his theory;

90. As to the sense in which "equity" is here used see *supra* section II E.
91. See section I *supra*, esp. note 22.
92. Perelman, *supra* note 77, at 355.

indeed it illustrates the primacy of the rule. But he also has to recognize that in linguistic usage there is a second kind of "just actor" who is not "just" simply because he conforms to a rule. This is the God of the Judaic-Christian tradition, as well as the prophet in this (as in some other) religious traditions.[93] Conceivably it might here be argued that in such traditions the actor (God) *is* the rule; but this solution would undermine Perelman's theory altogether. This theory stresses the primacy of the rule in order to show that statements about justice can be the subject-matter of rational argument. Now, to say God is the rule would be fatal to the main purpose of the theory, because it would then be necessary to conceive divine justice as the subject-matter of rational argument. This, however, Perelman is not prepared to do; on the contrary, he rather acknowledges this conception of justice as Messianic and the concept of God as the rule as irrational. *"On est libre . . . de se soumettre a la justice divine, mais on est incapable de le comprendre, car elle est rationellement injustifiable; elle ne peut pas guider l'action humaine, elle est inutilisable dans la vie sociale."*[94] The result, then, is that a particular meaning of "justice"—and one which is likely to be extremely important—escapes Perelman's systematization. While he admits that this meaning of justice is important in Western experience, he can find nothing rational to say about it. And his difficulties with the ancillary problem of the prophet, that is, of the just actor who neither conforms to a rule, nor is God, are (if possible) even more insuperable.

All this is to say that the reduction of justice to conformity to "rule" is only possible by conscious or unconscious disregard of all contexts in which justice has no rule-like features. Such a course, whether consciously or unconsciously entered upon, cannot be merely an uncommitted onlooker's exercise in historical semantics. It constitutes in itself a theory of justice, justice which tends to be identified, and (if the quip may be pardoned) not unjustly, with a contentless legalism. So a study ostensibly concerned with justice, the subject of men's deepest aspirations and frustrations throughout the ages, comes near to deserving the description given by de Bustamante to Kelsen's theory of law, as "the contentless content of formal juridical logic." Such a description, moreover, flatters a theory of justice even less than it flatters a theory of law; for, as our fourth section will show, much can be said for formalizing the language of law, which cannot sensibly be said for formalizing the language of justice.

93. It is of course even more deeply embedded in non-western experience and traditions, for instance in the role of the saint in Hindu social and political tradition.

94. *Id.* at 360.

Insofar as that part of justice which Perelman thinks can be the subject of cogent argument, thus resolves itself into an illustration of well-known principles of logic, and says nothing specific about justice as such, this reflects back significantly upon this writer's attitude to what he terms the formulae of concrete justice. His work points to the multiplicity and conflict of such formulae, as they are empirically found, as a reason for seeking a meaning of justice ("formal" justice) which will avoid these difficulties. Each man insists, he seems to be saying, on pressing that definition of concrete justice which fits in with his own *Weltanschauung*; and this results in conflict and confusion of definitions; whereas if each instead were content to look merely for a definition of "formal justice," they could all find themselves in agreement. "The difficulties resulting from concrete justice do not emerge when formal justice is our only concern."[95] The implication is that concern of men with "formal justice" would, in some degree at any rate, contribute to agreement about the justice with which experience shows that men are concerned.

While the emptiness of Perelman's formal justice, from this aspect, may meet some needs of an "uncommitted" observer of the human scene, it says little to the actor or even to the observer himself *as a man* about the questions which they try to answer through arguments about justice. Radbruch with his deep and sensitive humanism, recognized the limited significance of the relativist phase of his thought by proclaiming that our duties *as men* to take positions on justice come into play at the very point where intellectual analysis ends. Perelman, as is perhaps understandable in one whose approach has been to seek and isolate the area in which cogent argument and demonstration are possible, seems little concerned with *this* duty, and even to reproach us, albeit gently and indulgently, for causing confusion and conflict by seeking to perform it.

IV. ANALYZING THE LANGUAGE OF JUSTICE AND THE LANGUAGE OF LAW

It has been shown that, as an approach to the problem of understanding about "justice," Perelman did not choose the path of studying the different semantic shadings that this term has historically assumed in usage. He engaged instead on the search for a kind of nucleus of justice, which should be common whatever the usage-association, and whatever the ideological implications of the usage. His assumption manifestly was, and it is this type of assumption rather than any particular writer's indulgence of it, which this article concerns, that "justice" has a meaning independent of associated

95. PERELMAN, DE LA JUSTICE 42 (1945).

usages or ideologies, that in fact there is *some determinate and correct* communication when men speak of "justice," whoever speaks, and whoever listens. For all those who indulge this kind of assumption the problem of "communication" does not involve the problems of knowing what is the set of experiences or associations for which in a given speaker's mouth in a given context the symbol "justice" stands, or of the ideological or psychological implications of particular predications of justice. It is reduced to the problem of what is analytically implied in using "justice" as a symbol; once so reduced, this attitude insists, we can always count on getting agreement upon such a nucleus.

We have seen that in Perelman's case the discovered "nucleus" which he offers as a contribution towards the problem of better communication about "justice" is nothing more than this: that the meaning of all statements about "justice" can be ascertained by translating them into statements at the level of rules, and in particular into statements concerning conformity to rule. And we have also seen that so far as concerns improving communication *about* the concept of "justice," it is highly questionable whether a nucleus which is unchangeable can be of any utility, at any rate when it is merely formal. We now turn to a deeper question, and a question of wider interest for both linguistics and jurisprudence: Is it even sensible to search for a formal nucleus which shall be essential to justice, in the sense that it is always implied in predications of justice, regardless of their authors, contents and contexts, and which therefore can serve to distinguish what is meant by "justice" from what is meant by all other words? It is a fortunate thing (though not in the least coincidental) that the question can be given a rather clear answer, by confronting the language of justice with the language of law.

A. Presence of General Propositions of Privileged Status

First of all, the language of law is a language such that, at any rate in our own times, all legal propositions can be conceived to be general propositions. This is a result of the fact that, in our times, there is a segment of propositions of law which are both general in form and privileged. This is only another way of saying that today, in the usage of most lawyers, a proposition is a proposition of law if and only if it is either analytically derived from, or it is an interpretation of certain general propositions of law *which are given* (as a *datum* of legal experience) *as having* privileged status.[95a]

95a. We stress that this and the following discussion concerns *the meaning of the word* "law" *in the usage of most lawyers,* and *not* either the question what is an acceptable philosophical conception of "law," or the question what

The generality of the propositions of law which are privileged may, of course, be of different degrees.[96] It is taken for granted that the propositions of a constitution are normally highly generalized; but even those propositions emerging from a judicial decision which are privileged (that is, may be thought to be a basis of later decision) must be general to a degree. For patently, where decisions are deemed to be such a basis, what is drawn from the prior decision cannot be a particular proposition, else *stare decisis* in a system of precedent would have *no* conceivable application, the full particularity of each case being unique and never repeated.[97] Insofar as a *ratio decidendi* of one case is a basis of decision of a later one, that *ratio* must be a general proposition.[98] Moreover, the fact that the standing of an entity as law is referred to a more general proposition is a datum of legal experience; and so is the fact that there is a level of general propositions which is privileged, to which the standing of other propositions is referred. Both these facts are data of experience; neither is merely a construction of the analyst. The language of the law accordingly reflects these facts.

In strong contrast to this, usage presents the language of justice in the three spheres (which Perelman correctly detects, but assumes without argument to be "levels") of the just man, just act, just rule, without any ground in usage for distinguishing any one of them as privileged. Nor, for that matter, does usage offer any ground for insisting at all that there must be a privileged level as between them. All that can be said is that, historically (that is, in the history of usage), such and such meaning or meanings of "justice" appeared first of all at the level of "just rules," and then related (but not identical) meaning or meanings were attached to "justice" as predicated at the level of men, and others at the levels of acts; that such and such meaning or meanings appeared first at the level of "just acts," and then related (but not identical) meanings were attached to "justice" at the level of rules, and the level of men respectively. And so also with the meaning or meanings which appeared first of all at the level of "the just man."

In this situation, to speak of levels as privileged may be meaningful

is a true description of law as a social phenomenon. For the first author's view on these latter (here excluded) questions, reference should be made to his *The Province and Function of Law*, esp. chs. 7, 26, 27 (1946).

96. See Stone, *The Ratio of the Ratio Decidendi*, 22 MODERN L. REV. 597, 605-06 (1959).

97. STONE, PROVINCE 188.

98. In the discussions about the *"ratio decidendi,"* (Goodhart, Montrose, Simpson, Stone) the hypothesis that the authoritative statement could be a particular proposition, in the sense stated in the first section of this paper, has not even arisen. See Julius Stone, article cited, esp. 599-600, where the earlier contributions are cited and discussed.

in the sense of some logical frame into which the analyst fits them. But then the privilege arises from the logical frame and not from the "levels" of justice which we find as a datum of experience. Further, it may also make sense to speak of privilege as between the various meanings found *within each "level,"* that is, of just rule, just act, and just man, if these meanings are subject to a logical framework supplied by the analysts. But here again the privilege is a function of the logical frame and not of the meanings as found; and moreover as *between the levels,* this would yield even then only three different versions of the logical framework, one for each "level," and three different logicized languages of justice corresponding to the versions. These three logicized languages, moreover, would not be mutually translatable, and their number would multiply according to the number of rival ideologies found within each of the three spheres.

In short, to logicize the language of justice would but result in the construction of three different languages and a number of criteria of interpretation of them, all of them different from the common usage of the term "justice." For what is found in common usage is simply an interaction of meanings on one another, as well as an interaction between statements which, because they are structurally different, are not mutually translatable. To logicize the language, *i.e.,* this fragment of common usage, and split up the products of the process, is not to study a section of experience as given, but to assert tacitly how this experience should be reconstructed. It is to advance a new, if rather arid, ideology of justice. And the same is to be said of the giving of a privileged status to one of the three spheres by logicizing the language of discourse concerning them.

B. Identification of Law and of Justice as a Subject of Logical Argument

A proposition of law can, for some purposes, be identified in terms of the arguments supporting its claim to be such. This is because, as we have seen, some propositions of law are treated as privileged, so that other propositions can be said to be law only if analytically derived from, or an interpretation of, the privileged ones.[99] To identify a proposition of law, therefore, it may suffice to state the privileged norm or norms, and the rules of derivation and interpretation; the privileged norms themselves, in so far as they are not derived from or otherwise dependent for their indentification on any other norms, are "primitives." When, on the other hand, we try

99. See N. Bobbio's paper in the section on theory of proof of the *Colloque International de Logique* at Brussels, 1953, in *Considérations introductives sur le raisonnement des juristes,* 8 REVUE INTERNATIONALE DE PHILOSOPHIE 67 (1954).

to identify a proposition of justice, this method is not available. Any statement about justice may, in fact, be unrelated in any systematic way to any other statement; whether in the spheres of just men, or just acts, or just rules, it may be a primitive statement, quite independent of all other statements of justice. Nor is there any way of determining whether a particular statement about justice is a "primitive" one or not, for even if it were not "primitive," usage gives us no principles for testing for what it might derive from. Logic certainly provides no such principles; for, as has just been seen, "logical" transformations of sentences of justice amount to a prescription about justice, not to a description of it. One statement of justice may in usage be "derived" from another in the same or in different spheres in any of numerous senses, from logical deduction to the merest association of ideas. To say that the ground of one statement of justice must be another *more general* statement of justice, amounts to saying that the language of evaluations in common usage *ought to be reduced* to a particular system of formal logic. It is not in fact so reduced; nor is the tacit assertion that it *ought to be* so reduced even a plausible reason for accepting the reduction as in any way useful.

C. Common Usage, Logical Structuring and Semantic Autonomy

Throughout this article our concern has been to examine what is conveyed by words, and what inferences from words or structuring of words are legitimate. For this reason we have tried to avoid (and to make clear that this is so) saying anything about the social phenomenon some aspects or other of which are associated with the word "law." For whatever view be taken of this phenomenon, it is sufficient for our purpose that every lawyer would agree that it includes a technique of social control, in which an important part is the formulation of propositions of law, to cope with particular cases through determined procedures.[100] Although the normative propositions thus formulated must (if, as normally intended, they are to exercise the function of influencing men's behavior) be expressed in ordinary language or be translatable into ordinary language propositions,[101] it is still a fact that, in modern legal orders,

100. There is a tendency even to appropriate the name "law" to the set of normative propositions, resolving social control through law into a social control through words. Glanville Williams, *Language and the Law,* 61 L.Q. REV. 71 (1945), comes nearer this than we believe he intends in saying: "The law, with its verbal apparatus of 'rights,' 'duties,' and 'wrongs' is merely a particular application of language as a means of social control." If such a view is taken by lawyers the analysis hereafter applies *a fortiori;* we are not here, therefore, concerned with its tenability.

101. This constitutes the recent theme of U. Scarpelli, *"Contributo alla Semantica del Linguaggio Normativo"* in MEMORIE DELL' ACADEMIA DELLA

the formulation of legal normative propositions is arrived at in a special manner, having little to do with common language.

Below the level of enactment, the normative propositions are the product of processes of linguistic transformation (*i.e.*, derivation and interpretation) of the privileged propositions of law above referred to. The rules of transformation are, to a great extent, predetermined and fixed.[102] These rules of transformation include, first, the enumeration of described situations which are then, for the purposes of transformation of one proposition to another, substituted for by specific symbols (*e.g.*, "a transaction," "a corporation," and "a trustee"). Second, they include the definition of further symbols which function as linguistic connectives of the law-field ("a right," "a duty" and "a power"). The privileged propositions are often statements about the above-mentioned specific symbols in which occur the above-mentioned connectives. Broadly speaking, moreover, we can say that there is a trend to make the language of law as rigorous as possible, thus promoting legal predictability and certainty at the level of drawing conclusions of law *in abstracto* (though obviously this predictability and certainty are not necessarily achieved at the level of concrete legal applications). And this leads to the increasing configuration of law as a logical field, which in turn results in a gradual separation off from within the concept of law (as a substantive) of "legal" adjectivations used by lawyers, which also may take the form of the predication of rights, duties, powers, and so on.

It is necessary to state immediately what is implied in the preceding sentence. As a term used in common language, the word "law" (which is still in general use in relation to the natural sciences for describing uniformities of nature) is the name for a rather vague notion of order and obligatoriness, with fringes of indeterminacy in the directions of the notion of justice and the notion of empirical regularity. This is a relic of an earlier historical stage in which these notions were undifferentiated in the usage of generations whose tongues as now developed we continue to use. In the special use of the lawyers, however, "law" has tended to become more and more the name neither of the above vague notion nor of the specific technique of social control, but of the sum-total of the "propositions of law" through which the social control is exercised. This is quite natural, because these propositions are what lawyers as a group are mainly concerned with. And it is certainly the word "law" in this

SCIENSE DI TORINO, *Serie* 3a, *Tomo* 5, *Parte* II, 4, i (1959). As Scarpelli follows R. M. Hare in this matter (see note 19 *supra*), what is to be translatable into common language sentences is, of course, the phrastic.

102. Either by prescription of the particular legal order itself, or according to the assumption made by those who operate it.

special use, to which Kelsen's description of "law" is directed. And it is also to this special use of the word "law," that Perelman's conception of justice approximates.

In these propositions of law, the "legal" adjectivations tend to be translated into statements in which the above connective symbols, "a duty," "a right," etc., occur. Thus, there is a correspondence between the following pairs: "It is legal that I be allowed . . ." and "I have a (legal) right to . . ."; "It is legal that I be not allowed . . ." and "I have a (legal) duty . . ."; "It is not legal that I be not allowed . . ." and "I have a (legal) privilege . . ."; and so on. The difference between the sentences framed in terms merely of what *is* "legal," and the sentences in terms of "right," "duty," etc., is that the latter set of sentences constitutes part of a highly analytic language. This language is structured on a system of logic, by which from the primitive (or privileged) propositions of law, discussed in the subsection *B* above, further propositions can be derived in terms of the symbols indicated above; or, in other words, by which propositions of law in terms of the adjective "legal" can be transformed into propositions of law in terms of such symbols. A sentence in terms of "rights," "duties," "privileges," and so on is, in fact, a transformation into those more compendious terms of several sentences which otherwise would have to be fully spelled out in terms of the adjective "legal,"[103] through such connectives as "and" and "not," and related to each other, not by dint of mutual logical consistency, but by the actual characteristics of the given positive law. The field of propositions of law, as lawyers talk of "law" in terms of "rights," "duties," "privileges," etc., is a special language using special symbols and structured on logical deduction from the primitive propositions of law.

Obviously, we are not here saying that the preceding sentences are an adequate description of the whole process of derivation of rules by lawyers either on the doctrinal or the juristic level;[104] but they certainly describe an important part of how lawyers think and talk about "law," even when this does not determine their concrete decisions. And this is all that is necessary for us to perceive that the movement of argument from a privileged proposition of law to what Professor Hart terms "conclusions of law" takes place within a frame of technicized language of law.[105] This is why to talk of

103. And see generally the references to STONE, PROVINCE in the next footnote.

104. See STONE, PROVINCE, pt. 1 *passim*, paying special attention to the sections beginning on 110-111, 166, 192, and see note 95a.

105. See Hart, *Definition and Theory in Jurisprudence*, 70 L.Q. REV. 37 *passim* (1954). But see note 122 *infra* as to the phrase "conclusion of law." We read "draw a conclusion of law" (*e.g.*, at page 49) as meaning "draft a

"law" in terms of syntactic structures is proper, always assuming that we intend to use "law" as a term connected with the specific activity of lawyers, and that the workings of the language of law are different from those of any other technical language.[106]

In other words, it is a fact that legal discourse tends to become, in modern times, more and more a technical discourse. A clear result of this is that adjectivations in terms of "law," through their translation into sentences in terms of "rights," etc., tend to become (a) fixed, (b) rigidly defined, and (c) differentiated from each other. Finally, and in part consequentially, (d) the relations between them tend to become logical relations. In the result, the word "law" tends not to be the substantive corresponding to an adjective, but the label for a field, with a set of logically interrelated substantives in the place of former law-adjectivations.

These observations do not apply to the word "justice." It is true that we indubitably see correspondences between the following pairs: "It is just that . . ."—"I have the legal right of . . ."; "It is just that I be not allowed . . ."—"I have a legal privilege . . ."; "It is just that I be allowed to make you do . . ."—"I have a legal power . . ."; "It is just that you be not allowed to make me do . . ."—"I have a legal immunity . . . ." But in the types of sentence referring to "legal *rights*," etc., the meaning receives a predictability and certainly from the conventional definitions of "rights," etc., and from the logical relations between this and other legal conceptions, which are simply not present in the sentences uttered in terms of what is just.

It is true, as seen in section II above, that Perelman's main thesis

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conclusion in legal terms"; not as "reach a decision as to the law and its application."

106. This meaning of the word "law" may also serve to describe law in general insofar as we think either that the different systems employ the same symbols or can be significantly described by the use of the same symbols. The second alternative entails there being a set of symbols such that, certain axioms being accepted, if we make statements about them every other statement about the actual symbols employed in the different actual legal systems can be translated into such statements. The relations between these new symbols would have to be defined, and on the basis of the axioms, it would have to be possible to develop a perfect language in which the relations between the symbols can be analytically described. These symbols are therefore variables, and every actual system of law is regarded as a system of interpretation of these variables. *Cf.* STONE, PROVINCE, pt. i, especially the sections beginning at 57, 68, 77, 92, 115.

On the position of Austin, Roguin, Hohfeld and Kelsen in relation to these "particular" and "universal" positions generally, see STONE, PROVINCE, chs. 2-5, to which we would here add the riders that perhaps Kelsen's position may not be as unequivocally "universal" as there suggested. The typical German *allgemeine Rechtslehre* of the nineteenth century was of the former nature. On the other hand, contemporary advocates of *Juristische Logik*, involving symbolization of law and the use of a logical calculus of indicatives, (Klug, Allen, Tammelo), or of modalities (*e.g.*, von Wright) to determine the conditions under which a legal proposition is "true" or "valid," are thinking in the latter terms.

is that he can make statements about justice which can be agreed upon whatever be the concrete ideas of justice which are entertained. We there showed, however, that the statements offered by him were rather statements about the logical relations between a class and a member of a class, than about justice. We are now in a position to attempt a more basic diagnosis of what is wrong with his thesis. For it is now clear that the syntactic structures by reference to which such agreed statements can be made about "justice" are the syntactic structures of common language, by reference to which we can also describe the usage of other abstract terms such as "beauty" and so on. And statements about "justice" by reference to some syntactic structures say *nothing specific about justice,* if the same statements by reference to the same syntactic structures can also be made about other abstract terms. On the other hand, as the preceding paragraphs have shown, a description of "law" in terms of syntactic structures does amount to a specific description of an important part of the special language-field for which, in lawyers' usage, "law" has become a comprehensive name.

We can now, perhaps, restate more precisely the gist of the preceding paragraphs. It is possible to substitute the description of a particular set of operations for terms which are (like the symbol "a right," etc.) employed as technical terms in a special and logicized language, or for terms (like "law") which are comprehensive names for such a language field. This is a consequence, in the former case ("a right"), of the fact that such terms in their technical use have when isolated no semantic side; they occur as logical connectives in sentences of the special language. It is a consequence, in the latter case ("law"), of the fact that the semantic side of the term as an isolated term is nothing other than the special language-field as a whole.

While "law" is thus but a comprehensive name of such a special language-field as a whole, it is clear that "justice" is not. This is the basic reason why, as already pointed out in subsection *B,* reference to terms of arguments and to syntactic structures is useful as an approach to the determination of the meaning of the word "law," this being a name for special syntactic structures which permit a special type of argumentation. Whereas this does not go for "justice," which neither is the name for a special language-field nor is itself a term whose meaning is clear only in such a field.

The word "justice" has a semantic autonomy even as an isolated word,[107] though of course, liable to change in the course of its history. It can, in other words, constitute a sentence-word in any of its

107. See ULLMAN, SEMANTICS 51 *passim* (2d ed. 1957).

meanings.[108] This is a characteristic of common language words. The cry "Justice!" is not only meaningful but reacts with a variety of meanings according to the factual contexts of the exclamation. It may mean: "Justice is done"; *"Fiat justitia,"* "Justice requires it"; "I want justice"; "I deserve justice"; "How just this man is"; and "It is just that John gives the money back to Jack." It may even be a synthetic expression of feeling different in meaning from *every* complete sentence. If in meditation we murmur, "Justice! . . . Justice! . . . Justice!," this word has a meaning other than if we substitute the words "Cheshire cats!" for the word "Justice!"; but it would still not be the meaning of any complete sentence containing the word "justice."

"Law" can, in some instances, amount to a sentence-word, just as can the word "justice"; but its meaning in such sentence-words does not include the meaning which primarily interests the lawyer, and which concerns Kelsen's "pure" theory of law. If we hear the cry "Law!," this utterance can conceivably have a meaning in two sets of conceivable factual contexts. The first is when we can understand this exclamation as a response similar to the complete sentence—"I speak of justice and you refer to law!"; the second is when we can understand this utterance as a response similar to the complete sentence—"This is not law, it is chaos." It is noticeable that in both of these situations "law" has the fringe meanings associated with the common usage, one trending towards the coverage of justice, and the other towards the coverage of empirical regularity.[109] In the first sentence, "law" stands for "legalism"; and in the second sentence it stands for (or is very akin to) "order" or "regularity."

It is clear that, in *these* acceptations, where "law" can stand as a sentence-word, it is a word about which nothing can be said by way of reference to any special, logically structured language-field. For the structures in which "law" in *these* acceptations occurs are the structures of common language. But in the meaning in which "law" is the name of such a special language field, to speak of that field is to say something about "law." The meanings of the word "law" when this can stand alone as a sentence-word, therefore, cannot be a basis for understanding either "law" or "justice" in terms of conformity to a rule. For such an understanding, as we have seen, fixes the meanings of these words in terms of logical structuring of propositions, subordinated to some of them which are privileged (that is to a special logically structured language field). We can, therefore, dismiss those meanings of "law" when it is a possible sentence-word, as quite irrelevant to our present problems.

108. See Graff, *The Word and the Sentence*, 5 LANGUAGE 163, 179 (1929).
109. See this section, esp. *supra* p. 373-74.

To conclude, the language of justice rests on a single, undifferentiated and undefined adjectivation; and (as already observed) the translation of a statement carrying an adjectivation in terms of justice into another statement also carrying one, may and does take place even though the two statements are not in the same sphere of "just acts," or "just men" or "just rules." As also there observed, transformation may be by a psychological trend, or an association of ideas, as well as by a predetermined system of logic. The language of law, on the other hand, includes the use of symbols, each of defined scope, whose interrelations have been established by a predetermined system of logic; so that propositions containing them are logically translatable into one another, and reference to some propositions which are privileged establishes the interrelations between all other propositions. There is, in other words, a special logically structured language of law;[110] there is not such a language of justice. The language of justice remains the common language, and common language is not structured on a given single system of logic.

D. Should We Merge the Languages of "Law" and "Justice"?

We may end with two further observations. One is that in language "justice" is connected to "law" in a double way. In some contexts "justice" is a synonym of "law" or of the legal process. "Penal justice" may mean "penal law." In such cases the word "justice" is a homonym, covering both law and justice, but, of course, the differentiation of the two concepts, stimulated by legal positivism, is leading to a disuse of this double meaning of "justice." This contemporary differentiation, however, still leaves a true homonymic clash in the contexts where the word was formerly of clear and single but undifferentiated meaning. Many positivist assaults on statements in the older literature treat as homonymical clashes words which *in their contexts* were of clear and single but undifferentiated meaning. Obviously a clash can be said to exist if someone can see a clash.

This is, moreover, another reason for not identifying "justice" and "law" as two names for the same thing, namely, conformity to rule. We are not suggesting that such a thing as "justice" and such a thing as "law" are obviously distinct (as it were, in themselves) as Professor Hart sometimes seems to do in the Fuller-Hart discussion.[111] We simply suggest that the very fact that a position like Hart's is taken, implies that the two concepts have to be distinguished. And this is so, even for anyone who insists on the old truth now again argued by Professor Fuller (and others like Villey) that, in the concrete

110. See this section *supra passim*, especially pp. 372-76.
111. See his *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 *passim* (1958).

process of law-application, considerations of "justice" and considerations of "law" cannot always be distinguished. The fact is to be acknowledged that there may be a logical structure within the framework of which, on the abstract level, conclusions of law are to be drawn. But this acknowledgement leaves unimpeached the truth that a proposition drawn through that logical framework, and thus *offering itself* for application as law, is not law on the concrete level *merely because it has been so drawn.*[112]

Secondly, "justice" and "just" occur as terms in legal contexts, and even in privileged propositions of the law-field. For instance, some statutes, like the Law Reform (Frustrated Contracts) Act, 1943, sections (1), (2) and (3)[113] contain the expression 'just." This gives another reason for distinguishing the language of law from the language of justice. In these contexts, in fact, it is clear that the introduction of "justice" is conditioned by the definition of the limits of its application, and, within these limits, the reference to justice amounts to the inclusion within the logical structure of law of an indeterminate standard.[114] In other words, the reference to justice—as to the *"equité," "equita," "equitable," "equo"*[115] in systems where equity has not been crystalized into law—marks the boundary where the judge stops speaking the language of law and begins speaking the common language (and begins thinking therefore in terms, not of legal sense, but of common sense).

What is more, the authors of this paper believe that considerations in terms of "justice" necessarily formulated in common language, as well as the processes of transformation of sentences containing such terms, processes ungoverned by any predetermined system of logic, are ever-present in the operation of law. And when such a term appears in a sentence, it may have a meaning different from that in any other sentence, or even context, in which it is found. Such considerations are found, notably (though of course not exclusively) (a) when the logically ordered body of legal propositions offers competing premises which can all be chosen for the instant problem;[116] (b) when the proposition given or chosen as a premise offers, by

112. STONE, PROVINCE 70, 110-111, 192.

113. Law Reform (Frustrated Contracts), 6 & 7 Geo. 6, c. 40, as to the circumstances in which money can be recovered by or from a party incurring expenses, or receiving a valuable benefit (respectively), before time of discharge of the contract.

114. Which has long been discussed in common law countries, for instance, by Pound. See now POUND, JURISPRUDENCE vol. ii, pp. 127 ff., vol. iv, p. 28, and his *Theory of Judicial Decision,* 36 HARV. L. REV. 641 (1923); and see STONE, PROVINCE 185-86.

115. In civil law countries there has recently been a considerable amount of attention directed to these standards. See, for instance, C. M. de Marini, IL GIUDIZIO DI EQUITA, PREMESSE TEORICHE (1959).

116. STONE, PROVINCE chs. 6, 8; Stone, *The Ratio of the Ratio Decidendi,* 22 MODERN L. REV. 598 *passim* (1959).

reason of its terms or internal syntactical relations, more than one solution for the instant problem;[117] and (c) when the legal order in which we are operating is not, or is regarded as not, complete.[118]

But the fact that the authors reject the view that a definition of law in terms of special language and logical structuring can be exhaustive, or that it can be a sufficient basis for doctrinal and judicial development of a legal system, does not prevent us from believing that such a definition may be useful for some purposes. One of the purposes for which it is useful is that of enabling us to envisage as a whole the framework through which lawyers usually process not only the particular propositions offered as the applicable rules, but also the fact situations for which they are seeking the applicable rules. "Law" in these terms refers to the framework and not to the process.[119] Moreover, the decision reached in the concrete case, while it must pass through the framework, is also conditioned by the process. And while the process presupposes the framework, it may be (and, in our view, often is) the process which has the last word.[120] But what is important for the present article is that Kelsen's theory of law, and indeed any significant analytical theory of law, can tell us something about law by telling us about the way in which words are used in sentences, and how sentences are related to each other, in the usage of lawyers. The reason for this we have shown to lie in the fact that the language used by lawyers is a special language, with its own logical structuring.

It is an important incidental reflection from our study of the language of justice, that we have reached, by a different route, concurrence with the important theme of H. L. A. Hart's distinguished inaugural lecture of 1953.[121] He there addressed himself to "the great anomaly of legal language—our inability to define its crucial words in terms of ordinary factual counterparts." And the core of his

117. Stone, works last cited, and see recently L. Bagolini, *La Scelta del Metodo nella Giurisprudenza,* 35 RIVISTA INTERNATIONALE DI FILOSOFIA DEL DIRITTO 24 (1958). The French translation is *La Choix de la méthode en Jurisprudence,* 1 LOGIQUE ET ANALYSE 2 (1958).

118. STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 869 (rev. ed. 1958); Stone, *Non Liquet and the Function of Law in the International Community,* 35 BRIT. YB. INT'L L. 124 (1959).

119. This does not mean that others, *e.g.,* M. S. McDougal, are not entitled to attempt to describe this process (or part of it) and to call it "law." It might even be argued that since it is usually the process which controls the decisions of concrete cases, the word "law" should be appropriated rather to this meaning. For reasons which I have stated elsewhere, however, I do not think it is fruitful to appropriate the word "law" exclusively to any of the rich variety of aspects of the phenomena to which men may refer when they use it. What is important is to distinguish the aspect which is for the moment being talked about.

120. *Cf.* STONE, PROVINCE 47-52, 137-46, 189-206; and Stone, *The Ratio of the Ratio Decidendi,* 22 MODERN L. REV. 598 (1959).

121. *Definition and Theory in Jurisprudence,* 70 L.Q. REV. 37, 40 *passim* esp. 41, 43, 54-55n. (1954).

answer was that legal terms such as "corporation," "a right," etc., are not capable of definition in the ordinary way, because their purport is not to describe any factual entity, nor to state any rule of law. It is rather to figure as part of a statement in which is recorded the legal effect of the existence of a certain rule in a legal system, and of a certain state of facts to which this rule applies, and to which a court has a legal duty to apply it. They are, in the present view, not part of the process of decision of concrete cases, but are rather symbols which have a function in statements which record in legal language a decision which has already been reached, whether a decision of the whole case itself, or of some intermediate question which is part of a logical chain leading to it.

This incidental reflection, perhaps, places Professor Hart's theme in a somewhat broader perspective which was not relevant to his own subject. The present paper has been concerned to stress that jurisprudence, insofar as it is not limited to analytical jurisprudence, dare not overlook the distinctive qualities *either* of common language, *or* of the special language of lawyers.[122] For what its authors deny above all is the utility of so defining a field—*like the justice-field*—which is a segment of common language, in terms of a special language or logical structuring similar to those used by lawyers. Nor do we think that the presence of considerations of justice (and therefore of common language statements) in the process of the operation of law, either requires or warrants the attempt to merge two language-fields so different in structure and so differentiated in usage as those, respectively, of law and justice.

122. In his brilliantly executed undertaking to address both lawyers and philosophers, Professor Hart was confronted by even sharper dangers. To speak with equal clarity to both, especially on an essentially linguistic problem, required perhaps an extraordinary sensitivity to two special languages (of lawyers and philosophers) as well as to common usage.