LAW AND PERSUASION: THE LANGUAGE-BEHAVIOR OF LAWYERS

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INTRODUCTION

Historians will have to say of these years we live in that they marked perhaps not a verbal awakening but certainly a vigorous and widespread interest in the study of words as they affect human behavior.¹ The approaches have been many and diverse, but all in some way involved in probing the mysteries of communication via verbal symbols. The deepest of these studies look at language as another aspect of human behavior and as a highly significant way in which that behavior is actually shaped or often conditioned.

While legal men of various stripes have always been interested in language, particularly legal language, even they do not until this quarter century seem to have shown the conscious awareness of words as words. In the late twenties and in the thirties there was a great deal said by legal thinkers on this subject, mostly in an iconoclastic vein, going in some cases so far as to suggest that legal language was meaningless. Whether extremism or merely a necessary part of advocacy, this attitude has made its impact and has led now to a desire in some persons to look more carefully at these language studies to determine what they may offer in a constructive way to the progress of law: theory and practice alike.

It is in the latter vein, mainly, that I write. I wish to look at legal language as it is used to persuade, as one law-person uses it to move, another law-person to make a choice in favor of the mover. From this view, legal language becomes something other than a matter of logic, yet something more than oratory. From this view, we may see running throughout legal language, as it is used, a method. We are not sure yet exactly how or why this method works, but if we know the method, we can make it work. Then perhaps we can discover the how and why. And perhaps we may also wonder if it be good that the method does work.

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¹ Included among the technical terms used to mark off this area are: semantics, semiotics, pragmatics, the science of signs, general semantics, language philosophy, etc.

The technique has best been analyzed by Charles Stevenson, not a lawyer but a philosopher. He wrote of the method of persuasive definition.² While he wrote for those who were interested in the problems of the language of ethics, he too saw that legal language was subject to the same analysis. In following the analysis, its refinements, and its implications, we will need to move about from semantics to logic to semiotic to general semantics to undeveloped theories of human behavior.³

A LOOK AT THE METHOD

Two college students, John and Bob, are discussing the merits of Professor Smith. John indicates he will not enroll in any more of Smith's courses despite Bob's suggestion that Smith is a sure "A", because John believes Smith to be too one-sided. Bob argues that no person or teacher can be anything but himself. "Smith is a good teacher," says Bob, "because he knows that. It is only the poor teacher who fails to give credit to the good student for being able to dig out other viewpoints for himself."

There is nothing unusual about this kind of a discussion. You can be involved in a similar one almost any day almost anywhere, including the courtroom. In this instance, the key to the subtle technique is the phrase "good teacher." John may not be persuaded to take Smith's course, but if he is, then it will be partly because of predictable human reactions to such phrases as "good teacher" which seem to have some external reference to some pre-existing standards for "good teaching." Bob may have succeeded, whether purposefully or not, in avoiding the couching of his argument in terms of his own likes and dislikes and may have become an amateur psychologist. He may be taking advantage of the general human tendency toward conformity and imitation. Most people favor "goodness" wherever they find it. Too often these same people may favor a thing or a person or a situation because it has been defined as good. That is, they may react to a favored word rather than to the greater complexity of a thing, person, or situation. John may not realize that he is reacting to Bob's opinion or evaluation of Professor Smith. If Bob had said merely that he liked Smith because of his approach to the teaching situation, then John would have been

² "To choose a definition is to plead a cause, so long as the word defined is strongly emotive." STEVENSON, *ETHICS AND LANGUAGE* 210 (1944). The author's analysis has been referred to at least twice before in legal literature, Shuman, *Jurisprudence and the Analysis of Fundamental Legal Terms*, 8 J. LEGAL ED. 437 (1956); Stoljar, *The Logical Status of a Legal Principle*, 20 U. CHI. L. REV. 181 (1953).

³ Professor Stevenson should get credit for so much of his analysis of persuasive definition as I have accurately conveyed. He probably would not agree with my elaborations. The unsullied version may be had in his work cited note 2 *supra*.

aware that what he was reacting to was a personal opinion. He still might be persuaded, but for a different reason, and his evaluation would be more accurate.

Take an equally obvious legal argument. Suppose two candidates for the same political office, Mr. *A* and Mr. *B*. *A* defames *B* on a television program under circumstances where the television station was required by government regulation to allow *A* to telecast and had little or no control over *A*'s statement. Suppose *B* sues the television station for damages for the defamation. While the question of the defendant's liability is a complex one, very likely one of the arguments which would be made on behalf of *B* would be that he should not be made to suffer such harm without compensation, particularly since he is an "innocent" party.⁴ Again, but here in lego-logical context is a persuasive definition, an attempt to arouse a response favorable to the client via the use of a favored word. This argument is largely, if not completely, an appeal to the emotion of the decision maker.

Not quite so obvious is another sort of argument. Suppose the case where a deserted wife is trying to obtain funds for her continued support. She cannot obtain personal jurisdiction over her husband. Her husband had taken out several insurance policies naming the wife as beneficiary and the wife has possession of them. Can a court authorize her to do what the policies do not permit, to turn the policies in for their cash surrender value? A possibly successful argument can be couched in technical terms: while the court must have jurisdiction over either the insured husband or his insurance policies, in this situation the court can achieve jurisdiction over the policies if the appropriate procedures are followed because the insurance policies are "personal property." Thus the court can gain the respected quasi-in-rem jurisdiction and grant relief to the extent of the property of the defendant—the cash surrender value—which is within the jurisdiction of the court.

The key word in this appeal to the emotion is "property," a word not as different from "good" or "innocent" as it seems. A predictable attitude prevails toward "property" in this kind of situation. The method is to define your case in terms which will arouse such a predictable attitude.

Admittedly the force of the analogy of this situation to other relationships which have been called "property" may bear on the persuasiveness of the argument. In no particular case can the analyst be sure whether the reaction is to the situation as a whole or to a favored

⁴For a case involving a similar problem, see *Farmers Educ. & Co-op. Union v. WDAY, Inc.*, 89 N.W.2d 102 (N.D. 1958), *aff'd*, 360 U.S. 525 (1959), 107 U. PA. L. REV. 280, in which the dissenting opinion speaks of the "innocent" bystander, where a corporation was alleged to have been defamed.

abstraction. The analyst can only be aware of the possibility or even probability that a decision maker will jump the complexities of a situation to a conclusion couched in favored words.⁵

THE SEMANTICS OF THE METHOD

Understanding of how the device works and skill in manipulation as well as recognition comes from seeing it at work under a semantic explanation. The study of language which is called semantics comes to us originally from a sort of an inter-working of psychology and philosophy. Ogden and Richards,⁶ the ground-movers in this area of thought, added the study of language as a facet of the overall study of human behavior. They indicated that such behavior could not be properly evaluated unless the language involved was also included within the observations. Neither could proper philosophical conclusions be reached about the nature of man and his world unless the very language man used was considered. In short, heretofore man had oversimplified the nature of his world by taking his language too much for granted.

Ogden and Richards developed a triangular structure to implement their new approach. Words stood not directly for things in the outer world, but for "thoughts" which were accumulated by a person's contact with those things. From that formulation they moved to another, that language had two chief functions: the symbolic, with ultimate external reference; and the emotive (and thus "meaningless")⁷ with no external reference. The word "tree" is clearly symbolic because one may point to its ultimate referent. "Beauty" is not symbolic, but is an emotive term with no possible agreed referent. Argument over whether a particular picture is or is not beautiful is futile because the emotive reaction involved is purely personal.

According to this approach, we tend to confuse these two functions of language and therefore do not realize that a word which may seem to be descriptive may actually be only emotive, such as the word "beautiful." The sunset may be red, orange, yellow and so on; its beauty, however, is not a matter of external stimuli impinging upon

⁵ A neutralizing argument might suggest that giving the wife the cash surrender privilege definitely changes the contract between the insured and the insurance company, and deprives the insured of his "freedom of contract" to change the beneficiary. Judges do have to choose between competing demands, but language-conditioning often hides this reality.

⁶ *THE MEANING OF MEANING* (5th ed. 1938). A good contemporary summary of their approach appears in SOBEL, *THE HUMANITY OF WORDS* (1958).

⁷ A notion coming from logical positivism. This proved to be an unpersuasive definition: nobody likes to say anything meaningless. If meaningless be defined to suggest "no external reference," it becomes harmless enough.

the senses, but rather a matter of the feeling of the individual who is observing it.

Another Englishman, Professor Williams,⁸ has given extensive application of this notion to legal discourse. For instance, whether a man is or is not "reasonable" is not a question of fact in the same sense as the presence or absence of a table is fact. Rather the word "reasonable" calls for the exercise of the emotions, the feelings of the individual, whether judge or juror. The distinction between "arbitrary" and "discretionary" is made in a number of places in the law, but the distinction is emotional, not measurable; it cannot be determined purely by reference to external things. Likewise the distinction between "direct" and "indirect" which seems to pop up periodically in new areas of the law, even though it may have lost favor in others. Then there is the word "justice" and all of its many relatives such as "right," "good," "proper," "necessary" and so on. According to this now widely held view, arguments over the *ultimate* meanings or standards of justice should be recognized as futile because here again emotions alone are involved.⁹

Charles Stevenson has taken this dualistic notion somewhat further. Instead of descriptive and emotive words, he speaks of beliefs and attitudes. We have notions concerning our environment which might be regarded as of a "factual" kind and which we may call beliefs. You may believe it is raining outside or that you have so much money in the bank and so on. Beliefs are not immutable because further information, observation, or evidence may cause you to change your beliefs. Attitudes, on the other hand, are tendencies to react in light of your beliefs. If you believe that there is no sugar in your coffee and if you like sweet coffee, you will probably sweeten it. Your feeling about the matter may be called an attitude to distinguish it from a belief.

Attitudes are functions of beliefs. As your information changes, so may your attitude. If you like a particular person, have a favorable attitude toward him, because you believe him to bear a blood relationship toward you, conceivably your attitude could change to dislike or apathy if you learn that he is not actually related to you at all.

The Ogden-Richards dualism may be translated into the Stevenson terminology. Emotive words are directly related to attitudes. Descriptive words are directly related to beliefs. Immediately it should become clear why definitions can affect and bring about desired reactions.

⁸ Williams, *Language and the Law* (pts. 1-5), 61 L.Q. REV. 71, 179, 293, 384 (1945), 62 L.Q. REV. 387 (1946).

⁹ The suggestion is not that "justice" is a useless or a meaningless term. Or at least that is not a suggestion I would make. Rather, "justice" does not have only one meaning.

As if to demonstrate the Stevenson analysis, there appeared recently a book length persuasive definition called *The Cultured Man*.¹⁰ Since the author is an anthropologist he should know all about culture because he is a student of culture.¹¹ A goodly number of people like to consider themselves cultured, and they will want to read through the book to see how they rate on the author's culture scale. They will learn that the cultured man is against racial discrimination, in favor of granting statehood to both Alaska and Hawaii, and of course wants his babies to be born at home. My persuasive definition of the "educated man" says that he will not regard these statements as any more than personal preferences of the author. But how will some readers react to the suggestion that the cultured man will like a certain painting or will eat a certain food or will support a movement for a botanical garden for his community?

Leon Green¹² recently used this technique of clustering certain informational data around an attitude shaping word complex to help make his case for revolutionizing the present method of litigating traffic accidents. He indicated that insurance companies have shown opposition to an idea that would replace the fault theory of liability with an insurance kind of strict liability, the insurers paying the victim out of premiums received from all drivers. Dean Green defines the insurer into his new technique by saying:

"As *trustees of the people's money* in an enterprise whose *purpose* is to relieve other enterprisers from unbearable responsibility, to provide a remedy for the victims of the people's highways, and incidentally to relieve the people's courts of litigation beyond their capacities, they can find no justification for thwarting the *fullest* application of the insurance principle to those ends."¹³

Some of the definitional words are italicized. Other words are more obviously emotional: "thwarting," "the people's courts," "no justification." The italicized words are more likely to be taken at face value—as bits of information rather than attitude reflectors and shapers. Every lawyer "worth his salt" has used the same technique countless times.

Perhaps the outstanding example in the legal process of the interworking of beliefs and attitudes is the trial process. Trial judges

¹⁰ MONTAGU, *THE CULTURED MAN* (1958). See STEVENSON, *op. cit. supra* note 2, at 211 for illustration of the method of persuasive definition by the word "culture."

¹¹ A general semantics device to point out the shift of meaning would be to write: he should know all about culture 1, because he is a student of culture 2.

¹² GREEN, *TRAFFIC VICTIMS* (1958).

¹³ *Id.* at 84. (Emphasis added.)

and jurors come equipped as do all humans with a given set of attitudes at a particular moment of time, attitudes built up over a lifetime of accumulated attitude-beliefs. The trial is essentially a matter of establishing belief patterns, that is, beliefs about the "facts." Depending upon what facts are found, what beliefs are consequently held by the decision makers, certain attitudes take over to bring about a reaction, the decision of law-fact.

Since words may be used to change beliefs, and actually constitute the main belief-establishing tool in the legal process, words may be used to bring about reactions flowing from certain attitudes. Likewise, emotive words may be used to affect the attitudes directly. Subtle interplay of descriptive belief-words and emotive attitude-words becomes possible. Add what amounts to action and reaction by definition, and you get the method of persuasive definition.

Take the word "foreseeable" which plays such a significant part in negligence cases. It is hornbook law that one person is liable to another for unreasonably causing foreseeable damage to another. What is not so well realized is that the word "foreseeable" is less a symbol or externally pointing word than it is an attitude shaping or reflecting word, or, in the earlier way of putting it, an emotive word.

Suppose we start with the following "facts" in order to establish a belief pattern by way of illustration. *A* is an employee in a service station. He smokes a cigarette and then throws it away. Gasoline fumes are ignited and a fire is started in the station. Across the street a female, *B*, is occupied at work in a café. She looks up and sees the fire. She darts to where her young child is playing, scoops him under her arm, and runs for the door. She is stopped by an intervening chair which she did not notice, with resultant damage to both her and the child. As it turns out, the fire is brought under control before it ever leaves the premises of the station. *B* sues the proprietors of the station for her damage.

If we look at the prior definition of negligence liability as an expression of an attitude rather than merely a descriptive statement of the sort: "a combination of hydrogen and oxygen produces water," then we may say that a judicial decision-maker will take a favorable attitude toward a defendant if defendant can show that the damage he caused was not foreseeable. Defendant may then frame a potentially winning argument by saying that a person smoking in a service station could not possibly foresee such a chain of events, including a mother's tripping over a chair with a child under her arm.¹⁴

¹⁴ *Mauney v. Gulf Ref. Co.*, 193 Miss. 421, 9 So. 2d 780 (1942), presents essentially the situation in the text.

If statements made in judicial opinions mean anything at all, if the observations we can make from watching actual oral arguments are at all significant, such winning arguments are often successfully made. Yet any conclusion that this damage was not foreseeable can hardly be a scientific conclusion, one based on repeated experiments or even a series of interviews to determine what people may think is foreseeable.¹⁵ Indeed, recovery has been allowed to plaintiffs where the damage involved was certainly no more foreseeable in whatever scientific or descriptive sense may be given to that word.¹⁶ The conclusion has to be that at least in many cases, including the example given above, the decision was reached in part if not in whole by reaction to a persuasive definition, by signal reaction to a word or words which traditionally favors defendants.

Is it not fair to say that exactly the same pattern, the same method, is involved here as was involved in Bob's attempt to persuade John to enroll in a given course because it had a "good" teacher? Admittedly, a large measure of agreement may be reached on who are good teachers and on what damages are foreseeable, yet not because those words necessarily have external reference, involve beliefs about facts, but because it may be predicted that a good many people will share similar attitudes, will react in the same way to a given set of facts. More descriptive of the judicial reaction would be the simple admission by a judge that he believes that the mother should not recover under the given set of facts. Perhaps even more realistic would be the admission that defendant wins because he defined the damage as unforeseeable. The point is that describing the damage as unforeseeable adds nothing which helps the analyst. Conceivably the definition involved has blocked constructive thinking, active consideration of the "proper" allocation of risks in such a situation against the contextual backdrop of a more complete consideration of the facts involved.

While such a word as "foreseeable" may easily be recognized as "attitudinal" rather than "factual," compare another example, this time involving an opinion written by Justice Cardozo and involving the jurisdiction of a federal district court, where "emotion" would hardly be thought to be involved at all.¹⁷ This was a suit by a state tax collector against a national bank for overdue state taxes. The defendant

¹⁵ These days, the word "scientific" is being used a great deal in persuasive definitions to win favor.

¹⁶ For a list of unusual happenings that are "foreseeable" see Prosser, *Proximate Cause in California*, 38 CALIF. L. REV. 369, 396 n.120 (1950). *E.g.*, that a man driving a car so as to hit a power line pole would thus electrocute a workman operating a laundry machine two miles away.

¹⁷ *Gully v. First Nat'l Bank*, 299 U.S. 109 (1936).

bank was alleged to have agreed to assume the tax debts of another, insolvent national bank in exchange for assets of the insolvent bank. The question of jurisdiction of a federal district court over such a case arose upon the defendant's attempt to remove the case to such a court.

In an historic case, an earlier Supreme Court had decided that the federal courts would have jurisdiction of a claim for state taxes against a national bank because the suit arose under the Constitution and laws of the United States.¹⁸ The federal act of incorporating a national bank provided an "original ingredient" of a federal nature. But in the principal case, the Court found no jurisdiction because there was no federal law which was an "essential" element of the case. Other reasons were given, some pointing at least a little more toward beliefs or fact patterns rather than attitudes or emotions. Yet the grounding of the reasons for the decision chiefly in emotional terms such as "essential" can hardly be a reference to observable facts, particularly where "essential" turns out to mean not "necessary" to the existence of the claim as a mother is necessary to the existence of the child, but "sufficient" to support federal jurisdiction. Cardozo helped to bear out this conclusion by analogizing his reasoning to the test of "causation" found in many areas of law. But Williams has well pointed out how words like "important," "substantial," and "essential" are emotive; surely one no longer need point out that the concept of proximate cause is one of the most clearly emotive to be found in the legal arena, an open door to whatever attitudes may enter. So it is, if the federal aspects of such a case as the principal one (and admittedly there was some federal interrelationship) were to be defined in terms of a favored word, such as "essential," then the favorable decision follows. Cardozo may have been persuaded by the definition, although in his case it seems doubtful. However, while the definition purports to be a reason, it actually serves little more purpose than an expression of an unfavorable "jurisdictional" attitude toward the facts of the case. Of course, the rejection of jurisdiction itself expresses such an attitude.

One of the most able legal analysts of this generation, Felix Cohen, in effect suggested that if we would understand how people, including judges, reach the decisions they do, we must understand the people themselves.¹⁹ He went on to say in effect that one good way to obtain this understanding was to note the words they used to justify their decisions. Rather than ask a man what he thinks of segregation, give him an actual segregation problem to solve and see what he has to say, what kind of persuasive definitions, if you will, he uses.

¹⁸ *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824).

¹⁹ See generally Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238 (1950).

THE LOGIC OF DEFINITIONS

So far we have been dealing with word usages in isolated instances, as slices of the communicative-persuasive language process. Analysis always tends to be a bit artificial, as here, because humans do not react simply to sentences. Rather they react to sentences in context, not only the immediate verbal context of the sentence but the larger environmental context, as well as the predispositional context of the person reacting. Our analysis can move a step further toward that kind of reality through examination of the definitional process in general.

There are various kinds of definitions, but they all seem to serve a common function of explanation. Explanation in turn facilitates agreement between human beings. In this sense, the most obvious definitional method is to point to the part of the environment symbolized by a particular word or group of words: "What is a cow? Why, there is one over in that field."

But one great service of words is to allow intellectual manipulation of the absent parts of the world environment. Words stand usually as symbols. When words are used in this way, explanation may be achieved, agreement on how the words are being used may be reached by relating the given words to other already accepted word patterns: "A cow is a four-legged creature which gives milk. . . ." As a simplification, this can be called the synonym technique.

These examples illustrate the familiarizing method, moving from the unknown to the known, to the accepted, customary word patterns. In the legal process, these definitional patterns are widely used. At the trial stage, for instance, things are often pointed to in order to establish agreement on word usages. The use of the synonym technique of course appears on all levels.

These are at least part of the total technique of dealing with accepted word usages. But definition is also a way of establishing new usages. One may by definition formulate a new word-to-word-to-thing organization. He may establish new relationships, build new maps. He may create.

I speak of the stipulative definition. Not only does this kind of definition serve very often to point out previously unobserved relationships, but it serves to bring about agreement that henceforth here is the way we will use certain words. Such a definition may point the way to new insights, or it may facilitate discussion—or, indeed, it may merely confuse. The clearest example of the stipulative definition would involve the coinage of a completely new term to fit newly discovered objects or relationships. As man progresses in his exploration

of the universe, he will add ever more stipulative definitions to his discourse. By and by they will lose their newness and become merely customary definitions, going through the process of cultural assimilation common to all now accepted word usages.

Stipulative definitions are constantly being used in the creative aspects of the legal process. An outstanding example involves the now customary definition of the "right of privacy." Before the turn of the century, some judicial decisions had been made that one person could not publish the letters he had received from another person because that other person had a right of "property" in the letters; similarly, one person could not use another person's name, and so on. Two legal scholars, Warren and Brandeis, thought they saw such matters as human liberty and psychology involved. They set about to reorganize the legal attitude by pointing out certain human-legal relationships which were not being clearly recognized. They capped off this bit of creative clarification by using the stipulative definition, "the right of privacy." Each state high court which has successively recognized these "new" relationships—and the process moves on to include situations not imagined in that earlier period—gives great play to the Warren and Brandeis proclamation.²⁰ Thus these scholars helped prepare the way for the extension of a "right" which might have taken years longer to evolve to its present state.

We are quite free to stipulate new definitions. I may, for instance, state that when I say "proximate cause" I mean to be talking only about automobile collisions and the problem of what injuries flow from such situations. While I might not achieve common acceptance of such a definition, still I could make use of it in an article such as this and achieve communication, so long as I continued to remind the reader of my definition.²¹

Here is where the rub comes. A surprising number of people have difficulty in accepting the flexibility of words in our language. They can see that a brand new term like "rostop" might readily be applied to some new form discovered on Venus, but the old terms are thought to be fixed in place. In the legal process, the doctrine of *stare decisis* helps to preserve this impression regarding legal words.

This view of words is not peculiar to lawyers. There seems to be a general tendency to act as if words had given and essential meanings. Perhaps a reason can be found in the conditioning process by which a person learns a language; the close association of word and thing be-

²⁰ Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

²¹ The explanation of verbal patterns called persuasive definition is itself a stipulative definition.

comes built in. Use of words like "apple" and "salt" bring definite responses and there is no need to remember that these words could be used differently. Then, apparently, a person becomes equally careless regarding words which have the potential of bringing a variety of responses in even the same individual. A person who is reacting to a word complex often assumes that the response he is having at a particular moment is the response which is necessarily associated with the words involved. Thus Roe believes that a particular movie actress is "beautiful," and he says so. He may have great difficulty in seeing why anyone would disagree, not necessarily because he believes what is good enough for him is good enough for his neighbors, but because he believes that his use of the word "beautiful" is universal. So too, lawyers can argue about the meaning of "proximate cause" or "foreseeable" or any number of other even more precise legal expressions and do so partly in the belief that they are arguing about the truth or falsity of their definitions.

Is it any wonder confusion results? A decision to use words in a particular way, perhaps a unique way, may easily be seen as a customary usage, or a customary usage of words may be thought to be the only possible usage. Naturally enough, the lawyer, as advocate, or even as analyst, will often use a stipulative definition which passes as a customary definition. Since many judges are more readily persuaded by the authority of tradition than by the seemingly speculative approach of an admitted stipulative definition, the lawyer as advocate may want to promote such confusion. But as analyst he may too often miss in the confusion ways of looking at his problem which might be favorable to his cause.

Another way of stating this perspective of definitions is to point out that definitions are not either true or false, *i.e.*, in the sense of ultimacy, in the sense that one can say, "Yes, I am leaning against a tree." This latter statement refers to a nonverbal relationship which can be verified or refuted by checking the nonverbal facts. It is not the words which are "true," but the nonverbal relationship. Even the act of pointing to an object we call a "cow" and saying "That is a cow!" is not true or false in this same sense, even though everybody may agree on the definition.²² The further we are removed from the pointing situation, the less able we are to speak of truth or falsity in either sense.

Thus I may actually stipulate a definition which is not true, in the sense that it does not fit perfectly the nonverbal facts. I can say, "A circle is the locus in a given plane of all points which are equidistant

²² This example differs from the previous one in that here is a definition whereas there is a description, direct reference to nonverbal events alone.

from a given point in the given plane." Such perfect, two dimensional circles do not actually exist in the nonverbal world. Still this has proven a most useful definition. I can by definition say that a corporation is a person. The word "person" is itself a definition of convenience; clearly so is the corporation definition. We can expect agreement on the definition if it proves useful. We could welcome disagreement if we realized that there may be more useful definitions of a corporation, disclosing hidden, unobserved relationships.

Calling an insurance policy a piece of property so that a court can give a deserted wife some relief may be convenient and may be good, but it is not a matter of ultimate truth. A court can apply this definition or it can refuse to do so; it can be persuaded or not by reference to the implications that follow. But it does seem possible too that a person, whether judge or juror or lawyer, may be persuaded toward a particular decision by the belief that words have set meanings or references and that the particular definition given is that proper one. So it is that a definition can be persuasive simply because it is set down in definitional form. Calling a person a trespasser may make him a trespasser in the eyes of a decision maker.

One of the most far-reaching definitional problems revolves around the word "law." The definition of "law" is significant not only for legal philosophers but also for the bread and butter attorney. Numerous definitions have been put forth over the years, but none of them can be said to be true or false. If I define "law" as the voice of the people, I may persuade a judge that he should be concerned about that voice, particularly if he be an elective official, but I cannot prove this definition. If I say that "law" is what judges do and nothing else, I may be articulating a clarifying simplification but not a final truth.

Those who disapprove of the decision of the Supreme Court in the segregation cases may say that the Court was not acting legally, *i.e.*, the judges were not finding or applying law, they were engaging in speculation about psychology or sociology. Yet by another definition, equally defensible as a matter of logic, if the Court had not looked outside the accumulated legal verbalisms of prior Supreme Court decisions, they would not have been acting legally. Who is right? Again, what is your definition of "right"? The question turns out to be many questions with many answers. Better, perhaps, to ask simply: Do you agree or disagree?

Still, in many decision-making situations, people are persuaded by the definition of law which is used. Of course, it is not entirely a matter of being fooled by words, although it probably often is a matter of being satisfied by the words because the alternative definitions are not known

or because it is not known that there can be alternative definitions. A related stipulative definition was that of Holmes who stated more than once that in assessing the constitutionality of congressional acts, the Justices should not substitute their own views, on economics for instance, for those of the congressmen. "The criterion of constitutionality is not whether *we* believe the law to be for the public good."²³ Yet some personal belief has had to come into play, in Holmes' instance, to dictate that his role as judge was definitely limited—a belief couched by Holmes in terms of constitutional interpretation. Persuasive this view has been,²⁴ but it is not a matter of truth or falsity. It is only a political view. Why could not a later Justice believe that his own economic viewpoint was as significant and weighty as Holmes' so-called political viewpoint and use it as a basis to strike down an act of Congress?

With that we are back to the basic method that is called persuasive definition. What I have tried to suggest in this section is that a statement may be per se persuasive if it takes the definitional form, because of the human tendency to take definitions for granted.

FROM EMOTION TO STRUCTURE

Of course there is still greater complexity in the human process of communication and persuasion than I have yet suggested or can suggest. To speak of emotive words versus descriptive words, of attitudes versus beliefs, of synonym definitions versus stipulative definitions is to play somewhat on the surface. Yet this does present an approach to the bridge which is now being built between language and other forms of human behavior.

To help round out the picture of the method of persuasive definition, I must refer to two of the leading language behaviorists in the United States, Alfred Korzybski²⁵ and Charles Morris.²⁶ Morris' emphasis seems to have been on the construction of a special syntax to talk about language-behavior, built upon a foundation of behavioral psychology. Korzybski's approach was to attempt to break through

²³ *Adkins v. Children's Hospital*, 261 U.S. 525, 570 (1923) (dissenting opinion). (Emphasis added.)

²⁴ Justice Frankfurter has embraced the Holmesian viewpoint. For example, see Frankfurter, *The Supreme Court in the Mirror of Justices*, 44 A.B.A.J. 723, 802 (1958). "For those wielding ultimate power it is easy to be . . . wilful . . . in the sense of enforcing individual views instead of speaking . . . as the voice of law. . . ."

²⁵ KORZYBSKI, *SCIENCE AND SANITY* (4th ed. 1958).

²⁶ MORRIS, *SIGNS, LANGUAGE AND BEHAVIOR* (1946). As yet there has been no unification of the various approaches to language-behavior. Morris attempted to unify the way of talking about language. Korzybski's work is by far the broadest in coverage and is vast in its implications. Still, others vary from this approach.

language as a primary human conditioning factor, to clear the way for an understanding of the interaction of man with both his verbal and nonverbal environment.

Both of these approaches show in different ways a predominant concern with the currently useful formulation of "structure" or "organization" or "order." From the Korzybskian perspective, man comes to master his environment through an ordering or organization of its complexities. Language in its symbolic role aids in the manipulation by allowing man to envisage that world. Man may organize his language in various ways, by stipulative definition if you will, by logic in the classical sense. But the trick is to master language itself to the point that the language structures which are built correlate with the structures of the nonverbal world environment to make for maximal predictability and adaptation.

From this view, mere logic in the classical sense is not enough. Consistency of verbal patterns, adherence to stipulated definitions, will not bring maximum predictability and adaptation. The analyst and the evaluator alike must look for consistency between verbal patterns and nonverbal patterns. When one applies this notion to the method of persuasive definition, he realizes that that method works more readily as a manipulative device on another person who is ignorant of the latter kind of consistency. The legal professional who is trained in Korzybski's general semantics, for instance, is not so readily persuaded by traditional legal doctrine as he is by a combination of legal and non-legal doctrines which bear the appearance of being geared to the environmental process. The legal theories which have accumulated from the background of legal realism and sociological jurisprudence as well as analytical positivism are more persuasive to such a person than are the theories of the analytical positivist alone. One does not have to be a general semanticist to take somewhat similar views toward legal doctrine.

Morris gives added insights into the structuring of language, the problem of syntactics.²⁷ He also has helped to show that the Ogden-Richards approach was too much a simplification of the language-behavior complex. Words not only express "emotions" and describe things and events. They may also be used to indicate the purpose of the user, or they may be used to prescribe conduct or incite action, as legal words are so often used.²⁸

²⁷ "Syntactics" as thus used may be distinguished from what is sometimes loosely called "semantics," the structural correlation of the verbal levels with the nonverbal levels.

²⁸ LANGUAGE, THOUGHT AND CULTURE (Henle ed. 1958).

Of immediate concern is his explanation of the formative function of words—the organizing or structuring role. A word like “and” clearly serves this organizing and arranging function by bringing together other symbols and so ultimately the things symbolized for whatever operational manipulation may follow, as in the sentence: “Pick up the apple and the orange.” Everybody will recognize that there are many such organizational words: “over,” “above,” “under,” “in” and a host of other prepositions, for instance. What is not so clearly recognized is that perhaps every symbol has this organizational potential. The words of the lawyer prove no exception.

Legal discourse is ordinarily thought of as emphasizing logic. Legal language *is* logical, and so indeed are most areas of discourse. An appropriate name which is widely used to emphasize this aspect of legal language is “legal doctrine.” Another appropriate name is “legal syntax,” which brings attention to the structuring of that area of discourse. Each technical area, and there are many, which we have blocked off has acquired its own syntax or internal structure which has arisen out of interpersonal relations and decisions in the legal process, as in the areas of torts, contracts, procedure and constitutional law. More specifically, for instance, there are the interrelated terms of offer, acceptance, consideration, performance, etc., which route one through the area of contract doctrine or syntax.

Words heretofore called “emotive” all have this structural function. The decision to call a man “reasonable” stems from a decision that the man bears certain accepted relationships to his environment. The word “reasonable” also appears in numerous of the blocked-off legal structures and bears definite syntactic relationships to the other terms in a particular syntax, calling ultimately for certain definite behavioral responses which follow from acceptance of the particular terms as appropriate. The effect of following the “reasonable” route in the negligence-doctrinal appraisal of a defendant is to bring ultimate judgment for that party.²⁹ In terms of definition, if a man is reasonable, he is not negligent—by syntactic requirement. Similarly, a circle is a figure which represents the locus of all points in a plane which are equidistant from a given point in the given plane. Such a geometric organization gives in the beginning a workable form with which to approach life facts. The negligence doctrine gives in the beginning a workable procedure for attacking a life problem, routing the litigational

²⁹ All the previous examples may be viewed from this perspective. Key legal terms actually do have “strong appeal” as well as this organizing function. It is difficult to determine which of these aspects is the more “persuasive” or whether they are actually different.

process from the pleading stages on through the trial stages and through appeal to whatever decision finally persists.

The method of persuasive definition, from this approach, involves the method of routing the decision maker into one syntax rather than another, or in one direction in a particular syntax rather than another direction in that same syntax. Thus the tort syntax may bear an organization which leads a decision maker to rule in favor of a plaintiff where contract syntax would lead to an opposite decision.³⁰ The job of plaintiff's attorney is to bring his case into the tort syntax by defining his case in the terms of that syntax. Or an injured party who defined his case in terms of battery doctrine might find himself barred by a statute of limitations of one year. His only hope might then be to define his case in terms of negligence doctrine if that would bring him within the scope of a two year statute of limitations.³¹

In this way of looking at things, the lawyer as advocate is not looking for emotions but for patterns of organization, for orientations. He knows the judge tends to organize his world into the legal part and the nonlegal part. He knows the judge tends to favor legal syntax over nonlegal syntax. The lawyer even as private citizen may actually criticize the judge who looks to another syntax for aid in organizing his thoughts and reaching his decision. He may not favor the reasoning of the Supreme Court in the segregation situation even though he favors the result. Looking at the whole problem from the Morris perspective, however, he might conclude that legal professionals have no corner on total knowledge; he might even welcome the orientation he could get from the other disciplines or language structures as a means of checking his own legal orientation.

Incidentally, the Morris approach has an added advantage over the earlier approaches in that it calls attention not just to one word or several words but to large structures of words and necessarily to the vast associations of ideas which gather around structures: associations which work in some as yet mysterious way to arouse the human into action, even if only internalized action.

At this point Korzybski supplies a formulation of tremendous untapped potential: the multiordinality of words. The formulation is on

³⁰ The life insurance company which delays in returning a policy may not have "accepted," but it can be called negligent. See PATTERSON, *CASES ON INSURANCE*, 642-55 (3d ed. 1955). The landlord who fails to make repairs he contracted to make for a tenant may not be liable to an injured third party under "third party beneficiary" theory, but he may be liable for negligence even though he would not have been liable except for the contract. See PROSSER, *TORTS* § 80 (2nd ed. 1955).

³¹ For example, an innocent bystander is hurt by a man who is "defending" his son with a rifle. *Lopez v. Surchia*, 112 Cal. App. 2d 314, 246 P.2d 111 (Dist. Ct. App. 1952).

loan from mathematics. Every person who knows something of algebra will recognize the multiordinality of the symbol "x" in the equation $x^3 - 6x^2 + 11x - 6 = 0$. The symbol "x" has three values which will satisfy the equation. "Satisfying the equation" means simply retaining the defined relationships of the total expression. The expression retains its form whether you substitute for "x" the numbers 1, 2, or 3.

Actually, when you view mathematics as a language, it should come as no surprise that the symbols of our everyday language and our legal language partake of the same multiordinality. Each word or term in a given syntax is related to the other words or terms as are the symbols in the equation, and there are multiple values for the words which will preserve the structural significance of a particular proposition, just as there are several values for "x" which will satisfy the equation.

Now a particular word can be referred to as multiordinal rather than emotive. A word like "good" still calls for a favorable response, but this is because of its invariant syntactic function, its precise logical meaning. The word has been assimilated into our language with this fixed relationship to certain other words. The word could be called behaviorally invariant to suggest the predictable tendency of humans to respond to such a word in a particular way. But such a word is also a roving word in that it may be moved about willy-nilly in reference to many other words. It may be used to describe anything from potato bugs to heaven. Such a word is symbolically or descriptively variant.

If language be looked at as having structure, and nonverbal experience be looked at as having structure, then the maps we build out of language symbols may be superimposed upon the experience structure to give an appearance of conformity. That is, we view our world structure through our language structure.³² There are a number of available language maps. The pattern of persuasive definition involves giving a particular map to the decision maker so he will view the "facts" of the case and of life the same way as the advocate and his client. But the lawyer as private citizen can, if he wishes, attempt to look for the maps which correlate closest with the terrain. In a sense, this correlation is the problem of justice.³³

The word "fact" which is so important in legal discourse is such a multiordinal word; but, rather than being merely of the third order, it

³² A leading proponent of this view was Benjamin Whorf. For a bibliography of his writings, see Hackett, *Bibliography of the Writings of Benjamin Lee Whorf*, 9 ETC.: A REVIEW OF GENERAL SEMANTICS 189 (1952).

³³ This "justice" idea is briefly elaborated below. See text accompanying note 42 *infra*.

is perhaps an infinite valued word. To illustrate its form-making or behavior-disposing function, consider that juries find facts, judges find law (also multiordinal); decisions are made at all levels on the basis of facts; witnesses must usually testify as to facts and not opinion; and so on. For these functions to be performed, we must know what the facts are. We may know them by observation or via persuasive definition, but we must be able to call them facts.³⁴

Yet consider the variability of reference. Do we mean the facts which actually happened, the objective occurrences which we may know if at all only by inference; do we mean a particular person's observations, his related experience of his observations; do we mean the observations of all the possible witnesses; do we mean the reaction of the jury? In the context of any litigated case, there are actually as many values for the word "fact" as there are persons participating in some way in the litigation—multiplied by the above and other syntactic applications. Everyone may agree that facts must determine the outcome and seem to agree what the facts are without actually doing so. As with the word "good," each person may to some extent provide his own references.

The variation may be multiplied even more. Sentences like "Democracy is good" of course increase the variability because two multiordinal words are involved. Each interpreter may, if he wishes, substitute for "Democracy" experiences which he favors, and preserve the logical structure as well as the behavioral structure involved in the simple proposition. Similarly, everybody can agree that the evaluation of a particular defendant driver's conduct is for the jury because reasonableness is a fact question—by definition—by syntactic requirement. Aside from this functional invariance of such words, the way in which each juror or perhaps a later appellate judge will use this word is very often unpredictable.

There is more involved here than vagueness. I am not just saying that words like "reasonable" and "fact" are vague in the sense of having no referents. Far from it. The words often have definite referents for each person who responds. The difficulty is in finding what referent a particular person attaches to them. Thus is increased the chances of success in using a particular definition containing multiordinal words. The higher the order of the word, the more possible values or "meanings," and the greater the chance that the decision maker will find some referents for the word which will put him in agreement, particularly

³⁴For a discussion of the doctrine of evidence from the perspective of general semantics, see Loevinger, *Facts, Evidence and Legal Proof*, in *The Language of Law: A Symposium*, 9 W. RES. L. REV. 115, 154 (1958). For further discussion of the "fact" formulation, see Probert, *Law, Logic and Communication*, *id.* at 129.

where his attitude toward lower level expressions would be thought to be unfavorable.³⁵

BEYOND SEMANTICS

Understanding the method of persuasive definition, appreciation of its workings from the various perspectives, might seem to be of most immediate importance to the legal advocate, the lawyer whose job it is to persuade a judge or a jury or a client or another lawyer. A moment's reflection reveals that a judge too may profit from such an awareness if for no other reason than that he will in this way gain greater insights into what factors he regards as important, into how to analyze the problem before him. But there are even deeper implications for legal theory. Disclosure of the method points the necessity for closer co-operation between students of human behavior and members of the legal profession at all levels. This kind of analysis raises questions about the notions of sociological jurisprudence, legal realism and natural law, to name only a few of the significant portions of legal philosophy. "Fact" researchers as opposed to "theorists" need to take heed of these insights as they bear on fact studies. Indeed, language-behavior theory is bound to have implications across the board; for all of us, whatever our specialty, whatever our perspective, use language to make our way in that specialty. Presently, language theory takes the leader's role formerly occupied by philosophy. Or if you wish, language theory is the currently provocative philosophy.³⁶

There is supposed to be an attitude among certain legal thinkers which has been called "legal realism." Some apparently count the attitude as dead. More likely, it has been absorbed into modern legal thought.³⁷ It is not enough to say that this attitude has served its purpose; better to say that the attitude continues to serve its purpose in promoting a critical outlook toward legal processes. Yet, while all who have been called legal realists have displeased some portion of the legal profession by shaking the complacent foundations of an older line of thought, some who have been called legal realists have displeased almost everybody including the members of their own supposed fraternity. These black sheep are regarded as having gone too far. It is not

³⁵ Along this line a favorite technique of the advocate in negligence cases is illustrated in *MORRIS*, *TORTS* 176 (1953). The defendant may be able to claim that the specific way in which the damage occurred was hardly foreseeable. The plaintiff will argue that the general kind of harm was foreseeable. *Mauney v. Gulf Ref. Co.*, 193 Miss. 421, 9 S.2d 780 (1942), could be argued in these two ways.

³⁶ An attempt at persuasive definition.

³⁷ For an expression of the continuing value of the approach see *Sturges, Legal Education—Some Compliments Due It*, 1957 WASH. U.L.Q. 1.

safe to conclude that they therefore did go too far. Now, viewed in a brighter light of language theory than was then available, perhaps their excesses can be qualified to the advantage of legal thought.

Olipphant presented one of the clearest expressions of the excessive position.³⁸ In essence, he suggested that by and large legal reasoning was question begging, that there always were available in the archives competing premises with which to decide a case, and that the real reasons for a given decision were rarely given.

Olipphant's argument need not be looked at as either true or false. Rather, it may be asked, is the analysis useful? Surely it has been, at least to those students who have seen it first hand. Such an attitude improves the skills of the advocate although it may leave the decision maker and the predictor at sea. What seems to me to be excessive about the position is its possible implication that legal doctrine or reasoning is peculiar in these respects. More accurately, all reasoning suffers from a kind of circularity, all definitions are in the end unjustifiable.

Take a sample problem chosen from the field of torts. Similar examples could be taken from any field of law; every judicial decision provides a case in point. *A* is a guest in *B*'s house. *A* becomes ill and asks to be lodged overnight. *B* refuses the courtesy and demands that *A* leave. *A* falls unconscious at the wheel of his car and suffers damage. He sues *B* for compensation for these damages. If a court should provide relief with the simple statement: *B* must pay because he owed the duty to *A* to render him aid, we might be satisfied with the result, but most of us would agree that the given reason really "begged the question." We can also recognize that there is available a competing premise that *B* did not owe *A* a duty to aid him, which in so brief a form would also be "begging the question." In other words, neither proposition provides a thorough consideration of the factors we all agree are relevant.

More detailed reasoning would involve bringing into play the whole syntax of property-tort relationships in an assertion that *A* is a licensee who loses his characterization as such and becomes a trespasser when *B*'s consent is revoked. The policy toward trespassers operates, and so on. We then conclude that these are the reasons for finding "no duty."³⁹

Yet the question is still being begged, according to the Olipphant kind of view, unless we can say why we invoke this particular syntax.

³⁸ Olipphant, *A Return to Stare Decisis*, 6 AM. L.S. REV. 215 (1928).

³⁹ Of course a court could simply refuse to treat *A* as a trespasser. See *Depue v. Flatau*, 100 Minn. 299, 111 N.W. 1 (1907).

In further justification we turn to the syntax of principles relevant to decision making in general. We resort to the licensee-trespasser syntax, we explain, because tradition calls for it. Why follow tradition? Then we resort to what might be called an anthropological or political or sociological syntax or line of reasoning. This is the way the human being tends to behave, we point out. But is that a necessity? No. Then why? Why? Why? Soon you are down to basic premises, to primitive levels where the answer must be: I do because I do. This is so because this is so. You arrive at this primitive level no matter what premise you use to reach your conclusion or to justify your conclusion, as the case may be.

Now take the following criticism of legal reasoning. You find the suggestion that decisions should be made not just on the basis of legal doctrines, but also on the basis of other doctrines which loosely may be called sociological. But there are obviously competing sociological premises available too; premises which find their sources ultimately in competing interests of competing personalities who hardly ever find themselves in a minority of one, so that you will then run up against competing notions as to how the interests should be ranked.

In Korzybskian formulation, the explanations of definitions, so to speak, are to be found on the nonverbal levels. There comes an end to any definitional chain where reasons given become repetitive and circular, in the common understanding of "circular," or simply end with pursed lips and a defensive stance suggested by the Holmesian "A dog will fight for its bone." We will always come to the point where definitions or reasons can be no further justified—verbally.⁴⁰

It does not seem likely at this moment that developing human knowledge will put an end to this "human nature of human reasoning." Rather the realization that man not only does use the method of persuasive definition but probably cannot escape using something very much like this method directs us to look to something other than logic for help in understanding how judges or lawyers or whoever reach their decisions. We look to the studies of man as he operates and lives and reacts as man in his complicated relationship with his verbal and non-verbal environment and context.

The current formulation of this perspective in various areas of thought including language-behavior studies seems to be by analogy

⁴⁰ Korzybski in *SCIENCE AND SANITY*, *op. cit. supra* note 25, at 21, told of a parlor game wherein the victim is asked to define any simple word. Then he is asked to define the definition. And so on. At no time is he allowed to use any key word previously used in this defining process. Korzybski relates that the victim soon becomes visibly upset—he reaches the end of his words. I have experienced the same reaction in the classroom when I seek the reasons for judicial decisions.

to "field theory."⁴¹ Here we have only a glamorous way of suggesting that there is a structural relationship of man to language to the non-verbal world which cannot successfully be understood by the primitive formulations presently in use. This notion of structure is itself largely undefinable except in the nonverbal understanding of those who use the formulation. The formulation serves as a starting point, a point of liaison between man and his world. Man apparently must have such points of liaison. And the current notion is that man will function most effectively if he knows what his starting points are.

Thus we may take heart that legal reasoning is no worse off than most lines of reasoning, that legal reasoning may be just as capable of handling human problems as are other lines of reasoning. Now law, as well as all lines of endeavor, must investigate to determine if a basic premise of language-behavior theory is relevant to its endeavors. Can these somewhat isolated doctrinal systems somehow reach a closer correlation between their structures and the observable structural relationships between man and his total environment?

To try to state it simply, law needs to look more closely at the developing knowledge about and interest in the studies of human behavior. Presently this appears to be the most promising route on the way toward the achievement of the "desirable" structural correlation.

IN CONCLUSION—THE MATTER OF JUSTICE

Everybody talks about justice; hardly anybody but philosophers talk systematically about it. Every lawyer purports to serve justice at all times and to call its name for his clients' sake, but few lawyers pay very much attention to justice as a pervading problem of their calling.

Yet the implications of uncovering the method of persuasive definition include the weighty "truth" that the search for justice is the search for some verbal guide to aid in selecting among competing premises. If it be true that human reasoning be circular in the sense already suggested and if it be true that *the* guide would be verbal, then it would likely be true that there would also be competing guides to justice, so that there would be no solution to the problem as it presently is almost universally viewed. In fact, Stevenson put forth his analysis of persuasive definition as a clue to the problem of justice, as a pattern of reasoning which could not possibly be avoided by those who purport to solve the problem of justice.

⁴¹ For instance see *LANGUAGE, THOUGHT AND CULTURE* (Henle ed. 1958); SOBEL, *THE HUMANITY OF WORDS* (1958); Cohen, *Field Theory and Judicial Logic*, 59 *YALE L.J.* 238 (1950), or any book on Gestalt psychology.

What I am saying is that the problem of justice so far as the legal process is concerned is nothing more nor less than the problem of what decision to make, what verbalism to choose from the array of competing persuasive definitions which exist in the vast structures of law and related disciplines—which must mean, really, all disciplines.

As Felix Cohen so neatly put it, anyone who offers guides for decision making, in the guise of facts, for instance, is really participating in the market place of ethics (justice) by supplying another set of premises from which to choose.⁴² If I say that a certain judge must make a certain decision because of precedent, I am making an ethical assertion; I am saying here is the way he should act because judges do act that way. Another person may properly compete with me and attempt to persuade by his own definition of what the judge should do, for example, on the grounds that changing social conditions call for a different decision.

I do not mean to say that awareness of the pattern of persuasive definition solves the as yet eternal problem of justice; I only mean to say that it offers significant insights into that choice-making problem. It yet remains to uncover the basic premises already in use—no small task—then to create new ones and weigh them all in the balance. What old and what new premises will be offered, how the competing premises will be weighed, all depend necessarily on the persons involved in the uncovering, the creating and the deciding. The next new insights will come from studies of human behavior not even envisioned at present.

Still, the fresh insights already being offered by the students of language-behavior have not yet been absorbed. Lawyers, as promulgators of justice as I have described that process, as public servants and as practical advocates cannot really afford to ignore these insights and their implications.

These are my definitions. I can only hope they may be persuasive to some small extent.

⁴² COHEN, *ETHICAL SYSTEMS AND LEGAL IDEALS* 21-28 (1933); Cohen, *Modern Ethics and the Law*, 4 *BROOKLYN L. REV.* 33 (1934).