



**PennState**  
Dickinson Law

**DICKINSON LAW REVIEW**  
PUBLISHED SINCE 1897

---

Volume 62  
Issue 3 *Dickinson Law Review* - Volume 62,  
1957-1958

---

3-1-1958

## Language and the "Law": Jurisprudence and Some First Principles of General Semantics

Julius Paul

Follow this and additional works at: <https://ideas.dickinsonlaw.psu.edu/dlra>

---

### Recommended Citation

Julius Paul, *Language and the "Law": Jurisprudence and Some First Principles of General Semantics*, 62 DICK. L. REV. 227 (1958).

Available at: <https://ideas.dickinsonlaw.psu.edu/dlra/vol62/iss3/3>

This Article is brought to you for free and open access by the Law Reviews at Dickinson Law IDEAS. It has been accepted for inclusion in Dickinson Law Review by an authorized editor of Dickinson Law IDEAS. For more information, please contact [lja10@psu.edu](mailto:lja10@psu.edu).

# LANGUAGE AND THE "LAW": JURISPRUDENCE AND SOME FIRST PRINCIPLES OF GENERAL SEMANTICS

BY JULIUS PAUL \*

**W**HEN the word "law" is used in ordinary discourse, what does it mean to us? What specifically does it refer to? How do we react to its usage, and to other similarly abstract legal terms such as "rule of law," "legal right," "law and order," "due process of law," and "clear and present danger"? These, and many other legal words and phrases, are but part of that immense area of jurisprudential myth that the late Felix S. Cohen called the "transcendental nonsense" of the law.<sup>1</sup>

The problem of language and the "law" is certainly not a new one, and many contemporary writers in the field of American jurisprudence have attempted to study the problems of legal behavior in terms of general semantic principles. For example, Thurman W. Arnold wrote:

"'Law' is primarily a great reservoir of emotionally important social symbols. It develops, as language develops, in spite of, and not because of, the grammarians . . . ." <sup>2</sup>

And, in a similar vein, Professor Edmond N. Cahn wrote:

". . . Symbols are the girders of society, fitted together to maintain a rational order, shifted or torn apart when new symbols promise a higher eminence." <sup>3</sup>

In jurisprudence, the nemesis of our study is nearly always the question: what *is* (the) "law"? This question usually assumes that the "law" (or just plain "law") is more than a maze of legal concepts or rules, and that the term "law" is a label (even if it is a kind of catch-all) for some *specific referent*. But what specific referent? Or set of referents? Here are some common

---

\* A.B., University of Minnesota, 1947; Ph.D., The Ohio State University, 1954. Assistant Professor of Government, Southern Illinois University. The substance of this article was contained in a paper delivered at the Second Conference On General Semantics of the International Society For General Semantics at Washington University (St. Louis).

<sup>1</sup> ". . . Our legal system is filled with supernatural concepts, that is to say, concepts which cannot be defined in terms of experience, and from which all sorts of empirical decisions are supposed to flow. Against these unverifiable concepts modern jurisprudence presents an ultimatum. Any word that cannot pay up in the currency of fact, upon demand, is to be declared bankrupt, and we are to have no further dealings with. . . ." Cohen, *Transcendental Nonsense and the Functional Approach*, 2 *Esc.: A Review of General Semantics* 82, 93 (winter 1944-1945); repr. from 35 *COL. L. REV.* 809 (1935).

<sup>2</sup> *THE SYMBOLS OF GOVERNMENT* 34 (1935).

<sup>3</sup> *THE SENSE OF INJUSTICE; AN ANTHROPOCENTRIC VIEW OF LAW* 60 (1949).

examples of the wide variety of difference in the field of jurisprudence over a simple definition of the term "law":

AUSTIN: The command of a political sovereign.

KELSEN: The higher (transcendental) rules or norms that govern the legal order.

POUND: The institutional basis for an ordered society and for the maintenance of social control.

SAVIGNY: The historical evolution of an instinctive sense of right possessed by all races of mankind.

HOLMES: What the courts do in fact, not what they say they do.

FRANK: Holmes' definition, plus the behavior-patterns of the individual judges and jurors.

BEALE: The multifarious legal rules that guide judges in judicial decisions.

LLEWELLYN: What government officials do about disputes.

EHRlich: The traditional set of mores or value judgments of a particular community.

RABELAIS: (Judge Bridlegoose): The results of cases decided by the throwing of a pair of dice.

The obvious difficulty, from the point of view of general semantic analysis, is the enormous differentiation in the definitions of the term "law" and the complete failure to achieve some kind of agreement on the ground rules for using this term in legal as well as non-legal discourse.

What is the source of this confusion? Primarily from the attempt to describe an *institution*,<sup>4</sup> in conjunction with or apposite to a *set of legal rules*, a *set of facts*, and/or a *particular legal situation*. Or, is it that some writers on "law" are *prescribing* a set of ideal legal rules when they use the term "law" or "*the law*" or even "Law"?

If ever logomachy was rampant, this is the place! The failure of most writers to distinguish the legal *what is* from the legal *what ought to be* is, of course, an old bugaboo, but it is nonetheless inexcusable. And even when this distinction is made, the problem arises as to whether the study of legal

---

<sup>4</sup> . . . The trick is to find a pair of polar words, in which the nice word justifies your own position and the bad word is applied to the other fellow.

"How may the observer of social institutions avoid such traps? The answer is that in writing *about* social institutions, he should never define anything. He should try to choose words and illustrations which will arouse the proper mental associations with his readers. If he doesn't succeed with these, he should try others. If he ever is led into an attempt at definition, he is lost. . . ." ARNOLD, *THE FOLKLORE OF CAPITALISM* 169, 182-83 (1937).

"reality" (the province of what is commonly called "legal realism" in American jurisprudence) excludes the "oughtness" or ideal elements of all legal activity.

The late Judge Jerome N. Frank, one of the foremost legal realists, called the overuse and misuse of legal language, "verbomania." He wrote that,

" . . . Word-consciousness may deliver us from primitivity in thinking by enabling us to look beyond our speech forms to the things we are talking about."<sup>5</sup>

This is a call for the application of the general semantic principle of "extensional" orientation (reliance on and a pointing to specific and clear-cut referents) to the use of legal language.

In short, when the word "law" is used (or "legal right" or some other abstract legal term), do we refer to a *past* decision or set of legal rules or principles, or to a *future* decision or set of legal rules, or to what we (subjectively) feel *ought to be* the correct decision or ruling principle in a specific case? The problem can be summarized in the following way:

(1) "Law" can mean all things to all men. It usually does, and this breeds terrible confusion. Sir Ernest Barker, an outstanding English political philosopher, is not a sloppy writer, but semantic confusion seems to be an inextricable part of both political and legal philosophy. For example, Sir Ernest wrote:

" . . . Legal action—we may also call it 'political', for, as it will be argued later, the political is also the legal, since the State is essentially law . . . Law, in a word, is a general mode of action which ranges over all places where a uniform rule is possible, and which touches, as it ranges, every sort of thing . . ."<sup>6</sup>

But let us return to the language of actual decisions. Since the results of specific decisions have important meaning for those who are concerned with the outcome of legal cases, the language of a specific decision should be clearly understood by everyone connected with the case. In respect to this problem, Jerome Frank wrote:

"The legal word-skeptics were engaged in a worth-while job. For the meaning of words, as they affect citizens involved in law suits—and any citizen may be, any day—is fearfully important. Every week, men are hanged or jailed for life, women are divorced or lose the custody of their children, sons and daughters lose all they have in the world, labor unions are destroyed, employers

<sup>5</sup> LAW AND THE MODERN MIND 87 (1930).

<sup>6</sup> PRINCIPLES OF SOCIAL AND POLITICAL THEORY 45, 82 (1951). In these two short excerpts (which are taken somewhat out of context), Sir Ernest equates "legal action" with "political," "political" with "legal", and "State" with "law". Needless to say, his definition of "law" is not an extensional one.

become bankrupt—all because of the meaning the courts give to such words as 'due process', 'income', 'willful', 'reasonable', or 'interstate commerce'. Our constitutional history is little more than a series of contests about the vocabulary employed by the founding fathers in the Constitution . . ."<sup>7</sup>

Of course, it is true that judicial decisions have all kinds of effects on the individuals concerned with their outcome, but certainly the *initial* activity that leads to a divorce, for example, is not the language of the judge, but some kind of non-verbal or verbal "action" that took place *prior* to a specific case. In this sense, the words and actions of the judge and jury are always *ex post facto*.

Although I agree that the interpretations of the language of the American Constitution have been an important and vital part of our political and legal history, only a naïve view of American constitutional history would center its attention on the verbal battles that raged over the meaning of various parts of the Constitution.

Legislators, judges, legal text-writers, and laymen alike have struggled (at times bitterly) with the esoteric language of the Constitution and of the Fourteenth Amendment, for example; but these conflicts not only involved "the vocabulary employed by the founding fathers in the Constitution", but the *actual* clash of men, groups of men, and of ideas.

Sometimes verbal contests were instrumental in provoking bloody contests. But whenever the battle over words took place in our constitutional history, the ideals and aspirations of individuals and of groups were part of that history, and the words employed by the participants were but tools that could be used in almost any fashion for the fulfillment of desired ends. (Perhaps the dramatic events at Little Rock in the fall of 1957 are a case-in-point.) The "action" components of history should not be ignored, although admittedly the words used are part of that historical "action".

Frank believes that there will always be some confusion over the uses of legal language because of the element of contingency and the inherent inexactitude of most legal activity. In regard to statutory interpretation, he wrote:

"The difficulty, however, is not primarily with the lawmakers; it lies in the impossibility of foreseeing all the situations which may arise in the future to which the words of the statute may be applied . . ."<sup>8</sup>

<sup>7</sup> *A Lawyer Looks at Language* in HAYAKAWA, *LANGUAGE IN ACTION* 329-30 (1941 ed.). Frank's last sentence would probably cause some consternation in the circles of American legal philosophy, but he is not alone in his assertion. For a monumental recent study of the meaning of the language of the Constitution, especially the interstate commerce clause and the Fourteenth Amendment, see WILLIAM CROSSEKY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* (1953).

<sup>8</sup> *Id.* at 331.

A more extreme example of the no-man's-land of legal terminology can be found in a statement made by the late Professor Arthur L. Corbin, a leading expert on the law of contracts. In writing about the language of contracts, he said that ". . . Words have no meanings; it is the users of words who give them meanings. . . ." <sup>9</sup> There is a ring of truth in Corbin's statement, but this still leaves undone the job of putting meaning into legal language. If legal words and phrases have no intrinsic or even provisional meaning, except that of their users, then the problem of language and the "law", is, in this writer's opinion, utterly hopeless.

(2) Methodologically, "law" can refer to tangible objects (*e.g.*, officials, court buildings, jails, etc.), or to metaphysical principles (*e.g.*, "natural rights", "justice", "rule of law", etc.).<sup>10</sup> The legal realists of the New Jurisprudence in America say that the only data of importance to them is *what courts do in fact*, not what judges say, or what laymen feel or think about "law". Legal "reality" to the legal realist excludes the values, aspirations, and social ideals that men attach to the term "law" or to the "legal order" in whatever fashion or form. (This is a broad generalization that would do injustice to those legal realists who are more modest and humble in their approach, for even the late Jerome Frank had a passionate regard for the civil rights of individuals and spent a lifetime suggesting ways for making the legal order a more "just" one.)

(3) "Law" can be functional or descriptive in its usage—what is sometimes called "pragmatic" jurisprudence—or teleological (purposeful), depending on the user's motives and his particular use of legal language.

Thus, the field of jurisprudence has much to learn from general semantics, especially its first principles. For example, here are some rules of caution that might be of some use to those who employ legal language:

(a) When using the term "law" and other legal terms, define and describe what is being discussed, insofar as this is possible, in some kind of *extensional* frame of reference. (*e.g.*, the efforts of the legal realists and others in the various fields of the social sciences, who are constantly searching for more accurate and precise terminology.)<sup>11</sup>

<sup>9</sup> 3 CORBIN, CONTRACTS 58 n.65 (1951).

<sup>10</sup> See "Law" and "the Rule of Law" in WELDON, THE VOCABULARY OF POLITICS 61-69 (1953).

<sup>11</sup> ". . . The object of a realistic legal criticism will be not the divine vision which follows the words 'Be it enacted:' but the probable reaction between the words of the legislature and the professional prejudices and distorting apparatus of the bench, between the ideas that emerge from this often bloody encounter and the social pressures that play upon enforcing officials. Words are frail packages for legislative hopes. The voyage to the realm of law-observance is long and dangerous. Seldom do meanings arrive at their destination intact. Whether or not we approve of storms

(b) If "law" refers to an additional set of terms or concepts, then these terms or concepts must be clearly defined and differentiated from the term "law" or term that is initially employed. (e.g., the term "law" can mean something quite different from the term "the law" or "Law". "Jurisprudence" is another term that can refer to "law" or "Law" but can mean something quite different from either of these terms.)<sup>12</sup>

(c) The use of the term "law" or any other abstract legal word or phrase in situation I is not the same as the use of "law" in situation II (e.g., using a particular legal term, phrase, or concept such as "reasonable man" in two separate cases involving different circumstances; nor is a particular legal term or concept in situation I (case-1954) the same when used in situation II (case-1957).

For example, the use of the doctrine of "clear and present danger" has been extremely varied, mainly because this doctrine is hard to define, except in terms of particular cases, sets of facts, decisions of individual judges, and the surrounding circumstances that make each case unique. This doctrine or rule is used in cases involving the "police power" (the protection of public health, safety, and morals) of the states and of the national government and the Constitutional guarantees of the First Amendment. The terms "clear", "present", and "danger" must all refer to a specific case, and each term comprises a unique aspect of this rule of American constitutional law.

The "clear and present danger" rule has never been used in exactly the same form by judges such as Oliver Wendell Holmes, Learned Hand, Louis D. Brandeis, and Fred Vinson, nor did the late Justice Holmes use it in the same way in every case where it was pertinent to the decision. The particular case with its unique set of facts, the reactions of the individual judges, and the time and place and social milieu, all affect the use of a legal doctrine such as this one.<sup>13</sup> We need only to remind ourselves of the outburst of dis-

---

and pirates, let us be aware of them when we appraise the cargo." Felix Cohen, *Ethical Systems and Legal Ideals; AN ESSAY ON THE FOUNDATIONS OF LEGAL CRITICISM* 240 (1933). See Arnold Rose, *Sociology and the Study of Values*, 7 BRITISH JOURNAL OF SOCIOLOGY 1 (1956) for a penetrating analysis of the problems involved in using and defining values.

<sup>12</sup> E.g., in a first degree murder trial in Columbus, Ohio, Judge Joseph M. Harter charged the jury: "I know it is not pleasant but someone has to do this job to make this system of American jurisprudence work." Ohio State Journal, May 20, 1954, p. 1, col. 8. This is indeed a strange use of the term "jurisprudence."

<sup>13</sup> See Robert Cushman, "Clear and Present Danger" in *Free Speech Cases: A Study in Judicial Semantics*, in *ESSAYS IN POLITICAL THEORY*; Presented To George Sabine 311-24 (Konvitz and Murphy ed. 1948). Also, see in opinions in *Dennis et al. v. United States*, 314 U.S. 494 (1951). The question of the application of the Fourteenth Amendment to the Bill of Rights is another area of difficult definitions and interpretations. See Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949); Morrison, *The Judicial Interpretation*, 2 *id.* 174 (1949); Frank and Munro, *The Original Understanding of Equal Protection of the Laws*, 50 COL. L. REV. 131 (1950).

cussion over the Supreme Court's meaning of "equal protection of the laws" in the 1954 *Public School Segregation Cases* to realize how difficult and agonizing the interpretation of terms such as these can be.<sup>14</sup> And there are a host of other variables in the picture, most of them harder to define and to measure. Extensionalization in the use of legal language and in legal practice is not easy to accomplish.

(d) "Law" as a "map" (as a descriptive tool of analysis) should be carefully distinguished from its use as a "territory" (as the area *for* description, whether it is a set of facts or metaphysical ideals). "Law" can be described and can be used in the sense of both "means" and "ends" (*e.g.*, when used by Roscoe Pound, "law" refers to the institutional mechanisms that create and maintain a stable society. To the nineteenth century analytical jurist, "law" referred to a *given* set of legal rules that became and end in itself. From the point of view of the political scientist, "law" might refer to the end-result of the legislative process).

(e) The *level of analysis* on which we use the term "law" and other legal terms is, it seems to this writer, extremely important. Here, Korzybski's "structural differential" is a useful tool in jurisprudence, for there are so many different levels of abstraction in the use of legal terms such as "law" that the user should be careful to distinguish not only his unique definition of the terms he employs, but also the level of abstraction that he is referring to. The symbol "etc.", the use of index numbers, specific dates and places, particular cases and decisions, quotations, and a careful pointing to and description of the referent in mind, can all help to unmask much of our confusion in the field of language and the "law".<sup>15</sup>

The most important reminder is that whenever legal language is used, *extensionalization* should be employed as much as possible. This, in my opinion, is the *modus operandi* between a complete abolition of these trouble-

---

<sup>14</sup> Cf. the following critical attempts at analyzing this decision: Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955); Cahn, *A Dangerous Myth in the School Segregation Cases*, 30 N.Y.U. L. REV. 150 (1955); Harris, *The Constitution, Education, and Segregation*, 29 TEMPLE L.Q. 409 (1956); Swisher, *Dred Scott One Hundred Years After*, 19 J. POL. 167 (1957).

<sup>15</sup> A more extreme solution was suggested by United States Supreme Court Justice William O. Douglas at a writer's conference in 1956: "I'd advise anyone who wants to write to stay away from the law." As quoted by the Associated Press in the St. Louis Post-Dispatch, July 29, 1956, #1, p. 21A, col. 3. Chief Justice O. Otto Moore of the Colorado Supreme Court told the Denver Bar Association that lawyers ought to use simpler words and shorter sentences. "I've got to use a dictionary in reading some of your legal briefs. And too much of that becomes embarrassing." As quoted by the Associated Press in the Southern Illinoisian, October 10, 1957, p. 17, col. 5.

some legal terms (which Jerome Frank and others have suggested),<sup>16</sup> and the current status of legal terminology in statutes as well as in jurisprudential literature.

This miasma of semantic confusion is neither endless nor hopeless. But anyone who uses terms such as "law" must be careful as well as belligerent. For confusion, even if it is innocent, over the use of such terms as "law" can lead to some mighty heady consequences.

---

<sup>16</sup> Frank would throw out such words as "law" and "legal realism" because they create too much confusion. He felt that it would be better to state clearly what he was talking about, *i.e.*, what courts do, are expected to do, can do, and ought to do; in short, to extensionalize without employing the word "law." This is the method he followed in *COURTS ON TRAIL* (1949), and in many of his own opinions as a Circuit Court judge.