JUSTICE AND EQUALITY[1]

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IN HIS judicious and scholarly essay Professor Sabine has clearly indicated what lawyers and social scientists can do in the determination of justice; but I am not sure how he thinks philosophers make their contribution to the subject. If you are in doubt about the justice of an action, Mr. Sabine does not direct you to the avowedly universal moral maxims of Plato, Kant, or Bentham. Rather, following his formula, you are to make a factual investigation to determine "an equivalence of burdens and advantages in a relationship that is defined by rules." In this formula there is an unknown, an x, a blank that has to be filled in by empirical inquiry at the scene of judgment. That blank is for the specific rules defining the specific relationships of the persons whose action and treatment are to be judged just or unjust. If you suspect that the rules and relationships are in the process of changing, you will make further factual studies, as Mr. Sabine did in tracing the changing conceptions of justice in compensating workmen for accidents. The *application* of the formula of justice clearly calls for the fact-finding methods and the predictions of legal and social science.

What I should like to have clarified is whether Professor Sabine believes that not only the application, but also the *formulation*, of the concept of justice is a fact-finding problem for legal and social science. Is his statement of the nature of justice an empirical generalization that can be verified by examining common usage (to which he frequently refers)?

The maxims of Plato, Bentham, and other philosophers are notoriously inaccurate as generalizations of common usage. If we try, as Plato did, to define justice as "every man doing that for which he is best fitted," or, with Bentham, say that it is "equal consideration in determining the greatest happiness of the greatest number," we are always bumping into situations where an application of the maxim runs counter to common usage. The application seems unjust to us and to other persons whose judgment we respect. The maxims of the grand philosophers do not describe the actual judgments of good and competent men. As Stuart Hampshire has said:

> In any personal or political decision there is a knot of particular reasons influencing action which cannot be unravelled into this tidy pattern of calculating the best means to some evident ideal ends.[2]

If we seek to make moral maxims more accurate, we begin to add qualifications, as many of the British philosophers have done, and we end up with such complexity that the moral maxims become incommunicable and are said to be intuitive.

Professor Sabine's way out of this difficulty is to deny that the universal moral maxims of Plato, Kant, and Bentham give an answer to the problem of justice. He says that they merely ask a question. If the philosophical component of justice is a question, it has no applicability without local information about the action situation.

As between the British intuitionists and Professor Sabine, I prefer Mr. Sabine's way of retreating from the sweeping assertions of the earlier philosophers. About ten years ago I came to the conclusion that *all* moral principles

make more sense as questions than they do as assertions. But what puzzles me in Professor Sabine's paper is the limited usefulness which he seems to attribute to the philosophical question, particularly in view of the fact that he does not say that his definition of justice is one of these philosophical questions.

When Professor Sabine states his formula, is he asking one of those moral maxim questions? Is he *asking* whether, in a given situation, there is an equivalence of burdens and advantages in a relationship that is defined by rules? Or does the equivalence formula stand as an empirical generalization which may properly be asserted as a truth, if it turns out to be an accurate summary of common usage?

For the purpose of sharpening up the issue, I shall take the position that Professor Sabine's equivalence formula is a question, and that it is in the same logical class as the universal moral maxims of Kant and Plato. I shall also contend that, although it may somehow be derived from a study of common usage, it cannot be proved by common usage, and that the only proof of which it is susceptible is its power to direct the mind, that is, its power to operate as a persuasive definition.

In taking this position, I express the hope that philosophy, though friendly to the scientific enterprise, may cease to imitate the sciences. The logical and ethical standards which are clarified by philosophical inquiry are scientifically insignificant. For the most part, philosophical standards are either tautologies or rhetorical questions. What makes them important are the biases and preoccupations of the human mind. To appreciate their importance, it is necessary to consider philosophical standards, not in themselves, but in the hostile contexts where they do their work. Thus, philosophical statements about justice are most meaningful in situations where their relevance is not already evident. To see that this is so, I shall ask you to examine some indeterminate situations in which it is not already settled that something is going to be branded as "just" or "unjust," or in which the prevalent interest in justice is quite limited.

Professor Sabine recognizes that the concept of "situation" and "position in a situation" are, to use his phrase, "intrinsic to justice." But he concentrates attention on situations in which persons are acting in a definite capacity relative to one another and in roles that are defined by rules. In situations that are already so determinate, I do not believe that the full force of the equal-treatment question is displayed.

In his brief comment on the moral maxim type of questioning, Mr. Sabine notes the indeterminacy of situations in which it is uncertain whether women constitute a special class on account of their sex with special rules appropriate to them. I shall try to turn attention to the indeterminate and unstable situation by an example that may remind you of Bertrand Russell's query to Mr. Dewey: "How large is a situation?"[3]

I remind you that it has been common practice to pay Negro employees lower wages than the wages of white employees. In the 1940's there were many localities where existing rules and classifications supported this practice as just. Then a war emergency, a labor shortage, and various pressures on the federal government resulted in a national wage stabilization policy, part of which was "equal pay for equal work." This federal policy intruded itself into many local situations where racial differentials had been the rule. *The War Labor Reports* for February 23, 1944, refer to a case in Miami, where the regional war labor

board decided that race differentials must be rejected in principle, but only part of the difference was eliminated in the instant dispute "so as not to unstabilize the industry," as the regional board said. This compromising attitude was not typical, for in the leading cases the national board abolished the previously established classifications "white laborer" and "colored laborer," and substituted the simple classification "laborer."[4] When the war ended and wage stabilization ceased to be a federal matter, the situation in which many a dispute occurred again shrank to the limits of the locality or region, and racial differentials reappeared as rules appropriate to the capacities of various persons in the now smaller situation.

In the race differential cases, the indeterminacy of the situation is not a radical uncertainty, for whether the dispute is perceived as part of a local situation or of a national situation, the situation is justiciable. There is uncertainty only as to which rules are going to be applied equally.

I should now like to turn to a more radical indeterminacy—the indeterminacy of situations in which the existence of rules and their equitable application ceases to be important. The family situation, mentioned by Aristotle, is an example. So is the situation that presents itself as a case of distress to which it is not certain whether justice or charity is the appropriate response. I shall also refer to situations whose justiciable character is threatened by engineering features, by sporting characteristics, and by the characteristics of a national emergency.

First, a few comments on the national emergency. The question of national security can crowd out the question of equal treatment. Our courts have, during wartime, dodged the issue of justice in certain cases by saying that the exercise of the war powers was not to be questioned by the courts. Public opinion has tended to perceive the war emergency in terms foreign to the idea of justice. For example, the courts for some time did not try to apply ordinary rules in litigation growing out of the 1942 relocation of the Japanese-Americans. They respected the Army's judgment of "military necessity." Although there were a few eggheads and saints who cried "unfair," the amazing fact was the unconsciousness of injustice. Only two or three members of Congress even expressed doubts.[5]

The submergence of the rules and of justice is something that has happened during wars. But occasionally a situation is perceived as a national emergency even during a peaceful period. Our Supreme Court upheld Minnesota's mortgage moratorium in 1934. Justice Hughes said, "Contracts should be kept but not at the price of destroying government itself."[6] More recently, Congress passed the Taft-Hartley, or Labor-Management Relations, Act of 1947. Title II of that legislation recognizes a class of disputes in which the rights of the parties are subordinated to the claims of the public to continued production. Although President Truman refused to invoke the Taft-Hartley Act in the steel strike of 1952, he did use the idea of a national emergency in seizing the steel mills.[7] The Supreme Court did not sustain President Truman in the steel case, and sentiment always seems to be farther from unanimity in the absence of a big war. Nevertheless, the national emergency is a constant threat to justice. The complacency about star chamber proceedings and trial without indictment or jury during the Cold War testifies to the power of fear and the desire for security which can be aroused when the situation is an

emergency.

Consider now a happier indeterminacy in the situation that could develop into litigation and again could develop into a process in which roles and rules are not given equal consideration. I refer to the labor-management negotiations that are reported in the National Planning Association's case studies. In one of the steel cases, a manager says to the union negotiator: "Let's keep the lawyers out of this." Such might well be the slogan of the entire series. In the Libby-Owens-Ford study we read:

> Each side avoids making an issue over the *authority* and *right* to set or approve rates. They have learned to look at the setting of new rates as a problem-solving process, not as a tactical battle in defining their respective prerogatives. Both can claim that they are "in the driver's seat." In the eyes of the union leaders this rate-setting policy means "new rates are not put in without our O.K. first; we negotiate every rate." Management puts it this way: "We usually make sure that the union knows what's behind the rate and try to get them to accept it and agree to make the boys give it a trial."[8]

This problem-solving orientation is a development from the point of view of John Dewey and Mary Follett. Follett persuasively presented the labor dispute as a problem-solving situation, using as a model the extra-legal settlements of bankruptcy cases and the like.[9] By persuading a creditor not to press his legal right to throw the debtor into bankruptcy a judge was able to work out a plan of instalment repayment that solved the problem for both creditor and debtor. Such a redefinition of the litigating situation has been accomplished by raising the question of ends and means and by replacing the legal point of view with a problem-solving point of view that is somewhat like an engineering outlook.

The same sort of thing sometimes happens in quasi-judicial proceedings, as, for example, when the Pure Food and Drug Administration was prosecuting canners for allowing worms to be canned with blueberries. The canners admitted that they did not know how to prevent the wormy result. Government scientists then went to work on the problem and invented a deworming process for the canners.[10] With a problem-solving orientation, we do not regard this action as a miscarriage of justice—even though the government conferred a favor upon the canners instead of issuing an impartial cease-and-desist order in accordance with the rules.

To raise the question of justice in either a national emergency or one of these problem-solving situations is no easy matter, but often the situation is not settled as it appears. Asking about rights and rules, sometimes with great ingenuity, strong-minded men may succeed in redefining the situation so that it is perceived as an occasion for justice.

A third alternative to justice is a questioning that sensitizes us to unusual hardship and stirs our sympathies. Merciful actions in a situation defined as a hardship case are not unjust; they are non-just. If a child begins to cut corners while playing a game, we justly tell him to play according to the rules, unless we perceive that he is sick. In that event, we forget the judgment according to the rules and call the doctor. A policeman rebukes the jaywalker, but if he perceives that the jaywalker is blind, he will stop traffic and escort the blind man. Even when American society was most completely dominated by the ideal of competition, there was a minimum standard of living and a minimum standard of competence, below which individuals would be regarded as exempt from ordinary rules.[11] It was the idea of charity

that kept many of our forebears from resenting as unjust the denial of rights to women. Women were regarded as too weak and defenseless to withstand the rigors of public life. Thomas Jefferson, a man sensitive to many injustices, saw nothing wrong in the exclusion of women from the business of a pure democracy.

> To prevent deprivation of morals and ambiguity of issue, [women] could not mix promiscuously in the public meetings of men.[12]

Observers who are not participants often see inequities in situations which the participants define as occasions for charity. I shall cite just two examples. One is the jury whose verdict "soaks the rich," especially the rich corporation, for the benefit of a plaintiff whose poverty or ill fortune has become an object of pity. Another example is the administration of religious rites, a work of charity which priests are called upon to perform for tyrants, gangsters, and assorted rascals—who have been guilty of gross injustice, but who in the hour of impending death or bereavement are as helpless as their erstwhile victims. Champions of justice are baffled by the callousness of such juries and such priests, but the latter may not be rejecting the claims of justice. They may be preoccupied with the relief of distress. In order to redefine the situation, the champion of justice not only asks about equal treatment of rights under the laws, but often resorts to rhetorical devices, hoping to shift attention to the noncharitable features of the situation. For instance, there was the judge who in his instructions to a sympathetic jury would tell about the pickpocket who was so moved by the charity sermon that he picked the pockets of nearby worshipers and put the proceeds into the collection.[13] Justice and mercy compete in indeterminate situations. A simple moral maxim about justice may be very difficult to enunciate in such circumstances.

Another alternative to justice as the nature of a situation is game-playing or amusement. Ordinarily, if the stakes are high, the sense of justice will not disappear in favor of game-playing, but there are court proceedings which develop into a battle of wits, so amusing that the outcome is appraised in terms of technique rather than in terms of justice. I refer to some of the "classics," such as the Delaware case in which conviction for stealing a pair of shoes was reversed because both shoes were shown to be for the same foot; and the Illinois case (during the Prohibition era) in which an indictment was thrown out because it charged the defendants with selling liquor one "day" at 8:30 P.M., whereas the almanac proved that the day ended at 8:29.

Various legal scholars have expressed the opinion that courts are not now so much disposed to be diverted by ridiculous technicalities as they once were. Roscoe Pound cites the Massachusetts case of the mid-nineteenth century: a man accused of taking a wooden pump out of a well in wanton mischief was prosecuted for malicious injury to real estate. His attorney cited cases to prove that a pump was not real estate. When the charge was changed to malicious injury to personal property, the defense "proved" that a pump is not personal property. "The magistrate enjoyed the joke upon himself." "In fact," Pound observes, "many of these legal tricks were looked upon as huge jokes."[14]

Whether or not such game-playing is disappearing, the fact remains that lawyers can become absorbed in problems of technique to the neglect of the claims of justice.[15] The same is true of laymen, whose sense of justice is at least dulled

by the enjoyment of games reported in a book like Wellman's *The Art of Cross-examination.* It is an unusual person who does not relish the recital of the clever tricks of forceful men like Huey Long. The picaresque novel has long been popular, and the beloved rogue continues to appear in best sellers.[16] If an unjust man's exploits are extremely clever and are accompanied by some agreeable personal characteristics, we "can't get mad at him."

One of the celebrated cheating incidents in American history occurred when public lands in Oklahoma were opened to settlers on April 22, 1889. Those who abided by the rules found that many of the choice tracts had been claimed by men who evaded the border guards and arrived "sooner." This was regarded as such a joke that, to this day, Oklahoma is laughingly referred to as the "Sooner State."

It is against a background of game-playing, of national emergencies, of engineering, and of charity that the moral maxims about justice must be appraised. "All men are equal," "Give every man his due," and the other formulations of justice do not mean much in themselves. But in an indeterminate situation or a situation dominated by characteristics other than rules, they ask a question that comes with great effort and ingenuity.[17] Indeed, to ask about justice in some circumstances may require a philosophy which questions the justice of every situation, regardless of its prima facie character.

It may seem that I have engaged in an empirical, scientific inquiry, with a view to describing non-justiciable situations in the same fact-respecting way that lawyers or anthropologists describe just and unjust situations. I disclaim any intention to contribute to social or legal science. I have *used* descriptions of national emergencies, engineering problems, charities, and game-playing situations for the sole purpose of developing a typology—showing some alternatives to the interpretation of situations in terms of justice. The business of philosophical ideas is to maintain a set of ideas that help us when we are in the process of defining a problematic situation.[18]

I now return to my original query. When Professor Sabine defines justice as an equivalence of burdens and advantages in a situation defined by rules, is he making an empirical generalization about common judgments or is he asking a philosophical question? If he is asking a philosophical question, I suggest that what makes it philosophical is its power to challenge radical alternatives, such as patriotism, benevolence, sport, etc. Whether it is good philosophy is not determined by its conformity to common usage, even though the question or formula may be derived from usage in the sense that some beautiful or persuasive examples may have been selected as models.

On this assumption, I offer the following criticism of Professor Sabine's formula. It is an excellent definition in local and domestic situations, wherever custom or sovereign power has in the past established rules for parties that have an adverse-interest relation to one another. Contrariwise, where rules are vague, uncertain, or extremely controversial, it seems to me that Professor Sabine's definition of justice is less helpful than some of the old moral maxims. This is the case when whole industries claim injustice, as the farmers do in demanding "parity." This is the case in international relations where it is often impossible for lawyers and diplomats to find established categories and rules. If

the lawyers and diplomats cannot find rules, I doubt that the philosophers' symbolic legerdemain will produce any. But a maxim like "equal consideration in the calculation of happiness" may persuasively define some international situations as occasions for justice, whereas Professor Sabine's formula will leave the situation outside the realm of justice for want of rules defining the relationship of the principals.[19]

This criticism applies to Mr. Sabine's formula only if it is a philosophical standard that operates with the force of a question in indeterminate situations or in situations that have been defined in terms other than those of justice. If, on the other hand, Mr. Sabine's formula is offered as an empirical generalization from common usage, it must be tested by lawyers and sociologists rather than by philosophers. But—I cannot see why common usage would ever settle the moral nature of justice.

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NOTES

1. Paper presented in a symposium of the Western Division of the American Philosophical Association at Indiana University on May 5, 1956.

2. Stuart Hampshire, "Moore's Principia Ethica," in *New Statesman and Nation*, April 2, 1955, p. 475.

3. Paul Schilpp (ed.), *The Philosophy of John Dewey* (The Library of Living Philosophers, 1939), p. 139.

4. See National War Labor Board, *The Termination Report* (Washington, D.C.: Government Printing Office, 1947), I, 150, 151.

5. See Morton Grodzins, *Americans Betrayed* (University of Chicago Press, 1949).

6. *Home Building and Loan Association* v. *Blaisdell*, 290 U.S. 398 (1934). See also the New York rent control case, *Block* v. *Hirsch*, 256 U.S. 135 (1921), in which Justice Holmes said, "It is unjust to pursue such profits from a national misfortune with sweeping denunciations," but went on to say that the public interest was sufficient justification for interfering with previously recognized rights of landlords.

7. See Bernstein, Enarson, and Fleming (eds.), *Emergency Disputes and National Policy* (Harper & Bros., 1955).

8. F. H. Harbison and K. Carr, "The Libby-Owens Ford Glass Company and the Federation of Glass, Ceramic, and Silica Sand Workers of America," *The Causes of Industrial Peace* ("National Planning Association Series," 1948).

9. *The New State.*

10. Cited by Pendleton Herring, *Public Administration and the Public Interest* (McGraw Hill Co., 1936), p. 234.

11. For an interesting study of judicial decisions that have been influenced by regard for distress, see Edmond Cahn, *The Moral Decision* (Indiana University Press, 1956), p. 212.

12. Jefferson, *Works*, VII, 36. It is appropriate also to refer here to the case for special disability with which Louis Brandeis successfully defended the constitutionality of an eight-hour law for women (*Muller* v. *Oregon*, 208 U.S. 412, 1908). This was a mixed case, not pure charity, for the idea of a threat to the public health and national welfare was also employed to exempt women from rules that were then applicable to men.

13. Empirical studies of the mercy-versus-justice theme are complicated by the variability of the standard of living and the standard of competence. As economic, medical, and other resources increase, the minimum standard changes. In effect, people seem to take a rough look at resources and then decide what they can afford in the form of charity designed to maintain a minimum standard of living.

14. Roscoe Pound, *The Spirit of the Common Law*, p. 125.

15. See Willard Hurst, *The Growth of American Law* (Little, Brown & Co., 1950), pp. 368–71; also J. W. Madden, "Is Justice Blind?" *Annals of the American Academy of Political and Social Science*, Vol. CCLXXX (March, 1952).

16. See Edwin O'Connor, *The Last Hurrah* (Little, Brown & Co., 1956); also John Kobler, "Profiles [Joseph Cosey]," in *New Yorker*, February 25, 1956, pp. 38 f. See also the kind of roguish incident which enlivens autobiographies like the one reproduced by Leonard White in *The Jacksonians* (Macmillan Co., 1954), p. 26. (Champagne was served in the U.S. Senate cloakroom. It was charged as "stationery" against the contingent fund. President pro tem Mangum thought this arrangement incongruous . . . and had it charged to the fuel account.)

17. For examples of such ingenuity, see the incident recorded on p. 283 of my *Ethics for Policy Decisions* (Prentice-Hall, Inc., 1952), or the comments of William Gomberg on page 52 of *The Psychology of Labor Management Relations* (Industrial Relations Research Association, 1949).

18. I am inclined to take the same typological view of logic, in so far as logic is philosophical.

It seems unphilosophical when a logician presents the syllogism or Mill's canons or the theorems of algebra in the manner of a teacher of chemistry presenting analytical models and procedures to be followed in chemical analyses. Logic, as a branch of philosophy, is a reminder of the contrasting types of logical structures and the very different tests that are appropriate to these structures, i.e., syllogism, sets of equations, analogies, generalizations from instances, second-order generalizations, and circumstantial evidence. Logical training, when it is part of philosophy, increases the kinds of resources that a person can mobilize when confronted by an undefined problematic situation.

19. I am not advocating that all international situations be defined in terms of justice. The philosophical contribution to international relations is sometimes a presentation of the forgotten claims of justice and sometimes a turning of men's minds away from the model of justice because it is an unpromising approach to the situation. It is always possible that persuasive definitions should lead diplomats and the molders of public opinion to perceive the situation as one of racial survival, of hardship meriting charity, or of technology. Robert Dahl comments on the limitations of the legal approach to international politics. He notes that over 60 per cent of our legislators have legal training. "In many ways, no background is better calculated to prevent realistic action in international politics. For the tendency of the lawyer is to interpret reality in terms of legality, to determine foreign policy by legal policy. The treaty process, careful analysis of legal obligations, concepts of 'rights' in the arena of international politics, emphasis on forms—this is the thrust of the lawyer" (*Congress and Foreign Policy* [Harcourt, Brace & Co., 1950], p. 134).