LEGAL FUNCTIONALISM

The concept of functionalism figures in American jurisprudence in a number of ways. My purpose is to explore some of these ways. I shall do this first, with reference to the legal system as a whole and will be particularly concerned with the role of values in the functional analysis of the legal system. Secondly, I shall briefly discuss the functional approach to judicial decision-making.

I

1. The idea of a functional legal system is most closely associated in America with the names of Holmes, Pound and the so-called legal realists. When Llewellyn announced the realist creed in 1931 he included as a basic element «the conception of law as a means to social ends, and not as an end in itself; so that any part needs constantly to be examined for its purpose, and for its effect, and to be judged in the light of both and of their relation to each other» (1). Pound's views were similar (2). Realists other than Llewellyn expressed like sentiments (3), as had Holmes (4) long before.

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(1) LLEWELLYN, *Jurisprudence* 55 (1962) (from reprint of «Some Realism About Realism», 44 *Harv. L. Rev.*, 1222 (1931). In the same article, he observes: «'Functional approach' stresses the interest in, and valuation by, effects». *Id.* at 53, n. 35.

(2) POUND, 1 *Jurisprudence* 91 (1959).

(3) E. g., FELIX COHEN wrote: «Functionalism as a philosophy may be defined as the view that a thing does not have a 'nature' or 'essence' or 'reality' underlying its manifestations and effects and apart from its relations with other things... Functionalism as a method may be summed up in the directive: If you want to understand something, observe it in action.» It is concerned, he said, with «the human meaning of the law». COHEN, *The Legal Conscience*, 79-80 (1960) (from reprint of «The Problems of A Functional Jurisprudence», *1 Modern Law Review*, 5 (1937). See also id.. 78-9; COOK, «Scientific Method and the Law», *13 A. B. A. Jo.*, 303 (1927).

(4) See, e. g., *Collected Legal Papers*, 181 (1920) (from reprint of «The Path of the Law», *10 Harv. L. Rev.* 457 (1897).

Pound's further stress on the «limits of effective legal action» (5) flowed from the same source. I. e., in this process of law's attempting to achieve its ends, one should be aware of certain factors in the human condition that erect limits upon the law's effectiveness. So too when Pound investigated differences between the «law in books» and the «law in action» (6) he was concerned with how law's actual functioning or its actual consequences differed from its theoretical functioning and intended consequences.

The functionalists, in short, are concerned with law's operative role in society. They emphasize the social effect of its operations (including the fulfillment of any existing *ideals* of the society, and including interactions of causes and effects).

In this functionalist model, what is the role of ethical or evaluative judgment? (1). Is there an endorsement of the «ideals» then existing in the public? The answer is, No. (2). Is there an endorsement of any ethical goals in the minds of those who are discharging the function (goals which may not be fulfilled because, for instance, the actual consequences of their activity may be other than intended)? The answer is, No. Usually at least, the functionalist model implied no ethical judgment as to the officials' goals or the ideals or social «needs» being served (nor did it imply any confinement to intended consequences) (7).

However, this didn't preclude Felix Cohen from making a prolonged exposition and defense of utilitarian ethics for law (8), or from criticizing Pound's «pragmatic justice» concept for failing to embody an ethical standard by which a choice among existing competing claims and interests could be made (9). Nor did it preclude Lasswell and McDougall from elaborately analyzing ideal «goal values» and offering them as a standard for analyzing and testing the functioning of a legal system. When they stressed that the legal scholar must engage in a «functional» study of law's operations in society, they were thinking of such study *not* merely in relation to existing ideals or needs being served but primarily in relation to these goals values they had selected and «recommended» as «the basic values of human dignity or of a free society», namely: «power,

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(5) POUND, «Limits of Effective Legal Action», *3 A. B. A. Jo.* 55 (1917).

(6) POUND, «Law in Books and Law in Action», *44 Am. L. Rev.*, 12 (1910).

(7) This was typically true in sociology-antrhopology as well. SEE EMMETT, «Functionalism in Sociology», *3 Encycl. of Philosophy* (Edwards, 1967).

(8) COHEN, *Ethical Systems and Legal Ideals* (1933).

(9) *Id.*, 6, note 8; 48.

wealth, respect, well-being, affection, skill, rectitude, and enlightenment» (10).

2. If we look specifically at functionalist writings addressed to the question, *What are the functions of law?* (a question not often asked or elaborately answered) (11), we find a rather close adherence to the usual functionalist model. Consider two prominent writers, Willard Hurst and Karl Llewellyn. Hurst's analysis of law's functions in American history (12) is similar in many respects to Llewellyn's treatment of what he called law's «jobs» (13). Both, for instance, pay attention to the alloca-

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(10) LASSWELL and MCDOUGALL, «Criteria For a Theory About Law», *44 S. Calif. L. Rev.*, 362, 380, 388, 393 (1971).

(11) For some examples of answers in addition to the Hurst and Llewellyn answers summarized below in notes 12 and 13, See RAZ, «On Functions of Law» in Simpson, ed.,, *Oxford Essays in Jurisprudence,* 2d series, 278-304 (1973); SUMMERS and HOWARD, *Law, Its Nature, Functions and Limith 440* (2d ed., 1972); MERMIN, *Law and the Legal System,* 5-10 (1973).

(12) Treating the American ideal of constitutionalism as an historical fact, Hurst describes law's functions as operating within that ideal, while exhibiting the following activities and effects: exercising the «legitimate monopoly of force»; appraising the «legitimacy of all private forms of power»; maintaining «regular and rational procedures» as well as «some level of rationality in the substance of public policy»; «allocat[ing] scarce economic resources... by taxing and by spending» and indirectly by «public borrowing and also by the standards by which [law] regulated behavior...» HURST, «Legal Elements in United States History», in Fleming and Bailyn, eds., *Law in American History,* 3-6 (1971). At another point he refers to creation and maintenance of «meaning» (including «orde») «in individual and group experience». *Id.,* at 74. At another, to law's «leverage and support functions» —the leverage function being «the help law gave to creative innovation or purposeful awareness in decisions that tended to reconstitute the frame of behavior», and the support function being «the help law gave to keep social processes in operation, whether these processes be the promising products of new awareness and fresh decision, or the familiar products of old institutions». HURST, *Law and Social Process in United States History,* 217 (1960).

(13) That LLEWELLYN treated «functions» and «law-jobs» interchangeably is illustrated by a sentence describing law-jobs as «those jobs around whose doing, those functions around whose fulfilment, one finds the most significant organization of normative generalization, of other law-stuff, such as procedure, and of the legal crafts and all the work and personnel of law», LLEWELLYN, *The Normative, The Legal and the Law-Jobs: The Problem of juristic Method,* 49, Yale L. Jo. 1355, 1363 (1940).

His analysis centered around fulfillment of the following «law-jobs»: 1) «the clearing up of... grievances and disputes...; 2) «Channeling conduct in situations fraught with potential tension and conflict, so that, negatively. grievances and disputes are avoided, and, positively, men's work is geared into team-play»; 3) «... rechanneling along new lines...»; 4) «allocation of that *say* which in case of doubt

tion of, and limits on, public and private power; to the provision of procedures; to order-maintenance; to legal support for creativity, change and improvement. Both are looking at ideals as existing social facts, and do not affirm particular value-systems of their own (14).

II

I come now to my second area of inquiry: the functional approach to judicial decision-making.

1. A functional approach to the *study* of judicial process would be represented by the same model I have described — together with the indicated kinds of deviations from the usual model.

2. Writings on the functional approach *by a court* to the decisional process have a number of facets. But first, a warning on the variant use of terms. There is, in the literature, some variation in the use of the term «function» as far as the role of values is concerned. Felix Cohen, for example, consistently used it in the narrow sense appropriate to the functional model already described. A rule's function had to do with its human consequences; and functional analysis was «descriptive» of these human consequences, whereas «an intelligent value judgment upon any legal rule or decision presupposes such descriptive functional analysis, but also involves an ethical premise». In its concern for consequences, functionalism is «a development of utilitarianism», but it does not con-

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or trouble is to go, and... the procedures for making that say an official and binding say»; 5) «producing a net organization and direction of the work of the whole group or society, and in a fashion which unleashes incentive»; 6) «building and using techniques and skills for keeping the men and machinery of all the law-jobs on their jobs and up to the jobs». LLEWELLYN, *Jurisprudence,* 199-200 (1962) (from reprint of «On the Good, the True, the Beatiful in Law», 9 Univ. of Chicago L. Rev. 224 (1942).

(14) The closest LLEWELLYN comes to the matter of values is: *first,* to say, as to the law-jobs, «Now each of these things I take to be a *good,* if the existence of groups or societies is a good» (i. e., each had «a bare-bones aspect which was the minimun condition of the group's continuance as a group»), *Id.,* 200, and *second,* to recognize two value-areas beyond this. One was simply the ideal of smooth efficiency and simplicity of operation of the system —which he endorsed. The other was the ultimate «Good for a Society». Here he confessed that broad goals, like Justice, left him dissatisfield. «For when it comes to ultimate substance of the Good, I repeat that I can find no clarity, nor any conviction of reason or of deduction as to specific matters, from the broad ultimates others have found clear.» He offered instead, his faith in certain rational means rather than in ends. He stressed that it was a matter of faith, and made no claim that his own faith was «better than another's». *Id.,* 201, 211-212.

tain utilitarianism's «theory of the good, i. e., that pleasure or happiness is the only good» (15). Ronald Dworkin and Richard Wasserstrom, on the other hand, hace used «fuction» in the opposite way. Daworkin criticized Richard Wasserstrom for analyzing the ideal judicial process in terms of law's «function», namely, rule-utilitarianism. One reason for the criticism was the thought that there are other ethical «functions» (such as being «fair») that may conflict with the utilitarian functon (16). Thus Dworkin, like Wasserstrom, is willing to merge the ethical factor into the «function» concept. Cohen would keep them separate.

a) Coming now to the gist of a functional approach (in the usual senso) by a court, it seems to me to be this: 1) the court is much interested in the probable *consequences* of its decision, and 2) it tries reasonably to interpret a statute's «purpose» or «intent», or a procedent rule's «purpose» or «intent» (i. e., its probably *intended* social consequences), to harmonize with the social consequences seen by the court as flowing from its projected decision.

Such an application of the legal provision in terms of purpose is preferred to a literalist or fixedly uniform application that sacrifices the «reason of the law» to its letter, or to unnecessarily technical considerations, or to conceptual implications allegedly required by «logic» or analogy, unmindful of actual social consequence. These latter approaches were what Pound called «mechanical jurisprudence» (17) (Jhering's «jurisprudence of conceptions»). Parenthetically, let me say that this approach did not involve a *repudiation* of the purpose factor; it usually involved a recognition of it but a subordination of it, or stilted application of it. For, after all, the common-law adage, «ratio legis, anima legis» was ancient wisdom; and so was the primacy of intent or purpose in the interpretation of statutes and Constitution.

b) Notice that the emphasis on consequences and on policies and purposes, in writers like Holmes, Pound and Llewellyn, was most clearly applied by them to how courts *ought* to function (18), but functionalists

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(15) COHEN, *supra note* 8 at 93.

(16) DWORKIN, *Does Law Have A Function*, 74 Yale L. Jo. 640 (1965). And see Wosserthon, *The Judicial Decision* 10 (finte) (1961).

(17) POUND, *Mechanical Jurisprudence*, 8 Colum. L. Rev. 605 (1908).

(18) «I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the ofiten procaimed judicial aversión to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious, as 1 have said.» HOLMES, *Collected Legal Papers*, 184 (1920) (from reprint of «The Path of the Law», 10 Harv. L. Rev., 457 (1897).

also thought that judges *in fact* were generally lesss influenced by the verbalism of rules than by their apparent purpose and their probable good-sense or bad-sense consequences. In addition to the writers more prominently identified with this view — like Holmes (19), Pound (20), Llewellyn (21), Oliphant (22), Max Radin (23) and John Dewey (24), I aarefer you to a less well-known passage from James Bonbright's treatise on Valuation of Property (25). Functionalists, in short, wanted these

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«For I submit that what courts do subconsciously, when they are at their best, is to generalize the claims of the parties as indipidual human claims, to subsume [them] under generalized claims involved in life in civilized society in the time and place, and endeavor to frame a precept or state a principle that will secure the most of these social interests that we may with the least sacrifice... Much will be gained when courts have perceived what it is that they are doing, and are thus enabled to address themselves consciously to doing in the best that they may.» POUND, *The Theory of Judicial Decision* (III), 36 Harv. L. Rev. 940, 955, 959 (1923).

LLEWELLYN observed that among legal realists, «There is very general agreement on the need for courts to face squarely the policy questions in their cases, and use the full freedom precedent affords in working towards conclusions that seem indicated. There is fairly general agreement that effects of rules, so far as known, should be taken account of in making or remaking the rules.» LLEWELLYN, Jurisprudence, 72 (1960) (from reprint of *Some Realism About Realism*, 44 Harv. L. Rev., 1222 (1931).

(19) It is the merit of the common law that it decides the case first and determines the principles afterwards... (L)awyers, like other men, frequently see well enough how they ought to decide on a given state of facts without being very clear as to the ratio decidendi.» HOLMES, *Codes and the Arrangement of the Law*, 44 Harv. L. Rev., 725 (1931) (reprinted from 5 Am. L. Rev., 1 (1870). See also the HOLMES quotation in note 18 *supra*.

(20) SEE the POUND quotation in note 18 *supra*.

(21) LLEWELLYN'S 1931 credo expressed «a distrust of the theory that traditional prescriptive rule-formulations are *the* heavily operative factor in producing court decisions. This involves the tentative adoptión [better: exploration] of the theory of rationalization for [what light it can give in] the study of opinions», LLEWELLYN *supra* note 18 at 57. (The bracketed matter was added by him when the original article was reprinted in the cited book). He also referred to research efforts aimed at getting better predictions through data other than the legal generalizations in court opinions. *Id.*, 58-65. And he later emphasized that not logical compulsion but the drive for a wise rule that would make «sense» for the «situation-type» before the Court was, and should be, a dominant force in judicial decision. The Common Law Tradition, e. g. at 11, 60-61 (1960).

(22) OLIPHANT, *A Return to Stare Decisis*, 14 A. B. A. Jo. 71, 159 (1928).

(23) RADIN, *The Method of Law*, 1950 Wash, U. L. Q., 471, 489.

(24) DEWEY, *Logical Method and Law*, 10 Cornell L. Q., 17, 20 (1924).

(25) BONBRIGHT observes that though conservative judges tend to insist that «value» should have a constant meaning in various legal fields, «courts are almost unanimous in shifting their concepts of value so as to make them comport with

hidden considerations of policies and consequences brought out into the open.

c) The kind of judicial process depicted has been disapprovingly described by critics as «result-orientation». But functionalists can respond by saying —as many of the cited authors did— that in the first place, result-orientation is normal in human thinking. Human beings generally, including judges, don't seem to begin reasoning with premises. They begin with a problematic situation — which causes them to cast about for tentatively suitable premises for a tentatively desired conclusion. And in the second place, the process permits them to reject premises that are deemed too unreasonable (a judge's tentative major premise reflecting the precedents may be rejected by him as too arbitrary an interpretation of the precedents, thereby necessitating a change in the tentative conclusion).

In other words, a court's result-orientation is qualified; it is subject to certain requirements attaching to its judicial role. Functionalists in general did not consider courts to be as free-wheeling as legislatures in their policy-making. Restraints were recognized in the mores of the judicial craft, in the *group* process of decision, and miscellaneos other factors, including the network of the system's rules, principles and ideals, with whose «policies» the judicial decision and its policy had to be explicitly and reasonably integrated. Thus, Llewellyn, who did much to expose the lee-ways available within those rules, principles and ideals, also did much to catalogue the restraints making for «reckonability» and «regularity» in appellate judicial decision (26).

d) The functionalist interpretation of a rule in terms of its purpose has a particular bearing on competing approaches to the constancy of meaning of individual legal words. Here Lon Fuller was a more thoroughgoing functionalist than H. L. A. Hart in their celebrated debate on

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their views as to the purposes of the valuation». The «verbalist or conceptualist, so far from being a stickler for purposeless rules, is really an undercover functionalist». The trouble comes not from a court's «adoption of excessively rigid concepts of value and rules of valuation but rather in its tendency to permit shifts in meaning that are inept, or else that are illdefined because the judges that make them will not openly admit that they are do-ing so». In contrast to these «conceptualist» or «verbalist» judges, the «functionalist does his best to recognize the fact that he has shifted his meaning, warns the world that he has done so, and tries to make his distinctions as sharp as circunstances will permit...». BONBRIGHT, 2 Valuation of Property, 1169, 1170, 1171 (1937).

(26) LLEVELYN, The Common Law Tradition (1960). See also Mermin, *Jurisprudence and Statecraft*, 96-103, 109-113 (1963).

positivism in the '50s. He opposed the theory that, except in a penumbra of debatable cases, interpretation problems should be resolved by core meanings of individual words. Purpose was not to be overridden that easily. The non-debatable cases are easy, he said, not because of the core meaning of individual words but because «we can see clearly enough what the rule "is aiming at in general"...». These cases, like the hard cases, should be governed by the principle that «a rule or statute has a structural or systematic quality that reflects itself in some measure into the meaning of every principal term in it» (27).

One interesting corollary of this approach to interpretation is that the same word may properly hace *opposite* meanings in the context of different rules or statutes with different purposes. This phenomenon is most prominently identified with the work of functionalist Walter Wheeler Cook in the conflict of laws field, but may be found throughout the law (28).

e) A final aspect of the functionalists' approach to judicial decision was their emphasis on the need for a reconstruction of the concepts and rules used by courts.

The basic point in reconstruction seemed to be the minimizing of abstraction, i. e., that the rules and concepts as far as possible, be translated into concrete terms of behavior. Thus, Felix Cohen pointed approvingly to Holmes' definition of the abstraction, «law», in terms of the prophecies of what the courts would do. He went further, arguing that «Legal systems, principles, rules, institutions, concepts, and decisions can be understood only as functions of human behavior» (29); concepts which could not be so linked to behavior he labelled «meaningless» and urged their «eradication». He pointed to a number of illustrative studies, including Llewellyn's attack on the «title» concept. Similarly, Llewellyn's 1931 credo declared that people of his persuasion want legal «words to represent tangibles which can be got at beneath the words, and to represent observable relations between those tangibles. They want to check ideas, and rules, and formulas by facts, to keep them close to facts».

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(27) FULLER, *Positivism and Fidelity to Law*, 71 Harv. L. Rev., 630, 663, 669, note 40.

(28) See COOK, *Logical and Legal Bases of the Conflicts of Laws* (1943); HANCOCK, *Fallacy of the Transplanted Category*, 37 Canadian Bar Rev., 535 (1959); MERMIN, *Functionalism, Definition, and the Problem of Contextual Ambiguity*, in Hubien, ed., Legal Reasoning, 319-327 (Brussels, 1971); Civil Aeronautics Board, v. Delta Air Lines, 367 U. S. 316 (1961); Grant v. McAuliffe, 264 Pac. 2d 944 (Calif., 1953).

(29) COHEN, *supra* note 8 at 72.

Why? Because «they view law as means to ends», and the facts as to what law is now doing to or for people must be discovered before any judgment can be made that law is achieving its proper ends (30).

As radical as any in his attack on abstractions was Thurman Arnold. When his study of the law of criminal attempts led him to conclude that the concepts being used by courts had become too abstract, complicated and confusing, he advocated a new approach involving discarding of the concepts (31). When he found that the «abstract» concepts and rules of the law of trusts were cutting across wholly different problematic situations he again called for a new, less «conceptual» approach (32).

Reconstruction need not mean eradication of concepts. It may simply mean the kind of rule reconstruction Llewellyn described in his 1931 program as follows: «A further line of attack on the apparent conflict and uncertainty among [appellate] decisions... has been to seek a more understandable statement of them by grouping the facts in new —and typically but not always narrower— categories. The search is for correlations of fact-situation and outcome which (aided by common sense) may reveal *when* courts seize on one rather than another of the available competing premises» (33). This approach is illustrated by a number of studies —e. g., an article which clarifies the insurance cases on «waiver» and «estopel» by re-classifying the cases according to the *types* of insurance (a distinction not generally made in the opinions) (34), or an article re-classifying the cases on the de facto-de jure distinction in corporation law, showing that a factual element not treated as crucial in the opinions could explain the cases better than the element that the opinions did treat as crucial (35). There are other such studies (36), though not as

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(30) LLEVELYN, *supra* note 1. at 59.

(31) ARNOLD, *Criminal Attempts-The Rise and Fall of an Abstraction*, 40 Yale L. Jo. 53 (1929).

(32) ARNOLD, *The Restatement of the Law of Trusts*, 31 Colun. L. Rev. 800 (1931).

(33) LLEVELYN, *supra* note 1 at 59.

(34) MORRIS, *Waiver and Estoppel in Insurance Policy Litigation*, 105 U. of Pa. L. Rev. 925 (1957). «Many, though of course not all, of the inconsistencies disappear or become understandable when the cases are classifiesed in terms of busines functions.» *Id.* at 950.

(35) FREY, *Legal Analysis and the 'De Facto' Doctrine*, 100 U. of Pa. L. Rev. 1153 (1952).

(36) See Oliphant's similar point about the contracts-not-to-compete cases, in *A Return to Stare Decisis*, 14 A. B. A. Jo. 71, 159 (1928); Prosser's analysis of the concealed role of the difference in *types* of contributory negligence in products

many as one might expect from the fact that the call for such studies was announced more than 40 years ago. These studies are one more illustration of the «law in books» vs. «law in action» distinction; of the fact that what judges *say* may differ from what they *do*. And by affording a better understanding of how judges are actually functioning such studies permit more accurate *prediction* of decision, a common concern of the functionalists.

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Because of the stringent space limits imposed, I must close this all too incomplete treatment of functionalism. But I wish in conclusion to say something about objections sometimes made to its basic tenet: that law is a means to an end. I remember being surprised by an attack on this tenet a couple of years ago at this Congress. The argument was: like the artist who proclaims «beauty for beauty's sake», the judge who effectuates his interest in the beauty of logical symmetry (37) is viewing the law as an end in itself.

I have some quarrel with this formulation. To the extent that a jurist values, and makes decisions aimed at, logical symmetry, he is not treating *law* as an end in itself. He may be viewing one feature of law, i. e., logical symmetry, as *an* end — not as an end in itself, for if asked why symmetry is an end, a reasonable jurist would doubtless point to the desirable *consequences* thereof, e. g., meeting the convenience, reasonable expectations, sense of intellectual or esthetic propriety, etc. of officials and/or the public.

It is further true, of course, that logical symmetry and its consequences must compete with other ends, and be subordinate to some ultimate ends, such as maximizing happiness, or being fair, or doing justice. The functionalists (like most of us today) would not give high priority, in the competition of ends, to logical symmetry. This follows if we recall their emphasis on the sociological or «human» dimensions of the law, and

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liability cases. *The Assault On the Citadel*, 69 Yale L. Jo. 1099, 1147 (1960); a recent study showing that variations in most «parol evidence» decisions could be predicted on the basis of the *status of the parties* to the contract making it wrong to think of the parol evidence rule as a general or unitary rule, CHILDRES and SPITZ, *Status In the Law of Contract*, 47 N.Y.U.L. Rev. 1 (1972); studies cited by LLEWELLYN *in On Reading and Using the Newer Jurisprudence*, 40 Colum. L. Rev. 581, 608, note 27 (1940).

(37) For an interesting discussion of this «aesthetic valuation of the law», see COHEN, *Ethical Systems and Legal Ideals*, 56-61 (1933).

if by «logical symmetry» we mean the kind of «mechanical jurisprudence» I have described as the object of functionalist attack. Mechanical jurisprudence would tend to preserve, for instance, the simplicity and uniformity which results from adherence to uniform meanings in spite of varying context, or from reluctance to recognize exceptions to rules.

If, on the other hand, «logical symmetry» were taken to mean logical *consistency*, then the indicated conflict between ends would typically *not* should be achieved, *within* the lee-ways of the precedent system rather *arise*, for the functionalists. For even they acknowledged that result-oriented decisions should be logically integrated into the body of the law. They thought social change through law had largely been achieved. and than through decisions logically inconsistent with the existing body of the law. And be it noted that such things as (principled) exceptions to rules, and the variability of meanings with context, are also compatible with the consistency criterion (38).

All this implies that a U. S. Supreme Court Justice in the typical case would find enough lee-way in the legal rules to permit a decision, consistent with the rules, effectuating the social end he prefers. But he may not make that decision. Factors outside the rules, as functionalists themselves acknowledged, could make him render a decision that was a means to a social end he did not himself prefer.

(38) Another aspect of consistency is this: HERBERT WECHSLER has argued that the principe invoked by a court must be one which the court acknowledges should be applied to other situations that then seem clearly similar. A criticism from EDWARD LEVI was in functional terms. «(I)t is not always possible or wise to anticipate the inevitable collision of important values too far beyond the case at hand. The choice of the preferred way of judicial reasoning depends upon a judgment as to the functions which judicial reasoning is to perfom. Clearly these functions are not always the same. They depend in part upon the needs of a society at a given time and the availability of other and possibly better ways of fulfilling these needs.» LEVI, *The Nature of Judicial Reasoning*, in Hook, ed., Law and Philosophy, 273, 277 (1964), also printed in 32 Univ. of Chicago L. Rev. 395 (1965).