FUNCTIONALISM, DEFINITION, AND THE PROBLEM OF CONTEXTUAL AMBIGUITY

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Now and then judicial opinions reveal the phenomenon of contradictory or opposite meanings being given to the same legal term in different situations, or in the same situation posing different legal issues, without any suggestion that precedent is being overruled or that terminology is being abused. This has disturbed and even outraged some judges. My present purpose is to explore this situation in an attempt to illuminate the properly functional nature of judicial reasoning. I shall analyze the phenomenon in question and then briefly consider its relation to logical theory — particularly to an appropriate theory of legal meaning or definition for the terms (statutory, common-law, or constitutional) that are used in judicial reasoning.

I.

As an illustration of the phenomenon, including the judicial outrage, consider the 1953 case of *Grant v. McAuliffe* (1). An auto accident between two California residents had occurred in Arizona. After the alleged tortfeasor's death, the injured party started a tort action in California. If the issue of survival of the cause of action were treated as "substantive" (in accordance with the Conflicts of Law Restatement) the California court would have had to apply the Arizona law, archaic though it was, under which a tort action could *not* be validly started after the tortfeasor's death. The majority chose to call the survival issue "procedural" and hence governed by California law. One of the obstacles to this conclusion had been the fact that a prior California case had held the California survival

statute "substantive" (in determining that the statute did not apply retroactively). Justice Traynor for the majority disposed of this obstacle by saying:

> The problem in the present proceeding, however, is not whether the survival statutes apply retroactively, but whether they are substantive or procedural for conflicts of law purposes. " 'Substance' and 'procedure' are not legal concepts of invariant content" ... A statute or other rule of law will be characterized as substantive or procedural according to the nature of the problem for which a characterization must be made ([2]).

The authorities cited were the noted conflicts of law scholar, Walter Wheeer Cook, and some cases that had recognized the variability of the "substance" and "procedure" concepts.

Justice Schauer's impassioned dissent declared the majority's approach suggested

> that the court will no longer be bound to consistent enforcement or uniform application of "a statute or other rule of law", but will instead apply one "rule" or another as the untrammeled whimsy of the majority may from time to time dictate "according to the nature of the problem" as they view it in a given case. This concept of the majority strikes deeply at what has been our proud boast that ours was a government of laws rather than of men ([3]).

What is the basis of Justice Schauer's outrage ? One element is the thought that a shift in word meaning can have an unfair impact on expectations based upon the meaning initially established. But one thinks of the greater unfairness of *not* adjusting meanings to the ultimate purpose of effectuating justice. Moreover, how true is it that expectations are established on the basis of an assumption of constancy of word meanings in all contexts — particularly in light of the fact that so much human conduct occurs without reference to the precise words of legal rules ? At any rate, should not people be made aware that meanings vary with context in the law just as they do outside the law ?

Another strand in Justice Schauer's reaction seems to be

based on misrepresentation of Justice Traynor's position. I refer to the accusation that Justice Traynor's approach would allow judges to indulge in that "untrammeled whimsy" which marks a government of men rather than of laws. Justice Traynor had argued as had Walter Wheeler Cook, for concentration upon the *purpose* or policy involved in characterizing a statute in such a way that it might or might not apply retroactively, and the purpose or policy involved in characterizing a statute in such a way that domestic rather than foreign law might be applied. An analysis in terms of purpose or policy in this context is not an exercise in untrammeled discretion; it is as amenable to testing by considerations of fact, logic, and values as any other area of the law in which purpose or policy of statutes, common law rules or constitutional provisions are under inquiry.

The other suggestion in Justice Schauer's opinion is that the Traynor tolerance of variability in meanings of terms violates the logical requirement of "consistency" and "uniformity". This parallels the statement of the Supreme Court minority in *Civil Aeronautics Board v. Delta Air Lines* (4) that from the decisions it cited on judicial review (holding that with a reconsideration petition pending, an administrative determination was *not yet final* so as to start the period for judicial review running), "*it necessarily follows* that if a timely motion for reconsideration is pending before the Board," the Board's decision "has 'not become final in the sense that it (is) no longer subject to change [without hearing] upon reconsideration' ..." (emphasis added) (5). This is also akin to the criticism in terms of "logical absurdity" made by the British Court of Appeals' judge, Atkin, L. J. in *Lake v. Simmons* when he rejected the notion that the meaning of "consent" in larceny was not necessarily embodied in the concept of "entrusting" as used in an insurance policy:

> ... that at one and the same time she could both take the goods without the consent of the owner and be entrusted with the goods by the true owner is to my mind a logical absurdity which I do not find it necessary to admit into our law (6).

The logical characteristic of legal terms that these judges are either asserting or assuming is *single meaning*. How can they do so in the face of common experience that words have multiple meanings ? They would have no difficulty, for instance, in distinguishing the meanings of "strike" in the fields of baseball, bowling, mining, fishing, or labor relations. The explanation seems to be that in these latter fields the meanings are more obviously distinguishable because the broad field and specific situation in which one meaning functions is obviously different from the broad field and specific situation in which the other meanings function; so that were the judge faced with a problem of interpreting "strike" in a labor relations dispute it would not even occur to him that the meaning of "strike" as used in baseball was relevant to the purpose of his inquiry.

But in our cases, it can be said that the broad fields are the same, and even the specific situations are in most respects the same. In the *Delta Airlines* case, referred to earlier, for example, where the court was being asked to determine the meaning of a (speaking somewhat loosely) "final" C.A.B. certification, in order to determine whether a particular certification could be modified without another hearing, the minority was not arguing that it should seek guidance from the meaning of the word as applied to school examinations or newspaper editions. Rather it looked to the same broad field, namely *the law*, and even the same narrower field, namely *administrative law*, and to the same specific situation of a C.A.B. *certification followed by a reconsideration petition*. In the eyes of the minority justices this sameness of the situation overshadowed the difference from the precedents on finality for judicial review purposes, i.e., obscured the different purposes for which the definitional question was being asked in the two sets of cases (7).

Some judges are sophisticated enough to see the fallacy of a single meaning assumption, but refuse to go all the way with a functional view. They may, for instance, concede its importance for the handling of key words in conflicts of law cases (largely because of Cook's work) and some other areas, but

not for other words and areas. As the Wisconsin Supreme Court once said: "*Some* words and phrases are subject to more than one meaning, depending upon the context in which used. The term 'public officer' falls within this category' (Emphasis added) ([8]).

Similarly, some would argue that even if the functional principle is properly applied to all words, there are limits to the principle: only in the unusual, borderline case should the principle be applied and the central or "core" meaning of the word be overridden. Perhaps this was H. L. A. Hart's view when in his 1958 debate on positivism with Lon Fuller he argued that there "must be a core of settled meaning", and that there will be "a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out". He implied his belief that there is a "central element of actual law to be seen in the core of central meaning which rules have"; and that there is something "in the nature of a legal rule inconsistent with *all* questions being open to reconsideration in the light of social policy" ([9]). The thrust of Fuller's position, on the other hand, was different. He denied that a word will or should be given its standard or central meaning "in any legal rule, whatever its purpose"; he denied "that problems of interpretation typically turn on the meaning of the individual words"; he asserted that the "easy" cases are easy not because of the core meaning of individual words but because "we can see clearly enough what the rule 'is aiming at in general' ..."; he declared 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" ([10]). Fuller's view offers an appropriate rationale for the phenomenon we have been considering.

II.

I turn now to a brief statement of the bearing of logical theory on the functional approach to judicial handling of word meanings. The logical principle known as the "law of contra-

diction" (nothing can be both A and not -A), when applied to a definition seems to lend some support to the single-meaning attitude. However, this principle, though usually stated without express qualification, must be viewed as subject to implied qualifications of time, place and other contexts. This was Aristotle's view. As put by the logician Schiller:

> If [formal logic] frankly admitted into its statement of the principle [of contradiction] all the qualifications which may be relevant in its actual use ... we should have to say, e.g., "A cannot be A and not -A at the same time, in the same place, in the same respect, in the same reference, in the same context, for the same persons — in short, under precisely the same circumstances" ([11]).

Thus our "common-sense" or intuitive, initial reaction that the meaning of, say, "procedure" or "consent" or "final" or "domicil" or any other key legal term cannot as a matter of logical principle both include and exclude a particular situation is seen to be at fault in failing to consider the implied qualifications surrounding the logical principle involved.

Nor is the theory of definition violated by our functional approach. Whatever may be true of other kinds of definition recognized by logicians, judicial definition is necessarily geared to a social *purpose*. I.e., judicial definition is not a process of discovery (through intuition, or empirical survey, or "analysis" or "explication") of a "true" or "valid" or "customary" or "real" or "essential" meaning, but one of prescribing or assigning a meaning in order to fulfill a social purpose. Since the legal rule itself has been established for a purpose, it makes sense that the verbal constituents of the rule be construed in harmony with the rule's purpose — even though those constituents may get different constructions when part of different rules. Such a meaning, assigned for its desired social consequences, might be viewed as a form of "stipulative" definition. Yet the typical stipulative definition assigns a meaning for the simple purpose of shorthand convenience (often when a new term is being coined), or perhaps for "fruitfulness" as Kantorowicz would put it ([12]). The judicial definition is quite different. The desired consequences are social action con-

sequences (e.g. recovery or non-recovery of the relief requested by plaintiff — because of the consequences in turn, of such recovery or non-recovery). Charles Stevenson's concept of a "persuasive definition" is pertinent here. He thought judicial definitions "resemble persuasive definitions or constitute special sorts of them" ([13]). Even more clearly apropos is John Ladd's concept of the "practical definition" ([14]) — to be used in making a practical decision as to *what should be done* ([15]).

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NOTES

([1]) 41 Cal. 2d 859, 264 P. 2d 944 (1953).

([2]) 41 Cal. 2d 859, 865, 264 P. 2d 944, 948 (1953).

([3]) **41 Cal. 2d 859, 868, 264 P.2d 944, 950 (1953).**

([4]) 367 U.S. 316, 81 S. Ct. 1611 (1961).

([5]) 367 U.S. 316, 340, 81 S. Ct. 1611, 1627 (1961).

([6]) [1926] 2 K.B. 51, 70, 95 L.J.K.B. 586. Atkin's incorporation of meanings from larceny law was also the approach taken by four of the five law lords when they reversed the Court of Appeal decision. [1927] A.C. 487, 96 L.J.K.B. 621. The opinions are discussed in HANCOCK, *Fallacy of the Transplanted Category*, 37 Canadian Bar Review 535, 562-7 (1959).

([7]) In the case before the Court, the C.A.B. had summarily modified the certification. The purpose of te Court's asking whether the finality concept should cover the certification was in order to decide whether it barred the summary modification, i.e. required a new full hearing. But in the other cases looked to by the Court, there had been some different happenings: after a denial of the reconsideration petition, judicial review had been sought at a time which was within the statutory period fixed for seeking review if the period were assumed to run from the time of denial — but ouside the period if it were assumed to run from the time of certification. So here the purpose of asking whether the finality concept covered the certification was in order to decide *whether the appeal was timely.*

([8]) Matczak v. Mathews, 256 Wis. 1, 5, 60 N.W. 2d 352, 354 (1953).

([9]) HART, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593, 607 (1958).

([10]) FULLER, *Positivism and Fidelity to Law*, 71 Harv. L. Rev. 630, 662, 663, 669 note 40.

The question of whether the functional principle applies only to "bor-

derline" or "penumbra" meanings is also raised in this comment attached to § 11 of the Restatement of the Law (Second), Conflict of Laws, Proposed Official Draft, Pt. 1 (1967) (which section states that "at least for the same purpose, no person has more than one domicil at a time"): "The core of the domicil concept remains constant in all situations. With rare exceptions, the courts assume that the rules of domicil are the same for all purposes, and it is customary for them to cite indiscriminately in their opinions cases dealing with domicil for purposes other than the one immediately involved... To reiterate, the core of domicil is everywhere the same. But in close cases decision of a question of domicil may sometimes depend upon the purpose for which the domicil concept is used in the particular case."

Cook himself once used rather similar language in discussing the first Conflicts Restatement (3 Proceedings of the A.L.I. 227 (1925)): "There is no doubt that what you might call the core of the concept is the same in all these situations; but as you get out towards what I like to call the twilight zone of the subject, I don't believe the scope remains exactly the same for all purposes". Yet Cook's language is not subject to the same criticism as the Restatement's language. It does not assume that only in close cases, or only "sometimes" in close cases, should decision "depend upon the purpose for which the domicil concept is used in the particular case". He would say, I think, as would Fuller, that this dependence was true in *all* cases; and that the *result* of so applying a purposive or functional test would yield the *same* meaning for the term in *most* situations, thus enabling us to speak of a "core" meaning; that only in a "twilight zone" minority of cases would application of the functional test *result* in a different meaning. Cf. on this point, HANCOCK, *supra* note 6 at 550, note 41.

([11]) SCHILLER, *Formal Logic,* 121-2 (1912).

([12]) KANTOROWICZ, *The Definition of Law,* 7 (1958).

([13]) STEVENSON, *Ethics and Language,* 294 (1944). He viewed the "persuasive definition" as aiming at a "redirection of people's attitudes" by taking a familiar term having a "descriptive and strongly emotive meaning," fashioning a modified descriptive meaning for it, and allowing the old emotive meaning to carry over to the new meaning. *Ibid.,* 210. In judicial reasoning, he said, "the function of emotive meaning is replaced by something more elaborate — by the full mechanism of the law. They [i.e., judicial definitions] wed new or more definite descriptive meanings to the terms that call these mechanisms into play and so direct the mechanisms to this or that range of application. *Which* range of application will depend on which one is judged by those who define the term, to be *just.* In much the same way, persuasive definitions wed new or more definite meanings to terms which bring emotive effects into play. Emotive effects do not have the material sanctions that lie behind the legal mechanisms; but the two are similar in making any word associated with them

an important ethical instrument, on whose definition a great deal may depend." *Ibid.*, 295.

(14) LADD, *The Concept of Community: A Logical Analysis*, in Friedrich, ed., *Community* (Nomos II), 269-277-288 (1959).

(15) In addition, dependence of the legal term's meaning upon the purpose of the particular rule of which it is a part bears a rough *analogy* to the dependence involved in the "definition in use" propounded by H.L.A. Hart, building on Bentham — wherein the meaning of (*some* abstract) legal terms is made dependent on a special kind of "truth" of the particular sentences of which they are a part. HART, *Definition and Theory in Jurisprudence*, 70 L.Q. Rev 37 (1954). One reason why the analogy is only rough is the great difference between a social policy purpose on the one hand and a logical truth (in the sense of a valid deduction from premises) on the other. This is not the place to explore the meaning, uses, and limitations of Hart's view.