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Review of “Legal Conscience,” By Felix S. Cohen

Neil N. Bernstein

Washington University School of Law

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BOOK REVIEWS

THE LEGAL CONSCIENCE: SELECTED PAPERS OF FELIX S. COHEN.
Edited by Lucy Kramer Cohen. New Haven: Yale University Press.
1960. Pp. xvii, 505. \$12.50.

One of the more articulate and original proponents of the approach to law known as "functional jurisprudence" was Felix S. Cohen. His productive career covered less than 25 years from the time he received his Ph.D. in philosophy from Harvard (at age 22) until his death at the age of 46.¹ During most of that period, Cohen carried on an active legal practice, for 14 years in the Department of the Interior and thereafter in private practice. In the last six years of his life, Cohen followed a weekly schedule of four days active practice in Washington, one day teaching at City College in New York, one day teaching at Yale—and one day to recover. In addition to his demanding work schedules, he was able to produce prodigious quantities of highest caliber legal writing. Although some of his scholarship appeared in book form,² the bulk of it was published as articles and book reviews scattered through numerous publications.

Seven years after his death, Felix Cohen's widow has collected and published a selection of his major papers, appropriately titled *The Legal Conscience*. The work is divided into three parts—"Logic, Law and Ethics," "The Indian's Quest for Justice" and "The Philosophy of American Democracy," following an organization made by Cohen shortly before his death. The collection is not exhaustive, but it is sufficiently complete to afford vivid evidence of the depth and breadth of his achievements.

Cohen's important jurisprudential papers are collected in the first section. As a functionalist, he rejected the language of traditional legal argument and opinions as justification for or explanation of any rule of law, and focused his analysis on "the human meaning of law."³ The only legal questions he considered significant were (1) "How do courts actually decide cases of a given kind?" and (2) "How ought they to decide cases of a given kind?"⁴ When a practitioner asks the question "Is there a contract?", he seeks a prediction as to what

1. The biographical material in this review is taken from Biography of Felix S. Cohen, 9 Rutg. L. Rev. 345 (1954).

2. *Ethical Systems and Legal Ideals* (1933); *Handbook of Federal Indian Law* (1941); *Readings in Jurisprudence and Legal Philosophy* (with Morris R. Cohen) (1951).

3. P. 79.

4. Pp. 49-50.

consequences a particular court will attach to a given fact situation. Any data that can be shown to aid in the prediction, whether it relates to previous decisions of the same or other judges, economic background, social class, work habits or digestion, are relevant; all other information is without significance. Law to him is a problem of social actualities.

To a judge, on the other hand, the question "Is there a contract?" presents a moral issue. In effect, he is asking whether a given transaction *should* be a contract. Prior cases will not answer this for him, because every case is both similar to and different from every other case. The problem of assigning relative importance to the similarities and dissimilarities is a problem of ethics, not logic or science.

Cohen felt that these moral value judgments should be made and criticized in terms of the consequences of the decision on the behavior of those persons affected thereby. Science can aid in tracing out the consequences of a specific course of conduct. However, there comes "a point at which one must stop tracing the consequences of any course and judge that in the light of all these consequences the course in question is desirable or undesirable."⁵ Such a judgment can only be made by application of basic ethical assumptions as to the "good life."⁶ The main problem of present day lawyers and scholars, according to Felix Cohen, is to bring the value assumptions underlying all legal decisions into the open where they can be subjected to scrutiny and criticism.

In contrast to the proponents of realistic jurisprudence, Felix Cohen believed ethical evaluation to be as necessary and imperative as scientific investigation of consequences. His position is best summarized in these words:

The collection of social facts without a selective criterion of human values produces a horrid wilderness of useless statistics. The relation between positive legal science and legal criticism is not a relation of temporal priority, but of mutual dependence. Legal criticism is empty without objective description of the causes and consequences of legal decisions. Legal description is blind without the guiding light of a theory of values. It is through the union of objective legal science and a critical theory

5. P. 401.

6. Cohen's philosophy has been criticized for its failure to provide any method for ascertainment of the fundamentals which make up the good life. See, e.g., Northrop, *The Complexity of Legal and Ethical Experience* 68-70 (1959). It is a defect which Cohen would undoubtedly acknowledge. Cohen, *Ethical Systems and Legal Ideals* 227 (1933). He would probably reply to it with this quotation: "The day is short and the task is great. It is not incumbent upon thee to complete the whole work, but neither art thou free to neglect it."

of social values that our understanding of the human significance of law will be enriched.⁷

Felix Cohen's most noteworthy achievements as a legal practitioner centered about the protection and expansion of the rights of American Indians. While in government service, he assisted in the drafting of the Indian Reorganization Act of 1934,⁸ lent his talent and authority to the successful effort to create the Indian Claims Commission⁹ and strove for equitable solutions to the myriad, persistent problems of Indian administration. As Special Assistant to the Attorney General in 1939, Cohen compiled a collection of Federal laws and treaties, on the basis of which he prepared the *Handbook of Federal Indian Law*, described by Felix Frankfurter as "the vademecum of all concerned with its problems."¹⁰ After returning to private practice, Cohen appeared as general counsel to several Indian tribes and the Association on American Indian Affairs in litigation securing to Indians such basic rights as voting¹¹ and participation in social security programs.¹² It is fair to say that he has influenced, either in person or through his writings, all significant Indian rights litigation since 1940.

The papers on Indian affairs reproduced in *The Legal Conscience* demonstrate that he wrote not to convert the oppressors of the original Americans but primarily to give the public generally, and especially those who considered themselves "friends" of the Indians, an accurate understanding of the history and status of Indians and Indian tribes. Cohen fought as hard to preserve those special attributes of tribal status beneficial to the Indians as to relieve those which were oppressive.

Three themes recur throughout these papers. The first is an effort to show that the Indian in his tribe is not a child-like ward of the Great White Father, but is instead a full citizen with certain rights over and above those enjoyed by other citizens. These rights were acquired by Indians, through statutes, treaties and contracts, in exchange for 95 per cent of the land in the public domain of the United States Government. Cohen believed the land acquisitions were generally fair and equitable and that the rights acquired by the Indians were and are of substantial benefit. He strove to protect against their

7. P. 76.

8. 48 Stat. 984 (1934), 25 U.S.C. § 461.

9. See the Indian Claims Commission Act 60 Stat. 1049 (1946), 25 U.S.C. § 70.

10. P. xiii.

11. *Trujillo v. Garley* (D.N.M. Aug. 3, 1948, Unreported); *Harrison v. Laveen*, 67 Ariz. 337, 196 P.2d 456 (1948).

12. *Acosta v. County of San Diego*, 272 P.2d 92 (Cal. 1954); *Arizona v. Hobby*, 221 F.2d 498 (D.C. Cir. 1954).

destruction in the name of "assimilation" and to ensure that their presence could not be mistakenly utilized as a justification for denying Indians the basic guarantees of citizenship.

The second theme is the notion that Indian tribes should enjoy the largest possible measure of self-government. Although the right to self-government has been recognized for more than 100 years, its practical implementation has been frustrated by the use of derogatory adjectives to describe the habits and activities of Indians, the reluctance of Bureau of Indian Affairs officials to surrender their authority, and procrastination. Cohen felt that Indians, no less than their white brothers, should enjoy "the right to use experts when their advice is wanted and the right to reject their advice when it conflicts with purposes on which we are all our own experts."¹³

Finally, he tried to familiarize all Americans with the scope and nature of the Indians' contribution to the American way of life. In politics, medicine, agriculture and even sports, Cohen felt "what is distinctive about America is Indian through and through."¹⁴ Although there is a tendency to overstate the case here, there is no doubt that the extent of the Indian contribution has been almost as great as our ignorance of its influence.

In the final section of papers, Felix Cohen's philosophy and talents are projected into the wider arena of the basic problems of democracy. His concern with the rights of Indians was duplicated by his efforts on behalf of aliens, Asiatics, peoples under colonial domination and the inhabitants of Puerto Rico. Cohen fought for these peoples, not for their sake alone, but for the sake of all free men:

If we fight for civil liberties for our side, we show that we believe not in civil liberties but in our side. But when those of us who were never Indians and never expect to be Indians fight for the cause of Indian self-government, we are fighting for something that is not limited by the accidents of race and creed and birth; we are fighting for . . . the integrity and salvation of our own souls. We are fighting for what Jefferson called the basic rights of man. We are fighting for the last best hope of earth. And these are causes that should carry us through many defeats.¹⁵

Up to the very day of his death,¹⁶ Felix Cohen wrote, practiced and fought to ensure the continuance of what he felt was the American way of life, not only for Americans but for the entire world. We

13. P. 313.

14. P. 316.

15. P. 314.

16. When he wrote the review of Konvitz, *Civil Rights in Immigration*, which is reprinted on pp. 481-84.

must lament that death stilled his voice in 1953, since his advice would be continually helpful in the present Cold War. But through the immortality of his good works, Felix Cohen's memory and beliefs remain with us.

NEIL N. BERNSTEIN †

POWERS OF THE PRESIDENT DURING CRISES, J. Malcolm Smith and Cornelius P. Cotter, Public Affairs Press, Washington, D. C., 1960. Pp. 146. \$5.00.

The major emphasis of the work is on emergency powers during wartime, with lesser attention being accorded to emergencies generally involving a small area. In the latter category are emergencies brought about by reason of droughts, earthquakes, fires, floods and tornadoes. The normal procedure followed in such cases is that Congress will authorize the president to take appropriate action after declaring that an emergency exists.

The conclusion that the Constitution authorizes the use of emergency powers is reached by the literature on the breadth of the inherent, residual, executive and war powers of the president. Hundreds of cases involving the use of emergency powers during crises in the three Administrations since 1933 are discussed by the authors, with a few references to earlier precedents. However, the point of view adopted is that precedent is unnecessary for the exercise of "emergency" powers. Supporting this position are references to numerous occasions where recent presidents have considered it necessary to exercise an emergency power for the public good without authority of law.

A separate chapter is devoted to the various legislative restraints on the use of the emergency powers. Among these restraints are requirements that the executive must report to Congress or to a Congressional Committee. In some cases Congress may by concurrent resolution check, modify or terminate an emergency program, while in other instances, legislation may require inter-agency cooperation in declaring and in meeting an emergency.

In the chapter devoted to judicial review, the authors agree that self-preservation in time of war may require the violation of constitutional rights of the individual. They quote with approval the dictum of Chief Justice Hughes that "the war power of the federal government . . . is a power to wage war successfully." Brief reference is made to the *Milligan* case following the Civil War, and to the *Schenck* case with Justice Holmes' "clear and present danger

† A.B., University of Michigan, 1954; LL.B., Yale University, 1957. Member of the District of Columbia and Wyoming bars.