
Edward Hirsch Levi
achievement of postal (and customs) censorship. They have assembled and organized facts which were heretofore largely obscure, and they have permitted the facts to generate the extremely difficult questions to which the community must now seek answers: What do we really know about the impact of sexually arousing words, or pictures? What groups need shielding from the impact of what kinds of communications? What sorts of sanctions, selectively fashioned and applied, best lend themselves to the exact tasks to be accomplished? How can we protect the nation against that wholesale antisepticizing of communication which would sterilize and stultify free speech and the arts? Are the judgments involved, and the modes of administration to be utilized, ones which should be fashioned nationally, or locally, or at many levels of official action? The Paul-Schwartz book gives us a concrete basis for beginning the hard and necessary job of tackling these questions, and many more.

LOUIS H. POLLAK *


This collection of Felix Cohen's papers, including twenty-seven articles and talks and seventeen book reviews, is at once a memorial to a dedicated and skilled scholar and lawyer and a valuable commentary on the relationships between philosophy, ethics, law, and the world of practical affairs. Written between 1929 and 1953, and addressed to different audiences, the papers necessarily reflect changing moods and points of view; nevertheless, taken together they constitute a coherent approach to law.

Felix Cohen was at home in philosophy. He was trained to think of philosophical systems as being translatable from one to the other. In a 1949 address on "Law and Language" (p. 111) he attributed to Professor Sheffer of Harvard the development of the idea "of a formula of translation through which a statement, true in one system, may be translated into a statement in another system that sounds quite different but that means the same thing" (p. 119). The recognition that truth may be expressed in different languages, that two philosophers using the same symbols may mean different things (p. 110), and that "legal philosophy is not a bad play in which each actor clears the stage by killing off his predecessors" (p. 154) helped to focus attention on the functional role of concepts. He was concerned with the context in which concepts were used, and with their usefulness in organizing inquiry. In his significant article, "Transcendental Nonsense and the Functional Approach" (p. 33), published in 1935, the thrust of the criticism

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was against "concepts which are not defined either in terms of empirical fact or in terms of ethics but which are used to answer empirical and ethical questions alike, and thus bar the way to intelligent investigation of social fact and social policy" (p. 45). The manipulation of unverifiable concepts, which could not be translated into terms of actual experience, had led, in his view, to a preoccupation with pseudo-problems, such as "what is the holding or ratio decidendi of a case?" or "where is a corporation?" which served "only as invitations to equally meaningless displays of conceptual acrobatics" (p. 49).

Cohen was interested in the living law, which "can be found in the contracts men make, written and unwritten, in the written or unwritten constitutions of the various associations in which people function, from the family to the modern business corporation, in the actual legal relationships and institutions that make up the social order" (pp. 189–90). He was concerned with the consequences of legal rules — consequences which would have to be understood in the light of all relevant knowledge. In the field of legal criticism, the functional method was essentially "a reorientation of utilitarianism to a wider philosophical perspective and to a broader horizon of relevant knowledge in the fields of psychology, economics, criminology and general sociology" (p. 94). He knew that sociological jurisprudence in 1933 remained "in large part a pious program rather than a record of achievement" (p. 181). But as early as 1935 he thought the age of the classical jurist was over; future creative scholars would not devote themselves to the taxonomy of legal concepts but rather would "look . . . to the actual facts of judicial behavior," would "make increasing use of statistical methods in the scientific description and prediction of judicial behavior," and would "more and more seek to map the hidden springs of judicial decision and to weigh the social forces which are represented on the bench" (pp. 59–60). He was critical of that realistic jurisprudence which was content to regard each judicial decision as a discrete event — an expression of individual personality — and which did not realize that every decision was "a product of social determinants and an index of social consequences" (p. 70). By 1950 he was able to give greater content and direction to his view of what would constitute a meaningful study of judicial decisions within their social context by formulating these hypotheses:

1. The more reprehensible the conduct, the more readily will judges find a causal connection between the conduct and the injury complained of.
2. The more hateful the defendant, the more readily will judges find a causal connection between the defendant and the injury complained of.
3. A judgment against a highly respected person has a larger precedent value than a judgment against a despised person; conversely, a judgment in favor of a despised person has a larger precedent value than one for a pillar of society.
4. A value differential in attitude of judge and jury towards a given class will be reflected in differences of judgment as to whether individuals of the given class are responsible for the wrongs complained of (p. 144).
Felix Cohen joined his interest as a philosopher and lawyer in the relationship of ethics to law with his zeal as a social reformer. Ethics represented that wisdom which would make possible appropriate conscious choices in the inevitable leeways of the law. He was insistent that the choice among precedents required an appraisal in ethical terms, even though he was scornful of the scholar who would “muddy his descriptions of judicial behavior with wishful thinking” and who, therefore, would conclude, “this cannot be the law because it is contrary to sound principle” rather than “this rule leads to the following results, which are socially undesirable for the following reasons” (p. 68). He was critical of “a belief that law can attain the prestige of science only by showing a thorough contempt for judgments of value” (p. 151). To know the limits of past knowledge is the needed prelude to useful research” (p. 32).

A criterion of values was required. No unified science and no inference was possible on the basis of individual cases alone (p. 16). “Dean Pound has talked for many years of the ‘balancing’ of interests, but without ever indicating . . . how a standard of weight or fineness can be constructed for the appraisal of ‘interests’” (p. 76). Modern ethics, renouncing the pretense of mystic learning, using the methods and data of science, would have “to build up moral rules . . . by testing every moral rule against moral judgments upon concrete cases, and by fitting every moral judgment into its proper context of social facts” (p. 29). It would proceed through casuistry which we “now call the case method” (p. 112). In a world of collapsing faiths, a new philosophy of values would have to be molded; “no civilization can endure which distrusts its moral foundations as profoundly as we have come to distrust the ideals that order our social existence” (p. 338). Max Radin’s retreat “from the intellectual outposts of legal reform” by delimiting the purpose of law as less than “to secure a good society” brought the sorrowful comment in 1941: “One may . . . hope that the conditions which make this exposition worth reading will soon pass away” (p. 199).

A great deal of Felix Cohen’s time and effort as a lawyer both in and out of government was spent on Indian affairs, and the most eloquent essays in the volume deal with the position of the Indian. To Felix Cohen the Indian tribe in America was as “the miners’ canary and when it flutters and droops we know that the poison gases of intolerance threaten all other minorities in our land” (pp. 313–14). The distinctive political ideals of American life had emerged “out of a rich
Indian democratic tradition" (p. 317). Again and again Felix Cohen emphasizes that "we owe to the Indian many of our sports, recreations, highways, drugs, food habits, and political institutions, and most of our agricultural staples" (p. 291). And we are reminded repeatedly that many of the contributions "had to meet suspicion and hostility before they won professional and public acceptance" (p. 262).

The treatment of Indian claims in judicial opinions illustrated for Felix Cohen the effect of value judgments on fact or law determinations, for "a white man 'travels' or 'commutes'" while "an Indian (like a buffalo) 'roams.' A white man may be of 'mixed ancestry,' an Indian (or a cow) is a 'mixed breed'" (pp. 149-50). Cohen was fascinated, appalled and indignant at the misconceptions concerning the Indian; as, for example, the legend that Indians are not citizens (pp. 232, 328, 463); or the view, ascribed to Justice Jackson in his concurring opinion in the Northwest Shoshone case,2 "that Indians were really communists, who did not understand or appreciate property rights" (p. 163). "It is safe to say," Felix Cohen writes, "that in every Indian tribe some individual interest and some social obligations are attached to the land" (p. 219). "Again, in dealing with our problem of rural land tenure in the United States, I think we shall make much greater progress if, instead of seeking to impose the worship of the fee simple absolute upon the Indians we adapt to white use some of the basic principles of Indian land tenure" (p. 260).

Felix Cohen was ambivalent in his description of the American treatment of the Indian. "It is a striking fact that so often in the history of Spain, Spanish-America, and the United States, oppression of Indians has come from local neighbors and officials and help has come from a far-off central government. Perhaps it is easier for legal ideals to live in a place far enough from the facts to which they are applied so that perspective in judgment is possible and long-range values are not sacrificed to immediate, petty advantages" (p. 245). The Indian claims were "the backwash of a great national experiment in dictatorship and racial extermination," particularly in the period from the close of the Civil War to the First World War (p. 265). Yet approximately $800 million of federal funds had been appropriated for the purchase of Indian lands—"not a common occurrence in the world's history" (p. 291). In 1942 Felix Cohen wrote, "those who will build a better postwar world can well afford to ponder the legal relationship of American Indians to the Federal Government, which, after three centuries of experience and experimentation, often bitter, conforms more closely today than ever before to the humane legal ideals first formulated by the theological jurisprudence of sixteenth-century Spain" (p. 252). The recognition of tribal self-government and the legal equality of the races would be relevant in many areas where the problem would be to preserve the rights and liberties of native groups while permitting the fullest development of the world's resources (p. 251-52).

Felix Cohen's view of the Indian in American political life reflected and no doubt influenced his jurisprudential ideas. Activity which might symbolize specific values in one culture had a different meaning under other circumstances. The inefficiency of Indian self-government symbolized the mark of respect for the individual and, not paradoxically, for group values, which reflected Felix Cohen's distaste for overbearing agents or experts of the Indian office and his view that some kind of socialism might provide the basis for a more meaningful ethics. These views found expression in a rather strange attack on Ernst Freund and other graduates of the University of Berlin for wishing to confer increased powers upon executive or administrative agencies (p. 366) and an intemperate review of Lippmann's *The Good Society* not quite characteristic of one who could see good through translation in most philosophical systems. Felix Cohen's experience with the practical seems also to have modified somewhat his view of the shape of intellectual rigor. The essays begin appropriately with a 1929 philosophical essay on "What is a Question?" Significant questions at that period of Felix Cohen's development were only those to which one true proposition, and one only, would be the correct answer. An ambiguous question would not be "in the logical sense, a question at all" (p. 11). By 1950, he reminds us that "lawyers . . . have special opportunities to learn what many logicians have not yet recognized: that truth on earth is a matter of degree . . . ." He then quotes Whitehead as saying, "We shall meet propositions in Heaven" and explains that Whitehead meant that "the symbolism of terrestrial life is too fuzzy ever to reach an absolute precision, so that unambiguousness is an ideal rather than an attainable fact" (p. 122). To be sure, Whitehead was quoted to the same effect in the 1929 essay, but there Cohen responded with a defense of "the divine task of the logician" (p. 12).

Two heroes, one implicit and one explicit, dominate these essays: one is Morris Cohen, Felix Cohen's father, whose skillful, precise and skeptical approach to matters of legal philosophy is capably and creatively reflected in these writings. The second is Francisco Vitoria, professor of moral theology at the University of Salamanca in the sixteenth century and courageous defender of Indian rights, to whom repeated reference is made as the real father of international law. To some extent these two heroes represent the fortunate union of philosophy and action underlying the essays.

The unity underlying these writings is not at once apparent — a difficulty perhaps inherent in most collections of separate essays. There is an added difficulty for the modern reader, who will easily catch the flavor of the jurisprudential ground-breakers of the 1930's, and whose mind is apt to wander away to more melancholy thoughts of how little progress has been made upon the suggested new lines of approach. The four hypotheses set forth in Felix Cohen's 1950 article remain almost in advance of the work which has been done. For some readers the answer to the implied question of the meaning of this lack of progress will be found in the more traditional values of the lawyer as public
servant and defender of moral values as exemplified in the essays on Indian affairs and on American democracy. The occasional disappointment that some of these later essays, which are action oriented, do not quite reflect the hard skepticism of the philosopher and the careful posing of issues is in itself a recognition of the power and breadth of this distinguished legal philosopher and lawyer.

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The authors of this work have courageously explored a field lying between philosophy and law which until recently has been only skirted by legal writers. This is the field denoted by the question: In law what causes are causes in fact? The authors distinguish this sharply from questions of policy and value, which they classify as "liability limitations" and exclude from their book. Lawyers have traditionally run the two areas together, though they sometimes pretend that they do not. This reviewer, as a first-semester law student, had a course called Legal Liability planned by Professor Joseph H. Beale. It was supposed to be a completely rational, or at least rationalized, study of proximate causation, and was intended to fit all aspects of all cases, whether they arose in a torts, criminal law, measure of contract damages, or other context. 3 At the opposite pole, eschewing formulas, Leon Green undertook to reduce causation to a minimum factual role and to identify the major problems as ones of social valuation: Who ought to bear the risks inherent in a situation? 4 Most of the talk in all this was about negligence cases. It was assumed that for a plaintiff to recover he had to prove three things. The first was negligence in the defendant, the third was injury to himself, and the second was whatever connected the first to the third. The handiest name for this relational element in the middle, and just about the most misleading, was "proximate causation." The Restatement of Torts, 5 with Judge Cardozo's help, 6 tried to divide the relational element into intelligible parts by putting most of the policy-value portion under the title "duty" and by

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3 The casebook was BEALE, CASES ON LEGAL LIABILITY (2d ed. 1920), and the reviewer's class may have been the last one to use it. The systematic study that went with the casebook was Beale, The Proximate Consequences of an Act, 33 HARV. L. REV. 633 (1920).

4 GREEN, RATIONALE OF PROXIMATE CAUSE (1927).

5 RESTATEMENT, TORTS, §§ 430-33 (1934), as amended, §§ 430, 433 (Supp. 1948).