

## REVIEWS

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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.

AMERICAN Legal Realism has long been, and perhaps still is, a stumbling block to European jurists and legal philosophers. This is not necessarily an indication of provincialism on either side of the Atlantic. The "normative" conception of law is too deeply embedded in the Continental mind to make room for a conception of law as a process of decisions. So is the notion of sovereignty as an exclusive attribute of the legislative. So, above all, is the conviction that certainty is the essential, and indeed the most precious, of all legal values. If the tenets of American Realism were generally looked upon with distrust in Europe, this is due not only to the fact that they refer to and are derived from a different legal experience. It is also because an essentially pragmatic approach to the law is not easily reconcilable with a tradition of legal thinking which is predominantly systematic and rational.

The publication of Felix Cohen's selected papers should contribute, I think, to lessen that suspicion. Cohen was still in his prime when he embraced with youthful enthusiasm the most challenging doctrines of Realism. His brilliant attack on "traditional legal thought-ways" shows all the exuberance of youth: the very title of one of his best-known essays is deliberately provocative. Realism (or, as he preferred to rechristen it, Functionalism) represented to his eyes "an assault upon all dogmas and devices that cannot be translated into terms of actual experience."<sup>1</sup> It should have put an end, once and for all, to the "transcendental nonsense" of traditional jurisprudence, "re-directing" the study of law into entirely different—empirical, operational—channels. Writing in the middle Thirties, Cohen saw in the use of the functional method the most significant advance of modern philosophy. "The attack upon transcendental conceptions of God, matter, the Absolute, essence and accident, substance and attribute, has been vigorously pressed by C.S. Peirce, James, Dewey, Russell, Whitehead, C.T. Lewis, C.D. Broad, and most recently by the Viennese school, primarily by Wittgenstein and Carnap."<sup>2</sup> A similar advance in jurisprudence could be achieved by taking the lead from Holmes' redefinition of legal concepts in terms of judicial decisions.

Functionalism as a method may be summed up in the directive: If you want to understand something, observe it in action.

Applied within the field of law itself, this approach leads to a definition of legal concepts, rules, and institutions in terms of judicial decisions or

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1. P. 47.
  2. P. 51.

other acts of State-force. Whatever cannot be so translated is functionally meaningless. Applied to the larger field of human behavior, this same approach leads to an appraisal of law in terms of conduct of human beings who are affected by law. In the former field, the outcome of the functional approach is generally designated as "realistic jurisprudence." In the latter field, the outcome of the functional approach is usually called "sociological jurisprudence." There is, however, no well-recognized definition of these schools of thought, and I think it is fair to say that "realistic" and "sociological" jurisprudence are in part complementary and in part overlapping, but in no way antithetical, and that both spring from a common skeptical, scientific, anti-supernatural, functional outlook.<sup>3</sup>

Thus, in Cohen's presentation of Realism, what had started essentially as a revolt against imported ways of thinking about law and as an attempt to replace them with others more in keeping with American realities, was now raised to the dignity of a brand-new and original legal philosophy. Indeed, Cohen's words read much more like a program than like an assessment. This program, alas, he was prevented from carrying out in detail. But his *Nachlass* is rich enough to indicate some of the new perspectives which his eye had perceived. Even in their bare outline, they constitute a remarkable enrichment and broadening of the conventional realistic approach. They are, in fact, a startling anticipation of some of the problems with which legal philosophy is more directly concerned today.

To begin with, I think that a very special significance should be attributed to Cohen's particularly cautious attitude towards some of the Realists' most extreme views, such as their denial of "certainty" in law and what Herbert Hart has recently called, very appropriately, their "rule-skepticism." Cohen saw very clearly what it took Llewellyn twenty years to admit: that there are rules of procedure as well as rules of competence behind the decisions of judges, rules which must be taken into account not only because without them "all legal decisions would be simply noises," but also as an indication of the existence of a "system of governmental controls" and as the basis for "certain predictable uniformities of official behavior."<sup>4</sup> Indeed, Cohen went even further in his concessions to "normativism." He clearly saw the peril of "breaking down rules and concepts into atomic decisions." He insisted that "the human demand for security" is the ground for legal protection. Against Jerome Frank's indiscriminate attack upon the "myth of certainty," he pointed out, in words that ring almost as a warning, that "civilization rests upon a vast, intricate complex of expectations and prophecies, and only the predictable behavior of those bodies to which society has entrusted its collectivized physical force can put iron into that scaffolding of hopes and reliances."<sup>5</sup>

Next to his rehabilitation of certainty I would list, as one of the most interesting and personal characteristics of Cohen's legal philosophy, his deep concern for the use and the role of logic in law. Quite aptly have the editors

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3. Pp. 80-81.

4. Pp. 70-71.

5. P. 148.

of the present collection chosen the title *Logic, Law, and Ethics* for the first group of essays which form almost half of the book. The references to logic are as frequent here as they are in the larger and more ambitious volume, *Ethical Systems and Legal Ideals* (where indeed there can be found an attempt at even using "the chaste language of symbolic logic"). I must leave it to more competent judges than I am to assess the value of Cohen's contribution on this score. What I am interested in are the implications of the question which Cohen seems to have had in mind in stressing the use of logic for legal theory. This is the question that crops up both in these essays and in the introduction to *Readings in Jurisprudence and Legal Philosophy*: "Can we devise translation formulae that will permit men to speak to each other across all the gulfs of creed and to understand each other through all the curtains of dogma?" If logic is to provide us with such formulae of translation, "through which a statement, true in our system, may be translated into a statement in another system that sounds quite different but that means the same thing,"<sup>6</sup> might not juristic logic bring us back, in the end, to those abstract, ever-valid concepts and rules of the *jurisprudentia universalis* which "functionalism" claimed to have discarded? This would be more in keeping with Coke's view, that "reason is the life of the law," than with Holmes' opinion, that the life of the law is experience, not logic.

Certainty and universality are not the only traditional values which we find, albeit indirectly, restored in Cohen's approach to law and its problems. The most deliberate, as well as the best known restoration was that of "ethical criticism" in legal theory. Here again, Cohen was parting company with his fellow-Realists. "Contemporary 'realists' "—he wrote—"have, in general, either denied absolutely that absolute standards of importance can exist, or else insisted that we must thoroughly understand the facts as they are before we begin to evaluate them. Such a postponement of the problem of values is equivalent to its repudiation."<sup>7</sup> So important did this restoration appear to Cohen that he devoted his finest efforts to it. The outcome was a remarkable book, *Ethical Systems and Legal Ideals*. It is a book that still has much to teach to the modern reader. Together with its brief and lucid restatement now included in this volume,<sup>8</sup> it seems to me particularly topical in our present-day controversy between "natural law" and "legal positivism." Contemporary advocates of natural law might rejoice in finding Cohen deliberately upholding the case for some discoverable standard of legal valuation. But legal positivists might equally rejoice in finding him laying down the basic principle that "law is law, whether it be good or bad, and [that] only on the admission of this platitude can a meaningful discussion of the goodness and badness of law rest."<sup>9</sup> Personally, I am unable to see why even the most obdurate positivist should take issue with Cohen's passionate vindication of the "instrumentality"

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6. P. 119.

7. P. 76.

8. Pp. 17-32.

9. COHEN, *ETHICAL SYSTEMS AND LEGAL IDEALS* 15 (1959).

of law. To conceive of law as primarily a rule or a body of rules should not prevent us from asking what the rules are about and what effects they have upon human lives. As Bentham emphasized, "expository" is by no means a substitute for "censorial" jurisprudence. All the "normativist" would do (and I think he would do so whether he inclines to natural law or to legal positivism) would be to suggest a slight, but important correction to the phrase which Cohen chose for his title. The proper description for the kind of research which Cohen advocated would be, not: *Ethical Systems and Legal Ideals*, but: *Ethical Ideals and Legal Systems*.

In concluding this review I am deeply aware that I have not done Cohen's essays full justice. There is so much else besides the niceties of legal philosophy in these pages. There emerges from them the picture of a man highly intelligent and sensitive, immensely cultivated, profoundly sincere and thoroughly dedicated to an ideal of social justice—to what he himself called "a new integration of human interests." The picture is so vivid that, although we never met, I felt in closing the book as if I had known Cohen personally. I cannot say how much I regret not having had that good fortune.

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