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REALISM AND FUNCTIONALISM IN THE LEGAL THOUGHT OF FELIX S. COHEN

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INTRODUCTION

"The term 'legal realism' emerged about 1930 as a label for the lively and somewhat heterodox legal theories of a group of American law teachers and lawyers who diverged from each other in many respects and yet had much in common."[1] The author of this statement, E. W. Patterson, listed himself and some twenty individuals, including Felix S. Cohen (1907-1953), as members of this group. If realism is correctly characterized as a "youth" movement,[2] Cohen was its baby. Son of the distinguished philosopher Morris R. Cohen,[3] he published his first article in legal theory in 1931 at the age of twenty-four.[4] His Harvard doctoral thesis, submitted when he was twenty-two, formed the basis of his book, *Ethical Systems and Legal Ideals*, which was published in 1933. Cohen's seminal article, *Transcendental Nonsense and the Functional Approach*,[5] appeared in 1935, when he was still two years shy of thirty. Until his death at the age of forty-six, Cohen continued to produce significant works in legal theory.[6] De-

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[1] E. PATTERSON, JURISPRUDENCE 537 (1953).

[2] Kennedy, *Principles or Facts?*, 4 FORDHAM L. REV. 53, 56 (1935).

[3] Morris Cohen wrote a number of important pieces on jurisprudence and almost single-handedly sustained the tradition of legal philosophy among American professional philosophers. *See, e.g.*, M. COHEN, LAW AND THE SOCIAL ORDER (1933); M. COHEN & F. COHEN, READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY (1951); M. COHEN, REASON AND LAW (1950).

[4] Cohen, *The Ethical Basis of Legal Criticism*, 41 YALE L.J. 201 (1932).

[5] 35 COLUM. L. REV. 809 (1935). For a brief biography and bibliography, see 9 RUTGERS L. REV. 341, 345-50, 351-53 (1954) (Cohen memorial issue). Cohen served 14 years as a lawyer with the Department of the Interior and distinguished himself in the field of American Indian law. During the last six years of his life, he taught at Yale Law School while also in private practice. His *Dialogue on Private Property*, 9 RUTGERS L. REV. 357 (1954), gives the flavor of his teaching. Most of Cohen's jurisprudential articles are collected in F. COHEN, THE LEGAL CONSCIENCE (1960) [hereinafter referred to as LEGAL CONSCIENCE]. References in this paper will be to LEGAL CONSCIENCE rather than to the original publication; original dates will be noted when appropriate. For an amplifed bibliography, see *id.* at 485-93.

[6] *See, e.g.*, Cohen, *The Problems of a Functional Jurisprudence*, 1 MODERN L. REV. 5 (1937); Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238 (1950); Cohen, *Judicial Ethics*, 12 OHIO ST. L.J. 3 (1951). Cohen also authored many book reviews and publications on Indian law and other topics.

spite Felix Cohen's relative youth as compared to other great figures in the realist movement,[7] Dean Eugene V. Rostow's opinion of Cohen is easily endorsed. "In my judgment," writes Rostow, "[Cohen's] has been, and will remain, the best balanced and one of the most creative voices in the literature of what is loosely called American legal realism."[8]

Cohen's work is of special interest to anyone attempting to come to grips with the realist movement. First, no other realist was as concerned with the philosophical underpinnings of realism and the relationship of realism to contemporary currents of philosophical thought. Second, no realist was better equipped to present a realist critique of all facets of traditional jurisprudence; Cohen was trained in philosophy and logic as well as law. Finally, no other realist made as thoroughgoing an attempt to deal with the problem of "legal criticism"—the ethical valuation of law. Cohen was anxious that the realists' "temporary"[9] divorce between the *is* and *ought* (for the purpose of studying the law that *is*) not repudiate in practice the question of what law *ought* to be.[10] Cohen demonstrated that some of his brother realists were, in their complacency, "crypto-idealists"; they possessed and implicitly employed standards for the valuation of law, though they failed to articulate them. This was a criticism that the realists frequently advanced against judges.[11] It is, then, no wonder that Felix Cohen occupies a central position in Garlan's *Legal Realism and Justice*,[12] the first work to survey sympathetically realist writings from the perspective of ethical theory and thus to uncover realism's positive ethical implications.[13]

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[7] Such figures included Underhill Moore, Herman Oliphant, Walter W. Cook, Karl N. Llewellyn, Charles E. Clark, and Jerome Frank—all considered by Patterson as the leaders of legal realism.

[8] LEGAL CONSCIENCE, *supra* note 5, at xvi.

[9] *See* K. LLEWELLYN, JURISPRUDENCE 55-56 (1962).

[10] LEGAL CONSCIENCE, *supra* note 5, at 76.

[11] The point originated with Holmes, the sire of legal realism: "Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding." O.W. HOLMES, COLLECTED LEGAL PAPERS 181 (1920).

[12] E. GARLAN, LEGAL REALISM AND JUSTICE (1941).

[13] I have not found Garlan's book very useful. There are many studies of realism, but I shall not refer to them; my aim is, by and large, to examine Cohen's thought as an independent unit. The only general study of Cohen of which I am aware is Koppleman, The Philosophy of Legal Functionalism: A Critical Examination of the Thought of Felix S. Cohen (1969) (unpublished dissertation, Columbia University). Koppleman's study, which discusses the bearing of Cohen's theoretical writings on his work in American Indian law, with a consideration of some of Cohen's briefs, was not available to me during the preparation of this paper. Cohen has also been referred to frequently since 1935 in the polemics that have surrounded realism. For the most vigorous attack on Cohen, see Kennedy, *Functional Nonsense*

In this essay, I propose to expound and critically examine the leading ideas in Cohen's jurisprudence. No claim is made that Cohen represented the realist movement—probably no single person could represent it. Furthermore, no attempt is made to relate in detail Cohen's work to the writings of other realists (although here and there a few points of contact are noted). Nor shall I deal with Cohen's extensive treatment of the problem of legal criticism, except where relevant to other issues. Cohen's treatment of the problem was unique among the realists; this particularly creative aspect of his work merits separate discussion in another place.

If Cohen does not represent legal realism, his writing does, I submit, represent the realist movement's best theoretical work.[14] A critical examination of Cohen's work will enable us to see its virtues as an overall theory as well as the gaps it left open. Given Cohen's early death, one naturally is hesitant to be excessively critical. Had he been able to continue his work, he might well have dealt with the gaps in realist theory.[15] One can detect certain moderating tendencies in Cohen's later writings, which might have impelled him towards some revision in the theory. It is fascinating to speculate on how Cohen would have reacted to the work of H.L.A.Hart, the Chicago school, and Ronald Dworkin. It would also be interesting to have had Cohen's response to Hart's critique of Cohen's views on "legal cause."[16] We are confined, however, to what we have.

This paper is divided into three sections. The first two, which discuss Cohen as critic, examine his animadversions against various traditional theories of law and the judicial process, as well as the exceptions he took to the ideas of other realists. The third section concerns the "functional method," which, according to Cohen, lies at the root of realism. There we shall consider Cohen's systematic philosophical development of his positive views.

I

COHEN'S CRITIQUE OF TRADITIONAL THEORIES OF LAW

It is useful to begin with Cohen's definition of "law": "By the term *law* we shall mean a body of rules according to which the courts,

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and the Transcendental Approach, 5 FORDHAM L. REV. 272 (1936), and Kennedy, *More Functional Nonsense—A Reply to Felix S. Cohen*, 6 FORDHAM L. REV. 75 (1937).

[14] I do not thereby assert that Cohen was the most important realist. If such a judgment can be made at all, I believe that the accolade should go to Llewellyn.

[15] Cohen died at the peak of his intellectual powers, as may be seen from a book review written on the day of his death. *See* LEGAL CONSCIENCE, *supra* note 5, at 481-84 (reviewing M. KONVITZ: CIVIL RIGHTS IN IMMIGRATION).

[16] H.L.A. HART & A. HONORE, CAUSATION IN THE LAW 269-72 (1959).

that is the judicial organs of a political body, decide cases."[17] According to Cohen, this is not the only possible definition of "law." Like any such definition, it can only be characterized as useful or useless, rather than "true" or "false."[18] Put in somewhat different terms, an acceptable definition should satisfy certain criteria of adequacy. Cohen's criteria may be summarized as follows. First a definition should capture some of the meanings intended by all speakers of the language or by an identifiable class of such speakers. In the case of "law," the relevant class is lawyers. Second, as a near corollary, a definition should aim at precision by reducing elements of ambiguity and vagueness. Complete precision in the term "law," however, is unachievable; as Cohen recoguized, there is room for disagreement as to what a court is, especially in borderline situations.[19] Third, a definition should lend itself to consistent employment.

These three criteria of adequacy presumably apply formally to all definitions. The purpose of definition is to provide an efficient vocabulary for the adequate and intelligible treatment of problems. Although Cohen did not specify exactly which problems he contemplated in this regard, further criteria of adequacy are evidently required in the field of law. Therefore, a fourth criterion is that a definition of "law" should be morally neutral; "law" should be defined so that the valuation of a law as good or bad always remains logically undetermined. Further, the mere definition of the term should not delimit the proper scope and function of law.[20] In Cohen's view, "[t]he normative use of definitions is one of the most prevalent sources of confusion in legal criticism."[21] His fifth criterion, on the other hand, is that no definition should permit the "abduction of law from the domain of morality." In other words, "law" should not be defined so that its inherent ethical neutrality precludes valuation altogether, merely because law purportedly is ethically neutral by its

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[17] F. COHEN, ETHICAL SYSTEMS AND LEGAL IDEALS 11 (1933) (emphasis in original) [hereinafter cited as ETHICAL SYSTEMS]. Cohen accepted "in essence" the definition advanced by John Chipman Gray: "The Law of the State or of any organized body of men is composed of the rules which the courts, that is, the judicial organs of that body, lay down for the determination of legal rights and duties." J.C. GRAY, THE NATURE AND SOURCES OF THE LAW 84 (2d ed. 1921).

[18] *See* ETHICAL SYSTEMS, *supra* note 17 at 9, 13; LEGAL CONSCIENCE, *supra* note 5, at 62.

[19] Llewellyn identified the following questions as basic jurisprudential issues: "What is a court? Why is a court? How much of what we know as 'court' is accidental, historically conditioned—how much is essential to the job?" K. LLEWELLYN, *supra* note 9, at 374. For an attempt at a partial answer, see M. GOLDING, PHILOSOPHY OF LAW ch. 6 (1975).

[20] LEGAL CONSCIENCE, *supra* note 5, at 29.

[21] *Id.* at 92.

nature.[22] These last criteria formed the basis of Cohen's rejection of various traditional theories of law.

Blackstone was Cohen's special target with respect to the fourth criterion.[23] According to Blackstone, a law is " 'a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong.' "[24] This definition, according to Cohen, combines two incompatible conceptions: Hobbes's (law as the command of the sovereign) and Coke's (law as the perfection of reason). Although Blackstone's explanation of the definition is somewhat ambiguous, it is fairly clear that the terms "right" and "wrong" designate not merely what is legally right or wrong (according to the sovereign), but also what is morally right or wrong. It seems to follow that a law's ethical status is thereby guaranteed, and the possibility of its being adjudged good or bad is not left open. As Cohen rather sarcastically said, "[p]erhaps the chief usefulness of the Blackstonian theory is the gag it places upon legal criticism."[25] Although he did not discuss the topic explicitly, Cohen undoubtedly would have found a similar fault in Thomas Aquinas, who held that a law is an ordinance of reason for the common good. For Aquinas, an unjust enactment is "no law at all" and a "perversion of law," the enforcement of which is violence perpetrated against the citizen.[26]

It is important to understand the theoretical assumption that underlies both the fourth criterion of adequacy and the critique of Blackstone that follows therefrom. As noted above, Cohen maintained that the definition of "law" should not and cannot determine the proper scope and function of law. This he held to be a conclusion of so-called "modern ethics." According to Cohen, modern ethics is unabashedly utilitarian, and he described himself as an unabashed hedonistic utilitarian. The ultimate good is human happiness, which is good in itself; everything else, law included, is good only insofar as it serves as a *means* to happiness. But a law cannot be good in itself. Law can only have instrumental value, and the valuation of law as good or bad is always an open question.

Given the utilitarian assumption underlying Cohen's approach to the definition of "law," the question naturally arises whether the fourth criterion should be adopted under a type of ethical theory that

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[22] ETHICAL SYSTEMS, *supra* note 17, at 25.

[23] *See* ETHICAL SYSTEMS, *supra* note 17, at 14; LEGAL CONSCIENCE, *supra* note 5, at 62-64.

[24] 1 W. BLACKSTONE, COMMENTARIES * 44.

[25] LEGAL CONSCIENCE, *supra* note 5, at 65.

[26] T. AQUINAS, SUMMA THEOLOGIAE I-II, q. 95, a. 2. Cohen, however, also acknowledged that what Aquinas had to say about law was "worth saying" and that he had made a "great contribution" to jurisprudence. LEGAL CONSCIENCE, *supra* note 5, at 120.

would allow for a law's having noninstrumental value. Fairness, for instance, might be such a value. We could admire a law for its fairness independent of its contribution to human welfare. Fairness, of course, need not be unconnected to human welfare and human interests, but in some of its aspects fairness concerns *how* human welfare is promoted and interests are balanced, as distinct from the sum of the welfare promoted or the particular interests balanced. A fairer law may have the consequence of making more people less happy than an unfair law. Thus, under an ethical theory that rejects Cohen's calculative[27] utilitarianism, there might be no objection to including a reference to fairness in the definition of "law."

This point may be reinforced by an additional consideration. Underlying the positions of Blackstone and Aquinas is a perceived difference between law and a regime of commands backed by threats. Even if one refuses to identify law with some system of ethics, one still may hesitate to identify it with pure force. Blackstone and Aquinas were, in a sense, concerned with the distinction between the gunman and the tax collector—first propounded by Kelsen and later made famous by Professor Hart. Law, under whose color the tax collector acts, appeals to a sense of obligation from the citizen, while the gunman's orders do not. But how could laws elicit or impose an obligation unless they are in some respect ethically acceptable? The problem of making this distinction leads to the class of theories represented by Blackstone's definition. I do not think that there yet is an adequate solution to the problem in the literature of legal philosophy.

Though I do not accept entirely the utilitarian point of view underlying Cohen's approach to the definition of "law" (especially his hedonism), nevertheless I tend to agree with his adoption of the fourth criterion. Notwithstanding Blackstone's theory, it makes sense to judge a law as good or bad even if there are noninstrumental legal values. A definition of "law" should allow for the possibility of such a judgment. It is conceivable that even a fair law might be regarded as a bad law if one takes other ethical considerations into account.[28]

The fifth criterion of adequacy rules out definitions that purport to make law immune to ethical valuation. Cohen's discussion constitutes some of the best material ever written on the topic. His main targets were Professor E. M. Morgan and Leon Duguit, the French theorist.[29] Morgan asserted that "law does not have the same purpose

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[27] Cohen was a defender of Bentham's hedonic calculus. *See* ETHICAL SYSTEMS, *supra* note 17, at 195-205.

[28] It should be mentioned that Aquinas developed an instrumental conception of law as means to ends. His teleology, however, was broader than Cohen's.

[29] *See* ETHICAL SYSTEMS, *supra* note 17, at 21-28.

as religion or ethics or morals."[30] Cohen had little difficulty demonstrating that Morgan's conclusion—that some rules of law are outside the realm of ethical criticism—rests upon confusion over the word "purpose," or upon construing "ethics" and "morals" in a special way.

Duguit began with the claim that the sole purpose of law is social solidarity. Solidarity is a morally neutral "fact": "It is not an imperative."[31] Duguit was not deterred, however, from also claiming that an individual ought to abstain from any act that would be contrary to social solidarity. Clearly, solidarity is not a mere "fact"; Duguit surreptitiously used it as a standard of valuation. Duguit, as Cohen said, was a "crypto-idealist." This insightful designation, derived from Morris R. Cohen, runs parallel to "crypto-positivism." Many philosophers claiming to offer purely formal definitions of "justice" invariably make all sorts of hidden assumptions about human nature and social realities that, once uncovered, are open to question.

Cohen's definition of "law" thus appears to satisfy the five criteria of adequacy. It remains to be seen, however, whether or to what extent his definition provides an "efficient vocabulary for the adequate and intelligible treatment of our problems."[32] Cohen insisted that a definition is a resolution to use words in a certain way; as such, it is useful or useless, not true or false. Perhaps, however, what we need here is not so much a definition of a word but the analysis of a concept. In his lengthy discussion of the meaning of the ethical term "good," Cohen was not at all concerned with verbal definition, but rather with the correct analysis of "good" as an explanation of the world of value.[33] He concluded that there is no way to choose a priori among certain alternative theories, but he settled on hedonism because it seemed to accord best with his own intuitions. If the question of the correct analysis of "good" is meaningful, however, why can't the question of the correct analysis of the concept of law also be meaningful?

It may be helpful to take a brief glance at Cohen's posthumously published article, *Dialogue on Private Property*,[34] in which Cohen stated:

> [T]here are some legal facts which are not just matters of words or definitions or theories, but which are objective in the sense that the

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[30] E. MORGAN, INTRODUCTION TO THE STUDY OF LAW 32 (1926).

[31] Duguit, *Theory of Objective Law Anterior to the State*, in MODERN FRENCH LEGAL PHILOSOPHY 237, 259 (1916).

[32] ETHICAL SYSTEMS, *supra* note 17, at 11.

[33] *Id.* at 145-229.

[34] 9 RUTGERS L. REV. 357 (1954).

> facts remain no matter what kind of language we use to describe them, and here, of course, while we are talking now about property we might as well be talking about contracts, or crimes, or constitutions, or rules of law. Or we might be talking about mathematics or music. Here we are dealing with realities which have their origin in human institutions, but they are objective facts in the sense that we have to recognize their existence or else bump our heads against them.[35]

Again, Cohen insisted that a definition can only be useful or useless. He offered a "realistic" definition of "property" in terms of exclusions that individuals can, with state backing, impose upon or withdraw from the rest of society, and he maintained that this definition surpasses others in legal analysis. Cohen dealt in part with other definitions of "property," however, by offering counter-examples. Given that property is an "objective" fact, he demonstrated that various definitions do not fit certain features of the fact. It is therefore hard to see that these definitions are merely useless rather than just plain wrong. Under these definitions, certain true statements turn out to be false and, conversely, certain false statements turn out to be true. Although there may be a range within which there is free play in the presentation of a definition or analysis, there is also a range within which a definition (or part of one) is correct or incorrect.

Shouldn't the same consideration hold for the definition of "law"? Suppose we think of law, like art, as a set of human activities. These activities are, in Cohen's words, "objective" facts; they are both similar to and different from other forms of activity. A definition of "law" would have as its object a formulation that ties together and accounts for the features that distinguish law from other activities. The free play at its edges notwithstanding, such a definition could be deemed correct or incorrect.

Perhaps the difference between this approach and Cohen's is only verbal. If we retain his notion that definitions are only useful or useless, the crucial question is whether Cohen's own definition really provides an answer to all our problems about law. Is there any aspect of law that Cohen's definition does not illuminate? Most important, does it fit the situation of the judge?

The key here is Cohen's annotations on his definition of "law" as a body of rules according to which the courts decide cases. As he construed it, law is the "pattern" in which cases are decided, and the "pattern may be as remote from the mind of the judge as is the

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[35] *Id.* at 359.

Gestalt psychology from Kohler's anthropoid subjects."[36] Legal rules are "simply descriptions of the way judicial volition works."[37] Such rules are "probabilities," descriptive of what will happen under certain conditions.[38] Cohen's theory of legal rules is thus a variation of the reductionism originally espoused by Justice Holmes;[39] it declines to view legal rules as norms that bind the judge and constrain judicial decisionmaking.

Although a fuller account of Cohen's theory must await our discussion of the judicial process and the functional method, we should note Cohen's responses to two criticisms of the "realistic" or "positive" definition, both advanced primarily against Llewellyn. Hermann Kantorowicz argued that a definition of "law" in terms of court decisions puts "the cart before the horse" and is as ridiculous as a definition of "medicine" fashioned in terms of the behavior of doctors.[40] To this Cohen had two replies. First, he argued, "[t]he parallel, though witty, is inapt: The correct analogy . . . would be a definition of the science of medicine as a description of the behavior of certain parasites, etc."[41] If I understand Cohen correctly, this response, albeit witty, misses the mark—Cohen seems to have confused medicine with parasitology and the other biological sciences on which medicine is dependent. Second, "[i]t is just as logical to define law in terms of courts as the other way about. The choice is a matter of convenience, not of logic or truth."[42] Cohen's remark is well-taken, but he really did not successfully address the issue raised by Kantorowicz: whether it makes sense to view laws that establish the courts and the powers of judges as descriptions of how judges decide cases. Cohen's definition elides the question of what it is that vests a judge's decision with *legal authority*. It would appear that only a conception of legal rules as binding norms is adequate to answer this question.

John Dickinson argued more directly that the realists' behavioral definition does not fit the problem of the judge, who wants to know not what he is about to do, but what he *should* do according to the rules. Only because legal rules are norms is it possible to criticize the judge's behavior. "[A] legal rule, even though derived by generaliza-

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[36] ETHICAL SYSTEMS, *supra* note 17, at 12.

[37] *Id.* at 12 n.16.

[38] *Id.* at 254.

[39] For a detailed discussion, see Golding, *Holmes's Jurisprudence: Aspects of Its Development and Continuity*, 5 SOC. THEORY & PRAC. 183 (1979).

[40] Kantorowicz, *Some Rationalism about Realism*, 43 YALE L.J. 1240, 1250 (1934).

[41] LEGAL CONSCIENCE, *supra* note 5, at 62 n.72 (from *Transcendental Nonsense and the Functional Approach*, published in 1935).

[42] *Id.*

tion from what has been done, is not a rule of 'isness' because it either may or may not be applied in the next case, *i.e.*, the case for which the rule is sought."[43] Cohen offered two replies to Dickinson. First, he asserted that "a description of judicial volition is a rule of *isness*. . . . [Dickinson] has said nothing which reveals the impossibility or undesirability of a descriptive science of judicial conduct."[44] This last remark is correct, but it ignores the issue of whether such a science could be complete if it does not also recognize that legal rules *are* normative for the judge. Cohen apparently assumed that statements made in a descriptive science cannot be statements about norms, and that such statements must therefore be predictive statements about behavior.[45] Cohen's second reply was that Dickinson assumed that "a judge's duty is to *find* the law rather than to *mould* it, an assumption which no realist makes. . . . Unless one assumes that law is above ethical criticism, there is no difficulty in criticising a judge for making or perpetuating bad law."[46] While Dickinson argued that a judge's duty is to find the law, he also admitted that judges mold the law as well.[47] The main issue for him, as for Morris R. Cohen, was in drawing the line between binding legal rule and judicial discretion.[48] Felix Cohen assumed that only ethical criticism is appropriate for judicial decisions, that there is no such thing as legal criticism of decisions, and that decisions cannot be criticized as correct or incorrect, but only, in a utilitarian sense, as good or bad.

Whether Cohen's responses to Kantorowicz and Dickinson are valid is a matter that we shall have to consider in more detail. I have tried to elucidate the weak points in each argument. Essentially, each

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[43] Dickinson, *Legal Rules: Their Function in the Process of Decision*, 79 U. PA. L. REV. 833, 860 n.51 (1931).

[44] ETHICAL SYSTEMS, *supra* note 17, at 12 n.16.

[45] *Cf.* H. KELSEN, PURE THEORY OF LAW 71-75 (1967). Kelsen states:

> The science of law describes the legal norms created by acts of human behavior and to be applied and obeyed by such acts; and thereby describes the norm-constituted relations between the facts determined by the norms. The sentences by which the science of law describes these norms and relationships must be distinguished as "rules of law" from the legal *norms* that are created by the legal authorities, applied by them, and obeyed by the legal subjects.
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> . . . .
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> . . .[T]hese rules of law are ought-statements and must be ought-statements, because they describe norms prescribing that something ought to be. . . . But the "ought" of the legal rule does not have a prescriptive character, like the "ought" of the legal norm—its meaning is descriptive.

Id. (emphasis in original).

[46] ETHICAL SYSTEMS, *supra* note 17, at 12 n.16. (emphasis in original).

[47] *See* J. DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF THE LAW IN THE UNITED STATES ch. V (1927).

[48] *See* M. COHEN, LAW AND THE SOCIAL ORDER 359 (1933).

fails to grasp the normative character of law. This is a fundamental defect in realist theory. It is true that Cohen as well as Llewellyn occasionally bowed in the direction of normative legal rules, but on the whole they seem to have ignored the need for much more than nods.[49]

The criticisms advanced by Kantorowicz and Dickinson bear directly on the theory of judicial decision. The next section addresses Cohen's critique of traditional doctrine, after which we shall return to the issue of the definition of "law" in our discussion of the "functional method."

II

COHEN'S CRITIQUE OF TRADITIONAL JURISPRUDENCE AS IT RELATES TO THE JUDICIAL PROCESS

According to Cohen, "realistic jurisprudence, in essence, is the idea that rules, principles, and opinions do not exhaust or explain actual judicial decisions."[50] This view, originally developed by Justice Holmes,[51] stands in sharp contrast to the traditional approach. As described by Cohen in places too numerous to cite, the traditional approach holds that judicial decisions are derivable by logical inference from pre-existent legal rules and principles which are binding upon the judge. In common law adjudication, these rules and principles are themselves logically derivable from prior judicial decisions; in constitutional adjudication, they are derivable from constitutional provisions such as the due process clause. Thus, a judicial opinion purports to be a self-contained and complete justification of the result arrived at (Cohen did not say much about statutes as a source of law). The heart of the traditional theory is that judges do not make law, but declare the law that already exists.[52] In rejecting this theory, Cohen supplemented various classics of realistic jurisprudence[53] with fresh arguments of his own, which I shall attempt to reconstruct.

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[49] *See* W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT app. B ("A Restatement of Llewellyn's *Theory of Rules*") (1973).

[50] LEGAL CONSCIENCE, *supra* note 5, at 113 (from an unpublished paper, delivered in 1949).

[51] *See* note 11 *supra*.

[52] LEGAL CONSCIENCE, *supra* note 5, at 82.

[53] *See, e.g.*, J. FRANK, LAW AND THE MODERN MIND (1930); K. LLEWELLYN, THE BRAMBLE BUSH (1930); Oliphant, *A Return to Stare Decisis*, 6 AM. L. SCH. REV. 215 (1928). Cohen also relied on his father's article, *The Process of Judicial Legislation. See* M. COHEN, *supra* note 48, at 112-47. Morris Cohen, however, did not accept some of his son's more radical conclusions.

Cohen's critique of the traditional doctrine may be thought of as turning on three points: (1) the abuse of the notion of logic; (2) the circularity of legal arguments; and (3) the false characterization of legal questions as *purely legal* questions. Underlying his critique, however, is the claim that the law is much more uncertain than the traditional theory presupposes,[54] which uncertainty Cohen took to have been firmly established by Jerome Frank's *Law and the Modern Mind*.[55] For Cohen, the claim also undoubtedly relates to the prediction theory of legal rules, under which so-called legal rules are probability statements about judicial volition; even high probability, were it attainable, would not remove uncertainty.

Cohen's argument, however, goes beyond the prediction theory. The traditional theorist rejects the prediction theory, for he maintains that legal rules are norms that control the judicial process. Moreover, the traditionalist readily admits that judicial decisions cannot be predicted with certainty. In fact, he acknowledges that judges do make mistakes regarding questions of law. Judicial decisions are only "evidence" of what law is; they do not make the law.[56] Finally, if Cohen meant to establish that the law is not *known*, the traditional theorist would hardly be disturbed. He does not maintain that every rule is known, but only that legal grounds exist for every decision.[57] Thus, in order for Cohen's position to have real bite, it must deny that legal grounds exist for every decision, and his assertion that the "notion of law as something that exists completely and systematically at any given moment . . . is false" must, contrary to his own exposition,[58] be partially disassociated from the prediction theory. More precisely, we must construe Cohen as maintaining the more controversial claim that, given any purported legal rule (r) and a legal system (S), it is not necessarily true that either r or the denial of r is a valid law in S.[59] If Cohen was right about this, the traditional theory is sunk before it leaves port.

I think that Cohen was right, but the damage done to the traditional theory is less severe than he and other realists supposed. The realists establish their point about uncertainty by focusing on so-called hard cases and by ignoring the areas of law in which there

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[54] LEGAL CONSCIENCE, *supra* note 5, at 71, 82.

[55] J. FRANK, *supra* note 53.

[56] Holdsworth, *Case Law*, 50 LAW Q. REV. 180, 184-85 (1934).

[57] *See* M. COHEN, *supra* note 48, at 233. Morris Cohen called this a "postulate" of a legal system. I think he would have admitted that this postulate is not always true.

[58] *See* LEGAL CONSCIENCE, *supra* note 5, at 71.

[59] *Cf.* Dworkin, *No Right Answer?*, 53 N.Y.U. L. REV. 1 (1978).

are established rules.[60] The traditional theorist need maintain only that his picture of the judicial process holds for the most part. If the traditionalist is correct, the realist position constitutes, at best, a supplemental corrective to the traditional view. Some realists occasionally have conceded that this is what they were propounding, but they did not recognize the significance of the concession. It should have impelled them to deal with the most difficult problem in the jurisprudence of the judicial process: how to draw the line between legal rule and judicial discretion. As noted above, this is a fundamental gap in realist theory.

Cohen had other weapons against the traditional view. For example, he argued that it abuses the notion of logic. First, he demonstrated that when a judge declares that some rule is "logical" or accords with "reason," this often indicates only that the judge regards the rule as right or good. Second, and more important, Cohen argued that traditional theory erroneously maintains that rules are logically deducible from past cases. This was an attack on the logical role allegedly played by the principle of stare decisis. The realists' position that judges manipulate precedent, that there is a "stretching or shrinking of precedents in every washing,"[61] must, I think, be admitted. Cohen went further, however, to emphasize that "no number of decisions can logically provide a rule of law, for the simple reason that a universal proposition can never be validly inferred from any number of particular propositions. A decision is a particular proposition, and a rule of law is a universal proposition."[62] This point clearly is sound, but one may nevertheless question whether it is on target. Although judges may speak of "deducing" a rule from prior decisions, the process might be that of inductive generalization rather than deduction.[63] Alternatively, it might be said that the rule the judge seeks is the one *presupposed* by the prior decisions. As Morris R. Cohen observed,[64] a case must stand for some general rule or principle if the decision rendered legitimately can be criticized as legally right or wrong.

It would be inappropriate here to enter the controversy over stare decisis that has agitated legal theorists since the 1930s. It will be

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[60] Morris Cohen in effect indicated this in a review of Frank's book. *See* M. COHEN, *supra* note 48, at 357-62. Frank later retreated somewhat from rule-skepticism to fact-skepticism. *See* Frank, *Preface to* J. FRANK, LAW AND THE MODERN MIND (6th ed. 1949).

[61] LEGAL CONSCIENCE, *supra* note 5, at 59.

[62] *Id.* at 88. *See also* ETHICAL SYSTEMS, *supra* note 17, at 254.

[63] There is a problem here, however, as to the use of induction in arriving at normative conclusions. *See* M. GOLDING, LEGAL REASONING (to be published in 1982).

[64] M. COHEN, *supra* note 48, at 190.

enough to focus on Felix Cohen's arguments. Though he seems not to have considered whether inductive generalization might be the proper logical instrument, he clearly did reject the alternative view stated above, that judges seek the rule that prior decisions presuppose. Relying in part on Herman Oliphant,[65] Cohen argued:

> Rules of increasing generality, each of them linking the given result to the given facts, spread pyramid-wise from a decision. The possibility of alternative modes of analysis makes a decision the apex not of one but of many such pyramids. No one of these rules has any logical priority; courts and lawyers choose among competing propositions on extra-logical grounds.[66]

Cohen claimed that these extra-logical grounds are always moral or ethical. Moreover, Cohen continued, the application of a chosen rule entails a further moral choice in order to bring a particular case under the rule. "[L]ogic," wrote Cohen, "can never establish that one case is a precedent for another case. That is because no two cases can possibly be alike in all respects. . . . Whether the respects in which two cases are alike are *important* is a question not of logic but of values."[67] Thus there are disagreements over precedents because of disagreements over value judgments, and the "moral" of past cases is always a moral question.[68]

The issue raised by these remarks—the extent to which judicial decisions are controlled by rules—is an extremely difficult one, and I will not pursue it fully. It is doubtful that Cohen meant to endorse the radical rule-skeptic's position that Oliphant seems to have represented. The fact is that rules successfully regulate much of human activity, and it is hard to see why at least some judicial activity should not also be regulated by rules. Such regulation is certainly desirable. Moreover, although no single rule in a pyramid has, by itself, any logical priority over any other rule, a given rule may have logical priority if we make other material assumptions. Hence, it is possible that some rule should have *legal* priority over another. This consideration, however, would not refute Cohen's argument so long as a choice of rules is still open to the judge.

One important aspect of Cohen's critique of the traditional theory concerns the nature of legal (judicial) arguments. According to Cohen, if the traditional theory accurately describes the way judges

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[65] *See* H. OLIPHANT, *supra* note 53. *Cf.* M. COHEN, *supra* note 48, at 216 (criticizing Oliphant).

[66] ETHICAL SYSTEMS, *supra* note 17, at 34 n.47.

[67] LEGAL CONSCIENCE, *supra* note 5, at 129 (emphasis added) (published in 1950).

[68] *Id.* at 25; ETHICAL SYSTEMS, *supra* note 17, at 28ff.

decide cases, then legal arguments (given in terms of allegedly binding rules and using concepts that are defined in purely legal terms) are circular: judges assume the results that should be justified.[69]

Cohen set forth an elaborate analysis of some opinions and legal concepts to establish this contention.[70] I shall give just one example, the case of *Oleff v. Hodapp*.[71] In *Oleff*, Tego Miovanis had a joint bank account with his uncle. Each depositor had unlimited authority to withdraw funds. When Tego murdered his uncle, the Ohio Court had to decide whether the joint deposit belonged exclusively to Tego as a result of the murder. A majority held that it did, stating:

> We are not subscribing to the righteousness of Tego's legal status; but this is a court of law and not a theological institution. . . . Property cannot be taken from an individual who is legally entitled to it because he violates a public policy. Property rights are too sacred to be subjected to a danger of that character. We experience no satisfaction in holding that Tego is entitled to this account; but that is the law, and we must so find.[72]

Cohen's response to this case, if oversimplification be permitted, would have been as follows. The question was: Is Tego legally entitled to the account? To put it slightly differently: Is this account Tego's property? The Court answered: Yes he is, because he is; or, yes it is, because it is! It was Cohen's contention that the courts always present such faulty arguments whenever they employ the words of traditional jurisprudence ("corporate entity," "property rights," "fair value," "due process," "title," "contract," "malice," "proximate cause"). "Legal arguments couched in these terms," he argued, "are necessarily circular, since these terms are themselves creations of law."[73]

To appreciate the significance of these contentions, one must turn to Cohen's claim that the traditional theory falsely characterizes legal questions as purely legal questions. This characterization is actually a corollary to the position that law is not subject to ethical valuation. In other words, the court in *Oleff v. Hodapp* was misled into giving a circular argument because it failed to understand the proper question.

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[69] "To justify or criticize legal rules in purely legal terms is always to argue in a vicious circle." LEGAL CONSCIENCE, *supra* note 5, at 38 (published in 1935).

[70] For a criticism of Cohen's analysis, see the articles by Kennedy, cited at note 13 *supra*.

[71] 129 Ohio St. 432, 195 N.E. 838 (1935). *Oleff* actually was used by Cohen for another purpose, but it will suffice to illustrate his argument. *See* LEGAL CONSCIENCE, *supra* note 5, at 160-61 (from an article published in 1951).

[72] 129 Ohio St. at 438-39, 195 N.E. at 841. It is fascinating to compare this case with Dworkin's discussion of Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889), in R. DWORKIN, TAKING RIGHTS SERIOUSLY 23 (1977).

[73] LEGAL CONSCIENCE, *supra* note 5, at 45.

As the above quotation indicates, the "court of law" refused to consider a "theological" question. Similarly, judges frequently declare that questions of righteousness, morality, or social policy cannot be considered by a court of law. Judges, Cohen wrote, are inclined to regard as theological or moral only those theologies and moralities that they do not share themselves.[74] As Holmes observed long ago,[75] the traditional form of legal argument enables judges to conceal the fact that their justifications inevitably contain ethical valuations. Courts ask the wrong questions because they do not appreciate this fact. The right questions are essentially moral questions.

Cohen also argued, in more general terms, that although judges generally come to decisions without thinking about moral principles,[76] the goodness or rightness of a decision can be measured only in moral terms. The traditional theory

> attempts to set up as a standard of legal criticism *truth* or *consistency* rather than *goodness*. But neither truth nor consistency can be rivals to goodness, in legal criticism or anywhere else. Truth and consistency are categories which apply to propositions or to sets of propositions, not to actions or events. A judicial decision is a command, not an assertion. Even if any sense could be found in the characterization of a decision as true or false (or, in the non-ethical sense of the terms, right or wrong, correct or erroneous), such truth or falsity could not determine what decision, in any case, ought to be given. That is a question of conduct and only the categories of ethics can apply to it. . . . *Consistency*, like *truth*, is relevant . . . only as an indication of the interest in legal certainty, and its value and significance are ethical rather than logical. The question, then, of how far one ought to consider precedent and statute in coming to a legal decision is purely ethical.[77]

I do not find this argument entirely convincing. First, Cohen conceived of a judicial decision as a kind of a performance, an action

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[74] *Id.* at 167.

[75] Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

[76] "[T]he question to which the judge's critical faculties are regularly restricted is: 'What decision would an intelligent lawyer familiar with statutes and past decisions expect in this situation?' or, more politely, 'What *is* the law?' " ETHICAL SYSTEMS, *supra* note 17, at 32 n.45. In their opinions, therefore, judges are concerned with *elegantia juris* and ceremonial adequacy—in a word, the "aesthetics" of legal argument. *See* LEGAL CONSCIENCE, *supra* note 5, at 31, 59. See also the heading under "aesthetics" in the Index to ETHICAL SYSTEMS, *supra* note 17, at 293. The point is substantially the same as Holmes's criticism against Christopher Columbus Langdell. *See* Holmes, *Common Carriers and the Common Law*, 13 AM. L. REV. 608, 630 (1879).

[77] ETHICAL SYSTEMS, *supra* note 17, at 32-33 (emphasis in original). *See also id.* at 5 n.7; *id.* at 244.

that is a datable event. As such, he contended, it is subject to ethical valuation. While it is true that a decision is a datable event, it does not follow that the event has no conceptual content. Insofar as a decision does have conceptual content, one may apply the categories of truth and consistency to it, and we can ask whether or not it is compatible with a given legal rule. Otherwise, certainty in the law would have no meaning. Second, although I agree that what decision ought to be made is a question of conduct, I do not agree that only "the categories of ethics" apply to it. The question is, to be sure, a normative one, but norms are not exclusively ethical—there are also legal norms, as well as other kinds. Thus we can ask both whether a decision conforms to a given legal norm and whether some judicial command is legally valid. Finally, although I agree that the "interest" in legal certainty is ultimately ethical, it does not follow that the extent to which precedent and statute should be considered by a judge is purely an ethical question. One argument Cohen might have advanced here is that the quasi-logical principle of stare decisis is also a principle of fairness—like cases should be treated alike because fairness requires it. Even so, if stare decisis is also a legal principle of the system in which the judge is operating, there could also be a purely legal answer to the question of how much weight should be accorded to precedent. At any rate, the question of whether a judge actually followed or departed from precedent certainly is not always a purely ethical question.[78]

Cohen's error was just the opposite of the error committed by the school of juristic thinking he was trying to confute—that is, the school that maintains that law and legal decisions are not subject to ethical valuation. In his zeal to dispose of this fallacy, Cohen was led into concluding that because moral criticism is always appropriate, it is therefore the only appropriate kind of criticism.

This finally came to a head when Cohen in effect acknowledged the criticism of Kantorowicz and Dickinson[79] that the predictive-descriptive theory of legal rules does not fit the situation of the judge. The judge who asks, for example, "Is there a contract?" is not trying to predict his own decision;[80] he is asking whether or not liability

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[78] In a later article, Cohen wrote that the question whether judges should follow precedent is misleading. We should instead ask *how* judges should follow precedent, how they should interpret past cases, and how they should draw the lines of similarity that connect past cases and present cases. *See* LEGAL CONSCIENCE, *supra* note 5, at 129 (*Field Theory and Judicial Logic* (1950)). Unfortunately, beyond noting that following precedents is not a logical process, Cohen gave no guidelines except to reiterate that the use of precedent always implies a value judgment.

[79] *See* notes 40-48 and accompanying text *supra*.

[80] LEGAL CONSCIENCE, *supra* note 5, at 67. Cohen maintained that the "dictum-holding" distinction involves a prediction as to the weight courts will give to parts of an opinion in the

should attach to certain acts. According to Cohen, this is "inescapably" an ethical question. To be sure it is, but, again, it need not be purely an ethical question. It may also be a legal question to which there is a legal (but ethically bad) answer. If one admits that the judge is asking a normative question, one can also admit that the judge is asking a normative legal question. Furthermore, even if all legal questions are not purely legal questions, neither are all legal questions purely ethical questions. Therefore, Cohen's realist theory fails to come to grips with the problem of how legal rules play a role in judicial decisions.[81]

A brief look at Cohen's criticism of his brother realists' views on the judicial process will complete our understanding of Cohen's ideas about traditional theory. Cohen registered his earliest criticism, if only indirectly, in a 1931 review of Frank's *Law and the Modern Mind.* Cohen argued that "insistence upon the omnipresence of uncertainty and the universal value of discretion leaves Mr. Frank in a fort which he has ably demolished." It was only in the "cool retrospection" of footnotes that Frank acknowledged the existence of "*something* beyond decisions, in terms of which we can criticize decisions. There is something to which the judicial 'hunch' should conform; there are some patterns to which it does conform."[82] Cohen was making two points: First, decisions are subject to ethical valuation; and second, the law may not be as uncertain as Frank believed in light of the discernable patterns (Cohen's "rules") in judicial decisionmaking.

Cohen strongly pressed the first of these points in a 1938 review[83] of Thurman Arnold's *The Folklore of Capitalism.*[84] Cohen acknowledged Arnold's extension of the insights of realistic jurisprudence to new areas. He criticized Arnold, however, for failing to confront "the basic ethical issue between realism as a defense of the status quo and

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future. *Id.* at 71. Insofar as the judges employ this distinction, it generally will not be the case that they are making such predictions.

[81] It should be mentioned here that in *Field Theory and Judicial Logic, id.* at 121, Cohen may have moderated his position on the character of legal rules and the logical force of precedents. In a possible swipe at Jerome Frank, Cohen wrote: "[T]he man who dons the judicial robe with the greatest contempt for precedent finds that the pressure of his office-space compels him to follow paths that, from outside the office-space, once appeared absurd." *Id.* at 13 (The term "office-space" is derived from Kurt Lewin's psychological theory. For Frank's considered views, see his concurring opinion in Aero Spark Plug v. B.G. Corp., 130 F.2d 290, 292 (2d Cir. 1942).). This remark suggests that logical compulsion, as we may call it, may play a significant role in the exercise of the judicial function. Unfortunately, Cohen never developed the point.

[82] LEGAL CONSCIENCE, *supra* note 5, at 179 (emphasis in original).

[83] *Id.* at 442.

[84] T. ARNOLD, THE FOLKLORE OF CAPITALISM (1937).

realism as a technique of social criticism, arguing in extenuation that it is unnecessary to think systematically about these matters because legal and economic theory has no relation to reality."[85] Arnold's realism, Cohen continued, threatened to become a denial of ethics and a justification of whatever happens to exist.[86] In this regard, Arnold apparently was not far from Leon Duguit, Cohen's model "cryp-to-idealist."

Cohen's second point emerged in his rejection of the views of "certain advocates of realistic jurisprudence" who look at decisions as unanalyzable products of irrational hunches, a position that Cohen associated with Frank and Judge Joseph Hutcheson. Called the "bellyache" theory by Cohen, it cannot explain how a rule of law comes into being or changes in time,[87] and explanations in psychological and psychoanalytical terms in this connection have been unconvincing.[88] The basic fault of these realists is their view of the law as a mass of unrelated decisions.

It is interesting to note that Felix's father also criticized Frank's book.[89] According to Morris Cohen, Frank's position on whether or not there is certainty in the law was rather ambiguous. Frank's extreme nominalism seems to imply that there is no certainty. It seems to me that Felix Cohen would also have held some kind of nominalism to be the philosophical root of the "bellyache" theory. In his posthumously published *Dialogue on Private Property*, he warned against accepting the medieval doctrine of William of Occam, which holds that all reality is tangible and exists in space.[90] Were we to accept this doctrine, Cohen wrote, it would be only a small step to viewing law as a mass of unrelated decisions, because the patterns into which judicial decisions fall—like the social relations that constitute the "objective fact" of property—are intangible and not locatable in space.[91] Morris Cohen, on the other hand, went much farther. He detected nominalism as the basis of the denial of the reality of normative rules. Perhaps Felix was a nominalist after all; a discussion of his "functionalism" may shed light on this point.

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[85] LEGAL CONSCIENCE, *supra* note 5, at 447.

[86] Morris Cohen advanced a similar criticism against Herman Oliphant, one of Felix's sources. M. COHEN, *supra* note 48, at 217.

[87] LEGAL CONSCIENCE, *supra* note 5, at 70, 135.

[88] *Id.* at 80.

[89] *See* M. COHEN, *supra* note 48, at 357-62.

[90] Cohen, *supra* note 34, at 361.

[91] LEGAL CONSCIENCE, *supra* note 5, at 62 n.72.

III

THE FUNCTIONAL APPROACH

We earlier became acquainted with Cohen's definition of "law" as the body of rules according to which courts decide cases in the discussion of traditional theories of law.[92] Cohen insisted that definitions are neither true nor false, but are only useful or useless. He supported his definition, however, with an argument related to his utilitarian ethical theory. Although he continued to regard a definition of "law" as only useful or useless,[93] Cohen continued to expand and refine his position, embedding his realist theory of the nature of law, judicial decisions, and legal concepts within a wider philosophical framework.[94] This broader theory is the philosophy of "functionalism." Cohen saw the realist definition of "law" as just one consequence of the adoption of functionalism.

Functionalism, as Cohen described it, is a philosophical doctrine that maintains that "a thing *is* what it does,"[95] or "a thing *is* its manifestations, its effects, and its relation with other things."[96] Cohen associated this doctrine with pragmatism, logical positivism, and operationalism. He cited, as a relative of functionalism, C. S. Peirce's position that the meaning of an intellectual concept is ascertained by considering what practical consequences might conceivably result by necessity from the truth of the conception. Also cited was the statement of Bertrand Russell to the effect that logical constructions should be substituted for inferred entities wherever possible, as well as the statement of the physicist Percy W. Bridgman, that we mean by a concept the corresponding set of operations, or that every theoretical term should be associated with an overt experimental procedure. While it is highly debatable that these different statements are equivalent to one another, Cohen summed up functionalism as a doctrine that maintains that "[a]ll concepts that cannot be defined in terms of the elements of actual experience are meaningless."[97]

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[92] *See* note 17 and accompanying text *supra*.

[93] *See* LEGAL CONSCIENCE, *supra* note 5, at 62.

[94] *See id.* at 33-76 (*Transcendental Nonsense and the Functional Approach*); *id.* at 77-94 (*The Problems of a Functional Jurisprudence*).

[95] *Id.* at 52; *see also* note 93 *supra*.

[96] *Id.* at 80. If this is meant as a definition of "thing," it appears to be circular.

[97] *Id.* at 52. Cohen also listed a variety of disciplines that have adopted the functional approach, including functional architecture (!), which is "likewise a repudiation of outworn symbols and functionless forms that have no meaning,—hollow marble pillars that do not support, fake buttresses, and false fronts." *Id.* at 48; *see also id.* at 80.

Cohen viewed functionalism as a theory of "meaning" that is the underpinning of a "scientific" study of legal institutions and legal happenings. Functionalism leads to the abatement of meaningless questions that cannot be answered by reference to "actual experience" (*e.g.*, "Where is a corporation?" or, "What is the difference between crime and tort?"). It also leads to a redefinition of legal concepts in experiential terms. Cohen, however, never clarified what he meant by "actual experience," and he admitted that the articulation of the basic terms of functional analysis is subject to disagreement.[98] Nevertheless, this approach "discovers the significance of a legal principle in the *actual behavior* of judges, sheriffs, and litigants rather than in conventional accounts of the principles that judges, sheriffs, and litigants are 'supposed' to follow."[99] For the most part, however, Cohen focused his definition of "law" on the behavior of judges. The realist definition of "law" as a "function" of judicial decisions—as what courts *do*[100]—is a consequence of his functionalist theory of meaning.

Although Cohen viewed functionalism as underpinning a scientific description of law, which is purely nonevaluative, he did not in the least intend to disassociate it from an ethical valuation of law:

> Fundamentally there are only two significant questions in the field of law. One is, "How do courts actually decide cases of a given kind?" The other is, "How ought they to decide cases of a given kind?" Unless a legal "problem" can be subsumed under one of these forms, it is not a meaningful question and any answer to it must be nonsense.[101]

As we shall see, Cohen regarded the empirical and the valuative inquiries as mutually dependent.

What do courts do? Perhaps the quickest answer to this question is that courts make the law. This point reminds us again of Cohen's critique of the traditional theory of judicial decision and of the roles of legal rules and concepts in judicial justification. What courts actually do when they decide cases is quite different from what traditional theory supposes. Thus, in a case in which a court decides that X has illegally used a trademark, it will say that the use was illegal because the trademark belonged to Y, that it was Y's *property*. In actuality, however, the court's decision *establishes* the trademark as Y's prop-

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[98] *Id.* at 52.
[99] *Id.* at 57 (emphasis added).
[100] *Id.* at 62.
[101] *Id.* at 49-50; *see also id.* at 79.

erty.[102] A similar analysis applies to other decisions. Thus, Cohen argued that the Supreme Court in the *Coronado* case[103] suggested that a labor union can be sued because it is, essentially, a person or quasi-corporation. Under realist analysis, the court was actually saying that a labor union is a person or quasi-corporation because it can be sued: "[T]o call something a person in law is merely to state, in metaphorical language, that it can be sued."[104]

Cohen's thesis, as illustrated by these examples, is as follows. Every case presents a court with the question of whether or not the court *should* recognize a certain claim, or whether or not some interest *should* be judicially protected. What the court *does* is to recognize or protect, or refuse to recognize or protect, the claim or interest. This, of course, is quite correct. To ask what the court did is an experientially decidable question. Furthermore, it makes sense to seek discernable patterns in judicial decisionmaking and to try to predict the course of decisions. Undoubtedly, a court does act as Cohen suggested when it comes to a decision in a particular case with a unique set of facts. The question still remains, however, to what extent legal rules and principles control a court's decision.

Despite a few qualifying remarks, Cohen's functionalism committed him to the view that judges' decisions are not controlled by legal rules and principles. This also comes out in his description of the "realistic judge," who

> will not fool himself or anyone else by basing decisions upon circular reasoning from the presence or absence of corporations, conspiracies, property rights, titles, contracts, proximate causes, or other legal derivatives of the judicial decision itself. Rather, he will frankly assess the conflicting human values that are opposed in every controversy, appraise the social importance of the precedents to which each claim appeals, open the courtroom to all evidence that will bring light to this delicate practical task of social adjustment, and consign to Von Jhering's heaven of legal concepts all attorneys whose only skill is that of the conceptual acrobat.[105]

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[102] *Id.* at 41.

[103] United Mine Workers v. Coronado Coal Co., 259 U.S. 344 (1922).

[104] LEGAL CONSCIENCE, *supra* note 5, at 38.

[105] *Id.* at 69; *see also id.* at 34. Cohen maintained that the concept of "proximate cause" is an inherently ethical notion, and he adopted a so-called moral blame theory of legal cause. He cited with approval Judge Andrews's statement in Palsgraf v. Long Island R.R., 248 N.Y. 339, 352, 162 N.E. 99, 103 (1928) (dissenting opinion), that " '[w]hat we do mean by the word 'proximate' is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics.' " LEGAL CONSCIENCE, *supra* note 5, at 137 n.18 (from an article published in 1950). For criticism of the moral blame theory, see H.L.A. HART & A. HONORE, *supra* note 16.

Clearly, the "realistic judge" is faced with an *ethical* question as to what factual information is relevant concerning the social consequences of rendering a particular decision. In sum, Cohen's position was that it is an understatement that there are no purely legal questions; a judge's task is always a legislative-ethical one.

I, for one, would not question this conclusion except to say that I should like to see the word "always" qualified. Cohen was forced to his conclusion by a combination of the functionalist theory of meaning and utilitarian ethics (He saw functionalism as the consequence of utilitarianism for legal criticism,[106] because the latter appears to make all ethical questions empirical.[107]). He offered no defense of the functionalist theory of meaning, perhaps because it was accepted widely in Anglo-American philosophical circles in the mid-1930s. I do not think that any rigid form of this theory of meaning is accepted widely today. Philosophical fashion aside, however, it seems to me that functionalism as Cohen expounded it committed him to nominalism in legal theory—the denial of the existence of normative legal rules. If there are such rules, Cohen failed to face the problem of drawing the line between legal rule and judicial discretion. As far as I am aware, no realist has faced up to this question. I do not mean to imply, of course, that any other school has resolved the problem successfully either.

The question of judicial authority is another problem for the realists. Cohen referred to Justice Sutherland's response to then-Professor Frankfurter's brief in *Adkins v. Children's Hospital*.[108] The brief suggested what happened when women worked long hours for inadequate wages. "These," said Sutherland, "are all proper enough for the consideration of the law-making bodies, since their tendency is to establish the desirability or undesirability of the legislation; but they reflect no legitimate light upon the question of its validity, and that is what we are called upon to decide."[109] Cohen then quoted, with some sarcasm, Justice Frankfurter's words in *West Virginia State Board of Education v. Barnette*:[110] " '[I]f the considerations governing constitutional construction are to be substantially those that underlie legislation then, indeed, judges should not have life tenure. . . . [There is a danger to the entire nation if] we unwarrantably enter social and

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[106] LEGAL CONSCIENCE, *supra* note 5, at 93.

[107] In a 1946 article, Cohen stated that there is only a "relative difference between *is* and *ought*. To say that we ought to avoid an atomic war is, I think, substantially equivalent to saying that we will, in the long run, avoid a great deal of suffering by averting such a war." *Id.* at 401.

[108] 261 U.S. 525 (1923), *overruled*, West Coast Hotel v. Parish, 300 U.S. 379, 400 (1937).

[109] LEGAL CONSCIENCE, *supra* note 5, at 164 (quoting Justice Sutherland).

[110] 319 U.S. 624 (1943).

political domains wholly outside our concern.' "[111] According to Cohen, these are "almost the very words of Justice Sutherland's opinion disposing of Mr. Frankfurter's brief in the *Adkins* case."[112] I think Cohen was correct in maintaining that judges engage in ethical-legislative decisionmaking. But what is their *authority* for doing so, especially in a democratic society? Cohen never answered this question. Perhaps he would have retreated to Holmes's view that such ethical-legislative activity is " 'only a necessity and not a duty.' "[113] Still, if there are any limits to judicial legislation, or if judicial modes of legislation are in any way distinctive, we need some account of them. It is hard to see, however, what a realist account would be.

Cohen saw realism as just one consequence of the functional approach. Realistic jurisprudence is a theory of the nature of law, legal rules, legal concepts, and legal questions; its essence is the definition of "law" as a function of judicial decisions. It is, however, only a preliminary stage in a vast research program on how law works and on the social and economic forces behind the law and judicial decisionmaking. Judges are agents of social change, but we do not yet have systematic knowledge of the causes of decisions or their effects. Functionalism, Cohen insisted, is not just another "ism," but is a series of questions about the actual operations of legal systems.[114]

This research program, Cohen maintained, ultimately depends on ethics, just as grounded ethical judgments depend on answers to factual inquiries. Although this research involves the gathering of statistics, we cannot be satisfied by the mere accumulation of data. The functionalist is "likely to be lost in an infinite maze of trivialities unless he is able to concentrate on the *important* consequences of a legal rule and ignore the *unimportant* consequences . . . ," and this, Cohen insisted, is a "distinction which can be made only in terms of an

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[111] LEGAL CONSCIENCE, *supra* note 5, at 165 (from an article published in 1951).

[112] *Id.*

[113] Quoted without citation in ETHICAL SYSTEMS, *supra* note 17, at 86. *See also* Holmes, *supra* note 75, at 467 ("I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable. . . .").

[114] *See, e.g.*, F. COHEN, *The Problems of a Functional Jurisprudence* (1937), in LEGAL CONSCIENCE, *supra* note 5, at 77-94. Cohen later developed the view, by analogy with physics and (Lewin's) topological psychology, that "public policy" is the "field" in which judicial activity occurs. F. COHEN, *Field Theory and Judicial Logic*, in LEGAL CONSCIENCE, *supra* note 5, at 121-59. It is difficult, for me at least, to follow the argument of his paper. Cohen apparently thought that if we could describe the "value field" of particular judges, we could then "translate" their opinions from the language of traditional jurisprudence into the language of realist jurisprudence. This would apparently not only facilitate communication between schools of legal philosophy, but also would facilitate the research program of the functional approach.

ethical theory."[115] This is reminiscent of his view that the application of stare decisis requires a criterion of importance. There is, however, one important difference: While it is plausible to maintain that such a criterion is ultimately ethical in the context of judicial decision, because the judge has to decide which characteristics in the instant case are similar or relevant to characteristics in past cases, it is far less plausible in the context of empirical research. Significant research in the natural sciences surely is gnided by various kinds of criteria of importance that do involve "value" judgments, but it is far from clear that any of them are ethical in nature. Why should empirical legal research be any different?

One suspects that Cohen's utilitarian ethical theory led him to this position on "importance." "In the field of legal criticism, or normative jurisprudence," he wrote, "functionalism is simply a development of utilitarianism."[116] To the philosophical challenge as to "[w]hy should we assume that the value of anything depends upon its consequences?"[117] functionalism responds by exposing "the emptiness of this challenge, by showing that the distinction between law and its consequences is purely arbitrary. The meaning of a legal rule is not action commanded but action caused."[118] Apparently, then, although empirical legal research is purely descriptive, the motivation behind it—the concern to describe the impact of law on human life—is ultimately an ethical interest.

It is not entirely clear to me that Cohen's utilitarianism was as thoroughgoing in his later days as it was when he wrote *Ethical Systems and Legal Ideals*. In a 1949 book review,[119] for example, Cohen argued that the fact that any criminal code is likely to involve the punishment of the innocent does not afford a valid reason for rejecting a legal system as unjust:

> If, in the long run, the system advances human welfare, then the sacrifice of some individuals for the general welfare may well be viewed as one of the inevitable products of human finitude. To view such cases as marking a breakdown of Plato's and Bentham's [utilitarian] social approach is to introduce a very different concept of individualistic justice. . . .[120]

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[115] LEGAL CONSCIENCE, *supra* note 5, at 79 (emphasis in original). "A theory of importance, I submit, is a theory of value." *Id.* at 169. *See also id.* at 75, 76.

[116] *Id.* at 93.

[117] *Id.* at 94.

[118] *Id.*

[119] *Id.* at 205.

[120] *Id.* at 205-06. In a 1938 review of Huntington Cairns's *Legal Philosophy from Plato to Hegel*, Cohen appeared to reject the idea that liberalism is based on a belief in "human inviolability" that is superior to the democratic judgments of popular majorities. *Id.* at 451.

Later on, however, Cohen began to speak of human rights,[121] which he did not think was incompatible with utilitarianism. Thus, in a 1954 review of Konvitz's *Civil Rights in Immigration*, which Cohen wrote on the last day of his life, he suggested that what is needed is an analysis of the cost of prejudice to society. Yet he also wrote of human rights attaching to individuals "just because they are human."[122] One wonders, therefore, whether a denial of human rights—if there are any—is to be deplored solely because of the "cost" to society, and whether the reference to cost is merely strategic.

The idea of human rights seems to require us to abandon the narrow consequentialism of Benthamite utilitarianism. If utilitarianism is to be retained, a broader teleology is necessary. Perhaps Cohen would have provided such a teleology had he lived to continue his work. I do think it would have prompted some revision of his realistic jurisprudence and his conception of legal criticism. I have no doubt that legal criticism, the ethical valuation of law, depends on empirical research into the operations of law and its human consequences. On the other hand, whether the decades of empirical research since the inception of realism have contributed more to the understanding of the judicial process than have the traditional theories, supplemented by the necessary correctives of realism, is a matter that I leave for others to judge.

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[121] *See* F. COHEN, *Human Rights: An Appeal to Philosophers* (1953), in LEGAL CONSCIENCE, *supra* note 5, at 171.

[122] *Id.* at 481.