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Book Reviews

PORTRAIT OF A PHILOSOPHER: MORRIS R. COHEN IN LIFE AND LETTERS. By Leonora Cohen Rosenfield. New York: Harcourt, Brace and World, Inc. Pp. xviii, 461. \$10.00.

Morris R. Cohen (1880-1947) was a professor of philosophy (chiefly at the College of the City of New York) with a special interest in the philosophy of law. I must leave any attempt to appraise his contribution to legal philosophy to those better qualified, or at least defer it until I have occasion to review his own writings. It must suffice to note that in the Thirties, when I was first a student and later a fledgling professor of law, much concerned in both capacities with abstract matters, I was aroused and stimulated by what he wrote on law and on logic.

Leonora Cohen Rosenfield, a scholar in her own right, is Morris Cohen's daughter; and that is another matter. While I will not venture a judgment on Cohen as a legal philosopher, I will make bold to suggest that the family biography is a genre that has little excuse for being. This is a book by a devotee for devotees. It is a book for those in whose hearts and minds Cohen's place as man and philosopher is already secure. It is a book to be relished by his former students and by the intimates such as Pound and Frankfurter who have survived him. It is not a book to be recommended to the student of today who desires an introduction to Cohen's legal thought. Filial homage is embarrassing, and the anecdote intended to endear may instead repel.

In his youth Cohen kept copious diaries and journals, "mostly in little notebooks but also on scraps of paper, scribbled in his distinctive handwriting" (p. 3). At the age of twenty-four he wrote to his fiancée: "I venture to think that no one ever will know the true Morris R. Cohen except the person who will examine everyone of those scraps with a truly psychologic microscope" (pp. 3, 30). Nevertheless she married him; and their daughter has lovingly undertaken just such an examination. It is an experience that only love can induce others to share.

It is easy to believe that Cohen was a great teacher—that he sought not to indoctrinate, but to encourage independent thinking; that he made a deep impression upon his students, and was remembered by them chiefly for his kindness (p. 99). It is more difficult to believe in the cliché that such success is achieved in good part by what passes for withering sarcasm in the classroom. Thus the following dialogue is reported:

Student: "But that's obvious."

Cohen: "Why?"

Student: "Any damn fool knows that."

Cohen: "I take your word for it, sir." (p. 143).

And again:

Another sophomoric oration was allowed to run its full course, with the professor's eyes fixed dreamily through the window at some far-off vista. When the torrent of words had finally run itself out, amidst dead silence, the professor's gaze returned to the classroom, and he asked mildly, "Did you say something?" (p. 143).

Moreover, it seems unnecessary to gild refined gold by asserting that Cohen "could quiet a baby's crying when nobody else could..." (p. 361). And it would seem achievement enough to have been a powerful influence on the minds of jurists and philosophers without, in addition, causing proletarian entrepreneurs to lose their heads. Yet we are told that on one occasion two young women in a taxicab mentioned his name, one of them being a distant relative:

The cabbie broke in. "Is that Morris Cohen the philosopher, the professor from City College, you're talking about? Yeah? He was quite a guy. I never travel without that book of his around. See. Here it is!" And he reached down to pull up a much-thumbed copy of *A Dreamer's Journey*. "Did you know him, miss? You're his grandniece? Say, is this where you girls wanted to go? Oh, no, you don't owe me nothing, miss. Not a niece of Morris Cohen" (p. 153).

The ultimate fate of this loyal cabbie's business enterprise is not stated.

Finally, the serious student should by all means read the philosopher's works *before* he learns that this man, who was once called "Spinoza, Voltaire, Socrates, Jew and Greek all rolled up in one" (p. 102), was addressed by his wife as "Dearest Darlingest Daddy" (p. 46).

The cloying effect of the book is mercifully relieved when we pass from daughterly characterization to Cohen's correspondence, especially that with Frankfurter, Cardozo, Learned Hand, Pound, and Holmes. The epistolary style of Cohen, like that of some of his correspondents (with the notable exception of Holmes), is more appropriate to posthumous publication than to the friendly letter. Yet that level of discourse cannot be sustained forever in competition with the little affairs of living, and the consequence is that much of the correspondence is trivial, concerned with rheum and rendezvous and railroad timetables and what Learned Hand called "the irrelevancies of Frauen und Kindern" (p. 296). Some of the best (the Holmes correspondence) has been previously published (in *The Journal of the History of Ideas*, 1948), and much of it is interesting less for what it reveals of Cohen than for what it reveals of his correspondents.

Frankfurter took Cohen to task for writing an introduction to a book by Goldberg and Levenson, *Lawless Judges*, which characterized the conduct of Holmes, Brandeis, and Stone in connection with the Sacco-Vanzetti case as "hypocritical" (p. 268). Cohen was impenitent: "I cannot, however, get excited about a transgression of this kind, which seems to me [merely] narrowness and bad manners. . . . I reflected that if I waited for a book that was free from fault, I should wait in vain forever, and that meanwhile many books less honest would continue to be published to strengthen the evil against which Mr. Goldberg protests" (pp. 269, 271). It appears that Frankfurter opposed Roosevelt's "court-packing" plan, and this may be significant, since, as I

recall, the public record contains little to indicate that he took a position. There is no word from Frankfurter himself, but Cohen writes to him on October 29, 1936:

In the spring of 1933 a number of people, Arthur Burns among them, did decidedly agree with me that the four die-hards would not be budged and that there was more than an even chance that one of the others would join them to kill the main progressive measures, so that the only safe course was to appoint at once four additional judges who were alive to the needs of their times. . . .

The common prejudice against "packing" the Supreme Court . . . as in any way unfair or "indirect" rests on fictions and I am surprised that you should fall for it. Can you mention a single good reason in support of your preference? (pp. 279-280).

In a dominantly pretentious context Holmes' irreverencies are refreshing if somewhat repetitious. Quite early he offers Cohen one of his choice "chestnuts"—"that the chief end of man is to frame general ideas—and that no general idea is worth a straw" (p. 314). "I do not believe that a shudder would go through the sky if our whole ant heap were kerosened. But then it might" (p. 316). "And I don't see why we shouldn't do our job in the station in which we were born without waiting for an angel to assure us that it is the jobbest job in jobdom" (*Ibid.*). "Aristotle—Metaphysics—divided between eternal truth and laboriously discussing quibbles to which the sufficient answers was oh pooh— (as it seemed to me)" (p. 337). "I have more respect for the universe now that I know there is a place in it for $\sqrt{-1}$ " (p. 342). Thucydides? "I can get more eternal truths for less money elsewhere" (p. 347). Cohen lent him some books: "They shall be returned within a reasonable time—if I live so long" (p. 348). Holmes "twists the tail of the cosmos" half a dozen times; he supplies a good story for teachers and practitioners of admiralty;¹ and perhaps most charmingly of all, he bequeaths to some author a magnificent book title: "I was about to deliver a dissent in the minimum wage case. . . . The other dissenters thought I went too far and *I flocked alone*" (p. 340) [Emphasis added].

Mrs. Rosenfield's final estimate of her father's place in history is more modest than one might anticipate on the basis of her early enthusiasms. He "emerges as a great *animateur* of America in the first half of our century" (p. 426). Even if that is all, we are the better for it, as readers of Cohen's works, if not readers of this book, would probably agree.

I am sorry to have written so crabbed a review; I would prefer not to have written at all. But, having committed myself to the editors, I had an obligation to read the book; and, having read the book, I have an obligation to prospective readers. I think I know now what Cohen meant by an obscure sentiment he confided to his diary: "If only the language of silence were communicable!" (p. 52).

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¹"A man sued for salvage of a boat in which he had sailed two or three thousand miles from a sinking ship—Lowell, J. said that as the boat seemed to have saved the man as much as the man the boat he thought that account was in *aequilibrio*" (p. 328).

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RELIGION AND THE LAW. Philip B. Kurland. Chicago: Aldine Publishing Company, 1962. Pp. 127. \$3.95.

All three branches of our federal government are immersed in the age-old problem of church and state. The Supreme Court is now deciding the fate of bible-reading in the public schools in the wake of their recent historic decisions on Sunday closing, the notary's oath, and the New York Regent's prayer. The President, elected after a campaign that attacked his fitness for office because of his religion, advocates federal aid to education, but maintains that aid to church-related schools is unconstitutional. The Department of Health, Education and Welfare has dutifully written a position paper to support his view. The Congress finds itself divided on both the constitutionality and the prudence of subsidizing the education of children whose parents exercise the constitutional right to send their children to private schools. Indeed Congress is not sure it wants to subsidize education at all.

Our founding fathers disposed of the church-state problem in one sentence: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . . ." The proper interpretation, and the philosophy of these sixteen words have been debated ever since. Professor Kurland of The University of Chicago School of Law is the latest to put forth a thesis for the proper construction of the religion clauses of the First Amendment. He warns the reader that his thesis is only a starting point, not a mechanical answer, for deciding particular problems.

It is usual to discuss the religion clause as not one, but two separate, although related clauses: the establishment clause and the free exercise clause. Professor Kurland's thesis rejects this separation as a source of confusion, and treats them as a whole. Their common philosophy forbids government to act or fail to act using religion as the basis of any classification. He writes:

. . . the proper construction of the religion clauses of the first amendment is that the freedom and separation clauses should be read as a single precept that government cannot utilize religion as a standard for action or inaction because these clauses prohibit classification in terms of religion either to confer a benefit or to impose a burden (p. 18).

In no way is religion to be the basis for any legislation which would help or discriminate against a citizen, a religion or a religious activity. Laws commanding or forbidding free textbooks for children in church-related schools would be equally unconstitutional since religion is the basis for the classification. Such provisions for all schools or only for public schools would be constitutional. The thesis has the double attraction of being concise and easy to comprehend.

Interpreters of the religion clause of the First Amendment are faced with a difficult juggling act; they must balance and coordinate the history which surrounded the adoption of the amendment with the customs sanctioned by our national traditions and the decisions handed down by the Supreme Court. It is, to say the least, doubtful that such a juggler can ever be found; the history, the practice and the court decisions share a common subject matter but not a common philosophy. Professor Kurland has wisely chosen to measure his thesis by the decisions of the court and to leave the history and traditions to one side.

In eleven short essays Professor Kurland analyzes the major decisions of the Supreme Court. It is brilliantly done. Whether the thesis is accepted or rejected, the analysis of the decisions is clear, balanced and objective. The thesis is not always sustained by the court opinions, but is seldom in direct conflict.

The refusal of the court to exempt Mormons from a statute making polygamy illegal was proper since it would have granted relief from the law based upon religious conviction.¹ The Maryland law requiring a notary public to profess a belief in God as a prerequisite for holding office was invalid since religion was the basis for qualification.² The *Everson* decision³ allowing free bus transportation, and the *Cochran*⁴ decision granting free textbooks to all school children were constitutional since no classification in terms of religion was ever made, although an indirect benefit to religion might be shown. Governmental aid to all hospitals, including those conducted under the auspices of religious groups, was sustained in the *Bradfield* case.⁵ Most of the proselytizing cases with which the Jehovah Witnesses inundated the court, the flag salute decision in *Barnette*⁶, and even the recent Regent's prayer decision in *Engel v. Vitale*⁷ can be fitted neatly into the thesis.

The *McCullum* decision⁸ outlawing religious instruction in public schools during class hours is in clear accord with Professor Kurland's principle, but the *Zorach* decision⁹ allowing such instruction outside the public schools but during class hours is in clear violation of the thesis. The recent court decision sustaining the constitutionality of Sunday closing laws is a sound application of the no religious classification principle; the fact that the day set aside for rest coincided with the religious convictions of some of the citizens is immaterial. But exemption from the Sunday closing laws for Sabbatarians, who hold Saturday as a day of rest by religious conviction, would be unconstitutional since exemption from the law is based on religion.

Under the influence of the Blaine Amendment, which passed the House of Representatives but failed in the Senate,¹⁰ many state constitutions discriminate against any activity, regardless of its clear public purpose, if conducted under the auspices of a religious group. It is doubtful that such long established state prohibitions could be erased even by such a convincing thesis as this one. The exemption of conscientious objectors on religious grounds could not be granted. The uniform practice of exempting church property from taxation would be unconstitutional, but the same effect could be reached by including churches in some other classification, such as charitable or non-profit organizations.

Professor Kurland's thesis runs counter to many of the customs to be found in the traditions of our country. Governmental provision for chaplains for men in the armed

¹ *Reynolds v. United States*, 98 U.S. 145 (1878).

² *Torcaso v. Watkins*, 367 U.S. 488 (1961).

³ *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

⁴ *Cochran v. Board of Educ.*, 281 U.S. 370 (1930).

⁵ *Bradfield v. Roberts*, 175 U.S. 291 (1899).

⁶ *Board Of Educ. v. Barnette*, 319 U.S. 624 (1943).

⁷ 370 U.S. 421 (1962).

⁸ *McCullum v. Board of Educ.*, 333 U.S. 203 (1948).

⁹ *Zorach v. Clauson*, 343 U.S. 306 (1952).

¹⁰ 4 Cong. Rec. 5595 (1876).

forces could never be sustained, nor chaplains in prisons, hospitals, or even in the Congress. Thanksgiving Day could be a national day of rest, but not of giving thanks to God. The oath of office and the oaths administered in courts of law would become affirmations with no reference to God. But such customs are valid norms for interpretation of law and should not be readily disregarded.

The historical problems are not so great, nor of equal importance. It is generally agreed that the First Amendment in regard to religion was a necessity to insure peace and tranquility in the fledgling nation. The philosophy of the leading founding fathers, like Jefferson and Madison, was never accepted by all nor written into the Constitution. The last established church did not disappear until 1834, and many states had disabilities based upon religion late into the nineteenth century. It was not until the twentieth century that the Supreme Court, by an elliptic judicial interpretation, applied the First Amendment to the states through the Fourteenth Amendment.

Professor Kurland has made an impressive contribution to the problem of church-state relations in American law. His analysis of the Supreme Court decisions is clear and accurate; if they are inconsistent it is not his fault. His thesis brings more unity to the law than it has possessed heretofore. His guiding principle is generally satisfactory and workable, but it must be refined to allow for the customs which our national traditions have handed down to us. They must not be disregarded until we are sure they do not contain wisdom that is the product of experience. The juggling act has not been perfected, but it is no longer so difficult.

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JURISPRUDENCE. M. J. Sethna. Girgaon-Bombay: Lakhani Book Depot. 1959. 2d ed. rev. Pp. xliii, 689. Rs. 13.25.

At a time of growing interest in foreign law in the United States it is of special interest and importance to give attention to publications which are not concerned with a narrow field of legal research, but which endeavor to embrace law as a whole and thus promote common understanding of jurists throughout the world. Books on jurisprudence have become somewhat scarce at the present time. Their publication is overshadowed by a real deluge of other legal writings—extensive articles, monographs, textbooks and casebooks. With the notable exception of Dean Roscoe Pound's monumental treatise on jurisprudence which at the present time stands as an unsurpassed lonely monument of jurisprudential scholarship, the last twenty years have not produced any other basic work which is a real and original contribution to jurisprudence in the United States.

There is a bleak spectre of contemporary indifference in America toward the value of jurisprudence. It is therefore refreshing to see that in a country which has regained its independence only a decade ago, a treatise on jurisprudence, the first edition of which was published as recently as 1955, appears in its second revised and enlarged

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edition four years later. Professor Sethna's voluminous treatise on jurisprudence is, however, more than a mere text book for teaching law in India. It is an attempt to cover the subject of jurisprudence by means of a new method, that of synthetic jurisprudence, which is intended to provide a more complete and comprehensive survey of the body of Indian law on the basis of Hindu, Mahometan, Roman, civil and common law principles. Sethna's book is a remarkable blend of the fundamental principles of law, as outlined in these systems, with particular emphasis on Roman and common law. By applying his method of synthetic jurisprudence Sethna has proved that a student of law may equally profit by a study of the civil and common law systems, both of which rest on the same fundamental legal concepts of justice and are but different variations of the same basic theme—jurisprudence which "is really a huge mine of legal principles" and from which "the students of various legal pursuits have to find the choicest ore out of this precious mine" (p. vii). The gist of Sethna's method consists in the study of the rules of positive Indian law (which he calls residuary or concrete jurisprudence) without divorcing them from the fundamental underlying principles. In addition, Sethna has by means of "synthetic thinking" amalgamated the historical, the analytical, the comparative, the philosophical, the sociological, the functional, and the teleological methods and as a result created the synthetic method of jurisprudence.

Professor Sethna has applied his idea to develop the study of jurisprudence in a synthetic style to several general concepts and legal institutions to prove that his new method of constructive synthetic criticism may be of real importance to legal scholars of any system of law. For example, in discussing "negligence," Sethna rejects what he calls compartmental theories of negligence (pp. 79, 579-80), i.e., the subjective theory according to which negligence is a faulty state of mind (Salmond), and the objective theory which terms negligence as a faulty behavior condition (Pollock, Clerk and Lindsell). In Sethna's opinion both theories are only partially correct, because negligence is a combination of both elements. Sethna writes, "Negligence is a *faulty negative act*—a default—a failure of the duty to take as much care as a normal person, under the circumstances, would take. It is *both* subjective and objective. It is *objective* because it is something in the nature of *external behaviour*; and *subjective* because it *arises from mental lethargy*" (p. 580).

Sethna has also been able to inter-relate "by a golden thread of synthetic harmony" (p. viii) the conflicting theories of punishment—retribution, reformation, deterrent and prevention. Drawing in part upon the sacral nature of ancient Hindu law, he stresses that the theory is not just a theory of revenge, but is based on the saying: "As you sow, so shall you reap." Punishment enables the offender to atone for his crime. To quote Sethna, "The properly-explained and correctly-understood theory of retributive punishment fits in ideally with the theories of reformation and deterrent. Through reformation and penitence, the offender can understand the heinousness of his wrongful conduct; and thus freedom from recidivism can result. If punishment is reformative and retributive, it becomes preventive also. . . . Determent should not be understood as '*terror at all cost*'—even brutality of a degrading and useless type. . . . Determent should be understood within its legitimate limits, and should not be divorced from the idea of reformation" (pp. 323, 325). To Sethna, the theories of

retribution, reformation, deterrent and prevention go hand in hand, and "exist for preservation of the moral order, the protection of society and the rehabilitation of the offender himself" (p. 325) .

One can not be impressed enough with the magnitude of Professor Sethna's work. His penetrating analysis and his deep insight are reflected in this scholarly work. This Indian legal scholar has created a classic jurisprudence book of lasting value.

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