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THE COMMON LAW TRADITION –  
DECIDING APPEALS. Karl N. Llewellyn. –  
LEGACY OF SUPPRESSION. Leonard W. Levy.  
– THE LEGAL CONSCIENCE: SELECTED  
PAPERS OF FELIX S. COHEN. Edited by Lucy  
Kramer Cohen. Foreword by Felix Frankfurter. –  
THE SUPREME COURT REVIEW. 1960. Edited  
by Philip Kurland.

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## BOOK REVIEWS

THE COMMON LAW TRADITION—DECIDING APPEALS. Karl N. Llewellyn. Boston. Little, Brown and Company, 1960. Pp. xii, 565. \$8.50.

The author's introductory words are:

This book starts with the fact that the bar is bothered about our appellate courts—not the much discussed Supreme Court alone, but our appellate courts in general. The bar is so much bothered about these courts that we face a crisis in confidence which packs danger.<sup>1</sup>

He goes on to say that the lack of confidence of the bar arises from its doubt as to:

whether there is any reckonability in the work of our appellate courts, any real stability of footing for the lawyer, be it in appellate litigation or in counseling, whether therefore there is any effective craftsmanship for him to bring to bear to serve his client and justify his being.<sup>2</sup>

On the following page the author says that in fact the work of our appellate courts is "reckonable" and that skilled legal craftsmen can make useful decisions as to the probable outcome of an appeal, and as to how best to proceed to win or defeat an appeal.

Since, in the author's opinion, the bar's lack of confidence in the predictability of the outcome of appeals is not justified, the book might be devoted to persuading the lawyers of their error, and thus allaying the crisis threatened by their unjustified lack of confidence. The book does have that purpose. The appellate courts, by which the author means the supreme courts of the states, come out with very good marks for their work, both past and current.

The book, a rather thick one, is not, of course, a mere job of pamphleteering to persuade a mistaken bar that the good old days when a well educated and diligent lawyer could advise a client or conduct a litigation with complete confidence as to the stability of the transaction or the outcome of the litigation never in fact existed. It is a Llewellyn book. It is wordy and repetitive. It is encyclopedic in its figures of speech and allusions to relevant references in literature and in life. The language is like the flow of a stream over a rocky riffle. For this reviewer, Llewellyn is hard reading.

The author says there was a Golden Age in American appellate court deciding and writing. Roscoe Pound calls it "our classic period." The author calls it "our Grand Style." It extended roughly from Jefferson's administration up to Grant's. He says that the very existence of that Golden Age has been obscured and buried by a later method of appellate work in which the judges "*sought* to do their deciding without reference to much except the rules, *sought* to eliminate the impact of sense, as an intrusion, and *sought* to write their opinions as if wisdom (in contrast to logic) were hardly a decent attribute of a responsible appellate court."<sup>3</sup> The author calls that way of work the "Formal Style." It seems that, some thirty or

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<sup>1</sup> P. 3.

<sup>2</sup> *Ibid.*

<sup>3</sup> P. 5-6.

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more years ago the judges, or the better ones, began to discard the Formal Style and to reassume the Grand Style. This poses the seeming paradox that the bar, which now thinks it was quite happy in the bad old days of the Formal Style, is now afflicted with unhappiness of the magnitude which threatens crisis, in these days of the Grand Style. Must the bar always be wrong?

The author promises to prove, and by evidence almost equivalent to that which would emerge from a laboratory investigation, that there was a Grand Style, then a Formal Style, and that there is now again a Grand Style. No doubt there was a Grand Style in the Jefferson to Grant interval. Llewellyn says there was and Roscoe Pound writes of "our classical period." But the evidence in the book under review is inadequate to prove it to the otherwise uninformed reader. On pages 64-68 the author tells us what he found of such a style in New York in pages 1-94 of 2 Hill (1842). There is a nice sampling of Bronson, Cowen and Nelson, but the author does not quote enough of the language of the judges to show a superior style of writing, and the cases were run of the mill cases such as any court at any time would have for decision. The author's discovery of the Grand Style in Ohio seems almost frighteningly accidental. It seems that he was lecturing in Cincinnati "when it occurred to me to check up, locally, on a possible early Grand Style."<sup>4</sup> He pulled out 13 Ohio (1844) from the shelf, perused pages 1 to 84. On pages 68 to 71 of our book he discusses briefly what he found in those pages, and then says:

I do not see how any man can doubt the pervasive tone, in this material, of the quest for type-situation-reason as the determining factor in laying down the rule for the situation. Both precedents and statutes are tested by that, even when they are dealt with as controlling. Neither do I see how any man can doubt that the court is moving with clean and honest effort both to attend to the "law" it has received, and to shape and phrase good "law" for future. Nor, finally, do I see how any man can doubt that the net is a decently competent performance. *That is the American Grand Style at work, in Ohio, 1844.* (Italics supplied.)<sup>5</sup>

One might be permitted two comments. (1) The discovery that the Grand Style had penetrated beyond the Alleghenies by 1844 was not comparable, in excitement, to the discovery of Bracton's Notebook. (2) It would be remarkable if one could not discover, in some pages of opinions written even in the bad days of the "Formal Style," what one would have to call "a decently competent performance."

With regard to so completely human and individual a process as deciding lawsuits and writing opinions, generalization and classification into historical periods, and into styles, Grand, or Formal, can be overdone. To the unenlightened it would seem that in every period of our history the judges would have been, by and large, honest men, conscious of their responsibility to the public, to the law as a social institution, and to the just decision of the case in hand. They would have varied enormously in natural acumen, in learning in the rules and precedents, in their feeling for the problems of one or another social class, and in their articulateness in organizing and expressing their thoughts in writing. This condition of affairs always has existed and always will exist. Whatever the bar can do to get on the bench those most competent to be judges it should do. When the bar does

<sup>4</sup> P. 68.

<sup>5</sup> P. 71.

its own work competently, its good work shows in the quality of the decisions and opinions of the judges.

As we have seen, the author's view is that the lawyer's complaint about the lack of reckonability in present day law is not justified. He tells the lawyers that if they would recognize the amount of "leeway" which is rightly available to appellate courts in dealing with precedents, and would study with care the decisions of their court, not only in cases directly in point, but in all kinds of cases, they could sense the trend and predict the outcome of their own cases with reasonable certainty. He gives suggestions, which some judges may find useful, as to acceptable techniques in dealing with precedents in various types of situations. He urges frankness in all situations and of course regards it as a mortal sin to give silent treatment to a relevant adverse precedent, or to avoid a precedent by saying it is distinguishable without demonstrating the distinction.

Among other "how to do it" suggestions, one is the more frequent adoption by appellate courts of the opinions of trial or inferior appellate courts. It is good for the morale of the judge so complimented, and incites him and his colleagues to work worthy of adoption by their supreme court.

Professor Llewellyn's book is the product of many years of study, teaching, and, most important, thinking. In a review of this kind it is not possible even to suggest the scope and flavor and variety of the book. The author's respect for our appellate courts and their work is obvious, as is his ambition that they may improve. It is good that a scholar of his stature should devote his energy to the subject which, while important, is elusive and not susceptible of very palpable treatment.

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LEGACY OF SUPPRESSION. Leonard W. Levy. Cambridge, Massachusetts: The Belknap Press of Harvard University Press. 1960. Pp. xiv, 353. \$6.50.

For those who have believed that "the First Amendment repudiated seditious libel for this country"<sup>1</sup> as "at war with the kind of free government envisioned by those who forced adoption of our Bill of Rights,"<sup>2</sup> Dean Levy's book may provoke some new ideas about the libertarianism of the Founding Fathers. After an extensive survey of contemporary documents he concludes that if "a choice must be made between two propositions, first, that the [First Amendment] substantially embodies the Blackstonian definition and left the law of seditious libel in force,

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<sup>1</sup> *Beauharnais v. People*, 343 U.S. 250, 272 (1952) (dissenting opinion).

<sup>2</sup> *Id.*, at 274.

or second, that it repudiated Blackstone and superseded the common law, the known evidence points strongly in support of the former proposition."<sup>3</sup>

Conceding that at least two libertarian propositions—that truth was a defense against a charge of criminal libel and that the jury should have the power of deciding the question of criminality rather than merely the question of publication—were "in the air,"<sup>4</sup> Dean Levy nonetheless finds, in the absence of contemporary American statements challenging the concept of seditious libel itself,<sup>5</sup> "no passion on the part of anyone to grind underfoot the common law of liberty of the press."<sup>6</sup>

While the evidence adduced points rather dramatically to the absence of a desire to abandon entirely the concept of seditious libel there is rather less support for the view that the Framers—"nurtured on the crabbed historicism of Coke and the narrow conservatism of Blackstone"<sup>7</sup>—advocated anything like the sort of suppressiveness associated with the common law. Dean Levy's argument, for example, that "Pennsylvania's suppression of Royalist speech during the Revolution suggests . . . acceptance of the common law's restraints upon free speech and press,"<sup>8</sup> is as unappealing as the suggestion that our shameful treatment of Japanese-Americans during the Second World War put America on the side of tyranny rather than freedom.

Most important in this regard is his analysis of the abundant contemporary discussion of the issues of truth as a defense and the right of the jury to pass upon criminality. Dean Levy's own failure to treat these issues as of major importance in the development of a liberal tradition is perhaps motivated by his view that they are inadequate safeguards for a truly free press. Truth, he says, "is a mischievous, often illusory, standard that defines knowledge and understanding."<sup>9</sup> Moreover, he remarks, "A jury is a court of public opinion, often synonymous with public prejudice, and is not an adequate measure of truth."<sup>10</sup> The mere fact that the author finds them wanting, however, cannot diminish the fact, established by the authorities which he himself cites, that these were the issues and this the battleground upon which a war against the repressiveness of the common law was being waged.<sup>11</sup> The enormous popularity which attended the advocacy of

<sup>3</sup> Pp. 247-248. Levy acknowledges that the First Amendment may have been intended to render "the national government utterly powerless to act in any way against oral or printed utterances" (p. 235), but notes that even were this the case, it may merely prove a solicitude for states' rights rather than a passion for free expression. (*Ibid.*)

<sup>4</sup> P. ix.

<sup>5</sup> Levy states that "With the exception of Oswald's remark in 1788 that the doctrine of libels was incompatible with liberty, no statement to this effect by any American can be found from the time of the revolutionary controversy through the ratification of the First Amendment." P. 214.

<sup>6</sup> P. 233.

<sup>7</sup> P. 3.

<sup>8</sup> P. 183.

<sup>9</sup> P. 197.

<sup>10</sup> *Ibid.*

<sup>11</sup> It is worth noting that the legal defenses of which Dean Levy speaks so slightly are not without distinguished support. Cf. *Times Film Corp. v. Chicago*, 365 U.S. 43, 68-69, 84; *Beauharnais v. People*, 343 U.S. 250 at 273, 301 (1952); *Kingsley Books v. Brown*, 354 U.S. 436, 448 (1957).

these defenses in the Zenger and Wilkes trials suggests a good deal about contemporary views on the Blackstonian theory of seditious libel.

The treatment accorded the truth and jury issues is indicative of an approach, manifested throughout the book, to play down that evidence which does suggest an attempt to break away from the common law tradition.<sup>12</sup> This view is perhaps best revealed by the remark that the important Cushing-Adams correspondence "is not a dependable revelation of the intention underlying constitutional guarantees of freedom of the press or speech"<sup>13</sup> because the authors of that correspondence "were engaged in a reform, not a declaration of the thinking of 1780."<sup>14</sup> If by this it is meant to suggest that the Bill of Rights was not, in many respects, a document of reform, there will be those who disagree. If, on the other hand, it is suggested that only that reform was intended which was specifically articulated in contemporary writings many will find Professor Chafee's view more persuasive. "[The Framers] say very little about [the First Amendment's] exact meaning. That should not surprise us if we recall our own vagueness about freedom of the seas. . . . It was not until the Sedition Law of 1798 made the limits of liberty of the press a concrete and burning issue that we get much helpful expression of opinion."<sup>15</sup> Indeed, Dean Levy himself quotes the contemporary statement of Franklin that as to the First Amendment "few of us, I believe, have distinct ideas of its nature and extent."<sup>16</sup>

In view of the growing liberalism represented by such writers as Cato, Father of Candor, Furneaux and Bentham, among others, along with the highly significant Zenger and Wilkes trials, it would not be inappropriate to speculate that the Framers of the First Amendment had it in mind to avoid the English experience. That they did not indicate in precisely what way or exactly to what extent they desired to repudiate the common law is, as Professor Chafee noted, not surprising. Indeed, it might have been more surprising had they developed, in the absence of an imminent threat to freedom of the press, some refined notion such as clear and present danger for which Dean Levy has so assiduously searched in the contemporary documents. The fact of the matter is, as his book reveals, that such an analysis had been suggested by several writers as had the more extreme overt acts test. His book similarly reveals the prevalence of more ambiguous, and probably more conservative notions which promoted "the liberty of discussing the propriety of public measures and political opinion,"<sup>17</sup> but disapproved the printing

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<sup>12</sup> The influence of CATO'S LETTERS, for example, is discounted as "a flashing star in an orthodox sky." P. 121.

<sup>13</sup> P. 200.

<sup>14</sup> *Ibid.*

<sup>15</sup> CHAFEE, FREE SPEECH IN THE UNITED STATES 16 (1948). While Levy may be correct in suggesting that debates upon the Sedition Laws were more a product of pressing expediency than a recollection of past intentions, Professor Chafee's view is nonetheless useful in suggesting the reason for the absence of debate about the precise meaning of the Amendment at the time of its drafting.

<sup>16</sup> P. 200. Cf. also the view of Hamilton that freedom of the press defies precise definition. THE FEDERALIST, No. 84.

<sup>17</sup> P. 187.

of "scurrilous" diatribes against the government.<sup>18</sup> And of course there were many who did approve the common law doctrine. Out of this multitude of opinions, and in an atmosphere of growing liberalism it seems hardly fair to suggest as strongly as Dean Levy does that the Framers were Blackstonians.<sup>19</sup> There were among them at least a substantial body of genuine, if somewhat foggy, libertarians.

No review of Dean Levy's fascinating, if controversial, historical study would be complete without a comment upon the author's effort to square his scholarly findings with his liberal predilections. "That [the Framers] were Blackstonians," he says, "does not mean that we cannot be Brandeisians."<sup>20</sup> "The fact that the First Amendment was not originally intended to mean what it has become to mean does not derogate from the statesmanship of its Framers who formulated its language in words of such breath, [sic] however ambiguous, that we have been able to breathe a liberality of meaning into it, in keeping with the ideals of our expanding democracy."<sup>21</sup> It is one thing for Justice Holmes, in answer to the question whether the First Amendment adopted the principle of seditious libel, to say "history seems to me against the notion."<sup>22</sup> It is quite another for Dean Levy to suggest that we ought to excise from the Constitution a concept which, in his view, the Framers distinctly approved, merely because we are against the notion.

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

The papers of Felix Cohen consisting of articles and shorter pieces written over about twenty years convey a consistent philosophy of law and society. The author in his *Readings in Jurisprudence and Legal Philosophy* (1951) referred to jurisprudence as the jurist's quest "for a systematic vision that will order and illumine the dark realities of the law;" legal philosophy, on the other hand, was conceived as "the philosopher's effort to understand the legal order and its role in human life." He believed that jurisprudence and legal philosophy had come close enough together to warrant "a unified approach to these two overlapping fields." He said that his *Readings* were "an attempt to justify the view of jurisprudence and legal philosophy as a great cooperative adventure. . . ." His papers, collected

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<sup>18</sup> While it is true that such formulations can be squared with the common law view, as Dean Levy notes, it is at least equally likely that their authors meant to depart from the common law test at least to the extent of permitting truth as a defense, or even to permit all but the most vituperative form of comment. Cf. p. 119.

<sup>19</sup> Pp. 3, 309. But cf. ix, x.

<sup>20</sup> P. 309.

<sup>21</sup> P. xii.

<sup>22</sup> *Abrams v. United States*, 250 U.S. 616-630 (1919).

in the book under review, reveal the philosophy of law and society which, in Cohen's opinion, was to provide the basis and framework for this "cooperative adventure."

Two of the papers published in this volume, "Modern Ethics and the Law" (1934) and "The Socialization of Morality" (1935) provide the reader insights into the moral and ethical assumptions on which Cohen's work rested. The key to his thinking is to be found in his belief that traditional morality and ethics relying on, what he called, a dogmatic approach were things of the past. Traditional ethics, he maintained, had been based on unwarranted and scientifically unverifiable certainty. However, "As matters of state come within the province of science, these topics drop out of the books and lectures of moral teachers. The end of this process is the complete divorce between ethics and all studies of human conduct which invoke the aid or the name of science. The divorce between ethics and law is only one aspect of this wider fact."<sup>1</sup> He is emphatic in his conviction that established morals and ethics, as he disparagingly said, are meaningful only for those ". . . divinely blessed with infallible moral intuition."<sup>2</sup>

The reason for this development Cohen saw, as already indicated, in the progress of science under whose constant attack traditional ethics can only maintain itself as a "morbid searching of conscience for feelings of guilt."<sup>3</sup>

There is hardly any evidence in Cohen's writings that he was more than superficially familiar with classical and medieval philosophy; neither does he seem to have been familiar with modern philosophies except those which fitted his approach to these problems.<sup>4</sup> It is, then, on a rather narrow and *ex parte* foundation that the author set out to certify the demise of existing civilization—and the ethics and morals on which it had been based for millenia. ". . . [N]o civilization can endure which distrusts its moral foundations as profoundly as we have come to distrust the ideals that order our social existence." And he continues that "the suicide of our civilization can be prevented only by the discovery of a new pattern upon which its life can be integrated, a new synthesis of conflicting human desires."<sup>5</sup> What was this new synthesis going to be? Whereas, according to Cohen, traditional ethics and morals had been concerned with the integration of the life of the individual, modern civilization demanded the integration of the life of society. By this the author understood a shifting of moral values from ". . . traditional problems of retail charity and retail murder, courtesy and sexual decency, personal thrift and prudence, to the long-range problems of peace and war, the organization of industry and government, the growth of science and culture, and the material conditions of human existence."<sup>6</sup> Obviously Cohen did not take into consideration that social regeneration depended upon respect for human values which in the order of ends has precedence over collective values. ". . . respect for what history has evolved is the sign of the genuine will for reforms and the guarantee of their happy outcome. . . . He [social man] is responsible . . . [for]

<sup>1</sup> P. 22.

<sup>2</sup> COHEN, ETHICAL SYSTEMS AND LEGAL IDEALS 118 (1959).

<sup>3</sup> P. 23.

<sup>4</sup> Cf. COHEN & COHEN, READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY viii (1951).

<sup>5</sup> P. 338.

<sup>6</sup> P. 346.

molding continuously the life of the community . . . without taking from sections of society the free and personal action of the individual."<sup>7</sup>

Cohen completely overlooked the fact that the questions of peace and war, the growth of science and culture, etc., had been moral and ethical problems since times immemorial, and that they had been practically accommodated in the great traditional moral and ethical systems. It is a neo-Machiavellian aberration to believe that 'personal ethics' and 'public ethics' can and should be divorced from each other, and that the former is, as Cohen called it, simply "Sunday School ethics"—unfit to deal with the problems of modern society. This approach denies implicitly that the task of society is that of providing an environment for the perfection of the individual; that, then, the individual and his perfection are the principal reasons for the very existence of society. Surely, the problems mentioned by Cohen are important ones; however, they do not call for a 'new morality' or 'new ethics' but only for the application of traditional morality and ethics to a set of new problems.

Cohen saw it differently; he called for "socialized morality," for socialism "as the fulfillment of democracy" to redefine the moral virtues and vices. ". . . it [socialism] replaces the heroes, saints, and gods of the past with new exemplars of the good life, as in Russia, for instance, the figure of Christ, who deals with all things in an intimate and personal way, has been replaced by the figure of Lenin, the exponent of statistical morality."<sup>8</sup> To our author, it seemed "to be more useful and more nearly true to view the socialization of institutions and the socialization of the human soul as parallel aspects of a single task."<sup>9</sup> All this, however, can ultimately be achieved only, as Cohen maintained, on the basis of "a classless culture and a socialized conscience."<sup>10</sup>

The reason for our author's approach to these questions lies in his meta-physical assumptions. For him, the ultimate question to which ethics and morality are to address themselves are 'suffering' and 'well-being' which, as he repeatedly assured the reader, are nothing else but the old Benthamite categories of 'pain' and 'pleasure'. The 'good' and 'pleasure'—the 'evil' and 'pain' are identified with each other.<sup>11</sup> Cohen maintained, however, that Bentham's 'beatific calculus' can under modern conditions be established by, what he chose to call, scientific means. A sentence in the preface to the *Readings* proves that the author was well aware of the fact that his meaning of the term science was not a generally accepted one; he complained there that "The pejorative suffix 'ism' is invoked to disparage interest in science by calling it 'scientism'. . ."<sup>12</sup>

Cohen based himself expressly on Bertrand Russell when he developed the idea that a modern ethical system "must face the scientific test of empirical confirmation."<sup>13</sup> The conclusion from these observations was that modern ethics was

<sup>7</sup> POPE PIUS XII, 1956 CHRISTMAS MESSAGE, par. 33.

<sup>8</sup> P. 349.

<sup>9</sup> *Ibid.*

<sup>10</sup> P. 348.

<sup>11</sup> Pp. 401-402.

<sup>12</sup> See note 4 *supra* at v.

<sup>13</sup> See note 2 *supra* at 121.

going to obtain moral knowledge through the methods of science—and that, in order to achieve this goal, it will have to reject all dogmas.<sup>14</sup> Our author believed that the relationship between science and ethics could best be understood if it was accepted that science was permanent doubt whereas, as already indicated, traditional ethics was based on certainty.

The saving grace of Cohen's scientific method as applied to ethics was supposed to lie in the identification of fact and value; the normative sphere was to be submerged in the factual—or, put the other way, Cohen believed in the normative power of facts in the ethical realm. "*Ought* propositions are thus always reducible to *is* propositions. . . . Values are facts, and if they are facts of a peculiar sort, so too are colors, sounds, and intervals of time."<sup>15</sup> Ethics becomes thus primarily an empirical, experiential science whose subject matter is the 'good'.

About fifteen years after the two articles discussed above, Cohen wrote his "Field Theory and Judicial Logic" (1950) in which he, in scientific guise, took up the question of achieving this universal 'good'—read 'pleasure'—by developing the universal classless society which he presented as the ultimate goal. Or, as he put it in his *Readings*, "Contemporary philosophy faces its greatest challenge in the problem of intercultural understanding."<sup>16</sup> This 'understanding' he hoped to achieve scientifically by transposing Einstein's and Planck's ideas of 'the field' to ethics and law, by developing, as he called it, the idea of a 'value field'. ". . . in the tracing of lines of causation, we find prime indicators of the value patterns . . . of a society. The sum of such indicators defines a value field. The definition of the value field makes the contents of the field exportable."<sup>17</sup>

The application of all these considerations to the field of jurisprudence was discussed by Cohen in his two articles on "Transcendental Nonsense and the Functional Approach" (1935) and "The Problems of a Functional Jurisprudence" (1937). Cohen used the term 'functional' to designate the attempt to eliminate "supernatural terms and meaningless questions," to redefine "concepts and problems in terms of verifiable realities."<sup>18</sup> "Functionalism, operationalism, pragmatism, logical positivism, all these and many other terms have been used in diverse fields . . . to designate a certain common approach to this general task of redefining traditional concepts and traditional problems. . . . On its negative side . . . functionalism represents an assault upon all dogmas and devices that cannot be translated into terms of actual experience."<sup>19</sup>

Cohen pointed out—and correctly so—that Peirce, James, Dewey, Russell, Whitehead, Wittgenstein, in spite of their differences, had taken an identical position on one question, namely that "A thing is what it does."<sup>20</sup> The functional approach, then, poses an entirely empirical question, namely "What influence is a legal decision likely to have on future cases? . . . To describe these choices as they occur is the objective of a functional theory of legal precedence."<sup>21</sup>

<sup>14</sup> P. 24.

<sup>15</sup> See note 2 *supra* at 116.

<sup>16</sup> See note 4 *supra* at iv.

<sup>17</sup> P. 151.

<sup>18</sup> P. 47.

<sup>19</sup> *Ibid.*

<sup>20</sup> P. 52.

<sup>21</sup> P. 88.

It is at this point that Cohen maintained that Bentham's great contribution to normative jurisprudence had been his insistence on the fact that the value of a legal rule depended entirely on its human consequences. Functionalism, thus, reveals itself as the legitimate heir of utilitarianism<sup>22</sup> or put differently, "The meaning of a legal rule is not action commanded but action caused."<sup>23</sup> Our author tried to distinguish between functionalism as a method and as a philosophy. Can, however, this separation between method and philosophy legitimately be maintained? Every method is an epistemological device and can, therefore, never be separated from its metaphysical foundation. In discussing Bentham, Cohen made a feeble attempt to divorce method from its metaphysical basis: "[But] it is only fair to recognize that Bentham's nominalism is methodological rather than categorical, a rule of evidence rather than a rule of substance."<sup>24</sup> That Cohen's mind on these questions was closed is proved by the fact that he was obviously unable to see the unbreakable link between methodology and its ontological foundations. Ontologically, he maintained, functionalism ". . . may be defined as the view that a thing does not have a 'nature' or 'essence' or 'reality' underlying its manifestations and effects and apart from its relations with other things; that the nature, essence, or reality of a thing *is* its manifestations, its effects, and its relations with other things; and that, apart from these, 'it' is nothing, or at most a point in logical space, a possibility of something happening";<sup>25</sup> he emphasized this point by adding in a footnote that "The viewpoint is something common to logical positivism, pragmatism, operationalism, and Whitehead's 'method of extensive abstraction'."<sup>26</sup> What is the difference between the above statement and his definition of functionalism as a method which he made when saying that it may be summed up ". . . in the directive: If you want to understand something, observe it in action"?<sup>27</sup> The difference between evidence and substance to which Cohen referred when speaking of Bentham seems to disappear. Substance for our author is motion and relation—and evidence of motion and relation is the only one he admits as being material and relevant. Needless to say, this does not mean that functionalism has not its place, and an extremely important one, as an analytical and even policy-making *technique* if it is employed as a tool in the framework of a philosophy of being and a methodology squarely based on such an ontology. In surveying neo-scholastic jurisprudential literature, we shall find that in this sense functionalism has proved to be a most valuable *technique*.

Cohen's philosophy of law and society amounts, therefore, to just one other expression of the extreme forms of nominalism developed by various modern philosophies of becoming to which our author repeatedly referred as the foundations of his thought. And nominalism, in turn, is, as Friedrich Engels shrewdly remarked in his essay *On Historical Materialism*, nothing else but "the first form of materialism."

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<sup>22</sup> P. 93.

<sup>23</sup> P. 94.

<sup>24</sup> P. 182.

<sup>25</sup> Pp. 79-80.

<sup>26</sup> *Id.*, at 80.

<sup>27</sup> *Ibid.*

THE SUPREME COURT REVIEW. 1960. Edited by Philip Kurland. Chicago. The University of Chicago Press, 1960. Pp. viii, 326. \$6.00.

From its graceful dedication to its last page, this first annual volume of a projected series is a serious and worthy addition to the literature of American jurisprudence. The epigraphs facing the title page foreshadow the explanation given in the editor's brief preface: criticism of the American constitutional process, if it is to be fruitful, ought to come from the informed and experienced minds of the American legal scholar. These minds, reflecting upon the activity in any given term of the Supreme Court, ought to be able to see and to evaluate trends in the Court's decisions; these evaluations, in turn, ought to be made available to the Court and to all those interested in the Court's effect upon the American system. The Law School of the University of Chicago has determined to attempt to make such evaluations available in a series of annual publications. If the remainder of the series should prove as thoughtful and provocative as this first volume, that law school will indeed have accomplished much.

The seven essays in this book are formidable in their legal erudition, penetrating in their analysis of current judicial attitudes, thoughtful in their conclusions and recommendations. Without being didactic or even markedly incisive, each of the authors manages to avoid being tentative in his suggestions to the Court. One major tribute to the editorship of this volume ought to be noted: in spite of what the editor admits was an "unreasonably short time" for the preparation of these essays, the editor's choice of essayists, and his performance of his own editorial function, have resulted in a volume remarkably uniform in appearance and presentation. The essays vary in style, of course, and in length—from thirty through forty-five to seventy-odd pages, but they all present to the reader factual analyses undertaken with high seriousness, and suggestions made with vigor and clarity.

The work's merits are quite apparent. The seven essays make clear the Supreme Court's preoccupation with areas affecting individuals and groups, with labor and management, with civil rights and legislative action; they also make clear, though with necessary indirection, the part played by inferior state and federal courts, and by Congress and state legislatures in the American constitutional system. Reduction of the mass of information gleaned from these essays to proportions proper to a book review would be impossible; the bibliographic knowledge displayed would alone be worth special comment. What seems possible is to note, first, the content of each essay, and then to venture some generalizations about the pleiad as a whole.

Harry Kalven, Jr., discusses "The Metaphysics of Obscenity," ingeniously handling an amorphous concept and a difficult legal problem; Edward L. Barrett, Jr., in an essay concerned with "Personal Rights, Property Rights, and the Fourth Amendment," questions whether the first set of rights is not being ignored at the undue expense of the second; Kenneth L. Karst examines the difficult matter of "Legislative Facts in Constitutional Legislation," pointing out that the court record is frequently and disturbingly meager in this important area; Bernard D. Meltzer examines "The Chicago & North Western Case" as an "Example of Judicial Workmanship and Collective Bargaining," and concludes that the Court needs to spend some time in re-examination of fundamental political and economic questions;

David P. Currie, discussing "Federalism and the Admiralty," subtitles his essay "The Devil's Own Mess," quoting from Ibsen to do so, and then proves the aptness of his quotation by showing the complexity of the present tangle in admiralty law; Charles L. B. Lowndes considers "Federal Taxation and the Supreme Court," reviewing the history of the Court's action especially since 1894 and suggesting the desirability of arranging to remove much of the burden currently imposed on the Court through the creation of a special tax court; and Edward H. Levi, in "The Parke, Davis-Colgate Doctrine: the Ban on Resale Price Maintenance," suggests that improved evaluations of the Sherman or other anti-trust legislation would assist the Court in considering cases of price-fixing by manufacturers. Obviously, few aspects of the Court's recent activity have been omitted from this relatively small volume.

One note recurs throughout these essays: the Supreme Court is not only impossibly overburdened, it is insufficiently informed on many matters which it ought to know. Not until the fourth essay does one of the writers suggest the desirability of a Brandeis brief, and then he suggests it for labor, not for the Court. In the meantime, however, it seemed to this reviewer that the Court could have been confronted with masses of statistics or equally weighty showings of evidence to make even the matter of the judgment of obscenity less subjective and more in keeping with the general judicial judgment.

In fact, the one theme which might have been emphasized, but which appeared only by omission and indirection, was that the Court ought to conform its activity to standards accepted by reasonable men. Once or twice this actual phase appears; the bad odor which the innocent expression, "rule of reason," has acquired, however, undoubtedly would prevent the essayists from employing what one Chief Justice suggested as a criterion a half-century ago. All the essays show clearly that what is needed is some sort of recognizable standard. No essay is written to suggest that this might be natural law, or the judgment of reason; each essay declares or implies that the Court is, and must be responsive—but carefully and judicially responsive—to the constantly changing complexities of society. Unless there is recurrence to some objective standard, therefore, there must be at least a major effort devoted to keeping the Supreme Court informed of the advances of science and technology, of the shifting status of economic groups, of the new knowledge of behavior patterns, and the like.

Some assumptions are implicit in these essays, and they indicate that theological and philosophical assumptions have been made and that they are the measure against which legal judgments must be considered. In the first essay, for instance, the writer declares that the *Saturday Evening Post* and *Life* will have to rescue *Playboy* and *Esquire* by showing acceptable standards of photography. Obviously the naming of these four periodicals involves at least a "value judgment" if not an appeal to a moral standard. But these seven essayists point out that the Justices of the Supreme Court must concern themselves with balancing points of view, instead of with absolutes.

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