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Walter B. Kennedy

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## Functional Nonsense and the Transcendental Approach

### Cover Page Footnote

Professor of Law, Fordham University, School of Law

# FUNCTIONAL NONSENSE AND THE TRANSCENDENTAL APPROACH

WALTER B. KENNEDY†

WITH increasing frequency and dogmatic assurance we are informed that the law is an agglomeration and admixture of transcendental nonsense,<sup>1</sup> perpetuated stupidity,<sup>2</sup> scholastic logic,<sup>3</sup> syllogistic reasoning,<sup>4</sup> supernatural concepts<sup>5</sup> and medieval theology.<sup>6</sup> The "Jovian lawyers"<sup>7</sup> of the classical tradition are pictured in their heavenly abode of empty abstractions, mumbling pious principles<sup>8</sup> and uttering "solving words,"<sup>9</sup>

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† Professor of Law, Fordham University, School of Law.

1. Cohen, *Transcendental Nonsense and the Functional Approach* (1935) 35 COL. L. REV. 809, 821: "Jurisprudence, then, as an autonomous system of legal concepts, rules and arguments. . . is a special branch of the science of transcendental nonsense." (Hereafter cited: Cohen).

*The italics used throughout this paper have been inserted by the writer.*

2. "It [the doctrine of precedent] is a habit of mind in which a stupidity may be perpetuated on the grounds that it is well established." ROBINSON, *LAW AND THE LAWYERS* (1935) 31.

One is tempted to ask whether the risk of stupidity will be lessened by the substitution of the whim or caprice of individualized justice. Kennedy, *Men or Laws?* (1932) 2 BROOKLYN L. REV. 11, 24-25.

3. FRANK, *LAW AND THE MODERN MIND* (1930) 63-68; Harno, *Social Planning and Perspective Through Law* (1933) 7 AM. L. SCHOOL REV. 705, 707. ROBINSON, *op. cit. supra* note 2, at 43.

Scholastic logic is the *bête noire* of the functionalists' attack. Like the cry of "radical" in political parlance, one can destroy any dogma of traditional law by calling it "scholastic logic". Citation of scholastic authorities is deemed unnecessary.

For an exposition of present-day scholasticism, see ZYBURA, *PRESENT-DAY THINKERS AND THE NEW SCHOLASTICISM* (1927); BRUNI-ZYBURA, *PROGRESSIVE SCHOLASTICISM* (1929). See also Wilkinson, *The Scholastic Heritage of Our Law* (1936) 13 THE MODERN SCHOOLMAN 66.

4. FRANK, *op. cit. supra* note 3, at 66; Cook, *Legal Logic* (1931) 31 COL. L. REV. 108, 114; Harno, *Experience, Experimentation and Logical Method* (1931) 17 A. B. A. J. 659.

5. Cohen, at 821.

6. Arnold, *Apologia for Jurisprudence* (1935) 44 YALE L. J. 729, 737-753; ROBINSON, *op. cit. supra* note 2, at 38.

7. Frank, *Realism in Jurisprudence* (1934) 7 AM. L. SCHOOL REV. 1063, 1065.

8. Williston, *Change in the Law* (1935) 69 U. S. L. REV. 237; Kennedy, *Principles or Facts?* (1935) 4 FORDHAM L. REV. 53.

9. The critic cannot refrain from directing attention to the fact that "words" are beginning to trouble the worshippers of facts quite as much as the old fashioned theoreticians. For a movement which has as one of its objectives the elimination of the "word-magic" of conceptualism the reformers are displaying considerable difficulty in fixing upon a suitable word for their product. Jerome Frank, after a devastating attack upon the "verbalism" of the conceptualists, (*op. cit. supra* note 2, at 22-31) suggests that "realistic jurisprudence was an unfortunate label since the word 'realism' has too many conflicting meanings." (*Supra* note 7, at 1063.) He proposes a new word, "experimental" jurisprudence. Other words are offered in competition with "realism" and are expressive of in-

unmindful of the facts of life and unaware of the march of science. Grim warnings are currently issued that the law of the classical tradition must submit to a major operation, cutting deep into the fabric of the old order, or retire in favor of the sociological, functional, scientific, institutional, experimental and realistic schools of jurisprudence now vehemently pressing forward with their overlapping programs of reform. Emboldened by their rapid advances, they exhibit a new ferocity in recent realistic manifestos; predictions are presently made that the age of classical law is drawing to a close;<sup>10</sup> the functional approach is not only approaching—it is here;<sup>11</sup> a new era is in the making, pregnant not merely with the promise of progress but also with present performance. Sur-realism<sup>12</sup> has arrived.

Typical of the vigor and breadth of attack against the traditional order is a recent paper by Felix S. Cohen under the significant title, "Transcendental Nonsense and the Functional Approach."<sup>13</sup> In ruthless fashion he tears apart the placid, senseless concepts of the "theoreticians of the law" and argues for a wholesale ouster of "supernatural terms" which befool the realities of human and societal relations and smother frank discussion behind a smoke screen of "legal nonsense."

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genuity in word-coinage: functionalism, skepticism, animism, neo-realism, objective method, fact-research and scientific approach.

The modernists after ousting the "words" of the logicians have done tolerably well in setting up a new vocabulary to take the place of the old. Not alone in the title but in the content of their writings the new leaders have introduced *terms* and *words* which puzzle and confuse even the word-ridden followers of the classical law. See notes 19-29, *infra*. Is it possible that in the zest of attack against the "word-magic" of the old order the functionalists have been unwittingly building up a competitive "word-magic" of their own? Goodrich, *Our Black Ink Balance* (1932) 7 *AM. L. SCHOOL REV.* 385, 395.

10. Cohen, at 833.

11. Llewellyn, *Some Realism About Realism* (1931) 44 *HARV. L. REV.* 1222, 1223. "The experimentalist attitude may have been fostered, in its inception, at Columbia and Yale but today it is an attitude which has spread everywhere." Frank, *supra* note 7, at 1066.

12. The term, sur-realism, is offered as a label for the extremists of the realist movement who display an impatience with the slow and gradual reform of the law and advocate a "revision to the roots". See Cohen; ROBINSON, *op. cit. supra* note 2; Beutel, *Some Implications of Experimental Jurisprudence* (1934) 48 *HARV. L. REV.* 169; Frank, *supra* note 7.

It is interesting to observe the successive steps in the progress of functional, realistic or experimental jurisprudence. It began as an outgrowth of pragmatic or sociological jurisprudence. Kennedy, *Pragmatism as a Philosophy of Law* (1925) 9 *MARQ. L. REV.* 63; Sabine, *The Pragmatic Approach to Politics* (1930) 24 *AM. POL. SCI. REV.* 866; Aumann, *Some Changing Patterns in the Social Order* (1935) 24 *KY. L. J.* 38. Cardozo and Pound, torch bearers of the pragmatic approach, have now been displaced in the onrush of realism and rather severely criticised for their lack of vision and progress, for their adherence to precedents and concepts. FRANK, *op. cit. supra* note 3, at 207, 236. For estimates of realism by Cardozo and Pound, see Cardozo, *Address before New York State Bar Association*, 55 *REPORT OF NEW YORK STATE BAR ASS'N* (1932) 264; Pound, *The Call for a Realist Jurisprudence* (1931) 44 *HARV. L. REV.* 697.

13. (1935) 35 *COL. L. REV.* 809.

His thesis begins with a colorful and metaphorical description of the "heaven of legal concepts":

"Some fifty years ago a great German jurist had a curious dream. He dreamed that he died and was taken to a special heaven preserved for the theoreticians of the law. In this heaven one met, face to face, the many concepts of jurisprudence in their absolute purity, freed from all entangling alliances with human life. Here were the disembodied spirits of good faith and bad faith, property, possession, *lashes*, and rights *in rem*. Here were all the logical instruments needed to manipulate and transform these legal concepts and thus to create and to solve the most beautiful of legal problems. Here one found a dialectic-hydraulic-interpretation press, which could press an indefinite number of meanings out of any text or statute, an apparatus for constructing fictions, and a hair-splitting machine that could divide a single hair into 999,999 equal parts and, when operated by the most expert jurists, could split each of these parts again into 999,999 equal parts. The boundless opportunities of this heaven of legal concepts were open to all properly qualified jurists, provided only they drain the Lethean draught which induced forgetfulness of terrestrial human affairs. But for the most accomplished jurists the Lethean draught was entirely superfluous. They had nothing to forget.

"Von Jhering's dream has been retold, in recent years, in the chapels of sociological, functional, institutional, scientific, experimental, realistic, and neo-realistic jurisprudence. The question is raised: How much of contemporary legal thought moves in the pure ether of Von Jhering's heaven of legal concepts? One turns to our leading textbooks and to the opinions of our courts for answer. May the Shade of Von Jhering be our guide."<sup>14</sup>

Needless to add, this passage was "writ sarcastic" for the obvious purpose of directing attention to the extravagant and absurd emphasis placed upon legal concepts. In telling fashion and unique allegory Cohen demolishes the temple of legal conceptualism. Falling victim to the picturesque imagery which guided the pens of Von Jhering and Cohen, and in tribute to the generous gesture of functionalism which allots the full expanse of ethereal regions to the disciples of transcendentalism, the writer succumbs to the temptation to sketch out an opposition—"heaven" being reared in our own day and place—a super-special, *de luxe*, celestial world, strangely different from the graphic picture of the special heaven reserved for the theoreticians of the law; a dream world quite as wondrous and starting as the fanciful fabrication of Von Jhering.

### I THE HEAVEN OF FUNCTIONALISM

In this realistic heaven one meets the many *facts* of life, in their absolute nakedness, bared of all the vaporous abstractions, metaphysical principles and airy concepts, so dear to the "theoreticians" of the law. This modernistic Olympus has as its first *function* (*principle*, one must

14. *Id.* at 809.

never say) the eviction of the musty absolutes of the classical tradition and the substitution of instruments of science. Here in the Elysian fields of functionalism one rubs against things "as is" and not things "as if";<sup>15</sup> its stalwart adherents think thoughts, not words<sup>16</sup> and in their workshops recall that "*words* are daughters of men, but *things* are the sons of heaven."<sup>17</sup> Gone are the disembodied spirits of good faith and bad faith, property, possession, laches and rights *in rem*. Gone, too, are the moth-eaten, dry-as-dust, outmoded and "bankrupt" concepts of Corporation, Title, Contract, Due Process, Fair Value and Vested Rights.<sup>18</sup> These are taboo words which have been ousted from the lexicon of the realists and a new series of fact-words, packed with the "itness" of realism, are to be substituted. Such soothing specimens are found as "Wousining",<sup>19</sup> nihilistic skepticism,<sup>20</sup> institution,<sup>21</sup> behavior,<sup>22</sup> pattern,<sup>23</sup> cultural lag,<sup>24</sup> background,<sup>25</sup> purpose,<sup>26</sup> hunch,<sup>27</sup> induction,<sup>28</sup>

15. Llewellyn, *supra* note 11, at 1236; ROBINSON, *op. cit. supra* note 2, at 38; Cohen, at 839.

16. Hutchinson, *Judging as Administration* (1934) 7 AM. L. SCHOOL REV. 1069, 1072.

17. Johnson, *Preface to the English Dictionary*, reprinted in (1909) 39 HARV. CLASSICS 191.

18. Cohen, at 820, 821 and 823.

19. FRANK, *op. cit. supra* note 3, at 57.

20. *Id.* at 63.

21. "By institutions we merely mean collective behavior patterns, the ways in which a community carries on the innumerable activities of social life . . ." Shepard, *Democracy in Transition* (1935) 29 AM. POL. SCI. REV. 1; Moore, *Rational Basis of Legal Institutions* (1923) 23 COL. L. REV. 609; NOYES, *THE INSTITUTION OF PROPERTY* (1936).

22. The study of behavior is an important item in the program of the functionalists; not what judges say, but what they do, not "words," but "behavior." The "non-vocal" interpretation of law is found in Oliphant, *A Return to Stare Decisis* (1928) 6 AM. L. SCHOOL REV. 215, 229. It is closely linked with behavioristic psychology. Beutel, *supra* note 12, at 175. In the arguments of the legal behaviorists we find the contention that judicial decision is motivated by "stimuli" and "reactions" and that human action is determined by environment and may be controlled. WINGFIELD-STRAITFORD, *NEW MINDS FOR OLD* (1934) 16-21.

23. Aumann, *supra* note 12.

24. "Cultural lag" is a favorite term expressive of the drag of legal conservatism which holds back legal reform. ROBINSON, *op. cit. supra* note 2, at 3, 13, 325.

25. "The upshot seems to be that, within our time-limitation, we either integrate the *background* of social and economic fact and policy, course by course, or fail of our job." Llewellyn, *On What is Wrong with Legal Education* (1935) 35 COL. L. REV. 651, 671. If Llewellyn is right in his thesis that law schools should wake up "to the job of *integrating* background—social or philosophical—into every course" (p. 671), then the law schools have been, and are, derelict in their duties to the law students.

The issue of "background" engendered by the realists' demands for the infiltration of social, psychological, and economic theories as a part of law teaching is one of the most debatable proposals offered by the modernists. It is now becoming commonplace to read that unless this change of method takes place, unless the law adopts this scientific approach, the decay of the legal profession is quite possible. ROBINSON, *op. cit. supra* note 2, at 43-44; Beutel, *supra* note 12, at 187.

and "law"—law.<sup>29</sup> These robust terms coined in the laboratories of the functionalists, washed in cynical acid<sup>30</sup> and smeared with skepticism are guaranteed to solve the most involved legal problem—at least when solemnly uttered by the oracles of the fact-approach.

### *The New Scientific Approach*

The functionalists have relegated to the junk pile the "dialectic-hydraulic-interpretation press" of the poor, deluded logicians of the law. In place thereof the scientific jurists have installed the machines of modern science, albeit many of the mechanisms are in the blue-print or experimental stage. Here one finds mechanical contraptions clicking merrily away, grinding out the *facts* with unerring accuracy, divorced (thanks be) from the distorted syllogistic output which formerly issued forth from the discarded machinery of the theoreticians of the law. Here one finds the chromium-plated devices of science (stream-lined and knee-actioned): the lie-detector<sup>31</sup> and the electronic diagnosis apparatus,<sup>32</sup> the "eight-cylinder social machine",<sup>33</sup> the behavior estimators

26. Cohen, at 822.

27. Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision* (1929) 14 CORN. L. Q. 274; Hadley, *The Place of the Hunch in Legal Analysis* (1935) 9 TEMPLE L. Q. 410; cf. Kennedy, *How Do Judges Decide Cases?* Address before Mt. Vernon Lawyers' Ass'n, March 1, 1933, reprinted in Westchester L.J., March 2, 1933; Kennedy, *To Hunch or not to Hunch?* N. Y. L. J., Feb. 6, 7, 1933, at 742, 768.

28. Induction is one of the key-words of the new learning in the law; it is in marked contrast to the deductive method rejected by the realists. Its function is to observe and to assemble particulars, not to erect universals in the manner of logicians. Facts, not concepts, are the objectives of the inductionists. Nelles, *Towards Legal Understanding* (1934) 34 COL. L. REV. 862.

The disciples of induction are seemingly unmindful of the fact that the principal "function" of induction is to produce a universal proposition which may be used as a major premise in the process of deduction. The devotees of induction are not, even under their own theories, eliminating deduction, but are merely postponing the process. See Cardozo, *supra* note 12; PYNE, *THE MIND* (1926) 299.

Hutchins, a pioneer in realist jurisprudence, has lately argued that induction alone is powerless in the solution of legal problems. *The Autobiography of an Ex-Law Student* (1934) 7 AM. L. SCHOOL REV. 1051, 1055. There is grave danger that functionalism having turned to the study of facts, things and tangibles, may end by shutting itself up in that reality and closing the mind to the consideration, analysis and evaluation of the facts. Morris R. Cohen, *Law and Scientific Method* (1928) 6 AM. L. SCHOOL REV. 231, 234-235.

29. Llewellyn, *supra* note 25, at 676.

30. Cohen, at 830.

31. Beutel, *supra* note 12, at 175; cf. Kennedy, *supra* note 8, at 68; Hoover, *Scientific Methods of Crime Detection in the Judicial Process* (1935) 4 GEO. WASH. L. REV. 1.

32. "Of all the people in the world we Americans are the most mechanically minded . . . Nowhere is the laboratory so glorified as in the United States . . . Nowhere in the world could such medical mumbo-jumbo as Abram's electronic diagnosis or Palmer's Chiropractic have originated except in California or Iowa." Wolfe, *The Twilight of Psychoanalysis* (1935) AMERICAN MERCURY 385.

33. ROBINSON, *op. cit supra* note 2, at 6.

and free-will eliminators,<sup>34</sup> the sure-fire questionnaires,<sup>35</sup> statistical devices<sup>36</sup> for registering trends, control rooms<sup>37</sup> for systematizing human actions and departments for investigating the sex life of judges<sup>38</sup> and their inhibitions of childhood days (the more expert manipulators being trained to hunch as to the hunch of the judges<sup>39</sup>); all these multiple and variegated machines clicking in amazing unison; machines with mechanical fingers grabbing particulars, automatically piling up and weighing the facts, welding them into generalizations, wrapping them with cellophane and producing the solution of any possible problem of the legal order, untouched by human hand and without the contamination of ugly universals or delusive deduction. Neatly and accurately synchronized to the realities of life these mechanical devices can divide

34. Beutel, *supra* note 12, at 174: "Although the doctrine of the free-willing individual appears throughout literature, religion, philosophy, and legal dogma, it is surprising to note that it has very little experimental support."

35. For an example of the naïveté of the psychologist in accepting the findings of questionnaires, see TAFT, WITNESSES IN COURT (1934) c. 3.

36. Llewellyn, *supra* note 25, at 673, makes the point that "when it comes to broadly social facts in their social hearings, lawyers are helpless—childish . . . Is there, for instance, anything sadder than the naïveté with which mere lawyers man-handle statistics?" Answering Llewellyn, one might suggest that a "sadder" instance of the manhandling of statistics is found in the unscientific way that the criminologists have been peddling forth the results of crime surveys, as noted in MICHAEL AND ADLER, CRIME, LAW AND SOCIAL SCIENCE (1933) *passim*. It may comfort the "helpless lawyer" to read the following of the manner in which sociologists "manhandle" social facts: "Our total knowledge of society at the present time is far from sufficient to give a 'scientific prescription' as to what should be done in a given field to alleviate social, political and economic misfortune. *Many theories now regarded as knowledge are only shots in the dark.* We have no right to apply them on a large social scale or to urge others to do so.

"Rather than any sort of ruler who is a highbrow social scientist, I would rather have a man of plain common sense from the street. Not until the social scientist is sure that he has something pragmatic and helpful does he deserve his chance." Prof. Pitiram A. Sorokin, Chairman of the Department of Sociology, Harvard University, interview in N. Y. Herald-Tribune, Dec. 30, 1935, at 4.

37. ". . . today there are many scientists of standing who will support the proposition that by *controlling* the individual's environment you can *control* his character and predict his future actions." Beutel, *supra* note 12, at 175.

This suggestion, of course, is another way of arguing against the freedom of the will. See note 32, *supra*. If the individual action is controllable, it might be asked: Who is going to control the controllers? By what magic of science are we certain to escape the danger that the "engineer" in charge of the "control mechanism" may himself be tossed and twisted about by environment and circumstance, unable to exercise judgment and discretion in the operation of the levers and gadgets of behavioristic machinery? WINGFIELD-STRAITFORD, *op. cit. supra* note 22, at 39-40; McWilliams, *Free Will in Nature* (1935) 12 MODERN SCHOOLMAN 39.

38. Scott, *Confessions of a Law Teacher* (1928) HANDBOOK OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS 17, 28.

39. One of the most astounding offshoots of realistic writings is the attempt to probe the unconscious mind of the judges and to bring to the surface the *real* as distinguished from



a single fact<sup>40</sup> into 999,999 parts and, when operated by the most expert realists, split each of these parts again into 999,999 equal parts—all to be pigeon-holed in separate compartments in the fact warehouses of the realists' heaven for instant use when the occasion arises.

Here in the heaven of functionalism one finds many strange workmen overrunning the legal edifice: physicists,<sup>41</sup> psychologists,<sup>42</sup> sociologists,<sup>43</sup> mathematicians,<sup>44</sup> economists<sup>45</sup> and anthropologists,<sup>46</sup> who have graciously entered the realistic heaven and volunteered their services to cure the law of the shortcomings of scholastic logic and deduction by the injection of a new process called induction or experimentalism. These

the *stated* reasons of judicial decision. This psychological venture is bravely undertaken by *open minded* realists pursuing the *closed minds* of the judges. Oliphant pleads for an intellectual dive into the "non-vocal" regions of the judicial mind and the purposeful study of backgrounds. Oliphant, *supra* note 22, at 315; cf. Morris R. Cohen, *Justice Holmes and the Nature of Law* (1931) 31 COL. L. REV. 352-356.

For examples of this "subterranean" process of law-finding, see Nelles, *supra* note 28, at 862, 884-889; Eno, *Unstated Objections in the Law of Sales* (1935) 44 YALE L. J. 782.

Dean Wilkinson has pointed out the danger of over-simplifying this quest for possible reactions of judges to their environment and associations. Wilkinson, *John T. Loughran—An Appreciation* (1935) 4 FORDHAM L. REV. 179, 184. See also, ROBINSON, *op. cit. supra* note 2, at 193.

40. "I have talked with young disciples of functionalist teachers, who have acquired such a strong antipathy to conceptualism, and are so impressed with factual differences, that they are unhappy if a court decides two cases the same way, if there is any slight difference in the facts, as, indeed, there always is, but are perfectly content if the court decides the cases in opposite ways, no matter how slight the difference in the facts." Scott, *supra* note 38, at 24.

The writer has further developed the fact-fetish of realism in his article, *Principles or Facts?* (1935) 4 FORDHAM L. REV. 53, 61-64.

41. RUEFF, *FROM THE PHYSICAL TO THE SOCIAL SCIENCES* (1929); Cohen, *supra* note 1, at 822, 827; Beutel, *supra* note 12, at 172.

42. ROBINSON, *op. cit. supra* note 2, Foreword V: "This book attempts to show that jurisprudence is certain to become one of the family of social sciences—that *all of its fundamental concepts will have to be brought into line with psychological knowledge.*"

Frank, in *LAW AND THE MODERN MIND* (*supra* note 3), deals heavily with psychological materials in relation to law. As elsewhere noted (*infra* note 54) pet psychological theories, like behaviorism or psychoanalysis, hold the interest of the realists even after psychologists have moved on to other fancies. Terman, *Psychology and the Law* (1935) 40 COM. L. J. 639.

43. Angel, *The Value of Sociology to Law* (1933) 31 MICH. L. REV. 512; Harno, *supra* note 3.

44. Cohen, at 825.

45. Frank pays tribute to "experimental economics". *Supra* note 7, at 1065. Beutel points out that modern economists "are rapidly demonstrating that economic actions are controlled by *definite knowable laws.*" If "applied economics" can be bottomed on "scientific data", he argues, why not the law? *Supra* note 12, at 176, 177. Cohen, at 832.

One wonders whether the exponents of "applied economics" resting on "definite knowable laws" were on sabbatical leave during the pre-depression era.

46. CAIRNS, *LAW AND THE SOCIAL SCIENCES* (1935).

volunteers come with the guarantee that the scientific process of induction has worked wonders in their own separate and special heavens; that the blanket of the deductive method, which smothered progress in their disciplines has been lifted and the bright light of induction is illuminating the dark places with rays of reality and piercing the fogs of fanaticism and mysticism.

### *The Law Visits Science*

Not content with their neighborly visit to the legal heaven and kindly assistance in the more efficient operation of the juristic machines, the scientists press forward with an insistent invitation to the lawyers. They propose that the legal functionalists journey to the halls of science and there view at close range the actual accomplishments of the Baconian formula of induction in contrast with the circular wanderings of the devotees of deduction. Many good natured quips are directed against the concepts of the law, legal concepts which match the metaphysical nonsense typified by such classical conundrums as, "How many angels can dance on the point of a needle?"<sup>47</sup> In place of this ethereal enigma the pragmatists counter with the eminently practical question, "What is the best functional approach to the elusive needle in the haystack?" Here one may sense the realities of the scientific method, the raw stuff of functionalism in action. Even lawyers, say the scientists, have *seen* a needle and a haystack, whereas nobody has ever *seen* an angel (nor indeed a corporation,<sup>48</sup> nor a chose in action,<sup>49</sup> nor a contract). Hence the good *sense* of searching for a needle in a haystack and the abject *nonsense* of looking for an angel, or a corporation, or a chose in action, or a contract—or any of those other concepts so near and dear to the theoreticians in the law.

On the "home grounds" of the scientists, the "visiting team" of juristic scholars is royally entertained. Here one looks in vain for the "conceptual acrobatics" of the logicians and the word-magic of the verbalists. Instead of empty abstractions the scientists lead the lawyer-groups into their laboratories and reveal their latest experiments fraught with so many possibilities of utility in the law.

For example, the psychologists point out that one of their most recent discoveries is the amazing fact that brain power may be determined by chest measurement. More convincing still, the psychologists *prove* the validity of their hypothesis by disclosing actual measurements made

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47. This is a stock example of the type of thought which, it is alleged, permeates present-day legal thinking. Cohen, at 810; ROBINSON, *op. cit. supra* note 2, at 51.

48. "Nobody has ever seen a corporation. What right have we to believe in corporations if we don't believe in angels?" Cohen, at 811.

49. Kennedy, *Garnishment of Intangible Debts in New York* (1926) 35 YALE L. J. 639, 690.

with an actual tape measure on actual chests.<sup>50</sup> Instead of the mysticism of the "laying on of hands" (reminiscent of the "medicine men" of conceptualism) the mind-experts propose the "laying on of tape measures." How pregnant with opportunities to improve the law is this new discovery of science! The quality of law students, lawyers and judges may be determined by the simple application of a tape measure—a sort of a "pulmonic approach" (shall we say) to a more abundant legal life. Criminologists whisper to the lawyers that they have decided that a crime is an act, and nothing but an act, stripped of all conceptual nonsense about a guilty mind, premeditated action, or a *mens rea*, these concepts being but a mess of senseless verbiage engrafted upon the law by the mind-ridden moralists of the Dark Ages.<sup>51</sup> The obvious result is a movement to scrape the classical criminal law to the bone and revitalize it in terms of psychoanalysis,<sup>52</sup> behaviorism<sup>53</sup> or some other evanescent theory of modern psychology.<sup>54</sup> In one final broadside for the use of scientific methods in the law, the advocates of the new order posit this unanswerable query: If science has cleaned up the pest holes of Panama, why not use the same methods to bring about the regularity of human and social activities?<sup>55</sup> Now that science is prepared to argue against the freedom of the will, there seems to be no reasonable ground for quarreling with the conclusion that mosquitoes and men may

50. Dr. S. A. Weisman, Address Before Convention of American College of Surgeons, N. Y. Herald-Tribune, May 2, 1935, at 21.

51. "A crime is an act. It is not an act plus an intent." Levitt, *Extent and Function of the Doctrine of Mens Rea* (1923) 17 ILL. L. REV. 578, 589; cf. Sayre, *Mens Rea in Criminal Law*, HARV. LEGAL ESSAYS (1934) 399.

52. Psychoanalysis is the basis of Frank's interpretation of law in LAW AND THE MODERN MIND. *Supra* note 3. See ROBINSON, *op. cit. supra* note 2, at 333.

53. *Supra* note 22. See Dashiell, *The Objective Character of Legal Intent* (1931) 38 PSYCHOLOGICAL REVIEW 529-537.

54. Functionalism poses as a "scientific" approach to the law, an unbiased, fearless method of viewing the facts, a stern rejection of the *a priori* reasoning familiar in older types of juristic thought. In fact there is a marked tendency among functionalists to offer to the law some current dogma of a single controverted psychological school and to insist that it must be accepted. In so doing functionalism is guilty of the same *a priori* dogmatism which it charges against the logicians. Pound, *The Call for a Realist Jurisprudence* (1931) 44 HARV. L. REV. 697, 706.

The functionalists quarrel among themselves about the value and worth of contesting psychological theories and yet join together in berating the lawyers because they refuse to grant these theories entrance in the legal order. Beutel argues for behavioristic psychology (*supra* note 12), while Robinson says that "as a school of thought behaviorism has now nearly died out. . . ." *Op. cit. supra* note 2, at 103. Frank's LAW AND THE MODERN MIND (*supra* note 3) rests upon an interpretation of law in terms of Freudian psychoanalysis. Elsewhere we read that psychoanalysis with its underlying dogma of mechanistic animism is basically unsound and obsolete. Wolfe, *supra* note 32, at 385; Robinson agrees that "this theory [psychoanalysis] is full of grotesque details that are essentially unscientific. . . ." *Op. cit. supra* at 60. See also *id.* at 140, 171, 186.

55. Beutel, *supra* note 12, at 174-175; cf. Kennedy, *supra* note 8, at 68.

be regulated and controlled by like scientific methods. Why not, indeed, abandon the imperfect performance of conceptualism for the glowing promise of functionalism? Impatient at the uplifted eyebrows of the more conservative lawyers, who express doubt about the far flung effects of these experiments in social control, the scientists indignantly recall that *skepticism*<sup>56</sup> is their own peculiar attribute, and that it is manifestly unfair for the conceptualists to betray lingering doubts about the promised program of science. In other words, the stand-patters of the law are informed that they must accept, without cavil, the *futurity*<sup>57</sup> of science for the *futility* of logic.

So in the heavens of the economists, sociologists, anthropologists and physicists, the juristic functionalists spend long hours in awesome admiration of the countless experiments of Science, experiments proven and verified, checked and double-checked, experiments dripping with cold facts. The disclosure of this valuable information leads to the plausible suggestion by the scientists that this conglomerated mass of physical, sociological and economic data (dressed up in scientific terms)<sup>58</sup> may be fused and squeezed into the law, or at least that this technique of omniscience may give birth to the evaluation of law "in action" and not merely of law "in books." Thus in the special heaven of the functionalists the face of the Law is "lifted" and beautified by Science; in place of the "hair-splitting machine" of the conceptualists (now happily discarded) Science has installed a hair-curling mechanism which is guaranteed to impress a permanent wave of progress and perfection upon the brow of the Law.

One more area of the functionalists' heaven remains to be developed. Confronted with the beneficial effects of Science working upon the law it is now suggested that the Law should establish a permanent home (one must never say, domicile) in the heaven of Science, abandoning for all time the old homesteads of logic, concept, free will, principle and precedent. Why return at all to the old order when the new scientific approach promises so much—and follows promise with performance. Cut away from traditional doctrine and begin anew. After a realistic huddle and a functional hunch, our younger law teachers and students<sup>59</sup> decide to give up the dogmas of legal theology, bid adieu to Cardozo,<sup>60</sup>

56. Frank, *supra* note 7, at 1063.

57. For instances of "promissory notes" of functionalism payable "in futuro," the reader is referred to Beutel, *supra* note 12, ROBINSON, *op. cit. supra* note 2, and Cohen.

58. *Supra* notes 19-29.

59. Cohen, at 833.

60. FRANK, *op. cit. supra* note 3, at 236-239; *cf.* ROBINSON, *op. cit. supra* note 2, at 237; Cohen, at 809-811.

Brandeis,<sup>61</sup> Dean Pound,<sup>62</sup> Beale,<sup>63</sup> Williston<sup>64</sup> and Wigmore,<sup>65</sup> defenders of tradition and precedent in varying degrees.<sup>66</sup> The really creative thinkers of the future will join forces with Watson,<sup>67</sup> Freud,<sup>68</sup> Veblen<sup>69</sup> and the other master minds of science itching to "plow under" the old order and give us a "New Deal" in the law.<sup>70</sup> And so plans and specifications are being prepared which call for a rather complete abdication of the Law (as formerly defined, taught and practised), and the entry of Science, not merely as a friendly adviser, but as an all powerful, legal *Der Fuehrer*. True, this last step is still in the making, but the advocates of functionalism assure us that it is going to happen and—let it be remembered—the scientists never confuse fact with fiction, nor intermix elusive expectation with established experiment.<sup>71</sup> When the heaven of functionalism is fully developed, Law will be but a memory. Science—not Law<sup>72</sup>—will be King, nay more, Science will be King, Queen, Jack and indeed the whole legal pack.

## II FUNCTIONALISM IN ACTION

Hyperbolic description of legal theories—whether penned by functionalist or conceptualist—serves but the limited purpose of directing attention to some of the inconsistencies and excesses which characterize the given movement. The fanciful fabrication of "heavens" to house the competitive advocates of function or concept is at best a caricature which catches imperfections and trends and magnifies them out of their true proportion with an eye to their accentuation. Writing in the skies is a vaporous and impermanent method of solving earthly problems;

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61. For a mild criticism of Brandeis, see Cohen, at 811.

62. FRANK, *op. cit. supra* note 3, at 207-216.

63. Beale is the arch-disciple of conceptualistic dogma, say the realists. *Id.* at 48-56; Cook, Book Review (1935) 35 COL. L. REV. 1154. See *infra* note 89.

64. Cohen, at 833.

65. *Ibid.*

66. While Brandeis and Cardozo manifest a liberal attitude toward judicial law-making, they insist that the doctrine of precedent still occupies first place in judicial process. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921) 149; see dissenting opinion of Brandeis J., in *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, 406 (1932).

67. *Supra* notes 22, 54.

68. *Supra* note 54.

69. Cohen, at 832.

70. Kennedy, *The New Deal in the Law*, Address before Bronx County Bar Ass'n, Oct. 12, 1934, reprinted in N. Y. L. J., Oct. 13, 1934, at 721, (1934) 68 U. S. L. REV. 533, (1934) 2 U. S. L. Week 41.

71. Nelles, *supra* note 28, at 862; ROBINSON, *op. cit. supra* note 2, at 19.

72. "What must the King do now? must he submit?

The King shall do it: must he be deposed?

The King shall be contented: must he lose

The name of King?"

Shakespeare, King Richard III.

the real battle between realists and logicians, between the old and the new theories of law and law-making, will be fought on the ground, not in the air. The issue will be determined by the effective way in which the contending groups grapple with the work-a-day questions of law.

Descending from the juristic "heavens" and leaving above "such stuff as dreams are made of", let us consider how the "ground crew" of the functionalists is functioning, how they propose to come to grips with the bread and butter controversies, whether they have accomplished, as asserted, "the final debunking of the legal profession, by calling attention to some of the actualities in the legal order and insisting upon 'grubbing for facts'".<sup>73</sup>

By way of introduction it is submitted that two major objectives face the realists and the functionalists in their aim and purpose of substantially altering the classical method of deciding cases by adhering to principle or precedent: (1) they must accurately and convincingly assay the present-day methods of adjudication and point out the defects which exist therein without enlargement or exaggeration of the evils chronic in the present system. Nor will it suffice that the reformers indicate imperfections and shortcomings in the classical tradition. Concededly these imperfections exist (and perhaps always will exist) but the question remains whether the legal machine now operating should be overhauled or junked and a new machine installed in its place. (2) Having established the breakdown of the common law methods the task of the functionalists is not over. They must submit and establish a reform program and prove that it will function better than the traditional methods in vogue in our day and place. "To destroy the case of one's opponents and to justify one's own are two different things".<sup>74</sup> Before the ancient house of the law is dismantled,<sup>75</sup> the functionalists are asked to file a bond promissory of betterment and a guarantee that realism is real and that the functional approach is an approach and not a retreat. One more condition: In this period of transition and change, the proponents of the New Deal in the law must submit to the critical examination of their evidence, must bear the affirmative of the issues, and must establish the "experiential capacity"<sup>76</sup> of the experts offered by functionalism before their testimony is given full credence and their formulas are translated into action.

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73. Beutel, *supra* note 12 at 169.

74. Theodore Roosevelt, *The Search for Truth* (1913) HISTORY AS LITERATURE 252.

75. A somewhat analogous situation arises in the law when a tenant is threatening to injure the reversioner's interest. "It is, in general, no justification for an act of waste that a party will, at some future time, put the premises in the same condition as they were when the lease was made. . . . How can it be known, as a matter of law, that a tenant will retrace his steps and repair an injury which he has deliberately caused?" *Agate v. Lowenbein*, 57 N. Y. 604, 614 (1874).

76. 1 WIGMORE, EVIDENCE (2d ed. 1923) §§ 555-571.

*Functionalism—And Youth*

The modest objective of this paper is to suggest that nonsense is not in the sole possession of the conceptualists. In no small degree is nonsense beginning to appear in the writings of the functionalists. Our central purpose, therefore, is not to prove that traditional law is a perfect system or that it defies improvement. Functionalism has very ably and properly pointed out that there are yawning chasms in the law which should be filled in and which may be bridged over by considering the results and consequences of a given law in action. Concededly, functionalism has a place in the legal order, provided that it keeps its place. But it seems timely to warn "the more intelligent of our younger law teachers and students"<sup>77</sup> that youth has an impulsive and insatiable urge to pull things apart just to see how the wheels go round. This juvenile propensity, first developed in the nursery, may find belated expression in more mature years. Frank suggests that man's quest for *certainty* in the law is traceable to a survival of the childish reliance upon the omnipotence of its father.<sup>78</sup> We offer the counter suggestion that the itch for *change* in the law may be traceable to the restless impatience of youth seeking utterance in their legal philosophies.<sup>79</sup>

But whatever its origin, whether due to the influence of youth or to the inevitable excesses incident to the formation of a new juristic movement, the fact remains that there are evidences of nonsense in functional and realistic literature which are holding back the spread of functionalism and causing the conservatives in the law to withhold even partial recognition of the attack upon the classical tradition.

*A Lesson in Grammar*

One cannot fairly object when functionalists venture a guess as to the developing course of law in the years to come. If they are of the opinion that there are rumblings of a legal revolution *in futuro* and so state, their prophetic views may or may not materialize. Who knows? But when the critic of existing institutions of law passes from the permissive area of prediction and essays the statement of *present-day* conditions in the law, he is dealing with visible facts of our day and place. Tangible evidence is available to test out the truth or falsity of his assertions. There is an appreciable difference between the *present* and the *future* tense—in grammar and in legal criticism. It is feared that the functionalists in their enthusiasm to advertise and to sell their wares have confused promise with performance, have distorted hopes

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77. Cohen, at 833.

78. FRANK, *op. cit. supra* note 3, c. 2.

79. The writer has further developed the point that realism is essentially a youth-movement in *Principles or Facts?* *supra* note 8, at 56-57.

into happenings. In their emphasis upon the importance of finding the *outside* facts in the decision of cases, they have omitted to evaluate accurately the *inside* facts concerning the present status of experimentalism and realism.

Frank confidently tells us that "The experimental attitude . . . is an attitude which *has spread everywhere*."<sup>80</sup> Cohen expresses the opinion that "the age of the classical jurist *is over*".<sup>81</sup> Such statements are expressive of the present facts—not prophecies as to the future. Independently of what may happen, the announcement of the present demise of the classical era, like the erroneous report of Mark Twain's death, is grossly exaggerated and slightly premature.

Personifying the classical era of the law, which we are told is now over, are men of the type of Dean Pound,<sup>82</sup> Williston,<sup>83</sup> Wigmore<sup>84</sup> and Beale;<sup>85</sup> it is said that their reign is at an end; that their legal methods and technique are now outmoded and functionally unsound. "Creative thinkers" armed with statistics, charts, graphs, questionnaires, tape measures and hunch-producers are ready to take their places.<sup>86</sup> What are the facts?

At the moment when the functionalists are lowering the mantle of oblivion upon Williston and his classical terminology (with a gesture of thanks for "yeoman service in clarifying the *logical* implications and inconsistencies of judicial doctrines"<sup>87</sup>) announcement is made that

80. Frank, *supra* note 7, at 1066.

81. Cohen, at 833.

82. *Supra* note 62.

83. *Supra* note 64.

84. *Supra* note 65.

85. *Supra* note 63.

86. *Supra* notes 31-46.

87. Cohen, at 833.

To state, or to imply, that Williston, is alone concerned with "clarifying the *logical* implications" of judicial doctrines is to reveal an utter lack of knowledge of Williston's work in codifying the law of sales, bills of lading and warehouse receipts. Before some of the present-day functionalists were out of their swaddling clothes, Williston set for himself the task of reforming the law and criticising decisions "where they seemed opposed to principle and to the convenience of trade." WILLISTON, SALES (1st ed. 1909) Preface.

By way of concrete example, note that it was Williston who insisted that "value" is present when a creditor receives goods, bills of lading, or warehouse receipts in extinguishment of or as security for antecedent indebtedness. Despite the fact that judicial decisions were opposed to this definition of "value," Williston fought for the change and implanted this definition in the Uniform Sales Act, Uniform Bills of Lading Act and Uniform Warehouse Receipts Act. Commissioners' Note, 1 UNIFORM LAWS ANN. (1931) 448, 449; WILLISTON AND McCURDY, CASES ON SALES (1932) 430, 431; 2 WILLISTON, SALES (2d ed. 1924) 1563.

New York, which inconsistently rejected this definition of "value" in the original passage of the Uniform Sales Act and Uniform Bills of Lading Act in 1911, has finally adopted the view of Williston. N. Y. LAWS 1935, c. 455, N. Y. PERS. PROP. LAW (1935) § 156;



Williston is hard at work on a new edition of his masterful treatise on contracts, and, *mirabile dictu*, the legal profession seems to be manifesting keen interest in this new "relic" of traditional contract law. One might venture the prediction that lawyers will "approach" problems of contract law for the immediate present by turning to Williston, the lawyer, rather than to Watson, the psychologist.<sup>88</sup> Beale, the arch-disciple of conceptualism, has just published his monumental work on Conflict of Laws seemingly unaware that his usefulness came to an end with the arrival of realism. It may be that his theories of conflict of laws, written into text and Restatement of Conflict of Laws, will die out in other times under the vigorous attack of the functionalists.<sup>89</sup> Conservative opinion exists that, here and now, Beale dominates the law in his life-long specialty—and will probably do so for many years. Professor Wigmore, it is true, has retired from his active career as a law teacher at Northwestern University, but his classical text on Evidence still holds forth in Anglo-American law as the guide of judge and lawyer.

The point about this "lesson in grammar" is that functionalism is on safer ground when it speaks in the future tense. Classical law is still a vigorous and hardy perennial; functionalism should be content with pruning the branches of the classical tradition rather than proclaiming that a "revision to the roots" is already under way.

### III CORPORATION—A "BANKRUPT" CONCEPT

One part of the traditional method of settling legal problems which has been fair game for criticism by the modernists is the practice of

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N. Y. LAWS 1935, c. 455, N. Y. PERS. PROP. LAW (1935) § 239. Kennedy, "Value"—A Plea for Uniformity in New York Commercial Law (1933) 8 ST. JOHN'S L. REV. 1; Comment (1936) 5 FORDHAM L. REV. 80.

88. *Supra* notes 22, 54.

89. Cook, *The Logical and Legal Bases of the Conflict of Laws* (1924) 33 YALE L. J. 457; Lorenzen, *Territoriality, Public Policy and Conflict of Laws* (1924) 33 YALE L. J. 736; Lorenzen and Heilman, *The Restatement of the Conflict of Laws* (1935) 83 U. OF PA. L. REV. 555; Cook, *loc. cit. supra* note 63; cf. Goodrich, *Institute Bards and Yale Reviewers* (1936) 84 U. OF PA. L. REV. 448.

Applying the realists' test of the law "as is," it may not be impertinent to recall that Beale offers an interesting "box score" in the contest between his "vested rights theory" and the opposing theories of functionalism in the single area of contract law. Beale contends (citing statistics) that in the last twenty-seven years the trend of the states has been in the direction of the adoption of the *lex loci contractus* (the vested rights theory as to the creation of contracts). 2 BEALE, CONFLICT OF LAWS (1935) 1172-1173. The wide variance between the estimate of Cohen that the "vested rights" theory of conflict of laws is "bankrupt" (p. 823) and the view of Beale may be worth noting. Beale says: "It is probable that before many years have passed the influence of the American Law Institute [the body responsible for the Restatement of the Conflict of Laws] will have led to the abandonment of intention of the parties, and to the general adoption of the law of the place of contracting." *op. cit. supra*, at 1174.

the conceptualist lawyer to produce his bag of principles and precedents and pull out a choice rule or maxim or case ready made for instant use in the solution of most difficult legal problems. The critics<sup>90</sup> have made telling use of the contention that legal concepts are empty, mouth-filling words cluttering the pages of reports and text books and preventing a pragmatic, functional approach to the decision of cases. We enter the last stage of the bombardment of conceptual thinking in the law with the attack of Felix S. Cohen.<sup>91</sup> Impatient with the piecemeal and fragmentary criticism of single segments of legal concepts, Cohen argues for the wholesale ouster of the concepts of Corporation, Contract, Title, Due Process and Property.<sup>92</sup> In metaphorical terms he contends that involuntary petitions in bankruptcy have been filed against these concepts and others.<sup>93</sup> Cohen begins his onslaught by directing his fire against the Corporation concept, concededly a basic fiction of the old law and still deeply imbedded in the traditional approach. Formerly it was possible to complain that the functional reformers talked *about* the law but seldom *of* the law.<sup>94</sup> But Cohen, with commendable directness, takes up specific cases and decisions, first stating them in terms of concept and principle, then pointing out the vice and inherent limitations of the traditional approach, and concluding with the statement of the methods of functionalism and its advantages when applied to the given situation.

Adopting this mode of attack, he advances to his task of demolishing the ancient myth of corporation and showing the superior excellence of realistic devices. Cohen sets up his problem by reference to the familiar case of *Tauza v. Susquehanna Coal Co.*<sup>95</sup> The facts are simple. The Susquehanna Coal Co. was a foreign corporation chartered by the state of Pennsylvania. It was sued in New York, service being effected upon an officer of the corporation as required by New York law. The New York Court of Appeals found that the corporation had an office in New York, with salesmen and desks, was doing business in the state, and was suable in its courts. Cohen bitterly condemns the manner in which Cardozo and the New York Court of Appeals deal with the question, Where is a corporation? He asserts that the conclusion that the foreign corporation was "in" New York, and therefore

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90. *Supra* notes 1-7.

91. Cohen, *supra* note 1.

92. *Id.* at 820, 821.

93. *Id.* at 823.

94. Frank's book (*op. cit. supra* note 3) is practically devoid of reference to cases and decisions; it is replete with quotations from extra-legal sources. The criticism is directed not to the fact that he included non-legal authorities, but rather to the omission in his study of the very material he sets out to analyze.

95. 220 N. Y. 259, 115 N. E. 915 (1917).

suble therein, matches in metaphysical status the query, "How many angels can stand on the head of a needle?" symbolic "of an age in which thought without roots in reality was an object of high esteem." He continues:

"Will future historians deal more charitably with such legal questions as Where is a corporation? Nobody has ever seen a corporation. What right have we to believe in corporations if we don't believe in angels? To be sure, some of us have seen corporate funds, corporate transactions, etc. (just as some of us have seen angelic deeds, angelic countenances, etc.) But this does not give us the right to hypostatize, to 'thingify,' the corporation, and to assume that it travels about from State to State as mortal men travel. Surely we are qualifying as inmates of Von Jhering's heaven of legal concepts when we approach a legal problem in these essentially supernatural terms.

"Yet it is exactly in these terms of transcendental nonsense that the Court of Appeals approached the question of whether the Susquehanna Coal Company could be sued in New York State. 'The essential thing,' said Judge Cardozo, writing for a unanimous court, 'is that the corporation shall have come into the State.' Why this journey is *essential*, or how it is *possible*, we are not informed."<sup>96</sup>

The critic of functionalism must concede that Cohen sets up no straw man to be bowled over by his realistic lance, no concept-minded conservative to be riddled by the shafts of functionalism. Cardozo is his first target, the philosopher-judge who spends his leisure hours in reflecting upon the judicial process,<sup>97</sup> and the mouthpiece in the *Tauza* case of "an exceptionally able court." More than that, Cohen indicts Justice Brandeis of uttering the same "transcendental nonsense" in deciding the situs of a foreign corporation for purposes of suit.<sup>98</sup> And may we add that Cohen might also have included Holmes in his indictment against the "thingifying" of a foreign corporation.<sup>99</sup> It may be at once admitted that if the opinions of Cardozo, Brandeis and Holmes reveal types of reasoning "without roots in reality" his case against the continuance of this conceptual thinking is convincingly established.

Cohen's argument proves too much; he not only reads out of the law the myth of a foreign corporation travelling from state to state, but he likewise upsets the myth of a domestic corporation journeying within the borders of the state of incorporation.—It is just as difficult to "see"

96. Cohen, at 811. (*italics in original text.*)

97. Justice Cardozo once humorously said: ". . . I find there is a fairly general notion among my brethren at the Bar, that in some occult way I invented the judicial process and am responsible for its existence." Address, NEW YORK COUNTY LAWYERS' ASS'N, YEAR BOOK (1932) 371.

98. Cohen, at 811-812.

99. *Riverside Mills v. Menefee*, 237 U. S. 189, 194 (1914); *Rosenberg Co. v. Curtiss Brown Co.*, 260 U. S. 516 (1923); *Bank of America v. Whitney Central National Bank*, 261 U. S. 171 (1923).

a domestic corporation at home, as it is to "see" a foreign corporation abroad.<sup>100</sup>

The load of the functionalist who aims to erase from the law the corporate concept (even in the narrow field of corporate "travel" from state to state) is a heavy one to carry although stated in terms of vibrant realism with its emphasis upon tangibles and things and its abhorrence of intangibles and abstractions. One discerns in the argument realistic gymnastics quite as elusive and evasive as the "conceptual acrobatics" charged against the schoolmen. *Non sequiturs* (as the old fashioned logician might phrase it) or punctures of the "pattern" and blowouts of the "background" (to borrow the "it"-words of realism) sometimes upset the universals of the realist no less than of the conceptualist. *In generalibus dolor latet*. To say that a corporation is *not* because it cannot be *seen* is a somewhat startling generalization for a functionalist to parade before his readers consistently and without yawning gaps in the reasoning. Let us follow through Cohen's ingenious argument.

Having pronounced the death sentence over foreign corporations, it is surprising to read the concession that "some of us have seen corporate funds, corporate transactions, etc. (just as some of us have seen angelic deeds, angelic countenances, etc.)." Does Cohen mean that "corporate funds" and "corporate transactions" are real and can be "seen" in contrast with the corporation itself which "nobody has ever seen?"<sup>101</sup> If so, the distinction is a most subtle and unsatisfactory one. The shift from the noun, corporation, to the adjective, corporate, possesses no magical power of breathing life and tangibility into the invisible corporation. It is just as mystifying and "thingifying" to see a "corporate fund" or to see a corporation *entering into* a "transaction" as it is to see a foreign corporation *entering into* a state. The fact of the matter is that corporations whether at home or abroad are doing many things, engaging in many transactions, owning corporate funds, embarking in business in many states and to deny reality to these many ramifications of corporate activity because they are not carried on as "mortal man" acts is not devoid of the nonsense which Cohen charges against Cardozo and Brandeis.

### *Functionalism "Sees" the Corporation*

The functionalist, having pricked the corporate bubble inflated with the airy nonsense of transcendentalism, now proceeds to outline and to

100. Kennedy, *The Scientific Approach in the Law* (1936) 70 U. S. L. Rev. 75, 78.

101. It may be that Cohen merely means that "corporate transactions" and "corporate funds" are just as unreal as "angelic deeds", neither having anything more than metaphysical existence. If so, he is emphasizing his ouster of the corporation concept and its train of imaginary satellites.

construct the functional approach to the same situation, the realistic manner in which the modern jurists would deal with the foreign corporation. Before following functionalism through the second step, let it be clearly recalled that the New York Court of Appeals and other courts have already been accused of indulging in arrant nonsense because they saw, or pretended to see, this elusive foreign corporation stalking into foreign states and doing business therein in the manner of mortal men. What then is Cohen's realistic solution of this vexing question? He says:

"If a competent legislature had considered the problem of when a corporation incorporated in another State should be subject to suit, it would probably have made some factual inquiry into the practice of modern corporations in choosing their sovereigns and into the actual significance of the relationship between a corporation and the state of its incorporation. It might have considered the difficulties that injured plaintiffs may encounter if they have to bring suit against corporate defendants in the state of incorporation. It might have balanced, against such difficulties, the possible hardship to corporations of having to defend actions in many states, considering the legal facilities available to corporate defendants. On the basis of *facts* revealed by such an inquiry, and on the basis of certain political or ethical *value judgments* as to the propriety of putting financial burdens upon corporations, a competent legislature would have attempted to formulate some rule as to when a foreign corporation should be subject to suit."<sup>102</sup>

To state it mildly, this solution of functionalism is a rather violent turn-about-face from the preceding position. Despite his contention that it is a myth of metaphysical origin for the *courts* to say that a foreign corporation may travel from state to state, Cohen calmly considers the realistic approach which a "competent legislature" would take in considering the problem of "when a corporation incorporated in another state should be subject to suit". Thus the corporation concept, figuratively booted out of the *courts* of the foreign state (because it cannot be seen in the state) bobs up serenely and is plainly visible to the *legislature* of the same foreign state. To the legislature this search for the foreign corporation suddenly becomes "a thoroughly practical one"—a real, tangible problem to be approached in the functional manner for the purpose of attempting "to formulate some *rule* as to when a foreign corporation should be subject to suit." Cohen does not venture to tell us what the "rule" (detestable word of conceptualism) should be, nor wherein the functional "rule" would differ from the one in force in the *Tauza* case. His complaint is not that the *Tauza* holding or its results are objectionable; his criticism is directed to "the mode of reasoning by which this decision was reached".<sup>103</sup>

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102. *Id.* at 810. (italics in original text.)

103. *Ibid.*

The antagonists of functionalism also file a *caveat* against the "mode of reasoning" which Cohen uses to bankrupt the corporation concept. They suggest that his reasoning is a piece of verbal calisthenics, surpassing the angels-on-the-head-of-a-needle riddle. It is certainly fantastic to concede that realists and legislatures can view "in a practical manner" the foreign corporation travelling in the land, engaging in business, entering into the political and industrial life of the foreign states, affecting the lives of the citizenry; and at the same time to contend that the courts, viewing this same panorama of corporate activities, are guilty of transcendental nonsense in facing and dealing with the identical fact-situation. Otherwise stated, functionalism asserts that the actualities of corporate presence can be detected through the "one hundred inch telescope" of realistic design, but that it is not "possible" to see a foreign corporation when viewed through the misty spectacles of judicial conceptualism.

Returning once more to the sweeping generalization—"nobody has ever seen a corporation"<sup>104</sup>—it now seems that this universal statement needs some revision; the major premise of the realist's syllogism is a bit shaky; it must be whittled down to fit the precious facts. Restated, it should read that nobody has ever seen a corporation—*except* the state of incorporation, competent legislatures and far-seeing realists! So revised, it appears that the corporation myth is not "nonsense" at all times but only when muddled by the transcendental-minded Cardozo or Brandeis who use the wrong words—but reach an unobjectionable result. Instead of saying that the corporation *functions* in the foreign state, Cardozo and Brandeis say that the foreign corporation is *in* the foreign state—and hence are guilty of transcendental nonsense!

#### *Functionalism "Solves" the Corporate Problem*

Functionalism has frequently emphasized the importance of fact-finding, the grubbing for the facts, the digging into the dirt of actualities and searching for tangibles and things.<sup>105</sup> Usually these pragmatic remedies are prescribed without a patient in sight, are offered generally as a cure-all for the sick man of the law. Cohen, however, with commendable candor writes out the prescription in definite form and offers it as a palliative for a particular malady, namely, the senseless manner in which Cardozo and his associates mutilated the *Tauza* case. His diagnosis of juristic nonsense completed, Cohen pens the functional formula which will alleviate the word-magic of corporate fictions. The prescription<sup>106</sup> runs as follows: (1) Collect *factual* inquiries about mod-

104. *Id.* at 811.

105. Kennedy, *supra* note 8, at 58-64.

106. See p. 290, *supra*.

ern corporations; (2) mix in the *difficulties* attendant upon compelling plaintiffs to sue in the state of incorporation; (3) stir with certain *political* or *ethical* value-judgments; (4) add plenty of *economic* and *sociological* investigations. Shake well so that the ingredients of factual inquiries, difficulties and political and ethical value-judgments are thoroughly intermixed—and serve. Thus the problem is solved! Having set down the required ingredients, the functionalist placidly leaves the scene without any attempt to obtain the suggested ingredients, or to show *how* they can be obtained; or to predict what the result will be after they have been applied; or to disclose wherein the result will differ from the “rule” set down in the *Tauza* case. After wrecking the corporation concept—like the bad boy picking his father’s watch apart—the functionalist offers a new vocabulary to the befuddled lawyer, and departs.

Before leaving the scene Cohen issues one final broadside against Cardozo and the New York Court of Appeals:

“The [New York] Court of Appeals reached its decision without avowedly considering any of these matters [referring to legislative inquiries].<sup>107</sup> It does not appear that scientific evidence on any of these issues was offered to the court. Instead of addressing itself to such economic, sociological, political, or ethical questions as a competent legislature might have faced, the court addressed itself to the question, ‘Where is a corporation?’ Was this corporation *really* in Pennsylvania or in New York or could it be in two places at once?

“Clearly the question of *where a corporation is*, when it incorporates in one state and has agents transacting corporate business in another state, is not a question that can be answered by empirical observation. Nor is it a question that demands for its solution any analysis of political considerations or social ideals.”<sup>108</sup>

To charge that the New York Court of Appeals reached its decision as to the suability of a foreign corporation without addressing itself “to the economic, sociological, political or ethical questions” is to ignore the history and flux of precedents leading up to and latent in the *Tauza* case. *Tauza v. Susquehanna Coal Co.*<sup>109</sup> is but a link in a chain of decisions, a chain whose links have been forged and hammered, altered and removed from time to time. The story of the institution, pattern or background (to borrow functional words) of the foreign corporation cannot, and should not, be sought in an isolated decision, pulled out of its setting, but rather should be viewed in the march of judicial decisions down the years. The advantage of *stare decisis*—its safety valve and brake—is that it is a system which accumulates the wisdom and exper-

107. *Ibid.*

108. Cohen, at 810. (italics in original.)

109. 220 N. Y. 259, 150 N. E. 915 (1917).

ience of the past and offers it to the judges of the present as a substitute for, or a warning against, precipitate, individualized and arbitrary action.<sup>110</sup>

Looking back of the scene which confronted the New York Court of Appeals in deciding the *Tauza* case, there is ample warrant for the assertion that the courts have realistically and functionally considered the results and consequences of the advent of the foreign corporation. The present rule that the foreign corporation may be sued when it is "doing business" in the distant state was not the special "brain child" of the New York Court of Appeals.<sup>111</sup> This well considered principle of today evolved slowly, painfully and after many pauses.

Cohen's plea for an "ethical value-judgment" is visible in the early case of *Lafayette Insurance Co. v. French* when the court pointed out that "it cannot be deemed unreasonable that the state of Ohio should endeavor to secure to its citizens a remedy in their domestic forum"<sup>112</sup> [against foreign corporations]. There is functional approach aplenty in the statement of the reasons for the present rule in the leading case of *St. Clair v. Cox*:

"This doctrine of the exemption of a corporation from suit in a State other than that of its creation was the cause of much inconvenience, and often of manifest injustice. The great increase in the number of corporations of late years, and the immense extent of their business, only made this inconvenience and injustice more frequent and marked. Corporations now enter into all the industries of the country. The business of banking, mining, manufacturing, transportation, and insurance is almost entirely carried on by them, and a large portion of the wealth of the country is in their hands. Incorporated under the laws of one State, they carry on the most extensive operations in other States. To meet and obviate this inconvenience and injustice, the legislature of several States interposed, and provided for service of process on officers and agents of foreign corporations doing business therein. *Whilst the theoretical and legal view, that the domicile of a corporation is only in the State where it is created, was admitted, it was perceived that when a foreign corporation sent its officers and agents into other States and offices, and carried on its business there, it was, in effect, as much represented by them there as in the State of its creation.* As it was protected by the laws of those States, allowed to carry on its business within their borders, and to sue in their courts, it seemed only right that it should be held responsible in those courts to obligations and liabilities there incurred."<sup>113</sup>

110. Kennedy, *supra* notes 2, 8, 70.

111. For a brief history of the evolution of the law of New York regarding service on foreign corporations, see Kennedy, *supra* note 49, at 699-700. The same topic is covered in HENDERSON, *THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW* (1918) 79.

112. 59 U. S. 396, 407 (1855).

113. *St. Clair v. Cox*, 106 U. S. 350, 355 (1882).



The general charge made by Cohen that the basic question of the *Tauza* case, Where is a corporation? prevents the consideration of non-legal data, is clearly not substantiated by a reference to the leading cases on this subject. Surely the realists do not insist that each time the court repeats this principle it must likewise repeat in a fulsome manner all the previous arguments collectable out of past decisions. Even though the *Tauza* case is silent as to the earlier cases like *Lafayette Insurance Co. v. French* and *St. Clair v. Cox*, the spirit, if not the language, of these decisions is before the New York Court of Appeals.

#### *A Bit of "Conceptual" Functionalism*

Before concluding the consideration of *Tauza v. Susquehanna Coal Co.*, it may be interesting to seek out the origin and source of Cohen's criticism that Cardozo and Brandeis and other judges are "thingifying", creating a fiction, and uttering transcendental nonsense when they detect a foreign corporation and see it travelling from state to state. One might expect to find that the ammunition for the functional broadside against the foreign corporation came from the arsenals of sociological, functional, institutional, scientific, experimental, realistic and neo-realistic jurisprudence which are dedicated to the ouster of worthless legal concepts. But alas! This robust contribution to the betterment of law cannot be claimed by the modernists.

In *McQueen v. Middletown Manufacturing Co.*,<sup>114</sup> decided over a century ago, it was observed that an officer of a foreign corporation did not represent the corporation in New York and that "his function and his character would not accompany him when he moved beyond the jurisdiction of the government under whose laws he derived this character". Such an expression should arouse enthusiastic endorsement from the present-day functionalists. Both in substance, and even in the use of the realistic term, *function*, *McQueen v. Middletown Manufacturing Co.* clicks with the contention of Cohen, that a corporation cannot be seen outside of the state of origin, cannot travel abroad. Respectable support for the same view came out of Massachusetts in the early case of *Peckham v. North Parish in Haverhill*.<sup>115</sup> But these isolated instances of "rugged realism" soon give way to the so-called "nonsense" of the present era and we read of the United States Supreme Court endorsing,<sup>116</sup> after first rejecting the dictum of the *McQueen* case,<sup>117</sup> the power of a state to entertain a suit against a foreign corporation. The cases continue to pile up, all reinforcing the doctrine applied by the New York Court of Appeals in *Tauza v. Susquehanna Coal Co.*<sup>118</sup>

114. 16 Johns. 4, 6 (N. Y. 1819).

115. 16 Pick. 274 (Mass. 1834).

116. *St. Clair v. Cox*, 106 U. S. 350 (1882).

117. *Id.* at 354.

118. See HENDERSON, *op. cit. supra* note 111, *passim*.

The truth of the matter is that cases of the type of *McQueen v. Middletown Manufacturing Co.* and *Peckham v. North Parish in Haverhill* are so-called Conceptualism in its worst form and do not cease to be such because of their tardy revival by fact-finding functionalists; while the *Tauza* case is essentially Realism in its best dress, viewing the thing "as is," recognizing that a foreign corporation is in New York, doing business in the state, touching the economic and political life of the state, functioning as a real institution, and ethically and equitably subject to action by aggrieved parties in the courts of the foreign state. The functionalist who berates all concepts as types of *perpetuated* stupidity<sup>119</sup> may learn an interesting lesson anent the flexibility of the concept and its readiness to "grub" for facts by studying the course of the concept of foreign corporations in America. Trial and error in goodly measure showed forth before the present rule of the *Tauza* case assumed final shape.

One thing seems clear. It will take considerable persuasive power to convince the lawyers that Cohen has upset the soundness of *Tauza v. Susquehanna Coal Co.* (in language or in result) by invoking the departed spirit of *McQueen v. Middletown Manufacturing Co.* If this treatment of the Corporation concept is a sample of functionalism in action, it is suspected that the bulk of the legal profession will prefer to trail along with the "transcendental nonsense" of Cardozo and Brandeis.

#### *When is a Corporation?*

Having disposed of *Tauza v. Susquehanna Coal Co.* and the New York Court of Appeals, Cohen moves on to point out the "transcendental nonsense" of the United States Supreme Court in its decision of the famous case, *United Mine Workers of America v. Coronado Coal Co.*<sup>120</sup> This case presented the question whether coal companies whose business had been injuriously affected in the course of a strike could reach the funds of the labor unions which had encouraged the strike or whether legal action should be confined to the particular individuals charged with committing or inducing the injury. The Court decided: (1) that unincorporated labor unions, such as the United Mine Workers of America, are recognized as distinct entities, suable as such for torts committed by them in the course of strikes, and their strike-funds are subject to execution; (2) that the national union is not responsible for local strikes committed without its sanction; (3) that the district union, a subdivision of the national body, is responsible for injuries unlawfully inflicted during authorized strikes and that its strike-funds may be subjected to a

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119. ROBINSON, *loc. cit. supra* note 2.

120. 259 U. S. 344 (1922).

resulting judgment; and (4) that the strike therein involved was not a conspiracy to restrain interstate commerce within the Sherman Act.

Cohen proceeds to "functionalize" the decision and to inform us (1) how the Supreme Court should have decided the case and (2) how Charles E. Hughes, of counsel for the labor union, should have framed his brief. The errors committed by Hughes and his associates are as follows:

"So far as appears from the printed record, counsel for the union defendants did not attempt to show that labor unions would be seriously handicapped by the imposition of financial responsibility for damage done in strikes, that it would be impossible for labor unions to control *agents provocateurs*, and that labor unions served a very important function in modern industrial society which would be seriously endangered by the type of liability in question. Instead of offering any such argument to support the claim of the labor union to legal immunity for the torts of its members, counsel for the union advanced the metaphysical argument that a labor union, being an unincorporated association, is not a person and, therefore, cannot be subject to tort liability."<sup>121</sup>

Despite the fact that the labor unions, both national and district, won a fairly complete victory in this case,<sup>122</sup> it seems that Hughes (like Cardozo in the *Tauza* case) used the wrong words in his successful defense. He ought to have talked about "functions" and "handicaps" and "*agents provocateurs*" and thereby have stirred the Supreme Court emotionally by the use of non-legal, economic, industrial, and sociological data and statistics. Instead, Hughes committed the grievous error of considering the law and the decisions of the Supreme Court—seemingly a very heinous offense in the primer of functionalism. Hughes, let it be noted, was appearing in the *Coronado* case as a lawyer, not as a philosopher or as a reformer. His single task was to frame a brief that would convince the court and he very naturally referred to the procedural obstacles concededly existing at common law<sup>123</sup> in the bringing of actions against unincorporated associations. True, the technical point was decided against the labor union but the reading of the opinion will disclose that it is highly problematical whether the suggested discussion about

121. Cohen, at 813.

The brief of the labor unions was not confined to the single point that the labor union was an unincorporated association. The brief contains eight points. One of these points, to the effect that the defendant labor unions were not liable in this suit under the Sherman Act, was accepted by the Supreme Court and resulted in a reversal of the judgment against the defendant unions.

122. The Court, while deciding that labor unions, though unincorporated, can be sued under the Sherman Act, held that the particular strike in question did not constitute a conspiracy to obstruct interstate commerce within the Act.

123. *United Mine Workers of America v. Coronado Coal Co.*, 259 U. S. 344, 385 (1922).

functions and handicaps of labor unions would have altered the Court's conclusion.<sup>124</sup>

Moreover, it is submitted, that Hughes approached the preparation of his brief in true realistic fashion according to Cohen's own formula—and is blamed for doing it. Hughes was concerned "with the actual behavior of the courts",<sup>125</sup> in this instance, the actual behavior of the Supreme Court evidenced by their past decisions. As Cohen states it: "The question what the courts *ought* to do is irrelevant here"<sup>126</sup> [in the preparation of the lawyer's case]. Yet in his attack upon the brief of the labor unions in the *Coronado* case the critic berates counsel for not building their brief around arguments about functions and handicaps, omitting or minimizing basic legal questions. To stress a program emphasizing strict adherence to the law "as is" and then to scold an advocate who follows this very formula is seemingly inconsistent if not nonsensical.

### *The "Word-Magic" of Functionalism*

Next Cohen proceeds to show wherein the Supreme Court departed from the true functional approach:

"The Supreme Court argued, 'A labor union can be sued because it is, in essential aspects, a person, a quasi-corporation.' The realist will say, 'A labor union is a person or quasi-corporation because it can be sued; to call something a person in law, is merely to state, in metaphorical language, that it can be sued.'"<sup>127</sup>

To the casual reader not versed in the refinements of functional terminology, this verbal distinction seems strikingly like the hodge-podge and word-magic charged so frequently against the logicians and the theoreticians of the law.<sup>128</sup> What is the difference between the "transcendental" argument of the Supreme Court in the *Coronado* case that "a labor union can be sued because it is . . . a person" and the realistic statement that "a labor union is a person . . . because it can be sued"?

The scientific explanation of "the significant difference" between the two modes of expression is as follows:

"If we say that a court acts in a certain way 'because a labor union is a person,' we *appear to justify the court's action*, and to justify that action, moreover, in transcendental terms, by asserting something that sounds like a proposition but which *can not be confirmed or refuted by positive evidence or by ethical argument*. If, on the other hand, we say that a labor union is a

124. See *infra* notes 131-135.

125. Cohen, at 839.

126. *Ibid.*

127. *Id.* at 813.

128. FRANK, *op. cit. supra* note 3, at 57-68.

person 'because the courts allow it to be sued,' we recognize that the action of the courts has not been justified at all, and that the question of whether the action of the courts is justifiable calls for an answer in non-legal terms. To justify or criticize legal rules in purely legal terms is always to argue in a vicious circle."<sup>129</sup>

His contention is, therefore, that the Supreme Court smothered and prevented the consideration of "positive evidence," "ethical argument," and "non-legal" factors by arguing that "a labor union can be sued because it is . . . a person." Here, and elsewhere,<sup>130</sup> the critic of legal concepts is contending that the use of concepts (like corporation, contract and property) blankets and stifles the evaluation of the practicability, justice and soundness of the stated precept or principle in actual operation.

An excellent proving-ground exists to test the validity of the complaint that the Supreme Court was prevented from weighing non-legal facts by reason of the metaphysical terms used in the opinion. That proving-ground is the *Coronado* case itself. A reading of the decision discloses that the Supreme Court did the very thing which Cohen says is barred by reason of the Court's transcendental approach to the question at issue. The judges meticulously traced the nature, extent, functions and powers of the United Mine Workers' international union. They showed the centralization of control in the union's president, the unity of the organization and its financial resources leading to the conclusion that "no organized corporation has greater unity of action, and in none is more power centered in the governing executive bodies."<sup>131</sup> Having shown the "institution" and "functions" of the United Mine Workers of America, the opinion frankly admits that at common law unincorporated associations of this type could not be sued as separate entities.<sup>132</sup> But the Supreme Court refused to follow the "bankrupt" concept. Then follows this striking passage:

"But the growth and necessities of these great labor organizations have brought affirmative legal recognition of their existence and usefulness and provisions for their protection, which their members have found necessary. Their right to maintain strikes, when they do not violate law or the rights of others, has been declared. The embezzlement of funds by their officers has been especially denounced as crime. The so-called union label, which is a *quasi* trademark to indicate the origin of manufactured product in union labor, has been protected against pirating and deceptive use by the statutes of most of the States, and in many States authority to sue to enjoin its use has been con-

129. Cohen, at 814. (italics in original text.)

130. *Id.* at 809-820.

131. *United Mine Workers of America v. Coronado Coal Co.*, 259 U. S. 344, 383-385 (1922).

132. *Id.* at 385.

ferred on unions. They have been given distinct and separate representations and the right to appear to represent union interests in statutory arbitrations, and before official labor boards."<sup>133</sup>

After listing the favorable legislation which has been enacted on behalf of labor unions and after stressing the "modern needs" which require a change in procedure applicable to unincorporated associations,<sup>134</sup> the Court states the ethical grounds justifying it in reversing the common law rule governing service upon unincorporated associations:

"It would be unfortunate if an organization with as great power as this International Union has in the raising of large funds and in directing the conduct of four hundred thousand members in carrying on, in a wide territory, industrial controversies and strikes, out of which so much unlawful injury to private rights is possible, could assemble its assets to be used therein free from liability for injuries by torts committed in course of such strikes. To remand persons injured to a suit against each of the 400,000 members to recover damages and to levy on his share of the strike fund, would be to leave them remediless."<sup>135</sup>

Concluding the consideration of the *Coronado* case, two significant points may be noted: (1) The *Coronado* case, offered as a sample of transcendental nonsense, is in fact a decision in which the Supreme Court rejected the rule of the common law that an unincorporated association cannot be sued as a distinct entity.<sup>136</sup> In place of this outmoded formula the Supreme Court set up a new procedural rule (or concept) which established the suability of unincorporated labor unions and the right to seize their strike-funds for unlawful injuries inflicted during the course of an authorized strike. (2) The Supreme Court established this new "concept" following an exhaustive coverage of the "handicaps" which resulted from the former rule, after due consideration of the "functions" which labor unions perform in our social order, and mindful of the "advantages" bestowed on labor unions by legislation and of the "ethical" considerations justifying a departure from the ancient rule of procedure.

In the selection of the *Coronado* case the functional critic has picked, it would seem, a case which stands out not as an instance of dry-as-dust formalism but rather as a pertinent example of the flexibility of traditional law ready and able to adjust the "rules" and "principles" to fit the needs and emergencies of our day and place.

In his exhaustive and unique analysis of the *Tauza*<sup>137</sup> and *Coronado*<sup>138</sup>

133. *Id.* at 385-386.

134. *Id.* at 387.

135. *Id.* at 388-389.

136. WRIGHTINGTON, UNINCORPORATED ASSOCIATIONS (2d ed. 1923) 70.

137. *Tauza v. Susquehanna Coal Co.*, 220 N. Y. 259, 115 N. E. 915 (1917).

138. *United Mine Workers of America v. Coronado Coal Co.*, 259 U. S. 344 (1922).

cases, Cohen discloses his adherence to the "recent cult of the single decision",<sup>139</sup> a cult which stresses the individualization of juristic thought, the emphasis upon facts, functions and purposes, and the abandonment of concepts, rules and principles. In this battle between function and concept, between the single decision and the train of precedents, one pauses to consider the outcome. Functionalism already claims that victory is in its grasp; that classical law is in retreat;<sup>140</sup> that the "'Restatement of the Law' by the American Law Institute is the last long-drawn-out *gasp* of a dying tradition".<sup>141</sup>

It may not be impertinent to set down the contrasted views of Dean Pound, a distinguished critic of realism,<sup>142</sup> as to the permanency of this new cult:

"As to the recent cult of the single decision, I take that to be in jurisprudence what philosophical anarchy is in politics. Indeed, it is like philosophical anarchy or, anarchist individualism, as it might better be called, an outgrowth of the economic realism of the latter part of the nineteenth century. Like the latter, it makes confident pretensions to a peculiar or even exclusive touch with reality."<sup>143</sup>

Then follows this significant prediction violently contradicting the glowing promise of functionalism:

" . . . the cult of the single decision is one of the last *gasps* of the over-individualist thinking of the nineteenth-century Anglo-American jurist."<sup>144</sup>

Whether the contrasted view of Cohen or Pound regarding the vitality of the new cult ultimately prevails, caution should impel the functionalist to postpone the obituary notice of the "transcendental approach" until a remote date in the future; to announce the death of traditional law at the moment might be termed "functional nonsense".

[To be concluded]

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139. Pound, *How Far Are We Attaining a New Measure of Values in Twentieth-Century Juristic Thought?* (1936) 42 W. VA. L. Q. 81, 89.

140. See p. 285, *supra*.

141. Cohen, at 833.

142. Pound, *The Call for a Realist Jurisprudence* (1931) 44 HARV. L. REV. 697; Pound, *Law and the Science of Law in Recent Theories* (1934) 7 AM. L. SCHOOL REV. 1057.

143. Pound, *supra* note 139, at 89.

144. *Id.* at 90.

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## CONTRIBUTORS TO THIS ISSUE

I. MAURICE WORMSER, A.B., 1906, LL.B., 1909, Columbia University; LL.D., 1924, Fordham University. Professor of Law, Fordham University, School of Law, 1913 to date. Author of *DISREGARD OF THE CORPORATE FICTION AND ALLIED CORPORATION PROBLEMS* (1927); *FRANKENSTEIN INCORPORATED* (1931); *CASES ON THE LAW OF MORTGAGES* (2d ed. 1936); and other books. Contributor to law reviews.

FREDERICK J. DE SLOOVÈRE, A.B., 1910, LL.B., 1912, S.J.D., 1917, Harvard University. Professor of Law, New York University School of Law. Author of *CASES ON THE INTERPRETATION OF STATUTES* (1931); *The Local-Law Theory and Its Implications in the Conflict of Laws* (1928) 41 HARV. L. REV. 421; *Preliminary Questions in Statutory Interpretation* (1932) 9 N. Y. U. L. Q. REV. 407; *Rudiments of Statutory Interpretation* (1932) 10 N. Y. U. L. Q. REV. 1; and other legal articles.

GEORGE W. BACON, A.B., 1915, Bowdoin College; LL.B., 1921, Fordham University, School of Law. Lecturer in Law, 1925-1927, Associate Professor of Law, 1927 to date. Staff contributor to publications of Alexander Hamilton Institute, 1920-1925. Contributed chapters on law of commodity exchanges to *BAER AND WOODRUFF, COMMODITY EXCHANGES* (3d ed. 1935); contributed chapters on corporate reorganization to *CORNELL, BUSINESS ORGANIZATION* (1930); contributor to legal periodicals.

WALTER B. KENNEDY, A.B., 1906, A.M., 1912, Holy Cross College; LL.B., 1909, Harvard University. Member of the New York, Massachusetts and District of Columbia Bars. Professor of Law, Fordham University, School of Law. Author of *CASES ON PERSONAL PROPERTY* (1932); *Garnishment of Intangible Debts in New York* (1926) 35 YALE L. J. 689; *The New Deal in the Law* (1934) 68 U. S. L. REV. 533, (1934) 2 U. S. L. WEEK 41, and other articles in law reviews.