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CORRESPONDENCE

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TO THE EDITOR OF THE FORDHAM LAW REVIEW:

I ask the courtesy of your columns to decline all responsibility for six ideas which Professor Kennedy erroneously ascribes to me, in his engaging and scholarly article in your last issue, "Functional Nonsense and the Transcendental Approach," to wit:

(1) *That a corporation is not because it cannot be seen.* When Professor Kennedy, in the course of criticizing my comments on *Tauza v. Susquehanna Coal Co.*, writes, "To say that a corporation *is not* because it cannot be *seen* is a somewhat startling generalization to parade before his readers consistently and without yawning gaps in the reasoning,"¹ the unwary reader would naturally suppose that I had in fact said that a corporation *is not* because it cannot be *seen*. In fact I never did say that or anything like it. I suppose that Professor Kennedy infers that I deny the existence of corporations from the fact that I actually do deny that a corporation is a material thing located in space.² Such an inference, however, betrays the error of materialism. For my part, I believe that many things are real which are not material and do not have spatial location. The differences of opinion, for instance, between Professor Kennedy and myself are none the less real because they do not commute between Washington and the Bronx. It would be quite stupid of me to deny the reality of corporations that I have helped to organize, on the ground that none of them is visible, and if Professor Kennedy will reread the article he criticizes he will find that it contains no such statement.

I do not know whether Professor Kennedy believes that angels, differences of opinion, time, and the Kingdom of Heaven have spatial location. Apparently he does believe that corporations have spatial location. Only in the light of that belief can one follow the tortuous argument³ that because I disagree with the statement in *Tauza v. Susquehanna Coal Co.* that corporations travel from state to state, I am logically compelled to agree with the view advanced in *McQueen v. Middletown Mfg. Co.* that corporations always stay at home within the boundaries of the chartering state. Now Professor Kennedy happens to be wrong in believing that I disapprove of the result reached in the *Tauza* case, *i.e.*, the imposition of liability upon a foreign corporation, and wrong again in believing that I agree with the argument in the *McQueen* case. Likewise he is wrong in thinking that the approach of the two contrasted cases is different and that the difference represents the issue between orthodoxy and functionalism, when as a matter of fact both cases alike assume that a corporation can be sued only where it is "present," which is precisely the assumption that functional analysis shows to be scientifically false and pragmatically useless. But these errors are less important than the fallacious character of Professor Kennedy's reasoning. Even a very casual acquaintance with the scholastic logic which Professor Kennedy zealously defends against imagined attack⁴ should convince one that the

1. Kennedy, *Functional Nonsense and the Transcendental Approach* (1936) 5 FORDHAM L. REV. 272, 289. (Hereafter cited: Kennedy).

2. Cohen, *Transcendental Nonsense and the Functional Approach* (1935) 35 COL. L. REV. 809, 811. (Hereafter cited: Cohen).

3. Kennedy, at 294-295.

4. *Id.*, at 272, n. 3.

contradictory of the proposition, *Corporations are metaphysical monsters that travel from state to state*, is not, *Corporations are metaphysical monsters that stay at home*, and that one who denies the first proposition is not logically compelled to affirm the second. Why should one assume that a corporation is a metaphysical monster of either variety? In actual practice I have never found it necessary or useful to assume that a corporation is anything more than a bundle of legal relationships between actual human beings. The bundle of relationships exists, in a very real sense, but it is not a human being. It does not travel from state to state, and when eminent judges say that it does, they do reverence to a language habit that helps to obscure important issues of social policy.

(2) *That Justices Cardozo and Brandeis are poor judges and that Charles Evans Hughes was a bad lawyer because they did not exploit the functional approach in their opinions and briefs.* According to my gentle critic, I issue a "broadsheet against Cardozo and the New York Court of Appeals," condemning "bitterly" their actions in the *Tauza* case, I "attack" Mr. Hughes' brief in the *Coronado* case, and I "berate" and "scold" Mr. Hughes himself, all because these eminent jurists do not use "functional" words in their briefs and judicial opinions.⁵ The reader of Professor Kennedy's article who turns to the piece that is attacked will be surprised to find that nowhere do I attack, condemn, berate, or scold these men for their use of legal nonsense (*i.e.*, legal discourse that has no verifiable meaning), but that, on the contrary, I say:

Of course, it would be captious to criticize courts for delivering their opinions in the language of transcendental nonsense Certain words and phrases are useful for the purpose of releasing pent-up emotions, or putting babies to sleep, or inducing certain emotions and attitudes in a political or a judicial audience. The law is not a science but a special activity, and myths may impress the imagination and memory where more exact discourse would leave minds cold.⁶

As for Professor Kennedy's assertion that my analysis of the argument on corporate existence in the *Coronado* case pretends to explain "(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,"⁷ it is enough to state categorically that both parts of Professor Kennedy's statement are false. There is no suggestion in the article criticized as to how the Supreme Court should have decided the case, and no suggestion as to how the brief should have been written. Professor Kennedy's defense of the Supreme Court's decision, and his attempt to excuse Mr. Hughes' defeat on the point of corporate capacity and praise his victory on certain other points, are entirely beside the point, which is whether or not any decision in the case could be derived from the "fact" that a union is or is not a corporation.

Finally, the bitter attack which Professor Kennedy accuses me of making upon certain judges is as much a product of his imagination as my alleged attempt to instruct Mr. Hughes in the art of successful brief-writing. I have always thought that a serious appraisal of any system of thought should deal at first hand with its most intelligent advocates. For this reason I attempted to analyze certain aspects of legal reasoning evidenced in the opinions of "the most intelligent judges in America."⁸ Unreal questions and meaningless statements in the opinions of lesser men might be ascribed to personal stupidity. In the opinions of Justice Cardozo and others of

5. *Id.*, at 287, 292, 297.

6. Cohen, at 812.

7. Kennedy, at 296.

8. Cohen, at 812.

his stature, these are evidences of weakness in the system of legal reasoning by which our judges are bound.

(3) *That I am an adherent of the cult of the single decision.* The only evidence adduced by Professor Kennedy for his charge of "adherence to the 'recent cult of the single decision'"⁹ is the fact that I devoted three pages in the article which is criticized to an allegedly "exhaustive" consideration of two particular cases. By the same token, Professor Kennedy convicts himself, since he spends thirteen pages on these two cases. As a matter of fact, the opinion expressed in my article with regard to the significance of single decisions is precisely the opposite of that ascribed to be by Professor Kennedy. What I actually wrote was:

Law is not a mass of unrelated decisions nor a product of judicial bellyaches. . . .

Only by probing behind the decision to the forces which it reflects, or projecting beyond the decision the lines of its force upon the future, do we come to an understanding of the meaning of the decision itself. . . .

Except in the context of such predictions the announcement of a judicial decision is only a noise. If reasonably certain predictions of this sort could never be made, as Jerome Frank at times seems to say, then all legal decisions would be simply noises, and no better grist for science than the magical phrases of transcendental jurisprudence.¹⁰

(4) *That jurisprudence is nonsense.* By means of a phrase quoted out of context, Professor Kennedy ascribes to me the view that jurisprudence is nonsense.¹¹ Unfortunately Professor Kennedy fails to observe that the characterization of jurisprudence which he quotes from my article was preceded, in that article, by the following words:

If the foregoing instances of legal reasoning are typical, we may summarize the basic assumptions of traditional legal theory in the following terms:¹²

I cannot understand why Professor Kennedy should impute to me views which I characterize as "the basic assumptions of traditional legal theory," unless he honestly believes that I adhere to those assumptions. And in that event I cannot understand why he should attack me as a "functionalist".

(5) *That scholastic logic is a bad thing.* Professor Kennedy's claim that "Scholastic logic is the *bête noire* of the functionalists' attack"¹³ is not borne out by the facts. When the realist Oliphant demonstrates with rigorous logic the inconsistencies in certain theories held by the traditionalist Williston, it is Williston who cries "Scholastic logic" as a term of reproach, and Oliphant who affirms his respect for scholastic logic as nothing more than rigorous inference.¹⁴ My own respect for scholastic logic is evidenced by certain humble attempts to contribute to its modern development.¹⁵

(6) *That rules, concepts, and principles should be eliminated from the law.* This curious opinion is ascribed to me on the ground that I have been discovered, on numerous occasions, in the company of men who express such sentiments. I shall

9. Kennedy, at 299-300.

10. Cohen, at 843-844.

11. Kennedy, at 272, n. 1.

12. Cohen, at 820-821.

13. Kennedy, at 272 n. 3.

14. Williston, *The Effect of One Void Promise in a Bilateral Agreement* (1925) 25 COL. L. REV. 857, 866; Oliphant, *Mutuality of Obligation in Bilateral Contracts at Law* (1928) 28 COL. L. REV. 997, n. 2.

15. Cohen, *What is a Question?* (1929) 39 MONIST 350; ETHICAL SYSTEMS AND LEGAL IDEALS (1933) 37-40, 244-245.

let my co-defendants speak for themselves. My own opinion, expressed in the article that Professor Kennedy attacks and elsewhere,¹⁶ is that correct definition of legal concepts, rules, and principles in terms of verifiable facts and verifiable legal consequences is the chief object of legal study, and that the most important original contributions to positive legal science in the recent past (and probably in the immediate future) are those of "youthful"¹⁷ realists like Holmes, Brooks Adams, Hohfeld, Cook, Oliphant, Hale, and Llewellyn, through whose work we may come to a clearer understanding of such legal concepts as "duty," "value," "contract," and "corporation," and of the rules and principles constructed with such concepts.

With this expression of dissent from the opinions which Professor Kennedy ascribes to me, I should conclude; but I cannot help expressing a measure of agreement with his positive argument. As I understand that argument, it is threefold: (1) that the functional approach is inadequate; (2) that it is silly; and (3) that the courts have been using it all along, without saying so.¹⁸ On the first point, the article criticized expresses my agreement in its "caveats against the notion that the functional approach will solve all the problems of law."¹⁹ On the second point I agree only in thinking that what is silly in some functionalist writings is a certain phobia towards "principles" and "concepts," a phobia which can be eliminated without damage to the functional approach as a permanent tool of legal research. On the third point I have contended that what covert and unavowed use the courts have made, in the past, of the functional approach has been less satisfactory than it might have been because while judges (like law professors) have sometimes based their legal opinions upon social conditions, they have never established a reliable technique for observing these conditions and have endeavored to protect their social opinions from criticism by clothing them in the protective camouflage of transcendental nonsense.

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16. Cohen, at 827-829, 835-842; *ETHICAL SYSTEMS AND LEGAL IDEALS* (1933) 235-249.

17. Kennedy, at 284.

18. Note in particular Professor Kennedy's attempt to prove that the functional approach is used in *St. Clair v. Cox* (Kennedy, at 293) and in the *Coronado Case* (*id.* at 297-299).

19. Cohen, at 829-830.

