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More Functional Nonsense—A Reply to Felix S. Cohen

Cover Page Footnote

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MORE FUNCTIONAL NONSENSE—A REPLY TO FELIX S. COHEN

WALTER B. KENNEDY†

Once upon a time there lived a dear, dear lady. She was born many, many centuries ago and lived happily with her children until some naughty men came to live near the edge of the forest. The naughty men frightened the children and told them that the lovely lady was going to die. The story about to be unfolded will tell you all about the dear lady, her children, her house and the naughty men.

OUR LADY THE COMMON LAW

THESE are trying times for those who pay court to "Our Lady the Common Law" and picture her as a militant figure, possessing vigor and longevity, with a genius and capacity for adoption and absorption of change and custom, albeit somewhat tardily.¹ Her admirers believe with the faith of the true lover that her long reign did not just happen and that her antiquity somehow gives evidence of her ability to survive the perils of the present, as well as proof that her constitution is organically sound, even though she is not immune from the ailments of human-kind. It is not pleasant to be advised by the internes and orderlies of the Hospital of Functionalism that not only is the dear Lady of the Common Law no longer young, charming and vivacious, but, sad to report, that she is suffering from legal astigmatism and hardening of the juristic arteries; that "the last long-drawn-out gasp of a dying tradition"² is already echoing from the operating-room and that the Lady will soon be but a memory of yesteryears.

Realizing the danger of the patient's condition and the impermanence of worldly existence, the admirers of Our Lady of the Law anxiously ask for a consultation with the leading legal diagnosticians and juridical doctors in the despairing hope that their wide skill and experience, coupled with their intimate knowledge of the Lady's past illnesses, may be of some aid in this critical moment. The curt retort is made that such venerable "doctors" as Williston, Wigmore and Beale³ have been dismissed from the staff, that their methods of treating the elderly Lady of the Law have been outmoded, and that outside specialists are in charge of the case—which is at best a hopeless one.

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The italics throughout this paper, for the most part, have been inserted by the present writer.

1. POLLOCK, *THE GENIUS OF THE COMMON LAW* (1912).
2. Cohen, *Transcendental Nonsense and the Functional Approach* (1935) 35 COL. L. REV. 809, 833.
3. *Ibid.*

Not only is the Lady of the Common Law in dire distress, but her dwelling place is sadly in need of repair and reformation. With that sweet complacency of the lawyer-class, long accustomed to ruthless criticism, the elder generation has been standing by while juvenile jurists have been playing havoc with the old homestead of the law and breaking up juristic toys fabricated by their parents-in-the-law. Their seniors have hoped that the flare of flaming youth would subside under the mellowing influences of age and experience and that the sophomoric smash-everything-in-sight playfulness would be relegated to the attic along with other boyhood pranks. Even the classics were invoked to stay the destructive fingers of youth:

"The youth, when Nature and Art attract him, thinks that with a vigorous effort he can soon penetrate into the innermost sanctuary; the man, after long wanderings, finds himself in the outer court."⁴

But alas! The policy of watchful waiting has been a failure. Of late the bedlam has increased and junior jurisprudence has been loudly declaiming against the inheritance of the common law, its logic, mysticism and verbalism.⁵ The irksome restraints and prohibitions, imposed by the five, seven or "nine old men"⁶ of our appellate courts fumbling around among "precedents," "cases" and "authorities" of the ox-cart age, must be implemented by televisioned, electronic, radio-controlled devices which will permit the controversies of mankind to be settled with slot machine accuracy and speed. What to do about this uprising is a matter of grave doubt and debate. Some argue for a conspiracy of silence on the ground that radical reformers seeking to undermine the old tradition are still groping around in the shadows of the sub-cellar and have not yet seen the light of day. Others prescribe a trip to the juristic woodshed and the application of a verbal spanking in the hope that the shock might quell the rebellion. A compromise course between these contrasted policies of silence and of the application of force may be preferable. Why not consider some of the more fantastic proposals of the problem-children of our generation? Perhaps, seeing the error of their ways, the prodigal sons of functionalism and realism may return to the old mansion of the law. If so, all will be forgiven. More than that, we can assure them a reasonable degree of freedom within the household of the law, a fair opportunity to experiment and even to alter the existing legal structure. Our main worry at the moment is that the reformers will insist upon pulling down the rose covered cottage of the common

4. Von Goethe, *Introduction to the Propylaen*, 39 HARVARD CLASSICS 264.

5. Kennedy, *Functional Nonsense and the Transcendental Approach* (1936) 5 FORDHAM L. REV. 272.

6. PEARSON AND ALLEN, *NINE OLD MEN* (1936).

law and offering us a "blueprint" of modernistic design in its place. While conceding the advantages of modernizing the old homestead by installing a "sunken" living-room, the fear subsists that the "lowering process" will extend to the entire legal edifice.

The leaders of functional thought have set down very clearly some of the institutions and agencies which are destined to bring about the New Order in the law. One thing has been made crystal-clear: The lawyer is deemed to be incapable of cleaning his own house; associate counsel from without the gates are to be employed; a new technique has been devised with processes and methods wholly divorced from concept-ridden transcendentalism. Great reliance is placed on the utility and benefits to be derived from such positive sciences as economics or psychology.⁷ We are confidently informed that "every major legal problem will soon be worked over in terms of the psychology of today."⁸ Again, it is stated that "fundamental postulates and methods which underlie experimental physical science are capable of application in the field of juristic science."⁹

In a recent article, I attempted to reproduce and to comment upon certain of these extreme proposals to reform the law. The reproduction disclosed a determined drive to revolutionize the legal order, a sustained assault upon the citadels of the common law, an amazing assertion that outstanding legal scholars are definitely outmoded,¹⁰ an ouster of the ivy-covered concepts of the "gay nineties,"¹¹ a debunking of the rules and principles,¹² a violent attack against the horse-and-buggy era of jurisprudence and a warm welcome to the "eight cylinder social machine" ready to go places under the direction of functional engineers and realist reformers.

A REPLY TO FELIX S. COHEN

Following the publication of my paper, Felix S. Cohen wrote a reply letter in the November issue of the *FORDHAM LAW REVIEW*.¹³ In his letter Mr. Cohen takes me to task for certain statements which I made regarding his article, "Transcendental Nonsense and the Functional

7. Cohen, *supra* note 2, at 821: "Jurisprudence, then, as an autonomous system of legal concepts, rules, and arguments, must be independent both of ethics and of *such positive sciences as economics or psychology.*" (Italics inserted.)

8. ROBINSON, *LAW AND LAWYERS* (1936) 50. For a criticism of Robinson, see Goodrich, *Institute Bards and Yale Reviewers* (1936) 84 *U. OF PA. L. REV.* 449, 451; see also Arnold, *Institute Priests and Yale Observers* (1936) 84 *U. OF PA. L. REV.* 811.

9. Beutel, *Some Implications of Experimental Jurisprudence* (1934) 48 *HARV. L. REV.* 169, 172.

10. Kennedy, *supra* note 5, at 285.

11. *Id.* at 275.

12. *Id.* at 283.

13. Cohen, *Correspondence* (1936) 5 *FORDHAM L. REV.* 548.

Approach."¹⁴ "Six ideas," he charges, I erroneously ascribe to him—all of which he definitely repudiates. Were a verbal sparring-match between Mr. Cohen and myself alone at stake, our differences of opinion and interpretation might be allowed to smother and die, "a happy ending"—I suspect, many of our readers might exclaim—to the entire discussion about Nonsense, Functional, Transcendental or Plain, in which we are now immersed. However, in view of the fact that my censor invented the suggestive title, *Transcendental* Nonsense, and ingeniously applied it to describe the "heaven" of legal concepts which houses the senseless, legal thinking of our courts, I may be permitted the privilege of a reply-brief in defense of the thesis that, functionalism is at least a joint-tenant in the same House of Nonsense; and, is betraying evidences of meriting the sole right of survivorship.

Before beginning the analysis of Mr. Cohen's letter, let us get rid of the personal equation at once. I gathered the impression that my objector was slightly vexed by the statements of his "gentle critic"¹⁵ and by his lively "imagination."¹⁶ If so, I am sorry. True, I was not the "gentle critic" in dealing with his brand of functionalism, but Mr. Cohen's article¹⁷ could *hardly* be characterized as a bed-time lullaby in its farewell to dear, old jurisprudence and some of its most distinguished followers. Yet I liked his freshness of approach, his scholarship and his courage.

I am sure that liberal legal scholars—who are having such fun with the five, seven or "nine old men"¹⁸ of the appellate courts of the law, their "conceptual gymnastics" and their blindness to "reliable technique"—will concede to the Old Order the *same* privilege of an indulging in an occasional flash of humor, however forced and stale it may be, in defense of the "dying" tradition! There is ample precedent¹⁹ (which, of course, the conceptualist *must* have) for an occasional bit of playfulness. Moreover, the whole controversy between the conservatives and the progressives in the law is at best dreadfully dry and dismal. To the modernists must go the credit for lifting legal literature out of the dry-as-dust doldrums and adding a new "punch" which has enhanced the reader-interest. A sense of humor, which oftentimes pervades the writings of the functionalists, is also helpful in the consideration of

14. Cohen, *Transcendental Nonsense and the Functional Approach* (1935) 35 COL. L. REV. 809.

15. Cohen, *supra* note 13, at 549.

16. *Ibid.*

17. Note 14, *supra*.

18. Note 6, *supra*.

19. If precedent is asked for a touch of humor to soften the ponderous paragraphs of jurisprudence, Cardozo concedes that a modicum of mirth is permissible. CARDOZO, *LAW AND LITERATURE* (1931) 26-30. See Rodell, *Goodbye to Law Reviews* (1936) 23 VA. L. REV. 38.

some of their proposals; it acts as a soothing sedative in the endeavor to detect the *prudence* in their brand of jurisprudence.

In this spirit of professional camaraderie (and not too seriously) I should like to discuss the reply-letter of Felix S. Cohen. I repeat that I reopen the involved issues solely because I believe that the errors in his position, both in his original article and in his reply, are typical of the more advanced thinkers of the school of juristic thought to which he adheres. I further believe that these errors, if widely adopted in the law, would be harmful and a discussion may be of some benefit to the legal profession.

It has been my contention that functional jurisprudence, despite its alleged devotion to facts, figures, charts, statistical curves and tape measures is more empty, airy, elusive and impractical than the legal concepts, principles, precedents and rules which have been the targets for the functional sharpshooters; that there is a lot of "nonsense" bearing the stamp of science which is being peddled about by the traders in the fact-approach;²⁰ that this "reliable technique"²¹ never gets close enough to legal problems to be of any value; that when it does "approach" it walks around the given problem, offers a few generalizations and then departs.²²

My attention was directed to Mr. Cohen's paper,²³ because it discussed cases, actual cases, and criticised them in terms of functionalism. He also attempted to show how the functionalists (or some of them) would have dealt with these controversies. Due commendation was paid to him for discussing *cases*²⁴ rather than the drug store as an institution or the home life of Nebraska farmers.²⁵ To me it seemed that his specific treatment offered an ideal "proving ground" to test out the comparative values of the "old" and the "new" ways of handling legal problems. His wide knowledge of law and the social sciences made it evident that functionalism was in the hands of competent counsel.

Let us now turn to the "six ideas" which, it is charged, I erroneously ascribed to Felix S. Cohen in his paper.

To "See" or Not to "See"?

(1). The first idea for which he declines "all responsibility" and which I "erroneously ascribed" to him is: "*that a corporation is not*

20. Kennedy, *supra* note 5, at 274-281.

21. Cohen, *supra* note 13, at 551.

22. For examples of this tendency among functional writers, see Cohen, *supra* note 14, at 810, 813, 817.

23. Note 14, *supra*.

24. Kennedy, *supra* note 5, at 287.

25. For a humorous estimate of functionalism by law students see (1935) COLUMBIA LAW JUMBLE.

because it cannot be seen."²⁶ He says he "never said that or anything like it." What *did* Mr. Cohen say?

I quote from his article in the *Columbia Law Review*:

"Nobody has *ever seen* a corporation. What right have we to *believe* in corporations if we don't believe in angels?"²⁷

And later, he says:

"Legal concepts (for example, *corporations* or *property rights*) are supernatural entities which do not have a *verifiable existence* except to the *eyes of faith*."^{27a}

A writer, who questions the right to "believe" in "corporations" if we don't believe in "angels," who classifies them as "supernatural entities" which have no "verifiable existence" except to "eyes of faith," cannot be too harsh on the reader who concludes that he means what he says. The difficulty with Mr. Cohen is that he wants to abolish the corporation concept and at the same time to keep it. A difficult task even under the flexible formulas of realistic jurisprudence. Compare the above quotation with his recent letter. In his letter he *now* concedes that the corporation which had no "verifiable existence" *is* a "reality."²⁸ That which *was* a "supernatural entity" is *now* a "bundle of legal relations."²⁹ The corporation (which his article in the *Columbia Law Review* contended had no "verifiable existence" except to the "eyes of faith") can *now* be "seen" by the *eyes* of the *faithful* functionalist, for it would be "stupid" of Mr. Cohen, as he frankly concedes,³⁰ "to deny the *reality* of corporations" which he helped to organize.

Two points more, in concluding the first "idea": let me recall that his letter did not first reveal his attempt to reject the corporation concept and also to retain it. Attention was directed to the same nimble straddle in his article when he criticized Judge Cardozo for "seeing" a foreign corporation, and yet allowed his "competent legislature" to "see" and to deal with the same foreign corporation.³¹ But the main issue arising out of foreign corporations is completely ignored by Mr. Cohen. That issue is not, whether a corporation can be "seen," or whether it is a "human being," or whether it can "travel" from state to state as mortal men travel. The issue is whether Judge Cardozo and the New York Court of Appeals were guilty of uttering words of nonsense when they

26. Cohen, *supra* note 13, at 548.

27. Cohen, *supra* note 14, at 811. (Italics inserted, in part.)

27a. *Id.* at 821.

28. Cohen, *supra* note 13, at 548.

29. *Id.* at 549.

30. *Id.* at 548.

31. Kennedy, *supra* note 5, at 289-291.

permitted a foreign corporation to be sued in New York.³² I claim that Judge Cardozo was not interested in the manner in which the foreign corporation *arrived* in New York, whether by flight of plane, flight of imagination, or horse and buggy. Our point of emphasis was that the foreign corporation dealt with in the *Tauza* case was doing business in New York and should be subjected to the process of the New York Courts.³³ Instead of dealing with the corporation as a "reality" (as Mr. Cohen *now* does) he centered his attack upon *one single sentence*³⁴ of Judge Cardozo's opinion, and ignored the balance of the opinion. It is submitted that a reading of my worthy opponent's critique of the *Tauza* case leaves the impression that Judge Cardozo was juggling a supernatural entity on the end of his pen, sketching out and "thingifying" a pure abstraction, and utterly ignoring the social, political and practical problems of the given question, namely, the suability of a foreign corporation in New York. The crux of the issue between Mr. Cohen and myself was stated as follows:

"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.* is but a link in the chain of decisions, a chain whose links have been forged and hammered, altered and removed from time to time."³⁵

And again, it was said:

"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 the subject."³⁶

32. *Tauza v. Susquehanna Coal Co.*, 220 N. Y. 259, 115 N. E. 915 (1917); Cohen, *supra* note 14, at 810-811; Kennedy, *supra* note 5, at 286-296.

33. Kennedy, *supra* note 5, at 286-296.

34. The sentence lifted out of Judge Cardozo's opinion was the following: "The essential thing is that the corporation shall have come into the state." Cohen, *supra* note 14, at 811.

What did Judge Cardozo mean when he said that it is essential that the corporation shall have come into the state? Was he really suggesting (or inferring) that a corporation "travelled" about from state to state as mortal men travel? The *real* meaning of the above quoted sentence is not a matter of conjecture. Judge Cardozo said: "Unless a foreign corporation is engaged in business within the state, it is not brought within the state by the presence of its agents. But there is no precise test of the nature or extent of the business that must be done. All that is requisite is that enough be done to enable us to say that the corporation is here" *Tauza v. Susquehanna Coal Co.*, *supra* note 32, at 268. A reading of the complete opinion in the *Tauza* case discloses that the "doing of business," systematically and regularly, is the fact which spells out jurisdiction over the foreign corporation, and it was "the established course of business" which brought it into New York.

35. Kennedy, *supra* note 5, at 292.

36. *Id.* at 294.

Instead of the broader issue raised, Mr. Cohen prefers to debate the question of whether he said that a "*a corporation is not because it cannot be seen.*"

To sum up, our critic of the corporation in his *article* used rather definite language which carried the reasonable inference that the corporation was a "supernatural entity" without "verifiable existence" and visible only "to eyes of faith." In his *letter* he takes a juristic nose-dive from the heaven of legal concepts and concedes that a corporation has "reality" and is a "bundle of legal relationships between *actual human beings.*" His "corporation" has parted company with the "angels" at least, and is now dwelling with "actual human beings." But before the "descent" first set down in his letter, his reader's gaze was directed to the heaven of abstractions, which "nobody has ever seen." I suspect that Mr. Cohen went once too often to the "heaven of legal concepts" for the purpose of fixing the domicile of corporations; now that he is back on solid earth again, all is well.

Functionalism and the Courts

(2). The second "idea" to which Mr. Cohen takes exception is my statement that he was using rather vigorous language in criticising prominent judges and attorneys because of their use of "transcendental nonsense" in their opinions and briefs.³⁷ Nowhere, he contends, does he attack these men for their unreal questions and meaningless statements. On the contrary his alleged attack is a product of his gentle critic's "imagination." Analysis may disclose that his strong criticism of the courts, which he localizes in my "imagination," has a *dual situs* (if I may inject another "unreality" of conceptual thinking). To prove that all is "sweetness and light" in his relations to the transcendental jurists, he quotes from his article as follows:

"Of course, it would be *captious* to criticise 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."³⁸

Somehow the reader of the quotation gathers the faint suspicion that this confession of the utility of "transcendental nonsense" is not wholly complimentary. The admission that such words and phrases are alike useful in the nursery and in the opinions of the courts for the purpose of inducing emotions and attitudes and arousing imagination and memory

37. Cohen, *supra* note 13, at 549.

38. *Ibid.*

seems to be, at best, a luke-warm indorsement of "transcendental nonsense" in judicial utterances.

The passage which follows in his article (which is not quoted in Mr. Cohen's letter) will complete his estimate of the *usefulness* of couching judicial opinions in the language of Bo-Peep and Little Jack Horner:

"Valuable as is the language of transcendental nonsense for many practical legal purposes, it is *entirely useless* when we come to study, describe, predict, and criticise legal phenomena. And although judges and lawyers need not be legal scientists, it is of some *practical* importance that they should recognize that the *traditional language* of argument and opinion *neither explains nor justifies* court decisions."³⁹

While the writer states that "of course, it would be captious to criticise courts for delivering their opinions in the language of transcendental nonsense," it is feared, after reading the additional passage, that he "went and done it!" Is it not permissible for a commentator to conclude that Mr. Cohen was striking at the foundation of judicial decisions when he says that the traditional methods do not justify or explain these decisions and that the customary language used by our courts (the language he terms transcendental nonsense) is entirely useless for purposes of the study, description, prediction or criticism of legal phenomena?

Let the exact issue between Mr. Cohen and myself on this point be repeated. The question is *not* whether he is *right* or *wrong* in his plea for reformation of law. It is much more confined. The query is: *Is Mr. Cohen criticizing the courts and their manner of deciding cases?*

Continuing Mr. Cohen's dissent to my assumption that he was finding fault in material degree with the manner in which our leading jurists are deciding cases, he says that he was merely analyzing certain aspects of legal reasoning in the opinions of "the most intelligent judges in America."⁴⁰ True, he referred to Justices Cardozo and Brandeis as "the most intelligent judges in America,"⁴¹ but I fear that Mr. Cohen was taking that remark "out of context." Let us reproduce the entire passage in which the quotation appears:

"Thus it is that *the most intelligent judges in America* [Justices Cardozo and Brandeis] can deal with a concrete practical problem of procedural law and corporate responsibility *without any appreciation of the economic, social, and ethical issues which it involves.*"⁴²

There are certain statements which are so patently exaggerated that

39. Cohen, *supra* note 14, at 812.

40. Cohen, *supra* note 13, at 549.

41. *Id.* at 549.

42. Cohen, *supra* note 14, at 812.

further comment thereon is a waste of time. I submit that the foregoing quotation accusing Justices Cardozo and Brandeis of deciding a concrete problem of procedural law "without *any appreciation* of the economic, social and ethical issues which it involves," is of that calibre and I further say that the complimentary part of the sentence, quoted out of context in his letter, fades away considerably when the complete sentence is read. I am afraid that we shall have to insist, beyond and outside of my "imagination," that the critic *was* using some pretty strong language anent the manner in which Justices Brandeis and Cardozo handled the cases in question. However Mr. Cohen's letter is *much* milder. He now says:

"In the opinions of Justice Cardozo and others of his stature, these [unreal questions and meaningless statements] are *evidences* of *weakness* in the system of legal reasoning by which our judges are bound."⁴³

Softer in tone, however untrue in substance!

Mr. Cohen also objects⁴⁴ to my statement that he "bitterly" condemned the manner in which Judge Cardozo decided *Tauza v. Susquehanna Coal Company*.⁴⁵ A reading of his article, I think, justifies my remark. For two pages he takes the New York Court of Appeals and Judge Cardozo to task for the manner in which they decided the *Tauza* case.⁴⁶ He points out that "terms of transcendental nonsense" are present in the decision and implies that those who approach a legal problem in these supernatural terms are qualifying "as inmates of Von Jhering's heaven of legal concepts." And if the reader is interested, it might be added, that the "inmates" of the aforesaid heaven, so graphically described by Mr. Cohen,⁴⁷ do not seem to be "jurists" with whom Justice Cardozo and his associates would like to be confined. On rereading the caustic comment about the manner in which the *Tauza* case was decided by Judge Cardozo, I marvel at the temperance of language which I used to describe his criticism.⁴⁸ Mr. Cohen also finds fault with his "gentle critic" because said critic accused him of "attacking" the brief of Mr. Hughes in the *Coronado* case⁴⁹ and "scolding" counsel for not building their brief about functions and handicaps, omitting or minimizing legal principles.⁵⁰ Not to prolong the dispute, the "attack" directed against the brief of Mr. Hughes in the *Coronado* case will be found in the following language:

43. Cohen, *supra* note 13, at 549-550.

44. *Id.* at 549.

45. Note 34, *supra*.

46. Cohen, *supra* note 14, at 810-811.

47. *Id.* at 809.

48. Kennedy, *supra* note 5, at 286-294.

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

50. Cohen, *supra* note 13, at 549. For my treatment of the *Coronado* case see *supra* note 5, at 295-300.

"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."⁵¹

I think that the term, attack, is not too violent a word to apply to Mr. Cohen's analysis. Incidentally, I also stated (and this also he denies⁵²) that Mr. Cohen volunteered a bit of "instruction" to the Supreme Court concerning the "reliable technique" of functionalism, and showed *how* the Supreme Court ought to have phrased an essential part of the decision in the *Coronado* case;⁵³ and finally, I suggested that the aforesaid decision contained plenty of functional material which Mr. Cohen apparently was unable to see because of his concerted attack upon the unfortunate and regrettable use of conceptual language.⁵⁴

Two More "Ideas"

(3). We may combine two of Mr. Cohen's criticisms (numbered 3 and 6⁵⁵) and deal with them under one caption. He objects to the claim that he is an adherent to the cult of the single decision, *i.e.*, the cult which abhors rules and principles and holds fast to facts and functions. This point need not long detain us. Any writer who advocates in one article the abandonment of the concepts of property, corporation, title, due process, contract and police power on the ground that they are bankrupt, supernatural terms⁵⁶ can hardly object when his reader concludes that he is not an ardent advocate of rules or principles. Even a casual reading of his article will disclose that he is very enthusiastic about non-legal materials and their great value in the evaluation of legal problems. He is very insistent that the courts should use this material although he is not clear as to where the material is to be found. Indeed, so critical is he of the lack of fact-finding in the Supreme Court that he concludes that this technique, which was used in the brief of Mr. Brandeis in *Muller v. Oregon*,⁵⁷ found less favor in subsequent cases in

51. Cohen, *supra* note 14, at 813.

52. Cohen, *supra* note 13, at 549

53. Kennedy, *supra* note 5, at 297-298.

54. *Id.* at 298-299.

55. Cohen, *supra* note 13, at 550-551.

56. Cohen, *supra* note 14, at 820, 823, 833.

57. 208 U. S. 412, 419 (1908).

the eyes of the courts.⁵⁸ In proof of the collapse of the fact-finding brief, he points to the lonesome case of *Adkins v. Children's Hospital*,⁵⁹ decided thirteen years ago, and omits completely more recent decisions which have recognized and applied the fact approach.⁶⁰ One may not be criticised for inferring that Mr. Cohen is a devotee of facts, lots of facts, although just what is to be done after their collection is still to be determined.

But Mr. Cohen chides me for spending *thirteen* pages on the discussion of *two* cases (*Tauza* and *Coronado* cases).⁶¹ True, too true. If Mr. Cohen will reread the thirteen pages,⁶² he will find that they were used in the attempt to prove that the "transcendental nonsense" he extracted out of these two cases was in fact a principle which had evolved slowly out of no *single* case, but was the crystallization of years of painful development which, strange to say, included an adequate coverage of the "economic, sociological and ethical questions" which my adversary so frequently stresses.

In a humble way, I was "probing behind the decision to the forces which it reflects"⁶³—a part of his own formula which was strangely lacking in his zeal to pull out of Judge Cardozo's opinion in the *Tauza* case a single sentence⁶⁴ and put it under the microscope of functionalism.

"Nonsense" Defined

(4). We now come to the most startling portion of Mr. Cohen's letter. Herein he criticizes me for ascribing to him the view "*that jurisprudence is nonsense.*"⁶⁵ Regretfully my answer must start with a correction: I stated that Mr. Cohen maintained that "jurisprudence is *transcendental* nonsense." Let the text of my paper speak for itself:

"With increasing frequency and dogmatic assurance we are informed that the law is an agglomeration and admixture of *transcendental* nonsense. . . ."⁶⁶

58. Cohen, *supra* note 14, at 819.

Cf. Frankfurter, *Hours of Labor and Realism in Constitutional Law* (1916) 29 HARV. L. REV. 353, for a coverage of cases after *Muller v. Oregon*, which led Professor Frankfurter to conclude "that the technique of the brief in the *Muller* case has established itself through a series of decisions within the last few years, which have caused not only change in decisions, but the much more vital change in method of approach to constitutional questions." *Id.* at 365.

59. 261 U. S. 525 (1923).

60. *Tax Commissioners v. Jackson*, 283 U. S. 527, 534-536 (1931); *Home Building and Loan Ass'n v. Blaisdell*, 290 U. S. 398, 420-424 (1933); *Nebbia v. New York*, 291 U. S. 502, 530 (1933); *Borden's Farm Products Co. v. Baldwin*, 293 U. S. 194, 210 (1934).

61. Cohen, *supra* note 13, at 550.

62. Kennedy, *supra* note 5, at 287-300.

63. Cohen, *supra* note 13, at 550.

64. Note 34, *supra*.

65. Cohen, *supra* note 13, at 550.

66. Kennedy, *supra* note 5, at 272.

In proof of the text statement, I inserted the following passage from Mr. Cohen's article in the *Columbia Law Review*:

"Jurisprudence, then, as an autonomous system of legal concepts, rules and arguments . . . is a special branch of the science of *transcendental* nonsense."⁶⁷

The additional word "*transcendental*," it will appear, is a rather important one and should not be deleted from the quotation.

After such correction, does Mr. Cohen deny that he said (or that he believes) that "jurisprudence is *transcendental* nonsense"? If so, I offer his title,⁶⁸ his section headings,⁶⁹ his many samples of transcendental nonsense,⁷⁰ his express readiness to provide additional examples of such nonsense,⁷¹ as evidence that a reasonable reader would be warranted in drawing such a sentiment out of his article. Based upon the foregoing, I cannot see why Mr. Cohen should claim that the statement (as corrected above) was made "out of context." It seems to me that such an expression is not only set forth in the quotation from his article, but indeed, pervades his entire paper.

Regarding Scholastic Logic

(5). Finally, Mr. Cohen labors under the impression that I charged him with an attack upon scholastic logic. While a material portion of my article was devoted to his paper there were many parts which were general in character. The statement which I made regarding scholastic logic was as follows: "Scholastic logic is the *bête noire* of the functionalists' attack."⁷² The issue is not what Mr. Cohen thinks about scholastic logic (and he concedes its value⁷³) but whether functionalists generally look with favor or disfavor on this form of reasoning which we call scholastic logic.

That there is opposition to the methods of scholastic logic, of syllogistic reasoning, and of formal logic and that the antagonism issues forth from the ranks of functionalists and realists has been noted by Goodhart,⁷⁴ Harno⁷⁵ and Adler.⁷⁶ If a sample of the view of a functionalist is sought

67. Cohen, *supra* note 14, at 821.

68. *Transcendental Nonsense and the Functional Approach* (1935) 35 COL. L. REV. 809.

69. A few of his section headings are "The Heaven of Legal Concepts" (p. 809); "The Nature of Legal Nonsense" (p. 820); "The Eradication of Meaningless Concepts" (p. 822); and "The Abatement of Meaningless Questions" (p. 823).

70. *Id.* at 809-821.

71. *Id.* at 820.

72. Kennedy, *supra* note 5, at 272, n. 3.

73. Cohen, *supra* note 13, at 550.

74. "The second feature of the realist school is its attack on the use of formal logic in the law. . . ." GOODHART, *Some American Interpretations of Law, MODERN THEORIES OF LAW* (1933) 12.

75. Harno, *Social Planning and Perspective Through Law* (1933) AM. L. SCHOOL REV. 705, 707-710.

76. Adler, *Legal Certainty* (1931) 31 COL. L. REV. 91, 99.

we recommend the reading of Frank, who deplors the "curse of formal (*i.e.* scholastic) logic"⁷⁷ and "the slavish adherence of lawyers to that instrument of reasoning which was worshipped by all men of the Middle Ages—formal logic."⁷⁸ But Mr. Cohen refers to Oliphant as a defender of scholastic logic.⁷⁹ Rather curiously Frank invokes Oliphant as a keen critic of scholastic logic,⁸⁰ and so also Goodhart selects Oliphant as an opponent of formal logic.⁸¹ Without trying to solve the riddle of whether Oliphant is a "true lover" of scholastic logic or not, sufficient appears to make the single authority cited by Mr. Cohen a bit doubtful. In any event, the foregoing is offered in proof that functionalism and scholastic logic are not exactly ideal playmates.

In his conclusion, Mr. Cohen makes a general plea for the establishment of a "reliable technique" in the law to observe social conditions.⁸² I hope, at some other time, to consider this matter of "reliable technique" arising out of, for instance, his mention of "*such positive sciences as economics and psychology*."⁸³ A mere glance at these "positive sciences" and their wrangles, conflicts and confusion makes the lawyer skeptical about any material aid from such sources. If there is one thing that discredits functionalism, more than any other, it is its threatening to sell the law "down the river" to the social scientists in seeming disregard of current happenings in these bordering disciplines.

Signs point to a gradual recognition that fact-finding has failed to bring about the promised certainty, understanding and direction to social policy and program. Modern thought under the guise of the scientific method is at the crossways. In a devastating chapter⁸⁴ Beard has sketched out the breakdown of scientific procedure in economics,⁸⁵ in political science,⁸⁶ and in sociology.⁸⁷ Hutchins continues the survey and ventures the opinion that the reason for the collapse of the scientific approach is traceable to an utter absence of principle, a freedom of thought which promised solution of the knotty problems of life—and instead gave us confusion, chaos and "anarchy."⁸⁸ Yet this program of science, facing revaluation—if not defeat—in its own domains, is offered

77. FRANK, *LAW AND THE MODERN MIND* (1930) 90.

78. *Id.* at 65. See also ch. VII.

79. Cohen, *supra* note 13, at 550.

80. FRANK, *op. cit. supra* note 77, at 65-66.

81. GOODHART, *op. cit. supra* note 74, at 12.

82. Cohen, *supra* note 13, at 551.

83. Cohen, *supra* note 14, at 821.

84. BEARD, *THE OPEN DOOR AT HOME* (1935) ch. 2.

85. *Id.* at 8-10.

86. *Id.* at 11.

87. *Id.* at 12-13.

88. Hutchins, *University Education* (1936) 25, *YALE REVIEW* 665, *passim*.

as the true solution to the vexatious problems of the law. More than that, the extremists are asking for the substitution of the "scientific method" in place of the traditional approach of the Common Law.

Our Lady the Common Law Lives On

Once more we turn back to "Our Lady the Common Law." We note that she gives a slight nod of recognition, a faint smile that promises convalescence, a semblance of a frown directed to the Doctors of Functionalism who predicted her early demise. But the frown clears away as quickly as it formed, for this diagnosis of despair is nothing novel in her long career. With the mellowing influence of years she is ready to welcome her wayward sons back to the fold. Despite the dire predictions that the dear Lady is not long for this world, the story may end—in true fairy-tale fashion—with the prophecy that Our Lady the Common Law will live happily on for many, many years.

*"Whatever its defects, the [common-law] system, deep rooted in our tradition and habit of mind, after serving us for some six centuries, will not be discarded. In the rôle of critics and prophets we will do well to accept that as the probable verdict of history."*⁸⁹

89. Stone, *The Common Law in the United States* (1936) 50 HARV. L. REV. 4, 7.

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