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MORRIS R. COHEN: A PHILOSOPHER'S INFLUENCE ON THE LAW

HARRY N. ROSENFELD*

Morris Raphael Cohen, the American philosopher, has had a major impact on the development of both legal philosophy and the law itself in the United States. This article addresses only a few aspects of Cohen's enormous influence.¹ Since his lifetime (1880-1947), the changes which may be attributed to him have been taken for granted by lawyers, judges, authors, and historians. Cohen frequently has been afforded less credit than is due him, perhaps because he was interested more in propagating ideas than in claiming credit for them, and because he founded no "school," sought neither to encourage disciples nor converts,² nor to indoctrinate his students.³

Four facets of Cohen's seminal influence on the law will be discussed: (1) Philosophy of law—what and why; (2) the revival of legal philosophy in the United States; (3) debunking the fiction that judges declare, but do

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¹ For other writings on the life and philosophy of Morris R. Cohen, see M. R. COHEN, *AMERICAN THOUGHT: A CRITICAL SKETCH*, ch. 6 (F. Cohen ed. 1954) [hereinafter cited as *AMERICAN THOUGHT*]; M. R. COHEN, *FAITH OF A LIBERAL*, chs. 3 & 19 (1946) [hereinafter cited as *FAITH OF A LIBERAL*]; M. R. COHEN, *LAW AND THE SOCIAL ORDER* (1933) [hereinafter cited as *LAW AND THE SOCIAL ORDER*]; M. R. COHEN, *MY PHILOSOPHY OF LAW* (1940), reprinted in *REASON AND LAW* (1961) [hereinafter cited as *MY PHILOSOPHY*]; L. ROSENFELD, *PORTRAIT OF A PHILOSOPHER: MORRIS R. COHEN IN LIFE AND LETTERS*, chs. 6 & 14-16 and pp. 163-68 (1948); Cairns, *The Legal Philosophy of Morris R. Cohen*, 14 *VAND. L. REV.* 239 (1960); Laski, *Morris Cohen's Approach to Legal Philosophy*, 15 *U. CHI. L. REV.* 575 (1948); Reid, *A Philosopher's Perspective: A Study of Morris R. Cohen*, 16 *AM. J. JURIS.* 242 (1971); Note, *Liberalism and Legal Science: THE JURISPRUDENCE OF MORRIS RAPHAEL COHEN*, 52 *NOTRE DAME LAW.* 653 (1977).

² S. Hook, *Prof. Morris R. Cohen as Teacher*, in *A TRIBUTE TO PROF. MORRIS R. COHEN, TEACHER AND PHILOSOPHER* 94 (1928) (privately published).

³ Rosenfield, *Morris R. Cohen, The Teacher*, 18 *J. HIST. IDEAS* 554 & 565 (1957).

not make, the law; and (4) substantive legal themes.

I. PHILOSOPHY OF LAW—WHAT AND WHY

A. *What is Philosophy of Law?*

In a 1912 paper entitled "Jurisprudence as a Philosophic Discipline," Cohen indicated the purpose of a philosophy of law:

[T]o examine anew the problem of social ends in relation to law and morals and the life of civilization The vitality of philosophy cannot continue if it adheres to the ideal of a monastic or sterile celibacy.⁴

Cohen viewed legal philosophy as an integral part of any social-ethical system.⁵ In "My Philosophy of Law," published in 1940, he said that "when we ask . . . how are we to choose the basic premises of our legal system, we enter the realm of ethics as the science of ultimate human ends."⁶ Cohen saw that law, as a part of the entire social process, could ignore neither philosophy, history, nor social science.⁷ While law is "a part of an enforceable social morality,"⁸ it is not identical with morality.⁹

In his 1929 Presidential Address to the Eastern Division of the American Philosophical Association, "Vision and Technique in Philosophy," he described the function of philosophical vision or contemplation as designed "[t]o introduce order and consistency into our vision, to remove pleasant but illusory plausibilities, to contrast various views with their possible alternatives, and to judge critically all pretended proofs in the light of rigorous rules of scientific evidence"¹⁰

Cohen frequently referred to the profound insight¹¹ of Mr. Justice Holmes' observation that "[t]o have doubted one's own first principles is the mark of a civilized man."¹² In this light, Cohen was seen as "a dispassionate critic of established beliefs and institutions who sifts the grain from the chaff."¹³

In an unpublished and undated fragment of his writings, Cohen aptly described the philosophy of law:

The philosophy of law means an effort to carry legal theory far enough to make it conscious of its fundamental assumptions as to the ultimate nature

⁴ MY PHILOSOPHY, *supra* note 1, at 135-36.

⁵ *Id.* at 129.

⁶ *Id.* at 6.

⁷ *Id.* at 165.

⁸ *Id.* at 120.

⁹ *Id.* at 118.

¹⁰ FAITH OF A LIBERAL, *supra* note 1, at 380; 39 PHILOSOPHICAL REV. 127 (1930).

¹¹ See, e.g., M. R. COHEN, THE MEANING OF HUMAN HISTORY 175 (1947).

¹² O. W. HOLMES, *Ideals and Doubts*, in COLLECTED LEGAL PAPERS 307 (1920).

¹³ Nagel, *Morris R. Cohen in Retrospect*, 18 J. HIST. IDEAS 550 (1957).

of its subject matter, its method of reasoning, its ideals, etc. Concretely, it means, first, a critical analysis of the methods of reasoning. Second, an examination of the fundamental ethical or moral assumptions, an attempt to systematize the ultimate values of the law or at least to determine the basis or criterion of judging what is good or better among the various considerations and phases of human life that enter into determination of legal issues. Third, an examination of human nature in its individual and group manifestations. To what extent do rational emotional and volitional [sic] elements enter into and influence our legal system? And finally, the metaphysical issue of nominalism and realism, whether the ideal, the norm, or the realm of validity involves a monistic or dualistic view of existence. What is the character of the formal and material elements which enter into the law?¹⁴

B. *Why is Philosophy of Law Relevant to Law?*

Cohen regarded the philosophy of law as important not only for philosophers, but also for lawyers. Recognizing the inability of philosophy to solve the specific problems of society, he emphasized that an understanding of what is essential to civilization would foster the resolution of those problems.¹⁵ According to his biographer, Cohen stressed the importance of subjecting unacknowledged assumptions and ethical judgments to a rational analysis.¹⁶

Benjamin N. Cardozo, as New York State's Chief Judge, lauded Cohen's efforts to dispel the notion that law should be so segmented from philosophy:

I can think of no one who has battled against that view more steadily and gallantly than this pseudo-lawyer who has enriched our conception of our jurisprudence by the fertilizing waters of a profound and pure philosophy . . . We shall never separate the law from the study of philosophy unless we are ready to condemn it to barrenness and decay.¹⁷

Viewing the philosophy of law as a pragmatic necessity for helping "to harmonize conflicting rules and to decide which of competing tendencies or analogies in the law is to be favored in new cases,"¹⁸ Cohen also believed that jurisprudence made law "a more effective tool in the cause of social justice."¹⁹ It is necessary to turn to his concept of the role of philosophy in general in order to understand how he believed philosophy

¹⁴ This unpublished fragment, and others referred to hereafter, are from Morris R. Cohen's unpublished papers.

¹⁵ MY PHILOSOPHY, *supra* note 1, at 104; Cohen, *On Absolutisms in Legal Thought*, 84 U. PA. L. REV. 715 (1936).

¹⁶ L. ROSENFELD, *supra* note 1, at 192.

¹⁷ S. Hook, *supra* note 2, at 39-40.

¹⁸ LAW AND THE SOCIAL ORDER, *supra* note 1, at 351.

¹⁹ Cohen, *Foreward to The Holmes—Cohen Correspondence*, 9 J. HIST. IDEAS 5 (1948); see L. ROSENFELD, *supra* note 1, at ch. 16.

and law interrelated: "Instead of life, we want the good life . . . Rational philosophy tries to meet this need by defining the good, the true, and the beautiful."²⁰ Law is a means of reaching this goal, since "the conscientious judge must ask which of the various decisions that he can see best suits the interests of the community he serves."²¹

II. THE REVIVAL OF LEGAL PHILOSOPHY IN THE UNITED STATES

In 1912, Cohen introduced and taught the first course given in legal philosophy at the City College of New York.²² In that year, he presented a paper on "Jurisprudence as a Philosophic Discipline," which shocked his fellow-philosophers in much the same way as "The Process of Judicial Legislation," published in 1913, would shock the Bar. The paper lamented that legal philosophy in the United States had been neglected in recent years.²³ He called on the American Philosophical Association to cooperate with the plan of the American Association of Law Schools to translate a series of European works on legal philosophy.²⁴ In 1913, Cohen was the chief initiator of the organization of the Conference on Legal and Social Philosophy; he served as Secretary, and John Dewey served as Chairman. Morris's son, Felix S. Cohen, has noted that "much of the social and philosophic consciousness of modern American jurisprudence derives" from this Conference.²⁵ Its purpose was to make professors of law more cognizant of the assumptions on which their teaching was predicated.²⁶

In the succeeding years, Cohen spread legal philosophy into the nation's philosophy and law curricula by serving as co-editor of *The Modern Legal Philosophy Series*, by writing on legal philosophy in philosophical journals and law reviews, and by teaching and lecturing at numerous law schools.²⁷

Lawyers, in particular, have been most generous in acknowledging Cohen's role in connection with American legal philosophy. Professor Roscoe Pound, Dean of the Harvard Law School, described Cohen as "the

²⁰ M. R. COHEN, *REASON AND NATURE* 457 (1st ed. 1931) [hereinafter cited as *REASON AND NATURE*].

²¹ *LAW AND THE SOCIAL ORDER*, *supra* note 1, at 246.

²² For this course, M. R. Cohen developed *Readings in the Philosophy of Law* (privately published), which was subsequently enlarged into *READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY* (F. S. Cohen & M. R. Cohen eds. 1951).

²³ *MY PHILOSOPHY*, *supra* note 1, at 129.

²⁴ At an early date, M. R. Cohen became a co-editor of this series.

²⁵ Cohen, *Foreward to AMERICAN THOUGHT*, *supra* note 1, at 14. For a discussion of the history of the Conference, see M. R. COHEN, *A DREAMER'S JOURNEY* 178-88 (1949) [hereinafter cited as *DREAMER'S JOURNEY*].

²⁶ *Id.*

²⁷ L. ROSENFELD, *supra* note 1, at 189-90.

pioneer in the revival of philosophy of law in America"²⁸ Not surprisingly, a mutual intellectual attraction, which was to last over 20 years, developed between philosopher Cohen and Supreme Court Justice Oliver Wendell Holmes.²⁹ One explanation for this relationship, it has been suggested, is that Cohen was "the first American philosopher to interest himself in the law, as Holmes was the first American lawyer to interest himself in philosophy."³⁰

The philosopher waged a dual battle—one against the current dogma of the philosophers who wanted no taint of jurisprudence, the other against the lawyers who saw no relevance in philosophy. From the vantage-point of his autobiography, Cohen wrote that his 1912 paper "left the waters of academic philosophy unrippled."³¹ The effect on the Bar, however, may have been more significant: "More and more, following the good example of Holmes, our foremost judges have come to see that their daily work involves fundamental ethical, logical, and other philosophical issues"³²

Cohen's revolutionary suggestion is now so commonplace in both philosophy and law that one sometimes forgets the prophetic courage it took to fly in the face of the orthodoxies of the time. Today, in large part due to Morris R. Cohen, philosophy of law is a recognized and integral aspect of both philosophical and legal disciplines in the United States.

III. DEBUNKING THE FICTION THAT JUDGES DECLARE, BUT DO NOT MAKE, THE LAW

The American Bar Association's annual report of 1907 warned the legal profession to beware of judicial legislation.³³ In 1913, Cohen shocked the legal world with his landmark paper entitled "The Process of Judicial Legislation,"³⁴ in which he attacked the ABA's position as patently incorrect.³⁵ Deriding that view as "the phonograph theory of the judicial function—according to which the judge merely repeats the words that the law has spoken into him . . . ,"³⁶ he struck at the very heart of the then cur-

²⁸ *Id.* at 197.

²⁹ *See id.* at ch. 16; *The Holmes—Cohen Correspondence*, *supra* note 19.

³⁰ Judge Nathan R. Margold, *quoted in* L. ROSENFELD, *supra* note 1, at 186.

³¹ DREAMER'S JOURNEY, *supra* note 26, at 177.

³² READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY at v (F. S. Cohen & M. R. Cohen eds. 1951).

³³ *See* Sharswood, *An Essay on Professional Ethics*, 32 REP. A.B.A. 44-52 (1907).

³⁴ Margold, *Morris R. Cohen as a Teacher of Lawyers and Jurists*, in FREEDOM AND REASON 43 (1946), *quoted in* Cohen, *Foreward to AMERICAN THOUGHT*, *supra* note 1, at 13.

³⁵ *See* LAW AND THE SOCIAL ORDER, *supra* note 1, at 112. This paper was read at the first Conference on Legal and Social Philosophy, held April 26, 1913, and published in 48 AM. L. REV. 161 (1914). LAW AND THE SOCIAL ORDER, *supra* note 1, at 112 n.1.

³⁶ *Id.* at 112.

rent legal and judicial orthodoxy: "[t]he process of judicial legislation is . . . determined consciously or unconsciously by the judge's view of fair play, public policy, and the general nature of things."³⁷

Cohen applied the doctrine of judicial legislation to the development of the common law³⁸ as well as to administrative decisions and judicial interpretation of statutes.³⁹ The traditionally conservative legal establishment was most appalled, however, when Cohen applied this concept to constitutional law:

As a historic fact it cannot be denied that the vast body of constitutional law has been made by our courts in accordance with their sense of justice or public policy. The whole theory of police power is a judicial invention. The term does not occur in our constitution⁴⁰

Cohen argued that in each context, principles of judicial legislation were intertwined with philosophy.⁴¹ He continued to emphasize this point for the rest of his life.⁴² In 1936, reacting to President Franklin D. Roosevelt's "court-packing plan" to increase the size of the Supreme Court in order to defeat constitutional attacks on New Deal legislation,⁴³ Cohen said:

If then, our constitutional law does change from time to time or adapts itself to new conditions, it must be that the process of interpreting the Constitution is really a form of legislation or constitution-making [T]he most important issues that come before the [Supreme] court are not questions of well-settled law but concern issues of public policy about which well-informed and well-disposed people differ⁴⁴

Perhaps Cohen's most devastating attack on the "phonograph theory" appeared in a private letter he wrote in July 1935 to his old Harvard roommate, Felix Frankfurter: "Constitutional law is politics, and not very clean politics at that—for it deals in dishonest intellectual coinage hiding factual issues under false legal covers."⁴⁵

Why was it so important to recognize that judges made, and did not merely declare, the law? Cohen explained that the phonograph theory di-

³⁷ *Id.* at 123.

³⁸ *Id.* at 112.

³⁹ *Id.* at 133-34.

⁴⁰ *Id.* at 138.

⁴¹ *Id.* at 144.

⁴² *See, e.g.,* FAITH OF A LIBERAL, *supra* note 1, at 44; MY PHILOSOPHY, *supra* note 1, at vi-vii, 8 *passim*.

⁴³ *See* C. PRITCHETT, THE ROOSEVELT COURT (1948).

⁴⁴ FAITH OF A LIBERAL, *supra* note 1, at 176 & 180. In the same year he wrote: The pretense that every decision of the Supreme Court follows logically from the Constitution must, therefore, be characterized as a superstition. MY PHILOSOPHY, *supra* note 1, at 74.

⁴⁵ L. ROSENFIELD, *supra* note 1, at 264.

forced the development of the law from the social, political, and economic sciences. A recognition of judicial legislation will underscore the need for science to supply the best available information, he continued.⁴⁶ Moreover, since decisions which interpret the Constitution are statements of policy, all facts relevant to the controversy should be evaluated.

Throughout much of the twentieth century, charges of "judicial legislation" were regarded as intellectual treason within the legal community. The American Bar Association and its stalwarts had set the "proper" tone and doctrine: Courts find, not make, the law. In his autobiography, Morris Cohen wryly commented: "[B]ack in 1912 these ideas were far from the beaten track of philosophers, lawyers, judges and even law teachers."⁴⁷ He also noted that the paper on judicial legislation

created more of a stir than anything I had ever written. Much of the stir was quite unfavorable The deans of some of our largest law schools wrote me that while the contention that judges do have a share in making the law was unanswerable, it was still advisable to keep up the fiction of the phonograph theory to prevent the law from becoming more fluid than it already is⁴⁸

Today, the existence of "judicial legislation" is rarely disputed. The common law is avowedly judge-made.⁴⁹

Even in constitutional law, it is now widely recognized that judicial interpretation is judicial legislation or constitution making or remaking. For example, the Supreme Court's unanimous decision in *Brown v. Board of Education of Topeka*,⁵⁰ which established the doctrine that separate educational facilities for black people are not equal, marked a complete about-face from its position in the decision it overruled, *Plessy v. Ferguson*.⁵¹ This reversal can only be explained by a recognition of judicial legislation. Significantly, the Supreme Court justified its constitutional reinterpretation by the open use of psychological and sociological data.⁵²

Did the Constitution change—or only the judges' interpretation—when the Supreme Court nullified the death penalty in 1972 by reinterpreting a 200-year-old doctrine of American legal history? How else, except by recognizing the fact of judicial legislation, can one explain the Supreme Court's ruling that capital punishment—admittedly "employed

⁴⁶ LAW AND THE SOCIAL ORDER, *supra* note 1, at 380-81 & n.86; *Legal Theories and Social Science*, 25 INT'L J. ETHICS 469 (1915).

⁴⁷ DREAMER'S JOURNEY, *supra* note 26, at 177.

⁴⁸ *Id.* at 179.

⁴⁹ See Cairns, *supra* note 1, at 258-60. See also *Trammel v. United States*, 445 U.S. 40 (1980).

⁵⁰ *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

⁵¹ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

⁵² *Brown v. Board of Educ.*, 347 U.S. at 494.

throughout our history"⁵³—was no longer constitutionally valid?

Comments by the Supreme Court itself are insightful: "It is not uncommon for federal courts to fashion federal law where federal rights are involved The range of judicial inventiveness will be determined by the nature of the problem."⁵⁴ Perhaps one of the most interesting recent examples of the current perception of this issue occurred in 1972 when Justice Rehnquist was asked to recuse himself on the basis of Congressional testimony on a certain subject during his employment with the Department of Justice. Refusing to disqualify himself, he explained: "Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias."⁵⁵ Off-the-bench comments, purportedly made by other Supreme Court Justices, are also of interest: "I'd rather create a precedent than find one;"⁵⁶ and, "We are the Supreme Court and can do what we want."⁵⁷

Although Cohen recognized and asserted that judges *made* law, he was not happy with the pre-Roosevelt Supreme Court. Aware of the inevitability of judicial legislation, Cohen sought to force the courts to examine their assumptions openly.⁵⁸ He consistently objected to judicial review by the Supreme Court⁵⁹ and this penetrating question: "How many times have the people of the United States actually been saved by the judiciary from injustice at the hands of the legislature and executive? And how often have judicial interventions themselves produced injustice?"⁶⁰ Cohen frequently responded to his own inquiries by reciting a litany of Supreme Court decisions which were, in his judgment, deleterious to the public interest.⁶¹ It is fascinating to speculate how he would have reacted to the Warren Court's vigorous protection of individual rights vis-à-vis the Congress and the President and their State counterparts, as compared with the pattern of the Supreme Court in his day.

Cohen believed that law necessarily included general ethical precepts.

⁵³ *Furman v. Georgia*, 408 U.S. 238, 282 (1972) (per curiam) (Brennan, J., concurring).

⁵⁴ *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957).

⁵⁵ *Laird v. Tatum*, 409 U.S. 824, 835 (1972) (mem.) (Rehnquist, J., denying motion to recuse).

⁵⁶ See Wermeil, *The Philosophical Legacy of William O. Douglas*, Wall St. J., Jan. 25, 1980, at 16, col. 3 (quoting William O. Douglas).

⁵⁷ B. WOODWARD & S. ARMSTRONG, *THE BROTHERS, INSIDE THE SUPREME COURT* 61 (1979) (quoting Warren E. Burger); see also Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1269 (1979).

⁵⁸ Laski, *supra* note 1, at 583.

⁵⁹ See, e.g., *Overruling the Supreme Court: A Plea for Abolishing the Judicial Veto*, NEW LEADER, May 30, 1936, at 5.

⁶⁰ Cohen, *On Absolutisms in Law and Morals*, 84 U. PA. L. REV. 681 (1936).

⁶¹ See Konvitz, *Morris Raphael Cohen*, 7 THE ANTIOCH REV. 487, 494 (1947).

Society must recognize that in rendering judicial decisions, judges articulate their own ethical prejudices and sociological precepts under the guise of "the law." It was a curious, but necessary, corollary from his view in this regard that the law had a dynamic character which should be protected: "[N]o one can really understand law apart from law in the making."⁶² Further, "the sense of justice must necessarily exercise an influence in any growing law"⁶³

For years, Cohen was nearly the sole intellectual force in the struggle to dethrone the phonograph theory of law.⁶⁴ Judge Margold assessed the results: "Morris R. Cohen made the phonograph theory of justice intellectually untenable In this change the voice of Morris R. Cohen was the voice of the prophet who first points out that which becomes obvious to all once it has been declared."⁶⁵

IV. SUBSTANTIVE LEGAL THEMES

Thus far, Cohen's influence on the law has been considered in broad, general terms. His principal focus in these areas was not so much with the law in a given field, but rather with rigorous analysis of underlying assumptions and factual underpinnings. His approach was—as it was always in the classroom—to subject all seemingly plausible and "obvious" justifications to a rigorous intellectual critique in the light of all possible alternatives. "[O]ne of the primary rules of the intellectual game is that ideas must submit to the most rigorous criticism and to the test of fact."⁶⁶ Next we consider his philosophy on three areas of substantive law.

A. Property

Cohen thoroughly examined "the nature of property, its justification, and the ultimate meaning of the policies based on it."⁶⁷ He viewed private property as a manifestation of sovereignty, as a form of power, rather than merely as material goods. Inherent in property was "the right to exclude others."⁶⁸ He saw property "as sovereign power compelling service and obedience [D]ominion over things is also *imperium* over our fellow human beings."⁶⁹ In Cohen's view, the role of the law of prop-

⁶² REASON AND NATURE, *supra* note 20, at 375 n.21.

⁶³ *Id.* at 406.

⁶⁴ See Konvitz, *supra* note 61, at 494 n.70.

⁶⁵ Margold, *Morris R. Cohen as a Teacher of Lawyers and Jurists*, in FREEDOM AND REASON 40 (1951).

⁶⁶ REASON AND NATURE, *supra* note 20, at 400.

⁶⁷ Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 11 (1927), reprinted in LAW AND SOCIAL ORDER, *supra* note 1, at 45.

⁶⁸ Cohen, *supra* note 67, at 12.

⁶⁹ *Id.* at 12-13.

erty is not limited to the protection of possessions. Rather, it determines who will receive the future social product.

Thus . . . the owners of all revenue-producing property are in fact granted by the law certain powers to tax the future social product. When to this power of taxation there is added the power to command the services of large numbers of people who are not economically independent, we have the essence of what historically has constituted political sovereignty.⁷⁰

This concept of property has a direct and pragmatic social meaning for Cohen; it is not merely a gambit in a philosophic chess game: "[I]t is necessary to apply to the law of property all those considerations of social ethics and enlightened public policy which ought to be brought to the discussion of any just form of government."⁷¹ The application of this concept of property to the real world has important political and social implications, since property owners must subordinate their interests to those of society as a whole.⁷² "[I]t would be as absurd to argue that the distribution of property must never be modified by law as it would be to argue that the distribution of political power must never be changed."⁷³ Private property, according to Cohen, was not sacrosanct from government interference or retrenchment. The issue was not abolition of private property, "but the determination of the precise lines along which private enterprise must be given free scope and where it must be restricted in the interests of the common good."⁷⁴ For Cohen, there are no absolute or inalienable property rights.

Because plural sovereignty exists (divided between the sovereignty exercised by groups of property owners and the sovereignty exercised by the state), the final "deciding word is given to the State as the organ of the general community."⁷⁵ Since "the large property owner is . . . a wielder of power over the lives of his fellow citizens, the law should not hesitate to develop a doctrine as to his positive duties in the public interest."⁷⁶ Cohen, therefore, supported the legality of minimum wage laws, protection of labor union memberships, the confiscation of slaves from their owners, and other restrictions on property. Furthermore, Cohen perceived the question of whether the tasks which society must perform should be left to private enterprise or to the government as properly a

⁷⁰ *Id.* at 13.

⁷¹ *Id.* at 14.

⁷² *Id.* at 19.

⁷³ *Id.* at 16.

⁷⁴ *Id.* at 21.

⁷⁵ REASON AND NATURE, *supra* note 1, at 297; *Communal Ghosts and Other Perils in Social Philosophy*, 16 J. PHILOSOPHY 673 (1918).

⁷⁶ Cohen, *supra* note 67, at 26.

question of which is most efficient.⁷⁷ Thus, the governmental orbit encompassed such things as the construction of bridges and roads, universal education, control of city congestion, restrictions on advertising, and the protection of the public against products deleterious to the public health. For Cohen, "there must be restrictions on the use of property not only in the interests of other property owners but also in the interests of health, safety, religion, morals, and the general welfare of the whole community."⁷⁸

B. *Contracts*

Cohen rejected all theories of contract as involving nothing but private relations between the contracting parties. Instead, he viewed the law of contracts as a branch of public law which involved aspects of sovereignty:

The law of contract, then, through judges, sheriffs, or marshals puts the sovereign power of the state at the disposal of one party to be exercised over the other party. It thus grants a limited sovereignty to the former From this point of view the law of contract may be viewed as a subsidiary branch of public law, as a body of rules according to which the sovereign power of the state shall be exercised as between the parties to a more or less private transaction.⁷⁹

This concept of contract had special meaning when first published in 1933, during the Depression, when novel ideas developed as to the power of the state to control its participation in the enforcement of contracts. Cohen argued that the freedom to contract necessarily had to be subject to restrictions, since the state's power to compel enforcement could be invoked by a contracting party.⁸⁰ He noted developments whereby "the terms of the agreement are more and more being fixed by law,"⁸¹ pointing to the child labor laws and contracts of insurance, among others. Cohen even analogized contract law "as having a function somewhat parallel to that of the criminal law," referring to limitations on the enforcement of gambling contracts and agreements in restraint of trade.⁸² He opposed the current ideology of unrestrained individualism and uninhibited freedom of contract which necessarily ignores society's objectives.

The core of Cohen's contractual theory as a form of public law is that

⁷⁷ *Id.* at 27.

⁷⁸ *Id.* at 21-22.

⁷⁹ Cohen, *The Basis of Contract*, 46 HARV. L. REV. 586 (1933), reprinted in LAW AND SOCIAL ORDER, *supra* note 1, at 101.

⁸⁰ Cohen, *supra* note 79, at 587.

⁸¹ LAW AND SOCIAL ORDER, *supra* note 1, at 70.

⁸² Cohen, *supra* note 79, at 589.

"at no time does a community completely abdicate its right to limit and regulate the effect of private agreements, a right that it must exercise to safeguard what it regards as the interest of all its members."⁸³ "[T]he notion that in enforcing contracts the state is only giving effect to the will of the parties rests upon an utterly untenable theory as to what the enforcement of contracts involves."⁸⁴

C. *Criminal Law*

Cohen viewed the various theories of crime, criminality, and punishment in terms of ethics.⁸⁵ An analysis of criminal law raises ethical considerations—such as equality and conflicting interest—which are present in any legal analysis. As in other areas of the law, criminal rules must be susceptible to change so that criminal law will reflect the prevailing mores of the community.

The law of property and contract and, criminal law were thought by Cohen to be elements in one large category of public law. In each area, specifications have been designated which determiné when public force will actively punish those who violate society's proscriptions. In his thoughts on property, contract, and criminal law, Cohen applied his basic approach in philosophical thought to law: factual investigation, uncovering basic assumptions, critical analysis of alternatives in terms of their social, political and public consequences, and the application of his own philosophic insight. Several factors stand out clearly. First, Cohen was interested in concrete subjects in the law. Second, he was interested in the practical effects of the law in politics, economics, and society. For example, if both property and contract are forms of public law, the customary distinction between public and private law is contradicted. His formulation points the way to effective public control of both property and contract. Likewise, in recognizing the role of ethical and moral considerations in criminal law, he emphasizes the need for that law's harmony with changing public concepts and views as to what should and should not be punished. As stated in "My Philosophy of Law":

The law is not a homeless wandering ghost. It is a phase of human life located in time and space No discussion of the philosophy of law can properly omit reference to the ultimate aims of law and the extent to which it can influence human fate⁸⁶

For Cohen, law was not a closed system impervious to injustice.

⁸³ LAW AND SOCIAL ORDER, *supra* note 1, at 74.

⁸⁴ *Id.* at 79.

⁸⁵ Cohen, *Moral Aspects of the Criminal Law*, 49 YALE L.J. 987 (1940).

⁸⁶ MY PHILOSOPHY, *supra* note 1, at 4 & 8.

CONCLUSION

What was Morris R. Cohen's influence on American law? As far back as 1927, Felix Frankfurter said: "There isn't a thinking lawyer in this country, there isn't a judge who reflects on his task, who hasn't been . . . directly or indirectly impregnated with the contributions of Morris R. Cohen to jurisprudence."⁸⁷

Even before Cohen's books on legal philosophy were published, Benjamin Cardozo recognized that Cohen's "power will be felt in every law school in the land."⁸⁸ Milton R. Konvitz wrote: "Cohen's influence on judges and teachers of law can hardly be exaggerated. The weight of his legal philosophy was felt in high courts, including the United States Supreme Court."⁸⁹ In 1960, John Schmidhauser wrote: "The liberal legal tradition . . . derives much of its contemporary vitality from the pragmatism of James and Dewey and the contributions of jurists such as Holmes and Cardozo and of philosophers such as Morris Raphael Cohen."⁹⁰ In 1971, Herbert G. Reid said that "the influence of Morris Cohen continues to be felt in twentieth century American law."⁹¹ And in 1977, Edward B. Myers described "how constructive interpretation of Cohen's legal science constitutes a framework within which a usable liberal jurisprudence can be developed."⁹²

Cohen's influence on American law continues. His concept of the philosophy of law and his view of law as a social science⁹³ have become part of the core of modern legal teaching and judicial decisionmaking. Since the philosophy of law is now recognized by lawyers and philosophers as a necessary component of the law, since it is accepted that judges make and do not merely declare law, since it is now a general principle that the law is a social science that must recognize the social, political, and economic needs and moral aspirations of the people, the prior situation has become somewhat difficult to recall.

⁸⁷ S. Hook, *supra* note 2, at 32.

⁸⁸ *Id.* at 38.

⁸⁹ Cohen, *The Life and Mind of Morris R. Cohen*, in *FREEDOM AND REASON* 17 (1951).

⁹⁰ J. SCHMIDHAUSER, *THE SUPREME COURT: ITS POLITICS, PERSONALITIES AND PROCEDURES* 144 (1960).

⁹¹ Reid, *supra* note 1, at 242.

⁹² Note, *Liberalism and Legal Science: The Jurisprudence of Morris Raphael Cohen*, 52 *NOTRE DAME LAW.* 653 (1977).

⁹³ *LAW AND THE SOCIAL ORDER*, *supra* note 1, at 37.

Perhaps Cohen's biographer best perceived his special significance in American life. She wrote that his most comprehensive contribution was in serving as "intellectual animator of America."⁶⁴ Not the least of his animating influences was to bring about a continuing acceptance by American lawyers and philosophers of their indispensable mutual interdependency.

⁶⁴ L. ROSENFELD, *supra* note 1, at 431.