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The Legal Conscience

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BOOK REVIEWS

The Legal Conscience: Selected Papers of FELIX S. COHEN. Edited by Lucy Kramer Cohen. New Haven, Conn.: Yale University Press, 1960. Pp. 505, xvii. \$12.50.

"The day is short and the task is great. It is not incumbent upon thee to complete the whole work, but neither art thou free to neglect it." Felix S. Cohen quoted those words, as solace, at the conclusion of the preface to *Readings in Jurisprudence and Legal Philosophy*,¹ the work edited by him and his father, Morris R. Cohen. They appear again in the editor's note written by his widow, Lucy Kramer Cohen, at the beginning of *The Legal Conscience*. And ten pages later, in Dean Rostow's "Introduction," they appear once more. Yet, with this constant running thread, Felix Cohen's contribution to the law is characterized by Justice Felix Frankfurter as "the fullness of a lifetime. [Cohen died at the age of 46] into which he crowded twenty-five years of thought and deed."²

Felix Cohen crowded three quite dissimilar legal careers into those twenty-five years. He was Assistant Solicitor of the Department of the Interior from 1933 until 1948. Both during and after this period, he taught at the City College of New York and at Yale Law School. He engaged in private practice from 1948 until his death in 1953, and, for part of that time, he was General Counsel of the Association on American Indian Affairs. *The Legal Conscience* represents but a small selection from his writings on those areas of legal life in which he lived: government and democracy, the problems of the American Indian,³ and legal philosophy and jurisprudence.

From "What is a Question?" to "The Vocabulary of Prejudice," this collection presents material which *ought* to concern all lawyers (and others, too). It is accurate to observe, however, that it does not, and that, therefore, this remarkable book will not be read by many lawyers. This is no reason for not reviewing the book. In fact, it is a very good reason for doing so by adapting a method for which credit must go to another.⁴ Mr. Cohen reminds the reader of ideas more comfortably forgotten; he provides insight into beginnings, and he utters at timely times value judgments which are timeless.

Consider these examples, each drawn from one of the book's three sections. Of "Modern Ethics and the Law," Cohen wrote: "The term 'ethics,' to many lawyers and judges, carries the flavor of a trade code. . . . Ethics, shunned alike by lawyers and judges, looks today for friends among the students and teachers of law. But they are, in the main, too busy to be disturbed. . . . There is no room for ethics in the oldest and most advanced science, physics. Why should those who seek to build legal science

¹New York, N. Y.: Prentice-Hall, Inc., 1951.

²Foreword, page xiv.

³Justice Frankfurter writes that Cohen's *Handbook of Federal Indian Law* established him "as the unrivaled authority within that field." Page xiii.

⁴Niccolo Tucci, reviewing Mary McCarthy's *On the Contrary*, in an issue of *Saturday Review* which appeared late in 1961, the exact date not being printed on the page torn by this reviewer from the magazine.

concern themselves with ethics? Science feeds upon facts. And what have facts to do with moral values?"⁵

In "Americanizing the White Man," a part of Book II (The Indian's Quest for Justice), Felix Cohen argued convincingly that "it is out of a rich Indian democratic tradition that the distinctive political ideals of American life emerged." And then, in a short paragraph marked by insight and scholarship, and an exceptional grasp of the essence of this nation, he wrote:

Even the sole American contribution to the vocabulary of democratic government turns out to be a word borrowed from an Indian language. When Andrew Jackson popularized a word that his Choctaw neighbors always used in their councils to signify agreement with another speaker, the aristocrats he threw out of office, always grasping at a chance to ridicule backwoods illiteracy, accused him of abbreviating and misspelling "All Corect." But O.K. (or okeh, in Choctaw) does not mean "all correct"; it means that we have reached a point where practical agreement is possible, however far from perfection it may lie. And that is an idea which is central in the American idea of government.⁶

Near the end of the volume, in Book III (The Philosophy of American Democracy), there appears a heretofore unpublished address delivered to the Yale Philosophy Club in 1951, six months after the beginning of the Korean conflict. Felix Cohen entitled his address "The Democratic Faith," and he began it with this question: "Can democracy survive?" He closed it with these words, as timely now as then:

What is true of men generally is certainly true of men in their conduct of international affairs. Those who recognize and put to use the strength of democracy will be denounced by 'practical' cynics as 'do-gooders' and altruists. Yet only such a passion can displace the futilities of the premature pallbearers of democracy. Only such a passion can save our democracy at once from the menace of communist armies and from danger, closer at hand, that in fighting communism with communist weapons, we may meanly lose the last best hope on earth.⁷

In a Foreword to another book, recently reissued, *Mr. Justice Holmes and the Supreme Court*,⁸ Professor Paul Freund of Harvard Law School wrote that Holmes was always concerned with "the recurring contrapuntal themes of government under law: innovation and continuity, popular will and imposed restraints, practical reason and categorical imperatives." The same concerns are evident in Felix Cohen's selected papers. One is tempted to illustrate the counterpoint by reference to titles, but resists temptation that the reader may compose his own.

One more reference: Thomas D. Phelps is President of the national American Law Students Association, which publishes *The Student Lawyer*

⁵Pages 17, 19. The first section of the collection, Book I, is entitled "Logic, Law, and Ethics."

⁶Page 317.

⁷Page 428.

⁸Cambridge, Mass.: The Bellknap Press of Harvard University Press, 1961.

Journal. The President's message in the February, 1962 issue begins with this sentence: "Law students are steeped in provincialism." And it continues: "The intellectual vacuum into which law students wander is no mere temporary mental restraint—it becomes a permanent stockade from which few later manage to escape."⁹ Felix Cohen's writing offers a way over the wall. Yet one need not leave the vicinage, because Cohen writes about the law.

In one of his book reviews, he wrote that "a reviewer is generally expected to list the errors in a book, in order to prove that he has read it."¹⁰ This review does not fulfill that expectation;¹¹ each reader is free to compile his own list. However, even those most prone to assign error will find it difficult to deny that "students of law and lovers of freedom owe a great debt"¹² to Felix R. Cohen for his creation.

GARDNER CROMWELL*

Antitrust Laws, et al. v. Unit Operation of Oil or Gas Pools. ROBERT E. HARDWICKE, Dallas, Texas: Society of Petroleum Engineers of AIME, 1961. Pp. 352. \$8.00.

This is a reprint of a book published in 1948, but unavailable since 1951, with a supplement keyed to the original text that covers developments to April 1, 1961. The title, origin of which is somewhat of a mystery even to the author, is not illustrative of the contents. The stated purpose of the volume is to analyze the effect of antitrust laws on the unit operation of oil or gas pools. This has been achieved but in the process peripheral data are thoroughly treated.

American law recognizes the concept of ownership of oil and gas as they occur in their native state in the earth. There is also recognition of the principle that a single reservoir of oil and gas may be owned in severalty by a number of diverse individuals or legal entitles. As a rule of convenience, American courts have adopted the Rule of Capture which predicates ownership of such natural resources on the reduction to possession at the surface of the earth. In turn, this stimulates a race among the diverse owners in a reservoir to produce as much as possible, as quickly as possible, and thus avoid loss to an adjoining owner who is engaged in production from the same reservoir. As a consequence, there is overproduction and consequent waste—through evaporation, fire, inferior use, or non-use. Various methods have been utilized to correct this "bacchanalia." One of them is the coordination of production by the diverse owners, through a single operator, called the unit operator. Thus the entire reservoir, or a large part thereof, is produced, *i.e.*, operated, as though it was owned by a

⁹Page 3.

¹⁰Page 445, reviewing Thurman Arnold's *The Folklore of Capitalism*.

¹¹Thus proving, it would seem, that the reviewer did not read the book.

¹²Page 478. Felix Cohen's review of Alexander H. Pekelis' *Law and Social Action: Selected Essays*.

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single person. These unit operations may arise through voluntary agreement of the parties, or through governmental insistence applicable to owners of minority interests. In the latter case, governmental intervention is pursuant to specific statutory authorization, and is referred to as a compulsory unit operation. This joinder of the several owners in cooperative operations raises questions of the applicability of the antitrust laws, hence this book by Mr. Hardwicke.

The history of overproduction and waste, organized efforts to solve the problem, and the evolution of the concept of unit operations are developed chronologically. In the words of the author:

Diligent research . . . has failed to disclose a single suit by a state or the Federal Government in which the claim was or is made that an agreement of operators for the purpose of carrying on unit operations to increase ultimate recovery, and having that effect, violated antitrust laws.¹

Diligent search and inquiry have also failed to disclose a single suit by a state or the Federal Government in which the claim was or is made that an agreement by the owners of individual interests or undivided interests in oil and gas lands or leases to develop the property constitutes a violation of antitrust laws.

Clearly, agreements for carrying on unit operations to prevent waste (or increase ultimate recovery), and agreements for joint development of jointly owned oil and gas lands or leases, are not made to effect restraints on trade or trade competition, or for the purpose of monopolizing trade or commerce, or to control markets and prices by suppressing competition or the like. The real purpose of such agreements is to protect property rights, or, stated differently, to adjust conflicting rights and duties with respect to oil and gas lands, thereby avoiding the waste and other evils that would otherwise be inevitable. Antitrust laws were not designed to apply to such agreements and activities.²

The importance of this conclusion, and of this book are evident from the number of unit plans that have been effected. Although accurate statistics are not available, the records of the Corporation Commission of Oklahoma show that 206 units had been approved by that agency between July 1947 and September 1960. The Railroad Commission of Texas approved 160 voluntary unit operation projects between 1949 and 1959.³ The Interstate Oil Compact Commission in 1960 listed 779 unit operation projects by states and declared that 398 projects had been formed on federal lands. With the depletion of older oil fields in Montana and the inauguration of secondary recovery operations to restore or stimulate further recovery of oil, the concept of unit operations will be of interest and of concern to Montana landowners and their attorneys. This book is a unique contribution to the law of oil and gas by a practitioner who has been recognized for many years as an outstanding scholar in this area of the law.





ROBERT E. SULLIVAN*

¹At page 332.

²At page 335.

³ABA, *CONSERVATION OF OIL AND GAS, A LEGAL HISTORY 1948-1958*, 228 (1960) (Robert E. Sullivan, editor).

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