

1980

## Book Review

Roger K. Newman

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### Recommended Citation

Roger K. Newman, *Book Review*, 18 Duq. L. Rev. 387 (1980).

Available at: <https://dsc.duq.edu/dlr/vol18/iss2/13>

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# Book Review

MORRIS R. COHEN AND THE SCIENTIFIC IDEAL. By *David A. Hollinger*. Cambridge, Massachusetts: Massachusetts Institute of Technology Press, 1975. Pp. xvi, 262. \$16.50.

When Morris R. Cohen died, shortly after World War II, he was widely acclaimed a public sage. As a teacher and philosopher, he made a deep, lasting impact on a broad generation during his lifetime. Yet, today, Cohen is dated and largely unread—a figure more of historical curiosity than of contemporary significance. His biographer admirably performs one of history's prime functions by pointing out one of the dangers of true pedagogical success: "[l]ike so many influential teachers, Cohen was consumed by the history he had helped to create."<sup>1</sup>

This well-wrought biography tells us why. In a series of penetrating chapters, David Hollinger guides the reader through Cohen's diverse interests—logic and metaphysics, philosophy of science and history, and jurisprudence among them—to which he, ever the rationalist, employed the scientific method to arrive at the root of a problem.<sup>2</sup> The reader leaves these pages with a firm knowledge of the contours of Cohen's mind and an acute awareness of the limits of his thought. Hollinger weaves biographical detail into the larger, illuminating tapestry of intellectual history. One never loses sight of the man but always sees him in perspective (Cohen touched many nerve centers of American intellectual life from 1910 to 1940), with the background history skillfully presented and Cohen's impact on it deftly defined. This is intellectual biography at its finest.<sup>3</sup>

This review will discuss the basics of Cohen's philosophy, consider its relationship to legal theory, and evaluate Cohen's position in history. An exchange of letters between Judge Jerome Frank and Edmond Cahn, brought about by Cahn's review of one of Cohen's books, is presented in the Appendix; these letters complement Hollinger's critically admirable treatment. A thinker whose destructive tendencies

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1. D. HOLLINGER, MORRIS R. COHEN AND THE SCIENTIFIC IDEAL 245-46 (1975) [hereinafter cited as HOLLINGER].

2. *Id.* at 242-43, 249-50, 253-56.

3. One of the very few factual errors in the book is Hollinger's statement that Morris Cohen's son, Felix, was "Solicitor General for the United States Department of the Interior." *Id.* at 197 n.66. Felix Cohen was Assistant and then Associate Solicitor of the Interior Department, and served as Chairman of its Board of Appeals. See *Felix S. Cohen*, 9 RUTGERS L. REV. 345, 348 (1954).

hindered his constructive potential, Cohen evoked in Frank and Cahn a feeling of respect mixed with sadness.<sup>4</sup>

### I. COHEN'S PHILOSOPHY

Cohen's career was built largely on a series of negative peaks. The thrust of his teaching and writing was toward "cleaning out the Augean stables": let thinkers pursue any desired path but *first clean the rubbish away*. Encouraging disciples was not as important as training minds to stay on the logical track.<sup>5</sup> Cohen's continual questioning stimulated some to intense thinking and also killed nascent ideas in others. But the renowned philosopher never built a philosophical system. One searches Cohen's voluminous writings in vain for a glimpse or even a hint of the future; he leaves no blueprint for tomorrow's architect. His effect was "to quicken thought but to stop the imagination."<sup>6</sup> Tenacious in his beliefs and carping in his criticism, he was devoted to "the critical spirit of free inquiry which is inseparable from the love of truth that makes men free."<sup>7</sup>

His philosophical stances reflected this duality. He was best known for his "principle of polarity," which is "a maxim of intellectual search."<sup>8</sup> All factors must be considered; opposites require each other to be understood. The result of searching in such a manner may well be that one becomes sated without becoming nourished. "*Everything is connected in definite ways with definite other things, so that its full nature is not revealed except by its position and relations within a system.*"<sup>9</sup> This was true only because of the "revolt against formalism" of his predecessors. Although Cohen had an early opportunity to build on this foundation, as did John Dewey (whom he once nominated as

4. Justice Holmes wrote to Harold Laski: "You speak of Morris Cohen as an outstanding legal theorist. As you know I regard him with affection and reverence, but I hardly am aware of anything that I have felt to be a great contribution to legal theory." Letter from Oliver Wendell Holmes to Harold Laski (Oct. 19, 1928), *reprinted in 2 HOLMES-LASKI LETTERS* 1103 (M. Howe ed. 1953).

5. "And I for one," wrote Max Lerner, "can never escape the suspicion that Professor Cohen is more concerned to annihilate those who deny scope to logic than he is to attack those who claim too pervasive a scope for private property." M. LERNER, *Morris R. Cohen: Law and the Life of Reason*, in *IDEAS ARE WEAPONS* 221 (1939) [hereinafter cited as LERNER].

6. HOLLINGER, *supra* note 1, at 94 n.50 (quoting the confession of one of Cohen's most eminent students, Paul Weiss). See WEISS, *Persons, Places, and Things*, in *INSTITUTE FOR RELIGIOUS AND SOCIAL STUDIES, MOMENTS OF PERSONAL DISCOVERY* 52 (1952).

7. HOLLINGER, *supra* note 1, at 83 (quoting M. COHEN, *A DREAMER'S JOURNEY* 146 (1949)).

8. M. COHEN, *A PREFACE TO LOGIC* 74 (1944) [hereinafter cited as *PREFACE TO LOGIC*].

9. M. COHEN, *REASON AND NATURE* 150 (1931) [hereinafter cited as *REASON AND NATURE*].

"national philosopher"),<sup>10</sup> he chose not to do so. "In every context he was preeminently a critic, concerned always to clarify the implications of technical work for the most general of moral and intellectual questions."<sup>11</sup>

Cohen recoiled from the pragmatism of William James, who Cohen felt had "never gotten beyond [John Stuart] Mill"<sup>12</sup> and who was to become his "lifelong exemplar of passionate, wrong-headed irrationalism."<sup>13</sup> James typified the "insurgence against reason."<sup>14</sup> Process philosophy, the natural outgrowth of James' radical empiricism, was alien to the system of formal logic Cohen was attempting to construct. To Cohen the whole idea of process smacked too much of substituting experience, practice and experiment for reality as the basic unit of analysis. Process, "fully thought out," notes one of its leading theorists, is "creationism;"<sup>15</sup> things are not what they are,<sup>16</sup> but what they are becoming. Process opposes the idea of nature, in which truth is an "objective" foundation. Truth is now prospective, not retrospective. If Cohen had prevailed, he would have drained philosophy of many of its vital life juices.

Cohen was always searching for secure relativist terrain moderate enough to be protected from extreme, absolute, idealist attacks.<sup>17</sup> But, like natural law, "[t]he Absolute"—that all-embracing and overruling

10. "If there could be such an office as that of national philosopher," Cohen wrote of Dewey, "no one else could be properly mentioned for it." M. COHEN, *AMERICAN THOUGHT: A CRITICAL SKETCH* 290 (1954).

11. HOLLINGER, *supra* note 1, at 84. "The integrating principle" in Cohen's philosophy "is one of criticism," noted Lerner in a not entirely unadmiring review:

No scalpel is defter than his laying bare a half-truth or an overstated truth, or in probing the intellectual insolvency of some brave array of argument. It is because of this approach that much of his best work proceeds chiefly by a critical review of the existing theories and "a sifting of the valid from the invalid elements."

Such a procedure . . . becomes in Professor Cohen's hands an instrument of affirmative statement.

LERNER, *supra* note 5, at 219. But Lerner nowise instances Cohen's "investing [criticism] with a creative capacity," *id.* at 220, because of the very real difficulty of finding examples.

12. HOLLINGER, *supra* note 1, at 53 (quoting M. COHEN, *A DREAMER'S JOURNEY* 168 (1946)).

13. *Id.* at 53.

14. *Id.* at 139 (citing Cohen, *Insurgence Against Reason*, 22 *J. PHILOSOPHY* 113 (1925)).

15. Hartshorne, *Introduction to PHILOSOPHERS OF PROCESS* xi (D. Browning ed. 1965).

16. "If you deny that things are what they are, you annihilate all reason, sanity, and discourse." Cohen, *The Rivals and Substitutes for Reason*, 22 *J. PHILOSOPHY* 189 (1925), reprinted in REASON AND NATURE, *supra* note 9, at 44. See HOLLINGER, *supra* note 1, at 99. Interestingly, Hartshorne's was "[a]mong the very few attempts made during the 1950's and 1960's to build from Cohen's metaphysical formulations." *Id.* at 133 n.72 (citing C. HARTSHORNE, *REALITY AS A SOCIAL PROCESS* 86 (1960)).

17. HOLLINGER, *supra* note 1, at 56-57.

spiritual being"<sup>18</sup>—"Damn great Empires! including that of the Absolute," said James<sup>19</sup>—can never be overthrown completely, for at least a modicum of it is necessary for a *functional*, balanced philosophical system. Cohen's yearning for a centrist philosophical position was an extension of his personal needs. Only a happy home life, recognition of his professional achievements and many warm friendships overcame his early, sorrowful years in Russia, constant frail health and a haunting fear of death. He did not exhibit that lust for life which so marked his roommate and lifelong friend, Felix Frankfurter. He ignored contemporaries such as Alexander Meiklejohn and Max Otto who represented a native, "homespun" strain of idealism. Meiklejohn's was Platonic and Kantian in origin<sup>20</sup> and Otto's directly Jamesian;<sup>21</sup> both were rooted in personal responsibility, with an especial insistence and urgency for action and reform. Cohen found lasting comfort in reason—"a pitiful candle in the dark and boundless sea of being and

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18. R. PERRY, *THE THOUGHT AND CHARACTER OF WILLIAM JAMES* 163 (1948). See also *id.* at 265-66, 333.

19. See *id.* at 248.

20. For a discussion of Meiklejohn's philosophy see Frantz, *Meiklejohn: Freedom v. Liberty*, 33 GUILD PRAC. 72 (1975); *Homage to Alexander Meiklejohn, Champion of the First Amendment*, 9 RIGHTS No. 1-2 (1965). See generally Bixler, *Alexander Meiklejohn: The Making of the Amherst Mind*, 47 NEW ENGLAND Q. 179 (1974). See also Frank, *Hugo L. Black: Free Speech and the Declaration of Independence*, 1977 U. ILL. L.F. 577, 578-79. A biography of Meiklejohn would do much to elucidate the nature of freedom, democracy and education in twentieth-century America.

21. See M. OTTO, *SCIENCE AND THE MORAL LIFE: SELECTED WRITINGS OF MAX C. OTTO* (1949); *THE CLEAVAGE IN OUR CULTURE: STUDIES IN SCIENTIFIC HUMANISM IN HONOR OF MAX OTTO* (F. Burkhardt ed. 1952); OTTO, *The Distinctive Philosophy of William James* in *WILLIAM JAMES: THE MAN AND THE THINKER* (1942).

That both Meiklejohn and Otto can be categorized as "idealists" only shows the tyranny of labels. Meiklejohn was more of an experimentalist than Otto thought. And Otto had his eye more on the goal to be achieved than he realized, or perhaps liked to admit. Brushing aside the chicken or the egg question on approaches and results, this supports John Dewey's observation about the "interpenetration of ends and means." See J. DEWEY, *THE THEORY OF VALUATION* (1939). See also Summers, *Professor Fuller's Jurisprudence and America's Dominant Philosophy of Law*, 92 HARV. L. REV. 433, 437-39, 448 n.89 (1978). Even so, Otto's 1945 criticism of Meiklejohn does show a real, although exaggerated, difference of view: it also reflects the divergent sources of their idealism. Otto advocated that "the technique of creative bargaining," which he viewed as "a social fine art," was an "attempt to adjudicate differences instead of leaving their supporters to fight it out." Otto, *Professional Philosophy and the Public*, in *AMERICAN EDUCATION* 159 (1945). Despite the principle's being "easy to comprehend, many people and certain philosophers seem unable to get beyond a superficial understanding of it." *Id.* at 160. Otto, who was Meiklejohn's colleague at the University of Wisconsin from 1924 to 1938, claimed that Meiklejohn seemed to be "irrevocably convinced . . . that when two sides meet to adjust a difference each side must come with 'the passionate determination that nothing alien shall be allowed to interfere with the object of its devotion.'" *Id.* at 160-61 (quoting A. MEIKLEJOHN, *PHILOSOPHY* 13 (1926)).

woe to those who wilfully try to put it out"<sup>22</sup>—and in his "version of the scientific ideal" by which "the method of reason achieves continuity and balance by clinging 'tenaciously' to old ideas while seeking new ones that will integrate the bits and pieces of experience yet more tightly into a mathematical system."<sup>23</sup> His entire effort "was devoted to the discovery of the logical suppositions of scientific method."<sup>24</sup>

It was as a legal philosopher applying these precepts that Cohen had perhaps his greatest influence.<sup>25</sup> The comparative insights of relativism and absolutism must be carefully balanced lest the "ship of law . . . be 'wrecked' on either the Scylla of totalitarianism or the Charybdis of anarchy'.<sup>26</sup> This was part of Cohen's "more general struggle for possession of the scientific ideal."<sup>27</sup> In his continual quest for the jurisprudential midpoint he resembled Cardozo. Both searched

22. HOLLINGER, *supra* note 1, at 5-6 (quoting REASON AND NATURE, *supra* note 9, at 165).

23. HOLLINGER, *supra* note 1, at 151-52.

24. Cairns, *The Legal Philosophy of Morris R. Cohen*, 14 VAND. L. REV. 239 (1960) (one of the very few sources about Cohen which Hollinger does not mention in his exhaustive documentation). Cairns "admired [Cohen] without limit," and believed that Cohen was "one of the few great men" that he "ever had the privilege of knowing." Letter from Huntington Cairns to Felix S. Cohen (Feb. 4, 1947) (Box 4, Cairns MSS, Library of Congress). After reading Milton Konvitz's essay about Morris R. Cohen, *see* 7 ANTIOCH REV. 487 (1947), Cairns wrote Konvitz that

[your] little essay on Morris couldn't be better. It is the best account of his work that I have read, and at the same time you managed to convey the flavor of his personality . . . I feel that it is important that his ideas be circulated as widely as possible. Your own little essay is a model of what can be done in that direction.

Letter from Huntington Cairns to Milton R. Konvitz (Feb. 9, 1948) (Box 5, Cairns MSS, Library of Congress). Cairns expanded upon this theme in a later letter to Felix Cohen:

The more I read your father's work—and I may say that scarcely a day goes by that I don't read something by him—the more certain I am of his position as one of the greatest minds we have ever had in America. It may take us several generations to assimilate his thought, but the profundity and wisdom of it I think is every day becoming more apparent. I shall always remember the hours I was privileged to spend with him as among the most fruitful experiences of my life.

Letter from Huntington Cairns to Felix S. Cohen (Jan. 5, 1950) (Box 5, Cairns MSS, Library of Congress).

25. The reasoning of Thurman Arnold can be applied to Cohen's jurisprudence: "Logical strictness can be obtained only at the expense of ignoring matters which properly should be taken into account in the ordinary case." Letter from Thurmon Arnold to Arthur L. Goodhart, (March 12, 1932), *reprinted in* VOLTAIRE AND THE COWBOY: THE LETTERS OF THURMAN ARNOLD 183 (G. Gressley ed. 1977). Among these matters are tradition, custom, ideals (the *ought*), the "unruly horse" of public policy, precedent, and social utility and adaptability.

26. HOLLINGER, *supra* note 1, at 166. *See* Cohen, *Should Legal Thought Abandon Clear Distinctions?*, 36 ILL. L. REV. 239, 241 (1941), *reprinted in* COHEN, REASON AND LAW 171, 178 (1950) [hereinafter cited as *Should Legal Thought Abandon Clear Distinctions?*].

27. HOLLINGER, *supra* note 1, at 167.

for the compromise between "positivism and idealism."<sup>28</sup> The judicial process, said Cardozo, is one "of compromise . . . between paradoxes, between certainty and uncertainty . . ." With its "insistence upon twilight zones in the world of nature and of ideas, and upon the principles of polarity as the mediating force between them," Cohen's philosophy, thought Cardozo, was "a forceful auxiliary" to his own.<sup>29</sup>

Cohen's philosophical universe was not free and open, and in his juridical world judges could not jump from precedent to precedent on a whim to satisfy their fancy in reaching a longed for result. Uniformities exist in law as well as in science, and judges must pay heed to them. "The simple fact is that the desire to do justice is a constant motive but," he stressed, "the sense for juristic consistency or symmetry is another that sometimes outweighs it."<sup>30</sup> Surprisingly, though, he found room for the demons of natural law in his relativist philosophy.<sup>31</sup> But when the extreme rule-skepticism of the legal realists threatened the certainty, continuity and traditional norms of law, Cohen changed focus and readopted his critical mien. Back in his natural habitat, he was devastatingly effective. Reviewing Jerome Frank's blockbusting *Law and the Modern Mind*,<sup>32</sup> he was distressed at his "highly esteemed friend[s]" assault upon the chinks in the legal armor:

Does not Mr. Frank believe that his formula, that the law is a *growing* or changing affair, is the real or absolute truth? Or does he grant that tomorrow it *may* be proved once for all that the law is a fixed and eternally unchanging system? Mr. Frank does not really face the theoretical and practical conditions of this craving for, and assumption of, absolute knowledge, because of his preoccupation with his pet theory that in the legal field this craving is due to a transference of father-authority to the Law personified.<sup>33</sup>

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28. See Cohen, *Positivism and the Limits of Idealism in the Law*, 27 COLUM. L. REV. 237 (1927).

29. B. CARDOZO, *Jurisprudence*, in SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 25 (M. Hall ed. 1947) [hereinafter cited as *Jurisprudence*].

30. M. COHEN, *LAW AND THE SOCIAL ORDER* 124 (1933) [hereinafter cited as *LAW AND THE SOCIAL ORDER*].

31. See HOLLINGER, *supra* note 1, at 171-77.

32. J. FRANK, *LAW AND THE MODERN MIND* (1930) [hereinafter cited as *LAW AND THE MODERN MIND*].

33. *LAW AND THE SOCIAL ORDER*, *supra* note 30, at 160. See HOLLINGER, *supra* note 1, at 189. For the comments that Morris Cohen might have made, see J. Cohen, *An Evening with Three Philosophers*, 14 J. LEG. EDUC. 317, 318-20 (1962). One can imagine the vehemence with which Cohen would have attacked the "individualistic libertarianism" which Lon Fuller, Jerome Frank, and Edmond Cahn vigorously espoused shortly after his death. See Cowan, *A Report on the Status of the Philosophy of Law in the United States*, 50 COLUM. L. REV. 1086, 1093-96 (1950). The rigorous logician would have considered this reemergent idealism (which in its humanitarianism appealed to him) fully as pernicious as

This was despite Frank's holding up as the "completely adult jurist" and mature mind the man Cohen venerated above any other, Justice Oliver Wendell Holmes.<sup>34</sup>

## II. EDMOND CAHN'S CRITIQUE OF COHEN

After Cohen's death, his devoted son, Felix, edited several volumes of his essays. In reviewing one of these, *Reason and Law*,<sup>35</sup> Professor Edmond Cahn noted Cohen's great influence "on two generations of juristic theorists."<sup>36</sup> Cahn was merely reflecting the contemporary belief; but the brightly shining retrospective light of history shows this not to be the case at all. Cohen's main contribution was to indicate the pitfalls in our reasoning and the lapses and loopholes in our logic; his method often substituted for content. Reading Cohen, Cahn observed, one becomes aware that

his exposition is a technique of exposure . . . . Every layer [of a doctrine] is differentiated, then pulled off and held up to the light. The process might be called *peeling* an idea.

. . . . [T]he essential secret of Cohen's success . . . is to find or create an artful and profitable distinction, a distinction that shows the shape and limit of the notion, a distinction that reveals the critical line at which it must yield to the sovereignty of some polar force. The principle of polarity, so firmly attached to Cohen's name, yields consequences to the thinker only as he learns to differentiate what is superficially integral, and to identify more and more of the inexhaustible species under which any construct may be viewed. Treating a notion somewhat like an artichoke, we take off each successive leaf, dip it in the sauce of such acumen as we have, and chew on it a bit; then we cautiously remove the annoying pickles. What have we left? The very heart.<sup>37</sup>

But "differentiation" and "separation" should not be "confused." "The heart, however luscious, remains the heart of an artichoke, unintelligible without reference to the leaves and the prickly refuse."<sup>38</sup>

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the old variety which he and his teachers (with the conspicuous exception of Josiah Royce, see B. KUKLICK, *THE RISE OF AMERICAN PHILOSOPHY* 140-58, 275-90 (1977)) fought so strenuously—and largely successfully—to dethrone. See *Should Legal Thought Abandon Clear Distinctions?*, note 26 *supra* (a critical, yet still slightly favorable, review of Lon Fuller's 1940 work, *The Law in Quest of Itself*). The phrase "individualistic libertarianism" comes from Letter from Horace Kallen to Edmond Cahn (February 22, 1956) (Cahn MSS in private possession).

34. "To have known Holmes was to have had a revelation of the possibilities of . . . human personality." Cohen, *Justice Holmes*, NEW REPUBLIC, April 3, 1935, at 209, reprinted in M. COHEN, *FAITH OF A LIBERAL* 31 (1946).

35. See note 26 *supra*.

36. Cahn, Book Review, 35 CORNELL L. REV. 941 (1950).

37. *Id.* at 941-42.

38. *Id.* at 942.

Cahn sent a copy of the review to his friend, Judge Jerome Frank. Their resulting exchange of letters, which well caught the spirit of Morris Cohen the man and the thinker, is reprinted in the Appendix.<sup>39</sup>

### III. MORRIS COHEN IN HISTORY

The importance of Morris Cohen transcends his scholarly contributions. His dissecting the ideas of his contemporaries eased the burden of the succeeding generation; there was now less ground to plow. And many of that generation were formally or informally students of Cohen. They were "the youth who sat at his feet."<sup>40</sup> Whether they refined, expanded upon or revolted against his views was irrelevant; for he was often the first who "ignited minds that were theoretically inert. He woke us up, all of us."<sup>41</sup>

It was fitting that it was Felix Frankfurter,<sup>42</sup> after whom Cohen named his firstborn, who said this in dedicating the Morris Raphael Cohen Library at City College of New York, their alma mater where Cohen became a legend in his time. Frankfurter and Cohen shared more than a similar background: they exemplified different versions of intellectual life (one basically "gave his life to contemplation"<sup>43</sup> while the other was deeply involved in the "actions and passions" of his time). Both were deft synthesizers who left a vast corpus of writings

39. Cahn also sent a copy of the review to Huntington Cairns, who told him: I think you go right to the heart of Morris' method. It is an acute and graceful piece, and Morris, I feel sure, would have been pleased with it. The point you put your finger on seems to me close to the method of the *Republic*; and I don't know of a better one for our refractory subject matter. . . . Morris was closer to Aristotle than to Plato; at least he cited him oftener. But he learned a great deal from Plato (perhaps through Aristotle) and had a high respect for him.

Letter from Huntington Cairns to Edmond Cahn (July 31, 1950) (Box 5, Cairns MSS, Library of Congress).

40. See A TRIBUTE TO PROFESSOR MORRIS RAPHAEL COHEN, TEACHER AND PHILOSOPHER—PUBLISHED BY "THE YOUTH WHO SAT AT HIS FEET" (M. Grossman ed. 1928).

41. F. FRANKFURTER, OF LAW AND LIFE AND OTHER THINGS THAT MATTER 109 (P. Kurland ed. 1965).

42. After Frankfurter's passionate, sole dissent in *West Virginia State Board of Educ. v. Barnette*, 319 U.S. 624, 646 (1943), upholding the state's power to require school children to salute the flag, Cohen, "living in Washington, partially disabled from a stroke but intellectually alert," asked a former student then clerking at the Supreme Court "to take him on a visit [there]. He wanted to meet [Justice] Hugo Black, he said. He did not want to see Frankfurter." J. LASH, *A Brahmin of the Law*, in FROM THE DIARIES OF FELIX FRANKFURTER 72 (1975). Frankfurter must have known that Cohen came to the Court—the Justice was interested in everything and everyone; indeed, he tried, one way or the other, to run almost all—and the reason for the visit must have hurt him greatly.

43. Letter from Felix Frankfurter to Alvin Johnson (Feb. 1, 1947) (Box 201, Frankfurter MSS, Library of Congress). See L. ROSENFELD, PORTRAIT OF A PHILOSOPHER: MORRIS R. COHEN IN LIFE AND LETTERS 291 (1962).

but whose eclectic brilliance hid their lack of true originality. Both were vigorous adherents of the organicism which transformed American thought after the turn of the century. They were reformers who, in their respective fields, were afraid to go too far too fast for fear of losing stragglers. Both unabashedly revered Holmes. Both were among the first Jews to attain prominent positions in their disciplines and served (Cohen especially) as role models to young Jews wishing to enter their respective professions. In short, Frankfurter and Cohen were intellectual provocateurs whose obstinacy led some and encouragement sparked others to develop their own viewpoints.

Above all, though, Morris Cohen and Felix Frankfurter were teachers. Because they gave so much of themselves in this effort, their students, whose numbers far exceeded those who ever sat in their classrooms, were better equipped to overcome their mentors' limitations, and are among the most prominent architects of our present intellectual discourse. Many of these students arose from the same milieu as did Cohen and Frankfurter. Located as they were at strategic points on America's intellectual map, the two devoted friends complemented the native traditions. Their careers were instrumental in this development, an achievement whose importance can hardly be overestimated. They also prove anew that in history, position is often as crucial as are inspiration and insight.

*Roger K. Newman\**

#### APPENDIX\*\*

#### UNITED STATES COURT OF APPEALS<sup>44</sup> SECOND CIRCUIT

CHAMBERS OF  
JEROME N. FRANK

May 4, 1950

Dear Edmond:

You use Morris Cohen's insights to intensify your own. I confess I like yours better.

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\*B.A., 1970, Hunter College; M.A., 1976, University of Virginia; M.A., 1978, New York University.

\*\*The Appendix presents an exchange of letters between Judge Jerome Frank and Edmond Cahn. In order to clarify some of the references made in these letters, the author of this review has supplemented the text of the letters by adding footnote material where appropriate.

44. Letter from Jerome Frank to Edmond Cahn (May 4, 1950) (Cahn MSS).

Morris, of course, had immense virtues. For instance: I've been reading criminological writings lately; I think his brief essay<sup>45</sup> more penetrating than most of the books on the subject. Nevertheless, something is missing. He tends to discourage the exploration of the psychiatric approach.

When, first I read Morris, and when first I met and talked with him, years ago, I thought I'd come upon a first-rate genius. I think he so regarded himself. *Reason and Nature*<sup>46</sup> was then under way. He told me that, in it, he aimed to become the Spinoza of our era. I think he missed his aim.<sup>47</sup>

Why? Because, I think, often he did not treat ideas as artichokes but as rotten onions. He peeled and peeled until nothing was left but the smell, and not a sweet one. Of course, some ideas deserve that fate. On them he did a useful job. But, too frequently, he mistook an artichoke for a decaying onion.

Perhaps what I mean is that he had in him too little of the poet.<sup>48</sup> So, often, he merely "separated," and failed to recognize that the separated parts are dead but that the whole had a life incapable of precise description.

There was sometimes a sadistic streak in his dissection. Sometimes he pulled the wings off butterflies, partly for the pleasure of destroying them.

I remember a talk in 1931 with a wise old Russian-Jewish engineer, a great bridge-builder, whose background resembled Morris. "Cohen," he said, "has the mind of a keen rabbi. It's a keen mind—but it's too dry. There's no joy in him. He's not juicy." Recently, although in different words, Learned Hand uttered much the same judgment of Morris.

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45. Cohen, *Moral Aspects of the Criminal Law*, 49 YALE L.J. 987 (1940), reprinted in REASON AND NATURE, *supra* note 9, at 15.

46. REASON AND NATURE, note 9 *supra*.

47. Jerome Frank, in a letter to Cohen, called *Reason and Nature* upon publication "the most important [intellectual] event of our times." HOLLINGER, *supra* note 1, at 122. Hollinger states, on the basis of this letter, that Frank was "a devoted, and even a fawning, admirer of Cohen . . ." *Id.* at 85. This characterization is not entirely accurate. A letter congratulating an author on the publication of a book is an occasion naturally calling for praise. And Frank was always lavish, sometimes extravagantly so, in his compliments: An author was not just "brilliant," but unusually so: one was typically "learned," if not "sagacious." In addition, Frank's letter immediately preceded nearly a year of strenuous bouting correspondentially with Cohen. Frank, though, was never "a fawning . . . admirer" of anyone. He had his heroes—chiefly Holmes and Hand, among contemporaries—and he knew their faults, even if he did not proclaim them publicly.

48. "Wise study of society requires a fusion of poetic imagination and the scientific spirit." J. FRANK, COURTS ON TRIAL 217 n.79 (1949) [hereinafter cited as COURTS ON TRIAL]. See also *id.* at 173, 175-76.

In argument (so I found), he sought, not to reach the heart of the matter, but solely to win. When his adversary was a young man, the result was often discouragement, the destruction of a novel idea which had something precious at its core. To be sure, if the young man was robust enough, Morris' criticism, compelling thoughtful re-examination, could be all to the good. But some youngsters with splendid germinating ideas are not thus robust. Morris, to them, was not an intellectual midwife. He killed their ideas in the early part of their gestation.<sup>49</sup>

My own joust with him about the judicial process—covering about a year of correspondence<sup>50</sup>—happened to serve me well. In his lust to win, he seized on every ambiguous statement I made, giving the statement a meaning I obviously, as he knew, didn't intend. I learned something of how, by nicer articulation, to avoid such tactics. Moreover—although that was exactly not his purpose—I became better acquainted with the essentials of my own ideas. When I expressed them in such a way that they were armored against his previous thrusts, he became angry and somewhat abrasive. I was tough enough to take it. But I know many a man who would have surrendered to Morris, a philosopher of repute equipped as he was with erudition and amazing debater's skill.

After our debate was over, I read Schopenhauer's essay, *The Art of Controversy*,<sup>51</sup> in which he writes of "controversial Dialectic" as the "art of disputing . . . in such a way as to hold one's own, whether one is in the right or wrong"<sup>52</sup> or the "art of being in the right whether one has any reason for being so or not. . . ."<sup>53</sup> It has "no objective truth in view, but only the appearance of it . . . ;" it aims solely "at victory."<sup>54</sup> I then perceived, to my dismay, an ugly, sheerly destructive, phase of and understood better, Morris' character.

True, as he said somewhere, sheer destruction may be valuable, as when a surgeon destroys a cancerous growth. But some surgeons sometimes use the knife, sadistically, on vital tissues.

No man can begin work in any field with all his ideas full-blown. If he grows, he must out-grow some of those ideas. He should, I think, occasionally so acknowledge, should say, "Here I was wrong. I've changed my mind." I can think of no instance when Morris so admitted. He tried to create the impression of complete consistency in his thinking,

49. For a discussion of Cohen's teaching methods, see HOLLINGER, *supra* note 1, at 69-90. See also Hook, *Morris Cohen—Fifty Years*, 45 AM. SCHOLAR 426, 426-32 (1976) [hereinafter cited as Hook].

50. See HOLLINGER, *supra* note 1, at 85-88.

51. A. SCHOPENHAUER, *The Art of Controversy* in *ESSAYS* (A. Bailey trans. 1951).

52. *Id.* at 7.

53. *Id.* at 7 n.1.

54. *Id.*

as if his new attitudes had been implicit in his old. All men pridefully sin in that way to some extent. But a truly great man sometimes confesses past errors.<sup>55</sup>

I think that because Morris came so much to delight in destruction that, to the disappointment of his admirers, neither his *Reason and Nature* nor any of his major writings yielded a positive philosophy.

55. See, e.g., Judge Learned Hand's comments in *Metallizing Eng'r Co. v. Kenyon Bearing and Auto Parts Co.*, 153 F.2d 516, 519 (2d Cir. 1946). Frank himself several times avowed his mistakes. See, e.g., Frank, *Preface to Sixth Printing of LAW AND THE MODERN MIND*, *supra* note 32, at vi-vii, xvii-xix (1949) (as to the definition of "law," "scholasticism" and Aristotle); J. FRANK, IF MEN WERE ANGELS 332 n.\*, 369 n.30 (1942) (as to his isolationism and Aristotle). See also *United States v. Masiello*, 235 F.2d 279, 290 n.8 (2d Cir. 1956). Justice Douglas believed that Frank "had no hesitation at a later date to say that he had blundered." Douglas, *Jerome N. Frank*, 10 J. LEG. EDUC. 1, 9 (1957). Douglas was "never . . . afraid to admit that he was wrong in the past and to overrule himself." Newman, Book Review, 6 HASTINGS CONST. L.Q. 387, 394 n.46 (1978) (citing examples). For an admission by Justice Brennan, the architect of the modern Court's obscenity decisions, see *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), in which Justice Brennan stated:

I am convinced that the approach initiated 16 years ago in *Roth v. United States* [which Brennan wrote] and culminating in the Court's decision today, cannot bring back stability to this area of the law without jeopardizing fundamental First Amendment values, and I have concluded that the time has come to make a significant departure from that approach.

*Id.* at 73-74 (Brennan, J., dissenting) (citation omitted). See also *id.* at 85 n.9. Note the admissions in *Jones v. Opelika*, 316 U.S. 584, 623 (1942) (Black, Douglas and Murphy, JJ., dissenting) and *West Virginia State Board of Educ. v. Barnette*, 319 U.S. 624, 643 (1943) (Black and Douglas, JJ., concurring). As Justice Frankfurter wrote after changing his mind, "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." *Henslee v. Union Planters Nat'l Bank & Trust Co.*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting). The classic statement of confessing prior errors is that of Justice Jackson in his concurring opinion in *McGrath v. Kristensen*, 340 U.S. 162 (1950):

I concur in the judgment and opinion of the Court. But since it is contrary to an opinion which, as Attorney General, I rendered in 1940, I owe some word of explanation. . . . I am entitled to say of that opinion what any discriminating reader must think of it—that it was as foggy as the statute the Attorney General was asked to interpret . . . .

Precedent, however, is not lacking for ways by which a judge may recede from a prior opinion that has proven untenable and perhaps misled others. [Jackson then cited Chief Justice Taney and quoted Baron Bramwell and Justice Story.] Perhaps Dr. Johnson really went to the heart of the matter when he explained a blunder in his dictionary—"Ignorance, sir, ignorance." But an escape less self-depreciating was taken by Lord Westbury, who, it is said, rebuffed a barrister's reliance upon an earlier opinion of his Lordship: "I can only say that I am amazed that a man of my intelligence should have been guilty of giving such an opinion." If there are other ways of gracefully and good-naturedly surrendering former views to a better considered position, I invoke them all.

*Id.* at 176, 177-78 (Jackson, J., concurring).

At p. 200 of *Courts on Trial*,<sup>56</sup> I quoted [Arthur] Schlesinger [Jr.]'s remark that Morris "underestimated the dark and subterranean forces of the human mind" with the result that he often engaged "in fighting or denying the unconscious instead of trying to assimilate it." True, he did not overlook those "dark forces." I also quoted . . . the words you quote at the end of your essay [that "human wisdom consists in recognizing both the supreme claim of rational effort and its pathetic inadequacy"].<sup>57</sup> Yet the recognition of that inadequacy was, with him, too reluctant and infrequent. So I disagree with you that "his ultimate message" adequately contained such recognition.

His persistent denigration of Freud is significant.<sup>58</sup> Correctly, he pointed to the excesses of psycho-analysis, to its absurd pretensions as a science and a philosophy. But, surely, he went wrong in treating it as nothing but a rotten onion. How much wiser is [Lionel] Trilling's discussion of Freud<sup>59</sup> or [David] Reisman's.<sup>60</sup>

I consider it remarkable that, although he was brought back from death's door, and enabled to write several more books, through the efforts of a young psycho-somatic physician,<sup>61</sup> yet in his subsequent book on history,<sup>62</sup> he still refused to concede any worth to Freud's insights.

For such reasons, I think I did not err in saying . . . that he "did not break any importantly new ground in legal theory."<sup>63</sup> He became, at best, a leading left-wing advocate of conventional legal philosophizing.<sup>64</sup>

56. See note 48 *supra*.

57. See COHEN, PREFACE TO LOGIC, *supra* note 8, at 60, quoted in Cahn, Book Review, 35 CORNELL L. REV. 941, 943 (1950) and COURTS ON TRIAL, *supra* note 48, at 200 n.30. In an earlier letter to James Feibleman, Frank characterized Cohen as having an "antipathy" toward the irrational:

It seems to me that many [philosophical] realists postulate that all of [knowledge] is logical and intelligible. They have a distaste for the irrational, a distaste which explains why some of them shun psychology. For it expresses the vast extent of irrational human thinking. Even [Charles] Peirce, [whom Cohen, as his first editor, see C. PEIRCE, CHANCE, LOVE, AND LOGIC (M. Cohen ed. 1928), helped decidedly to bring to public attention], had an "antipathy" for that subject. With Morris Cohen, that antipathy, at times, became almost frenzied.

This bias seriously affected Cohen's jurisprudential writings.

Letter from Jerome Frank to James Feibleman (March 10, 1948) (Box 20, Cairns MSS, Library of Congress).

58. See HOLLINGER, *supra* note 1, at 221-22. See also *Jurisprudence*, *supra* note 29, at 31.

59. See L. TRILLING, THE LIBERAL IMAGINATION 32-54 (1950) ("Freud and Literature").

60. See D. REISMAN, INDIVIDUALISM RECONSIDERED Ch. VI (1954) ("Freud and Psychoanalysis"); COURTS ON TRIAL, *supra* note 48, at 398.

61. See HOLLINGER, *supra* note 1, at 244-45.

62. M. COHEN, THE MEANING OF HUMAN HISTORY (1947).

63. COURTS ON TRIAL, *supra* note 48, at 198.

64. See Frank, "Short of Sickness and Death": A Study of Moral Responsibility in Legal Criticism, 26 N.Y.U. L. REV. 545, 574 (1951). See also COURTS ON TRIAL, *supra* note 48, at 74.

I don't deny that he had occasional glimpses of another hemisphere of the legal realm. But, like Columbus' predecessors, he lacked the will, the courage, to voyage in search of a new hemisphere, and usually treated it as but a frivolous fantasy.

I assume you've read his book on history. It's full of wisdom. Yet, there again, he becomes the apologist for the conventional position, using the unconventional "asides" not to attack the conventional but strengthen it. Contrast his position with that of young Schlesinger who wrote me the other day: "I want to thank you for the opening chapters of *Fate and Freedom*.<sup>65</sup> You find here one professional historian who agrees almost entirely with your diagnosis of history."<sup>66</sup>

One of these days, I want to do a detailed essay on Morris.<sup>67</sup> When I do, I'll try to answer yours.

Your footnote reference to Felix Cohen<sup>68</sup> prompts me to say that I regret the bad effect on him of undue reverence for his father. I think it blocks the progress in developing his own, sometimes more fruitful, ideas.

Sincerely,  
s/Jerome

NEW YORK UNIVERSITY<sup>69</sup>  
SCHOOL OF LAW

May 9, 1950

Dear Jerome:

I really relish your letter . . . about Morris Cohen, and I think that we shall not succeed in disagreeing to any appreciable extent.

I was, of course, not discussing Cohen as a pedagogue. From my own limited observations and from unanimous reports of others who had much more intimate contact with him in that capacity, I long since came to the conclusion that he was a wretched teacher.<sup>70</sup> Nor was I dis-

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65. J. FRANK, *FATE AND FREEDOM* (1945).

66. Letter from Arthur Schlesinger, Jr. to Jerome Frank (April 24, 1950) (Series IV, Box 68, Folder 825, Frank MSS, Sterling Memorial Library, Yale University).

67. This projected piece was never written.

68. Cahn, Book Review, 35 *CORNELL L. REV.* 941, 941 n.1 (1950).

69. Letter from Edmond Cahn to Jerome Frank (May 9, 1950) (Cahn MSS).

70. Cohen's student, Sidney Hook, has written in a warm-hearted, level-headed remembrance:

Looking back on those days and years [in his classes], I am shocked at the insensitivity and actual cruelty of Cohen's teaching method. . . . It is true that he inspired. . . . But he needlessly hurt too many others in what was for him a form of theater. His religion, his accent, and his irascibility denied him an opportunity to teach in the graduate school of a great university. That is where he really belonged and where the challenge of mature minds would have enabled him to fulfill what he

cussing him under the aspect of personal relations, because, although I have heard too many tales of his petty cruelties to doubt your accusations, I have always been disposed to attribute these faults to the fact that he was so long in ill health.<sup>71</sup> Now that he is dead, we certainly can afford to be forgiving, even if we are not disposed to defend or justify.

I do not think your criticism of his resistance to Freudian psychology goes quite far enough: he seems to have been almost equally impervious to the insights that have come from modern sociology.

What I tried to say in my review was that he exemplified the development of a particular human power, i.e., the dialectic. In his writings this power was used with much better purpose on many occasions than his classroom performances and private correspondence might lead one to hope. The fact that the instrument can be so misused would not, of course, make it undesirable in itself; what cannot?

You refer to his book on the meaning of human history and seem to like it, on the whole. I would agree that it has considerable merit, but I am baffled as to how anyone could have turned out such a book at the time he did without once mentioning [Arnold] Toynbee's name. Certainly a logician like Cohen could have had a merry time with some of Toynbee's grandiose non-sequiters.

. . . .

Thank you again for your beautifully composed letter.

Cordially yours,  
s/ Edmond<sup>72</sup>

professed was his overwhelming desire—to pursue systematic philosophy. He compensated by playing God in the classroom.

To his credit, Cohen acknowledged in later years that his way of giving students a proper appreciation of the depths of their ignorance left scars. He even related the comment of one student who, asked for an evaluation of Cohen's course, responded: "Justice Holmes said he envied the youth who sat at your feet. It is evident that he never took a course with you."

Hook, *supra* note 49, at 428-29.

71. See HOLLINGER, *supra* note 1, at 242.

72. Frank briefly responded: "We certainly don't disagree about M.R.C., it seems. I certainly value highly his use of the logical scissors." Letter from Jerome Frank to Edmond Cahn (May 10, 1950) (Cahn MSS).

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