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THE MINER'S CANARY: FELIX S. COHEN'S PHILOSOPHY OF INDIAN RIGHTS

Jill E. Martin*

Introduction

Felix S. Cohen is best known as the author and editor of the Handbook of Federal Indian Law and for his advocacy of legal rights and equal rights for Native Americans.¹ The Handbook was the first book to compile all existing laws, statutes, and cases dealing with Indian issues, and set them forth in a readable and understandable format, with commentary. The Handbook was published in 1942 and became the standard work in the field of Indian law. Cohen was working in the Solicitor's Office of the Interior Department when he wrote the Handbook. But the scope of the book extended far beyond what rights the government had against the Indians. It looked at the government's responsibilities to the tribes, and the Indians' rights against the federal government.

What is perhaps less known about Felix Cohen are his background and writings in philosophy and law. It was this background and interest that made Cohen the ideal person to write the Handbook. Nathan Margold, Solicitor of the Interior Department during the New Deal, wrote of Cohen in his Introduction to the Handbook,

When I assigned to the writer of these words the task of applying to the field of Indian law the standards of scholarship which he had written about and demonstrated in several other fields, I did so with the conviction that the resulting work would be a contribution to legal scholarship and legal method as well as to the immediate field of Indian Law.²

Cohen had advanced degrees in both law and philosophy, from Columbia and Harvard respectively. He edited, with his father philosopher Morris Raphael

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¹. FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (1942) [hereinafter COHEN 1942 ED.]. The original 1942 edition is out of print, but was reprinted in 1971 by the University of New Mexico. See FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (Univ. of N.M., photo reprint 1971) (1942).

². Nathan Margold, Introduction to COHEN 1942 ED., supra note 1, at xxi.
Cohen, the textbook "Readings in Jurisprudence and Legal Philosophy." While working full-time as a lawyer, he also taught philosophy courses to undergraduates at City College, and jurisprudence to law students at Yale. As a teacher, he was able to pass on his philosophy of law to future generations of law clerks, lawyers and justices. As a lawyer, he was an advocate for Indian rights, first as a solicitor in the Department of the Interior, and later as a private attorney. It was while working within the government that he put his own philosophy of law into action. Through his own writings and actions, he influenced the way others viewed the interplay between jurisprudence and social issues.

When the Handbook was revised in 1982, it was titled Felix S. Cohen's Handbook of Federal Indian Law, in recognition of Cohen's genius, vision, and hard work. The introduction to the 1982 edition referred to Cohen as "the Blackstone of American Indian Law." It quoted Justice Felix Frankfurter:

Only a ripe and imaginative scholar with a synthesizing faculty would have brought luminous order out of such a mish-mash. He was enabled to do so because of his wide learning in the various fields of inquiry which are relevant to so-called technical legal questions. Learning would not have sufficed. It required realization that any domain of law, but particularly the intricacies and peculiarities of Indian law, demanded an appreciation of history, and understanding of the economic, social, political, and moral problems in which the more immediate problems of that law are entwined.

Cohen's ability to think conceptually and apply these concepts to practice made him an active attorney, and a prolific writer. He wrote law review articles for scholars in the field, but also wrote shorter articles for public consumption in magazines such as Collier's and Commentary. His writings show his underlying belief in the ideals of American democracy. Yet these beliefs were something he lived, not just wrote about.

The Role of the Judge

Cohen truly believed in the tenet of the democratic system that all men are created equal. As a lawyer, it was his duty to take the ideals of democracy and make them work. He proposed a legal philosophy that he called functional jurisprudence. Functional jurisprudence would look at the impact of laws on society, and would incorporate science, sociology and history. This concept was

3. MORRIS R. COHEN & FELIX S. COHEN, READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY (1951).
in keeping with changes being proposed during the New Deal. The "Brandeis Brief," created originally by Attorney Louis D. Brandeis, argued the prevailing facts of the underlying case, and how the Court's decision would affect those facts. Social and economic reforms were being advanced through legislation. The United States Congress was seeking ways to solve societal problems through the use of science, technology, and government intervention. However, the Supreme Court had not conceived of ways of changing the judicial process to accommodate these reforms, finding many of them unconstitutional. For example, wage and hour laws, passed to protect workers, were struck down as an unconstitutional invasion on the right to contract. 6

In his article "The Problems of a Functional Jurisprudence," Cohen stated,

> Functionalism as a method may be summed up in the directive —
> If you want to understand something, observe it in action. Applied within the field of law itself, this approach leads to a definition of legal concepts, rules and institutions in terms of judicial decisions or other acts of state-force. 7

Laws on the books were only ideals, until they were interpreted and enforced by judicial decisions. It was then necessary to examine how the courts decided cases and the consequences of those decisions. "The functional approach substitutes a wholly empirical question: 'What influence is a legal decision likely to have on a future case?'" 8

Cohen viewed law as a social process, one of give and take, which took account of cause and effect, and was involved with human activities. 9 Judicial decisions could not be made in a vacuum. All law was value laden, though most legislators and judges did not recognize it as such. People differed in their views of law and fact "because each of us operates in a value-charged field which gives shape and color to whatever we see." 10 It was the role of the attorney to persuade the judges and legislators to see beyond their own value field.

Legal philosophy should be used to determine what the law ought to be, and create discussion toward that end. Traditional legal philosophy viewed decisions as logical deductions from fixed principles without any thought to how they would be affecting the members of the society, or even whether the decision

8. Id. at 20.
could be enforced by society." This to him was "transcendental nonsense." Cohen wanted the judicial system to take into account the sociological, historical and scientific factors that surrounded the cases. Judges should not only look at precedent but also should be realistic and consider the social and moral ramifications to society. The basic question to be asked was, "What effect would this decision have on society?" He argued:

Although judges and lawyers need not be legal scientists, it is of some practical importance that they should recognize that the traditional language of argument and opinion neither explains nor justifies court decisions. When the vivid fictions and metaphors of traditional jurisprudence are thought of as reasons for decision, rather than poetical or mnemonic devices for formulating decisions reached on other grounds, then the author, as well as the reader, of the opinion or argument, is apt to forget the social forces which mold the law and the social ideals by which the law is to be judged.

Judges needed to consider social forces and ethical ideals. Judges should determine how the case should be decided, and then use appropriate language to reach that decision. Cohen was concerned that legal language could be used to make a decision sound reasonable, when in fact the effects of the decision were unreasonable. He called these "weasel words" — words and phrases used by judges that gave a decision the stamp of legitimacy. Examples of words he considered "weasel words" include "good faith," "due care," and "due process." These words were too vague to be understood by laymen, yet they were used in an opinion as if they conveyed an exact, definitive and absolute meaning. Cohen believed the use of weasel words created "an appearance of continuity, uniformity and definiteness which does not in fact exist." Such language hid the impact of the decision behind official legalese, thereby obscuring the rights of the people affected by the decision. It also allowed courts to believe they were just following precedent.

Cohen believed that language itself was value-laden, and the language used by the court was an indicator of the values held by the judges. Using the "weasel words" above, the Court could make decisions harmful to litigants under the guise of judicial legitimacy. Cohen found this especially true as applied to cases involving Indians. The courts used semantics to make the negative outcomes against Indians more acceptable to society as a whole. Cohen wrote "Probably the easiest way of maintaining consistency in our principles is

11. Transcendental Nonsense, supra note 9, at 809.
12. Id.
13. Transcendental Nonsense, supra note 9, at 812.
15. Id.
to have a second-string substitute vocabulary to use in describing any facts that
do not fit into the vocabulary of our professed principles." He gave the
following example:

In many cases, for example, the courts will apply to Indians terms
that are ordinarily applied to animals, thus conveying the impression
that the relation of an Indian to his land is similar to that of an
animal to its habitat and therefore not a subject of enforceable
rights. Thus, while a white man "travels" or "commutes," an Indian
(like a buffalo) "roams." A white man may be of "mixed ancestry,"
an Indian (or a cow) is a "mixed breed." Land held by a group of
white men in accordance with an intricate apportionment of
individual rights is called "corporate" or "partnership" or "family"
property. Land held by a group of Indians under arrangements
equal or of greater intricacy is dubbed "communally occupied." 7

This recognition of the use of value-laden language allowed Cohen to use
alternative language in a positive way. It provided him with an opportunity to
educate the judges and legislators about the problems facing Indians.
Recognizing a judge's values in advance provided him with the ability to speak
to that judge's values, to have him recognize the impact of the decision upon the
litigants. This was part of the role of the attorney. Cohen stated:

A lawyer is not a soldier. . . . A lawyer is likely to muff his case
if he does not sympathize with his opponent. It takes a measure of
sympathy to feel the opponent's next move, to appreciate the
sequence of his argument and the effect it will have on a more or
less disinterested judge. 8

A lawyer could best represent his client if he understood the values of the other
side, and the judge, and could use the appropriate language.

The Role of the Attorney

Cohen believed that lawyers had a special responsibility to bring the right
questions before the judiciary. The lawyer should determine not only what the
law ought to accomplish, but what the law could accomplish. 9
This latter question leads us inevitably to seek some measurement of the organized force that can be brought to bear on any legal issue. The force of law depends partly, to be sure, on the death-dealing equipment of the state; it depends also upon the essential human services which the state controls.\(^\text{20}\)

During the New Deal, the state controlled a larger number of essential human services than in the past. The government was more involved with providing the essential human services to all citizens and had more avenues to allow law to accomplish what seemed best for society.

The New Deal legislation provided an opportunity to show what the law could accomplish. In a speech to law students at City College, Cohen urged them to think about what the law could accomplish and to take a leadership role in using law to better society. He told them,

> It is the lawyer who does more than cite precedent that makes precedent. The lawyer who moulds the development of the law is the lawyer who can, after mastering the traditional thought-ways of his profession, rise above them to find a new pattern in the cases or group familiar facts in a new Gestalt.\(^\text{21}\)

He called for a new trend in legal education, to include not only statutes and cases, but also "the social realities on which the statutes and cases impinge, and with the social realities that, in turn, impinge on the courts and legislatures as determinants in the development of law."\(^\text{22}\) Law could not be studied in a vacuum. Lawyers had to look at the end product of their work — which was not just the decision rendered, but the impact of that decision on the individual litigant and the whole society.

Lawyers had a responsibility to take a leadership role, and to merge their ideals with their life work. They should try to look at the law in new ways to advance societal goals. It was the role of the attorney to do what was right for all people.

> Ours is the responsibility for deepening the public consciousness of the hopes, the ideals, and the values that are written into our constitution and our laws. We have a responsibility for broadening the consciousness of the ways in which we fail to meet these hopes and ideals. Our society, by and large, has marked its aspirations in the books of the law, for those who can read them: and we who are charged with the reading of those books have a special

\(^{20}\) Id.

\(^{21}\) *City College*, supra note 18, at 8.

\(^{22}\) *Functional Jurisprudence*, supra note 7, at 17-18.

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responsibility for keeping alive the vision of our country's highest hopes and deepest aspirations.23

A new breed of lawyers was coming of age in the New Deal, young lawyers beginning work which would have a significant impact on judicial behavior. Cohen wrote,

Creative legal thought will more and more look beyond the petty array of 'correct' cases to the actual facts of judicial behavior, will make increasing use of statistical methods in the scientific description and predication of judicial behavior, will more and more seek to map the hidden springs of judicial decision and to weigh the social forces which are represented on the bench. And on the critical side, I think that creative legal thought will more and more look behind the traditionally accepted principles of 'justice' and 'reason' to appraise in ethical terms the social values at stake in any choice between two precedents.24

Cohen was a perfect model for this new breed of lawyer because he took his philosophical beliefs in a functional jurisprudence and merged them with his life's work of advocacy for the underdog, especially Indians. To represent groups in society who had not previously had a voice in the legal system, an attorney was required to be creative in his legal thinking. The attorney representing the under represented could not look to traditional precedent to find the answers to his client's legal problems. He had to argue for new interpretations of old laws, find a new pattern in a set of established cases, or advocate for new laws. In a 1940 law review article on Indian rights, Cohen set forth the way to advocate against racial discrimination. He stated:

The right to be immune from racial discrimination is in part a constitutional right derived from the fifth, fourteenth and fifteenth amendments, in part a statutory right, and for the rest a moral right, implicit in the character of a democratic government but not always protected by adequate legal machinery. In the first instance the struggle of the Indian to achieve legal equality with his white neighbors requires an attack upon unconstitutional discriminatory legislation. The second calls for an attack on discriminatory administrative practices that are in conflict with existing law. The third situation calls for positive effort to secure appropriate legislation that will secure to the Indian equal treatment before the law.25

24. Transcendental Nonsense, supra note 9, at 833.
This argument for various methods of advocacy on behalf of Indians would also apply to other minorities. Though writing in 1940, before *Brown v. Board of Education*, before civil rights legislation, Cohen set forth the legal plan of action to achieve equal rights under the law. Not only was it necessary to argue for judicial recognition of rights, but the advocate had also to seek legislative recognition. Cohen's creativity in trying different methods of advocacy and different interpretations of laws to assist Indians helped pave the way for civil rights for other groups. Cohen's use of creative legal thought was evidenced in his own creation — the *Handbook of Federal Indian Law*.

The Handbook of Federal Indian Law

The *Handbook of Federal Indian Law* was the perfect vehicle for Cohen to combine law and philosophy. His philosophy of law had a direct impact on his fight for Indian rights. The *Handbook* was his most complete expression of his theory of functional jurisprudence as applied to Indian rights. Cohen saw Indians as not only individuals and tribes, but also as representing all minorities in America's legal system.

In fact, the Indian plays much the same role in our American society that the Jews played in Germany. Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more that our treatment of other minorities, reflects the rise and fall in our democratic faith.26

And Cohen saw himself as a member of a generation striving to provide unfulfilled democratic promises and principles for all.

Cohen viewed racial oppression as the most harmful because, unlike other types of oppression, the victims could do nothing to change their race.27 But racial oppression harmed everyone in society, not just the oppressed. "For the fact remains that while racial intolerance has seldom destroyed its intended victim, it has almost always, in the end, destroyed the society in which it flourished."28 One of the purposes of the *Handbook*, according to Secretary of the Interior Harold Ickes, was to assist the Indian minority in protecting its rights. In the Foreword to the *Handbook*, Ickes wrote that the book should give to Indians useful weapons in the continual struggle that every minority must wage to maintain its liberties, and at the same time it should give to those who deal with Indians, whether on

behalf of the federal or state governments or as private individuals, the understanding which may prevent oppression.\textsuperscript{29}

In writing the \textit{Handbook} Cohen put his ideas of functional jurisprudence to work. He immersed himself in all aspects of the subject. He instructed his staff to review all historical documents. He sent them to the National Archives to review original treaties, and had them read the Congressional debates and legislative history of Indian legislation. He had his staff consider the effect of judicial decisions on the individual Indian and tribe on the reservation. He wanted his work to be useful for the future, not just for the present. In 1939, Cohen addressed his staff about looking to the future.

\textit{[W]e are writing a book to be used in [the] next 10 or 20 years, or if we do a really good job 50 years. If we're to be worthy of that job, we've got to look ahead, to see how the legal problems of the future will differ from those of the past. Our job is one of prophecy, based on careful observation of present trends.}\textsuperscript{30}

He asked his staff to answer the functional question, "what influence is a legal decision likely to have on a future case?" The entire situation had to be considered.

Cohen recognized that value-laden language had been used by judges and legislators when discussing Indian legal issues. The language must therefore be reviewed carefully. What judges saw as reasonable and wise, Indians may have seen as presumptuous and discriminatory.\textsuperscript{31} "In the interaction between two groups with divergent histories, traditions, and ways of life, such differences of value standards are common. They must be continually reckoned with by one who seeks to understand divergent viewpoints in the field of Indian civil liberties."\textsuperscript{32}

Cohen had argued in his writings that the author of a textbook must be realistic when describing judicial decisions. He wrote,

\begin{quote}
if he dislikes a decision or line of decision, he will refrain from saying "This cannot be the law because it is contrary to sound principle," and say instead, "This is the law, but I don't like it," or more usefully, "This rule leads to the following results, which are socially undesirable for the following reasons."
\end{quote}\textsuperscript{33}

Cohen did just that in the \textit{Handbook}. Rather than just list and describe cases, Cohen reviewed the historical context of the case and the impact of the decision

\begin{itemize}
\item \textsuperscript{29} HAROLD ICKES, \textit{Foreword to Cohen 1942 Ed.}, supra note 1, at xix, xx.
\item \textsuperscript{30} Felix S. Cohen, Handwritten Notes (n.d.) (on file with the \textit{American Indian Law Review}) (FSC 17/301) [hereinafter Cohen, Notes].
\item \textsuperscript{31} COHEN 1942 ED., supra note 1, at 173.
\item \textsuperscript{32} \textit{Id}.
\item \textsuperscript{33} \textit{Transcendental Nonsense}, supra note 9, at 841.
\end{itemize}
on the Indians. If he believed that a case had not been properly decided, he
would explain the social outcome of the decision, and why that outcome was
not desirable. He narrowed the decision to the facts of the case, thereby
expanding the interpretations of the dicta in the opinion. While not creating new
rights, he used creative legal thought to view decisions in the context of
different interpretations. Decisions could be read many ways, and Cohen looked
beyond the traditional views to illustrate the impact of the decision on the
litigants. He tried to find a new pattern in old cases.

The New Deal was the perfect climate in which to strive for new patterns in
jurisprudence, based on the belief that government could assist in creating the
ideal society. But Cohen was realistic about what government could do. He
recognized that the government in its dealings with Indians was not all or
always the oppressor. His article in Collier's magazine, "How We Bought the
United States," explained to lay people how the government had actually bought
most of the land from the various Indian tribes. And he stressed that the
government had always recognized that Indians, unlike other minority groups,
had legal rights.

There is no problem of Negro claims for the uncompensated labors
of two and one-half centuries of slavery, because the Negroes had
no legal rights during the period of slavery. The fact that there is
an Indian claims problem today, while it points to the fact that
wrongs and injuries have been committed against Indians, points
also to the equally important fact that Indians have always occupied
a high and protected position in the law of the land.

The legal system recognized that Indians had rights, it just did not always
respect or enforce those rights. But while the government had not respected
rights, Cohen, as a government attorney was helping Indians get their rights
enforced.

This seemingly contradictory approach to Indian affairs — the United States
government recognizing Indian rights but not enforcing them — can be seen in
the conflicting roles played by the Justice and Interior Departments in Indian
matters. The Handbook in fact started as a joint project between the Interior and
Justice Departments. The Justice Department handled all claims involving public
land in the United States. As federal ownership of the public lands was based
mainly on Indian treaty cessions, the Justice Department was involved in
interpreting Indian treaties, laws and statutes. The Interior Department, on the
other hand, handled matters such as Indian self-government, and freedom of
religion for Indians. The Interior Department tended to be advocating on behalf
of Indians, while the Justice Department was often advocating against Indians.

34. Felix S. Cohen, How We Bought the United States, Collier's, Jan. 19, 1946, at 22.
35. Felix S. Cohen, Indian Claims, Am. Indian, Spring 1945, at 3-11 (vol. 2, no. 3),
So conflicts between the two departments arose as to the purpose of the *Handbook*. Some lawyers at Justice wanted a litigation manual that explained how to win Indian cases, from the government's perspective. They wanted a discussion of the government's rights and responsibilities, rather than the Indians' rights and responsibilities. The Justice Department wanted all issues viewed from the role of the litigating government attorney, rather than from the role of the Indian attorney. Cohen believed that the *Handbook* should meet the needs of Indians. He told his staff that he would "judge your work by this test: Does it serve to safeguard our national resources and the rights and property of the nation's wards." Even within the Interior Department, there was some disagreement. Cohen's vision of the *Handbook* was not accepted by all. He was changing the way Indian affairs were assessed and handled by the Departments. His vision advocated rights for Indians, but some questioned whether it adequately presented Indian law as it existed in 1939, rather than as Cohen believed it should be. The difference in opinion between Cohen and the Justice Department led to the termination of the joint project, because the goals became too incompatible. The *Handbook* was finished by Cohen, sponsored only by the Interior Department.

Cohen believed that government could and should help Indians and other oppressed minorities, not only for the sake of the oppressed, but also for the sake of all who believed in democracy. Cohen summed it up in his author's note in the *Handbook*:

> What has made this work possible, in the final analysis, is a set of beliefs that form the intellectual equipment of a generation — a belief that our treatment of Indians in the past is not something of which a democracy can be proud, a belief that confusion and ignorance in fields of law are allies of despotism, a belief that it is the duty of the Government to aid oppressed groups in the understanding and appreciation of their legal rights, a belief that understanding of the law, in Indian fields as elsewhere, requires more than textual exegesis, requires appreciation of history and understanding of economic, political, social and moral problems. These beliefs represent, I think, the American mind in our generation as it impinges upon one tiny segment of the many problems which modern democracy faces.

This statement represents the essence of Cohen's fight for Indian rights. His generation — those who came of age in the New Deal — was able to fight oppression through government, and through a deeper understanding of the societal forces that surround the law. Government was not the enemy of the Indians, even though the Federal government had oppressed the Indian.

37. COHEN 1942 ED., *supra* note 1, at xviii.
Government could be used for positive enactments, to better society. Government could enrich society by upholding the ideals of democracy the country professed. In a later fight for the passage of the Fair Employment Practices Act, Cohen wrote that the passage of the bill "would perhaps be the most important event since the Civil War in our long national striving towards the Jeffersonian vision of a government based on the equality of human rights, as well as towards the more ancient vision of the fatherhood of God and the brotherhood of man." While perhaps overstating this case, Cohen was striving to bring about equality of human rights, and believed it could be done by the government.

Indian Rights

Cohen realized that recognizing the rights of Indians did not mean that all problems would be solved, or that individual Indians or tribes would be in a better position. Indians do not have human rights because they are smart, or competent, or able to use their rights in a positive way. Indians have rights because they are human. "There are no inherently superior or inferior races. The teaching of the Scriptures that there is only one race, the human race, that all men have the blood of Adam, is confirmed by the teaching of modern science." Cohen recognized that all men were minorities in some fashion, and wrote of himself as a member of the "colorless race."

Race should not be a factor in determining human rights.

The great thing about American democracy is that most of us have an unprecedented power to shape our own lives, make our own mistakes, and attain new understanding and strength from the mistakes we make. To extend such democracy to Indians — to let Indians spend their own money, run their own schools, use or lease their own lands, and hire their own lawyers to defend their rights, just as neighboring white communities do, would not establish utopias on our 200 Indian reservations, but at least it would remove from our own democratic professions, in our dealings with non-white peoples, the taint of hypocrisy.

Allowing Indians to exercise their rights would not cure all the ills of the reservation or the system created by the government.

But it would allow the Indians to make their own choices — the essence of the democratic tradition. It would allow the Indians to make their own mistakes — rather than suffering from the mistakes made by bureaucrats not

40. Id. at 1.
directly affected. But white communities and governments make mistakes too, and Indians should not be denied the right to self-governance because of the possibility, or even the probability that mistakes would be made.

Cohen also recognized that Indian rights included the right to follow traditional ways. He questioned the melting pot theory, which tried to recreate all people, immigrants and Indians and racial minorities, into a stereotypical American persona. The melting pot tended to destroy different cultures, based generally on the belief that the "American" culture was better than any other culture. This taint of superiority was caused by racial conceit. Racial conceit extended to the area of law, with Americans believing that the United States legal and governmental system was the best in the world. Yet Indian tribes had always had some form of judicial system, and in some tribes it was very organized and sophisticated. Cohen wrote, "If we can rise above our racial and national conceit and look at the matter objectively or scientifically, I think we shall find that in many respects the legal institutions of Indian life are superior to those of their white neighbors."

Contemporary scholars mock the Indian Reorganization Act of 1934 (IRA) as an attempt to force a European-American form of government onto tribes. It is viewed by some as racist and paternalistic. The IRA provided that tribes could adopt their own constitutions. The tribe had to vote to accept the IRA, after which it established a constitution. The constitutions were reviewed by the Interior Department, and voted on by the tribe before they became effective. Cohen was heavily involved in the drafting the IRA, then known as the Wheeler-Howard Act, and testified in support of its passage. He visited Indian reservations to discuss the provisions of the IRA with the tribes. And he reviewed the constitutions established by the tribes.

At the time of its adoption, the IRA was a radical step. Prior to the New Deal, the official government policy was to allow the tribal structure to wither away, in the hopes that individual Indians would then assimilate into the white culture. That would then relieve the government of any obligations toward tribes or individuals. The IRA reversed this policy of assimilation. Viewed in a positive light, it recognized the existence of the tribal structure, and encouraged tribal government.

Cohen's review of the constitution was not to ensure that each one was identical, but to put the constitution into legal language and ensure that the wishes of the tribe were actually being set forth. Cohen believed too strongly in Indian rights to be involved with limiting those rights.

42. Felix S. Cohen, Indians Are Citizens!, AM. INDIAN, Summer 1994, at 12-22 (vol. 1, no. 4) [hereinafter Cohen, Citizens], reprinted in LEGAL CONSCIENCE, supra note 16, at 257.
43. Id. at 259-60.
The problem of protecting the legal rights of Indians is not a purely individual problem. Rather, it is a problem which affects Indians as a group and therefore profoundly affects the rest of society, for while racial oppression has seldom destroyed the people that was oppressed, it has always in the end destroyed the oppressor. The rights of each of us in a democracy can be no stronger than the rights of our weakest minority. "Even as ye do unto the least of these, so ye do unto me."

The fight for Indian rights was echoed by the fight for legal rights for immigrants, blacks and other oppressed peoples. Cohen was also involved in these fights, both in the Interior Department, and after 1948, as an attorney in private practice. In an article in the newsletter of the Association on American Indian Affairs, he wrote of the broad nature of the issue.

The issue is not only an issue of Indian rights; it is the much larger one of whether American liberty can be preserved. If we fight only for our own liberty because it is our own, are we any better than the dog who fights for his bone? We must believe in liberty itself to defend it effectively. What is my own, divides me from my fellow man. Liberty, which is the other side of the shield of tolerance, is a social affair that unites me with my fellow man. If we fight for civil liberties for our side, we show that we believe not in civil liberties but in our side. But when those of us who were never Indians and never expect to be Indians fight for the cause of Indian self-government, we are fighting for something that is not limited by the accidents of race and creed and birth, we are fighting for what de las Casas and Vitoria and Pope Paul III called our integrity or salvation of our own souls. We are fighting for what Jefferson called the basic rights of man. We are fighting for the last best hope of earth. And these are causes that should carry us through many defeats.

**Conclusion**

Though much of Cohen's writings deal specifically with the rights of Indians, his purpose was typically to stress that Indians as a minority and Indian rights were representative of many oppressed minorities whose rights had been infringed. Thus his writings are applicable on a broader scale. As a lawyer and philosopher, he was writing in part to provoke change in the judicial system.

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46. *Id.* at 314.
The *Handbook* was a major innovation for its time. No one had looked at laws affecting Indians as a whole scheme. No one had compared how decisions in one area of Indian law, for example, the interpretations of treaties setting forth hunting and fishing rights, also related to other areas of Indian law, such as issues of reservation governance. His philosophy of functional jurisprudence had laid the framework for a judicial process where minority rights could be advocated and advanced. By setting forth legal arguments supporting equal rights, he laid the groundwork for those rights to be accepted by society. His concern for Indian rights was only an amplification of his concerns for the rights of all oppressed. And it was his role as an attorney to bring the cause of equal rights before the public.

Cohen's article "The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy" was published in the *Yale Law Journal* just nine months before his premature death. Justice Felix Frankfurter, a family friend, wrote to Cohen after reading the article, commenting on the need to publicize wrongs of government to the people. Frankfurter was concerned that in the Cold War era, few people would be concerned about the wrongs that Cohen had addressed. But he added, "Not the least of wisdom is to reconcile oneself to the thought that to do all that one can do is all that one can do. But it is important that one should do it — and you have done it." Cohen thanked Frankfurter for his words of comfort, and his interest in Indian rights.

It is to me a real source of encouragement to know that there are others — sometimes they seem to be very few and far between — who see the Indian, not as a museum curiosity but rather as a key figure in the whole world problem of interracial and international relations that is, in some ways, the Number One challenge of the twentieth century to western man.

Cohen upheld his special responsibility to society. His functional jurisprudence advanced the rights of Indians and of other minorities. Until his death, he was concerned about the rights of Indians, and the human rights of all mankind. Cohen's ability to put his ideas into practice, and his drive to make his ideals the reality, make him a major figure in the field of Indian law. Cohen's ideas, considered radical for his time, have become accepted legal theories. They are no longer the philosophy of law, but the law itself. He truly is the "Blackstone of Indian law."

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47. *Erosion of Indian Rights*, supra note 26, at 348.
48. Letter from Justice Felix Frankfurter to Felix S. Cohen (June 1, 1953) (on file with the *American Indian Law Review*).