

“TRANSCENDENTAL NONSENSE” AND SYSTEM IN THE LAW

*Jeremy Waldron**

In 1935, Felix Cohen argued in these pages that the technical terminology of the law was mere “word-jugglery,” and that its practitioners were allowing “transcendental nonsense” to stand in for the hard work of functional decisionmaking in the law. Professor Waldron argues that in fact technical legal vocabulary performs an important function: It flags the systematicity of the law, highlighting the interrelatedness of diverse concepts and doctrines. Cohen, like later legal positivists, largely denied the importance of such systematicity, if he acknowledged it at all. But Professor Waldron suggests that valuing such systematicity, and the technical vocabulary that supports it, is quite compatible with Cohen’s functionalist critique of formalist jurisprudence. In particular, Professor Waldron argues that the role of technical terms in regard to systematicity is critical for the coherence of modern legal systems, which develop in a context of pervasive moral disagreement and shifting political power.

INTRODUCTION

The most striking thing about Felix Cohen’s article, “Transcendental Nonsense and the Functional Approach,”¹ is its blistering critique of technical legal vocabulary and its blunt rejection of the idea that the manipulation of concepts has any important role to play in legal problem-solving. The days of conceptual argument are over, says Cohen; the days when lawyers lulled each other into a complacent sleep by means of hypnotic “logomachy” are behind us.² It is time to reject the metaphysics of corporate personality,³ to wean ourselves from the “word-jugglery” of “due process” in constitutional law,⁴ and to abandon the use of “thingif[ying]” terms like “property” to obscure the social issues that are really at stake in questions about modern commerce.⁵ The manipulation of such terms is typical of the “Restatement” movement of the American Law Institute; but the Restatements are “the last long-drawn-out gasp of a dying tradi-

* Maurice and Hilda Friedman Professor of Law; Director, Center for Law and Philosophy, Columbia University School of Law. I am grateful to Tom Campbell, Joseph Raz, and Charles Sabel for conversations about some of the issues in this Essay. An earlier version of it was presented on June 28, 1999, at a plenary session on “Legal Reasoning and Multi-Culturalism” at the 19th World Congress in Philosophy of Law and Social Philosophy, in New York City.

1. 35 Colum. L. Rev. 809 (1935).

2. *Id.* at 818.

3. See *id.* at 809–14.

4. *Id.* at 818–21.

5. *Id.* at 814–17.

tion," in Cohen's opinion.⁶ The legal scholar of the future, says Cohen, will "substitute a realistic, rational, scientific account of legal happenings for the classical theological jurisprudence of concepts."⁷ Judges will make their policy preferences explicit rather than "masquerading in the cloak of legal logic,"⁸ and "social policy" will be understood by everyone involved in the law "not as an emergency factor in legal argument but rather as the gravitational field that gives weight to any rule or precedent, whether it be in constitutional law, in the law of trade-marks, or in the most technical details of legal procedure."⁹

In 1935, Cohen acknowledged that the first steps in this direction are bound to be "clumsy and evoke smiles of sympathy or roars of laughter from critics of diverse temperaments."¹⁰ Today, however, almost sixty-five years after the publication of "Transcendental Nonsense," it is noticeable that any steps we have taken down this road have been taken without giving up the conceptual terminology of traditional legal analysis. Opinions may differ as to whether legal argument and judicial decisionmaking are more realistic now, and more explicitly attuned to policy; but even among those who think they are, few would deny that the language of the law remains as technical and as esoteric as it was in 1935. We have not abandoned terms like "corporate entity," "property rights," "fair value," and "due process"; we still manipulate expressions like "title," "contract," "conspiracy," "malice," "proximate cause," and what Cohen referred to as "all the rest of the magic 'solving words' of traditional jurisprudence."¹¹ Does this represent a failure of nerve? Perhaps we have stuck with the word-juggling because we are afraid to face the real issues. Or have we discovered that in fact the use of this technical vocabulary does not, as Cohen alleged, "bar the way to intelligent investigation of social fact and social policy"?¹² Maybe technical vocabulary turns out to be not only non-obstructive, but affirmatively indispensable for policy analysis in a legal context.

In this Essay, I want to explore the last of those three possibilities. I shall argue that the use of technical legal vocabulary is in fact necessary for the intelligent promotion of social policy, and that even if it is not the whole of legal problem-solving, still an ability and a willingness to locate particular issues within the framework of legal concepts and doctrine remain essential parts of the modern lawyer's craft.¹³ The case I want to

6. *Id.* at 833. For discussion of realist critiques of the Restatements, see Bruce A. Ackerman, *Reconstructing American Law* 11-17 (1983); Neil Duxbury, *Patterns of American Jurisprudence* 147-49 (1995).

7. Cohen, *supra* note 1, at 821.

8. *Id.* at 817.

9. *Id.* at 834.

10. *Id.*

11. *Id.* at 820.

12. *Id.*

13. I was surprised to find that there has been almost no critical response to this aspect of Cohen's argument in the legal literature since the 1930s. In 1935, a published

attack on the article was so ferocious that it elicited a letter to the offending law review from Felix Cohen himself (to which the author of the attack responded in a second article the following year). See Walter B. Kennedy, *Functional Nonsense and the Transcendental Approach*, 5 *Fordham L. Rev.* 272 (1936) [hereinafter Kennedy, *Functional Nonsense*]; Felix S. Cohen, *Correspondence*, 5 *Fordham L. Rev.* 548 (1936); Walter B. Kennedy, *More Functional Nonsense—A Reply to Felix S. Cohen*, 6 *Fordham L. Rev.* 75 (1937) [hereinafter Kennedy, *More Functional Nonsense*]. The gist of Professor Kennedy's critique is that "nonsense is not in the sole possession of the conceptualists," and that Cohen himself is guilty of many of the sins he excoriates. Kennedy, *Functional Nonsense*, *supra*, at 284.

Since then there has been no significant critical discussion of Cohen's attack on legal concepts, as far as I can see. A number of important articles have been published on the role of legal language. See, e.g., Zechariah Chafee, Jr., *The Disorderly Conduct of Words*, 41 *Colum. L. Rev.* 381 (1941); H.L.A. Hart, *Definition and Theory in Jurisprudence*, 70 *L. Q. Rev.* 37 (1954); Samuel I. Shuman, *Jurisprudence and the Analysis of Fundamental Legal Terms*, 8 *J. Legal Educ.* 437 (1956); A.W.B. Simpson, *The Analysis of Legal Concepts*, 80 *L. Q. Rev.* 535 (1964); Glanville Williams, *Language and the Law*, 61 *L. Q. Rev.* 71 (1945). None of these so much as mentions Cohen's article. Cohen's critique of legal concepts is mentioned but not discussed in S.I. Hayakawa, *Semantics, Law and "Priestly-Minded Men,"* 9 *W. Res. L. Rev.* 176, 183 (1958). Herbert Morris promises some discussion of Cohen's view but fails to deliver on the promise. See Herbert Morris, *Verbal Disputes and the Legal Philosophy of John Austin*, 7 *UCLA L. Rev.* 27, 29 (1960). Nor is this aspect of Cohen's article discussed at all in Rutgers University's symposium in his memory, *A Jurisprudential Symposium in Memory of Felix S. Cohen*, 9 *Rutgers L. Rev.* 341 (1954).

I suspect this neglect is a product of the critics of legal realism having more challenging targets, both as to persons (Felix Cohen was regarded as rather less incendiary than some of the others such as Jerome Frank) and as to positions (rule-skepticism and the prediction theory of law may have been more inviting targets). Also, the English jurists have been more interested in the critique of legal concepts offered by the Scandinavian than by the American legal realists. See, e.g., Alf Ross, *Tü-tü*, 70 *Harv. L. Rev.* 812 (1957); Simpson, *supra*, at 535-45.

Certainly the critical neglect of Cohen's argument has not discredited it in the eyes of modern scholars. Cohen's article is apparently the 72nd most cited article ever written in a law review. See Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 *Chi-Kent L. Rev.* 751, 766 (1996). At the time of writing, a casual Westlaw search turned up 345 documents, 26 of which were dated 1999; for many journals, of course, the search captured only relatively recent citations. Search of WESTLAW, JLR database (Dec. 23, 1999) (search on "'transcendental nonsense' /s Cohen"). Most of these articles simply mention Cohen's article with an approving parenthesis along the lines of "(arguing that the classical jurisprudence of concepts should be replaced with the 'functionalist approach')." Benjamin C. Zipursky, *Legal Malpractice and the Structure of Negligence Law*, 67 *Fordham L. Rev.* 649, 658 n.64 (1998). Even the more substantial discussions just outline Cohen's position without argument or objection. For the best of the recent discussions, see James Boyle, *Is Subjectivity Possible? The Postmodern Subject in Legal Theory*, 62 *U. Colo. L. Rev.* 489, 515-22 (1991); Daniel C.K. Chow, *Trashing Nihilism*, 65 *Tul. L. Rev.* 221, 248-51 (1990); Daniel T. Ostas, *Postmodern Economic Analysis of Law: Extending the Pragmatic Visions of Richard A. Posner*, 36 *Am. Bus. L.J.* 193, 199-206 (1998); Gary Peller, *The Metaphysics of American Law*, 73 *Cal. L. Rev.* 1151, 1227-39 (1985); Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 *U. Pa. L. Rev.* 1105, 1160-66 (1989); Christian Zapf & Eben Moglen, *Linguistic Indeterminacy and the Rule of Law: On the Perils of Misunderstanding Wittgenstein*, 84 *Geo. L.J.* 485, 514-20 (1996). None of them venture any criticism of Cohen's position.

make is complicated. In Part I of the Essay, I will argue that the best way to understand the features of conceptual terminology that Cohen condemned—features like circularity and the absence of immediate empirical reducibility—is in terms of the internal systematicity¹⁴ of the law. Part II will suggest that Cohen underestimates the importance of coherence and systematicity, and that this underestimation is associated with an essentially legislative approach to legal problems. In this regard, Cohen's legal realism shares some of the character and certainly some of the reputation of classic legal positivism; so in Part III, I will broaden the discussion a little, examining the positivist approach to legal systematicity. Parts IV and V will explain why systematicity is important in the law, and why positivists and realists especially ought to be in the business of taking it seriously. Finally, in Part VI, I will argue that systematicity is best promoted by using the conceptual terminology of legal doctrine as a framework that aims to accommodate the policy initiatives of legislators and law-reformers, but at the same time is able to stand a little apart from particular controversial positions.

I. FLAGS OF SYSTEMATICITY

Cohen's diagnosis of what he regarded as the pathology of legal word-juggling resonates with the logical positivist movement in early-twentieth-century philosophy—a movement that aimed to rid scientific and philosophical language of terms that lacked empirical meaning.¹⁵ The rhetoric is very similar. Cohen says that our legal system "is filled with supernatural concepts, that is to say, concepts which cannot be defined in terms of experience."¹⁶ "Any word," he says, "that cannot pay up in the currency of fact, upon demand, is to be declared bankrupt, and we are to have no further dealings with it."¹⁷ And he writes scathingly about the arguments of legal scholars "trapezing around in cycles and epicycles

14. My apologies for this barbaric term. I use "systematicity" in its straightforward sense of "the quality of being systematic or of working as a system." The systematicity of a set of items refers to the fact that an operation performed on one member of the set will have an impact on other members too, and on their relations with one another. For the somewhat more complicated use of "systematicity" in philosophy, see Jerry A. Fodor & Zenon W. Pylyshyn, *Connectionism and Cognitive Architecture: A Critical Analysis*, 28 *Cognition* 3 (1988); see also Paul Guyer, *Reason and Reflective Judgment: Kant on the Significance of Systematicity*, 24 *Noûs* 17 (1990). For the use of the term elsewhere in jurisprudence, see Neil MacCormick, *Institutional Normative Order: A Conception of Law*, 82 *Cornell L. Rev.* 1051, 1061 (1997); Thomas C. Grey, *Modern American Legal Thought*, 106 *Yale L.J.* 493, 496 (1996) (book review).

15. The best known work of this kind is Alfred J. Ayer, *Language, Truth, and Logic* (1936); see also Rudolf Carnap, *The Logical Structure of the World* (Rolf A. George trans., 1968). Cohen's own references to the logical positivists are to Carnap and also to Ludwig Wittgenstein, *Tractatus Logico-Philosophicus* (1922). See Cohen, *supra* note 1, at 823–24, 826 & n.48.

16. Cohen, *supra* note 1, at 823.

17. *Id.*

without coming to rest on the floor of verifiable fact."¹⁸ Predictably, the manipulation of such terms is compared with medieval scholastic philosophers asking questions about angels and pin-heads,¹⁹ and the whole enterprise is associated (variously) with the "magic[al],"²⁰ the "metaphysical,"²¹ the "transcendental,"²² the "supernatural,"²³ and the "theolog[ical]."²⁴ (Contemporary logical positivists put the ethical in this category, too, though Cohen does not follow them in that.²⁵) The overall tendency, Cohen says (again echoing the logical positivists), is a form of language which is not intended to convey determinate meanings, but which is "useful for the purpose of releasing pent-up emotions, or putting babies to sleep, or inducing certain emotions or attitudes in a political or judicial audience."²⁶ It is, he concludes, of some importance for jurists to understand and for judges to acknowledge that the traditional language of the law is intended to perform functions like these rather than to explain or justify legal conclusions.²⁷ In a striking analogy, he says that legal propositions, such as the proposition that a labor union can be sued because it is a legal person, are no more informative of the grounds of a decision allowing a lawsuit than the observation of Moliere's physician "that opium puts men to sleep because it contains a dormitive principle."²⁸

Pursuing this analogy, Cohen concedes that the reference to a "dormitive principle" would furnish a useful explanation in the Moliere story if it were "defined physically or chemically."²⁹ But as long as it is not so defined, "it serves only to obstruct the path of understanding with the pretense of knowledge."³⁰ And the same is true, he says, with the legal concepts he excoriates. Now the phrase "defined physically or chemically" could mean two things. It might mean "defined with reference to other terms in a given physical or chemical theory." Or it might mean "defined with reference to basic terms of observation"—red, here, now, etc.—terms on which an empirically intelligible theory rests but which are not themselves theoretical terms. Mostly Cohen seems to mean the latter. In law, he says, the challenge is to break out of the magical circle of theoretical inter-definition and understand useful concepts "in non-legal

18. *Id.* at 814.

19. See *id.* at 810 (though Cohen does acknowledge, see *id.* at 810 n.4, that this is probably a slander on medieval philosophy).

20. *Id.* at 820.

21. *Id.* at 810.

22. *Id.* at 811.

23. *Id.*

24. *Id.* at 818.

25. See *id.* at 840; cf. Ayer, *supra* note 15, at 149–83.

26. Cohen, *supra* note 1, at 812.

27. See *id.*

28. *Id.* at 820; see *id.* at 813–14.

29. *Id.* at 820.

30. *Id.*

terms."³¹ The forms of argument which he is attacking, he says, run "in a vicious circle to which no obviously extra-legal facts can gain admittance."³²

It is worth noting, however, the difficulties that would attend any analogous requirement in science. First of all, the insistence that we must be able to break out of the magic circle of theoretical terms presupposes a clear distinction between theoretical terms and non-theoretical terms that philosophy has, on the whole, found untenable.³³ Second, actual scientific theories do not seem at all debilitated by the fact that their most important theoretical expressions are inter-defined, rather than defined in terms of sense-experience. Modern physics finds itself able to function perfectly well with terms like "force," "mass," "energy," and "momentum," which are learned and understood as a package rather than each or any of them being defined on the basis of ideas that are given pre-theoretically.

What distinguishes this, then, from the case of Moliere's "dormitive principle"? I think it is not the fact that "dormitive principle" is a theoretical term, but that it is defined in a very tight circle, a circle of vanishingly small diameter, by reference to exactly the phenomenon it is supposed to explain. A patient falls asleep after taking a given draught. What explains that? The draught has or contains a "dormitive principle." What is a dormitive principle? It is defined as something which makes a person fall asleep. End of story. The "principle" in question is not related to any other properties of the draught, nor to any other phenomena in the world, nor even taxonomically to other entities with other properties that might be related systematically to its soporific capacity.

Suppose, however, that Moliere's physician were to invoke a general (though primitive) science of medicine that organized the properties of various elements into principles, that characterized complex principles (such as the dormitive) in terms of simpler principles (such as, let's say, the anesthetic, the suppressive, the quiescent, etc.), and that understood the "principle" of an element as an intermediate term between the condition of the person to whom it was administered (one of several possible conditions) and the incantations under whose auspices it was distilled (one of several possible incantations). Then, the claim that the patient fell asleep because of a dormitive principle would locate itself in an orderly scheme for organizing an understanding of the world, and it would exclude certain explanations (such as that the patient was fatigued or hit on the head) and certain assumptions about his condition, about the draught, and about the alchemist who administered it to him.

Of course the "science" in this example is preposterous—and Cohen might say we were better off with angels dancing on the head of a pin! It

31. *Id.*

32. *Id.* at 815.

33. See Willard V.O. Quine, *Two Dogmas of Empiricism*, in *From a Logical Point of View* 20 (2d ed. 1980).

is intended only to illustrate that when we condemn the inter-definition of theoretical terms as "circular," the breadth of the circle sometimes does make a difference. In Moliere's example, the circle is so tight that nothing is explained: The explanans is nothing but a redescription of the explanandum. In the alchemy example which I have concocted, the circle is a little wider, and even though the leading terms are inter-defined, they add up to an intriguing system in which a particular understanding of the event that interests us is given a determinate location. In modern physics, the circle is very wide indeed, and the complex system of inter-definitions furnishes a web of understanding that enables us systematically to relate, for example, what we say about the decay of a radioactive isotope to what we say about the observation of light from a distant galaxy. The theoretical concepts that we use to characterize the radioactive decay are understood in terms of other theoretical concepts, which are understood in terms of still others . . . which are indispensable for characterizing the cosmological phenomenon. There need be no assumption that these connections embody a reduction in one direction or the other, a reduction of theoretical to observational concepts. Or, even if they do, in modern physics there seems little reason to infer that therefore the theoretical concepts are vindicated by their connection to the observational concepts, rather than the folk-psychology of sensory observation being vindicated by its systematic connection with an elaborate and successful physical theory.³⁴ It is enough if the theory works and seems satisfactory as a whole, without there being any privileged trail of sustaining reductions from the most patently theoretical to the most observational of its terms.

But the point is not just about holism. Suppose we did try to eliminate the more abstract of our theoretical terms, replacing them, as appropriate, with complex restatements in terms that struck us for some reason as "less abstract" (whether because they were more "observational" or more colloquial or whatever). Suppose propositions about "kinetic energy" were systematically replaced with "observational" propositions about instruments of a certain kind. What would we lose, besides elegance and brevity? One thing we might lose would be a readily visible indicator of the main pathways of interconnection among the propositions of our theory. The very abstraction of terms like "energy" and "mass," together with their well-known inter-definability, alerts us to the fact that the theorems of a given scientific paradigm do not stand or fall as single propositions, but have determinate cross-cutting relationships among themselves. To return to our earlier alchemy example, when we modify a theorem about the relation between simpler and more complex "principles" of various elements, the presence of the term "principle" in propositions about patients' conditions or distillers' incantations reminds

34. For further discussion, see Richard Boyd, Introductory Essay, *in* *The Philosophy of Science* 3, 8-10 (Richard Boyd et al. eds., 1991).

us to check the consequences of our revision for those propositions too, and for the other theoretical terms that they in turn involve. Theoretical terms are—if you like—flags of systematicity. In their very abstraction from ordinary usage, they remind us that we are dealing with a web-like structure, not just individual items on a list of propositions. Of course if the Quinean point is correct³⁵—that there is in the end no sustainable distinction between theoretical and non-theoretical terms—then some sort of flag of systematicity is always present anyway, even if it marks only the loose and informal web of folk-psychology. The difference would be that terms that looked more forbiddingly abstract would more readily be taken as terms of art—i.e., as deliberately planted flags of a systematicity that was constructed, not just inherited in the informal apparatus of natural language.

Much the same seems to me to be true of the “terms of art” in a well-functioning jurisprudence. The use of technical expressions like “corporation,” “legal personality,” “jurisdiction,” “locus standi,” and the like alerts us to the fact that the members of an array of legal rules are understood to be related to one another systematically, so that (for example) there will be consequences for what we say about standing to sue commercial enterprises if we reorganize the internal boundaries of our legal system, and consequences for what we say about civil procedure if we offer legal recognition to new forms of commercial enterprise. No doubt, if we were careful and patient enough, we could replace such arcane vocabulary with non-legal terms and restate all the rules about which people can get other people to do things against their will under various circumstances in language that eschewed what Cohen called “transcendental nonsense.” Let us not pretend, though, that such a move would represent the replacement of theoretical with non-theoretical vocabulary. There would still be theoretical terms like “person,” “power,” “force,” and “will”; and their interconnectedness in natural language or informal political sociology would still be significant for us. My point is that that might not be the interconnectedness we wanted to display, for one of the things the law does is to insist that issues and standards may be linked with each other in ways that are belied by “natural” or “intuitive” connections. And that would be that much harder to signal in a discourse purged of Cohen’s “transcendental nonsense.” To take another example, an insistence in contract law that expressions like “offer,” “promise,” “contractual terms,” “performance,” and “acceptance” are to be understood as terms of art and not simply in their natural language meaning is a helpful reminder that we have constructed some artificial systematicity among various rules of private obligation and public recourse. By giving these words technical meanings, defined inter se and with reference also to expressions like “consideration” that are more patently theoretical, we flag the interconnectedness we have constructed in the law and not just

35. See supra note 33 and accompanying text.

the interconnectedness we have inherited in the vocabulary and meaning-relations among the terms of natural language.

Notice the contrast between this account and the most charitable construction that Felix Cohen is prepared to place upon theoretical terms in the law.³⁶ In the account Cohen accepts, a given legal concept is at best “a mere signpost of a real relation subsisting between an antecedent and a consequent.”³⁷ A theoretical term *T* might figure in a pair of propositions such as (1) “Anything which is *a* and *b* is *T*” and (2) “Anything which is *T* is to be responded to with *c*.” Clearly, if that were all, then (1) and (2) could be combined and *T* eliminated to leave us with (3) “Anything which is *a* and *b* is to be responded to with *c*.” *T* would be simply the signpost of that relation.

On the account I have given, theoretical terms do much more work than that. Each significant theoretical term in the law represents not just a single pair of propositions like (1) and (2), but the nexus of a whole array of pairs of propositions, addressing normative issues of slightly different shape and character, such as how a thing which is *T* can cease to be *a* (which may be quite different from a thing which is not *T* ceasing to be *a*), how being *T* is to be proved (as opposed to other proceedings in which *a* or *b* might be involved), what alternatives there might be to *c* in the case of something which is not merely *T* but also *T** (another theoretical predicate), and so on. What I have just said is very schematic, but I think it is pretty obvious that terms like “corporation,” “malice,” “property,” “due process,” “locus standi,” and so on, function in this very complex way, rather than as the sort of single-issue signposts that Cohen is prepared to countenance.

Certainly legal systematicity can be understood in many different ways, and theoretical terms will function differently depending on the version of systematicity we have in mind.³⁸ Cohen’s analysis might be appropriate for a form of systematicity which is not much more than susceptibility to abbreviation—the ability to replace complex formulae with shorthand terms of art. Other forms of systematicity have to do with generalization—the ability to present a multitude of distinct rules or standards as instances of a single over-arching standard—and coherence of purposes. I shall say something about these later;³⁹ but for the moment we may note that the theoretical terms they generate are just terms which are slightly more abstract than those in general use. By contrast, what I

36. See Cohen, *supra* note 1, at 827 (“The task of modern philosophy is the salvaging of whatever significance attaches to the traditional concepts of metaphysics, through the redefinition of these concepts as functions of actual experience.”).

37. *Id.* at 828 (quoting with approval John C.H. Wu, *Realistic Analysis of Legal Concepts: A Study in the Legal Method of Mr. Justice Holmes*, 5 *China L. Rev.* 1, 2 (1932)).

38. See Ken Kress, *Coherence*, in *A Companion to Philosophy of Law and Legal Theory* 533, 536–39 (Dennis Paterson ed., 1996).

39. See *infra* notes 73–86 and accompanying text.

have particularly in mind is a form of interconnectedness (flagged by a corresponding technical vocabulary) that we might refer to not just as coherence but as doctrinal systematicity—the way that, in specific areas of law (such as contracts, corporations, criminal law, or torts), rules of different kinds fit together in a structured and articulated whole as part of a system. Think, for example, of the way in which rules about actions, intentions, attempts, complicity, excuses, and justifications fit together in criminal law. The theoretical terms that flag this sort of systematicity—terms like “mens rea”—are not just shorthand expressions, nor are they merely abstract generalizations. The rules in which they appear fit together in complex interconnection, not as coordinate purposive rules in a coherent array of purposes but as interlocking parts of different shape, each contributing a particular functional component to an overall integrated picture. This is the sort of systematicity most often marked by the use of technical phrases of specialist legal vocabulary, and this, I think, is what Cohen has neglected in dismissing such vocabulary as “transcendental nonsense.”

Let me sum up what I have suggested so far. Cohen thought that technical terms like “corporate entity” do little more explanatory work in law than “dormitive principle” in the conversation of Moliere’s physician. In both cases, he says, the function of the technical term is to conceal reasoning rather than exhibit it, and act as a barrier to understanding of what is really going on. I have suggested that this may be the case if the meaning of a technical term (in law or science) is tied tightly to the event it allegedly explains and has no connectedness to any other proposition in a system. But that is not the way theoretical terms usually function. In law, as in science, they occur and recur in a whole array of standards or theorems, occupying slightly different positions in each case and expressing somewhat different relations, so that each theoretical term represents a nexus of connections and not just the begging of a particular question. When it occurs in a particular standard or judgment, the abstraction of a term like “legal personality” reminds us that there are likely to be complex rules about the setting up of such an entity, complex rules about agency, complex rules about the relation between its rights, obligations, and liabilities and the rights, obligations, and liabilities of various natural persons, as well as complex rules about jurisdiction, standing, liquidation, and so on. It is not just the esoteric complexity of these rules that we are alerted to, nor are the technical terms merely shorthand for the prolixity of our standards. The recurrence of an expression like “legal person” in a given array of rules is a token of the systematic interconnection of those rules. That interconnection may be something of substantial importance for anyone proposing to change or repeal any one or more items in the array, or even for anyone proposing simply to apply one of the rules in the array to a particular set of events in a particular case. Accordingly, to ask whether a labor union is a legal person (in one

of Cohen's examples of "transcendental nonsense")⁴⁰ is not just an obfuscating way of phrasing the plain man's question, "Can an employer recover a judgment against a union in this particular case?" It is a way of relating each possible answer to that question to various other answers that might have to be given to various connected questions, both in the instant case, and in other cases that were similar to it or connected with it in various respects, if we give a particular decision in this particular case.

II. COHEN ON SYSTEMATICITY

What would Felix Cohen make of the argument that I have just set out? What does he think about theoretical systems? Would he accept that doctrinal systematicity can redeem the transcendental nonsense of legal word-mongering?

Nothing much in the way of an affirmative account of the importance of systematicity in the law can be found in Cohen's article.⁴¹ He does briefly mention the importance of relating particular pieces of legal knowledge to their wider context,⁴² and towards the end of the article he criticizes those realists (particularly Jerome Frank) who portray the law as "a mass of unrelated decisions."⁴³ However, his comments about systematicity in that passage concern mainly the position of judges in a system of judging, rather than the position of legal propositions in a doctrinal system.⁴⁴ There is a somewhat more substantial account of systematicity in Cohen's other writings, particularly in his book, *Ethical Systems and Legal Ideals*. There, Cohen argues that "the jural significance of the jural act" cannot properly be grasped without some understanding of the place of the jural act—a particular judgment or legal order, for

40. See Cohen, *supra* note 1, at 813–14.

41. Compare the discussion in Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 457–58 (1897), which associates the prediction of judicial decisions with the organization of the law into a system ("Far the most important and pretty nearly the whole meaning of every new effort of legal thought is to make these prophecies more precise, and to generalize them into a thoroughly connected system."). Holmes also notes:

We have too little theory in the law rather than too much Theory is the most important part of the dogma of the law, as the architect is the most important man who takes part in the building of a house. The most important improvements of the last twenty-five years are improvements in theory. It is not to be feared as unpractical, for, to the competent, it simply means going to the bottom of the subject.

Id. at 476–77. Though Cohen cites Holmes favorably in his article, he does not cite Holmes's insistence on the systematic element. See Cohen, *supra* note 1, at 827–28, 835.

42. See Cohen, *supra* note 1, at 829.

43. *Id.* at 843; cf. Jerome Frank, *Law and the Modern Mind* 138 (1930) ("[J]udging involves discretion and individualization. The judge, in determining what is the law of the case, must choose and select, and it is virtually impossible to delimit the range of his choice and selection.").

44. See Cohen, *supra* note 1, at 843 ("Judges are human, but they are a peculiar breed of humans, selected to a type and held to service under a potent system of government controls. Their acts are 'judicial' only within a system which provides for appeals, rehearings, impeachments, and legislation.").

example—in a legal system.⁴⁵ “[T]he advocates of realistic jurisprudence,” he acknowledges, “have often seemed to argue against the existence of any systematic relations within law,” but in fact “there is no essential incompatibility between the view that particular legal decisions are significant only in the context of potential decisions systematically related, and the view that law finds its content in decisions of courts.”⁴⁶ Partly what Cohen has in mind here is that a given judicial decision must take its place in a system of possible appeals and also a system of legal enforcement (with all the attendant issues of remedies, avoidance of judgments, further recourse against defendants, the effect that might be given to this judgment in another jurisdiction, and so on).⁴⁷ Partly he has in mind too the systemic connection between propositions of private law (e.g., rules of property) and propositions of criminal law. He follows Jeremy Bentham in insisting that the significance of a proposition like “This car has been sold to Smith” cannot be understood without tracing its connection to other propositions like “Jones will be committing an offense if he uses this car without Smith’s consent.”⁴⁸ Even “[t]he most abstract rule of civil law, seen in its legal context, thus reduces to a set of probabilities that under certain conditions certain unpleasant things will happen to certain people,”⁴⁹ though Cohen does also take the opportunity to observe that this realization “has the great value of recalling us from the law-treatise’s degenerate world of abstractions, in which strange metaphysical entities bearing outlandish names undergo curious metamorphoses to become stranger entities with more outlandish names.”⁵⁰

And indeed, it is this latter theme, rather than Cohen’s respect for systematicity, that finds its way from *Ethical Systems* to “Transcendental Nonsense.” The general impression we are given in the article is that the concept of doctrinal systematicity is no more congenial to the author than any other aspect of formalist jurisprudence. So, at the end of Part I of “Transcendental Nonsense,” Cohen offers this summary of “traditional legal theory”:

Legal concepts (for example, corporations or property rights) are supernatural entities which do not have a verifiable existence except to the eyes of faith. Rules of law, which refer to these legal concepts, are not descriptions of empirical social facts . . . nor yet statements of moral ideals, but are rather theorems in an independent system. . . . Jurisprudence, then, as an autonomous system of legal concepts, rules, and arguments,

45. Felix S. Cohen, *Ethical Systems and Legal Ideals: An Essay on the Foundations of Legal Criticism* 235–36 (1933).

46. *Id.* at 238.

47. *See id.* at 239.

48. *See id.* at 253–54; cf. Jeremy Bentham, *Of Laws in General* 176–83 (H.L.A. Hart ed., Athlone Press 1970) (discussing the distinction between complete and incomplete laws).

49. Cohen, *supra* note 45, at 254.

50. *Id.* at 254–55.

must be independent both of ethics and of such positive sciences as economics or psychology. In effect, it is a special branch of the science of transcendental nonsense.⁵¹

There is certainly not much encouragement in that passage for the sort of line I tried to peddle in Part I of this essay, though I think it is fair to say that Cohen's disparaging tone does seem to be directed more heavily at the first than at the second word in the phrase "autonomous system." A little later he writes that "the really creative legal thinkers of the future will not devote themselves . . . to the taxonomy of legal concepts and to the systematic explication of principles of 'justice' and 'reason,' buttressed by 'correct' cases."⁵² It is important, he says, to undermine "[t]he vested interests of our law schools in an 'independent' science of law."⁵³ And by the end of the article, the rejection of system is quite strident. The attempt to systematize law, to present it as a well-organized system, deprives it of its life, he says, and underestimates the significance of constant flux and change:

[T]he notion of law as something that exists completely and systematically at any given moment in time is false. Law is a social process, a complex of human activities Legal science, as traditionally conceived, attempts to give an instantaneous snapshot of an existing and completed system of rights and duties. Within that system there are no temporal processes, no cause and no effect, no past and no future. A legal decision is thus conceived as a logical deduction from fixed principles. . . . A legal system, thus viewed, is as far removed from temporal activity as a system of pure geometry.⁵⁴

I suspect that the denigration of systematicity in "Transcendental Nonsense" has a lot to do with the essentially legislative perspective of Cohen's legal realism. In the passage just quoted, the tidiness of formal systems is contrasted with the dynamism, the process-aspect of the law. Law cannot be a "completed system" of rights and duties because its systematicity is always liable to be disturbed by the intrusion of new elements and new decisions. And judges cannot treat it as a closed and completed system, because most of the issues they face represent gaps and inconsistencies generated by previous acts of legal change. Their decisions cannot be deduced from existing law. Instead, they are evoked by the indeterminacy of law as a dynamic process, and they represent in their turn contributions to that dynamic process, rather than inferences from law as a static body of propositions. Each judicial decision is just one more step in the process of decisionmaking by which law defies systematization.

This dynamic legislative perspective is very important in Cohen's article. It is noticeable that when he attacks courts for addressing nonsensi-

51. Cohen, *supra* note 1, at 821 (emphases omitted).

52. *Id.* at 833.

53. *Id.* at 834.

54. *Id.* at 844-45 (footnote omitted).

cal questions, he is saying in effect that they have failed to live up to their responsibilities as lawmakers. For example, he writes concerning the transcendental nonsense deployed by the New York Court of Appeals in its decision in *Tauza v. Susquehanna Coal Company*:⁵⁵ "Instead of addressing itself to such economic, sociological, political, or ethical questions as a competent legislator might have faced, the court addressed itself to the question, 'Where is a corporation?' Was this corporation *really* in Pennsylvania or in New York, or could it be in two places at once?"⁵⁶ A competent legislature, he implies, would have had no truck with any metaphysical question of that sort. A little later he makes the point explicit (this time concerning issues about the metaphysics of "property" rather than "corporation"):

The theory that judicial decisions in the field of unfair competition law are merely recognitions of a supernatural Something that is immanent in certain trade names and symbols is, of course, one of the numerous progeny of the theory that judges have nothing to do with making the law, but merely recognize pre-existent truths not made by mortal men.⁵⁷

The immediate implication of this is that the business of juggling words and supernatural concepts is nothing but an attempt to camouflage what courts are really doing—viz., making new decisions (on ethical and probably ideological grounds).⁵⁸ Beyond that, however, Cohen seems to imply also that a self-conscious and explicit legislative procedure would have no use for technical legal vocabulary, and that to the extent that courts begin to think of themselves as legislatures, they will see that they have no use for it either. Conversely, too, he notices his juristic opponents maintaining that the sort of ethical and social considerations which Cohen thinks should be invoked are in fact more appropriate for legislative than for judicial proceedings.⁵⁹ And he responds to that observation with a sort of threat:

[C]ourts that shut their doors to such non-legal materials, laying the taboos of evidence law upon facts and arguments that reveal the functional social significance of a legal claim or a legal precedent, will eventually learn that society has other organs—legislatures and legislative committees and administrative commissions of many sorts—that are willing to handle, in straightforward fashion, the materials, statistical and descriptive, that a too finicky judiciary disdains.⁶⁰

Now, it is not entirely clear why a traditionalist court, whose finicky disdain is based on respect for the separation of powers, should actually be worried by this. But the observation is typical of Cohen's realism; courts

55. 115 N.E. 915 (N.Y. 1917).

56. Cohen, *supra* note 1, at 810.

57. *Id.* at 816 (footnote omitted).

58. See *id.* at 812, 816–18, 847.

59. See *id.* at 819 (quoting *Adkins v. Children's Hospital*, 261 U.S. 525, 559 (1923)).

60. *Id.* at 834.

are nothing if not lawmakers, he implies, and if they will not start acting like competent lawmakers, society is going to replace them with other agencies that will.

Both in "Transcendental Nonsense" and in some of his other writings, Cohen describes social policy as a "field" within which particular legal issues ought to be addressed.⁶¹ There is no reason to suppose that he thinks social policy itself should be unsystematic: The relatively technical term "field" suggests quite the contrary. But I believe he thinks that each discrete issue posited for decision before a court (or a legislature) should be dealt with—in this systematic field of social policy—on its own merits without reference to the decision that precedes it or the decision that follows it, except insofar as these are actually connected (for example in the relation of right and remedy, or of judgement and enforcement, or something along those lines). Certainly, a judge may show some respect for precedent. But in most hard cases, he has the option of choosing his authority from a number of precedents, each competing to push the instant decision one way or the other. So, once again, the suggestion seems to be that the bearing of each competing precedent on the present case should be examined in the field of social policy on its own merits, without regard to the bearing that it or any other precedent might have on a different sort of decision that might come up at another time. This certainly seems to be the implication of Cohen's suggestion 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."⁶² The point is never quite explicit in the article, but one comes away from it with the strong sense that Cohen seeks a jurisprudence that will deal with issues ethically and responsibly in terms of social policy, one at a time, and that this is one of the reasons he will have so little truck with the traditional vocabulary of the law and its overtones of doctrinal systematicity.

III. LEGAL POSITIVISM AND SYSTEMATICITY

I said at the beginning of this essay that I would try to connect this tendency in Cohen's legal realism with a broader tendency in legal positivist thought more generally.⁶³ "Legal positivism" refers to a broad cluster of jurisprudential theories which identify law with social facts about power, practice, and command, and which insist on a very sharp distinction between the social facts about law as it is, and moral facts or moral

61. *Id.* at 834; see Felix Cohen, Field Theory and Judicial Logic, in *The Legal Conscience: Selected Papers of Felix S. Cohen* 121, 145 (Lucy K. Cohen ed., 1960).

62. Cohen, *supra* note 1, at 833; see also *id.* at 842.

63. I assume it is not necessary to warn readers against any confusion between legal positivism and logical positivism. (For logical positivism, see *supra* note 15 and accompanying text). For the rest of this Essay, the word "positivism" standing alone means "legal positivism."

opinions about law as it ought to be.⁶⁴ Classic positivists like Jeremy Bentham and John Austin identified law with the commands of a sovereign, defining sovereignty in the purely descriptive terms of political sociology.⁶⁵ Modern positivists like H.L.A. Hart and Joseph Raz offer somewhat more accommodating definitions, recognizing the complexity of the sources of law.⁶⁶ Nevertheless, in their theories law is still defined as such on the basis of certain sorts of facts about a society, most notably facts about the social provenance or source of certain norms and directives. When legal positivism is understood in this broad way, legal realism may be seen as one of its branches, albeit one that lays inordinate stress on courts, rather than legislatures and constitution-framers, as sources of valid law.⁶⁷ The connection is reinforced, too, by Cohen's explicit invocation of the proto-positivist Thomas Hobbes as "the grandfather of realistic jurisprudence,"⁶⁸ and by his insistence (against Coke and Blackstone) on a clear distinction between law as it is and law as it would be if it were perfectly moral or rational.⁶⁹

Let me talk then for a little while about the attitude of legal positivism in general to the issues about systematicity that I have raised.

The systematicity of law is something which legal positivists are often accused of ignoring or underestimating. In certain circles in recent American jurisprudence, for example, positivism seems to be identified with the view that enacted rules of law may be considered, interpreted, and applied one by one, each without reference to any of the others or to any other legal materials. I learned about this accusation when I came across a reference in some literature on federal courts to what several

64. See Jules L. Coleman & Brian Leiter, *Legal Positivism*, in *A Companion to Philosophy of Law and Legal Theory*, supra note 38, at 241, 241.

65. See Bentham, supra note 48, at 1, 18-19; John Austin, *The Province of Jurisprudence Determined* 18-19 (Wilfrid E. Rumble ed., 1995).

66. See H.L.A. Hart, *The Concept of Law* 185 (rev. ed. 1994); Joseph Raz, *The Authority of Law: Essays on Law and Morality* 37, 45-52 (1979) [hereinafter *Raz, Authority of Law*]; see also Coleman & Leiter, supra note 64, at 244-46 (discussing Hart), 253-55 (discussing Raz).

67. For the view that the overlap between legal realism and legal positivism is quite limited, see Anthony Sebok, *Misunderstanding Positivism*, 93 *Mich. L. Rev.* 2054 (1995). The main difference, according to Sebok, is that positivists are committed to "[t]he idea that legal reasoning constrains legal results," whereas of course realists deny this. *Id.* at 2093-94.

My own assimilation of the two has to do, not with their theory of adjudication, but with the fundamental accounts they give of the nature of law. From this point of view, the fact that both positivists and realists regard propositions as law by virtue of their source (in the decisions of a court, according to the realist, or in the decisions of a court or a legislature, according to the positivist) is more important taxonomically than the divergence between realists and some positivists about the extent to which legal reasoning can or does constrain legal results.

68. Cohen, supra note 1, at 836.

69. See *id.* at 836-38.

authors call “the Anti-Positivist Principle.”⁷⁰ The term was invented, as far as I can see, by Richard Fallon, though he attributes the content of the principle to the “Legal Process” materials of Henry Hart and Albert Sacks, developed at Harvard in the 1950s.⁷¹ According to Fallon, Hart (together with one of his collaborators, Herbert Wechsler) insisted that

we should understand the “law” bearing on allocations of institutional responsibility as a rich, fluid, and evolving set of norms for effective governance and dispute resolution, not as a positivist system of fixed and determinate rules. Any particular legal directive must be seen and interpreted in light of the whole body of law. . . . This principle applies to both constitutional and statutory interpretation.⁷²

The implication is that legal positivists deny this, because they treat law piecemeal—as simply a heap or a set of unrelated commands or rules, each command or rule self-sufficient in its source or pedigree, its meaning, and its application. Each item in the set is the product of a discrete event of positing or enactment: The validity of a particular rule, R_1 , is a matter of who issued R_1 or how R_1 was issued. Each rule or each command demands our attention and our compliance. It does not affect, nor is it affected by, the question of the validity of the next rule, R_2 , that comes along. The subject is required by his sovereign to comply with each of them, one by one; and legal officials, especially judges, are required to figure out what compliance means, in each case, independently of each of the others.

Notice that the lack of systematicity associated with legal positivism is doctrinal systematicity. Positivists do provide an understanding of the notion of legal system, but they understand it purely in terms of the systematicity of sources of law.⁷³ A set of laws becomes a legal system because of the unity or identity of their source. Actually, that is not quite right. A set of commands springing from a single commander (or a single rule-producing institution or even a hierarchy of rule-producing institutions) is not a legal system just in virtue of that fact alone. Suppose the

70. Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 *Vand. L. Rev.* 953, 965 (1994); Karen A. Jordan, *The Complete Preemption Dilemma: A Legal Process Perspective*, 31 *Wake Forest L. Rev.* 927, 937 n.52 (1996); Michael Wells, *Positivism and Antipositivism in Federal Courts Law*, 29 *Ga. L. Rev.* 655, 659 (1995).

71. See Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

72. Fallon, *supra* note 70, at 965.

73. Sometimes this is abbreviated in the idea of there being, for each legal system, a single rule of recognition—the shadow, as it were, in Anglophone positivism of Hans Kelsen’s *grund-norm*. (For rule of recognition, see Hart, *supra* note 66, at 94. For *grund-norm*, see Hans Kelsen, *Pure Theory of Law* 201 (Max Knight trans., 1989).) But there seems to be no reason why this should be so, i.e., no reason why there should not be multiple effective rules of recognition in a given society, related to one another in such a way as to constitute a single legal system. See Joseph Raz, *Practical Reason and Norms* 146–48 (1990).

same person is absolute ruler of England and absolute ruler of France: Qua source of law he is self-identical, but England and France do not thereby form a single legal system. The identity of the system is not given by the identity of the commander alone but by his identity in relation to a given set of subjects.⁷⁴ We sometimes miss this because classic Austinian positivism defines "sovereign" in a way that already takes subjects into account: "Sovereign" and "subjects" are correlative terms, with a sovereign being someone to whom a given group of subjects have a habit of obedience.⁷⁵

We have already seen that something along these lines is acknowledged by Felix Cohen, in his recognition that individual judges are not simply let loose in the world, each with his own hunches and bellyaches; they work as members of a hierarchy of officials.⁷⁶ Cohen recognizes also a slightly different aspect of systematicity associated with this. Legal orders are not just commands directed by sovereigns (or judges) at citizens, but are also associated with subsidiary commands issued to sheriffs, bailiffs, wardens, and police officers.⁷⁷ So the unity of a legal system is secured not only by the hierarchy of sources but also by the unity and organization of the enforcement apparatus of the state.

By contrast, the systematicity in which legal positivism is supposed to *lack* the appropriate level of interest is doctrinal systematicity.⁷⁸ We could think of it as systematicity among primary rules (acknowledging that positivism gives a good account of systematicity among secondary rules), but that would be a little misleading, for two reasons. In the context of H.L.A. Hart's distinction between primary and secondary rules, it is misleading because Hart includes among secondary rules private powers of change, such as the power to execute a will or enter into a contract,⁷⁹ whereas in what follows I shall treat the relations among these private powers and the relations between them and various primary rules as as-

74. Note that just as a given commander might have two sets of subjects, so, in principle, a given set of persons might be subject to two sovereigns and thus participate in two legal systems. Positivists have chosen however to focus on what they think of as the central case of a single commander matched uniquely with a single set of persons accustomed to obeying him and him alone.

75. See Austin, *supra* note 65, at 166. In H.L.A. Hart's positivism, systematicity has a slightly different cast, but it preserves the basic character of the source-and-subjects approach. It is defined in two stages: first by virtue of some systematicity among a given cluster of secondary rules, and second (because the participants in the practices that constitute the secondary rules are not necessarily the whole class of those to whom primary rules apply) by reference to the domain of effectiveness of the primary rules whose enactment and application is governed by an identifiable set of secondary rules. See Hart, *supra* note 66, at 100–23.

76. See Cohen, *supra* note 1, at 843; see also *supra* text accompanying notes 44–45.

77. See Cohen, *supra* note 45, at 239. For the classic positivist analysis of subsidiary command, see Bentham, *supra* note 48, at 137.

78. In Kelsenian terms, it is the systematicity of law in its "static," rather than its "dynamic" aspect. See Kelsen, *supra* note 73, at 108–278.

79. See Hart, *supra* note 66, at 96.

pects of doctrinal systematicity. It is misleading also because the legal positivist's interest in the systematicity of secondary rules tends to be confined to those at the peak of the secondary rules structure (the most far-reaching rules of change and recognition, empowering the legislature and also the courts). Positivist philosophers tend to neglect the interconnection of lower-level secondary rules in the public realm, such as those conferring, regulating, and limiting the authority of subordinate legislatures, rule-making agencies, etc. And of course it is precisely with regard to these rules that Richard Fallon identified an "Anti-Positivist Principle" in the Legal Process tradition.⁸⁰

A less misleading, though also a less precise, way of putting it would be to say that legal positivists tend to neglect what I earlier called "doctrinal systematicity,"⁸¹ except for aspects of doctrine connected with the very basis and unity of the legal system. Once it has been established that the members of a given set of rules belong to the same legal system so far as source, subjects, and enforcement are concerned, positivists tend to be uninterested in any further questions about the connections among the rules in the set.⁸² Occasionally, legal positivists may add something to this sparse picture. They may acknowledge that the word "law" applies to rules that are general, as opposed to particular orders; and I guess that is a crude form of systematicity. John Austin emphasized this, saying that "contradistinguished or opposed to an occasional or particular command, a law is a command which obliges . . . generally to acts and forbearances of a class."⁸³ But he made nothing of it, and he failed to explore its significance for his overall system. Meanwhile, non-positivist philosophers who emphasize systemic features like generality tend to find that the importance of their work in this regard is deprecated by legal positivists.⁸⁴ Still less are the positivists interested in any more robust conception of doctrinal systematicity.⁸⁵ They are not much concerned with coherence of purpose among various legal rules, tending to downplay purpose (as compared with text) in each case and to deny the suggestion

80. See *supra* notes 70–72 and accompanying text.

81. See *supra* text accompanying note 39.

82. See, e.g., the agenda laid out at the beginning of Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System* 1–4 (2d ed. 1980) (outlining four principles of theory). Though Raz associates himself with a comment of Hans Kelsen to the effect that "it is impossible to grasp the nature of law if we limit our attention to the single isolated rule," it turns out that he is most interested in questions about how norms come to be parts of a legal system rather than about their relations *inter se*. *Id.* at 2. There is, however, some discussion in Raz's book of the systematic relations between rights, duties, and permissions. See *id.* at 147–83. Connected as it is with the issue of sanctions, this really has to do with the systematicity of the enforcement apparatus rather than doctrinal systematicity. See *supra* note 77 and accompanying text.

83. Austin, *supra* note 65, at 29.

84. Compare Lon L. Fuller, *The Morality of Law* 46–49, 209–10 (rev. ed. 1969), with Hart, *supra* note 66, at 207.

85. See Joseph Raz, *The Relevance of Coherence*, in *Ethics in the Public Domain: Essays in the Morality of Law and Politics* 277, 314–19 (rev. ed. 1995).

(of Ronald Dworkin, for example) that a more coherent approach to purpose helps constrain a judge's discretion in a hard case where the text of a rule is vague or indeterminate.⁸⁶ It is left to the opponents of positivism—Legal Process scholars, natural lawyers, and latter-day formalists—to take coherence seriously and to explore the implications for jurisprudence of doctrinal systematicity.⁸⁷

To notice the neglect of systematicity in legal positivist theory is one thing; to explain it is another. Why exactly are positivists not interested in doctrinal systematicity? We have seen that they are interested in external systematicity, i.e., systematicity so far as the sources of law are concerned. Why does their interest fall off after that? Why do they diminish the importance of system in their descriptive theories of law? Why do they give it less emphasis in their theories of adjudication?

I suppose the most obvious answer has to do with the traditional positivist emphasis on legislation. A conception of law as primarily legislators' law tends to stress the contingency of the external events that generate particular enactments, rather than the internal logic that makes sense of the system of enacted rules as a whole. On the simplest command model, particular laws come into existence by virtue of the vagaries of a sovereign's political decisionmaking. He decides to have a law like this; then he decides to have a law like that; and so they are both laws, by virtue of his two discrete decisions, whether or not anyone can make sense of them together. This is sometimes ridiculed in relation to the lack of even the most elementary form of systematicity—the ability to generalize. Jeremy Bentham offered the following observation about the impulsive nature of legislation in eighteenth-century England: "The country squire who has had his turnips stolen, goes to work and gets a bloody law against stealing turnips. It exceeds the utmost stretch of his comprehension to conceive that the next year the same catastrophe may happen to his potatoes."⁸⁸

Traditionally, too, the impulsive ad hoc character of positive lawmaking has been ridiculed in terms of the amateurish nature of legislation. William Blackstone observed in 1765 that a long course of reading and study is required to form a professor of laws, "but every man of superior fortune thinks himself *born* a legislator."⁸⁹ As a result, he said, "[t]he

86. See Ronald Dworkin, *Law's Empire* 186–224, 238–50 (1986). For positivist doubts about the work that purposive coherence can do, see Hart, *supra* note 66, at 274–75 (postscript).

87. For discussion of the legal process approach to coherence, see William N. Eskridge, Jr., *Dynamic Statutory Interpretation* 143 (1994). For systematicity in natural law theory, see John Finnis, *Natural Law and Natural Rights* 355–57 (1980). For a modern-day formalist approach to doctrinal systematicity, see generally Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 *Yale L.J.* 949, 966–75 (1988).

88. Gerald J. Postema, *Bentham and the Common Law Tradition* 264 (1986) (citation omitted). Bentham, as we shall see, is the one great legal positivist who does take systematicity seriously and argues strongly for it as a desirable characteristic of positive law.

89. 1 William Blackstone, *Commentaries* *9.

common law of England has fared like other venerable edifices of antiquity, which rash and unexperienced workmen have ventured to new-dress and refine, with all the rage of modern improvement."⁹⁰ Blackstone continued:

The mischiefs that have arisen to the public from inconsiderate alterations in our laws, are too obvious to be called in question . . . [A]lmost all the perplexed questions, almost all the niceties, intricacies, and delays, (which have sometimes disgraced the English, as well as other courts of justice,) owe their original not to the common law itself, but to innovations that have been made in it by acts of parliament.⁹¹

The tenor of this critique is that the legislators ought to have taken systematicity more seriously. But the more law takes on the character of a heap of "inconsiderate" legislation, the less rewarding—indeed the less practicable—an inquiry into legal systematicity will be.

There is a slight appearance of paradox here. Blackstone's worry is that, by emphasizing the enacted nature of law, the positivists are not giving due weight to its technical inter-connectedness. They extol, as the epitome of lawmaking, a form of law that is clumsy and piecemeal in its effects, and often leads to disastrously ill-conceived results. But if common law (before the legislators got at it) really was systematic, why would positivists want to deny or deprecate that systematicity (assuming that their aim, as positivists, is simply to describe the law as it is)? There are three answers to this. First, as a matter of fact, most positivists did not share Blackstone's view that common law was systematic, apart from legislative alterations. Most of them regarded it as a mess on its own terms: in Bentham's words, a "dark Chaos,"⁹² a "cobweb of ancient barbarism."⁹³ Secondly, they believed that any systematicity there was in the common law was by now so obscure and intricate that judicial attempts to craft new decisions on the basis of it would only add to the mess.⁹⁴ Making doctrinal systematicity the point of reference for judicial reasoning, rather than

90. *Id.* at *10. Indeed it was the point of the Commentaries to address this situation. Though they were delivered as lectures at Oxford, they were not intended as a contribution to the education of lawyers; instead they were aimed at the sort of gentlemen in the audience who might be expected to seek positions as legislators five or ten years hence in the House of Commons. See David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* 56–67 (1989); Jeremy Waldron, *The Dignity of Legislation* 9 (1999).

91. 1 Blackstone, *supra* note 89, at *10; see also Lieberman, *supra* note 90, at 56.

92. Lieberman, *supra* note 90, at 239.

93. Postema, *supra* note 88, at 266.

94. From a set of *data* like these a law is to be extracted by every man who can fancy that he is able: by each man, perhaps a different law: and these then are the *monades* which meeting together constitute the rules which taken together constitute that inimitable and unimproveable production of enlightened reason, that fruit of concord, pledge of liberty in every country in which it is found, the common or customary law. Bentham, *supra* note 48, at 192. I am grateful to Gerald J. Postema, "Protestant" Interpretation and Social Practices, 6 *L. & Phil.* 283, 300 (1987), for this quotation.

respect for the text of the latest piece of legislation, would make judges' decisions even less predictable than they already were. Thirdly, we must remember that legal positivism represents not merely a descriptive but also a normative impulse.⁹⁵ The classic positivists—Hobbes, Bentham, and Austin—were not entirely neutral when they identified a parliamentary sovereign as a primary source of law. They valued the opportunity that legislation represented as a way by which the community, or the most enlightened part of it, could take control of its law as something explicitly man-made.⁹⁶ They rejected as nonsense the Blackstonian suggestion that the immemorial customs of common law embodied the consent and the wisdom of the English people and that the quest for its immanent wisdom was a way of vindicating English liberty.⁹⁷ Even if the common law was rooted historically in popular custom, its ways were by now so byzantine that doctrinal reasoning could yield conclusions on the basis of no better credentials than their capricious appeal to the judicial intellect. As Jeremy Bentham put it,

[W]hat is called the Unwritten Law is made not by the people, but by Judges: the substance of it by Judges solely: the expression of it, either by Judges, or by lawyers who hope to be so. Now would I ask, which had most of the people's voluntary consent to it, a sort of Law made by persons, at least some hundred of them chosen by the people, or a sort of Law made by companies of four men called Judges, every one of them appointed by the Crown?⁹⁸

Legislation was the more legitimate source of law; so we might as well make the best of it, and develop a jurisprudence that can come explicitly to terms with its potential for incoherence and lack of systematicity.

To this, I want to add one further complication. Elsewhere I have observed that twentieth-century legal positivists do not place the same emphasis on legislation as a source of law as Bentham and their other jurisprudential ancestors did.⁹⁹ Joseph Raz argues, for example, that it is a mistake to think that a sovereign legislature is always the key to the systematicity of a body of law.¹⁰⁰ What makes a legal system a system, he argues, is not the dominating position of a legislature, but the fact that there is an organized set of norm-applying institutions (e.g., courts) which recognize norms as valid in virtue of the same source-based criteria. On the traditional positivist understanding, a phrase like "source-based criteria of validity" would refer us automatically to a legislator. But

95. See Postema, *supra* note 88, at 328–36, for a discussion of the normative roots of positivist jurisprudence; see also Jeremy Waldron, *Law and Disagreement* 166–70 (1999).

96. See Postema, *supra* note 88, at 308–13.

97. See Jeremy Waldron, *Custom Redeemed by Statute*, 51 *Current Legal Probs.* 93, 108–12 (1998).

98. Jeremy Bentham, *A Comment on the Commentaries and A Fragment on Government* 223 (J.H. Burns & H.L.A. Hart eds., 1977).

99. See Waldron, *supra* note 97, at 33–48.

100. See Raz, *supra* note 73, at 129–31.

Raz argues that there is no reason courts need to orient themselves toward a legislature at all. The criteria of validity shared by a system of courts may refer just to a heritage of earlier decisions by similar norm-applying institutions. Suppose the following two things are true of a legal system: (1) It is the task of the courts to apply pre-existing norms; and (2) Any determination by a court as to what those pre-existing norms are is binding. A system of courts governed by these principles might develop a complex and evolving body of law, each constituent norm of which would be valid by virtue of its source (in a determination by a court as to what some pre-existing norm amounted), without any institution thinking of itself or being perceived as a legislative body, i.e., as a body whose function it is to change the law or to enact new law deliberately. Of course, law in such a system would change, and new law would be created; but it would be created by virtue of mistakes by courts in the application of the task laid down in (1), mistakes which would nevertheless themselves acquire the status of existent legal norms by virtue of the doctrine of authority laid down in (2).¹⁰¹ Such a system would satisfy Raz's own "sources thesis" and would involve the operation of a rule (or rules) of recognition. But it would not be oriented, as those ideas are often taken to be oriented, toward a sovereign legislature as source or toward criteria of valid enactment as the basis on which law is distinguished from non-law. Hence, Raz concludes that "the existence of norm-creating institutions though characteristic of modern legal systems is not a necessary feature of all legal systems."¹⁰²

Well, that is an intriguing possibility.¹⁰³ However, the underlying point remains; if anything it is reinforced. On Raz's account, the evolution of the content of a legal system is a matter of decision building upon decision in a series of steps in which judges make mistakes about what the law is and their mistakes acquire an authority of their own. Once we understand that law is like that, so far as its content is concerned—not a system, but an accumulation of independent "mistakes"—then we will see little virtue in emphasizing doctrinal systematicity. Law remains just one damned thing after another. Something like this may be implicated too in Felix Cohen's view of the law. Courts have power to decide cases, and officially they are supposed to decide them by reference to pre-existing standards. But even when this requirement is not satisfied (and often, on account of indeterminacy, etc., it cannot be), each decision still has authority, and each becomes part of the background for the next judicial decision. After this has gone on for a while, each judge might do better treating the hard case before the court as simply a discrete issue presenting itself for decision on its own merits, rather than as an occasion to

101. See *id.* at 132–48; see also Raz, *Authority of Law*, *supra* note 66, at 105–11.

102. Raz, *Authority of Law*, *supra* note 66, at 105; see also *id.* at 87–88.

103. For some discussion of its significance, see Waldron, *supra* note 97, at 35; see also Waldron, *supra* note 90, at 15–16.

search for a systematicity in the law that might miraculously yield a right answer.

Thus, whether we emphasize a series of unrelated legislative decisions or a series of unrelated judicial decisions, the effect is the same. Law is a heap, not a system, so far as the positivists are concerned. They do emphasize the systematicity of the sources of law, but there is nothing in that external systematicity to secure or guarantee the systematicity of the rules that are enacted. Indeed there is nothing in the idea of external systematicity that even warns the theorist (or the judges that the theorist is trying to re-create in his image) that the inter-connectedness of enacted rules is even important. On the contrary, the emphasis on source rather than content as the basis of validity, though not intended to denigrate systematicity, has the effect of undercutting any attempt to make coherent connection with the rest of the system an element in the recognition of a substantial norm as part of the law. Positivists are insistent that each separate enacted rule is law, on the basis of its own source-based credentials, and we (the citizens, the judges, and the officials) have an obligation to make the best of it, whether it can be connected sensibly with the rest of the *corpus juris* or not.

From this perspective, then, any theoretical terms in the law purporting to draw our attention to its systematicity are to be put to one side as a distraction. On both legal positivist and legal realist views, there is good reason to think that any claims about legal systematicity are false and that any appearance of systematicity in the law is an illusion. Given what we know about law—how it is made, who makes it, its contingent dependence upon occasion, and the haphazard way in which it accumulates—we might as well each play our part in the series of lawmakers rather than pretend, by responding affirmatively to technical legal jargon, that we are simply registering the implications of an orderly system on the case presented before us. That—it seems to me—is what Cohen might say.

IV. THE VALUE OF SYSTEMATICITY

Thus far, the argument has emphasized the occasional nature of positive lawmaking as a foil to the importance of systematicity. On Monday the sovereign commands R_1 , on Tuesday, he is moved to command R_2 , and on Wednesday, for the hell of it, he commands R_3 ; or R_1 , R_2 , and R_3 represent the contingent decisions of courts on various different occasions. Being responses to different political stimuli, being the products of different bellyaches, there is no reason to suppose that R_1 , R_2 , and R_3 will fit together as a system.

What is to stop us, however, from trying to persuade the sovereign that systematicity is important? Why do we not insist as a normative matter that he should try to keep track of the systematic connection of his various legislative impulses in relation to an overall social philosophy? Then, surely, systematicity could come back into the positivist picture. Aware of its importance (if it is important—a point I'll discuss in a mo-

ment), the sovereign would see that it was as much a desideratum of the legislator's craft as clarity or enforceability, and would adjust his lawmaking activity accordingly. And the same might be true of the courts. The legal positivist would not necessarily have to build this recommendation of attention to systematicity into his concept of law. The positivist might acknowledge that it is up to particular lawmakers to determine how important systematicity is, and that a society which thought it unimportant might still be said to have a legal system. Still the positivist is not precluded from taking it seriously in his broader philosophy of law.

The positivist need not be persuaded to do this on the basis of any particular theory of adjudication. That is, we should not make the mistake of thinking that systematicity is important only to the extent that a particular lawmaker wants judges to be able to reach their decisions formalistically. Even if that is not his aspiration, he is still likely to value some way of keeping track of the impact that a particular modification in the law might have on other aspects of the legal system. A set of laws works as a system if the application or change of any one or more members of the set tends to have an impact on the consequences of applying any of the others, whether those consequences are intended by those who make the laws or not. Such *de facto* systematicity is something that any lawmaker ought to be concerned about if his interest goes beyond the particular modification in which he is currently engaged. It means that on a given occasion of lawmaking, he may well effect changes in the law other than, or as well as, the amendment that he intends to make. It is not hard to sketch some examples: A change in the definition of a crime—for instance, the stipulation of “race hatred” as an aggravating factor—may affect the laws of evidence and the laws of criminal procedure, by requiring courts to pay attention now to the establishment of motive not just as a probative factor but as an element of the offense; a change in the rules governing rights-of-way may make a difference to whether certain regulations affecting property have the constitutional character of a “taking”; in torts, a change in the understanding of foreseeability may affect the conditions under which it may be reasonable to offer injunctive relief; and so on. A good legislative draftsman will want to keep track of these effects, and formal systematicity in the law, even if it is not valued for any other purpose in jurisprudence, may offer a way of doing this.

This normative point was generalized by Jeremy Bentham, who (as I said earlier¹⁰⁴) was the only one of the classic positivists who seems to have noticed the importance of this element in the law. I shall quote his argument at length, from the chapter that ends *Of Laws in General*. Bentham begins by noticing the importance of the reforming impulse:

No system of laws will ever . . . be altogether perfect: none so good but that a greater share either of information or judgment

104. See *supra* note 88 and accompanying text.

or of probity might make it better. Even if at any given instant it were really perfect, at the next instant, owing to some change in national affairs it might be otherwise. Every system of law then may from time to time be requiring alterations: and though it were never to require any, yet owing to the fluctuation of human councils, alterations would in fact be made in it. In a body of laws as in every other complex piece of mechanism a great part of its perfection depends upon the facility with which the several parts of it may be altered and repaired, taken to pieces, and put together. But such a system if constructed upon a regular and measured plan . . . would not only have the advantage of every other which remained untouched, but alterations, whenever any were made, would give less disturbance to it: provided that such alterations, as often as any were made in point of form, were accommodated as they easily might be to that of the original groundwork. The effects and influence of every such provision whether it were an entire law, a provision expositive, limitative, or exceptive, might then with certainty and precision be traced on and coloured by reference throughout the whole body of the laws. At present such is the entanglement, that when a new statute is applied it is next to impossible to follow it through and discern the limits of its influence. As the laws amidst which it falls are not to be distinguished from one another, there is no saying which of them it repeals or qualifies, nor which of them it leaves untouched: it is like water poured into the sea.¹⁰⁵

Bentham's plea is for formal codification—"a regular and measured plan" of statutes into which enacted modifications could easily be digested.¹⁰⁶ But even short of that, a judge or a legislator may see the importance of being able to phrase a given proposal for change in the language of a conceptual system, a language which enables useful inferences to be drawn about the impact the change is likely to have on adjacent laws and throughout the legal system. Why then would the positivist, or a legal realist like Cohen, not take this Benthamite line?

V. DISAGREEMENT AND POLITICAL COMPETITION

From the positivist's point of view, there might still be something other-worldly or unrealistic about the suggestion I have just developed. At the beginning of Part IV, I imagined a legislator or a judge laying down three rules— R_1 , R_2 , and R_3 —on different occasions; and the suggestion we have been considering is that a lawmaker who wants to understand the difference that a given change—say, R_3 —makes to the law should ensure that the existing *corpus juris*— $\{R_1, R_2\}$ —is phrased and organized in a systematic way, and that R_3 is understood also in the theoretical terms of that system. The suggestion is that the judge or the legislator ought to aim for a sort of articulate consistency when lawmaking. But the

105. Bentham, *supra* note 48, at 236 (footnote omitted).

106. *Id.*

lack of system in the existing law is not due merely to the existing lawmaker's paying insufficient attention to systematicity. It is due primarily to the fact that modern legal systems are open to change at the hands of *different* lawmakers, with differing and often opposed priorities, programs, and values.

Consider this schematic example. R_1 and R_2 might be pieces of legislation passed by a conservative parliament during a long period in office. When, eventually, the voters throw the conservatives out and the liberals come to power, the latter may find themselves politically unable to undo the whole legacy of their conservative opponents.¹⁰⁷ They may not have the time or the political resources to repeal R_1 and R_2 . Maybe the best they can do is enact a liberal statute, R_3 , which offsets some of what they judge to be the worst effects of $\{R_1, R_2\}$. And when the conservatives win office again a little later, they in turn may have other priorities than simply repealing R_3 . Maybe the best they can do is add a new center-right statute R_4 to what by now is a compromised legal system $\{R_1, R_2, R_3\}$. It is no good urging these legislators to keep faith with the system of their predecessors, for they have come into office ideologically opposed to that system. But equally, it is no good urging them to replace their opponents' system with a whole new system of their own: They do not have the political resources to do that. Moreover, they have no intention of scrapping all the existing laws and starting over: They simply want such congenial measures as they can pass to take their place in the existing law. And so the law becomes a "checkerboard,"¹⁰⁸ incorporating half-measure upon half-measure in a way that defies any attempt to discern a single, coherent system.

This point about disagreement and the diversity of political programs that various people bring to their lawmaking is quite important for jurisprudence. The separation of law and morality, and the refusal to associate the concept of law with any particular moral theory or social or political program is not just an abstract thesis in jurisprudence. It reflects the reality of almost every developed legal system—that lawmaking takes place in a context of moral disagreement and political competition,¹⁰⁹ and that almost every modern legal system operates politically under the auspices of a multi-party state. Any identification of law with morality, therefore, would be not only theoretically tendentious, but politically poisonous, as each party would accuse the other of abandoning the rule of law simply by virtue of its attempt to implement its own program.¹¹⁰

107. I have been assisted here by the discussion in Joseph Raz, *The Inner Logic of the Law*, in *Ethics in the Public Domain*, *supra* note 85, at 238, 240–41.

108. This term is adapted from Dworkin, *supra* note 86, at 179.

109. I have made this a major theme in my recent work. See Waldron, *supra* note 95, at 6–8.

110. Something very like this happened in Germany between the wars, as the juristic opponents of social democracy developed "natural law" theories to justify their refusal to enforce legislation that they opposed. For the legacy of this in the Nazi era, see Ingo

Legal positivism is a jurisprudence ready-made for the multi-party situation, the situation in which different moralities and ideologies compete for possession of the commanding heights; other legal philosophies, which deny the separation of law and morality, either have to regard some of the parties in modern political competition as anti-legal or else water down the moral content that they associate with the concept of law to some rather agreeably anodyne values. The very formalism of the positivist account of sovereignty or rules of recognition, which many find distressingly "thin" and bereft of substance, has its advantages precisely because, on the positivist account, law and the apparatus of lawmaking are understood in terms that are hospitable to various parties and ideologies (each of which, if it had the world to itself, would inject a different substantive content into the concept of law).

This point has not been emphasized as explicitly as it ought to have been in positivist jurisprudence. Modern positivists talk about the separation of law and morality—where morality is identified either with the morality that actually flourishes in a given society (positive morality), or with the morality ("critical morality" or "moral truth") that any competent moral philosopher will eventually light upon¹¹¹—rather than the separation between law and any particular controversial moral view (existing actually in an array of competing positive moralities in society, or notionally as competing critical candidates for the status of "moral truth"). As one reads modern positivist accounts of the separation between law and morality, one gets the impression that there is a clearly identified thing called law and another clearly identified thing called morality, and it is important (for some reason) to keep the two things apart.¹¹² One has to go all the way back to Hobbes to find jurisprudential emphasis on the need to distinguish between what the law is on any given matter, and what various people's moral views on that matter might be, and to recognize that law makes its claims not against an orderly moral background but against the background of moral difference, controversy, and disagreement.¹¹³ Even, perhaps especially, in Bentham's work there is an assumption that we know what moral theory to use in the evaluation of law—Bentham's own utilitarianism¹¹⁴—and thus what is the morality to

Muller, *Hitler's Justice: The Courts of the Third Reich* 10–24 (Deborah Lucas Schneider trans., 1991) (1987).

111. See, e.g., Hart, *supra* note 66, at 167–84.

112. There is a good discussion of this in Robin West, *Three Positivisms*, 78 *B.U. L. Rev.* 791, 792–800 (1998).

113. See Thomas Hobbes, *Leviathan* 32–33, 189–91 (Richard Tuck ed., Cambridge Univ. Press 1988) (1651); see also Waldron, *supra* note 95, at 12, 202–03, 245.

114. See Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* 158 (J.H. Burns & H.L.A. Hart eds., Athlone Press 1970) (1789) ("The general object which all laws have, or ought to have, in common, is to augment the total happiness of the community . . .").

counterpose (in “censorial” jurisprudence¹¹⁵) to law as it actually is. Bentham seems to think that anyone enlightened enough to see the need for codification will also be enlightened enough to adopt utilitarianism as his normative touchstone. He does have the good grace to refer to “the fluctuation of human councils” and to notice a distinction between changes in the law actually required by utility and changes which legislators merely imagine are required.¹¹⁶ Even so, in the pages immediately following the long passage about the importance of system quoted earlier,¹¹⁷ Bentham observes that “[t]he fundamental principle which is the basis of the system of laws here sketched out is the principle of utility; and the method here proposed is particularly calculated to shew how far that principle has been deferred to, and where if anywhere it has been deviated from.”¹¹⁸

I suspect something similar goes on in Felix Cohen’s work as well. When Cohen suggests that social policy is “the gravitational field that gives weight to any rule or precedent,”¹¹⁹ he seems to be implying that for an enlightened person there is just one approach to be taken to legal questions, a pragmatic morality of a broadly utilitarian kind—the “functionalist approach” of his article’s title.¹²⁰ Like Bentham’s approach,¹²¹ it is consequentialist in character, focusing on the harms and benefits that flow to the members of a society from a given legal rule or decision. “Morality, so conceived, is vitally concerned with such facts as human expectations based upon past decisions, the stability of economic transactions, and even the maintenance of order and simplicity in our legal system.”¹²² Cohen does acknowledge that traditionalist judges have their own peculiar ethics and ideologies cowering behind the camouflage of legal concepts. In the discussion of one of his examples of transcendental nonsense, trademark law, he says:

115. For the distinction between “expository” and “censorial” jurisprudence, see *id.* at 293–94.

116. See *supra* text accompanying note 105.

117. See *supra* text accompanying note 105.

118. Bentham, *supra* note 48, at 237.

119. Cohen, *supra* note 1, at 834.

120. See *id.* at 821–22. Notice that in Cohen’s work, “functionalism” denotes both an ethical theory and a method for analyzing language. See *id.* at 822–24.

121. Cohen talks of “the brilliant achievements of Bentham . . . in determining the consequences of legal rules.” *Id.* at 848. There is further discussion of Bentham in Felix Cohen, *The Problems of a Functionalist Jurisprudence*, in *The Legal Conscience*, *supra* note 61, at 77, 93–94, where Cohen observes: “It was Bentham’s great and enduring contribution to legal criticism to insist that the value of a legal rule depends upon its human consequences. In the field of legal criticism, or normative jurisprudence, functionalism is simply a development of utilitarianism.” *Id.* at 93. Cohen’s “criticisms” of Bentham in these pages relate simply to Bentham’s failure to generalize his utilitarianism, his failure to defend it with sufficient vigor, and his lack (through no fault of his own) of the social science material that would enable a consequentialist program to be carried through convincingly. See also Martin P. Golding, *Realism and Functionalism in the Legal Thought of Felix S. Cohen*, 66 *Cornell L. Rev.* 1032, 1056–57 (1981).

122. Cohen, *supra* note 1, at 840.

Courts, then, in establishing inequality in the commercial exploitation of language are creating economic wealth and property, creating property not, of course, *ex nihilo*, but out of the materials of social fact, commercial custom, and popular moral faiths or prejudices. It does not follow, except by the fallacy of composition, that in creating new private property courts are benefiting society. Whether they are benefiting society depends upon a series of questions which courts and scholars dealing with this field of law have not seriously considered.¹²³

And he then poses a series of questions of a utilitarian sort. The implication is that at present judges are proceeding on the basis of moral prejudice (cloaked in legal logic), but that if they were to proceed sensibly, facing ethical questions directly, they would pose them in terms of the pragmatic morality that Cohen calls "[s]ocial policy."¹²⁴ He does not draw Benthamite conclusions from this, i.e., that therefore a legal system of enlightened judges could in fact construct a well-organized utilitarian code. But like Bentham he does not clearly understand the obstacle that prevents this from happening—namely, the existence of full-blooded moral disagreement even among enlightened persons. The more moderate among the realists often used to talk in this way, as though there were a crucial contrast between the moral prejudices of their conservative and formalist opponents and the truth (singular) about morality, which they embodied in a pragmatic and humane consequentialism. This complacency about enlightened moral thought really lasted through the ascendancy of the Legal Process school, and was not exploded until the followers of Critical Legal Studies began to question the tautologies of "policy" and nostrums of the liberal consensus.¹²⁵

There are reasons then for thinking that the *corpus juris* is even more of a mess than the realists supposed. For even if all judges were to decide

123. *Id.* at 816–17 (footnote omitted).

124. *Id.* at 834.

125. For rich and helpful accounts, see Duxbury, *supra* note 6, at 153, 155, 161–203, 424 (discussing the "anti-realist" critique and the "policy-science approach," which saw lawyers as leaders versed in public policy, and then discussing Critical Legal Studies's assault on the complacency of post-realist jurisprudence); Mark Kelman, *A Guide to Critical Legal Studies* 13 (1987) (arguing that the legal realist recommendation that we pay greater attention to "policy" does not necessarily rescue law from indeterminacy and contradiction); Duncan Kennedy, *A Critique of Adjudication* 83, 108–19, 133–156 (1997) (arguing that "policy" is "a potential Trojan horse for ideology"). Kennedy's account is particularly helpful:

Much in the current state of legal theory in the United States is explained by the realists' choice to attempt to reground the rules of law in a combination of fine-grained policy analysis . . . We can say of this enterprise, first, that it entailed the abandonment of the critical, or viral, strand in their own project and, second, that it was only partially successful.

The realist's critical project was aborted because they never extended their successes in the critique of deduction, precedent, and statutory interpretation to policy argument itself. That, to my mind, has been a contribution of cls.

Id. at 112–13.

hard cases on the basis of policy considerations, they might mean such different things by “policy” that their decisions would point in different directions—some wealth-maximizing, some egalitarian, some welfarist, some taking into account the interests of future generations, and so on—and not add up to anything systematic. Moreover, realist (and modern positivist¹²⁶) attention to courts as sources of law alerts us to the fact that the messiness of law is not just the product of serial changes in legislative authority (e.g., liberal majorities succeeding conservative majorities in the legislatures),¹²⁷ but that in any given period law is being made by persons of differing views and ideologies. There may be socialist legislators, conservative judges, liberal judges, feminist administrators with rule-making authority, and so on across the political spectrum, each adding his or her penny’s worth day by day to the contents of the law.¹²⁸ Law becomes a patchwork of variegated standards of differing inspirations—a bit of utilitarianism here, a bit of retributivism there, a little bit of market libertarianism coexisting with a hangover from the New Deal, a little bit of Christian moralism side-by-side with sixties liberalism. The mixture is partly archaeological—different strata from different periods—and partly a product of contemporary competition, as different ideologies battle it out from different positions of power. In the context of this sort of melange, an emphasis on system may seem futile.

The position of Critical Legal Studies is even more dismissive. “[L]aw,” says Roberto Unger, “is the product of real collective conflict, carried on over a long time, among many different wills and imaginations, interests and visions.”¹²⁹ With this sort of provenance, any given body of legal doctrine is bound to be messy, compromised, and riddled with contradictions:

Warring solutions to similar problems will coexist. Their boundaries of application will continue uncertain. Interests and ideals favored in some domains will be discounted in others for no better reason than the sequence in which certain decisive conflicts took place and the relative influence enjoyed by contending parties of opinion at each time. Intellectual fashions will join with preponderant interests to produce results that neither interests nor fashions alone would have allowed us to predict. Defeated or rejected solutions will remain, incongruously, in the corners of the law as vestiges of past approaches and prophecies of possible alternatives.¹³⁰

126. See *supra* text accompanying notes 99–103.

127. See *supra* text accompanying notes 107–108.

128. See Jeremy Waldron, *The Circumstances of Integrity*, 3 *Legal Theory* 1, 2 (1997) (“Checks and balances, the separation of powers, and a history of political competition are likely to yield a patchwork of standards and institutions that no political party and no conception of justice can acknowledge as peculiarly its own.”).

129. Roberto Mangabeira Unger, *What Should Legal Analysis Become?* 65 (1996).

130. *Id.* at 66; see also Jeremy Waldron, *Dirty Little Secret*, 98 *Colum. L. Rev.* 510, 513–16 (1998) (reviewing Unger, *supra* note 129).

With this as our raw material, the idea of "keeping track" through legal systematicity looks hopeless.¹³¹

VI. TECHNICAL TERMS AND NEUTRAL FRAMEWORKS

And yet, the reasons for valuing systematicity do not go away. It remains the case that if we want to understand the effect that a given judicial decision or piece of legislation will have, we must consider its impact in the context of all the other rules and decisions with which it is surrounded. The fact that those adjacent rules and decisions were not inspired by the same program as our present legal measure does not mean that they operate independently of it. Suppose we pass a law adding a new ground of liability of corporations to consumers. The liberalism of our decision today may well be offset by the conservatism of other rules (for example, rules of procedure, rules of jurisdiction, and detailed rules about remedies), all of which will need to be considered before we can grasp the net difference that our present decision actually makes. If anything, the need to trace these influences increases the more variegated the legal system. If our political program were in sole possession of the law, then a given measure might have exactly the significance in the law that it has in our program. But if we are jostling for influence with our predecessors and our contemporary opponents, then there is no guarantee that a measure which seems ameliorative in the context of our program will actually be ameliorative in its net effect. One way or another, then, the task of keeping track has to be addressed. Since the law will operate as a system *de facto* whether we like it or not, we need to find some way of comprehending it as such, so that (in Bentham's words) "when a new statute is applied," we can "follow it through and discern the limits of its influence."¹³²

An important point follows from this. If the technical language of the law is to offer us any assistance in this task of "keeping track," then it must be able to express the actual interrelationships of legal provisions, laid down by diverse and competing lawmakers. The conceptual terminology of legal doctrine must be able to accommodate policy initiatives inspired by different moralities, ideologies, and programs, while resisting theoretical identification with any one of them. It must be understood as a sort of neutral matrix on which their interlocking relations can be laid out without any assumption that the various elements were, so to speak, made for one another. This is quite a tall order because, traditionally in jurisprudence, there has been a tendency to associate legal formalism with substantive moral theory. Bentham identified his methodical system with the substance of his utilitarianism.¹³³ In the United States, legal for-

131. See *supra* notes 92-102 and accompanying text.

132. Bentham, *supra* note 48, at 236.

133. See *id.* at 237.

malism was associated with laissez-faire ideology.¹³⁴ On the Continent, the logical rigor of the codes was identified with a neo-Kantian science of universal freedom.¹³⁵ This tendency to associate formal systematicity in the law with the substantive systematicity of some particular moral theory is very common in legal philosophy.¹³⁶ The American case is particularly significant. We must remember that the formalism which the legal realists were reacting against was discredited in American jurisprudence not just because of what Felix Cohen might have called its “theological” or “metaphysical” character, but because it was associated with a social theory that people found ultimately unconvincing.¹³⁷ It is natural to suspect therefore that any attempt to rehabilitate the idea of formal systematicity inevitably involves a reversion to the “logic” of freedom of contract and capitalist competition. This particular suspicion, and its counterparts in the Benthamite and neo-Kantian cases, has got to be allayed.

In Continental legal theory, the main work in distinguishing doctrinal systematicity from the systematicity of a substantive moral program has been done by Hans Kelsen. Though Kelsen’s theory is often described as neo-Kantian,¹³⁸ he was at pains to distinguish the formal features of his system, which were indeed based on Kantian architectonic, from any allegiance to Kant’s moral philosophy.¹³⁹ The whole point of his “Pure Theory” was that law should be systematized on its own ground, quite apart from any moral or ideological content. On the one hand, “the Pure Theory . . . aims at the totality of law in its objective validity and seeks to conceive each individual phenomenon in its systematic context with all”;¹⁴⁰ on the other hand, “the Pure Theory places itself in sharpest contrast to traditional jurisprudence which, consciously or unconsciously,

134. See Duxbury, *supra* note 6, at 25–32.

135. See Alexander Somek, German Legal Philosophy and Theory in the Nineteenth and Twentieth Centuries, in *A Companion to Philosophy of Law and Legal Theory*, *supra* note 38, at 343, 343–46; Albert A. Ehrenzweig, Book Review, 64 *Harv. L. Rev.* 355, 356 (1950).

136. We should include also under this heading Ronald Dworkin’s theory that moral systematicity (or “integrity”) must be constructed for the law, precisely because law is the product of differing moralities. See Dworkin, *supra* note 86, at 176–78. Dworkin is not prepared to accept that law’s integrity might be purely formal: He maintains that it must consist in “a coherent vision of justice,” *id.* at 368, something that might in principle be held by one person as his own moral view.

137. See Duxbury, *supra* note 6, at 32; see also Morton J. Horwitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy* 34 (1992); Morton White, *Social Thought in America: The Revolt Against Formalism* 11 (1952).

138. See, e.g., Stanley L. Paulson, *The Neo-Kantian Dimension of Kelsen’s Pure Theory of Law*, 12 *Oxford J. Legal Stud.* 311 *passim* (1992); Dhananjai Shivakumar, Note, *The Pure Theory as Ideal Type: Defending Kelsen on the Basis of Weberian Methodology*, 105 *Yale L.J.* 1383 *passim* (1996).

139. See Stanley L. Paulson, Introduction to Hans Kelsen, in *Introduction to the Problems of Legal Theory* xvii, xxix (Bonnie Litschewski Paulson & Stanley L. Paulson trans., Oxford Univ. Press 1992) (1934).

140. Kelsen, *supra* note 73, at 191–92.

sometimes more, sometimes less, has an 'ideological' character."¹⁴¹ One of Kelsen's critics caricatured the "neutrality" of his technical apparatus with a sarcasm worthy of Felix Cohen. He imagined Kelsen saying, "We neither know nor care what kind of laws you should make. That appertains to the art of legislation, which is foreign to us. Pass laws as you wish. Once you have done so, we shall explain to you in Latin what kind of a law you have passed."¹⁴² But the importance of Kelsen's explanatory aspiration should not be underestimated. If a body of Latin tags can actually reorder the elements of law as a system, then its substantive emptiness—"We neither know nor care what laws you pass"—is an advantage, not an occasion for ridicule.

In American jurisprudence, there were hints among the realists and proto-realists that they too understood the need to divorce doctrinal from programmatic systematicity. Oliver Wendell Holmes said famously in his dissent in *Lochner v. New York* that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics":

Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views¹⁴³

He did not confine the point to constitutional law. We have alluded already to Holmes's belief in the importance of systematicity,¹⁴⁴ and it is clear that the formalism he held was a doctrinal formalism divorced from any particular social theory. He urged those who came up with predictions about what courts will do to organize them systematically, and "to generalize them into a thoroughly connected system"; but he was under no illusion that this would depend on the predictions being inspired by a single orderly program.¹⁴⁵ Even Felix Cohen remarked in one of his essays that "[t]o identify economic theory with a particular *laissez faire* theory that is repudiated by most intelligent students of economics today, and to identify legal theory . . . with a set of doctrines that are rapidly being undermined, is to throw out the baby with the dirty water."¹⁴⁶ His claim here is that if legal theory has any virtue at all, it has to be kept apart from the economic theories that are discrediting it.

At the same time, however, Cohen's own "functionalist" pattern of analysis tends to tighten, not loosen, the link between legal concept and particular content. We saw earlier that Cohen thought that at best each

141. *Id.* at 106.

142. Evgeny B. Pashukanis, *Law and Marxism: A General Theory* 52 (Barbara Einhorn trans. & Chris Arthur ed., Ink Links 1978) (1929) (quoting Julius Ofner).

143. *Lochner v. New York*, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting).

144. See *supra* note 41.

145. Holmes, *supra* note 41, at 457-58.

146. Felix S. Cohen, *The Folklore of Capitalism*, in *The Legal Conscience: Selected Papers of Felix S. Cohen*, *supra* note 61, at 442, 447.

technical term was simply a “signpost of a real relation subsisting between an antecedent and a consequent.”¹⁴⁷ On his analysis, the term indicated that “[i]f a certain group of facts is true of a person, then the person will receive a certain group of consequences attached by the law to that group of facts.”¹⁴⁸ But if a given term is defined in this way, then it will be identified (for each legal system) with the actual criteria that happen to be used at a given time to determine whether or not the concept applies. Change the criteria, and you change the concept. The trouble with this is that you then lose the ability of the concept to mark connections with other concepts—connections that survive such changes in applicability.

A schematic example may help. Suppose locus standi in a particular system of administrative law is confined at one time to those who are “materially affected” by an administrative decision. It follows, on Cohen’s analysis, that the term “locus standi” is just shorthand for the rule that “All and only those who are materially affected by a decision are entitled to bring an action to have it overturned.” Now, if the basis on which people can bring actions is subsequently changed (extended, for example, to those who have “a special interest” in the decision), then the old term will have been discarded, on Cohen’s analysis, and replaced with a new one.¹⁴⁹ That change may belie the fact that there remain important conceptual linkages in the legal system between, say, locus standi, relator actions, interlocutory injunctions, inherent discretion, and other technical concepts, linkages which need to be considered and explored in the context of any given set of grounds for standing to sue. Understanding these connections is as important as understanding the operational definition of “locus standi” at a particular time; but it is only the latter, not the former, that is captured in Cohen’s “sign-post” analysis.

In other words, in his enthusiasm for securing some empirical point of reference, Cohen succeeds only in tightly identifying each concept with the particular content that some morally or ideologically-motivated lawmaker has invested it with at a particular point in time. The very “magic circle” of inter-definition that he disparaged—the flexible ability of terms like these to indicate theoretical linkages that are not necessarily grounded upon particular empirical content—is in fact exactly the “neutrality” we are looking for. The exclusion of “extra-legal facts” from the magic circle is a way of allowing us to trace the resonances of particular norms in a system of norms, without having to assume that all theoretical bets are off the moment the content of any particular norm is changed.

147. Cohen, *supra* note 1, at 828 (quoting Wu, *supra* note 37, at 2); see *supra* note 37 and accompanying text.

148. Cohen, *supra* note 1, at 828.

149. The new term may or may not be a homonym of the old—that is, we might continue to use the string of letters “l-o-c-u-s s-t-a-n-d-i” to mean (now) “All and only those who are specially interested in a decision are entitled to bring an action to have it overturned.” But our only reason for doing so would be to preserve a sense of the concept that went beyond the reductivist account of its meaning that Cohen is urging on us.

In the end of course, empirical reality is not excluded. We cannot apply the concept of *locus standi* in a particular case without knowing the criteria currently laid down for its application, and those criteria do direct our attention to extra-legal facts. But still, we can be alerted to the importance of exploring the consequences of a change in *locus standi* criteria for administrative procedure or courts' discretion or the powers of an attorney general by purely conceptual connections, and that seems too valuable a thing to simply give up for the sake of a reductionist analysis.¹⁵⁰ Cohen might be right in his distaste for conceptual arguments that trapeze around in cycles and epicycles without ever coming to rest on the floor of verifiable fact.¹⁵¹ But that does not mean that every non-empirical connection is discreditable and unimportant. To say the contrary would be to preclude (in Cohen's earlier terms¹⁵²) any distinction at all between the theoretical baby and the dirty water of substance (moral or economic) that happens to have contaminated it.

A word, finally, about neutrality. I said that if our technical legal vocabulary is to be serviceable in the context of a modern legal system, we must treat it as a sort of neutral accommodating matrix, on which we may register and trace the connections among various legal changes, inspired by quite disparate moral and political programs. If it is to perform the Benthamite function of "keeping track" (following each legal change through and discerning the limits of its influence),¹⁵³ this theoretical matrix must be relatively independent of any particular morality or ideology. Now there are bound to be limits to this detachment. The requirement of independence cannot mean that the systematicity of the law is entirely pure in the sense of pristine, uncontaminated by any history of association with particular substantive doctrine. Our legal concepts have not been manufactured by bloodless technicians. Terms like "consideration," "malice," and "due process" do have a genealogy, and they come with resonances of previous associations, some of them piecemeal and some of them programmatic, some of them uplifting and some of them quite unpleasant. They are capable nevertheless of being more accommodating than these particular resonances might suggest, for we have made it one of the principles of legal education that terms of art can and must be understood in a way that distinguishes in their technical sense from other meanings with which they may be associated. (Consider, by analogy, how the classic positivists were able to adapt the term "sovereign" to refer not just to monarchy, which its original sense connoted, but to "uncom-

150. The distinction between concept and conception seems ready-made for this problem. We may distinguish between the concept of *locus standi*, related internally in the legal system to other concepts, and particular conceptions of *locus standi*, each of which represents some lawmaker's investment of the concept with a particular content. For the concept/conception distinction, see Ronald Dworkin, *Taking Rights Seriously* 134-46 (1978).

151. See Cohen, *supra* note 1, at 814-15.

152. See *supra* note 146 and accompanying text.

153. See Bentham, *supra* note 48, at 236.

manded commanders" of all sorts—juntas, parliaments, even direct democracies.¹⁵⁴) No doubt, new terminology will be introduced from time to time as the old concepts prove unaccommodating to certain forms of radical change. Those new concepts may begin by being identified with the innovations that elicited them; but in time they too may become terms of art that can be distinguished, in their systematic connections with other concepts in the law, from a particular content and a particular policy or morality.

CONCLUSION

I have tried to set out the best case that can be made to answer Felix Cohen's famous critique of legal concepts in "Transcendental Nonsense and the Functional Approach." The resilience of technical vocabulary in law seems to indicate that it serves some purpose, and it has seemed to me worth exploring what that purpose might be. In that exploration, I have played down the role in which formal systematicity has usually been cast—the role of constraining judicial decision—and I have emphasized instead its importance in helping us keep track of the significance of legal changes in a complex patchwork of doctrine, whether those changes are wrought by legislators or by courts. I do not think the suggestions I have made are wholly repugnant to the spirit of Cohen's discussion. For all his talk about "theology" and the "supernatural approach," we have seen that his hostility to theory is not complete and steadfast. There are moments when he recognizes the importance of paying attention to system in the law, and moments too when he tries to understand legal theory in a way that sets it a little apart from the systematicity of particular moral and ideological programs.

It would be wrong, however, to conclude that the case I have made is unanswerable. There is a strand in legal realism that has always been quite pessimistic about the possibility of anything along the lines I have suggested. At the time Cohen was writing, the best-known attempts to take systematicity seriously in American law were the ALI Restatements. As we have seen,¹⁵⁵ Cohen and others dismissed these attempts as "hopeless"¹⁵⁶ and "hideously difficult"¹⁵⁷ in the light of law's mutability, "the last . . . gasp of a dying tradition."¹⁵⁸ It would be easier, said Edward S. Robinson in 1934, "to learn law by random sampling of the cases with all

154. See Bentham, *supra* note 114, at 18; Hobbes, *supra* note 113, at 129–37; see also Waldron, *supra* note 95, at 42–45.

155. See *supra* note 6 and accompanying text. See generally Allen R. Kamp, *Between-The-Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code in Context*, 59 *Alb. L. Rev.* 325 (1995) (describing social influences on the realist).

156. Leon Green, *The Duty Problem in Negligence Cases* (pt. 1), 28 *Colum. L. Rev.* 1014, 1014 (1928), quoted in Duxbury, *supra* note 6, at 147.

157. Edward Stevens Robinson, *Law and the Lawyers* 36 (1935), quoted in Duxbury, *supra* note 6, at 148.

158. Cohen, *supra* note 1, at 833.

their contradictions and complexities than by reading the abstract propositions in the volumes issued by the Institute."¹⁵⁹ And the tolerance for this enterprise has hardly improved as the realist critique has been superseded by the onslaught of CLS.

Still, let us not succumb too quickly to this sort of pessimism. "Transcendental Nonsense" developed a powerful and scathing critique. But it neglected a whole body of jurisprudential theory about the importance of legal concepts and the logical relations between them, and therefore failed to give the case in favor of conceptual argumentation a decent run for its money. Moreover, things have changed philosophically since 1935. The logical positivism with which Cohen buttressed his critique looks rather passe almost sixty-five years later. In philosophy, we have become quite accepting of theoretical language, quite tolerant of terms that cannot immediately be reduced to empirical observation, and quite understanding of the role that argument around such terms may play in a scientific system. That does not mean, of course, that similar terms necessarily play a similar role in something called "legal science." But they may; and if they do, it is certainly worth understanding—even in Cohen's own functional terms—what the point of these conceptual arguments might be, and what contribution they make to law's ability to flourish in an environment of complexity, diversity, and disagreement.

159. Robinson, *supra* note 157, at 36.