

# Transcending Transcendental Nonsense: Toward a New Realism in Federal Indian Law

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## I. INTRODUCTION

Felix Cohen, the influential legal realist, produced the most important work in federal Indian law, the famous treatise that appeared in the 1940s.<sup>1</sup> There is a potential disconnect between these two aspects of Cohen's work. His legal realism scorned abstract legal conceptualisms in favor of the law in action, while the treatise categorized and systematized a vast and largely unknown area of law into a variety of legal concepts. My concern in this essay is not Cohen's consistency, but the extent to which his treatise project, not his legal realism, may continue to frame thinking about academic federal Indian law. In my judgment, more of his legal realism, and less of the perceived implications of his treatise, would benefit the field as it makes its way into the 21st century. I write to sketch out—free from the usual burdens of comprehensiveness and citation to authority—my concerns about undue conceptionalism in the field and my hope that an emerging generation of Indian law scholars may be on the path to a realistic cure for it.

Before Cohen's *Handbook of Federal Indian Law*, Indian law was sprawl and muddle, an unruly mass of treaties, statutes, executive orders, executive regulations, cases, and other sources of law. Cohen and his staff organized the materials and then provided a concise overview and synthesis. Moreover, their work was normative as well as descriptive. As Nathan Margold wrote in the introduction to Cohen's *Handbook of Federal*

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<sup>1</sup> FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* (1941). Additional editions were also printed in 1942 and 1945.

*Indian Law*, the treatise supported four major principles: (1) the political equality of Indians; (2) the tribal power of self-government; (3) the exclusion of state power from Indian country; and (4) federal responsibility for the protection of Indian interests.<sup>2</sup>

Cohen and his *Handbook of Federal Indian Law* are saintly presences in federal Indian law. In 1982, a new generation of Indian law scholars, who published an updated handbook, called Cohen “the Blackstone of American Indian law” and the *Handbook* “the most enduring contribution of this truly eminent scholar.”<sup>3</sup> They reported that they had “updated, reorganized, and rewritten, but that the abiding principles of Indian law have changed little since Cohen so carefully articulated them. Cohen’s vision has proved out. . . .”<sup>4</sup> They dedicated the 1982 edition to Cohen and included, as an epigram, his famous analogy between Indians and the miner’s canary.<sup>5</sup> Indeed, despite all the rewriting required by forty years of legal developments, they entitled the book *Felix S. Cohen’s Handbook of Federal Indian Law (1982 edition)*. Law review editors have been bedeviled ever since: They usually alter the citation to *Felix S. Cohen, Handbook of Federal Indian Law (1982 ed.)*, because they do not know that Cohen met his untimely demise in 1953.

The reverence for Cohen and his book is not only understandable, it is well deserved. Yet, I think that an unintended consequence of this adoration has been to hinder the development of modern scholarship in federal Indian law. Ironically, what sometimes seems missing in Indian law is precisely the attitude that Cohen personified in his broader contributions to legal scholarship, where he undertook to deflate empty legal conceptualisms by stressing that law should be measured by what it means in action, not necessarily by what is said in the case reporters (or treatises).

In Part II, I briefly contrast the formalist vision of law at the heart of the classic treatises with Cohen’s own legal realism, as exemplified in his classic article, *Transcendental Nonsense and the Functional Approach*.<sup>6</sup> In light of this article, labeling Cohen the Blackstone of federal Indian law turns out to be a kind of unintended affront. In Parts III and IV, I suggest that future Indian law scholarship should be less formalistic and doctrinal—less treatise-like—and more sensitive to Cohen’s brand of legal realism. In my judgment, this kind of scholarship in federal Indian law

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<sup>2</sup> See *id.* at ix–xiii.

<sup>3</sup> FELIX S. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW viii (Rennard Strickland et al. eds., 1982 ed.).

<sup>4</sup> *Id.* at x.

<sup>5</sup> *Id.* at v (“Like the miner’s canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith. . . .”).

<sup>6</sup> Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

should be simultaneously more grounded and more theoretical. If doctrine is at least as subject to evolution here as in other fields of law, scholarship should aspire to explain and prescribe Indian law where, according to Cohen, it counts—on the ground. What actually happens on Indian reservations concerning the creation, evolution, and implementation of law is a subject about which the broader legal community has few conceptions, and most of those are probably inaccurate. If, as legal realism suggests, the law that counts is the law in action, and the law in action should be measured by a bottom-up consequential calculus rather than some top-down consistency with abstract doctrine, the legal community cannot hope to understand, much less appreciate, federal Indian law without a much better sense of grounded reality.

Law's groundedness alone cannot reconfigure a field, of course. What it can do is open up insights for theoretical reframing, including serious efforts to integrate contemporary jurisprudential insights that have probably been viewed as flying too high to bother Indian law scholarship. A grounded appreciation for federal Indian law is also likely to make greater sense out of claims for tribal independence by situating them not in a supposedly quaint, little-understood cultural backwater, but in a vibrant world view and culture that are actually explicable to the broader community. What Cohen's jurisprudence called for—an interrogation of the law in action, descriptively and normatively—is worthy of the highest scholarly aspirations in federal Indian law. To the extent that formalist conceptions of law—perhaps partially borne out of a misguided appreciation for his treatise—get in the way, no doubt Cohen would shoo them aside. And so should we.

## II. TREATISES AND TRANSCENDENTAL NONSENSE

As my colleague Bob Berring has explained, at the heart of the classic legal treatise is a formalist conception of law.<sup>7</sup> Law is conclusively presumed to be a closed, rational system of rules embodied in sources of law—primarily cases—that can be found and systematized by a single treatise writer. The fragments of law that do not fit the system are therefore false steps to be jettisoned. The basic goal for the treatise writer is to articulate right answers. For example, consider how Wigmore explained his project: “The particular aspiration of this Treatise is, first, to expound the Anglo-American law of Evidence as a system of reasoned principles and rules; secondly, to deal with the apparently warring mass of judicial

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<sup>7</sup> See Robert C. Berring, *Legal Research and Legal Concepts: Where Form Molds Substance*, 75 CAL. L. REV. 15–16 (1987). For an extended discussion of the project of the classic legal treatise, see A.W.B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632 (1981) (commenting that the practice of writing positivistic treatises has significantly declined in United States).

precedents as the consistent product of these principles and rules. . . .”<sup>8</sup>

The classic treatise was designed to be unimpeachable legal authority, so that these rules maintain themselves regardless of the contexts in which disputes touching on them arise. When courts follow such treatises, they are not appealing to the authority of a person (the writer) who might have had a sense for the law in action (for example, by having practiced law), but to the authority of a thing (the treatise) that expresses the law only in the abstract. The treatise takes on a life of its own, disembodied from its writer and living on past his death, as later courts continue to “find” law in it and later legal scribes faithfully systematize later law to smooth out any rough edges in them as compared to the law in the treatise.

In short, the classic treatise assumes law is found, not made, and consists of abstract rules with eternal life, not necessarily tentative conclusions subject to reconsideration and extinction at the intersection of law and life. The highest goal of the treatise is to be like the Bible with pocket parts.

In his remarkable article, *Transcendental Nonsense and the Functional Approach*,<sup>9</sup> Felix Cohen made one of the most famous and effective attacks upon this dual conception of law and legal authority. Questions that courts say they are pondering—for example, whether a corporation is “located” in a state, whether a labor union is a “person” subject to suit—frequently are just “transcendental nonsense” that “thingifies” purely abstract conceptions.<sup>10</sup> The thingification is a part of classic legal reasoning: The matter under consideration is or is not a particular kind of thing (say, a legal person) and therefore potentially subject to legal rules that regulate things of that kind (it can be sued). A court will say, for example, “[a] labor union can be sued because it is, in essential aspects, a person, a quasi-corporation.”<sup>11</sup> The realist, who believes in the law in action rather than the law of empty conceptualisms, will instead ask, “what are the practical and ethical consequences of one approach or another to the question presented?”<sup>12</sup> For example: Is a union capable of controlling its various actual or apparent agents? What sort of damages to what sort of interests occur from union activity, and can they be deterred without unduly inhibiting appropriate union activity? And so on. When the answer from this descriptive and ethical consequentialism emerges, the realist will then abstract a legal conceptualization that embodies this outcome. Thus, after considering the consequences of subjecting a union to suit and concluding that, on balance, it should be allowed, a realist will

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<sup>8</sup> Berring, *supra* note 7, at 15 n.2 (quoting 1 J. WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW vii (1st ed. 1904)).

<sup>9</sup> Cohen, *supra* note 6.

<sup>10</sup> *See id.* at 811.

<sup>11</sup> *Id.* at 813.

<sup>12</sup> *See id.* at 813–14.

say, “[a] labor union is a person or quasi-corporation because it can be sued; to call something a person in law, is merely to state, in metaphorical language, that it can be sued.”<sup>13</sup> Cohen summed up his analysis brilliantly:

When the vivid fictions and metaphors of traditional jurisprudence are thought of as reasons for decisions, rather than poetical or mnemonic devices for formulating decisions reached on other grounds, then the author, as well as the reader, of the opinion or argument, is apt to forget the social forces which mold the law and the social ideals by which the law is to be judged.<sup>14</sup>

A classic treatise embracing transcendental nonsense might consider itself the Bible with pocket parts, but for Cohen, it was like the sermon given by Emerson’s famous minister, filled with pompous rules for living but uninformed by any consideration of life.<sup>15</sup> Indeed, in *Transcendental Nonsense*, the supposed Blackstone of federal Indian law not only took special delight in deflating the authority of the classic treatise, but also singled out *Blackstone’s Commentaries* for special scorn.<sup>16</sup>

The obvious question is, “how could a legal realist of this stripe have himself written a treatise?” One might suspect an ulterior agenda. For example, I was once told a story about how another legal realist, William Prosser, created the first edition of his famous torts treatise, which coincidentally appeared at the same time that Cohen published his Indian

<sup>13</sup> *Id.* at 813.

<sup>14</sup> *Id.* at 812.

<sup>15</sup> Emerson explained:

Whenever the pulpit is usurped by a formalist, then is the worshipper defrauded and disconsolate. . . . I once heard a preacher who sorely tempted me to say, I would go to church no more. . . . A snowstorm was falling around us. The snowstorm was real; the preacher merely spectral; and the eye felt the sad contrast in looking at him, and then out of the window behind him, into the beautiful meteor of the snow. He had lived in vain. He had no one word intimating that he had laughed or wept, was married or in love, had been commended, or cheated, or chagrined. If he had ever lived and acted, we were none the wiser for it. The capital secret of his profession, namely, to convert life into truth, he had not learned. Not one fact in all his experience, had he yet imported into his doctrine. This man had ploughed, and planted, and talked, and bought, and sold; he had read books; he had eaten and drunken; his head aches; his heart throbs; he smiles and suffers; yet was there not a surmise, a hint, in all the discourse, that he had ever lived at all. Not a line did he draw out of real history. The true preacher can always be known by this, that he deals out to the people his life,—life passed through the fire of thought. But of the bad preacher, it could not be told from his sermon, what age of the world he fell in; whether he had a father or a child; whether he was a freeholder or a pauper; whether he was a citizen or a countryman; or any other fact of his biography.

It seemed strange that the people should come to church. It seemed as if their houses were very unentertaining, that they should prefer this thoughtless clamor.

RALPH WALDO EMERSON, *The Divinity School Address*, reprinted in 1 THE COLLECTED WORKS OF RALPH WALDO EMERSON 71, 85–86 (Alfred R. Ferguson et al. eds., 1971) (1838).

<sup>16</sup> See Cohen, *supra* note 6, at 838.

law handbook. According to this account (or legend), the text of the first edition of Prosser's hornbook, published in 1941, contained a variety of interesting, debatable, progressive propositions about tort law. But sometimes the cases cited in the footnotes did not support these assertions. The cited cases might have involved a fact pattern somewhat like a hypothetical given in the text, but sometimes they turned on points of law unrelated to those posited in the text by Prosser as the correct way to resolve the hypothetical. As the story goes, in the second edition of the hornbook, published in 1955, the text remained largely the same, but the footnotes changed, citing recent cases that actually supported the assertions made in the text—cases that themselves had cited the first edition of the hornbook as the authority relied upon.

I cast no such aspersion on Cohen.<sup>17</sup> I do not know whether he was able to reconcile his treatise project with his legal realism—from anecdotal evidence, it does appear, at least, that he pondered the question.<sup>18</sup> For present purposes, it is helpful to note that apparently Cohen did not imagine his Indian law book as a treatise in the classic sense. First, at least if Nathan Margold's comments in his introduction to the book are credited, the work was never understood to be comprehensive, much less the last answer to questions about Indian law.<sup>19</sup> Second, Cohen's own introductory comments stressed ethical and functional dimensions that he hoped the book would serve and that a classic treatise would never acknowledge:

What has made this work possible . . . is a set of beliefs that

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<sup>17</sup> Nor do I mean to cast aspersions on Prosser. I have not attempted to determine whether the story about the first and second editions of his treatise is accurate. The tale strikes me as plausible, though. In the torts field, there are recurring rumors about how Prosser approached his work in torts not so much as a project of construal as of construction. In addition, I heard the treatise story from Harry Blackmun, who practiced law with Prosser when they were young men. Blackmun never struck me as prone to fanciful embellishment. The most interesting question, I think, is this: Assuming the story has a kernel of accuracy, what follows from it? Prosser's liberating influence upon tort law has generally been viewed in the measure of time as a major progressive achievement. See G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 139–79 (2d ed. 2003) (discussing Prosser's impact on tort law).

<sup>18</sup> For work on Cohen's jurisprudence and his approach to Indian law, see Stephen M. Feldman, *Felix S. Cohen and His Jurisprudence: Reflections on Federal Indian Law*, 35 *BUFF. L. REV.* 479 (1986); Jill E. Martin, *"A Year and a Spring of My Existence": Felix S. Cohen and the Handbook of Federal Indian Law*, 8 *W. LEGAL HIST.* 35 (1995); Dalia Tsuk, *"A Double Runner": Felix S. Cohen and the Indian New Deal*, 25 *POL. & LEGAL ANTHROPOLOGY REV.* 48 (2002). The definitive work on this immensely interesting subject has yet to be written. I am indebted to conversations with Sam Hirsch, of the Washington, D.C. firm of Jenner & Block, who has conducted extensive archival research in the papers of Felix Cohen and his father, Morris Cohen, the philosopher. I hope that Mr. Hirsch is able to finish his project in the near future.

<sup>19</sup> Nathan R. Margold, *Introduction* to COHEN, *supra* note 1, vii, at xiii ("This handbook does not purport to be a cyclopedia. It does not attempt to say the last word on the varied legal problems which it treats. If one who seeks to track down a point of federal Indian law finds in this volume relevant background, general perspective, and useful leads to the authorities, the handbook will have served the purpose for which it was written.").

form the intellectual equipment of a generation—a belief that our treatment of the Indian in the past is not something of which a democracy can be proud, a belief that the protection of minority rights and the substitution of reason and agreement for force and dictation represent a contribution to civilization, a belief that confusion and ignorance in fields of law are allies of despotism, a belief that it is the duty of the Government to aid oppressed groups in the understanding and appreciation of their legal rights, a belief that understanding of the law, in Indian fields and elsewhere, requires more than textual exegesis, requires appreciation of history and understanding of economic, political, social, and moral problems.<sup>20</sup>

Margold, too, hoped the book would foster a functional jurisprudence that abjured transcendental nonsense:

History and analysis need to be supplemented by an understanding of the actual functioning of legal rules and concepts, the actual consequences of statutes and decisions. Language on statute books, in the field of Indian law as in other fields, frequently has only a tenuous relation to the law-in-action which courts and administrators and the process of government have derived from the words of Congress. The words of court opinions frequently have as tenuous a relation to the actual holdings. Magic “solving words” like “Indian title,” “wardship,” and “competency,” are often used to establish connections, between a case under consideration and some precedent, that turn out on reflection to be purely verbal. Functional study of the federal Indian law in action is essential to a work that may serve the practical purposes of administrators.<sup>21</sup>

It ought to be apparent by now how ironic it was that the editors of the 1982 edition called Cohen the Blackstone of federal Indian law and were gratified to report that few substantive matters needed to be changed because Cohen had been proved out. They understood—or, at least, wrote about—the treatise as a treatise in the classic sense. Cohen and Margold did not—or at least, professed not.

<sup>20</sup> COHEN, *supra* note 1, at xviii.

<sup>21</sup> Margold, *supra* note 19, at xiv. One must speculate that Cohen ghost-wrote this passage, similar as it is to the perspective of *Transcendental Nonsense and the Functional Approach*. In addition, the passage was followed by a long quotation from one of Cohen’s recent articles attempting to provide methods to mediate the tension between analytical jurisprudence and the functionalist approach. *See id.*

## III. TRANSCENDENTAL NONSENSE IN INDIAN LAW

Hell hath no fury like a modern legal scholar condemned as a formalist.<sup>22</sup> So for an example that might illustrate the dangers of undue conceptualism in federal Indian law, I shall use a passage from an article written by someone I know well and who has no objection so long as his name is spelled correctly. Calling the handbook Cohen's "monumental attempt to systematize federal Indian law," this writer relied upon the book for "three basic principles" that explained "the whole course of judicial decision" in federal Indian law.<sup>23</sup> His article focused on the third such principle, that tribes retain sovereignty "subject to qualification by treaties and by express legislation of Congress."<sup>24</sup> The writer quoted Cohen for the proposition that "tribal powers are not 'delegated powers granted by express acts of Congress,' 'but rather inherent powers of a limited sovereignty which has never been extinguished.'"<sup>25</sup> Again relying on Cohen, the writer posited that, under the appropriate canons of construction in federal Indian law, inherent tribal sovereignty was protected against all but explicit treaty cessions of authority by the tribe or clear congressional legislation intended to truncate tribal power.<sup>26</sup> The rest of the article could be read as a demonstration that recent Supreme Court decisions have failed to follow the Cohen model, and that has been a bad thing.

I happen to think that the article does a good deal more than that, and that the suggestion that Cohen's formulation has been eroded is the least significant of its criticisms, which generally run in pragmatic and ethical directions consistent with Cohen's broader jurisprudential perspective. But the reader should get the picture. To the extent that modern legal scholarship treats Cohen's handbook as a classic treatise, so that the legal concepts found in the handbook have some sort of magically entrenched quality to them and later courts that fail to follow the concepts are willful abusers of the rule of law, the modern scholar is violating the most fundamental precepts of Cohen's realist jurisprudence.

I fear that this formalistic disease infects a fair bit of Indian law writing, and even more Indian law thinking.<sup>27</sup> Perhaps the point is made

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<sup>22</sup> Except, of course, for the very few legal scholars who celebrate their formalism. I am unaware of any such person in the field of federal Indian law.

<sup>23</sup> Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 8 (1990) (quoting COHEN, *supra* note 1, at 123).

<sup>24</sup> *Id.* (quoting COHEN, *supra* note 1, at 123).

<sup>25</sup> *Id.* (quoting COHEN, *supra* note 1, at 122).

<sup>26</sup> *Id.* at 8-9.

<sup>27</sup> No, I am not going to provide examples, but I should note that I have had a long interest in encouraging less conceptual, more pragmatic approaches to Indian law. See Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137, 1216-30 (1990).



most clearly by quoting Cohen again, but this time the *Transcendental Nonsense* Cohen, not the Cohen treatise:

*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 (such as the customs of men or the customs of judges) nor yet statements of moral ideals, but are rather theorems in an independent system. It follows that a *legal argument* can never be refuted by a moral principle nor yet by any empirical fact. *Jurisprudence*, then, as an autonomous system of legal concepts, rules, and arguments, must be independent both of ethics and of such positive sciences as economics and psychology. In effect, it is a special branch of the science of transcendental nonsense.<sup>28</sup>

In the wrong (formalist) hands, “tribal sovereignty” is such a legal concept. If uttered blindly, without practical and ethical considerations, a principle that tribes have “inherent sovereignty” to exercise “jurisdiction” over a nonmember for violating the tribe’s law is such a rule of law. A legal argument on behalf of tribal sovereignty, if made in this formal way, purports to be immune to counterargument by ethics or facts. In recent years, though, the most likely outcome is that such an argument will be blown off by judicial derision, often based on the Court’s own misguided sense of ethics or facts. If the arguments for tribes are simply that Cohen “has proved out,” Indian law becomes a sub-branch of the science of transcendental nonsense.

To take an example, consider *Oliphant v. Suquamish Indian Tribe*.<sup>29</sup> The question before the Court was whether a tribe had the authority to prosecute, in its tribal court, a non-Indian for a crime he allegedly committed on its reservation. As noted, Cohen’s treatise provides an impeccable formalist argument supporting the tribe: The treatise posited that tribal authority over its reservation is inherent and plenary except where truncated by a clear treaty cession by the tribe or by a clear federal statute. When in *Oliphant* the Supreme Court forbade the tribal prosecution despite no clear treaty or statutory provision to the contrary, it therefore violated one of the treatise’s clearest legal rules.

What could account for such apparent judicial willfulness? The Court purported to justify the result based on the historical assumptions of the three federal branches,<sup>30</sup> but the historical case for this proposition is very

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<sup>28</sup> Cohen, *supra* note 6, at 821.

<sup>29</sup> 435 U.S. 191 (1978).

<sup>30</sup> See *id.* at 196–206.

weak.<sup>31</sup> In my view, *Oliphant* largely turned on two functional and ethical considerations.

First, the Court cited concerns about the civil liberties protected by tribal courts.<sup>32</sup> The Constitution does not apply to tribes.<sup>33</sup> By enacting the Indian Civil Rights Act (ICRA),<sup>34</sup> however, Congress has imposed a number of limitations upon tribal government that are similar to the constraints that the Constitution places upon federal and state action, and anyone incarcerated in tribal court may seek habeas corpus relief in federal court.<sup>35</sup> Although ICRA does not completely parallel the Constitution, the circumstances of non-Indian criminal defendants in tribal court seem hardly so dire as to require preemptive judicial intervention as a matter of federal common law.

The second, and I think the more outcome-determinative factor was, I would speculate, the Court's intuitive reaction to the facts. The *Oliphant* case arose on a reservation near Seattle on which only fifty tribal members and over 2,900 nonmembers resided.<sup>36</sup> It was about as bad a test case as one could imagine from the tribal perspective. As no less a supporter of tribal sovereignty than Vine Deloria later wrote, in language paralleling Cohen's transcendental-nonsense perspective:

The facts of the situation make the Indian argument not only moot but demonstrate that it was based on an idea of sovereignty having little relation to actual reality. . . . The doctrine of tribal sovereignty, perhaps relevant for a large reservation such as the Navajo with millions of acres of land and over 100,000 Indian residents, was expected to control the court's thinking in defiance of the actual facts. Surely, here was an instance of a doctrine run amok. When attorneys and scholars come to believe that doctrines have a greater reality than the data from which they are derived, all aspects of the judicial process suffer accordingly.<sup>37</sup>

My own view is that there were good reasons, from the standpoint of a functional approach, for the Court to allow the tribal prosecution nonetheless.<sup>38</sup> As explained above, the concerns about civil liberties

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<sup>31</sup> See, e.g., Russel Lawrence Barsh & James Youngblood Henderson, *The Betrayal: Oliphant v. Suquamish Indian Tribe and the Hunting of the Snark*, 63 MINN. L. REV. 609, 617 (1979).

<sup>32</sup> See *Oliphant*, 435 U.S. at 194, 210–12.

<sup>33</sup> See *Talton v. Mayes*, 163 U.S. 376, 382–85 (1896).

<sup>34</sup> Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 77, (codified as 25 U.S.C. §§ 1301–03 (2000)).

<sup>35</sup> See 25 U.S.C. §§ 1302–03.

<sup>36</sup> *Oliphant*, 435 U.S. at 193 n.1.

<sup>37</sup> Vine Deloria, Jr., *Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law*, 31 ARIZ. L. REV. 203, 215 (1989).

<sup>38</sup> Philip P. Frickey, *Doctrine, Context, Institutional Relationships, and Commentary: The*

seemed vastly overstated. Instead, *Oliphant* should have turned on who—the non-Indians who allegedly commit crimes, or the tribe attempting to preserve peace within its reservation borders—should have the benefit of the legal status quo. Whoever lost the case was left with the problem of overcoming the burden of legislative inertia and persuading Congress to overturn the result by legislation. If these tribal court prosecutions were allowed to proceed and worked mischief—or even if they did not—one would expect non-Indians in Indian country (in many states, a fairly large number of persons) to have a receptive ear with their representatives in Congress. I believe that the Court should have allowed the tribes to proceed, rather than intervene based on speculative intuitions about civil liberties and context.

But whatever the Court should have done in *Oliphant* on the facts, it should not have done what it did doctrinally. It took a case with bad facts and created a rule of law to solve it that especially earns the epithet of transcendental nonsense. Rather than finding a way to limit its holding to reservations of radically diminished contextual tribal sovereignty, the Court adopted a flat rule that tribes lack criminal jurisdiction over non-Indians. The rule applies equally to the Navajo as to the Suquamish. The supposed rationale for the rule is transcendental nonsense on stilts: Tribes, we learn in *Oliphant*, lack powers inconsistent with their status of “dependence on the Federal Government.”<sup>39</sup>

How might one figure out what powers tribes have lost by virtue of their dependent status? The Court has never seriously considered this a historical test. Indeed, how would it figure out at what point in time a particular tribe lost a particular power that had, by hypothesis, never been taken away by treaty or statute, but instead by the unwritten, mystical evolution of the relationship between the United States and this tribe (or all tribes), as seen through the eyes of non-Indian judges? In a long series of cases after *Oliphant*, the Court has applied this utterly vacuous test of the implicit divestiture of tribal authority to diverse sets of facts. It should come as no surprise that the outcomes have been incoherent.<sup>40</sup> After all, the outcomes are unlikely to be a whole lot better than the test itself, unless the Court has a case-by-case, contextual feel for things, which it does not.

The rule that tribes lack authority inconsistent with their dependent status is a paradigmatic example of Cohen’s transcendental nonsense, because no historical, ethical, or functional argument can defeat the rule.<sup>41</sup> Consider *Duro v. Reina*.<sup>42</sup> The Court applied the *Oliphant* rule to prohibit

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*Malaise of Federal Indian Law through the Lens of Lone Wolf*, 38 TULSA L. REV. 5, 31–32 (2002).

<sup>39</sup> *Oliphant*, 435 U.S. at 208.

<sup>40</sup> E.g., Frickey, *supra* note 23, at 5.

<sup>41</sup> See *supra* Part II.

<sup>42</sup> 495 U.S. 676 (1990).

tribal criminal prosecution of a nonmember Indian—that is, a member of a tribe other than the tribe prosecuting—despite three obvious objections. First is a historical barrier: The tribes have surely exercised this power routinely both long before and long after contact with Europeans.<sup>43</sup> Second is a functional barrier: As suggested above, no significant civil liberties concerns seem evident. Third, and most striking, is a consequential barrier of a different kind. The Court's decision created a jurisdictional void in which, for all but very serious crimes, nonmember Indians who commit crimes on Indian reservations could often not be prosecuted *by any sovereign at all, federal, tribal, or state*.<sup>44</sup> If, as we suppose, the common law is designed to create a reasonable outcome on the facts that can be rationally tied to the overall purposes and policies of the law, *Duro*'s creation of a jurisdictional void over crime is so senseless as to be shocking. But the Court reached the result anyway, deploying the implicit divestiture rule as just that kind of transcendental nonsense that so usefully allows courts to do anything they wish, functional and ethical arguments be damned. In *Duro* and other cases, the implicit divestiture rule has operated as an empty shell, readily available for judicial deployment against tribes behaving inconsistently with federal judicial expectations.

#### IV. TRANSCENDING TRANSCENDENTAL NONSENSE

I believe that federal Indian law would profit greatly from two things. First, it should recognize that tribal advocates cannot rely upon transcendental nonsense—like an abstract formulation about the nature and extent of tribal sovereignty—to defeat federal judicial expectations about tribal behavior. Second, writing in the field needs to work toward a functional jurisprudence, in which objective, scholarly work interrogates the law and life on the ground, to make transcendental nonsense more difficult to deploy for anyone on any side of a dispute, but especially by the Supreme Court in cases like *Duro*. Of course, such work might deflate some federal judicial stereotypes about tribes, but might support some others. So be it. Scholarship is not—or should not be—unidimensional in

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<sup>43</sup> See Brief for the Rosebud Sioux Tribe et al. as Amici Curiae Supporting Respondent, *Duro v. Reina*, 495 U.S. 676 (1990) (No. 88-6546), 1989 WL 1126953, at \*5–\*7.

<sup>44</sup> Absent some congressional authorization of a broader role, the only instance in which a state may assert criminal jurisdiction in Indian country is when both the victim and perpetrator are non-Indian. See *United States v. McBratney*, 104 U.S. 621, 624 (1881). As for federal jurisdiction, the Major Crimes Act makes it a federal offense for any “Indian” to commit certain enumerated serious infractions in Indian country. 18 U.S.C. § 1153 (2000). In addition, the General Crimes Act applies the federal criminal code in Indian country, but does not apply to offenses committed by one Indian against another Indian. 18 U.S.C. § 1152 (2000). Thus, a tribal member who victimizes another Indian in a way that does not run afoul of the Major Crimes Act escapes federal prosecution because the tribal court has exclusive jurisdiction. But when a nonmember Indian rather than a member is the perpetrator, *Duro* forbids tribal jurisdiction, leaving a jurisdictional void.

any ideological way. My sense, though, is that such work would tend to support the pragmatic legitimacy of tribes in many circumstances. Illustratively, consider the work of several young scholars in federal Indian law who have somehow found their way through the maze of transcendental nonsense and begun addressing questions relevant to a functional Indian law jurisprudence.<sup>45</sup>

It has been said countless times that federal jurisdiction over Indian country crimes invades tribal sovereignty. This is obviously true, but too abstract a critique to be responsive to functional and ethical questions. Recently, Kevin Washburn has confronted the problems of federal criminal jurisdiction with ethical and functional analysis. He persuasively contends that the capacity of a society or culture to define its own sense of right and wrong through the criminal law is not only at the core of sovereignty as an abstract matter, but lies at the heart of any ethical and functional appreciation of cultural self-definition.<sup>46</sup> A former Assistant United States Attorney who prosecuted Indian country crimes, Washburn has also turned his acute analytical eye toward the functional problems with that federal jurisdiction. He is publishing a terrific article in which the reader almost feels as if she is riding in the back of the tribal police car along with the resident FBI agent, then sitting in on conversations between the Assistant United States Attorney and the federal public defender, listening to a series of questions relating to the problems of that jurisdiction in action.<sup>47</sup>

Consider just a few questions he raises about the beginning of the criminal investigation and prosecution. Will tribal members be willing to talk to non-Indian FBI agents about the offense? Even if so, can they later be located for subpoena to appear in federal district court in the case—a court that might be 300 miles away, over lonely highways through bad weather? If they are subpoenaed but do not appear, then what? If the case requires grand jury indictment and then a later trial, these problems double in magnitude.

Similarly, consider just a few other questions he raises, this time about the nature of federal prosecution from the defendant's perspective. Trial will be in a federal district court in a city often very far away from the reservation. The jury pool will not reflect the local (tribal) community. If the defendant or witnesses do not use English as a first language, an

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<sup>45</sup> The senior scholar in federal Indian law associated with this sort of "inside-out" or "bottom-up" approach to the field is Frank Pommersheim, whose wonderful work should frame the emerging interest in a more empirical approach to Indian law. See FRANK POMMERSHEIM, *BRAID OF FEATHERS* 2–3 (1995).

<sup>46</sup> See Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 784, 834–35 (2006) [hereinafter Washburn, *Federal Criminal Law*]; see also Kevin K. Washburn, *Tribal Self-Determination at the Crossroads*, 38 CONN. L. REV. 777 (2006).

<sup>47</sup> See Kevin K. Washburn, *American Indians, Crime and the Law*, 104 MICH. L. REV. 709 (2006).

interpreter will be needed. No matter how sensitive and professional the Assistant United States Attorney as prosecutor and the federal public defender attempt to be, they cannot possibly operate with much sense for how the tribal community views the prosecution and potential punishment options. If a conviction results, incarceration will likely result hundreds, perhaps thousands, of miles from the reservation, making continuing contact with family and friends unlikely.

At every stage, Washburn persuasively argues, federal criminal jurisdiction in Indian country turns American ideals and values about criminal justice on their heads. His argument is not that federal jurisdiction invades some pristine notion of tribal sovereignty, as formulated in *Cohen's Handbook*. His contention, instead, is that it violates the values and norms of the whole American community, not just the tribal one. The work is so powerful because it is simultaneously so attuned to the law on the ground and so careful in explaining how this grounded reality is an affront to the values all Americans cherish. It demonstrates that, even with the many well-intentioned and hard-working participants in the system, federal criminal jurisdiction is colonial to the core. For these reasons, in my judgment, it is the best work yet on criminal justice in Indian country.<sup>48</sup>

Another emerging Indian law scholar with a functional and ethical bent is Sarah Krakoff. In an excellent recent article, she integrates the Supreme Court's fluctuations concerning tribal sovereignty with the Navajo resistance and response to them.<sup>49</sup> Because several of the most important Supreme Court cases arose on the Navajo reservation—where Professor Krakoff spent several years working as a lawyer—the tribal responses are especially illuminating. The Navajo legislative and judicial institutions are necessarily reactive, but also innovative, determined to continue to exercise meaningful sovereignty in spite of federal judicial truncation of tribal power. The reader sees the people behind the institutions and their struggle to remain a political community and political culture, not just an ethnic group.

Professor Krakoff then does more: She makes an important contribution toward the development of an understanding of the *experiential* nature of tribal sovereignty. Why is it, in the face of doctrinal incoherence and continuing erosion of tribal power, that the Navajo so resolutely maintain

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<sup>48</sup> Carole Goldberg, one of Indian law's most distinguished scholars, has embarked on an important empirical project concerning law enforcement on Indian reservations governed by Public Law 280, where criminal justice is the responsibility of the state rather than the federal government. See Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 CONN. L. REV. 697 (2006). The combination of her work with Washburn's holds hope that Indian law may finally address fundamental questions of criminal justice in Indian country from a grounded perspective, where facts rather than rhetoric or abstract concepts will control.

<sup>49</sup> Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109, 1111 (2004); see also Sarah Krakoff, *The Virtues and Vices of Sovereignty*, 38 CONN. L. REV. 797 (2006).

their political essentialism? The cultural quality of sovereignty within a tribe has been virtually impossible to explain to non-Indians. So long as tribal sovereignty is viewed as obscure, quaint, peculiar, and culturally insular, it is no surprise that nine justices sitting in the District of Columbia refuse to put any effort into understanding it, much less attempting to preserve it. For them, as well as for virtually everyone else in the legal community, sovereignty is simply the power of the state, appropriately exercised through established institutions and procedures. It is separate from culture. Sovereignty is abstract and implemented through pluralistic politics. It is neither explicitly normative nor important in the ways ordinary people live their lives, so long as they follow the rules laid down by the government.

Professor Krakoff persuasively documents that, for the Navajo, sovereignty is quite different: It has central cultural and experiential components. When the Supreme Court preempts tribal sovereignty, it is not simply rearranging the allocation of governmental power in our system (as is the case in balancing federal versus state power, for example). Instead, it is invading core aspects of cultural self-definition. Only through work of this sort might the dominant legal community come to appreciate the remarkably different, culturally essential dimensions of tribal sovereignty—in essence, why tribal sovereignty is worth caring about, in a grounded rather than abstract sense.

A third young scholar striving for a grounded sense of federal Indian law is Bethany Berger, whose work also benefits from her having spent several years working on the Navajo reservation. She has just published an important empirical study of cases in the Navajo court system involving nonmembers.<sup>50</sup> She addresses two primary objections to tribal court jurisdiction over nonmembers: The fear of bias and the notion that such jurisdiction is unnecessary to promote important tribal interests. Her data and analysis suggest that the Navajo courts have adjudicated cases involving nonmembers fairly, even on such matters as child custody and contract disputes, which might seem particularly prone to produce biased outcomes. She also thoughtfully contends—based on her examination of the law on the ground, not simply based on abstract notions of sovereignty—that jurisdiction over nonmembers is important to tribes.

For example, tribal courts have difficulty achieving acceptance in tribes because historically they were institutions of assimilation and non-Indian domination. Limiting tribal courts to cases involving members perpetuates the image that the courts are just institutions designed to subordinate Indians and are of inferior quality. Moreover, the tribal courts have the potential to be the primary tribal institution involved in

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<sup>50</sup> Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047 (2006).

incremental, ongoing contact with and accommodation of other cultures and interests. Tribal courts cannot easily attain legitimacy within and without the tribal system without the opportunity to handle these challenges in a way consistent with tribal norms and simultaneously fair to outsiders. This is especially so if, as Berger contends, many of the most pressing issues to tribes involve relations with nonmembers and the larger society. Finally, she persuasively suggests that tribal courts will be challenged to perform their roles better if exercising jurisdiction over nonmembers as well as members. It will force the judges to interrogate more carefully, with greater objectivity and more focused considerations of fairness, what norms are at the core of Navajo culture and tradition and how the tribe and its members should engage the larger culture in responsible ways that reflect well upon the Navajo people. Over time, she posits, a greater objectivity and a greater judicial insulation from internal political pressures will come from a broader docket with greater responsibility.

Berger is also seeking to take federal Indian law in more explicitly theoretical directions. One of her current projects, discussed in her essay in this issue, concerns the extent to which tribal claims of authority can be made consistent with liberal and republican political theory. She effectively identifies how tribal claims can seem to violate widely shared intuitions of political theory, but can often be reconfigured in much more understandable and attractive ways.<sup>51</sup>

Taken together, the work of these three young scholars demonstrates that Indian law is ripe to be taken in functional and ethical directions.<sup>52</sup> This work is more empirical, less doctrinal, more experiential, more narrative, less stridently normative, potentially more interdisciplinary,<sup>53</sup>

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<sup>51</sup> See Bethany R. Berger, *Liberalism and Republicanism in Federal Indian Law*, 38 CONN. L. REV. 813 (2006).

<sup>52</sup> I have not attempted to survey recent Indian law scholarship by young scholars, so I do not mean to imply the lack of functional and ethical importance for any work that I have not mentioned. For example, Stacy Leeds, another young scholar, has made an important contribution by demonstrating that state courts often fail to enforce tribal court orders involving domestic violence restraint—even though the state judges are mandated to do so by federal statute. See Stacy L. Leeds, *Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Perspective*, 76 N.D. L. REV. 311, 313–14 (2000). Leeds' discovery turns on its head the usual non-Indian intuition about tribal courts refusing to follow federal or state law. It is the kind of grounded contribution to our understanding of tribal, federal, and state relations that Indian law greatly needs. Cf. Cohen, *supra* note 6, at 846–47 (arguing that law in action must account for noncompliance with law not only by the citizenry, but by officials themselves).

<sup>53</sup> For instance, Professor Berger has brought law-and-society scholarship to bear on the question of the internal and external legitimacy of tribal courts. See Berger, *supra* note 50, at 71–72. Professor Krakoff has written about the potential of narrative to inform legal scholarship. See Sarah Krakoff, *Does "Law and Literature" Survive Lawyerland?*, 101 COLUM. L. REV. 1742, 1742 (2001). She has told me that she hopes to incorporate insights from critical theory in future work in Indian law. Professor Washburn is beginning to place issues of criminal justice in Indian country in the larger framework of criminal justice scholarship. See, e.g., Washburn, *Federal Criminal Law*, *supra* note 46, at 62 n.291, 63.



and potentially more useful to jurisprudential theory than traditional federal Indian law scholarship has been.

Theoretical frameworks aside, without work like this concerning the law on the ground, the Supreme Court and inferior federal courts will continue to fill in gaps in knowledge by intuition and downright wrongheaded assumptions. Illustratively, consider Justice Souter's concurring opinion in *Nevada v. Hicks*, which involved tribal court jurisdiction over nonmembers. Lacking much information on tribal courts, Justice Souter posited that they were unusual and potentially unreliable.<sup>54</sup>

As a former Supreme Court law clerk, allow me to speculate on what would have happened had Justice Souter asked his law clerks for help in finding out about tribal courts. (I do not know if he asked this question.) When I was a clerk, in 1979–80, our best research tools were the excellent research librarians of the Supreme Court library. If asked by my justice, Thurgood Marshall, to find out all I could about tribal courts—a subject about which I knew nothing—I would have turned over the inquiry to one of them. In a few days, I would have received whatever she or he could locate in the Supreme Court library, the Library of Congress, and wherever else materials could be found. There is no way even to guess what those materials would include. Today, a quarter-century after I was a law clerk, one would speculate that the clerks would also take advantage of computer-assisted research. For example, it would seem likely that they would search for “tribal court” using one or more Internet search engines. And it would be beyond the scope of anyone's imagination what might result from such searches. The task of separating the small amount of wheat from the vast array of chaff would initially fall upon the clerks, who would almost certainly have no expertise to bring to bear.

This is no way for the Supreme Court to “learn” about tribal courts. Amicus briefs can provide some context,<sup>55</sup> but legal scholarship has the obligation to provide objective, meaningful information and analysis. Work of the nature now being undertaken by Professors Berger, Krakoff, and Washburn is sorely needed—indeed, long overdue.

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Federal Indian law will have matured when at least a few of its scholars also have standing in a broader, allied field of inquiry, like law and society, law and narrativity, or criminal justice.

<sup>54</sup> See 533 U.S. 353, 383–85 (2001) (Souter, J., concurring). Justice Souter cited a law review article by Dean Newton, which actually supports precisely the opposite set of conclusions. See *id.* at 384 (citing Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 344 n.238 (1997)).

<sup>55</sup> Bob Anderson, another junior scholar of federal Indian law, recently wrote an important amicus brief in a major Ninth Circuit case involving treaty rights. See Brief for Law Professors et al. as Amici Curiae Supporting Petitioners, *Skokomish Indian Tribe v. United States*, No. 01-35028, No. 01-35845, (9th Cir. June 3, 2005), which apparently helped persuade the Ninth Circuit to withdraw a particularly damaging section of its original en banc opinion. See *Skokomish Indian Tribe v. United States*, No. 01-35028, No. 01-35845, (9th Cir. June 3, 2005), 2005 U.S. App. LEXIS 10188, at \*1.

## V. CONCLUSION

Under the leadership of Dean Nell Jessup Newton, the 2005 edition of *Cohen's Handbook* is more explicitly critical than earlier editions.<sup>56</sup> The book provides an opportunity for scholarly and practical engagement with federal Indian law, rather than merely a purported systemization and restatement of it. Many young scholars in the field joined some of the more experienced hands in creating this much-needed volume. In time, it will become a Cohen of their own—a Cohen they will have made at least as much as they will have found. Cohen concluded *Transcendental Nonsense* with language providing them apt advice:

Legal criticism is empty without objective description of the causes and consequences of legal decisions. Legal description is blind without the guiding light of a theory of values. It is through the union of objective legal science and a critical theory of social values that our understanding of the human significance of law will be enriched. It is loyalty to this union of distinct disciplines that will mark whatever is of lasting importance in contemporary legal science and legal philosophy.<sup>57</sup>

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<sup>56</sup> For example, the 2005 book reports scholarly criticism of Supreme Court decisions and sometimes suggests ethical and functional methods of guiding Indian law in better directions. See, e.g., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.01-.02 (Nell Jessup Newton et al. eds., 2005 ed.) (consisting of a sophisticated analysis and critique of the notion that Congress has plenary power over Indian affairs).

<sup>57</sup> Cohen, *supra* note 6, at 849.