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The Moral Decision: Right and Wrong in the Light of American Law, by Edmond Cahn

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BOOK REVIEWS

THE MORAL DECISION: RIGHT AND WRONG IN THE LIGHT OF AMERICAN LAW. By Edmond Cahn. Bloomington: Indiana University Press, 1955. Pp. ix, 342. $5.00.

There are still far too many—among lawyers and laymen alike—who believe that legal philosophy—the study of relationships between law and the basic principles of life—is a matter of preoccupation for the few, the learned and the abstruse. The lamentable place that the teaching of jurisprudence still occupies in the American law schools shows how great the contempt of the so-called practical lawyer is for such apparent luxuries.

Professor Edmond Cahn has for years been one of those who not only have energetically fought against this dangerous and damaging belief, but who, by a combination of strong convictions, deep learning, and felicity of expression have been able to carry this message to wider circles. The *Sense of Injustice,* published in 1949, was an important event in the literature of jurisprudence. However it still suffered from a certain tenseness of presentation, and the frequent use of allegorical language made the book difficult for the uninitiated. *The Moral Decision* is a far more relaxed and, therefore, far more generally accessible book, though this does not detract from either its importance or its depth of thinking. This book is an attempt to assess the influence that the moral sense, the standards and the consciousness of right and wrong, have in the making and application of American law. The juxtaposition of these often antithetic concepts, "making and application," is deliberate. For it is in the application of moral judgment to the borderline situation that judges and administrators make law while applying it.

In the introductory part, Professor Cahn disposes of some still current heresies. Among them is the belief, prevalent among earlier philosophers such as Kant, that morality is a matter of inner conscience, and law a matter of outward behavior. Another is that law is not concerned with moral standards except in a very remote way. Professor Cahn shows—and in this he is in accord with prevalent contemporary legal thought—that in our times the share of law-making in the development of moral standards is far greater than at any previous time. There is a constant interaction, a give-and-take between moral standards that influence the law, and legislative standards that shape morality.

The main, and the most fascinating, part of the book is devoted to a discussion of a number of selected cases, ranging over different fields of the law, which raise moral problems of outstanding significance. The cases chosen are grouped around six major problems: the value of life; sexual relationships; the conduct of business; business with Government; the enlargement of personality; life and death (called by the author "the last of life"). The treatment of the author is that of a composer who sets a theme and paraphrases it in a number of variations. The mood of these variations ranges from that of the last movement of the Appasionata to that of the intensely reflective slow movements of Beethoven's last sonatas. On some of the issues raised Professor Cahn feels very strongly indeed; on others he raises doubts, pondering conflicting values, but hardly ever leaving the reader in a position where he could not make up his mind one way or another.

It is not always clear whether Professor Cahn's conclusions on the solution of a case are of the moral or the legal order—granted that the distinction is never more than a relative one. For example, in discussing the strikingly parallel American and English cases where survivors on a wreck had to choose between a common death and self-preservation by the killing of some of the survivors, he ends in the following manner:

> I am driven to conclude that otherwise—that is, if none sacrifice themselves of free will to spare the others—they must all wait and die together. For where all have become congeners, pure and simple, no one can save himself by killing another. In such a setting and at such a price, he has no moral individuality left to save. Under the terms of the moral constitution, it will be *wholly* his self that he kills in his vain effort to preserve himself. The "morals of the last days" leave him a generic creature only; in such a setting, so remote from the differentiations of normal existence, every person in the boat embodies the entire genus. Whoever saves one, saves the whole human race; whoever kills one, kills mankind.
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> So, in all humility, I would put aside the talk of casting lots, not only because the crisis involves stakes too high for gambling and responsibilities too deep for destiny, but also because no one can win in such a lottery, no one can survive intact by means of the killing.[1]

Presumably Professor Cahn's conclusion is that the conviction for murder of those who took part in the killing of some of the survivors was

1. P. 71.

justified. Implicit in this evaluation is the moral philosophy that the struggle for self-preservation, involving in times of emergency the survival of some at the expense of others, is not the supreme value in contemporary American (and English) law. The survivors have become part of a community of necessity and fate, much like those who fight in battle or together face a bombing raid.

The author's strongest, and most eloquently expressed, convictions are reserved to the field of marriage and other sexual relationships. There is no doubt where he stands. He emphatically endorses, though in far more vivid language, the decision of the House of Lords in *Baxter v. Baxter*.[2] The procreation of children is not a necessary, though an important, part of the marriage relationship, so that insistence on the use of contraceptives is not refusal to consummate, nullifying the marriage. This, of course, is deeply controversial among lawyers and others, largely according to their religious persuasion. To Professor Cahn, the insistence on procreation as the essential purpose of marriage is a "studfarm philosophy," the treatment of a prospective wife as a foaling mare. And what Professor Cahn says about this particular aspect of the marriage permeates his whole attitude towards the infinitely complex and delicate adventure that is marriage, as well as his attitude towards children (he is emphatically in favor of treating trespassing children as entitled to recovery for damages suffered by attractive traps). He strongly, and rightly, attacks the surviving statutes in the law of some American States which purport to condemn "fornication" and mostly lie buried until they are unearthed to justify some act of discrimination or vindictiveness.

It is welcome, too, that Professor Cahn, a practical tax lawyer of experience and note, has no sympathy with the widely held and occasionally judicially favored view that the citizens should cheat the Government of taxes as far as they possibly can. In this, one of the most convincing of his discussions, Professor Cahn clearly disagrees, as on other occasions, with Judge Learned Hand who said: "I could wish that it was commonly thought more morally shameful than it is to evade taxes. . . . [W]e must try to appraise the moral repugnance of the ordinary man towards the conduct in question; not what an ideal citizen would feel."[3]

The subject of a concluding discussion on the mind of the judge is the question of the "common conscience," and in particular a conflict of opinion between Judge Hand and Judge Frank. In the celebrated case

2. [1948] A.C. 247.
3. United States ex rel. Berlandi v. Reimer, 113 F.2d 429, 431 (2d Cir. 1940).

of *R. v. United States*[4] the question was whether the petitioner for naturalization who, some years earlier, had deliberately put his thirteen-year-old son to death, should be granted his petition. The petitioner, a dutiful father with several normal children, lovingly cared for, had killed the child because it had "suffered from birth from a brain injury which destined him to be an idiot and a physical monstrosity malformed in all four limbs. The child was blind, mute, and deformed. He had to be fed; the movements of his bladder and bowels were involuntary, and his entire life was spent in a small crib." The answer to this problem will, of course, again divide people according to their religious convictions about the sanctity of life in relation to other values. What Professor Cahn is concerned with, is the skeptical view of Judge Hand, who despaired of any reliable test to ascertain what, in a given instance, the "common conscience" demanded. In contrast, Judge Frank contended that if community opinion was to be decisive in a particular case, the case should be remanded to the trial judge, under directions to receive additional evidence as to what the community thought. Professor Cahn does not share Judge Hand's pessimism, but neither does he appear to share Judge Frank's belief that a question of this kind can be solved by a kind of Gallup Poll evidence.

In the present reviewer's respectful opinion, there is no doubt that the task of choosing between conflicting moral values need not be left to the purely subjective discretion of the judge in a particular case. There must be, and there are, objective tests. They cannot, however, be sought solely or even predominantly in statistics, a view with which Professor Cahn agrees, or in any single criterion. The present reviewer has attempted elsewhere[5] to indicate some of the ways in which this complex problem could be solved. What the prevalent moral standards of a community are at a given time can seldom be answered with complete certainty. But the problem can usually be narrowed down to a choice between fairly clearly defined alternatives. One hundred years ago, or even thirty years ago, collective agreements, for example, were still widely regarded as an improper derogation of freedom of contract. Today, such a view would be untenable in any civilized country. Fifty years ago, the married woman was still in many respects a chattel, greatly inferior in legal status to the husband. Again, such a view could not be defended by an English, American, or German court today, in the light of clearly ascertainable trends of legislation. Nor would it be tenable any longer to regard economic activities of governments as "non-

4. 165 F.2d 152 (2d Cir. 1947).
5. LEGAL THEORY, c. 23 (3d ed. 1953).

governmental."[6] As regards the validity of blood group tests, science has progressed sufficiently in the last quarter of a century to make at least a negative proof of parenthood by this means a clearly reliable judicial test. Again, suicide is a crime, in theory; some judges still will regard it substantively as a crime, because of their religious beliefs. But clearly any judge would be justified today not to regard suicide as an impairment of moral character in view of the whole trend of judicial practice and public opinion that has made the crime a fictitious one. But there remain fields in which the stark choice between conflicting ultimate beliefs cannot be avoided, because the community itself is deeply divided. Neither the advanced views of a minority, nor the backward-looking views of another minority, can furnish the test. The judge cannot be a revolutionary when he interprets the law. Euthanasia, for example, would still have to be regarded as a crime where a conviction for murder is at issue. But where a free evaluation of moral character for another purpose, such as naturalization, is in question, the judge is clearly entitled to choose as best he can between conflicting views on euthanasia that are held with equal fervor and moral seriousness by different sections of the community. That is why, in this particular case, Judge Frank's recommendation would not presumably have led to any clearly ascertainable result, and Judge Hand's view was probably right in the circumstances (though not as a general maxim).

It goes without saying that the selection of problems is very far from exhausting the field of moral decisions in relation to the law. It is greatly to be hoped that Professor Cahn will continue the present book, much as A. P. Herbert has added from time to time to his *Uncommon Law* or *Misleading Cases*. Among the areas which the present reviewer would recommend to the author's attention, would be the infinitely complex but important problem of competition and cooperation as reflected in American anti-trust law. The philosophy of free enterprise and free competition is usually taken as a gospel, and few are willing to test it on its own premises as well as in relation to the equally important principle of cooperation. This whole matter now gains added significance, because of the international impact of American anti-trust and American investment policy. Few could help as much in clear and fearless thinking on this as on many other subjects as the author of this wise and important book.

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6. *Cf., e.g.*, New York v. United States, 326 U.S. 572 (1946).

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