

great merits. In a way this is a pioneering work, and thus by its very nature bound to be occasionally lacking in sophistication.

GERHARD BEBR†

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.

MR. CAHN, in his most recent book, has given us a painstaking study of a subject that holds vital interest for all thinking persons. The book may perhaps best be described as a detailed analysis and appraisal by a very thoughtful man of the influence of morals on American law, chiefly our decisional law. The author says:

“Our purpose is to learn what we can about good and evil and other moral concerns by looking critically at the way American law deals with them.”¹

Although he definitely seeks the advancement of a high moral plane—the “good-in-law,” to use his expression, his treatment is based almost entirely on the natural order. For this reason some will miss, as I do, more explicit recognition of the pervading influence of the supernatural in the realm of morals.

There are three parts—The Legal and the Good, Moral Guides in the American Law of Rights, and Moral Guides in the American Law of Procedure. The arrangement is excellent, with well chosen subdivisions, pointing up appropriately the diverse problems with which the author deals in his intense studies of his subject. There is also a short bibliography, and the book is well housed.

The characteristics of self and the role of the conscience are among the many factors discussed in the analysis presented of the moral “constitution” that underlies much of our behavior. And because the author is aware of “the beauty of those general standards that stem directly” from this constitution,² the codified standards of moral legislation take on a broader and deeper sense than mere enactments by legislative bodies. For example, “we see [moral legislation] . . . in objective behavior because a subjective individual has enacted it in his conscience.”³ Again, after a wealth of illustrations reviewing those factors which have played a part in the growth of moral legislation, the author concludes that such legislation “will always reflect the mutations of times and places—but it does so in the mirror of an expanding moral constitution. . . .”⁴

†Visiting Lecturer in Law, Yale Law School.

1. P. 11.
2. P. 19.
3. P. 31.
4. *Ibid.*

After reviewing the tensions in our own legal history, with excursions into experiences of earlier periods, Mr. Cahn states a belief that there has been a considerable rise

“in the moral level of legal standards. The more duties the law took on its shoulders during the new industrial era, the more responsive it became to a number of human needs it had previously neglected or ignored. . . . [J]udges do not say as readily as they did a century ago, ‘Plaintiff may have a moral right but he has no legal right,’”⁵

Mr. Cahn probes for some similar process that may be identified in moral standards. In doing so, he explains three moral standards used by us in passing judgment: the “minimum” standard, the “required” standard and the “revered” standard. The last, he says, is of little practical reference: the actual presence of the moral hero instills “feelings of guilt and resentment” in others.⁶ The author’s pen here draws perhaps too broad a line. For is it not true that many do not succumb to resentment when confronted with the ideal, but strive to approach it?

In an interesting comparison of the two domains—law and morals—Mr. Cahn discusses the place in law of the subjective, as distinct from external conduct, and of the moral importance of the state of mind.⁷ He states that the clergy for many centuries so heavily over-emphasized the latter “that nothing else seemed really meaningful.”⁸ This I would think rather doubtful. The great sweep of religious teaching has not neglected the moral importance of deeds while emphasizing at the same time the “faith, belief, [and] the subjective dedication to a creed”⁹ mentioned by the author. While it is true that often what one does is forbidden by law when what one intends is not, it should be recognized that what one thinks may be morally wrong when what one does is not. As Mr. Cahn says, some moral precepts are enforced under law while others are not. But then the law is not a complete moral code.

There is a discussion of a further distinction drawn by the sophisticated between moral values within and those outside the law—the difference in method by which values are enforced. It is said to be the authentic American view, guaranteed by our Constitution, that the development and enforcement of morals do not belong by superior right within the jurisdiction of any church. I think this needs some explanation, followed as it is by the statement that:

“If moral rules and behavior were considered mere subdivisions or corollaries of ecclesiastical tenets, no government could legislate concerning them without violating the First Article of the Bill of Rights.”¹⁰

5. P. 40.

6. P. 41.

7. P. 45.

8. Pp. 45-46.

9. P. 46.

10. P. 48.

Perhaps the emphasis here is upon the word "mere"; for surely the development of morals is within the jurisdiction of churches without any offense to our Constitution, and their "enforcement," too, by precept, teaching and suasion. We accord churches a very special or superior right in this regard. I suppose Mr. Cahn does not mean otherwise.

Part I ends with an interesting review of the manner in which the "social institution" of the law impresses itself on the moral precepts it enforces through "the Mode of Trial," "Professional Discipline," "the Social Function" and "Control over Official Force."

In Part II the author takes up an absorbing selection of factual situations which have arisen in the law. The cases are concrete, they have decided moral overtones, and the dilemmas confronting the persons involved are very real. These problems, chosen for analysis of the relation of morals to law, include: the taking of lives in an overcrowded longboat at sea in order to save other lives; the duty the law imposes with respect to children exposed to attractive hazards, such as railroad turntables; the sad manifestations of maladjustment in domestic relations; the contact of the law with sexual problems; morality and the law in the conduct of private business and in the business of government; and the effort of the law to cope with the doctrine of the Good Samaritan—the moving moral of charity to neighbor. "[N]o institution can make us whole if we lose an opportunity to rescue, in him, the entire human race."¹¹

A number of questions that affect the fundamental rights of citizens, including freedom of speech and of religion, are within the wide range of Mr. Cahn's analyses. The problems range from birth to death, though, as he says, not all the areas in between can be covered. And while one must reserve a different view now and then from that taken by the author, his over-all purpose—to advance the "good-in-law"—is commendable. In this regard he assures us, in words borrowed from Francis Bacon, that "there is hope enough and to spare."¹²

Part III moves into a smooth stream of style and treatment as Mr. Cahn here reaches "Moral Guides in the American Law of Procedure." It lacks the intricacies that mark, for me, some earlier portions of the book. This concluding part contains a study of due process in the morality of law and its administration in America—the means by which a claim of right can be enforced, the place of counsel in fair trial, in sum the whole idea of due process in the law's effort to reach moral judgment. "To presume to judge without due process is to sink to the level of the beasts. . . ."¹³ Pitfalls of factual error and of decision can not obviate the need for choosing alternatives; a decision must be made. Every judgment, however, should be viewed as a self-judgment, for thus it is more likely to be just. While recognizing that the same man may be good, evil or mediocre in varying degrees in different circumstances, "A forum should

11. P. 197.

12. P. 244.

13. P. 260.

cleanse itself thoroughly before it presumes to pass judgment on anyone else."¹⁴ The fine flavor of this part of the volume can be conveyed only by personal perusal.

In reviewing the essentials of due process in moral decision, the author discusses the difficulties of achieving it. The place of the forum, the necessity of freedom in the decisional process and the part played by compromise are considered. As to the latter, the importance of timing as well as skill is stressed, for radical adjustments require the use of time—witness the school segregation decision.

Mr. Cahn convincingly outlines the qualities a judge should possess. He should inspire confidence and wisdom in the process of fact finding to reach the truth. Worthy of special note are these sentences:

"It is the mark of a superior mind to segregate and condemn an unfair mode of accusation even when it is levelled at a notoriously obnoxious individual. But this calls for a constant will to cleanse one's intellectual apparatus by means of self-criticism."¹⁵

There is an exposition of the reasons which lie behind the law's insistence that no one shall be condemned as a criminal unless proof carries conviction beyond a reasonable doubt. The philosophical character of these last pages is evidenced by his reference to "the mutual confidences that bind a human community together. . . . Without conclusive proof, a judgment of condemnation would shirk the group's obligation and reduce the group's solidarity."¹⁶

Tribute is paid to Judge Jerome Frank, to whom the book is inscribed, and to Judge Learned Hand. In naturalization cases, where good moral character must be found in the applicant for a statutory period, Judge Hand's search for "the common conscience" with respect to this standard is questioned. Mr. Cahn prefers a more personal responsibility on the part of the judge in deciding the issue.

In his concluding pages the author speaks again in praise of mankind, though "we are utterly dispensable to a galactic scheme."¹⁷ The future will be a struggle for existence, it will require even more of imagination, discipline and cultural refinement than man has previously been called upon to exhibit. But the capacity to reach moral standards superior to those of the past will persist. Moral evolution will continue; the moral constitution abides to guide progress; and the test of progress must be qualitative, not quantitative. Let our successors accept the "yoke of due process and personal responsibility":¹⁸ the task of our society summons every human being "to join in creating the happier world of justice, kindness, and compassion."¹⁹ These fine words are the very

14. P. 266.

15. P. 295.

16. P. 298.

17. P. 312.

18. P. 315.

19. P. 315.

last. They slow the pen which would raise a question about the book as a whole. Yet, scholarly and thoughtful as it is, the omission of significant and explicit awareness of religion and Revelation should not be passed without notice. In a work devoted to morals in relations to the law, I miss a clear recognition of the foundation of morals, the Source of all good. I miss more definite appreciation of the influence of religion, and of the fact that man is endowed by his Creator.

CHARLES FAHY†

†Circuit Judge, United States Court of Appeals, District of Columbia Circuit.

ERRATUM

65 Yale L.J. 54 n.108:

Omit sentence beginning "And Maico . . ." and remainder of footnote.