

as for cash, and power to own shares of other companies, as were calculated to make a strong appeal to promoters of corporations. However, it was not until near the end of the period that New Jersey began on a limited scale the practice, in which it engaged extensively after 1890, of so framing its corporation laws as to induce nonresidents to seek New Jersey charters for enterprises which had no business situs in the state. How far the generally "liberal" attitude of the state towards the granting of corporate charters was influential in stimulating its industrial development is a difficult question which the author does not attempt to explore.

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THE SENSE OF INJUSTICE. By Edmond M. Cahn.<sup>1</sup> New York: New York University Press. 1949. Pp. 186. \$3.50.

Man's ancient struggle against injustice has produced a great variety of works — tracts contagious in their passion, treatises profound in insight, and textbooks that bravely try to teach the unteachable and unscrew the inscrutable. Professor Cahn's little volume falls into none of these categories. It is something that is half-prose and half-poetry. Perhaps its best place on a shelf of law books would be between Pollock's *The Genius of the Common Law* and Cardozo's *Law and Literature*. It is a vivid account of what happens in a man's heart when he seeks to right an injustice. It is studded with piquant phrases nicely turned, with quotations from the world's great books, and with novel analogies calculated to stimulate, alike, the tired student and the jaded lawyer. But the flavor of the book is more easily conveyed by excerpts than by description. I pick, almost at random, a few phrases that exemplify the insight and the imagination with which this volume makes its distinctive contribution to our understanding of law and the modern mind: "The aeroplane has recently ripped heaven off the fee simple, and perhaps nuclear fission will take care of the balance" (p. 59). "[T]he spirit of the laws can in time suffuse the laws of the spirit" (p. 109). "A robber would not like a lawless society: he needs law-abiding citizens to accumulate goods for him; if the police become too lax, he will have more competitors than prospective victims" (p. 136 n.7).

It is nearly 2500 years since the philosopher-poet Heraclitus made the pregnant observation: "Were there no injustice, men would never have known the name of justice." We are all inclined to vague verbalisms when we speak of justice or happiness. It is much easier to be specific and solid when we speak of injustice or suffering. It is the great merit of Professor Cahn's work that it brings this ancient wisdom to bear on a host of contemporary issues from the doctrine of "separate but equal" facilities to taxation and social security.

Having said this much, one might express thanks and say no more. And if the writer of this volume had been content to set forth his own

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vision, it would be unfair to say more. But alas, like many others to whom modern psychology has appeared as a startling revelation, the author must needs consign to the ash cans of outworn history all philosophers and jurists who had the misfortune to write before the discovery of adrenals and complexes. And since this attitude (of which Dr. Cahn is not the most extreme advocate) bids fair to introduce a new provincialism into American jurisprudence, its expressions in this volume call for more than passing comment.

What we know and value in the human ideals that our law more or less successfully enshrines comes, by and large, out of two great intellectual traditions. One is the tradition of systematized ideals that has generally been formulated in the language of natural law and is largely responsible for the conceptions of human rights that are at the growing points of domestic and international law today. The other great tradition is that of the realists who have fixed their eyes on the human frailties that are manifested when officials give commands in the name of the state. If these two traditions are excised from our search after justice, little but vague impressionism remains. Yet Professor Cahn's volume is full of words of contempt and disparagement for past thinkers, and even if these words have not dissuaded the author himself from classical studies, they are likely to have an obscurantist effect upon the unarmed reader.

Consider, for example, the author's cavalier dismissal of natural law. The "theory" of natural law, he solemnly tells us, was destroyed when Hobbes challenged the postulate of "original virtue" which "natural law had posited" (p. 7). Apparently, Professor Cahn does not realize that the language of natural law is still a living language, after a good many centuries of usage, and that those who have made the largest contributions to the doctrine of human rights have generally started not from the postulate of original virtue but rather from the postulate of original sin. If men (including officials) were not prone to pride and prejudice, would they require the social controls that go by the name of "natural law" and that command respect by nations and by bureaucrats for "natural rights"?

Utilitarian and realistic thought are disposed of quite as cavalierly. The words sound plausible enough when we read, for example, that Austin purged Bentham's analysis of law of its "optimistic utilitarianism" (p. 8). But if we stop for reflection, what happens to the sense of the statement? Was there ever a jurist who took a less optimistic view of the law of his own time and place than Bentham? Was there ever a jurist who protested more acridly against the reigning optimism of established legal theory than this unabashed critic of the holy cows of the common law which Blackstone had begotten out of Coke? And in any event did not Austin, as a faithful student and devoted follower of Bentham, take over, without substantial alteration, Bentham's realistic conception that law consists of state commands? What was truly significant about the Benthamite-Austinian view was the insistence of these realists that law is law, whether good or bad.

Under the apologetic or optative definitions of Coke and Blackstone

it had been impossible to criticize law, which was, by definition, beyond criticism — being a function of the highest reason commanding the right and forbidding the wrong. When Bentham, Austin, and Holmes substituted a realistic vocabulary that distinguished between law and ethics, they upset not only the sacred cows of established jurisprudence but also the sacred cows of ethics, since they suggested the desirability of tracing the actual consequences of laws and decisions before criticizing them. It was on the basis of that realistic conception that the law of England, America, and Western Europe was subjected to the most devastating century and a half of criticism that has been directed at any body of law during any similar period of recorded history. Entrenched absurdities were swept out of the law of procedure, ancient barbarisms were excised from the criminal law, and conceptions of human freedom were expanded to new horizons. Of all this, however, Professor Cahn gives no hint. He accepts the common but unhistorical view of Bentham as a reactionary individualist and tells us that “Bentham wished man to be liberated by legislation: his insights were made to serve the ends of bondage” (pp. 8–9). He is equally cavalier in accepting the common conception of Austin and disposes of the “command” analysis of law quite casually: “[O]ne may still fail to discover a clear command in most rules of law. Who is commanded to do what, for example, by a statute that simply requires two witnesses for a valid will?” (p. 9). If the questioner would only stop for answer he would surely realize that the human meaning of any testamentary rule is in the command that the beneficiary of the alleged will shall not take the designated property from the heirs if the testamentary requirements were not met.

The summary dismissal of analytical jurisprudence and of natural law reflects the author’s general opinion that legal philosophers are supercilious, other-worldly, or lacking in guts (pp. 1, 51–52). “Legal philosophy,” we are told, “when it has seen fit to turn its eyes toward men, has customarily regarded them either as a row of identical pegs on which to hang rights and interests or as mere particular instances of some conceptualized being called ‘Man’; . . . but the ultimate consumer of the product will always be some quite concrete individual” (p. 2).

Plausible as this contrast between philosophy and life may sound when we have heard it for the hundredth time, is there any reason to think that it is really true at either end? Is there ever a concrete individual who is the *ultimate* consumer of the product we call law? What about the prisoner’s wife and children, and their neighbors, and the parties in another case for which the one just decided will be a precedent? What about the effect of the case on the jury, on the newspaper-reading public, and on the taxpayers who foot the bill? Doesn’t every case affect society? How can there be an ultimate consumer, or an ultimate anything else, in real life, which flows past all ultimates?

Of course, each particular human being is an individual. But what philosopher ever denied that? And if Professor Cahn is complaining because philosophers use abstractions when they think about people,

let him consider that we all use abstractions when we think about anything. The question is not whether we use abstractions but how adequate our abstractions are to the needs of our cases. In this respect, the inadequacies of Professor Cahn's abstractions are serious. He tells us, for example, that if five defendants receive different penalties for similar offenses this will arouse the "sense of injustice" (p. 14). But this is so only if we assume that punishment is due to the crime, and not to the criminal. If we accept the more enlightened modern view that one (not necessarily the only) function of punishment is to reform the offender, then natural differences between offenders will call for differentiation in degrees of punishment, or even the omission of punishment in some cases where punishment will do more harm than good. Very few legal philosophers would allow themselves to be trapped by such oversimplified abstractions as Professor Cahn falls for when he argues for uniformity of punishment on the ground that "[a]s human integers, men are indistinguishables" (p. 15).

Some readers, perhaps, will be inconsiderate enough to ask what the author means by the "sense of injustice," about which this book is written. The words of the author's answer sound clear enough: "It denotes that sympathetic reaction of outrage, horror, shock, resentment, and anger, those affections of the viscera and abnormal secretions of the adrenals that prepare *the human animal* to resist attack" (p. 24) (emphasis supplied).

But what, really, does all this mean? If we take seriously the author's warning against the tendency of philosophers to generalize unduly about "some conceptualized being called 'Man'" (p. 2), we may be prepared to recognize that different human animals react very differently to identical situations. Consider, for instance, the human animals that rule in any dictatorship and their reactions to efforts of freedom-loving subjects to overthrow the dictatorship. Let us assume that we have verified and measured the "sympathetic reaction of outrage, horror, shock, resentment, and anger" of the dictator and his clique. Let us assume, further, that we have chemically analyzed "those affections of the viscera and abnormal secretions of the adrenals that prepare the human animal [in this particular position] to resist attack." Do we have here, in truth, a "sense of injustice"? Or do we have simply the "fact of resentment"? It seems to me that Dr. Cahn, like all psychologists who write on ethics, dodges the \$64 questions.

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SOZIOLOGIE DER DEUTSCHEN NACHKRIEGSKRIMINALITÄT. By Karl S. Bader.<sup>1</sup> Tübingen: J. C. B. Mohr (Paul Siebeck). 1949. Pp. xv, 209.

This book is an attempt to analyze the effects of the Second World War on criminality in Germany. It is primarily statistical in character.

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