

## The Moral Decision, Right and Wrong in the Light of American Law

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## BOOK REVIEWS

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

*Reviewed by*

DR. BRENDAN F. BROWN\*

In this book, the author, who is Professor of Philosophy of Law, Law and Society, and Constitutional Law, at New York University, undertakes to explore moral right and wrong in the light of American law, so as to provide "a new experience in understanding and living."<sup>1</sup> He uses the "moral constitution" as his criterion in the analysis of more than twenty cases selected from various phases of American law. He supplements this analysis by personal opinions and illustrations drawn from numerous great classical books of the past. The over-all effect is a successful refutation of legal positivism by conclusive proof of the essential historical and philosophical connection between law and morals.

The work is part of the growing trend to employ the case-method in teaching and writing about jurisprudence. The cases in question were selected for their "prismatic" rather than for their "demonstrative" or "illustrative"<sup>2</sup> qualities, in order to enable the reader "to discover an entire spectrum of hidden moral interests and values"<sup>3</sup> in them. They were taken from the fields of Torts, Criminal Law, Domestic Relations,

Equity, especially in relation to fraud and labor unions, Tax Law, Constitutional Law, Property, Insurance Law, and Statutory Construction. Their facts have been summarized in nontechnical language for the benefit of the lay reader. Although Professor Cahn, generally speaking, agrees with the results reached in these cases, he is not to "be charged with a credulous or uncritical approval of the present state of American law."<sup>4</sup>

The author has distributed these cases and materials under three general headings; namely, the legal and the good, moral guides in the American law of rights, and, finally, moral guides in the American law of procedure. The first two parts, dealing with moral and legal rights, are the common province of the layman and the lawyer, but the third part is principally for lawyers. A discussion of morals as a legal order, and of law as a moral order, in Part I, is followed by a consideration in Part II of the specific rights which are peculiar to the various stages of a man's life. In Part III, emphasis is placed on the necessity of avoiding ex post facto laws, of giving notice and hearing to a defendant, of insuring the impartiality of judge and jury, and of providing adequate counsel.

The book should be hailed as an important, useful, and scholarly contribution to the field of Philosophical Jurisprudence.

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†Reprinted with permission from 44 Georgetown Law Journal 542 (1956).

<sup>1</sup> CAHN, THE MORAL DECISION, RIGHT AND WRONG IN THE LIGHT OF AMERICAN LAW, jacket (1955).

<sup>2</sup> *Id.* at 245.

<sup>3</sup> *Id.* at 52.

<sup>4</sup> *Id.* at 245.

It is to be commended for its insistence upon the need of correlating positive law and morals in the judicial process, and for its successful demonstration that American law has tended more and more to recognize moral rights. The author has performed a fine service for the cause of normative jurisprudence by showing that law and morals are not one and the same, and that there is a distinction between the *is* and the *ought*. He has effectively refuted those jurists who assert that the moral measure of law is to be found in the *mores* or customs of the community.

But the formula of the "moral constitution" which Professor Cahn uses as his ultimate test of right and wrong does not sufficiently emphasize reason and neglects the factor of will. This "moral constitution," or conscience, includes such psychological phenomena as self-dramatization, imperfect identification, and the sense of wrong.<sup>5</sup> But even this sense of wrong, according to Professor Cahn, does not proceed entirely from the operation of reason as a suprasensible faculty which "evaluates" the moral act, for he states that

our reaction to an act of moral wrong is a blend of reason that recognizes, of emotion that evaluates, and of glands that pump physical preparations for action.<sup>6</sup>

No reference is made to the place of the will. Since emotion pertains rather to the physical part of man, this conception of the human moral equipment is considerably inferior to that of the traditional school of natural law and appears at variance with the Thomistic thesis that truth is primarily in the intellect. It is possible of course for the emotions to reduce the

power of reason to comprehend the existence of moral evil in a particular situation, and also to limit the area of free moral choice.

Moreover, the formula of the "moral constitution" is detached from the authority of an objective natural law. How does Professor Cahn expect to assist the reader "to make enlightened decisions in the moral confusion of our times,"<sup>7</sup> when he himself fails to accept the existence of fixed moral principles which owe their validity not to the appraisal of any particular individual conscience, but rather to their intrinsic reasonableness, and because conformity to them by man is essential for the realization of ends which are evident from his nature and the purposes for which he was created? Is not the very confusion of our times, which the author laments,<sup>8</sup> largely the consequence of rejecting the ideals of the objective natural law, and allowing each individual to create his own little natural law, as it were? Without an objective criterion of good and evil, it is difficult to understand how Professor Cahn can go so far as to assure the reader that the moral constitution "intimates a promise that at times we may reach what is called 'moral certainty'."<sup>9</sup>

In addition to the blind spot resulting from the adoption of a subjective conception of the moral law, Professor Cahn has reached two moral decisions at variance with those acceptable to scholastic jurists, and one which is contrary to the Catholic concept of the supernatural law. Thus he believes that divorce, with the right of remarriage, and the use of contraceptives

<sup>7</sup> *Id.* at jacket.

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

<sup>9</sup> *Id.* at 34.

<sup>5</sup> *Id.* at 16-18.

<sup>6</sup> *Id.* at 18.

are moral, according to the "moral constitution." He also rejects all interpretations of the doctrine of original sin.

In the first place, the natural law prescribes lifelong monogamy, because this is morally necessary for the achievement of the primary and secondary ends of marriage. The primary end is the procreation of children, caring for their physical needs, and providing for their moral and educational training. The secondary objective is the mutual assistance of the spouses, physical, mental and spiritual, and the allaying of concupiscence.

Professor Cahn errs in his moral decision that American divorce law should be changed by multiplying the number of grounds of divorce, and by eliminating the "guilt" theory of divorce. Particularly unwarranted is the argument for "liberalizing" the divorce law in New York, namely, that there is an abuse of the annulment power of the courts by perjury. Abuse of the judicial process is never a reason in itself for relaxing or abolishing a law.

Professor Cahn has vaguely endeavored to imply a parallel between the Rota, *i.e.*, the highest ecclesiastical court of the Catholic Church, and the New York courts, in their use of the annulment process as a substitute for divorce, which a spirit of "Puritanism" in each instance would not recognize. But certainly since marriage is among other things a contract, there must be a declaration of nullity *ab initio* if there has been lack of consent, for marriage is created by an act of the mutual wills of the parties who alone can supply this act. Hence it was necessary for the Rota in the *Vanderbilt* case, cited by Professor Cahn,<sup>10</sup>

to grant "an annulment to a woman on proof that she had been coerced by her imperious mother into an unwilling marriage,"<sup>11</sup> even though "the marriage had produced two children"<sup>12</sup> and despite the fact that "the suit for annulment was not filed until 1925, some thirty years after the act of coercion!"<sup>13</sup> The woman who had been coerced into the marriage did not know that her marriage was judicially invalid from the beginning, and hence, according to canon law, any later assent, short of a new consent given with knowledge of the previous invalidity of the original assent and with the intention of making the marriage valid, could not validate the marriage.<sup>14</sup> The decree of nullity in the *Vanderbilt* case, therefore, was not tantamount to a divorce because it did not break the marital bond.

According to the law of New York, annulment sometimes means a judicial declaration that there never was a marriage, but at other times it refers to the voiding of a voidable marriage, which was originally valid. Manifestly, annulment in the first sense, as where a brother and sister have endeavored to marry, is not equivalent to the breaking of the marriage bond. Annulment in the second sense, as where the consent to the marriage has been obtained by fraud, so that the New York courts have discretion to declare such a voidable marriage terminated as of the time of the declaration of nullity, deviates from the canonical concept and involves the breaking of the marriage bond. It is

<sup>11</sup> *Id.* at 101.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> Can. 1133-34, 1137; BOUSCAREN AND ELLIS, CANON LAW 515 (1946); 2 SIMPSON AND STONE, LAW AND SOCIETY 946 (1949).

<sup>10</sup> *Id.* at 100-01.

perhaps juridically unfortunate that the New York statutes have blurred the concept of annulment as understood by the canon and natural laws. But Professor Cahn has not offered evidence to show that these statutes were originally intended to provide a "popular mode of exit,"<sup>15</sup> by way of a substitute for divorce, or that the judges apply these statutes for that purpose at the present time.

The moral decision of the author to reject the "guilt" theory of divorce and to allow *A*, even though morally guilty, to divorce *B*, who is not guilty, and marry someone else, provided the fact of irreconcilability was established, would seem to invite sociological disaster. It would increase the number of delinquent children who are the aftermath of broken homes. It would destroy the institution of marriage which has become a fundamental postulate of western civilization. To reject the "guilt" theory is to deny moral responsibility, and to adopt a behavioristic philosophy of human conduct, which is completely foreign to the moral basis of the Anglo-American common law, particularly, equity.

In the second place, the moral decision of the author which praises "the great and increasing availability of contraceptives"<sup>16</sup> as "one of the important benefactions of modern science and technology"<sup>17</sup> is contrary to the ideals of the objective natural law, because it unreasonably exalts the individual interests of the spouses at the expense of the social interest in the procreation of children. Professor Cahn has mistakenly subordinated the primary end

of marriage to its secondary objective. Indeed

actually the perfection of the spouses in the family is impossible unless they pursue the essential ends of marriage as recognized from the direction of the marital act toward procreation and the resulting duties to children.<sup>18</sup>

Neither this perfection nor happiness can be achieved by affirmative acts which interfere with the natural effects of generative activity to produce offspring.

In the third place, Professor Cahn wrongly rejects all concepts of the doctrine of original sin in his discussion of "the cosmic meaning of decision," by stating that it has not been demonstrated "that we have fallen in any respect or have lost a more important status by lapsing into sin."<sup>19</sup> Acceptance of this doctrine is not solely a conclusion of rational demonstration, but rather of grace and faith based on divine revelation, and hence is beyond "an objective estimate of the species we belong to. . . ."<sup>20</sup> In rejecting the doctrine, he especially identifies it with the non-Catholic interpretation that man is "predominantly evil."<sup>21</sup> Catholic theology maintains that original sin did not render man essentially evil, but it did weaken his will and darken his understanding. It left in him a tendency toward evil which will always retard his moral progress.

Under the Catholic doctrine, it is possible to hope that "our successors can be counted on to surpass and supersede the moral decisions established in our time,"<sup>22</sup>

<sup>18</sup> See Brown, *The Natural Law, The Marriage Bond, and Divorce*, 24 *FORDHAM L. REV.* 83, 88 (1955).

<sup>19</sup> CAHN, *op. cit. supra* note 1, at 312.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> *Id.* at 315.

<sup>15</sup> CAHN, *op. cit. supra* note 1, at 101.

<sup>16</sup> *Id.* at 92.

<sup>17</sup> *Ibid.*

insofar as this means that their intellects may provide a clearer vision of the dictates of the natural law, their wills may more often choose the good, and their acts more effectually implement their moral decisions. But it will not be possible for them "to create moral standards superior to those their fathers evolved,"<sup>23</sup> because man does not "create" or "evolve" the basic truths of

the natural law. He only recognizes them, and is under a duty to employ those means which will best give effect to these truths. This is not to deny, however, that moral conclusions, reached by recourse to the fixed ideals of the natural law, as a major premise, will vary in accordance with the ever changing economic, sociological, technological, scientific, and cultural facts of the minor premise.

