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Book Review: The Moral Decision

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BOOK REVIEW

THE MORAL DECISION. By Edmond Cahn.† Indiana University Press, Bloomington, Ind., New Midland Book Edition, 1981. Pp. 342. Reviewed by Harold D. Cunningham, Jr.‡

The Moral Decision has been reviewed on many occasions since its first publication in 1955. In this current review, a former student of Professor Cahn has reflected and drawn upon his personal knowledge of Professor Cahn to offer the reader a new perspective of both the book and its author.

*The Moral Decision*¹ is an engaging book written more for the literate laymen than for the legal professional. Professor Cahn aims at offering the reader a distillation of moral insights discerned from an analysis of “cases”—actual controversies that have received the attention of courts of law. Cases, in his view, are “prisms” revealing “an entire spectrum of moral forces—personal ambitions, group standards, lusts, sufferings, and ideals.”²

The book is organized into three parts, each of which is further subdivided by chapters and sections. Part One, “The Legal and the Good,” examines the relationship between law and morals and suggests how the law can provide moral guides and insights.³ Part Two, “Moral Guides in the American Law of Rights,” demonstrates this thesis through illustrative cases touching on the moral content of substantive rules,⁴ while Part Three, “Moral Guides in the American Law of Procedure,” pursues the same theme from the viewpoint of procedural norms.⁵ Beginning with Part Two, Professor Cahn provides notes that

† B.A., Tulane University, 1925; J.D., Tulane University School of Law, 1927. Professor Cahn practiced law in New York City for over 20 years, and then devoted the remainder of his life to full time teaching as a Professor at the New York University School of Law until his death in 1964. His publications include: *CONFRONTING INJUSTICE* (1969) (published posthumously); *THE PREDICAMENT OF DEMOCRATIC MAN* (1961); *THE MORAL DECISION* (1955); and *THE SENSE OF INJUSTICE* (1949).

‡ B.A., Manhattan College, 1941; J.D., Boston College Law School, 1948; L.L.M., New York University School of Law, 1949; B.C.L., Oxford University, 1953; Professor of Law, University of Baltimore School of Law.

Rarely does one have an opportunity to review a book by one's former teacher. Such, however, is my pleasure with this review. This circumstance makes it possible to do more in these pages than to simply review a book. It offers an occasion to evaluate the thinking of a scholar and teacher, to savor his style, and to bring to the reader's attention insights that he shared with a student over 35 years ago, when I attended his graduate course in Jurisprudence at New York University School of Law during the academic year 1948-1949.

1. E. CAHN, *THE MORAL DECISION* (1955) [hereinafter cited as *THE MORAL DECISION*].

2. *Id.* at 4.

3. *Id.* at 7-58.

4. *Id.* at 59-248.

5. *Id.* at 249-315.

appear at the end of the book,⁶ as well as a short bibliography,⁷ to provide further references for the reader. And, to enable the reader better to follow the graceful but subtle flow of the author's theme, the book includes a topical analysis.⁸

In Part One, Professor Cahn examines the relationship between law and morals under two topic headings, "Morals as a Legal Order" and "Law as a Moral Order." These topics complement one another, for moral precepts can make the law meaningful and, correspondingly, the law can give force to moral precepts. Professor Cahn frequently alludes to the reciprocal contributions that law and morals make to one another.⁹

To explain Professor Cahn's treatment of these ideas and to understand the various influences that have shaped his thinking, it is necessary to place him in perspective as a jurist. While Professor Cahn refers frequently to famous jurists¹⁰ and offers comments on the various schools of legal philosophy,¹¹ he does not specifically identify himself with any particular jurisprudential viewpoint. For this reason, it is difficult to discern the dominant influences on his thinking. One point, however, is clear: Professor Cahn demands a moral element in law, and he moves effortlessly between the familiar realms of law and ethics. In so doing, he is following the example of many of his predecessors. Jurists in the natural law tradition¹² from Aristotle¹³ to Saint Thomas

6. *Id.* at 321-29.

7. *Id.* at 319.

8. *Id.* at 334-42.

9. *E.g.*, "It is realistic to look at the law . . . as a rich repository of moral knowledge. . . ." *Id.* at 3; "Where the legal doctrine so conspicuously overlaps with what we are used to call [sic] morals, it should have momentous lessons to teach us." *Id.* at 38.

10. *E.g.*, Aristotle, *id.* at 5, 10, 73, 136-37, 299; Immanuel Kant, *id.* at 18, 86; Jeremy Bentham, *id.* at 22-23, 157, 297; Thomas Hobbes, *id.* at 193; Jean Jacques Rousseau, *id.* at 35; Justice Oliver Wendell Holmes, *id.* at 65, 75-77, 144-45, 181, 287; Judge Jerome Frank, *id.* at 257-58, 304; John Chipman Gray, *id.* at 302, 308; Max Weber, *id.* at 275.

11. *E.g.*, higher law theories of the ancient world, *id.* at 5, 24; utilitarianism, *id.* at 13; positivism, *id.* at 36; pragmatism (realism), *id.* at 47, 156, 295.

12. For a succinct account of the natural law, or law of nature school of jurisprudence, see E. PATTERSON, JURISPRUDENCE, MEN AND IDEAS OF THE LAW 332-75 (1953).

13. Aristotle (384-322 B.C.), in his celebrated work, *The Nichomachean Ethics*, wrote of the moral content of law:

[T]he law bids us do both the acts of a brave man (e.g. not to desert our post nor take to flight nor throw away our arms), and those of a temperate man (e.g. not to commit adultery nor to gratify one's lust), and those of a good-tempered man (e.g. not to strike another nor to speak evil), and similarly with regard to the other virtues and forms of wickedness, commanding some acts and forbidding others; and the rightly-framed law does this rightly, and the hastily conceived one less well.

ARISTOTLE, *THE NICHOMACHEAN ETHICS*, book V (W. Ross trans. 1925), reprinted in G. CHRISTIE, JURISPRUDENCE, TEXT AND READINGS ON THE PHILOSOPHY OF LAW 58 (1973) [hereinafter cited as G. CHRISTIE].

Aquinas,¹⁴ and more recently to Dr. John Finnis,¹⁵ have insisted that law does, and should, reflect moral values, and indeed, that one of the criteria for the validity of a legal norm must be its congruence with moral sentiments. In contrast, proponents of the positivist tradition in legal philosophy¹⁶ deny a necessary connection between law and morality,¹⁷ while jurists of the realist persuasion assert that concern over the relationship between law and morals may be misplaced.¹⁸ The inquiry, the realists feel, should focus on the practice of the courts—on what judges and other officials do—not on what should be included in, or excluded from, a definition of law or a rule formulation.¹⁹

14. Saint Thomas Aquinas (1225-1274), in his monumental work *Summa Theologica*, stated:

[E]very law aims at being obeyed by those who are subject to it. Consequently it is evident that the proper effect of law is to lead its subjects to their proper virtue: and since virtue is *that which makes its subject good*, it follows that the proper effect of law is to make those to whom it is given, good, either simply or in some particular respect.

T. AQUINAS, *SUMMA THEOLOGICA* question 92, art. 1 (Fathers of the English Dominican Province trans. 1915), *reprinted in* G. CHRISTIE, *supra* note 13, at 100 (emphasis in original).

15. Dr. John Finnis, Fellow of University College, Oxford, and a major contemporary exponent of natural law, wrote:

[T]he principles of natural law . . . are traced out not only in moral philosophy or ethics and 'individual' conduct, but also in political philosophy and jurisprudence, in political action, adjudication, and the life of the citizen. For those principles justify the exercise of authority in community. They require, too, that the authority be exercised, in most circumstances, according to the manner conveniently labelled the Rule of Law, and with due respect for the human rights which embody the requirements of justice, and for the purpose of promoting a common good in which such respect for rights is a component.

J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 23 (1980).

16. See G. PATON & D. DERHAM, *A TEXTBOOK OF JURISPRUDENCE* 5-14 (4th ed. 1972) [hereinafter cited as G. PATON]; E. PATTERSON, *supra* note 12, at 82-88. The adjectives "imperative" or "analytical" are also used to describe the positivist school.

17. John Austin (1790-1859), in his first lecture on jurisprudence, entitled *The Province of Jurisprudence Determined*, carefully distinguished law in the strict sense of the term from morals. The former is a norm posited by a political superior for the direction of subordinates, the breach of which entails the imposition of a punitive sanction. The latter cannot properly be described as law for it lacks a sanction and rests ultimately on convention. J. AUSTIN, *1 LECTURES ON JURISPRUDENCE* (5th ed. 1885), *reprinted in* G. CHRISTIE, *supra* note 13, at 471-83. Other jurists who sharply distinguish law from morals and who deny the preeminence of moral norms include Hans Kelsen, whose *Pure Theory of Law* is discussed in E. PATTERSON, *supra* note 12, at 259-65. For a further discussion of Kelsen's views, see G. CHRISTIE, *supra* note 13, at 631-34; H. HART, *THE CONCEPT OF LAW* 35-36 (1961); G. PATON, *supra* note 16, at 113-14. The relationship between law and morals continues to generate a lively controversy in legal literature. See L. FULLER, *THE MORALITY OF LAW* (1964); Fuller, *The Morality of Law*, 10 *VILL. L. REV.* 623, 623-78 (1965); Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.* 593 (1958); Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 *HARV. L. REV.* 630 (1958).

18. For an account of the realist position, see E. PATTERSON, *supra* note 12, at 507-08.

19. Karl Llewellyn, for example, stated: "The 'rules' are laid down; in the type case

There are several other schools of legal philosophy,²⁰ each claiming to have the key to a proper understanding of the meaning of law, and answers to the salient questions of jurisprudence.²¹ Professor Cahn, however, in his search for an understanding of the relationship between law and morals, eschewed identity with any particular school. Early in his career, he formed an attitude of cautious incredulity towards speculation aimed at deducing a litany of structured precepts from *a priori* postulates.²² In *The Moral Decision*, this suspicion of preconceived value systems became an underlying premise to his thinking. Thus, while Professor Cahn shared with the positivists a reluctance to give an authoritative system of morals preeminence over law, he distrusted the positivists' notion that "the law is only the established and existing list of official commands; and speculation on what the rules of law ought to be constitutes a waste of effort."²³ Professor Cahn may have been more comfortable with the realist viewpoint, but not in the cynical sense of Justice Holmes.²⁴ Rather, he would share the ap-

they are 'ought' rules, prescriptive rules: the writer's prescriptions, the writer's oughts, individually proclaimed oughts—the true rule is that judges should give judgment for the plaintiff on these facts." Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 443 (1930). Llewellyn later stated it more simply: "What these officials do about disputes is, to my mind, the law itself." K. LLEWELLYN, *THE BRAMBLE BUSH* 12 (1960).

20. *E.g.*, the idealist (Immanuel Kant), see E. PATTERSON, *supra* note 12, at 376-89; the historical (Friedrich von Savigny, Sir Henry Maine, James Carter), see *id.* at 404-25; the utilitarian (Jeremy Bentham, John Stuart Mill, Rudolph von Jhering), see *id.* at 439-64; the sociological (Roscoe Pound, Eugen Ehrlich), see *id.* at 79-81, 509-27.
21. Patterson formulated these questions as follows: "What is law?" "What is the law?" "What should be the law?" E. PATTERSON, *supra* note 12, at 4-5 (emphasis in original). In the first lecture of my jurisprudence class on September 27, 1948, Professor Cahn asked his students to imagine a pitch black field around the perimeter of which were a series of search lights. Each light represented a school of jurisprudence. A person behind each light saw only the field as illuminated by his light. Consequently, the answers to these salient questions of jurisprudence can only be discovered by lighting every light and examining the teaching of every school, and even then, there will always be room for more lights.
22. E. CAHN, *THE SENSE OF INJUSTICE* 190 (1949) [hereinafter cited as *THE SENSE OF INJUSTICE*]. Professor Cahn had little sympathy for "a list of natural and immutable moral precepts." *THE MORAL DECISION* 25.
23. *THE MORAL DECISION* 36-37. Professor Cahn objected to an elite priestly caste, for example, stating: "And—most important in this development—the very same priestly group that regularly dispensed the mysteries and performed the ritual, by like authority and with like finality announced what kind of conduct was or was not to be considered good." *Id.* at 21.
24. Illustrative of Justice Holmes' cynicism is his famous statement that "the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by law." Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897). In *United Zinc & Chem. v. Britt*, 258 U.S. 268 (1922), Justice Holmes restricted the application of the attractive nuisance doctrine, and denied recovery for burns from sulfuric acid resulting in the death of two boys who thought a brick cellar containing an attractive pool of water, but which actually contained sulfuric acid, was a fine place in which to swim. See *THE MORAL DECISION* 74-75. Professor Cahn regretted Justice Holmes' myopic holding in this case. *Id.*

proach to realism of his close friend, Judge Jerome Frank.²⁵ Another noted jurist, for whose view Professor Cahn may have had considerable empathy, is John Stuart Mill. Mill thought justice could best be defined in terms of its opposites.²⁶ Professor Cahn adopted a similar approach in another of his books, *The Sense of Injustice*.²⁷ There, he sought to reach an understanding of justice by focusing on instances of injustice.²⁸ Also like Mill, Professor Cahn recognized the importance of instinct in forming human values,²⁹ and, again like Mill, he gave preeminence to liberty as a legally protected interest.³⁰

As for the relationship between law and morals, Professor Cahn's position is unique. He wrote *The Moral Decision* before publication of the celebrated Wolfenden Report,³¹ which recommended decriminalizing certain acts of sexual immorality, and before the controversy generated by this report between Lord Justice Devlin, who believed that the

25. Professor Cahn wrote:

Those of us who were introduced to the law in the conceptualistic murk of the 1920s are bound to remember with gratitude the brave company of so-called 'realists' who forced the windows open and gave us light and air. Foremost of that band, Jerome Frank continues—with zest and sparkle—to disturb the complacent, to shock the intellectual prudes, and to lay a youthfully tempestuous siege to the heart of justice.

Cahn, *Book Review*, 59 *YALE L.J.* 809, 811-12 (1959) (reviewing J. FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* (1949)); see J. FRANK, *LAW AND THE MODERN MIND* (1930), reprinted in G. CHRISTIE, *supra* note 13, at 697-709.

26. J. Mill, *Utilitarianism*, in *THE GREAT LEGAL PHILOSOPHERS* 365, 371, 373 (C. Morris ed. 1959).

27. *THE SENSE OF INJUSTICE*, *supra* note 22, at 13.

28. *Id.* at 13-14.

29. See *THE MORAL DECISION* 61-71 (self preservation); *id.* at 88-93 (sexual relations); J. Mill, *Utilitarianism*, in *THE GREAT LEGAL PHILOSOPHERS*, *supra* note 26, at 365, 374.

30. See J. Mill, *On Liberty*, in *THE GREAT LEGAL PHILOSOPHERS*, *supra* note 26, at 380-96. In essays memorializing him and recognizing his devotion to the Bill of Rights, Professor Cahn is characterized as a champion of civil liberties. McKay, *The Constitution and Edmond Cahn*, 40 *N.Y.U. L. Rev.* 233, 242 (1965); Redlich, *Edmond Cahn: A Philosopher for Democratic Man*, 40 *N.Y.U. L. Rev.* 250, 261 (1965). Professor Cahn wrote to Justice Black, "We've disagreed, just barely enough to prove that there are two of us," Black, *About Edmond Cahn*, 40 *N.Y.U. L. Rev.* 207, 207 (1964), and Justice Black wrote of him:

[H]is conversations, which I venture to say lifted us both above the commonplace things and to a greater appreciation of our country and its Constitution, with its promise of freedom for the mind and spirit of man to seek new light—always freedom to think and speak and write and believe.

Id. at 208.

31. *REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION*, *CMD.* 247 (1957). The Wolfenden Report, published in Great Britain, recommended that homosexual behavior between consenting adults in private should not be subject to penal sanctions. For a discussion of the Wolfenden Report, see G. PATON, *supra* note 16, at 155-58. See also Director of Pub. Prosecution v. Shaw, 1962 *A.C.* 220.

law should punish immorality as such,³² and Professor H.L.A. Hart of Oxford University, who argued that it should not.³³ Although he was an intensely religious man, steeped in the traditions of his faith and sensitive to the impact of moral values on human behavior,³⁴ Professor Cahn would probably take issue with Lord Justice Devlin's views, and would agree with the Wolfenden Report and Professor Hart. Professor Cahn, however, would steer between the natural law tone of Lord Justice Devlin's views, and the positivist orientation of Professor Hart. Professor Cahn would argue that the danger to be avoided is an arbitrarily imposed standard of what is moral or immoral,³⁵ and that to forestall that result, the legislative body adopting the moral standard should reach a consensus through the unique process he develops for making "the moral decision." Professor Cahn explains this process in Part One of his book, wherein he describes what he means by the moral decision.

Professor Cahn begins by focusing on "Morals as a Legal Order."³⁶ He contends that each person must discern the content of the moral decision for himself by a process of personal moral legislation. The objective to be gained is "a disciplined conscious self or *conscience*, who will speak within on behalf of the outer community and will enforce [the community's] moral standards."³⁷ According to Professor Cahn, the moral values and precepts that originate outside a person, that are experienced by the individual and that inform his conscience, are not socially established mores. Moreover, they do not provide immediate answers to specific moral questions.³⁸ They can, however, help in making the moral decision.³⁹ For example, these moral values and precepts assist one "to project into and to care about other selves. . . . [T]hey can summon the self to recognize all that is generically human in the moral predicaments of other individuals."⁴⁰

32. Lord Justice Devlin argued that traditional moral values were a part of the common law tradition, and that:

[S]ociety may use the law to preserve morality in the same way as it uses it to safeguard anything else that is essential to its existence. If therefore the first proposition is securely established with all its implications, society has a prima facie right to legislate against immorality as such.

P. DEVLIN, *THE ENFORCEMENT OF MORALS* 11 (1965).

33. Professor Hart, relying on Mill, gave a negative answer to the question, "Ought immorality as such to be a crime?" H. HART, *LAW, LIBERTY AND MORALITY* 4-6 (1963).

34. McKay, *supra* note 30, at 248. This reviewer's recollection is that Professor Cahn's jurisprudence lectures were punctuated by religious references stated with appreciation, conviction, and respect. *See also* Black, *supra* note 30, at 208. Biblical references abound in *The Moral Decision*. *See, e.g.*, *THE MORAL DECISION* 36, 265-66, 290.

35. *THE MORAL DECISION* 21, 25, 89.

36. *Id.* at 9-34.

37. *Id.* at 23 (emphasis in original).

38. *Id.* at 27.

39. *Id.*

40. *Id.* This concept of projection of one's self into another's self is the key to Profes-

Felt moral values pass through three stages before they become, for the individual, the bases for moral decision.⁴¹ First, group values—which include more than just the prevailing mores—are impressed upon the individual until, at the second stage, they become “an implement of self-police.”⁴² In the third stage, these values are reformulated by the decision-maker to reflect his own experience and personality and, as they are externalized in decision and action, they and the group value system on which they impact are, in an ongoing process, inevitably changed.⁴³

Professor Cahn moves from a discussion of the precepts upon which the moral decision is based, to a consideration of the moral types that act as role models, and that make concrete the impressions and assessments that lead to the moral decision.⁴⁴ He identifies three of these moral types as having influenced American values: the “muscular” type, exemplified by the high principled activist; the “eupeptic” type, who is more cheerful and opportunistic; and, the “well-adjusted individual,” who, like a chameleon, is ready to blend into his environment by conforming to the prevailing mores.⁴⁵ Occasionally, a fourth type will appear, exemplified by the “prophet,” who, if he is not a false prophet, advances “the moral constitution” by his protests against injustice.⁴⁶

Professor Cahn concludes his treatment of “Morals as a Legal Order” with admonitions against too many ill-conceived “thou shalt nots,”⁴⁷ and against attempts to impose negative or proscriptive precepts on thought processes.⁴⁸ He then turns his attention to “Law as

sor Cahn’s notion of empathy that figured prominently in his first major work, *The Sense of Injustice*. There, he described the “sense of injustice” as follows:

Finally, the sense of injustice is no mere generic label for the concepts already reviewed. It denotes that sympathetic reaction to 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. Nature has thus equipped all men to regard injustice to another as personal aggression. Through a mysterious and magical *empathy* or imaginative interchange, each projects himself into the shoes of the other, not in pity or compassion merely, but in the vigor of self-defense. Injustice is transmuted into assault; the sense of injustice is the implement by which assault is discerned and defense is prepared.

THE SENSE OF INJUSTICE, *supra* note 22, at 24 (emphasis in original).

41. THE MORAL DECISION 24.

42. *Id.* at 24-25.

43. *Id.* at 25.

44. *Id.* at 28.

45. *Id.* at 29-30.

46. *Id.* at 30.

47. *Id.* at 32-34.

48. He observes: “The most unsuccessful of the Ten Commandments is the tenth (‘Thou shalt not covet’). . . .” *Id.* at 34. The medieval English judges knew this: “The thought of man shall not be tried, for the devil himself knoweth not the thought of man—Brian, C.J., in Y.B. 7 Edward IV, Pasch. no. 2, f. 2 (1467).” T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 447 n.5 (5th ed. 1956).

a Moral Order"⁴⁹ and begins discussion of this topic by examining "American Attitudes Towards the Law."⁵⁰

The history of American law, as Professor Cahn notes, reflects an unresolved tension between those who have "an uncritical and excessive trust in what can be accomplished through legislation and policing"⁵¹—a legalistic attitude, and those who have a mistrust of law and government—an anti-legalistic attitude.⁵² He warns against two variations of the legalistic attitude. First, there is positivism that "posits" or "lays down" official commands and disclaims any interest in speculating about what the law ought to be. Proponents of the second variation, instead of distinguishing between law and morals, insist that they are but the same. According to Professor Cahn, these excessive viewpoints distort both law and morals by denying that morals are relevant to law, and by forgetting that some laws are morally neutral.⁵³

The next topic is "Popular Distinctions Between Law and Morals."⁵⁴ Professor Cahn notes the relevance of not one, but three, moral standards that impact on the law: the one we require, the one we desire, and the one we revere.⁵⁵ The latter standard has an element of the heroic in its makeup that can make individuals who follow its precepts difficult companions.⁵⁶ There are fluctuating shifts in the emphasis these standards are given caused by extraneous factors such as war and economic and racial unrest.⁵⁷ Thus, in times of great ideological stress, measures repressive of human rights may be tolerated that would be roundly condemned in a more tranquil period.⁵⁸

Professor Cahn also disposes of the popular misconception that law is concerned with externals, while morals look to the inner man, by noting instances in which the law takes note of subjective mental states.⁵⁹ He then criticizes another distinction sometimes made be-

49. THE MORAL DECISION 35-38.

50. *Id.*

51. *Id.* at 35.

52. *Id.*

53. *Id.* at 37-38.

54. *Id.* at 38-46.

55. *Id.* at 40-41.

56. *Id.* at 41.

57. *Id.*

58. *Id.* An example of this phenomenon is the internment during World War II of individuals, nearly all of Japanese origin, without regard to their loyalty to the United States. See *Ex parte Endo*, 323 U.S. 283 (1944) (construing Act of Mar. 21, 1942, ch. 191, 56 Stat. 173 (codified at 18 U.S.C. § 97a (Supp. II 1943) (repealed 1976); Exec. Order No. 9066, 7 Fed. Reg. 1407 (1942)); *Yasui v. United States*, 320 U.S. 115 (1943) (same); *Hirabayashi v. United States*, 320 U.S. 81 (1943) (same); see also S. 2116, 98th Cong., 1st Sess. (1983); S. 1520, 98th Cong., 1st Sess. (1983); H.R. 4110, 98th Cong., 1st Sess. (1983); H.R. 3387, 98th Cong., 1st Sess. (1983) (legislation seeking redress for these governmental excesses).

59. THE MORAL DECISION 45. That there are legal norms, such as traffic laws, the moral content of which is neutral or more limited, does not contradict this contention. The law is very much concerned with states of mind, and motives are often

tween law and morals that holds that "*the only practical difference between them is in the respective methods by which they are enforced.*"⁶⁰ He agrees that this pragmatic position has merit, but feels it is too limited in that it "intimates nothing concerning the really indispensable clews, i.e., clews that might tell us what to look for when we see a familiar moral precept being enforced in the courts as a rule of law."⁶¹ He suggests that a decision-maker should observe how law as a social institution "impresses its own distinctive characteristics on the moral precepts it enforces."⁶² The drama of the courtroom leaves its imprint,⁶³ as does the craft of the lawyer—his affection for the "nice distinction" and other aspects of his professional discipline.⁶⁴ Likewise important in this context is the imprint of the social function of the law,⁶⁵ and the control exercised by the judge.⁶⁶

Following his discussion of "Law as a Moral Order," Professor Cahn devotes the second and major part of his book to a consideration of "Moral Guides in the American Law of Rights."⁶⁷ He presents this subject by means of illuminating and entertaining critiques of actual cases⁶⁸ illustrative of the impact of moral values on various areas of the law. His themes are aptly chosen, and the cases he selects to make his points are particularly enlightening.

He begins by considering "The First of Life,"⁶⁹ and under this heading comments on "The Value of Being Alive,"⁷⁰ "The Right to be Young,"⁷¹ and "The Family as Moral Administration."⁷² The case chosen to introduce this latter topic, *White v. Thomson*,⁷³ involved an action for alienation of affections. *White* reflects the law's "hands-off" policy where family harmony is concerned. The *White* court held that, as a matter of law, children could not enjoin their father and his par-amour from consorting together.⁷⁴

To explain the topic "The Value of Being Alive," Professor Cahn

inferred from overt acts, e.g., mens rea in criminal law, intent in the law of decedents' estates. *Id.*

60. *Id.* at 47 (emphasis in original).

61. *Id.* at 48.

62. *Id.* at 49.

63. *Id.* at 49-50.

64. *Id.* at 53.

65. *Id.* at 54-55.

66. *Id.* at 55-56.

67. *Id.* at 59-248.

68. Professor Cahn identified some of these cases only by the first letter of the last name of each party, by the year in which the case was decided, and by the volume and page number of the law report series in which the case may be located. In some instances he omitted the identity of the jurisdiction that decided the case.

69. THE MORAL DECISION 61-87.

70. *Id.* at 61-71.

71. *Id.* at 72-77.

72. *Id.* at 77-87.

73. 324 Mass. 140, 85 N.E.2d 246 (1949).

74. *Id.* at 143, 85 N.E.2d at 247; THE MORAL DECISION 77.

discusses *United States v. Holmes*.⁷⁵ In this famous case, a seaman was convicted of manslaughter for throwing male passengers overboard to prevent the sinking of a "long boat" in which some of the crew of a sinking ship and its passengers had taken refuge. This decision illustrates the proposition that whereas self-defense is a valid defense to homicide, duress and necessity are not.⁷⁶ Professor Cahn skillfully leads the reader to conclude that if there are no heroic martyrs to sacrifice themselves in favor of the rest, all must await death or rescue. All are congeners literally "in the same boat," and no one can save himself by killing another. There can be no casting of lots, for the stakes are too high for gambling, and no one can escape the taint of the throw of the dice.⁷⁷

In his discussion of "Sexual Relationships,"⁷⁸ the second topic in Part Two, Professor Cahn anticipates the delineation of the right of privacy established by *Griswold v. Connecticut*.⁷⁹ The case selected to introduce the subtopic "Love's Right of Privacy,"⁸⁰ *Rachel v. State*,⁸¹ involved the reversal of the convictions of a white woman and a black man for "openly outraging public decency and injuring public morals" by engaging in sexual intercourse.⁸² Professor Cahn, ahead of his time

75. 26 F. Cas. 360 (E.D. Pa. 1842) (No. 15,383).

76. *Id.*; *Arp v. State*, 97 Ala. 5, 12 So. 301 (1893); *Regina v. Dudley*, 14 Q.B.D. 273 (1884). The celebrated "Problem of the Sinking Plank," which in its various versions has been a favorite of jurists for centuries, presents the same issue. See G. CHRISTIE, *supra* note 13, at 200 & n.164 (briefly noting divergent opinions of Francis Bacon, Hugo Grotius, Samuel von Pufendorf, and Immanuel Kant on this problem); see also Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949) (raising the same moral and legal issues). The sinking plank problem appears in a syllabus prepared in 1957 by Professors Hardy C. Dillard and Marcus B. Mallet of the University of Virginia for use by students in a legal philosophy seminar. In their version of the problem, students are asked to decide to whom of the struggling survivors seeking support from a plank should a life preserver be thrown. Only one can be saved by the life preserver, and the candidates for rescue personify differing degrees of virtue and value to society.

77. THE MORAL DECISION 71. As a postscript to this justification for the objective moral worth of every person, Professor Cahn analogizes earth to the lifeboat in the *Holmes* case. *Id.* He wrote before the nuclear arms race intensified and before concern for the environment became critical, but the metaphor is apt.

78. THE MORAL DECISION 88-122.

79. 381 U.S. 479 (1965). *Griswold* spawned a host of decisions based on the right of privacy. *E.g.*, *Zablocki v. Redhail*, 434 U.S. 374 (1978) (freedom to marry); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (family living arrangements); *Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *Stanley v. Illinois*, 405 U.S. 645 (1972) (child custody).

80. THE MORAL DECISION 88-93.

81. 71 Okla. Crim. 33, 107 P.2d 813 (1940).

82. THE MORAL DECISION 88. The intended sexual partners were unmarried, and their conduct was occurring in private when the police, having observed them in the darkened room by flashlight, burst into the bedroom and interrupted them. The court held that even if fornication had been a crime in Oklahoma, which it was not, whatever sexual conduct had occurred had taken place in private and was not forbidden by statute. *Id.* at 88-89.

in recognizing the momentum of the sexual revolution,⁸³ leads the reader to the heart of the problem presented by the *Rachel* case: what nexus should exist between law and morals with respect to sexual love? There is much misunderstanding about the morality of sex, and even more uncertainty concerning what sexual conduct the law should reach.⁸⁴ Professor Cahn argues that private sexual behavior, which is not intrinsically evil, as is rape⁸⁵ or injury to a child,⁸⁶ should not be a concern of the criminal law, nor can it be effectively repressed by that law. Nevertheless, Professor Cahn suggests that despite the law's uncertainty and lack of uniformity on this question, "we should still have to ask ourselves whether [private fornication] is morally permissible."⁸⁷

On another aspect of sexual relationships, the "Grounds for Divorce,"⁸⁸ Professor Cahn drew upon his wide knowledge of Roman and Canon law to examine and reject the doctrine of recrimination as a defense to an action for divorce. In his consideration of *Pavletich v. Pavletich*,⁸⁹ the case chosen to illustrate this topic, Professor Cahn anticipates the current trend towards no-fault divorce.⁹⁰ He notes that if the parties can never be reconciled, that one party is more guilty of marital misconduct than the other should not bar a divorce petition at the instance of the more guilty party. It seems, he argues, a perverse sort of logic to use the doctrine of recrimination to force couples who ought to be separated to remain joined.⁹¹ Professor Cahn reviews the grounds for severing the marriage bond and discusses whether the parties should be free to try again. At least in law they are free, and Professor Cahn indicates that "[w]e are a nation of congenial optimists" in our belief that next time it will be better.⁹²

Professor Cahn highlights several other areas of the law in which morality plays a major role, such as the duty of honesty in the market place,⁹³ malicious interference with a business enterprise,⁹⁴ and the fiduciary duty of loyalty of a person associated with another in a joint business venture.⁹⁵ In another section entitled "Business with Govern-

83. *Id.* at 92-93.

84. *Id.* at 89-92.

85. *Id.* at 89. The distinction based on the privacy of the act would be untenable if the prevailing mores signified that the act was evil in itself. *Id.* at 92.

86. *Id.* at 89.

87. *Id.* at 90.

88. *Id.* at 110-22.

89. 50 N.M. 224, 174 P.2d 826 (1946).

90. THE MORAL DECISION 121. Professor Cahn notes that "[t]here never was a husband or wife altogether fit, in the forum of conscience, to throw the first stone." *Id.* Roman law was surprisingly modern in recognizing the concept of no-fault divorce. For a brief account of divorce in Roman law, see R. LEE, THE ELEMENTS OF ROMAN LAW 67-68 (4th ed. 1956).

91. THE MORAL DECISION 121.

92. *Id.*

93. *Id.* at 123-35.

94. *Id.* at 135-47.

95. *Id.* at 147-53.

ment," Professor Cahn also examines the demands of ethics in one's dealings with the government.⁹⁶ The topics discussed under this heading include such varied subjects as the enforcement of racially restrictive covenants,⁹⁷ cheating on taxes,⁹⁸ and what is expected of a person as a consequence of his citizenship.⁹⁹

Professor Cahn introduces this latter topic, "The Citizen's Allegiance,"¹⁰⁰ by an explanation of *Marsh v. Alabama*¹⁰¹ and *Tucker v. Texas*,¹⁰² two celebrated cases on the freedoms of speech and religion.¹⁰³ In *Marsh*, the Court reversed the trespass conviction of a member of the Jehovah's Witness sect who had persisted in displaying her religious literature while standing on the sidewalk of a company town in Alabama.¹⁰⁴ In *Tucker*, the Court likewise reversed the conviction of a member of the same sect for the door-to-door distribution of religious literature in a government-owned village, contrary to a Texas statute.¹⁰⁵

It may appear at first blush that freedom of speech as conceived by Justice Black in *Marsh* and *Tucker* bears no relationship to good citizenship. Professor Cahn, however, believed that Justice Black recognized a fundamental nexus between the two. Responsible participation by the citizen in the affairs of government is the hallmark of a democratic society, and a citizen cannot make effective decisions unless he is informed. The channels of communication and access to information must be kept open. Thus, while the Constitution generally protects the right of the communicator, in this instance it is the constitutional protection of the right of the citizen to receive information that is decisive.¹⁰⁶ Correspondingly, it is the duty of the citizen to act responsibly on the basis of the information at his disposal. He is to challenge the majority if he thinks it is wrong, and should persist in his dissent even

96. *Id.* at 154-82.

97. *Id.* at 161-62 (discussing *Shelley v. Kraemer*, 334 U.S. 1 (1948)).

98. *Id.* at 164-75.

99. *Id.* at 175-82.

100. *Id.*

101. 326 U.S. 501 (1946).

102. 326 U.S. 517 (1946).

103. THE MORAL DECISION 175-76. Justice Black's reasoning in these cases was, in Professor Cahn's view, "incandescent." *Id.* at 176. My notes from Professor Cahn's Jurisprudence course for October 11, 1948, make particularly vivid my recollection of Professor Cahn's enthusiastic and illuminating discussion of these cases in class, and demonstrate the influence of Justice Black upon his thinking. Professor Cahn stated: "Black detests natural law as he understands it. Yet he uses it here." Professor Cahn attributed Justice Black's rationale to Aristotle, who identified the power of speech as that which sets man apart from other creatures. This faculty leads to man's ability to distinguish right from wrong, and to the enhancement of man's life in political society.

104. THE MORAL DECISION 175-76.

105. *Id.*

106. *Id.* at 176-77.

at the risk of adverse consequences if so instructed by his conscience.¹⁰⁷ Such is the teaching of two cases on loyalty¹⁰⁸ that Professor Cahn discusses in concluding "The Citizen's Allegiance."¹⁰⁹

The final two topics discussed under the heading "Moral Guides in the American Law of Rights" are "The Enlargement of Personality"¹¹⁰ and "The Last of Life."¹¹¹ Professor Cahn's treatment of these topics is a further testimonial to his skill as a story teller, the breadth of his learning, and the precision of his insights. His thesis with respect to the topic, "The Enlargement of Personality," is that one's personality is enlarged by acts of magnanimity such as that in *Wagner v. International Railway Co.*¹¹² In that case, a train passenger sued the railway for injuries sustained when he fell from a trestle. Despite the possibility of risk to himself, the passenger had ventured onto the trestle to rescue his cousin who had fallen from the train.¹¹³ The passenger lost at the trial level, but he prevailed in the Court of Appeals of New York. There, Chief Judge Cardozo, speaking for a unanimous court, pronounced his now famous rationale: "Danger invites rescue. The cry of distress is the summons to relief."¹¹⁴ In Professor Cahn's view, the *Wagner* case moves the law towards a higher moral plane. The nineteenth century values of laissez-faire and individualism fostered enterprise and initiative, but they also favored an attitude of callous indifference towards victims in need of rescue. *Wagner* suggests that the moral value to inform the law in duty to rescue cases is magnanimity, not individual self-interest.¹¹⁵

In exploring the duty to rescue, Professor Cahn informs the reader through a consideration of the parable of the Good Samaritan,¹¹⁶ and extrapolates hypotheticals from the parable by subtle changes in its facts.¹¹⁷ From the Bible, Professor Cahn moves to literature¹¹⁸ to illus-

107. *Id.* at 179-80.

108. *Girouard v. United States*, 328 U.S. 61 (1946); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). In *Girouard*, the Court held that a pacifist's "allegiance to the cosmic value of human life is not incompatible with assuming allegiance to the United States." THE MORAL DECISION 181 (quoting *Girouard*, 328 U.S. at 70). In *Barnette*, the Court held that a school board could not require children of Jehovah's Witnesses to salute the flag if they believed it was an idolatrous image. THE MORAL DECISION 181 (discussing *Barnette*, 319 U.S. at 642).

109. THE MORAL DECISION 181.

110. *Id.* at 183-214.

111. *Id.* at 215-48.

112. 232 N.Y. 176, 133 N.E. 437 (1921).

113. THE MORAL DECISION 183.

114. *Id.* at 184, 194 (quoting *Wagner*, 232 N.Y. at 180, 133 N.E. at 437).

115. THE MORAL DECISION 190, 194-95.

116. *Id.* at 185, 195.

117. *Id.* at 185-86.

118. *Id.* at 186. Professor Cahn brings into focus celebrated characters such as Miguel de Cervantes' Don Quixote, Feodor Dostoevski's Raskolnikov, and Henry Fielding's Joseph Andrews. *Id.* at 186-90.

trate how the law sometimes discourages acts of magnanimity,¹¹⁹ and yet at other times may seem to prompt generous gestures.¹²⁰ He further suggests that the trend in American decisional law is away from laissez-faire individualism toward a legal recognition of the duty to rescue.¹²¹

In his final chapter on the theme of "Moral Guides in the American Law of Rights," Professor Cahn analyzes the topic "The Last of Life."¹²² Under this heading, he discusses issues ranging from physical disability¹²³ to suicide and other aspects of death.¹²⁴ His view that suicide is justifiable only if there is no other way to save one's inner self is a striking example of the respect Professor Cahn has for the autonomy of the individual. Personal freedom and responsibility are to him ultimate moral values. A purely naturalistic conception of freedom, however, may be a deceptive benchmark for the justification of suicide. Each human being may have personal autonomy and responsibility within the perimeters of his being, and self-destruction may be the ultimate demonstration of that autonomy at least in human terms; but no individual is the source or author of his being and therefore no person can claim the moral title to will his non-being or be the direct engine of that result.

Professor Cahn concludes his discussion of "The Last of Life" with some "Interim Comments,"¹²⁵ in which he reminds the reader that he did not intend in his discussion of "Moral Guides in the American Law of Rights" to discover a formula or a system for discerning the good in law. Rather, he tried to select cases that would serve as prisms

119. *Id.* at 186.

120. *Id.* at 190. For example, Professor Cahn remarks: "[A]t least when any Joseph pictures himself shivering and bleeding beside the road, he will heartily commend the law as one of the episode's implicit heroes. And he may be disposed to infer that in certain important respects the fear of the law is the beginning of virtue."
Id.

121. *Id.* For a discussion of the duty to rescue, see generally Note, *The Failure to Rescue: A Comparative Study*, 52 COLUM. L. REV. 631 (1952).

122. THE MORAL DECISION 215-48.

123. *Id.* at 215-21. Professor Cahn discusses *Smith v. Sneller*, 345 Pa. 68, 26 A.2d 452 (1942), in which the court denied recovery to a nearly blind plaintiff because his negligence in failing to use a cane contributed to his injury.

124. THE MORAL DECISION 222-43. Professor Cahn begins his discussion of death with an examination of *Chamberlain v. Feldman*, 300 N.Y. 135, 89 N.E. 2d 863 (1949). The *Chamberlain* court held that Mark Twain's estate and his survivors could prevent publication of a manuscript that the author had not intended for publication. Professor Cahn suggests using the rule against perpetuities as a guide in determining how long publication may be enjoined after the death of the author. THE MORAL DECISION 230-31. He concludes the topic with some observations on suicide, and suggests that suicide, as a form of homicide, can be justified only on the theory of self-defense to "preserve the generic integrity of the individual though at the cost of ending his private capacities and of destroying whatever within him is unique and ongoing." *Id.* at 239-40. With characteristic sensitivity and compassion, Professor Cahn advises against passing judgment on suicide, "for until a man has crawled his way through that same valley, he can understand nothing of its unique and solitary terrain. . . ." *Id.* at 240.

125. THE MORAL DECISION 244-48.

to "catch the undifferentiated, white light of the good and disperse it in multiple colors and rays—precise, decisive and responsible."¹²⁶ He further notes that his findings have continually emphasized the moral freedom of the individual human being.¹²⁷ These "Interim Comments" serve as a summary of his discourse thus far and lead into Part Three of *The Moral Decision*, "Moral Guides in the American Law of Procedure."¹²⁸

Part Three, which to this reviewer is the most rewarding portion of the book, is subdivided into two segments, each of which examines a different aspect of the impact of morals on procedural norms. In the first of these segments, "The Forum,"¹²⁹ Professor Cahn introduces by way of metaphors reminiscent of Heraclitus, Pythagoras, and other pre-Socratic Greek philosophers,¹³⁰ a discussion of his concept of the "due process of moral decision." With the exception of the advice of counsel,¹³¹ all of the legal criteria for due process—no ex post facto laws, notice and opportunity to be heard, unbiased and attentive triers of the law and fact, and remedial processes to correct error¹³²—apply to the "formation of defensible judgments in the life of morals."¹³³ This means, Professor Cahn argues, that the moral decision-maker must have a special attitude of mind that strives zealously for truth if he is properly to apply due process considerations to the moral decision.¹³⁴ To explain this attitude of mind, Professor Cahn draws again upon the wisdom of Judge Jerome Frank, and borrows his concept of "fact-skepticism."¹³⁵

Judge Frank's fact-skepticism, Professor Cahn observes, is a hesitancy to accept blindly assertions of fact that may lack cogency because of a number of "traps and snares"¹³⁶ in the fact finding process, such as weaknesses in a witness's powers of observation, memory, and narration, as well as similar shortcomings on the part of the triers of fact and

126. *Id.* at 245.

127. *Id.* at 247.

128. *Id.* at 249-315.

129. *Id.* at 251-60.

130. *E.g.*, "Wisdom is neither dry nor cold but moist and warm. . . ." *Id.* at 252; "These adversaries can be labeled in the same way the early Greeks labeled the constituent elements of the physical universe: the adversaries of earth, air, fire and water." *Id.* at 255. Heraclitus made similar comments. *See* J. ROBINSON, AN INTRODUCTION TO EARLY GREEK PHILOSOPHY 87-105 (1968). For a discussion of the pre-Socratic Greek philosophers, see generally I F. COPLESTON, A HISTORY OF PHILOSOPHY 13-80 (1947); R. WARNER, THE GREEK PHILOSOPHERS 9-48 (1959). Professor Cahn also metaphorically offers the reader a key to moral insights. THE MORAL DECISION 252 ("The key I present is 'due process of moral decision.'")

131. THE MORAL DECISION 254.

132. *Id.* at 253.

133. *Id.* at 254.

134. *See id.* at 256.

135. *Id.* at 257.

136. *Id.*

law.¹³⁷ For Professor Cahn, the criteria for the due process of the moral decision¹³⁸ are but applications to morals of Judge Frank's fact-skepticism critiques.¹³⁹

In the context of the topics "The Freedom to Decide"¹⁴⁰ and "The Skills of Compromise,"¹⁴¹ Professor Cahn employs two celebrated cases to demonstrate the application of fact-skepticism to the "Due Process of Moral Decision." The first is *Bushell's Case*.¹⁴² One cannot but admire the heroic jurors in this case who steadfastly refused to convict William Penn and William Mead on charges of unlawful assembly, despite pressure from the court to do so, and who were illegally imprisoned for their courage. Bushell and the other jurors were finally vindicated, and Professor Cahn notes that "Bushell's Case has erected due process in Anglo-American procedure on a firm and enduring foundation of fact-skepticism."¹⁴³ Sincerity of conviction on the part of the authorities is not a substitute for procedural fairness in the discovery of the defendant's guilt or innocence.¹⁴⁴

Brown v. Board of Education,¹⁴⁵ the famous school desegregation case, provides Professor Cahn with a vehicle to demonstrate how duration can be another moral dimension, for the limits of which fact-skepticism provides guidance by counseling caution and circumspection.¹⁴⁶ One may, for example, have a valid claim, but the time may not be ripe to assert it in all its fullness. Thus, it is necessary to strike a balance between an illegally deprived right and its immediate vindication, between the "void" and the "valid."¹⁴⁷ These observations are explained more fully by Professor Cahn in his discussion of compromise and negotiation¹⁴⁸ as manifestations of fact-skepticism. Thus, in *Brown* the time had come to discard the doctrine of separate but equal facilities for whites and non-whites as the standard of equal protection under the Constitution. The instantaneous reversal of attitudes and patterns of behavior that had existed for decades, in response to idealistic demands for immediate school integration, however, would be disruptive and counter-productive. Consequently, the Court was hesitant to vindicate the plaintiffs' claims immediately, and instead ordered "an effective

137. *Id.* at 257-58.

138. *Id.* at 253.

139. *See id.* at 259 ("Turning back to the sphere of morals, we shall find that 'fact-skepticism' will mark and influence our views in almost every remaining portion of this book.")

140. *Id.* at 260-72.

141. *Id.* at 272-85.

142. 6 How. St. Tr. 999, 124 Eng. Rep. 1006 (1670).

143. THE MORAL DECISION 262.

144. *Id.*

145. 347 U.S. 483 (1954).

146. THE MORAL DECISION 276-78.

147. *Id.* at 276-77.

148. *Id.* at 272-85.

gradual adjustment,"¹⁴⁹ a compromise, the details of which were to be worked out among the parties by negotiation. This achieved the ends that justice demanded, while minimizing any adverse social impact.

In the final segment on the subject of "Moral Guides in the American Law of Procedure," Professor Cahn examines a topic entitled "In the Mind of the Judge,"¹⁵⁰ which in turn is divided into three subtopics: "Inference and Evidence,"¹⁵¹ "Whose Decision?,"¹⁵² and "The Cosmic Meaning of Decision."¹⁵³ Under the heading "Inference and Evidence," Professor Cahn suggests that some ethical insights may help to explain the technical obscurities that surround the rules concerning presumptions and burdens of proof. He compares a statutory presumption, such as the presumption of fraud from proof of a bank's insolvency,¹⁵⁴ to a "crutch" that judges may refuse to use on the ground that "they can find no rational connection between fact A, which is duly proved by proper evidence, and fact B, which they are asked to infer from it. . . ." ¹⁵⁵ Thus, they will hold the statutory presumption to be unconstitutional on due process grounds.¹⁵⁶ The moral goals suggested by Professor Cahn in this context are a willingness to uncover the facts and to "put away the crutch of irrational inference and the complementary crutch of vulgar prejudice that indolent minds love to lean upon."¹⁵⁷

The fact-skepticism approach has a singular role to play with respect to two rules that Professor Cahn next considers: the burden of proof and the presumption of innocence that apply in criminal cases.¹⁵⁸ Professor Cahn's treatment of these rules is clear but somewhat cursory. He notes that in the popular mind these rules are regarded as equivalent,¹⁵⁹ but he does not delve more deeply into this popular mis-

149. *Id.* at 274.

150. *Id.* at 286-315.

151. *Id.* at 286-300.

152. *Id.* at 300-12.

153. *Id.* at 312-15.

154. For a discussion of *Manley v. Georgia*, 279 U.S. 1 (1929) and *Bailey v. Alabama*, 219 U.S. 219 (1911), upon which the *Manley* Court relied, see THE MORAL DECISION 286-88. The Court in *Bailey* invalidated as unconstitutional a statutory presumption of fraud from the failure of an employee to repay a loan to his employer. *Id.* at 288.

155. THE MORAL DECISION 289.

156. *See id.* at 287, 289.

157. *Id.* at 290.

158. *Id.* at 291-97.

159. *Id.* at 291. The distinctions between the two rules became blurred following Professor James Thayer's attack on Justice White's opinion in *Coffin v. United States*, 156 U.S. 432 (1895), in which Justice White held that the presumption of innocence was "evidence." *Id.* at 460. Professor Thayer ably demonstrated that the presumption is a rule about evidence, but it is not, and cannot be, "evidence," i.e., tangible probative matter. Rather, in Professor Thayer's view, the presumption of innocence is the other side of the burden of proof coin, and a caution to the triers of fact not to draw inferences of guilt from matters not in evidence, such as the presence of the defendant in the dock. J. THAYER, A PRELIMINARY TREATISE ON

conception and does not identify the legal distinctions between the rules. He thus loses an opportunity to emphasize the unique support the rule that "the accused is presumed to be innocent" gives to fact-skepticism theory. The rule regarding the burden of proof is two-pronged. In imposing the burden of proof on the prosecution, the rule addresses itself to the adversaries in the trial drama, but in mandating proof beyond a reasonable doubt, the rule points to the triers of fact and directs their *fact-believing* processes. It requires them to doubt guilt if they can believe innocence. By contrast, the rule requiring the accused to be presumed innocent aims solely at the triers of fact, directing their *fact-inferring* processes. It mandates an attitude of constant ambivalence toward contentions of fact that point to guilt and instructs the fact finders that even when they believe the evidence in support of the prosecution's case, they should not infer guilt therefrom if an inference of innocence is equally tenable. In fulfilling this role, the presumption of innocence is the epitome of fact-skepticism.

Professor Cahn's discussion of the moral bases for these rules is, however, illuminating. He posits three possible moral bases for these rules,¹⁶⁰ the first of which is religious. As in the example of the biblical admonition against judging lest one be judged,¹⁶¹ one applies the rules concerning burden of proof and presumption of innocence to another's case, hoping he would be accorded their benefit were he tried.¹⁶² Second, a socially oriented moral attitude would call for the application of these rules in a given case because of an underlying postulate that society is partly to blame for the accused's predicament.¹⁶³ The third moral basis for these rules, which he attributes to Aristotle, is the one that Professor Cahn prefers. This is the point of view of the "equitable man."¹⁶⁴ It combines the other two bases, and asserts that "[c]onfronted by the universal and eternal ocean of anguish that flows wherever there are men, [the equitable man] will not add a single drop to its tide unless justice, having removed the last vestige of a reasonable doubt, compels him."¹⁶⁵ If, therefore, the decision-maker would truly wish his actions to be in accord with due process, he must be guided by

EVIDENCE AT THE COMMON LAW app. B, at 562-64 (1898); see 9 J. WIGMORE, EVIDENCE §§ 2497, 2511 (Chadbourne rev. 1981). Recently, the Court has reemphasized the singular role of the presumption of innocence. See *Bell v. Wolfish*, 441 U.S. 520, 533 (1979); *Taylor v. Kentucky*, 436 U.S. 478, 483 (1978). For a more detailed analysis of the presumption of innocence, see Reough, *Presumptions and the Burden of Proof*, 26 ILL. L. REV. 703 (1942); Cunningham, *The Presumption of Innocence: A Comparative Study* (1957) (unpublished thesis, The Judge Advocate General's School, Charlottesville, Va.).

160. THE MORAL DECISION 297-99.

161. *Id.* at 297-98. Professor Cahn more directly refers to this biblical admonition in support of his analysis of distinctions between the burdens of proof in civil and criminal cases, and of the demands of due process. *Id.* at 265-66.

162. *Id.* at 297-98.

163. *Id.* at 298.

164. *Id.* at 298-99.

165. *Id.* at 299.

the conscience of a temperate and upright man¹⁶⁶ and, imbued with an attitude of fact-skepticism, address his deliberations and actions respecting "the moral decision" accordingly.

Under the subtopic, "Whose Decision?,"¹⁶⁷ Professor Cahn presents his last illustrative case, *Repouille v. United States*.¹⁶⁸ In this tragic and perplexing case, Repouille's petition for naturalization was denied on appeal because less than five years before filing his petition he had been convicted of manslaughter. The homicide was a mercy killing in which Repouille had used chloroform to kill his blind, mute, deformed, and retarded son. In light of this prior conviction, the court denied Repouille's naturalization petition, finding he was not a person of "good moral character."¹⁶⁹ Professor Cahn criticizes the method of determining good moral character used by Judge Learned Hand in *Repouille*. Judge Hand, writing for the majority of the court of appeals, insisted that moral right and wrong must be determined by the prevailing common conscience of the community.¹⁷⁰ Judge Frank noted in dissent that if community opinion were to be decisive, the presiding judge should be required to take additional evidence on community mores, and to ask ethical leaders for their views.¹⁷¹ Professor Cahn, in approval of Judge Frank's analysis, found support in the view of Professor John Chipman Gray that a judge should follow his own notions of right and wrong. When faced with diverse positions on an issue, a judge should make a moral commitment and select a point of view he can adopt as his own.¹⁷² Thus, a judge must be not only fair-minded

166. *Id.*; see *supra* note 13.

167. THE MORAL DECISION 300-12.

168. 165 F.2d 152 (2d Cir. 1947).

169. THE MORAL DECISION 300-01.

170. *Id.* at 301.

171. *Id.* at 304.

172. *Id.* at 302. Professor Cahn had cited Professor Gray to the same effect in THE SENSE OF INJUSTICE, *supra* note 22, at 114 n.52. Professor Cahn very likely had an additional source for the view he shared with Professor Gray. Lucas de Penna (1320-1390) expressed concern over the difference between the public and the private conscience of the judge. In giving priority to his private conscience, Lucas argued, contrary to St. Thomas Aquinas, that if a judge had personal knowledge of the innocence of the defendant brought before him, he should acquit him even though the evidence presented in court satisfied the prescribed quantum of proof of guilt. W. ULLMANN, THE MEDIEVAL IDEA OF LAW 126-29 (1946). Professor Cahn cited Lucas in THE SENSE OF INJUSTICE, *supra* note 22, at 108, 110, and also alluded favorably to him in the first meeting of his Jurisprudence class on September 27, 1948. In that class, he described Lucas as a link in a long chain of natural law thinkers who had rejected the notion that the Church, as the depository of divine law, was the ultimate arbitrator of natural law. Lucas thus secularized natural law, contending that divine law and natural law were identical, and that a lay person could understand natural law without ecclesiastical guidance. The challenge this revolutionary idea presented to the authorities of Lucas's time was obvious. My notes further report:

[L]ike a cancer from within [Lucas's] theses started the breakdown of the system. They mark a turning point in medieval thinking. His break with Aquinas and the other scholastic thinkers on the province of natu-

and circumspect, he must also be a reflective and responsible judge.¹⁷³

In his concluding segment of Part Three, "In the Mind of the Judge," Professor Cahn discusses "The Cosmic Meaning of Decision."¹⁷⁴ Here, he is optimistic, but not blindly or naively so. Basing his observations on human experience, he believes it is possible for mankind to achieve a better moral world. In his view, the human species is fickle and unstable, but not predominantly evil. The prophets of old reached a lofty moral plane, which contemporary and future man can surpass.¹⁷⁵ Professor Cahn notes that "[e]verything we have learned from the ancients needs to be refined through modern experience and employed toward producing still better moral decisions."¹⁷⁶ Professor Cahn places very little faith in the contribution that quantitative science and technology can make to this endeavor, for "[i]n morals, there is no basis for saying that ten good decisions are worth ten times as much as one."¹⁷⁷ The test of moral value "will always be qualitative."¹⁷⁸ For Professor Cahn, the answer to moral progress is to be found in the dynamic good of the moral choice, for by "merely seeking to ascertain what is righteous we can bring the quality into existence, where it persists until we learn, as we may, to form still more humane decisions."¹⁷⁹ Thus, Professor Cahn is optimistic about the future of the human condition, provided that the judge, and indeed all decision-makers, "accept the yoke of due process and personal responsibility"¹⁸⁰ and strive to move ever forward the quality of the moral decision.

It is clear from the foregoing that Professor Cahn is a profound, original thinker. His insights are penetrating and incisive and they extend over many intellectual disciplines. He is equally at home in religion, ethics, philosophy, and literature as he is in the law, and he expects his readers to have a modicum of understanding of the cultural values that have molded the character of contemporary civilized man. He requires attentive reading, for if his words are but lightly scanned, many of the subtle nuances of his ideas and the graceful manner in which he conveys them will escape the reader's notice. He needs to be relished and savored; many passages should be read and reread to appreciate more fully the benefit of his message.

For these reasons, a conclusion in the form of a condensation or summation of Professor Cahn's views would tend to be crabbed and distorted. Rather than attempt such a truncated summary, this re-

ral law paved the way for the perspectives of the Renaissance and the Reformation.

173. THE MORAL DECISION 302.

174. *Id.* at 312-15.

175. *Id.* at 312-14.

176. *Id.* at 314.

177. *Id.* at 315.

178. *Id.*

179. *Id.*

180. *Id.*

viewer will reiterate what he conceives to be the principal tenets of Professor Cahn's thesis, and to assess his position as a jurist in light of the themes he develops and the various influences on his thinking.

The moral decision is a personal decision. Professor Cahn asks the reader to use the cases he describes as vehicles for personal analysis and reflection. Each individual must discover the moral content of the decision for himself. The moral decision concerns not only officials, for every person has an obligation as a human being to premise his decisions and actions on a moral foundation.

The law, as Professor Cahn eloquently demonstrates throughout his book, is a potent source of insight for moral decisions. But the decision-maker ought not passively accept legal rubrics as definitive ethical pronouncements. Neither should he assent without reflection to moral pronouncements purportedly bearing a divine imprimatur. At the other extreme are value judgments reflecting conventional mores. These too, the decision-maker should carefully weigh, lest the tenor of his convictions be distorted and diluted by pious platitudes or vague sentimental formulations.

The moral decision should be bottomed on the firmer foundation of open-mindedness and persistent inquiry. It should reflect reason and courage and evoke human responses ranging from magnanimity to righteous indignation. It must be a human decision stamped with human values. It is this characteristic that gives the moral character of the decision its universality. In seeking a premise for his moral insights, the decision-maker must reach for fundamental moral values such as integrity, honor, righteousness, and rectitude.

For Professor Cahn, these fundamental values are the moral determinants of generically human behavior. They are norms that apply to all mankind, but their relevance and efficacy do not depend on their congruence with the cosmic order of things. Their validity is predicated on the human condition, or at least on man's assessment of that condition. This humanistic perspective is anthropocentric, or man-centered. Given its premises, it is a defensible position, but a theocentric, or God-centered, humanism would emphasize different moral values and sometimes yield different results.¹⁸¹

181. As a major philosopher in the scholastic tradition has stated:

One sees immediately that the word *humanism* is ambiguous. It is clear that whoever uses the word brings into play at once an entire metaphysic, and that the idea we form of humanism will have wholly different implications according to whether we hold or do not hold that there is in the nature of man something which breathes an air outside of time and a personality whose profoundest needs surpass the order of the universe.

J. MARITAIN, *TRUE HUMANISM* xii (1941) (emphasis in original). Maritain went on to note:

We are thus led to distinguish between two kinds of humanism: a humanism which is theocentric or truly christian; and one which is anthropocentric, for which the spirit of the Renaissance and that of the

Professor Cahn is concerned with several aspects of morality, and as noted above, he deals forthrightly with suicide,¹⁸² euthanasia,¹⁸³ sexual love,¹⁸⁴ the ethics of the marketplace,¹⁸⁵ the moral duties of the citizen and government officials,¹⁸⁶ and a variety of related topics. In keeping with the seriousness of the subject there is not much humor in the book. Professor Cahn's goal is to educate rather than to entertain. But the book is by no means solemn or sermonizing, and there are passages in which the author gives the reader subtle hints of his amusement at the human condition.¹⁸⁷

As for categorizing Professor Cahn and endeavoring to position him in the ranks of the jurists, his preeminence is assured. Assigning a jurisprudential label to him, however, is difficult. He cannot be wholly identified with any of the traditional schools of jurisprudence, although he subscribes to some of the views of several jurists. He is, in short, his own man, *sui generis*, and if this inconclusive grouping results in a certain eclecticism, that may prove to be fortuitous. He did not set out to discover a formula or system,¹⁸⁸ or to present a litany of norms that would provide a ready-made solution to moral problems. Rather, he was in pursuit of wisdom, and he was willing to reach for it wherever he found it. That is why his book is a treasure house of subtle precepts drawn from ancient Greece and Rome, the Judeo-Christian tradition, and from medieval and modern jurists and moralists. His achievements are that he makes the reader aware of the attitude with which he should face moral decisions, and of the process through which he should go to transform values received from outside himself into the commandments of conscience. The attitude to be desired is one of open-minded hesitancy, of suspended judgment until all the determinants have been weighed. The process is one of distillation of values for the purpose of self-enlightenment. The goal is moral rectitude, and the movement of the law towards a higher moral plane.

Those who have influenced him and whose insights and character he extols are those who have advanced moral legislation by their heroic virtue and creative individuality. He admires prophets and martyrs,

Reformation were primarily responsible, of which we have just been speaking. The first kind of humanism recognises that the centre for man is God; it implies the christian conception of man as at once a sinner and redeemed, and the christian conception of grace and freedom, whose principles we have already called to mind. The second kind of humanism believes that man is his own centre, and therefore the centre of all things. It implies a naturalistic conception of man and freedom.

Id. at 19.

182. THE MORAL DECISION 236-40.

183. *Id.* at 300-12.

184. *Id.* at 88-122.

185. *Id.* at 123-53.

186. *Id.* at 154-82.

187. *See id.* at 95, 107.

188. *Id.* at 244.

and indeed asks for martyrs as a solution to the problem of the overloaded and foundering lifeboat in *United States v. Holmes*.¹⁸⁹ He also respects thinkers of an independent turn of mind such as Lucas de Penna,¹⁹⁰ and Henry David Thoreau,¹⁹¹ and men of courage such as the jurors in *Bushell's Case*.¹⁹² Among the jurists who have influenced him, preeminence must be given to Judge Jerome Frank,¹⁹³ but one should not overlook Baruch Spinoza,¹⁹⁴ John Stuart Mill,¹⁹⁵ Justice Benjamin Cardozo,¹⁹⁶ Charles S. Pierce,¹⁹⁷ and Justice Hugo Black.¹⁹⁸

Professor Cahn's message is one of optimism. In terms of eternity, man's petty concerns are of no moment, but each age can create moral standards superior to those of earlier times. Professor Cahn believes the process will continue, not to utopia, but to a happier world of justice, kindness, and compassion. In this journey, each individual must face up to making his own moral decisions. Professor Cahn offers guidance towards that end. His insights are cogent and persuasive, and he tells his tale with grace and perceptiveness. His message is as valuable today as it was when *The Moral Decision* was first published, and it will remain of value for generations yet to come.

189. 26 F. Cas. 360 (E.D. Pa. 1842) (No. 15,383); see THE MORAL DECISION 71.

190. See *supra* note 172.

191. THE MORAL DECISION 180-82.

192. 6 How. St. Tr. 999, 124 Eng. Rep. 1006 (1670); see THE MORAL DECISION 260-63.

193. See THE MORAL DECISION 257-60, 304.

194. See *id.* at 202.

195. See *supra* notes 26-30 and accompanying text.

196. See THE MORAL DECISION 70, 148-49.

197. See *id.* at 295.

198. See *id.* at 176; *supra* note 30.

