The Moral Decision (Edmond Cahn, 1955)

Ernest M. Jones
University of Florida

Follow this and additional works at: https://scholarship.law.ufl.edu/flr

Recommended Citation
Available at: https://scholarship.law.ufl.edu/flr/vol9/iss2/18

This Book Review is brought to you for free and open access by UF Law Scholarship Repository. It has been accepted for inclusion in Florida Law Review by an authorized editor of UF Law Scholarship Repository. For more information, please contact rachel@law.ufl.edu.

The avowed purpose of Professor Cahn's book is "to draw upon the supply of moral insight and experience that American courts have gradually developed and accumulated" (p. 3). Drawing upon this "rich repository of moral knowledge" (p. 3) needs to be done because almost all Americans are "afflicted with uncertainty" (p. 9) as a result of the moral confusion of the times. Because of the breadth of this affliction, the audience to whom the work is addressed is not limited to the legal profession but extends to all who consider themselves "literate individual[s] . . . affected or troubled by the moral confusion of the times" (p. 4).

The method chosen to mine this lode of moral insight, according to Professor Cahn, is to introduce each topic for discussion "within the statement of an authentic case, summarized from the law reports" (p. 4). Only American cases are used because "what happens in the cases is easier to understand where we already know the whole social context" (p. 52). Each of these cases has been selected not for its "demonstrative nor illustrative, but [for its] prismatic" (p. 52) utility. In each "prism" case Professor Cahn is to discover "an entire spectrum of hidden moral interests and values" so that the reader can see "a rainbow sweep of component factors" (p. 52). Thus "the dry abstractions of technical law" will be "transform[ed] into notions that respond to the needs of flesh and blood" (p. 4) and "convert[ed] . . . into practical guides" (p. 5).

The book has three parts. Despite the fact that the reader is assured he will not be offered another "study of legal philosophy, political doctrines, law reform, sociology of law, or theoretical ethics" (p. 3), Part One, roughly one sixth of the book, can best be characterized by one or more of these labels. There is a chapter on Morals as a Legal Order and a chapter on Law as a Moral Order. Part Two purports to explore the substantive law for moral guides. The discussion touches upon the moral factors involved in a variety of different areas of our behavior — seventeen topics are discussed — from taking life, evaluating the conduct of children and practicing fornication to the standard of care owed by the partially disabled and the right to publish an author's works after his death. Part Three searches the law of procedure for moral guides. Due Process of Moral Decision, The Freedom to Decide, The Skills of Compromise, Inference and Evidence, Whose
Decision and The Cosmic Meaning of Decision are the topic headings discussed in Part Three.

The work suffers from the lack of a clear conception of goals to be achieved in making the study. As a consequence the discussion tends to be digressive, meandering and obscure. A belief that moral confusion is widespread and must be alleviated is not a clearly conceived need unless the expression "moral confusion" is given specific referential significance. Although Professor Cahn twice discusses the causes of moral confusion he is never very specific about what he considers the state or condition of moral confusion,\(^1\) either as to its characteristics or its dimensions.\(^2\) The words "moral confusion" may be used to refer to a lack of moral standards to govern either old or new problems, to uncertainty in formulating moral standards, to sheer inability to formulate new moral standards, to indecision about applying and inability to apply moral standards, and to failure to obey moral standards.\(^3\) Resort to the context for his meaning is not always successful.

Vagueness and ambiguity are characteristic of each of the three parts of the book. Professor Cahn suggests as a standard to determine right from wrong that we ask if a given act is wrong.\(^4\) Even if we cannot decide whether a given act is right we can be certain whether it is wrong.\(^5\) Further, we should choose the course of conduct which will make us happy unless our conscience demands otherwise.\(^6\) These standards seem to me to be specious, and none the less so after an

\(^1\)Pp. 9-10, 20-22.

\(^2\)The rather oblique reference on p. 10 to "almost all Americans" is surely no more than a guess.

\(^3\)The vagueness of such expressions is noted, and the need of more precise indices if such concepts are to prove serviceable in the solution of concrete problems is stressed by Cohen, Robson and Bates, Ascertaining the Moral Sense of the Community," 8 J. LEGAL ED. 137, 138-39 (1955). Of course Cahn is free to use the words as he pleases; but communication with the reader is facilitated if he indicates the meaning or meanings he selects.

\(^4\)This is what appears to me to be the purport of his suggestion that "an analysis of moral experience should (1) focus on the doing of specific acts and (2) focus on the notion of wrong" (p. 11).

\(^5\)"How often when we cannot decide which of many alternative courses is right, we find ourselves utterly certain that one particular course is wrong!" (p. 11).

\(^6\)"[T]here are many moral problems that are best suited to an administrative disposition subject to a judicial review, that is, moral problems that we may handle best by concerning ourselves primarily with values in human happiness and by bowing to the rigorous mandate of conscience only when conscience can find no acceptable basis whatever for the course we have chosen" (pp. 15-16).
analogy is drawn to the administrative process and to judicial review. The fact that each topic in Part Two is preceded by a digest of a case does not vitiate the charge of vagueness and ambiguity. The cases serve for the most part as background and as a springboard for a quick leap to a high level of abstraction where discussion can proceed unfettered by the facts of concrete cases. At times the discussion becomes mystical. The moral guides evolved are stated with such generality that they seem virtually useless. Regarding some cases Professor Cahn gives his own opinion of what is right. He believes it is wrong to kill another even to save your own life (p. 71); that private fornication is morally right since contraceptives are now available (pp. 92-93); and that the fault concept has no place in the law of annulment of marriage and divorce.

In Part Three we are told that "the key" to "wiser and juster moral decisions" is "due process of moral decision" (p. 252). The charge that the expression "due process of moral decision" is vague and ambiguous is parried by commenting that the United States Supreme Court has refused to define "due process"; that defining the phrase would only freeze it and render it useless for unanticipated cases; and that there "are people who would not permit a lifeguard to save them from drowning until he had first given a satisfactory definition of the word 'rescue'" (p. 253). Procedural requirements for due process of moral decision are set forth which are essentially the same as those of all American courts. Apparently the role of the judge, the jury, counsel, and the accused must be played in each individual's psyche.

---

7P. 195; see also p. 254.
8Consult the duties imposed upon "all morally sensitive persons" (pp. 220-21); the "practical maxims of administration within the family" (p. 85); and the "moral obligation to be intelligent" (p. 76).
9"We must not accuse anyone of an act violating some standard of behavior unless he could have ascertained the existence and meaning of the standard before he committed the act. We must let him know what he is accused of doing and must give him a fair opportunity to collect his evidence and then to present it. The judge and jury who hear his case must be unbiased and attentive; and, especially where the accusation is a grave one, the accused is entitled to the assistance of a counsel and advocate. Moreover, even after an accused has been found guilty, due process of law requires that we provide some sort of remedial procedure to remove and correct any serious defect that may have been committed in the trial of his case" (p. 258).
10"In the moral forum, of course, the whole process takes place within a single psyche; the judge and the jury operate internally" (p. 254). Rules of evidence are applicable too (pp. 269-70).
The excellence of the book lies, I think, in the discussion of the necessity for the skills of compromise (pp. 284-85). Here, for the first time, attention is focused explicitly on the fact that we "cannot make a moral decision without sacrificing at least part of one desire for another." Important decisions probably always involve considerations of value other than conformance to notions of right conduct. Realistically, then, an attempt to formulate standards of morality should include a study of the ways in which competing desires are accommodated and, if possible, suggestions looking toward a more satisfactory accommodation in the future. Professor Cahn's recognition of the need of a common scale with which to measure the values at stake in particular problems is suggestive both of how compromises are effected and of what might be done to improve the quality of these decisions. The invention and adaptation of more of these "comensurables" to more and more of our important problems is a project to which a high priority could well be assigned. Decision making at all levels might be improved thereby.

Ernest M. Jones
Associate Professor of Law
University of Florida

11P. 274. A number of oblique references to the effect that decisions, judicial or otherwise, reflect considerations other than rectitude are interspersed throughout the book. See pp. 41, 52, 79, 113. Cahn's "principle of the route" underscores the proposition that the decision or accommodation of particular persons is in part a function of the predispositions of the decision maker (pp. 113-14).

12We place a high value on preserving life. Yet grade crossings abound. Obviously our desire to adhere to right conduct is limited by our desire to maximize wealth.

13Cahn's discussion of the cases is, on the whole, greatly weakened because of inadequate attention to other than the moral value.

14"[T]here is no questioning the social need for some kind of crude comensurable— if possible an arithmetical one, like money or working hours or acres of land — to supply the medium for the negotiation of compromises" (p. 281). The quoted passage seems curiously inconsistent with the attitude exhibited by Cahn's ready acceptance of the conclusion that it is futile to try to give operational indices to Hand's concept of the common conscience. See pp. 303-305. Further, Cahn's easy assurance that "arithmetic and statistics will furnish little guidance" (p. 314) and his attitude toward empirical verification of assumptions betray the classical bias (a sort of don't poach on my preserve feeling) against anything resembling a scientific approach to problems involving a moral judgment. See pp. 256-57. Thus, "If a man can find his mouth in the dark, he can eat without an accurate anatomical chart" (p. 257).