

**Confronting Injustice: The Edmond Cahn Reader.** EDITED BY LENORE CAHN. Little, Brown & Co., Boston, 1966. Pp. xxiv, 428. \$8.95.

In his tribute to the late Professor Edmond Cahn, which opened the memorial edition of the *New York University Law Review*, Justice Hugo Black took a text from Cahn's first book, *The Sense of Injustice*. Wrote Black:

"Here was a man—a lawyer—who was not ashamed to endorse the idea that 'justice or righteousness is the source, the substance, and the ultimate end of law,' and that a legal concept is most worthwhile when it 'becomes relevant to the homely experiences of individual human beings.' This was to me a pleasing contrast to the idea expressed by many that 'courts do not sit to administer justice, but to administer the law,' as though there is a kind of hostility between the two."<sup>1</sup>

Edmond Cahn's precept concerning justice and injustice was carried forward in his second book, *The Moral Decision*, and in his last published work, *The Predicament of Democratic Man*, the concept was broadened to take in the entire society. It is by no means surprising that at the moment of his untimely death, in 1964, he was writing a book with the assigned title, *The Meaning of Justice*. It is consequently wholly fitting that "The Edmond Cahn Reader," drawn together from many sources and posthumously published in 1966, should be entitled *Confronting Injustice*.

Thanks to this concentration of thought upon the meaning of justice, during the twenty years after he ceased to be a tax lawyer to become legal philosopher, the close-to-forty articles here assembled from legal and other magazines, public addresses and correspondence, have a truly remarkable consistency and cohesion. It is almost as if he had completed the book whose two written chapters tragically terminate the present volume. The style is clear, lucid and charming, giving no hint of the heavy labors Cahn is said to have bestowed upon his writing.

Credit for selection of the contents of this book belongs to Lenore Cahn, who played an active role in the development of her husband's ideas and ideals. The introduction and illuminating headnotes are from the pen of Norman Redlich, former student and faculty associate of Professor Cahn, and at present executive assistant corporation counsel of the City of New York. His contribution combines deserved eulogy with exposition of Cahn's ideas and purposes and has a clarifying and unifying effect.

The basic unity, however, is in Cahn's thought. It is significant that

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<sup>1</sup> Black, *About Edmond Cahn*, 40 N.Y.U.L. REV. 207 (1965).

the opening and near-closing articles of *Confronting Injustice* have closely-related titles, "The Consumers of Injustice" and "The Shift to a Consumer Perspective." The first is a reprint of Cahn's Horace M. Kallen Lecture of 1959 at the New School for Social Research; the last presents the fundamental idea of the book whose production was precluded by his death. In both he was dealing with a new and truly American factor in law and politics—the shift of perspective from legal concepts held in monarchies, oligarchies and aristocracies to the power and responsibility of the citizen in a representative democracy. The old perspective was that of the ruler or the government official; the new perspective is that of "the democratic citizen in the role of consumer of the law."<sup>2</sup> Not that this shift is fully achieved in American jurisprudence!

Injustice persists, in Cahn's estimation, because the old imperial perspective continues to dominate legislatures and courts through tradition, ignorance and the self-interest of its beneficiaries. "The ugliest sign of our thralldom to the old outlook is that it tends to desensitize men of fine intellect and good will."<sup>3</sup> They learn somehow not to notice what happens to individuals, and suppress their own inevitable involvement in the ills of the victims. Such men beguile themselves with a rule of averages. The "third degree" and such horrors are not used (or at least exposed) frequently, so on balance all is well. Even Justice Cardozo, rightly "regarded as a paragon of moral insight,"<sup>4</sup> wrote in his most celebrated book that "the eccentricities of judges balance one another," causing a little confusion until, happily, "The future takes care of such things."<sup>5</sup>

"Revere Cardozo as we may," comments Edmond Cahn, "we cannot help retorting that averages in the administration of justice do not avail the person who is wronged grievously in his own, particular case."<sup>6</sup> Official misconduct, seen, heard or read about, arouses the sense of injustice, stirring the sympathetic reaction of outrage, resentment, and anger, "for our physiology has equipped us to regard an act of injustice to another as a personal aggression against ourselves."<sup>7</sup>

Is that all? Clearly not, adds Cahn. "While the sense of injustice uses empathy, projection, and emotion, it simultaneously summons perception, reasoning, intelligence, and judgment—all the capacities

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<sup>2</sup> E. CAHN, *CONFRONTING INJUSTICE* 6 (L. Cahn ed. 1966).

<sup>3</sup> *Id.* at 7.

<sup>4</sup> *Id.* at 9.

<sup>5</sup> *Id.* at 9-10.

<sup>6</sup> *Id.* at 10.

<sup>7</sup> *Id.* at 12.

that make for understanding and the application of sense.”<sup>8</sup> The author, using the method he employed so strikingly in *The Moral Decision*, goes to the courts to trace the transition that has taken place in the last forty years, in reaction, for example, against the excesses of the prosecution and the callousness of judges in the case of Tom Mooney.

Cahn’s keen perceptions govern the several chapters devoted to the Bill of Rights, especially to freedom of religion and the press. The title of one of them, “The Firstness of the First Amendment,” furnishes a sufficient indication of this emphasis. The touchstone is James Madison’s prophecy in 1789 that if these rights are implanted in the Constitution, independent tribunals of justice “will be an impenetrable bulwark against every assumption of power in the legislative or executive.”<sup>9</sup> Actually, the rights thus implanted have been frustrated, followed by a belated movement of fulfillment in the judicial opinions of Justices Holmes, Brandeis, Stone, Cardozo, Hughes, Black, Douglas, Murphy, Rutledge, Brennan, Warren and others who have made up occasional and precarious majorities.

Like an interlude from the Middle Ages is a chapter comprised of 1962 correspondence on freedom of the press between Professor Cahn and David Ben-Gurion, then Prime Minister of Israel. Cahn wrote to protest against a proposed Israeli law that would enable the government to shut down any newspaper found guilty of publishing two libels in the course of two years. Almost any reflection on a public person, the nation, or the people in general was to be considered libelous. Ben-Gurion stuck to his guns, defending the doctrine of “prior restraint” just as it was defended by Archbishop Whitgift and Star Chamber judges in Elizabethan England. He then drew the same distinction between “freedom” and “licentiousness” of the press that was drawn by Blackstone in 1769 and by the framers of the American Alien and Sedition Acts of 1798. In one of his replies Cahn assailed the concept of “group libel” as something that precluded the defense of truth or reasonable basis of belief—an argument that he could have directed equally against the United States Supreme Court for its decision in Chicago’s *Beauharnais* case.

In his exchange with Ben-Gurion, Cahn carefully limited the issue to restraint previous to publication. He was not talking about punishment of published libels. That same tactic was followed by English libertarians in the eighteenth century, when they concentrated on reform of the libel law instead of advocating complete freedom of opin-

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<sup>8</sup> *Id.* at 13.

<sup>9</sup> *Id.* at 90.

ion. That has been taken by modern defenders of seditious libel laws as an indication that Englishmen, and inferentially the sponsors of the first amendment, accepted the punishment of published utterances. But Cahn elsewhere rejects that utterly—just as English libertarians would have done if they had discerned the remotest chance of success.

Cahn's commitment to absolute freedom of expression put him on the side of Justices Black and Douglas and against the "balancing doctrine" of Justice Felix Frankfurter. The latter construed the words of the first amendment, "Congress shall make no law" restricting the freedom of religion, speech, press, or assembly, to mean that Congress shall make no such law unless there is sufficient reason for doing so. But Cahn took note of overlapping inconsistencies on both sides. Black and Douglas grade the first eight amendments, making the first pre-eminent. But they put them all on a par in judging the weight of the fourteenth amendment upon them. Frankfurter grades them with respect to inclusion under the fourteenth amendment, excluding some from its force, but he puts them on a par in relation to their intrinsic force and importance. Cahn clarifies these inconsistencies in terms of constitutional realities. Judged by their fruits, "the composite doctrines of Justices Black and Douglas are designed consistently to promote the constitutional guarantees, and the composite doctrines of Justice Frankfurter are designed as consistently to subordinate, demote, or delete them."<sup>10</sup>

The *Cahn Reader* heartily approves Judge Jerome Frank's doctrine of "fact-skepticism": a questioning of the reliability of evidence based on the senses of sight, sound and memory. This goes to the heart of the question of justice in the criminal courts, and is climactic on the subject of capital punishment. On that theme the *Reader* reproduces Cahn's introduction to Arthur Koestler's *Reflections on Hanging*. In this preface he vividly transfers the impact of English legal atrocities to the American scene.

Running all through *Confronting Injustice* is the appeal for a new outlook in American legal education. It is written for law students, faculties, lawyers and judges, and has in it the seeds of growth of a modern miracle in the law.

Irving Brant†

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<sup>10</sup> *Id.* at 303.

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