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BOOK REVIEWS

The Sense of Injustice. By Edmond N. Cahn. New York: The New York University Press, 1949. Pp. 186. \$3.50.

For milleniums men have believed that just as there are such things as heat and cold, height and depth, and bigness and littleness, so also are there such things as right and wrong, and justice and injustice. All of these have been thought to be part of things as they are, of existing reality, of nature. That right and wrong, and justice and injustice, are part of existing reality is one version of what is called natural law. But from ancient times other men, including many whose desires were neither right nor just, but who rebelled at admitting their own unrighteousness and injustice, have sought to escape such condemnation by denying that there are any such things as right and justice. In modern times the denial has reached a peak; successive schools of juristic thought have sought to show that justice is not a permanent reality with an identity of its own, but that what men have believed to be justice is actually something else, for example, whatever will produce the greatest happiness of the greatest number (a utilitarian view), or a product of the mind of a particular people, so that justice has no existence apart from what each folk mind conceives it to be (the view of the German historical school), or a product of society (a sociological version), or that which will satisfy the maximum of demands (the pragmatic view). Nevertheless, despite a season of acceptance by the bulk of modern juristic thinkers of the idea that justice has no existence of its own, but is really something else, such as utility, in disguise, one stubborn fact remained. Men thought about justice, talked about justice, strove for justice, and, when the chips were down, even died for justice. If justice and utility were one and the same thing, it was remarkable that their claims on the human mind were so different. Some of our modern jurists have come to grips with the fact that justice as such, and not justice as utility or expediency, has kept a hold upon human beings despite all the theories which would explain it away. Being modern jurists they have been animated by the belief that reality lies within the field of the tangible and demonstrable (a point of view borrowed from the physical sciences and showing the influence of style in thought as well as in clothing). Looking at justice from such an allegedly scientific viewpoint the reality is not justice itself, because justice is neither tangible nor demonstrable; rather the reality is man's belief in justice. That can be demonstrated, its operations can be seen, its results can be

observed, it is a fact, it is worthy of scientific acceptance. Leon Duguit wrote, "The idea of what is just or unjust is infinitely variable and changing. But the sentiment of the just and of the unjust is a permanent element in human nature. It is found in all periods and in all degrees of civilization, in the souls of all men, in the wisest as in the most ignorant."¹

A similar view, with a half twist added, constitutes the most frequently recurring idea in Professor Cahn's book, *The Sense of Injustice*. As the title reveals, the half twist is made by turning to the sense of injustice instead of the sense of justice. For those who believe that a scientific attitude calls for the conclusion that only the tangible and demonstrable is real, Cahn's emphasis on the sense of injustice should be even more satisfactory than looking to a sense of justice, for certainly the workings of a sense of injustice can be verified by observation. As Cahn puts it, p. 24, speaking of the sense of injustice, "It denotes that sympathetic reaction of outrage, horror, shock, resentment, and anger, those affections of the viscera and abnormal secretions of the adrenals that prepare the human animal to resist attack. 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." It seems a little odd that Cahn should have accepted as real something which on his own showing is mysterious, even magical; inconsistencies of viewpoint appear to the reviewer to be a frequently recurring characteristic of the book. But this is no fault peculiar to Cahn; it seems rather to be characteristic of much of the thought of our time; the forward surge of the human mind in modern times has unearthed such a vast variety of realities not yet fully understood that even the realities seem inconsistent, and many of us have discarded the task of being consistent as hopeless. But at any rate, the first sentence of the quotation, which points to affections of the viscera and secretions of the adrenals brings forward a good, gutsy version of justice which we might have prophesied would appeal to the tastes of American juristic Realists. And our prophesy would have proved correct. Judge Jerome Frank, himself a writer of the front rank among the Realists, in reviewing this book, began his review² with the words, "I shall take the risk of predicting that, in ten years or so, Edmond Cahn will be a name to conjure with, like that of John Dewey or William James or Alfred North Whitehead. For here is the most impelling discussion since Aristotle of the subject of justice. . . ." Fortified by praise so unqualified from a source so eminent the book should not suffer if it be subjected in this review to a bit of scepticism.

¹ Duguit, *Objective Law*, 21 COL. L. REV. 17, 30 (1921).

² N. Y. Times, Book Review Section, Dec. 18, 1949, p. 3.

Professor Cahn vigorously rules out the idea of justice as a reality having an existence of its own. He says, p. 24, "The law of nature may exist, may not exist, or may linger in the limbo of doubt for the purposes of this inquiry, whose movement is forward to consequences, not backward to origins." With the same vigor he espouses, p. 23, the view of the realists, who are also pragmatists. "In any sound pragmatic sense, principles are real so far as they have meaningful consequences. . . . Our interest here is rather in the real *qua* efficacious."

This idea of discarding justice in favor of looking to a sense of injustice impresses the reviewer as being on a par with treating the subject of odors by discarding the idea that there are any and instead emphasizing, not even the sense of smell, but the human sensitivity to stinks, for the reason that the human reaction to stinks is so real and visible that here we are on sure ground. This may be a "movement forward to consequences," but the value of any such movement is dubious. A sense of injustice without any justice and injustice to be sensed is a wandering guide. To take one of Cahn's own illustrations, he tells us, p. 30, that at the end of World War II the sense of injustice everywhere called for the punishment of those brigands who had seized the instrumentality of a state and committed crimes against the whole society of civilized nations. But if the ultimate voucher for justice and injustice is merely visceral reaction we had no business hanging Nazis for, among other things, killing Jews. After all, the Jews produced unpleasant visceral reactions in the Nazis, who were therefore as justified in hanging Jews as we were in hanging Nazis. In the reviewer's opinion, it makes a world of difference what the viscera are reacting to; and the superiority of justice over race prejudice lies not in the viscera but in the character of justice as compared with race prejudice. Professor Cahn admits, p. 184, that a sense of injustice is frequently applied mistakenly. But upon what basis are we to say "mistakenly" unless there is indeed something real about justice itself so that we can measure whether our application was mistaken or not?

The author's emphasis on a sense of injustice leads to other emphases no more valid than the first. Thus he asserts, p. 78, that freedom of speech kindles from the rebelliousness of human beings. They resent prohibitions, and they attack that which they do not like. Freedom of speech so interpreted loses value. The idea that freedom of speech means primarily the right to denounce would make it a destructive force; actually its tremendous power lies in its emancipation of people to speak all the truth they are capable of knowing. Freedom to criticize is worth something, but freedom to assert great ideas is worth more.

In short, to such assertions as the one, p. 104, that the ultimate and only hope of a society which aspires to freedom is to develop the sense

of injustice in the redeemable mass of its citizens, a dissent is hereby filed.

However, the sense of injustice is not the theme of the whole book, but is rather an idea given more attention than any other one. The book consists of three essays by Edmond N. Cahn, a Professor of Law at New York University. The first two, *Justice and Power*, and *Freedom and Order*, are revised versions of previously published law review articles. The third is entitled *Security and Change*. In these essays are put together a large number of diverse observations by the author on law and life. One gains the impression that the author has found a place in the book for previously developed discussions of diverse legal matters, with the result that here and there an idea is squeezed in without having much to do with the subject in hand. Thus in the chapter on *Freedom and Order* there appears as an aspect of freedom a discussion of mobility of goods. If this discussion sheds light on freedom the reviewer's eyes lacked the proper sensitivity to discern it.

In the same chapter, p. 68, appears an intriguing conclusion. The author has pointed out that beginning with Hannibal's devastation of the Italian peninsula, much of the population became fixed to the soil. He concludes, "No wonder that Western man, once enable to pierce the boundaries of his little county, did not stop until he had crossed the seas, discovered the Indies, settled the Antipodes, and challenged the poles." Thus there is ascribed a collective character and mind to Western man, so that some sort of collective individual went through the experience of being long confined, to burst forth at last with irrepressible energy. Probably most of us would agree that the Nazis (and German historical jurists) who ascribed to a race a folk mind were deluded to the point of living in a dream world. But on occasion we are capable of thinking along just such lines ourselves.

The fame of this book is likely to rest on the numerous separate thoughts collected here. And although some of them have been greeted herein with something short of unrestrained approval, this is nevertheless one of the most worthwhile books in the field of jurisprudence to come to the reviewer's attention in recent years. For one thing it is, by and large, one of the most readable. Cahn gives us numerous illustrations which make his ideas far more intelligible than the massive abstractions to be found in all too many books on jurisprudence. Incomprehensibility is an ersatz profundity in common use among scholars in various social sciences because the genuine article is so hard to come by. But Professor Cahn is frequently at pains to make his meaning clear. Another virtue is that he sometimes freshens old observations by making them in a sprightly manner. Thus, p. 61, he remarks that "lawyers remember better than they learn." Professor Cahn on occa-

sion introduces some good fun into a sober subject; for example, p. 110, he refers to the ancient principle of an eye for an eye, and notes that Solon introduced a refinement of the rule by making the penalty for depriving a one-eyed man of his one eye the loss of the offender's two eyes. Then, doubtless with a twinkle in his own eyes, Cahn inquires, "Suppose a one-eyed man deprives a two-eyed man of one eye?" The book is full of penetrating comments. Furthermore, like most good writers Cahn has a strong intuitive understanding for the feelings of other people; his exposition, for example, of a layman's awe in a courtroom, p. 133, shows his capacity to put himself in someone else's position and feel as that person feels.

Cahn is at his best when expounding anew age old ideas. His exposition in the first chapter, beginning p. 14, of particular types of situation which call the sense of injustice into play is really an excellent discourse on elementary aspects of justice itself, although the author does not admit it. Conversely, Cahn is at his worst when he is obviously under the influence of a style of thought set by the natural sciences. He refers, p. 66, to "the movement of a man from place to place over the surface of the earth (horizontal), and his movement up and down in relation to the structure of society (vertical). The two movements, each functionally tied to the other, sum up a human being's course in life." Here is a sterile transposition of a concept from physics into the field of thought about human life. Indeed this chapter on freedom and order, with its effort to reduce freedom to mechanics, shows the unhappy results of the undue influence of natural sciences on thought about matters related to the human spirit. This comment is, however, not limited in application to this book; it applies to a large body of modern juristic thought, which has endeavored to make tangibility do the work of comprehension.

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