

REVIEW

Psychoanalytic Jurisprudence. ALBERT A. EHRENZWEIG. Oceana Publications, Inc., Dobbs Ferry, N.Y. Pp. 395. \$19.40.

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Two major books on jurisprudence were published in 1971, John Rawls's *A Theory of Justice* and Albert Ehrenzweig's *Psychoanalytic Jurisprudence*. Rawls has presented us with a comprehensive and systematic theory of justice; Ehrenzweig's aim is to prove the futility of all attempts to determine the meaning and content of justice. The contrast, however, is more apparent than real. Rawls does not attempt to give us *the* theory of justice, but *a* theory of justice that, in my view, expresses the vision of the Western Liberal in the mid-twentieth century. And Ehrenzweig's enterprise, does it not perhaps express a theory of justice that is akin to Rawls's—the theory of justice of modern pluralist society?

For millenia mankind has speculated about justice. What is it? What is the relationship between justice and law? Can law be unjust? How, if at all, can injustice of the law be avoided? These questions have long troubled philosophers, theologians, jurists, lawyers, statesmen, and, not the least, ordinary people. They have found many different answers. A survey of a vast number of such attempts constitutes the first part of Ehrenzweig's book. It is a comprehensive presentation of the jurisprudential theories propounded from antiquity to the present day. The multitude of positions is presented pointedly and succinctly. Readers will find that this bird's eye view is a convenient, well-structured, and stimulating guide through the labyrinth of jurisprudence.

Few are those who, like Hobbes, have identified justice with the law whatever it may be. There is agreement that law may be unjust. By what standard, however, can we determine the justice or injustice of the law, be it of a total legal order or some particular law within a legal order of which the justice or near justice is conceded? It is over definition of this yardstick that minds have split. "Judgments on

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justice," Ehrenzweig states, "vary with their author, time and place."¹ Advocates of different notions of justice have rarely been satisfied with merely stating their views. They claim absolute validity for their own ideas, and, so Ehrenzweig finds, they often attack those of others with violence and passion. Ehrenzweig believes that he knows the reason for this emotional display and that the angry controversy can be calmed. Science has reached a stage at which the existence of the opposing views can be explained and resolved on a higher plane. The science by which this futile battle is to be ended, by which the truly relevant problems can be revealed and fruitfully attacked in ways of reason rather than emotion, is psychology, more specifically Freudian psychoanalysis.

A convincing case is made that the traditional arguments on justice are irrational and emotional in nature and thus that efforts to solve practical problems of social life through such argumentation are futile. But doubt must be raised as to whether Freudian psychoanalysis is the best way to approach these problems. Ehrenzweig believes in it, however, and this belief can be shaken by logical argument as little as any other faith.

Freudian psychoanalysis appears to be a fascinating combination of deep insights of lasting value and futile attempts to penetrate mysteries of the human mind that are still inaccessible given the limited methods of search presently at mankind's disposal. Thus the resort to psychoanalysis has forced Ehrenzweig simultaneously to explain too much and too little.

The irrational, or perhaps intuitive prerational, character of the arguments traditionally used in theoretical and practical discussions about justice are unmasked by Ehrenzweig and shown to be products of the subconscious or, as we might prefer to express it, emotions. He succeeds in using modern science to penetrate the facade of seemingly rational verbiage, thus making it possible for practical men to recognize practical problems for what they are and to seek solutions by means of rational analysis.

Ehrenzweig further attempts, however, to explain the traditional disdain for stating political arguments in practical terms and the preference for arguments couched in terms of high morals and religion. His psychoanalytic approach leads him to the conclusion that this inclination is a result of the Ego's fear of the urges of the subconscious Id and its respect for the subconsciously recognized demands of the Super-ego. Articulation of the ambivalence of the human personality is one immensely important achievement of modern psychology, and Freud's

¹ P. 150.

demonstration that the subconscious struggle of opposite desires results in tension has been of high significance. The passionate character of discussions on justice is well explained by these insights. With all due respect, however, we hesitate to regard this as the full explanation of man's reluctance to reveal his true motives to others and to himself and his tendency to hide these motives behind invocations of an eternal order, God's word, justice, law, common good, and the like.

The theoretical and concrete-political discussions of justice are an insoluble mixture of genuine beliefs in ideals of justice and self- or group-interests expressed in terms of altruistic concern for the common good. For example, Ehrenzweig wonders how so illustrious a man as Roscoe Pound could oppose a plan of no-fault insurance as an attack upon the free society and a beginning of socialism.² One possible explanation is that Pound was editor-in-chief of the NACCA Law Journal.³

Another manner in which the ideal of justice is today finding expression is the postulate of equality. In that postulate Superego idealism does have a role; the postulate of equality, however, could as easily be an angry expression of envy, appearing in psychoanalytic terms as an aspect of the Id, or a facade for simple self-interest. In this context it is interesting that the successful attack on the Illinois scheme of no-fault insurance as violative of the constitutional equal protection guarantee was initiated by the Association of Trial Lawyers. In a discussion recently held by an organization of divorce lawyers, no-fault divorce was criticized in terms of morality, religion, and the sanctity of marriage; finally one of the members blurted out, "Gentlemen, if that law is passed one-half of us will have to close shop." *Vulgus vult decipi*. By no means is all talk about justice cant, but this possibility deserves no less emphasis than the emotive form of the Superego in its clashes with the Id.

We have dwelt on doubts about the usefulness of expressing psychological insights in terms of Freudian psychoanalysis because of a fear that this approach will provoke misunderstandings and unnecessary attacks upon an important book that can well help us to clarify age-old controversies and throw the light of reason on problems that are too often obscured by passion hiding behind high-sounding but empty verbiage.

One of the most clarifying of Ehrenzweig's ideas is his distinction between the sense of justice universal to all mankind and the variety

² P. 253.

³ This journal is published by the National Association of Claimants' Compensation Attorneys.

of "justnesses," *i.e.* ideals of justice visualized in different environments by different human beings, or even contradictory ideals simultaneously held by the same individual.⁴ This idea is fertile. In the somewhat different form of the distinction between the one concept of justice and the various conceptions of justice it is mentioned in the work of John Rawls.⁵ In Albert Ehrenzweig's scheme it plays a vital role; it was suggested to him by the investigations of his brother Anton into the realm of aesthetics. Man's ideals of beauty, the "beautnesses," are manifold (*de gustibus non est disputandum*), but universal to all men is the irresistible thirst for beauty and an equally irresistible abhorrence of ugliness, whatever these protean ideas may signify. Once we recognize that the number of justnesses or beautnesses is infinite, we must realize that although there are universal senses of justice and beauty, all attempts to regard these uniform urges as capable of being satisfied by any uniform idea of justice or beauty are futile. This clarifying insight might also be extended to the sense of truth, for the urge to comprehend the "true" ultimate essence of all being is universal among mankind. Ehrenzweig might tell us, however, that these "truenesses"—or more simply the "truths" by which the universal urge for Truth is sought to be stilled—are infinitely varied. In wise abstention, he has resisted the temptation to venture into this realm of metaphysics.

The book is already rich enough in subject matter, thought, and suggestion. Its full title is *Psychoanalytic Jurisprudence—On Ethics, Aesthetics, and "Law"—On Crime, Tort, and Procedure*. The scope of the author's learning is stupendous, and he is at home in all of the fields indicated in the title. The bibliography covers eighty-one pages. The work is the product of a comprehensive humanist mind, able to draw upon the literature of the world as an accomplished linguist, upon the experiences of the ages as an historian, and upon the civil and common law legal systems as a comparatist.

Throughout the book, law is viewed as a phenomenon universal to all mankind, rather than as the legal system peculiar to one people or one age. A major part of the book, however, contains a specific comparison of the common law and civil law systems.⁶ Ehrenzweig starts out from often repeated statements, expressing widely held views on either side about alleged characteristics of the other. Some such statements express emotional prejudices, as for instance the view not infrequently found in Anglo-American countries that the common law and especially its type of procedure is the law of freedom while the civil

⁴ Pp. 147 ff.

⁵ J. RAWLS, *A THEORY OF JUSTICE* 6 (1971).

⁶ Pp. 96-141, 259-81.

law is the law of authority and officiousness. When psychoanalysis is applied, however, one is told that the common law judge is a father figure, and that his reluctance actively to participate in the conduct of a law suit is an expression of the ambivalence of being a patriarch who is simultaneously exposed to reverence and reduced to impotence.⁷ Here, just as with theories of justice, name-calling, snap judgments, and misleading generalizations are not inconspicuous, but are they not due more to ignorance than to psychological tensions?

With the growth of interest in foreign laws, the expansion of international legal practice, the intense contacts among scholars, and the consequential increase in competent writing, the old lump sum judgments are disappearing. It is certainly too crude to characterize the common law as judge-made and the civil law as codified, to label the former as inductive and the latter as deductive, to identify the civil law with Roman law, or to overlook the profound differences that exist between the various legal systems of the civil law group. With expert knowledge and fine intuition Ehrenzweig culls the grains of truth from the generalizations that hide them.

In his discussion of procedure in general and of civil procedure in particular Ehrenzweig is a severe critic of the traditional American system. He aptly exposes the fallacy of contrasting an "inquisitorial" civil law scheme with an "adversary" common law scheme. He correctly points out that weaknesses in the procedure of France, Italy, and other civil law countries are due to a reluctance to give inquisitorial powers to the judge and to reduce the adversary style of the proceedings. He emphasizes the differences of these systems, widely regarded as obsolete, from the system that was initiated in Austria at the turn of the century. Ehrenzweig sees the strength of the Austrian system in the judge's enlarged powers to expedite the course of the law suit and actively to participate in the evidentiary stage. He regards such a system as superior to those of both France and the United States. But shall one underestimate the strength and the pace of the American movement for reform? Shall one seek the reason for resistance mainly in psychological blocks? Psychology also appears to explain insufficiently the differences between the Occidental view of the law and courts as instruments of deciding between all or nothing and the Oriental preference for compromise over litigation.⁸

The proposition that the tort law's adherence to the fault principle, and its resistance to replace it with a system of liability for risk, is

⁷ P. 271.

⁸ Pp. 276 ff.

rooted in Man's masochistic desire for self-punishment is as unproved and as unprovable as a psychoanalyst's allegation that overly solicitous parents "often" unconsciously desire to see their children become delinquent.⁹ Ehrenzweig's plan of loss insurance,¹⁰ however, is a well-considered specimen of the schemes now being discussed as feasible devices for protecting the victims of enterprise risk.

A work ranging over so vast a field necessarily provokes the suspicion of superficiality; such a suspicion would be unfounded in this case. No problem is shunned and no difficulty glossed over. The fact that it could all be compressed into 249 pages of text is astonishing. Certainly a price had to be paid for this conciseness; the vast number of conflicting views expressed over the centuries that are critically surveyed by the author are indicated more by apt labels than explicit presentation. Unfortunately, hardly any reader can be expected to be familiar with all of the world's writings. Nevertheless all those who, like the present reviewer, are not precisely familiar with the existentialists, psychoanalysts, or phenomenologists will deeply enjoy the challenge of the work. The book will meet resistance. Believers in some kind of ultimate truth must resent that the firm and deep convictions for which they will continue to fight with passion and appeals to ultimate ideals are here reduced to unconscious tensions. Living with tension and with knowledge that neither the Beautiful nor the Just nor the True can ever be defined with universal validity is unsettling. Psychology has shown that Man is a being full of contradictory urges. We must learn to live in a world of tension, around us and within us.

In the front of Ehrenzweig's book there is a reproduction of what seems to be a sixteenth-century engraving. Under the motto *In contraria ducet*—"It will run into controversy"—the ship sails against the wind. But it goes full speed.

⁹ P. 254.

¹⁰ Pp. 254-55.