
A.W.B. Simpson†

Dr. Ehrenzweig was an Austrian by birth who, before coming to the United States in 1939, had worked both as a judge and law teacher in the civil-law world. His principal reputation rests on his work in the areas of conflict of laws, comparative law, and tort law. He was, however, deeply concerned with the philosophy of law, and he set out his theoretical views in a highly idiosyncratic work, *Psychoanalytic Jurisprudence*.¹ Although not the first American law teacher to link legal theory with psychoanalysis—his predecessor in this respect was Jerome Frank²—Ehrenzweig’s work was the product of a more mature and wide-ranging scholarship; whereas Ehrenzweig’s ideas were elaborately developed, Frank’s were not. *Psychoanalytic Jurisprudence* attracted much attention and was extensively reviewed, but it would not be unfair to say that the legal world was somewhat uncertain what to make of it. Such uncertainty may have been in part the consequence of the unease and unfamiliarity of that world with the world of the Ego, the Id and the Superego; it was no doubt also due to Ehrenzweig’s style of writing and reasoning on philosophical matters, which was not easy to follow.

Now we have another, posthumous statement of his theoretical views in an unusual and in some ways puzzling book.³ Before his death Ehrenzweig attempted to summarize, and in many instances restate, his thoughts and ideas on the philosophy of law. He left an incomplete, disorganized, and at times obscure manu-

---

† Professor of Law, University of Kent at Canterbury; Visiting Professor of Law, The University of Chicago, Spring, 1980.

¹ A. EHRENZWEIG, *Psychoanalytic Jurisprudence* (1971) [hereinafter cited as *Psychoanalytic Jurisprudence*].

² Frank seemed to believe that the adult citizen respects “the authority of law” for psychological reasons similar to the psychological reasons explaining an infant child’s respect for the authority of his father. See J. FRANK, *Law and the Modern Mind* 202 (6th ed. 1949) (“In the anthropomorphic period of social development, law-giving, lawmaking, the punishing of misdeeds, which the child first conceived as parts of the father’s function, become parts of God’s function, and law then derives its authority from the father-God.”). See generally id. at 243-52.

script, which his widow, shortly before her death, entrusted to his friend, Max Knight. Through the painstaking work of Mr. Knight and others, the author's "final word and wisdom," as Knight puts it, has now been arranged in publishable form. Not surprisingly, the end product is neither easy nor attractive reading.

The work's unusual mode of citing authority and source material detracts greatly from its appeal, and indeed its usefulness. Although the author alluded to the work of other scholars throughout the volume (he was a man of immensely wide culture), he had also become hostile to the normal practice of offering precise references. He regarded footnotes as "academic ballast," a view with which one may sympathize. But instead of jettisoning them entirely he adopted the practice, hardly an improvement, of citing authors in a very general way, interrupting his text with parenthetical references to authors by last name only, thus leaving the reader quite uncertain what to make of the references.

For example, at one point in the discussion of justice we read that "the term 'morals' is often . . . extended so broadly as to be meaningless (H.L.A. Hart)." It is quite unclear whether Hart is supposed to have said this somewhere, or to have used the term in a meaningless way, or what. Perhaps the reference is to a passage in The Concept of Law that suggests that justice alone is an insufficient criterion by which to determine the desirability of laws or behavior. Hart argues that assertions regarding justice or injustice are "more specific forms of moral criticism than [those regarding] good and bad or right and wrong," and he thus supplies the concept of morality with somewhat broad scope. But the contention that considerations of justice concern only particular aspects of morality hardly extends the concept of morality "so broadly as to be meaningless." If this passage is indeed an example of the analysis to which Ehrenzweig objected, his objections might indicate a misunderstanding of Hart's argument. Perhaps, however, Ehrenzweig was actually referring to a completely different element of Hart's work—as a result of this system of imprecise citation, the reader can never be certain.

---

4 Knight, Editor's Note to Ehrenzweig at VII.
5 Id.
6 The editor expanded the references to include first names, and the volume includes a bibliography, Ehrenzweig at 145, and index of names, id. at 157.
7 Id. at 4.
9 Id. at 154.
Similar difficulties recur throughout the book, and it might have been better to have omitted these unusable references entirely and to have permitted the text to stand on its own. It seems that Ehrenzweig's primary aim was to emphasize the substance of his ideas and deemphasize academic formality. The ambiguity and awkwardness engendered by this method of reference, however, is so glaring that the references divert the reader's attention away from the text rather than focus his concentration on it. Thus, in introducing the subject of judicial decisionmaking, Ehrenzweig suggests:

The legal language ultimately used to explain the holding... becomes mostly a mere, albeit indispensable, tool of rationalization. There remain those rare cases where the judge will actually be faced with the conscious choice between the apparently competing legal rules. But even here he will usually follow his "judicial hunch" (Benjamin N. Cardozo),... and formulate his decision in the language of traditional legal reasoning as a mere afterthought.\(^\text{1}\)

The point may be a valid one, but the reference does not provide a helpful illustration; Cardozo's *The Nature of the Judicial Process*\(^\text{11}\) attempted a more sophisticated account of deciding tricky cases\(^\text{12}\) than Ehrenzweig suggests. Yet the use of Cardozo's name in this fashion implies that the narrow statement paraphrased here was characteristic of all his work in legal philosophy. The unfairness of the inference is apparent even on first reading, and one expects that Ehrenzweig's assertion would have been stronger without the reference.

A further source of difficulty, which may also be a result of the form in which the text was left, is the compressed presentation of the argument; some passages consist of little more than notes, and the reasoning is hard or even impossible to follow. For example, Ehrenzweig's discussion mentions and dismisses J.R. Searle's well known article *How to Derive "Ought" from "Is"*\(^\text{3}\) with the brusque

\[^{10}\text{EHRENZWEIG at 76-77.}\]
\[^{11}\text{B. CARDozo, THE NATURE OF THE JUDICIAL Process (1921).}\]
\[^{12}\text{Judge Cardozo acknowledged that "subconscious forces" shape "the form and content" of judicial opinions, id. at 167, but discussed the phenomenon at length and suggested that "my duty as a judge may be to objectify in law, not my own aspirations and convictions and philosophies, but the aspirations and convictions and philosophies of the men and women of my time," id. at 173.}\]
\[^{13}\text{Searle, How to Derive "Ought" from "Is", 73 PHILOSOPHICAL REV. 43 (1964).}\]
statement: "For this construction assumed the conclusion it seeks to reach, namely, that a 'promise creates an obligation.'"\(^{14}\) This may well be a valid criticism, but Searle argued that he was not guilty of this mistake,\(^{16}\) and more than mere assertion is required to show he was wrong. Ehrenzweig gives us no reason for accepting his view, and we can only guess at his argument.

The work's lack of obvious structure creates additional difficulty. (Some passages, such as the discussions of criminal law\(^{16}\) and anarchism,\(^{17}\) seem to have no obvious relevance at the points at which they appear; the editor has indicated that Ehrenzweig may have been uncertain as to the arrangement of the material.\(^{18}\)) In the form in which his ideas are here presented, Ehrenzweig begins with a discussion of the concept of justice, "the guidestar and curse of all legal philosophy."\(^{19}\) He appears to dismiss conventional theories of justice, which seek to show what is and is not just, as based on semantic and psychological confusion.\(^{20}\) Instead of pursuing them, we must start from the recognition that men possess a sense of justice (similar to a sense of smell or sight\(^{21}\)), and that they thereby react to stimuli by reaching judgments that this or that is just; these are called "justnesses."\(^{22}\) Ehrenzweig regards law as a product of this sense or drive in human beings.\(^{23}\)

We next are presented with a concept of law based essentially on Kelsen's theory.\(^{24}\) Ehrenzweig seems to have considered this concept "pure" in Kelsen's sense to the extent that it is "to be distinguished from other systems of norms."\(^{25}\) Apparently, this dis-

\(^{14}\) EHRENZWEIG at 33.
\(^{15}\) See, e.g., Searle, supra note 13, at 50-51.
\(^{16}\) EHRENZWEIG at 33.
\(^{17}\) Id. at 36.
\(^{18}\) Knight, supra note 4, at VIII.
\(^{19}\) EHRENZWEIG at XIII.
\(^{20}\) Id. at 6.
\(^{21}\) Id. at 6-7.
\(^{22}\) Id. at 7.
\(^{23}\) See id. at 24.
\(^{24}\) Compare id. at 38-43 with H. Kelsen, Pure Theory of Law 1-23 (M. Knight trans. 1967).
\(^{25}\) EHRENZWEIG at 39. Interestingly, although Ehrenzweig would first distinguish legal norms from "other systems of norms," he would then "relate[] the system of legal norms to the psychological fact of justice" that opened his analysis. Id. Kelsen himself, however, may well have regarded such a relation as an "adulteration," in light of his complaint that "uncritically the science of law has been mixed with elements of [among other disciplines] psychology." H. Kelsen, supra note 24, at 1. It seems possible that Ehrenzweig removed from his system the extraneous concepts of other disciplines only to supply it with notions he considered indispensable, but which to Kelsen were as "impure" as those that first required
cussion is related to the immediately preceding discussion of justice in that it identifies the object of legal philosophy, what it is that Ehrenzweig considers as "being essentially determined by a drive, partly inborn, partly inbred, to demand and to render something man has called 'justice.'"26 A brief discussion of the character of legal decisions follows;27 its relationship to anything that has come before is not easy to see, although perhaps its relevance stems from the pretensions of courts to do justice through their decisions. Next we have a discussion of legal responsibility in criminal law and tort law,28 and the book concludes with a survey of the "schools" of jurisprudence,29 more impressive for its display of knowledge than for the detail of its criticisms, most of which are so briefly expressed as to hint at ideas rather than present them.

Although at first reading the book appears to possess only the character of a collection of pensées, I think it is possible to discern three themes running throughout. The first, which is writ more large in the author's earlier work, is a belief in the explanatory power of Freudian psychoanalytic theory, which Ehrenzweig believed could explain the irrationality underlying many legal rules and practices (for example, the criminal punishment of passion murderers30), the controversies of legal theory (such as those surrounding the concept of justice31) and perhaps the very existence of law itself. Although at times he refers to psychology, there is little indication that he was much interested in anything outside the Freudian scheme, such as social psychology; his allusions to other forms of psychological theory are infrequent and fleeting.32

Ehrenzweig appears to have thought of the function of psychoanalytic notions as therapeutic, in that they enable us to understand law and legal institutions more fully, and to liberate our thinking from the pursuit of the futile and the irrational. His ideas resemble slightly Wittgenstein's vision of philosophy as removing

26 EHRENZWEIG at XIII.
27 Id. at 75-91.
28 Id. at 95-112.
29 Id. at 115-44.
30 See id. at 100-01.
31 See id. at 19.
32 E.g., id. at 13 ("Post-Freudian psychiatry has taken many dramatic turns due to either technical progress or social necessity, but Freud's psychological language, including his triad of the 'soul,' has become a common means of communication. In varying forms it has been accepted by writers of all persuasions . . . .").
the need to philosophize. He seems to have envisaged a brave new world in which, once the old confusions had been eliminated, law would become the object of a new "science of justice," but I find it almost impossible to understand what he had in mind when he used this expression. Presumably he thought that the "sense of justice" could be made the subject of scientific study, and that law could thus be explained by examining the human faculty that generates it. Here he flirted with sociobiology as well as with psychoanalysis, but his own attempt at analysis of the development of the sense in the human infant is best forgotten, and he makes no attempt to grapple with the problems of interpreting animal behavior in terms of human social values and institutions. Although Ehrenzweig's initial applications seem inadequate, his central idea may profitably be developed someday.

The second common thread reflected throughout the work is the author's implicit rejection of the possibility of absolutes. It is evident that at some point or other in his intellectual history he absorbed a set of ideas, possibly a spin-off from logical positivism, that discounted the possibility of definitive determination of such qualities as justice. He was thus left with the belief that propositions that could not be conclusively shown true or false, or that were not in some weaker sense verifiable, were simply expressions of individual but irrational choice. This sort of approach (never clearly formulated) left little room in his thought for any explanation of rational choice or decisionmaking when the available reasons are not conclusive, though he obviously valued rationality.

It might be observed that this frame of reference does not seem fully compatible with his acceptance of psychoanalytic explanations, the verifiability of which are, to say the least, problematic. Ehrenzweig seems to have been a thinker who absorbed philosophical arguments from disparate sources, but who generally did not weld them together into coherent ideas. This is especially evident in his discussion of how the judicial process arrives at "truth"—both the "true facts" of a situation and the "true law"

---

33 See L. Wittgenstein, *Philosophical Investigations* 51e (G. Anscombe trans. 1967) ("The real discovery is the one that makes me capable of stopping doing philosophy when I want to.—The one that gives philosophy peace, so that it is no longer tormented by questions which bring itself into question.") (emphasis in original).

34 Ehrenzweig at 144.

35 Id. at 20-21.

36 See, e.g., *Psychoanalytic Jurisprudence*, supra note 1, at 151 ("a common core of justice and probably not be established;" "there is no absolute justice").
that applies to it. At one point he affirms the truth-determining power of language by seeming to assert that the mastery of classical rhetoric is essential if one is to decide effectively between competing values. At another point he seems to denigrate the usefulness of language by referring to the limitations inherent in the attempt to derive "true law" from legal rules, limitations that arise because the rules are "unavoidably formulated in the words of daily usage." At yet another point he appears to question the very role of truth-finding among the goals of adjudication: "the ascertainable truth [may be] only one of relevant justnesses" to be considered in the process. It is admirable that Ehrenzweig's perspectives were so wide ranging, but it is unfortunate that he did not synthesize the views he thus obtained to provide constructive resolutions of the issues he addressed.

Finally, it seems implicit in Ehrenzweig's work that, although he believed that choices between particular propositions, once a legal system has developed, are made on individual and irrational bases, the fundamental choice between different perceptions of justice (or at least the compromise between them) has to be made on rational grounds. It was to this end that the abandonment of absolutes and the liberation from unreason afforded by psychoanalytic theory would contribute. His vision here reminds one again of Jerome Frank, and it reflects the problem-solving approach of American law teaching. Much theoretical writing or jurisprudence seems irrelevant when one adopts this approach, and this may explain how Ehrenzweig came to be impatient with the high controversies of legal philosophy. Unhappily, as he seems to have admitted, the discounting of old theory did not lead him far in the job of presenting a new one, and this book, with its rich display of learning, is valuable more for the ideas it may generate than for those it actually presents.

37 See EHRENZWEIG at 73-85.
38 See id. at 79.
39 Id. at 80.
40 Id. at 85.
41 See text and note at note 2 supra.