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Ehrenzweig: Psychoanalytic Jurisprudence

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BOOK REVIEWS

PSYCHOANALYTIC JURISPRUDENCE. By *Albert A. Ehrenzweig*. Leiden: A.W. Sijthoff [distributed by Oceana, Dobbs Ferry, N.Y.]. 1971. Pp. 395. \$19.40.

This is an exciting book, written in a colorful style that reveals an artistic temperament. When the author feels strongly (as he often does) about an issue of jurisprudence or legal policy, his manner of presentation attains a vigor sometimes approaching angry denunciation. The originality, freshness, and effervescence displayed in many parts of the book make its study a worthwhile experience.

The range of subjects dealt with in the book amazes in its inclusiveness and diversity. The legend, "From Plato to Freud and after," which precedes the title page, announces Ehrenzweig's intention to come to grips with influential historical contributions to thinking about law; his analysis and evaluation, which often proceed in a flashlight-resembling mode of exposure, is found in the first part of the book. This part also contains a sketch of comparative jurisprudence, including a geographic survey of legal systems and a comparison of the general structure of the common law with that of the civil law. The connections of this chapter with the main theme of the book are not always clearly visible, but the treatment offers many illuminating insights as well as valuable corrections of traditional misconceptions. The second part of the book contains a compact record of Ehrenzweig's personal creed that goes far beyond an appraisal of the general foundations of law commonly found in jurisprudential works. It includes, for example, an excursion into problems of aesthetics, a statement by the author of his views on punishment, a critical evaluation of the bases of tort liability, and a plea for reforming the law of procedure. An eighty-page bibliography listing works on jurisprudence and related disciplines is appended.

Ehrenzweig's abundance of provocative suggestions, scattered over a great multitude of subjects, complicates the task of narrating the central ideas of the book. It is, however, possible to discern a red thread running through the somewhat baroque structure of the discourse. Ehrenzweig sees the future of jurisprudence in a philosophy based on a new knowledge of the human mind. He uses the term "psychosophy" as an identifying mark for this new science. Its essential building stones have been furnished by the discoveries of Freudian psychoanalysis, which, in his opinion, have rendered to shreds much (probably most) of pre-Freudian legal thought. Post-Freudian psychology, Ehrenzweig believes, has added some new insights, but

not many crucial ones. Any basic reform of the law, he declares, must pay deference to the Freudian truth.

The break with the pre-Freudian past necessitates, in Ehrenzweig's view, an abandonment of the search for absolute justice. He regards as a mirage any more-or-less unitary conception of justice that claims an objective philosophical validity. Although he is convinced that some sense of justice is inborn in all human beings, its manifestations appear in many diversified and often contradictory forms. Thus justice reduces itself, for the most part, to a conflict between individual "justnesses," which are praised or condemned in the light of our personal feelings. Ehrenzweig intimates, however, that this atomistic interpretation does not necessarily preclude the achievement of some consensus on the essential requirements of a group justice.

One recurring subject of psychoanalytic dissection discussed by the author is the age-old battle between positivists and believers in natural law. This conflict, according to Ehrenzweig, is based on emotional desires rather than rational disagreements, and its literature is dominated by rhetorical flourish rather than meaningful argument; this controversy should therefore be put to rest in post-Freudian jurisprudence. In his opinion, it is the antagonism between competing conceptions of justice, and not the battle between naturalistic and positivistic views of the law, that poses the crucial problems of jurisprudence.

The ubiquity of the theme of conflict in Ehrenzweig's "psychosophy" is, of course, symptomatic of the acknowledged provenience of his approach. Freudian psychoanalysis places great emphasis on internal conflicts in man's psyche, which result chiefly from the struggle of the id with the superego, as well as on the inevitability of external (political and social) combat attributable to the intrinsic aggressiveness of man. The dedication of Ehrenzweig's book to "Eros and Thanatos—to Life and Peace" and the reference in its last sentence to the struggle between "man's love of life" and his "yearning for peace" are intimations of the author's concurrence in Heraclitus' belief that strife is the father of all things, including things just and unjust.

At this point I should like to interpose a word of doubt and dissent. There can be no question of Ehrenzweig's awareness that the dialectics of the human condition include the contrast of harmony and disharmony, of conflict and conflict resolution. Several references are made, for example, to the use of the positive law as a mediator and pacifier of contending conceptions of desirable law. Yet there is, at least in the mode of argumentation, a strong undercurrent of emphasis on irreconcilable differences in human conceptions of right and wrong, on man's innate pugnacity, and on the irrational nature

of justice. This attitude is epitomized in the positing of a contrast between man's love of life and his yearning for peace. I do not believe that the human desire for peace should be linked up with the Freudian death instinct. To be sure, the peace of the graveyard may prevail in a country in which a despotic government extinguishes all manifestations of an independent and potentially rebellious spirit. But there is also the creative, life-affirming peace of a society in which a substantial measure of cooperative solidarity has been achieved without the suppression of constructive conflict. I do not assert that Ehrenzweig would deny or discount this possibility. I am somewhat concerned, however, that a general acceptance of the belief in man's preponderant irrationality and pugnacity might tend to put too much of a damper on, and thus discourage, human efforts to control aggression, a matter related today to the chances for human survival.

I should also like to express my disagreement on some other facets of Ehrenzweig's exposition. I do not believe that the battle between adherents of natural law and positivistic jurisprudence is a "false conflict" evincing confused emotions rather than rational differences of opinion. For example, judicial review of legislation is proper for the positivist only if the positive law so provides. The natural-law advocate, on the other hand, may concede this power to the judge, in the absence of constitutional or statutory authorization, when the state has passed an unconscionable enactment. Secondly, although I agree fully with Ehrenzweig that no society should frame its ideal of justice in terms of one unitary goal value, I feel that the common core of agreement, in the civilized and developing countries of the world, on basic requirements of justice is greater than his discussion of the question would seem to suggest. Last but not least, I do not believe that the bulk of pre-Freudian legal philosophy has been rendered obsolete by the Freudian dispensation. Rather, it seems that the ideas expressed by Plato, Aristotle, St. Thomas Aquinas, Kant, and Hegel are vitally relevant to the great issues of our time. I am also convinced that post-Freudian existential and humanistic psychology, especially the logotherapy of Viktor Frankl, has made highly significant contributions to our understanding of man, despite its strong criticism of some phases of Freudian orthodoxy. Although I agree with Ehrenzweig that no one in his right mind can today ignore or intelligently belittle the epochal achievements of Freud, I have as yet to become persuaded that, in matters of psychology relevant to the law, the last word of wisdom from Mount Sinai has been spoken by this great pathbreaker of human knowledge.

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