

BOOK REVIEW

PSYCHOANALYTIC JURISPRUDENCE: ON ETHICS, AESTHETICS, AND "LAW" — ON CRIME, TORT, AND PROCEDURE. By Albert A. Ehrenzweig.¹ Leiden: A. W. Sijthoff; Dobbs Ferry, New York: Oceana Publications, Inc. 1971. Pp. 395. \$19.40.

*Reviewed by Michael E. Tigar*²

Few books today are forgivable. Black on the canvas, silence on the screen, an empty white sheet of paper, are perhaps feasible. There is little conjunction of truth and social 'reality.'³

Written to begin a study of human alienation and the possibility of human love, R. D. Laing's words ring true when one surveys what passes for jurisprudence today. One sees, for example, a serious legalist like Lord Devlin laboring long to prove, first, that a fictive "man on the Clapham omnibus" is a viable arbiter of legal sexual behavior and, second, that people may be fined or shut up in prison for publishing, writing, or making love in ways that the omnibus passenger finds revolting.⁴ Devlin's theory has been oft-examined,⁵ but I remain struck by its rigorous insistence on purely structural arguments — its easy assumption of the need for rules of law which bind us all to pretty much the same outlooks about sex and a series of other basic human drives.

A courageous, wise, and gentle judge in Los Angeles, acquitting a defendant of draft evasion in 1972, apologized for himself and his colleagues by recalling Chesterton's words about the English judges: They are not cruel, they just get used to things. This judge knew that the law's customary rigor and customary inhumanity can be crueler than deliberate vengeance; the structure of law and legal penalties, as seen by the individuals caught up in the system, is so profoundly alienating. As Laing has also written:⁶

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² B.A. 1962, J.D. 1966, University of California, Berkeley; Member, District of Columbia Bar. This author and Madeleine R. Levy-Tigar are collaborating on a history of capitalist law and of the jurisprudence of insurgency, to be published by Random House. Most of the conclusions and sources in this review are the product of this joint research.

³ R. LAING, *THE POLITICS OF EXPERIENCE* xiii (1967) [hereinafter cited as LAING].

⁴ P. DEVLIN, *THE ENFORCEMENT OF MORALS* (1959).

⁵ See, e.g., H.L.A. HART, *LAW, LIBERTY AND MORALITY* (1963); Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 *YALE L.J.* 986 (1966).

⁶ LAING 13.

Men have . . . always been weighed down not only by their sense of subordination to fate and chance, to ordained external necessities or contingencies, but by a sense that their very own thoughts and feelings, in their most intimate interstices, are the outcome, the resultant of processes which they undergo.

Because so much jurisprudence is merely justification for the structures and systems that alienate us from one another, Albert Ehrenzweig's learned, passionate, and perceptive book is welcome. *Psychoanalytic Jurisprudence* is not only an historical survey of the principal currents of legal thought since the eleventh century⁷ and a patient effort to identify the decisive differences between common and civil law systems. To be sure, were it only these things, it would be among the most valuable legal texts recently written. But Ehrenzweig goes farther; he seeks to discover what makes so much of our law uncaring and vengeful, and he outlines an idea of justice that comprehends the most basic human sensibilities and that may serve as a basis for building legal systems which respect rather than deprecate life.

Both in his survey of jurisprudential thought and in his "world tour" of legal systems, Ehrenzweig's scholarship and analysis are of the highest order, and no summary can do him justice. His treatment of the leading trends in jurisprudential theory is itself a tour de force. He concludes, and not facilely, that the great debate between positivist and natural law schools turns really upon a difference in the degree of emphasis placed upon the normative, morally obligatory character of sovereign commands, and not upon any outright eschewal by positivists of nonverifiable moral propositions (§§ 21-46).⁸ His essay on com-

⁷ On the "turning point" in European civilization which coincided with the rediscovery of the Roman texts, see generally Meynial, *Roman Law*, in *THE LEGACY OF THE MIDDLE AGES* 363 (C. Crump & E. Jacob eds. 1926). In the same volume, see also Vinogradoff, *Customary Law*, at 287, and LeBras, *Canon Law*, at 321. See also T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 260-80 (2d ed. 1936); P. VINOGRADOFF, *ROMAN LAW IN MEDIEVAL EUROPE* (1909).

⁸ The legal writers classified as positivists are concerned mainly with the structure of violence-enforced rules. Those classified as natural law theorists emphasize received or discovered principles of morality validating such rules. To these major schools, one may add what Ehrenzweig terms the "non-schools" of jurisprudence (§§ 47-58), including the essentially descriptive and classification-oriented sociological, legal realist, and dialectical theories of law.

I am unsure about Ehrenzweig's use of the term "dialectical." Used to denote a means of describing legal systems, the word creates no difficulty. However, if Ehrenzweig means to classify all Marxist jurisprudence as a "non-school," on the ground that it is merely descriptive, I believe he has erred. There are many elements in Marxist thought, but at least some of them deal with the relation between law and social institutions, with the forces that create and change law, and with the historical tendencies perceived as imminent in contemporary insti-

parative jurisprudence seeks, while putting the development of legal concepts in historical perspective, to demystify the continental or "civil" law for common law lawyers. As a former lawyer and judge in Austria, and a lawyer, law reformer, and professor in the United States, Ehrenzweig focuses his diverse and prodigious learning upon this analysis. After rejecting a number of commonly held notions, he concludes that the principal differences between the common law and civil law systems consist of the greater role which the latter gives to legal scholarship, the more highly developed legislative process in civil law countries as opposed to the more self-consciously lawmaking role played by common law judges, and the easier access to the judicial process enjoyed by those subject to European civil law systems (§§ 87-112).

Despite the high order of scholarship and analysis represented by Ehrenzweig's discussion of these matters, I do venture some criticisms the meeting of which I think would have added weight to Ehrenzweig's concluding section — his call for a new and humane jurisprudence which takes being human, rather than "order," "contract," or an abstract and unitary "justice," as its beginning. To begin with, Ehrenzweig has concentrated too much upon Europe and America. For example, he states a feeling that Western legal thought owes a large and unacknowledged debt to Islamic law of the ninth and tenth centuries (§ 85), but he does not develop the point. One wishes that he had, for one of his main themes is the crucial role played by the revival of Roman law study in the Middle Ages under the aegis of the Church, the new national monarchs, and the rising merchant class. And it has been suggested elsewhere — and the bloody course of Mediterranean commercial history verifies it — that the revival of trade, and the modern law of property and contracts, were heavily influenced by the Moslem merchants and their merchant and consular courts.⁹ By the same token, one

tutions. See Cloke, *The Economic Basis of Law and State*, in *LAW AGAINST THE PEOPLE* 65 (R. Lefcourt ed. 1971); Tigar, *Socialist Law and Legal Institutions*, in *id.* at 327; sources cited in *LAW AGAINST THE PEOPLE*, *supra*, at 348-50, 365-67 (bibliography on this subject). See also the classic statement in F. ENGELS, *THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY AND THE STATE* (E. Leacock ed. 1972), a new paperback edition with a perceptive introduction by Eleanor Leacock.

⁹ The sources in Western European languages are not complete, but they do exist. See, e.g., W. BEWES, *THE ROMANCE OF THE LAW MERCHANT* 1-11 (1923); R. DAVID, *LES GRANDS SYSTÈMES DE DROIT CONTEMPORAINS* § 424 (4th ed. 1971). For an idea of the importance of the Islamic traders, see C. BOXER, *THE PORTUGUESE SEABORNE EMPIRE* 1-105 (1969); M. KEEN, *THE PELICAN HISTORY OF MEDIEVAL EUROPE* (1968); *HISTOIRE DE LA PROVINCE* chs. 4-5 (E. Baratier ed. 1969). For a more graphic picture, see C. MCEVEDY, *THE PENGUIN ATLAS OF MEDIEVAL HISTORY* (1961).

wishes that Ehrenzweig had considered more fully than he did (§ 84) the Cuban and Chinese legal materials, particularly the latter. The current Chinese legal system, rooted in traditional concepts of mediation and conciliation, as well as in the Marxist ideal of a society without a state power apparatus, casts light upon any search for legal principles based on human needs, drives, and desires, and for a legal system in which rules and rule-enforcement do not appear to men and women as hostile, uncontrollable, and therefore alienating.¹⁰

Greater attention to materials from outside the West might have led also to consideration and highlighting of the social groups which have produced the jurisprudence of modern Europe and America — the merchants, traders, and others whose stake in sovereign power was to protect the rights of property and contract. These groups sought to create legal theories to justify lawmaking and law-enforcing controlled by the owners of property rather than by feudal secular or religious authorities. Thus, in approaching jurisprudential writing in the West from the perspective of a need for humane systems of law, I would not concede even as much of a distinction as Ehrenzweig does between natural law and positivist jurisprudence, or between the common law and civil law systems. The decisive fact is that, working for a class with fairly uniform interests and drawing upon a common stock of legal ideas, jurists were, in the building time of Western law, a group of specially trained persons whose job it was to justify structures of power. These structures were independent from, and alienating to, the subjects of such power. The jurists constructed intellectual models which made “logical” to rulers and (so far as possible) to their subjects the means by which violence was to be done against people in the name of “their” church, lord, king, corporate city government, or, in the case of republics, their collective selves. Though there are exceptions, they are few. Even during and after revolutions, jurisprudence, as the task of this specially trained group, was not related expressly or implicitly to human needs, except by the conceit that the needs of those who paid for jurisprudence to be written coincided with the needs of humanity in general. To expand on this point requires an historical outline.

¹⁰ Several recent works in Western languages deal with this subject, and Ehrenzweig does cite some of them (§ 84). However, it would be useful to attempt to integrate these legal sources with such material on social institutions in China as W. HINTON, *FANSHEN* (1966); V. NEE & D. LAYMAN, *THE CULTURAL REVOLUTION AT PEKING UNIVERSITY* (1969); E. SNOW, *THE OTHER SIDE OF THE RIVER* (1962) (republished in 1970 in paperback under the title *RED CHINA TODAY* with additional material).

While the Roman Church's desire to replace the universal authority of the Roman Empire greatly encouraged the rediscovery and renewed application of Roman law, the real revival of jurisprudence in the West after the eleventh century took place under rather different sponsorship and with quite different motives. The rising merchant class welcomed, of course, any authority which could both guarantee the security of trade against feudal warfare and relieve the trader from the feudal impediments to traffic in goods. These impediments took the form both of feudal seigneurial regulations of status and property rights, and of feudal particularistic tolls, taxes, and restrictions on the movement of goods.

The revival of trade and the beginnings of money economies were accompanied by the establishment of the communes of artisans and merchants. These "new cities," "free cities," franchised cities, burghs, and boroughs were created either by revolutionary uprisings of artisans and merchants, or by feudal seigneurial grants (clerical, royal, or otherwise) made to promote and organize commerce or to populate frontier areas for defense and trade purposes. Though the cities existed formally within the feudal system, they prefigured the dissolution of the personal bonds which held that system together and the replacement of those bonds by those of contract and property relations.

In the cities took root the revived commercial jurisprudence of Rome, regarded as the authoritative basis of new social relations, or as "natural law and written reason." Even in the North of France, where customary law was said to reign, the customs of the cities owed evident debt to the Roman-based law of merchants. In Germany, despite the continuing vitality of customary institutions as exemplified in the *Sachsenspiegel* (Mirror of the Saxons), the same was true. And in the South of France and Italy, Roman law was officially recognized as the primary source of legal rules.

The struggle to dissolve feudal bonds spread outward from these cities which were centers of sedition even against the feudal lords who had more or less grudgingly recognized the rights of the bourgeois, the burghers, and the burgesses to control trade. One by one, the governments of Europe were swept away by this new force — their erstwhile ally — and the vestiges of feudalism were abolished. The troops who did the fighting in these revolutionary struggles were often poor artisans, journeymen, and peasants, but the directing force was always those who stood the most to gain from the thorough triumph of private property. And one can see that the legal system which crowned each such

successful conquest of power consolidated authority in the hands of those who had the most money and property to protect.¹¹

In the course of these struggles between the eleventh and nineteenth centuries, jurisprudential writing was a major undertaking of each organized group which either hoped to gain power or wanted to consolidate power it already had. One cannot separate the great legal treatises, ordinances, charters, and customs of these nine centuries from the men and women of power who paid for them. Lawyers and jurists were for hire and worked in the courts of lords and sovereigns, and in the universities established and patronized by the Church or the Crown. Jurisprudence was not an activity for the commonalty; indeed, the Church for a time forbade the lower orders from reading the old legal texts. Jurisprudence was an instrument of actual or potential power, and each writing bears the indelible stamp of its patron's interests. One need not search far, therefore, to explain the estrangement of our Western legal heritage from more human concerns.

To be sure, there were occasional revolts and returns, looking back to the time when laws and legal institutions were not so forbidding. "Justice," some seditious souls believed, should be defined in terms of human needs and of community, rather than in terms of what sorts of violence it might properly wreak — rather than in the terms, for example, of the French *coutumes*, defining "high justice" as the right of him who possessed it to punish grave crimes and to have a scaffold.¹² Some, perhaps, thought of Paul, who counselled resort to pastors or brothers for resolution of disputes. There were late echoes of this ideal, as in the sixteenth century German saying "*Juristen, böse Christen*" (jurists, bad Christians),¹³ or in the occasional attempts to escape reliance upon formal structures of law in communes and cities.

While this short summary has spoken principally of continental European developments, it should be recognized that the decisive features of the English law of contracts and property (at least property in movables) were determined by the same historical forces. Legal history as taught in law schools pays far too much attention to feudal and royal law in England and too little attention to the law merchant's spreading power and influ-

¹¹ See P. KROPOTKIN, *THE GREAT FRENCH REVOLUTION: 1789-1793* (1909) (reissued in a 1971 Schocken paperback).

¹² See 2 C. BOURDOT DE RICHEBOURG, *NOUVEAU COUTUMIER GENERAL* 415 (nouvelle ed. 1724); C. FERRIERE, 1 *DICIONNAIRE DE DROIT ET DE PRATIQUE* 671 (3d ed. 1749); 2 *id.* 95.

¹³ See R. DAVID, *supra* note 9, at § 27.

ence. This influence was achieved through merchant courts, fair courts (Courts of Pie Powder), admiralty courts, borough courts, and through the outright borrowing by dozens of English cities of the customs of continental cities.

I do not set out this sketch to combat in any sense Ehrenzweig's own far more detailed one. Indeed, the above discussion takes as its beginning and owes a great debt to the sensitive, encyclopedic, and cogent presentation in Ehrenzweig's work of the main outlines of legal philosophy and history. More importantly, the points made above largely comport with and support Ehrenzweig's central message, to which I now turn.

The second half of Ehrenzweig's book is an attempt to go beyond the structures of legal rules and principles to the human motivations forming their foundation. For Ehrenzweig, psychoanalytic knowledge has three functions in relation to jurisprudential study. First, it enables us to see the motives behind fierce debate in the fields of law and social science. Second, the insights of Freudian psychoanalysis into conflict and cooperation within the father-dominated monogamistic family provide clues to the origin and maintenance of specific forms of social organization which have been crystallized and ossified into laws and rules. Third, he believes that the potential for human understanding and human liberation in the work of Freud and some post-Freudians provides keys to an essential reformation of criminal law, torts, and other fields of law in light of knowledge about human needs.

His views on the last subject are especially valuable and timely. To suggest a jurisprudence founded upon human drives and needs is an important step. To bring to such a suggestion a wealth of analysis of psychoanalytic writing, social science, and jurisprudence is a great service.

The criminal law is but one illustration, though the most dramatic because of the stakes involved, of the overlay of unreason and superstition in Western law. In the area of criminal responsibility, for example, the varying doctrines of "insanity" and "diminished capacity" have led to a confusing array of legal rules, each little more supportable than the *M'Naghten* "right or wrong" test¹⁴ and all sophistically turned into a largely irrational and result-oriented jurisprudence. Even in the present state of Western society, jurisprudential theory should be able to recognize some basic patterns of violent conduct for which punishment is mere vengeance and deterrence an empty hope. Ehrenzweig

¹⁴ *M'Naghten's Case*, 8 Eng. Rep. 718 (House of Lords 1843) (defining insanity as inability to distinguish right from wrong).

suggests, to begin, a distinction between oedipal and postoedipal crimes. The former are those which originate in family-based patterns of aggression: "the oedipal period of parricidal wishes" (§ 180 at 211). The depth and strength of urges to commit such crimes preclude deterrence. In contrast, postoedipal crimes are those which, like theft, "respond to desires whose repression occurs at a postoedipal stage" (§ 180 at 212).

While making notes for this review, my eye fell upon a story in the local newspaper which illustrates the oedipal crime, admittedly with unusual sharpness. A 14-year-old boy observed his father, half-drunk, beating the boy's mother, as was the father's wont when intoxicated. The boy took a rifle and shot his father, who then lay down on the parental bed, gravely wounded. The boy went outside, and through the bedroom window shot his father eight more times, killing him. When the police arrived, the lad said, "He always beat my mother, I could take it no longer. Take me to prison."¹⁵ Any jurisprudence that treats such an act as meriting imprisonment, even if only in theory, is irrational, and overlooks much that we have so painfully learned about primal urges of protection and love, hatred and aggression.

At the root of Ehrenzweig's programmatic suggestions is his insistence that the search for overriding and absolute postulates about justice is doomed to fail. For, he points out, the sense of justice is not unitary, but formed of complementary and competing principles originating in different archetypical family situations, and pressing toward different behavior in individual humans and toward different results in solving concrete problems of adjudication. Ehrenzweig's insistence upon eclectic, and often dialectic, competing "justnesses" does not, however, take the form of multiplying the variables or grounds of decision so as either to make all choice irrational or to deny causality. He seeks rather to understand why, from what basic motives, lawyers, judges, and litigants elevate certain principles over others in the search for "justice," or in the justification of results obtained or sought in the system which calls itself "justice."

This attempt to penetrate structures of rules and principles to the human motivations underlying them is valuable, as is Ehrenzweig's closely reasoned critique of Western law in the light of psychoanalytic theory. I believe his analysis to be incomplete, however, for reasons which do not depart from fundamental agreement with the Freudian insight into human behavior. The history of jurisprudence to date, in most of the world at any

¹⁵ Nice-Matin, July 15, 1972, at 22, col. 6 (Cannes-Grasse ed.).

rate, has been that of repression, violence, and denial of human possibilities. Against that tradition Ehrenzweig rightly inveighs, though not so strongly as I would have done. And, by the same token, my disagreement with his psychoanalytic jurisprudence is that he does not carry his (and Freud's) innovative, indeed revolutionary, findings as far as the evidence and need warrant.

Freud recognized that individual self-understanding is only one part of mental health.¹⁶ One can progress far, but not all the way, toward an integration of one's personality by becoming conscious of the drives which arise in infancy and are repressed in the family setting. Superimposed upon the family, the form of which is determined by the social structure of taboos and legally-enforced prohibitions, is a rigorous set of laws and rules, and of economic and social conditions, which each of us confronts upon emerging from the protective family environment. Freud recognized, and the more radical of contemporary analysts convincingly demonstrate, that the social order of the West, and the family structure which it assiduously cultivates to protect itself from disintegration, is the most important cause of individual repression and unhappiness.¹⁷

Marcuse, for example, in *Eros and Civilization* perceives in Freud's writing a recognition of the limits upon individual therapeutic "cures." To cure the patient means to help him or her see the repressive nature of both the family and the larger society. There are those wealthy enough or fortunate enough to create zones of freedom and love within which to be integrated human beings. But for the rest, obtaining a psychoanalytic insight leads either to resignation or to rebellion, the latter after

¹⁶ See generally H. MARCUSE, *EROS AND CIVILIZATION* (1955).

¹⁷ See, e.g., LAING 10-11:

The relevance of Freud to our time is largely his insight, to a very considerable extent, his *demonstration* that the *ordinary* person is a shriveled, dessicated fragment of what a person can be.

What we call "normal" is a product of repression, denial, splitting, projection, introjection, and other forms of destructive action on experience. . . . It is radically estranged from the structure of being.

From these initial thoughts, Laing goes on to analyze the violence done to children and adults in the family, in the systems of education, and in the larger society, pre-figuring and patterning the violence we each do to ourselves:

In the last fifty years, we human beings have slaughtered by our own hands coming on for one hundred million of our species. We all live under constant threat of our total annihilation. We seem to seek death and destruction as much as life and happiness. We are as driven to kill and be killed as we are to let live and live. Only by the most outrageous violation of ourselves have we achieved our capacity to live in relative adjustment to a civilization apparently driven to its own destruction.

Id. at 49.

recognition that human liberation is possible only in a liberated society. As Erich Fromm has written:¹⁸

The fulfillment of this claim [for happiness] requires the availability of the material means for its satisfaction and must therefore entail the explosion of the prevailing social order.

One ought to add that the creation of material conditions for human happiness is not the only necessary task. Human beings must also create social institutions of production and life which affirm human values.

I review all this not to suggest that Ehrenzweig should have issued an unqualified call for revolution: within revolutionary movements one finds also a lack of regard for the possibilities of human love and of an end to alienation. And, certainly, Ehrenzweig goes farther than those whom Marcuse terms "the revisionist" neo-Freudians, for whom individual "adjustment" is all and social change of next to no concern. Given the valuable and thoughtful contribution of *Psychoanalytic Jurisprudence*, one wishes that Ehrenzweig would confront and evaluate the writings of R. D. Laing and his associates and deal directly with Marcuse's *Eros and Civilization*. In both Laing and Marcuse one finds critical insights — though from very different perspectives — into the social malaise from which springs mental illness.

Certainly, as Ehrenzweig argues, we must begin to change our law now, in this society. But, having the insights of Freud and those who understand his work, we must also discover in each of us the possibilities of loving, trusting, and, finally, uniting to make a society in which love and trust are basic goals. To unite in this way, which many are now attempting, may bring conflict with law. The decision to risk law-violation involves not only deep-seated urges formed during the oedipal period, but also conscious choice of the kind which is amenable, as Ehrenzweig argues, to the deterrent processes of the criminal law. One can apply the criminal law, that is, to repress political behavior, and do so effectively — as recent American experience demonstrates. There is, however, a limit to the effectiveness of such legal repression, and the growing strength of movements for human liberation attests to the depth of human needs to be free.

In short, I am persuaded by Ehrenzweig's analysis and by his basic thesis that Freudian insights can point jurisprudential study in directions more responsive to human needs. But I believe that the present social system in the West will not permit enough change in basic social arrangements to make psycho-

¹⁸ Fromm, *Die Sozialpsychologische Bedeutung der Mutterrechtstheorie*, 3 ZEITSCHRIFT FÜR SOZIALFORSCHUNG 196, 215, quoted in MARCUSE, *supra* note 16, at 222.

analytic jurisprudence an instrument of human happiness for those subject to the law's ever-present threat of repression and violence. We are not yet arrived at a stage of society in which programmatic reform is enough.¹⁹ Where Ehrenzweig writes that the common law will not survive unless it changes in this or that way, I would write that it will not, can not, survive *because* the present legal system, and the system of social relations in whose service it is, cannot change to permit human beings to live and love. For now, therefore, the task is to understand the provenance of and interests reflected in currently accepted legal ideas, and to develop a theory of law which arraigns those ideas in light of human needs. But this "jurisprudence of insurgency" must understand what Ehrenzweig has written and, more, must know that his insights are crucial to its own development.

Within the group which struggles to make, in Fromm's terms, the "explosion of the prevailing social order," there can be genuine relations of love and trust. In a society which sets a goal of human freedom, such relations may be fostered, developed, and encouraged, even through—perhaps especially through—the means of "justice" chosen to enforce rules. In Laing's words:²⁰

[E]ach emotion is always found in one or another inflection according to the group mode it occurs in. There are no "basic" emotions, instincts or personality, outside of the relationships a person has within one or another social context.

And there is no freedom, no love, and no liberation except in a society which struggles to create the social conditions, the economic conditions, and the jurisprudence of freedom, love, and liberation.

¹⁹ Having stated this difference with Ehrenzweig, I quickly add that even in a society in which wealth and power are shared more nearly equally than in ours at present, human liberation in the sense Freud perceived it does not automatically follow. See p. 794 *supra*.

²⁰ LAING 67.