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LAW

A PERSONAL VIEW

SIJTHOFF

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by

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to Erica

Editor's Note

This book represents the final word and wisdom of a great thinker. It is the summary of what a scholar and philosopher has to say to the world at the end of his life. It is a *summary*—much of it, in one way or another, he had stated in earlier works but here, in his farewell message, he wanted to give his words the ultimate formulation, unencumbered by what he impatiently referred to as “academic ballast.” He wanted to write a book without footnotes and extensive bibliography, addressing the world at large, the general (albeit well-educated) reader, who, so Ehrenzweig felt, did not care where a certain quotation came from. Accordingly, Ehrenzweig uses quotations and paraphrases freely without usually stating the source, although stating the author—grudgingly, as it were, by providing only the family names even for such common names as Davis, Robinson, Cohen, Alexander. He seems to be saying to his reader: “Author X said it and it does not matter where; trust me for quoting or paraphrasing him correctly; let’s not get bogged down with ‘documentation,’ but get on with the show and continue our discussion without scholarly interruptions. This is my last book, let me have my way.”

Ehrenzweig’s wish was respected when his manuscript was edited, although first names were supplied by the devoted detective work of Thomas H. Reynolds of the University of California Law School Library, by Professor Friedrich Kessler of the Law School, and by myself. The reader interested in documentation nevertheless can find much of it in Ehrenzweig’s earlier work, *Psychoanalytic Jurisprudence*, published by the same publisher in 1971, to which Ehrenzweig frequently refers, using his initials (AAE). In some instances (such as Michael Tigar, the former editor of the *California Law Review*, and Dr. Dorothea Mayer-Maly of the University of Salzburg, Austria),

Ehrenzweig quoted what they told him in conversation or wrote in personal letters.

The manuscript was left in unfinished form. There were penciled emendations of many kinds, some in German shorthand, some in abbreviated form, some illegible, some doubtful concerning their placement, some incomplete or in the form of reminders for later elaboration, some scribbled in the margins with guidelines that seemed to lead to places where they could hardly belong. Mrs. Maria Rosenthal, his long-time associate in the Law School office, familiar with his ways and hand-writing, miraculously deciphered much that could not have been interpreted by anybody else; three retypings were needed to put the manuscript in shape for the printer. The most serious problem was posed by the organization. Ehrenzweig had altered the structure of the manuscript at least twice, changing the numbering and placement of pages, sections, and subtitles, but only in sketched form and inconsistently, so that the final arrangement had to be conjectural. Professor Edgar Bodenheimer of the University of California School of Law at Davis saw the manuscript in this form and made some valuable corrections.

A few hours before her death, Mrs. Erica Ehrenzweig handed me the manuscript saying it had been her late husband's wish that I put it into publishable form; I had edited his *Negligence without Fault* in 1951, and his "*Full Aid*" for the *Traffic Victim* in 1954. Thus this book, in addition to being Professor Albert Ehrenzweig's farewell to the world, is also my farewell to a revered friend.

March, 1977

Max Knight

“Of the three powers which may dispute the basic position of science, religion alone is to be taken seriously as an enemy. Art is almost always harmless and beneficent; it does not seek to be anything but an illusion. . . . Philosophy is not opposed to science, it behaves like a science and works in part by the same method; it departs from it, however, by clinging to the illusion of being able to present a picture of the universe which . . . is coherent, though one which is bound to collapse with every fresh advance in our knowledge. It goes astray in its method by overestimating the epistemological value of our logical operations and by not accepting other sources of knowledge such as intuition” (Freud, *New Introductory Lectures on Psychoanalysis*).

Preface

Legal philosophy has exhausted itself in moral and political emotions, which often have been concealed in semantic confusion. Efforts for new beginnings in legal philosophy have borrowed new tools from this century's natural sciences. Among these tools, psychology might help to reduce that part of the confusion which has been caused by unconscious motivation; other tools are derived from the sociologies, linguistics, ethologies, and anthropologies of our day.

The present introduction to such efforts has had to discount much of the old learning without the benefit of conclusive studies in the new sciences. It can, therefore, only present "a personal view," to borrow the subtitle to Kenneth Clark's brilliant *Civilisation*. But I believe that this view can bear witness to a general contemporary turn in man's search for himself, which so far has almost wholly lacked expression in writings about law.

The following attempt at offering a coherent, however biased, scheme for a legal philosophy will not be burdened by citations of writers of the past. But I hope to provide bridges to a more traditional framework by references to some of my more documented earlier writings as well as by insertions of dogmatic discussions.

I have chosen for the title of this book the simple word "Law" rather than "Jurisprudence" because of the ambiguity of the latter word. John Austin, following Bentham, seems to have given jurisprudence its modern English meaning. To Austin it meant "the science of what is essential to law, combined with the science of what it ought to be." It has thus from the beginning been distinct from both German "Jurisprudenz" (legal theory) and French "jurisprudence" (the analysis of judge-made law). Since Austin, Anglo-American "jurisprudence" has repeatedly changed its scope and aim. It has come to embrace analytic endeavors to define the concept of posited law; a legal philosophy

concerned with the meta-positive foundations and meanings of law and "justice"; "legal" hermeneutics, the study of the process governing the law's creation and growth; "legal" logics, sociologies, anthropologies, linguistics, theologies; and, perhaps most fruitfully, historical and comparative studies. In this book we shall enlist the help of all these disciplines as well as of a "legal" ethology which, through study of animal behavior, promises to supplement biological findings.

Finally, we shall take note of many old and new attempts at attacking the eternal riddles of the human predicament, such as the phenomenological trust in an objective spirit, the ontological effort to isolate universals, the existential imagery of man's "self-actualization," and the deontological concern with the law as it should be. Little would be gained by reserving such endeavors to jurisprudence, legal philosophy, or legal theory, which have long lost their identities. We shall listen instead to the most discordant voices as expressions of an unease which has challenged any autonomous science about the law. This may seem an audacious, indeed, an impossible undertaking within the confines of such a small book.

There are, of course, numerous repositories of thought and tools of instruction in many languages which have taken approaches more elaborate and thus more modest. We shall gratefully rely on them for much that we need for our journey. In this country, Edwin Patterson has told us in much accurate detail about the "men and ideas of the law"; Wolfgang Friedmann has given us a summary of the sayings of the Great, from the Fragments of Heraclitus to the aphorisms of Oliver Wendell Holmes; Edgar Bodenheimer has guided us through the painful struggle which has ever repeated and ever defeated those conceptions of justice currently reflected in the highly regarded reformulations of John Rawls' work. Julius Stone has given us his trilogy and Jerome Hall his "integrative" effort, while George W. Paton and David P. Derham have undertaken to accompany us through the entire mansion of "jurisprudence." In order to avoid repetition of polemics against what I have tried to show to be obsolescent controversies I shall, in addition, with all apologies, rely on my *Psychoanalytic Jurisprudence*.^{*} For those who seek access to similar texts in

^{*} Albert A. Ehrenzweig, *Psychoanalytic Jurisprudence* (A. W. Sijthoff, Leiden and Oceana Publications, Inc., Dobbs Ferry, N.Y. 1971). In the text, this work will be cited as AAE.

other cultures, several major treatises in foreign languages will be referred to. For first-hand materials the reader is referred to the works of William R. Bishin and Christopher Stone, George Christie, Morris and Felix Cohen, Jerome Hall, Lon Fuller, Lord Lloyd of Hampstead, and Clarence Morris.

Law cannot be defined in any generally meaningful sense. When speaking of law, one person may be thinking of the government's forceable actions, while another may contemplate the quiet operation of a "law abiding" community. It is of little value, therefore, to take sides in such classic disputes as those around Kant's theory of compulsion or Hegel's conception of law as "will", nor can we profit from the controversy between those professing adherence to a "natural law" and their "positivist" opponents. Different definitions or at least descriptions of law will be needed for such distinctions as those between law and other normative orders, between types of "civil disobedience", between "closed" and "open" legal systems. Many of these discrepancies will be shown to be reducible to their semantic and emotional elements. It is the analysis of the latter that holds the greatest promise of progress. Indeed, in Thomas Cowan's words, "law and the general science of psychology must eventually come to terms if law is not to slip further into an antiscientific stance." Law could be seen as the product of pure reason, of man's realization of his need for his self-preservation, or as the result of a mindless drive attributed to ants and bees. Both views have as often been taken as rejected. As an object of legal philosophy, law has been considered and will be considered in this book as being essentially determined by a drive, partly inborn, partly inbred, to demand and to render something man has called "justice."

In Chapter One, I shall first attempt to separate the ambiguous and ambivalent uses of this word "justice," which has been the guidestar and curse of all legal philosophy. I shall try to show that this word must become the essence of our science once it ceases to stand by itself and instead comes to designate the drive that we shall call "the sense of justice," and the latter's individual reactions to selected stimuli.

Chapter Two formulates a concept of law usable for the analysis of some universal social facts — the concept of a body of "legal norms." To describe this body, we shall choose a vertical structure whose form, like that of mathematics, avoids value judgments. Such a form cannot be

defended as true or attacked as untrue but only as either useful or misleading. We shall call “legal” any norm which is ultimately derived from the highest “posited” legal norm or “apex norm” (a written or unwritten constitution). In testing the “lawness” of that apex norm itself, we each follow our own choice of what we feel to be the metalegal, value-based source of our law. This source may be our faith, “reason,” trust in the structure’s effectiveness, or any other religious or secular “natural law.” Any such source can be referred to as the chosen “metanorm.” An attempt to establish the transsocial and transcultural usefulness of the adopted terminology by reference to other legal orbits and to current findings of legal sociology and legal anthropology will conclude Chapter Two.

With no more than an apology for not having been able to include in this analysis the fast-progressing studies of deontic logic (Constantin Kalinowski; Ilmar Tammelo), Chapter Three will discuss the legal decision and Chapter Four some of the “truths” and “justnesses” in law and fact which are sought in legal procedures and such central concepts as legal (civil and criminal) responsibility of legal persons, and legal obligations, all topics which have long been included in books on “jurisprudence,” “legal philosophy,” or “legal theory.”

Chapter Five presents the perennial discourse between the “schools of jurisprudence” about the metanorms.

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Chapter One

Law as Justice

