REVIEWS


Edmund W. Kitch†

This witty, complex, sophisticated, and charming book sets forth an agenda for reform of the Securities and Exchange Commission ("SEC"). Destined to serve as a blueprint for restructuring the SEC's activities, it will surely be regarded as an important work in the decade to come.

The book has three major themes. The first of these follows the course of an intellectual autobiography: the young, idealist SEC staff professional becomes the older, more sophisticated, doggedly idealist, securities scholar and practitioner. The book, drawing generously upon earlier essays dealing with the same topic, is a personal summation of the author's career in securities law, a career that has contributed much serious thought to the field:

I have been an observer of federal securities regulation since its very beginning. . . . The Securities Act seemed then to be the New Deal's pre-eminent means of preventing a recurrence of the conditions that led to the Great Depression, and well-designed to prevent a recurrence of the securities abuses of the 1920s.

Now, as I wind up over 45 years of watching, it seems clear that as the regulation gets more and more detailed and pervasive, its effectiveness is rapidly diminishing. The usefulness of constantly added detail must be questioned, especially considering our greater knowledge of how securities decisions

† Professor of Law, The University of Chicago.

1 See particularly Kripke's dissent to a recent report by a special SEC advisory committee, ADVISORY COMMITTEE ON CORPORATE DISCLOSURE TO THE SECURITIES AND EXCHANGE COMMISSION, 95TH CONG., 1ST SESS., REPORT, D-49 to D-56 (Comm. Print 1977), whose other members concluded that the current disclosure system "is sound and does not need radical reform or renovation," id. at ii. Kripke expanded his dissent into an article that was published in two professional journals. Kripke, Where Are We on Securities Disclosure After the Advisory Committee Report?, 2 J. ACCOUNTING, AUDITING & FINANCE 4 (1978), also published in 6 SEC. REG. L. J. 99 (1978).
are made and the lack of decisive influence of the disclosure system in those decisions. The administration of the securities legislation, despite its reputation for efficiency, has proved to be a conspicuous example of over-regulation. . . .

This book is an attempt to outline my dissatisfaction with the present disclosure system, and to indicate what went wrong.²

The second and most amusing theme of the book delineates Homer Kripke's role as an indefatigable and ineffective critic of the SEC. His criticism is laced with wit, sarcasm, and not a little pique, the last of which results less from the failure of his arguments to carry the day than from the refusal of the SEC and its well-disciplined phalanx of practitioner defenders³ to deign to begin a dialogue. Of the modern staff, the clearest villain of the piece, Kripke writes:

Beyond all the written material are the routine staff contacts with the public when processing filings with the Commission. From all of this has developed a vast interpretive maze, for which even a sympathetic reader trained under the Acts and sympathetic to their purposes can find little justification in the statutes. . . .

The correct way to understand the maze, having in mind the staff's zealotry and apparent delight in spinning out these glosses on the statute and their lack of demonstrable basis, is as a "theology."

. . . . The attitude of the staff toward its disclosure functions is marked by an unquestioning faith that the mandatory disclosure system must be a good in itself, and must be useful, and the more of it the better. . . . [W]hen one is self-righteously sure that he or she is performing a valuable public service, one becomes impatient with disagreement or delay.⁴

The third theme of the book details Homer Kripke's positive program for a better SEC. Kripke maintains that the SEC should

---

² H. Kripke, The SEC and Corporate Disclosure: Regulation in Search of a Purpose xvii (1979) [hereinafter cited without cross-reference as Kripke].
³ "The practicing lawyer knows that he or she has to live with an SEC staff profoundly immersed in its own preconceptions and ideology. . . . [T]he practicing lawyer is loath overtly to challenge the SEC ideology and methods . . . ." Id. at xix.
⁴ Id. at 4-5.
turn to the new learning of financial economics for the guidance to reform its program. It should substitute economically relevant, value-informative, future-oriented information in place of accounting numbers generated by the dead hand of the past. The central intellectual interest of this book emerges from Kripke's relentless determination to wrest from the literature of financial economics a meaningful reform program for the SEC.

Kripke has a devout commitment to the SEC and the Securities Acts as means to serve the public interest. Accordingly, he briefly discusses, but quickly discredits, the capture hypothesis—the notion that the SEC was created or captured by elements of the securities industry to serve their own interests. He dismisses the hypothesis (quite correctly in my view) on the ground that throughout much of its history, the SEC has been so ineffective that capture has been unnecessary. He does not discuss two hypotheses that seem to me more plausible. The first is that the SEC has been captured by the members of its staff, who have an interest in increasing the value of their specialized knowledge by advocating ever-more pervasive and irrational regulation. The more pervasive their control, the more potential employees their activities will impinge on; and the more irrational their requirements, the less likely the regulations will be understood by outsiders. My second hypothesis is that the SEC was created to foster and maintain two important myths of contemporary society: that the Depression was caused by structural flaws of the private sector and that those flaws have not been corrected. The gradual erosion of those myths seems to explain why serious criticism of the SEC such as that offered by Kripke is now more widely entertained, discussed, and considered.

"The theory behind the formation of the SEC and other administrative agencies," writes Kripke, "was that a cross-disciplinary expertise in all the relevant fields of learning would permit more efficient government than that provided through the old separation of legislative, executive, and judicial powers." Kripke notes that "[i]t is well-known that . . . the hopes of the New Deal

---

* See Kripke at 32-38.
* See id. at 33, 35.
* See, e.g., M. Friedman & A. Schwartz, A Monetary History of the United States 299-419 (1963) (exhaustively documenting the central role of Federal Reserve Board actions in exacerbating the Great Depression).
* Kripke at 62.
have been disappointed," but he is not about to give up, for he has found the appropriate field for the SEC: financial economics.

[Al]though the SEC has always been dominated by lawyer-commissioners and lawyers on the staff, the most stimulating insights into the operations of the securities markets in the last twenty-five years have come from specialists in finance and academic accountants. Nevertheless, their empirical research is reported less in English than in mathematics, with only occasional translations of the implications into everyday speech . . . . It is . . . desirable that a lawyer familiar with SEC language and modes of thought should point out the implications of the research and thinking from other disciplines.11

For a practitioner, the most valuable aspect of this book is Kripke's effort to extract from this specialized literature lessons relevant to the regulatory policy issues the SEC decides. It is likely that the style of argument that Kripke uses—analysis of the impact of policy alternatives on the efficiency of securities markets—will become increasingly common in the decade ahead. In this respect, securities practice will be catching up with many other fields of law in which this type of argument has become more common. The practitioner who, persuaded by Kripke's analysis of a wide range of issues of securities law from the standpoint of financial economics, wishes to enhance his ability to use the economic material, should not stop with Kripke's book. He should go on to the texts,12 and perhaps from there into the literature13 of financial economics itself. For the literature contains a rich body of theoretical and empirical material that advocates can deploy on different sides of many issues.

There is one central theme of the literature that Kripke exploits with great skill and persuasiveness: the unlikelihood that pervasive disclosure of the attributes of a firm can significantly benefit anyone. The development and empirical confirmation of the efficient-market hypothesis,14 with its important corollary that,

10 Id. at 63.
11 Id. at xv.
13 The texts contain extensive references to the original literature.
14 See Kripke at 100-03.
for most investors, the market price is the best indication of the value of a stock.\textsuperscript{15} devastates the model of the securities-purchase decision implicit in most SEC disclosure regulations.\textsuperscript{16} Even more telling, the research indicates that much of the informational content of the SEC-required disclosures is impounded in the market price before the disclosures are made.\textsuperscript{17} Once one decides that SEC disclosures are not central to the operation of securities markets, choices between requiring more detailed and more widely disseminated disclosure on the one hand and saving the costs of that disclosure on the other are quickly and easily decided in favor of saving costs. Kripke's most compelling element on the agenda for reform is that the SEC reduce the amount and detail of required disclosure, since the disclosure is costly and there is no reason to think that information is of any practical benefit.\textsuperscript{18}

But Kripke does not stop there, for he has a grander vision. Kripke suggests that the SEC should reform his first love, accounting. Armed with the insights of the new literature, the SEC should lead the way toward more useful and meaningful accounting standards. The animating vision is that accounting should turn away from antique concepts of recording the historic acts of stewardship\textsuperscript{19} and turn instead toward meeting the needs of the modern investor by providing meaningful information as to the real value of the corporation.\textsuperscript{20} The stereotype of the green-eyeshade accountant is transformed into that of the all-knowing seer who provides the market with the information it needs to be efficient. Ironically, Kripke would assign the role of leading, indeed mandating, this revolution—designed to overcome the timid and vested interests of the accounting profession\textsuperscript{21}—to the SEC itself.

Kripke has so much intellectual difficulty with this vision, as he candidly and charmingly reveals, that he concludes with a quite

\textsuperscript{15} Id. at 104-05.
\textsuperscript{16} One example of regulation based on the assumption that all investors want to value their securities independently is the requirement that copies of the prospectus must be delivered to all purchasers. See 15 U.S.C. § 77e(b)(2) (1976). See also 17 C.F.R. §§ 230.153-153a, 230.174 (1979).
\textsuperscript{17} See KRIPKE at 97-98. See also P. FOSTER, supra note 12, at 361 (“Much of the market's reaction to accounting earnings is anticipating; more timely information sources than the earnings announcement are used in the security price revaluation process.”).
\textsuperscript{18} See KRIPKE at 117-33.
\textsuperscript{19} Id. at 145-48, 166.
\textsuperscript{20} Id. at 190.
\textsuperscript{21} See id. at 153-54. Kripke recognizes the irony of his position in light of his general disapproval of the SEC's performance in the field of disclosure. Id. at 157.
unassuming proposal: firms should supplement traditional accounting statements with additional statements disclosing future-oriented and value-related information such as earnings projections and asset-value changes. Thus, operatively, Kripke's reform agenda becomes one of adding to accounting procedures (and to their costs) marginal information of an explicitly value-related and future-oriented nature.

Kripke never rigorously lays out the logic of his animating vision. In spite of a curious and inexplicable section that relies on a long, naive quotation from Adolph Berle to the effect that securities markets have no effect on allocational efficiency, and his own conclusion that "[t]he SEC’s potential for having an influence is primarily with respect to public equity issues for new money, a very small portion of the total process of resource allocation," Kripke appears to believe that the SEC could reform accounting standards to improve the efficiency of securities markets. Since improving efficiency means improving the correspondence between market prices and real economic value, Kripke also appears to suggest that accounting standards should be reformed to reveal economic values more accurately.

At this point, Kripke has cast himself into an area of finance economics and the theory of information that is beset by paradox and confusion. How can the efficiency of the markets be improved if the research shows that the markets already are efficient? Kripke's answer is that "[a] strong case can be made for the uniformity on the basis—apart from theoretical correctness—of understandability, compatibility, and economy of use." Since the issue involved in the dispute over regulation is not whether, but how much uniformity is desirable, this response is a non-answer. I would respond instead that the efficient-market hypothesis, as confirmed by research, states not that the market makes no errors, but that its errors are randomly distributed. I would identify the objective of accounting as the reduction of the amount of this random error in market prices, and thus the improvement of the correspondence between actual market prices and the Pareto standard of efficiency. The modern literature on property rights has demon-

---

22 See, e.g., id. at 165.
23 Id. at 134-39.
24 Id. at 137-39 (quoting Berle, Modern Functions of the Corporate System, 62 COLUM. L. REV. 433, 445-47 (1962)).
25 Kripke at 139.
26 Id. at 164.
strated that in a world where transaction costs are not zero, the optimum assignment of rights and duties can increase social welfare.\textsuperscript{27} I could thus restate Kripke's argument in more cogent terms by asserting that the appropriate assignment of duties to accountants can increase social welfare.

Yet the finance literature fails to provide guidance. The efficient-market hypothesis contains an inherent paradox: if the market price already impounds the best information on value available,\textsuperscript{28} then how does it pay anyone to invest in acquiring that information? But if it doesn't pay anyone to invest in acquiring that information, then how is the information transmitted to the market so that the price is efficient?\textsuperscript{29} The literature on the theory of information has undertaken some initial and promising attempts to explore this paradox,\textsuperscript{30} and it is likely that ten years from now these processes will be better understood. Since Kripke has no implicit model of market efficiency, he has no guides as to how accounting can be more or less efficient. Kripke reports that he has sampled the economics of information and has learned little from it. "Frankly, I think that this discipline suffers because the authors do not know what they are talking about."\textsuperscript{31} A more accurate observation would be that although the authors know what they are talking about, the puzzles have yet to be solved.

Kripke does not confront those studies that present the most serious challenge to his approach, studies that show that accounting conventions do not affect market-price valuation of companies.\textsuperscript{32} For instance, Shyam Sunder has shown that the shift from LIFO to FIFO inventory accounting raises rather than lowers the market's evaluation of companies, even though it lowers accounting earnings.\textsuperscript{33} If the market is efficient either way, what difference do the accounting conventions make? Why is not accounting like

\begin{footnotesize}
\begin{itemize}
\item[27] See, e.g., R. Coase, The Problem of Social Cost, 3 J. L. & Econ. 1 (1960).
\item[28] See text and note at note 17 supra.
\item[29] See Kripke at 106.
\item[31] Kripke at 118.
\item[32] See, e.g., P. Foster, supra note 12, at 352-59.
\item[33] The increase in value is due to deferred taxation. See Sunder, Relationship Between Accounting Changes and Stock Prices: Problems of Measurement and Some Empirical Evidence, in EMPirical Research in Accounting: SELECTed Studies 27 (1973); Sunder, Stock Price and Risk Related to Accounting Changes in Inventory Valuation, 50 Accounting Rev. 305, 305 (1975).
\end{itemize}
\end{footnotesize}
language, with which it shares the important feature that its symbols must have shared meaning?

Both language and accounting conventions must change to adapt to new realities. We do not have a system for legally mandating the meaning of words, with fraud penalties imposed on those who use words in a nonofficial sense. This permits new usages to appear and compete in the communications marketplace. Kripke does not consider the possibility that the conservative bias of accounting has been strengthened by regulation, and that it will be still further strengthened by more activist SEC intervention. Nor does he explain how economically useful accounting conventions are to be developed and proven in a market where deviation from the prescribed norm is penalized. A regulatory solution would be to increase the range of options available to companies (not their accountants) in the selection of accounting principles. Kripke's emphasis on the value of uniformity keeps him from considering this approach. Kripke has no sense that the SEC's delegation of accounting standards to the accounting profession, which he repeatedly deplores, is one device for preserving adaptive flexibility in a system biased toward harmful rigidity.

Kripke argues for modification of accounting conventions in the same "let's decide on the right rule" spirit so common to modern advocates of legal reform; he devotes insufficient attention to the costs of the changes he proposes. Existing accounting conventions have generated large investments on both the producer side and the user side. Companies and their accountants have invested in personnel training and in systems to collect and retain the information in the form required. Users and their agents have invested time and resources in acquiring the skill to interpret the information thus provided. Any change in the conventions imposes costs on both the producer and the user, and thus carries a heavy burden of justification. New words are not lightly adopted in such an expensive language.

Consider, for instance, the subject of disclosure of earnings projections. One of Kripke's most effective rhetorical themes is his criticism of the SEC for suppressing disclosure of earnings projections. Such suppression provides an ideal opportunity for twitting the SEC, since it seems to cast the Commission in the role of suppressing, rather than disseminating information. But does that

---

34 See, e.g., Kripke at 150, 151, 153, 155.
35 See, e.g., id. at 147.
mean that the information contained in earnings projections never reaches the market? The finance literature strongly indicates that it does, either through the buy-and-sell decisions of management itself, or through intermediaries who learn of the projections orally from management or who reconstruct them from other data. If earnings projections appear in disclosure documents, the literature suggests that management and professional intermediaries would beat the user of the documentary information to the market. Even though the SEC's suppression of earnings projections places it in an unflattering perspective, there seems little to be gained by adding to the length and complexity of the disclosure document.

The intellectual thrust and power of Kripke's positions are undercut by a fundamental reverence for authorities, even when they conflict. He reports without rebuttal that "professors Gonedes and Dopuch assert that no structure of accounting is theoretically more warranted than an other," but argues that since "the FASB and the SEC believe otherwise . . . it is worthwhile to try to influence their views."36 This is a non sequitur of the first order. If there is no right case, then there are only two intellectually rigorous positions: either the SEC should leave its requirements intact so as to avoid the costs of change, or its should reduce its involvement in the prescribing of requirements. At one point Kripke appears to adopt the position that the SEC serves no useful function,37 but he abandons it throughout the rest of the book without explanation. Is that because the SEC and Congress believe otherwise?

36 Id. at 164.
37 Id. at 117-33.
Positing the contractarian conception of "justice" proposed by John Rawls, Professor Beitz has attempted to explore the moral obligations of people to assist weaker members of the world community—the disadvantaged of other states. This exploration has the strengths and weaknesses of a derivative work. It adopts the vocabulary and assumes the fundamental acceptability of Rawls's model, and then adds to the model a superstructure and modifications to make it applicable to the external as well as to the internal moral policies of states. Those persons to whom the Rawls model is unacceptable will find Beitz equally off the mark. Those to whom the Rawls model seems useful will have their horizons usefully broadened.

To agree with Beitz the reader must accept "justice" as a major aim of society and the concept of "justice" as not being directly related to the concept of law. In other words, despite the contractarian language, we are in the world of natural law, not of positive law—the world of Jeremy Bentham rather than John Austin. "Justice" in this conception does not relate to common law and statutes or, in the sphere of international law, to practices accepted as law and general principles of law accepted by pertinent national legal systems. Instead, for the purposes of this analysis, "justice" is the ideal global distribution of rights (including property rights) resulting from the acceptance and application of particular a priori principles.

Beitz and Rawls envision a group of "rational persons" meeting in an "original position" to decide upon a "social contract" that will reflect the principles of justice that the advantage of their po-

† Professor of International Law, Fletether School of Law and Diplomacy.

1 J. Rawls, A Theory of Justice (1971) [hereinafter cited without cross-reference as Rawls].

2 C. Beitz, Political Theory and International Relations (1979) [hereinafter cited without cross-reference as Beitz].

3 See, e.g., J. Bentham, An Introduction to the Principles of Morality and Legislation (1780-1789).

4 See, e.g., J. Austin, The Province of Jurisprudence Determined (1832).
sition permits them to discover. One condition of this "original position" is that a "veil of ignorance" prevents any of the participants from learning the identities of the persons who would gain or lose by any specific rule. Rawls asserts, and Beitz assumes, that certain fundamental "moral" rules would emerge from such a meeting. Chief among them is the principle that "all social primary goods—liberty and opportunity, income and wealth, and the bases of self-respect—are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favored."

Beitz concludes, not surprisingly, that this model could be quite useful for those who would act internationally to promote "justice." Some of his analyses do indeed contain insights of general applicability, such as his conclusion that to do justice one must focus on individuals as the ultimate recipients of goods rather than on states, because distributing advantages to the already-advantaged elites of unjust states does not work to the advantage of the least favored in any meaningful way. Other conclusions, however, such as his rather elusive declaration that "self-determination" is "just" for any group when it is "the only way for the oppressed group to secure conditions supportive of just institutions" seem less incisive.

As with all internally consistent systems, it is impossible to criticize Beitz's analysis except perhaps for peripheral inconsistencies. Such inconsistencies, however, would not in any case detract from its utility as a clarification of the contractarian-naturalist approach for those internationalists who find that approach a useful guide of moral policy. The better criticism must be directed toward the insularity of the approach itself.

I

Rawls and Beitz assume that a policy based on "justice" as they define it will be perceived as "just" by those whose perceptions matter to the policy-makers. This assumption underlies their preoccupation with distributive justice at the expense of other types of justice no less deserving of consideration. The fairness of

---

* See Beitz at 130; Rawls at 118-30.
* See Beitz at 130; Rawls at 136-37.
7 Beitz at 130 n.6 (quoting Rawls at 303).
8 See Beitz at 152-53.
9 Id. at 115.
an exchange as between the parties to it, the core of commutative justice, for example, is dependent upon the perceptions of the parties. Rawls and Beitz, however, concentrating solely on distributive elements of justice, must assume that the parties to the redistribution scheme that the authors propose share their evaluation of its commutative justice. Were this not so, then policymakers, pursuing a "just" policy with a warm glow of self-satisfaction, could be surprised to find their best efforts regarded as cultural imperialism, paternalism, or worse. Such dissent would make no difference to the moral judgment of the policy-maker himself, but it would certainly reduce his ability to pursue the "just" policy his moral sense dictates, and would necessarily raise doubts about the comprehensiveness of his ideal conception of "justice."

My point is not that the ideal is never attainable, or that the equal right of all societies to determine their own moral codes should lead us to reject the search for a moral guide either for ourselves or for a universal society; Beitz has properly rejected those arguments. My point is that particular actions that impact on other persons must be perceived by those other persons as "just," whether or not those recipients of action accept the entire system. Failure to include the objects of charity or the other party to a bargain in the equation by which the "justice" of the gift or bargain is measured violates principles of commutative justice.

This is more than a merely academic objection. As Beitz himself seems to acknowledge, the United Nations General Assembly Resolution on Permanent Sovereignty over Natural Resources focused primarily on an issue of commutative justice. The impetus for that resolution was the perceived inadequacy of compensation from multinational corporations and their sponsoring governments to less affluent governments for access to their natural resources, and the belief that such access had on occasion been granted improvidently or under "unjust" economic or political pressures. The concern that a transaction regarding natural resources be fairly negotiated and equitable is a commutative concern wholly distinct from the question whether those natural resources were justly distributed in the first instance. Many statesmen brought up in the

11 See, e.g., Beitz at 181.
12 Id. at 142 n.31.
Anglo-American and European legal traditions, as well as many raised in Islamic, Chinese, and other influential and sophisticated legal and moral traditions, do not regard a lack of distributive justice as the sole complaint against an allegedly unjust international moral order.14

Of course, the authors have provided a partial answer to this objection. Rawls's fundamental rule that permits only those unequal bargains that advantage the least favored16 includes a conception of commutative justice, although it requires a departure from commutative justice when, in the particular case, that departure is in the interest of distributive justice.16 But that is not a complete answer, since Rawls's formulation, and Beitz's use of it as a moral rule, are directed not toward individual bargains but toward legislative policy. Furthermore, part of the Rawls-Beitz elaboration of this rule posits each person having "an equal right to the most extensive total system of equal basic liberties [including, presumably, the liberty to enter into a disadvantageous contract] compatible with a similar system of liberty for all."17 When a jurisprudential model includes exceptions as large as its rules and leaves individual analysts free to come to any conclusion at all in particular cases, it is difficult to discern the model's utility as a guide to policy.

II

What is needed as a guide to enlightened policy is a different framework that includes conceptions of justice not arrived at by the application of a priori principles, but by the perception of rules accepted by losers as well as winners in real cases. That is the

14 This is not the place to delve further into the question, but it is notable that Iranian actions against American diplomats in Iran are rationalized by the Iranians involved in terms of retributive justice—as steps toward righting the eternal scales originally disturbed by allegedly unjust actions by the United States and the Shah of Iran. Rawls and Beitz barely address retributive justice. See Bzrztz at 169; RAWLS at 314-15.

16 See text and note at note 7 supra.

16 See, e.g., Bzrztz at 169.

17 Id. at 129 (quoting RAWLS at 302). A similar problem is posed in the Anglo-American law of contract; in some jurisdictions, at least, the common law has redressed some of the imbalance of form contracts between contracting parties of unequal bargaining power by expanding the conception of "unconscionability." See, e.g., Henningens v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960). A statutory solution along the same lines is set out in UCC section 2-302. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965), used the concept of unconscionability to create what looks like a special legal protection for the merely improvident.
genius of the Anglo-American common law and of the general system of international law so badly misunderstood by Beitz and, to our universal detriment, by our political leaders.

The extent of Beitz's misunderstanding is evident from his adoption of a segment of Rawls, which both authors contend to be based on sections of Brierly's *The Law of Nations*. Beitz seems to assert the existence of five basic moral principles from which all substantive international law flows: self-determination, nonintervention, the sanctity of treaty commitments, the right of self-defense, and limits to the direction of force in armed conflict. Yet these five concepts in fact are not *a priori* "principles" of the international legal order; they exist on widely different levels of generality and are used with greatly varying degrees of persuasiveness as justifications for conduct. Moreover, large areas of international law, including perhaps the bulk of rules regularly applied in practice, such as those of diplomatic immunity, do not derive from these so-called principles in any way. They derive instead from the needs of society rationalized as "just" by governments as the occasion demands through public statements and diplomatic correspondence, much as Anglo-American principles of tort law derive from the perceptions of lawyers arguing for "justice" before each other (and occasionally before judges) as the occasion demands.

This is not the place to explore the analogy in great detail, but once it is grasped that Anglo-American common law and even constitutional law are, despite the written American Constitution, fundamentally customary law systems in which reference to third-party adjudication is the exception rather than the rule, the glib assumption that lack of criminal-law-type enforcement techniques differentiates international law from domestic law must fail. Thus Beitz's finding of a key distinction between the international order and "domestic" orders—the lack of a reliable way of enforcing compliance with international redistributive policies—seems

---

18 *Beitz* at 134.
19 *Rawls* at 378-79.
21 More is required for meaningful discussion of "basic principles" than recitation of cliches. Regarding the principles of nonintervention and self-determination, see text at IV infra and text and note at note 40 infra.
22 *Beitz* at 154-55.
superficial indeed. If all he means is that there is no overt taxing authority in the international order to redistribute earnings and inheritances, he has chosen a very small issue, considering how ineffective taxing policies in most countries actually are in working any redistribution comparable to what Beitz implies is demanded by justice.

When political theorists begin to build jurisprudential distinctions on the supposed possibility of a thoroughgoing redistribution system in domestic society as contrasted with a supposed impossibility of creating such a system in international society, the error is even greater. The obstacle to effective redistribution of goods in both societies is the refusal of those having goods to agree to such a reform—indeed, to agree that such a reform would be "just"—and if their agreement could be obtained, there would be no greater obstacle to a redistribution of wealth in international society than there is in domestic societies. To the extent that Beitz uses the factor of coercive enforcement to distinguish his proposed international moral order from the existing international legal order, his contentions must be questioned for their accuracy as well as the "justice" of their goals.

III

The failure to recognize international law as a customary-law system dependent on the perceptions of its participants for its means of enforcement can also lead to misunderstanding regarding the legislative process of international law. Beitz at one point refers to the General Assembly Declaration on the Establishment of a New International Economic Order, but he later maintains that without "coercive global institutions," the redistribution policies he proposes could not be adequately enforced. Beitz and others appear to assume that because instruments such as the New International Economic Order Declaration lack coercive enforcement mechanisms to support them, they are ineffective as legislation. But they were never intended to be legislation; legislation as such is beyond the legal authority of the General Assembly. Those who expect such instruments to be respected as legislation are not only likely to be disappointed, but also reveal their confusion re-

---

24 See Beitz at 174.
25 See J. Brierly, supra note 20, at 110.
Regarding the purposes of such documents. These resolutions serve not as laws, but as exercises in persuasion aimed at encouraging legislation through the usual legislative mechanisms of a customary-law system. They are useful in part because the conviction of international actors that a particular international program is just helps to create the conviction of legal, as distinguished from political, compulsion that is a prerequisite for its binding force. In this case, the New International Economic Order Declaration seeks to create a conviction of legal force to underlie practices originally begun as a matter of grace. In asserting the necessity of a coercive regime to enforce international objectives, Beitz misunderstands the importance of the actors' perceptions presented by the very existence of such documents as the New International Economic Order Declaration.

IV

This loss of touch with commutative justice, misunderstanding of the international order, and confusion between the moral imperatives of "justice" and the legislative process of international law, are three distinct but interrelated examples of a fundamental misconception at the root of Beitz's work—that externally enforced *a priori* models of moral justice could become a persuasive force in the determination of international law. This basic misunderstanding, as well as the insularity of Beitz's outlook, is evident in such minor matters as his discussion of self-determination. Beitz deals with the problem of how to determine which groups are entitled to claim the right of self-determination by addressing elaborate—and irrelevant—constructs such as "nationality" and "ethnicity," and in the process ignores the writings of authors with some direct insight into the true dynamics of self-determination.

Two Eastern Nigerian scholars, for example, presumably inspired by the Biafra crisis, have written lucid essays on self-determination as the concept derives from the practice of states and convictions of law and "justice" evidenced by international correspondence and political needs. U.O. Umezurike presents an argumentative work, originally completed as a doctoral dissertation at Oxford, that illustrates the kind of data and logic that statesmen find convincing for purposes of an adversary confrontation. Chris

---

26 Beitz at 114-15 & 115 n.93.
27 U. Umezurike, Self-Determination in International Law (1972).
N. Okeke's more subtle analysis\textsuperscript{28} reaches the same conclusions, supporting self-determination as a "right" of any self-defined group. Okeke argues that the law requires states to treat as "belligerents" some groups not yet able to act as "governments" of states but sufficiently cohesive to establish a collective identity requiring international status. His basic viewpoint is sound and could be helpful in resolving the question of who is entitled to "self-determination" without recourse to the irrelevancies that trouble Beitz. Okeke's type of argument, supporting new conclusions that seem to be required by the impact of new facts on a traditional system, is totally lacking in Beitz's work. Statesmen who feel impelled to lead their states along the paths of the law are far more likely to be persuaded by such an argument than by the \textit{a priori} models of moral suasion used by Beitz.

V

Beitz's misunderstanding of the international legal order is most evident in his emphasis on enforcement as an essential element of law and his exaggeration of the legal effect of article 2(4) of the United Nations Charter,\textsuperscript{29} under which the members of the United Nations undertook in their international relations generally to refrain from the threat or use of force.\textsuperscript{30} Not only is it not self-evident that the realistic threat of external enforcement is a necessary ingredient to a legal order, but it is simply not true that the international legal order lacks a background threat of coercive enforcement or that article 2(4) in any significant way curtails the actual enforcement mechanisms of the international legal order.

A

Regarding the first point, there is no threat of external coercion enforcing judicial decisions limiting governmental power under the British constitutional system, or, for that matter, under

\textsuperscript{28} C. OKEKE, \textit{CONTROVERSIAL SUBJECTS OF CONTEMPORARY INTERNATIONAL LAW} (1974).

\textsuperscript{29} "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." \textit{U.N. CHARTER} art. 2, para. 4.

\textsuperscript{30} \textit{See Beitz} at 93. Beitz seems to regard article 2(4) as somehow enshrining self-determination as a "main principle of international law," \textit{id.}, and notes that the General Assembly repeatedly cites self-determination "as if it were a self-evident first principle," \textit{id.} at 94.
the American constitutional system. Yet we routinely acknowledge that it is their unwritten and written constitutions that enable us to characterize the governments of the United Kingdom and the United States as governments based on law. Furthermore, recourse to tribunals, even where theoretically possible in tort, contract, or property disputes, is only rarely considered in day-to-day practice by knowledgeable lawyers; the vast bulk of business and neighborly disputes is settled by negotiation in the light of the law with no party remotely contemplating appeal to any court.

Moreover, even in domestic legal systems and in international law the pressure for compliance comes, in the overwhelming number of situations, not from outside the actor but from within him. In domestic systems, extralegal social pressures, the internal pressure of conscience, the desire to seem righteous, or the mere apprehension of reciprocal behavior (not necessarily by those with capacity to retaliate in kind), suffices to assure that individuals generally comply with the law. Similarly in international affairs, the pressures from internal elites and their external friends (not necessarily those with official positions in foreign governments) provide a social pressure on prospective policy-makers that, coupled with deeply felt traditions of righteousness and theoretical apprehensions of reciprocity, serve to keep most governments generally law abiding. The United States did not invade Cuba in 1961 or 1962, although it had overwhelming military power in the Caribbean area and Soviet intervention was most unlikely either at the time of the Bay of Pigs or the Cuban Missile Crisis. The Soviet Union has not prevented American vessels from entering its claimed Northern Sea Route, but has prevented them from drilling core samples of the Soviet continental shelf and from using certain straits in the route for which the Soviet claim to a right to stop them was legally strong. Both the Soviet Union and the United States, when using force in pursuit of their respective national interests, have attempted to justify particular interventions in legal terms; the Soviet attempts to justify their occupation of Afghanistan are patently unconvincing, but the Soviet attempts to justify

---

31 It is true that the political-question doctrine might be viewed as resulting from the realization that the judiciary lacks the coercive power to enforce certain decisions against other branches of the federal government or the states, but the Supreme Court is relatively free to disregard the doctrine when it so chooses.

their occupation of Czechoslovakia bear an unfortunate resemblance to American explanations for our armed intervention in the Dominican Republic.\textsuperscript{33}

Undeniably, the enforcement of international law rests to a certain extent on political evaluations and pressures. Normally the law is observed, but occasionally it is not; when it is not, political enforcement mechanisms create countervailing pressures and other effects that diminish the advantage gained by the illegal act. Very rarely, an illegal act goes without protest or other reaction, in which case the party acting illegally "gets away with it." But is not the enforcement of municipal tort and criminal law influenced by political and discretionary factors as well? To argue that because the enforcement mechanisms of international law are political, there is no evidence that the law as such exists outside of political calculations, is to reduce municipal law as well as international law to mere politics. This political view of law may seem appealing to some analysts, but it is not a basis for distinguishing international law from domestic law.

B

Furthermore, international law has, in the United Nations Charter, the substance of an enforcement system closely analogous to even domestic criminal law in many respects. The proscription in article 2(4) of the threat or use of force\textsuperscript{34} cannot be fully understood without first examining the enforcement provisions of article 2(6) and Chapter VII\textsuperscript{35} of the Charter. Article 2(6) requires the Organization to "ensure that states which are not Members of the United Nations act in accordance with these Principles [the principles set out in article 2 of the Charter] so far as may be necessary for the maintenance of international peace and security." By signing the Charter, all 152 member-states of the Organization have consented to an enforcement system under which a Security Council of fifteen members has the authority, through article 39,\textsuperscript{36} to

\textsuperscript{33} See, e.g., T. Franck & E. Weissband, Word Politics 96-113 (1971) (branding the similarity as "The Echo Phenomenon"). Nor should the capacity of small powers to harass great powers in their own right be underestimated; American diplomats are being held hostage in Iran, patently illegally, as this is written.

\textsuperscript{34} See text and note at note 29 supra.

\textsuperscript{35} U.N. Charter arts. 39-51.

\textsuperscript{36} "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken . . . to maintain or restore international peace and security." Id.
decide on measures to be taken whenever they collectively perceive any threat to the peace. Under article 25, the members must carry out those decisions, and article 42 explicitly permits such decisions to incorporate the use of force. It would thus appear that article 2(4)'s prohibition of force does not impose such absolute constraints on the coercive power of the international legal order as Beitz seems to believe.

Of course, it is highly unlikely that the Organization itself would use force acting under either authority, article 2(6), applying to nonmembers, or Chapter VII, applying to members. Nevertheless, there have been instances in which some forcible action by the Organization as a whole has been considered and member states have been authorized to take something approaching enforcement action. Furthermore, it is difficult to condemn the use of political discretion in enforcement, and impossible to argue rationally that political discretion in the United Nations enforcement system deprives that system of the characteristics of a legal order. The use of political discretion in enforcement is a problem common to all coercive legal orders. The pardon of President Nixon, the failure to use the criminal justice system to probe the Kent State killings of 1970, and the plea bargain that saved Vice President Agnew from imprisonment in 1973, are clear American examples of the use, if not the abuse, of such discretion. Moreover, where effective enforcement of even the frankly coercive aspects of our domestic criminal justice system is impossible, as in many American cities, the system is still regarded as law. Adjustments are made by the subjects of the system, particularly in urban areas, through the formation of individual and collective defense arrangements parallel to but outside the formal enforcement mechanisms of the system. And whereas domestic legal systems look with disfavor on those extra-system safeguards of legally protected interests, and may even in some cases label them illegal, the international legal order...
seems more realistic. Through article 52, the United Nations Charter accepts a defense role for regional organizations, and article 51 permits action in collective self-defense as part of the enforcement machinery of the system itself.

The closest analogy to international law in domestic law relates to systems of constitutional, contract, tort, and property law, and the international legal order already contains an enforcement mechanism that cannot easily be distinguished from the enforcement mechanisms of those branches of domestic law. The conclusion drawn from the purported distinction between the domestic and international orders, that a coercive international moral order must be established since the present international legal order lacks effective means of enforcement, must therefore fall. Of course, in many ways the international legal order is different from domestic legal orders of the coercive sort, but generalities about "justice" in any way pertinent to international law do not, and from the very nature of international law cannot, flow from those differences.

In sum, Beitz, building on Rawls, has proposed a model of the international moral order that he distinguishes from the international legal order by use of a false analogy, and in its own terms seems to ignore the issues of commutative justice that many would regard as the essence of today's widely felt dissatisfaction with the international legal order.

---

39 Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations. 

Id. art. 52, para. 1.

40 "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security." Id. art 51.

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. Although not the first American law teacher to link legal theory with psychoanalysis—his predecessor in this respect was Jerome Frank—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. 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.

3 A. EHRENZWEIG, LAW: A PERSONAL VIEW (1977) [hereinafter cited without cross-reference as EHRENZWEIG].
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.10

The point may be a valid one, but the reference does not provide a helpful illustration; Cardozo's The Nature of the Judicial Process11 attempted a more sophisticated account of deciding tricky cases12 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"13 with the brusque

---

10 EHRENZWEIG at 76-77.
12 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 "[mly duty as a judge may be to objectify in law, not my own aspirations and convictions, but the aspirations and convictions and philosophies of the men and women of my time," id. at 173.
13 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.'" This may well be a valid criticism, but Searle argued that he was not guilty of this mistake, 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 and anarchism, 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.) 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." 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. 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), and that they thereby react to stimuli by reaching judgments that this or that is just; these are called "justnesses." Ehrenzweig regards law as a product of this sense or drive in human beings.

We next are presented with a concept of law based essentially on Kelsen's theory. 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." 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 I. 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
discussion 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.'" A brief discussion of the character of legal decisions follows; 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, and the book concludes with a survey of the "schools" of jurisprudence, 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 murderers), the controversies of legal theory (such as those surrounding the concept of justice 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.

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 76-91.
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.\textsuperscript{33} 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,"\textsuperscript{34} 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\textsuperscript{35} 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.\textsuperscript{36} 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"

\textsuperscript{33} See L. Wittgenstein, \textit{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).

\textsuperscript{34} Ehrenzweig at 144.

\textsuperscript{35} Id. at 20-21.

\textsuperscript{36} See, e.g., \textit{Psychoanalytic Jurisprudence}, \textit{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.