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## Editorial Forum

### JUSTICE, JUSTNESS AND REASON: A GLOSS

Abraham to the Holy One: *If Thou desirest the world to endure, there can be no absolute justice, while if Thou desirest absolute justice the world cannot endure, yet Thou wouldest hold the cord by both ends, desiring both the world and absolute justice. Unless Thou foregoest a little, the world cannot endure. Genesis, MIDRASH RABBAH 39.6 (Levi)*

In 1965 the *California Law Review* published the pioneering *Prolegomena to a Psychoanalysis of Law and Justice* by Rudolf Bienenfeld.<sup>1</sup> In the same year one of us pleaded for a common language in the Babylon of jurisprudence on the thesis that the age-old battle about the existence of a natural law based on justice is not only one of emotions but one of semantics.<sup>2</sup> An irrepressible sense of justice must fail to reconcile man's inherently inconsistent reactions and judgments of justness. We believe that this thesis bears decisively on a recent exchange in which Clarence Morris filed *A Dissent to Dr. Waelder's Theory of Justice*, and Waelder replied.<sup>3</sup>

If a discussion by two men of such rank concludes with Waelder, the psychoanalyst, accusing Morris, the legal philosopher, of misinterpreting his "motivation and attitude,"<sup>4</sup> two neophytes in both psychoanalysis and legal philosophy may have little to contribute. If they nonetheless ask for the floor, they do so out of their conviction that, to state it again, the issue is one of emotions and semantics rather than one of philosophy or analysis.

<sup>1</sup> 53 CALIF. L. REV. 957 (1965).

<sup>2</sup> Ehrenzweig, *Psychoanalytical Jurisprudence: A Common Language for Babylon*, 65 COLUM. L. REV. 1331 (1965).

<sup>3</sup> Waelder, *A Concept of Justice and the Quest for a Perfectly Just Society*, 115 U. PA. L. REV. 1 (1966); Morris, *A Dissent to Dr. Waelder's Theory of Justice*, 115 U. PA. L. REV. 12 (1966); Waelder, *A Reply to Professor Morris' Statement of Dissent*, 115 U. PA. L. REV. 17 (1966).

<sup>4</sup> Waelder, *A Reply to Professor Morris' Statement of Dissent*, 115 U. PA. L. REV. 17, 21 (1966). The authors have learned with regret of Dr. Waelder's recent death and wish to dedicate this modest contribution to his memory.

## I

To Waelder, even the demand for absolute justice is dangerous. Justice, he argues, is an elusive concept defying definition. The very history of legal philosophy charts its protean meaning. To the disciples of Aristotle, justice partook of the aristocratic by treating people according to their station. In later ages, justice concealed her preferential mien by blindfolding herself to favorites; to act justly was to treat all people as persons by providing them all with equal opportunity. More recently, justice has once again removed her blindfold to treat people according to their station; however, instead of favoring the privileged, she is now said to give preferential treatment—as a social handicap—to the underprivileged.

To illustrate: consider the case of shipwrecked passengers on a life-raft with limited provisions of water. "Aristocratic" justice would justify giving larger portions to the oldest or the strongest or the richest or the most gifted members of the party. "Blindfolded" justice would dictate dividing provisions equally among all passengers, regardless of age or strength or wealth or talent. And "social" justice would encourage distributing larger portions to the hungriest or youngest or weakest.

For this reason, it would appear . . . that an absolutely just order cannot exist, in fact cannot be devised; not only because people are morally imperfect—or sinful, if you like—but simply for the reason that there is no agreement as to what justice is and no likelihood of there ever being complete agreement. There will always be situations in which one man's justice is another man's outrage.<sup>5</sup>

In recognizing this, Waelder fears those who would champion any one mirage of justice as reality. The history of western civilization is an epitaph to those who at one time or another have claimed knowledge of absolute justice and the duty of attaining it, only to perish in a crusade of righteousness and cruelty.

The shipwrecked passengers who are forced to distribute their limited supply of water must base that distribution—whether to the strongest, to the weakest, or to all equally—not on abstract ideology, but on the concrete exigency of their present plight. Those who trumpet tunes of "Justice" can only transform the unhappy reality of conflict into a dangerous illusion of order—and a ruthless use of force.

Morris takes issue with Waelder's "complacency about injustice."<sup>6</sup> It may be true, he admits, that no one has defined absolute justice satisfactorily. It may also be true that man's imperfection will prevent him

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<sup>5</sup> Waelder, *A Concept of Justice and the Quest for a Perfectly Just Society*, 115 U. PA. L. REV. 1, 8 (1966).

<sup>6</sup> Morris, *A Dissent to Dr. Waelder's Theory of Justice*, 115 U. PA. L. REV. 12 (1966).

from ever attaining this ideal. But it is not true, insists Morris, that all justice is relative, that it changes like seasons and fashion. Everyone, for example, would condemn genocide and concentration camps. Two thousand years of western civilization have created a growing concern with humanity, a mounting intolerance of cruelty, and an increasing demand for justice. Consider, in that light, the elimination over time of capital punishment. "[T]he search for practical advances in justice will produce, in the long run, and bit by bit, a juster world."<sup>7</sup>

The controversy between Morris and Waelder—between those who proclaim and those who despair of the realization of justice—is an old one. Part of the issue is the emotional one between those who find peace in truth, however hopeless, and those who seek comfort in hope, however untrue—between the psychoanalyst's experience and the philosopher's faith. But there is another element in this controversy as to which, we believe, semantic clarification could reduce and perhaps eliminate disagreement. The difficulty is in getting Waelder and Morris to confront one another. Confrontation, however, presupposes a common language. Nothing but fury flows from answering the language of fact with the language of idea, from responding to the language of "positive law" with that of "natural law."

## II

Both authors invoke history to substantiate their arguments: Waelder uses it to chronicle the changing content of justice; Morris relies on the annals of capital punishment to predict the coming of a juster world. Historical facts and trends, however, have limited value as a common language. First, the isolation of such "facts" and the description of such "trends" are subjective processes that cannot be verified; second, history itself is a story only partially told. To deduce from it conclusions for the future of humanity is like defining Aeschylus's theory of justice after seeing only two plays of the *Oresteia*. History's message, like that of the stage, must wait until the curtain has fallen.

More, we suggest, can be expected from an inquiry into the psychological origin of man's standards of justice and into some of the psychological functions of that concept. Man has a verifiable sense of justice as he has a sense of hunger and a sense of sex. Men share these senses in the same manner in which they share senses of audial and visual pleasure. But just as they may disagree on what they enjoy hearing and seeing, they disagree on what they find "just." As each of us may, at different times, like hearing and seeing different things, each of us may

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<sup>7</sup> *Id.* at 16.

at different times find different things just. Even more important, each of us may—at the same time—have conflicting reactions to sights and sounds and human deeds. *Man's sense of justice is one, "justnesses" are many.* These justnesses, then, which correspond to different layers in a subconscious makeup that we have acquired since earliest childhood, are inherently inconsistent. And, because they continue to coexist in each of us, they produce lasting and unavoidable conflict. It is this necessary conflict of justnesses that has caused some to ignore or deny the unity of our sense of justice and others to ignore or deny the multitude of justnesses.

Bienenfeld has shown that even children in earliest infancy exhibit numerous reactions to and judgments on "justness."<sup>8</sup> The child's "just" yearning for full equality in the family necessarily conflicts with his "just" demand for inequalities based on his needs or, alternatively, on his deserts; his "just" demand for the preservation of what he presently possesses must conflict with his "just" desire to share what others possess; his "just" demand for freedom conflicts with his "just" preference for those close to him. These various "just" judgments and demands pursue man through his entire life, contradicting one another at every step.

Waelder, we saw, disregarded this coexistence in his description of justnesses as historical phases. He was right, however, in doubting that these coexisting justnesses can be consolidated into one measure of absolute justice. They cannot be amalgamated—this side of the heaven of divine justice—any more than the individual judgments of our senses of sight, hearing, touch, taste, and smell can be fused into a single standard of absolute "goodness" or "beauty."

With this in mind, the emotional controversy between Morris and Waelder is revealed as a battle of semantics. They both condemn child labor and debtor's prisons. Morris maintains, on the one hand, that "powerful men can no longer claim a moral or legal right"<sup>9</sup> to child labor and debtor's prison because "men have generally agreed that [these] injustices should be repressed."<sup>10</sup> Waelder, on the other hand, suggests that such agreements are the mere result of "conflicts of interest [to be] adjusted with charity."<sup>11</sup> While we assume with Morris that man has a single and verifiable sense of justice, we are also convinced with Waelder that man's competing judgments on justnesses

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<sup>8</sup> See R. BIENENFELD, *REDISCOVERY OF JUSTICE* 27-29 (1947); Bienenfeld, *Prolegomena to a Psychoanalysis of Justice*, 53 CALIF. L. REV. 957 (1965).

<sup>9</sup> Morris, *supra* note 6, at 13.

<sup>10</sup> *Id.*

<sup>11</sup> Waelder, *supra* note 5, at 8.

must remain irreconcilable and will, therefore, in different individuals, at different times, and under different conditions, combine in different ways. Once they overcome emotional resistance to the distinction between man's *sense of justice* and his *judgments on justness*, Morris and Waelder, positivists and "naturalists," psychoanalysts and philosophers will have begun to speak a common language.

Waelder should not have conceded that "justice" condemns child labor and debtor's prisons. Even today, the justness of feeding the family keeps children at work in rural communities. Even today the justness of protecting deceived lenders may keep debtors in prison. And in an unhappy future, in the aftermath of an atomic bomb with a regression from automation to human resources, both child labor and debtor's prison may again become "just." Dr. Waelder has properly limited the unjustness of genocide by claiming only that it "cannot be defended in terms of Western values or, for that matter, in terms of the values of any of the great historical civilizations."<sup>12</sup> Indeed, for Hitler, the purity of the German race required the killing of all Jews. Nasser vowed to "drive them into the sea" for the greater glory of his nation and his faith. However perverted their justnesses, Hitler and Nasser, too, reacted from their sense of justice without violating an absolute standard of justice. In that light, let us humbly compare the justness of the judgment at Nuremberg with the justness of Bertrand Russell's message from Stockholm.

### III

Must we resign ourselves to a stalemate? Can there never be progress? Man has advanced technically from his first use of the wheel to his invention of the computer; can he not also advance in cultural achievement? Are not the institutions of democratic government, the abolition of slavery, and the creation of the United Nations landmarks in mankind's march to an ever greater mastery of himself and his world? Well, perhaps, if we succeed in avoiding another Auschwitz, another Hiroshima, and a future battle of the megatons. But if there is to be such progress through mastery, it will not be because we are nearing an ever "juster" world. For irreconcilable justnesses will continue to compete in the jungle that is our sense of justice.

Our way is not that of despair. We must, it is true, acquiesce in the existence of competing "justnesses" and in the impossibility of reconciliation. Nonetheless, although no single justness intrinsically dominates the others to produce absolute justice, we may and must, when faced with an individual decision, by *reason* prefer one justness over the others.

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<sup>12</sup> Waelder, *supra* note 4, at 17.

Once we have recognized and tried to repress irrational urges of aggression, hatred and love, and chosen an ultimate aim, reason may help us in our preference. Once our shipwrecked passengers choose—or their leaders decree—the aim of saving the greatest possible number, reason, not justice, will have them distribute their supplies to those most likely to survive. If their ultimate aim, rather, is to minimize suffering, preference by reason, not justice, will favor the weak and ill. Or if “due process” prevails as the guiding value, distribution by reason, not justice, will follow the majority vote.

In a brilliant paper,<sup>13</sup> published subsequent to his exchange with Clarence Morris, Dr. Waelder discussed our problem in the context of the justnesses of civil liberty, on the one hand, and society’s protection against crime on the other. He concluded that, “only if we recognize the existence of a genuine antimony which makes a fully satisfactory solution impossible, can the situation be fruitfully discussed and an arrangement be sought which would minimize human damage without eliminating it.”<sup>14</sup> There may be progress after all, Dr. Waelder—but such progress, Dr. Morris, will not be through justice. We must cease grandly to wave the flag to the phantom of justice. We need not limply lower it in the battle of justnesses. Let us humbly hold it at half-mast and call on reason to help us to live with that battle in resignation and hope, as we live with war with sickness and with death.

*Albert A. Ehrenzweig*

Walter Perry Johnson Professor of Law

*Peter Kay Westen*

Editor-in-Chief

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<sup>13</sup> Waelder, *Conflicts of Values and Moral Dilemmas*, 38 *PA. B.A.Q.* 410 (1967).

<sup>14</sup> *Id.* at 421-22.