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Seow Hon Tan: Justice as Friendship: A Theory of Law

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Book Review

Ethan J Leib*

Seow Hon Tan

Justice as Friendship: A Theory of Law

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It was Aristotle who first tried to bring friendship to the center of political and legal theory. But although Aristotle was our greatest theorist of the different types of friendship, he basically left the ideal type of friendship in the background when it came to thinking about politics and the law. Montaigne took up Aristotle's ideal friendship of equals and the good – but had a hard time finding a way to render it relevant to thinking about the state; it was Aristotle's flexibility in thinking about the friendship of unequals that helped him see how friendship could be relevant to political and legal theory, a sphere of life central to our identities but not at the center of our circles of intimacy. Seow Hon Tan's erudite monograph makes an effort to convince us that thinking about the best kinds of friendship – a universal experience or aspiration, she claims – can be a foundation for justifying and improving the law. Others have tried to use a model of friendship to think about some niche areas in the law: family law's boundaries or relational contract theory, for example. And some have sought to make friendship more relevant to public policy design. But no one has tried as ambitiously as she does in this book to ground law itself upon a model of "justice as friendship."

To execute on its impressive ambitions, the book begins its breathtaking work by seeking to highlight difficulties in most positivist, liberal, and procedural theories of law. In quick succession, the author rejects Hart, Rawls, Dworkin, Habermas, and Michelman. In different ways, they are all found to be insufficiently normative and insufficiently attentive to the ways extra-legal morality has a substantive effect on the law. More, all fail to justify law and its coercive force because they too often ask of law that it be neutral among substantive visions of the good and that it prioritize the right over the good. She insists that this ask is as misguided as it is naïve.

Having concisely rejected the leading lights of political and legal theory in her first 50 pages, Dr. Tan then initiates the reader into the core of her constructive project, which is to invite us to reflect on our experiences of or aspirations for our best friendships. Because she is certain her reader will connect with this invitation, she is able to develop a new heuristic for thinking about social and political justice that draws upon a real and ready-to-hand human experience. Notwithstanding Dr. Tan's occasional denial that she means for her theory to be a kind of thought experiment for moral and legal reasoning (93), it is clear that she wants her readers to undertake the exercise of imagining the norms of friendship because they will reveal themselves to be more determinate and relatable than the ones produced by competitor heuristics like Rawls' "veil of ignorance" or Habermas's "ideal speech situation." She argues that the "reflective equilibrium" or "overlapping consensus" (19) produced by meditating on friendship (or the "Idea" of friendship in Kant's rendering (68)) commits us to three principles central to substantive justice: reciprocity, recognizing the intrinsic moral worth of individuals (45, 89); respect for the legitimate expectations produced by relational norms (89, 95-96); and the

Golden Rule (72, 100-03). These are the foundation of what the author calls “justice as friendship” (JAF).

Whether one needs a “higher law” of JAF (133) to derive what is basically a natural law theory that takes its point of departure from the near-universal Golden Rule – do unto others as you yourself want to be treated – could be disputed. But Dr. Tan’s argument at least gives us an experiential basis for building an account of law that requires it to be humane and empathetic to the needs of others. As she suggests, friendship becomes a kind of “moral tutor” (72) to help us see the best of what law can do and how to make it better. Although secular readers may find too much theological and biblical analysis in some of the bedrock here (xiii-xiv, 53, 57, 60, 83, 95, 102, 112), there is much to reward the patient scholar, who beholds Dr. Tan’s efforts to translate some of this tutoring into more specific lessons for public and private law.

The private law lessons for contract and tort are the most developed at the end of the book in her final two chapters. They reveal Dr. Tan’s *bona fides* as a serious lawyer who has labored to show how JAF is not just an abstract theory but is also capable of doctrinal elaboration, filling gaps in other accounts of private law. In these chapters, one can feel the powerful influence of Duncan Kennedy’s work in “critical legal studies.” For Kennedy, private law is a battleground of competing and contradictory commitments to individualism and altruism; there can be no conciliation or grand theory that explains all of doctrine in private law because it comes from two very different places, both of which will almost surely always be with us. This kind of indeterminacy about our life in the law looms over Dr. Tan’s theory of law – but she thinks JAF might help “mediate” between individualism and altruism (179), enabling us know when which value should gain the upper hand in a dispute. If we ask ourselves “what would friends do?,” we might find a way to figure out better what we owe each other not only in moral life but also in law.

There is ultimately some tension within the volume about whether JAF is truly a justification or ground for law itself – or a more interstitial heuristic to solve some thorny legal problems where we have competing instincts. It seems more persuasive as the latter, ultimately, as it is probably true that the book’s method of drawing upon a deeply felt experience or aspiration has resonance to solve under-determined legal problems, even if one isn’t a natural law adherent (68, 75, 123-25). But getting from the problem-solving approach to a comprehensive account of the ground for any coercive force of the state’s law is challenging. There are hints both to the more ambitious agenda and also to some reliance on more conventional deliberative and democratic justifications for law’s legitimacy (125). There is an acknowledgement on several pages about the kind of despotism of virtue or the crowding out of intrinsic motivation that could be effectuated by hewing too closely to an ethic of friendship in our laws (88, 113-14, 123). Yet there is also an effort to claim that JAF is not just a theory of adjudication for hard cases but is also a higher law that all legislation is supposed to be keeping in view (91). How that can be in light of the coordinating function of most of our laws – many of which aim to give us the freedom of remaining *strangers* without special norms of partiality – is not always clear.

Still, one could imagine a middle-of-the-road “accommodationist” position under which laws should aim to minimize interference with our roles as friends or potential friends (93), even if they shouldn’t necessarily always be in the business of enforcing friendship’s special demands. Although Dr. Tan probably prefers a more ambitious role for friendship in law’s justification and development, there are likely some good reasons even Aristotle didn’t push it this far – and that

Montaigne, in his celebration of the best kind of friendship, also saw a more modest role for friendship in politics and law.

About the reviewer:

Ethan J Leib is the John D Calamari Distinguished Professor of Law at Fordham Law School. His book on friendship and the law was published by Oxford University Press as *Friend v. Friend: The Transformation of Friendship – and What the Law Has To Do with It*.