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Psychoanalysis and Jurisprudence^{*}

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Psychoanalysis endeavors to provide a systematic theory of human behavior. Law, both as a body of substantive decisions and as a process for decisionmaking, has been created by man to regulate the behavior of man. Psychoanalysis seeks to understand the workings of the mind. Law is mind-of-man-made. There is in law, as psychoanalysis teaches that there is in individual man, a rich residue which each generation preserves from the past, modifies for the present, and leaves for the future. An initial, though tentative assumption that one discipline is relevant to the other seems therefore warranted. The congruence of their concern for man, his mind, his behavior, and his environment may justify this assertion of mutual relevance. But it does nothing to demarcate the potential use and potential limits of psychoanalysis as an aid to understanding the meaning and function of law. This essay explores some of the contributions psychoanalytic theory may make to jurisprudence and, perhaps more significantly, seeks to locate and ex-

^{*} This essay is an elaboration and substantive revision of my paper entitled *Psychoanalysis and Law—A Subject for Study?* read at Hampstead Child Therapy Clinic, London (1965) and of a paper entitled *On the Relevance of Psychoanalytic Theory to Law*, presented at the Annual Meeting of the American Psychoanalytic Association in Detroit, May 1967 and the joint meeting of the Boston and Western New England Institutes of Psychoanalysis in Stockbridge, Mass., October 1967. It is an outgrowth of my work with Jay Katz and Alan Dershowitz and with my students over the years in a seminar entitled Psychoanalysis and Law. See J. KATZ, J. GOLDSTEIN & A. DERSHOWITZ, *PSYCHOANALYSIS, PSYCHIATRY AND LAW* (1967). I am especially grateful to Friedrich Kessler for the continuous commentary he has generously given to me on the many drafts of this paper, particularly on the section concerned with exemptions for conscientious objectors.

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An essay on substantially the same subject matter but with a somewhat different emphasis is simultaneously being published in *23 PSYCHOANALYTIC STUDY OF THE CHILD* (1968).

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amine the boundaries which mark the potential area of any such contribution.

Though law is stereotypically perceived as being concerned with an external image of man, and psychoanalysis with his internal image, each discipline is in fact concerned with both faces of man. While legal training, practice, and research concentrate primarily on man's external world, the substance and process of law depend heavily on assumptions about man's internal world. While psychoanalytic training, practice and research focus primarily on an internal view of man, the theory and therapy of psychoanalysis have always had an ear and an eye to outer reality—and increasingly so with the development of genetic and adaptive vantage points in metapsychology.¹ Both disciplines then must cross common intellectual territory. Lawyers, for example, may ask of law in terms of its social control function what psychoanalysts might ask of man in terms of his adaptive capacities: "To what extent are internal mechanisms of control reflected in and affected by the development of external controls?"

Yet the integration of psychoanalysis and jurisprudence is not close at hand, and the scant beginning has occurred only at a relatively superficial descriptive level. It may be that psychoanalysis as theory is too young and incomplete. It may be that psychoanalysis as a data-gathering technique is inadequate to provide a basis for developing a general psychology of man. Or it may be that the psychoanalytic theory of man as an individual is too complex to permit productive explorations of what may be even more complex—groups of human beings interacting in the legal process. This state of intellectual affairs may, on the other hand, be attributable not to psychoanalysis, but to legal theory. It may be that problems in jurisprudence are inadequately defined or excessively bound by linguistic analysis and functionless

1. Freud defined metapsychology as the study of the assumptions upon which the system of psychoanalytic theory is based. S. FREUD, *Metapsychological Supplement to the Theory of Dreams*, in 14 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 222 n.1 (J. Strachey ed. 1957) [hereinafter cited S.E.].

These assumptions are typed according to five points of view—the dynamic, the topographic, the economic, the genetic, and the adaptive. Briefly and possibly too cryptically, these viewpoints require that the psychoanalytic explanation of any psychological phenomenon include propositions concerning: (1) the psychological forces (dynamic), (2) the psychological energy (economic), and (3) the psychological configurations (structural) involved in the phenomenon, as well as propositions concerning: (4) the psychological origin and development (genetic) of the phenomenon, and (5) its relationship to the environment (adaptive). Rapaport and Gill, *The Points of View and Assumptions of Metapsychology*, in THE COLLECTED PAPERS OF DAVID RAPAPORT 795-811 (M. Gill ed. 1967).

"Even though in various psychoanalytic propositions one or another metapsychological point of view or assumption may be dominant, all psychoanalytic propositions involve all metapsychological points of view." *Id.* 797.

questions. For these or for other reasons, a mere exchange of maps charting the terrain for each discipline may reveal nothing but a no-man's land between—a no-man's land in the sense both of an area separating hostile forces, and of an area for which no one claims responsibility. Thus, in searching for a common ground between psychoanalysis and jurisprudence, the assumption of mutual relevance must constantly be challenged. The no-man's land may be mined with frustration, or even raked by cross-fire. But hopefully the possible ambit of, as well as the limits to, the contribution psychoanalytic theory may make to law will begin to emerge.

I.

Before exploring the ways psychoanalysis may enrich the law, the variegated nature of each must be heeded. Neither the concept of psychoanalysis nor the concept of law is unitary. In theory, in practice, and in research, psychoanalysis like law is both a set of concepts and a process of interaction. Psychoanalysis is a theory of man as an individual, how he may have become what he is, and how he may change or be changed. Psychoanalysis is also a mode of therapy, a means pre-eminently of helping an individual understand what he is and why, and thereby liberating him to accept the strength and limits of his potential and perhaps to change himself. Finally, psychoanalysis is a method of investigation, a research tool to further theory and to improve therapy.²

Law, too, appears in many garbs. It is a part of man's reality, a mechanism for molding and reinforcing controls over himself in relation to others, an instrument that assigns to man-made authority, the state, the power to decide why, under what circumstances, to what extent, and by what means man as a private person is to be restrained or encouraged in the making and implementing of his decisions as an individual. Law is, in turn, a device to control the state—or, strictly speaking, the individuals who act as decisionmakers for the state—in the exercise of its power over man. The underlying question always confronting the decisionmakers in the exercise of their discretion is whether, how and to what extent the state should not or should be

2. "Psychoanalysis is the name (1) of a procedure for the investigation of mental processes which are almost inaccessible in any other way, (2) of a method (based upon that investigation) for the treatment of neurotic disorders, and (3) of a collection of psychological information obtained along these lines, which is gradually being accumulated into a new scientific discipline." S. FREUD, *Psycho-analysis*, in 18 S.E. 235.

authorized to intervene in what would otherwise be the private ordering of a man's life.

Law is at the same time the guardian of a powerful substantive heritage, as well as a generator and regenerator of fundamental societal values. It is a concrete and continuous process for meeting both man's need for stability by providing authority, rule, and precedent, and his need for flexibility by providing for each authority a counter-authority, for each rule a counter-rule and for each precedent a counter-precedent. In deciding between available alternatives and among oft-conflicting goals, law ideally allows, encourages, and secures an environment conducive to man's growth and development. Of course the degree of stability, flexibility, growth, and development achieved through law varies over time, both as to subject matter and as to points of decision. The process is and must be a complicated one that changes as man, his knowledge, or the conditions which surround him change. To the extent law provides a proper mix of continuity and flexibility, it provides the basis for a stable, vital and viable society capable of keeping its revolutions peaceful.³ Thus the study of law focuses, or should focus, upon the ways in which this process meets or fails to meet these needs.

In 1881, when a young medical student named Sigmund Freud was conducting research on the nerve cells of crayfish,⁴ Oliver Wendell Holmes, Jr., spoke of the law as psychoanalysis has come to speak of man. He observed:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. . . . [T]he most difficult labor will be to understand the combination of the two into new products at every stage. . . . [T]he degree to which it is able to work out desired results depend[s] very much upon its past.

3. "No lawyer worthy of the name can ever be either truly a conservative or truly a radical: at one and the same time we must somehow devote ourselves to the preservation of tradition, which we do not greatly respect, and to the promotion of change, in which we do not greatly believe." Gilmore, *The Truth About Harvard and Yale*, YALE L. REP., Winter 1964, at 9.

4. 1 E. JONES, *THE LIFE AND WORK OF SIGMUND FREUD* 48 (1953).

The rational study of law is still to a large extent the study of history. . . . It is a part of the rational study, because it is the first step toward an enlightened scepticism. . . . When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength.⁵

The student of law, then, must always ask, "What is or should be the purpose of the decision?" and "What must I learn to make a decision compatible with that purpose?" Since the law is concerned with every aspect of human activity,⁶ and since its decisions are not bound by logic, the work and the findings of many disciplines are not only appropriate but may be essential sources of data. This does not mean that a lawyer ought indiscriminately to collect data, but rather that he must first determine what he seeks to do and then pose for himself a series of questions which should be tested by the underlying question: "In what way would any possible answer to the question posed be relevant to that which the lawyer (on behalf of society, the state, an individual client, himself, or any combination of these) seeks to accomplish?"⁷ The form these questions will take may vary with the ambit of discretion of the decisionmaker and the point of decision in the legal process. Thus, to draw on questions framed with cautious expectations for the Katz, Goldstein, and Dershowitz text, the decisionmaker creating or applying law might ask:

To what extent does, can, or should the State take into account the unconscious in the promulgation, invocation and administration of its law?

Should the unconscious be taken as a characteristic common to all human activity, and thus deemed of no special significance to decisions in law?⁸

5. Holmes, *The Place of History in Understanding Law*, in *THE LIFE OF THE LAW* 3 (J. Honnold ed. 1964). Interestingly, in *Analysis Terminable and Interminable* Freud writes, "All that has once lived clings tenaciously to life. Sometimes we are inclined to doubt whether the dragons of primaeval times are really extinct." 23 S.E. 229.

6. The law, as a subject for study, includes any problem for decision which may confront any agency of the state, as well as any decisions which explicitly, implicitly, or by default place certain areas of human activity outside the ambit of official concern or regulation.

7. This question of functional analysis, obvious once posed, has been overlooked, for example, in the years of fruitless debate which persists in search of a formula for an insanity defense to criminal responsibility. See Goldstein & Katz, *Abolish The "Insanity Defense"—Why Not?* 72 YALE L.J. 853 (1963).

8. J. KATZ, J. GOLDSTEIN, & A. DERSHOWITZ, *PSYCHOANALYSIS, PSYCHIATRY AND LAW* 51 (1967) [hereinafter cited as KATZ, GOLDSTEIN & DERSHOWITZ].

With regard to a particular problem, criminal responsibility, the question might be put this way: What is the function, purpose, and relevance of the mental elements of intent (*mens rea*) and voluntariness which are requisite to the definition of most major criminal offences? Should the law, for example, authorize different official responses for (a) the indi-

The student of the law, in addition to examining questions relevant to the decisionmaker's task, might inquire more broadly into the nature and purposes of the law:

Are there forces in man interacting within him and among men which require the creation of some external authority to administer man in his day-to-day relations with himself and others?

Does law develop out of a recognition, express or implied, that id out of control would destroy us as individuals and as a society?

Does law rest on the assumption that man has both an ego and a superego, which require nutriment for the control of id?

Does law, though a part of reality, develop as do ego and superego, out of a continuous interaction with id and reality?⁹

Do exceptions to legal proscriptions in such forms as defenses, excuses, and justifications serve to preserve the autonomy of the ego from environmental pressures which ultimately might reduce the autonomy of the ego from the id?¹⁰

The temptation is strong to attempt a single, all-explanatory response to these questions. Thus, in the idiom of psychoanalysis, law might be discussed as a secondary process phenomenon, as a function and product of the ego enhancing its control over id impulses. It could be perceived as a generally non-violent external means for regulating aggression by mouth as well as by hand and arm. These organs, as psychoanalysts have noted, may function as instruments for the discharge of aggressive energy.¹¹ But while psychoanalysis invoked in this fashion supplies new words to describe the loud voice, the heavy hand, and the long arm of the law, it does not necessarily furnish new insights about law. Long before the law had a psychoanalytic window, it was viewed as an adversary process, as a substitute of trial by words for trial by combat. Indeed, Freud in an early writing attributes to an unnamed Englishman the observation that "the man who first flung a word of abuse at his enemy instead of a spear was the founder of civilization."¹²

vidual whose "conscious intent" differs from his "unconscious intent," and (b) the individual whose "conscious and unconscious intent" coincide—assuming these concepts can be given meaning? If official responses should differ, how should and can the difference be manifested? Or does the law make a theoretically valid point, from a psychoanalytic point of view, when it creates an evidentiary rule that "intent" of the accused can be determined from his overt conduct since it is to be assumed that "man intends the natural consequences of his acts"?

9. *Id.* 5, 87.

10. This question is added by the author.

11. "[A]ggression . . . has a specific relation to certain organs, e.g., to the mouth, to the hands, or the arms, but these organs do not appear as sources of stimulation; as far as aggression is concerned, they function as instruments of discharge." Hartmann, Kris, & Loewenstein, *Notes on the Theory of Aggression*, *PSYCHOLOGICAL ISSUES*, vol. 4, no. 2, monograph 14, 1964, at 56, 85.

12. S. FREUD, *On the Psychical Mechanism of Hysterical Phenomena*, § S.E. 36.

The vividness and the richness of this prepsychoanalytic remark should not, however, obscure the need for a systematic theory which can contribute to a greater and more detailed understanding of the meaning of justice for man who is, at one and the same time, "law-making," "law-abiding," and "law-breaking."

Thus, the search must be not for jargon-laden formulas which merely cast aged platitudes into specious scientific terms, but for focused insights into particular areas or aspects of the law. In doing this, it is important to locate the limits of psychoanalytic theory in understanding the dynamics of law as a product of, stimulator of, and regulator for human behavior. Marking the limits will at the same time delineate the area of potential contribution.

II.

Law cannot find in psychoanalysis, or for that matter in any science, the moral, political, or social values upon which to base or evaluate its decisions. Psychoanalytic theory cannot provide guides to the "good" or the "bad." Yet in appraising decisions designed to serve the "good" and undermine the "bad," psychoanalysis may provide insights which suggest a modification of the means by which society, through law, seeks to fulfill its goals.

Nothing in psychoanalytic theory, for example, can supply the moral values which should inform the law's decision in the legislative debate about whether and why abortion should or should not be singled out from other surgical procedures for special social controls. Nor can it provide the values to guide a judge or legislator deciding the validity of a document, signed by an adult in the prime of life, requiring that his life be extinguished at a specified age so as to avoid an "unpleasant" prolongation through newly devised medical procedures.¹³ Nor can it provide the ethical or moral standards to regulate through law the con-

13. Toupees, false teeth, spectacles, cosmetics, girdles and arch supports, are accepted means of compensating for time's unkind arrows. Recently, corneal transplants, plastic arteries, and whole transplanted kidneys, even artificial hearts and kidneys, have received much attention and will no doubt solve some acute medical problems. However, the picture of a patched and pasted bicentenarian being transported by pneumatic tube from heart-lung machine to artificial kidney to artificial liver, perhaps feebly twitching his servo-musculature or enjoying direct 3-dimensional video tape transmission to his occipital cortex (because of blindness) is not presently an attractive alternative to an extended sleep and I doubt that man will move with much satisfaction in that direction.

Bernard L. Strehler, untitled essay presented to the Conference on Aging sponsored by the Harvard Program on Technology and Society on Feb. 18, 1967.

duct of experiments on human beings or animals. The psychoanalyst, as scientist, cannot say what conduct, if any, should be considered a ground for divorce, punishment, or excuse from punishment. Nor can he pronounce who should be held or relieved of responsibility, or what the function of a finding of responsibility should be. He cannot, to take a specific example, provide the law with guides for deciding whether homosexual acts between consenting adults should be subject to criminal sanction. The insidious temptation to take Freud's *Three Essays on the Theory of Sexuality* as an affirmative vote for genitality and thus as a justification for official social condemnation of what he neutrally labels "a perversion"—"a pathological disorder"—must be resisted.¹⁴ As Szasz so dramatically argues, the failure of the decision-maker in the legal process to recognize that psychoanalysis is not a source of moral values, as well as the failure of the psychoanalyst to make clear to himself and others when he is speaking as scientist and when merely as citizen, has contributed to much of the confusion, chaos, and injustice which surrounds the administration of our mental health laws.¹⁵ Less prominently, though not necessarily less significantly, these blurred identities have cast doubt on the work of some psychoanalysts and psychiatrists writing about problems in law. Without advising their readers or possibly themselves, they abandon their value-neutral scientific perspective and present their personal value preferences camouflaged in the language of psychoanalysis.¹⁶ Freud, the scientist, makes this point in his essay on *Moral Responsibility for the Content of Dreams* when he writes, albeit somewhat sarcastically, "The physician will leave it to the jurist to construct for social purposes a responsibility that is artificially limited to the metapsychological ego."¹⁷

Psychoanalysis may, however, help the legal decisionmaker by forcing into view conflicts between existing rules and preferred values which he may not see or may not wish to acknowledge. Thus, while a judge will not turn to psychoanalysis to determine whether the trial process should require "belief beyond a reasonable doubt" in order to find a person guilty of a criminal offense, he may, given the value

14. S. FREUD, *Three Essays on the Theory of Sexuality*, 7 S.E. 135, 160-62, 208-12.

15. Statement of Thomas Szasz, *Hearings Before the Subcommittee on Constitutional Rights of the Mentally Ill of the Senate Committee on the Judiciary*, 87th Cong., 1st Sess., pt. 1, 251-72 (1961); T. SZASZ, *THE MYTH OF MENTAL ILLNESS* (1961). See also Waelder, *Psychiatry and the Problem of Criminal Responsibility*, 101 U. PA. L. REV. 378 (1952); Goldstein & Katz, *Abolish the "Insanity Defense"—Why Not?* 72 YALE L.J. 853, 870 (1963).

16. See generally KATZ, GOLDSTEIN & DERSHOWITZ, ch. II (1967).

17. S. Freud, *Some Additional Notes on Dream-Interpretation as a Whole*, 19 S.E. 132, 134.

preference for minimizing the chance of error which supports the reasonable doubt standard, draw on insights from psychoanalysis in determining whether the standard has been met in a particular case.

One judge, for example, has re-examined the evidentiary rule which infers guilt from the act of flight. Courts and legal commentators have assumed, on the basis of what they call "common" experience, (1) that a person who flees shortly after a criminal act is committed or after being accused of a crime does so because he feels some guilt about that act, and (2) that one who feels some guilt concerning an act is guilty of committing that act. The first principle has been roundly criticized, and some decisions have acknowledged that a man may flee for reasons other than a sense of guilt. The second rule, however, has generally been accepted uncritically.¹⁸

In 1963 the Court of Appeals for the District of Columbia decided to modify the rule in response to Freud's warning to lawyers in 1906 that

[Y]ou may be led astray by a neurotic who, although he is innocent, reacts as though he were guilty, because a lurking sense of guilt that already exists in him seizes upon the accusation made in the particular instance . . . It can be that he has in fact not committed the particular crime with which you have charged him but that he has committed one of which you know nothing and of which you are not accusing him. He therefore quite truthfully denies being guilty of the one misdeed, while at the same time betraying his sense of guilt on account of the other."¹⁹

Accordingly, without altering the function or purpose of the rule, the appellate court changed its content to recognize a more complex image of man as a guilt-feeling animal:

When evidence of flight has been introduced into a case, . . . the trial court should . . . explain to the jury . . . that flight does not necessarily reflect feelings of guilt, and that feelings of guilt, which are present in many innocent people, do not necessarily reflect actual guilt.²⁰

The implications of psychoanalytic insights about the relationship between feeling guilty (or, for that matter, not feeling guilty) and

18. See 1 J. WIGMORE, EVIDENCE § 173 (3d ed. 1940).

19. S. FREUD, *Psychoanalysis and the Establishment of Facts in Legal Proceedings*, 9 S.E. 103, 113. The court relied on a slightly different translation from S. FREUD, *Psycho-Analysis and the Ascertaining of Truth in Courts of Law*, 2 COLLECTED PAPERS 13, 23 (1956).

20. *Miller v. United States*, 320 F.2d 767, 773 (D.C. Cir. 1963).

actually being guilty in a legal sense are still to be explored in important areas of the law—confessions, guilty pleas, and particularly admissions of guilt by juveniles in delinquency proceedings.

What Hartmann said of the relationship between psychoanalysis as therapy and an individual patient's moral code may be said as well of the relationship of psychoanalysis as theory to the legal process. Psychoanalysis cannot provide "the ultimate ends for the moral aspects of personal, social or political behavior. But . . . contributions toward clarification and organization, in the framework of a given system of valuations, or more specifically in the framework of given moral codes . . . can be gained simply and directly from psychoanalytic knowledge."²¹ Thus, despite this limitation which psychoanalysis shares with all science, a very significant sector of potential and actual application to law emerges.

A quite different, but related limitation can be discerned in the manner in which the court applied its psychoanalytic knowledge about feelings of guilt to the evidentiary rule on flight. The appellate court limited its use of such knowledge to the revision of a legal assumption

21. H. HARTMANN, *PSYCHOANALYSIS AND MORAL VALUES* 100-01 (1960).

[P]schoanalysis as a science cannot be expected to provide us with ultimate moral aims, or general moral imperatives; these cannot be deduced from its empirical findings. This is not to say that we cannot make any statements on such aims, . . . We can form a scientific opinion on what strivings they will, or will not, gratify, on their synergisms and antagonisms with other mental tendencies. But beyond this the "superiority" of one "Weltanschauung" over another one cannot be proved analytically. On the other hand, taking this for granted, psychoanalytic insight can often be used as a superior tool; it can contribute in the domain of means-end relationships toward the realization of personal, social or cultural values. In addition, psychoanalytic understanding can powerfully contribute to the more peripheral elaborations of the basic imperatives in the moral codes.

Id. 60. See also Moore, *Psychoanalysis, Man and Values*, in *PSYCHOANALYSIS IN CONTEMPORARY AMERICAN CULTURE* 40-53 (H. Ruitenbeek ed. 1964); and Zinberg, *The Problem of Values in Teaching Psychoanalytic Psychiatry*, 31 *BULL. OF THE MENNINGER CLINIC* 236 (1967):

The psychoanalyst's belief that an extensive understanding of a patient's psychological state and its relationship to *all* of his life experience is good could be said to be the basis of psychoanalysis itself as a therapeutic technique The second value to consider—the belief that we as analysts cannot and should not judge or, in many instances, direct our patients—contains the essence of the stereotyped view of psychoanalysts. In the deepest sense, judgment occurs in every human interaction, and in this total sense, the analyst does judge his patients. But he does not judge them by conventional moral standards: he "judges" and values the patient's understanding of himself and his taking responsibility for his own choices and decisions. We direct patients, too, but so differently from the usual medical doctor that the whole concept is changed. When we say, "Tell us your thoughts and fantasies," we give directions similar to the request for a medical history of symptoms. But after the history is obtained and a diagnosis is made, the medical doctor can prescribe penicillin or some other drug. If the patient refuses to cooperate in watching his regimen, someone else can help. The analyst cannot prescribe understanding. The patient must accept a different sort of responsibility which leads to a value which emphasizes the patient's freedom from direction.

Id. 239, 242.

about the nature of man. It did not concern itself with the meaning of flight as a psychic act for the particular defendant in the particular case. Nor did it advise the trial judge or jury to engage in such curb-stone psychoanalysis—that is, the interpretation of an individual's conduct or feelings without access to the one source of evidence which distinguishes psychoanalysis from all other disciplines: the individual's associations observed over a very substantial period of time in a very special setting.²²

By contrast, it is a cute, tempting, and potentially destructive abuse of “psychoanalysis” for a teacher examining the decision in a famous attempted murder case to suggest that the defendant was revealing his sexual impotence when he shouted, “It won't fire. It won't fire,” as he held an unloaded pistol at his estranged wife's head and pulled the trigger.²³ Such remarks are of no value in examining the function and purpose of the law of attempted murder, and are of no relevance or reliability in assessing the criminal responsibility of the particular defendant. That Freud was aware of the danger of such misuse of psychoanalytic insights is made implicit by his observations concerning a homicide case in which expert testimony on the universality of the Oedipus complex and of the death wishes sons hold for fathers was used to indict and convict one Philip Halsmann of murdering his

22. [M]etapsychological assessments of the patient's personalities are carried out after treatment, not before it, and are based on a specific type of observation which is inseparable from the analytic setting. It proceeds in the atmosphere of close intimacy which is established between the persons of the observer and observed, *i.e.*, between analyst and patient. It is carried out with the knowledge and agreement of the patient and relies on his active cooperation, on the sincerity of his verbal communications, on following, together with him, the subtle variations of his behaviour within the analytic session, his affects whether verbalised or dramatised, his accounts of dreams and phantasies, his resistances, and the re-living of past experience transferred onto and centered around the person of the analyst. Served by the method of free association as the tool of exploration, the analyst of adults restricts this observation intentionally to the subjective material given by the patient himself about himself.

A. Freud, *Diagnostic Skills and Their Growth in Psychoanalysis*, in J. GOLDSTEIN & J. KATZ, *THE FAMILY AND THE LAW* 959 (1965). “[T]he analyst is tied to his own laborious and slow method of observation and sees no more without it than the bacteriologist, deprived of his microscope, sees of bacilli with his naked eye.” A. FREUD, *NORMALITY AND PATHOLOGY IN CHILDHOOD* 12 (1965). See also L. STONE, *THE PSYCHOANALYTIC SITUATION* (1961).

23. See *State v. Damms*, 9 Wis. 2d 183, 186, 100 N.W.2d 592, 594 (1960). E. JONES 3 *THE LIFE AND WORK OF SIGMUND FREUD* 88 (1953):

In November [1922] the son of an old servant of Freud's shot his father, though not fatally, while the latter was in the act of raping the youth's half-sister. Freud did not know the youth personally, but his humanitarian nature was always moved by sympathy with juvenile delinquents. So, paying all the legal expenses himself, he engaged Dr. Valentin Teirich, the leading authority in that sphere and founder of an institution for the reform of judicial procedures in such cases, to defend the youth. He also wrote a memorandum saying that any attempt to seek for deeper motives would only obscure the plain facts.

father, despite the absence of objective proof that he had in fact killed his father. Freud warned:

Precisely because it is always present, the Oedipus complex is not suited to provide a decision on the question of guilt. The situation envisaged in a well-known anecdote might easily be brought about. There was a burglary. A man who had a jemmy in his possession was found guilty of the crime. After the verdict had been given and he had been asked if he had anything to say, he begged to be sentenced for adultery at the same time—since he was carrying the tool for that on him as well.²⁴

It may seem paradoxical that, while psychoanalysis is a theory based on individual personal introspective data, an important limit on the contribution of psychoanalysis to law is the general inapplicability of its concepts to specific participants without infinitely more information about them than is usually available. Yet, since law must concern itself primarily with men in groups and the resolution of group problems or the group resolution of external conflicts, the proper application of psychoanalysis as a general theory of human behavior can only be assured if this very significant limitation is acknowledged. This unequivocal condemnation of casual psychoanalytic speculations about the mental lives of particular individuals is re-inforced by two important findings of psychoanalysis which must be made explicit.

A.

The first finding is that what appears to be similar behavior, whether perceived as a symptom of illness or a sign of health, may for different people be a reflection of and response to a wide range of different and even opposite unconscious forces. In like fashion different conduct on the part of different individuals may be a consequence of similar underlying psychic factors.²⁵

Law, depending on its purposes, may in appropriately different ways take into account this psychoanalytic finding. For example, in construing the congressional exemption for conscientious objectors from com-

24. S. FREUD, *The Expert Opinion in the Halsmann Case*, 21 S.E. 251, 252.

25. "[E]xperience has shown that details of behavior that in a cross-sectional analysis appear indistinguishable may clearly be differentiated by genetic investigation. Conversely, details of behavior that in a cross-sectional analysis appear different and are actually opposite may have grown out of the same root, and may justify the same prognosis." Hartmann & Kris, *The Genetic Approach in Psychoanalysis*, *PSYCHOLOGICAL ISSUES*, vol. 4, no. 2, monograph 14, 1964, at 7, 15. See also A. FREUD, *NORMALITY AND PATHOLOGY IN CHILDHOOD* 108-47 (1965).

batant service the Supreme Court has wisely not required draft boards to distinguish between those whose pacifism might be, for example, a response to the death wish or the wish to live, or a reaction "to the wish to attack" or "to the fear of being attacked"²⁶ or "against impulses of the anal-sadistic phase,"²⁷ and those for whom pacifism might have become a relatively independent structure through what Hartmann calls the "phenomenon of change of function."²⁸ Though such distinctions between individual pacifists may be of use for diagnostic and therapeutic purposes,²⁹ they cannot assist Congress, the courts, or administrators in finding a meaningful compromise to the conflicts which may arise under any mass conscription system between two basic values which the statutory exemption is designed to safeguard: the conscience of the individual and the security of the state.³⁰ By failing to consider the unconscious origins of the individual draftee's pacifism in determining who is entitled to conscientious objector status, the law does not deny the existence of unconscious forces; rather it recognizes that the universality of such internal forces makes them (like the adulterer's tool) irrelevant to the evaluation of the individual's claim, which is a claim not to therapy, but to exemption.

26. Hartmann & Kris, *The Genetic Approach in Psychoanalysis*, PSYCHOLOGICAL ISSUES, vol. 4, no. 2, monograph 14, 1964, at 7, 15.

27. Rapaport, *The Autonomy of the Ego*, in THE COLLECTED PAPERS OF DAVID RAPAPORT 357, 364 (M. Gill ed. 1967).

28. See pp. 1067-68 *infra*.

29. Except for analytic purposes unconscious forces and processes cannot be separated from external processes—from external reality. Though external and internal (psychic) reality are inextricably linked, the gap between them, as we have noted concerning feelings of guilt, may be substantial.

[T]he object of psychoanalytic observation is, according to Freud, not the individual in splendid isolation: it is a part of a world. Psychoanalysis does not claim to explain human behavior only as a result of drives and fantasies; human behavior is directed toward a world of men and things.

Hartmann & Kris, *The Genetic Approach in Psychoanalysis*, PSYCHOLOGICAL ISSUES, vol. 4, no. 2, monograph 14, 1964, at 7, 23.

30. See *United States v. Seeger*, 380 U.S. 163 (1965). Mr. Justice Clark, explaining for the Court "the rationale behind the long recognition of conscientious objection to war accorded by Congress," *id.* at 169-70, cited with approval Stone, *The Conscientious Objector*, 21 COLUM. U.Q. 253, 259 (1919):

[B]oth morals and sound policy require that the state should not violate the conscience of the individual. All our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state. So deep in its significance and vital, indeed, is it to the integrity of man's moral and spiritual nature that nothing short of the self-preservation of the state should warrant its violation; and it may well be questioned whether the state which preserves its life by a settled policy of violation of the conscience of the individual will not in fact ultimately lose it by the process.

On these and other values in issue, see NATIONAL ADVISORY COMMISSION ON SELECTIVE SERVICE, REPORT: IN PURSUIT OF EQUITY: WHO SERVES WHEN NOT ALL SERVE? III (1967):

The Commission sought to find the means of securing the manpower needed for our national security in a manner as consistent as possible with human dignity, individual liberty, fairness to all citizens, and the other principles and traditions of a democratic and free society.

However, psychoanalysis may have a contribution to make to the decision as to which categories of objectors should receive exemptions if the congressional purpose that the state should not violate the individual's conscience is to be realized. The 1864 and 1917 draft laws exempted members of any recognized religious sect for which opposition to war was an article of faith. In the draft laws of 1940 and 1948, Congress abandoned this relatively formalistic and impersonal standard, as both too broad and too narrow.³¹ Instead, it adopted a more flexible, personal, and ambiguous standard which exempts any person "who by means of religious training and belief is conscientiously opposed to war in any form" and which further provides that "[r]eligious training and belief . . . means an individual's belief in a relation to a Supreme Being . . . , but does not include essentially political, sociological, or philosophical views or a merely personal moral code."³² In 1965 the Supreme Court, in *United States v. Seeger*,³³ interpreted the congressional mandate for local draft boards by adopting a test which without disturbing the legislative language, and despite disclaimers to the contrary, significantly changes its meaning. The Court said:

We recognize the difficulties that have always faced the trier of fact in these cases. . . . While the applicant's words may differ, the test is simple of application. It is essentially an objective one, namely, does the claimed belief occupy the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption?

Moreover, it must be remembered that in resolving these exemption problems one deals with the beliefs of different individuals who will articulate them in a multitude of ways. In such an intensely personal area, of course, the claim of the registrant that his belief is an essential part of a religious faith must be given great weight. . . . The validity of what he believes cannot be questioned. Some theologians, and indeed some examiners, might be tempted to question the existence of the registrant's "Supreme Being" or the truth of his concepts. But these are inquiries foreclosed to Government Local boards and courts in this sense are not free to reject beliefs because they consider them "incomprehensible." Their task is to decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious.

But we hasten to emphasize that while the "truth" of a belief is not open to question, there remains the significant question

31. See *United States v. Seeger*, 380 U.S. 163, 171-73 (1965).

32. Selective Service Act of 1948, ch. 625, § 6(j), 62 Stat. 612.

33. 380 U.S. 163 (1965).

whether it is “truly held.” This is the threshold question of sincerity which must be resolved in every case. It is, of course, a question of fact—a prime consideration to the validity of every claim for exemption as a conscientious objector. The Act provides a comprehensive scheme for assisting the Appeals Board in making this determination, placing at their service the facilities of the Department of Justice, including the Federal Bureau of Investigation and hearing examiners.³⁴

In construing the congressional standard so as virtually to obliterate the distinction between “religious,” “philosophic,” and a “merely personal moral” pacifism, and thereby avoiding difficult constitutional questions, the Court seems to have recognized the impossibility of making meaningful distinctions among the consciences of applicants who so intellectualize their instinctual lives that their pacifism rings sincere, appears “truly held,” by objective standards.³⁵ Draft boards are not to question the external or internal origins of the belief but only the intensity or sincerity with which the belief is held in order thereby to determine whether the “claimed belief [occupies] the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption.”³⁶ The Court further declared: “[T]he statute does not distinguish between externally and internally derived beliefs.”³⁷ From a psychoanalytic vantage point, the Court seems intuitively to have assumed in establishing its criteria for decision that the pacifism of some conscientious objectors (and it is not necessary to know which individual ones) may be explained not only in terms of some reaction formation, but also in terms of the “phenomenon of change of function,” which Hartmann describes:

[A] behavior form which originated in a certain realm of life may, in the course of development, appear in an entirely different realm and role. An attitude which arose originally in the service of defense against an instinctual drive may, in the course of time, become an independent structure, in which case the instinctual drive merely triggers this automatized apparatus . . . , but, as long as the automatization is not controverted, does not determine the details of its action. Such an apparatus may, as a relatively independent structure, come to serve other functions (adaptation, synthesis, etc.); it may also—and this is genetically of even broader

34. *Id.* at 183-85.

35. *Id.* at 184. By “objective standards” the Court means in the light of evidence obtained by traditional, not psychoanalytic, data gathering techniques, such as the FBI.

36. *Id.* at 176.

37. *Id.* at 186.

significance—through a change of function turn from a means into a goal in its own right.³⁸

The Supreme Court's reasoning in *Seeger* thus rests on assumptions about the nature of man which are in harmony with Hartmann's concept of change of function. The Court delineates an area of legal decision for which data concerning the unconscious forces at work in any individual claimant to the process are of no special relevance. Unconscious forces and processes are taken as a given, a common denominator of all human conduct, and prime focus is placed for purposes of the legislative and judicial design on conscious reflections of the conscience—on beliefs whether perceived as externally or internally derived.

Thus Congress broadened the concept of a "religious belief," and the Supreme Court stretched the legislative definition beyond recognition. Both seemed to have perceived, without the aid of specifically psychoanalytic insights, that a conscientious objection to all wars may be so highly personal that meaningful distinctions, for purposes of exemption, cannot be made either internally in terms of unconscious origins or externally on the basis of an upbringing within or without one of the traditional Peace Sects. But the momentum of the reasoning with which the Court has broadened the exemption for men who object to all war should lead it, or more appropriately Congress,³⁹ to acknowledge the claims of men who oppose only a specific war. For the same insights which reveal that neither internal nor external factors allow meaningful distinctions within the category of general pacifism show that neither can such distinctions be drawn between the

38. H. HARTMANN, *EGO PSYCHOLOGY AND THE PROBLEM OF ADAPTATION* 25-26 (1958). Genetically, some of the pertinent questions of structural psychology can be viewed from the angle of what, borrowing a term from biology, I called "change of function." It is part of what I now call "secondary autonomy." It means relative functional independence, despite genetic continuity, and invites marking off more clearly the functional aspect from the genetic one. This relative independence may be more or less complete. In some cases it is practically irreversible under the conditions of "normal," everyday behavior. But we know from experience that even in many of these instances reversibility can be observed under special conditions, as in dreams, in neuroses and psychoses, and in analysis.

H. HARTMANN, *ESSAYS ON EGO PSYCHOLOGY* 142, 152 (1964).

39. Following *Seeger*, Congress eliminated the supreme being clause in the Military Selective Service Act of 1967, 50 U.S.C. APP. § 456(j) (1964). Congressional intent (if there be such a thing) is not clear. The House committee report indicates that the clause was removed primarily to prevent the "substantial increase in the number of unjustified appeals for exemption" which the Director of Selective Service foresaw under *Seeger* and at the same time not to jeopardize legitimate claims of conscientious objection. H.R. REP. NO. 267, 90th Cong., 1st Sess. 1490 (1967). The Senate conferees did not think the action overruled *Seeger*, and some members of the House indicated they voted for the revision because they thought it broadened the ambit of exemption. 113 CONG. REC. 8054 (daily ed. June 12, 1967); *id.* at 6245, 6266 (daily ed. May 25, 1967).

two forms of objection. Just as a conscientious objection may spring from more than one source, so may a conscientiously held objection take more than one form or be articulated, in the words of the Court, "in a multitude of ways."⁴⁰ The same external and internal realities, with all their multiplicity and interrelationships, may lead one individual to conscientiously oppose all war and another individual to conscientiously oppose only a specific war.⁴¹

Unless the Court were to ignore its own emphasis in *Seeger* upon "the diverse manners in which beliefs, equally paramount in the lives of their possessors, may be articulated,"⁴² it could only with difficulty fail to conclude that the beliefs of both the general and specific objector may assume the same compelling importance in the conscience of each and should therefore receive equal recognition for purposes of exemption. The question of the sincerity with which either belief is held remains "a prime consideration to the validity of every claim";⁴³ but there is no reason that this factual inquiry is more difficult for those professing a specific objection to war than for those professing a general objection. Against these considerations, of course, decision-makers must balance, as they do in considering any exemption, the need for an armed force and the interest of individuals who serve that others too will do their share in the messy business of war. It may well be said of the Court's decision, as the Court says of the fundamental questions it confronts, "that in no field of human endeavor has the tool of language proved so inadequate. . . ."⁴⁴ But a fuller knowledge of what psychoanalytic theory can contribute to the study of man and the origins and manifestations of his actions should force Congress and the Court to recognize that the distinction between a general and a specific opposition to war is meaningless by any criterion of respect for individual integrity and freedom of conscience.⁴⁵

On the other hand, for other purposes and in other settings, the

40. *United States v. Seeger*, 380 U.S. 163, 184 (1965).

41. In similar fashion, of course, other individuals may come to support all wars, or one specific war; still others may not really care in any conscientious sense or be ambivalent about wars in general, or about a specific war.

42. 380 U.S. at 183.

43. *Id.* at 185. See generally Clancy & Weiss, *The Conscientious Objector Exemption: Problems in Conceptual Clarity and Constitutional Considerations*, 17 *ME. L. REV.* 143 (1965).

44. 380 U.S. at 174.

45. The Court in noting "the elusive nature of the inquiry" and in acknowledging that "we are not without certain guidelines" cited with approval the language of Chief Justice Hughes in *United States v. Macintosh*, 283 U.S. 605, 634 (1931): "[P]utting aside dogmas with their particular conceptions of deity, freedom of conscience itself implies respect for an innate conviction of paramount duty." 380 U.S. at 176.

same general finding that the similar conduct of different individuals does not necessarily reflect an identical interplay of psychic forces also suggests a limitation on the utility of categorizing individuals by reference to their overt behavior. In this regard, the admonition of Anna Freud should be of particular interest to decisionmakers and students of law, particularly those concerned with criminal law, the law of juvenile delinquency, and the administration of mental health laws:

[T]he descriptive nature of many of the current diagnostic categories runs counter to the essence of psychoanalytic thinking, since it emphasizes the identity of or difference between manifest symptomatology while neglecting those of the underlying . . . factors. It is true that in this manner a classification . . . seems orderly and comprehensive to the superficial glance. . . . Whenever the analyst accepts diagnostic thinking on this level, he is inevitably led into confusion in assessment and subsequently to erroneous therapeutic inferences.⁴⁶

Of course, this warning does not lead to the conclusion that all legislatively defined categories—such as thief, murderer, rapist, conspirator, juvenile delinquent, or committable mentally-ill person—are inappropriate for all purposes.⁴⁷ It may be a useful and workable legislative strategy to create such categories as a basis for sorting out those who are entitled to one legal process or another or who may or may not be considered appropriate objects of community anger. But it is a limitation of the strategy that such categories cannot serve as a basis for determining who should be provided with what therapeutic regime or assigned what institutional setting for rehabilitative purposes. It is confusing, then, to find psychoanalytic studies and research programs which rest on the assumption that “juvenile delinquent” is a useful diagnostic category. On the other hand, it is encouraging, for example, to find emphasized in the report of the President’s Commission on Law Enforcement a premise consistent with the essence of psychoanalytic thinking: “No single formula, no single theory, no single generalization can explain the vast range of behavior called crime.”⁴⁸ To the extent the law is concerned with therapeutic goals in respond-

46. A. FREUD, *NORMALITY AND PATHOLOGY IN CHILDHOOD* 110-11 (1965).

47. See Letter from W. L. Pious, M.D., to the author, October 9, 1967: “While I agree with your and Anna Freud’s position concerning diagnostic classifications and other attempts at descriptive categorization, I would also like to warn against too hasty snubbing of such categorizations. The fact remains that human behavior does lend itself to classification and that the basis for this relative uniformity of behavior patterns, arising from multiple and often unrelated motivations, remains a riddle.”

48. THE PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *REPORT: THE CHALLENGE OF CRIME IN A FREE SOCIETY* v (1967).

ing to the "criminal" or the "juvenile delinquent" or the "mentally ill," it becomes of enormous value to heed Anna Freud's warning, not only in directing research but also in framing procedures and institutional responses. Thus, the psychoanalytic generalization that one cannot generalize about the nature of an individual or the causes of his behavior on the basis of his overt conduct makes a significant contribution to law by forcing into view the limitations of conduct-based categories. Here the psychoanalytic contribution can press the law in theory and in practice to focus more sharply on those decisions for which the individual must be decategorized and perceived as the highly complex human being that he is.⁴⁹

B.

The second general finding is but another face of the first, and seems obvious once stated. It is that the meaning of an actual experience in giving direction to a person's life rests on countless internal and external variables. Not only may what appears to be a similar event have different significance for the same person at different stages in his development, but it may also have different implications for different people at similar stages of development.⁵⁰ Implicit in this observation

49. See e.g., Professor George H. Dession's Final Draft of the Code of Correction For Puerto Rico, 71 YALE L.J. 1050, 1070 (1962), ch. I, sec. 3(4), *Individualization of Correction*:

Trends away from indiscriminate retribution and toward the individualization of correction are embraced in this Code to facilitate more selective and efficient measures of discipline (general and particular) and of prevention, where these are indicated, and to reduce unnecessary deprivations of all persons. Such individualization is deemed desirable by reason of the experience that acts or omissions falling within any given category of situations subject to correction may be committed by a variety of personalities ranging from the healthy to the destructive, that adequate and economical protection of the community rests on an informal discrimination of such persons, and that the morale and responsiveness of persons subject to correction to education or therapy will be jeopardized by lack of such discrimination as by any other arbitrariness in classification or the shaping of measures.

50. Hartmann & Kris, *The Genetic Approach in Psychoanalysis*, PSYCHOLOGICAL ISSUES vol. 4, no. 2, monograph 14, 1964, at 22 (1964). See also S. FREUD, *A Case of Homosexuality in a Woman*, 18 S.E. 147, 167:

So long as we trace the development from its final outcome backwards, the chain of events appears continuous, and we feel we have gained an insight which is completely satisfactory or even exhaustive. But if we proceed the reverse way, if we start from the premises inferred from the analysis and try to follow these up to the final result, then we no longer get the impression of an inevitable sequence of events which could not have been otherwise determined. We notice at once that there might have been another result, and that we might have been just as well able to understand and explain the latter. The synthesis is thus not so satisfactory as the analysis; in other words, from a knowledge of the premises we could not have foretold the nature of the result.

See generally A. Freud, *Child Observation of Prediction and Development*, 13 THE PSYCHOANALYTIC STUDY OF THE CHILD 92 (1958); A. FREUD, *NORMALITY AND PATHOLOGY IN*

is an insight of substantial significance to anyone seeking to predict or to evaluate the consequences of decisions in law. It points to a limitation, frequently obscured in assumptions, on empirical studies about the impact or likely impact of a statute, judgment, or administrative ruling. Unless such decisions are perceived as external events in the lives of many people—events which have different meanings for different people—statistical evidence of success may include, without recognizing a distinction, a number of people upon whom the decision had no impact and, even more significant, may include in the failure column a number upon whom the decision had not just no impact, but an impact contrary to that sought. For example, in evaluating a decision to impose a criminal sanction against a specific offender for purposes both of satisfying the punitive demands of the community and of deterring others from engaging in the offensive conduct, the student of law must recognize that the decision may satisfy some demands for vengeance, exacerbate some, and have no effect at all on others; and may for some restrain, for some provoke, or for some have no impact on the urge to engage in the prohibited conduct. Recognition of the multiple consequences of every law-created event makes comprehensible the never-ending search for multiple resolutions of what is perceived to be a single problem in law and the resulting need to find an ensemble of official and unofficial responses which on balance come closest to achieving the social control sought.

It would seem that the value of this psychoanalytic insight has often been lost in the stock criticism of psychoanalysis that whatever the facts, psychoanalysts can always use or fashion them to fit the theory.⁵¹ What is lost to the critic engaged in the fruitless exercise of establishing that psychoanalysis is not a science and what is often lost to the unwary psychoanalyst is the finding that a symptom common to different people may reflect a variety of different dynamic explanations or causes and that a single "traumatic" event may reverberate in different ways in different people. The need for reemphasizing this finding is pointedly illustrated by the Bullitt-Freud book on Wilson⁵² and the Zelig volume misleadingly subtitled *An Analysis of Whittaker Cham-*

CHILDHOOD (1965); Waelder, *Psychoanalysis, Scientific Method and Philosophy*, 10 J. OF THE AM. PSYCHOANALYTIC ASS'N 617 (1962).

51. See S. FREUD, *Constructions in Analysis*, 23 S.E. 257.

52. S. FREUD & W. BULLITT, THOMAS WOODROW WILSON: TWENTY-EIGHTH PRESIDENT OF THE UNITED STATES—A PSYCHOLOGICAL STUDY (1967). For fascinating and conflicting views of Freud's contribution to the book, compare P. ROAZEN, FREUD: POLITICAL AND SOCIAL THOUGHT 300-22 (1968) with Erikson, *The Strange Case of Freud, Bullitt, and Woodrow Wilson*, THE NEW YORK REVIEW OF BOOKS, Feb. 9, 1967, at 3-5.

bers and Alger Hiss.⁵³ This is not to say that a highly skilled and artistic psychoanalytic observer with access to reliable manifest and secondary data about a particular individual cannot make perceptive and probably valid guesses about unconscious content.⁵⁴ But in both of these books, one of which is based on a major legal confrontation, the data were neither sufficient nor of sufficient reliability to justify the specific assertions made about specific individuals concerning specific events. As Hartmann and Kris have frequently warned: "This is the reason why a superficial collection of anamnestic data concerning an individual's childhood is frequently misleading."⁵⁵

Psychoanalytic theory makes manifest the complexity of man and the unreliability of conduct-based or event-based categorizations as sources for predicting conduct and for understanding the intrapsychic meaning of the conduct or event for any specific individual. That insight rests upon generalizations about the intrapsychic processes at work in all individuals—about the dynamic interaction of id, ego, and super-ego, about the functions of the ego and mechanisms of defense, about the pleasure principle and the reality principle, etc. These generalizations, particularly those drawn from the genetic points of vantage in metapsychology concerning the process of growth and development from birth to adulthood hold the most immediate promise of applicability to problems for decision in law.⁵⁶ These problems concern the process and substance of the disposition of children in a variety of legal settings, from the initial legal assignment of each child to his natural parents to child custody decisions ordered or acquiesced in by the state in proceedings labelled, for example, "neglecting parent," "juvenile delinquency," "adoption," "foster care," "separation," and "divorce."

To the extent that legal decisions regarding child custody are to comply with an official policy preference for the *child's best interest*, psychoanalytic theory and research findings have a contribution to make to both substantive guides and procedures for decision. Anna Freud's work on growth and development, for example, demonstrates

53. M. ZELIGS, *FRIENDSHIP AND FRATRICIDE* (1967).

54. See A. FREUD, *NORMALITY AND PATHOLOGY IN CHILDHOOD* 14-15, 21 (1965).

55. Hartmann & Kris, *The Genetic Approach in Psychoanalysis*, *PSYCHOLOGICAL ISSUES*, vol. 4, no. 2, monograph 14, 1964, at 7, 22.

56. The genetic propositions describe how any condition under observation has grown out of an individual's past, and extended throughout his total life span. . . . Genetic propositions state how . . . reactions [such as those against danger or to frustration] come into being and are used in the course of an individual's life.

Id. 7.

the need of every child for unbroken continuity of affectionate and stimulating relationships.⁵⁷ Her formulation pours content into that aspect of the law's standard which is concerned with psychological well-being. It calls into question decisions which split the custody of a child between two parents or which provide a non-custodial parent with the right to visit or to force the child to visit. It casts doubt upon traditional procedures which never finalize a custody decision in divorce but instead allow the court to retain jurisdiction to modify and remodify custody. Such official invitations to discontinuity in the life of a child are but illustrative of the many decisions in law which persistently run contrary to the professed purpose of the decisions themselves—to serve the child's best interest.

Since dispositions are frequently rendered in divorce proceedings without presenting the decisionmakers with adequate data about both the child and the available alternative custodians, a presumption should be established to favor relatively long-standing and continuing relationships. *Painter v. Bannister*⁵⁸ is an interesting and celebrated case in point. There a father sought to regain the custody of his seven-year-old son who, at the time of court decision, had been living with his grandparents for two and one-half years following the death of his mother. The court was confronted with a request to interrupt a satisfactory ongoing "parent-figure" child relationship and to make an abrupt change without any plan for transition to allow for the gradual reestablishment of a relationship between natural father and son.⁵⁹ At the outset the appellate court made clear that its guiding principle would be the child's best interest. The household of the grandparents

57. See, e.g., A. Freud, *Cindy*, in J. GOLDSTEIN & J. KATZ, *THE FAMILY AND THE LAW* 1051, 1053 (1965):

According to the psychoanalyst's experience, the best interests of an infant are safeguarded under the condition that three needs are fulfilled: the need for *affection* (for the unfolding and centering of the infant's own feelings); the need for *stimulation* (to elicit inherent functions and potentialities); and the need for *unbroken continuity* (to prevent damage done to the personality by the loss of function and destruction of capacities which follow invariably on the emotional upheavals brought about by separation from, death or disappearance of the child's first love-objects).

58. 258 Iowa 1390, 140 N.W.2d 152 (1966).

59. In their Petition for Rehearing before the Supreme Court of Iowa, the attorneys for Harold Painter argued, without offering a plan: "If, however, the Court remains in doubt as to whether an abrupt change would serve Mark's interest, a course is available whereby Mark can be prepared for a return to his father's home. A carefully planned program of supervision and preparation can be arranged to facilitate Mark's return to his own father and his own family, which program would utilize the specialized training and competence of the Iowa Department of Social Welfare . . . as well as the cooperation of the California State Department of Social Welfare." Petitioner's Brief for Rehearing at 59-60. The Petition was denied June 13, 1966; certiorari was denied by the United States Supreme Court, 385 U.S. 949 (1966).

was described as “stable, dependable, conventional, middle-class, mid-west” and that of the father as “unstable, unconventional, arty Bohemian, and probably intellectually stimulating.”⁶⁰ The court correctly asserted: “It is not our prerogative to determine custody upon our choice of one of two ways of life within normal and proper limits and we will not do so.”⁶¹ It concurred with the trial judge’s finding that both parties were proper and fit. While acknowledging a preference in law for the natural parent, the court weighed more heavily the child’s best interest and concluded that the existing relationship should not be disturbed. The court declared:

Mark has established a father-son relationship with [the grandfather], which he apparently had never had with his natural father. He is happy, well adjusted and progressing nicely in his development. We do not believe it is for Mark’s best interest to take him out of this stable atmosphere in the face of warnings of dire consequences from an eminent child psychologist and send him to an uncertain future in his father’s home. Regardless of our appreciation of the father’s love for his child and his desire to have him with him, we do not believe we have the moral right to gamble with this child’s future. . . .⁶²

Despite provocative newspaper headlines charging the court with depriving a Bohemian parent (and member of the American Civil Liberties Union) of his child because of his style of life, it follows from the opinion that the court’s decision would have been the same even if the characterization of the competing parties had been reversed.⁶³ Evaluated in the light of Anna Freud’s need-for-continuity formulation, the decision viewed as precedent can be understood as a determination made in accord with the overall mandate of the state—the child’s best interests.

In noting that the problems concerned with the legal disposition of children offer a major opportunity for the application of psychoanalytic knowledge to law, the word “opportunity” is used advisedly, for there is in this area a great amount of judicial and student resistance. Judicial decisions abound in which the judge, unhampered by any procedural barriers to the introduction of psychoanalytic evidence of a general or specific character, will patiently hear all the evidence and then render a decision as if the record were free of such guides as those pro-

60. 258 Iowa at 1393, 1396, 140 N.W.2d at 154, 156.

61. *Id.* at 1393, 140 N.W.2d at 154.

62. *Id.* at 1400, 140 N.W.2d at 158.

63. *See, e.g., Halstead v. Halstead*, — Iowa —, 144 N.W.2d 861 (1966).

vided by Anna Freud. There intrudes, and perhaps correctly so in areas of compulsory state action, the judge's express concern for parental rights or for the policy of a foster care agency seeking to preserve the natural parent's right to the ultimate return of her child—however remote the possibility.⁶⁴ Such disregard of the evidence may for some reflect a fear that approving the widespread use of psychoanalytic guides will somehow in other contexts empower the state to mold whatever kind of adult the state may want at any given time—button pushers for the new machines, astronauts, or what you will.⁶⁵ It is here that effective communication between law and psychoanalysis can begin to remove such misunderstandings, to the extent that they are real. If the law student (who is also hopefully the future judge) were to study the primary sources of psychoanalysis, he would see that at most and at best a psychoanalytically-informed definition of the child's *best interest* would assist a court or adoption agency in deciding which disposition among available alternatives is likely to provide the child, whatever his endowments, with the best available opportunity to fulfill his potential in society as a civilized human being.⁶⁶ The diverse con-

64. See, e.g., *In re Jewish Child Care Ass'n*, 5 N.Y.2d 222, 156 N.E.2d 700 (1959); Ritvo, *Discussion*, in J. GOLDSTEIN & J. KATZ, *supra* note 57, at 1032.

65. See, e.g., C.S. LEWIS, *THE ABOLITION OF MAN* 72-73 (1962):

For the power of Man to make himself what he pleases means . . . the power of some men to make other men what *they* please. In all ages, no doubt, nurture and instruction have, in some sense, attempted to exercise this power. But the situation to which we must look forward will be novel . . . [T]he power will be enormously increased. Hitherto the plans of educationalists have achieved very little of what they attempted and indeed, when we read them—how Plato would have every infant "a bastard nursed in a bureau," and Elyot would have the boy see no men before the age of seven and, after that, no women, and how Locke wants children to have leaky shoes and no turn for poetry—we may well thank the beneficent obstinacy of real mothers, real nurses, and (above all) real children for preserving the human race in such sanity as it still possesses. But the man-moulders of the new age will be armed with the powers of an omniscient state and an irresistible scientific technique: we shall get at last a race of conditioners who really can cut out all posterity in what shape they please [footnotes omitted].

Cf. Statement by Sargent Shriver before The Senate Subcommittee on Employment, Manpower, and Poverty, Mar. 23, 1967:

I favor the registration and testing of all young Americans at age 16—females as well as males. . . . [I]f we registered and tested all youngsters at age 16, we would know who needs what help early enough to do something—time to perform significant remedial physical fitness, academic education, and *motivational training* (emphasis added).

66. It may prove less awesome, more realistic, and thus more amenable to relevant data gathering were the guide to decision in the child's best interest cast in terms of "that which is the least detrimental alternative for the child." See J. GOLDSTEIN & J. KATZ, *supra* note 57, at 4. See also Erikson, *Growth and Crises of the Healthy Personality*, *PSYCHOLOGICAL ISSUES*, vol. 1, no. 1, monograph 1, 1959, at 50, 71:

Why . . . if we know how, do we not tell parents in detail what to do to develop this intrinsic, this genuine autonomy? The answer is: because when it comes to human values, nobody knows how to fabricate or manage the fabrication of the genuine article. . . . Actually, we are learning only gradually what exactly *not* to do with *what kind* of children at *what age*.

glomeration of procedures for handling children which have haphazardly entered the statute books require examination in the light of this knowledge.

III.

I have tried to pose some questions about law in the light of psychoanalytic theory, and thus to identify the area of—as well as to locate some limits to—the potential contribution of psychoanalysis to jurisprudence. While the boundaries and the size of the area remain unclear, it is plain that the student of law who turns to psychoanalysis for a finished theory offering a complete explanation of any and all human activity will be either duped or disappointed. For psychoanalytic theory is neither all nor nothing. It is a body of knowledge and hypotheses which legal scholars and practitioners can add to their other analytic tools in the continuing effort to better understand and thereby to better the law.