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Law and Childhood Psychological Experience

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PSYCHOANALYSTS HAVE LEARNED that young children (certainly up to the age of five or six) pass through a regular series of psychic stages and, in the main, have similar psychic experiences. These stages and experiences of early childhood are not simply lived through and then forgotten, however. On the contrary, remnants of them persist in the mind (though on an unconscious level) and frequently play a significant role during adulthood.[1]

To suggest that a causal relationship exists between these survivals of early childhood and the law may, at first sight, seem absurd. Yet assuming that insofar as laws "are made by men, for men, they cannot help having the nature of men in them";[2] and assuming further that (as psychoanalysts have discovered) the psychic events of childhood frequently exercise a profound influence upon adults who affect and are affected by the law;[3] then it no longer seems so farfetched to postulate a relationship between early childhood and the law.

With the foregoing in mind—and in an effort to help lawyers identify (and possibly change) that which in the law may reflect unduly the influence of early childhood—this paper will detail certain psychoanalytic discoveries concerning the first few years of childhood and will try to suggest wherein traces of these early years may have played a part in helping to mold the law.

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Considerable study has been devoted by psychoanalysts to early "ego" development—to the development of such cognitive

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[1] See, for example, William V. Silverberg, Childhood Experience and Personal Destiny (New York: Springer, 1952).

[2] James Willard Hurst, The Growth of American Law: The Law Makers (Boston, Mass.: Little, Brown, 1950), 15.

[3] As an example, consider the relationship between the psychic events of early childhood and the conduct of lawyers. For relevant psychoanalytic material, see Modlin, The Client and You—What You Are, 16 N. Y. County B. Bull. 151, 155-156 (1959); Ranyard West, "A Psychological Theory of Law," in Interpretations Of Modern Legal Philosophies (Paul Sayre, ed., New York: Oxford University Press, 1947), 772-774; Sigmund Freud, "Notes Upon A Case Of Obsessional Neurosis," in Collected Papers (London: Hogarth Press, 1950), vol. III, 292-383.

functions as memory, reason, and reality-testing. And though psychoanalysts have been unable as yet to describe early ego development with precision, they *have* been able to identify certain stages in the maturation of a child's sense of reality.

For example, psychoanalysts are convinced of the existence of an animistic period in early childhood of a time when children believe that things as well as people live, feel, and react. To quote Sandor Ferenczi (one of Sigmund Freud's leading disciples): "Everything points to the conclusion that the child passes through an *animistic period* in the apprehension of reality, in which every object appears to him to be endowed with life, and in which he seeks to find again in every object his own organs and their activities." [4]

Though it is difficult at first sight to conceive of any connection between this animistic period and the law, it is indisputable that animistic conceptions are writ large upon Admiralty Law. For example, Admiralty Law permits ships to sue, to be sued, and to be held liable for the misconduct of their master or crew.[5] As Holmes observed: "It is only by supposing . . . [that ships are] endowed with personality, that the arbitrary seeming peculiarities of the maritime law can be made intelligible . . . ." [6] Further, in many systems of law of the past, inanimate objects seem to have been treated (at least for some purposes) as though they were alive, had desires of their own, and had the ability to try to satisfy these desires. In ancient Greece, for instance, courts sat in judgment on inanimate objects; and if these objects (axes, stones, and so on) were found guilty, they were outlawed and cast beyond the State's borders.[7] In England under the laws of King Alfred, if a tree fell upon a man and killed him, the tree was condemned and surrendered to the dead man's relatives, to be used or abused by them.[8] And during the early stages of the common law, if a man drowned in a well, the well was to be filled

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[4] Sandor Ferenczi, "Stages in the Development of the Sense of Reality," in Sex in Psychoanalysis (Contributions to Psychoanalysis) [New York: Dover, 1956], 193.

[5] See the appropriate references in Gustavus H. Robinson, Handbook of Admiralty Law in the United States (St. Paul, Minnesota: West Publishing Co., 1939).

[6] Oliver Wendell Holmes, Jr., The Common Law (Boston: Little, Brown, 1881), 26-27.

[7] *Id.*, 8, 34.

[8] *Id.*, 11, 19, 24.

up;[9] and if a man was accidentally killed by an inanimate object in motion—be it a moving cart, a collapsing house, or whatever —the object was condemned as an accursed thing and forfeited.[10]

Admittedly, these examples, in and of themselves, fail to reveal the extent to which an actual, firm belief in animism existed among the ancient Greeks, the Anglo-Saxons under the laws of Alfred, or the English during the early days of the common law. After all, Admiralty Law still treats ships (for certain purposes) as though they were animate beings; yet neither admiralty lawyers—nor the general public—really believe ships are endowed with life. Indisputably, however, animism still retains some hold upon the public. For one thing, psychoanalysis has shown that animistic ideas of early childhood still affect significantly the behavior of certain neurotics and psychotics.[11] And as Holmes pointed out when discussing ancient laws that punish inanimate objects, even a presumably normal, civilized man will "kick a door that pinches his finger." [12] Further, it is undeniable that animistic concepts play a major role in certain widely-practiced religious rites—in the Holy Communion, for instance. And to this very day, a surprisingly large number of adults still believe —or perhaps, half-believe—in the efficacy of such talismans as lucky coins, rabbits' feet, and the like. Indeed, still apposite is David Hume's observation, made two hundred years ago, that: "There is an universal tendency amongst mankind to conceive all beings like themselves, and to transfer to every object those qualities with which they are familiarly acquainted, and of which they are intimately conscious. We find human faces in the moon, armies in the clouds; and by a natural propensity, if not corrected by experience and reflection, ascribe malice and goodwill to everything that hurts or pleases us." [13]

Thus, if the animism that characterizes a young child's thinking still influences adult thought—at least to some extent; and if systems of law of the past—and some aspects of Admiralty Law today—reflect animistic concepts; there may be some basis

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[9] *Id.*, 24-25.

[10] *Id.*, 25, 35.

[11] See for example, Otto Fenichel, The Psychoanalytic Theory of Neurosis (New York: W. W. Norton, 1945), 205-206.

[12] Holmes, *op. cit. supra*, n. 6, at 11.

[13] See David Hume, The Natural History of Religion.

for concluding that vestiges of the animistic stage of ego development have affected—and continue to affect—the law.

The animistic stage is followed by a period of ego development that psychoanalysts call the stage of the "omnipotence of words." During this period, the child tends to overestimate greatly the influence of words—and even appears to believe that words can, in a physical sense, create or destroy. The period of the omnipotence of words is, in short, a time when words seem capable of accomplishing extraordinary things—a time of word magic.

As traces of the animistic stage of childhood may influence the law, so may traces of the childhood stage of the omnipotence of words. After all, there is much in the law's attitude towards words that strongly resembles the way children regard words during the period of the omnipotence of words.[14] For one thing, just as these children tend to invest certain words or phrases with a sort of magical significance, so does the law. In this light, consider for a moment the phrase "and his heirs."

At the common law, if A, the owner of Blackacre in fee simple, wanted to convey his full fee simple estate in Blackacre to B, A's conveyance would have to contain the words "to B and his heirs." If A used any other word formula, B would *not* get a fee simple. If, for example, A conveyed Blackacre "to B in fee simple," or even "to B forever," all that B would get is a life estate in Blackacre.[15] Thus, at the common law, the phrase "and his heirs" was invested with a sort of magic: only if this phrase were used could a successful *inter vivos* transfer of a fee simple estate in land be accomplished.

Best known, however, of the word formulas or verbalizations that the law seems to regard as somehow inherently efficacious or magical is the judicial oath. Though this oath has assumed various forms and has been variously defined, it is, in essence, a solemn pledge coupled with an appeal to God, a pledge of truthfulness taken in a judicial proceeding or in relation to some matter connected with a judicial proceeding.[16] Historically, the

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[14] See the relevant comments of Jerome Frank in Law and the Modern Mind (Sixth printing; New York: Coward-McCann, 1949), 57-68.

[15] See John E. Cribbet, Principles of the Law of Property (Brooklyn, New York: Foundation Press, 1962), 41.

[16] See Black's Law Dictionary (3rd ed.; St. Paul, Minnesota: West Publishing, 1933), 1268.

judicial oath is a derivative of the ordeal—an ancient mode of trial designed to elicit supernatural help in ascertaining certain facts.[17] And the judicial oath may have reached the height of its influence or significance in the common law procedure known as "wager of law"—a mode of trial in which an accused defended himself against a charge by getting a number of persons to swear, not that the charge was false, but rather that the oath taken by the accused was "clean" (that is, trustworthy).[18] Today, the judicial oath is by no means so highly regarded, if for no other reason than the apparent willingness of many of those who take the oath to perjure themselves. As Jerome Frank has pointed out: "We know, alas, that an immense amount of testimony is deliberately and knowingly false. Experienced lawyers say that, in large cities, scarcely a trial occurs, in which some witness does not lie." [19] Yet despite this, the judicial oath still seems to retain (at least for some people) much of its old magic: its use is still vigorously defended—and rarely indeed is it dispensed with.[20]

Besides regarding certain words as being in some way extraordinarily efficacious, the law—like the child during the period of the omnipotence of words—tends to overestimate the influence of words.

For example, in jury trials, the law ascribes considerable significance to the judge's charge to the jury—the slightest error in the charge often serving on appeal as a basis for reversing the jury's verdict. In fact, it is a commonplace that: "Decisions, in cases which have taken weeks to try, are reversed on appeal because a phrase, or a sentence, meaningless to the jury, has been included in or omitted from the charge." [21] The words "meaningless to the jury" are important here, for it is notorious that jury-

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[17] See Jerome Frank, Courts on Trial (Princeton, New Jersey: Princeton University Press, 1950), 45; Max Radin, Handbook Of Anglo-American Legal History (St. Paul, Minnesota: West Publishing, 1936), 35-37.

[18] See Theodore F. T. Plucknett, A Concise History of the Common Law (2nd ed.; Rochester, New York: Lawyers Co-Operative Publishing, 1936), 109-110.

[19] Frank, Courts on Trial, *op. cit. supra,* n. 17, at 85.

[20] Most used, perhaps, of the arguments advanced in defense of the law's continued employment of oaths is the contention that "many people who do not hesitate to speak loosely find themselves trying very definitely to stick closely to the facts under the sobering influence of an oath. . . . [A] solemn oath . . . has a distinct, salutary effect upon the tongues of the great majority of persons." Roy Moreland, Modern Criminal Procedure (Indianapolis, Indiana: Bobbs-Merrill, 1959), 17.

[21] Frank, Courts on Trial, *op. cit. supra,* n. 17, at 117.

men usually fail to comprehend completely or properly the judge's charge—especially its nuances and subtleties. Indeed, Jerome Frank has contended that: "It is inconceivable that a body of twelve ordinary men, casually gathered together for a few days, could, merely from listening to the instructions of the judge, gain the knowledge necessary to grasp the true import of the judge's words. For these words have often acquired their meaning as the result of hundreds of years of professional disputation in the courts. The jurors usually are as unlikely to get the meaning of those words, as if they were spoken in Chinese, Sanskrit, or Choctaw." [22]

Frank's contentions may well be extreme. Yet it *is* a fact that a judge's charge is likely to have far less impact and influence upon a jury than the law assumes. And insofar as the law overestimates the effect of the judge's charge, the law (like the young child) overestimates the effect of words.

This tendency of the law to exaggerate the significance of words has also found expression in considerable strictness concerning matters of form. For example, at the common law, though a plaintiff might have conclusively proven an undeniably valid cause of action, he would have been nonsuited if this cause of action failed to match the word formula he had used when beginning his suit—that is, failed to match the "form of action" he had chosen.[23] Worse, there have been cases in which convictions have been reversed because a written verdict was handed in reading "guily" rather than "guilty," or reading murder in the "fist" degree rather than in the "first" degree. In fact, convictions of major felonies have been reversed "because the formal conclusion of the indictment omitted the word "the" in the constitutionally prescribed formula. . . ." [24]

Another manifestation of the law's tendency to exaggerate the importance or power of words is the assumption apparently made by the law—akin to the assumption a child seems to make during the period of the omnipotence of words—that words can, in a physical sense, create or destroy. The law seems to assume, for example, that when a judge orders a jury to disregard certain

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[22] *Id.* at 116.

[23] See Frederick William Maitland, The Forms of Action at Common Law (New York: Cambridge University Press, 1909), 251-252.

[24] Roscoe Pound, Criminal Justice in America (Cambridge, Massachusetts: Harvard University Press, 1945), 161.

testimony, these instructions alone eliminate whatever effect the testimony may have had upon the jury. But surely this assumption, if made, is untenable. As Lawrence Kubie has pointed out: "It is unrealistic to assume that the officially 'stricken out' words do not influence feelings and thoughts merely because no one talks about something which a lawyer has said but to which an objection has been raised and sustained. This is as naive as is the parent's idea that what the child does not talk about is not affecting profoundly the child's feelings and actions." [25]

Many other illustrations of the law's tendency to overestimate the power of words could readily be cited. It is hoped, however, that sufficient material has been considered to reveal a striking resemblance between the law's attitude towards words and that of the child during the period of the omnipotence of words—a resemblance striking enough to suggest that vestiges of this period of ego development have exerted, and continue to exert, influence upon the law.

Besides studying early ego development, psychoanalysts have given even more attention to the early phases of a child's *sexual* development. And though psychoanalytic discoveries concerning this sexual development are many and diverse, they all have a common ground in Freud's finding that "it is not at all true that the sexual impulse enters into the child at puberty, as the devils in the gospel entered into the swine. The child has his sexual impulses and activities from the beginning, he brings them with him into the world, and from these the so-called normal sexuality of adults emerges by a significant development through manifold steps." [26]

Perhaps the most significant psychic events that mark a child's sexual development occur during a stage psychoanalysts call the "phallic period"—a stage that usually begins when the child reaches the age of about three and a half. During the phallic period, the child tends to feel drawn erotically to the parent of the opposite sex and to direct jealous and hostile im-

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[25] Kubie, To Break the Hold of the Past, 16 N. Y. County B. Bull 139, 142 (1959).

[26] Sigmund Freud, The Origin and Development of Psychoanalysis (Chicago, Illinois: Henry Regnery, 1955), 49. It ought be noted that psychoanalysts tend to employ the term "sexual" in a very broad manner, including within its meaning various forms of bodily pleasure and such tender emotions as affection and love. Reuben Fine, Freud: A Critical Re-Evaluation of His Theories (New York: McKay, 1962), 13, 14.

pulses towards the other parent. Freud coined the phrase "Oedipus complex" to describe this concatenation of feelings. He derived the phrase from the Oedipus legend embodied in Sophocles' tragic drama *Oedipus Rex*. Freud's comments upon this drama are among the best-known lines he ever wrote.

> If the *Oedipus Rex* is capable of moving a modern reader or play-goer no less powerfully than it would the contemporary Greeks, the only possible explanation is that the effect of the Greek tragedy does not depend upon the conflict between fate and human will, but upon the peculiar nature of the material by which this conflict is revealed. There must be a voice within us which is prepared to acknowledge the compelling power of fate in the *Oedipus*. . . . And there actually is a motive in the story of King Oedipus which explains the verdict of this inner voice. His fate moves us because it might have been our own, because the oracle laid upon us before our birth the very curse which rested upon him. It may be that we were all destined to direct our first sexual impulses towards our mothers and the first impulses of hatred and violence towards our fathers; our dreams convince us that we were. King Oedipus, who slew his father Laius and wedded his Mother Jocasta, is nothing more or less than a wish-fulfillment—the fulfillment of the wish of our childhood. But we, more fortunate than he, insofar as we have not become psychoneurotics, have since our childhood succeeded in withdrawing our sexual impulses from our mothers, and in forgetting our jealousy of our fathers. We recoil from the person for whom this primitive wish of childhood has been fulfilled with all the force of the repression which these wishes have undergone in our minds since childhood. As the poet brings the guilt of Oedipus to light by his investigation, he forces us to become aware of our own inner selves, in which the same impulses are still extant. . . .[27]

By the time a child reaches his sixth birthday, his Oedipal strivings have usually begun to subside. This may occur partly because the time has arrived for the Oedipus complex to come to an end, just as the child's milk teeth begin to fall out when the time comes for his permanent teeth to erupt. But in addition, the Oedipus complex dies out because it leads to painful disappointments—and is frequently accompanied by an intense fear of parental retaliation.[28] Further, when the Oedipus complex

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[27] Sigmund Freud, The Interpretation of Dreams, in The Basic Writings of Sigmund Freud (A. A. Brill, ed.; New York: Random House, 1938), 308.

[28] Sigmund Freud, "The Passing of the Oedipus Complex," in Collected Papers (London: Hogarth Press, 1956), vol. II, 269-276.

begins to disappear (and its disappearance generally marks the end of the phallic period), a new psychic agency—the super-ego —is set up in the mind, an agency that tends to engender unbearable feelings of anxiety whenever incestuous or parenticidal impulses threaten to become conscious.[29]

At first sight, laws pertaining to family relationships would seem to provide an appropriate starting point for considering the possible effect of the Oedipus complex upon the law. After all, Oedipal urges first appear in the matrix of the family and have to do with a child's relationship with his parents (or their surrogates). But much in family law—the law of domestic relations, for example—is well-settled, and any conclusions reached here concerning such well-settled areas of family law are likely to have little or no practical effect. Hence, it seems best to limit the present discussion of family law to a consideration of the possible influence of the Oedipus complex upon that area of family law most in flux and most in need of reform—the law of divorce.

As Roscoe Pound and many other students of law have pointed out, the "law of divorce is in many ways one of the most unsatisfactory parts of American law." [30] Not only do statutes governing divorce vary greatly from state to state—so much so that no real pattern is discernible—but these statutes appear to be violated more frequently than they are honored. To put it bluntly: "wholesale evasion of the law [of divorce] . . . is a daily occurrence throughout the country." [31]

Many reasons might be advanced to help explain this unfortunate state of affairs. For one thing, there is no common law of divorce; hence, the flywheel that usually ensures a reasonable consistency in American law is missing in divorce legislation. Further, much divorce legislation is unrealistic (in certain cases in which a marriage seems hopelessly broken—when, for example, both parties have committed adultery—no divorce is grant-

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[29] Ernest Jones, "The Genesis of the Super-Ego," in Papers on Psychoanalysis (Fifth ed.; London: Bailliere, Tindall, and Cox, 1950), 145-152.

[30] Roscoe Pound, "A Symposium in the Law of Divorce, Foreword," in Selected Essays on Family Law (Paul Sayre, ed.; Brooklyn, New York: Foundation Press, 1950), 872.

[31] Albert A. Ehrenzweig, Conflict of Laws (St. Paul, Minnesota: West Publishing, 1959), 232.

ed);[32] hence, the use of fraud to circumvent such legislation can hardly be unexpected.

In addition, however, the possibility exists that deep-rooted inner conflicts—especially conflicts pertaining to the Oedipus complex—may be partly responsible for the deplorable state of American divorce law.

Consider that a divorce signifies a permanent separation of spouses—a separation that would, in effect, fulfill the Oedipal wish of childhood for the elimination of the main rival for the affection of the Oedipally-loved parent. Hence the idea of divorce may well stir up vestiges of the Oedipal desires of childhood. And these vestiges may prove powerful enough to mold thought and belief concerning divorce—even to the extent of finding expression in legislation regarding divorce.

But if the concept of divorce is likely to stir up Oedipal remnants, it is every bit as likely to arouse remnants of the disappointments and fears of childhood that originally helped to bring the Oedipus complex to an end. And in addition, any arousal of Oedipal remnants is likely to provoke a variety of defensive measures—especially by the superego, which, as has been pointed out, is an agency of the mind that tends to engender unbearable anxiety whenever incestuous or parenticidal strivings threaten to erupt. In short, the idea of divorce may well stir up inner conflicts pertaining to the Oedipus complex, conflicts that may express themselves (among other ways) in the crazy-quilt pattern of American divorce legislation and in the public's failure to insist upon divorce laws that reflect its divorce practices.

Admittedly, any hypothesis concerning a possible relationship between survivals of the Oedipus complex and American divorce legislation and practice is conjectural. Nevertheless, lawyers ought to be aware of the possibility that Oedipal or other inner conflicts may play a part in the formulation of American divorce law and in the public's apparent need to pay lip service to divorce legislation that it disregards in practice. Once such an awareness exists, lawyers may prove far more

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[32] "Where both parties to a marriage have committed adultery, *neither is entitled to a divorce.* This is a fundamental proposition of divorce law in most states. The law takes the completely unrealistic position, that where a marriage appears to be damaged beyond repair, because both the husband and the wife are engaged in extramarital sex escapades, neither will be awarded a divorce." Morris Ploscowe, *The Truth About Divorce* (New York: Hawthorn Books, 1955), 137.

willing than now to demand reforms that, at the very least, will result in divorce legislation that is reasonably uniform and more in accordance with the realities of modern American life.

Besides playing a possible role in divorce legislation (and in other aspects of family law), Oedipal traces may also find reflection in laws having to do with persons who consciously or unconsciously tend to symbolize members of the family—with employers or other typical parent-substitutes, for example.[33] Deserving attention in this light is the possibility that Oedipal impulses may express themselves in labor relations and labor law.

Though labor relations and labor law in the United States have received perhaps more than their share of governmental attention during the past thirty years or so, they are still far from satisfactory. For one thing, the problem of preventing autocratic and corrupt men from seizing control of labor unions is still unresolved. And of greater interest here, no satisfactory way has yet been evolved to prevent what appears to be a never-ending succession of protracted and often violent strikes.

It is possible, of course, that some simple or single cause—premature governmental intervention in labor relations, for example[34]—is largely responsible for these persistent strikes. Yet it is far more likely that strikes are, as they have always been, products of a variety of causes: economic, political, social, and psychological.

One frequently-mentioned psychological cause of strikes stresses their ability to help express pent-up aggressive and hostile urges. That is, a strike may sometimes be precipitated not so much by economic issues as by the likelihood that it will help

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[33] A variety of authority-figures (teachers, policemen, military and political leaders, etc.) may serve as parent-substitutes. Especially relevant for this paper's purpose, however, is the tendency of many persons to regard *employers* and *judges* as father-substitutes. See Morris, The Psychoanalysis of Labor Strikes, 10 Lab. L. J. 833, 834, 841 [1959]; Paul Reiwald, Society and Its Criminals (New York: International Universities Press, 1950), 42-65.

[34] ". . . it is in a certain sense regrettable that positive labor relations legislation intervened before the evolutionary processes of the common law could operate to smooth out . . . differences or at least pose the central issues in a succinct and manageable manner. It is entirely possible that certain problems which vex labor relations law today, even under the comprehensive statutes, might have been solved sooner and more satisfactorily had the common law had more time to clarify the issues, if not to advance definitive solutions." Sylvester Petro, The Labor Policy of the Free Society (New York: Ronald Press, 1957), 139.

the participants to rid themselves of aggressive tensions. To quote Ross Stagner: "In some instances wage issues are introduced only as an after-thought, after a strike has begun. The strike that is a spontaneous explosion of aggressive tensions must be made to appear rational." [35]

The roots of these aggressive and hostile strivings have by no means been fully exposed. Yet, as Joel Morris has suggested, such strivings may well be partly Oedipal in origin.[36]

Consider that, as pointed out earlier, employers are often regarded as parent or father-substitutes.[37] Hence remnants of the hostile father-oriented Oedipal feelings of employees may readily be deflected onto employers—especially if, as is usually the case, it is unthinkable or socially unacceptable for an employee to display these feelings towards his actual father. When employer-employee relations are peaceful, such hostile Oedipal feelings may remain latent; and, indeed, employees may feel towards their employers as towards a benevolent father. But when employees have or imagine they have reason for dissatisfaction, hostile Oedipal impulses are likely to be stirred up and to help precipitate—or at least to express themselves in—strikes and other forms of industrial discord.

This theory (suggested by Morris) concerning the kinship of Oedipal aggression and strikes is admittedly speculative. Indisputably, however, employees (in fact, most persons) *do* regard employers as parent-substitutes; and Oedipal feelings concerning parents *are* frequently deflected onto employers. Hence there is certainly some basis for believing that Oedipal remnants may play a role in labor relations. Further, insofar as those responsible for molding labor laws (judges, legislators—indeed, the general public) tend to regard employers as parent-substitutes, labor law itself is likely to reflect the influence of Oedipal traces. In fact, this may help explain why labor law is still far from satisfactory—and why traditional legal restraints that help to prevent protracted and violent disputes among individuals may ultimately have to become part of labor law.

Like employers, judges may frequently serve as parent or father-substitutes. Indeed, judges are among the most ubiquitous

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[35] Ross Stagner, Psychology of Industrial Conflict (New York: John Wiley & Sons, 1956), 424.

[36] Morris, *op. cit. supra*, n. 33, at 833-842.

[37] See *supra*, n. 33.

of father-symbols.[38] Hence there is reason to suppose that survivals of father-oriented Oedipal feelings may be displaced onto judges and may therefore affect beliefs concerning judges. As an example, consider the once-prevalent belief that judges find but do not make law.

Today it is usually taken for granted that judges can, and do, make law.[39] Judge-made law is, as Cardozo put it, "one of the existing realities of life." [40] Yet up to about thirty years ago, the prevalent American view was that judges merely discover and apply existing law.[41]

This erroneous view of the role judges play may have taken hold in the United States partly because of historical reasons—partly because Blackstone (who exerted an enormous influence on early American law) declared unequivocally that judges were "not delegated to pronounce a new law, but to maintain and expound the old one." [42] Also, as Jerome Frank has suggested, the view that judges simply discover and announce existing law may have been, albeit in part, the product of a widespread and strongly-held desire for an unalterably stable legal order.[43]

In addition, however, the possibility exists that the belief that judges find but do not make law may have reflected the influence of vestiges of the Oedipal impulses of childhood. That is (as pointed out above), judges are often regarded as parent or father-substitutes—and as such, probably receive Oedipal feelings. Insofar as these deflected Oedipal feelings are "positive," judges would tend to be looked upon with increased admiration and respect; and an attempt might even be made to increase the scope of their judicial powers. But to the extent that this Oedipal material is "negative," it might well find expression in criticism of judges—and more especially, in a wish to limit their powers. This wish, in turn, may adopt a number of guises, including the wish-fulfilling belief that judges lack the power to make law.

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[38] See Reiwald, *op. cit. supra*, n. 33, at 42-65.

[39] See, for example, William Seal Carpenter, Foundations of Modern Jurisprudence (New York: Appleton-Century-Crofts, 1958), 222.

[40] Benjamin N. Cardozo, The Nature of the Judicial Process (New Haven, Connecticut: Yale University Press, 1921), 10.

[41] Frank, Law and the Modern Mind, *op. cit. supra*, n. 14, at 32-33.

[42] See Zechariah Chafee, Jr., "Do Judges Make or Discover Law?" Proceedings of the American Philosophical Society, v. 91, no. 5, D' 1947, p. 405.

[43] Frank, Law and the Modern Mind, *op. cit. supra*, n. 14, at 34-36.

The preceding suggestion concerning the genesis of the once-prevalent belief that judges find but do not make law is admittedly speculative. And in addition, it appears to ignore the tendency of *judges themselves* to believe they lacked the power to make law[44]—unless the assumption can be made that these judges displaced their hostile Oedipal feelings onto themselves. Yet, paradoxically, something akin to this may actually have happened.

Consider that the first lawmakers or judges that a child knows are his parents—more especially, perhaps, his father. As Jerome Frank has phrased it: "To the child the father is the Infallible Judge, the Maker of definite rules of conduct. He knows precisely what is right and what is wrong and, as head of the family, sits in judgment and punishes misdeeds." [45] These childhood impressions of the father (vestiges of which probably remain in the mind) may cause a man who is made a judge to react unconsciously as though he had usurped his father's place. And as a result, Oedipal urges still extant in him may well be aroused.

But if a man's Oedipal urges are aroused, it is likely that his inner defenses against the resurrection of these urges would also be aroused. For one thing, his superego (the basic function of which is to help control incestuous and parenticidal impulses)[46] would probably spring into action, *direct angry and hostile impulses against his ego,* and thereby engender considerable anxiety. To help assuage this anxiety, the man might try—albeit unconsciously—to convince himself that in becoming a judge he had in no way taken his father's place. And he might succeed in doing this by asserting and believing that, unlike the father of childhood ("the Maker of definite rules of conduct"), he had no power to make law.

Not only erroneous beliefs concerning the powers of judges, but also *actual* restrictions upon their powers may reflect the influence of Oedipal strivings. For example, Oedipal traces may be partly responsible for the limitations on judicial powers implicit in the use of accusatorial (rather than inquisitorial) criminal proceedings in the United States—and perhaps even partly

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[44] *Id.* at 37.

[45] *Id.* at 18.

[46] See Jones, "The Genesis of the Super-Ego," *op. cit. supra,* n. 29, at 145-152.

responsible for the persistence of the jury system in the United States.

Special historical circumstances (the revulsion and outrage engendered by the inquisitorial methods of the Court of Star Chamber, for example, and especially the furor aroused by the Star Chamber trial of "Freeborn John" Lilburne)—such circumstances alone may well explain why accusatorial courtroom practices were ultimately adopted in England and the United States, and why English and American judges therefore began to play a far less active role in criminal proceedings than did their counterparts in countries employing inquisitorial techniques.[47] Hence it may be unrealistic to suggest that Oedipal hostility displaced from fathers onto judges was a significant cause of the abandonment of inquisitorial procedures in the United States and of the resultant adoption of accusatorial limitations upon the powers of American judges.

However, no special historical circumstances appear capable of explaining completely why—despite the appearance of extremely serious abuses—this accusatorial system has *persisted* so long in the United States. It is true that the anti-professional, equalitarian movement of a century ago was in large measure responsible for the imposition of new and extraordinarily stringent restrictions upon the powers of American judges.[48] Yet even so, this movement of long ago can hardly be considered sufficient reason to explain fully why modern judges appear to lack the power to stem what seems to be an ever-rising tide of perjured testimony.[49] Nor, indeed, do these or other special historical circumstances appear capable of explaining completely why stringent limitations *continue* to be imposed upon the investigatory powers of judges—limitations that seem to have engendered a concomitant increase in (and with this increase, horrendous abuses of) the investigatory powers of the police.[50] In view of all this, it is certainly conceivable that some psychological factor—the displacement of Oedipal hatred from fathers onto judges, for example—though perhaps not a significant cause

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[47] See John Henry Wigmore, The Law of Evidence (3rd ed.; Boston, Mass.: Little, Brown, 1940), v. 8, §§ 2250 et. seq.

[48] See Arthur T. Vanderbilt, The Challenge of Law Reform (Princeton, New Jersey: Princeton University Press, 1955), 51-53.

[49] See Frank, Courts on Trial, *op. cit. supra*, n. 17, at 85-86.

[50] For an illuminating collocation of material regarding police brutality, see Jerome Frank, If Men Were Angels (New York: Harper, 1942), 317-324.

of the original adoption of accusatorial criminal procedures in the United States, is in part responsible for the *persistence* of these procedures. That is, the persistence of accusatorial restrictions upon the powers of judges may reflect hostility unconsciously deflected from fathers onto the judge as a parent-symbol.

A more likely example, however, of the effect of Oedipal traces upon the powers of judges can perhaps be found in the persistence of what is, in a sense, the most significant restriction upon the powers of American judges: the jury.

Though the ancient Greeks had a jury system, and the precursor of the English jury is perhaps to be found in ninth century France, the "modern" jury is essentially an Anglo-American institution, one that has existed in the United States since colonial times.[51] Further the continuance of the jury system in the United States is in effect guaranteed by the Sixth and Seventh Amendments to the Constitution and by analogous provisions in the constitutions of almost all the fifty states.[52] Yet in recent times, the American jury system has become the target of forceful criticism.[53]

One frequently-heard criticism is that jury trials take an inordinate amount of time and are therefore probably responsible for much of the court congestion and delay that now mark the administration of justice. Another much-used argument is that juries are often unable—and frequently unwilling—to apply the instructions of the court. Hence juries are likely to go beyond their proper role as finders of the facts and to try to determine as well the legal rights and duties of the parties. Related to this argument is the contention that juries are often moved by ignorance, prejudice, and passion; and as a result, their decisions are likely to be unpredictable, arbitrary—and erroneous.

Such contentions are by no means unanswerable. After all, just as the decisions of juries may be arbitrary, unpredictable, and subject to passion, so may the decisions of judges.[54] Further,

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[51] Frank, Courts on Trial, *op. cit. supra*, n. 17, at 108-109.

[52] See Charles W. Joiner, Civil Justice and the Jury (Englewood Cliffs, New Jersey: Prentice-Hall, 1962), 58.

[53] See, for example, Frank, Courts on Trial, *op. cit. supra*, n. 17, at 108-145.

[54] "We constantly hear that the jury is arbitrary, unpredictable, and subject to passion . . . . But do not decisions by judges in absence of juries sometimes appear to exhibit these same qualities?" Joiner, *op. cit. supra*, n. 52, at 70.

a recent study of court congestion and delay (a study that summarizes five years' research conducted under the auspices of The University of Chicago Jury Project) reveals that the delay caused by jury trials is by no means so great as many critics have contended, and goes on to suggest that the remedy for the delay may not be to abolish the jury trial but rather "to speed it up." [55] Moreover, as partisans of the jury repeatedly assert: "The fact that the jury is a sort of 'group mind' gives it peculiar advantages over the judge . . . . [For example, the] weighing of the evidence and the matter of guilt or innocence by a composite group, the jury, is more apt to result in a verdict that is acceptable to the community and in accord with its mores." [56]

The appeal of the arguments and counterarguments sketched above is, admittedly, intellectual rather than emotional. Yet there can be little doubt that the attitude towards the jury of many Americans—especially their traditional fondness for and attachment to the jury—is in part emotionally motivated. And this emotional motivation may well reflect the influence of Oedipal remnants.

After all, as pointed out above, the jury constitutes what is perhaps the most significant restriction upon the power of American judges. In civil jury trials, for example, it is the jury and not the judge who usually finds the facts and renders the verdict; and in criminal prosecutions, a judge lacks the power to reverse a jury verdict of acquittal, even though he may believe the verdict to be palpably erroneous. Consider also that, as pointed out several times, judges are among the most ubiquitous of parent or father-symbols; and as such, may frequently become targets for Oedipal hostility deflected from fathers. In view of all this, is it not possible—perhaps even likely—that the stringent restrictions upon the powers of judges implicit in the jury system serve as a conduit for and as a means of expressing Oedipal hostility displaced from fathers onto judges? And if so, is it not conceivable that the fondness and attachment to the jury exhibited by so many Americans—an attitude that ultimately finds expression in the persistence of the jury in the United States—may well be based in part upon this very ability of the jury system to function as a vehicle for expressing Oedipal hostility?

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[55] Hans Zeisel, Harry Kalven, Jr., Bernard Buchholz, Delay in the Court (Boston, Mass.: Little, Brown, 1959), 10.

[56] Moreland, *op. cit. supra,* n. 20, at 240.

Speculative these possibilities surely are. Yet knowing about them—knowing that the persistence of the jury system in the United States may reflect the influence of Oedipal traces—can prove useful. For one thing, this knowledge may facilitate a more objective study of the jury than has hitherto been possible —a study that may help eliminate those defects of the jury system that have given rise to demands for its abolition.

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This paper has sought to relate law to the first few years of childhood. To this end, psychoanalytic discoveries concerning stages and experiences of early childhood have been described, and an attempt has been made to show how vestiges of these stages and experiences may have influenced such aspects of the law as the persistence of the jury system, the animism that pervades Admiralty Law, the deplorable state of Divorce Law, the failure of Labor Law to prevent violent strikes, the belief that judges find but do not make law, the continuance of stringent accusatorial restrictions upon the powers of judges, and the stress placed by the law upon certain verbal formulas ("to A and his heirs," for example).

Admittedly, only one complex of sexual experiences (the Oedipus complex) and only two stages of ego development (the animistic stage and the period of the omnipotence of words) were considered. Further, much of the material presented—especially regarding the effect of the Oedipus complex upon the law—was highly speculative. Nevertheless, this paper will have fulfilled its purpose if it is able to help lawyers begin to identify —and possibly do something about—those aspects of law that are likely to reflect unduly the influence of traces of the stages and experiences of early childhood. And law may well reflect this influence, for (as pointed out at the beginning of this paper) insofar as laws "are made by men, for men, they cannot help having the nature of men in them." [57]

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[57] See *supra*, n. 2.