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THE SUPEREGO'S INFLUENCE ON THE LAW

C. G. SCHOENFELD*

IT is a truism that law needs the support of man's moral faculty—what psychoanalysts call the “superego.” When the law fails to enlist the superego's aid, crime increases, unrest spreads, and law and order prove difficult—if not impossible—to maintain.

As the law needs the superego, so does the superego need the law. For example, one of the superego's original and prime functions is to inhibit incestuous impulses. Yet men hardly take it for granted that the superego alone can prevent incest; on the contrary, incest is specifically prohibited and severely punished in primitive and civilized communities. In fact, the Code of Hammurabi (one of the oldest written codes of law in existence) provides that:

§ 154—If a man have known his daughter, they shall expel that man from the city.

§ 157—If a man lie in the bosom of his mother after [the death of] his father, they shall burn both of them.¹

Not only incest prohibitions, but many other laws as well (laws enjoining murder, for instance) supplement and strengthen the superego's moral directives. Indeed, a prime purpose of law may be to reinforce the moral faculty: to help men live up to a standard that, in their ethically more enlightened moments, they recognize as binding upon themselves.

Be this as it may, there can be no doubt that a close relationship exists between the superego and the law. And lawyers who hope to master and improve the law owe it to themselves—and to those who rely upon them—to learn all they can about the superego and its influence upon the law.

The superego corresponds, in a general way, to what most men refer to as “conscience.” Like the conscience, it performs various moral functions.

¹ HARPER, *THE CODE OF HAMMURABI KING OF BABYLON ABOUT 2250 B.C.* 55 (2d ed. 1940).

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These [superego] functions include (1) the approval or disapproval of actions and wishes on the grounds of rectitude, (2) critical self-observation, (3) self-punishment, (4) the demand for reparation or repentance of wrongdoing, and (5) self-praise or self-love as a reward for virtuous or desirable thoughts and actions.²

Unlike the conscience, however, the superego operates not only on a conscious level, but more especially on an unconscious level.³

At birth, an infant has no superego. Rather, it appears only after about five or six years—at the time when the youngster unconsciously internalizes (“introspects”) the image he has formed of his parents. Thereafter, this parent-image rules him from within as his parents have been ruling him from without. The superego is, in short, the successor and representative of the youngster’s parents.

Though essentially a parent-substitute, the superego of a child is also affected by his *own* urges and feelings, many of which are primitive and violent derivatives of man’s savage past. Influenced by this archaic heritage, the superego often reacts more aggressively and severely than the youngster’s parents ever did. And, in addition, the superego is colored by the youngster’s attempts to master these primal desires—incestuous and hostile wishes, especially.

. . . the original nucleus of the prohibitions of the superego is the demand that the individual repudiate . . . incestuous and hostile wishes. . . . Moreover, this demand persists throughout life, unconsciously of course, as the essence of the superego.⁴

The superego of a child also reflects his own ideas concerning what is just and unjust. Like him, it is governed by the talion concept—the primitive “eye for eye, tooth for tooth” principle found in Mosaic law and in other ancient legal codes.⁵ Further, the superego’s demand for justice is frequently rooted in feelings of envy that arise during childhood. When a youngster finds himself unable to obtain special privileges, or is forced to renounce certain infantile pleasures, he wants to make sure that his brothers and sisters are treated no better. For

² BRENNER, AN ELEMENTARY TEXTBOOK OF PSYCHOANALYSIS 125 (1957).

³ For an analysis of the relationship between the conscience and the superego, see FREUD, CIVILIZATION, AND ITS DISCONTENTS 127 (1955). For a somewhat different view of this relationship, see JONES, THE GENESIS OF THE SUPEREGO, PAPERS ON PSYCHOANALYSIS 146 (5th ed. 1950).

⁴ Brenner, *op. cit. supra* note 2, at 126.

⁵ See DIAMOND, PRIMITIVE LAW 321 (1935).

him justice means: "What I am not permitted to do, no one else should be permitted, either."⁷

Though originally a product of the emotions of childhood and of the impressions a child forms of his parents, the superego does not simply remain as such. If healthy, it tends (at least in part) to develop and change: it loses much of its original savageness, it becomes less and less like the child's original parents; and most important, it gains the flexibility needed to permit the child—and later the man—to mature properly and to achieve his potentialities. But if the superego is unhealthy, it may fail to support—and is likely to impede—normal emotional and intellectual growth: it may (as in the case of many criminals) prove unable to offer needed moral guidance; or it is likely to try to impose throughout life the overly rigid and severe standards of childhood—and use its influence to inhibit proper development and prevent worthwhile change.

As Austin, Holmes, and other legal scholars have rightly pointed out, law and morality are not synonymous.⁷ Yet it is undeniable that law is in a large part a product of man's moral faculty—of his superego. Consider equity jurisprudence.

Much that is typical of and basic to equity jurisprudence finds expression in the maxim: "He who comes into equity must come with clean hands." Guided by this maxim, courts of equity have frequently refused to enjoin tortious acts when the plaintiff has acted wrongfully with respect to the property right he wants protected. For example, these courts have denied protection to a patent when a plaintiff is using it to restrain competition.⁸ And they have declined to protect a trademark when a plaintiff employs misleading words or symbols in connection with it.⁹

The "clean hands" doctrine has also found vigorous application in suits in equity for specific performance of contracts. Thus in *Weegham v. Killefer*,¹⁰ the court refused to order the defendant to carry out a contract to play baseball for a Chicago team, because the

⁶ FENICHEL, *THE PSYCHOANALYTIC THEORY OF NEUROSIS* (1945).

⁷ See, e.g., AUSTIN, *LECTURES ON JURISPRUDENCE* (various editions); Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

⁸ E.g., *Mercoid Corp. v. Mid-Continent Investment Co.*, 320 U.S. 661 (1944).

⁹ E.g., *Clotworthy v. Scheep*, 42 Fed. 62 (2d Cir. 1890).

¹⁰ 215 Fed. 168 (6th Cir. 1914).

plaintiff had knowingly induced the defendant to breach another—though invalid—contract to play baseball with a team in Philadelphia. In so deciding, the court exhibited the typical reluctance of courts of equity to decree specific performance of an agreement tainted by a plaintiff's unethical behavior. Indeed, the rule generally applied is that specific performance will always be refused when the plaintiff has obtained the agreement by sharp and unscrupulous practices, by overreaching, by concealment of important facts, even though not actually fraudulent, by trickery, by taking undue advantage of his position, or by any other means which are unconscientious.¹¹

This and allied rules used to implement the "clean hands" doctrine underscore the preoccupation of equity jurisprudence with matters of conscience. In fact, so steadfastly have courts of equity tried to express man's moral strivings, that these courts have, for centuries, been referred to as "courts of conscience." To use psychoanalytic terminology, courts of equity have traditionally attempted to fulfill the moral demands of man's superego. And the jurisprudence that has emerged—equity jurisprudence—reflects these demands.

Another (and perhaps the prime) area of law that reveals the impress of the superego is the criminal law. Even Holmes, who contended that "the secret root from which the law draws all the juices of life . . . [is] what is expedient for the community"¹²—even he admitted that moral beliefs and urgencies have helped shape the criminal law.¹³ As a case in point, consider the common law distinction between murder and voluntary manslaughter.

At the common law, murder was defined as an unlawful homicide committed with malice aforethought, express or implied.

Malice, in this definition, is used in a technical sense, including not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive. It is not confined to ill-will towards one or more individual persons, but is intended to denote an action flowing from any wicked and corrupt motive, a thing done *malo animo*, where the fact has been attended with such circumstances, as carry in them the plain indications of a heart regardless of social duty, and fatally bent on mischief.¹⁴

¹¹ 4 POMEROY, EQUITY JURISPRUDENCE § 1405a (5th ed. 1941).

¹² HOLMES, THE COMMON LAW 35 (1881).

¹³ *Id.* at 50. According to Jerome Hall, "the conscience of the community . . . is expressed in its penal law." HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 164 (2d ed. 1960).

¹⁴ 59 Mass. (5 Cush.) 295, 304 (1850).

Voluntary manslaughter, on the other hand, was described as an unlawful and intentional homicide, committed not with malice aforethought, but in sudden passion or heat of blood caused by a reasonable provocation. In the view of many courts, this distinction between murder and voluntary manslaughter reflects a moral judgment—a judgment based upon an appreciation of man's passions and frailties.¹⁵ Certainly Holmes so believed, and in the discussion of manslaughter in *The Common Law*, he concludes that: "According to current morality, a man is not so much to blame for an act done under the disturbance of great excitement . . . as when he is calm."¹⁶

Moral feelings have also helped to make insanity an acceptable defense in prosecutions for murder, manslaughter, and other crimes. In medieval times, insanity was never a defense for crime.¹⁷ By 1843, however, when *M'Naghten's Case* was decided, insanity had been recognized as a valid defense in original prosecutions.¹⁸ And since *M'Naghten's Case*, almost all American courts have abided by the so-called "M'Naghten Rules," the most important of which is:

. . . to establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.¹⁹

This rule is, in reality, an application of the traditional principle of Anglo-American criminal law that legal responsibility depends upon moral responsibility, that if a man is morally blameless, he ought not be punished.²⁰ To do otherwise, to punish a man for a wrong he committed while insane, seems unjust and inhumane. Or, to quote the court in *Holloway v. United States*: "Our collective conscience does not allow punishment where it cannot impose blame."²¹

Not only have the moral edicts of conscience or superego influ-

¹⁵ E.g., *State v. Ferguson*, 9 S.C. (2 Hill 619) 337, 27 AM. DEC. 412 (1835).

¹⁶ HOLMES, *op. cit. supra* note 12, at 61.

¹⁷ CARDOZO, *WHAT MEDICINE CAN DO FOR LAW*, SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO (1947).

¹⁸ HALL, *op. cit. supra* note 13, at 472.

¹⁹ 10 Cl. & F. 200, 210, 8 Eng. Rep. 718, 722 (1843).

²⁰ This is not to deny the existence of exceptions to this principle—strict liability statutes, for example.

²¹ 148 F.2d 665, 666-667 (D.C. Cir. 1945).

enced the criminal law in such ways as helping to make insanity an acceptable defense and in helping to create a distinction between murder and voluntary manslaughter, but the superego's moral imperatives have also had a considerable effect upon the criminal law's penal sanctions.

Talion punishments, for example, have reflected and helped to satisfy the superego's demands for justice since time immemorial. Sometimes, as in Mosaic law and in the Code of Hammurabi, talion punishments are set forth bluntly and openly.

Eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe.—*Exodus* 21:24–25.

If a son strike his father, they shall cut off his fingers—*Code of Hammurabi*, § 195.

If a builder build a house for a man and do not make its construction firm, and the house which he has built collapse and cause the death of the owner of the house, that builder shall be put to death—*Code of Hammurabi*, § 229.

Frequently, however, talion sanctions assume less obvious guises: they may appear in the form of a philosophic principle—or may even find disguised expression in statutes ostensibly designed to promote eugenic goals.

Even if a Civil Society resolved to dissolve itself with the consent of all its members . . . the last Murderer lying in prison ought to be executed before the resolution was carried out.—Immanuel Kant.

If it shall appear from the warrant of commitment that any male inmate shall have been convicted for rape, incest, any crime against nature . . . then it shall be the duty of the board of examiners, if ordered by the court, to perform or cause to be performed an operation for the castration of such male inmate. . . .²²

Like talion sanctions, imprisonment—a punishment rarely used until comparatively recent times—helps to satisfy the superego's desire for retribution. Perhaps because of this, little has been done about the shocking effects of prison life (“The terrible monotony of prison life changes . . . normal men into homosexual and otherwise perverted wrecks.”²³)—indeed, as criminologists have repeatedly pointed out, the traditional practice of minimizing contacts between prisoners and the general public has added greatly to the number of hardened criminals.²⁴

²² NEB. REV. STAT. ch. 83, § 83-504 (1943).

²³ BARNES AND TEETERS, *NEW HORIZONS IN CRIMINOLOGY* 617 (1945).

²⁴ SUTHERLAND, *PRINCIPLES OF CRIMINOLOGY* 504 (5th ed. 1955).

The limiting of contacts between criminals and non-criminals is, however, what the general public appears to demand. And this demand may well reflect not only the superego's desire for vengeance, but also the fear that crime will prove contagious, that conscience will no longer be able to control the criminal impulses that beset—albeit unsuccessfully—the general public itself.²⁵

As has been seen, the superego's influence upon the law is, at times, readily discernible. There are circumstances, however, in which this influence proves easy neither to detect nor to evaluate. A particularly apt—and instructive—case in point is provided by the widespread desire for absolute certainty in law.

That certainty is a legal desideratum is perhaps self-evident. After all, unless the law were reasonably certain, property rights would never be settled and the integrity of contracts and wills, conveyances and securities would be impaired. Further, uncertainty in law would tend to paralyze commerce and to destroy respect for legal processes: businessmen are hardly likely to enter into transactions that might be deemed valid in the morning and criminal in the afternoon; and the public would have little or no confidence in a legal system that simply ignored the decisions reached (and the wisdom adduced) in prior controversies. Indeed, if law lacked certainty, the “common-law process would become the most intolerable kind of *ex post facto* judicial law-making.”²⁶

Legal certainty may be carried too far, however. It may serve as an excuse for a court's failure to correct doctrinal mistakes—and it may be used to bar needed economic and political changes. In fact, society would be strait-jacketed, were not the courts constantly reworking the law and adapting it to ever-changing social, political and economic conditions. In Judge Cardozo's words: “The law, like the traveler, must be ready for the morrow. It must have a principle of growth.”²⁷

Thus by no means is certainty always a desirable legal goal; on the contrary, it must be sacrificed at times to permit change and reform.

²⁵ REIK, *THE COMPULSION TO CONFESS: ON THE PSYCHOANALYSIS OF CRIME AND PUNISHMENT* 167 (1961).

²⁶ JACKSON, *Decisional Law and Stare Decisis*, 30 A.B.A.J. 334, 334 (1944); also in SPRECHER, *The Development of the Doctrine of Stare Decisis and the Extent to Which It Should Be Applied*, 31 A.B.A.J. 501, 505 (1945).

²⁷ CARDOZO, *THE GROWTH OF THE LAW* 20 (1924).

Yet many laymen regard certainty as an immutable legal value—and consider its absence to be unfortunate and unnecessary.

The layman thinks that it would be possible so to revise the law books that they would become something like logarithm tables, that the lawyers could, if only they would, contrive some kind of legal slide rule for finding exact legal answers. Public opinion agrees with Napoleon who was sure that “it would be possible to reduce laws to simple geometrical demonstrations, so that whoever could read and tie two ideas together would be capable of pronouncing on them.”²⁸

Not only laymen, but many lawyers as well, believe that law ought to be as definite and certain as possible.²⁹ Hence the wish for absolute legal certainty defies explanation as nothing but the product of lay ignorance. But why, then, do so many people—lawyers and laymen alike—long for complete certainty in law?

An aesthetic desire for simplicity, a practical interest in peace and quiet, an instinctive striving for certainty and security—these and a dozen or so other factors have been cited as helping to explain the craving for undue legal certainty.³⁰ Of particular interest here, however, is Jerome Frank’s “psychoanalytic” explanation of this craving.

In *Law and the Modern Mind*, Frank suggested that the widespread yearning for absolute certainty in law reflected an unconscious wish to find in law a substitute for the firmness, certainty, and infallibility ascribed in childhood to the father. Frank noted that infants and young children often manifest a desire for peace, comfort, and protection from the dangers of the unknown—for a steadfast world, calm and controllable. He also pointed out that youngsters often satisfy this desire through confidence in and reliance upon an apparently incomparable, omnipotent, and infallible father. Then, observing that most men are affected at times by the childish appetite for complete serenity and the childish fear of chance, he concluded that when grown men long for complete legal certainty, they are actually trying to find in law the authoritativeness, certainty, and predictability they once believed existed in the law set forth by the father.³¹

²⁸ FRANK, *LAW AND THE MODERN MIND* 5 (1949).

²⁹ “The lawyers, themselves, like the laymen, fail to recognize fully the essentially plastic and mutable character of law. Although it is the chiefest function of lawyers to make the legal rules viable and pliable, a large part of the profession believes, and therefore encourages the laity to believe, that those rules either are or can be made essentially immutable.” *Id.* at 9.

³⁰ For a list of these factors, see *id.* at 263.

³¹ *Id.* at 18-21.

Unfortunately, this explanation of the craving for an unrealizable certainty in law defies ready evaluation. On the one hand, Frank attempted to secure his views against attack by stating repeatedly that he was only advancing a "partial explanation"—that is, one among many possible hypotheses.³² On the other hand, he overestimated the father's importance during infancy and early childhood, apparently failing to realize that the mother, not the father, was the one to whom youngsters ordinarily turn for comfort, help, protection, and guidance; that the mother, not the father, was generally the first—and usually the main—source of "law" during the earliest years of life.³³ Again, Frank correctly pointed out that children frequently exhibit a marked desire for certainty and security³⁴—and that the wish of adults for absolute certainty and security in law bears a strong resemblance to this earlier desire. Yet he lacked sufficient evidence to prove his theory that the wish of adulthood reflected, or was basically the same as, the earlier desire of childhood.

Perhaps Frank would have been on firmer ground had he attempted to offer a psychoanalytic explanation of the desire for undue legal certainty in terms of superego development. He might have pointed out, that when the superego first appears, it consists mainly of the impressions a child has formed of his parents. Later it usually becomes less parent-oriented and more self-oriented, tending to rely less upon the parental edicts of childhood and more upon its own growing ability to make moral decisions. But if the superego fails to develop properly, it may never become sufficiently independent of parental support, and may never learn to determine for itself the difference between right and wrong. Rather, it may remain much as

³² *Id.* at 21.

³³ BOWLBY, CHILD CARE AND THE GROWTH OF LOVE (1955); MUNROE, SCHOOLS OF PSYCHOANALYTIC THOUGHT 184-188 (1955); Spitz, *Hospitalism: An Inquiry into the Genesis of Psychiatric Conditions in Early Childhood*, 1 THE PSYCHOANALYTIC STUDY OF THE CHILD 53-74 (1945); Spitz, *Hospitalism: A Follow-up Report on Investigation Described in Volume 1, 1945*, 3 THE PSYCHOANALYTIC STUDY OF THE CHILD 113-117 (1947). In fairness to Frank, it ought to be pointed out that much of the psychoanalytic research cited in this note had not been done when *Law and the Modern Mind* was first published in 1930. Also, it ought to be observed that Frank's overemphasis of the role of the father during infancy is akin to Freud's father-oriented ideas concerning the god concept. See FREUD, THE FUTURE OF AN ILLUSION 28-34 (1953).

³⁴ See, e.g., BRILL, LECTURES ON PSYCHOANALYTIC PSYCHIATRY 74-75 (1955). According to Harry Stack Sullivan (a major contributor to modern psychoanalytic thought), the pursuit of security is one of the two basic human goals. MULLAHY, OEDIPUS: MYTH AND COMPLEX 280-282 (1952).

it was during childhood: unstable, incomplete, and in need of the direction and help parents (and parent substitutes like teachers, employers, and political leaders) ordinarily provide. Inherently weak and dependent, unable to resolve successfully the moral problems of modern life, the undeveloped superego may try to find in things legal the firmness, strength, and comprehensiveness that it lacks. And in so doing, may well require of the law an unrealizable definiteness, completeness, and certainty.

This explanation of the widespread yearning for undue legal certainty is, admittedly, but one of many possible explanations.³⁵ Also it lacks (and perhaps will always lack) the precise evidentiary support that only the psychoanalysis of a sufficient number of lawyers and non-lawyers can provide.³⁶ Yet unlike other hypotheses, it takes into account the considerable influence of the superego upon thought and feeling concerning the law. And perhaps most important, it can help provide a basis for understanding (and possibly correcting) traditional legal faults like the excruciatingly slow pace of the law reform.

Consider that for centuries, reform has been desperately needed in the law of evidence; yet changes have been—and still are—accomplished with exasperating slowness. At the common law, for example, stringent incompetency rules excluded the self-serving testimony of persons with a pecuniary or proprietary interest in a lawsuit, including the testimony of the parties to the suit themselves. These and kindred incompetency rules were intended to preclude perjury. More often, however, they appear to have excluded truth.

Truth was investigated by rules of evidence so carefully framed to exclude falsehood, that very often truth was quite unable to force its way through the barriers erected against its opposite. Plaintiff and defendant, husband and wife, persons, excepting Quakers, who objected to an oath, those with an interest, direct or indirect, immediate or contingent, in the issue to be tried, were all absolutely excluded from giving evidence. Nonsuits were constant, not because there was no cause of action, but because the law refused the evidence of the only persons who could prove it.³⁷

Unfortunately, these incompetency rules did not begin to disappear until about the middle of the nineteenth century—and then, only in

³⁵ It is, to use Jerome Frank's terminology, a "partial explanation." FRANK, *op. cit. supra* note 28.

³⁶ For a discussion of psychoanalytic discoveries concerning lawyers, see Modlin, *The Client and You—What Your Are*, 16 NEW YORK COUNTY BAR BULL. 151 (1959).

³⁷ VANDERBILT, *The Challenge of Law Reform* 45 (1955), quoting Lord Chief Justice Coleridge, 37 CONTEMP. REV. 798 (1890).

piecemeal fashion. In 1843, Lord Denman's Act removed the disability of almost all interested witnesses except the parties to a suit; the Evidence Acts of 1851, 1853 and 1869 went on to make the parties themselves (and their spouses) competent to testify; and finally in 1898, Lord Halsbury's Act granted defendants the right to testify on their own behalf in criminal actions.³⁸ To this very day, however, remnants of the old incompetency rules appear in so-called "dead-man statutes," laws that prohibit claimants having an interest in an estate from testifying to a communication or transaction with the decedent.³⁹ These laws persist "in spite of experience which demonstrates that they defeat the honest litigant and rarely, if ever, prevent the dishonest from introducing the desired evidence: if the dishonest party is prevented from committing perjury, he is not prevented from suborning it."⁴⁰

But why should the ghost of common law rules disqualifying interested witnesses live on in dead-man statutes—and why should the old incompetency rules themselves have taken so long to die out? Indeed, why in this day and age should the law of evidence be in "a confused and confusing condition,"⁴¹ and be "where the law of forms of action and common law pleading was in the early part of the nineteenth century?"⁴²

These questions appear to invite a variety of replies. Yet the replies given often fall back upon descriptions of the conservatism of lawyers, their opposition to change, and their dread of innovations.⁴³ These descriptions of lawyers frequently employ phrases like an "inveterate aversion to change," or a "chronic professional inability to see the need of any kind of change in the law"—phrases used to help explain the excruciatingly slow pace of reform in non-evidentiary as well as in evidentiary law.⁴⁴ But if an understanding of the slowness

³⁸ POLAND, *CHANGES IN THE CRIMINAL LAW AND PROCEDURE SINCE 1800, A CENTURY OF LAW REFORM* 54 (1901).

³⁹ See, e.g., N.Y. CIV. PRAC. LAW § 347.

⁴⁰ MORGAN, *SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION* 188 (1956).

⁴¹ MODEL CODE OF EVIDENCE, foreword by Edmund M. Morgan 69 (1942).

⁴² *Id.* at 5.

⁴³ McCARTY, *PSYCHOLOGY AND THE LAW* 242 (1960). See also ARNOLD, *PSYCHOLOGY APPLIED TO LEGAL EVIDENCE* (2d ed. 1913).

⁴⁴ VANDERBILT, *op. cit. supra* note 37, at 39-41. For an interesting attempt to explain the conservatism of lawyers, see Fowler, *A Psychological Approach to Procedural Reform*, 43 *YALE L.J.* 1254 (1934).

of law reform is achievable (of course, only in part) in terms of the psychology of lawyers, then—as in the case of the wish for absolute certainty in law—this understanding may prove expressible in terms of superego development.⁴⁵ After all, a disinclination to change law may well be related to a desire that law retain whatever certainty it has.

As was pointed out at the beginning of this paper, the superego needs the law's support—and as was suggested in the discussion of the widespread desire for unrealizable legal certainty, this need may find expression in attempts by the superego to seek in things legal the definiteness, completeness, and certainty that it lacks. Admittedly, law reform may actually increase legal stability and certainty. Yet to advocate a change in law is to imply that existing law is less than perfect—and more, is to imply that the law itself is neither completely stable nor immutably certain, but rather is something that can and ought to be changed when necessary.⁴⁶ Because of this, proposed legal changes may be reacted to as threats to the integrity of the law—especially if law is regarded as a discipline where absolute definiteness, completeness, and certainty ought to prevail. The mature superego, however, is unlikely to react in this way: by definition it is strong and independent—sufficiently so to permit reforms that may reduce legal certainty temporarily or even permanently. On the other hand, suggested legal changes may well be regarded with alarm by the immature superego, especially if it relies unduly upon law as a symbol of certainty and stability. The immature superego would then presumably cling with desperation to the certainty it had found (or thought it had found) in law—and would oppose legal reforms that appeared in any way to threaten this certainty. In short, the snail-like pace of law reform may well be attributable (in part)⁴⁷ to the determination of the superego that law retain as much certainty as possible.

⁴⁵ Any such understanding would be a "partial" understanding (*supra* note 32). After all, a plethora of reasons have been advanced to explain the slowness of law reform—and many of these reasons appear to have nothing to do with superego development or with the psychology of lawyers. See, e.g., POUND, CRIMINAL JUSTICE IN AMERICA 161-164, 198-204 (1945).

⁴⁶ It can and has been argued, however, that law reform is a way of "finding" rather than "making" law. Indeed, this was for centuries the orthodox view concerning law promulgated by judges. But through the efforts of the "legal realists," this view has been discredited. See FRANK, *op. cit. supra* note 28, ch. IV; Smith, *Surviving Fictions*, 27 YALE L.J. 147 (1917).

⁴⁷ See *supra* note 45.

Though the superego may often oppose changes in law, by no means is it an inveterate enemy of law reform. On the contrary, the mature, healthy superego—especially when its sense of justice has been outraged—has frequently provided the impetus for legal changes. The procedural reforms accomplished here and in England during the past century or so—reforms culminating in the Federal Rules of Civil Procedure—help to illustrate this.

By 1827, the procedures used in English courts had become incredibly artificial and cumbersome. The common law courts employed more fictions than perhaps any legal system has ever possessed. And Chancery practice had become so technical, slow, and cumbersome, that the period of time taken to decide even uncontested cases amounted to a deprivation of justice.⁴⁸ All too accurately did Charles Dickens describe the interminable length of Chancery proceedings in *Bleak House*.

Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated, that no man alive knows what it means. The parties to it understand it least; but it has been observed that no two Chancery lawyers can talk about it for five minutes, without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in Jarndyce, without knowing how or why; whole families have inherited legendary hatreds with the suit. The little plaintiff or defendant, who was promised a new rockinghorse when Jarndyce and Jarndyce should be settled, has grown up, possessed himself of a real horse, and trotted away into the other world. Fair wards of court have faded into mothers and grandmothers; a long procession of Chancellors has come in and gone out; the legion of bills in the suit have been transformed into mere bills of mortality; there are not three Jarndyces left upon the earth perhaps, since old Tom Jarndyce in despair blew his brains out at a coffee-house in Chancery Lane; but Jarndyce and Jarndyce still drags its dreary length before the Court, perennially hopeless.⁴⁹

This state-of-affairs seems to have failed to rouse the conscience of most members of the English Bar.⁵⁰ The sense of justice of the general public, however, appears to have been outraged by such matters as the atrocious technicalities of pleading, the scandalous use of judicial patronage, the extortionate expense of litigation, and so on. Indeed,

⁴⁸ HOLDSWORTH, CHARLES DICKENS AS A LEGAL HISTORIAN 86, 117 (1929).

⁴⁹ DICKENS, BLEAK HOUSE 4 (1904).

⁵⁰ Sunderland, *The English Struggle for Procedural Reform*, 39 HARV. L. REV. 725, 727 (1926); but see, PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 192 (2d ed. 1936).

led by the newspapers, the general public forced through Parliament a variety of reform bills that did away with practically all of the procedural abuses that disgraced English justice during much of the nineteenth century.⁵¹

As in England, legal procedure hypertrophied in the United States during the nineteenth century—and needed reform badly. Unfortunately, however, some of those who advocated procedural changes seemed governed more by anti-British prejudices and outmoded frontier conceptions, than by the outraged sense of justice of a mature superego.⁵²

Cut from radically different cloth was America's greatest law reformer, David Dudley Field. Appalled by the injustices that procedural technicalities and obscurities spawned, he took time out from a busy and highly successful law practice to draw up a revolutionary code of civil procedure.

Discarding entirely the procedural blunders of the past, [Field] . . . swept aside fictions, technicalities, and foreign verbiage and constructed a new code of procedure based on the complete abolition of the distinction between all forms of common-law actions and between actions at law and suits in equity, and he did this without changing substantive rights, duties, and liberties or remedies or remedial rights. In short, all procedural distinctions up to judgment were eliminated, and the purpose of the judgment when obtained was to protect some substantive right or enforce some primary duty.⁵³

Field's procedural code was extraordinarily influential: thirty states ultimately adopted it in whole or in part—and it had a profound effect upon English procedural reform. In the words of Roscoe Pound, "Field's . . . *Code of Civil Procedure* . . . stands towards procedure in the world of the common law where Beccaria's treatise on *Crimes and Punishment* stood toward the nineteenth century criminal law. It showed the way."⁵⁴

Unfortunately, Field's procedural code was manhandled in many states—and for a time procedural reform bogged down. Despite this, the moral indignation that had driven Field never died out completely. Others were affected by it—and ultimately, they helped to draft and promulgate the Federal Rules of Civil Procedure.

⁵¹ Sunderland, *id.* at 729, 731, 736; PLUCKNETT, *id.*, 186-192.

⁵² POUND, *op. cit. supra* note 45, at 154-164.

⁵³ VANDERBILT, *op. cit. supra* note 37, at 53-54.

⁵⁴ POUND, DAVID DUDLEY FIELD: AN APPRAISAL, DAVID DUDLEY FIELD: CENTENARY ESSAYS CELEBRATING ONE HUNDRED YEARS OF LEGAL REFORM 8 (Reppy ed. 1949).

Adopted by the Supreme Court in 1937 (and made effective as of September 16, 1938), the Federal Rules of Civil Procedure were—and still are—a model of simplicity and flexibility. Like Field's original procedural code—upon which they were partly based—these rules seek the “just, speedy, and inexpensive determination of every action.”⁵⁵

Perhaps the most significant change these rules introduced was the pre-trial deposition-discovery procedure outlined in rules twenty-six through thirty-seven, a procedure designed to permit the parties to a suit to obtain the fullest possible knowledge of the issues and the facts before trial.

Under the new rules, the purpose of the pleading is to give notice of what an adverse party may expect to meet. The broadening of the discovery rules and other pre-trial procedure are designed to define the issues and obtain the facts. This is revolutionary but not experimental.⁵⁶

Further, as the Supreme Court pointed out in the leading case of *Hickman v. Taylor*,⁵⁷ rules twenty-six through thirty-seven are to be construed broadly and liberally. No longer can the time-honored cry of “fishing expedition” prevent a party from inquiring into the facts upon which his opponent's case is based; now either party may compel disclosure of all pertinent facts in his opponent's possession.

The fullest possible pre-trial disclosure of pertinent facts may appear to laymen to be an obvious desideratum. After all, the greater the disclosure, the less danger there is that trickery, surprise, or chance—rather than the facts themselves—will decide the outcome of a suit. Lawyers know, however, that Anglo-American trials are traceable to various “ordeals” (the ordeal of hot iron, for example) and to trial by battle, procedures that minimized disclosure of the facts and maximized reliance upon the magic of divine intervention. And vestiges of these ancient ordeals and trial by battle are discernible in modern lawsuits: the oath, for example, is traceable in part to the ordeals; and the widespread tendency to regard a trial as a sort of game or contest between the parties or their attorneys is a partial derivative of trial by battle.⁵⁸

⁵⁵ FED. R. CIV. P. 1.

⁵⁶ Montgomery, *Changes in Federal Practice Resulting From the Adoption of the New Federal Rules of Civil Procedure*, 1 F.R.D. 337, 339 (1941).

⁵⁷ 329 U.S. 495 (1947).

⁵⁸ REIK, *op. cit. supra* note 25, at 108; Hancock, *Conflict, Drama and Magic in the Early English Law*, 14 OHIO ST. L.J. 119 (1953).

Moreover, it is most unlikely that an immature superego would abandon willingly the opportunities lawsuits still provide for venting the primitive urges and emotions that once found expression in ordeals and trial by battle. Perhaps because of this, lawsuits serve to this very day as a mechanism for expressing grudges and for sublimating combat feelings. But on the other hand, the *healthy, mature* superego is probably able to resist the temptation to use lawsuits as an excuse for displaying hostility and aggression. And more important, it is the sense of justice of the emotionally mature that has been largely responsible for the slow but sure abandonment of the view that a trial is a magically directed game of fate and the acceptance of the concept that a suit ought be a rational investigatory procedure designed to unearth all pertinent facts, a concept that has found effective expression in the pre-trial deposition-discovery rules of the Federal Rules of Civil Procedure.

To the same extent, perhaps, that the healthy, mature superego has helped to make possible a century of procedural reform culminating in the Federal Rules of Civil Procedure, its sense of justice continues to provide the impetus for needed changes in the law. And these needed changes are many.

For one thing, a demand has been voiced in recent years that the elevated moral standards of equity be applied far more frequently than at present. And in certain instances, this demand appears justified: it is difficult, for example, to find a satisfactory reason (other than a historical reason) why an unscrupulous plaintiff seeking to enforce an unconscionable contract should be denied specific performance of the contract but be permitted to recover full damages under it. Certainly no such distinction is made in the legal systems of the European continent: the lawmakers of continental Europe seem to feel that if a contract is too unfair to be specifically enforced, it is too unfair to be enforced by damages.⁵⁹

In addition, the law of damages itself is in need of reform. Specifically, the practice of awarding exemplary or punitive damages (sometimes called "smart money") is seriously questionable—and on far more significant grounds than the artistic or aesthetic feeling that to assess damages as punishment and not as compensation is to disturb "the harmonious symphony of the law of damages. . . ."⁶⁰ Consider

⁵⁹ NEWMAN, *EQUITY AND LAW: A COMPARATIVE STUDY* 92 (1961).

⁶⁰ MCCORMICK, *HANDBOOK ON THE LAW OF DAMAGES* 275 (1935).

that punitive damages are determined only by the whim of the jury, and are imposed without the usual safeguards thrown about criminal procedure—the privilege against self-incrimination, proof of guilt beyond a reasonable doubt; and even the rule against double jeopardy, for the defendant may be prosecuted for the crime after a judgment has been rendered against him in the tort action. Because of all this, it is more than likely that were a model code of damages drawn up for a country unhampered by legal tradition, exemplary damages would find no place.⁶¹

The abolition of punitive damages, the increased use of equity's elevated moral standards, the elimination of dead-man statutes and other vestiges of ancient evidentiary rules⁶²—these are a few typical reforms needed to help modernize the law and to facilitate the achievement of justice. Yet despite the obvious importance of these reforms, they are by no means as urgently needed as certain changes in the criminal law and its administration, an area in which there is more that is offensive to the healthy superego than in any other part of the law.

Under existing penal laws, a so-called "sexual psychopath" can be deprived of his liberty for an indefinite period of time, even though he may never have been convicted of, nor even charged with, a crime.⁶³ Worse, no one really knows what a sexual psychopath is; and the applicable statutory definitions are, for the most part, general and vague.⁶⁴ Little wonder, therefore, that the sexual psychopath laws (which deliver even minor sex offenders into the hands of experts) seem to frighten the experts themselves.⁶⁵

Related to sex psychopath laws are statutes that provide for the sterilization of such persons as criminals, moral degenerates, and perverts.⁶⁶ These sterilization statutes are presumed to have a eugenic purpose: to prevent the inheritance of sexual perverseness, moral degeneracy, criminality, and so on. Yet, there is little or no evidence that sexual perverseness and the like are inherited or are even in-

⁶¹ *Id.* at 276. *But see* MORRIS, *STUDIES IN THE LAW OF TORTS* 339-382 (1952).

⁶² *Supra*, p. 21 *et seq.*

⁶³ ST. JOHN-STEVAS, *LIFE, DEATH AND THE LAW* 228-230 (1961).

⁶⁴ Sutherland, *The Sexual Psychopath Laws*, 40 *J. CRIM. L., C. & P.S.* 543 (1950).

⁶⁵ Silving, *Psychoanalysis and Criminal Law*, 51 *J. CRIM. L., C. & P.S.* 19 (1960).

⁶⁶ For a resume of these statutes, see ST. JOHN-STEVAS, *op. cit. supra* note 63, at 292-309.

heritable.⁶⁷ But there *is* evidence that sterilization is a castration substitute;⁶⁸ indeed, a Nebraska statute still provides that persons convicted of such offenses as rape, incest, or "any crime against nature" are (under certain conditions) to be rendered impotent by means of castration.⁶⁹

The existence of sterilization statutes and sex psychopath legislation reveals the pressing need for change in penal law, especially regarding sexual offenders.⁷⁰ Unfortunately, however, this need is dwarfed by a far greater urgency—the need to reform the way in which the penal law is administered.

For one thing, there is a shocking lack of co-operation among law-enforcement officials. As Roscoe Pound has pointed out, the various agencies of justice tend to act quite independently of one another and frequently hinder or thwart one another; or, if perchance there is no interference, they usually lend one another comparatively little aid. Each state, county, city, and municipality—in fact, each court and police organization—is likely to pursue an independent course and to reveal little or no concern about what the others are trying to do.⁷¹ And this unco-ordinated activity can hardly be brushed aside as simply the product of police stupidity, villainy, or the like. On the contrary, even the most intelligent and dedicated policemen are severely handicapped—nay, handcuffed—when, as within 50 miles of the center of Chicago, more than 400 independent police forces operate, with no central control or organization, and only incidental co-operative efforts.⁷²

Even more objectionable than the absence of co-ordinated law enforcement is the influence of politics and politicians upon prosecutors and police officials.

⁶⁷ *Id.* at 179, 182.

⁶⁸ See, for example, *MENNINGER, MAN AGAINST HIMSELF* 239(n) (1938); *Davis v. Barry*, 216 Fed. 413, 416 (8th Cir. 1914).

⁶⁹ *NEB. REV. STAT.* ch. 83, § 83-504 (1943).

⁷⁰ "Planted by superstition and watered with ignorance, taproots of our criminal law concerning sex offenders and offenses lie deeply embedded in a compost of religious notions of sin and legal ideas of crime. . . . An unscientific tradition lays a heavy hand on judge, juror, legislator and offender." *CLARK AND MARSHALL, A TREATISE ON THE LAW OF CRIMES* 669 (6th ed. 1958).

⁷¹ *POUND, op. cit. supra* note 45, at 174-175.

⁷² *SUTHERLAND, op. cit. supra* note 24, at 335.

Political responsibility was a check on the prosecutor in a proper sense in pioneer America, where dockets were small, where citizens in large and representative numbers attended all trials, where every one knew what the prosecutor did and how and why. Political responsibility kept him from doing what he should not. Nowadays politics are a check in an improper sense, hindering him from doing what he should. Today, political pressure upon prosecutions, except in rare intervals of political upheaval, is a weapon against society, not a shield of the innocent individual citizen.⁷³

The most serious impediments to efficient crime control by the police are found in the system of political control of police organizations. In most cities the police force is under the control of politicians who do not wish and will not permit the enforcement of law and order. . . . Many politicians in the ordinary American city secure their incomes by plunder and graft, and keep their control by distribution of patronage. The politicians, being in control and being criminal or marginally criminal in their own behavior, naturally protect other criminals.⁷⁴

All this has been brought periodically to the public's attention—during the Seabury investigation of the early 1930's, for example; yet little or nothing has been done about it. Hence there should have been no great surprise or shock when the Kefauver Committee reported in 1951 that widespread corruption existed at all levels of government—federal, state, and local; that certain law-enforcement officials not only received protection money from gangsters, but actually ran vice operations themselves; that racketeers sometimes supported financially the entire slate of both political parties in a local election, thereby giving the racketeers virtual control of the local government.⁷⁵ And, there is no hope for more than periodic and temporary improvements of this appalling and unconscionable state-of-affairs—until and unless politics and politicians are divorced from law enforcement.

Perhaps the most revolting and morally opprobrious aspect of the administration of the criminal law in the United States today is the widespread use by the police of the "third degree." Some officials have, it is true, pooch-pooched the employment of third degree practices by police departments, contending that the injuries prisoners exhibit as "proof" of having been tortured by the police are usually injuries received while resisting arrest.⁷⁶ But despite such disclaimers,

⁷³ POUND, *op. cit. supra* note 45, at 185.

⁷⁴ SUTHERLAND, *op. cit. supra* note 24, at 337.

⁷⁵ Special Committee to Investigate Organized Crime in Interstate Commerce, *Final Report*, S. Rep. No. 725, 82d Cong., 5 (1951). Also see this committee's *Third Interim Report*, S. Rep. No. 307, 82d Cong., 183-186 (1951).

⁷⁶ See, e.g., FRANK, *DIARY OF A D.A.* (1960).

evidence has been amassed which demonstrates beyond a shadow of a doubt that the third degree is a widely used police practice.⁷⁷

It would be an error, however, to suppose that the third degree is simply the product of cruel and sadistic tendencies, or of vengeful superegos demanding corporal retribution. Antiquated laws unduly limiting the right of policemen to make arrests; and more especially, artificial territorial restrictions upon the jurisdiction of police departments—these and similar factors often hamstringing law enforcement so completely that physical coercion may appear to be the only effective method of obtaining the information needed to control crime. And it ought to be noted, that when a particularly shocking crime has been committed, the public frequently condones the use of police brutality in bringing the perpetrator to justice.

Yet, are these not excuses for brutality, rather than reasons for it? In England the third degree (referred to as the "American method") is neither tolerated nor found necessary. And competent American police forces—the F.B.I., for example—succeed in doing a highly effective job of law enforcement without employing third degree tactics. Further, as Justice Frankfurter has pointed out, "the history of the criminal law proves overwhelmingly that brutal methods of law enforcement are essentially self-defeating. . . . Law triumphs when the natural impulses aroused by a shocking crime yield to the safeguards which our civilization has evolved for an administration of criminal justice at once rational and effective."⁷⁸

In short, not only is the third degree morally outrageous, but probably unnecessary and self-defeating as well. No wonder, therefore, that its abolition heads the list of reforms needed in the administration of the criminal law—reforms demanded by the healthy, mature superego.

Proceeding upon the assumption that the superego and the law are intimately related, that they need and supplement each other, this paper has attempted to explore the superego's influence upon the law. To this end, basic psychoanalytic discoveries concerning the superego have been detailed, and consideration has been given to the effect of the superego upon such matters as equity jurisprudence (the "clean hands" doctrine, specifically), the distinction between murder and voluntary manslaughter, the defense of insanity in criminal prosecu-

⁷⁷ See the material detailed in FRANK, *IF MEN WERE ANGELS* 317-324 (1942).

⁷⁸ *Watts v. Indiana*, 338 U.S. 49, 55 (1949).

tions, and methods—ancient and modern—of punishing criminals. Also, an effort has been made to explain in terms of superego development the widespread desire for undue certainty in law—and to examine the possibility that the immature, unhealthy superego may be partly responsible for the snail-like pace of law reform. Further, an attempt has been made to show that the mature, healthy superego has played a considerable role in obtaining procedural reforms and to demonstrate that it now helps provide the impetus for such reforms as the abolition of punitive damages, the increased use of equity's elevated moral standards, the repeal of sterilization and sexual psychopath laws, and the improvement of the administration of the criminal law (by achieving better co-ordination among law enforcement agencies, by divorcing politics and politicians from police departments, and—perhaps most important—by eliminating the use of third degree practices).

Despite the many areas and aspects of the law considered, much remains to be done if the relationship between the superego and the law is to be properly illumined. For one thing, it might prove helpful to try to determine whether a connection exists between the failure of the superego to appear before the fifth or sixth year of life and the common law presumption that a child under the age of seven is incapable of harboring a criminal intent. A sufficient number and variety of examples have been discussed, however, so as to enable lawyers to gain some understanding of how the superego—both of the emotionally mature and immature—may affect the law. Armed with this understanding, lawyers ought be better able than now to minimize the influence of the unhealthy, immature superego upon the law, maximize the influence of the healthy, mature superego upon the law—and thus be better able than now to help the law become, ever-increasingly, adult, effective, and moral.