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ON THE RELATIONSHIP BETWEEN LAW AND UNCONSCIOUS SYMBOLISM

C. G. Schoenfeld*

“And the whole earth was of one language, and of one speech”—so begins the Old Testament story of the tower of Babel, a story that may be no more than myth or fable. Yet psychoanalysts have learned that a universal language *does* exist—the symbolic language of the unconscious.

Gaining familiarity with this archaic symbolic language—and more especially, learning to translate its key “words”—ought prove extraordinarily useful to lawyers. For one thing, a lawyer who familiarizes himself with unconscious symbolism ought be far better able to predict when unconscious ideas and emotions are likely to attach themselves to and distort the law.

There is, for example, no self-evident or *a priori* reason why unconscious conflicts regarding mother or birth ought affect law governing the disposition of land or law concerning the rights of passengers on seagoing vessels. But psychoanalysts have discovered that, on an unconscious level, land (more especially, the earth) is among the most frequent of mother symbols, and birth is almost always represented by some reference to water. Hence an unconscious connection exists between mother and land, birth and water—and this archaic symbolic relationship helps make it possible for unconscious conflicts pertaining to mother and birth to influence real property law and admiralty law respectively. Indeed, herein may be found one of the reasons why, to this very day, real property law and admiralty law are riddled with anachronisms and archaic concepts.

Though admittedly conjectural, these suggestions concerning the possible influence of unconscious conflicts regarding mother or birth upon real property law or admiralty law foreshadow the unexpected, and often startling, findings about law that await lawyers who gain a working knowledge of unconscious symbolism. And to help lawyers acquire this knowledge, psychoanalytic discoveries concerning unconscious symbolism will be detailed, an attempt will be made to apply these discoveries to

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the law, and—perhaps most important—reforms in the law suggested by this material will be examined.

A symbol is something that stands for something else. The word “scarf,” for instance, is a symbol: it stands for a broad piece of cloth usually worn about the neck. A white flag may also serve as a symbol: its display may reveal a desire to surrender, or to hold a parley, or the like. Both the word “scarf” and the white flag are conventional symbols: what they stand for is simply a matter of convention or agreement. A scarf could, for example, be symbolized by the letters C-H-A-I-R, or T-A-B-L-E, or whatever; and a desire to surrender or to hold a parley could be symbolized by a brown flag, a blue flag—or indeed, no flag at all.

Of far greater interest to the psychoanalyst, however, are symbols related to what they represent not primarily—or at all—by convention or agreement, but rather by an unconsciously recognized or created bond.

Sometimes this unconscious bond between a symbol and what it stands for is entirely individual.

“Let us assume that someone has had a saddening experience in a certain city; when he hears the name of that city, he will easily connect the name with a mood of sadness, just as he would connect it with a mood of joy had his experience been a happy one. Quite obviously there is nothing in the nature of the city that is either sad or joyful. It is the individual experience connected with the city that makes it a symbol of a mood.”¹

At other times, the unconscious meaning of a symbol may be shared by a limited number of persons or by a certain group. What kleptomaniacs steal, for example, is frequently equated in their unconscious with milk or affection.

Certain symbols—called by psychoanalysts *universal* symbols—have the same unconscious meaning for practically everybody. Blindness, for instance, is almost always equated unconsciously with castration; and a similarly close unconscious relationship exists between money (gold, especially) and filth. Universal symbols are also characterized by their ubiquity: they

1. FROMM, *THE FORGOTTEN LANGUAGE* 14-15 (1951).

are writ large upon such apparently unconnected matters as dreams, rituals, witticisms, myths, neurotic symptoms, fairy tales, and the speech of schizophrenics.

“One of the most amazing features of . . . [universal] symbolism is the remarkable ubiquity of the same symbols, which are to be found, not only in different fields of thought, dreams, wit, insanity, poetry . . . but among different races at different epochs of the world’s history. A symbol which today we find, for instance, in an obscene joke is also to be found in a mythical cult of Ancient Greece, and another that we come across only in dream analysis was used thousands of years ago in the sacred books of the East.”²

Unconscious symbols are countable in the thousands. Yet the ideas or themes they—and especially *universal* unconscious symbols—represent are usually limited to such matters as birth, death, love (sex), ideas of the self and of close blood relatives (or their surrogates).

The vast majority of unconscious symbols are sexual; in fact, there are more symbols of the male phallus than all other symbols combined. Of particular interest to lawyers, however, are unconscious parent-symbols. As Freud pointed out, kings, queens, and “other exalted personages” often serve as parent-substitutes;³ and judges are likely to rank high on the list of “other exalted personages.”⁴

“The after-effect of childhood experience is particularly strong, if we encounter figures which later in life play, in effect, a similar role to that played by the closest early associations. Often enough the father represents the judge to the child. And so it happens that *later the judge represents the father in man’s unconscious.*”⁵

Employers may also symbolize parents in the unconscious; and, as will be seen, this is likely to complicate labor relations and labor law.⁶

2. Jones, *The Theory of Symbolism*, in PAPERS ON PSYCHO-ANALYSIS 101 (5th ed. 1950).

3. FREUD, A GENERAL INTRODUCTION TO PSYCHOANALYSIS 160 (PermaBooks ed. 1957).

4. See REIWALD, SOCIETY AND ITS CRIMINALS 42-65 (1950).

5. *Id.* at 44.

6. Morris, *The Psychoanalysis of Labor Strikes*, 10 LAB. L.J. 833 (1959). See also text accompanying notes 8-22 *infra*.

Relevant here is the psychoanalytic discovery that the feelings of a child regarding his parents are ambivalent, that he directs towards them impulses not only of affection and love, but also of hostility and hatred. Further, these impulses may become and remain unconscious; and when adulthood is reached, they may help to mold attitudes towards parent-substitutes.⁷ Similarly, a child is frequently beset by angry and hostile feelings concerning his brothers and sisters, feelings that often enter and luxuriate in his unconscious, later attaching themselves to and distorting his relationships with classmates, colleagues, and other sibling-figures.

Offhand, the law of agency would seem to provide an appropriate starting point for applying psychoanalytic findings concerning unconscious parent-symbolism to the law. For one thing, the principal-agent relationship appears likely to be unconsciously equated at times with the parent-child relationship. Agency law, however, has become relatively well-settled.

“The reading of the many cases involving agency decided since the publication of the Restatement reveals little to excite surprise. As to most matters the subject has become static. Although there is some deepening of emphasis in places, as in the expanding area in which an employer is liable for the acts of a servant or contractor, there has been recently no significant change in approach.”⁸

Because of this, attempting to apply psychoanalytic conclusions regarding unconscious parent-symbolism to the law of agency would seem to be, at least for the present, an intellectual exercise of doubtful practical value.

Unlike agency law, labor law is in flux. Hence any knowledge gained from applying psychoanalytic discoveries about unconscious parent-symbolism to problems with which labor law is concerned might well prove of immediate value to those who seek to mold labor law. Indeed, it is this practical end that prompts consideration here of violence in labor relations—specifically, the violence that so often accompanies strikes.

7. “The King is one of the most regular unconscious symbols for the father, the Queen for the mother, and so on. In Great Britain, we have a rather happy arrangement whereby the ambivalent attitude towards the father is dealt with by dividing his public representative into two persons. The head of the executive, The Prime Minister, is periodically cast from power and politically annihilated, while the respect due to the father is reserved for another person.” JONES, *WHAT IS PSYCHOANALYSIS?* 87 (1948).

8. Seavey, *Agency Since the Restatement*, in *STUDIES IN AGENCY* 161 (1949).

The recent strike conducted by the United Automobile Workers Union against the Kohler Company of Wisconsin was marked by considerable violence. In fact, it has been charged that "the United Automobile Workers Union engaged in sustained violence which covered almost the whole range of illegality, stopping just short of murder."⁹ Shocking this violence most certainly was. Yet it was as nothing compared with the violence that has all too frequently accompanied labor disputes in the United States since the Civil War. During the Railway Strike of 1877, for example, several hundred persons were killed and more than ten million dollars worth of property was destroyed.¹⁰

Finding impressive-sounding reasons for such violent behavior presents no problem. If blame cannot be placed upon "industrial oppression" by employers,¹¹ then, perhaps, it can be placed upon the "arrogant impudence" of labor leaders.¹² Or, perchance, neither explanation seems adequate, then picketing and other normal strike practices can always be faulted.¹³

Often disregarded, however, are the tension and emotionalism that almost invariably accompany a strike. That a strike is a profoundly emotional experience may seem too obvious to mention. Yet as such, a strike is likely to serve as an occasion for venting aggressive impulses.¹⁴ And perhaps more important, a strike may well provide an opportunity for displacing unconscious hostility regarding parents onto employers.¹⁵

As has been pointed out, unconscious feelings concerning parents usually range from affection and love to hostility and hatred. And these unconscious feelings may help to mold attitudes towards employers; since, as has also been mentioned,

9. *Preface* to PETRO, *THE KOHLER STRIKE: UNION VIOLENCE AND ADMINISTRATIVE LAW* at v (1961).

10. See RAYBACK, *A HISTORY OF AMERICAN LABOR* 133-36 (1959).

11. Magruder, *A Half Century of Legal Influence upon the Development of Collective Bargaining*, 50 HARV. L. REV. 1071, 1076 (1937).

12. PETRO, *THE KOHLER STRIKE: UNION VIOLENCE AND ADMINISTRATIVE LAW* 93 (1961).

13. See GREGORY, *LABOR AND THE LAW* 141-42 (1961): "There is and can be no such thing as peaceful picketing, any more than there can be chaste vulgarity, or peaceful mobbing, or lawful lynching." PETRO, *THE LABOR POLICY OF THE FREE SOCIETY* 196-97 (1957).

14. STAGNER, *PSYCHOLOGY OF INDUSTRIAL CONFLICT* 416 (1956): "A second major feature of the strike is that it is an opportunity for expressing aggression The strike atmosphere encourages and indeed even seems to sanction the open expression of hostility."

15. Morris, *The Psychoanalysis of Labor Strikes*, 10 LAB. L.J. 833-41 (1959).

employers are likely to be unconsciously equated with parents. In fact, an employer may sense that his employees react to him as though he were a parent of theirs, and may take advantage (undue or otherwise) of the friendly and affectionate feelings displaced onto him.

But when a strike takes place, such warm feelings tend to disappear. Rather, the strike seems to activate angry and violent impulses—including unconscious hostility towards parents. This unconscious hostility (coupled with other aggressive impulses) is then likely to be displaced onto the employer (a far more acceptable target for aggression than parents)—and violence may well occur. Indeed, displaced hostility—and not economic issues—may actually be the root cause of many strikes and of the violence that so often accompanies them.¹⁶

Now if the violence that frequently erupts during strikes is in part attributable to the aggressive urges strikes activate and to the hostility displaced from parents onto employers, then even if employers (and union leaders, for that matter) behave in exemplary fashion during strikes, violence is still likely to occur. Further, assuming that one of the functions of law is to prevent or minimize outbursts of violence, then it would seem to follow that the law ought provide effective means of curbing violence when strikes are called.

Experience has shown that the issuance of a timely injunction is perhaps the only really effective method (other than employing inordinate numbers of policemen, National Guardsmen, and the like) of controlling violence when strikes occur.¹⁷ Unfortunately, however, beginning late in the 1880's and continuing into the early 1930's, injunctions were used in labor disputes to disrupt and prevent legitimate union activity.¹⁸ Reacting against this misuse of injunctions, Congress passed the Norris-Laguardia Act in 1932,¹⁹ a statute that removed from the *federal* courts "jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a

16. *Id.* at 833: "In some instances wage issues are introduced only as an afterthought, after a strike has begun. The strike that is a spontaneous explosion of aggressive tensions must be made to appear rational." STAGNER, *PSYCHOLOGY OF INDUSTRIAL CONFLICT* 424 (1956).

17. See GREGORY, *LABOR AND THE LAW* 192 (1961); PETRO, *THE LABOR POLICY OF THE FREE SOCIETY* 272-80 (1957).

18. GREGORY, *LABOR AND THE LAW* 99-104 (1961). See generally FRANKFURTER & GREENE, *THE LABOR INJUNCTION* (1930).

19. 47 Stat. 70 (1932), 29 U.S.C. §§ 101-115 (1952).

labor dispute."²⁰ Similar laws passed by state legislatures, as well as Supreme Court decisions emphasizing the preemptive role of federal law in labor relations, have severely restricted the right of *state* courts to issue injunctions in labor disputes.²¹ Thus the one legal weapon experience has shown to be really effective in curbing violence when strikes occur is, for all practical purposes, no longer available.

Because of this, the Norris-Laguardia Act and analogous state laws must be repealed, insofar as they deny to courts the injunctive powers needed to control labor violence quickly and effectively. Unlike the early 1930's when the Norris-Laguardia Act was passed, labor unions are now well-entrenched, extremely powerful, and apparently a permanent fixture in labor relations. Further, the rights of unions are now secured by the National Labor Relations Act and protected by the National Labor Relations Board. Hence there would seem to be little danger in giving back to the federal courts (and to state courts, where necessary) the right to issue injunctions when violence erupts during strikes.

The violence bred by strikes—indeed, labor relations itself—provides only a starting point for applying psychoanalytic knowledge concerning unconscious parent-symbolism to the law. For example, proceeding upon the assumption that fiduciaries may serve as unconscious parent-symbols, an investigation of the effect of unconscious ideas about parents upon the legal powers of trustees, guardians, and the like, might well prove of value. Deserving of immediate attention, however, are the law's most important parent-symbols—courts, and the judges who serve on them.

To suggest that the Supreme Court of the United States is not a only a court but also a symbol is hardly to advance a novel thesis. More than twenty-five years ago, Thurman Arnold asserted that the Supreme Court was America's "most important symbol of government."²² And within a year or two thereafter, Max Lerner declared that the Supreme Court had

20. *Id.* at § 1, 29 U.S.C. at § 101. Injunctions are permitted, however, if certain extraordinary stringent requirements are met. See *Accommodation of the Norris-Laguardia Act to other Federal Statutes*, 72 HARV. L. REV. 354, 356 (1958).

21. GREGORY, LABOR AND THE LAW 530-40 (1961); PETRO, THE LABOR POLICY OF THE FREE SOCIETY 276 (1957). See generally Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297 (1954).

22. ARNOLD, THE SYMBOLS OF GOVERNMENT 196 (1935).

become a symbol of sureness and stability; that as such, it fulfilled needs once satisfied by the kingships of Europe; that, indeed, the Court had "a strong symbolic hold over the American mind."²³ Perhaps a more precise way of expressing all this would be to say that the Supreme Court of the United States is, for most Americans, an unconscious parent-symbol.

Be this as it may, the assumption that the Court often serves as an unconscious parent-symbol is likely to help explain such matters as the inordinate—nay, morbid—preoccupation of some persons with what the Court will or will not do. For example, endless speculating concerning future decisions of the Court may well reflect an undue unconscious preoccupation with parental reactions and judgments.²⁴ Further, the knowledge that unconscious feelings towards parents range from love to hatred—indeed, are usually ambivalent—may help to explain why some persons venerate the Supreme Court, why others abhor it, and why the emotions of many people regarding it swing back and forth from one extreme to the other. In this light, consider the emotional storm aroused in 1937 by President Roosevelt's court-packing plan.

Roosevelt's plan to overcome the opposition of the Supreme Court to New Deal policies by obtaining congressional authority to appoint an extra Supreme Court Justice for each member of the Court who refused to retire at the age of seventy—this plan may have been so outrageous that the furious opposition it evoked may well have been justified. Recall, however, that in 1937 the country was in the throes of a seemingly endless and ever-worsening depression. Yet despite this, the Supreme Court had repeatedly struck down legislation that the administration believed necessary to help save the country's economy from total collapse. And Roosevelt feared that all other New Deal legislation was likely to suffer a similar fate at the hands of a Supreme Court that had come "virtually to exercise the functions of a 'super-legislature,' to be what Harold J. Laski termed 'a third chamber in the United States.'"²⁵ Thus there

23. Lerner, *Constitution and Court as Symbols*, 46 *YALE L.J.* 1290, 1291, 1292, 1306 (1937).

24. Attempts have even been made to predict mathematically (!) how the Court will decide the cases that come before it. For articles describing these attempts, see MURPHY & PRITCHETT, *COURTS, JUDGES AND POLITICS: AN INTRODUCTION TO THE JUDICIAL PROCESS* 535-43 (1961).

25. SCHWARTZ, *THE SUPREME COURT: CONSTITUTIONAL REVOLUTION IN RETROSPECT* 14 (1957).

was good reason for Roosevelt's desire to appoint additional Justices to the Supreme Court—and it is not at all obvious why the plan aroused such widespread and incredibly furious opposition. Certainly no such reaction was anticipated by the administration, which shortly before the plan was announced had won a landslide victory at the polls.

But once the assumption is made that the Supreme Court is an unconscious parent-symbol, then the emotional storm aroused by the court-packing plan no longer appears so inexplicable. That is, if a person unconsciously looks upon the Supreme Court as a parent-substitute, then any attempt to reduce or to destroy the Court's power might well be unconsciously interpreted by him as an attack upon his parents, as an attempt to render them impotent. Such an unconscious reaction to Roosevelt's plan, for instance, would almost inevitably arouse powerful unconscious forces and precipitate a most violent reaction. Because of this, the furious opposition evoked by the court-packing plan of 1937 no longer appears so inexplicable, once the Supreme Court's role as an unconscious parent-symbol is taken into account.²⁶

Though the extent to which the Supreme Court is regarded as an unconscious parent-symbol is admittedly debatable, there can be little doubt that the judges who serve on this court, and on other courts as well, are often unconsciously looked upon as father-substitutes. In short, as the father once represented the judge during childhood—

“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.”²⁷

—so does the judge represent the father during adulthood.²⁸

Now if a judge is unconsciously regarded as a father-substitute, then unconscious ideas and feelings concerning the fathers of those with whom he comes into contact are likely to be deflected onto him. This may help to explain why some

26. The suggestions in the text provide, at best, a *partial* explanation of the emotional upheaval evoked by Roosevelt's court-packing plan. Many factors having nothing whatsoever to do with parent-symbolism undoubtedly played a part in arousing opposition to the plan.

27. FRANK, *LAW AND THE MODERN MIND* 18 (1949).

28. REIWALD, *SOCIETY AND ITS CRIMINALS* 42-65 (1950).

lawyers feel compelled to venerate the judges before whom they appear—why judges are, by and large, the heroes of the bar. And by the same token, the deflection of *antagonistic* father-oriented feelings onto judges may help to explain why many criminals—and some lawyers as well—adopt an abusive and antagonistic attitude towards the judges before whom they appear.

Further, not only may a judge stir up unconscious father-oriented feelings in others, *but in himself as well*. A man's being a judge may arouse in his own unconscious the childhood wish to be in every way like his father.²⁹ The resurrection of this wish might not be objectionable if the judge's father ought have been a judge himself. But if the judge's father had been unduly strict or severe, then the judge's modelling himself on his father might well result in the dispensation of over-severe "justice." As Paul Reiwald (a psychoanalytically-oriented Swiss attorney) has pointed out: "Many harsh and over-severe judgments are traceable to the fact that the judge once identified himself with a harsh father."³⁰

Conversely, a man's becoming a judge may stir up in himself an unconscious desire to outshine his father in the eyes of others (the mother especially).³¹ Acting under the spur of this desire, a judge may so conduct himself in the courtroom as to rivet attention not upon the issues, but upon himself. Harold D. Lasswell has described such a judge—a certain "Judge Z," who "managed to keep in the center of attention in court by the use of many subtle devices, such as permitting many shades of expression to cross his countenance, playing off one counsel against another, and abruptly shifting his favors."³² To help eliminate such behavior, the *Canons Of Judicial Ethics* warn judges against "unconsciously falling into the attitude of mind that the litigants are made for the courts instead of the courts for the litigants."³³

Finally, mention ought be made of the possibility that unconscious feelings concerning a judge's father, as well as other

29. Children of five or so years of age normally try to model themselves on the parent of the same sex. See, e.g., BALINT, *THE EARLY YEARS OF LIFE: A PSYCHOANALYTIC STUDY* 108-09 (1954).

30. REIWALD, *SOCIETY AND ITS CRIMINALS* 51 (1950).

31. A desire to usurp the father's place with the mother usually appears by the time a boy is four years old. See, e.g., JONES, *HAMLET AND OEDIPUS* 85-86

32. LASSWELL, *POWER AND PERSONALITY* 84 (1962).

33. DRINKER, *LEGAL ETHICS* 275 (1953). (1955).

unconscious urges and strivings, affect the legal opinions that the judge renders. Much this possibility was raised more than forty years ago by Theodore Schroeder, who suggested that judicial acts reflect "emotional tones or values . . . acquired in past experiences . . . long after the experiences themselves have been crowded out of consciousness."³⁴ Unfortunately, however, Schroeder went on to contend that every judicial opinion "is little more than a special plea made in defense of impulses which are largely unconscious."³⁵

This further contention by Schroeder fails to convince, for (among other things) it ignores completely the role that logic and reason have played in the growth of Anglo-American law. As Morris R. Cohen has pointed out, the reasons given by judges for various legal rules have, beyond a shadow of a doubt, influenced the subsequent development of these rules. "The reasons found in the *Federalist* or those given by John Marshall in *Marbury v. Madison* or in *McCullough v. Maryland* have certainly been a determining factor in the subsequent development of our constitutional law."³⁶

The point is that conscious and unconscious forces are by no means mutually exclusive; both are likely to affect judicial opinions. And, as it is an error to ignore the influence of logic and reason upon judicial opinions, so is it an error to ignore the possible influence of unconscious feelings concerning a judge's father (as well as other unconscious ideas and urges) upon the opinions that the judge renders.

Parent-symbols—be they judges, courts, or employers—are by no means the only unconscious symbols of interest to lawyers. Sibling-symbols, for instance, also deserve the attention of the bar, for lawyers may unconsciously regard their fellow-lawyers as siblings. A lawyer may, on an unconscious level, equate the counsel who opposes him with a sibling who once competed with him for parental love—and if so, angry and hostile feelings concerning this sibling are likely to be aroused and to affect the lawyer's reactions towards the opposing counsel. Indeed, this may be one of the reasons why undignified squabbles between lawyers are so frequent, why judges repeatedly find it

34. Schroeder, *The Psychologic Study of Judicial Opinions*, 6 CALIF. L. REV. 89 (1918).

35. *Id.* at 95.

36. COHEN, *THE RATIONAL BASIS OF LEGAL INSTITUTIONS, REASON AND LAW* 183 (1950).

necessary to remind lawyers of the courtesy and respect that ought be shown to an opposing counsel.

Observations such as these may appear to have little or no practical value. Yet they are of use, if only to remind lawyers that their own behavior is affected by unconscious symbols—a reminder that may induce them to take a greater interest in, and perhaps be more sympathetic concerning, the problems of those who are unconsciously compelled to commit certain crimes because of the symbolic meaning these crimes have. Kleptomaniacs and pyromaniacs are typical of such unfortunates—and their behavior will now be considered in detail.

Kleptomaniacs are ruled by a compulsive and unconsciously motivated urge to steal. Unlike most thieves, however, kleptomaniacs often have no ostensible need for the articles they steal and may throw them away after stealing them.

“In kleptomanics, we have individuals who steal, but their stealing has a number of important differences from ordinary theft. For one thing, the purely predatory element present in common theft is lacking here. The subject steals not because of the value and the money he gets from the stolen article—that is, not for their mercenary value—but entirely for what they mean to him emotionally and symbolically. One often observes this in rich women who have no need for the article they steal.”³⁷

In like manner, pyromaniacs are driven by a compelling urge to set fires, an urge they usually find extremely difficult to resist.

“When the patient was asked to explain how he felt when setting fires, he said, ‘it comes on me all of a sudden. I’ll be walking down the street and something comes over me. I even may be whistling. He said that the impulse was tremendously powerful. He had often tried to resist, realizing that it is a terrible thing to do. He would struggle with himself until he got so weak that he was wet with perspiration and had to sit down. . . . Occasionally he succeeded in restraining himself, but he generally felt forced to yield. As soon as he had set the fire he felt calm—his terrifying anxiety was gone.’”³⁸

37. Karpman, *Criminality, Insanity and the Law*, 39 J. CRIM. L. & C. 590 (1949).

38. GUTTMACHER & WEIHOFEN, *PSYCHIATRY AND THE LAW* 58-59 (1952).

Unlike the typical arsonist, a pyromaniac generally sets fires neither for material gain nor out of a conscious desire for revenge. Rather, motivated by unconscious emotional urgencies, the pyromaniac is usually unable to explain why he acts as he does.³⁹

To detail the reasons why kleptomaniacs steal and pyromaniacs set fires would require a discussion of impulse neuroses and related emotional disorders,⁴⁰ a discussion foreign to the purposes and scope of this paper. Relevant here, however, is the psychoanalytic discovery that the articles a kleptomaniac steals or the fires a pyromaniac sets symbolize something that the kleptomaniac or pyromaniac unconsciously craves.

If the kleptomaniac is a woman, as is usually the case, she may unconsciously equate what she steals with the male phallus—a phallus that, as a little girl, she is likely to have seen (on a baby brother or on another little boy) and have envied.⁴¹ Most frequently, perhaps, the articles she steals unconsciously symbolize the love and affection she longed for, but somehow never received enough of, during childhood—love and affection she once may have wanted to take by force from her mother.⁴²

To a pyromaniac, and to other persons as well, fire has an unconscious symbolic meaning. Typically, fire is unconsciously equated with love.⁴³ For the pyromaniac, however, setting a fire often helps to gratify—albeit symbolically—an imperious unconscious demand for sexual gratification, a demand rooted in the erotic urges of childhood.⁴⁴ As David Abrahamsen has pointed out: "Firesetting is a substitute for a sexual thrill, and the devastating and destructive powers of fire reflect the intensity of the pyromaniac's sexual desires."⁴⁵

In short, pyromaniacs and kleptomaniacs commit—what are for them—symbolic crimes. And they commit these crimes in response to compelling unconscious demands.

39. Simmel, *Incendiarism*, in SEARCHLIGHTS ON DELINQUENCY 90 (Eissler ed. 1949).

40. See GUTTMACHER & WEIHOFEN, *PSYCHIATRY AND THE LAW* 56-57 (1952); FENICHEL, *THE PSYCHOANALYTIC THEORY OF NEUROSIS* 367-72 (1945).

41. For a description of basic psychoanalytic discoveries concerning penis-envy, see FREUD, *AN OUTLINE OF PSYCHOANALYSIS* 97-99 (1949).

42. See FRIEDLANDER, *THE PSYCHOANALYTIC APPROACH TO JUVENILE DELINQUENCY* 130 (1960).

43. NUNBERG, *PRINCIPLES OF PSYCHOANALYSIS* 14 (1955).

44. There is an as yet insufficiently understood connection between pyromania and the urethral-eroticism of children. See Ferenczi, *Composite Formations of Erotic and Character Traits*, in FURTHER CONTRIBUTIONS TO THE THEORY AND TECHNIQUE OF PSYCHOANALYSIS 257-59 (1951).

Despite this, the criminal law fails, by and large, to distinguish between pyromaniacs or kleptomaniacs and vicious predatory criminals. Rules that protect the insane (the "McNaghten Rules,"⁴⁶ for example) are, in the main, no more applicable to kleptomaniacs or pyromaniacs than to the ordinary criminal, for kleptomaniacs and pyromaniacs are usually neurotic and not psychotic or insane.⁴⁷ Admittedly, statutes in about a dozen states exonerate defendants whose crimes are the product of a so-called "irresistible impulse";⁴⁸ and it has been argued (and some courts have held) that these statutes are broad enough to include both psychotic and neurotic compulsions.⁴⁹ But these statutes were originally intended to apply to the insane (psychotic) only;⁵⁰ and even as a semantic matter, the thefts committed by neurotic kleptomaniacs and the fires set by neurotic pyromaniacs ordinarily defy characterization as the products of an "irresistible impulse."

"Irresistible implies that the person was absolutely unable to resist; *impulse* suggests an urge that is sudden and overwhelming but momentary. Such conditions exist—for example, in the irrational acts of confused epileptics, paretics, and schizophrenics—but they are rare."⁵¹

Further—and perhaps most important—defendants rarely try (except in homicide prosecutions) to invoke the protection of irresistible impulse laws, for acquittal under them is usually followed by commitment to a mental hospital for an indefinite period of time.⁵² Thus laws concerning insanity (including the irresistible impulse statutes in force in about a dozen states) have comparatively little effect upon the criminal law's treat-

45. ABRAHAMSEN, *THE PSYCHOLOGY OF CRIME* 129 (1960).

46. See CLARK & MARSHALL, *LAW OF CRIMES* 336-83 (6th ed., Wingersky rev. 1958).

47. ABRAHAMSEN, *THE PSYCHOLOGY OF CRIME* 127 (1960); Karpman, *Criminality, Insanity and the Law*, 39 J. CRIM. L. & C. 590 (1949).

48. GUTTMACHER & WEIHOFEN, *PSYCHIATRY AND THE LAW* 409n (1952): "The irresistible impulse test has been accepted in Alabama, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Illinois, Indiana, Kentucky, Michigan, Montana, Utah, Vermont, and Virginia, and perhaps also in Massachusetts, New Mexico, Ohio, and Wyoming, although the decisions in a few of these states are somewhat ambiguous." But see HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 491 (2d ed. 1960).

49. Davidson, *Irresistible Impulse and Criminal Responsibility*, in *CRIME AND INSANITY* 30, 47 (Nice ed. 1958).

50. Davidson, *Irresistible Impulse and Criminal Responsibility*, in *CRIME AND INSANITY* 30, 47 (Nice ed. 1958).

51. GUTTMACHER & WEIHOFEN, *PSYCHIATRY AND THE LAW* 410 (1952).

52. *Id.* at 422.

ment of kleptomaniacs and pyromaniacs—a treatment basically the same as that accorded the ordinary criminal.

For the law to do this, however, for the law to treat kleptomaniacs and pyromaniacs as though they were ordinary criminals, and accordingly, to punish kleptomaniacs and pyromaniacs with the usual jail sentences given to thieves and arsonists is, in certain significant ways, useless, unjust, and dangerous.

Sending kleptomaniacs and pyromaniacs to prison is certainly a useless way of trying to reform or rehabilitate them. As pointed out above, kleptomaniacs and pyromaniacs are often beset by compulsive unconscious urges for sexual gratification and love, urges they unconsciously try to fulfill symbolically by stealing or setting fires. Imprisonment, however, fails to satisfy these urges; instead, it intensifies them, for imprisonment is likely to be interpreted as a rejection⁵³—and being rejected by society is an extremely painful psychic experience, especially for those kleptomaniacs and pyromaniacs whose crimes are an unconscious symbolic attempt to gain love and affection. Thus sending kleptomaniacs and pyromaniacs to jail probably aggravates and strengthens than ameliorates and weakens the unconscious urges that originally provoked their crimes—and thereby increases the likelihood that when these kleptomaniacs and pyromaniacs are released from prison, they will, in an effort to satisfy the unconscious urges that beset them, break the law more frequently than in the past.⁵⁴

As imprisonment is a useless method of trying to reform kleptomaniacs and pyromaniacs, so is the *threat* of imprisonment useless as a means of *detering* them from stealing and setting fires. Before committing a crime, some criminals may coolly weigh the gains it is expected to bring against the legal penalty it is likely to incur, and may decide on this basis whether the crime ought be committed.⁵⁵ But a kleptomaniac

53. See Davidson, *Irresistible Impulse and Criminal Responsibility*, in *CRIME AND INSANITY* 1 (Nice ed. 1958).

54. Many criminologists and psychiatrists have reached similar conclusion regarding the effect of prison life upon the ordinary criminal. Like Edwin H. Sutherland, they have concluded that prison life is "conducive to the retention and development of criminal attitudes, rather than to reformation." SUTHERLAND, *PRINCIPLES OF CRIMINOLOGY* 504 (5th ed. 1955).

55. That criminals so act is a theory most closely associated with the name of Jeremy Bentham. See, e.g., BENTHAM, *THEORY OF LEGISLATION* (various editions).

or pyromaniac normally fails—indeed, is usually unable—to act in this manner. For one thing, he is ordinarily unaware of the unconscious objectives of his crimes (what his crimes unconsciously symbolize); and is therefore unable to evaluate these objectives and to determine if they are worth pursuing. Also, his crimes are generally committed in response to imperious unconscious demands—unconscious urgencies that overwhelm the protests of logic and reason and compel acquiescence. The kleptomaniac or pyromaniac is, in short, unlike the ordinary criminal who is presumably capable of balancing the expected rewards from a crime against the legal punishment for it.⁵⁶ Rather, the kleptomaniac or pyromaniac is usually a poor wretch who, unable to resist the unconscious demands that beset him, often steals worthless articles or sets profitless fires, and in so doing exposes himself to the danger of arrest, imprisonment, or worse.

Not only is the threatened or actual jailing of kleptomaniacs and pyromaniacs frequently useless, but it is often unjust as well—at least, insofar as the thefts of kleptomaniacs and the fires set by pyromaniacs are unconsciously determined and not the products of free will.

Whether man has a significant degree of free will—or indeed, any free will at all—is surely debatable, and perhaps unknowable as well.⁵⁷ Yet a belief in free will has been woven into the fabric of the law—and certainly plays a large part in the penal law.⁵⁸ To this very day, juries are called upon to determine whether an allegedly criminal act was “done with

56. The extent to which even ordinary criminals can or do balance the expected gains from a crime against the legal punishment for it has probably been greatly exaggerated. See, e.g., SUTHERLAND, *PRINCIPLES OF CRIMINOLOGY* 288 (5th ed. 1955).

57. For a brief and clear exposition of the philosophical arguments for and against the existence of free will, see HOSPERS, *AN INTRODUCTION TO PHILOSOPHICAL ANALYSIS* 262-75 (1953). It is sometimes asserted that the discoveries of Freud and his followers have refuted all free-will theories of philosophy. See, e.g., Green, *The Concept of Responsibility*, 33 *J. CRIM. L., C. & P.S.* 392-94 (1943). This assertion is erroneous, however. Psychoanalytic discoveries have admittedly revealed that *more* behavior is determined than had previously been supposed, that dreams and a number of other psychic events are *often* determined. By no means, however, have these discoveries shown that *all* behavior is determined, or even that dreams (or other psychic events) are *always* determined. Further, certain major psychoanalytic tenets such as Freud's theories concerning the healthy ego are incompatible with determinism and imply the existence of some degree of free will. See FREUD, *NEW INTRODUCTORY LECTURES ON PSYCHOANALYSIS* 108-12 (1933).

58. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 455 (2d ed. 1960). “Free will is the chief cornerstone of the criminal law.” GUTTMACHER & WEIHOFEN, *PSYCHIATRY AND THE LAW* 4 (1952).

evil intent (*mens rea*) for which there is criminal responsibility, or was the product of a mental condition that makes the act not one of free will, and hence not criminally punishable."⁵⁹

That kleptomaniacs and pyromaniacs have no will at all, that they lack even a modicum of ability to conform their behavior to legal standards—this hardly seems likely. Nevertheless, kleptomaniacs and pyromaniacs are, indisputably, far less able than the ordinary person—or even the ordinary criminal—to prevent themselves from committing antisocial acts. A kleptomaniac or pyromaniac may, at first, resist the inner urgencies that beset him; and may, for a time, succeed in preventing himself from stealing or setting fires. Sooner or later, however, these urgencies become too powerful: they overwhelm his will and force him to commit crimes that, as has been seen, usually make sense only as symbolic fulfillments of unconscious needs.

Now if, as pointed out above, the penal law regards the existence of a malevolent will and the freedom to decide whether or not to commit a crime as prerequisites of criminal liability; and if, as seems likely, kleptomaniacs and pyromaniacs possess not a malevolent will but rather a weak and defective will, a will unable to resist or to control unconscious urgencies; then treating kleptomaniacs and pyromaniacs as though they possess the same freedom of choice or free will that the law presumes guides the conduct of the ordinary man, and punishing these seriously ill persons with the usual jail sentences given to predatory thieves and arsonists, is surely unjust.

But are not the lives and property of society's more normal and law-abiding citizens entitled to protection? And if so, does not society have the right—nay, the duty—to imprison thieves and arsonists, though they be kleptomaniacs and pyromaniacs? More than eighty years ago, Holmes pointed out that "No society has ever admitted that it could not sacrifice individual welfare to its own existence."⁶⁰ And many patient-oriented psychiatrists and psychoanalysts have since concluded, albeit reluctantly, that the protection of society forbids the exculpation of such potentially dangerous neurotic offenders as kleptomaniacs and pyromaniacs.

"It seems clear that if the neurotic compulsion is traumatizing

59. Sobeloff, *From McNaghten to Durham and Beyond*, in *CRIME AND INSANITY* 145 (Nice ed. 1958).

60. HOLMES, *THE COMMON LAW* 43 (1881).

or dangerous, the defendant should *not* be exculpated. From the patient-oriented doctor's viewpoint this may be a harsh gospel. But the protection of society really does require it."⁶¹

But treating kleptomaniacs and pyromaniacs in the same manner as ordinary criminals, and sending seriously ill kleptomaniacs and pyromaniacs back into society after what may have been a relatively short jail term—this is an extraordinarily dangerous procedure. Imprisonment, as has been pointed out, can easily aggravate and strengthen the unconscious cravings that beset kleptomaniacs and pyromaniacs, cravings that all too frequently find symbolic satisfaction in stealing and setting fires. Hence, a *kleptomaniac or pyromaniac who has been released from prison may be more of a social menace than ever before*. Because of this, it is more than dangerous, it is unthinkable, to follow a procedure that *begins* by aggravating the unconscious cravings that assail kleptomaniacs or pyromaniacs—and that *ends* by sending these neurotic offenders back into the mainstream of society, thereby giving them the freedom and opportunity to commit the very crimes that assuage symbolically their unconscious cravings.

To summarize: imprisoning a kleptomaniac or pyromaniac on the same basis as an ordinary thief or arsonist is, in certain significant ways, useless, unjust, and dangerous. But how, then, ought these neurotic offenders be treated? How can the law protect kleptomaniacs and pyromaniacs (they are, after all, unfortunates ruled by unconscious forces that compel them to steal articles that are often worthless and to set fires that are often profitless)—how can the law treat kleptomaniacs and pyromaniacs with fairness and understanding, and at the same time protect society against the crimes they inevitably commit?

Conjuring up grandiose and elaborate methods of trying to accomplish this is not at all difficult. For instance, it is *theoretically* possible for boards of psychiatrists to examine practically everybody in the United States; for these boards to decide who among those examined are actual or potential kleptomaniacs or pyromaniacs; for the boards to determine which of these actual or potential offenders ought receive psychiatric

61. Davidson, *Irresistible Impulse and Criminal Responsibility*, in CRIME AND INSANITY 44 (Nice ed. 1958). See ALEXANDER & STAUB, *THE CRIMINAL, THE JUDGE, AND THE PUBLIC* xiii (1956).

treatment, which offenders ought be institutionalized, and so on. But even if this or a similar plan were feasible; even if a sufficient number of experts were found to staff these boards, and in addition, the public's cooperation were obtained—even then, such a plan would inevitably prove cumbersome, time-consuming, and extraordinarily expensive; and most important, it would undoubtedly violate traditional values and existing legal rights.⁶² Because of all this, a desirable method of handling kleptomaniacs and pyromaniacs is likely to be one that would maximize the use of existing legal facilities, one that would depart as little as possible from accepted legal practices.

Consider, therefore, a comparatively simple procedure, a procedure that would begin with a determination of whether or not an offender was a kleptomaniac or pyromaniac—a determination to be made *only if and when this offender had been tried and convicted of theft or arson* (in the traditional manner prescribed in the criminal law), *but before he had been sentenced*. In short, after the completion of a trial in which a defendant had enjoyed all the traditional safeguards offered by the criminal law, but had nonetheless been found guilty of theft or arson—after this trial, but before sentence was pronounced, a board of qualified psychiatrists would attempt to determine whether or not the defendant was a kleptomaniac or pyromaniac.⁶³

If a board ruled that the defendant was not a kleptomaniac or pyromaniac (the probable finding concerning most thieves and arsonists), then the usual penal sanction for robbery or arson would be imposed upon him. But if the board concluded that the defendant *was* a kleptomaniac or pyromaniac, then he would be sent to a correctional institution for an indeterminate period of time—indeterminate, however, only within the maximum and minimum prison terms now prescribed by law for the offense committed. For example, if robbery were now punishable in a certain state by imprisonment for no more than twenty years and for no less than two years, then a kleptomaniac convicted in this state would be sentenced to a

62. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 57 (2d ed. 1960).

63. Pre-sentence psychiatric examinations have been used extensively in juvenile courts and are now employed in a number of criminal courts as well. Reinemann, *The Expansion of the Juvenile Court Idea*, in *THE JUVENILE OFFENDER: PERSPECTIVE AND READINGS* 286-87 (Vedder ed. 1954). Indeed, in Massachusetts (under the Briggs Law) and in several other states, certain defendants receive a psychiatric examination even before their trial begins. GUTTMACHER & WEIHOFEN, *PSYCHIATRY AND THE LAW* 259-61 (1952).

correctional institution for an indefinite term, but in no event for less than two years or for more than twenty years.

While in the correctional institution, the kleptomaniac or pyromaniac would receive appropriate psychiatric treatment. Hopefully, this treatment would prove sufficiently effective to root out the unconscious causes of his antisocial behavior. And when the governing body of the correctional institution found that the offender no longer had a compulsive desire to steal or to set fires, he would be released.

But suppose that the psychiatric help given the kleptomaniac or pyromaniac proved only partially successful—or was, indeed, completely unsuccessful. In either event, he would presumably be confined in the correctional institution (or possibly be sent to a custodial institution) until the maximum term of his indeterminate sentence had expired; and only then would he be released. It is true that once again he would be a menace to society (though not as great a menace as before if partially cured). Nevertheless, his confinement in the correctional institution would have kept him from stealing or setting fires for the maximum number of years society permits for incarcerating even the most hardened thieves and arsonists. And upon his release from the institution, some provision could probably be made for keeping him under surveillance, thereby minimizing the threat he poses to society.

Now just as an upper limit on the number of years for which a kleptomaniac or pyromaniac can be sent to a correctional institution—just as this upper limit helps to protect the offender against an unduly long confinement in an institution (against what has been called the “tyranny of experts”⁶⁴) so does a lower limit on the indeterminate sentence given a kleptomaniac or pyromaniac help to reassure and to protect *society*. First of all, sending kleptomaniacs and pyromaniacs to a correctional institution for an indeterminate period having a specific minimum term helps to reassure the public that, at least during this minimum term, society need not concern itself with possible depredations by these offenders. Also, a minimum commitment term helps to protect society against malingerers—thieves and arsonists

64. See HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 57 (2d ed. 1960). What worries many lawyers is the possibility that a neurotic may, after committing a petty theft or other minor offense, be confined in an institution for a disproportionate number of years—perhaps for the rest of his life.

who are able to pretend they are kleptomaniacs or pyromaniacs; and who, after being committed to a correctional institution, would presumably show a rapid and remarkable "improvement." It is possible, of course, that a real kleptomaniac or pyromaniac may respond so well to psychiatric treatment that he is ready for release before the minimum term of his commitment expires. In this event, he can always be paroled (on much the same basis and in much the same manner) as are convicts who serve regular prison terms.⁶⁵

Needless to say, the procedure for handling kleptomaniacs and pyromaniacs outlined in the preceding pages leaves many questions unanswered. For instance, is it really advisable to deal with both kleptomaniacs and pyromaniacs in the same manner? After all, do not pyromaniacs pose a far greater threat to society than kleptomaniacs? And suppose that a kleptomaniac or pyromaniac unintentionally kills somebody while stealing or committing arson. Would not an outraged public require that he be treated like an ordinary thief or arsonist—and accordingly, demand that he be indicted for murder under the felony-murder rule? These and similar questions surely deserve serious and extended consideration. Yet regardless of how such questions are answered, it is indisputable that kleptomaniacs and pyromaniacs are sick persons—unfortunates who are compelled by inner forces to fulfill symbolically certain unconscious needs. And it is becoming increasingly apparent that: "Detention and treatment of sick persons rather than holding them to full accountability comports with our traditional concept of the dignity of the individual. It takes into due account the public safety and fully vindicates the proper interests of public justice."⁶⁶

Though concerned to a considerable extent with the problems of kleptomaniacs and pyromaniacs, offenders whose crimes fulfill symbolically their unconscious needs, this paper has sought throughout to shed light upon the relationship between law and unconscious symbolism. To this end, psychoanalytic discoveries

65. State penal laws may fail to specify minimum and/or maximum penal terms for arson or robbery. The New York Penal Law, for example, fails to provide a minimum term of imprisonment for arson and for robbery in the second and third degree. N.Y. PENAL LAW §§ 244, 2127, 2129. In such cases, the plan suggested in the text would have to be supplemented by legislation specifying whatever minimum and/or maximum periods of imprisonment are needed.

66. Sobeloff, *From McNaghten to Durham and Beyond*, in *CRIME AND INSANITY* 152 (Nice ed. 1958).

concerning the universal language of the human race—the symbolic language of the unconscious—have been presented. And an attempt has been made to reveal the applicability of these psychoanalytic discoveries to the law, by touching lightly upon such diverse areas as admiralty law, real property law, the law of agency, the conduct of lawyers; and by considering in greater detail such diverse matters as the symbolic role played by the Supreme Court, the violence that so frequently erupts during strikes, the unconscious feelings that may influence a judge's behavior, and the problem of finding a suitable method of handling kleptomaniacs and pyromaniacs. Further, certain reforms have been urged: it has been suggested that courts be given the injunctive powers needed to quash violence during strikes; and a plan has been advanced under which kleptomaniacs and pyromaniacs would be sent to a correctional institution for a period of time consistent with their rights and with the interests of society.

That this paper has only begun the task of exploring the relationship between law and unconscious symbolism is patent. No attempt has been made, for example, to follow up the possibility that fiduciaries may serve as unconscious parent-symbols, that parent-oriented ideas and feelings may have helped to mold legal rules concerning the rights and duties of trustees, guardians, and the like. Nevertheless, the material presented *does* offer a basis upon which lawyers can begin to find out how, and to what extent, unconscious symbolism has influenced the law—a basis upon which lawyers can begin to determine whether or not the influence of unconscious symbolism on the law is untoward and ought be permitted to continue unchecked and uncorrected.