Notre Dame Law Review

Volume 47 | Issue 2 Article 11

12-1-1971

Book Review

James A. Henderson

BOOK REVIEW

DEATH, PROPERTY, AND LAWYERS. By Thomas L. Shaffer. New York: Dunellen Publishing Company, Inc. 1970. Pp. xi, 292. $7.95.

Most legal writers aspire to be both practical and creative. And yet, as everyone who has ever tried his hand at legal writing will attest, to a certain extent practicality and creativity are antagonistic virtues. Too much of one tends to cancel out the other, resulting in the author's either saying something that most intelligent readers are likely to know already, or saying something that few intelligent readers are likely to accept as valid or relevant. Success lies in steering a mid-course between obviousness and unacceptability. And if the task were not difficult enough under the best of circumstances, there are some subjects with respect to which no such mid-course is possible. With these subjects, the author may succeed in being sensibly practical or interestingly creative, but not both ("How to execute a will," or "Why it's fun being a law school dean" come to mind).

Frankly, I would have supposed that the subject of Professor Shaffer's book, *Death, Property and Lawyers*—an attempt to relate the psychology of testation to the practice of law—would fall into this difficult category. That is, I would have supposed that in writing of the ways in which the legal profession might employ knowledge of the effects of death anxiety upon the disposition of property, one would inevitably wind up being either practical but obvious, on the one hand, or creative but unacceptable, on the other. Now, having read Professor Shaffer's book, I am not so sure.

I say that I am not sure because, at least at a relatively superficial level, the book quite clearly succeeds in giving the impression of being both practical and creative; and yet I am uncertain as to whether the same judgment may be made in substance. Returning to the metaphor of steering a mid-course between obviousness and unacceptability, I am still not convinced with respect to this subject that a mid-course actually exists. The author warned at the outset that he was about to embark upon uncharted seas, containing difficulties both obvious and hidden. Yet, try as I might, I somehow missed the precise point at which these difficulties were overcome. It is as though we had safely passed the critical point in our journey, where the dangers of becoming either obvious or unacceptable were greatest, during an intense fog of extremely short duration. I am left with a bit of the puzzlement of the grateful traveler who, having followed helpful instructions and having arrived at his intended destination, still harbors the suspicion that "you can't get there from here."

Before returning to explore the possible sources of my puzzlement, I shall briefly describe the contents of what the author himself calls "this curious book." In a total of seven chapters, five of which have been adapted from previously published articles, Professor Shaffer presents a series of different contexts in which lawyers can, and he strongly urges should, take advantage of psychological insights into human attitudes towards death. Every conscious human being is aware that

sooner or later he must die; awareness of inevitable death produces fear; fear of death invites suppression; and suppression of fear causes anxiety. Insisting that the anxiety produced through suppression of fear of death is pervasive in our culture and that it represents a source of harmful psychological disorder, the author asserts that the ownership and disposition of property—especially the testamentary disposition of property—significantly affects, and is affected by, attitudes toward death. The relationship between disposition of property and attitudes toward death is developed in two basic contexts familiar to lawyers: planning and litigation. These contexts each serve as the focus for discussion in a pair of chapters, each pair being organized into a separate part (Parts two and three, respectively) and given an appropriate subtitle (Part one of the book, subtitled "Death" and comprised of three chapters, introduces the reader to the basics of death psychology).

In the planning context, Professor Shaffer asserts that the client's interaction with the lawyer in planning the disposition of the client's estate forces both participants honestly to confront the fact of the inevitability of the client's death, resulting in an experience which allows the client to reduce his level of harmful death anxiety. The author sees the lawyer assuming the role of psychotherapist, helping to reconcile the client to his mortality and thus to console him. Reconciliation and consolation come not merely from the client's facing up to death, but also from the fact that in planning the disposition of his estate, the client in a sense "defeats" his death, or at least he defeats some of the tangible effects of death upon his property and his family. The developing psychology of property ownership suggests that, to a certain extent, the individual equates himself psychologically with his possessions, and that to the extent of this identification, "a person is what he owns." It is this identification of possessor and possessed which gives the estate planning context its unique therapeutic potential:

> The wills client, because his confrontation with death involves also a consideration of his property, may tend to regard his property as representing and, in effect, immortalizing him . . . .
>
> . . . One of the things [he] learns is that death will not rob him of power. . . .
>
> . . . Lawyers who understand [this] are able to help their clients leave the law office realistically consoled by the discovery that law provides ways to feed one's children, to continue one's business, and to rob death of some of its ability to frighten the living.[1]

The author is critical of some lawyers who, he says, "show little concern about the therapeutic counseling that goes on in an 'estate planning' client's experience."[2] Amplifying upon this criticism, he later observes that "[L]awyers cannot perform even everyday psychotherapy for death anxiety if they continue to treat will-drafting as a form of black magic . . . with canned forms and ten-minute interviews."[3] Anticipating the reluctance some lawyers will feel at the prospect of assuming the role of psychotherapist, he explains:

1 SHAFFER, DEATH, PROPERTY, AND LAWYERS 75, 76 and 89 (1971) [hereinafter cited as SHAFFER].
2 *Id.* at 72.
3 *Id.* at 142.

> The question here is not whether the lawyer is a counselor in this relationship, he cannot avoid being a counselor. The question is whether the lawyer realizes what he is doing, is able to accept what it involves for himself and for his client, and has the wisdom and courage to be a helpful companion.[4]

In attempting to relate the psychology of testation to the litigation context, Professor Shaffer focusses upon two types of cases in which postmortem inquiries into decedents' prior states of mind are regularly made: cases in which, for federal estate tax purposes, inquiry is made into whether inter vivos gifts by decedents within three years of death were not, contrary to a statutory presumption, made "in contemplation of death;"[5] and cases involving will contests in which inquiry is made into whether testamentary gifts were the product of undue influence. Professor Shaffer argues that in neither type of case have courts adequately based their decisions upon available psychological theories regarding human motivations. Instead, courts have resorted either to "unstated, even unconscious [psychological] assumptions which are patently unsound,"[6] or to "gimmicks such as presumptions and burden of proof."[7] For example, it is clear to psychologists that frantic physical activity or travel by a decedent shortly before his death probably indicates the decedent's awareness of impending death and represents a subconscious and futile effort to avoid the inevitable. However, it is precisely such activity which many courts in the contemplation-of-death cases have accepted as convincing proof that the decedent could not have been motivated by thoughts of death during the period in question.[8]

The sense of creativity which the book conveys is very much a product of the author's methodology and style. Obviously he has attempted, I believe largely successfully, to break away from traditional modes of legal writing. His style is easy and literate, and sprinkled with quotations from creative works of literature which he uses effectively in helping to clarify difficult or abstract ideas. Sources include not only traditional legal and psychological writings, but original and independent field work conducted by the author. To allow his readers to begin to develop their own sensitivities concerning death attitudes and anxieties, he supplies an edited transcript of a group encounter session in which the dominant subject is death and the participants' attitudes toward death. In an effort to substantiate hypotheses concerning the attitudes and expectations of potential wills clients, he reports the results of a questionnaire designed and administered to provide interesting and useful data. Edited transcripts of wills interviews are combined with commentary to support and develop hypotheses concerning the psychological dynamics of the lawyer-client relationship in the estate planning context.

If the book suffers from any deficiency in organization or style, it is a tendency for the various chapters not quite to fit together into an integrated whole, perhaps reflecting the fact that most of them were first written for separate

4 *Id.* at 72.
5 INT. REV. CODE OF 1954, § 2035.
6 SHAFFER at 202.
7 *Id.* at 261.
8 See cases cited in SHAFFER at 162 and 163 nn. 39-46.

publication. However, the author has done a commendable job of selecting, arranging and, where absolutely necessary, rewriting the pieces which make up the various chapters. The difficulty—perhaps the impossibility—of finally and totally integrating them does not constitute a substantial barrier to the book's effectiveness.

Assuming that this description of Professor Shaffer's book is reasonably accurate, it remains my task to answer, if I can, the question raised at the beginning of this review. Does the book manage substantively to combine the virtues of practicality and creativity? I must emphasize the word "substantively" here, because there can be no question that the author has produced an interesting and provocative book. What I seek to uncover in the discussion which follows is whether, in addition to the author's very readable style and his intriguing recapitulation of theories of death psychology, he is saying anything of creative substance to his lawyer-readers concerning the way they should approach the practice of law. One interpretation of the substance of what he has said would, in the final analysis, find him being quite practical but not very creative, and therefore subject to the criticism of merely stating the obvious. Psychological terminology and Hoosier wit aside, all that he may be saying substantively is that lawyers who plan estates ought to be aware that their clients fear death and are uncomfortable talking about it, and that the estate planning experience is both psychologically traumatic and potentially consoling.[9] And in the litigation context, he may simply be criticizing lawyers for not bringing the behavioral and psychological sciences sufficiently to bear upon the decision of certain cases, leaving to traditional methods the task of integrating these truths into the adjudicative process. If this is the substance of what he is saying, then he deserves polite thanks, but hardly excited shouts of praise, from his lawyer-readers. He has said what should have been, and hereafter surely will be, obvious to us all. Viewed in this manner, the sense of creativity which the book achieves, especially in relation to the lawyer's role as counselor, is largely superficial, extending way beyond the substance of what he is saying. The more complex empirical analyses contained in the book are certainly justified as interesting examples of psychological "art for art's sake," and I would recommend them to anyone wishing to broaden his perspective in the fascinating area of psychological attitudes towards death and property. But professionally, for the lawyer, they constitute something of a dead end.

My purpose here is not to belittle the book unnecessarily insofar as it is susceptible to what might be called the conservative interpretation of accomplishing little more in substance than telling lawyers to be more sensitive to the psychological impact they have upon their clients, and perhaps trying to help them to increase their sensitivity. Such a message is valid and certainly warrants repetition. It is simply that I believe (along with Professor Shaffer)[10] that most good

9 There are several places where the author speaks of the purpose of his book in a way consistent with this more conservative interpretation; *e.g.*, SHAFFER at 57:

> [I]f this book is of any value to you it will be in encouraging you to feel what clients feel in the testamentary situation. You need empathy, feelings of your own, to bring that off.

10 *E.g.*, SHAFFER at 264: "The best guidance and support [for troubled clients] probably come from lawyers who *intuitively* appreciate and enter into . . . a transference relationship." (Emphasis added.)

lawyers know this without being told, and that the other kind of lawyers are not going to learn it from a book, especially a book as technically complex and as scholarly as this one. If the author intended nothing more than to urge lawyers in need of urging that they should be more sensitive toward their estate planning clients, he could have said it much more effectively than this.

Upon reflection I am inevitably compelled in the direction of a less conservative interpretation of the substance of Professor Shaffer's book, one in which, to a marked degree, he goes beyond reiteration of the obvious and prescribes a very untraditional ideal toward which the legal profession should begin consciously to strive. Beyond merely advocating that lawyers become more sensitive to their clients' feelings, I interpret the author to be urging lawyers consciously to become psychotherapists to the limits of their capabilities. Replying to the hypothetical objection that lawyers do not have enough time to offer clients the type of extended therapeutic counseling that he advocates, Professor Shaffer offers this revealing reflection upon the lawyer's role as he would like to see it develop:

> In any event, we lawyers are obviously willing to give the wealthy as much time as the complexity of their problems demands, and we should be willing to consider the possibility that their problems may include anxieties about death, identifications with property, and hang-ups in the family . . . .
>
> . . . If lawyers are willing to do a humane job for middle-class wills clients (and even for poor ones), but have, despite professional good will, serious problems in finding enough time to do what is required, then we academics and the commercial "estate planning" industry should turn our attention to the human depth of will and trust preparation, and provide our busy brethren in the field with concise, dependable empirical and secondary behavioral information. I hope that this little book can be regarded as at least a contribution and a stimulus in that effort.[11]

In keeping with this philosophy, Professor Shaffer is clearly suggesting that will interviews should be long enough to permit maximum therapy, even if the extra time is not justified solely as it relates to the lawyer's drafting of the necessary instruments. To be sure, the author undoubtedly knows that he is not going to alter the behavior patterns of the profession overnight. But there can be little doubt that he wants to see basic and important shifts in the way lawyers—even good ones—approach their wills practice. Presently, lawyers fail to function as psychotherapists not because they *should not* so function, but because they *cannot,* at least given current limitations of training and expertise. The obvious cure for this deficiency, however, is not difficult to anticipate. In the not-too-distant future, one may expect courses, available both in law school and on a continuing education basis, designed to give lawyers the basic tools with which to function as competent psychotherapists in a whole range of counseling contexts.

And it is no less obvious to me that in the litigation context, as well as in the planning context, the author is not entirely content with what I earlier described as the conservative objective of making psychological insights generally available to courts, to be integrated, where found to be helpful, into the adjudicative

11 SHAFFER at 10 and 11.

process by traditional means. I shall return shortly to analyze the author's somewhat ambiguous suggestions for reform in the way in which "decedents' motivation" cases are decided. Suffice it to say for present purposes that in placing the "gimmick" label on such time-honored judicial institutions as policy-based presumptions and burden of proof,[12] the author quite clearly signals that his impatience, whatever it may eventually spawn by way of suggested change, runs deeper than mere petty annoyance.

Accepting for purposes of analysis that my less conservative reading of Professor Shaffer's book is an appropriate interpretation, what the author is saying is the furthest thing imaginable from obvious—it is unquestionably and provocatively creative. But in so dramatically avoiding criticism for having stated the obvious, has he said something that is valid? Is this more radical blending of the practice of law and the psychological sciences acceptable? I think not.

I should hasten to point out that my rejection of Professor Shaffer's thesis is based upon philosophical, rather than practical, grounds. My point here is not to insist that lawyers are incapable of consciously functioning as psychotherapists, or that they are unlikely so to function in the foreseeable future. I am more than ready to agree for purposes of discussion that the profession could so develop, if only gradually, were adequate efforts made. Therefore, the point I shall try to make here is not that lawyers cannot become psychotherapists, but that they ought not become psychotherapists—that the roles of lawyer and psychotherapist are irreconcilably distinct and philosophically at odds with one another in a way which inevitably forces one to choose between them. Moreover, I believe this fundamental distinction between lawyer and psychotherapist to be important enough to warrant a somewhat extended effort on my part to advance it by way of rebuttal of what I believe to be the proper interpretation of what Professor Shaffer has said. Viewed in this manner, the book speaks to lawyers about a most fundamental shift in the way they approach the practice of law, and as such it deserves whatever efforts are necessary to put it into proper perspective.

The distinction of which I speak, like any distinction rooted in first principles, may be illustrated in countless ways and on many levels of abstraction. As Professor Shaffer's book makes abundantly clear, the foundation of the psychotherapist's relationship with his patient is acceptance of the patient for what he is, without indulging professionally in normative judgments. First and always the psychotherapist understands and accepts the patient.[13] The world with which he is professionally concerned is the empirical world, in which normative judgments have a way of doing more harm than good. In stark contrast, the lawyer's instinct properly should be to resist the "is" in favor of the "ought." The rock bottom essence of the lawyer's role is, as an officer of the judicial and legal system in which he functions, precisely to do what the psychotherapist does not—to make normative judgments concerning the world around him, including his client and his client's values.

I do not for a moment intend to suggest that the lawyer constantly sits in stern judgment of his client. My point earlier was that most lawyers know better

12 *Id.* at 261.
13 See the first nine steps in successful therapeutic counseling in SHAFFER at 95.

than to do anything as foolish as that. However, I do insist that what distinguishes the lawyer from other professional counselors is his normative judgmental function, no doubt exercised subtly and with tact, but exercised nevertheless "when the chips are down." Deep at the very core of his being, the lawyer's role is not to accept or to understand, but to evaluate and to advise. He is not forced at every turn to choose between these two functions, and a good lawyer takes every opportunity to combine them. But when forced to choose, as I insist he often will be forced, the lawyer's choice is clear. The client pays for and should receive judgment and advice, even at the expense of acceptance and understanding.

Perhaps concrete illustrations will serve to clarify this distinction. It will be recalled from an earlier description of Professor Shaffer's thesis that the therapeutic potential of the estate planning experience inheres in the availability to the client of power which he may exercise after his death through the terms of his estate plan. "[The] promise of influence after death . . . is the psychological center of 'estate planning.' "[14] The book also makes abundantly clear that often, the more arbitrary and egocentric the client's exercise of this power, the greater the therapeutic potential. The author describes research by psychologists working with terminally ill patients, and suggests that "[i]n fact, detailed, mundane, and totally illogical plans for the future are a means of escaping or perhaps repressing death anxiety."[15] Later, in discussing the possible relevance of Freud's "Faecal Theory" of infantile development, he explains:

> The faecal theory explains how it is that a man expresses himself in giving or refusing to give. It explains how a man can identify with what he owns . . . .
>
> My main difficulty with the faecal theory is that I cannot trace it . . . from specific articles such as heirlooms . . . to wealth—to the economic power and security one has, *and to the tyranny one can exercise with intangible property.*[16]

Assuming that I am right, and that the therapeutic potential of the estate planning experience will often be increased through the implementation of arbitrary, egocentric property arrangements,[17] it is clear to me that the lawyer-as-therapist would owe the client a duty to accept and understand this potential, and to see that it is realized. Yet it seems no less clear to me that the lawyer-as-lawyer would in this situation owe the client (and his family) exactly the opposite duty—i.e., the duty to make a normative judgment that such a plan is unreasonable and to do everything in his power (including, finally, being critical of the client's desires) to "sell" a more reasonable (less egocentric) plan to his

14 *Id.* at 73.
15 *Id.* at 77.
16 *Id.* at 137 (emphasis added).
17 The high water mark of psychotherapeutic consolation through estate planning must be the English testator who directed that the income from his estate each year be changed into sixpence and thrown on his grave, to be scrambled for by the old women of his home town. The mind boggles at the therapeutic effect that the execution of his will must have achieved in consoling the testator regarding his mortality. It is also interesting, though hardly surprising, that the eminent legal scholar from whom I received this priceless gem referred to it (obviously applying an objective standard and unquestionably insensitive to the therapeutic aspects) as "the nadir of trusts of this kind." *See* 4 SCOTT, TRUSTS 2860 (1967).

client.[18] Thus, in the difficult but not so unusual case, the lawyer's role and the psychotherapists' role conflict, and in my view the former must eventually prevail. I believe this is how lawyers do function presently, and it is basically how I think they ought to function.

I am sure that in reply to what I have just said, Professor Shaffer would point to a number of places in his book where he makes it clear that he is in favor of "humane" property arrangements, and I am willing to read normative standards into his ambiguous phrase.[19] But I remain puzzled, as I stated at the outset, over how he can have it both ways—i.e., how he can insist upon achieving estate plans which conform to generally shared views of what is right and proper, and at the same time urge an approach on the part of lawyers which would, in the final analysis, subordinate normative judgment to therapeutic potential. As I see it, if the lawyer's duty really is to provide his client with "humane" plans, and if maximum therapy often lies (as I believe it will) in the direction of indulging the client in "inhumane" property arrangements, then the lawyer's role as lawyer must inevitably conflict with his role as psychotherapist. A choice must finally be made—the objectives of "humaneness" and psychotherapy cannot both be maximized.

If in the final analysis Professor Shaffer agrees with me that the lawyer's role as lawyer should prevail over his role as psychotherapist, then we are back where we began, i.e., telling lawyers something most of them already know: to be "gentle, but firm." If Professor Shaffer does not agree with me philosophically, and insists that the lawyer's role as psychotherapist should prevail (or even somehow that it should be given "equal weight"), then he is advocating a fundamental and radical departure from tradition that I could never accept.

The closest the author comes to confronting the essence of this "role conflict" between lawyer-as-lawyer and lawyer-as-therapist comes mid-way through his treatment of the planning content, where he urges lawyers to adopt toward their wills clients the "experimental mode of inquiry" developed by behavioral scientists:

---

18 Obviously, the important word here is "reasonable." With it, I mean to refer to a whole range of normative values, including what I believe to be the modern trend toward a recognition of the legal and moral rights of the surviving family to a portion of the estate. Moreover, current thinking is clearly in the direction of removing the testator as much as possible from the decisions that occur after his death, and replacing him with a fiduciary broadly empowered with discretion to act for the benefit of the family. I equate "egocentric" plans with nineteenth-century images of the "dead hand." Even today, to be sure, the testator has the legal "right" to be egocentric; but I insist the lawyer has the professional "duty," which he owes not just to the testator but in a real sense to the testator's spouse and children, to resist him on that score.

19 Of course, my notion of "reasonableness" is no less ambiguous, but it is ambiguous in a different way. At least my standard is clearly meant to be objective. Professor Shaffer's standard, on the other hand, may very well be subjective, in the sense that each testator's own personal desires establish what would be a "humane" plan for him. This tendency toward ambiguity (objective vs. subjective, normative vs. empirical) permeates the author's treatment of his entire subject, and I make numerous references to it throughout this review. A good example of it in the present context occurs on page 97 of the book, where, having emphasized that the client's desires and feelings should be accepted and understood by the lawyer, he suggests that "young-family clients eventually come to a realization that their small wealth *must be* applied for minor children . . ." (emphasis supplied). The ambiguity for me stems from the fact that he does not mention the lawyer's role in bringing about this realization, nor does he pose a case which tests the normative content of the "must" here. Clearly, he is positing clients who do want to benefit their children, but who start off thinking impractically in terms of assuring their children's college educations.

> The "experimental mode of inquiry" also excludes narrow value systems which reflect what the lawyer thinks the client should do with his property. At the very least, an openness to the client's own feelings and values about property and family requires that the lawyer realize that he communicates his values and attitudes to the client, whether he wants to or not. It may be that a life-estate trust for the client's wife is, in the lawyer's opinion, a poor idea. But the value of the idea should be tested against the way the client feels about his wife, about—for instance—her remarriage after his death, and about her ability to plan for and support their children. *It should not be based on a moral absolute which represents the lawyer's own feelings and values.*[20]

The quoted language could not have been better phrased to prevent a meaningful confrontation between the roles of lawyer and psychotherapist. The author's choice of "a moral absolute representing the lawyer's own values" as a target of criticism in the last sentence eliminates any chance the reader might otherwise have had of being forced to choose sides in response to the truly difficult case. Of course, the lawyer should not impose his own values absolutely—does the author honestly believe many lawyers do that? But what of the more realistic situation, for example, in which the client's desires may be said to be unreasonably egocentric when judged by general societal norms? The first sentence of the quoted passage comes closer to answering that one—and in a manner consistent with my interpretation that the author is subordinating the "rightness" of the plan to the therapeutic potential of planning to the client.

Taken as a whole, the quoted passage clearly reveals what I have described as the puzzling ambiguity of the book. Either it is a restatement of a sensible truth, i.e., that the lawyer should be more "open to the client's feelings," in which case I find the passage obvious and unexceptional; or (as I believe) it is a somewhat obfuscated call to the lawyer to defer, in the final showdown, legalistic values in favor of therapeutic understanding and acceptance, in which case I find the substance of the passage unacceptable.

One more illustration of this inherent conflict between the roles of lawyer and psychotherapist will serve to make clear my philosophical difference with Professor Shaffer concerning the role that lawyers should play in advising their clients. In a very interesting portion of a later chapter dealing with the subject of transference as it relates to the adjudication of undue influence cases, the author quotes at length from Dr. K. R. Eissler's book, *The Psychiatrist and the Dying Patient,* in which the therapist-author describes his relationship with a middle-aged, female patient. The psychiatrist and patient were very close, and entered into a relationship in which the psychiatrist became the only person whom the patient trusted and upon whom the patient relied psychologically. Having undergone a battery of physiological tests at the psychiatrist's suggestion, the woman was found to be terminally ill. The examining internist did not tell the patient of his findings, agreeing with the psychiatrist that such information should be withheld. During the months that followed, the psychiatrist repeatedly assured the woman that the condition for which she had been tested was completely benign.

---

20 SHAFFER at 98 and 99 (emphasis added).

I shall let Dr. Eissler relate in his own words the portion of the story of particular relevance to our present discussion:

> Shortly after her return from O—— the patient had told me that if she knew she were dying, she would change her will instantly and distribute part of the money which had been allocated in a previous will to her quasi-adopted daughter to other relatives, who were in need of financial assistance. But since she was assured that her sickness was benign, she did not see any reason to proceed in a hurry. Pointedly—and evidently in order to test me—she added that she was certain that I, since I had never let her down, would tell her to make a will now if her life were in danger. A decision to make myself instrumental in the preservation of the patient's illusion of approaching recovery thus might have had detrimental consequences for some of her relatives, inasmuch as they would obtain less of her estate if she died prior to executing a new will. However, I decided that the patient's mental and emotional welfare had to be my paramount goal even though, if all circumstances were known to the members of her family, I would be liable to the justified complaints of those who might be injured by the patient's premature death. I am fully aware that I might be censured by some members of the medical and juridical professions for such an opinion, but I do not see how a different decision can be made if the patient's welfare is made the physician's uppermost goal, which, after all, it should be.[21]

No story concerning the therapist-patient relationship could more vividly serve to illustrate what I see as the intrinsic difference between the roles of lawyer and psychotherapist. Dr. Eissler himself admits in the quoted passage that he would be liable to the justified complaints of the family, and that some lawyers and psychiatrists might censure him. And yet several pages later, Professor Shaffer comments in reference to Dr. Eissler's story that:

> [S]ound medical technique, in his opinion, presented him with no alternative to putting the patient in a situation where she was motivated to make what lawyers have for years called an "unnatural" will. This was true despite complete innocence . . . on the part of the doctor.[22]

I submit that "sound legal technique" would never have presented a lawyer analogously situated with "no alternative" to allowing the client to leave an unnatural will. The "complete innocence" of which Professor Shaffer speaks is an innocence which can have its source only in the whatever-helps-the-patient world of the dedicated psychotherapist. The point here is that the lawyer ought never put himself in a position sufficiently analogous to that of the doctor in this case so as to raise a similar dilemma. It ought always be open to the lawyer to take a middle course between telling the client she is terminally ill and telling her, in effect, that she need not change her will. Once the personal relationship becomes so intense that it interferes with the lawyer's giving his client even minimally sound legal counsel, I submit that a sense of professional responsibility should compel the lawer to advise her to seek other, more objective legal advice. For a lawyer to act as this doctor acted would be for the lawyer to act unethically.

21 *Id.* at 221.
22 *Id.* at 225.

Although Dr. Eissler's case is extreme, I offer no apologies for making use of is, for it is precisely the extreme case that illustrates most clearly the essential difference between the roles of lawyer and psychotherapist which I believe Professor Shaffer has glossed over. It is one thing to accept the goal of the psychotherapist to be that of putting the psychological welfare of the patient before all else, and to condone such conduct as a medically legitimate means to that end. By no stretch of one's wildest imagination, however, should the same goal, or conduct, be advocated for legal counselors. I do not mean to suggest that Professor Shaffer anywhere in his book expressly advocates that lawyers should behave as did the doctor in this story. I do insist, however, that this is the clear implication of any serious call for lawyers to begin to act consciously as psychotherapists, and I feel compelled to object at the outset, long before the extreme case inevitably presents itself.

Turning briefly to the author's treatment of the litigation context, one should observe that here, too, the dominant theme reflected in the book is a replacement of value judgment with empirical judgment. I alluded earlier to Professor Shaffer's deprecating reference to policy-based presumptions as "gimmicks." It is clear to me that he would like to see contemplation-of-death and undue influence cases decided less by resort to policy and more by reliance upon modern psychological theories concerning human motivation. My reaction to this suggestion is twofold: first, as one may have guessed from my reactions regarding the lawyer's role as adviser, I am not nearly so uncomfortable as he seems to be with the idea of policy and ultimate values playing a large role in the decision of these cases, and I suspect from some of the things he has said that at times he may not be able to tell the difference between value judgment and empirical judgment when he sees it; and second, despite receiving a rather vague assurance from the author to the contrary,[23] I am fairly certain that the move towards greater empirical sophistication which he advocates would inevitably and unhappily force lawyers practicing in this area to become much more dependent upon experts in psychology.

I can best illustrate the validity of my reactions by a brief reference to Professor Shaffer's analysis of a specific problem raised in the book. In his discussion of contemplation-of-death cases, the author describes one type of recurring fact pattern in which courts, faced with property transfers which a layman would describe as "vindictive," have held the vindictiveness accompanying the transfers to establish a life, rather than a death, orientation, and have accordingly found the gifts not to have been made in contemplation of death.[24] The author refers to psychological studies which reveal that some vindictive transfers are focally suicidal, and suggests that suicidal frames of mind ought to be held to be within the statutory phrase, "contemplation of death":

23 Reacting favorably to a judicial opinion which takes advantage of psychological insights in deciding a gift in contemplation-of-death question, the author remarks:

> The . . . court did not, on the other hand, surrender its decision to the "experts." That would have added a new chapter to the long, unwholesome list of judicial problems which are falsely centered on a misuse of a psychiatric and psychological information . . . [P]sychology as it is presently derived in the adversary system, through adversary expert witnesses, often dilutes its scientific integrity, and does not serve the law well. SHAFFER at 202 & 203.

24 See cases cited in SHAFFER at 177 n. 73.

> The reasoning [which the courts should adopt in deciding these cases] would be this: (1) the transferor identified himself in some significant way with his property; (2) he transferred his property in a suicidal frame of mind; (3) suicidal frames of mind are within the statutory phrase "contemplation of death." . . . Point 3 is a conclusion based on inquiry but applied more or less generally: it is a "legislative fact."[25]

I have no quarrel with the notion that courts ought to re-evaluate their assumptions regarding vindictive transfers in light of the psychological insights regarding focally suicidal transfers. However, I do object to the author's explanation of how this re-evaluation will be implemented. Contrary to what he may have said elsewhere about not surrendering decision to the experts, his "Points 1 and 2" are most certainly going to require a far greater dependence upon experts in psychology. And lest his lawyer-readers underestimate the thicket of psychological jargon that may be visited upon them, Professor Shaffer supplies a truly staggering display in the form of one eminent suicidologist's division of death attitudes into four major psychological categories with no fewer than fourteen subcategories.[26] Moreover, contrary to his characterization of it as "legislative fact," "Point 3" most certainly is a value judgment to be made by the court in light of the policies held to underly the contemplation-of-death statute. In deciding what meaning to attach to the statutory phrase, "contemplation of death," the courts should not, as the author suggests they should, ask the advice of psychologists.

The failure of Professor Shaffer's analysis of the implications of his approach to the litigation context is exemplified by the analysis of the same contemplation-of-death problem by a clinical psychologist, Dr. Robert S. Redmount (who is also a lawyer), whom Professor Shaffer invites to join him in responding to a hypothetical fact pattern. Having described the "procedural" way in which a court typically approaches these cases, with factual evidence on both sides of the contemplation issue giving the court great latitude to decide the case either way, Dr. Redmount explains:

> Contemplation from a substantive point of view may be another matter. And, it may be more properly and reasonably the province of the psychologist who truly seeks to examine behavior than of the jurist whose essential effort and responsibility is to somehow pass judgment.[27]

The beauty of this passage is that it succeeds in bringing together everything that has been said by way of critical analysis in this review of Professor Shaffer's book. I could not agree more with Dr. Redmount's statement that the jurist's (I would expand it, of course, to include the lawyer's) responsibility is "somehow to pass judgment." However, I react to it oppositely. Instead of de-emphasizing this judgmental role in the counseling and adjudication contexts, I would emphasize it. There is more than a little conceit of the "only knower of truth" in Dr. Redmount's phrase "the psychologist who *truly* seeks to examine behavior,"

25 *Id.* at 191.
26 *Id.* at 150-52.
27 *Id.* at 180.

which, frankly, I find distasteful.[28] The very same point is echoed several pages later in Professor Shaffer's comment on the same hypothetical case, "[I]t is perfectly obvious that courts do not with any sincerity or seriousness attempt to find out what the dead man's intention was."[29]

It is not so much what these men are saying as how they are saying it that reveals the basic error to which they both fall prey. They appear to have lost sight of the fact that the ultimate goal of the courts in every case involving a decedent's prior motivations ought to be to try to reach results that are by and large consistent with the policies and values underlying the particular rule, not necessarily to characterize a dead man's intent with clinically accurate precision. This is essentially the point I made earlier in my discussion of the proper role of the lawyer as counselor. The clinical psychologist's goal is to achieve empirical understanding; the lawyer's goal is to render normative judgments. The behavioral scientist is interested in measuring and determining human motivation as an end in itself; the jurist, only to the extent that such a determination demonstrably helps in reaching right results. If the courts are floundering in trying to decide the contemplation-of-death cases, my lawyer's instinct tells me it is not the fact-finding, but the policy-determining that is in need of reworking. If the values sought to be implemented by the contemplation-of-death concept cannot be articulated in a more precise way, then perhaps the concept itself should be abandoned.[30] In any event, I am reasonably sure that the answer here does not lie in bringing the psychologists in to tell either judge or jury what it means to "contemplate death."

I began this review of Professor Shaffer's provocative book with the observation that I was not sure that a middle course existed here between the twin dangers of being obvious or being unacceptable. In light of the foregoing analysis, I am ready to assert with a fair degree of confidence that no such mid-course exists. To the extent that the book says something practically useful to lawyers, I find it tending toward the obvious; and to the extent that it says something creatively different about how law should be practiced, I find it unacceptable. If my analysis is correct, then it is the subject itself, and not Professor Shaffer's treatment of it, which forces this conclusion. And to the extent that his subject is fairly typical of a growing number of others which attempt to bring the behavioral sciences to bear upon the law, perhaps we are here dealing with what could be called an "inherent limitation" of this particular art form.

There are at least two ways in which I may have been unfair to the author in my critical analysis of this book. First, in dwelling upon the substance of what Professor Shaffer has said, I have undoubtedly failed adequately to convey a sense of the charm, vitality, and the excitement of the book. Rarely have I read a work of this sort where the author's personality was so vividly and candidly projected. This is an interesting book, an informative book and a book well worth every lawyer's time to read and react to.

The second possibility of error on my part goes to substance. There may, in

28 The author seems to have hit it when he states, "Psychologists . . . have a snobbery of their own. . . ." *Id.* at 11.

29 *Id.* at 188.

30 *Id.* at 150 (Point 1).

fact, be a mid-ground here, the existence of which has eluded me. I leave it to my readers to read Professor Shaffer's book and decide for themselves. In any event, the nature of my criticism is such that it would not be met by the suggestion that lawyers should be "a little bit like psychotherapists," or "three-quarters like psychotherapists." For me, this is a fish-or-cut-bait situation. The distinction I have tried to elucidate is one which goes to the very heart of the professional lawyer's image of himself, his role, and his responsibility. It should not be glossed over, even in the interest of urging lawyers to be more sensitive and considerate toward the feelings of their wills clients. If I may justifiably be accused of putting words into Professor Shaffer's mouth, then at least he shares the blame for being ambiguous enough to have allowed me honestly and in good faith to commit such an error. I can only hope that the polarization of our positions has brought some further clarity to this interesting and important subject.

*James A. Henderson, Jr.**

* A.B., Princeton, 1959; LL.B., Harvard, 1962; LL.M., Harvard, 1964; Member, Florida and Massachusetts Bars. The author is Professor of Law at Boston University School of Law.

BOOKS RECEIVED

THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT. By Alfred H. Kelly and Winfred A. Harbison. This is the fourth edition of what has become a standard work in the field of Constitutional history. Of primary interest to historians, the book has been revised to include an analysis of the Warren Court. New York: W. W. Norton & Company, Inc. 1970. Pp. xviii, 1209, $10.75.

AMERICAN LAW: AN INTRODUCTORY SURVEY OF SOME PRINCIPLES. By Samuel I. Shuman and Norbert W. West. Designed as an introduction to basic principles of law, this work will be primarily of interest to those who teach introductory courses in law at the undergraduate level or during the first year of law school. Detroit: Wayne State University Press. 1971. Pp. 638. $19.95.

THE FUTURE OF THE INTERNATIONAL LEGAL ORDER: VOL. II, WEALTH AND RESOURCES. Edited by Richard A. Falk and Cyril E. Black. This latest of a five-volume series attempts to call attention to some of the critical developments in the economic area of international law. While the first article (by Wolfgang Friedman) tends to cover old ground, articles by William T. Burke (Ocean Law) and Ivan A. Vlasic (Outer Space) are of greater interest. Princeton: Princeton University Press. 1970. Pp. x, 343. $11.00.

THE GAY MILITANTS. By Donn Teal. Mr. Teal, who proclaims himself to be "gay and proud," has shed little light on the legal issues and human problems raised by homosexuals. Rather, he is content to fill this book with glib remarks by avant-garde publications on the issue of harassment of homosexuals, while paying scant attention to the problems of the "gay" segment of society in any area other than New York City. New York: Stein and Day. 1971. Pp. 355. $7.95.

INTELLECTUAL PROPERTY: CASES AND MATERIALS, 1960-70. By Albert P. Blaustein and Robert A. Gorman. Designed as a casebook for their copyright course, the authors have demonstrated considerable imagination in selecting cases (most of which were decided after 1960). The book demonstrates that copyright law can be a stimulating area to study or practice in. South Hackensack: Fred B. Rothman & Co. 1971. Pp. ii, 264. (price unreported).

LAW FOR EVERYONE. By Howard L. Oleck. Designed primarily for laymen, this book presents legal concepts in the context of simple fact patterns, without technical language, in order to instruct citizens in the legal implications of everyday affairs. New York: Association Press. 1971. Pp. 255. $5.95.

LETTERS OF LOUIS D. BRANDEIS: VOL. I, 1870-1907: URBAN REFORMER. Edited by Melvin I. Urofsky and David W. Levy. This is the first of a five-volume series, which goes far towards adding historical depth to one of the most prominent of twentieth-century jurists. Volume I is extremely well done, with footnotes that are illuminating without being burdensome and pages which are typeset so as to be extremely readable. Personal as well as legal correspondence is included.

THE LOCAL ECONOMIC DEVELOPMENT CORPORATION: LEGAL AND FINANCIAL GUIDELINES. Compiled by the Practicing Law Institute under Direction of the U.S. Department of Commerce. This book attempts, as fully as possible, to advise lawyers who are attempting to stimulate economic development in a low-income community. Franchises, cooperatives, financing problems and tax implications are treated in detail. Washington, D.C.: U.S. Government Printing Office. Pp. xxv, 259. $2.00 (paperbound).

LOW-INCOME HOUSING: A CRITIQUE OF FEDERAL AID. By Robert Taggart III. Mr. Taggart attacks federal programs to improve housing primarily because of their lack of coordination. The author makes an attempt to concentrate on some of the less celebrated housing problems and programs, such as homeownership plans, rural housing assistance, and rehabilitation programs. Baltimore: Johns Hopkins Press. 1970. Pp. x, 146. $2.25 (paperbound).

THE NLRB AND THE APPROPRIATE BARGAINING UNIT. By John E. Abodeely. The author gives extensive treatment to the historical factors bearing upon the determination of the appropriate bargaining unit, as well as to special circumstances bearing upon that determination. In addition, the problems presented by reorganization, merger, and acquisition, as well as the topic of NLRB craft severance policies are considered. Philadelphia: University of Pennsylvania Press. 1971. Pp. viii, 239. $5.95 (paperbound).

NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY. By Telford Taylor. Professor Taylor discusses the legal implications not only of the My Lai incident, but also of handling prisoners, widespread bombing of civilian population centers, "free fire" zones, and guerilla warfare. He leaves us with the uncomfortable conclusion that we have given little more than lip service to the principles enunciated through the Nuremberg trials. New York: Bantam Books, Inc. 1970. Pp. 224. $1.25 (paperbound).

PICTURES AT A PROSECUTION: DRAWINGS & TEXTS FROM THE CHICAGO CONSPIRACY TRIAL. By Jules Feiffer. Artist and playwright Feiffer, by juxtaposing drawings and official transcripts, has managed to capture the atmosphere of a trial in which the American judicial system had some of its most trying moments. New York: Grove Press, Inc. 1971. Pp. 182. $3.95 (paperbound).

THE RIGHT TO LIVE. By C. C. Cawley. Mr. Cawley thoroughly deals with the problems created when a parent, because of his religious convictions, denies his child proper medical care. Problems presented by faith healers, Christian Scientists, and Jehovah's Witnesses are examined in detail. Mr. Cawley strongly suggests, as many courts have concluded, that the religious freedom of parents should be secondary to the welfare of the child. Cranbury, N.J.: A. S. Barnes and Company. 1969. Pp. 303. $10.00.

THE SOMETIME GOVERNMENTS: A CRITICAL STUDY OF THE 50 AMERICAN LEGISLATURES. By John Burns. The author's thesis is that federal and local governments have failed to deal effectively with the social problems of this decade, leaving a gap which must be filled by effective state governments. An interesting feature of the book is that extensive recommendations are made for each of the fifty state legislatures. New York: Bantam Books, Inc. 1971. Pp. xv, 367. $1.95 (paperbound).

UNCLE SAM, THE MONOPLY MAN. By William C. Wooldridge. The author, in this rather surprising book, challenges the assumption that government is the only institution capable of providing certain services, such as a post office. His suggestion is a "denationalization" of these monopolies and a return of private enterprise to these areas. New Rochelle: Arlington House. Pp. 160. $6.95.

WITH MAN IN MIND: AN INTERDISCIPLINARY PROSPECTUS FOR ENVIRONMENTAL DESIGN. By Constance Perin. The author argues that money and resources are not enough to redesign our urban environment. A "humane rationality" must be introduced into every level of urban design, from the subway station to housing units and industrial complexes. Cambridge: M.I.T. Press. 1970. Pp. 185. $7.50.

Pages 421-424 are Intentionally Blank.