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AN ACADEMIC LAWYER PLAYS ARMCHAIR ANALYST: SOME SPECULATIONS ON THE RELEVANCE OF PSYCHOANALYSIS TO THE LAW

Leonard V. Kaplan*

"The antinomy between mind and body, word and deed, speech and silence, overcome. Everything is only a metaphor; there is only poetry."¹ Philosophers, psychiatrists, psychoanalysts, psychologists, social scientists of all hues of philosophic/theologic persuasion today as in the past adumbrate theories, justifications, systems, nonsystems explaining man *qua* man, man *qua* man in society.

Theoretical postulates in various stages of proof or faith as they respectively persuade thinking man of their efficacy, validity, viability through their respective prophets, be they philosopher, cleric, medical doctor, or soul doctor, find their way into the law for good or ill. Such statements concerning the absolute or relative truth of man's "being"² often "find" their way into legal structures without close scrutiny as basic postulates, only to be "re-discovered" and examined at a later date. No matter to what jurisprudential school one belongs, it must be admitted that "things" happen sometimes consciously, sometimes unconsciously in the working of those institutions which we call legal, uncaring whether a particular jurisprudential theory accounts for them or not.

Lawyers, at least many theoreticians of the law, as well as many practitioners, can look on formulations in disciplines formally outside the law (at least the originators/finders believe their theories to be outside the law) as found, discovered, invented or merely "there" for the use of the legal system, if not within the particular lawyer's definition of law. Some extant jurisprudential schools define law so expansively as to include within it all arts and sciences. Law becomes the interworking of all processes, known, unknown, phenomenal, numeral, essential or existential.

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¹ N. O. BROWN, *LOVE'S BODY* 266 (1966).

² Words themselves become associated with basic theories to such an extent that we must often resort to analytical analysis merely to indicate the meaning usage we wish to convey. See A. KORZYBSKI, *SCIENCE AND SANITY: AN INTRODUCTION TO NON-ARISTOTELIAN SYSTEMS AND GENERAL SEMANTICS* (4th ed. 1958); H. WEINBERG, *LEVELS OF KNOWING AND EXISTENCE* (1959).

In short, many lawyers feel the responsibility of at least attempting to categorize where possible or at least acknowledge where known the relationship of fields of knowledge and experience to legal frameworks.

But this prerogative of assimilating, identifying and attempting relational explanation is no longer, if it ever was, peculiarly within the lawyer's ambit. Notwithstanding all the complaints of the "other-directedness"³ of our modern society, we can discern a trend, favorable or not, toward interdisciplinary exegesis of man's situation. As certain elements of our society fall into increasingly rigid and specialized modes of existence and perspective, others are specializing in everything and, in some cases, in the vastness of no-thing. Many are, in fact, aware that no discipline has a monopoly on theories of existence, but certain disciplines because of the genius of our times have the potential for greater impact than others.⁴ Erickson has indicated that, in his opinion, Luther's Protestantism was an admixture of Luther's implicit genius, both for constitutional and environmental reasons, and the "fortuity" of the time within which he lived. The emphasis of theology in our present society is political, ethical, psychoanalytic and, to a much lesser extent than formerly, deistic. Increasingly the behavioral sciences have focused upon an analysis of modern values. For example, a fast definition of the sociological term "anomie" is "the state of being normless or without value commitment in the relationship of the individual to society."

The purpose of this paper is to briefly analyze two levels of potential and actual interrelationship between psychoanalytic insights and legal working. The first is psychoanalysis as a total philosophy of man, descriptive of man and all his institutions including legal ones; the second is psychoanalysis as a tool for the law where legal institutions seek for value reasons to intervene in a particular situation where the psychology of an individual(s) is at issue. The latter use of psychological theorems and methods covers the legal spectrum from cases of "undue influence" in wills to questions of "mens rea" in criminal, intent in torts, reliability in evidence and "proper parent" in family law, to mention only a few situations.

I intend to first indicate the obvious, *i.e.*, that the law is primarily concerned with the weighing and balancing of values. To

³ To use the term of D. REISMAN, *THE LONELY CROWD* (1950).

⁴ By "because of . . ." I don't mean to indicate anything but the fact that it seems particularly ripe at this time for certain disciplines, for reasons beyond my ken but subject to analysis, to make a greater impact on society than others.

do this I will in very summary form explore some recent jurisprudential formulations that do or do not cover within their definition the total nature of man. This becomes pertinent in examining my first point—that psychoanalysis presents a total view of man which may prove after examination to be in conflict with the law's or a particular jurisprudent's philosophical postulates. After this very brief and necessarily inconclusive jurisprudential exercise, I will attempt again summarily to indicate some extant psychological theories and how they respectively convey different pictures of man. I will finally focus upon psychoanalysis as a legal tool to help the law make more "valid" decisions. For this purpose I have selected the problem of intervention into the family unit as of particular pertinency to our whole range of societal values and where, if anywhere, psychoanalysis could prove a guiding resource. I have indicated my own value preferences, but the purpose of this article is to suggest these points: (1) that the lawyer must be aware of everything pertinent to human nature, and (2) that despite all his knowledge he still must make his own decisions. In light of present psychoanalytic learning I will maintain that the law should not seek out the individual case to intervene affirmatively in human relationships unless and until private persons begin adversary proceedings. Once the legal process has been invoked, the question of psychiatric intervention is more difficult and the outcome still speculative at best, as I will attempt to show.

JURISPRUDENCE

The law has a long tradition of groping with values, ranging from various natural law theories to analytical positivism, realism of assorted natures and back to natural law theories. H. L. A. Hart traces the heritage of analytical positivism through the utilitarians and attempts to indicate the need for the law to make clear, decisive distinctions between itself and morality.⁵ Hart acknowledges the convergence of law with morality at certain points. Moreover, he does not eschew the moral responsibility of the individual when confronted with a law he deems intrinsically evil. The individual then, in the best tradition of civil disobedience, must be prepared to pay the penalty for nonconformity with the particular or series of prescriptions; of course, we realize that the Anglo/American legal system has much flexibility and will mitigate in case of strong moral pressure on the system. But such pressure necessarily comes from effective groups or elites⁶ that have emotional commitments

⁵ Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

⁶ To fall into the suggested meta-language postulated by McDougal and

either to the particular substantive ideal espoused by the nonconforming civil disobeyer, or to the fairness of the procedural methodology utilized to implement the substantive prescription in question. It is epigrammatic at this point to emphasize the importance of legal procedure to our legal framework.

Lon L. Fuller in his celebrated rejoinder to Professor Hart asserted the impossibility of having a legal system dedicated to the dignity of man which separates law and morality.⁷ He speaks of the "inner morality of the law" by which he means that without certain procedural elements a mere prescription even with judicial backing will be unable to gain adherence from society. One commentator describes Fuller's view of man as "more in terms of process than in terms of substance; it is more voluntaristic than rationalistic; it is more Dionysian than Apollonian. In other words, the 'supreme end' or 'ultimate destiny' of man, were Fuller to use those terms, is conceived not as a stage of human development to be achieved at some moment once and for all; not as a state than can be realized and that, once realized, results in the cessation of desire and movement; not as a condition of static perfection. Rather the 'supreme end' or 'ultimate destiny' of man is a quality of living, a mode of developing, a character of action that must be rechosen and reactualized again and again in each new moment of living, in each new stage of development, in each new instant of action. It is this understanding of man that leads Fuller to pay close attention to the procedural aspects of legal institutions, for correctness of procedures in institutional process is the correlative of rightness of quality in individual living. Institutional procedures are adjudged correct from the standpoint of the universal principles of natural law to the extent to which they keep alive the purposive side of man's nature and maintain communication."⁸

I am not concerned here with umpiring or casting sides in the Hart/Fuller debate but merely with indicating two obvious points: (1) jurisprudence as at least a subset of practical philosophy must and does concern itself with the nature of man in describing or structuring a theory of law, and (2) jurisprudence in dealing with prescriptions and judicial interpretations alone must and does con-

Lasswell in their behavioral science-oriented jurisprudence, Law, Science, and Policy. See, e.g., McDougal, Lasswell & Reisman, *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL ED. 253 (1967).

⁷ Fuller, *Positivism and Fidelity to Law—A reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

⁸ Sturm, *Lon Fuller's Multidimensional Natural Law Theory*, 18 STAN. L. REV. 612, 619 (1966).

cern itself with values of man and man in society. Fuller would bring morality, *i.e.*, a set of either "naturally" held or acquired values, within the definition of law; Hart might in all but the penumbral area⁹ exclude morality from the definition of law. But both, to reiterate, are concerned with the problem of "bad" law, of "bad" values and the obligation of the individual to conform or breach those prescriptions which are, he deems, personally odious. Both would agree that the aim of the law should be toward the "good." It is not an easy question to determine which theory posited is more protective of the individual and more conducive to such an aim as human dignity.

If the law does and should take morality into question, the individual who feels compelled to resist a particular legal policy will perhaps have a more difficult time in asserting the rectitude of his position; he will be told that the law has already taken morality into consideration, and if not, in fact, the quintessence of morality, the law at least represents the minimum of morality. If, on the other hand, the law "should" separate legal from moral questions, the nonconforming individual can assert that the law is generally ethically neutral and therefore must give priority to individual morality. He will be answered that at least in certain areas the law does take morality into consideration if only coincidentally and that implicit within any legal system there is a moral norm, *i.e.*, conformity or, if you will, fidelity to the law to preserve existing values. Practically or realistically, the individual, despite his theoretical argument from one or the other of the prevailing definitions of law, will find himself in the same position. He will find it necessary to appeal to certain values either contained within the legal system or held by the community, despite what interpretation and prescription say, so as to transmute or mitigate the sanction accorded for his recalcitrance. If the individual's position rests on an effective value base, thereby appealing to the society or those members of society who do or can exercise pressure (effective elite), the legal system will mitigate or attempt as much as possible to cajole him from or neutralize his position. We all understand the reluctance of the court in finally incarcerating David Miller for breaking probation by participating in an anti-Vietnam demonstration and particularly for refusing to carry a draft card. Miller had been put on probation for draft card burning. His sincerity plus perhaps the court's feeling toward the

⁹ It is not necessary here to reanalyze the respective positions of Hart and Fuller on problems of interpretation of the penumbra; the reader can make his own judgment from the literature already developed on both sides.

statute allowed the court to accord him merely probation. Miller's press coverage seemed to me to be rather sympathetic. He was standing and is standing for an important value position in this nation, and the legal system, both because of sympathy with it residing in the court and because of felt sympathy or anticipated sympathy from "non-legal" institutions, was prone to be "soft" on Miller as long as he could be held in check in the future.

The Miller case is as yet not over. The appellate courts can certainly decide that the probation conditions were in derogation of other values, i.e., freedom of speech and assembly. Practically such a position would strengthen the value position of speech and assembly and increase community respect for legal institutions which show sympathy and understanding for even the recalcitrant. We can contrast the *Miller* case with the case of the ex-heavyweight champion of the world, Mohammed Ali. The press which was sympathetic or at least generally neutral to the sincere, upstanding Miller, has been for the most part, with certain notable exceptions,¹⁰ condemnatory of the "dupe" of black power. Ali has been accorded none of the respect of a Miller because society finds his religion repugnant and antithetical to shared values of the wider community. This followed despite the fact that Ali could certainly have had an easy time if he had denounced his held values and conformed to the system; he would have been a most popular champion and a more wealthy one. And the likelihood of his ever having had to fight as a soldier was indeed small.

I am repeating a very old message in the contrast between Miller and Ali, that the force of non-legal institutions in society exercises great weight in the operation of legal machinery. Miller's position is certainly not an "easy" personal choice, and he has undoubtedly suffered for it and despite my earlier analysis will probably continue to suffer for it.

Our question then becomes a most complex one of the how and particularly the why of invocation of legal processes. Arnold has demonstrated the importance of symbolic action in our legal system despite the result of that action.¹¹ The power of the press on legal institutions has just recently been reaccorded judicial recognition in *Sheppard* and *Estés*. We have heard, read, and debated the recognized broad limit of prosecutorial discretion. The American legal realists have indicated the importance of coming off a

¹⁰ Wicker, *In the Nation: Muhammad Ali and Dissent*, N.Y. Times, May 2, 1967, at 42, col. 5.

¹¹ T. ARNOLD, *THE SYMBOLS OF GOVERNMENT* (1935); see also Kaplan, Book Review, 46 NEB. L. REV. 737 (1967).

logic-chopping Olympus and taking a long hard look at society and its impact on the law and at the men who man the legal institutions, men who are obviously members of society at least in their spare time. Lawyers have at least become verbally more sophisticated today. We acknowledge and attempt to make use of the broad range of sciences available. McDougal and Lasswell, *inter alia*, have devised a definition of law which encompasses all knowledge of man.¹² They have enumerated a series of values which when shared, and shared by as many of the community as possible (a refinement of the Utilitarian calculus), should hopefully lead to human dignity.

Theirs is a jurisprudential methodology which specifically attempts to use all the knowledge we have at our disposal to understand how man acts, how his actions structure or modify legal institutions, and ultimately how legal institutions can structure for the benefit of society and the individual. And the one system of human thought which is necessarily relevant to such an activist jurisprudence is the area of psychiatry, psychoanalysis, and psychology, with its explanations of man's perspectives and actions both by and for himself and in the wider community.¹³

Returning to Fuller's concept of the "inner morality" of the law, we can see that inner morality makes sense as a natural law postulate, not as a rule from on high, but because man must be capable of understanding and emotionally endorsing a legal system. He cannot follow laws he cannot understand or which do not have at least a modicum of internal consistency. This does not mean that legal institutions cannot change man, but that such change can occur only through an understanding of the individual psyche and the relationship of that psyche to external conditions, objects and other psyches. To requote from Sturm on Fuller: "Rather the 'supreme end' or 'ultimate destiny' of man is a quality of living, a mode of developing, a character of action that must be re-chosen and reactualized again and again in each new moment of living, in each new stage of development, in each new instant of action."¹⁴ We have here an ontological statement of man which conforms with the position of existential philosophy which in turn

¹² See McDougal, Lasswell & Reisman, *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL ED. 253 (1967).

¹³ This obviously stretches into the area of sociology; but I will leave the analysis of relevant sociological theory aside for the purpose of this brief appraisal without gainsaying its validity to such a discussion as I am undertaking here. See generally F. DAVIS, H. FOSTER, C. JEFFERY & E. DAVIS, *SOCIETY AND THE LAW* (1962).

¹⁴ Sturm, *supra* note 8.

in Europe and to a lesser extent in America has become the base for a psychoanalytic theory and methodology.¹⁵

PSYCHOANALYSIS

If, as I think rightly to be the case, psychiatry in its many theoretical forms and methods is relevant to the working of legal institutions, the question becomes what kind of rapprochement can be made between these two viable, non-static bodies of knowledge and experience.¹⁶ In fact, the problem is one of stepping back and reexamining the place of psychiatry in the legal process. Professor Paulson impresses on us the impact of psychiatry and related social work in the area of juvenile disposition.¹⁷ "A Children's Bureau publication of 1929 characterized the new court [Family Court]: 'The old courts relied upon the learning of lawyers; the new courts depend more upon psychiatrists and social workers. . . . Justice in the old courts was based on legal science; in the new courts it is based on social engineering [sic].'"¹⁸ He goes on to quote from Judge Julian Mack "'The physical and mental condition of the child must be known . . . therefore . . . every child, before hearing, shall be subject to a thoroughly scientific psycho-physical examination.'"¹⁹

The criminal law has become so dependent upon psychiatric expertise as to call for reappraisal of the psychiatrist's role and to question the ethical neutrality of the psychiatrist in an adversary proceeding.²⁰ The whole area of civil commitment has been usurped or rather ceded by the law to psychiatric experts.²¹ One of the most ardent opponents of too much reliance on the psychiatric profession is advanced by Dr. Thomas S. Szasz, himself a psychiatrist.

¹⁵ See generally *PSYCHOANALYSIS AND EXISTENTIAL PHILOSOPHY* (H. Ruitenbeek ed. 1962).

¹⁶ For a discussion and appraisal of this question as to criminal responsibility, see Louisell & Diamond, *Law and Psychiatry: Détente, Entente or Concomitance*, 50 CORNELL L. REV. (1965) [hereinafter cited as Louisell].

¹⁷ Paulson, *Juvenile Courts, Family Courts, and the Poor Man*, 54 CAL. L. REV. 694 (1966).

¹⁸ *Id.* at 714.

¹⁹ *Id.*

²⁰ Diamond, *The Fallacy of the Impartial Expert*, *Archives of Criminal Psychodynamics*, III 221 (1959), reprinted in part in R. DONNELLY, J. GOLDSTEIN & R. SCHWARTZ, *CRIMINAL LAW* 798 (1962).

²¹ For the best collection of extant cases in the area of civil commitment, see J. KATZ, J. GOLDSTEIN & A. DERSHOWITZ, *PSYCHOANALYSIS PSYCHIATRY AND LAW* (1967) [hereinafter cited as Katz].

Psychiatric activity is medical in name only. For the most part, psychiatrists are engaged in attempts to change the behavior and values of individuals, groups, institutions, and sometimes even of nations. . . . Further, that insofar as they are social engineers, their goal is to advance not ethical but health values. Instead of remaking individuals and society to give greater scope, say to individualism and critical rationalism, as the philosophers of the Enlightenment sought to do, the modern psychiatrist tries to remake individuals and society to promote mental health. So-called health values have thus tended to replace moral and political values.²²

Professor Dershowitz has in kind recently inveighed against the abdication of judicial responsibility in the same area—civil commitment.²³

To rearticulate our question then we must decide not whether psychiatry is relevant to any particular or the whole organic legal system but how and where to apply or exclude it in any particular area. An assessment of the place of psychiatry vis-à-vis the law is the type of problem particularly suited to the lawyer who is by training and responsibility hopefully equipped to make value decisions in the light of conflicting policy considerations. Professor Green has indicated that, "it need not be stressed how fatal it may be for the advocate to be blind to the environmental facts of his case, unable to formulate the policies that lie beneath, or inadequate in doctrinal articulation. Nor need it be stressed that with an enterprise, industrial, and now a political world in such ferment the advocate's power to behold the environmental facts of his problem, sense the policies they command, and reduce to doctrinal language the significance of both is the supreme power he can possess."²⁴ We can certainly add that the law itself must lose respect if it fails to take into consideration bodies of knowledge available and relevant to human interaction in society.

The advocate, the judge, the legislator and the executive (including agencies) then all have the responsibility of assimilating and wisely using the total knowledge of man so as to reduce any cultural lag between the law and existing knowledge. But a fine balance must be struck, in that reliance on unproved or conflicting theory represents an abdication of responsibility on the part of legal institutions. Moreover, the law as a working, practical system of decision-makers must look for the practical ramifications of the application of theoretical postulates in relative degrees of proof as preached, taught and applied by itself or other practicing prac-

²² Szasz, *Preface to T. SZASZ, LAW, LIBERTY, AND PSYCHIATRY* at vii (1963).

²³ *THE HARVARD LAW REPORTER*, April 13, 1967, at 2-3.

²⁴ Green, *Tort Law Public Law in Disguise*, 38 *TEXAS L. REV.* 257, 265-66 (1960).

tioners. (There must necessarily be some gap between the translation of a theory into practical operation.) Obviously, legal institutions can use the knowledge and expertise of related learnings in assorted ways and certainly without reliance on the practitioners of the particular theory. This is, as already somewhat indicated, necessary for the mere operation of our legal system. We constantly have used psychological insights, sometimes without awareness and sometimes purposively. The law must take human psychology implicitly or explicitly into account in order to function. If we turn to criminal law we can examine the whole development of fault (*mens rea*) as a doctrine. A very much simplified description of criminal definition would state that for a crime to be imputed, the person committing the act must have an evil intention.²⁵ In our law of evidence, we have made common-sense conclusions that certain statements will or will not be admissible because of their relative reliability, drawn from the law's understanding of human nature. Evidence, in short, draws much of its application from human psychology as interpreted by legal institutions which may or may not explicitly refer to external theoretical and practical bodies of psychology. We as lawyers acknowledge the necessity for decision-making and value selection without the availability of knowledge which perhaps in the future will clarify and simplify decision-making. The law must necessarily act with the resources it has at hand. And among these resources is the body of behavioral science knowledge. Guttmacher has stated: "It may seem startling to think of the psychiatrist as preceptor in legal, moral, and political philosophy, but by throwing light on man's potentialities for growth, and on the factors which lead individuals to retreat from maturity and growth, psychiatry helps law to focus on its goal, the development of the individual's potentialities for freedom and productiveness."²⁶ But as lawyers we have the special burden of exploring extant psychological theory before further application and infusion into the legal process.

Katz, Goldstein and Dershowitz in their recent casebook²⁷ state that "Law" . . . may be defined as an essential part of man's reality, a mechanism for moulding and reinforcing controls over himself in relation to others, a process of assigning to some man-

²⁵ It is beyond the purpose of this particular article to explore the fault and nonfault bases of criminal liability in our present application of the criminal law.

²⁶ M. GUTTMACHER & H. WIEHOFEN, *PSYCHIATRY AND THE LAW* 11 (1952).

²⁷ Katz, *supra* note 21, is more than merely a casebook but rather is a probing collection of materials which purposively suggest relevant problems in the application of psychiatric and psychoanalytic theory to legal institutions.

made authority, i.e., the State, the power to decide why, under what circumstances, to what extent, and by what means man, as a private person, is to be restrained or encouraged in the making and implementing of individual decisions. Law is, in turn, a device for controlling the State—i.e., the individual as official-decision making agent of the State—in the exercise of its power over man. The underlying question always confronting the decision-makers and those concerned with the study of law is whether, how and to what extent the State should not or should be authorized to intervene in what would otherwise be the private ordering of a man's life.

...²⁸

Using this for a working definition of law, how then can we define psychiatry, psychoanalysis and psychology to fit their respective teachings into use in the legal framework where *we* as lawyers deem them relevant.

Psychiatry is the medical specialty concerned with the study, diagnosis, treatment, and prevention of behavior disorders. America's most original modern psychiatrist, Harry Stack Sullivan, defined psychiatry as the science of human relations. The scope of psychiatry is admittedly broad; indeed, Alan Gregg once half-seriously remarked that psychiatry is a generality and not a specialty. Nevertheless, Sullivan's definition is too encompassing. It applies overall to the sciences of human behavior but not to psychiatry alone; it is so far-reaching as to invite psychiatrists to assume an absurd sense of omniscience. Psychiatry is an applied science that deals with abnormal human behavior. Psychiatrists are primarily scientifically informed medical practitioners whose task is to help people, not with all, but with certain kinds of difficulties. To accomplish this requires not only psychiatric research but contributions from disciplines that are basic sciences for psychiatry; these explore the spectrum of human or animal behavior largely in an experimental framework and often with systematic and theoretical interest.²⁹

But psychiatry and psychoanalysis in attempting as medical "schools" to cure certain kinds of mental problems encompass differing methodologies to cure "mental illness" and differences in their whole Weltanschauung.

Psychoanalysis . . . is particularly enticing in its potential applicability to social entities. Psychoanalysis is concerned with the most basic of all human psychological forces: sex and aggression, love and hate. Psychoanalysis is preoccupied with the origin, growth and development, and ultimate expression of these deep human drives. Sex and aggression are conceived of as innate biological forces which undergo an incredibly varied series of

²⁸ *Id.* at 2.

²⁹ F. REDLICH & D. FREEMAN, *THE THEORY AND PRACTICE OF PSYCHIATRY* 1 (1966) (footnotes omitted).

transformations before they manifest themselves in their adult mature forms. Detrimental influences, both intra and extrapsychic, affect the development and vicissitudes of these biological drives. If the noxious influences are not overcome, psychopathology results. The symptoms of the resultant psychopathological states are explainable as consequences of the dynamic interaction of the pathological drives and the defenses of the ego. In short, the psychodynamic mechanisms explain and account for the manifestations of psychical disease, and these same mechanisms provide the means for the remedial process through the techniques of psychoanalytic therapy.³⁰

Freud himself extrapolated from his psychoanalytic theory to the nature and potential of mankind,³¹ warning, however, of the wholesale application of his theories to social contexts.³² Freudian theory has, however, been applied to the nature of man in society brilliantly on a theoretical level in souring fashion so as to provide the basis of man breaking through his historic boundaries into the postulated state of his potential being.

[P]sychoanalysis offers a theoretical framework for exploring the possibility of a way out of the nightmare of endless "progress" and endless Faustian discontent, a way out of human neurosis, a way out of history. In the case of the neurotic individual, the goal of psychoanalytical therapy is to free him from the burden of his past, from the burden of his history, the burden which compels him to go on having (and being) a case history. And the method of psychoanalytical therapy is to deepen the historical consciousness of the individual ("fill up the memory-gaps") till he awakens from his own history as from a nightmare. Psychoanalytical consciousness, as a higher stage in the general consciousness of mankind, may be likewise the fulfillment of the historical consciousness, that ever widening and deepening search for origins which has obsessed Western thought

³⁰ Diamond, *The Children of Leviathan: Psychoanalytic Speculations Concerning Welfare Law and Punitive Sanctions*, 54 CALIF. L. REV. 357, 357-58 (1966) [hereinafter cited as Diamond].

³¹ See S. FREUD, *CIVILIZATION AND ITS DISCONTENTS* (Riviere transl. 1930) [hereinafter cited as Freud].

³² "But it behooves us to be very careful, not to forget that after all we are dealing only with analogies, and that it is dangerous, not only with men but also with concepts, to drag them out of the region where they originated and have matured. The diagnosis of collective neuroses, moreover, will be confronted by a special difficulty. In the neurosis of an individual we can use as a starting-point the contrast presented to us between the patient and his environment which we assume to be 'normal.' No such background as this would be available for any society similarly affected; it would have to be supplied in some other way. And with regard to any therapeutic application of our knowledge, what would be the use of the most acute analysis of social neurosis, since no one possesses power to compel the community to adopt the therapy?" *Id.* at 141-42. To be found also in Diamond, *supra* note 30, at 359.

ever since the Renaissance. If historical consciousness is finally transformed into psychoanalytical consciousness, the grip of the dead hand of the past on life in the present would be loosened, and man would be ready to live instead of making history, to enjoy instead of paying back old scores and debts, and to enter that state of Being which was the goal of his Becoming.³³

Classical Freudian theory is grounded on the opposition of two instincts, the sexual and the aggressive, (or if one prefers) life and death. Although there is a constant conflictual interaction between these constitutional instincts, they can combine or be channeled for the good of society through socialization *via* sublimation.³⁴ Later Freudians have postulated that the ego is capable of conflict-free activity.³⁵ Rapaport has indicated that neither the Berkelian view of man (a solipsistic view in which man is independent of environment but dependent on internal forces) nor the Cartesian postulate (man is born free, independent from within but dependent on his environment) presents the true picture of man in society.³⁶

Observation confirms neither of these views. It shows that while man's behavior is determined by drive forces which originate in him, it is not totally at their mercy since it has a certain independence from them. We refer to this independence as *the autonomy of the ego from the id*. The most common observation which necessitated this conception was the responsiveness and relevance of behavior to external reality. But this dependence of behavior on the external world and on experience is not complete either. Man can interpose delay and thought not only between instinctual promptings and action, modifying and even indefinitely postponing drive discharge, he can likewise modify and postpone his reaction to external stimulation. This independence of behavior from external stimulation we will refer to as *the autonomy of the ego from external reality*. Since the ego is never completely independent from the id nor from external reality, we always speak about *relative* autonomy.³⁷

³³ N. O. BROWN, *LIFE AGAINST DEATH* 19 (1959) [hereinafter cited as N. O. Brown]. See also H. MARCUSE, *EROS AND CIVILIZATION* (1955), for a similar attempt to use Freudian doctrine to extricate man from his present state to a new consciousness.

³⁴ It is outside the scope of this article to describe in any depth Freud's instinctual and energy theory which is the very basis of his doctrine. See C. BRENNER, *AN ELEMENTARY TEXTBOOK OF PSYCHOANALYSIS* (1955), for a clear description of Freudian psychoanalysis.

³⁵ See generally H. HARTMANN, *EGO PSYCHOLOGY AND THE PROBLEM OF ADAPTATION* (1939), reprinted in part in Katz, *supra* note 21, at 307.

³⁶ Rapaport, *The Theory of Ego Autonomy: A Generalization*, 22 *BULLETIN OF THE MENNINGER CLINIC* 13 (1958), reprinted in part in Katz, *supra* note 21, at 300.

³⁷ Katz, *supra* note 21, at 301. Freud's own position indicates at least the sentiment that the individual must be held to individual responsibility.

Despite Freud's assertion of the individual's personal responsibility for his acts and despite the more recent formulation of Rapaport of the individual's relative autonomy, Freudian psychoanalysis presages little hope for the individual to free himself from his environmental bonds. Freud, and Brown following in his path, conclude their respective works³⁸ with this presage:

Men have brought their powers of subduing the forces of nature to such a pitch that by using them they could now very easily exterminate one another to the last man. They know this—hence arises a great part of their current unrest, their dejection, their mood of apprehension. And now it may be expected that the other of the two 'heavenly forces,' eternal Eros, will put forth his strength so as to maintain himself alongside of his equally immortal adversary.³⁹

This is hardly an augury of optimism.

C. G. Jung, who broke with Freud and abandoned Freud's instinctual dialectic, affirmed the capability of the individual psyche to free itself from its external environment and achieve a "mana" state through a process of eternal discovery of "self." Jung calls this the "individuation" process.⁴⁰ Glover attacked the Jungian psychic paradigm and all other pretenders to psychic truth in an illuminatory comparison between the two schools.⁴¹ Glover's attack was particularly vehement in defense of the Freudian instinctual duality.⁴² Nevertheless, the so-called Neo-Freudian school

"Obviously one must hold oneself responsible for the evil impulses of one's dreams. What else is one to do with them? Unless the content of the dream (rightly understood) is inspired by alien spirits, it is a part of my own being. If I seek to classify the impulses that are present in me according to social standards into good and bad, I must assume responsibility for both sorts; and if, in defence, I say that what is unknown, unconscious and repressed in me is not my 'ego,' then I shall not be basing my position upon psycho-analysis . . . The physician will leave it to the jurist to construct for social purposes a responsibility that is artificially limited to the metapsychological ego." 19 S. FREUD, COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 131 (Standford ed. 1961). This quote can be found in Louisell, *supra* note 16, at 219.

³⁸ Freud, *supra* note 31; N. O. Brown, *supra* note 33.

³⁹ *Id.*

⁴⁰ C. JUNG, TWO ESSAYS ON ANALYTICAL PSYCHOLOGY (1953), is the best exposition of Jungian dynamics, by Jung himself. For a fictionalized account of the power of individual Jungian archetype see H. HESSE, DEMIAN (1919), an earlier and I think inferior example of the work of this master novelist.

⁴¹ E. GLOVER, FREUD OR JUNG? (1950).

⁴² See H. BENOIT, THE SUPREME DOCTRINE PSYCHOLOGICAL STUDIES IN ZEN THOUGHT (1951), for the affinity between the Freudian dialectic and Zen theory.

abandoned Freud's instinctual theory positing that man was conditioned solely by his environment.⁴³

Neurosis or, to speak more broadly, mental illness, was shown to be the upshot of insecurity and anxiety (Sullivan); insecurity and anxiety were shown to be generated most frequently—almost infallibly—by competition (Horney); competition was shown to be the necessary consequence of the quest for individual self-validation in an egalitarian, competitive society of conflicting values (Alexander); and our egalitarian, competitive society was shown to be the product of a long-term evolution of social institutions (Kardiner). Neo-Freudian social philosophy therefore seems to point to the melancholy conclusion that an extensive incidence of mental illness is inherent in modern Western society, to say nothing of an unavoidable trend toward social breakdown.⁴⁴

Margolis comments, "Here we have full-fledged social criticism presented as medicine; small wonder that some members of the neo-Freudian movement have found it necessary to construct or suggest visions of a utopian society."⁴⁵ Erickson, using a Freudian framework, has greatly contributed to an analysis of an epigenetic development of man. He posits as his ideal the integrated man who is the product of an "ongoing" development passing safely and successfully through life crisis states common to the development of all.⁴⁶

For man's psychosocial survival is safeguarded only by vital virtues which develop in the interplay of successive and overlapping generations, living together in organized settings. Here, living together means more than incidental proximity. It means that the individual's lifestages are 'interliving,' cogwheeling with the stages of others which move him along as he moves them. I have, therefore, in recent years, attempted to delineate the whole life-cycle as an integrated psychosocial phenomenon, instead of following what (in analogy to teleology) may be called the 'original' approach, that is, the attempt to derive the meaning of development primarily from a reconstruction of the infant's beginnings.⁴⁷

Erickson goes on to indicate the respective crises which the developing individual must confront, survive and surpass. Often in this scheme the individual will only partially achieve the next stage of his development. Moreover, only partial resolution will leave residue from a particular stage with the individual as he reaches adulthood.

⁴³ See generally M. BIRNBACH, *NEO-FREUDIAN SOCIAL PHILOSOPHY* (1961).

⁴⁴ *Id.* at 128.

⁴⁵ J. MARGOLIS, *PSYCHOTHERAPY & MORALITY* 81 (1966) [hereinafter cited as Margolis].

⁴⁶ E. ERICKSON, *INSIGHT AND RESPONSIBILITY* 114 (1964). See also E. ERICKSON, *CHILDHOOD AND SOCIETY* (2d ed. 1963).

⁴⁷ E. ERICKSON, *INSIGHT AND RESPONSIBILITY* 114 (1964).

Finally, we must mention the newest and yet perhaps the oldest psychoanalytic school, *i.e.*, existential analysis.⁴⁸ The existential approach denies the validity of all but a total view of man's being in the world.⁴⁹ Correspondingly and unsurprisingly existentialism as a philosophy has been adopted by a psychiatric movement as both a theory of man and a methodology to "cure" man or rather to help man live with his ontological anxiety.⁵⁰ Binswanger, a contemporary of Freud, has listed some trends common to the existential psychiatric orientation:

(1) A psychotherapy on existential-analytic bases investigates the life-history of the patient to be treated. . . . It does not explain this life-history and its pathologic idiosyncrasies according to the teaching of any school of psychotherapy, or by means of its preferred categories. Instead, it *understands* this life-history as modifications of the total structure of the patient's being-in-the world. . . .

(2) A psychotherapy on existential-analytic bases thus proceeds *not* merely by showing the patient where, when and to what extent he has failed to realize the fullness of his humanity, but it tries to make him *experience* this as radically as possible. . . .

(3) [T]he existential analyst . . . will always stand on the same plane with his patients—the plane of common existence. . . . He will . . . consider the bond between the two partners . . . an *encounter* on what Martin Buber calls the "sharp edge of existence". . . .⁵¹

Existential psychoanalysis then is more a way of looking at the individual, a perspective of the individual as a being in society with all the problems implicit therein, rather than one core theory of man's dynamics. But this does not mean that existential psychoanalysis is only a methodology which would, of course, be important in itself. A perspective of man as an ontological being has a definite impact on both the type of therapy invoked by the practitioner and the theoretical view of what man's condition actually is and may become. Sartre's famous "Man's essence is his existence," has been interpreted by Tillich to mean "that man is a

⁴⁸ "Existentialism [as a philosophy] is a timeless sensibility that can be discerned here and there in the past; but it is only in recent times that it has hardened into a sustained protest and preoccupation." *EXISTENTIALISM FROM DOSTOESKY TO SARTRE* 12 (W. Kaufmann ed. 1956).

⁴⁹ J. SARTRE, *EXISTENTIAL PSYCHOANALYSIS* 60 (1953).

⁵⁰ See V. FRANKL, *MAN'S SEARCH FOR MEANING, AN INTRODUCTION TO LOGOTHERAPY* (1963).

⁵¹ Binswanger, *Existential Analysis and Psychotherapy*, in *PSYCHOANALYSIS AND EXISTENTIAL PHILOSOPHY* 19-21 (R. Ruitenbeek ed. 1962) [hereinafter cited as Ruitenbeek].

being of whom no essence can be affirmed, for such an essence would introduce a permanent element, contradictory to man's power of transforming himself indefinitely. According to Sarte, man is what he acts to be."⁵² Tillich continues, "Man breaks through his environment in all directions, his language is his liberation from bondage to a limited situation. But this freedom is not easy to accept and many people turn back from the openness of their world to the prison of their environment."⁵³ According to the dictates of the existential psychoanalytic view, man must be prepared to throw off false security and accept his ontological alienation; he must confront his nothingness to be truly free.

Instead of speaking in terms of internal dynamics employed by Freudian dynamics, existential analysis uses descriptive, metaphorical terms. Laing, for example, cites the patient who in group therapy interrupted, "I can't go on. You are arguing in order to have the pleasure of triumphing over me. At best you win an argument. At worst you lose an argument. *I am arguing in order to preserve my existence.*"⁵⁴ This Laing calls "engulfment" where "basic security is so low that practically any relationship with another person, however tenuous or however apparently 'harmless,' threatens to overwhelm him."⁵⁵ He goes on to define "implosion" as "a threat to what identity the individual is able to suppose himself to have, 'depersonalization' and 'petrification' as defensive acts of (1) fearing being turned to stone, (2) the dread of this happening, (3) the magical act of turning someone else to stone."⁵⁶

In existential analysis we're dealing with the terror and poetry of being in relation to ourselves and how we react when confronted by the alien world with the implicit dread of death, nothingness, rejection. The existential therapist plays an active part in the therapy, be it in a group or in a one-to-one relationship. He is concerned not so much with past states of mind nor the etiology of such states, as the creation or restoration of a present meaning to existence.

Becker, similarly using Dewey rather than Freud as a "philo/psychical" base, posits four questions common to each individual needing answer by each individual for himself: "(1) What kind

⁵² Tillich, *Existentialism and Psychotherapy*, in Ruitenbeek, *supra* note 51, at 5.

⁵³ Ruitenbeek, *supra* note 51, at 16.

⁵⁴ Laing, *Ontological Insecurity*, in Ruitenbeek, *supra* note 51, at 46.

⁵⁵ Ruitenbeek, *supra* note 51, at 47.

⁵⁶ Ruitenbeek, *supra* note 51, at 49-50.

of reactions is one to expect from volatile human-objects? (2) What are the supports and limitations of my powers? (3) In what sequential schema is my action to be embedded? (4) How can I best orient my action to safety and to maximum satisfaction?"⁵⁷ Allport has edited a series of poignant letters which indicate the life style, pride, fear, aloneness, recalcitrance and ultimate end of one Jenny who lived and breathed.⁵⁸ At the outset he queries, "Do ordinary psychological rubrics adequately fit Jenny's case? One might label her as hysterical, overprotective, aggressive, asocial, extrapunitive, an isolate, paranoid, having a character disorder. But do these categories singly or in combination represent the focal disposition of her unique being."⁵⁹ After a presentation of the letters, without comment, Allport proceeds in summary form to apply various psychological theories to "explain" Jenny, to analyze her as success or failure, normal or abnormal. Whether it be Allport's inability, lack of information, or unwillingness to probe Jenny to a greater extent with each particular theoretical paradigm (one doubts any lack of ability or interest) or the unsatisfactoriness of any of the theories to explain the person living in the letters, the subjective reader rebels against affixing single descriptive or dynamic labels summing up and shelving Jenny (whether we would have liked her or not).

To complicate matters further, commentators and practitioners often reach differing "answers" applying the same basic theory. Brown, without renouncing Freud, has changed position and now feels that the individual can attain a new state of being without the modification or restructuring of his societal environment.⁶⁰ Marcuse answers Brown, "You have revealed the latent, the true content of politics—you know that the political fight is the fight for the whole: not the mystical whole, but the very unmystical, antagonistic whole of our life and that of our children—the only life that is."⁶¹ Brown rejoins, "From politics to life. And therefore revolution as creation; resurrection; renaissance instead of progress. To perceive in all human culture the hidden reality of the human body. This is to discover as Freud did, the Holy Communion as the basis of community; the Eucharist, the cannibalism, the hidden *eating*; one of the forms of which is war—making chil-

⁵⁷ E. BECKER, *THE REVOLUTION IN PSYCHIATRY, THE NEW UNDERSTANDING OF MAN* 12 (1964) [hereinafter cited as Becker].

⁵⁸ J. MASTERTON, *LETTERS FROM JENNY* (G. Allport ed. 1965).

⁵⁹ Allport, *Preface* to *id.* at viii.

⁶⁰ N. O. BROWN, *LOVE'S BODY* (1966).

⁶¹ Marcuse, *Love Mystified: A Critique of Norman O. Brown*, *COMMENTARY*, Feb., 1967, Vol. 43, No. 2, at 61, 65.

dren pass through the fire unto Moloch. Go to the end of the road and that is what you will find. And so the God is not Freud's God Logos, abstract or disembodied Reason, but the Human Form Divine. And the language is the language not of reason but of love. Reason is power; powerful arguments; power-politics; *Realpolitik*; reality-principal. Love comes emptyhanded (*Love's Body*, p. 237); the eternal proletariat; like Cordelia, bringing Nothing."⁶²

Hoping for Brown's sublime state (Apocalypse, Nirvana, Satori, as you like it), we lawyers or at least most of us are like Marcuse still earthbound. And we are confronted with the problem of the Brown/Marcuse colloquy multiplied, including, *inter alia* Jungian and Existential insight beside the Freudian. The theories lead man to differing realities, through differing methodologies. In short the various psychoanalytic theories are more than methods of "curing" "neurosis" or "psychosis." They present philosophical postulates calling man to live in particular modes to attain "mental health" ends, "integration" or a new sensibility free of repression. They vary in their optimism, some presaging man's potential destruction, some promising nothing but Promethean struggle for those who are willing to accept freedom, and some indicating that the individual despite the society can achieve a mystic Oneness. But for a truer picture it must be indicated this presents the particular theories in their ultimate. They present intermediate stages but with intermediate result. If we acknowledge the existential anxiety of each individual, that which Sartre labels "nausea," can and should we separate this common feeling from a more pathological neurosis or neurosis *in extremis*, i.e., psychosis (neurosis perhaps on the far end of the continuum of man's experiential potential). Tillich points "to . . . [this] difference and confusion of existential and neurotic anxiety, of existential and neurotic guilt, of existential and neurotic emptiness. . . . The decisive question here is whether one believes that it is possible to remove by successful analysis not only neurotic forms of anxiety but also its genuine forms—the anxieties of finitude, of guilt, of emptiness."⁶³

It would seem that often what we call neurosis is a defense against the more frightening fear of aloneness and of ultimate individual confrontation with death, which is amplified in our Bomb-scared society to include the fear of ultimate and yet too immediate threat not only to the individual but to all his family, friends, society and values. It would seem a greater threat than merely

⁶² Brown, *A Reply to Herbert Marcuse*, COMMENTARY, March 1967, Vol. 43, No. 2, at 83, 83-84.

⁶³ Tillich, *Existentialism and Psychotherapy*, in *supra* note 51, at 12-13.

the snuffing out of one's individual life that nothing will remain to carry on lifework.

By now it should be obvious that psychiatry and psychoanalysis are necessarily value laden, pointing, if their theories admit of an "answer," to a superior mode of living depending on the particular theory of psychology and its crypto-idealistic philosophical base if any.

Psychotherapy then, is primarily concerned with a technical goal, the preservation and restoration of mental health; nevertheless, its own development leads it, inevitably, to take up the role of moral legislator. Similarly, religion is primarily concerned with facilitating the acceptance of existential finitude; nevertheless, in its historical role, it has itself always been a moral legislator. What is needed, obviously, is a new reconciliation of the dominant values of our society—and this is, in fact, one of the principal endeavors of moral sensibility. It is a reconciliation that cannot be undertaken defensibly . . . either by the scientific pretensions of any form of psychotherapy or by the higher pretensions of revealed religion; nevertheless, the reconciliation will have to be one between the conflicting values of these two influential traditions.⁶⁴

Since I have suggested that psychiatry is already an integral part of the legal process and that as a body of knowledge attempting explanation of human action and motivation it must be relevant to legal process merely to hold societal respect for the law, should the law establish an official state therapeutical theory? The suggestion is patently against our democratic position. This would be tantamount to establishing a state religion. Mill has perhaps best articulated our value position in this respect.⁶⁵

Strange it is that men should admit the validity of the arguments for free discussion, but object to their being 'pushed to an extreme'; not seeing that unless the reasons are good for an extreme case, they are not good for any case. Strange that they should imagine that they are not assuming infallibility, when they acknowledge that there should be free discussion on all subjects which can possibly be *doubtful*, but think that some particular principle or doctrine should be forbidden to be questioned because it is so *certain*, that is, because *they are certain* that it is certain. To call any proposition certain while there is anyone who would deny its certainty if permitted, but who is not permitted, is to assume that we ourselves, and those who agree with us, are the judges of certainty, and judges without hearing the other side.⁶⁶

Even if we were to opt for the validity of one particular psy-

⁶⁴ Margolis, *supra* note 45, at 146; see also J. FLUGEL, *MAN, MORALS, AND SOCIETY, A PSYCHOANALYTIC STUDY* (1945).

⁶⁵ Mill, *On Liberty*, in *THE ENGLISH PHILOSOPHERS FROM BACON TO MILL* 949 (E. Burt ed. 1939).

⁶⁶ *Id.* at 965.

choanalytic theory over the other, how as lawyers could we choose. Truth through an elective process? Through empiricism? Through the dominant school among practitioners? Through the persuasive force-emotional, logical, of key spokesmen? The law is obviously not in the position to choose between the various psychoanalytic theories. Even using a "scientific" empirical base is nonavailing in that the creative intuition of man often proves more tenable than empirically "proven" theories.⁶⁷ It is easy to say at this stage of psychoanalytic theory that no determination can be made as to which, if any of the many postulates, separately or eclectically will lead to the ultimate knowledge of man's psyche. The law must ask itself for what purposes does it mean or can it employ such theories. The most obvious, it would seem, is predicting and structuring or determining human action and thought. I join with Becker:

[I]f once we are in a position to determine man, are we going to use this control? How? Who is going to use it—scientists?—philosophers-kings? Toward what end? Obviously the question is insurmountable; we cannot even entertain it if we value freedom. The point is that control of human life by a physical science is antidemocratic and antihuman. Therefore we cannot envisage it as a goal of science. Further, the conclusion is ineluctable: *if we had a science of the precise determinism of human behavior we should have to repudiate it!* It would be incompatible with a belief in human possibility.⁶⁸

We don't break the dilemma of having to use knowledge and fearing the use of such knowledge by ignoring the problem. Other institutions will inexorably make use of psychological findings with relative degrees of efficacy.⁶⁹ Moreover, certain insights are common to the various psychological theories. All, it would seem, would agree with Freud in some degree concerning an irrational element in man, although there would probably be great dispute as to the capacity of an individual to control his "unconsciousness" or "irrational" elements. Psychoanalysis is a form of education to

⁶⁷ See M. POLANYI, *PERSONAL KNOWLEDGE TOWARDS A POST-CRITICAL PHILOSOPHY* (Harper Torchbook ed. 1964). "[T]he act of knowing includes an appraisal; and this personal coefficient, which shapes all factual knowledge, bridges in doing so the disjunction between subjectivity and objectivity. It implies the claim that man can transcend his own subjectivity by striving passionately to fulfill his personal obligation to universal standards." *Id.* at 17.

⁶⁸ Becker, *supra* note 57, at 215-16.

⁶⁹ Consider the use of psychology of a Pavlovian type by the advertising industry. See also M. McLUHAN, *UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN* (1964), and his contention that the medium, e.g., television, in and of itself creates a certain type of sensitivity in man by its very nature. The law must obviously take such insights into account so, at least, as to prevent potential abuse.

open a man to himself and to his society, to widen his area of choice and increase his responsibility as to each particular choice. It must be recognized especially that "normality," "responsibility," "pathology," "reality" *inter alia* are value statements, that labels have viability only in relationship to other contrasting states, that labels cannot pin down man's mutability. And yet practically speaking a label once affixed establishes a certain set of legal and social relationships, benefits, responsibilities, sanctions and stigmas. Moreover, the very process of labeling can affect the very doctors who ascribe the label in the type of treatment or lack thereof which they accord.⁷⁰ For example the American Psychiatric Association standard nomenclature defines a "simple schizophrenic reaction":

This type of reaction is characterized chiefly by reduction in external attachments and interests and by impoverishment of human relationships. It often involves adjustment on a lower psychological level of functioning, usually accompanied by apathy and indifference but rarely by conspicuous delusions or hallucinations. The simple type of schizophrenic reaction characteristically manifests an increase in the severity of symptoms over long periods, usually with apparent mental deterioration, in contrast to the schizoid personality, in which there is little if any change.⁷¹

Becker, on the other hand, along with Szasz⁷² thinks schizophrenia is stupidity—"stupidity in a very basic area of experience, in primary enculturation data. The schizophrenic, lacking behavior patterns, has no chance for manipulating means and ends. When his world begins to slip away, his only recourse is to constrict his means-ends control to such a narrow range that he turns into a ludicrous caricature of cultural man."⁷³

One can readily see the value content of the respective definitions and the potential of differing treatment because of definition. Admitting then that not only cannot the law effectively choose between the various theories, and that it does use them, and that the law itself can be explained in its very processes by them,⁷⁴

⁷⁰ See, e.g., K. MENNINGER, M. MAYMAN, & P. PRUYSER, *THE VITAL BALANCE* (1963).

⁷¹ Katz, *supra* note 21, at 509.

⁷² T. SZASZ, *THE MYTH OF MENTAL ILLNESS; FOUNDATIONS OF A THEORY OF PERSONAL CONDUCT* (1961).

⁷³ Becker, *supra* note 57, at 208.

⁷⁴ See Bienenfeld, *Prolegomena to a Psychoanalysis of Law and Justice*, 53 CALIF. L. REV. 957 (1965). "The universality of the various sections of legal systems is due to claims based on common infant impulses. For example, the legal section that concerns itself with social law is based on the child's impulse to nurse; criminal law on the impulse to

I repeat the question, how should the law treat psychological insights? The law deals by its nature with value analysis; psychological theories present a series of insights predicated in orientation toward particular value results. Moreover, the mere fact that a particular analyst belongs to a particular school is not necessarily indicative of his particular methodological approach. He may follow a number of variations from classical one-to-one analysis with little therapeutic intervention, to psychotherapies, again based on the same theory with relatively greater intervention, to actual direct participation with the patient, to group therapies again with relative degrees of intervention by the analyst, to pharmaceutical (drug) or physical manipulation (shock therapy). Psychoanalytic theories which attempt to extrapolate from the individual to a philosophical system stand in the same relation to the law as competing philosophical systems, with perhaps somewhat of a priority because of a societal preference for "medical" theory.

Moving from psychoanalytic theory as *Weltanschauung* to specific uses of psychological theories as part of our already ongoing legal process, we still must keep in mind the basic conflicting theoretical posits of the competing psychologies, the type of methodology used by the particular practitioner and the relationship of the employed methodology to the orienting theory. To further complicate the process we must examine not only the value preference of the particular psychological theory posited by the practitioner, but also the biases that the psychiatrist or psychologist has as a member of his profession, as a whole, and as a citizen in society. Perhaps the most important aspect of treatment is the relationship between analyst and patient. To be effective the psychiatrist must often be above community prejudices and be able to neutralize his own bias. But naturally, practitioners "try to select what they call a good patient. We are not sure what attributes a good patient must have, but they include sensitivity, intelligence, social and intellectual standards similar to the psychiatrist's, a will to do one's best, a desire to improve one's personality and status in life, youth, attractiveness, and charm."⁷⁵

obey or disobey the father; the law of contracts on the impulse to co-operate or compete; property law on the impulse for dependence or independence." *Id.* at 960-61.

⁷⁵ A. HOLLINGSHEAD & F. REDLICK, *SOCIAL CLASS AND MENTAL ILLNESS: A COMMUNITY STUDY* 192 (1958), quoted by Weihofen, *Mental Health for the Poor*, 54 CALIF. L. REV. 920, 927, n. 34 (1966). Professor Weihofen concludes "The poor need vastly expanded mental health services, especially local community health centers. To raise the money to build needed facilities and to find the personnel to staff them will be prodigious tasks, but even if we accomplish them, we shall still face the baffling problem of inducing the poor to use those services. The

It is a shared axiom to most psychological theories that man's early environment is at least somewhat relevant to his future psychic potential in society. But Professor Weihofen, among many commentators on the state of our poor, indicates: "We are in a vicious circle of indigency, unplanned parenthood, and poor reproductive quality. . . . We cannot, of course, assure every child good genes or loving, competent parents. 'But it does not lie beyond the reach of justice to insist that no child be negligently born . . . or negligently exposed after birth to surroundings, physical or social, that alter his chances for a rewarding maturity.'"⁷⁶

We can at this point ask how psychoanalysis can aid the law in one specific area—the family law. We know that psychoanalytic and sociological teachings can aid constructive, preventative legislation through such projects as Head Start.⁷⁷ Even here we should realize that legal action implicitly reinforces value predilections, in this case the value that each citizen should be permitted and sometimes compelled to become as responsible as possible in his ability to choose between alternative actions. (We have other problems when this model poor youth grows into "full potential" and he is confronted with institutional blocks in attempting choice; but we must first get the majority to this stage.) The Court of Appeals for the District of Columbia recently⁷⁸ held that the lower court, in a habeas corpus case where a finding was made that a civilly committed woman, who was not immediately dangerous to herself or others but who couldn't provide for herself, didn't have the burden of showing alternative disposition; rather the lower court was charged with the responsibility of creatively seeking alternative remedies of disposition. The case is an indication of the accepted responsibility of courts to understand and use all avenues available to effectuate just results. The value sought to be preserved in the instant case was individual freedom. But after applauding the decision, we must examine what alternative dispositions are open and whether the court is willing to follow its

poor often do not recognize that they need help; even when they do, they may not know that services exist or how to obtain them. They are apathetic about finding out, or cynical, or hostile. That this attitude of defeat, bitterness, and despair has become so widespread throughout our nation is a damning indictment of our sins of the past. It should shame and goad us to more heroic efforts now." *Id.* at 945.

⁷⁶ *Id.* at 924 (footnotes omitted).

⁷⁷ The thinking is that since the early years, at least according to Freudian and Neo-Freudian theory, are significant in character formation, special educational effort at pre-school age will ameliorate and add to the intellectual stimulation necessary to the formation of an "integrated" adult.

⁷⁸ *Lake v. Cameron*, 364 F.2d 657 (D.C. Cir. 1966).

logic to its proper conclusion, i.e., if there are no alternative institutional means, release the woman anyhow in that she is being "illegally" detained. The trial courts then become increasingly dependent on extralegal information, and institutions, e.g., welfare reports and workers, orphan institutions, foster homes, *inter alia*. Moreover, we are told that, "It becomes the duty of the law to impinge upon the parent-child relationship at some of its critical points: divorce, separation, or death of the parents; delinquent behavior of the child; abuse or neglect of the child; and adoption of the child."⁷⁹ In fact, the law is often called upon to intervene in family law problems. How can psychoanalytic theory aid in determining when and how to intervene?⁸⁰ Professor George cuttngly lays out the basic assumptions implicit in our family law:

"(1) The marriage ceremony is a magic ritual which somehow produces visible and ineradicable changes in its principal figures.

(2) The essence of marriage is the union of penis and vagina, preferably for purposes of procreation. That these organs happen to be attached to people is purely incidental.

(3) This predominantly genital union is not to be legally broken up until one of the parties is clearly shown to be 'at fault.' If there is relative equality of either fault or faultlessness, the union must remain unbroken.

(4) Property and monetary payments are to be administered as rewards to the good and chastisement to the bad.

(5) Children are indeed creatures, whose lives are the proprietary interests of those who conceived and bore them. Therefore, only the race, blood, heredity and religion of the parents are relevant factors in determining the placement and career of the child.

(6) Legal doctrines are effective devices to shape human conduct. When the law speaks, human actors will immediately conform their conduct to the law's expectations.

(7) All organs of government must order their activities as the judges would have them do. Those who are married are married for all purposes. Those who are not married are not married for all purposes. Those who are illegitimate are illegitimate for all purposes."⁸¹

⁷⁹ Kay & Philips, *Poverty and the Law of Child Custody*, 54 CALIF. L. REV. 717 (1966).

⁸⁰ See J. GOLDSTEIN & J. KATZ, *THE FAMILY AND THE LAW* (1965) [herein-after cited as Goldstein], for an analytical exposition of cases and materials relating to this and the whole gamut of issues relevant to the family process.

⁸¹ George, *Review of the Family and the Law*, 75 YALE L.J. 504, 505 (1966).

An examination of the relevance of psychoanalysis to all phases of the family law process would be in order. But it will suffice for the purposes of this article to examine but one series of issues in the process—those relating to when the law should intervene in the parental relationship for the so-called “best interests of the child.”

In passing I would like to indicate that the question is a tougher one, I feel, than considering the use of psychoanalysis or some other compulsory counseling in an attempt to prevent divorce and as a precondition of divorce.⁸² The state in the latter case, it seems to me, may make available counseling or psychological services if it decides such services will have any efficacy but a compulsory counseling is adverse to the tenets of almost all therapies which opt for voluntary patients. Moreover, in light of limited manpower expertise in this area it seems an inordinate resource waste to force acceptance of services where such services are not desired. But, the most significant issue is the explicit recognition of lack of the individual couples' respective responsibility.⁸³ The state has an interest in protecting the marriage institution (a battle which it may be losing and which may not be worth the effort without a modification of the relationship).⁸⁴ To Lichtenberger's argument⁸⁵ that divorce without fault based only on the couple's desire may free an individual who will only go out and repeat the experience with someone else (Freud's repetition compulsion), I demur. We are not going to establish even a modicum of individual responsibility if we are always legally foisting our “help” onto others. Too often children grow up in a disharmonious atmosphere maintained “only” for the good of the children which, in fact, because of the constant strain and hostility in the environment redounds to the detriment of the children. We know from psychoanalysis, if not common sense, that there is often a neurotic symbiotic need on the part of each partner for the other.⁸⁶ It is unlikely that such a relationship will be good, i.e., happy or

⁸² For a recent discussion of fault and nonfault bases for divorce see Tenney, *Divorce Without Fault: The Next Step*, 46 NEB. L. REV. 24 (1967); and in rebuttal Turner, *Retreat from “Fault”? An English Lawyer's Views*, 46 NEB. L. REV. 64 (1967).

⁸³ For an indication of my views on responsibility in another area see Kaplan, *Experimentation—An Articulation of a New Myth*, 46 NEB. L. REV. 87 (1967).

⁸⁴ See Redmount, *An Analysis of Marriage Trends and Divorce Policies*, 10 VAND. L. REV. 513 (1957).

⁸⁵ *Id.* at 549 n. 87.

⁸⁶ For a very short work on basic human emotions and relationship see M. KLEIN & J. RIVIERE, *LOVE, HATE AND REPARATION* (1937).

dignified, in itself or reflect anything but venom, alienation and dissatisfaction back into society. If one or both of the marital partners, freed so benevolently by an easy divorce prescription, remarries and causes further pain to himself and the new partner, I still demur. Our recourse in such a case would be to place a moratorium either limited or indefinite on remarriage. A next step perhaps would be to foster computerized matings. In fact, we could also restrict by means of qualified or permanent birth control the size of the population. With eugenically matched couples we should produce a most capable society. If these alternatives seem frightening as a denigration of human dignity, they are but a legal recognition of relative degrees of human responsibility. I would prefer to hold the individual to as much responsibility as possible while recognizing that some have at certain stages more choice potential than others.⁸⁷ I feel even if we had sufficient analysts to examine and "treat" each individual who wanted a divorce, often the marriage would not be saved and might not be worth saving. Rather the law should take into account some of man's basic drives and reexamine the potentiality of marriage as an institution in satisfying those needs.⁸⁸ At least the law should undertake to be a non-repressing societal force (if that is a possibility and not an internal contradiction). Our society sees the marriage institution losing its initial property conserving and maintenance function. The family is, moreover, losing significance as the prime socializing institution of the young. Increasingly school and television are sharing and usurping⁸⁹ this role.

But I do not feel that the family is destined to lose its importance in our society, or that the law can significantly break through man's repression (to use Freudian terminology) or to compel man to responsibly face his ontological alienation (to use existential shorthand). But the law should not be a repressing force where it does not have to be. Society is and probably will remain more than sufficiently conservative without further legal reinforcement. Lib-

⁸⁷ This does not mean I would abandon our *mens rea* formulation for criminal responsibility. I do not think each individual is always in control or even aware of his motivations.

⁸⁸ Most of our benighted sex laws would be revoked. The couple might be encouraged to sample each other on all levels for a time before hastily undertaking marriage. Moreover, the law might encourage moratoria on the relationship at agreed upon intervals so each partner could satisfy his natural curiosity with others without shame, guilt or community obloquy reinforced by the legal framework.

⁸⁹ "Usurping" is probably the wrong word; often responsibility for the education of the young is happily relinquished or never even undertaken.

eralized divorce policies won't cause a societal disintegration to any greater extent than corrupt and corrupting marriages. Psychoanalysis can indicate that the trend should be toward increasing opportunity economically and emotionally. It can also be employed as a methodology to conform individual neurotics to an external society which will often encourage retreat. (It must be recognized that these are all valuational terms, and that each individual has his own personal validity, identity pursuit and reality. There is nothing intrinsically wrong with the reality of an hallucinating schizophrenic. He is most probably suffering, but he perhaps suffered in his "normal" existence before regression to "primary process" [to use Freudian language]). Moreover, there is nothing inherently evil about the individual today who for "kicks" or for genuine philosophical predilection takes an LSD trip. His reality in the "high" state is as relevant and as real to him as television or *The New York Times* is to us.

I am not commending the schizophrenic state or the use of LSD, I am suggesting and, in fact, stressing, that the burden of legal intervention in either case rests heavily on the democratic state. Situation ethics suggests that each individual must make his own moral choices in accordance with the one prevailing value, agape.⁹⁰ Sherman and Lewis have recently depicted one of the primary life styles of youth today:

Many critics, both in the United States and abroad, have recently complained that the youth on the streets of our cities are no longer the alienated intellectuals and activists demonstrating for social change, but the teeny-boppers out for "kicks." That is to say, SDS has been rejected in favor of LSD. But what Antonioni and other critics cannot understand is that if one "turns on, tunes in, and drops out," it is not an escape from reality, not a refusal to commit oneself, but a movement toward a different level of perception of what we call "reality." It is the most radical form of commitment. The exploration of "inner space" is a revolutionary act.⁹¹

We have too long acquiesced to the damning false security and corruption of "society has a right to protect itself." Our democratic tradition holds the individual sacrosanct as long as he proscribes no other's freedom or privilege. This at least is the theory. Lawyers have the obligation to assess the facts. It is too easy to use psychoanalytic labels of mental illness to avoid confrontation with basic issues of individual rights. Does not the individual have the right to be sick? The difficulty becomes where the individual is contaminating or will imminently contaminate others. This is pos-

⁹⁰ See J. FLETCHER, *SITUATION ETHICS: THE NEW MORALITY* (1966).

⁹¹ L. LEWIS & W. SHERMAN, *LANDSCAPE OF CONTEMPORARY CINEMA* 3 (1967).

sible both with organic illness and certain states of psychic existence (or mental illness, if you please). The law can undoubtedly, and must, intervene to save the life of others in such cases as threats of epidemic through such preventative actions as quarantine.

But what standards are applicable in a case like *Painter v. Bannister*?⁹² In *Painter* the Iowa Supreme Court ruled that the maternal grandparents of a then seven year old boy could maintain custody over the "rights" of the natural father. The father had left the boy with the grandparents after the sudden death of the boy's mother and sister. The father after two years remarried and sought custody, which the disapproving grandparents rejected. Despite no finding of the father's unfitness, the court ruled for the grandparents indicating as grounds the stability and solid middle class upbringing accorded the boy by his grandparents. Moreover, the court placed reliance on psychological testimony that the grandparents had become parental figures, that change in environment could prove detrimental to the boy and that "the chances are very high (Mark) will go wrong if he is returned to his father."⁹³

Ironically, protest is most often heard from reformers that children are not chattel; that parents have only limited rights in children; and that the placing of children should be in the "best interests of the child." In this case the court decided that the child's best interests were to grow up in the Midwest even though "In the Painter home, Mark would have more freedom of conduct and thought with an opportunity to develop his individual talents. It would be more exciting and challenging in many respects, but romantic, impractical and unstable."⁹⁴ Anna Freud suggests "the best interests of an infant are safe-guarded under the condition that three needs are fulfilled: the need for *affection* (for the unfolding and centering of the infant's own feelings); the need for *stimulation* (to elicit inherent functions and potentialities); and the need for *unbroken continuity* (to prevent damage done to the personality by the loss of function and destruction of capacities which follow invariably on the emotional upheavals brought about by separation from death or disappearance of the child's first love-objects)."⁹⁵

Applying these psychoanalytic insights to *Painter* we see that

⁹² No. 51974 (Sup. Ct. Iowa, Feb. 8, 1966), 140 N.W.2d 152 (1966).

⁹³ *Id.* at 157.

⁹⁴ *Id.* at 154.

⁹⁵ See Goldstein *supra* note 80, at 1053.

Mark would have affection from both vying families, that he would perhaps have greater stimulation from his natural father, and greater continuity with his grandparents.⁹⁶ Mark's age might make a great difference; some analysts feel the first four years of life as most significant in future developmental potential. The oedipal period is also held by Freudians, particularly, to be vital to a child's character progress. Mark is theoretically at the end of the oedipal period, but this certainly varies in different individuals. Moreover, we must analyze what traumatic effects, if any, Mark experienced when his mother and sister suddenly died. He perhaps feels personal guilt on either an "unconscious" or fantasy level for his mother's and/or sister's death—for his mother because of normal incestuous desires (oedipal) and also possibly because of ambivalence toward her (it is possible he didn't want to share his father with her, or her with his father). His guilt, if any, for the death of his sister could arise from the jealousy of sibling rivalry. We can speculate that he might think his mother's death was a personal rejection.⁹⁷ In short, any of the above speculations are within the range of possibility and perhaps probability. Separation (breaking of newly established continuity) could signify to him that he is a failure or evil, that no one wants him.⁹⁸

But we do not know, and a psychoanalyst, psychologist, or any other expert "soul" doctor can only speculate on the ramifications of choosing the maternal grandparents over the natural father's new family. We don't know and can only surmise Mark's resiliency in the face of change. The court in *Painter* rests on firm psychological grounds. But does this end the case? The stimulation factor was, as stated, pro the natural father. Isn't this important to both Mark and society? Opting for the father's custody in this case could widely increase Mark's future potential responsibility choice range, or the traumatic break in relationship with his grandparents could leave him permanently restricted, alienated, or

⁹⁶ We can, of course, further complicate the analysis by bringing in other extant theoretical analysis, but this will suffice to indicate the difficulty of analysis.

⁹⁷ For problems and approaches to child psychoanalysis see A. FREUD, *NORMALITY AND PATHOLOGY IN CHILDHOOD* (1965).

⁹⁸ I don't know in this case whether the trial court asked Mark what he wanted. Such a question could cut for good or bad. If the court asks but ignores Mark's opinion, he may feel more futile than if he is not asked at all. Even under the guidance of a subtle and trust-inspiring court, questioning Mark may force him into a position to choose, thereby rejecting one family over another, which could create present and future guilt, i.e. he may later ask if a "natural" son repudiates his own father. Depending on age and circumstances I would opt for the child's opinion being taken into consideration.

embittered. A Jungian or an analyst with existential proclivities would perhaps posit that in either case Mark is responsible for any self limitation, that he can discover (if a Jungian) or make (if an existentialist) his own world. In this case the choice of the father would seem superior because of the increased chance that his father will demand greater intellectual responsibility on the basis of personal choice than the more conforming grandparents (to use the court's characterization).⁹⁹ The *Painter* court bravely abandoned a safe parental rights test, but as in the law of conflicts, it was then forced to confront assorted and conflicting interests with varying value shadings. I cannot fault the *Painter* court for conservatism, for favoring a "middle class" over a "bohemian" morality for Mark's benefit; I can point out that the "best interests of the child" as a criterion is inordinately complex and any decision speculative at least. Moreover, other competing tests should be evaluated, e.g., the best interests of the individuals who seek custody and the ramifications of any intervention or disposition ultimately to the society. From personal bias toward intellectual stimulation and potential and since affection would not be diminished, I, on reading the paper record (which is necessarily sterile) would have opted for the paternal father.

In the *Painter* case, our question of disposition was between two competing, competent and loving households. The law is often not so lucky in alternatives. The recent *Liuni* case which excited popular indignation in New York presented the problem of removing a foster child who had lived with a family almost from birth from that family.¹⁰⁰ The welfare authorities in good faith felt that the little blonde girl shouldn't for her own good be retained in custody by the family who, they felt were becoming too attached to her. The board, among other and unreported reasons, felt the Liunis too old to be parents for this girl. There was no question of love and care involved. Popular pressure resulted in custody for the Liunis. This case is easy for me. The competing dispositions were the Liunis who had affirmed and proven their love and care for the child and unknown, undesignated foster parents, or an interim or permanent institutionalization.¹⁰¹ To break

⁹⁹ Certainly a Freudian analyst may also decide that in Mark's case the stimulation factor outweighs continuity. Some perhaps would even challenge continuity with the grandparents and argue a recontinuity with the natural father.

¹⁰⁰ See N.Y. Times, Nov. 5, 1966, at 1, col. 4-7; N.Y. Times, Nov. 10, 1966, at 27, col. 1; N.Y. Times, Nov. 19, 1966, at 35, col. 8; N.Y. Times, Nov. 29, 1966, at 39, col. 6; N.Y. Times, Jan. 14, 1967, at 30, col. 2.

¹⁰¹ It should be indicated, however, that the welfare authorities' concern necessarily includes more than the one case. Often public and private

up a relationship which has become as close and perhaps closer than many natural ones impinges upon the security of the family unit which supposedly we wish to strengthen. Psychoanalytically, affection, stimulation and continuity were all safeguarded by the decision to keep the child with the Luinis.

Passing over the many other very real situations and combinations of events which confront the law, I would like to turn to one more model which further indicates the difficulty of policy considerations and psychoanalytic relevance or lack thereof to the question of parental and child interests and rights. Freud has stated: "It follows from the nature of the facts which form the material of psycho-analysis that we are obliged to pay as much attention in our case histories to the purely human and social circumstances of our patients as to the somatic data and the symptoms of the disorder. Above all, our interest will be directed towards their family circumstances."¹⁰² Recent researchers have presented rich interrelational case analyses highly indicative of the etiological relationship of schizophrenia to the family unit.¹⁰³

The family despite all talk of its disintegration is still a significant institution in raising, socializing and channeling our young. If a particular family environment is socially diseased, how can we tell; would or should we intervene and remove the children from the tainted environment? Carrying out our earlier analogy if we

agencies place children with foster homes for natural parents who are assured they will later be able to regain custody. Often such parents are in an emergency state and can't in good faith care for the child during a particular interval; yet they relinquish control only on the assurance that they will get their child back. Foster parents, who are generally a more favorable alternative than an institution, may after an interval become attached to the child and fight threatened loss of custody. Moreover, the welfare agencies are particularly sensitive to public opinion and any judgment error reflects back to their detriment.

¹⁰² T. LIDZ, S. FLECK & A. CORNELISON, *SCHIZOPHRENIA AND THE FAMILY* 11 (1965) [hereinafter cited as Lidz].

¹⁰³ "Initially, we hoped that we might find some elements or factors within the family that led to schizophrenic development of an offspring. A plethora rather than a paucity of findings of potential significance created the problem. In each aspect of the family life which we examined something was seriously amiss. The parental personalities, the parents' marital interaction, the relationship of each parent to the child, the verbal and nonverbal communication within the family, the essential adherence to parental and childhood generation tasks and roles, the structure of the family as a unit, the parents' gender-linked roles, the transmission of the culture's techniques of adaptation, the relatedness of the family to the community: these and other facets were all seriously disturbed in our judgment—and various authorities who examined the protocols agreed." *Id.* at 27.

step into situations of organic epidemic proportions, shouldn't we intervene where we see the transmission of psychic distortion and pain?¹⁰⁴ I would like to present a case study of a schizophrenic patient from a middle to upper class family, treated in a superior psychiatric institution.¹⁰⁵

The patient Emil Dolfuss was twenty-six years old when he was transferred from another hospital to which he had been admitted for the second time following a serious suicidal attempt. At the time of admission to the Yale Psychiatric Institute, he conducted himself in a haughty and pompous manner, choosing his words and accent carefully. He spoke calmly of his suicidal attempt which, he explained, followed a quarrel with his mother. He answered most questions in vague generalities and stated that he was in the hospital because, "It's usually the case that one hopes to become more stable and achieve a more harmonious relationship to one's self and to one's family and others."

Overt psychotic behavior first appeared when Emil was twenty-one, although we later learned that shortly after his father's death when Emil was fourteen symptoms in the form of ideas of persecution had occurred. Although Emil was highly intelligent, his school record had been so poor that he could not gain admission to college and after a few years of aimless studying, he traveled alone to the Orient although his family recognized then that he was severely disturbed. While abroad, he developed ideas of saving the world, lived out religious delusions, and was returned to the United States by consular authorities after he persistently attempted to contact the President. Emil was then hospitalized for the first time for approximately eighteen months; he received insulin and electric shock treatments and psychotherapy. During this hospitalization he was catatonic and exhibited many rituals, most of which were derived from various Eastern religions or philosophies; and he would periodically refuse to eat meat. He declared his only sibling, Adele, a goddess, and knelt and prayed in front of her before speaking to her. For a period he became mute and refused to see his family.

Between hospitalizations, Emil maintained a marginal adjustment, changing occupations often, but gradually he again became preoccupied with Eastern religion and, at times, believed himself a God. He insisted on having such brilliant lights turned on constantly within and around his garage apartment that it disturbed the neighborhood. After the argument with his mother which concerned a religious trinket that belonged to a friend of his father, Emil offered an engagement ring to his sister's friend whom he knew but slightly, and ostensibly his suicidal attempt followed the rejection of his proposal.

In our hospital the patient's behavior gradually deteriorated. Because of his many pompous and unreasonable demands, he

¹⁰⁴ For a fictionalized and poignant picture of a schizophrenic condition see H. GREEN, *I NEVER PROMISED YOU A ROSE GARDEN* (1964).

¹⁰⁵ The institution is the Yale Psychiatric Institute and this case and other cases of similar richness are interspersed through Lidz, *supra* note 102.

found himself increasingly isolated from other patients who resented in particular his attempts to enforce his belief that all rooms must be fully illuminated around the clock. These and other demands made it extremely difficult for the staff to maintain a harmonious and consistent attitude toward him, a factor which contributed to his behavioral incontinence. At first he was immaculately overdressed, as if he were at an exclusive English country club, but then his dress became increasingly slovenly, and he refused to shave or have his hair cut. Following a major crisis about the lights five months after admission, Emil became combative, remained mute for weeks, and refused to eat. He then demanded and ate enormous quantities of beef for a period, after which he put himself on a strictly vegetarian diet. From this time on, he also steadfastly refused to wear trousers. He would remain attired in shorts, a checkered waistcoat, and a heavy jacket even on very hot days; later he wore only shorts even in winter while insisting that his windows be open. He refused to sleep in bed throughout the remainder of his hospital stay and slept either standing up or in a chair. Emil was never without light in his room. Although he acted as if he had the right to command the staff to carry out his wishes, it was clear that the absence of light caused him to panic and become combative. He communicated with the staff by signs, charades, or in a foreign language. He refused to wash or to be bathed, and while quite oblivious to certain health hazards, he also propounded many faddish health theories and was deeply worried about insufficient food supply. He hoarded food, especially candy, fruits, and nuts in large quantities, and when his mother objected to these foods for health reasons, he accused her of stinginess.

Emil also became quite interested in Jewish customs and history (he had a Jewish therapist) and even wished to be circumcized, but in his behavior continued to adhere to the dicta of a mysterious Eastern religion. In observance of the latter, he counteracted gravity by never lying down, worshipped light, and avoided "animal excitation" by not eating meat.

A vignette of Emil's life in our hospital follows: a tall, bearded young man with hair to his shoulders, dressed only in shorts stands in a room stacked with magazines and fruit, or sits on the toilet in the adjacent bathroom reading the *Wall Street Journal*. The doors and windows are open; he motions to a passer-by in the hall to come into his room. There he forces a sticky fig into the visitor's hand and makes a request in sign language. When he is refused, he listens carefully, then shoves the visitor out and shoots him with mock gestures.

The Family

Mr. Dolfuss, of a wealthy middle-class background, was sent from Austria in early adulthood to conduct the American branch of the family business. Mrs. Dolfuss who came from an Austrian family of considerable renown also immigrated to this country as a young adult. After they married, they moved to the home near Boston which Mr. Dolfuss had established as a bachelor. He ran his well-appointed home in the manner of European no-

bility which set the family apart from the rest of the community. The formality of the household was unusual—the chauffeur wore white gloves even to shop for groceries, and all members of the household had to dress formally every afternoon to receive the master at the door. The children were permitted to be with their parents only during specific hours. When at home, Mr. Dolfuss spent much of his time in his bedroom, where he was not to be disturbed, and only his wife or the "Fräulein" was permitted to look after his needs. He was mortally afraid of drafts, and frequently suffered from colds. Usually he spent his time reading about Eastern religion and philosophy while dressed only in his underwear. From his reading he evolved a peculiar cult which the family shared, but which allegedly was understood by only a few select people. This Eastern philosophy somehow included certain Christian traditions so that Christmas and winter-solstice celebrations were combined. A ceremony of the lighting of candles was preceded by a long speech by Mr. Dolfuss on the holiness of light during which the entire household were required to stand listening.

....

Mrs. Dolfuss considered her primary duty to be at the service of her husband: she felt he was a great man and came to share his beliefs to which she still adheres. After his death she continued to believe that her husband was still alive, dead but in another reincarnation. The family members refused to elaborate their religious beliefs to us because the religion was not to be discussed with people not devoted to it. Even the daughter maintained this reticence out of reverence for her father, although she supposedly disavowed the creed.

The patient and his sister as children were cared for by the Fräulein since the parents were frequently absent on long trips. The Fräulein favored Emil over his sister, she treated him like a little prince, and habitually slept with him. This nursemaid also worshipped the father and claims even now that she understood him better than did Mrs. Dolfuss. Thus, to the patient, his mother who devoted most of her time and energy to her husband represented remoteness, whereas the Fräulein mixed motherliness and seductiveness with rigid reinforcement of the father's cold formality and religious preoccupations. She had used harsh methods of toilet training.

When the patient was seven or eight, the nursemaid was dismissed by Mrs. Dolfuss, partly because of their competitive feelings, but also because Emil's teachers complained that he had not been taught the rudiments of self-care and that he was being severely "spoiled" by his nurse. Supposedly, Emil did not react to this separation. He showed little emotional disturbance until shortly after his father's sudden death. For a few days following this crucial event, Emil behaved appropriately, acting as the head of the household during his mother's transient incapacitation in the period of her acute bereavement. The patient has been quoted as saying, "I have to be the man in the family now." Soon thereafter he became delusional, believing that a light beam from a tall building was following him. He told one of his psychiatrists, "The loss of my father set me back, and I don't know how

to describe the incomparable harm it did to my development of all descriptions."

Other characteristics of the family interaction and attitude must be mentioned. In line with his beliefs, the father disapproved of and never expressed any hostility. Everybody was "happy" in this family—the mother, however, despite her subservience, belittled and criticized the father's disinclination for fresh air, sports, and physical activity. She was a food faddist and considered physical culture extremely important for herself and her children. She was always very parsimonious, leading the patient to say, "I always gave my family large presents, but they never gave me anything."¹⁰⁶

On the surface, this family and other families in the study, appeared "normal" and perhaps above average. There was affection (if distorted), stimulation (if of a peculiar type) and continuity (taking into account, however, the early parental trip). And yet the case history as even further developed than presented here convincingly indicates that Emil's condition is predicated to a great degree on his developmental familial environment. We should mention that in many of the studies the parents of the schizophrenics were not only in good financial shape, but were as intellectually endowed, if not more, than the norm. Moreover, the individual parental partners were often thought to be successful in the outside community, by the standards of the dominant society. Often, however, the child formed distorted ego ideals from parents who practiced other than they consciously preached. Often the offspring became a focal point in a never ending battle between the parents. Sometimes the offspring became an erotic love object fulfilling the needs of one parent who thus broke generational boundaries. Ironically, the healthy partner many times submitted family control and children upbringing to the more "pathological" partner. We could go on and list various other interrelationship "abnormalities" occurring in these cases but we have enough for analysis already. It is already trite in our literature to recognize our sexual role confusion. This confusion of the parent who himself never "learned" how to act as a man or a woman is generated to some degree, depending on the given school, to the children who in turn transmit their individual and societal confusions. We can talk of the seductive mother or father or the ineffectual mother and father; we can assimilate the message that the children may very well be harmed when judged by the types of persons we allegedly opt for in our society; but can we intervene without creating the danger of a more insidious type of harm.¹⁰⁷

¹⁰⁶ Lidz, *supra* note 102, at 163-68.

¹⁰⁷ One afternoon in New Haven I noticed a mother sitting in a waiting room holding her infant away from her, with the infant's head slanted

In the range of mental states, schizophrenia, no matter how defined and no matter how nebulous a characterization, is perhaps the label with the most stigmatizing potential in our society. The schizophrenic, whether voluntarily or through determining conditions, has "opted" out of society and fruitful relationships. I am not capable of assessing how much "schizophrenia" our society can withstand before whole sections "opt" out. I do think that we must establish procedural safeguards to allow the individual to "opt" out while encouraging him to remain committed to society. Flag waving is to no avail. We must attempt to delineate and develop values to which the individual can remain thinkingly and emotionally cathected.

A nonaction is obviously a decision as much as is an affirmative intervention. While psychoanalysis can describe Emil's development to the schizophrenic stage, it is a much greater, in fact at this stage, an impossible burden to predict beforehand an ultimate individual outcome. We can through psychoanalytic insights read many of the factors which contribute toward the outcome of the emotionally restricted or pained man. We can understand then to some degree how and why Emil developed as he did. Particularly astute observers could perhaps have intuited Emil's potential disintegration. But the privacy and integrity of the family is still too prized to randomly or selectively eavesdrop on the given family unit. Separation from even the bad family environment often creates more fertile potential for trauma and disintegration than does no intervention. Moreover, institutionalization because of manpower problems, *inter alia*, is generally not a preferred disposition.

We can, of course posit a Spartan solution to child development and conditioning. We can remove children from parents at certain ages and raise them "in conformity" with the best insights, toward the best goals we can postulate. But this is not a very realistic option in this society at this juncture. We can add necessary funds as a priority to such institutionalized programs as Head Start at early stages of the child's life. But as in the case of Emil, we must recognize that the middle class and upperclass can be emotionally impoverished. We have statutes which call for doctors' reports

toward the ground. The mother's facial expression seemed flat in my "expert" opinion. The mother didn't seem to be relating warmly with or to the child. I didn't discern the basic trust elements discussed by analysts like Erickson. Should the law have taken the child away from that mother, or treated that mother recognizing that all mothers are not loving or "capable" of loving. But perhaps this was a good mother seen at a time when she was harassed, tired and not very loving (seen, in fact, by a not very knowledgeable expert).

where the "battered child" is found. A "psychically battered" child is often worse off than the physically traumatized infant. And yet I maintain that with all our psychoanalytic knowledge, intervention leading to separation is a dangerous and generally nonpreferred step—dangerous not only to the child but also to other stipulated values of society. Institutional intervention is prone to lead to a deadening conformity, to a denial of the richness of human potential. Not only the family but society failed Emil, but Emil failed himself (if as a value consideration we deem his state failure). The Promethean man may also push himself to madness or individual ecstasy.

If as I state, the law must at this stage enter a family structure like the Dolfuss' very warily, even if it can isolate the true factors leading to Emil's subsequent breakdown before the fact, the burden becomes heavier than in intervening in less pathological (again recognize the value content of this term) environments. What then can the law do, if anything? The law as a structuring framework of society can and must guarantee individual freedom of movement and expression until imminent danger to others, *i.e.*, until a Charles J. Whitman starts climbing the tower with his "can of deodorant." Intervention after a fact is too late. Certainly we must safeguard procedural process throughout the law when once we invoke it. But the law is more than judicial interpretation in individual cases, for it also has the capacity and obligation to allow the individual to expand or to drop out. And it can certainly encourage expansion.

We generally have opted for a system of compulsory education often to the detriment of well integrated and respectable societal communities; *e.g.*, the Amish are constantly subject to pressure to bring their children to school. I oppose such a coercive process. But since we have so opted (and at this stage at least abdicating my responsibility for articulating my dissent), we must reassess our educational processes.¹⁰⁸ Our system of government can only succeed as long as it remains true to our procedural values and persuasively articulates reasons for value choice where conflict ensues. The goal of all jurisprudences is movement toward the dignity of man which can only mean the responsibility of man—a responsibility which will remain mythical the more the law circumscribes instinctual outlets. I do not oppose community health stations manned by trained and compassionate analysts and social workers, but we cannot coerce attendance and expect responsibility.

¹⁰⁸ The literature pro and con on educational reform is so widespread and community knowledge such as to leave to the reader's own discerning evaluation the manifold problems here.

Nor can we say thus that the individual should help himself when we know that in much of our society the individual starts so down as to be potentially circumscribed forever. We must encourage the rich variety of human action and viewpoint. Let the law worry about dignity and the individual worry about his own standard of happiness which may be ultimately only relative, an ephimery, or a cosmic Oneness.

CONCLUSION

I have intermixed the terms psychology, psychoanalysis and psychiatry throughout this article. I now maintain despite the individual theoretical positions of the various schools and methodologies that the two basic levels of relevance between them and the law are ultimately one. Any psychology which can and is extrapolated into a whole theory of the nature of man necessarily focuses on the individual with that whole philosophical position in mind. This position no matter how ethically neutral seeks the change or cure of the voluntary or coerced patient. The patient has a right to select his own medicine through any church, philosophy or psychology of his choice. Medical intervention on the psychic level is speculative at best, often frustrating and nugatory and, if coerced, in derogation of individual choice. When we opt for intervention then we are opting for a whole series of value structures and denying an equally valid series. The law must shoulder a heavy burden in active intervention indeed.

Moreover, the choice between the competing schools of psychology and methodology is still speculative at best, although when the polemic clears, many common insights are evidenced. We encourage commitment to values we hold dear. Therapists and theoreticians no matter how objective remain committed to their personal theoretical postulates, although indeed practice often disavows theory. This does not mean that we should eschew any legal recognition of the relevancy of psychological theories to the law, but rather we must recognize the value content and potential insights of each. The man without a philosophy is often adrift, but blind commitment to a false god through legal structures must necessarily destroy legal efficacy. We have come full face; psychological theories are more relevant in explaining and modifying legal structures than as pragmatic tools intervening in individual cases—too often to the potential detriment of the individual. Doctors generally don't prescribe medicine until they know how it works. And yet at some stage even doctors must experiment. Our one human hope is that mankind cannot be bounded by theoretical postulates, that man will be able to defy descriptive categorization without destroying himself.