

Summer 1960

Psychoanalysis and the Criminal Law

Helen Silving

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

Recommended Citation

Helen Silving, Psychoanalysis and the Criminal Law, 51 J. Crim. L. Criminology & Police Sci. 19 (1960-1961)

This Article is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

PSYCHOANALYSIS AND THE CRIMINAL LAW

HELEN SILVING*

Professor Silving is a Professor of the University of Puerto Rico. However, she is at present on leave from the University while serving as Adviser to the Legislative Penal Reform Commission of the Commonwealth of Puerto Rico. Previously, Professor Silving was associated with the law faculties of Harvard and Yale.

This article presents an assessment of the impact of psychology upon two important areas of criminal law, (1) the problem of "responsibility" and (2) the question of what types of conduct should be treated as criminal. Professor Silving points out that psychoanalytic findings cast new light upon many of the assumptions, methods and goals of criminal law, and that many of these findings can be utilized to improve the criminal law. She notes as well, however, that wholesale incorporation of ideas contributed by psychoanalysis would be highly undesirable in the criminal law, which must reflect the concern of a democratic society for individual liberties. Caution must be exercised, therefore, in evaluating the potential effect upon important individual freedoms of policies which appear desirable when considered only in the light of psychiatric discoveries. She concludes that the teachings of psychoanalysis have much to contribute to the criminal law when they are thoughtfully weighed and selectively chosen on the basis of their consistency with the fundamental aims of a constitutional, democratic society.

The author prepared this article at the special request of the Board of Editors in commemoration of the *Journal's* fifty years of publication.—EDITOR.

The most significant contribution of psychoanalysis to the understanding of mental processes is discovery of unconscious mental life. The so-called "Unconscious" follows its own laws. Within the system "conscious," unconscious contents appear "irrational." Since there is "communication" between the "Conscious" and the "Unconscious," such "irrational" contents, of which man is unaware and over which he has no control, intervene in his thoughts, decisions and actions and thus exercise an influence upon his life. In the light of this discovery, man no longer appears to be a wholly "rational being."

This new "image of man" has given a distinctive imprint to contemporary culture, just as various other historical "man's images" have influenced and reflected particular cultures.¹ As each of these has shaped legal reality, so "man's image" as conceived by psychoanalysis today has a growing impact upon legal development. It increasingly in-

fluences legal thought indirectly through a variety of channels, such as general and legal philosophy, ethics, and changes in social mores, as well as directly through the new knowledge of mental life which it conveys. It throws a new light on "man" in the various capacities in which he functions in law: as law creator and enforcer, as addressee of legal norms and as object of law enforcement.

Space limitations do not permit a comprehensive evaluation of the impact of psychoanalysis upon all phases of jurisprudence and criminal law. The following discussion is thus necessarily selective. Basic methodological issues are treated only incidentally. Problems of the bearing of psychoanalysis on legal philosophy and ethics affecting criminal law cannot receive the full consideration they deserve, and inquiry into the significant problem of the influence of psychoanalysis on development of pertinent constitutional concepts must be omitted. I shall confine myself to a discussion of the impact of psychoanalysis on substantive criminal law, that is, on the two fundamental problems which it presents, that of "responsibility" and that of appropriate selection of conduct to be proscribed. In each context, I shall point out the limitations upon a full realization of psychoanalytic insight in law which are imposed by political and legal ideology.

* The views expressed in this article are exclusively those of the author. They do not reflect the opinions of the Penal Reform Commission.

¹ Perhaps no single Biblical thought has summarized Judaeo-Christian philosophy as adequately or determined its cultural impact as effectively as the idea of man's creation "in the image of God." Other representative "images of man" of distinctive cultures are Luther's "free Christian man," Rousseau's man "born free," the "economic man" and the "rational man."

RESPONSIBILITY

"Responsibility" is a moral or legal rather than a scientific concept. It is best defined as the connection adopted in ethics or in law between certain conditions, such as certain mental and external factual data (*e.g.*, intent or negligence and death causation), and certain consequences, such as social censure, imprisonment, fine, compensation. Decision makers shape these conditions and consequences for legal purposes with a view to achieving their preferred goals, the so-called "ends of criminal law." As stated by Dean Paul K. Ryu, responsibility is a "relational concept."² This means that there is no absolute concept, state or quality of "responsibility." The conditions and consequences constituting "responsibility" are not each a separate phenomenon or occurrence suspended in the air or a quality inherent in the individual. Rather, to each type of condition or conditions complex there is assigned by law a particular type of consequence or a group of consequence types. In a rational system of law this assignment is based on rational considerations, so that the conditions and consequences are geared to each other in a sound manner. Such rationality is judged from the standpoint of the goals which operation of the responsibility concept is expected to reach. The choice of "ends," as well as of the conditions and consequences which are to serve the chosen ends, is in large measure limited in democratic society by constitutional restrictions aimed at preservation of fundamental rights of men.

This definition of "responsibility" suggests not only the sphere of potential contribution of psychoanalysis, as a science, that is, psychoanalytic psychology, to the shaping of a legal concept of responsibility but also the limitations imposed upon such a contribution. Psychoanalytic insight may be brought to bear on the elements of rational teleology implied in a sound system of responsibility. But it cannot resolve the normative problems of choice, the choice of goals or of their proper hierarchy, except perhaps indirectly by bringing to the attention of decision makers the manner in which pursuit of a given goal would operate. Finally, as the goals themselves, considerations of scientific teleology also must yield to constitutional limitations, so that a method which is most appropriate scientifically may often have to be sacrificed to fundamental liberties.

² PAUL K. RYU, *KOREAN CULTURE AND CRIMINAL RESPONSIBILITY* (Yale Thesis, 1958, on file in the Library of Yale Law School).

Problems of "responsibility," though closely connected with each other, may be divided for purposes of presentation, into three topics: (1) the goals or "ends of criminal law"; (2) the consequences of responsibility or "sanctions"; and (3) the personal conditions of responsibility or "imputation."³

(1) *The "Ends of Criminal Law"*

The misunderstanding between lawyers and psychiatrists, abundantly discussed in the literatures of both law and psychiatry, begins at the stage of "ends" to be pursued. It is thus important to clarify further the methodological problem in issue. Treatment of specific "ends," retribution, reformation, community protection, etc., will be omitted.

The "ends of criminal law" are ethical, political and social ideals, that is, they are normative and not scientific conceptions. The choice of normative ends—provided that they do not involve dedication to an abstract purpose at any cost—to be "rational" should take account of pertinent facts, particularly those bearing on the questions of whether a given end can be reached and, if so, what is the cost of reaching it. But a normative choice, adoption or rejection of an "end" as a "value," cannot be made by a simple application of reason to facts, for values neither rationally flow from facts nor are automatically invalidated by facts. The function of science in the process of choice lies in its use as a tool, a fact-finding instrument, where facts have been normatively decided to be pertinent. Thus, in considering adoption of an end, decision makers may take account of the fact-finding of psychoanalytic psychology that conscious pursuit of that end may be impeded by unconscious judicial and public motivations at variance with those consciously professed. The decision makers may or may not decide that the mere fact of a goal being psychologically rooted in or impeded by a motive deemed objectionable does not nullify its value. This is itself a matter of normative decision. If they decide that the value is not thus ipso facto nullified, they should further consider, in the light of science, whether it is possible by judicial and public education to eliminate or modify the operation of the impeding unconscious forces. The decision makers may make final decision regarding adoption or rejection of the goal

³ To be accurate, the objective parts of definitions of crime and the tests of ascertaining the presence of objective crime elements also form part of the "responsibility" concept.

dependent on the answer to this question. But the ultimate decision upon adoption or rejection of an "end" must be theirs, for it is a normative decision.

It is thus fallacious to assume that the "ends of criminal law" can simply be logically derived from scientific findings of psychoanalytic psychology regarding the motives which prompt man's actions and reactions. But this is precisely the method which has often been used in the numerous law reform proposals advanced in recent decades. Frequently, what appears to be a conflict between the legal and the "scientific" approach is in fact a conflict between legal and medical ethics. Confusion may be avoided by clarity regarding the exact line of demarcation between scientific finding and ethical choice. An example may illustrate the manner in which separation of the "scientific" from the "ethical" aspects of choice should be maintained.

The first issue before decision makers entrusted with formulation of criminal law policy is choice of a basic ethical approach. That choice may or may not be made without regard to any factual or scientific information. The problem of whether the dominant ethics should be absolute or utilitarian ethics is implied in all discussions concerning "ends"; however, this problem is never verbalized in this country,⁴ utilitarianism being tacitly assumed to be a self-evident approach even by those professing adherence to various religious views.⁵ The psychoanalytic information that may or may not be regarded as pertinent to the choice between absolute and utilitarian ethics concerns the roots of ethical principles. Psychoanalysis has traced the preferred symbols of absolute ethics to psychological origins in motives traditionally identified with vices. Self-sacrifice, altruism, generosity, absolute truthfulness have been shown to originate in un-

conscious processes governed by the "pleasure-pain" principle and often grow out of motives that are diametrically opposed to the noble sentiments apparent to the bearer himself as well as to others. Of course, psychoanalysis, as a science, does not avow any particular ethical preference. Its own operational concepts, the "reality principle," the "superego," incorporate the idea of modification of the "pleasure-pain" principle. Psychoanalytic writers disclaim that any inference as to the value of ethical principles may be drawn from their origins. But the fact is that whether or not such inference may or should be drawn is itself a normative ethical rather than scientific problem. Within this context, it may or may not be pertinent to note that absolute ethical ideals, by definition, defy "proof" or "disproof" by reference to origins.

To arrive at a "rational" system of ends, it is necessary to view the pertinent facts and factors in context with each other rather than treat each as an isolated phenomenon. When this method is applied, it will appear that utilization of psychoanalytic knowledge in law presents a distinctive problem not to be equated with that obtaining in other fields. An example may illustrate the point. While, as suggested above, *e.g.*, retribution⁶ is not necessarily eliminated as an "end of criminal law" on the sole ground that—as has been shown by psychoanalytic writers⁷—it is psychologically rooted in vengeance, awareness of such motivation may be most pertinent to its choice as an "end." Psychoanalytic insight into such motivation constitutes an important contribution to law. But in legal context the inquiry must be extended to other pertinent factors. For instance, one might inquire to what extent a defendant who is the victim of judicial "vengeance" disguised as "retribution" may obtain legal relief. The law possesses various tools of control aimed at prevention of mob justice and judicial error. Appellate judges who may never face the accused perhaps do not identify themselves with him in the same degree as a trial judge. It may be worth exploring whether the psychological relationship of appellate judges to the trial judge may not have a stronger impact on their decision than their relationship to the accused. It

⁶ Modern "retribution," though rooted in "vengeance," cannot be simply identified with vengeance. Its meaning and function in modern law will be discussed in a separate paper.

⁷ On this, see Reik, *Geständniszwang und Strafbedürfnis*, in *PROBLEME DER PSYCHOANALYSE UND DER KRIMINOLOGIE* 146 (1925); ALEXANDER & STAUB, *THE CRIMINAL, THE JUDGE, AND THE PUBLIC* 218 (rev. ed. 1956); REIWALD, *SOCIETY AND ITS CRIMINALS* 202 (transl. T. E. James 1950).

⁴ Contrast with this approach the elaborate discussion of the type of prevailing ethics by the Bundesgerichtshof of the German Federal Republic. Decision of the Bundesgerichtshof (Great Senate in Criminal Matters), February 17, 1954, 6 B.G.H.St. 46 (1954), holding that the question of whether sexual intercourse between fiancés constitutes "lewd conduct" within the meaning of §§ 180, 181, Penal Code (Pandering), must be determined by objective ethical norms and not by either community standards or community mores. For criticism of this decision see Bockelmann, *Zur Strafbarkeit der Kuppelei*, JURISTISCHE RUNDschau 361-364 (1954); Jescheck, *Zur Frage der Kuppelei gegenüber Verlobten*, MONATSSCHRIFT FÜR DEUTSCHES RECHT 645-649 (1954).

⁵ Another problem which decision makers may have to face is whether it is proper for them, in a democratic country adhering to the principle of separation of state and church, to apply their religious preferences to law. Such separation, of course, does not necessarily imply adoption of utilitarian ethics.

is important to remember that historically the trial judge was the "accused" on appeal, for judicial review grew out of a "trial" of trial judges. Legal "justice" cannot be fully equated with individual or family justice.

The choice of both ends and means in a democratic society must always remain subject to limitations imposed by the demands for preservation of fundamental political and ethical principles. In evaluating an "end of criminal law," it is thus essential to visualize the effect of its realization upon individual liberties. For instance, while there can be no serious dispute over the desirability of a policy of reformation and treatment, advocated by many psychiatrists, account should be taken, in following this policy, of the political effects of an extreme treatment-oriented policy. A by-product of such policy has been extension of the notion of the State as *parens patriae* into the criminal law for adults. Psychiatrists often equate the State with a "parent"—a just, unjust, loving or hating parent.⁸ Of course, such equation presumably purports to describe particular reactions of neurotic offenders to the State. No objection can be raised against the equation so long as it is confined to such description of neurotic reactions. But it is dangerous to extend it further by creating a general, presumably ideal, image of the State as a "good parent" or of a judge as a "just father." When carried over into political or legal ideology, the equation tends to support a distorted, "paternalistic," totalitarian ideal of State in the minds of men. Mature, freedom-loving men neither deify nor personify the State. They look upon it critically as a utilitarian device, an instrument serving accomplishment of certain limited and well-defined community ends. But it may be difficult to maintain this democratic impersonal concept of State when an altogether different anthropomorphic picture of State is used in "treatment" context. Though the psychiatrists' demand for treatment of offenders is meritorious, policy makers must never lose sight of the fact that treatment imposed upon law breakers under State authority cannot be equated with a medical task, as generally conceived.

⁸ See, e. g., Watson, *A Critique of the Legal Approach to Crime and Correction*, 23 LAW AND CONTEMP. PROB. 611, 627 (1958). And see Guttmacher, *The Psychiatric Approach to Crime and Correction*, 23 LAW AND CONTEMP. PROB. 633, 647 (1958), opposing preemption of the judicial function by psychiatrists on the ground that the judge as a "father figure" is "worthy of preservation by society."

(2) *The Consequences of Responsibility: Sanctions*

As we reach the problem of appropriate means toward the chosen goals, the potential contribution of psychoanalytic knowledge to law gains ground. But in this area there is greater disagreement among psychiatrists than in the area of goal determination. Some psychiatrists would like to see punishment entirely abolished and offenders classified by psychiatrists, not by judges, into two groups, those who should be treated and those who should be confined indefinitely.⁹ Others would admit application of punishment to special groups of offenders for reformatory or deterrent purposes.¹⁰ The wisdom of granting psychiatrists a broad discretion in exercising judgment as regards confinement of a nonpsychotic offender for the remainder of his life, regardless of the crime for which he has been convicted, has been questioned.¹¹ But our law itself is making increasing concessions to the spokesmen of the law's "sister sciences" for a greater measure of control over disposition and treatment of offenders. Within the scope of the relatively indeterminate sentence device, there is appearing upon the legal scene the board of experts, replacing the court as sentencing authority and endowed with discretion in manipulating treatment methods and with power of extending at any time (within the maximum set by law) the term of sentence.¹² The new trend raises considerable doubts in the minds of those who believe that man's freedom—not completely forfeited by conviction—is better safeguarded where the sentencing power is more narrowly limited by law and wielded by independent judges who are used to thinking in terms of legal categories of jurisdiction, limitation of power and due process, than where such power is broadly defined and exercised by an administrative body composed of men who by training and profession are oriented to welfare rather than to social freedom. The sex psychopath laws, which

⁹ See, e. g., KARL A. MENNINGER, *THE HUMAN MIND* 448-49 (3d ed. 1945); ZILBOORG, *THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT* (1954).

¹⁰ Waelder, *Psychiatry and the Problem of Criminal Responsibility*, 101 U. PA. L. REV. 378 (1952); ALEXANDER & STAUB, *op. cit. supra*, note 7, at 210-211. ¹¹ See Wertham, Book Review (of ZILBOORG, *op. cit. supra*, note 9), 22 U. CHI. L. REV. 569 (1955); also *Psychoauthoritarianism and the Law*, *id.* at 336 (1955). Compare also a sociologist's critique, Hakeem, *A Critique of the Psychiatric Approach to Crime and Correction*, 23 LAW AND CONTEMP. PROB. 650 (1958).

¹² See particularly the California Adult Authority, §§ 5075-5094, California Penal Code, West's Annotated California Codes (1956), as amended.

deliver into the hands of experts for an indefinite time even minor sex offenders often not convicted of any crime, seem to frighten the experts themselves.¹³

There is practical unanimity on the superior merits of psychiatric and educational treatment—provided that it can be used in a given case—as compared with imprisonment. Of course, the essence of a sanction lies in its involuntary nature, and psychiatric treatment practiced on a compulsory basis presents certain fundamental difficulties. Since it may produce profound changes in a man's personality, it is perhaps a more serious intervention into his private sphere than is imprisonment. Moreover, from a psychiatric point of view, many believe that a compulsory treatment promises no success.¹⁴ Our law has devised an ingenious method of reaching a compromise solution between the scheme of imprisonment and the alternative of treatment: probation, which permits the judge to make treatment a condition of probation. Moreover, in England, wisely, probation requires the prisoner's consent,¹⁵ and the draft of a new German Penal Code singles out psychiatric treatment as a condition of probation which cannot be imposed without consent of the probationer.¹⁶

Psychoanalytic writers have called attention to certain specific problems raised by the unconscious reactions of various offender types to conventional criminal law methods. In this area psychoanalytic findings have been most instructive in showing that several of these methods often promote the very factors that lead to crime. Psychoanalysts have dramatically described the manner in which "the criminal from a sense of guilt" unconsciously schemes to achieve being punished. He does that in order to secure atonement for an imaginary crime of childhood and to attach his guilt feelings for

such non-existent crime to something real.¹⁷ In this scheme, law enforcement agencies, believed to assist in the maintenance of the legal order, actually serve as unwitting tools of the offender. Psychoanalysts have pointed out that imprisonment, which places the offender in a position of utter childlike dependence on guidance, frequently promotes the very infantile drives, the immaturity, from which the crime arose. They have called attention to the fact that harshness as a response to crime waves, generally believed to act as a powerful deterrent factor, actually tends to increase criminality, for excessive punishment, in doing violence to the offender's "sense of justice," which in his Unconscious takes the form of a *lex talionis*, is interpreted by him as advance payment for future violations, a credit on future crime.¹⁸ It should be interesting to secure the expert opinion of psychoanalysts on the impact of the insecurity element in the indeterminate sentence upon the reformation process of the offender.¹⁹

The most constructive contribution of psychoanalysis to reformatory penology is discovery of the psychoanalytic method of treatment, which makes it possible to reach certain types of offenders who are not accessible to conventional therapeutic methods, that is, neurotic offenders.²⁰ Psychoanalytic writers have shown that recidivism, especially stigmatized by law, does not automatically indicate greater depravity of the offender but indeed points to a greater likelihood of mental abnormality than does casual criminality.²¹ Where recidivism is "an intrinsic part or natural phase of

¹³ See KARPAN, *THE SEXUAL OFFENDER AND HIS OFFENSES* 233-34 (1957).

¹⁴ On this problem see BRITISH JOURNAL OF MEDICAL PSYCHOLOGY, vol. 17 (1938). Among sociologists opposing treatment on an involuntary basis, see BARNES & TEETERS, *NEW HORIZONS IN CRIMINOLOGY* 592 (3d ed. 1959).

¹⁵ Criminal Justice Act, 1948, s. 3 (11 & 12 Geo. c. 53). On the therapeutic value of consent, see Clifford, *The Role of Probation in the Treatment of Offenders, THE ROOTS OF CRIME* 120, 122 (East ed. 1954).

¹⁶ The reason advanced for adoption of this rule is that treatment cannot be fruitfully applied on an involuntary basis. See ENTWURF DES ALLGEMEINEN TEILS EINES STRAFGESETZBUCHS (Verlag des Bundesanzeigers 1958), § 78(2), and comment at p. 79.

¹⁷ Freud, *Der Verbrecher aus Schuld Bewusstsein*, X GESAMMELTE SCHRIFTEN, Internationaler Psychoanalytischer Verlag 312.

¹⁸ ALEXANDER & STAUB, *op. cit. supra*, note 7, at 54; MIRA Y LÓPEZ, *MANUAL DE PSICOLOGÍA JURÍDICA* 91 (4th rev. ed. 1954).

¹⁹ In recommending such sentences, Professor Glueck stressed the fact that indeterminateness itself is a deterrent. Sheldon Glueck, *Principles of a Rational Penal Code*, 41 HARV. L. REV. 453 (1928). It is not quite clear in what manner or upon whom this deterrence is expected to operate.

²⁰ BERNARD GLUECK, *PROBATION AND CRIMINAL JUSTICE* 197-220 (1933).

²¹ *Ibid.*; see also Glover, *Prognosis or Prediction: A Psychiatric Examination of the Concept of 'Recidivism'*, 6 BRITISH JOURNAL OF DELINQUENCY 116 (1955-56); compare also Conclusions of Section III of the THIRD INTERNATIONAL CONGRESS ON CRIMINOLOGY, London, 12th-18th September 1955, in SUMMARY OF PROCEEDINGS, published by the British Organizing Committee (1957) at 221, recognizing that "mental disease and abnormal personality traits play a much greater part in recidivism, and especially in grave and persistent recidivism, than in casual criminals."

... disease,"²² conventional reactions to recurrence of crime, such as automatic aggravation, revocation of probation and incidental interruption of treatment, appear unreasonable. While the grave problem of recidivism cannot be regarded as resolved, a foundation has been laid for careful re-examination of this legal category.

(3) *Personal Conditions of Responsibility: "Imputation"*²³

In addition to the objective elements of crime, responsibility in the sense of amenability to sanctions requires the presence of certain subjective psychological factors: states of mind, as appearing in definitions of crimes, and a general mental aptitude of the offender. The former are known as "intent" and "negligence," the latter is called "mental capacity." The new image of man which psychoanalysis has introduced into contemporary culture sheds new light on both factors.

Formerly, man's personality was compartmentalized into various distinct and separate sections—reason, will, emotions—and each of his acts constituted an independent event solely connected with a particular mental episode specifically bearing upon it. Psychoanalysis has shown that this picture of man's personality and of his behavior is fallacious. In its light, man's reason, will and emotions are inter-connected. Specific conscious expressions of any of these elements are never the sole determinants of his conduct. Rather, there is accumulated in man's Unconscious the total history of his life experience dating back to his infancy. The contents of the Unconscious penetrate his conscious life expressions; conversely, his Unconscious is influenced by his conscious experiences. The conscious present and the unconscious life history of man are combined in his personality, which constitutes an indivisible dynamic unit. Each of man's acts emanates from his unitary total personality rather than from a single autonomous state of his mind.

In the following I shall attempt to show how this new interpretation of mental life affects the legal doctrines of the "psychological factors of crime" and of "mental capacity."

²² Glover, *supra*, note 21, at 122.

²³ "Imputation" is ascription of responsibility for an event to an individual. This term, as used in the criminal law doctrine in civil law countries, is normally predicated upon the objective occurrence of the event, causation by the individual, and a certain mental attitude of the individual (who must be "imputable," that is mentally capable to be a fit object of imputation) toward the act or its consequences.

PSYCHOLOGICAL FACTORS OF CRIME

"Intent"

The law proceeds on the assumption that any given "intentional" act is ascribable to a particular "intent," which psychologically appears as an isolated event or at least as an event separable from other psychological phenomena. It thus singles out from the dynamic continuity of a human life one act and a particular intent directed toward it or toward its consequences. Inquiry into the total personality development which culminated in the particular act in issue, indeed even into the specific motive which produced the intent to carry out the act, is barred.²⁴ Our law further assumes that if the intent is not a spontaneous growth but instead follows a certain pattern of continuity, then it is ipso facto more reprehensible, "premeditation" invariably adding to the wickedness of intent.

The modern psychological conception of each human act as emanation of man's total personality—which is a dynamic, historically developed unit—makes the "isolated intent-act" position appear highly unrealistic. Nor does "premeditation" as conceived by law in itself present a distinctive psychological category; often it is not discernible from intent. Psychological differences rather appear in the motives of action. Hence, there is noticeable an increasing demand for recognition of the significance of "motive" in law. But "motive," as known in psychology and psychiatry, has a broader connotation than is attributed to this term in jurisprudence. In the latter discipline, as in everyday life, "motive" consists of the conscious reasons—or "rationalizations"—which are believed to produce the intent to commit the act. In modern psychiatry, on the other hand, motive is at least partly unconscious and is not a detached phenomenon but rather part of a continuous process of evolution.²⁵ It is doubtful that a proper assessment of such "profound" motive by psychoanalytic methods is feasible within the framework of legal procedures for the establishment of "responsibility."²⁶ In any event, the legality principle, which is a most important safeguard of liberty, bars assigning to "motive" in its full psychological sense the place it

²⁴ Motive has only evidentiary value, except where it is made a part of the definition of a crime.

²⁵ KARL A. MENNINGER, *THE HUMAN MIND*, *op. cit. supra*, note 9, at 446.

²⁶ Theoretically, profound motives may be considered today within the procedures of sentencing and execution. But it is doubtful that these procedures can be developed in such manner as to permit the technique of a significant profound analysis to function within their framework.

deserves on scientific grounds. Crime, that is, both its external and its psychological elements, must be definitely described in abstract terms in advance of its commission, lest a defendant be placed at the mercy of the arbitrariness of his judges.²⁷ ProFOUND, unique, untypifiable motives do not lend themselves to be made part of abstract definitions of crime. This means that such motives may be considered at the trial stage only within the context of "mental capacity."²⁸ Conscious "motives" have gained ground in substantive definitions of crime, particularly in the law of homicide, as well as in the general area of mitigation grounds, in civil law countries, "premeditation" receding in importance or being entirely eliminated.²⁹

"Negligence"

The conventional legal concept of "negligence" presents a most interesting psychological phenomenon. In it, conscious and unconscious factors are not differentiated for legal purposes. That which "ought to be known" is deemed equivalent to that which "is known." Advertent and inadvertent negligence are treated alike. It appears as though the law anticipated the concept of "unconscious knowledge." Indeed, inadvertent as well as advertent negligence have been traditionally classified as "states of mind," which is justifiable only in the light of psychoanalytic doctrine.³⁰ Significantly, the need for a clear differentiation of advertent and inadvertent negligence appears to be increasingly felt precisely as psychoanalytic knowledge is brought to the attention of lawyers.³¹

The question has been posed whether it is just to punish a man for conduct the risk of which has

²⁷ The legality principle is an essential of the "rule of law," guaranteeing the security and peace of mind of citizens. Its importance must not be underrated precisely in the light of psychoanalytic knowledge.

²⁸ The dubious aspects of the differential treatment of the trial and sentencing stages in our law and the questionable features of a personality oriented criminal law will be discussed in a separate paper.

²⁹ On this see Silving, *Eulhasia: A Study in Comparative Criminal Law*, 103 U. PA. L. REV. 350, 360-368 (1954).

³⁰ Some writers deny that negligence is a "state of mind." On this see Edgerton, *Negligence, Inadvertence, and Indifference*, 39 HARV. L. REV. 849, 852 (1926).

³¹ The concept of "negligence" presents special difficulties within the scope of Welzel's celebrated "teleological action doctrine." According to this doctrine, the fault of the negligent actor lies precisely in his failure (omission) to "direct his conduct teleologically" as required by law. WELZEL, *DAS DEUTSCHE STRAFRECHT* 32, 110 (6th ed. 1958). While Welzel apparently has not been influenced by psychoanalytic thought, his doctrine of the essential unity of psychological and external elements of crime meets in part certain psychoanalytic findings.

never entered his conscious mind. Alexander and Staub suggested that since there is communication between the Conscious and the Unconscious, a threat of punishment for inadvertent negligence may, through the medium of man's Conscious, enter his Unconscious and deter dangerous acts by bringing the danger to his unconscious knowledge.³² This utilitarian consideration does not dispose of the moral issue presented by punishment of conduct not consciously "known" to be dangerous.

Differentiation in law of negligent conduct depending on presence or absence of consciousness of risk is essential. Only when committed in awareness of risk can an act be blameworthy and hence deserve punishment. However, the law cannot disregard the danger inherent in conduct expressing an unconscious tendency to produce harm. The proper solution seems to lie in a differentiation of the sanctions to be imposed into those expressing censure and those aimed at correction. This solution may be fitted into a scheme for isolation and differentiation of sanctions first devised by Carl Stoos³³ and incorporated in the 1893 Project of a Swiss Penal Code. The scheme, known under the technical name "dual-track system" (*Zweispurigkeit*), has since been adopted by numerous civil law countries.³⁴ It realizes a special type of "relational responsibility."³⁵ Punishment is imposed upon those "guilty" of censurable conduct, whereas "security measures" are applied for preventive

³² ALEXANDER & STAUB, *op. cit. supra*, note 7, at 79, 129-131.

³³ See *Exposé des Motifs de l'Avant Projet de 1893* (Basel-Geneva 1893). See also STOOS, *DER KAMPF GEGEN DAS VERBRECHEN* (1894); *Die sichernden Massnahmen im Entwurf zu einem Schweizerischen Strafgesetzbuch*, 17 SCHWEIZERISCHE ZEITSCHRIFT FÜR STRAFRECHT 380 (1904). For further citations see JIMÉNEZ DE ASUA, *Las Penas y las medidas de seguridad*, in 2 EL CRIMINALISTA, (2d series) 175, note 4 at 178 (1958).

³⁴ Swiss Federal Penal Code, 1937; Italian Penal Code, 1930; German Penal Code, as amended in 1933, present text of Sept. 1, 1953. For further examples see SCHÖNKE, *STRAFGESETZBUCH, KOMMENTAR* 127-128 (7th rev. ed. Schröder 1954). The "European penal reform movement" which promoted the "dual-track system" first focused on the fight against recidivism and habitual criminality. As indicated above, this area of law requires careful reexamination. The dual-track system, however, generally represents the idea that punishment is a proper sanction for those "responsible," whereas measures are appropriate for those not "responsible" but dangerous to themselves or others, e.g., those acquitted on the ground of insanity and alcoholics who have committed crime. For citation of international congresses which discussed the subject see SCHÖNKE, *supra*, 127-128; also JIMÉNEZ DE ASUA, *op. cit. supra*, note 33.

³⁵ See RYU, *op. cit. supra*, note 2, also discussing the "dual-track system."

and protective purposes to those whose conduct, though not censurable, is dangerous.³⁶ I believe that such a scheme may be used to advantage to stress the significant difference that exists between advertent and inadvertent "criminal" conduct. Only advertent negligence should be punished. Those who breach the law inadvertently should be subject to measures of education and cure not involving moral censure but directed and limited to furthering advertence of danger.³⁷ It is important to add that "measures" in a democratic country can be imposed only where the harm resulting from inadvertence is serious; moreover, such "measures" must be administered by judges pursuant to requirements of the "rule of law."³⁸

From this evaluation of inadvertent negligence follows a need for reassessment of the legal treatment of "crimes aggravated by the result." These are crimes in which the consequences exceed in gravity those intended by the offender. In order to prevent punishing the offender for consequences not attributable to his "guilt," Germany amended her Penal Code so as not to hold the actor responsible for unintended consequences unless he brought them about "at least negligently."³⁹ Here, as generally in the law of negligence, no distinction is drawn between advertent and inadvertent negligence. The policy implicit in the above stated position indicates that the German rule should be modified to make the actor punitively responsible only for those consequences which he brought about at least by advertent negligence.

³⁶ The draftsmen of the Project of a German Penal Code believe that a pure law of "guilt" can be maintained only where there is a separate system of "measures." See ENTWURF DES ALLGEMEINEN TEILS EINES STRAFGESETZBUCHS, *op. cit. supra*, note 16, at 84.

³⁷ The measures suggested here for inadvertent negligence resulting in harm are psychoanalytically oriented education and, if consistent with the actor's freedom to accept or reject treatment, also treatment. Methods of inducing acceptance of treatment short of actual punitive coercion are, *e.g.*, withdrawal of a license of an inadvertently careless driver. On desirability of corrective treatment rather than punishment in cases of inadvertent negligence see HALL, *PRINCIPLES OF CRIMINAL LAW* 245-46 (1947).

³⁸ Application of special legality rules to measures is an important feature of the recognition of their distinctiveness in civil law countries. Contrast with this approach our American method of non-differential treatment of punishment and measures, which has resulted in indiscriminate administrative application of "measures," presenting a serious danger to individual liberty.

³⁹ § 56, German Penal Code, added Aug. 25, 1953 (text of Sept. 1, 1953, B. G. Bl. pt. I, at 1083). For translation of the provision see Silving, *Euthanasia*, *supra*, note 29, at 361.

The law draws a distinction between "negligence" and "accident." Some penal codes of civil law countries, indeed, expressly exclude responsibility for "accident"—"*caso fortuito*,"⁴⁰ "*mero accidente*."⁴¹ A Spanish commentator significantly notices that, the incidents of responsibility being enumerated in the penal code, such express exemption of situations in no way comprised in the enumeration would seem superfluous, as is express exemption today of responsibility of animals or for death by lightning.⁴² But the fact is that the "fortuitous case" or "mere accident" is felt not to be clearly distinguishable from "negligence," and the history of the distinction, as the same commentator remarks, is marked by an "absolute confusionism." Psychoanalysis may help to reduce the significance of the distinction to functional limits. In its light, a human act which causes harm is seldom "accidental"; however consciously "unintended" by the actor, the harm may have been "intended" by him unconsciously. Thus, "accident" shades into inadvertent negligence. Even death by lightning may be unconsciously intended.⁴³ Psychoanalysts have hence suggested that the "accidental actor" be held responsible.⁴⁴ No psychoanalytically oriented lawyer can object to some form of legal reaction to "accidental" conduct where the harm caused is a very serious one. An "accidental" killer *prima facie* presents a clear and present danger to his fellow men, and it is certainly not more excessive to demand that he cooperate in an attempt at avoiding future fatal accidents than it is to require a person to submit to vaccination or to a quarantine. But, as in the case of the inadvertently negligent actor, "responsibility" should imply no moral censure but consist of a "measure of security and cure" and be confined to such intervention as is necessary to accomplish the curative and safety purpose. Differentiation in inadvertent conduct between "negligent" and "accidental" acts is, nevertheless, justified. Traditionally, the former are marked by a high degree of risk and foreseeability of harm.⁴⁵

⁴⁰ Art. 45, Italian Penal Code.

⁴¹ Art. 8(8°), Spanish Penal Code.

⁴² I QUINTANO RIPOLLES, *COMMENTARIOS AL CODIGO PENAL* 123 (1946).

⁴³ This example, used by BRENNER, *AN ELEMENTARY TEXTBOOK OF PSYCHOANALYSIS* 150-151 (1955), is singularly responsive to Ripolles' query, *supra*, note 42.

⁴⁴ ALEXANDER & STAUB, *op. cit. supra*, note 7, at 130.

⁴⁵ The standard of foreseeability and care in criminal negligence cases is fairer to the defendant in, *e.g.*, the German law than it is in our law. That standard is both subjective and objective, the individual not

In the case of an act resulting in serious harm, the difference between inadvertent negligence and accident will be given effect within the context of the choice of the measure to be applied. Also to be considered is further limitation of the scope of applicability of measures where the act is "accidental" rather than inadvertently negligent, e.g., measures might be used in "accident" cases only where the "accident" results in death or serious bodily harm.

MENTAL CAPACITY: "IMPUTABILITY"

The problem of defining "mental capacity" has been the object of a vigorous controversy in which lawyers, psychiatrists and sociologists have recently participated. The debate has advanced on two levels. The issue on one level has been the proper test for exempting an accused from responsibility on the ground of mental incapacity. The issue on the second level has been a proposal advanced by a group of psychiatrists that everyone, whether or not mentally sane, be held "responsible" for the consequences of his acts, "responsibility" meaning amenability to psychiatric treatment or indefinite confinement; this would render formulation of any test unnecessary.

"The Mental Capacity Test"

The debate over the first mentioned issue has focused on the so-called *McNaghten* rules⁴⁶ which hold an accused not responsible if, due to mental disease, he did not know "the nature and quality of his act" or that it was "wrong." Psychiatrists have challenged this test on the ground that it proceeds from a now outmoded view of the human mind as functioning in distinct parts or sections, reasoning being separated from volition and feeling. This "faculty-psychology" approach—they say—is incompatible with the now prevailing concept of man's unitary personality.

Under the influence of such psychiatric criticism, on both sides of the Atlantic new rules were formulated. In Spain a Law Revision Commission under the chairmanship of the author of *PSICOANÁLISIS CRIMINAL*,⁴⁷ Luis Jiménez de Asúa, accepted a

formula suggested by a psychiatrist member of the commission, Dr. José Sanchis Banús.⁴⁸ The Spanish test exempts from responsibility simply "the alienated" (*enajenado*), adding "a person who is in a state of temporary mental disturbance" (*el que se halla en situación de trastorno mental transitorio*).⁴⁹ The ground advanced for choice of the one word test, "*enajenado*," derived from the common language rather than from scientific vocabulary,⁵⁰ was the commission's desire to avoid involvement in problems of controversial and changing nosology.⁵¹

In the United States, Judge Bazelon formulated the celebrated *Durham* rule,⁵² which defines mental incapacity exempting from criminal responsibility simply as "mental disease or defect," adding as a qualifying factor the so-called "product-test": the mental disease or defect affords an exemption only if the act was "the product" of the disease or defect. It may be advisable to dispose first of the "product" aspect of the *Durham* test, for this aspect could be easily eliminated, as suggested by the Spanish rule. The "product" test, undoubtedly derived from "the offspring or product" test of the *New Hampshire* rule,⁵³ formulated at a time when "faculty psychology" was still dominant,⁵⁴ is based on the notion of that psychology that a human act is the product not of one's entire personality but of particular personality portions separable from others. As correctly pointed out by Judge Biggs, this test "will only lead to the fallacies of monomania if the courts permit it."⁵⁵

Criticism of both the Spanish and the *Durham* tests must rather focus on the main concepts of these tests. Before commenting upon them, it might be useful to state what precisely is the issue to be resolved by a test. The law is not concerned with the medical definition of "insanity"

⁴⁸ See JIMÉNEZ DE ASÚA, *LA LEY Y EL DELITO*, PRINCIPIOS DE DERECHO PENAL 371, 378 (2d ed. 1954).

⁴⁹ Art. 8, subdiv. 1, present Spanish Penal Code (1944).

⁵⁰ The scientific term is rather "*alienado*."

⁵¹ JIMÉNEZ DE ASÚA, *LA LEY Y EL DELITO*, *op. cit. supra*, note 48, at 371.

⁵² *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954).

⁵³ *State v. Jones*, 50 N. H. 369 (1871). The basic distinction between *Durham* and the New Hampshire rules lies in the fact that the framers of the latter believed that "mental disease" eliminates "intent," whereas this belief is no longer valid today. Of course, absence of intent specifies the meaning of "mental disease" and thus affords a functional limitation of the test as well as a rationale for its adoption.

⁵⁴ See OVERHOLSER, *THE PSYCHIATRIST AND THE LAW* 22 (1953).

⁵⁵ BIGGS, *THE GUILTY MIND* 155 (1955).

being held responsible beyond a measure of care of which he was personally capable, as well as in excess of such measure if his personal capacity exceeds that of the average citizen. See MAURACH, *DEUTSCHES STRAFRECHT, ALLGEMEINER TEIL* 491-492 (1954).

⁴⁶ *McNaghten's Case*, 10 Cl. & F. 200, 8 E.R. 718 [1843].

⁴⁷ JIMÉNEZ DE ASÚA, *PSICOANÁLISIS CRIMINAL* (1940).

or of "mental disease."⁵⁶ It is concerned with the moral or social convenience issue⁵⁷ of deciding what mental qualities or states of mind "should," as a matter of sound policy, exculpate an offender. The *McNaghten* rules were formulated on the Biblical assumption—perhaps unconscious at the time of *McNaghten's Case*—that error of fact or of law exculpates because it removes an essential element of crime, disobedience to law.⁵⁸ The case expresses a definite policy, which, of course, is too narrow to meet present-day requirements. But a test now as then should provide an operational tool for a chosen policy. Neither the Spanish nor the *Durham* test satisfies this requirement.

To say that a "mentally ill" person is not responsible, and then, only, pose the question wherein mental disease consists and what qualities it comprises, begs the issue.⁵⁹ Such statement is not a substantive policy disposition but a delegation of power.⁶⁰ The basic objections to such dele-

gation of power are political—possibly also constitutional—ones. It affords no assurance of equal treatment and leaves abundant room for arbitrariness of those on whom determination of the presence of mental disease in concrete cases depends. The substantive issue not being decided, neither can an adequate answer be expected regarding the rationale of the exemption.

If it is deemed preferable not to leave the policy decision on the scope of exemption from responsibility ultimately to individual psychiatric experts, a legal definition of mental incapacity must be formulated in such a manner as to indicate that scope. If the concept of "mental disease" is to play a significant role in the exemption clause, it is important to note that there is disagreement among the different psychiatric schools of thought on the meaning and scope of this concept.⁶¹ This implies that the law must choose between the divergent psychiatric approaches and follow a definite psychiatric school of thought. Should the chosen doctrine be psychoanalytic, the definition would have to be shaped in the light of the fundamental psychoanalytic tenet of the relativity of mental health and mental disease. According to psychoanalytic doctrine, there are present in every man's mind, the healthy as well as the ill, contradictory forces struggling for supremacy, conflicts between the ego, the id and the superego. Mental health consists in a balance of these forces, a successful resolution of these conflicts, and mental disease consists in a disturbance of such balance, failure to resolve a conflict. The disease area is thus broad, and the borderline between illness and health is tenuous.⁶²

Adoption by law of the psychoanalytic definition of mental disease as a test of exemption would imply concession of a rather comprehensive scope

⁵⁶ Glover, *Isolating a Group of Delinquent Disorders*, 1 BRITISH JOURNAL OF DELINQUENCY 109 (1950).

⁵⁷ Whether morality or social convenience is assumed as a policy standard depends on the basic approach to ethics adopted by a given legal system.

⁵⁸ See Ryu & Silving, *Error Juris: A Comparative Study*, 24 U. CHI. L. REV. 421, 430 (1957). That it was the policy of *McNaghten* to exempt from responsibility those engaged in legal and factual error and not those simply mentally ill becomes clear when the case is studied in historical perspective. That mental disease itself exculpates is the result of a long evolution of law. Historically, the mentally ill were not exempt from punishment. Perhaps the main reason for the law's failure to recognize mental disease as a ground of immunity is the fact that the Bible, which has influenced our criminal law throughout the formative period of its history, far from looking upon such disease as an incapacity, indeed regards it as a source of visionary, prophetic inspiration. Balaam was a "closed-eyed man"; his eyes opened and he "perceived the sight of the Almighty" only after "he fell down." Numbers 24, 3, 4. He was obviously an epileptic. Compare also Hosea 9, 7. Freud's showing of the correspondence of opposites (*Totem and Taboo*, in THE BASIC WRITINGS OF SIGMUND FREUD (Brill transl. & ed. 1938) 807, at 858-9), affords a basis for assuming that it is this Biblical conception of insanity as a Divine gift which we find reflected in the medieval notion of mental disease as possession by demons. But error of fact and of law was deemed in the Bible to excuse non-observance of law, and it is this exemption that was preserved in the limited form of error based on mental disease constituting a defense.

⁵⁹ "Disease" is not a medically or psychiatrically well defined concept. As pointed out by East, *Legal and Medical Advances in Criminology*, in THE ROOTS OF CRIME, *op. cit. supra*, note 15, 1, at 5, "Many books on general medicine, psychiatry and psychology omit 'disease' from their indexes."

⁶⁰ This is shown by *In re Rosenfield*, 157 Fed. Supp. 18 (D.D.C. 1957), reversed and remanded *sub nom.* *Rosenfield v. Overholser*, 262 F.2d 34 (D.C. Cir. 1958).

⁶¹ There is no controversy today regarding desirability of exempting from responsibility all persons suffering from severe mental diseases, the so-called "psychoses." The *McNaghten* rules are inadequate to supply a basis for affording an exemption even to all such persons. The differentiation between "significant knowledge" of right and wrong and "insignificant knowledge" is not a precise standard of exemption. There is no indication in the light of what science or discipline "significance" of knowledge is to be judged. In the case of a psychotic offender, it would seem unnecessary to inquire into the question of whether the act was a product of the disease, even if such question were scientifically answerable.

⁶² On the nature of psychiatric diagnoses, see OVERHOLSER, *op. cit. supra*, note 54, at 25; Brancale, *Diagnostic Techniques in Aid of Sentencing*, 23 LAW AND CONTEMP. PROB. 442, 445 (1958); MACDONALD, *PSYCHIATRY AND THE CRIMINAL LAW* 65 (1958).

of exemption.⁶³ But "mental disease," without further qualification, is not a necessary test of exemption. Many psychoanalysts might, on psychiatric grounds, not favor exemption from responsibility of all those whom they include in the category of the "mentally diseased." Assuming that the psychoanalytic interpretation of mental life is accepted by law as scientifically sound, psychoanalysts should be consulted on the problem of rational selection of the groups to be exempted. In fact, suggestions for narrowing the scope of the psychoanalytic "mental disease" definition by adding a qualifying clause for use in a legal incapacity test are already available. The Group for Advancement of Psychiatry has suggested adoption of the civil committability test.⁶⁴ This suggestion, however, merely shifts the issue to another area in which there is considerable uncertainty. A test advanced by Bromberg and Cleckley offers a distinct improvement. It poses the question of mental incapacity in the following terms: Was the function of the accused's "ego so impaired that he could not, because of genuine disability, act within the limits of social demands and rules?"⁶⁵ Yet, the phrases, "could not" and "genuine disability," would seem to be rather vague. The former might also lend itself to being nullified by deterministically oriented psychiatrists. Perhaps, since the very essence of the psychoanalytic view of mental illness lies in its relativity, the test should also be couched in comparative terms: Was the accused's ego so impaired that he was very considerably less than the majority of the people within the community⁶⁶ capable of conforming to social demands and rules?⁶⁷ Both tests would probably satisfy those concerned with the moral issue of responsibility. Presumably, anyone asked for a

common-sense reason for exempting a mentally ill person from responsibility would answer: "Because a mentally ill person cannot help acting as he does, in a manner comparable to that in which you and I can help acting as we do." The moral ground of the exemption is not the disease but the ensuing incapacity,⁶⁸ and the disease merely functions as a device of typifying and proving incapacity.

"Responsibility as Amenability to Treatment"

As pointed out above, our contemporary moral standards suggest a policy of not holding a man punitively responsible for an act he could not help committing. But a number of psychoanalysts believe that the psychoanalytic discovery of the operations of the Unconscious has proved the existence of a complete "psychic determinism," in the light of which all human thoughts, decisions and actions are referable to causes, so that man never possesses freedom of either choice or action. However, a man who cannot thus help committing crime presents a danger to his fellow men. Since society must be protected, it has been proposed by several psychoanalysts that all persons who commit crime, whether mentally ill or healthy, whether intentionally or unintentionally, consciously or unconsciously, be held "responsible," responsibility however meaning not punishment but amenability to treatment in accordance with personality differences to be established by psychiatrists.⁶⁹ This raises the second issue which, of course, is by no means new in recent history, having been thoroughly debated when contentions of a similar nature were advanced by the positivist school of criminal law.

The argument thus advanced proceeds from a misconceived notion of causation and the policy advocated is politically dangerous. To be sure, psychoanalysis has closed many gaps of our previous knowledge of causation. It has supplied causal explanations for mental phenomena which were hitherto unexplainable, by tracing them back to unconscious sources. Although its causal ex-

⁶³ The problem of qualification as an expert would present a major issue.

⁶⁴ *Criminal Responsibility and Psychiatric Expert Testimony*, Report No. 26 (May 1954) of the Committee on Psychiatry and Law of the Group for the Advancement of Psychiatry.

⁶⁵ Bromberg and Cleckley, *The Medico-Legal Dilemma, A Suggested Solution*, 42 J. CRIM. L., C. & P.S. 729, 744 (1952). The authors also put the question differently: whether the accused's "total personality (i.e., the ego), was impaired by mental disease to a degree rendering him unable to adjust to society's rules."

⁶⁶ It would be necessary, of course, to include in the penal code a definition of the term "community."

⁶⁷ The danger of exempting too large a group of persons from responsibility might be to some extent obviated if the same test were used for releasing those acquitted on the ground of insanity from mental hospitals.

⁶⁸ It may be interesting to note that Jiménez de Asúa, under whose chairmanship the Spanish test was formulated, does not himself approve of this test. He suggests the following formula: The following persons are not responsible (not imputable): "the alienated and the person in a state of temporary mental disturbance, when he cannot discern the illegal nature of his acts or inhibit his criminal impulses." See LA LEY Y EL DELITO, *op. cit. supra*, note 48, at 377.

⁶⁹ See e.g., KARL MENNINGER, *THE HUMAN MIND* 448-49 (3d ed. 1945); ZILBOORG, *op. cit. supra*, note 9.

planations have been chiefly concerned with phenomena hitherto ascribed to "accident" (parapraxes and dreams), it has also shown that our conscious decisions and actions may be referred to unconscious motivations. From this the inference has been drawn that what we subjectively experience as "choice" of courses of action is in reality predetermined by such motivations. Thus, though belief in free will may serve as a useful tool⁷⁰ for educational or therapeutic purposes, it is in fact, in the opinion of many psychoanalysts, but a figment of man's imagination.

This argument is not convincing. The histories of theology and philosophy are replete with allegations of universal causation,⁷¹ and the problem of reconciling determinism of human conduct with free will is at least as old as the doctrine of the origins of sin and of Satan's godly descent. It was certainly raised when God abstained from destroying man on the ground that "the structure of man's heart is evil since his childhood."⁷² It is neither possible nor necessary in the present context to trace the history of the notion of causation as it developed from the time of this Biblical pronouncement until our age of science and psychology. With the emergence of new sciences of man, the "sister sciences" of the law, the problem of causation must be viewed in the first place methodologically. It is not permissible to transfer notions of causation from mathematical sciences to the so-called "sciences of man," for the methods of verification in the latter are vastly different from and less accurate than those available in the former.⁷³ One might give further thought to the

precise import of the "proof" allegedly adduced by psychoanalysis of the inexistence of free will. In this discipline, proof consists mainly of psychological experiences, e.g., the experience of a cure or a recollection, and such experiences are not qualitatively different from the allegedly sham experience of free choice.⁷⁴ Many thoughtful analysts treat "psychic determinism" as a hypothesis.⁷⁵ That such hypothesis is a necessary operational tool of psychological research and psychiatric treatment cannot be doubted. But to draw from it any inferences applicable also in law and ethics is entirely unwarranted. In any event, assuming the deterministic hypothesis to be applicable outside of the spheres of psychology and psychiatry, it could afford no basis for any ethical proposition—even a utilitarian one—that might in turn serve as a hypothesis for society's "right" to intervene in man's life, either punitively or in the form of treatment. Determinism can at best support the ethical nihilism expressed in the judicial statement to a prisoner: "You could not help killing and I cannot help sentencing you to be hanged."⁷⁶

However, exclusion of the issue of determinism does not dispose of the problem of the desirability of accepting the psychiatrists' proposal for replacing retributive imprisonment by reformatory treatment and in the case of the unreformable by preventive indefinite confinement. This proposal also includes the suggestion that, after verdict, judges be replaced by psychiatrists. Attention is

tion. See PLANCK, *VOM WESEN DER WILLENSFREIHEIT* (1939). See also KAUSALGESETZ UND WILLENSFREIHEIT 45-47 (1923).

⁷⁴ I do not mean to imply that such experience is proof of the existence of free will in a Jamesian sense.

⁷⁵ See, e.g., BRENNER, *op. cit. supra*, note 43, 11-24.

⁷⁶ Ferri, a leading determinist, thus found himself in a peculiar dilemma which he resolved by performing a "Kantian" switch from the realm of causation to that of moral law. He said: "A man who violates the criminal law may be examined as a delinquent (*uomo delinquente*) as regards his anti-social conduct (criminal psychology), as an accused as regards his conduct in the course of procedure (judicial psychology), and as a convict as regards his conduct in prison (prison psychology). But as regards the legal crime, and as his author, man must be studied as a subject of rights (individual or collective)." FERRI, *PRINCIPI DI DIRITTO CRIMINALE* 396-397 (1928). Life in society, he concluded, imposes an obligation of a minimum social discipline. *Supra*, at 398. He failed to explain what an "obligation" means when a man cannot possibly perform it. The idea of "social necessity" to which he eventually resorted is itself a legal concept—a reflection of the "state of necessity" known in penal law.

⁷⁰ Knight, *Determinism, Freedom and Psychotherapy*, 9 *PSYCHIATRY* 251-262, at 251 (1946).

⁷¹ It may be pertinent to note that KEELSEN, *SOCIETY AND NATURE* (1943), has shown the idea of "causation" to have originated in the legal notion of retribution and, throughout its history in science and philosophy, to have developed in close analogy to jurisprudential changes.

⁷² Genesis 8, 21. The passage in the King James version reads: "the imagination of man's heart is evil from his youth." But "yezer" (translated as "imagination") cannot be adequately translated. It is used as "yezer hatov" and "yezer harah," a "good" and an "evil" "yezer." It is "creation," "creature," "product," "structure," even temptation or urge. "Neurim" (translated as "youth") is man's "childhood" as well as his youth.

⁷³ It may be interesting to note that Max Planck, who showed an extremely keen interest in the problem of "free will," found evidence of its existence in the rather pessimistic observation that, while it is possible to predict objectively the conduct of other men, it is not possible to predict one's own conduct without at the same time influencing such conduct by self-observa-

invited to the fact that the proposal does not completely exclude the law and its processes, for it requires the subjects of treatment or confinement to be selected on the basis of conviction of a crime, although as soon as such conviction is pronounced it is to be completely disregarded, neither treatment nor period of detention being affected by the gravity of the crime. That crime has at best symptomatic value, but other symptoms may be equally or even more pertinent to the ultimate disposition. It would seem that the ritual of conviction must serve some purpose. This purpose is hardly preservation of the constitutional requirement of jury trial alone. It is, rather, avoidance of drawing the ultimate logical inference from the rationale of the proposal, that is, discarding the requisite of crime and dividing the population into classes in accordance with psychiatric standards of disposition. Those who admit such solution to be unacceptable in a free society ought to realize that it is only one step removed from indefinite confinement when the precipitating crime is a minor one. The scope of this essay does not permit elaborate discussion of all constitutional grounds of objection against such scheme.⁷⁷

DEFINING CRIMINAL CONDUCT

Regrettably, no comprehensive reassessment of the present system of substantive criminal law in the light of psychoanalytic insight has as yet been undertaken. Many psychoanalytic findings can be fruitfully used in an attempt at a critical evaluation of conventional crime types.

Psychoanalysis has substantiated the Biblical finding that no man is immune against evil thoughts. It has thus lent added support to the principle that intent alone is not punishable. Moreover, psychoanalysis has described in dramatic fashion the struggle of contradictory forces within man's mind for supremacy over his actions. It has shown how forces of the Unconscious opposed to man's conscious intent to commit crime may express themselves in the external

world of action, frustrating its effectiveness. Thus, as the consequences of man's acts are seldom wholly unrelated to his mental processes, neither is failure of intended consequences in most cases entirely "accidental." Frustration of an "intended" act appears to shed doubt on the integrity of the intent.⁷⁸ This finding renders the doctrine of attempt, which in its present form clearly aims at intent without even potential social harm, highly dubious.⁷⁹ Attempt should accordingly be punishable only in those instances in which frustration of the result was clearly due to circumstances over which the actor had neither conscious nor unconscious control.⁸⁰ Unless intervention of a "true accident" is established, the actor should at best incur a measure of education or a fine. By the same token, the other so-called "inchoate crimes," solicitation and conspiracy, which share with attempt the feature that the act falls short of that

⁷⁸ On this see Ryu, *Causation in Criminal Law*, 106 U. PA. L. REV. 773, 797-799 (1958).

⁷⁹ On subjectivism in the law of attempt see Ryu, *Problems of Criminal Attempts*, 32 N. Y. U. L. REV. 1170, 1187-1188 (1957).

Commenting upon Besson's Case, decided by the French Cour de Cassation (Ch. crim.), Aug. 8, 1947 [1948] Dalloz Jurisprudence 293, which held an information of homicide sufficient to support a conviction for attempted homicide, Donnedieu de Vabres, in a note to the case in Dalloz Jurisprudence 293-296 (1948), said (at 295): "The attempt of any crime is but a particular aspect of that crime; indeed, it is that crime itself, which is commenced, planned, but whose completion is prevented by an accidental circumstance which hindered the will of the offender from pursuing [his intent] until the end of the consequences of the action." This suggests that in attempt, it is mostly "the intent" that is obstructed. In some countries attempt is punishable as severely as the completed crime (e. g., Art. 3, French Penal Code), in others it may be punished milder than the consummated crime (Section 44, German Penal Code). GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* 109 (1953), states that "the objects of incapacitation and reform would admit of no distinction [between attempt and the consummated crime] being made, for the danger is the same where the criminal's failure to complete is due to chance." However, psychoanalysis shows that in most cases that which is traditionally believed to be "chance" is an unconsciously caused failure of intent, so that the actor who failed to consummate the crime is at least less dangerous than the successful actor.

⁸⁰ To use a phrase of BRENNER, *op. cit. supra*, note 43, at 151, "Insofar as a foreseeable mishap [in the context of the text, a happy event—the avoidance of a criminal result] is caused by a 'human imperfection' in the performance of some action or other, we assume that it was unconsciously intended by the performer of that action." In the case of the frustrated criminal intent, superego forces operate unconsciously to impede success.

⁷⁷ Notice that the recommendation of the American Psychiatric Association, 1927, for "permanent legal detention of the incurably inadequate, incompetent, and anti-social offenders irrespective of the particular offense committed" (see Menninger, *Medico-legal Proposals of the American Psychiatric Association*, 19 J. CRIM. L. & CRIMINOLOGY 367, 376 (1928)) is not accompanied by specification of the meaning of these terms. Hakeem, *op. cit. supra*, note 11, at 650, notes: "Not one of the terms used in this grim scheme was defined."

contemplated by the accused, appear questionable.⁸¹

The ground for punishing conspiracy apart from and often in addition to the punishment of the act which is its object lies in the increased social danger when several persons participate in a criminal scheme. This feature is present in all instances of "participation in crime," instigation, aiding and abetting. Yet, in the latter instances, the punitive scheme of the criminal law takes account of the unity of purpose of the several participants in a limitative rather than extensive manner. It makes criminality—sometimes prosecution, punishment and conviction—of the accomplice dependent on criminality—prosecution, punishment and conviction—of the principal. This dependence of the accomplice's criminality on that of the principal has been adequately described in French doctrine as "borrowed criminality."⁸² The notion of "borrowed criminality" has been traced to ancient myths relating transmission of moral taint to inanimate objects as well as to men, a taint which must be washed off by adjudging and destroying the affected thing or by punishing the contaminated person.⁸³ The most moderate expression of the spirit of "borrowed criminality" in modern law is the German rule which, though no longer requiring the crime of the accomplice to be of the same type as that of the principal,⁸⁴ still predicates criminality of the

accomplice upon the presence of criminal intent in the principal's mind.⁸⁵ "Borrowed criminality" today is based on a primitive "sociologic" notion of crime. Crime committed by several persons is apparently viewed as a direct product of the specific relationship between them. The "intent" in such crimes seems to be conceived of as an "inter-personal," "supra-individual" psychological entity. Psychoanalysis rejects this, as well as any other primarily sociologic, interpretation of crime. In its view, crime results from each actor's own psychological history and total personality development rather than from a direct impact of specific environmental social causation. Criminality is thus always ultimately centered in the individual. It follows from this psychoanalytic view of crime that each participant in crime should be responsible for his own intent, regardless of whether anyone else possessed intent, and for the share which he had in bringing about the criminal result.

On the other hand, psychoanalysis suggests the possibility of unconscious participation in crime. Of course, the law cannot intervene as regards the person participating unconsciously; however, it may and increasingly does take account of the phenomenon of unconscious participation within the scope of mitigating circumstances, particularly where the person who unconsciously instigates or aids the actor is the victim of the crime or a person on whom the actor is dependent.⁸⁶

Psychoanalysis may also shed new light on the legal doctrine of consent in those instances in which "consent" eliminates the criminality of an act. A special situation may arise in the relationship between a psychiatrist and his patient. An intervention into the bodily integrity of a patient is an assault unless he consents. Where he is mentally ill and thus legally incapable of giving consent, his relatives usually supply the necessary consent; for example, they consent to application of

⁸¹ As stated by Justice Jackson, concurring in *Krulewitch v. United States*, 336 U. S. 440, 445, at 450 (1949), "The doctrine [of conspiracy] does not commend itself to jurists of civil-law countries, despite universal recognition that an organized society must have legal weapons for combatting organized criminality." The Italian Penal Code (1930), art. 115(1), specifically provides for the impunity of the mere fact of agreement to commit crime. However, under art. 115(2), in the case of an agreement to commit a felony, the judge may apply a security measure. Such measure is supervised liberty. Art. 229, It. Penal Code. On this see BETTIOL, *DIRITTO PENALE* 441 (Third rev. ed. 1955).

⁸² VOUIN ET LEAUTÉ, *DROIT PENAL ET CRIMINOLOGIE* 283-284 (1956).

⁸³ *Ibid.*

⁸⁴ See Decision of the Bundesgerichtshof in Criminal Matters (German Federal Republic) (V. Strafsenat), November 12, 1957, reported in 11 *Neue Juristische Wochenschrift* 69 (1958), holding that an accomplice could be convicted of aiding and abetting fraud (since this was what he intended to do) even though the principals had committed blackmail. Contrast with this approach the French law's literal interpretation of "borrowed criminality," which results in the following paradoxical situation: If A instigates B to kill B's father, A is punishable for parricide, although the victim is not his father; but if A instigates B to kill A's father, who is not also the father of B, neither A

nor B is punishable for parricide, but both are punishable for simple murder. See VOUIN ET LEAUTÉ, *op. cit.*, *supra*, note 82, at 282.

⁸⁵ See Decision of the Bundesgerichtshof in Criminal Matters (III. Strafsenat), July 6, 1956, reported in 10 *Neue Juristische Wochenschrift* 29 (1957).

⁸⁶ Thus, the Swiss Federal Penal Code (1937), Art. 64, enumerates among the mitigating circumstances the actor's having been induced to commit the crime by a person "to whom he owes obedience or on whom he is dependent" and his having been "seriously tempted by the conduct of the injured person."

electro-shocks.⁸⁷ The knowledge we now possess of the hidden aggressions that exist precisely among family members should disqualify relatives from thus deciding upon the fate of a patient.⁸⁸ In cases of mental patients, electro-shocks as well as any other serious interventions should be permissible only upon the authority of a special court order after an adversary hearing in which the patient is represented by a public defender of the rights and interests of the mentally ill.

As regards specific crimes, only particularly instructive examples of the potential spheres of psychoanalytic impact may be noted in this essay.

Perhaps the most effective demonstration of contemporary man's unconscious memory of an original father murder and of the presence of an Oedipus complex in the mind of every man, whether judge or public, is the twentieth century scene of a parricide led to the place of execution barefeet, clad only in a shirt, a black veil covering his face. On reading this description of the law of parricide, one would assume that it refers to the law of the Trobriand Islanders. It may be instructive to learn that it is the law of one of the most civilized, sophisticated and enlightened nations of the world, France.⁸⁹ Psychoanalytic insight justifies elimination of parricide as a distinctive crime.⁹⁰

⁸⁷ Prominent psychiatrists have expressed the view that such treatment may permanently damage the mental functions of the patient. See Guttmacher, *supra*, note 8, at 633. Concern with the possibility of abuse of the device is expressed in *Shock Therapy*, Report No. 1 of the Group for Advancement of Psychiatry, September 15, 1947. See also *Revised Electro-Shock Therapy Report*, Report No. 15, August 1950, showing somewhat less concern; but see par. 9, letter a, at p. 2: "The mode of action of electro-shock therapy . . . is unknown."

⁸⁸ An interesting malpractice case in which a wife's consent to application of shock-therapy to the husband was collaterally in issue is *Lester v. Aetna Cas. & Sur. Co.*, 240 F.2d 676 (5th Cir. 1957).

⁸⁹ Art. 13, French Penal Code.

⁹⁰ In France, parricide is punished capitally (Art. 302, Penal Code), whereas simple murder is punished by life imprisonment with forced labor. The special crime of parricide was abolished in Germany in 1941. Law of Sept. 4, 1941 (R.G.B.I. I S. 549).

Psychoanalysis, which in its formative years had been branded as "all quackery and pornography"⁹¹ because it had dared to discuss sex scientifically and dispassionately, has been since remarkably successful in bringing enlightenment on the subject to the general public. But it has reached only a very limited audience when it has attempted to make the sex offender better understood. Sex offenders are special targets of prejudice, because their crimes are particularly apt to call forth in the minds of judges and the public their own infantile experiences, forbidden wishes and guilt feelings. Even convicted burglars tend to despise their fellow prisoners of the homosexual type.⁹² Psychoanalysis has shown that many sex offenders are not simply wicked but are rather victims of neurotic impulses which they are unable to control.

The impact of the reform movement originated in this area is as yet uncertain. There is, on the one hand, a tendency to eliminate from the list of crimes deviations which are expressed in conduct not socially harmful, to grade other conduct in accordance with the degree of its actual harmfulness, and to treat rather than punish the offender, and, on the other hand, a highly questionable trend toward protection of society often against minor and uncertain danger at the expense of individual liberty and due process.⁹³

As a lawyer inspired by the stimulus afforded to legal thinking by the psychoanalytic movement, I should like to conclude on a note of hope that the law may, within the limits of due process and the needs of protecting men's freedom, equality and dignity, utilize to the fullest extent the teachings of psychoanalytic psychology.

⁹¹ GEORGE BERNARD SHAW, *THE CRIME OF IMPRISONMENT* 47 (Philosophical Library New York 1946) thus expressed the public view of psychoanalysis.

⁹² H. MANNHEIM, *CRIMINAL JUSTICE AND SOCIAL RECONSTRUCTION* 65 (1946).

⁹³ On the problem of sex offenses see particularly B. KARPMAN, *op. cit. supra*, note 13.