Psychoanalysis and Law

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How may one characterize the relation between the disciplines of psychoanalysis and law or, rather, the relation between representative members of the two professions? It will not do to say simply that it is a relation of friendly co-operation or one of hostile suspicion. Perhaps the usual relation may fairly be called one of mutual ambivalence. The analyst, on the one hand, regards the maintenance of a system of law and justice as a necessary condition for personal equilibrium. On the other hand, he regards much of the law as antiquated and outworn and often criticizes it as based on theological and moral ideas which have survived their usefulness. From their side, the men of law sometimes welcome the insights into human motivation which psychoanalysis has contributed. At other times lawyers show hostile defensiveness in the face of the analysts' sweeping criticisms of the law.

Psychoanalysts have sometimes spoken of the law in terms which seem calculated to increase this defensiveness. Thus in a book which we may take as representative of the psychoanalytic tradition, Dr. Franz Alexander begins one chapter with a brisk resolution boldly to "enter the Augean stables of philosophy of law and attempt to make a psychological analysis of the concept of responsibility."

As this quotation suggests, the principal focus of tension between psychoanalysis and law is the general concept of responsibility. Legal tradition asserts, or at least assumes, that most men have some measure of free choice. Psychoanalysis, on the other hand (to quote Alexander again), "considers the human psychic apparatus as a system which is fully, and without a single gap, determined by psychological and biological causative factors." He adds his diagnosis that the concept of free will is an illusion—"an expression of the narcissistic wish, or even the postulate of the moralists that the Super-Ego does or should rule, supreme and unlimited in the psychic apparatus of man..."

Ten years ago an American Bar Association committee warned that careful consideration must be given to the spread of Freudian doctrine.

So far as your committee can discover, the doctrines of psychoanalysis tend toward determinism; free will does not exist but human conduct is or may be determined by long past events in the life of the individual...3

The committee added a vague threat:

Unless there is a reversal in the trend of the development and exploitation of psychoanalysis... the courts will be called on sooner or later to determine whether it is or is not an established science or art... to justify the admission of testimony of psychoanalysts... (It is not recorded that analysts were thrown into a panic by this pronouncement.)

A general treatment of the relation of psychoanalysis and law would have to deal with many points of contact. In this paper, however, I shall consider only certain problems related to the concept of responsibility.

In the 1920's Dr. Alexander worked closely with a Berlin criminal lawyer, Hugo Staub. They wrote a book which was published in this country in 1931 under the title The Criminal, the Judge, and the Public—a Psychological Analysis. This book is still one of the most penetrating interpretations of criminal behavior. In the next few pages I shall attempt a highly condensed summary of this analysis, realizing, of course, that I can hardly expect to avoid inaccuracy.

Criminality is not a congenital defect; it results from defective training; it shows arrested development. We all go through a period of infantile criminality. (The authors invite us to imagine what the world would be like if predominance of power were in the hands of children under ten.) A majority of children learn not to be criminals through the experience of punishment—punishment from the physical world itself and from parents (and others) through the infliction of pain or the apparent withdrawal of love. This experience of the demands of reality leads to repression of part of the basic drives and to the discovery of socially acceptable outlets for the remainder. The result is an unstable equilibrium, "a sort of a contract between the powers which restrict our instinctual expression and the instinctual demands of the individual." Criminal behavior results from the blocking of this process or from the precarious nature of this equilibrium.

Alexander distinguishes four principal categories of criminals. The first consists of psychotics and defectives in whom criminal acts are traceable to organic degeneration or failure of organic development. The second category is that of "neurotic criminals." The third he calls "normal criminals," professional criminals without psychological conflict. These three categories are those of "chronic" criminals. The fourth includes those who have committed crimes not because of a general criminal tendency but because of the external pressure of an acute situation.

These four categories of crime are distinguished according to the degree and character of the ego participation which they involve. In the case of psychotics and defectives, ego participation is entirely absent. Among neurotic criminals, however, there is variety in the degree and mode of ego participation. One must distinguish those with specific neurotic symptom patterns from those with general neurotic characters. Persons with specific neurotic symptoms enact and re-enact an unconscious drama of crime and self-inflicted punishment. Klepto-
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mania and pyromania afford illustrations of such neurotic symptoms. Here the action is compulsive; ego participation is almost zero. In the case of general neurotic characters, however, the ego assents to the overt conduct, but there is usually no awareness of the subjective meaning of the conduct, and mechanisms such as rationalization and projection are typically involved. This category includes not only many law-abiding eccentrics but also a large proportion of criminals. Often psychoanalysis can reveal clearly that the unconscious motivation is one of seeking punishment.

In the case of normal (professional) criminals, Alexander finds a "criminal Super-Ego"; the criminal is without unconscious conflict, but his adjustment is to the law-breaking section of the community. In his conduct there is relatively full ego participation. The same is true of the acute or "situational" criminal; here the circumstances faced are so painful that the individual feels released from the "bargain" which normally keeps his behavior within the law.

Alexander and Staub's analysis covers not only the conduct of criminals but also the social demand for their punishment. In the first place, the demand for punishment is seen as a defensive reaction to the threat which the criminal presents. The threat is twofold. Externally, of course, crime is a threat to safety and order and is met by defensive force. But even more significant is the internal threat to the normally law-abiding citizen.

The example of the criminal has a stimulating effect on our own repressed impulses, and increases the pressure coming from them...

The demand that every crime should be expiated represents, then, a defense reaction on the part of the Ego against one's own instinctual drives; the Ego puts itself at the service of the inner repressing forces, in order to retain the state of equilibrium, which must always exist between the repressed and the repressing forces of the personality.

In both of these ways the demand that crime be punished is defensive. It must be added, however, that the demand may also represent an outbreak of basic hatred and aggressiveness.

Other analysts might charge Dr. Alexander with oversimplification and might question his four categories. For our purposes, however, we may take the foregoing as a typical psychoanalytic view of the behavior of criminals and of the social reaction to such behavior. What does such a view imply as to the purposes of the criminal law?

It implies, in the first place, that the criminal law is exclusively forward-looking. Penalties should be imposed only in order to influence behavior—either the future behavior of the criminal himself or the behavior of others for whom his punishment serves as an example. The criminal law should in no sense be retributory. The criminal's act was fully determined; he could not have avoided acting as he did. The notion of expiation or retribution is entirely inadmissible.

If penalties are viewed as imposed to influence the behavior of the criminals themselves, what are the implications of the classification of criminals outlined above? In the case of both psychotic and neurotic criminals, punishment will not have the desired effect. In such characters criminal conduct is not deterred by the threat of punishment. In many cases, in fact, the threat of punishment is an inducement, since the unconscious motivation is that of desire for punishment. The other two classes, the professional and the "situational" criminals, consist of those whose acts are characterized by ego participation. They are therefore more or less deterable. As to the acute or "situational" crime, however, Alexander states that "punishment...is superfluous." He is skeptical as to the effect of actual punishment upon professional criminals, but he insists that these "will have to be isolated, or made socially safe in some other way, throughout the course of the period during which they remain a menace to society."

Much more important, from the viewpoint of psychoanalysis, is the deterrence of others as a justification of the criminal law. According to Alexander, "the majority of people resist some of their own tendencies toward antisocial behavior, not because of moral qualms, but because of fear of real consequences... The laws forbidding the murder of parents, incest and cannibalism...are almost the only laws which man, in general, obeys without police supervision." In the words of Dr. Ranyard West, "In our law-making it is our own control which we are planning rather than that of others." From this viewpoint the criminal law is an outstanding success.

This summary of the psychoanalytic view of the function of the criminal law suggests that a working agreement is possible between the lawyer and the analyst, notwithstanding their apparent disagreement as to retribution and free will. They should be able to agree that individuals who are in general deterable (those in whose conduct a high degree of ego participation is manifested) are to be held responsible as if their acts sprang from free choice. As to the mentally ill, neurotic criminals as well as psychotics, it is inappropriate to treat them in the same fashion—and it is unnecessary in order to maintain the general deterrent force of the law. To the extent that "normal" citizens sense that such persons are psychologically different, their being treated as sick rather than as criminals should accord with the sense of justice. This assumes, of course, that dangerous persons who are thus held irresponsible will be segregated with such opportunity for therapy as the state can make available.

For some lawyers acceptance of this working agreement should be relatively easy. Some lawyers take a determinist view of human conduct and regard punishment
as a mere use of the criminal to deter others. Thus, Mr. Justice Holmes wrote in a letter to Laski:

If I were having a philosophical talk with a man I was going to have hanged (or electrocuted) I should say, I don't doubt that your act was inevitable for you but to make it more avoidable by others we propose to sacrifice you to the common good. You may regard yourself as a soldier dying for your country if you like. But the law must keep its promises.9

In general, however, lawyers have balked at any such working agreement with psychiatrists. The typical lawyer, like the typical citizen, assumes that legal responsibility is related to moral responsibility and that moral responsibility presupposes freedom of choice. Judges and legislators (at least in Anglo-American countries) have hesitated to follow the lead of psychiatrists in defining the class of the irresponsible. For over a century they have insisted on a test of responsibility which most analysts and other psychiatrists regard as untenable and unworkable. This is the traditional "right and wrong" test (the M'Naghten test named for the celebrated English murder case out of which it originated), under which evidence of mental illness may be considered only if it establishes that the accused was unable to understand the moral nature of his act. Psychoanalysts and others have repeatedly criticized this formula because it apparently holds responsible many criminals who are seriously ill and who act compulsively despite an acute sense that their conduct is "wrong."

In some American states the class of irresponsibles is increased by recognition of an "irresistible impulse" defense. In many states, however, judges have refused to adopt this rule. Nor are they likely to be won over by the psychoanalyst who argues that "every tenet of modern psychiatry points toward the acceptance of the "irresistible impulse" plea" and at the same time insists that "modern psychiatry ... regards all criminal acts as products of abnormal personality structure and development."10 This, in an article labeling free will an illusion, seems to suggest that impulses which were not in fact resisted were necessarily irresistible, a notion which can hardly be incorporated into the criminal law.

Psychoanalysts and other psychiatrists have long insisted that the "right and wrong" approach to criminal responsibility should be abandoned. For example, the British Institute of Psycho-Analysis recommended recently that the law should hold not criminally responsible a person suffering from "disorder of emotion such that he did not possess sufficient power to prevent himself from committing the act."11 In the United States a similar recommendation has been made by the Group for the Advancement of Psychiatry, an organization which includes influential psychoanalysts. This recommendation is simply that "no person shall be convicted ... when at the time he committed the act ... he was suffering from mental illness." Mental illness is defined as "an illness which so lessens the capacity of the person to use ... his judgment, discretion and control in the conduct of his affairs and social relations as to warrant his commitment to a mental institution."12

In July, 1954, the Court of Appeals for the District of Columbia reviewed these recommendations and, without the aid of statute, adopted a new test: Did the defendant's act stem from mental illness or defect, or was it the result of an exercise of free will?13 Judge Bazelon argued explicitly that, if free choice is involved, moral blame attaches and criminal responsibility is therefore imposed; if the act is traceable to mental illness rather than to free choice, criminal responsibility should not be imposed, because moral blame does not attach.

This reasoning raises anew the basic tension between the traditions of law and psychoanalysis. What are the possibilities of reducing this tension? I think the possibilities are substantial. Lawyers and psychoanalysts can achieve not only a working agreement but also common insight as to the nature of man and common acceptance of the paradox or mystery of his freedom.

In the first place, not all psychoanalysts and analytically oriented psychiatrists are dogmatic in their total rejection of free choice. The following quotation is from Dr. Stanley A. Leavey, of the Yale School of Medicine:

Insofar as we approach the subject inductively we come out with nothing but a determinist view; causality is even seen to reign within the moral life as it does elsewhere. . . . [But] only a prejudice would make us deny the reality of all our choices. A scientific statement of the matter at this point seems to me to be this: that we really have moral choices, and that when we examine them, we find their determinants, and these two clauses are not reducible to one another, i.e., the discovery of causality in human experience does not exhaust its meaning.14

Another analyst who may be cited here is Dr. Robert P. Knight, whose address on "Determinism, 'Freedom,' and Psychotherapy"15 was a direct reply to the bar association warning already referred to. In this address he discussed the necessity of effort on the part of a patient undergoing psychotherapy. If therapy is to be successful, must the patient exert effort and, if so, is the exertion fully explained by tracing its appearance to existing character traits and to the new determinants brought to bear by the therapist? Dr. Knight took a thoroughgoing determinist position and yet insisted upon the necessity of effort. After puzzling over this address for some time, I wrote to Dr. Knight, asking whether there is not a paradox between determinism and the notion of "effort" which patients (and everyone else) must make in order to grow in responsibility. (I had laid a wager with one of my colleagues that Dr. Knight would admit the existence of paradox.) He replied as follows:

Yes, I puzzled quite a bit over the paradox of psychic determinism vs. "effort," and have not yet reconciled it to my satisfaction. One can say that the effort itself is also deter-
A general view of the luncheon meeting held at the Conrad Hilton Hotel during the annual meeting of the Association of American Law Schools.

Bigelow Fellow Alan Mewett, Ralph Kharas ’27, Dean of the School of Law at Syracuse University, Assistant Dean Jo Lucas, and Bigelow Fellow Robert Stoyles, at the AALS luncheon.

Lawrence Friedman, ’52, Professor Max Rheinstein, and John Hazard, JSD ’39, professor of public law at Columbia University, on the occasion of the luncheon held by The Law School at the annual meeting of the Association of American Law Schools.

Maurice Van Hecke, ’17, president of the Association of American Law Schools, Justice Walter V. Scaife, ’28, of the Illinois Supreme Court, and Robert Mathews of Ohio State University, at the AALS luncheon.

mined—which seems to be something of a tour de force—or one can concede that, especially in psychotherapy, one expects and mobilizes more effort than the amount which is yet "determined" by previous experience. Such factors as transference (in therapy), inspirational influences, and conceptions of one’s self or of one’s completed work, projected into the future, may be regarded as determining factors, but I still, at this stage of my thinking at least, feel that there is something left over. Harry Emerson Fosdick . . . calls it a "personal rejoinder" to life experience. I think you win your bet.

One may even find a psychoanalyst saying a good word for the idea of retribution and for traditional ideas of morality. Dr. Robert Waelder, a graduate of the Vienna Psychoanalytic Institute, has asserted that everyone, without exception, believes that retribution should follow violation of law; he explains that the apparent opponents of retribution merely hold that someone other than the criminal is guilty of his act—"society," "the ruling class," etc. Dr. Waelder has also written:
Psychoanalysis is gradually developing a distinctive ethical theory. It has its own conception of "the good," the objective of healthy personality development. The varying formulations use terms such as "maturity," "spontaneity," "productiveness," "inner freedom," "responsibility," "capacity to love." Furthermore, some analysts, as we have seen, are willing to concede that men have a degree of freedom to move or not to move in the direction of this goal. To be sure, this is no power to lift one's self by his bootstraps. Progress toward maturity comes about only with external help—help which ordinary experience affords or help made available in psychotherapy. Man's real freedom of choice is a freedom to accept or reject such help, a freedom to choose among potential determinants of one's conduct.

Acceptance of help means the acceptance of painful self-knowledge (as well as other frustrations); it means also the resisting of self-protective reaction tendencies. This is the basic requirement for advance in maturity. In the words of Dr. Ernest Jones, the English editor of Freud:

The psychological problem of normality must ultimately reside in the capacity to endure—in the ability to hold wishes in suspension without either renouncing them or "reacting" to them in defensive ways. Freedom and self-control are thus seen to be really the same thing, though both are badly misused concepts.16

Of course one seldom finds psychoanalysts speaking of moral duty, but even Dr. Alexander comes close in the following passage:

Freud remarked once that one may postulate that man is responsible even for his dreams, i.e., for his unconscious wishes. When asked whether we must bear responsibility for our dreams, Freud answered: "Who else can take over this responsibility?" After all, an individual is closer to his own unconscious than anyone else . . .

Psychoanalysis makes it possible for the individual to increase the scope of power of his conscious Ego. . . . The founder of psychoanalysis has thus a right to impose on us the responsibility for the unconscious because he made it possible for man to gain the upper hand over [it].17

In the foregoing pages are fragmentary materials for a psychoanalytic ethics. Can such a position be satisfactory to the lawyer? He has usually affirmed a freedom of choice far wider than that which any analyst is willing to recognize. Can he admit that this wider freedom is a fiction? He may have heard of the "philosophy of 'as if,'"20 and he may recall that careful judges have sometimes spoken of free will as only an assumption. Thus Mr. Justice Jackson:

How far one by an exercise of free will may determine his general destiny or his course in a particular matter and how far he is the toy of circumstance has been debated through the ages by theologians, philosophers, and scientists. Whatever doubts they have entertained as to the matter, the practical business of government and administration of the law is obliged to proceed on more or less rough and ready judgments based on the assumption that mature and rational persons are in control of their own conduct.21

What may trouble the lawyer is the realization that legal responsibility is thus revealed as largely vicarious responsibility. To be sure, the law has had its categories of liability without fault; employers are vicariously responsible for acts of their employees. But it is usually assumed that such instances of liability are exceptional and require special justification. And it is also believed that in criminal law vicarious liability is even more strictly limited. Now the lawyer is told that the typical liability for "fault," criminal as well as civil, is largely vicarious, since it is liability for consequences of the acts of others who have molded the defendant's character and determined his conduct.

If the lawyer explores this view of responsibility, he may discover that it is by no means novel. It is a central theme in the Judeo-Christian tradition of moral theology. In this tradition there is no impairment of the sense of responsibility if one recognizes the extent to which one's character and therefore one's acts are determined by the acts of one's forebears and others. Men are called to assume responsibility for themselves and for their acts regardless of the determinants of those acts. God imposes this responsibility, and his grace makes it possible for man to shoulder it, to make something of himself. The key to personality development is the acceptance of this vicarious responsibility—in Christian terms it is participation in the atoning life of the Savior. In the words of Sir Walter Moberly:

It may be [that it is] by the acceptance of a moral liability greater than appears to be due that moral advance is made . . .

. . . .we are forced to widen our conception of responsibility. It no longer appears simply a liability arising out of a power. It may also be a power arising out of a voluntary, and apparently quixotic, embracing of a liability that could have been disputed.22
It is not essential, of course, that the lawyer and the psychoanalyst reach agreement on metaphysical terms in which to couch the mystery of human freedom. If they mutually acknowledge the existence of the mystery, they can join wholeheartedly in a working agreement. They can agree that the purposes of the criminal law are forward-looking, that the legal process is impotent to uncover and adjudicate man's real freedom and responsibility. The law must summon men to full responsibility and to this end must treat most men as if they were fully responsible. (In this sense only is legal justice retributive.) Legal liability is both necessary and helpful in enabling men to increase in self-control. But it is only the relatively healthy whom it is appropriate to treat in this manner. The drawing of the line will remain a difficult task. And it will be unfortunate and unnecessary if mutual distrust keeps lawyers and psychiatrists from co-operative attack upon this problem.

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1 Franz Alexander and Hugo Staub, The Criminal, the Judge, and the Public 70 (1931).
2 Ibid. 71.
4 Alexander and Staub, op. cit. 214.
5 Ibid. 215.
6 Ibid. 151.
7 Ibid. 149.
8 Ranyard West, Conscience and Society 166 (1945).
15 9 Psychiatry 251 (1946).
17 Ibid.
18 Yearbook of Psychoanalysis, 1945, 49, 61.
19 Alexander and Staub, op. cit. 73.
20 Hans Vaihinger, The Philosophy of 'As If' 43-47 (1924).