Panel Discussion

Psychoanalytic Remains?

Psychoanalytic Perspectives on Law and the Humanities

May 1, 2009

KABAT: Thank you all for coming. I'm Patrick Kabat, and along with Diana Reiter here we're editors-in-chief of the Yale Journal of Law & the Humanities. We have a fantastic panel this evening which Anne Dailey will introduce in a moment. But I did want to introduce Anne, who has been the motive force behind this panel discussion. Anne is the Sidley Austin—Robert D. McLean Business Professor at Yale Law School and she is a Professor of Law and Associate Dean for Academic Affairs at the University of Connecticut School of Law. She has pulled together a remarkable group of scholars to talk with us about psychoanalysis and the law. So we should certainly thank Anne for helping organize this panel [applause].

DAILEY: Thank you all for coming. It's wonderful to have you all here, and wonderful to have this absolutely sterling panel. I'd first like to thank the two students who organized this event—Pat Kabat, who just spoke with you, and Diana Reiter next to him—from the Yale Journal of Law & the Humanities, both of whom have supported the panel with interest and enthusiasm. They're dynamic and engaged, it's just been fabulous and a pleasure to work with them. Also, I'd like to introduce
Nancy Olsen—Nancy, maybe just a wave—from the Muriel Gardner Program in Psychoanalysis and the Humanities which is supporting tonight’s events along with Yale Law School.

The format tonight is each of the panelists is going to speak for five minutes—just brief remarks. Then we’re going to have discussion among the panel, and then we’d like to bring everybody into the conversation with questions. So that’s our format. And I’m just going to do absolutely the briefest of introductions, because no one actually sitting up here—probably apart from me—needs an introduction. You’re all familiar with their work. I’m going to go in reverse order and then we’ll speak in our five minutes in the opposite order. Ok, so sitting at the end, Robert Post, is the David Boies Professor of Law at Yale Law School. To his right is Jed Rubenfeld, the Robert R. Slaughter Professor of Law at Yale Law School. Nancy Chodorow is a feminine sociologist and psychoanalyst. And next to Nancy is Robert Burt, Alexander M. Bickel Professor of Law here at Yale Law School. And finally, to my left, Peter Brooks, Sterling Professor of French and Comparative Literature—I’m sorry, is that still correct, at Yale University?

BROOKS: For the next couple of weeks.

DAILEY: For the next couple of weeks [laughs]. Anyway, he’s now in the Department of Comparative Literature and the University Center for Human Values at Princeton University. So I’m just going to say my few brief remarks and then we’ll move on to the rest of the panelists. I want to say a few remarks about a book, which I think was arguably the height of psychoanalytic thinking in law—apart, actually, from the publications of some of the members of this panel. But I’m going to go back in time a bit and talk about a casebook called *Psychoanalysis, Psychiatry, and Law*, by Jay Katz, Joe Goldstein, and Alan Dershowitz, which was published in 1967.1 This is a magisterial volume. It has tiny print. It runs to almost one thousand pages. It’s a sweeping effort to investigate law from a sophisticated psychoanalytic perspective. And it’s truly, if you have the chance to look at it, a feast of ideas. But there’s a strange moment right at the beginning of the book, and this moment occurs when the authors set out the overall purpose of their project. And they write: “The aim of this book is to explore the relevance of psychoanalysis, if any, to law.”2 So I’d like to take a moment to think about the meaning of the “if any” in this sentence. Without it the sentence would read, simply, “We aim to explore the relevance of psychoanalysis to law.” So what does it mean that these scholars, supremely knowledgeable about psychoanalysis, what does it mean that these men of confidence interjected “if any” into the description

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1. JAY KATZ, JOSEPH GOLDSTEIN, & ALAN DERSHOWITZ, PSYCHOANALYSIS, PSYCHIATRY AND LAW (1967).
2. Id., at vii.
of their endeavor? What does the “if any” signify in this text?

It is truly an analytic moment in a book dedicated to psychoanalytic understanding—a moment of hesitation, of self-doubt. A textual symptom of underlying anxiety and conflict, a crying out, “The following one thousand pages mean nothing. What we do here is for naught.” So here is one possible interpretation of this textual symptom. Psychoanalysis teaches us that we are in large part opaque to ourselves; our inner lives are accessible only indirectly through symptoms, and hesitations, and dreams; our conscious egos are only the surface beneath our well dressed exteriors of naked conflicts, and aggressions, and fears, and longings of unconscious fantasy life. And, in contrast, law operates primarily on the surface of things. It regulates behavior and it takes us at our word. It cares little for our unconscious motivations or our self-insights. It treats individuals as coherent, brash, known subjects. So “if any” expresses an underlying legal anxiety about the effort to reconcile these two worldviews. And this is the question that is posed by these two simple words—how can any liberal system of justice committed to the rule of law and individual freedom accept psychoanalytic insights? How can law take the powerful forces of the unconscious into account and still pass judgment, still hold people accountable for their acts, still impose sanctions for behavior that harms other people? What if “if any” expresses the underlying conviction that law, at bottom, is unanalyzable?

So I’m going to suggest that there is another reading of “if any” that allows us to approach a deeper reconciliation between psychoanalysis and law. The hesitation and doubt engendered by the interjection into the text, “if any,” is the point. In this reading, law’s claim to certainty and knowing is itself a dangerous fiction. Any claim to knowledge, even psychoanalytic, must be offered with hesitation. “If any” reminds us that law in particular must question its claim to certainty and knowledge before passing judgment or establishing definitive legal meaning. Now this acknowledgement of uncertainty does not undermine the principle of the rule of law, or the idea of individual agency. And, to the contrary, we understand that psychoanalysis itself has rules, and patients are expected to abide by them. So, to take a simple example, if patients fail to come to sessions, or call the analyst at home, or insist on physical contact with the analyst, then the rules are broken and the treatment can be terminated. Although there may be unconscious reasons that would explain these behaviors—rage at the analyst, or desire to be taken care of—the patient is expected to conform his behavior to the rules of the treatment. So it’s not that analysis has no law, and that individuals cannot be held accountable. Psychoanalysis simply insists that
agency is a capacity to be worked at, that ideally we work to create a coherent sense of self and meaning in our lives through a process of self-examination and self-insight.

And thus we pierce the surface competence of a magisterial volume on law and psychoanalysis through this small opening provided by the words “if any.” Law, like psychoanalysis, these words teach us, must approach the idea of its own system of knowledge with humility for its limits. Law may not be fully analyzable. Certainly we cannot expect an easy cure. But whatever the benefits, if any, the treatment must be undertaken, the book must be read, and the panel discussion must begin. So, I’ll turn it over to Peter.

BROOKS: Thank you. I have a feeling maybe Anne said everything that needs to be said on the subject. But let me illustrate what I see as the relation of law to psychoanalysis—or any other form of exploration of the psychic life, really—with a few brief comments from our highest court in the realm of criminal procedure. My first quote comes from the case of Missouri v. Seibert, which was a case on the interrogation of a criminal suspect, whether you could interrogate first, then give the Miranda warnings after you had already obtained an admission—what came to be known as the “Missouri two-step” [laughs]. During oral argument before the Supreme Court—this is in December of 2003—a question from the bench, it was from Justice Kennedy, pressed Patrice Seibert’s attorney on what constitutes coercion of a subject. He said, and I quote: “Is he afraid that he’ll be beaten, or she in this case, or has the will been broken down so that the decision is a little more clouded—and it would have been clearer to the person if the warning had been given at the outset? These are matters of psychology that Elstad told us we should really not be speculating about.” Kennedy’s reference here is to an earlier case, Oregon v. Elstad, one that I thought had maybe gone into the dustbin of history, where it really belongs, until Seibert revived it and gave it a new life. In particular he was referring to Justice O’Connor’s majority opinion in Elstad, which she picks up in her dissent in Seibert. Her point is that the court has never afforded constitutional protection to the psychological effects of interrogation. She argues that we cannot, therefore, worry about the effects of an unwarned confession or admission on the subsequent statements of the suspect. She says, I quote, “Endowing the psychological effects of voluntary, unwarned admissions with constitutional implications would, practically speaking, disable the police from obtaining the suspect’s informed cooperation even when the official coercion proscribed by the Fifth Amendment played no part in either his warned or unwarned

confessions.”\(^5\) And she goes on, “This court has never held that the psychological impact of voluntary disclosure of a guilty secret qualifies as state compulsion or compromises the voluntariness of the subsequent informed waiver.”\(^6\) And then, “The causal connection between any psychological disadvantage created by his admission and his ultimate decision to cooperate is speculative and attenuated at best. It is difficult to tell with certainty what motivates a suspect to speak.”\(^7\) So having so disposed of the darker reaches of psychological motivation, she at the end of her opinion rehabilitates the language of free will. I quote: “We hold today that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite Miranda warnings.”\(^8\)

So here I think you see on display the basic enmity between the law and psychology, and one wonders if that enmity is simply inherent to the discipline. The law, including Miranda in its liberal interpretation, needs a bright-line test for the voluntary and therefore acceptable statement. The problem that I see is that if the court won’t deal in psychology or won’t give it constitutional implications, the police certainly will. The legal scholar Charles Weisselberg has recently argued in a very depressing article that current sophisticated police tactics in the wake of Seibert and other cases post-Miranda include describing evidence against a suspect real or false before Mirandizing the suspect and seeking a waiver from the outset of questioning. Techniques that indicate, as Weisselberg puts it, that, “Miranda’s safeguards have been relocated to the heart of the psychological process of interrogation” itself. So what was supposed to protect, legally, the suspect, has been taken by police investigators and become part of their psychology in breaking down the free will of a suspect. So a police precinct, it seems to me, will always find ways to get confessions, whatever prophylactics the court has devised.

Now, to bring this up to date for just two moments, we have discovered a great deal recently about the collaboration of psychologists in so-called “enhanced interrogation” of terrorist suspects in the black holes of Bagram and elsewhere, and the question is whether this is part of ethical professional practice. To be quite unfair to Justice O’Connor for a moment, I think her reply on the matter of criminal interrogations seems to be that it doesn’t matter because we’re not going to go there—not because

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6. Id. at 312.
7. Id. at 313-14.
8. Id. at 318.
psychology doesn’t exist, but because the law is other. It’s different. It’s a
system of principles and rules that would deviate from its true aim if it let
itself be seduced into the byways of psychic function.

Now, just one last point. I think O’Connor’s view of psychoanalysis
would find quite stunning confirmation in a relatively early piece of
Freud’s, his lecture to a seminar on jurisprudence in Vienna in 1906
entitled, “Psychoanalysis and the Establishment of the Facts in Legal
Proceedings,” a piece that I was totally unaware of until it was brought to
my attention in a fine article by Susan Schmeiser.9 Freud here blithely
proposes that the free association technique used in psychotherapy be
applied by police interrogators to their suspects. The interrogators would
feed the suspects certain words and according to their free associations in
response would be able to establish their guilt or innocence. The idea,
Freud said, would be to compel the accused person himself to establish his
own guilt or innocence by objective signs, since interrogation in this
method would inevitably lead to what he called “self-betrayal.” Now
rather chillingly Freud seems pleased to note the similarity in tasks of the
detective and the psychoanalyst. He says, “The task of the therapist . . . is
the same as that of the examining magistrate. We have to uncover
psychical material and in order to do this we have invented a number of
detective devices, some of which it seems that you gentleman of the law
are now about to copy from us.”10 Which indeed has happened. But then,
as Freud goes on to the end of his article, one may doubt that the police
interrogator would feel blessed by what he was hearing. Freud says that
psychoanalysts are always “on the lookout for remarks which suggest any
ambiguity and in which the hidden meaning glimmers through an innocent
expression. . . . It is not difficult to understand that the only way in which a
carefully guarded secret betrays itself is by subtle or, at most, ambiguous
illusions. In the end a patient becomes accustomed to disclosing to us, by
means of what is known as ‘indirect representation,’ all that we’re
required in order to uncover the complex.”11 I’m not sure that “indirect
representation” of this type is exactly what the police precinct wants to
hear. And then finally, as a final complication, he says, “I should like to
point out that your test may possibly be subject to a complication which
does not, by its very nature, arise in psychoanalysis. In your explanation,
you may be led astray by a neurotic who, although he is innocent, reacts as
if he were guilty, because a lurking sense of guilt that already exists in him

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11. Id. at 113.
seizes upon the accusation made in the particular instance.” If that’s the case, if we may be lured into imputing criminal guilt when faced with what is in fact psychic guilt, the parallel between police interrogator and psychoanalyst at the end of Freud’s article lies in ruins. Far from being a sure guide to the truth, psychoanalytic free association posits the existence of a wholly other kind of truth, one in which the law can’t and won’t deal.

So the law I think is right to be suspicious of psychoanalytic truths since it is in many ways wholly other. But I don’t think O’Connor wins this contest hands down. Because I think we need to ask whether we as post-Freudians, or post-Foucauldians, or just post-Proustians and post-Woolfians, really can pretend that criminal suspects are a kind of pure res cogitans—a disembodied decision maker, a product of Enlightenment psychology with attributes of will and memory, instincts of self-preservation, and perhaps sympathy, but no more irrational forces in play. Which is, of course, a parody of Enlightenment psychology. But the law often reads as a parody of Enlightenment psychology [laughs].

Now I think it finally comes back to a question of what—one that continues to haunt me—what do we as a society want our criminal suspects to be? Do we want to treat them as full human agents whose speech we will engage dialogically in search of the truth? Probably not—that’s too complex, too slow, too expensive, too subtle. Do we reserve them the right to silence just because we know the whole process of their apprehension and custodial interrogation is too crude, too weighted, too inherently coercive, to wish them to speak freely? Or do we wish to give them simply the formal guarantee that if they trap themselves our hands are clean? So my final question is, how much of what we have learned from Freud and his followers do we really want to admit into the consciousness of criminal justice?

BURT: I want to start with Anne’s lovely playfulness on those two words, “if any,” those two words that came from two teachers of mine here. Alan Dershowitz was too close in age to be a teacher then, but Joe Goldstein and Jay Katz were enormously influential. And in a certain sense it occurred to me as I was listening to you, I could almost trace the arc of my career, trying to struggle with exactly that, “if any.” So what I want to do with my very brief introductory remarks is to offer myself as an example of someone who has tried to see what relevance psychoanalytic thinking could have to thinking about legal institutions. I want to use myself as a kind of test case, really, for the success of attempting to use psychoanalytic thinking to inform how we deal with legal regulation. And I want to begin, in a way, by taking from the theme, Peter, that you put out—the question whether there is a fundamental enmity between these two systems of thinking, legal thinking and psychoanalytic thinking.
I think that there is a fundamental enmity between them in this sense, but it doesn’t seem to me to reduce or eliminate the usefulness of trying to move back and forth between these elements. But the core of the enmity is, it seems to me, that social institutions generally—and legal institutions in particular—prize the very idea of rational control. Now whether it’s rational self-control so that the image of the individual human being is one as a rational calculator, or whether it’s the possibility of kind of central command and control, that state officials can rationally control social processes, the fact remains, it seems to me, that the core ambition is the dominance of rational thinking over an unruly reality. Whereas psychoanalysis teaches—if I can paint with a very broad brush—that vast areas of our personal lives and our communal lives take place outside our rational control, and that it is easy and continually tempting to fool ourselves that our rational capacities can contain these unconscious psychic forces.

Psychoanalysis also teaches that unconscious forces can be a devious and dangerous adversary of rationality. And this is the lesson that I ultimately extract from psychoanalysis that I try to teach, or to use, in thinking about legal institutions: that the dangers of these unconscious forces are greatest when we refuse to acknowledge the power of our irrational thinking. When, that is, we try to repress awareness of unconscious conflict that underlies all conscious rationality.

Now, those broad themes I have used in my own work most recently in thinking about issues of death and dying—the book that I published a few years ago, called *Death Is That Man Taking Names*. And what I tried to do was not so much to find a bright-line guide from psychoanalytic thinking as to find a series of warnings about the limits of the capacity for rational self-control and the constant temptation to fool ourselves into thinking that we have more control over our lives and our thinking and our will than we actually do. Part of my thesis in that book was that death in particular raises these issues to a dramatic point. Death because it is the end of the thinking self, death because it is somehow unimaginable, as Freud himself has powerfully observed. It’s like it opens a hole in our psyches for all kinds of unruly forces to rush in.

Now having said that, one has to have different kinds of legal regulations of death and dying. So is there a right to refuse treatment, for example? Is there a right to have control over one’s death so that one can have access to physician-assisted suicide? One can speak in the language of rights, and it’s very attractive in

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that language to say, well, does it matter for self-control, rational self-control? And so you use competency tests to see if the dying person is in fact fully in possession of his or her rational thinking, and as long as they pass the test then you treat this as like any other decision. I think that’s extraordinarily dangerous. I think it’s dangerous because of the unruliness of these forces, and the ease with which we can fool ourselves. What I have tried to extract, if I can summarize the theme of the book in two or three sentences, what I look for are ways to design social institutions that are likely to bring to the fore ambivalent feelings. That is to say, that highlight how difficult it is to walk this line of being rational and in control.

I’ll only use two examples here illustratively that I speak about at much greater length in the book, obviously. One example is attitudes toward claims to physician-assisted suicide. Now what frightens me about these claims . . . and they are becoming more and more common. Washington State has just joined Oregon, and in the meantime, in Europe, Switzerland and Belgium are joining the Netherlands. So it is increasingly common for people to say, “Well, if I want to choose my own death I want to be able to do so by enlisting the assistance of physicians. And I’m willing to be subjected to a rationality test, but if I’m rational it’s for me to decide.” Now the problem that I have with that is that in order to justify the provision of physician-assisted suicide, both of the participants in the transaction have to view themselves as utterly in the right. The physician who’s doing the analysis has to be able to say, “I am,” as it were, “virtually a fly on the wall listening to the patient. The patient is not enacting what I want. I am simply here to hear what it is that the patient wants. And I rely on the standard view, the rational view, that we are separate entities, and that I can keep this straight in my own mind.” If I were to believe that I were saying to the patient, “I think you should hasten your death because you’re a useless person, or because I’m afraid of death, or because we’re all afraid of death, or because you scare me, or because your very existence is too much of a burden on me,” this is intolerable. Obviously it would be a wrong. So in order for me as a physician to participate in this I have to cleanse my mind. I have to persuade myself that I am wholly righteous, self-righteous in this matter.

Now I think that that is an impossibility, actually. It’s a counter-transference problem; death is very scary, we want to distance ourselves from death. So the enemy to me here is the necessity that I see in this transaction for a person to paint a false picture of him or herself. That’s on the doctor side. On the patient side, it seems to me that there is a similar temptation, really. That the patient who is hastening his or her own death, it seems to me, has to say, “I’m doing this because I want it. I’m not doing it because my family wants it, or in particular, I’m not doing it because my doctor wants it. I’m not doing it because I am hated and feared by people.
I am doing it because I make a rational calculus that, all things considered, it is better for me to hasten my death than not.” And it seems to me that on the patient side it is equally the case that this separation between self and other—which is part of the core of rational thinking—is really possible to have. That patient is as frightened of death, has as many conflicted, and confused, and confounding problems with it as the people who are watching. And in many ways it’s very tempting for the patient to, as it were, self-objectify—to treat himself as an enemy here, and wish himself dead in order to vindicate the values of life that he or she has always clung to.

Can we cleanse that perspective? The answer is no. And then I ask myself, how important is it in terms of the inner justification of this legal process that it be so clean on both sides? And if the answer is, as I think it is with regard to physician-assisted suicide, it is critical for the administration, as the law understands it, that it be pure, that I say then that’s the danger side. Don’t do it. But, by comparison, a question like, “Is there a right to refuse treatment?” so that you turn down medication—you’re on a ventilator and you say, “I want to get off the ventilator,” well, paradoxically, the thing that recommends itself to me is that everybody knows that this line between helping a person die and letting a person die is very shaky. And the very shakiness of that, it seems to me, alerts the practitioner that they’re in dangerous territory. It’s the very fact that when the proponents of physician-assisted suicide say, “Well if you’re in favor of stopping it here, then it’s just a short rational step,” that to me is the danger side. What I like is the fact when people say, “Am I hastening death, or is it really the illness that’s taking over?” It’s the paradox that’s built into it that it seems to me at least alerts someone to the proposition that there’s more here than simple rationality. And so—you should excuse me for talking for so long—that’s what I tried to do. Now does it work? I don’t know. But that’s the way I fill the “if any.”

DAILEY: Great, thank you.

CHODOROW: I’m just really delighted to be here and to participate in this forum. I come at these questions that were raised for us by Anne and, in fact, I think we think in very similar ways about a lot of them, which I didn’t know until today. I’m someone who spends her time now as a practicing psychoanalyst, and I’m a former professor of sociology. So I’m a psychoanalyst and a social scientist, neither in law nor in the humanities. For me, psychoanalysis begins from two foundational assumptions, points of inquiry or practice, and one foundational contradiction. First, the contradiction: Consciousness is not all there is to language, to our thinking, yet unconscious experience is by definition not available to consciousness. Whether we listen, speak, read, look, we bring unconscious meanings—transferences—personal, emotional, cognitive shapings, unconscious fantasies, images, emotional intensities, to any experiences
that matter to us. We filter the world through these transferential prisms, these lenses. These meanings specify, enrich, and enhance experience. Why does one person fall in love with Jane Austen and another with *Jane Eyre* (and really, one with an author and her stories in interaction with that author, since we have all these Janeites who really love Jane Austen herself, the other with the story and the text itself). If being heterosexual means you’re attracted to people of the opposite sex, why is Joe attracted to Jane Smith and indifferent to Jane Jones, whereas John is neutral to Jane Smith and passionately attracted to Jane Jones? How can a gay male patient and I be in the same space together, both him verbally and me silently, musing dreamily about the kinds of men we are attracted to?

Transferential meanings also limit and distort through conflict, dissociation and association, knowing and not knowing at the same time, through displacement of affect, guilt, envy, rage. I began my presentation by saying what I was not—not a legal scholar, not in the humanities. I know myself well enough by now to know that this is my automatic self-location. An insider/outsider identity (especially the latter) — on the margin, on the cusp — this pervades every element of my being and of how I see my work. I am “not” a humanist, “not” a real social scientist either, because I do feminist theory, I do theory, I do psychoanalysis, none of which is social science. I’m not a one-person psychologist nor a two-person relational analyst, but an intersubjective ego psychologist. I once wrote, “I was a little Jewish girl from New York living in California who wanted to be a cowboy” [laughs]. I’m the subject of my own internal custody war. Of course, this sense of marginality has enhanced my work, made me courageous, but it’s also inhibited me in many ways and distorted my experience. All of us have such unconscious senses—personal meanings fueled by affect that inhibit, distort, shape, limit our capacity to be and to see.

Whether enhancing or limiting, the basic premise here is that experience is always more than conscious. This is a problem for fields—and I think this is what you’ve all been thinking about, the speakers so far—for fields that operate in terms of consciousness, or say, of words. If you’re thinking psychoanalytically, you need to assume that people do not say what they mean when you interview, or depose, or cross-examine them. The words are only the tip of the unconscious iceberg. When you get statements or answers, you are not getting subjective, individual meaning. You are getting only conscious meaning, shaped and distorted by unconscious conflict and affect, unconscious stories and proto-stories. To draw from psychoanalysis, I would want to figure out how to get at these multiple layerings that go into meanings, to get before and beyond words. As I put it to a patient this morning, we don’t know what her unconscious thought is, but maybe we can notice what is creeping into consciousness, hovering in the wings. Analysts say that we listen to music and not only words.
Now, to get back to my first foundational point—so that's the contradiction. The first foundational point: Psychoanalysis is the practice, both the investigative practice and the theory, maybe the only one that makes the unique individual its central object of investigation, individuality its central subject, and actual live individuals its empirical base. The patient is a "unique other," to use Warren Poland's phrase; the mind is a "universe in its own right," to use Loewald's term. Experience is filtered, as I've put it, through the powers of personal meaning and personal feeling. I've called each person a "clinical individual." When I described just before how we bring unconscious meaning—whatever the psychoanalytic theory of mind that we draw upon to experience, each of us does that according to her own unique individuality. We do not have a generic mind. This makes somewhat problematic, I think, claims for what texts or other works do to people, how we experience them, what's inherent in them, since for each person they operate differently according to their unique individuality. We can notice patterns and probabilities: there's no question that Shakespeare grabs most people somehow, and there's certainly something in those texts, those passionately spoken words and those acutely painful or moving relationships, that is what we might call universal, and we can try to figure out what it is. But each person's experience of them is also personally created and linked to other elements in her unique individuality. If unique individuality is the fundamental insight of psychoanalysis, if there is not the unconscious, how do we preserve that truth so that we don't end up generalizing, assuming universal unconscious structures and universal fantasies, or paying attention to words rather than trying to discover personal affect, fantasy, and conflict?

The second foundational point: Psychoanalysis, like qualitative sociology and ethnography, rests on an intersubjective methodology and epistemology. Our minds are unique and at the same time they are formed by us in relation to particular others. As Loewald puts it, we do not learn language in general: we learn language inextricably intertwined within the particularized relationship to the particular mother who holds and speaks to us, to the particular others who care for us. Linguistic meaning is not only public and cognitive, but personal, emotional, bodily, and contextual. As we come to know the public consensual meanings of words—secondary process—these are always in interaction with primary process, which itself is both internal, within the mind, the individual core or center of being that we are born with, and that unfolds and is shaped by primary affective and bodily relationships.

What we know about the mind comes only from these particular two-person intersubjective encounters. Psychoanalysts do their work by bringing the fullness of their own subjectivity along with their training to the analytic encounter. They listen to the music, paying attention to
silences, tonalities, facial expressions, posture and gesture, to changes in how someone dresses or does their hair—all non-verbal. They make curiosity, what is beyond what’s being said, central in their technique, and they hope to awaken curiosity in the patient. They want to recognize the patient as a way-station into the patient’s feeling recognized and being able to recognize himself. This asymmetrical intersubjectivity—one person is the focus of the encounter, though both people are equally living in their own subjectivity—might or might not find resonance in images of legal relationships, legal scholarship, or in the humanities. How do we translate this foundational intersubjective encounter into fields in which this particularized intersubjectivity is not there? So I’ll stop there. I’m raising questions since I can’t answer them, because I don’t have that experience in the fields that we’re trying to look at.

DAILEY: Well, Jed, you can answer for us then [laughs].

RUBENFELD: I want to thank Anne for that beautiful introduction, and also to thank Anne and the journal for organizing this and for inviting me to this panel. I feel like the odd person out on this panel. It’s an honor for me even to be on this panel with Nancy and Peter, and my colleagues Bo and Robert, all of whom are really much more expert than I in this subject. And then I discover, to my horror, that Peter is also more expert on constitutional law than I am, and I’m a professor of constitutional law. And I know that if I keep protesting my anxiety I’m going to have to ask for treatment from Nancy [laughs]. It’s really getting bad. On psychology and the law—psychiatry, Freudian psychology, and law—I just want to say this about it. You could abstract away from all of Freud’s particular, from the content of Freud’s particular diagnoses of the neuroses. You could abstract away from all of that and you would still be left with certain fundamental revolutionary insights which we all live with. It’s as if we breathe a Freudian air and they are present not only in our lives, but in the law.

So, just for example, the centrality of sexuality as a kernel, a key to the hidden truth of ourselves and a key to our identity. This is all over the constitutional law of the right of privacy. Roe v. Wade\textsuperscript{14} and in subsequent cases in which the Supreme Court has held that decisions about sexuality, and sexual orientation, and sexual identity are central to the kinds of persons we are, whereas lots of other decisions you see just aren’t nearly as central. Or, at an even more general level, Freud’s relationship to the past—that is, what is Freud’s idea of mental health, of mental health in

\footnotetext{14. 410 U.S. 113 (1973).}
terms of a person’s relationship to his past? Well what Freud says, of course, is that neurotics suffer from reminiscences and it is the goal of psychoanalysis to free individuals from their past. But of course the ambiguity is that a psychoanalytic process is one of engagement with the past. So of course it’s very complex and complicated. But what he says is the goal is to free the person from the past. And we see this ideal of freeing oneself from the past all over our lives, the law—it’s in our polity, it’s in our understanding of democracy. Freud was talking about human freedom. You weren’t free if you were stuck in your past. He wanted to free people from their past.

You needed to live in the present in order to be free in this sense—and this is the same idea that political theory, democratic theory, uses for political freedom. That is, democracy is understood as a matter of freeing the polity from its past. We need to have the self, the political self in the present, govern itself by its own present will. This is why we have, I would suggest, so much difficulty in having a politics that is genuinely future directed—having a politics that is devoted to the achievement of things that can’t be done in more than six months or a year, that take more than a president’s term to achieve. It is very difficult, based on our understanding of democracy and our political structure, to commit ourselves, to devote ourselves to that kind of political long-term project and to see it through. But you see this living in the present, in not just such highfalutin terms. It’s in our consumerism, it’s in our materialism, it’s in law and economics.

Freud’s relevance—you know, I can’t speak to the content of psychoanalysis. But at these general, very general levels where Freud’s contributions—fundamental, revolutionary contributions—are almost obscured by the more controversial content of his psychoanalytic diagnoses, we could not understand what we are today without Freud’s influence.

POST: The advantage of speaking last on a panel of this eminence is that one gets to learn a lot. You have been a patient and tolerant audience, so I’ll be very quick. I want to summarize different ways that we can speak about the relationship of psychoanalysis and law—ways informed by what my friends and colleagues on this panel have said. My basic point is that Anne’s “if any” should be qualified by two other words: “it depends” [laughs].

If we are going to explore the relationship between psychoanalysis and law, we could ask about the ways in which psychoanalysis incorporates the law and changes because of legal changes. But because I know nothing about that subject, I’m going to speak instead about the ways in which the law incorporates and uses insights coming from psychoanalysis.
Of course, the first question that this inquiry raises is: “What does one mean by psychoanalysis?” This question is very complicated and difficult, and for the moment I wish to bracket it. I wish instead to start with an analysis of law. Law performs several different functions. One main function of law is to decide what to do in particular cases. The sociologist Niklas Luhmann invites us to conceive law as a system that has at its heart a dichotomizing function. In many situations this seems to be the case. The point of many legal decisions is to distinguish the legal from the illegal. A court must determine whether a defendant is guilty or innocent, or whether a contract is valid or invalid. Luhmann is correct that many legal questions assume this dichotomous form.

How a court decides such dichotomous questions often depends upon the law’s judgment about particular persons. In Seibert, the question was whether a particular person’s confession was voluntary or involuntary. This depends on a judgment of the person. But because often in law you have only two choices—either the defendant goes or doesn’t go to jail—the judgment of the person is similarly simplified. Whether or not a contract is made under duress must depend upon a simple, dichotomous picture of the psychological state of the persons involved. And this results in what Bo rightly calls a parody of an Enlightenment psychology. It is necessarily a judgment without nuance or complexity.

Whenever the law must decide whether a particular person is in psychological state A or state B, it is going to presuppose an image of the self that is exactly opposite to the image of the self that underlies psychoanalysis. From the perspective of psychoanalysis, all selves are complex and layered; selves are in constant motion and dynamic tension. They have conscious and unconscious dimensions. They are ambivalent and ambiguous. They can never be reduced to a dichotomous choice between state A or state B. Yet it is precisely this sort of simplified choice, which determines whether a particular defendant walks or goes to jail, that the law must frequently make.

Sometimes the law must make decisions that do not depend upon a dichotomous judgment about persons. Instead of asking whether a defendant was sane or insane, the law must sometimes predict the future and ask whether a defendant will be dangerous or not dangerous. It must determine the likelihood that person A will engage in behavior X or behavior Y. Notice that when the law asks questions of this nature, psychoanalytic models may have a lot to contribute to legal decisionmaking. Psychoanalytical accounts of a person would identify personality structures and dynamics that predict a spectrum of likely behavioral outcomes. The full complexity and nuance of psychoanalytic modeling of the self can be brought to bear in making these predictions.

It is at this point that we must confront the question of what is psychoanalysis. On one account, it is simply the accumulated wisdom of how to construct, to use Nancy's nice formulation, an intersubjective encounter in which one self narrates itself to another self. On this view, psychoanalysis is the method of intersubjective entervention to provoke certain forms of narrative ownership and interconnection. If that is what psychoanalysis essentially is, then it lacks the expertise to predict the future in any way that could assist the law. There is, however, another and distinct account of the nature of psychoanalysis. On this view, psychoanalysis identifies and studies the actual dynamic structures of personality as they exist in real time. Knowledge of these real structures might allow us to predict behavior. On some views of psychoanalysis, its understanding of the psychological dynamics of the self should enable the law to foresee future conduct. This is a second relationship that the law might have with psychoanalysis. It could use the insights of psychoanalysis to make the predictions upon which many legal judgments depend. One might imagine yet a third way in which the law might use the insights of psychoanalysis. Sometimes the law neither predicts future behavior nor punishes past behavior. It instead structures ongoing behavior. The law establishes frameworks that channel relationships among people. To create a good structure that accomplishes its underlying purposes, the law must have a good understanding of the intersubjective dynamics that might obtain among persons within the structure. It would need to know, for example, whether the persons who are being regulated will be likely to experience aggressive impulses toward others; if so, it would need to understand the nature and dynamic of those impulses. Bo's work on the care of strangers, for example, is immensely illuminating on this subject. He brings to bear a sophisticated psychoanalytic knowledge of psychological dynamics likely to be unleashed by situations of extreme dependency. The more we understand these dynamics, the better we can design the legal environment within which these relationships must transpire. Anne has written with grace and intelligence about a similar problem, which is how the law should structure prenuptual agreements between couples who are getting married.16

Let me raise a fourth possible relationship between law and psychoanalysis. Sometimes law exists as a functional tool by which we manage social relationships. But sometimes law also serves to express our ideals and values. We use law to instantiate and sanction principles which we believe are sufficiently significant. On this panel, Jed has talked about the many ways that our values are themselves shaped by how our culture has assimilated the insights of psychoanalysis. He notes, for example, that we have come to believe that a person's sexuality is so important to their

identity that we have fashioned the constitutional right of privacy to protect it. In such circumstances, when the law acts in its own name to speak for our constitutive values, from where does it derive its authority and content? The law gets it from us, and we get it from many places, including the psychoanalytic insights that have become culturally absorbed and which we take for granted and use in all sorts of contexts.

DAILEY: So I'd like to just open it up to discussion among ourselves and then we'll bring in the audience. One of the things that I thought was interesting, pulling together some of the, actually maybe all of the comments, in a way, is Robert, what you were saying about the usefulness of law and thinking about how to structure our relationships. And one of the things is Peter's comment about the phenomenon of torture by the government, and how we deal with this. And Obama's comment struck me as the most un-analytic moment where he said, well, we should just move on. And so this notion that it's possible to just move on seems to me something that really needs to be probed and thought about from a psychoanalytic perspective—that one of the values, one of the overarching values we might say comes from a psychoanalytic perspective is self-examination. That this is something that, as a legal matter, needs to be in place in order for us to think about who we are as a community, who we are as individuals. And so we might think that public hearings, or other forms, should be in place to help us work through that relationship with the past.

BURT: Well, Robert, it was good that you went last, it seemed to me, because you offered a very useful schematization of the different kinds of uses. I just want to inject yet another dimension to our discussion here, and that is the changing salience of psychoanalysis in our culture. You know, by the 1950s and '60s—the time when this Goldstein, Katz, and Dershowitz book was written—psychoanalysis was at its imperial high moment, at least in American culture. There was a tendency to think amongst psychoanalysts themselves that they had the royal road not just to the unconscious but to everything, really. That everything could be understood. And that was a moment also of high ambition for psychoanalysis and law. Psychoanalysis itself has become much more modest since then, and it seems to me appropriately so. Its great strength is as an observational technique. But that observation takes place over long periods of time with tensions of intersubjectivity between the observer and the observed, so it seems to me that there is a more cautious sense of psychoanalysis now, about making generalizations of a variety of sorts, which is all to the good. That should translate, I think, into the law being very reluctant, unwilling, or put another way, psychoanalysts should be unwilling to lend themselves to elements such as dichotomous judgments which the law, obviously, has to make at different times. But it seems to me that they should not make them with the blessings of psychoanalysts.
They should be forced to say that the discipline by its own observational
techniques really can't come in to be helpful here. Once again, it seems to
me, at least as I understand psychoanalytic methods, that ignoring the
cautious observational back and forth, the uncertainty, is really a kind of
profanation of this technique. So psychoanalysts should stay away from
this enterprise. As commentators, yes, psychoanalysts have a lot to offer, it
seems to me—but always with a sense that you need long term
observation, and watch forces play out, with psychoanalysts commenting
from the sidelines, as it were, but not taking on the decisional modes.

POST: Yet there is something chilling about the quotation from Freud
that Peter read to us—it's hard to imagine psychoanalysis claiming a
higher, more imperial vantage point than in the essay Peter read.

BURT: But that was Freud, you know; that was Freud at his most
imperial. Freud is a complicated figure—a great genius in many ways—
but in my view he overstated the capacity of rationality ultimately to rule
the roost, it seems to me he overstated the extent to which, Jed, as you
were saying, that it is possible to free us from our past. Hans Loewald put
it rather nicely, to turn around Freud's famous aphorism that where the id
is there the ego shall come into being, and Loewald turned it beautifully
around, saying, well yes, but where the ego is there the id should come
back into being. And it seems to me that that vision says something very
different from what you had said, Jed, although it was an accurate reading
of what Freud's ambition was. We can't free ourselves from our pasts. We
can see them, we can acknowledge them, we can get more comfortable
with them. But it seems to me that's more with the insight that
psychoanalysis has to offer.

BROOKS: Well, take off from that and go back to what Jed was
saying and Robert, and ask whether the law really borrows as much of its
understanding of human nature from psychoanalysis as you seem to imply.
Granted psychoanalysis is part of our culture and cannot be entirely
avoided, but when courts talk about motivation they generally use their
gate keeping function to keep out too much real expertise—think of what
was going on in the recovered memory cases fifteen years ago. And, of
course, the usable psychoanalytic literature on a subject like that was
totally contradictory in any case, self-contradicting. And in the confession
case I was referring to, Oregon v. Elstad,\textsuperscript{17} they get into a discussion of
“the cat is out of the bag,” which goes back to an earlier case United States
v. Bayer—(Justice) Jackson uses it.\textsuperscript{18} They keep coming back—is the cat
really out of the bag? Can the suspect put the cat back into the bag? And
they go on for paragraphs in this kind of folk psychology, and it's all very
picturesque, but it is very unsophisticated and it makes you feel that if

\textsuperscript{17} Oregon v. Elstad, 470 U.S. 298 (1985).
\textsuperscript{18} U.S. v. Bayer, 331 U.S. 532 (1947).
they're going to talk about this kind of subject at all they really ought to

RUBENFELD: Do you think that an expert would be better, would be

BROOKS: No. But I think an expert might improve the vocabulary in

POST: One way to think about expertise is to examine how it functions

within a system. Systems are designed to achieve certain purposes. What

counts as expertise within a system is determined by whether it helps

achieve the purpose of the system. So psychoanalytic expertise is oriented
to the task of helping to cure patients. And legal expertise is oriented to
the task of determining which persons are blameworthy or dangerous and
should be removed from the streets. It follows that within any given
expertise, what counts as a "person," what counts as "autonomy," what
counts as "knowledge," will depend upon the pragmatic horizon of the
functional system within which the expertise is embedded. This implies
that there will always be problems of translation between systems. Bo and
I both worked for a judge named David Bazelon who was famous for
trying to bring the expertise of psychology into the law's determination of
criminal responsibility. And for a while he succeeded in the Durham case.
But after a bit people began to say, "Well, you know, when they use
the concept of responsibility the psychologists are really talking about
something else than what we're talking about." This backlash happened
precisely because what is useful knowledge within the context of one
system may not be useful knowledge within the context of a different
system. So whether the knowledge of one system can be translated to a
different one is always a contingent problem.

CHODOROW: It seems that there are two contextualizations here.
One is that law—I've just learned from sitting here on this panel—is so
much more than what I was thinking of when I was, you know, thinking
about what I was going to say. But psychoanalysis is so many things, and
so it's very hard to see how to put it together. I'm thinking back to
conceptions of the individual values that go into law, into constitutions of
countries, or notions of civil polity. Those are things that would very
much, it seems to me, reflect, or could reflect, or should reflect something
about psychoanalytic understandings of personhood, of humanity, of what
an intersubjective relationship is. I'm thinking, Robert, about years of our
talking about these matters before we both left Berkeley, you know, from
different sides. But, you know, it does seem to me that in terms of, not a

19. David Lionel Bazelon was a judge on the United States Court of Appeals for the District of
Columbia Circuit.

decision about guilt, innocence, what should happen to one particular person, but that all psychoanalytic insights just have a lot to do with how you would think legally, what you would think about.

I actually want to raise something else, which is not about analysis, but I think there's a lot of social thinking that goes along with psychoanalysis in being not about rational thought. I don't think psychoanalysis is the only route into our thinking about other ways of conceptualizing social life, maybe legal life. I'm thinking of the founding fathers of sociology—of Durkheim, and collective consciousness, and The Elementary Forms of the Religious Life, of Weber, of charisma, of disenchantment, and the sort of regret about rationalization and the conception of a different kind of polity. And I think those are coming from a different point of view, or a coordinate way of thinking, about melding psychoanalytic and maybe legal thinking. All kinds, but I'm thinking in particular of Weber and Durkheim, who wrote at the same time as Freud, and in a somewhat similar zeitgeist of bringing in these kinds of things. When you were talking about sexuality, free association—I don't know whether it makes a difference if Freud wrote the Three Essays on the Theory of Sexuality that we now think that sex is important. But it is kind of extraordinary to think about how Freud described the centrality of desire and bodies and libido, and sexual orientation—you know, the fluidity of it. I mean, that is a radical revision of a concept of the person.

Another radical revision of the concept of the person—which of course, wherever we stand on it, is so central to the issues today of torture—is when he wrote about the death drive. And whether you think there's something innate and definite that has to be destructive, you have to just look at how people treat their neighbor, how they want to torture, and rape, and dismember, and undermine. Again, I'm thinking in larger conceptions—not should this person be guilty or innocent, but a picture of some of what we've been living through in recent years that express, or have come to count as expressing, our polity in the world. And I think that Freud's understanding—he didn't invent sadism or sadomasochism—but his conception of how it comes into being in the individual, and how it gets sexualized, those insights seem to me to be profoundly important for understanding the person in the legal system.

BURT: But you know it strikes me, from what you were saying, that here's a use—and I think a rather direct use—of psychoanalytic thinking applied to the torture question. Because when you hear it discussed in some areas, the claim is made, "Well, you know we can torture just a little bit. It is really quite controlled. So we'll do water boarding but we'll do it in this way, or we'll do this—we'll ratchet it up but then we'll stop the...
ratcheting.” But it seems to me that what psychoanalysis teaches, what Freud pointed to in particular, is the enormous force of sadism and its link—whether it’s the death drive or whatever it is that you say—that we are at the edge of aggression at all times and have to worry about letting it run rampant. So once you start down that path you can’t imagine that you’re going to stop yourself sensibly. At least that’s one application that I would take from what I understand to be psychoanalytic insight. This is very dangerous stuff. Don’t pretend that it can be finely calibrated like the Bush lawyers did. Torture is this but not that, you know. You can go this far, but then you will stop. There’s an internal dynamic that gets unleashed.

CHODOROW: One of the good things that Freud talked about in this context is guilt. And one of the things that the people who are doing that don’t seem to have is a lot of guilt [murmurs of approval]. And so, you know—

BURT: Or put another way, you know, from this wonderful little essay of his “Criminals From a Sense of Guilt,” it may be that they feel very guilty in a disguised way and are acting in these grotesquely illegal ways claiming that it’s justified to show themselves up. You know, there’s both ways of running it.

RUBENFELD: I was just going to say that I agree completely with what Nancy was just saying. And it does, I think, raise the question, to what extent the Freudian concept of the person and action is consistent with that concept of free will which is basically ineliminable from criminal law and from many areas where the law applies. Now we do have a case where Freud considered the criminalness of individuals’ actions—at the time when he was formulating the death instinct, he was also studying shell shock. Because it was right after and during the First World War and, as I’m sure you know, he was asked to write a report on the validity and the propriety of what Viennese physicians, psychiatrists were doing with shell shock patients. There were tens of thousands, eighty thousand British soldiers, came down with what was called shell shock or war neurosis, and one theory was they were criminals, they were malingers. The initial treatment of shell shock was the firing squad, because this was a criminal offense. It was Freud’s view that they were suffering from a neurosis and that they were, indeed, just as their fiercest critics were saying, motivated by a desire to get the heck away from the front—and he actually thought that was the central motivation behind these symptoms. But the one thing he insisted on was that that motivation was unconscious. That’s why it was generating the symptoms rather than other more ordinary effects. But by saying that, he removed them from the sphere of at least criminal

liability, not the law's regulatory sphere. There's plenty of stuff the law might have wanted to do with them, passing rules about what should happen to them next. Should they be put in hospitals? Should they be given—as what started happening in the 1940s—just a couple days of rest and then sent back to the front? That's a legal question, too. But if we're just talking about criminal liability, that analysis—that distinctively analytic analysis—does make you feel that you can't attach the kinds of responsibility that criminal law wants and looks for.

DAILEY: So we haven't answered your questions [laughs]. We're back to that nodal point of the law's desire to judge, to assign responsibility or accountability—

POST: Why do you say the “law's desire to judge” as opposed to “our desire to judge?”

DAILEY: Only because I think it's institutionalized in some way. But our desire to judge, which is interesting, because in the analytic situation that's where we have the suspension of judgment—theoretically, that is. I don't know what may actually be happening in practice. But analysis is the place where meaning is created in the absence of judgment.

POST: That's a deep point right there.

CHODOROW: But there are parts of the psyche that judge and evaluate and, you know, have guilt, or should have guilt if they're torturing, or, you know, should be able to evaluate sadistic wishes and fantasies and actions. I think part of analysis is about the unconscious and about these forces. But I think that there's a psychic structure, and I think it's important. Ego psychology is given a bad name these days, but there's something good about ego capacities, and that you can think, reason, evaluate, assess, self-observe.

DAILEY: And that's very Freudian, really.

CHODOROW: Yes.

POST: At the outset I said one issue is the way that psychoanalysis internalizes and uses law. So in so far as a successful analysis is a well functioning ego, the goal of it is a well functioning ego, and in so far as a well functioning ego makes judgments about what's appropriate and not, one can ask of analysts, where do those judgments come from? How do you know what the appropriate play of internal judgment is? And I'd be shocked if that didn't in part come from the law. Just to think, internal to analysis, but that's not a subject that I know much about.

CHODOROW: That's an interesting question.

DAILEY: Ok, we have a hand up, yes.

Q: Thank you all so much...thank you all so much for all the discussion. I was very struck—I was very struck by a lot—but I was very struck by two of Professor Post's comments, one being this basic idea right at the end of your summary. Ok, so what we're really seeing here is that we can think of psychoanalysis as a source of values that we're taking
to the law. And then your example later of Judge Bazelon incorporating psychology and its efficacy or non-efficacy, its legitimacy or non-legitimacy, and the backlash that then occurred. So there we have this issue of what kind of values or reasons, or really worldviews, are we going to admit into the law. Each time we confront one of these systems and the law, it seems we’re confronted with Professor Post’s sort of implied question. Is it admissible? Is this new way of thinking about the world, do we want that to be a part of our law?

That question strikes me as very analogous to another that’s been going on in political philosophy—starting with folks like Rawls and Habermas—about the admissibility of religious reasons into legal thinking. You know, the basic idea being what we really need in a secular pluralist, pluralist society is public reason through which legislators and judges can announce their decisions not contaminated by this set of reasons which we feel people just won’t be able to agree on. How—I just address this to anybody who’s interested—how does that debate about the admissibility of religious reasons—which I take to be reasons that embody certain worldviews—how should that debate influence our assessment of what kind of worldviews we want to admit into the law from these various social scientific disciplines?

POST: The original formulation by Rawls and Habermas had something to do with what should count as a reason in the public life of a democracy. They called it public reason. And they excluded religion from public reason because they thought that we didn’t all share the same religion, so that we couldn’t talk to each other from within paradigms that rested on premises that we didn’t all share. The definition of a public reason was that a reasonable person could understand it and potentially agree. A Jew, Catholic, or Muslim who spoke from religious dogma was not speaking to reasonable persons, but only to other Jews, Catholics or Muslims. My understanding is that Rawls and Habermas later backed off this position on the grounds that political legitimacy required a larger and thicker sense of inclusion, including those people for whom religious reasons are motivating. If we understand that the general purpose of public debate is to legitimate the use of public power, no adequate account of legitimation can exclude from public debate the reasons that move most people.

This debate is quite different than the issue of what can or should justify a law for legal or constitutional purposes. If we pass a law that no one can work on Saturday, and if the justification for the law is the religious principle that God requires us to rest on the seventh day, and in my religion the seventh day is Saturday, that’s not going to count as a legal reason. So religious reasons count for some purposes and not others. It all depends upon the system within which these reasons are being given.
BURT: Can I add to a response? To draw the analogy I think is quite interesting and provocative. But at least as I think about it, one can imagine, it seems to me, a decision making process in which you say religion simply is out of bounds. There can be normative reasons to say well that’s not quite right, but in any event one can imagine one saying we’ll cleanse the process by keeping religion out of it. I can’t imagine believing that you can have a decisional process that keeps unconscious forces out. Because that’s the way that we are constructed. Now, you know, what one does with them, you know, how explicitly one acknowledges them—but it seems to me that there is a different order there. That in fact they are so pervasive, they are so built in to the way that we are, that one can’t engage in decisional processes without having unconscious influence. So it strikes me at least that that is a distinction in the analogy that you draw.

Q: I’m a psychoanalyst who lives with a trial attorney [laughs]. And a central psychoanalytic principle is that we are always deceiving ourselves. We are always deceiving ourselves because to look at the truth about ourselves, we have to face something that’s unbearable or too painful, too distressing, too disturbing. I have listened to the accounts of many, many trials and yet it seems to me that the exterior aspect, the most superficial aspect of a trial is to reach a certain conclusion or establish—put these in quotations or not—establish a truth about what happened and what didn’t happen, innocence or guilt. But as I listen to trials, listen to stories and accounts of trials, I hear the ways in which attorneys are playing to the jury. Attorneys are trying to speak the language that they perceive the jury to like. Trying to get the jury to like them—in short, what a psychoanalyst might call a transference that would have in it a kind of illusion that what the other counsel is saying is untrue. Even though if you get that attorney at home and talk with the attorney you find out that there are, there is value to either side of the case—truth value to either side of the case. Now it seems to me, in that sense, to admit a psychoanalytic principle to that proceeding, to that system, is dangerous to that system. I think that it’s quite undermining to that system, because the psychoanalytic principle would be seeking to expose the self-deception. And in some ways, I think each attorney would be trying to promote it in the mind of the jury. So I would welcome the panel’s discussion of that idea. It seems to me it’s not that far away from your challenge of mens rea, Anne.

Q: Anne, can I just pick up on that one second from the point of view of a trial lawyer [laughs]? I was with Sid all the way until, right at the end [laughs], because even though both sides can’t be right in some sense, I think the jury is really the one place where psychoanalytic concepts can be used—... the jury is really the one place where psychoanalytic concepts can be used—and truthfully and honestly.
and truthfully and honestly. That is, you can talk to the jury about what’s really going on here. If you talk to a judge about that, in the sense I’m talking about—about what’s motivating people, and what’s really behind these stories of breach of the contract in a civil case, or even in a criminal case, what have you, what’s really self-defense. What’s really going on here...you can talk to the jury about it, whereas you can’t do it with the judge. You certainly can’t do it with the prosecutor.

SID: So in effect you’re inviting the jury to expose the deception.

BROOKS: I—and of course, you know better than I. Consultants on the composition and choice of jurors—this has become a big business, I don’t know if it’s psychoanalytic concept but it’s a psychological one, certainly—are being introduced laterally into the courtroom procedure in a way over which the man, the man or woman who was supposed to be running the show—the judge—has very little control.

RUBENFELD: But these are very different thoughts, and I’m not sure which one is right. I think Steve is saying he can, as a lawyer, speak the truth to the jury and he can speak a psychological truth to them. It’s the one place, instead of suggesting that the lawyer, I guess by vesting himself with a certain kind of charismatic sort of transference is trying to deceive the jury. So I mean, it makes a big difference.

DAILEY: You’re trying to win.

RUBENFELD: You’re trying to win! Which might involve deceiving the jury. But I didn’t hear that from Steve, it didn’t sound like.

DAILEY: I wonder if at this moment what enters is the idea of a legal fiction. That this is the notion that saves us—that we can act as if we’re speaking the truth or, in other ways, believing what we’re saying at the same time that we’re profoundly deceiving ourselves, potentially deceiving the jury or the judge. And to that extent, I mean, law may need these legal fictions that defy, actually, psychoanalytic or other understandings in order to operate as a kind of pragmatic—you know, this is how we have to go forward in order to resolve, go on, live. And I suppose one could generalize to life as individuals—that we live with our non-legal fictions as well. We create stories about ourselves, we design our lives around things that feel good, we operate within self-deceptions. But maybe they shouldn’t all be exposed. Maybe life comes to a halt at that point. I don’t know.

BURT: You know, I’m very uncomfortable with that idea. Maybe it’s just a childish idea that one should tell the truth and be truthful. The idea of organizing ourselves around what we understand to be a fiction seems to me very troublesome, very uncomfortable. Sid if I can go back to your observation, about how everyone is self-deceptive, I mean, that unravels just lots and lots. However it strikes me as a kind of useful warning for everybody in the process. So what I would do is go back to Robert’s schematization and say if you’re dealing with dichotomous thinking, as
you are in a trial—this one is all right, that one is all wrong—it seems to me one should approach that suspiciously in terms of all of the participants. So if my instinct is to say—and I guess it’s not a lawyer’s well paying instinct—but it would suggest to me that a self-reflective lawyer should try and incur that self-reflection with her client to lead to the proposition, are you sure that the dichotomous result is what’s the best for you and desirable here? You know, maybe you shouldn’t get into court. Maybe you should keep this in a setting in which there’s more fluidity. So you start negotiating with the idea that maybe truth is a very elusive gesture here. And once you finally get into truth and falsehood, it seems to me you’re suggesting you’re locked in falsehood, whatever it is that you’re doing. Now, you know, that does lead me to seem to prize compromise over everything else. And there are sometimes, I admit, in which there is one person who is really in the right and one person who is really in the wrong—like, you know, torturing people. So I’m not being consistent, and maybe that’s the fiction that I want to live with too [laughs]—but consistency is the hobgoblin of small minds and all that.

DAILEY: Okay, so there’s two questions here—you can decide what order.

Q: I want to get it over with, I’m too nervous about making this comment [laughs]. I’m a psychoanalytically boring and clinical psychologist, and I deal a lot with divorce and custody cases—so there’s a whole other issue in which I think there’s a lot of overlap in what we can talk to each other about. And I think that one of the things that I’ve heard is that psychoanalysis as we’ve talked about it is a very unitary kind of thing, with a moral view and with certain central tenets. And actually, what I’ve found in the reading that I’ve done over the last ten years, has been that, first of all, it never was that unitary. If you read the psychoanalytic reading minutes they were always arguing about all of these things. And that also it’s evolved now, so that there are many different models, maybe you can call them psychoanalytic models, or psychologies, the four psychologies that Fred Pine writes about. And it’s not just worldview or an emphasis on certain issues. In fact, some analysts are debating the centrality of drives in people’s development and lives. So there’s a lot. But it seemed to me that there’s so much in the common project of law and psychoanalytic work that, you know, you’re addressing individuals in the most complex, humanly ambiguous—sometimes—situations that psychoanalysis is not just, again, what’s been described, but it’s also the observations and the thinking about human affairs that is encoded in a whole literature and I think that selectively could inform or, you know, mutually inform. And as you said, we’re talking about the four

different structural ways of approaching what it has to contribute and
where it doesn’t contribute something useful. And so I think what I’m
getting at with this initial shock at “if any,” the words that you started with
is the need for a lot of interdisciplinary collaboration, because we’re using
words in different ways. And that’s a big one. I mean, to start having some
definitional consensus is a big one about sharing information.

Q: I may not have read the book correctly, but I think the message
from Martha Nussbaum’s Poetic Justice: Literary Imagination and Public
Life\(^\text{23}\) left the conclusion that no fair judgment could be made by a lawyer
or a judge unless those individuals understood the circumstances of the
individual’s life who is on trial. So one of the questions that I would have
is, what are the circumstances of an individual’s life? Now I realize that
it’s really quite foolish to expect that in all such confrontations that one
would bring such a textured richness to the encounter. But my question, I
guess, would be would it be unreasonable to ask whether or not that
textured analysis would be appropriate? I’ll take it one step further,
because Jay Katz has already concluded this. In his book, The Silent World
of Doctor and Patient,\(^\text{24}\) he suggests the ideal doctor/patient relationship is
one where the physicians attempts to take into consideration not simply
the conscious needs of the patient, but the unconscious needs of the patient
as well. And of course the parallels are quite striking. The physician is
making decisions regarding life and death. And certainly in the courtroom
there are decisions that include that. So to say it should not exist—I realize
that’s a very practical response—but if life is on the line, do not humans,
are they not entitled to a more textured analysis?

RUBENFELD: It’s a hard question.

DAILEY: Yeah, I think there are some questions back there. Ok, go
ahead.

Q: I have a question. A few weeks ago, the Terry lectures at Yale were
given by the novelist and essayist Marilynne Robinson, and her third
lecture was on “The Freudian Self.” And in the first two lectures she was
speaking about this idea of the parascience, which is this science that is
very much based on theory and ideology that tries to discount ideas as
human altruism or the belief in God or anything like that. And in the third
lecture on “The Freudian Self” she was in some senses discounting Freud,
and one of the things she said was that when we understand Freud we
understand the theory and not the man—which is to say that we don’t
understand that Freud was a Jew living in Vienna at a time when it was
very difficult to be a Jew living in Vienna. And if we look at his theories
in that sense, and his view of what it is to be human in that sense, we can


gleam a lot more from Freud. So my question for the panel is that if we’re going to understand how we can apply what Freud says to the law or to any other discipline, what do we need to understand about Freud the man not just Freud the theory?

DAILEY: He was a sexist [laughs].

BURT: I would, I would also say that Freud the man is not psychoanalysis today. You know, Freud launched the enterprise, but it seems to me it is now much deeper, broader, more interesting, than the reflections of the fellow who lived in Vienna when it was hard to be a Jew. One of the extraordinary things about Freud is he founded this field and then he psychoanalyzed himself. But all of the tenets, it seems to me, that he put forward indicated that that’s impossible to do. So one might say that Freud’s problem was he didn’t have a good psychoanalyst [laughs].

BROOKS: The attempt to discredit psychoanalysis on the basis of what one can say about Freud’s blind spots just doesn’t hold up. I mean, we wouldn’t still have psychoanalysis it were that limited to the personality of one person.

DAILEY: Claire, did you have your hand up?

Q: Going off of several things that people have already talked about, I’ve been thinking a lot as everybody was talking, particularly about issues dealing with the criminal justice system and the fact that this is clearly an element of law where we’ve come to realize that over recent years that psychology is intertwined in how people come to even be involved with the criminal justice in the first place. When you ask the statisticians they say well over twenty percent of all people in prisons suffer from serious mental illnesses, and particularly—as the comment that was just made—dealing with issues facing capital punishment. So we have this idea in capital punishment that in order for a sentencing to be fair the defense has to be able to provide mitigating factors, and the jury has to be able to consider mitigating factors. And that seems to speak to this idea that we’ve all accepted that we have to look at the individual as this multi-nuanced, particular person in the more psychoanalytic sense. But then when you see the way that psychoanalysis so frequently plays out in capital cases, where juries—consistently polled—say that they pay very little attention to what we typically think of as mitigating evidence of disturbed instances in the individual’s past, but yet put so much weight on psychological predictions of future dangerousness. It just seems to me like this is an area of law where I find myself feeling very conflicted, and I would really like to know what the panelists think about this sort of double-edged sword that psychology poses, where on the one hand, you really look at statistics that say, as the APA has said, two out of every three predictions of future dangerousness are wrong, and the Supreme Court has said we’re still going to let it in. But then at the same time these ideas of the individualized defendant and presenting mitigating factors is
so powerful. This is just, for me, an area where I’ve been really struggling trying to figure out how criminal justice can get away from these sort of dichotomous ideas of guilty and not guilty and use psychology’s ideas about culpability.

DAILEY: Robert, then Nancy—

POST: So I want to address these two comments together. We perpetually say that the law should be more textured. It should see more, it should understand more, it should take better account of the complexity of what we actually are. Yet contrast this urge to the traditional image of justice with a blindfold. Justice in this image is less textured and rich. It is in fact blind. Why would we ever want justice to see less of the world? The answer is that we also strongly believe that justice shouldn’t see what is irrelevant to the just resolution of a controversy. If the race or gender of the parties are irrelevant to the resolution of a case, justice should not see them. Justice should see only what the law requires it to see. This principle has strong implications for the question that was just raised. At sentencing, a judge should see only those facts, whether concerned with personality or not, that are relevant to the judgment of the judge. Now notice we are talking about sentencing, which is precisely not dichotomous. The point about sentencing as opposed to guilt and innocence is how much. And the question of how much depends upon the purposes which sentencing is designed to serve. So at the root of the question is a debate about the purposes of sentencing. Your claim is that sentencing shouldn’t depend on future dangerousness because such judgments are erratic, and subject to prejudice, and so on. I think that you are also arguing that the purpose of sentencing is also to express some judgment about the heinousness of a crime, which in turn may depend upon how much a defendant had been able to exercise control in the simplified Enlightenment sense, or something like that. Yet others would reject that account of sentencing, and argue that the purpose of sentencing is to protect society. What the sentencing judge should and should not know would depend, therefore, on what the underlying purpose of the system of sentencing is. Whatever we decide it is, justice should be blind to what is irrelevant to those purposes. The ultimate question concerns the appropriate grounds of legal judgment. Law itself, qua law, is indifferent. The issue here is what we want the law to do.

BROOKS: Robert, I agree totally, but I still think the question was a very good one, because I think there was a moment maybe three decades ago when there was a great deal more attention to sort of a particularized notion of the person who was eligible for the death sentence, right? Coming out of Woodson and so on, and that you really were supposed to study the factors that led to this person’s becoming a criminal before you

decided to put him or her to death. And I think courts have pulled back from that. They’ve gotten bored with it. And so now the victim impact statement seems to take precedence over the statement in mitigation. And this is political, and I think it shows a kind of coarsened sense of psychology—well, at least in criminal law.

BURT: Well I agree, Robert, with the general perspective that you just set out, but it seems to me that sentencing is not dichotomous when the issue is life or death.

POST: It is in that case.

BURT: I’m sorry, it is dichotomous.

POST: Yes, with respect to the question of whether a death sentence should or should not be imposed.

BURT: Right, it is dichotomous. And it leads me to say—and my understanding of the guidance that psychoanalytic thinking can give to our decisions—it seems to me that the decision between life or death is precisely too unruly, too impossible to cabin and make sense out of, too dangerous for our inner psyches to kind of spill out as if we should not be making that kind of decision. So I simply traverse the whole question, should it be more textured, less textured. It’s a context, it seems to me, in which it brings out the worst in everybody who touches it. I would equally say that this question of who should get mental health treatment—the insanity defense, for example. Is this person in need of treatment, or in need of punishment? There’s another dichotomous judgment that is really quite a foolish judgment. Everybody can benefit, or hopefully—I think we should operate on the premise that everybody can benefit from some psychological treatment and psychological understanding, and that no one should be thrown away in the sense of saying “well this person should merely be punished.” So again, I am constantly led to be the enemy of dichotomous thinking that seems to me, in so many different contexts, is exploded by the kind of psychological premises that we’re trying to flesh out here.

CHODOROW: It does seem to me that we’re muddling two things here. One is how to bring in psychological evaluation, psychological judgment—you know, a psychiatric assessment of people to make a decision about whether or not can they stand trial, or were they competent to decide whether what they did was good or bad. I think that’s different from the sort of psychoanalytic questions which are more around meaning and particularity, and it just might be useful to have those as separate in thinking about things like sentencing, or judging, or something like that. It’s a different consideration, so that if you’re trying to look at an individual’s circumstance, situation, then you are in the realm of what I was saying was the real particularity, the individual clinical individuality of each person. And then that is in contradiction to general behavioral assessments about whether somebody does something that’s against the
law or not against the law. The question of how to help somebody who has mental imbalances isn't always the way in which you're thinking about mental difficulty and mental illness. And I just think it's probably important, as people walk out of this room, to not think that we're talking about using psychology in any way in the law, but really trying to—not the only or best way to do it—but just trying to talk more specifically about a particular way of thinking, or a particular kind of conception of human beings, and their limitations, and conflicts, and difficulties, and needs.

DAILEY: That actually may be a great place for us to end, so thank you all for coming [applause].