

THE YALE JOURNAL OF LAW & THE HUMANITIES

**SYMPOSIUM:**

**ANNE C. DAILEY, *Law and the Unconscious: A Psychoanalytic Perspective***

**About.** The following essays reflect on Professor Anne Dailey's challenge to the presumptions of rationality in law in light of all we now know today about the unconscious. The authors draw from a wide array of perspectives ranging from the classroom to poetry.



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**PETER BROOKS*****On Law and the Unconscious***

A few years ago, I cotaught a seminar, “Law, Psychoanalysis, and Ideas of Human Agency,” with law professor and philosopher Martin J. Stone. Stone began the first class by making the claim that in the law, there are no persons, only relations between and among persons. This was a disturbing start to a course that, by its interest in psychoanalysis, seemed dedicated to some notion of personhood. I spent much time debating whether or not Stone’s claim was true.

I concluded, tentatively, that this claim was true of torts and contracts and maybe even constitutional law—as “rights” seem to be primarily about distances maintained among persons, and hence about relations rather than persons. But the claim failed in regard to criminal law and procedure, where there are persons—though of what kind is not so clear. What is personhood in criminal justice? I often find myself thinking of Judge John Noonan’s title, *Persons and Masks of the Law*.<sup>1</sup> Most often, it seems, legal procedure provides masks, as in Greek comedy and tragedy: mere representations of persons rather than the fully developed individual. This is not surprising in that a deep interest in personal psychology might disable the processes of law entirely. After all, Sigmund Freud, in his brief essay, “Criminals from a Sense of Guilt,” argued that perpetrators commit crimes because they are oppressed by a burden of guilt.<sup>2</sup> Commission of the crime and the resulting punishment seem to

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<sup>1</sup> JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS* (1976).

<sup>2</sup> See 14 SIGMUND FREUD, *Some Character-Types Met with in Psycho-Analytic Work*, in *STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD* 311, 332-33 (E.C. Mayne trans., James Strachey rev. 1957).

them the only way to cope with guilt. Guilt before crime: that more or less stands criminology and penology on their heads.

Robert Weisberg, in an essay some years back, asked the question: what do we want our criminal suspects to be like?<sup>3</sup> Do we want them to be “real people”? I don’t think so, at least not fully. We do not want to deal with them as interiorities. In illustration of this proposition, I would point to the incoherence of an opinion such as *Miranda v. Arizona*,<sup>4</sup> which tries to protect the free will and voluntary choice of a subject considered vulnerable to the power of state policing yet, strangely, also capable of waiving the very rights that the Court wants to give him as protection against bad choices in relation to state power. The human person in *Miranda* and most of its progeny appears a subject conceived as both ignorant and somehow so intelligent it can understand and defend against its ignorance. It is as if legal liberalism could not understand the realities of human agents in the law, both suspects and the police who handle them—or rather, found them too complex as persons to analyze fully their possible behaviors.

I would refer the reader at this point to Justice O’Connor’s opinion for the Court in *Oregon v. Elstad*, which expressly states that the Court will not endow psychological conditions with constitutional implications.<sup>5</sup> She asserts further: “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 a subsequent informed waiver.”<sup>6</sup> This of course begs a number of the questions at issue: was the disclosure in fact voluntary? (*Miranda* doctrine would presume it was not.) Was the waiver voluntary? What is the status of a “guilty secret” in the law? Are we going to go there? Is it worth unpacking those two words and their psychological relation?

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<sup>3</sup> Robert Weisberg, *Criminal Law, Criminology, and the Small World of Legal Scholars*, 63 U. COLO. L. REV. 521 (1992).

<sup>4</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>5</sup> See *Oregon v. Elstad*, 470 U.S. 298, 311 (1985).

<sup>6</sup> *Id.* at 312.

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When the Court addressed these questions again in *Missouri v. Seibert*,<sup>7</sup> Justice Kennedy invoked Justice O'Connor's ban on psychological probing at oral argument. "These are—these are matters of psychology that *Eldred* told us that we really should not be speculating about."<sup>8</sup> Yet Justice Souter, in his plurality opinion, does see a psychological inflection of constitutional rights in the so-called "Missouri Two-Step" (viz. question first, warn after there is an admission):

Upon hearing warnings only in the aftermath of interrogation and just after making a confession, a suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again. A more likely reaction on a suspect's part would be perplexity about the reason for discussing rights at that point, bewilderment being an unpromising frame of mind for knowledgeable decision.<sup>9</sup>

While cast in the language of rights, derived from *Miranda*, Justice Souter describes an essentially psychological situation ("perplexity", "bewilderment").<sup>10</sup> Justice O'Connor's dissent seizes upon this move, arguing that *Eldred* rejected such an approach: "We did so not because we refused to recognize the 'psychological impact of the suspect's conviction that he has let the cat out of the bag,' but because we refused to 'endo[w]' those 'psychological effects' with 'constitutional implications.'"<sup>11</sup> Justice O'Connor (and not she alone, as Justice Souter's opinion in *Seibert* now appears the outlier) blinds herself to the fact that, even if the Court may not want to enter the messy realm of psychology, police interrogators have long since happily set up shop there. They have studied carefully the

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<sup>7</sup> *Missouri v. Seibert*, 542 U.S. 600 (2004) (plurality opinion).

<sup>8</sup> Transcript of Oral Argument at 31, *Missouri v. Seibert*, 542 U.S. 600 (2004) (No. 02-1371).

<sup>9</sup> *Seibert*, 542 U.S. at 613 (footnote omitted).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 628 (O'Connor, J., dissenting) (quoting *Eldred*, 470 U.S. at 311).

ways in which suspects can be put in extreme psychological stress. They posit “guilty secrets” everywhere. The failure of the Court to follow police into the study of psychology seems both understandable and deeply pernicious.

Anne Dailey’s *Law and the Unconscious* makes a powerful argument that we need to reconceive the relations of law and psychology and of psychoanalysis, and to end longstanding hostilities between them.<sup>12</sup> She has written a book of great cogency and importance that goes far beyond the standard quarrels that divide the two fields. She makes a reasoned and forceful case for psychoanalysis as coming to the aid of the law—not opposing it—in providing a richer account of human autonomy and responsibility. And she shows very effectively how psychoanalysis could make a difference in such fields as child custody, surrogacy, pre-nuptial agreements, and duty-to-warn laws, all areas where greater nuance and depth in understanding human behavior and motive are important and desirable. The issue, as she sees it, is not that psychoanalysis is irrelevant to law, but rather is *too* relevant. I agree wholeheartedly, while remaining unconvinced that the law understands this.

Dailey argues that the law’s presumptions of rationality and transparency need to be reconciled with what we know by way of psychoanalysis about the true vectors of our inner lives and the complexities of human motivation. I am especially moved by how she applies these insights to our punitive and carceral society, which, she writes, needs to be “more modest in its certainty, more tentative in its judgment, and more compassionate in its punishment.”<sup>13</sup> That is very true. Having recently taught a course in a New Jersey prison, I feel even more strongly that our ideas of punishment and rehabilitation need to be rewritten on a clean slate. But I think for that to happen, law would have to give up a very central resistance to psychoanalytic insight; legal thought fears psychoanalytic

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<sup>12</sup> ANNE C. DAILEY, *LAW AND THE UNCONSCIOUS: A PSYCHOANALYTIC PERSPECTIVE* (2017).

<sup>13</sup> *Id.* at 99.

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thinking as essentially disabling of its performative speech and its finalities—the psychoanalytic view of humans is one of incompleteness and process, and this the law cannot abide.

That fact is why I am skeptical about a “reconciliation” between law and psychoanalysis in our criminal justice “system” (as it is laughably called). Law does not want to get into the subjectivities of those it punishes. It does not even want to police too much the caricatures of “voluntariness” that are produced daily, and nightly, in police precincts everywhere.

There might be some slight hope on the rehabilitative side. There are some modest new signs of attention to the lives of the incarcerated, to the length of sentences, and especially to the importance of educational programs within prisons. I do not think the criminal law’s paradigm of personhood can ever accommodate psychoanalytic insight. But, perhaps paradoxically, once it has put non-persons into prison cells, the liberal belief in rehabilitation, in the possibility of human evolution, change, even enlightenment, can begin to make good on the lessons of psychoanalysis. But such optimism needs, of course, to be very tentative.

**About.** Peter Brooks is the Sterling Professor of Comparative Literature Emeritus at Yale University and author of *Troubling Confessions: Speaking Guilt in Law & Literature*.

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**SARAH RAFF**

### ***Louis C.K. and Psychoanalytic Legal Thinking in the Age of #MeToo***

The law's presumptions of rationality and free will can lead to devastating errors in judgment—the determination that confessions are true when they are not, the finding that consent to sexual relations is present when it is not—as well as abandon individuals to live with the harsh consequences of their bad decisions without offering understanding, empathy, or any real pathway to rehabilitation.<sup>1</sup>

In the year since the publication of Anne Dailey's luminous account of the value of psychoanalytic theory to the law, the #MeToo movement has brought new visibility and urgency to a legal problem that Dailey suggests "may prove amenable to psychoanalytic study," namely sexual harassment.<sup>2</sup> I first read Dailey's book in the wake of the Harvey Weinstein revelations, and I write these words in the wake of the Brett Kavanaugh hearings. Between these events concerning men accused of and denying sexual assault, there appeared the *New York Times* headline, "Louis C.K. Is Accused by 5 Women of Sexual Misconduct."<sup>3</sup> The day following this disclosure, the comedian published a statement in the

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<sup>1</sup> ANNE C. DAILEY, LAW AND THE UNCONSCIOUS: A PSYCHOANALYTIC PERSPECTIVE 225 (2017).

<sup>2</sup> *Id.* at 226.

<sup>3</sup> Melena Ryzik et al., *Louis C.K. Is Accused by 5 Women of Sexual Misconduct*, N.Y. TIMES (Nov. 9, 2017), <https://www.nytimes.com/2017/11/09/arts/television/louis-ck-sexual-misconduct.html> [<https://perma.cc/UYC8-BVG7>].

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same paper acknowledging wrongdoing.<sup>4</sup> In the remarks that follow, I will offer a psychoanalytic close-reading of Louis C.K.'s confession in order to show how some of the insights in Dailey's book can be brought to bear on this well-known episode in entertainment history and in order to invite speculation about how a psychoanalytically informed jurisprudence might approach sexual-harassment law.

Let me first pause to say that what I am calling psychoanalytic close-reading could just as easily be called literary close-reading. As Lionel Trilling pointed out long ago, Freud saw the mind as a "poetry-making organ."<sup>5</sup> Recognizing that we "feel and think in figurative formations," Freud discovered "in the very organization of the mind those mechanisms by which art makes its effects, such devices as the condensations of meanings and the displacement of accent," and he made psychoanalysis "a science of tropes."<sup>6</sup> Psychoanalytic readings are therefore literary readings. The fact is worth dwelling on because it aligns with one of the important contributions of Dailey's book. Dailey's elucidation of the value of psychoanalysis to the law is on one level a defense of the humanities and an explanation of their importance to civic life.

The *Times* article is remarkably tentative in defining exactly what Louis C.K. did wrong. It recounts that he masturbated within sight of three women, one of whom was in an office and two together in a hotel room, that he masturbated within hearing of a fourth, who was on the phone with him, and that, in a hallway at work, he asked to masturbate in front of a fifth, who refused his request.<sup>7</sup> The article reports that the women in the hotel were "unsure whether what happened was criminal" but found the behavior "abusive."<sup>8</sup> "I think a line gets crossed when you take all

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<sup>4</sup> Louis C.K., *Louis C.K. Responds to Accusations: 'These Stories Are True,'* N.Y. TIMES (Nov. 10, 2017), <https://www.nytimes.com/2017/11/10/arts/television/louis-ck-statement.html> [<https://perma.cc/T72Q-WV6R>].

<sup>5</sup> LIONEL TRILLING, *Freud and Literature*, in *THE LIBERAL IMAGINATION: ESSAYS ON LITERATURE AND SOCIETY* 34, 52 (1951).

<sup>6</sup> *Id.* at 53.

<sup>7</sup> Ryzik et al., *supra* note 3.

<sup>8</sup> *Id.*

your clothes off and start masturbating,” one of them is quoted as saying.<sup>9</sup> But no one explains what that line might be.

Louis C.K.’s own account of what he did wrong is incoherent. Here is part of his statement:

These stories are true. At the time, I said to myself that what I did was O.K. because I never showed a woman my dick without asking first, which is also true. But what I learned later in life, too late, is that when you have power over another person, asking them to look at your dick isn’t a question. It’s a predicament for them. The power I had over these women is that they admired me. And I wielded that power irresponsibly.<sup>10</sup>

The sentences swing between self-condemnation and self-exculpation. Yes, I did what the five women have said I did. But I asked first for their consent. Granted, free consent would have been impossible for them to give, as we were then circumstanced, for my request was not a real question. Here one expects to learn that the request was more sinister than a question, an act of coercion of some kind. Instead, the request gets described with the relatively innocuous-sounding word “predicament,” a term emphasizing the free choice (and necessity for choice) of the person who faces it. In the meantime, Louis C.K. concedes that he had over these women something that rendered their ostensible consent unfree and invalid: power. But when the source of that power is defined, the quantity of power in question sounds negligible. His power stemmed not from any threat of or capacity for harmful action on his part but rather from an action of the women (admiring) that we do not normally think of as giving its object much sway over its subject.

By the end of the passage quoted, Louis C.K. seems deliberately to exaggerate his negative assessment of his misbehavior in order to

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<sup>9</sup> *Id.*

<sup>10</sup> Louis C.K., *supra* note 4.

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invite contradiction. Self-condemnation is after all part of his shtick. He means, “I’m innocent, for the only power I had over my accusers is that they admired me”; he says, “their admiration and its results are precisely what made my behavior bad.” The self-reproach is absurd. If we forbid sexual overtures when one of the parties admires the other, we will have prohibited the sexual overtures that our culture most prizes. By the same token, we cannot forbid sexual overtures when one party has power over the other, for to be in love is to be subject to the power of the love object.

At other moments, however, the subtext of Louis C.K.’s words suggests genuine self-condemnation. As we have seen, a person in a predicament is called upon precisely to answer the question of what is to be done. However, anyone with a little Latin will hear in the word “predicament,” “pre-*dicere*”: pre-saying, what goes without saying or consent, predication. Indeed, the Latin origin is “*praedicare*,” to assert. On this interpretation, Louis C.K.’s request was indeed a preclusion of choice, not a question but a foregone conclusion—and the start to an inevitable sequel. Although he asked before showing his dick, Louis C.K. confesses, the asking was not a question but a pre-dick-ament: under no circumstance would the dick be absent from what followed. Why not? One reason might be that Louis C.K. was determined to go on with the self-exposure whatever the response to his request. (In one case, however, we do know that a woman successfully rebuffed him.) Alternatively, what foreclosed any effective refusal was the speech act performed by the request itself. To ask a person to watch one masturbate is already to exhibit something to her that she might rather not see, already to draw her into a sexual relation she might rather avoid. Although the request can be answered in the negative, it cannot be unheard, and it has already changed the atmosphere between the two persons. The request to show his dick is a proleptic pre-showing, a pre-dick-ament that brings a sample of the very sexual relation that it claims to envision as one of two possible outcomes to the request.

By contrast to “predicament,” the word “admire” consistently does the work of self-exculpation. Louis C.K. writes that “[t]he power I had over

these women is that they admired me. And I wielded that power irresponsibly.”<sup>11</sup> Louis C.K.’s power derived not from any threat of professional retaliation, but rather from the women’s mere admiration: a surprisingly mild word to account for the decisive effect it is supposed to have, namely the invalidation of consent. But consider again some etymology. Admire: from “*mirari*,” to wonder at, which is one letter off from “*mirare*,” to look at. “It was irresponsible for me to invite these women to look at me because they (already had) looked at me.” Nonsense! Or: “what made it culpable for me to ask them to watch me was the circumstance that they had (already had) a positive response to watching me.” More nonsense, though the underlying meaning is in each case easy to detect once you substitute “responsible” and “innocent” for “irresponsible” and “culpable”—the unconscious knows no negative<sup>12</sup>—and once you see that Louis C.K. associates his stand-up comedy routines, the performances that garnered the women’s admiration, with masturbatory display. He means, “I was justified in inviting them to look at—admire—me, because they already admired me: I was only inviting them to do what they already did.” If you consider the subject-matter of Louis C.K.’s comedy routines, namely personal material of a revealing, embarrassing sort, you can add, “it was no big deal for me to ask them to witness my indecent exposure, because they had already witnessed—and admired—my indecent exposure.”

Attempting to define his blameworthiness, Louis C.K. ends up question-begging in further, punning tautology. What rendered my potency in that situation irresponsible was my power. What created the predick-ament was my potency. Blaming the victims, he proposes that the women’s admiration, their watching of him, has given him both the potency for which he is now professing remorse and the potency that made the former culpable. Indeed, the context-activated pun in the avowal, “I wielded that power irresponsibly,” retracts the admission of guilt, for if to

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<sup>11</sup> *Id.*

<sup>12</sup> See 19 SIGMUND FREUD, *Negation*, in STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 235 (Joan Riviere trans., James Strachey rev. 1961).

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wield power at all is to masturbate, then there was no avoiding masturbation once the women's admiration had bestowed the power.

To be sure, the continuities run not just between Louis C.K.'s repeated misdeed and line of work (that of "stand-up comic," a term suggesting male excitation) but also between the work, the misdeed, the *New York Times* exposé, and the confession. Each brings shameful secrets to light. The kind of stand-up comedy Louis C.K. performs is full of confessions, and the masturbatory act is itself a confession of taboo desire. Any confession is of course its own kind of performance, and the one in question is an exhibition offered before the *New York Times's* vast international audience.

How should we treat the public confession of a confessed exhibitionist?<sup>13</sup> Dailey describes a federal appellate judge who identified a defendant as one of those "criminals from a sense of guilt" who, in Freud's view, "commit criminal acts in order to obtain the satisfaction of punishment for some earlier crime—real or imagined."<sup>14</sup> The judge "reversed a criminal conviction on this ground, holding that the defendant had acted from an unconscious desire to be apprehended and punished."<sup>15</sup> Bent on denying the criminal his desire for punishment, the court refused to be enlisted to satisfy the wish that had prompted the errant behavior. Should a confession that partakes in the exhibitionism and equivocal self-degradation that it confesses meet a similar resistance?

Perhaps such a confession's assessment of the harm done the victims should be taken with extra skepticism. Here is the continuation of Louis C.K.'s statement:

I have been remorseful of my actions. And I've tried to learn from them. And run from them. Now I'm aware of the extent of the impact of my actions. I learned yesterday the extent

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<sup>13</sup> For a discussion of this question as it concerns Jean-Jacques Rousseau's *Confessions*, see PETER BROOKS, TROUBLING CONFESSIONS: SPEAKING GUILT IN LAW AND LITERATURE 20-21, 49-52 (2000).

<sup>14</sup> DAILEY, *supra* note 1, at 115.

<sup>15</sup> *Id.* (internal quotation marks omitted).

to which I left these women who admired me feeling badly about themselves and cautious around other men who would never have put them in that position. I also took advantage of the fact that I was widely admired in my and their community, which disabled them from sharing their story and brought hardship to them when they tried because people who look up to me didn't want to hear it. I didn't think that I was doing any of that because my position allowed me not to think about it. There is nothing about this that I forgive myself for. And I have to reconcile it with who I am. Which is nothing compared to the task I left them with. I wish I had reacted to their admiration of me by being a good example to them as a man and given them some guidance as a comedian, including because I admired their work.

The hardest regret to live with is what you've done to hurt someone else. And I can hardly wrap my head around the scope of hurt I brought on them. I'd be remiss to exclude the hurt that I've brought on people who I work with

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Some commentators have faulted Louis C.K. for omitting to apologize in his statement, but to me this sounds very apologetic. So eager is Louis C.K. to show remorse and understanding of the harm he has caused that he exaggerates that harm, at least to my ear. The *Times* exposé says nothing about any of the victims becoming cautious around other men. It does say that one of the accusers, the one who never saw his exhibition, felt discouraged and left comedy, that one felt shame, and that two others lost work opportunities because their attempt to spread the word of Louis C.K.'s misbehavior alienated potential employers and colleagues. To describe these harms as comprising a scope of hurt so broad as to be difficult to contemplate seems extravagant, as does the suggestion that Louis C.K. has left his victims with a task immeasurably greater than his

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<sup>16</sup> Louis C.K., *supra* note 4.

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own project of self-reconciliation. The guilt described here seems displaced. Its real objects are perhaps the persons to whom the rest of the paragraph refers: the family members mortified by the exposé and confession, the partners whose projects would soon be abruptly cancelled. Those harms are an effect of the publicity, not an immediate effect of the crime, much as the professional harm suffered by the two women derived not from the exhibition itself but from the repercussions of their exposure of it to the reluctant knowledge of others.

In her discussion of prenuptial agreements, Dailey lends support from psychoanalytic theory to the idea that people on the cusp of marriage tend to be out of their minds, and that they should not be held to the ruinous prenuptial agreements they sign—if on the face of it the agreements seem unfair.<sup>17</sup> Leaving aside the possibility that having just been exposed as an exhibitionist in the newspaper of record might create conditions that cancel the voluntariness of the accused's confession, it would be well if courts understood that *any* confession, like any prenuptial agreement, is likely to be offered under conditions of stress, if not duress, and that any confession should be searched, not just for fairness, but for what Dailey, following Peter Brooks, calls “narrative truth.”<sup>18</sup> Dailey remarks, “[W]here state of mind is an issue, law necessarily stakes its claim to truth on the construction of convincing narratives.”<sup>19</sup> It seems to me that the Louis C.K. confession does not meet this standard. It does contain a straightforward admission that the accusations are true, but as we have seen, it is inconsistent in its assessment of whether the actions were culpable, and it offers no very persuasive account of the harm done.

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<sup>17</sup> DAILEY, *supra* note 1, at 139.

<sup>18</sup> Narrative truth is “a matter of conviction, derived from the plausibility and well-formedness of the narrative discourse, and also from what we might call its force, its power to create further patterns of connectedness, its power to persuade us that things must have happened this way, since here lies the only explanatory narrative, the only one that will make sense of things.” *Id.* at 35 (quoting PETER BROOKS, *PSYCHOANALYSIS AND STORY-TELLING* 59 (1994)). On confessions as “inherently unstable and unreliable,” see BROOKS, *supra* note 13, at 23, 52, 63-64.

<sup>19</sup> *Id.* at 36.

Granted, Louis C.K. faced a court of public opinion rather than a court of law. But the immediate aftermath—cancellations of all of his deals, opprobrium—strikes me as a reaction that does not demonstrate what Dailey calls, brilliantly, “good-enough judging.”<sup>20</sup> The punishment evinces a most credulous and literal-minded taking-seriously of his own assessment of the harm he caused, an assessment which far exceeds in severity the grievances expressed by any of the victims quoted in the *Times*.<sup>21</sup> If a confession such as Louis C.K.’s were to appear in a court of law, I hope that the judge would read it closely, with an eye to its implicit self-defenses as well as its explicit self-accusations, for some of the self-defenses may be partially exculpatory and some of the self-accusations may be too harsh.

Let me acknowledge that I bridle at the idea that the exhibitions and solicitations Louis C.K. made should be taken to have been particularly harmful in themselves. I except here the case of the woman then in her early twenties who was working “in production” while Louis C.K. was a producer and writer on the same program, and who did consent, after repeated requests, to watch him.<sup>22</sup> It is easy to see that she was his subordinate, that the requests felt coercive, that her acceptance drew her into an upsetting secret complicity with him. But the other cases seem different. It is true that people vary in their responses. What Person A

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<sup>20</sup> *Id.* at 33, 37. For an account of the standard for mothering upon which “good-enough judging” plays, see D.W. WINNICOTT, *PLAYING AND REALITY* (1971).

<sup>21</sup> Arguably, Louis C.K.’s confession is so arranged as to make his acts not seem prosecutable. As Christina Cauterucci points out, he emphasizes his requests for consent, even though in the case of the woman on the telephone, he never did ask consent, and meanwhile he does not say that he *obtained* express consent. See Christina Cauterucci, *Louis C.K.’s Public Statement Unnervingly Misunderstands the Concept of Consent*, SLATE (Nov. 10, 2017), <https://slate.com/human-interest/2017/11/louis-c-k-s-masturbation-statement-unnervingly-misunderstands-the-concept-of-consent.html> [<https://perma.cc/73UG-9Z7T>]. As for the in-person rather than telephonic performances, we know that in one case he did obtain consent, in one case he did not (and refrained from the display), and in one case he made the exhibition after the two women had “laughed off” his request. See Louis C.K., *supra* note 4; Ryzik et al., *supra* note 3.

<sup>22</sup> Ryzik et al., *supra* note 3.

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finds traumatic might not seem so to Person B. But one thing that makes this case so interesting is that the victims do not seem particularly vulnerable. In the remaining four instances, Louis C.K. was not a supervisor or even a consistent coworker. (The woman who refused in the hallway was a guest star on a show he was working on.) Among these four, we find one woman who refused his request with indignation; one woman on the phone with him, aware of what he was doing but uncomfortably not hanging up; and two women wrapped in their winter coats, “holding onto each other, screaming and laughing in shock,” and then leaving the room.<sup>23</sup> *He* was the outnumbered and naked one.

Indeed, it is possible to detect in his exhibition more self-abasement than aggression. The act would seem to surrender rather than to seize power, to disempower the perpetrator, to make him vulnerable, to put him at the mercy of his viewers, who might for example tell on him, shame him. (As we know, the women in coats *did* try to tell on him, and they suffered for it. Much as the mob boss or absolute monarch gives orders while seated on the toilet, Louis C.K. made of show of defenselessness that ultimately demonstrated his invulnerability and imperviousness to being shamed. But the women did not know this would happen while they were watching.) The four victims were grown women and professional comedians. Their chosen career advantages knowingness, sophistication, worldliness, and sexual experience in particular. When Louis C.K. makes an idiot of himself from across the room, across the telephone wire, or in the hallway with a verbal request turned down, *they* are the ones harmed? To think so risks accepting the idea that women are polluted by sexual knowledge. Psychoanalysis has been good for feminism not least by reducing the stigma attached to sex and sexual awareness. The notion that it is necessarily traumatic for a woman to see or to contemplate seeing a man masturbating is, I fear, a step in the wrong direction. Of course, there are other harms than trauma, and because a social double-standard *does* punish women for exposure to sexual

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<sup>23</sup> *Id.*

knowledge and experience, women and their reputations are subject to wounding by a comic's possibly comical sexual display.

If they are to be effective, the adjustments to sexual-harassment law that will follow our current ferment will have to reckon intelligently with gender. It is no accident that the recent focus in the news on sexual harassment and assault has brought with it a new eagerness on all sides to emphasize gender difference. Following the Harvey Weinstein scandal, John Kelly, then chief of staff in the Trump administration, complained, "Women were sacred,"<sup>24</sup> and Joe Biden, former vice president in the Obama administration, reminisced, "My father taught me that the greatest sin was the abuse of power: mental, physical, or economic. The cardinal sin was for a man to use his power to abuse a woman or a child. It is disgusting."<sup>25</sup> For Biden, a man and a woman represent an automatic, maximal power differential. If Biden agrees with the many commentators who have recently implied that the sheer existence of a large power differential entails a consent-demolishing threat of coercion, then it is unclear that for Biden any woman could ever give valid consent to a man's offer of anything. More unexpectedly, feminists are also taking inequality between men and women as a given. The implied source of the inequality is not always clear. It could be the difference in physical strength, the differently applied stigma attached to sex, or the fact that men still hold a majority of positions of power. The astonishing recent slogan, "Believe all women" makes some sense if one reads it together with its successor, "I believe the survivors." One can "believe all women" if, looking beyond the individual instance a given woman describes, one takes all women to be survivors of systematic of sexual misconduct.

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<sup>24</sup> Emma Gray & Dana Liebelson, *John Kelly Is Sad Women Are No Longer 'Sacred.' Women Are Not That Sad*, HUFFINGTON POST (Oct. 19, 2017), [https://www.huffpost.com/entry/john-kelly-women-sacred-humans\\_n\\_59e91025e4b0df10767be25e](https://www.huffpost.com/entry/john-kelly-women-sacred-humans_n_59e91025e4b0df10767be25e) [https://perma.cc/VE7Z-4UBG] (emphasis added).

<sup>25</sup> Alanna Vagianos, *Joe Biden Condemns Harvey Weinstein's 'Disgusting Behavior,'* HUFFPOST (Oct. 11, 2017), [https://www.huffpost.com/entry/joe-biden-condemns-harvey-weinstein\\_n\\_59de61ffe4b0eb18af05ada9](https://www.huffpost.com/entry/joe-biden-condemns-harvey-weinstein_n_59de61ffe4b0eb18af05ada9) [https://perma.cc/DU5D-H78E].

## DAILEY SYMPOSIUM

Henry Sumner Maine famously remarked in 1861 that “the movement of the progressive societies has hitherto been a movement from Status to Contract.”<sup>26</sup> Perhaps our society is now moving back in the direction of status. We seem to be finding more and more reasons *not* to hold people to their words—to their consent to contracts, to their confessions. Historians have shown how contingent are our deeply held beliefs about what constitutes valid consent. Confessions used to be considered valid even when—and in the case of enslaved persons in ancient Greece and the Roman Republic, *only* when—they had been obtained by torture.<sup>27</sup> Deeds for the sale of land and contracts binding one party to a period of servitude used to be considered valid even when they had been extorted by the other party to the agreement through violence or imprisonment.<sup>28</sup> Nor has youth always invalidated contracts. The historian Holly Brewer points out that “[i]n sixteenth-century England, children over the age seven were of ‘ripe age’ to marry . . . . Four-year-olds could make wills to give away their goods and chattels. Children of any age could bind themselves into apprenticeships.”<sup>29</sup> According to Brewer, it was the Protestant Reformation, with its emphasis on internal choice of church membership, that led people to ponder seriously the idea that certain conditions, such as the consentor’s freedom from coercion and attainment of what would later be called the “age of reason,” might be necessary to an act of consent’s validity.<sup>30</sup>

Today, our notions of consent seems to be changing at break-neck speed. I am perhaps in a special position to notice this, because I teach the eighteenth-century novel. Passages that my students identify as rape scenes were, in my student days, regarded simply as sex

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<sup>26</sup> HENRY JAMES SUMNER MAINE, *ANCIENT LAW* 100 (1917) (emphasis omitted).

<sup>27</sup> See A. Lawrence Lowell, *The Judicial Use of Torture. Part I.*, 11 HARV. L. REV. 220, 220 (1897).

<sup>28</sup> See HOLLY BREWER, *BY BIRTH OR CONSENT: CHILDREN, LAW, AND THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY* 239, 243 (2005).

<sup>29</sup> *Id.* at 1.

<sup>30</sup> See *id.* at 8.

scenes. But anyone can sense a paradigm shift taking place when noting the pace at which new sexual-harassment scandals unfold during a moment that many people seem to agree is special, a marker of a new era, maybe a herald of better things to come. Clearly, the larger culture has grasped the psychoanalytic idea that “free consent” can be an illusion, that, as Dailey puts it, there is a “gap between law’s presumption of rationality and the reality of subjective life.”<sup>31</sup> Commentators are finding more and more kinds of speech that should be discounted. Not just, “don’t believe the consenting words of minors and people deemed psychotic,” but also, “don’t believe an employee’s ostensible consent to the sexual solicitation of her boss.” Perhaps we should add: “don’t believe the confessions of a stand-up comic; don’t believe the exhibitions of an exhibitionist.” These phrases consort strangely with “Believe all women,” but they share with the slogan a common emphasis on the category to which the speaker belongs, even as they threaten to treat all those whose words are dismissed as children. The rumblings that one cannot validly consent to sex with one’s boss, or with any person who has power over oneself, or with anyone who is simply more successful in one’s profession, or anyone with more influence, or anyone who is a man if one is oneself a woman, seem to revert us to an older, apparently less free, system of political membership or legal position, where agency is based not on contract but on status, not on what one agrees to but on one’s social role.

Some of the questions I would address to Dailey are the following. In a better, less sexist and sexphobic world, would all of Louis C.K.’s alleged transgressions, including the declined and dropped request, still look wrong? What difference does sex make to harassment? How, in other words, should we distinguish between Louis C.K.’s primary misdeed and that of a man who calls a woman colleague aside to drone on to her about a boring part of his life—another kind of self-exposure that may be unwelcome and inconsiderate of her preferences, but one that is

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<sup>31</sup> DAILEY, *supra* note 1, at 225.

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not considered newsworthy or punishable? We sometimes—but not always—have the feeling that if sexuality is involved, then it is not really about us. “I thought I was a friend and here I am later, just another piece of meat,” complained the former model who accused George Takei of having sexually assaulted him in the 1980s.<sup>32</sup> One could argue that a harm of sexual solicitations is that they can erase one’s individuality and make one interchangeable with others. Louis C.K. implied as much when he called after the two women as they fled, “Which one is Dana and which one is Julia?”<sup>33</sup> If this is so, how does it bear on workplace harassment, given that work is where in most cases you are *supposed* to be interchangeable with someone else, and where you are *valued* in any case not as an end-in-yourself but as an instrument, as a means to the end of production, though not of a colleague’s pleasure? How might sexual-harassment law refuse the belief that there is something especially degrading about sex but acknowledge that sex still carries an extra stigma for women? What should we think of the assumption common in today’s climate of opinion that women generally need protection from men (despite newsworthy predatory behavior alleged of women)? If indeed we are currently witnessing the rise of status at the expense of contract, is that a good thing? Can we help ensure that it will become a good thing if we use psychoanalysis to refine our status categories? What more, in short, might feminist psychoanalytic thought contribute to our understanding of sexual harassment?

**About.** Sarah Raff is an Associate Professor of English at Pomona College.

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<sup>32</sup> Halle Kiefer, *George Takei Accused of Sexually Assaulting Actor in 1981*, VULTURE (Nov. 10, 2017), <https://www.vulture.com/2017/11/george-takei-accused-of-sexually-assaulting-actor-in-1981.html> [<https://perma.cc/K9HK-N4QJ>].

<sup>33</sup> Ryzik et al., *supra* note 3.

## THE YALE JOURNAL OF LAW & THE HUMANITIES

**ELYN R. SAKS**

***Book Review: Law and the Unconscious***

I'm honored and delighted to be giving this commentary on Anne Dailey's *Law and the Unconscious: A Psychoanalytic Perspective*. Dailey and I have a lot of common interests, and it is wonderful for a psychoanalytically trained person such as myself to get to see another psychoanalytically trained person put psychoanalytic concepts to such good use in the legal arena.

Dailey's "Law and the Unconscious: A Psychoanalytic Perspective," is an excellent account of how psychoanalytic understandings can inform law in many dimensions. She speaks of "formulating abstract rules that reflect the reality of psychoanalytic experiences and identify when the law should take account of the granular characteristics of the individual."

Dailey notes that law and psychoanalysis are both humanistic disciplines and share an ideal of human flourishing. She focuses on the main drivers of our psychological lives—love and aggression—and so looks at criminal behavior and family relations. More specifically, Dailey looks at the law of crimes; intimate contracts (prenuptial agreements and surrogacy contracts); violent threats; sexual choice; and children's rights.

Dailey complexifies the issues she looks at. Law tends to look at the "reasonable person."<sup>1</sup> And when it looks at actual subjective intent, it

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<sup>1</sup> See e.g., Mayo Moran, *Symposium: Who is the Reasonable Person? The Reasonable Person: A Conceptual Biography in Comparative Perspective*, 14 LEWIS & CLARK L. REV. 1233 (2010).

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often also utilizes objective standards—for instance, it insists that “a person intends the natural and probable consequences of his or her act.”<sup>2</sup>

Psychoanalysis, by contrast, wants to know about this same person’s *mind* by seeking out his actual goals and values, his conflicts, and the unconscious thoughts and feelings that are motivating his behavior.

Of course, we can’t put every person whose choice is at issue on the couch and analyze his deep and profound motives. But the law can take account of likely dynamics behind important choices. And it can design its interventions in a way that does not trigger or exploit these.

As just one example that Dailey discusses, let us think about confessions. The law tends to presume that confessions are acts of conscious, voluntary choice that are very probative of guilt—why on earth would one confess to something one didn’t do? As Dailey points out, though, one might confess for a variety of unconscious reasons: one feels unconscious guilt about some other act or feeling and displaces it onto this crime (Freud even suggests that guilt over sexual feelings as a child toward one’s parents might be at work); one has an unconscious need to be punished, so that confession and punishment serves one’s unconscious masochistic needs and traits; one might want to please the interrogator. Other motives also might exist; for example, one might want to bring ignominy on one’s family because one feels neglected by them. Again, many of these may be outside conscious awareness.

Dailey points out three interrogation tactics that might especially lead to coerced or false confessions: becoming overly friendly with the accused so he thinks you are on his side (“false sympathy”); degradation that stimulates unconscious self-destructive urges by creating a relationship with sadomasochistic undertones; and trickery. While Dailey does

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<sup>2</sup> *People v. Farrell*, 89 Ill. App. 3d 262 (1980); *People v. Conley*, 187 Ill. App. 3d 234 (1989); Michael G. Heyman, *The Natural and Probable Consequences Doctrine: A Case Study in Failed Law Reform*, 15 BERKELEY J. CRIM. L. 388 (2010).

not rule out such tactics altogether, she does think they should be used in a temperate way so as not to override the “will” of the confessor.

Another example Dailey addresses is the so-called *Tarasoff* duty: that potential victims of your patient may need to be warned.<sup>3</sup> Dailey uses this example to tease out the law’s posture of transparency versus psychoanalysis’ posture of opacity.

And so some jurisdictions have a bright-line rule that if your patient makes an actual threat, you have to warn.<sup>4</sup> And she points out that even in jurisdictions that don’t have this rule, therapists might expect that juries will find she should have predicted danger if the patient had made a threat and then acts out.

Dailey uses psychoanalytic understandings of possible meanings of threats to underscore that this rule is problematic. The patient may be communicating things other than wanting literally to kill the victim. The patient might want psychologically to be rid of the victim, to put him out of mind, or to prevent anyone else from having him. He may also be wanting to trigger strong countertransference feelings in the therapist.

So a bright-line rule gives the analyst no discretion or authority to try to understand and interpret the threat. This will likely mean you are going to very much over-predict violence, destroy the analyst-patient relationship, and possibly lead to more violence in the future as patients won’t be able to get help with their upsetting thoughts and feelings.

Other similar examples show Dailey as a person with premier psychoanalytic understandings of human behavior. She is great at uncovering the unconscious motives of people in various contexts. For example, why would someone sign a prenuptial agreement that disadvantages him or her? Or consent to give up a baby who one is surrogate for?

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<sup>3</sup> *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334 (1976).

<sup>4</sup> See David G. Jensen, *The Tarasoff Two-Step*, THE THERAPIST 44 (2012).

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Dailey's recommendations tend to be to not just blindly enforce a contract, but to try to formulate rules that take account of our decisional frailties, by, for instance, suggesting certain presumptions in such cases.

Of course there is a vast expanse between fully objective standards and fully subjective standards, especially if we countenance unconscious motives as well. If it is hard to get inside a person's conscious mind, it is near impossible to get into her unconscious mind. How do we establish or falsify a claim of an unconscious motive?

Dailey straddles this divide quite well. She wants our psychoanalytic understandings to inform rules and policies that are workable. Take confessions, for example. Dailey recommends against rules or policies that allow interrogations to overly stress a person's ability to make a reasoned choice whether to confess.

A few other thoughts about Dailey's project: First, if we are going to import psychological ideas into the law, why psychoanalytic ideas? Dailey does discuss this some—arguing that cognitive psychology's use in our law could be well supplemented by psychoanalytic ideas. But why psychoanalytic ideas, particularly in a climate in which many think psychoanalysis has been debunked? (I don't agree with this view, but it is out there.)

And then there is the question of which psychoanalytic ideas or theories? Professor Dailey does compare and contrast some of the main different schools—for instance, Kleinian psychoanalysis and relational theories no less than classical psychoanalysis—but I would have liked to hear more about which theories and why. And given the multiplicity of psychoanalytic theories, how is the law to decide which theory to rely upon?

Also, I am not totally convinced that the unconscious doesn't really stress us beyond our breaking point. Take informed consent. If a patient says he is consenting to surgery because he believes the doctor is God and will omnipotently cure him, we would say he was incompetent to make this decision.

But what if he *unconsciously* believes this? (Indeed, many analysts would probably say this is the rule rather than the exception.) If that was his reason for deciding, why isn't this choice incompetent too?

One could say that he will have had a conscious reason for his decision too, and if there is at least one competent reason for the choice, that is enough. But does this make sense? I can imagine two conscious reasons, one OK and one radically incompetent. We might say the incompetent choice might be the real reason. Indeed, a powerful enough delusion could overwhelm the decision-maker. Also, partly for that reason, we might want to endorse the view that if there are two reasons for a choice, *both* must be competent. If this scenario is at all common, it would totally undermine our concept that we are, most of us, most of the time, competent deciders.

A not very satisfactory response is that the proof problems around unconscious motivations are too severe for us to be able to identify these motivations, so the law must simply rule out unconscious motivation. This makes practical sense but is not very satisfying theoretically (or psychologically).

Another major problem with importing psychoanalytic theories into the law is that they are underdeterminative of policy. Take the case of child custody. One prominent psychoanalytic theory says that the child's relationship with her primary, psychological parent is paramount, and that this parent must be perceived by the child as powerful and helpful. And this means that the custodial parent should be able to bar the other parent from visitation altogether. In other words, the child's perceiving the parent to have this power is important to her psychological well-being.

But another psychological theory says that the child's having a relationship with both parents, even if they are at odds with each other, is important for her wellbeing, and courts should grant shared custody or visitation to both parents, even if the primary custodial parent doesn't want this and thinks it is bad for the child. So turning to psychoanalytic theory is not going to lead us to determinate rules in many cases.

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Also, even if one stance would be better for the child, there are interests beyond the child's that are at stake—namely those of the parents. She has needs and wants of her own that are entitled to some deference and respect.

So the normative question—how to balance the child's needs, rights, and interests against the parents'—cries out for exploration. But it will not be settled by psychoanalysis—this is a question for law, not doctors.

Another point is that, as Dailey has noted, there are other areas of law and mental health that would benefit from a psychoanalytic exploration of the different issues at stake. I hope Dailey intends to continue looking at legal rules in different contexts from a psychoanalytic view—that hers is just a beginning of important conversations, and that others will undertake them as well.

And a final point is to recommend to Dailey, in another project, that she look at the concept of capacity itself. She more or less presumes competency—she wants to give people maximal choice consistent with their frailties—and it would be useful to think about how psychoanalysis bears on the capacity question itself.

Indeed, psychoanalytic ideas may be most disruptive of our way of seeing things in the context of capacity determinations. And so the capacity question may itself be *the* most urgent to ponder in this context.

So, just to summarize: why psychoanalysis? Why a particular version of psychoanalysis? Can we really avoid or manage the problem of unconscious motivation? What is our response to the idea or fact that psychoanalysis can be used to justify policies that are completely at odds with each other? And how shall we understand the concept of capacity in psychoanalytic terms?

In conclusion, Anne Dailey's book is a deep and subtle exploration of the intersection between law and psychoanalysis, and I highly recommend it. It's beautifully written, powerful, and very important.

## THE YALE JOURNAL OF LAW & THE HUMANITIES

**NOMI M. STOLZENBERG**

***As If: Anne Dailey and the New Fictionalism***

Originally published in German in 1899, *Die Traumdeutung*, soon thereafter translated into English as *The Interpretation of Dreams*, launched what its author, Sigmund Freud, called “psychoanalysis,” a term that was used for the first time in that publication.<sup>1</sup> Within a few decades, Freud had become a household name and his ideas had percolated into the general culture, radically transforming popular as well as medical conceptions of sexuality and memory, among many other facets of the human mind and behavior. Even after an extensive period of “Freud-bashing” which commenced in the 1970s, during which psychoanalysis and Freud himself were lambasted for a variety of sins,<sup>2</sup> he remains, in the immortal words of W.H. Auden, “no more a person now than

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<sup>1</sup> SIGMUND FREUD, *THE INTERPRETATION OF DREAMS* (A.A. Brill trans., MacMillan Co. 1913) (1899) (first English translation).

<sup>2</sup> The oceans of ink spilled on the subject have spared no aspect of Freud’s work. See, e.g., HENRI ELLENBERGER, *THE DISCOVERY OF THE UNCONSCIOUS: THE HISTORY AND EVOLUTION OF DYNAMIC PSYCHIATRY* (1970) (arguing that Freud exaggerated claims of “curing” his patients); JOHN C. FARRELL, *FREUD’S PARANOID QUEST: PSYCHOANALYSIS AND MODERN SUSPICION* (1998) (declaring Freud’s self-denigrating humor to be a “communicable disease” infecting intellectual thought); ADOLF GRÜNBAUM, *THE FOUNDATIONS OF PSYCHOANALYSIS* (1984) (questioning empirical support of psychoanalysis); FRANK SULLOWAY, *FREUD, BIOLOGIST OF THE MIND: BEYOND THE PSYCHOANALYTIC LEGEND* (1979) (calling Freud a “crypto-biologist” whose ideas were simply “an epitome of the late-nineteenth century [evolutionary] vision of man put forth by so many of his forgotten contemporaries”); ELIZABETH M. THORNTON, *THE FREUDIAN FALLACY: AN ALTERNATIVE VIEW OF FREUDIAN THEORY* (1984) (viciously critiquing Freud’s theories as the result of cocaine addiction). The most vocal and persistent critic of Freud is Frederick Crews, who began his attack with a series of articles published starting in 1980 and continuing throughout the 1980s, 1990s and up to the present day with his recently published biography. FREDERICK CREWS, *FREUD: THE*

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a whole climate of opinion."<sup>3</sup> Gone are the days of *Mad Men* when having an analyst was a standard accoutrement of upper middle class life, like having a piano, and a Freudian vocabulary was on every educated person's lips. Yet Freud is not so much forgotten (though he is discredited in certain circles) as he is now so fundamental that the ideas he popularized (the formative influence of childhood, repression and the unconscious, to name just a few) are no longer attributed to any particular thinker or school of thought. They are just part of the intellectual furniture in the house of ideas in which we all live.

In 1911, just a little more than ten years after the publication of *The Interpretation of Dreams* and around the time Freud's ideas were first being popularized,<sup>4</sup> another book was published in German, which also had a significant influence on the intellectual culture of that time.<sup>5</sup> Titled *Die Philosophie des Als Ob*, (in English, *The Philosophy of 'As If'*),<sup>6</sup> this book was actually first published as a dissertation, in 1877,<sup>7</sup> the year that Freud, then a medical student at the University of Vienna, moved to Ernst Brucke's physiology laboratory where he studied the brains of humans and other animals.<sup>8</sup> This was twelve years before *The Interpreta-*

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MAKING OF AN ILLUSION (2017). See, e.g., Frederick C. Crews, *Analysis Terminable*, 70 COMMENTARY 25 (1980); *The Revenge of the Repressed, Parts I and II*, NEW YORK REVIEW OF BOOKS (1994); *The Verdict on Freud*, 7 PSYCH. SCIENCE (1996) THE NEW YORK REVIEW OF BOOKS

<sup>3</sup> W.H. Auden, *In Memory of Sigmund Freud*, in ANOTHER TIME (1940).

<sup>4</sup> See Dean Rapp, *The Early Discovery of Freud By the British General Educated Public, 1912-1919*, 3 SOC. HIST. MED. 217(1990).

<sup>5</sup> That same year saw the publication in Paris by French philosopher and legal theorist Rene Berthelot of UN ROMANISME UTILITAIRE: ETUDE SUR LE MOUVEMENT, another work that, like "the philosophy of as if," expressed the pragmatist spirit of the time. See Richard Rorty, *Pragmatism as Romantic Polytheism*, in THE REVIVAL OF PRAGMATISM: NEW ESSAYS ON SOCIAL THOUGHT, LAW AND CULTURE (Morris Dickstein ed., 1998).

<sup>6</sup> Hans Vaihinger, *DIE PHILOSOPHIE DES ALS OB: SYSTEM DER THEORETISCHEN, PRAKTISCHEN UND RELIGIÖSEN FIKTIONEM DER MENSCHHEIT AUF GRUND EINES IDEALISTISCHEN POSITIVISMUS* (1911).

<sup>7</sup> See Arthur Fine, *Fictionalism*, 18 MIDWEST STUD. PHIL. 1, 3 (1993).

<sup>8</sup> See, e.g., PETER GAY, *FREUD: A LIFE FOR OUR TIME* 32-33, 106 (1988); ADAM PHILLIPS, *BECOMING FREUD: THE MAKING OF A PSYCHOANALYST* 61, 69 (2014).

*tion of Dreams* was published, and eight years before Freud started working on that transformative book. Written by a young German philosopher by the name of Hans Vaihinger, *The Philosophy of 'As If'* also was a study of the human mind, though one that focused strictly on the questions of cognitive psychology that are the shared terrain of psychology and philosophy. How do people know things? What does human knowledge consist of? Are people capable of knowing anything at all? Subtitled “A System of the Theoretical, Practical, and Religious Fictions of Mankind,” Vaihinger’s work answered these questions by putting forth the theory that objective knowledge of reality is not attainable, but that we can attain a kind of knowledge that is practically useful and sufficiently reliable to be treated *as if* it is true. All thought, according to Vaihinger, consists of idealizations or presumptions that we treat as if they are true, even though we lack the ability to verify them. Facts, in other words, are fictions. The fiction lies not necessarily in their falsehood, but rather, in the unwarranted degree of certainty we assign to what are merely inferences, which is the only way of knowing things we have and which are, at best, only probably true.

Vaihinger’s theory of “fictionalism,” as this philosophy is sometimes known,<sup>9</sup> captured the attention of European and American intellectuals in the early decades of the twentieth century. His reception in American and English philosophical circles can largely be credited to C.K. Ogden, an Englishman who translated Vaihinger’s magnum opus and published the English translation in 1924, just a little more than a decade after the original book took German intellectual circles by storm.<sup>10</sup> Best known as the co-author with I.A. Richards of *The Meaning of Meaning*, which ushered in New Criticism,<sup>11</sup> Ogden was an eccentric scholar who dedicated most of his life to the promotion of Basic English, an 850-word

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<sup>9</sup> See, e.g., Fine, *supra* note 7.

<sup>10</sup> Hans Vaihinger, *THE PHILOSOPHY OF 'AS IF': A SYSTEM OF THE THEORETICAL, PRACTICAL, AND RELIGIOUS FICTIONS OF MANKIND* (C.K. Ogden trans., 1924) (1911).

<sup>11</sup> C.K. & I.A. RICHARDS, *THE MEANING OF MEANING: A STUDY OF THE INFLUENCE OF LANGUAGE UPON THOUGHT AND OF THE SCIENCE OF SYMBOLISM* (1927).

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“controlled language,” not unlike Esperanto, which he invented and believed was destined to become a universal language and bring about world peace.<sup>12</sup> He also devoted much of his time to editing and translating works on the philosophy of mind, which shared the common theme of criticizing philosophical realism (the doctrine that things exist independently of our perceptions of them) and the correspondence theory of truth (according to which true statements are accurate reflections of things as they actually exist). All of the thinkers that Ogden promoted rejected the correspondence theory in favor of the essentially pragmatist view that the only criteria for validating beliefs are utility and probability. In 1922, two years before he published his English translation of Vaihinger’s work, Ogden assisted F.P. Ramsey with producing an English translation of Wittgenstein’s *Tractatus Logico-Philosophicus*.<sup>13</sup> Eight years after he brought out his translation of Vaihinger’s *Philosophy of ‘As If,’* Ogden published a posthumous collection of Bentham’s writings on the role of fictions in human thought. Composed of scraps of paper Bentham had left behind, which Ogden pieced together and assembled into a book, *Bentham’s Theory of Fictions* (the title Ogden bestowed on it) is arguably Ogden’s theory more than Bentham’s.<sup>14</sup> Whether Bentham held the full-blown philosophy of fictionalism that Ogden attributed to him

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<sup>12</sup> Curiously, there appears to be no writing on the history of Basic English, notwithstanding a spate of books on other constructed languages, such as Esperanto. On Ogden’s Basic English project, as well as his “Benthamania,” see James E. Crimmins and K.E. Garay, *The C.K. Ogden Papers at McMaster University: Bibliographia Benthamania*, 32 ARCHIVARIA 114, 116 (1991) (noting that “[a]mong the early supporters of Basic English Ogden could count on were George Bernard Shaw, Julian Huxley, and H.G. Wells.”).

<sup>13</sup> LUDWIG WITTGENSTEIN, *TRACTATUS LOGICO-PHILOSOPHICUS* (C.K. Ogden trans., 1922). For more on this collaboration, see generally LUDWIG WITTGENSTEIN, *LETTERS TO C.K. OGDEN WITH COMMENTS ON THE ENGLISH TRANSLATION OF THE TRACTATUS LOGICO-PHILOSOPHICUS* (Georg Henrik von Wright ed., 1973); Mathieu Marion, *Wittgenstein, Ramsey, and British Pragmatism*, 4 EUR. J. PRAGMATISM & AM. PHIL. 1, 2 (2012).

<sup>14</sup> C.K. OGDEN, *BENTHAM’S THEORY OF FICTIONS* (1932); see also Nomi Maya Stolzenberg, *Bentham’s Theory of Fictions—A ‘Curious Double Language,’* 11 CARDOZO STUD. L. & LIT. 223 (1999).

is debatable. What is not debatable is that the ideas about the dependency of human thought on fictions expressed in this book are quite at odds with Bentham's well-known views about the nefarious role played by fictions in law. Whereas Bentham was famously derisive about legal fictions, calling them "a syphilis, which runs in every vein" of English law<sup>15</sup> along with many other colorful epithets, the words of Bentham that Ogden gathered, which focus on the use of fictions outside the context of law, express an approving view of fictions as an "indispensable"<sup>16</sup> constitutive feature of human thought, which blurs the line between fiction and fact. As Ogden summarized it, "Bentham believed that language must contain fictions in order to remain a language" and in order to express thought.<sup>17</sup> Far from regarding them as "vile lies"<sup>18</sup> (the term he used when describing legal fictions), Bentham described the fictions he thought to be ubiquitous in scientific thought and everyday factual observations, as "a sort of innocent falsehood, the utterance of which is necessary to the purpose of discourse."<sup>19</sup> In short, at least as presented by Ogden, Bentham espoused a theory of fictionalism similar in content and spirit to Vaihinger's.

Despite Ogden's effort to popularize it, *Bentham's Theory of Fictions* had little impact, although it was reviewed in the pages of the Harvard Law Review by Lon Fuller, the renowned American legal philosopher, in 1933, shortly after it was published. Fuller was dismissive of the book, pronouncing "Bentham's turn of mind . . . inimical to the painstaking analysis demanded by these subjects."<sup>20</sup> Fuller had expressed his own

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<sup>15</sup> JEREMY BENTHAM, 1 THE WORKS OF JEREMY BENTHAM 92 (John Bowring ed., London, Simpkin & Marshall 1843).

<sup>16</sup> OGDEN, *supra* note 14, at xxxii, 15.

<sup>17</sup> *Id.* at i.

<sup>18</sup> *Id.* at 141-45.

<sup>19</sup> *Id.* at xliii.

<sup>20</sup> L.L. Fuller, *Review: Bentham's Theory of Fictions*, 47 HARV. L. REV. 367 (1933).

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thoughts on “these subjects” in a series of law review articles the preceding year.<sup>21</sup> Originally published in the *Illinois Law Review* between 1930 and 1931, Fuller’s essays remain the leading work on the subject of legal fictions, thanks largely to their republication in the form of a book in the late 1960s, when Fuller was at the height of his fame.<sup>22</sup> They were written when Fuller was still a young man and starting out in his career as a legal philosopher. The first essay, which became the first chapter of the book, addresses the definitional question of what legal fictions are. The second addresses the question of what legal fictions are for. And the final one is entirely devoted to a discussion of *Vaihinger*.<sup>23</sup>

Fuller’s work reflects the wide influence that *Vaihinger’s Philosophy of ‘As If’* once enjoyed. By the time his essays were reissued as a book in 1967 under the elegantly simple title *Legal Fictions*, *Vaihinger* had long been out of fashion and Fuller was obliged to update his thirty-five year old work with a reference to the then-reigning philosopher of science, Thomas Kuhn.<sup>24</sup> But when he first wrote those essays, in the early 1930s, Fuller was far from alone in his fascination with *Vaihinger’s* philosophy. Indeed, as Kwame Anthony Appiah recently recalled in an interview he gave just last Spring, *Vaihinger* was, for a while, “incredibly famous.”<sup>25</sup> Although his ideas never entered into popular consciousness, as Freud’s did, his influence during the teens, twenties, and thirties extended well beyond the fields of philosophy of science and mind (where his readers included the likes of Wittgenstein and Carnap)<sup>26</sup> to include

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<sup>21</sup> L.L. Fuller, *Legal Fictions*, 25 ILL. L. REV. 363 (1930); L.L. Fuller, *Legal Fictions*, 25 ILL. L. REV. 513 (1931); L.L. Fuller, *Legal Fictions*, 25 ILL. L. REV. 877 (1931).

<sup>22</sup> LON FULLER, *LEGAL FICTIONS* (1967).

<sup>23</sup> Interestingly, Fuller relied on his own translation of *Vaihinger*, rather than C.K. Ogden’s.

<sup>24</sup> FULLER, *LEGAL FICTIONS*, supra note 22.

<sup>25</sup> See Andy Fitch, *Pictures for Many Different Purposes: Talking to Anthony Appiah*, BLOG: LOS ANGELES REVIEW OF BOOKS (May 11, 2018), <https://blog.lareviewofbooks.org/interviews/pictures-many-different-purposes-talking-anthony-appiah>.

<sup>26</sup> A.W. CARUS, *CARNAP AND TWENTIETH CENTURY THOUGHT: EXPLICATION AS ENLIGHTENMENT* 126 (2007) (“*Vaihinger’s* positive doctrines influenced Carnap less than the basic framework in which he articulated the Kantian questions.”).

scholars of linguistics, religion, and law. His philosophy of as if also was a significant influence on the budding Vienna Psychoanalytic Society, most notably, on Alfred Adler<sup>27</sup> and Sigmund Freud.<sup>28</sup>

Anne Dailey's new book, *Law and the Unconscious: A Psychoanalytic Perspective*,<sup>29</sup> marks the revival of both law and psychoanalysis and the fictionalist philosophy of 'as if.' And it stands as an important reminder of their interrelationship. Although Dailey does not reference Vaihinger, the commitment of psychoanalysis to a philosophy of 'as if'—and the indispensability of this philosophy to law—are central themes of her book.

Dailey takes "intent" and "motive" as her primary examples of facts that the law is routinely required to "find," which can only be concluded to exist by relying on certain fictions. The elusiveness of subjective states of mind, which remain forever hidden inside the "black box" of the human mind, makes them a prime example of the problem of proof, and this "question of what we can know and prove about subjective states of mind" is presented by Dailey as one of the "two overarching inquiries" of her book.<sup>30</sup> The other overarching inquiry is "the question of who we are as human beings,"<sup>31</sup> more specifically, "what it means to be an agent with the capacity to choose freely"<sup>32</sup> and, more fundamentally, whether we have the capacity to choose on which the assignment of legal and moral responsibility depends. To each of these issues, Dailey responds with the identification of a legal fiction upon which courts and other institutions and actors routinely and necessarily rely.

The legal fiction that corresponds to the issue of attributing agency and responsibility to human actors that Dailey identifies is the

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<sup>27</sup> PAUL STEPANSKY, IN FREUD'S SHADOW: ADLER IN CONTEXT 154 (1983).

<sup>28</sup> Richard E. Geha, *Freud As Fictionalist: The Imaginary Worlds of Psychoanalysis*, in 2 FREUD: APPRAISALS AND REAPPRAISALS (Paul Stepansky ed., 1988).

<sup>29</sup> ANNE C. DAILEY, LAW AND THE UNCONSCIOUS: A PSYCHOANALYTIC PERSPECTIVE (2017).

<sup>30</sup> *Id.* at 17.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 10.

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fiction of rationality. According to this fiction, adult individuals are presumed to be “conscious, knowing beings who generally make decisions consistent with their beliefs, desires, and intentions.”<sup>33</sup> Dailey explains that this presumption has the status of a fiction because “no one actually believes that individuals are rational automatons” and “we know that people behave irrationally at times.”<sup>34</sup> Adhering to the presumption, Dailey explains, means that “the law acts *as if* people are rational.”<sup>35</sup> The law applies the presumption knowing that people often behave irrationally and not knowing if that was the case in the particular situation to which the presumption is being applied. The law does this, Dailey further explains, because “doing so seems essential to furthering the goals of a liberal legal system committed to the ideal of individual liberty.”<sup>36</sup> It “relies on this well-entrenched fiction that people make conscious choices and consciously intend their actions in order to justify holding them responsible for their behavior.”<sup>37</sup>

Much of Dailey’s book is concerned with effectuating a reconciliation between law and psychoanalysis, which have become estranged from one another because of a mutual misunderstanding about their respective views about the use of such fictions. At first blush, the fact that “[l]aw resorts to a fiction of rationality”<sup>38</sup> appears to put it at odds with psychoanalysis. “The law thus resists psychoanalysis because the idea of the dynamic unconscious seems to be irredeemably at odds with the law’s liberal norms and the social order that law functions to uphold.”<sup>39</sup> Dailey is at pains to correct this “mistaken idea that psychoanalysis views the individual as helplessly *irrational*.”<sup>40</sup> “Nothing could be further from the truth,” she says emphatically.<sup>41</sup> The rest of the book, in particular,

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<sup>33</sup> *Id.* at 18.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* (emphasis added).

<sup>36</sup> *Id.* at 21.

<sup>37</sup> *Id.* at 18.

<sup>38</sup> *Id.* at 21.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

chapters Three and Four, on the topics of “Psychoanalysis and Free Will” and “Guilty Minds” respectively, lays out her case for viewing psychoanalysis as a discipline that, like law, aims at developing the faculty of reason and the mechanisms of ego control that make human beings into autonomous responsible individuals. Both law and psychoanalysis, in her view, are committed to a “a practical conception of human freedom that recognizes both agency and constraints on agency.”<sup>42</sup> They thus address the problem of holding people responsible for their actions in a similar way.

There is a more fundamental problem, however, which Dailey recognizes also constitutes a site of convergence between law and psychoanalysis, and that is the question of “how does law know and prove what goes in the mind of legal actors?”<sup>43</sup> This may sound like the same as the first issue, and the two are indeed intimately tied together, both practically and theoretically. But the first is a question about whether the human psyche can ever satisfy the conditions for holding an individual responsible for her actions, given internal forces (e.g., emotions and animal drives) and external forces (e.g., traumatic experiences or deficits in our upbringing that impair cognitive and emotional development) that drive our decisions. Because these are forces over which we have no control, they call into question the assumption that human beings have the capacity for choice upon which assignments of blame and responsibility rest. This is separate from, and theoretically prior to, the question of how we can establish what was going in the mind of a particular human being in a particular situation. That question only becomes relevant if we assume that people can satisfy the conditions for holding human beings responsible for their actions in most cases, as the presumption, or fiction, of rationality holds. If we did not maintain that fiction, if we held that human beings are never capable of exercising agency, there would be no point in having *mens rea* requirements. And if we thought there were some circumstances in which people have the capacity for rational

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<sup>42</sup> *Id.* at 24.

<sup>43</sup> *Id.* at 29.

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choice, but that the conditions in which this is true are rare, there still would be no warrant for presuming their capacity for choice and agency; the presumption would have to be the other way around. It is only because we do make the presumption of rationality, which is based on the view that most human beings are *usually* able to engage in enough self-reflection and self-control to warrant holding them responsible for their actions, that the question arises of how to determine if a person lacked the capacity for rational choice in a particular case, thereby rendering their punishment (or a judgment of civil liability) unjust or in need of mitigation.

Dailey's analysis of how law and psychoanalysis, respectively, deal with this problem of proof is one of the most interesting and important contributions of her book. Furthering her project of bringing these two estranged fields back together, she convincingly shows that law and psychoanalysis share a theory and a practice of "as if." And in so doing, she reveals that the application of the legal fiction of rationality (which is to say, treating people *as if* "individual decision-making is . . . the product of conscious, informed choice," rather than "the result of unseen motivations, beliefs, and desires that often elude us") rests on a more fundamental legal fiction: namely, that the law, in its "fact-finding" function, can establish "truth."<sup>44</sup> Just as Dailey disputes the proposition that psychoanalysis rejects the ideal of rationality on the basis of which judgments of culpability can be made, she disputes the proposition that law embraces a naive idea of establishing historical truth. Instead, she shows that legal standards of proof, rules of evidence, and fact-finding procedures reflect a sophisticated understanding of the impossibility of ever establishing "historical truth" to a certainty. From this understanding stems the belief that we need to accept "narrative truths," stories about what likely happened in a particular case which are constructed out of beliefs about what usually happens. (Here we see the link between narrative and probable, as opposed to certain, truths.)<sup>45</sup> This same substitution of narrative for

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<sup>44</sup> *Id.* at 21.

<sup>45</sup> *Id.* at 34-35.

historical truth is already recognized to be a feature of psychoanalysis, which “does not put the discovery of historical truth at the center of the inquiry,” but, rather, “focuses on constructing a narrative that makes sense of psychic truth.”<sup>46</sup> Pointing to the work of post-Freudian psychoanalysts, in particular D.W. Winnicott and other members of the British school of object-relations, Dailey shows how Freud’s flickering insight into the constructed nature of historical truth<sup>47</sup> has been developed into a more consistent theory of narrative truth, which “derive[s] from the plausibility and well-formedness of the narrative discourse.”<sup>48</sup> Were it the case that the legal process of establishing facts purported to be “getting at ‘truth’ in any strictly empirical sense,” it would indeed be at odds with the psychoanalytic understanding of the kinds of truth claims we can make. But, as Dailey shows, the law understands full well that its ability to uncover historical truth is a pretense and that all it can hope to do is to establish possible, at best probable truths.

Hope itself, and its close cousin, wishfulness, is another of the principal subjects of Dailey’s book. This is a fundamentally optimistic book that construes both law and psychoanalysis as optimistic disciplines motivated by the belief in the possibility that human beings can behave somewhat rationally and somewhat responsibly and that legal actors can themselves behave somewhat rationally and therefore justly. But this is an optimism chastened by the awareness of the ever-present possibility of our irrational drives and desires overwhelming our better judgment and undermining just and responsible action, both on the part of the people who are subject to the law (i.e., all of us) and on the part of the people (judges and jurors) who are responsible for applying it. Blindness, born of the wish for things to be otherwise than they are, as well as our simple inability to see things as they are actually are or as other people see them, is a perpetual danger. (Some of the most compelling pages of the

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<sup>46</sup> *Id.* at 34.

<sup>47</sup> *Id.* at 35.

<sup>48</sup> *Id.* (quoting PETER BROOKS, *PSYCHOANALYSIS AND STORYTELLING* 59 (1994)).

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book discuss the doctrine of “willful blindness,” which holds people responsible for willfully avoiding knowledge that would have rendered them culpable of a crime.) But while Dailey is alive to such dangers and to the law’s own willful blindness (to the forces that determine human action and to the limits of its own ability to know things), she is ultimately a believer in the capacity for law and for people generally to be good. Such optimism is tied to a fundamentally anti-perfectionist outlook, which eschews both perfectionism (the elimination of *any* doubt, not just reasonable doubt) and radical skepticism (the refusal ever to judge or act on judgments because of the ineliminability of doubt). Drawing on Winnicott’s well-known concept of the “good enough mother,” Dailey proposes that “psychoanalysis points toward a vision of good-enough judging,” judging which is admittedly imperfect, falling far short of absolute certainty and truth, but nonetheless adequate to the tasks of meting out justice and satisfying other human needs.<sup>49</sup>

The invocation of Winnicott’s good-enough mother points to the nurturing and caretaking nature of the law in its fact-finding mode. By providing answers to questions of fact, the law satisfies our emotional need for closure. It stills the anxiety that arises out of the uncertain state of not knowing things we have a strong desire to know. It thereby not only soothes us on an emotional level. It operates on a cognitive level as well, populating our brains with beliefs—beliefs about what usually happens, beliefs about what is supposed to happen, and beliefs about what happened in a particular case—that may or not be true. Of course, this fact-finding function is not always successful. The ability of the law to provide closure and the ability of people to gain closure from the law and to believe in the law both depend on suppressing the “as if” character of our beliefs. When the awareness of that character surfaces, the law

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<sup>49</sup> *Id.* at 79-85. I also have proposed that the legal process of fact-finding is based on a model of good-enough judging analogous to Winnicott’s conception of the good-enough mother. See Nomi Maya Stolzenberg, *Anti-Anxiety Law: Winnicott and the Legal Fiction of Paternity*, 64 *AM. IMAGO* 339, 343-45, 377 (2007).

is no longer able to serve the essentially maternal function of “minding” us.<sup>50</sup>

“Minding,” it is worth noting, is a term used in England to refer to the work of childcare and, more generally, caretaking. (A “childminder” is a nanny). In philosophical discourse, the term refers to the processes by which the diffuse psychological processes of the human brain become integrated into the form or substance of a “mind” and populated with particular perceptions, beliefs, and ideas.<sup>51</sup> Dailey’s turn to the object-relations school of psychoanalysis, with its focus on early childhood development and the mother-infant relationship, sheds light on how the law performs both these aspects of “minding,” just as mothers traditionally have performed the role of minding children, at one and the same time. In doing so, it offers a model of legal authority that contrasts with the paternal model of authority associated with the law’s regulatory and penal functions, the more common focus of works on law and psychoanalysis. Calling attention to the fact-finding function of the law, Dailey asks us to consider what happens to our understanding of law when, rather than drawing exclusively upon Freud’s account of law “as prohibitions,” which “the child” (i.e., the son) “learns to obey . . . out of fear that the father will unleash his castrating fury,” we instead, or also, model the law on the relationship of the child to the mother.<sup>52</sup> By locating the origin of the law in the pre-Oedipal time of maternal caregiving, she reveals the extent to which legal authority is constituted by bonds of attachment (love) as much as fear. And she further reveals the extent to which such emotional bonds are integrally related to the formation of cognitive beliefs. The two functions that legal fictions perform, the creation of a state of cognitive certainty, which entails the formation of certain beliefs, and the creation of state of emotional calm, which follows the resolution of

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<sup>50</sup> See *id.*

<sup>51</sup> See, e.g., JONATHAN LEAR, *OPEN MINDED: WORKING OUT THE LOGIC OF THE SOUL* 249 (1998) (explaining that “A person is *minded* in a certain way if he has the perceptions of salience, routes of interest, feelings of naturalness in following a rule, and so on which constitute a form of life.”)

<sup>52</sup> Dailey, *supra* note 29, at 235.

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uncertainty, are not just analogous to the functions traditionally ascribed to the mother. They *are* the functions ascribed by Winnicott to the “good-enough mother,” whom he understood to play an indispensable role in facilitating cognitive development and the formation of a basic sense of reality. As Winnicott depicts it, this cognitive function of the maternal caregiver is not a separate function that exists alongside the provision of emotional and physical caretaking. It is *through* the acts of physical caregiving (feeding and holding) and emotional caretaking (loving and looking with the maternal gaze) that the mind begins to integrate itself and to integrate a self, which is to say, the perception of the difference between self and other, which begins as the perception of the difference between self and mother.

Winnicott was crystal-clear about the dependency of cognitive development on the physical acts of being held and fed and loved (claims that have since been confirmed by neurological science.)<sup>53</sup> And he was equally explicit about the “illusionary” nature of the perception of reality that is the result of normal psychological development.<sup>54</sup> Most babies, Winnicott maintained, “are fortunate enough to have a mother whose initial active adaptation to their infant’s needs was good enough.”<sup>55</sup> He goes on to say that “[t]his enables them to have the illusion of actually finding what was created (hallucinated).”<sup>56</sup> “Eventually,” he concludes, “such a baby grows up to say, ‘I know there is no direct contact between external reality and myself, only an illusion of contact, a midway phenomenon that works very well for me when I am not tired. I couldn’t care less that there is a philosophical problem.’”<sup>57</sup> The philosophical problem that

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<sup>53</sup> See, e.g., Mörelius et al., *Early Maternal Contact has an Impact on Preterm Infants’ Brain Systems that Manage Stress*, 28 NURS. CHILD. & YOUNG PEOPLE 18, 62-63 (2016); Feldman, Rosenthal & Eidelman, *Maternal-Preterm Skin-to-Skin Contact Enhances Child Physiologic Organization and Cognitive Control Across the First 10 Years of Life*, 75 BIOL. PSYCHIATRY 55-64 (2014).

<sup>54</sup> D. W. Winnicott, HUMAN NATURE 114-115 (1988).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

Winnicott here alludes to is of course the same as that which occupied Vaihinger, Bentham, and Fuller, the problem of how we know things given the fact that the human mind is unable to make “direct contact” with reality. For Winnicott, as for Vaihinger and other thinkers who accept that the human mind cannot simply reflect external reality, the problem extends beyond the difficulty of proving subjective states of minds. It is not just “[w]hat ‘lurks within’ [that] can never be known directly.”<sup>58</sup> As Winnicott and Vaihinger recognized, all facts present the same problem: they can’t be simply found. They have to be constructed. They have to be fabricated. That is to say, they have to be fictions. (The root of meaning of fiction, it needs to be recalled, is simply that which is fabricated or formed.)

Dailey’s turn to Winnicott and the other object-relations theorists to explain *how* facts are found in and by law helps us to see that the creation of beliefs about facts out of inferences and indicia is one of the essential functions of the adjudicative system. It helps us to see, further, that this is an essentially maternal function, which replicates the emotional and cognitive effects of the good enough mother. Like the good enough mother, the good enough judge performs the two kinds of minding at once, soothing us on the emotional level and populating our minds with beliefs on the cognitive level—soothing us *by* populating our minds with beliefs. Thus, the good enough judge stills anxiety by creating an illusion of certainty and constructing a matrix of beliefs that we treat as if they were true (“a midway” phenomenon that usually “works very well”).<sup>59</sup>

The corollary to this is that when beliefs fail to “work very well,” they cease to function as such, that is to say, they fail to be accepted. Winnicott proposes that beliefs fail to “work” when we are “tired,” by which he seems to mean, temporarily disabled from making the mental effort required to sustain suspension of disbelief that usually keeps us going.<sup>60</sup> These are the moments in which our ability to keep up the usual illusions

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<sup>58</sup> Dailey, *supra* note 29, at 29.

<sup>59</sup> HUMAN NATURE, *supra* note 56, at 115.

<sup>60</sup> *Id.*

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flags and we suddenly see flashes of the reality that lies beyond our perceptions. In these moments, we question our perceptions or our very ability to perceive things as they are.

But fatigue is hardly the only situation which brings about such lapses of “illusionment,” as Winnicott refers to the normal state of human consciousness. There are other, political and cultural, circumstances in which the official fictions cease to work. When the authorized presumptions fail to meet our practical needs, our awareness of their fictional nature comes to the surface, overwhelming our ability to suspend disbelief and treat them as if they are true. Dailey’s turn to the object-relations school does not tell us much about what these circumstances are, but by helping us to see that it is utility that is the critical determinant, her analysis points toward a needs-based account for evaluating the validity of legal fictions and understanding when and why they fail to work. It is meeting, or failing to meet, human needs that fictionalism tells us is the relevant criterion, not some Archimedean standard of objective truth.

Dailey’s turn to Winnicott and other object-relations also helps us to see that the way the law constructs facts is a practical implementation of the philosophy of “as if.” This philosophy existed in law long before Vaihinger. Vaihinger did not himself apply his theory to law. It was Fuller who applied Vaihinger’s theory to fictions in law.<sup>61</sup> But in doing so he was merely revealing an understanding of the fictive nature of fact-finding that has always been an integral part of the theory and practice of law. For Dailey, the most immediate source for the fictionalist view is not Vaihinger, but Oliver Wendell Holmes. Her book builds on her earlier work on Holmes, which located him at the intersection of nineteenth century romanticism and philosophical pragmatism.<sup>62</sup> Reaching back to Holmes as her philosophical forbear, she shows how the justification for substituting merely probable truths that we treat “as if” they are true for

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<sup>61</sup> For a recent discussion of Vaihinger’s omission of legal discourse from his analysis of the use of fictions in scientific and religious discourse, and Fuller’s role in bringing Vaihinger’s theory of fictions to bear on law, see SIMON STERN, *LEGAL FICTIONS AND THE LEGAL IMAGINATION* (forthcoming) (on file with the author).

<sup>62</sup> Anne C. Dailey, *Holmes and the Romantic Mind*, 48 *DUKE L.J.* 429 (1998).

certain truth is an expression of philosophical pragmatism, but also, at the same time, of romanticism. Romanticism goes beyond merely recognizing the limits of human reason (as pragmatism does) to exalt the wild and irrational dimensions the human mind. But what links the two is a kind of wishful thinking: if only we could act as if people are rational, the Holmesian view that Dailey adopts seems to say, the wish for rationality would become self-fulfilling—at least to a point.

Dailey's invocation of Holmes demonstrates the fundamental link between fictionalism and pragmatism. The idea that fictions, such as the fiction of rationality, are validated by their utility is an expression of the basic pragmatic idea that there is no criterion for validating beliefs other than utility. More specifically, fictionalism asserts that fictions are valid if acting as if they are true serves to get people to act in ways that meet our basic needs. The needs whose satisfaction fictionalism posits as the sole criterion for validating beliefs are psychological as well as material, including the need for comfort and stability, the need for knowledge and a sense that the world is basically just. These ideas are the common coin of all theories of mind and theories of knowledge that fall under the broad umbrella of philosophical pragmatism.

To be sure, Vaihinger rejected the application of this label to his philosophy.<sup>63</sup> He insisted that his philosophy of “as if” was distinguishable from the philosophical pragmatism in vogue when he was writing (a vogue owing in no small measure to the influence of Holmes and Holmes's intellectual comrades, William James, John Dewey, and Charles Sanders Peirce.) But in this insistence there was a strong hint of protesting too much. Vaihinger wrote the dissertation from which his famous book derived in the very decade that American philosophical

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<sup>63</sup> See, e.g., Fine, *supra* note 7, at 8 (“In highlighting the idealizations and approximations commonly used in modeling physical phenomena, Vaihinger's central concern is to undo the opinion that if constructs are devoid of reality they are also devoid of utility. Put the other way around, Vaihinger regards the inference from utility to reality as fundamentally incorrect. Thus, despite his pragmatic emphasis on thought as a tool for action, he wants to distinguish his position from the Jamesian form of pragmatism that regards truth to be whatever turns out to be “good” by way of belief, for all the scientific fictions satisfy this formula.”).

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pragmatism first emerged, when the movement was at the peak of its influence (the 1870s). The intellectual leader of that movement, Charles Peirce, also went to great lengths to distinguish his philosophy from pragmatism, going so far as to coin an ungainly neologism—"pragmaticism"—in order to deny the connection between his philosophy and pragmatism. Needless to say, the term never caught on, and today, Peirce is widely recognized as the father of American pragmatism, notwithstanding his efforts to deny it. By the same token, without getting caught up in the philosophical quibbles that separate one version of pragmatism from another, we can recognize that Vaihinger's philosophy likewise belongs to the tradition of philosophical pragmatism, notwithstanding *his* attempts to deny it.

The basic pragmatist principle, shared by psychoanalytic thinkers like Winnicott, philosophers like Vaihinger and legal scholars like Fuller, is that the only test of any fact claim's validity is its utility. If it works, it can be treated as "true." Utility in turn is related to probability. On the pragmatist view, probable truths are a serviceable substitute for certain truths. Together, probability and utility constitute the only criteria of "truth" or validity we have.

This is the view that underlies the assertion that facts are constructions. In today's parlance we might use the term "social constructions," but an earlier age preferred the term fictions. Fiction, from this point of view, is synonymous with construction. A fiction is a thing that is fabricated, constructed, by human minds. As Fuller argued at great length in his otherwise short book, fictions are not the same as falsehoods; they might even be "true" in most cases, meaning the application of a legal fiction to a particular situation might correspond with what was actually the case. Thus, for example, the legal fiction of paternity—the presumption that husbands are fathers of their wives' babies—might be applied in cases where the husband who is declared to be the father actually did impregnate his wife! But the fact (so to speak) remains that even in those cases, the facts are not, strictly speaking, proven. They are merely presumed to be true. They, accordingly, become the basis

for acting *as if* they were true, with beneficial and dangerous consequences as the case may be. They are, in this sense, constructions or fictions.

We are living in a moment of renewed interest in the role of fictions in establishing legal and scientific facts. In 2017, the same year that Anne Dailey's book on law and psychoanalysis was published, the philosopher Kwame Anthony Appiah published a work of philosophy called *As If: Idealization and Ideals*.<sup>64</sup> As his title clearly signifies to those in the know (and a major aim of the book is clearly to have more people in the know), the book is a tribute to, and an attempt to revive interest in, Vaihinger's philosophy of "as if." Resisting the persistent irrepressible tendency to regard fictions as dangerous lies, Appiah aims, as his book jacket proclaims, to explore "how strategic untruth plays a critical role in far-flung areas of inquiry," including decision theory, psychology, natural science, and political philosophy.<sup>65</sup> Like Vaihinger before him, Appiah does not focus on law. But the potential applications to law are not hard to miss.

It would be nice to see Appiah and Dailey in dialogue together. That would allow for a fuller exploration of how Vaihinger's philosophy of "as if" and fictionalism, more generally, apply to the law. More importantly, it would allow for the role of law in the creation of "as if" truths to be more fully explored. Even outside the domains of judicial proceedings, it is clear that there is something "lawlike" going on in the construction of scientific, religious, and everyday factual beliefs. What that lawlike something is has yet to be fully explicated (though social theorists like Foucault and historians and philosophers of science like Daston, Shapin and Shaffer, to name just a few, have made important contributions to

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<sup>64</sup> KWAME ANTHONY APPIAH, *AS IF: IDEALIZATION AND IDEALS* (2017).

<sup>65</sup> *Kwame Anthony Appiah: "Sometimes in Thinking about the World, the Truth Isn't What You Need"*, LAVIN AGENCY (Aug. 15, 2018), <https://www.thelavinagency.com/news/kwame-anthony-appiahs-latest-book-as-if-idealization-ideals>.

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our understanding).<sup>66</sup> In its careful attention to the actual practices of fact-finding in legal cases, Dailey's book opens a window into the ways in which substantive rules and standards (like the presumption of rationality and doctrines of culpability) interact with evidentiary rules and practices (like legal presumptions that we treat as if they were true, thereby creating and indulging in the fiction that we have found the presumed facts to be true).

It is worth pondering why the return to Vaihinger and the philosophy of as if is occurring at this moment. Perhaps in a time of "truthiness" (or are we already post-truthiness?), fake news, and blatant lying, we are in need of a way of recognizing lies and falsehoods and arriving at shared truths that doesn't depend on denying the constructed nature of the stories we tell and the fictive nature of facts. In a recent commentary on the confirmation hearing debacle which recently took place, at which then nominee, now Justice, Brett Kavanaugh was credibly accused of sexual assault and lying under oath, Randol Schoenberg, a lawyer best known for recovering the famous Klimt paintings in one of the first Nazi-looted art cases,<sup>67</sup> wrote a blog about the Kavanaugh hearing that began with a translation of the German phrase for wishful thinking: "the wish is the father of the idea."<sup>68</sup> Schoenberg is the grandson of Arthur Schoenberg, the renowned classical composer, and of Eric Ziesl, also a classical composer of note, both of whom were part of the community of "Hollywood exiles" who escaped from "Freud's Vienna," as their shared milieu is

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<sup>66</sup> See, e.g., LORRAINE DASTON, OBJECTIVITY (2007); LORRAINE DASTON, CLASSICAL PROBABILITY IN THE ENLIGHTENMENT (1988); MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., 1977); STEVEN SHAPIN, A SOCIAL HISTORY OF TRUTH (1994).

<sup>67</sup> The case of *Republic of Austria v. Altmann* and Schoenberg's role in litigating it are depicted in the films *Woman in Gold*, *Stealing Klimt* and *Adele's Wish* and in the book *LADY IN GOLD: THE EXTRAORDINARY TALE OF GUSTAV KLIMT'S MASTERPIECE, PORTRAIT OF ADELE BLOCH-BAUER* (2012) by Anne-Marie O'Connor.

<sup>68</sup> E. Randol Schoenberg, *Wishful Thinking and Reasonable Doubt*, SHOENBLOG (Sept. 20, 2018), <http://schoenblog.com/?p=1592>.

often referred to, settling in Los Angeles. Schoenberg fils (more precisely, fils of fils) grew up in this community, absorbing the culture and the history of his grandparents and their close-knit circle of friends and dedicating himself to perpetuating the memory of that culture. His artfully constructed dissection of the evidence against Kavanaugh, assessing the credibility of Kavanaugh and his accuser, begins by confronting the undeniable psychoanalytic fact that, indeed, “the wish is the father of the idea.”<sup>69</sup> He then goes on to carefully sift the evidence and analyze the testimonies given respectively by Kavanaugh and his accuser, Dr. Christine Blasey-Ford. Schoenberg assesses each piece of evidence for its likelihood against the background of what experience or science has taught is usually true in these matters, thereby exemplifying the pragmatist method of relying probabilistic truths. Thus, he rebuts the argument that “she waited too long to tell anyone” with the observation that “[i]t is quite common, perhaps even more common, for people to keep secret an incident of sexual assault,” and likewise responds to the argument “no one else can confirm her story” by observing that “this is something that is true with many sexual assault allegations.”<sup>70</sup> Throughout his analysis, Schoenberg reminds us of the necessity of being vigilant about the possibility that our own assessments of the evidence are subject to our wishes—and the need to take active steps to emancipate ourselves from our wishful thinking. “[W]hen you are deciding issues where you really do care about the result, it is not so easy to make sure that your wish is not controlling the way your mind is working. You have to try to sublimate that wish to another wish (for example, a commitment to *stare decisis*.)”<sup>71</sup>

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* In the same paragraph, Schoenberg expresses his disappointment in Justice Kavanaugh’s initial Senate testimony that recited the now obligatory mantra that “[a] good judge must be an umpire, a neutral and impartial arbiter who favors no litigant or policy.” *Id.* Ironically speculating that “[p]erhaps he was the only student at Yale Law School who didn’t receive the notoriously theoretical training that Yale was best known for at the time,” Schoenberg asserts that due to his legal training, Kavanaugh “certainly must know that judges do more than just ‘call balls and strikes’” and takes him to task for failing to

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This is exactly the type of psychoanalytic technique that Dailey says should inform legal practice.

Wishful thinking, Schoenberg's topic, and willful blindness, Dailey's special concern, are two sides of the same coin. Both represent forms of blindness and, indeed, bias, to which we are all inescapably prone. Accepting that facts are social constructions, legal fictions, requires squarely recognizing that we often *fail* to see the truth, that is, we often fail to see other people's perspectives and legitimate needs because of how we are blinded by our own desires and needs. But that does not mean we are incapable of enlarging our vision. To the contrary, as Schoenberg's skillful analysis demonstrates, recognizing our blind-spots is the necessary prerequisite to overcoming them and arriving at good enough judgments of the truth.

In our flailing attempts to come to grips with the attack on common standards and procedures for fact-finding and decision-making, there has been a tendency to blame our current predicament on intellectual schools of thought that call attention to the constructed nature of facts and deny the possibility of objective truth. These attacks on postmodernism are worse than risible. They promote the kind of facile thinking and false dichotomies that the philosophy of as if—and the law—has always wisely eschewed. The simultaneous appearance of Dailey's and Appiah's books heralds a revival of this ancient wisdom. With her focus on the common philosophical heritage of psychoanalysis and law, Dailey's work in particular turns our attention to the essential task at hand:

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acknowledge that "deciding legal and factual issues all require creativity and ideas," of which, "as the German saying goes," the wish is the father.

not to deny the dependency of factfinding on fictions, but to develop the tools for distinguishing between valid and invalid fictions—tools that are both legal and psychoanalytic.

**About.** Nomi Stolzenberg holds the Nathan and Lilly Shapell Chair in Law at the University of Southern California Gould School of Law and is a co-director of USC's Center for Law, History, and Culture.

THE YALE JOURNAL OF LAW & THE HUMANITIES

**MARTHA MERRILL UMPHREY**

***Law and Psychoanalysis: An Ambivalent Attachment***

Allow me to begin with a poem, resonant with Anne Dailey's project.

**WH Auden, Law Like Love (1939)**

Law, say the gardeners, is the sun,  
Law is the one  
All gardeners obey  
To-morrow, yesterday, to-day.

Law is the wisdom of the old,  
The impotent grandfathers feebly scold;  
The grandchildren put out a treble tongue,  
Law is the senses of the young.

Law, says the priest with a priestly look,  
Expounding to an unpriestly people,  
Law is the words in my priestly book,  
Law is my pulpit and my steeple.

Law, says the judge as he looks down his nose,  
Speaking clearly and most severely,  
Law is as I've told you before,  
Law is as you know I suppose,  
Law is but let me explain it once more,  
Law is The Law.

Yet law-abiding scholars write:  
Law is neither wrong nor right,  
Law is only crimes  
Punished by places and by times,  
Law is the clothes men wear  
Anytime, anywhere,  
Law is Good morning and Good night.

Others say, Law is our Fate;  
Others say, Law is our State;  
Others say, others say  
Law is no more,  
Law has gone away.

And always the loud angry crowd,  
Very angry and very loud,  
Law is We,  
And always the soft idiot softly Me.

If we, dear, know we know no more  
Than they about the Law,  
If I no more than you  
Know what we should and should not do  
Except that all agree  
Gladly or miserably  
That the Law is  
And that all know this  
If therefore thinking it absurd  
To identify Law with some other word,  
Unlike so many men  
I cannot say Law is again,

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No more than they can we suppress  
The universal wish to guess  
Or slip out of our own position  
Into an unconcerned condition.  
Although I can at least confine  
Your vanity and mine  
To stating timidly  
A timid similarity,  
We shall boast anyway:  
Like love I say.

Like love we don't know where or why,  
Like love we can't compel or fly,  
Like love we often weep,  
Like love we seldom keep.<sup>1</sup>

I begin with this poem in order to praise Anne Dailey's book for its deep investment in a humanities-embracing approach to law and legal theory. Like Auden, Anne leans into the largest questions one can ask about the nature of law; and like Auden, far from abandoning law, Anne reframes or recasts those questions from a perspective that emphasizes the constitutive place of humanness in any conversation about the relation between law and justice. As she suggests, "Law and psychoanalysis share a humanistic perspective regarding the idiosyncratic, individual, and diverse nature of subjective experience."<sup>2</sup>

That perspective emerges halfway through Auden's poem, when the narrator turns from the project of mapping various authoritative or monologic opinions on the nature of law (from gardeners, priests, judges, mobs, idiots) to a dialogic conjuring of law via a colloquy with an intimate addressee. Shifting tone, the narrator speaks of a "we," uncertain but impelled by a desire to understand law ("the universal wish to guess")

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<sup>1</sup> W.H. AUDEN, *Law like Love*, in THE COLLECTED POETRY OF W.H. AUDEN 74 (1945).

<sup>2</sup> ANNE DAILEY, LAW AND THE UNCONSCIOUS: A PSYCHOANALYTIC PERSPECTIVE 10 (2017).

and by unavoidable implication in it (our own position is not an unconcerned condition), that approaches law from a slant perspective. Moving from metaphor (law is) to simile (law is like), the final stanza constitutes the “we” as profoundly human, subject to forces that cannot be controlled, affectively saturated, and fundamentally irrational; in short, the legal subject Anne places before us.

Anne’s approach is quite unlike other law and humanities scholars interested in the conjunction of law and psychoanalysis because she conceives of psychoanalysis not just as a set of theories about human mind and subjectivity, but also as a set of clinical practices and relations; in other words, as a pragmatic response to human suffering. Among the many aspects of this book to admire, I appreciate the clarity with which it renders contemporary psychoanalytic precepts, the pragmatism of Anne’s applications of psychoanalysis to law, and the impressive reach of the legal implications of her analysis. Orienting the book to the actual practice of psychoanalysis helps Anne overcome well-trodden scholarly claims that law and psychoanalysis have incompatible aims.<sup>3</sup>

Anne offers an incisive critique of liberal legality’s fantasy of a legal subject—reasoning, autonomous, transparent—and thereby a critique of the injustices done under liberal legality’s name. As is true in psychoanalytic practice, she argues, law ought to imagine the self and psyche as dynamic, relational, and only relatively autonomous, and it ought to both foster and, on a larger scale, engage in the kind of self-reflection that brings it closer to doing justice to individuals.

Although Anne’s project is in one sense to analyze, inflect and reframe legal theory and doctrine by drawing our attention to psychoanalytic approaches to problems in various areas of law, her work is invested in finding and illuminating some parallels between psychoanalysis and law that in fact go to the very heart of an inquiry into the nature of

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<sup>3</sup> Indeed, as Anne notes, Freud himself famously made such an argument: he resisted psychoanalysis’s use as a legal tool to assess guilt. But that is a very narrow way to conceive the relation between law and psychoanalysis, as Anne shows us. And perhaps Freud had a deficient understanding of the juridical anyway.

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law itself. *Law and the Unconscious* broadly considers the implications of certain fundamentals of psychoanalysis in three different domains: legal theory, specific legal doctrines, and processes of adjudication. Focusing here only on the third domain, and more specifically the trial, Anne's insights enable us to see and ask questions about a number of shared epistemological and structural parallels between psychoanalytic and adjudicative modes of inquiry and judgment.

First, Anne's emphasis on the dynamic relation between analyst and patient, captured by the concepts of transference and countertransference (particularly in her chapters on confessions and on sexual choice), suggests that we might fruitfully analyze the courtroom as a site of complex, dynamic relationality. Judges, she argues, are like analysts insofar as they operate under a professional imperative to reflect on their inevitable assumptions and biases as they make adjudicative decisions.<sup>4</sup> Indeed one could ask further questions about how judges engage relationally with those who come before them: the aesthetics of the robe and bench; the laying out of rules and rulings; the censorious condemnation of threats to courtroom order. How, one might ask, is the courtroom like the human mind? What must be repressed for it to conduct its operations in a civilized manner? What relations of authority, dependence, and desire emerge among judge, jury, attorneys, and litigants or defendants?

Second, psychoanalytic practice is, fundamentally, about storytelling—about both what is said and how it is heard, or more precisely what *can* be said and how both words and silences are interpreted. Trials do something similar: they generate highly stylized narratives of guilt, innocence, mitigation, and excuse crafted with concerted attention to language, to rules that govern what can and cannot be said, and to audience. Attorneys tell stories in ways that attempt to impose interpretive codes on juries (pay attention to this; disregard that; x action can be interpreted as meaning y legally), even as the trial process constantly threatens to undo their stories with testimonial disruptions and adversarial counternarratives. Judges and juries must interpret such stories with

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<sup>4</sup> DAILEY, *supra* note 2, at 138.

the goal of assessing their truth-value and generating a coherent-enough explanation of past events on which to ground judgment.

Third, on a deeper level psychoanalysis reveals that one can never gain full access to knowledge about the self and about one's past. Some part of that past is inaccessible to the conscious mind. At the same time, psychoanalysis suggests that the not-fully-retrievable past, even if it is repressed, is always in dynamic relation to the present. The same problematic is evident in trials, which narrate past events reconstructively without being able fully to re-present them. Fallible memories, exclusions of evidence, stories emphasizing some facts over others—so many traces of the past are distorted or lost in adjudication. As Anne suggests, “Although the law’s adjudicatory mission is to uncover historical truth, it is clear that we are not always getting at ‘truth’ in a strictly empirical sense ... Psychoanalysis and law each combine modes of historical analysis with modes of narrative construction.”<sup>5</sup> As such, trials cannot fully reconstruct historical truth, any more than a patient in analysis can: at best, both settings offer stylized reenactments and interpretations. If psychoanalysis offers “psychic truth,” trials offer “legal truth,” which is not coextensive with historical truth (assuming we can ever get at that). In other words, the truths trials attempt to capture emerge from present performance of a not-fully-retrievable past: a social dreamscape that must be interpreted in order to generate the grounds for judgment.

Anne’s insistence on the relevance of psychoanalytic thinking and practice to law signals the fruitfulness of a humanities-oriented approach to the analysis of legal theory, institutions, and particular doctrines: *Law and the Unconscious* provokes rich, complex, and deeply relevant questions about what law is and should be. Ultimately, for me, the book enjoins us to view law through a psychoanalytic lens in ways that suggest law to be a site not just of rules enforced by legitimated violence, but also of attachment, with all the heartache that can bring. Anne emphasizes ambivalent attachment:<sup>6</sup> just as does a child with a parent, we both desire

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<sup>5</sup> *Id.* at 36.

<sup>6</sup> *Id.* at 91.

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and reject law; we internalize it, parry it, fall in love with it, are dependent on it, break it even as it can break us. As Auden concludes: Like love we often weep/Like love we seldom keep.

This is to my mind Anne's most fundamental insight into the nature of law: we desire the order it generates even as we resist or reject its judgments and its violence. Indeed it is precisely out of our ambivalent attachment to law—our love and hate of it—that calls for justice emerge, in both senses of the term: calls for violence as punishment for wrongdoing—for unleashing the aggression of the state—but also calls for equity and the amelioration of violence against those dependent on law, for the exercise of care and mercy in judging individuals. Anne's book is a compelling exploration of these ambivalent dynamics, and itself an example of them. For what else is a call for legal reform, such as this wonderful book offers, than an ambivalent embrace of law?

**About.** Martha Merrill Umphrey is the Bertrand H. Snell 1894 Professor in American Government at Amherst College and the President of the Association for the Study of Law, Culture, and the Humanities.

## THE YALE JOURNAL OF LAW & THE HUMANITIES

**STEVEN WILF**

***In the Heart of Criminal Law's Darkness***

Anne Dailey's *Law & the Unconscious: A Psychoanalytic Perspective* is exactly what we would expect from Anne: it is graceful, perceptive, humanist in the broadest sense of the word, and asks a big question—how might a surfacing of the unconscious challenge the presumption of rationality as core to a liberal legal framework. Anne challenges what she calls “law’s dogged resistance to the reality of unconscious life.”

In this sense, the entire book is a psychoanalytic enterprising, burrowing beneath the surface of a conscious legalism. *Law & the Unconscious* pursues Freud’s preoccupation with the surfacing of what has been buried. It is a manifesto calling for the revivification of a project that emerged in law school in the 1960s, and resulted in the publication by Jay Katz, Joseph Goldstein, and Alan Dershowitz of a treatise on law and psychoanalysis. It demands a meaningful encounter with a methodology that was familiar some fifty years ago, but which is now often seen as archaic, threatening, or too cumbersome to deploy—a method from which we have become estranged. Anne’s book traces the genealogy of law’s borrowing from psychoanalysis from Freud to Frank, from Clarence Darrow’s defense of Leopold and Loeb to Judge David Bazelon. It is an Audubon field guide to the many species of legal doctrine that must grapple with the cognitive ecosystem of the unconscious: the teasing out of confessions, contracts with hidden motives, children’s rights, and the conundrum of legally propped-up incest taboos in an age of sexual freedom. But, above everything else the book is a geological trench that reminds us of the subterranean dark places where desire, repression, and

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the unspoken lurk. It is, as they like to say in the humanities, an interrogation with an interrogative. A complication.

Anne begins her introduction with the modest opening words of the path-breaking treatise *Psychoanalysis, Psychiatry, & the Law* published in 1967 by Katz, Goldstein, and Dershowitz: “The materials are designed to present a detailed study of psychoanalytic theory and to explore its relevance, *if any*, to law.”<sup>1</sup> This, of course (as Anne herself points out) is itself a deliciously psychoanalytic moment. It is a deflection, a defense mechanism—what does *any* mean? Anne’s book is an attempt to address this lacuna. But perhaps Anne is making another gesture as well: she is simply deploying this phrase, *if any*, to suggest that we still (so many years later) need to make a special plea for relevance.

The book is chock-full of examples where a cognitive bias towards conscious, reasoned choice renders the unconscious opaque. I want to provide just one more example—which, unfortunately, entails the brutal murder of a child. The case is *People v. Anderson*,<sup>2</sup> a California Supreme Court case decided *en banc* just a year after the above-mentioned treatise was published. It involved a border, Robert Anderson, who had been living with a San Jose family for about eight months. The mother went to work, leaving the youngest child, 10-year old Victoria, alone with Anderson. During the course of the day, he had stabbed her some sixty times, seemingly blindly. Some of the stabbings took place after death. There was no evidence of a sexual assault. Anderson did not attempt to hide the body or flee. The California Supreme Court rejected a finding of first-degree murder. In order to determine premeditation, the court stated that it would be necessary to find: (1) prior planning—a purposeful pattern of behavior leading to the killing; (2) subsequent actions—disposing of the corpse or fleeing; (3) and the existence of a relationship between the perpetrator and the victim.

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<sup>1</sup>JAY KATZ, ET AL., *PSYCHOANALYSIS, PSYCHIATRY, & THE LAW* 2 (1967).

<sup>2</sup>70 Cal. 2d 15, 73 Cal. Rptr. 550, 447 P.2d 942 (1968).

Reducing the conviction to second-degree murder, the court said the killing was not purposeful, no attempt was made to cover up the crime, and there were few prior interactions between the ten-year-old girl and Anderson. Anderson did not set out well-ordered plans to commit the homicide. But what does the repeating stabbing suggest? Mindless immediate impulsivity or a long-standing intent that can only be dissipated through unrestrained violence? Anderson was discovered in the house where the murder took place—according to the trial court—constantly washing his hands. Was this *his* version of appropriate subsequent actions rather than hiding the crime? Was there a need to purify, to free himself from the blood? And the California Supreme Court finds, quite remarkably, that there was no evidence of “any prior relationship or behavior with the victim from which the jury could infer that defendant entertained a ‘motive’ for killing his victim.”<sup>3</sup>

What does the court mean when it says (quite astonishingly) there was no relationship? It may have been a fantasy, an obsession, an acting out of some sort of conjured up intense connection, but most certainly, at least for Anderson, there *must* have been a relationship. The California court refuses to probe beneath the surface—adhering to the greatest of all legal fictions, the fiction of rational choice. The psychoanalytic enterprise, Anne tells us, is at its core a signpost warning that intellectual hydrofoils should be wary of deep waters.

Freud put it this way in his *New Introductory Lectures*: “If we wish to do justice to the specificity of the psyche, we must not seek to render it through linear contours, as in a drawing or in primitive painting . . . We have to allow what we have kept apart to blur.”<sup>4</sup> He identified the psychoanalytic project as “making the psyche intelligible [*anschaulich*].”<sup>5</sup> But such taking into account subjectivity is all well and good when we are

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<sup>3</sup> *Id.* at 33.

<sup>4</sup> Sigmund Freud, NEW INTRODUCTORY LECTURES ON PSYCHOANALYSIS (Neue Folge der Vorlesung zur Einführung in die Psychoanalyse) (Simon Weber trans. 1993) in THE LEGEND OF FREUD 33 (2000).

<sup>5</sup> *Id.*

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speaking about individual minds. I am reminded of Jerome Groopman's wonderful book *How Doctors Think*—which urges physicians to be slow, deliberative, and to look for zebras (his image) that might seem like ordinary horses.<sup>6</sup> Groopman's notion of medicine is utopian: every puzzling disease gets its own Dr. Gregory House with his team of young acolytes. If Congress would simply pass the Unaffordable Care Act to pay for all this, then we would be in marvelous shape. True, an unconscious mind is a terrible thing to waste. Yet what do we make of the psychoanalytic enterprise in the realm of criminal justice?

Anne, of course, knows we live in a very different world. Around 94% of state criminal convictions and 97% of federal prosecutions are plea bargains. The late William Stuntz describes the irony of how procedures intended to protect defendants turned into the procedural machinery of the incarceration state. Psychiatrists are often agents of the state criminal justice system, even administering forced psychotropic drugs for the purposes of readying those with mental infirmities for criminal proceedings or even capital punishment—though there are those who wonder whether the administration of Haldol for the restoration of competency in order for a prisoner to be executed is a violation of the Hippocratic Oath.<sup>7</sup> Forensics, not psychoanalysis, seems attractive as a shortcut to the truth. A recent case in Wisconsin unsuccessfully challenged the use by a judge in sentencing of a secret proprietary software called COMPAS.<sup>8</sup> Using algorithms, the software determined that the defendant posed a high risk of recidivism and was a danger to the community, and based on that report, the court sentenced him to six years in prison for evading arrest and operating a motor vehicle without the owner's consent.<sup>9</sup>

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<sup>6</sup> JEROME GROOPMAN, *HOW DOCTORS THINK* 127 (2008).

<sup>7</sup> Rhonda K. Jenkins, *Fit to Die: Drug-Induced Competency for the Purpose of Execution*, 20 S. ILL. U.L.J. 149 (1995); Kacie McCoy Daugherty, *Synthetic Sanity: The Ethics and Legality of Using Psychotropic Medications to Render Death Row Inmates Competent for Execution*, 17 J. CONTEMP. HEALTH L. & POL'Y 715 (2001).

<sup>8</sup> *State v. Loomis*, 2016 WI 68, 371 Wis. 2d 235, 881 N.W.2d 749.

<sup>9</sup> *Id.* at 757.

Anne's book shifts back and forth between two ways of thinking about the relevance of psychoanalysis of law. These may be best identified using the terminology of the French legal scholar Pierre Legendre. On one hand, we need in Legendre's terminology to capture a deeper understanding of the legal subject (*sujet*). What does it mean to probe the subconscious of offenders such as Anderson or those entangled in custody disputes? Yet her other theme is embodied in Legendre's term *anthropologie dogmatique*—what presumptions about consciousness might be embedded in the fabric of legal doctrine?

In both cases, we need to know when law should be treated as a matter of rational choices considered by individuals and when we must embark on the psychoanalytic turn. Criminal law is a form of public law. It poses issues of social governance much like constitutional law. Its historical past—at least in the state's context—has been intertwined in the late eighteenth century with our claims to sovereignty. Susanna Blumenthal brilliantly shows how our political architecture rests upon the shared cognitive touchstones of the rational mind. There is almost a touching belief that individuals are able to make moral choices except in such rare cases as duress—where a person of ordinary moral fortitude could not resist becoming the agent of a criminal figure—or extreme emotional distress—where a sudden disorienting intervention sends the rational moral compass off kilter. Yet Anne tells us that criminal law is often the law of intimacy. A maelstrom of emotions emerge around closeness: children and partners, lovers, and enemies. And it is the dilemma of intimacy, what Anne refers to as the “dynamic unconscious”—an intimacy in the criminal law sphere with emotions so powerful that that might undergo some sort of alchemy, and turn to violence.

Anne's conclusion is certainly the most intriguing part of the volume. Who should be deploying psychoanalysis as a mode of inquiry? Is it those drafting statutes such as the norms governing incest? Do we expect judges to pose psychoanalytically informed questions much as we expect fancy footnotes in doctrine on a very select number of cases? I can also imagine how discussions of the unconscious might slip into the

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sentencing phase of a criminal trial. Must lawyers be trained how to handle transference when dealing with family law clients? Do we expect self-knowledge to be a goal of a felon (those masters, so often, of narcissistic defenses)? Or, as Anne also suggests, is psychoanalysis an essential part of every citizen's formative education—a kind of Dewey on the psychoanalytic couch?

Katz, Goldstein, and Dershowitz's half-century old treatise begins with the defensive, *if any*. But the treatise's conclusion was even more telling—there has been a remarkably limited grappling by law with the unconscious. This is a classic example of one of those Freudian *lücken*—gaps—where absence speaks volumes. It is a long time to anticipate a conclusion. Anne's wonderful volume is proof that it was worth the wait.