

Psychoanalysis and the Law

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BOOK REVIEW

Psychoanalysis and the Law. C. G. SCHOENFELD. Springfield, Illinois: Charles C. Thomas. 1973. Pp. ix, 285. \$13.75.

Entitling a book *Psychoanalysis and the Law* ought to inspire the kind of interest among lawyers and law schools that *Everything You Have Always Wanted To Know About Sex*¹ created among the general public. For psychiatry and psychoanalysis have finally "arrived" on the legal stage. No less than two hundred professors are listed in this field in the current AALS *Directory of Law Teachers*.² Any month's *Index to Legal Periodicals* will show several articles of general review on "Psychiatry and the Law,"³ and recently an extensive symposium was conducted on this topic.⁴ Indeed, many of the major law schools have psychiatrists on their staffs and offer courses in law and psychiatry.⁵ We have come a long way since lawyers turned a closed, if not deaf, ear to the introduction of psychiatry into the law schools by Andrew Watson in the 1950's.⁶

Now appears C. G. Schoenfeld's book, *Psychoanalysis and the Law*. This volume is actually two books and must be so reviewed. Part I deals with "[b]asic psychoanalytic tenets and the law"—the old bones that have been worried over so many times: the unconscious, motivation, the superego, symbolism, and aggression. It is to be commended, however, for not wasting time rehashing the *M'Naghten* and *Durham* rules.⁷ Part II contains a totally new approach entitled "Psychoanalysis and Constitutional Law." Many

¹ D. RUEBEN, *EVERYTHING YOU HAVE ALWAYS WANTED TO KNOW ABOUT SEX BUT WERE AFRAID TO ASK* (1969).

² ASSOCIATION OF AMERICAN LAW SCHOOLS: *DIRECTORY OF LAW TEACHERS* 1973.

³ See Turner, *Psychiatry and the Law*, 11 OSGOODE HALL L.J. 157 (1973). See also Bartholomew, *Some Problems of the Psychiatrist in Relation to Sentencing*, 15 CRIM. L.Q. 325 (1973); Fried, *Psychiatric Consultation and Adult Probation Case Management*, 37 FED. PROBATION 12 (1973); Leroy, *Avoiding Psychiatric Malpractice*, 9 CAL. W. L. REV. 260 (1973); Wexler, *Therapeutic Justice*, 57 MINN. L. REV. 289 (1972).

⁴ *Symposium—Law and Psychiatry*, 10 AM. CRIM. L. REV. 33 (1972). See also *Symposium—Mental Illness, the Law and Civil Liberties*, 13 SANTA CLARA L. REV. 367 (1973).

⁵ Law schools having psychiatrists on their teaching staffs include Columbia University Law School, Harvard University Law School, University of California Law School, Berkeley, and University of Michigan Law School.

⁶ A. Watson, *Psychiatry for Lawyers*, 1957 (Univ. of Pennsylvania Law School mimeo); Watson, *The Law and Behavioral Science Project at the University of Pennsylvania: A Psychiatrist on the Law Faculty*, 11 J. LEGAL ED. 73 (1958).

⁷ *Durham v. United States*, 214 F.2d 862 (1954); *M'Naghten's Case*, 8 Eng. Rep. 718 (1843).

lawyers may have harbored thoughts that Supreme Court Justices have made decisions from the couch or on the basis of unconscious predilections. But that is not where this book is headed. It seriously tries to examine four constitutional problems from a psychoanalytic point of view: judicial review of congressional enactments, judicial activism and judicial self-restraint, literal interpretation of the Constitution, and balancing federal and state powers.

This review will select "motivation" from Part I and "judicial review" from Part II for detailed analysis. Only minor reference will be made to other concepts and sections.

PART I: BASIC PSYCHOANALYTIC TENETS AND THE LAW

Chapter 2 in Part I of Schoenfeld's work is entitled "Unconscious Motives and the Law." One might expect to find here a discussion of the fascinating and rapidly developing psychological studies of motivation in criminal behavior. Not so. There is not so much as a clear definition of "motive."⁸ The book turns out to be Neo-Freudian in approach,⁹ and is more concerned with unconscious motives in judges' decisions and reactions of litigants to judges than with the psychology of motivation in criminal or other acts with which the law deals.¹⁰

The most elementary psychology textbooks today would not so limit a chapter on motives.¹¹ Current motivational theory emphasizes "drives" such as exploration, curiosity, achievement, and values.¹² Regrettably, Schoenfeld fails to recognize that the old "id" drives of Freud are inadequate explanations. Even this reviewer, as

⁸ A generally acceptable modern definition of motive might be: "The capacity to habitually gain gratification from a particular class of incentives."

⁹ Schoenfeld summarizes why lawyers should pay particular attention to psychoanalytic psychology by quoting John Dollard's observation, "Let's face it, Freud has won." P. 5. He also echoes Edward S. Robinson's view that a lawyer is "likely to conclude that of all contemporary psychologists, the Freudian is the one whose interests are most nearly identical with his own." *Id.*

¹⁰ Very early the author makes clear his view that trials offer many opportunities for unconscious ideas and reactions to find expression. . . . Thus the reverential awe exhibited by some persons toward judges—and conversely the angry defiance displayed towards judges by others—may well reflect the influence of parent-oriented feelings.

Pp. 16-17.

¹¹ See, e.g., *PSYCHOLOGY TODAY: AN INTRODUCTION* (2d ed. 1972).

¹² See J. ATKINSON, *AN INTRODUCTION TO MOTIVATION* (1964); J. ATKINSON, *A THEORY OF ACHIEVEMENT MOTIVATION* (1966); D. BERLYNE, *CONFLICT AROUSAL AND CURIOSITY* (1960); A. MASLOW, *MOTIVATION AND PERSONALITY* (1954); D. MCCLELLAND, *THE ACHIEVEMENT MOTIVE* (1953); White, *Motivation Reconsidered: The Concept of Competence*, 66 *PSYCH. REV.* 297 (1959).

early as 1963, summarized these modern emphases and charted several additions to personality and motivation theory.¹³ Numerous scholars, both Freudian and non-Freudian, have carried this discussion of motive far beyond Freud's concepts.¹⁴ Yet Schoenfeld fails to deal with these significant developments.¹⁵

Certainly psychoanalytic psychology has a great deal to teach lawyers about motivation, and we would do well to reshape our thinking on criminality, prisons, rehabilitation, drug abuse, and so forth accordingly. But this is not accomplished by merely pointing out to lawyers that all of us make decisions based on unconscious preconceptions and motives. Law must deal with motivation and personality factors because it deals with people. Therefore, we need further guidance on how to manipulate and change these factors which influence people to create the kinds of relationships and societal patterns which law is commissioned to produce.

Chapter IV on symbolism has similar inadequacies. Even Freudianism has much to say about symbolism. But Mr. Schoenfeld devotes a large part of this chapter to the law and judges as symbolic of the parent figure. Certainly law has used language suggesting that guardians, trustees, or even judges may be substituted for parents. Nevertheless, the law is moving away from the doctrine of *in loco parentis* in many fields, and the book fails to analyze this important trend within the framework of its discussion of symbolism.¹⁶

Although the lawyer will find Part I interesting and stimulating reading, it does not provide an instructive lesson in what he needs to know about psychoanalysis.

PART II: PSYCHOANALYSIS AND CONSTITUTIONAL LAW

The most interesting of Schoenfeld's theories in Part II is his psychoanalytical explanation of judicial review. He presents the two principal—and to a certain extent, opposing—theories of judicial review: (1) that it was intended by the Founding Fathers and (2) that it was inevitable, whether or not it was intended.¹⁷ He points out that, although the Supreme Court claimed the power of judi-

¹³ H. FREEMAN, *LEGAL INTERVIEWING AND COUNSELING* 19-47 (1964).

¹⁴ See *PSYCHOLOGY TODAY*, *supra* note 10, at 414-15 (Table 21.2), 434-35 (Table 22.1).

¹⁵ *Id.* chs. 21, 22, 23, 24, 26.

¹⁶ There are a number of recent books dealing with law and symbolism. See, e.g., W. PROBERT, *LAW, LANGUAGE AND COMMUNICATION* (1973); W. BISHIN & C. STONE, *LAW, LANGUAGE AND ETHICS* (1973).

¹⁷ P. 111.

cial review in 1803 in *Marbury v. Madison*,¹⁸ it was not until 1857 that the Court first exercised this power in the *Dred Scott* case.¹⁹ And not until after the Civil War did the Court assume the role of final arbiter of the Constitution that it plays today.²⁰ Schoenfeld suggests that there is a psychoanalytically understandable reason for this shift by the Court from dormancy to activism:

If, as psychoanalysts have discovered, traumatic events tend to stir up unconscious vestiges of the immature needs and desires of childhood; and if, as suggested above, the Civil War was the most traumatic event in American history, then the likelihood is that the Civil War aroused in many people childhood urges . . . including the very strong wish of childhood for parental guidance and control. If it is now recalled that judges and courts frequently serve as unconscious parent symbols . . . then it is conceivable that the unconscious wish for parental direction and control presumably stirred up in many people by the Civil War may have caused these people to be more willing than before to accept . . . judicial review of congressional legislation.²¹

As a corollary to this theory, Schoenfeld views the power struggle between the states and the federal government as a type of Oedipal conflict wherein the states react to their loss of power with the "anger, hostility and rage of childhood."²² Labor relations and labor law are also seen as reflecting Oedipal patterns.²³

It would seem that Schoenfeld's four-page legal analysis in support of his judicial review theory²⁴ is less than adequate. He only briefly discusses *Marbury v. Madison*²⁵ and *Dred Scott v. Sanford*,²⁶ the *Federalist Papers*,²⁷ and the views of constitutional scholars Professors Rostow²⁸ and Corwin.²⁹ His major reliance is on practices in Switzerland, and in Sweden, Norway, and Denmark.

¹⁸ 5 U.S. (1 Cranch) 137 (1803).

¹⁹ 60 U.S. (19 How.) 393 (1857).

²⁰ See C. HAINES, *THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY* 287-312 (1914).

²¹ P. 114. See also Schoenfeld, *On the Relationship Between Law and Unconscious Symbolism*, 26 LA. L. REV. 46 (1965).

²² P. 202.

²³ P. 200. See also Morris, *The Psychoanalysis of Labor Strikes*, 10 LAB. L.J. 833 (1959).

²⁴ Pp. 108-11.

²⁵ 5 U.S. (1 Cranch) 137 (1803).

²⁶ 60 U.S. (19 How.) 393 (1857).

²⁷ A. HAMILTON, *THE FEDERALIST PAPERS* (Mentor ed. 1961).

²⁸ Schoenfeld discusses Rostow's belief that the courts have not overstepped their authority in their review activities. See Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952).

²⁹ See Corwin, *The "Higher Law" Background of American Constitutional Law* (pts. 1-2), 42 HARV. L. REV. 149, 265 (1928-1929). The author does refer to Corwin's tracing of judicial review to common law principles.

He uses these countries as examples to suggest that "judicial review of national legislation is by no means inevitable in a constitutional democracy."³⁰ In Switzerland, the national congress or a citizens' referendum decides the constitutionality of a law. Similarly, in the Scandinavian countries, the highest court does not exercise judicial review as the United States Supreme Court does.³¹

The difficulty with Schoenfeld's analysis is that he fails to consider the plain fact that ours is a government with a written constitution and written laws, and that the courts are the recognized interpreters of legal meaning. Judicial review is not as "new" as Schoenfeld suggests; its roots lie deep in Anglo-American history. In Britain, although Parliament is supreme and there is no written constitution, it is the function of the House of Lords, sitting as a *judicial* body, to make the final decision on appeals. This function was performed in the colonies, and later in the American federation, by the courts.

But these objections aside, any reader should find the author's theses fascinating. There is much in the application of psychoanalysis to law from which lawyers can learn. The book is therefore recommended, not as definitive, but as explorative and unique.

Harrop A. Freeman

³⁰ P. 110.

³¹ Pp. 109-10.