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Homo Psychologicus: Notes on a New Legal Formalism*

William H. Simon†

The world we teach about is a world built on rights and duties; the world of practice is a world built upon human needs and emotions—it is relatively irrational, unsolomonic, and fluid.

The world we teach about is a world which invokes lawyers as advocates; in the real professional world the lawyer is a manipulator who knows how to get what the client wants with subtle, unpublic, and unjudicial intrusions into the power structure. . . .

The world we teach about is, finally, a world in which standards of decision relate more or less to fairness; the real professional world, in property-settlement practice especially, is a world of decision in which standards of decision relate to love and hate.

Thomas Shaffer¹

"These contradictions are easy to explain," said the painter. "We must distinguish between two things: What is written in the Law, and what I have discovered through personal experience; you must not confuse the two. In the code of the Law, which admittedly I have not read, it is of course laid down on the one hand that the innocent shall be acquitted, but it is not stated on the other hand that the Judges are open to influence. Now my experience is diametrically opposed to that. I have not met one case of definite acquittal, and I have met many cases of influential intervention."

Franz Kafka²

Having survived the assault of the Realists earlier in this century, the doctrinal tradition in legal theory and legal education is undergoing a second wave of criticism.³ Again, doctrinal writing and education is charged with promoting a conservative ideological perspective and with ignoring the practical tasks of lawyering. Law schools are

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* This essay is part of a dialogue with Gary Bellow.

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1. T. SHAFFER, *THE PLANNING AND DRAFTING OF WILLS AND TRUSTS* 5 (2d ed. 1979).

2. F. KAFKA, *THE TRIAL* 192 (rev. ed. trans. 1957).

3. On the first wave of criticism, the Realist assault, see Note, *Legal Theory and Legal Education*, 79 *YALE L.J.* 1153 (1970); on the cooptation of the Realist critique and the survival of the doctrinal tradition, see Gordon, *J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 *LAW & SOC'Y REV.* 9, 32-44 (1975).

criticized for failing both to train competent practitioners and to instill in their students an appropriate sense of "responsibility."

One of the most interesting aspects of this second wave of criticism has been the emergence of a new style of discourse about law inspired by psychology. This style, which I call the Psychological Vision, shifts attention away from cases and statutes and the professional discourse of lawyers and judges toward the practical tasks of lawyering and the interaction between lawyers and clients. The Psychological Vision claims to cut through the formalism of the established doctrinal approach and to confront the concrete realities of lawyering.

The Psychological Vision draws heavily on a particular kind of psychology, the kind associated with American existentialist psychotherapy and the human potential movement. Perhaps the most prominent characteristics of this psychology are an exclusive concern with conscious and immediate subjective experience and an ethic of positive thinking. This psychology prescribes strict attention to the feelings and sentiments of the moment. At the same time, it urges, for the therapist, an attitude of acceptance and affirmation toward the client, and for the client, an attitude of expansive self-esteem. The theorists of the Psychological Vision find in this psychology answers to the issues of lawyering and legal education raised by the renewed assault on the doctrinal tradition. They suggest that the most fundamental practical skills of lawyering involve understanding the intimate feelings of the client and of others whose conduct impinges on the client. Moreover, they believe that the psychological ethic of positive thinking is analogous to the legal profession's ethic of client loyalty and that the psychological perspective gives depth and plausibility to the legal ethic.

The development of the Psychological Vision seems a significant event in the intellectual history of American law. Its influence on the law schools can be seen in the recent proliferation of courses on law and "human relations," negotiation and counseling, advocacy, professional responsibility, and, particularly, the clinical versions of these subjects.⁴ Moreover, the Psychological Vision seems to express attitudes which are characteristic of a substantial segment of the

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4. Much of this influence has been fostered by the Council on Legal Education for Professional Responsibility, which has subsidized the launching of clinical programs at law schools throughout the country. The Council has been a zealous propagator of the Psychological Vision. See Pincus, *The Clinical Component in University Professional Education*, 32 OHIO ST. L.J. 283 (1971). The National Institute of Mental Health has recently financed a program at Columbia University for the application of "humanistic" psychology to law teaching.

practicing bar, but which previously have not been prominently acknowledged in academic legal writing.

This essay considers the work of the legal psychologists as jurisprudence, as a set of ideas purporting to describe and explain lawyering and the legal system, rather than simply as legal and pedagogical technique. The psychologists sometimes speak as if their concerns were purely technical, but their technique necessarily assumes an understanding of the nature and purposes of lawyering and the legal system. It is this, sometimes implicit, understanding which this essay treats. The essay is thus less concerned with the psychologists' claims that their approach is effective in producing more competent and responsible lawyers than it is with the criteria of competence and responsibility which such claims assume.

In my view, the psychological literature fails to confront adequately the issues raised by the critique of the doctrinal tradition. In important respects, the Psychological Vision obscures rather than illuminates the critical issues of lawyering and legality. For the formalisms of the doctrinal tradition, it tends to substitute a formalism of its own. The Psychological Vision is impatient with—and sometimes explicitly hostile to—critical thought and theory in general, and it tends toward an unreflective and complacent acceptance of prevailing professional institutions and practices. Even while purporting to be critical of lawyers, the Psychological Vision blunts the insufficiently but significantly critical stance of the doctrinal tradition toward the practicing bar in favor of a sentimental rationalization of the attitudes and practices of elite practitioners.

The analysis which follows does not purport to give a balanced assessment of any of the writers discussed. It emphasizes the defects of their works rather than their virtues.⁵ Moreover, it makes no attempt to do justice to the distinctive features of each of these writers. What I call the Psychological Vision is a synthesis of themes present to varying degrees of explicitness in the work of these writers. How-

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5. The legal psychologists have focused attention on the phenomenology of legal education and law practice. In doing so, they have explored some problematical aspects of the relations of lawyers and clients and of law teachers and students which legal writing has tended to ignore. Most notably, they have emphasized certain ways in which lawyers often dominate and misunderstand clients and in which teachers dominate and misunderstand students. See G. BELLOW & B. MOULTON, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* (1978); Shaffer & Redmount, *Legal Education: The Classroom Experience*, 52 NOTRE DAME LAW. 190 (1976). Although these achievements are substantial, they require no elaboration here. Instead, I will focus on the problems this literature obscures and on the ways in which the answers it gives to the problems it has identified are inadequate.

ever, not all of the themes are necessarily present in the work of each writer, and there are other important (although, for the most part, not inconsistent) themes in the work of some of them.⁶

The major doctrines of the Psychological Vision express themes which have been widely perceived throughout American culture in recent years. These themes include the celebration of the private at the expense of the public, of the personal at the expense of the social, and of the affective at the expense of the cognitive. My analysis of the Psychological Vision has benefited from several recent examinations of these themes in the general context of American popular psychology and popular culture.⁷

The first part of this essay will consider very generally the problem of legal formalism. The discussion suggests some parallels between the problems of the Psychological Vision and the increasingly familiar criticisms of the two principal approaches of the doctrinal tradition. The following four parts discuss some of the major themes of the Psychological Vision. The concluding section suggests that the most fundamental defect of the Psychological Vision and of previous kinds of legal formalism stems from their refusal to confront squarely and critically the political character of law and law practice.

I. THREE KINDS OF LEGAL FORMALISM

The foremost claim of the Psychological Vision is to address the "whole person," to confront people not as juridical abstractions, but in the full depth and breadth of their humanity. It is a central contention of this essay that, in fact, the subjects of the psychological literature are no more whole than their predecessors in earlier schools of jurisprudence. They are abstract and fragmentary creatures of theory. Specifically, they belong to the species which Philip Rieff has

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6. For exceptions to this statement, see note 28 *infra*.

7. T. ADORNO, *THE JARGON OF AUTHENTICITY* (trans. 1973); A. DOUGLAS, *THE FEMINIZATION OF AMERICAN CULTURE* (1977); R. JACOBY, *SOCIAL AMNESIA: A CRITIQUE OF CONFORMIST PSYCHOLOGY FROM ADLER TO LAING* (1975); C. LASCH, *THE CULTURE OF NARCISSISM* (1978); H. MARCUSE, *ONE DIMENSIONAL MAN* (1964); D. MEYER, *THE POSITIVE THINKERS* (1965); P. RIEFF, *THE TRIUMPH OF THE THERAPEUTIC: USES OF FAITH AFTER FREUD* (1966); E. SCHUR, *THE AWARENESS TRAP: SELF-ABSORPTION INSTEAD OF SOCIAL CHANGE* (1976); R. SENNETT, *THE FALL OF PUBLIC MAN* (1977). These works develop, from a variety of perspectives, a line of argument formulated in 2 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (1835), and since revised from the perspective of Freud. The most impressive contemporary version remains in D. RIESMAN, R. DENNEY & N. GLAZER, *THE LONELY CROWD* (1950).

described as Psychological Man.⁸

Psychological Man is the successor to the discredited Economic Man and the declining Sociological Man. Economic Man is the subject of the jurisprudence exemplified by the constitutional doctrines of substantive due process which were prominent from the late 19th century through the 1930s. Economic Man is rational, egoistic, and materialistic. He inhabits a legal order which tolerates a high degree of aggression and acquisitiveness but which employs force to check the excesses of aggression and acquisitiveness when they threaten anarchy. He claims a sphere in society in which he can pursue his own interests without having to account to others for his actions.

Sociological Man is the subject of the jurisprudence which emerged from the critique of the Economic Vision and became the preeminent legal theory in America from the late 1930s until recently. It is exemplified by the work of Pound, Brandeis, Llewellyn, and Henry Hart. Sociological Man is not without selfish instincts, but he has a fundamental disposition toward altruism. He complies spontaneously with social norms, which he has internalized, and he seeks the approval of his fellows. He sees his own welfare as inextricably bound to that of the larger community.⁹

Psychological Man, the subject of the writings to be examined in this paper, is an egoist, but he is neither as rational nor as materialistic as Economic Man. He is defensive rather than aggressive. He

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8. P. RIEFF, *supra* note 7, at 29-78; P. RIEFF, FREUD: THE MIND OF THE MORALIST 329-57 (1959).

9. Terms such as Economic Man and Sociological Man hardly do justice to the doctrines to which they refer. These terms are associated more with the critiques of the doctrines than with the doctrines themselves. They are invoked here not in order summarily to dismiss these doctrines but in order to emphasize certain parallels between the criticisms to be made here of recent legal psychological literature and the familiar criticisms of the older doctrines.

For the origins of Economic Man in political economy, see A. SMITH, *THE WEALTH OF NATIONS* (1776). The jurisprudence of the Economic Vision is exemplified by the majority opinion in *Lochner v. New York*, 198 U.S. 45 (1905), and by J. BEALE, *A TREATISE ON THE CONFLICT OF LAWS* (1916). See generally Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); D. Kennedy, *The Rise and Fall of Classical Legal Thought 1865-1940* (1975) (unpublished manuscript on file with author). For an example of the contemporary effort to revive the Economic Vision on revised premises, see R. POSNER, *ECONOMIC ANALYSIS OF LAW* (2d ed. 1978).

For a sociological tract exemplifying Sociological Man, see T. PARSONS, *THE SOCIAL SYSTEM* (1950). Examples of the jurisprudence of the Sociological Vision include L. BRANDEIS, *BUSINESS—A PROFESSION* (1926); H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (tent. ed. 1958); K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960); and R. POUND, *THE SPIRIT OF THE COMMON LAW* (1921). See generally Kennedy, *supra*; D. Kennedy, *Utopian Rationalism in American Legal Thought* (May 1970) (unpublished manuscript on file with author).

does not seek to impose his will on the material world, but rather to achieve a largely internal satisfaction, a "sense of well being."¹⁰ Psychological Man acquiesces in the claims of social relations and norms, but this acquiescence takes a heavy toll in anxiety and frustration. Social relations and norms tend to compromise the fulfillment of his desires and feelings. He seeks to strike a realistic balance between acquiescence and indulgence.

The Economic and Sociological Visions are centrally concerned with the legitimacy of the demands made by society on the individual, and particularly with the justification of public power through the judicial decision. The Psychological Vision shifts attention away from these larger issues. Public power is relegated to the background as something taken for granted; its legitimacy is not in issue. The central focus of attention is the lawyer-client relation itself, and particularly the feelings of the participants. This relation is viewed in a way analogous to that of the psychotherapist-patient relation, which Rieff describes as a "community-of-two."¹¹ Within the lawyer-client relation, the client seeks a personal solution which is substantially independent of material factors or social relations.

The Economic and Sociological Visions portray the public sphere as a realm of reason or common purpose. By contrast, in the Psychological Vision, the public sphere is portrayed as chaotic and forbidding. As Rieff puts it, "the public world is constituted as one vast stranger who appears at inconvenient times and makes demands viewed as purely external and therefore with no power to elicit a genuinely moral response."¹² On the one hand, the lawyer's role is "remissive;"¹³ he releases the client from the excessive pressures of the public realm. On the other hand, it is manipulative; he advances the client's interests through his ability to influence the conduct of people with power. In both respects, his expertise lies in his mastery not so much of rules or policy, but of feeling. Like Rieff's protagonist, he is a "virtuoso of the self."¹⁴

The criticisms of the Psychological Vision which follow are all variations on the charge of formalism. The term formalism is used here in a more general and more explicitly pejorative sense than it is sometimes understood. It does not refer only to the jurisprudence of

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10. P. RIEFF, *supra* note 7, at 40.

11. *Id.* at 52.

12. *Id.*

13. *Id.* at 236.

14. *Id.* at 32.

mechanical rule application and conceptual systematics. (These are features associated with the Economic Vision.) Rather, it refers to any misuse of form in a manner which systematically inhibits understanding. Form involves the use of categories which abstract and fragment knowledge. Categories flatten out knowledge within them and mask knowledge outside them. All thought is abstract and fragmentary, but the charge of formalism suggests that categories which purport to distill and organize reality have in fact obscured it, that form has suppressed vital distinctions and connections, that it has eliminated contradiction and contingency.

Many of the familiar accusations of formalism focus on the related notions of human nature and of power.¹⁵ The Economic and Sociological Visions depend on opposed and equally untenable portrayals of human nature. The Economic Vision describes people as basically egoistic and aggressive; the Sociological Vision describes them as basically conformist and cooperative. The plausibility of both kinds of theory depends on the treatment of character and behavior at a level of abstraction which suppresses important distinctions between different kinds of attitudes and conduct. (For example, in the Economic Vision, altruistic behavior can be collapsed into egoism by arguing that it affords a purely subjective satisfaction to the actor; in the Sociological Vision, protest or deviance can be collapsed into conformism by arguing that they perform "latent functions" to satisfy social needs which the dominant value system cannot explicitly acknowledge.) At the same time, the theories fragment their fields of study by focusing on historical situations and areas of social life in which the characteristics they emphasize are most manifest and by excluding situations and areas where contrasting attitudes would be more difficult to ignore. (For example, the Economic Vision sees litigation as the characteristic legal activity; the Sociological Vision focuses on counseling and negotiation as the characteristic legal activity.)

The Psychological Vision embodies an analogous formalism in its treatment of human nature. In some respects, the defensive, antinomian, self-absorbed creatures of the Psychological Vision portray real people, but this portrayal is misleading. First, it involves an abstraction which tends to reduce all human experience to intimate feeling and which treats all social demands as equally intrusive and repressive. It thus obscures the practical and social dimensions of personal-

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15. On the critical relation of these issues, see S. LUKES, *POWER: A RADICAL VIEW* (1974), and R. UNGER, *KNOWLEDGE AND POLITICS* (1975).

ity. Most notably, it obscures people's capacity and need for fulfillment through rational and relatively impersonal social commitments: the capacity which makes it possible for people to submit to authority without experiencing it as repressive and to resist power for reasons which are not purely personal. Second, the Psychological Vision fragments the understanding of Psychological Man from his social context. It portrays the psychology it describes as a general human nature, rather than as a response to particular social situations. It ignores the relation of this psychology to the historical developments of recent decades, particularly those affecting the legal profession.¹⁶

A second issue on which the critiques of the Economic and Sociological Visions have focused is the issue of power. Modern legal thought portrays the central role of law as the control of power. In order for it to perform this role, law must be distinguished from politics; its principles must be shown to be autonomous of the interests of specific contending groups. In the Economic Vision, this demonstration rests on an integrated body of rules defining the market economy and purporting to guarantee an equal realm of basic freedom to each citizen. This demonstration depends in large part on the abstraction of the notions of freedom and power. The drastically unequal bargaining power of employer and worker, for example, is justified in part by conflating the very different situations and experiences of the two parties under the abstraction of freedom of contract. Moreover, the Economic Vision fragments the study of production and exchange from the study of social structure. Since the study of social structure requires the recognition of inequality, the realm of production and exchange can be portrayed as a realm of equality only by ignoring its relations to social structure.¹⁷

The Sociological Vision seeks to justify the exercise of power by appealing to social norms, values, and policies. Yet, norms, values,

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16. For arguments criticizing as formalistic the notions of human nature on which much of economics and sociology rests, see B. BARRY, *SOCIOLOGISTS, ECONOMISTS AND DEMOCRACY* (1970); A. GOULDNER, *THE COMING CRISIS OF WESTERN SOCIOLOGY* (1970); K. MARX, *ECONOMIC AND PHILOSOPHIC MANUSCRIPTS OF 1844* (trans. 1961); R. WOLFF, *THE POVERTY OF LIBERALISM* (1968); and Wrong, *The Oversocialized Conception of Man in Modern Sociology*, 26 AM. SOC. REV. 183 (1961). See generally R. UNGER, *LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY* 23-37 (1976).

17. See, e.g., G. LUKÁCS, *Reification and the Consciousness of the Proletariat*, in *HISTORY AND CLASS CONSCIOUSNESS* (1971); Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); Kennedy, *supra* note 9; Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974); Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909).

and policies are described at a level of abstraction which suppresses distinctions between concrete interests; conflicting interests are merged into general categories such as "economic productivity" and "industrial peace." Again, the subject is fragmented to exclude issues in which conflict is most apparent. For example, distributive questions may be defined as "legislative" and thus outside the sphere of jurisprudence.¹⁸

In the Psychological Vision, power is obscured by psychologism, the reduction of the social to the personal. Because it focuses on the affective self as the exclusive source of value and legitimacy, the psychological literature treats social norms, rules, and values as obstacles to personal fulfillment. It cannot distinguish legitimate authority—authority which might be experienced as an affirmation rather than a denial of self—from oppression. Furthermore, the psychological literature tends to personalize power. It resists understanding power as a product of class, property, or institutions and collapses power into the personal needs and dispositions of the individuals who command and obey. From this perspective, it becomes difficult to distinguish the powerful from the powerless. In every case, both the exercise of power and submission to it are portrayed as a matter of personal accommodation and adjustment.

All three formalisms share a line of fragmentation which is particularly significant. This is the line which separates the study of the judicial decision from the study of lawyering. The Economic and Sociological Visions are concerned only with the former; the Psychological Vision is concerned only with the latter. In each of the three versions this fragmentation obscures a contradiction in the attitudes of the members of the legal profession. On the one hand, lawyers believe that it is possible to justify a particular exercise of judicial power as more rational and just than the alternatives. They emphasize the availability of rational methods of factfinding and of legitimate public standards of legal criticism. The legitimacy of judicial power depends on these points. On the other hand, when rationalizing their partisan activities on behalf of private individuals, lawyers tend to emphasize the difficulty and even impossibility of deciding rationally between competing claims. In this posture, lawyers emphasize the ambiguity of evidence and the vagueness and shallowness

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18. See A. GOULDNER, *supra* note 16; Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978); Gabel, *Book Review*, 91 HARV. L. REV. 302 (1977); D. Kennedy, *Utopian Rationalism in American Legal Thought*, *supra* note 9.

of public norms.¹⁹ The profession has avoided confronting the tension between these attitudes by separating the study of the judicial decision from the study of lawyering. In this way, the acknowledgement of the connection of law and power is restricted to the judicial sphere, and the acknowledgement of the weakness of the normative basis of public power is restricted to the sphere of lawyering. The contradictions which challenge the prevailing justifications of both institutions thus remain unacknowledged.

II. THE COMMUNITY-OF-TWO

A. *From Mediation to Remission*

In 1905, Louis Brandeis spoke to a group of Harvard law students on "The Opportunity in the Law." "[Y]ou wish to know whether the legal profession would afford you special opportunities for service to your fellow-men," he began.²⁰ Brandeis's answer was that there were exceptional opportunities for public service in legal work, but that these opportunities had been largely ignored by his contemporaries at the bar who had served dominant economic interests without any sense of public obligation. He criticized corporation lawyers for failing both to "curb the excesses" of their clients and "to use their powers for the protection of the people."²¹ Brandeis argued that narrow devotion to private interest was ignoble and stultifying for both lawyer and client. In his view, personal fulfillment could only be attained by escaping the private realm and linking one's fortunes to the welfare of the greater community. Brandeis saw law as a uniquely attractive occupation because it was distinctively concerned with building bridges between private and public interest.

In 1964, Edgar Cahn and Jean Cahn contributed an article on the opportunities of lawyers to serve the poor to an issue of the *Yale Law Journal* devoted to "public interest law."²² Like Brandeis, the Cahns saw in law special opportunities for personally rewarding service, but unlike Brandeis, they did not see these opportunities in terms of public responsibilities. On the contrary, the Cahns suggested that the "lawyer's most significant asset" was his exemption from public responsibility and his obligation to the private interests of the client:

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19. Compare E. LEVI, AN INTRODUCTION TO LEGAL REASONING (1948), with Krash, *Professional Responsibility to Clients and the Public Interest: Is There a Conflict?*, 55 CHI. B. REC. (SPECIAL CENTENNIAL ISSUE) 31 (1974).

20. L. BRANDEIS, *The Opportunity in the Law*, in BUSINESS—A PROFESSION 329 (1933).

21. *Id.*

22. Cahn & Cahn, *The War on Poverty: A Civilian Analysis*, 73 YALE L.J. 1317 (1964).

Other professionals such as social workers and educators are institutionally given the role of mediating between their employers and their clients. A lawyer need not be apologetic for being partisan, for identifying.²³

In an article supposedly about public interest law, the Cahns had nothing at all to say about public values. They did speak of "middle class orientation and values," but they spoke of them with contempt and argued that the lawyer would have to "suspend such values in judging his client's case and conduct."²⁴

Brandeis's ideal of the lawyer as mediator between public and private has never been generally realized, but has had an important influence on the doctrine of legal professionalism and has been an important source of criticism from within the bar and the law schools of the persisting private and antinomian orientation of practitioners. The established bar has acknowledged public responsibility only in the most general terms and has resisted any meaningful specification or enforcement of responsibility.²⁵ It has done so because its members have feared that such specification and enforcement would sometimes bring them into costly conflict with their clients, as Brandeis's famous series of quarrels suggests.²⁶ Judges, academics, and maverick practitioners writing in the sociological tradition have consistently castigated the bar for failing to live up to its public responsibilities, although they have not achieved a consensus even among themselves as to the precise nature and extent of these responsibilities.

In the Cahns' discussion, such questions do not even arise; there is little tension between the public and private aspects of the lawyer's role because the public aspect has largely been eliminated. The Cahns shift attention from the lawyer's exceptional public responsibilities to his peculiar exemption from public responsibility. They see the lawyer's basic function not as restraining, but as remissive. They portray social norms not as redemptive, but as oppressive. They do not seem to expect lawyer and client to find fulfillment within the larger community, but rather within the community-of-two which they constitute by themselves. Thus, they view the lawyer-client relation less as a bridge between private interest and public

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23. *Id.* at 1335.

24. *Id.*

25. *See, e.g.* ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8, DR 7-101(A)(1), 7-102(B); ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 341 (1975). *See also* Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 82-83.

26. *See* Frank, *The Legal Ethics of Louis D. Brandeis*, 17 STAN. L. REV. 683 (1965).

welfare than as a self-contained institution which shields the client from the pressures of the public realm.

The Cahns' remarks exemplify a significant recent development in the discourse of legal professionalism. Like the Cahns, the legal psychologists celebrate the lawyer's ethic of partisan loyalty to the private client. Of course, the defense of partisan loyalty is not new. But throughout most of the century, lawyers have felt constrained to justify such loyalty primarily as an indirect means of furthering the general welfare in the long run (*e.g.*, by encouraging people to seek legal advice or by facilitating the presentation of claims for appropriate judicial resolution).²⁷ By contrast, the theme of the community-of-two portrays this loyalty as the central constitutive element of an intrinsically valuable personal relationship.

This theme has been developed most explicitly and extravagantly by Charles Curtis, Thomas Shaffer, and Charles Fried.²⁸ Each of these writers defends lawyer-client relations not as means to social ends, but as "good in themselves."²⁹ They emphasize the personal and even intimate nature of the needs for which clients consult lawyers. Curtis discusses the lawyer-client relation as "one of the intimate relations."³⁰ Fried writes that legal services are distinctively related to "crises going to one's concreteness and individuality."³¹ Shaffer suggests that the need for legal counseling arises from "something in human beings, in their need for one another, which the state cannot supplant."³²

These writers analogize the lawyer-client relation to a variety of intensely personal and private relations. Thus, Curtis argues for the lawyer's duty to lie to others for the benefit of the client:

A parson will lie for his parishioner, a priest for his penitent, a physician for his patient. You would lie to protect your wife and child. There are others with whom you are intimate enough, close

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27. See Simon, *supra* note 25, at 34-39.

28. Of the most prominent theorists of the legal community-of-two, only Shaffer is squarely within the Psychological Vision. I have brought Curtis, Fried, and the Cahns into the discussion because they are unusually articulate about this theme, which is integral to, but often only implicit in, the psychological literature. The Cahns, however, do not appear to subscribe to the other themes of the Psychological Vision, and Curtis and Fried would probably endorse the other themes only to a very limited extent.

29. Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1075 (1976); see Shaffer, *Christian Theories of Professional Responsibility*, 48 S. CAL. L. REV. 721, 724-25 (1975).

30. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 4, 8 (1951).

31. Fried, *supra* note 29, at 1072.

32. Shaffer, *supra* note 29, at 724.

enough to lie for, when you would not lie for yourself.³³

Fried and Shaffer have elaborated on such analogies at length. For Fried, the lawyer-client relation is like friendship. It is a "personal relation of trust and care," and it involves "an authorization to take the interests of particular concrete persons more seriously and to give them priority over the interests of the wider collectivity."³⁴ For Shaffer, the lawyer-client relation is like Christ's relation to His followers. It involves the "experience of enjoying companionship with another person, walking in his shoes, and living in his world."³⁵

Although the theorists of the community-of-two often focus on situations of exceptional intimacy or anguish, such as divorce or criminal defense, they do not limit their interpretation to such situations. They find the qualities of personal trust and care in almost all of the common activities of practitioners. Thus, Curtis finds the ethic of personal loyalty exemplified in a real estate transaction;³⁶ Shaffer emphasizes the personal intimacy involved in drawing wills and trusts;³⁷ and Fried finds the virtues of friendship in the lawyer's efforts to help a rich person avoid taxes or "to help the finance company foreclose on the widow's refrigerator."³⁸ In the psychological literature, this understanding of law practice is reinforced by the emphasis on the underlying pervasiveness and determinism of feeling. As we will see, even in the world of business, the psychologists find that intimate feeling is always working closely beneath the surface, determining what happens above.

This changed attitude toward the lawyer-client relation implies a changed attitude toward legal norms. Writers in the Sociological Vision, such as Brandeis, portray legal norms as fundamentally benign, familiar, and congruent with individual goals. In their view, law is not exhaustively and precisely fixed by the state; it is continually constituted and reconstituted by lawyers and clients themselves as they create patterns of interaction with powers delegated and ratified by the state. The sociologists point out that a lawyer who drafts a railroad's freight regulations is really dictating to the client's customers the terms of a legal relationship in a manner similar to the legislature when it promulgates a regulatory statute. They emphasize that in fashioning the positive law, courts and legislatures draw on and in-

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33. C. CURTIS, *IT'S YOUR LAW* 16 (1954).

34. Fried, *supra* note 29, at 1075, 1066.

35. Shaffer, *supra* note 29, at 738.

36. C. CURTIS, *supra* note 33, at 8-9.

37. T. SHAFFER, *supra* note 1, at 5.

38. Fried, *supra* note 29, at 1086.

corporate standards and forms worked out by individuals in the course of private transactions. For the sociologists, the fact of private lawmaking implies private responsibility for public norms. They argue that any sharp ethical distinction between the positive law and social norms is untenable and that lawyers are bound by social norms which are not explicit in court decisions and statutes.³⁹

By contrast, in the works by Curtis, Fried, and Shaffer, law appears as alien, forbidding, and oppressive. Curtis writes of justice as a "chilly virtue" and of the halls of justice as "inhospitable."⁴⁰ He argues that the lawyer can remain loyal to the client only by sublimating his sense of public obligation and treating his work as a "game" without moral significance.⁴¹ Fried deprecates the virtues of justice and public welfare as "cooler, more abstract" than the virtue of client loyalty.⁴² He opposes the sociological notion of public responsibility as a "monstrous conception."⁴³

Shaffer's analysis focuses on an incident in which a lawyer discovers that a former client has perjured himself in order to satisfy the residency requirement for an uncontested divorce. In his celebration of the lawyer's refusal to report the client's crime as an instance of Christian concern for the individual, it is clear that the only part of the Christian ethic for which Shaffer has any real enthusiasm is its antilegalism.⁴⁴ Shaffer makes no attempt to defend the lawyer's choice in terms of the injustice or cruelty of the divorce laws. He treats the incident as paradigmatic of professional responsibility issues generally and the lawyer's choice as a recognition of the external and relatively weak nature of legal norms.

These writers recognize that lawyers have obligations to courts and the law which limit their ability to pursue their clients' interests.

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39. See, e.g., H. HART & A. SACKS, *supra* note 9, at 1-9; Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

40. C. CURTIS, *supra* note 33, at 1.

41. *Id.* at 35-36.

42. Fried, *supra* note 29, at 1070.

43. *Id.* at 1078.

44. See Shaffer, *supra* note 29, at 724-26. Shaffer does not contemplate that lawyers or clients be influenced by any of Christ's more demanding precepts. Compare, e.g., 12 Luke 13-32 (Christ's teaching about property) with T. SHAFFER, *supra* note 1, at 19-26 ("feelings" about property). Shaffer's analogy between Christian love and professional loyalty ignores that the former makes radical demands on both lover and loved and extends to enemies as well as neighbors. Even Shaffer's antilegalism is quite different from Christ's. Christ deprecates the legal form in order to demand a more exacting obedience, see 1 R. BULTMANN, *THEOLOGY OF THE NEW TESTAMENT* 11-22 (trans. 1951); Shaffer deprecates law in order to license self-indulgence. Curtis is surely right in arguing that the most plausible religious analogy for legal ethics is not to Christianity but to Stoicism. C. CURTIS, *supra* note 33, at 33-34.

Yet, while Brandeis viewed these obligations as a source of redemption and inspiration, these writers treat them as a source of strain. Public obligation appears to restrict and even compromise, rather than constitute, the distinctively valuable and satisfying qualities of the professional relation. The lawyer's discharge of public responsibilities seems a betrayal; to the extent that he acts as a mediator between public and private, he seems a "double agent."⁴⁵

B. *The World Outside*

One might argue against Shaffer and Fried that, in actuality, trust and personal care do not flourish in the lawyer-client relation any more than they do in explicitly commercial relations. There is an ample empirical literature to support the argument that the professionals' ethical doctrines are empty, pretentious window dressing on a relationship characterized by distrust and impersonality in which the stronger party usually dominates the weaker.⁴⁶ The objection to be emphasized here, however, is not concerned with the discrepancy between ideals and actual practice. For present purposes, the critical point is that the analysis of lawyer and client as a community-of-two, even understood as an ideal rather than as a description, fragments the lawyer-client relation from the legal system as a whole and from the larger society. In doing so, it subverts understanding of the connection of lawyering with power and diverts attention from the moral issues of responsibility and justice which are raised by the connection of lawyering with power.

The analogies to such roles as doctor and priest are fundamentally misleading. For unlike the relations defined by these roles, the lawyer-client relation is fundamentally impersonal and other-regarding. People seek legal assistance to affect the conduct of others. In the case of doctors and priests, the principal impact of the professional's activity occurs within the professional relation in the form of the change which the patient or penitent undergoes. But in the case of lawyers, the principal impact occurs *outside* the professional relation. The client benefits only to the extent that outsiders are af-

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45. Blumberg, *The Practise of Law as Confidence Game*, in *SOCIOLOGY OF LAW* 321, 328 (V. Aubert ed. 1969). The notion that public norms are alien, rather than integral, to the professional relation is further exemplified in the recent suggestion that the lawyer's public obligations be removed entirely from the Code of Professional Responsibility and recodified as part of the general law. Weinstein, *On the Teaching of Legal Ethics*, 72 *COLUM. L. REV.* 452, 457-67 (1972).

46. See D. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* (1974); Blumberg, *supra* note 45.

fectured. Moreover, law is a relatively impersonal and coercive way of dealing with others. In some respects, law does express the values of trust and care, but more often it is a substitute for such values. Legal norms define the most general and least intimate dimensions of human interaction. For the most part, the lawyer's trust and care are important to the client *only* to the extent that the client encounters distrust and hostility in the social world.⁴⁷ Curtis is exceptionally candid on this point. He recognizes that the greater the lawyer's obligation of loyalty to the client, the greater the obligation "to treat outsiders as if they were barbarians and enemies."⁴⁸ The celebration of trust and care within the lawyer-client relation rests on an implicit vision of the social world as a realm of barbarism.

Prior to the Psychological Vision, lawyers and clients justified the consequences of their actions through various theories of procedural justice.⁴⁹ Such theories argue that the judicial process can canalize the actions of individuals egoistically pursuing private interests so as to maximize the extent to which legal outcomes serve the public interest. There is no need to rehearse here the objections to these theories.⁵⁰ The Psychological Vision is itself an acknowledgement of their failure. It does not attempt to show that the legal system is rational or that the consequences it produces are in the public interest. It simply does not concern itself with consequences at all. Yet the consequences continue to occur. However much lawyer and client may find satisfaction in their relation to each other, they continue to take actions which change the outside world and affect the lives of outsiders. By emphasizing the immediate and the personal aspects of the lawyer-client relation, the Psychological Vision obscures this fact. By celebrating the relation as an end in itself, the Psychological Vision subverts consideration of the comparatively impersonal legal, social, and ethical considerations in terms of which consequences might be identified and the actions which produced them justified or condemned.⁵¹

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47. In their critique of Fried's friendship analogy, Arthur Leff and Edward Dauer write, "The client comes to a lawyer to be aided when he feels he is being treated, or wishes to treat someone else, not as a whole other person, but (at least in part) as a threat or hindrance to the client's satisfaction in life." Dauer & Leff, *Correspondence: The Lawyer as Friend*, 86 YALE L.J. 573, 581 (1977).

48. C. CURTIS, *supra* note 33, at 8.

49. See Simon, *supra* note 25, at 39-42, 61-74, 91-94.

50. See *id.* at 42-59, 74-89, 94-113.

51. Thus, the literature of popular psychotherapy tends to vacillate between the position that the individual is responsible for everything and the position that he is responsible for nothing. See E. SCHUR, *supra* note 7, at 51-52, 78-79. No intermediate position seems possi-

This retreat from responsibility into the lawyer-client relation has occurred because issues of responsibility have come to seem enormously difficult. Brandeis's confidence in his ability to ascertain the relation between individual action and social consequence and in the legitimacy of a determinate public interest as a guide to conduct today seems facile and naive. As the Cahns suggest, imposing "middle class" notions of responsibility on poor clients may be a form of domination. No doubt the Cahns would not apply the ethic of client loyalty which they urge on poverty lawyers to lawyers for the wealthy and powerful. But the psychological approach leaves no room for such distinctions. Any attempt to distinguish among clients in terms of wealth and power would require reference to external social criteria which are irrelevant to the distinctive personal value of the relation. Since all clients are human and all have personal needs, all are entitled to the lawyer's trust and care. Fried's conclusion that the tax chiseler and the "disagreeable dowager" deserve "legal friendship" follows from the premise of the community-of-two.

Talking and thinking about the lawyer-client relationship as a community-of-two also tends to direct attention away from the relation between lawyering and political action. Throughout the past century, dominant social groups have pursued their interests both within and without the legal system through impersonal organizations which have achieved power through their ability to aggregate claims and discipline their members. By contrast, lawyers representing the disadvantaged have tended to ignore the possibilities of assisting their clients through organization and collective action and to confine representation to the separate assertion of individual claims.⁵² The bar has rationalized loyalty to established organizations by treating the organizations as persons entitled to personal care and trust. It has rationalized opposition to collective action by the disadvantaged by treating each participant as an isolated individual with personal interests which would be betrayed by any effort to achieve power by joining with others.⁵³

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ble because all criteria which might identify and distinguish among consequences have been excluded.

52. See J. HURST, *THE GROWTH OF AMERICAN LAW* 342-52 (1950); Bellow, *Turning Solutions into Problems: The Legal Aid Experience*, 34 *NLADA BRIEFCASE* 106 (1977); Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC'Y REV.* 95 (1974).

53. Compare ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 5-18 (lawyer representing corporation owes loyalty not to individuals but to "entity") with EC 2-33 (lawyer working with legal assistance organization must be loyal to "interests of individual clients").

The doctrine of the community-of-two exacerbates a formalism which has long influenced the bar's conflict-of-interest doctrines. Dominant groups have repeatedly appealed to the notions of personal service and loyalty to thwart the use of the legal system by the disadvantaged. A notable example is the attempt by Southern elites in the 1950s to block the NAACP's concerted legal assault on segregation.⁵⁴ The NAACP pursued its strategy by planning and financing test cases. The cases were brought by NAACP lawyers formally on behalf of individuals whom the organization had identified as desirable plaintiffs and persuaded to participate in its strategy. Bar associations accused the NAACP lawyers of illegal and unprofessional conduct in thus associating themselves with both the NAACP and the individual litigants. They argued that the lawyers' obligations to both the organization and the individual plaintiffs created a conflict of interest because, in a variety of hypothetical situations, the interests of organization and individuals might conflict, and the lawyer would then be tempted to compromise the interests of the individuals. In other words, the organization was an intruder on the community-of-two. In fact, the NAACP's arrangement was probably the most effective way for these individuals and other victims of segregation to pursue their ends through the legal process. The risk of betrayal (if there really was one) was the price the individuals had to pay in order to take collective action. But the political realities which create the need for collective action are obscured in the ideal of lawyer-and-client as a self-contained relation between individuals.⁵⁵

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54. See *NAACP v. Button*, 371 U.S. 415, 419-23 (1963).

55. Another striking example is the long history of attempts by railroads, with the zealous cooperation of bar associations, to prevent trainmen from enforcing their rights against the railroads under the federal liability acts. See Bodle, *Group Legal Services: The Case for BRT*, 12 U.C.L.A. L. REV. 306 (1965); Griffith, *The Vindication of a National Public Policy Under the Federal Employers' Liability Act*, 18 LAW & CONTEMP. PROB. 160 (1953).

In order to assist its members in finding competent and reliable counsel, the Brotherhood of Railway Trainmen in 1930 appointed 16 regional counsel and established procedures by which claims of members were referred to counsel and by which union investigators assisted counsel in preparing the cases. Over the course of four decades these procedures were attacked in disciplinary, injunction, and legislative proceedings under conflict of interest, solicitation, and lay intermediary rules. The union was portrayed as a threat to the "voluntary" and "personal" character of the lawyer-client relation. It was argued that the lawyers' dependence on the union created a danger that they would sacrifice interests of clients to those of the union and that the procedures encouraged routinized and incompetent representation.

The Supreme Court has held the union's activities protected under the first amendment. *United Transp. Union v. State Bar*, 401 U.S. 576 (1971). Yet prominent professionals continue to express concern about the impersonal and bureaucratic nature of the union's procedures, even in the absence of any evidence that the procedures lead to inadequate

The Supreme Court has held the NAACP's litigation program protected by the first amendment, but the formalism on which the case against the program was premised continues to exert a strong influence on professional ethics and ideology. Although the people who most benefit from the legal system participate largely through impersonal institutions, and elite lawyers spend most of their time serving such institutions, the bar continues to proclaim that "the attorney-client relation is personal and unique"⁵⁶ and to rationalize its devotion to impersonal institutions of wealth and power in terms of the personal norms of trust and loyalty. Although it appears that the way the disadvantaged can most effectively use the legal system is through organization and through coordination and aggregation of claims, the bar continues to discourage and inhibit this kind of lawyering in the name of "devotion to the interests of individual clients."⁵⁷ Issues concerning the distribution of power in society are translated into issues of personal relations.

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representation. See A. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 392 (1975). That they should do so is simply astonishing in the light of the facts that:

(1) A principal purpose of the campaign against the union lawyers was precisely to see that the trainmen were *deprived* of competent representation. Whatever the purposes of the bar associations, this was surely the purpose of the railroads, which financed part of the campaign and instigated many of the proceedings. Bodle, *supra*, at 314-15; Griffith, *supra*, at 174-78, 180-81. (In the 1950s the railroads operated a bureau for the sole purpose of investigating lawyers who represented trainmen for possible solicitation or conflict of interest charges. At one time, the bureau's annual budget was \$325,000. Bodle, *supra*, at 314.) For a case involving a disciplinary action against a regional counsel which was financed in part by the railroads, investigated by a railroad employee (who suborned perjury in the course of doing so), prosecuted by a railroad lawyer, and heard and decided by a committee of the Chicago Bar Association which included a prominent railroad lawyer, see *In re Heirich*, 10 Ill. 2d 357, 140 N.E.2d 825 (1946).

(2) While I know of no evidence that the trainmen are poorly served by the union's group service plan, there is evidence that personal injury plaintiffs who seek out and retain lawyers on their own are routinely exploited by their lawyers. D. ROSENTHAL, *supra* note 46. Group service plans can monitor the competence of representation and bargain for price in ways that individuals cannot do on their own. One ideological function of the community-of-two theme may be to rationalize the bar's opposition to this kind of countervailing power.

56. ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 2-9.

57. *Id.* at EC 2-33, DR 2-103(D)(4), DR 5-107(B), -107(C); see Note, *Group Legal Services and the Organized Bar*, 10 COLUM. J.L. & SOC. PROB. 228 (1974). But see ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 334 (1974). This opinion invokes the community-of-two theme in opposition to public or semi-public supervisory controls on representation of individual clients by legal services lawyers. Here the political consequences are different from the bar's position in *NAACP v. Button*, 371 U.S. 415, 419-23 (1963), but the same formalism is at work. Activities such as class actions, which some fear and some support because they may benefit the poor as a group, are defended by the bar on the ground that they are required to adequately serve the personal needs of individuals. Again, the political issues have been translated into a matter of personal relations.

III. FACTS INTO FEELINGS

A. *Masters of Feelings*

The lawyer portrayed in the Sociological Vision is, as J. Willard Hurst puts it, a "Master of Fact."⁵⁸ In order to advance the client's ends, the lawyer needs a strong understanding of the details of the client's activities. And because the client's activities are fundamentally social, because they are intricately tied to the larger society through myriad effects and relationships, the lawyer's quest for understanding of the client's situation soon leads beyond the client's immediate world to the realm of broader social movements and processes. Thus, in a memorandum on "What the practice of law includes," Brandeis wrote, "Know not only specific cases, but the whole subject. Can't otherwise know the facts. Know not only those facts which bear on direct controversy, but know all facts and law that surround."⁵⁹ Moreover, since social relations are founded on social values, the study of facts involves the study of values.⁶⁰ Service to the particular needs of the particular client leads the lawyer into the realm of social issues where the normative and empirical converge, the realm of social purpose or "policy."

The Psychological Vision disdains this concern with fact or policy as useless, elitist, oppressive, and neurotic. It deprecates the abstract, the remote, and the social, and urges concentration on the concrete, the immediate, and the emotional. The lawyer should not be a Master of Fact, but a Master of Feeling. Thus, Gary Goodpaster emphasizes that the "successful lawyer" is characterized by a "subtle awareness of the emotions, concerns, and anxieties of others."⁶¹ Shaffer deprecates the "property lawyer," who is "fact conscious" and "relevance conscious," and exalts the "legal counselor," who "tunes into feelings, his own and his client's."⁶²

The legal psychologists interpret the world almost exclusively in terms of feelings. The opening chapter of Shaffer's book on wills eschews any discussion of the role of testamentary disposition in, for instance, distributing wealth, financing government, or channeling private conduct. Instead, Shaffer explains the subject in terms of the testator's "anxiety about death, his personal involvement with his

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58. J. HURST, *supra* note 52, at 339.

59. *Id.* (quoting A. MASON, *BRANDEIS* 69 (1946)).

60. See Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1 (1943).

61. Goodpaster, *The Human Arts of Lawyering: Interviewing and Counseling*, 27 J. LEGAL EDUC. 5, 5 (1975).

62. T. SHAFFER, *supra* note 1, at 11.

property, and his *need* somehow to express love despite death through property.”⁶³ There is a section entitled “Feelings About Death” which reports on classes in a course on wills in which Shaffer and a psychologist asked students to speak freely about their feelings concerning death. In another section entitled “Feelings About Property,” Shaffer exalts private ownership because it provides a variety of emotional gratifications and comforts.⁶⁴

Goodpaster elaborates a theory which “postulates that the behavior of an individual at any given time is the resultant of all the *psychological* forces operating on the individual at that time” and suggests that the “facts which would be of interest to one who would understand the behavior of another” are these “psychological forces.”⁶⁵ Apparently, “psychological forces” are simply feelings. As an example, Goodpaster discusses a hypothetical criminal defendant. “What are the psychological forces operating on the client . . . ? His arrest and current incarceration, together with the criminal charge, generate considerable anxiety, fear and uncertainty in him.” He is also “suspicious of the role of defense counsel . . . . At the same time, . . . [h]e will experience . . . relief when visited by counsel . . . .”⁶⁶ It is an indication of how sharply the Psychological Vision breaks with the traditional doctrinal approach that this analysis never suggests that the client’s behavior might be affected by, or that the lawyer should be particularly concerned with, whether or not the client committed the criminal actions with which he is charged. The doctrinal approach focuses on the justice and legality of punishment and directs attention to the relation between the accused’s past conduct and applicable legal norms. The Psychological Vision displaces these concerns entirely in its focus on the accused’s present feelings.

Indeed, justice and legality play very slight roles in the Psychological Vision except insofar as they are collapsed into feelings. Legal work and institutions are judged by explicitly subjective criteria. Curtis argues that the legitimacy of the adversary system rests, not on its service to ideals of “justice in general,” but rather on “the satisfaction of the parties.”⁶⁷ Writing of the lawyer as counselor, Robert Redmount asserts that the “measure of success is the most satisfac-

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63. *Id.* at 8 (emphasis added).

64. *Id.* at 12-19, 19-26.

65. Goodpaster, *supra* note 61, at 26, 24 (emphasis added).

66. *Id.* at 26-27.

67. C. CURTIS, *supra* note 33, at 3.

tion and the largest sense of well-being."⁶⁸ The psychologists recognize that in entering into the client's world of personal feeling, the lawyer, "to a certain extent, leave[s] the law behind."⁶⁹

Clinical courses inspired by the Psychological Vision focus on "conflict" and "struggle," but the conflict and struggle do not occur in society. The psychologists are concerned with conflict and struggle not among individuals, but within them. The student learns to "struggle with his feelings" and to deal with "conflicting feelings."⁷⁰ He learns to interpret encounters between people in terms of the feelings which they arouse in each other. He studies not social relations, but "interpersonal relations."

The social world, the world in which people act, appears only dimly and randomly. It has neither history nor structure. It is of interest principally insofar as it is reflected through or impinges upon feelings. For the lawyer, the facts which define the social world are a function of the feelings perceived in the community-of-two. The psychologists legitimate the most deceptive and obfuscatory of traditional litigation tactics by deprecating the notion that empirical truth might transcend individual feeling. They emphasize that "facts are elusive."⁷¹ Redmount speaks of values and facts as "value and fact possibilities" to be exploited in accordance with the desires of the client.⁷² He emphasizes the lawyer's duty to adopt the client's "view of reality."⁷³ In a chapter entitled "Constructing the Case," Gary Bellow and Bea Moulton assert that "to a large extent good facts . . . are often made, not found."⁷⁴ They emphasize the extent to which people can be "'persuade[d]' . . . to recount facts in a way consistent with the outcome [lawyers] desire."⁷⁵ They repeatedly urge that lawyering be conceived in terms of metaphors, such as writing fiction, acting in a play, or playing a game, which imply the unreality of the context in which the lawyer acts.⁷⁶ One of their students has written an essay interpreting his clinical experience in

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68. Redmount, *Attorney Personalities and Some Psychological Aspects of Legal Consultation*, 109 U. PA. L. REV. 972, 989 (1961).

69. Goodpaster, *supra* note 61, at 50.

70. Watson, *Some Psychological Aspects of Teaching Professional Responsibility*, 16 J. LEGAL EDUC. 1, 22 (1963). These conflicts and struggles are usually resolved with surprising ease.

71. Meltsner & Schrag, *Report from a CLEPR Colony*, 76 COLUM. L. REV. 581, 585 (1976).

72. Redmount, *Humanistic Law Through Legal Counseling*, 2 CONN. L. REV. 98, 102 (1969).

73. Redmount, *supra* note 68, at 983.

74. G. BELLOW & B. MOULTON, *supra* note 5, at 290.

75. *Id.* at 364.

76. *See id.* at 2-8.

terms of a novel consisting of three conflicting versions of the same event, all of which are regarded as equally true.⁷⁷ Describing the experience of a student in wrestling with a difficult ethical question, Marvin Kayne expresses satisfaction that the student began to see "life as a complex of grays and no longer starkly contrasting blacks and whites" and eventually concluded that "there just wasn't any 'real answer.'" ⁷⁸

Michael Meltsner and Philip Schrag have published a lively description of a clinical course in which they appear to have dramatized many of the critical features of the Psychological Vision. They deride doctrinal education as abstract and useless; they want to prepare students to practice in the real world. For Meltsner and Schrag, the principal characteristics of this world appear to be radical uncertainty and ambiguity: "Facts may be unavailable, obscure, disputed or distorted. The law may be unclear, or in flux. The goals of . . . persons . . . may be cloudy . . ." ⁷⁹ They strive to convey to students an intense experience of "simultaneous uncertainty and conflict, as well as factual, ethical, and [legal] ambiguity."⁸⁰ Students are "bombard[ed]" with conflicting and mysterious demands and perceptions.⁸¹ Students playing roles in simulated cases are given deliberately incomplete and contradictory statements of facts. Role-players deliberately confuse or change their stories. Tape machines are used to demonstrate the unreliability of attempts to establish empirical truth through ordinary perception and memory.⁸²

Having resigned themselves and their students to the opaqueness of the social world, Meltsner and Schrag proceed to establish the relative accessibility of feelings. Students are required to write "introspective papers that explore their own feelings." In class, the instructor behaves like a "group dynamics trainer or consultant," reporting "his feelings (as his feelings, not as truth) openly and honestly. He encourages students to express openly their feelings about

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77. A. Strasser, *The Good Soldier and Truth* (1976) (unpublished manuscript on file with author).

78. Kayne, *The Establishment is Leaning on My Poor, Helpless Client*, in COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY, LAWYERS, CLIENTS & ETHICS 1, 4-5 (1974) [hereinafter cited as *LAWYERS, CLIENTS & ETHICS*].

79. Meltsner & Schrag, *supra* note 71, at 584. The Council on Legal Education for Professional Responsibility (CLEPR) has described one of its goals as introducing students to the "chaos" of law practice. CLEPR, FIRST BIENNIAL REPORT 13 (1971), *quoted in* Grossman, *Clinical Legal Education: History and Diagnosis*, 26 J. LEGAL EDUC. 162, 176 (1974).

80. Meltsner & Schrag, *supra* note 71, at 593.

81. *Id.* at 585.

82. *Id.* at 593-94.

him.”⁸³ They discuss and analyze their own feelings about practice and the feelings exhibited by clients and witnesses they have interviewed.

In describing classes on ethical questions, Meltsner and Schrag are concerned not with the substance of what was said, but with the emotions displayed. Here, for example, is their description of a class discussion of the ethical obligations of a student representing a father in a custody battle:

Did the group owe it to the client to use the legal machinery most likely to enable him to get what he wanted? Did the group owe it to the children to select exactly the opposite strategy? The class was really a rough one: one student's voice cracked repeatedly, Schrag snapped a paper clip across the room, and Mary, whose case it was, promptly lost the file.⁸⁴

In the Psychological Vision, moral questions tend to be answered in terms of the feelings they arouse.

For some of the psychologists, the knowledge of the client's social context which Brandeis thought so important is not only irrelevant, but positively destructive of the kind of psychological understanding the lawyer really needs. In order to empathize sufficiently with the client, the lawyer may have to discard relatively impersonal economic and social categories and concepts. There is a moral as well as an epistemological dimension to this point. To some of the psychologists, there is something inhuman about the abstract, the remote, and the relatively impersonal. "Intellectualizing," thinking about the world abstractly, is often taken as a moral failing. Thinking about people abstractly degrades them by stripping them of what makes them human, that is, their feelings. Shaffer writes that a "lawyer may react negatively to his client if he looks at his client in social or economic terms; viewed in this way, the client may be a conventional middle class prig."⁸⁵ But by "tun[ing] in to" the client's feelings, the lawyer understands the client as an individual, and this understanding makes possible a more "positive" attitude toward the client, which makes the relation more satisfying to both.⁸⁶ Besides being degrading to others, intellectualizing can be a sign of cowardice or maladjustment on the part of the lawyer.⁸⁷ The lawyer concerned

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83. *Id.* at 600-01; cf. Watson, *supra* note 70, at 19 ("emotionalism in the classroom" a "mark of successful teaching").

84. Meltsner & Schrag, *supra* note 71, at 620.

85. T. SHAFFER, *supra* note 1, at 8; see Pincus, *supra* note 4, at 285-86.

86. T. SHAFFER, *supra* note 1, at 10-11.

87. See, e.g., Pincus, *supra* note 4, at 285; Watson, *On Teaching Lawyers Professionalism: A Continuing Psychiatric Analysis*, in COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RE-

with the abstract, the remote, and the impersonal appears unable or afraid to deal with her own and her client's feelings. She may use concepts to block out an emotional reality which frightens and daunts her.

The psychologists' case against the normative and intellectual orientation of the sociological approach is most vigorously advanced by William Pincus, president of the Council on Legal Education for Professional Responsibility. Pincus's ideas appear to have been strongly influenced by his revulsion at the "destructive university protest movement" of the late 1960s.⁸⁸ For Pincus, this student protest was the fruit of an "arrogance" for which doctrines such as those of the Sociological Vision bear significant responsibility. He argues that the proclivity of traditional legal education to "Think Big!" exacerbates "the natural affinity and the need for the young for arrogance."⁸⁹ The student who deals with experience "distilled into abstractions" comes to see "[i]ndividuals and their petty lives . . . reduced in size and consequence."⁹⁰ Concern with public policy breeds insensitivity to the concerns of individuals. Pincus argues that the policy orientation reflects an "immoral, anti-democratic, and, thank goodness, nonsensical" assumption that law students will inevitably occupy positions of public prominence.⁹¹ In his view, law schools should produce "lawyers," not "policy-makers." To this end, students should be taught that the profession exists "to serve people" rather than to exercise public power.⁹² The principal thrust of the proposed clinical curriculum is thus sensitivity to the personal needs of individual clients.

B. *The Influence of Carl Rogers*

The most prominent theoretical influence on the treatment of feeling by these writers is the psychology of Carl Rogers and his followers.⁹³ For Rogers, the self consists of a cluster of continuously changing feelings. These feelings constitute a basic core of personal

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SPONSIBILITY, CLINICAL EDUCATION FOR THE LAW STUDENT 139, 142-44 (1973) [hereinafter cited as CLINICAL EDUCATION]; Redmount, Book Review, 53 N.Y.U. L. REV. 677, 685 (1978). But see Bellow, *On Teaching Teachers: Some Preliminary Reflections on Clinical Education as Methodology*, in CLINICAL EDUCATION, *supra*, at 374, 379-85.

88. Pincus, *supra* note 4, at 283-86.

89. *Id.* at 285-86.

90. *Id.* at 285.

91. *Id.* at 292.

92. *Id.* at 292-93.

93. The summary which follows is based on Rogers, *A Theory of Therapy, Personality, and Interpersonal Relationships, as Developed in the Client-Centered Framework*, in 3 PSYCHOLOGY: A

authenticity, and the goal of therapy is to facilitate their "actualization." Rogers's principal concern is with the congruence between this self and the "self-concept," that is, between the authentic core of feelings and the individual's consciousness of these feelings. Social norms are the greatest threat to self-actualization; they create "incongruence." Incongruence occurs when the individual internalizes, as part of his self-concept, normative expectations of others which are inconsistent with his authentic feelings; the individual is then prone to screen from consciousness the inconsistent feelings. He may refrain from acting on these repressed feelings, or he may act on them and then refuse to recognize the behavior prompted by them. The incongruent person tends to be unhappy and his behavior incoherent. People are vulnerable to incongruence because, by nature, they seek and depend on some measure of recognition and approval from their fellows. Rogers calls this essential recognition and approval "positive regard." The problem is that, for reasons Rogers does not explain, the approval given by others is often conditioned by normative expectations, and the individual, in internalizing the approval, also internalizes these expectations. Therapy is a means by which the individual is liberated from the internalized normative expectations which prevent him from fully recognizing and accepting his feelings. The individual gains the insight and the confidence he needs to recognize and accept his true self through the experience of being accepted by the therapist. The therapist adopts an attitude of "unconditional positive regard" and makes clear to the client that he values him regardless of the content of his feelings. The individual thus internalizes an approval which is not conditioned by normative expectations and thus does not require that he deny any of his feelings. The therapy is considered successful when the individual ceases to evaluate in terms of norms and evaluates solely in terms of his own authentic feelings. Rogers advances "unconditional positive regard" as a goal for social relations generally. The legal psychologists influ-

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STUDY OF A SCIENCE 184 (S. Koch ed. 1959), and on C. ROGERS, ON BECOMING A PERSON (1961).

The influence of Rogers is acknowledged in T. SHAFFER, *supra* note 1, at 10; Himmelstein, *Reassessing Law Schooling: An Inquiry into the Application of Humanistic Educational Psychology to the Teaching of Law*, 53 N.Y.U. L. REV. 514, 545 (1978); and Meltsner & Schrag, *Scenes from a Clinic*, 127 U. PA. L. REV. 1, 2 n.3 (1978). Rogerian rhetoric is also prominent in Bellow, *supra* note 87; Goodpaster, *supra* note 61; and Redmount, *supra* note 72. Watson's approach is a more traditional, psychiatric one. On the differences between him and the Rogerians, see Shaffer, Book Review, 45 NOTRE DAME LAW. 382 (1970). For a relatively critical discussion of the relevance of Rogers's doctrines to legal education, see Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 392, 433-40 (1971).

enced by Rogers have accepted it along with other features of Rogers's psychology and have applied it to the lawyer-client relation.

At first impression, Rogers's theory, with its emphasis on both positive regard of others and self-actualization, might seem a kind of compromise between the altruism emphasized in the Sociological Vision and the egoism emphasized in the Economic Vision. In fact, however, Rogers's psychology departs radically from the personal characteristics portrayed in the older doctrines. For one thing, the notion of "positive regard" has little to do with the sociological notion of altruism. Positive regard received from others is valuable only because it enhances positive self-regard. Although Rogers believes that it is satisfying to give as well as receive positive regard, he makes clear that the critical source of personal fulfillment lies in the acceptance and actualization of the authentic self. This self is fundamentally narcissistic and asocial.⁹⁴ While the Sociological Vision sees the

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94. See Rogers, *supra* note 93, at 209, 223-25, 234. I realize that the statement that the Rogerian self is asocial contradicts some of Rogers's assertions, but the contradiction arises only from Rogers's eccentric use of the words "social" and "socialized." *E.g.*, C. ROGERS, *supra* note 93, at 90-92, 103. Rogers describes the authentic self in these terms when expressing disagreement with psychological theories which argue that the self is fundamentally aggressive or lustful and that social repression or sublimation of feeling and instinct are necessary. It seems clear that what Rogers means by calling the self "social" and "socialized" is that authentic feeling is passionless and innocuous and that there is nothing to fear from its actualization.

Rogers does not mean that the self is social or socialized in the more familiar sense of being constituted and fulfilled in society. That the authentic self is not social or socialized in this sense follows from Rogers's most basic propositions. For Rogers, the only locus of value for the "fully functioning person" is personal feeling. Rogers, *supra* note 93, at 209-10, 234. Relations with others are important only as a source of a completely undifferentiated acceptance and affirmation which is "unconditioned" by norms or expectations of any kind. In the Sociological Vision, the self is socialized through the internalization of norms. In Rogers's theory, internalized norms can only compromise self-actualization. *Id.* at 209-10, 224-25. In the Sociological Vision, the self is constituted by incorporating the expectations of significant others. In Rogers's psychology, self-actualization can only occur when the "individual . . . becomes his own significant social other." *Id.* at 209.

The asocial character of the Rogerian self is illustrated in the following passage which is the only concrete example of a relation given in Rogers's major theoretical statement: "If the infant always felt prized, if his own feelings were always accepted even though some behaviors were inhibited, then no conditions of worth would develop. This could at least theoretically be achieved if the parental attitude was genuinely of this sort: 'I can understand how satisfying it feels to you to hit your baby brother (or to defecate when and where you please, or to destroy things) and I love you and am quite willing for you to have these feelings. But I am quite willing for me to have my feelings, too, and I feel very distressed when your brother is hurt, (or annoyed or sad at other behaviors) and so I do not let you hit him. Both your feelings and my feelings are important, and each of us can freely have his own.' If the child were thus able to retain his own organismic evaluation of each experience, then his life would become a balancing of these satisfactions. Schematically he might feel, 'I'd enjoy hitting baby brother. It feels good. I do not enjoy mother's distress. That feels dissatisfying to me. I

self as developed and fulfilled through normative social experience, the Psychological Vision sees it as constituted independently of society and fulfilled largely in spite of it. Moreover, the interpersonal relations of unconditional positive regard which enhance the self are shallow and undifferentiated compared to the social relations which sustain people in the Sociological Vision. Unconditional positive regard—an ostensibly personal regard which has nothing to do with the specific ends and qualities of either the person regarding or the person regarded—is a kind of intimate, smiling indifference which is dispensed indiscriminately.⁹⁵ Denser, more intense, and more discriminating attitudes and relations, such as love, friendship, solidarity, and respect, are suspect because they impose “conditions” on the participants which may inhibit their expression and acceptance of their own feelings.⁹⁶ Any affective relation premised on particular concrete characteristics of the people involved is a threat to the self-actualization of each of them.

Furthermore, the egoism of the Psychological Vision is quite different from that of the Economic Vision. Where Economic Man is aggressive and materialistic, Psychological Man is passive and self-absorbed. In the Economic Vision, feelings usually refer to objects in the material world. While satisfaction is ultimately subjective, it is mediated by objects, and the quest for it motivates practical activity which transforms the material world. By contrast, Rogers’s subjects

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enjoy pleasing her.’ Thus his behavior would sometimes involve the satisfaction of hitting his brother, sometimes the satisfaction of pleasing mother. But he would never have to disown the feelings of satisfaction or dissatisfaction which he experienced in this differential way.” *Id.* at 225-26.

This discussion reflects a radical departure from the traditional understanding of the family as an institution in which socialization is accomplished through a unique nexus of power, love, and authority. Neither authority nor love has anything to do with Rogers’s conception. In Rogers’s ideal, the child understands that pleasing the mother is merely one possible source of subjective satisfaction to him, and that such satisfaction is to be balanced against competing satisfactions, such as hitting the brother. Although the child must adjust his behavior to the external constraints on the satisfaction of his desires, his encounter with the mother in no way alters the character of his authentic self.

95. See Rogers, *supra* note 93, at 208, 213-14; cf. S. FREUD, CIVILIZATION AND ITS DISCONTENTS 49 (1st Am. ed. 1962) (“A love that does not discriminate seems to me to forfeit a part of its own value, by doing an injustice to its object . . .”).

96. C. ROGERS, *supra* note 93, at 84. Rogers points out that unconditional self-regard is “devoid of the *quid pro quo* aspect of most of the experiences we call love” and that it is “more basic than sexual or parental feeling.” Unlike love, unconditional positive regard means “caring enough about the person that you do not wish to interfere with his development, nor to use him for any self-aggrandizing goals of your own.” *Id.*; cf. Fried, *supra* note 29, at 1071-76 (lawyer-client relation analogized to friendship, but only after friendship tacitly purged of its *quid pro quo* aspect, as well as its aspects of admiration, affection, and vulnerability).

have little interest in the practical and material circumstances of social life. Although some feelings refer to objects and motivate practical activity, all the feelings which constitute the authentic self are to an important extent satisfying in themselves. Self-actualization consists primarily in simply recognizing and accepting one's own feelings. People seek from society not so much material satisfactions as unconditional positive regard. Moreover, unconditional positive regard is simply an attitude. The obligation to regard another positively imposes no limitations on what one can *do* to the other in the pursuit of one's own self-actualization.⁹⁷ Thus, the fulfillment with which the Psychological Vision is concerned is largely an internal one independent of the individual's concrete material circumstances and the way people act toward him.

Rogers and his disciples cannot entirely ignore that clients engage in practical activity and desire material objects, but when they do confront these realities, they seem to adopt a curious compromise. To the extent that the individual is successful in achieving her practical material aims and genuinely values her success, they interpret and approve of this success as a form of self-actualization. But they tend to regard failure to achieve material success as unimportant. Since the only really important asset is the accepted self, practical or material success is a secondary concern.⁹⁸

Rogers's theory explains why the world of facts—of norms, events, and institutions—plays such a small role in the Psychological Vision. Since the only source of value is the asocial self, social norms are at best irrelevant and at worst threatening and oppressive. Moreover, since personal fulfillment is basically subjective, introspective, and independent of how one is actually treated in the social world, events and institutions are not relevant. Indeed, concern with them inhibits the critical empathic perception of feelings. The indifference to norm and fact is reinforced by the strong presentism of Rogers's theory. A norm implies a commitment, and a commitment implies some measure of temporal continuity. Actions, both the actions of the subject and the actions of others which affect the subject, are

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97. See note 94 *supra* (passage quoted).

98. Thus, in the passage quoted in note 94 *supra*, Rogers suggests that although the child may not be able to realize all of his desires, he will have the compensation, under the regime of unconditional positive regard, of his feelings. In another work, Rogers describes a hypothetical client at the end of a successful therapy as saying to himself, "You know, I feel as if I'm floating along on the current of life, very adventurously, being me. I get defeated sometimes, I get hurt sometimes, but I'm learning that those experiences are not fatal." C. ROGERS, *supra* note 93, at 68-69.

relevant to personality only to the extent that personality is seen to have some history, so that what has happened to the person in the past is relevant to who the person is now. Yet, to Rogers, the self consists principally and perhaps exclusively of present feelings.⁹⁹ These feelings are understood to be constantly changing, and although Rogers speaks of feelings as forming a "pattern," he has almost nothing to say about the nature of this pattern.

C. *Feeling and Formalism*

Rogers's theory is highly formalistic, and the jurisprudence it has influenced is, if anything, more formalistic than any of its predecessors. In the first place, it is almost completely abstract. This may seem a surprising criticism in view of the claim of Rogers and his disciples that abstraction is a sickness of which they are trying to cure the world.¹⁰⁰ Yet, when the psychologists purport to deprecate the abstract they usually are really rejecting the economic or the sociological. The attack on abstraction is an excuse for fragmenting the subjective from other areas of understanding.

But within their chosen field of the subjective, the psychologists are shamelessly abstract. Rogers's major theoretical statement consists of a redundant string of vacuous propositions such as " $B = (f)A$," where B stands for "The Process of Therapy" and A stands for "Conditions of the Therapeutic Process" and the proposition is supposed to indicate that the former is dependent on the latter.¹⁰¹ Goodpaster invites lawyers to think of a client's situation as a rectangular box in which discrete "psychological forces" are represented by little arrows pointing in one direction (positive forces) or the other (negative forces).¹⁰² Throughout Bellow and Moulton's text, personal encounters are portrayed in terms of various arrangements of lines, boxes, and arrows.¹⁰³ Surely the appropriate response to such pointless abstraction is, "Physicians, heal yourselves!"

These are extreme instances, but all of the psychological literature suffers from pervasive abstractness. Rogers's case studies usually record the gradual emergence of some form of self-love, but the discussion between therapist and client consists largely of vague refer-

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99. Rogers, *supra* note 93, at 209-10, 234; see Goodpaster, *supra* note 61, at 24.

100. For Rogers on abstraction, see C. ROGERS, *supra* note 93, at 22; Rogers, *supra* note 93, at 205, 216, 227.

101. Rogers, *supra* note 93, at 220.

102. Goodpaster, *supra* note 61, at 25.

103. G. BELLOW & B. MOULTON, *supra* note 5, at *e.g.*, 295, 448, 721.

ences to very general feelings. Not only do they omit all concern for the social context in which the client lives, but they fail to achieve concreteness even in describing the client's feelings.¹⁰⁴ Similarly, there is little in the literature of the legal psychologists which rivals either in concreteness or in plausibility the portrayals of the impact of law on the lives of particular individuals in some of the works of the Sociological Vision.¹⁰⁵

A psychological theory which seeks to understand people as concrete individuals must have a notion of personality or human nature sufficiently definite to be of use in interpreting what people say and do. But the psychology of feelings consists of little more than a posture of sentimental indulgence and a repertory of stock emotions and desires. Beyond generally asserting its affective and narcissistic nature, the Rogerians have almost nothing to say about the nature or structure of the authentic self. Personality is simply a container for feelings. Human nature is simply—as Shaffer puts it—“the way people are.”¹⁰⁶

Since lawyers, unlike psychotherapists, act for their clients, the legal psychologists are forced to deal with relatively specific wants and desires. But the Psychological Vision has no principles by which any want or desire can be ranked in terms of any other, or by which any one can be related to any other. It regards every self-regarding want or desire as equally an expression of the same amorphous human nature. As Shaffer's book on wills illustrates, the result is not a more concrete understanding of the client, but merely the sentimentalization of the conventional wants and desires which lawyers have always recognized and served.¹⁰⁷ In preparing an estate plan for one client, Shaffer perceives that buying and selling securities is “part of what keeps him alive” and thus does not recommend that he create an *inter vivos* trust for them. He comes to the same conclusion about another client whose real estate assets, which he “had selected, bought cheap, tended and then pushed people around on,” were a major part of what kept *him* alive. A domineering father wants to express his vindictiveness toward his daughter-in-law in his will. A

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104. See C. ROGERS, *supra* note 93, at 77–103, 132–55.

105. See, e.g., L. FRIEDMAN, *CONTRACT IN AMERICA* (1965); H. HART & A. SACKS, *supra* note 9. An important exception is G. BELLOW & B. MOULTON, *supra* note 5, which makes creative use of fiction, journalism, and autobiography to present a partial phenomenology of litigation.

106. T. SHAFFER, *supra* note 1, at 25.

107. See T. ADORNO, *supra* note 7, at 81: “The jargon . . . unites the appearance of an absent concreteness with the ennobling of that concreteness.”

mother "concerned about waning interpersonal clout" needs "flexibility" in distributing her husband's estate in order to make sure her children will stay in line.¹⁰⁸ Each of these desires is considered equally an expression of the client's humanity, and the lawyer's service to each is equated with an affirmation of the client's humanity. A doctrine which claims to seek to make law practice more personal and affective ends by legitimating the most impersonal and materialistic of the ends traditionally served by lawyers. As Adorno wrote of a partly analogous body of doctrine, "Thanks to its abstractness, the concept [of human nature] lets itself be squirted like grease into the machinery it once wanted to assail."¹⁰⁹

In denying the social dimensions of personality, the psychology of feeling also underpins the fragmentation of social considerations from the Psychological Vision. In positing an asocial self to which social relations are at best instrumental and at worst oppressive, this psychology rejects the basic moral premise of most legal thought: that people can experience authority as an affirmation rather than a denial of self;¹¹⁰ that individuality can be expressed through rational commitments with others. An important consequence of this perspective is to preclude any attempt to distinguish legitimate from illegitimate coercion. Since the only locus of value is the asocial self, all demands on the individual must be viewed as uniformly oppressive. There is no reason why a person should permit any norms she can get away with violating to interfere with her pursuit of self-actualization. At the same time, there are no standards by which the exercise of power can be criticized or by which resistance to power can be justified. Such distinctions as those between guilt and innocence or exploitation and fairness, which are based on social considerations, have no significance in the psychology of feeling.

The psychologists do not appear to recognize fully these consequences of their doctrine; much less to confront the difficulties these consequences involve. For one thing, the psychologists appear unable to explain why so many people attach so much importance to the kinds of normative distinctions they debunk. They also seem unable to deal with the ample psychological evidence that people need and are fulfilled by the kind of concrete, normatively conditioned relationships which the ideal of "unconditional positive regard" re-

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108. T. SHAFFER, *supra* note 1, at 321-24, 267.

109. T. ADORNO, *supra* note 7, at 61.

110. See, e.g., E. DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* (2d ed. trans. 1933); I. KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* (trans. 1965).

pudiates.¹¹¹ Moreover, it is doubtful whether their theory of personality is consistent with the existence of any kind of social order at all. There seems to be no way that a social order could be created by an aggregation of asocial individuals¹¹² or that it could survive the narcissistic liberation which is to attend the advent of unconditional positive regard.

As the psychology makes all social authority seem a form of domination, it makes it impossible to see any self-regarding feeling in terms of domination. The psychologists purport to liberate the client from internalized social norms, but the liberation they propose is a shallow one. Unlike Freudian psychoanalysis, the Psychological Vision does not propose to go beneath the surface of present feeling to make the subject conscious of the social and historical origins of feelings she now perceives spontaneously. Since social life can be considered only insofar as it is reflected in feelings, socially influenced feelings can be identified only insofar as they are now *felt* to be socially influenced. That is, internalized norms can be identified only to the extent that the subject is already aware that they are internalized. Yet conscious social influences do not constitute the entire impact of society on the wants and desires of the individual. The wants and desires people express and experience as their own vary widely, but most correlate strongly with the social settings in which they live. It is thus undeniable that such wants and desires are shaped by social setting. Yet the Psychological Vision cannot distinguish social influences which are not immediately accessible to consciousness. In consequence, the psychologists tacitly legitimate the social arrangements which unconsciously influence feelings. In collapsing social arrangements into feelings, and then urging acceptance of those feelings, the psychologists in effect urge acceptance of the social arrangements.¹¹³

The psychology of feeling undermines the very concept of social arrangements by dissolving actions, objects, and institutions into feelings. Actions, objects, and institutions do express feelings, but in treating them as the same as the feelings they express, the Psychologi-

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111. *See, e.g.*, H. HENDIN, *THE AGE OF SENSATION* (1975) (psychiatric study of American college students which finds the Rogerian tendencies of self-absorption, reluctance to submit to judgment of others, and wariness of intense personal relations gaining ground hand-in-hand with anguish and insecurity); J. HENDIN, *VULNERABLE PEOPLE: A VIEW OF AMERICAN FICTION SINCE 1945* (1978) (similar interpretation of contemporary American culture based on literary evidence); C. LASCH, *supra* note 7.

112. *See, e.g.*, R. UNGER, *supra* note 16, at 27-29 (1976); R. WINCH, *THE IDEA OF A SOCIAL SCIENCE AND ITS RELATION TO PHILOSOPHY* (1958); Fuller, *Human Interaction and the Law*, in *THE RULE OF LAW* 171-217 (R. Wolff ed. 1971).

113. *See* R. JACOBY, *supra* note 7, at 19-72.

cal Vision obscures a fundamental aspect of the social and material world: that once made, it stands apart from its makers and affects the future thoughts and actions of both the makers and others.¹¹⁴ When Charles Fried writes that "corporations and other institutions are only formal arrangements of real persons pursuing their real interests,"¹¹⁵ he invites us to ignore the fact that institutions, in addition to arranging people's interests, also affect people's practical ability to pursue them against the competing interests of others.

The psychologists' disdain for abstract and remote knowledge seems to arise in part from this unwillingness to confront social and material realities. All theory is necessarily abstract to some extent, and aspects of some subjects may be susceptible to understanding only in relatively abstract terms.¹¹⁶ Social relations may seem abstract when they are experienced as oppressive or when they engage only a narrow dimension of the self. The material world may seem remote when it fails adequately to express the intentions of those who make and live in it. In a society with these characteristics, it is natural that people should withdraw into personal introspection. But in ignoring or denying the social and practical character of personality, the psychologists obscure the frustration and alienation which motivates the worship of feeling so that the retreat from social and practical goals appears a triumph. In castigating economic and sociological knowledge as abstract and remote, the psychologists attack the messengers which bring the bad news.

D. *The Politics of Psychology*

Despite its repeatedly expressed ambition to do so, the psychology of feeling does not escape politics. On the contrary, it seems to have consistently conservative political implications. These implications are sometimes quite transparent. Consider, for example, an early and prescient article on *Law Schools and Human Relations*, in which Erwin Griswold suggested labor relations as a potentially fruitful area of application for psychology.¹¹⁷ Griswold argued that labor

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114. See K. MARX, CAPITAL 41-55 (3d ed. trans. 1889) ("fetishism of commodities").

115. Fried, *supra* note 29, at 1076.

116. See E. GELLNER, LEGITIMATION OF BELIEF 10-13 (1974). See also Brecht's critique of the empathic approach to theater, which argues provocatively that the emphasis on the immediate and the familiar, and the consequent hostility to abstraction, have a stultifying and conservative effect on political understanding. The theatrical doctrine Brecht criticizes closely resembles the epistemological premises of the Psychological Vision. See B. BRECHT, BRECHT ON THEATRE 179-205 (J. Willett trans. ed. 1964).

117. Griswold, *Law Schools and Human Relations*, 37 CHI. B. REC. 199 (1956).

"problems are often human rather than monetary."¹¹⁸ As an example of "good human relations" he mentioned the publication in a trade periodical of a picture of a company president together with a union leader. The company had understood that "what the workers wanted most of all was to *be* someone, to be accepted as important, as belonging, as being as essential to the plant as the boss. When we think of people as people, and not as cases, we realize these things."¹¹⁹ Here are some of the basic notions of the Psychological Vision: Satisfaction does not depend on the material world; it is merely a function of how people feel. Individuals do not need money so much as they need to be "accepted" as "people." To treat individuals as "people" means to ignore the distinctions of class, of wealth and power, which separate them, and to emphasize the abstract affective needs they share. It means to flatter them, to encourage them to retreat from the social and material world to a world of passive self-love. The price of being treated as "human" is acquiescence in the prevailing social and material inequalities.¹²⁰

Another striking example is the discussion of private ownership advanced by Shaffer in his book on wills. "My favorite image of men and things is Humphrey Bogart on the *African Queen*," he begins. In the image, the boat engine rattles and steams; Bogart kicks it, and it starts to work properly again.

Hepburn asked what was the matter with the boiler and Bogart said it was jammed. Hepburn asked him why, and Bogart said one of his boys left a screw-driver in it one day when he was working on it, and the screw-driver jammed a valve. Hepburn asked why he didn't take it apart and take the screw-driver out. And Bogart said, "You know, I'm gonna do that one of these days. The only reason I ain't done it up to now is I kinda like kickin' her. She's all I got."

You cannot talk about the captain of the *African Queen* as a person unless you are willing to talk about the *African Queen* as an extension of its captain—as part of his personality.¹²¹

People who reject private ownership in favor of socialism, Shaffer argues, have an inadequate understanding of psychology. They do not understand "the way people are," that is, the way in which they derive personal satisfaction from their things.¹²²

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118. *Id.* at 206.

119. *Id.*

120. On the abuse of psychology and "human relations" research for apologetic and manipulative purposes in business, see L. BARITZ, *THE SERVANTS OF POWER* (1960), and D. MEYER, *supra* note 7, at 111-89.

121. T. SHAFFER, *supra* note 1, at 21.

122. *Id.* at 25-26. Shaffer does acknowledge in passing that property can be a "means

It is typical of the Psychological Vision to attempt to deal with difficult issues by reducing them to quaint and familiar settings. As his paradigmatic owners, Shaffer chooses not General Motors or even a wealthy testator, but a lonely, impecunious boatsman. The image alone seems to answer the question. Who could deny that Bogart should own his boat? It is an expression of his humanity. Yet even in Shaffer's homely example there is a lapse which gives the game away: the unfortunate reference to the "boys." It is a reminder that the boat is an extension, not only of Bogart's personality, but of the personalities of his "boys" and no doubt of many others who have worked on it. Although the boat is an extension of the personalities of many people, it is the property of only one of them. A plausible theory of private ownership would have to account for this distinction. Yet Shaffer's cannot because the reasons for this distinction are social, not psychological, and Shaffer has excluded social considerations at the outset.

Shaffer's discussion of property shows that those who disdain theory condemn themselves to become its victims. He apparently does not realize that his "personality" approach to property is substantially the theory by which private property was justified for two centuries in liberal political thought.¹²³ He seems also not to know that this theory was abandoned by the most prominent defenders of private ownership in the 19th century when it became apparent that, in the economic conditions of the time, the personality theory *undermined* private ownership rather than supported it.¹²⁴ The increasing interdependence of economic life made it implausible to suggest that the personalities of particular subjects could be identified in their products. In an economy where production was collective rather than individual, the personality approach seemed to imply collective rather than individual ownership. But such considerations can play no role in the Psychological Vision, where economic context must be dissolved into feeling.

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of assuming and protecting power" and gives the English feudal system as an example of a property system designed for this purpose. *Id.* at 24. Despite his commitment to immediacy and relevance, however, Shaffer never considers what legal scholars have argued for decades: that property relations in advanced capitalism serve such a purpose. See Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927); Hale, *supra* note 17.

123. See J. LOCKE, *TWO TREATISES OF GOVERNMENT* 285-446 (2d ed. P. Laslett 1967); C. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM* (1962).

124. For the 19th century repudiation of the personality approach by the defenders of private ownership, see J. BENTHAM, *Principles of the Civil Code*, in 1 *THE WORKS OF JEREMY BENTHAM* 297, 308-09 (Edinburgh 1838) (pt. I, ch. VIII: "Of Property"). For the 19th century adoption of the personality approach by the opponents of private ownership, see K. MARX, *supra* note 16.

In some respects, these passages from Griswold and Shaffer are atypical of the psychological literature. For one thing, it is extremely uncharacteristic of the legal psychologists to attempt any kind of explicit theoretical account of a social or material phenomenon such as property. One would have expected Shaffer to deal with property as he dealt with death in the same chapter of his book on wills, by describing feelings expressed by individuals about it. More important, both the Griswold and the Shaffer passages are atypical because of their explicitly conservative flavor. By contrast, many and perhaps most of the legal psychologists appear to consider themselves politically to the left of center,¹²⁵ and they would be reluctant to embrace these specific formulations.

Nevertheless, I think that these passages accurately represent the principal political thrust of the Psychological Vision. The major doctrines of the Psychological Vision have a consistently conservative bias which often contradicts the expressed political values of the authors. As Sherry Turkle writes, "The politics of the theorist are not necessarily the politics of the theory."¹²⁶ In insisting on the elusive or illusory nature of the facts which constitute the social world, in debunking all nonsubjective criteria of judgment, and in diverting attention away from the material and the social, the psychology of feeling discourages understanding and precludes criticism of the social order. In viewing people apart from their social and material context, in collapsing all experience into subjective feeling, and in urging an attitude of indiscriminating affirmation of feeling, the psychology of feeling sentimentalizes the social order and tacitly urges its acceptance. The Psychological Vision does not lead inevitably to a defense of private property. It merely tends to rationalize the prevailing social institutions, whatever their nature.

A more specific political implication of the psychology of feeling is the justification of the prevailing attitudes and practices of the bar. The psychology tends to rationalize the conventional conduct of lawyers as servants of private power against criticisms such as those of Brandeis and other prominent theorists in the Sociological Vision. Pincus's rejection of the "policy" approach to legal education as arrogant and elitist and Shaffer's claim that sociological understanding is useless dispose of the sociological criticisms by obfuscating the issues of power and responsibility. The premise of the policy approach was never, as Pincus implies, that all lawyers would naturally occupy

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125. See text accompanying note 237 *infra*.

126. S. TURKLE, *PSYCHOANALYTIC POLITICS* 226 (1978).

high government positions. Rather it was that the practice of law—even by ordinary lawyers in the routine tasks of private practice—inevitably involves the exercise of power.¹²⁷ The sociologists recognized that in using the legal system to advance their clients' ends lawyers changed the social landscape in ways that affected the ability of others to pursue their ends. They thought that this power implied obligations of social responsibility, and it was in large part to guide the fulfillment of this responsibility that they argued for policy education. These theorists may well have been elitist in assuming that professional training could qualify people to exercise power, but they were right in seeing that lawyers exercise power, and it is no solution to the problem of elitism to close one's eyes to this reality. When Pincus urges that lawyers "serve people" rather than make policy,¹²⁸ he denigrates the norm of responsibility without in any way changing the reality of power. In challenging the norm of public obligation, Pincus assaults an ideal which never had any substantial impact on practice in order to propose as a novel and daring goal what is in effect the status quo.¹²⁹

The psychology of feeling well complements the ethical vision of the community-of-two. It rationalizes acquiescence in the desires of individual clients while portraying the world beyond the community-of-two as forbiddingly opaque and oppressive, or, at best, meaningless. It devalues all social relations except those founded on the kind of detached acceptance which has traditionally characterized the attitudes of professionals toward their clients. Clearly, in a world constituted by narcissistic feeling, the only conceivable community would be the professional community-of-two; the only plausible leaders would be those virtuosos of feeling, the psychological professionals.

E. *Kafka and the Psychological Vision*

The world implied by the psychological doctrines bears an interesting resemblance to the one portrayed in Kafka's *The Trial*.¹³⁰ Kafka describes a society in which the public realm has been completely collapsed into the private. The Court sits in an unmarked

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127. See, e.g., Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203, 208-10 (1943).

128. Pincus, *supra* note 4, at 293.

129. Cf. T. ADORNO, *supra* note 7, at 37 ("what man is anyway once more becomes his goal").

130. F. KAFKA, *supra* note 2.

hall of a slum tenement. It has no discernible institutional or procedural structure. Its officials are creatures of personal idiosyncrasy; they are constrained not by the rules, but only by the personal idiosyncrasies of their unseen superiors. The Law is a remote and threatening mystery accessible only through personal encounters with its lowest-level minions. The lawyers are authorities not on the rules, but on "human relations."¹³¹ The preeminence of these legal-psychological professionals is such that even the officials seek private consultations with them to ask how they should perform their duties. In the course of a series of helping relations, Joseph K. learns that it is not the rules which matter, but rather personal contacts and the ability to flatter and cajole the officials. It is not enough to prove one's innocence; one must master the psychological "subtleties" which really determine the outcome.¹³² In the course of the novel, various experts advise K. on how to ingratiate himself with the officials and offer to intervene personally on his behalf. Yet K. foolishly resists these offers and continues to insist on his innocence and to demand a rational explanation of what is happening to him.

Kafka's professionals do not exhibit the kind of empathy and tolerance to which the legal psychologists aspire, but it is doubtful whether these qualities would mitigate the anguish and terror which the reader shares with K. This anguish and terror arise in part from the refusal of the social world to yield to the impersonal claims of reason and justice. Joseph K. is a petty, pompous figure, and his insistent invocation of bourgeois public ideals seems almost ridiculous. Yet, the fear which his experience evokes suggests that these ideals express fundamental needs and cannot be written off without great cost. Perhaps the defect of the Psychological Vision lies less in its insistence on the chaotic and mysterious nature of the social world and the chimerical nature of moral and political values than in its failure to evoke the anguish and terror Joseph K. experiences when his claims of reason and justice receive only a personal response.

IV. THERAPEUTIC PEDAGOGY

Like its predecessors, the Psychological Vision has developed partly in response to pedagogical concerns, and like them, it has had to confront the issue of the relation between law as a theoretical discipline and the process of preparing students for professional legal

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131. *Id.* at 148.

132. *Id.* at 186.

roles. One of the proudest claims of the psychologists is to have reconciled theory with a professionally effective pedagogy. Yet, the reconciliation may be a costly one, for the pedagogy they have elaborated seems to have defects which correspond to the formalism of their psychology. In particular, it seems to generate conformist pressures which subvert consideration of the same kinds of issues which are ignored or suppressed in the psychology of feeling.

A. *Theory and Therapy*

Academic sociology portrays legal education as a form of "secondary socialization" through which individual inclination is shaped in accordance with social needs. In this view, a vital function of the law school is to inculcate that spontaneous disposition to conform to occupational norms which is a hallmark of professionalism.¹³³ As sociologists, the educators of the Sociological Vision recognized the role of the law school in the preparation of students to fill established professional roles. Yet, as academics, they resisted this role to the extent that it implied indoctrination in the attitudes and pronouncements of the bar. Like their predecessors, the sociologists taught law as a critical and theoretical discipline. Since they believed that legal doctrines embodied social norms, they thought that they could fulfill their socializing role simply by leading their students to an appreciation of the doctrines. But they expected this appreciation to come only through a process of rational examination and evaluation in which students would be encouraged to criticize the doctrines and consider alternatives before accepting them.¹³⁴

Recent critics argue persuasively that the doctrines of the Sociological Vision have a conservative ideological character and that the methods used to teach them involve a variety of unacknowledged psychological pressures which inhibit critical examination.¹³⁵ Yet, despite the truth of these charges, the legal education of the Sociological Vision has never been merely indoctrination in the attitudes typical of legal practitioners. Indeed, to a significant extent, elite law schools have maintained and encouraged a critical stance toward the practicing bar. This stance arises from the tension between the per-

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133. See, e.g., Parsons, *A Sociologist Looks at the Legal Profession*, in *ESSAYS IN SOCIOLOGICAL THEORY* 370-85 (rev. ed. 1954).

134. See Fuller, *What the Law Schools Can Contribute to the Making of Lawyers*, 1 J. LEGAL EDUC. 189 (1948).

135. See, e.g., Klare, *supra* note 18; Shaffer & Redmount, *supra* note 5; D. Kennedy, *Utopian Rationalism in American Legal Thought*, *supra* note 9.

spective of public policy adopted by the law teachers of the Sociological Vision and the perspective of private gain which has remained influential among private practitioners.¹³⁶

The Psychological Vision confronts the task of preparing students to fill established professional roles from a different posture. On the one hand, the psychologists conceive of education as having a much broader impact on the individual than do the sociologists. They do not share the inhibitions about indoctrination which stemmed from the academic ideals of the doctrinal tradition. Their primary approach is not theoretical but therapeutic. They are concerned less with winning reasoned acceptance for a body of doctrine than with changing the kind of people their students are. To this end, their pedagogy encourages or requires the disclosure and engagement of relatively intimate personal feeling. While the economists and sociologists sought to engage only the cognitive capacities of the student, the psychologists seek to affect the "whole being."¹³⁷ On the other hand, the psychologists locate value within the self and tend to see social norms and goals as repressive. It is thus difficult for them to embrace the sociological notion of education as a process by which individual impulses are shaped in accordance with external social needs. It might seem, therefore, that while the more intrusive thrust of therapeutic pedagogy enlarges the opportunities to promote conformity to the demands of professional role, the psychologists' commitment to the ideal of self-actualization would preclude efforts to do so.

Yet, in fact, this is not the case. The psychologists explicitly portray their pedagogy as an effective way of inculcating the prevailing norms of legal professionalism. While the sociologists were often uncomfortable and embarrassed by the prospect of having to propagate the bar's norms, the psychologists enthusiastically embrace the task of fostering "professional responsibility."¹³⁸ Moreover, in the writing of several of the psychologists, the rhetoric of antinomian self-actualization lapses into the rhetoric of manipulation and conformity. For instance, Andrew Watson writes that the "primary purpose of education for professionalism is to instill a self-image that will result in a certain kind of behavior."¹³⁹ He urges teachers to "avidly grasp every opportunity to reinforce positively" desirable professional be-

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136. See, e.g., J. HURST, *supra* note 52, at 366-75.

137. Pincus, *supra* note 4, at 284.

138. See, e.g., *id.*; Watson, *supra* note 70, at 20-23.

139. Watson, *supra* note 70, at 20.

havior.¹⁴⁰ Redmount speaks of psychology as "managing the accommodation of individual behavior to social order."¹⁴¹ Even the most dedicated Rogerians can lapse into the language of behaviorist conditioning: Meltsner and Schrag write that they strive to "reinforce role behavior they want to perpetuate."¹⁴² How can the psychologists' antinomianism coexist with their willingness to inculcate professional norms? How can their rhetoric of self-actualization coexist with the rhetoric of manipulated conformity?

The Psychological Vision makes room for the task of promoting conformity in two ways. First, the psychologists tend to assume that the norms associated with the lawyer's professional role are somehow not social, that they lack the arbitrary and oppressive qualities the Psychological Vision attributes to social norms. The assumption is made explicit in a remarkable passage in which Meltsner and Schrag boast that they consciously strive in their classes to inculcate their "professional" values but express doubt that it would be appropriate for them to try to inculcate their "social" values.¹⁴³ Although the distinction makes no sense in terms of any sociological understanding of the legal role, perhaps it can be justified in the Psychological Vision in terms of the unique moral status of the community-of-two. The legal role and the norms associated with it constitute the community-of-two. While this role does imply some commitments and obligations, it is a shield against most other commitments and obligations. Thus, the psychologists can rationalize the legal role not from the outside as a social function, but from the inside as a shelter for sentiment.

Second, although therapeutic pedagogy precludes appeal to social norms and goals as a basis for rationalizing conformity, it lends itself to the justification of conformity in terms of therapeutic ideals. The tendency of the psychology of feeling to identify personal fulfillment with receiving and giving acceptance ("positive regard") is susceptible to the promotion of a less reflective and more pervasive conformity than that of the Sociological Vision. The Rogerian ideal can encourage fluid adjustment to the shifting expectations of others; it can be used to exalt cooperative and acquiescent behavior and to deprecate criticism and resistance. Of course, therapeutic pedagogy purports to alter the individual only in the interests of his own self-

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140. Watson, *supra* note 87, at 142.

141. Redmount, *supra* note 68, at 989.

142. Meltsner & Schrag, *supra* note 71, at 601.

143. *Id.* at 627.

actualization, and the Rogerian ideal rejects any attempt to secure positive regard which requires the compromise of the individual's authentic feeling. But the psychologists' understanding of human nature is too shallow to provide any convincing criteria by which authentic feeling could be distinguished from feeling conditioned by social experience, including the experience of therapy (or education) itself. The occasional lapses into the language of explicit manipulation are symptoms of a problem which pervades the literature: a psychological vacuity which blurs the distinction between antinomian release and manipulated conformity.¹⁴⁴

B. *Nonconformity as Pathology*

Because they deny or ignore transcendent values and standards by which social institutions and norms might be criticized or resisted, the psychologists can explain instances of criticism and resistance in terms of personal pathology. For instance, despite his posture of "unconditional positive regard" toward feelings in general, Shaffer admits that there is one class of feelings which he does not regard positively. These are the feelings of "middle class liberals" who oppose private ownership. Shaffer's primary reason for favoring private ownership is that he believes people like it. Confronted with the fact that some people do not like it, he puts their feelings down to neurosis. Middle class liberals, he diagnoses, are "ashamed" of ownership.¹⁴⁵

This tendency to diagnose dissent and nonconformity as pathological is evident in a series of analyses by Watson of student performances in a low-income neighborhood law office.¹⁴⁶ Watson repeatedly interprets student discontent with the community-of-two model of lawyer-client relations as personal idiosyncrasy. Whenever the students attempt to integrate the representation of individual cli-

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144. Similar defects have been identified by critics of the pragmatist psychology and pedagogy of the Progressive movement. See R. HOFSTADTER, *ANTI-INTELLECTUALISM IN AMERICAN LIFE* 299-322 (1963); C. LASCH, *THE NEW RADICALISM IN AMERICA* 141-80 (1965).

On the conformist and manipulative aspect of contemporary psychotherapy, see R. JACOBY, *supra* note 7, at 19-72; D. MEYER, *supra* note 7, at 192-292; and T. SZASZ, *THE MANUFACTURE OF MADNESS* (1970).

145. T. SHAFFER, *supra* note 1, at 25-26.

146. Watson belongs to an older tradition of psychotherapy which is less antinomian and more straightforward about its conformism than Rogerian or "humanistic" psychology. His rhetoric differs from that of the humanists, but it is useful because it makes explicit a tendency to rationalize professionalism in therapeutic terms which is less evident but nevertheless influential in the writings of the humanists.

ents into larger social and political contexts, he condemns their efforts as deviant self-indulgence. In one case, for example, the students file a class action challenging abusive practices by a car dealer, a finance company, and an insurer, and the defendants try to buy off the nominal plaintiff with a small settlement. When the students wonder whether they should encourage the client to press the action on behalf of the class even though it might be in his individual interest to take the settlement, Watson terms their ambivalence a "narcissistic conflict" which can only "be comfortably and appropriately resolved" by sacrificing the interest of the larger community.¹⁴⁷ In another instance, a clinical supervisor reproaches himself for failing to have seen that the facts of two or three cases in the office indicated that a local company was engaged in continuing and widespread fraudulent sales practices which could most effectively be challenged in a class action. The supervisor notes that although the office had done well on the two or three individual actions, it had probably not prevented the company from continuing to swindle others. Watson finds this instructor's "self-flagellation" unwarranted and diagnoses it as an expression of an unconscious personal desire to seem or to be more aggressive through participation in a large-scale litigation. He suggests that a reason for the "popularity" of class litigation among poverty lawyers is its "capacity to provide large sources of narcissistic gratification."¹⁴⁸ A third case in which a student seeks, perhaps unnecessarily in view of the particular client's immediate interests, to raise a broad constitutional issue is also interpreted in terms of the student's "narcissistic strivings."¹⁴⁹

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147. Watson, Comment to Kayne, *For a Classy Class Action, Some Classes Are More Suited Than Others*, in *LAWYERS, CLIENTS & ETHICS*, *supra* note 78, at 79-80.

148. Watson, Comment to Kayne, "Would I Tell You, a Brother, a Lie?", in *LAWYERS, CLIENTS & ETHICS*, *supra* note 78, at 101.

149. Watson, Comment to Kayne, *The Game of the Name*, in *LAWYERS, CLIENTS & ETHICS*, *supra* note 78, at 112. This third case is the only one of the three in which there is any basis to infer that the student's discontent with the norm of service to the individual client was influenced by purely self-regarding considerations, as opposed to concern for people outside the lawyer-client relation or for impersonal norms of justice. But even here, the facts given do not warrant either the length or the intensity of Watson's allegations of maladjustment. See *id.* at 111-12.

Moreover, in this case, Watson's psychological jargon is freighted with a conservative bias toward not only the traditional lawyer role but also the traditional female sex role. Referring to the fact that the student was a middle-aged wife and mother, he notes that she exemplified the need felt by many contemporary women "to see a new role outside of their families—a role in which they can come to feel important to themselves through the approval and adulation of others. While this is not inappropriate or undesirable in itself, if the motives are apprehended and managed properly," Watson continues, "it can lead to inappropriate professional behavior." *Id.* at 111. In other words, once a woman ceases to conform to the

To anyone willing to confront the social and political realities of the distribution of power and wealth, and particularly of legal services, the attempt to coordinate and focus the scarce legal resources available to the poor so as to achieve the broadest possible benefit to the community as a whole might seem not only appropriate, but indeed the only rational approach to providing the poor with even a modicum of the kind of access to the legal system which the wealthy enjoy.¹⁵⁰ Yet, because it would involve a departure from the established lawyer role, Watson interprets every step toward such a view in terms of personal idiosyncrasy which he condemns as pathological. The point is not that Watson's judgment is wrong but that his analysis discourages consideration of the real issues. He frames the matter not in terms of the validity of alternative kinds of conduct or conceptions of lawyering, but in terms of the kind of person the student is. The critical social and political considerations go unmentioned; they enter covertly in the guise of an ostensibly scientific judgment on the student himself.¹⁵¹

C. *Conformity as Self-Actualization*

Most of the psychologists aspire to a more subtle therapeutic approach than Watson's. For those who have been influenced by "humanistic" psychology, narcissism is not, as it is for Watson, a term of reproach. But it does not appear that they are any less prone to unreflective conformism. Consider, for example, the elaborate pedagogical approach of Chris Argyris, a professor at the Harvard School of Education who has been active in the clinical program at Harvard Law School.¹⁵² For Argyris, as for Rogers, the locus of value is the feeling self. Argyris is concerned with teaching managers and professionals how to be more "effective" in implementing their values. He

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traditional sex role, she is already so far along the road to narcissistic deviance that special concern is called for.

150. See Bellow, *supra* note 52; Galanter, *supra* note 52.

151. Watson is as quick to defend the traditional role against *excessive* loyalty to clients as he is to condemn insufficient loyalty. In a case involving the defense of a groundless libel action brought by a car dealer against a consumer group, a student expressed reluctance to disclose to the court adverse legal authority probably unknown to the other side. Everything the student said and did was consistent with familiar notions of justice and loyalty, but apparently because it was not consistent with the Code of Professional Responsibility, see ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106, Watson diagnoses his reluctance in terms of a "powerful desire to enhance his self-esteem by pursuing this car dealer." Watson, Comment to Kayne, "Do I Have to Tell Them?", in *LAWYERS, CLIENTS & ETHICS*, *supra* note 78, at 20.

152. C. ARGYRIS & D. SCHÖN, *THEORY IN PRACTICE: INCREASING PROFESSIONAL EFFECTIVENESS* (1974).

believes that managers and professionals tend to persist in habits and practices which do not effectively maximize their goals, first, because they are not sufficiently reflective, and second, because they behave in a defensive or coercive way which discourages others from helping them to realize their goals.

The purpose of therapy (Argyris prefers the term "effectiveness education"¹⁵³) is to encourage the student to become more reflective about his behavior and to introduce him to a style of conduct which Argyris and his colleagues believe is more effective. This style ("Model II") resembles Rogers's notion of "unconditional positive regard." Model II behavior is characterized above all by a willingness to express one's own feelings, a receptiveness to expressions of feeling by others, and a disposition toward cooperation. Argyris condemns impersonal, competitive, and coercive behavior ("Model I") not because it is bad in itself, but because it deprives the managers or professionals of information and resources (*i.e.*, the feelings and efforts of others) which can help them to be more effective. He believes that Model I behavior reflects insecurity. Like Rogers, he believes that effectiveness depends on self-regard and that both must be enhanced together.¹⁵⁴ His pedagogy emphasizes group sessions in which members describe prior experiences or play roles and then analyze each other's conduct and statements and their own reactions to them.

Argyris and his disciples believe that Model II behavior is peculiarly well adapted to the legal ideal of the community-of-two. But they also believe that Model II has broader applications. They treat it as generally appropriate within the professional-bureaucratic universe of co-workers and potential cooperators.¹⁵⁵ The psychologists view the classroom as a segment of this universe, and they treat the class as an extended therapeutic community. The classroom community is a slightly less intense one than the community-of-two, but it is also characterized by openness, intimacy, and concern.

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153. *Id.* at 127.

154. Argyris's theory follows in a long line of conformist self-manipulative psychological doctrines addressed to managers and professionals. See D. MEYER, *supra* note 7, at 114-289; D. RIESMAN, R. DENNEY & N. GLAZER, *supra* note 7, at 160-61. For several decades, successive waves of this literature have each purported to discover the vices of coercive, competitive behavior and have proposed as radical goals openness and cooperation.

155. The psychologists do not consider Model II applicable outside the universe of clients, co-workers, and potential cooperators. They do not propose that adversaries be confronted in a spirit of openness and cooperation; on the contrary, they prescribe the traditional aggressive, manipulative posture. Yet, as I will argue below, the aggression they legitimate is very modest and stylized, and the adversary doctrines of the psychologists also reflect a strong conformist bias. See text accompanying notes 156-61 *infra*.

Argyris's approach probably has valuable therapeutic effects in some settings, but on the level of generality on which he presents it it is inadequate and misleading. There are two important kinds of situations which recur even within the universe of co-workers and potential cooperators where Model II behavior is unlikely to serve the ends of at least some people. The first includes situations characterized by an unequal distribution of power or scarce resources or by sharply divergent values. In such situations, to be open and cooperative means to acquiesce in the prevailing practices and arrangements. It means to be nonpolitical. Argyris and his colleagues refuse to recognize the social reality of inequality and dissensus. They condemn what they call the "win-lose" (competitive) mentality as if it were a product of personal idiosyncrasy rather than material and social constraints.¹⁵⁶ The second kind of situation in which Model II behavior is particularly likely to be ineffective includes situations involving authority. Many kinds of authority are by nature impersonal; their legitimacy derives in substantial part from principles independent of the feelings of those who exercise it or are subject to it. Moreover, though authority is often associated with coercion, this coercion sometimes seems legitimate because it is governed by principles which the coerced can recognize as just even when they conflict with his inclinations. Of course, the identification and consideration of both these kinds of situations depend on social and political factors. Because Argyris ignores these factors, he cannot distinguish these situations from those in which Model II behavior is more likely to be appropriate. In consequence, his doctrines tend to obscure critical elements of the choices they purport to clarify. To a significant extent, these doctrines tend to celebrate open, acquiescent behavior as an end in itself.¹⁵⁷

The published reports of class sessions conducted by Argyris and his colleagues indicate that they usually win assent from class participants for their position, but it does not appear that this assent is a reasoned one. Some of the statements of participants who have accepted the doctrines have that combination of intense zeal and trite-

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156. C. ARGYRIS & D. SCHÖN, *supra* note 152, at 88.

157. "The harmony of feelings among manager, worker, and work process often matters more to the manager than it matters to the worker or the work process, partly because, as we have seen, the other-directed manager cannot stand hostility and conflict and partly, as we have also seen, because trying to eliminate hostility and conflict keeps him busy. In this situation the achievement of harmony sometimes becomes not a by-product of otherwise agreeable and meaningful work but an obligatory prerequisite." D. RIESMAN, R. DENNEY & N. GLAZER, *supra* note 7, at 315.

ness which one associates with quickie religious conversions. The participants condemn their former selves and declare their fidelity to Model II in words suspiciously identical to the stock phrases from Argyris's doctrines.¹⁵⁸

In theory, "effectiveness education" involves two perspectives. In the first, the instructor helps the participants to become conscious of and articulate about their ends. Since ends are presumed to be subjective, once articulated, they are supposed to be taken for granted. In the second perspective, the instructor and participants are supposed to assess rationally the efficacy of alternative means (Model I v. Model II behavior) for attaining these ends. Yet it seems likely that in the first phase, when people are asked to define their ends, there are strong tacit pressures which encourage them to portray themselves as the kind of people for whom Model II behavior is invariably effective.¹⁵⁹ The instructor naturally tends to define the universe of

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158. After a small dose of effectiveness education, some students apparently begin raving with the self-deprecatory fanaticism of inmates at a Maoist re-education camp. Here are some excerpts from the conversion speech of a minister which incorporate most of the principal themes of Argyris's doctrine: "I am persuaded that my behavior generates a closed system, with nontestable, self-fulfilling results. It is not a self-conscious design, but a result of my doing what comes naturally. That scares me, for it means that my spontaneous behavior produces a system that perpetuates mistrust and diplomacy—and that does not match my self-image of what I want to be and what I want to do.

. . . .

"On critical moral issues, *I have determined* that the church must act—and I can give all the theological and Biblical reasons—so I have manipulated the environment and people to assure that the church would act, in ways that *I determined* were right. The expectations, the prophecies have been fulfilled. I have won, but what am I now left with? The realization that the win/lose game pollutes the moral environment . . . .

" . . . My need, as I see it, is to become sensitive and self-conscious about the impact of my behavior and to begin to learn (hopefully) how to behave in ways that are more consistent with my deepest aspirations. It is not a matter of being one thing or another; it means being realistic about all sides of me, and being willing to put into practice behavior that will protect others from my manipulative, controlling, and self-righteous side.

"I don't have to win. . . . I am ready to be open and follow the insights of others." C. ARGYRIS & D. SCHÖN, *supra* note 152, at 47 (emphasis in original).

159. Meyer writes of the ideology of openness in the literature of industrial psychology of the later 1940s and 1950s: "There was an assumption, more or less explicit, enabling such open communication. This was the assumption that it was safe to be open. To be emotionally clear and unrepressed and unguarded and frank was of course to be vulnerable, and to be so a man had to feel secure. Obviously then, one of the tasks of the new-model executive was to reconstitute himself so that he did seem safe as the recipient of whole, honest, frank communications, and, in precise analogy to Dale Carnegie's logic of smiles, to do this he had to give himself honestly and frankly to the process, to be sincere. How? That would be hard, unless he in his turn could trust that the power which gave order and meaning to the process of honest communication was not that of the manipulating managers but that of the organization itself, with its intrinsic integrity." D. MEYER, *supra* note 7, at 173-74.

discourse. The bias of Argyris's theories against politics and against authority is likely to color this universe and to affect the participants' understanding of their goals.

These possibilities are repeatedly illustrated in the case studies Argyris and his colleagues report. For example, one study describes class discussions of a minister's decision to permit his church to be used for a demonstration protesting the Nixon invasion of Cambodia. The discussion immediately focuses on the fact that the minister consulted only the church's executive council before permitting the demonstration and failed to assemble and consult the entire congregation. The class assumes that the reason for the protest against the Cambodian invasion was that Nixon failed to allow "broad participation" in deciding whether to invade, and the minister is thus asked to explain why he used the "same strategy" with his congregation as the one used by Nixon. The minister is "shocked to realize that he used the same tactics as President Nixon."¹⁶⁰ Although he had initially given a plausible explanation for his failure to consult the entire congregation—it would have delayed and perhaps precluded the protest—he comes to believe this explanation a dishonest rationalization for a pathological coerciveness. He condemns his actions and proclaims his conversion from Model I to Model II.¹⁶¹ It appears that the minister is never allowed to consider that there were reasons why he might have wanted to protest the Cambodian invasion other than the absence of public participation in deciding on it. He is never allowed to consider that his ends might have been political, that he might plausibly have committed himself to a substantive goal which would require and warrant engaging in coercion and conflict.

If the case of the minister illustrates the bias of Argyris's doctrines against politics, another well-known case reported from a seminar for clinical teachers at Harvard Law School exemplifies its tacit hostility to authority. This case concerns discussions of the efforts of a teacher named Joan to persuade one of her students to continue representing a prison inmate client. The student had proposed to withdraw because the client had rebuffed him, but Joan had argued that the rebuff had been due to misery and frustration, rather than a wish to terminate the relation, and urged the student not to withdraw. The class interprets Joan's conduct with the student as "manipulating the student to feel guilty about the possibility that the client might be

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160. C. ARGYRIS & D. SCHÖN, *supra* note 152, at 45.

161. *See id.* at 45-48.

harmed." The incident is promptly analogized to an earlier discussion in which Joan had described with regret how she had once unintentionally pressured a criminal defendant to accept a plea bargain. The class leads Joan to consider that "she was actually using the same [coercive] strategies with the student that she had used earlier" with the criminal defendant. Her remarks to the student are interpreted as "guilt-inducing," and she is accused of "asking the student to reproduce behaviors she did not value in her own practice," that is, guilt feelings.¹⁶² After an hour or so of this kind of talk, Joan acknowledges that she had erred in straying from the path of Model II with her student.

As in the case of the minister, the discussion is colored by a question-begging analogy reflecting the instructor's biases.¹⁶³ Joan is never allowed to consider that her goals in relation to her student might have been different from her goals in relation to her client. The discussion never recognizes the possibility that Joan might reasonably have thought it appropriate, as a teacher, to exercise authority in regard to her student.¹⁶⁴ Once the possibility is admitted that

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162. Bolman, *Learning and Lawyering: An Approach to Education for Legal Practice*, in *ADVANCES IN EXPERIENTIAL SOCIAL PROCESSES* 111, 126-30 (C. Cooper & C. Alderfer eds. 1978). Of course, what the effectiveness educators find objectionable about Joan's behavior is not her belief in client loyalty—this is entirely consistent with Model II—but her appeal to norms and authority in encouraging her student to be loyal to his client. This appeal to norms and authority provokes the dreaded epithet "guilt-inducing." The psychologists want students to accept client loyalty not as a moral commitment but as a form of self-actualization. For them, the goal of Model II lawyering requires a Model II pedagogy.

163. In the earlier session, Joan had indicated that one reason she pressured the defendant to plead guilty was that "she would have felt responsible and guilty had [the defendant] gone to trial and lost," and she apparently regretted allowing herself to be influenced by this concern. *Id.* at 122. In the later session, Joan is accused of inconsistency because she made her student feel guilty. But in the first situation: (1) Joan's feeling of guilt was irrational—if she had defended her client zealously and competently, she should not have felt responsible for his conviction; and (2) Joan's response to this irrational feeling was unfair because she sacrificed the client's legitimate interest to assuage her feelings. Joan's regret for her feelings and conduct in this situation in no way suggests a general condemnation of guilt feelings or behavior. She seems to have disapproved of not guilt in general, but the irrationality of her feeling and the unfairness of her response to it in the first situation. By contrast, in the second situation, there is nothing irrational or unfair about the attitude she encourages in her student. If Joan is right, the student is being irresponsible—in terms of both Joan's own espoused values and values she might plausibly attribute to the student—and Joan encourages guilt feelings by appealing to responsibility. Bolman ignores the critical moral distinctions applicable to the first situation in order to impute his own antinomianism to Joan and then accuses her of inconsistency when she fails to conform to the attitudes he has baselessly attributed to her.

164. Because they tend to conflate authority and coercion, Bolman and Argyris do not distinguish the traditional pedagogical approach, which might be called the Authority Model, from the defensive, coercive approach of Model I. All of their arguments and evi-

Joan's goals as a teacher included influencing her students' goals, her behavior in the two incidents appears admirably consistent; she encourages her student to show the same sensitivity to his client that she regretted she had failed to show toward her own client. But the moral and social distinctions between the roles of lawyer and teacher are lost in a rhetoric skewed by an unreflective hostility to coercion, guilt, and authority.

It is not possible to make a psychological analysis of this kind of pedagogy on the basis of published reports. For present purposes, it is sufficient to emphasize that the reports reflect the same kind of formalism noted in other writings of the Psychological Vision. First, there is the exaltation of the values of openness and cooperation on a level of abstraction which obscures the concrete issues they raise in many important situations. Second, there is the fragmentation of all social, economic, and political considerations. Professionals are urged to define a style of conduct for themselves on the basis of purely personal and psychological considerations.

D. *Conformity as Fatalism*

Therapeutic pedagogy does not need to engage in conscious manipulation or explicit rationalization in order to encourage conformity to professional role. Nor does it have to generate the kind of enthusiastic conversion experience of Argyris's more zealous disciples. It can promote conformity merely by undermining belief in the co-

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dence for Model II are designed to show that Model II is more effective than the defensive, coercive approach of Model I. But the most plausible alternative to Model II pedagogy is not Model I; it is the Authority Model. In the Authority Model, the teacher occupies a relatively fixed and impersonal role which entitles her to a certain measure of deference and attention by virtue of her presumptively superior learning. The student, having studied the teacher's presentation, is entitled to question and dispute it, but the teacher has no need to justify or defend *herself* because neither her self nor her position is in issue; only her ideas are in issue. Thus, the teacher has no cause to be either open or defensive. Rather, she puts forth her teaching from a relatively impersonal standpoint. Moreover, the teacher is not coercive—the student must learn her doctrines but is not compelled to accept them. On the other hand, there is no pretense of equality or collaboration; the focus of attention is the teacher's ideas and judgments, not the personal interchange between student and teacher. Bolman seems to assimilate Joan's teaching to Model I, but it seems more consistent with the Authority Model, which he completely ignores.

My reading of the effectiveness education literature suggests that Model II pedagogy has the dual defect of simultaneously coercing and denying that it is coercive. If this is right, then the Authority Model might be thought considerably more respectful of the student's autonomy than Model II. For in the Authority Model, the pressures on the student to change his values are explicit and confined and are subject to the student's ability to test them in the light of reason. By contrast, the pressures of Model II seem more insidious for being covert and pervasive.

herence and rationality of action which does not conform to role. I discussed previously how the Psychological Vision tends to subvert the claims to legitimacy and even reality of all norms and institutions except professional role.¹⁶⁵ In so doing, even when it does not make role seem legitimate, it can make role seem inescapable. As Kafka's priest explains to Joseph K., "it is not necessary to accept everything as true, one must only accept it as necessary."¹⁶⁶

This style of conformity is strikingly illustrated in the three student essays reprinted in the first chapter of Bellow and Moulton's clinical text, *The Lawyering Process*.¹⁶⁷ The essays, written at the end of a semester in the Harvard clinical program, are attempts by the students to "capture their experience" in the program.¹⁶⁸ The subject of each of the essays is role. Each essay reflects both an acute consciousness of the lawyer role as frightening and personally oppressive and a complete inability to envision any alternative to it besides moral and social anarchy. One essay refers to a novel called *The Dice Man* in which the stultification of role is contrasted to the liberating randomness of personal disintegration. The essay expresses anguish that lawyering means becoming a "prisoner of role" who must rigidly calculate and control behavior and suppress spontaneity. By contrast, the philosophy of chance put forth in the novel is described as "an experiment in . . . destroying the personality."¹⁶⁹ The author chooses to compromise, proposing that lawyers "should be compelled at various times in their lives to submit to attacks of randomness."¹⁷⁰ In another essay, the author writes that as she learns to master the system, "I become more submerged within it."¹⁷¹ She compares her experience to the characters in Pirandello's *Six Characters in Search of An Author* who explain that "there can be no changes, that the characters can only act their roles and cannot deviate from them."¹⁷² The conformist attitude which underlies all three essays is made explicit in the third essay, which recommends the attitude of the "warrior" as described by Carlos Castaneda's Don Juan: "A warrior acts as if nothing had ever happened because he doesn't believe in any-

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165. See text accompanying notes 67-92 *supra*.

166. F. KAFKA, *supra* note 2, at 276.

167. G. BELLOW & B. MOULTON, *supra* note 5, at 2-8.

168. *Id.* at 2.

169. *Id.* at 6 (quoting L. RHINEHART, *THE DICE MAN* 169 (1971)).

170. *Id.* at 7.

171. *Id.* at 5.

172. *Id.* at 4.

thing, yet he accepts everything at its face value."¹⁷³ While attempting to help these students to deal with their feelings, therapeutic pedagogy seems to have left them incapable of dealing with society on any terms other than the most conventional.

V. THE INSTRUMENTAL SELF

The Psychological Vision divides society into the community-of-two (or the larger therapeutic community of colleagues and students) which it portrays as a realm of personal concern and loyalty, and the outside world, which it portrays as a realm of chaos and barbarism. From the perspective of the community-of-two, the outside world is to be manipulated in the interests of those within the community. There is a corresponding division in the notion of personality implied in the psychological literature. On the one hand, there is the inner core of feeling which constitutes the authentic self and which is the only measure of value. On the other hand, there are those features of the self through which the individual is known to others: appearance and conduct. These presented features of the self are viewed as tools for the manipulation of outsiders in the social world. They are instrumental to the attainment of satisfactions to be enjoyed by the authentic self.¹⁷⁴

A. *Lawyering as Psychological Technique*

The psychologists seek to assist lawyers in perfecting themselves as instruments. They strive for a precise and pervasive control of the presented self which makes possible effective control of others. Redmount urges lawyers to consider themselves as "primitive com-

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173. *Id.* at 5 (quoting C. CASTANEDA, *TALES OF POWER* 58-59 (1974)).

174. This description is simplified; some qualifications should be noted: First, there sometimes appears to be an intermediate realm between the therapeutic community and the social world. This is the realm of nonadversary negotiation. Although the realm is less intimate than the therapeutic community, it is less alien than the social world.

Second, in addition to the authentic and instrumental aspects of the self, there is a third aspect, a mediating aspect, which is susceptible to the internalization of norms. The goal of the psychologists is to make this aspect transparent so that it will not inhibit actualization of the authentic self. See text accompanying note 94 *supra*.

Third, there sometimes appears to be a further division within the authentic self. Although the legal psychologists tend to follow Rogers in treating all authentic feeling as good, they occasionally allow for negative or destructive authentic feeling. To the extent that such feelings appear, not only the instrumental self but also these negative feelings must be controlled in the interests of actualization of positive feeling. See, e.g., Watson, *supra* note 70, at 22. Presumably, the mediating aspect of the self is charged with distinguishing between the negative feelings which are to be controlled and the positive feelings which are to be actualized.

puter model[s]."¹⁷⁵ Meltzner and Schrag teach their students to "predict and control their behavior."¹⁷⁶ Argyris's doctrine is designed to enable people to "change" their "behavior" so as to make it more "effective."¹⁷⁷ The lawyers' attitudes and conduct are viewed as a set of mechanical components to be assembled and adjusted in accordance with principles of efficiency. The psychologists show how the minutest aspects of behavior can be calculated to contribute to a desirable outcome. They encourage self-consciousness about the smallest gestures and the most fleeting facial expressions. They offer instruction in grooming and "body language."¹⁷⁸

At the same time that the lawyers develop their own behavioral equipment, they become sensitive to the vulnerabilities of outsiders, learning "how that person can be 'managed' to contribute to a certain result."¹⁷⁹ They become adept at "mental judo."¹⁸⁰ They are shown that both their own and other people's vulnerabilities are pervasive and myriad. They can never safely let down their guard; they must always be watching for the outsiders to let down theirs. They learn how to penetrate the appearance and conduct of outsiders, to play upon their fears, misconceptions, ignorance, prejudices, and vanities. And they study how to avoid revealing their own feelings involuntarily so that they can better defend against manipulation by outsiders.

The instrumental doctrine of the Psychological Vision is an assault on the ideal and practice of rational discourse. For the psychologists, discourse is merely a facade which hides a psychic war of all against all in which everyone must dominate or be dominated. The psychologists teach lawyers to view the statements of others as symptoms of an underlying affective reality. They direct attention away from the explicit content of statements to the "hidden agenda"¹⁸¹ beneath the surface. The statements of others are neither to be accepted on their own terms nor evaluated in terms of impersonal criteria of truth; they are to be diagnosed in an attempt to determine hidden emotional vulnerabilities. The psychologists teach lawyers to

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175. Redmount, *supra* note 72, at 105.

176. Meltzner & Schrag, *supra* note 71, at 585.

177. C. ARGYRIS & D. SCHÖN, *supra* note 152, at 97.

178. *E.g.*, G. BELLOW & B. MOULTON, *supra* note 5, at 943; Goodpaster, *supra* note 61, at 43.

179. Goodpaster, *supra* note 61, at 25.

180. *Id.* at 32.

181. Sacks, *Human-Relations Training for Law Students and Lawyers*, 11 J. LEGAL EDUC. 316, 325 (1959).

view their own statements not as means of communication, but as tools of manipulation. Words are considered instruments of purposes they do not express.¹⁸² They are to be calculated to appeal not to reason or to shared norms, but to the emotional needs of the other.

The Psychological Vision is ideally suited to give theoretical expression to the trial lawyer's traditional contempt for law, and particularly, for the legal ideals of transcendence and universality. The ideal of law calls for impartial and rational assessment of the litigants' claims in terms of relatively impersonal normative criteria. Most of the traditional repertory of trial tactics is designed to subvert such assessment through appeals to vanity, prejudice, and sentimentality. The basic commandment of trial strategy, to "personalize" the client, reflects this orientation toward psychological reductionism and manipulation.¹⁸³ The point is usually to obfuscate the legal, moral, and factual issues by focusing attention on the kind of person the litigant is.¹⁸⁴ To "personalize" the client does not mean to enable the jury to understand her in her concrete individuality. It means to manipulate her or help her manipulate herself in order to flatter the trier or to exploit its biases.¹⁸⁵

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182. *E.g.*, G. BELLOW & B. MOULTON, *supra* note 5, at 372.

183. *E.g.*, Lynch, *Advocacy in Court: The Trial Judge Looks at the Trial Lawyer*, in 2 MASSACHUSETTS CONTINUING LEGAL EDUCATION, FIFTEENTH ANNUAL PRACTICAL SKILLS COURSE A-3 (1979).

184. *See, e.g.*, T. MORGAN & R. ROTUNDA, PROFESSIONAL RESPONSIBILITY: PROBLEMS AND MATERIALS 16 (1976): "Cohan always has an employee of the defendant insurance company sit with him at defense counsel's table so that the defense can be personalized. In one case he used the foreman of the plant where the fatal accident occurred. All during the trial the foreman dressed in working clothes, sat at the table. He was called as the defense's only witness. In Cohan's emotional closing argument he implied (or rather, a layman could infer) that the foreman and not the company was actually being charged with the wrongful death damages."

185. *E.g.*, A. AMSTERDAM, B. SEGAL & M. MILLER, TRIAL MANUAL 3 FOR THE DEFENSE OF CRIMINAL CASES § 280 (3d ed. 1974): "Finally, counsel should help the defendant to see ways in which he can best present himself to the jury as a likeable person, as someone they can identify with and want to acquit."

This kind of "false personalization," D. RIESMAN, R. DENNEY & N. GLAZER, *supra* note 7, at 307-25, should not be confused with appeals to "lay equity" or to moral principles outside the positive law. The purpose of the appeal is to encourage the trier to judge the litigant not on the basis of alternative principles but on the basis of the kind of person she is. (For a brilliant treatment of the underlying jurisprudential problem, see Katz, *Disorienting Deviance and the Rule of Law*, in *Studies in Boundary Theory* 1 (1976) (unpublished manuscript on file with author).) Nor should it be confused with the appeal to love. Love transcends moral conceptions, but it requires an understanding and embracing of a person in his complete concrete individuality. By contrast, false personalization requires that the individual present himself in shallow, artificial, and conventional terms. *See* D. RIESMAN, R. DENNEY & N. GLAZER, *supra* note 7, at 311-23.

The full panoply of the traditional techniques of adversary advocacy, as well as a variety of new ones, is described and analyzed in detail in the psychological literature. The psychologists are candid about the manipulative nature of these techniques. For example, here are some of the instructions which Meltsner and Schrag offer in their chapter on negotiation: "If the law is not on your side, avoid using it . . . [I]nvoke . . . whatever kind of authority (for example, public pressure) seems to support your position." "Be tough—especially against a patsy." "Appear irrational when it seems helpful." "After agreement has been reached, have your client reject it and raise his demands."¹⁸⁶ They give advice on how to improve your bargaining position by making your adversaries "feel small" (have them sit lower than you) or "fear for their personal safety" (poverty lawyers can schedule negotiations at offices in the ghetto).¹⁸⁷ They discuss tactics used by Hitler in the invasion of Czechoslovakia and Khrushchev at the United Nations as examples of effective technique.¹⁸⁸

B. *Totalitarian Role*

There is nothing novel about advice of this kind, but the psychologists carry it to new levels of subtlety. Consider an analysis of the psychology of "persuasion" which Bellow and Moulton reprint in their section on pretrial witness interviews to indicate how lawyers can "'persuade' witnesses to recount the facts in ways that are most consistent with the outcome they desire."¹⁸⁹ The basic approach is to "find the weak points of the target person."¹⁹⁰ The author has little respect for the liberal faith that appeal to reason and fact is the best form of persuasion. They believe that there are three bases for belief—"needs for information, for social acceptance by other people or for ego protection from unacceptable impulses and ideas"—and that appealing to the first is the "least effective" means of persuasion. Persuaders must play upon the other two.¹⁹¹

In preparing for an interview, persuaders are to practice the "strategy of identification" which dictates that they dress and groom

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186. M. MELTSNER & P. SCHRAG, PUBLIC INTEREST ADVOCACY: MATERIALS FOR CLINICAL LEGAL EDUCATION 236-38 (1974).

187. *Id.* at 233.

188. *Id.* at 236-37, 239-40.

189. G. BELLOW & B. MOULTON, *supra* note 5, at 364.

190. Zimbardo, *The Tactics and Ethics of Persuasion*, in G. BELLOW & B. MOULTON, *supra* note 5, at 366.

191. *Id.* at 367.

themselves similarly to the target, use speech similar to that of the target, and express opinions on nonessential issues similar to those held by the target. If the target is working class, the persuaders should express respect for hard work and portray themselves as hard workers. If the target is white collar, they should present a neat appearance and be formally courteous and deferent. Once an interview begins, they should selectively "reinforce" those "behaviors" of the target which will contribute to the desired result. This ability to reinforce can be enhanced by pretending to care personally about the target and what he has to say, by maintaining "eye contact" and "close physical proximity," by feigning agreement with nonessential opinions, and by "individuating" him by using his name. Desirable "specific behaviors" are to be "[r]einforce[d] . . . explicitly and immediately by nodding, saying 'good,' 'that's an interesting point,' and the like." Desirable "general classes of behavior" are to be "[r]einforce[d] . . . by smiling, and by making it obvious you enjoy the interaction."¹⁹² In order to enhance intimacy, persuaders should "individuate" themselves, but at the same time they should be careful to avoid threatening the target or causing him to raise his guard: "At some point, describe something personal or unique about your feelings, background, interests, and so forth (which you expect will be acceptable). However, once this is accomplished, then do not allow yourself to be the exception to the stereotype—say 'most other students are like me in how they feel about X.'"¹⁹³

Persuaders are advised to work in pairs, with each member differing from the other in some characteristic such as age or sex. This promotes "the subtle idea that even when people differ in outward characteristics, they can still agree on the important issue." When stating the position the persuaders want the target to adopt, they should phrase the position to appeal "to the dominant social and personality characteristics" of the target.¹⁹⁴ Persuaders should not "insist that the person accept and believe what [he is supposed] to say before he makes a behavioral commitment." Rather, "get the behavioral commitment anyway, and attitude change will follow."¹⁹⁵

A final piece of advice illustrates the subtlety of the psychologists' manipulative apparatus:

When you believe the target person is about to make the com-

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192. *Id.* at 369.

193. *Id.* at 368–70.

194. *Id.* at 371.

195. *Id.*

mitment (or after a verbal agreement is made), stress the fact that the decision is his own; it involves free choice, no pressure. This maximizes the dissonance experienced by the decision made and forces the individual to make his behavior internally consistent by generating his own intrinsic justification for his behavior.¹⁹⁶

Here is a technical insight that would have won the admiration of the Grand Inquisitor. The target is not merely defeated, but made to acknowledge the destruction of his autonomy as an exercise of his freedom.

Most of these techniques are premised on the conformist vision of social life which pervades the Psychological Vision; they require a high degree of conformity on the part of both the lawyer-manipulators and their targets. Lawyers are expected to alter every aspect of their presented selves to conform to the expectations and prejudices of the target. The recurring contradiction in the Psychological Vision—that it exalts autonomy while prescribing conformity—is nicely exemplified in the advice to emphasize something “personal and unique” about yourself but without letting yourself become “the exception to the stereotype.”¹⁹⁷

Of course, the lawyers' efforts are expected to generate a reciprocal conformity on the part of the target, and their technical proficiency is supposed to enable them to come out ahead in the exchange. While the target gets little of importance, the lawyer is able to use the target to further important ends. Yet the range of ends and means which the psychological literature contemplates is a very restricted one. There is no hint of the possibility emphasized in the Sociological Vision of using technique to creatively transform social relations.¹⁹⁸ Although some of the psychological tactics are referred to as “Machiavellian,”¹⁹⁹ none of them contemplates gaining or using political power. The psychologists give the kind of advice one associates with Willy Loman, not with Machiavelli.²⁰⁰ The only

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196. *Id.* at 372.

197. *Id.* at 368–70; see text accompanying note 193 *supra*. This is the strategy of “marginal differentiation” which David Riesman describes as characteristic of the other-directed person. Such a person feels obliged to conform to most of the expectations of the other because any genuine expression of individuality would threaten the other and deprive the person of the other's approval. At the same time, he strives to create some sense of personal distinctiveness by adopting some minor innocuous characteristic from among a limited range of permissible variations. D. RIESMAN, R. DENNEY & N. GLAZER, *supra* note 7, at 46–47.

198. See, e.g., L. BRANDEIS, *supra* note 20; J. HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* (1956); Pound, *The Lawyer as a Social Engineer*, 3 J. PUB. L. 292 (1954); sources cited note 9 *supra*.

199. Zimbardo, *supra* note 190, at 366.

200. See, e.g., A. MILLER, *DEATH OF A SALESMAN* 33 (1949) (“[T]he man who makes an

form of power considered is psychic manipulation. The immediate goals sought are acts of marginal personal acquiescence; the ultimate goals are the routine benefits prescribed by the established reward structure. The manipulative apparatus thus assumes a large measure of resignation to established social institutions.²⁰¹

In addition to this resignation, there is, on a psychological level, something disturbing about the instrumental self. The psychologists, who claim to be dedicated to the "whole person,"²⁰² seem to prescribe conditions of personal disintegration. In *The Divided Self*,²⁰³ R.D. Laing describes a schizoid state in which the person is split between a true "unembodied" self and a false "embodied" self.²⁰⁴ The unembodied self is an "onlooker" who is disengaged from the world. The embodied self is a "series of impersonations" calculated to protect the true self from being perceived by others and to elicit desired responses from others.²⁰⁵ Others are viewed as "actors" struggling to project their own false impressions;²⁰⁶ at the same time they are de-personalized into objects to "be used, manipulated, acted upon."²⁰⁷ In this state, the person is "terrifyingly self-conscious";²⁰⁸ he struggles to make himself "omnipotent" through self-control and control of others.²⁰⁹ Laing describes one such patient:

His ideal *was never to give himself away to others* . . . . As an actor he wished always to be detached from the part he was playing. Thereby he felt himself to be master of the situation, in entire conscious control of his expressions and actions, calculating with precision their effects on others. To be spontaneous was merely stupid. It was simply putting oneself at other people's mercy.²¹⁰

I emphasize this parallel between the instrumental self of the Psychological Vision and the schizoid state to support my intuition that the style of thought and action expressed in the psychologists' techniques is radically inconsistent with any plausible ideal of fulfilling work or social life. The schizoids Laing describes cannot experience

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appearance in the business world, the man who creates personal interest, is the man who gets ahead. Be liked and you will never want.").

201. See T. ADORNO, *supra* note 7, at 18-19; D. RIESMAN, R. DENNEY & N. GLAZER, *supra* note 7, at 130-47. See also A. GOULDNER, *supra* note 16, at 381-82.

202. Goodpaster, *supra* note 61, at 8.

203. R. LAING, *THE DIVIDED SELF* (1965).

204. *Id.* at 65-69.

205. *Id.* at 72.

206. *Id.* at 71.

207. *Id.* at 76.

208. *Id.* at 74.

209. *Id.* at 75.

210. *Id.* at 71-72.

themselves as integral or continuous personalities. They cannot embody or express their intentions in the world. They cannot learn about themselves in relation with other people or grow through knowledge of other selves. Since their personal world has no structure, they suffer from constant anxiety and uncertainty. Because they do not participate directly in the world, they feel unreal. Because they cannot be enriched through relations with others, they feel empty.²¹¹ The negative implication of this analysis is that people have a need to express and constitute themselves in the natural and social world.²¹² In demanding that the lawyer "be prepared to write off everything he is"²¹³ except the secret purposes of the inner self, the technical doctrines of the Psychological Vision violate this need. To oppose the instrumental self in the name of spontaneity and sincerity is not necessarily to argue for randomness or enforced intimacy. It is simply to suggest that people rightly value their conduct and appearance not merely for their usefulness in attaining ulterior satisfactions, but because they are important and valuable parts of who they are.

In the discussion of pedagogy, we saw that the therapeutic community was governed by a regime of enforced intimacy. By contrast, the social world is governed by a regime of enforced estrangement. Although the transition from one world to the other is portrayed and no doubt experienced as a radical break, the two realms have dimensions in common. In both worlds, attitudes and conduct are por-

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211. See *id.* at 65-105. In one important sense, the analogy between Laing's schizoid and the instrumental self may seem inapposite. Laing distinguishes the schizoid from people like Shakespeare's Iago, who "pretended to be what [he] was not" but did so "to further [his] own purposes." By contrast, "the schizoid individual 'seems' because he is frightened not to seem to further what he imagines to be the purpose that someone else has in mind for him." *Id.* at 99. The goal of the schizoid is privacy or a highly abstract autonomy rather than some concrete result. Although he is calculating to an intense degree, his efforts are more defensive than aggressive.

I do not think that this point diminishes the relevance of the analogy. First, although the psychological literature purports to address prospective Iagos, it is not clear that it really does. As the discussion of the techniques of "persuasion" illustrates, the psychological apparatus contemplates that those who use it conform to a very high degree to the expectations of others in return for relatively marginal and conventional concessions. Moreover, the student essays reprinted in G. BELLOW & B. MOULTON, *supra* note 5, at 2-8, suggest not a sense of confidence and mastery from learning the techniques of the lawyer role but a sense of being "submerged" in the role or of having retreated there. *Id.* at 5. Second, even a successful disciple of Iago might suffer from the principal consequence of this schizoid state: an inability to know himself and to grow through relations with others.

212. This point is argued on the basis of practical reason in R. UNGER, *supra* note 15, at 55-59, 199-222, on which my remarks rely. For a very different approach, see R. LAING, *THE POLITICS OF EXPERIENCE* (1967).

213. R. LAING, *supra* note 203, at 77.

trayed as instrumental. Within the therapeutic community, "manipulative" behavior is deprecated in favor of cooperative behavior, but cooperation is praised not as an end in itself, but as a means of eliciting desired responses in others.²¹⁴ Thus, cooperation is seen as another kind of manipulation. Moreover, in both worlds the individual is subject to severe conformist pressures. In the therapeutic community, these pressures take the form of invasion of privacy. In the social world, they take the form of repression of sociability. In both worlds, the individual's attitudes and conduct can no longer express and constitute who she is; they are completely absorbed into role.

The Psychological Vision has thus produced a totalitarian notion of role. In the sociological concept, role is a realm of conformity, but because this conformity is explicit, limited, and socially defined, role is also possibly and partially a realm of freedom.²¹⁵ Because the demands of sociological role are explicit, individuals may be able to question and even to reject them. Because these demands are limited, they leave individuals a substantial measure of personal discretion to distinguish themselves from the roles they occupy. And because they are socially defined, they protect their occupants to some extent from the pressures of the personal expectations of other individuals. Individuals can appeal to norms of role to resist the personal demands of other individuals. On the other hand, the notion of role often assumed in the Psychological Vision dispenses with these safeguards and subjects individuals to a regime in which demands for conformity are pervasive and implicit, in which individuals cannot separate their presented selves from their roles, and in which every aspect of appearance and conduct is subject to conscription in the psychic war of all against all.

C. *The Posture of Detachment*

At their best, the psychologists are not insensitive to the degrading, stultifying, and exploitative aspects of the instrumental self. Indeed they do not see themselves as justifying the mode of life expressed in their technique, but simply as describing it. Moreover, they sometimes express doubts about goals for which their technique is commonly used. They consider that their mission is to help people understand the reality of law practice, not in order to encourage

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214. See C. ARGYRIS & D. SCHÖN, *supra* note 152, at 85-95.

215. See P. BERGER, *INVITATION TO SOCIOLOGY: A HUMANISTIC PERSPECTIVE* 145 (1963).

them to adapt to it, but in order to enhance their capacity to choose the extent to which they will adapt to it. They theorize that when people learn the techniques for the first time under the pressures of practice it is difficult for them to view their conduct and situation reflectively. By reproducing law practice in their writings and their classrooms, they try to enable people to confront it in a context more conducive to reflection and criticism.²¹⁶

To an extent, these claims are justified. At their best, the psychologists do describe certain prevalent techniques of practice at a more sophisticated and concrete level than previous writers, and their works are useful in understanding contemporary law practice. But despite their intentions, these works often tend unreflectively and uncritically to rationalize the modes of thought and action they describe.

In the first place, the psychologists tend to assume a posture of technical neutrality which they themselves probably recognize as false when it is assumed by policy scientists. Although the Psychological Vision has a curious connection with the movement to provide legal services to the disadvantaged, which will be discussed below, it purports to be neutral toward the various kinds of clients and ends for which it might be used, and it is addressed to readers and students interested in all areas of practice. Like arms merchants, the psychologists can defend their wares by arguing that they may be useful to the righteous; but also like arms merchants, they sell to all customers, and they keep fairly quiet about who they think the righteous are.²¹⁷

Yet such an ostensibly neutral elaboration of technique has inherent biases. To approach technique from a value-free posture is to make a value of technique itself. Technical proficiency becomes the only norm within the universe of discourse. By presenting technique as something worth knowing in itself and by encouraging and rewarding the acquisition of proficiency, technicians encourage people to value technique and to use it. Moreover, the posture of technical neutrality fragments technique from its social contexts. When specific ends and settings are discussed, they are taken as hypothetical,

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216. See, e.g., Bellow, *supra* note 87, at 377-78; Meltsner & Schrag, *supra* note 71, at 584-87.

217. Meltsner, Schrag, Bellow, and Moulton all have written works outside the Psychological Vision which express commitments to particular social values and groups, but they have not integrated these views into their clinical writing within the Psychological Vision. See, e.g., Meltsner & Schrag, *supra* note 71, at 627-28; see note 240 *infra* and accompanying text.

and the issues are defined so that analysis may be confined to technique. Students are asked to adopt hypothetically the goals and perspectives of corporation lawyers or poverty lawyers, prosecutors, or defense lawyers, without analyzing these goals or the social contexts in which they arise. From an academic point of view, this fragmentation is unjustifiable. Technique is always created and used for specific purposes in specific social contexts. To analyze it without also analyzing these contexts is to preclude reflective understanding of it.²¹⁸

In the second place, there is a more explicit sense in which the psychologists tend to legitimate the prevailing modes of practice. The psychologists justify their work as making better and more effective practitioners.²¹⁹ Yet they ignore the extent to which this goal commits them to the prevailing norms and modes of conduct of the private bar. As long as the only formally recognized criteria of quality and efficacy in legal work are established by elite private practitioners, and as long as the career aspirations and opportunities of most law students are oriented toward private practice, any legal literature or pedagogy addressed to students or lawyers generally that justifies itself in utilitarian terms must acquiesce in the norms of private practice. Specific practices may be questioned in the light of general professional norms, but the range of questioning will be con-

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218. Two decades ago, C. Wright Mills emphasized the limitations of the "as-if-I-were-a-human-engineer" posture, which the legal psychologists have since developed into an elaborate repertory of roles and simulations: "To act in this as-if-I-were-a-human-engineer manner might be merely amusing in a society in which human reason were widely and democratically installed, but the United States is not such a society. . . . Ours seems to be a period in which key decisions or their lack by bureaucratically instituted elites are increasingly sources of historical change. Moreover, it is a period and a society in which the enlargement and the centralization of the means of control, of power, now include quite widely the use of social science for whatever ends those in control of these means may assign to it. To talk of 'prediction and control' without confronting the questions such developments raise is to abandon such moral and political autonomy as one may have." C. MILLS, *THE SOCIOLOGICAL IMAGINATION* 115-16 (1959).

Most of the legal psychologists do discuss ethical questions in connection with their technical demonstrations, but these discussions are rarely integrated with their technical analysis, and usually consist of brief, vague afterthoughts or qualifications relegated to footnotes or appendices. They are often framed in a manner in which the more basic issues are taken for granted, and only narrow interstitial matters are presented for analysis. When more general issues are recognized, the discussions often take the form of vague expressions of doubt or invitations to readers or students to consult their personal feelings. While the mood of the technocratic discussions is one of confidence and mastery, the mood of the ethical discussions is one of uncertainty. These discussions do not substantially alter the predominantly technocratic orientation of their clinical approach.

219. *See, e.g.*, T. SHAFFER, *supra* note 1, at 3-5; Meltsner & Schrag, *supra* note 71, at 586-87.

strained sharply by the demand that teaching be "relevant" to practice.²²⁰ A seriously reflective and critical approach to the study of law practice would probably make people less prepared for practice, not more.²²¹

In the third place, the other major themes of the Psychological Vision—the community-of-two, the reduction of the world to personal feeling, and therapeutic pedagogy—all reinforce and legitimate the instrumental self and its manipulative apparatus. The theme of the community-of-two devalues the social world and undermines social constraints to manipulation. In portraying the authentic self as a core of intimate feeling, the psychology of feeling leaves the presented self available for the purposes of manipulation. The conception of feeling as the only meaningful reality undermines all moral considerations with which the instrumental self might be criticized convincingly or which might generate an alternative conception of lawyering.

Therapeutic pedagogy encourages conformity to the established lawyer role. Meltsner and Schrag, who teach technique through role-playing, write that "[s]ome students simply hated the role-playing." The teachers view this "resistance to role-playing" as a pathological fear of learning about the reality of lawyering, but perhaps it was actually a protest against the all-too-apparent degrading, stultifying, and exploitative features of the roles the students were asked to play. The teachers found that over the semester "the resistance could be explored, grappled with, and used creatively, resulting in warmer feelings after a period of time."²²² The introduction to the instrumental self under the auspices of therapeutic pedagogy leads not to critical understanding or moral revulsion, but to "warmer feelings."

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220. It is not utopian to suggest that legal theory and legal education could justify themselves on nonutilitarian terms and that law schools could adopt basic goals other than the preparation of people for practice. The most prominent charge of the psychologists against the doctrinal tradition has been precisely that it is irrelevant to practice. See, e.g., T. SHAFFER, *supra* note 1, at 1-5; Meltsner & Schrag, *supra* note 71, at 581. This charge at least indicates that the range of possibilities transcends the demands of practice. In fact, the bar's claim that law is a learned discipline and the professed commitment of the universities to critical and theoretical knowledge create important practical possibilities for reflective and critical legal scholarship and education. In conceding so much to the demands of practice, the Psychological Vision subverts these possibilities.

221. Bellow acknowledges that "the demand for self-consciousness . . . is not entirely reconcilable with the demands for performance in the field." Bellow, *supra* note 87, at 390.

222. Meltsner & Schrag, *supra* note 71, at 596.

VI. CONCLUSION: HOMO POLITICUS

In *The Interpretation of Dreams*,²²³ Freud analyzes a dream of his own which he calls "A Revolutionary Dream."²²⁴ Freud dreamed this dream in August 1898 after he had seen the conservative, aristocratic Austrian minister president imperiously boarding a train in a railroad station. This real life scene had aroused Freud's resentment at Austrian conservatism and aristocracy and had called to his mind Beaumarchais's revolutionary Figaro. The dream opened at a speech by the minister president to a group of students in which the minister president spoke contemptuously of German nationalism. Freud jumped up in anger at the minister's remarks. Then, sensing himself in danger, he fled from the scene through a corridor of a university into the street to seek refuge in some city where the Austro-Hungarian Court would not be in residence. The dream ends in a railroad station where Freud holds a urinal for a helpless old man. Freud's interpretation of his dream focuses on the last scene. Freud refers to a childhood event in which he had wet himself and his father angrily rebuked him by saying that the son would never amount to anything. Freud understands the last scene of his dream as a kind of revenge in which his father (the old man) is reduced to the same kind of helplessness for which he had rebuked the son and the son demonstrates to the father that he has in fact amounted to something.²²⁵

Carl Schorske, in a brilliant *tour de force*, has reinterpreted this and others of Freud's dreams. Using a method which stands Freud's on its head, Schorske argues that these dreams performed the function of "dissolving political impulses and political guilt."²²⁶ At a time of rapidly growing political turmoil and antisemitism, Freud had abandoned a youthful ambition for a government career and had chosen instead a scientific career. Much later, after years of academic martyrdom and aloofness, he decided to ingratiate himself with the academic establishment in order to secure a university professorship. Freud's revolutionary dream occurred between these two events, and in Schorske's interpretation, the dream excuses the first decision and prepares for the second; it rationalizes Freud's retreat from politics to

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223. S. FREUD, *The Interpretation of Dreams*, in 4, 5 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 1-627 (J. Strachey ed. 1953).

224. 4 *id.* at 208-19; 5 *id.* at 431-35.

225. *Id.*; see Schorske, *Politics and Patricide in Freud's Interpretation of Dreams*, 78 AM. HIST. REV. 328, 339-42 (1973). I have followed Schorske's paraphrase, although on one or two points it is questionable whether Freud's text supports it.

226. Schorske, *supra* note 225, at 341.

psychology and the academy. In the dream, Freud gratifies his wish to politically oppose aristocratic conservatism by rising in protest against the minister; he then retreats through the refuge of the academy. In the final scene, the father replaces the minister; Freud's desire for revenge on his father replaces his desire for political action; and patricidal instinct replaces political instinct.²²⁷ Schorske suggests more generally that the creation of psychoanalysis can be understood as a form of political sublimation in a society where politics has become difficult and dangerous. "By reducing his own political past to epiphenomenal status in relation to the primal conflict between father and son, Freud gave his fellow liberals an ahistorical theory of man that could make bearable a political world spun out of orbit."²²⁸ It takes a far less ingenious interpretation than Schorske's to see the psychologism of the legal psychologists as a form of political repudiation and consolation.

Throughout this century, a primary function of the law schools in the intraprofessional division of labor has been to vindicate the bar's claim that law is a morally charged, theoretical discipline which stands above politics.²²⁹ The doctrinal tradition accomplished this goal through the elaboration of complex and coherent structures of discourse and moral visions which appeared to transcend fundamental controversies and struggles. The relative disengagement of the doctrinal tradition from practice was not a perverse byproduct or a pedagogical error; it was a condition of the portrayal of law as theoretically rich and apolitical. Most law practice consists of unreflective bureaucratic routine remote from the ideal of a theoretically rich discipline. The more creative, stimulating, and nonroutine legal work has had a quality of expedience and predation which is difficult to experience as transcending basic struggles of competing interests and conflicting values. By ignoring practice altogether, the doctrinal tradition avoided confrontation with those aspects of practice which contradicted the professional ideal.

Most of the teachers of the doctrinal tradition have fled to the academy from the disappointments of practice.²³⁰ They have been people who failed to find in practice the intellectual stimulation and moral transcendence promised by the professional ideal. This kind of

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227. *Id.* at 329, 339-43.

228. *Id.* at 347.

229. See J. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976).

230. "With a few exceptions, people are law professors because they tried practice and didn't like it." M. MAYER, *THE LAWYERS* 117 (1967) (quoting Murray Schwartz).

disappointment might have led to criticism of the unreflective character of law practice and of the social conditions which account for its subservience to dominant economic interests, and to some extent it has. But such efforts have threatened to create tensions with the bar and to re-involve the professors in politics. The more characteristic response of the refugee professoriat has been to seek the experience of intellectual stimulation and moral transcendence without the tensions of criticism and politics by immersing themselves and their students in a doctrinal universe relatively disengaged from politics and society. From the point of view of the professors, the purpose of the doctrinal education was not so much to prepare people for practice as to provide the ritual experience of an ideal of work and social life which is not realized in practice.

The Psychological Vision emerged during the Warren Court era when the doctrinal solution to the problems of professional legitimation and professorial consolation had been drastically shaken. The judiciary's response to the civil rights and public interest movement fractured the prevailing doctrinal structure and undermined the image of adjudication as apolitical. The professors failed convincingly to assimilate the new precedents into established doctrinal frameworks; doctrinal controversy became increasingly pervasive and explicitly political; and legal discourse lost stability and coherence. It thus became increasingly difficult to portray doctrine as theoretically rich and coherent, and morally charged but apolitical. Moreover, the civil rights and public interest movements produced a vision of lawyering which to a limited extent was explicitly political. As doctrine became less coherent and more political, it lost much of its capacity to legitimate and produced controversies which became embarrassments to the professional establishment. It also generated tensions within the academic community which undermined the ritual experience of normative transcendence. It became more difficult to convince students that doctrinal education constituted initiation into a "mysterious science" which was a genuine prerequisite to law practice. The schools became vulnerable to charges from both students and practitioners that doctrinal education was irrelevant to practice. In addition, they became vulnerable to criticisms by students and liberal critics who focused on the gap between legal doctrine and social reality to argue that any serious commitment to the moral vision of liberal legalism would require an activist and explicitly political approach to lawyering.

The Psychological Vision is one response to this situation. It of-

fers an approach to legal theory and education which concedes the failure of the doctrinal tradition and yet meets the claims of professional legitimation and professorial consolation. Psychology appears as a way to focus on practical skills while continuing to portray law as a learned discipline. It provides a set of themes and jargon which help unify a variety of practical lawyering tasks in terms of an established body of academic knowledge. It also provides a set of values sufficiently abstract and amorphous to be compatible with almost any style of practice. The psychologists achieve a measure of theoretical coherence by excluding economic, social, and political considerations and focusing on personal relations and emotion. They achieve a sense of apolitical moral engagement by committing their doctrines to the celebration of an ahistorical and apolitical conception of human nature. In their classrooms, while purporting to respect the realities of practice, the psychologists create a self-contained world of emotional transparency, self-consciousness, and personal care in which the routine tasks of practice can be invested with sentiment and in which all political considerations are reduced to feeling or treated as hypothetical.

The Psychological Vision thus enables legal academics to bow to the demands of practical relevance which arise from the decline of the doctrinal tradition, without confronting the tension between academic and professional ideals on the one hand and the realities of practice on the other. While the Economic and Sociological Visions dealt with these tensions by sublimating them in the elaboration of an idealized doctrinal order, the Psychological Vision deals with them through an indiscriminate desublimation which encourages that the most impersonal, stultifying, and exploitative practices be invested with intimate feeling.²³¹

The repudiation of politics is occasionally an explicit theme in the psychological literature. I have already mentioned that Pincus defended CLEPR's psychologistic approach to clinical education as an anesthetic for the "destructive university protest movement." CLEPR sold clinical education to the schools as a way of teaching students to "live with frustration" and to "repress the arrogance that would dictate answers for others."²³² And for Shaffer, a major purpose of psychologistic instruction was to cure any tendencies the student might have "to react negatively" to a client and to cultivate a capacity for "acceptance" of clients and, in particular, prevailing

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231. See H. MARCUSE, *supra* note 7, at 56-83.

232. Pincus, *supra* note 4, at 286.

property norms and institutions.²³³ The antipolitical theme is also prominent in the first major contribution to the contemporary psychological literature, Griswold's *Law Schools and Human Relations*.²³⁴ Griswold began by expressing concern about the preoccupation of recent legal discourse with questions of "liberty, due process, governmental power." He warned that there was "some danger from overemphasis of these questions," in that discussing them was likely to involve a "certain amount of emotion, and if we are not careful, we sometimes end up with each side calling the other hysterical—perhaps justifiably."²³⁵ He suggested that a cardinal virtue of his topic, the introduction of psychology into law teaching, was precisely that it did not raise dangerous political issues.²³⁶

The appeal of the antipolitical thrust of the Psychological Vision to conservatives such as Shaffer and Griswold seems obvious. Yet, as mentioned earlier,²³⁷ it is a striking fact that the majority of the theorists and teachers of legal psychologism seem to be politically to the left of center.²³⁸ Indeed, many and perhaps most of them are veter-

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233. T. SHAFFER, *supra* note 1, at 8, 17, 19–27.

234. Griswold, *supra* note 117.

235. *Id.* at 199.

236. *Id.*

237. See text accompanying note 125 *supra*.

238. The liberal clinicians do not think of their pedagogy as antipolitical. They often assert a strong connection between clinical pedagogy and a progressive political orientation. The principal basis for this assertion seems to be a set of assumptions similar to the pragmatist psychology criticized in R. HOFSTADTER, *supra* note 144, at 229–323; C. LASCH, *supra* note 144, at 144–46; and Note, *supra* note 3, which influenced the Progressive Movement earlier in this century. Like the Progressives, the clinicians tend to identify truth and value with concrete and useful knowledge and to think of domination and destruction as learning problems (when they think of them at all). People engage in or submit to domination and destruction because they are under the tyranny of anachronistic abstract concepts, which may once have accurately summarized the world but have been outmoded by changes in the underlying concrete reality. Concrete and practical education is seen as progressive because it arms people to make changes and because it frees them from the cognitive obstructions which prevent them from seeing the changes which should be made.

As I have argued above, this theory is a dubious one. In their quest for the concrete, the psychologists do not free themselves from abstraction; they merely surrender to unrecognized but highly conventional preconceptions. And their discussions of practical utility tend to assume the familiar prevailing ends served by elite practitioners and to beg the question of the legitimacy of these ends. See text accompanying notes 219–20 *supra*.

Aside from its theoretical defects, there is a further aspect of the clinical pedagogy which bears on its curious political significance: *Few of the clinicians ever really implemented their theory.* The majority of the clinicians have been most concerned with advocacy on behalf of the disadvantaged, and much of the clinical curriculum has focused on legal services and public interest practice. Yet a majority of students to whom the clinical curriculum has been taught have headed for conventional private practice, often in corporate firms. A pedagogy committed to the unmediated experience of the concrete has prepared students for conventional pri-

ans of the movements which during the Warren Court era challenged the professional vision of lawyering as apolitical: the public interest and legal services movements. The connection between the clinical versions of psychologism and the legal services movement is particularly striking. A large number of the teachers in the clinical programs came to law teaching from legal services practice. Moreover, many of these programs have provided for students to work for academic credit in legal services offices under the supervision of legal services practitioners.²³⁹ To some extent the explanation of this phenomenon seems to lie in the decline of the public interest and legal services movements. The period of dramatic growth in the clinical movement of the late 1960s and early 1970s coincided with a period of rightward drift in American politics and of growing frustration and demoralization among liberal activist lawyers.²⁴⁰ For the activists, the disappointments of practice must have come not from the discovery that lawyering was political, but from the discovery of the tension and difficulty of politics. In this climate, the clinical movement became one of the most attractive escape routes from public interest and legal services practice. A majority of the rapidly growing number of clinical teaching jobs went to lawyers leaving this kind of practice.²⁴¹ The Psychological Vision thus appears a product not so much of the legal services and public interest practice, as of the abandonment of this kind of practice.²⁴²

Like Freud, many of the legal psychologists turned to psychology and to the academy at a time when politics seemed increasingly difficult. Like him, they transformed their former political concerns into

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vate practice by immersing them in the experience of a very different kind of practice. This situation has pushed the clinicians toward precisely the kind of formalism they repudiated: the abstraction from one kind of practical experience to a model of practice-in-general which ignores the concrete differences among different areas of lawyering. Moreover, the focus of legal services practice—in effect, a paradigm of practice-in-general—has encouraged the sentimental acceptance of the prevailing norms of advocacy. Students destined to represent wealthy and powerful institutions are taught partisan advocacy in a setting involving representation of relatively poor and helpless individuals, that is, in precisely the setting where the profession's norms of loyalty and acceptance are least likely to provoke criticism and dissent.

239. See Grossman, *Clinical Legal Education: History and Diagnosis*, 26 J. LEGAL EDUC. 162, 175-76 (1974).

240. For expressions of this mood of disillusionment, see, e.g., Schrag, *Bleak House 1968: A Report on Consumer Test Litigation*, 44 N.Y.U. L. REV. 115 (1969), and Sparer, *The Right to Welfare*, in *THE RIGHTS OF AMERICANS* 65 (N. Dorsen ed. 1971). On demoralization within the legal services movement, see Bellow, *supra* note 52.

241. This is Gary Bellow's estimate.

242. However, it has also exerted its influence on many who have remained. For example, the Federal Legal Services Corporation now conducts sessions in "group process" and "sensitivity training" for poverty lawyers.

a concern with subjective experience and with therapy. Perhaps as they turned away from law practice to the academy, they felt as Freud did when he decided to accept his professorship:

When I got back from Rome . . . my zest for martyrdom diminished. . . . So I made up my mind to break with my strict scruples and take appropriate steps. . . . One must look somewhere for one's salvation, and the salvation I chose was the title of professor.²⁴³

The interpretation of psychologism as political sublimation or consolation implies an understanding of human nature which is entirely foreign to all three versions of legal formalism considered so far. Reversing Freud's approach, Schorske finds in the surface exaggerations and implausibilities of psychological doctrines redirected and distorted expressions of unfulfilled or frustrated "political instincts." This notion of a political instinct or nature suggests that people naturally seek to participate in defining and constituting the social order in which they live. From such a notion one might hypothesize a Political Man and a Political Vision which might constitute the basis of an alternative jurisprudential doctrine.²⁴⁴

Political Man would resemble Economic Man in his activist and transformative stance toward the world and in recognizing and accepting a coercive dimension to his actions. In other respects, however, he would differ sharply from Economic Man. He would not view social action as merely instrumental to the attainment of individual material satisfactions, but rather as to a significant extent fulfilling in itself. Moreover, he would consider himself guided and constrained by values and principles that transcend material self-interest and by a reason which addresses ends as well as means.

Like Sociological Man, Political Man would seek solidarity with his fellows and would orient his conduct toward norms. But concern for others and for norms would not necessarily lead to conformity. Political Man would be capable of finding both personal fulfillment and solidarity in conflict. In the Political Vision, norms would not always produce integration and solidarity; they might appear to contradict established practices and provide a basis for opposing them. Moreover, the prevailing social norms would not exhaust the possibilities of rational and fulfilling normative commitments. One

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243. Letter from Sigmund Freud to Wilhelm Fliess (Mar. 11, 1902), *quoted in* Schorske, *supra* note 225, at 347.

244. For the classical version of Political Man, see ARISTOTLE, *POLITICS* bk. III. On the decline or sublimation of the political in modern social thought, see H. ARENDT, *THE HUMAN CONDITION* 22-77 (1958); S. WOLIN, *POLITICS AND VISION* 286-434 (1960).

might appeal beyond prevailing norms to more fundamental principles and values.

Political Man could follow Psychological Man to the extent of acknowledging the value of intimate personal experience and relations, but he would have to insist on the distinction between the private realm of intimacy and the public world and on the value of relatively impersonal action in the public world. He could also acknowledge the value of self-awareness, but he would be wary of the dangers of self-absorption and he would not regard his attitudes and behavior merely as instruments of concealed intimate purposes.

The Political Vision is not the solution to the problems of formalism. It is yet another formalism. But like each of its predecessors it has the virtue of emphasizing important aspects of personality and society which the others ignore. In particular, it counters the tendencies of the Psychological Vision to sentimentalize law practice and to deny or obscure the political character of lawyering.

The Political Vision should not prevent recognition of the fact that the antinomian, self-absorbed, manipulative style of practice celebrated by the Psychological Vision does to a significant extent accurately portray the conduct and attitudes of legal practitioners. The Psychological Vision has made a valuable contribution in focusing attention on practice and in providing the beginnings of a phenomenology of practice. But its analysis has been crippled by a tendency to define human nature in terms of the attitudes and conduct characteristic of elite practitioners and their clients. A more reflective approach to the study of law practice would require a psychology sufficiently developed and concrete to make it possible to consider that the prevailing style of practice may deny or frustrate important human needs of both lawyers and clients. The notion of Political Man suggests one direction which efforts to develop such a psychology should explore.

In addition, a more reflective approach to the study of law practice would have to confront the political character of lawyering. That law reflects and constitutes the struggle for scarce resources and the conflict of opposed ends has become a commonplace in every field except professional legal discourse and education. A reflective approach to practice would have to be prepared to see lawyering as part of a relatively impersonal process of conflict and coercion. It would have to recognize the ways in which the pursuit of clients' goals compromises and restricts the ability of others to pursue their

goals, in which loyalty to clients requires the betrayal or coercion of others.

The notion of a Political Vision is intended to inspire such an understanding.²⁴⁵ At the same time, the Political Vision retains a premise which figured prominently in the doctrinal tradition but which the Psychological Vision ignored or rejected: the belief in the value and possibility of rational justification and criticism of the exercise of power. The Political Vision would recognize the integral connection of law and power without either legitimating all power or debunking all law. The critics of the doctrinal tradition have shown persuasively the difficulty of rationalizing public power in terms of formal logic or social consensus. But the psychologists have been too quick to turn their backs on social issues and to adopt a jurisprudential vision in which questions of power are simply begged. A deeper and more ambitious, but by no means unfamiliar, understanding of human nature than that of the Psychological Vision might provide the basis for a critical understanding of power even while recognizing the social reality of contradiction and conflict. The Political Vision would have to attempt to understand power in the light of a conception of human needs and possibilities which transcended (but did not ignore) formal logic and the normative practices of any particular society.²⁴⁶

The psychologists have not been wrong to emphasize the abstractness of the public norms and the illusory nature of much of the social consensus to which the doctrinal tradition has appealed. But in responding to these phenomena in largely therapeutic and pedagogical terms, they have trivialized the problems of alienation and domination. And in celebrating self-absorption and the shallowest personal relations, they have tacitly renounced the effort to come to terms theoretically or practically with a social world characterized by contradiction and conflict.

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245. Some of the possibilities for a political jurisprudence are illustrated by M. WALZER, *REGICIDE AND REVOLUTION* (1976), and Klare, *supra* note 18.

246. See S. LUKES, *supra* note 15; R. UNGER, *supra* note 15.