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Striving for Rationality

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BOOK REVIEW

STRIVING FOR RATIONALITY

Open Minded: Working Out the Logic of the Soul. By Jonathan Lear. Harvard University Press. 1998.

*Reviewed by Anne C. Dailey**

IN 1907, a young lawyer came to see Freud complaining of severe symptoms that included obsessive fears of harm befalling both his father and the woman he loved, obsessive rituals designed to protect his father and that woman against such harm, compulsive suicidal impulses such as cutting his throat with a razor or throwing himself off a cliff, and tormenting fantasies involving sexual defilement and death. An otherwise intelligent and sensible young man, the 29 year-old lawyer had spent years of his life fighting against these obsessive ideas and impulses.¹ One day early in his year-long treatment with Freud, he began to describe his obsession with a "specially horrible punishment used in the East," one that involved live rats boring their way into a person's anus.² Stricken with torment, the young man leapt up from the couch, begging that Freud spare him from reciting the details.³ In a similarly dramatic fashion later in his treatment, the patient, while

heaping the grossest and filthiest abuse upon [Freud and his family,] . . . behaved like some one in desperate terror trying to save himself from castigations of terrific violence; he would bury his head in his hands, cover his face with his arm, jump up suddenly and rush away, his features distorted with pain.⁴

* Professor of Law, University of Connecticut School of Law. Thanks to Doron Ben-Atar, Steve Ecker, Jeremy Paul, Ernst Prelinger, Peter Siegelman and Nomi Stolzenberg for helpful comments.

¹ See 10 Sigmund Freud, *The Standard Edition of the Complete Psychological Works of Sigmund Freud* 158 (James Strachey trans., Hogarth Press 1955) (1908) [hereinafter Freud, 10 Standard Edition].

² Id. at 166.

³ See id.

⁴ Id. at 209.

What does it mean when this young patient leaps from the couch and cringes in terror? Is the Rat Man rational or crazy?⁵ A lawyer or a lunatic?

Jonathan Lear uses the image of Freud's famous patient cringing in terror as a central motif in his recent book on the immanence of irrationality in human affairs. A professor of philosophy and member of the Committee on Social Thought at the University of Chicago, as well as a trained psychoanalyst and one of the country's most outspoken defenders of Freud, Lear has gathered together a selection of his essays, written over a fifteen year period, that comprise a sustained meditation on what he describes as the fundamental Socratic question: "In what way should one live?"⁶ Drawing connections among Plato, Freud, and Wittgenstein, to name only the most prominently discussed thinkers in this book, Lear manages to breathe new life into a centuries-old debate over the relationship between human nature and democratic life. The important theme that connects these essays is Lear's effort to work out an account of the important role that irrationality plays in human experience.

The study of irrationality is not a familiar topic in the law. Despite scattered references to psychoanalysis and the unconscious, the law has remained remarkably resistant to the methods and insights of psychoanalysis generally and the study of irrationality in particular. Oliver Wendell Holmes, Jr. stressed the influence of unconscious ideas on the development of law,⁷ but his lasting contribution has been the reasonableness standard of legal liability.⁸

⁵ Freud referred to the patient as Dr. Lorenz, see id. at 254, although his real name, we are told, was Ernst Lanzer. See Patrick J. Mahoney, *Freud and the Rat Man* 2 (1986). Peter Gay tells us that "it was Freud himself who referred to his famous patient informally, with a measure of affection, as the *Rattenmann*, or, in English, as the 'man of the rats.'" Peter Gay, *Freud: A Life for Our Time* 261 (1988).

⁶ Jonathan Lear, *Open Minded: Working Out the Logic of the Soul* 4 (1998) [hereinafter Lear, *Open Minded*].

⁷ See Anne C. Dailey, *Holmes and the Romantic Mind*, 48 *Duke L.J.* 429 (1998) [hereinafter Dailey, *Holmes and the Romantic Mind*].

⁸ The most important application of psychoanalytic ideas in the law was carried out by Jerome Frank in *Law and the Modern Mind*, a book, despite its many flaws, whose originality and importance has yet to be fully appreciated. See Jerome Frank, *Law and the Modern Mind* (1930). Bruce Ackerman notes the unappreciated brilliance of Frank's contribution. See Bruce A. Ackerman, *Law and the Modern Mind* by Jerome Frank, 103 *Daedalus* 119 (1974). A few prominent scholars attempted to integrate

Reason dominates, both as a descriptive model of human behavior and as a prescriptive norm for legal rules and adjudicative outcomes. Today the reasonable person is a canonical figure in the law, legal rules are developed to further the aims of rational man, and legal scholars promote the idea of bounded rationality. Ideas such as the unconscious, repression, and motivated irrationality are generally considered irrelevant, unscientific, unproven, and obviously unsuited to law.⁹ The law as we know it operates on the premise that individuals are autonomous, rational, self-governing beings. Whatever its value or interest in the realms of literature, art, philosophy, or even medicine, psychoanalytic ideas are taken to be incompatible with a legal system founded upon the premise of individual responsibility.¹⁰

I am quite sure the law's resistance to irrationality reveals a deep flaw in its ability to account for, and hence regulate, human

psychoanalysis into law earlier in this century. See Jay Katz et al., *Psychoanalysis, Psychiatry and Law* (1967); C.G. Schoenfeld, *Psychoanalysis and the Law* (1973); Joseph Goldstein, *Psychoanalysis and Jurisprudence*, 77 *Yale L.J.* 1053 (1968); Robert S. Redmont, *Law as a Psychological Phenomenon*, 18 *Am. J. Juris.* 80 (1973); Alan A. Stone, *Psychoanalysis and Jurisprudence: Revisited*, in *Moral Values and the Superego Concept in Psychoanalysis* (Seymour C. Post ed., 1972). More recently, Charles R. Lawrence III applied psychoanalytic ideas in the area of race discrimination. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *Stan. L. Rev.* 317 (1987). The earliest discussion of psychoanalytic ideas in the legal literature appears to be Theodore Schroeder, *The Psychologic Study of Judicial Opinions*, 6 *Calif. L. Rev.* 89 (1918). Karl Llewellyn, for one, described the influence of psychoanalytic ideas on legal realism: "In 1920, as a result of James Harvey Robinson's *Mind in the Making*, a Freudian interpretation of judicial opinions broke upon the little world of legal scholarship." Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* 12 (1960). Freud wrote directly about the application of psychoanalysis to law in *Psycho-analysis and the Establishment of the Facts in Legal Proceedings*, 9 *The Standard Edition of the Complete Psychological Works of Sigmund Freud* 103 (James Strachey trans., Hogarth Press 1959) (1908) [hereinafter *Freud*, 9 *Standard Edition*].

⁹ See, e.g., Stephen J. Morse, *Failed Explanations and Criminal Responsibility: Experts and the Unconscious*, 68 *Va. L. Rev.* 971, 1015-16 (1982) (arguing that law should reject all, or at least most, of psychodynamic theory as a scientific, causal account of behavior).

¹⁰ See, e.g., *Gregg Cartage & Storage Co. v. United States*, 316 U.S. 74, 79-80 (1942) ("Whatever doubts they have entertained as to the matter, the practical business of government and administration of the law is obliged to proceed on more or less rough and ready judgments based on the assumption that mature and rational persons are in control of their own conduct."); *State v. Sikora*, 210 A.2d 193, 202 (N.J. 1965) ("Criminal responsibility must be judged at the level of the conscious.").

behavior. Although Lear's book does not address itself explicitly to lawyers, judges, or legal scholars, the essays in this volume speak directly to the fact that law understates, or ignores altogether, the important role of unconscious emotions and motivations in human decisionmaking and behavior. Lear's book helps us to understand the ways in which law must take account of unconscious emotions and motivations if we are to maintain a legal system premised on a meaningful conception of individual autonomy and democratic self-government. The Rat Man's bizarre behavior is just an extreme version of the everyday passions, loves, hatreds, fears, anxieties, and hopes that affect ordinary people, often in unknown ways. In a world that does not value self-reflection, reason can serve to rationalize or cover over these unconscious feelings rather than to foster personal self-control and democratic self-government. Psychoanalytic views of rationality also have an important contribution to make to our understanding of how institutions like the family and the workplace facilitate the development of liberal citizens possessing the psychological capacity for civic virtue. In addition, by focusing attention on the immanence of irrationality in human nature, Lear compels us, as lawyers and legal scholars, to question prevailing assumptions about individual decisionmaking, choice, intent, and motive in law. Overall, Lear's book offers the opportunity for assessing what contemporary psychoanalysis has to offer law, how psychoanalysis differs from currently popular behavioral and cognitive psychologies, and what efforts are being made to establish psychoanalysis as an empirically grounded science.

At the heart of Lear's sustained consideration of irrationality are two central claims. The first is a descriptive account of what it is to be "minded" as we are: Lear provides a philosophical, quasi-empirical description of human subjectivity as active, embodied, and inherently, if only intermittently, irrational. By irrationality, Lear means those occasions when people intentionally act in ways that contradict their own system of values, beliefs, and commitments.¹¹ Most philosophers, along with most of the rest of us, recognize that indi-

¹¹ See Lear, *Open Minded*, *supra* note 6, at 81.

viduals are not rational all of the time.¹² Yet as Lear points out, moments of irrationality are generally regarded as exceptions that prove the rule of rationality. Lear challenges this view by arguing that irrationality, too, is part of the rule, as fundamental and essential as reason itself. The mechanisms of irrationality, he contends, can and should be approached from a perspective that blends the empirical insights of psychoanalysis with the conceptual rigor of philosophical inquiry. This perspective reveals in what way the human capacity for rational thought is a developmental achievement inherently subject to irrational disruptions from unconscious desires and feelings.

The idea that irrationality and its disruptive effects are inherent in human nature—indeed define in part what it means to be human—leads Lear to his second, prescriptive claim: that democratic freedom, as well as serious philosophical inquiry, turn on recognizing the many ways in which meaning in our lives is governed by unknown, and sometimes unknowable, motivations and feelings. Lear argues that psychoanalysis is a powerful tool for understanding and facilitating the psychological processes by which citizens become capable of living meaningful, self-directed lives. He explains how the psychoanalytic model of human development, called object relations theory, elucidates the dynamic relationship between individual identity and political community or, in Lear's terms, psyche and polis. Lear's conception of the way in which psyche and polis are mutually interdependent leads him to propose that an open-minded citizenry is an important, if not necessary, condition of democratic society. Lear argues that democratic engagement with the fundamental question of how to live one's life, both as an individual and as a collective enterprise, requires an appreciation of the elusive, disruptive, creative, and potentially self-destructive forces of mind.

Given the title *Open Minded*, one could hardly be faulted for assuming that Lear intends to promote the standard liberal account of human flourishing in a culturally diverse world. Yet it would be wrong to assume that Lear's book concerns itself with liberalism's

¹² See generally Jon Elster, *Sour Grapes: Studies in the Subversion of Rationality* (1983) [hereinafter Elster, *Sour Grapes*].

cardinal principle of tolerance for other points of view. Instead Lear defines "open minded" as the capacity to know ourselves as beings with unconscious feelings and motivations that move us to behave in mysterious and irrational ways.¹³ He means to challenge the standard liberal account of individuals as rationally minded beings, and he does so by building upon a descriptive account of human nature that puts irrationality at the center rather than the periphery of human experience.¹⁴ Relying on psychoanalytic clinical work and theory, this collection of essays lays the foundation for an empirical model of human irrationality robust enough to challenge the prevailing liberal model of rationality and decision-making. By advocating what he calls a science of subjectivity¹⁵—psychoanalysis—that takes seriously the important and ineradicable place of unconscious motivations and feelings in human affairs, Lear's work provides a more meaningful, empirically based account of what it takes to sustain individual autonomy and democratic freedom in our liberal state.¹⁶

My argument about the relevance of Lear's thesis to law proceeds in two parts. First, I discuss how the model of human nature employed in law and economics scholarship reflects a fundamental human striving for rationality, but one that overlooks the develop-

¹³ Lear, *Open Minded*, *supra* note 6, at 8.

¹⁴ As Lear notes, the centrality of irrationality to mindedness is what distinguishes psychoanalytic investigation from the tradition of Socratic philosophy: "Rather than starting, as Socrates does, with an argument that mind must be rational, and then wondering how irrationality can be tacked on, psychoanalysis, when properly understood, begins with the idea that mind must be sometimes irrational. The possibility of disruption is built into the very idea of mindedness." *Id.* at 90.

¹⁵ See Jonathan Lear, *Love and Its Place in Nature: A Philosophical Interpretation of Freudian Psychoanalysis* (2d ed. 1998) [hereinafter *Lear, Love and Its Place in Nature*]; Lear, *Open Minded*, *supra* note 6, at 31.

¹⁶ Lear's thesis that mental life is characterized as much by irrational disruptions of meaning as by conscious rational thought can be placed in the tradition of writers such as Shakespeare, Proust, and Nietzsche, an observation that Lear himself makes several times in this book, see Lear, *Open Minded*, *supra* note 6, at 18, 28, 54, as well as the late 18th century English Romantic poets. Although Lear rejects the idea that subjective experience affords a glimpse of transcendent meaning or universal truths, there is nevertheless an emphasis in his work on the imaginative processes and their disruptive, creative, developmental, and unfathomable nature that has a strongly romantic flavor to it. Despite this family resemblance, Lear's philosophical views and temperament are, like Freud's, decidedly on the side of scientific empiricism.

mental and unconscious elements in human decisionmaking. As a descriptive matter, the model of bounded rationality, which incorporates the work of cognitive psychologists, cannot explain why people frequently fail to further their own self-interest. It cannot explain the phenomena of repression, self-denial, self-destructive urges, or weakness of the will, nor can it account for behavior motivated by unconscious passions, anxieties, fears, and hopes of everyday life. The economists' failure to attend to irrational and self-defeating forms of thinking threatens to reduce the legal ideal of individual autonomy, and the related ideas of choice, preference, and self-control, to their most shallow forms. In addition to its descriptive limitations, therefore, the model of bounded rationality reinforces a normative legal culture in which the conditions for effective self-government, including the capacity for personal self-reflection and collective deliberation, are increasingly diminished.

Next, I consider the implications of Lear's thesis about irrationality for the study of legal doctrine. I use the legal regulation of parenthood and the rules governing the education of future citizens as an example of the relevance of Lear's ideas about the relationship of psyche and polis to law.¹⁷ The question of how children acquire and retain the capacities for rational thought and autonomous decisionmaking is of central importance to working out the ideal of citizenship in a liberal democracy. This Part also considers the application of Lear's ideas to the constitutional principles of privacy and equality, as well as to other doctrinal areas where legal liability turns on questions about human decisionmaking, choice, motive, or intent. In the Conclusion, I suggest in what ways psychoanalysis can be considered a scientific discipline, and I

¹⁷ See Anne C. Dailey, *Constitutional Privacy and the Just Family*, 67 Tul. L. Rev. 955 (1993) [hereinafter Dailey, *Constitutional Privacy*]. In a future article, I plan to examine the relevance of psychoanalytic ideas to the doctrine of free speech by focusing on the connection between the doctrine's roots in the idea of individual autonomy on the one hand, and democratic self-government on the other. Lear's thesis also enriches the view, which I have taken elsewhere, that contemporary psychoanalysis offers feminists a normative framework for conceptualizing individual autonomy to take into account the developmental roots of human relationships. See Anne C. Dailey, *Federalism and Families*, 143 U. Pa. L. Rev. 1787, 1846-49 (1995) [hereinafter Dailey, *Federalism and Families*]; Anne C. Dailey, *Feminism's Return to Liberalism*, 102 Yale L.J. 1265, 1275-76 (1993) (book review).

identify those areas in which the clinical, experimental, and neuroscientific validation of psychoanalytic ideas is being carried out.

Early in his book, Lear observes: "It has crossed my mind to wonder whether it isn't the point of all professions—of medicine and law as much as of philosophy and psychoanalysis—to instill deadness."¹⁸ Deadness in law, to Lear, means the establishment of fixed norms that stifle open and honest engagement with the question of how to live in a world that often escapes transparent meaning.¹⁹ Lear's critique of the professions comes startlingly close to Holmes's well-known observation that "the life of the law" is not logic but experience, by which Holmes meant unconscious as well as conscious experience.²⁰ From early on in his career, Holmes was keenly aware of the role that unconscious mental processes play in determining individual behavior as well as legal decision-making.²¹

That is not to say that the depths of unconscious experience can be studied directly (indeed, the point of Lear's book is exactly the opposite) but rather that unconscious processes do operate in accordance with certain, identifiable mental processes and that these processes can be empirically, albeit indirectly, studied and understood. Most scholars of human decisionmaking are content to develop mathematical formulas, statistical graphs, and cost-benefit analyses, but seem unable to grapple with "the enigmatic nature of human motivation."²² In this collection of erudite and often engaging essays, Jonathan Lear shows us how we can, and should, begin to do just that.

¹⁸ Lear, *Open Minded*, *supra* note 6, at 3.

¹⁹ See *id.* at 3–4.

²⁰ Oliver Wendell Holmes, *The Common Law* 5 (1881) (Mark DeWolfe Howe ed., Little, Brown, and Co. 1963).

²¹ Even as great a legal mind as Justice Holmes had difficulty reconciling his belief in the unconscious forces of mind with his more tough-minded approach to legal rules and decisions; eventually Holmes promoted an objective standard of liability that avoided the problem of irrationality by bracketing subjective experience altogether. See Dailey, *Holmes and the Romantic Mind*, *supra* note 7, at 434–37.

²² Lear, *Open Minded*, *supra* note 6, at 28–29.

I. THE IMMANENCE OF IRRATIONALITY

This Section presents Lear's argument that the experience of irrationality is a condition of being a human being with a particular kind of mind—a condition of our being “minded” in the way we are. Being minded as we are means, in Lear's words, that we share “perceptions of salience, routes of interest, feelings of naturalness in following a rule, and so on which constitute being part of a certain form of life.”²³ We are minded so as to understand, for example, that seven plus five equals twelve, that measuring follows certain predictable rules, and that infants are developing human beings. To the extent we can imagine a primitive tribe with a different form of life, one that might believe, for example, that seven plus five equals fifteen or that infants are food, “we have not reached a case of other-mindedness; we have simply passed beyond the outer bounds of our mindedness into incoherence.”²⁴ Not to be minded in the only way we know is not irrationality but a loss of mind altogether, a psychotic breakdown of rationalizing systems of thought.²⁵ In contrast to true craziness, Lear contends, irrationality is a central part of what it means to have a mind capable of a rationalizing system of thought.

In philosophical terms, rationality is often defined as action that an agent chooses out of a belief that it will bring about a desired end.²⁶ Lear broadens this standard definition somewhat by emphasizing that behaviors or decisions are rational when they are consistent with the individual's broader system of beliefs and desires. The concept of rationality as understood by Lear turns on the ability to give a full or coherent account of what one is doing by situating one's

²³ Id. at 249.

²⁴ Id. at 251.

²⁵ “There is no getting a glimpse of what it might be like to be ‘other-minded,’ for as we move toward the outer bounds of our mindedness we verge on incoherence and nonsense.” Id. at 250.

²⁶ See Jules L. Coleman, *Rational Choice and Rational Cognition*, 3 *Legal Theory* 183, 183 (1997); John C. Harsanyi, *Advances in Understanding Rational Behavior*, in *Rational Choice* 82, 83 (Jon Elster ed., 1986). Jon Elster refers to this definition of rationality as the “thin theory” of individual rationality. Elster, *Sour Grapes*, *supra* note 12, at 2–3. Later in this Review I address the relationship of Lear's concept of irrationality to the definition of rationality as the maximization of expected utility in law and economics scholarship. See *infra* notes 115–41 and accompanying text.

actions within a system of beliefs, desires, and intentions. Animals might act purposefully, and in that sense act for reasons, but only humans "are able to think about what they want, to subject their desires and beliefs to self-conscious scrutiny, and to modify them in the light of criticism."²⁷ Thus, like most philosophers, Lear accepts the Socratic view that "some presumption of rationality is built into the very ideas of mind and action."²⁸ Yet Lear goes on to examine why, at times, individuals think or act in ways that contradict their system of beliefs. Lear contends that moments of irrationality are not only common, but are central to the experience of being minded: "[I]t is intrinsic to the very idea of mind that mind must be sometimes irrational."²⁹ Irrationality, Lear argues, is an inescapable factor in human experience.

Let us take the Rat Man, Freud's patient introduced at the beginning of this Review, as an illustration of what Lear means by irrationality. If the Rat Man leapt from the couch in terror because he believed that Freud was physically attacking him, then we would say that he was simply mistaken (e.g., he mistakes Freud's reaching for a cigar as an attempted blow) or crazy (e.g., he thinks Freud's cigar is a club). Similarly, if the patient had leapt off the couch involuntarily or unconsciously, he would not have been acting irrationally in the sense Lear means it here. Involuntary, random, or crazy acts are unmotivated events that fall outside the sphere of minded behavior. But this is not the case with the Rat Man, for the cringing and the leaping, Lear says, are an expression of mind.³⁰ It is only because the Rat Man's cringing and leaping occur within a system of rational thought that they may properly be called irrational in the first place. Here Lear echoes Jon Elster's view that "[w]e must be able to make sense of a person on the whole, if we are to be able to say that some of his plans do not make sense."³¹ Beliefs or acts outside

²⁷ Lear, *Open Minded*, *supra* note 6, at 81.

²⁸ *Id.*

²⁹ *Id.* at 84.

³⁰ See Lear, *Open Minded*, *supra* note 6, at 93-101.

³¹ Elster, *Sour Grapes*, *supra* note 12, at 11 (concluding that "global rationality is a precondition for imputing intentions to a person, be they irrational."); see also Jon Elster, *Introduction*, in *Rational Choice* 27 (Jon Elster ed., 1986) [hereinafter *Elster, Introduction*] (arguing that irrationality can only be predicated on a broad background of rationality).

the system of rational thought are nonrational, or even nonmental, events.³²

Nor does the irrationality of the Rat Man's cringing and leaping lie in a failure to conform to what others think is reasonable under the circumstances, although that might of course be the case. Instead the Rat Man's irrationality resides in his failure to conform his behavior to his *own* personal system of values, beliefs and commitments.³³ Irrationality, as it is understood here, entails a contradiction between one's actions or stated beliefs and how one would take oneself to be, if questioned.³⁴ Lear identifies the most important category of irrational behavior as "akratic," or what are sometimes called incontinent, acts: "the intentional performance of an act for which one believes one has less-good reasons than for another act."³⁵ A person who genuinely believes attending college is the best choice for his or her future but nevertheless fails to show up for classes could be said to be acting akratically. Other categories of irrationality in addition to akrasia are wishful thinking and self-deception, situations where the individual's reasoned sense of self is defeated.³⁶ Returning to the Rat Man, we know he acts irrationally because, despite the fact that he is consciously aware that he is in the safety of Freud's consulting room, he acts as though he is in

³² See Donald Davidson, *Paradoxes of Irrationality*, in *Philosophical Essays on Freud* 289, 289 (Richard Wollheim & James Hopkins eds., 1982) [hereinafter Davidson, *Paradoxes of Irrationality*] ("For the irrational is not merely the nonrational, which lies outside the ambit of the rational; irrationality is a failure within the house of reason.").

³³ "The sort of irrationality that makes conceptual trouble is not the failure of someone else to believe or feel or do what we deem reasonable, but rather the failure, within a single person, of coherence or consistency in the pattern of beliefs, attitudes, emotions, intentions and actions." Id. at 290.

³⁴ See Sebastian Gardner, *Irrationality and the Philosophy of Psychoanalysis* 3 (1993).

³⁵ Lear, *Open Minded*, supra note 6, at 81. In attempting to work out a plausible account of practical reason, Donald Davidson defines incontinent actions in the following way: "If a man holds some course of action to be the best one, everything considered, or the right one, or the thing he ought to do, and yet does something else, he acts incontinently." Donald Davidson, *Essays on Actions and Events* 21 (1980) [hereinafter Davidson, *Actions and Events*]. In contrast, Jon Elster refers to incontinent acts as a problem of impatience. See Elster, *Sour Grapes*, supra note 12, at 7.

³⁶ See Gardner, supra note 34, at 16; David Pears, *Motivated Irrationality* 6-17 (1984). Acting counter to what one believes is also sometimes referred to as weakness of the will. See Davidson, *Paradoxes of Irrationality*, supra note 32, at 294.

danger of mortal attack. There exists a seemingly unbridgeable gap between his conscious self-knowledge and his manifest behavior.³⁷

Philosophical accounts of irrationality, Lear tells us, have in general taken one of two approaches to explaining the phenomenon. One approach, which Lear identifies with Aristotle, has been to understand the self-contradiction that signals irrationality as a product of ignorance: The mind's "knowledge of the better alternative is somehow shut down."³⁸ Knowledge of the better alternative might be forgotten or repressed, or it might be ousted from consciousness by a condition of intoxication, overriding pleasure, or trauma.³⁹ An alternative approach "divides the mind into mindlike parts," each of which is its own locus of rationality and intentionality.⁴⁰ In this view, the unconscious mind possesses rational desires and beliefs that can lead to acts in conflict with the desires and beliefs of the conscious mind; the irrational self-contradiction is simply the product of a conflict between two different, but equally rational, systems. These accounts of irrationality, while having something in common with Freud's early theories of mind,⁴¹ nevertheless leave Lear dissatisfied because they retain the idea that mind is, by definition, rational, and that irrationality can be attributed either to

³⁷ There is another possible interpretation of the Rat Man's leaping and cringing that would go some way toward rationalizing the strange behavior. It is at least possible that the Rat Man's behavior was a reasonable response to Freud's unconscious hostile feelings, what would now be called countertransference. At least one other famous patient of Freud, named Dora, experienced him in that way, abruptly ending the treatment. See 7 Sigmund Freud, *The Standard Edition of the Complete Psychological Works of Sigmund Freud* 109 (James Strachey trans., Hogarth Press 1953) (1905) [hereinafter *Freud*, 7 *Standard Edition*].

³⁸ Lear, *Open Minded*, *supra* note 6, at 82.

³⁹ See Davidson, *Actions and Events*, *supra* note 35, at 42.

⁴⁰ Lear, *Open Minded*, *supra* note 6, at 82. For an example of the two-minds argument in the legal literature on rational choice, see Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 *Stan. L. Rev.* 1551, 1555-56 (1998). For a critique of the two-minds theory, see Gardner, *supra* note 33, at 40-45.

⁴¹ What Lear calls the Aristotelian theory has much in common with Freud's early cathartic theory of neurosis. See 2 Josef Breuer & Sigmund Freud, *The Standard Edition of the Complete Psychological Works of Sigmund Freud* 261 (James Strachey trans., Hogarth Press 1955) (1893). The two-minds view, of course, resembles the topographic model. See 5 Sigmund Freud, *The Standard Edition of the Complete Psychological Works of Sigmund Freud* 536-41 (James Strachey trans., Hogarth Press 1955) (1905).

ignorance or to a conflict between rationally motivated beliefs or desires.

Lear argues that what is significant about irrational acts and beliefs is their inarticulateness: They are feelings or actions for which no explanation is or can be given.⁴² For example, we know the Rat Man behaves irrationally when he leaps and cringes in Freud's consulting room because he cannot explain the apparent contradiction between his knowledge that he is safe and his manifest terror. He might be able to construct, after the fact, an explanation for his fearful behavior, such as that he had transferred his childhood fear of his father onto Freud, but Lear argues that such explanations are only *post hoc* rationalizations for behavior that, at the moment it occurs, does not yet stand for anything. Reflexive breakdown, as Lear calls this lapse of self-understanding, is inexplicable: It has not yet been integrated into a coherent account of the individual's life.⁴³ And to the extent that this lapse of self-understanding manifests itself in actions like leaping, cringing, crying, shouting, or even silence, it is, by definition, disruptive of ordered thought and speech.

[T]here are many ways in which a person may disrupt his thought activity which do not involve the creation of a new meaning: by stuttering or sneezing, by repeatedly getting up to go to the bathroom, by having intrusive thoughts which break in on one's train of thought, and so on.⁴⁴

Although the Rat Man might later say, in reflecting upon his bizarre conduct, "I was afraid of Freud like I was afraid of my father," Lear contends that this idea did not actually pre-exist or accompany the bizarre conduct nor did it cause the behavior to happen. The affective state of fear, expressed in the acts of cringing and leaping, disrupted the Rat Man's sense of self, his speech, and, to the extent he also suffered from suicidal impulses, potentially his survival.

⁴² See Davidson, *Actions and Events*, *supra* note 35, at 42 ("What is special in incontinence is that the actor cannot understand himself: he recognizes, in his own intentional behaviour, something essentially *surd*."). *Id.*

⁴³ See Lear, *Open Minded*, *supra* note 6, at 101.

⁴⁴ *Id.* at 107.

In Lear's view, the moment of reflexive breakdown (e.g., cringing in terror) is the enactment of mind's power, indeed mind's tendency, to disrupt itself.⁴⁵ The idea that mind exhibits an inherent tendency to disrupt itself was first developed, brilliantly, by Freud in his work on the importance of dreams, slips of the tongue, jokes, and other everyday occurrences. As Freud once observed, "[h]e that has eyes to see and ears to hear may convince himself that no mortal can keep a secret. If his lips are silent, he chatters with his finger-tips; betrayal oozes out of him at every pore."⁴⁶ Lear links this view of the inherent disruptiveness of mind to the basic psychoanalytic principle that rationality is a developmental achievement rather than a psychological given.⁴⁷ The elemental forms of mental activity, what Freud called "primary process," are the type of mental functioning dominant in infancy when the preverbal child's mental life is governed by the pleasure principle; other mental processes dominant at this time include imagistic thinking, displacement, condensation, and hallucinatory perception. As the child grows, these elemental forms of thinking evolve into higher mechanisms of thought, which Freud called secondary process, and which eventually include, at adulthood, what we consider rational, logical, reality-based think-

⁴⁵ See *id.* at 84.

⁴⁶ Sigmund Freud, 7 *Standard Edition*, *supra* note 37, at 77-78. Freud often wrote as if he believed that the unconscious contained already-formed ideas that find expression in dreams and parapraxes. Lear does not adopt Freud's view that the psychoanalyst, in the tradition of the natural scientist, uncovers ideas already existing in the patient's unconscious. Instead, Lear argues that what finds expression in moments of irrational thought or behavior are feelings not yet understood or articulated. Lear views the analyst's role as developmentally transforming the patient's inarticulate feelings into conscious, rational thought. See Lear, *Open Minded*, *supra* note 6, at 103-04. Lear's views on the inexplicable, archaic aspect of irrational behavior draw heavily on the work of object-relations theorists. See *id.* at 328 n.1.

⁴⁷ Contemporary psychoanalysts differ in their views about the origins of such development: Neo-Freudian analysts, like Lear, believe that rationality develops in the service of gratifying instinctual needs, whereas ego psychologists view rational thought as unfolding autonomously as part of an innate process of biological maturation. See, e.g., Heinz Hartmann, *Ego Psychology and the Problem of Adaptation* (David Rapaport trans., International Universities Press 1986) (1958). Whether one attributes the origins of rationality to the gratification of instinctual drives of one kind or another, to genetic programming, or to something else altogether, the important point is that any psychoanalytically oriented psychology understands rationality as a developmental achievement.

ing. Lear thus attributes the inexplicable, disruptive quality of irrational moments in our lives to the origins of mind in the infant's primitive modes of thought. Echoing Freud's description of the mind as an archeological dig, with the older, more primitive layers buried beneath newer, more advanced modes of thought and memory, Lear describes the existence of primitive mental mechanisms that are the precursors to more mature rational mentation.⁴⁸ In his leaping and cringing the Rat Man is, among other things, putting the archaic origins of mind on display.⁴⁹

Lear considers his theory of irrationality to be an empirical account of mind, but he considers it to be conceptually required as well.⁵⁰ The idea that minds have an inherent tendency to disrupt themselves follows from Lear's definition of what it means to be minded in the first place. Minds, Lear argues, are by nature restless, which means they "must be able to make leaps, to make associations, to

⁴⁸ The psychoanalyst Hans Loewald provides a helpful description of the way in which primary process thinking remains an active force throughout the individual's life:

Primary and secondary process are ideal constructs. Or they may be described as poles between which human mentation moves. I mean this not only in the longitudinal sense of progression from primitive and infantile to civilized and adult mental life and regressions in the opposite direction. Mental activity appears to be characterized by a to and fro between, an interweaving of, these modes of mental processes, granted that often one or the other is dominant and more manifestly guiding mentation and that the secondary process assumes an increasingly important role on more advanced levels of mentation. Language itself, considered in terms of these categories, partakes of those two sides of the coin of mentation. The primary process quality or suggestiveness of language is apparent in certain kinds of schizophrenic speech as well as in poetry, especially modern poetry, and in modern prose by writers such as Joyce or Faulkner. We see here that what we call dynamically unconscious processes can be compatible with conscious awareness and verbalization, as though there were a direct leap from primary process to conscious awareness, omitting preconscious, secondary process mediation, despite the fact of expression in words.

Hans W. Loewald, *Papers on Psychoanalysis* 178-79 (1980).

⁴⁹ See Lear, *Opeu Minded*, *supra* note 6, at 101.

⁵⁰ See *id.* at 84 ("This isn't only an empirical discovery about the human mind . . . it also comes to light when we think about what it is to be minded."). See also Davidson, *Actions and Events*, *supra* note 35, at 29 ("Does it never happen that I have an unclouded, unwavering judgement that my action is not for the best, all things considered, and yet where the action I do perform has no hint of compulsion or of the compulsive? There is no proving such actions exist; but it seems to me absolutely certain that they do.").

bring things together and divide them up in all sorts of strange ways."⁵¹ The idea that "a mind must have at least the potentiality for creativity"⁵² derives from the fact that minds exist in bodies: "[I]t is part of the idea of mind that a mind is part of a living organism over which the mind has incomplete control and that it helps the organism to live in an environment over which the organism has incomplete control."⁵³ The creative activity of mind, its intensity and plasticity, is what allows the individual to interact with his environment so as to satisfy his needs. From the moment the infant turns its head in anticipation of milk, for example, or cries out in hunger, it learns to express itself in ways that bring it the instinctual satisfaction it craves.⁵⁴ The restless nature of mind that operates from the earliest instinctual searching brings both the possibility of satisfaction (e.g., in the form of nourishment and object love) as well as frustration (e.g., in the form of misunderstanding and loss). The innate activity of mind is always, to some degree, unsettling. For the Rat Man on the couch it was unsettling in the extreme.

The Rat Man's effort to banish his hostile feelings about his father illuminates the creative, sometimes even poetic, aspect of irrationality. Maternal love, friendship, romance, artistic inspiration, transcendent faith, and heroic greatness are all examples of the life-sustaining and affirming power of the irrational in our lives. "[U]nconscious mental functioning is not everywhere disruptive: it can infuse one's conscious, emotional life with joy and creativity."⁵⁵ One of the more creative ways in which the Rat Man attempted to mitigate his guilt over his fantasies of his father undergoing the rat torture was to engage in protective prayers. In his description of the case, Freud tells us:

⁵¹ Lear, *Open Minded*, *supra* note 6, at 84-85.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ The concept of a drive, like hunger or sexuality, for example, "lends content to the idea of a mind embodied in a nonomnipotent organism which must interact with an environment to satisfy its needs." *Id.* at 88. In emphasizing the active quality of mental life, Lear's views resonate with classical Freudian drive theory, although in this book Lear does not focus on the sexualized nature of those strivings. See Lear, *Love and Its Place in Nature*, *supra* note 15, at 120-55.

⁵⁵ Lear, *Open Minded*, *supra* note 6, at 87.

At the time of the revival of his piety he made up prayers for himself, which took up more and more time and eventually lasted for an hour and a half. The reason for this was that he found, like an inverted Balaam, that something always inserted itself into his pious phrases and turned them into their opposite. E.g., if he said "May God protect him," an evil spirit would hurriedly insinuate a "not." On one such occasion the idea occurred to him of cursing instead, for in that case, he thought, the contrary words would be sure to creep in. His original intention, which had been repressed by his praying, was forcing its way through in this last idea of his. In the end he found his way out of his embarrassment by giving up the prayers and replacing them by a short formula concocted out of the initial letters or syllables of various prayers. He then recited this formula so quickly that nothing could slip into it.⁵⁶

The story of the Rat Man's prayer captures both the conscious rationality of the protective prayer (i.e., "If I utter this prayer, then my father will not suffer the rat torture") and the irrationality of the inserted "not," in which we witness "a mental activity too primitive to be understood as the outcome of belief and desire."⁵⁷ Indeed, it is in the very nature of irrational disruptions to be irrepressible, such as in the forcible, but unintended, insertion of the "not."⁵⁸ "Primitive expressions of hostility thus survive, unintegrated into rational thought," disrupting conscious life in creative, but also potentially destructive, ways.⁵⁹

Lear's ideas about the immanence of irrationality are not a refutation of rationality. To the contrary, psychoanalysis in general posits rationality as a primary axis of individual development as well as one aim of the therapeutic process. The value of psychoanalytic self-reflection lies in its synthesizing function: It promotes an integration of irrational feelings into one's conscious sense of self, allowing for a unification of ideas and feelings at higher, increas-

⁵⁶ Id. at 106 (quoting Freud, 10 Standard Edition, *supra* note 1, at 193).

⁵⁷ Lear, *Open Minded*, *supra* note 6, at 106.

⁵⁸ Id. at 107. Cleverly, Lear remarks: "That is, even as he is trying to protect his father from the rat-torture by uttering a prayer, *he reenacts the torture by shoving a 'not' up the ass of his utterance.* The 'not' intrudes inside the utterance and eats away at its meaning." Id. at 108.

⁵⁹ Id. at 107.

ingly verbal and abstract levels of psychological functioning. The Rat Man, for example, came to Freud for the purpose of working through his irrational fears and obsessions; integration of his irrational feelings occurred in the process of understanding the fantasies of rat torture, the protective prayers, the leaps and cringes. Lear describes the Rat Man's therapeutic experience:

It is the process Freud called "working-through:" the enduring attempt to give a meaning to the phantasy activity itself. Rather than simply stating the meaning of a cringe, the interpretation would try to state (in understandable terms) what the Rat Man is doing with that cringe. In that way, the phantasy activity would itself come to have meaning for the Rat Man, come to be a possible object of thought, and thus gain some genuine integration into the rationality system The effect is that intrapsychic structure gets loosened up—and a real possibility of psychic integration emerges.⁶⁰

The process of working-through involves the integration of irrational feelings into the system of rational thought, a process that ideally promotes psychic growth and increased self-control.⁶¹ Neurosis arises when the individual is unable to integrate these moments of reflexive breakdown in a meaningful way: The neurotic suffers from repetition, as Freud discovered, unable to understand and hence move beyond the subjective experience of terror, fear, or despair. The therapeutic aim, as Lear would have it, is to transform these inexplicable, affect-laden disruptions into conscious, articulate, and coherent self-understandings.⁶²

⁶⁰ *Id.* at 103–04.

⁶¹ Hans Loewald describes this process as carried out by the ego:

[W]e want to stress the point that the boundaries between ego and external reality develop out of an original state where, psychologically, there are no boundaries and therefore there is no distinction between the two.

It is from here that the synthetic, integrative function of the ego can be understood. The ego mediates, unifies, integrates because it is of its essence to maintain, on more and more complex levels of differentiation and objectivation of reality, the original unity.

Loewald, *supra* note 48, at 11.

⁶² Lear notes that in Freud's later writings on transference:

The accent of his writings shifts from transference as a transfer (across a given world) to transference as a repetition. The cost of keeping something out of consciousness, Freud says, is that one acts it out unconsciously. Repetition is the

Lear's approach departs from standard philosophical writing on rationality in his emphasis on the immanent and developmental nature of irrationality. He also departs from standard philosophy in his effort to work out "the logic of the soul" in a way that integrates empirical and conceptual inquiry. Having described the centrality of irrationality in human experience, Lear goes on to prescribe the importance of integrating an understanding of irrationality into our conception of democratic self-government. This argument, summarized in the following pages, connects the ideal of citizenship in a liberal democracy to the psychoanalytic model of rational self-reflection and discourse.

II. OPEN MINDS AND DEMOCRATIC CITIZENSHIP

Over the last century, Freud has enjoyed the dubious honor of being the object of contempt from both sides of the political divide: Social conservatives have viewed his ideas as radically individualistic and subversive of social order, and social progressives have accused him of reinforcing oppressive social hierarchies and the moral status quo.⁶³ Yet whatever their respective merits, (and it might be that both perspectives are right to some degree)⁶⁴ these critical views obscure the point that psychoanalysis provides at its foundational level a psy-

return of the repressed, in unconscious form. This reenactment is inescapable in the transference: "As long as the patient is in the treatment, he cannot escape from this compulsion to repeat[.] in the end we understand that this is his way of remembering."

Lear, *Open Minded*, supra note 6, at 65 (quoting 12 Sigmund Freud, *The Standard Edition of the Complete Psychological Works of Sigmund Freud* 150 (James Strachey trans., Hogarth Press 1958) (1914)).

⁶³ See, e.g., Gay, supra note 5, at 119 (describing psychoanalysis as revolutionary for its time); Juliet Mitchell, *Psychoanalysis and Feminism* at xv (1974) (discussing how most feminists view psychoanalysis "as a justification for the status-quo, bourgeois and patriarchal . . .").

⁶⁴ Lear comments upon the ambivalence in Freud's thought:

It is in this context that Freud comes across as a much more ambiguous figure than he is normally taken to be. In one way, he is the advocate of the unconscious; in another, he is himself filled with Enlightenment optimism that the problems posed by the unconscious can be solved; in yet another, he is wary of the dark side of the human soul and pessimistic about doing much to alleviate psychological pain. He is Tiresias and Oedipus and Sophocles rolled into one.

Lear, *Open Minded*, supra note 6, at 31.

chological theory of the relationship between individual and state.⁶⁵ Because Freud viewed himself as a scientific observer of human nature, he did not dwell on the political implications of his psychology; he concerned himself for the most part with working out the proper balance of freedom and repression at the level of individual pathology rather than social organization.⁶⁶ Nevertheless, his work on unconscious drives, repression, secondary process, compromise formation, sublimation, projection, the superego, and group psychology, to name just a few examples, bear on the deep interconnections between psychic and social development. Freud's seminal ideas about psychology, psychopathology, and mental development have made it possible for others, including Lear, to explore the relationship between human nature and political organization.

Lear's insights into irrationality lead him, as a student of classical philosophy, to ask: If irrationality is inherent in mind, how does this bear on the capacity of citizens to maintain a democratic state? In what way, he asks, does the democratic freedom of the polity rest on the psychic condition of its citizens? In answering these questions, Lear draws on two main psychoanalytic insights about the relationship between mental life and the world: the concept of transference and the theory of object relations. The relevance of these two psychoanalytic insights to Lear's ideas about democracy will be taken up in turn.

⁶⁵ Earlier writers who have applied psychoanalytic ideas to politics include Norman O. Brown, *Life Against Death: The Psychoanalytical Meaning of History* (1959); Erich Fromm, *Escape From Freedom* (1941); Harold J. Laski, *Authority in the Modern State* (1919); Harold D. Lasswell, *Psychopathology and Politics* (1930); Walter Lippmann, *Preface to Politics* (1913); Herbert Marcuse, *Eros and Civilization: A Philosophical Inquiry into Freud* (1955).

⁶⁶ Early in his career, and in connection with his work on what he called the actual neuroses such as neurasthenia and anxiety neurosis, Freud openly criticized the sexually repressive moral standards of Victorian culture. See, e.g., Sigmund Freud, 1 *The Standard Edition of the Complete Psychological Works of Sigmund Freud* 184 (James Strachey trans., Hogarth Press 1966) (1899) [hereinafter *Freud, 1 Standard Edition*] ("In the absence of [greater sexual freedom], society appears doomed to fall a victim to incurable neuroses, which reduce the enjoyment of life to a minimum, destroy the marriage relation and bring hereditary ruin on the whole coming generation."); *Freud, 9 Standard Edition*, supra note 8, at 131-39 (arguing for the sexual education of children).

Transference is a concept that recognizes the role that mind plays in the individual's subjective experience of the real world. Early in his career, Freud believed that the hysterical and obsessional symptoms suffered by his adult patients were caused by actual childhood seductions by caregivers or family members. However, in a famous turnabout, he soon abandoned the seduction theory as the primary explanatory paradigm for adult neurosis.⁶⁷ Although he never denied the importance of actual seductions, he came to emphasize the primary role that fantasy plays in shaping a child's experience and development in the earliest years. "In abandoning the seduction theory," Lear writes, "Freud opened the door to seeing the psyche as imaginative and active in structuring its experience."⁶⁸ Actual seductions still take place, Lear explains, but "[t]o discover an actual seduction does not absolve one of the task of analyzing what meaning this event has for the analysand—in particular, how the memory of that event gets woven into the analysand's phantasy life."⁶⁹ Freud's abandonment of the seduction theory represented an important first step in the direction of understanding the active role that mind plays in the development of the individual's sense of self and world.

Transference is one way to describe this active relationship between mind and world. In classical analytic thought, transference is a technical concept that refers to the phenomenon whereby the analytic patient transfers feelings about significant people from his or her past onto the present.⁷⁰ In clinical usage, transference:

is the tendency to repeat, in a current setting, attitudes, feelings, impulses, and desires experienced or generated in early life in relation to important figures in the individual's development. These original figures are primarily the parents but may include

⁶⁷ See Freud, 1 Standard Edition, *supra* note 66, at 259–60.

⁶⁸ Lear, *Open Minded*, *supra* note 6, at 128.

⁶⁹ *Id.*

⁷⁰ See Lear, *Open Minded*, *supra* note 6, at 61. Freud conceived of transference in economic terms: the transfer of a certain quantity of psychic energy from one idea, usually an unconscious, infantile wish, to a present, conscious idea. In this way, the present idea becomes cathected, or charged, with energy properly associated with the past. See *id.*

other family members or even persons outside the family who have assumed important functional roles in actuality.⁷¹

In the case of the Rat Man, for example, Freud interpreted the patient's cringes and leaps as a transference of the patient's childhood fear of his father, now dead, onto Freud.⁷² Lear expands the meaning of the term "transference" beyond the psychoanalytic relationship to include all external reality. Transference is thus one way to describe the mind's creative power to endow the material world with meaning. "Nietzsche admonished us to live our lives as though we were creating a work of art. The phenomenon of transference reveals, I think, that each of us is unconsciously trying to do just that."⁷³ The Rat Man, for example, experienced Freud as a man to be feared; another patient might have experienced the same Freud as a man to be loved. In both cases, Lear explains, the patient transfers onto the objective world a meaning of his own making.

Transference becomes pathogenic, or negative, when the meanings imposed by the individual on the world are wildly distorted, frozen, or self-defeating. As Lear describes it, negative transference locks the patient into experiencing the world passively as "fixed, rigid, and tragic."⁷⁴ A negative transference may be said to exist when a patient continues to view his analyst as cold and uncaring despite clear evidence to the contrary, or when an otherwise sensible man cannot remain in a relationship because he views all women as liars, or when an otherwise sensible employee cannot retain a job because he repeatedly experiences his employers as out to get him. The individual remains fixed in the negative transference until he "comes to see that he is a dramatist: creator of meanings, rather than passive victim of a tragic world."⁷⁵ In Lear's usage, therefore, transference stands for the way individuals come to endow the material world around them with meaning, positive or negative, fixed or changing, drawn from their particular life histories.

⁷¹ Leo Stone, *Transference*, in *Psychoanalysis: The Major Concepts* 110, 110 (Burness E. Moore & Bernard D. Fine eds., 1995).

⁷² See *supra* text accompanying notes 42-43.

⁷³ Lear, *Open Minded*, *supra* note 6, at 71-72.

⁷⁴ *Id.* at 140.

⁷⁵ *Id.*

The concept of transference leads to the second psychoanalytic insight, original with Freud but later adopted by object-relations theorists,⁷⁶ that the earliest development of one's sense of self, or ego, takes place in the context of relationships with others.⁷⁷ As we discover in Lear's account, contemporary psychoanalysis offers a richly developed theory of the dynamic process by which the individual emerges as a subjective being in the world.⁷⁸ Psychoanalysis teaches that "one can no longer take the individual as given,"⁷⁹ but that individuality is a psychological achievement set in motion by developmental forces and embedded in social relations. The individual, Lear explains, "begins to emerge from the infant-mother dyad largely in response to the communications flowing through that field."⁸⁰ Although Freud commented upon the importance of early relationships to the infant's development, he tended to view the individual as relating to others primarily as objects for the gratification of instinctual desires.⁸¹ In contrast, object-relations theorists emphasize the role

⁷⁶ For an overview of object relations theories, see Jay R. Greenberg & Stephen A. Mitchell, *Object Relations in Psychoanalytic Theory* (1983); Otto F. Kernberg, *Psychoanalytic Object Relations Theories*, in *Psychoanalysis: The Major Concepts* 450, 459 (Burness E. Moore & Bernard D. Fine eds., 1995). For works by object-relations theorists, see W. Ronald D. Fairbairn, *Psychoanalytic Studies of the Personality* (1952); Harry Guntrip, *Personality Structure and Human Interaction: The Developing Synthesis of Psycho-dynamic Theory* (1961); Melanie Klein, *Love, Guilt and Reparation, and Other Works 1921-1945* (1981) [hereinafter Klein, *Love, Guilt and Reparation*]; Melanie Klein, *Envy and Gratitude, and Other Works 1946-1963* (1980) [hereinafter Klein, *Envy and Gratitude*]; D.W. Winnicott, *The Maturation Processes and the Facilitating Environment: Studies in the Theory of Emotional Development* (1965).

⁷⁷ "Freud, of course, understood that a person's ego and superego are formed around internalizations of parental figures. In the analytic situation, he concentrated on the intrapsychic configurations of the analysand, but he recognized that these configurations are due in part to interpsychic relations." Lear, *Open Minded*, supra note 6, at 328 n.1.

⁷⁸ See, e.g., Klein, *Envy and Gratitude*, supra note 76; Klein, *Love, Guilt and Reparation*, supra note 76.

⁷⁹ Lear, *Open Minded*, supra note 6, at 134.

⁸⁰ Id. This is the paradox of psychoanalytic practice, as Hans Loewald describes it: "The unit of a psychoanalytic investigation is the individual human mind or personality . . . The individual's status in this regard, however, is questionable and cannot be taken for granted." Loewald, supra note 48, at 278.

⁸¹ Freud tells us:

The object [*Objekt*] of an instinct is the thing in regard to which or through which the instinct is able to achieve its aim. It is what is most variable about an

that early relationships, especially the pre-Oedipal relationship with a maternal figure, have in constituting the infant's emerging sense of self and world.⁸²

Object relations theory provides Lear with the conceptual framework for his account of the relationship between individual and world. The theory confirms that the transference of subjective feelings onto the real world is not a one-way street: What we call the real world structures subjective experience in important ways. The world around us determines what can be perceived and, through processes of memory and internalization, shapes the psychic mechanisms by which the individual experiences the world. "[F]rom a properly psychoanalytic perspective, reality must always be understood as reality as it exists for an ego. The ego's developmental task is not merely to develop itself, but to develop its relations with what, for it, is an ever more complex world."⁸³ Object relations theory views the most important influence on the mind's capacity to structure its experience of the world to be the infant's interactions with its early caregivers: The external world comes to have meaning for the child as mediated by and through these early emotional attachments. In this way the lifelong dynamic relationship between the real world of the caregiver and the subjective experience of the individual begins.

Lear uses the concept of transference and the theory of object relations to develop his claim that the relationship between the individual and the political state—psyche and polis—is rooted in the earliest exchanges of external caregiving and subjective experience. In a chapter entitled "Inside and outside the *Republic*," Lear finds

instinct and is not originally connected with it. . . . The object is not necessarily something extraneous: it may equally well be a part of the subject's own body. It may be changed any number of times.

14 Sigmund Freud, *The Standard Edition of the Complete Psychological Works of Sigmund Freud* 122–23 (James Strachey trans., Hogarth Press 1957) (1915).

⁸² A more clinical definition of object relations theories is offered by Otto Kernberg: [Psychoanalytic object relations theories are] defined as those that place the internalization, structuralization, and clinical reactivation (in the transference and countertransference) of the earliest dyadic object relations at the center of their motivational (genetic and developmental), structural, and clinical formulations.

Kernberg, *supra* note 76, at 450.

⁸³ Lear, *Open Minded*, *supra* note 6, at 130–31.

the origins of this idea in the work of Plato. He focuses on what he describes as "the most distinctive aspect of Plato's psychology: a dynamic account of the psychological transactions between inside and outside a person's psyche, between a person's inner life and his cultural environment, between *intrapsychic* and *interpsychic* relations."⁸⁴ Plato's view of the relationship between psyche and polis is not merely analogical, as Lear argues many commentators have mistakenly assumed. Instead, to Lear, mind and polis are two parts of an organic whole, each of whose condition affects the balance and harmony of the other.⁸⁵ During infancy and childhood, the process of internalizing the norms and habits of thinking possessed by caregivers and other significant people is primary; in adulthood, the process of projecting or externalizing those norms, not only in the raising of children, but also in the building of political, social, and other institutions, takes precedence.

The processes of internalization and externalization are classical psychoanalytic concepts. Freud understood the process of internalization as serving in some instances to repress instinctual wishes; the most important example of internalization in classical Freudian thought is the repression of Oedipal longings, a process that leads to the development of the superego, the seat of moral norms and self-criticism.⁸⁶ We might consider, for example, that the norms of justice are internalized at a very early age as children learn, under the guidance of caregivers, to channel their primitive envy and aggression into appeals to fairness.⁸⁷ Plato had a somewhat different idea of internalization, Lear tells us, one premised on the process, often unconscious, of mirroring the virtues to which one is exposed at an early age. Yet however one understands the specific process of internalization, (and it is not entirely clear how Lear himself views it)⁸⁸ the important point is that we internalize cultural and political norms at the earliest age, "before we can understand their

⁸⁴ Id. at 219–20.

⁸⁵ See id. at 239.

⁸⁶ See id. at 98–100. See also David Beres, Conflict, in *Psychoanalysis: The Major Concepts* 477, 479 (Burness E. Moore & Bernard D. Fine eds., 1995).

⁸⁷ Ernst Prelinger raised this point with me in conversation. See also Jereiny Paul, A Bedtime Story, 74 Va. L. Rev. 915 (1988).

⁸⁸ See Lear, Open Minded, *supra* note 6, at 329–30 n.15.

significance,"⁸⁹ and that this process of internalization is necessary "for acquiring psychological structure."⁹⁰ Similarly, externalization, as Lear finds it in Plato, "is a basic psychological activity,"⁹¹ a kind of group transference, if you will, by which adults actively participate in the creation of a shared, semiautonomous culture passed on to future citizens. Lear explains:

Although the polis is dependent on our enduring commitment, and although it reflects our collective psychic activity, it is not just psychology. Rather, we have created an environment which our psyches can, for better or worse, inhabit . . . In general, social institutions—law, medicine, the university, the corporation, art—reflect our interests and depend on our enduring commitments, but they cannot be reduced to our psychological states. These institutions are artifacts [of our creation], and they help to constitute a social world, a polis, in which we locate ourselves.⁹²

In Lear's reading, therefore, Plato's *Republic* stands for the proposition that "[p]syche and polis are mutually constituted by a series of internalizations and externalizations, with transformations occurring on both sides of the border."⁹³ The creation of the polis, Lear argues, is a product of "our joint contributions to the creation and maintenance of the social world," a world that then "gains a certain independence from the shifting psychological states of its inhabitants."⁹⁴

The importance of Lear's connection between politics and irrationality becomes evident here: Given the immanence of irrationality, the dynamic between psyche and polis not only constitutes the social order, but also, paradoxically, threatens its demise. If what it means to be minded is to experience lapses from rationality, then the capacity of citizens to achieve our normative ideal of democracy is obviously put in question. "According to Socrates in the *Republic*, even when the human psyche is in the best of shape, even when the

⁸⁹ Id. at 224.

⁹⁰ Id. at 238.

⁹¹ Id. at 238.

⁹² Id. at 67 (footnote omitted).

⁹³ Id. at 226.

⁹⁴ Id. at 66; see also id. at 219–20.

most basic form of political organization, the polis, is in the best of shape, each will have to struggle with internal as well as external threats to its integrity."⁹⁵ More fundamentally, if what it means to be minded is to be subject to irrational, inexplicable, and often unconscious feelings, then it is inevitable that, in the dynamic between mind and polis, these feelings find their way into the political sphere:

If we examine Plato's tale of political decline, we see that the degeneration occurs through a dialectic of internalization of pathological cultural influences in individuals which provokes a degeneration in character structure (as compared to the previous generation), which is in turn imposed on the polis, which thus acquires and provokes deeper pathology. Plato does not merely want to show that the same neurotic structure can exist in both psyche and polis, but that the pathology in each helps to bring about pathology in the other.⁹⁶

The dynamic between psyche and polis creates the possibility that the archaic, unconscious feelings of a citizenry could be politically inobilized for destructive ends, potentially resulting, in the most extreme cases, in democratic support for a political regime given over to religious persecution or ethnic cleansing. The sudden, destructive outbreak of irrational desires on the political level, such as what happened, some would say democratically,⁹⁷ in Nazi Germany, would be the social equivalent to the Rat Man's leaping and cringing.⁹⁸ More commonly, we might find the destructive eruption of these feelings in more everyday acts of violence and aggression, including not only random assaults but hate crimes and other acts of political violence. Whereas the prevailing ideal of liberal progress might view these everyday acts of violence as exceptions to the rule of civilized society, Lear would argue that such acts represent the tendency to social disintegration immanent in the very nature of human organization.

Given his views on irrationality, Lear concedes that "it might look as though the recognition of a dark strain running through the

⁹⁵ Id. at 89.

⁹⁶ Id. at 234-35 (footnote omitted).

⁹⁷ See, e.g., Daniel Jonah Goldhagen, *Hitler's Willing Executioners: Ordinary Germans and the Holocaust* (1996).

⁹⁸ See Lear, *Open Minded*, *supra* note 6, at 186.

human soul might threaten the viability of democratic culture."⁹⁹ How is it, then, that "one might both take human irrationality seriously and participate in a democratic ideal?"¹⁰⁰ One response would be to favor strong repressive safeguards on social order and political change. Plato banished the tragic poets precisely because of their threat to the stability of the social order:

What lie beyond logos [rational thought] for Plato are certain forms of violence and undoing. Plato banished tragedy from the polis because he thought it encouraged a strain of destructiveness which logos could not contain. It does this by perverting the process of psychosocial development. The human psyche, for Plato, stands in a dynamic relation to the social world it inhabits. Primarily in youth, but throughout life, a person internalizes cultural influences; and these influences, once internalized, become motives. They are organized with other motives into an 'inner polis,' the psyche. In maturity, a person externalizes these metabolized influences in activities which help to shape, sustain, or undo the social world. Tragic poetry, Plato thinks, turns this dynamic process into a vicious downward spiral.¹⁰¹

As Lear explains, Plato's approach to the irrational in human nature was to banish it from the life of the polity. To the extent tragedy awakens us to the dark and "lawless" forces within,¹⁰² it threatens the virtue of citizens and therefore the survival of the republic. "Poet and tyrant ultimately enslave us, but while the tyrant enforces external compliance, poetic enslavement reaches inside the psyche and reorganizes it so that we remain unconscious of our slavery."¹⁰³ Children in particular are susceptible to the destructive tendencies of art and poetry; it is for that reason that Plato "begins his construction of the ideal polis with a discussion of the education of young children."¹⁰⁴

Not surprisingly, Lear concludes in his essay on Plato that "there is plenty of room to doubt whether Plato's solution is called for or

⁹⁹ Id. at 31.

¹⁰⁰ Id.

¹⁰¹ Id. at 174-75.

¹⁰² Id. at 175.

¹⁰³ Id. at 245.

¹⁰⁴ Id. at 221.

whether it would be successful."¹⁰⁵ Lear would clearly prefer a degree of democratic freedom unavailable under Plato's regime. Moreover, it appears that Lear, like Freud, doubts that any effort to banish irrational and destructive desires can actually work. Lear suggests that even the healthiest polis must struggle with the immanence of irrational disruptions in the political sphere. Banishing or repressing those disruptions risks, at the social level, "being overtaken by horrific surprise."¹⁰⁶ But it is not just that Lear thinks that the irrational cannot be eradicated or imprisoned. Unlike Plato, Lear believes that lawless desires in human nature can be taken up and integrated into the social order in the same way that those desires can be controlled or sublimated in the individual life. Lear means to incorporate rather than repress the immanence of threats to political stability and integrity in our culture because he views them, in some way, as a necessary condition of genuine democratic liberty and political health.

Lear picks up here on the strain in Freud's work that carries a more optimistic assessment of the capacity for human autonomy. It is true that Freud delivered a sobering message about the obstacles to achieving personal autonomy. Freud's theory of the dynamic unconscious, like Lear's theory of the irrational, insists on the regular absence of conscious self-control.¹⁰⁷ Yet Freud also exhibited an

¹⁰⁵ Id. at 245.

¹⁰⁶ Id. at 190.

¹⁰⁷ Freud wrote in 1917:

In the course of centuries the naive self-love of men has had to submit to two major blows at the hands of science. The first was when they learnt that our earth was not the centre of the universe but only a tiny fragment of a cosmic system of scarcely imaginable vastness. This is associated in our minds with the name of Copernicus, though something similar had already been asserted by Alexandrian science. The second blow fell when biological research destroyed man's supposedly privileged place in creation and proved his descent from the animal kingdom and his ineradicable animal nature. This revaluation has been accomplished in our own days by Darwin, Wallace and their predecessors, though not without the most violent contemporary opposition. But human megalomania will have suffered its third and most wounding blow from the psychological research of the present time which seeks to prove to the ego that it is not even master in its own house, but must content itself with scanty information of what is going on unconsciously in its mind.

Sigmund Freud, *Introductory Lectures on Psychoanalysis* 284–85 (James Strachey trans., W.W. Norton & Co. 1966) (1917) (Lecture VIII).

undeniable optimism regarding the potential for human beings to utilize unconscious feelings in ways that promote growth and change. Rather than leading to religious stoicism or existential despair, the idea of irrationality in psychoanalytic thought gives rise to an Enlightenment faith in the capacities of the human mind to master, more or less well, unconscious urges:

If, for the moment, we concentrate on the optimism [in some accounts of Freud], we see a vision emerge of how one might both take human irrationality seriously and participate in a democratic ideal. If the source of irrationality lies within, rather than outside, the human realm, the possibility opens up of a responsible engagement with it. Psychoanalysis is, in its essence, the attempt to work out just such an engagement. It is a technique which allows dark meanings and irrational motivations to rise to the surface of conscious awareness. They can then be taken into account, they can be influenced by other considerations, and they become less liable to disrupt human life in violent and incomprehensible ways.¹⁰⁸

In Lear's view, responsible engagement that seeks to integrate rather than banish the irrational is crucial for realizing the goals of personal autonomy and democratic self-government. Irrationality is not just an obstacle to rational control: It is the dynamic force behind personal autonomy and social transformation. What is dangerous and self-destructive within us can be taken up and utilized for the construction of creative, meaningful, and self-directed lives.

As Plato understood, any engagement with irrational desires, whether responsible or not, carries the risk that those desires will overwhelm the social order. This becomes for Lear a fact of social existence in the same way that the danger of irrational feelings are a fact of mindedness. But, for Lear, this does not mean that no safeguards are in place to keep the political order from sliding into either anarchy or despotism. Some of these safeguards are cultural, such as the role that art, especially tragedy, can play in controlling irrational impulses.¹⁰⁹ Some involve careful attention to the developmental

¹⁰⁸ Lear, *Open Minded*, *supra* note 6, at 31.

¹⁰⁹ See *id.* at 191-218.

needs of future citizens, particularly education and childcare.¹¹⁰ But Lear implicitly suggests that most important to the survival of a democratic polity is the cultivation of what he calls an open-minded citizenry. Lear draws on the methods and goals of psychoanalysis in prescribing the norms of good democratic life. Being open minded means taking seriously "the idea that there may be meaning opaque to human understanding,"¹¹¹ most notably irrational beliefs and desires. Being open minded also involves cultivating one's capacity for self-reflection, humility, and skepticism with the goal of controlling destructively irrational impulses and feelings. In the end, however, what Lear intends by open minded seems less a substantive set of virtues than a virtuous way of life. Psychoanalysis "is not essentially a body of esoteric knowledge; it is a peculiar form of mental activity, a peculiar form of speaking and listening, a peculiar form of life"¹¹² directed to self-knowledge and social transformation.

Open minded is clearly a normative concept. Freud's understanding of the ends of psychoanalysis reflected his view of the analyst as a physician of the mind: The ends of psychoanalytic treatment were directed to relieving the suffering of patients. The normative claim from Freud's point of view was simply the preference for psychic health over illness. Like most analysts today, Lear does not share Freud's view of psychoanalysis as a natural science or of the analyst as a neutral observer of human nature. Instead, Lear views psychoanalysis in terms of a relationship between two people that, primarily through speech, brings about lasting psychological change. It hardly needs saying that the relief of acute suffering is a worthwhile goal of psychoanalytic treatment, but relief from suffering can take many forms, as the vast array of psychological approaches today confirms. In this regard, Lear suggests that the main virtue of psychoanalysis may be found in the fact that it is

the first therapy that sets *freedom* rather than some specific image of human *happiness* as its goal. Other kinds of therapy posit

¹¹⁰ See generally *id.* at 223 (discussing the importance of early education in Plato's theory of the polis).

¹¹¹ *Id.* at 50.

¹¹² *Id.* at 34.

particular outcomes—increased self-esteem, overcoming depression—and, implicitly or explicitly, give advice about how to get there. Psychoanalysis is the one form of therapy which leaves it to analysts to determine for themselves what their specific goals will be. Indeed, it leaves it to them to determine whether they will have specific goals.¹¹³

It is true that, theoretically at least, psychoanalytic therapy does not promote specific ends. In theory, the analyst remains morally neutral, even if that means, for example, that the patient makes choices that harm other people. Yet psychoanalysis's claim to moral neutrality with respect to the particular patient is misleading: The discipline in fact promotes an ideal of human flourishing with its own set of human virtues. In addition to freedom, the ends of psychoanalysis, broadly construed, include rationality, autonomy, self-control, skepticism, humility, introspection, self-reflection, integration, coherence, empathy, and, as the vehicle for all these, verbal articulation. The ends of psychoanalysis are not necessarily compatible with all ways of thinking and living, particularly traditional and religious beliefs, but Lear makes a strong case for the proposition that they are perfectly compatible with, and perhaps necessary to, the survival of the secular democratic state.

III. STRIVING FOR RATIONALITY IN THE LAW

In one of the few direct references to law in the book, Lear wonders "whether it isn't the point of all professions—of medicine and law as much as philosophy and psychoanalysis—to instill deadness."¹¹⁴ Certainly there is some truth to the idea that the professionalization of law—the establishment of fixed standards for legal education and practice, in addition to the systematic ordering of legal rules and processes—discourages critical inquiry and questioning. There is also some truth to the idea that many aspects of legal thinking, including, for example, objective standards of reasonableness, legal presumptions, precedent and stare decisis, seem abstract and lifeless. As discussed earlier, there is also something especially deadened about the model of human behavior in law

¹¹³ *Id.* at 22.

¹¹⁴ *Id.* at 3.

and economics. Yet despite these tendencies, there are countless ways in which law remains a vital endeavor.¹¹⁵ The drama of the courtroom, the emotional clash of the parties, the satisfactions and disappointments that come with seeking redress through the law, and the hopes and fears of law reform advocates all permeate the professional practice and culture of law. Holmes's famous maxim—"the life of the law is not logic; it is experience"—is as true today as it was a century ago.¹¹⁶

Moreover, it cannot be the case that, to be fully alive, law must tolerate irrational motives and actions in any and all circumstances, for such a regime would quickly approach a condition of lawlessness. The task becomes integrating a more complex, realistic view of human agency and rationality into law in a way that acknowledges the need for social order and control. Given Lear's insight that it is neither possible nor desirable to banish irrationality from life or law, the remainder of this Review considers how his ideas about irrationality can contribute to a richer, if more complex, legal understanding of human agency, decisionmaking, and democratic self-government.

A. Bounded Rationality in Law

Nowhere does the premise of rationality have a greater influence than the field of law and economics, where the rational actor model of human behavior has prevailed, against criticism, for over thirty

¹¹⁵ One important area where psychoanalytic ideas have had a significant and lasting influence on legal doctrine and policy is the law regulating child custody. In 1973, Joseph Goldstein, Anna Freud, and Albert J. Solnit published *Beyond the Best Interests of the Child*, the first in a trilogy of books applying psychoanalytic ideas to the subject of child custody. See Joseph Goldstein et al., *Beyond the Best Interests of the Child* (1973). The second and third books in the trilogy are Joseph Goldstein et al., *Before the Best Interests of the Child* (1979) and Joseph Goldstein et al., *In the Best Interests of the Child* (1986). Goldstein, Freud and Solnit's psychological parent theory was directed to eliminating custody decisions that turned on parental rights, parental interests, maternal presumptions, and other factors unrelated to the developmental needs of young children. They argued in favor of a standard that would award permanent and unconditional custody to the person who, on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs for a parent, as well as the child's physical needs. See Goldstein et al., *Beyond the Best Interests of the Child* (1973), supra, at 98.

¹¹⁶ Holmes, supra note 20, at 3.

years.¹¹⁷ Law and economics scholars are interested in studying how individuals rationally go about achieving their goals in a world of scarce resources.¹¹⁸ Although the definition of rationality within law and economics is far from agreed upon, it is fair to say that most recent work in the field has defined rationality as the maximization of expected utility.¹¹⁹ "The task of law and economics is to determine the implications of such rational maximizing behavior in and out of markets, and its legal implications for markets and other institutions."¹²⁰ Like more everyday understandings of rationality, the expected-utility model assumes that individuals are motivated to seek certain ends, or preferences, and that rational choices are those which prove to be consistent with those preferences. In legal scholarship, the paradigm of rational choice has enjoyed widespread popularity, increasingly being applied to areas of decisionmaking outside the traditional domain of the competitive market, including the arena of family relations.¹²¹

¹¹⁷ See Gary S. Becker, *The Economic Approach to Human Behavior* (1976); A. Mitchell Polinsky, *An Introduction to Law and Economics* (2d ed. 1989); Richard A. Posner, *Economic Analysis of Law* (5th ed. 1998); Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 *Chi.-Kent L. Rev.* 23, 26-30 (1989). One of the earliest critics to raise psychoanalytic evidence against the model of expected utility maximization was Arthur Allen Leff in a commentary on the publication of the first edition of Richard Posner's *Economic Analysis of Law*:

What happens . . . to questions of "utility" if one accepts, even as a hypothesis, the idea of unconscious desires? In speaking about the maximization of utility, does one rate success in achieving what people "conceive to be their self-interest" in terms of their conscious or unconscious aims? . . . Can one actually, now, write four hundred pages about human desire without adverting to Freud, his followers, or even his enemies?

Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 *Va. L. Rev.* 451, 474 (1974) (quoting Posner, *supra*).

¹¹⁸ See Posner, *supra* note 117, at 3.

¹¹⁹ See Posner, *supra* note 117, at 3-4; Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 *N.Y.U. L. Rev.* 630, 642 (1999); see also Becker, *supra* note 117, at 14 ("[A]ll human behavior can be viewed as involving participants who maximize their utility from a stable set of preferences and accumulate an optimal amount of information . . .").

¹²⁰ Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 *Stan. L. Rev.* 1471, 1476 (1998).

¹²¹ See Gary S. Becker, *A Theory of Marriage*, (pts. I & II), 81 *J. Pol. Econ.* 813 (1973); 82 *J. Pol. Econ.* S11 (1974); Lloyd Cohen, *Marriage, Divorce, and Quasi Rents*; or, "I Gave Him the Best Years of My Life," 16 *J. Legal Stud.* 267 (1987);

The model of rational choice is a simple and elegant paradigm for human behavior,¹²² attractive characteristics in a theoretical model. Simple models are easy to explain, and elegant models allow for a high level of sophistication, sometimes in the form of mathematical formulas that only a handful of thinkers can understand.¹²³ Yet despite the allure of simplicity, law and economics scholars have begun to acknowledge that the neoclassical assumption of rationality often fails as a descriptive model of economic actors and their behavior.¹²⁴ Turning to experimental work in cognitive psychology, scholars have borrowed the concept of bounded rationality, already popular in the economic literature,¹²⁵ to help explain non-rational behavior. The theory of bounded rationality does this by identifying systematic, and therefore purportedly predictable, deviations from rational behavior. The theory focuses on cognitive

Theodore F. Haas, *The Rationality and Enforceability of Contractual Restrictions on Divorce*, 66 N.C. L. Rev. 879, 882 (1988); Joan Huber & Glenn Spitzer, *Considering Divorce: An Expansion of Becker's Theory of Marital Instability*, 86 Am. J. Soc. 75 (1980); Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 Va. L. Rev. 9 (1990).

¹²² But see Posner, *supra* note 117, at 18.

¹²³ Matthew Rabin makes the following point about the economic model:

Because of the high premium economics places on the logic and precision of arguments and the quantification of evidence, attending to all facets of human nature is neither feasible nor desirable. The realization that many details of human behavior must be ignored, however, should not license institutionalized complacency about the behavioral validity of our assumptions

Matthew Rabin, *Psychology and Economics*, 36 J. Econ. Literature 11, 13 (1998).

¹²⁴ The pioneering article in the economic area was Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q. J. Econ. 99 (1955). See generally Jolls et al., *supra* note 120, at 1471 (examining "how law and economics analysis may be improved by increased attention to insights about actual human behavior"); Symposium: *The Legal Implications of Psychology: Human Behavior, Behavioral Economics, and the Law*, 51 Vand. L. Rev. 1495 (1998) (examining behavioral research and the impact of behavioral economic analysis of law on scholarship and policy).

¹²⁵ See John Conlisk, *Why Bounded Rationality?*, 34 J. Econ. Literature 669 (1996) (surveying empirical studies of cognitive biases suggesting that people are capable of substantial and systematic reasoning errors relevant to economic decisions). For an example of the genre, see Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. Pol. Econ. 1325 (1990); see also Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 Vand. L. Rev. 1499, 1502 (1998) ("Transaction cost economics accepts that the rationality of economic actors is 'bounded,' to use Herbert Simon's phraseology, and bounded rationality can include cognitive imperfection as well as informational limits.").

biases, heuristics, and limitations that lead individuals to depart from outcomes otherwise predicted by the neoclassical rational choice model.¹²⁶ Bounded rationality is not a refutation of the rational actor model; to the contrary, it attempts to fine-tune the model to take account of predictable cognitive limitations and biases.¹²⁷ Despite occasional references to irrationality in the literature,¹²⁸ there is nothing in fact irrational about bounded rationality.¹²⁹

From a psychoanalytic perspective, one is tempted to begin with what is missing in the idea of bounded rationality. But it is important initially to acknowledge that law and economics scholars doing work in the area of cognitive psychology have several important contributions to make. First, the model of bounded rationality represents a desirable shift away from abstract conceptions of human nature to a more empirically grounded psychology. Unlike neoclassical economists, who make no strong claim to the subjective accuracy of their model,¹³⁰ behavioral law and economics scholars do lay claim to the descriptive accuracy of their model of human behav-

¹²⁶ For a useful listing of the cognitive biases, heuristics, and limitations discussed in the economic literature, see Langevoort, *supra* note 125, at 1503-05; Conlisk, *supra* note 125, at 675-83. See also Hanson & Kysar, *supra* note 119, at 640 ("In place of the rational actor model, [cognitive psychologists, behavioral researchers, probability theorists, and others] were developing a human decisionmaker model replete with heuristics and biases, unwarranted self-confidence, a notable ineptitude for probability, and a host of other nonrational cognitive features.").

¹²⁷ See Hanson & Kysar, *supra* note 119, at 633 ("These researchers claim not merely that we sometimes fail to abide by rules of logic, but that we fail to do so in predictable ways."). In the economics literature, the debate over rationality goes beyond cognitive biases to include alternative models of behavior such as learning theory and evolutionary psychology. See Conlisk, *supra* note 125, at 679, 683.

¹²⁸ See, e.g., Gary S. Becker, *Irrational Behavior and Economic Theory*, 70 *J. Pol. Econ.* 1 (1962).

¹²⁹ See Elster, *Sour Grapes*, *supra* note 12, at 24-27; Coleman, *supra* note 26, at 203; Langevoort, *supra* note 125, at 1506 (noting that "identifying a departure from rationality is not the same as discovering irrationality").

¹³⁰ Richard Posner explains that "[r]ationality means little more to an economist than a disposition to choose, consciously or unconsciously, an apt means to whatever ends the chooser happens to have." Posner, *supra* note 117, at 17. In Posner's view, the psychology of economics is entirely behavioral. One would never define irrationality in terms of inconsistency, therefore, since preferences are defined in objective terms as those choices the individual has made. One way to understand the shift from the neoclassical concept of rationality to behavioral law and economics is a shift, despite the use of the term behavioral, from an objective to a subjective psychology.

ior. The goal of work in this field, as described by several leading authors, "is to advance an approach to the economic analysis of law that is informed by a more accurate conception of choice, one that reflects a better understanding of human behavior and its wellsprings."¹³¹ This empirical work certainly offers useful information about how people in the aggregate might respond to particular legal regulations. The value of this work varies depending on the area of research; with sophisticated investors in financial markets, the model of rationality seems more likely to approach actual decisionmaking than in areas such as the family, criminal behavior, or the labor market. Despite the fact that behavioral law and economics does not tell us which rules to adopt, in certain spheres it can give us limited, empirical information about how particular legal rules might affect behavior on an aggregate scale.¹³² The rise of bounded rationality suggests that law and economics scholars are increasingly interested in the model's explanatory and predictive usefulness as well as its utility for setting normative standards for behavior.

Second, the principles of cognitive psychology informing behavioral law and economics scholarship recognize the important role of unconscious processes in human decisionmaking.¹³³ While the

¹³¹ Jolls et al., *supra* note 120, at 1473; see also *id.* at 1474 ("The unifying idea in our analysis is that behavioral economics allows us to model and predict behavior relevant to law with the tools of traditional economic analysis, but with more accurate assumptions about human behavior, and more accurate predictions and prescriptions about law."); Simon, *supra* note 124, at 99 ("[T]he task is to replace the global rationality of economic man with a kind of rational behavior that is compatible with the access to information and the computational capacities that are actually possessed by organisms, including man, in the kinds of environments in which such organisms exist.").

¹³² In this respect, behavioral law and economics scholars can rightly claim to be working squarely in the empirical tradition of the legal realists, many of whom, at Yale and elsewhere, collaborated with psychologists in carrying out empirical research and writings. Even in the economics field, the effort to make rational choice theory more empirical is hardly new; economists have been moving in this direction ever since Herbert Simon published his pathbreaking article on bounded rationality in 1955. See Simon, *supra* note 124.

¹³³ See Morris N. Eagle, *The Psychoanalytic and the Cognitive Unconscious*, in *Theories of the Unconscious and Theories of the Self* 155, 155 (Raphael Stern ed., 1987) (noting that "the concept of unconscious mental processes has gained a new respectability on the basis of recent experimental work in cognitive psychology and perception—work that

idea of the cognitive unconscious is very different from the idea of the dynamic unconscious in psychoanalytic thought, acknowledging that unconscious processes play a central role in human decision-making is an important step in the direction of constructing a more holistic view of mental life. The idea of unconscious processes was first studied in depth by nineteenth-century German physiologists who were interested in exploring how perception works.¹³⁴ Today, cognitive psychologists have established that, in addition to perception, mental processes such as memory, judgment, and attention also take place below the level of conscious awareness. Although Freud himself would have been enthusiastic about the work on unconscious cognitive processes,¹³⁵ including the biases and heuristics familiar in the work of behavioral law and economics, the psychoanalytic unconscious extends well beyond perception and memory to include instincts, emotions, fantasies, desires, and conflicts. Moreover, the cognitive unconscious is a vastly more rational place than the dynamic unconscious studied by Freud. The behavioral economist Herbert Simon once observed that "we cannot, of course, rule out the possibility that the unconscious is a better decision-maker than the conscious,"¹³⁶ an idea at odds with psychoanalytic views about compromise formations, condensation, displacement, and other unconscious processes. Yet despite these important differences, we can still conclude that the attention paid by behavioral law and economics scholars to the phenomenon of unconscious processes is a positive, albeit limited, step.

Still more fundamentally, law and economics scholarship illustrates an important truth about human nature. The basic premise of law and economics is that individuals are motivated to act rationally, that is, to act in a way that maximizes their expected utility. This foundational premise rests on a basic psychoanalytic principle: Human beings are reasoning animals who *strive* for rationality. For the behavioral law and economics scholars and their colleagues in cognitive psychology, striving for rationality may be the most we can

demonstrates the existence of ubiquitous and remarkably complex and intelligent operations even in the absence of awareness.") (footnote omitted).

¹³⁴ See Dailey, Holmes and the Romantic Mind, *supra* note 7, at 461-63.

¹³⁵ See, e.g., Howard Shevrin et al., Event-Related Potential Indicators of the Dynamic Unconscious, 1 Consciousness and Cognition 340, 340-41 (1992).

¹³⁶ Simon, *supra* note 124, at 104.

expect from human beings.¹³⁷ Since Milton Friedman argued a version of this point, some economists have taken the position that people possess bounded rationality, but that “they act *as if* unboundedly rational.”¹³⁸ From a psychoanalytic perspective, however, this “as if” defense of rationality fails to acknowledge the ways in which acting “as if rational” can be used, defensively, to hinder expected utility maximization. As Lear’s discussion of irrationality shows, and as any astute observer of human nature knows, the human capacity for rationalization can be used to further self-defeating as well as self-fulfilling ends.

This is the insight for legal scholars offered by Lear’s analysis. For Lear, striving for rationality and taking pleasure from rationalizing do not make us rational beings, or even necessarily facilitate bringing us closer to being so. Referring to the Rat Man’s cringing, Lear explains:

[I]t is precisely here that the Rat Man reflexively breaks down: he cannot coherently *say* what he *shows*. He does not understand what he is doing, and he searches for some rationalizing explanation. It is not just that as a self-interpreting animal, the Rat Man wants to understand what he is doing; he wants to understand himself as a rational animal. He wants to see himself as acting for a reason. Thus he quickly constructs his more “co-gent explanation” [that he fears Freud in the same way he feared his father] [R]eason is used as a defense to cover over unreason.¹³⁹

In certain contexts, the human pursuit of rationality operates as a defense against feelings of inner disorder or external chaos. This defensive “stance of knowingness,” as Lear calls it, keeps us “blind to the realm of unconscious meaning, confident that any real human problem can be both posed and solved by the transparent use

¹³⁷ See *id.* at 101 (“Because of the psychological limits of the organism (particularly with respect to computational and predictive ability), actual human rationality-striving can at best be an extremely crude and simplified approximation to the kind of global rationality that is implied, for example, by game-theoretical models.”); see also Elster, Introduction, *supra* note 31, at 27 (observing that “[w]e all want to be rational”).

¹³⁸ Conlisk, *supra* note 125, at 683 (citing Milton Friedman, *Essays in Positive Economics* (1953)).

¹³⁹ Lear, *Open Minded*, *supra* note 6, at 101.

of practical reason."¹⁴⁰ The assumption of rationality in law and economics, however softened by the biases and limitations of cognitive psychology, comes to look very much like a defensive rationalization against the idea that human institutions, like people themselves, are not always logical, coherent, predictable, or stable.

Why should the general legal reader care about the concept of rationality in behavioral law and economics? Economic thinking is no longer confined to a small group of scholars working in discrete areas of market transactions. As economic analysis becomes an increasingly popular tool in law, economic thinking and principles, including concepts such as bounded rationality, come to permeate the legal culture more broadly. Apart from its influence in specific areas of legal regulation, therefore, law and economics scholarship promotes a model of human nature that, despite what its proponents claim,¹⁴¹ threatens to diminish the normative legal concepts of personal autonomy and political agency. Citizens in a liberal democracy are assumed to possess a sufficient degree of self-knowledge about their own moral values, beliefs, and preferences to be self-directing in their choices and behavior. Psychoanalysis shows us why rational deliberation alone, without self-insight, does not give rise to such self-directing behavior: An appreciation for the ways in which behavior is affected by unconscious feelings and irrational motivations is central to any meaningful experience over time of individual agency and self-control.

When a young woman makes the choice to carry a pregnancy to term, for example, she acts autonomously only in the thinnest sense of the term if she does so in order to gratify an unconscious infantile wish to be loved or to avoid an unconscious fear of parental punishment. What it means to act autonomously, in any but the most formal sense of acting without external compulsion or directive, requires some measure of self-understanding. The economic model of rationality, whether bounded or not, misses the self-reflection and self-understanding, the "way of life," in Lear's words, necessary for sustaining the psychological capacity for personal autonomy and agency over time. Although law and economics scholars tend to

¹⁴⁰ *Id.* at 54.

¹⁴¹ See Posner, *supra* note 117, at 29.

view themselves as facilitating individual choice, the reduction of mind to rational processes in fact contributes to a legal culture in which individuals are increasingly vulnerable to the realm of deeper impulses and desires. Put more strongly, law and economics can be seen to create a legal climate in which the personal autonomy that sustains democratic freedom is threatened.

In a recent article, two scholars in the field of law and economics demonstrate how it might be possible to begin to incorporate psychoanalytic ideas into the paradigm of bounded rationality.¹⁴² Jon Hanson and Douglas Kysar open their article on the problem of market manipulation in products liability law with a quote from Tennyson: "Do we move ourselves, or are moved by an unseen hand . . . ?"¹⁴³ They consider the implications for products liability law of viewing the relationship between seller and buyer in dynamic terms. What is the proper standard of liability, they ask, when product sellers are in a position to manipulate the choices consumers make by influencing, often unconsciously, the framework for the decision or the factors taken into account? Hanson and Kysar's consideration of interpsychic dynamics is certainly an important step in the direction of understanding human decisionmaking, although it does not go far enough. Law and economics scholars must begin to confront the dynamics of *intrapsychic* as well as *interpsychic* factors, the role the unconscious plays in these dynamics, the disruptive effects of irrational thoughts and feelings in everyday life, and the developmental vicissitudes of rationality over the course of a lifetime. These scholars, with their obvious interest in empirical work and experimental methods, would seem to be well-equipped for the task of developing a legal model of human decisionmaking that takes into account psychoanalytic evidence of the immanence of irrationality in human experience.

B. Irrationality in Law

Lear's ideas about irrationality have important implications for many areas of legal doctrine and constitutional jurisprudence. Of

¹⁴² See Hanson & Kysar, *supra* note 119.

¹⁴³ *Id.* at 633 (quoting Alfred Lord Tennyson, Maud, Locksley Hall, and other Poems 14 (1891)).

particular interest to me is the way that psychoanalysis can deepen the conception of citizenship that underlies constitutional protection for individual rights and democratic processes. Central to the notion of citizenship in our constitutional scheme is the individual's capacity for mature, rational, autonomous decisionmaking about both personal life choices and the collective good. The two central defining features of liberal citizenship—autonomy and rationality—presuppose this psychological status as a given without explicit consideration of what it means to possess such mental qualities or how those qualities are in fact acquired and maintained.¹⁴⁴ Lear, by contrast, asks us to consider how the human striving for rationality is a developmental outcome.¹⁴⁵ An appreciation for the basic insights of dynamic and developmental psychology opens up new and provocative ways of looking at the self-reflective, deliberative decisionmaking that underlies the idea of individual autonomy.¹⁴⁶ Although liberal thinkers in recent years have come to recognize the fact that individuals are embedded in familial and social communities, and that individual values are constituted, at least in the first instance, by those communities, relatively little attention has been paid by legal scholars to the developmental dimensions of the self. In Lear's rendition, psychoanalysis gives us a model for assessing the political role of family life in the democratic state by leading us to consider the importance of families and early caregivers to the psychological development of civic virtues. The process by which citizens acquire the psychological capacities for democratic citizenship—virtues such as autonomy, rationality, tolerance, deliberation, and civility—and the way that families and other social institutions

¹⁴⁴ See Peter Berkowitz, *Virtue and the Making of Modern Liberalism* at xi (1999) (describing the liberal way of life as an achievement that "demands of individuals specific virtues or, to speak less formally, certain qualities of mind and character—such as reflective judgment, sympathetic imagination, self-restraint, the ability to cooperate, and toleration—that do not arise spontaneously but require education and cultivation").

¹⁴⁵ See also Langevoort, *supra* note 125, at 1526 ("What is interesting, and what Elster sees, is that individual cognitive biases may also have their origins in the need to make sense—to a greater degree than is justified—of a confusing, chaotic world . . ."). Cf. Jon Elster, *Solomonic Judgements: Studies in the Limitations of Rationality* 57–59, 124 (1989) (discussing the roles of instinct in difficult or close decisions).

¹⁴⁶ See Dailey, *Federalism and Families*, *supra* note 17, at 1846–49.

instill (or inhibit) and sustain (or debilitate) those virtues, are underlying themes in Lear's book and important areas of study from a psychoanalytically informed perspective.

How would a psychoanalytic understanding of democratic citizenship alter extant legal principles and norms? Given the crucial role of the family in developing the liberal virtues of rationality and autonomy, we might conclude, as Susan Moller Okin does, that the family is a sphere of justice to which liberal norms of equality and fairness should apply, at least in some circumstances.¹⁴⁷ We might adjust our notions of family privacy, parental rights, and child custody to account explicitly for the collective interest in the psychological development of future citizens. We might reexamine our conception of political authority in light of psychoanalytic work on group psychology. We might recognize the important role that early education plays in inculcating the values of liberal citizenship and in training young children to think critically and rationally.¹⁴⁸ We might also think about expanding the state's educational mission to include, through subjects like art, literature, history, psychology, and philosophy, instruction in the importance of self-reflection and self-knowledge to a democratic and anti-authoritarian way of life.

Psychoanalytic ideas about irrationality can also inform our understanding of the fundamental constitutional principles of privacy and equality. A model of human nature that overlooks the central role of psychodynamic processes inevitably results in an impover-

¹⁴⁷ See Susan Moller Okin, *Justice, Gender, and the Family* (1989). Although Okin's proposal seems much more radical, we already apply liberal norms in a limited fashion when the veil of family privacy is removed, such as at the time of divorce. See Dailey, *Constitutional Privacy*, *supra* note 17.

¹⁴⁸ See, e.g., *Smith v. Board of Sch. Comm'rs*, 827 F.2d 684, 692 (11th Cir. 1987) (noting that "one of the major objectives of public education is the 'inculcat[ion] of fundamental values necessary to the maintenance of a democratic political system'" (citations omitted); William A. Galston, *Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State* 241 (1991); Judith N. Shklar, *The Liberalism of Fear*, in *Liberalism and the Moral Life* 21, 33 (Nancy L. Rosenblum ed., 1989) ("To foster well-informed and self-directed adults must be the aim of every effort to educate the citizens of a liberal society."); Nomi Maya Stolzenberg, "He Drew a Circle That Shut Me Out:" Assimilation, Indoctrination, and the Paradox of a Liberal Education, 106 *Harv. L. Rev.* 581 (1993); ("It has been taken for granted that young people must be shaped into citizens and that public institutions have both the right and the responsibility to take the lead in shaping them.").

ished jurisprudence in a wide variety of important cases. Understanding the role of unconscious emotions and motivations would seem vital in areas of personal decisionmaking such as whether to carry a pregnancy to term, whether to end one's own life or the life of a terminally ill family member, whether one's children should have access to condoms in school, or whether an unmarried biological father should be allowed to raise his daughter. Similarly, understanding the psychoanalytic roots and mechanisms of discrimination, and particularly the role of irrational fears and hatreds, would appear to be a crucial task for anyone purporting to make responsible legal doctrine in the field. Relying on psychoanalytic literature, Charles Lawrence has written about how "a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation."¹⁴⁹ Lawrence argues that the *Washington v. Davis* discriminatory intent standard for proving unconstitutional race-based discrimination "ignores much of what we understand about how the human mind works" and "disregards both the irrationality of racism and the profound effect that the history of American race relations has had on the individual and collective [i.e., cultural] unconscious."¹⁵⁰ Lawrence's analysis of the irrational roots of racism has much in common with Lear's views on the socially disruptive effects of irrational desires and feelings: "Racism is irrational in the sense that we are not fully aware of the meanings we attach to race or why we have made race significant. It is also arguably dysfunctional to the extent that its irrationality prevents the optimal use of human resources."¹⁵¹ Lawrence's insights demonstrate the inadequacy of the simplified view that human behavior is always, or most often, the product of conscious intent and rational choice. Although many people guilty of discriminatory conduct certainly fit an "intentional bigot" model, Lawrence argues that the greatest barrier to racial equality comes from the unconscious motivations of ostensibly well-intentioned citizens. How to move these citizens collectively to reflect on the unconscious sources of their behavior and whether to provide

¹⁴⁹ Lawrence, *supra* note 8, at 322 (footnote omitted).

¹⁵⁰ *Id.* at 323.

¹⁵¹ *Id.* at 330.

legal remedies for that behavior are the important subjects of Lawrence's work.

Many other doctrinal areas suggest themselves for study using the insights of psychoanalysis. I think immediately of the reasonable person standard in tort law, mens rea in criminal law, the question of welcomeness in sexual harassment law, the standard of consent in rape, the reliability of criminal confessions, the notion of competency in trusts and estates, and many other areas where legal liability turns on individual decisionmaking, choice, motive, or intent. More broadly, too, Lear's thesis bears on our understanding of legal institutions and the values they purport to serve. The role of irrationality in the decisionmaking of the jury, including jury nullification, may be a fruitful avenue for future study; issues such as witness identification, admissibility of recovered memories, predictions of future violence, and recovery for emotional pain and suffering are further examples of areas that merit attention. The psychological significance of plea bargaining, confession, mediation, and having one's day in court all bear on the values these legal procedures and institutions serve.

Finally, I believe that Lear's views about irrationality have important application in the area of free speech, where the United States Supreme Court has made room for the protection of offensive, emotional, disputatious, even hateful speech. By allowing speech of this nature to enter the sphere of public deliberation, however disruptive it might be to civilized discussion, the Supreme Court may be providing the public mechanism by which irrational feelings and impulses are integrated into democratic life. The interchange Lear identifies between the psyche and the polis points to the deep connection between the First Amendment values of self-expression and collective self-determination. The centrality of speech to the ends of psychoanalysis provides a fertile paradigm for the importance of protection for expressive, uncivilized speech, both on the couch and off, to the democratic polity.

IV. CONCLUSION

Psychoanalytic observation from the days of Freud has always ranged between the two extremes of common-sense wisdom about ordinary experience and wildly speculative pronouncements on

human nature. Freud launched his revolutionary psychology on the basis of such simple observations that missed anniversaries and forgotten dates have meaning, confirming what every neglected spouse and spurned lover has always known; Freud also announced the existence of a death drive that has never been clinically confirmed in the way he imagined. Lear has a touch of the speculative cowboy in him, too, at times at the expense of more careful, empirically grounded argument. Ironically, it is perhaps his most wildly speculative observation—that psychoanalysis is necessary to democracy—that seems the most original and promising contribution in this intelligent and wide-ranging collection of essays.

Although Lear is a trained psychoanalyst, his collection of essays is undeniably the work of a philosopher.¹⁵² He refers to psychoanalysis as a “science of subjectivity,”¹⁵³ but openly disputes the idea of scientific standards being relevant to psychoanalysis:

[A]s soon as one enters the realm of meaningful explanation one has to employ different methods of validating causal claims than one finds in experimental physics. And it is simply a mistake to think that therefore the methods of validation in ordinary psychology or in psychoanalysis must be less precise or fall short of the methods in experimental physics.¹⁵⁴

Lear never explains what these methods of validation might be, and I consider it a minor shortcoming of the book that Lear does not address the science question in greater depth. As lawyers, we would want to know more before concluding that psychoanalytic ideas should not be evaluated by the same standards of scientific investigation and proof applied in the natural sciences.¹⁵⁵ The fact that

¹⁵² Lear comments:

Philosophers have sometimes complained that psychoanalysis is not an empirical discipline, that it is not a “science.” This seems to me a reason for hope, not disdain: for perhaps reflection on the therapeutic model will shed light on how to proceed philosophically in a way which is neither a methodology of the sciences nor a purely transcendental investigation.

Lear, *Open Minded*, supra note 6, at 272.

¹⁵³ Id. at 317 n.11 (citing Lear, *Love and Its Place in Nature*, supra note 15, at ch.1).

¹⁵⁴ Id. at 24.

¹⁵⁵ The most well known critique of psychoanalysis as a science is Adolf Grünbaum, *Validation in the Clinical Theory of Psychoanalysis: A Study in the Philosophy of*

psychoanalysis has not yet proven itself a scientifically rigorous discipline might be, to borrow Lear's words, "a reason for hope, not disdain."¹⁵⁶ Cognitive, behavioral, and neuroscientific approaches to understanding mind and human behavior continue to prove themselves useful but incomplete models of human nature, with no capacity for synthesizing the various findings into a coherent framework.

At the same time, psychoanalytic researchers and scholars have begun to recognize the pressing need to establish the empirical validity of their enterprise. Most of this work must be carried out by clinicians with the hard data gathered in the course of providing psychoanalytic therapy.¹⁵⁷ Some of this work is already being done at the intersection of cognitive psychology and psychoanalysis.¹⁵⁸ And some of this work is being done by researchers in the fields of neuroimaging and neuropsychiatry.¹⁵⁹ Even the philosopher Karl Popper, whom critics cite most often for the proposition that psy-

Psychoanalysis (1993). See also Howard Shevrin, *Is Psychoanalysis One Science, Two Sciences, or No Science at All?: A Discourse among Friendly Antagonists*, 43 *J. of the Am. Psychoanalytic Ass'n* 963 (1995) (examining arguments for and against psychoanalysis as science).

¹⁵⁶ Lear, *supra* note 6, at 272.

¹⁵⁷ For a sampling of recent work in this vein, see *Psychoanalytic Process Research Strategies* (Hartvig Dahl et al. eds., 1988); *Research in Psychoanalysis: Process, Development, Outcome* (Theodore Shapiro & Robert N. Emde eds., 1995); Marshall Edelson, *Is Testing Psychoanalytic Hypotheses in the Psychoanalytic Situation Really Impossible?*, 38 *Psychoanalytic Stud. Child* 61 (1983); Enrico E. Jones & Michael Windholz, *The Psychoanalytic Case Study: Toward a Method for Systematic Inquiry*, 38 *J. Am. Psychoanalytic Ass'n* 985 (1990).

¹⁵⁸ See, e.g., Wilma Bucci, *Psychoanalysis and Cognitive Science* (1997); *Theories of the Unconscious and Theories of the Self* (Raphael Stern ed., 1987); Cornelis Wegman, *Psychoanalysis and Cognitive Psychology: A Formalization of Freud's Earliest Theory* (1985).

¹⁵⁹ See, e.g., Morton F. Reiser, *Memory in Mind and Brain: What Dream Imagery Reveals* (1990); Morton F. Reiser, *Mind, Brain, Body: Toward a Convergence of Psychoanalysis and Neurobiology* (1984); Morton F. Reiser, *Converging Sectors of Psychoanalysis and Neurobiology: Mutual Challenges and Opportunity*, 33 *J. Am. Psychoanalytic Ass'n* 11 (1985). The Arnold Pfeffer Center for Neuropsychanalysis, affiliated with the New York Psychoanalytic Institute, sponsors several research groups currently exploring issues such as Consciousness, Neuro-Imaging in Psychiatry, Early Mental Development, Clinical Studies in Neuropsychanalysis, and Chronic Fatigue Syndrome from an interdisciplinary perspective. See *The Bulletin of the New York Psychoanalytic Institute and Society* 1999-2000, at 46-47.

choanalysis is not a science,¹⁶⁰ expressed optimism in this regard: "I personally do not doubt that much of what Freud and Adler say is of considerable importance, and may well play its part one day in a psychological science which is testable."¹⁶¹

It is worth concluding with the observation that this eclectic collection of essays is itself a study in open mindedness. "I am less concerned," Lear explains, "with trying to persuade the reader of any particular thesis than with showing various ways in which philosophical and psychoanalytic questions might be pursued with a sense of liveliness and openness."¹⁶² It is certainly true that the sheer variety and breadth of these essays raise some resistance in the reader: One wonders at times if Lear is totally in control of his own subject matter. But resistance of this sort—the desire for clear order, logical progression, well-developed themes, rational connections—may be exactly the kind of closed-minded thinking Lear wishes to challenge. The legal reader, in particular, must work to find connections among topics as diverse as Plato, Freud, and Wittgenstein, but the intelligence and creativity that Lear brings to his subject matter more than reward the effort.

¹⁶⁰ Popper defines "scientific" in the following way: "A theory which is not refutable by any conceivable event is non-scientific." Karl R. Popper, *Conjectures and Refutations: The Growth of Scientific Knowledge* 36 (2d ed. 1962).

¹⁶¹ *Id.* at 37.

¹⁶² Lear, *Open Minded*, *supra* note 6, at 15.