

Prolegomena to a Psychoanalysis of Law and Justice

Part II Analysis[†]

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III

RELATIVE OBLIGATIONS

RELATIVE OBLIGATIONS are psychologically based on the relations between father and mother, mother and child, father and child, and the child and his fellows. They are not discernible at the same stage of development; nor are the required performances identical. Nevertheless, the typical infantile unconscious motive for their formation is the same for all four kinds of obligations in spite of their emergence at different periods of mental and bodily development and in spite of their different contents. *This motivation is the child's overwhelming fear of being abandoned and his corresponding desire, or at least inclination, to conclude unions with others.*

The search for the infantile source from which each of the various kinds of obligations evolves should logically begin with the marital obligations, which are the earliest, since they are usually established before the child's conception and birth. However, the maternal obligations will be discussed first, merely for the technical reason that fear of isolation is easier to demonstrate by examining the contents and origin of the mother-infant reciprocal relations.

A. Mother and Child (Social Law)

The strongest conceivable bond between two beings is the umbilical cord. The mother and the embryo form a unit, although the mother may frequently feel the embryo to be a foreign body and parasite, and the embryo may have tendencies of his own the nearer it is to the day of birth. There may well be a correlation between the embryo's drive to be born and the mother's frequently concealed impulse to regain freedom

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* For a short biographical note on Bienenfeld see *Part I*, 53 CALIF. L. REV. 957 (1965).

and independence. With birth begins full identity. After the cutting of the umbilical cord the one entity divides into two "selves," and shortly thereafter most vital obligations begin.

After birth the dominant factor in the child's psyche is the overwhelming fear of being deserted and abandoned. The "*Urangst*" (primary anxiety), as Ernest Jones called it, may be caused by dyspnea after birth, as indicated by Otto Rank and Freud and observed by Piaget. But long after such dyspnea disappears, anxiety caused by the cutting of the cord is discernible in the infant's despair when left alone, and in his efforts to escape isolation by the closest possible union with the mother. However, no obligations come into being for several weeks after birth. Obligations presuppose the existence of two persons—of two egos—as parties. For some time after birth the mother regards the infant still as part of herself while the infant has not yet developed clear traces of an ego or superego. Immediately after birth a strong urge dominates the mother: to feed the child, to protect him, and to watch over his spiritual and bodily growth. Her urge is the source of *future* vital obligations and liabilities which guarantee the survival of humanity. The infant is not a subject or party to any obligations at that earliest stage. The cutting of the cord is a precondition of advancing human beings into individuals by allowing breathing, nursing, digesting, and developing sensorial capacities. The separation from the mother which sets an end to complete unity produces for the child only the *possibility* of future obligations. Unconnected ego nuclei very early may be observed indicating aggressive sexual or social urges soon after birth. These ego nuclei, which are at the same time nuclei of the child's superegos and ego ideals, mirror those of the mother. At this stage no obligations exist between mother and infant though the foundation is laid for the future.

The stage between birth and the first emergence of obligations is characterized by empathy. In spite of all misunderstandings at an early period when the infant transmits his communications merely by whimpering and crying, and comprehends words only by their intonation, both parties often grasp the requests of the other. Empathy discloses the spiritual and bodily union which replaces the unity before birth. By its effects it makes obligations of both parties unnecessary, even if such obligations were feasible notwithstanding the absence of the child's ego and superego. The more the infant's sensorial capacities develop in the course of maturing, the more difficult it is to understand his specified demands. Empathy is able to satisfy the desire for a union for a limited period only, and even there, mainly for some conspicuous communications such as the so-called "hunger cries." The infant's wish to escape

isolation and to mitigate his anxiety and the mother's corresponding wish to maintain ties resembling those before birth soon will not be satisfied by empathy alone, although remnants may be traced throughout the lives of both.

The hypothesis that the typical situation of escaping isolation by obligations comes into being at a very early stage does not contradict the doctrine of the school of psychoanalysis led by Ernest Jones and Melanie Klein that a schizoid-paranoid position of the infant starts very soon after birth, continues for months, and is partly replaced by depression. The position appears when the child develops his ego to such a surprising extent that the period could be called the most fertile of his life. During the schizoid-paranoid position and the subsequent depressive stage he learns to see, hear, grasp, and make voluntary movements. All these activities serve his self-assertion and primary narcissism and integrate his ego. The acquisition of capacities and the establishment of communication by other means than empathy prepare the ground for the drive to accept obligations and spiritual bonds.

After birth, the infant's ego speedily increases in strength. In spite of its weakness and incoherence, the essential psychological elements of relative obligations are soon present. The first—the emotional and spiritual bond between the two parties—is even more perceptible in the inseparable union it creates shortly after birth than in later stages of evolution; the second—the design to produce a performance required by the other party—is distinctly discernible in the mother's activities which induce and advise the infant to nurse; the third is apparent in the infant's voluntary submission to beneficial rules which are intended to keep him alive by his own efforts, and are in harmony with inherited reflexes. The infant's drive to feed and be fed, to be protected and not to be deserted, imposes moral obligations on the mother. Her impulses for the child's survival are the psychological source of her obligations. They consist in feeding, touching, warming, and protecting the infant against dangers he encounters for the first time after the expulsion from the womb, and in watching over his bodily and mental growth; they serve the same purpose as the bodily chain before birth. These impulses create legal and moral obligations on the mother's side which are universally recognized. On the infant's side, his life as an individual commences after the unity with the mother is discontinued. Nuclei of his ego emerge soon after birth and enable him to follow his reflexes and the mother's pleasant recommendations to nurse and, later on, primarily from fear of desertion, also her unpleasant requests concerning weaning, cleanliness, and manners. His claim for reciprocal obligations is even stronger than the mother's urge. The roles of both parties are reversed

at the beginning: He is the creditor who insists on the mother's care, she is the debtor who has to fulfill his requests. His earliest conflicts are probably caused by the real or imagined breach of her obligations since she cannot keep her "promise" of permanent presence.

It is the mother's ego ideal that keeps the infant alive. The word "ego ideal" however needs some explanation since the terms and notions "ego ideal," "superego," "conscience," and their relations to each other have been used by Freud with different meanings. In the essay "The Ego and the Id," where he first introduced the concept of the superego, it was identical with that of the ego ideal and even with conscience so that all those words described the same phenomenon. Originally they were conceived as a psychological agency which shaped and created conscience and drew its compelling force from the need to defend the ego against the id. Freud's original concept of the superego, the ego ideal, and the conscience in general as psychological agencies in everybody's psyche has been challenged later particularly by John Rickman for whom they are unconscious mental functions. Ernest Jones taught that the notion of the superego contains two meanings: one which describes the formation of a psychological reality in the infant's mind produced by the introjection of the parents' morality, and another which accords to John Rickman's view. Freud himself, Ernest Jones, Sylvia Payne, Gerhart Piers, and H. M. Lynd have employed and defined the notions of ego ideal, superego, and conscience in ways that partly contradict each other. I therefore have to state that the terms are used in this study in the original concept of Freud and that I am making use of the illuminating study of Piers, who apparently accepts it. Conscience then, is a psychological agency which consists of two parts: the ego ideal and the superego. These having differing tendencies and effects and, conflicting with each other, form a regularly unharmonious unit called conscience.

The mother's union with the infant, the ensuing obligations, and the influence of her ego ideal of support have a monopolizing character at the outset. Both desire, to the point of exclusion of other bonds, to maintain the closest relation: the infant for fear of being deserted and the mother in order to continue the union which existed before birth. Both, however, are simultaneously possessed of the divergent desires to be independent and free, even at the risk of increased isolation anxiety. The infant pursues vital activities out of his free will. Nobody could force him, as he voluntarily does at an early stage, to see, hear, grasp, sit upright, speak, or later creep, stand, or walk. He may not resent, but even cry for, the support of the mother which is normally readily offered; in principle, however, he can tolerate neither isolation nor permanent guidance. Isolation reawakens his primary anxiety; guidance is

opposed to his feelings of omnipotence of thought and his primary narcissism. He normally responds to both permanent supervision and temporary absence of the mother with outbreaks of despair, depression, aggression, and fury. While he strives for the closest possible union with her and wants to be bound by ties and reciprocal obligations, nevertheless he objects to their compelling force.

The mother's mind is also split by the same contradictory impulses—to be bound and to be free. It soon becomes unbearable to satisfy the insatiable demands of the infant. Even the best of mothers must leave the child alone to fulfill her obligations towards the father, the other family members, and the rest of the world. Moreover, she cannot keep the promise of full protection as implied by her presence and ward off troublesome events like changes in temperature, disturbing noises, or lights. Finally, she is often unable to grasp the cause of sufferings and complaints in spite of conscious endeavors and unconscious empathy. Impatience which is normally evoked by prolonged efforts increases her own aggressive impulses and produces further obstacles to the desired complete union. Thus the typical situation that gives rise to the universal phenomenon of keeping and breaking obligations is soon established. Both mother and child aim at a union, the mother by fulfilling her obligations of support, and the child by obediently submitting to her ruling; simultaneously, they are unable fully to discharge their duties because of their drives for freedom and independence. Obligations are usually kept in spite of inconveniences. On the mother's side, care for survival will always remain fundamental; on the child's side disobedience is incompatible with conscience—particularly with the incorporated ego ideal of the mother—and is bound to increase isolation anxiety. The open neglect of obligations is therefore rather rare. Their breach will nevertheless frequently occur under the pretense, or in the real emotional conviction, that their meaning can be interpreted in different ways and allows nonfulfillment under some circumstances. Such pretense and conviction serves the narcissism of both mother and child and does not violate at the same time the prescriptions of conscience, though it may lead to the same effects as a breach. The typical situation thereby establishes moral obligations between mother and child, which are usually observed yet frequently neglected.

The relationship between mother and child after birth may be called the *Oedipus union* (in contrast to the *Oedipus conflict*) which is fundamental for the initial position of the newborn within the family and the corresponding obligations of all family members. For some time after birth—and even before—the child is the main center of interest. Motherly obligations take preference over marital obligations with the

consent of the father and of the community—of the ego ideal and of her surroundings—as is demonstrated by the widespread customs, taboos, and superstitions which prohibit marital intercourse some time before, and for a considerable time after, birth. The infant achieves his unconscious aim of a nearly exclusive union with the mother by her nursing, her nearly permanent presence, and her lavished care and love; in the social sphere too the infant's demands and their satisfaction are in the foreground, while those of the father take second place, so that even his authority is impaired. The newcomer's requests, expressed by crying, and his satisfactions and disappointments are recognized as vital events by the mother and, under her influence, reluctantly by all family members. The marital union is replaced for a time by the infant's union with the mother. The Oedipus situation—the removal of the father and the closest feasible union with the mother—is firmly established after birth; it is a reality and not a fantasy. (In parentheses, it may be indicated here what will be discussed fully later: that the Oedipus conflict owes its formation to the father's urge to destroy the Oedipus union and prevent its reappearance, and to the child's reaction to the father's commands and threats.)

The urge and the claim for social rules of support which are institutionalized by social law in infancy within families and primitive states does not mean their automatic functioning in the desired and desirable direction. The mother's conscience embraces also her superego. It may force her, in spite of her conscious wish to introduce the most advantageous rules for the infant's survival, to follow her unconscious aggressive impulses and to impose obligations on the infant which are untimely and too strict. She may interpret her duty to nurse in a manner that does not correspond to the needs of an individual infant, and may change pleasant situations into unpleasant events. Social law, in spite of its benevolent character, may fail in its application. Legal rules and laws are often contrary to the method of justice even in the sphere of support; they serve survival by two contradictory means, by aggressive discipline and by benevolent tolerance—a difficult proposition. A dilemma arises in the infant's psyche by his inclination to be obedient and by his simultaneous disinclination to repress his aggression when mother is too insistent with her commands.

All criteria that characterize the typical infant situation are present in the Oedipus union and the initial obligations between mother and child. Clearly apparent are his fear of being abandoned, his wish to escape isolation by emotional, spiritual, and bodily ties, and the corresponding impulse of the mother to continue the unity that existed before birth. Here too the universal infantile source is demonstrated by the

emergence of social and legal rules of support in the family as the state. Finally, the reciprocal obligations are normally kept because of the infant's isolation anxiety and the mother's impulse to alleviate it and are frequently broken by the narcissistic tendencies of both: to be independent and to be free.

The infant's victory which culminates in the emotional realization of the Oedipus fantasy is short-lived. The scene soon changes: The mother no longer remains an equal partner in the union, and resumes her ruling position. Prohibitive rules, in contrast to the initial stage, are regularly institutionalized when weaning begins or when she insists on civilized behavior. She advances from a debtor to a creditor whose claims are normally met with resistance; even when she confines herself to kind admonitions she is now a disciplinarian whose recommendations are impressed upon the nuclei of the infant's conscience.

The more the newcomer gains independence the less urgent becomes the mother's permanent care. She is soon disinclined to allow monopolistic possession of her love to the disadvantage of the father and the other children. Thus the Oedipus union is weakened, but the wish for its full re-establishment continues through life. The mother ceases to be the infant's reliable ally. She has to terminate the situation, as demanded by the father and the other family members who reluctantly had recognized the privileged position of the intruder at the beginning. Now the same child has to adapt itself to the family; such adaptation to the customs, rules, morality, and religion of the surroundings into which he is born is the indispensable condition of his survival: He would condemn himself to death should he remain in isolation. Accommodation and assimilation, in Piaget's terminology, are the basic drives for survival.

Such adaptation, accommodation, and assimilation, however, are possible only by the mother's continuing active support and guidance. She first introduces rules of behavior, and she sustains the child's existence by her care for his needs. She thereby implants a morality of support in his mind which is universally institutionalized in social law notwithstanding its varying contents in different cultures.

The father soon joins and even takes over the leading part in the application of social law by assuming the main responsibility for the maintenance of the family. The mother's influence decreases and her morality is partly superseded by his moral beliefs and attitudes though it never ceases unconsciously to operate in the psyches of the family members and of the states' subjects.

From the moment when the kingly ruler becomes the highest authority in families or states his ego ideal and superego concepts become predominant factors in the destiny of the individual.

His conscience is composed of two elements: that of the superego which calls for cruel measures against oneself, against one's fellow men, and against enemies, and is based on fear and guilt; and the other of the ego ideal, which is founded on love and shame, and demands selflessness, sacrifice for others, and pity for oneself. Love, first experienced and taught by the mother, seems to be more effective in spite of the apparently predominant aggressive morality of the paternal ruler's superego. For the mother's ego ideal of support has not only been the driving force in the revival of social law in our period; it is even more conspicuous in the progress of medicine which within the past 150 years has everywhere increased life expectancy and decreased infant mortality. In spite of all wars, all persecutions, all famines, the atomic bomb, and the suppression of natural rights in many places and at all periods, security created by love and leading to social law of support has, nevertheless, been established to such an extent that in unhappy Europe alone the population has increased from about 187 million in 1800 to 440 million today, and the population of the world to about 3.2 billion. Love thereby shows its overwhelming power, even though the momentum of its impetus may lead to increased unhappiness for many.

B. Father and Child (Criminal Law)

The paternal obligations dominate, as Freud stated, the development of morality and thereby of obligations and law in the course of the maturation process to an even greater extent than those of and toward the mother. They differ from each other in many respects: The father's obligations appear later; they are not based on a natural union; the typical infantile situation is represented by the Oedipus *conflict* and not by the Oedipus *union*; they are strongly connected with guilt and overwhelming feelings of guilt, and are institutionalized in criminal law.

The thesis that obligations of and toward the mother appear earlier than those produced by the union with the father is not in accordance with Freud's teaching. He explained that the father at an early stage imposes his superego on the child, which evolves the Oedipus complex and through it the peculiar character of morality. "The little boy," he states, "develops an object cathexis of his mother which originally related to the mother's breast and is the earliest instance of object choice on the anacletic model. And the boy takes possession of his father by identifying himself with him."* But the earliest example of intensive object

* In German: "Ganz frühzeitig entwickelt das männliche Kind für die Mutter eine Objektbesetzung, die von der Mutterbrust ihren Ausgang nimmt und das vorbildliche Beispiel einer Objektwahl nach dem Anlehnungstyp zeigt; des Vaters bemächtigt sich der Knabe durch Identifizierung." Cathexis is an expression coined by psychoanalytic doctrine to describe the process where, in the words of Ruth Monroe, "the sensomotor apparatus has begun to become drive-connected (cathexed)."

cathexis *and* of identification is that with the mother. The nursing infant at the earliest stage where his bodily and emotional relations are confined to those of the mother, identifies himself with, and projects himself into, her. Freud, in order to simplify his presentation, discussed only the identification with the father and left out that with the mother. "The effects," he said,* "of the first identifications in earliest childhood will be profound and lasting. This leads us back to the origin of the ego-ideal; for behind the latter there lies hidden the first and most important identification of all, the identification with the father which takes place in the prehistory of every person." Freud's own doubt of the absolute validity of this thesis found expression in an immediate annotation that "perhaps it would be safer to say 'with the parents.' "**

The infant at the earliest stage can identify himself only with the mother: What Freud impressively stated on the origin of the ego ideal refers to the primary identification with the introjection of the mother's image and his imagined projection into the mother. In his initial writings Freud described the growth of the Oedipus complex and its influence on morality as a rather late process which reaches its peak shortly before the beginning of the latency period. Later psychoanalytic research improved his doctrine by showing that the Oedipus conflict—or its precursor—and the infant's superego arise at a much earlier stage. But however early the conflict—and thereby the father's superego and ego ideal—influences and changes morals, there has always been a preceding stage where only relations with the mother were established and where the mother's conscience created nuclei of the infant's ego and superego. Both mother and child form a close bodily union and spiritual unity after birth whereby the infant identifies himself with the mother, and the mother accepts such identification. Though the father's presence may be felt soon after birth, it cannot produce such an intimate union as that with the mother. Feeding, warmth, close touchings, cleanings, and thereby vital support, are at the beginning of infancy obligations of the mother, and of the mother alone.

The father's influence is powerful at an early, though not at the earliest, stage. By empathy the infant may feel the bonds which connect mother and father so that the child's jealousy may create the wish to remove the father and thus produce the first trace of the Oedipus conflict. It may even ascribe any incomprehensible absence of the mother to her relationship with the father. An inherited image of the father and of his moralities may also exist in its mind. Nevertheless, though the weight of such arguments is not denied, projection into, and identifica-

* FREUD, *THE EGO AND THE ID* 39 (Riviere transl. 1950).

** *Id.* at 39 n.1.

tion with, the image of the good and bad mother are still more actual after birth, the more so as the mother's image would be inherited too if such transference of feelings and moral conceptions from one generation to the other takes place automatically at all. Freud himself might have felt that he overestimated the role of the father and of the Oedipus conflict in explaining the origin and character of morals and justice and underrated that of the mother. In *Totem and Taboo*, when describing the ritual murder of the father deity, he says: "I cannot suggest at what point in this process a place is to be found for the great mother-goddesses, who may perhaps in general have preceded the father-gods."*

The second difference between the paternal and the maternal obligations is closely connected with the order of their appearance. The father's obligations, compared with those of the mother, are more artificial. There was no bond between father and child before birth which created a unity and, as in the case of the mother, was immediately replaced by a spiritual and close bodily union after birth. The obligations are due to a legal, ritual, or religious admission of fatherhood on condition that the infant is recognized as the fruit of marriage—of a legal and moral institution. The begetting of the child by the father, from the actual and legal standpoint, is merely a presumption: *Pater semper incertus*. Full obligations of, and between, father and child come into force only after the infant's family membership has been recognized. Such public, legal, more or less solemn recognition of fatherhood is required in most communities: The father has to undergo the couvade, or take the newborn into his arms, or cover him with his coat, or, as in most present-day Western societies, acknowledge him by a formal declaration before a registrar that the child was born in wedlock and is legitimate. The mother is always bound by obligations toward the illegitimate child while the "natural" father's obligations are restricted to alimony—and even this is often practically excluded, as in Moham-medan law, through the right not to accept writs or by the famous article 340 of the Code Napoleon: *La recherche de la paternité est interdite* (scrutiny as to paternity is forbidden). The question of legitimacy does not arise in primitive communities where the child is a member either of the mother's or of the father's clan. In more advanced patrilineal societies paternal obligations and rights are based on wedlock; the "natural" father has only to bear some financial obligations and acquires no rights of guidance and education.

The paternal obligations and rights are derived from his position as head of the family and are a result of marriage, a legal and social institution. They rest on his authority as governor of the family, or the clan.

* 13 FREUD, THE COMPLETE PSYCHOLOGICAL WORKS 149 (1955).—Ed.

Consequently, since the father-child union is not prearranged by nature to the same extent as the mother-child union, the typical infantile situation on which their reciprocal obligations are founded emerges only after a complicated process has taken place, namely after the child's primary anxiety to be abandoned and to be saved from isolation by a union with the father and the latter's corresponding inclination to conclude such union. Both conditions are realized at an early stage though not before the father's initial attitude to the newcomer was reluctantly changed.

The father, whose authority over the family was seriously challenged and whose marital relations were interrupted by the infant's birth, wants to restore his ruling position after the period of conjugal taboos has come to an end. Two ways are open: either to remove any reappearance of the Oedipus union by killing, exposing, or castrating the intruder, or by incorporating into the infant's psyche by threats the commands of his superego to give up the incestuous wish for the union with the mother.

Both methods were applied in families and communities. Infanticide stands, as Freud observed, on the threshold of human history as a legal and morally approved institution, not only for fear of overpopulation. The nearly universal institution of the father's *ius vitae necisque* proves the existence of an impulse, common to humanity, to commit infanticide. Laius neither legally nor morally attempted "murder"; he only exercised his right over Oedipus' life and death. The primary anxiety of Oedipus and of any infant to be exposed, mutilated, or killed outright is justified. No union between father and child is feasible, and no reciprocal obligations are possible so long as the mightier party aims at the removal of the other party, who has no power of defense.

The exercise of the father's right over life and death for the sake of his sexual monopoly and uncontested authority could lead to the extinction of the clan or the family—an event which often occurred. It was against the interests of the clan and therefore sparingly used in the course of history. It runs contrary, moreover, to a part of the father's own conscience which consists not only of his cruel *superego*: for his *ego ideal* the infant means more than simply the rival and intruder. In the same way as the Lord created Adam in His image, the father, partly rightly and partly wrongly, believes he produced an image of himself by his creative act. His wish for his and the family's immortality through descendants is in harmony with the mother's drive for the offspring's survival. At the same time when his *superego* calls for the child's annihilation his *ego ideal* requests the infant's well-being. Two tendencies in his conscience, the one to remove and the other to protect the child, fight each other. Abraham attempted the ritual murder of Isaac in obedience to the Lord's harsh commands—to his own personi-

fied superego. He was allowed to refrain from it and received in appreciation of his obedience the promise to his ego ideal that "his seed will be multiplied as the stars of Heaven and as the sand which is upon the seashore."*

The paternal ruler's renunciation of his *ius vitae necisque* in the course of history marks the point where his ego ideal's impulse for his own and the family's immortality through children subdues his cruel superego's wish for infanticide. From then on the other method to secure and maintain his authority regularly prevailed; the Oedipus situation was to be removed by the compulsory incorporation of his own superego into the child's mind as the child's conscience. He is inclined to enter into a union with the infant on condition that the child foregoes the incestuous union with the mother and introjects the father's superego as the essential part of the child's conscience.

The child also now desires to conclude a union of subservience with the father and is prepared to take over ensuing duties. The father proved his omnipotence by showing that even the mighty mother is subjected to him, particularly if the primary scene, which will occur after the end of sexual abstinence, is observed or suspected. By obedience the child escapes isolation at the very moment when the mother loosens the Oedipus union, seems to abandon the child, and to break her obligations. The child sacrifices his own narcissism and belief in his own omnipotence under the real or imagined threat of castration and longs for strengthened bonds with the father because of a renewed isolation anxiety. Due to the child's disappointment with the mother's supposed desertion, homosexual tendencies on the basis of the bisexual nature of all human beings advance reverence and loyalty toward the father to a moral obligation. The basis of their union is the father's renunciation of his infanticidal wish and the infant's renunciation of his desire to restore the Oedipus union. The obligations thereby created consist on the side of the father in taking over a considerable part of the previously exclusively maternal obligations—education and the care for protection and nourishment—and on the side of the child in obedience.

However, both parties are unable to discharge their obligations fully. The father (and ruler) still retains unconsciously his wish for the removal of the infant and for infanticide, as demonstrated by the frequent deprivation of infants (and subjects) of elementary human rights, such as freedom of opinion, expression, and movement. By their suppression the father and ruler annihilates bodily and mental integrity: He tries to kill the infant's (and subject's) individuality by his attempt to uproot the narcissistic drive for self-assertion.

* *Genesis*, 22:17-18.—Ed.

The infant, too, cannot fully keep its obligations under the new union: He is unconsciously unable to abandon his drive for independence and self-determination and, thereby, the impulse to achieve authority by the realization of the Oedipus fantasy in concluding marriage with a female which will make him the head of his own family. His moral conflict between open subservience and unconscious disobedience, between the fear of, and the longing for, freedom provokes powerful resistance to the father's revered, and simultaneously unconsciously disapproved, authority and superego. The fear of freedom is supported by the child's masochism which favors autocratic government, while the insistence on freedom remains the powerful expression of sadism and aggression, and of the wish for independence and self-government.

The typical situation between father and infant is thus characterized by the aggressive elements of the Oedipus conflict. In contrast to the Oedipus union, the conflict arises from the infant's reaction to the father's impulse of destroying the union by abandonment or exposure. The wish for parricide is the infant's reply to the father's wish for infanticide.

The union between father and child produces reciprocal obligations for both parties. The father promises the infant's survival by protection while the infant represses the claim to be a rival. When the father cannot keep his obligations, the infant is no longer bound. Parricide in the family and regicide of the unsuccessful leader of the clan advance to an obligation of the subject when the ruler fails in his protection against enemies or in his ability to maintain order. When he does not succeed in hunting expeditions, wars, or in averting famines, when his "mana," which is the divine source of life for his subjects, disappears, the obligation of the governed to obey changes into that of committing the ruler's ritual murder, since any major catastrophe which befalls the community is ascribed to him. His obligations in primitive communities are therefore often unbearable so that acceptance of kingship frequently meets with the candidate's resistance in view of the risk to his life. As long as he rules efficiently he is untouchable and protected by all; when he cannot keep his obligations any longer, he has to be sacrificed by collective aggressive action. Accordingly, in primitive families the father, when exhausted by old age or other disabilities, is often killed, and in any case deposed.

Parricide remains the unpardonable sin of mankind: It is the irrevocable breach of the infant's obligation to revere the deified father and to recognize his lasting authority. It is opposed to conscience—to the commands of the paternal superego, which had been incorporated into the child's psyche by means of compulsion and love. Overwhelming guilt feelings are the symptoms and results of the unconsciously con-

demned wish for parricide which appear after the deed has been committed, and even before, while it was consciously or unconsciously contemplated.

This does not mean that guilt feelings are absent in the union with the mother; they do not, however, become institutionalized and do not create universal legal tenets, although reciprocal aggressive tendencies between infant and mother might arise even earlier than those against the father, including, on the mother's side, the wish for castration and infanticide. Castration, as Freud and other psychoanalysts stressed, is frequently threatened by the mother who usually emphasizes the prohibition of autoerotic activities by the menace "to tell father." In the saga Oedipus is not only his father's murderer; he also causes the death of his mother—who committed suicide after the incest was revealed—and of the sphinx who, as Roheim explained, was also a mother image and also committed suicide after Oedipus had solved the riddle. Oedipus interrupted the mother's union with her husband. For the infant's sake she had to break the fundamental marital obligation never to desert the partner. She too wants to weaken the Oedipus situation after some time in order to enjoy again sexual pleasure or to take care of the other children. Nevertheless, neither the mother's aggressive tendencies nor the infant's destructive impulses against the mother are institutionalized in criminal law in a similar way as the Oedipus *union* (and its purpose and result of support) are institutionalized in social law. The child's wish for matricide and that of the mother for infanticide, though both exist, left hardly any mark in legal systems—a phenomenon which might be explained by the prevalence of love over hatred in the initial mother-child relation, in contrast to the opposite timing of events between child and father. While the first kind of relation and the ensuing obligations are based on the Oedipus union, the other is founded on the Oedipus conflict and evokes different feelings of guilt. A similar observation—namely the existence of different kinds of guilt—led R. E. Money-Kyrle and John Rickman to distinguish between persecutory and depressive guilt: Persecutory guilt arises by the breach of rules imposed upon the infant by an internal persecutor it dares not offend; depressive guilt arises when it is not able to abandon its wish to injure internal benefactors whom it wants to preserve. Money-Kyrle draws the conclusion that if persecutory guilt predominates in infancy the later mentor will be more judge than friend and the resulting moral character will be authoritarian; if the depressive guilt predominates the mentor will be more friend than judge and the character will be more humanistic. Depressive guilt may prevail in the earliest relations with the mother who is the first internal benefactor, while persecutory guilt may be pre-

ponderant in the relations with the father who is responsible for the prohibitive rules forbidding parricide and incest. (It should be remembered, however, as indicated above, that soon the father advances also to an internal benefactor when taking over protection and care for survival, while the mother becomes a more or less strict disciplinarian.)

Guilt feelings and aggression in the relations to the mother do not, then, lead to the formation of criminal law. The union with her is initially a union for support. As Freud observed and Melanie Klein stressed in *Envy and Gratitude, A Study of Unconscious Sources*, mutual love is fundamental for their union, though reciprocal aggression and envy appear very early. Love by, and for, the mother is regularly more accentuated than aggression in the initial stage. The mother is mainly, though not exclusively, an internal benefactor in the infant's fantasies whom he wants to preserve in spite of destructive impulses. The father's imposed and incorporated prohibitions aim primarily at dissolving the Oedipus union in his own interest in spite of his concern for the infant's survival; the child's corresponding reactions are aggressive despite his admiration for the father's authority. To simplify and typify the problem: Depressive guilt promotes social law by silent appeal for assistance; persecutory guilt is the main root of criminal law which aims at the suppression of destructive impulses.

Two kinds of guilt are also distinguished in the domain of criminal law itself: *dolus* (evil intention) and *culpa* (negligence). Evil intention is inherent in crimes deliberately committed such as murder, theft, or robbery, while negligence characterizes faulty actions or forbearances caused by carelessness or by ignorance. The culprit is condemned either for not having behaved in a certain situation with the usual attention previously displayed (*culpa in concreto*) or because he did not act like an "average reasonable person" (*culpa in abstracto*). While *dolus* misdeeds regularly lead to permanent or temporary exclusion of the criminal from the community by the death penalty, the sentence of exile, or imprisonment, negligence is a conception in criminal law which arises late in the evolution of families and communities and is mainly punished by fines. (In civil law it becomes rather fictitious, being, as shown by Albert A. Elrenzweig, a mere vehicle for the distribution of unavoidable loss.) It means that ignorance, carelessness, or incapacity are punishable—a puzzling proposition which is, however, of ever-increasing influence in present-day states. For it may safely be stated that today the ratio between *dolus* crimes and punishable acts of negligence may be one to ten thousand in view of the innumerable regulations governing traffic, behavior in public, health, sales, and all the numerous rules to be kept by specialists, such as doctors, engineers, skilled workmen, and others.

This contravention is a symptom of the subject's disability to have attained the average standard.

In the initiation rites the prohibitions of parricide, incest, and irreverent behavior are in the foreground and impress on the conscience of the candidates for membership to the clan the necessity for punishing crimes committed with evil intentions (*dolus*). At the same time, they are reminded of rules for social behavior toward fellows by the severe tests which protect social security. While the prohibitions aim at producing persecutory guilt, the rules may create depressive guilt for not having realized the ego ideal of the mother, and later of the father, by ignorance, missing diligence, or incapacity. Negligent deeds and forbearances belong to the category of slips of the tongue or of the pen, or fallacy of visions, which were described and their reasons illuminated in Freud's *Psychopathology of Everyday Life*. They reveal repressed aggressive wishes of the individual which unconsciously break through and cause damage. This explains why negligence is penalized more leniently; the culprit did his best, unconsciously failed, and is regularly experiencing depressive guilt, while in the case of consciously intended crimes where no repression is apparent, the persecutory guilt thereby discernible is more severely punished.

The infant's obligation to obey the commands of the paternal ruler's superego are conditioned by persecutory guilt and characterize criminal law; the commands—the "gentle coercion"—of the mother create depressive guilt based on the child's failure to realize the goal of her ego ideal, and are not crystallized into criminal rules initially. Freud may have overemphasized persecutory guilt in stating that the Oedipus conflict or its precursor in infancy—and thereby morality and legality (which originally means the same in families and primitive states)—is implanted into the infant's mind by the incorporation of the father's superego. "The moral conscience," Freud states, "has its source in highly efficient unconscious guilt feelings. . . . The Lord in Christianity and other monotheistic religions is the image of the omnipotent and omniscient, cruel and persecuting father . . . an inexorable higher being who metes out punishment." Melanie Klein deviates from Freud by saying that the sense of guilt toward the mother and not toward the father characterizes the child's earliest feelings. Both emphasize the influence of love and gratitude in the formation of conscience but insist that guilt precedes even conscience and is the fundament of morals and consequently of law.

It is in accordance with their teaching that numerous actions and forbearances of the child and of subjects lead to obligations only when condemned as guilty by the explicit or implicit judgment of deified au-

thorities. Guilt is thereby a condition of obligations which, as proved by the emergence of criminal law, increases in relevance during the evolution of families and states. Nonetheless, obligations of subjects are in force which create liabilities without the imputation of fault or guilt and appear to refute Freud's initial concept of the role of guilt in morality. Their very existence has not been taken into account by psychoanalytic and by legal theory although their vital importance overshadows those of criminal law and even those of social law.

In all primitive and advanced communities obligations and liabilities are imposed upon the subjects whereby they contribute, and are bound to contribute, to the maintenance of deities, of the parental deified rulers, and of the whole community from the moment they are able to do so. In advanced states the most striking, though by no means unique, example is the payment of taxes or levies on which the existence of the community is based. They are not due to, and not conditioned by, guilty or faulty actions or lack of actions of the taxpayers. They depend only on his residence within, or his membership in, the community and on his having an income or assets. The same applies to many other essential obligations, such as to serve in the armed forces, to act as a juror, or to help the police against lawbreakers. All those obligations of any subject follow from his existence in a community, not from his guilt nor even from any actions. They are obligations without the imputation of guilt, and—even more characteristically—the causation of the relevant conditions is of no legal meaning: They produce liabilities from a state or status, and not from causation and fault—they are "*Zustandshaftungen*," and not "*Erfolgshaftungen*" (responsibility flowing from a status rather than from a causation of an effect).

Nor are such obligations confined to advanced states: They are universal and even more conspicuous in primitive families and clans. There, instead of taxes, all that a member collects and earns belongs to the ruler who is entitled to dispose of the whole income and assets of the subject and not only over a part, as under a taxation scheme. Distribution among all members takes place without, or with only slight, preference for the original contributor. Subjects may acquire, with wide variations in the different primitive communities, some proprietary rights of consumer goods which, however, never gain major importance. In principle, the result of hunting and fishing expeditions, or booty in war, belongs to the governor. The system that all or a main part of the subject's income is to be delivered to government is not an exceptional feature of primitive or of present-day capitalist or Communist states: During the feudal period in the East as well as in the West the overlord owned all property and, at least in theory, the income derived from it, although

the growing maturity and independence of the subjects gradually prevented the full application of his right.

The subjects' obligations to deliver the results of their efforts to the government are so universal that they must be based on a typical situation: the obligation of the ruled to maintain the divine rulers.

Such an obligation is not so surprising as might appear at first sight. The status of the child after the dissolution of the Oedipus union is that of a slave: It is the subject of *patria potestas*, not even legally entitled to live in view of the father's *ius vitae necisque* nor able to own property or be the bearer of rights. The child's obligations are unilateral and imposed upon him by a superior power which enforces them without his consent.

Nor are guilt and the sense of guilt apparent in obligations and liabilities produced by marriage. Even if marriage were concluded in primitive clans by stealing the bride, and even if such theft were regarded as a crime, all marital obligations remained the same: The marital services and performances are not rendered because the parties are guilty or have a sense of guilt for having concluded a marriage. The parental obligations for support, feeding, education, and protection do not originate from any guilty action or behavior, though some analysts seem to base the mother's desire to care for the child on her "guilt" to have caused, by giving birth, not only the life but also the death of the child and his sufferings in a dreary world.

Within the family, quarrels are a common feature; nevertheless, toward strangers the family has always presented a natural and moral unity whose purpose and function has been to secure the survival of its members, most conspicuously in primitive communities. Today the family may no longer be liable for its members' actions as it was regularly in the primitive stage: Still, its moral obligation to assist in times of need is widely practiced, cannot have its origin in guilt, and could not have been initially introduced because of a sense of guilt.

Nevertheless, even the uncontestable existence of obligations without the imputation of fault may not be regarded as a cogent argument against the doctrine of guilt being a necessary element of all obligations, and thereby of law and morality. For though guilt does not condition such obligations, their nonfulfillment is normally judged to constitute a guilty omission: The obligation to pay taxes is not conditioned by guilt, but nonpayment of taxes is frequently a delict; the legal duty to serve in the armed forces is not based on guilt either, but its evasion constitutes the crime of desertion and justifies penalties. The judgment of "guilt" by the ruler is passed, and the sense of guilt in the mind of the ruled arises only when the obligation has not been fulfilled. The obligation

must therefore have been in existence earlier than the guilt; the obligation, in fact, reveals an original trend toward virtue rather than sin as long as it is observed. The earliest and most vital obligations are therefore operating, and liabilities are in force which are not conditioned by guilt.

An analyst, while admitting the existence of obligations without the imputation of guilt, suggested to me to call them premoral obligations in order to retain guilt as an indispensable component of morality. But every obligation contains an "ought" which is obeyed by conscience—by the moral agency within everybody's mind—voluntarily or under spiritual compulsion. This moral element is not guilt in the obligation mentioned above and is due to love or gratitude. It is discernible also in the mother's obligations of support immediately after birth, and is traceable in the infant's reflexes which explain its normally obedient attitude to the mother's recommendations in nursing. John Bowlby arrived at similar conclusions by a different train of thought by stating that there is in human beings the germ of an innate morality which, if given the opportunity, provides in the child's personality the emotional foundations of moral behavior. It is a notion, Bowlby feels, which puts beside the concept of original sin, of which psychoanalysis discovers so much evidence in the human heart, the concept of original concern for others or original goodness. Maurice Richardson in a spirited review, "Psychoanalysis and Contemporary Thought," gave it the heading "original virtue," and he remarked with reference to Bowlby's contribution that the new trend in psychoanalysis, while continuing to investigate the nature of original sin, seems to have stumbled on original virtue.

Guilt and the sense of guilt contain a judgment on morals whereby deeds and forbearances (including fantasies and thoughts) are condemned by authorities and, under the stress of their disapproval, by the subject himself. The investigation into its contents is complicated because the same sentiment can normally be denoted by two expressions, one derogatory and one laudatory, and is thereby either condemned as vice or praised as virtue. This became particularly obvious in Nazi propaganda: Submissiveness was called discipline in the description of the Teutonic soul, and contemptible servility when shown by Orientals; courage before an authority was subversive impertinence in a Jew, and civic heroism in the German; love of property displayed by a Jew was gross materialism, and a symptom of "holy egoism" in a German, to cite only a few examples from my book *The Germans and the Jews*.

The designating of the same feeling by contradictory expressions contains generally a moral judgment: A name given to a character

trait is regularly a value judgment and varies according to sympathies or antipathies; even destructive aggression and fury may be called virtues, when one wishes to defend the infant's vital narcissism against too severe suppression by either parent, or when one wishes to protect the self-determination of subjects against tyranny.

Such observations, however, do not reduce the conception of morality to a mere linguistic problem. On the contrary, the condemnation or appreciation of the same trait by contradicting designations proves that two kinds of morals, opposed to each other, are usually present in the psyche of human beings: one which emphasizes guilt and force, and the other which stresses love and gratitude.

The antithesis between the Oedipus union and the Oedipus conflict again is responsible for the equivocal character of moral rules, moral designations, and moral judgments. The mother's ego ideal of support is prevalent in the earliest stage after birth notwithstanding aggressive tendencies, fantasies, and impulses of both parties. The father's wish to commit infanticide, and its reaction, the child's wish for parricide, condition the Oedipus conflict and create rules for discipline by the incorporation of, and submission to, his superego. In the father's moral system, submissiveness is normally a virtue in a child, which restores paternal authority. In the mother's moral concept the same submissiveness may be judged as a defect—as an obstacle to maturing and independence which are aimed at by both partners of the Oedipus union. The confusion caused by applying differing measures of valuation is further increased by the father's later desire to mold the infant's mind into a replica of his own image (which, in his daydreams, is that of a hero who despises submissiveness), while the mother, when tired by the child's resistance to weaning or order, may regard the same character trait as a virtue, in contrast to her original attitude.

Morals in general express judgments of approval or disapproval determined according to whether the superegos or the ego ideals of either parent prevail at a certain occasion or within a certain period. Guilt and the sense of guilt may therefore be due to disobedience and aggression which led to the formation of the Oedipus conflict or also to the despair because of an inability to fulfill the dictates of sacrifice and love which are inherent in the Oedipus union. At the earliest stage where no strong communication with the father is established, the valuation is in the foreground which mirrors the mother's conception of support (though it may cause depressive guilt by the simultaneous presence of aggressive and destructive tendencies against her). After the father's influence has become more accentuated, the infant's adaptation leads partly to admiration of force. Both conceptions of morality are justified to some extent,

the one stated by Schopenhauer who found the origin of morals in pity (*Mitleid* in German, which literally means the desire to mitigate sufferings by making them a part of oneself), and the other taught by Freud in his earlier writings, that morality is cruel and persecutory. In the quotation from Bowlby, "innate morality" means only the concern for others and condemns implicitly as immoral the opposite tendency by which human beings maintain their aggressive narcissism.

Piaget's investigations on the evolution of morals in children from three to thirteen confirm the thesis that two moralities are present in their minds: one which finds expression in harsh judgments on the faulty behavior of fellows and predominates in the earlier years, and the other which tends toward pardoning and characterizes the later stage of maturing. Piaget concluded that the persecuting aspect of morality is heteronomous since it is imposed upon the child by the ruling parents while the pardoning aspect is autonomous and produced by co-operation with fellows.

Although I highly respect Piaget's, Durkheim's, Bovet's, and Baldwin's contributions to the problems of morality, law, and obligations, I find myself in disagreement with their differentiation between autonomous and heteronomous morals. The harsh judgments of younger children and the increasingly more tolerant judgments of older ones cannot be distinguished by the first being heteronomous and the others being autonomous. The change from cruel to tolerant judgments reveals a tendency toward the re-emergence of the morality of support and pity which was imbibed with the mother's milk and which is therefore heteronomous too. Piaget, though fully aware of the influence which the mother's love exercises, does not stress the moral rules which are firmly impressed by her into the infant's mind in the earliest phase. His method, like Freud's thought, is faced with the same problem of "original sin" and "original virtue."

The child's morality is heteronomous and autonomous at the same time. It is heteronomous since his tolerant as well as his cruel judgments are the result of parental influences, the tolerant normally of the mother's ego ideal, and the cruel normally of the father's superego, both of which establish a valuating agency called conscience in the child's mind. It is autonomous because it is an innate necessity for human beings to follow rules that distinguish good and evil. Neither the one morality is autonomous which is revealed by the insistence of younger children on punishment nor the other of older children which is inclined to pardon. Piaget's research has demonstrated that the judgment of the younger child harmonizes regularly with the commands of the father's incorporated severe superego and condemns any disobedience—imagined or real—as sin and

any action for which someone is at fault as crime, while the older child's judgment follows the mother's tendency toward pardon and understanding. Co-operation with fellows revives old moral rules of support; it does not create new autonomous morality, though it may change the trend of morality.

The moral judgments of three-year-old children in Piaget's examples are passed at a time when the repression of the Oedipus wish by harsh prohibition and by threats of castration and exposure led to the incorporation into the infant's mind of the father's superego, which then functions as the most conspicuous part of the child's conscience. The mother's ego ideal, which has been earlier incorporated, temporarily loses its impetus so that younger children apparently regard tolerance and pardon as weaknesses. Their attitude is highly influenced by co-operation with fellows, as Piaget's experiments convincingly proved—due to the memory of the unconsciously never forgotten happiest early experience where co-operation had been the essence of life in the initial union with the mother.

To sum up the conclusions that follow from the father-child relations: Guilt and the sense of guilt are highly instrumental in the evolution of morality and law but they are neither the earliest elements nor do they appear in vital obligations which are conditioned only by the presence of subjects in a community, and not by faulty actions. The father's impulse for infanticide finds response in the child's wish for parricide. The mother's real or imagined moral conceptions which sprang from the Oedipus union recede as soon as the father insists on its dissolution by threats of castration and abandonment; his morality calls for obedience, discipline, and subservience. Such subservience is weakened by the subjected children's co-operation, which promotes the revival of the mother's original conception in the course of maturing. In the permanent struggle for prevalence in the child's conscience between the superego and the ego ideals of either parent, co-operation with fellows will not create a new morality; its growing influence and the ensuing reciprocal obligations will decide, however, upon the type of morals preferred by families and states.

C. Husband and Wife (Constitutional Law)

The marital obligations founded the family and determine its constitution, and thereby the prevailing morality of future generations. Human beings are born into a system of law and order which had been in force before their birth and is considered sacrosanct because of its traditional and religious character. They acclimatize to their environment by submitting to obligations voluntarily or under compulsion. They do not belong to the groups of mammals which are able to care for themselves im-

mediately or soon after birth; one-third of the human lifespan is dedicated to maturing under the guidance of rulers, usually in the framework of the family and in interdependence with fellows. The impulse for social co-operation functions in their minds neither automatically as among termites nor as among animals possessed with impulses to follow a leader without thinking. Men belong to a clan. Though their need for social relations reveals itself in their isolation-anxiety and their reliance on the mother in the initial stage of evolution, and is performed by reflexes, all family members—rulers, ruled, and fellows—retain some choice to accept or repudiate social relations even when rejection may mean extinction. As members of a clan they impose, after the initial stage of empathy has passed, reciprocal obligations on each other which are normally respected and frequently declined. This might explain the biological function of obligations in general: They are spiritual and moral bonds between individuals which replace natural ties to the extent necessary for the continuance of the clan, the first model of which is the family. All obligations appear therefore within its structure and presuppose its existence.

The tendency to submit to and to observe marital obligations in spite of all sexual and social temptations is again based on the fear of loneliness, on the "*Urangst*" of being isolated. The opposite tendency, to break the marital obligations, is frequently due to differences in the superegos and ego ideals of both partners. A real break or loosening of marital bonds is temporarily caused by the infant's birth and by the Oedipus union.

When the child is born, the mother is faced by obligations which in part are incompatible—those of a wife and those of a mother. The husband and father unconsciously, and sometimes consciously, wants to restore the position as it existed before the Oedipus union came into being by the appearance of the rival and intruder. His loss of authority is the more painful as he is no longer in exclusive possession of the love object. He feels that the union between mother and child which both desire and partly realize has its origin in erotic feelings of the infant. A lasting intimate union between mother and child would deprive him, as he is unconsciously aware, both of authority and of affection. His understandable jealousy and envy revive unconscious powerful infantile impulses; they provide the motives for the newcomer's removal and for the dissolution of the Oedipus union, which signifies for the father the temporary neglect of marital obligations by his wife. The mother decides at the beginning in favor of her motherly, and in disfavor of her conjugal, obligations. The tendency of all humans to keep and to break obligations is apparent in her attitude. While she is forced after birth to sacrifice marital relations she wants to restore them after the infant's need for survival by nursing

has passed. After the end of the taboo celibacy they regain preference; she now assists the father in reasserting his authority and sexual domination.

The infantile source of the marital obligations is the Oedipus union. Every infant is possessed with the wish to conclude a permanent sexually tinged union with the mother. When this proves impossible for reasons of immaturity and of the father's threats, the impulse does not disappear. The infant acquiesces and apparently renounces his desire for the exclusive possession of the mother and for the father's removal. Unconsciously, however, the drive retains its force; it will lead after maturity is reached to the renaissance of the male child's wish to form a family of his own, to have the exclusive possession of a female, and to become an authority in his own right. The fear of loneliness, the "*Urangst*," is a strong incentive for marriage and for the keeping of the marital obligations. "It is not good," according to the Bible, "that the man shall be alone. I will make a helpmeet for him . . . and they shall be one flesh."* In the Bible the "*Urangst*" precedes the sexual union.

The Oedipus union resembles marriage. The infant partly realizes and partly imagines a close union with the mother—including fantasies of genuine sexual relations as apparent in the Oedipus dream and in the Oedipus saga—which represents the typical infantile experience of marriage. The same Oedipus situation which is the infantile source of the adult's wish for marriage creates in the father's mind the impulse to dissolve the situation in his infant son's psyche because both unions cannot permanently coexist: The marital obligations aim at making both partners "one flesh," which is also the aim of the union between mother and child who were "one flesh" before birth and desire to continue the unity after birth.

D. Brothers and Sisters (Law of Contracts)

The drive for social co-operation is immanent in man though it does not show itself at first and only slowly develops in the course of maturing. At the initial stage human beings do not display any tendency for co-operation with their brothers and sisters. At first, the older fellows normally express hostile feelings against the newcomer whom they regard as an unwelcome competitor for the love of the parents. For the newcomers the older fellows are strangers who awaken all the fear which originally arises in infants by the appearance of any strangers. Moreover, co-operation, even if desired, is impossible because of the child's initial incapacity to walk and to understand and be understood by means of language. Social co-operation with fellows is therefore insignificant at the beginning.

* *Genesis*, 2:18-24.—*Ed.*

Such relations emerge later than marital, maternal, or paternal relations; no natural ties or bonds connect fellows at the beginning. The initial attitude of brothers and sisters toward the newcomer is regularly hostile—particularly if there is no great difference in age—because they are envious of the baby's preferential treatment after birth and of having to share with him parental love and attention. The baby, in turn, may react with anger and fear as long as they are strangers. Aggressive feelings are soon replaced on the part of the older children by "fathering and mothering the baby" in imitation of the parents' protective behavior, and on the part of the baby who reacts by smiling at people he knows. Normally, nevertheless, co-operation does not appear during the first two or even three years after birth. The impulse for co-operation with fellows becomes irresistible, and the ensuing obligations indispensable, when the infant is threatened by renewed fear of desertion. The initial intimate union with the mother, though still continuing, is now weakened by weaning, by the restoration of marital obligations, and by her insistence on cleanliness and manners. The bonds with the father did not remove, but in fact increased, the fear of abandonment. Both parents were elevated to the rank of deities who, whether friendly or hostile, are exalted and remote. Thus the child is, or imagines himself to be, again abandoned; in order to escape the revitalized isolation anxiety, he strives after co-operation with fellows who, though not exactly his equals, are nearer, more easily accessible, and may more clearly understand emotions, troubles, and conflicts which they themselves still experience. They too are inclined to co-operation in spite of continuing envy and aggression. For brothers and sisters are united by awe, reverence, fear, and admiration for the same parents. They identify easily with each other in their attitude toward the family rulers since they suffered and enjoyed similar experiences. Notwithstanding their natural inequalities, all have the same status in relation to the parents; all are subjected to the commands of their incorporated superegos and ego ideals; all are united by the same faith in the deified paternal and maternal rules; and all are afraid of abandonment and desertion. Social relations with each other relieve the primary isolation anxiety of the newcomer as well as his elders. In principle, social co-operation, once established and continued by a union, is the most effective way to escape isolation.

The obligations which spring from such a union of fellows differ in one fundamental respect from those produced by the relations with parents and rulers: They are bilateral (or multilateral) obligations (contracts), in contrast to the unilateral obligations imposed by superior parental authorities partly in their own interest and partly to secure order and survival.

Contract is defined by Savigny, with whom most scholars on law theory agree, as "the union of several in an accord and expression of will with the object of creating an obligation between them." The terms which rule the contract are voluntarily consented to by its parties. Frederick Pollock, the distinguished authority on contracts in England, has stated that the obligation of contract is an obligation created and determined by the will of the parties; and that herein is the characteristic difference of contracts from all other branches of law. The subjects themselves decide upon the purposes and content of their reciprocal obligations. The rulers in their judicial capacity interfere for two reasons only: to uphold traditional morality by excluding aims which are thought immoral in accordance with the accepted superegos and ego ideals governing the community and to avoid internal struggles and disorders which may threaten peace when one party does not carry out his contractual obligations.

Intervention and compulsion by judicial authorities is commonly believed to be the main motive for keeping contracts. This is true to a certain extent in present-day states, in contrast to most primitive communities where private contracts were not the concern of the governing patriarch or matriarch. But even today few of the innumerable cases of unfulfilled contracts are submitted to courts—either because of precedents which secure stability by reference to previous judgments, or because of the risk of expense in view of the uncertainty how the judge would weigh evidence. Normally, isolation anxiety and not fear of authorities is the decisive motive for keeping contracts. When one party does not honor his contractual obligations, the other party will act accordingly: If promised goods are not delivered, the equivalent will not be paid. When a party does not carry out contracts, nothing may happen on the first occasion except the loosening of ties with the other party; the supplier may lose a customer and the nonobservant customer may lose a supplier. When, however, they frequently behave in the same manner, the contractor will damage his reputation, will have his offers rejected, and ruin his enterprise by severing bonds with people on whose support his livelihood depends. Likewise, customers who systematically delay or refuse payment will experience serious difficulties in receiving even necessities of life when their behavior becomes known. Today breaching parties may not become lone wolves and be excluded from the community, as happened in primitive clans by exile, or under the guild system by removal from the guild. They are, however, still in danger of being isolated from their social environments. They may be bankrupt and thereby be expelled from their group and abandoned. It is therefore not primarily compulsion by authorities and guilt, but fear of desertion by fellows which is mainly responsible for the keeping of contracts.

In some primitive groups, as the Pueblo Mexicans, Eskimos, and others, no public authority resembling a government can be detected. Private contracts are there concluded, and normally kept in spite of absence of enforcement by an authority. Even more convincing, in all legal systems the judicial authorities decide upon the validity, the breach, or the keeping of contracts only *upon appeal* of the allegedly violated party, while they usually act on their own initiative in the sphere of criminal or administrative law.

Isolation anxiety is so strong, and fear of compulsion by superior authorities often so immaterial in many cultures that anthropologists distinguish between guilt and shame societies according to whether the conscience of the subject to an obligation is more concerned about public contempt than about fear of compulsion. In China, almost no controversies on contracts are submitted to judges.

In international law, too, many treaties have been faithfully kept for long periods although no supreme authority existed to enforce them. It may be said that frequently they are cynically broken for this very reason. It is, however, overlooked that an enormous number of international agreements have effectively operated though no authority had been established which could enforce them. Manly O. Hudson lists 257 multipartite instruments made from 1864 to 1914,* and 610 made from 1919 to 1941,** most of which have been faithfully kept. Among them have been such important agreements as the Geneva Convention on the Red Cross, the Constitution of the International Labor Organization, the Statute of the Permanent Court of Justice, and, above all, the United Nations Charter. A good many of them have been practiced without any difficulties for many decades, as the International Postal Union or the International Anti-Slavery Conventions (which were concluded in the nineteenth century on the initiative of Wilberforce by Great Britain against her own economic interests and led to the legal abolition of slavery everywhere except Saudi Arabia and Yemen and to severe restrictions of the slave trade).

These international treaties have normally been kept because their breach would have excluded the violating party from further co-operation and isolated it. The United Nations Charter tried to give the power of enforcement to the Security Council, which proved abortive because of the right of veto given to its permanent members. Therefore no supreme authority exists at present in international relations which would explain the keeping of contracts in international law.

The principle of *pacta sunt servanda* nonetheless became the funda-

* 1 HUDSON, INTERNATIONAL LEGISLATION xix-xxxvi (1931).—Ed.

** 8 HUDSON, INTERNATIONAL LEGISLATION xxvi (1949).—Ed.

mental tenet of international law. All national frontiers are based on treaties and are normally respected even if they are not defended by military forces which would be sufficient against mighty neighbors. The breach by Germany in 1914 of the treaty guaranteeing the frontiers of Belgium led to the First World War and Germany's subsequent isolation, and the same occurred after Poland was invaded in 1939.

International trade, by which goods are delivered to countries in need of them, thus providing a source of national income for the producing countries, is based on contracts whose enforcement by courts is frequently a doubtful proposition and which in the majority of cases are faithfully kept nevertheless. Here it is particularly evident that the fear of severing bonds, and thereby of isolation, and not fear of force, is the main motive for keeping contractual obligations. The absence of sanctions explains at the same time breaches which often enough occur.

Therefore, the fear of authorities and the sense of guilt caused by the breach of their precepts are not, or not mainly and exclusively, the unconscious motives for keeping contracts. Another feeling is even more decisive in this field and perhaps in the individual's moral attitude in general: shame and the sense of shame.

Shame differs from guilt in its origin and effects though it is often indistinguishable from it in its expression. Freud considered shame to be a deep-rooted emotion, whose development is organically determined, fixed by heredity, and occasionally established entirely without the help of training. Nevertheless it has been less in the focus of psychoanalytic research than guilt so that decades later Erik H. Erikson could state that it has been "insufficiently studied because in our civilization it is so early and easily absorbed by guilt." Observation by psychoanalysts like Numborg who, following Freud, explained shame as a defense against the exhibitionist tendency, or Fenichel who emphasized its relation to ambition and to the efforts of mastering urethral urges, seem to be of little help in explaining the universal respect for contracts.

The problem of shame has been illuminated by two other psychoanalysts, F. Alexander and G. Piers. According to Piers shame is differentiated from guilt mainly because shame arises out of a tension between the ego and the ego ideal, not between ego and superego as in guilt. Whereas guilt in Piers' view is generated whenever a boundary (set by the superego) is touched or transgressed, shame occurs when a goal (presented by the ego ideal) is not being reached; it thus indicates a real shortcoming. Guilt anxiety accompanies transgression; shame accompanies failure.

His conclusions are confirmed by the method used in this study: The observation of general legal tenets in the law of contracts led to the same

conclusion with respect to the permanent influence of shame on the moral and legal systems of communities.

The infant receives recommendations, advice, and rules which are rooted in the mother's ego ideal explicitly or by intimation particularly as to nursing, urethral, and anal behavior immediately or a few months after birth. His immaturity frequently delays the attainment of the goal in spite of his own inclinations which urge him to accept her advice because of love and of unconscious fear of desertion. Shame feelings have their origin in the disability of the infant to conform to ego ideals of the mother which he has emotionally accepted and, simultaneously, they act as a driving force to overcome the difficulties of realization during maturation, as a part of the "maturation drive" as Piers has called it. As soon as the early bonds with the parents are weakened and feelings of shame or the sense of guilt are growing, the child tries to escape isolation by the establishment of social relations with fellows.

While social law initially is founded on the union with the mother, criminal law on that with the father, the law of contracts is the domain of fellowship. In contrast to other parts of the legal system, where subordination to authorities is the leading principle, voluntary collaboration of fellows is instrumental in the formation of contract law.

The typical infantile situation of collaboration with fellows appears first in joint games which represent the infantile models of contracts. They are governed by rules binding all playmates which they believe to be unchangeable and eternal though, in fact, they continually change in many details, as Piaget's investigations demonstrated. They are not invented by the children themselves; they are taught by parents and their deputies—nurses or teachers—who interfere later only occasionally when controversies threaten the internal order of the nursery, and thereby affect parental authority. The rulers reserve in any case their right to decide upon the correct interpretation of the fellows' reciprocal obligations.

The newcomer joins the games out of his free will. He is granted participation on the condition he keeps the rules like all other playmates in return for the enjoyment of their impartial application. Such reciprocal obligations are observed out of isolation anxiety, and not out of fear of persecution, in contrast to unilateral obligations imposed by the paternal ruler; the leader of the playing group, who has no natural authority and is not entitled to punish, can do no more than, with the consent of its members, expel the disobedient child from further participation, and leave him isolated—a measure usually more effective than any punishment could be. The rules of the games, like the terms of contracts, are therefore normally kept for fear of abandonment, and frequently broken in defiance of their supposed unjustified interpretation.

Joint games, like contracts, aim at avoiding destructive competition and at establishing mutual support and defense by joint efforts. Games provide an outlet for surplus energies by agreement of the partners to rules which are designed to change chaotic struggles for superiority into orderly contests. By excluding predilection, games of skill advance the successful player to a hero within groups of children, and to a demigod in communities as exemplified by the testified ritual sham fights in primitive communities, by the Olympic Games in antiquity, and the popularity of leading sportsmen and chess masters today. Games of chance are also based on nonpreferential rules and are competitive too in that they are peaceful contests for favors of Fate. Success proves the victors to be minions of superior powers for unfathomable reasons. It singles them out for admiration and not too seldom even for leadership of their group, whether they are gamblers at stock exchanges, shrewd politicians, or military commanders whose outstanding virtue (according to Napoleon) has to be luck.

Competition which is so conspicuous in nearly all games is also an intrinsic component of contracts. In principle a contract should be, and normally is, equally beneficial for both parties when needed goods are delivered or needed services rendered for an amount of money which adequately contributes to the maintenance of the other party. Sometimes, particularly between relations and friends, the advantages of contractual obligations are intentionally disproportionate, as in the contract of donation, where the main burden lies with the donor and only an obligation of gratitude is imposed upon the receiver of presents. Frequently, on the other hand, one party is deliberately exploited by the other party's ambition to gain unjustified advantages and to show superiority in bargaining either by greater skill, by risky speculation, or by deceptive promises. Such exploitation provides the motive for the breach of contracts, even at the risk of desertion. It also explains why unfair competition has been condemned in nearly all states. The sublimation of envy by games into productive ambition by co-operation is the infantile source of universally accepted legal and moral tenets in the sphere of economics and other spheres of culture and civilization.

The second aim of contracts—mutual defense and support by agreement—also appears in joint games, which are their typical infantile forerunners.

Joint plays enable children who all had to undergo similar terrifying and similar beneficial experiences to overcome their identical anxieties and to express their identical hopes by co-operation more effectively than by remaining isolated. Two ways are open to mitigate their common fears of superior powers who are felt to be responsible for their sufferings as well

as for their survival: Either a traumatic experience is repeated in a joint performance where its intensity is attenuated by the representation of the persecuting evil power by the child himself or his fellows, or it is repeated by joint magical performances and songs for the continuing grant of blessings by benign powers. Children act like adults in primitive and even in more advanced societies where ceremonies are performed either to escape vengeance, as those in repentance of the ritual murder of the previously omnipotent father, or to assure survival, as by ritual intercourse on fields before sowing and by solemn traditional incantations for rain.

Accordingly, joint games have been divided into two classes: those which weaken common traumas by joint repetition, and those which call forth blessings by combined efforts. In the game "You Need Not Be Afraid of the Black Man" the playmates realize that the devil who wants to catch them in order to commit infanticide is in fact one of them; or in the game "Father Lend Me the Scissors" the fear of castration becomes less real because the child in alleged possession of the instrument of castration has no power to use it and, moreover, has to surrender the role of the threatening father to another playmate in following the traditional rules of the play. Joint games for the purpose of inducing the benevolence of the deities by ritual performances are particularly the "circle games" which, according to Lady Gomme show such customs as the harvest or marriage with love and courting and a ceremony and sanctions by assembled friends. Thus the purpose of joint games is to satisfy the need for survival by combined co-ordinated efforts in observing traditional magical rules and in repeating traditional formulas.

Even in details the parallelism of joint games and early contracts is striking. The solemn character of rituals aiming at averting persecution or praying for continuing blessings where no syllable of the traditional performances or songs must be left out is also a feature of early contracts which were made invalid by the slightest deviation from the magical formulas under which they were concluded. The relatively late appearance of joint games in the nursery also concurs with the observation of F. Pollock that the importance of contract is developed comparatively late in the history of law.

Therefore, co-operation, in spite of its psychological importance, is of small immediate practical relevance in primitive communities and in the early stages of family life. Children and youngsters may conclude bargains for the exchange of valuables, like stamps, pebbles, or shells, some of which even survive as a medium of exchange—as money—in several communities. Regularly, however, contracts of nonadults are neither legally recognized by the parents, nor are contracts of subjects relevant in primi-

tive communities. This is mainly due to the ambivalent attitude of the parental ruler in the family and in early communities toward co-operation.

The ruler is confronted with the problem of supporting the subjects' drive for co-operation with fellows which could release him from his burdensome obligations of maintenance and, at the same time, of upholding his authority. Often, he may not be able to act impartially, may be influenced by predilections based on his morality and religion, and may give preference to children in the nursery and groups of subjects in communities; his failure to act impartially sharpens continuing competition for the monopolistic possession of his affection. Frequently the rulers recognize a right to co-operation of older children, and of higher classes in communities, while they still deny this right to the younger children and to the lower classes. The rivalry of the subjects—which, as Margaret Mead explained, is to be distinguished from organized competition—continues an early impulse to display superiority over the weaker fellow. Thus some of the subjects form alliances with the rulers against their fellows in families, and against fellow men in states. In states this may lead to class war, which is opposed to co-operation—to conflicts between organized or unorganized groups of the population.

Scholars have not reached agreement on the origin of classes. One origin of classes may be subjugation of a community by conquerors who form the highest class while the status of the natives is lowered. Another more psychological origin seems to be that the parental ruler of the family and of the community follows his predilections, and thereby creates a differing valuation of the holders of various professions. The military, scholars, landowners, artisans, priests, workers, may form higher or lower groups in the various communities which may depend on traditional preferences of the rulers. In any case, the competition between groups for supremacy is opposed to co-operation in spite of the necessity—which is recognized by the ruler—for all to co-operate.

In the course of evolution, co-operation leads to the emergence of the different types of contracts (sales, services, loans, partnerships, agencies, guarantees, mandates, and insurance) which all aim at stabilizing the relations between individuals and groups. It would be a fascinating but also an overwhelming task to indicate the evolution of co-operation by contracts on the basis of studies by law historians, sociologists, and anthropologists. For the purpose of this study it suffices to emphasize that co-operation between the subjects, though an important driving force and based on typical infantile experiences and situations, is not effective in the earliest stages of family life and in the earliest phases of communities, as is demonstrated by the relatively minor part played by contracts at that time.

Piaget, in his investigations into co-operation between children, expressed the opinion that co-operation is instrumental in evolving a new morality opposed to that of the paternal ruler's superego. Co-operation would thereby be a driving force in depriving the paternal ruler of his divine authority. As I attempted to demonstrate above, however, co-operation does not create an autonomous morality of the subjected child and only revives moral conceptions that were inherent in the ego ideal of the mother.

It does not seem in full accordance with some historical events that the drive for co-operation leads by itself to opposition against the authority of the ruler. In the Inca empire social co-operation between the subjects was organized in a manner seldom surpassed in any other advanced community. It did not diminish the veneration for the ruler who imposed from above, by his divine commandments upon all subjects, the obligation to co-operate. This example, which is not unique in history, demonstrates that co-operation of the subjects and autocratic rule are by no means incompatible. The drive for co-operation alone does not shake the ruler's authority unless it is supported by the psychological drive for self-assertion. Only when this earliest drive grows in intensity in the course of maturing, creates claims, allies itself with the drive for co-operation, and is recognized in families or communities, will the constitution of both institutions radically change, and the deified governor lose his throne, as happened in most advanced present-day states.

Individualism, self-assertion, self-esteem, or narcissism—whatever this fundamental drive may be called—leads usually to the recognition of a sphere of influence of the individual, and thereby to the evolution and recognition of absolute obligations. Their infantile source and their fundamental relevance in the evolution of law, morals, and government are described in the following section.

IV

ABSOLUTE OBLIGATIONS

Life, bodily and spiritual safety, and property are protected in all legal systems by obligations imposed on everybody to respect them. Such obligations not to infringe upon what is called in German legal theory *Persönlichkeitsrechte* do not exist in respect of children nor, as a rule, of subjects in primitive communities.

Infants have no right to life in view of the *ius vitae necisque* of the *paterfamilias* in every primitive and, for a long period, in most advanced communities. Infants have no right to bodily security, as is testified by the mutilations and castrations which were usual features at an early stage of

history; the memory of it still survives in the institution of circumcision in many highly advanced cultures. Infants have no right to own or to possess objects, and likewise in primitive communities the subject's ownership is confined mostly to insignificant consumer goods so that the research of Malinowski, Ruth Benedict, and Margaret Mead was needed to ascertain that it existed at all. They are not granted a legal sphere of influence of their own in the initial stage and for a long period until adulthood is reached, though it slowly emerges in the course of the maturing process.

The driving force in the establishment of absolute obligations of everybody toward the infant is his impulse for orientation, self-determination, and self-assertion which finds expression in independent efforts. Feeble as these efforts are at the outset, Piaget demonstrated that the infant is not a mere passive object even a few hours after birth. Though he cannot satisfy his inherited reflexes for nursing or clinging without the mother's assistance, he displays activities which partly satisfy his wishes so that, according to Piaget, from birth sucking-like movements may be observed: impulsive movement and protrusion of the lips accompanied by displacement of the tongue, while the arms are engaged in unruly and more or less rhythmical gestures, and the head moves unilaterally. His crying, from the very beginning, reveals not only displeasure with the new and (when compared with the situation in the womb) unfavorable environment; it expresses even more a request to nurse, touch and be touched, grasp, bite, and obtain warmth.

Initially the infant has no relations with the outer world—including his own body which he does not yet recognize as part of himself—except those with the mother whose vaguely felt image very soon belongs to his "self" by way of projection and introjection, if it is permissible to use the word "self" for a living entity whose sensorial, emotional, and rational capacities are hardly traceable at this earliest phase. Nevertheless, the weak utterances caused by his inherited reflexes are already effective, because they provoke the mother's impulses. She reacts to his crying by placing him into the position to nurse or by producing the bottle, by relieving him of isolation anxiety by taking him into her arms and thereby simultaneously satisfying his reflex to smell. Thus, even at the time when his ego is completely undeveloped he directs and brings to life, unconsciously and by way of his reflexes, obligations of the mother. Only with her assistance and under her guidance are his reflexive activities led to survival and maturing, and only after many experiments and failures.

This does not mean that only efforts in relation to the mother are effective. His drive for self-assertion and his fantasies show themselves in his solitary movements and are the source of his endeavors to gain mastery

over the outside world. As again Piaget demonstrated, the infant displays activities when left alone which can only be interpreted as expressions of his impulse to discover his environment (including his own body), to control and sway objects by purposeful movements, and to find thereby partial satisfaction of fundamental drives. He finds his mouth to suck his thumb for the pleasure of sucking, he satisfies his desire for smelling by playing with his excrements, he grasps his own fingers which are for him still an outer object, he regulates his breathing during the first few days after birth and, generally, he tries to develop his own capabilities: He plays. The typical infantile situation, which in a long process of maturing creates a sphere of influence of his own, first appears in his solitary games.

The unconscious motives and function of such games which have been illuminated by Freud, Flügel, Kris, Waelder, and other psychoanalysts, and also by Lady Gomme and Karl Gross, are: to endure seemingly intolerable traumas by playful active repetition; to get some hold over his surroundings, including his own body; to transpose, according to Freud, things into his own world according to a new arrangement which is to his liking. The three explanations of the unconscious purposes of such games have one point in common: They all emphasize the child's creative activities.

The infant is subjected to severe traumas after birth against which he cannot defend himself. He cannot reach the goal of inborn reflexes for being fed and clinging any time he wants to satisfy them. In his dream world which represents his sole reality, dissatisfaction is emotionally ascribed to persecution by hostile superior powers outside and inside himself and thereby works as a fundamental trauma. He tries to attenuate it by active repetition of the dreadful event in his solitary games; he identifies himself with the persecutor and thereby retains his feeling of omnipotence which is a characteristic of his state of mind where his wishes are realized by the mother whom he regards as part of himself. The mechanism which thus operates is retained by older children and was explained to Anna Freud by a small boy who posed as a ghost in order to get rid of his fears: "You don't be afraid of ghosts now; you have just to pretend you are the ghost you might meet."

The second unconscious motive of those games, to discover and master objects by his own efforts, becomes apparent in his attempts to grasp things with his hands, to catch them with his eyes, to use his own limbs and genitals as means for pleasure and, in a later phase, to crawl, to stand upright, to walk, to babble, to learn the meaning of words, and, finally, to speak. Imitation of the parents' behavior is a symptom of his spontaneous impulse to accommodate himself to their mode of life, and thereby to

acquire by magical or quasi-magical means the same domination over the outer world which they have.

By imagination he thereby builds up a realm of his own; he wants to govern it autocratically and resents interference by outer forces as is manifest in his frequent bursts of anger when his wishes are not guessed or not realized. The material of his universe is taken from his experiences whether they are collisions with, or supports by, superior hostile or benign powers, inside and outside himself, while the pattern into which they are placed is of his own making.

His feelings include a spiritual and emotional sphere of influence, and he strives for its recognition. His drive for self-determination and self-assertion, inefficient as it may appear at the earliest stage, is strengthened in the course of maturing, and enforced by its persistent obligations upon rulers and fellows.

Havelock Ellis originally called this drive narcissism to describe a perversion where the subject is too intensely interested in admiring his own body and mind. (Ellis alluded to the legend of Narcissus who fell in love with his own reflection in the waters of a spring, was no longer able to love anyone else, and heard only his own words repeated by the goddess Echo.) Freud in his essay, "On the Introduction of Narcissism," explained that "narcissism is in fact a general impulse in every human being and therefore the libidinous complement to egoism of the drive for self-preservation which is ascribed to every living entity as a part of its psychological structure." Narcissism, according to Freud, is the basis of the faith in the magical omnipotence of thought, and, later, of words. It creates what the psychoanalyst Erik H. Erikson called the sense of identity, and increases self-esteem to whose importance psychoanalyst Fenichel drew particular attention. It is the psychological fundament of a typical infantile situation in which the child pursues activities in accordance with his unconscious drive for omnipotence and recognition. The infant suffers many defeats when he attempts to gain mastery over things and to accommodate himself to his surroundings. His failures may produce a period of depression which, according to Melanie Klein's observations, exists in the first six months after birth, while later, according to Erikson, he seems "driven to repeat such actions for the pure enjoyment of functioning and out of the need to master and perfect a newly initiated function." In any case, primary narcissism or, as it may be called, the impulse to establish identity and to justify self-assertion, self-esteem and determination, induces the infant steadily to repeat seemingly futile attempts. There is nothing so impressive, indeed so hopeful for the future of humanity, as his unceasing ventures to triumph in spite of all setbacks over his inability and to save himself from isolation by his own exertions.

By his grasping, catching, and visualizing objects, a sphere of influence emerges which in the process of maturing consistently expands, particularly after the attempts to crawl, walk, talk, and touch are meeting with success.

The attitude of the parental rulers to the child's self-determination and increasing independence is ambivalent. The mother promotes maturing from the first moment of his life, and facilitates his accommodation to changed conditions after birth. On the other hand, the child was a part of herself—her property, which should be permanently directed by her advices and intentions. The father, too, after his influence becomes decisive, is initially not inclined to recognize even the infant's right to live, and much less a discretionary sphere of influence. However, his *ius vitae necisque* has two functions: On the one hand, in harmony with the morality prevalent in early communities, he denies the right of the child to existence and to a domain of his own; on the other hand only the father himself, and no stranger or fellow, is allowed to hurt the child or to interfere with his activities without the father's consent (save the mother and the governor of the community who, however, in the primitive family or community is identical with the father). The sphere of influence, though not granted to the child in respect to the rulers, is simultaneously recognized with regard to all others. Later, after the father practically abandoned his right over life and death in favor of the alternative to incorporate his morality into the child's mind by threats of castration and exposure, he permits the operation of the child's drive for self-assertion and the consequential activities in the expectation to create an *alter ego* of himself and to assure the validity of the family's morality and faith.

The infant thereby, though he has only traces of an ego and superego and is not a "person" in law at this earliest phase, becomes nevertheless the bearer of obligations *in rem* to be kept by everybody except the parents who protect his legal domain without his knowledge in accord with his psychological urges. The situation produced is the infantile model of parts of the legal systems which recognize his legal personality, guarantee his safety and inviolability, his identity, his property and possession, and his faculty to conclude contracts. The infant's recognized unconscious claims will be instrumental in creating the law on the status and on the *Persönlichkeitsrechte* of the individual, on property and possession, and on that part of the law of contracts that deals with the mental state of the parties.

The recognition by the parental rulers of the subject's sphere of influence with regard to fellows and strangers and, simultaneously, its denial in respect to themselves causes a dichotomy which is fundamental in the parts of the law that deal with rights and obligations *in rem*.

A. Life

The subject's *right to life*, and the ruler's corresponding obligations to respect it, are never fully recognized in any community even after the *ius vitae necisque* has fallen into disuse. It is still maintained in the criminal code of most states by the death penalty, which, even where legally abolished in peacetime, has always been practiced during wars, particularly to punish high treason and cowardice. Still more basic is the subject's obligation to sacrifice his life and the ruler's right to command its sacrifice. This obligation has formed the main legal tenet of military law in all primitive states as can be observed in most advanced states though there it did not always apply to all classes of the population (as in feudal societies, or in modern times where systems of recruiting favored the wealthy). When the existence of the state is in danger, the government's right over life and death is usually revived by compulsory conscription.

On the other hand, strict obligations to respect the subject's life are imposed by the same rulers on strangers and fellows. Protection of life may not have been their business in primitive or feudal states, where the misdeed committed and its retribution by heavy compensations were settled between clans, families, and individuals, and enforced by traditional morality and faith, without direct interference of authorities. In the course of evolution, however, the condemnation of the impulse to kill has advanced to a legal obligation of everybody in internal affairs. Its breach is severely penalized by the same governments which make murder in war a sacred duty for every soldier. They still exercise their supreme right and obligation to sacrifice his life and, at the same time, defend it against all others.

B. Safety

The subject's *safety* too is restricted by his obligations toward the state and its rulers. Initially he could be deserted without reasons, and later he could be expelled in case of antisocial behavior. He thus became a lone wolf, stateless, and deprived of political and economic security by a practice which is still continuing in many advanced communities despite some opposition and official declarations to the contrary.

The early psychological attitude of the ruler is thereby still operative. In the nursery, he protects the infant's security against hostile attacks from brothers and sisters which frequently occur at the earliest stage, and have been traced in fantasies by psychoanalysts and psychologists; he also watches over its safety when it is threatened by strangers; simultaneously, he maintains, and insists on, his right to destroy the infant by exposure, abandonment, and exclusion from the family. In the course of

evolution protection has been strengthened and persecution weakened due to the children's and subjects' growing independence, to the resulting change in the trend of the ruler's morality, and to the granting of a restricted sphere of influence to subjects during the process of maturing. The principle that the ruler imposes on everybody the absolute obligation not to infringe upon the safety of others including children and youths steadily advances to a recognized legal tenet.

The limitations of rights and obligations in this sphere have been changing in the various phases and loci of civilization. Every action or omission of any subject restricts other subjects' spheres even when no customs and rules are violated. Diseases which often imperiled whole towns or communities were spread not so long ago even in the West by the habit which was tolerated as "natural" of emptying chamber pots into roads or of unintentionally polluting wells. For a long period, which has not yet passed everywhere, tuberculosis and asthma are caused by smoke from factory chimneys, although the owners are acting in a permitted and accustomed manner. Even in the nursery the play of one child will often accidentally threaten the safety of his playmates. In any domain of life pursuance of aims even in an ordinary fashion collides with those of others. Rulers, while exercising their own prerogatives and refusing to recognize a subject's sphere in relation to themselves, have drawn the line between permitted and prohibited actions toward fellows from the dawn of history. Their taboos forbade the casting of spells on others by magical means, and now traffic regulations impose general obligations for the same reason of protecting the safety of the individual. The tenet "*neminem laede*"—the guiding principle of all taboos and all such regulations—guarantees a sphere of his own to everybody independent of his age or status, under the control of the rules in harmony with the moral standard of the state.

C. Property

The law of property serves the same purpose of granting (and simultaneously restricting) an independent sphere of influence to the subjects. Psychologically, legally, and historically the three stages in the establishment of the law of property are detention, possession, and ownership. Detention need not lead to the intention to keep the object. Possession consists in detention (called *corpus* in Roman Law) of an object with the will (*animus*) to use it exclusively. Ownership is a reversal of the original infantile situation where the child "owned" objects in his imagination by mere intention—by his omnipotence of thought. For after ownership is established—often in a mere symbolic way—intention to retain the object is sufficient for its continuance. The

differing features of all three institutions in the various states (in respect to acquisition and protection of objects; exclusion from appropriation of some objects such as air, often water, and frequently game; and inclusion of incorporeal objects such as names or authorship into their scope) make it impossible to follow up the psychological significance of their varying contents since this would amount to a history of their disparate evolution all over the globe. The following observations on ownership and possession are therefore confined to indicating the features that are common to their institutionalization and the result of impulses common to the human race.

Again it is the primary anxiety, the "*Urangst*," not to remain isolated which is the unconscious infantile motive for a link with reality by possessions and thereby for making them a part of one's self. In contrast, however, to relative obligations and liabilities (which remove isolation by bonds with members of the family and the community), absolute obligations toward the child (and subject) and his corresponding absolute rights are not produced by bonds, but by the ruler's recognition of the child's (subject's) unceasing independent endeavors to assimilate reality. The idea of ownership is conceived by the urge for self-preservation through self-assertion and self-orientation (primary narcissism), which are expressed in the child's activities to occupy and use objects exclusively, often against the initial resistance of his fellows.

Psychoanalytic doctrine has impressively emphasized the infant's (and every human being's) unconscious desire to return to the passive peace and security in the mother's body. There exists, however, simultaneously the opposite urge: to part from her and to become active and independent, as evidenced by the birth throes which reveal the force of the foetus' drive toward separation through regularly impatient movements. Remarkably the same psychoanalyst (Otto Rank) who stressed (in Freud's opinion, overstressed) the persistent impulse to return to the passive security before birth also described the opposite tendency to advance to an active personality. Rank referred to the widespread legends of the birth of the hero and to the general religious veneration of heroic adventures. He did not, however, draw conclusions about the conflict between the fundamental tendency to return to primary unity and dependence and the likewise fundamental tendency toward separation and independence. This may be due to the fact that corporeal dependence is more conspicuous at the outset than faint independence efforts.

Neither the foetus in the mother's womb, nor the nursing child immediately after birth have any relation with objects. The discovery of objects and the impulse to gain mastery over them starts in the first

days of life by the exploration of his own body and those parts of the mother's which belong to him in his imagination. The concept of "object" is mainly connected with the oral and anal zones at the beginning, as disclosed by the nursling's attempts to incorporate and possess things by swallowing them, and to part from objects by way of digestion. By experiencing pleasure in imbibing things as milk and by removing displeasure through sphincter activities he soon learns to distinguish *objects*, the incorporation or removal of which leads to mostly pleasurable sensations, from *fantasies* which do not lead to full gratification. He repeats agreeable experiences by the solitary games of thumb-sucking or rocking which are bound to enhance his feeling of independence.

The period of gaining possession by oral or anal activities is soon followed by one where vision promotes acquisition. The infant's curiosity, which directs his attention to outer objects soon after birth, reveals an inherited reflexive drive to discover and explore them. He catches them with his eyes. In doing so, he may already have possessive feelings because everything he sees or touches belongs to him in his omnipotence of thought. His sphere of influence is thereby steadily expanding, at least in his imagination, and the urge for self-assertion and independence is consequently strengthened. Its impetus increases as creeping and walking promote the possibility of physical possession. It might even be presumed that the impulse to discover, conquer, and occupy things is a relevant factor in the development of those capacities. The infant's solitary activities use his earliest possessions as bridges to reality. Freud's famous observation of the game played by a boy, eighteen months of age, who for hours threw away a small ball and recaptured it by untiringly pulling the attached string toward himself, is the classical description not only of a cherished object's identification with the beloved temporarily absent mother, but even more of the efforts to cause her reappearance by magic.

Nevertheless, the child's (and, later, any human being's) relations to objects are ambivalent. They are founded on two emotions: First, strange things, which are all felt to be animated, are experienced as dangers by humans and animals after birth, and arouse fear—and all things are strange at the earliest stage. And second, objects (particularly the mother's body after the period of complete identification with her has passed) prove to be beneficial in providing food and in defending against threatening attacks from unknown forces. The subsequent relief from primary anxiety and the ensuing feelings of gratitude and love toward the protectors seem to be stronger in the human race and may more firmly uphold the desire for dependence on the rulers than in any other genus of animal that lives in groups. For it finds expression in

smiling, which is a peculiarity of humans and is discernible for the first time a few weeks after birth when strange objects change into friendly entities (it may have its counterpart in the wagging of tails by canines and the purring of felines). According to Piaget it is primarily a reaction to familiar images, to what has already been seen.

However, growing acquaintance with strange objects and attempts to take possession of them may lead also to intensified anxiety if they are dangerous or repulsive like fire, floods, knives, many animals, and even fellows. Things seem to be divided into those which are friendly and support the impulse for possession and others which call for continuing dependence on, and protection by, the rulers. Psychologically, such classification is frequently impractical: The child in the family and the subject in the state may be induced to attack and possess the most threatening objects driven by the unconscious wish to justify feelings of omnipotence and to satisfy the impulse for self-assertion—a Prometheus who subdued fire or a St. George who slew the dragon. The relative strength of the fear of objects versus the desire to conquer them decides a person's preferences for attaining possession by his own efforts or by continuing obedience toward inscrutable superior beings which grant such possessions by grace. The attitude is not unchangeable: It may be influenced by psychological and physical events, and particularly by the behavior of the paternal kingly ruler.

The typically and universally vacillating position of the child (and of subjects) and of the rulers' attitude toward domination over subjects by ownership is institutionalized in the basic tenets of the law on property. On the one hand the tendency to independence is apparently fully recognized everywhere where ownership is a legal institution. It is "a plenary control over objects" (Lord Holland), "eine totale Herrschaft über eine Sache" (Puchta), "le pouvoir juridique plein et entière d'une personne sur une chose corporelle" (Ahrens), "a right over a determined thing, indefinite in point of user, unrestricted in point of disposition, and unlimited in point of duration" (Austin).

On the other hand, the claim for ownership, independence, and an exclusive sovereign sphere is checked by the opposite claim for continuing protective dependence on the ruler's superior power against the dangerous qualities of objects and against attacks of fellows or strangers. His protection is granted only on condition that the subjects' use of property is in harmony with the ruler's aims, morality, or predilections, and recognizes his authority. This aspect too is universally institutionalized in the laws on property.

All governments have consistently adhered to the doctrine of eminent domain. The government (and the state it represents) remains the real

owner of the individual's possessions and permits their use by grace which may be revoked any time, and does not produce obligations on the government's part. The doctrine is either explicitly laid down in codes, or consistently practiced as in primitive communities by usage or in advanced communities by court. Article 544 of the French Civil Code defines ownership as "le droit de jouir et disposer des choses de la manière la plus absolue, *pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements*" (the right to enjoy and dispose of things in the most absolute manner, provided that one does nothing prohibited by rules or by law) or, in the wording of article 903 of the German Civil Code, "Der Eigentümer kann, *soweit nicht das Gesetz oder Rechte Dritter entgegenstehen*, mit der Sache nach Belieben verfahren und andere von jeder Einwirkung ausschliessen" (An owner can dispose of his things in any way he desires and can exclude others from all influence therein, as long as the law or the rights of third persons do not intervene). Sometimes the limitations drawn by such legal restrictions go so far as to produce *proprietas nuda*—a mere title without substantive content. The *dominium eminens* is even more conspicuous and effective in the institutions of confiscation and expropriation (which though they differ in theory in the important point of payment or nonpayment of compensation can frequently not be practically distinguished since often compensation is not a real equivalent of the property taken even in capitalist countries). The temporary character of private ownership is likewise apparent in the tenet that heirless properties fall to the crown or the state, and even more emphasized by the taking of a considerable part of it (or of its value) after the death of the owner before permission of transference to his legal successors is given. The permanent eminent domain of the ruler, the state, or the overlord is shown in many primitive communities by partial seizure of the inheritance by the king, in feudal communities by the necessity of a solemn investiture of the heirs in the case of vassals and knights, and of levies in that of lower classes, and in modern advanced communities by (frequently very high) death duties. In the Bolshevik zone of contemporary civilization the doctrine of the state's *dominium eminens* regained its full original vigor although even there private ownership (and thereby the opposite drive for independence) is still granted for some objects as a privilege to the individual; in capitalist-minded countries—where the belief prevails that private ownership and thereby independent efforts of the individual are essential for the state's prosperity—the superior title of the state is nonetheless never disclaimed.

The ruler allows ownership of objects and may withdraw such permission when he thinks that they are employed in undesirable activities

or that he himself needs them. The parents support the infant's desire for possession by presents of dolls or rattles which, however, they may take back whenever they want, be it for the reason that they do not agree with the intensity of the infant's attachment or in view of his seeming indifference or even aversion to them. For the infant does not appear to value his presents and possession at the initial stage. He throws the doll or the teddy bear out of his cradle a hundred times, and thereby seems to indicate a desire to get rid of them, for a superficial observer. In fact he expects the objects to come back by themselves by his mere wishing in a way similar to the re-emergence of the mother after a temporary absence. His omnipotence of thought will enforce the return of the beloved thing, and it is confirmed by the parent's fulfillment of his wish for continuing possession. The strength of his impulse becomes apparent in his outbreaks of fury, despair, and anger when the plaything does not return after his custodians discontinued their efforts of rescue.

The infant's first possessions are of small social relevancy (parallel to the insignificance of private property in primitive communities). From the psychological point, however, the grant of such possessions, their acceptance, and the growing desire to retain them can hardly be exaggerated in their effects: They establish close relations with the outer world, and partly satisfy the impulse to gain mastery over it. The recognition of an independent sphere of influence, and the obligations imposed on the fellows to respect it, change the child's moral and social outlook as well as that of the consenting rulers.

Even as the *ius vitae necisque* is maintained in theory, practically abandoned in the ordinary course of events, and revived only under special circumstances like war or murder, in the same way the disavowal of individual property by the still-continuing *dominium eminens* of the state is an unusual occurrence in families and in states. Parents do not normally deprive children of their treasures, but may do so in the interests of their fellows in the nursery who, having no or too few toys, want their share and are in need of some of those of the possessors; similarly the rulers may regret the privilege granted for reasons of "public welfare"—that is, to avoid internal strife.

The establishment and recognition of absolute rights to life, safety, and property and the ensuing obligations which are designed to protect them, make by their universal appearance in all legal systems, and by their differing contents in the various zones of culture, the moral and legal attitude of the state and its rulers toward the drive for self-assertion and self-determination of the individual.

The child's ambition is the most significant manifestation of his self-

esteem and narcissism. From the earliest stage it is directed to the discovery and conquest of objects, and is apparent in the infant's curiosity already in the first days after birth as Piaget's experiments, and their description in his studies, *Origins of Intelligence in Children* and *The Construction of Reality in the Child*, demonstrated. By the impetus of ambition, the feeling of omnipotence, which was shaken by its first collisions with reality, tends to regain its original central position. The aim of its partial restoration is normally achieved by methods which contradict each other and are nevertheless usually intertwined. Human beings may assert their personality either by lasting identification with, and obedience to, the rulers' superegos and ego ideals, or they may be directed by their impulse to modify them and to pursue their realization more effectively by independent efforts. In the first case self-esteem may lead to full submission to a stable and unchangeable legal and moral system where all rights and obligations depend on the grace of the divine rulers. In the second case the same impulse toward self-assertion might find expression in criticism and in the desire for change and for participation in government. Both trends never appear in full purity: Both are normally effective, though the prevalence of one over the other seems to decide upon the definitive trend of morality of families and states.

On what psychological force does such prevalence depend? Is it the sense of guilt or the sense of shame which guides ambition toward the establishment of absolute rights and toward their (incomplete) recognition by corresponding absolute obligations? The question is not academic. Milton B. Singer has pointed out that in the comparative study of culture it has become axiomatic to speak of shame cultures and guilt cultures according to whether societies rely principally on shame as an external sanction for assuring conformity to the cultural norms or on a sense of guilt or "conscience." Since in the opinion of most anthropologists—not in Singer's—primitive cultures with a few exceptions, and practically all the cultures of Asia, are regarded as shame cultures, and guilt cultures are said to be restricted to the cultures of Western Europe and America, the dangerous misunderstanding between great powers of the West and the East may be clarified by the observation that those representative of the West stress guilt as the main source of morality and consequently of the individuals' rights and obligations while most important Eastern communities are guided by shame.

According to Freud the development of shame is organically determined, fixed by heredity, and it is established occasionally without the help of training. Although this thesis assigns to shame the same rank as guilt in the development of everybody's ego, shame has been less in the focus of interest of psychoanalysis than guilt, so that Erik H. Erik-

son sees in it emotion insufficiently studied because in our civilization it is so easily and early absorbed by guilt. Nunberg confirmed Freud's observations on shame as a defense against the impulse toward exhibitionism, and Fenichel underlined its relation to ambition as discernible in the infant's efforts to master urethral urges. A profound investigation into the difference between guilt and shame was published by F. Alexander (though he did not use the word "shame"), later by Gerhart Piers in his psychoanalytic study, *Shame and Guilt*, whose formulations and train of thought are followed in the present work, in the implications for obligations and rights *in rem*.

Piers differentiates guilt from shame by the following criteria:

- 1) Shame arises out of a tension between the Ego and the Ego-Ideal, not between Ego and Superego as in guilt. 2) Whereas guilt is generated whenever a boundary (set by the Super-Ego) is touched or transgressed, shame occurs when a goal (presented by the Ego-Ideal) is not being reached. It thus indicates a real "shortcoming." Guilt anxiety accompanies transgression; shame, failure. 3) The unconscious, irrational threat implied in shame anxiety is abandonment, and not mutilation (castration) as in guilt.

The infant receives instructions from the mother particularly as to urethral and anal behavior explicitly or by intimation a few weeks or months after birth. His immature abilities impede the attainment of the goal even if his own inclinations would urge him to follow her advice partly for reasons of love and partly out of unconscious isolation anxiety. When the father intervenes in the infant's education, the feelings of shame are further strengthened. The infant is ashamed of being so small and inefficient even when he tries his best and incorporates the superego of the paternal ruler. In combination with his envy of, and resistance to, him, both the sense of guilt and the sense of shame develop and determine his activities: the one by the unconscious hope to propitiate his threats and hostile impulses by obedience, devotion, and admiration; the other by the wish to overcome disability, and to gain by imitation the same efficiency, authority, and independence he displays.

The typical infantile situation is thereby characterized by a mixture of shame and of guilt where the one is the source of the trend toward independence and toward the establishment of absolute obligations of fellows to recognize such independence, while the other is the source of the opposite trend toward lasting dependence and toward the emotional acceptance of obligations of oneself.

The attitude of the parental rulers may appear the most conspicuous factor in families and states among the numerous causes of whether the sense of shame or that of guilt is preponderant in the subject's

morality. Presumably the behavior of strict parents increases the sense of guilt, and of gentle parents that of shame. Often, however, the imagined and not the real image of the parental rulers may prove decisive: In the infant's fantasies—for reasons not known at present—weak fathers and mothers may act as tyrants evoking guilt feelings and not shame feelings.

Guilt and shame in spite of their fundamental difference are often in origin and effects hardly distinguishable: The disability to follow (friendly or unfriendly) recommendations may often be experienced as disobedience and thereby arouse the sense of guilt, while guilt may frequently be accompanied by the sense of shame when the infant (and the subject) may not feel willing, or is not able, to submit to the commands of the rulers' incorporated superego. Though Piers rightly states that guilt and shame are clearly differentiated, that one can lead to the other, and that one can conceal the other, he may be too schematic in linking the sense of guilt exclusively to disobedience toward the superego and that of shame exclusively to not reaching the ego ideal. For in "shame states" guilt and the punishment of guilt also created parts of the legal system such as that of criminal law including the institution of the death penalty, while in "guilt states" shame too is highly effective in providing, for instance, one of the main reasons why agreements are kept in national and international law for the conscious or unconscious motive not to be ashamed of oneself and not to be put to shame by the moral judgment of the environment. It is therefore frequently neither the absence nor the presence of the sense of guilt or of shame which characterizes morality in the various zones of culture, but their relative strength as compared with each other. In Asian states, such as Japan, the anxiety to "lose face" surpasses even the fear of extermination so that hara-kiri has been a religious institution for many centuries and is committed when a goal set by the superego or the ego ideal of the ruler is not reached. In ancient China, too, where cruel punishments were inflicted upon those guilty of disobedience and impiety, the shame to be exposed was still more efficient in enforcing lawful behavior.

In states where the sense of shame prevails and "shame-driven" individuals (in the terminology of Piers) tend toward stability, subjects and children of such type are satisfied when they reach a stage where they have overcome their disability to conform with the demands of the ruler's incorporated conscience and morality. Submission to his moral and legal commands, loyalty, and obedience, advance therefore to outstanding virtues while the tendency toward independence and participation in the government is comparatively weak. Life, safety, individual property, and the absolute obligations of fellows and governments to

respect them are relatively unimportant. Such observation is not contradictory to the phenomenon that in pre-Communist China the land area was divided into innumerable small plots, for they were in fact the property of the family and of its patriarch—who were the competitors of the central government—and not the property of the individual. Conservatism in methods of production was averse to progress and demonstrated the reverence for tradition. It confirms the observations of Piers that “social conformity” achieved through shame will be essentially one of identification, and will be averse to independent activities. In Western states, on the other hand, the tendency toward independence led to increased veneration of progress and to the legal and moral establishment of absolute rights and obligations of the individual in the course of a laborious historical process. Two facts might be safely asserted: First, the authority of the spiritual leadership of the Pope who personified the general creed of Western states, and, later, that of the kings—his earthly deputies—was questioned in the course of events; and second, the individual’s personality and absolute rights of life, safety, and property were recognized to a varying extent.

The increased desire for self-determination became in Western states the ally of social co-operation on an equal footing with fellows and led in America and Europe to the disappearance of traditional, sacred, and hereditary rulership during the past 150 years: in the Western Hemisphere, in the United States in 1776, in Canada in 1840, in Argentina in 1816, in most other South American territories by the wars of independence against Spain under the leadership of Bolívar, even in Brazil, in spite of the reverence for its well-meaning and successful emperor, in 1889; in Europe, in England in 1688, in France in 1789, in Belgium in 1830, in Austria-Hungary in 1848, 1867, and 1918, in the Balkan States after their liberation from the Turks, in Turkey by the dethronement of Abdul-Hamid by the Young Turkish movement in 1909, in Portugal in 1910.

The dissipation of the faith in a divine, paternal, hereditary king who governed by the “natural” right of being a scion of a sacred family caused cries of authority everywhere. In a fatherless community the problem arose how to elect a leader, without which no human community is able to survive. The victory of self-determination and of self-government by co-operation found expression in legal institutions such as general elementary education, general conscription, and universal franchise to parliaments. They did not, however, lead to a general solution, but frequently (particularly in Germany) to an even more autocratic system which was no longer sanctified by the authority of a traditional king—a severe regression into an infantile irresponsible state

of the individual which culminated in Nazi legal theory and practice that "the word of the leader is law."

The Western world is still shaken in its innermost belief by the loss of a foundation for the rule of law after the superego and ego ideals of the sacred father-king had to be replaced by government selected by methods which proved unsuccessful in many states. Many of them are wavering between the contradictory aims of promoting progress by strengthening the individual's independent sphere or by curtailing it for the sake of stability. The chaotic aspect of the basic principles of their present legal systems is caused by the failure to implant a new unequivocal conscience, and thereby reverence for the commands of superego and ego ideals, into the common faith of the community.

At the same time, the previously predominant mentality of the Western "guilt" societies has shaken the seemingly unshakable traditional morals of Asian "shame societies" with the result that there too the faith in the deified government of a traditional ruler dissolved—in China in 1911 and 1924, in Japan after the Second World War, in India in 1947. The intrusion of the Western belief in the blessings of progress upon the Asian faith led there to the abandonment of the fundamental idea of immutable stability, which had been guaranteed by the government of the divine scion of a sacred family. It is a historical paradox that political and moral conceptions of the West, while themselves undergoing a crisis, had a serious impact on those of the East and led to an organized and successful movement against the West, particularly in the sphere of absolute rights and of the corresponding absolute obligations: The moral and legal gap between the two zones of culture was widened rather than narrowed. In China, private ownership is less recognized than ever before: The *dominium eminens* of the family patriarch over their assets—which has been, at least in theory, the backbone of Chinese society for thousands of years—was abandoned in favor of a central authority. Besides, the sacrifice of the life of individuals for the sake of the community's progress became a recent characteristic feature though conformity to the new faith is still achieved by the methods of a shame community, that is, by impressive and irresistible persuasion under threat of social isolation. The traditional ego ideals of China, her pacifism, her avoidance of racial and religious persecution, and her conquest of other communities by culture rather than by military action appear to have been weakened by the contact with the West. Her belligerence is a reaction to the humiliation of her self-esteem and narcissism by the Western aggressive powers during one hundred years—beginning with the Anglo-Chinese war of 1839, and followed by the Opium War of 1856, the annexation of Annam by France in 1885,

of Burma by Britain in 1885, the loss of Korea to Japan in 1894, the occupation of Tsingtao and Kiaochow by Germany in 1897 and 1898; her division into spheres of influence by all these powers, and the American doctrine of the "Open Door" announcing the right of free access of every foreigner and any foreign undertaking into China while at the same time restricting that of the Chinese into the United States to an insignificant quota. Her present exclusion from the United Nations and the nonrecognition of her government representing the fourth part of mankind by the United States is felt not so much as opposition to her Communist economic system, but as the continued violation of her self-esteem by foreigners. Her apparent change into a military power—for the first time in her long history—caused deep-reaching repercussions in the structure of her legal and moral system and in her attitude toward the function of law and justice.

Even more paradoxically, the difference in the moral faith of the West and Asia which makes the destruction of both zones of culture a disastrous possibility is aggravated by the fact that the third cultural zone, a community of decisive importance for the destiny of humanity, has always been wavering between the commands of the ego ideals and superegos of Europe and Asia. Russia has ever been a half-Asiatic and a half-European state. Her most influential tsars, Ivan the Terrible, Boris Godunov, and Peter the Great forcibly impressed upon their subjects the Western ideas of economic progress, and of aggrandizement by means of aggression in their relations to other governments, while simultaneously upholding the Asian principle of immutable stability and of unrestricted obedience to their own authority. The desire of the masses for self-determination, and even a small amount of economic and political independence and liberty, was denied. In 1838 the serfs who were bound to the soil and were the property of their masters comprised forty-four per cent of the population; and their emancipation in 1861—barely more than a hundred years ago—concerned fifteen million people. Their insecurity was in some respect even increased by the theoretical recognition of their rights to life and property because they were not educated and not in possession of the means for maintaining themselves; they could hardly practice the rights granted. The fanatical aversion against private ownership and thereby against an ego ideal of the West is understandable when one considers that about half of the Russian people of today are the grandchildren of serfs who suffered from being private property without owning any private property.

The rulers of the Soviet Union are advocating Western conceptions to the previously stable Asian communities by promoting progress, while the methods for reaching this goal follow the traditional Asian

ways of uncritical obedience toward a deified leader. The politics of Lenin, Stalin, or Khrushchev for aggrandizement and retention of occupied territories by force has been hardly less outspoken than that of the tsars whose sacred authority they replaced; they display aggressive impulses as active apostles of a new religion which will conquer the globe and simultaneously pose as defenders of peaceful coexistence, threatened by the West. In their internal affairs too they vacillate between promoting independent efforts (occasionally even private undertakings) and condemning the same activities as betraying the faith of the community. They cannot afford to uphold by persuasion the unstable order of their progressing community in the manner of Asiatic shame societies and have to incorporate the changing commands of their superegos upon the minds of their subjects in their attempts to resuscitate in their fatherless community the religious veneration of previous generations for the omnipotent and infallible tsar by force, aggression, and the insistence on guilt feelings. Progress in technical knowledge and increased material welfare cannot conceal, but rather emphasize, their conversion to Western moral conceptions.

There is no need here to go into the intricacies of Soviet law theory—which has been done brilliantly in Kelsen's *The Communist Theory of Law*. For the present study the Communist theory's partial denial of the subjects' contribution to the creation of law calls for an examination of the subjects' role in the formation of legal systems. The judicial process which directs the activities of any government in distributing justice is everywhere influenced by the claims of the individual. The procedure by which his claims are submitted and dealt with decides thereby the ascertainment of fundamental obligations.

V

ASCERTAINMENT OF OBLIGATIONS (LAW OF PROCEDURE)

Legal procedure is universally institutionalized although its contents differ greatly in the various places and periods of culture; it constitutes in any legal system the part which comprises the rules on the method of ascertaining the subjects' obligations and of finding the facts which condition their operation.

Judicial authorities—the hereditary or elected ruler, judges, public servants, juries—pass judgments which state the rules in force. They do so on behalf of applicants in the sphere of administrative, civil, and constitutional law. Their judgments authoritatively regulate the behavior and guide the conscience of the members of the community on what is permitted or forbidden in law.

Judgments are intellectual accomplishments; rationalization and

reasoning are characteristic for the conscious construction of a coherent moral and physical universe. Their basic significance in law now needs to be discussed in this study which so far has only stressed the emotional unconscious foundations of moral and legal institutions and obligations.

Judgment is a fundamental concept in the realm of morality, justice, and law, and also in that of logic. Its foremost function in both domains is orientation by means of systematization for the purpose of adaptation, accommodation, and assimilation.

Piaget has concluded from his illuminating experiments and observations of nurslings and infants in his *Origins of Intelligence in Children* and *The Construction of Reality in the Child* that "one can conceive of intelligence as the development of an assimilatory activity whose functional laws are laid down as early as organic life" and which is directed at orientation, that is, at discovering the conditions for assimilation. In logic, judgment means exactly the same as Piaget, in harmony with the teaching of leading psychoanalysts, stated for psychology. In the *Encyclopedia Britannica*, Abraham Wolf gives a summary of the research into the nature of judgment by the science of logic which confirms Piaget's deductions, though apparently neither was aware of the other's explanations. "All beliefs and all knowledge," Wolf states,

consist of judgments. . . . *Judgment* is essentially a process of intellectual orientation. Life is only possible by continuous adjustment to surroundings, and therefore requires that living beings should take their bearings so as to adapt their actions to their environment. . . . The method pursued is that of "trial and error," which frequently leads to improved adaptation. In this way even the lowliest organisms learn from experience. At the human level, however, a new form of orientation emerges. It is intellectual; it consists of judgments.*

Reason is highly undeveloped at the earliest stage. The basic principles of logic are strange to the infant's psyche, where the ego exists only in traces and the influence of the id is overwhelming, and they remain strange in the unconscious id of adults as evidenced by their dreams. The fundamental logical tenets of contradiction (that *X* cannot be both *A* and non-*A*) and of excluded middle (that *X* must be *A* or not be *A*) are invalid in the region of the unconscious. In the id an image may represent different persons or things at the same time as Freud demonstrated by referring to symbols in dreams and to the initial ambiguity of visions. To the nursling, the mother is not a single entity—she is split into two images, a benign deity and a demon, so that she is *A* and also non-*A*. The father appears in two images—he is a protector whose presence guarantees security and survival, and he also is a stanger and rival who

* Wolf, *Logic*, 14 *ENCYCLOPEDIA BRITANICA* 307 (1950 ed.).—*Ed.*

is threatening security and survival. The nursling (and partly the infant) does not yet even recognize the unity of his own body, and it takes a long period until he applies the concept of "I" to himself. He is *A* and non-*A* concurrently because he does not conceive of himself as a coherent whole, and is split into seemingly independent parts one of which is hostile and calls for destruction while the other is cherished and calls for preservation.

A kernel of reasoning, however, and a reflexive drive toward orientation (and thereby toward judgments) is present in every human's mind from the very beginning. It is manifest a few hours or days after birth in the baby's curiosity and in its untiring attempts of groping. But although orientation is the aim of his movements it cannot be achieved by his efforts alone. He needs the active support of the mother and later of the father.

If infantile identification of diversified objects and non-identification of the same object persisted, reality would continue to resemble a frightening or exhilarating dream. Moral and physical impressions would remain isolated points of experiences and could not lead to the concept of, and domination over, an object. Maturing of the individual is directed to "where id is ego shall be," in Freud's famous formulation. But such always imperfect and only partial replacement of the unconscious by consciousness can be achieved only with the help of judgments of the parental rulers.

The judicial process—the method typically applied by rulers in their judicial capacity—has therefore always been in the foreground of interest in the science of jurisprudence. In the same manner as the child, by groping and crying, parties submit alleged or imagined claims to the authorities. It is the task of the judge to ascertain by the judicial process the existence of those claims and, simultaneously, of the rule to be applied. It is his judgment which (as that of the parents) leads to the incorporation of his and the community's traditional conscience—of his ego ideal and superego—into the minds of the subjects where a case is presented for decision.

Every legal judgment, then, consists of ascertaining the facts of the case and of the applicable rules. The ascertainment of facts and of the rule influence each other, as Jerome Frank has clarified. No fact and no event is comprehensible and has any meaning if seen without regard to a rule, and no rule can be found unless the facts of the case are stated—rightly or wrongly—to be similar to other already adjudicated cases which are used as precedents in code-law systems as well as in case-law systems. Any event or any fact consists of innumerable details, most of which may have no relevance for supporting the claim in the opinion of the judge. He selects the *relevant* facts out of the chaos. Such selection already depends on the rule which, as he envisages, should be applied.

But the rule itself is not offered to him ready-made either: He has to find it, and often indeed to create it. For no case is identical with any other. Judgments in other cases, and legal principles derived from those judgments or from the interpretation of statutes, never completely fit the facts of the new case. The judge subsumes them under the old rule by a rational process of judging by analogy. A case is either identified with other already adjudicated cases, or not so identified in view of real or alleged dissimilarities.

This method in finding the rule is inconclusive from the point of view of strict logic. The deduction that a case is identical with another because it shows similar features has no validity in logical conscious thinking: When a man is brave like a lion it does not follow that he is a lion nor that he ought to be treated as a lion. Nevertheless, the method of judging by analogy represents the essential and characteristic feature of judicial reasoning so that Edward H. Levi in his *Introduction to Legal Reasoning* stated and demonstrated by impressive examples that "the finding of similarity or difference is the key step in the legal process."

Judging by identifying nonidentical objects by their similarity is rooted in the earliest unconscious and reflexive method of orientation. For primitive men a human being is not merely *like* a lion when he is courageous and powerful, and not merely *like* a bird when he has a sharp vision, he *is* the lion and he *is* the bird. The belief in totemism whereby the totem not only represents but *is* the ancestor of the community has its source in the identification of similar objects by rulers and ruled alike and explains why kings and queens, gods and goddesses are pictured with the heads of a bull or eagle, of a cow or an ibis. In the unconscious of the infant the same method of reasoning has remained effective as described by Freud in the analysis of little Hans who identified his father unconsciously with a horse since both possessed similarly impressive genital organs.

The judicial process of finding rules by the method of analogy uses reason and reasoning as instruments for orientation. So far they are creative in ascertaining the existence of obligations and of the facts which condition their application. They are, however, though indispensable, not precise and reliable instruments. The orientation achieved and serving as guidance for applicants by judgments of the judge, may turn out to be misleading, as experience grows. The intellectual process of judging by analogy often results in a distorted picture of reality and thus contradicts the purpose of orientation and adaptation. Judgments in primitive communities were governed by magical concepts of reasoning, and imposed obligations on all members of the community by identifying sowing with begetting, or hunting with appropriation. Such obligations were abandoned in the course of maturing since they proved to be unsatisfactory and unreliable and were displaced by other apparently more effective

obligations. They still show their original force in surviving popular customs to produce rain by magical prayers, incantations, and processions even in advanced Western communities, or in the auguries and magical advices of geomancers in China.

The universal method of finding and stating obligations by analogy is not confined to that of the rule, and operates also in the collection of facts which condition their application. The operative facts and the norm are interdependent. Physical and moral events—or, more accurately, the judgments which state their existence—can frequently and even normally not be differentiated, surely not at an early stage of ego development. For the judge and for the subject in primitive communities all actions, events and fantasies have simultaneously a moral and physical meaning since all are conceived to have their origin in purposeful, beneficial, or punishing activities of superior powers. Such religious belief and legal conception have been weakened nearly everywhere in the course of evolution; however, in the mind of even the most rational judge in present-day communities the moral aspect of the case continues to influence both the finding of the facts and that of the rule.

Moral rules and physical events derive their meaning only in correlation with other rules and facts within a *system*. Human beings, beginning from the moment they are able to use the instrument of reason for the discovery of reality, are driven toward creating a coherent whole out of unconnected moral and physical experiences. The judge is thereby forced to place the rule (which he adapts to the new case) and also its facts within the traditional legal system of substantive law in stating their connection and interdependence with other hitherto recognized rules and their similarity with other already decided cases. Systematization and classification advance thereby to a necessary presupposition of all judgments. Without them judgments would be incomprehensible to the applicants and to all would-be applicants in future cases. They function as means of impressing upon the community the conviction that the individual case was judged in harmony with the relevant commands of conscience—of the superegos and ego ideals—as laid down in the structure of law as a whole. They are designed to assure the subjects and the judges themselves of the stability of those moral commands. For, at the initial stage of development of individuals and of communities, religion, morals, and law are firmly believed to be immutable and are still regarded as sacred, and their basic tenets as unchangeable, in most advanced communities.

In fact, such stability cannot be achieved nor would its achievement, if possible, serve the aims of adaptation and orientation, which are inherent in the laws on procedure. It is characteristic not of legal thinking

alone, but of human life in general, that every human being aims at stability and security while external and internal conditions are always in flux and demand continuous new adaptation to unstable physical environments and restless social surroundings. The deep-rooted wish of everyone for stability and security has its root in the unconscious drive to re-establish the peaceful state the foetus enjoyed in the mother's womb, and the baby in the mother's (or the father's) arms; this wish is opposed to, and fought by, the even stronger drive toward maturation and activity, which implies constant change and insecurity. The wish for security and stability is fully comprehensible in a universe which is in motion at an incredible speed and in which cosmic catastrophes are possible at any moment. The behavior of the judge—to be assured of the permanence of legality and morality for the sake of adaptation and survival in spite of unforeseeable events—is not peculiar to law; it characterizes the actions in general of all human beings who must retain the faith in possible stability within a restless universe; and must act under the "fiction of possible security"—to use *Vaihinger's* term.

It is a paradox not only of jurisprudence as described by *Cardozo*, but of law itself, that the judicial process leads either to progress or to regression, and frequently not to stability at which it is consciously aimed. In their judgments judges employ by necessity the insecure and rationally doubtful method of finding similarities—of identifying cases which are never fully identifiable—and of finding facts by means of evidence which often does not allow statement of their existence with certainty. In their drive toward orientation and adaptation they are bound to bring about by their method the change of rules whose permanent validity they want to ascertain, and thereby they may increase instability and hinder adaptation. It can rarely be predicted by themselves, and even less by the parties and their counsel, what will be found similar in respect of rules, and certainly in respect of facts. All a judge can do is to give the reasons for his decisions; such reasons, however, are not an essential part of legal judgments and are not prejudicial. In primitive communities and to immature children no reasons for commands are given by the king or the parental rulers though they may be emotionally guessed, and even in advanced communities juries do not pronounce reasons for their judgments. Even the judgment of a court may be the result of consideration of its members who did not concur in its reasons.

It is therefore not so much stability of legal rules that is established by judicial organs, as their coherence within a system which serves orientation and adaptation. Precedents have played an important role since ancient times, in code-law as well as in case-law systems; in spite of the nearly religious respect for them, however, they are changed or given

an opposite meaning if they prove to be an obstacle to the coherence of the whole structure of law and contradict leading general tenets derived from other cases.

The judicial *interpretation* by the method of analogy is a general rational process and is not confined to the legal sphere. In normal social relations and in psychoanalytic treatment interpretation by detecting similarities is indispensable for orientation to the purpose of adaptation and is a presupposition of transference, and countertransference, that is, of emotionally influencing fellows or patients and being influenced by them. The process of interpretation, though rational, is founded on the unconscious, still operative, original method of communication by empathy—by placing oneself in the situation in which one finds the other and emotionally identifying it with a similar one experienced by oneself. Thus reason—the instrument for orientation and accommodation—is consciously used for discovering similarity and coherence, and unconsciously serves identification and understanding. The parents judge and interpret the infant's behavior, which is an appeal to attract their attention and to provoke their judgments, in order to pass judgments for his guidance and for their own orientation. They may often be led to misjudgments either by misinterpretation of the child's vague movements and utterances (that is, by misinterpretation of the facts) or by applying an inappropriate rule in the same way as misjudgments of judges occur as a result of the same factor of failing to ascertain the relevant facts and the relevant rule. Interpretation is therefore, like reason itself, a necessary but often misleading instrument for orientation, adaptation and systematization.

All laws on administrative, constitutional, civil, or criminal procedure, irrespective of their disparate contents in the various zones and periods of culture, are a means for the ascertainment of rules which are designed to guide the judge in finding the facts of the case for the sake of selecting a norm by interpreting its meaning and purpose. The applicants, like the children in their communications to the parents, present their claims and may, but need not, indicate the rule under which the claims should be judged. The judge in his task to state the reality of alleged facts and the insignificance of alleged needs follows rules of evidence which provide, everywhere and always, the method to achieve orientation by "due process of law."

Rules of evidence, however, curtailed his power to collect the relevant facts in primitive states and in the social systems of feudalism or early capitalism everywhere; to a lesser extent, they still curtail it. At an early stage of civil or criminal procedure, he could accept as "proved" only those facts presented to him in a formal and solemnized manner (such as accepting the testimonies only of witnesses of high standing who vouched

for the credibility of the claimant, or by ordeals, or by testified auguries). He was not authorized freely to interpret his own impressions and to find the relevant facts by way of what German jurisprudence calls *freie Beweiswürdigung* (free evaluation of the evidence). Due process of law has been the strict prohibition of interpretation of events and of ascertainment of obligations on the basis of the judge's own moral and intellectual judgment. Even today he usually cannot go—at least in Western communities—beyond the facts laid before him by the parties in the course of procedure. From the psychological point of view, procedural restrictions in fact-finding emphasize that only typical events presented in a formalized manner are normally taken into account.

The influence exercised by the judicial authorities in communities and in families is prominently indirect. Their judgments referring to individual cases incorporate into the minds of the subjects those directives which the subjects themselves expect to be applied in similar situations. They may err in their expectations; in new cases the judge may apply different rules and issue a statement of dissimilarity where one of similarity was expected. But such error in predicting judgments, which are often unpredictable, results in a behavior which, in the vast majority of cases, is in accordance with the emotional or rational conclusions drawn from adjudicated cases. A child which was prohibited to play with matches or scissors may wrongly assume that the rule applies also to playing with toy soldiers and will identify situations which are not similar in the eyes of the parental authority. It will often refrain from putting the new case before the mother out of fear of being reproached for obstinacy. Likewise two children quarreling for possession of a toy may frequently prefer to settle the matter between themselves on the basis of what they emotionally deduct from the mother's judgment in previous cases though the deductions may not be cogent and the situation dissimilar. In the community, too, numerous conflicts and dissensions between individuals are never submitted to court for two apparently contradicting reasons. The parties may frequently assume that the judgments of the court are predictable, that an unquestionable legal rule exists and that the facts are easily ascertainable since the rules of evidence which are followed by the judge would state their existence. Or they may, less frequently, believe (or be led to believe by their cautious counsel) that the judge's decision is unpredictable, that no firm legal rule has been established that would be applied with certainty to the (in their opinion) unique case to be submitted, and that the application for finding the relevant facts would be a risky and expensive enterprise.

The position which, paraphrasing Jerome Frank, may be called "rule-finding scepticism and fact-finding scepticism," is a rather late product of

children's and subjects' growing intelligence. Initially the faith in the stability of the universe and in the omniscience of the deified family and community rulers takes the eternity of rules for granted and the finding of facts for certain, so that the judgments of superior authorities are regularly felt unnecessary and, if asked for, demand only a restatement of unalterable legal tenets. After the incorporation of the parental super-egos and ego ideals into the infant's mind, judgments of the rulers of the family are normally not required because the infant's conscience passes judgments on its own behavior which are regularly more binding than those of the parents would possibly be.

It is therefore not so much the children and subjects which urge the adaptation of moral and legal commands to apparently unprecedented situations as the parents in their judicial capacity who have to adapt the "eternal" rules—and thereby to create new rules—to changing patterns of events and to new demands of the subjects. They are able to do so when observing a fundamental tenet of moral and legal procedure which has been recognized universally and at all periods: the right of children and subjects to be heard and to the corresponding duty of the judge to listen. He attains his own orientation on the basis of their communications.

The subjects' right of audience derives its general recognition from an infantile impulse and a typical infantile situation common to mankind. All reflexive activities of the nursling are appeals for help in the form of complaints and are understood as such. They reveal the infant's needs and serve thereby as means of orientation for the judgments of the parental rulers. The claims are rejected when their satisfaction would not lead to the subjects' adaptation, accommodation, and assimilation in the belief of the governing authorities. But such a rebuff invalidates neither the mother's obligation to interpret the child's vague communications nor that of the paternal judge to learn the situation at the risk of misinterpretation. Correspondingly it does not invalidate the obligation of any judicial organ within a community to collect the relevant facts and to take note of the subjects' claims on the basis of their information.

If a judicial organ does not fulfill its obligation, serious consequences may result: for a child, mental and physical disturbances and even death; for a community, antisocial behavior of the population and a threat to their survival. The rulers themselves, who by neglecting information do not orient themselves and cannot adapt accordingly their own activities to the needs of their subjects, are frequently regressing to the primitive faith of divine kings in their own unrestrained omnipotence and unlimited omniscience—and thereby to a megalomaniac attitude which seems characteristic of dictatorships and is no longer tenable in the complicated structure of modern states. Even for the most exalted ruler the knowledge

and thereby the consideration of the subjects' claims is indispensable for the maintenance of his government. The obstruction of the right of audience by the ruler's inability to listen leads to systems resembling Nazi Germany's legal conception that "the words of the leader are law" which replaced cohesion and orientation, and thereby law itself, by personal whims.

The right of audience does not imply that the individual's claims must be satisfied nor even that the relevancy of the phenomena he submits must be recognized; it implies only consideration by the judicial authority. The children's and the subjects' contribution to the formation of moral or legal systems consists in their influence on how the perceiving ruler regulates typical and, at the same time, new situations for the sake of asserting his own authority, promoting the subjects' survival, and guaranteeing the community's permanence.

The rules on procedure differ in the various subsections of procedural law according to the purposes of substantive law whose ascertainment they are designed to serve.

A. Administrative Procedure

Administrative procedure is directed toward the orientation of the ruler (in his function as administrator) to learn about the claims of the individuals for guidance on how to behave, and to decide on a routine of social activities without which no family and no community could survive. Administrative procedural rules emphasize therefore the right of the individual to be heard, but they are not directed to the passing of judgments in controversial matters. The authority in charge retains its right and its obligation to decide and to guide the behavior of the applicant unilaterally in the interest of the "common good," that is, in harmony with moral and legal tenets which have been deduced from similar adjudicated cases. Their function has its early psychological source in the family where the parents establish by their judgments a daily routine for the child. The obligations of the administrative authorities and of parents to maintain a stabilized order are often broken. Personal predilections may frequently disturb consistency and thereby shake one of the fundamentals of law, with disastrous results for the authority of the rulers and the security of the ruled.

B. Criminal Procedure

Criminal procedure as the ancillary of criminal law adapts the subject's and the child's psyche to those conceptions of right and wrong which are inherent in the minds of the judicial authorities in harmony with the traditional faith of their environment. The observations of the judges in this domain do not serve the recognition and acknowledgment of the

subjects' claims, but are directed to the discovery of deviations from sacred commands. The aim of criminal procedure remains adaptation, accommodation, and orientation of the subject. The adaptation, orientation, and accommodation of the judge, on the other hand, is rather inconspicuous in its domain. His legal and moral judgments in the domain of criminal law are so firmly based in his unshakable faith in their eternal stability that doubts of the accused in the validity of the rule in themselves amount to a crime. In early stages of evolution the judge's supposed omniscience led to the prejudiced conviction that denial by the defendant reveals only his obstinacy and may provide a reason to increase the penalty. Any criminal procedure still follows the method of the parents who aim at incorporating their moral faith, in whose eternal validity they believe, into the infant's mind; at breaking resistance by threats of isolation and extermination; and at observing the factual behavior of the infant as symptomatic of whether he submitted to the commands.

C. Civil Procedure

Civil procedure is directed toward a different goal. The main purpose of civil law is the settlement of conflicts between fellow men; here, too, the judge has to ascertain both rules and facts. He orients himself only on the basis of information submitted by either party. Since the case does not concern his own authority, his judgment serves the maintenance of internal peace within the community to avoid future disturbances in similar situations. His obligation to inform himself is conditioned by receiving information from the quarreling parties. He acts as an arbiter in controversies between community members, following rules of procedure which enable him, within the limits set by the parties, to learn the basis of the conflict. This serves the same purpose and is derived from the same psychological source as the parents' behavior when controversies between the children are submitted for decision.

Parents and judges act under the universal obligation of impartiality. The method to attain an impartial outlook is highly diversified and cannot even be indicated since this would mean undertaking to give a historical description of the highly varying and often inconsistent trends of the laws of procedure everywhere. Impartiality is considered, nevertheless, everywhere as an essential concept in the judicial process and as an essential obligation of the judge in fact-finding and rule-finding.

Impartiality of the ruler in his judicial capacity presupposes the existence of parties, whom he must treat impartially. The conception is therefore particularly conspicuous in civil procedure, since mainly there parties in the proper sense of the term make their appearance. In criminal law and criminal procedure the accused and the prosecutor are usually

parties only in a figurative sense, the one being the subordinate subject in the proceedings, while the judge and the prosecution represent the superior authority of the state. In administrative procedure individuals interested in the undertaking of a fellow citizen may be granted the status of parties when the decision may influence their rights and obligations. In principle it is a procedure of the administrative authority toward subordinated subjects, where no other parties are necessarily involved, and where need for impartiality exists only to the extent that the rules of proceedings should not be contradictory to those in similar cases. Impartiality is therefore initially a postulate in civil procedure where two or more parties are directly involved in contentions submitted to the judge. He has to orient himself by an intellectual process of abstraction from personal predilections and emotions—a problem he will never fully solve, although he will normally try to do so. The concept of impartiality toward parties was transferred from civil procedure to criminal and administrative procedure by insistence on the judicial organ's emotional impartiality in parts of law where, in principle, no parties exist.

Such transference and such acceptance of the postulate of impartiality, however, would be unfeasible unless the transference and acceptance have their source in an early fundamental obligation of the parents and in a corresponding early claim of the infant, both of which arise as soon as a child is born and enforce the adaptation of the behavior of the family members to his presence and needs. For the sake of such adaptation the parents have, in the first place, to orientate themselves by the procedural method of fact and rule-finding—by observing and interpreting the infant's weak and vague activities for the purpose of arriving at rules of treatment. In a family where parents already govern over other children, their judgments are faced with the dilemma of either temporarily neglecting the older members of the small community in favor of the newcomer or of reducing his claims for exclusive attention and care. Like the judicial authorities in states, the parents ought to keep their obligation of impartiality although it can hardly be ever completely fulfilled because of conscious or unconscious preferential love for one child. Normally, nevertheless, judgments of parents in families, and of judges in communities, are equitable in spite of unavoidable partiality.

The impossibility of the judges to display full impartiality produces only one of the psychological difficulties of subjects emotionally accepting their judgments and thereby adapting themselves accordingly to the moral rules and to the discovery of facts. Even more fundamental is their exposure to the commands of several authorities whose moralities, superegos, and ego ideals may conflict with each other.

Already, in the first stages of life, the infant has to recognize the

existence and power of two rulers: the father and of the mother, each of whom demands obedience and who may insist on different rules of behavior. Such problems of double loyalty and jurisdiction become even more complicated as soon as the individual family is integrated into the framework of a larger community. In primitive societies the task of adaptation, orientation, and accommodation of the individual to the uniform morality and faith of his environment is sometimes not entrusted to the king but to a special class of magicians and priests. If these judgments do not coincide, the individual is subjected to disparate methods of adaptation and orientation by authorities of equal rank who are both consciously and unconsciously revered, loved, and feared, and who both claim jurisdiction. The conflict for superiority between the mundane and the spiritual authority appears also in advanced communities, for example, as in the struggle for investiture in the Middle Ages of European culture or in the continuous struggle of priests and kings in the ancient and in the revived State of Israel. The tendency to have both offices combined, in order to establish a uniform jurisdiction, seems to be operative in many communities; it may or may not succeed. The tenet *cuius regio, illius religio* may win, as in Western Europe after the Thirty Years War, or the spiritual authority may also win in mundane affairs as it did in the Pontifical State or in the government of the Society of Jesus in Paraguay in the seventeenth and eighteenth centuries; or both authorities may continue to exercise their sometimes competing influence as in the recognition of the Pope's supreme authority by Catholics who represent the faith of one-fifth of mankind—and simultaneously that of the mundane authorities. No common pattern might be discernible concerning the role of mundane or spiritual authorities in the orientation and morality of the individual. In any case, the individual frequently remains uncertain as to their jurisdiction as is particularly apparent in the laws on marriage.

Double loyalty and the problem of competing jurisdiction does not arise solely from conflicts between spiritual and mundane authorities, but even more conspicuously from those between two mundane authorities. At the beginning, as long as the community was identical with the individual family or clan, the jurisdiction of the father in patrilineal, or of the mother and her oldest brother in matrilineal families, is firmly established according to the arrangement between them in all cases where they want to intervene. As soon as families or clans are integrated into a greater community, however, two authorities come into being who both claim jurisdiction over the subject: the father and the king. If their judgments collide the individual is faced with the dilemma of choosing between contradictory obligations. In some primitive and also in some advanced cultural zones the central government did not win the battle for supreme

authority: The most prominent example is provided by pre-Communist China where filial piety retained precedence over loyalty to the emperor. It resulted in chaotic decentralization of the Chinese state since normally the decisions of the family patriarch, and not of the emperor, oriented the individual. The present leaders are well aware of the political weakness of previous Chinese governments and its psychological source; they do all in their power to shake the faith in filial reverence and to replace it by the reverence for a deified central authority. It is still in the balance whether they will succeed and persuade the Chinese masses to abandon their procedure of adaptation to reality by recognizing the superior jurisdiction of the family patriarchs in favor of the sole jurisdiction of the public government.

While the problem of double loyalty is not yet solved for a quarter of mankind inhabiting the East, it is by no means solved in a considerable part of Western civilization either (though for quite different reasons) and there became vital in the present era. The integration of smaller units into a state also frequently led to the integration of those states into a still larger federation whereby the constituent parts retained their identities in a similar manner as the family continues in the state. The United States, Canada, Argentina, Brazil, and the Soviet Union are all federations where every individual experiences the conflict of double loyalty when the authoritative guidance of the federal and of the member state's governments do not coincide.

D. Constitutional Procedure

Constitutional procedure—the last and most important subsection of the law on procedure—regulates the jurisdiction of different authorities and delimits their rights and obligations of adapting the lives of the subjects to their environment on the basis of rules found by a judicial organ. Constitutional procedure is universally institutionalized whether its purpose of maintaining and stabilizing the constitution is reached by elections to parliament or by other methods, and it is not confined to the conspicuous case of federal states.

Conflicts of jurisdiction and competence are bound to arise wherever towns, districts, boroughs, or provinces are entitled to enact bylaws or to pass judgments over residents to keep order within the precincts. Since such judgments and local regulations may not be congruous with general legal tenets abstracted from similar cases and pronounced by the judicial organs of the greater community of which the individual is also a member, controversy between two authorities may arise, which must be adjusted by constitutional procedure.

Claim for loyalty and obedience need not issue from an entity under

public law and need not be represented by judges: Private bodies such as trade unions, associations of industrialists, clubs of any kinds, demand observation of specific moral rules which may not be in harmony with those prevailing in the community.

The foremost aim of constitutional procedure is to find the contents and principles of the constitution by the highest judicial authority. By such findings they advance to an operating concept. Not only in the United States of America is the Constitution what the Supreme Court says it is; everywhere the highest judicial organ decides upon its meaning and purposes. As in any branch of procedure the judge is obliged to ascertain the obligations and rights of the individual by a statement on facts and rules, which were submitted to him by the parties—either individuals or public bodies or states—in order to orient himself and to direct their behavior to a legal system with reference to similar adjudicated cases. Again, if such an obligation is not fulfilled—as has frequently happened, particularly under dictatorial governments—instability is unavoidable and the security of the subject is impaired.

The nonfulfillment of the obligation is normally caused by the judicial authorities' incapacity to express tenets which serve the adaptation of the subjects and, at the same time, the adaptation of themselves to changing conditions. Homes and families change their "constitution" as soon as infants and children grow up and transform their claim to be heard into one of criticism of the parental decisions. Resistance of parents to change their orientation frequently results in permanent crisis. The individual family, after the primitive period of its identity with the community has passed, reaches its natural end and is usually dissolved after the children have attained maturity, marry, and have their own families. Communities and states, on the other hand, are intended to last. "The king is dead, long live the king," has been a universal principle everywhere though the methods of selecting a successor have been different. The problem of a fatherless community where no firm principle in the selection of the ruler is discernible became a burning problem of our period. For not only in Communist states, but even in the most democratic countries, the selection of the ruler is often decided not by party programs which often hardly differ in their moral contents, but by personal and frequently untraceable predilections of the majority of the electorate for the personality of the candidates who are often identified with a certain moral attitude. In the few states where monarchy and its rules of succession still exist, the leadership of the monarchs is curtailed to such an extent that only rarely can they make their influence felt. The real leadership, which is indispensable everywhere and at all periods in a larger social group, is also

decided there by elections, frequently not on the basis of party programs but on the spur of the moment by personal predilections.

This does not imply that predilections originate only from isolated considerations of the individual. He normally shares the interests of the social class to which he belongs, and he is normally not dedicated to one type of ego ideal or superego. He may desire to realize all the contradictory claims for liberty, security, traditional "natural" privileges, fair rewards, and equality or exclusion of strangers, and may stress in a given moment the incompatible beliefs in theocratic reverence or in enlarged individualism, self-determination, and social co-operation. Thus it is never predictable with certainty how he will decide at the hour of voting, and the outcome will be determined by ephemeral motives of individuals.

Constitutional procedure in the West as well as in the East thereby appears still to be a "groping" method in selecting the leader of the social group. After election, his reasoning and judgments may result in disorientation and thereby impede the adaptation of the whole community to changing conditions.

Usually the authority entrusted with leadership in orientation by constitutional procedure is also empowered to realize the desired behavior of the subjects by executive measures. The universal method of constitutional procedure is directed to the likewise universally institutionalized laws on execution. Jurisdiction and execution are normally connected.

The relation between the mother first, the father soon thereafter, and the infant is the model of the law on execution which forms a never-absent part in all legal systems. From the very outset the mother guides the infant in its orientation and adaptation and executes her judgments against its resistance in case they are not accepted. In the "constitution" of every family she has the jurisdiction to overcome reluctance of a baby to nurse. The father by his judgments directs the infant's orientation and adaptation, and realizes them, if necessary, by means of execution. The child is compelled less by physical force than by fear of isolation and annihilation to recognize parental jurisdiction by emotional assent to the constitutional procedure.

In the course of the process of maturation, however, after the child—and the subject in primitive communities—has strengthened his social bonds with fellows and fellow men jurisdiction no longer remains the monopoly of the supreme ruler. Organs of the associations, which were joined by the subject voluntarily or for the compelling reason not to remain isolated, assume jurisdiction in all matters within their competence and exercise it by the same method as is applied by the parental rulers of the family. They enforce the acceptance of their judgments by the same

threats of expulsion which may often mean (as in the case of trade unions today or of guilds in feudal societies), economic annihilation, and they thereby even revive the ancient right over life and death of the subject to a considerable extent.

The central supreme authorities normally recognize the limitations of their own jurisdiction. They only intervene when the fundamental obligation of procedural law—respect for the right of audience—has not been fulfilled, and thereby due process of law has not been granted or, when the moral rules found and proclaimed by the decision are in obvious contrast to those valid in the community. The multitude of existing and recognized judicial authorities may help in explaining the difference of legality and morality within a community. In the early phase of family life and in primitive communities where only one judge is regularly legitimized, both conceptions are identical; at a more advanced stage the legal rules are only those moral rules on whose observance the central judicial organs of the state insist, while moral rules are assigned to the sphere of private or public associations. The gulf between morality and legality gapes wider the more the individual has to adapt himself to sometimes disparate moral obligations defended by courts of the state or of private associations. Constitutional procedure in the present usage of the term on jurisprudence is thereby confined to procedure relating to the state's constitution.

EPILOGUE

The Origin of Law

The application of psychoanalytical thought to the field of law is rare, but not unknown, in the literature of psychoanalysis. In his book, *Man, Morals and Society*, Flügel quotes essays and books by analysts such as F. Alexander, Theodor Reik, Hesnard, and Laforgue, all of whom discussed the concept of law. It is remarkable, however, and has some bearing on the theme of the present study that nearly all analysts and psychologists who deal with the problem confine themselves to an inquiry into criminal law and the consciousness of guilt. It would appear as if the legal system consisted mainly of criminal law, and that justice was therefore based on the desire and the obligation of the ruler to punish and on the wishes of the subjects either to get rid of guilt feelings or to satisfy their vengeance impulse.

The disregard by psychoanalysts of parts of law which are at least as vital as criminal law, and which are not based on aggression, might again justify the method used in this study. Up to now psychoanalysts have confirmed that Freud's method and many of his observations have shed light on facts and developments in the social sciences. The existence of

parts in all legal systems which have been taken into account may lead to conclusions where psychoanalysis has not yet arrived at a definite view, and may contribute to its ego psychology.

Every legal system is designed to obtain security and to maintain stability within the community. The laws achieve those ends either by aggression and compulsion or by persuasion. The one method is primarily applied to criminal law and military law: the first directed against the wrongdoer, the internal enemy of the community, the second establishing the rules for the organization of its armed forces against the outside enemy who is either threatening its existence or is an obstacle to its desire for greater glory or power. The other method seeks to attain its end by providing the subjects with the resources necessary for their existence, and not by aggression, punishment, or threats. It formed social law—such as laws on social insurance, benefits for the unemployed, rationing in times of scarcity, and compensation for industrial accidents (where payment is made without taking into account the guilt either of the employer or of the worker). They thereby create rights and liabilities without the imputation of fault, and play an outstanding part in the private law of torts, and even more so in public law.

There are other parts of the legal system in which the two methods are mixed and where it is hardly possible to distinguish whether their purpose is the defense of security by compulsion or by persuasion. One of these is, for instance, that part of private law which covers contracts: restitution, compensation, and reparation for broken contracts and for the results of accidents arising from negligence.

There have therefore existed everywhere and at all times domains of law in which punishment and aggression are of slight significance, and in which the effort is made to establish order by providing what is indispensable for the survival of the protected. The very existence of such essential parts of law, which aim at security by means of support, must be based on fundamental impulses, on trends in human nature which have their source in drives apparent in infancy, and in the behavior of the parents toward those drives.

One fundamental objection could be raised against this assumption. It could be maintained that social laws—the social insurance laws, the laws permitting the formation of trade unions and recognizing their legal personality, the laws regulating unemployment benefits, workmen's compensation, old-age pensions, and free education—are all of recent origin. It could be pointed out that the trade union movement started in the 1830's and took eighty years to be legalized, that the first social insurance laws in Europe were enacted in Germany in the 1880's, that it was only recently that the Beveridge Report introduced the British Health Service,

or that the idea of free elementary education was proposed by Pestalozzi no earlier than the end of the eighteenth century. It would follow that since the desire to guarantee the survival and well-being of the masses arose in a particular period of Western history, and since the impulses which created social law have been active only in recent times, they could not be considered to represent a permanent and inherent feature of human nature. The appearance of these impulses would be due to historical incidents, although it would be difficult to explain where the impulses originated and from what psychological source they gathered their enormous momentum.

This objection, however, fails to recognize that in all periods—in early times even more conspicuously than in our own day—security and survival through social institutions, regulations, or customs have been a dominant aim of every legal system, and have everywhere formed one of its most essential parts in the West as well as the East. Anthropologists tell us that in primitive communities it was the prerogative and the sacred duty of the ruler to distribute among his subjects whatever goods were available for the community and had been acquired by hunting, cattle breeding, or agriculture. This did not follow from the principle of equality; the ruler could retain a large part as his own share and apportion more to his advisers or magicians than to the bulk of his subjects. Every family, however, had to get a share to survive. If the ruler was not able to fend off starvation, this was attributed to the failure of his “mana,” and he was removed because of his inability to fulfill his chief obligation. Responsibility for the security and survival of the members of the tribe by means of support was the subject of an unchangeable and holy law, and was even more important than the defense against external enemies. This prime responsibility of the ruler has continued to form an essential part of every legal system in all those primitive communities which still exist today. The claim of every member to receive the means of survival by distribution of the common stock was his sacred natural right at that stage, and corresponded to the sacred obligation of the deified rulers and heads of families.

The natural right of the subject to a minimum of subsistence sufficient for survival continued to be recognized, after the dissolution of primitive communities, in all periods of history and in every legal or economic system. A few examples may suffice to illustrate this statement. In ancient Egypt, the cradle of civilization, the dreams of the Pharaoh, as reported in the Bible, of the seven well-favored and the seven flat-fleshed kine, and of the seven rank and the seven thin ears of corn, testify that even his sleep was haunted by his obligation to keep his subjects alive by collecting and storing reserves of food against a period of famine. He was forced by

his conscience excitedly to seek an interpretation of the dream from all his priests and magicians. The proper interpretation offered by Joseph was so important that the Pharaoh made him second in command in Egypt because only in this way could the royal "mana," which was the source of life for his subjects, be retained. In Rome, at the time of the empire, it was *panem et circenses* which the emperor had to provide, thereby affording the means for bodily survival of the poor and unemployed, and caring for their pleasures. In fact, the whole social system of Rome was based on patronage in the sense that an aristocracy destined by birth or fate to lead ought to be rich and powerful, and had the moral and legal obligation to guarantee the existence of those dependent on them. The mighty personage was bound to protect and maintain his clients, servants, freedmen or slaves, who, in turn, owed him allegiance, handed over to him their earnings, enabled him to live in accordance with his rank, and, even more important, to support all of them. Even if they were allowed to retain the fruits of their labor, their possessions still legally belonged to the master. In China, the head of the family, however numerous its members were and even if they lived far away from his home, was responsible for their well-being and entitled to dispose of their assets—a legal and moral principle which formed the basis of Chinese society since the dawn of her history. The divine emperor was the father of his people in the same way as the head of the family who distributed the means of livelihood for all its members. In medieval times, feudalism, at least in theory, resembled a pyramid, the king being the highest lord who entrusted fiefs to the vassals. The vassals, in turn, supplied the knights in their service with property which guaranteed their standard of living and enabled them to support all those dependent on them, and, by this system, to safeguard the maintenance of the masses. Later, after the towns had gained in importance, the independent townsmen usually belonged to a guild, which had to help them in time of need and scarcity of work, while they themselves had the same duty toward their subordinate journeymen and their families.

It is not the appearance of trade unions, old age and unemployment benefits, and all the other measures for support and survival which is surprising, and they were not introduced as the result of a sudden outbreak of humane feeling; what is surprising is the disappearance of all such measures during approximately 100 to 150 years from the middle of the eighteenth century up to the end of the nineteenth. This disappearance was due to a historical event—the Industrial Revolution, which, in spite of all advantages it brought about in the long run, in its initial stages caused panic, disorder, and economic chaos. Those of us who were born and educated during this period felt in our youth that this chaos was the "natural" state of society, whereas, in fact, the conditions were excep-

tional. In a panic the most self-evident desires may temporarily vanish, and only after its termination are feelings resuscitated and measures in harmony with them taken once more. Thus, after the economic and legal chaos caused by the Industrial Revolution had been overcome—frequently by political revolutions—the eternal duty of every government to guarantee the survival of the subject by means of support was re-established.

Since a vital part of the legal system in every period of history, past or present, has been dedicated to the welfare and survival of the subject with the aim of realizing security by support, and not by aggression, the psychological sources of the existence and practice of such laws must be deeply rooted in human nature—in experiences and typical situations which all human beings have to undergo in early childhood. They are originally connected with the relations between infant and mother who is the first law-giver. It may therefore be misleading that the historical illustrations were taken from obligations of kings and not of queens—from patriarchal and not from matriarchal legal systems. The reason is that those legal systems—if matriarchy ever existed—are unknown in spite of all attempts to reconstruct them. Moreover they left only rare traces in historical periods where legal testimonies are available, as for instance in the right of succession on matrilineal lines. This should not conceal that the earliest typical infantile situation which can be universally observed gives rise to direction by the mother and to conduct by the child in harmony with that direction.

From birth on, overriding urges for sleep, food, warmth, clinging, crying, touching, and being touched are prevalent in every child. The security he enjoyed in its mother's womb and the seclusion from the outside world is preserved as far as possible by sleep for twenty hours a day during the first four weeks after birth. This is interrupted, apart from cleaning, mainly by the necessity to receive food. The mother, in harmony with her own urges, usually recognizes the infant's desires as natural and legitimate. She therefore takes care of his security and survival by protecting his sleep, by close bodily connection, by recognizing his cries as demands for help, and by producing and giving milk for feeding. The infant is unable to satisfy his desires without her help. He can neither establish bodily contacts nor protect himself against the influences of wind and weather, and cannot, in contrast even to the anthropoid apes, cling to the mother by his own efforts.

Above all, he is not able to take food without the mother's assistance. When placed by her in a position to take her breast he is often reluctant on the first occasion and has to be induced by gentle force. Whether he refuses or readily responds to the invitation to take the nipple or the bottle he must first be brought into the position for nursing without, or even

against, his will. By nursing, his need and his desire for food is satisfied. The infant's feelings during and after nursing are usually pleasant, as may be seen from some activities during nursing which cannot be explained except as symptoms of love. The act of nursing by breast or bottle is complex, and the description given may be inadequate. Nevertheless, it may be stated that the first instruction, recommendation, or advice—whatever it may be called—received in life is imposed by the mother on the infant for the purpose of his survival in harmony with his inherited reflexes. He does not yet respond to a law; he responds, however, to what may be described as a precursor of law.

The feelings for justice and law show five characteristic components which are only partly present when nursing takes place for the first time. They all, however, make their appearance soon afterward. These components are: First, law must express a demand or at least an advice by the ruler about how to behave, and should have the effect of evoking a corresponding reaction by the ruled. (Authors who deny the element of command in law do not intend to explain the psychological source which led to its establishment. Kelsen's Pure Theory of Law which excludes all sociological and psychological elements from the *notion* of law does not deny that commands play an outstanding part in the origin of the feeling for law.) Second, inseparable from law is a certain amount of threat, and, if necessary, of force. Third, law must be of a permanent character; if not practiced in typical situations repeatedly, consistently, and in accordance with fixed principles as a matter of course, actions of decisions of the ruler are based on isolated considerations, that is, on discretion, not on law. Fourth, both parties must be present and unconsciously imbued with a sense of justice. Finally, law belongs to the realm of values. Evaluation of events and behavior by the judicial authorities and the subjects is its main characteristic and regulates orientation toward and adaptation of the infant's behavior with respect to right and wrong. Evaluation and validity—the respect for, and recognition of, rules pronounced by the governing authority—are fundamental components of law. These five psychological components—the demand to behave, a certain amount of compulsion, permanent rules, the presence of two parties, and evaluation—are all apparent in the situation of nursing.

The first element, the demand to behave in a prescribed manner, is inherent in the mother's action of bringing the infant into the appropriate position of nursing without his will and, following this, in the invitation to take the nipple or the bottle. If the child happens to be reluctant to do so, particularly on the first occasion, the mother forces it into his mouth, and if he sometimes falls asleep during nursing, she may awaken him by a tender tap. In this she resorts to the second element of law—to compulsion

gentle though it is. In the first few weeks or months after birth the mother may even interrupt the child's sleep for the act of feeding and then again exercise gentle coercion to overcome apathy. The baby, too, having been brought into the position to nurse might vaguely experience the influence of helpful force, which makes the operation of his reflexes possible, and thereby the first inkling of the advantage of obeying which in spite of initial unpleasantness leads to the enjoyable act of nursing.

These two elements of the feeling for justice which are present from the very beginning in the act of nursing do not, however, bring any law into existence on the first occasion, because other essential components are still lacking. They soon make their appearance through the regular repetition of the event. When the child is fed six times a day during the first four weeks and four times during the next months in a more or less regular rhythm nursing becomes an established institution for many months, that is, for an eternity in the life of the newborn child. The concerted actions of mother and child create by their natural repetition the first rule of life which is imposed by the mother and accepted by the child in the emotionally sure expectation that the rule will be permanently applied in the future—the third characteristic of law.

Fourth, even at this stage, two parties are involved in the rule. The mother is alive to her part as a ruler in the business of nursing. Unconsciously she may feel that there is no other person present but herself, because the child is still a part of her, her own flesh and blood, and not yet separate from her; consciously she has to admit that he has desires and a destiny of his own. The child, though not an ego during the first period and not distinguishing between himself and the outer world, identifies himself with the mother, by the process of projection and introjection, or in the terminology of Piaget, by accommodation.

The fifth fundamental element of law consists in its evaluation of actions and omissions as good or evil, permitted or forbidden. It contains the judgments of the governor within a coherent system of rules which aim at his own orientation in the sphere of morals and at adapting the behavior of the rules to such orientation. The mother is initially the guiding judge; she introduces the regulations for the rhythm of feeding and sleeping, of playing and clinging. Notwithstanding some deviations caused by idiosyncrasies of an infant she follows a traditional pattern which is shaped differently in every community under the influence of the paternal co-governor. The infant is highly impressed by her commands and deeply feels whether its behavior is approved or disapproved—even stronger than in subsequent phases since its dependency on the mother and, shortly later, on the father is much more intimate and its primary anxiety of being deserted is overwhelming. Such approval or disapproval

has been observed by scientists of all psychological schools at the earliest phase in the infant's gestures, expressions, or cries: It is instrumental for its orientation, assimilation, accommodation, and adaptation to an even greater extent than that of visualizing or motility. It decides over its joyful or reluctant acceptance of "good" food, over the prevalence of love or aggression in its relations to the images of the parents, over its domination by feelings of gratitude or envy. Even the reflex activities of the bodily functions are already emotionally valued either as propitious or as poisonous. Orientation and adaptation to the mother's commands in harmony or disharmony with the child's own urges of the moment are the infantile source of emotional moral judgments whose contents are changing while their concept is universal. Moral orientation which is the condition of judgments in the realm of values leads to the concept of *norms* and is the psychological source of the normative character of any legal system. It appears first in the act of nursing.

Although all the elements of law are present in that infantile situation, it may well be asked whether and why the rules for survival by support are the *earliest* rules to come into force. The aggressive impulses of the infant, as Sigmund Freud, Anna Freud and Melanie Klein emphasize, are very powerful. Why, therefore, are not criminal laws, whose core is aggression, the first and basic laws to come into existence, the more so as leading psychoanalysts maintain that in the life of every human being aggression precedes love?

The answer is that in the functioning of aggression during the first year of life two periods must be differentiated. One is that of resistance against unpleasant demands by the mother; these demands are normally made at a later period of infancy, mainly at the time of weaning and toilet training. They meet frequently with resistance from the child, give rise to tantrums, and strengthen the impulse of aggression against the mother. At the same time her aggressive impulses may also be increased by the necessity to break down the infant's resistance. It is this kind of aggression on the child's part which is combatted by countermeasures and often by punishment. Its appearance and its subsequent suppression by the mother are a contributory source of criminal law, which advances to an essential part of legal systems through the father's influence. It provokes, however, rules several months after the rules for nursing—and thereby the earliest laws for survival—have been firmly established.

The other period of the infant's aggression sets in immediately after birth, and is based on a biological instinct. It has to go through new, dangerous, and highly unpleasant experiences at the beginning of life, such as the trauma of birth, the terrifying changes in temperature, light, noises, disturbances of breathing, and many others. All these events are

ascribed by the nursling (and by adults in primitive societies) in a vague way to hostile forces outside and inside himself, which at this stage means the same thing. The child's aggressive urge at this earliest period aims at removing his anxiety and at finding instinctively security by counter-attacks or by outbursts of fury against imagined attacks of an imagined enemy. Crying and tantrums, which are expressions of his aggression, are his only means of calling for protection and security; they are cries for help, support, and survival, and are understood as such and usually do not incur even gentle punishment. On the contrary, the mother normally does everything she can to eliminate the cause of the displeasure which led to tantrums and prolonged crying. She rocks the child to assure him of the presence of a protective power and to replace his discomfort by pleasurable experiences. She gives him extra warmth if she thinks his unhappiness is caused by cold. Melanie Klein and her followers have described how the nursling nonetheless sees in the same mother, who represents his only bridge to the outside world, the cause of his torments, and that he may desire to destroy her. His actions to this end are, however, normally ineffective and not taken seriously: They do not normally call forth at this early stage any punitive measures on the mother's part. The child is left free to soil himself as he wants, and to make his futile attempts to bite or to destroy. None of these activities gives rise to creation of rules. Their result is frequently to induce actions on the mother's part which again, like nursing, aim at protecting the child against dangers. Though parental attitudes show many variations, suppression of aggression on the child's part rarely leads to the introduction of rules at the earliest stage and accordingly does not produce criminal law at this period. Removal of anxiety and security by means of support are normally the ruler's main aim and the subject of the first rules and the earliest laws.

A sixth essential component of law—guilt—is implicit in certain ideas of Freud, when he maintains that guilt is inherent in morality. In this, Freud is followed by leading psychoanalysts. Ernest Jones in his investigations in *Fear, Guilt and Hate* and *On the Genesis of the Super-Ego* has stressed the central role of guilt by demonstrating that a pre-ideational anxiety (*Urangst*) exists from the very beginning of life and creates different phases of guilt in the course of early development. Melanie Klein and others, though also emphasizing the process of introjection of the image of the good mother at the earliest stage, stress simultaneously, and even more emphatically, the importance of guilt, by way of an impulse to make reparation, which is said to be created by the intense feeling of the nursling three months after birth and subsequently to have hurt and destroyed the mother by its aggressive drive; thus he wants to repair and revive her. On the basis of the method applied in this study I am not con-

vinced of the relevancy of an urge to make reparation out of a sense of guilt for damage caused. If it constituted an essential and effective drive of the human mind, and if its impetus were so conspicuous, it would have built an essential part of all legal systems, as the aggressive urge did in forming criminal law or the impulse to support in creating social law. In fact, an impulse to make reparation is hardly apparent in any legal system. After the Second World War the restoration of the defeated enemy may have been an object of international politics. The attitude of the victorious powers was not, however, based on a desire to make reparation; its main result was the renunciation of reparations which victors have felt entitled to demand throughout the course of history. There is, of course, in every legal system an important part—the law of torts—dedicated to the regulation of reparation, compensation, and restitution. This part, however, was not created by the desire of the perpetrator of the faulty action to make restitution, but, on the contrary, by the desire of the victim to receive restitution—and this desire is really a fundamental psychological urge, as is shown by illuminating observations of Kelsen and Roechlin. Only small traces, if any, of an urge to make reparation can be found in legal institutions. The strength of an early and basic urge of this kind in infancy which would have led, by necessity, to corresponding universal legal institutions seems to have been exaggerated.

The further undeniable fact that in the development of legal tenets guilt was set up as a condition of responsibility on the demand of those who suffered damage, and not on that of those who caused it, also permits some doubt as to the validity of the hypothesis that a feeling of guilt pervades the mind of an infant a few weeks after birth to such an extent that the urge to make reparation is dominant. Normally a sense of guilt arises only when a rule has been violated. "There is no morality," as P. Schilder stated, "which is not superimposed by an executive power. Law and morals are, therefore, identified at this stage of development." The rules are imposed on the infant by an aggressive tendency of the mother, as is the case when punctuality of nursing at regular intervals is employed too strictly and the child is left hungry for a time in spite of his hunger cries. Mothers may also frequently become impatient and thereby show disapproval of the infant's behavior. Owing to the empathy between mother and child he may feel in a vague way that his behavior is disapproved of by the mother, that a rule was imposed upon him, and that he has broken the rule. As a result a rudiment of guilt feeling may arise; even so, there is a difference between the rules given for nursing and those which show disapproval of infantile activities. The act of nursing is normally a concerted and organized action of mother and child which leads to the satisfaction of them both. The child accepts the rules joyfully,

while rules created by the aggression of the mother which evoke his resistance do not usually at this stage lead to systematic countermeasures to break that resistance.

Feelings of guilt and shame gain in intensity several weeks and months later after the mother effectively introduces rules of conduct during weaning and toilet training which are unpleasant and can frequently not be followed up by the child's weak and undeveloped ego. The father's direct influence steadily increases and promotes the establishment of criminal law in connection with the Oedipus conflict and the prohibitions it inflicts. Nevertheless, criminal law—and thereby the incorporation of a harsh superego into the child's psyche—usually appears later in the family (and correspondingly in the primitive community) than social law and the formation of the ego ideal of support.

This does imply neither that the father's aggressive superego is of no avail in the earliest phase of human development nor that maturation leads by necessity toward the realization of the ego ideal of peace and survival by support which is a part of the mother's as well as of the father's conscience. It only allows the deduction that love is a driving force in morality though it does not exclude the essential significance of aggression producing guilt. The father's aggressive leadership is indirectly of the highest relevance already at the earliest stage. He decidedly determines the conduct of family life. Defense and attacks against hostile powers by force and cunning are his domain and call for the mother's and the children's corresponding behavior. He is the hunter who provides food for the family members, though not for the nursing infant. He has to insist on obedience and discipline since in magical belief breaches of traditional obligations by any member of the clan must result in failure of his undertaking. The law on administration and administrative procedure which regulates the sacred routine of behavior is even in relation to nursing only overtly the mother's exclusive domain. Her conduct is regularly highly shaped by the father's requirements, impulses, and instructions in order not to disturb his vital activities. Even sacrifice and abandonment of the child in case of an emergency at the paternal leader's command occur in primitive and also in advanced communities, and sometimes even kindle an enthusiasm of mothers to offer their sons for the slaughter of war, as happened not only in Nazi Germany. Constitutional law, too, which ascertains the predominance of certain demands of ego ideals and superegos within the community and on which the validity of obligations in all other parts of any legal system depends, is a domain where from the beginning the father's authority is firmly fixed and gains preponderance in nearly all communities in the course of historical evolution. His superego and ego ideals form to a wide extent the morality of the subjects and give rise to

moral conflicts since they are often in harmony, but also often in disharmony with those of the mother and both continue to operate unconsciously in the mind of any human being.

The infant (and any individual) is therefore placed in a position where it is exposed to, and subject to, obligations which may contradict each other. In many communities veneration of aggression and of aggressive leadership may become the driving force for the ascertainment of fundamental duties, while in others peace to be reached by love and growing understanding may advance or, more precisely, may be revived as the ultimate goal of social relations. Even within the same community conflicts between contradictory moral tenets normally continue. They are particularly conspicuous in the typical attitude against feared strangers within a community who could not completely accommodate itself to the prevailing mode of life and against outside communities which supposedly or really are a threat. Against such strangers morality may insist on aggressive defense or attacks in the name of holy patriotism and justified self-preservation or may press the power of the love drive for tolerance and understanding when they are felt to be more effective means for survival.

In such perilous conflicts of superego and ego ideal concepts, where normally both parties allege to be representatives of a morality of peace against that of aggression, a ray of hope may lighten the aspect of a dark and uncertain future. In spite of all wars, persecution, famines, the atomic bomb, and the suppression of fundamental human rights by intolerance in many places and at all periods, security by means of support has been, nevertheless, established to such an extent that in war-stricken Europe alone the population has increased from 187 millions in 1800 to over 440 millions today—who enjoy better living conditions—and that of the globe to about 3.2 billion. Eros thereby reveals the overwhelming strength of its driving force though the momentum of its impetus may frequently lead to increased unhappiness for many and may pose anew the vital Malthusian problem of how far and how long adaptation of the human race is feasible in limited space.

Another favorable aspect may be concluded from a tendency toward integration of small into greater units. In the course of history, families have been integrated into clans, clans into communities, communities into states, and states frequently into federations. Thereby fundamental concepts of right or wrong were often unified, or differences in their content weakened in the enlarged territories. The tendency which led to the formation of the League of Nations and of the United Nations is counterbalanced, however, in our present era by the opposite tendency to separatism, to breaking up of already existing units, to founding

new states and governments in all parts of the world, or to insisting on the inviolability of states rights within a federation. The tendency has normally been justified everywhere by the moral obligation of faithful adherence to traditional moral principles which are peculiar to groups or nations and are, or are deemed to be, indispensable for maintaining their individuality. The fight of both tendencies led to the paradoxical situation that while physical distances have been narrowed by technical inventions, moral gulfs have widened. Discoveries which were designed to adapt humanity to the concept of one united spatial whole have changed into murderous threats of mutual annihilation and moral separation. In such clash of moral concepts legal systems everywhere are emphasizing support and security as a main function of law and government while they defeat this end at the same time by legal measures which are curtailing fundamental rights and are directed toward destruction. They thereby make the lives of all individuals insecure—of their citizens as well as of all humans outside their frontiers.

Morality, and not physics, will decide the destiny of mankind. Any government and any individual is therefore faced with the fateful problem of whether it is feasible to influence morality and to direct—at least to some extent—the course of events, or whether the future is predetermined as the dogma of predestination and of original sin seem to indicate.

APPENDIX: BIBLIOGRAPHY

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