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The Concept of the Self in Legal Culture

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THE FORTY-FIFTH CLEVELAND-MARSHALL FUND LECTURE*

THE CONCEPT OF THE SELF IN LEGAL CULTURE

LAWRENCE M. FRIEDMAN**

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I. INTRODUCTION

This essay is an exploration in the domain of legal culture, or, in other words, an exploration of those social ideas and concepts that shape and underpin the law. Specifically, it is about the concept of the individual, or the self, and how this concept makes its mark on the legal order.

Human beings are social, cultural animals; they live in communities tied together with normative bonds. Cultures have histories, traditions, habits, structures, and ways of looking at the world. In each culture, no doubt, there is a concept of the self, and each culture is governed by assumptions about the relationship of the individual to other individuals, and to society at large. In any complex society there are many such concepts, just as there are many separate legal cultures. Nonetheless, it is possible to generalize and aggregate. Societies have structures, they have personalities, they have ways of life. Not everybody in America conforms to the standard "American" patterns (whatever these turn out to be); but on balance people do, certainly as compared to ancient Egypt or for that matter modern France.

Not all societies, past and present, have been "individualistic" in the sense that American society is. Older societies, and their legal systems, tended to locate important rights and duties not in individuals but in groups, classes, families, or clans. Ancient and traditional societies, on the whole, subordinated individual rights to the rights of larger collec-

* This essay is based on the address given at Cleveland-Marshall College of Law, September, 1989, which was the Forty-Fifth Cleveland-Marshall Fund Lecture.
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1 Legal culture means simply the ideas, values, opinions, and attitudes of some population with regard to law and legal systems. It is worth distinguishing between an external and an internal legal culture. The external legal culture is the legal culture of the general population; the internal legal culture is the legal culture of insiders—lawyers, jurists, judges, law professors. See L. FRIEDMAN, THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE 223-24 (1975).
tivities. Our society insists on the uniqueness of individuals; ancient and traditional societies focused on groups, and emphasized marks of status. It was not the naked self, so to speak, that mattered, but a form draped in labels, signs, and tags, specifying race, gender, occupation, age, birth order, and the rest: a kind of costume that became part of the person, inseparable from him or her; and that assumed a reality almost as palpable as the flesh and bone underneath.

In our world, as we said, the individual is the bearer of duties and rights; and at the core of the social and legal systems stands a radically individualistic concept of self. This concept is a deep-seated element of popular culture; it is not a construct hatched by political or social theorists. It oozes into every corner of the law, and affects every legal arrangement. Usually, however, we take this concept completely for granted; the law simply reflects, without thinking, the postulates of its conceptual and structural matrix. Private property, freedom of contract, freedom of testation: all these assume a particular kind of social self. A few fields of law or legal scholarship, to be sure, confront the question of the self more directly. One of these is law and psychiatry.

This essay is about concepts and ideas, but it is not an essay in intellectual history, or in the intellectual history of law. The ideas and concepts discussed here do not come out of the higher culture—that is, the philosophical or theoretical literature of law or society; rather, as we said, they are products of popular culture. Nor are these ideas, as ideas, the ultimate creator or source of the law. They are best seen as intervening variables: powerful "outside" forces produce them, and they in turn create or influence structures and patterns of law. I will not try to explore those "outside" forces, at least not in this essay. It may be that the ultimate source of law is to be found in the structure of the economy, or in technological change, or in sunspots, or spontaneous generation, or what have you; the question shall remain open for now.

II. INDIVIDUALISM PAST AND PRESENT

It is neither new nor news that Western society has a strong individualistic bent. This bent became evident in society some span of time ago and has only strengthened over time. But there are various grades and forms of individualism. Between the 19th century and the present, I believe, there has been a shift in the dominant form of individualism, at least in this culture. The movement has been in the direction of what Robert Bellah and his associates have called "expressive individualism." This is the view that each person "has a unique core of feeling and intuition," and that this core should "unfold or be expressed" in order for each person to "realize" his or her "individuality." Thus the main task

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4 Id. at 334.
of the individual is to be an individual; each person has the right, if not the duty, to craft a unique, exclusive self. In so doing, a person may select from many models and patterns, each equally valid. One chooses the one that best suits one's interests, talents, and needs.

Popular literature, how-to-do-it books, best sellers, and magazines are unwitting testimony to the pervasiveness of such notions in popular culture. Everywhere we find expressed the themes of individual growth: stories and guides on how to gain control of the human environment; literally how to make ourselves, including shaping our bodies to the form we might desire; putting a persona together, as well as how to build a gazebo in our backyard, or grow better roses; or become more (or less) assertive. Our society is a do-it-yourself society, and do it to yourself and for yourself. It is dominated by concepts of uniqueness, individuality, freedom of choice.

These underlying concepts play themselves out, in practice, throughout the legal and social systems. I will start with a mundane example, and then go on to something a bit higher. Consider the so-called gourmet revolution. In recent years, there has been an explosive growth in interest in food in general, foreign food in particular—an age of experimentation in taste and in cooking. The American middle class is quite curious about foreign foods and is willing to buy or make Japanese, Thai, Ethiopian, Polish, or other foreign foods. At one time, food was simply one more aspect of inherited culture; you ate what your people ate. Today, the buyer, eater, or cook confronts a rainbow of competing choices. One eats what one likes. National cuisines are simply so many options on a vast menu, a cosmic market-place of styles of food.

A similar development has occurred with respect to contemporary religion. Generally speaking, religion was historically a matter of ascription: you adhered to the gods of your parents. In modern America, religion is much more a matter of affiliation—a personal, custom-made choice, an individual route to salvation or to inner satisfaction and power. Most people, of course, do not wander off from their inherited faith; but even

5 It seems obvious that we live in an age of individualism; yet it is also the age of the welfare state, of conformity, of "other-directedness." All of these have led many people to imagine that there is a movement in society away from individualism, an "escape" from freedom and responsibility. Yet these phenomena, though real, are in a sense secondary: they presuppose or guarantee the exercise of individual choice. I try to make this argument, in more detail, in FRIEDMAN, THE REPUBLIC OF CHOICE (1990).

6 Although this trend is most obvious in the urban middle class, I think it is far more general; after all, almost everybody is willing to eat pizza, tacos, tortilla chips, and some dialects of Chinese food.

Of course, many factors have been at work in creating a food revolution: affluence, very obviously; and modern technology, which makes it possible to preserve and fly truffles and sashimi to Wichita, Kansas. These are necessary, but not sufficient conditions. The affluent nobility of, say, 18th century France probably ate French food only; they ignored cuisines whose raw materials were just as much at hand as those they relished.
these faiths have been changing in response to modern culture. There is a new or heightened emphasis on personal experience, a tilting of doctrine and ritual in the direction of spiritual rebirth. Needless to say, the law of church-state relations reflects those changes.

In short, modern culture treats as obsolete the idea that there is or can be a single, dominant religion, even when combined with "toleration" for minority faiths. The governing principle is that there is a vast family of religions, equally open to every man, woman and child, as he or she chooses or needs. This idea of religious neutrality has doomed the comfortable arrangements under which schools and public places reflected the majority faith. It generates pressure for subtle adjustments in public ceremonial and official behavior. These pressures meet with resistance. The conflict produces an enormous amount of first amendment law; decisions about the separation of church and state or the establishment of religion, about Christmas displays, or about prayers in public schools. At one time, to be sure, school prayers reflecting dominant religions were simply a matter of course.

The civil rights revolution has manifold roots and sources, but in one regard it is also an example of how the modern definition of the self works its way into life and law. Minority groups seem to be claiming group rights, and their rhetoric often makes this point emphatically. But in a sense the group claims are misleading. The rights are, in essence, individual rights—most fundamentally, the right not to be assigned to a box or category because of race, sex, birth order, ethnicity, religion, life style, or physical condition. Some of these traits are socially defined as "immutable" (race and sex, for example); some, to the contrary, are considered part of the domain of free and open choice (religion). The culture considers it wrong and unjust to penalize a person for what is immutable—for what he or she "can't help." As for affiliations, it would be equally wrong to privilege one legitimate choice over another.

"Affirmative action," or "benign discrimination," are strategies, then, that are in tune with modern individualism. On the surface, they assign claim-rights to groups as groups, yet they are nonetheless outgrowths of expressive individualism. The idea behind them goes something like this: prejudice is a corrosive force, an evil; it creates situations of extreme disadvantage for its victims; it submerges the individual victim, against his or her will, in the depths of a (disfavored) group identity; it masks the individual, the unique personality. All that a bigot sees is group

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7 See e.g., Lynch v. Donnelly, 465 U.S. 668 (1984), which upheld a Christmas display sponsored by the city of Pawtucket, Rhode Island. Even questioning the legality of such a display would have been unthinkable in the 19th century.
9 Thus the Supreme Court, in Frontiero v. Richardson, 411 U.S. 677, 686 (1973) spoke of gender as "an immutable characteristic determined solely by the accident of birth," like "race and national origin."
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identity. Only through active measures of race-conscious redress (or gender-conscious; or the like) can society bring the individual into a position of genuine equality, where the true self can emerge, in his or her own right.

In some ways it seems odd to connect the eating of sushi with the civil rights revolution, and to connect the surge of religious fundamentalism with the civil rights revolution may strike one as downright perverse. But a social fabric is a seamless web. The influence of individualism in its particular 20th century guise percolates throughout the whole of that fabric. Of course, there is no such thing as the culture; the civil rights idea has a long way to go before one can safely speak of a consensus. Certainly intolerance, racism and religious prejudice are still rampant, along with other persistent historical evils; but even these have changed their form under the influence of the legal culture of the day.

III. THE CRIMINAL SELF: LAW AND PSYCHIATRY

Some areas of law confront the issue of the self in a direct, explicit way. One clear example is the law of criminal responsibility: insanity as a defense in criminal trials. Criminal law only punishes those who are responsible, who choose to do evil. Hence issues of self-hood are at the core of the dispute over definitions of insanity.

They are, of course, also at the core of psychiatry. But the legal system stands in a rather delicate, ambivalent relationship to the science of psychiatry. Law and psychiatry is a recognized field of legal scholarship. Like most fields, it is riven with disputes and conflicts over theory and practice. Some legal scholars have eagerly taken up the cause of psychiatry; they see it as a science, as progress, a source of fresh ideas which can make the legal system more decent, rational, humane. They regret that other judges and jurists are obstinate and resistant. Some legal scholars (and even some psychiatrists) are, on the other hand, skeptical about psychiatry, feel that it has been oversold, that its scientific claims are exaggerated, and that the legal system would be better off ignoring it altogether.10 This group seems to be on the increase. And then, as usual, there are the moderates, the inbetweens, the people in the middle.

It is not my purpose to take sides on this issue. Rather, I will approach the question from the outside, so to speak, and ask why law has formed so uneasy a partnership with psychiatry, why the relationship has been so troubled. My answer, at the most general level, is that modern legal culture and psychiatry imply radically different theories of the self; and that this divergence has prevented any real merger of interests, aims, and methods.

10 The extreme case is T. Szasz, in LAW, LIBERTY AND PSYCHIATRY (1963) and other works. Szasz feels there are “no clear or generally accepted criteria of mental illness” so that the search for evidence of such illness is “like searching for evidence of heresy.” The investigator, once he gets “into the proper frame of mind,” can always find it. Szasz called for abolition of the insanity plea. Id. at 227-28.
Legal culture is not just opinion. Its importance lies in the fact that it is the immediate source or cause of legal phenomenon. It is the wellspring of actions and attitudes which generate demands on the legal system, and hence move the system in this or that direction. In other words, what people and institutions want and go after determines (in the first instance) how the legal system behaves. The civil rights movement was a particularly strong and concrete structure created and nurtured by the changing culture. The movement was the ultimate source of civil rights law. Without the NAACP, without blacks willing to fight in the courts, without the pressure these actors generated, *Brown v. Board of Education* would never have happened.

It is good to remind ourselves that "science" is not and cannot be a source of law, whether it is medical science, or physical science, social science, or whatever. Moreover, law is not and cannot be "scientific." Law is a tool, an instrument, a device which human societies and their elements make use of for whatever ends they choose. Living legal systems may or may not be hospitable to propositions from the sciences; they may decide to be "scientific" as they define this term. But the decision to use or not use "science" is itself socially determined, and does not necessarily depend on the truth value of the science in question. A scientific proposition cannot enter the body of the law by itself; it needs a chaperone, a sponsor. It is legal culture which plays that role.

Many experts—not only psychiatrists, but experts of every stamp—have come to grief, because they assume that the law is a top-down command system; hence, if they could only persuade the gate-keepers to open the door, true science and right reason could march boldly in and take over the system. But this is almost never the case. The law may well be, in some aspects, a top-down command system, but neither top nor bottom have any interest in science per se. The rationality of law is not a scientific rationality, but ethical or pragmatic. In short, the legal system makes use of a body of knowledge only when, for reasons of social demand, there is a decision to do so. It may also choose to ignore "science" or the "facts," and frequently does.

Sometimes a scientific proposition has been accepted by experts—perhaps universally—and yet the law shuts it out. Expert consensus is no guarantee that legal decision-making will absorb or accept a scientific proposition. Politics, tradition, economics all play a crucial role. The Food and Drug Administration, for example, has a mandate to ban food additives which, in the light of chemical and medical knowledge, may cause cancer, even if the risk is small and remote. But the FDA does not and cannot ban tobacco, despite a mountain of evidence linking it to cancer

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11 The "people" and "institutions" who influence the system are those that actually exert pressure. The text should not be taken to assume that legal culture is a matter of one-person, one-vote; far from it.


beyond any reasonable doubt. The reasons have nothing to do with the strength of the case for banning tobacco. The evidence could hardly be stronger. Rather, the explanation lies in the pattern of demands on the legal system, and that in turn is at least partly a function of the legal culture. In regard to tobacco, the blatant self-interest of a powerful industry, along with the reckless wishes and habits of millions of smokers, are important underlying factors; they produce demands on Congress, the FDA, and whoever else is relevant.

Modern psychiatry is uneasily poised between medicine and the social sciences. As it oscillates between these two poles it has a deterministic cast. Not that this is unique to psychiatry; it is true of the social sciences in general, perhaps most egregiously true of anthropology and sociology. The central message of the social sciences is that human beings are prisoners of culture, dependent on the framework that surrounds them. People in modern society may feel that they make fundamental choices in regard to their lives, but these choices are irretrievably brokered by context. Culture is as encompassing, as determinative, as the very air we breathe. The context, at the very least, sets the limits and parameters of choice.

Psychiatry certainly shares this general leaning. Indeed, within psychology, the (mental or developmental) context has a kind of special strength. Psychiatry specializes in debunking the notion of complete free choice. Its provinces are the hidden recesses and secret longings of the mind. Psychiatry is, in one sense, the science of the subconscious. Classical psychoanalysis, for example, insisted on the primacy of early childhood. At that point, the personality takes form without our knowledge, and from then on unseen gears and levers drive the machine. In any event, psychoanalysis placed major emphasis on pre-formed unconscious motivations. Psychoanalysis, to be sure, offered a way out. The patient who gained awareness of unconscious urges and sentiments acquired power to choose and to control. The fully analyzed human being had an autonomy that was beyond the reach of unexamined lives. But this autonomy required a long, slow climb through many stages of self awareness. Modern psychiatry and psychology are still skeptical about autonomy, even for the average person. Every psychiatrist is convinced that some people can never escape their inner prisons. They are forever captives of forces that have seized control of their souls. Almost all psychiatrists would probably agree that the public in general, and jurists in particular, exaggerate the domain of free will;¹⁴ no one is truly master of her fate.

Popular culture is the maker of legal culture, and it is almost diametrically opposed to this idea, or to any kind of determinism. Popular culture stresses choice, fault, responsibility, good and evil. People are (and by rights should be) free agents. They create their own selves and

¹⁴ The realization that there is a conflict between psychiatric determinism and the jurists' view of punishment goes back many years. See, e.g., G. Jacoby, The Unsound Mind and the Law 3-16 (1918).
their worlds. Whether we actually have these choices, or are merely fooling ourselves, is not the issue. In either event, popular culture exalts the concept of free choice. One cannot understand the evolution of modern law and most of its aspects, from easy divorce to civil rights, without taking into account trends in the evolution of social understandings, specifically the rise of a radical and expressive form of individualism. 15

Hence, in a way, it puts matters backwards to ask how psychiatry has influenced the law. More interesting is the way law influences psychiatry, and most interesting and pervasive is the influence of legal culture on both law and psychiatry. Legal culture is what ultimately makes law, and norms of general culture are what ultimately make or powerfully influence psychiatry.

In the 19th century, popular culture placed great stress on themes of self-control. A century ago, law and literature emphasized to an astounding extent the value of discipline and self-control. These ideas are (relatively speaking) much weaker today. The 19th century also celebrated freedom and freedom of choice. Articulate spokesmen, in the United States in particular, eagerly embraced democracy and self-government as fundamental values. The individual was by rights his own master. Autocracy was an evil and dying stage of authority. But the mastery which individuals were to exercise was nonetheless confined within the bounds of a rather traditional morality. The model held up to emulation was the man moderate in habits, hard-working, monogamous, who got up early in the morning, went to church on Sunday, and never got drunk. (The model woman, of course, was domestic and submissive.) The key to success, both individual and social, lay in self-control and personal discipline. Codes of law, and popular literature, strongly disapproved of vice—drunkenness, gambling, debauchery, sexual excess.

Nineteenth century medical texts, for example, gave out the message that self control and moderation were essential to the health of body and soul. Sexual exuberance was especially harmful. Sylvester Graham, writing in the 1830's, warned readers against sexual excitement, which "rapidly exhausts the vital properties of the tissues, and impairs the functional powers of the organs." 16 Nearly 80 years later, Dr. Richardson Parke, author of a popular medical treatise, claimed that "artificial eroticism" damaged, among other things, the "delicate mechanism of the eye." 17 He also warned businessmen they were doomed to failure, if they became addicted to masturbation. 18 The key to health was repression. The human

15 The argument does not depend on the assumption—which would be wrong—that everybody in the society is in fact an expressive individualist; only that the distribution of self-concepts has moved in the direction of expressive individualism, and rather markedly.
18 Id. at 375.

https://engagedscholarship.csuohio.edu/clevstlrev/vol38/iss4/3
body was a delicate mechanism which could easily go out of kilter. A balance had to be preserved. Self-control was essential. This message pervaded and shaped the legal system—in rules about sexual behavior, for example—as well as popular, medical, and psychological literature. Not that everybody obeyed these dictates, by any means. But many did; and some people perhaps suffered from the tortures of repression. Others, who fell from grace, probably suffered from the pangs of guilt. This cluster of ideas about the ideal self, and the consequences of deviating from it, persisted well into the 20th century. Psychology, including Freudian psychiatry, was interpreted in terms of this basic message. Civilization itself depended on repression, on sublimation of crude animal impulses. Civilization, as Freud put it, was “built up upon renunciation of instinct,” through “suppression, repression, or some other means.”

Science and popular culture may have quarreled over the reach and reality of choice, but they agreed on the value of careful self-control.

In our times, it hardly needs to be said, entirely different premises rule the day. Freudian notions have been stood on their heads. The tendency today is to treat repression, not expression, as harmful and abnormal. The old medical warnings about the dangers of sex seem completely ridiculous—something out of the dark ages. People today hold strong views—which may be equally farfetched—on the opposite side: about the mental and physical rot that repression brings.

Why this dramatic reversal? No doubt the full story is immensely complicated but whatever else was causal, it reflects a drastic change in the concept of the self. New forms of individualism have replaced 19th century ones. Not discipline, but growth, self-realization, and development of one's full potential are the modern ideals and goals. To achieve these ends may require discipline and self-control, including (often enough) dieting, yoga, jogging and other forms of trendy masochism—but the discipline is only a means to an end.

In the new legal culture, choice is the primary value. Changes in legal rules about sexual behavior starkly reflect this value. Many states have wiped away the old restrictions on freedom of sexual choice. In these states, laws against fornication, adultery, and sodomy have gone into the dustbin. Sex has been in essence decriminalized, except insofar as free choice is lacking, for example, in the case of rape, or where the victim is not legally capable of choice, as, for example, minors.

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19 S. FREUD, CIVILIZATION AND ITS DISCONTENTS, 49 (1930). The “physical energy” which civilization needs “has to be withdrawn from sexuality.” Id. at 57.
21 Choice and consent are of course important concepts in the law of rape, and here their meaning has been substantially redefined to reflect the reality of women's experiences. See S. ESTRICH, REAL RAPE (1987); D. RHODE, GENDER AND JUSTICE 244-53 (1989).
22 Not all states, to be sure, have gone along with this general trend, and the Supreme Court, in Bowers v. Hardwick, 478 U.S. 186 (1986), in a notably mean-spirited and retrograde mood, narrowly upheld Georgia's sodomy statute against constitutional attack.
Psychiatry has not, on the whole, resisted these changes. It has been, primarily, on the side of sexual expression. It has never been as harsh and judgmental about sexual deviance as the general population. But the legal revolution cannot by any means be chalked up to the credit of psychiatry; rather, the changes come from critical changes in general culture; they also owe a great deal to social movements—for example, gay liberation. These movements themselves rest on a cultural base: the primacy of expressive individualism. The movements reject all discrimination against those who live a life-style outside the mainstream. They insist on legitimacy for their members and their way of life, either because these members have no realistic choice in the matter, or, contrariwise, because they feel they have a right to choose. It was pressure from outside that forced psychiatry to delist homosexuality as a mental disease. The streams of power flowed into rather than out of the profession. Similarly, it was the sheer force of numbers of cohabiters, and their insistence on their right to cohabit, that doomed the old rules about fornication and the illicitness of “meretricious relationships.”

Psychiatrists, of course, have always considered themselves enlightened, and with considerable justice. They were willing to define non-Biblical sexuality as a disease at a time when the general public treated it as evil, the devil’s work, perversion. Psychiatrists argued that sexuality was an aspect of the self, an aspect of human development. If the self took a wrong turn because of accident or distortion in early childhood, this was nobody’s fault. The deformation was, for the most part, incurable, or curable only through a long and painful process. Persecution and punishment did no one any good.

This was, for its time, humane and progressive. But the disease label has become offensive, both to the right and to the left, and for somewhat comparable reasons. On the right, sexual deviance still looks like a sinful, evil choice. Society should ban and punish such behavior in accordance with the divine judgment. The left is clear on the result it wishes, but somewhat ambivalent about reasons. To a certain extent, advocates point to the absence of choice: people cannot change their basic sexual orientation. But insofar as deviance is a “life-style,” a “preference,” one choice should be as good or as valid as another—like the choice of ethnic foods (on the mundane level) or of spiritual routes to salvation, on a higher plane.

A similar theme runs through the recent history of the insanity defense. This is, of course, an often-told, long and complicated story. Tests of in-

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24 Marvin v. Marvin, 18 Cal.3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976). The court specifically referred to the “prevalence of nonmarital relationships in modern society, and the social acceptance of them . . . .” Id. at 683, 557 P.2d at 122, 134 Cal. Rptr. at 831.
sanity have gyrated wildly over time. The first important modern test, the “right or wrong” test, dates back to the McNaghten Rules, formulated in 1843.25 The McNaghten test was basically cognitive. It focused on the reasoning power of the defendant and the strength and health of his brain. A person accused of crime was insane only if “laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.”26 This formulation tied in well with the dominant 19th century theme of self-control—if you knew what you were doing then failure to desist must be a failure of self-control, if not a deliberate choice of evil deeds.

The McNaghten test became standard in the United States as well as in England. In some states a second test, “irresistible impulse,” came to supplement it. There was a medical concept of “moral mania,” which had some currency in the profession.27 Some sources used the term “moral insanity.” The theory was that insanity was a condition that could affect the emotions without necessarily affecting reasoning or cognitive function. The medical profession was in fact split on whether this was a real form of insanity or a spurious one.28 The debate found some echo in the case law. To some courts, the doctrine was too dangerous; it opened the door to too many abuses and excuses. An Alabama court, in 1879, expressed grave doubts about the “species of mental disorder . . . sometimes called ‘irresistible impulse,’ [or] ‘moral insanity’ . . . .” The court did not want to excuse “acts otherwise criminal” merely because of “a morbid state of the affections or passions, or an unsettling of the moral system, the mental faculties remaining meanwhile in a normal, sound condition . . . .”29 A firm line, in other words, between insanity and ordinary evil must be maintained; and ordinary evil should never be condoned.

Over the years, legal scholars, as well as psychiatrist, argued the issue and, in general, found the state of the law more and more unsatisfactory. The “right-or-wrong” test seemed excessively simple-minded. Psychiatry, which, after all, took insanity as its special province, rejected the test

25 Daniel McNaughten (there are at least a dozen ways to spell the name, none of them totally canonical) was a young Scotsman who wanted to assassinate the British prime minister, Sir Robert Peel, in 1843, and shot and killed Edward Drummond, Peel’s private secretary, thinking he was Peel. McNaughten’s trial—and acquittal by reason of insanity—led the English judges to formulate the so-called “McNaughten Rules,” defining the scope of criminal insanity. R. Moran, Knowing Right from Wrong: The Insanity Defense of Daniel McNaughtan 1-2 (1981).

26 Daniel McNaghten’s Case, 10 Cl. & Fin. 200, 210, 8 Eng. Rep. 718 (H.L. 1843).


because it focused too narrowly on cognitive functions, on reasoning power. In 1954, the United States Court of Appeals for the District of Columbia, partly in response to academic criticism, struck out on its own, and launched its own corrective, the famous Durham rule. The essence of the rule was that a person “is not criminally responsible if his unlawful act was the product of mental disease or mental defect.”

The (intended) thrust of the Durham rule was to shift attention away from cognitive or other “tests” and open the door to a richer mix of considerations, in particular to give more weight to scientific testimony about mental illness. The court expected to usher in a more enlightened, rational regime—a regime of psychiatric justice. What Durham actually accomplished was quite different. The actual impact is not easy to measure; it was, after all, only a rule about instructions to the jury, with implications for admission of evidence. The power to decide remained with the jury. In any event, the doctrine was and remained controversial. In the end, the District of Columbia repudiated the Durham test and replaced it with a more modulated rule. The new standard—popular everywhere—is the so-called ALI rule, the formula of the American Law Institute in its Model Penal Code. This rule is in part a return to 19th century models; it echoes in some ways the McNaughten test itself.

Meanwhile, the insanity defense in general came under increased popular pressure. The trial of John Hinckley, who shot President Reagan, pleaded insanity, and was acquitted, “brought to a head a long-smoldering discontent” with the insanity defense. The insanity plea looked to many people like a loophole, a way of “permitting and even encouraging the exculpation of criminal defendants who are not really mentally ill ... and who deserve to be punished ...” In that atmosphere, it was easy to float proposals to get rid of the insanity defense altogether. In fact, what was proposed was not really outright abolition but what has sometimes been called the mens rea approach. There would no longer be an insanity plea, strictly speaking; the issue would be whether the defendant had enough mental equipment to form an intent to commit his crime. Intent, of course, is an element in the definition of a great many crimes.

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32 In United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972), adopting the ALI rule: “A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality ... of his conduct or to conform his conduct to the requirements of the law.”
Defendant’s mental status would also figure in sentencing. A few states, including Idaho and Montana, have taken the \textit{mens rea} line and can be (loosely) described as states that have abolished the insanity defense.

These complex, subtle developments obviously cannot be understood merely in terms of the history of psychiatry, nor even in terms of changes at the juncture of psychiatry and the legal profession. A major element in the political stew has been the unpopularity of medical or deterministic theories of criminal behavior—the yawning gap between two polar views of the self. This gap, to be sure, already existed in the 19th century. The issue emerged, for example, in the trial of Charles Guiteau, who killed President Garfield. Charles Guiteau’s behavior and language were such that, to the modern eye, he seems completely and hopelessly insane. Nonetheless, Guiteau was condemned to die. The jury (and the public) demanded no less. Guiteau had killed an American president, and he had to be held \textit{responsible} for this terrible act.

The Hinckley trial, of course, came out differently. For one thing, the President (Reagan) did not die of his wounds; for another, the jury took their instructions seriously, and did what law-and-psychiatry told them they must do. No one could have predicted the precise outcome of the trial, but perhaps the reaction to the outcome, once it happened, \textit{was} predictable: the outrage, the backlash, the cries to do something about the insanity defense. The Hinckleys of this world must not escape the \textit{label} of guilty, they must not escape the thunderous condemnation of law. And yet Hinckley \textit{had} escaped. A rogue and runaway doctrine had let him go. This event reinforced the widespread feeling that the insanity defense is wildly overused; that thousands of wicked malefactors go free and laugh at the law. A poll at the start of the Hinckley trial found that 87% of the population “believed that too many murderers were using insanity pleas to avoid jail.”

\begin{itemize}
\item Steadman, Callahan, Robbins & Morrissey, \textit{Maintenance of an Insanity Defense under Montana’s ‘Abolition’ of the Insanity Defense}, 146 AMERICAN J. OF PSYCHIATRY 357 (1989) (report on a study of Montana before and after the law.) There is evidence that after the change acquittals based on the insanity plea declined, but dismissals based on incompetence to stand trial increased.
\item Thus, to editorial writers in the newspapers, the “most alarming aspect” of the psychiatric defense of Guiteau was its “deterministic emphasis upon heredity. The acceptance of such theories would imply a corresponding decrease in the vitality of traditional emphasis upon individual responsibility.” ROSENBERG, \textit{THE TRIAL OF THE ASSASSIN GUITEAU} 288 (1968). (This book is a superb recreation of the case).
\item \textit{Caplan, supra} note 32.
\end{itemize}
Misconceptions, however, are social facts; and they do not arise out of thin air. No doubt there are a number of reasons why people are so convinced insanity as a defense is overworked. The mass media may be partly responsible. But surely one factor is unwillingness to accept theories that cut down on the notion of responsibility. The era of "self-control" is at an end, but people still believe in evil, as a fact, and as a freely chosen way of life. Those who choose to be evil must and should be held to account for their acts. In California, public outcry took the form of an attack on the doctrine of "diminished responsibility." The doctrine was abolished after the fiasco of the Dan White trial.40 This case had completely discredited the concept in California.41 The primacy of choice, the prevailing popular theories of responsibility, have been more influential, over time, in molding the shape of legal doctrine than arguments by and between men and women of medicine and science; or by and between them and the keepers of law.

A word is in order about a trend that seems to contradict the one here mentioned. In accident law—the law of torts—there has been an explosive increase in liability; and this leads to the charge that the public is inclined to disclaim responsibility altogether.42 Everybody is suing everybody; people do not take responsibility for the consequences of their acts; somebody else is always responsible. But "responsibility," as a legal and social concept, has a variety of meanings.43 The popular critique mixes up two of those meanings. I am "responsible" for an accident if I caused it; responsible also means liable, regardless of cause—if, for example, a parent must pay for damage done by a child, or a car owner must pay for the torts of someone who borrowed the car. A person who slips on the ice feels that somebody else must be responsible (in the money sense) precisely because she does not think of herself as responsible in the causal sense. Accountability is probably stronger than ever, but notions of causality—of "responsibility" in this other sense—have shifted rather dramatically over time.

40 Cal. Penal Code, § 25(a). The change came by way of an initiative. The text of the initiative tried to button up the new provisions against change. They were not to be amended except by a two-thirds majority in both houses or by a "statute that becomes effective only when approved by the electors." Cal. Penal Code, § 25(d).
41 Dan White shot and killed the Mayor of San Francisco, George Moscone, and Supervisor Harvey Milk, a leader of the gay community. White's lawyers argued that he was deeply disturbed, though not insane, and the outcome of the trial was "perceived to be so lenient that an estimated 5,000 people in San Francisco were provoked to protest." San Francisco Examiner Oct. 22, 1985, at 8, col. 5. The quote is from a newspaper article on Dan White's suicide, which occurred after he had been released from prison.
42 See R. LEMPERT & J. SANDERS, AN INVITATION TO LAW AND SOCIAL SCIENCE 20-22 (1986).
These remarks (about law and psychiatry; and about accountability) have been made from the outside, so to speak, from a sociological and historical standpoint. They have been explanatory and descriptive in the main. Issues of law and psychiatry, like legal issues generally, also have a strongly normative, ethical, human, and emotional cast. I do not mean to say that the debates about normative issues are meaningless or unimportant. They most certainly are not. These debates invoke concern about human lives and their meanings, they stir up our deepest feelings and beliefs. If anything, I meant to underscore that point. In fact, issues of law and psychiatry are too important, too vital, to be left to lawyers and psychiatrists. They demand historical and sociological explication precisely because they are not, and cannot be, purely issues of "science."

IV. Family Law

Changing concepts of the self have also played a strong role in the transformation of family law. Two hundred years ago, marriage was defined, socially, as a sacrament. It was under the domination and control of religious authorities; divorce was as good as unknown. A marriage was only superficially the union of two individuals. Of course it joined together a particular man and woman; but its social meaning radiated beyond the couple, and was in some sense independent of them. It was, very notably, an affair of the extended family.44

By the early 19th century, the secular element in marriage had become more prominent. Legal texts referred to marriage as a "contract,"45 sometimes specifically as a "civil contract;"46 and the language certainly gave expression to a conception rather different than the traditional one. In the United States, many states recognized as valid the so-called "common-law marriage," a marriage without ceremony, which was entirely consensual and contractual.47 But even in this period, the "contract" of marriage was a peculiar kind of contract. Unlike other contracts, it could not be rescinded by the parties. Getting into a marriage was easy; getting out was not. The law, generally speaking, did not favor divorce. In England, divorce was, basically, not available at all until 1857,48 and in the United States, divorce was not common even in those states (chiefly northern)

45 Thus James Kent, in Commentaries on American Law (2d ed., 1832) consistently refers to marriage as a contract, though of a special kind, since it is "one of the chief foundations of social order." Vol. II, p. 75.
46 1 W. BLACKSTONE'S COMMENTARIES 440 ("Our law considers marriage in no other light than as a civil contract").
47 "No peculiar ceremonies are requisite ... to ... marriage. The consent of the parties is all that is required ... ." J. KENT, supra note 44, at 86. See also M. GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 69-102 (1985). The common-law marriage, though there is some dispute on this point, was probably an American innovation.
which permitted judicial divorce and did not require a special act of the legislature to end a marriage.\textsuperscript{49}

This situation of scarcity did not last; the demand for divorce rose steadily in the 19th century. Moralists fulminated against it and fought divorce reform in the legislatures. Overall, they succeeded in preventing the most radical changes in divorce laws. But though the moralists won victories on the official level, they lost ground steadily on the level of actual legal behavior. The law on the books remained tough and unyielding for the most part; but underneath it was a shell, a charade, a facade. An epidemic of collusion overwhelmed the law of divorce, especially in states like New York, which permitted divorce only for adultery. A few states turned themselves into divorce mills, made divorce relatively easy, and tried to earn a dirty dollar or two from birds of passage in search of divorce.\textsuperscript{50} All along, the divorce rate steadily increased.

The underlying cause was a revolution in the nature of marriage itself. As the concept of the self slowly altered, marriage came to have a deeper, more personal meaning. Husbands and wives were supposed to fulfill each other's needs. Marriage was becoming a partnership, in which the role of each partner was to complete and enrich the life of the other.\textsuperscript{51} The new social meaning of marriage put additional strains and burdens on the institution; very notably, it created a demand for a way to end marriages, legally and legitimately. When the marriage failed to accomplish its exalted purpose, there arose a demand for consensual divorce. This demand was met, at least roughly and covertly, by the rise in collusive divorce, which took place from about 1870 on.\textsuperscript{52} As one writer put it in the 1950's, speaking about New York, "There is a strong probability that . . . divorces are collusive and perjurious."\textsuperscript{53}

In 1970, quite suddenly, no-fault divorce burst on the scene. The first no-fault law was enacted in California; versions of no-fault soon swept the country.\textsuperscript{54} Today virtually every state provides for divorce without


\textsuperscript{50} The divorce business became, in the 20th century, an important feature of the economy of Nevada.

\textsuperscript{51} See generally W. O'NEILL, DIVORCE IN THE PROGRESSIVE ERA (1967).

\textsuperscript{52} See sources cited supra, note 49.


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fault, at least as an option to the parties. No-fault, in its pure form, eradicates the sham and collusion that made consensual divorce a matter of shame for the legal profession. Indeed, no-fault goes a step beyond mere consent. In practice, under a no-fault statute, either party can get out of a marriage without giving a reason, except the bare fact: "I want out."

No doubt, there were many factors behind this radical change in family law. But a major role must be assigned to the rise of expressive individualism, that is, to evolution in the concept of the self. In contemporary society, as we have seen, marriage has become a strictly individual matter; it is a partnership, whose purpose (among other things) is to provide a matrix within which a person can be happy, can freely develop and "grow." Thus marriage lies within the circle of the parties' untrammeled choices; it cannot be imposed on men and women against their will, nor prolonged against their will. The vice of the older system was that it resisted this concept of marriage, and locked the couple into their marriage. The only way out was a lawsuit in which an innocent party complained of desertion, cruelty, adultery, or the like. It rested on the firm belief that society had an interest, above and beyond the happiness of this man and this woman, in keeping the marriage alive.

Collusive divorce had already undermined the fault principle, but it did so in a way that left standing the pretense of fault. Divorce was not, in legal theory, a matter of free, personal choice. It was for this reason, perhaps, that the collusive system was ultimately doomed to die. In an age which exalted the individual self as a free, choosing, self-making entity, tough divorce laws (even as fictions) were an anachronism; they had to be eliminated.55

The new concept of the self pervades and reshapes all of family law, including the law of children and children's rights. In general, family law has evolved in one particular direction: toward fragmenting the family, legally speaking, into separate individuals. Historically, family law empowered families, rather than individuals; which usually meant, in practice, giving the father despotic rights within his family domain. This meant that parents on the whole had important power over children, power to control and dispose of their lives.56

Parental power has of course not disappeared, but it has definitely weakened. Developments in family law have been, in part, camouflaged by the (apparent) growth in the countervailing power of the state. Public authorities can intervene in family affairs and assert a social interest— in cases of child abuse, for example, or delinquency. On the surface, the increased power of the state seems to clash with modern individualism. Moreover, state intervention has drawn considerable criticism, and not

55 The collusive system as it operated from 1870 to 1950, had, to be sure, many other vices: it was messy, corrupt, expensive, and irrational. But these faults, which inhered in the system from start to finish, never provided reformers with enough muscle to overcome the moralists who were opposed to "easy" divorce— until 1970, that is, when the old system collapsed like a house of cards.

56 See M. Grossberg, supra note 46, at 300.
only from those who defend the traditional family.\textsuperscript{57} State intervention can be and often is abused, particularly in so sensitive a domain as the family. But state power, when it can be justified at all, must be seen basically as a proxy for the power of individuals who, for various reasons, are unable to look out for themselves. In short, debates over children’s rights, whatever form they otherwise take, are necessarily framed within the world-view that makes up modern legal culture.

V. A CONCLUDING WORD

The basic theme of this essay can be wrapped up in one small package: society, and law, have moved in the direction of expressive individualism over the last century or so, especially in the last few decades. Whatever the sources of this change “outside” the legal system, its consequences “inside” have been comprehensive and profound. They have been felt in every field of law, from child custody through tort law, civil rights, and civil liberties.

This has not been in any way an essay on policy. It has not been my intention to pronounce on these changes; to label them good, bad or indifferent. Nor have I advocated changes in law, or suggested directions for policy. This has been an attempt at understanding, at decoding and translating. The basic theme has been a theme of legal culture. The key assumption is that legal culture (rather than legal tradition, or doctrine, or the lawyers themselves) acts as the immediate source of law, the impetus for legal stasis or change. Social forces, including norms of general culture, in turn underpin and mold the legal culture. In terms of scholarly strategy, the basic message is a call, or plea, for interdisciplinary study of law; for invoking empirical, cultural, historiographic techniques, as an aid in reading the runes of legal order.