IMAGINATION AND CHOICE

Anne C. Dailey*

Abstract

Contemporary legal scholarship on individual decisionmaking draws primarily from cognitive psychology. This Article argues that this field of behavioral legal scholarship should be broadened to include modern psychoanalytic ideas about the processes of individual decisionmaking. The basic perspective of psychoanalytic psychology is largely compatible with recent cognitive research on decisionmaking. However, a psychoanalytic perspective adds valuable nuance and complexity by exposing for scholarly examination certain essential attributes of individual decisionmaking left unaddressed by cognitive psychology. As a first step in bringing modern psychoanalytic ideas to the attention of contemporary behavioral legal scholars, this Article examines imagination, a psychological attribute central to individual decisionmaking and a fundamental feature of psychoanalytic psychology. Contemporary legal scholarship recognizes the relatively narrow idea of a cognitive imagination, one which encompasses processes such as representation and memory as well as certain cognitive distortions and biases in processing information such as the “availability heuristic.” In contrast, imagination as understood from a psychoanalytic perspective is the creative capacity to express one’s personal wishes, needs, and desires in words and images. Imagination is central to decisionmaking because, however trivial or important the context, individual choice always depends fundamentally on consideration of alternative future courses of action and their consequences. Imagined alternatives must be contemplated and mentally tested. In ideal circumstances, unexamined ideas and feelings about future events are made conscious and concrete. For this reason, studying the origins and mechanisms of imagination – its relationship to reality testing, its sources in early childhood, and its unconscious operations – is essential if law is to develop a comprehensive understanding of individual choice. An example of the value of psychoanalytic psychology to contemporary legal scholarship is provided by examining the law governing the enforceability of prenuptial agreements. As this discussion shows, psychoanalysis cannot provide easy answers to difficult legal and policy questions. No psychology can. But a psychoanalytic perspective, in conjunction with research from the cognitive sciences, does provide a richer understanding of the assumptions about individual choice upon which many laws and legal policies are based.

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Anne C. Dailey*

We need to understand not only how people reason about alternatives but where the alternatives come from in the first place.

Herbert Simon¹

That all-consuming, ceaseless process of creation is what reasoning and deciding are about . . .

Antonio R. Damasio²

Individual choice is a central feature of the psychological portrait drawn by every established school of thought in modern American jurisprudence. Liberal theorists envisage a society populated by citizens with the ability to make autonomous choices about how to lead their lives. Law and economics scholars emphasize the importance of rational decisionmaking to a well-ordered society. Communitarian-minded scholars acknowledge that individuals must be free to accept or reject the affiliations and values into which they are born. Even critical legal scholars seek to establish the conditions under which free choice is possible. Rare indeed is a vision of our modern legal system that does not emphasize to some extent the reasoned decisionmaking of individual adult citizens. Of course, no sensible person contends that pure rationality does or should

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capture the full range of human thought and behavior. But reasoned choice is the
normative model, and when legal theorists refer to rational or autonomous choice, they
generally mean to evoke a normative framework for describing the process by which
individuals make important decisions about their own lives or the life of the collectivity.

At a more doctrinal level, modern legal scholars have demonstrated substantial
interest in piercing the conceptual surface of choice to inquire into its actual
psychological workings. In areas such as criminal insanity and civil incompetency,
scholars have traditionally worked to identify the psychological line separating rational
from irrational thought. More recently, this empirical psychological investigation has
expanded its mission well beyond the realm of psychopathology. What distinguishes
this new behavioral legal scholarship is its focus on the workings of normal decision-
making processes and the relevance of this psychological data to legal doctrines in a wide
range of fields, including business law, employment law, family law, jury
decisionmaking, products liability law, evidence law, and jurisprudence.

The new behavioral legal scholarship on individual decisionmaking draws
primarily from cognitive psychology. The cognitive research of greatest interest to
behavioral legal scholars shows the existence of predictable and systematic distortions, limitations and biases in cognitive thinking, particularly in the ability to reason under conditions of uncertainty.5 This research is intended to provide a testable, simplified and scientific framework for understanding human decisionmaking in the real world. Its goal is to make the process of decisionmaking more precise and therefore more rational, to reduce and fine tune mistakes in judgment. Most legal scholarship drawing on cognitive psychology aims to develop a blueprint for fixing mistakes or “debiasing” individuals though doctrinal and legislative reform.6 Emotions are also studied for their effect on cognitive thinking. Thus, behavioral legal scholarship is moving in the direction of establishing a paradigm of individual decisionmaking in law that puts cognition at the center of mental activity.

This Article offers an alternative view on individual choice drawn from psychoanalytic psychology. This psychoanalytic perspective supplements the cognitive paradigm and is largely consistent with cognitive research.7 One central point of intersection between cognitive and psychoanalytic psychologies is their shared effort to identify the ways in which human thinking departs from rational thought processes.8 But by delving more deeply into the realm of irrationality, a psychoanalytic perspective

6 Jolls, et al.
8 Other points of intersection can be named. See, e.g., Kihlstrom, Psychodynamics and Social Cognition – Notes on the Fusion of Psychoanalysis and Psychology, supra note xx at 687 (“Like cognitive psychology, psychoanalysis is interested in how people form mental representations of objects and events, store them in memory, retrieve them as needed, and manipulate them during reasoning and problem solving.”).
brings to light features of adult psychology that are largely overlooked in current law and psychology scholarship. Many of these unseen and unexamined aspects of human psychology are directly relevant to the processes and outcome of individual decisionmaking, including, for example, unconscious mental conflict and motivation, ego defenses such as repression and denial, transference, regression, and unconscious guilt. Imagination is another such central feature of individual decisionmaking, and it is the focus of this Article.

Broadly defined, imagination is the capacity to conceive of objects, events or experiences not presently available to the senses. From a psychoanalytic perspective, imagination can be understood to signify more specifically the mind’s capacity for envisioning and expressing desires, needs, and wishes in words and images. Because conceiving of alternatives to present circumstances is a necessary component of decisionmaking, imagination is what – at least in significant part – makes individual choice possible. Imagination gives the individual the tools to generate and weigh alternatives to present reality. Imagination equips the individual to recognize the existence of alternative possibilities in the world. In almost any decision-making context, however trivial or important, alternative future courses of action must be considered and imagined consequences assessed. Imagined alternative scenarios must be contemplated.

Historically, psychoanalysis has been an important influence on both legal doctrine and theory, but since the mid-1960s psychoanalytic psychology in law has been in decline. A handful of scholars continue to apply psychoanalytic principles to law. See, e.g., Peter Brooks, Troubling Confessions (2001); Amy Adler, Girls! Girls! Girls!: The Supreme Court Confronts the G-String, 80 N.Y.U. Law Rev.1108 (2005); Anne C. Dailey, Striving for Rationality; Anne C. Dailey, The Hidden Economy of the Unconscious; Martha Grace Duncan, “So Young and So Untender”: Remorseless Children and the Expectations of the Law, 102 Colum. 1469 (2002); Elyn Saks; Susan Schmeiser. See also American Imago, Special Issue on Law and Psychoanalysis (Anne Dailey, ed. Forthcoming 2007). Some legal scholars also draw on Lacanian psychoanalytic ideas, although that approach is not examined in this Article. See e.g., Peter Goodrich, Oedipus Lex: Psychoanalysis, History, Law (1995).

The term imagination is not commonly employed by psychoanalysts, who prefer Freud’s term “fantasy.” See The Standard Edition of the Complete Psychological Works of Sigmund Freud (James Strachey, ed.). For purposes of this paper, the two terms are used interchangeably.
and mentally tested. In ideal circumstances, unconscious scenarios about future events are made conscious and concrete. For these reasons, understanding the origins and operations of imagination is essential for a comprehensive picture of individual decisionmaking in law.

The essential connection between imagination and decisionmaking has been noted by a few scholars addressing the economic, political and social aspects of choice. The behavioral economist Herbert Simon identified the importance of imagination in generating a set of alternatives necessary for rational choice in an article on rational decisionmaking written in 1985. Simon writes: “We need to understand not only how people reason about alternatives but where the alternatives come from in the first place.”11 He continues by asking: “But is such a treatment possible? Are we not treading upon the sacred precincts of creativity? Indeed we are; but I think the precincts are no longer sacrosanct.”12 The political philosopher Michael Walzer likewise recognizes that authentic moral and political choice – even the choice to maintain the current state of affairs – depends on the ability to envision alternatives to reality. Walzer describes the importance of what he calls “imaginative longings” that allow us to break loose from the involuntary associations into which we are born: “[W]e imagine ourselves breaking away and so are enabled to adopt a critical attitude toward what we are actually doing.”13 Similarly the psychologist Jerome Bruner shows that to live without imaginative longings is to be unable to bridge the gap between what is and what is possible, thereby leaving a person fully and only in the present, able to react to real circumstances but unable to

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11 Simon, Human Nature in Politics, supra note xx at 302-03.
12 Id.
13 Walzer at 12
direct the course of his or her life.\(^{14}\) Psychoanalysis brings clarity to this fundamental insight about choice: the ability to conceive what is not there represents an essential feature of individual decisionmaking, and it is necessary to study imagination in order to understand fully the process of individual choice.

Part I of this Article provides some background on the longstanding tension within psychology between Enlightenment views on the supremacy of reason and the contrasting Romantic appreciation for the powers of the creative imagination. Cognitive psychology does not ignore imagination altogether. Yet its perspective on imagination is relatively narrow, focused on processes such as representation and memory, and cognitive distortions and biases in processing information such as the “availability heuristic.” Moreover, it is not enough in this context to study emotions and their effects on cognition, because emotions do not get at the creative aspects of choice. By contrast, contemporary psychoanalytic psychology holds out the possibility of supplementing the insights of cognitive psychology with a psychoanalytic appreciation for the creative, Romantically-imbued elements of mind, its processes and its limitations. The fit is not perfect, of course. The two fields traditionally follow different methodologies, one experimental and the other clinical, and psychoanalysis is far less optimistic about the powers of rational thought or behaviorist conditioning to control human activity. Nevertheless, the psychoanalytic approach to decisionmaking presented in this Article aims to relax formal disciplinary boundaries to reveal the areas of commonality between the two fields and the relevance of this commonality for law.

Part II provides a psychoanalytic perspective on the role of the creative imagination in individual decisionmaking, along with cognitive and neuroscientific

\(^{14}\) Jerome Bruner, Actual Minds, Possible Worlds (1985).
research that lends support to that perspective. Three aspects of imagination are considered: the process of reality testing, the importance of early childhood experience, and the influence of unconscious operations. Section A shows how reality testing – the process of negotiating the psychological boundary between subjective meaning and objective reality – is a central aspect of decisionmaking which is made more difficult by the transference of unconscious beliefs and feelings onto one’s present thinking. Section B describes how early childhood experience operates to structure and color present imaginings about the world through the mechanisms of internalization and transference. Finally, the discussion in Section C examines the related influence of unconscious wishes, needs and desires on the process of conscious choice, and the particular back and forth between the less rational unconscious primary thought processes and conscious rational thinking. The place of the peculiar phenomenon of regression in mental life is considered here.

Part III explores the implications for law of a psychoanalytically-informed view of imagination in individual decisionmaking. Of course, not all legal doctrines would necessarily benefit from deeper psychological insights into choice, but many areas of law would. As a case study, this Part examines the implications of a psychoanalytically-informed view of imagination for the law governing prenuptial contracts. Cognitive psychology confirms that most individuals are overly optimistic about the chance that their marriage will not fail. But undue optimism is only half the picture. Psychoanalysis explains what is missing from the diagnostic assessment of “optimism” made by the cognitive psychologists, and suggests a doctrinal direction for the law that would otherwise remain unexplored. Beneath the surface of the prospective spouses’ over-
optimism lurks its opposite; the truth is that most individuals experience profoundly ambivalent, fearful and uncertain feelings about marrying. This ambivalence is sometimes unrecognized as such, and any acknowledgement by the parties is typically muted and transient. Part III explores this ambivalence as it may be reflected in the choice to enter into a prenuptial agreement. Taking into account the resistance that most individuals experience in regard to ambivalence might result in laws imposing stronger procedural requirements for the enforceability of prenuptial agreements or subjecting such agreements to equitable fairness standards at the time of divorce. As the discussion in Part III shows, psychoanalysis cannot provide easy, comprehensive answers to difficult legal and policy questions. No psychology can. But a psychoanalytic perspective does, in conjunction with research from the cognitive sciences, provide a richer understanding of the assumptions about individual choice upon which many laws and legal policies are based.

I. Behavioral Legal Scholarship and Imagination

A. A Brief History

Legal scholarship that directly addresses imagination is uncommon, but it does exist. Susanna Blumenthal has described how common law judges in the nineteenth century drew on romantic ideas about the creative imagination in conceptualizing the process of common law decisionmaking. 15 Oliver Wendell Holmes’s legal positivism reflected a deeper romantic appreciation for the imaginative, often irrational, elements of the human mind. 16 In the 20th century, Jerome Frank drew on psychoanalytic ideas about

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imagination in describing the distorting effects of infantile wishes and fantasies on the decisionmaking of legal actors and judges.\(^\text{17}\) James Boyd White produced a casebook in the early 1970’s entitled “The Legal Imagination” in which he explored the linguistic, creative dimensions of law.\(^\text{18}\) More recently, in her book *Poetic Justice*, Martha Nussbaum argues that, because imagination is what allows us to empathize emotionally with the suffering of others, it is central to achieving a morally-just legal system.\(^\text{19}\) Jed Rubenfeld argues for a constitutional theory of the copyright clause that recognizes and protects, in his words, “the freedom of imagination.”\(^\text{20}\)

Evident in even this small sample of writings is an association between imagination and the creative workings of the human mind. This association poses obvious problems for an ideal of legal decisionmaking based on reasoned thinking and rational deliberation. The Oxford English Dictionary defines “to imagine” as “[to form] a mental concept of what is not actually present to the senses.”\(^\text{21}\) This basic definition of imagination, to conceive in one’s mind something not present to the senses, reflects the close linguistic tie between the imagination and the imaginary. To imagine in the creative sense is to abandon, however briefly, the external world. To imagine is usually, to some degree, to engage in counter-factual thought. Upon first consideration, then, it is easy to see how to think imaginatively would be viewed as antagonistic to the concept of individual choice in American law. To the extent the imagination operates on what does not presently exist in reality, it seems to be a creative endeavor at odds with an ideal of

\(^{17}\) Jerome Frank, Law and the Modern Mind (1930).  
\(^{19}\) Martha C. Nussbaum, Poetic Justice: The Literary Imagination and Public Life (1997).  
\(^{21}\) OED
legal decisionmaking directed to making choices in the real world rather than in private fantasy.

The distrust of imagination has roots in Enlightenment ideas about human nature. At the risk of oversimplifying, many Enlightenment philosophers viewed imagination as inferior to what they considered to be the higher processes of reason. They tended to disdain imagination to the extent this form of thinking failed to follow the laws of empirical inquiry and rational thought. In contrast, many Romantic writers conceived of imagination as an innate capacity for grasping the transcendent truth of subjective experience and the natural world. To the Romantics, imaginative capacities such as “the sympathetic imagination” provided greater knowledge of the reality of others’ suffering, thus allowing individuals to apprehend reality in a deeper, more emotional way. The poet Wordsworth, for example, warned of the distorting, even destructive, effects of rational inquiry on imaginative truth. The Romantic view of the creative imagination had its parallels in certain religious and philosophical traditions that considered imagination to be the highest faculty for perceiving God or truth.

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23 Charles Taylor, Sources of the Self 368 (1989) (“Against the classical stress on rationalism, tradition, and formal harmony, the Romantics affirmed the rights of the individual, of the imagination, and of feeling.”).
24 The term Romantic as used in this Article is intentionally broad. Cf. Arthur O. Lovejoy, On the Discrimination of Romanticisms, in Essays on the History of Ideas 228, 232 (1948) (“The word ‘romantic’ has come to mean so many things that, by itself, it means nothing.”).
25 [Abrams: “the sympathetic imagination” in empirical and associationist morality Shelley p. 130]
26 “Sweet is the lore which Nature brings;/Our meddling intellect/Mis-shapes the beauteous forms of things:/We murder to dissect.” William Wordsworth, The Tables Turned, reprinted in Romantic Poetry and Prose 129 (Harold Bloom & Lionel Trilling, eds. 1973).
27 See Kirchner
Romantic perspective, then, imagination served to supplement sense perceptions and gave emotional and spiritual depth to knowledge of the natural world.²⁸

Developments in the field of psychology over the last century reflect a back and forth between Enlightenment and Romantic views on imagination, and this back and forth has reverberated in legal scholarship over this same period. Early in the twentieth century, behaviorism and psychoanalysis battled for supremacy in psychology departments and medical schools, and, for a while at least, behaviorism prevailed. Behaviorism claimed the ground of empirical science while psychoanalysis, with its focus on unconscious wishes and fantasies, displayed a strong affinity with Romantic ideas.²⁹ The early dominance of behaviorism was reflected in the work of legal realists from the period, many of whom used behaviorism as a guide to legal policy.³⁰ By mid-century, the pendulum had swung, and psychoanalysis eclipsed behaviorism in both the academy and the consulting room. Jerome Frank established a psychoanalytic approach to law early on with his seminal 1931 book *Law and the Modern Mind*. In the thirty years following World War II, the popularity of psychoanalysis was reflected in legal

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²⁹ See Weston, *Scientific Legacy*, supra note xx at 335 (“As the most comprehensive experimental alternative to psychoanalysis, behaviorism dominated academic psychology (particularly in the United States) through the 1950s and rejected the notion that unconscious processes (or even conscious processes) could play any causal role in human behavior.”). Freud considered himself an empirical scientist, and his interpretation of the latent meaning of dreams and symptoms followed a kind of rational logic, but the basic tenets of psychoanalysis were not open to empirical testing or rational proof. Moreover, psychoanalysis was interested in the unconscious desires that motivate human beings and the way in which the mind creatively expresses these desires through dreams, fantasies, and symptoms. In contrast, behaviorism disdained consciousness altogether.

scholarship on the insanity defense, child custody, and jurisprudence. Indeed, by the end of this era, psychoanalysts were even appointed to law school faculties.

With the rise of cognitive psychology in the latter part of the 20th century, we are witnessing the broad social, cultural and intellectual revival of empirical psychology and a corresponding decline in the study of the imaginative realm of desires and fantasies. The “cognitive revolution” in psychology which lies behind these developments had its roots in the scientific advances in communications, engineering, computer programming, artificial intelligence, and linguistics that came after World War II. Cognitive research focuses on human information processing, including perception, memory, computation, judgment, attention, language, problem-solving and related processes in the area of decisionmaking, all designed to understand “the kinds of information we have in our memories and the processes involved in acquiring, retaining, and using that information.” The field of cognitive psychology reflects a view of the human mind as operating according to structures, rules and plans, much like the software of a computer processing system. Up until the late 1980s, cognitive psychology focused on conscious

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31 Jerome Frank; Goldstein, Freud and Solnit; psychoanalysis and law casebook.
32 Alan Stone, Harvard; Jay Katz, Yale.
33 See Weston, Scientific Legacy, supra note xx at 335.
35 Wessells, supra note xx at 1-2. Ulric Neisser, a leader in the field of cognitive psychology, defines subject of study as “all the processes by which the sensory input is transformed, reduced, elaborated, stored, recovered, and used.” Ulric Neisser, Cognitive Psychology 4 (1967).
36 See Howard Shevrin, et al., Conscious and Unconscious Processes: Psychodynamic, Cognitive, and Neurophysiological Convergences 51 (1996) (“[T]he computational operations of the computer are basic to most views of how cognitive processes work.”).
mental processes. In 1987, John Kihlstrom announced the existence of the cognitive unconscious, which heralded a new era of investigation.

While cognitive psychology reflects a pendulum swing back toward empiricism, cognitive psychology itself actually combines elements of both behaviorism and psychoanalysis. Like behaviorism, cognitive psychologists carry out experimental studies and evaluate their findings in light of scientific standards. But cognitive psychology also departs from the principles of strict behaviorism to the extent researchers in the field study consciousness, a realm that behaviorists find irreducibly subjective and unsuitable for scientific study. And in recent years, as discussed in greater detail below, cognitive scientists have set their sights on unconscious mental processes. Thus, to some extent, cognitive psychology occupies a middle ground between the poles of psychoanalysis and behaviorism, not quite fully in either camp. This ambivalent historical stance opens the door to a rapprochement, as discussed more fully below, between the more creative, Romantic interests of psychoanalysis and the cognitive orientation of empirical psychology.

B. The Cognitive Imagination

In the 1990s, legal scholars became interested in cognitive psychology. The area of greatest interest to legal scholars was experimental work being carried out by cognitive psychologists and economists that demonstrated the limitations, biases and errors in individual information processing. The cognitive distortions and biases under study include the availability heuristic, the hindsight bias, self-serving biases such as over-

37 See Weston, Scientific Legacy, supra note xx at 335.
optimism, affect heuristics, and reference point biases such as loss aversion, the endowment effect, framing effects and anchoring biases. Law and economics scholars were the first to follow in the steps of the cognitive researchers and economists, but in a relatively short period of time a broad range of legal scholars has produced an impressive array of work on the implications of bounded rationality for law, including, as discussed earlier, business law, employment law, family law, jury decisionmaking, products liability law, evidence law, and jurisprudence. The appeal of this scholarship to legal thinkers is not unrelated to Enlightenment ideals. Experimental cognitive psychology provides a verifiable and simplified framework for understanding human decisionmaking in the real world. Its quantified data supply a blueprint for laws and public policies to “debias” individuals through procedural and substantive legal reforms. And it reaffirms the core Enlightenment paradigm of reason.

Although in many ways contemporary legal scholarship on cognition exhibits traditional Enlightenment values, contemporary cognitive scientists do not denounce imagination. Many of the studies carried out by cognitive researchers involve what we may call the “cognitive imagination,” an aspect of mental life that is distinct from the creative imagination favored by the Romantics and psychoanalysts but which nevertheless involves imagination in the broad sense of the term. The ancient philosophers understood that the existence of a mental representation implies powers of imagination such as perception and memory. At a basic level, for example, imagination

39 Cites
40 See supra, Introduction.
41 See Cass R. Sunstein, Behavioral Analysis of Law, 64 U. Chi. L. Rev. 1175, 1175 (1997) (noting that research in cognitive psychology offers “new and better understandings of decision and choice”).
43 For discussion of the role of imagination in Enlightenment thought, see Engell, The Creative Imagination, supra note xx.
functions as memory by allowing the mind to represent images and events once perceived but which are no longer present to the senses.\textsuperscript{44} Kant went beyond mere representation in identifying the cognitive imagination as one of the six innate faculties of mind essential to the rudimentary process of synthesizing mental representations into a coherent whole. The 19\textsuperscript{th} century associationist psychologists similarly accorded imagination a role to play in the integration of sense perceptions into more complex mental ideas.\textsuperscript{45} More recently, George Lakoff and Mark Johnson have emphasized the importance of “conceptual metaphors” to the brain’s basic cognitive processes.\textsuperscript{46} Legal scholars such as Steven Winter highlight the importance of imagination to basic cognitive operations such as categorization, metaphor, metonymy, and cognitive schemas.\textsuperscript{47}

Some of the work carried out by cognitive researchers focuses on the mistakes people make in imaginatively predicting the future under conditions of uncertainty. Psychologists have identified what they call the availability heuristic, which is a mental shortcut that can produce mistakes in imaging future outcomes.\textsuperscript{48} The availability heuristic is defined as “a pervasive mental shortcut whereby the perceived likelihood of any given event is tied to the ease with which its occurrence can be brought to mind.”\textsuperscript{49} Many instances of bias in decisionmaking due to the availability heuristic have to do with memory retrieval, for example, where occurrence of a particular event is frequent or

\textsuperscript{44} The root of the word imagination, from the Latin “imago,” originally “referred to portraits of ancestors which were placed in Roman homes or carried in family funeral processions.” Mayes 26-27

\textsuperscript{45} See Dailey, Holmes and the Romantic Mind, supra note xx.

\textsuperscript{46} George Lakoff & Mark Johnson, Metaphors We Live By (1980); see also Jerome Feldman, From Molecule to Metaphor

\textsuperscript{47} Steven Winter, A Clearing in the Forest: Law, Life and Mind 6 (2001).


particularly salient.\textsuperscript{50} Sometimes individuals must evaluate a particular option based on imagining its occurrence. Tversky and Kahneman observe the following about imaginability:

> Imaginability plays an important role in the evaluation of probabilities in real-life situations. The risk involved in an adventurous expedition, for example, is evaluated by imagining contingencies with which the expedition is not equipped to cope. If many such difficulties are vividly portrayed, the expedition can be made to appear exceedingly dangerous, although the ease with which disasters are imagined need not reflect their actual likelihood. Conversely, the risk involved in an undertaking may be grossly underestimated if some possible dangers are either difficult to conceive of, or simply do not come to mind.\textsuperscript{51}

The availability heuristic thus explains how individuals may underestimate or overestimate the probability of an event happening based on imagined scenarios or scripts. As Tversky and Kahneman note, “[t]he plausibility of the scenarios that come to mind, or the difficulty of producing them, then serve as a clue to the likelihood of the event.”\textsuperscript{52} Experimental research has confirmed the effects of imagined behavioral scripts on personal expectations and intentions.\textsuperscript{53}

The availability bias captures a failure in imagination of a particular kind, which is to say a failure in the operation of the mind’s cognitive capacity for judging the risk of an event happening. But it must be emphasized that, from a cognitive psychological perspective, a bias in imagining is not a failure in the creative process of expressing one’s desires, needs or wishes. Imagination as utilized in the service of cognitive thinking, whether conscious or unconscious, does not directly relate to the creative process of

\textsuperscript{50} Tversky & Kahneman, Judgment Under Uncertainty, supra note xx at 1127.
\textsuperscript{51} Id. at 1128.
\textsuperscript{52} Tversky & Kahneman, Availability, supra note xx at 177.
generating and assessing the alternatives necessary for choice.\textsuperscript{54} The cognitive imagination is, in the language of cognitive psychology, more procedural than substantive.\textsuperscript{55} It does not encompass the mind’s ability to create alternatives to reality from wishes, needs and desires, nor does it address the factors which can interfere with this creative process.

\textit{C. Emotional Influences on Cognition}

As far back as Plato, philosophical thinkers have described the threat that the passions pose to reason.\textsuperscript{56} The tension between reason and emotions has similarly preoccupied legal thinkers for centuries. The federalist papers expressed the Framers’ Enlightenment concern with establishing a constitutional structure of government that could contain the passions of the majority. Justice Holmes viewed law as an institution designed to constrain the more Romantic instinctual desires of man for revenge.\textsuperscript{57} In the early nineteenth century, the Supreme Court resisted a strong interpretation of the First Amendment in part out of fear of the unruly passions of the crowd.\textsuperscript{58} Juries are instructed to exclude sympathy from their decisionmaking. Reasonable persons and rational actors embody a long-standing view that law is properly the domain of reason, and that legal decisionmaking should be free from the irrational and distorting effect of emotions.\textsuperscript{59}

\textsuperscript{54} Jerome Bruner notes that imagination contributes to scientific thinking in that it “leads to good theory, tight analysis, logical proof, sound argument, and empirical discovery guided by reasoned hypothesis.” Bruner, supra note xx at 13.

\textsuperscript{55} See infra Part II.C

\textsuperscript{56} Plato, The Republic, Book X, Part I. For more recent explorations of this topic, see Elster; Isaiah Berlin; Lear; Ronald de Sousa, The Rationality of Emotion (1987).

\textsuperscript{57} See Dailey, Holmes and the Romantic Mind, supra note xx.

\textsuperscript{58} See cases; Geoffrey Stone.

\textsuperscript{59} For a collection of essays devoted to emotions and the law, see The Passions of Law (Susan Bandes, ed., 1999).
In the beginning, cognitive psychology excluded emotions from its study of mind, in part because emotional biases were viewed as belonging to the realm of social psychology. At the time, the idea of a purely cognitive bias was novel. In recent years, however, cognitive psychologists have broadened their empirical investigation of individual decisionmaking to inquire into the relationship between emotions and cognitive thinking. To some extent, these researchers have confirmed the Enlightenment view of the dangers that emotions pose to logical, rational thought.

It is widely accepted among empirical psychologists, for example, that emotions can lead to self-destructive behavior. Researchers have also studied how anger can have an incidental influence on decisionmaking by leading the individual to punish the wrong person, to be indiscriminately punitive, or indiscriminately optimistic, or careless in thought or eager to act, a phenomenon cognitive researchers call the “appraisal tendency.” Daniel Kahneman concludes that “automatic affective valuations – the emotional core of an attitude – is the main determinant of many judgments and behaviors.” Research into the effect of emotions on decisionmaking, or “hot

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60 Ralph Adolphs, Emotions Are Really Social, Am. J of Psychology 472, 472 (Fall 2000).
62 Id.
63 A convergence of interest between behavioral legal scholars and those doing work on law and the emotions also seems to be taking place. Law and emotions scholars study the role of affects such as disgust, fear and anger in legal decisionmaking as well as emotional mechanisms such as shame and guilt. For a helpful review of the contemporary literature on law and emotions, see Terry A. Maroney, Law and Emotion: A Proposed Taxonomy of an Emerging Field, 30 Law & Hum Behavior 119 (2006). While most scholars are oriented in one direction or the other, either toward cognition or emotions, the overall picture is increasingly one of integration.
64 George Loewenstein & Jennifer S. Lerner, The Role of Affect in Decisionmaking, in Handbook of Affective Science 619, 635 (R. Davidson, H. Goldsmith, & K. Scherer eds., 2003) (“A tendency to override deliberations – to cause people to behave self-destructively – has been well documented.”).
65 See Jennifer S. Lerner & Larissa Z. Tiedens, Portrait of the Angry Decision Maker: How Appraisal Tendencies Shape Anger’s Influence on Cognition, 19 J. of Behavioral Decisionmaking 115, 116 (2006) (“Once activated, anger can color people’s perceptions, regardless of whether the decisions at hand have anything to do with the source of one’s anger.”).
66 See Kahneman, Nobel Prize Lecture, supra note xx at 470
cognition,” has also emerged in recent years, showing that individuals in an emotional state do a poor job of predicting how they will feel or behave when the emotions subside.\textsuperscript{67} Social cognitive psychologists study the ways in which “implicit affects” unconsciously distort decisionmaking along racial, gender and other lines.\textsuperscript{68} Important work on the effect of mood and emotional contagion on decisionmaking is also being carried out.\textsuperscript{69} Overall these studies confirm the traditional view that emotions can shape cognitive thinking and behavior in undesirable ways.

But despite the fact that studies confirm the antagonism between reason and emotion, contemporary research also shows the ways in which the two work in concert.\textsuperscript{70} This research reveals that cognition utilizes emotions in ways that further rational thinking. For example, emotions have been shown to serve an adaptive role by enabling an individual to focus on important events and to react quickly.\textsuperscript{71} Antonio Damasio shows how emotions serve as “somatic markers” necessary for good decisionmaking.\textsuperscript{72} Researchers have explored the cognitive component of emotions, emphasizing the evaluative aspect of certain emotional responses to the environment.\textsuperscript{73} Legal scholars, too, explore how emotions such as shame and disgust may prove important to the moral ends of law.\textsuperscript{74}

\textsuperscript{67} See Loewenstein & Lerner, The Role of Affect, supra note xx at 628-29.
\textsuperscript{70} Loewenstein & Lerner, The Role of Affect, supra note xx at 619.
\textsuperscript{71} Lerner & Tiedens, Portrait of the Angry Decision Maker, supra note xx at 119.
\textsuperscript{72} Damasio 1994; Frank 1988; Isen 1993
\textsuperscript{73} Adolphs at 474. For a critique, see Richard Posner, Emotion Versus Emotionalism in Law, in Passions of Law, supra note xx at 309, 310-11.
\textsuperscript{74} See, e.g., Dan M. Kahan, The Progressive Appropriate of Disgust, in Passions of Law, supra note xx at 63.
Cognitive researchers are also beginning to study what are called emotion scripts or prototypes. These scripts or prototypes are mental representations of the self, others and relationships laid down in early childhood.\textsuperscript{75} Although everyone experiences early childhood amnesia, cognitive psychologists explain that experiences during this time are encoded and stored at unconscious levels not accessible to conscious recall although, as described below, early, implicit, preverbal experiences form the basis for prototypes that have long-term effects on the individual’s view of himself and others.\textsuperscript{76}

The study of emotions and their effect on cognition might seem to be a natural fit with ideas about the creative imagination. Indeed, emotions and imagination often work together. Imagination may be fueled by emotions, or operate as a vehicle for the expression of emotions.\textsuperscript{77} Imagination can also be colored by emotions in powerful ways. Emotions can dictate the content of imagined choices. Moreover, imagination, like passion, is traditionally understood to be antagonistic to reason to the extent it is positioned in opposition to reality-based, rational thinking. But while emotions and imagination are intimately bound up together, the idea that imagination is reducible to emotions is misleading. Research on emotions little to do with the study of the creative imagination \textit{per se}. Imagination is not in itself solely an emotional process; it has an

\textsuperscript{75} See Weston, supra note xx at 352.


\textsuperscript{77} As one legal commentator has put it, “imagination is feeling put into words.” Rubenfeld, Copyright, supra note xx.
independent role in mental life that involves conceiving of possible alternatives that do not yet exist.

Empathy might be the best example of the way in which emotions and imagination are closely interrelated but nevertheless independent factors in mental life. As noted earlier, many Romantics viewed imagination as a mechanism for sympathetic understanding. Martha Nussbaum offers a modern version of this idea by arguing that the capacity for empathy is essential to a just legal system. As she explains, imagination is the mechanism by which empathic emotional processes take place. When we empathize with the suffering that a victim has endured, or when we experience compassion for a criminal defendant who himself suffered from child abuse, we use our imagination to put these feelings into words and images. The emotional currents produced by empathy are set in motion by the mind’s ability to represent to itself the experience of another person.

Empathy thus illustrates the way in which the creative imagination can utilize emotions adaptively to further an individual’s knowledge about other people and their motivations. Yet standing alone, emotions do not capture the full range of imaginative activity needed for reasoned decisionmaking. Emotional understanding can expand one’s knowledge of the world, but it does not capture fully the creative process by which the individual comes to generate alternatives to reality. The way in which emotions can both facilitate and impede cognitive thinking is clearly of importance to understanding individual choice. But the study of emotions, while related to imagination, does not directly address how the individual gives expression to his or her inner wishes, needs and

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desires. While taking into account emotional factors is an important advance in understanding individual choice, it is not enough to capture the full range of imaginative activity necessary to produce alternatives to present reality.

II. Psychoanalytic Views on Imagination

This Part looks at the role of imagination in individual choice from a psychoanalytic perspective. To the extent psychoanalysis offers a well worked out theory of imagination, it can be situated within a long tradition of Romantic thinking on the subject. But the concept of imagination in psychoanalytic psychology does differ in at least one fundamental way from Romanticism, as Richard Rorty points out:

[Psychoanalytic ideas about the mind as a poetry-making faculty] may seem to return us to philosophy, and to the idea of an intrinsic human nature. Specifically, it may seem to return us to a Romantic theory of human nature in which “Imagination” plays the role which the Greeks assigned to “Reason.” But it does not. “Imagination” was, for the Romantics, a link with something not ourselves, a proof that we were here as from another world. It was a faculty of expression. But what Freud takes to be shared by all of us relatively leisured language-users – all of us who have the equipment and time for fantasy – is a faculty for creating metaphors.

This capacity for metaphor-making, as Rorty puts it, involves conceiving of one’s own wishes, needs and desires in words and images. Freud developed, as Rorty implies, the first true psychology of imagination.

Three different but related psychoanalytic perspectives on imagination are explored: imagination’s role in reality testing, its sources in early childhood, and its unconscious operations. These three aspects of imagination highlight the ambiguity and

81 Imagination is not a psychoanalytic term in common use. The more standard term is fantasy. See supra note xx. As used here, the two words are basically interchangeable.
ambivalence that inevitably accompany individual choice. Each is connected in some way with the difficulties surrounding the line that separates fantasy from reality. The psychoanalytic concepts of transference, internalization and regression are all discussed as they bear on the central decisional task of imagining alternatives to present reality.

These three psychoanalytic perspectives on the place of imagination in individual choice all find empirical support in the cognitive sciences. Most empirical psychologists are today highly resistant to a psychoanalytically-informed view of individual decisionmaking. In the field of academic psychology, psychoanalytic ideas about individual decisionmaking are often regarded with suspicion, if not outright hostility. Cognitive researchers are skeptical about fundamental psychoanalytic tenets such as unconscious conflicts and motivations. Yet these researchers overlook more than a century of clinical findings and current scientific research providing some evidence for these ideas. As discussed in this Part, basic psychoanalytic ideas relating to the role of imagination in decisionmaking find empirical validation not only in clinical data but also in research being carried out in the cognitive sciences.

A. Reality Testing

Imagination has a central role to play in producing alternatives to the present state of affairs. It also, obviously, can stray too far from reality and, if not brought under control, can undermine the individual’s ability to assess realistically the available options. Even for Romantic enthusiasts, an excess of imagination was known to run the danger of

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82 See Weston, Scientific Legacy, supra note xx at 333.
83 Weston, Scientific Legacy, supra note xx; Eric R. Kandel, Biology and the Future of Psychoanalysis: A New Intellectual Framework for Psychiatry Revisited, 156 Am. J. Psychiatry 505, 508-09 (1999); see also note xx, supra.
overwhelming the mind’s grasp on reality. Kay Jamison has eloquently described the close association between creative genius and madness. She quotes the poet Lord Byron for his famous observation: “We of the craft are all crazy.”84 And Wordsworth similarly described the romantic temperament of his contemporaries: “We poets in our youth begin in gladness; But thereof come in the end despondency and madness.”85 Given the close link between imagination and madness, one might be tempted to regard imagination as a threat to reality-based thinking. But that is only part of the picture. As already discussed above, imagination plays a role in facilitating cognitive thought processes. This section discusses how imagination is also an integral part of the process by which the individual perceives and understands the objective world. This section presents the psychoanalytic view that imagination plays a central role in establishing and stabilizing the individual’s subjective sense of reality and the scientific evidence that supports this view.86

The process of choosing requires that an individual assess the realistic likelihood of alternatives. The traditional view of reality testing posits a bright line between these subjective imaginings and external reality. Freud defined reality testing as the process by which the individual mentally assesses what is real and what is imagined, or what is external and what is internal. Reality testing “assumed, among other things, acquisition of the means to distinguish what is real from what is merely imagined.”87 For Freud, “the essential point was to emphasize the distinguishing of perception from ideas, or, in other

85 Id.
86 The discussion in this section focuses exclusively psychoanalytic thinking on the subject of reality testing, which is grounded in clinical psychological work. The Article does not attempt to link this discussion up with philosophical thinking on the subject.
words, the crucial distinction was whether a given mental stimulus originated inside or outside the mind."88 To some later commentators, Freud viewed reality testing in cognitive, rational terms, carried out by “sense organs, consciousness, attention, memory, and judgment, . . . all arranged in some contraption like a scientific instrument.”89 Curiously, then, Freud’s early conception of reality testing was of a cognitive process.

Analysts after Freud have brought greater complexity to the issue of reality testing by examining the extent to which present knowledge of reality is inevitably shaped by past experience and imagined hopes. In other words, these analysts emphasize, there is no sharp line separating internal subjective experience from external reality. “From the psychoanalytic point of view, imagination involves the creation of an inner world of subjectivity against which one judges (consciously or unconsciously) the objective, veridical world.”90 From a psychological standpoint, then, reality testing can be likened to a process of reality creating.

There are many aspects to this process of establishing an internal sense of reality.91 For example, analysts study how the unconscious transference of feelings from past experiences onto the present plays a crucial role in shaping the individual’s perception of reality. Transference is what gives objective reality its meaning. Hans Loewald explains:

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\text{[T]here is neither such a thing as reality nor a real relationship, without transference. Any ‘real relationship’ involves transfer of unconscious images to present-day objects [people]. In fact, present-day objects are}
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88 Id. at 221.
89 Id. at 225
90 Mayes & Cohen, Imagination, supra note xx at 25. The literary critic Leo Bersani observes that “[psychoanalytic theory has made the notion of fantasy so richly problematic that we should no longer be able to take for granted the distinction between art and life.” Richard Rorty, Contingency, Irony, and Solidarity 36 (1989) (quoting Leo Bersani, Baudelaire and Freud 138 (1977)).
91 For one reflection on this question, see Jonathan Lear, Open Minded: Working Out the Logic of the Soul (2000).
objects, and thus real, in the full sense of the word . . . only to the extent to which this transference, in the sense of transformational interplay between unconscious and preconscious, is realized.\textsuperscript{92}

The imagined workings of transference gives meaningful depth to one’s experience of the present world. Events and people have meaning in large part because of their resonance with the past. To psychoanalysts, the mind is continually evaluating and integrating external stimuli and internal imaginings to arrive at a stable, although hardly objective, sense of what is real.\textsuperscript{93} From a psychoanalytic perspective, then, reality testing is a capacity that mediates the transferential relationship between imagination and the objective world. Rather than policing a bright line between fact and fantasy, the purpose of reality testing is to achieve a balanced interplay between subjective and objective.\textsuperscript{94}

Reality testing is of obvious relevance to decisionmaking. Psychoanalysts define reality testing to include the individual’s ability to use thought as trial action.\textsuperscript{95} Testing one’s imagined alternatives against the constraints of the real world, as that world is subjectively perceived, is part of what it means to make decisions. Decisions may be trivial or important. The degree of imagination required in choosing whether to boil water for tea is minimal, perhaps just the amount needed for imagining the task and its possible gratifications. Perhaps more is involved if drinking tea is associated with being cared for as a child, or if it is hoped that the tea will have medicinal properties. But a great deal of imaginative effort is required to make the decision, for example, of whether

\textsuperscript{92} Hans W. Loewald, Papers on Psychoanalysis 254 (1980).
\textsuperscript{94} The developmental psychologist Piaget described cognitive thinking in similar terms: “[i]ntelligence,” he wrote, constitutes “an equilibrium between assimilation [of reality] and accommodation [to it].” Piaget, p. 58
\textsuperscript{95} See, e.g., Mayes & Cohen, Imagination, supra note xx at 24.
to attend graduate school or to raise a child. These imagined alternatives must be realistically assessed in light of objective possibilities, past experiences, and future wishes. Reality testing may take place quickly and unconsciously, beneath the surface of awareness, but it is an integral part of conceiving and evaluating alternatives to the present state of affairs. Learning to balance fantasy and reality in this way – learning how to make realistic choices from among imagined alternatives – is an essential part of which it means to make decisions.

This balanced interplay between reality and fantasy is not always easy to achieve. Our imaginings are not always in our self-interest; distortions in our capacity to imagine can happen as readily as distortions in cognitive thinking. Individuals can suffer from a biological condition such as depression that affects their desires, needs and wishes. Or they can have a character attribute such as melancholia or paranoia that colors their perceptions about the world and the future. A compulsion to repeat may interfere with one’s imaginative capacities as well. Ordinary ego defenses such as denial and repression can blind individuals to the reality of their circumstances in ways that impair imaginative thinking. For example, choosing no medical treatment in the face of a fatal illness may reflect a considered assessment of future suffering but it may also reflect an unconscious wish to die. Understanding that the wish to die has played a role in the decision, that the wish has a history to be understood, and that the wish might conflict with other desires, such as a desire to be cared for, exemplifies the need to address the imaginative distortions and conflicts that inevitably accompany important life choices.

Developmental research and neuroscientific research support the view that imagination is central to a stable sense of reality. The developmental psychologist Paul

96 See Lear, Open Minded, supra note xx.
Harris observes that imagination “is not an activity that is doomed to suppression but the first indication of a lifelong mental capacity to consider alternatives to reality.”97 To Harris, the emergence of imaginative thinking “may be linked with a move toward objectivity rather than away from it.98 Imagination, in other words, is not supplanted by reason or suppressed by the ego, but is of fundamental developmental importance to the emergence of the adult capacity for assessing the reality of perceived choices. He describes how the absence of imagination in children is one indication of a vastly restricted capacity for decisionmaking. For example, he and others have observed that one of the earliest markers of childhood autism is an absence of pretend play.99 Before the second year, researchers tell us, children imitate, but they do not yet pretend.100 By engaging in pretend play with caregivers and others, children learn to master the distinction between inner subjective experience and the external object world, and between self and other.

The psychoanalyst Donald Winnicott describes the developmental process that leads children to master reality testing. He identifies the very young child’s use of “transitional objects,” such as security blankets, whose meaning resides in both objective reality and the child’s subjective imagination.101

It is usual to refer to ‘reality-testing’ . . . I am here staking a claim for an intermediate state between a baby’s inability and his growing ability to recognize and accept reality. I am therefore studying the substance of illusion, that which is allowed to the infant, and which in adult life is inherent in art and religion, and yet becomes the hallmark of madness when an adult puts too powerful a claim on the

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98Id. at 6-7
99Id. at 4; Mayes & Cohen, Imagination, supra note xx at 41.
100 Harris, Work of the Imagination, supra note xx at .
credulity of others, forcing them to acknowledge a sharing of illusion that is not their own.102

While some analysts have taken issue with Winnicott’s idea of a third realm of experience between the purely subjective and the purely objective,103 there is widespread agreement with his view of the interplay of the two. As Winnicott explains, “the task of reality-acceptance is never completed . . . no human being is free from the strain of relating inner and outer reality.”104

Research from the cognitive sciences also supports the psychoanalytic idea that imagination shapes the individual’s subjective sense of reality. One relevant area of work is research that looks at how children learn that other people have minds. Called mindfulness, or mentalization, the capacity to conceive that other people have minds is a crucial developmental milestone that is typically reached around age four.105 Mentalization highlights the facts that it is impossible to know the world – to know why other people behave the way they do – without imagination.106 Children must learn “that the mental world is made up of feelings and beliefs, and these are expressed in various ways – dreams and daydreams, memories, wishes, feelings, thoughts – each of which, though not directly perceivable, is nevertheless real.”107 Psychoanalysts studying mentalization observe that “the mental world can feel either totally real or totally unreal to a young child, and . . . playing with reality, making the real unreal and vice versa, is

102Id. at 3.
103 See Hans Loewald, Sublimation
104 Winnicott, Transitional Objects, supra note xx at 13.
105 Mayes & Cohen, Imagination, supra note xx at 35.
106Id. at 36.
the principal avenue for the development of mentalization.”108 To know another person and to understand their motivations separate from one’s own requires imagining what goes on in the other person’s mind.

An experiment called the False Belief Task elucidates the concept of mentalization. The experiment has many variations, but each is designed to test how and when children develop a theory of mind. For example, person A will place an item in a drawer while person B watches. A will then leave. While A is gone, B will move the item to a cupboard. When A returns, the child will be asked where A will look for the item. The experiments show that children younger than 3 or 4 will respond that A will look in the cupboard, but older children will understand that A will have a false belief that the item is still located in the drawer. The False Belief Task measures children’s ability to imagine that what goes on in other people’s minds may be different from what goes on in their own. Adults with severe impairments in reasoned decisionmaking such as autism or extreme character pathology perform very poorly on theory of mind tests.109

Mentalization is one example of the way in which the cognitive sciences are producing data which supports the psychoanalytic view of the importance of imagination to the individual’s sense of reality. Mentalization is its own form of reality testing. To be able to read other people’s minds is central to “understand[ing] the separation between one’s own mental life and that of others and between psychic and external reality.”110 The failure of mentalization can have serious implications for the child’s sense of self.111

109 Fonagy at 305
110 Vittorio Gallese, Morris N. Eagle & Paolo Mignone, Intentional Attunement, Mirror Neurons and the Neural Underpinnings of Interpersonal Relations, Journal of the American Psychoanalytic Ass’n 131 (May 2007); Mayes & Cohen, Experiencing Self and Other, supra note xx at 209
111 Fonagy et al.
“It is not only the blurring of the distinction between pretend and real but also the failure to imagine others’ feelings, beliefs and wishes that mark [autism and related social developmental disorders] as examples of the failure to develop an imaginative capacity that supports ongoing social differentiation.”\(^{112}\) Distortions in imagining other minds can also occur. Paranoid individuals, for example, fail in their ability to subject their imaginings about the minds of other people to reality testing.

Neuroscientists have discovered what some take to be a neurological basis for mentalization. In the 1990s, neuroscientists studying macaque monkeys discovered a new class of premotor neurons they call “mirror neurons.”\(^{113}\) A similar neuron system has been identified in humans.\(^{114}\) When an individual observes a motor activity, for example, the observer’s neurons for that activity also discharge, as do the neurons for what the observer predicts will happen next. Researchers postulate that mirror neurons operate automatically and form the basis for understanding intentionality in other people. “According to this hypothesis, when we confront the intentional behavior of others, embodied simulation, a specific mechanism by means of which our brain/body system models in interactions with the world, generates a specific phenomenal state of ‘intentional attunement.’”\(^{115}\) This research may have identified the neurological pathway for imagining what goes on in other people’s minds.

Reality testing presents itself as a conceptual paradox. Imagining what is not there is necessary in order to experience the world in a real way. To live without imagination is to be locked in a concrete, present-oriented experience where meaningful

\(^{112}\) Mayes & Cohen, Imagination, supra note xx at 41.
\(^{113}\) See Gallese et al., supra note xx; see also Giacomo Rizzolatti, Leonardo Fogassi & Vittorio Gallese, Mirrors in the Mind, Scientific American (Nov 2006).
\(^{114}\) See Gallese et al., supra note xx at 134.
\(^{115}\) Gallese et al., supra note xx at 144.
choice about how to relate to other people or to lead one’s life is lacking. But just as clearly, to be governed fully by imagination is also to live without meaningful choice. As two developmental psychologists put it, “[t]oo much imagination impairs the individual’s capacity to judge reality and to use thought as trial action, while too little imagination grounds that person in a stale, rarely novel, affectively impoverished world.”\textsuperscript{116} Between these two extremes, the parameters of reality testing can shift dramatically. At times of poetic inspiration, mourning, or trauma, for example, the constraints of the real world will be loosened.\textsuperscript{117} Freud observed that ordinary individuals are often plagued by imaginary fears of the uncanny; indeed few can venture into dark graveyards at night without trepidation. But imagination in these ordinary circumstances is measured. The individual conjures up the imaginative possibilities, and then critically assesses them in the clear, if somewhat shimmering, light of day.

\textit{B. Early Childhood}

Understanding the problematic relationship between subjective fantasy and objective reality requires a closer look at the influence of early childhood on imagination. The transference of early childhood feelings and fantasies onto present day experiences is one important area of inquiry, already discussed above. A related topic is the process of internalization. Internalization refers to a childhood phenomenon by which early relationships become part of one’s thinking about oneself and the world. Transferential feelings often draw on internalized relationships.

\textsuperscript{116} Mayes & Cohen, Imagination, supra note xx at 24.
\textsuperscript{117} See Joan Didion, The Year of Magical Thinking
Imagination does not develop in a biologically-driven, autonomous fashion, but it is a developmental pathway dependent on a number of environmental, psychological and physiological factors.\textsuperscript{118} Despite the complexity of this developmental trajectory, psychological research strongly suggests that imagination has its roots, if not its first stirring, in the infant’s earliest relationship with a primary caregiver.\textsuperscript{119} As explained in this section, psychoanalysts have long understood the formative influence of the early caregiving relationship on adult psychological life. More recently, cognitive and neuroscientific researchers are offering their own empirical validations for the importance of early childhood experience to with their study of emotion schemas and prototypes. The point here is not the somewhat banal observation that childhood experience shapes whom a person becomes. Rather the child’s relationship with early caregivers affects how the mind operates, and in particular the mechanisms and content of imagination.

As noted, psychoanalysis has long maintained that early childhood relationships have a formative influence on adult thinking. All of Freud’s major case histories focus on the relationship of adult psychopathology to events in early childhood. In the late nineteenth century, when Freud first began to investigate the origins of his female patients’ hysterical symptoms, he concluded that these symptoms were caused by early sexual abuse at the hands of older male relatives, primarily fathers. But after Freud abandoned the seduction theory, as he called it, he embraced the idea that all adults, not just neurotics, pass through a childhood phase of oedipal longings and frustrations. Modern psychoanalysts no longer adhere to the universality of the Oedipus complex as

\textsuperscript{118} See Mayes & Cohen, Imagination, supra note xx at 26.
\textsuperscript{119} From a developmental psychoanalytic point of view, imagination “is part of a line of development that begins in the earliest symbiotic interaction between mother and infant, takes further shape as the child moves from dyadic to triadic relations, and culminates in a fully mature capacity to reflect upon in thought one’s wishes and feelings vis-à-vis multiple others.” Id. at 26.
Freud described it, but most still recognize the period between ages three and five as a
time of passionate intensity between child and caregivers.

Since Freud, the earlier, pre-oedipal phase has increasingly become a focus of
inquiry in psychoanalytic psychology. In particular, British object relations and
attachment theorists have brought sustained attention to the relationship between infants
and early caregivers.120 Most modern psychoanalytic thinkers share the belief that the
quality of the relationship between the infant and its primary caregivers has a formative
influence on the mind. Psychoanalysts from different schools might focus on different
aspects of this relationship, but overall they emphasize the importance of a “good-
enough” caregiver able to respond to the child’s needs in a consistent, emotionally-
attuned way.121 Research on early infant-caregiver attachment suggests that infants are
born with an innate predisposition to develop affective relationships with others.122
Researchers postulate that from the beginning infants internalize their interactions with
primary caregivers in a process of building up internal representations of those
interactions.123

Internalization of the relationship with early parental figures involves creating a
“stable mental image of a thing in place of the thing itself”; it is the first step in the
development of the imaginative processes leading to more complex forms of memory,

120 See Bowlby; Fonagy
121 See Dailey, Developing Citizens, supra note xx at .
122 See id. at 462; see also Peter Fonage, et al., Affect Regulation, Mentalization, and the Development of
the Self 4 (2002); Margaret S. Mahler, Fred Pine & Anni Bergman, The Psychological Birth of the Human
Infant 3 (1975); Phyllis Tyson & Robert L. Tyson, Psychoanalytic Theories of Development: An
Integration 24-25 (1990).
123 Dailey, Developing Citizens, supra note xx at 463; see also Fonagy et al., supra note xx at 40-41; Mayes
symbolization, and conceptual thinking.\textsuperscript{124} The reality that other people continue to exist for the child even in their physical absence is a major developmental step, one that requires the infant to negotiate the relationship between what is outside and what is inside. Paradoxically, the infant’s ability to know that the other is still “out there” depends on its ability to internalize or “take in” the relationship with the other person. These affectively-laden representations are then utilized by the young child at times of physical separation from the caregiver.\textsuperscript{125} Internalization is thus what allows the infant to move psychologically closer to other human beings at the same time that it promotes the infants’ physical and emotional independence.

From a psychoanalytic perspective, internalization of early caregiving relationships is one of the primary influences adult wishes, needs and desires. Early childhood relationships establish the psychological foundation for imaginative activity, and they also, through internalization, shape the content of those imaginings. Of course, early childhood is only one formative source for the adult individual’s creative imaginings. Many other factors play an important role in shaping the development of the individual’s life desires, including innate maturation, constitution, social environment and cognitive growth.\textsuperscript{126} Contemporary factors as well play a direct role in shaping the individual’s imaginings. But psychoanalysis brings out the distinct and central influence of early childhood relationships on the adult individual’s imaginative powers.

\textsuperscript{125} Dailey, Developing Citizens, supra note xx at 464.
\textsuperscript{126}Id. at 468; see Steven Marans & Donald J. Cohen, Psychoanalytic Theories of Development, in Child and Adolescent Psychiatry: A Comprehensive Textbook 129, 129 (Melvin Lewis ed., 1991).
Researchers in the area of early infancy offer evidence that the internalization of a good-enough caregiving relationship in infancy is a formative step in the development of imagination. Cognitive researchers describe the way in which unconscious mental schemas or scripts are laid down early in life from countless interactions with early caregivers, a process arguably parallel to the psychoanalytic conception of the internalization of early caregiving relations. 127 Neuroscientists have also studied the biological mechanisms involved in the creation of these prototypes. 128 These researchers have created neural network models that, using parallel processing, attribute the creation of representations, or internal schemas, to the strength of the connection between neurons. 129 Attachment research has shown that securely attached children have a more balanced view of themselves, remember positive events more accurately, and score higher on tests of emotional understanding. 130 “One of the key initial ideas to emerge from both cognitive and neurobiological study of development is that the development of these internal representations can only be induced during certain early and critical periods in the infant’s life.” 131 In all these areas, scientists are confirming the psychoanalytic proposition that early interactions with the environment fundamentally affect the quality of the individual’s internal representations and prototypes.

Evidence from the field of developmental psychopathology strongly suggests that profound failures in early caregiving can result in a lifelong impairment in the ability to

129 See Vaughan, supra note xx at 37.
131 Kandel, Biology and the Future of Psychoanalysis, supra note xx at 513.
generate and critically assess imagined alternatives to reality. Research suggests that children born with deficits in their capacity to form good-enough caregiving relationships, for example children with certain pervasive developmental disorders such as autism, “do not have an ability to imagine the other or to use such an imaginative process for affect regulation.” The causal connection between early caregiving and imagination is obviously fraught with complexity. Many children, for example, use a developed imaginative capacity to sustain themselves emotionally through early environmental trauma or deprivation. The capacity to call upon imagined sources of emotional gratification at times of stress may explain the resilience that some children exhibit even under conditions of extreme neglect or abuse. Indeed, if the basic foundation of imaginative thinking is present, adversity in early childhood can serve to stimulate the child’s imaginative powers. As researchers describe it, “the need for an imaginative capacity comes into being as the child wants or desires those individuals whom he does not or cannot have at that moment.” When the external world is impoverished, psychologists believe, the child’s internal world can become sustaining.

Early caregiving relationships that result in the creation of sufficiently gratifying internal representations or prototypes are easily established in the average imperfect family environment. In other words, early childhood need not be perfect for a full imaginative life to take hold, it need only be “good-enough.” In many cases, however, the stress put upon the early caregiving relationship by long-term family poverty, mental

132 Mayes & Cohen, Imagination, supra note xx at 40.
133 Id. at 46.
134 Id. at 42.
135 Dailey, Developing Citizens, supra note xx at 469.
illness, substance abuse or domestic violence diminishes children’s imaginative capacities. Using animal models, researchers believe that elevated levels of stress in the early years interfere with the development of cortical inhibitory controls that regulate stress responses and are associated with long-term changes in brain development.\textsuperscript{137} While “[r]esearch on early imaginative capacities and their variation is only beginning,” researchers believe it likely “that many children, particularly under conditions of environmental deprivation and stress, show less of such abilities.”\textsuperscript{138} Genetic variations and cultural diversity obviously play an important part in how an individual child’s imaginative capacities will unfold.\textsuperscript{139}

The influence of the early caregiving experience on unconscious wishes, needs and desires is a universal phenomenon. Once prototypes of early caregiving relationships are created, they achieve a certain stability necessary for psychic structure and organization.\textsuperscript{140} Adults with an early history of neglect or abuse are more likely to perceive other people and events in disappointing, depriving, or dangerous ways than an adult whose early caregiving experience was emotionally nurturing, although early childhood experience is never determinative of adult life.\textsuperscript{141} But even in ordinary circumstances, the quality of early caregiving – joyful or depressed, anxious or relaxed, hovering or detached – will direct adult imaginings in particular ways. The field of psychoanalysis is dedicated to understanding the transference of these early childhood events and fantasies onto adult imaginings.

\textsuperscript{137} See Dailey, Developing Citizens, supra note xx at 471.
\textsuperscript{138} Emde & Robinson, XX 175
\textsuperscript{139} Id.
\textsuperscript{141} See Seuss & Stroufe; see also Cortina & Liotti at 21-22; Dailey, Developing Citizens, supra note xx at 464.
Understanding the processes of transference and internalization yields a more complete picture of adult choice, one that takes account of the temporal dimension in imagination. Early experience both gives meaning to present life but also can keep individuals locked in the past, unable to experience present life in an immediate and full way. As in most psychoanalytic inquiries, a core paradox is presented: too much clinging to the past deprives the individual of imaginative freedom, while too little connection to the past deprives the individual of imagination’s animating source. The tension between past and present as it gets played out in adult decisionmaking is closely related to the process of reality testing, for one’s perception of the present world is often, if not always, colored by these early caregiving relationships. Psychoanalysis helps to clarify the ways in which failures in imagination can result from early childhood experience, either from a diminishment in imaginative activity or from distortions brought about by caregiving failures. Individuals who make self-destructive choices again and again, or who undermine their own conscious values and beliefs, or who find themselves repeatedly making the same bad choices, unable to break free from a self-defeating cycle, are experiencing failures in imagination. Understanding these types of failures and their roots in early childhood is as essential to a paradigm of individual decisionmaking as understanding failures of a more strictly cognitive kind.

C. Unconscious Operations

A psychoanalytic perspective on individual decisionmaking illuminates the unconscious mental operations that produce and shape imagined alternatives to the present. Attention to unconscious processes is arguably the area of greatest shared
interest between psychoanalysis and the cognitive sciences.  As discussed in this section, research in the cognitive sciences supports the existence of unconscious thought processes and feelings. Psychoanalysis supplements that empirical research by investigating not only the psychodynamic aspects of the unconscious but also how and why individuals use their imagination to create alternatives to reality.

Freud was not the first to discover the unconscious. Many thinkers before him had acknowledged the existence of ideas and beliefs below the level of conscious awareness. The seventeenth century German philosopher Leibniz, for example, conceived of mental life as comprised of infinitesimal units of force which existed in a continuum from perception (unconscious) to apperception (conscious). Johann Herbert was an early experimental psychologist who expanded on Leibniz’s theory by describing “inhibited ideas” which reside in the unconscious and can move into full awareness. Mid-nineteenth century German physiologists also worked with the notion of unconscious inference. Many nineteenth century writers described the influence of unconscious ideas and feelings on conscious behavior. Emerson commented that “[the world] is a remoter and inferior incarnation of God, a projection of God in the unconscious.” Oliver Wendell Holmes Sr. and his son both focused on the idea of the unconscious as an important influence on human behavior and decisionmaking.

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143 For research supporting the compatibility of cognitive and psychoanalytic views of the unconscious, see Howard Shevrin, et al., Event-Related Potential Indicators of the Dynamic Unconscious, 1 Consciousness and Cognition 340 (1992).
145 Id. at 449; see Edwin G. Boring, A History of Experimental Psychology 256 (2nd ed. 1956).
146 Ralph Waldo Emerson, Spirit, reprinted in 2 The Complete Works of Ralph Waldo Emerson 167 (1866).
147 See Dailey, Holmes, supra note xx at 449-51.
Although Freud did not discover the unconscious, he was the first psychologist to study in detail its operating mechanisms. Freud initially described the unconscious as a realm of mental experience governed by the pleasure principle and its hallucinatory powers. For Freud, the unconscious had no reality testing since the mind experienced its fantasies as external perceptions, as with dreaming. The activity that takes place in the unconscious Freud called primary process, a term reflecting the developmental view that this form of thinking was what the individual first experiences as an infant. In later years Freud expanded his idea of the unconscious to include ego-related activities such as unconscious guilt, but the core meaning of the unconscious still revolved around the idea of primary process.

Freud believed that primary process operated according to certain non-logical laws such as association, condensation and displacement. In his view, unconscious ideas are linked one to the other not by logical or rational meaning but by association in time, place, similarity or feeling. For example, events might be connected in fantasy or dreams that have no obvious connection when consciously considered. Condensation occurs when two or more ideas are collapsed together, for example when two people known to the dreamer are merged into one, or when an event has elements of two or more real life experiences. Displacement is a form of transference where ideas or feelings about a person or event get transferred or displaced onto another. Often individuals will react to another person as if the other person had qualities belonging to yet a third person, usually someone important from the past. In all these ways, the unconscious did not follow the

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148 Freud actually began his career as a neurologist. The term psychologist did not become popular until the early twentieth century.
149 He also, more controversially, associated it with the thinking of members of so-called primitive societies.
rules of logical, rational thought. Rather, for Freud, it operated according to these
precepts of imagination.

Almost all modern analysts would agree that primary process exists, and that this
very early form of thinking can express itself in associative, metaphorical, imagistic and
verbally ambiguous ways. Secondary process, on the other hand, is understood to be a
more mature form of thinking that usually takes the form of logical, verbally transparent,
rational thought. Developmentally, the increasing strength of the secondary process
allows the child to transform primary process wishes and fantasies into a more reality-
congruent and rational form. For Freud, the emergence of rational thought reflected a
biologically-programmed need to adapt to the real world. The child learns to bring the
eyear, more primitive imaginative thinking under the control of the reality-oriented ego.
In developmental terms this is what Freud meant by his famous maxim, “where id was
there ego shall be.” Rational, logical thought is a later, more disciplined, higher-order
mental faculty governed by the reality principle and directed to controlling the untamed
fantasies of the imagination.

Although secondary process is understood to be a distinct, later form of mental
activity, analysts observe that all mature forms of thinking combine the two. Primary
process is never entirely displaced, as Freud’s early hysterical patients first brought to his
attention. But symptoms are not the only expression of primary process activity; rational,
cognitive thinking also incorporates primary primary elements. Close attention to
conscious decisionmaking reveals “the hidden linkage” and “inextricable bond” between
the two.\textsuperscript{150} As the psychoanalyst Hans Loewald explains:

\begin{flushright}
\textsuperscript{150} Hans W. Loewald, Sublimation: Inquiries into Theoretical Psychoanalysis 13 (1988).
\end{flushright}
Primary and secondary process are ideal constructs. Or they may be described as poles between which human mentation moves. I mean this not only in the longitudinal sense of progression from primitive and infantile to civilized and adult mental life and regressions in the opposite direction. Mental activity appears to be characterized by a to and fro between, and interweaving of, these modes of mental processes, granted that often one or the other is dominant and more manifestly guiding mentation and that the secondary process assumes an increasingly important role on more advanced levels of mentation.151

For psychoanalysts, all mature thinking entails a back and forth between rational, secondary process and the loose associations and intuitions of primary process thought.152

The movement backward from secondary to primary process psychoanalysts call “regression.” Regression is a universal feature of mental life that reflects the continuing presence of early modes of thinking alongside more mature mental processes.153 In a measured way, regression allows the individual to let go of the constraints of rational, logical thought, thereby bringing an emotional richness and depth to his or her experience of the world.154 Romantic love, creative inspiration, and spiritual transcendence are all common examples of adult experiences involved some degree of controlled ego regression. Certain modes of everyday thinking such as fantasies and daydreaming exhibit regressive features. Because it brings the adult caregiver into touch with infantile modes of feeling and thinking, early childrearing also involves a controlled measure of regression. An utter lack of primary process functioning – no dreams, no fantasies, no romance, no imagination – would be taken as a sign of psychopathology, not to mention

152 Id.
154 The remainder of this paragraph takes from Dailey, Developing Citizens, at 477-78.
an indication of a greatly impoverished, emotionally-wooden inner world.\textsuperscript{155} Regression in the service of the ego is the phrase analysts use to describe the letting go of conscious rational thought in a way that promotes rather than frustrates individual self understanding.\textsuperscript{156}

Primary and secondary process cannot be mapped perfectly along unconscious and conscious lines. The deep workings of imagination – association, condensation, and displacement – are often opaque to the individual, but not always. Art and religion are two examples of conscious primary process expressions, as noted above. Similarly, secondary process operates at the level of unconscious thought as well, as cognitive researchers have shown. Perception is one example, as are certain acquired skills such as driving a car or reading. Some of these unconscious cognitive processes are under study by scientific researchers, as noted below. Nevertheless, although no neat lines between types of conscious and unconscious thought processes can be drawn, psychoanalytic finds suggest that primary process largely operates outside of conscious awareness whereas secondary process often works at the conscious level of thought.

Scientific research supports the psychoanalytic idea that unconscious forms of thinking exist. Cognitive researchers have discovered parallel systems of thought bearing some similarity to the systems of primary and secondary processes. Daniel Kahneman, for example, “distinguishes two generic modes of cognitive function: an intuitive mode in which judgments and decisions are made automatically and rapidly, and a controlled mode, which is deliberate and slower.”\textsuperscript{157} Cognitive neuroscientists also refer to parallel

\textsuperscript{155} See Tyson & Tyson, supra note xx at 170.  
\textsuperscript{156} Ernst Kris, Psychoanalytic Explorations in Art 177 (1952).  
\textsuperscript{157} Daniel Kahneman, Maps of Bounded Rationality: A Perspective on Intuitive Judgment and Choice (2002).
systems of thought when they distinguish between implicit or procedural knowledge and explicit or declarative thinking. Implicit or procedural processes are considered adaptive ways in which the mind codes and stores information into memory and representational formats. Scientists use neuro-imaging techniques in an attempt to locate brain activity for procedural and declarative thought processes. Specifically, neuroscientists have located procedural knowledge in extrapyramidal systems and the cerebellum while declarative thought processes are understood to take place in the hippocampus.

Empirical research on subliminal stimuli also supports the existence of unconscious thought processes. Recent research suggests that repression plays a role in processing subliminal information. Social psychologists also use experimental studies to investigate the realm of unconscious affects in the forms of implicit attitudes and stereotypes which operate outside of conscious awareness in ways that can bias conscious decisions. Developmental researchers studying early parent-child attachment also provide support for preverbal implicit learning.

Although both psychoanalysts and cognitive psychologists study the unconscious, researchers in each field would not necessarily describe the type of mental activity under study in similar terms. Traditionally, the cognitive unconscious and the dynamic

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158 See Kandel, Biology and the Future of Psychoanalysis, supra note xx at 508-09.
161 See Shevrin, et al., Event-Related Potential Indicators, supra note xx at 341.
162 Cites
unconscious as defined in each field have been understood to be incompatible with each other. To cognitive researchers, the unconscious is primarily procedural, a locus of pathways for processing information. In contrast, the psychoanalytic unconscious is much more than a mechanism for information-processing, association or attention. Psychoanalysis views the unconscious as an imaginative realm constituted by wishes, needs and desires, often conflicting. Unconscious wishes, needs and desires are shaped in part by the internalization of early childhood relationships which can be transferred onto present perceptions and imaginings about the future. From a psychoanalytic perspective, then, the process of choosing sets in motion a complex interplay between inner subjective experience and external reality, between past and present, and between unconscious fantasies and conscious rational thinking. When this process of choosing operates well, it serves to fulfill rather than frustrate the individual’s ability to imagine, in a realistic fashion, alternatives to reality.

While some cognitive researchers would still maintain that the cognitive unconscious is incompatible with psychoanalytic ideas, psychoanalytically-informed cognitive researchers argue persuasively that the two perspectives can be reconciled. Without denying the procedural aspects of unconscious thinking, psychoanalysis provides supplemental information relating to unconscious conflict and motivations. In the minds of many, there is no inherent incompatibility between these two aspects of unconscious mental life.165

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III. Implications for Law

A. General Considerations

Well over a century ago, Oliver Wendell Holmes, Jr. recognized the extent to which human behavior is driven by unconscious passions and instincts. Like the Romantic writers he frequently read, Holmes asserted the existence of fundamental concepts such as unconscious motivations, instinctual desires, inner conflict, irrationality, imagination, heroism, and transcendent faith in the “infinite.”\textsuperscript{166} His two most important jurisprudential works, \textit{The Common Law} and \textit{The Path of the Law}, elaborate the ways in which rational faculties can be overcome by deep-seated instincts and unconscious passions.\textsuperscript{167} His response to this truth was to take a behaviorist approach in law that bracketed the question of individual subjectivity altogether. Holmes was in many ways a Romantic thinker, but he ultimately concluded that law best operates on the objective level of behavior.

Not long after Holmes published \textit{The Path of the Law}, Sigmund Freud wrote a short essay essentially agreeing with Holmes. In this paper, entitled “Psycho-analysis and the Establishment of the Facts in Legal Proceedings,”\textsuperscript{168} Freud wrote negatively about the usefulness of psychoanalysis to the outcome in particular legal cases. In Freud’s view, psychoanalysis could not be helpful in determining innocence or guilt in any particular criminal case since the field had not yet produced any easy and verifiable method for ascertaining the facts outside the psychoanalytic consulting room. While both

\textsuperscript{166} See Dailey, Holmes, supra note xx at 431.
\textsuperscript{167} Id.
Holmes and Freud recognized the irrational in human nature, and in many ways extolled the virtues of Romanticism, they also were both led to regard law as a practical tool of reason unable to contend with the irrational turmoil below the surface of behavior.\footnote{While he was discouraging about the application of psychoanalysis to the issue of intent in criminal proceedings, Freud’s major theories were all involved, in some way or another, with ideas about law and lawfulness. *Totem and Taboo* and *Civilization and Its Discontents* are perhaps Freud’s most well known treatises on the subject of law, the former outlining Freud’s ideas about the psychological establishment of law through the internalization of parental prohibitions, and the latter about the ultimate irreconcilability between human desires and legal rules. Cites Edward A. Purcell, Crisis of Democratic Theory (1982).}

Freud’s followers did not agree. It was the implications of Freud’s ideas about how the mind works that proved to be of most interest to legal commentators and an important basis for the legal realist assault on formalism.\footnote{Bruce Ackerman has noted the unappreciated brilliance of Frank’s book. See Bruce A. Ackerman, Law and the Modern Mind by Jerome Frank, 103 Daedalus 119 (1974).} By the early 1930s, legal commentators were struggling with the implications of psychoanalytic theory for judicial decisionmaking, an area of special concern to legal critics of the time. In 1930, Jerome Frank published *Law and the Modern Mind*, his well-known treatise on the Oedipal dynamics of the role of the judge as a father figure.\footnote{Edward A. Purcell, Crisis of Democratic Theory (1982).} Frank drew on psychoanalytic ideas, in some cases rather unorthodox ones, to argue that judges needed to engage in self scrutiny in order to overcome their childish desires to become authoritarian father figures rather than dispassionate, mature decision-makers. Frank emphasized the judge’s immature imaginings about becoming an all-powerful paternal figure. In his view, imagination fueled by infantile wishes served to distort the judicial decision-making process and posed an obstacle to reality-based logical thinking. Not surprisingly, Frank identified Holmes as the one truly “mature” judicial figure.

In the same year that Frank published his book, Harold Lasswell, a well-regarded political theorists and public commentator, also published an essay on imagination and
judicial decisionmaking. Unlike Frank, Lasswell went beyond imagination’s distorting
effects on judgment to consider its affirmative role in judicial decisionmaking. His essay,
entitled “Self-Analysis and Judicial Thinking,” argued that the law’s “exclusive emphasis
upon the importance of logical thinking incapacitates, rather than equips, the mind of the
judge for the performance of its functions.”1 He continued: “Our structures upon the
cult of logic begin by showing that the supposition that emotional aberrations are to be
overcome by heroic doses of logical thinking is a delusion. . . . We have been misled by
presuming that the mind can rely upon a single mode of operation to find reality.”174 In a
plea for a theory of legal decisionmaking that integrates both cognition and imagination,
he wrote:

It is fair to say that the mind is a much fitter instrument for reality testing
when both blades are sharpened, those of logic and of free-phantasy. Until this
proposition is understood, the professional training of our judges, administrators,
and theorists will continue to furnish disciples in self-deception rather than self-
analysis, through a disproportionate emphasis upon a single mode of thought.175

Mature judgment, Lasswell argued, requires both cognitive faculties and
imaginative self insight. Lasswell advocated personal self analysis as a means for
integrating these two aspects of mature judgment.

Judicial decisionmaking may be the most obvious area for thinking about
imagination and choice in law, but it is only a starting point. Assumptions about human
nature permeate almost every area of law and legal policy, as behavioral legal scholars
have established. Their work on individual choice challenges the underlying assumption

174 Id. at 356. Lasswell observed about transference: “The world around us is much richer in meanings
than we conscious recognize. These meanings which come from our ‘private’ pasts are continually cutting
across our ostensible criteria of judgment, and compulsively distorting the operations of the mind whose
quest for an objective view of reality is consciously quite sincere.” Id. at 361.
175 Id. at 362.
of rationality in a whole host of legal areas. Work by behavior legal scholars is being
carried out in fields as diverse as commercial law, employment law, family law, jury
decisionmaking, criminal law, corporate law, and jurisprudence. Other areas relying
explicitly on assumptions about individual psychology could also be cited, including the
dying declaration and statement against interest in evidence law, the battered women’s
syndrome in criminal law, jury instructions such as falsus in unum, in omnibus, the rule
that all ambiguities will be construed against the drafter in contract law, trusts and estates
law, just to name a few. More general conceptions of individual choice operate in
constitutional law as well, including the intent requirement under the equal protection
clause, the parental choice doctrine under the first amendment, and the concept of
autonomy under the liberty clause of the fourteenth amendment. Not all of these areas
will benefit from a psychoanalytically-informed understanding of choice, but many
arguably will.

Following Lasswell, the most important conceptual contribution that a
psychoanalytic view of individual decisionmaking can make to law is to dispel the myth
of rationality upon which so many laws and policies rest. The goal of current behavioral
legal scholarship is to dispel the legal fiction of rational choice and the reasonable person
by identifying the myriad ways in which individuals do not think rationally. But
ultimately cognitive psychology focuses too narrowly on the mechanisms of choice.
Reform efforts include correcting for cognitive mistakes by debiasing or fixing the
cognitive errors, thereby fine-tuning and improving the processes of rational choice.176
But what if, as Lasswell observes and as psychoanalysis shows, individual choice cannot
proceed on mere rationality alone? The point of this Article, of course, is to demonstrate

that something more is necessary for the individual to arrive at a stable sense of reality and to produce the alternatives to reality necessary for choice. How might insights into imagination and its relationship to cognition affect the development and application of legal rules and policies in areas other than the realm of judicial decisionmaking discussed by Lasswell?

The remainder of the Part considers in greater detail what a psychoanalytic perspective on choice can offer law. Psychoanalysis broadens and at the same time complicates the law’s view of individual decisionmaking. This means, obviously, a trade-off. Some observers, following Justice Holmes, might prefer that, given the complexity and opaqueness of human nature, the civil law remain focused on objective behavior rather than subjective experience. But the premise of behavior legal scholarship and this Article is that a deeper understanding of individual choice is a more useful and just approach in most circumstances than pure behaviorism or abstract rationality. As Freud observed a century ago, psychoanalysis cannot dictate the outcome of particular cases or determine specific legal rules. But it has much to offer in revising the law’s underlying assumptions about individual choice, thereby helping to shape legal rules.

As an illustration, the following section looks at how a psychoanalytic perspective that takes into account the role of imagination in decisionmaking would help legal decision-makers and policy-makers better understand the psychological dynamics surrounding the creation and enforcement of pre-nuptial agreements. No substantive outcomes are dictated by a psychoanalytic perspective that takes imagination into account. No easy answers or clear guidelines for reform are provided. Bright lines

177 See Oliver Wendell Holmes, Jr., The Common Law (1881); The Path of the Law, HLR.
cannot be drawn. But in the end, a psychoanalytic perspective can help legal decision-makers and policy makers to be better informed about how individuals actually make decisions.

B. Prenuptial Agreements

Commentators, courts and legislators are divided over whether and to what extent prenuptial agreements about financial matters should be enforceable at the time of divorce.\textsuperscript{178} Traditionally, prenuptial agreements were not enforceable at all on the ground that they violated public policy either because they promoted divorce or because they altered the essential terms of the marriage contract.\textsuperscript{179} Since the early 1970s, state courts and legislatures are increasingly more likely to enforce prenuptial agreements about financial matters other than child support if the agreements meet certain procedural and substantive requirements, and today nearly all states will enforce such agreements under certain circumstances.\textsuperscript{180}

At a minimum, prenuptial agreements must comply with traditional contract principles such as unconscionability, misrepresentation and duress.\textsuperscript{181} Because of the close relationship between the parties, most states also impose additional procedural requirements such as a duty to disclose financial assets.\textsuperscript{182} The controversy over the enforceability of prenuptial agreements has to do with additional substantive grounds of review. When prenuptial agreements first became enforceable, many if not all states also


\textsuperscript{179} See id. at 151.

\textsuperscript{180} See id.

\textsuperscript{181} See, e.g., Simeone v. Simeone, 581 A.2d 162, 165 (Pa. 1990); Bix, Bargaining, supra note xx at 154.

\textsuperscript{182} See Bix, Bargaining, supra note xx at 155-56.
reviewed the agreements under a substantive standard that the contract not be unjust or unfair at the time of enforcement.\(^{183}\) Although some states characterized this review in terms of unconscionability, in practice the review came closer to a fairness standard since the contract was being evaluated in light of changed circumstances.\(^{184}\) This substantive fairness review at the time of enforcement has given courts a substantial amount of discretion over the enforceability of agreements. Critics of the fairness standard argue that it undermines the parties’ expectations, reduces predictability and discourages individuals from entering into marriage in the first place. Overall, the fairness review is seen to contradict the more general trend toward private ordering in the family law realm.\(^{185}\)

Reflecting some of these concerns, the Uniform Premarital Agreement Act as originally drafted in 1983, in effect retains only a very limited substantive fairness review.\(^{186}\) It provides that agreements will be enforceable unless the agreement is unconscionable at the time it was signed and in addition there was inadequate disclosure of assets.\(^{187}\) Although a majority of states has adopted the UPAA, many have retained a more robust substantive standard of review by modifying the Act to include the

\(^{183}\) In general, the term unconscionability as used in these circumstances is the same as the standard used in commercial law (protection against onesidedness, oppression, or unfair surprise) and contract law (protection against manifestly unfair or inequitable terms). See Uniform Premarital Agreement Act, comment to § 6(a)(2).

\(^{184}\) See Katherine B. Silbaugh, Marriage Contracts and the Family Economy, 93 NW Univ. L. Rev. 65, 75 (1998) (“As a part of the general peculiarities of premarital agreement law, courts often feel free to simply ignore the existence of agreements or dismiss them on fairly thin grounds, when their enforcement seems unfair in the context of a given divorce.”).

\(^{185}\) The trend toward civil unions in many states constitutes a counter-trend in this area. Moreover, in Connecticut, at least, the law of prenuptial agreements also applies to parties entering civil unions. See Conn. Gen. Stat.

\(^{186}\) See Bix, Bargaining, supra note xx. At least one state, Pennsylvania, will enforce prenuptial agreements about financial matters (other than child support) as long as there was full disclosure of assets and the parties entered into the agreement knowingly and voluntarily. See Simeone, supra.

\(^{187}\) As of 200x, at least 28 states had passed some version of UPAA. The UPAA also provides that a provision in a premarital agreement modifying or eliminating spousal support will not be upheld if the party against whom enforcement is sought would become eligible for public support.
traditional requirement that the prenuptial agreement not be unconscionable either at the
time of signing or enforcement. Thus while there is a discernable trend away from
imposing a requirement of substantive fairness at the time of enforcement, the overall
picture is still one of subjecting prenuptial agreements to some kind of heightened
fairness requirements. The ALI Principles of the Law of Family Dissolution imposes a
fairness standard by providing that agreements will not be enforceable if, at the time of
enforcement, the premarital agreement will “work a substantial injustice.” Given
changed circumstances over the course of most marriages, such as children, health,
employment, and other life events, an unconscionability standard at the time of
enforcement gives tremendous discretion to courts to find agreements unenforceable.

Why is it that many states continue to subject prenuptial agreements to a
substantive fairness review at the time of enforcement when other contracts, generally,
are not? Substantive standards of review for prenuptial agreements have been justified
on two main grounds. First is the public policy ground that prenuptial agreements can
have devastating financial consequences for children and the financially weaker party.

The public policy concern has two aspects. First is the view that the financially less well-
off party, usually the wife, is not sophisticated enough to protect her own interests. A
desire to protect the unsophisticated party has led to heightened procedural requirements
such as a duty to disclose, a requirement that the parties have the opportunity to consult
counsel, and waiting periods. Second is a straightforward public policy argument that

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188 See, e.g., Conn. Gen. Stat. § 7.05
189 Silbaugh, Marriage Contracts, supra note xx at 75.
190 See Brian H. Bix, Premarital Agreements in the ALI Principles of Family Dissolution, 8 Duke J. Gender
L & Pol’y 231, 232 (referring to this concern as “folk wisdom”).
191 See Bix, Bargaining, supra note xx at xx.
financially vulnerable parties, particularly children, should be protected from the adverse financial consequences of prenuptial agreements, particularly in long term marriages where circumstances have changed. At least one commentator proposes that, because premarital agreements inevitably exclude non-monetary aspects of the bargain from enforcement, agreements about financial aspects of the relationship should be presumptively unenforceable to protect spouses who have contributed in non-monetary ways to the marriage.\(^{193}\)

The second main ground for subjecting prenuptial agreements to a substantive fairness review at the time of enforcement is the claim that parties entering into these agreements do not think rationally about their financial futures.\(^{194}\) One problem with this ground is that, by definition, the financially more secure party to the agreement is almost always acting rationally to protect his or her own financial interests, unless the prenuptial agreement provides generously for the other party. The question thus appears to be a more narrow one: why do less financially secure parties sign prenuptial agreements that foreseeably are not in their financial interests? Upon closer inspection, however, the question is actually much broader. The vast majority of couple marrying for the first time do not enter into prenuptial agrees about their financial futures, even when to do so would clearly be in their mutual self interest given the likelihood of divorce.\(^{195}\) So the “choice”

\(^{193}\) Silbaugh, Marriage Contracts, supra note xx.

\(^{194}\) See Bix, Bargaining, supra note xx. Katherine Silbaugh argues that this second ground is rarely the basis for substantive fairness review. See Silbaugh, supra note xx at 75 (“States that examine substance even when the procedure for entering the agreement clearly indicates voluntariness do not simply seek to protect parties from cognitive errors. Instead these states assert an ongoing role in defining the legal consequences of marriage, no matter what the parties may prefer.”).

\(^{195}\) One reason might be that the parties are equally situated financially at the time of marriage, and neither one imagines a disruption in their earning power. Nevertheless, the fact that the vast majority of married women with children take time off or work part time, or work full time at lower paying jobs, suggests that this explanation raises similar issues concerning the rational decisionmaking of women on the eve of marriage.
not to enter into a prenuptial agreement must be explained as well as the choice that many financially vulnerable parties make to sign an agreement that does not protect their long-term interests. The remainder of this section examines from a psychoanalytic perspective the proposition that most individuals contemplating marriage are not in a frame of mind to make a rational choice whether to enter into a prenuptial agreement.

Behavioral legal scholarship suggests that most individuals anticipating marriage experience particular cognitive errors relating to their long-term expectations for the relationship. The errors fall into two categories: the over-optimism bias and the emotional distortions of romantic love. In one of the first papers to identify the phenomenon of over-optimism, Melvin Eisenberg described the “dispositional characteristic of undue optimism” for couples entering marriage.\(^{196}\) Citing research by Baker and Emery,\(^{197}\) Eisenberg recounted how parties entering marriage correctly estimated that 50 percent of American couples will eventually divorce, but they estimated their own chance of divorce at zero.\(^{198}\) The over-optimism bias has been described as a kind of self-serving bias that leads individuals to underestimate the risk that something bad will happen to them.\(^{199}\) The bias helps to explain why the majority of couples marrying for the first time do not enter into prenuptial agreements even if it would be in their mutual best interest given the uncertainties that accompany any long-term relationship. Indeed, given the over-optimism bias, it may seem surprising that anyone has the rational presence of mind to request that his or her intended spouse sign a

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\(^{198}\) Id.; see also Bix, Bargaining, supra note xx; Elizabeth Scott, Rational Decision-Making About Marriage and Divorce, 76 Va. L. Rev. 9, 35 n. 93 (1990)
\(^{199}\) See Bix, Bargaining, supra note xx at 194.
prenuptial agreement. The over-optimism bias also explains in part why individuals entering second marriages are more likely to enter into pre-nuptial agreements that address, at the very least, what happens to assets upon death or divorce.

In addition to the general self-serving optimism most individuals exhibit, it is also reasonable to conclude that romantic love clouds people’s rational judgment.\(^{200}\) Love is likely to distort the individual’s assessment of future events in a positive direction in the same way that depression or anger can lead individuals to distort their thinking in a negative way.\(^{201}\) Individuals in love idealize their partners, thus potentially causing them to assume that the intended spouse would always be financially generous no matter what the circumstances. Romantic love, it can be argued from a behavioral perspective, operates to heat up cognitive thinking in ways that distort rational choice about the future of the marital relationship.

From a cognitive perspective, then, the solution for eliminating the effects of over-optimism and emotional distortions on decisionmaking is to “de-bias” (or “de-romanticize”) individuals by correcting their misperception of the risk of the event happening to them and by “cooling off” their judgment.\(^{202}\) In other words, the problem as viewed from the perspective of cognitive psychology is either misinformation about the risk or a failure to weigh the risk properly. Correcting for this bias could mean establishing a process that provides both parties with accurate information about the long-term prospects for the marriage and that gives them adequate time to consider the options. It might support a policy, for example, that mandates consultation with an attorney or that provides for mandatory counseling on the subject or that imposes a

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\(^{200}\) See id.

\(^{201}\) See id.; see also literature on mood.

\(^{202}\) For discussion of de-biasing, see Jolls & Sunstein, supra note xx.
waiting period.203 The goal here would be to promote, to the extent possible, procedures that enhance conscious, informed decisionmaking about the long-term financial consequences of marriage and divorce. De-biasing individuals may be a difficult task, and there might be strong differences of opinion on how to carry it out. But the ultimate policy goal is to correct for widespread errors.

In many ways, prenuptial agreements seem to be the perfect illustration of the cogency and usefulness of a behavioral paradigm that looks at cognitive errors in judgment. Nevertheless, a cognitive perspective – even one that takes into account over-optimism and the distorting effects of love – misses something important about the factors bearing on the decision whether to sign a prenuptial agreement.

1. **Over-optimism and Ambivalence.** The dilemma posed by prenuptial agreements is not usually a problem of foreseeability. Rather, the underlying problem with prenuptial agreements has to do with the parties’ inability to imagine that their relationship will fail.204 The parties can reasonably foresee the event, but they cannot actually imagine that it will happen to them. In fact, they resist knowing that it can happen to them. From a behavioral perspective, cognitive dissonance is the best explanation for the resistance that so many individuals exhibit in the face of


204 It is possible that the availability bias plays some role here. Tversky and Kahneman discuss the example of divorce:

In judging the likelihood that a particular couple will be divorced, for example, one may scan one’s memory for similar couples which this question brings to mind. Divorce will appear probably if divorces are prevalent among the instances that are retrieved in this manner. Alternatively, one may evaluate likelihood by attempting to construct stories, or scenarios, that lead to divorce. The plausibility of such scenarios, or the ease with which they come to mind, can provide a basis for the judgment of likelihood.

Tversky & Kahneman, Availability, supra note xx at 176. However, the availability bias does not explain why, given the prevalence of divorce, couples contemplating marriage do not have a divorce scenario readily available.
incontrovertible evidence about the risk of divorce happening to them.205 When parties are forced to hold two contradictory beliefs in mind (my marriage will last forever; fifty percent of marriages end in divorce), they resolve the contradiction by rejecting one belief or the other.206 This explanation fits perfectly with the goal of de-biasing individuals by providing more information. If an individual’s ability to process information relating to divorce is improved then the individual may conclude, rationally, that the marriage might fail, and the contradiction will then be resolved in a manner that does not require rejecting reality.

From a psychoanalytic perspective, the important contradiction at issue is not between belief in the marriage lasting forever and the statistics on divorce. Instead, the fundamental contradiction in this context inheres in the individual’s feelings about the marital relationship itself. One of the important factors bearing on the decision to enter into a prenuptial agreement that psychoanalytic psychology brings to our attention is the ambivalence that many individuals can feel in connection with the decision to marry. Psychoanalysis thus suggests that over-optimism is only half the psychological picture. Anxiety and pre-wedding jitters also play a role, and point to the underlying worries that many if not most people have about the prospect of marriage. These worries can stem from the loss of a single lifestyle, the fear that the intended spouse will not be the perfect partner, financial concerns, and a general anxiety about the long-term nature of the commitment. Whereas cognitive psychology suggests that the universal factor in mental life affecting couples on the eve of marriage is over-optimism, psychoanalysis raises the question whether the universal factor is, instead, ambivalence.

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205 See Bix, Bargaining, supra note xx.
Why then do empirical studies conclusively demonstrate that individuals self-report that they are overly optimistic rather than deeply ambivalent at the time of marrying? A psychoanalytic perspective looks more closely at whether doubts about the marriage and the intended spouse are being unconsciously repressed. Ambivalent feelings toward important others are ubiquitous in human experience, beginning with the infant’s ambivalent feelings of love and hate towards early parental figures. To psychoanalysts, it would come as no surprise that these ambivalent feelings toward an intended spouse would exist at the time of marrying, and that less loving feelings would be strongly repressed. Indeed, psychoanalysis suggests that the stronger the ambivalent feelings, the stronger the resistance to conscious knowledge of them. The phenomena of repression and resistance help to explain why individuals cling so tenaciously to the belief that they will never divorce despite the incontrovertible statistics. The need to repress ambivalent feelings overcomes the individual’s rational reflection on the future of his or her marriage. And the conscious effect is a state of over-optimism.

Feelings of ambivalence are a sign of a healthy, mature relationship with an important person in one’s life. At its most extreme, an absence of ambivalence can signal a particular defensive state of mind called “splitting,” usually experienced by severely regressed individuals who view the world and other people in all good or all bad terms. To see another person in either purely idealized or purely negative terms outside the romantic sphere is considered a sign of mental distress. Romantic love is one of those life experiences where splitting comes into play as a normal part of the development of adult relationships, which is in part why romantic love, with its idealization of the other,

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207 Cites
208 See Paul Grey; Freud.
is so hard to sustain over the long term. Moreover, idealized love does not mean that its emotional counterparts do not exist. These more negative feelings instead can be split off away from consciousness, but nevertheless can express themselves in unconscious ways. The implications of unconscious ambivalence for decisionmaking about prenuptial agreements are examined in the following Section.

2. Imagining Marriage. Imagination is necessary for an individual to decide whether to enter into a prenuptial agreement, for no one can make a rational decision on the matter without imagining what the marriage will bring in the long term. So imagination is essential, but it is also, as psychoanalysis clarifies, not without its own distorting effects on the decisionmaking process. In the context of marrying, ambivalent feelings toward the intended spouse are likely to be the most important factor affecting the individual’s ability to assess realistically whether to enter into a prenuptial agreement. The individual’s decision can be influenced by unconscious ambivalent feelings that shape how the individual imagines his or her relationship to an intended spouse, both in the present and the future. Where this is present, all of the aspects of imagination discussed in Part II above come strongly into play.

A psychoanalytic perspective thus focuses attention on a set of questions relating to what individuals on the eve of marrying might imagine about their future together. How might imaginings about the future differ depending on whether this is a first or subsequent marriage? How do individuals predict how their future spouse will behave in the event of divorce? How do past experiences, such as a depriving childhood, prevent

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209 See Bix, Bargaining, supra note xx at 200; ALI Principles, § 7.02, comment C (Parties “entering into a family relationship have expectations about their future partner that may disarm their capacity for self-protective judgment, or their inclination to exercise it as compared to parties negotiating other kinds of contracts”).
individuals from fairly treating their intended spouse in financial matters? Or unfairly treating themselves? What unconscious feelings of anger or guilt might be playing a role in a spouse’s insistence that a prenuptial agreement be signed, or a spouse’s agreement to sign onto unfair terms? What ambivalent feelings about future parenthood are playing a role?

To look more closely, an individual’s capacity for reality testing can be weakened as a result of the strong emotions and anxieties surrounding the event of marriage. For example, the individual’s early childhood experience of not being emotionally well cared for as a child can stimulate his or her longings to be taken care of by an intended spouse. If an individual comes from an emotionally depriving early life, for example, the longings may be so strong that a realistic assessment of the partner’s capacity and willingness to care for the individual financially cannot be had. If an individual experiences her partner in ways similar to an abusive parent, then she might unreasonably distrust her future spouse, and this distrust might distort her thinking about prenuptial arrangements, leading her to avoid financial planning or to insist on terms that are manifestly unfair. Individuals who have themselves experienced parental divorce may be likely to want to redo their early childhood experience and therefore repress most strongly any unconscious ambivalent feelings they might be experiencing and any possibility of divorce.

Understanding the possible stress put on the individual’s capacity to engage in dispassionate reality testing at the time of marrying reveals that the phenomenon of over-optimism at the time of marrying may be the result of too much imagination rather than too little. The transference of early childhood experiences onto the present is likely
present for most people at such important family events, and unconscious regression to idealized thinking about the other is a common aspect of romantic love. A psychoanalytic perspective on these factors leads inevitably to the conclusion that no one psychological factor can account for why individuals make the prenuptial decisions that they do. A psychoanalytic view that focuses on the complexity of ambivalence, transference, and repression means that attempts to de-bias individuals by providing them with more information may be a valuable effort, but is not likely to be enough. The ambivalence most couples experience at the moment of marrying also needs to be addressed. How the legal system should address this ambivalence is unclear. The following section reviews several possible options.

3. *Psychoanalytic “De-Biasing.”* It may be difficult for both individuals and our legal system to admit that people entering into marriage might have ambivalence about the moment, and that this ambivalence may not even be conscious. But recognizing that this ambivalence may exist is an important first step. De-biasing from a psychoanalytic perspective, then, might include helping individuals to overcome the resistance to unconscious ambivalent feelings most people feel in relation to important people in their lives, notably their intended spouse at the time of marrying. How the legal system might address this resistance on the part of individuals is unclear. Raising the subject of prenuptial agreements in itself can be an anxiety-producing event, which may be why most people avoid it. Direct counseling on the subject by family law attorneys or mediators is one possibility. Mandating prenuptial agreements and thus directly overriding resistance is another. Advocating self-analysis on the matter is a third, as

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Holmes and many realists did for legal decision makers, although certainly a less practical alternative.

These options for addressing the parties’ resistance to prenuptial agreements are procedural in nature. Psychoanalysis does not dismiss procedural safeguards, and it does not deny the fact that prenuptial agreements can serve the interests of both parties to the marriage, as well as their children from prior marriages. But psychoanalysis questions the idea that parties entering into pre-nuptial agreement can be guided by conscious rational considerations alone. If one considers the decision to enter into prenuptial contracts from the perspective of how individuals actually imagine their future, how they generate alternatives to the present state of affairs, what basic unconscious longings they might have, then one is less inclined to assume that procedural safeguards alone will be sufficient to protect the parties’ interests. From a psychoanalytic perspective, procedural rules are especially useful in these circumstances to the extent they set constraints on imagination. But psychoanalysis offers less optimism about the ability of procedural reforms alone to substantially improve rational decisionmaking about marrying.

In terms of prenuptial agreements, the question then becomes, from a psychoanalytic perspective, whether some sort of substantive fairness review should be retained in addition to the procedural reforms called for by behavioral legal scholars. No clear answers present themselves. One could reasonably take the position that, because prenuptial agreements are so colored by unconscious imaginative longings about one’s future, and one’s past, that the only sensible legal approach is to remove all substantive fairness reviews entirely. This approach, arguably taken by Justice Holmes in his early jurisprudential work, takes the view that individual subjectivity is so complex that legal
rules should operate at the level of behavior only. To try to uncover the unconscious reasons behind any particular individual’s decision to enter into a prenuptial agreement, in this view, is simply unrealistic. Better to remove law altogether from the realm of subjective experience.

On the other hand, psychoanalysis could also be seen to support an equitable approach to the enforceability of prenuptial agreements, one that takes into account the ambivalence and complexity that surrounds decisionmaking in this context. This more traditional approach would allow judges to decide whether, in the given circumstances, enforcing the contract would be unfair or would work an injustice. The most important factor here would be the financial status, needs and abilities of the parties at the present time and whether enforcing the agreement would be manifestly unfair given those factors. However, a psychoanalytic perspective might alter the nature of this substantive review to include consideration of the psychological factors that might have led the parties to enter into the agreement in the first place. But review of the parties’ expectations at the time they signed the agreement could involve consideration of the likely ambivalences, transferences and repressions surrounding the decision. One could argue that such an inquiry is neither practical nor desirable. But this approach would not require putting every party on the couch. To the contrary, a court would only need to take into consideration the possibility that such complicated factors may have played a determinative role in the decision to enter into an agreement that, from any objective perspective, was not in one of the party’s best interests.

Whatever approach legal policy makers and courts ultimately take, psychoanalysis helps to dispel the myth that law is operating in the realm of rational

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211 See Dailey, Holmes, supra note xx.
choice. Along with cognitive psychology, psychoanalysis helps to clarify how the law of prenuptial agreements operates in the real world. Cognitive psychology and psychoanalysis work together in clarifying the particular ways in which individuals do not always make decisions in rational, conscious ways. Psychoanalysis supplements cognitive psychology with insights into the process by which individuals create the alternatives to reality that are necessary for choice. In circumstances such as prenuptial agreements, where individual decisionmaking draws so heavily on imagined needs, desires and wishes, a decision must be made whether law will confront or set aside the complexities and ambivalences inherent in individual choice.

**IV. Conclusion**

*(To be written)*