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Imagination and Choice

Anne C. Dailey

Individual choice is a central feature of the psychological portrait drawn by nearly every established school of thought in modern American jurisprudence. Legal scholars are increasingly interested in piercing the conceptual surface of choice to inquire into its actual psychological workings. The study of choice in this emerging behavioral legal scholarship draws primarily from cognitive psychology. This article argues that this important inquiry into choice should be broadened to include modern psychoanalytic ideas about imagination. An example of the importance of a psychoanalytic perspective on imagination is provided by the law governing the enforceability of prenuptial agreements. As this discussion illustrates, psychoanalytic psychology, in conjunction with research from the cognitive sciences, provides a valuable framework for examining assumptions about individual choice in law.

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

Simon (1985, 302)

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

Damasio (1994, 165)

INTRODUCTION

Individual choice is a central feature of the psychological portrait drawn by nearly every established school of thought in modern American

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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 decision making to a well-ordered society. Communitarian-minded scholars acknowledge that individuals must be free to accept or reject the affiliations and values of the families and cultures into which they are born. Even some 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 decision making of individual adult citizens. Of course, no sensible person contends that pure rationality does or should capture the full range of human thought and behavior, but reasoned choice is the prevailing model. When legal theorists refer to rational or autonomous choice, they generally mean to evoke a normative framework for conceptualizing how individuals make important decisions about their own lives or the life of the collectivity.

Contemporary legal scholars are increasingly interested 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 long worked to identify the psychological line separating rational from irrational thought. More recently, however, 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 corporations law (Langevoort 1997), contracts law (Eisenberg 1995), employment law (Krieger 1995), family law (Scott 1990), jury decision making (McCaffery, Kahaneman, and Spitzer 1995), products liability law (Hanson and Kysar 1999a; Hanson and Kysar 1999b), evidence law (Heller 2006), feminist legal theory (Levit 2006), and jurisprudence (Winter 2001). Following the work of Jolls, Sunstein, and Thaler (1998), behavioral legal studies scholarship has established itself as one of the most influential and exciting movements to emerge in the legal academy over the last few decades.

The new behavioral legal scholarship on individual decision making 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 (Kahneman, Slovic, and Tversky 1982). Emotions are studied for their facilitating as well as distorting effects on cognitive thinking. This research aims to provide a testable, simplified, and scientific framework for understanding human decision making in the real world. Its primary goal is to improve decision-making outcomes in law by reducing individual cognitive errors and fine-tuning judgment. Where debiasing is not possible, then legal rules can be modified to take account of these predictable cognitive failures. Overall, the emerging field of behavioral legal scholarship is moving toward a paradigm of individual
decision making in law that puts cognition and, to some extent, emotions at the center of mental activity.

This article aims to supplement the cognitive paradigm with a view of individual choice drawn from psychoanalytic psychology. By delving more deeply into the realm of irrationality, a psychoanalytic perspective brings to light features of adult psychology largely overlooked in cognitive psychology and, consequently, in contemporary behavioral legal scholarship as well. Many of these unseen and unexamined aspects of human psychology are directly relevant to the processes and outcomes of individual decision making. Imagination is one such central feature of individual decision making from a psychoanalytic perspective, and it is the subject of this article. By studying the role of imagination in decision making, this article hopes to broaden the horizons of contemporary behavioral legal scholarship to encompass a psychoanalytic approach to the legal study of how and why individuals make the choices that they do.¹

Legal scholarship that directly addresses the role of the imagination in law is uncommon, but examples do exist. Susanna Blumenthal (1998) 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 decision making. Additionally, James Boyd White (1973) produced a casebook in the early 1970s titled The Legal Imagination, in which he explored the linguistic, creative dimensions of law. In her book Poetic Justice, Martha Nussbaum (1997) argues that, because imagination allows us to empathize emotionally with others' suffering, imagination is necessary to achieve a morally just legal system. Jed Rubenfeld (2002) argues for a constitutional theory of the First Amendment that recognizes and protects, in his words, "the freedom of imagination." What ties these otherwise unrelated works together is a shared interest in examining the relationship between law and the mind's creative processes. This article builds on these earlier efforts in order to develop a theory of imagination that refines and elaborates on existing behavioral ideas about individual decision making in law.

Broadly defined, imagination is the capacity to conceive of objects or experiences not presently available to the senses. More specifically, the term imagination can encompass a range of mental activities. From a cognitive perspective, for example, imagination can indicate the capacity for representation, memory, perception, and any counterfactual process of thinking (Roese 1997; Byrne 2005). From a social psychology perspective, in contrast, the term imagination can be used to describe the way in which individuals

¹ 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 (Saks 1999, 2001; Brooks 2001; Dailey 2000a, 2000b, 2007; Burt 2002; Duncan 2002; Adler 2005; Schmeiser 2004, 2006). Some legal scholars also draw on Lacanian psychoanalytic ideas, although that approach is not examined in this article (Goodrich 1995).
situate themselves in a social world or by which they gain emotional understanding about other people (Ickes 1997). The term imagination is also commonly used to refer to the mental processes involved in creative or artistic pursuits. Some thinkers, like the eighteenth-century Romantics, associated it with spiritual or religious meaning.

As used in this article, imagination specifically means the mind's creative capacity for conceiving of desires, needs, and wishes in words and images. Imagination has been a foundational concept in psychoanalytic psychology ever since Freud abandoned the "seduction theory"—the view that his neurotic female patients all suffered from the effects of actual child sexual abuse—in favor of the idea that his women patients actually suffered from the unresolved sexual fantasies of childhood (Freud 1959a). Freud did not deny the occurrence of early child sexual abuse, but he put imagination center stage when he identified the Oedipus complex as the expression of unconscious libidinal desires. Modern psychoanalysis has evolved significantly since Freud, but imagination as an expression of desires, needs, and wishes remains a fundamental tenet of contemporary psychoanalytic theory.

This article draws on psychoanalytic psychology to make the argument, perhaps counterintuitive, that the bedrock ideal of adult reasoned decision making in modern American law implicates the foundational skill of imagination. In almost any decision-making context, however trivial or important, imagined alternatives must be contemplated and mentally tested. Because conceiving of alternatives to the present state of affairs is a necessary component of decision making, imagination is what, in part, makes individual choice possible. Without a capacity to imagine desired alternatives, an individual would live in a literal, nonsymbolic, self-regarding world with no meaningful past or contemplated future (Bruner 1985). Yet unlike the cognitive understanding of imagination, which focuses on the processes of representation and counterfactual thinking, a psychoanalytic view of imagination understands these choices as motivated by personal desires, needs, and wishes. Creativity and motivation are the defining attributes of imagination from a psychoanalytic perspective. As argued here, examining the origins and mechanisms of the creative imagination is essential for a comprehensive understanding of individual decision making in law, particularly in areas touching upon close personal relationships, emotionally charged circumstances, or important life decisions.

2. The essential connection between imagination and decision making has been noted by a few prominent scholars. For example, the behavioral economist Herbert Simon (1985) identified the importance of imagination in generating a set of alternatives necessary for rational choice in an article on rational decision making; he writes, "We need to understand not only how people reason about alternatives but where the alternatives come from in the first place" (302–03). 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" (302–03).
Part I of this article addresses the longstanding tension within psychology between cognitive psychology's preference for reason and psychoanalytic psychology's emphasis on the creative imagination. The field of cognitive psychology does not overlook imagination altogether. It focuses on processes, such as representation and memory, and cognitive distortions and biases in processing information, such as the availability heuristic. Similarly, the study of counterfactual thinking by cognitive psychologists attempts to understand the process of producing alternative outcomes for past events. But while cognitive psychology deepens our understanding of choice, it does not fully account for the creative aspects of imagination. Contemporary psychoanalytic psychology holds out the possibility of supplementing the insights of cognitive psychology with a psychoanalytic appreciation for the creative elements of decision making, its processes, and its limitations. Psychoanalysis allows for a deeper understanding of the wishes, needs, and desires that can set cognitive thinking about the future in motion.

Part II provides a psychoanalytic perspective on the role of the creative imagination in individual decision making, along with cognitive and neuroscientific research that complements and fortifies that perspective. It considers three central aspects of imagination: the processes of reality testing, the importance of early childhood experience, and the influence of unconscious operations. Research in the cognitive sciences informs each of the three aspects discussed. Section A shows how reality testing—the process of negotiating the psychological boundary between subjective meaning and objective reality—is a central aspect of decision making. 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 exchange between less rational unconscious primary thought processes and conscious cognitive thinking.

As a case study, Part III examines the implications of a psychoanalytically informed view of imagination for the laws governing prenuptial contracts. Cognitive psychology confirms that most individuals are overly optimistic about the chances that their marriage will succeed. 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 undeveloped. Beneath the surface of the prospective spouses’ overoptimism lurks its opposite; the fact is that most, if not all, individuals experience some degree of ambivalence about their impending marriage and their intended spouse. This ambivalence can remain outside the parties’ conscious

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3. Psychoanalysts generally prefer Freud's term “fantasy” to the term “imagination” (Freud 1959). This article uses the two terms interchangeably.
imaginings about the future and it can distort those imaginings in particular ways. Part III explores how this ambivalence may affect the choice to enter into a prenuptial agreement and argues that taking into account the ambivalence felt by most individuals should lead judges and lawmakers to impose an ex post substantive fairness standard at the time of divorce. As Part III’s discussion of prenuptial agreements illustrates, a psychoanalytic perspective, in conjunction with research from the cognitive sciences, provides a valuable psychological framework for examining assumptions about individual choice, particularly in legal areas touching upon close personal relationships, emotionally charged circumstances, or important life decisions.

I. BEHAVIORAL LEGAL SCHOLARSHIP AND IMAGINATION

Developments in the field of psychology over the last century reflect a back and forth between empirical and humanistic views on human nature, and this back and forth has reverberated in legal scholarship over this same period. Early in the twentieth century, behaviorism dominated the empirical sciences (Weston 1998), while psychoanalysis, with its focus on unconscious wishes and fantasies, displayed a strong affinity with Romantic ideas. Freud indeed believed he was establishing a scientific discipline, and his interpretation of the latent meaning of dreams and symptoms followed a deeply 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.

The early popularity of behaviorism was reflected in the work of legal realists from the period, many of whom used behaviorism as a guide to legal policy (Moore and Callahan 1943; Schlegel 1995). Not long after, however, the pendulum swung, and psychoanalysis eclipsed behaviorism in both the academy and the consulting room. In 1930, Jerome Frank published his seminal book, *Law and the Modern Mind*, which drew on psychoanalytic ideas to describe the distorting effects of infantile wishes and fantasies on the decision making of legal actors and judges. Over the following decades, the ascendance of psychoanalysis was reflected in legal scholarship on the insanity defense, child custody, and jurisprudence (Goldstein, Freud, and Solnit 1973). Indeed, by the 1970s, psychoanalysts had even joined the Harvard and Yale law school faculties.4

With the emergence of cognitive psychology in the latter part of the twentieth century, we are witnessing the broad social, cultural, and  

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intellectual revival of empirical psychology, and a corresponding decline in
the study of the psychoanalytic realm of desire and fantasy (Weston 1998).
The “cognitive revolution” in psychology underlying these developments
has its roots in the scientific advances in communications, engineering, comp-
puter programming, artificial intelligence, and linguistics that came after
World War II. Cognitive research focuses on human information processing
(Wessells 1982; Haberlandt 1994; Dailey 2000b), including perception,
memory, computation, judgment, attention, language, problem-solving, and
related processes in the area of decision making, which are all designed
to understand “the kinds of information we have in our memories and
the processes involved in acquiring, retaining, and using that information”
(Wessells 1982, 1–2). 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 (Shevrin et al. 1996). Part
I describes the widespread influence of cognitive psychology on legal scholar-
ship and identifies its strengths and limitations as a framework for studying
individual decision making in law.

A. The Cognitive Imagination

In the 1990s, legal scholars became interested in cognitive psychology,
particularly experimental work demonstrating the limitations, biases, and
errors in individual decision making, in order to understand how legal struc-
tures affected individual decision making (Jolls, Sunstein, and Thaler 1998).
The cognitive distortions and biases under study include the availability
heuristic, the hindsight bias, self-serving biases (such as overoptimism), affect
heuristics, and reference point biases (such as loss aversion, the endowment
effect, framing effects, and anchoring biases) (Kahneman, Slovic, and
Tversky 1982). Law and economics scholars were the first to embrace the
work of cognitive researchers, 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. The appeal of this research to
legal thinkers is understandable. Experimental cognitive psychology provides
a verifiable and simplified framework for understanding human decision
making in the real world (Sunstein 1997). Its quantified data supply a blue-
print for laws and public policies to “debias” individuals through procedural
and substantive legal reforms (Jolls and Sunstein 2006b). And it reaffirms the
core Enlightenment paradigm of reason.

In their study of rational decision making, contemporary cognitive sci-
entists do not overlook the imagination. Much of the work carried out by
cognitive researchers involves what may be called the “cognitive imagina-
tion,” an aspect of mental life 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 under-
stood that the existence of a mental representation implies powers of imagi-
nation such as perception and memory. At a basic level, for example, im-
agination functions as memory by allowing the mind to represent images
and events once perceived but no longer present to the senses. The root of the
word imagination, from the Latin *imago*, originally referred to portraits of
ancestors placed in Roman houses or carried in family funeral processions
(Mayes and Cohen 1992). Kant went beyond mere representation in identi-
fying the cognitive imagination as one of the six innate faculties of the mind
essential to the rudimentary process of synthesizing mental representations
into a coherent whole. The nineteenth-century associationist-psychologists
similarly accorded imagination a role to play in the integration of sense
perceptions into more complex mental ideas (Dailey 1998). George Lakoff
and Mark Johnson (1980) emphasized the importance of “conceptual meta-
phors” to the brain’s basic cognitive processes.5

Some of the work carried out by cognitive researchers focuses on the
mistakes people make in predicting the future under conditions of uncer-
tainty. Psychologists have identified what they call the availability heuristic,
which 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” (Kuran and Sunstein 2000, 374). For instance, many
instances of bias in decision making due to the availability heuristic relate to
memory retrieval, where occurrence of a particular event is frequent or
particularly salient. Kahneman, Slovic, and Tversky (1982) 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 diffi-
cult to conceive of, or simply do not come to mind. (1127)

The availability heuristic thus explains how individuals may underesti-
mate or overestimate the probability of an event happening based on acces-
sibility to imagined scenarios or scripts. As Tversky and Kahneman (1973)
note, “the plausibility of the scenarios that come to mind, or the difficulty of

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5. Legal scholars such as Steven Winter (2001) highlight the importance of imagination
to basic cognitive operations, such as categorization, metaphor, metonymy, and cognitive
schemas.
producing them, then serve as a clue to the likelihood of the event” (229). Experimental research has confirmed the effects of imagined behavioral scripts on personal expectations and intentions (Anderson 1983).

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 in the cognitive sense, whether conscious or unconscious, does not directly relate to the creative process of generating and assessing the alternatives necessary for choice. The cognitive imagination is, in the language of cognitive psychology, more procedural than substantive. It does not encompass the mind's ability to create alternatives to reality out of wishes, needs, and desires, nor does it address the factors that can interfere with this creative process.

The closest cognitive psychologists have come to the study of the creative imagination is in the area of counterfactual thinking. As the name indicates, counterfactual thinking is the process by which individuals imagine alternatives to past events (Roese 1997). While researchers in the area produce valuable information about the process by which individuals produce alternatives to reality, this body of research remains limited in two ways. First, it is retrospective, focusing on the reconstruction of past events rather than the creation of future possibilities. Researchers study how people reflect on the ways in which things could have been, but they do not investigate how people decide what the future should be. Second, researchers describe counterfactual thinking as an inherently cognitive activity. As one researcher describes it, “the principles that guide the possibilities that people think about and that underlie rational thought also underlie imaginative thought” (Byrne 2005, 38). As with cognitive psychology more generally, consideration is not given to the wishes, needs, and desires that motivate and shape the creation of alternatives for the future.

B. Emotional Influences on Cognition

The tension between reason and emotions has preoccupied legal thinkers for centuries. The Federalist papers expressed the Framers' 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 instinctual desires of man for revenge (Dailey 1998). 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 (Stone 2003). Juries are instructed to exclude sympathy from their decision making. Reasonable persons and rational actors embody the long-standing
views that law is properly the domain of reason and that legal decision making should be free from the irrational and distorting effects of emotions.\(^6\)

In recent years, cognitive psychologists have broadened their investigation of individual decision making to inquire into the relationship between emotions and cognitive thinking.\(^7\) To some extent, these researchers have confirmed the traditional view that emotions pose a danger to logical, rational thought. For example, it is widely accepted among empirical psychologists, as it is by the lay public generally, that emotions can lead to self-destructive behavior (Loewenstein and Lerner 2003). Researchers have studied how anger can have an incidental influence on decision making by leading the individual to punish the wrong person, to be indiscriminately punitive or optimistic, or to be careless in thought or eager to act. Daniel Kahneman (2002) concludes that “an automatic affective valuation—the emotional core of an attitude—is the main determinant of many judgments and behaviors” (470). Research into the effect of emotions on decision making, or “hot 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 (Loewenstein and Lerner 2003). Social cognitive psychologists study the ways in which “implicit affects” unconsciously distort decision making along racial, gender, and other lines (Greenwald and Banaji 1995). Important work on the effect of mood and emotional contagion on decision making has also attracted scholarly attention recently (Freshman, Hayes, and Feldman 2002; Emens 2006). Overall, these studies confirm the traditional view that emotions can affect 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 (Loewenstein and Lerner 2003). This research reveals that cognition sometimes utilizes emotions to further rational thinking. For example, researchers have shown that emotions can sometimes serve an adaptive role by enabling an individual to focus on important events and to react quickly (Wilson 2002; Lerner and Tiedens 2006). Antonio Damasio (1994), among others, shows how emotions serve as “somatic markers” (177) necessary for good decision making. Researchers have explored the cognitive component of emotions, emphasizing the evaluative aspect of certain emotional responses to the environment (Adolphs and Damasio 2001; cf. Posner

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6. For a collection of essays devoted to emotions and the law, see Bandes (1999).
7. 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 decision making, as well as emotional mechanisms, such as shame and guilt. For a helpful review of the contemporary literature on law and emotions, see Maroney (2006). While most scholars orient themselves toward either cognition or emotions, the overall picture is increasingly one of integration.
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Legal scholars, too, explore how emotions such as shame and disgust may prove important to the moral ends of law (Kahan 1999).

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 (Weston 1998). Although everyone experiences early childhood amnesia, cognitive psychologists explain that experiences during this time are nevertheless encoded and stored at unconscious levels not accessible to conscious recall. Early, implicit, preverbal, and emotional experiences form the basis for prototypes that have long-term effects on the individual's view of himself or herself and others (Cortina and Liotti 2007).

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. 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 has little to do with the study of the creative imagination, per se. Imagination is not in itself solely an emotional process; it has an independent role in mental life that involves conceiving of alternatives that draw on or are motivated by wishes, needs, and desires.

Empathy might be the best example of the way in which emotions and imagination are closely interrelated but nevertheless are independent factors in mental life (Arlow 1995). Many Romantics viewed imagination as a mechanism for sympathetic understanding. Martha Nussbaum (1997) offers a contemporary version of this idea. She argues 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 or herself 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

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8. For a longitudinal experimental study showing these effects, see Suess and Sroufe (2005). For further work on emotion schemas or scripts, see Tompkins (1987) and Demorest (1995). For a study of emotion schemas in psychotherapy transcripts, see Siegel, Sammons, and Dahl (2002).
people and their motivations. Yet, standing alone, emotions do not capture the full range of imaginative activity needed for reasoned decision making. Emotional understanding can expand one's knowledge of the world, but it does not explain the creative process by which the individual comes to generate alternatives to reality. The study of emotions, while related to imagination, does not directly address the process by which the individual gives expression to his or her inner wishes, needs, and desires. While taking into account emotional factors is an important advance in understanding individual choice, it does not capture the full range of imaginative activity necessary to produce alternatives to present reality. Imagination affects individual decision making far more than a study of emotions can convey.

II. PSYCHOANALYTIC VIEWS ON IMAGINATION

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 (Kirschner 1996). But the concept of imagination in psychoanalytic psychology does differ in at least one fundamental way from Romanticism, as Richard Rorty (1989) 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 the time for fantasy—is a faculty for creating metaphors. (36)

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.

In this part, 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. Each of these three aspects of imagination finds support in the cognitive sciences. Most contemporary empirical psychologists are resistant to a psychoanalytically informed view of individual decision making (Weston 1998). In the field of academic psychology, psychoanalytic ideas about individual decision making 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 their relationship to current scientific research. Moreover, as should be clear from the following discussion, psychoanalytic findings and cognitive research are not fundamentally at odds (Bucci 1997; Shevrin et al. 1996; Weston 1998; Kandel 1999). As explained in this part, basic psychoanalytic ideas relating to the role of imagination in decision making find empirical validation in research being carried out in the cognitive sciences (Weston 1998; Kandel 1999).

A psychoanalytic framework for decision making nevertheless provides a deeper and thus more accurate account of choice than the cognitive sciences standing alone. This framework illuminates the complex interplay between subjective experience and external reality, between past and present, and between unconscious fantasies and conscious rational thought. As explained in this part, distortions in reality testing, transferences from early childhood experiences, and repressed unconscious feelings can have powerful effects on one's imaginings about the future. Part III will then show how understanding these effects on the decision-making process is essential to developing more just legal rules and doctrines governing human behavior in areas touching upon close personal relationships, emotionally charged circumstances, or important life decisions.

A. Reality Testing

The creative 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 controlled, 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 overwhelming the mind's grasp on reality. Kay Jamison (1995) 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" (2). 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" (quoted in Jamison 1995, 52). 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. This section discusses how imagination is also an integral part of the process by which the individual perceives and understands the objective world. It 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.

The process of choosing requires that an individual recognize the problematic line between the world as it is and the world as he or she wants it to be. Drawing this line involves the psychological skill of reality testing. The
traditional view of reality testing posits a bright line between fantasy 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 (Abend 1982). For Freud, "the essential point was to emphasize the distinguishing of perceptions from ideas, or, in other words, the crucial decision was whether a given mental stimulus originated inside or outside the mind" (221). To some later commentators, Freud viewed reality testing in cognitive, rational terms because it was carried out by "sense organs, consciousness, attention, memory, and judgment . . . all arranged in some contraption like a scientific instrument" (225). Freud's early conception of reality testing was of a cognitive process brought to bear on fantasy.

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" (Mayes and Cohen 1992, 25). There are many aspects to this process of establishing an internal sense of reality. Perception obviously plays a primary role. But perception itself is shaped by experience. Some kinds of perception are physical, as when an individual perceives that fire is hot from the past experience of being burned. But some ways of perceiving the world operate on a psychological rather than physical plane. For example, an individual suffering from posttraumatic stress disorder might perceive gunfire in the sound of a car backfiring. This "transference" of prior experiences onto present reality is a universal phenomenon.

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 other people and of the world. Transference is, in this sense, what gives objective reality its meaning. Hans Loewald (1980) explains:

There 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 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. (254)

Events and people have meaning for the individual 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 (Arlow 1969; Abend 1982). From a psychoanalytic perspective, then, reality testing is a
Imagination and Choice

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.

Reality testing is of obvious relevance to decision making. Psychoanalysts define reality testing to include the individual’s ability to use thought as trial action (Mayes and Cohen 1994). 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. 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 to attend college or to have 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 what it means to make decisions.

A 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, which 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 (Lear 1998). 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 and neuroscientific research support the view that imagination is central to a stable sense of reality. The developmental psychologist Paul Harris (2001) 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” (28). To Harris, the emergence of
imaginative thinking "may be linked with a move toward objectivity rather than away from it" (6-7). 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. Harris describes how the absence of imagination in children is one indication of a vastly restricted capacity for decision making. For example, he and others have observed that one of the earliest markers of childhood autism is an absence of pretend play (Harris 2001; Mayes and Cohen 1994). Before the second year, researchers tell us, children imitate but they do not yet pretend (Harris 2001). 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 (1971) describes the developmental process that leads children to master reality testing. He identified 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 (1-2):

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 credulity of others, forcing them to acknowledge a sharing of illusion that is not their own. (3)

While some analysts have taken issue with Winnicott's idea of a third realm of experience between the purely subjective and the purely objective (Loewald 1988), there is widespread agreement with his view of the interplay between the two. As Winnicott (1953) explained, "the task of reality-acceptance is never completed . . . no human being is free from the strain of relating inner and outer reality" (96).

Research from the cognitive sciences also supports the 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 (Mayes and Cohen 1992). Mentalization highlights the facts that it is impossible to know the world—to know why other people behave the way they do—without imagination (Mayes and Cohen 1994). 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 the principal avenue for the
development of mentalization” (Fonagy et al. 2002, 18). To know another person and to understand his or her 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 three or four years old 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 decision making, such as autism or extreme character pathology, perform very poorly on theory of mind tests (Fonagy et al. 2002).

Mentalization is one example of the way in which the cognitive sciences are producing data that support 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” (Mayes and Cohen 1994, 209; cf. Gallese, Eagle, and Migone 2007). The failure of mentalization can have serious implications for the child’s sense of self (Fonagy et al. 2002). “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 autonomous self that supports ongoing social differentiation” (Mayes and Cohen 1994, 196). 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.

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 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, “too 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” (Mayes and Cohen 1992, 24). 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.
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. Ideally, the individual conjures up the imaginative possibilities and then critically assesses them in the clear, if somewhat shimmering, light of day.

B. Early Childhood

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 that provide a clue to its inner workings (Mayes and Cohen 1994). Despite the complexity of imagination's developmental trajectory, psychological research strongly suggests that imagination has its roots in the infant's earliest relationship with a primary caregiver. 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 the study of adult 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, which includes the mechanisms and content of imagination.

From a psychoanalytic perspective, internalization of early caregiving relationships is one of the primary influences on 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 (Marans and Cohen 1991). Contemporary factors also 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 content of the adult individual's wishes, needs, and desires.

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 (Dailey 2006). 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 (Vaughan 1997; Kandel 1999). Neuroscientists
have also studied the biological mechanisms involved in the creation of these prototypes (Kandel, Schwartz, and Jessell 1995; Kosslyn and Koenig 1995; Vaughan 1997). 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 (Vaughan 1997). 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 (Fonagy 2001).

“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” (Kandel 1999, 513). 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. Cognitive research does not confirm directly that unconscious wishes, needs, and desires are the animating source of imaginative life, but it does provide support for the general proposition that early childhood is a time when the individual's foundational view of himself or herself and the world gets laid down.

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 generate and critically assess imagined alternatives to reality. While human studies on this point do not exist, research suggests that children born 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" (Mayes and Cohen 1992, 40). The causal connection among early caregiving, biology, 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 Mayes and Cohen (1992) 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" (27). 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 (Dailey 2006). In other words, early childhood need not be perfect for a full imaginative life to take hold; it need only be "good-enough" (Winnicott 1965, 145). In many cases, however, the stress put upon the early caregiving relationship by long-term family poverty,
mental 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 (Dailey 2006). While "research 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" (Emde and Robinson 2000, 175). Genetic variations and cultural diversity obviously play an important part in how an individual child's imaginative capacities will unfold.

The influence of the early caregiving experience on the individual's 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 (Mayes and Cohen 1996). 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 clearly early childhood experience is never determinative of adult life (Suess and Sroufe 2005; Cortina and Liotti 2007). But even in ordinary circumstances, the quality of early caregiving—joyful or depressed, anxious or relaxed, hovering or detached—will direct the child's future imaginings in particular ways.

Examination of the processes of transference and internalization yields a more complete picture of adult choice, one that takes into account the temporal dimension of imagination. Early experience 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 decision making closely relates 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 failures in early caregiving relationships. Individuals who make self-destructive choices again and again, who undermine their own conscious values and beliefs, or who find themselves repeatedly making the same bad decisions, unable to break free from a self-defeating cycle, can be said to be experiencing failures in imagination rooted in unconscious wishes, needs, and desires. Understanding these types of failures is as essential to a paradigm of individual decision making as understanding
failures of a more strictly cognitive kind. A cognitive psychology focused on the availability heuristic and other cognitive biases cannot adequately account for the kinds of self-defeating or self-destructive choices people make in their lives.

C. Unconscious Operations

A psychoanalytic perspective on individual decision making 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 (Shevrin et al. 1996). 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.

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 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. These unconscious wishes, needs, and desires are shaped in part by the internalization of early childhood relationships that can be transferred onto present perceptions and imaginings about the future. Nevertheless, as this section explains, there is a clear and important overlap in the way each discipline conceives of the unconscious.

Freud was not the first to discover the unconscious (Ellenberger 1981). 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 comprising infinitesimal units of force that existed in a continuum from perception (unconscious) to apperception (conscious) (Dailey 1998). Johann Herbert was an early experimental psychologist who expanded on Leibniz’s theory by describing “inhibited ideas” that reside in the unconscious and can move into full awareness (Boring 1957). 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 (1866) commented that “[the world] is a remoter and inferior incarnation of God, a projection of God in the
unconscious” (167). Oliver Wendell Holmes Sr. and his son both focused on the idea of the unconscious as an important influence on human behavior and decision making (Dailey 1998).

Although Freud did not discover the unconscious, he was the first psychologist to study in detail its operating mechanisms. The activity that takes place in the unconscious Freud called “primary process,” a term reflecting the developmental view that this form of thinking is what the individual first experiences as an infant. Freud believed that primary process operated according to certain nonlogical 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, such as 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, Freud's unconscious did not follow the 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, verbal, 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 early, 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 elements. Close attention to conscious decision making reveals “the hidden linkage” and “inextricable bond” between the two (Loewald 1988, 13). As the psychoanalyst Hans Loewald (1980) explains,
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. (178–79)

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

To the extent all creative thinking involves some degree of primary-process thinking, then it is easily seen how primary process plays a role in generating the alternatives necessary for choice. The movement backward, from secondary to primary process, psychoanalysts call "regression" (Brakel, Shevrin, and Villa 2002). In a measured way, regression allows the individual to let go of the constraints of rational, logical thought, thereby bringing a creative emotional richness and depth to his or her experience of the world. 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 an indication of a greatly impoverished, emotionally wooden inner world (Tyson and Tyson 1990). Romantic love, creative inspiration, and spiritual transcendence are all common examples of adult experiences that involve 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 in touch with infantile modes of feeling and thinking, early childrearing also involves a controlled measure of regression.9

Scientific research supports the psychoanalytic idea that unconscious forms of thinking exist. Before the late 1980s, cognitive psychology focused on conscious mental processes (Weston 1998). In 1987, John Kihlstrom announced the existence of the cognitive unconscious, heralding a new era of investigation (Kihlstrom 1987). Cognitive researchers have discovered parallel systems of thought bearing some similarity to the systems of primary and secondary processes. Daniel Kahneman (2002), 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" (449). Cognitive neuroscientists also

9. "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 (Kris 1952).
refer to parallel systems of thought when they distinguish between implicit or procedural knowledge and explicit or declarative thinking (Kandel 1999, 508–09). Implicit or procedural processes are considered adaptive ways in which the mind codes and stores information into memory and representational formats. Empirical research on subliminal stimuli also supports the existence of unconscious thought processes (Shevrin et al. 1992, 341). 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 that operate outside of conscious awareness in ways that can bias conscious decisions (Greenwald and Banaji 1995). Developmental researchers studying early parent-child attachment also provide support for preverbal implicit learning (Cortina and Liotti 2007).

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. As shown here, research in the cognitive sciences supports many aspects of these psychoanalytic propositions relating to the role of the imagination in individual decision making. Part III applies these propositions to the law governing prenuptial agreements. As the discussion of prenuptial agreements illustrates, a psychoanalytic framework brings greater clarity and insight to assumptions about individual choice in family relations and related areas.

III. IMPLICATIONS OF A PSYCHOANALYTIC PERSPECTIVE FOR LAW

A. Overview

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 psychological attributes, such as unconscious motivations, instinctual desires, inner conflict, irrationality, imagination, heroism, and transcendent faith in the “infinite” (Dailey 1998). His two most important jurisprudential works, The Common Law (1881) and The Path of the Law (1897), elaborate the myriad ways in which rational faculties can be

10. Scientists use neuroimaging 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 (Schank and Abelson 1977; McEwen and Sapolsky 1995; Bucci 1997; Cortina and Liotti 2007).
overcome by deep-seated instincts and unconscious passions. His response to human passion and irrationality 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 *The Path of the Law*, Sigmund Freud wrote a short essay essentially agreeing with Holmes. In “Psycho-Analysis and the Establishment of the Facts in Legal Proceedings” (Freud 1959c), 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 criminal cases since the field had not yet produced any easy and verifiable method for ascertaining the facts outside the psychoanalytic consulting room. Freud and Holmes both regarded law as a practical tool of reason ill suited to contend with the subjective turmoil lying below the surface of behavior.11

Their followers did not all agree. The implications of Freud’s ideas about unconscious fantasies proved to be of great interest to early twentieth-century legal commentators and an important basis for the legal realist assault on formalism (Purcell 1973). At first, legal commentators struggled with the implications of psychoanalytic theory for judicial decision making. 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.12 Frank drew on psychoanalytic ideas, in some instances rather unorthodox ones, to argue that judges needed to engage in self-scrutiny in order to overcome their childish desires to be authoritarian father figures rather than dispassionate, mature decision makers. Frank emphasized the judges’ immature imaginings about the 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.

In the same year that Frank published his book, the political theorist Harold Lasswell also published an essay on imagination and judicial decision making (Lasswell 1930). Unlike Frank, Lasswell went beyond imagination’s distorting effects on judgment to consider its positive role in judicial decision making. His essay, “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

11. 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* (1959d) and *Civilization and Its Discontents* (1959c) 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.

12. Bruce Ackerman (1974) has noted the unappreciated brilliance of Frank’s book.
functions” (355). 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” (356). In a plea for a theory of legal decision making 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. (362)

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.

As Lasswell suggests, the most important contribution that a psychoanalytic view of individual decision making can make to law is to dispel the “cult of logic” upon which so many laws and policies rest. The goal of current behavioral legal scholarship is similarly to challenge the legal fiction of rational choice and the reasonable person by identifying the myriad ways in which individuals do not think rationally. Reform efforts include correcting for cognitive mistakes by debiasing or fixing the cognitive errors, thereby fine-tuning and improving the processes of rational choice (Jolls and Sunstein 2006a). Reforms might also involve modifying legal rules to take account of systematic cognitive errors and biases. But what if, as Lasswell observes and as psychoanalysis shows, individual choice cannot proceed on mere reason alone? 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 decision making discussed by Lasswell?

As with any conceptual framework, a psychoanalytic inquiry is more suited to some problems than others. A starting assumption of this article is that a psychoanalytic framework is likely to be of use in contexts where close personal relationships, emotionally charged circumstances, or important life decisions are involved. A useful analogy is the field of law and economics. For example, whether impact victim statements should be admissible in sentencing proceedings, or whether surrogacy agreements should be enforceable, is arguably not solely, or even primarily, an economic question. Judgment must always be exercised as to whether the economic framework is a useful tool in the particular context. Similarly, a psychoanalytic framework is more likely to be useful in areas where imagination plays a dominant role, such as laws touching upon close personal relationships, emotionally charged circumstances, or important life decisions. Family law may be the paradigm example.
In this regard, then, the following section considers what a psychoanalytic perspective on choice can offer the law of prenuptial agreements. The core problem here is that individuals frequently make the financially irrational decision to enter into prenuptial agreements against their own financial self-interest. Cognitive psychology suggests that individuals make these irrational decisions because they are overly optimistic about the chances that their marriage will succeed. But a psychoanalytic inquiry into the three facets of imagination described in Part II—distortions in reality testing, the effects of early childhood experiences, and the existence of unconscious fantasies—suggests that more is going on beneath the surface of imagined marital bliss than might appear. Lurking beneath the optimism of this premarital period is a near-universal, unconscious ambivalence about the prospective spouse and the marriage itself.

Recognizing that couples making the decision whether to enter into a premarital agreement may be unaware of this ambivalence has important policy implications for the law governing the enforceability of these agreements. While a cognitive bias leading to overoptimism can be remedied by providing couples ex ante with the information needed to correct their bias, unconscious ambivalence cannot be so easily remedied. As explained here, a psychoanalytic perspective treats ex ante solutions with skepticism and lends greater support to an ex post substantive fairness review at the time of enforcement.

B. Cognitive Overoptimism

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 overoptimism bias and the emotional distortions of romantic love. In one of the first articles to identify the phenomenon of overoptimism, Melvin Eisenberg (1995) described the “dispositional characteristic of undue optimism” (217) for couples entering marriage. Citing 1993 research by Lynn Baker and Robert Emery, 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 (Eisenberg 1995). The overoptimism 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 (Bix 1998). 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

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13. Although criticized, the Baker and Emery findings have been replicated in subsequent studies (see Mahar 2003).
long-term relationship. Indeed, given the overoptimism bias, it may seem surprising that anyone has the rational presence of mind to request that his or her intended spouse sign a prenuptial agreement. The overoptimism bias also explains, in part, why individuals entering second marriages are more likely to enter into prenuptial 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, romantic love can also cloud people’s rational judgment (Bix 1998). 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 (Bix 1998). 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 overoptimism and emotional distortions on decision making is to “debias” (or “deromanticize”) individuals by correcting their misperception of the risk of the event happening to them and by “cooling off” their judgment. 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, gives them adequate time to consider the options, and reduces the significance of any implied signals regarding the parties’ level of commitment. It might support a policy, for example, that mandates consultation with an attorney or that provides for mandatory counseling on the subject or imposes a waiting period (Bix 1998; Fink and Carbone 2003). The goal here would be to promote, to the extent possible, procedures that enhance conscious, informed decision making 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 at the time of decision making.

The dilemma posed by prenuptial agreements is not 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. 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 incontrovertible evidence about the risk of divorce (Bix 1998). When parties are forced to hold two contradictory beliefs in mind (my marriage will last
forever, 50 percent of marriages end in divorce), they resolve the contradiction by rejecting one belief or the other (Festinger 1957). This explanation gives rise to the goal of correcting for the overoptimism by providing individuals with 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.

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 overoptimism and the distorting effects of love—misses something important about the factors bearing on the decision whether to sign a prenuptial agreement.

C. Psychoanalytic Ambivalence

From a psychoanalytic perspective, the important conflict at issue is not between belief in the marriage lasting forever and the statistics on divorce. Instead, the fundamental conflict 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. Anxiety and prewedding jitters point to the underlying worries that many, if not most, people have about the prospect of marriage. Consciously, these worries include a fear that the intended spouse will not be the perfect partner and a general anxiety about the long-term nature of the commitment. Unconsciously, these worries have their roots in ambivalent feelings of love and hate toward one's intended spouse. Whereas cognitive psychology suggests that the universal factor in mental life affecting couples on the eve of marriage is overoptimism, psychoanalysis raises the question whether the universal factor is, instead, ambivalence.

Balanced feelings of ambivalence are a sign of a healthy, mature relationship with an important person in one's life. Ambivalent feelings toward important others are ubiquitous in human experience, beginning with the infant's ambivalent feelings of love and hate toward early parental figures. An absence of ambivalence can signal a particular defensive state of mind called "splitting," usually experienced by regressed individuals who view the world and other people in all good or all bad terms (Klein 1987). 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, is so hard to sustain over the long term. Moreover, idealized love does not mean that its emotional counterpart does not exist. These more negative feelings instead can be split off from consciousness, or repressed, but nevertheless can express themselves in unconscious ways. In romantic love, unconscious ambivalence about one’s intended spouse is not a sign of psychopathology but a near-universal facet of the love relationship.

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 distortions rooted in the primary ambivalence of close personal relationships. Failures of imagination can result from the repression of negative feelings and the idealization of the other party that accompanies romantic love. The distortions in reality testing that are reflected in the idealization of the other partner are often rooted in early childhood experience. For example, an 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 deprived early life, 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; or if an individual experiences the partner in ways similar to an abusive parent, then the individual’s capacity for reality testing at the time of marriage may be partially compromised, and he or she could repress any ambivalent feelings associated with early childhood or need to deny their existence in order to preserve some image of the ideal parent. In any case where one party is financially vulnerable, that vulnerability can translate into a wish to be taken care of.

Psychoanalysis thus suggests that overoptimism is only half the psychological picture. 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. To psychoanalysts, it would come as no surprise that ambivalent feelings toward an intended spouse would exist at the time of marrying and that less loving feelings would be strongly repressed. Indeed, psychoanalysis indicates that the stronger the ambivalent feelings, the stronger the resistance to conscious knowledge of them.

The phenomenon of repression helps 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 overoptimism. The repression of doubts and reservations can also result in the use of a particular defense mechanism called reaction formation, by which the individual adopts, in an overly
emphatic way, the opposite attitude of the actual conflicted and repressed feelings. Reaction formation may explain overoptimism as well as the individual's resistance to acknowledging ambivalent feelings. Overoptimism, and the related psychological process of idealization, defends against reservations about one's prospective spouse and the impending event.

In the context of marrying, the repression of ambivalent feelings toward the intended spouse is likely to be the most important factor affecting the individual's ability to assess realistically whether to enter into an unfair bargain. In the throes of reaction formation and idealization, individuals may imagine the intended spouse will cure all their anxieties, guilt, and doubts, and to acknowledge any ambivalence whatsoever would cause overwhelming anxiety. In other words, the need to repress unconscious negative feelings toward oneself or the other spouse means, psychologically, that one must sign the prenuptial agreement at any cost.

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 unconscious ambivalence toward the other spouse differ depending on whether this is a first or subsequent marriage? To what extent does unconscious ambivalence affect how individuals predict how their future spouse will behave in the event of divorce? How do past experiences, such as a deprived childhood, prevent 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 decision to sign an unfair prenuptial agreement? To what extent are ambivalent imaginings about powerful early object relationships mobilized by one spouse's insistence on a prenuptial agreement, thus provoking, in the moment, regression and submission to a more powerful parental figure?14

Psychoanalysis highlights the complexity of the processes of unconscious ambivalence and repression that define the psychological context in which decisions concerning prenuptial agreements are made. This is not to say that cognitive psychology has nothing to offer law. To the contrary, the availability bias goes some distance toward explaining why many more people enter into prenuptial agreements upon second marriage. For example, Tversky and Kahneman (1973) discuss the example of divorce:

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14. It is worth noting that repression may account for why so few couples enter into prenuptial agreements in the first place. Also, given the complicated psychodynamics, even the party proposing the prenuptial agreement may be as prone to conflicted motivations as the spouse being presented with the agreement. For example, the decision to propose a prenuptial agreement may reflect a fear of commitment or unconscious hostile feelings that manifest themselves as an attack on the conscious optimism and hopes of the other party. The fact that the proposing party may have consulted an attorney and drafted an agreement that protects his or her financial self-interest does not, as a psychological matter, mean that the contract is not being used to gratify unconscious destructive wishes or to express unconscious fears of emotional commitment.
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 probable 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. (228)

However, the availability bias does not explain why, given the prevalence of divorce, couples contemplating marriage do not have a divorce scenario readily available.

It is possible that parties who choose not to enter into a prenuptial agreement when it would otherwise be in their self-interest are avoiding a "signaling problem" (Spence 1973; Rasmusen 1989); in other words, a party might worry that requesting a prenuptial agreement will send the wrong signal to the intended spouse. The phenomenon of signaling might also suggest that decisions to sign unfair agreements can reflect one party's desire to communicate a high level of commitment regardless of the financial sacrifice. But a signaling hypothesis does not explain the overoptimism studies. Moreover, even if accepted, a signaling thesis is not necessarily inconsistent with a psychoanalytic account of ambivalence and repression. The signal being sent (or not sent) reflects conscious feelings toward the intended spouse but does not necessarily touch upon the underlying ambivalence. Indeed, the thesis may be an important point of convergence between psychoanalysis and cognitive psychology, although a psychoanalytic account would further investigate what unconscious signals might exist in the context of the prenuptial agreement.

The point here is that cognitive factors alone are insufficient for a full understanding of the psychological context that surrounds these decisions. As the next section shows, understanding the role of unconscious ambivalence and repression is essential to crafting a just and effective regime governing prenuptial agreements. The following section argues that legal rules based on assumptions derived solely from cognitive psychology rely too heavily on ex ante procedural reforms to fix errors in decision making. A psychoanalytic perspective goes beyond ex ante reforms to support an ex post substantive fairness review of prenuptial agreements at the time of enforcement.

D. Psychoanalytic “Debiasing”

Behavioral legal scholarship drawing on cognitive psychology aims to develop a blueprint for fixing cognitive errors or “debiasing” individuals through procedural reforms governing the making of prenuptial contracts.
Overoptimism as an explanatory framework suggests that greater information ex ante will cure the irrationality. But psychoanalysis indicates that greater information alone is an inadequate tool for dealing with powerful ambivalent feelings. A psychoanalytic view that focuses on the complexity of unconscious ambivalence and repression means that attempts to debias individuals by providing them with more information may have some valuable effects but are not likely to be enough. Although it is possible that, in some circumstances, ambivalence itself could serve a protective function against over-reaching by prospective spouses, the factors leading individuals to repress their ambivalence in the context of marriage are not likely to be amenable to procedural reforms.

Cognitive debiasing focuses on correcting for overoptimism at the time when the contract is signed. This ex ante approach includes a variety of procedural techniques for informing parties about the benefits and drawbacks of prenuptial agreements. Some commentators suggest that direct counseling on the subject by family law attorneys or mediators should be required (Fink and Carbone 2003). Individual representation by attorneys is another option to improve the parties’ decision-making process. Mandating that the prenuptial agreement be signed some period of time prior to the wedding can also help to make the decision more rational. All of these reforms reflect a cognitive approach that focuses ex ante on procedures for correcting informational distortions in the decision-making process.

Psychoanalysis does not dismiss procedural safeguards, but it does question their effectiveness. From a psychoanalytic perspective, cognitive psychology does not address adequately the fact that the parties may resist knowing certain things; that is, that certain feelings may be repressed. As discussed above, the most important factor affecting the parties’ decision making at the time of marriage is ambivalence. But this ambivalence is not just outside conscious awareness; it is repressed. Procedural reforms focused on informing individuals about the financial risks of divorce will have little effect if the resistance is left unaddressed.

How might the legal system best address this resistance? Raising the subject of prenuptial agreements in itself can be an anxiety-producing event, which may be why most people avoid it. It also threatens to “deromanticize” the premarital period, which may run counter to public policy. Mandating some kind of prenuptial agreements and thus directly overriding resistance is another possible procedural reform. Advocating some kind of counseling is yet another, as Holmes and many realists did for legal decision makers, although certainly a less practical alternative. A legal rule requiring that both parties be represented by counsel would go some distance toward eliminating subjective distortions, but legal representation would not ensure that parties do not sign a manifestly unfair agreement out of unconscious fears or longings about what the future will hold. If one considers the decision to enter into an unfair bargain as influenced by childhood longings and unconscious fantasies,
then one is less inclined to assume that procedural safeguards alone will be sufficient to protect the parties' interests. Fittingly, psychoanalysis is less optimistic than cognitive psychology about the ability of procedural reforms alone to substantially improve decision making on the eve of marriage.

The question then becomes, from a psychoanalytic perspective, whether some sort of ex post substantive fairness review should be retained in addition to the procedural reforms called for by behavioral legal scholars. One might take the position that, because prenuptial agreements are so colored by imaginative distortions rooted in unconscious ambivalence, 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, reflects the view that individual subjectivity is so complex that legal rules should operate at the level of behavior only (Dailey 1998). 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.

Abandoning individuals to their ill-chosen fates in this context is neither just nor necessary. Psychoanalysis supports an equitable approach to the enforceability of prenuptial agreements, one that takes into account the ambivalence and complexity that surrounds decision making in this context, but that does not require putting the parties on the couch in a case-by-case inquiry into the psychoanalytic vicissitudes of choice. In other words, a psychoanalytic perspective does not mandate that a court consider the actual psychological factors that led the parties to enter into the agreement in the first place. Instead, a psychoanalytic understanding of the complexity of choice simply points to an ex post substantive fairness review of the terms of the bargain. The court need not know anything about the particular psychological makeup of the parties. All the judge needs to do is determine whether the financial terms of the contract are not grossly unfair at the time of enforcement.

This approach allows judges to decide whether, in the given circumstances, enforcing the contract would work a substantial injustice. The most important factors here would be the financial status, needs, and abilities of the parties at the present time, and whether enforcing the agreement would be manifestly or grossly unfair given those factors. The length of the marriage, the presence of children, health issues, or any other circumstances unforeseen at the time of signing can be taken into account. Review of the parties' actual ambivalences and repressions at the time of signing is neither practical nor desirable. A substantive review is justified by the psychological complexities surrounding the decision but, again, it does not require the court to put the parties on the couch.

The proposal for ex post substantive fairness review of prenuptial agreements is an argument for maintaining the status quo in the face of an
emerging trend toward stricter enforceability. Ex post substantive review of prenuptial agreements by courts has been the traditional rule, although the trend is moving away from it. In general, substantive fairness review is increasingly disfavored because the original paternalistic reasons for the review—that women were the weaker party—are no longer valid. But women’s social and educational equality does not eliminate the failures of imagination by parties to the agreement, nor does it eliminate the economic inequality that marriage still entails. Gender equality does not do away with the psychological fact of ambivalence, which makes an individual feel that he or she must sign an agreement no matter what the terms.

In summary, understanding that ambivalence lurks in the heart of nearly every prospective spouse does not mean that all individuals contemplating prenuptial agreements are irrational. What it does mean, however, is that the studies showing overoptimism cannot be taken at face value and that the repression of ambivalence can lead to serious failures in the decision-making process. With respect to prenuptial agreements, where individual decision making draws so heavily on imagined needs, desires, and wishes, a just outcome is more likely reached when law recognizes the complexities of individual choice. In contrast to current trends favoring ex ante procedural reforms, psychoanalysis suggests that prenuptial agreements should only be enforced where the terms of the bargain are not unfair at the time of enforcement.

How far beyond prenuptial agreements does a psychoanalytic understanding of choice go? Does recognizing the complexity of choice mean that all contracts, no matter what the subject matter, should be subject to fairness review at the time of enforcement? Where do we draw the line? As discussed above, a psychoanalytic framework—as with any conceptual interdisciplinary framework—will be useful in some areas and not in others. Financial transactions in the marketplace, for example, may not be suitable for psychoanalytic inquiry, in the same way that economic analysis may not be right for the sphere of family relationships. A starting assumption of this article is that a psychoanalytic inquiry is more likely to be of use in the context of close, personal relationships, emotionally charged circumstances, or important life choices. Thus, consideration might be given to whether contracts among family members, or cohabitants, or separating parties, or parties entering surrogacy contracts, should also be subject to some measure of substantive review. How far beyond the core realm of family law a psychoanalytic inquiry should go is left to be determined. Properly applied, psychoanalysis has much to offer our understanding of how law should understand and regulate the choices individuals make in these imagination-rich areas of their everyday lives.

IV. CONCLUSION

This article has argued that contemporary behavioral legal theories about individual decision making need to be broadened to take account of the fundamental role of imagination in individual decision making. The contemporary interest in studying the psychology of individual decision making is one of the most innovative and exciting legal movements in decades. The work of behavioral legal scholars provides an empirical foundation for challenging the idea of the reasonable man, which has dominated the law since Justice Holmes coined the term over a century ago. It brings an interdisciplinary perspective to bear on the mechanisms of individual decision making by legal actors. It draws on impressive new work in psychology and the cognitive sciences.

This article seeks to broaden contemporary legal thinking about choice to include psychoanalytic insights into the role of the creative imagination in individual decision making. Psychoanalysis broadens and at the same time complicates the law's view of individual decision making. This means, obviously, a trade-off. Some observers, following Holmes, might prefer that, given the complexity and opaqueness of human nature, the law remain focused on objective behavior rather than subjective experience (Dailey 1998). But the premise of contemporary thinking about decision making and of this article is that a deeper understanding of individual choice is a more useful and just approach in many circumstances than pure behaviorism or abstract rationality.

Psychoanalysis has a great deal to offer in terms of revising the law's underlying assumptions about individual choice. To illustrate this assertion, this article applies a psychoanalytic framework to the law governing prenuptial agreements. Because it so directly involves close personal relationships, family law is an obvious starting point for a psychoanalytic view of individual choice, which takes the creative imagination into account. But family law is not unique in this regard. Individual choice in the context of close personal relationships, emotionally charged circumstances, or important life decisions is most likely to benefit from a psychoanalytic framework, in part because these decisions are so closely tied to the unconscious wishes, needs, and desires that fuel the imagination. Supported by related research in the cognitive sciences, psychoanalysis provides a comprehensive and useful framework for examining individual choice in law, one that recognizes and validates the innate creativity of the human mind.

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