

Book Review

Anne C. Dailey, *Law and the Unconscious: A Psychoanalytic Perspective*, New Haven, Connecticut: Yale University Press, 2017, pp. 304, \$15.50

Reviewed by Susan Carle

Anne C. Dailey's beautifully conceived and written book *Law and the Unconscious: A Psychoanalytic Perspective*¹ makes a strong case that the insights of the psychoanalytic tradition remain important to law, even these many decades after the initial era of excitement about this topic.² Psychoanalytic insights point to humans' complex psychological makeup. Their appreciation thus, according to Dailey, can infuse law with humanistic qualities such as the capacities for forgiveness, redemption, mercy, empathy, and tolerance.³ Yet, as Dailey acknowledges in the book's last chapter, some of what appears most relevant about psychology to law today comes from its natural science-based subfields, such as cognitive neuroscience, rather than its humanistic strands, such as psychoanalysis. In Part I of this review, I lay out Dailey's main arguments about how psychoanalysis can improve law. In Part II, I assess these arguments in relation to the natural science-based thinking of cognitive psychology disciplines, such as neuroscience and behavioral economics, which have gained great popularity with legal scholars today.

Having spent a year's sabbatical teaching myself about social neuroscience⁴ after a long-ago undergraduate education immersed in Freud and other classic

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1. ANNE C. DAILEY, *LAW AND THE UNCONSCIOUS: A PSYCHOANALYTIC PERSPECTIVE* (2017).
2. Dailey dates the heyday of this era as 1967, the year in which Jay Katz, Joseph Goldstein, and Alan Dershowitz published *Psychiatry and Law*. See *id.* at 1. Yet, as she further points out, the intellectual history of legal scholars' examination of the influence of the concept of the unconscious on legal theory goes back at least to OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (1881), and extends to other "towering" twentieth-century jurists including Cardozo, Frank, and Frankfurter. DAILEY, *supra* note 1, at 42, 61.
3. *Id.* at 10.
4. Social neuroscience is a relatively new interdisciplinary field that draws from a multitude of experimental and medical methodologies to study how the brain performs social behavior. See generally Tor D. Wager & Martin A. Lindquist, *Essentials of Functional Magnetic Resonance Imaging*, in *THE OXFORD HANDBOOK OF SOCIAL NEUROSCIENCE* 69 (Jean Decety & John T. Cacioppo eds., 2011) [hereinafter *SOCIAL NEUROSCIENCE HANDBOOK*]; John T. Cacioppo & Jean Decety, *An Introduction to Social Neuroscience*, in *SOCIAL NEUROSCIENCE HANDBOOK* at 3,

social theorists, I must admit that I started Dailey's book somewhat skeptically. As I read, I realized that I regard Freudian theory as a relic of an intellectual tradition now superseded by the different intellectual fashions of a new century. I was soon won over, however, by Dailey's humble yet brilliantly insightful prose. Dailey's humility and sincerity charmed me; her unassuming yet on-point argument style led me to lower my guard. Her sensible observations returned me to commitments I held in my intellectual youth but have become too cynical to remember anymore. In this respect, Dailey's prose functions somewhat as therapy does—opening memory to beliefs held in an earlier, more optimistic state of mind. Dailey's book thus provides a kind of therapy via the written page for a world that has become too bitter to pay regard to the humanistic virtues anymore.

Psychoanalysis in Law as Humanism

Dailey's most fundamental point is that a psychoanalytic perspective can teach law the virtue of humility in judging human motivation and conduct. Psychoanalysis calls for greater compassion for wrongdoers and greater appreciation for the fact that adjudicators can never truly determine human intent.⁵ As Dailey puts it, the insights she draws from her reading of the psychoanalytic tradition “move law in the direction of a more skeptical, less epistemologically certain, and more forgiving model of judging.”⁶ Note here that Dailey's focus is on a certain type of psychoanalysis influenced by feminist and other philosophical traditions that emphasize the limits of human knowing. Certainly, not all famous psychoanalysts, with Freud being Exhibit One, were known for “humility” in either their ideas or practices.⁷

Dailey argues that psychoanalysis can provide enriching insights about the obvious fact that we often do not behave rationally. Law typically wants to assume, contrary to observed evidence, that we do, but psychoanalysis shows that we access only some of our thoughts, and that needs and desires we only partly understand motivate us. The emotions that influence us arise from our first experiences in life as creatures dependent on highly imperfect caregivers.⁸ The task of applying such psychoanalytic insights to law does not involve condemning law as hopelessly out of sync with human nature, Dailey argues, but achieving a better balance between “serving the law's pragmatic

5 (noting that “[s]ocial neuroscience emerged in the early 1990s as a new interdisciplinary academic field”); Svenja Matusall et al., *The Emergence of Social Neuroscience as an Academic Discipline*, in SOCIAL NEUROSCIENCE HANDBOOK at 6, 9, 12, 17-18 (discussing the contribution to social neuroscience of brain neuroimaging studies, behavioral economics, game theory, computer modeling, epidemiology, animal behavior studies, and experimental social and developmental psychology).

5. DAILEY, *supra* note 1, at 98.

6. *Id.* at 18.

7. For a recent unflattering portrayal of Freud's temperament and character, see FREDERICK CREWS, *FREUD: THE MAKING OF AN ILLUSION* (2017).

8. DAILEY, *supra* note 1, at 6-7.

need to govern and hold individuals accountable,” on the one hand, and “the importance of taking into account unconscious influences on decision-making and behavior,” on the other.⁹

Dailey applies these insights to a range of legal topics, including family law, criminal law, juvenile law, and what she terms the law of “sexual choice,” by which she mostly means sexual autonomy.¹⁰ A presumption of rational human behavior generally works well enough in fields such as commercial law, Dailey asserts (although some would probably contest even that proposition), but such a presumption works much less well in areas such as criminal interrogations and contracts between close family members.¹¹ The stronger the emotions and deep human attachments in play, Dailey suggests, the less well the rational-actor paradigm can be presumed to work.

As a legal scholar who has struggled with applying the broad principles of interdisciplinary thinking to the nitty-gritty doctrinal details of law, I know how difficult this project can be. Dailey excels at the task. To be clear, she does *not* argue that psychoanalysis should be used in particular cases to achieve certain results. Dailey is looking at broad principles instead, a point that is important to emphasize at the start, because people so often regard psychology as relevant to law primarily as a tool in litigation. As Freud pointed out, and as Dailey agrees, the potential contributions of the psychological disciplines to law lie in shaping legal doctrine and policy generally, *not* in specific applications in particular cases.¹²

Turning to how psychoanalysis can influence legal doctrine and policy, Dailey starts with criminal interrogations. She points out the huge mismatch between the legal assumption that confessions are, in the words of the U.S. Supreme Court, “the most probative and damaging evidence” that can be used against a defendant,¹³ and the actual evidence on this score, which documents a human tendency to agree to false statements when faced with interrogation.¹⁴ Accordingly, Dailey argues, courts should be far more careful to evaluate confessions for possible coercion and other signs of unreliability.¹⁵ To support this recommendation, she focuses on several interrogation techniques,

9. *Id.* at 226.

10. She also point outs, without further developing this point, that these insights can be applied to many more areas of legal doctrine, including sexual harassment, the death penalty, trusts and estates, employment, discrimination, property, and obscenity law. *Id.* at 226. For more on Dailey’s use of the term “sexual choice,” see Anne C. Dailey, *The Psychodynamics of Sexual Choice*, 57 ARIZ. L. REV. 343, 343 (2015) (equating sexual choice with sexual autonomy).

11. DAILEY, *supra* note 1, at 21.

12. *Id.* at 44 (“Freud argued that psychoanalysis was not suitable in the courtroom”).

13. *Id.* at 103, 249 n.1 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991)) (citations omitted).

14. *Id.* at 105.

15. *Id.* at 126.

including false sympathy, degradation, and trickery, and discusses how each works psychologically to produce false confessions.¹⁶ For example, in cases in which interrogators have produced a confession by building a relationship with a defendant based on false expressions of sympathy and emotional support, such tactics can wear down a defendant's powers of resistance to the point that a confession becomes coerced.¹⁷ Likewise, where interrogators resort to tactics emphasizing the defendant's lack of worth, such "degrading police tactics can inflame self-destructive urges" and thus "violate the Due Process Clause test of voluntariness."¹⁸ And in cases of trickery, defendants may begin to doubt their own minds, even about facts that are patently not true. This doubt can lead to "unconscious guilt about some other perceived transgression," causing defendants to wrongly confess because they have come to believe that false evidence must be true.¹⁹ Thus, Dailey concludes, the fact that a subject has been read his or her *Miranda* rights²⁰ "should not be the final word on the admission of confessions"; instead, courts should subject confessions to close Due Process Clause scrutiny.²¹ Of course, due-process challenges to confessions are as old as the concept of due process itself; what Dailey seeks to offer are the most up-to-date psychological insights that can support such challenges.

Dailey next turns to what she terms intimate contracts.²² She begins with prenuptial agreements. Given the frequency with which people enter into such agreements, which are clearly against their economic self-interest, something other than rational behavior clearly must be taking place. Yet, Dailey observes, courts seem to ignore this obvious fact.²³ Such agreements fall squarely into the realm of human affairs in which the psychoanalytic tradition points to powerful, unconscious forces being at play. Dailey acknowledges that cognitive psychology, which has documented humans' tendency to make overly optimistic predictions, explains in part why persons would enter into prenuptial contracts that are against their clear economic interests. Yet she argues that psychoanalytic concepts can further enrich explanations for this phenomenon. Unconscious ambivalence may be another factor, under which persons may split off negative feelings from positive ones and allow only positive emotions toward another to enter conscious perception.²⁴ A prospective spouse thus may be making a cognitive error not as the result of

16. *Id.* at 105-26.

17. *Id.* at 112.

18. *Id.* at 118.

19. *Id.* at 125.

20. *Miranda v. Arizona*, 384 U.S. 436 (1966).

21. DAILEY, *supra* note 1, at 105.

22. *Id.* at 128.

23. *Id.* at 132.

24. *Id.* at 135-36.

a faulty computational shortcut, but because she is dynamically suppressing information that would be obvious to a disinterested outsider. Similarly, Dailey quips, “it is not surprising that the legal system engages in its own form of denial by simply ignoring this psychic drama altogether and strictly enforcing the contract.”²⁵

Thus, Dailey concludes, prenuptial agreements, being closely bound with love and attachment and irrational optimism colored by desire and hope, deserve much closer scrutiny by courts than they typically get. She offers several practical suggestions about how legal rules for enforcing prenuptial agreements could be improved, including by requiring judicial review before contracts are enforced, limiting lawful prenuptial agreements to “a few model contracts already vetted for general fairness,” and applying the doctrine of unconscionability to test whether such contracts were “fair and reasonable” when signed.²⁶

Dailey’s arguments focus on the weaker party in the relationship. What she does not discuss, but perhaps should, is whether analysis of prenuptial agreements should also consider unconscious influences the stronger party may be experiencing. This is true throughout the book: Dailey is most concerned with those with relatively little power within the legal system. This may be because she views more powerful parties as having an easier time realizing their interests and desires through law, and for this reason is most concerned about how unconscious factors may thwart the interests of weaker parties in the law. Nonetheless, a subsequent investigation focused on how psychoanalytic insights could help illuminate potential reform of the legal regulation of those with outsized legal power might be an excellent sequel project, though it might end up being the case that these issues largely reflect the flip side of many of the legal reforms Dailey is advocating. For example, the opposite of being more careful about how unconscious forces may lead weaker parties into prenuptial agreements that are obviously against their interests is to be less careful, which in Dailey’s view ends up privileging the stronger parties, who may want to limit their spouse’s access to their assets for all sorts of reasons, both conscious and unconscious. It is not clear to me that unpacking the reasons that stronger parties use law to disadvantage weaker parties matters that much—unless law is willing to do something about this based on a heightened realization that weaker parties (in criminal interrogations as in prenuptial agreements) are not necessarily acting of their own free will as per the standard myth that Dailey wants to dismantle.

In a similar vein, Dailey examines gestational surrogacy agreements, wherein a woman agrees to carry to term for another person or couple a baby that is not biologically related to her. Here, too, Dailey points out, the surrogate mother may experience a confusing array of ambivalent emotions. The relationship between the surrogate mother and baby both is and is not a

25. *Id.* at 137.

26. *Id.*

strictly economic transaction. When the law treats it as nothing more than a contract-based commitment, it drastically oversimplifies a far more complex situation. A majority of jurisdictions have moved away from interventionist approaches to gestational surrogacy agreements, instead treating them as commercial contracts in which the parties' initial expressed intent should always prevail. Dailey agrees, for a host of policy reasons, that judges should not void such contracts upon their completion.²⁷ But she argues that courts should adopt a more hands-on approach prospectively. Such an approach might include courts limiting the amount of compensation that can be offered for gestational service contracts to expenses incurred, so that women are not induced into such contracts for financial reasons, and requiring counseling before such arrangements are entered into.²⁸ Dailey acknowledges the problem of potentially patronizing women through such protections, but argues that the benefits of more restrictive approaches outweigh these drawbacks.²⁹ Her argument here bears all the marks of her sensible analysis, fully acknowledging the problems inherent in restricting freedom of contract yet concluding on balance that some restrictions are the best, though imperfect, policy option.³⁰

Dailey next turns to torts. Her focus here is on the *Tarasoff*³¹ doctrine, which requires psychiatrists and other therapists to warn specific persons of threats to commit violence that patients make against them when psychiatrists reasonably should deem such threats to be serious. As Dailey points out, from a psychoanalytic perspective the *Tarasoff* doctrine makes little sense. People may seek psychiatric treatment because they have aggressive feelings, yet, according to Dailey, a psychiatrist under a reporting duty ends up having to give *Miranda*-like warnings to patients to refrain from talking about "the very thing most central in the therapy: murderous rage or blinding self-destructive love."³² Thus, imposing on psychiatrists a duty to warn ends up thwarting the very purpose of therapy, as the role of the psychiatrist is to encourage patients to examine their most deeply buried, shameful fantasies without fear of consequence in the non-fantasy world. Carrying out the duty to warn may "destroy the treatment" and leave the patient worse off, feeling abandoned and punished as well as grappling with troublesome thoughts without support and thus increasing the risk of violence.³³ Dailey situates her discussion in the extensive literature about *Tarasoff*, including both legal and other psychological work.³⁴ Here, as with other topics she takes on, she seeks to offer synthesis

27. *Id.* at 152-53.

28. *Id.* at 152.

29. *See id.* at 152-53.

30. *Id.* at 150.

31. *See Tarasoff v. Regents of University of California*, 551 P.2d 334 (Cal. 1976).

32. DAILEY, *supra* note 1, at 167.

33. *Id.* at 168-69.

34. *See id.* at 155-76, 256-58 (providing citations to these literatures).

and up-to-date psychoanalytic insights on topics that legal commentators have been debating for a long time.

Sometimes Dailey ventures into territory I found challenging, such as in her qualified support for the legality of adult sibling incest. Dailey acknowledges that parent-offspring incest always raises too much risk of psychological coercion to be lawful.³⁵ Likewise, therapist-patient intimate relationships should remain off-limits, as supported by research showing harmful effects on patients,³⁶ as should sex in other similar authority relationships involving an imbalance of power and dependence between the parties.³⁷ Yet Dailey pushes forward in examining the argument that, despite the incest taboo, consenting adults should be able to choose siblings as sex partners—especially when they have not been raised together and no authority relationship exists between them.³⁸ Dailey gives a compelling case example in which a court imposed a harsh criminal sentence and terminated the parental rights of siblings who married after meeting for the first time as adults.³⁹ She does not, however, provide much discussion about how one would decide whether there had been an authority relationship or some level of coercion between siblings who knew each other before their sexual relationship began, and she leaves me less than completely convinced of her argument (though of course this could spring from my deep-seated psychological aversion to the whole idea of sex between family members). Here and elsewhere, Dailey grounds a provocative argument in supporting evidence. She succeeds at what she sets out to do, which is to raise, rather than definitively resolve, topics that require more attention from the judiciary and other policymakers. Again Dailey proves her bona fides as a steadfast, courageous, nonemotionally controlled—perhaps well-psychoanalyzed?—legal scholar. She goes where the logical implications of ideas lead her, even when they bring her to uncomfortable territory. Once there, she examines what she finds.

My favorite chapter addresses children’s rights in the law, an area in which she holds considerable expertise.⁴⁰ Here Dailey argues that children have special affirmative rights that adults may not have, including rights to the resources that will allow them to develop so that they can later flourish in

35. *Id.* at 179, 184, 214 (noting that impact of early childhood attachments typically remains very significant in adulthood, thus raising the real possibility that adult incest between parent and offspring may not be consensual).

36. *Id.* at 188.

37. *Id.* at 190, 201.

38. *See id.* at 182, 186 (“The adult-incest prohibition thus comes across, upon reflection, as an overly broad, morally discriminatory, and unnecessary intrusion on the right of sexual autonomy.”).

39. *See id.* at 179, 185 (discussing *Muth v. Frank*, 412 F.3d 808, 810 (7th Cir. 2005)).

40. *Id.* at 203. Indeed, Dailey’s faculty page indicates that her two primary areas of academic interest are psychoanalysis and the law and children and the law. *See Anne C. Dailey Evangeline Starr Professor of Law*, UCONN SCHOOL OF LAW, [HTTPS://WWW.LAW.UCONN.EDU/FACULTY/PROFILES/ANNE-C-DAILEY](https://www.law.uconn.edu/faculty/profiles/anne-c-dailey) (last visited March 9, 2019).

adult life. She labels these rights “transitional rights,” and lists as among these the rights to state support, caregiving, relationships with siblings, physical and emotional safety, and rehabilitation in the juvenile and criminal justice systems.⁴¹ Turning the competencies argument on its head, Dailey points out that children in many respects have *more* competencies than adults, such as “strikingly well-developed capacities for emotional attachment, fantasy, cognitive thinking, relating to others, and psychic change.”⁴² She then applies these observations to the special competencies and needs that children possess—which are not so much less than as different from adults’—to particular areas of legal doctrine. For example, Dailey notes, research on child development confirms that children have deep and profoundly important attachments not only to their primary caregivers but also to other significant adults who are not their parents or primary caretakers. Yet the law gives virtually universal rights to parents and primary caregivers and virtually no recognition to the value of relationships children have with other adults with significant roles in their lives.⁴³ Still another example: The literature demonstrates that some forms of punishment of children cause terrible, life-long damage. Yet the law largely adopts a hands-off approach to parent disciplinary decisions (at least in biologically created families).⁴⁴ In these and other areas, Dailey argues, a psychoanalytic perspective helps encourage more nuanced and tailored approaches in children’s law that better take into account the needs and interests of children.

Dailey also attacks the “traditional incapacities framework”⁴⁵ that governs the law of competency with regard to children and others who are not fully autonomous in their decision-making. This notion is not completely new, but Dailey’s discussion is fresh and engaging, drawing from what researchers have learned from the study of the stages in human development. This part of her argument is reminiscent of a reform proposal that disability-rights advocates have long made⁴⁶ to the effect that law should not regard competency as an on-off switch in which people are either fully competent or lack competency to manage their lives at all. In the context of children’s law, full autonomy and competence as a human being occurs not all at once, but instead in stages or phases. Likewise, Dailey sensibly argues, the law should not contain on-off switches by which young persons suddenly obtain full rights on reaching the age of majority but possess very few autonomy rights before that magic date.

41. DAILEY, *supra* note 1, at 205.

42. *Id.* at 211.

43. *Id.* at 220.

44. *Id.*

45. *Id.* at 210.

46. See, e.g., Robert D. Dinerstein, Esme Grant Grewal, & Jonathan Martinis *Emerging International Trends and Practices in Guardianship Law for People with Disabilities*, 22 ILSA J. INT’L & COMP. LAW 435 (2016).

Part of the reason this chapter is so good is that it is strongly rooted in the evidence-based knowledge researchers have about human development, especially about such matters as the importance in brain development of developing secure early attachments, along with the adverse effects on human development of a lack of positive attachments and physical and emotional abuse. Children's brains also have special "neuroplasticity," as Dailey points out.⁴⁷

Dailey's arguments focus on children's law but have ramifications throughout law, as she points out. Thus she calls for focusing on the role of law in "constituting rather than controlling citizens" and protecting positive entitlements as well as negative freedoms. These positive entitlements include rights to maintain important relationships and to receive rehabilitation support from the state, since adults, like children, can change. Indeed, as Dailey notes, her framework for children's transitional rights opens inquiry into recognition of special rights at other stages of life, such as in old age.⁴⁸ Thus Dailey's long-term humanistic agenda is broader, suggesting that the insights of human development research indicate that adult rights, too, should encompass "not only a guarantee of negative liberty but some affirmative set of entitlements"—a subject she leaves for later work.⁴⁹

Dailey's inquiry into what legal reforms are suggested by empirical work on human development takes a somewhat different tack from that of her earlier chapters. In this penultimate chapter she relies on evidence-based knowledge, whereas in her earlier chapters she focuses more on the theories of the psychoanalytic tradition. This shift in focus sets up for the reader the question Dailey considers in her concluding chapter, in which she compares the psychoanalytic tradition she has been championing throughout the book with contemporary trends in psychology that are based in natural science-based, empirical and/or experimental approaches. This last chapter is less fleshed out than her earlier ones, sounding more speculative, as appropriate for the end of a work that aims to be ambitious but not to provide a definitive treatment of all aspects of a very broad topic. The author is gesturing toward future directions she has not conclusively exhausted in the present work. Yet this concluding chapter raises important and intriguing questions that require consideration in evaluating Dailey's contribution. I take up these questions below.

47. DAILEY, *supra* note 1, at 217.

48. *Id.* at 219.

49. *Id.*

Psychoanalysis in the Humanistic Tradition Versus Cognitive Psychology As Science

In ending her book with a comparison between psychoanalysis and cognitive science, Dailey is recognizing, as well she must, a observation with which I began this essay—namely, that the topic of the relevance of psychoanalysis to law today appears, at least initially, to involve a rather dated question. Dailey does not fully spell out the enormous shift in today’s academic climate as compared with that of even a decade ago, as that is not the topic of her book,⁵⁰ but we can consider it for ourselves. In the age of Trump, we academics find ourselves struggling to hold onto even the most basic ideas of the Enlightenment, especially such notions as the existence of verifiable facts⁵¹ and the usefulness of the scientific method in producing replicable empirical knowledge. Given this climate, the psychoanalytically influenced ideas popular when I first started teaching two decades ago, including enthusiasm about continental theory, post-structuralism, and Freud-inspired theorists such as Judith Butler and others, have largely gone out of vogue. In circles of elite legal thinkers, the work of Daniel Kahneman and Amos Tversky⁵² has replaced in canonical prominence that of Sigmund Freud, just as controlled laboratory experiments have taken the place of observations from the psychoanalyst’s chair. Related disciplines in the social sciences have moved on as well: The broad qualitative observational techniques of classic anthropologists and psychoanalysts have been replaced by the tightly controlled, quantitative-measurement research styles favored by many of the most highly respected researchers of today. Thus a key question Dailey takes on but leaves less than fully answered is this: What continued relevance does psychoanalysis have for law in these desperate days in the age of Trump, during which law’s foremost concern appears to be defending the idea that policy and outcomes can and should be based on empirically verifiable knowledge? The comparison between psychoanalysis and cognitive science provides a good example of such a paradigm shift that can lead us to an assessment of psychoanalysis’s continued usefulness given today’s harsh political debate.

Some fundamental concepts in psychology are shared across both the psychoanalytic and cognitive psychology traditions. Most significantly

50. Of course, Dailey is clearly well-versed in the long and complex history of psychology as a discipline (or, stated more accurately, multiple disciplines), but that intellectual history is not a central focus of her inquiry, especially after Chapter Two, which deals with the history of psychology’s influence on law. *See Id.* at 38-73.
51. The iconic example is Trump’s claim about the crowd size at this inauguration. *See* Eric Bradner, *Conway: Trump White House Offered “Alternative Facts” on Crowd Size*, CNN (Jan. 23, 2017), <http://www.cnn.com/2017/01/22/politics/kellyanne-conway-alternative-facts/index.html> (reporting on Trump advisor Kellyanne Conway’s use of the term “alternative facts” to explain the discrepancy between Trump’s claims and photographic evidence comparing the Obama and Trump inaugurations).
52. *See, e.g.*, DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2013) (presenting classic findings of cognitive psychology based on experiments that Kahneman and Tversky developed together).

for purposes of this review, both psychoanalysis and natural-science-based approaches to human psychology embrace the existence of the unconscious.⁵³ What is very different between the two disciplinary approaches is what the unconscious looks like. Freud's unconscious is wild, free, creative, active, and dynamic.⁵⁴ A neuroscientist's unconscious, in contrast, consists of patterns in neurons that cause quick, intuitive, nondeliberative associations. Dailey describes the cognitive psychologist's unconscious as "relatively passive,"⁵⁵ though this seems to me to reflect the slightly biased view of a partisan. In both traditions, the unconscious operates as a powerful force on human behavior.

In both traditions, unconscious thought is often irrational. In both traditions, such thought is not only *un-* (i.e., not in) consciousness, but is largely *inaccessible* to consciousness. In cognitive psychology, however, this lack of accessibility to the conscious mind of the unconscious results not from thoughts being repressed, as in the psychoanalyst's view⁵⁶; instead, cognitive scientists believe that the conscious cannot observe unconscious brain processes because these processes occur far too fast for the conscious brain to catch them as experience. The brain, for example, processes images in thirteen milliseconds.⁵⁷ The cognitive psychologist's unconsciousness constructs human experience by creating the world the brain perceives through the nonvolitional unconscious processes involved in vision, for example.⁵⁸ The unconscious not only deciphers human faces in milliseconds, but also interprets human intent and responds reciprocally with appropriate social behavior, among a great many other functions, all primarily through rapid, unconscious neural processes.⁵⁹ Some unconscious social associations, such as those that equate perceived

53. For a longer discussion of the differences between Freudian and neuroscience views of the unconscious, see Susan Carle, *Acting Differently: How Science on the Social Brain Can Inform Anti-Discrimination Law*, 73 U. MIAMI L. REV. (2019) (forthcoming).

54. DAILEY, *supra* note 1, at 231 (describing "an unconscious characterized by movement: repression, resistance, conflict, fantasy, motivation, [and] managing passions, aggressions, fears, anxieties, guilt, envy, desire, and self-deprecation, among a multitude of other forces").

55. *Id.* at 231.

56. *See id.* (discussing repression as an aspect of the "dynamic unconscious").

57. *See* Anne Trafton, *In the Blink of an Eye*, MIT NEWS (Jan. 16, 2014), <http://news.mit.edu/2014/in-the-blink-of-an-eye-0116>.

58. On the crucial role of the unconscious processes involved in vision in constructing human experience, see LEONARD MLODINOW, *SUBLIMINAL: HOW YOUR UNCONSCIOUS MIND RULES YOUR BEHAVIOR* (2013).

59. For a longer discussion, see Carle, *supra* note 53. Moreover, in a possible critique Dailey does not take on, many natural-science-based psychology researchers appear wedded to arguing that many of these unconscious social associations the brain makes instantly may be "wired into" the brain as the result of evolutionary processes that for thousands of years made it generally a good idea, for example, to regard people different from oneself with anxiety. *Id.*

social differences—of a great many types—with potential danger, create the phenomenon of implicit bias.⁶⁰ These nonvolitional and unconscious reactions are irrational in a modern world benefiting from occupational differentiation, political pluralism, cultural exchange, and global trade. In such an age, when human difference offers a huge societal asset, unconscious instinctual distaste or anxiety in response to perceptions of human otherness presents a giant liability, interfering with the flourishing of society, yet hard to stamp out.⁶¹

The psychoanalyst's unconscious and that of the cognitive psychologist differ in another important way, as well. As Dailey hints in several parts of the book, the psychoanalyst's operating faith includes a belief that human functioning can be made more rational by pulling ideas repressed in the unconsciousness into conscious awareness. Psychoanalysis, Dailey writes, "draws from Enlightenment values" in its hope that an individual can gain some control over the "disruptive, unconscious aspects of the psyche" through the exercise of "conscious reason and self-reflection."⁶²

In contrast, cognitive psychology does not hold any such belief as an article of faith. Instead, researchers in disciplines such as behavioral economics and cognitive psychology seek to measure the degree to which irrational unconscious processes can be changed through training. That research has not shown particularly promising results in attempts to disrupt the working of unconscious brain mechanisms.⁶³ Implicit bias, for example, does not seem easily dislodged even when brought to subjects' conscious attention.⁶⁴ And many other aspects of rapid unconscious thinking are completely inaccessible to conscious control, as explored in fascinating detail in a popular treatment, *Subliminal*.⁶⁵ One cannot resist seeing visual images if one's eyes are open, for example. Thus, although Dailey suggests that cognitive glitches are relatively easy to fix with self-reflection, my reading of the literature on cognitive biases suggests that they are quite difficult to expunge.⁶⁶ In this respect, cognitive neuroscience may present no more rosy a picture of the prospects of liberated human rationality than the psychoanalytic tradition does.

60. See generally Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945 (2006) (introducing the science concerning implicit bias to a legal audience); *Harvard University Project Implicit Overview*, <https://implicit.harvard.edu/implicit/education.html> (last visited Oct. 23, 2017) (providing a good description of how implicit bias testing works by leading researchers in the field).

61. Greenwald & Krieger, *supra* note 60.

62. DAILEY, *supra* note 1, at 23.

63. KAHNEMAN, *supra* note 52, at 216 (noting the stubbornness of cognitive illusions).

64. See, e.g., Calvin K. Lai et al., *Reducing Implicit Racial Preferences: A Comparative Investigation of 17 Interventions*, 143 J. EXPERIMENTAL PSYCHOLOGY 1765 (2016) (comparing seventeen studies of interventions to lessen implicit bias and finding the majority were completely ineffective and the ones that were somewhat effective were only weakly so).

65. MLODINOW, *supra* note 58.

66. See, e.g., Lai, *supra* note 64.

The question Dailey raises at the end of her book is whether psychoanalysis or cognitive psychology present the best guide going forward.⁶⁷ The short answer, not surprisingly, is that both traditions offer something valuable. Neither standing alone is as good as both taken together. Cognitive neuroscience and related fields help most with the questions these disciplines have been able to effectively address, especially because they rely on empirically based, replicable research methodologies and thus benefit from the (albeit limited) advantages of scientific methodologies. But as Dailey convinced me by the end of her book, the psychoanalytic tradition still has much to offer law that cognitive science cannot yet—and probably never will be able to—provide. Human emotions play a large role in human conduct, as Dailey persuasively argues, and science-based approaches cannot explain all such human behavior—as, indeed, cognitive neuroscientists are more than willing to acknowledge. For example, knowing more about the specific neuronal mechanisms underlying human action does not help lawyers and other legal policymakers construct convincing narratives about why criminal defendants falsely confess to crimes they did not commit. Note, however, that empirical evidence documenting that this phenomenon occurs frequently is also important in Dailey’s ability to construct her powerful arguments.

At bottom, the fundamental challenge Dailey confronts in writing her book in this particular era, and successfully meets to some substantial degree, is to defend convincingly what she defines as the key relevant *humanistic* insights of psychoanalysis in an age of *neuroscience*. What contributions do psychoanalytic insights offer that neuroscience does not? Dailey’s default argument is that psychoanalysis offers a humanistic viewpoint, while neuroscience does not. This is well and good as far as it goes, but what about when the two disciplinary approaches cover the same turf or topics? Which approach should prevail then? Dailey acknowledges that some questions are better answered by neuroscience approaches: For example, cognitive science explains over-optimism and other faulty heuristics.

In the end, I believe Dailey’s best argument is this, though she does not put it exactly this way: In important legal policy circles, psychoanalysis offers a shared set of cultural beliefs. Indeed, this may essentially be all it really is. Dailey promises to, but never really does, present the empirical, data-driven case for why psychoanalysis should be understood to capture verifiable “truth.” But regardless of whether psychoanalytical concepts are “true,” so to speak, they do today in some important circles provide a vocabulary signaling a shared set of cultural beliefs. In this way, the psychoanalytic tradition assists legal advocates and adjudicators in constructing the compelling stories or narratives about how law should be applied: Individuals’ willingness to enter into irrational prenuptial agreements shows that they are facing complex and powerful emotional pulls that justify closer court scrutiny about such contracts; defendants should not be forced to falsely confess through the

67. DAILEY, *supra* note 1, at 227 (exploring “[t]he relationship of cognitive psychology to psychoanalysis”).

use of psychological tactics that amount to psychological coercion; children should be permitted to visit adults who are significant in their lives, given the importance of such bonds to human development.

In sum, Dailey's version of psychoanalysis illuminates a potentially shared fantasy of a kinder, gentler, more understanding and merciful legal system that would care more about using legal rules to advance human flourishing. This is not the world we live in today, but it is a wonderful reading experience to be reminded of these fantasies and the commitments that push us toward their realization.