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# UNDUE INFLUENCE, CONFIDENTIAL RELATIONSHIP, AND THE PSYCHOLOGY OF TRANSFERENCE

Thomas L. Shaffer\*

This article attempts to describe a common human relationship as it has been developed in two traditions which are today largely separated from one another. The relationship is referred to as "confidential" in the law and as "transference" in psychoanalytical psychology. Legal insight on the phenomenon is found mainly in the appellate literature on gratuitous transfers obtained by undue influence; psychological insight occurs in the practice and speculation of therapists who have discovered the phenomenon in psychotherapy. Both traditions are useful in understanding the confidential or transference factor in human interaction. The interaction itself has impact beyond the appellate cases or the practice of psychotherapy. It is, for one relevant instance, of central importance in legal counseling.

## I. A Psychiatric Case Study of Transference and the Law

One of the clinical case reports in Dr. K. R. Eissler's book, *The Psychiatrist and the Dying Patient*,<sup>1</sup> suggests a model that might integrate both aspects of the prototype undue influence case — the legal tradition and the psychodynamics of what is known, in the legal tradition, as "confidential relationship."

Dr. Eissler treated a dying, middle-aged woman during the last three years of her life, from an early point in her last illness until she died. He then became defendant in a lawsuit involving her will; her family contended he had exercised undue influence on his patient.

Dr. Eissler treated this lady during three periods in the last three years of her life. She first consulted him, for about three months, while her husband was dying. A second treatment period of about eight months commenced after the husband's death and terminated when the patient moved away from Dr. Eissler's city. When she returned, about ten months later, treatment was resumed. This final phase ended with the patient's death fourteen months after the latest resumption of therapy.

Treatment during the periods immediately before and after the husband's death consisted largely of resolving the woman's "slavish dependency" upon her husband and converting her from a "social doll" to a self-reliant and competent businesswoman able to take over her dead husband's affairs. Dr. Eissler's prognosis was optimistic when she left his care to build a new life in another state.

The terminal phase of treatment began when the patient returned to her husband's old home and again consulted Dr. Eissler.

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1 K. EISSLER, *THE PSYCHIATRIST AND THE DYING PATIENT* 144-47, 200-40 (1955). Copyright 1955 by International Universities Press, Inc. Quotations used by permission of the publisher.

When I met her, her physical appearance alarmed me. She was paler than usual, underweight, and short of breath. She coughed from time to time but was sure that her physical symptoms as well as the nightly attacks of anxiety which had started a few weeks earlier were psychogenic. She had been carefully examined in O—— as well as upon her arrival in C——, but no physical pathology responsible for the cough had been detected. She spoke with great anger of her relative, reporting a few incidents which had made her stay in O—— unbearable and reproached me for ever having her go to O——. She was determined to stay in C——, never to return to O——, and to stand on her own feet from then on. She felt independent and was certain that she could now manage her affairs successfully, because she had left O—— against her family's advice, had prepared the move alone, and had traveled alone, something of which she had previously been afraid. She was disturbed only by the reappearance of anxiety at night and by the cough. She begged me to help her in getting rid of these symptoms so that this time nothing would stand in the way of her fulfilling the great wish which she had had since early youth, namely to live an independent life. A brief exploration revealed that shortly before the onset of her nervous cough and anxiety, a person who had played an important role in her life had died. This suggested a connection between the nervous cough, the return of anxiety, and a feeling of guilt which she habitually tended to develop after the death of a person close to her.<sup>2</sup>

Dr. Eissler referred the patient for further physical examination, despite indications that she was not physically ill, and learned that she had "an inoperable malignancy. . . . [D]eath would prematurely stop the patient who had, against heavy odds, rallied all her resources in order to realize finally some of the potentialities which seemed to have been dormant in her."<sup>3</sup>

Dr. Eissler and the internist who examined the patient agreed that she should not be told she was dying; they conspired in what they thought benign deceit and told her that she had a minor disorder. They decided that "she should be kept ignorant of the gravity of her state, encouraged to maintain her optimism and her morale, and prevented from falling into a depression." Dr. Eissler believed that a more candid relationship "would have precipitated severe psychopathology."<sup>4</sup>

At about this time (and possibly as evidence against Dr. Eissler's belief that she didn't know she was dying) the patient began to talk to him about her will.

Shortly after her return from O—— the patient had told me that if she knew she were dying, she would change her will instantly and distribute part of the money which had been allocated in a previous will to her quasi-adopted daughter to other relatives, who were in need of financial assistance. But since she was assured that her sickness was benign, she did not see any reason to proceed in a hurry. Pointedly — and evidently in order to test me — she added that she was certain that I, since I had never let her down, would tell her to make a will now if her life were in danger.

<sup>2</sup> *Id.* at 206-07.

<sup>3</sup> *Id.* at 207.

<sup>4</sup> *Id.* at 208. Dr. Eissler thinks that this involves a denial of death and a strong motivation to be free of the pain of death. *Id.* at 46, 130. This means that the patient wants the doctor to keep the fact of impending death a secret — even though he may in his fibers know that death is coming. *Id.* at 48-50.

A decision to make myself instrumental in the preservation of the patient's illusion of approaching recovery thus might have had detrimental consequences for some of her relatives, inasmuch as they would obtain less of her estate if she died prior to executing a new will. However, I decided that the patient's mental and emotional welfare had to be my paramount goal even though, if all circumstances were known to the members of her family, I would be liable to the justified complaints of those who might be injured by the patient's premature death. I am fully aware that I might be censured by some members of the medical and juridical professions for such an opinion, but I do not see how a different decision can be made if the patient's welfare is made the physician's uppermost goal, which, after all, it should be.

However, after some time — it was two weeks before her demise — she did decide to change her will and seemed relieved after she had accomplished this. From a previous experience I knew that she was the victim of superstitions with regard to the making of a will, and that she had to go through a struggle before she found enough resolution to do anything active in testamentary matters.<sup>5</sup>

That resolved, Dr. Eissler had to decide how he would handle his patient as the disease accomplished its final end — a painful, slow, disfiguring death. He decided to "make use of the strong affectionate tie which the patient had formed and of the feeling of omnipotence she had projected upon me."<sup>6</sup> This was "contrary to the usual technique applied in treatment of neurotics, when the growth of transference beyond the physiological optimum must be immediately reduced to combat the patient's illusionary belief in the therapist's omnipotence."<sup>7</sup> The regimen worked, or so Dr. Eissler thought at the time.

The outbreaks of anger against her relative softened, and when she expressed the feeling that she seemed able now to forgive her, she seemed well on the way to achieving internal peace. She died in her sleep, without ever having consciously doubted that she was on the way to recovery, and to the end she believed that I had saved her life by sending her to an internist and that she would soon embark upon an active life in the pursuit of long-cherished ambitions.<sup>8</sup>

The patient "died without conscious knowledge of the fatal nature of her disease," he says, "but was convinced — in conformity with the content of my communications and those of the other physicians who treated her — that she suffered from a minor disorder."<sup>9</sup> He had seen this lady before he knew that her disease was fatal, under a normal professional relationship (e.g., he billed her for his services), but he changed this procedure when he knew she was dying; from that point on he did not mention fees to her.

[U]nder ordinary circumstances this would be a strange procedure, and

5 *Id.* at 208-09.

6 *Id.* at 209.

7 *Id.* at 210.

8 *Id.* The ego activity changes as death approaches and the patient becomes more capable of acts of forgiveness, kindness, and personal growth. See also Zinker & Fink, *The Possibility for Psychological Growth in a Dying Person*, 74 J. GENERAL PSYCHOLOGY 185 (1966); Joseph, *Transference and Countertransference in the Case of a Dying Patient*, 49 PSYCHOANALYSIS & PSYCHOANALYTIC REV. 21 (1962).

9 K. EISSLER, *supra* note 1, at 144.

logically the patient should have inquired about it. However, during this period she took for granted my not bothering her with financial obligations and did not draw any conclusions, although one might have expected that this circumstance alone would have aroused her suspicion that an essential change must have occurred in her condition.<sup>10</sup>

Not only did Dr. Eissler give this lady free psychiatric treatment, he also presented gifts to her; both actions were, he says, a way of conveying "the therapist's animistic conviction of the patient's immortality," and "helped the patient to maintain a strongly represented future."<sup>11</sup>

Shortly after the patient's death, Dr. Eissler was informed by counsel that she had named him executor of her will and had left him "a considerable legacy." After some soul-searching, he decided to refuse the legacy; he specified to counsel that it be given to charity. He accepted the executorship, however, because he thought he could thereby avoid family strife. The patient's heir then filed suit, alleging that Dr. Eissler's legacy was the result of his undue influence over the testatrix. The suit was ultimately settled — with Dr. Eissler receiving no benefit from the estate — but not without an obviously unsettling experience for the physician.

Dr. Eissler writes both as an expert in the psychodynamics of confidential relationship and as one who wears the scars of legal battle. He notes first of all that usual relationship of "positive transference" had developed between himself and the patient — that is, she had fastened upon him emotions that were out of place in the reality of the doctor's office; she was, to oversimplify, inappropriately affectionate toward him. This affection was exhibited in bizarre as well as in normal conduct. Because she was wealthy, she had supposed that her money and her position entitled her to be demanding toward him — a situation she felt she could maintain by the offer of gifts, that is to say, by bribery. This patient had, however, surprised Dr. Eissler and "graciously assented to the repeated explanation [that] the acceptance of gifts would lead to a detrimental psycho-therapeutic situation"; she did not react as he had expected she would, "with unfriendliness or hostility to the feeling of rejection which unavoidably occurs when a gift is refused." Dr. Eissler later concluded that the relative ease with which he resolved her impulse to bribe him may have concealed her determination to make him a beneficiary in her will.<sup>12</sup>

Dr. Eissler did not, of course, consciously manipulate the patient toward making her will in his favor. But, he admitted, "the patient nevertheless . . . acted under my influence and may have been psychologically as unfree as the person who is [as he understood it] under undue influence in terms of the law." And this suggested two possibilities in his own state of mind — "an unconscious

10 *Id.* The theory of the gift is developed in some detail in *id.* at 126-39. Dr. Eissler believes that his personal generosity toward the patient must demonstrate "unambivalent love" toward two general emotional objectives in the patient — a (false) feeling of personal immortality and a more vague conviction that the environment will survive even if he does not. *Id.* at 142-48. See generally Lifton, *Psychological Effects of the Atomic Bomb in Hiroshima — The Theme of Death*, 92 DAEDALUS 462 (1963); Lifton, *On Death and Death Symbolism: The Hiroshima Disaster, PEACE IS POSSIBLE* 14 (E. Hollins ed. 1966); S. ANTHONY, *THE CHILD'S DISCOVERY OF DEATH* (1940).

11 K. EISSLER, *supra* note 1, at 145.

12 *Id.* at 213.

utilization of a transference or . . . unconscious opportunism." In either situation, "some wish, quote unconscious in the therapist, may nevertheless be perceived by the patient — probably also unconsciously — and then be reacted upon by the patient out of an intensive transference relationship." The likelihood of this happening varies, he thinks, with the intensity of the transference.

Thus it is quite feasible that a therapist, even when motivated by irreproachably honest *conscious* motives, inadvertently creates in a patient the disposition toward giving him a gift. I do not need to construct all the possibilities of how this may happen. The question of interest here is: how can one ascertain that unconscious strivings colored the physician's behavior in such a way as to create a disposition of that kind in a patient? Evidently the therapist's assertion that he did not behave in a reproachable way is not decisive since the behavior concerns his unconscious and he therefore must be ignorant of it, in case such a striving should become operative. The therapist is here in a difficult situation. He is accused of unethical conduct of which he is supposed to be unconscious; he has no witnesses since psychotherapy does not accept the presence of a third party; and the victim of his allegedly unethical conduct cannot be questioned because she is dead.<sup>13</sup>

Another possibility — not present in this case — is that the psychotherapist, given the opportunity presented by a wealthy woman who was somehow in his power, might consciously manipulate her into making a will in his favor. There is a third possibility, beyond the possibility that the doctor might manipulate the patient unconsciously — a situation Dr. Eissler says he would regard as professional incompetence. Suppose that the doctor were neither unethical nor incompetent and that no manipulation occurred but that the patient acted out the transference without stimulation, conscious or unconscious.

But another and even more important aspect imposes itself. This patient undoubtedly acted under the influence of a strong transference. Since transference per se, and a strong transference even more, is comparable under certain circumstances to hypnotic states, the question may be raised whether the mere acting out of the transference is tantamount to acting under the impact of undue influence.<sup>14</sup>

The possibility poses a serious dilemma for those who treat mental disease and who routinely exploit transference situations for therapeutic purposes.

Transference . . . whether interpreted or not, is the essential lever of psychotherapy, as it is of psychoanalysis. In psychotherapy I prefer to use transference as much as possible through the everyday channels of interpersonal communication. The whole inventory of stimuli with which one person acts on the other stands here at the therapist's disposal. It depends on his knowledge and skill whether, on the one hand, these stimuli are used in such a way as to reduce the patient's anxiety or the other emotions which block his access to reality-adjusted action, or, whether, on the other hand, they are used to facilitate the patient's access to the sources of pleasure and enjoyment at his disposal. The intensity of the transference which is

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13 *Id.* at 222.

14 *Id.* at 224.

necessary to accomplish these two goals varies from patient to patient. It was evident in this patient, who had suffered for many years from a serious disorder, that the optimum of transference was a very high one. Only if she felt reliably protected would she dare to develop that degree of activity which the particular circumstances of her life situation required.

The question which is of interest here concerns the extent to which a therapist must or may make himself the protector of the patient. I believe that in such instances as the one under discussion, when the patient had gone through a long series of highly traumatizing disappointments, there was scarcely an upper limit if the patient's confidence in the world and in herself was to be restored.<sup>15</sup>

The dilemma is exceptionally keen in Dr. Eissler's therapy for dying patients; they, unlike patients who may be expected to survive psychoanalysis, need not have the transference dissolved. Their demand is for comfort and growth during a relatively short period of time, a period expected to end with death.

During the terminal phase, of course, the necessity for maintaining a maximum positive transference — if it still can be called transference — was evident, and any consideration of the problem of the patient's dependency would have become incongruous in the exigencies of the clinical situation. I trust it is not necessary to emphasize that these opinions concern exclusively the technique of psychotherapy and even within this area only exceedingly sick patients and emergency situations. To raise this question regarding the psychoanalytic technique proper would betray a misunderstanding and lack of comprehension of the basic fundament and the goal of that technique.<sup>16</sup>

Dr. Eissler recognized that his patient-testatrix had developed a very strong transference and that she did not, therefore, "from the psychoanalytic point of view . . . act as a free agent when she included me in her will; she was under an undue influence . . . ." Not only that, but sound medical technique, in his opinion, presented him no alternative to putting the patient in a situation where she was motivated to make what lawyers have for years called an "unnatural" will. This was true despite complete innocence — and even precaution — on the part of the doctor.

Transference reactions are outside the scope of the ego's will power. The ego is victimized here by impulses which are beyond the strength of its regulative apparatuses. The patient had evolved a very strong transference; I was the only person in her environment whom she trusted and by whom she felt protected, and the seeming — seeming only as we shall see later — generosity of looking at me as an "object of her bounty" does not require the assumption of any foul play on the side of the psychiatrist, but rather it becomes explainable by considering well-known clinical facts.<sup>17</sup>

The alternative for the psychiatrist is an austere and self-denying attitude toward the generosity of his patients.

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<sup>15</sup> *Id.* at 224-25.

<sup>16</sup> *Id.* at 226-27.

<sup>17</sup> *Id.* at 227.

The particular and unique prominence which the transference acquires in mental treatment in turn requires particular and unique professional ethics for the worker in the field. Since only in mental treatment does the handling of the transference coincide with essential professional activity, the psychiatrist (and all the more, of course, the psychoanalyst) must take a different attitude toward the result of the positive transference than is necessary in any other profession. If the patient's attorney or surgeon had helped her to the extent I had done, and she had left a legacy to either of them, there would have been no objection to their accepting the bequest, although positive feelings of the transference nature might have been as much at work as they were in the patient's relationship to me. But in surgery and law practice "positive transference" is taken for granted as an unknown and undetermined factor for which the person who becomes the subject of the patient's or the client's "transference" does not carry responsibility in the way in which the psychotherapist does. If surgeons and lawyers do not intuitively handle transference correctly, they will soon be out of business, though they may be excellent surgeons or lawyers. If a psychotherapist or psychoanalyst does not handle transference in a therapeutically correct way, he may nevertheless increase his clientele, but he will not cure his patients, and therefore he must be considered a poor therapist despite the success he may have in his social group. The austerity which the therapist must impose on the patient must be equally valid for himself, and he cannot enjoy some of the benefits which other professions are permitted to enjoy. Therefore, I made a mistake when I initially thought my bequest could be used for charitable purposes. Even if this could be done in strict anonymity, without any benefit to the therapist's prestige, it still would have been against a self-evident and therefore unwritten basic principle.<sup>18</sup>

The only exception to this austerity is the exception demanded by the treatment itself. "For example, in psychotherapy the refusal of a gift might end the transference; then the acceptance of the gift is put into the therapeutic process and has become necessitated by therapeutic requirements . . . ."<sup>19</sup>

Dr. Eissler concluded, after reading a book on psychiatry and law,<sup>20</sup> that this situation probably does not constitute undue influence in the legal sense, but his account suggests that he may have doubted whether this legal result is desirable. First he noted that transference, particularly in psychotherapy, may rise to an inordinate intensity. "All the latent strivings of a positive nature, desirous of giving and of expressing affection might become mobilized and focus upon the therapist. The intensity of these strivings in its relationship to the strength of the ego can be compared to a hypnotic state." Second, the patient may act on this emotional framework without any conscious activity by the therapist — and even without any unconscious activity. "[T]he patient's transference wish still may find a symbolic and factual gratification in giving the therapist a gift. In the situation of the dying this may easily lead to the psychiatrist's inclusion in the will of the patient who looks at him as an object of his bounty." He concluded — but I think tentatively — that the law probably ought not regard such

18 *Id.* at 227-28.

19 *Id.* at 229.

20 M. GUTTMACHER & H. WEIHOFFEN, *PSYCHIATRY AND THE LAW* (1952).



a will as invalid, but that medicine ought, as a matter of ethics, not permit the psychiatrist to accept the legacy.<sup>21</sup>

Dr. Eissler's experience was a product of the coincidence of the most common of all psychotherapeutic phenomena — transference — and of an ancient legal principle that a person subject to extraordinary influence ought to be protected by the law from his own impulses. Dr. Eissler's problem was the result of the fact that he did not see the legal implications of a familiar and even beneficent affective relationship with his patient. And it may be that the legal tradition has not yet seen the psychological implications of its familiar and even beneficent rule against undue influence. The affinities seem to be significant; this article assumes that exploration of them will be useful to lawyers in three ways. First, the exploration may criticize what appear to be the modern contours of the undue influence principle, particularly in wills cases. Second, in a more positive analysis, the psychotherapeutic insights may appear to have been foreshadowed in the legal insights, so that the process may become one of comparison — more a matter of illumination than of criticism.<sup>22</sup> Finally, consideration of the affective relationship between helping persons and those they help — the atmosphere in which Sigmund Freud first identified transference — may be useful to lawyers in counseling their clients. A principal benefit in any exploration of law and psychology is the benefit that comes to the lawyer as a counselor of troubled people.<sup>23</sup>

## II. Observations on Transference from the Literature of Psychotherapy

The enormous importance that Freud attached to the transference phenomenon became clear to me at our first personal meeting in 1907. After a conversation lasting many hours there came a pause. Suddenly he asked me out of the blue, "And what do you think about the transference?" I replied with the deepest conviction that it was the alpha and omega of the analytical method, whereupon he said, "Then you have grasped the main thing."

— C. G. Jung<sup>24</sup>

*Transference is a specialized instance of the ego defense of projection.* One way to live with myself is to blame all my troubles on other people. It is comforting to find you crabby when in fact I am crabby. Psychology regards the maneuver as defensive; what I am defending is my conscious self, my ego, and the ego defense in this case is projection.

21 K. EISSLER, *supra* note 1, at 231: "It would actually lead to an infringement upon the patient's freedom if he could make a valid will only by excluding his psychiatrist." Dr. Eissler concludes from this that the psychiatrist ought renounce the legacy. However, a distortion in the testator's plan is not so easily avoided; renunciation will benefit either a residuary legatee or intestate heirs. He also thinks his situation is peculiar to psychotherapy. *Id.* at 228. But he is wrong in supposing that lawyers do not have to be governed by the same considerations. See *Magee v. State Bar of California*, 58 Cal. 2d 423, 374 P.2d 807, 24 Cal. Rptr. 839 (1962).

22 In a somewhat similar vein, see Shaffer, *The Psychological Autopsy in Judicial Opinions under Section 2035*, 3 LOYOLA U. OF LOS ANGELES L. REV. 1 (1970).

23 See Shaffer, *The "Estate Planning" Counselor and Values Destroyed by Death*, 55 IOWA L. REV. 376 (1970).

24 C. JUNG, *Die Psychologie der Übertragung*, in 16 COLLECTED WORKS OF C. G. JUNG 172 (H. Read, M. Fordham & G. Adler, eds., 2d ed. 1966) [hereinafter cited as COLLECTED WORKS].

David Riesman gives an example of projection that should be familiar to lawyers. "Lawyers," he says, "learn not to take the law too seriously" — this as a product of legal education in "the art of debunking legal rituals and debunking authority, especially the authority of upper-court judges." The layman who consults a lawyer, on the other hand, consciously regards "the law" — and this concept includes the people who administer law and who create it — with awe, even though, unconsciously, he is cynical about the fairness and honesty of the legal process. He is surprised and even resentful when he finds that his lawyer takes "the law" lightly.

[T]he layman is not quite sure how he feels about such a person, whose usefulness he may need and whose knowledge may fascinate him; the more he needs him, the more he may be apt to project on to him his own tendencies to cynicism about authority and procedure.<sup>25</sup>

In other words, the layman resents his lawyer because his lawyer's matter-of-factness about legal authority reminds him of a cynicism and fear that he will not admit to himself. Riesman suggests that this projection may explain why some clients demand of their lawyers emotional support and economic identification, even at the expense of effective advocacy.<sup>26</sup>

Displacement<sup>27</sup> is a kind of projection<sup>28</sup> in which feelings toward one person are refocused on another person, or even on an animal or inanimate object. For example, a patient has feelings for his doctor that were originally (and are really) the feelings he has for his father. Displacement is also defensive, as all projections are; by displacing his feelings a person may avoid confronting in a realistic way his relationship toward significant people. Commentators universally regard transference as a projection. Freudians tend to regard it as displacement projection; Jungians tend to regard it as projection without displacement. Brussel and Cantzlaar, who are Freudians, define transference as "unconscious displacement of libido, whereby the patient shifts his antagonism and libidinal attachments from the disturbing 'characters' in his underlying emotional conflict to [in therapy] the psychiatrist."<sup>29</sup> Even Carl Rogers, who is no Freudian, sees transference as involving "attitudes transferred to the therapist which were originally directed, with more justification, toward a parent or other person."<sup>30</sup>

Ernest Jones, one of the greatest of the original Freudians, defined transference in alternative ways. Sometimes, he wrote, transference is "displacement of an affect, either positive or negative, from one person on to the psycho-analyst."

25 Riesman, *Some Observations on Law and Psychology*, 19 U. CHI. L. REV. 30, 33 (1931).

26 *Id.* at 34.

27 Displacement is a "mechanism . . . whereby persons, objects, situations, and ideas disturbing to the ego are replaced by less offensive ones." J. BRUSSEL & G. CANTZLAAR, *THE LAYMAN'S DICTIONARY OF PSYCHIATRY* 70 (1967).

28 Projection is "[a] defense mechanism in which the subject unconsciously attributes his own unacceptable ideas or impulses to another." *Id.* at 185.

29 *Id.* at 226-27. The "transference situation" is

the emotional situation which develops between patient and physician; during the course of psychoanalysis, wherein the patient transfers now affection and again hostile feelings to the analyst which are based on transient unconscious identifications and have no relation to reality.

M. PECK, *THE MEANING OF PSYCHOANALYSIS* 224-25 (1950).

30 C. ROGERS, *CLIENT-CENTERED THERAPY* 198 (Houghton Mifflin ed. 1965).

At other times transference is "displacement of affect from one idea to another."<sup>31</sup> Dr. Andrew Watson's recent book for lawyers defines transference as "the unreal attributes which the observer believes he sees or feels to be present in the observed, and which are drawn from some superficial likeness to an important person from the past, such as a parent." He adds that "this tendency to make a whole from a part represents projection on the part of the observer."<sup>32</sup>

C. G. Jung analyzed transference as projection *without displacement*. This might mean that an unreal attachment to the physician represents an aspect of the patient's character from which he must defend himself. Under Jung's theory, as under the Freudian displacement theory, transference is a defensive operation which has its origins — or etiology<sup>33</sup> as the doctors put it — deep in the transferring person's past, and which results in regarding the object of the transference in an unrealistic way in order that the patient may avoid necessity of regarding himself (in Jung's theory), or some more significant person (in Freud's theory), in a realistic way.<sup>34</sup>

It may help to explore the transference-by-displacement idea in one of its earliest reported clinical manifestations, Freud's patient Dora.<sup>35</sup> Dora was an unmarried young lady who was brought to Freud with what were then thought to be "hysterical" physical symptoms for which her physician could find no pathological or systemic explanation. Freud treated her for three months, in the process discovering that she was in the midst of a romantic triangle involving her father and a married couple (Herr and Frau K.) in whose home Dora had been

31 E. JONES, PAPERS ON PSYCHO-ANALYSIS 500 (Beacon ed. 1961).

32 A. WATSON, PSYCHIATRY FOR LAWYERS 4 (1968). A. Freud, *The Ego and the Mechanisms of Defense*, in PSYCHOANALYSIS, PSYCHIATRY, AND THE LAW 144 (J. Katz, J. Goldstein & A. Dershowitz eds. 1967) referred to transference as "the most powerful instrument in the analyst's hand" and defined it to include "all those impulses experienced by the patient in his relationship with the analyst which are not newly created by the objective analytic situation but have their source in the early — indeed, the very earliest — object relations." *Id.* at 146-47. Because of this infantile origin, transference reactions are valuable "as a means of information about the patient's past affective experiences." *Id.* at 147. She analyzes transference reactions as: (a) those involving libidinal impulses ("The patient finds himself disturbed in his relation to the analyst by passionate emotions . . . which do not seem to be justified by the facts of the actual situation." *Id.*); and (b) transference of defense, which differs in that it is attributable to the ego rather than to the id ("[I]n the most instructive cases [the transference of defense is attributable] to the ego of the same infantile period in which the id impulse first arose." *Id.*). The peculiar value of transference of defense is that it contains information on the patient's ego development, "the history of the transformation through which his instincts have passed." *Id.*

33 Etiology includes

[t]he facts concerning the origin and development of a patient's illness. Often used loosely to mean "cause," the term is actually more comprehensive, embracing predisposition, environmental influences, and other phenomena directly or indirectly involved in the development of the illness. J. BRUSSEL & G. CANTZLAAR, *supra* note 27,

at 87.

34 S. FREUD, *Psychoanalysis*, in PSYCHOANALYSIS, PSYCHIATRY, AND THE LAW, *supra* note 32, at 49-50.

By "transference" is meant a striking peculiarity of neurotics. They develop toward their physician the emotional relations, both of an affectionate and hostile character, which are not based upon the actual situation but are derived from their relations to their parents (the Oedipus complex). Transference is a proof of the fact that adults have not overcome their former childish dependence; it coincides with the force which has been named "suggestion"; and it is only by learning to make use of it that the physician is enabled to induce the patient to overcome his internal resistances and do away with his repressions. Thus psychoanalytic treatment acts as a second education of the adult, as a corrective to his education as a child. *Id.* at 50.

35 S. FREUD, DORA: AN ANALYSIS OF A CASE OF HYSTERIA 126-44 (Collier ed. 1963).

an employee. Freud did not get to the bottom of all of the confusing relationships that caused Dora's illness, but he suspected they involved homosexual attachments to Frau K (who was her father's mistress) and a proposition from Herr K (Dora had repulsed the proposition though she was attracted by it).

When Dora suddenly announced to Freud that she was terminating treatment, Freud did not accept her conventional explanation that she found it too lengthy. (She had earlier agreed to treatment for a year or more; the value of even the three months she spent with Freud is evidenced by the fact that she later married and apparently led a relatively normal life.) Freud explained Dora's decision in terms of her emotional identification of him with her potential lover, Herr K. She had, Freud thought, severed her relationship with the physician in order to punish Herr K. This was apparently one of Freud's earliest experiences with transference. He explained the phenomenon this way:

[Patients] replace some earlier person by the person of the physician. To put it another way: a whole series of psychological experiences are revived, not as belonging to the past, but as applying to the person of the physician at the present moment.<sup>36</sup>

Sometimes, he said, the transferences are exact reproductions of the earlier feelings — the only difference being that the object of the feelings is a new person, an object of transference. On other occasions, the transferences are disguised, "ingeniously constructed":

[T]heir content has been subjected to a moderating influence — to *sublimation*,<sup>37</sup> as I call it — and they may even become conscious, by cleverly taking advantage of some real peculiarity in the physician's person or circumstances and attaching themselves to that. These, then, will no longer be new impressions, but revised editions.<sup>38</sup>

Freud appears to have believed that Dora's feelings for Herr K were themselves transferred from someone else, probably from her father. Dora, in other words, had projected onto Herr K her feelings for her father (who had rejected her in favor of a liaison with Frau K). She had then projected onto Freud her feelings for Herr K, and had acted as she did toward Freud in order to punish Herr K. Freud went on to express his opinion that transference feelings for him as a doctor were almost inevitably present, and present throughout the course of therapy, and that cure depended on their being recognized by the patient and, through a process of awareness, dissolved. The problem in Dora's treatment was, Freud thought, that he had not recognized the transference soon enough; he did not treat it before Dora had an opportunity to act it out by rejecting him.<sup>39</sup>

36 *Id.* at 138.

37 Sublimation is "[a] defense mechanism whereby consciously unacceptable instinctual demands are channeled into acceptable forms for gratification." J. BRUSSEL & G. CANTZLAAR, *supra* note 27, at 217.

38 S. FREUD, *supra* note 35, at 138.

39 Gill, *Psychoanalysis and Exploratory Psychotherapy*, in *PSYCHOANALYSIS, PSYCHIATRY, AND THE LAW*, *supra* note 32, at 669-74, refers to this process as a "regressive transference neurosis" and enumerates the "trappings of analysis" that both encourage and flow from it: the recumbancy and inability to see the analyst . . . with the inevitable accompanying

Freud explained that he could have taken an altogether different course. He could have retained Dora as a patient by encouraging the transference. He could have done what Dr. Eissler does with dying patients — ignoring the possibility that transference might prevent cure. Dr. Eissler's therapeutic goal, after all, is not cure but endurance until the patient dies. Freud elected not to encourage the transference.

Might I perhaps have kept the girl under my treatment if I myself had acted a part, if I had exaggerated the importance to me of her staying on, and had shown a warm personal interest in her — a course which, even after allowing for my position as her physician, would have been tantamount to providing her with a substitute for the affection she longed for? I do not know. . . . [T]here must be some limits set to the extent to which psychological influence may be used, and I respect as one of these limits the patient's own will and understanding.<sup>40</sup>

Clearly, Freud believed he could have maintained his relationship with Dora if he had been willing to respond to her emotion — either genuinely (a countertransference)<sup>41</sup> or falsely.<sup>42</sup> Dr. Eissler responds as Freud refused to respond. His

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sense of being inferior; the frustration by silence and through other techniques; the awakening of strong needs without gratification; the absence of reality cues from the analyst; the general atmosphere of timelessness, with the relative disregard of symptoms . . . free association, bringing into the field of consciousness the thoughts and feelings ordinarily excluded from the usual interpersonal relationship; the emphasis on fantasy; and . . . the frequency of visits which, metaphorically speaking, we may regard as the constant irritation necessary to keep open the wounds into the unconscious, and indeed as a general strong invitation to become dependent, to regress, and to feel safe enough to do so because there is time enough and stability and frequency. *Id.* at 671.

For an example in which this neurosis was worked out, see F. FROMM-REICHMANN, *PRINCIPLES OF INTENSIVE PSYCHOTHERAPY* 77-79 (1960). The process involved to a great extent the experiences and emotional reactions of the physician. *See id.* at 91, 103-4, 106-7, 121-22.

40 S. FREUD, *supra* note 35, at 131.

41 Countertransference is "the analyst's emotional involvement in the patient's psychic problem. It is due to arousal by the patient of repressed feelings in the analyst's unconscious." J. BRUSSEL & G. CANTZLAAR, *supra* note 27, at 61.

42 I think there is little doubt that . . . by overt behavior toward the patient one can more quickly get him to change some aspects of his behavior. But what is the meaning of such a change? It is an adaptation to this particular interpersonal relationship — as it exists between patient and analyst. But this is not the goal of analysis. The goal of analysis is an intrapsychic modification in the patient, so that for example his dependent behavior is given up not because he has learned that if he acts too dependent he will be punished . . . but because despite the invitation to regress . . . he has come to feel and understand his dependency in such a way that he no longer needs it or wants it — and that is a conclusion valid not simply for this particular interpersonal relationship but has more general applicability, in short has the status of an intrapsychic change. Gill, *supra* note 39, at 671.

Every psychiatrist has had scores of patients who have been sick for a long time with a nervous illness and who are miraculously cured after a few interviews with him. . . . The patient is cured if he or she happens to develop a strong transference and feels that the physician's attitude is reciprocal. This does not mean that the physician must love him or her in the ordinary sense, but that he must be loving in the same way that the original person of the transference — that is, the mother or father — was loving.

The only trouble about these cures is that they last only so long as the transference lasts . . . . That is why some people are well as long as they keep running to the doctor . . . . K. MENNINGER, *THE HUMAN MIND* 276 (1930).

Menninger mentions, as Freud's experience with Dora illustrates, that the transference feelings can often be discovered only through dream analysis or through the disguised expression of feelings. *See* S. FREUD, *NEW INTRODUCTORY LECTURES ON PSYCHOANALYSIS* 106 (J. Strachey transl. 1965).

practice of giving gifts, of not billing for his services, and of indicating for the patient what he refers to as "unambivalent love," is an encouragement of transference. Dr. Eissler's dying lady patients, often as a product of his skillful cultivation of their feelings, project onto him strong feelings of affection for someone else — probably for their fathers, or brothers, or husbands — and he encourages those feelings in order to make their dying days more psychologically comfortable. His embarrassment in the will case reported above occurred only because he did not foresee what must, to a lawyer, seem entirely predictable — that the patient would make him a generous legacy and turn over to him the post-mortem management of her affairs. Because the patient is soon to die, Dr. Eissler views his practice as defensible and even medically sound (I do not suggest the contrary). Is it possible to imagine this same critical juncture in human relationships occurring outside the doctor's consulting room—a juncture at which an object of the transference is called upon to either encourage feelings or to reject them? Might not that same human relationship explain cases of extravagant inter vivos gifts and generous legacies in cases the courts later consider under the head of undue influence?

*Transference occurs commonly in all schools of psychotherapy and is fundamental in Freudian and Jungian psychoanalysis.* The first observation suggests the contours of transference theory as it has been developed in Freudian psychiatry, the school of psychotherapy most directly associated with the American medical profession. It may serve the purposes of the present observation, and some important tangential purposes, to look at the concept as it operates in Rogerian nonmedical psychotherapy and in Jungian analytical psychology.

Carl R. Rogers, in a system for talking to troubled people which has significance both in psychotherapy<sup>43</sup> and in counseling,<sup>44</sup> is defensive about transference — probably because he has been accused of exploiting it in his relationships with, as he calls them, "clients."<sup>45</sup> Rogers believes that transference in his "client-centered therapy" develops to some extent in almost all cases but to a troublesome extent in only a few. In each situation, he sees four indications that transference is present: (1) "a desire for dependence upon the counselor, accompanied by deep affect"; (2) "fear of the counselor, which is . . . related to fear of parents"; (3) "attitudes of hostility . . . beyond the attitudes . . . realistically related to the experience"; and (4) "expressions of affection, and a desire for a love relationship."<sup>46</sup>

Rogers believes that the milder — and more common — transference disappears as the client is led to rely on his own judgment rather than that of his counselor. He reports the case of a young woman who wanted to drop her sessions with her therapist because of a dream:

I was up for trial, and you were the judge . . . .

I didn't see how I could come back into the situation. I mean the circum-

<sup>43</sup> C. ROGERS, *supra* note 30, at 199-201.

<sup>44</sup> See generally E. PORTER, AN INTRODUCTION TO THERAPEUTIC COUNSELING (1950); L. TYLER, THE WORK OF THE COUNSELOR (3d ed. 1969).

<sup>45</sup> C. ROGERS, *supra* note 30, at 199-218.

<sup>46</sup> *Id.* at 200.

stances, you already judged me, and therefore I didn't really see how I could possibly talk any more.

. . . I suppose in my own way I was judging myself.<sup>47</sup>

In the process of talking the dream out, Rogers believes, this lady came to see that she was projecting a self-assessment and was capable of recognizing "that there are other sensory evidences which I have not admitted into consciousness, or have admitted but interpreted inaccurately." When this happens:

the "transference attitudes" . . . simply disappear because experience has been re-perceived in a way which makes them meaningless. It is analogous to the way in which one attitude drops out and another entirely different one takes its place when I turn to watch the large plane I have dimly glimpsed out of the corner of my eye, and find it to be a gnat flying by a few inches from my face.<sup>48</sup>

In other cases, those involving "aggressive dependence" and those in which the patient "insists that the counselor must take over," Rogers feels that his system of "client-centered therapy" is relatively unsuccessful. He gives an example that also illustrates the intensity of some transference reactions. Another young lady has developed a strong negative transference toward her therapist; she is ravaged by guilt feelings that relate to possible incest with her father:

I want to be independent — but I want to show you I don't have to be dependent. . . . You feel I want to come, but I *don't*! I'm not coming anymore. It doesn't do any good. I don't like you. I hate you! . . . All I've had is pain, pain, pain. . . . You think I can't get well, but I can. You think I had hallucinations, but I didn't. I hate you. . . . You think I'm crazy, but I'm not.<sup>49</sup>

Rogers believes that psychoanalysis develops transference more strongly than his system of psychotherapy does. The truth or falsity of this assertion is not of importance here, but the substance of Rogers's explanation for his position is directly relevant to the lives we lawyers have with our clients; for that reason it might be useful to consider it briefly.

Rogers explains transference in terms of dependence. First, he says, evaluation by an authoritative person tends to create dependence — evaluation of a moral character ("It is perfectly normal to . . ."), or evaluation of characteristics (as in psychological testing, or I suppose, an assessment of chances for success in litigation), or evaluation of causes or patterns in the client's life. Second, "dependency arises when it is expected," something which follows from "the analyst's stress upon the use of free association," and other devices in which "the patient is advised to avoid all feeling of responsibility," which in turn "would tend to imply that another will be responsible for him."<sup>50</sup> (One might pause to ask if there is a resemblance between this assessment of analysis and

47 *Id.* at 202.

48 *Id.* at 210.

49 *Id.* at 211-12.

50 *Id.* at 214-15.

the assessment Rogers might make of lawyers who tell clients, "Don't worry about a thing; I'll take care of it.") In summary:

When the client is evaluated to realize clearly in his own experience that this evaluation is more accurate than any he has made himself, then self-confidence crumbles, and a dependent relationship is built up. When the therapist is experienced as "knowing more about me than I know myself," then there appears to the client to be nothing to do but to hand over the reins of his life . . . .<sup>51</sup>

The example he gives, of a patient who became dependent on his doctor for every sort of practical, day-to-day advice, resembles examples given by Fromm-Reichmann<sup>52</sup> as well as experiences most practicing lawyers could relate on the subject of client dependence.

Jung's treatment of transference<sup>53</sup> is at the center of his view of man, and illustrates his use of the concept of collective unconscious to explain behavior. Jung regarded transference as a natural phenomenon rather than a manipulative device. While he admitted that the phenomenon was common, he thought psychotherapy would probably be better off without it. When it occurs, it poses a delicate and even insurmountable obstacle to the doctor:

What seems to be so easily won by the transference always turns out in the end to be a loss; for a patient who gets rid of a symptom by transferring it to the analyst always makes the analyst the guarantor of this miracle and so binds himself to him more closely than ever.<sup>54</sup>

This diffidence seems to be fundamentally at odds with Freud, who said that "the field of application of analytic therapy lies in the transference neurosis," and even suggested that any mental disorders "differing from these, narcissistic and psychotic conditions, is unsuitable to a greater or less extent" for psychoanalysis.<sup>55</sup> This leads the Freudian and his patient to work for transference, a venture Jung believed to be futile. "[T]ransference is only another word for

<sup>51</sup> *Id.* at 215-16.

<sup>52</sup> Two comments should be made on this assessment of psychoanalysis. First, Rogers does not discuss the use of transference to discover etiology — to find out about the patient's past experiences. See A. Freud, *supra* note 32, *passim*. Second, he does not emphasize (at least not as much as the psychiatrists who write on transference) the important effects of dissolution of the transference as a last step in treatment. See F. FROMM-REICHMANN, *supra* note 39, *passim*; M. PECK, *supra* note 29, at 92-100. The early stage of transference is positive in that it leads to discussion of "trains of thought ordinarily automatically repressed," and leads the patient to feel that "he may not be so different from other people . . . he feels hope, and his attitude . . . is that at last he has found . . . someone to understand him." *Id.* at 94-95. It is difficult but essential that this attitude be ultimately made realistic. "The analysis is not complete . . . until he has given up the analyst as an object of very special significance in his own emotional life." *Id.* at 99-100. Peck sees a technique of dissolution as important to avoid "the difficulty of a permanent transference bondage." *Id.* at 171-72. He suggests that one problem with nonmedical psychotherapy is that it may develop and depend on a permanent transference. *Id.* at 94. Peck, ironically, ends up accusing "client-centered therapy" of the same sins Rogers finds in psychoanalysis.

<sup>53</sup> Jung regarded transference as "the main problem of medical psychotherapy." C. JUNG, MEMORIES, DREAMS, REFLECTIONS 212-13 (R. & C. Winston transl. 1963). Jung first worked this theory out in his 1946 book, *Die Psychologie der Übertragung*, 16 COLLECTED WORKS 172. See C. JUNG, ANALYTICAL PSYCHOLOGY, ITS THEORY AND PRACTICE, THE TAVISTOCK LECTURES (1968).

<sup>54</sup> 16 COLLECTED WORKS 328. See also *id.* at 133-34.

<sup>55</sup> S. FREUD, *supra* note 42, at 155.



'projection.' No one can voluntarily make projections, they just happen. They are illusions which merely make the treatment more difficult."<sup>56</sup> When transference does occur it is delicate, time consuming, and not so methodically broken as the Freudians implied. "Words like 'nonsense' only succeed in banishing little things — not the things that thrust themselves tyrannically upon you in the stillness and loneliness of the night."<sup>57</sup>

Psychotherapeutic relations rest, in Jung's view, on rapport — and he apparently did not regard therapeutic rapport as coextensive with transference, although his discussion suggests that transference is often present along with rapport.<sup>58</sup> Transference, when it occurs, is a projection; and projections are dissociative — they are unintegrated bits of the personality wrongly seen as belonging outside the self.<sup>59</sup> The cure for them is integration — individuation — and this involves two or three features that are noteworthy for present purposes. First, honest rapport minimizes transference:

The transference is the patient's attempt to get into psychological rapport with the doctor. He needs this relationship if he is to overcome the dissociation. The feebler the rapport . . . the more intensely will the transference be fostered and the more sexual will be its form.<sup>60</sup>

A concomitant feature of transference, according to Jung, is that it seems to answer an affective hunger that is often present in disturbed people; their mental weakness "is enough to set these instinctive urges and desires in motion and bring about a dissociation of personality."<sup>61</sup> This accounts, at least in part, for the sexual element in transference. Another feature — and one that seems to bear potently on cases like Dr. Eissler's — is that the doctor's personality is *unavoidably* involved in the transference. "[T]wo psychic systems interact . . . individuality is a fact not to be ignored, the relationship must be dialectical."<sup>62</sup> The very survival of the patient may depend on "the doctor's knowledge, like a flickering lamp . . . the one dim light in the darkness."<sup>63</sup> The doctor has an opportunity to lead his patient to the integration of personality — "[n]o longer a mere selection of suitable fictions, but a string of

<sup>56</sup> 16 COLLECTED WORKS 328. See also C. JUNG, ANALYTICAL PSYCHOLOGY, *supra* note 53, at 170.

<sup>57</sup> 16 COLLECTED WORKS 255.

<sup>58</sup> *Id.* at 3-9.

<sup>59</sup> [T]he essential factor is the dissociation of the psyche and not the existence of a highly charged affect and, consequently . . . the main therapeutic problem is not abreaction but how to integrate the dissociation. This argument advances our discussion and entirely agrees with our experience that a traumatic complex brings about dissociation of the psyche. The complex is not under the control of the will and for this reason it possesses the quality of psychic autonomy. *Id.* at 131.

<sup>60</sup> *Id.* at 134.

<sup>61</sup> *Id.* at 173.

<sup>62</sup> *Id.* at 9.

<sup>63</sup> *Id.* at 199.

So long as the patient can think that somebody else (his father or mother) is responsible for his difficulties, he can save some semblance of unity . . . . But once he realizes that he himself has a shadow, that his enemy is in his own heart, then the conflict begins and one becomes two. Since the "other" will eventually prove to be yet another duality, a compound of opposites, the ego soon becomes a shuttlecock tossed between a multitude of "velleities" with the result that there is an "obfuscation of the light," i.e., consciousness is depotiated and the patient is at a loss to know where his personality begins or ends. *Id.* at 198.

hard facts, which together make up the cross we all have to carry or the fate we ourselves are."<sup>64</sup> But Jung is at some pains to make it clear that this therapeutic process is not a matter of manipulation. The transference relationship is most of all a link between the unconscious of the doctor and that of the patient;<sup>65</sup> Jung believes they share in a collective unconscious.<sup>66</sup> Without going so far, though, one can appreciate the relevance of his insight to any legal analysis of the confidential relationship a litigant in Dr. Eissler's position may have had with his patient:

The transference . . . alters the psychological stature of the doctor, though this is at first imperceptible to him. He too becomes affected, and has as much difficulty in distinguishing between the patient and what has taken possession of him as has the patient himself.<sup>67</sup>

A final important insight of Jung's is that the sexual element in transference is archetypal rather than oedipal. Both Freud and Jung had to take account of the sexual element. Freud linked it to the infantile Oedipus complex, the child's desire to replace his father in his mother's life. Transference to a female therapist by a male patient would therefore involve these sexual feelings, though not all modern Freudians would agree.<sup>68</sup> Jung thought that the projection was fundamentally of the contrasexual element within the patient himself. A man tends to project the female within him — the *anima*. In childhood he has made this projection on his mother and sisters; he later projects it on other women, but it often retains a certain incestuous character.<sup>69</sup> (He also projects homo-erotic feelings from within himself on his father, his brothers, his male doctor.)<sup>70</sup> This *anima* projection in its purest form involves the incest taboo;<sup>71</sup> but it affords also the therapeutic opportunity for a "spiritual marriage" in which the projected and unprojected elements of the patient's personality are integrated into a new conscious self.<sup>72</sup> This process, insofar as it is therapeutic,<sup>73</sup> is a process which needs some substitute for the biological unity of the family — "family" here in the sense of ancient, archetypal, "kinship" as well as in an etiological sense. The idea that integration takes place in a human association that is libidinal but not sexual<sup>74</sup> is complex—almost mystical—but it is obviously central to what Jung says about transference in modern man:

Everyone is now a stranger among strangers. Kinship libido . . . has long been deprived of its object. But, being an instinct, it is not to be satisfied

<sup>64</sup> *Id.* at 199.

<sup>65</sup> *Id.* at 176-82.

<sup>66</sup> *Id.* at 183-85.

<sup>67</sup> *Id.* at 182. Jung's conception of the transference is that it is a third force, which possesses both the patient and the analyst. See *id.* at 171-73, 175-80.

<sup>68</sup> See, e.g., F. FROMM-REICHMANN, *supra* note 39, at 2, 99.

<sup>69</sup> 16 COLLECTED WORKS 95-96. "Whenever this drive for wholeness appears, it begins by disguising itself under the symbolism of incest, for, unless he seeks it in himself, a man's nearest feminine counterpart is to be found in his mother, sister, or daughter." *Id.* at 263.

<sup>70</sup> *Id.* at 178-82, 218.

<sup>71</sup> *Id.* at 219-32.

<sup>72</sup> *Id.* at 232-33.

<sup>73</sup> Jung goes beyond the therapeutic — he describes the process as virtually political. *Id.* at 233.

<sup>74</sup> *Id.* at 265-66. This is related to Jung's seminal thinking about the second half of life. See C. JUNG, MODERN MAN IN SEARCH OF A SOUL 95-115 (W. Dell & C. Baynes transl. 1933).

by any mere substitute such as a creed, party, nation, or state. It wants the *human* connection. That is the core of the whole transference phenomenon, and it is impossible to argue it away, because relationship to the self is at once relationship to our fellow man, and no one can be related to the latter until he is related to himself.<sup>75</sup>

*Transference is not limited to psychotherapeutic relationships. It may occur in any relationship in which the transferring person feels trust toward the object of the transference.* In his recent book, *Psychiatry for Lawyers*, Dr. Andrew S. Watson suggests that transference is an essential "tool" in the relationship between lawyer and client.<sup>76</sup> Transference is, he says, an "ubiquitous phenomenon"; lawyers who bother to understand the phenomenon "can profit immensely." He quotes former Justice Abe Fortas and Talcott Parsons in support of the proposition that transference and countertransference are commonplace in the law office. He directs most of his brief discussion of the subject toward legal counseling, but not without noticing in the process that a father-son transference relationship often develops between young lawyers and their senior partners.<sup>77</sup> "The capacity to accept the possibility that one's feelings about another may be due to unconscious and unrealistic coloring rather than to the other's reality traits," he says, "is a major step toward understanding" in relations among lawyers and in lawyer-client encounters. "Without awareness of transference phenomena, people are over- or under-convinced by their own emotional responses and have no opportunity to work out any understanding of them."<sup>78</sup>

Dr. Watson applies, close to home, the insight that transference is a matter of everyday living. The point is rare and important. Personal observation by physicians gives them little opportunity to work out principles of "relatedness" in nonmedical contexts, but the relatedness is present everywhere. "[E]arly experiences in interpersonal relatedness," Fromm-Reichmann said, "affect . . . later relationships with [a] family doctor, dentist, minister, etc. Even the mere anticipation of consulting any kind of qualified helper . . . may pave the way for the development of transference reactions." She added that "[a]s a result, present-day persons and interpersonal situations will be misjudged, incorrectly evaluated, and paratactically distorted along the lines of the patients' unrevised, early, dissociated experiences."<sup>79</sup> "The transference itself," Jung said, "is a perfectly natural phenomenon which does not by any means happen only in the consulting room — it can be seen everywhere and may lead to all sorts

75 16 COLLECTED WORKS 233-34.

76 A. WATSON, *PSYCHIATRY FOR LAWYERS* 4-9 (1968).

77 *Id.* at 6-7. See the discussion of this point as to the personal relationship between Freud and Jung, note 94 *infra*.

78 A. WATSON, *PSYCHIATRY FOR LAWYERS* 8 (1968).

So, if a patient projects the saviour complex into you, for instance, you have to give back to him nothing less than a saviour . . .

. . . Each profession carries its respective difficulties, and the danger of analysis is that of becoming infected by transference projections . . . So he begins to feel, "If there are saviours, well, perhaps it is just possible that I am one," and he will fall for it, at first hesitantly, and then it will become more and more plain to him that he really is a sort of extraordinary individual. C. JUNG, *ANALYTICAL PSYCHOLOGY*, *supra* note 53, at 171. That sort of thing, of course, never happens to lawyers.

79 F. FROMM-REICHMANN, *supra* note 39, at 97-98.

of nonsense . . . ."<sup>80</sup> Dr. Peck suggested that transference is likely to exist in any professional relationship in which good rapport has been established;<sup>81</sup> one psychiatrist even attempted to gauge transference between students and their teacher in an engineering class.<sup>82</sup>

*Transference often crosses sexual lines and may involve a reversal of generations.* Jung used a medieval book on alchemy to explain transference. He built his explanation around woodcuts that illustrated the *coniunctio* between symbolic, mythical male and female figures.<sup>83</sup> His theory was that transference involves the projection of contrasexual contents in the unconscious of the transferring person. Although he did not confine transference to this sort of projection — it was possible, he said, to transfer even onto inanimate objects<sup>84</sup> — it is clear that the Jungian prototype of transference is contrasexual. Freud's view of transference was tied to his view of the Oedipus complex. Feelings transferred by the patient originated in competition between the patient and his father for the love of the patient's mother — a necessarily contrasexual relationship.<sup>85</sup> It is possible to exaggerate the importance of the sexual element in transference — especially in a limited discussion, for nonmedical purposes. Fromm-Reichmann appears to disagree with Freud's view on the Oedipus complex in transference; she regards the affective content in the transference as a "wish for closeness and tenderness with the beloved parent . . . without recognizable sexual roots," and attributes the apparently contrasexual character of transference to the fact that people in our culture find it easier to talk about sex than about "friendly, tender, asexually loving aspects of . . . interpersonal relationships."<sup>86</sup> However, the evidence for some contrasexual tendency in transference is at least strong enough to justify seeking a parallel between clinical experience with the phenomenon and the apparent incidence of contrasexual transference in undue influence wills cases.<sup>87</sup>

80 16 COLLECTED WORKS 218.

All activated contents of the unconscious have the tendency to appear in projections. It is even the rule that an unconscious content which is constellated shows itself first as a projection. Any activated archetype can appear in projection, either into an external situation, or into people, or into circumstances — in short, into all sorts of objects. There are even transferences to animals and to things. C. JUNG, *ANALYTICAL*

*PSYCHOLOGY*, *supra* note 53, at 158.

81 M. PECK, *supra* note 29, at 93-94.

82 Kahne, *Psychiatrist Observer in the Classroom*, *MED. TRIAL TECH. Q.*, June 1969, at 81.

83 16 COLLECTED WORKS 247-56.

84 C. JUNG, *ANALYTICAL PSYCHOLOGY*, *supra* note 53, at 158.

85 S. FREUD, *supra* note 42, at 106.

They have their source in old affective constellations, such as the Oedipus and the castration complex, and they become comprehensible and indeed are justified if we disengage them from the analytic situation and insert them into some infantile affective situation. A. Freud, *supra* note 32, at 147. See Joseph, *supra* note 8; K. MENINGER, *supra* note 42; 16 COLLECTED WORKS 95-96; text accompanying note 69, *supra*. See also E. JONES, *supra* note 31, at 413-95.

86 F. FROMM-REICHMANN, *supra* note 39, at 99.

87 Patrick E. Maloney, a third-year law student, undertook to check this impression and an impression on generation reversal against the appellate literature. He took random samples from all of the cases indexed under "undue influence" in the Indiana digest and the California digest. Based on a study of fourteen randomly selected Indiana cases and forty-three randomly selected California cases, he obtained the following results. In Indiana, sixty-four percent of the cases involved contrasexual relationships and eighty-six percent involved what I have called generation reversal. In California, seventy-seven percent of the cases involved contrasexual relationships and sixty-three percent involved generation reversal. These figures indicate a

A more evasive aspect of transference is that it frequently appears to involve generation reversal. Ernest Jones, an early giant of psychiatry, noted that children tend, almost universally, to believe that people grow smaller as they grow older. "When I am a big girl and you are a little girl," a child says to her mother, "I shall whip you just as you whip me now." The fantasy extends, as in this example, to a general reversal of parent-child positions; Jones finds parallels in certain Eastern and Egyptian myths and even in Little Red Riding Hood. He attributes this phenomenon to an early, narcissistic conviction of immortality, to early impulses of love and hate for parents, and to a childish need to find, in fantasy, a position in which the child can both demand from and help his parents. The phenomenon has a number of important results, most notably in a parent's compulsion to compare his own child with his parent. "I have . . . noticed," Jones says, "how the parent's attitude towards quite minute specific traits . . . in his or her own parent is reproduced when dealing with his or her child." This has a significant cultural effect in the transfer of traditions, traditions which may be defied, as well as accepted, by the child on whom they are imposed.<sup>88</sup>

This piece of clinical observation is relevant here because it may help to explain the fact that transference often appears to involve an object — contrasexual or not — who is younger than the patient or client making the transference. This was apparently true in Dr. Eissler's case. It was often true in Jung's practice and may account in part for his conviction that the process of individuation, toward which the transference tends, occurs in the second half of life.<sup>89</sup>

It may be that use of Jones's explanation is overly complex, and that the transference onto younger people is merely a species of regression.<sup>90</sup> Regression

significant level of transfers to younger people thought by plaintiffs or their counsel to justify an undue-influence contest. They further indicate that the level of contrasexual transfers was higher in both states than would occur by accident (assuming that chance occurrence would be approximately fifty percent).

In terms of what courts do with these situations, the study indicates that in California twenty-nine percent of all cases resulted in appellate holdings against the will; thirty-seven percent of all cases involving contrasexual relationships resulted in appellate holdings against the will; and twenty-six percent of all cases involving generation reversal resulted in appellate holdings against the will.

In Indiana, thirty percent of all appellate holdings were against the will; thirty-six percent of appellate holdings in contrasexual relationship cases were against the will; and thirty-one percent of all appellate holdings in generation reversal cases were against the will.

From all this I conclude that:

(1) A contrasexual will transfer is more likely to be subject to contest than a transfer where testator and legatee are of the same sex. And, when the suit is brought, it is more likely to be successful where the transfer is contrasexual than where it is not.

(2) A transfer which is cross-generational tempts contest in a great many cases (as much as four-fifths of all cases brought). But, when the suit is brought, the chances of winning or losing are about the same as if no generation reversal were involved. The first part of this second conclusion is not very useful, since there is no "normal" transfer situation with which it may be compared. One would expect that most testamentary transfers would go from older to younger persons.

<sup>88</sup> E. JONES, *supra* note 31, at 411-12.

<sup>89</sup> C. JUNG, *supra* note 74.

<sup>90</sup> Regression is a "[r]eversal of psychosexual development; a primary feature of schizophrenia . . ." The patient in extreme cases "retraces his steps back to the protective shell of security of babyhood and there, beyond the reach of society's demands, constructs his own thoroughly satisfying world of fantasy . . ." J. BRUSSEL & G. CANTZLAAR, *supra* note 27, at 200. In his *Analytical Psychology*, Jung notes that some ancient and medieval sexual practices were designed to prevent spouses from regressing all the way to attachment to parents.

was sufficient to explain the transference noted by Bloch, Silber and Perry; they found that parents in the 1956 Vicksburg tornado disaster turned to their children for emotional support.<sup>91</sup> Burton noted that an elderly, dying lady in a hospital tended to regress to a need for the sort of love she had as a child.<sup>92</sup> However this contragenerational element in transference is explained, it is important to suggest some clinical parallel here because many undue influence wills cases involve testators influenced by younger, trusted legatees.

*Transference relationships may become exceptionally strong.* Dr. Eissler's assessment was that transference can be virtually hypnotic. Examples from Freud and Jung may illustrate the point. Freud's case involved a Herr P who had developed a strong positive transference for Freud. Freud had decided he could not help Herr P and had told him so, but Herr P wanted to continue therapy for some few weeks until his duties at a university began. Freud agreed, although he recognized that his only link to the patient was that Herr P "felt comfortable in a well-tempered father-transference to me," and that this indefinite arrangement was "in disregard of the strict rules of medical practice." The relationship became so intense that the patient seemed to know facts — most notably the name of a foreign visitor to Freud's office — which were, objectively, hidden from him. Freud was tempted to believe that the relationship between him and Herr P caused a transfer of thought.<sup>93</sup>

Jung's examples are even more candid; one of them involved Freud, with whom he had a strong father-son relationship, which Freud also experienced.<sup>94</sup> While they were still speaking to each other, Jung had a dream that signaled to him their forthcoming break and that represented both aspects of the ambivalent transference relationship:

[H]e still meant to me a superior personality, upon whom I had projected the father, and at the time of the dream this projection was still far from eliminated. Where such a projection occurs, we are no longer objective; we persist in a state of divided judgment. On the one hand we are dependent, and on the other we have resistances. When the dream took place I still thought highly of Freud, but at the same time I was critical of him. This divided attitude is a sign that I was still unconscious of the situation and had not come to any resolution of it. This is characteristic of all projections.<sup>95</sup>

Jung cited his other example in explanation of parapsychological pheno-

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Theory was that the spouse would regress to interim feelings toward a temple prostitute or a feudal lord (*prima nox*). C. JUNG, *ANALYTICAL PSYCHOLOGY*, *supra* note 53, at 178.

91 Bloch, Silber & Perry, *Some Factors in the Emotional Reaction of Children to Disaster*, 113 AM. J. PSYCHIATRY 416 (1956); see Shaffer, *The "Estate Planning" Counselor and Values Destroyed by Death*, 55 IOWA L. REV. 376 (1970).

92 Burton, *Death as Countertransference*, 49 PSYCHOANALYSIS & PSYCHOANALYTIC REV. 3 (1962).

93 S. FREUD, *supra* note 42, at 47-54.

94 Time reports the discovery of correspondence between Freud and G. Stanley Hall in which Hall wrote to Freud that the split between Freud and Jung was a classical case of adolescent rebellion. Freud replied:

"If the real facts were more familiar to you, you would very likely not have thought that there was again a case where a father did not let his sons develop, but you would have seen that the sons wished to eliminate their father, as in ancient times."

TIME, Sept. 5, 1969, at 32.

95 C. JUNG, *MEMORIES, DREAMS, REFLECTIONS* 163-64 (R. & C. Winston trans. 1963).

mena. A patient, with whom Jung had formed a strong transference, was progressing toward cure when he discovered that his wife resented Jung. In the face of stress between wife and surrogate father, the patient relapsed into depression. One night Jung was awakened as if someone were in his room. While awake he felt a dull pain at the back of his skull. The next day he learned that his patient had shot himself in the head, at the time of Jung's experience. "The collective unconscious is common to all," Jung said of this experience. "[I]t is the foundation of what the ancients called the 'empathy of all things.' In this case the unconscious had knowledge of my patient's condition."<sup>96</sup>

### III. The Transference Relationship in Undue Influence Cases

. . . recollecting, that, in discussing whether it is an act of rational consideration, an act of pure volition, uninfluenced, that inquiry is so easily baffled in a Court of justice, that instead of the spontaneous act of a friend, uninfluenced, it may be the impulse of a mind misled by undue kindness, or forced by oppression . . . And, therefore, if the Court does not watch these transactions, with a jealousy almost invincible, in a great majority of cases it will lend its assistance to fraud . . .

— Lord Eldon<sup>97</sup>

Dr. Eissler's discussion of transference, coupled with reasonable conjecture from other clinical discussions, suggests four situations in which the subject of the transference might make gratuitous disposition of property in favor of the object of the transference — situations to which the law of undue influence has been applied.

First, the object of the transference consciously manipulates it to his own advantage. Second, the object of the transference is (a) aware of his power over the subject, (b) aware of the transfer, or plans for the transfer, in his favor, and (c) disinclined to do anything about the effect of the transference, which favors him. In this second situation, conscious manipulation of the transference cannot be shown. Third, the object of the transference is not aware of any of the facts noted in the second case, but *unconsciously* manipulates the person in his power ("unconscious opportunism," in Dr. Eissler's phrase). Fourth, there is no evidence of manipulation, conscious or unconscious, but there is evidence that a transference existed, and the evidence supports a conclusion that the gratuitous transfer was a result of the transference — i.e., it was an inappropriate gift, which the law terms "unnatural."<sup>98</sup> Each of these four examples can be found in the appellate and secondary literature on undue influence.

#### A. Conscious Manipulation

*In re Kauffmann's Will*<sup>99</sup> made two trips to the appellate division of the New

<sup>96</sup> *Id.* at 138.

<sup>97</sup> *Hatch v. Hatch*, 9 Ves. Jr. 292, 297, 32 Eng. Rep. 615, 617 (Ch. 1804).

<sup>98</sup> See 3 W. BOWE & D. PARKER, *PAGE ON WILLS* § 29.124, at 669 (1961).

<sup>99</sup> 20 App. Div. 2d 464, 247 N.Y.S.2d 664 (1964), *aff'd*, 15 N.Y.2d 825, 205 N.E.2d 864, 257 N.Y.S.2d 941 (1965).

York Supreme Court and was finally resolved, by a divided court, against legacies made by Robert Kaufmann to his friend Walter Weiss. The majority held that the evidence supported a jury finding that the will had been obtained by undue influence. The relationship between Kaufmann and Weiss spanned eleven years. Kaufmann was a middle-aged bachelor, a millionaire, an amateur painter, and an inept businessman who had inherited all of his wealth; Weiss was a lawyer not in practice, a domineering personality, and a loyal companion to his well-heeled friend. The contestants were Robert's brothers and nephews. Both opinions in the appellate division are fervent; the majority seemed to absorb the emotional force of the contestants' argument and represented Weiss's conduct in such righteous hyperbole as "deceitful," "improper, and insidious," "deliberately false," and "unnatural . . . influence"; the brothers and nephews were subjects of such cordial phrases as "natural warm family" and "intimately and warmly associated." The dissenters saw the family as "disappointed relatives," noted "business differences" between Kaufmann and his brother, and said Kaufmann "rarely saw his relatives" even before he came to know Weiss. The majority opinion speaks of Kaufmann himself as weak and submissive; the dissenters describe him as sensitive, intelligent, and merely peculiar.

Kaufmann and Weiss met in 1948 and entered into a business arrangement under which Weiss was to be Kaufmann's financial advisor. Within two years they were sharing Kaufmann's apparently palatial New York townhouse. Five wills were at issue. The first, which gave his property to brothers, nephews, friends and charities — and a small legacy to Weiss — was seen by the majority as a "natural testamentary disposition." The other four, dating from 1951 to 1958, progressively increased Weiss's share and ultimately eliminated all other legatees except the two nephews; these were characterized as the result of a calculated scheme:

To overtly seize Robert's property would risk a challenge by his family. So long as Robert was under his control and influence, Weiss was assured of a life of ease and luxury. He, therefore, need only direct Robert toward making him his principal beneficiary in the event of his death. This he could do without the knowledge of the family. The result was to be substantiated by written declarations of Robert assigning reasons for the unnatural disposition.<sup>100</sup>

This last sentence referred to Robert's handwritten letter, put with the first of the contested wills (executed in 1951); the letter explained to the family that Weiss had encouraged Robert's painting, had given him "a balanced, healthy sex life," and had been responsible for his peace of mind. The majority explained the letter with alternative theories — either it was dictated by Weiss, or it was so filled with errors as to indicate Robert's weakness of mind.<sup>101</sup>

100 *Id.* at 482, 247 N.Y.S.2d at 681.

101 *Id.* at 471, 247 N.Y.S.2d at 672. "The emotional base reflected in the letter . . . is gratitude utterly unreal, highly exaggerated and pitched to a state of fervor and ecstasy." *Id.* at 474, 247 N.Y.S.2d at 674. The court suggests that Weiss had a hand in writing it. *Id.* at 481-83, 247 N.Y.S.2d at 681-82.



The majority's view of the relationship was that it began in dependence, largely because Robert "sought help and direction to satisfy his drive for independence." Robert immediately made a bad bargain (\$10,000 a year for Weiss's advice). He then began to take Weiss's advice in business and lost large amounts of money because Weiss was a bad advisor. Weiss then, in the majority view, began to use business quarrels within the family as a pretext for alienating Robert from his brothers; "Weiss exploited Robert, induced him to transfer to him the stewardship formerly exercised by [his brother, and] increased Robert's need for dependency, prevented and curtailed associations which threatened his absolute control of Robert and alienated him from his family."<sup>102</sup>

Once family control was eliminated, in the majority's view, Weiss intensified his own virtually parental control over Kaufmann. They travelled together (at Kaufmann's expense); Weiss wrote notes to Kaufmann that were sometimes curt and commanding, sometimes condescending. ("I think you are finally growing up and realize you are not playing with marbles.")<sup>103</sup> Weiss dominated the household while Kaufmann "stood by mutely . . . submitted silently . . . complied."<sup>104</sup> Once control was undisputed, Weiss built the system of gratuitous transfers at issue — legacies of corporate stock, of cash, of real estate; beneficiary designations on life insurance; and cash gifts.<sup>105</sup>

The majority believed that throughout this carefully constructed relationship Weiss practiced calculated, pervasive deception on Robert and his brothers and manipulated Robert's affections. The court called this eleven-year adventure a "skillfully executed plan," and carefully implied that Weiss exploited a homosexual relationship with Robert.<sup>106</sup> Robert was, the majority said, "a personality with pathological dependency; one unable to deal with reality, insecure, unstable and who tends to submit unreasonably to the will of another."<sup>107</sup> This was a case of the "insidious, subtle and impalpable kind which subverts the intent or will of the testator, internalizes within the mind of the testator the desire to do that which is not his intent but the intent and end of another."<sup>108</sup>

The dissenters thought the evidence was circumstantial and unconvincing;

102 *Id.* at 479, 247 N.Y.S.2d at 679. The majority also felt that Weiss attempted without success to win the support of Robert's brothers. *Id.* at 467, 247 N.Y.S.2d at 668.

103 *Id.* at 468, 247 N.Y.S.2d at 669.

104 *Id.* at 480, 247 N.Y.S.2d at 680.

105 These transfers were summarized by the dissenters. *Id.* at 488, 247 N.Y.S.2d at 687. The majority regarded the inter vivos transfers as circumstantial evidence of undue influence in the execution of the will. *Id.* at 468-69, 247 N.Y.S.2d at 669-70.

106 The majority, in referring to Kaufmann's ambiguous allusion to Weiss's effect on his sex life, saw an "implication . . . that Weiss in some fashion was identified with Robert's sex life," but noted Weiss's denial of such involvement. *Id.* at 471, 247 N.Y.S.2d at 672. The dissenters spoke of "love and affection" and "the intimate relationship which existed between the two men" but insisted that "the morals of these men" were irrelevant. *Id.* at 490-91, 247 N.Y.S.2d at 689-90. The dissenters later admitted, rather more bluntly, that "the relationship may be likened to that of one who has a mistress." *Id.* at 492, 247 N.Y.S.2d at 691.

107 *Id.* at 482, 247 N.Y.S.2d at 682 (paraphrasing medical testimony from the record). The majority saw the manipulation as a shift in affection from Robert's brothers to Weiss, *id.* at 469, 247 N.Y.S.2d at 670, rather than as a creation of affection *ab initio*. That is, of course, similar to Freud's description of his experience with Dora.

108 *Id.* at 482-83, 247 N.Y.S.2d at 682. This was, the majority said, not overcome by "[t]he fact that the instrument . . . was prepared by reputable, competent attorneys . . ." *Id.* at 485, 247 N.Y.S.2d at 684. It is clear — although the point is well hidden — that the holding does not rest upon a presumption of undue influence, but upon a finding that the evidence supported the judgment of the trial court. *Id.* at 485-86, 247 N.Y.S.2d at 685-86.

the verdict, they said, rested "upon surmise, suspicion, conjecture and moral indignation and resentment, not upon the legally required proof of undue influence . . . ." <sup>109</sup> The two dissenting judges felt that Weiss was being tried for admitted discrepancies between pretrial testimony and facts in the record, and for the peculiar "intimate relationship," which neither set of judges was able to be candid about. <sup>110</sup> The dissenting view of the four wills at issue was that they were the result of close friendship and gratitude. The dissenters could not accept the notion that undue influence could be exercised progressively and consistently for eleven years: "It is not claimed that the testator was hypnotized by Weiss during all this period, and certainly no evidence thereof has been presented." <sup>111</sup>

Both sets of judges, for all their hyperbole, agreed on the existence of a confidential relationship. Dicta in the majority opinion puts the case within New York precedents that place the burden of proof on the proponent when it is shown there is "a marked departure from a prior, natural plan of testamentary disposition which excessively and unnaturally favors a nonrelative under circumstances establishing motive, opportunity, overreaching and persistent involvement in transfers and dispositions of property . . . ." <sup>112</sup> The dissenters admitted the influence, and even deplored it, but felt the majority encroached too far on freedom of testation. "Undoubtedly the testator was influenced but the evidence . . . is entirely consistent with the complete lack of undue influence," the dissenters said. "Yet, because of the suspicious circumstances involved, the majority . . . would deny him his legal right to dispose of his property as he has chosen to do." <sup>113</sup>

*Kauffmann* appears to be a clear case of manipulation. Evidentiary sophistication in dealing with it — most notably the sophistication of a presumption or shift in the burden of proof — is not necessary to the decision. The majority alluded to the New York rule on presumption of undue influence, but its holding does not rest on a presumption or on an esoteric view of burden of proof; the case was decided solely on the record. Psychological sophistication is not necessary either, given the majority's view of the evidence. A transference clearly existed, and it was clearly contrasexual, even though both parties were male. It was a strong transference, an emotional lever Weiss could have exploited in all the ways the family pointed out. It probably gripped Weiss, too, but the majority could not discuss that because it was too intent on finding a villain. Moral judgments about Weiss and his power over Robert Kaufmann were doubtless made by the jury. They were made expressly by appellate judges on both sides of the issue; they were made by the majority in such a way as to resolve the evidence into both a finding and a righteous condemnation. Transference theory illuminates this sort of case; it would temper judicial

109 *Id.* at 490, 247 N.Y.S.2d at 689.

110 "Of course, the court does not condone the relationship, but the moral law may not be substituted for the law of wills; and it should not be overlooked that difficult cases tend to make bad law." *Id.* at 492, 247 N.Y.S.2d at 691.

111 *Id.*, 247 N.Y.S.2d at 690.

112 *Id.* at 486, 247 N.Y.S.2d at 685. See 1 W. BOWE & D. PARKER, PAGE ON WILLS § 15.4 (1960); 3 W. BOWE & D. PARKER, PAGE ON WILLS §§ 29.124, 29.131, at 669, 685 (1961); 1 R. JENNINGS, JARMAN ON WILLS 28-29 (8th ed. 1951).

113 20 App. Div. 2d 464, 492, 247 N.Y.S.2d 664, 691 (1964).

rhetoric to have the theory out in the open — if only because the judges would see that we all manipulate and are manipulated — but it would probably not change the decision.

### B. The "Let It Happen" Case

Transference may work its way without overt manipulation; the sagacious potential legatee simply lets matters take their course. This is the second category of undue influence case suggested by Dr. Eissler's experience. The object of the transference is aware that he has power over the subject; he is aware (or should be) that the subject plans some more or less inappropriate memorial of the relationship; and he does nothing about it. Dr. Eissler thought that psychotherapist who allows this to happen is unethical, while the psychotherapist who doesn't know it is happening is incompetent.

This case is harder to resolve than the overt manipulation case because the object of the transference let the testator's emotions do his work for him. What Jung saw as virtually a third personality — the shared unconscious of both parties — is at work. Even if Jung's analysis seems unduly mystical, it at least provides a useful metaphor. The unconscious interaction is like a third person: neither party controls it, but the testator is controlled by it.

*In re Faulks' Will*<sup>114</sup> is an example. Mrs. Mary Faulks was the testator; the litigation was between a will offered by her quasi-adopted son Will Jensen and a later will offered by her physician, Dr. L. G. Patterson. All the relevant facts occurred during the last two years of Mrs. Faulks's six-year widowhood, while she was between the ages of 76 and 78 and Dr. Patterson was between 36 and 38. Her earlier wills (not at issue) had given her estate largely to Will Jensen. She and her husband had raised Will, saw him married to a neighbor's daughter, and then made the young couple their successors on the family farm. Mrs. Faulks was close to the Jensens' daughter, Lorraine.

Mrs. Faulks employed Dr. Patterson about two years before her death. She loaned him large sums of money for investment in real estate and in the doctor's airplane. A year before she died, in the fourth will she made after her husband's death, Mrs. Faulks forgave several thousand dollars of the doctor's indebtedness to her. In the following months she loaned him additional money, paid his debts, purchased real estate for him, and gave him cash — for a total value of more than \$14,000 at the time of her death. During this period, according to a parade of witnesses,

[h]er conversation was always about the Doctor and it gradually grew more and more that way. She expressed feelings of sympathy and sorrow for him.

. . . We started a subject and then she would stop it and talk about Dr. Patterson. That was every time I went there. She did not carry on a conversation on the same subject very long. It would always turn to the doctor. She was always telling how nice he was, how wonderful a doctor she had . . . . Her manner was different when she referred to him . . . . She was kind of happy and smiled. The last time I was there she sat on

114 246 Wis. 319, 17 N.W.2d 423 (1945).

the studio couch . . . with her hands folded and . . . looked at the sky and just beamed about the doctor.

. . . . She felt sorry for him. She said she guessed he was the son she never had. She requested him to come and see her every day . . . but not to put himself out if he was busy. At one time she made the remark to me, "I don't know why I've taken such a liking to Dr. Patterson." \* \* \* She mentioned to me that she wished she had more money than she did have. She said to try and help Dr. Patterson build a hospital for the city. She said she would like to live another year at least to see Dr. Patterson become famous.

. . . . She referred to him as Dear Pat, Dear Doctor. When she spoke about him she always seemed to be very happy. . . . She used to tell me how good he was. He would come up there every night when he was so tired.

. . . . I always liked her as an old friend. . . . She kept up with current events up to two or three years ago. She had a radio and spent time with that. She talked with me about things she heard over the radio. The last couple of years she did not do this . . . I don't think she was well. The last couple of years I visited her it wasn't much only Dr. Patterson.<sup>115</sup>

When a cousin of the testatrix once appeared to disparage Dr. Patterson's professional competence, Mrs. Faulks drove her from the house and later disinherited her.

During that conversation the subject came up regarding a patient that Dr. Patterson had had. It was an old neighbor of ours, Mrs. Nickel. I said something to Mary respecting the condition of this patient. I said her hip had only partly knitted and she wasn't well. . . . She had been a patient of Dr. Patterson. I was just telling her what I had learned. When the visit ended she told me to get out of the house and stay out. I learned after that there had been a will by Mary cutting me off entirely.<sup>116</sup>

Half of the last two years of Mrs. Faulks's life was spent in Dr. Patterson's private hospital. During her intermittent hospitalization, Dr. Patterson gave her flowers, took her out of the hospital for admittedly risky airplane rides, and took her (at her expense) for a vacation in Wyoming.

Will and Pearl Jensen eventually confronted Mrs. Faulks with their opinions about her beneficence to the physician. This proved a psychologically naive thing to do. Within a month Mrs. Faulks had ordered Will out of her presence and executed a new will in favor of Dr. Patterson. The will was not drawn by Mrs. Faulks's regular lawyer but by new counsel, who was summoned to Mrs. Faulks's hospital bed by one of Dr. Patterson's nurses. There was no significant evidence of lack of capacity at the time the will was executed.

The probate judge found against the will in favor of Dr. Patterson and admitted the earlier will that merely forgave his indebtedness to Mrs. Faulks. The Supreme Court of Wisconsin, three members dissenting, reversed. The

115 *Id.* at —, 17 N.W.2d at 429-30.

116 *Id.* at —, 17 N.W.2d at 430.

appellate court's view of the relationship suggests the essential human fact it had to decide on the record:

Here was an elderly woman with a serious heart ailment living alone, attended by a faithful and competent physician, as she believed an unusually competent one . . . . Under the circumstances there is nothing strange about her attachment. The extent of it is perhaps unusual but not infrequent. A doctor might well hesitate before accepting such gratuities from a patient. Such transactions are in the minds of the general public subject to the inference that something wrong has occurred. Offers from clients and patients to make gifts of considerable value are not at all uncommon in the experiences of lawyers and doctors. While a sensitive man might not accept such gifts, there is no rule of law which prohibits it.<sup>117</sup>

This is the essence of the appellate majority's view of the case, and it significantly resembles Dr. Eissler's view as to what the law ought be. To arrive at the conclusion, the court had to make several preliminary judgments. The first was that the doctor had not *done* anything. "The [trial] court . . . found that . . . the proponent was disposed to influence the deceased," the court said. "We are unable to find a single shred of testimony in support of this finding."<sup>118</sup> One of the dissenters, however, in reference to Dr. Patterson's suggestion to Mrs. Faulks that the Jensens were eager for inheritance, was moved to suggestive rhetorical questions:

It, also, is evident that Jensen and others were not excluded from her consideration as objects of her bounty until after appellant's suggestion to her that Jensen was not cordial in his relations to him. Was that an innocent observation? Were other acts referred to in the opinions . . . unselfish, not colorable and prompted by design?<sup>119</sup>

Secondly, the court observed that the bequest to Dr. Patterson was causally unrelated to his relationship with her. In the majority's view, the change in will was precipitated by the Jensens, who attacked Mrs. Faulks's beneficence to her physician and who deserted her after she drove Will Jensen from her hospital room:

Death is a great leveler and a great solvent of human relations and however deep their resentment might have been . . . if there was nothing more between them than her request that they stay away, they would have attended her funeral [which they did not] and made some inquiry in regard to her . . . .<sup>120</sup>

In the view of the dissenters, who insisted on similar moral fulminations in the other direction, this alienation was the product of Dr. Patterson's design:

The quarrel with the Jensens . . . explains cutting them off . . . [but] does not apply to their daughter Lorraine. There was no quarrel with or misconduct by her . . . . Cutting off Lorraine in favor of one for whom only a foolish infatuation existed, was unnatural and indicates some mental

117 *Id.* at —, 17 N.W.2d at 442.

118 *Id.* at —, 17 N.W.2d at 441.

119 *Id.* at —, 17 N.W.2d at 443.

120 *Id.* at —, 17 N.W.2d at 442.

abnormality or impairment . . . . It would also seem that something must have been done by the doctor between the making of wills . . . whereby the doctor was given nothing and the will . . . wherein he was forgiven debts of \$13,600. . . . The relation between the doctor and his patient was manifestly very close. The influence attributable to the confidential nature of that relation that the doctor might exert upon his patient in view of her age and physical condition is very great. But for that confidential relation the view of this court would be correct, but that relation existing I think that the conclusion of the county court that undue influence was exerted by Dr. Patterson is justified.<sup>121</sup>

Ultimately, the dissenters make the object of all this affection the villain, as the majority had done in *Kauffman*.

[T]he bestowal of \$14,700, to say nothing of \$40,000 or more, can hardly be accounted for except by inference that his such service was rendered with the purpose of securing benefactions as a result of it. The doctor . . . knew that she was an "easy mark." The conclusion that he took advantage of the confidential relation that exists between doctor and patient . . . can hardly be avoided. The doctor clearly did not take his patient up in an airplane for her health. That he did this for his own rather than her good, went with her to Yellowstone Park, gave her two hundred forty-nine days' hospitalization, paid for an eye operation which he himself was unable to perform and made countless unnecessary calls, all beyond the requirements of professional duty . . . and poisoned her mind against Mr. Jensen, all as means of influencing benefactions to himself, was not an unreasonable inference for the trial judge to draw.<sup>122</sup>

Most of the majority opinion in *Faulks* is given over to analysis of two legal questions: whether the burden of proof shifts, in an undue influence case, to the proponent of the will; and whether the existence of a confidential relationship raises a presumption of undue influence. But the essence of the decision, in the midst of an interminable exposition of precedent, is in the relationship between doctor and patient and, as a sort of counterpoint, the relationship between Mrs. Faulks and her sometime surrogate son, Will Jensen. The thrust of the majority's conclusion on the recondite legal questions is that *the existence of the relationship itself is not enough to invalidate the will*, however intense the relationship may be and however unusual its testamentary product. The majority stated the rule thus:

[T]he mere existence of a confidential relation between a testator and a beneficiary under his will such as attorney and client, physician and patient, priest and parishioner, confidential advisor and his advisee, etc., does not of itself constitute undue influence, nor cast upon the beneficiary the burden of disproving undue influence. However, the existence of such a relationship may cause a court to scrutinize the evidence more closely and weigh it more carefully. When coupled with other circumstances such as the activity of the beneficiary in procuring the drafting and execution of the will or a sudden and unexplained change in the attitude of the testator

121 *Id.* at —, 17 N.W.2d at 444-45.

122 *Id.* at —, 17 N.W.2d at 444. The paragraph quoted in the text illustrates two of the "principles of the common law" that I find helpful to a wills teacher: (1) people are no damned good; and (2) it's not the principle of the thing, it's the money.

or some other somewhat persuasive circumstance, it gives rise to an inference of undue influence which the proponent has the burden of rebutting.<sup>123</sup>

The dissenters in effect accepted this standard: their real disagreement was on the facts presented, facts that they felt were sufficient to show that Dr. Patterson was a man of evil heart.

Inferences, presumptions, and the burden of proof theories are of no assistance at all in resolving this sort of case. These are only means for disguising a decision that turns, despite the court's protestations to the contrary, on a judicial view of human relationships. One cannot imagine that the evidence could have been presented more fully — from Dr. Patterson or anyone else concerned in the estate, nor from disinterested witnesses, medical or lay. Dr. Patterson might, had the votes gone the other way, have been said to have the burden of explaining what happened, but he could not have added anything to the record except clinical psychological terms (assuming, which is probably true, that he did not procure the will by overt manipulation). No amount of procedural sophistry was needed in the case. What the court had to decide, and what it necessarily decided, was that a gift so clearly the product of transference was allowable within the limits of freedom of testation. And what the dissenters would have had the court decide was that physicians should not be permitted to accept gifts which are so clearly the product of transference.

### C. The "Unconscious Opportunism" Case

In *In Re Pitt's Estate*,<sup>124</sup> Julie H. Pitt, a strong-willed, frontier Arizona businesswoman, gave almost all of her estate to Guy Anderson, her lawyer. She was a widow the last eleven years of her life; she depended on Anderson for legal assistance and companionship in time of stress. When she first suggested a will in Anderson's favor — and asked him to draft it for her — he expressed surprise at her choice. She told him that she was making the will because Anderson had been her husband's friend. Anderson saw to it that another lawyer drafted that will, but took care of later versions of it himself. There was no evidence of Anderson overtly manipulating Mrs. Pitt; in fact, there was a great deal of evidence that she was self-reliant and even stubborn in this and all other property transactions. The question, as the Arizona court saw it, was whether the coincidence of three facts — "[o]ne, that Anderson occupied a confidential relationship to Mrs. Pitt . . . Two, that he was active in the preparation of the wills. Three, that he was the principal beneficiary"<sup>125</sup> — was enough to require a presumption of undue influence that would survive Anderson's denial that he had influenced or attempted to influence the testatrix. The Arizona court decided that it was not and reversed a jury verdict against the will, a verdict the court saw as "supported by nothing beyond speculation, suspicion and bottomless inference."<sup>126</sup> The same court made a similar analysis

123 *Id.* at —, 17 N.W.2d at 440.

124 88 Ariz. 312, 356 P.2d 408 (1960).

125 *Id.* at —, 356 P.2d at 411.

126 *Id.* at —, 356 P.2d at 412.

in a more recent case in which the confidentially related legatee was the testatrix's husband.<sup>127</sup>

In another case<sup>128</sup> of this type, Mabel Banta was rescued from a lonely, grieving widowhood by her niece, Ila Green, and her niece's husband. She left an apartment in Chicago and moved into the Greens' home in Rockford, Illinois. Within a month, with the help of the Greens' lawyer, Mrs. Banta executed trust documents and a will in favor of the Greens; these largely disinherited the contestant, a nephew. The Illinois appellate court affirmed a jury verdict finding the will to be the product of undue influence. The evidence included testimony that Mr. Green had peremptorily urged Mrs. Banta to make a will. The court spoke of the relationship as one involving a fiduciary:

Under certain circumstances, a presumption will arise that the instrument is the result of undue influence. One such circumstance is: where a fiduciary relationship exists . . . where the testator is the dependent and the . . . legatee the dominant party; where the testator reposes trust and confidence in the . . . legatee, and where the will is prepared by or its preparation procured by such . . . legatee. Proof of these facts will establish a *prima facie* case that the execution of the will was the result of undue influence.<sup>129</sup>

An interesting aspect of the case was a tendered instruction that would have charged the jury that "any degree of influence over another acquired by kindness and attention, can never constitute undue influence"; the court held that the instruction was properly refused. "[W]hether the influence is . . . undue depends not on the manner of influence, but on the degree of influence."<sup>130</sup>

In another case,<sup>131</sup> Dr. Ulrich A. Fritschi divorced his wife and made his receptionist a principal legatee in his will. In a codicil, the only instrument contested, he rearranged the disposition so that his children, rather than the receptionist, bore death taxes. He died six days later. There was some evidence of mental deficiency, but not enough to establish incapacity. The California Supreme Court, sitting en banc, reversed a verdict for the contestants. The substantial inroads that death taxation has made on the freedom of testation, the court said, "have served to sharpen the court's vigilance in protecting the testator's right to be free of interference in the area which remains to him." According to the court, undue influence cannot be found unless the evidence shows: (1) a confidential relationship, (2) an "unnatural will," and (3) the legatee's activity in procuring the will. The third element was not met. "[T]he record does not show that . . . she ever or at all discussed the wills with the testator." Evidence that she was greedy or that she spent a great deal of time with the doctor would not suffice to meet the third requirement. "Plaintiffs have failed to show that the alleged ability and desire of Mrs. Teed unduly to influence the decedent were ever brought to bear upon the testamentary act."<sup>132</sup>

127 *In re Estate of Harber*, 102 Ariz. 285, 428 P.2d 662 (1967).

128 *Swenson v. Wintercorn*, 92 Ill. App. 2d 88, 234 N.E.2d 91 (1968).

129 *Id.* at 99-100, 234 N.E.2d at 97.

130 *Id.* at 105, 234 N.E.2d at 99.

131 *In re Estate of Fritschi*, 60 Cal. 2d 367, 384 P.2d 656, 33 Cal. Rptr. 264 (1963).

132 *Id.* at —, 384 P.2d at 661-62, 33 Cal. Rptr. at 269-70.



*Fritsch* is similar to a later California case, *In re Estate of Straisinger*,<sup>133</sup> in which an elderly widow changed her principal beneficiaries from a missionary society to two close friends. The testatrix, Maude Straisinger, often referred to one of the legatees, Gladys Uldene Cunningham, as her "foster" or "adopted" daughter — although Mrs. Cunningham was neither. The court thought this confusion made the will less "unnatural" than it would have been without the confusion and held — as in *Fritsch* — that opportunity to influence, and even motive, would not be enough to raise a presumption. "There must be activity on the part of a beneficiary in the matter of the actual preparation of the will."<sup>134</sup>

In yet another case,<sup>135</sup> Mary Smith, an eighty-two-year-old widow, was hospitalized in Liston Falls, Maine. Marion M. Chambers, a trained and registered nurse, was hired to care for her. Mrs. Smith drew a check for \$3,500 on her bank in Lewiston, handed it to Mrs. Chambers, and asked Mrs. Chambers to take the draft to the bank. Mrs. Chambers returned with a cashier's check, whereupon Mrs. Smith endorsed the check, handed it to Mrs. Chambers, and told her she was making a gift of the money — which represented about a third of Mrs. Smith's estate. The court of last resort in Maine held that the transfer was presumptively the product of undue influence:

[The] rule is that, whenever a fiduciary or confidential relation exists between the parties to a deed, gift, contract or the like, the law implies a condition of superiority held by one of the parties over the other, so that in every transaction between them by which the superior party obtains a possible benefit equity presumes the existence of undue influence and the invalidity of the transaction, and casts upon that party the burden of proof of showing affirmatively by clear evidence that he or she acted with entire fairness and the other party acted independently, with full knowledge and of his own volition free from undue influence.<sup>136</sup>

The court's opinion made it clear that the holding was based on the relationship between the two ladies and that the court did not expect that the nurse could conceivably explain away the judicial inference of undue influence:

Mrs. Smith was entirely dependent upon her nurse for her every care and comfort, including the administration of the opiate when her cravings for the drug and the sufferings of her body demanded relief. There can be no doubt that a confidential relation existed between Mrs. Smith and her nurse. Indeed, it would be difficult to visualize a more complete condition of dependence and trust between any patient and her caretaker. It is an entirely warranted conclusion that, even permitting Mrs. Smith, without impartial and disinterested advice, to make this transfer of this large sum of money to her, the defendant Marion M. Chambers took an unconscionable and unfair advantage of her patient. The presumption of fraud which the law casts upon transactions of this kind is not overcome by the evidence. It is confirmed.<sup>137</sup>

In all of these cases some unconscious manipulation of the testator seems

133 247 Cal. App. 2d 574, 55 Cal. Rptr. 750 (Ct. App. 1967).

134 *Id.* at —, 55 Cal. Rptr. at 758.

135 *Gerrish v. Chambers*, 135 Me. 70, 189 A. 187 (1937).

136 *Id.* at 74, 189 A. at 189.

137 *Id.* at 78, 189 A. at 191-92.

likely; in all of them the ability to manipulate unconsciously, the "unconscious opportunism," arises out of an apparent transference. The difference in them, which merits fuller discussion below, is that some of the cases (Mrs. Pitt, Mrs. Banta, Mrs. Smith) involve a socially useful professional relationship, while others (Dr. Fritsch, Mrs. Straisinger) involve personal relationships in which the isolation and judicial treatment of the transference are more difficult.

#### D. The No-Manipulation Case

Dr. Lunette Powers,<sup>138</sup> a spinster and a physician, gave almost all of her half-million-dollar estate to her best friend, the wife of the lawyer who drew her will. A jury verdict against the will was reversed in the will's third trip to the Supreme Court of Michigan. The holding turns on procedural error, but the opinion intimates, and a concurring opinion emphasizes, that the Michigan rule on undue influence was involved in the case. "The issue of the relationship of the attorney and his client, and the attorney and his wife as beneficiaries, is an . . . element in the broader concept of undue influence,"<sup>139</sup> the majority said. The evidence showed that Dr. Powers was very close to her lawyer's wife and that she had suffered progressive mental disability in the months before the will at issue was made. But for the procedural errors in the case, the verdict would have been affirmed on the theory that Dr. Powers lacked testamentary capacity; the concurring opinion was directed principally to the view that an additional theory, the law of undue influence, ought to reach this lawyer-client relationship:

When the fiduciary so benefited directly or indirectly, happens to be a lawyer-scrivener of the challenged testament, the burden of overcoming the presumption quite obviously is substantially greater than had an independent and disinterested person prepared the testamentary instruments. . . . [T]his Court . . . [has] bluntly warned the profession against such conduct . . . .<sup>140</sup>

Even the majority suggested that the Michigan state bar procedure for unethical conduct was relevant in considering the lawyer's conduct, and noted that "[i]f any prizes were to be awarded for dismal professional judgment, the proponent here would be in a fair way to be signally recognized."<sup>141</sup>

There is, in *Powers*, no evidence that the legatee's husband held any sway over Dr. Powers. There is little evidence that a transference relationship existed between Dr. Powers and the legatee. Dr. Powers gave her estate to friends, the evidence showed, because she had no close relatives. If the court in Michigan is willing to invalidate this kind of will, it is not because there was an emotional tie that produced the will, but because the court wishes to punish an errant lawyer.<sup>142</sup> It is important to note, though, that neither the concurring opinion

<sup>138</sup> *In re Powers' Estate*, 375 Mich. 150, 134 N.W.2d 148 (1965).

<sup>139</sup> *Id.* at 157, 134 N.W.2d at 151.

<sup>140</sup> *Id.* at 181, 134 N.W.2d at 164. See *In re Wood's Estate*, 374 Mich. 278, 132 N.W.2d 35 (1965).

<sup>141</sup> *In re Powers' Estate*, 375 Mich. 150, 157, 134 N.W.2d 148, 151 (1965); see note 21 *supra*.

<sup>142</sup> *Estate of Karabadian*, 170 N.W.2d 166 (Mich. 1969) is a recent confirmation of this determination. See also *Matter of Casey* (Sur. Ct. 1969), N.Y.L.J., Nov. 25, 1969, at 16; 1 J. STORY, *EQUITY JURISPRUDENCE* 301 (12th ed. 1877); Annot., 19 A.L.R.3d 575 (1968); Comment, 38 Miss. L.J. 156, 159 (1966).

nor the majority goes this far. Nothing these judges say justifies the conclusion that they would, on this professional ground, invalidate the will. What they do say is that the lawyer may have the burden of explaining how it came about. This use of the presumption is altogether different from the Wisconsin court's use of it in *Faulks* or the Maine court's use of it in *Mrs. Smith's* case. In those cases no explanation from the legatee was likely and none was expected. In *Powers*, on the other hand, the lawyer involved would probably have been able to show that no transference relationship existed between him and Dr. Powers.<sup>143</sup>

#### IV. Synthesis

A differentiation among these four classes of cases can be made both psychologically and on the basis of ancient, often neglected, common-law authority. It is helpful, first, to remove from consideration the case of conscious manipulation (*Kaufmann*).<sup>144</sup> Transference illuminates such cases, makes proof easier perhaps, explains something about the way people are, but is not essential to solution. Cases like *Kaufmann* may even be disposed of as involving fraud in the inducement. Fraud theory requires a showing of false representation, but the manipulation of a transference is false representation. Love is as much a fact as residence, age, or digestion. It is just as capable of being falsely represented. (Dr. Eissler, for instance, falsely represents "unambivalent love" — for benign ends; Freud refused to make that false representation to his Dora.) If the law can take cognizance of false representations about the loyalty or honesty of third persons,<sup>145</sup> it can take cognizance of the falsity in a person who pretends love in order to gain property.<sup>146</sup> But even if the law of fraud won't do that, the law of undue influence has shown itself capable of dealing with cases like *Kaufmann*.

The other three cases — "let it happen," "unconscious opportunism," and "no manipulation," unconscious or otherwise — are more difficult for two reasons. First, they often seem to involve the results of human affection, which the law ought honor, not frustrate.<sup>147</sup> Second, they are not often accessible to the judicial process. Although proof of transference is not unduly difficult — psychotherapists of all faiths seem able to detect it — proof of unconscious influence by the object of transference would often be very difficult.<sup>148</sup>

One possible approach would be to apply to all three kinds of cases an equitable version of the *Durham* test:<sup>149</sup> "If a will is the product of a transference (i.e., a displacement of feeling, or affect, which is inappropriate in the judgment of an informed fact finder), it is invalid." That would be a fairly workable

143 1 J. STORY, *supra* note 142, at 311-26.

144 See *Grondziak v. Grondziak*, 12 Mich. App. 61, 162 N.W.2d 354 (1968); *Lipson v. Lipson*, 183 S.2d 900 (Miss. 1966), noted in 38 Miss. L.J. 156 (1966).

145 1 W. BOWE & D. PARKER, *PAGE ON WILLS* § 15.4, at 721-22 (1960).

146 See *id.* at §§ 15.1 - .14.

147 E.g., *In re Estate of Harber*, 102 Ariz. 285, 428 P.2d 662 (1967); *Galvan v. Miller*, 79 N.M. 540, 445 P.2d 961 (1968).

148 1 W. BOWE & D. PARKER, *PAGE ON WILLS* § 15.1 (1960); see *Richardson v. Bly*, 181 Mass. 97, 63 N.E. 3 (1902).

149 "[A]n accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." *Durham v. United States*, 214 F.2d 862, 874-75 (D.C. Cir. 1954).

test, since transference is not nearly as difficult to establish as the "mental defect" of the *Durham* rule. But this test perhaps limits freedom of testation more than our legal tradition will allow. Dr. Eissler says "it would actually lead to an infringement upon the patient's freedom if he could make a valid will only by excluding his psychiatrist."<sup>150</sup> One might disagree with him; one might nobly disagree with the proposition that a man may make a will in favor of his lawyer.<sup>151</sup> But it is probably too restrictive to deny that one should be free to make a will in favor of his (ordinary) physician, his nurse, his housekeeper, his brother or sister, or his best friend.<sup>152</sup>

If my judgment as to the sentiment of those who mold the common law is correct, I am left where the *Faulks* court was left; I must suggest a plus factor: Transference *plus* something equals undue influence. What is the plus factor to be? Is it possible to formulate it more informatively than the cases and texts have done to date?<sup>153</sup> In the "let it happen" (*Faulks*) case, there is good common-law authority for holding the legacy invalid. The theory rests in cases where T is influenced by A to make a gift to B, or where T is influenced by A to make a gift to A and B.<sup>154</sup> In both situations B's legacy fails. The same result would obtain for "unconscious opportunism" if an unconscious, probably neurotic, third force could be equated, at least metaphorically, to a third person.

One might say that the only difference between the "let it happen" case and the "unconscious opportunism" case is that in the latter (*Pitt, Swenson* [Mrs. Banta], *Fritsch*) the object of the transference was not sufficiently aware of what was going on to be negligent about it. The third force still produced the legacy. The object's innocence should be irrelevant, just as B's innocence is irrelevant when he receives a gift as the result of A's undue influence.<sup>155</sup> This argument stumbles, though, when it reaches the "no manipulation" class of cases, where unconscious influences were projections from the testator. One distinction might be that in this fourth class of cases the force of transference is weaker. In Jungian terms the transference is probably not a third force at all. The transference is still purely projection at what Jung called the level of "personal unconscious." Even so, drawing the line here — allowing the transference-caused gift to stand — seems arbitrary and, more important, establishes a distinction that is likely to be impossible to make on specific conglomerations of evidence.

Transference is of more value to the law if it is used to support a line of distinction between the "let it happen" and "unconscious opportunism" cases. The object of the "let it happen" transference is aware of what is going on. He may not be able to diagnose the emotional climate precisely, but he comprehends

150 K. EISSLER, *supra* note 1, at 231.

151 See *In re Estate of Taylor*, 423 Pa. 276, 223 A.2d 708 (1966); Stapleton, *The Presumption of Undue Influence*, 17 U. NEW BRUNSWICK L.J. 46, 53 (1967); Annot., 19 A.L.R.3d 575, 585-87 (1968).

152 *Galvan v. Miller*, 79 N.M. 540, 445 P.2d 961 (1968); see *Vantrease v. Carl*, 410 S.W.2d 629 (Tenn. App. 1966).

153 See 3 W. BOWE & D. PARKER, *PAGE ON WILLS* § 29.81, at 591-97 (1961). Bowe and Parker attempt to enumerate the "plus factors." *Id.* § 29.81, at 602-7.

154 1 W. BOWE & D. PARKER, *PAGE ON WILLS* § 15.9 (1960).

155 *Id.* at 737; 1 J. STORY, *supra* note 142, at 311.

it and allows the benefits of it to flow to him inappropriately.<sup>156</sup> He will often be what Rogers calls a "helping person" whose ideals are to accept emotions for professional ends: a medical person, therapist, teacher, or lawyer (e.g., Dr. Patterson in the *Faulks* case). The law can workably and fairly require that the results of influence from these professional "helping" relationships be confined to their appropriate compensatory ends; any "let it happen" gifts will thus be disallowed. There is some ancient authority for this proposition in an opinion by Lord Langdale often cited as a leading case on undue influence in inter vivos transactions.

In that case,<sup>157</sup> Dennis Chandler owed his solicitor more money than he had available. The solicitor, Barsham, suggested that Chandler convey real estate to him and prepared the necessary deed. Chandler refused, argued with Barsham, consulted members of his (Chandler's) family, argued some more, and then finally — after Barsham unsuccessfully offered property for trade in addition to the debt—signed the deed. Members of the family sued to set the deed aside, arguing that it was obtained by fraud and undue influence. The jury found for Barsham on the fraud issue, but found for the family on the question of undue influence. Barsham moved for a new trial; the Master of the Rolls (Lord Langdale) granted the motion.

Langdale's opinion made a number of important distinctions about undue influence. The first was between undue influence and fraud; he said that the jury finding on that issue meant "there was no deception and no misrepresentation or suppression of truth." Undue influence, therefore, does not involve falsehood. This is a seminal distinction, which American courts, by use of rhetoric suggesting that undue influence is a species of fraud, have incorrectly ignored.<sup>158</sup>

Langdale also distinguished between two species of undue influence. The first species turns on the existence of a relationship in which "there is . . . great . . . inequality between the transacting parties . . . habitual exercise of power on the one side, and habitual submission on the other . . . [for example] transactions between parent and child . . . [or] solicitor and client."<sup>159</sup> The other species rests on circumstances—"on the nature of the transaction and the fact of habitual or occasional influence."<sup>160</sup> The difference is in the proof necessary to make the case. In the habitual relationship situation the act complained of can be set aside "without any proof of the exercise of power beyond that which may be inferred from the nature of the transaction itself."<sup>161</sup> According to Langdale the court could, in this first situation, "impute" undue influence. In the second

156 "The question in such cases does not turn upon the point whether there is any intention to cheat or not; but upon the obligation, from the fiduciary relation of the parties, to make a frank and full disclosure." 1 J. STORY, *supra* note 142, at 311. See *O'Rourke v. O'Rourke*, 167 N.W.2d 733 (Minn. 1969); Comment, 38 Miss. L.J. 156, 158-59 (1966).

157 *Casborne v. Barsham*, 2 Beav. 76, 48 Eng. Rep. 1108 (Exch. 1839). There is some authority both ways for the proposition that the rules on confidential relationship do not apply in wills cases as they do in inter vivos transfer cases. 3 W. BOWE & D. PARKER, *PAGE ON WILLS* § 29.84, at 600 (1961). 1 J. STORY, *supra* note 142, at 296-326 discusses the subject in great detail without affirming the distinction.

158 See note 161 *infra*, and accompanying text.

159 *Casborne v. Barsham*, 2 Beav. 76, —, 48 Eng. Rep. 1108, 1108-9 (Exch. 1839).

160 *Id.* at —, 48 Eng. Rep. at 1109.

161 *Id.*

situation, however, where the influence is occasional or circumstantial, "it is required to shew that some advantage was taken, or that there was some fear, some use of threat or of undue practice or persuasion."<sup>162</sup> He felt that it was within the province of the court to decide which type of undue influence was involved, and that only the second type presents a question for a factual determination on the relationship itself.

Another distinction is subtle and important. Langdale's finding that Chandler's deed was not the product of undue influence turned on Chandler's susceptibility to a wide array of influences—especially from members of his family who opposed the transfer.<sup>163</sup> This fact, in addition to the fact that Chandler argued with Barsham and resisted signing the deed for some time, apparently suggested to the Master of the Rolls that Chandler acted out of considered self-interest rather than "by the undue influence of Barsham, as a solicitor." The case seems to hold that the solicitor-client relationship fell within the "imputed influence" category, but that the evidence was sufficient to prove that no controlling influence was exerted.

An earlier English opinion,<sup>164</sup> this by Lord Eldon, rested the distinction between the two kinds of influence on an affective relationship, not on a legal or formal association having a clear beginning and a clear end. In this case, Ann Kerby, an octogenarian widow, had bought an annuity from her former attorney. The price of the annuity was arguably excessive. Lord Eldon set the transaction aside. The principal defense was that the attorney-client relationship had been dissolved before the transaction, but, Lord Eldon held, "it is the confidence [which] must be withdrawn." If the affective relationship remained, it was up to the attorney "to have acted with more providence and attention than are required even in the case of parent and child."<sup>165</sup> "It is asked," Lord Eldon continued, "where is that rule to be found?"

I answer, in that great rule of the Court, that he, who bargains in a matter of advantage with a person placing confidence in him is bound to shew, that a reasonable use has been made of that confidence; a rule applying to trustees, attorneys, or any one else.<sup>166</sup>

He secured the rule procedurally with a presumption—a procedural holding that is clearer here than Lord Langdale's imputation was in *Casborne v. Barsham*:

It is necessary to say broadly, that those, who meddle with such transactions, take upon themselves the whole proof, that the thing is righteous. The circumstances, that pass upon such transactions, may be consistent with honest intentions: but they are so delicate in their nature, that parties must not complain of being called on to prove, they are so.<sup>167</sup>

These are equitable principles that suggest a relatively ancient and philosophi-

<sup>162</sup> *Id.*

<sup>163</sup> Langdale even suggested that these plaintiffs knew more than they submitted in evidence. "[I]t seems singular that they should not have stated what were the motives which Barsham offered to induce the father to execute the deed against their objections." *Id.*

<sup>164</sup> *Gibson v. Jeyes*, 6 Ves. Jr. 266, 31 Eng. Rep. 1044 (Ch. 1801).

<sup>165</sup> *Id.* at —, 31 Eng. Rep. at 1049.

<sup>166</sup> *Id.* at —, 31 Eng. Rep. at 1050.

<sup>167</sup> *Id.* at —, 31 Eng. Rep. at 1049.

cally sound rule for distinguishing cases involving a perceived relationship from those undoubtedly involving real psychic interchange but which are probably too subtle to be handled by the blunt instruments of the law. The rule suggests that the Wisconsin court was wrong in *Faulks* and the Arizona court wrong in *Pitt*. Both cases involved professional relationships and strong transference. On the other hand, the rule would support the Illinois court in Mrs. Banta's case, the California court in *Fritsch*, and the Maine court in Mrs. Smith's case. It would support also the Michigan court in *Powers*, but indications from that opinion imply that the relationship could be explained to exclude Lord Langdale's imputation of undue influence.

The operation of transference in undue influence cases suggests that the law ought draw a distinction between the "let it happen" transfer and cases of unconscious manipulation. In "let it happen" cases the proponent or transferee ought be required to show that the contested transfer was not the product of unreal psychological disturbances in the transferor or testator. Most relationships of the "let it happen" type are "helping" relationships, professional associations that the law ought to protect. In these cases the helping person involved ought to be required to demonstrate that the transfer of property to him by patient or client is consistent with the positive value the law seeks to protect in the relationship.<sup>168</sup> If retention of the transferred property is not consistent with the ideals expressed in the relationship, the transfer ought to be set aside. This is simply a vindication of the professional trust involved—something the law protects through evidentiary privileges and legally sanctioned status symbols, and which it ought to protect in the field of gratuitous transfers.

In a few other cases (Mrs. Banta's case is an example), the "let it happen" transfer has not been made in a professional relationship, but the relationship is so much like professional trust, so strongly *fiduciary*, that it deserves the same protection. The test, as Lord Eldon said in *Gibson*, is whether the facts indicate human confidence justifiably reposed.

There are some few "let it happen" cases—*Fritsch* for example—in which the transfer ought not be set aside because the relationship is unimportant.<sup>169</sup> Such results can be categorized as exceptions to a general rule on "let it happen" transfers, or they can be regarded as not included in a rule that purports to reach only professional relationship "let it happen" cases. Even if the abstract rule fails to reach them, it is probable that the proponent can show, on the evidence, that transference, if any, was not strong enough to come within the evidentiary boundaries of the rule I am suggesting. (My suggestion is that the proponent be required to justify the transfer; in cases like *Fritsch* and *Powers* the evidentiary requirement can probably be met by the proponent.)

It is too much to hope that future generalizations about undue influence in appellate literature will turn only on the value of helping-person relationships and that the courts will abandon their traditional reliance on gimmicks such

168 "If the means of personal control are given, they must be always restrained to purposes of good faith and personal good." 1 J. STORY, *supra* note 142, at 297; see *id.* at 323-26.

169 S. BAILEY, WILLS 76, 80 (6th ed. 1967). See 1 W. BOWE & D. PARKER, PAGE ON WILLS §§ 15.2-.3, 15.5-.6 (1960); Annot. 25 A.L.R.2d 1429 (1952).

as presumptions and burden of proof.<sup>170</sup> But there is solid scientific ground for some improvement in the expression of rules governing gratuitous transfers within intimate human relationships, at least in those relationships that the law ought to protect from the penury of its society's "helping persons."<sup>171</sup> It would seem that the English opinions in *Casborne* and *Gibson* pointed in that direction long ago and that the psychological revelations of this century support those early judicial insights.<sup>172</sup>

I am suggesting a substantial departure from both the American majority and minority rules as they are usually stated. The majority rule—represented starkly by the court's opinion in *Faulks*—refuses to require explanations from transferees *unless* some overt activity procuring the transfer can be shown. The majority rule was formed and is maintained in psychological ignorance. It rests on the tenuous assumption—illustrated by the Wisconsin court's treatment of Mrs. Faulks's will—that the transferee must *do* something (with his hands?) in order to influence the transferor. We have known for a long time that the influences that radiate from one man to another are far too strong and far too subtle to be reduced to the flimsy test of overt activity.

The minority rule, as it was announced by the Michigan court recently,<sup>173</sup> rests too heavily on illusive mechanical doctrines of evidence and, even when those doctrines operate clearly, infringes too far on the traditional American respect for freedom of testation. The Michigan court would raise a presumption of undue influence (or shift the burden of proof to the transferee) in *every* case where a confidential relationship (transference) is shown.<sup>174</sup> That rule is, I think, too broad and mechanical. It departs too far from the distinction put by Lord Langdale, who would have required an explanation from the transferee only in cases where there is "habitual exercise of power on the one side, and habitual submission on the other." The Michigan court's rule would be better were it confined to (1) cases of overt manipulation, or (2) cases where a professional relationship is involved, or (3) cases where circumstances indicate a *de facto* fiduciary relationship.

## V. The Transference Relationship in Legal Counseling

At several points this paper has made the tangential observation that transference theory has something of value to say about legal counseling. This impression of mine was encouragingly supported by Dr. Watson in his recent

170 See *In re Wood's Estate*, 374 Mich. 278, 132 N.W.2d 35 (1965); 3 W. BOWE & D. PARKER, *PAGE ON WILLS* §§ 29.77 - .134 (1961); Comment, 65 MICH. L. REV. 223 (1966).

171 See *Brown v. Commercial Nat'l Bank*, 42 Ill. 2d 365, 247 N.E.2d 894 (1969); *Richardson v. Bly*, 181 Mass. 97, 63 N.E. 3 (1902); *Zipkin v. Freeman*, 436 S.W.2d 753 (Mo. 1968); 3 W. BOWE & D. PARKER, *PAGE ON WILLS* §§ 29.84 - .106 (1961); 1 J. STORY, *supra* note 142, at 296-326; Stapleton, *supra* note 151.

172 Opinions too often begin by badly confusing undue influence with fraud or mental incapacity, as in *Hatch v. Hatch*, 9 Ves. Jr. 292, 297, 32 Eng. Rep. 615, 617 (Ch. 1804). 1 J. STORY, *supra* note 142, at 296 is an ancient textbook source of the confusion ("constructive fraud"); a more modern English textbook example is D. PARRY, *LAW OF SUCCESSION* 10 (5th ed. 1966). See *Logan v. Washington*, 408 F.2d 1303 (D.C. Cir. 1969).

173 See authorities in note 170 *supra*.

174 See Comment, 65 MICH. L. REV. 223, 230-31 (1966); Comment, 38 MISS. L.J. 156, 160-61 (1966). See also Stapleton, *supra* note 151; Annot., 19 A.L.R.3d 575, 594-98 (1968).



book on psychiatry for lawyers.<sup>175</sup> There he develops the idea that transference is a common phenomenon in the law office. If Dr. Watson is correct, as I believe he is, a few paragraphs to suggest an analogy from the practice of psychotherapy may be useful.

The analogy is found in a paper by the Jungian analyst J. Marvin Spiegelman.<sup>176</sup> His theory is built on an observation made by Professor C. A. Meier, which he paraphrases as follows:

[I]n the subject-object relation, A, the analyst, in investigating his patient, B, ever more intimately and deeply, soon finds that the "cut"—that is, the distinction between subject and object, between himself and his patient — becomes blurred. As he moves more and more into the object, the analyst eventually finds that he cannot distinguish between what belongs to him, as his own complexes, and what belongs to the patient.<sup>177</sup>

This means, Spiegelman says, that the analyst "cannot really go deeply into the psyche of his partner without discovering his own unresolved complexes and confusions as to what is patient and what is himself. Should he stubbornly resist this realization about himself and the situation, he will . . . *require that the patient carry the whole burden of the contents activated.*"<sup>178</sup> In the process "the analyst . . . protects [both] his patient and himself from anything not quite right in his own condition."<sup>179</sup>

Annoyance or impatience or anxiety in the lawyer — to extract the analogy — affects his clients far more than he realizes.<sup>180</sup> It would be better to "acknowledge one's fatigue, boredom, or anger . . . where it occurs, and analyze it, jointly."<sup>181</sup> Spiegelman believes that analysts learn from patients, and most good lawyers would agree that lawyers learn from their clients. "To learn, one must be ready to submit to the other and expose one's ignorance."<sup>182</sup>

Spiegelman believes that members of his profession have too often let themselves fall into one of two unsatisfactory models — the doctor-patient model or the teacher-pupil model. Neither of these takes account of the fact that "the relationship itself is central and . . . the desired objectivity, individuality, and understanding come out of the actual experience, rather than out of some presumed . . . objectivity" in the helping person.<sup>183</sup> The doctor-patient model does not produce this human interaction because doctors tend to be "technique-oriented, impersonal, often mechanical, cut off from or not aware of . . . the spiritual factor."<sup>184</sup> The doctor does not, even when sensitive, enter

175 A. WATSON, *PSYCHIATRY FOR LAWYERS* (1968).

176 Spiegelman, *Festschrift von C. A. Meier*, 1965 (translation of unpublished paper on file with the author). Spiegelman's essay is based on Meier, *Projection, Transference and the Subject-Object Relation in Psychology*, 4 J. ANALYTICAL PSYCHOLOGY 21 (1959).

177 Spiegelman, *supra* note 176, at 1.

178 *Id.* at 1-2.

179 *Id.* at 2.

180 See Redmount, *Attorney Personalities and Some Psychological Aspects of Legal Consultation*, 109 U. PA. L. REV. 972 (1961); Redmount, *Humanistic Law Through Legal Counseling*, 2 CONN. L. REV. 98 (1969).

181 Spiegelman, *supra* note 176, at 3.

182 *Id.*

183 *Id.* at 5.

184 *Id.* at 6-7.

into the process as an equal. Nor does the teacher-pupil model satisfy him. "However wise a guru," he says, "[the teacher] is never quite human."<sup>185</sup> It takes too long "to simply react to the situation and the person with some naturalness and not out of a theory."

Lawyers are not analysts and clients are not in the law office for analysis. But people who come to law offices are troubled, and the lawyers who talk to them — whether they admit it or not — are also troubled. The best guidance and support probably come from lawyers who intuitively appreciate and enter into what Dr. Watson identifies as a transference relationship. Not all of Spiegelman's personal experience is applicable to lawyers — partly because it is so personal that not all of it is applicable to anybody but Spiegelman—but there is much that is important and instructive for lawyers: "I found," he says, "that I, too, was shown to be human, limited, have complexes, and not be responding. . . . I find that the best interpretations come out of what is actually transpiring in the relationship . . . ."<sup>186</sup>

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185 *Id.* at 7.

186 *Id.* at 5.