

What is the Psychoanalysis of Law?

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Abstract: *This paper is an attempt to explicate the theoretical relationship between psychoanalysis and the law for those who are approaching this topic for the first time. It explains the need for such a discourse by situating it within the tradition of interdisciplinary approaches to the law in Anglo-American academia. The part played by discursive predecessors (such as the 'law and psychiatry' movement and the 'psychoanalysis of crime') and discursive contemporaries (such as 'law and economics' and 'law and literature') are also discussed. The success of these applications of psychoanalysis is then invoked to make a case for the law and psychoanalysis movement in law schools. One of the goals of this theoretical movement, needless to say, is to formalize the notion of the legal subject by applying the theories of subjectivity that are available in the work of European psychoanalysts like Sigmund Freud and Jacques Lacan. The paper concludes by calling attention to not only the generic forms in which this is already being done by a number of scholars in law schools and in the legal literature, but also deploys the concepts of Freudian metapsychology that are relevant to doing so.*

Keywords: *Interdisciplinary Legal Studies, Psychiatry, Psychoanalysis, Legal Subject, Jurisprudence, Oedipus, Guilt, Shame, Unconscious*

I. Introduction

This paper is an attempt to explicate the theoretical relationship between psychoanalysis and the law. Let me however start with the title. It is worth asking at the outset what exactly is at stake in the application of psychoanalysis to the law. Legal scholarship has become increasingly interdisciplinary in recent years as evidenced by the success of emerging areas of legal scholarship like 'law and economics,' 'law and literature,' and 'law and society,' when compared to the traditional function of the legal 'treatise' as the dominant genre of the legal literature in the United States for both jurists and legal practitioners (Danner, 2013). The function of these legal treatises was to codify or subsume entire areas of the law in one or a few volumes without loss of disciplinary autonomy for the law. It was not thought necessary to incorporate ideas from any other discipline unless absolutely necessary since the law had its own way of thinking through and solving problems. The writers of legal treatises however tried to encourage a 'learned' approach to problem solving in the law by using both a 'descriptive' approach and an 'internal' perspective since these treatises were meant to be used by legal academics, lawyers, and judges who needed an exhaustive understanding of the specific areas in the law in which they might have chosen to specialize (Langbein, 1993; Posner, 1993a; Priest, 1993; Galanter and Edwards, 1997a). The rise of interdisciplinary legal studies (ILS) is however forcing a rethink on the scale and scope of legal literature in contemporary law schools in the Anglo-American academy since there is a much greater level of scholarly contribution than usual in ILS from those outside the traditional ambit of the legal profession. These scholarly or theoretical contributions could include the work of economists, literary theorists, sociologists, and psychoanalysts who invoke both a prescriptive approach and an external perspective unlike the descriptive approach and the internal perspective that is characteristic of traditional legal practitioners mentioned above (Dunlop, 1991; Posner, 1975; Posner, 1987). In these interdisciplinary approaches to the law, the main goal is the invigoration of legal theory and the teaching of substantive law by enhancing the lawyering skills that constitute the mainstay of teaching and research in law schools.

II. Interdisciplinary Legal Studies

These interdisciplinary attempts are, needless to say, not mere technical achievements in problem solving. They are accompanied by political fantasies of 'liberation' and 'emancipation' from various forms of oppression that may be difficult to realize in the here-and-now, but which nonetheless cannot be wished away completely by members of the legal community since they recur from generation to generation (Fish, 1991; Greenhaw, 1995; Stavrakakis, 1999). Internal approaches to the law are preoccupied with what the law really is; external approaches to the law are an attempt to set out what the law 'ought' to be in an ideal world. These differences in theoretical perspective and political orientation then constitute the main forms of legal discourse that follow from the 'is-ought' distinction in philosophical analysis and the attempts made by legal theorists to move from this binary opposition to a more comprehensive model of legal scholarship that can relate the internal and external perspectives within a theoretical continuum comprising both these dimensions (Epstein,

2002; Rubin, 2010). I will argue that psychoanalytic jurisprudence can be classified as a prescriptive form of legal discourse. But, in order to make an effective case for it, we must begin by describing the part that has been played so far by the 'law and psychiatry' movement. The work done by the early Freudians was important in identifying the psychic determinants of criminal behavior. The early Freudians also deployed these analytic insights to increase the levels of 'efficiency' in the criminal justice system within Anglo-American jurisprudence; and, by emulation, elsewhere by introducing a model of the legal subject since the adjudication of cases proceeded on a case-by-case basis in the common law system without a comprehensive understanding of either criminal behavior or subjectivity. This model of interdisciplinary legal pedagogy is however not a recent trend; it has in fact been the de facto model of legal scholarship in leading American law schools for more than a generation. Legal theory has - for better or worse-displaced, or is threatening to displace, the doctrinal analysis of law as the main research goal of legal academics. This is however not the same as saying that it has been able to generate a 'new consensus' on what forms of legal scholarship would be most relevant for law schools and the legal community in the future and the part that must be played by clinical programs in legal training (Edwards, 1992; Collier, 1993).

III. Defining A Law School

What is at stake here is nothing less than the very definition of what a law school is or should be (Wizner, 1989). Law schools increasingly compete for the best students and faculty by becoming well-known for innovations in legal theory (even though the areas of scholarship that they borrow from in creating interdisciplinary areas do not have the same value system or preoccupations as the law). The law, needless to say, has to come to terms with this 'uneasy relationship' it has with other disciplines; it has to find ways to narrow the gap between its 'instrumental' means and its 'ideal' goals in the attempt to resolve legal problems within the space of politics, the economy, and society as a whole (Priest, 1983; Balkin and Levinson, 2006). Legal educators who are aware of the dangers of merely taking the instrumental or reductive approach to the law, however, hold on to the dream of producing 'lawyer statesmen.' These lawyer statesmen will hopefully engage with larger questions of public policy rather than merely become hired guns for their clients. In the process of doing so, they will help to re-institute the ideals of the legal profession like the founding fathers of the nation did in their time (Kronman, 1993). In order to make this ideal historically possible, however, the teaching of the law must have some 'moral content' (i.e. it must attempt to build character in students and prevent them from becoming mercenaries); and, likewise, the professional 'comportment' of the law professor must be imbued with a passion for legal scholarship that goes beyond problem solving (Kronman, 1981a). Only then will it be possible to counter the cynicism of law students who graduate with the belief that the practice of law is reducible to forms of legal sophism (Reich, 1965; Calabresi, 2003; Kalman, 2004).

IV. Law and...

The invocation of the connector 'and' in the title of these interdisciplinary areas (as mentioned above in the introduction to this paper) might give the impression that the relationship between these areas of expertise is that of equals; but, more often than not, the latter term is used to make sense of the former since it has greater explanatory scope (Galanter and Edwards, 1997b). So, for instance, economics, or economic theory, is used to explain aspects of the law like the ideal of efficiency as 'a legal goal' (Stigler, 1992; Hardin, 1995), the importance of deploying cognitive tools like cost-benefit analyses and game theory in legal decision making (Hanson et al, 2010); and in formally deploying theories of behavior, markets, prices, regulation, and rules to make sense of the law (Kitch, 1983). Likewise, literature and literary theory can also be invoked to explain aspects of the law and the legal system like the formation of the legal canon (Resnick, 1990); the structure of legal and textual communities (Posner, 1986; West, 1988a); the narrative function of story-telling in criminal trials (Brooks, 2006); the representational structure of legal epistemology (Morawetz, 2010); and the differences between the forms of subjectivity that are preoccupied with utility maximization (Posner, 1993b) as opposed to those that are more likely to be characterized by empathy (West, 1988b; Tingle, 1992); the politics of inclusion and exclusion (Weisberg, 1993); the ideological function of the law (Caudill, 1991); and even, in a sense, the very language (i.e. the conceptual structure) of the law (Caudill, 1999). That is why it doesn't matter if the title of this paper is law and psychoanalysis, or the psychoanalysis of law; since, for all practical purposes, psychoanalysis is used to explain the law in interdisciplinary approaches to legal analysis (Caudill, 1996a).

V. 'Applications' of Psychoanalysis

Psychoanalysis, needless to say, is a part of a tradition of interdisciplinary scholarship which believes that Freudian metapsychology can throw light on a range of areas that are outside the confines of the clinic including traditional questions in the history of medicine and the history of philosophy (Galdston, 1956; Badiou, 2000; Boothby, 2001; Levine, 2002). This tradition of interdisciplinary or applied scholarship began with the papers of Sigmund Freud himself and was taken up later by his successors (Jones, 1948a). Freudian

psychoanalysis was applied to a number of areas like art, anthropology, literature, history, philosophy, the social sciences, and even 'everyday' life (Freud, 1913a; Ruitenbeek, 1973; Freud, 1990; Freud, 1991a; Freud, 1991b; Mowitt, 2002). Psychoanalysts have also believed for long (i.e. much before the contemporary preoccupation with the psychoanalysis of law in the legal academy) that they can not only make sense of criminal behavior and criminal impulses, but also contribute to the prevention of crime in society. They can also educate the public on the need to institute psychiatric examinations of criminals and differentiate more effectively between forms of 'criminality and insanity' in the criminal justice system (Stekel, 1962; Slovenko, 1963). This belief is related to the fact that Freud and his followers had a full-fledged theory of the subject that invokes the Oedipus complex as the prototype of how the subject relates to the problem of law, desire, and authority in organizations and society (Laurent, 1996). Such a theory of the subject is bound to be useful in creating 'psychoanalytically informed' approaches to a number of areas like corporate transformation, law, management, organizational analysis, and public administration (Kakar, 1972; Drucker, 1991; Kets de Vries and Balazs, 1999; Kets de Vries, 2001; Carr, 2002; Gabriel and Carr, 2002; Anderson and White, 2003; Srinivasan, 2010). It was therefore possible for the Freudians to also contemplate how psychoanalytic interventions can make a crucial difference in difficult areas like criminology and penal reform. Knowledge of psychoanalysis can also help to address cases and problems that would have otherwise remained difficult to solve. It has been argued for instance that Sherlock Holmes and Dr. Watson, the private detectives based at 221B Baker Street, London, were successful in their detective work in the stories of Dr. Arthur Conan Doyle because they used analytic methods that were similar to that of Sigmund Freud. Holmes and Watson demonstrate not only a considerable understanding of areas like psychology, psychiatry, and criminology, but also of psychic defenses exhibited by the characters whom they were trying to study; psychoanalysis, reciprocally, is itself a kind of 'detective work' characterized by phenomena such as transference, repetition, guilt, shame, and self-destructive behavior (Kellogg, 1992; Kets de Vries, 1995).

VI. Guilt And Shame In Oedipal Structure

Psychoanalysts were, for instance, fond of arguing that if criminals don't feel guilty about the crimes that they commit it is because the sense of guilt precedes the crime. The crime itself is committed to alleviate a chronic feeling of guilt with roots in infantile sexuality and the Oedipus complex. This, needless to say, was a counter-intuitive argument and an important theoretical insight in psychoanalytic approaches to crime and criminology (Jones, 1948b; Silving, 1960; Denno, 2005). This theoretical insight also helped analysts to understand the propensity to self-destructive behavior amongst criminals and ask whether punishments lead to crimes, or help to prevent crimes, by serving as an effective deterrent because it has important implications for the design of sentencing guidelines in the criminal justice system (Alexander, 1940; Menninger, 1966; Alexander, 1960). It also led to important studies on the relationship between the Oedipal configuration of the family and society with different aspects of the law and the legal system as a whole (Bienenfeld, 1965). Analysts also attempted to demonstrate the part played by 'guilt and shame' as the residual affects of the Oedipus complex. They tried to explain the 'mythical' origins of the law, and the forms of legal symbolism, in terms of the totemic rites and rituals that resulted from the murder of the primal father by his sons and the subsequent emergence of the 'incest-taboo' and 'exogamy' as regulative ideals in society. The structural equivalent of these regulative ideals is articulated later by Lacan under the aegis of 'contradictions and impossibilities' in his theory of oedipal desire which he anchors in the kinship systems of structural anthropology (Freud, 1913b; Dunand, 1996; Leader, 2003). This mythical act also had important theoretical implications for not only psychoanalytic approaches to the law, but also for studies in cultural anthropology, legal anthropology, and psychoanalytic anthropology. What all these studies had in common was the attempt to understand the paternal function of the law, or in its psychoanalytic articulation, 'the law-of-the-father,' as constituting the renunciation of the fantasy of unlimited jouissance by the sons through the identification with the paternal metaphor. This fantasy of unlimited jouissance with all the women of the tribe is not only specific to the sons, but was the mythical reality that led to the murder of the father and the institution of the totem and the taboo by his sons (Grigg, 1987; Paul, 1989; LeVine, 1996; Brunner, 2002).

VII. Law And Psychiatry

The precursor for these Freudian analysts - in trying to meet the legal obligations of relating a theory of the subject, or subjectivity, to a theory of criminal behavior - was the 'law and psychiatry' movement in nineteenth century America. These legal obligations made it necessary for psychiatrists to move out of their clinics and make themselves 'useful' as experts on criminal behavior before juries in the United States in order to evaluate the 'credibility of witnesses,' and then decide on whether to 'admit or bar' a given instance of testimony during a criminal trial (Saxe, 1970). Psychiatrists also had to introduce, whenever necessary, a typology of insanity defenses which differentiated between 'idiocy, lunacy, and madness' through factual determination in the form of psychiatric testimony rather than legal determination per se (Crotty, 1924). This was in addition to their responsibility for classifying the different types of mental illnesses, evaluating witnesses

who participated in trials, and in understanding the forms of psychopathology that they may be prone to. The main preoccupation then of the 'law and psychiatry' movement was in the area of the 'jurisprudence of insanity.' That is still the case for psychiatrists who also have the additional responsibility of thinking through the ontology of mental illness in the history of psychiatry (Berrios, 1999; Duffin, 2000); and on, whether or not, the challenges involved in the 'commitment' of patients in asylums are being correctly understood and discharged by psychiatrists (Szasz, 1963). This is because the jurisprudence of insanity is necessarily implicated in the human quest for freedom and meaning in democratic societies that believe in the due process of law and the freedoms associated with the Bill of Rights (Burns, 1978). These psychoanalytic studies were also relevant in the context of the history of crime and punishment, the history of medicine, the history of psychiatry, and the history of sexuality (Foucault, 1988a; Foucault, 1988b; Foucault, 1990a; Foucault, 1990b; Foucault, 1994; Foucault, 1995). There have also been a number of attempts to apply the insights of Freudian psychoanalysis in the context of law and legal studies (Goldstein, 1968) that seek to demonstrate the extent to which irrational forms of thinking and decision making have permeated professional life, organizations, and communities. But, needless to say, we might overlook these endemic forms of psychic and social conflicts on the assumption that pluralism is a solution to all social problems (Katz, 1967; Nagera and Colonna, 1970; Burt, 2006; Caudill, 1995a). So while there is not much difficulty in situating the term 'psychoanalysis' in psychoanalysis and law, it is easy to misunderstand what the term 'law' really means in this context.

VIII. The Subject Of Law

The term 'law' here is used mainly in the sense in which this term is used in legal theory, jurisprudence, substantive law, legal science, and the law of evidence. It is also related to the attempts to make sense of the relationship between 'law' and 'science' with specific reference to both legal ethnography and the social construction of science in the discourse of law - so there is a range of meanings that can be activated rather than one specific meaning that subsumes all possible invocations of the term 'law' (Hoeflich, 1986; Caudill, 1996b; Caudill, 2003). Most of the work done so far in the context of law and psychoanalysis is preoccupied with legal theory because that has the highest levels of theoretical generality (Miller, 1992), but it is also possible to identify gaps in substantive law, as legal scholars do, and apply Freudian insights to see if that will generate a better understanding of the legal situation therein (Caudill, 1992a; Caudill, 1993a; Caudill, 1997a); or focus upon 'the images of social paternity,' and 'the application of legal rules in the name of the father,' albeit within the context of legal history (Goodrich, 1997), family law (Kronman, 1981b; Rodriguez, 1996), and international law (Stevens, 2006). What these varied references to the legal literature demonstrate is that there is a variety of applications of psychoanalysis within legal theory. Not every single application will be of interest to a particular reader but if considered as a whole, it will give him a sense of what has been achieved so far in law and psychoanalysis as an area of theoretical expertise. It will also make it possible to identify those areas of the law that will gain through an engagement with Freudian and Lacanian theory. My argument is not that only Freudian and Lacanian theory is relevant to the discourse of law and psychoanalysis. It is rather that legal scholars in this area have already made considerable use of these psychoanalysts. But it should be possible to use insights from other schools of psychoanalytic thought and practice as well. This paper has attempted to answer the titular question mainly in the context of the applications of Lacanian psychoanalysis to legal theory; and the problem of the legal subject within the Anglo-American legal academy (Caudill, 1993b; Caudill, 1997b; Caudill, 1998; Redding, 1997; Richardson, 1983). It is important not to conflate, in this context, the Lacanian subject of law with the traditional subject of 'liberal pluralism' that constitutes the better part of both mainstream legal ideology and legal scholarship (West, 1986). One of the main goals of Caudill's work on formalizing the structure and function of the legal subject in the American legal academy, through the invocation of Jacques Lacan, is to establish precisely this difference going forward in the psychoanalysis of law and psychoanalytic jurisprudence (Douzinas et al, 1994; Caudill, 1995b).

IX. Law And Management

Caudill's goal of establishing a theory of the subject for the law is analogous to attempts to do the same in the psychoanalysis of management, leadership studies, organizational dynamics, and risk management by scholars in organizational studies. The Lacanian model of subjectivity turns out to be useful in both these projects where the main goal is to make organizations healthier through the invocation of the 'clinical paradigm' that was innovated by Manfred de Vries and his followers at INSEAD (Van de Loo, 2000; Arnaud, 2002; Holt, 2004; Arnaud and Vanheule, 2007; Cluley, 2008). Psychoanalytic jurisprudence also emphasizes the fact that the Lacanian model of the subject is not reducible to a particular form of legal content or ideological interpellation since the subject is split by language. It does not posit a simplistic opposition between Desire and the Law; but instead thinks through their conceptual interdependence as embodied, for instance, in the trial of the Greek philosopher, Socrates, and its implications for a theory of hysteria and, by implication, for a theory of the legal subject. This is because Socrates does not seem too anxious about the verdict. Again, he does not make any

attempt to evade the Law of the City or attempt to escape from prison. Another compelling example is that of Antigone who is willing to transgress the limit of symbolic, the *até*, in her confrontation with the tyrant Creon who identifies the Law with Reason as such (Evans, 1997; Srinivasan, 2000; Collits, 2000; Ragland, 2002; Zupančič, 2003). Lacan neither identifies Desire as that which must be controlled by the Law nor even as that which must be liberated by the Law because it is not possible to invoke a theory of Desire without an understanding of the existential dimensions of hysteria (Srinivasan, 2002). Hence, the preoccupation in the Lacanian model of ethics with the Law of Desire and the Desire for the Law and not – as the conventional assumption in political theory has it – Desire as that which is opposed to the Law. The only thing that a subject can be guilty of in the Lacanian model of the subject then is to give up on its Desire (Lacan, 1992). It is not the Law as such that is a barrier to *jouissance*, then, but the forms of ‘impossibility’ that constitute the structure of the symbolic Other (Levy-Stokes, 2000). The significance of this argument also follows from the Lacanian contention that the structure of the unconscious is ‘pre-ontological’ and can therefore be described as ‘ethical’ rather than as an alternate form of ontology. So, in that sense, it is not about choosing between Desire and the Law, but understanding their conceptual interdependence as existential entities in a theory of subjectivity (Lacan, 1979; Nancy, 1997; Verhaeghe, 1998).

X. Desire And Law

The relationship between Desire and the Law must also be identified within a range of subject positions including that of the hysteric, the obsessional, the phobic, and the pervert and situated within a range of discourses comprising that of the hysteric, the analyst, the academic, and the master that constitutes Lacanian discourse theory (Ragland-Sullivan, 1992; Lacan, 2007). Lacanians focus not only on the relationship between the structure of language and the function of the letter in the unconscious in a theory of the subject (Lacan, 1966; Miel, 1966), but also try to determine its topological dimensions by invoking the epistemological transition from ‘the letter to the *matheme*’ as a mode of meta-psychological representation in psychoanalysis (Gasperoni, 1996; Burgoyne, 2003; Fink, 2004). The structural relationship between the Law and the Superego is also of importance in this context given the insistence of the latter that the subject should ‘enjoy.’ Analysts like to study the function of symptomatic enjoyment in both neurotic and perverse subjects and contrast that with the normative subject in both their theoretical and clinical work since the theory of the symptom and the theory of enjoyment inform each other like a theory of Desire and a theory of the Law (Marcuse, 1970; Miller, 1992; Žižek, 1992; Copjec, 1994; Žižek, 1994; Caudill, 1995c; Fink, 1997; Zupančič, 1998). It is therefore important in Caudill’s approach in the psychoanalysis of law to identify the generic forms of the legal unconscious and the social contexts in which they must be studied to make sense of how the promptings of the unconscious play their part in legal cognition and judicial decision-making. This includes the wide-spread fear amongst litigants that judicial decisions are subjective and subject to forms of rationalization that escape the conscious awareness of the judge in any given case. It is therefore important in the law to be ‘a reasonable creature’ given that the fabric of the law is neither reducible in its entirety to a science nor to a mystery, but encompasses elements of both (Caudill, 1997c; White, 1988; Boorstin, 1996).

XI. Conclusion

The emergence of the unconscious in law then is implicated not only in the gaps relating to a particular instance of litigation or legal action; but, more broadly speaking, to the discourse of the law as such insofar as the law can emerge only in the locus of the Big Other (Caudill, 1992b). In this approach to psychoanalytic jurisprudence, the history of the law is the actual object of study. The legal unconscious however pertains to that element of the law or society which is repressed within the ‘originary violence’ of that history. This moment of primary repression and its secondary derivatives, which return in distorted forms in any given case, are what are in contention in any specific form of legal action, litigation, or adjudication in law or equity (Freud, 1915; Goodrich, 1995). The return of the repressed is also significant in the history of ‘terrible events’ that exceed the subject’s ability to comprehend, or work-through effectively, through the legal or the political system making it necessary to invoke a theory of historical repression to make sense of the concerned phenomena (Frankl, 1985; Slovos, 2002; Žižek, 2006). That is why the psychoanalysis of law is increasingly becoming an important way of supplementing what is or was lacking in legal theory and in traditional approaches to jurisprudence.

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